

127 FERC ¶ 61,269  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, and Philip D. Moeller.

San Diego Gas and Electric Company  
Complainant,

Docket Nos. EL00-95-172;  
EL00-95-181; and EL00-95-  
190

v.

Sellers of Market Energy and Ancillary  
Services Into Markets Operated by the  
California Independent System Operator  
Corporation and the California Power  
Exchange Corporation,

Respondents.

Investigation of Practices of the  
California Independent System Operator  
Corporation and the California Power  
Exchange Corporation

Docket Nos. EL00-98-158;  
EL00-98-167; and EL00-98-  
175

ORDER ON REHEARING

(Issued June 18, 2009)

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1. In this order, the Commission addresses requests for rehearing and clarification of the cost filing orders addressing requests for cost offsets from refunds issued on January 26, 2006,<sup>1</sup> March 27, 2006,<sup>2</sup> and November 2, 2006.<sup>3</sup> Throughout the California refund proceeding, the Commission has sought to create a reasonable methodology for

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<sup>1</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 114 FERC ¶ 61,070 (2006) (January 26, 2006 Order).

<sup>2</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 114 FERC ¶ 61,310 (2006) (March 27, 2006 Order).

<sup>3</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 117 FERC ¶ 61,151 (2006) (November 2, 2006 Order).

calculating refunds, while ensuring sufficient due process.<sup>4</sup> In keeping with that approach, early on in this proceeding, the Commission created the cost filing process as a “safety valve” to give each seller the opportunity to demonstrate that the refund methodology, as applied to that individual seller, resulted in a confiscatory rate.<sup>5</sup> In the orders before us on rehearing, the Commission examined the costs and revenue in each seller’s cost filing according to the framework established in the August 8, 2005 Order to ensure that each seller was appropriately compensated for its costs of serving the California markets from October 2, 2000 through June 21, 2001 (Refund Period).

2. After considering the arguments, the Commission grants in part and denies in part requests for rehearing of the January 26, 2006 and November 2, 2006 Orders. In addition, this order grants in part and denies in part requests for clarification of our March 27, 2006 Order rejecting the cost filing of IDACORP. Finally, this order denies the motion of El Paso Marketing, L.P. (El Paso) to supplement its cost filing;<sup>6</sup> grants Cal

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<sup>4</sup> See, e.g., January 26, 2006 Order, 114 FERC ¶ 61,070 at P 1; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,184, at P 2 (2007) (November 19, 2007 Rehearing Order) (“The approach is logical, recognizes the difficulties of an after-the-fact retrofit of cost of service principles to a market dominated by market-based sales, and is within the breadth of the agency’s discretion in fashioning a remedy.”); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,176, at P 1, 115 (2005) (August 8, 2005 Order); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 105 FERC ¶ 61,065, at P 22 (2003) (October 16, 2003 Order).

<sup>5</sup> See October 16, 2003 Order, 105 FERC ¶ 61,065 at P 22 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 99 FERC ¶ 61,160 at 61,656 (2002) (May 15, 2002 Order)).

<sup>6</sup> Motion for Leave to File Supplemental Cost Recovery Filing Or, In the Alternative, Offer of Proof of El Paso Marketing, L.P. In Response to the Federal Energy Regulatory Commission’s January 26, 2006 Order on Cost Filings, Docket Nos. EL00-95-000, *et al.*, (February 27, 2006) (El Paso Motion for Leave to Supplement Cost Filing). In a June 21, 2007 order, the Commission approved the El Paso Settlement, resolving all matters and claims during the Refund Period between El Paso and San Diego Gas & Electric Co. (SDG&E). See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 119 FERC ¶ 61,297 (2007) (El Paso Settlement Order). While the El Paso Settlement resolves all claims between the parties to the El Paso Settlement, it does not resolve claims between El Paso and other participants in the refund proceeding. Accordingly, the Commission will address the El Paso Motion for Leave to Supplement Cost Filing, and all other issues related to El Paso raised on

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Parties'<sup>7</sup> motion to strike supplemental materials submitted by Allegheny, Hafslund, Portland, and PPL Energy with their requests for rehearing of the January 26, 2006 Order;<sup>8</sup> denies Cal Parties' motion to lodge the submission of Puget Sound Energy, Inc. (Puget) to the California Independent System Operator, Inc. (CAISO);<sup>9</sup> and denies Cal Parties' protest to the sellers' Approved Offset Submissions.<sup>10</sup>

## **I. Background**

3. The purpose of the cost filing process is to give individual sellers the opportunity to demonstrate that, after application of the mitigated market clearing price (MMCP)<sup>11</sup> refund methodology, the costs of providing electricity to the CAISO and/or California Power Exchange (PX) markets exceeded the total revenues received from those markets

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rehearing of the January 26, 2006 Order.

<sup>7</sup> The California Parties are the People of the State of California *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Pacific Gas and Electric Company, and Southern California Edison Company.

<sup>8</sup> Cal Parties' Motion to Strike Supplemental Materials Submitted with Requests for Rehearing of the January 26, 2006 Order and Motion for Leave to Answer and Limited Answer to Requests for Rehearing, Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.* (March 13, 2006) (Cal Parties' Motion to Strike).

<sup>9</sup> California Parties' Comments and Motion to Lodge Puget Sound Energy, Inc.'s Submission to the California Independent System Operator Corporation, Docket Nos. EL00-95-000, *et al.*, (March 20, 2006) (Cal Parties' Motion to Lodge). Pursuant to the January 26, 2006 Order, each seller must make a final submission of its Commission-approved cost offset claim directly to the CAISO (Approved Offset Claim).

<sup>10</sup> California Parties' Protest and Comments to Sellers' Cost Filing Submissions to the CAISO, Docket Nos. EL00-95-000, *et al.*, (March 29, 2006) (Cal Parties' Protest and Comments to Sellers' Cost Filings).

<sup>11</sup> The MMCP is a maximum hourly price that is designed to emulate a competitive market price during the Refund Period. The Commission held that all sales priced above the MMCP in the CAISO or PX spot markets were unjust and unreasonable and ordered refunds to remedy receipt of amounts above the just and reasonable level. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,515-56 (2001); October 16, 2003 Order, 105 FERC ¶ 61,065 at P 18.

during the Refund Period. On December 19, 2001, marketers and those reselling purchased power in the CAISO/PX markets were put on notice that they would be afforded this opportunity.<sup>12</sup> This opportunity was extended to all sellers in the CAISO/PX markets in the May 15, 2002 Order.<sup>13</sup>

4. The Commission's primary concern throughout the refund proceeding has been to remedy rates that buyers may have paid above the zone of reasonableness, which led the Commission to establish the MMCP.<sup>14</sup> The Commission has balanced this key objective with its concomitant statutory obligation to ensure that the MMCP does not result in a confiscatory rate for any individual seller. The MMCP, which was designed to emulate a generic competitive market price in California markets during the Refund Period, does not take into account the impact of the MMCP on any individual seller's costs of providing electricity to those markets. Consequently, in the December 19, 2001 Order, the Commission announced its intention to provide an opportunity after the conclusion of the refund hearing for marketers to submit cost evidence on the impact of the refund methodology on their overall revenues during the Refund Period.<sup>15</sup> The Commission explained that, to consider any adjustment, marketers would have to demonstrate that the refund methodology results in a total revenue shortfall for all jurisdictional transactions in the CAISO/PX markets during the Refund Period.<sup>16</sup>

5. Prior to the deadline for the submission of cost filings, sellers were made aware of the general requirements for the cost filing submissions. Specifically, sellers were on notice that they would have to justify and support actual costs in order to obtain a cost offset from their refund liability. In the August 8, 2005 Order, the Commission established the general framework and many of the details of the cost filings. Parties engaged in intense negotiations on the issues related to these cost filings. For example, in a Technical Conference held on July 26, 2004 (July 26, 2004 Technical Conference) to

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<sup>12</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275, at 62,193-94 (2001) (December 19, 2001 Order). For a detailed procedural history of the proceedings leading up to the instant rehearing, see January 26, 2006 Order, 114 FERC ¶ 61,070 at P 3-18.

<sup>13</sup> May 15, 2002 Order, 99 FERC ¶ 61,160 at P 61,656.

<sup>14</sup> October 16, 2003 Order, 105 FERC ¶ 61,065 at P 17 (citing May 15, 2002 Order, 99 FERC ¶ 61,160 at 61,655 and n.6).

<sup>15</sup> December 19, 2001 Order, 97 FERC ¶ 61,275 at 62,193-94 and 62,254.

<sup>16</sup> *Id.*

discuss how to conclude the refund proceeding, Commission staff and parties discussed cost filing procedures.<sup>17</sup> The Commission accepted comments and replies on the issues raised at the July 26, 2004 Technical Conference.<sup>18</sup> After the Commission became aware that disputes over the scope of transactions that could be included in cost filings had become an impediment to finalizing settlements, the Commission solicited two rounds of comments on the scope of transactions and other cost filing issues.<sup>19</sup> These comments formed the basis of the record underlying the Commission's August 8, 2005 Order, which set forth the cost verification required by each party seeking recovery. Three weeks after issuance of the August 8, 2005 Order and the opportunity to file additional comments on a uniform template,<sup>20</sup> the Commission staff convened the August 25, 2005 Technical Conference (August 25, 2005 Technical Conference)<sup>21</sup> to discuss the cost filing template.

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<sup>17</sup> *E.g.*, Comments of the California Independent System Operator Corporation on "Open Issues" in the FERC Refund Proceeding, Docket Nos. EL00-95-000, *et al.*, at 9 (August 2, 2004) ("At the Refund Conference, several parties raised questions as to when the CAISO would propose to reflect any approved marketer cost-based filings . . . ."); California Parties' Comments in Response to FERC Staff Meeting on Refund Re-Run Issues, Docket Nos. EL00-95-000, *et al.*, at 5 (August 2, 2004) ("[A] number of parties at the July 26 Meeting noted the importance of developing appropriate time-lines and procedures for submitting and reviewing cost-based filings that sellers are permitted to make . . .").

<sup>18</sup> *See* Notice of Meeting with the CAISO and California Power Exchange, Docket No. EL00-95-000, *et al.* (July 16, 2004). *See also* Comments of Arizona Electric Power Company Regarding Status of Conference on Refund Procedures at 4-5, Docket Nos. EL00-95-000, *et al.* (August 2, 2004); Cal Parties' Comments in Response to FERC Staff Meeting on Refund Re-run Issues at 5, Docket Nos. EL00-95-000, *et al.* (August 2, 2004); Initial Comments of Sacramento Municipal Utility District on Issues Raised During the July 26 Meeting, Docket Nos. EL00-95-000, *et al.* (August 2, 2004); Comments of the California Independent System Operator Corporation on "Open Issues" in the FERC Refund Proceeding at 9-10, Docket Nos. EL00-95-000, *et al.* (August 2, 2004).

<sup>19</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 109 FERC ¶ 61,264 (2004) (December 10, 2004 Order).

<sup>20</sup> *See* August 8, 2005 Order, 112 FERC ¶ 61,176 at Ordering Paragraph (C) ("Parties may submit a proposed template and supporting comments within 14 days of the date of this order.").

<sup>21</sup> Notice of Technical Conference, Docket Nos. EL00-95-000 and EL00-98-000

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6. During the August 25, 2005 Technical Conference, the Commission gave cost filers an opportunity to raise questions related to the August 8, 2005 Order in order to help them prepare their cost filings. At the August 25, 2005 Technical Conference, Commission staff emphasized that, consistent with the August 8, 2005 Order and prior Commission action in the refund proceeding, parties would only have one chance to make their cost demonstration.<sup>22</sup>

7. The day after the August 25, 2005 Technical Conference, the Commission published a cost filing template in this docket.<sup>23</sup> The introduction to the Cost Filing Template repeated the August 8, 2005 Order's requirement that cost submissions must include clearly referenced source documents that are tied to books and records.<sup>24</sup> The Cost Filing Template also stated that "[a]ny entry to the cost filing (including investment and expense) not so supported may be subject to summary rejection for lack of support."<sup>25</sup> In addition, while the Cost Filing Template provided that parties seeking cost offsets could submit representative samples, rather than voluminous source documents, it further stated that "clear reference to remaining source documents and location for review is imperative."<sup>26</sup>

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(August 16, 2005).

<sup>22</sup> See August 8, 2005 Order, 112 FERC ¶ 61,176 at P 116 ("The Commission does not envision the need for evidentiary hearings to resolve the cost filings. The Commission views the cost filings as limited demonstrations of actual transactions and costs. The burden will be on the filer to present the actual data in a manner that supports its claim ... The Commission envisions issuing an order on November 15, or sooner, that finalizes the offsets."). We also note that at an earlier phase of the refund proceeding, the Commission summarily rejected three sellers' cost justification filings for lack of support. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,012 (2001). A fourth filing was summarily rejected as untimely. *Id.*

<sup>23</sup> Staff Suggested Template for EL00-95-000 and EL00-98-000 (August 26, 2005) (Cost Filing Template).

<sup>24</sup> Cost Filing Template; August 8, 2005 Order, 112 FERC ¶ 61,176 at P 103.

<sup>25</sup> Cost Filing Template.

<sup>26</sup> *Id.*

8. On August 26, 2005, pursuant to a joint motion filed on behalf of a “substantial number” of the parties that participated in the August 25, 2005 Technical Conference,<sup>27</sup> the Commission extended the cost filing deadline to September 14, 2005, giving cost filers additional time to take into account the guidance provided by Commission staff at the August 25, 2005 Technical Conference.<sup>28</sup> Including this extension, parties had over a month after issuance of the August 8, 2005 Order, and 20 days after issuance of the Cost Filing Template, to populate the Cost Filing Template with their actual historic data.

9. On September 14, 2005, the following 23 parties submitted cost filings: Allegheny Energy Supply Co., LLC (Allegheny); Avista Energy, Inc. (Avista); Constellation Energy Commodities Group, Inc. (Constellation); Coral Power, L.L.C. (Coral); Edison Mission Marketing & Trading, Inc. (Edison Mission); El Paso Marketing, L.P. (El Paso Marketing); Enron Power Marketing, Inc. (Enron); Hafslund Energy Trading, LLC (Hafslund); IDACORP Energy, L.P. and Idaho Power Company (IDACORP); Merrill Lynch Capital Service, Inc. (MLCS); Merrill Lynch Commodities, Inc. (ML Commodities); NEGT Energy Trading-Power L.P. (NEGT); Portland General Electric Company (Portland); Powerex Corp. (Powerex); PPL EnergyPlus, LLC and PPL Montana, LLC (PPL Energy); Public Service Company of New Mexico (PNM); Puget Sound Energy, Inc. (Puget); Sempra Energy Trading Corp. (Sempra); Tractebel Energy Marketing, Inc. (Tractebel); TransAlta Energy Marketing (US) Inc. (TransAlta); Pacific Gas & Electric Co. (PG&E), Southern California Edison (SoCal Edison); and California Resources Scheduling Division of the California Department of Water Resources (CERS). In addition, four entities filed to reserve their rights to file later: Aquila Merchant Services, Inc. (Aquila); Constellation New Energy, Inc. (Constellation New Energy); Morgan Stanley Capital Group Inc. (Morgan Stanley); Pinnacle West Capital Corporation and Arizona Public Service Company (Pinnacle West Companies). Subsequently, a number of errata were filed.<sup>29</sup>

10. In the January 26, 2006 Order, the Commission determined which sellers demonstrated that the refund methodology resulted in an overall revenue shortfall for their transactions in the relevant California markets during the Refund Period, and each seller’s respective level of allowed cost offsets from refunds. Of the cost filings

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<sup>27</sup> Joint Motion for Adjustment to Filing Date for Cost Filings, Docket Nos. EL00-95-000 and EL00-98-000 (August 25, 2005).

<sup>28</sup> See Notice of Extension of Time, Docket Nos. EL00-95-000 and EL00-98-000 (August 26, 2005).

<sup>29</sup> See January 26, 2006 Order, 114 FERC ¶ 61,070 at Appendix A for a list of errata filings.

submitted for review, the Commission accepted, subject to further conditions and/or modifications, the filings of Avista; Constellation; Coral; Edison Mission; Hafslund; PPL Energy; PNM; Portland; Powerex; Puget; Sempra; Tractebel;<sup>30</sup> and TransAlta. The Commission rejected with prejudice the cost filings of El Paso; Enron; Merrill Lynch; NEGT; and Allegheny. In the January 26, 2006 Order, the Commission also deferred ruling on the cost filings submitted by SoCal Edison; PG&E; CERS; and IDACORP because these entities would likely be refund recipients. Finally, in the January 26, 2006 Order, the Commission denied requests made by Aquila; Constellation New Energy; Morgan Stanley; and Pinnacle West Companies to reserve rights to make cost filings in the future. At that time, the Commission also issued a separate order granting a joint motion to defer action on IDACORP's cost filing.<sup>31</sup>

11. The following parties filed timely requests for rehearing of the January 26, 2006 Order: Allegheny; Aquila; the City of Colton (Colton); Coral; El Paso; Hafslund; MLCS and ML Commodities (collectively, Merrill Lynch); Modesto Irrigation District (Modesto); Morgan Stanley; Northern California Power Agency (NCPA); NEGT;<sup>32</sup> Pinnacle West Companies; PNM; Portland; Powerex; Sempra; TransAlta; PPL Energy; Puget; City of Santa Clara; California, d/b/a Silicon Valley Power (SVP); Sacramento Municipal Utility District (SMUD); and Cal Parties.<sup>33</sup> APX and Constellation filed

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<sup>30</sup> Tractebel subsequently, pursuant to the terms of a settlement agreement filed a notice of the withdrawal of all of its pleadings, comments and petitions in the refund proceedings. Tractebel Notice of Withdraw, Docket Nos. EL00-95-000, *et al.* (April 30, 2007). Accordingly, we will not address the arguments raised by Cal Parties on rehearing as they pertain to Tractebel.

<sup>31</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,069 (2006) (IDACORP Cost Filing Order). Cal Parties and IDACORP together filed a request to defer action on IDACORP's cost filing in order to avoid possible disruption of their settlement efforts.

<sup>32</sup> On January 29, 2009, pursuant to the terms of a settlement agreement, NEGT filed a notice of withdrawal of all of its pleadings, comments, and petitions related to the cost offset proceeding, including NEGT's request for rehearing of the January 26, 2006 Order. NEGT Notice of Withdrawal, Docket Nos. EL00-05-000, *et al.* (January 26, 2006). Accordingly we will not address any of the issues raised by NEGT in its rehearing request or any of Cal Parties' protests to NEGT's cost filing.

<sup>33</sup> In this order, we will not address arguments made by Cal Parties in its request for rehearing of the January 26, 2006 Order with regard to Portland because those arguments have been superseded by a subsequent settlement. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 119 FERC ¶ 61,151 (2007) (Portland

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answers to certain of the requests for rehearing. On March 29, 2006, Allegheny filed an answer to the answer filed by APX.

12. On February 10, 2006, Avista, Portland, Powerex, Sempra, and TransAlta submitted compliance filings, as directed by the Commission in the January 26, 2006 Order.<sup>34</sup> On February 27, 2006, El Paso filed a motion for leave to supplement its cost filing.

13. On March 17, 2006, IDACORP filed a motion for summary disposition of its cost filing.<sup>35</sup> On March 27, 2006, the Commission summarily rejected IDACORP's cost filing because it was non-compliant and incomplete.<sup>36</sup> The cities of Pasadena and Vernon, California each requested clarification of the March 27, 2006 Order.<sup>37</sup> On April 26, 2006, IDACORP filed an answer to Vernon's request for clarification,<sup>38</sup> and a request for rehearing of the March 27, 2006 Order.<sup>39</sup>

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Settlement). On May 17, 2007, the Commission approved the Portland Settlement, which resolved all matters and claims during the Refund Period between Portland and Cal Parties. *Id.* While the Portland Settlement resolves all claims between the parties to the Portland Settlement, the Settlement does not resolve claims between Portland and other non-settling participants in the refund proceeding. Accordingly, the Commission will address the relevant issues raised in Portland's rehearing requests.

<sup>34</sup> Portland and Powerex subsequently filed errata to correct errors that were made in their filings.

<sup>35</sup> Motion of IDACORP for Summary Disposition of Its Cost Filing, Docket Nos. EL00-95-147 and EL00-98-134 (March 17, 2006).

<sup>36</sup> *See* March 27, 2006 Order, 114 FERC ¶ 61,310 at 15-19.

<sup>37</sup> City of Pasadena, California's Request for Clarification of March 27, 2006 Order, Docket Nos. EL00-95-147 and EL00-98-134 (March 29, 2006); City of Vernon's Request for Clarification of March 27, 2006 Order, Docket Nos. EL00-95-147 and EL00-98-134 (April 12, 2006).

<sup>38</sup> Answer of IDACORP to Request of City of Vernon for Clarification of March 27, 2006 Order, Docket Nos. EL00-95-147 and EL00-98-134 (April 26, 2006).

<sup>39</sup> Request of IDACORP for Rehearing of Order Rejecting Cost Filing, Docket Nos. EL00-95-147 and EL00-98-134 (April 26, 2006). We will not address in this order the arguments made on rehearing of the March 27, 2006 Order by IDACORP because those arguments have been superseded by a subsequent settlement and Notice of

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14. In the November 2, 2006 Order, the Commission accepted in whole or in part the compliance filings of Avista, Portland, and Powerex, and directed these three parties to submit to the CAISO their final cost offsets, after incorporating the directives contained within the November 2, 2006 Order.<sup>40</sup> In the November 2, 2006 Order, the Commission rejected Sempra's and TransAlta's compliance filings for failure to comply with the January 26, 2006 Order.<sup>41</sup> Sempra, Portland, TransAlta, and Cal Parties filed timely requests for rehearing of the November 2, 2006 Order. Several parties filed supplemental evidence with their requests for rehearing.

15. In addition to its requests for rehearing, Cal Parties filed protests and comments on various sellers' cost filings, a motion to strike the supplemental materials submitted with parties' requests for rehearing of the January 26, 2006 Order and answer to certain requests for rehearing,<sup>42</sup> and comments on and a motion to lodge Puget's March 3, 2006 cost filing to the CAISO.<sup>43</sup> Puget filed an answer to Cal Parties' motion lodge and Cal Parties, in turn, filed an answer to Puget's answer. Hafslund filed an answer to the Cal

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Withdrawal. In a May 22, 2006 order, the Commission approved a settlement resolving all disputes and claims among IDACORP, Cal Parties and the Commission's Office of Enforcement, formerly known as the Office of Market Oversight and Investigations, regarding matters and claims raised in the refund proceeding arising from events in the CAISO and PX markets during the Refund Period as they relate to IDACORP. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,230 (2006) (May 22, 2006 Order). IDACORP subsequently filed a notice of withdrawal of its various filings, including its rehearing request of the March 27, 2006 Order. *See* IDACORP's Notice of Withdrawal, Docket No. EL00-95-000, *et al.*, at 2 (June 6, 2006). While the IDACORP Settlement resolves all claims between the parties to the IDACORP Settlement, it does not resolve claims between IDACORP and other participants in the refund proceeding.

<sup>40</sup> *See* November 2, 2006 Order, 117 FERC ¶ 61,151 at P 2.

<sup>41</sup> *Id.*

<sup>42</sup> Cal Parties' Motion to Strike, *supra* n.8.

<sup>43</sup> California Parties' Comments and Motion to Lodge Puget Sound Energy, Inc.'s Submission to the California Independent System Operator Corporation, Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.* (March 20, 2006) (Cal Parties' Motion to Lodge).

Parties' motion to strike. In its rehearing request, Sempra filed a motion to stay the time to submit its cost filing to the CAISO.<sup>44</sup>

16. On March 13, 2006, Constellation made its required Approved Offset Submission to the CAISO. On November 10, 2006, Constellation made an additional submission to the CAISO. On November 27, 2006, Cal Parties filed a protest to Constellation's November 10, 2006 submission.<sup>45</sup> On December 15, 2006, Constellation filed comments and a request for rejection of Cal Parties' Protest to Constellation Submission.<sup>46</sup>

## **II. Procedural Discussion**

17. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing.<sup>47</sup> Accordingly, we reject the answers of APX and Constellation to requests for rehearing of the January 26, 2006 Order. Similarly, Rule 213(a)(2) of the Commission's Rules of Practice and Procedure does not permit answers to protests and/or answers unless otherwise ordered by the decisional authority.<sup>48</sup> We are not persuaded to accept the answer of Allegheny, filed in response to APX's answer to certain rehearing requests and, therefore, reject it. However, we accept Cal Parties' answer to Puget's answer to Cal Parties' motion to lodge and Constellation's answer to Cal Parties' protest of Constellation's submission to the CAISO because they have provided information that assisted us in our decision-making process.

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<sup>44</sup> Request of Sempra Energy Trading Corp. for Rehearing of January 26, 2006 Order on Cost Filings and Motion for Stay of Submission of Cost Filing to CAISO, Docket Nos. EL00-95 and EL00-98, at 1, 16-18 (Feb. 27, 2006) (Sempra Request for Rehearing of January 26, 2006 Order).

<sup>45</sup> California Parties' Protest to Constellation Energy Commodities Group, Inc.'s Revised Cost Filing Submission to the California Independent System Operator Corporation, Docket Nos. EL00-95-000, EL00-95-61, and EL00-98-148 (November 27, 2006) (Cal Parties' Protest to Constellation Submission).

<sup>46</sup> Comments and Request for Rejection of Constellation Energy Commodities Group, Inc. of California Parties' Impermissible Protest, Docket Nos. EL00-95-000, EL00-95-61, EL00-98-000, and EL00-98-148 (December 15, 2006) (Constellation Request for Rejection).

<sup>47</sup> 18 C.F.R. § 385.713(d)(1) (2008).

<sup>48</sup> 18 C.F.R. § 385.213(a)(2) (2008).

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept Cal Parties' answer to Puget's answer to the motion to lodge and Constellations' answer to Cal Parties protest of its submission to the CAISO because they have provided information that assisted us in our decision-making process.

**A. Supplemental Evidence**

**1. Evidence Submitted in Requests for Rehearing**

19. In their requests for rehearing, Allegheny, PPL Energy, Portland, Hafslund and TransAlta submitted supplemental evidence. PPL Energy attached December 2000 invoices to its request for rehearing<sup>49</sup> in an effort to demonstrate that PPL Energy was invoiced at the tariff rates for transmission costs. Portland's requests for rehearing of both the January 26, 2006 Order and the November 2, 2006 Order each contained supplemental exhibits. Portland's Request for Rehearing of the January 26, 2006 Order contained an affidavit from Kristin Stathis, Assistant Treasurer of Portland, with an attached transcript of a December 24, 2000 scheduler telephone conversation between the CAISO and Portland. The affidavit and transcript were submitted as support for Portland's request that the Commission grant rehearing and allow Portland to incorporate its section 202(c) sales.<sup>50</sup> In its request for rehearing of the November 2, 2006 Order, in furtherance of its continued DOE sales arguments, Portland submitted two more supplemental attachments: (i) Proposed Stipulation on Section 202(c) Issues; and (ii) a chart showing alleged discrepancies and errors between Portland and CAISO data.<sup>51</sup>

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<sup>49</sup> Request of PPL Energy for Rehearing of January 26, 2006 Order on Cost Filings, Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*, at 9 (February 27, 2006) (PPL Energy Request for Rehearing).

<sup>50</sup> Portland General Electric Company's Request for Rehearing and Clarification of the Commission's January 26, 2006 Order on Cost Filings, Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*, at 7, n.4 and n.5 (February 27, 2006) (Portland Request for Rehearing). Section 202(c) of the FPA, 16 U.S.C. § 824a(c) (2006), provides authority for the Commission to order temporary interconnections, generation, delivery, interchange or transmission of electric energy to alleviate emergency conditions involving a shortage of electricity. This authority was later transferred by statute to the Secretary of Energy. In this case, several parties, including Portland and PPL Energy made sales at the order of the Secretary of Energy of the Department of Energy (DOE) to relieve shortages of electricity during the California energy crisis.

<sup>51</sup> Request for Rehearing of Portland General Electric Company, Docket Nos.

(continued...)

Hafslund attached 2000 and 2001 invoices to its Request for Rehearing in an effort to confirm that it incurred inter-zonal congestion costs.<sup>52</sup> TransAlta attached to its Request for Rehearing a copy of its contract with Centralia in support of its argument that its affiliated purchases were not based on a market index, but rather were based on a contractually-established price.<sup>53</sup>

## 2. Cal Parties Motion to Strike

20. On March 13, 2006, Cal Parties filed a motion to strike the supplemental evidence submitted with the requests for rehearing of Allegheny, Hafslund, Portland, and PPL Energy.<sup>54</sup> Cal Parties argue that Commission precedent is well settled on the principle that supplemental evidence at the rehearing stage should be rejected so as to protect the efficiency and finality of Commission proceedings.<sup>55</sup> Cal Parties state that Allegheny, Hafslund, Portland, and PPL Energy have not shown good cause for allowing this new late-filed evidence in the rehearing stage. Further, Cal Parties state that Allegheny, Hafslund, Portland, and PPL Energy failed to comply with Commission Rule 716, which requires a party to file a motion to reopen the record to ask the Commission to reopen the record. In addition, Cal Parties argue that Allegheny, Hafslund, Portland, and PPL Energy have not met the standard required for reopening the record. Cal Parties contend that Allegheny, Hafslund, Portland, and PPL Energy have neither shown changes in conditions of fact or law since they first submitted their cost filing, nor have they shown that public interest requires inclusion in the record of such new exhibits.<sup>56</sup>

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EL00-95-173, *et al.* and EL00-98-159, *et al.*, at 33, n.45 (December 4, 2006) (Portland Request for Rehearing of November 2, 2006 Order).

<sup>52</sup> Request for Rehearing of Hafslund Energy Trading, LLC, Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*, at 4 (February 24, 2006) (Hafslund Request for Rehearing).

<sup>53</sup> Request for Rehearing of TransAlta Energy Marketing (U.S.) Inc., Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*, (Feb. 24, 2006) (TransAlta Request for Rehearing of January 26, 2006 Order).

<sup>54</sup> Cal Parties' Motion to Strike.

<sup>55</sup> *Id.* at 8.

<sup>56</sup> *Id.* at 9-12.

**3. El Paso Motion for Leave to File Supplemental Evidence or Make an Offer of Proof**

21. On February 27, 2006, El Paso filed a motion for leave to file supplemental cost recovery evidence or, alternatively, to make an offer of proof.<sup>57</sup> El Paso asserts that the Commission's January 26, 2006 Order rests on numerous errors of material fact and submits the supplemental testimony of Dennis Price to point out these errors and support El Paso's cost filing. El Paso argues that good cause exists for the Commission to grant its Motion to Supplement because the Commission allowed other parties in this proceeding to supplement their cost filings. In addition, El Paso argues that it has acted reasonably and as quickly as possible to supplement its cost filing, and that no delay would result from granting its motion. Finally, El Paso argues that no party would be prejudiced by granting El Paso's motion since the January 26, 2006 Order rests on several incorrect assumptions of fact and because the newly offered evidence "tracks fully" with El Paso's cost filing.<sup>58</sup>

22. In the event that the Commission deems it inappropriate to grant El Paso's Motion to Supplement, El Paso requests permission to file Mr. Price's testimony and exhibits as an Offer of Proof.<sup>59</sup> El Paso argues that an Offer of Proof is a matter of right under the Commission's Rules of Practice and Procedure, Rule 505,<sup>60</sup> and section 554 of the Administrative Procedures Act (APA).<sup>61</sup>

**Commission Determination**

23. We reject the efforts of Allegheny, PPL Energy, Portland, Hafslund and TransAlta to introduce supplemental evidence at the rehearing stage of the proceeding. The Commission's longstanding policy is to not accept additional evidence at the rehearing

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<sup>57</sup> Motion for Leave to File Supplemental Cost Recovery Filing or, in the Alternative, Offer of Proof of El Paso Marketing, L.P. in Response to the Federal Energy Regulatory Commission's January 26, 2006 Order on Cost Filings, Docket Nos. EL00-95-179 and EL00-98-165 (Feb. 27, 2006) (El Paso Motion to Supplement).

<sup>58</sup> *Id.* at 6.

<sup>59</sup> *Id.* at 7.

<sup>60</sup> 18 C.F.R. § 385.505 (2008).

<sup>61</sup> 5 U.S.C. § 554(c) (2006).

stage of a proceeding, absent a compelling showing of good cause.<sup>62</sup> The Commission finds that Allegheny, PPL Energy, Portland, Hafslund and TransAlta have not raised any persuasive reasons nor have they made a showing of good cause for the Commission to act in a manner contrary to well-settled Commission precedent and accept their late filed supplemental evidence during the rehearing phase of this proceeding. Further, because other parties are precluded under Rule 713(d)(1)<sup>63</sup> from filing answers to requests for rehearing, allowing these parties to introduce new evidence at this stage would raise concerns of fairness and due process for other parties to the proceeding.<sup>64</sup> In addition, accepting such evidence at the rehearing stage disrupts the administrative process by inhibiting the Commission's ability to resolve issues with finality.<sup>65</sup>

24. The Commission did not exercise lightly its discretion to summarily dispose of parties' cost filings. Indeed, the only cost filings that were summarily rejected were those of sellers who demonstrably failed to support their cost filings as required by the August 8, 2005 Order. The rejected cost filings were not cases of minor deviations from Commission requirements or partial incompleteness. Rather, these filings completely

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<sup>62</sup> *Nevada Power Co.*, 111 FERC ¶ 61,111, at P 10 (2005) (*Nevada Power*); *see also Californians for Renewable Energy, Inc. v. Calpine Energy Servs., L.P.*, 107 FERC ¶ 61,238, at P 7 (2004); *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,548 (1994); *Midwest Independent Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,178, at P 11 (2008); *Entergy Nuclear Operations, Inc., v. Consol. Edison Co.*, 112 FERC ¶ 61,117, at P 39 (2005).

<sup>63</sup> 18 C.F.R. § 713(d)(1) (2008).

<sup>64</sup> *See California Indep. Sys. Op. Corp.*, 119 FERC ¶ 61,076, at 61,587 (2007); *Northern States Power Co.*, 54 FERC ¶ 61,242, at 61,711 (1991).

<sup>65</sup> *Nevada Power*, 111 FERC ¶ 61,111 at P 10 (accepting additional evidence with a request for rehearing "is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision"). *See also PJM Interconnection, L.L.C.*, 121 FERC ¶ 61,173 (2007) ("[A]llowing new evidence on rehearing presents a moving target and eliminates the need for finality to proceedings"); *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,548 (1994) ("The Commission generally will not consider new evidence on rehearing, as we cannot resolve issues finally and with any efficiency if parties attempt to have us chase a moving target"); *Arkansas Power & Light Company*, 52 FERC ¶ 61,029, at 61,156, n.14 (1990) ("The Commission has discretion to reject evidence that was available but not proffered for consideration at the time of the final decision or final order).

failed to comply with the August 8, 2005 Order.<sup>66</sup> It would be arbitrary and capricious for the Commission to apply a lower standard to certain parties by giving them a second chance to comply with the cost filing requirements when the rest of the parties were able to comply with the requirements by the September 14, 2005 deadline. Consequently, as Allegheny, PPL Energy, Portland, Hafslund and TransAlta have all failed to provide any new or persuasive reason to convince the Commission to accept their late submitted evidence with their rehearing requests, we must reject it. Since issuance of the cost filing orders, none of the parties have demonstrated that they have experienced any change in circumstance sufficient to warrant a reversal of our previous determination, nor have these parties shown that the evidence they attempt to submit now was not previously available when they made their cost filings. Other parties in this proceeding faced similar constraints and, based on the Commission's instructions regarding verification of costs, were able to provide sufficient evidence to satisfy the cost filing requirements established in the August 8, 2005 Order.

25. Therefore, consistent with its prior treatment of the original cost filings, the Commission rejects the supplemental evidence of Allegheny, PPL Energy, Portland, Hafslund and TransAlta, and the Commission will not give any consideration to rehearing arguments that are based on the supplemental evidence submitted by these parties. Accordingly, we grant Cal Parties' Motion to Strike.

26. Finally, El Paso's Motion to Supplement is denied. The Commission finds that El Paso failed to raise any persuasive reasons for going against well-settled Commission precedent disallowing supplemental evidence on rehearing, and provides no compelling reason for the Commission to grant its Motion to Supplement. A decision to reopen the record is a matter of discretion for the Commission.<sup>67</sup> Reopening a proceeding generally requires a change in fact, law or public interest.<sup>68</sup> To persuade the Commission to exercise its discretion to reopen the record, a party must demonstrate extraordinary circumstances that outweigh the need for finality in the administrative process.<sup>69</sup> The

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<sup>66</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 135, 157-158, 160.

<sup>67</sup> 18 C.F.R. § 385.716(c). *See also Gas Producing Enterprises, Inc.*, 28 FERC ¶ 61,008 (1984) (citing *Consolidated Gas Supply Corporation*, 24 FERC ¶ 61,283 (1983), *Transcontinental Gas Pipe Line Corporation*, 23 FERC ¶ 61,152 (1983), and *ICC v. Jersey City*, 322 U.S. 503 (1944)).

<sup>68</sup> 18 C.F.R. § 385.716(c) (2008).

<sup>69</sup> *See U.S. Dept. of Energy – Western Area Power Administration*, 100 FERC ¶ 61,194, at P 17 (2002).

movant must show a change in circumstances that is more than just material; the change must go to the very heart of the case.<sup>70</sup>

27. There has not been a material change in fact or law for El Paso; nor has El Paso shown that the evidence it attempts to submit now was not previously available when it made its cost filing. In fact, El Paso admits that this evidence was in existence at the time it made its cost filing, and “always available upon request.”<sup>71</sup>

28. Moreover, as noted above, because of the need for fairness, due process and finality in administrative proceedings, the Commission’s longstanding policy is to reject additional evidence at the rehearing stage of a proceeding. As with Allegheny, the Commission reasonably exercised its discretion to summarily dispose of El Paso’s cost filing. The Commission found that El Paso patently failed to comply with the August 8, 2005 Order. El Paso simply submitted three screen shots for one day of trading as a sample. As we explained in the January 26, 2006 Order, this sample is insufficient to confirm by counterparty invoice that purchases were made, nor does it provide evidence that a trade even took place during the Refund Period.<sup>72</sup>

29. While the Commission did accept a number of cost filings subject to further modifications and/or compliance filings, those cases are easily distinguishable from the cost filings,<sup>73</sup> including El Paso’s, that were summarily rejected with prejudice. In those cases where the cost filings were accepted on the condition of further modifications and/or compliance filings, the filing parties made a good faith effort to comply timely with the Commission’s August 8, 2005 Order. These filings, while essentially complete by the standards for substantiation established in the August 8, 2005 Order, presented details that warranted further examination by the Commission.<sup>74</sup> On the other hand, the

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<sup>70</sup> *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,624 (1991).

<sup>71</sup> El Paso Motion to Supplement at 4.

<sup>72</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 137-140.

<sup>73</sup> As noted in the Background section of this order, the parties whose cost filings were summarily rejected with prejudice by the Commission are: Allegheny, El Paso, Enron, Merrill Lynch and NEGTE.

<sup>74</sup> *See, e.g.*, January 26, 2006 Order, 114 FERC ¶ 61,070 at P 175 (“While Avista adequately provided the underlying data necessary to support its purchase power costs. . . we find that Avista’s calculation of its purchase power costs for matched sales. . . may be overstated”); *id.* P 195 – 196 (“We find that Constellation has provided adequate

(continued...)

cost filings that were summarily rejected with prejudice, including El Paso's, "patently failed to comply with the August 8, 2005 Order."<sup>75</sup> Notwithstanding the volume of records involved, other parties included their documentation and satisfied the requirements of the August 8, 2005 Order. El Paso did not even attempt to submit representative data.

30. The Commission also denies El Paso's Motion for Offer of Proof. Generally speaking, an offer of proof is an evidentiary rule that enables an aggrieved party to use a ruling excluding evidence as a basis for an appeal.<sup>76</sup> When the exclusion of evidence affects a party's substantial right and the offer of proof apprised the agency of the substance of the evidence, the agency's decision to exclude the evidence can be reversed.<sup>77</sup> Within the specific context of Commission proceedings, "the effect of an offer of proof is to preserve excluded material for later review by the Commission following certification to the Commission of the record in an adjudicatory proceeding."<sup>78</sup> In no event is an offer of proof a method by which parties can circumvent agency deadlines and introduce new evidence at the rehearing stage of a proceeding. Moreover, despite El Paso's claim that "an [o]ffer of [p]roof is a matter of right,"<sup>79</sup> the Commission has previously rejected offers of proof when the proponent of the new evidence offers no sound reason for accepting it.<sup>80</sup> As discussed above, El Paso admits that this evidence

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documentation to support its purchase power costs . . . and provided sufficient evidence to give the Commission a fair representation of the costs it incurred." "With regard to instances where Constellation may have claimed costs associated with bids that were not fully accepted by the [CA]ISO and PX, we find that Constellation must remove both the costs and revenues associated with the unaccepted portion of the bids."); *id.* P 250 – 251 ("Our review of Portland's cost filing indicates that it adequately provided the underlying data necessary to support its purchased power costs related to sales into the [CA]ISO and PX markets. We note that Portland provides sufficient evidence to give the Commission a fair representation of the costs it incurred . . .").

<sup>75</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 135.

<sup>76</sup> Fed. R. Evid. 103(a).

<sup>77</sup> *Id.*

<sup>78</sup> Order Granting in Part and Denying in Part Motion to Strike, Docket No. EL04-124-000, at 11 (Dec. 28, 2006).

<sup>79</sup> El Paso Motion to Supplement at 7.

<sup>80</sup> *See, e.g., Arkansas Power and Light Co.*, 21 FERC ¶ 63,101 (1982).

was in existence at the time it made its cost filing, but provides no explanation for why it chose to submit its cost filing without the required documentation to support its cost offset claims.<sup>81</sup> Thus, we find that El Paso's self-styled "offer of proof" is properly characterized as an attempt to introduce untimely new evidence that could have and should have been included with its cost filing.

31. In addition, contrary to El Paso's assertions, we find that allowing El Paso a second attempt to support its cost filing by accepting such late-filed evidence would prejudice other parties, both those parties whose cost filings were accepted because they properly supported their costs in a timely manner, and those other parties whose cost filings were rejected for lack of timely substantiation. El Paso chose not to include support for its cost filing, and El Paso is now bound by the consequences of its choice.

## **B. Other Cal Parties' Pleadings**

### **1. Motions to Lodge Approved Offset Submissions**

32. On March 20, 2006, Cal Parties filed comments and a motion to lodge Puget's March 3, 2006 Approved Offset Submission to the CAISO. Cal Parties also requested that the Commission find that Puget's Approved Offset Submission to the CAISO failed to meet the Commission's January 26, 2006 Order directives, thereby rendering Puget ineligible for a cost offset.<sup>82</sup> Cal Parties argue that good cause exists under Rule 716 to lodge Puget's Approved Offset Submission to the CAISO with the record of this proceeding. Cal Parties maintain that this proceeding remains open, given the requests for rehearing of the January 26, 2006 Order, and the fact that the cost filings themselves are an input into the calculation of refunds by the CAISO and PX, and will be reflected in compliance filings by those entities that the Commission determines are eligible to receive cost offsets.<sup>83</sup>

33. Cal Parties argue that Puget's Approved Offset Submission to the CAISO is inadequate and fails to properly implement the Commission's January 26, 2006 Order directives because, according to Cal Parties, Puget incorrectly calculated the average portfolio costs associated with its sales to the CAISO, and also unilaterally increased its transmission costs and administrative fee claims without direction from the Commission

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<sup>81</sup> El Paso Motion to Supplement at 4.

<sup>82</sup> Cal Parties' Motion to Lodge at 7-11.

<sup>83</sup> *Id.* at 4-5.

to do so.<sup>84</sup> Cal Parties assert that although Puget's March 3, 2006 Approved Offset Submission to the CAISO reduced Puget's cost offset to \$2,330,267, had Puget properly calculated its cost offset pursuant to the January 26, 2006 Order, Puget's cost offset would be zero.<sup>85</sup>

34. Additionally, in its request for rehearing of the November 2, 2006 Order, Cal Parties request that the Commission grant on rehearing Cal Parties' March 15, 2006 motion to lodge Powerex's Approved Offset Submission to the CAISO. Cal Parties maintain that the Commission's refusal to allow Powerex's Approved Offset Submission to be lodged in the record of this proceeding for consideration by the Commission (or by the courts on judicial review) is arbitrary and capricious and deprives Cal Parties of due process.<sup>86</sup>

### **Commission Determination**

35. The Commission denies Cal Parties' Motion to Lodge. In addition, the Commission also denies Cal Parties' request for rehearing of the denial, in the November 2, 2006 Order, of Cal Parties' motion to lodge Powerex's Approved Offset Submission to the CAISO. Rule 716 provides that a proceeding may be reopened only when reopening is warranted by a change in condition of fact or law, or by public interest.<sup>87</sup> Additionally, a decision to reopen the record is a discretionary one for the Commission, and Commission policy discourages reopening records, except in extraordinary circumstances in order to prevent administrative chaos and provide finality to proceedings.<sup>88</sup> Further, a demonstration of extraordinary circumstances requires a showing of a material change that goes to the very heart of the case.<sup>89</sup> The Commission finds that Cal Parties fail to show any compelling changes in law, fact or public interest necessitating reopening of the record to lodge Puget's or Powerex's Approved Offset Submissions to the CAISO.

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<sup>84</sup> *Id.* at 6.

<sup>85</sup> *Id.* at 4, 7-11.

<sup>86</sup> Cal Parties' Request for Rehearing of November 2, 2006 Order at 20-21.

<sup>87</sup> 18 C.F.R. § 385.716(c).

<sup>88</sup> *See supra* P 26 (describing Commission precedent against accepting new evidence at the rehearing stage of a proceeding and discussing the moving target doctrine), and P 35 (detailing threshold for reopening a proceeding).

<sup>89</sup> *See supra* P 26, n.70.

Neither has Cal Parties persuaded the Commission that extraordinary circumstances exist to warrant reopening of the record with respect to Puget and/or Powerex.

36. Moreover, the CAISO and PX must make compliance filings regarding final refund calculations, on which the parties may comment and which the Commission will review. Accordingly, Cal Parties will have the opportunity to challenge any refund amounts or calculations it believes may be in error.<sup>90</sup> In addition, as discussed below, the Commission's refusal to permit the Approved Offset Submissions to the CAISO to be lodged in the record of this proceeding is not an unlawful abdication of the Commission's duties under the FPA because, through its review of the CAISO and PX compliance filings, the Commission retains final decision-making authority over sellers' cost offsets.<sup>91</sup>

## **2. Protests and Comments to Sellers' Approved Offset Submissions**

37. On March 29, 2006, Cal Parties filed a protest and comments to various sellers' Approved Offset Submissions to the CAISO.<sup>92</sup> Cal Parties' comments focused on what they perceive as the Commission's failure to adopt any process for review of the sellers' Approved Offset Submissions to the CAISO. Cal Parties argue that the Commission's approach to the Approved Offset Submissions precludes a full and fair review of the sellers' filings and violates Cal Parties' due process rights. Cal Parties assert that they have identified numerous errors or omissions in the Approved Offset Submissions of several sellers, including: Avista, Edison Mission, Powerex, PPL Energy, Puget, TransAlta, and Tractabel. Cal Parties contend that the Commission has a non-delegable duty to retain final decision-making authority on the sellers' cost offset claims. Accordingly, Cal Parties request that the Commission institute procedures for review of these submissions that includes a full and fair opportunity for Cal Parties to protest the claimed cost offsets.

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<sup>90</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 105 FERC ¶ 61,066, at 140, 194 (2003) (October 2003 Order).

<sup>91</sup> *See infra* P 109 for further discussion of the Commission's authority to delegate.

<sup>92</sup> Cal Parties' Protest and Comments to Sellers' Cost Filing Submissions to the California Independent System Operator Corporation, Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.* (March 29, 2006) (Cal Parties' Protest and Comments to Sellers' Cost Filings).

### **Commission Determination**

38. The Commission finds that Cal Parties have not raised any persuasive arguments for accepting its protest and comments on sellers' Approved Offset Submissions to the CAISO. As discussed below,<sup>93</sup> the Commission does retain final decision-making authority on the sellers' cost offset claims and, therefore, did not improperly delegate its authority to the CAISO. Cal Parties will have the opportunity to challenge any refund amounts when the CAISO and PX make their compliance filings regarding final refund calculations.<sup>94</sup>

### **3. Public Disclosure of Pleadings and Data**

39. Cal Parties argue that the Commission should identify for public disclosure all cost filings and comments on cost filings, including reply comments and answers, currently designated as "Protected Materials" pursuant to the protective order issued in Docket Nos. EL00-95, *et al.*<sup>95</sup> Cal Parties maintain that, given the passage of time, there is no basis for continuing to maintain most, if any, of this data as protected.<sup>96</sup> Cal Parties state that release of the requested information is necessary and in the public interest, and such release would enable the public to understand better the basis of the Commission's decisions, assist in framing the issues, and allow expeditious resolution of any further proceedings regarding the California energy crisis. Cal Parties contend that the sellers have no credible argument that the information must be withheld from the public domain.

40. Cal Parties contend that the CAISO, PX and APX revenue data should be publicly filed with the Commission so that a common set and source of data are available to all parties. To the extent that some data may be provided for the first time in a consolidated format, Cal Parties request an additional opportunity to comment. Cal Parties maintain

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<sup>93</sup> See *infra* P 109 for further discussion of the Commission's authority to delegate certain ministerial tasks to the CAISO.

<sup>94</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 109 FERC ¶ 61,218, at P 80 (2004).

<sup>95</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 103 FERC ¶ 61,359 (2003) (Protective Order).

<sup>96</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 51-52; California Parties' Preliminary Request for Expedited Clarification, or, in the Alternative, Rehearing of Order on Cost Filings, Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.*, at 13 (Feb. 8, 2006) (Cal Parties' Preliminary Rehearing Request).

that the intent of paragraph 389 of the January 26, 2006 Order is unclear as to whether the data would be publicly filed.<sup>97</sup>

### **Commission Determination**

41. We deny Cal Parties' request for rehearing on this issue. Pursuant to the Protective Order and confidentiality agreement in this proceeding, all parties have been given access to all material, including Protected Materials.<sup>98</sup> The Commission remains unconvinced by Cal Parties' arguments that all of the CAISO, PX and APX data should be made publicly available. The Commission remains cognizant of contractual obligations parties may have to their clients to ensure confidentiality of data, and the generally sensitive nature of the data itself.<sup>99</sup> Consistently in these proceedings the Commission has found it reasonable to condition the release of information to the parties on the applicability of a protective order.<sup>100</sup> The Commission continues to find persuasive these bases for protecting the confidentiality of data submitted by the CAISO, PX, APX and/or cost-filers, and concludes that it is unnecessary to determine at this point in time whether all of the information contained in the cost filings and related supporting documents and work papers merits the public release requested by Cal Parties.

#### **4. Rehearing of August 8, 2005 Order**

42. Cal Parties seek clarification that the Commission's January 26, 2006 Order was not intended to rule on the issues raised in Cal Parties' request for rehearing of the August 8, 2005 Order. Cal Parties maintain that several of the Commission's determinations in the January 26, 2006 Order could potentially be read as implicitly addressing arguments advanced by Cal Parties in their request for rehearing of the August 8, 2005 Order.<sup>101</sup>

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<sup>97</sup> Cal Parties' Preliminary Rehearing Request at 12.

<sup>98</sup> Protective Order, 103 FERC ¶ 61,359 at P 3 (defining "Protected Materials").

<sup>99</sup> *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 116 FERC ¶ 61,245 (2006), *reh'g denied*, 118 FERC ¶ 61,088, at P 14 (2007).

<sup>100</sup> *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 116 FERC ¶ 61,183, at P 23 (2006) (August 25, 2006 Order).

<sup>101</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 114-115.

### **Commission Determination**

43. The Commission grants Cal Parties' request for clarification that the January 26, 2006 Order does not address Cal Parties' request for rehearing of the August 8, 2005 Order, insofar as such clarification still remains necessary. While there are some overlapping issues between the August 8, 2005 Order and the January 26, 2006 Order, the August 8, 2005 Order establishes the framework for cost filing submissions, whereas the January 26, 2006 Order, entitled "Order on Cost Filings," presents the results of the Commission's analysis of the individual cost filings.<sup>102</sup> On November 19, 2007, the Commission issued its order denying rehearing of the August 8, 2005 Order.<sup>103</sup> This rehearing order should have eliminated any lingering confusion, and made it clear to parties that the January 26, 2006 Order was not attempting to address the issues raised in Cal Parties' request for rehearing of the August 8, 2005 Order.

### **5. Comment on Future Cost Filings by Governmental and Public Entities**

44. Cal Parties notes that on September 13, 2005, the Commission extended the deadline for governmental and public entities, including municipalities, to make cost filings until five business days after the U.S. Court of Appeals for the Ninth Circuit issues its mandate in *Bonneville*.<sup>104</sup> Cal Parties maintain that in their Common Comments on Sellers' Cost Filings, they requested the Commission to provide assurances that interested parties would be provided adequate time to comment should these entities submit cost filings in the future, and that the Commission was silent on this request in the context of the January 26, 2006 Order.<sup>105</sup> Cal Parties seek clarification that parties will be provided the opportunity to comment on any cost filings that governmental or public entities, including municipalities, submit in the future.

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<sup>102</sup> Compare January 26, 2006 Order, 114 FERC ¶ 61,070 at P 1 with August 8, 2005 Order, 112 FERC ¶ 61,176 at P 1.

<sup>103</sup> See November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184.

<sup>104</sup> *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9<sup>th</sup> Cir. 2005) (*Bonneville*); see Cal Parties' Request for Rehearing of January 26, 2006 Order at 116 (citing Notice of Extension of Time, Docket Nos. EL00-95-000 and EL00-98-000 (Sept. 13, 2006)).

<sup>105</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 116.

### **Commission Determination**

45. The Ninth Circuit held that “FERC does not have refund authority over wholesale electric energy sales made by governmental entities and non-public utilities.”<sup>106</sup> On October 19, 2007, the Commission issued its Order on Remand in this matter, vacating each of the Commission’s California refund orders to the extent that those orders subjected non-public utilities to the Commission’s then existing FPA section 206 refund authority.<sup>107</sup> Given that we have vacated all California refund orders to the extent that they require non-jurisdictional entities to pay refunds, we reject this argument as moot.

### **C. Sempra’s Motion to Stay Cost Filing**

46. In its rehearing request of the January 26, 2006 Order, Sempra requests the Commission to stay the time to submit Sempra’s cost filing to the CAISO until 15 days after the CAISO fully complies with the January 26, 2006 Order, and provides to sellers final settlement data that combines automatic records and manual adjustments in a single record for each transaction.<sup>108</sup> Sempra maintains that the CAISO provided revised data to market participants on February 16, 2006, but failed to provide the data in the format required by the Commission. Sempra argues that the Commission required the CAISO to provide final settlement data that has a single record for each transaction. Sempra maintains that without CAISO data that combines automatic records and manual adjustments in a single record for each transaction, it is impossible for sellers to produce independently-verifiable cost filings.

### **Commission Determination**

47. We reject Sempra’s motion to stay the time to submit its cost filing to the CAISO as moot. On February 10, 2006, Sempra submitted a compliance filing in response to our directive in the January 26, 2006 Order.<sup>109</sup> Because Sempra failed to support its affiliate purchase costs and because these costs were an integral part of Sempra’s averaged cost portfolio, we rejected Sempra’s entire proposed cost offset as unsupported.<sup>110</sup>

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<sup>106</sup> *Bonneville*, 422 F.3d at 911.

<sup>107</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,067 (2007) (*Bonneville Remand Order*), *order on reh’g*, 125 FERC ¶ 61,214 (2008).

<sup>108</sup> Sempra Request for Rehearing of January 26, 2006 Order at 1, 16-18.

<sup>109</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 8.

<sup>110</sup> *Id.* P 80.

Accordingly, Sempra will not be submitting a cost filing to the CAISO. Therefore, we need not reach the question of sales data integration.

### **III. General Findings**

#### **A. Due Process**

##### **1. Notice and Opportunity to be Heard**

48. Allegheny, El Paso, Merrill Lynch, Morgan Stanley, Aquila, the Pinnacle West Companies and Sempra argue that the Commission violated their due process rights by failing to provide adequate notice, prior to the January 26, 2006 Order, of the standards and timelines that would be applied to the cost filings. Allegheny, El Paso, Merrill Lynch, and Portland contend that by summarily rejecting their cost filings with prejudice or by rejecting certain portions of their cost filings without providing an opportunity to respond, the Commission violated their due process rights by denying them a meaningful opportunity to be heard.

49. Specifically, Allegheny argues that parties were not, as the Commission states in the January 26, 2006 Order, on notice since the August 8, 2005 Order regarding the type of cost verification documentation that would be required to support the cost filings. Allegheny claims that the Commission did not provide direction regarding the format and level of proof required to support the cost filing until the August 25 Technical Conference, and that even this guidance was ambiguous. Therefore, Allegheny also disputes that the Commission provided ample time to produce such data and documentation.<sup>111</sup>

50. According to Allegheny, the Commission's summary rejection of Allegheny's cost filing also constitutes a violation of Allegheny's due process rights under section 5(c) of the APA,<sup>112</sup> which requires an agency to give interested parties notice and the opportunity for the submission and consideration of facts, among other things, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. Allegheny further argues that because this cost filing represents its sole opportunity to mitigate any potential refund obligation in this proceeding, the Commission's summary rejection with prejudice deprives Allegheny of its property in

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<sup>111</sup> Allegheny Request for Rehearing at 27.

<sup>112</sup> 5 U.S.C. § 554 (2006).

violation of Allegheny's due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution.<sup>113</sup>

51. In general, El Paso and Merrill Lynch argue that the Commission failed to satisfy the fundamental requirement of procedural due process under the Fifth Amendment, which guarantees an "opportunity to be heard at a meaningful time and in a meaningful manner."<sup>114</sup> Both El Paso and Merrill Lynch apply the three-factor test set forth in *Mathews v. Eldridge*,<sup>115</sup> and conclude that by summarily rejecting their respective cost filings with prejudice, the Commission failed to afford adequate process. El Paso and Merrill Lynch point out that the Commission's summary rejection of their cost filings results in substantial financial losses. Thus, they argue that the private interests at stake, the first factor in the *Mathews* test, are significant. Second, El Paso and Merrill Lynch assert that the summary rejections themselves demonstrate that the second factor of the *Mathews* test, the risk of erroneously depriving parties of their property interests, is present in this case. Third, El Paso and Merrill Lynch maintain that the third factor of the *Mathews* test, the Commission's interest, should carry little weight under the circumstances. El Paso and Merrill Lynch contend that fiscal and administrative burdens of providing additional procedural safeguards would be minimal. According to El Paso and Merrill Lynch, speed is the predominant government interest being served by the summary rejections. El Paso and Merrill Lynch do not believe that the Commission's

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<sup>113</sup> *Id.* at 26-28.

<sup>114</sup> Request for Rehearing of El Paso Marketing, L.P. of January 26, 2006 Order Denying Cost Recovery Showing, Docket Nos. EL00-95-000 and EL00-98-000, at 8-10 (Feb. 27, 2006) (El Paso Request for Rehearing) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (*Mathews*)); Request for Rehearing of Merrill Lynch Capital Services, Inc. and Merrill Lynch Commodities, Inc. on Order Denying Cost Recovery Showings, Docket Nos. EL00-95-000 and EL00-98-000, at 7-10 (Feb. 27, 2006) (Merrill Lynch Request for Rehearing).

<sup>115</sup> Pursuant to the test set forth in *Mathews*, a court will weigh three factors to determine the adequacy of the process afforded as follows: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews*, 424 U.S. at 335.

interest in a quick resolution to the refund proceeding trumps its obligation to provide parties with due process.<sup>116</sup>

52. More specifically, Merrill Lynch and El Paso contend that the Commission harmed them by abruptly changing the cost filing deadline. According to El Paso and Merrill Lynch, the Commission had committed to providing an opportunity for the marketers to submit their cost filings “at the end of the proceeding.”<sup>117</sup> Both El Paso and Merrill Lynch assert that they reasonably relied on the Commission’s statements regarding this purported deadline and were, therefore, harmed by the Commission’s decision in the August 8, 2005 Order to condense the procedural schedule to accelerate the issuance of refunds.<sup>118</sup> El Paso argues that by moving the filing deadline forward, the Commission forced El Paso to prepare a cost recovery at an unreasonably accelerated pace.<sup>119</sup>

53. In addition, both El Paso and Merrill Lynch dispute the Commission’s contention that marketers had notice since December 2001 of their impending cost recovery obligations, and contend that the Commission’s claims regarding the adequacy of notice lack record support and reasoned decision-making. El Paso contends that despite the Commission’s prior solicitation of comments on the issue, the process for determining the scope, methodology, and data that marketers would need for cost filings did not begin until the August 8, 2005 Order.<sup>120</sup> Accordingly, El Paso and Merrill Lynch contend that prior to the August 8, 2005 Order, they were not in a position to gather and review specific data that would facilitate the preparation of a cost filing. El Paso and Merrill Lynch assert that prior to the August 8, 2005 Order, they had no notice of what type of documentation they were supposed to have been gathering since 2001, or what type of methodology would be required.<sup>121</sup> Merrill Lynch also argues specifically that the

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<sup>116</sup> El Paso Request for Rehearing at 8-10; Merrill Lynch Request for Rehearing at 7-10.

<sup>117</sup> El Paso Request for Rehearing at 17; Merrill Lynch Request for Rehearing at 14 (citing December 19, 2001 Order, 97 FERC ¶ 61,275 at 62,193).

<sup>118</sup> El Paso Request for Rehearing at 18; Merrill Lynch Request for Rehearing at 14.

<sup>119</sup> El Paso Request for Rehearing at 19.

<sup>120</sup> *Id.* at 15.

<sup>121</sup> El Paso Request for Rehearing at 17-23; Merrill Lynch Request for Rehearing at 16-18.

August 8, 2005 Order failed to provide guidance on the filing requirements for sellers who traded through APX, and contends that the opportunity to submit comments on the filing format is not equivalent to receiving a Commission order with specific guidance.<sup>122</sup>

54. El Paso and Merrill Lynch also assert that the January 26, 2006 Order violates due process by effectively establishing new standards of what constitutes an acceptable cost filing without providing the parties with adequate notice or opportunity to be heard.<sup>123</sup> El Paso and Merrill Lynch maintain that they could not have failed to meet the requisite burden of proof because, in the opinion of El Paso and Merrill Lynch, the Commission did not clearly establish the nature of a seller's burden of proof until the January 26, 2006 Order, after the submission of their respective cost filings.<sup>124</sup> Specifically, El Paso argues that the January 26, 2006 Order erred by finding that the August 25, 2005 Technical Conference provided adequate notice regarding the standards that would be applied to the cost filings. El Paso further argues that the Commission improperly bound the parties to staff statements at the unrecorded August 25, 2005 Technical Conference, notwithstanding a previous Commission determination that guidance provided at the staff Technical Conference and in the Cost Filing Template was non-binding.<sup>125</sup> Thus, El Paso and Merrill Lynch allege that the Commission rejected their cost filings without prior notice of the issues to be considered, and without providing an opportunity to amend their cost filings to satisfy the new standards.<sup>126</sup>

55. In addition, El Paso and Merrill Lynch argue that the August 8, 2005 Order provides no notice, implicit or explicit, of the possibility that cost filings could be summarily rejected with prejudice. El Paso and Merrill Lynch assert that, if the

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<sup>122</sup> Merrill Lynch Request for Rehearing at 18-19.

<sup>123</sup> El Paso Request for Rehearing at 29-31; Merrill Lynch Request for Rehearing at 26-27.

<sup>124</sup> El Paso Request for Rehearing at 47-48; Merrill Lynch Request for Rehearing at 44-46.

<sup>125</sup> El Paso Request for Rehearing at 29 (citing the Commission's August 24, 2005 Order Denying Emergency Request for Transcription of August 25 Technical Conference, or, in the Alternative, for Leave to Make Own Transcription Arrangements, 112 FERC ¶ 61, 220, at P 2 (2005) ("no one is required to do anything that may be suggested at the [August 25] conference.")).

<sup>126</sup> El Paso Request for Rehearing at 29-31; Merrill Lynch Request for Rehearing at 26-27.

Commission summarily rejects a filing pursuant to Rule 217, it typically includes a description of the problems and instructions on how to fix the filing and provides the filing entity with an opportunity to make the required corrections and resubmit the filing.<sup>127</sup> As a result, El Paso and Merrill Lynch assert that the January 26, 2006 Order improperly rejects their cost filings without notice.

56. Also challenging the adequacy of notice, Morgan Stanley and Aquila allege that the Commission failed to provide adequate notice that market participants with no refund liability were required to file a cost offset claim by September 14, 2005. Morgan Stanley, Aquila, and the Pinnacle West Companies argue that, based on Commission orders on the subject of cost filings, only sellers that owe net refunds were entitled to make cost filings, leading Morgan Stanley, Aquila, and Pinnacle West Companies to believe they were not eligible to make cost filings. Morgan Stanley and Aquila maintain that the Commission rulings did not contemplate that net refund recipients would be required to submit cost filings by September 14, 2005.<sup>128</sup>

57. Further, Morgan Stanley and Aquila contend that the Commission improperly relied on nonbinding, unrecorded statements by Commission Staff at the August 25, 2005 Technical Conference for the proposition that parties had notice that September 14, 2005

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<sup>127</sup> El Paso Request for Rehearing at 25-29; Merrill Lynch Request for Rehearing at 23-25 (citing *Midwest Indep. Trans. Sys. Operator, Inc.*, 103 FERC ¶ 61,217, at 61,827 (2003) (denying rehearing of order rejecting tariff revisions due to a lack of cost support for proposed rate increase, but noting that the rejection was without prejudice); *Phillips Pipe Line Co. v. Phillips Pipe Line Co.*, 67 FERC ¶ 63,002 (1994); *Ohio Power Co. and Indiana & Michigan Electric Co.*, 3 FERC ¶ 61,188 (1978) (declining to reject tariff filing that was found to be deficient twice); *Municipal Light Boards of Reading and Wakefield MA v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971) (explaining that a “notice of rejection” is generally used to give a utility an opportunity to correct a defect in its original filings, and not to dispose of a case on its merits.))

<sup>128</sup> Request for Rehearing of Morgan Stanley Capital Group Inc. Concerning Power Marketer Cost Recovery Showings, Docket Nos. EL00-95-000 and EL00-98-000, at 4-6 (Feb. 27, 2006) (Morgan Stanley Request for Rehearing); Aquila Merchant Services’ Request for Limited Clarification, or, in the Alternative, Rehearing of Order on Cost Filings, Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.*, at 4-7 (Feb. 24, 2006) (Aquila Request for Rehearing); Request for Rehearing of Pinnacle West Capital Corporation and Arizona Public Service Company, Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.*, at 4-5 (February 27, 2006) (Pinnacle West Companies Request for Rehearing).

would be the only cost filing opportunity in the proceeding.<sup>129</sup> Likewise, Pinnacle West Companies argues that reliance on an informal and off-the-record technical conference violates Pinnacle West Companies' due process rights.<sup>130</sup>

58. Portland argues that the Commission violated its due process rights by failing to provide a sufficient explanation, in the January 26, 2006 Order, of its finding that Portland's stacking analysis was biased. Portland alleges that the lack of sufficient explanation had the effect of denying Portland a meaningful opportunity to respond.<sup>131</sup>

59. In its request for rehearing of the November 2, 2006 Order, Sempra contends that the Commission's rejection of Sempra's compliance filing constitutes a violation of Sempra's due process rights.<sup>132</sup> Sempra maintains that both the Due Process Clause of the U.S. Constitution and the APA require that when an "agency seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the party before the agency must be given notice and an opportunity to introduce evidence bearing on the new standard."<sup>133</sup> However, Sempra argues that after it submitted the compliance filing required by the January 26, 2006 Order, the November 2, 2006 Order set forth new requirements regarding the inclusion and valuation of affiliate purchases. Sempra asserts that it had no notice of the new requirements adopted in the November 2, 2006 Order until issuance of that order, which rejected Sempra's compliance filing. Sempra further alleges that the Commission violated Sempra's due process rights by not giving Sempra the opportunity to revise its cost filing in accordance with what it perceived as the new standards set forth in the November 2, 2006 Order.<sup>134</sup>

60. Cal Parties continue to argue that "paper hearings" are not an adequate substitute for evidentiary hearings for the contested cost filings, particularly given the complexity

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<sup>129</sup> Morgan Stanley Request for Rehearing at 5-6; Aquila Request for Rehearing at 6-7.

<sup>130</sup> Pinnacle West Companies Request for Rehearing at 7.

<sup>131</sup> Portland Request for Rehearing at 13-14.

<sup>132</sup> Sempra Request for Rehearing of November 2, 2006 Order at 8.

<sup>133</sup> *Id.* (citing *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981)).

<sup>134</sup> *Id.* at 8.

of the filings.<sup>135</sup> Cal Parties contend that the Commission violated Cal Parties' due process rights by depriving Cal Parties of the opportunity to conduct discovery and by failing to hold a trial-type hearing concerning the sellers' cost filings.<sup>136</sup> Cal Parties argue that although there are circumstances in which a trial-type evidentiary hearing is unnecessary, those circumstances do not include the situation at hand, where there is a significant rate increase at issue, and where there remain substantial disputed issues of material fact.<sup>137</sup> Rather, in their Request for Rehearing of the November 2, 2006 Order, Cal Parties maintain that D.C. Circuit Court precedent requires "some sort of adversary, adjudicative-type procedures" in circumstances such as this, where an agency is required to support its decision under the substantial evidence standard.<sup>138</sup> Cal Parties add that the Due Process Clause "forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."<sup>139</sup>

61. Cal Parties assert that, other than the summary rulings and conclusory data comparisons contained in Appendices to the January 26, 2006 Order, the Commission failed to explain how it conducted its evaluation of the record, or how it independently determined that the record was complete and accurate. Cal Parties argue that the cost filings raise multiple issues of material fact that, even after the Commission's summary

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<sup>135</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 23-29; Cal Parties' Preliminary Rehearing Request at 8-9; Cal Parties' Request for Rehearing of November 2, 2006 Order at 17-18.

<sup>136</sup> Cal Parties' Request for Rehearing of November 2, 2006 Order at 17.

<sup>137</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 25-26; Cal Parties' Preliminary Rehearing Request at 7-10; Cal Parties contend that each of the cases and law review articles cited by the Commission (*Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1199 (D.C. Cir. 2000); *Central Maine v. FERC*, 252 F.3d 34 (1<sup>st</sup> Cir. 2001); *El Paso Natural Gas Company*, 48 FERC ¶ 61,202 (1989); *Town of Norwood v. FERC*, 202 F.3d 392, 404 (1<sup>st</sup> Cir. 2000), *cert. denied*, 531 U.S. 818 (2000); Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1270 & n.14 (1975)) in support of its finding that a paper hearing was adequate involved materials in the written record of the proceeding, and not the submissions directly to the CAISO, as required by the August 8, 2005 Order.

<sup>138</sup> Cal Parties' Request for Rehearing of November 2, 2006 Order at 18 (citing *People's Mojahedin Org. of Iran v. Albright*, 182 F.3d 17, 24 n.8 (D.C. Cir. 1999)).

<sup>139</sup> Cal Parties' Request for Rehearing of November 2, 2006 Order at 18 (citing *Bowman Transp. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974)).

rulings, remain disputed on the record of this proceeding.<sup>140</sup> Further, Cal Parties assert that the compliance filings submitted by several sellers raise even more questions of material fact that are unresolved in the record of this proceeding. Cal Parties insist that this complexity requires expert evaluation to ensure that the data are accurate and that the computations are correctly performed. Cal Parties maintain that in cases such as this, involving significant dollar amounts and numerous disputed issues of fact, parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.<sup>141</sup>

62. Further, in their Request for Rehearing of the January 26, 2006 Order, Cal Parties state that, while the filings included evidence and testimony, submissions opposing the filings have been hamstrung by unverifiable information and analyses for which no discovery has been undertaken. Without discovery, Cal Parties assert that they may never know exactly how the Commission conducted its own evaluation, what specific data it used, or whether that data was accurate. Cal Parties argue that this internal Commission review of costs involving complex calculations and hundreds of millions of dollars in rate increases to consumers does not constitute due process.<sup>142</sup>

## **2. Arbitrary and Capricious Action**

63. Allegheny, El Paso, Merrill Lynch, and Sempra argue that the Commission violated their due process rights by making determinations in an arbitrary and capricious manner, by impermissibly departing from Commission precedent, by applying inconsistent standards to the various parties' cost filings, and by acting inconsistently on parallel issues.

64. Allegheny contends that the Commission's summary rejection of Allegheny's cost filing is not the product of reasoned decision-making, and is arbitrary, because the Commission failed to examine the data Allegheny supplied in its cost filing before summarily rejecting the filing with prejudice. Allegheny asserts that it "included in its [c]ost [f]iling the substantive information required by the [August 8, 2005 Order]" to demonstrate that the MMCP results in an overall revenue shortfall for Allegheny.<sup>143</sup>

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<sup>140</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 27; Cal Parties' Request for Rehearing of November 2, 2006 Order at 17.

<sup>141</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 23-28.

<sup>142</sup> *Id.* at 29-32.

<sup>143</sup> Allegheny Request for Rehearing at 12.

However, Allegheny argues that instead of undertaking an independent review of Allegheny's submittal, the Commission merely accepted Cal Parties' characterization of Allegheny's cost filing. Allegheny asserts that in doing so, the Commission violated the APA requirement that an agency engage in reasoned decision-making by supporting its conclusions with "substantial evidence in the record."<sup>144</sup>

65. Allegheny also argues that the Commission engaged in disparate treatment of the various parties' cost filings in the January 26, 2006 Order, rendering its summary rejection of Allegheny's cost filing unduly discriminatory, arbitrary, capricious, and an abuse of the agency's discretion. Allegheny asserts that the Commission went beyond an objective review of other parties' submittals and supplied data itself to validate the parties' claims. Specifically, Allegheny claims that in light of Cal Parties' challenge to Sempra's documentation, the Commission independently validated Sempra submissions with CAISO settlement data. Allegheny maintains that the Commission has offered no explanation for this purportedly inconsistent treatment.<sup>145</sup>

66. In addition, Allegheny argues that rejection of the supplemental materials it submitted with its request for rehearing would violate due process by treating Allegheny's supplemental data in a manner that is inconsistent with the treatment of other parties' supplemental filings. Allegheny asserts that the Commission accepted supplemental filings from other parties after the deadline in the January 26, 2006 Order and avers that the materials it now offers satisfy the standard for the acceptance of supplemental materials set forth in the January 26, 2006 Order.<sup>146</sup>

67. Merrill Lynch and El Paso argue that the Commission's rejection of their respective cost filings as "patent nullities" was an abuse of discretion, not supported by substantial evidence, and that the Commission's application of its own rules was arbitrary and capricious. Both Merrill Lynch and El Paso dispute that the Commission's treatment of their respective cost filings had any rational connection to the standards set forth in the August 8, 2005 Order.<sup>147</sup> For example, El Paso contends that it made a *prima facie*

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<sup>144</sup> *Id.* at 23 (quoting *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511, 1513 (D.C. Cir. 1984)).

<sup>145</sup> *Id.* at 24-25.

<sup>146</sup> Allegheny Request for Rehearing at 30 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 19(accepting supplemental materials "to the extent these replies address or rebut concerns raised in initial comments on the original cost filing.")).

<sup>147</sup> El Paso Request for Rehearing at 46; Merrill Lynch Request for Rehearing at 44.

showing of its costs using extracts from its trade capture system.<sup>148</sup> El Paso asserts that the Commission offers no explanation as to why it considers El Paso's trade capture data unreliable or why it now departs from its existing practice of use of trade capture systems for compliance filings and responses to Commission investigations. El Paso further contends that the Commission blatantly ignored the evidentiary record by presuming that El Paso chose the values for its affiliate purchases.<sup>149</sup> Likewise, Merrill Lynch maintains that its filing was not a "patent nullity." Merrill Lynch asserts that its cost data comported with the requirements of the August 8, 2005 Order, the Cost Filing Template and the August 25, 2005 Technical Conference. Therefore, Merrill Lynch argues that it made a *prima facie* case supporting its cost filing. Thus, Merrill Lynch contends that the Commission should have found the filing to be substantially compliant.<sup>150</sup>

68. Merrill Lynch and El Paso further contend that the Commission acted arbitrarily and capriciously because allowing Merrill Lynch and El Paso to supplement their filings would not materially delay or otherwise adversely impact the proceedings. Moreover, Merrill Lynch and El Paso assert that dismissing their cost filings actually worked counter to the Commission's stated policy goals in the refund proceeding by subjecting the Commission's decisions to a protracted appeals process.<sup>151</sup> Furthermore, El Paso and Merrill Lynch maintain that the Commission abused its discretion by summarily dismissing with prejudice their respective cost filings in the interest of avoiding substantial delay. El Paso and Merrill Lynch contend that allowing El Paso and Merrill Lynch to submit supplemental cost justification filings would not have caused any more delay than the filing opportunities or deferrals on action the Commission provided other market participants. El Paso and Merrill Lynch allege that the Commission fails to account for its seemingly inconsistent exercise of discretion.<sup>152</sup>

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<sup>148</sup> In its September 14, 2005 cost filing, El Paso explained that the data presented were taken from its power trading deal tracking database, known as RAMP. In its cost filing, El Paso explained that the system contains all transaction data related to the purchases and sales at issue and that the information used in RAMP generates accounting documents used in El Paso's business activities. El Paso Marketing, L.P. Cost Recovery Filing, Docket Nos. EL00-95-000 *et al.*, Prepared Testimony of Dennis Price at 8 (September 14, 2005).

<sup>149</sup> El Paso Request for Rehearing at 31-40.

<sup>150</sup> Merrill Lynch Request for Rehearing at 28-38.

<sup>151</sup> *Id.* at 39-42; El Paso Request for Rehearing at 40-44.

<sup>152</sup> El Paso Request for Rehearing at 62-63; Merrill Lynch Request for Rehearing

(continued...)

69. In addition, Merrill Lynch and El Paso assert that they did not receive due process comparable to that provided to the generators through the Fuel Cost Allowance process.<sup>153</sup> El Paso and Merrill Lynch claim that as marketers they were subjected to a “36-day, one ‘bite at the apple’” cost offset process.<sup>154</sup> In contrast, El Paso and Merrill Lynch argue that generators, the CAISO, and other market participants were afforded more than two years to develop and complete the Fuel Cost Allowance process, including multiple rounds of pleadings and ample time to prepare Fuel Cost Allowance claims.<sup>155</sup> Moreover, El Paso notes that unlike the Commission’s summary rejection of its cost filing in this proceeding, not a single fuel cost allowance submission was rejected with prejudice upon the first submission, even though the Commission found errors of form and substance in fuel cost allowance filings. El Paso maintains that purchased power costs of a power marketer are the functional equivalent to input costs of a generator. Therefore, according to El Paso, the procedure for the cost filings should have been comparable to that afforded during the fuel cost allowance phase of the proceeding.<sup>156</sup>

70. Finally, El Paso and Merrill Lynch both argue that the Commission applied its cost filing instructions in an arbitrary and capricious manner by approving some cost filings subject to a compliance filing, while summarily rejecting others.<sup>157</sup> El Paso and Merrill Lynch assert that the Commission’s errors are magnified by the fact that the Commission did accept several other sellers’ cost filings, but required substantial modifications.<sup>158</sup> Moreover, El Paso and Merrill Lynch contend that the Commission engaged in inconsistent treatment of the cost filings without providing any explanation as to why certain filings were summarily dismissed, while others were accepted subject to

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at 63-64.

<sup>153</sup> El Paso Request for Rehearing at 10-17; Merrill Lynch Request for Rehearing at 10-13.

<sup>154</sup> Merrill Lynch Request for Rehearing at 10.

<sup>155</sup> El Paso Request for Rehearing at 11; Merrill Lynch Request for Rehearing at 11.

<sup>156</sup> El Paso Request for Rehearing at 14-15.

<sup>157</sup> El Paso Request for Rehearing at 55-62; Merrill Lynch Request for Rehearing at 55-63.

<sup>158</sup> El Paso Request for Rehearing at 30; Merrill Lynch Request for Rehearing at 27.

compliance filings, or why the Commission allowed supplemental filings by certain parties.<sup>159</sup>

71. In its request for rehearing of the January 26, 2006 Order, Sempra argues that the Commission “failed to engage in reasoned-decision-making, acted arbitrarily and capriciously and not in accordance with the law, and impermissibly departed from its precedent” by directing Sempra to submit certain modifications to its cost offset claim in a compliance filing.<sup>160</sup> In its request for rehearing of the November 2, 2006 Order, Sempra alleges that the Commission acted arbitrarily and capriciously by rejecting Sempra’s compliance filing.<sup>161</sup>

72. In addition, Pinnacle posits that it would be arbitrary and capricious for the Commission to require cost filings by market participants with no refund liability because the proceeding is not yet final. Thus, Pinnacle asserts that the status of net refund recipients is still in question, and that it would have to engage in speculation, based on guesses about future events in order to make a cost filing.<sup>162</sup>

### **Commission Determination**

73. The Supreme Court has explained that “the touchstone of due process is protection of the individual against arbitrary action of government.”<sup>163</sup> Thus, constitutional due process requires certain procedural safeguards, including the requirement that a party affected by government action be given “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action,”<sup>164</sup> and also “the opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>165</sup>

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<sup>159</sup> El Paso Request for Rehearing at 55-63; Merrill Lynch Request for Rehearing at 55-62.

<sup>160</sup> Sempra Request for Rehearing of January 26, 2006 Order at 5-16.

<sup>161</sup> Request of Sempra Energy Trading Corp. for Rehearing of November 2, 2006 Order on Compliance Filings, Docket Nos. EL00-95-000, *et al* and EL00-98-000, *et al*, at 5-8 (December 4, 2006) (Sempra Request for Rehearing of November 2, 2006 Order).

<sup>162</sup> Pinnacle West Companies Request for Rehearing at 5.

<sup>163</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

<sup>164</sup> *Jones v. Flowers*, 547 U.S. 220, 226 (2006).

<sup>165</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks and citations omitted).

However, circumstances vary and the sufficiency of the procedures supplied must be decided in the light of the circumstances of each case.<sup>166</sup> Significantly, in this case, the cost filing opportunity was not an isolated process, but was part of a lengthy and complex refund proceeding that began in 2001. By the time the Commission issued its August 8, 2005 Order establishing the guidelines for cost filings, parties had been on notice for several years that they would have the opportunity to make such a filing.<sup>167</sup> Furthermore, the Commission's rulings on the cost filings were based on a consistent and impartial application of the standards set forth in the August 8, 2005 Order, and thorough consideration of the evidence and documentation contained in the parties' filings, as well as pertinent comments and protests. Thus, the Commission rejects parties' claims that the cost filing procedures violated due process or that the Commission's rulings on the cost filings were arbitrary, capricious, or otherwise in error. Accordingly, as discussed below, the Commission denies the requests for rehearing of Allegheny, El Paso, Merrill Lynch, Sempra, Portland, Morgan Stanley, Aquila, and Pinnacle West Companies on this issue.

### 1. Notice and Opportunity to be Heard

74. As Merrill Lynch and El Paso correctly observe, courts frequently apply the three-factor *Mathews* test to determine the adequacy of process. However, we disagree with El Paso and Merrill Lynch that the process provided in this proceeding fails this test. To the contrary, we find that application of the *Mathews* test demonstrates that the procedural safeguards utilized throughout the cost filing process were sufficient. As previously noted, the first factor considered in the *Mathews* analysis is the private interest that will

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<sup>166</sup> *Id.* at 334 (“[D]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” (citation omitted)); *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970) (welfare termination proceeding); *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 807-08 (9th Cir. 2002); *Southern California Edison Co. v. Lynch*, 353 F.3d 648 (9th Cir. 2003) (given the totality of the circumstances, expedited briefing schedule did not deprive appellant of procedural due process). *See also California v. FERC*, 329 F.3d 700, 713 (9th Cir. 2003) (“[W]e hold that, under the circumstances of this case, the Commission’s consideration of the petitioners’ evidence and arguments in their motions to intervene and petitions for rehearing gave the petitioners all the procedural safeguards they were due under the Due Process Clause or the FPA.”).

<sup>167</sup> *San Diego Gas & Elec. v. Sellers of Energy and Ancillary Services*, 97 FERC ¶ 61,120 (2001); *San Diego Gas & Elec. v. Sellers of Energy and Ancillary Servs.*, 99 FERC ¶ 61,160, at 61,656 (2002).

be affected by the official action.<sup>168</sup> While we agree with El Paso and Merrill Lynch that the private interest affected is substantial, we find that the procedural safeguards provided in this proceeding, as discussed above,<sup>169</sup> are sufficient to protect the private interests at risk.

75. The second factor in the *Mathews* test considers the risk of erroneous deprivation of interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.<sup>170</sup> Throughout this proceeding, the Commission has provided ample procedural safeguards, which we have recited time and again in a number of orders, to ensure against any deprivation of the parties' interests.<sup>171</sup> With numerous opportunities to participate in and comment on the process that culminated in the Cost Filing Template, we find little risk of an erroneous deprivation of the parties' substantial private interests. We do not believe that additional process was either warranted or appropriate under the circumstances. In fact, the majority of the parties were able to follow the Commission's guidance and submit substantially compliant cost offset claims within the established time frame. The Commission maintains that it would be unfair to the parties that made the effort to substantially comply with the cost filing requirements to provide additional time and opportunities to the parties that chose not to follow the guidelines set out in the August 8, 2005 Order and Cost Filing Template.

76. The third factor in the *Mathews* test is the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute requirements would entail.<sup>172</sup> This proceeding has been underway for many years; the Commission remains mindful that customers still have not received refunds. As we

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<sup>168</sup> *Mathews*, 422 U.S. at 335.

<sup>169</sup> *See, e.g., supra* P 3-8 for a discussion of the process we have provided in this proceeding; *see also* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 3-18.

<sup>170</sup> *Mathews*, 422 U.S. at 335.

<sup>171</sup> *See, e.g., supra* P 3-8 for a lengthy and detailed discussion of the process provided. For example, parties were involved in an intense dialogue on the issues related to these cost filings at least since the July 26, 2004 Technical Conference, a Technical Conference convened specifically to discuss how to conclude this proceeding. Since that time, the parties have had several more opportunities to comment on the scope, methodology, format and other specific aspects of the cost filing. *See, e.g.,* November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 179.

<sup>172</sup> *Mathews*, 422 U.S. at 335.

explained in the January 26, 2006 Order, the CAISO must have all the final offset numbers at the same time before it may begin processing the refunds.<sup>173</sup> None of the parties that raised this issue in their requests for rehearing have persuaded us that special circumstances exist to justify preferential treatment of certain parties' cost filings when the majority of the sellers were able to follow our guidelines and substantiate their claims. Moreover, the Commission's approach to the cost offset phase of the refund proceeding is consistent with the well-established principle that the Commission has discretion to tailor its processes to suit its proceedings, within the bounds of due process.<sup>174</sup> We find that the procedures selected fully satisfy the due process requirements of the *Mathews* test. Thus, we maintain that parties received sufficient due process.

77. With respect to the issue of notice, the Commission finds that the parties were provided adequate notice regarding both the burden of proof and the timelines for the cost filings. First, the December 10, 2004 Order soliciting comments on the cost filing process signaled to parties that the cost offset phase of the proceeding had begun.<sup>175</sup> In addition, the August 8, 2005 Order, which established the general framework and many of the details of the cost filings, was the result of a several-year process. Not only did parties know since 2002<sup>176</sup> that the cost filing opportunity was imminent, but parties were engaged in an intense dialogue regarding the issues related to these cost filings, including format and content, for well over a year before the issuance of the August 8, 2005 Order.<sup>177</sup> As discussed above, the Commission also provided additional opportunities for the parties to participate in the process that resulted in the Cost Filing Template after the August 8, 2005 Order, including a Commission staff-led technical conference and an

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<sup>173</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at 387.

<sup>174</sup> See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case); *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion).

<sup>175</sup> See December 10, 2004 Order, 109 FERC ¶ 61,264.

<sup>176</sup> See May 15, 2002 Order, 99 FERC ¶ 61,160 at 61,656.

<sup>177</sup> See August 8, 2005 Order, 112 FERC ¶ 61,176 and December 10, 2004 Order, 109 FERC ¶ 61,264, for a summary of the opportunities for party participation prior to issuance of the August 8, 2005 Order.

extension of the filing deadline to allow parties to incorporate guidance from the August 25, 2005 Technical Conference. Thus, we continue to find that the parties had adequate notice of what would be required for cost filings and when the filings would be due.

78. We also reject parties' arguments that they were confused or misled by the Commission's statements that they would receive the opportunity to submit cost offset claims at "the end" of the refund proceedings, and that the Commission essentially sprang the deadline for cost filings on them. Before reaching the cost filing phase of this proceeding, the Commission had already issued numerous orders refining the MMCP methodology, and dealing with the major issues concerning emissions cost offsets and Fuel Cost Allowance offsets. Thus, the parties were aware that sellers' costs were the only remaining category of offsets. Further, parties were on notice since the December 10, 2004 Order soliciting comments on the scope of transactions for inclusion in cost filings that the time for the last category of offsets was approaching. The fact that the Commission solicited these comments should have sent a clear signal to the parties that the cost filing phase of the proceeding was underway, regardless of whether we technically and formally reached "the end" of the refund hearing.

79. We find further that summary rejection with prejudice was proper in the cases of those sellers whose cost filings patently failed to satisfy the requirements set forth in the August 8, 2005 Order. Specifically, we refute the claims of El Paso and Merrill Lynch that summary rejection with prejudice under Rule 217 was improper due to a lack of notice. First, we emphasized in the August 8, 2005 Order that we intended a speedy resolution to the cost offset phase of the refund proceeding. Accordingly, we stated unambiguously that the burden was on the filer to present actual data in a manner that supports its claim by the September filing deadline.<sup>178</sup> We included an unambiguous list of the types of documentation that each sellers' cost filing must include.<sup>179</sup> We also indicated that we envisioned issuing an order finalizing the cost offsets by November 15, 2005, approximately two months after the cost filing deadline, and that we did not intend to allow a second attempt for those parties whose original filings failed to adhere to the requirements set forth in the August 8, 2005 Order; nor did we intend to allow parties to defer filing.<sup>180</sup> To further assist parties in their efforts to submit an adequately supported cost filing, we established the August 25, 2005 Technical Conference and provided parties an opportunity to participate in the development of the Cost Filing Template. In addition, the Cost Filing Template provided an additional

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<sup>178</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 116.

<sup>179</sup> *Id.* P 103.

<sup>180</sup> *Id.* P 116.

reminder that we expected the parties' cost filings to comprise their cases-in-chief for claiming cost offset. Moreover, while not required, the Cost Filing Template instructed parties to attach source documentation tied to company books and records, and explicitly stated that "[a]ny entry to the cost filing ... not so supported *may be subject to summary rejection for lack of support.*"<sup>181</sup> Even though the Cost Filing Template was not mandatory, it was published in the relevant dockets. The instructions provided in the template alerted parties to the possibility of summary rejection.<sup>182</sup> Accordingly, we find that the parties had sufficient notice regarding the possibility of summary rejection.

80. Moreover, Rule 217 vests in the decisional authority the discretion to summarily dispose of all or part of a proceeding when it determines that there are no genuine issues of fact material to the decision of a proceeding. Under Rule 217, as we emphasized in the January 26, 2006 Order, the Commission has the discretion to reject a filing that does not comply with a Commission order,<sup>183</sup> and the authority to summarily dispose of portions of a proposed filing if it determines that there are no material issues of fact in dispute or the filing is in clear violation of an applicable statute, regulation, or Commission policy.<sup>184</sup> Importantly, Rule 217 also provides that, if good cause is shown, the Commission may summarily dispose of a filing without providing opportunity for the participants to comment on the proposed disposition.<sup>185</sup> Therefore, even if the August 8, 2005 Order and the Cost Filing Template had not included express notice about the possibility of summary rejection, the Commission's Rules and Regulations provide notice that summary rejection is appropriate when good cause is shown. Sellers had numerous opportunities to understand how to make a proper cost filing and ample notice that unsupported filings could be summarily rejected and because the filings failed to include sufficient support per the August 8, 2005 Order, the Commission had good cause to reject those filings. Moreover, as we noted in our previous orders, this is not a novel approach. Indeed, we have exercised our discretion under Rule 217 to summarily reject

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<sup>181</sup> Cost Filing Template (emphasis added).

<sup>182</sup> *See id.*

<sup>183</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 135 (citing 18 C.F.R. § 385.2001 (2006)).

<sup>184</sup> *Id.* P 133.

<sup>185</sup> 18 C.F.R. § 385.217(c)(2) (2008).

untimely and/or unsupported cost justifications throughout the refund proceeding.<sup>186</sup> Accordingly, our summary rejection of insufficiently supported cost filings in the January 26, 2006 Order should not have come as a surprise.

81. Furthermore, we note that Cal Parties previously raised the issue of summary disposition in its October 11, 2005 comments on the cost filings,<sup>187</sup> arguing that summary disposition was appropriate for cost filings that were “inadequately or insufficiently supported.”<sup>188</sup> Sellers had an opportunity to submit reply comments on the issue, but did not do so.<sup>189</sup> Upon review of the parties’ comments, the Commission found that sellers had sufficient notice regarding the Commission’s intent to summarily dispose of insufficiently supported cost filings. We explained that allowing submission of any additional filings would cause substantial delay, requiring a new comment period with full due process rights. Accordingly, we exercised our discretion to summarily reject the deficient cost filing submissions.<sup>190</sup>

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<sup>186</sup> At an earlier phase of the refund proceeding, the Commission summarily rejected for lack of support three sellers’ cost justification filings. *San Diego Gas & Electric Co.*, 96 FERC ¶ 61,254 (rejecting cost justifications submitted by: Reliant Energy Services, Inc.; Williams Energy Services Corporation; and Mirant Americas Energy Marketing, LP, Mirant California, LLC, M/rant Delta, LLC, and Mirant Potrero, LLC); *reh’g denied and motion to supplement rejected*, 97 FERC ¶ 61,290 (2001); *reh’g denied*, 99 FERC ¶ 61,008 (2002). A fourth filing was summarily rejected as untimely. *San Diego Gas & Electric Co.*, 97 FERC ¶ 61,012 (2001).

<sup>187</sup> California Parties’ Common Comments on Sellers’ Cost Filings, Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.* (October 11, 2005) (Cal Parties’ Common Comments).

<sup>188</sup> *Id.* at 16.

<sup>189</sup> In its reply comments, Portland General argued specifically that there was no valid basis for summarily rejecting Portland General’s cost filing, but did not challenge the Commission’s authority to summarily reject cost filings in general. Portland General Electric Company’s Reply Comments in Support of Cost Filing, Docket Nos. EL00-95-144 and EL00-98-131, at 3 (October 18, 2005). No other party submitted reply comments on this issue.

<sup>190</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 45.

82. In addition, the precedent cited by El Paso and Merrill Lynch to support their claims that summary rejection was inappropriate<sup>191</sup> is inapt. In fact, several of the cases cited actually support the Commission's decision to summarily reject the cost filings we found to be patently deficient. First, in *Phillips*, we determined that there were issues of material fact raised that could not be resolved on the basis of the existing written record.<sup>192</sup> As noted above, the cost filings that were summarily rejected raised no issues of material fact that could not be resolved on the basis of the existing written record in this proceeding, as they were clearly not in compliance with the August 8, 2005 Order. Therefore, *Phillips* does not square with the facts of this case. Moreover, with respect to the notice requirement, in *Phillips* we stated that summary disposition would be inappropriate in cases where the Commission has left open "questions about who has to prove what and just when he has to prove it."<sup>193</sup> In contrast to the factual circumstances in *Phillips*, the August 8, 2005 Order made it abundantly clear who had the burden to prove what and by when they had to do it. Despite this guidance, several parties' cost filings patently failed to comply with the requirements of the August 8, 2005 Order. Thus, Commission precedent supports summary disposition with prejudice under the facts of this record.

83. In *Columbia Gulf Transmission*,<sup>194</sup> also cited by El Paso for the proposition that summary dismissal typically includes a description of the deficiency and guidance on how to fix the filing, the Commission denied parties' requests for summary rejection of Columbia Gulf's certificate application, but stated that the test for whether summary rejection is appropriate is "whether the deficiencies in the filing are so significant as to warrant immediate rejection."<sup>195</sup> In the instant proceeding, consistent with our holding in *Columbia Gulf*, we found the cost filings of El Paso, Merrill Lynch, and Allegheny contained such significant deficiencies that summary rejection was warranted. Thus, we find that El Paso's reliance on *Columbia Gulf* is misplaced. Likewise, in *Municipal Light Boards of Reading and Wakefield MA*, the court did observe, as Merrill Lynch points out, that the summary rejection of a filing is classically used "as a technique for calling on the

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<sup>191</sup> See *supra* n.126 for a list of cases cited by El Paso and Merrill Lynch as precedent on this issue.

<sup>192</sup> See *Phillips Pipe Line Co.*, 67 FERC ¶ 63,002, at 65,003 (1994) (*Phillips*).

<sup>193</sup> *Id.* at 65,004.

<sup>194</sup> *Columbia Gulf Transmission*, 86 FERC ¶ 61,130 (1999) (*Columbia Gulf*).

<sup>195</sup> *Id.* at 61,450.

party to put its papers in proper form and order.”<sup>196</sup> However, the court also noted that its use is not limited to defects in form, but could also be “used by an agency where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket.”<sup>197</sup> Therefore, based on the significant deficiencies in the filings of El Paso and Merrill Lynch, and the need to complete the refund proceeding, the Commission’s summary rejection with prejudice is entirely consistent with the precedent in *Municipal Light Boards*.

84. As noted above, El Paso, Merrill Lynch and Allegheny failed to sufficiently support their cost filings as required by the August 8, 2005 Order.<sup>198</sup> These were not just cases of minor deviations from Commission policy or partial incompleteness. We did not, as several parties suggest, reject their filings merely on the basis of form. Rather these sellers have wholly failed to comply with the August 8, 2005 Order.<sup>199</sup> The Commission is not persuaded to depart from its previous determination to exercise its discretion under Rule 217 to summarily reject, with prejudice, incomplete or non-compliant cost filings for which no issues of material fact have been raised that could not be resolved on the basis of the existing written record.<sup>200</sup>

85. Finally, we find that net refund recipients were provided adequate notice that they were both eligible to submit cost filings and also bound by the same September 14, 2005

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<sup>196</sup> *Municipal Light Boards*, 450 F.2d at 1346.

<sup>197</sup> *Id.*

<sup>198</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 1 (requiring cost filings to reflect “fully-supported actual costs”).

<sup>199</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 139 (“El Paso’s claim that the supporting documentation was too large to provide is insufficient justification for failure to provide adequate support and does not withstand scrutiny”) and *id.* P 158 (“We reject NEG’s cost filing for insufficient support to demonstrate its claimed costs.”); *id.* P 148 (“We will reject [Merrill Lynch’s] cost filing for failure to provide supporting documents to verify claimed costs.”); *id.* P 152 (“[Merrill Lynch] did not submit any support that verifies purchase transactions.”); *id.* P 160 (“We find Allegheny’s cost filing to be patently deficient. Allegheny did not submit any support that verifies the purchase transactions.”). *See also id.* n.177.

<sup>200</sup> *Id.* P 42; *see also* November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 135-139.

deadline as all other parties. Contrary to Morgan Stanley's, Aquila's, and Pinnacle West's assertions, the August 8, 2005 Order did not, implicitly or otherwise, prohibit any seller from making a cost filing based on whether the seller expected to be a net refund recipient. Indeed, Ordering Paragraph (D) of the August 8, 2005 Order simply states, "*Parties* are hereby required to submit their cost filings no later than [the September, 2005 filing deadline]." <sup>201</sup> Thus, the August 8, 2005 Order indicated that all parties, irrespective of the filing parties' refund liability status, were required to meet the September 14, 2005 deadline for cost filings.

86. As we explained in the January 26, 2006 Order, concerns for consistency and fairness require the Commission to treat all parties filing for offset equally. <sup>202</sup> We continue to conclude that if the Commission were to allow some sellers to make their cost filings at a later date, this would unduly discriminate against those sellers who made the effort to submit complete cost filings by the September 14<sup>th</sup> deadline. Accordingly, the Commission adheres to its determination in the January 26, 2006 Order to deny requests to reserve rights to make cost filings in the future.

87. We disagree with Morgan Stanley's contention that the Commission's decision to defer action on certain cost filings is unduly discriminatory against Morgan Stanley. In the January 26, 2006 Order, we deferred action on the cost filings of SoCal Ed, PG&E, and CERS because these parties were net refund recipients, with no ostensible refund liability to offset. <sup>203</sup> However, Morgan Stanley is not, as it claims, similarly situated with these parties in one important respect – SoCal Edison, PG&E, and CERS all timely submitted cost filings and Morgan Stanley did not. The deferral of action on a timely submitted cost filing differs significantly from the deferral of the deadline for submitting a cost filing. As previously noted, we find that it would be unduly discriminatory to give a special advantage to certain parties by providing a second chance at making a cost offset demonstration when most parties were able to meet the deadline established in the August 8, 2005 Order.

88. Furthermore, we did not, as Morgan Stanley, Aquila, and Pinnacle West contend, "rely on" unrecorded staff statements from the August 25 Technical Conference in the January 26, 2006 Order to support our position that all parties were on notice that September 14, 2005 would be their sole opportunity to submit cost filings. Rather, the

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<sup>201</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at Ordering Paragraph (D) (emphasis added).

<sup>202</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at section III.B.

<sup>203</sup> *Id.* P 130.

January 26, 2006 Order merely referred to Commission staff statements made at the August 25, 2005 Technical Conference as further support for the Commission's determinations in the August 8, 2005 Order. Indeed, we emphasize the many means the Commission employed to alert sellers to the fact that the cost filings were a one-shot opportunity, including: prior summary rejection in this proceeding; the combination of our admonition in the August 8, 2005 Order regarding deadlines, and the establishment of the Technical Conference to help parties address cost filing concerns; Commission staff's statements in the Technical Conference; and the Cost Filing Template. Given this notice, prudent parties would have adhered to our requirement that each seller must submit its cost filing to the Commission by September 14, 2005, in order to be eligible for offset.<sup>204</sup>

89. With respect to the parties' allegations that by compressing the time schedule, the Commission violated the parties' due process rights, we remind the parties that this issue has been raised previously in a request for rehearing of the August 8, 2005 Order.<sup>205</sup> In response to that rehearing request, the Commission determined that the compressed proceeding schedule did not violate Merrill Lynch's due process rights.<sup>206</sup> None of the arguments presented now have persuaded us otherwise. Furthermore, the Commission's discretion to establish its calendar and procedures to balance the interests of all parties and provide for a reasonable resolution of proceedings is a well-established principle of administrative law.<sup>207</sup> The August 8, 2005 Order set out the parameters of the cost filings, shortened several previously-established deadlines, appropriately extended the cost filing deadline and comment period, and altered the compliance filing phase of the

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<sup>204</sup> See, e.g., *id.* (SoCal Edison, PG&E and CERS have been principal refund recipients, but nonetheless submitted timely cost filings because they did incur costs as sellers).

<sup>205</sup> Request for Rehearing of Merrill Lynch Capital Services, Inc., Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.*, at 5-7 (September 7, 2005).

<sup>206</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 166.

<sup>207</sup> *Id.* P 164 (citing *Midwest Independent Transmission System Operator, Inc.*, 117 FERC ¶ 61,267, at P 5 (2006) (no principle of administrative law is more firmly established than that of agency control of its own calendar, within the bounds of due process); *Association of Massachusetts Consumers Inc. v. SEC*, 516 F.2d 711, 714 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976); *Consolidation Coal Co. v. Costel*, 483 F. Supp. 1003 (E.D. Ohio 1979) (an administrative agency has wide discretion in controlling its calendar)); *see also Miami General Hospital v. Bowen*, 652 F. Supp. 812, 814 (S.D. Fla. 1986) (decision to refuse an extension of time not reviewable).

refund proceeding.<sup>208</sup> Therefore, the Commission maintains that the schedule required by the August 8, 2005 Order was appropriate, and that the parties were afforded adequate notice. We conclude that the compressed schedule did not violate the parties' due process rights.

90. Likewise, the Commission remains unpersuaded by claims that certain parties either did not retain their data from the Refund Period or did not have access to their data in a timely manner. As the Commission has emphasized several times throughout this lengthy proceeding, marketers and those reselling purchase power have been on notice at least since December 2001, and all sellers at least since May 15, 2002, that they would have an opportunity to recover their individual costs that exceeded the MMCP.<sup>209</sup> Thus, prudent parties would have exercised reasonable business judgment by collecting and preserving, in a readily accessible manner, their cost and revenue data required to make this demonstration in anticipation of the showing they knew they would have to make.<sup>210</sup> Regardless of the specific format of the cost filings, the exercise of reasonable business judgment would have enabled the parties to discern the type of records that would likely be required to support a cost offset claim.

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<sup>208</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 1.

<sup>209</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 43 (citing December 19, 2001 Order, 97 FERC ¶ 61,275 at P 98, 172; May 15, 2002 Order, 99 FERC ¶ 61,160 at P 61,656).

<sup>210</sup> *Id.* See also November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at n.193 (If parties were complying with the Commission's record retention regulations in effect at the time, the parties would have had the relevant data in storage at the time CAISO and PX market issues arose. Thus, prudence demanded the retention of records that questionably could have been necessary to either fight off demands for refunds or to support demands for refunds for market dysfunctions. Record retention compliant parties certainly would have had the relevant data in storage at the time the Commission put the parties on notice that they would have an opportunity, in the future, to demonstrate that, after application of the MMCP, their costs of providing electricity into the CAISO and PX markets exceed their total revenues received from those markets in that period. See Section 125.3 Schedule of Records and Periods of Retention. 18 C.F.R. § 125.3 (2000). See also Section 125.2(k), Preservation of Records of Public Utilities and Licensees, General Instructions, Retention Periods Designated "Destroy at option." 18 C.F.R. § 125.2(k) (2000) (even those records designated "Destroy at option" may not be destroyed in those cases where such destruction would be in conflict with the usefulness of such records in satisfying pending regulatory actions or directives)).

91. We are also not persuaded by Merrill Lynch's argument that the Commission failed to provide guidance on the filing requirements for sellers who traded through APX prior to the January 26, 2006 Order.<sup>211</sup> As noted above, the August 8, 2005 Order provided adequate notice of both the burden of proof and required standard of support for the cost filings. This was as clear for APX transactions as it was for non-APX transactions. APX's compliance filing is not a prerequisite to the cost filing of any APX participant, including Merrill Lynch.<sup>212</sup> There were no special circumstances involving the APX data that would warrant special cost filing treatment for APX participants. Moreover, in early 2005, APX provided all of its participants with data for their transactions in the CAISO and PX markets that could be used in their cost filing submissions. APX states that it posted data on its settlement web site for its participants to view, download and verify. Furthermore, APX provided its participants with a dispute period for the data it had posted.<sup>213</sup> Accordingly, the Commission finds that Merrill Lynch had access to the APX data for several months before the September 2005 cost filing deadline. Accordingly, the Commission denies Merrill Lynch's request for rehearing on this issue.

92. In addition, we reject the argument made by El Paso and Merrill Lynch that the January 26, 2006 Order changed the cost support standards without notice. The January 26, 2006 Order did not change the cost support standards. Rather, the January 26, 2006 Order consistently applied the standards set forth in the August 8, 2005 Order and summarily rejected those filings that patently failed to comply with those standards.

93. Similarly, we reject Sempra's claim that we violated its due process rights by putting forth new affiliate purchase treatment requirements, without notice, in the November 2, 2006 Order, and then rejected Sempra's February 10, 2006 compliance filing on the basis of those new standards. The Commission did not put forth new requirements in the November 2, 2006 Order. Rather, in the November 2, 2006 Order,

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<sup>211</sup> Merrill Lynch previously raised similar concerns with regard to APX. *See* Request for Rehearing of Merrill Lynch Capital Services, Inc. on Seller Cost Recovery Filings Order, Docket Nos. EL00-95-000 and EL00-98-000, at 8-12 (Sept. 7, 2005) (Merrill Lynch Request for Rehearing of August 8, 2005 Order).

<sup>212</sup> *See* November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 167.

<sup>213</sup> Request for Clarification or, in the Alternative, Rehearing of APX, Inc., Docket Nos. EL00-95-000 and EL00-98-000, at 4-7 (Sept. 7, 2005) (APX Request for Rehearing of August 8, 2005 Order).

we found that Sempra failed to follow either of the two modifications directed by the January 26, 2006 Order.<sup>214</sup>

94. Specifically, the required modifications for Sempra included revising the matched and average portfolio costs to either: (a) eliminate all affiliate purchases that utilized market indices or other market pricing; or (b) resubmit to the Commission a revised average purchased power costs valuing affiliate transactions at actual production costs.<sup>215</sup> In its compliance filing, Sempra removed its affiliate costs without removing the associated revenues, thereby creating an arbitrary proxy price to value affiliate purchases rather than excluding the entire transaction.<sup>216</sup> In addition, we found that the cost demonstration in the compliance filing constituted opportunity pricing that was disallowed under the August 8, 2005 Order.<sup>217</sup> Sempra not only failed to re-price its affiliate purchases to actual costs of production, but also failed to explain why such a value could not be determined.<sup>218</sup> Further, Sempra provided no evidence to justify the assumption that its average price proxy is equivalent to its affiliate generators' actual costs of production.<sup>219</sup> Moreover, we found that Sempra failed to comply with the prior Commission directives on what evidence was necessary to support cost offsets from refunds.<sup>220</sup> Thus, the Commission did not create new affiliate treatment requirements in the context of the November 2, 2006 Order. Rather, the November 2, 2006 Order rejected Sempra's compliance filing for failure to comply with the January 26, 2006 Order.

95. In addition, we disagree with Portland's claim that the January 26, 2006 Order failed to provide sufficient explanation of our finding that Portland's stacking analysis

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<sup>214</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 77 (“While the Commission gave Sempra the option of either revaluing its affiliate purchases at the actual cost of production or removing them altogether, Sempra has failed to follow either approach in its compliance filing.”).

<sup>215</sup> *Id.* P 71, 72. *See also* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 95, 355-361.

<sup>216</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 77.

<sup>217</sup> *Id.* (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 72).

<sup>218</sup> *Id.* P 78.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* P 80. *See also* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 360.

was biased. As discussed in more detail in the individual determinations section of this order,<sup>221</sup> the Commission provided specific illustrations concerning Portland's lack of a clearly defined stacking analysis.<sup>222</sup> Further, the Commission provided in the January 26, 2006 Order guidance for Portland to rectify this aspect of its cost filing.<sup>223</sup> Moreover, in the November 2, 2006 Order, the Commission accepted Portland's Case 2 stacking analysis.<sup>224</sup> Accordingly, the Commission rejects Portland's request for rehearing on this issue as moot.

96. Finally, we reject the due process arguments raised by Cal Parties. We note that Cal Parties have twice previously raised these arguments, in their rehearing request of the August 8, 2005 Order and in their Common Comments on Sellers' Cost Filings filed on October 11, 2005.<sup>225</sup> The Commission has already explained twice why a paper hearing with full documentation filed was sufficient to establish a complete record on the cost filings.<sup>226</sup> We again find that Cal Parties fail to raise any persuasive concerns as to the adequacy of the paper hearing process. First, as we have stated above, the Commission has considerable discretion to establish its calendar and procedures.<sup>227</sup> In particular, within the context of administrative law, it is well established that "[t]he term 'hearing' is notoriously malleable."<sup>228</sup> Moreover, in this proceeding, parties have received a form of

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<sup>221</sup> See *infra* P 330-333.

<sup>222</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 251.

<sup>223</sup> *Id.* P 252.

<sup>224</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 25.

<sup>225</sup> California Parties' Request for Rehearing of (1) the August 8, 2005 Order on Cost Recovery, Revising Procedural Schedule for Refunds, and Establishing Technical Conference, (2) the August 24, 2005 Order Denying Emergency Request for Transcription of Technical Conference, and (3) the September 2, 2005 Order on Clarification, Docket Nos. EL00-95-000 and EL00-98-000, at 48-56 (Sept. 7, 2005) (Cal Parties' Request for Rehearing of August 8, 2005 Order); California Parties' Common Comments on Sellers' Cost Filings, Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.*, at 19-20 (Oct. 11, 2005) (Cal Parties' Common Comments on Sellers' Cost Filings).

<sup>226</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 31. See also November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 143.

<sup>227</sup> See *supra* P 75 & n.173.

paper hearing that courts agree is now quite common in utility regulation.<sup>229</sup> As the Commission has previously stated, “[n]ot every factual dispute requires a trial-type hearing. The use of a paper hearing rather than a trial-type evidentiary hearing has been addressed in numerous cases ... It is well settled that the Commission may determine disputed facts in a paper hearing.”<sup>230</sup>

97. Indeed, the Commission has previously found that a paper hearing is sufficient process to protect parties’ rights even when there are material issues of fact raised.<sup>231</sup> As noted in the January 26, 2006, and November 19, 2007 Rehearing Orders, courts have repeatedly held that the Commission is required to provide a trial-type hearing only if the material facts in dispute cannot be resolved on the basis of written submissions in the record.<sup>232</sup> Here, the Commission found that there were no material facts in dispute that

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<sup>228</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 31; November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 145 (citing *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 46 (1<sup>st</sup> Cir. 2001) (*Central Maine*)).

<sup>229</sup> *Id.* (citing *Town of Norwood v. FERC*, 202 F.3d 392, 404 (1<sup>st</sup> Cir.), *cert denied*, 531 U.S. 818 (2000)).

<sup>230</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 143 (citing *Blumenthal v. ISO New England, Inc.*, 118 FERC ¶ 61,205, at P 17 (2007) (citing *Public Service Co. of Indiana*, 49 FERC ¶ 61,346 (1989), *order on reh’g*, 50 FERC ¶ 61,186, *opinion issued*, Opinion 349, 51 FERC ¶ 61,367, *order on reh’g*, Opinion 349-A, 52 FERC ¶ 61,260, *clarified*, 53 FERC ¶ 61,131 (1990), *dismissed*, *Northern Indiana Public Service Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1992). As the Commission noted in Opinion 349, 51 FERC ¶ 61,367, at 62,218-19 and n.67, while the FPA and case law require that the Commission provide the parties with a meaningful opportunity for a hearing, the Commission is required to reach decisions on the basis of an oral, trial-type evidentiary record only if the material facts in dispute cannot be resolved on the basis of the written record, i.e., where written submissions do not provide an adequate basis for resolving disputes about material facts.). *See also Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1199 (D.C. Cir. 2000) (*Lomak*) (citing *Conoco Inc. v. FERC*, 90 F.3d 536, 543 n.15 (D.C. Cir. 1996) (quoting *Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993)); and *Central Maine*).

<sup>231</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 31; November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 145 (citing *El Paso Natural Gas Company*, 48 FERC ¶ 61,202 (1989)).

<sup>232</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 145 (citing *Lomak* at 1199).

could not be resolved on the basis of the written record. Accordingly, the paper hearing constituted adequate due process. A voluminous written record has been amassed in this proceeding. The Commission has considered all the arguments presented by Cal Parties, along with the numerous submissions by all parties in this case. The Commission finds that its procedures have provided parties with more than adequate means to establish a complete record that is sufficient to enable the Commission to achieve just and reasonable results in these proceedings. Accordingly, the Commission again maintains that it will not order trial-type hearings on any of the cost filings.

98. Moreover, mere allegations by Cal Parties of disputed fact and lack of due process are insufficient to mandate an evidentiary hearing. Such allegations must be supported by an adequate proffer of evidence.<sup>233</sup> Despite Cal Parties' complaints regarding the inadequacy of the period for reviewing and commenting on cost filings,<sup>234</sup> Cal Parties managed to produce literally hundreds of pages of carefully footnoted comments on all cost filings of interest to them.<sup>235</sup> Where Cal Parties challenged the inclusion of specific cost items or a lack of support by an individual filer, we were able to address those challenges on the basis of the voluminous written record amassed in this proceeding.<sup>236</sup> Trial-type evidentiary hearings are not necessary to dispense with purely technical issues, such as the specific categories of information raised by Cal Parties in their comments. Cal Parties failed to show either that the existing written record is insufficient to address any specific disputes or that the administrative process already provided requires additional steps in order to adjudicate fairly the cost filings.<sup>237</sup>

99. Further, we again reject Cal Parties' request for additional discovery and/or cross-examination of witnesses. The August 8, 2005 Order required each seller submitting a cost filing to include the sworn affidavit of a corporate officer, verifying the accuracy of its submission.<sup>238</sup> As we previously found, the written testimony provided by witnesses by way of sworn affidavits in this proceeding pertained to actual historic operations. In

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<sup>233</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 32.

<sup>234</sup> Cal Parties' Request for Rehearing of August 8, 2005 Order at 54-55.

<sup>235</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 179.

<sup>236</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 32.

<sup>237</sup> *Id.* P 32-35. *See also* November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 145.

<sup>238</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 105.

addition, we found that such written testimony was supplied by witnesses whose corporate positions placed them in the best position to explain those historic operations.<sup>239</sup> The Commission maintains that these corporate officers' attestations are sufficient to verify the actual historic cost data. Accordingly, the Commission again maintains that it will not and need not permit additional discovery or cross-examination of witnesses.

## 2. Arbitrary and Capricious Action

100. Contrary to the parties' assertions, the Commission applied a uniform standard, based on the direction provided in the August 8, 2005 Order, to evaluate whether each cost filing was adequately supported. We reviewed the cost data submitted by each party and considered all relevant comments or protests. Based on the data and supporting documentation submitted, and the requirements of the August 8, 2005 Order as exemplified by the Cost Filing Template, we made determinations about the sufficiency of the cost filings. As noted above, in those cases where the cost filings were accepted on the condition of further modification and/or compliance filings, the filing parties had made a good faith effort in their initial filings to comply with the threshold standard of support established in the Commission's August 8, 2005 Order.<sup>240</sup> Unlike those cost filings, the cost filings of Allegheny, El Paso and Merrill Lynch were insufficiently supported and, therefore, failed to comply with the threshold requirements of the August 8, 2005 Order. Consequently, these parties are now bound by their decisions to submit non-compliant cost filings.

101. Accordingly, we reject the arguments made by Allegheny, El Paso, and Merrill Lynch that the Commission engaged in disparate treatment of the cost filings by accepting certain filings subject to modification and/or compliance filings, while summarily dismissing others. The August 8, 2005 Order gave sellers adequate notice of the threshold standard of evidentiary support the Commission required sellers to submit in order to avoid summary dismissal. All sellers had notice that claimants had the burden of proof to provide the necessary support for their claims by the September 14, 2005

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<sup>239</sup> *Id.*; January 26, 2006 Order, 114 FERC ¶ 61,070 at P 40.

<sup>240</sup> *See* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 355-357. Contrary to claims that the Commission engaged in disparate treatment by independently validating Sempra's cost data without extending the same benefit to other parties, the January 26, 2006 Order found that despite certain issues raised by Sempra's cost filing and possible inaccuracies, Sempra adequately and independently met the burden of support in its initial filing, supporting its purchase power transactions with original, validated source documentation consistent with the August 8, 2005 Order.

deadline.<sup>241</sup> As we explained in the January 26, 2006 Order, we accepted supplemental cost revisions, comments and testimony only to the extent those replies addressed or rebutted concerns raised in initial comments on the original cost filings. We clearly explained that we did not permit the parties to use those materials as a vehicle for essentially re-filing their case-in-chief.<sup>242</sup> In contrast, the supplemental materials that we have consistently rejected, and continue to reject in this order, represent attempts to persuade the Commission to give certain parties a second chance to submit their cases-in-chief. Differences in the nature and purpose of the supplemental materials warrant different treatment by the Commission. Therefore, we conclude that we were justified in accepting some supplemental materials while rejecting others. The rejection of claims we determined to be patent nullities evidences reasoned decision-making. Indeed, we believe that if we were to allow a party whose cost filing was rejected with prejudice as a patent nullity to now supplement or modify its filing, this would unduly discriminate against those sellers who made the effort to submit complete cost filings by the September 14<sup>th</sup> deadline.

102. We likewise reject Pinnacle West's claim that requiring net refund recipients to submit cost filings would be arbitrary and capricious. Net refund recipients, like those sellers with refund liability, incurred calculable costs in their role as sellers into the California markets and were, therefore, eligible to submit cost filings.<sup>243</sup> As we discussed above, because sellers were on notice for several years that they would have the opportunity to submit cost data, we find that sellers should have had access to the cost data necessary to submit a cost filing that substantially complied with the requirements of the August 8, 2005 Order. Although a seller may have had to estimate fuel cost allowance and emission offsets because neither of these were finalized prior to the cost filings, these estimates did not render the entire filing speculative. The Commission recognized the possibility that estimates would be used, but has concluded that, given the unique circumstances of this proceeding, simultaneous interrelated data filings were

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<sup>241</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 103-106.

<sup>242</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 19 (“While we accept these supplemental materials, we do not allow parties to use these materials essentially to re-file their case-in-chief and increase claimed costs. Otherwise, these cost filings would become moving targets that deprive challengers of the opportunity to comment.”).

<sup>243</sup> We note that although SoCal Edison, PG&E, and CERS were the principal refund recipients, they also incurred costs in their role as sellers into the California markets. Thus, they timely submitted cost filings. January 26, 2006 Order, 114 FERC ¶ 61,070 at P 130.

unavoidable. We explained that to require such filing sequentially would prolong these proceedings unnecessarily.<sup>244</sup>

103. We also reject the claims made by Sempra that the modifications to Sempra's cost filing required by the January 26, 2006 Order constitute an arbitrary, capricious, and impermissible departure from Commission precedent. As discussed below in the individual seller section of this order,<sup>245</sup> the compliance filing required of Sempra by the January 26, 2006 Order is warranted, given the data and documentation supplied by Sempra in its original cost offset claim. The modifications ordered are also fully consistent with our precedent on the issues presented.

104. Additionally, we disagree with the assertions by El Paso and Merrill Lynch that the Commission acted arbitrarily and capriciously by establishing different procedures for the cost filing process than those used for the fuel cost allowance process. First, the standards and precedent cited by El Paso and Merrill Lynch are inapplicable to the issues presented in this case, because the procedural aspects of the cost filings are not a "parallel issue" to the fuel cost adjustment procedures. Even though the guiding principle of both processes is the Commission's interest in ensuring that the refunds do not result in confiscatory rates, a common purpose does not imply the need for identical procedures. In *Allegheny Power v. FERC*,<sup>246</sup> the primary case cited by El Paso and Merrill Lynch in support of their position, the "parallel issue" at question was the Commission's treatment of the integration between facilities for subtransmission and transmission in two separate proceedings. In other words, the court expected consistency, in terms of the standards applied, when the Commission is dealing with identical issues in independent proceedings. *Allegheny* does not stand for the proposition that the Commission must provide identical procedures any time it considers similar or comparable issues.<sup>247</sup>

105. In contrast to the parallel issues presented in *Allegheny*, the procedures established by the Commission for the cost offset process reasonably differed from those established for the fuel cost allowance claims. First, the claims by El Paso and Merrill Lynch that the procedures for the seller offsets should be the same as those for the generator cost offsets

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<sup>244</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 168. We stated that the Commission would not expect parties to resubmit entire new filings to reflect limited adjusted data.

<sup>245</sup> See *infra* P 368-382.

<sup>246</sup> *Allegheny Power v. FERC*, 437 F.3d 1215 (D.C. Cir. 2006) (*Allegheny*).

<sup>247</sup> See *id.*

overlook the fact that the contents of the fuel cost allowance claims and the seller cost offset claims differ markedly. Because the fuel cost allowance claims involved a discrete category of costs, the Commission was able to provide sufficient direction and delegate the verification of the claims to a reputable accounting firm. Given the breadth of issues and need for significant industry expertise required to analyze the cost filings, the cost filings are not susceptible to such delegation. Rather, the Commission reasonably set a timeline for the cost filing process that would facilitate analysis in-house of the claims by Commission staff members with expertise in the wide range of issues raised by the cost filings.

106. In addition, the procedural differences between the cost filing process and the fuel cost allowance process are of no consequence, so long as the process afforded in each was adequate. Therefore, the only pertinent inquiry is whether we provided adequate due process in the cost filing process. In contrast to the inflexible set of requirements advocated by El Paso and Merrill Lynch, the sufficiency of the procedures supplied must be decided in the light of the circumstances of each case.<sup>248</sup> Accordingly, courts have turned to the factors delineated in *Mathews* for resolution of the issue whether the administrative procedures are constitutionally sufficient. As we demonstrated above,<sup>249</sup> application of the *Mathews* factors to the procedural safeguards provided in this case indicates the sufficiency of the process provided.

107. Finally, consistent with our commitment to consistent and fair treatment of all parties' cost filings, and as discussed above in the procedural section of this order,<sup>250</sup> the Commission denies Allegheny's request to submit supplemental cost verification documentation. As explained above, this rejection does not constitute disparate treatment because the new evidence now offered by Allegheny is not comparable to the supplemental filings that were accepted in the January 26, 2006 Order. We consider Allegheny's supplemental filing an attempt to effectively re-file its case in chief, which we explicitly prohibited in the January 26, 2006 Order.<sup>251</sup> Therefore, we conclude that rejection of Allegheny's request to submit new cost verification data is not arbitrary and capricious, nor does it violate Allegheny's due process rights.

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<sup>248</sup> See, e.g., *Mathews*, 424 U.S. at 334 (“[D]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” (citation omitted)).

<sup>249</sup> See *supra* P 74-76 for a detailed analysis of the *Mathews* factors.

<sup>250</sup> See P 23-25.

<sup>251</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 19.

## **B. Subdelegation of the Commission's Authority**

108. Cal Parties object to the Commission's directive in the January 26, 2006 Order that a group of sellers modify their original cost filings in accordance with the January 26, 2006 Order and then submit these Approved Offset Submissions directly to the CAISO, rather than to the Commission first for re-review.<sup>252</sup> Cal Parties argue that the Commission has failed to adopt any process for reviewing these sellers' submissions to the CAISO to ensure that the required changes have been made correctly, even though these submissions will form the basis for the sellers' jurisdictional rates.<sup>253</sup> Cal Parties claim that the Commission has improperly ceded its authority to the CAISO to rule on these submissions because the Commission has not retained final decision-making authority over the Approved Offset Submissions that sellers submit directly to the CAISO.<sup>254</sup> Cal Parties argue that the Commission: (1) must retain final decisional authority over the cost filings; (2) should require that the cost filings and all supporting documentation be filed with the Commission; and (3) must institute procedures for Commission review of these submissions in an adversarial context.<sup>255</sup> Cal Parties also

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<sup>252</sup> Cal Parties' Preliminary Rehearing Request at 7-10; Cal Parties' Request for Rehearing of January 26, 2006 Order at 4, 32-33; Cal Parties' Protest and Comments to Sellers' Cost Filings at 3-8; Cal Parties' Request for Rehearing of November 2, 2006 Order at 18-19.

<sup>253</sup> Cal Parties' Protest and Comments to Sellers' Cost Filings at 4; Cal Parties' Preliminary Rehearing Request at 7-10.

<sup>254</sup> Cal Parties' Protest and Comments to Sellers' Cost Filings at 4, 7 (citing *Perot v. Fed. Election Comm'n*, 97 F.3d 553, 559 (D.C. Cir. 1996); *NARUC v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984); *Sierra Club v. Sigler*, 695 F.2d 957, 962 (5<sup>th</sup> Cir. 1983); *Riverbend Farms Inc. v. Madigan*, 958 F.2d 1479 (9<sup>th</sup> Cir. 1992); *Enron Power Mktg., Inc. v. FERC*, 296 F.3d 1148 (D.C. Cir. 2002)); Cal Parties' Preliminary Rehearing Request at 7 n.10 (citing *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) (*U.S. Telecom*)); Cal Parties' Request for Rehearing of January 26, 2006 Order at 32-33; Cal Parties' Request for Rehearing of November 2, 2006 Order at 18-19 (citing *Enron Power Mktg., Inc. v. FERC*, 296 F.3d 1148, 1153; *Perot v. Fed. Election Comm'n*, 97 F.3d 553, 559; *NARUC v. FCC*, 737 F.2d 1095, 1143; *Sierra Club v. Sigler*, 695 F.2d 957, 962).

<sup>255</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 3 (citing *U.S. Telecom*, at 565-66); Cal Parties' Protest and Comments to Sellers' Cost Filings at 8; Cal Parties' Preliminary Rehearing Request at 10; Cal Parties' Request for Rehearing of January 26, 2006 Order at 33; Cal Parties' Request for Rehearing of November 2, 2006 Order at 19.

request that the Commission clarify that the data included in these filings must be in a useable electronic format (e.g., database or spreadsheets).<sup>256</sup> Finally, Cal Parties ask the Commission to further require filing with the Commission of the CAISO, PX and APX data upon which these Approved Offset Submissions are based, with an opportunity for review.<sup>257</sup>

### **Commission Determination**

109. Contrary to Cal Parties' assertions, we find that the Commission has not improperly delegated its ratemaking authority to the CAISO by directing sellers to submit their Approved Offset Submissions directly to the CAISO. Nor is the CAISO exercising the Commission's statutory decision-making authority over the cost filings. Because we have not delegated any substantive decision-making authority to the CAISO, we find that Cal Parties' reliance on *U.S. Telecom* is misplaced. As Cal Parties correctly observe, *U.S. Telecom* limits a federal agency's ability to subdelegate its substantive decision-making authority, absent affirmative evidence of a contrary congressional intent. However, *U.S. Telecom* also recognizes that a federal agency may use an outside entity to provide the agency with factual information. We find that the duties we have directed the CAISO to perform with respect to the Approved Offset Submissions fall within this category of permissible use of an outside agency.

110. First, the Commission only allowed a subset of sellers to directly submit their Approved Offset Submissions to the CAISO. These sellers only needed to make the minor changes to their cost filings that were clearly delineated in the January 26, 2006 order, such as removing a line item of costs.<sup>258</sup> For those cost filings that required more substantial revision, the Commission required sellers to first make compliance filings with the Commission, for the Commission to review and approve, prior to submitting Approved Offset Submissions to the CAISO.<sup>259</sup> In accordance with due process, parties were given the opportunity to comment on these compliance filings. In fact, Cal Parties

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<sup>256</sup> Cal Parties' Preliminary Rehearing Request at 10.

<sup>257</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 33.

<sup>258</sup> See January 26, 2006 Order, 114 FERC ¶ 61,070 at P 197, 214, 224, 237, 298, 334, 371, Appendix B. For example, the Commission required Hafslund to remove PX chargeback costs, remove congestion costs and reconcile errors in revenues shown by staff calculations, as summarized in Appendix E of the January 26, 2006 Order. *Id.* at Appendix B.

<sup>259</sup> *Id.* P 182, 257, 280, 361, 385.

filed motions to reject and protests to the compliance filings.<sup>260</sup> Second, contrary to Cal Parties' assertion, the Commission has not delegated to the CAISO the responsibility of ensuring that the required changes have been made correctly. Rather, the Commission has tasked the CAISO and PX with the function of running software calculations in conformance with our directions on how to calculate refunds and make various offsets and allocations.<sup>261</sup> To ensure that the final refund calculations conform to the Commission's directives regarding cost offsets, cost allocation, etc., the Commission has required compliance filings from the CAISO, PX, and APX.<sup>262</sup> The Commission will then order the refunds to be issued on the basis of the reviewed and approved calculations supplied by the CAISO, PX, and APX. The Commission retains the final authority to approve or reject these calculations. As with the fuel cost allowance process, parties will have an opportunity to challenge the Approved Offset Submissions as part of their protests to the CAISO and PX final refund compliance filings. Accordingly, we deny Cal Parties' request for rehearing on this issue.<sup>263</sup>

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<sup>260</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 9.

<sup>261</sup> We note that the only function that the Commission has delegated to the CAISO, PX and APX is the running of the software calculations. We note that the Cal Parties do not dispute the Commission's decision that these entities perform the ministerial function of running the software calculations. Even if they had disputed this delegation, Cal Parties' argument would be unfounded because this type of delegation falls within the exceptions set forth in *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 566. In particular, as required in *United States Telecom Ass'n v. FCC*, there is a reasonable basis for granting this limited discretion to these non-federal entities: these entities hold the software, which incorporates the entities' tariff rates, that is needed to run these calculations. *See id.*

<sup>262</sup> *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 109 FERC ¶ 61,218, at P 80 (2004).

<sup>263</sup> We note our denial of Cal Parties' rehearing request is consistent with the Commission's prior rejection of nearly identical arguments, made by Cal Parties in opposition to the Commission's use of an outside auditor to verify the fuel cost allowance claims, during an earlier phase of this proceeding. Cal Parties relied on *U.S. Telecom*, as it does now, for the proposition that federal agencies may not delegate to outside entities absent affirmative evidence of authority to do so. The Commission denied Cal Parties request for rehearing on this issue, explaining that the outside auditor would not be exercising any decision-making authority, but would be performing merely ministerial tasks, pursuant to detailed guidance provided by the Commission. The Commission further explained that adverse parties would have an opportunity to dispute any

(continued...)

111. We do, however, clarify a few points. We expect that, like the CAISO and PX, APX will provide the supporting data for its results. We also will give parties the opportunity to comment on APX's compliance filing. To facilitate transparency and review, we require the CAISO to include all of the Approved Offset Submissions, including updated submissions, as part of the supporting data that accompanies its compliance filing. In addition, the data accompanying these compliance filings must be submitted in a useable electronic format (e.g., database or spreadsheets).

### C. Mitigated Revenue

112. The issue parties characterize as "jurisdictional" arises because of Coral's inclusion in its cost filing of mitigated revenue gleaned from the transactions it scheduled for certain governmental entities. Specifically, during the Refund Period, Coral, a jurisdictional entity, was a scheduling coordinator for itself as well as certain governmental entities, including Colton.<sup>264</sup> In comments submitted in connection with its cost filing, Coral argued that the *Bonneville* mandate would require the Commission to direct the CAISO to remove the non-jurisdictional governmental entities' schedules from its refund calculations and, therefore, Coral should be allowed to modify its cost filing by removing the volumes it scheduled on behalf of Colton, along with associated revenues.<sup>265</sup> In the January 26, 2006 Order, the Commission explained that it had generally held that refund liability attaches to scheduling coordinators of transactions into the CAISO and PX markets, and *Bonneville* only provides relief to governmental entities or non-public utilities providing scheduling coordinator services.<sup>266</sup> Therefore, the Commission determined that *Bonneville* did not require removal from Coral's cost filing of governmental entities' transactions.<sup>267</sup> Furthermore, and consistent with that determination, after issuance of the January 26, 2006 Order, the Commission decided not

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unresolved issues regarding specific fuel cost allowance claims as part of the parties' protests of the CAISO's refund compliance filing. Thus, we found no improper delegation and no due process violation. *San Diego Gas & Elec. Co. vs. Sellers of Energy and Ancillary Servs.*, 108 FERC ¶ 61,311, at 86-87 (2004).

<sup>264</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 207.

<sup>265</sup> *Id.*; *see also* Coral's Oct. 11, 2005 Comments, Docket Nos. EL00-95-159 and EL00-98-146, at 2-4.

<sup>266</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at 212 (citing the May 12, 2004 Order Addressing Fuel Cost Allowance Issues, 107 FERC ¶ 61,166, at P 18 (2004)).

<sup>267</sup> *Id.*

to require the CAISO to remove governmental entities' schedules from its refund calculation, but rather to continue its refund calculations and allocate the refund shortfall *pro rata* to net refund recipients.<sup>268</sup>

113. SVP, Modesto, Colton, Coral, SMUD and NCPA seek clarification or, in the alternative, rehearing of the Commission's determination that the *Bonneville* opinion provides relief only to governmental entities or non-public utilities providing scheduling coordinator services on behalf of other entities in the CAISO and PX markets during the Refund Period. They argue that the Commission lacks jurisdiction to mitigate the prices for sales Coral scheduled into CAISO and PX markets on behalf of Colton.

114. Specifically, Modesto and SVP assert that the January 26, 2006 Order incorrectly limits the scope of the *Bonneville* decision and conflicts with Commission precedent regarding the meaning of *Bonneville*.<sup>269</sup> Modesto and SVP argue that the *Bonneville* opinion stands for the proposition that the Commission lacks jurisdiction over all non-public utilities and governmental entities, not just those non-public utilities/governmental entities that provide scheduling coordinator services on behalf of other entities.<sup>270</sup> Modesto and SVP also observe that the term "scheduling coordinator" does not appear in the *Bonneville* decision.<sup>271</sup>

115. Modesto and SVP argue that the January 26, 2006 Order is internally inconsistent regarding the Commission's interpretation of the scope of *Bonneville*. Specifically, Modesto and SVP rely on paragraph 14 of the January 26, 2006 Order to support their claims that the Commission did not intend to limit the applicability of *Bonneville* to only those non-public utilities and governmental entities that provided scheduling coordinator services.<sup>272</sup>

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<sup>268</sup> *Bonneville* Remand Order, 121 FERC ¶ 61,067 at P 38-39.

<sup>269</sup> Request for Clarification, or in the Alternative, Rehearing of the Modesto Irrigation District, Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*, at 7-8 (Feb. 27, 2006) (Modesto Request for Rehearing). *See also* Request for Clarification, or in the Alternative, Rehearing of the City of Santa Clara, California, Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*, at P 8-9 (Feb. 27, 2006) (SVP Request for Rehearing).

<sup>270</sup> SVP Request for Rehearing at 6-9.

<sup>271</sup> Modesto Request for Rehearing at 8; SVP Request for Rehearing at 8.

<sup>272</sup> Modesto Request for Rehearing at 9-10; SVP Request for Rehearing at 9-10 (both citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 14, "Recognizing that the

116. SVP states that the Commission erred by ruling that the *Bonneville* decision does not exempt from refunds sales by governmental entities/non-public utilities where a jurisdictional utility acts as its scheduling coordinator.<sup>273</sup> SVP argues that, for purposes of the Commission's refund jurisdiction, sales by a governmental entity through a jurisdictional scheduling coordinator are no different than sales by a governmental entity acting as its own scheduling coordinator.<sup>274</sup> SVP notes that the Commission has made sellers that utilized APX as their scheduling coordinator jointly and severally liable for refunds, and asserts that the Commission based this decision on the existence of a direct contractual relationship between the CAISO and APX customers.<sup>275</sup> SVP cites to PG&E testimony for the proposition that sales by a governmental entity through a jurisdictional scheduling coordinator are sales by the governmental entity directly to the CAISO, which *Bonneville* determined to be beyond the Commission's refund authority.<sup>276</sup> Thus, SVP argues that when the seller is a governmental entity, the existence of a scheduling coordinator intermediary does not provide the Commission with refund authority over such sales.<sup>277</sup>

117. Colton and Coral also claim that the fact that the sales by governmental entities to the CAISO and PX were scheduled by Coral does not alter Colton's non-jurisdictional status.<sup>278</sup> Colton and Coral assert that those sales were still made by the governmental entities, not Coral. Colton states that the January 26, 2006 Order provides no basis for concluding that sales by a non-jurisdictional entity become subject to the Commission's

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*Bonneville* decision, if final, could render cost filings moot for governmental entities...").

<sup>273</sup> SVP Request for Rehearing at 10-12.

<sup>274</sup> *Id.* at 10.

<sup>275</sup> *Id.* at 12 (citing October 16, 2003 Order, 105 FERC ¶ 61,065 at P 166-69).

<sup>276</sup> *Id.* at 11 (citing Cal Parties' Response to December 1, 2005 Filings of Powerex Corp., City of Santa Clara, California, Portland Electric Company, APX Participants, and the Northern California Power Agency Relating to Outstanding Refund Rerun Disputes at 8 (submitted December 16, 2005) (PG&E filed as a member of Cal Parties)).

<sup>277</sup> *Id.* at 12.

<sup>278</sup> Request for Rehearing of the City of Colton, California, Docket Nos. EL00-95-000 and EL00-98-000, *et al.*, at 3-6 (Feb. 24, 2006) (Colton Request for Rehearing). *See also* Request for Rehearing of Coral Power, L.L.C., Docket Nos. EL00-95-000 and EL00-98-000, *et al.*, at 3-6 (Feb. 27, 2006) (Coral Request for Rehearing).

jurisdiction simply by virtue of being scheduled by a jurisdictional scheduling coordinator.<sup>279</sup> Colton and Coral contend that by exercising jurisdiction over these sales, the Commission is impermissibly doing indirectly what it has no authority to do directly.<sup>280</sup> Colton further argues that “even if there had been any notice to Colton that provision of scheduling services by a jurisdictional scheduling coordinator might be construed as submission to the Commission’s jurisdiction, the *Bonneville* Court made clear that a governmental entity cannot subject its sales to Commission jurisdiction by agreement or waiver.”<sup>281</sup>

118. Like SVP, Colton also challenges the Commission’s determination that APX and the sellers that utilized its services are jointly and severally responsible for refunding revenues received in excess of the mitigated price levels, even though APX acted as the scheduling coordinator for the transactions. Colton asserts that there is no justification for piercing the scheduling coordinator veil for APX but ignoring the non-jurisdictional status of other sellers, such as Colton, that obtained scheduling coordinator services from jurisdictional entities.<sup>282</sup>

119. Coral notes that the Commission has generally not required the CAISO, as part of the refund rerun process, to provide additional granularity to reflect the schedules submitted on behalf of entities behind the scheduling coordinator. Thus, states Coral, the Commission has determined the refund obligation on the basis of volumes scheduled by the scheduling coordinator without regard to the nature of the entities behind the scheduling coordinator.<sup>283</sup> However, Coral contends that the Commission’s determination not to require the CAISO to take into account the schedules submitted on behalf of others did not, at that time, lead to a result that is beyond the Commission’s jurisdiction to effectuate. Coral maintains that the Commission had discretion in those

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<sup>279</sup> Colton Request for Rehearing at 4.

<sup>280</sup> *Id.*; Coral Request for Rehearing at 3 (both parties citing *Public Utils. Comm’n. v. FERC*, 143 F.3d 610, 616 (D.C. Cir. 1998)).

<sup>281</sup> Colton Request for Rehearing at 4 (citing *Bonneville*, 422 F.3d 908 at 923-26).

<sup>282</sup> *Id.* at 5 (citing October 16, 2003 Order, 105 FERC ¶ 61,065 at P 166-169).

<sup>283</sup> Coral Request for Rehearing at 3-4 (citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 102 FERC ¶ 61,317, at P 5 (2003)); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 108 FERC ¶ 61,311, at P 95 (2004); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Service*, 111 FERC ¶ 61,186, at P 23 (2005).

situations to structure its refund process to accomplish its objectives in the manner that it believed to be most reasonable. Conversely, Coral asserts that, in contrast, here the Commission has no such discretion because it cannot exercise refund jurisdiction over the governmental entities. Coral therefore argues that, if the Commission is not to exceed its jurisdiction, as set forth in *Bonneville*,<sup>284</sup> the CAISO must remove the schedules provided by scheduling coordinators on behalf of governmental entities from the sales scheduled by Coral that the CAISO mitigates.<sup>285</sup>

120. NCPA, SMUD, and Colton maintain that prior Commission decisions have concluded that brokering services are not subject to the Commission's jurisdiction, and that the Commission has relied on the absence of transfer of title in determining a number of cases that power brokers are non-jurisdictional.<sup>286</sup> Colton argues that Coral did not take title to the energy it scheduled on behalf of Colton, and "[j]ust as a broker's activities in facilitating energy transactions do not give rise to jurisdictional sales, Coral's scheduling of transactions on behalf of Colton could not transform the non-jurisdictional nature of Colton's sales."<sup>287</sup>

121. Like Coral, NCPA and SMUD similarly state that the Commission provided an exception for sales scheduled by the APX, but has offered no reason why APX is entitled to an exemption but governmental entities beyond the Commission's jurisdiction are not entitled to the same exemption.<sup>288</sup> NCPA and SMUD maintain that the Commission even reiterated this point in the January 26, 2006 Order, noting that APX was not required to

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<sup>284</sup> *Id.* at 4.

<sup>285</sup> *Id.*

<sup>286</sup> Colton Request for Rehearing at 5-6; Request of the Sacramento Municipal Utility District for Rehearing of Order on Cost Filings, Docket Nos. EL00-95-000 and EL00-98-000, *et al.*, at 3 (Feb. 27, 2006) (SMUD Request for Rehearing); Request of the Northern California Power Agency for Rehearing of Order on Cost Filings, Docket Nos. EL00-95-000 and EL00-98-000, *et al.*, at 2 (Feb. 27, 2006) (NCPA Request for Rehearing).

<sup>287</sup> Colton Request for Rehearing at 5-6 (citing *Citizens Energy Corp.*, 35 FERC ¶ 61,198 (1986); *Torco Energy Marketing, Inc.*, 48 FERC ¶ 61,294 (1989); *LG&E Power Marketing, Inc.*, 68 FERC ¶ 61,247 (1994); *UtiliCorp United, Inc.*, 70 FERC ¶ 61,021 (1995)).

<sup>288</sup> NCPA Request for Rehearing at 3; SMUD Request for Rehearing at 3 (citing October 16, 2003 Order, 105 FERC ¶ 61,065 at P 166-169).

make cost filings and that it was not APX, but the “sellers behind the APX” that are responsible for refunds.<sup>289</sup>

122. NCPA and SMUD insist that the Commission’s decision to use Coral’s cost filing as a vehicle to subject to refund exposure sales by a non-jurisdictional utility made through a scheduling coordinator is an unreasonable use of the cost filing process, which was established to allow jurisdictional sellers the opportunity to demonstrate their entitlement to offsets from refund liability, based on the existence of costs eligible for offset.<sup>290</sup>

### **Commission Determination**

123. As explained below, we deny rehearing because the Commission is not directly or indirectly causing governmental entities or non-public utilities to pay refunds by requiring jurisdictional sellers to include in their cost filings the revenue they earned from scheduling non-jurisdictional entities’ transactions in CAISO and PX markets during the Refund Period.

124. Challengers’ primary argument is that cost filings should not include the mitigated revenues jurisdictional scheduling coordinators, like Coral, earned from scheduling energy on behalf of governmental entities/non-public utilities, like Colton, because the *Bonneville* court held that the Commission lacks jurisdiction to require governmental entities/non-public utilities to pay refunds. Parties insist that requiring jurisdictional scheduling coordinators to include in cost filings the mitigated revenue of governmental entities/non-public utility entities is equivalent to directly or indirectly requiring these entities to pay refunds. These arguments fundamentally misconstrue or ignore altogether the purpose of cost filings.

125. In this cost-offset phase of the refund proceeding, the Commission is *not* requiring any jurisdictional scheduling coordinator who scheduled transactions on behalf of any non-jurisdictional seller to pay refunds on those transactions; nor is the Commission requiring any governmental entity/non-public utility whose transactions were scheduled by a jurisdictional scheduling coordinator to pay any refunds. Rather, the Commission is simply evaluating whether the MMCP refund methodology afforded individual sellers, like Coral, the opportunity to recover their costs of providing electricity to the CAISO

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<sup>289</sup> NCPA Request for Rehearing at 3; SMUD Request for Rehearing at 3-4 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 370).

<sup>290</sup> NCPA Request for Rehearing at 3-4; SMUD Request for Rehearing at 4 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 1-2).

and PX markets during the Refund Period. Consequently, in this cost-offset phase of the refund proceeding, sellers were allowed to submit cost filings to demonstrate that the MMCP refund methodology resulted in an overall revenue shortfall for their company.<sup>291</sup>

126. To evaluate the merit of each cost filing, the Commission compared the revenues of each seller submitting a cost offset filing earned from the transactions it scheduled in CAISO and/or PX markets during the Refund Period with the costs it incurred to serve those markets. Where revenues are concerned, to prevent cherry-picking, the Commission required all sellers to include in their cost filings all Refund Period transactions in CAISO and PX markets for all hours, mitigated and unmitigated.<sup>292</sup>

127. Coral, as the scheduling coordinator for Colton, earned revenue from the transactions that it scheduled for Colton, which later may have been mitigated in accordance with the refund methodology. Coral does not dispute this fact, which is further supported by Coral's inclusion of this mitigated revenue in its original cost filing.<sup>293</sup> Even after refunds are disbursed, Coral will be entitled to keep the revenue it earned from scheduling transactions for Colton. Therefore, in assessing whether the refund methodology is confiscatory towards Coral, the Commission must take into account the revenue Coral earned from scheduling these transactions. The Commission is simply assessing whether the revenue Coral earned after application of the MMCP to all transactions Coral scheduled in the CAISO and PX markets during the Refund Period gave Coral the opportunity to recover its costs of serving those markets.

128. Furthermore, contrary to Coral's surmise expressed in its October 2005 comments on cost filings, when the Commission considered the impact of *Bonneville's* mandate on its pre-established refund methodology, the Commission decided not to require the removal of governmental/non-public utility entities' schedules from the CAISO's refund calculation.<sup>294</sup> In the order on remand of the *Bonneville* opinion, the Commission found that removing the schedules for governmental and other non-public utility entities and

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<sup>291</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 32-33 (citing December 19, 2001 Order, 97 FERC ¶ 61,275 at 62,254 and May 15, 2002 Order, 99 FERC ¶ 61,160 at 61,656).

<sup>292</sup> *Id.* P 37 (citing May 15, 2002 Order, 99 FERC ¶ 61,160 at 61,652).

<sup>293</sup> We note that, whether or not Coral has actually been paid is an issue beyond the scope of this proceeding.

<sup>294</sup> *Bonneville* Remand Order, 121 FERC ¶ 61,067 at P 38.

recalculating the refund would be time intensive and unreasonable.<sup>295</sup> Accordingly, the Commission directed the CAISO and PX to complete their respective refund calculations for all entities that participated in the CAISO and PX markets.<sup>296</sup> Realizing that application of the *Bonneville* decision to its refund methodology would nevertheless result in an overall shortfall of refund amounts, the Commission decided that the total amount of refunds that otherwise would have been paid by governmental entities and other non-public utilities for their sales in the CAISO and PX markets during the Refund Period should be reflected in reduced refund amounts that buyers will receive.<sup>297</sup> Specifically, the Commission decided to allocate the refund shortfall through *pro rata* reductions to the refunds received by all net refund recipients.<sup>298</sup>

129. Parties latch onto the statement in the January 26, 2006 Order that the Commission has long held that scheduling coordinators have refund liability for the transactions they scheduled during the Refund Period, and the *Bonneville* decision only eliminated this refund obligation for governmental entities/non-public utilities. This statement is accurate insofar as post-*Bonneville*, jurisdictional scheduling coordinators that are net sellers are obligated to pay refunds in connection with transactions they scheduled into CAISO/PX markets.<sup>299</sup> However, the *Bonneville* Remand Order, which issued after the January 26, 2006 Order, vacated all California refund orders to the extent that they required non-jurisdictional entities to pay refunds.<sup>300</sup> Therefore, because the Commission has thoroughly vetted this issue in the *Bonneville* Remand Order, and

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<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* P 39.

<sup>298</sup> *Id.*

<sup>299</sup> The Commission has generally held that refund liability in this proceeding attaches to the scheduling coordinator of the transaction. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 125 FERC ¶ 61,214, at P 36 & n.64 (2008) (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317 (2003); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166, at P 18, *clarified*, 108 FERC ¶ 61,219, *reh'g denied and partial clarification granted*, 108 FERC ¶ 61,311 (2004); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 116 FERC ¶ 61,167, at P 45 (2006), *reh'g denied and clarification granted*, 122 FERC ¶ 61,274 (2008).

<sup>300</sup> *Bonneville* Remand Order, 121 FERC ¶ 61,067 at P 2 and P 57.

because the cost filings only concern reduction of refund liability for net *sellers* and does not require non-jurisdictional entities to pay refunds, we reject these arguments as moot or irrelevant.

130. Parties argue that it is unfair to look behind the scheduling coordinator for APX, but not others. Specifically, they assert that there is no justification for making APX jointly and severally liable for refunds, while disregarding the non-jurisdictional status of other sellers that obtained scheduling coordinator services from jurisdictional entities. We disagree. Within the context of the refund proceedings, we have distinguished APX from other scheduling coordinators on the basis of its similarity to the PX, as opposed to competitive energy producers.<sup>301</sup> We reiterated our rationale for this distinction on rehearing of the *Bonneville* remand order.<sup>302</sup> Thus, contrary to the claims of SVP, Colton, Coral, NCPA and SMUD, we have consistently provided justification for imposing joint and several liability on APX and the PX, while holding scheduling coordinators, like Coral, who acted as competitive market participants, liable for the transactions they scheduled into CAISO and PX markets during the Refund Period. Parties have not raised anything new that would persuade us to reconsider this determination; therefore, we will not do so.

#### **D. Market Manipulation**

131. In its request for rehearing of the January 26, 2006 Order, Cal Parties continue to maintain that the Commission permitted cost offsets to refunds for transactions that the Commission found to be tariff violations. Cal Parties assert that several sellers claimed cost offsets for costs incurred in connection with “Fat Boy” transactions and other transactions that violated the CAISO and/or PX tariffs, and that the Commission should have either rejected claims for costs associated with these transactions, or should have established a hearing on these costs. Cal Parties contend that it is unjust to permit sellers who engaged in Refund Period market manipulation to recover amounts in excess of the MMCP as a result of their own contribution to the excessive and unjust rates that customers paid during the Refund Period.<sup>303</sup>

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<sup>301</sup> October 2003 Order, 105 FERC ¶ 61,066 at P 166 (quoting *Town of Concord, et al., v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992)).

<sup>302</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 125 FERC ¶ 61,214, at P 36 (2008) (explaining that the PX is like APX because it was a not-for-profit entity created for a public purpose that performed intermediary-type scheduling coordinator services, rather than acting as a competitive market participant).

<sup>303</sup> Cal Parties’ Request for Rehearing of January 26, 2006 Order at 48-51.

132. Cal Parties argue that limiting the right to make cost filings for manipulative transactions that were not previously made subject to disgorgement is not a collateral attack on past Commission orders, but instead flows from the Commission's past rulings.<sup>304</sup> Cal Parties state that one of the Commission's key reasons in the Gaming Order for not requiring disgorgement of profits from certain transactions that had been found to constitute illegal market manipulation was that these transactions were being mitigated down to the MMCP in the Refund Proceeding. Cal Parties allege that "providing a cost-based offset to refunds that focuses on just the CAISO and PX markets eliminates the mitigation that was the basis for the Commission's ruling because sellers can now claim costs in excess of mitigated prices, costs which may include a profit component that would otherwise have been subject to disgorgement."<sup>305</sup> Cal Parties maintain that the Commission should not allow such an unjust, unreasonable and inconsistent result.

133. Cal Parties also assert that to the extent sellers earned profits by other manipulative activities that affected California markets during the Refund Period, such as churning, those profits should also be reflected as reductions in the applicable cost offset claims.<sup>306</sup>

### **Commission Determination**

134. The Commission once again denies Cal Parties' request for rehearing on this issue.<sup>307</sup> As the Commission has found previously,<sup>308</sup> issues of gaming or other illegal

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<sup>304</sup> *Id.* at 49.

<sup>305</sup> *Id.* at 50.

<sup>306</sup> *Id.* at 50-51.

<sup>307</sup> The Commission notes that Cal Parties raised the same argument in their request for rehearing of the August 8, 2005 Order, California Parties Request for Rehearing, Docket Nos. EL00-95-000 and EL00-98-000, *et al.*, at 61-62 (Sept. 7, 2005), which the Commission addressed in the November 19, 2007 Rehearing Order. *See* November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 35.

<sup>308</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 109 (citing, *e.g.*, *Coral Power, L.L.C.*, 108 FERC ¶ 61,115 (2004); *Idaho Power Co.*, 106 FERC ¶ 61,208 (2004); *Portland Electric Co.*, 106 FERC ¶ 61,236 (2004); *Powerex Corp.*, 106 FERC ¶ 61,304 (2004); *Sempra Energy Trading Co.*, 108 FERC ¶ 61,114 (2004); *Arizona Public Service Co.*, 106 FERC ¶ 1,021 (2004)); *see also* November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 35.

behavior are the subject of other proceedings that are separate from and independent of the Commission's review of whether the MMCP is confiscatory. To the extent that the Cal Parties contend that sellers engaged in manipulation or other illegal activity, those allegations are beyond the scope of this proceeding and are the subject of other proceedings.<sup>309</sup>

135. Moreover, the MMCP methodology and cost filing process were designed to ensure that sellers could not include inflated costs based on the market clearing prices during the Refund Period that were found to be unjust and unreasonable. The entire purpose of establishing the MMCP was to implement a baseline just and reasonable rate. Thus, effects of manipulative or "gaming" behavior have effectively been eliminated through application of the MMCP. Only to the extent that a seller can demonstrate through the cost offset process that, as applied to that seller, the MMCP methodology resulted in confiscatory rates, may the seller obtain a cost offset.

136. To prevent recovery of unjustly inflated costs, the Commission has incorporated numerous mechanisms in the cost offset phase of the proceeding to ensure that costs associated with manipulative or gaming conduct do not re-enter the offset calculation, including: first and foremost, the application of the MMCP as the just and reasonable baseline price applicable to CAISO and PX transactions during the Refund Period, and with respect to cost offsets, requiring signed corporate verifications;<sup>310</sup> tailoring the scope of eligible transactions; limiting claimed costs to actual costs; disallowing claims for costs based on flawed indices or reflecting the market clearing prices that the Commission had found to be unjust and unreasonable; requiring the inclusion of section 202(c) sales to prevent "cherry-picking" transactions that would result in the highest cost offsets, while shielding revenues earned during the Refund Period; and rejecting opportunity costs. For example, in the August 8, 2005 Order, the Commission required any seller making a claim for costs associated with affiliate transactions to make a threshold showing that its transactions were in compliance with the Commission's rules and regulations, including codes of conduct and standards of conduct.<sup>311</sup>

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<sup>309</sup> See, e.g., *State of California, ex rel. Bill Lockyer v. British Columbia Power Exchange Corp.*, 122 FERC ¶ 61,260 (2008) (establishing hearing proceedings to determine whether any seller improperly or untimely filed its quarterly transaction reports and whether any such improper or untimely filing masked an accumulation of market power such that rates were unjust and unreasonable).

<sup>310</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 105.

<sup>311</sup> *Id.* P 106.

137. Further, to ensure that such affiliate transactions were valued properly, the Commission allowed only the inclusion of the actual cost of producing power sold by one affiliate to another, and disallowed any speculative opportunity price. Thus, the Commission rejected the inclusion of market-valued affiliate costs, explaining that allowing sellers to value affiliate transactions at market clearing prices would permit sellers, on a consolidated-company basis, to collect inflated market prices and avoid the Commission's application of the MMCP.<sup>312</sup> The Commission similarly rejected claims for costs valuing affiliate transactions at index prices because the indices (many of which were flawed) did not bear any relationship to the corporate entities' actual cost of purchasing or generating power.<sup>313</sup>

138. In addition to the general findings discussed above, the Commission has also carefully scrutinized each seller's cost filing to ensure that no improper costs were included. As noted above, for example, the Commission disallowed any costs based on market clearing prices or indices that may have reflected manipulative practices. Thus, as discussed in individual seller sections below, we find that we have adequately addressed the gaming concerns raised by Cal Parties with regard to the cost filings of Avista, Hafslund, Powerex, and Sempra.

139. We note that the Commission has consistently rejected Cal Parties attempts to conflate the cost offset phase of the refund proceeding with claims of gaming or other illegal activity. For example, in the August 8, 2005 Order, the Commission rejected Cal Parties' contention that all uninstructed energy sales to the CAISO should be excluded from the cost filings because such transactions necessarily implicate a seller's involvement in prohibited gaming practices. Consequently, the Commission found it appropriate for sellers to include revenues from these sales along with the associated costs.<sup>314</sup> We continue to reject Cal Parties requests to eliminate entire categories of allowable cost offsets on the basis of Cal Parties' allegations of gaming conduct. Furthermore, as discussed above, such an inquiry is beyond the scope of this proceeding, which focused exclusively on the issue of whether the MMCP, as applied to individual sellers, results in confiscatory rates.<sup>315</sup>

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<sup>312</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 91-92.

<sup>313</sup> *Id* P 93.

<sup>314</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 109.

<sup>315</sup> *See, e.g., Mobil Oil Exploration v. United Distrib. Cos.*, 498 U.S. 211, 239 (1991) ("An agency employs broad discretion in determining how to handle related, yet discrete, issues in terms of procedures . . . [such as] where a different proceeding would

(continued...)

**E. Section 202(c) and Multi-Day Sales**

140. Sales made under section 202(c) of the FPA<sup>316</sup> and multi-day, or balance of the month sales, are sales made to the CAISO when the CAISO, short of power, directly negotiated energy purchases from sellers. In the January 26, 2006 Order, the Commission determined that sellers must include the revenue from these transactions in their cost demonstrations.<sup>317</sup> The Commission reasoned that “[e]xcluding these sales would ignore the reality of how sellers transacted in the California market during the California energy crisis.”<sup>318</sup> The Commission explained that, although these transactions were not made through the CAISO and PX spot markets, they were made to serve the California markets, and California market participants were billed for the portion of the purchase attributable to serving their load. Like sales into the CAISO and PX markets, multi-day and section 202(c) sales were made directly to the CAISO, and not as bilateral transactions with other market participants. The Commission further reasoned that “equity requires inclusion of these sales not subject to mitigation” because the purpose of the cost filing phase of the refund proceeding is to ensure that the refund methodology does not preclude a seller’s recovery of its legitimate costs of serving the California markets.<sup>319</sup> If a seller has already been adequately compensated for all of its costs related to sales in California markets by revenues generated from its sales into the California markets, then the MMCP refund methodology is not confiscatory with respect to that seller.

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generate more appropriate information and where the agency was addressing the question.”) (citations omitted); *Nadar v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (“[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload.”).

<sup>316</sup> 16 U.S.C. § 8251 (2006). Under FPA section 202(c), whenever the Commission determines that an “emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy . . . or other causes,” it has authority to order “temporary connections of facilities and such generation, delivery, interchange or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest.” *Id.* This authority was later transferred by statute to the Secretary of Energy.

<sup>317</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 79.

<sup>318</sup> *Id.* P 79 (footnote omitted).

<sup>319</sup> *Id.* P 80.

141. Sempra, Puget, and Powerex filed requests for rehearing on the issue of the inclusion of multi-day sales in the cost filings. Portland and PPL Energy filed requests for rehearing on the issue of including section 202(c) sales. Portland filed requests for rehearing of both the January 26, 2006 Order and the November 2, 2006 Order on this issue.

142. Sempra, Portland, PPL Energy, Powerex and Puget argue that transactions that are not subject to the MMCP refund methodology, like section 202(c) sales and multi-day transactions or bilateral sales to third parties, are not relevant to the determination whether the refund methodology results in confiscatory rates. They argue that these transactions are completely unrelated to the MMCP and, therefore, should not be included in cost filings. Moreover, the parties requesting rehearing on this issue all maintain, in essence, that the inclusion of multi-day and section 202(c) sales in this proceeding undermine the purpose of the cost filing process.

143. Sempra contends that because multi-day transactions were not subject to the MMCP cap, these transactions cannot be used to demonstrate whether the MMCP was confiscatory.<sup>320</sup> Powerex also asserts that prices associated with multi-day sales are unrelated to the MMCP, making it inappropriate to gauge the impact of the Commission's treatment of transactions that are subject to mitigation by looking also to transactions that are not subject to mitigation.<sup>321</sup> Puget maintains that the inclusion of multi-day sales is inconsistent not only with the purpose of this proceeding, but also with the Commission's decision that the use of non-mitigated sales from bilateral markets throughout the West would effectively require that market participants in markets outside the CAISO and PX subsidize transactions in those markets.<sup>322</sup> Finally, Portland insists that the inclusion of section 202(c) sales undermines the entire purpose of the cost filing

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<sup>320</sup> Sempra Request for Rehearing of January 26, 2006 Order at 15-16.

<sup>321</sup> Request for Clarification and Rehearing of Powerex Corp., Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*, at 7-8 (Feb. 27, 2006) On March 15, 2006, Powerex filed an errata to the February 27 request for rehearing. Both filings are referred to collectively as Powerex Request for Rehearing. The page numbers referenced herein refer to the errata filing.

<sup>322</sup> Request for Rehearing of Puget Sound Energy, Inc., Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*, at 4 (Feb. 27, 2006) (Puget Request for Rehearing) (citing the August 8, 2005 Order, 112 FERC ¶ 61,176 at P 35-36).

process by improperly mitigating each section 202(c) sale down to, and in many instances below, the cost incurred to serve it.<sup>323</sup>

144. Puget argues that there is no rational basis for requiring inclusion of multi-day sales in the cost filing analysis.<sup>324</sup> Puget contends that multi-day sales bear no relationship to the spot market sales that are the focus of this proceeding and should not be included for the purpose of calculating sellers' revenue shortfalls. Puget distinguishes multi-day sales from spot transactions by pointing out that multi-day sales: (1) are not covered by the CAISO tariff and are not subject to mitigation in this proceeding; (2) are not covered by the refund notice in this proceeding; (3) were not made in the same temporal market as spot market sales; (4) were priced by mutual agreement and not by a single price auction; (5) were made under different contracts, pursuant to different tariffs; (6) are subject to filed rate protection under the terms of Puget's sales tariff; and (7) were scheduled to the California load by the CAISO, not Puget.

145. PPL Energy, Portland, Powerex and Puget contend that the August 8, 2005 Order made clear that the only revenues to be included in a cost filing are those from MMCP-derived CAISO and PX sales. The parties state that they understood the August 8, 2005 Order to mean that non-mitigated transactions would be included only to the extent they were CAISO and/or PX transactions that were subject to mitigation, but were not mitigated because they were below the MMCP. According to their reading of the August 8, 2005 Order, transactions that were never subject to mitigation, such as multi-day transactions and section 202(c) sales, are outside the scope of this proceeding.<sup>325</sup>

146. Portland argues that Commission staff agreed with this interpretation of the August 8, 2005 Order at the August 25, 2005 Technical Conference, and maintains that the exclusion of section 202(c) sales is consistent with that interpretation. In addition, Portland argues that the January 26, 2006 Order departs from the Commission's own interpretation of the cost filing process without justification by requiring that Portland include revenues from 202(c) sales in the cost offset analysis even though they were not supposed to be subject to mitigation.<sup>326</sup> Likewise, PPL Energy asserts that the

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<sup>323</sup> Portland Request for Rehearing of January 26, 2006 Order at 3-4.

<sup>324</sup> Puget Request for Rehearing at 2-7.

<sup>325</sup> Portland Request for Rehearing of January 26, 2006 Order at 3-7; Request of PPL Energy for Rehearing of January 26, 2006 Order on Cost Filings, Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.*, at 7 (February 27, 2006) (PPL Energy Request for Rehearing); Puget Request for Rehearing at 4.

<sup>326</sup> Portland Request for Rehearing of the January 26, 2006 Order at 4.

Commission departed from precedent in the January 26, 2006 Order by stating that 202(c) sales are “the type of transaction the Commission intended to include when it required inclusion of non-mitigated sales in the ‘relevant’ (here [CA]ISO) markets.”<sup>327</sup> PPL Energy states that in the order establishing the refund proceeding, that the Commission expressly excluded section 202(c) sales<sup>328</sup> and claims that the Commission cites no authority to support the position taken in the January 26, 2006 Order. PPL Energy argues that the Commission acted unreasonably in the January 26, 2006 Order by changing its position on the inclusion of section 202(c) sales without providing a reasoned explanation for the change.<sup>329</sup>

147. The parties seeking rehearing argue that inclusion of these transactions results in improper, or even illegal, mitigation of these transactions. Specifically Puget, Portland and PPL Energy argue that the Commission lacks the authority to mitigate multi-day and section 202(c) sales. PPL Energy argues that the express terms of section 202(c) preclude the Commission from exercising jurisdiction over such sales. According to PPL Energy, the statute gives the Commission authority over the terms of these agreements only if the parties cannot agree to the terms themselves.<sup>330</sup> PPL Energy contends that because the statute prohibits the Commission from mitigating these transactions directly, the Commission also cannot mitigate them indirectly by requiring their inclusion in the cost filings.<sup>331</sup> In addition, PPL Energy argues that by erroneously conflating the multi-day sales issue together with the 202(c) issue, the Commission ignored statutory restrictions on the Commission’s authority to require PPL Energy to revisit these sales.<sup>332</sup> Likewise, Portland observes that the FPA “provides no role for the Commission in the event the parties agreed on the terms and rates that will apply to [202(c)] transactions,” and argues that the Commission’s decision to include these revenues in the cost offset

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<sup>327</sup> PPL Energy Request for Rehearing at 4 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 78).

<sup>328</sup> *Id.* (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,516 (2001)).

<sup>329</sup> *Id.* at 7.

<sup>330</sup> *Id.* at 3-6.

<sup>331</sup> *Id.* at 7.

<sup>332</sup> *Id.* at 3-4.

analysis has the effect of imposing back-door mitigation of the section 202(c) sales in violation of its prior orders in this proceeding.<sup>333</sup>

148. Similarly, Puget argues that the Commission lacks jurisdiction to order, directly or indirectly, the mitigation of Puget's multi-day sales.<sup>334</sup> Moreover, Puget contends that even if the Commission had jurisdiction, it would be prohibited by the FPA's prohibition against retroactive rate making from mitigating multi-day sales at this point in the proceeding. Puget states that the Commission may not retroactively adjust rates charged by a public utility for past sales unless it establishes a refund effective date pursuant to section 206(b) of the FPA. Puget maintains that multi-day sales have never been subject to refund in this proceeding and that, therefore, the FPA bars the Commission from now altering the outcome of those transactions.<sup>335</sup>

149. Portland, PPL Energy, and Puget further argue that including section 202(c) and multi-day sales revenue is inconsistent with sound policy. Portland argues that the Commission's decision to indirectly mitigate section 202(c) sales "creates profoundly bad policy on a critical issue of national importance that reaches far beyond this proceeding."<sup>336</sup> Portland suggests that the Commission's decision to indirectly mitigate these sales may undercut the incentive to respond to 202(c) orders, thereby potentially jeopardizing reliability. Portland states that while the financial effect of including these transactions in the cost offset is relatively small, the future risk to reliability is "much more severe."<sup>337</sup>

150. PPL Energy asserts that Commission again improperly conflates multi-day sales and section 202(c) sales for purposes of supporting its policy analysis. PPL Energy maintains that much of the Commission's reasoning is irrelevant to the treatment of section 202(c) sales. Specifically, PPL Energy emphasizes that the exclusion of section 202(c) sales in no way precludes the inclusion of out-of-market transactions that were

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<sup>333</sup> See Portland Request for Rehearing of January 26, 2006 Order at 4 (citing *San Diego & Elec. Co.*, 97 FERC ¶ 61,275, at 62,196 (2001)).

<sup>334</sup> Puget Request for Rehearing at 7. Puget notes that issues regarding the mitigation of multi-day sales are currently pending before the U.S. Court of Appeals for the Ninth Circuit.

<sup>335</sup> *Id.* at 7.

<sup>336</sup> Portland Request for Rehearing of January 26, 2006 Order at 1.

<sup>337</sup> *Id.* at 2.

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151. With respect to the inclusion of multi-day sales, Puget also finds the Commission's policy explanations unconvincing. Puget asserts that contrary to the Commission's finding in the January 26, 2006 Order, requiring the inclusion of multi-day sales ignores "the reality of how sellers transacted in the California energy market during the crisis."<sup>339</sup> Puget also asserts that the Commission's concerns regarding equity and "cherry-picking" are misplaced. Puget maintains that its multi-day transactions are no more "cherry-picked" than any other bilateral forward transactions made into the California markets. In addition, Puget contends that although the Commission's discussion of its responsibility to ensure that the "end result" is reasonable and relevant to the issue of multi-day sales, the "end result" justification misses the mark because it does not permit the Commission to apply revenues collected under one tariff to the end result produced under a separate tariff. Puget argues that this type of cross-subsidization would occur if multi-day sales are included in the cost offset analysis.<sup>340</sup> Finally, Puget asserts

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<sup>338</sup> PPL Energy Request for Rehearing at 4-6.

<sup>339</sup> Puget Request for Rehearing at 5 (citing January 26, 2006 Order, 114 FERC 61,070 at P 78).

<sup>340</sup> Puget notes that the notion of cross-subsidized rate design by FERC has been rejected by the courts as an unjust and unreasonable end result. Puget Request for

(continued...)

that the Commission's analogy to out-of-market spot sales is inapt. Puget reasons that because its multi-day sales are not covered by the CAISO tariff, they are not subject to refund and not within the scope of this proceeding.<sup>341</sup> Similarly, Powerex maintains that the exclusion of multi-day transactions has no bearing on, and is completely consistent with, the inclusion of out-of-market transactions because the multi-day transactions, unlike the out-of-market transactions, were never subject to refund.<sup>342</sup>

152. Finally, in the event that the Commission does not grant rehearing on the issue of the inclusion of section 202(c) sales, Portland requests rehearing on the proper methodology for incorporating section 202(c) sales in the cost filing. Portland contends that the current methodology, which requires the use of average portfolio prices, is inconsistent with Portland's policy for pricing these transactions. Portland explains that it had a policy of identifying resources available for section 202(c) sales by reference to the most expensive resources in its stack and pricing sales volumes accordingly. Portland argues, therefore, that using average portfolio cost would be unjustified because it would conflict with the factual record in this proceeding. Accordingly, Portland requests that the Commission grant rehearing to permit Portland to incorporate its section 202(c) sales by pricing each sale using the most expensive resources in its supply stack in the relevant hour.<sup>343</sup>

### **Commission Determination**

153. We deny requests for rehearing, as explained below.

#### **1. Section 202(c) and Multi-Day Sales Transactions Are Relevant**

154. We disagree with the parties' argument that, because these transactions were not mitigated, the revenue from the multi-day transactions or section 202(c) sales is not relevant to the determination as to whether the refund methodology is confiscatory to certain sellers. The purpose of the cost filing phase of the refund proceeding is to ensure that, with respect to individual sellers, the refund methodology is not confiscatory. In

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Rehearing at 5 (citing *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511, 1516 (D.C. Cir. 1984)). Puget further notes that even if the "end result" in this case could be deemed reasonable, the decision could not be upheld because the underlying methodology is not the result of reasoned decision-making.

<sup>341</sup> Puget Request for Rehearing at 6.

<sup>342</sup> Powerex Request for Rehearing at 8.

<sup>343</sup> Portland Request for Rehearing of January 26, 2006 Order at 6-7.

making this assessment, the Commission needs to allow sellers the opportunity to recover their costs of serving the California markets, while ensuring that the mitigated rate is not so low that it places sellers in a position of financial distress.<sup>344</sup>

155. While the section 202(c) and multi-day sales were not spot market transactions and, therefore, not subject to mitigation, they were similar to spot market transactions in that they were made directly to the CAISO. They were also relatively short-term bilateral contractual arrangements with the CAISO, as opposed to long-term bilateral contracts with third parties. If sufficient power at reasonable prices had been available in the CAISO and PX markets at the height of the crisis when these transactions were made, the CAISO would not have had to resort to procuring power through these multi-day and section 202(c) sales. Therefore, the section 202(c) and multi-day sales were made for the purpose of serving the California markets, as a substitute for the spot market transactions that would have supplied power under normal conditions, thereby making the revenue from those transactions relevant to the Commission's analysis of whether the mitigated rate is confiscatory. Furthermore, the Commission must ensure that any cost offset compensates the seller for what would genuinely constitute a confiscatory loss for all transactions in the relevant markets. In the Commission's view, any seller whose profits from section 202(c) sales and multi-day sales transactions into the California markets cover or exceed its costs for serving the California markets has not suffered a confiscatory loss as a result of the refund methodology.

156. Furthermore, despite PPL Energy's and Portland's assertions that their respective section 202(c) sales comprise a relatively small portion of their revenues, the magnitude of the revenue derived from these transactions is subordinate to the principle warranting their inclusion. It is not the magnitude of the revenues that persuaded the Commission to require their inclusion in the cost filing analysis, but rather the principle. Cost filings must properly reflect the revenues sellers earned from serving the relevant California markets during the Refund Period, as well as the costs of serving those markets. Revenues from section 202(c) and multi-day sales were garnered from serving the California markets, and were ultimately paid by California customers. Therefore, they are relevant to any analysis of the costs of serving those markets.

157. Contrary to the parties' assertions, inclusion of these transactions is consistent with the intent of prior orders in the refund proceeding. As we explained in the January 26, 2006 Order, while the primary focus of the revenue shortfall analysis is CAISO and PX spot market transactions, this does not preclude consideration of the revenue earned

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<sup>344</sup> See *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989); see also *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 603 (1944).

from multi-day and section 202(c) transactions.<sup>345</sup> Like spot market transactions, the multi-day and section 202(c) sales at issue were sales to the CAISO, to serve the CAISO market, billed to CAISO customers according to the proportion of the sale used to serve their load. Furthermore, when the Commission limited the scope of cost filings to all mitigated and non-mitigated transactions in CAISO and PX markets during the Refund Period in the August 8, 2005 Order, we were primarily explaining our decision to deny the requests of the parties seeking to expand the scope of the proceeding to include WECC-wide transactions.<sup>346</sup> Unlike WECC-wide transactions, section 202(c) and multi-day sales were made to serve the California markets. The fact that they were not subject to mitigation does not diminish the fact that they were made to serve the California markets. Accordingly, we find that PPL Energy, Puget and Portland take the distinction drawn between transactions in and through the California markets and WECC-wide transactions in the August 8, 2005 Order out of context. Contrary to the parties' claims that only spot market transactions are relevant, the Commission determined in the August 8, 2005 Order that non-mitigated transactions, such as multi-day and section 202(c) sales, must be included in the cost filings because the revenues from such sales impact the total revenue position of a seller.<sup>347</sup> Therefore, we conclude that the revenue earned from these sales is relevant to assessing whether the refund methodology is confiscatory to any particular seller.

2. **Section 202(c) and Multi-Day Sales Transactions Are Not Mitigated**

158. The Commission continues to reject parties' arguments that considering the revenue from section 202(c) and multi-day sales in the cost filing analysis constitutes improper, indirect mitigation of those transactions. The Commission is not directly or indirectly mitigating these transactions because it has not applied the refund methodology to these transactions. Moreover, the sellers have always been allowed to keep all the

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<sup>345</sup> Indeed, we note that the seminal order in this case initiated a section 206 investigation into the "justness and reasonableness of the rates and charges of public utilities that sell energy and ancillary services *to or through the California ISO and PX[.]*" *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 92 FERC ¶ 61,172, at 61,608 (2000) (emphasis added.) Both section 202(c) and multi-day sales qualify as sales to or through the CAISO.

<sup>346</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 32-38.

<sup>347</sup> *Id.* P 37 ("the relevant scope of transactions is further defined to include all transactions for all hours, mitigated and non-mitigated in the relevant [CA]ISO/PX markets.").

revenue they earned from these transactions. If the “net effect” of including revenue from these transactions reduces any seller’s claimed cost offset, this is because the refund methodology does not produce as great a shortfall as the seller asserts once all relevant revenue has been considered. We remind the parties that the Commission has considerable discretion in fashioning remedies,<sup>348</sup> and we find that it is reasonable for us to take into account the revenue sellers earned from these transactions with the CAISO in our assessment of whether the refund methodology is confiscatory with respect to transactions involving the same market.

### 3. Inclusion is Consistent with a Portfolio Approach

159. We are not persuaded by Puget’s and PPL Energy’s contentions that the Commission’s cherry-picking rationale is misplaced. Contrary to PPL Energy’s assertions, the Commission’s rationale is not “newly minted.” Rather, including these transactions in the cost filings is consistent with our “portfolio” methodology, which we enunciated as early as December of 2001.<sup>349</sup> We find that multi-day and section 202(c) transactions are part of the seller’s “entire portfolio,” through which it profited from transactions in the California markets. Consequently, we continue to find that it is necessary to include section 202(c) and multi-day transactions, consistent with the Commission’s required portfolio approach of netting *all* losses into the CAISO and PX markets, for the relevant time period, against all gains. No action we take here unravels the efforts PPL Energy has made to establish its 202(c) transactions. We reiterate that sellers are allowed to retain the revenue earned from section 202(c) and multi-day sales.

160. The Commission also disagrees with parties’ argument that inclusion of these transactions is inconsistent with our decision not to include bilateral transactions from the West (WECC-wide transactions) in the cost filing analysis. As Puget points out, if the Commission were to require inclusion of WECC-wide transactions, which span a considerably vast geographic region, this would ultimately result in customers from those far-reaching areas subsidizing California customers. Also, as the Commission has explained before, including WECC-wide transactions would mix products and markets without a fully reasoned basis for doing so.<sup>350</sup> In contrast, revenue from section 202(c)

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<sup>348</sup> *E.g., Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (“the breadth of agency discretion is ... at zenith when the action assailed relates ... to the fashioning of policies, remedies and sanctions.”).

<sup>349</sup> December 19, 2001 Order, 97 FERC ¶ 61,275 at P 50 (overall revenue shortfall “demonstrations must show the impact [of the refund methodology] on all transactions from all sources during the Refund Period.”).

<sup>350</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 30.

and multi-day sales is derived from CAISO customers for transactions involving the relevant markets. Not requiring inclusion of section 202(c) and multi-day transactions could enable sellers to shield revenue they earned from closely related markets. Since section 202(c) and multi-day sales were indeed transactions into the CAISO and PX markets, they should be included in the cost filings.

#### 4. Broad Remedial Authority

161. In response to Puget's arguments concerning the "end-result" test, it is well-established that the Commission's discretion is at its zenith when fashioning remedies.<sup>351</sup> Moreover, Puget's reliance on *Electricity Consumers Resource Council v. FERC*,<sup>352</sup> to support its contention that we cannot consider sales under more than one tariff to achieve a just and reasonable "end result," is misplaced. In *Electricity Consumers*, the court vacated the Commission's approval of the proposed rate design based on its finding that "the record lacked any meaningful evidence of a causal relationship between the rate and the theoretical design," not because the cross-subsidization was necessarily an unjust and unreasonable end result.<sup>353</sup> However, the *Electricity Consumers* court also noted that it will uphold an agency's decision so long as it is "supported by substantial evidence in the record and reached by reasoned decision-making, including an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choice made."<sup>354</sup>

162. The facts of this case show that Puget and PPL Energy sold energy either voluntarily or under section 202(c) into virtually identical markets and earned revenue through their section 202(c) sales in the California markets during the Refund Period,

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<sup>351</sup> *Niagara Mohawk*, 379 F.2d at 159; see also *Towns of Concord v. FERC*, 293 U.S. App. D.C. 374, 955 F.2d 67, 75 (D.C. Cir. 1992) (citing *Moss v. Civil Aeronautics Board*, 172 U.S. App. D.C. 198, 521 F.2d 298, 308-09 (D.C. Cir. 1975)); *Consol. Edison Co. of N.Y., Inc. v. FERC*, 379 U.S. App. D.C. 105, 510 F.3d 333 (D.C. Cir. 2007); *Connecticut Valley Elec. Co. v. FERC*, 341 U.S. App. D.C. 68, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *La. PSC v. FERC*, 335 U.S. App. D.C. 382, 174 F.3d 218, 225 (D.C. Cir. 1999); *Public Utilities Com'n of Cal. v. FERC*, 462 F.3d 1027, 1053 (9th Cir. 2006).

<sup>352</sup> *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511 (1984) (*Electricity Consumers*).

<sup>353</sup> *Id.* at 1517 (citing *City of Charlottesville v. FERC*, 213 U.S. App. D.C. 33, 661 F.2d 945 (D.C. Cir.1981)).

<sup>354</sup> *Electricity Consumers*, 747 F.2d at 1513.

regardless of which tariff governed those sales. Therefore, given the similarities in the markets served, and in order to determine whether the refund methodology is confiscatory as applied to Puget and PPL Energy, we must consider whether the revenue from these sales was sufficient to offset any losses from the mitigated sales. As we have emphasized repeatedly, the primary purpose of the cost filing process is to ensure that no seller's mitigated revenue falls below the cost the seller incurred to serve the relevant California markets. If the Commission, in its cost offset evaluations, were to disregard certain types of revenue earned from transactions in the relevant markets, this would undercut the original purpose of the cost filings. As we stated in the January 26, 2006 Order, "the Commission is not bound myopically to consider only certain costs and revenues, but ignore others."<sup>355</sup> On the contrary, in such a novel situation as this, involving resetting the rates for an entire market for a number of months, it is incumbent on the Commission to exercise its full discretion and examine compensation through a wide-angled lens in order to fairly assess the "big picture" of the impact of the refund methodology. While the Commission cannot mitigate section 202(c) sales, that does not mean that we cannot or should not take into account the revenues from those section 202(c) sales and multi-day sales when assessing the fairness of the remedy we have crafted.<sup>356</sup> Accordingly, the Commission continues to hold that requiring the inclusion of section 202(c) sales and multi-day sales in cost filings falls well within the scope of our broad remedial authority, and is necessary to achieve a just and reasonable end result.

163. As for Sempra's contention that equity is an insufficient basis to require inclusion of its particular Multi-Day Transaction, we again emphasize our broad remedial authority, and note that balancing the equities lies at the core of crafting remedies.

### **5. Portland's Stacking Methodology**

164. The Commission denies Portland's request for rehearing concerning its stacking methodology for 202(c) sales because its stacking methodology conflicts with the August 8, 2005 Order, and because it would be unduly discriminatory to assess Portland's costs

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<sup>355</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 81 (citing *Duquesne*, 488 U.S. at 314).

<sup>356</sup> *Cf. Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271 (1976) (*Conway*). In *Conway*, the Supreme Court held that the Commission may consider retail rates, over which the Commission lacks jurisdiction, in assessing the justness and reasonableness of wholesale rates, which are within the Commission's jurisdiction. Similarly, the Commission should be allowed to consider the revenue from section 202(c) sales, which are beyond its jurisdiction, in its assessment of the reasonableness of the refund methodology the Commission has created, consistent with its broad remedial authority.

of providing energy under section 202(c) in a manner that differs from the way the Commission assesses other sellers' costs of making section 202(c) sales during the Refund Period.<sup>357</sup>

165. The August 8, 2005 Order required sellers first to match specific sales to specific resources. If a seller is unable to match, then it must average the costs of providing energy.<sup>358</sup> Portland states that it cannot match because its transactions at that time were not electronically tagged. Consequently, because it cannot match, Portland must average its costs of providing energy for section 202(c) sales. We find that the electronically recorded conversation between the CAISO and Portland's trader is insufficient to establish a physical match between the generation and the service provided. A significant reason the August 8, 2005 Order required matching before averaging was to verify actual costs, as much as they can be determined.<sup>359</sup> Portland's stacking analysis is essentially an accounting process that measures availability and economic dispatch.<sup>360</sup> The stacking analysis does not establish which generation resource was actually used to provide the energy for the section 202(c) transaction. An accounting process, even an agreement to use a particular accounting process to determine a price, does not link a specific generation resource to the provision of energy for a particular transaction. Through analysis of Portland's filing and the company's FERC Form 1, the Commission is aware that all of Portland's generation was running at the time of these transactions, and also that the company had purchased power resources that were below the cost of the output

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<sup>357</sup> See August 8, 2005 Order 112 FERC ¶ 61,176 at P 67, explicitly rejecting Indicated Sellers' request to use the stacking method Portland seeks to use because the Commission found it inconsistent with the way load serving entities use their lowest cost resources to service native load and make off-system sales with only the excess.

<sup>358</sup> *Id.* P 69.

<sup>359</sup> *Id.* (“Our approach of first requiring matching with documentation before turning to an averaging methodology should address California Parties’ concern that a seller not be permitted to artificially attribute its most expensive resources to the [CA]ISO and PX spot market sales, which would tend to overstate a seller’s associated cost of energy.”); November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 44 (“We find that the costs associated with specific sales will be most accurately reflected where the seller can demonstrate that a specific resource supported that sale . . . . [M]atched transactions are more accurate because they are based on the actual cost of production or actual cost of purchased power used to make specific sales.”).

<sup>360</sup> This process measures economic resources that are available for sale into the market.

of some of Portland's own generating plants.<sup>361</sup> It would be unreasonable, therefore, to assume that a particular generator provided a particular sale for resale, as Portland contends. Consequently, because Portland cannot establish a physical match, the Commission must treat Portland the way it would treat other similarly situated sellers that cannot match transactions: Portland must use the average cost methodology. Accordingly, Portland's request for rehearing concerning use of its stacking analysis is denied.<sup>362</sup>

#### **F. Congestion Costs**

166. In the January 26, 2006 Order, the Commission determined that the costs associated with the two forms of congestion in the CAISO market, inter-zonal and intra-zonal, were not allowable in the cost filings. The Commission stated that a direct consequence of the application of the MMCP was the reduction or elimination of Inter-zonal congestion. The Commission also determined that Intra-zonal congestion was not assigned to sellers, and therefore not allowable in the cost filings.<sup>363</sup> Cal Parties, Coral Power, and Hafslund have requested rehearing of the Commission's determination.

167. According to Cal Parties, the Commission erroneously refused to review individual claims for congestion costs and congestion revenues, even though the Commission previously had determined that such costs and revenues could be included in the cost filings. Cal Parties assert that the January 26, 2006 Order errs by reversing the Commission's prior decision to allow non-mitigated California expenses, such as the CAISO's "Hour Ahead Inter-Zonal Congestion Charge," to be included in the cost filings. Cal Parties state that each cost filing with congestion costs that was not deferred or summarily rejected (i.e., Avista, Coral, Hafslund, and Sempra) should have been evaluated separately to determine whether the costs claimed were justified under the standards established in the August 8, 2005 Order. Cal Parties argue that the change in standards for cost filings, after the cost filings were submitted, is contrary to the APA, is not supported by substantial evidence, and is arbitrary and capricious. As a result, Cal

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<sup>361</sup> See also January 26, 2006 Order, 114 FERC ¶ 61,070 at P 251 ("A review of Portland's Load Data and FERC Form 1 data for the years 2000 and 2001 indicate that the amount of generation available from Portland's resources in certain hours was so significant that sales should have been made from less costly generating units."); November 2, 2006 Order, 117 FERC ¶ 61,151 at P 25.

<sup>362</sup> We note that our action today has no impact on the revenue Portland received for its section 202(c) sales, since those sales are not subject to refund.

<sup>363</sup> See January 26, 2006 Order, 114 FERC ¶ 61,070 at P 102-104.

Parties request rehearing of the decision to generically preclude congestion costs and revenues from the cost filings, and instead urge the Commission to permit the question of whether such cost and revenues have been justified, and in what amount, to be considered in the context of individual seller's cost filings.<sup>364</sup>

168. Hafslund and Coral state that despite ruling in the August 8, 2005 Order that certain congestion costs may be included in a cost filing, the January 26, 2006 Order denied sellers the opportunity to recover congestion costs.<sup>365</sup> They argue that contrary to the Commission's reasoning, all congestion costs are not allocated to load in all situations. Hafslund contends that despite the fact that the Commission acknowledged in the January 26, 2006 Order that two separate categories of congestion costs existed, inter-zonal and intra-zonal, the Commission's ruling on congestion costs was guided by its analysis of intra-zonal congestion costs alone.<sup>366</sup> Hafslund, for example, states that it incurred approximately \$784,000 in inter-zonal congestion costs and that these costs were allocated to the seller and not to load as the Commission suggested through its analysis of intra-zonal congestion costs. Hafslund adds that based on generally accepted CAISO allocation rules, inter-zonal congestion costs are netted against payments made to sellers prior to the actual payment being tendered and cannot be allocated to anyone other than the seller.

169. Hafslund and Coral contend that the Commission's suggestion that price mitigation has largely eliminated price differences between zones, even if true, is immaterial. They state that inter-zonal congestion costs represent costs incurred by the CAISO to compensate generators for out-of-merit-order production, an expense billed by the CAISO directly to sellers. These costs were deducted from revenues due to sellers from the original market clearing price and refunds do not return these dollars to sellers.<sup>367</sup>

### **Commission Determination**

170. The Commission denies all requests for rehearing concerning congestion costs, as discussed below. First, Coral and Hafslund misinterpret the Commission's determination

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<sup>364</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 39-41; Cal Parties' Request for Rehearing of November 2, 2006 Order at 38-39.

<sup>365</sup> Hafslund Request for Rehearing at 3-5; Coral Request for Rehearing at 5-6.

<sup>366</sup> *Id.* at 4.

<sup>367</sup> *Id.* at 5; Coral Request for Rehearing at 5.

in the January 26, 2006 Order, which, contrary to their assertion, did not assume that intra-zonal and inter-zonal congestion costs and revenues should be removed from cost filing analysis for the same reason.<sup>368</sup> Rather, in the January 26, 2006 Order, the Commission determined that *intra*-zonal congestion costs were allocated to load, and, therefore, were not marginal costs to sellers. For this reason, the Commission found that it would not be appropriate for sellers to include intra-zonal congestion costs in their cost filings to offset their refund obligation.<sup>369</sup>

171. The Commission's decision to disallow recovery of *inter*-zonal congestion costs through the cost filing process rested on other grounds. As we explained in the January 26, 2006 Order, as a direct consequence of applying the Commission's refund methodology, the inter-zonal congestion charge will be largely, if not entirely, diminished, as zonal prices are adjusted to reflect the mitigated energy price. By resetting the price in each of the three zones to the lower of the market-clearing price or the mitigated price, so that each zone generally pays the same or similar price, congestion between zones is therefore eliminated or greatly reduced.<sup>370</sup> In the January 26, 2006 Order, the Commission determined that including congestion costs in the cost filing based upon unmitigated amounts would be unjust and unreasonable. We explained that sellers' attempts to cost justify inter-zonal congestion costs based on congestion costs incurred when the unmitigated market clearing prices were the reference point for calculating congestion costs were inconsistent with the refund methodology.<sup>371</sup> As a result, the January 26, 2006 Order denied requests to offset inter-zonal congestion costs from refunds.<sup>372</sup> Therefore, contrary to the assertion of Coral and Hafslund, the

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<sup>368</sup> Intra-zonal congestion costs are the congestion costs that arise within a single zone; inter-zonal congestion costs are a function of the price differential between reference points in different zones.

<sup>369</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 103. The Commission also found that any costs associated with generators that were backed down due to intra-zonal congestion are lost opportunity costs, which are not acceptable as offsets to refunds. *Id.*

<sup>370</sup> As we noted in the January 26, 2006 Order, in some hours during the Refund Period when prices are not mitigated (because the market-clearing price was lower than the mitigated price), congestion costs may still accrue. While we assumed the amount of those congestion costs would be *de minimus*, to the extent the CAISO can ascertain what the congestion costs would be after application of the refund methodology, it should do so, as discussed herein. The CAISO is the only entity that has the data to perform such calculation. *See id.* P 102 & n.153.

<sup>371</sup> *Id.* P 102.

172. Accordingly, we disagree with the claims of Coral and Hafslund that absent an opportunity to recover congestion costs through the cost filing process, they will not receive offset for the full impact of the congestion charges they were obligated to pay. Contrary to Coral's and Hafslund's contention that congestion costs were already subtracted from any revenues from energy sales and, therefore, absent any correction, their cost offsets will be incorrect, the Commission has determined that the ultimate mitigated prices developed through the refund process will effectively eliminate or certainly substantially reduce the financial impact of all inter-zonal congestion. In addition, we understand that ultimately net congestion costs will be accounted for by the CAISO through the refund calculation process utilizing appropriate energy prices after application of the MMCP. Such refund amounts will be reflected in the CAISO's final compliance filing with the Commission. Accordingly, sellers' obligation to pay inter-zonal congestion charges is subject to revision.

173. Next, we disagree with the parties' contentions that the Commission's rejection of the congestion cost component of their cost filings in the January 26, 2006 Order amounts to a reversal of the August 8, 2005 Order. We have consistently indicated that costs, including congestion costs, which result in confiscatory rates may be eligible for recovery as an offset to refunds.<sup>373</sup> However, sellers have not shown that their claimed congestion costs represent their actual marginal costs of serving the California markets during the Refund Period. Sellers did not pay the intra-zonal congestion costs, and their obligation to pay the inter-zonal costs is subject to revision after application of the refund methodology. Therefore any inclusion of congestion costs here is premature and rejected.

174. Finally, we refute Cal Parties' allegations that the Commission has not fully considered the congestion cost/revenue issue. Since the CAISO's treatment of intra-zonal and inter-zonal congestion costs was consistent for all market participants, it is not necessary for the Commission to examine congestion costs in each cost filing on a case-by-case basis to determine how they should be handled for cost filing purposes. As we explain above, the amount of net congestion charges remaining after application of the Commission's MMCP refund methodology will be finally computed by the CAISO, based on the direction provided here, as a billing charge adjustment to sellers in the refund process. To the extent that after applying the refund methodology, sellers still

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<sup>372</sup> *Id.*

<sup>373</sup> *E.g.*, August 8, 2005 Order, 112 FERC ¶ 61,176 at P 78.

have some net congestion adjustments in their invoices, we find the CAISO is the appropriate organization to make the necessary billing adjustments and offset potential refunds. The CAISO is the repository of billing information; it can correctly account for remaining congestion pricing adjustments after application of the MMCP. The Commission expects the CAISO to appropriately reduce refund exposure for remaining net congestion costs assessed upon sellers through the CAISO's financial recalculation process. Thus, upon the final financial calculation by the CAISO, we expect that the spot energy sales revenues subject to refund from each seller will be offset by the impact of the recalculated net congestion costs those sellers may have been assessed. Therefore, we deny Cal Parties' rehearing request.

### **G. PX Collateral Costs and Letters of Credit**

175. In the January 26, 2006 Order, the Commission allowed certain sellers to include as relevant costs associated with sales in the California markets the cost of maintaining collateral with the PX in order to transact in the PX market.<sup>374</sup> Cal Parties argue that by expanding the recoverable costs to include out-of-period collateral costs and collateral costs associated with non-cost filing transactions, the Commission went beyond protecting against confiscatory rates and provided sellers with an unwarranted cost-recovery guarantee.<sup>375</sup> Cal Parties assert that the Commission lost sight of its objective to establish just and reasonable rates for the Refund Period by fixing MMCPs, "limited only by actual costs considered in the light of the regulatory principle that sellers are guaranteed only an opportunity to make a profit."<sup>376</sup> Cal Parties state that there is nothing in the January 26, 2006 Order or in the record to justify extending the remedy for unjust and unreasonable prices during the Refund Period simply to relieve sellers of costs incurred outside of the Refund Period and costs associated with transactions not included in the cost filing.

176. Specifically, Cal Parties point to the cost filing of Avista, stating that Avista was allowed to include in its offset PX collateral costs incurred from October 6, 2000 through July 31, 2005 associated with a letter of credit.<sup>377</sup> Cal Parties reiterate that out-of-period PX collateral costs and costs associated with transactions that were not part of a cost

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<sup>374</sup> See January 26, 2006 Order, 114 FERC ¶ 61,070 at P 165, 180 (Avista), P 236 (Hafslund), and P 309 (PNM).

<sup>375</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 37-39.

<sup>376</sup> *Id.* at 38.

<sup>377</sup> *Id.* at 80; Cal Parties' Request for Rehearing of November 2, 2006 Order at 28.

filing should not be allowed. Cal Parties add that if the Commission intended to allow these costs, it erred and its determination should be reversed on rehearing.

### **Commission Determination**

177. We deny rehearing. As we explained in the January 26, 2006 Order, during the Refund Period, sellers were required to maintain letters of credit and/or post collateral in order to trade in the PX market during the Refund Period. Sellers, therefore, incurred actual PX collateral costs and the costs of maintaining letters of credit.<sup>378</sup> They have continued to incur these costs after the Refund Period ended because the PX was required to retain sellers' collateral after the close of the Refund Period, in order to help ensure the availability of funds to cover refund obligations.<sup>379</sup> Consequently, we disagree with Cal Parties' characterization of these costs as unrecoverable "out-of-period" costs. While some of the costs incurred by sellers in association with their PX collateral/letters of credit technically accrued after the end of the Refund Period, these costs were the direct result of the obligation to post collateral and/or maintain letters of credit as a condition of trading in the California PX market during the Refund Period. Accordingly, these so-called "out-of-period" costs are directly related to the cost of transactions in the relevant California markets during the Refund Period. Therefore, it is appropriate to allow sellers who have demonstrated that they have accrued such costs to include them in their cost filings. Cal Parties have not proffered any new evidence that persuades us to reverse this determination. As a result, we deny rehearing.

178. However, we agree that these on-going, rolling updated submissions create moving targets that have the potential to cause further delay in this proceeding. Thus, we find that, in order to facilitate the actual calculation of refunds by the CAISO and conclude this proceeding, it is necessary to require that collateral posting cost updates end 30 days from the date of issuance of this order. While we have found that, under a confiscatory standard, it is reasonable to include these costs because they are directly related to the cost of selling electricity in California markets during the Refund Period, this is true only until a reasonable point in time. In today's environment, companies have various collateral costs for many reasons. We consider it reasonable to conclude that all future costs beyond the cut-off date associated with collateral requirements from 2009, including refund-related collateral costs, would be more appropriately expensed in the current year pursuant to the relevant Generally Accepted Accounting Principles (GAAP).

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<sup>378</sup> See, e.g., January 26, 2006 Order, 114 FERC ¶ 61,070 at P 180.

<sup>379</sup> See, e.g., *PG&E Energy Trading-Power, L.P.*, 102 FERC ¶ 61,091 (2003).

## H. Transmission Costs and Losses

179. Applying the principles set forth in the August 8, 2005 Order to the cost filings before it, the Commission rejected the claims of Portland and PPL Energy for transmission-related costs, finding that neither party had sufficiently explained or supported its transmission costs and related costs for transmission losses.<sup>380</sup> With regard to Portland, the Commission determined that it would not accept Portland's claimed transmission losses because Portland had not explained why it incurred transmission losses without incurring transmission costs.<sup>381</sup> In the case of PPL Energy, the Commission rejected the inclusion of both transmission costs as well as the cost of transmission losses because PPL Energy had not demonstrated the reasonableness of the magnitude of its claimed costs for transmission losses in relation to its transmission costs. The Commission further determined that PPL Energy had not provided adequate documentation in its cost filing submittal.<sup>382</sup>

180. On request for rehearing, Portland explains that all sales made from Portland to the CAISO and PX markets were accomplished through transmission over the Southern Interties operated by Bonneville Power Administration (BPA).<sup>383</sup> Portland states that its ownership interest in the AC Intertie entitled it to the right to transmit, without incurring wheeling charges, up to 850 MW from north-to-south on the AC Intertie and, as a result of contractual arrangements, up to 100 MW from north-to-south on the DC Intertie. Portland asserts that, although it did not incur wheeling charges when using these capacity rights, it remained responsible for associated transmission losses. Portland explains that BPA generally applied a loss factor of 3.0 percent for transmission over the Southern Interties, although Portland negotiated a lower loss factor of 2.0 percent for transmission on the AC Intertie (as opposed to the DC Intertie).<sup>384</sup>

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<sup>380</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 68-71, 255, 297.

<sup>381</sup> *Id.* P 255.

<sup>382</sup> *Id.* P 297.

<sup>383</sup> Portland Request for Rehearing at 10-11 (referring to attached Exh. PGE-1 at 32:21-22; and Exh. PGE-10 at 2:9-12). Portland maintains that the Southern Intertie consists of two groups of transmission facilities: the AC Intertie and the DC Intertie. (*See* Portland Exh. PGE-10 at 2:12-15.) Portland asserts that both the AC Intertie and DC Intertie are operated by BPA, although the transmission facilities constituting the AC Intertie are actually owned by various entities, including Portland. (*Id.* at 2:16-17).

<sup>384</sup> *Id.* at 11 (referring to attached Exh. PGE-1 at 33:16-20, Exh. PGE-10 at 4, n.3).

181. According to Portland, the various transmission rights were held by Portland on a corporate level. At the time of functional unbundling under Order No. 888, Portland's merchant function became a transmission customer of Portland's transmission function under its Open Access Transmission Tariff (OATT). As a result, the Portland merchant function was allocated the right to use 200 MW of Portland's share on the AC Intertie. Portland states that all trading in the CAISO and PX markets was conducted by its merchant function, which used this 200 MW of capacity as well as additional transmission capacity on the AC and DC Interties, which was purchased from BPA as necessary to accomplish particular transactions. Unlike use of the 200 MW of ownership-related capacity, these additional purchases of transmission on the AC and DC Interties were subject to wheeling charges from BPA, and, like any other use of Portland's capacity rights, those additional schedules were subject to transmission loss charges.<sup>385</sup>

182. Portland summarizes that its energy deliveries to the CAISO/PX markets were thus accomplished using a mix of transmission rights, some of which involved wheeling charges while others did not. Portland explains, however, that all of the transmission was subject to loss charges. Portland explains that while it could have attempted in its original filing to determine which CAISO/PX sales were made using its 200 MW of capacity rights, which did not incur wheeling charges, such an allocation process would have inevitably involved discretion. Therefore, Portland took the conservative approach of assuming that all sales in the CAISO/PX markets were made using Portland's 200 MW of capacity rights on the AC Intertie – i.e., that no wheeling charges applied to the transactions. Because loss charges continued to apply to these schedules, however, Portland included those charges in its cost filing (calculated using the lowest applicable loss factor rate of 2.0 percent) without including any related transmission charges. As a result, Portland contends that the January 26, 2006 Order is incorrect in stating that it had not explained why it has incurred transmission losses without incurring transmission costs. Accordingly, Portland requests rehearing and reversal of the Commission's determination.<sup>386</sup>

183. Similarly, PPL Energy asserts that it properly incurred transmission costs and losses in selling energy to the CAISO, but that the Commission, in the January 26, 2006 Order, denied PPL Energy any recovery at all for transmission costs and losses based on

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<sup>385</sup> *Id.* at 11.

<sup>386</sup> *Id.* at 11-13.

only the most cursory analysis. PPL Energy asserts that the Commission's decision was arbitrary and capricious and should be reversed on rehearing.<sup>387</sup>

184. According to PPL Energy, it explained in its cost filing that the energy it sold to the CAISO moved to the CAISO market on two transmission routes. PPL Energy states that the first route was from within Montana to CAISO border points, and included charges from Northwestern (formerly Montana Power Company) of \$4.66/MWh for the movement within Montana, and BPA system charges totaling \$6.18/MWh from the Montana border to the CAISO. Thus, PPL Energy submits that the total charge was \$10.84/MWh for sales from within Montana, while sales from the Montana border incurred only the \$6.18/MWh BPA tariff charge. PPL Energy maintains that it supplied references to the relevant provisions of each company's tariff, and showed the calculation of the total tariff charges.<sup>388</sup>

185. PPL Energy states that it also showed that it incurred transmission losses at applicable tariff rates to move all of the power it sold the CAISO, except for its matched sales on a single day. PPL Energy claims that the losses were based on a standard loss estimate multiplied by the cost of that lost energy. The loss rate was four percent of the transmission delivery quantity, multiplied by an index rate for such losses that was tied to the Mid-Columbia (Mid-C) index rate.<sup>389</sup>

186. PPL Energy avers that since transmission providers are bound to charge tariff rates, and since PPL Energy receives monthly invoices for transmission that are not broken out by individual sale, no purpose is served by providing the invoices themselves in addition to the tariff references. Nonetheless, in the interests of eliminating any issue on the matter in this rehearing, PPL Energy attached in its rehearing request invoices from BPA and Montana Power Company confirming that PPL Energy was invoiced at the tariff rates set out in its cost filing for transmission costs.<sup>390</sup>

187. PPL Energy notes that the only other objection in the January 26, 2006 Order is that "PPL Energy does not clearly explain why transmission losses are almost twice the magnitude of transmission costs."<sup>391</sup> PPL Energy claims that its cost filing explanation

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<sup>387</sup> PPL Energy Request for Rehearing at 7-10.

<sup>388</sup> *Id.* at 7-8.

<sup>389</sup> *Id.* at 8.

<sup>390</sup> *Id.* at 9.

<sup>391</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 297).

was sufficient because, although PPL Energy's transmission costs were based on the tariff rates of \$6.18 or \$10.84 per MWh, the terms of the Montana tariff required PPL Energy to compensate for the cost of the energy itself at a price tied to Mid-C index rates, which tended to be very high during this period. PPL Energy states that it did not expressly compare the two numbers, but claims that it should be clear that losses calculated on market indices can be quite costly when the price of energy is high. PPL Energy thus concludes there is nothing anomalous about transmission losses being greater than transmission costs in its cost filing and that, since there is no dispute that PPL Energy was in fact charged these amounts, there is no basis to deny PPL Energy recovery of these costs.<sup>392</sup>

188. Cal Parties contend that the Commission erroneously determined that Puget adequately justified its transmission costs, arguing that Puget's sample documentation does not make it clear whether the claimed costs were incurred correctly for CAISO sales or demonstrate transmission costs associated with each CAISO sale.<sup>393</sup>

### **Commission Determination**

189. For the reasons discussed below, we deny the rehearing requests of Portland and PPL Energy on the issue of transmission costs and/or losses. Additionally, as discussed above in this order, and in accordance with well-settled Commission precedent, we reject the supplemental evidence introduced by these parties during the rehearing phase of this proceeding.<sup>394</sup> We also deny Cal Parties' rehearing request and affirm our finding that Puget sufficiently supported its claim for recovery of transmission costs via sample invoices, as permitted by the August 8, 2005 Order.

#### **1. Transmission Losses claimed by Portland and PPL Energy**

190. Both PPL Energy and Portland state that they decided to return in-kind the transmission-related energy losses incurred during the Refund Period. Portland further contends that the BPA tariff requires return-in-kind. Our analysis of the BPA tariff does not find such a requirement; rather, it appears to be a customer choice. Portland, in its original testimony, stated that it returned the losses in kind within 168 hours from the date of the sale.<sup>395</sup> However, Portland has not demonstrated at what time the losses were

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<sup>392</sup> *Id.* at 9-10.

<sup>393</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 107.

<sup>394</sup> *See supra* P 23-25.

<sup>395</sup> Cost Recovery Filing of Portland General Elec. Co., Docket Nos. EL00-95-144

returned within the required time frame. Therefore, Portland may have, in accordance with the BPA tariff, used a practice that booked accumulated transmission losses and returned in-kind the energy for those transmission losses at a time when prices were more favorable to do so. In other words, Portland may have generated or purchased the energy at a lower price than the price it booked when the energy was returned-in-kind to BPA. Portland did not present evidence confirming what practice it actually utilized at the time the return-in kind energy transactions took place.

191. Furthermore, in pricing the transmission losses it returned to BPA in-kind, Portland simply used a reference price, the Mid-C index, as a basis for calculating its cost for returning the energy to BPA. If Portland had simply compensated BPA for the losses, the transmission tariff and support demonstrating simply that the transmission transaction took place would have been sufficient. However, not only did Portland not provide both the OASIS and relevant tariff sheets, but Portland made no showing whatsoever that it actually purchased energy at the Mid-C price in order to satisfy its return-in-kind loss obligation. As an integrated utility, Portland may have had its system resources and economic purchases to rely upon for satisfying that requirement. Portland made no showing that it incurred additional expenses to serve the CAISO/PX markets and that it did not simply used excess energy in its already existing portfolio to fulfill its obligation to BPA in connection with its energy sales.<sup>396</sup>

192. The purpose of the cost filings is to allow sellers of energy to the CAISO and PX markets the opportunity to demonstrate the actual marginal costs of their sales, and show that the refund methodology does not allow them to recover costs of serving those markets. When the Commission made the determination that transmission costs were marginal costs that could be included in the cost filings, and indicated the support necessary to prove the incurrence of those costs, this determination was contingent on the assumption that these transmission costs were incurred to support the energy transactions. In this instance, not only has Portland failed to provide the documentation to support the actual level of losses it incurred in transmitting energy to the California markets, it clearly stated that it was using a proxy price, the Mid-C index, in order to determine its actual cost of supplying energy to BPA to compensate for its transmission losses incurred. As we have found that index prices could not be used in place of actual costs for demonstrating energy sales,<sup>397</sup> neither can index prices be used to demonstrate the

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and EL00-98-131, Exh. PGE-1, Prepared Testimony of Kristin Stathis on Behalf of Portland Gen. Elec. Co., at 33-34 (Sept. 14, 2005).

<sup>396</sup> If Portland incurred marginal costs from using its own portfolio, it has failed to demonstrate those.

<sup>397</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 93 (valuing affiliate

(continued...)

actual cost of return-in-kind of transmission losses. Accordingly, we reaffirm our finding that Portland's cost filing failed to support its claimed transmission losses. As a result, Portland's claimed costs for transmission losses were appropriately disallowed, as discussed in the January 26, 2006 Order and herein.

193. We deny PPL Energy's rehearing request on the same basis, i.e., because its cost filing lacks verification of the cost of transmission losses PPL Energy actually incurred in connection with serving the CAISO and PX markets during the Refund Period. PPL Energy states that under the terms of the applicable tariffs, PPL Energy returned a fixed percentage of transmission delivery quantity, multiplied by an index rate for losses that was tied to the Mid-C index rates, "which tended to be very high during this period."<sup>398</sup> PPL Energy argues that "[s]ince there were no invoices – energy was simply returned in compensation – it is not rational to deny PPL Energy recovery for these losses on the basis that PPL Energy did not file invoices with its cost filing."<sup>399</sup> However, without invoices, the Commission has no way to ascertain whether PPL Energy returned energy-in-kind by purchasing energy at the Mid-C, what the actual Mid-C price may have been, or whether it relied on its own system resources and economic purchases to return energy-in-kind to Montana Power Company and BPA. There is also uncertainty regarding whether energy was "booked" at a return-in-kind price that differed from its actual cost to PPL Energy. Furthermore, as mentioned above, just as the Commission has found the use of an index to be improper in valuing energy sales, valuing losses returned in-kind at an index-based price also may bear no relation to the price PPL Energy incurred to generate or purchase such power.

194. PPL Energy maintains that no party contested its use of the Mid-C index rate. However, the Commission must independently assess whether the seller's support for its claim is sufficient under the standards set forth in the cost filing proceeding, regardless of whether this element of the cost filing was contested. Therefore, since we lack evidence that PPL Energy actually purchased or generated energy at a particular price to satisfy its return-in-kind loss obligation, we must deny PPL Energy's request for rehearing.

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transactions at index prices bear no relation to the corporate entities' actual cost of purchasing or generating power).

<sup>398</sup> PPL Energy Rehearing Request at 9.

<sup>399</sup> *Id.* at 10, n.20.

## 2. PPL Energy's Transmission Costs

195. In its transmission costs claim, PPL Energy did not submit the required OASIS reservation information, nor did it provide invoices or sample invoices with its cost filing. Rather, PPL Energy merely ascertained transmission tariff rates from its relevant neighboring transmission owners and applied those rates to its volume of sales into the CAISO and PX markets. The reason the Commission required the OASIS reservation and invoices, or at least sample invoices, was to verify that costs were actually incurred. Contrary to PPL Energy's claim that no purpose would be served by submitting the actual invoices, sellers were on notice that they were required to submit details sufficient to confirm costs, including invoices or at least sample invoices.<sup>400</sup> The August 8, 2005 Order also explicitly required sellers seeking offsets from refunds for transmission costs to include in their cost filings the OASIS reservation, as well as the transmission service agreement and effective tariff rate.<sup>401</sup> If PPL Energy had submitted documentation of the confirmed reservation and the relevant tariff rate, then the Commission would have considered those costs eligible to offset refunds. PPL Energy could at least have submitted its monthly invoice for transmission, with an explanation of what percentage of transmission charges were associated with sales into CAISO/PX markets, based on sales volume or other measure. However, PPL Energy failed to submit any supporting evidence in its original cost filing. Therefore, we must reject PPL Energy's efforts to cure this omission with the submission of invoices on rehearing. It is too late now to submit evidence to support the claim, since accepting such information now would be unfair to other cost sellers whose filings were rejected for failure to timely comply with cost filing requirements.

## 3. Puget's Transmission Costs

196. We disagree with Cal Parties' claim that Puget has not sufficiently supported its claim for transmission costs. As the Commission stated in the January 26, 2006 Order, Puget has submitted sufficient samples of data and transaction invoices to demonstrate that it incurred actual transmission costs for sales to the California markets. As we explained in the August 8, 2005 and January 26, 2006 Orders, given the voluminous nature of data that would be received if sellers had to verify every individual transaction, sellers were allowed to submit a sampling of supporting documentation. Puget has met that standard. Accordingly, we deny Cal Parties' request for rehearing of our acceptance of Puget's claimed offset for transmission costs.

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<sup>400</sup> See August 8, 2005 Order, 112 FERC ¶ 61,176 at P 103, 104, n.70; *see also* Cost Filing Template.

<sup>401</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 103.

## I. Return on Investment

197. In the August 8, 2005 Order, the Commission stated that it would allow *marketers* the opportunity to receive a return on investment of 10 percent (e.g., cash requirements).<sup>402</sup> The September 2, 2005 Order on Clarification clarified that for the purposes of return on investment, “*marketers* are allowed to include in their cost filings the product of 10 percent times their investment in plant-in-service and/or cash prepayments.”<sup>403</sup> On rehearing of both orders, in the November 19, 2006 Order, the Commission upheld its decision that load serving entities are not entitled to a return on investment as part of their cost filing because load serving entities do not have the same risk profile for capital that marketers have.<sup>404</sup> The Commission explained that, unlike marketers, load serving entities already earn a cost of capital on investment from their traditional ratepayers.<sup>405</sup>

198. PNM, Portland and Puget request rehearing, arguing that it is arbitrary and capricious and unduly discriminatory for the Commission to preclude load serving entities from recovering a return on investment in their cost offsets. They reiterate previously-raised concerns that denying load serving entities a return on investment is inconsistent with Commission precedent, as well as the way load serving entities actually conduct business.

199. Specifically, Puget claims that there is no record evidence to support the Commission’s conclusion in the January 26, 2006 Order that load serving entities need

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<sup>402</sup> *Id.* P 81; November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 111 and P 117.

<sup>403</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,249 at P 1 and P 6 (2005) (September 2, 2005 Order); November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 111 and P 117.

<sup>404</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 117. We note that the January 26, 2006 Order accepted the return on investment claims of marketers Hafslund and Avista, 114 FERC ¶ 61,070 at P 118, 119, and challenges to that decision are discussed in the company-specific sections below.

<sup>405</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 116. We allowed marketers to add the allocated return on investment and related income tax amount in order to recognize their cost of capital, in an attempt to reflect a traditional cost of service approach for marketers. *Id.*; *see also* September 2, 2005 Order, 112 FERC ¶ 61,249 at P 6. Accordingly, we denied LSE’s inclusion of any additional return on investment.

not be afforded a return because they “already earn a return . . . on investment from their traditional ratepayers.”<sup>406</sup> Puget argues that the Commission’s conclusion that a load serving entity making wholesale sales should not be allowed to include a return on investment because it can rely on its retail customers to recover those costs is at odds with decades of cost-of-service rulings that expressly permit the inclusion of a return in cost-based wholesale power rates.<sup>407</sup>

200. Puget points out that the utilities subject to the *AEP* order the Commission cited to support the 10 percent rate of return allowed marketers were all load serving entities.<sup>408</sup> Puget emphasizes that, in *AEP*, the Commission declared that “our ratemaking policy is designed to provide for recovery of prudently incurred costs plus a reasonable return on investment.”<sup>409</sup> Portland also argues that precluding load serving entities from including a return in their cost filings is inconsistent with the Commission’s approach in *AEP*.<sup>410</sup> Portland contends that in *AEP*, the Commission held that is it is appropriate, and to be expected in a competitive market, for load serving entities to earn a return. Portland argues that a return to compensate for risk is an essential component of a non-confiscatory rate.<sup>411</sup> Portland concludes that the inconsistent treatment by the Commission in *AEP* and the cost filing orders does not constitute reasoned decision-making, discriminates against load servings, and, therefore, should be reversed.<sup>412</sup>

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<sup>406</sup> Puget Request for Rehearing at 9-11 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 116).

<sup>407</sup> *Id.* at 10 (citing, *e.g.*, *AEP Power Marketing, Inc.*, 108 FERC ¶ 61,026 (2004) (*AEP*)).

<sup>408</sup> *Id.* (citing August 8, 2005 Order, 112 FERC ¶ 61,176, n.65 (referring to *AEP*, 108 FERC ¶ 61,026)).

<sup>409</sup> *Id.* at 10-11 (citing *AEP*, 108 FERC ¶ 61,026 at P 152).

<sup>410</sup> *Id.* at 15 (citing, *generally*, *AEP*).

<sup>411</sup> *Id.* at 16 (citing *FPC v. Sierra Pacific Power Company*, 350 U.S. 348 (1956)).

<sup>412</sup> In addition, Portland relies on an early order in this refund proceeding to support its claim that it should be treated no differently than a true power “marketer” for purposes of the cost filings. *See* Portland Request for Rehearing of November 2, 2006 Order at 9, 15-16 *Id.* at 9 (citing December 19, 2001 Order, 97 FERC ¶ 61,275 at 62,193 (holding that load serving entities will be treated as marketers, and therefore required to be price takers, in the application of prospective mitigation)).

201. Portland also argues that the 10 percent adder for return, as discussed in the August 8, 2005 Order, and clarified by the September 2, 2005 Order, inappropriately mixes competing paradigms of cost-of-service rate-making and market-based determinations. For example, Portland contends that the Commission uses account categories, such as “plant in service” that are inapplicable within the context of the standards set forth for market-based rates in *AEP*. Portland also asserts that the 10 percent adder is below the return amounts typically allowed to traditional utilities, and given the additional risk undertaken by marketers, such a return should be applied to an appropriate base. Portland states that by imposing the new return methodology, the Commission has made it impossible for marketers to recover a fair return on their sales, thus violating the standards of non-confiscation.<sup>413</sup>

202. Puget argues that load serving entities, like marketers, rely on their wholesale customers to recover the return on the portion of their capital investments dedicated to wholesale activities. Thus, Puget contends that there is no rational basis for treating non-load serving entity marketers and load serving entities differently with respect to allowing the inclusion of a return component in an approved cost offset. Further, Puget asserts that the Commission has not provided a meaningful distinction between the two classes of sellers that would justify such disparate treatment.

203. PNM asserts that the Commission failed to consider PNM’s evidence contradicting the Commission’s assumptions regarding how load serving entities are compensated for return on investment. PNM argues that the Commission failed to address PNM’s evidence that a significant portion of PNM’s generating resources are not included in its retail rate base. As a result, PNM contends that the only opportunity for it to earn a return on these assets is through wholesale sales, including its sales into the ISO and PX markets during the Refund Period.

204. PNM explains that the New Mexico Public Regulation Commission (New Mexico Commission) has determined that retail ratepayers ought to share in benefits of wholesale market transactions and has excluded substantial generation from PNM’s retail rate base. PNM claims that by prohibiting PNM from including a component for return on investment on generating assets used in the wholesale markets, the January 26, 2006 Order upsets the balance established by the New Mexico Commission and distorts the allocation of risk that underlies the New Mexico Commission’s policy, thereby eviscerating its state regulatory policy.<sup>414</sup>

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<sup>413</sup> *Id.* at 17-19.

<sup>414</sup> Request for Rehearing of Public Service Company of New Mexico, Docket Nos. EL00-95-000, *et al.*, and EL00-98-000, *et al.*, at 7 (Feb. 27, 2006) (PNM Request

205. PNM argues that the Commission failed to employ reasoned decision-making because it did not directly address the evidence that PNM submitted in support of its contention that the Commission's actions were confiscatory. PNM argues that the FPA restricts the Commission from setting rates at a level so low as to be confiscatory, and that in order for rates to be just and reasonable, they must provide a reasonable rate of return. PNM states that without the ability to include return on investment in its cost offset, PNM will experience a confiscatory rate, despite the Commission's assurance in numerous orders that such a result would not occur.<sup>415</sup>

206. Finally, PNM cites *Duquesne Light Co. v. Barasch*, in which the Supreme Court stated that "serious constitutional questions" would be raised by a regulator's "decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others ..."<sup>416</sup> PNM argues that the Commission has already switched methodologies once when it went from valuing sales at market prices to utilizing the retrospectively created MMCP. PNM contends that if it is denied the ability to include a return component as compensation for risk as part of the cost filing process, this will be the second case where the Commission has switched methodologies for dealing with refunds, in contravention of the prior Supreme Court ruling.<sup>417</sup>

### **Commission Determination**

207. The Commission denies PNM's, Puget's, and Portland's request for rehearing on the return component for load serving entities. As an initial matter, while PNM's and Puget's requests are styled as requests for rehearing of the January 26, 2006 Order, they are actually untimely requests for rehearing of issues decided in the August 8, 2005 and September 2, 2005 Orders. The August 8, 2005 and the September 2, 2005 Orders initially determined the circumstances under which a return component could be included in the cost filings; both orders clearly indicated that only marketers were eligible to receive return on investment through the cost filing process.<sup>418</sup> The November 19, 2007

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for Rehearing).

<sup>415</sup> *Id.* at 10-13.

<sup>416</sup> *Id.* at 12 (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989) (*Duquesne*)).

<sup>417</sup> *Id.*

<sup>418</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 81 and P 104 (marketers only); September 2, 2005 Order, 112 FERC ¶ 61,249 at P 6.

Rehearing Order again rejected requests to allow load serving entities to include a return component in their cost filings.<sup>419</sup> PNM, Puget, and Portland filed their cost filings as load serving entities. Thus, we properly denied the inclusion of a return component on their respective cost filings. In their requests for rehearing of the January 26, 2006 Order, Puget and Portland have not presented relevant information that has not been previously considered, either in the August 8, 2005 Order or the November 19, 2007 Rehearing Order on Rehearing.<sup>420</sup> Accordingly, we deny Puget and Portland's requests for rehearing on this issue.<sup>421</sup>

208. With respect to PNM's claim that the Commission's rejection of the return component of PNM's cost filing "eviscerates the [New Mexico Commission]'s state regulatory policy," we first note that this argument was also presented in PNM's cost filing.<sup>422</sup> Contrary to PNM's assertions, the Commission considered the evidence

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<sup>419</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 11 and P 117.

<sup>420</sup> In an abundance of caution, we note that we previously explained why the *AEP* case does not require the Commission to allow load serving entities to receive a return. *Id.* P 111. We also explained why our return methodology does not mix conflicting market-based and cost-based rate methodologies. *Id.* P 111 and 112. Furthermore, *Duquesne* is inapt because the Commission did not arbitrarily switch back and forth between just and reasonable rate methodologies when it reset the market clearing price to the MMCP. On the contrary, the Commission was remedying an unjust and unreasonable rate, as required by the FPA. By disallowing return for load serving entities, the Commission did not switch rate methodologies or contradict its prior determination in this proceeding. Finally, to the extent parties elaborate on arguments that could have been timely raised in prior comments or rehearing requests, the Commission is not required to address these. *See, e.g., Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of "infinite regress" that would "serve no useful end"); *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (citing *Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)).

<sup>421</sup> *See, e.g., Midwest Indep. Trans. Sys. Operator Inc.*, 122 FERC ¶ 61,127 at P 26 (2008) ("The Commission does not allow parties to seek rehearing of an order denying rehearing.") (citing *Bridgeport Energy, LLC*, 114 FERC ¶ 61,265, at P 8 (2006) (citing *Southern Company Servs., Inc.* 111 FERC ¶ 61,329 (2005) (*Southern Company Servs*); *AES Warrior Run, Inc. v. Potomac Edison Co. d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004) (*AES*); *Southwestern Pub. Serv. Co.*, 65 FERC ¶ 61,088 (1993))).

<sup>422</sup> Cost Recovery Filing of Public Service Commission of New Mexico, Docket Nos. EL00-95-143 and EL00-98-130, Affidavit of James G. Butler at 3

(continued...)

presented in PNM's cost filing and found it appropriate to reject PNM's request for a return on investment.<sup>423</sup> Based upon the data presented, PNM's "revenues from transactions in the CAISO and PX markets during the [R]efund [P]eriod exceeded its costs associated with such transactions."<sup>424</sup> Accordingly, the refund methodology, as applied to PNM, was not confiscatory. The Commission's goal in the cost offset process was not to ensure the highest justifiable profits for individual sellers, but to determine which sellers experienced an overall revenue shortfall for their transactions in the relevant California markets during the Refund Period. As long as the costs demonstrated by PNM, pursuant to the August 8, 2005 Order, did not result in an overall revenue shortfall, our stated goal has been achieved.

209. Moreover, in its request for rehearing of the August 8, 2005 Order and September 2, 2005 Order, PNM, as one of the "Indicated LSEs," insisted that "it would be an unwarranted exercise of jurisdiction over retail rates," if the Commission were to "base any wholesale cost recovery decision on the complex retail ratemaking tradeoffs and compromises included in state decisions."<sup>425</sup> Despite its earlier protestations, PNM now asks us to grant it special consideration on the basis of a complex retail ratemaking tradeoff resulting from a state commission order. As the Indicated LSEs acknowledged, "[s]tate commissions have any number of mechanisms and approaches to the crediting of

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(September 14, 2005) (PNM Cost Filing).

<sup>423</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 116, 309.

<sup>424</sup> PNM Cost Filing at 12-13. The Commission accepted PNM's cost filing, subject to modification, that claimed total revenues of \$15.8 million and total costs of \$14.5 million. Therefore, PNM's cost offset was \$0. PNM also submitted two alternate cost offset claims; one with a return component of ten percent, resulting in a cost offset of approximately \$1.1 million, and a second that included a return component of 16 percent, resulting in a cost offset of approximately \$2.5 million. January 26, 2006 Order, 114 FERC ¶ 61,070 at P 299, 308.

<sup>425</sup> Request for Rehearing of Indicated Load Serving Entities at 12-14, Docket Nos. EL00-95-000 and EL00-95-000 (September 7, 2005) (Indicated LSE Rehearing Request); *see also* November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 64, 125. The Indicated LSEs argued that the Commission was requiring improper and irrelevant cost information that pertained solely to its retail business. The Commission assured the LSEs that it was not attempting to impermissibly exercise jurisdiction over the LSEs, but rather, was imposing a uniform requirement that all sellers include a showing of all costs and revenues associated with all sales made into the ISO/PX during the Refund Period. November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 153.

wholesale transaction revenues.”<sup>426</sup> The interests and risks considered by a state commission may or may not align with the Commission’s goals. In this case, the New Mexico Commission policy raised by PNM is “one tailored to PNM,” arising out of “specific determinations ... regarding specific PNM generation assets,” and “established through numerous state regulatory proceedings that have sought to balance the benefits and risks of the [New Mexico Commission]’s prior determinations to exclude certain generating assets from PNM’s retail rate base.”<sup>427</sup> It is well established that the Commission is not bound by a state commission’s ratemaking decision,<sup>428</sup> although the state may take federal action into account when setting rates. It is our view that the state proceeding established certain risk and return levels that are best evaluated at the state level and not in this proceeding. Accordingly, we deny PNM’s rehearing request.

### **J. Affiliate Transactions**

210. The August 8, 2005 Order required any seller claiming costs associated with affiliate transactions to “show that its transactions were in compliance with the Commission’s rules and regulations, including codes of conduct and standards of conduct.”<sup>429</sup> For the sellers whose cost filings involved affiliate transactions, the January 26, 2006 Order took the following actions: (1) summarily rejected El Paso’s entire filing for insufficient documentation; (2) deferred action on the IDACORP filing, which was subsequently rejected in the March 27, 2006 Order; (3) accepted Portland’s exclusion of its affiliate transactions with Enron, upon finding that such transactions were not available for resale in the ISO and/or PX markets; (4) accepted PPL Energy’s claimed affiliate transaction costs because they were valued at production costs; (5) accepted Puget’s claimed affiliate transactions as properly calculated and supported; (6) directed Powerex to include affiliate transactions related to British Columbia Hydro and Power Authority (BC Hydro), including BC Hydro’s excess power above native load, at BC Hydro’s rate on file with the British Columbia Utilities Commission (BCUC) at the time

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<sup>426</sup> Indicated LSE Rehearing Request at 13.

<sup>427</sup> PNM Request for Rehearing at 10.

<sup>428</sup> *MidAmerican Energy Co. v. FERC*, 81 FERC ¶ 61,081, at 61,328, n.15 (1997) (“The Commission is not bound by a state commission’s determinations regarding either accounting or ratemaking.”); *Kentucky Utilities Co. v. FERC*, 760 F.2d 1321, 1326 (D.C. Cir. 1985) (“FERC is not bound to follow a state commission’s considered judgment with respect to either accounting or ratemaking. FERC must, rather, follow its own precedents...”).

<sup>429</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 106.

the transactions occurred; and (7) required Sempra and TransAlta to each make a compliance filing either (a) eliminating all affiliate purchases – costs and revenues – involving use of market indexes or other market pricing, or (b) including a revised average purchased power cost valuing affiliate transactions at actual production costs.<sup>430</sup> The Commission rejected the use of market-based or index-based affiliate prices because it found that these prices did not represent the corporate entity’s actual cost of power, included opportunity costs, and reflected the very unjust and unreasonable market clearing prices the Commission aimed to remedy through application of its MMCP refund methodology.<sup>431</sup> Subsequently, in the November 2, 2006 Order, the Commission conditionally accepted Powerex’s compliance filing, but rejected TransAlta’s and Sempra’s compliance filings for failure to comply with the directives set forth in the January 26, 2006 Order.

### 1. Adoption of a Single Rule

211. On rehearing of the January 26, Order, Cal Parties argue that, while the Commission intended for each seller to value its affiliate transactions at the “actual costs of its affiliate generation,” the January 26, 2006 Order’s directives were inconsistent and sometimes phrased differently. Cal Parties allege that, as a result, the Commission did not attain its objective, which was to make sellers price these transactions at the actual production costs of their affiliate generation. Cal Parties assert that these inconsistencies have resulted in sellers using different approaches in their cost filings.<sup>432</sup>

212. Cal Parties argue that excluding affiliate costs, under either an average or matching approach, will automatically skew costs upward and increase cost offsets. Cal Parties therefore ask the Commission to adopt on rehearing the following single rule to be applied consistently to all cost filings: all of a seller’s affiliate transactions must be reflected in the cost filing calculation, with the affiliate transactions priced at either (a) zero, or (b) actual costs.<sup>433</sup> Cal Parties elaborate that “actual costs” should be either the actual costs of production in the case of affiliated generation, or, in the case of purchased

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<sup>430</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 95.

<sup>431</sup> *Id.* P 92-93.

<sup>432</sup> Cal Parties’ Request for Rehearing of January 26, 2006 Order at 41-44. Cal Parties note, for example, that Sempra has simply removed affiliate transactions that should have been retained, and TransAlta has repriced its affiliate transactions using a proxy for the very market-based pricing that the Commission directed should not be used.

<sup>433</sup> *Id.* at 44-45.

energy, the actual cost to “the affiliate who first obtained ownership of the [energy] for the combined corporate entity.”<sup>434</sup>

### **Commission Determination**

213. We decline to adopt on rehearing Cal Parties’ proposed rule because it is inappropriate to adopt a new rule at the rehearing stage of the cost offset evaluations, and, moreover, it is unnecessary. By requiring the affiliate transactions included in cost filings to reflect actual costs, the Commission already enunciated one of Cal Parties’ two suggested options. As to California Parties’ second proposal, including revenue from affiliate transactions in cost offset claims but pricing unsupported affiliate transactions at zero, we find this proposal too draconian. Such a method would unjustly penalize sellers because virtually all revenue is associated with at least some costs. We conclude, therefore, that it is reasonable and more equitable to allow sellers who elect to eliminate affiliate transactions to do so by removing the revenues as well as the associated costs.<sup>435</sup>

### **2. Market-Valued Affiliate Transactions**

214. On rehearing of the January 26, 2006 Order, Sempra claims the Commission erred in directing it to eliminate purchases from its generating affiliate, El Dorado.<sup>436</sup> Sempra argues that the Commission’s rationale for eliminating all market-valued affiliate purchases is inapplicable to Sempra’s purchases from El Dorado. Sempra states that it paid to El Dorado the prices dictated by terms of the contract between the two companies. Those prices reflect the costs actually incurred by Sempra to procure the energy. Sempra argues, therefore, that it is arbitrary and capricious to treat Sempra’s purchases from El Dorado and Sempra’s purchases from non-affiliates differently because, in both cases, the contract price is the cost actually incurred by Sempra.

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<sup>434</sup> *Id.* (quoting *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166, at P 21 (2004)).

<sup>435</sup> Note that, as discussed in text, *infra*, the Commission did not give Powerex the option of eliminating its affiliate transactions, but instead found that Powerex must include them because Powerex was able to draw on the resources of its hydroelectric affiliate, BC Hydro, during the Refund Period, to support its transactions involving California markets. The Commission was concerned that because hydroelectric resources tend to be relatively inexpensive, failure to include them in the cost offset analysis could under-represent Powerex’s actual costs. January 26, 2006 Order, 114 FERC ¶ 61,070 at P 274-278.

<sup>436</sup> Sempra Request for Rehearing of January 26, 2006 Order at 13-15.

215. Likewise, on rehearing of the January 26, 2006 Order, TransAlta contends that the Commission erred by rejecting its affiliate purchases based on the belief that TransAlta's affiliate contracts, which used a market index price, did not accurately represent the seller's actual costs.<sup>437</sup> TransAlta asserts that its contract with its affiliate, Centralia, bases the price on a number of factors and not primarily on a market index. Furthermore, TransAlta contends that, even assuming that the TransAlta/Centralia Contract was based on an index, the Commission has not provided a valid basis to reject the contract price.

216. TransAlta explains that the TransAlta/Centralia Contract obligates TransAlta to purchase the full output of the Centralia Plant on a daily basis, subject to a mutual 90-day cancellation option. The contract price for this energy and capacity is established monthly, based on the contractually-established pricing formula. TransAlta states that Centralia has market-based rate authority and the TransAlta/Centralia Contract is Centralia's filed rate for its sales to TransAlta.<sup>438</sup>

217. TransAlta further argues that the Commission erred in rejecting TransAlta's inclusion of the costs it incurred in connection with the TransAlta/Centralia Contract without addressing the issue of whether it is proper for the Commission to disallow a filed rate between TransAlta and its affiliate in this proceeding. TransAlta objects to the Commission's argument that the Commission need not adhere to the filed rate doctrine because of its authority to remedy anti-competitive behavior. TransAlta maintains that because Commission staff concluded in the Partnership Gaming Proceeding that TransAlta had not engaged in gaming transactions, it has never been found to have engaged in the type of anti-competitive behavior mentioned by the Commission.<sup>439</sup> TransAlta argues that, absent a finding that TransAlta or Centralia violated the market-based rate tariff, the Commission cannot authorize retroactive refunds.<sup>440</sup>

218. Finally, El Paso argues that the Commission erred in the January 26, 2006 Order when it was presumed that El Paso's purchases from affiliates were accounted for on a consolidated basis.<sup>441</sup> El Paso states that the Commission attempted to justify summarily

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<sup>437</sup> TransAlta Request for Rehearing of January 26, 2006 Order at 3.

<sup>438</sup> *Id.* at 4-5.

<sup>439</sup> *Id.* at 6-7 (citing *Colorado River Commission of Nevada, et al.*, 106 FERC ¶ 61,022, at P 4, 49 (2004)).

<sup>440</sup> *Id.* at 5 (citing *Lockyer v. FERC*, 383 F.3d 1006, 1015-1016 (9th Cir. 2004) (*Lockyer*)).

<sup>441</sup> El Paso Request for Rehearing at 39-40.

rejecting its cost filing because “El Paso, for example, chose to value purchases from its affiliates at the CAISO's market clearing price.”<sup>442</sup> El Paso asserts that it explained in its cost filing and sworn testimony that it was contractually obligated to buy the power at the clearing price published by the PX and ISO, and that the company has already paid those amounts with no rights of recourse. El Paso also explain that, while the suppliers were affiliates, because El Paso’s parent held a minority interest, those suppliers’ income and expenses were not consolidated with the earnings of El Paso or its parent.

### **Commission Determination**

219. The Commission denies requests for rehearing on our determination that in valuing affiliate transactions for cost offset purposes, sellers should not use either flawed market-based indices or the market clearing prices found to be unjust and unreasonable. As explained before, the August 8, 2005 Order’s reference to codes of conduct for affiliate transactions merely responded to parties’ concerns whether affiliate costs could be included in cost filings. The August 8, 2005 Order set a threshold requirement that sellers had to meet if they wanted to include these costs. This threshold requirement was not a substitute for, nor did it alter, the Commission’s decision to deny recovery for opportunity costs and limit cost offsets to each seller’s actual out-of-pocket costs. Thus, in the January 26, 2006 Order, we found that it was necessary to reject inclusion of market-valued affiliate costs in offsets in order to prevent sellers from recovering costs based on the very unjust and unreasonable prices that the MMCP refund methodology was designed to mitigate.<sup>443</sup> Likewise, we found that affiliate transactions valued with index prices may have no relation to the corporate entities’ actual cost of purchasing or generating power.<sup>444</sup> We explained that “[a]llowing cost recovery for affiliate purchases at index rates or any rate above the actual cost ... would unjustly diminish the value of refunds.”<sup>445</sup> We also observed that in the fuel cost allowance phase of the refund proceeding, the Commission required fuel cost allowance claimants to present the actual cost of fuel incurred by the affiliate who first purchased the fuel.<sup>446</sup>

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<sup>442</sup> *Id.* at 39 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 84).

<sup>443</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 90-92.

<sup>444</sup> *Id.* P 93.

<sup>445</sup> *Id.* P 94.

<sup>446</sup> *Id.* at n.150 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166 (2004), *reh’g denied*, 108 FERC ¶ 61,311 (2004)).

220. Within the context of the above findings, the Commission ordered Sempra and TransAlta to “revise their matched and average portfolio costs to eliminate all affiliate purchases that utilized market indexes or other market pricing,” or to revalue their average purchased power costs “valuing affiliate transactions at actual production costs.”<sup>447</sup> Thus, we find the message was clear: Sempra and TransAlta could either remove the affiliate transactions or re-price them at the actual cost of production. In the November 19, 2007 Rehearing Order, we reaffirmed our determination that these sellers with affiliate transactions must either remove those transactions or present their affiliate’s actual costs.<sup>448</sup>

221. The Commission’s policy for addressing affiliate transactions and the authority of the Commission to disregard corporate forms when necessary to fulfill its statutory obligations are well documented. In *Town of Highlands v. Nantahala*, the Commission reiterated the general rule that an agency may disregard the corporate form in the interest of public convenience, fairness, or equity.<sup>449</sup> The Commission explained that this principle of allowing agencies to disregard corporate form is flexible and practical in nature, and corporations may be regarded as one entity for the purposes with which the agency is immediately concerned, even though they are legitimately distinct entities for other purposes. No misconduct on the part of the corporation is necessary; rather, the inquiry is simply a question of whether the statutory purposes would be frustrated by the corporate form.<sup>450</sup> Accordingly, the Commission may regard two entities as one when necessary to meet a statutory goal.<sup>451</sup> In the case of the cost filings, our statutory goal is the avoidance of a confiscatory outcome. The Commission has determined that the corporate entity as a whole would not suffer confiscatory loss if it recovers the actual cost of affiliate generation.<sup>452</sup> Therefore, in the case of sellers claiming cost offsets for

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<sup>447</sup> *Id.* P 95.

<sup>448</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 150.

<sup>449</sup> *Town of Highlands, N.C. v. Nantahala Power & Light Company*, 37 FERC ¶ 61,149, at 61,356 (1986) (*Town of Highlands*) (citing *Town of Brookline v. Gorsuch*, 667 F.2d 215 (1<sup>st</sup> Cir. 1981); *Capital Telephone Co., Inc. v. FCC*, 498 F.2d 734 (D.C. Cir. 1974)).

<sup>450</sup> *Town of Highlands*, 37 FERC ¶ 61,149 at 61,356.

<sup>451</sup> See, e.g., *Margaret M. Stapleton*, 27 FERC ¶ 61,286 (1984); see also *Donald B. Riefler*, 32 FERC ¶ 61,375 (1985).

<sup>452</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 94.

affiliate purchases, it becomes necessary to disregard the corporate form for the limited purpose of assessing the affiliate's actual costs. The primary focus of the refund proceeding is ensuring that California customers receive appropriate refunds. It would defeat the purpose of the MMCP refund methodology to allow sellers to rake in unjust and unreasonable costs "through the back door" of the cost filing process. That is exactly what would occur if sellers were to recover costs from affiliate transactions that were based wholly or in part on the very market-based/index-based rates the Commission is trying to remedy. We cannot allow sellers to collect inflated market prices and avoid the Commission's application of the MMCP by shielding its overall corporate revenue position in affiliate contracts.

222. Based upon our discussion above, we deny Sempra's request for rehearing of the January 26, 2006 Order. Sempra asserts that it should not be required to value its transactions with its affiliate, El Dorado, at the cost of production. While we agree that the off-take agreement between Sempra and its affiliate, El Dorado, sets forth a transaction price for energy, we conclude that, as affiliates, Sempra and El Dorado must be treated as a single entity for purposes of assessing whether the company as a whole experienced an overall revenue shortfall attributable to the MMCP refund methodology.

223. We likewise find flaws in Sempra's argument that because it is an equal owner of the El Dorado Unit with Reliant Energy, the Commission should find that its purchases are not affiliate transactions. Just because Sempra is a part owner rather than a sole owner of a company does not mean there is no affiliate relationship. Moreover, as an equal partner in the limited liability company, Sempra has a fiduciary responsibility to its partner to maximize the value of the going concern. In doing so, it must therefore reflect maximum prices to the entity, or, conversely, minimize costs to the partnership. In either case, the value of the El Dorado facility is reflected in the value of the total Sempra entity. Thus, the contract serves as little more than a transfer pricing mechanism. As a result, it does not transparently indicate Sempra's whole revenue position. Accordingly, Sempra's cost filing should have reflected the actual cost of production from its affiliate generation, or eliminated all affiliate transactions' costs and revenues.

224. Additionally, based upon our discussion above, we find that TransAlta's arguments on rehearing are misplaced. TransAlta claims that its contract with TransAlta Centralia, LLC, its generator affiliate, dictates the price TransAlta paid for the energy to serve the California markets and, therefore, consistent with the filed rate doctrine, the Commission cannot disregard these prices. However, as we explained in the January 26, 2006 Order, when assessing whether the MMCP was confiscatory towards the company as a whole, the filed rate doctrine does not bar the Commission from looking beyond the contract to the actual cost of generating the electricity sold by the

affiliate under the contract.<sup>453</sup> Furthermore, in the January 26, 2006 Order, when the Commission referred to its broad authority to redress anti-competitive behavior, the Commission was not referring specifically to TransAlta, but rather to the general anti-competitive tactics that resulted in our finding the prevailing market clearing prices unjust and unreasonable during the Refund Period. Exercising our broad remedial authority, we declined to honor affiliate contract prices based on those rates, even if that meant disregarding contract prices among affiliates.<sup>454</sup>

225. Furthermore, contrary to TransAlta's assertions, the Commission's authority to treat TransAlta and Centralia as a single corporate entity for cost offset purposes does not hinge on whether TransAlta engaged in any anti-competitive behavior or violated a market tariff. Rather, the relevant inquiry is whether the contract frustrates the Commission's goal of assessing whether application of the MMCP to TransAlta's transactions results in a confiscatory loss to the company as a whole. Because TransAlta's contract with its affiliate included a market-based index component, the Commission determined that TransAlta's contractual purchase price may not represent the company's actual cost of producing/purchasing the energy. Thus, the Commission appropriately required TransAlta to either demonstrate its affiliate's actual cost of production or exclude the transactions from its cost offset claim.

226. In addition, we note that in the cost offset phase of the refund proceedings, the Commission did not order retroactive refunds. Rather, the Commission is giving sellers the opportunity to offset a portion of the retroactive refunds that were ordered as a result of the holding in *Lockyer*, in which the Ninth Circuit established that retroactive refunds were a legally available remedy, given the tariff violations that ultimately resulted in the California energy crisis.<sup>455</sup> Therefore, TransAlta's claim that the Commission cannot order retroactive refunds absent a finding that TransAlta violated a market-based rate tariff misses the point of this cost offset phase of the refund proceeding. Viewed in the proper context, therefore, the fact that the TransAlta/Centralia Agreement constitutes Centralia's filed rate for its sales to TransAlta has no impact on the Commission's authority to require TransAlta to prove actual costs in order to obtain an offset from refund liability.

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<sup>453</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 94.

<sup>454</sup> *Id.*

<sup>455</sup> *Lockyer*, 383 F.3d 1006 at 1015-17.

227. While, as discussed above, the Commission rejects supplemental evidence introduced at the rehearing stage,<sup>456</sup> including TransAlta's agreement with Centralia, the Commission notes that the TransAlta/Centralia Agreement actually supports the Commission's determination. Pursuant to the TransAlta/Centralia Agreement, TransAlta is required to purchase the full output of the Centralia unit, market that energy, and then remit nearly all the revenue to Centralia.<sup>457</sup> Because TransAlta remits nearly all the revenues to Centralia, TransAlta is not incurring a purchase cost in the normal sense; rather, it is using its marketing expertise to bring the most value to the energy produced by the generator. This underscores the importance of focusing the cost offset analysis on whether Centralia is able to recover its cost of production, and not on the contractual cost to TransAlta, the marketing "middle man."<sup>458</sup>

228. Furthermore, contrary to TransAlta's assertion, the Commission rightfully determined that the TransAlta/Centralia contract included a market-based rate component. As specified above, the revenue remitted by TransAlta for transactions of less than twenty-four hours was valued at the Mid-C index. Even though the TransAlta/Centralia Agreement established a price "based on a number of factors," the fact remains that the Mid-C index was concededly a component of the price.<sup>459</sup> Consistent with the reasons articulated in the January 26, 2006 Order for rejecting affiliate transactions valued at index prices, which we reiterate above, this index-based

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<sup>456</sup> See *supra* P 23-25.

<sup>457</sup> See TransAlta Request for Rehearing of January 26, 2006 Order, Exhibit A, Power Purchase and Sale Agreement Between TransAlta Generation, L.L.C. and TransAlta Energy Marketing (US), Inc. (TransAlta/Centralia Agreement), Section 3. The TransAlta/Centralia Agreement specifies that TransAlta will remit to Centralia the total aggregate revenue from all transactions that have a term greater than twenty-four hours, less one percent of that revenue and any transmission and other related costs, plus the aggregate revenue from all transactions for the sale of output at the daily Dow Jones Mid-C index, that have a term less than or equal to twenty-four hours, less the costs of all energy or capacity purchased by TransAlta as a result of Centralia having been out or derated.

<sup>458</sup> This treatment for affiliate transactions is consistent with requiring load serving entities with their own generation fleet to demonstrate the cost of production most likely available to serve the California markets. See, e.g., January 26, 2006 Order, 114 FERC ¶ 61,170 at P 251-252 (requiring Portland General to revise its stacking analysis accordingly).

<sup>459</sup> TransAlta Request for Rehearing of January 26, 2006 Order at 3-4.

component renders the resultant price not reflective of actual costs, and possibly reflective of unjust and unreasonable rates. While the fact that the index is a component of a formula rate, rather than the sole source of the formula rate, may affect the degree to which the contract rate reflects unjust and unreasonable rates, it nonetheless does not represent the actual cost of the energy to the company as a whole. For all of the above reasons, therefore, Commission denies TransAlta's request for rehearing.

229. We similarly deny El Paso's request for rehearing. Since El Paso failed to support its cost filing, in the January 26, 2006 Order, the Commission rejected El Paso's whole cost filing, including affiliate transactions.<sup>460</sup> Even if the Commission had not rejected El Paso's filing in its entirety, the Commission nevertheless would still have precluded El Paso from valuing its affiliate transactions at California market clearing prices, the very prices we seek to redress via the MMCP, because doing so would allow the use of affiliates to unjustly diminish refund obligation.<sup>461</sup> Since El Paso fails to raise any new argument that can persuade us to reverse this determination, we deny El Paso's request for rehearing for the reasons set forth in the January 26, 2006 Order, and as discussed in connection with Sempra and TransAlta above.

**3. Rehearing of November 2, 2006 Order; Compliance with January 26, 2006 Order by Sempra**

230. In the November 2, 2006 Order, the Commission rejected Sempra's compliance filing because it did not comply with the Commission's directive in the January 26, 2006 Order.<sup>462</sup> On rehearing of the November 2, 2006 Order, Sempra argues that the Commission's rejection of its compliance filing was arbitrary and capricious for the following reasons: (1) because Sempra's removal of affiliate purchases from its cost filing was consistent with the January 26, 2006 Order, which authorized sellers to either eliminate all affiliate purchases from their cost calculations or revise their cost calculations by valuing affiliate transactions at actual production costs; and (b) because the Commission did not give Sempra an opportunity to revise its cost filings in accordance with what Sempra characterizes as the "new" requirements on affiliate purchases adopted in the November 2, 2006 Order.<sup>463</sup>

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<sup>460</sup> January 26, 2006 Order, 114 FERC ¶ 61,170 at P 137-140.

<sup>461</sup> *See id.* P 92.

<sup>462</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 77-80.

<sup>463</sup> Sempra Request for Rehearing of November 2, 2006 Order at 1-2 and 6-8.

### **Commission Determination**

231. We deny rehearing because Sempra failed to follow the directives in the January 26, 2006 Order, and, contrary to Sempra's assertion, the November 2, 2006 Order did not create any "new" requirements for affiliate purchases. In the January 26, 2006 Order, the Commission gave Sempra the option of either removing affiliate transactions that utilized market pricing – costs and revenues – or revising its average purchased power costs by valuing its affiliate transactions at actual production cost.<sup>464</sup> In its compliance filing, Sempra attempted to eliminate its affiliate purchases, but the Commission determined in the November 2, 2006 Order that Sempra's methodology of removing affiliate transactions did not actually eliminate those transactions. The Commission explained that, "[b]y removing its affiliate costs without removing the associated revenues, Sempra's calculation essentially creates an arbitrary proxy price at which to value affiliate purchases rather than exclude the entire transactions."<sup>465</sup> In addition, the Commission found that valuing affiliate transactions at prices other than the cost of production produced a value of energy that these sellers could have otherwise received if they sold that energy in the market – in other words, opportunity costs – which the Commission has not allowed sellers to recover in cost offsets. Furthermore, the Commission also found that Sempra not only failed to re-price its affiliate purchases at actual costs of production, but also failed to explain why such value could not be determined. Sempra provided no evidence to justify its assumption that its average price proxy is equivalent to its affiliate generators' actual costs of production. Sempra also failed to comply with prior Commission directives on what evidence was necessary to support its cost offset claim.

232. Sempra's objection that the Commission treated its affiliate transactions differently than its multi-day sale is beside the point. The Commission required sellers to include revenue from multi-day sales and specified how to determine the costs to produce the revenue from those sales. In contrast, for affiliate transactions, the Commission gave Sempra the choice of either eliminating the transactions altogether (revenue *and* costs) or justifying the affiliate's actual costs to produce the relevant revenue. Because Sempra failed to comply with either of the choices the Commission offered, Sempra's compliance filing, and hence its cost filing, is rejected. Because Sempra has raised no argument to persuade us to reverse our prior determination, we deny Sempra's rehearing request.

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<sup>464</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 95.

<sup>465</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 77.

**4. Rehearing of November 2, 2006 Order; Compliance with January 26, 2006 Order by TransAlta**

233. In the November 2, 2006 Order, the Commission rejected TransAlta's inclusion of weighted average costs for certain non-affiliate purchases to replace the previously rejected affiliate costs, relying on prior orders prohibiting sellers with affiliate transactions from using "any value other than the actual cost of production of an affiliate generator."<sup>466</sup> On rehearing of the November 2, Order, TransAlta argues that the Commission acted unreasonably by treating similarly-situated parties differently. Specifically, TransAlta states that the Commission erred by rejecting TransAlta's compliance filing but accepting Powerex's compliance filing. TransAlta argues that, in so doing, the Commission treated TransAlta differently than Powerex. TransAlta explains that the Commission required Powerex to include its affiliate transactions with BC Hydro, priced at the contract price accepted by the British Columbia Utilities Commission. In contrast, the Commission did not allow TransAlta to value its affiliate transactions at the contractual rate on file with the Commission. TransAlta complains that, on compliance, in accordance with the Commission's directive, it eliminated all affiliate purchase costs that the Commission concluded were priced based on market indices, despite the fact that these affiliate purchases costs were governed by the rate on file with the Commission.

234. Also on rehearing of the November 2, 2006 Order, TransAlta argues that the Commission "has once again failed" to rule on TransAlta's argument that the filed rate doctrine compels the Commission to allow TransAlta to recover its costs for power paid to its affiliate for power under the affiliate's rate on file with the Commission, and thus has provided no reason for its departure from precedent.

**Commission Determination**

235. We deny TransAlta's request for rehearing. In the January 26, 2006 Order, the Commission explained that it rejected use of TransAlta's contractual rate with Centralia to value affiliate purchases because the filed rate included a market index component, and indices from the Refund Period have been shown to be flawed.<sup>467</sup> In contrast, BC

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<sup>466</sup> TransAlta Energy Marketing (U.S.) Inc. Request for Rehearing, Docket Nos. EL00-95-173, *et al.*, and EL00-98-159, *et al.*, at 3 (Dec. 1, 2006) (TransAlta Request for Rehearing of November 2, 2006 Order) (quoting November 2, 2006 Order, 117 FERC ¶ 61,151 at P 87).

<sup>467</sup> *San Diego Gas & Elec. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317 at 57 & n.23 (2003) ("Staff finds prices established in California gas spot market were artificially high, due to, among other things, market dysfunctions, illiquidity

(continued...)

Hydro's rate on file with the BCUC is not an index-based rate, but rather a two-part rate consisting of a specific demand charge and an energy charge.<sup>468</sup> Furthermore, the Commission ultimately did not accept the rate on file without modification. Rather, to ensure the rate was reflective of actual costs, in the November 2, 2006 Order, the Commission rejected the demand charge component of BC Hydro's filed rate because it could not validate certain of Powerex's assumptions.<sup>469</sup> In sum, the Commission did not unduly discriminate against TransAlta because Powerex's filed rate is distinguishable from TransAlta's (and Sempra's). Powerex's rate on file at the BCUC is a rate on file with a foreign public utilities commission that does not include a market-based rate component, and, consistent with the requirement that cost offsets must reflect actual, verifiable costs,<sup>470</sup> the Commission also modified Powerex's filed rate.

236. Furthermore, requiring TransAlta to value its affiliate transactions at actual costs for cost offset purposes does not violate the filed rate doctrine. First, a prerequisite to honoring a filed rate is that the rate on file must be just and reasonable. Since TransAlta's contract with its affiliate included a component involving a flawed index, the Commission is not bound to honor this rate during the cost offset phase of the refund proceeding. Second, as we explained in the January 26, 2006 Order, the filed rate doctrine does not bar the Commission from looking beyond a contractual price when establishing a fair remedy.<sup>471</sup> When we cited the Commission's broad remedial authority to address anti-competitive behavior in the January 26, 2006 Order, we were not referring to any specific company, but rather referring to the general anti-competitive behavior that led to the unjust and unreasonable market clearing prices during the Refund Period. Using our broad remedial authority, we refused to honor affiliate contract prices

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in the spot gas market and *misrepresentation of index prices.*") (citing Staff Final Report on Price Manipulation in Western Markets, Docket No. PA02-2-000) (emphasis added).

<sup>468</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 60 (citing Wong Affidavit at 19-20).

<sup>469</sup> *Id.* P 63.

<sup>470</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 1, 103-104.

<sup>471</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 94; *see also* December 19, 2001 Order, 97 FERC ¶ 61,275 at 62,219 ("[T]he beneficial effects of rate certainty must yield to the Commission's statutory obligation to ensure that rates do not exceed the zone of reasonableness.").

incorporating those unjust and unreasonable rates.<sup>472</sup> As discussed above, this is consistent with established precedent in this case as well as others.

## 5. Powerex's Hydroelectric Affiliate Issues

237. Powerex claims the Commission erred in requiring Powerex to include BC Hydro's excess power above native load in its average portfolio purchase cost.<sup>473</sup> Powerex argues that the Commission's conclusion that Powerex had affiliate purchases available for resale in the CAISO and PX markets fails to consider the circumstances that existed during the Refund Period. In particular, Powerex states that the Commission ignores the fact that there was a drought during the Refund Period so there was no excess hydropower available for resale. Powerex then adds that, while it used BC Hydro's system capability to shape its hourly energy products, there was no surplus water and no surplus energy available for sale into the CAISO or PX spot markets.

238. Powerex states that, although it previously argued that the cost offset methodology should include the replacement cost of energy unique to hydroelectric power sellers, the Commission rejected this argument. As a result, Powerex claims that it was appropriate to exclude those affiliate purchases from Powerex's average portfolio purchase cost. Powerex contends that it is inconsistent now to include those purchases, without recognizing the replacement cost associated with those purchases.

239. On the other hand, Cal Parties argue that by accepting Powerex's compliance filing, the Commission effectively permitted Powerex to include replacement costs for hydroelectric power in its cost filing, thereby discriminating against other sellers.<sup>474</sup> Cal Parties state that these replacement costs for hydroelectric power were disallowed in the August 8, 2005 Order,<sup>475</sup> but Powerex's compliance filing failed to remove hydroelectric replacement costs from its average cost calculations, despite the January 26, 2006 Order's directive to remove these costs.<sup>476</sup> Furthermore, Cal Parties claim that if Powerex were to follow the Commission's methodology, Powerex's cost offset would be eliminated.

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<sup>472</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at 94.

<sup>473</sup> Powerex Request for Rehearing at 8-10.

<sup>474</sup> Cal Parties' Request for Rehearing of November 2, 2006 Order at 61.

<sup>475</sup> *Id.* at 61, 63.

<sup>476</sup> *Id.* at 62.

Cal Parties claim that the Commission ignored this issue in the November 2, 2006 Order.<sup>477</sup>

240. Cal Parties also disagree with the Commission's determination that Powerex's netting of long-term and short-term affiliate sales and purchases was different than the netting of CAISO and PX purchases and sales that the Commission disallowed in the August 8, 2005 Order.<sup>478</sup> Cal Parties argue that the Commission lacks discretion to ignore its own precedents without providing an adequate explanation for its decision to deviate from them.<sup>479</sup> Cal Parties add that Powerex's explanation that the sales and purchases at issue were used to refill BC Hydro's reservoirs is not sufficient to overcome the Commission's ruling in the August 8, 2005 Order disallowing special treatment for hydro replacement costs.<sup>480</sup> Cal Parties also argue that the mere fact that Powerex used a "portfolio-type approach" does not provide a basis for carving out a special exception to other directives in the August 8, 2005 Order. Cal Parties assert that the Commission was aware that sellers like Powerex might use a "portfolio-type approach," noting that the Commission required such an approach for all transactions that could not be specifically matched when it prohibited netting and directed marketers to calculate an average cost of energy for their unmatched sales based on their portfolio of short-term purchases.<sup>481</sup> Cal Parties claim that failure to grant rehearing on this issue will have harmful financial consequences because each deviation from the August 8, 2005 Order benefits Powerex by artificially inflating its actual costs during the relevant period.<sup>482</sup>

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<sup>477</sup> *Id.*

<sup>478</sup> *Id.* at 64 (citing November 2, 2006 Order, 117 FERC ¶ 61,151 at P 57; August 8, 2005 Order, 112 FERC ¶ 61,176 at P 89).

<sup>479</sup> *Id.* at 65 (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981); *accord Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))) and 66 (citing *CPUC v. FERC*, 462 F.3d 1027, 1058 (9<sup>th</sup> Cir. 2006)).

<sup>480</sup> *Id.* (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 91).

<sup>481</sup> *Id.* at 65-66 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 70).

<sup>482</sup> *Id.* at 66 (citing Berry Powerex Testimony, CAP-POWEREX-Ex. No. 12 at 12 (Table 3)).

241. Finally, Cal Parties note that in the November 2, 2006 Order, the Commission found it illogical for Powerex to net its surplus purchases with short-term purchases over the entire October 2, 2000 to January 16, 2001 period.<sup>483</sup> Cal Parties argue that the Commission should similarly find it illogical to allow Powerex to use purchases from December 2000 to justify the prices of sales in October 2000. Cal Parties claim that, while the Commission's requirement that Powerex split January 2001 from the fourth quarter of 2000 rectifies some of the damage caused by Powerex's netting approach, it failed to address the fundamental problem (i.e., Powerex was permitted to use a quarterly portfolio approach that applies costs from one month to sales made several months earlier, contrary to the letter and spirit of the August 8, 2005 Order).<sup>484</sup> Cal Parties conclude that Powerex's cost filing should be rejected because it contains multiple methodological errors, which are inconsistent with the directives in the August 8, 2005 Order and January 26, 2006 Order. Cal Parties claim that if these errors were corrected, Powerex's cost offset would be zero.

### **Commission Determination**

242. We deny requests for rehearing concerning issues associated with Powerex's affiliate transactions. The January 26, 2006 Order directed Powerex to include in its compliance filing the excess hydropower above native load of its affiliate, BC Hydro. The Commission's directive was premised on the facts of Powerex's case and Powerex's own testimony, which explained how Powerex utilized power from its affiliate to "shape" day-ahead purchases into hourly sales into CAISO and PX markets.<sup>485</sup> On rehearing, Powerex again argues that because there was a drought during the Refund Period, there was no excess hydropower available, and therefore it did not utilize power from BC Hydro to supply ISO and PX markets. Powerex's rehearing request misses the point. BC Hydro's supply of energy, which Powerex was able to draw on, was not limited to its own system hydropower, but also included thermal generation capability, returns of the Canadian Entitlement to the BC Hydro system, and seasonal exchanges with other utilities.<sup>486</sup> As Powerex acknowledged, it used the capability of the BC Hydro system – which included this amalgam of resources – to shape multi-hour and day-ahead purchases

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<sup>483</sup> *Id.* at 67 (citing November 2, 2006 Order, 117 FERC ¶ 61,151 at P 57-59).

<sup>484</sup> *Id.* at 68 (citing California Parties' Powerex Comments at 8 (citing Berry Powerex Testimony at 6, Figure 1)).

<sup>485</sup> *See* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 275-277.

<sup>486</sup> Tabors Affidavit at 13.

into single hour-ahead and real-time sales.<sup>487</sup> In other words, as a business practice, Powerex regularly obtained hydropower from BC Hydro and made that energy available for sale into the CAISO and PX markets. Under the framework established in the August 8, 2005 Order, a marketer like Powerex calculating its average portfolio costs must rely on its entire portfolio and cannot net out its low cost resources.<sup>488</sup> In an abundance of caution, to ensure that Powerex was not netting out its lowest cost resources, the Commission appropriately required Powerex to include all of its affiliate transactions in its cost offset claim.

243. Furthermore, we continue to disagree with Powerex's claim that its hydroelectric purchases "net out" during the relevant period. Powerex's own testimony acknowledges drawing on energy from BC Hydro during the Refund Period, and the cost of such energy (priced at the BCUC filed rate, as modified by the Commission) was generally less expensive than the market-based cost of Powerex's third-party purchases. Therefore, it would be inappropriate and contrary to the August 8, 2005 Order's emphasis on actual costs to allow Powerex to net out its affiliate transactions.

244. Powerex's continued assertion that it is inconsistent to require Powerex to include affiliate hydro purchases, without simultaneously allowing for the inclusion of replacement costs, is also unconvincing. These purchases are included to assess volume (number of megawatts) of sales; volume is a separate assessment from costs, and it is within the Commission's discretion to disallow pricing of these transactions at replacement cost. To elaborate, Powerex declined to file its affiliate purchases; therefore, the Commission found that it was reasonable to use BC Hydro's power, to the extent it exceeded BC Hydro's native load requirements, as a proxy for what would have been available to Powerex to sell to California markets. Since Powerex is a marketer (not an LSE), it would have marketed its affiliate's excess power, and given the high prices in the California markets during the Refund Period, would likely have sold that power into the ISO/PX. The Commission may take into account the volume of sales and associated revenue without allowing for the inclusion of replacement costs, i.e., the cost of purchasing power to replace hydroelectric power sold in the ISO/PX markets. The August 8, 2005 Order disallowed recovery of replacement costs for hydropower.<sup>489</sup>

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<sup>487</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 276 (citing Powerex Reply Comments to the December 10, 2004 Order, Docket No. EL00-95-000 (filed January 19, 2005)).

<sup>488</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 37.

<sup>489</sup> *Id.* P 91; November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 88.

Replacement costs implicate long-term, future purchases, and this proceeding only focuses on the actual costs incurred to serve ISO/PX markets during the refund period.<sup>490</sup>

245. Further, we continue to find that the Commission properly required Powerex to include its affiliate transactions because even priced at the rate on file with the BCUC they were likely less expensive than the market-based third party purchases Powerex included in its original cost filing. If the Commission were to allow the exclusion of the relatively inexpensive power Powerex was able to rely on from its affiliate, BC Hydro, this would totally distort Powerex's average costs, with the result that the costs would appear much higher than they actually were.

246. Likewise, we also deny Cal Parties' request for rehearing on the issue of Powerex's BC Hydro replacement costs. Specifically, Cal Parties argue that Powerex's purchases, which were then resold to its affiliate BC Hydro, are the very replacement costs for hydropower that the Commission disallowed in the August 8 Order. Cal Parties argue that by allowing Powerex to net its exports to California against its sales to BC Hydro, the Commission enabled Powerex to recover replacement costs. We disagree. Throughout this cost offset process, Commission has consistently refused to allow Powerex or any other seller to obtain hydropower replacement costs.<sup>491</sup> Replacement costs are not actual, historical costs for sales into ISO and PX markets, but rather the cost of replacing the power sold during the Refund Period for future use. As we have explained, we permitted Powerex to net in order to determine the volume (number of megawatts) Powerex had available to sell into the CAISO/PX during the Refund Period, not to determine the replacement cost of such power. Indeed, on rehearing of the November 2, 2006 Order, Powerex complained that it was not allowed to recover hydro replacement costs, even though it was required to include its entire portfolio with the Commission.<sup>492</sup>

247. We reject Cal Parties' contention that the netting utilized by Powerex is the same as the netting of ISO and PX purchases and sales prohibited by the August 8, 2005 Order. In the August 8, 2005 Order, the Commission determined that it was inappropriate to net purchases with sales because doing so was inconsistent with a methodology that required

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<sup>490</sup> See Powerex October 17 2005 Reply Comments at 18-20 (discussing complex steps necessary to implement a proper sophisticated replacement cost analysis); *see also* Wellenius Affidavit at 9:5-11:4.

<sup>491</sup> See August 8, 2005 Order, 112 FERC ¶ 61,176 at P 90; November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 88.

<sup>492</sup> Powerex Request for Rehearing of the November 2, 2006 Order at P 10.

<sup>493</sup> As

a result, the Commission required sellers to demonstrate separately their total revenue position for sales into the CAISO and PX markets and their costs to make those sales. Powerex's netting is different than the netting the Commission found inappropriate in the August 8, 2005 Order. Powerex utilized a netting approach to determine the volume (amount of MW) of affiliate transactions that must be included in its cost offset claim, as amended per the January 26, 2006 Order.<sup>494</sup> Powerex's netting did not improperly inflate costs. Since the netting of affiliate transactions does not conflict with the cost offset calculation methodology, we continue to find this use of netting is reasonable. Accordingly, we deny this rehearing request.

### **K. Uninstructed Energy**

248. In the January 26, 2006 Order, the Commission rejected the inclusion of costs associated with the purchase of uninstructed energy (i.e., energy imbalances) from the CAISO. We found that assessments for imbalance energy did not constitute costs related to forward energy purchases available for resale to the CAISO or PX. Thus, we concluded that inclusion of these purchases would be inconsistent with the August 8, 2005 Order.<sup>495</sup> However, we found that sellers may include the revenues from uninstructed energy sales to the CAISO, along with the associated purchases or generation costs related to those sales.<sup>496</sup>

249. Cal Parties request rehearing of the Commission's decisions, contending that the Commission erred in not including the purchase cost of uninstructed energy in sellers cost offsets, while including uninstructed energy sales.<sup>497</sup> Cal Parties argues that the purpose of uninstructed energy purchases is to meet a market participant's sale

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<sup>493</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 89. *See also* November 2, 2006 Order, 117 FERC ¶ 61,151 at P 57.

<sup>494</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 57.

<sup>495</sup> *Id.* P 107-108.

<sup>496</sup> *Id.* P 109.

<sup>497</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 45-47. In addition to arguing generally that uninstructed energy purchases should be included, Cal Parties make identical claims with regard to specific sellers' submittals, including Puget. *Id.* at 110. Cal Parties also make this argument in connection with Avista's compliance filing. Cal Parties' Request for Rehearing of November 2, 2006 Order at 37-38.

obligations into the CAISO and PX markets when the market participant has otherwise failed to meet those obligations. Cal Parties reason, therefore, that the purchases are, by definition, part of the supply that is used to meet CAISO and PX sale obligations and should be includable in the cost filings.<sup>498</sup>

250. Cal Parties explain that excluding an uninstructed energy purchase from consideration has the effect of presuming that a sale commitment to, for example, the PX, was met with other, more costly resources. They claim that such a presumption is not consistent with the way that commitments were met, and assert that it is plausible that such transactions were, instead, met with the uninstructed energy purchases, priced at or below the MMCP. Cal Parties further state that the compliance filings of various sellers reveal that the exclusion of uninstructed energy purchases from their cost filings actually increases the cost filings of sellers.<sup>499</sup>

### **Commission Determination**

251. We deny Cal Parties' rehearing requests. Cal Parties present no new evidence for the Commission to consider. Rather, they continue to argue that sellers used the uninstructed energy market to their advantage and that, as a result, sales transactions associated with uninstructed energy should be used to lower the overall average cost of power for the under-supplied seller<sup>500</sup> into the CAISO markets. First, as we have indicated in prior orders, the Commission disagrees with Cal Parties' contention that uninstructed energy sales to the CAISO imply that a seller was involved in gaming practices that violated the CAISO tariff.<sup>501</sup> Through the Show Cause Orders and the 100 Days of Discovery, the Commission investigated sellers, both individually and through alliances, to determine whether those sellers were involved in gaming or other anomalous market behavior. As a result of those proceedings, the Commission ultimately terminated cases against certain sellers, while other sellers settled without any admission of guilt.<sup>502</sup>

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<sup>498</sup> *Id.* at 45.

<sup>499</sup> *Id.* at 47.

<sup>500</sup> The undersupplied seller is the seller for whom the CAISO made uninstructed energy purchases to cover the seller's shortage of energy.

<sup>501</sup> See January 26, 2006 Order, 114 FERC ¶ 61,070 at P 109 and n.157.

<sup>502</sup> See, e.g., *Coral Power, L.L.C.*, 108 FERC ¶ 61,115 (2004); *Idaho Power Co.*, 106 FERC ¶ 61,208 (2004); *Portland General Electric Co.*, 106 FERC ¶ 61,236 (2004); *Powerex Corp.*, 106 FERC ¶ 61,304 (2004); *Sempra Energy Trading Co.*, 108 FERC ¶ 61,114 (2004); *Arizona Public Service Co., et al.*, 106 FERC ¶ 61,021 (2004).

We find here that the Cal Parties' position now attempts to reopen those proceedings. As discussed above,<sup>503</sup> the proceedings investigating gaming are terminated and will not be reopened.

252. Additionally, we reject Cal Parties' contention that the inclusion of uninstructed energy purchases is appropriate as a reduction to the seller's average cost of power. When a seller is under-supplied (i.e., short) in the real-time market, the CAISO procures the shortage from another seller and passes the cost of the procurement on to the seller who was initially short. The CAISO, in order to meet the short position in real time, acts as a transfer agent to balance the system. The seller who supplied the imbalance energy in real time to meet the short position is allowed to account for the sale to the CAISO market and its associated cost of power in its own cost filing. This is because, consistent with the August 8, 2005 Order, the seller who supplied the imbalance energy sold the imbalance energy to the CAISO/PX for resale. In contrast, the seller who was short is effectively buying the energy at the mitigated rate from the CAISO. The short seller is not buying for resale, and has no costs associated with producing the power. By allowing the seller who sold the uninstructed energy to the CAISO to include the cost associated with this energy in its cost filing, the uninstructed energy transactions are all accounted for in the refund proceeding. Accordingly, we re-affirm our prior determination that requiring the short seller also to include the cost of uninstructed energy purchases in its cost filing would result in a double accounting and unreasonably dilute the short seller's cost of power. Accordingly, the Commission will not require inclusion of the cost of uninstructed energy purchases in the calculation of the uninstructed energy purchaser's average costs. Thus, California Parties' request for rehearing is denied.

**L. Opportunity Purchases**<sup>504</sup>

253. In the January 26, 2006 Order, the Commission, consistent with its findings in the August 8, 2005 Order, rejected the inclusion of opportunity purchases in the cost filings.<sup>505</sup>

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<sup>503</sup> See *supra* P 134-139.

<sup>504</sup> The term "opportunity purchases" refers to purchases load serving entities made with the intent to resell at a profit and not for the purpose of serving native load. See August 8, 2005 Order, 112 FERC ¶ 61,176 at P 71.

<sup>505</sup> See January 26, 2006 Order, 114 FERC ¶ 61,070 at P 253 (Portland), and P 331 (Puget).

254. Puget requested rehearing of the Commission's determination in the January 26, 2006 Order.<sup>506</sup> Portland did not raise this issue in its request for rehearing of the January 26, 2006 Order, but filed for rehearing of this issue after the Commission rejected Portland's compliance filing in the November 2, 2006 Order.<sup>507</sup> Both Puget and Portland argue that disallowing inclusion of opportunity purchases in cost offsets discriminates against load serving entities. They contend that treating load serving entities differently than non-load serving entity marketers is illogical because there is no difference between their wholesale operations. Both Portland and Puget assert that the only factual distinction between a load serving entity and a non-load serving entity marketer is that load serving entities sell in a regulated retail market in addition to making wholesale sales, which results in different allocation methodologies for costs of supplies.<sup>508</sup>

255. Portland argues that the fact that these allocation methodologies differ does not justify penalizing load serving entities. Portland asserts that there is no meaningful distinction between how non-load serving entities and load serving entities recover the cost of their sales, as both undertake their marketing activities on the assumption that they will recover the cost of their sales and be compensated for risk. Therefore, Portland contends that no general presumption can be made that one type of marketer has an inherent advantage over another. Portland also states that the Commission cannot base its decision to exclude opportunity purchases from load serving entities' cost filings on the mere assumption that wholesale sales revenue from the CAISO and PX markets reduces retail rates in some type of regulatory risk-sharing that justifies eliminating recovery of the costs associated with opportunity purchases.<sup>509</sup>

### **Commission Determination**

256. We deny rehearing because the Commission has previously addressed the issue of why it is appropriate to exclude opportunity purchases from load serving entities' cost filings, and affirm our prior determinations.<sup>510</sup> The August 8, 2005 Order disallowed

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<sup>506</sup> Puget Request for Rehearing of January 26, 2006 Order at 8-9.

<sup>507</sup> Portland Request for Rehearing of November 2, 2006 Order at 10-14, 20-23.

<sup>508</sup> *Id.* at 10-14. *See also* Puget Request for Rehearing of January 26, 2006 Order at 8-9.

<sup>509</sup> Portland Request for Rehearing of November 2, 2006 Order at 10-14.

<sup>510</sup> *See* August 8, 2005 Order, 112 FERC ¶ 61,176 at P 71; November 19, 2007 Rehearing Order, 121 FERC ¶ 61,181 at 69-74; January 26, 2006 Order, 114 FERC ¶

(continued...)

recovery of opportunity purchases for load serving entities.<sup>511</sup> The Commission reaffirmed this decision in the November 19, 2007 Rehearing Order, explaining that the cost filing methodology treats load serving entities like any other seller in the sense that they are provided an opportunity to recover costs incurred to make sales into the CAISO/PX markets during the Refund Period. We further explained how, consistent with sellers' advice, the Commission established a cost filing methodology that corresponded to each type of seller's business practices. Using this principle, the Commission determined that the universe of relevant costs for a load serving entity included purchased power originally procured to serve native load, but ultimately not needed due to lower than expected native load demand.<sup>512</sup> We also reiterated, however, the Commission's corollary principle that since costs incurred from opportunity purchases, i.e., those purchases made with the intent to resell at a profit rather than to serve native load, "have nothing to do with load serving entities' primary business function or charged franchise requirements," it would be inappropriate to allow load serving entities to offset those costs from their refund obligation.<sup>513</sup>

257. On rehearing, challengers assert that the Commission wrongly disallowed recovery of opportunity purchases for load serving entities because the "only difference" between marketers and load serving entities is that load serving entities make retail sales and there is "no meaningful distinction" between how load serving entities and marketers recover their costs. However, the factual similarities parties allege do not contradict the distinction the Commission relied on in denying load serving entities inclusion of opportunity purchases in their cost filings, namely the difference in primary business purpose between the two classes of entities. In fact, one of the key differences challengers acknowledge, the fact that load serving entities also serve retail customers,

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61,070 at P 253 and 331.

<sup>511</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 71.

<sup>512</sup> See November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 70.

<sup>513</sup> See *id.* (citing *e.g.*, *In re Application of Nevada Power Company*, Docket No. 01-11029, 2002 Nev. PUC LEXIS 81, at P 279, 291-92 (2002) ("[Nevada Power Company, or NPC,] was not focused on serving its customers in the manner that is expected of Nevada's utility companies...NPC was indeed engaging in at least some speculation that it could benefit from power sales. Unfortunately, the decline in the energy market after April 2001 left NPC with high priced energy in a market of low prices. Therefore, NPC was unable to realize its desired benefit from these sales. Accordingly, the [Nevada Public Service] Commission finds that...disallowances for imprudently incurred expenses should be made.")).

258. In essence, Puget's request for rehearing of the January 26, 2006 Order raises the same arguments that the Commission already addressed in the November 19, 2007 Rehearing Order, or elaborates on arguments that Puget could have raised in time for consideration in the November 19, 2007 Rehearing Order.<sup>514</sup> We are not persuaded to depart from our prior determination. Therefore, we deny Puget's rehearing request.

259. We further reject Portland's request for rehearing because Portland failed to raise this issue in its request for rehearing of the January 26, 2006 Order, in which we directed Portland to remove opportunity sales from its cost filing; instead, Portland only raised the issue on rehearing of the November 2, 2007 Order on Compliance Filings.<sup>515</sup> Since the Commission's focus in reviewing compliance filings is to assess whether they comply with the Commission's previously-stated directives,<sup>516</sup> it is improper to challenge the substance of those directives on rehearing of an order on compliance.<sup>517</sup> Therefore, because the issue of whether load serving entities could include the costs associated with opportunity sales in their cost filings was not properly before the Commission in the

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<sup>514</sup> In fact, Puget was designated as one of the "Indicated LSEs" that raised this issue in the rehearing requests that culminated in the November 19, 2007 Rehearing Order. *Id.* at n.23. To the extent we have already addressed this issue once on rehearing, a second rehearing "does not lie" and should be rejected. *See, e.g., Midwest Indep. Trans. Sys. Operator Inc.*, 122 FERC ¶ 61,127, at P 26 (2008) ("The Commission does not allow parties to seek rehearing of an order denying rehearing.") (citing *Bridgeport Energy, LLC*, 114 FERC ¶ 61,125, at P 8 (2006) (citing *Southern Company Servs., Inc.*, 111 FERC ¶ 61,239 (2005); *AES Warrior Run, Inc. v. Potomac Edison Co. d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Pub. Serv. Co.*, 65 FERC ¶ 61,088 (1993))).

<sup>515</sup> We note that Portland, as a member of Indicated Load Serving Entities, raised these arguments on rehearing of the August 8, 2005 order, which we denied in the November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 70.

<sup>516</sup> *See, e.g., NorthWestern Corp.*, 113 FERC ¶ 61,215, at P 9 (2005); *AES Huntington Beach, LLC*, 111 FERC ¶ 61,079, at P 60 (2005).

<sup>517</sup> *See Reliant Energy Aurora*, 111 FERC ¶ 61,159, at P 26 (2005) (stating that compliance filings must be limited to the specific directives ordered by the Commission); *AES Huntington Beach, LLC*, 111 FERC ¶ 61,079, at P 60 (2005); *FirstEnergy Operating Companies*, 111 FERC ¶ 61,032, at P 20 (2005).

November 2, 2007 Order on Compliance, we must deny Portland's request for rehearing of the November 2, 2006 Order. But, even if we were to consider the merits of Portland's request for rehearing, we would deny it. Portland's request, like Puget's, was previously decided in the November 19, 2007 Rehearing Order.<sup>518</sup> Portland raises no arguments or concerns that could not have been raised earlier or that have not already been addressed in the paragraph above or in prior orders. Accordingly, we deny Portland's request for rehearing of this issue.

**M. Matching Versus Average Cost Methodology**

260. In the August 8, 2005 Order, the Commission determined that sellers should first match specific sales to specific resources if they could provide a clear correlation between each sale and a specific resource.<sup>519</sup> If sellers could not match their resources on a transaction-by-transaction basis, the Commission required sellers to average their costs.<sup>520</sup>

261. On rehearing of the January 26, 2006 Order, Cal Parties state that, although in principle they do not oppose the concept of matching transactions, the practice has proven to be problematic. Cal Parties argue that, in many cases, the support the sellers provided and the Commission accepted was insufficient to show that the transactions actually matched.<sup>521</sup> In this regard, Cal Parties contend that, in the January 26, Order, the Commission did not address Cal Parties' concerns regarding the after-the-fact matching in the TransAlta cost filing, other than to find that the sample of transactions provided was sufficient.<sup>522</sup> Cal Parties claim that access to a seller's complete trading portfolio(s) or book(s) is needed to make sure that sellers have not engaged in after-the-fact tactics that increase the cost side of a transaction.<sup>523</sup> Cal Parties assert that even (North

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<sup>518</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 70.

<sup>519</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 65, 69.

<sup>520</sup> *Id.* P 67-69.

<sup>521</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 36 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 65). On rehearing of the November 2, 2006 Order, Cal Parties argue specifically that the Commission should find that Avista's matched transactions in its Supplemental Cost Filing and compliance filing are not completely verifiable. Cal Parties' Request for Rehearing of November 2, 2006 Order at 11, 25-30. This issue is addressed in section IV.B. at P 277-280.

<sup>522</sup> *Id.* at 37 n.84 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 382).

American Electric Reliability Corporation (NERC) tag data may require additional validation for sales into California markets during the Refund Period.<sup>524</sup>

262. Therefore, Cal Parties request that the Commission reconsider its rulings approving cost filings without such documentation for matched transactions and either reject the filings or require each seller to provide its complete trading book(s) to corroborate that the seller's matching methodology was not used to game the cost filing process to the detriment of consumers. Alternatively, Cal Parties request that the Commission order evidentiary proceedings with discovery and the opportunity for cross-examination in order to fully evaluate and, if appropriate, challenge the claimed matches.

### **Commission Determination**

263. We deny rehearing. On rehearing of the August 8, 2005 Order, the Cal Parties also raised concerns with the possible abuse of the matching process. In the November 19, 2007 Rehearing Order, the Commission rejected these arguments.<sup>525</sup> The Commission found that the support required to justify sellers' costs, as explained in the August 8 Order and in more detail therein, adequately mitigated Cal Parties' concerns that the matching methodology would encourage sellers to propose inappropriate matches and provide insufficient data in order to show inflated losses.<sup>526</sup> The Commission also noted that cost filings had to include attestation of a company official, and the Commission's new penalty authority was in effect when these cost filings were made.<sup>527</sup> Insofar as the Cal Parties have not raised any new issues in this regard on rehearing of the January 26, 2006 Order, we deny rehearing.

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<sup>523</sup> *Id.* at 37 (citing Prepared Testimony of James D. Shandalov on Behalf of the California Parties Concerning Matching, CAP-CONSTELLATION-Ex. No. 4 at 6-9, Docket Nos. EL00-95-161 & EL00-98-148 (Oct. 11, 2005) (Shandalov Constellation Testimony)).

<sup>524</sup> *Id.* at 37 n.83 (citing Shandalov Constellation Testimony at 8).

<sup>525</sup> *See* November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 41, 45.

<sup>526</sup> *Id.* P 45 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 65).

<sup>527</sup> *Id.* (noting Section 1284(e) of the Energy Policy Act of 2005 amended section 316A(b) of the FPA, 16 U.S.C. § 825o-1(a), and provides the Commission authority to assess a civil penalty of not more than \$1,000,000 for each day that a violation of any provision of Part II of the FPA or any provision of any rule or order under there continues).

264. We further disagree with Cal Parties' assertion on rehearing that the Commission's application of the matching requirement was problematic, and maintain that the evidence the Commission relied upon to accept matched transactions was sufficient. In the January 26, 2006 Order, the Commission provided further detail regarding the support the Commission's required of sellers in its verification of matched transactions.<sup>528</sup> Based upon a review of the support provided, the Commission found that cost filers who utilized a matching of transaction-by-transaction accounting of resources were able to match sales together with corresponding documentation.<sup>529</sup> We continue to find that the data required by the Commission was sufficient to verify these matched transaction claims.

265. We also find Cal Parties' concern with the use of NERC tag data unfounded. While it is true that the Commission permitted sellers to use NERC tag data to substantiate a transaction, a tag alone could not verify a transaction.<sup>530</sup> The Commission required that seller submitted NERC tag data with some other evidence (e.g., an invoice or trade desk verifications) to demonstrate that the transaction matched the sale to the CAISO or PX.<sup>531</sup> The Commission did not rely upon tag data alone because the tags only demonstrate a seller's intent to make a delivery; other documentation (such as a final payment invoice) is needed to show that the intended delivery was made and the transaction was completed (i.e., a purchase occurred).

266. We also find that Cal Parties' statement – that the Commission did not address Cal Parties' concerns regarding the after-the-fact matching in the TransAlta cost filing – is inaccurate. In the January 26, 2006 Order, the Commission explicitly indicated the documentation it relied on to conclude that, contrary to Cal Parties' assertion, the matches were supported by the evidence.<sup>532</sup> In particular, the Commission explained how the invoices met the criteria set forth in the August 8, 2005 Order and the sample of

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<sup>528</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 63-65. *See also* August 8, 2005 Order, 112 FERC ¶ 61,176 at P 64-65 (explaining documentation needed for matched transactions).

<sup>529</sup> *Id.* P 64.

<sup>530</sup> *See, e.g., infra* P 367 (finding that the NERC tag data, without additional support, such as an invoice, was insufficient to support certain costs claimed by Sempra).

<sup>531</sup> *See* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 63-65.

<sup>532</sup> *Id.* P 382.

transactions were sufficient.<sup>533</sup> The Commission also explained why the template for matched transactions submitted by TransAlta was satisfactory.<sup>534</sup> We further note that this issue is essentially moot for TransAlta because the Commission rejected its cost filing in the November 2, 2006 Order.<sup>535</sup>

#### IV. Company Specific Findings

##### A. APX

267. In the January 26, 2006 Order, the Commission found that individual APX participants are entitled to file for an offset to their refund obligations.<sup>536</sup>

268. Cal Parties assert that the Commission's determination is arbitrary, capricious, not the result of reasoned decision-making and should be reversed because the Commission did not address the following arguments: (1) the cost filings submitted by individual APX participants should be rejected because APX did not submit a cost filing and individual APX participants' sales cannot be considered in isolation; (2) the offsets to refunds based on sales to the CAISO through APX must be consistent with APX's overall position in the CAISO market, and (3) to the extent that APX participants seek cost-based offsets to refunds, those offsets must be borne within the APX by APX participants.<sup>537</sup>

269. Cal Parties state that, to the extent that APX participants seek cost-based refunds, those offsets must be borne within the APX by APX participants to preclude a form of cherry picking that is unique to APX.<sup>538</sup> Cal Parties state that this arises because individual APX market participant cost filings reflect only the costs and revenues associated with that APX market participant's transactions in the markets through APX during that interval rather than a complete accounting of the costs and revenues associated with all APX market participants' transactions in the markets through the APX during any given interval. Cal Parties contend that, by failing to find that the offsets must be borne with the APX by APX participants, in the January 26, 2006 Order, the

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<sup>533</sup> *Id.* P 382, n.262.

<sup>534</sup> *Id.* P 382.

<sup>535</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 89.

<sup>536</sup> *See* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 176.

<sup>537</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 67-69.

<sup>538</sup> *Id.* at 67.

Commission permitted individual APX participants to get the benefit of net refunds while charging the rest of the market for their cost offset claims. Cal Parties argue that such a result is manifestly unjust and unreasonable and encourages seller opportunism.

270. Cal Parties also seek clarification that the January 26, 2006 Order requires APX to: (1) provide its final settlement data to all CAISO and PX market participants, including Cal Parties and (2) to file the final settlement data with the Commission. Alternatively, Cal Parties seek rehearing on this issue.

### **Commission Determination**

271. Cal Parties are incorrect that the Commission did not consider the issues regarding APX sellers and whether those sellers should be afforded the opportunity to submit a cost filing. In the January 26, 2006 Order, the Commission stated that it disagreed with Cal Parties' argument that individual APX participants are not entitled to file for an offset to their refund obligations.<sup>539</sup> The Commission pointed out that it had previously established that all sellers are entitled to submit a cost filing and sellers behind the APX are responsible for refunds.<sup>540</sup> Because sellers behind the APX are jointly and severally responsible for refunds where refund liability cannot be apportioned based on specific transactions to an individual seller, the Commission permitted them to submit cost filings, including costs associated with APX transactions.<sup>541</sup> For these reasons, we deny rehearing on this point.

272. We clarify that we will not require offsets from sellers behind the APX to be settled only among the APX sellers. While APX was the scheduling coordinator for sellers behind it, the Commission has determined that the unique situation of the APX requires that the APX and its sellers be held jointly and severally liable for refunds where the refund liability cannot be apportioned based on specific transactions to an individual seller.<sup>542</sup> Through the designation of joint and severable liability, the Commission has established that these sellers are in no different position than any other individual seller.

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<sup>539</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at 176, 370.

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*; *see also* October 2003 Order, 105 FERC ¶ 61,066 at P 170; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 122 FERC ¶ 61,274, at P 54-56 (2008) (March 2008 Order).

<sup>542</sup> October 2003 Order, 105 FERC ¶ 61,066 at P 170; *see also* March 2008 Order, 122 FERC ¶ 61,274 at P 54-56.

In particular, the Commission has not required sellers who made sales to the CAISO using the PX as the scheduling coordinator to net their offsets against other sellers who transacted within the PX and also made sales to the CAISO. This point is significant because the Commission has determined that the PX, like APX, is a unique entity that should similarly be shielded from refund liability.<sup>543</sup> Therefore, the Commission must treat similarly the sellers that used the APX and PX. Thus, to require APX sellers to net their offsets only among the APX sellers, as Cal Parties request, would be unduly discriminatory. Furthermore, in an order issued on May 12, 2006, the Commission combined all the markets for the allocation of cost offset amounts; therefore, it would be unduly discriminatory to treat APX sellers differently from all other PX and CAISO sellers.<sup>544</sup> We permit the APX sellers to submit cost filings and do not require them to net their offsets only behind the APX. Accordingly, we deny Cal Parties' request.

273. We find that it is unnecessary to clarify that offsets to refunds in the CAISO market through the APX should be consistent with APX's overall position in the CAISO market. Sellers behind the APX can only request offsets that are consistent with APX's position in the CAISO market. Because the APX receives the final settlement statements from the CAISO and PX and APX was the scheduling coordinator of record for these transactions, by definition, offsets from sellers behind the APX cannot be any greater than the total offset position of APX in the California markets. This outcome is consistent with the Commission's prior findings that sellers not be placed in a position that allows them to move from owing refunds to receiving refunds.<sup>545</sup> For these reasons, we deny this rehearing request.

274. We deny Cal Parties' request for clarification that the January 26, 2006 Order requires APX to provide its final settlement data to all CAISO and PX market participants, including Cal Parties. In the January 26, 2006 Order, the Commission required APX to provide final revenue data to sellers behind the APX in order to certify the accuracy of each APX seller's final cost offset position.<sup>546</sup> Because APX would not be able to provide the completed revenue data to APX participants until final settlement data was received from the CAISO, the Commission established a time frame for CAISO

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<sup>543</sup> See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 125 FERC ¶ 61,214, at P 36-37 (2008).

<sup>544</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,171, at P 45 (2006).

<sup>545</sup> See, e.g., August 8, 2005 Order, 112 FERC ¶ 61,176 at P 81.

<sup>546</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 58.

to submit final data to sellers and a subsequent time frame for APX to submit final settlement data to APX participants.<sup>547</sup> Contrary to Cal Parties' assertion, at no time did the Commission require APX to submit final settlement data to all parties in this proceeding. We do not find it relevant to do so at this juncture in the refund proceeding either. Accordingly, we deny Cal Parties' request on this point.

275. We grant Cal Parties' request for clarification that that the final APX settlement data be filed with the Commission. We reiterate that APX has an obligation to submit a final compliance filing demonstrating the refund liability of APX participants.<sup>548</sup> In the October 16, 2003 Order, the Commission required APX to submit a final accounting of the refund liability of each of the APX participants.<sup>549</sup> Due to APX's need for final CAISO and PX settlement data and the implementation of the cost offset proceeding, APX's filing could not have been completed with accuracy. Therefore, upon the conclusion of the CAISO's final financial clearing, APX is required to submit its compliance filing.<sup>550</sup>

## **B. Avista Energy**

### **1. Transaction Data**

276. On rehearing of the January 26, 2006 Order and November 2, 2006 Order, Cal Parties claim that Avista's transactional data was not subject to sufficient verification. In particular, Cal Parties contend that Avista provided no reliable contemporaneous documentation for its matched transactions. Cal Parties maintain that the inadequacy of Avista's documentation makes it impossible both to confirm the method by which Avista identified its matched purchases and to determine whether Avista properly matches sales. Cal Parties assert that Avista's movement of more and more matched transactions to its unmatched portfolio did not cure this failing. Cal Parties argue that the same lack of verification exists with regard to Avista's unmatched transactions and claims that without a documented explanation of how and why transactions were selected for inclusion, the

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<sup>547</sup> *See id.* P 389.

<sup>548</sup> *See* October 2003 Order, 105 FERC ¶ 61, 066 at P 170.

<sup>549</sup> *Id.*

<sup>550</sup> *See id.*

Commission cannot be assured that Avista's cost offset claim is justified. Thus, Cal Parties assert that the Commission should not accept Avista's cost filing.<sup>551</sup>

277. In addition, Cal Parties argue that the Commission did not address the issue of verification of transaction selection because it erroneously concluded that Avista's corrections adequately addressed Cal Parties' concerns. Cal Parties contend that the correction of errors does not address the fundamental lack of verification for Avista's transactions.<sup>552</sup>

### **Commission Determination**

278. In the January 26, 2006 Order, the Commission conditionally accepted Avista's cost filing subject to modification.<sup>553</sup> In the November 2, 2006 Order, the Commission accepted Avista's compliance filing because it complied with the directives in the January 26, 2006 Order.<sup>554</sup> We disagree with Cal Parties' contention that Avista failed to provide sufficient verification and find that any concerns about the adequacy of Avista's data were addressed in Avista's subsequent filings.

279. First, the Commission thoroughly reviewed all data received, including rebutting comments and any subsequent reply comments to those rebuttals. Cal Parties raised these same concerns in those comments that it raises now, repeatedly arguing that Avista had not sufficiently supported its filing and requesting rejection or an evidentiary hearing. Second, in the review of Avista's submittal, the Commission evaluated all the data included with the filing as well as other publicly available data, if necessary, to ascertain its veracity. As the Commission emphasized in the January 26, 2006 Order, sample data were sufficient to validate a seller's claim if it was clear from the filing how costs were derived.<sup>555</sup> As a result, the Commission was able to validate that Avista's original cost offset claim amount was adequately supported.<sup>556</sup> Using these same principles, the

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<sup>551</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 69-70 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 175, 182); Cal Parties' Request for Rehearing of November 2, 2006 Order at 25-26.

<sup>552</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 73; Cal Parties' Request for Rehearing of November 2, 2006 Order at 26, 30.

<sup>553</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 175-182.

<sup>554</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 6.

<sup>555</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at 11, 13, 44, 47.

<sup>556</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 14.

Commission determined in the November 2, 2006 Order that Avista's compliance filing satisfactorily complied with the January 26, 2006 Order.<sup>557</sup> Cal Parties have not raised any issues or presented any evidence on rehearing to persuade us otherwise. Accordingly, we deny rehearing on this issue.

## 2. APX Transactions

280. On rehearing of the January 26, 2006 Order and November 2, 2006 Order, Cal Parties argue that Avista's cost offset claim for its APX transactions should be disallowed. Cal Parties claim that despite the fact that APX provided extensive resettlement data to its participants, Avista based its inclusion of APX transactions on its own records, rather than the APX records. Cal Parties further assert that those records were not verified by Avista's own consultant.<sup>558</sup> Cal Parties contend that Avista's consultant placed the data Avista provided into its cost filing template without performing any tests to validate them.<sup>559</sup> Cal Parties allege that the Commission failed to acknowledge the lack of verification of Avista's data. In addition, Cal Parties continue to insist the Commission erred by rejecting Cal Parties' position that individual APX participants should not be entitled to file cost offset claims.

281. In addition to its specific objection to Avista's cost filing, Cal Parties add that, to the extent that APX seeks cost-based refunds, those offsets must be borne within APX by APX participants.<sup>560</sup> Cal Parties contend that, otherwise, a form of cherry picking that is unique to APX will be created because individual APX market participant's cost filings reflect only the costs and revenues associated with that APX market participant's transactions in the markets through APX during that interval.<sup>561</sup> Cal Parties contend that, if an individual APX market participant claims a cost offset for an interval in which the APX was a net purchaser in the market, then APX should bear the offset in order to (1) account for the offsetting revenues of other APX market participants during the interval

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<sup>557</sup> *See, e.g.*, November 2, 2006 Order, 117 FERC ¶ 61,151 at P 14.

<sup>558</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 73-74; Cal Parties' Request for Rehearing of November 2, 2006 Order at 31.

<sup>559</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 74 (citing Prepared Testimony of Patrick Wang on Behalf of Avista Energy, Inc., Exh. No. AE-3 at 4:13-16, Docket Nos. EL00-95, *et al.* (Sept. 14, 2005)).

<sup>560</sup> Cal Parties' Request for Rehearing of November 2, 2006 Order at 31.

<sup>561</sup> *Id.* at 32.

and (2) ensure that offsets to refunds based on sales to the CAISO through APX are consistent with APX's overall position in the CAISO market.<sup>562</sup> Cal Parties claim that, otherwise, the rest of the market will subsidize APX participants.<sup>563</sup>

282. For these reasons, Cal Parties argue that the revenues and costs associated with Avista's internally-generated APX transactions should be removed from Avista's Cost Filing template, which would reduce Avista's cost-based offset to refunds by approximately \$400,000.<sup>564</sup>

### **Commission Determination**

283. We deny rehearing on this point. The Commission addressed this issue in the January 26, 2006 Order. Specifically, the Commission stated that

[u]nlike [CA]ISO and PX settlement data, the Commission has not had access to final APX settlement data, and, therefore, has not verified sales transactions associated with APX transactions involving Avista, Tractebel and TransAlta. These sellers' *cost* data were confirmed by invoice or original source document, but the *revenue* was not confirmed by independent source.<sup>565</sup>

284. Because the Commission found that Avista's cost data was confirmed by invoice or original source document, no further verification of that data was necessary. However, due to the lack of independent source verification of the revenue data, the Commission directed sellers to utilize the final APX revenue data provided by the APX and certify this to the CAISO when submitting their cost offset to the CAISO.<sup>566</sup> Therefore, Avista's

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<sup>562</sup> *Id.*

<sup>563</sup> *Id.*

<sup>564</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 74 (citing Prepared Reply Testimony of Gerald A. Taylor on Behalf of the California Parties Concerning the Cost Filing of Avista Energy, Inc., CAP-AVISTA-Ex. No. 4 at 3:7-4:13, Docket Nos. EL00-95-148 & EL00-98-135 (Oct. 24, 2005)); Cal Parties' Request for Rehearing of November 2, 2006 Order at 32.

<sup>565</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 58.

<sup>566</sup> *Id.*

final revenue data will conform to APX settlement data upon final submittal to the CAISO. Through this directive, the Commission ensured that the cost and revenue data would be verified. Therefore, we find that the Commission has addressed Cal Parties' concern and deny Cal Parties' rehearing request.

### 3. Ancillary Services Buy-Backs<sup>567</sup>

285. On rehearing, Cal Parties argue that the Commission erred in its determination that Cal Parties are estopped from objecting to Avista's inclusion of the costs associated with certain buy backs of ancillary services. Cal Parties notes that in the January 26, 2006 Order, the Commission allowed Avista's inclusion of these costs on the basis of a Commission-approved settlement that cleared Avista of any gaming strategies associated with the California ancillary services market.<sup>568</sup> Cal Parties contend that the Commission Trial Staff's determination, in the Avista settlement proceeding, that Avista did not engage in a gaming practice known as "Paper Trading"<sup>569</sup> was based upon Trial Staff's conclusion that Avista did, in fact, have the resources available to provide the ancillary services at issue. Cal Parties now assert that Avista's cost filing included revenues and

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<sup>567</sup> "Ancillary services buy-backs" refers to a market participant's re-purchase, at a lower price, of ancillary services in the real-time market that the same market participant had sold in the day-ahead market. As long as the market participant had the generation resources available to provide the ancillary services, or had appropriately contracted for these resources, the Commission found that this practice was consistent with legitimate arbitrage, and was "nothing more than a method for the market participant to reap a valid profit from the price differential in the day-ahead and real-time markets." *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345, at P 64 (2003) (Gaming Order).

<sup>568</sup> *Avista Corp.*, 107 FERC ¶ 61,055 (2004) (Avista Order).

<sup>569</sup> Paper Trading was a practice that involved selling ancillary services in the day-ahead market even though the market participant did not have the resources available to provide the ancillary services. The market participant then bought back the ancillary services in the hour-ahead market at a lower price. The Commission determined that Paper Trading, unlike the ancillary services buy-backs that were a form of legitimate arbitrage, constituted a prohibited gaming practice because the market participants that engaged in this practice took unfair advantage of market rules by using false representations and/or receiving payments for services that they did not provide. Gaming Order, 103 FERC ¶ 61,345 at P 49, 51.

costs for ancillary services transactions that fell outside the scope of Trial Staff's findings in the settlement proceeding.<sup>570</sup>

286. Cal Parties argue, therefore, that they cannot be estopped from raising this argument because the Avista Order approved a contested settlement between Avista and the Commission's Trial Staff based upon an investigation conducted solely by the Trial Staff. Cal Parties note that throughout the settlement proceeding, it consistently opposed the settlement and demanded a hearing. Cal Parties contend that because there was no hearing, they did not have a full and fair opportunity to litigate the issue of whether Avista's ancillary services buy-backs were legitimate arbitrage or Paper Trading. Cal Parties argue, therefore, that the two central precepts of collateral estoppel were not fulfilled, i.e.,: (1) the issues surrounding Paper Trading were not litigated in the settlement proceeding; and (2) the Cal Parties did not have a full and fair opportunity to litigate the issues because the Avista settlement was approved without a hearing.<sup>571</sup>

287. Cal Parties add that they are not challenging the determination in the Avista Order, but rather the inclusion of these transactions in Avista's cost filing.<sup>572</sup> Cal Parties claim that only approximately \$600,000 of these costs included in Avista's cost filing involve the transactions that formed the basis of Trial Staff's conclusion in the settlement proceeding.<sup>573</sup> Therefore, Cal Parties request that the Commission grant rehearing and

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<sup>570</sup> Cal Parties' Rehearing Request of January 26, 2006 Order at 76-79 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 181; Avista Order, 107 FERC ¶ 61,055); Cal Parties' Request for Rehearing of November 2, 2006 Order at 34-37.

<sup>571</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 77 (*citing Applied Med. Res. Corp. v. United States Surgical Corp.*, 435 F. 3d 1356 (Fed. Cir. 2006); *Little Am. Ref. Co.*, 40 FERC ¶ 61,270 (1987)); Cal Parties' Request for Rehearing of November 2, 2006 Order at 35-36.

<sup>572</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 78; Cal Parties' Request for Rehearing of November 2, 2006 Order at 36.

<sup>573</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 78-79 (citing Avista Supplemental Cost Filing, Table AE-BF 1); Cal Parties' Request for Rehearing of November 2, 2006 Order at 37. Cal Parties contend that Trial Staff's determination in the settlement proceeding that Avista did not engage in Paper Trading rested solely on an arrangement with Chelan Public Utility District to provide the ancillary service. *Id.*

require Avista to exclude its alleged Paper Trading transactions, which Cal Parties estimates would reduce Avista's cost offset by \$1.5 million.<sup>574</sup>

### **Commission Determination**

288. Cal Parties' arguments are unfounded. In the Avista Order, the Commission agreed with Trial Staff and the Chief Judge that the matters were thoroughly investigated and that all interested parties had ample opportunity to participate and raise their objections to the settlement. In fact, Cal Parties raised their concerns about Avista's ancillary services buy-backs in both their initial comments and their supplemental comments on Trial Staff's investigation report in the settlement proceeding, arguing that Trial Staff's conclusions were not supported by evidence in the record.<sup>575</sup> However, in the Avista Order, the Commission found that the record supported Trial Staff's conclusions and affirmed Trial Staff's determination that Avista did not engage in Paper Trading or the other gaming practices at issue.<sup>576</sup> Based on these determinations, the Commission has no basis for now excluding the ancillary service buy-backs from Avista's cost filing.

289. Further, we find that Cal Parties' allegation that Trial Staff's determination in the settlement proceeding was based solely on an arrangement Avista had with Chelan Public Utility District to provide the ancillary services is inaccurate. Trial Staff also expressly relied on, among other things, the CAISO's Scheduling Coordinator Certification Letter, dated September 13, 1999, in which the CAISO confirmed that, based on its review, Avista demonstrated its ability to deliver ancillary services if and when called upon.<sup>577</sup> The Commission was not persuaded by Cal Parties' numerous objections to the sufficiency of this evidence during the settlement proceeding.<sup>578</sup> Cal Parties have not

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<sup>574</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 78-79; Cal Parties' Request for Rehearing of November 2, 2006 Order at 37.

<sup>575</sup> Avista Order, 107 FERC ¶ 61,055 at P 19, 35.

<sup>576</sup> *Id.* P 39-45.

<sup>577</sup> Supplemental of the Commission Trial Staff to its Investigation Report Attached to the Agreement of Resolution of Section 206 Proceeding Filed on January 30, 2003, Docket No. EL02-115-000, at 6 (May 15, 2003) (citing Final Report on Price Manipulation in Western Markets, Docket No. PA02-2-000, Exh. S-8 (March 26, 2003)).

<sup>578</sup> *See* Avista Order, 107 FERC ¶ 61,055 at P 44.

raised any new arguments or presented any new evidence regarding Avista's ancillary services buy-backs in their requests for rehearing in this proceeding. Consequently, we find that, contrary to Cal Parties' characterization, their request is a collateral attack on the Commission's prior determinations. Accordingly, we deny Cal Parties' request.

#### **4. Uninstructed Energy Purchases**

290. On rehearing of the January 26, 2006 Order and November 2, 2006 Order, Cal Parties claim that the Commission erred by determining that uninstructed energy purchases should be excluded from the cost filings. Consequently, for the reasons provided in its general discussion of uninstructed energy, Cal Parties argue that Avista should be directed to include uninstructed energy purchases in its average cost portfolio. Cal Parties claim that correcting this exclusion reduces Avista's claimed cost offset by \$1.3 million.<sup>579</sup> Cal Parties also claim that an incorrect formulation of one of the queries in Avista's work papers caused its average purchase costs to be overstated by nearly \$0.3 million.<sup>580</sup>

#### **Commission Determination**

291. As explained above,<sup>581</sup> we continue to find that uninstructed energy purchases are not appropriately included in the cost filings. In addition, we note that Cal Parties have not provided support for their additional claim that there is an error in Avista's work paper, resulting in an overstatement of Avista's average purchase costs.<sup>582</sup> Furthermore, Cal Parties did not raise this concern in its protest of Avista's cost filing. Absent good cause, the Commission looks with disfavor on parties raising new issues on rehearing, particularly in cases where the issues could have and should have been raised at an earlier point in the proceeding. Permitting parties to raise new issues for the first time on rehearing would have the effect of creating a moving target for parties and would be

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<sup>579</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 79 (citing California Parties' Comments and Testimony in Opposition to Cost Filing of Avista Energy, Inc., Docket Nos. EL00-95-148 & EL00-98-135 at 18 (Oct. 11, 2005)); Cal Parties' Request for Rehearing of November 2, 2006 Order at 37-38.

<sup>580</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 79; Cal Parties' Request for Rehearing of November 2, 2006 Order at 37-38.

<sup>581</sup> *See supra* P 252-253.

<sup>582</sup> *ISO New England Inc.*, 119 FERC ¶ 61,161, at P 16, *reh'g denied*, 121 FERC ¶ 61,125 (2007) (A party has an obligation to clearly articulate and substantiate the basis for its requested action, and not simply make an unsupported claim).

disruptive to the administrative process, given that parties have no opportunity to respond to rehearing requests.<sup>583</sup> Accordingly, we deny Cal Parties' request for rehearing of this issue.

### 5. March 13, 2006 Protest

292. In the November 2, 2006 Order, the Commission did not consider arguments that the Cal Parties sought to incorporate by reference in its March 13, 2006 protest (March 13, 2006 Protest) regarding errors and omissions in Avista's Commission-accepted cost filing and supplemental cost filing.<sup>584</sup> In the March 13, 2006 Protest, the Cal Parties merely referred the Commission to the arguments set forth in pleadings submitted prior to the issuance of the January 26, 2006 Order and their request for rehearing of the January 26, 2006 Order.<sup>585</sup> The Commission explained that such an incorporation of arguments by reference places the Commission in the untenable position of determining which arguments are still relevant to the compliance filing before it. For this reason, the Commission did not consider these arguments.<sup>586</sup>

293. On rehearing of the November 2, 2006 Order, Cal Parties argue that the Commission erroneously refused to consider the comments and testimony submitted at an earlier point in the proceeding that Cal Parties' incorporated by reference in its March 13, 2006 protest of Avista's compliance filing. Cal Parties assert that no Commission regulation prohibits a party from incorporating arguments by reference, particularly in a protest. In support of its position, Cal Parties contend that in 1982, when the Commission amended Rule 211 with respect to protests, the Commission rejected requests by commentators to require greater specificity in protests, in favor of simply requiring that the issues be set forth in a statement of issues.<sup>587</sup> Therefore, Cal Parties assert that they complied with the Commission's regulations in setting forth their statement of issues in the March 13, 2006 Protest.

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<sup>583</sup> See *Commonwealth Edison Co.*, 122 FERC ¶ 61,037, at P 39, *order on reh'g*, 124 FERC ¶ 61,231 (2008); 18 C.F.R. § 385.713(d)(1) (2008).

<sup>584</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 13.

<sup>585</sup> See *id.*

<sup>586</sup> *Id.*

<sup>587</sup> Cal Parties' Request for Rehearing of November 2, 2006 Order at 24 (citing FERC Order No. 225-A, 47 Fed. Reg. 35,955 (Aug. 18, 1982)).

Cal Parties maintain that they did not violate any rule by incorporating by reference specific arguments from other pleadings in the same docket.

294. Cal Parties add that the Commission has considered arguments incorporated by reference, even when those arguments were incorporated from documents filed in separately-docketed proceedings.<sup>588</sup> Cal Parties contend that the Commission has not provided any substantive reason for refusing to consider the arguments at issue. Cal Parties assert that the arguments are relevant to the proceeding, and that failing to consider the arguments denies Cal Parties due process. On rehearing, Cal Parties request that the Commission consider and address the points raised by incorporation in the March 13, 2006 Protest.

### **Commission Determination**

295. We deny rehearing on this issue. As the Commission explained in the November 2, 2006 Order,<sup>589</sup> the Commission has the discretion to decline, and has repeatedly declined, arguments incorporated by reference. For example, in the context of rehearing requests, the Commission has rejected attempts to incorporate by reference arguments from a prior pleading because such incorporation fails to inform the Commission as to which arguments from the referenced pleading are relevant and how they are relevant.<sup>590</sup> We continue to find that such reasoning is equally applicable here in the context of Cal Parties' March 13, 2006 protest. Based on the all-inclusive nature of Cal Parties' request, the Commission could not have determined which of its prior arguments Cal Parties still deemed relevant, nor could we have independently ascertained Cal Parties' interpretation of how those arguments were still relevant in light of the explanations provided in the January 26, 2006 Order for the acceptance of Avista's cost filing.

296. Furthermore, we find that the cases cited by Cal Parties are distinguishable from

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<sup>588</sup> *Id.* at 25 (citing *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,128, at P 5, n.4 (2006); *Duke Energy Guadalupe Pipeline, Inc.*, 115 FERC ¶ 61,289, at P 4 (2006) (*Duke Energy*); *Alaska v. B.P. Pipelines (Alaska) Inc.*, 114 FERC ¶ 61,174, at P 10 (2006); *Fla. Power & Light Co.*, 98 FERC ¶ 61,326, at P 8, n.4 (2002)).

<sup>589</sup> See November 2, 2006 Order, 117 FERC ¶ 61,151 at P 13. We note that, as this language indicates, contrary to Cal Parties' assertion, the Commission did provide a substantive reason for refusing to consider the arguments at issue. *Id.*

<sup>590</sup> *ISO New England Inc.*, 119 FERC ¶ 61,161, at P 16 (2007) (citing *ExxonMobil Chem. Co. v. Entergy Servs., Inc.*, 112 FERC ¶ 61,255, at P 10 (2005); *City of Santa Clara*, 112 FERC ¶ 61,280, at P 8 n.4 (2005)).

the situation presented by Cal Parties' March 13, 2006 Protest. In *Duke Energy Guadalupe Pipeline, Inc.*, the issue raised on rehearing was that the Commission erred in its prior order approving a settlement by stating that no party had objected to a rate. In response, a party that claimed to have objected to the rate at issue incorporated by reference its previous filing to support its claim that it had, in fact, objected to a single, specific element of a proposed settlement.<sup>591</sup> Thus, the Commission was not required to sort through a range of issues and arguments incorporated by reference in comments opposing the settlement; it had only to address an argument previously overlooked.<sup>592</sup> In contrast, in its March 13, 2006 Protest, Cal Parties attempted to broadly incorporate by reference all its previous arguments raised with regard to Avista's cost filing. Likewise, in *California Independent System Operator Corp.*,<sup>593</sup> the incorporation by reference involved a request for clarification on a single issue that the Commission allegedly overlooked in its order on rehearing. Again, as in *Duke Energy*, the Commission was not placed in the position of determining which arguments were still relevant following the issuance of a Commission order. Rather, the 4-page pleading incorporated by reference discussed only one issue.<sup>594</sup> Finally, in *Alaska v. BP Pipelines*, the Commission found that the issues presented in connection with an ongoing 2005 rate filing were all relevant to the same party's 2006 rate filing. Therefore, the Commission found it appropriate to consolidate the two proceedings and dispose of the issues in a single proceeding. Because the Commission had already determined that the arguments set forth in the protest to the 2005 filing applied with equal force to the 2006 filing, the incorporation by reference of a 2005 protest did not put the Commission in the position of trying to figure out which issues were still relevant.<sup>595</sup> In contrast, Cal Parties' March 13, 2006 Protest gave no indication of how the totality of its previous objections to Avista's cost filing supported its request for the Commission to reject Avista's compliance filing. Thus, as explained in the November 2, 2006 Order, Cal Parties' attempt to incorporate by reference its previous arguments placed the Commission in the untenable position of determining which arguments from the referenced pleadings were

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<sup>591</sup> *Duke Energy*, 115 FERC ¶ 61,289, at P 6 (2006) (*Duke Energy*).

<sup>592</sup> *See id.* P 11-13.

<sup>593</sup> *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,128, at P 5, n.4 (2006); *see also Cal. Indep. Sys. Operator Corp.*, 111 FERC ¶ 61,074 (2005).

<sup>594</sup> Termoelectrica de Mexicali S. de R. L. de C.V. February 22, 2005 Answer, Docket Nos. ER03-683-004 and ER03-683-005; Termoelectrica de Mexicali S. de R. L. de C.V. March 7, 2005 Protest, Docket No. ER03-683-007.

<sup>595</sup> *See Duke Energy*, 115 FERC ¶ 61,289 at P 11.

## 6. Return on Investment

297. Cal Parties argue that the Commission erred in accepting Avista's claimed return on investment and associated taxes. Cal Parties allege that Avista's claimed return was based on investments that do not satisfy the criteria established in the September 2, 2005 Order. Specifically, Cal Parties contend that the Commission based its determination on only the first criteria, i.e., that the 10 percent return was applied to Avista's long-term invested capital, while ignoring the second criteria, which requires the investment to be associated with either plant in service or prepayments. Cal Parties assert Avista's claimed return fails to meet the Commission's requirements because, according to Cal Parties, there is no record to show that the investment at issue encompasses either plant in service or prepayments.<sup>597</sup>

### Commission Determination

298. The Commission grants Cal Parties' request for rehearing with respect to Avista's claimed return amount. In the January 26, 2006 Order, the Commission found that the methodology utilized by Avista to calculate its return closely followed that prescribed in the September 2, 2005 Order.<sup>598</sup> Upon further review, however, we agree with Cal Parties that Avista has not provided adequate documentation to verify that the funds allocated to long-term investment in its return calculation were actually used for prepayments or plant in service. Therefore, we find that Avista's demonstration fails the requirements of the September 2, 2005 Order. Avista should only be allowed a recovery on amounts of the funds that it actually used to fund operations or investment, not on the amount available in an open credit line. Earning a ten percent return on funds that have never been drawn upon would be inappropriate. Accordingly, we reject Avista's return component, and the associated income tax amount. Avista is directed to revise its Approved Offset Submission with the CAISO, as set forth in this section, within 30 days of the date of this order.

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<sup>596</sup> We have not been able to identify the last case cited by Cal Parties (i.e., *Fla. Power & Light Co.*, 90 FERC ¶ 61,326 at P 8, n.4), which appears to be an incorrect citation.

<sup>597</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 75-76.

<sup>598</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 119.

**C. Constellation Energy Commodities Group, Inc.**

299. On rehearing of the January 26, 2006 Order, Cal Parties<sup>599</sup> seek rehearing of the Commission's decision to allow Constellation to file corrections directly with the CAISO, rather than requiring a compliance filing. Cal Parties claim this directive raises particular concerns because the Commission's stated directions to Constellation differ in the body of the order and Appendix B. Cal Parties state that, in the body of the order, the Commission directs Constellation to "remove cost and revenues associated with the unaccepted portions of bids,"<sup>600</sup> while, Appendix B requires Constellation to "[r]emove the costs and revenues associated with bids not fully accepted by the [CA]ISO and PX."<sup>601</sup> Cal Parties argue that these two formulations could result in different outcomes because one only requires Constellation to remove the costs and revenues associated with the unaccepted portion of a bid, while the other requires Constellation to remove all costs and revenues. Cal Parties request that the Commission grant rehearing, clarify that Constellation should only remove costs and revenues with the unaccepted portion of a bid, and require Constellation to make a compliance filing directly to the Commission with an opportunity for comment.

**Commission Determination**

300. We clarify that, in the January 26, 2006 Order, the Commission required Constellation to remove the costs and revenues associated only with the unaccepted *portion* of the bid that was not accepted by the CAISO or PX.<sup>602</sup> The Commission did not intend the instructions in Appendix B to conflict with this directive.

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<sup>599</sup> On rehearing of the January 26, 2006 Order, Cal Parties state that the Constellation filing raises many of the same issues addressed in its rehearing request of general issues (i.e., due process, the erroneous sub-delegation of authority to the CAISO, the exclusion of congestion costs and revenues, the inclusion of transactions used to manipulate markets and matching issues). Cal Parties' Request for Rehearing Request of 26, 2006 Order at 81. Cal Parties also request that the Commission establish evidentiary hearings to permit discovery and cross-examination. *Id.* We have addressed these issues above. *See supra* P 96-99.

<sup>600</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 81 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 196).

<sup>601</sup> *Id.* at 82 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at App. B).

<sup>602</sup> *See* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 196.

301. We deny Cal Parties request with respect to the submission of a compliance filing. Through the cost filing evaluation process, the Commission fully vetted Constellation's cost filing and accepted, subject to certain modifications, Constellation's cost filing as sufficiently supported.<sup>603</sup> As discussed above, the paper hearing process established in this cost offset phase of the refund proceeding provided sellers with an appropriate opportunity to present their case for Commission determination and for challengers to protest the cost filings. Because the Commission retains final decision-making authority with respect to the cost offset claims, the Commission did not delegate its authority to the CAISO.<sup>604</sup> Cal Parties have neither persuaded us that such a determination is beyond our authority, nor that any party was denied due process. For the reasons discussed in section III.B. of this order,<sup>605</sup> we deny Cal Parties' request to direct Constellation to make a compliance filing.

**D. Coral Power, LLC**

302. Cal Parties point out that the Commission accepted Coral's cost filing, subject to modification, without directing a compliance filing.<sup>606</sup> Cal Parties state that the Commission's acceptance of Coral's cost filing raises many of the same rehearing issues already addressed (i.e., due process, the erroneous sub-delegation of authority to the CAISO, the exclusion of congestion costs and revenues, the inclusion of transactions used to manipulate markets, and matching issues.) Cal Parties request rehearing and an evidentiary hearing to address these issues as they apply to Coral's cost filing.

**Commission Determination**

303. We deny Cal Parties' request with respect to the issues raised, both generically and with regard to the submission of a compliance filing. Through the offset process, the Commission fully vetted Coral's cost filing, and accepted, subject to certain modifications, Coral's cost filing as sufficiently supported.<sup>607</sup> As noted above, parties were afforded adequate notice and due process in this proceeding, and the Commission

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<sup>603</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 195-197.

<sup>604</sup> *See supra* P 109-111.

<sup>605</sup> *See supra* P 96-99, 109-111.

<sup>606</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 82 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 209-214, App. B).

<sup>607</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 214, App. B.

did not delegate its authority to the CAISO.<sup>608</sup> Cal Parties have neither persuaded us that such a determination is beyond our authority, nor that any party was denied due process.

**E. Edison Mission Marketing & Trading, Inc.**

304. On rehearing of the January 26, 2006 Order, Cal Parties contend that Edison Mission effectively filed two separate cost filings: the first filed on September 14, 2005, and the second filed on October 17, 2005 as reply comments to Cal Parties' criticisms of Edison Mission's first cost filing.<sup>609</sup> Cal Parties argue that this second filing was a totally revised cost filing designed to supplement the original filing and to correct its numerous fatal defects.<sup>610</sup> Cal Parties state that, in the January 26, 2006 Order, the Commission acted primarily, if not exclusively, on Edison Mission's second cost filing.<sup>611</sup> Cal Parties argue that they have been denied their due process rights because they were not given the opportunity to review and file comments and testimony opposing Edison Mission's second cost filing.<sup>612</sup>

305. Cal Parties request that the Commission grant rehearing and reject Edison Mission's cost filing or, in the alternative, provide a procedural opportunity for Cal Parties to review and challenge the merits of Edison Mission's October 17, 2005 filing. If the Commission chooses the alternative remedy, to expedite the process, Cal Parties request that the Commission order Edison Mission to file its final cost offset with the Commission, rather than with the CAISO.<sup>613</sup> Cal Parties argue that such a directive will give them the opportunity to review and challenge the cost filing.

306. In its December 17, 2007 motion for clarification on specified refund rerun calculations and allocations, Cal Parties again argue that the Commission should reject Edison Mission's October 17, 2005 filing.<sup>614</sup> Cal Parties acknowledge that in response to

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<sup>608</sup> *See supra* P 109-111.

<sup>609</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 83-86.

<sup>610</sup> *See id.* at 84-85.

<sup>611</sup> *Id.* at 83 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 222).

<sup>612</sup> *Id.* at 85-86.

<sup>613</sup> *See id.* at 84 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 224).

<sup>614</sup> California Parties' Motion for Clarification on Specified Refund Rerun Calculations and Allocations, Docket Nos. EL00-95-000, *et al.*, at 5, 19-20 (December 17, 2007) (Cal Parties' Motion for Clarification on Refund Rerun Calculations).

the Commission's directive in the January 26, 2006 Order, Edison Mission made a compliance filing for the portion of its cost filing related to fuel purchased on behalf of Sunrise Power Company (Sunrise) for Sunrise's uninstructed energy sales to the CAISO, but allege that Edison Mission neglected to make a timely compliance filing on its own behalf.<sup>615</sup> Cal Parties contend that after the deadline for compliance filings had passed, Edison Mission attempted to submit a corrected claim to the CAISO that actually constituted an out-of-time compliance filing on behalf of Edison Mission. Therefore, Cal Parties dispute the inclusion of Edison Mission's cost offset claim in the cost filing allocation and request the Commission to direct the CAISO to eliminate Edison Mission's claim from the cost filing calculation and allocation.

### **Commission Determination**

307. We deny Cal Parties' rehearing request. As discussed previously in this order, the Commission's paper hearing process in this case has provided sufficient due process for all parties. Furthermore, as explained in the January 26, 2006 Order, the Commission recognized that Edison Mission made several conforming changes to its cost filing in response to Cal Parties' comments.<sup>616</sup> The Commission evaluated those changes and found them appropriate.<sup>617</sup> The only remaining issue was data discrepancies between Edison Mission's data and the CAISO/PX settlement data, which the Commission directed Edison Mission to correct prior to submitting its final cost offset to the CAISO.<sup>618</sup> Therefore, Cal Parties' claim that they did not have an opportunity to review the filing is unfounded. The changes made by Edison Mission to its filing were in response to Cal Parties' comments to Edison Mission's submittal.

308. We likewise find Cal Parties' request for clarification regarding Edison Mission's corrected filing to be without merit. The January 26, 2006 Order accepted without modification the Edison Mission cost filing made on its own behalf; the compliance filing dealt exclusively with discrepancies in the data provided by Edison Mission regarding the Sunrise uninstructed energy sales. As Cal Parties point out, Edison Mission's March 14, 2006 compliance filing addressed the Sunrise claim. Because we did not

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<sup>615</sup> *Id.* The cost filing for Sunrise's uninstructed energy sales was submitted by Edison Mission in its role as a scheduling coordinator for Sunrise. January 26, 2006 Order, 114 FERC ¶ 61,070 at P 215.

<sup>616</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 222. *See also id.* P 219-221.

<sup>617</sup> *See id.* P 222.

<sup>618</sup> *See id.* P 223-224.

require a compliance filing for the cost offset claim relating to Edison Mission's PX sales, its later filing with the CAISO cannot be considered an out-of-time compliance filing. Accordingly, we deny Cal Parties request for clarification.

**F. Hafslund Energy Trading, L.L.C.**

309. In its request for rehearing,<sup>619</sup> Hafslund objects to the Commission's determination that marketers could only include marginal costs plus a 10 percent return on cash collateral in their cost filings.<sup>620</sup> Hafslund claims that subjecting it to this limitation will deny Hafslund an opportunity to fully recover its costs because Hafslund has ceased all business operations. According to Hafslund, its unique situation renders the cost recovery limitation confiscatory as applied to Hafslund.<sup>621</sup>

310. Hafslund interprets the Commission's August 8, 2005 Order as implicitly relying on marketers' future ability to recover fixed costs through continuing operations in the CAISO and PX markets.<sup>622</sup> According to Hafslund, this rationale does not apply to marketers, such as Hafslund, which sold energy predominately in the CAISO and PX markets during the Refund Period, and thus had limited ability to recover fixed costs elsewhere, and are no longer in business. Specifically, Hafslund contends that limiting its ability to recover its costs is inconsistent with the FPA, as well as Commission and court precedent. Hafslund argues that the return component of the refund methodology fails to meet the just and reasonable standard because in Hafslund's unique situation, the methodology will not produce a rate that is within the "zone of reasonableness."<sup>623</sup>

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<sup>619</sup> In its rehearing request, Hafslund also argues that the Commission improperly denied recovery of inter-zonal congestion costs that Hafslund incurred during the refund period. *See* Hafslund Request for Rehearing at 3-5. We address this argument above. *See supra* P 170-174.

<sup>620</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 76; November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 111.

<sup>621</sup> Hafslund Request for Rehearing at 5-6.

<sup>622</sup> *Id.* at 7.

<sup>623</sup> *Id.* at 6 (citing *Ocean State Power*, 44 FERC ¶ 61,261, at 61,979 (1988)). Hafslund argues that under this standard, the rates established by the Commission must give a regulated entity the opportunity to maintain its financial integrity, fairly compensate investors for the risks associated with the enterprise, and attract capital to the industry, while protecting the public interest. *Id.* at 6-7 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603

(continued...)

Hafslund claims that, consistent with Commission precedent, the Commission should permit Hafslund to recover all of its fixed costs due to its specific circumstances. Hafslund argues that precedent supports relief from a generally applicable pricing methodology based on specific circumstances.<sup>624</sup>

311. Cal Parties also seek rehearing of our determinations regarding Hafslund's cost filing. First, Cal Parties object to our finding that Hafslund had adequately supplied the data and evidence necessary to support its underlying purchased power costs, despite Hafslund providing support for only 10 percent of its transactions.<sup>625</sup> Cal Parties contend that, like other similarly deficient filings, the Commission should summarily reject Hafslund's cost filing for lack of support.<sup>626</sup> In the alternative, Cal Parties argue that if Hafslund's filing is not rejected for lack of support, due process requires evidentiary proceedings, including the opportunity for discovery.<sup>627</sup>

312. Second, Cal Parties argue that the Commission failed to provide a basis for excluding booked-out transactions<sup>628</sup> from the calculation of Hafslund's average

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(1944); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692-93 (1923)).

<sup>624</sup> *Id.* at 8 (citing *Permian*, 390 U.S. 747, 764; *FERC v. Pennzoil Producing Co.*, 439 U.S. 508 (1978); *Opinion and Order Prescribing Uniform National Rate for Sales of Natural Gas*, 51 FPC 2212, 2279 (1974); *Amarex, Inc.*, 16 FERC ¶ 63,020A, at 65,121 (1976)).

<sup>625</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 88 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 234; Affidavit of Josef M. Mueller on Behalf of Hafslund Energy Trading, LLC at ¶ 10, attached to Cost Filing Demonstrating that Refund Methodology Will Result in Overall Revenue Shortfall to Hafslund Energy Trading, LLC, Docket Nos. EL00-95-145 & EL00-98-132 (Sept. 14, 2005); Taylor Hafslund Testimony at 12, attached to California Parties Comments and Testimony in Opposition to the Cost Filing of Hafslund Energy Trading, LLC, Docket Nos. EL00-95-145 & EL00-98-132 (Oct. 11, 2005)).

<sup>626</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 41-45, 133-160).

<sup>627</sup> *Id.* Cal Parties rely on their general objections to the January 26, 2006 Order concerning the need for discovery and evidentiary proceedings to support their specific claim regarding the Hafslund cost filing.

<sup>628</sup> Order No. 2001 defines book-outs as the offsetting of opposing buy-sell transactions at the same time and place and gives examples of transactions that must be

(continued...)

weighted energy cost and they object to the decision to exclude these costs from the calculations.<sup>629</sup> Cal Parties argue that the August 8, 2005 Order requires sellers to include “all transactions for all hours” in their average cost calculations.<sup>630</sup> The Cal Parties also note that Order No. 2001 requires disaggregation of booked-out transactions. Cal Parties contend that, taken together, these two orders require inclusion of Hafslund’s booked-out transactions in Hafslund’s average weighted energy cost. Cal Parties complain that the Commission failed to explain why excluding these transactions is consistent with the August 8, 2005 Order and Order No. 2001.<sup>631</sup>

313. Third, Cal Parties contend that the Commission erred by failing to direct Hafslund to remove the revenues and costs associated with Hafslund’s admitted Fat Boy sales.<sup>632</sup> Cal Parties complain that the Commission only ruled generally that “sellers may include revenues from uninstructed energy sales to the CAISO along with the associated

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reported in Electric Quarterly Reports. *Revised Public Utility Filing Requirements*, FERC Stats. & Regs. ¶ 31,127 at PP 273-85 (2002). For example, if A sells 50 MW of power to B, and for the same time period and location, B sells 50MW of power back to A, the transactions would be booked out in their entirety and no transmission would be required. Nonetheless, the transactions must both be reported in Electric Quarterly Reports. Likewise, using the example given in Order No. 2001, if A sells 50 MW to B and, for the same time period and location, B sells 60 MW back to A, then all of these separate transactions must be reported in Electric Quarterly Reports, even though only 10 MW would be transmitted to A. A would report a 50 MW power sale to B, and B would report a 60 MW power sale to A.

<sup>629</sup> Cal Parties’ Request for Rehearing of January 26, 2006 Order at 89 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 235).

<sup>630</sup> *Id.* at 90.

<sup>631</sup> *Id.*

<sup>632</sup> *Id.* at 90-91 (citing Cal Parties’ Comments and Testimony in Opposition to the Cost Filing of Hafslund Energy Trading, LLC, Docket Nos. EL00-95-145 & EL00-98-132 at 13 (Oct. 11, 2005); Prepared Testimony of Gerald A. Taylor on Behalf of the Cal Parties Concerning the Cost Filings of Hafslund Energy Trading, LLC, CAP-HAFSLUND-Ex. No. 1, Docket Nos. EL00-95-145 and EL00-98-132 (Oct. 11, 2005); January 26, 2006 Order, 114 FERC ¶ 61,070 at P 105-109, 234-37, App. B).

purchases or generation costs related to those sales” and failed to rule on this issue as it applies to Hafslund.<sup>633</sup>

314. Finally, Cal Parties argue that the Commission erroneously accepted Hafslund’s late-filed support for its cost of maintaining collateral and its return on investment.<sup>634</sup> Cal Parties contend that the Commission’s acceptance of Hafslund’s reply comments providing additional information deprived them of the opportunity to challenge that information.<sup>635</sup>

### **Commission Determination**

315. We deny Hafslund’s request for rehearing. First, Hafslund’s objection to its inability to include fixed costs in its cost filing is untimely. Our August 8, 2005 Order made it clear that “sellers’ cost filings may only reflect their marginal costs” related to sales into the CAISO and PX markets.<sup>636</sup> Any objection to this aspect of the MMCP methodology should have been raised in a request for rehearing of the August 8, 2005 Order. To the extent that Hafslund seeks to recover other than marginal costs, its argument is a collateral attack on a final order.

316. Furthermore, the basic premise underlying Hafslund objection is simply incorrect. Contrary to Hafslund’s assertion, our MMCP methodology is not premised on sellers’ ability to recover fixed costs, or any other amounts, in future operations. This refund proceeding involves resetting rates for a specific period of time in the past; it does not look to the future. The MMCP is designed to replicate the just and reasonable rates that a competitive energy market would have produced. The MMCP does not take into account a seller's actual individual costs of providing electricity to those markets, but rather reflects an imputed level of costs.

317. Consequently, in the December 19, 2001 Order, the Commission announced its intent to provide an opportunity for marketers to submit cost evidence on the impact of

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<sup>633</sup> *Id.* at 91 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 109, App. B). Cal Parties rely on their general objections to the January 26, 2006 Order concerning the “Fat Boy” and other transactions at issue in the Gaming Proceeding to support their specific claim regarding the Hafslund cost filing.

<sup>634</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 118, 236).

<sup>635</sup> *Id.* at 92 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 236).

<sup>636</sup> August 8, 2005 Order, 112 FERC ¶ 61, 176 at P 76, *reh’g denied*, November 19, 2007 Rehearing Order, 121 FERC ¶ 61, 184.

the refund methodology on their overall revenues *over the Refund Period*.<sup>637</sup> The Commission stated that to justify any adjustment, marketers would have to demonstrate that the refund methodology results in a total revenue shortfall for all jurisdictional transactions during the Refund Period.<sup>638</sup> The Commission stated that it would consider these cost filings “in light of the regulatory principle that sellers are guaranteed only an opportunity to make a profit.”<sup>639</sup> Thus, the MMCP methodology aims to replicate the just and reasonable rates that a competitive market would have produced, and the cost filing process provides an opportunity for sellers to demonstrate that the MMCP does not provide revenues adequate to cover the actual costs of sales into the CAISO and PX markets.

318. With regard to the specific issue raised by Hafslund, i.e., that sellers’ cost filings may reflect only their marginal costs related to sales into the CAISO and PX markets, we found in the August 8, 2005 Order that sales into California markets were incremental in nature, and recovery of energy costs should be based on only the subset of a seller's resource portfolio available for sale into the CAISO and PX markets.<sup>640</sup> Thus, the relevant marginal costs are those costs that would have been avoided had no sales been made into the CAISO and PX markets.<sup>641</sup> More specifically, the costs of a generating unit were recovered through bilateral contracts, and real time sales were expected to be bid at marginal cost.<sup>642</sup> Consistent with the calculation of energy and other costs, we found that marketers should be directed to use a rate base investment that would have been avoidable, but for a seller's participation in the CAISO and PX markets.<sup>643</sup>

319. Because the basic premise underlying Hafslund’s objection is incorrect, that objection must fail. Hafslund’s inability to recover costs in the future is irrelevant to the

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<sup>637</sup> December 19, 2001 Order,, 97 FERC ¶ 61,275 at 62,193-94 and 62,254 (emphasis added).

<sup>638</sup> *Id.*

<sup>639</sup> *Id.*

<sup>640</sup> August 8, 2005 Order, 112 FERC ¶ 61, 176 at P 76.

<sup>641</sup> *Id.* P 77.

<sup>642</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,115, at 61,363-364 (2001).

<sup>643</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 88. We reaffirmed this determination in the November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 112.

calculation of the MMCP and to the refund proceeding. Hafslund's only justification for recognition of its "special circumstances" was its alleged future inability to recover its costs because it went bankrupt, unlike other sellers. Therefore, Hafslund has failed to justify why the Commission should grant it any exception from our cost filing requirements. Furthermore, we note that the Commission afforded Hafslund a cost-based recovery based upon a cost of service justification.<sup>644</sup> In contrast, Hafslund's approach would *guarantee* that it received a profit, which would put Hafslund in a better position than other sellers, who only received the *opportunity* to make a profit. The Commission has expressly stated that guaranteeing a profit is not an appropriate outcome for these proceedings.<sup>645</sup> Hafslund's approach is contrary to our previous orders, as well as inconsistent with generally accepted rate-making principles. Therefore, we reject Hafslund's suggested approach.

320. We also deny Cal Parties' rehearing request. In the January 26, 2006 Order, the Commission explained that a sample of supporting data could be sufficient to validate the specific costs being claimed in a seller's cost filing, provided that the submissions clearly showed actual historic costs and made clear reference to the remaining source documents.<sup>646</sup> The Commission's analysis found that Hafslund had provided a sufficient sampling of evidence for the Commission to validate the existence of the claimed transactions at the costs claimed in Hafslund's cost offset filing.<sup>647</sup> Cal Parties have not persuaded us otherwise.

321. We also disagree with Cal Parties' argument regarding Hafslund's booked-out transactions. Although the August 8, 2005 Order requires sellers to include "all transactions for all hours" in their average cost calculations, Cal Parties' contention ignores the fact that the Commission also reiterated in the August 8, 2005 Order that relevant transactions were transactions used to serve the CAISO and PX markets during the Refund Period. In its cost filing, Hafslund sufficiently disaggregated its booked-out transactions to allow the Commission to determine that these booked-out transactions did not result in physical sales into the CAISO and PX markets. Hafslund's support satisfactorily demonstrated the offsetting positions of its booked-out transactions, consistent with Order No. 2001.<sup>648</sup> Because these transactions were not used to serve the

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<sup>644</sup> See, e.g., September 2, 2005 Order, 112 FERC ¶ 61,249 at n. 9.

<sup>645</sup> December 19, 2001 Order, 97 FERC ¶ 61,275 at 62,193-94.

<sup>646</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 44.

<sup>647</sup> *Id.* at 234.

<sup>648</sup> See *id.* P 235, n.219; see also *Revised Public Utility Filing Requirements*, Order

CAISO and PX markets during the Refund Period, they fell outside of the scope of transactions to be included in the cost offset filings. Accordingly, we deny this rehearing request.

322. We also find no support for Cal Parties' claim regarding the inclusion of revenues and costs associated with alleged Fat Boy transactions. As noted previously, Cal Parties raised this issue in its general objections to the January 26, 2006 Order and did not raise any novel arguments that would be specific to Hafslund. Accordingly, we deny rehearing for the reasons set forth in the general discussion of market manipulation above.<sup>649</sup> Similarly, Cal Parties relied on their general due process claims to support their contentions regarding the need for an evidentiary proceeding addressing Hafslund's cost filing. For the reasons set forth in the due process discussion above,<sup>650</sup> we deny this request for rehearing.

323. Finally, we disagree with Cal Parties' assertion that the Commission erroneously accepted Hafslund's support for its cost of maintaining its collateral and its return on investment, which Hafslund submitted in response to Cal Parties' protest to Hafslund's cost filing. In reviewing Hafslund's original cost filing, the Commission determined that Hafslund had made a *prima facie* showing of entitlement to a cost offset. In the January 26, 2006 Order, the Commission only accepted supplemental information to the extent that it supported Hafslund's original cost filing.<sup>651</sup> The acceptance of this information was consistent with the Commission overall approach of accepting supplemental cost revisions if the replies addressed or rebutted concerns raised in initial comments on the original cost filings.<sup>652</sup>

324. In particular, in its reply comments, Hafslund provided a bank letter detailing Hafslund's cash holdings to support the return on investment it claimed in its original

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No. 2001, FERC Stats. & Regs. ¶ 31,127, at P 279-285, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003).

<sup>649</sup> *See supra* P 134-139.

<sup>650</sup> *See supra* P 96-99.

<sup>651</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 236.

<sup>652</sup> *Id.* P 19.

offset filing.<sup>653</sup> The Commission accepted this evidence because it supported the return Hafslund sought in its original cost filing and responded directly to the concerns raised in Cal Parties' protest.<sup>654</sup> This acceptance was not only consistent with the Commission's general approach to supplemental cost revisions that respond to concerns raised in initial comments,<sup>655</sup> but also consistent with the Commission's acceptance of other sellers' submission of additional support when the seller had made a *prima facie* showing of entitlement to cost offset in its original cost filing.<sup>656</sup> We also note that, as explained in the January 26, 2006 Order, the acceptance of this information was consistent with Rule 213 of the Commission's Rules of Practice and Procedure, which allows the Commission to accept generally prohibited answers to answers if they provide information that assists the Commission in its decision-making process.<sup>657</sup> Rule 213 expressly contemplates that documentation may accompany an answer.<sup>658</sup> For these reasons, we deny this rehearing request.

## **G. Portland General**

### **1. Stacking Analysis**

325. On rehearing of the January 26, 2006 Order, Portland argues that the Commission erred in its determination that Portland's stacking analysis was biased and overstated Portland's actual costs. Portland contends that these determinations are wholly unsupported and that the Commission failed to explain how it reached these conclusions.<sup>659</sup>

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<sup>653</sup> Hafslund October 17, 2005 Answer to the California Parties' Comments in Opposition to Hafslund's Cost Filing, Docket Nos. EL00-95-45 and EL00-98-132 at Att. C.

<sup>654</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 118.

<sup>655</sup> *Id.* P 19.

<sup>656</sup> *See id.* P 19, n. 198 (Avista), P 194 (Constellation), n. 211 and P 222 (Edison Mission), n. 220 (Portland), P 290 and 294 (PPL Energy), P 317 and 329 (Puget), n. 248 (Sempra), P 379 and 382 (TransAlta).

<sup>657</sup> *See id.* P 19 (citing 18 C.F.R. § 385.213 (2008)).

<sup>658</sup> *See* 18 C.F.R. § 385.213(c)(5) (2008).

<sup>659</sup> Portland Request for Rehearing of January 26, 2006 Order at 12.

326. According to Portland, it appears that the only material the Commission used in reaching its conclusion that Portland's stacking analysis was biased was "Portland's Load Data and FERC Form No. 1 data for the years 2000 and 2001," which indicated to the Commission that "the amount of generation available for Portland's resources in certain hours was so significant that sales should have been made from less costly generating units."<sup>660</sup> However, Portland questions how the Commission could use the FERC Form No. 1 data to reach its conclusion because the FERC Form No. 1 only contains aggregate summaries that are not broken out on an hourly basis.<sup>661</sup>

327. Portland claims that when it implemented the PNM stacking methodology in the preparation of its compliance filing, as directed by the Commission, its average portfolio costs actually rose. Portland attributes this result to several conservative assumptions it made in its original filing.<sup>662</sup> Portland claims, however, that because PNM did not use these assumptions, these assumptions were not part of the stacking analysis ordered by the Commission in the January 26, 2006 Order.<sup>663</sup> Portland explains that it attempted to reconcile the two methodologies in its Case 2 analysis by incorporating its original conservative assumptions into the stacking analysis required by the Commission. Portland states that once it applied this hybrid methodology, its average portfolio cost fell back down to a level approximately equaling the cost included in its original cost filing.<sup>664</sup> Portland contends that this result confirms that its original cost filing understated its costs, and that the only bias in its original stacking analysis cut against, and not in favor of, Portland. Portland notes that it has no objection to using the PNM stacking analysis, but argues that in light of its compliance filing, the Commission should

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<sup>660</sup> *Id.* at 14 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 251).

<sup>661</sup> *Id.*

<sup>662</sup> Portland explains that in its original cost filing, it excluded number of high-priced transactions from its analysis prior to allocating resources to spot sales, which had the effect of lowering the average cost of the portfolio assigned to serve those sales. *Id.* at 14-15.

<sup>663</sup> In the January 26, 2006 Order, the Commission directed Portland to submit a compliance filing in which it provided a complete stacking analysis of all its available resources. The Commission noted that the PNM cost filing could serve as an example of an LSE that submitted a satisfactory stacking analysis. January 26, 2006 Order 114 FERC ¶ 61,070 at P 252 and n. 225.

<sup>664</sup> Portland Request for Rehearing of January 26, 2006 Order at 14-15.

grant rehearing of its characterization of Portland's original stacking analysis as biased.<sup>665</sup>

328. On rehearing of the November 2, 2006 Order, Portland contends that, without explanation or record support, the Commission reversed course by rejecting Portland's Case 1 stacking analysis, provided as one of the four alternate stacking analyses in its compliance filing. Portland asserts that its Case 1 stacking analysis was modeled after the methodology suggested by the Commission, but claims that it was necessary to modify the underlying assumptions in order to implement the analysis.<sup>666</sup> Thus, due to the removal of these assumptions, Portland notes that its Case 1 stacking analysis showed a revenue deficiency that was approximately \$10 million higher than the Case 2 stacking analysis that the Commission ultimately accepted.<sup>667</sup> Portland disputes the Commission's determination that the Case 1 stacking analysis should be rejected because Portland changed underlying assumptions.<sup>668</sup> Rather, Portland argues that it is unduly discriminatory for the Commission to require Portland to follow a different methodology than the Commission found acceptable for a similarly situated entity. Therefore, Portland requests that the Commission grant rehearing and accept its Case 1 stacking analysis.

#### **Commission Determination**

329. In the January 26, 2006 Order, the Commission accepted Portland's cost filing, subject to modification, but questioned the accuracy of the single unit stacking analysis performed by Portland.<sup>669</sup> By using the monthly peak data from the FERC Form No. 1 for the relevant months during the Refund Period,<sup>670</sup> the Commission was able to

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<sup>665</sup> *Id.* at 15-16.

<sup>666</sup> Portland Rehearing Request of November 2, 2006 Order at 37-38 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 252 n.225; November 2, 2006 Order, 117 FERC ¶ 61,151 at P 25).

<sup>667</sup> *Id.* at 38 (citing Exh. PGE-20 at 6:12-15; November 2, 2006 Order, 117 FERC ¶ 61,151 at P 25). Portland notes that the Case 2 stacking analysis reflected the same stacking methodology as used in its original cost filing. *Id.* at 38.

<sup>668</sup> *Id.* (citing November 2, 2006 Order, 117 FERC ¶ 61,151 at P 25).

<sup>669</sup> *See* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 251.

<sup>670</sup> Data utilized from the FERC Form No. 1 includes monthly system peak reporting, generation unit name plate capacity, and the reporting of any long-term firm power purchases.

compare Portland's stacking analysis to its publicly reported data.<sup>671</sup> This comparison indicated to the Commission that Portland may have had lower cost generation available to make sales to the CAISO and PX markets during the Refund Period.<sup>672</sup> As a result, the Commission concluded that Portland's limited stacking analysis was deficient and biased.<sup>673</sup> Accordingly, the Commission required Portland to supplement the deficient information.<sup>674</sup>

330. Specifically, the Commission clearly directed Portland to submit a compliance filing in which it would: provide a complete stacking analysis of all its available resources; demonstrate which resources were necessary for native load and other primary obligations, and which were available for sales to the CAISO and PX markets in each hour; and develop an average portfolio cost for those resources shown to be available. We referred Portland to the cost filing submitted by the PNM for an example of a satisfactory stacking analysis by an LSE, but did not require Portland to follow the PNM methodology.<sup>675</sup> Nor did the Commission challenge Portland's underlying assumptions or direct Portland to modify this aspect of its cost filing. We do not find that such modification is implied by the reference to the PNM filing.

331. In the November 2, 2006 Order, we found that Portland failed to adhere to the Commission's directives by removing certain underlying assumptions in its Case 1, Case 1.1, and Case 2.1 analyses. We explained that because we did not direct this modification, those analyses were not responsive to the Commission's directive in the January 26, 2006 Order. Accordingly, we accepted, with modification, Portland's Case 2 analysis, which we found to be consistent with the directives of the January 26, 2006 Order.<sup>676</sup> We reject Portland's claim that implementing a different methodology necessarily implied changing the underlying assumptions. As we have previously stated, compliance filings must be limited to the specific directives ordered by the Commission.<sup>677</sup> Indeed, Portland acknowledges elsewhere in its rehearing request that

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<sup>671</sup> See January 26, 2006 Order, 114 FERC ¶ 61,070 at P 251.

<sup>672</sup> See *id.*

<sup>673</sup> *Id.*

<sup>674</sup> *Id.* P 252.

<sup>675</sup> *Id.* P 252, n.225.

<sup>676</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 25.

<sup>677</sup> See *Reliant Energy Aurora*, 111 FERC ¶ 61,159, at P 26 (2005); *AES*

because “that is the way [the transactions] were treated in the original filing and the Commission did not direct Portland to do otherwise,”<sup>678</sup> Portland continued to treat the transactions the same way in its compliance filing. Thus, we reject Portland’s claim that we “reversed course” on this issue without explanation or record support. Rather, we find that by rejecting Portland’s Case 1 stacking analysis, due to the inclusion of modifications not directed by the Commission, we were acting in a manner consistent with well-established Commission precedent on this issue.

332. Further, we reject Portland’s assertion that requiring Portland to adhere to the directives of the January 26, 2006 Order was unduly discriminatory. We did not, contrary to Portland’s assertions, require Portland to follow a different methodology than PNM. Rather, we directed Portland to modify its stacking analysis, based on specific directives in the January 26, 2006 Order, and using the PNM analysis as an example. At no time did we order any modifications to the assumptions underlying Portland’s stacking analysis. Thus, we find that it would be unduly discriminatory to the other parties for which we ordered compliance filings to allow Portland to modify our directives to suit its purposes, while requiring strict adherence to our directives by the other parties.

## **2. Updated Revenue Data and Reconciliation of Errors**

333. Portland contends that the Commission erred in concluding that the revenue figures relied on by Portland did not match the data supplied by the CAISO and PX to the Commission.<sup>679</sup> Portland states that it tried to use the CAISO and PX data in preparing its cost filing, but notes that it was uncertain which of the available CAISO data sets the Commission required. According to Portland, there were several sets of data from which to choose: (i) the CAISO preparatory rerun settlement data, which contained transaction-level revenue and cost information required by the Cost Filing Template; and (ii) the CAISO’s original production data manually adjusted by the CAISO. Portland explains that it chose to use the former because the latter does not contain transparent quantities and prices for each of Portland’s transactions.<sup>680</sup>

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*Huntington Beach, LLC*, 111 FERC ¶ 61,079, at P 60 (2005); *FirstEnergy Operating Companies*, 111 FERC ¶ 61,032, at P 20 (2005).

<sup>678</sup> Portland Rehearing Request of January 26, 2006 Order at 9.

<sup>679</sup> Portland Request for Rehearing of January 26, 2006 Order at 13.

<sup>680</sup> *Id.* (citing Exh. PGE-5 (Wang) at 3:15-4:2).

334. Portland agrees that the Commission's directive for the CAISO and PX to "merge and finalize all final MMCP and all manual adjustments" responded to the need for consolidated and verifiable data for use in the cost filings. However, Portland maintains that the settlement data delivered to the sellers was not "merged and finalized," as the Commission intended, but contained two distinct sets of data: (i) the records generated automatically by the CAISO for transactions during the Refund Period; and (ii) the manual adjustment records that update the automatic records. Thus, Portland contends that the two sets of data delivered by the CAISO are defective because, like the CAISO's original data, the later-produced data still fails to provide a single record for each transaction. Consequently, Portland claims that each seller must interpret the data in order to consolidate it into a format usable in the Cost Filing Template.<sup>681</sup>

335. Portland disputes the CAISO's assertion that such consolidation of the records would be overly burdensome, noting that it had already processed the records of its transactions and confirmed that the revenues match its original filing within a few hundred dollars. Portland states that the Commission will need to undertake its own consolidation of the manual and adjustment records provided by the CAISO in order to check the accuracy of the revenue figures in Portland's compliance filing. Portland cautions that, to the extent the Commission uses different assumptions than Portland used in its consolidation process, the Commission will continue to find discrepancies in Portland's revenue data.<sup>682</sup>

336. Further, Portland argues that the CAISO's interpretation of the Commission's directive in the January 26, 2006 Order to "merge and finalize" its data for use in the costs filing appears contrary to the Commission's intent. Therefore, Portland requests that the Commission clarify the requirement that sellers use the newly-produced CAISO data. Portland also requests that the Commission explain whether sellers are required to process the consolidation of manual and adjustment records in a particular way.<sup>683</sup>

### **Commission Determination**

337. We find it unnecessary to clarify the Commission's requirement that Portland update its revenue data to reflect CAISO and/or PX final settlement data. In the January 26, 2006 Order, we determined that many of the discrepancies in the sellers' revenue data resulted from sellers using different data than were supplied to the Commission and/or

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<sup>681</sup> *Id.* at 17.

<sup>682</sup> *Id.* at 18.

<sup>683</sup> *Id.*

incorporating manual adjustments. To correct this problem, the Commission directed the CAISO and PX to merge and finalize the revenue data to include all final MMCP and all manual adjustments and to supply this data to the sellers and the Commission.<sup>684</sup> The Commission directed Portland to reflect this CAISO and/or PX final settlement data for all revenues, including all manual adjustments, and to use this data to reconcile errors in revenues shown by staff calculations.<sup>685</sup>

338. In the November 2, 2006 Order, the Commission recognized that Portland could not provide finalized revenue data until it received final settlement data from the CAISO and PX.<sup>686</sup> The Commission explained that all sellers, including Portland, will be required to include final revenue data in their Approved Offset Submissions to the CAISO.<sup>687</sup> The Commission added that, as previously directed, Portland will have to reconcile the errors in revenue noted in the January 26, 2006 Order in its Approved Offset Submission to the CAISO.<sup>688</sup> Since issuing the November 2, 2006 Order, in which the Commission reaffirmed the need to use the updated CAISO and/or PX revenue data, we have not given instructions related to Approved Offset Submissions that indicate a change in our position. As stated in both the January 26, 2006 and the November 2, 2006 Orders, we continue to expect Portland to update its revenue data to reflect the final CAISO and/or PX settlement data and to reconcile the revenue errors as indicated. Accordingly, we deny clarification on this issue.

### 3. Recirculation Transactions<sup>689</sup>

339. On rehearing of the January 26, 2006 Order, Portland argues that the Commission should not have required Portland to include revenues from Portland's recirculation

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<sup>684</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 57.

<sup>685</sup> *Id.* at Appendix B.

<sup>686</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 45.

<sup>687</sup> *Id.*

<sup>688</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at App. B).

<sup>689</sup> According to Portland, recirculation transactions were purchase/sale transactions with the CAISO that occurred in the same hour, involving the use of Portland's ownership rights on the Southern Intertie. Recirculation transactions appear to be unique to Portland. January 26, 2006 Order, 114 FERC ¶ 61,070 at n.222.

transactions in its cost filing.<sup>690</sup> Portland asserts that there is no justification for the Commission to mix revenues from non-mitigated transactions, such as energy exchanges, which are not subject to refund, with mitigated transactions. Portland argues that the recirculation transactions were energy exchanges and, as a result, should not be subject to mitigation. Portland claims that revenues associated with those transactions are thus beyond the scope of this proceeding and should not be used to subsidize mitigation of other transactions in the CAISO and/or PX spot markets. Portland notes, however, that at the time of its rehearing request, there was a dispute between Portland and the CAISO regarding whether Portland's recirculation transactions should be subject to mitigation.<sup>691</sup> Portland complains that without ruling on whether the recirculation transactions were subject to refund, the Commission prematurely directed Portland to include revenues from those sales in its cost filing. Thus, Portland requests that the Commission grant rehearing of the January 26, 2006 Order to exclude these revenues from Portland's cost filing.<sup>692</sup>

340. If, however, the Commission denies rehearing and determines that the revenues from the recirculation transactions must be included in its cost filing, Portland requests that the Commission clarify how they should be valued. Portland states that in its original cost filing, it matched the recirculation transactions by identifying offsetting CAISO spot purchases and spot sales within its internal scheduling data and removing the matched transactions from its analysis.<sup>693</sup> However, Portland asserts that the matching of the recirculation transactions seems to conflict with the Commission's decision to exclude all uninstructed energy and other spot purchases as unavailable to serve any CAISO and/or PX sales.<sup>694</sup> Portland maintains that the Commission did not specifically rule on whether this was the proper treatment, notes that because the Commission did not direct

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<sup>690</sup> Portland Rehearing Request of January 26, 2006 Order at 8 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 254). Portland states that Portland and the CAISO disagree on whether Portland's recirculation transactions with the CAISO should be subject to mitigation in this proceeding. Portland Rehearing Request of January 26, 2006 Order at 7-8 (citing Portland's Notification of Potential Settlement Dispute, Docket No. EL00-95-000 (Dec. 1, 2005)).

<sup>691</sup> See Portland's Notification of Potential Settlement Dispute, Docket Nos. EL00-95-000, *et al.* (Dec. 1, 2005).

<sup>692</sup> Portland Request for Rehearing of January 26, 2006 Order at 8.

<sup>693</sup> *Id.* (citing Exh. PGE-I at 8:10-12; Exh. PGE-20 at 10:3-7).

<sup>694</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 108, 253).

Portland to do otherwise, it continued to match its recirculation spot purchases with spot sales in its February 2006 compliance filing. Portland explains that its use of net revenues as an offset to its cost to serve remaining CAISO and/or PX sales seemed to be consistent with the Commission's directive in the January 26, 2006 Order.<sup>695</sup>

341. Portland explains further that because of its uncertainty regarding the Commission's intent, it described, in its February 10, 2006 compliance filing, the method it would have used to incorporate the recirculation transactions had they not been treated as matched with CAISO spot purchases.<sup>696</sup> Portland requests that the Commission clarify whether this alternate methodology was what it intended when it required Portland to include revenues from recirculation transactions in its cost filing.

### **Commission Determination**

342. We continue to find that the recirculation transactions must be reflected in Portland's cost filing. In the January 26, 2006 Order, the Commission required Portland to include the net revenues resulting from the recirculation transactions in its cost filing. The Commission explained that because the relevant scope of transactions for the cost filing process included all transactions, for all hours, mitigated and non-mitigated, in the relevant CAISO and PX market, the inclusion of the net revenues from Portland's recirculation transactions was required.<sup>697</sup> Furthermore, in an order resolving refund process disputes between the sellers and the CAISO and/or PX,<sup>698</sup> the Commission noted that Portland's issues were previously addressed in the evidentiary hearing,<sup>699</sup> as well as in the Commission's March 26, 2006 Order.<sup>700</sup> In the Disputes Order, the Commission rejected Portland's argument regarding recirculation transactions as an improper attempt to seek reconsideration of the Commission's orders in other proceedings. Portland has

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<sup>695</sup> *Id.* at 9 (citing Exh. PGE-20 at 10:7-12).

<sup>696</sup> *Id.* at 9-10 (citing Exh. PGE-20 at 10:16-11:1).

<sup>697</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 254.

<sup>698</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 116 FERC ¶ 61,167, at P 31 (2006).

<sup>699</sup> *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 101 FERC ¶ 63,026, at P 466, 530-536 (2002).

<sup>700</sup> *See San Diego Gas and Electric Company*, 102 FERC ¶ 61,317 at P 14, 153, and 154 (2003) (Disputes Order).

not raised any arguments or presented new evidence that would cause us to reconsider our position now. Thus, we deny rehearing on this issue.

343. We also find, contrary to Portland's assertion, that the Commission was unambiguous in the January 26, 2006 Order with regard to its direction to Portland to include the recirculation transactions, except those categorized as uninstructed energy purchases. In the November 2, 2006 Order, the Commission found that in its compliance filing, Portland properly included its recirculation transactions, stating them separately from its average portfolio calculations, pursuant to the Commission's direction in the January 26, 2006 Order.<sup>701</sup> Because the Commission accepted, subject to modification,<sup>702</sup> the method used by Portland to include its recirculation transactions in its compliance filing, we find that clarification on this issue is not necessary. Accordingly, we deny Portland's request for clarification.

#### **H. Powerex Corporation**

344. On rehearing of the January 26, 2006 Order and November 2, 2006 Order, Cal Parties assert that the Commission should have summarily rejected Powerex's cost filing due to extensive deficiencies discussed below.<sup>703</sup>

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<sup>701</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 34.

<sup>702</sup> In the November 2, 2006 Order, we found that Portland had continued to include transactions settled as uninstructed energy purchases in its matched transactions. Consistent with the January 26, 2006 Order, the Commission required Portland to remove these transactions from its cost filing. *Id.* P 35.

<sup>703</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 99 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 272-280; California Parties Comments and Testimony in Opposition to Cost Recovery Filing of Powerex Corp., Docket Nos. EL00-95-154 & EL00-98-141 (Oct. 11, 2005) (California Parties' Powerex Comments); California Parties Supplemental Comments and Testimony in Opposition to Cost Recovery Filing of Powerex Corp., Docket Nos. EL00-95-154 & EL00-98-141 (Oct. 25, 2005) (CAP Supplemental Powerex Comments)); Cal Parties' Request for Rehearing of November 2, 2006 Order at 53-69. Cal Parties also raise issues regarding due process, market manipulation, affiliate pricing, and matched transactions. Cal Parties' Request for Rehearing of January 26, 2006 Order at 99; Cal Parties' Request for Rehearing of November 2, 2006 Order at 61-69. We have addressed these issues above. *See supra* P 96-99, 109-111, 243-248, 264-267.

### 1. Single Constant Total-Period Average<sup>704</sup>

345. Cal Parties argue that the Commission erroneously concluded that Powerex's use of a single constant total-period average instead of calculating an average portfolio cost for each hour did not violate the August 8, 2005 Order.<sup>705</sup> Cal Parties contend that the use of a single constant total-period average portfolio unfairly inflates its cost claims. If it does not summarily reject Powerex's cost filing, Cal Parties request that the Commission better explain how Powerex's use of a single constant total-period average portfolio cost can be squared with the Commission's goal of determining a full and fair accounting of Powerex's actual costs and revenues during the Refund Period.

346. Cal Parties assert that use of the total-period average is intended to avoid principles of cost-causation and artificially inflated prices. Cal Parties state that Powerex sold large quantities of power to the CAISO and PX in the earlier parts of the period, when its purchase prices were relatively low, and it purchased large quantities of power at high prices in later parts of the period in which it had few, if any, sales to the CAISO. Cal Parties claim that hourly portfolios properly and fairly attribute the low purchase costs of the early part of the period to the sales made in the early part of the period. Cal Parties argue that, in contrast, Powerex's methodology unfairly uses the high costs of the latter part of the period to inflate the price of sales made in the early part of the period. Cal Parties contend that Powerex's methodology violates not only the methodology established in the August 8, 2005 Order, but also the laws of physics because it reverses time and uses of power that was generated and purchased late in the period to satisfy sales that occurred months earlier. Cal Parties allege that this practice by Powerex cost California ratepayers tens of millions of dollars.<sup>706</sup>

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<sup>704</sup> This means that the average cost for each hour throughout the relevant period is constant.

<sup>705</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 100 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 265, 269, 272); Cal Parties' Request for Rehearing of November 2, 2006 Order at 58-61.

<sup>706</sup> *Id.* at 101 (citing California Parties' Powerex Comments at 7-16, 19-20; Prepared Testimony of Dr. Carolyn A. Berry on Behalf of the California Parties Concerning the Cost Filing of Powerex Corp., CAPPOWEREX-Ex. No. 1, Docket Nos. EL00-95-154 & EL00-98-141 at 10-27 (Oct. 11, 2005) (Berry Powerex Testimony); CAP Supplemental Powerex Comments at 3-11; Supplemental Testimony of Dr. Carolyn A. Berry in Support of California Parties' Comments in Opposition to Cost Recovery Filing of Powerex Corp. and Supporting Exhibits, CAP-POWEREX-Ex. Nos. 8-10, Docket Nos. EL00-95-154 & EL00-98-141 (Oct. 25, 2005) (Berry Supplemental Powerex

(continued...)

347. On rehearing of the November 2, 2006 Order, Cal Parties allege that the Commission's explanation in the January 26, 2006 Order that the use of an hourly average is not required allows a seller to avoid demonstrating the cost of procuring power that was sold to the California markets.<sup>707</sup> They further state that the August 8, 2005 Order expressly prohibited netting of sales and purchase and the inclusion of long-term purchases and that the Commission's determinations regarding Powerex's compliance filing allowed Powerex to net its transactions.<sup>708</sup> They contend that such treatment was only afforded to Powerex and should be reversed.

### **Commission Determination**

348. We disagree with Cal Parties' that Powerex's filing was not constructed and supported appropriately. As the Commission stated in the January 26, 2006 Order, in the August 8, 2005 Order, the Commission did not explicitly require the use of an hourly average.<sup>709</sup> To the contrary, in the August 8, 2005 Order, the Commission established the "framework" for the cost filings, allowing sellers to provide cost filings in a fashion consistent with their business practice, record keeping, or other necessary basis.<sup>710</sup> We continue to find that Powerex's methodology is consistent with the way it handled its resource portfolio during the Refund Period,<sup>711</sup> and sufficiently demonstrates the costs the company incurred to serve California markets. Furthermore, the Commission responded to Cal Parties' concerns by not allowing Powerex to net its surplus purchases with short-term purchases over the entire October 2, 2000 to January 16, 2001 time period.<sup>712</sup> Instead, the Commission required Powerex to revise its cost inputs based on

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Testimony)); Cal Parties' Request for Rehearing of November 2, 2006 Order at 60.

<sup>707</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at 59-60 (quoting January 26, 2006 Order, 114 FERC ¶ 61,070 at P 273).

<sup>708</sup> *Id.* at 60-61 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 70, 89; Berry Powerex Testimony, CAP-POWEREX-Ex. No. 12 at 6-8).

<sup>709</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 273.

<sup>710</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 95.

<sup>711</sup> *See* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 263 (Powerex's access to hydro capacity allowed Powerex to make short-term purchases available to support California market sales when needed, but not necessarily at the time at which they were delivered to Powerex, making it impossible to match or calculate an hourly average).

<sup>712</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 59 (requiring Powerex to

(continued...)

two discrete time periods – from October 2, 2000 through December 31, 2001 and January 1, 2001 until January 16, 2001, when Powerex ceased making sales into California markets. This prevented Powerex from netting surpluses in one period with shortages in another.

349. As for Cal Parties contention that the August 8, 2005 Order expressly prohibited netting of sales and purchase and the inclusion of long-term purchases, we explain above in Section III.J.4 that Powerex did not engage in the type of netting prohibited by the August 8, 2006 Order; rather, Powerex’s netting was simply to determine the quantity of short-term affiliate transactions to include in Powerex’s average cost portfolio.<sup>713</sup>

## 2. Matching Transactions

350. On rehearing of the January 26, 2006 Order, Cal Parties argue that the Commission did not adequately explain why Powerex should be immune to the August 8, 2005 Order’s directive to match transactions.<sup>714</sup> Cal Parties claim that the Commission disregarded its comments and testimony on this issue.<sup>715</sup> Cal Parties assert that Powerex submitted its NERC tags for the October 2, 2000 to December 31, 2000 period but made no attempt to match its sales into the CAISO and PX markets to a specific resource. Cal Parties claim that, through a review of these tags, its witness was able to trace over 200,000 MWh worth of sales to the CAISO.<sup>716</sup> Cal Parties also assert that Powerex continually engaged in “Fat Boy” transactions and the costs and revenues associated with this behavior should have been excluded. Cal Parties also contend that the Commission’s finding that Powerex met its evidentiary burden is erroneous and

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revise inputs based on two discrete time periods will result in a more accurate cost input calculation). We further note that the concerns that Cal Parties expressed over the laws of physics are irrelevant to the cost offset methodology, which focuses on sellers’ bottom line financial position.

<sup>713</sup> *Id.* P 57; *see* discussion in text *supra* P 243-248.

<sup>714</sup> Cal Parties’ Request for Rehearing of January 26, 2006 Order at 102 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 65, 69; January 26, 2006 Order, 114 FERC ¶ 61,070 at P 273).

<sup>715</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 272; California Parties’ Powerex Comments at 14-16).

<sup>716</sup> *Id.* (citing Berry Powerex Testimony at 5-6).

unsupported.<sup>717</sup>

### **Commission Determination**

351. We also find no merit to Cal Parties' claim that Powerex failed in its cost offset demonstration because it did not attempt to match its transactions before creating an average cost portfolio. The Commission noted, in the January 26, 2006 Order, that Powerex attested that it could not match its transactions as a result of, among other things, its business practices.<sup>718</sup> In the August 8, 2005 Order, the Commission created the framework for the cost filings. Powerex's cost filing met the requirements of the August 8, 2005 Order because it took into account the requisite revenues and costs in accordance with the August 8, 2005 Order.

352. Furthermore, we note that, in the August 8, 2005 Order, the Commission agreed with Cal Parties that it would be arbitrary to allow any matching of energy purchases to sales that were not sufficiently supported.<sup>719</sup> The Commission accepted, subject to certain modifications, Powerex's average portfolio demonstration because Powerex provided sufficient evidence of its energy purchases.<sup>720</sup>

353. We find that Cal Parties' claim that Powerex was involved in certain gaming transactions is misplaced. As stated in the January 26, 2006 Order, the Commission has held separate proceedings regarding gaming and made determinations regarding that issue in those proceedings.<sup>721</sup> Accordingly, we find that this argument is outside the scope of this proceeding.<sup>722</sup>

### **3. Applicable Time Periods**

354. On rehearing of the January 26, 2006 Order, Cal Parties request that the Commission provide clarification or grant rehearing regarding the inclusion of Powerex revenues from January 1, 2001 to January 16, 2001. Cal Parties state that, in the course

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<sup>717</sup> *Id.* at 103 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 272).

<sup>718</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 261.

<sup>719</sup> August 8, 2005 Order, 112 FERC ¶ 61,176 at P 58.

<sup>720</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 272.

<sup>721</sup> *Id.* P 109.

<sup>722</sup> *See also supra* P 134-139.

of requiring Powerex to include affiliate purchases in its average portfolio cost at the rate on file with the British Columbia Utilities Commission, the Commission ruled that “[t]he applicable time period will be from October 2, 2000, through December 31, 2000, since Powerex’s portfolio average cost was limited to that time period.”<sup>723</sup> Cal Parties state that this limitation does not square with the Commission requirement in the January 26, 2006 Order that Powerex include revenues made between January 1, 2001 and January 16, 2001 and revenues for the entire refund period, regardless of the number of transactions at issue.<sup>724</sup>

355. Powerex requests that the Commission clarify that the appropriate time period for its average purchase portfolio costs should not be limited to October 2, 2000 through December 31, 2000, but rather should be October 2, 2000 through January 16, 2001.<sup>725</sup> Powerex claims that, although the January 26, 2006 Order directed Powerex to include revenues from sales Powerex made after December 31, 2000,<sup>726</sup> the Commission did not specifically direct Powerex to include this same time period for calculating its average purchase portfolio cost. Powerex contends that the only reference in the January 26, 2006 Order to the time period applicable for Powerex’s average purchase portfolio cost was the Commission’s finding that Powerex must include BC Hydro’s excess power above native load from October 2, 2000 through December 31, 2000.<sup>727</sup> Powerex argues that the use of disparate time periods for its revenues and average purchase portfolio cost would be inconsistent with the purpose of the cost filing<sup>728</sup> and would be arbitrary and capricious and not the product of reasoned decision-making. Powerex argues that it should be permitted to include purchases after December 31, 2000 in its average purchase portfolio cost calculation in addition to including revenues after December 31, 2000. However, because Powerex’s participation in the CAISO and PX markets ended on January 16, 2001,<sup>729</sup> it argues that it should limit inclusion of its

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<sup>723</sup> Cal Parties’ Request for Rehearing of January 26, 2006 Order at 104 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 277).

<sup>724</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 274).

<sup>725</sup> Powerex Request for Rehearing at 3, 10-11.

<sup>726</sup> *Id.* at 10 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 274).

<sup>727</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 277).

<sup>728</sup> *Id.* at 11 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P1).

<sup>729</sup> *Id.* at 11, n.2 (citing Wong Affidavit (Att. 7) at P 10 n.1).

purchases to January 16, 2001 (even though it would include all revenues for the entire refund period). To the extent that the Commission does not clarify the January 26, 2006 Order as requested, Powerex seeks rehearing on this issue.

### **Commission Determination**

356. We deny Cal Parties' request for clarification/rehearing regarding the inclusion of Powerex revenues from January 1, 2001 to January 16, 2001. In the November 2, 2006 Order, the Commission determined that Powerex's netting of surplus purchases over the entire October 2, 2000 to January 16, 2001 time period was illogical and must be revised.<sup>730</sup> As part of that determination, the Commission explained that Powerex's netting to determine affiliate purchase levels should occur over the two distinct time periods in order to portray a more accurate cost input calculation.<sup>731</sup> Therefore, the Commission already directed Powerex to include revenue and costs from January 1, 2001 through January 16, 2001. Accordingly, we deny the request for clarification or rehearing because we find it is unnecessary.

357. Likewise, we find it unnecessary to clarify the time period for inclusion of Powerex's average purchase portfolio costs. In the November 2, 2006 Order, the Commission found that the inclusion of non-affiliate purchase costs for January 1-16, 2001 was reasonable.<sup>732</sup> The Commission agreed with Powerex that, because the Commission required Powerex to include revenues it received after December 31, 2000, it was reasonable also to include the associated purchase costs.<sup>733</sup> Accordingly, the Commission accepted Powerex's revised purchase costs and directed Powerex to utilize the CAISO final settlement data to complete the calculations required, as directed in the January 26, 2006 Order.<sup>734</sup> Therefore, the Commission already indicated that Powerex should include average purchase portfolio costs from October 2, 2000 through January 16, 2001. For this reason, we deny Powerex's request for clarification or rehearing on this issue.

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<sup>730</sup> November 2, 2006 Order, 117 FERC ¶ 61,151 at P 59.

<sup>731</sup> *Id.*

<sup>732</sup> *Id.* P 50.

<sup>733</sup> *Id.*

<sup>734</sup> *Id.*

## I. PPL Energy

358. On rehearing of the January 26, 2006 Order, Cal Parties continue to contend that PPL Energy had inflated the cost of its coal-fired generation in its cost filing from a base cost of \$6.71 to approximately \$50 by tacking on a charge for “other environmental costs,” “operating reserves,” and “other operational costs” without explanation or documentation.<sup>735</sup> They state that, in the January 26, 2006 Order, the Commission accepts PPL Energy’s cost filing on the basis that the components included in PPL Energy’s calculation are “usual and necessary.”<sup>736</sup> Cal Parties contend that, by accepting PPL Energy’s generation costs above the marginal fuel cost, the Commission departed from its own criteria of requiring cost filings to reflect fully-supported actual costs.<sup>737</sup> Cal Parties request that the Commission clarify that PPL Energy base the cost of its FPA section 202(c) sales on the average portfolio costs that PPL Energy already claimed in its cost filing and that PPL Energy is not permitted to submit additional cost information related specifically to its FPA section 202(c) sales. In the alternative, Cal Parties seek rehearing on this issue.

### Commission Determination

359. We grant, in part, Cal Parties’ request. We agree that PPL Energy’s “other operational costs” are insufficiently supported,<sup>738</sup> as required by the August 8, 2005 Order. Accordingly, we direct PPL Energy to remove the “other operational costs”

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<sup>735</sup> Cal Parties’ Request for Rehearing of January 26, 2006 Order at 105 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 295; Prepared Testimony of Dr. Carolyn A. Berry on Behalf of the California Parties Concerning the Cost filing of PPL Energy, CAP-PPL Ex. No 1 at 8-9, 9:2-14, Docket Nos. EL00-95-141 and EL00-98-128 (Oct. 11, 2005); Reply Comments of PPL Energy Parties in Support of Cost Filing at 7-9, Docket Nos. EL00-95-141 and EL00-98-128 (Oct. 17, 2005)).

<sup>736</sup> *Id.* at 105-106 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 295).

<sup>737</sup> *Id.* at 106 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 46 (quoting August 8, 2005 Order, 112 FERC ¶ 61,176 at P 1)).

<sup>738</sup> In its original cost filing, PPL Energy included in the calculation of its affiliated generation production costs, an amount equal to \$23.29/MWh as “other operational costs.” *See* PPL Energy September 14, 2005 Cost Offset Filing Template, as supplemented September 29, 2005, at tab “Nov 00 Details,” column Y, Docket Nos. EL00-95-141 and EL00-98-128 (PPL Energy Cost Offset Filing Template).

from its production costs calculations in its cost analysis. This change will reduce PPL Energy's cost offset by \$331,174.<sup>739</sup>

360. We continue, however, to find that PPL Energy has satisfactorily supported its claimed operating reserves costs. In its review of PPL Energy's cost filing, the Commission examined, among other data, PPL Energy's filing in Docket No. ER00-417-000, in which PPL Energy submitted an OATT for filing with the Commission. By letter order dated December 29, 1999, the Commission accepted for filing PPL Energy's OATT, finding that its rates for operating reserves, including regulation and frequency response and spinning and supplemental operating reserves, were just and reasonable.<sup>740</sup> Because PPL Energy used these Commission-accepted rates for operating reserves in its cost filing, by definition, these rates were appropriate. The Commission also reviewed FERC Form No. 1 data for the years 2000 and 2001 for the joint owners of the Colstrip facility to validate that the fuel costs, variable Operation and Maintenance (O&M), and environmental costs were reasonable for that unit. For these reasons, we deny Cal Parties' request to reject these costs.

361. We find it unnecessary to clarify how PPL Energy computes the cost of its FPA section 202(c) sales, as requested by Cal Parties. In the January 26, 2006 Order, the Commission required that PPL Energy's FPA section 202(c) sales be calculated based upon PPL Energy's average portfolio cost.<sup>741</sup> We find that directive unambiguous. Further, there was no other directive that allowed for supplemental cost information to support a different computation methodology. PPL Energy's average portfolio cost methodology in its cost filing, subject to the modification discussed above, is appropriate. For these reasons, we deny clarification and rehearing of this issue.

362. As a result of these findings, we find that PPL Energy has satisfactorily demonstrated a cost offset of \$595,485.49. Accordingly, we direct PPL Energy to submit to the CAISO a revised Approved Offset Submission, modified as discussed above,

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<sup>739</sup> This amount is a consequence of deleting the \$23.29/MWh "other operational costs" component that is utilized in the calculation of PPL Energy's average hourly cost. *See* PPL Energy Cost Offset Filing Template at tab "Nov 00 Details," column Y; tab "AT" (Format for Cost Filings for Hourly Average Portfolio Costs FOR MARKETERS); tab "AT Details;" tab "BX" (Format for Cost Filings for ISO Transaction Specific Instructed Energy Net Revenue).

<sup>740</sup> *See PPL Montana, LLC*, 89 FERC ¶ 61,337 (1999).

<sup>741</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 83, 296.

within 30 days, so the CAISO may incorporate this total as PPL Energy's cost offset in its refund calculations.

## **J. Puget Sound**

363. On rehearing of the January 26, 2006 Order,<sup>742</sup> Cal Parties argue that the Commission incorrectly accepted the inclusion of Puget's day-ahead or long-term purchases in its average cost portfolio based upon the finding that Puget's energy supply procedures during the Refund Period indicated that such purchases were intended to service native load.<sup>743</sup> Cal Parties state that Puget's support for its position was based upon the flawed assumption that its day-ahead resources were balanced with its day-ahead forecasted load on each day of the Refund Period.<sup>744</sup> Cal Parties argue that this assumption does not demonstrate that purchases occurring in the month prior to real-time were indeed purchased to meet its native load and that a day-ahead balance position is not indicative of the classification of purchases made prior to that point in time.<sup>745</sup> Cal Parties contend that Puget has not provided any documentation that shows its load/resource balance on a month-ahead basis.<sup>746</sup> Cal Parties assert that only their expert provided information on Puget's activity on a monthly basis and that information, although not conclusive, showed that Puget was "long" on a month-ahead basis.<sup>747</sup> Cal Parties therefore argue that, consistent with the August 8, 2005 Order, the Commission should consider the short-term purchases in the month prior to real-time as opportunity

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<sup>742</sup> On rehearing, Cal Parties argue that the Commission erred in directing Puget to exclude uninstructed energy purchases from its cost filing. Cal Parties' Request for Rehearing of January 26, 2006 Order at 110 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 333). We address this argument above. *See supra* P 252-253.

<sup>743</sup> *Id.* at 108 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 331).

<sup>744</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 330).

<sup>745</sup> *Id.* (citing Prepared Testimony of Dr. Carolyn A. Berry on Behalf of the California Parties Concerning the Cost Filing of Puget Sound Energy, Inc., CAP-PSE-Ex. No. 1, at 16:12-15, Docket Nos. EL00-95-142 & EL00-98-129 (Oct. 11, 2005) (Berry Puget Testimony)).

<sup>746</sup> *Id.* (citing Berry Puget Testimony at 16:15-16).

<sup>747</sup> *Id.* at 108-109 (citing Berry Puget Testimony at 16:17-19, 16:19-20). In other words, Cal Parties assert that Puget purchased in advance more than it actually needed to serve its native load.

transactions, which are excluded from the portfolio used to calculate average hourly costs because they were not made for native load.<sup>748</sup>

364. Cal Parties also argue that the Commission incorrectly found that Puget adequately justified its transmission costs.<sup>749</sup> Cal Parties contend that the Commission's determination conflicts with the requirement in the August 8, 2005 Order that transmission costs include only marginal costs, not sunk costs, and sellers must clearly demonstrate the transmission costs associated with each CAISO or PX sale.<sup>750</sup> Cal Parties state that their witness was unable to verify from a review of Puget's sample documentation, that Puget complied with the August 8, 2005 Order. Specifically, they argue that it is not clear whether the claimed costs were incurred correctly for CAISO sales, and that the documentation provided does not demonstrate the transmission costs associated with each CAISO sale.<sup>751</sup> Cal Parties state that the Commission recognized these inconsistencies.<sup>752</sup> Cal Parties request that the Commission disallow Puget's transmission costs from its cost-based offset.

### **Commission Determination**

365. We find that Cal Parties' request to reverse the Commission's decision on Puget's day-ahead or longer term purchases is unfounded. Cal Parties recognize that their own review of Puget's sales did not conclusively indicate that the purchases made up to a month in advance should be defined as opportunity purchases when an LSE is also making off-system sales during that time.<sup>753</sup> Furthermore, in the January 26, 2006 Order, the Commission found that Puget demonstrated, consistent with the August 8, 2005 Order, that, at times, it was required to sell excess energy due to its business practices as an LSE.<sup>754</sup> Cal Parties have not demonstrated that Puget's practices were opportunity

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<sup>748</sup> *Id.* at 109 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 78).

<sup>749</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 329).

<sup>750</sup> *Id.* (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 78).

<sup>751</sup> *Id.* at 110 (citing Berry Puget Testimony at 21:3-9).

<sup>752</sup> *Id.* (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 328).

<sup>753</sup> *See supra* n.747.

<sup>754</sup> *See* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 330-331; August 8, 2005 Order, 112 FERC ¶ 61,176 at P 103 (allowing sellers to include a statement of their business practice programs).

purchases. As an LSE, and consistent with our review of Puget's cost filing, Puget made purchases based on estimated load forecasts, which by definition may require that some of the day-ahead and month-ahead purchases may not be necessary for system needs, making these purchases available for resale.<sup>755</sup> However, Cal Parties provides no indication that Puget was making opportunity purchases in order to exclusively make additional sales to the California markets. For these reasons, we deny Cal Parties' request.

366. We are also not persuaded by Cal Parties' arguments and continue to find that the data and other supporting information provided by Puget satisfactorily demonstrates the level of transmission costs incurred to make sales to the California market. For example, Puget provided invoices illustrating its transmission costs from BPA, Portland General, and its own system use.<sup>756</sup> Puget also included interchange data further supporting the off-system sale availability and delivery areas.<sup>757</sup> Finally, Puget included the respective transmission tariff rates identifying rates utilized for sales to the California markets.<sup>758</sup> Our review of the data provided in Puget's submittal provides an appropriate demonstration of Puget's actual costs. Accordingly, we deny Cal Parties' request to deny Puget's transmission charges.

## **K. Sempra Energy Trading**

### **1. Show Cause Settlement**

367. In its rehearing request, Sempra argues that the Commission erred when it directed Sempra to remove from its original cost filing the offset of \$3,376,631.26 (offset) that Sempra has included as an "other cost."<sup>759</sup> Sempra argues that the offset corresponds to revenues from sales of ancillary services to the CAISO during the Refund Period that

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<sup>755</sup> See, e.g., Puget Sound September 15, 2005 Cost Offset Filing, Puget Ex. PSE-BU.2 (2000 Draft Energy Supply Procedures Manual), Docket Nos. EL00-95-142 and EL00-98-129.

<sup>756</sup> See Puget Sound September 26, 2005 Supplemental Cost Offset Filing, Puget Ex. PSE-BB-5, Docket Nos. EL00-95-142 and EL00-98-129.

<sup>757</sup> *Id.* at Puget Ex. PSE-BB-2\_v2 and PSE-BB-4.

<sup>758</sup> *Id.* at Puget Ex. PSE-BB-6, PSE-BB-7, and PSE-BB-8.

<sup>759</sup> Sempra Rehearing Request of January 26, 2006 Order at 6 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 360).

Sempra will not collect as a result of the Show Cause Settlement, which resolved all the issues related to Sempra's alleged gaming practices that were set for hearing in Docket Nos. EL03-173-000 and EL03-201-000.

368. Pursuant to the Show Cause Order, Sempra agreed to pay a settlement amount that corresponded to the total revenues owed to Sempra by the CAISO for transactions in the CAISO markets that allegedly constituted "gaming practices."<sup>760</sup> Sempra states that those transactions include certain sales of ancillary services made by Sempra to the CAISO during the Refund Period that are also subject to mitigation in this proceeding. Thus, as a result of the Show Cause Order, Sempra will not collect any of the revenues associated with the transactions covered by the Show Cause Settlement, including those revenues from ancillary services sales during the Refund Period that Sempra identified in the offset. Sempra argues that, because it will not collect the revenues associated with the offset, it is contrary to FPA section 206 for the Commission to impute those revenues to Sempra in determining whether the MMCP methodology results in confiscatory rates.

369. Sempra also contends that the Commission improperly characterized the offset as a settlement cost, which could not be included.<sup>761</sup> As explained by Sempra, the offset constitutes forgone revenues, not settlement costs. Sempra asserts its inclusion of the offset is consistent with the Commission's practice of decreasing refunds by unpaid amounts owed for services during the Refund Period.<sup>762</sup> Sempra reiterates that it should not pay refunds on revenues it will not collect and that this revenue should not be considered in the computation of costs that limit Sempra's refund liability. If the Commission determines that the offset should be excluded from the cost filing, Sempra requests that the Commission address and remedy the fact that Sempra would owe refunds on amounts it never collected.

370. Finally, Sempra argues that the Commission incorrectly stated that Sempra did not explain whether the revenues reported in the cost filing were already net of the offset and how Sempra calculated the offset.<sup>763</sup> Sempra contends that its original cost filing explained that it relied on CAISO and PX revenue data and specifically described the only adjustment made to the CAISO and PX revenue data, which deducted the multi-day

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<sup>760</sup> *Id.* (citing *Sempra Energy Trading Corp.*, 108 FERC ¶ 61,114, at P 3 (2004)).

<sup>761</sup> *Id.* at 7-8 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 360).

<sup>762</sup> *Id.* at 8 (citing *Panhandle Eastern Pipe Line Co.*, 83 FERC ¶ 61,261, at 62,088 (1998)).

<sup>763</sup> *Id.* at 8-9 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 360).

transaction. Sempra claims that, because it described the one change that it made to the CAISO and PX revenue data, the Commission has no reason to question whether the revenue in Sempra's cost filing was net of the offset. Sempra also contends that it included the offset as an "other cost" to offset the revenues included in the CAISO revenue data since under the Show Cause Order Sempra will not collect those revenues. Sempra adds that it did explain how it calculated the offset and provided testimony to describe its methodology, which cited to data filed in the Show Cause Proceeding for support.<sup>764</sup>

### **Commission Determination**

371. We grant rehearing of this issue. In the January 26, 2006 Order, the Commission noted that Sempra failed to identify how it calculated its estimate of ancillary service revenues.<sup>765</sup> In its rehearing request, Sempra relies on testimony filed in the cost filing proceeding, testimony which references data that was filed in the Show Cause Proceeding.<sup>766</sup> Using this data, the Commission can substantiate that Sempra's calculation is accurate. The Commission's review of Sempra's evidence indicates that the total ancillary service revenues related to the Show Cause Order reflected in Attachment F of Sempra's Oct. 31, 2003 Show Cause filing results in total net gains of \$3,377,611. In light of our discussion above regarding the form and substance of the cost offset analysis, we will allow Sempra to exclude the ancillary service revenue amount of \$3,376,631.

372. We note that, in reviewing the authenticity of the data provided in Attachment F of Sempra's Oct. 31, 2003 Show Cause filing, we found that none of the revenue received for the ancillary service transactions set forth therein were associated with actual production costs. In other words, Sempra's cost filing illustrates that there were no production costs associated with earning the revenue. Furthermore, because the revenue at issue will be refunded to CAISO market participants, it is reasonable to remove the revenues from the cost filing. Sempra will not receive the \$3,376,631, nor is it claiming costs that are related to those revenues.

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<sup>764</sup> *Id.* at 9 (quoting Hanna Testimony at 13:3-13:11 (referencing Sempra Show Cause Response, Att. F, Docket No. EL03-137-000, *et al.* (Oct. 31, 2003))).

<sup>765</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 360.

<sup>766</sup> See Sempra Rehearing Request of January 26, 2006 Order at 9 (quoting Hanna Testimony at 13:3-13:11 (referencing Sempra Show Cause Response, Att. F, Docket No. EL03-137-000, *et al.* (Oct. 31, 2003))).

## 2. Ancillary Services Purchases from the City of Burbank, California

373. Sempra also argues in its rehearing request that the Commission erred by directing Sempra to remove from its original cost filing purchases of ancillary services from the City of Burbank, California (Burbank) that were associated with Sempra's sales of ancillary services to the CAISO.<sup>767</sup> Sempra argues that the Commission's contention that it did not support the costs associated with these ancillary services sales is contradicted by the Commission's earlier finding that the purchases from Burbank "were supported by original source documentation."<sup>768</sup> Sempra states that it specifically included in its cost filing samples of tags documenting its transactions with Burbank,<sup>769</sup> which the Commission found adequately supported the costs associated with those transactions.<sup>770</sup> Sempra contends that the Commission failed to explain how the sample documentation did not support its ancillary services purchases from Burbank. Sempra notes that the Commission allowed the submission of sample documentation<sup>771</sup> and stated that the documentation for ancillary services purchases from Burbank was no different than that for energy purchases.<sup>772</sup> Sempra adds that any sample it could provide in support of the ancillary services purchases from Burbank would be substantially identical to the samples Sempra provided in support of transactions with the same counterparty. Sempra argues that the Commission did not explain why Sempra should provide specific documentation of ancillary services purchases when Sempra had satisfactorily documented transactions with that same counterparty.

### Commission Determination

374. In the January 26, 2006 Order, we found that Sempra had not supported the costs associated with the sales of ancillary services capacity.<sup>773</sup> We continue to find that the

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<sup>767</sup> *Id.* at 9-10 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 359).

<sup>768</sup> *Id.* at 10 (quoting January 26, 2006 Order, 114 FERC ¶ 61,070 at P 358).

<sup>769</sup> *Id.* (citing Hanna Testimony at 4:5-6, 9:15-16; Sempra September 14, 2005 Cost Recovery Filing, Att. A-2, Docket Nos. EL00-95-139 and EL00-98-126 (Att. A-2 of Sempra's September 14, 2005 Cost Recovery Filing)).

<sup>770</sup> *Id.* at 10-11 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 358).

<sup>771</sup> *Id.* at 10 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 65, 70, 357).

<sup>772</sup> *Id.* at 10, 11 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 67).

<sup>773</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 359.

evidence provided by Sempra regarding the Burbank ancillary services purchases lacks sufficient detail to verify these costs. In providing the tag data for the Burbank energy purchases, Sempra did not clearly specify whether the tag data supported the energy purchases (instructed or uninstructed energy) or the capacity purchases (for ancillary service purchases, predominantly spinning reserves).<sup>774</sup> Through the tag data, the Commission was able to determine that the megawatts from Burbank, in any particular hour, could have been sold as energy, ancillary service capacity, or potentially both, making it impossible to isolate and verify the costs associated with the ancillary service capacity purchases.<sup>775</sup> We recognize that Sempra has provided sufficient sample evidence support the fact that it made purchases from Burbank. However, we find that additional evidence, such as an invoice that identified the type of product purchased and the associated cost, would be required to justify Sempra's inclusion of costs associated with its ancillary service capacity purchases.<sup>776</sup> Moreover, the calculations used by Sempra to determine the ancillary service cost for the Burbank transactions are based on a formula that generically takes 80 percent of the revenues received by each of those transactions, and divides that amount by the number of MW of each transaction.<sup>777</sup> Sempra did not explain how that calculation is demonstrative of the Burbank costs, nor did Sempra provide any other demonstration of the cost of purchasing this capacity. For these reasons, we deny rehearing on this issue.

### 3. Energy Purchases from Burbank

375. Sempra argues that the Commission erred in requiring Sempra to reprice its energy purchases from Burbank at the MMCP.<sup>778</sup> Sempra contends that through this directive,

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<sup>774</sup> See, e.g., Att. A-2 of Sempra's September 14, 2005 Cost Recovery Filing.

<sup>775</sup> *Id.* See also Sempra September 27, 2005 Cost Offset Template, at tab "IE Burbank," Docket Nos. EL00-95-139 and EL00-98-126.

<sup>776</sup> In order to ensure that Sempra has not double included the costs for energy and/or ancillary service capacity purchases in both its matched and averaged portfolios, we must be able to determine which type of service (energy or ancillary service capacity) is associated with the claimed costs.

<sup>777</sup> Sempra September 27, 2005 Cost Offset Template, at tab "CD" (Format for Cost Filings for Spinning Reserves), Docket Nos. EL00-95-139 and EL00-98-126.

<sup>778</sup> Sempra Rehearing Request of January 26, 2006 Order at 11 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 358, App. B).

the Commission departed without explanation from its prior orders.<sup>779</sup> According to Sempra's interpretation of these orders, when the Commission determined that refund liability attached to the Scheduling Coordinator, and not the customer, this determination indicated that the Commission was treating the sales between the customer and the Scheduling Coordinator as a bilateral contract, meaning that the sale would not be directly subject to mitigation. By requiring Sempra to reprice the Burbank energy purchases, Sempra argues that the Commission has placed on the Scheduling Coordinator both the financial risk of paying refunds and the contractual risk of whether the Scheduling Coordinator could deduct those refunds from the amounts owed to its customers.<sup>780</sup> Sempra contends that, because it is liable to pay refunds to the CAISO and the PX regardless of what it flowed through to Burbank, its purchases from Burbank should reflect the price paid to Burbank for those transactions. Sempra adds that repricing will lead to the arbitrary result that Sempra will owe refunds on the sales matched to its Burbank purchases but will not be able to claim the actual costs of those purchases. According to Sempra, repricing such purchases at the same MMCP that also caps its sales will effectively defeat the Commission's goal of providing sellers with an opportunity to show that the MMCP rates are confiscatory. Sempra adds that its purchases of ancillary services from Burbank, like the energy purchases, should be priced at the actual purchase cost rather than the MMCP.

### **Commission Determination**

376. Sempra is arguing that in light of the Ninth Circuit's *Bonneville*<sup>781</sup> decisions finding that the Commission lacked the authority to order governmental entities to pay refunds, Sempra, though not a governmental entity, should no longer be held liable for refunds when it acted as a Scheduling Coordinator for a governmental entity. We addressed this issue in Section III, B and for the reasons stated there, deny Sempra's request for rehearing on this issue.

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<sup>779</sup> *Id.* at 12 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 107 FERC ¶ 61,166, at P 18 (2004)).

<sup>780</sup> Sempra states that the Commission similarly determined that sleeving parties assumed the risks associated with making spot energy sales to the CAISO, including the risk of refund liability, like a power marketer, because of the contractual relationship through the CAISO Tariff that these parties had with the CAISO. *Id.* at 12-13 n.43 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 105 FERC ¶ 61,066, at P 117 (2003)).

<sup>781</sup> *Bonneville*, 422 F.3d 908.

377. Although we deny Sempra's request for rehearing, we provide the following clarification. In the January 26, 2006 Order, the Commission required Sempra to reprice the energy purchased from the City of Burbank at the MMCP.<sup>782</sup> In reaching its conclusion, the Commission relied on the evidence submitted by Cal Parties, namely the Power Marketing, Surplus Resource and Agency Agreement (Agency Agreement) between Sempra and the City of Burbank. The Agency Agreement, however, did not indicate a price for the supply of energy from Burbank to Sempra.<sup>783</sup> While Sempra included OASIS transaction sheets in its cost filing, those transactions sheets confirmed merely that the transaction took place. The OASIS transaction sheets failed to substantiate the cost of the Burbank energy purchase. Moreover, based on Sempra's documentation, we found that it was unclear whether Sempra actually included the Burbank energy purchases in both the average portfolio calculation and the matched transaction analysis.<sup>784</sup> As a result, while the Commission was able to determine that Sempra made purchases from Burbank, the Commission directed Sempra to reprice the Burbank transactions at the MMCP, because Sempra failed to substantiate the cost of the energy.

#### **4. Evidentiary Support for Energy Purchases**

378. The Cal Parties also seek rehearing of our determinations regarding Sempra's cost filing. In their rehearing request,<sup>785</sup> Cal Parties argue that Sempra did not support its

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<sup>782</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 358.

<sup>783</sup> See Cal Parties' Comments and Testimony in Opposition to Cost Recovery Filing of Sempra Energy Trading Corp., Exhibit No. CAP-SET-Exh. No. 3 ("Power Marketing, Surplus Resource and Agency Agreement"), Docket No. EL00-95-139 and EL00-98-126 (Oct. 11, 2005) (Cal Parties' Comments and Testimony in Opposition to Sempra Cost Filing).

<sup>784</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 358.

<sup>785</sup> On rehearing of the January 26, 2006 Order, Cal Parties state that the Commission's acceptance of Sempra's cost filing raises issues regarding due process, subdelegation of authority to the CAISO, affiliate transactions, congestion, market manipulation and matching issues. See Cal Parties' Request for Rehearing of January 26, 2006 Order at 111. Cal Parties also seek rehearing of the Commission's decision not to set the Sempra filing for hearing with an opportunity for discovery and cross-examination of witnesses. *Id.* We have addressed these issues above. See *supra* P 96-99.

energy purchases related to sales to the CAISO.<sup>786</sup> Cal Parties claim the Sempra's documentation and support data are inadequate to support its matching and average cost portfolio analyses.<sup>787</sup>

### **Commission Determination**

379. We reiterate that, through our review of the various cost filings, Sempra provided sufficient sample evidence to support its actual energy purchases.<sup>788</sup> Specifically, the Commission was "able to verify that the purchase information from the source document (trade desk sheet) was accurately reflected in Sempra's purchase template, the sale transaction was accurately reflected in Sempra's sales template, and that the sale to the CAISO was independently validated by the [CA]ISO settlement data."<sup>789</sup> Accordingly, the Commission exhaustively evaluated the documentation submitted by Sempra and found that the evidence supported Sempra's energy purchase costs. Cal Parties general assertions to the contrary do not convince us otherwise. Therefore, we deny rehearing on this issue.

### **5. Revenues Associated with \$150 Soft Cap**

380. Cal Parties also argue that the Commission should have explicitly directed Sempra to include revenues from sales into the PX that were priced above the \$150/MWh soft cap in place during January 2001.<sup>790</sup> Cal Parties contend that, because Sempra included costs associated with these sales in its calculations, it was necessary to include the revenues as well. Cal Parties add that, because Sempra failed to provide the bid curve

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<sup>786</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 111 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 357).

<sup>787</sup> *Id.* at 111 (citing Cal Parties' Comments and Testimony in Opposition to Sempra Cost Filing; Prepared Testimony of Gerald A. Taylor concerning the Cost Recovery Filing of Sempra Energy Trading Corp., CAP-SET-Ex. No. 1, Docket Nos. EL00-95-139 and EL00-98-126 (Oct. 11, 2005) (Taylor Sempra Testimony)).

<sup>788</sup> *See, e.g.*, January 26, 2006 Order, 114 FERC ¶ 61,070 at P 357.

<sup>789</sup> *Id.*

<sup>790</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 111 (citing Cal Parties' Comments and Testimony in Opposition to Sempra Cost Filing at 7; Taylor Sempra Testimony at 7).

data necessary to calculate its revenue under the soft-cap policy, it would have been more accurate to price the soft-cap transactions at \$150/MWh.<sup>791</sup>

### **Commission Determination**

381. We find that Cal Parties' request that we direct Sempra to include the revenues at issue is unnecessary. As part of the review of the sellers' cost filings, the Commission analyzed the revenue claims of sellers against the settlement data from the CAISO and PX markets.<sup>792</sup> Based on that analysis, the Commission determined that the CAISO and PX must merge and finalize the revenue data to include all final MMCP and all manual adjustments and supply the data to sellers.<sup>793</sup> Each seller was then required to utilize the CAISO and PX revenue settlement data in their cost filings submitted to the CAISO. Therefore, Sempra was required to incorporate the correct revenue from the PX during the January 2001 period. For this reason, we deny rehearing.

#### **L. TransAlta**

382. On rehearing of the January 26, 2006 Order, Cal Parties contend that the Commission's language directing TransAlta to reprice its affiliate transactions can be misinterpreted.<sup>794</sup> Cal Parties request that the Commission clarify or revise the relevant language in accordance with the Commission's determination in the January 26, 2006 Order that cost offset claims had to reflect the actual cost of affiliate generation, and could not include market-valued affiliate costs. Cal Parties state that their concern proved to be valid in light of TransAlta's compliance cost filing in which, according to Cal Parties, TransAlta sought to re-price its affiliate transactions not at the cost of generation, but at prices based on one of three average price calculations.<sup>795</sup>

383. Cal Parties also argue that the Commission's acceptance of TransAlta's cost filing raises due process concerns and matching issues, and constitutes the erroneous sub-

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<sup>791</sup> *Id.*

<sup>792</sup> *See* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 53–57.

<sup>793</sup> *Id.* P 57.

<sup>794</sup> Cal Parties' Request for Rehearing of January 26, 2006 Order at 113 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 383).

<sup>795</sup> *Id.* at 113, n.326 (citing Compliance Filing of TransAlta Energy Marketing (U.S.) Inc. at 3, Docket Nos. EL00-95-173 & EL00-98-159 (Feb. 10, 2006)).

delegation of authority to the CAISO. Cal Parties seek rehearing of these issues as they apply to TransAlta's filing.

### **Commission Determination**

384. As a practical matter, Cal Parties request for rehearing regarding the language from the January 26, 2006 Order is moot given the rejection of TransAlta's compliance filing in the November 2, 2006 Order. However, we also disagree with Cal Parties' claim that the Commission's directive that TransAlta reprice its affiliate transactions can be misinterpreted. In the January 26, 2006 Order, the Commission rejected, as a general matter, the inclusion of market-valued affiliate costs in the cost offset claims.<sup>796</sup> We specifically directed the affected parties, including TransAlta, to "revise their matched and average portfolio costs to eliminate all affiliate purchases that utilized market indexes or other market pricing" or to submit revised cost filings "valuing affiliate transactions at actual production costs."<sup>797</sup> The Commission re-emphasized this directive in its determination regarding TransAlta's cost filing.<sup>798</sup> We find that our intent regarding affiliate transactions was clear; costs that included market-based rates could not be included, either by TransAlta or by any other seller. For these reasons, we deny Cal Parties' request.

385. We likewise deny Cal Parties' request for rehearing on the issues of due process, delegation of authority, and matching, consistent with our discussion of these issues above.<sup>799</sup> Cal Parties have not raised any new issues specific to TransAlta on these matters that warrant further review.

### **V. IDACORP March 27, 2006 Order: Requests for Rehearing, Clarification and Answer**

386. As noted above, the March 27, 2006 Order summarily rejected IDACORP's cost filing.<sup>800</sup> Subsequently, the Cities of Pasadena and Vernon both requested clarification of the March 27, 2006 Order,<sup>801</sup> and IDACORP filed both an answer to Vernon's request for

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<sup>796</sup> January 26, 2006 Order, 114 FERC ¶ 61,070 at P 90-94.

<sup>797</sup> *Id.* P 95.

<sup>798</sup> *Id.* P 383, Appendix B.

<sup>799</sup> *See supra* P 96-99, 109-111, 264-267.

<sup>800</sup> *See* March 27, 2006 Order, 114 FERC ¶ 61,310.

<sup>801</sup> City of Pasadena, California's Request for Clarification of March 27, 2006

clarification<sup>802</sup> and a request for rehearing of the March 27, 2006 Order.<sup>803</sup> In a May 22, 2006 Order, the Commission approved a settlement agreement filed by IDACORP, Cal Parties and the Commission's OMOI.<sup>804</sup> On June 6, 2006, IDACORP filed a Notice of Withdrawal of its request for rehearing of the March 27, 2006 Order.<sup>805</sup> Accordingly, we now have before us only Pasadena and Vernon's request for clarification of the March 27, 2006 Order and IDACORP's answer to Vernon's request for clarification. The Cities of Pasadena and Vernon both request clarification of paragraph 8 and footnote 24 of the March 27, 2006 Order.<sup>806</sup> Paragraph 8 states: "On March 9, 2006, a number of parties opted in to the IDACORP Settlement, and some parties opted out as well."<sup>24</sup><sup>807</sup> Footnote 24 states that "Opt outs include: . . . ." and lists entities included among the opt-outs.<sup>808</sup>

387. Pasadena and Vernon both state that, although they opted-out of the IDACORP settlement, they are not listed in footnote 24. Because the Commission's order will affect the final disbursement of money in the financial settlement phase of this proceeding, they request that the Commission clarify that they are among the parties that opted-out of the settlement.

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Order, Docket Nos. EL00-95-147 and EL00-98-134 (March 29, 2006) (Pasadena Request for Clarification); City of Vernon's Request for Clarification of March 27, 2006 Order, Docket Nos. EL00-95-147 and EL00-98-134 (April 12, 2006) (Vernon Request for Clarification).

<sup>802</sup> Answer of IDACORP to Request of City of Vernon for Clarification of March 27, 2006 Order, Docket Nos. EL00-95-147 and EL00-98-134 (April 26, 2006) (IDACORP Answer).

<sup>803</sup> Request of IDACORP for Rehearing of Order Rejecting Cost Filing, Docket Nos. EL00-95-147 and EL00-98-134 (April 26, 2006).

<sup>804</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,230 (2006) (May 22, 2006 IDACORP Settlement Order).

<sup>805</sup> IDACORP Notice of Withdrawal, Docket No. EL00-95-000, *et al.*, (June 6, 2006).

<sup>806</sup> Pasadena Request for Clarification at 1-2; Vernon Request for Clarification at 1-2.

<sup>807</sup> March 27, 2006 Order, 114 FERC ¶ 61,310 at P 8.

<sup>808</sup> *Id.* n.24

388. In IDACORP's answer, IDACORP asserts that Vernon was not a victim of a ministerial error because Vernon ignored the Commission's requirement in the February 23, 2006 Order<sup>809</sup> to either opt-in or opt-out of the IDACORP Settlement by March 9, 2006. Accordingly, IDACORP asserts that Vernon should be deemed to have opted-in to the settlement.

### **Commission Determination**

389. We grant the clarifications requested by the City of Pasadena and the City of Vernon, and find that they have both opted-out of the IDACORP settlement, albeit via different methods. As indicated by the lead-in phrase "Opt-outs *include*,"<sup>810</sup> the Commission did not intend footnote 24 in the March 27, 2006 Order to be an exhaustive list of the parties that opted-out of the IDACORP settlement. Further, in the May 22, 2006 IDACORP Settlement Order, the Commission listed the City of Pasadena as one of the parties that had filed a timely notice to opt-out of the settlement.<sup>811</sup> City of Pasadena, therefore, clearly opted-out of the IDACORP settlement.

390. As for the City of Vernon, it did not submit a notice notifying the Commission whether it intended to opt-in or opt-out of the settlement. It is true that the Commission required parties to notify the Commission of their intent to *either* opt-in *or* opt-out of the settlement, and stated that the elections would be binding on the parties.<sup>812</sup> However, neither the Commission nor the settlement stated that a party's failure to submit a notice would be treated as an election to opt-in to the settlement. In fact, according to the terms of the settlement, to be treated as a settling party, an entity had to act: it had to provide notice of its intent to opt-in to the settlement.<sup>813</sup> Vernon did not provide such notice; therefore, according to the terms of the settlement, it is not a settling party. For these reasons, we grant Vernon's request for clarification, and find that it is not a party to the

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<sup>809</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,195 (2006) (February 23, 2006 Order).

<sup>810</sup> March 27, 2006 Order, 114 FERC ¶ 61,310 at n.24 (emphasis added).

<sup>811</sup> May 22, 2006 IDACORP Settlement Order, 115 FERC ¶ 61,230, P 10 n.30, APP A.

<sup>812</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,069, at P 3 (2006); February 23, 2006 Order, 114 FERC ¶ 61,195 at P 5.

<sup>813</sup> See Joint Offer of Settlement, Docket No. EL00-95-000, Attachment A, Joint Explanatory Statement, at 11.

IDACORP settlement.

## **VI. Constellation's Updated Approved Offset Submission to the CAISO**

391. Consistent with the Commission's directive in the January 26, 2006 Order, on March 13, 2006, Constellation made its required Approved Offset Submission to the CAISO. On November 10, 2006, Constellation made an additional submission to the CAISO to recover ongoing, continued collateral posting costs associated with the 10 million dollars in collateral held by the PX in connection with the refund proceeding. On November 27, 2006, Cal Parties filed a protest to the November 10 submission.<sup>814</sup> On December 15, 2006, Constellation filed comments and a request for rejection of Cal Parties' Protest to Constellation's Submission.<sup>815</sup>

392. In Cal Parties' Protest to Constellation's Submission, Cal Parties argue that Constellation's November 10, 2006 submission to the CAISO was not permitted by the January 26, 2006 Order, and that it is an impermissible "proposed rate increase."<sup>816</sup> Additionally, Cal Parties' reiterate their due process concerns and allegations that the Commission has improperly sub-delegated its authority to the CAISO.

393. Constellation states that the January 26, 2006 Order provided that ongoing collateral costs are eligible to be claimed as cost offsets.<sup>817</sup> Accordingly, Constellation asserts that it continues to incur collateral posting costs on a daily basis, and will do so until the collateral is released by the PX. Thus, Constellation argues that the collateral posting costs included in its cost filing to the Commission and in its March 13, 2006 updated Approved Offset Submission to the CAISO are not final and do not reflect the full measure of the letter of credit costs that the Commission accepted in the January 26, 2006 Order. Constellation maintains that it must be able to offset these costs

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<sup>814</sup> California Parties' Protest to Constellation Energy Commodities Group, Inc.'s Revised Cost Filing Submission to the California Independent System Operator Corporation, Docket Nos. EL00-95-000, EL00-95-161, EL00-98-000 and EL00-98-148 (November 27, 2006) (Cal Parties' Protest to Constellation's Submission).

<sup>815</sup> Comments and Request for Rejection of Constellation Energy Commodities Group, Inc. of California Parties' Impermissible Protest, Docket Nos. EL00-95-000, EL00-95-161, EL00-98-000 and EL00-98-148 (December 15, 2006) (Constellation's Request for Rejection).

<sup>816</sup> Cal Parties' Protest to Constellation's Submission at 3-4.

<sup>817</sup> *Id.* at 6 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 180, 195-197).

in order not to under-recover its actual costs, in violation of the longstanding prohibition against confiscatory ratemaking. Constellation further argues that it could not know what its future on-going collateral costs would be at the time it submitted its cost filing, nor will it be able to predict the total extent of the collateral-related costs it will incur because it is difficult to predict when this proceeding will end.<sup>818</sup>

394. Finally, Constellation argues that Cal Parties have mischaracterized its submission to the CAISO as a “rate increase” subject to Rule 211 of the Commission’s Rules of Practice and Procedure,<sup>819</sup> and contend that the Protest is an impermissible pleading that should be rejected on procedural grounds because Constellation’s submission is not one of the types of pleadings enumerated in that rule and the Cal Parties have no right to protest a “rate increase” when Constellation did not file a rate increase.<sup>820</sup>

395. On December 21, 2006, Cal Parties filed an answer to Constellation’s Request for Rejection,<sup>821</sup> focusing again on rate increase arguments. Cal Parties assert that Constellation’s submission to the CAISO creates a moving target and the content of that filing presents new issues of concern, thus justifying both the procedural method selected by Cal Parties as well as the result they request.

### **Commission Determination**

396. As a preliminary matter, we reject Constellation’s procedural objections to Cal Parties’ protest. While, as discussed below, Cal Parties’ contention that Constellation’s updated Approved Offset Submission is a “rate increase” is incorrect, the fact the Cal Parties are wrong on the merits does not render their Protest procedurally deficient. Rule 211 provides for the filing of protests to a variety of pleadings.<sup>822</sup> The rule is not solely a vehicle for objecting to changes in rates. Therefore, we find that Cal Parties’ filing of a protest pursuant to Rule 211 was an appropriate procedural means of objecting to Constellation’s updated submission to the CAISO.

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<sup>818</sup> Constellation’s Request for Rejection at 3-4, 6-8.

<sup>819</sup> 18 C.F.R. § 385.211 (2008).

<sup>820</sup> *Id.* at 4-5 (citing 18 C.F.R. § 385.211 (2008)).

<sup>821</sup> California Parties’ Answer to Request to Reject, Docket Nos. EL00-95-000, EL00-95-161, EL00-98-000 and EL00-98-148 (December 21, 2006) (Cal Parties’ Answer to Constellation’s Request for Rejection). We accept Constellation’s Answer because it assisted us in our decision-making process. 18 C.F.R. § 385.213(a)(2) (2008).

<sup>822</sup> 18 C.F.R. § 385.211.

397. However, we reject Cal Parties' Protest to Constellation's Submission on the merits. The January 26, 2006 Order provided for inclusion of costs associated with collateral because these costs are marginal costs incurred as a direct result of trading in the California markets during the Refund Period.<sup>823</sup> Additionally, in the November 19, 2007 Rehearing Order, we stated, "[u]nder the confiscatory standard utilized herein the cost offset is developed based on actual, historical costs during the Refund Period, absent a direct Commission requirement to expend monies, such as the cost of posting collateral."<sup>824</sup> Accounting for such on-going collateral posting costs in the context of the cost filing is not a "rate increase." The Commission had previously approved recovery of the collateral posting costs, but the final total amount of these costs simply was unknown and unknowable when the initial cost filings were made. With respect to Cal Parties' arguments regarding due process and improper delegation of authority by the Commission, we reject these arguments consistent with the above discussions on these issues.<sup>825</sup> We will allow Constellation's submission to the CAISO to the extent that it reflects only the updated collateral posting costs associated with the California Refund proceeding period of 2000 and 2001.

398. Nevertheless, we agree that these on-going, rolling updated submissions create moving targets that have the potential to cause further delay in this proceeding. As discussed in Section III.F. above, we find that, in order to facilitate the actual calculation of refunds by the CAISO and to conclude this proceeding, it is necessary to require that collateral posting cost updates end 30 days from the date of issuance of this order. Using a confiscatory standard, in prior orders the Commission determined that the costs of maintaining collateral were sufficiently directly related to costs incurred during the Refund Period to allow sellers with approved offsets to include these costs in their offsets from refund liability. But this is only true until a reasonable point in time. Companies have various collateral costs in today's circumstances for many reasons, and it seems reasonable that all future costs beyond the cut-off date associated with collateral requirements from 2009, including refund-related collateral costs, are more appropriately expensed in the current year and charged to current revenue as required by Generally Accepted Accounting Principals.

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<sup>823</sup> See January 26, 2006 Order, 114 FERC ¶ 61,070 at P 180; *see also* discussion in text *supra* P 177-179.

<sup>824</sup> November 19, 2007 Rehearing Order, 121 FERC ¶ 61,184 at P 99.

<sup>825</sup> See *supra* P 96-99, 109-111.

The Commission orders:

(A) The Commission hereby grants in part and denies in part requests for rehearing of the January 26, 2006 and November 2, 2006 Orders, as discussed in the body of this order.

(B) The Commission hereby grants Cal Parties' Motion to Strike, as discussed in the body of this order.

(C) The Commission hereby denies El Paso's Motion for Leave to File Supplemental Cost Recovery Evidence and Motion to Make and Offer of Proof, as discussed in the body of this order.

(D) The Commission hereby denies Cal Parties' Protest and Comments to Sellers' Cost Offset Submissions to the CAISO, as discussed in the body of this order.

(E) The Commission hereby denies Cal Parties' Motion to Lodge Puget's Approved Offset Submission to the CAISO, as discussed in the body of this order.

(F) The Commission hereby grants the requests for clarification of the March 27, 2006 Order by the cities of Pasadena and Vernon, as discussed in the body of this order.

(G) The Commission hereby denies IDACORP's answer to Vernon's request for clarification of the March 27, 2006 Order, as discussed in the body of this order.

(H) Revised Approved Offset Submissions to update ongoing collateral costs are due to the CAISO within 30 days from the date of the issuance of this order, consistent within the body of this order.

(I) Avista and PPL Energy must submit revised Approved Offset Submissions to the CAISO within 30 days from the date of the issuance of this order, consistent with the body of this order.

(J) Sempra may account for the ancillary service revenue amount of \$3,376,631, consistent with the body of this order.

(K) The CAISO is directed to account for Constellation's November 10, 2006, update, consistent with the body of this order.

By the Commission. Commissioner Spitzer is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.