131 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller and John R. Norris.

San Diego Gas and Electric Company — Docket No. EL00-95-227
Complainant,

v.

Sellers of 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 No. EL00-98-212

ORDER ON REHEARING

(Issued May 18, 2010)

1. In this order, we grant in part and deny in part requests for rehearing and clarification of an order issued in the California refund proceeding on June 18, 2009.[1] In the June 18, 2009 Order, the Commission addressed requests for rehearing and clarification of Commission orders issued on January 26, 2006,[2] March 27, 2006,[3] and

[1] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 127 FERC ¶ 61,269 (June 18, 2009 Order). For background on the California refund proceeding, *see id.* P 3-16.

[2] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,070 (2006) (accepting, rejecting, and deferring action on cost offset filings, as well as requiring further compliance filing for some cost offset requests) (January 26, 2006 Order).

[3] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC
(continued)

November 2, 2006.[4] In those orders, the Commission addressed requests for cost offsets from refunds by sellers seeking to demonstrate that the refund methodology applied to the relevant California markets from October 2, 2000 through June 20, 2001 (Refund Period) resulted in an overall revenue shortfall for their transactions in those markets during that time. In addition, we also deny the request for rehearing of the March 27, 2006 Order filed by Idacorp Energy LP (Idacorp Energy) and Idaho Power Company (Idaho Power) (collectively, Idacorp).[5]

I. Background

2. This is the final phase of the third and last category of possible offsets from refund liability stemming from the California energy crisis of 2000-01. As the Commission has explained, its primary objective during this proceeding has been to remedy rates that buyers may have paid for certain transactions above the zone of reasonableness for energy purchased from the California Independent System Operator Corporation (CAISO) or California Power Exchange (CalPX) during the Refund Period.[6] This resulted in the creation of the mitigated market clearing price (MMCP) refund methodology. The Commission has balanced this objective with its concomitant statutory obligation to ensure that the MMCP does not result in a confiscatory rate for any individual seller.[7] This obligation led to the Commission early on in the refund proceeding to announce that it would provide an opportunity at the end of the refund hearing for sellers to submit cost evidence to prove that the MMCP refund methodology

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¶ 61,310 (2006) (rejecting Idacop's cost offset filing) (March 27, 2006 Order).

[4] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 117 FERC ¶ 61,151 (2006) (addressing compliance filings required by the January 26, 2006 Order) (November 2, 2006 Order).

[5] The June 18, 2009 Order treated Idacorp's request for rehearing of the March 27, 2006 Order as withdrawn, based on Idacorp's Notice of Withdrawal of its request for rehearing of the March 27, 2006 Order. June 18, 2009 Order, 127 FERC ¶ 61,269 at P 386 and n.805. Because we grant rehearing with respect to Idacorp's withdrawal of its request for rehearing of the March 27, 2006 Order, we address the issues raised in that rehearing request. *See infra* P 47-68.

[6] *See, e.g.*, January 26, 2006 Order, 114 FERC ¶ 61,070 at P 4.

[7] *Id.*

did not enable them to recover the costs of providing electricity to the CAISO and CalPX during the Refund Period.[8]

3. After inviting parties to file proposed templates for cost offset filings, holding a technical conference, establishing the guidelines for cost offset filings, and examining cost offset filings and relevant protests and comments, the Commission issued several orders acting on cost offset filings. In the January 26, 2006 Order, the Commission determined which sellers had demonstrated that the refund methodology resulted in an overall revenue shortfall for their transactions into California markets during the relevant time period, and the amount of cost offsets. Among other things, in that order, the Commission accepted, subject to condition and/or modification, the filings of Avista Energy, Inc. (Avista), Portland General Electric Company (Portland), Powerex Corp. (Powerex), Sempra Energy Trading (Sempra) and TransAlta, and required those sellers to make further compliance filings. In the November 2, 2006 Order, the Commission addressed the compliance filings required by the January 26, 2006 Order.[9] The Commission accepted in whole or in part the compliance filings made by Avista, Portland and Powerex, and rejected the filings made by Sempra and TransAlta for failure to comply with the January 26, 2006 Order.[10] In the interim, in the March 27, 2006 Order, the Commission summarily rejected Idacop's cost offset filing because it was non-compliant and incomplete.[11]

II. Procedural Matters

4. Avista and APX, Inc. (APX), jointly; the California Parties (Cal Parties);[12] and Idacorp filed requests for rehearing of the June 18, 2009 Order.

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[8] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 97 FERC ¶ 61,275, at 62,193-94 (2001) (providing opportunity for marketers); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 99 FERC ¶ 61, 160, at 61,656 (2002) (extending cost offset filing opportunity to all sellers).

[9] November 2, 2006 Order, 117 FERC ¶ 61,151.

[10] *Id.* P 2.

[11] March 27, 2006 Order, 114 FERC ¶ 61,310 at P 15-19.

[12] Cal Parties refer to Pacific Gas and Electric Company, Southern California Edison Company, the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, and the California Public Utilities Commission.

III. Rehearing Requests

A. APX

5. In the June 18, 2009 Order, the Commission granted Cal Parties' request for clarification that the final APX settlement data be filed with the Commission.[13] The Commission reiterated that APX has an obligation to submit a final compliance filing demonstrating the refund liability of APX participants.[14] The Commission noted that, 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.[15] The Commission stated that, due to APX's need for final CAISO and CalPX settlement data and the implementation of the cost offset proceeding, the compliance filing APX submitted April 24, 2007 "could not have been completed with accuracy."[16] Therefore, the Commission directed APX to resubmit its compliance filing upon the conclusion of the CAISO's final financial clearing.[17]

6. On rehearing, APX argues that the Commission's directive for APX to submit final APX settlement data to the Commission was in error. APX states that Cal Parties' 2006 request for clarification of this issue[18] was superseded by a settlement agreement entered into in January 2007 by APX and the entities transacting business through the APX during the relevant period (i.e., May 1, 2000 through June 20, 2001) (APX Settlement);[19] a term sheet entered into between APX and Cal Parties that resolved all of Cal Parties' concerns with the 2007 APX Settlement and its impact on the refund liability

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[13] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 275.

[14] *Id*. (citing October 2003 Order, 105 FERC ¶ 61, 066 at P 170).

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] APX and Avista July 20, 2009 Request for Rehearing of June 18, 2009 Order, Docket Nos. EL00-95-227 and EL00-98-212 at 1-2 (APX and Avista Rehearing Request of June 18, 2009 Order) (citing Cal Parties February 27, 2006 Request for Rehearing of January 26, 2006 Order, Docket Nos. EL00-95 and EL00-98, at 68-69 (Cal Parties Rehearing Request of January 26, 2006 Order)).

[19] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 118 FERC ¶ 61,168, at P 40 (2007) (March 1, 2007 Order).

of APX market participants in the CAISO and CalPX markets (Term Sheet);[20] and APX's April 24, 2007 compliance filing to make the Term Sheet a pre-condition to the distribution of any funds to APX (APX April 24, 2007 Compliance Filing).[21] APX contends that the APX Settlement and Term Sheet resolved all issues with respect to Cal Parties and the APX market participants, so that there is no need for APX to file any additional settlement data.

Commission Determination

7. We deny APX's request for rehearing. The Commission recognizes that the APX Settlement and Term Sheet resolved all issues related to APX's and APX market participants' refund liability. However, according to the Term Sheet, the payments resulting from the APX Settlement may be subject to further true-up upon the final financial clearing of the CAISO and CalPX markets for the Refund Period.[22] Because the final true-up has not occurred yet, we continue to require APX to submit a final compliance filing. Accordingly, we deny rehearing on this issue.

B. Avista

8. In the June 18, 2009 Order, the Commission noted that, due to the lack of independent source verification for the revenue data, the Commission had directed sellers to utilize the final APX revenue data provided by the APX and certify this to the CAISO when submitting cost offsets to the CAISO.[23] The Commission found that, through this

[20] APX and Avista Rehearing Request of June 18, 2009 Order at 2 n.9 (citing Joint Reply Comments of the APX Sponsoring Parties and California Parties on the January 5, 2007 Offer of Settlement, Docket Nos. EL00-95 and EL00-98, App. A (Feb. 7, 2007)). APX explains that, after initially filing comments in opposition to the APX Settlement, Cal Parties withdrew their opposition and agreed to a term sheet with APX that finally and conclusively resolved all of Cal Parties' concerns with respect to the APX Settlement and its impact on the refund liability of APX market participants in the CAISO and CalPX markets. *Id*.

[21] *Id*. at 2 n.10 (citing APX April 24, 2007 Compliance Filing, Docket Nos. EL00-95 and EL00-98; March 1, 2007 Order, 118 FERC ¶ 61,168 at P 40 (accepting APX Settlement subject to compliance filing incorporating Term Sheet)).

[22] *See id.*, Exh. A, sections 2 (True Ups) and 3 (Holdbacks); March 1, 2007 Order, 118 FERC ¶ 61,168 at P 50.

[23] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 284 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 58).

process, Avista's final revenue data will conform to APX settlement data upon final submittal to the CAISO.[24] Also, this directive ensured that the cost and revenue data would be verified.[25] As a result, the Commission found that it had already addressed Cal Parties' concerns regarding the verification of Avista's data and denied Cal Parties' rehearing request on that issue.[26]

9. On rehearing, Avista argues that the Commission erred in suggesting that further adjustments may be needed to Avista's cost offset filing to account for APX transactions.[27] Avista states that the APX Settlement, Term Sheet and APX April 24, 2007 Compliance Filing resolved all issues related to Avista's cost offset filing, including a reduction of $400,000 to account for the revenues and costs associated with Avista's internally-generated APX transactions.[28] Avista contends that, because its cost offset filing has already been adjusted to account for the APX Settlement, no further adjustments are needed to Avista's cost offset filing to implement the APX Settlement.

Commission Determination

10. We clarify that, through the APX Settlement, Term Sheet and APX April 24, 2007 Compliance Filing, Avista's cost offset has been reconciled with the final APX Settlement. In fact, the Term Sheet specifically states that Avista's "cost recovery filing will be reduced in the negotiated amount of $400,000.00."[29] Because the Term Sheet does not link the amount of Avista's cost offset to the Term Sheet's true-up provision,[30]

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[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] APX and Avista Rehearing Request of June 18, 2009 Order at 3 (citing June 18, 2009 Order, 127 FERC ¶ 61,269 at P 284).

[28] *Id*. at 3-4 (citing March 1, 2007 Order, 118 FERC ¶ 61,168 at P 23 (noting that "[i]n their joint reply comments, [Cal Parties] withdr[e]w their opposition to the [APX] Settlement, and request[ed] that the Commission approve the Settlement based on the agreed upon terms provided in the Term Sheet") and 28; June 18, 2009 Order, 127 FERC ¶ 61,269 at P 282; Cal Parties Rehearing Request of January 26, 2006 Order at 74).

[29] *See* APX and Avista Rehearing Request of June 18, 2009 Order, Exh. A, sections 4.1.

[30] *See id*. at sections 2 (True Ups), 3 (Holdbacks), and 4.1.

we concluded that no further adjustments to Avista' cost offset related to the APX Settlement are necessary.[31]

C. Cal Parties

1. Market Manipulation

a. June 18, 2009 Order

11. In the June 18, 2009 Order, the Commission again denied Cal Parties' request to consider issues of gaming and other illegal behavior in assessing whether the MMCP is confiscatory with respect to any individual seller into the relevant California markets during the Refund Period.[32] The Commission stated that Cal Parties' allegations that sellers engaged in manipulation or other illegal activity are beyond the scope of this phase of the refund proceeding insofar as they were the subject of other proceedings.[33] The Commission added that the MMCP methodology and cost offset filing process were designed to ensure that sellers could not include inflated costs based on the market

[31] *See Colo. Interstate Gas Co. v. FERC*, No. 08-1243, 2010 U.S. App. LEXIS 6255 (D.C. Cir. Mar. 26, 2010) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (2009) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part . . . of no effect.")).

[32] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 134 (citing 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 Gen. Elec. Co.*, 106 FERC ¶ 61,236 (2004); *Powerex Corp.*, 106 FERC ¶ 61,304 (2004); *Sempra Energy Trading Co.*, 108 FERC ¶ 61,114 (2004); *Arizona Public Serv. Co.*, 106 FERC ¶ 61,021 (2004)); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,184, at P 35 (2007) (November 19, 2007 Order)) and 139 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,176, at P 109 (2005) (August 8, 2005 Order); *Mobil Oil Exploration & Producing Southeast v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures . . . [such as] where a different proceeding would 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.")).

[33] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 134.

clearing prices during the Refund Period that were found to be unjust and unreasonable.[34] The Commission pointed out that, to prevent recovery of unjustly inflated costs, it had incorporated numerous mechanisms in the cost offset phase of the refund proceeding to ensure that costs associated with manipulative or gaming conduct do not re-enter the offset calculation.[35] Additionally, the Commission noted that, to ensure that affiliate transactions are valued properly, it allowed only the inclusion of the actual cost of producing power sold by one affiliate to another and disallowed any speculative opportunity price.[36] Finally, the Commission stated that it had also carefully scrutinized each seller's cost offset filing to ensure that no improper costs were included and disallowed any costs based on market clearing prices or indices that may have reflected manipulative practices.[37]

12. The Commission also again disagreed 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.[38] The Commission explained that, through the Show Cause Orders and the 100 Days of Discovery, the Commission had investigated sellers, both individually and through alliances, to determine whether those sellers had been involved in gaming or other anomalous market behavior during the Refund Period.[39] The Commission noted that, as a result of those proceedings, the Commission ultimately terminated cases against certain sellers, while other sellers settled without any admission of guilt.[40] The Commission found that Cal Parties were attempting to reopen

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[34] *Id*. P 135.

[35] *Id*. P 136 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 105, 106).

[36] *Id*. P 137 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 91-93).

[37] *Id*. P 138.

[38] *Id*. P 251 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 109 and n.157).

[39] *Id*.

[40] *Id*. (citing *Coral Power, L.L.C.*, 108 FERC ¶ 61,115; *Idaho Power Co.*, 106 FERC ¶ 61,208; *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,236; *Powerex Corp.*, 106 FERC ¶ 61,304; *Sempra Energy Trading Co.*, 108 FERC ¶ 61,114; *Arizona Public Serv. Co.*, 106 FERC ¶ 61,021).

those proceedings.[41] The Commission stated that the proceedings investigating gaming had been terminated and would not be reopened.[42]

13. The Commission further denied Cal Parties' request to require Avista to exclude its ancillary services buy-backs from its cost offset filing, which Cal Parties alleged were paper trading transactions.[43] The Commission stated that, 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.[44] The Commission pointed out that, 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.[45] The Commission noted, however, that 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.[46] Based on these determinations, the Commission concluded that it had no basis for excluding the ancillary service buy-backs from Avista's cost offset filing.[47]

14. The Commission also rejected 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.[48] The

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[41] *Id*.

[42] *Id*. (noting earlier discussion of this issue in the June 18, 2009 Order, 127 FERC ¶ 61,269 at P 134-139).

[43] *See id*. P 288-289.

[44] *Id*. P 288.

[45] *Id*. (citing *Avista Corp.*, 107 FERC ¶ 61,055, at P 19, 35 (2004) (Avista Order)).

[46] *Id.* (citing Avista Order, 107 FERC ¶ 61,055 at P 39-45).

[47] *Id*.

[48] *Id*. P 289 (citing 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)).

Commission noted that it had not been persuaded by Cal Parties' numerous objections to the sufficiency of the evidence during the settlement proceeding.[49] Additionally, the Commission found that Cal Parties did not raise any new arguments or presented any new evidence regarding Avista's ancillary services buy-backs in their requests for rehearing in this proceeding.[50] Consequently, the Commission found that, contrary to Cal Parties' characterization, their request was a collateral attack on the Commission's prior determinations.[51]

15. The Commission also found no support for Cal Parties' claim regarding the inclusion in Hafslund's cost offset filing of revenues and costs associated with alleged Fat Boy transactions.[52] Finally, the Commission found that Cal Parties' claim that Powerex was involved in certain gaming transactions was addressed by the Commission in another proceeding and therefore the argument was outside the scope of this proceeding.[53]

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[49] *Id*. (citing Avista Order, 107 FERC ¶ 61,055 at P 44).

[50] *Id*.

[51] *Id*.

[52] *Id*. P 322 (citing June 18, 2009 Order at P 134-139 (noting that, because Cal Parties had not raised any novel arguments that would be specific to Hafslund, the general discussion of market manipulation applied)). Fat Boy transactions "involved a market participant with more generation than load falsely overstating to the [CAISO] its scheduled load to correspond with the amount of generation in its schedule." *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345, at P 59 (2003) (Gaming Order); *reh'g denied*, 106 FERC ¶ 61,020 (2004). This permitted the market participant to be dispatched by the CAISO in real-time to its full capacity and receive the real-time market clearing price even though it did not have the load it scheduled in the day-ahead. Gaming Order, 103 FERC ¶ 61,345 at P 59.

[53] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 353 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 109; June 18, 2009 Order, 127 FERC ¶ 61,269 at P 134-139).

b. Rehearing Request

16. On rehearing, Cal Parties argue that *Public Utilities Comm'n v. FERC,*[54] undermines the Commission's determination that market manipulation and gaming should not be considered as part of the cost offset filing analysis because these issues had already been considered in the Gaming and Partnership Investigations in Docket Nos. EL03-137 and EL01-180. Cal Parties point to the Ninth Circuit's holding that "FERC cannot avoid adjudicating a third-party petition because it may or may not choose to commence a separate enforcement action."[55] According to Cal Parties, the courts have explained that when acting as a prosecutor, as in the Gaming and Partnership Investigations, the Commission enjoys prosecutorial discretion; however, when determining the merits of a legal controversy, the Commission must act as an adjudicator and consider the evidence presented by the parties.[56] Cal Parties argue, therefore, that the Commission cannot rely on the Gaming and Partnership Investigations to avoid determining in this proceeding the merits of Cal Parties' arguments that sellers' cost offset filings included amounts that, if accepted, would allow them to unjustly profit from gaming and market manipulation.[57] Cal Parties request that the Commission adjudicate all of Cal Parties' claims that a seller, through its cost offset filing, will profit from gaming and manipulating the market.

17. Cal Parties contend that the Commission's reliance in the June 18, 2009 Order on its orders in the *Lockyer* proceeding[58] illustrate the conflict between the June 18, 2009

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[54] 462 F.3d 1027 (9th Cir. 2006). Cal Parties state that their requests for rehearing of the Commission's February and November 2006 orders predate *Public Utilities Comm'n v. FERC;* therefore, they did not address the impact of that case in their 2006 rehearing requests. Cal Parties July 20, 2009 Request for Rehearing of June 18, 2009 Order, Docket Nos. EL00-95-227 and EL00-98-212, at 2 (Cal Parties Rehearing Request of June 18, 2009 Order).

[55] *Id*. at 4 (citing *Public Utilities Comm'n v. FERC*, 462 F.3d 1027, 1051).

[56] *Id*. (citing *Burlington v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008); *Public Utilities Comm'n v. FERC*, 462 F.3d 1027, 1049-1050)).

[57] *Id*. at 4-5 (citing *Public Utilities Comm'n v. FERC*, 462 F.3d 1027, 1051). Cal Parties claim that this issue was well-developed before the Ninth Circuit in *Public Utilities Comm'n v. FERC. See id*. at n.17.

[58] *Id*. at 2 (citing *Cal. ex rel. Lockyer v. B.C. Power Exch. Corp.*, 122 FERC ¶ 61,260, *order on clarification*, 123 FERC ¶ 61,042, *order on reh'g*, 125 FERC ¶ 61,016 (2008)) and 6.

Order and *Public Utilities Comm'n v. FERC*. In particular, Cal Parties contrast the Commission's statement in the June 18, 2009 Order, issued in Docket Nos. EL00-95, *et al*., that manipulation and gaming were being considered in the Lockyer Proceeding, Docket Nos. EL02-71, *et al.*, with the Commission's statement in the Lockyer proceeding that those issues were within the scope of the CPUC remand in Docket Nos. EL00-95, *et al*.[59] Cal Parties claim that the net impact of these orders is that the issue cannot be addressed anywhere.

18. Cal Parties question the Commission's statement that the application of the MMCP effectively eliminated the effects of manipulative or gaming behavior by implementing a baseline just and reasonable price applicable to CAISO and CalPX transactions during the Refund Period.[60] Cal Parties claim that this statement is non-responsive because the cost offset process allows sellers to receive a price higher than the MMCP for the very transactions by which Cal Parties allege they manipulated the market. Cal Parties conclude that such cost offsets therefore undo the price mitigation that the Commission assumes corrected manipulative transactions. Cal Parties contend that, as a result, no buyers in the market are receiving the benefits of the MMCP mitigation with respect to manipulative sellers who submitted cost offset filings.

19. Cal Parties also argue that, although the Commission took steps in the cost offset process to prevent sellers from profiting from flawed market indices or inflating the cost of affiliate trades,[61] these steps failed to refute direct evidence showing that some sellers profited from manipulation through a cost offset filing.

20. Specifically, Cal Parties question the Commission's claim that market manipulation and gaming were addressed through its disallowance of manipulated market indices, affiliate transaction rulings, and the requirement that suppliers submit sworn verifications to accompany their cost offset filings.[62] Cal Parties argue that, while these measures stop some sellers from profiting from some types or effects of manipulation, none of them offer protection from other manipulative conduct such as supplier withholding, scheduling sales to false load, improper ricochet transactions, or the gaming and manipulation activities that Cal Parties have identified.[63] In particular, Cal Parties

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[59] *Id*. at 2.

[60] *Id*. at 7 (citing June 18, 2009 Order, 127 FERC ¶ 61,269 at P 136).

[61] *Id*. at 5-6 (citing June 18, 2009 Order, 127 FERC ¶ 61,269 at P 136).

[62] *Id*. (citing June 18, 2009 Order, 127 FERC ¶ 61,269 at P 136-138).

[63] *Id*. at 7-8 (citing Cal Parties May 22, 2009 Motion, Exhibits). Cal Parties claim that they have submitted evidence to the Commission that identifies both the sellers who

(continued)

claim that these measures do not prevent a seller that fraudulently scheduled to serve false load from recovering the costs of the fraudulent transaction. Cal Parties assert that such fraudulent arrangements did not necessarily involve affiliate dealing or rely on market indices for transaction pricing. Cal Parties add that cost offset filing verifications do not require sellers to address these issues.

c. Commission Determination

21. The Commission again rejects Cal Parties' request for rehearing on this issue. At the outset we emphasize that Cal Parties already presented nearly identical rehearing arguments challenging the alleged potential inclusion of manipulative transactions in sellers' cost offset filings (at least) twice before.[64] The Commission denied these rehearing requests both times they were raised.[65] Cal Parties, therefore, have exhausted their legal right to seek rehearing on this issue.[66] Moreover, because the Commission previously resolved questions concerning the scope of the cost offset filings in the August 8, 2005 Order,[67] Cal Parties' current rehearing request can also be considered a collateral

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engaged in manipulative strategies and the measures that the Commission must take to prevent these specific sellers from profiting from their manipulative schemes.

[64] *See* California Parties September 7, 2005 Request for Rehearing of the August 8, 2005 Order, Docket Nos. EL00-95-000 and EL00-98-000, *et al.*, at 61-62 (Cal Parties Rehearing Request of August 8, 2005 Order), which the Commission addressed in the November 19, 2007 Order, 121 FERC ¶ 61,184 at P 35; Cal Parties Rehearing Request of January 26, 2006 Order at 48-51, which the Commission addressed in the June 18, 2009 Order, 127 FERC ¶ 61,269 at P 134-39.

[65] The same arguments were raised in requests for rehearing of the August 8, 2005 Order and January 26, 2006 Order. *See* Cal Parties Rehearing Request of August 8, 2005 Order; Cal Parties Rehearing Request of January 26, 2006 Order at 48-51. The Commission addressed these requests. *See* November 19, 2007 Order, 121 FERC ¶ 61,184 at P 35; June 18, 2009 Order, 127 FERC ¶ 61,269 at P 134-139.

[66] To the extent the Commission has already addressed this issue once on rehearing, a second rehearing "does not lie" and is therefore impermissible. *See, e.g., Midwest Indep. Trans. Sys. Operator Inc.*, 122 FERC ¶ 61,127, at P 26 (2008) ("[T]he 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 Co. Servs., Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Co.*, 106 FERC ¶ 61,181 (2004); *Southwestern Pub. Serv. Co.*, 65 FERC ¶ 61,088 (1993)).

[67] August 8, 2005 Order, 112 FERC ¶ 61,176, *reh'g denied*, November 19, 2007 Order, 121 FERC ¶ 61,184 at P 35.

attack on that order. Nevertheless, even if we were to again consider Cal Parties' arguments, we would again find them to be without merit, as elaborated below.

22. First, we find Cal Parties' reliance on the *Public Utilities Comm'n v. FERC* decision to be misplaced. Regardless of whether *Public Utilities Comm'n v. FERC* required us to consider additional evidence of manipulative/gaming behavior, it required us to do so only for the following categories of transactions: "(1) tariff violations that occurred prior to [the Refund Period], (2) transactions in the CalPX and Cal-ISO markets that occurred outside the 24-hour period specified by FERC, and (3) energy exchange transactions in the CalPx and Cal-ISO markets."[68] The *Public Utilities Comm'n v. FERC* decision did not reopen the Federal Power Act section 206 proceeding concerning the Refund Period and, in fact, expressly served to "preserve the scope of the existing FERC refund proceedings."[69] On remand, the Commission considered the categories of transactions identified in *Public Utilities Comm'n v. FERC* and set the matter for hearing to give parties the opportunity to present further evidence on whether any seller engaged in tariff violations prior to the Refund Period and to supplement the existing record with additional evidence on block forward transactions and exchange transactions entered into during the Refund Period.[70] It is well established that the Commission has broad discretion to structure its proceedings so as to resolve a controversy in the way it considers most appropriate.[71] The Commission has already established a forum, in the CPUC Remand Order,[72] that will enable Cal Parties to present additional evidence of market manipulation and gaming behavior; we will not order a redundant proceeding here.

23. In addition, as we have stated previously, the Commission has structured the MMCP and cost offset proceedings in such a way as to avoid the potential for sellers to recover in the cost offset phase of the refund proceeding gains that resulted from

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[68] *Public Utilities Comm'n v. FERC*, 462 F.3d 1027 at 1035.

[69] *Id.*

[70] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 129 FERC ¶ 61,147 (2009) (CPUC Remand Order).

[71] *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,233, n.39 (2009) (citing *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) (administrative agencies enjoy broad discretion to manage their own dockets)); *see also Ameren Energy Generating Co.*, 108 FERC ¶ 61,081, at P 23 (2004) ("The courts have repeatedly recognized that the Commission has broad discretion in managing its proceedings.").

[72] 129 FERC ¶ 61,147 at P 2-4.

manipulative or gaming conduct. For example, in the cost offset filing phase of the refund proceeding, the Commission considered the evidence submitted by Cal Parties and determined that the safeguards put in place to prevent the recovery of unjustly inflated costs were adequate to ensure that sellers could not profit from manipulative transactions or other tariff violations.[73] Moreover, as the party submitting the protests in opposition to the cost offset filings, Cal Parties had the burden of persuasion, or at least the burden of raising genuine issues of material fact sufficient to warrant a hearing.[74] Casting general aspersions on the cost offset filing process is insufficient to meet this burden.[75]

24. Further, based on our review of the record, it is unclear precisely what evidence Cal Parties expect the Commission to re-evaluate. Cal Parties fail to provide details regarding which of the cost offset filings accepted by the Commission allegedly include the transactions at issue, which of their prior pleadings are still relevant, or how their previous arguments support their current claims. Under the circumstances, therefore, Cal Parties' request amounts to little more than a fishing expedition. It is well established

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[73] *See* June 18, 2009 Order, 127 FERC ¶ 61,269 at P 135-38.

[74] When a protesting/complaining party wants a trial-type evidentiary proceeding, that party must provide more than mere unsubstantiated allegations; it must provide an adequate proffer of evidence that such a hearing is warranted. *NRG Energy, Inc. v. Entergy Servs., Inc*., 126 FERC ¶ 61,053, at P 35 (2009) (explaining that "a complainant must provide support for their allegations underlying the complaint"); *Pepco Holdings, Inc*., 124 FERC ¶ 61,176, at P 130 (2008) ("A broad allegation of factual issues 'without proffer of specific foundation [ ] is simply not enough to meet the material issue of fact requirement.'"); *Tampa Elec. Co.*, 95 FERC ¶ 61,101, at 61,307 (2001) ("it is not an abuse of that discretion to deny a request for hearing when there are no material facts in dispute"); *Algoma Group v. Wisconsin Public Serv. Corp.*, 61 FERC ¶ 61,265, at 61,959 (1992) ("obligation to proffer evidence to the Commission, rather than mere conclusions or unsubstantiated allegations, before the matter has been sent to an administrative law judge is especially important when a party seeks to raise doubts of a general nature about the prudence of a utility's actions"), *order on reh'g*, 62 FERC ¶ 61,040 (1993); *South Carolina Elec. & Gas Co.*, 56 FERC ¶ 61,379, at 62,440, n.14 (1991) ("Mere allegations of disputed facts are insufficient to mandate a hearing. Rather, the party seeking an evidentiary hearing must make an adequate proffer of evidence to support such allegations."), *reh'g denied*, 59 FERC ¶ 61,050, at 61,219-20 (1992) (finding that supplemental pleadings had not "raised genuine issues of material fact that would warrant instituting a trial-type evidentiary hearing"); *San Diego Gas & Elec. Co. v. Century Power Corp.*, 50 FERC ¶ 61,285, at 61,916 (1990) ("Mere allegations are insufficient to mandate a hearing; parties must make an adequate proffer of evidence to support them.").

[75] *Id.*

that the Commission's task in reviewing a party's allegations is to consider whether a party has raised a dispute of genuine material fact, and whether the dispute can be resolved on the basis of the pleadings before it; not to conduct a fishing expedition.[76] The Commission is charged with ruling on the merits of the case in light of the record evidence. In this case, Cal Parties have failed to present evidence sufficient to persuade us that sellers were able to profit unjustly by recouping the costs associated with manipulative transactions or other tariff violations. Thus, the Commission continues to find that all costs accepted via the cost offset filings were both verified and appropriately incurred.

25. The Commission further disagrees with Cal Parties' contention that the steps the Commission took to guard against inclusion of inappropriate costs in the cost offset filing process were insufficient. Cal Parties appear to misapprehend the discussion of the MMCP in the June 18, 2009 Order. The June 18, 2009 Order made reference to the MMCP as the baseline for just and reasonable prices only to provide the proper context for the procedural safeguards established in the cost offset phase of the refund proceeding. The Commission did not intend to imply that the MMCP itself functioned as one of those procedural safeguards; the MMCP served as the just and reasonable starting point for the calculation of cost offsets. Indeed, the June 18, 2009 Order makes clear that numerous measures were implemented to ensure against the inclusion of gaming-related costs in the cost offset filings, including: requiring signed corporate verifications; tailoring the scope of eligible transactions; limiting claimed costs to actual costs; and carefully determining the categories of allowable and required costs and revenues.[77] Even more significantly, the Commission took the extraordinary step of piercing the corporate veil, where necessary, to ensure that costs associated with affiliate transactions were legitimate, verified, and within the scope of permissible costs.[78] The Commission permitted sellers to receive an amount higher than the MMCP only if their cost offset filings adhered to these extensive procedural requirements and demonstrated conclusively that the application of the MMCP resulted in a confiscatory rate. Thus, we continue to find that if a seller is permitted to receive a price higher than the MMCP for certain transactions, it is because the Commission has determined that the seller is entitled to that

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[76] *Lester C. Reed v. Georgia Power Co.*, 94 FERC ¶ 61,404, at 62,510-11 (2001) ("The Commission's task in reviewing the complaint allegations was not to conduct a fishing expedition"); *Natural Gas Pipeline Co.*, 43 FERC ¶ 63,040, at 65,424 (1988) (explaining that a protestor's "desire for a 'fishing expedition'" does not satisfy the standards for articulating a material factual dispute such as to invoke hearing requirements).

[77] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 136-37.

[78] *Id.* P 136-38; 221-225.

higher amount due to the appropriately-incurred and verified costs associated with those transactions.

26. Finally, despite the generality of Cal Parties' arguments, our review of the record indicates that most of the transactions at issue involve the practice of overscheduling load.[79] For example, in their request for rehearing of the January 26, 2006 Order, Cal Parties argued that all of Hafslund's uninstructed energy sales to the CAISO during the Refund Period were Fat Boy sales and claimed that Hafslund had admitted as much.[80] Accordingly, Cal Parties argued that the Commission should grant rehearing and remove these transactions from Hafslund's cost offset filing.[81] In their rehearing requests, Cal Parties also referenced evidence presented in their original comments on several of the cost offset filings regarding the Fat Boy transactions.[82] However, Cal Parties' argument regarding the Fat Boy sales ignores the fact that the Commission had previously found this practice to be beneficial, explaining that it improved reliability by reducing the need for real-time energy due to persistent underscheduling problems.[83] Indeed, the Commission found that "[t]he phenomenon of market participants engaging in [o]verscheduling [l]oad in response to the utilities' practice of [u]nderscheduling [l]oad was widely known and accepted."[84] Based on these findings, the Commission declined to seek further remedy from market participants found to have engaged in Fat Boy transactions and opted not to pursue additional remedies for this particular type of transaction.[85]

27. Cal Parties have presented no evidence that would persuade us to change our position regarding the Fat Boy transactions. Accordingly, we find that it would be unjust to pursue an additional monetary remedy, in the form of disallowing cost offsets, for transactions undertaken at the request, and with the approval, of the CAISO.[86]

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[79] This gaming practice was also known as "Fat Boy." *See supra* note 52.

[80] Cal Parties Rehearing Request of January 26, 2006 Order at 90.

[81] *Id.* at 91, 48-51.

[82] *See, e.g., id*. at 48.

[83] Gaming Order, 103 FERC ¶ 61,345 at P 60.

[84] *Id.* n.65.

[85] *Id.*

[86] The phenomenon of market participants engaging in overscheduling load in response to the utilities' practice of underscheduling load was widely known and

(continued)

28. We disagree with Cal Parties' assertion that denying rehearing on this issue effectively leaves no available forum for raising the issue of whether cost offsets to refunds include amounts for transactions that were tariff violations. First, the Commission did not rely on the *Lockyer* proceeding as the sole forum available to Cal Parties for raising issues of gaming and manipulation. Rather, the footnote citing *Lockyer* in the June 18, 2009 Order[87] merely cites the *Lockyer* proceeding as an example of another forum that may have been available for addressing such issues. Therefore, despite the Commission's mischaracterization of the *Lockyer* proceeding in the June 18, 2009 Order, there is no conflict between the Commission's determinations, in various dockets, regarding the appropriate forum for raising these issues.

29. Second, we find that Cal Parties have had sufficient opportunity to present evidence on gaming and/or manipulative behavior as it relates to the cost offset filings. As explained above, Cal Parties did not introduce any new evidence during the cost offset phase of this proceeding that had not been previously considered by the Commission to persuade us that the established cost offset filing process was insufficient to prevent unjust profit from gaming activities. However, to the extent that Cal Parties did present evidence of gaming in its comments on the sellers' cost offset filings, we find that Cal Parties failed to tie general allegations of gaming practices to specific transactions included in the cost offset filings. Moreover, we note that in instances where Cal Parties have alleged that a specific seller, whose cost offset filing was accepted by the Commission, included costs associated with gaming transactions other than Fat Boy, the Commission expressly addressed Cal Parties' arguments.[88]

2. Sempra

30. In the June 18, 2009 Order, the Commission granted rehearing of its finding that Sempra had failed to identify how it calculated its estimate of ancillary service revenues.[89] The Commission noted that, in its rehearing request, Sempra relied on testimony filed in the cost offset proceeding, testimony that references data filed in the

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accepted. *See* Report on California Energy Markets Issues and Performance: May-June, 2000, CAISO Department of Market Analysis, at 2-3, 25-37 (Aug. 10, 2000) (available at http://www.caiso.com/docs/09003a6080/07/40/09003a6080074029.pdf).

[87] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 134, n.309.

[88] For example, in the June 18, 2009 Order, the Commission addressed Cal Parties' contention that Avista should be directed to exclude its ancillary services buy-backs from its cost offset filing and denied rehearing on this issue. *Id*. P 285-89.

[89] *Id*. P 371 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 360).

Show Cause Proceeding.[90] The Commission determined that, using this data, it could substantiate that Sempra's calculation was accurate.[91] The Commission's review of Sempra's evidence indicated 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 resulted in total net gains of $3,377,611.[92] In light of it discussion of the form and substance of the cost offset analysis, the Commission allowed Sempra to exclude a slightly lower amount of the ancillary service revenue, $3,376,631.[93]

31. On rehearing, Cal Parties argue that the Commission's determination that Sempra can exclude $3,376,631 of revenue (which they assert is related to Sempra's *Gaming and Partnership Investigation* settlement) from its cost offset filing contradicts the Commission's finding in the June 18, 2009 Order that new issues Sempra attempted to raise via motion were moot because the Commission had already rejected Sempra's entire cost offset filing.[94] Cal Parties ask the Commission to rescind its grant of rehearing concerning the proper amount of excludable ancillary service revenue because the issue is moot because Sempra's entire cost offset claim was ultimately rejected. Cal Parties add that the Commission did not explain the difference between the numbers noted in the June 18, 2009 Order (i.e., $3,377,611 and $3,376,631) or how one was determined from the other.

32. Alternatively, Cal Parties argue that the determination should be rejected based upon its market manipulation and gaming arguments.[95] Cal Parties argue that Sempra's alleged manipulative conduct in the ancillary markets would impact the appropriate amount of refunds owed by Sempra. Cal Parties contend that the impact and validity of the allegations should be determined based upon a full assessment of the facts related to

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[90] *Id*. (citing Sempra Energy Trading Corp. February 27, 2006 Request 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 9 (quoting Hanna Testimony at 13:3-13:11 (referencing Sempra Oct. 31, 2003 Show Cause Response, Att. F, Docket No. EL03-137-000, *et al*.))).

[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] *See* Cal Parties Rehearing Request of June 18, 2009 Order at 12 (citing June 18, 2009 Order, 127 FERC ¶ 61,269 at P 47).

[95] *Id*. at 12-13 (citing *Public Utilities Comm'n v. FERC*, 462 F.3d 1027).

Sempra's cost offset filing and not by reliance upon Sempra's settlement of its *Gaming and Partnership Investigation*.

Commission Determination

33. We grant Cal Parties' request for rehearing on the amount of Sempra's ancillary service revenue. It was unnecessary in the June 18, 2009 Order to determine the amount of ancillary service revenue Sempra could exclude from its cost offset filing because the Commission rejected Sempra's entire proposed cost offset in the November 2, 2006 Order.[96] Because Sempra cannot refile its cost offset proposal, we find that this issue was moot and grant rehearing. Because the Commission rejected Sempra's cost offset filing, we deny Cal Parties' request to conduct a separate review in this proceeding of its market manipulation and gaming arguments against Sempra.[97]

3. Edison Mission Energy (Edison Mission)

34. In a December 17, 2007 motion for clarification on specified refund rerun calculations and allocations, Cal Parties argued that the Commission should direct the CAISO to eliminate from the cost offset calculation and allocation Edison Mission's October 11, 2006 cost offset claim submitted to the CAISO.[98] Cal Parties acknowledged that, in response to the Commission's directive in the January 26, 2006 Order, Edison Mission made a compliance filing for the portion of its cost offset filing related to fuel purchased on behalf of Sunrise Power Company (Sunrise) for Sunrise's uninstructed energy sales to the CAISO, but alleged that Edison Mission neglected to make a timely compliance filing on its own behalf.[99] Cal Parties contended that, after the deadline for

[96] *See* June 18, 2009 Order, 127 FERC ¶ 61,269 at 47 (citing November 2, 2006 Order, 117 FERC ¶ 61,151 at P 80).

[97] *See also* P 21-29 (denying request to review market manipulation and gaming issues in this proceeding).

[98] *See* June 18, 2009 Order, 127 FERC ¶ 61,269 at P 306 (citing California Parties Motion for Clarification on Specified Refund Rerun Calculations and Allocations, Docket Nos. EL00-95-000, *et al*., at 5, 19-21 (December 17, 2007) (Cal Parties Motion for Clarification on Refund Rerun Calculations)). We note that, in the June 18, 2009 Order, the Commission inadvertently referred to Edison Mission's October 11, 2006 submission to the CAISO as "Edison Mission's October 17, 2005 filing." *Id*. In spite of this mistake, the Commission's summary of Cal Parties' concerns with respect to the October 11, 2006 submission was accurate and the Commission's response addressed those concerns. *See id*. P 306 and 308.

[99] Cal Parties Motion for Clarification on Refund Rerun Calculations at 5, 19-21.

(continued)

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.[100] Therefore, Cal Parties disputed the inclusion of Edison Mission's cost offset claim in the cost offset allocation and requested the Commission to direct the CAISO to eliminate Edison Mission's claim from the cost offset calculation and allocation.[101]

35. In the June 18, 2009 Order, the Commission denied Cal Parties' request for clarification.[102] The Commission explained that, in the January 26, 2006 Order, the Commission accepted without modification the cost offset filing Edison Mission made on its own behalf; the compliance filing directive dealt exclusively with discrepancies in the data provided by Edison Mission regarding the Sunrise uninstructed energy sales.[103] The Commission noted that, as Cal Parties pointed out, Edison Mission's March 14, 2006 compliance filing addressed the Sunrise claim.[104] The Commission therefore found that, because the Commission did not require a compliance filing for the cost offset claim relating to Edison Mission's CalPX sales, Edison Mission's October 2006 filing of that data with the CAISO could not be considered an out-of-time compliance filing.[105]

The cost offset 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.

[100] *Id*. Cal Parties also argued that the CAISO may have initially inadvertently conflated the Sunrise and Edison Mission submissions, resulting in an assumption that Edison Mission was making a "correction" when in fact Edison Mission was making an out-of-time compliance submission. Cal Parties Motion for Clarification on Refund Rerun Calculations at 20. However, Cal Parties acknowledged that the CAISO subsequently adjusted its cost offset data distribution information to reflect both the Sunrise claim and the Edison Mission claim. *Id*. at 20-21, n.55. Based on this acknowledgement, the Commission did not address this unsubstantiated claim.

[101] *Id*.

[102] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 308.

[103] *See id*.; January 26, 2006 Order, 114 FERC ¶ 61,070 at P 215, 218, 223, 224 and App. B and E.

[104] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 308; *see also* Cal Parties Motion for Clarification on Refund Rerun Calculations at 19-20.

[105] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 308.

36. On rehearing, Cal Parties first argue that in the June 18, 2009 Order the Commission failed to respond to its argument that Sunrise's cost offset claim should be limited to refunds owed.[106] Cal Parties state that Edison Mission filed a cost offset claim for Sunrise that is $440,666 while Sunrise's refund liability is only $228,802.[107] Cal Parties request that the Commission clarify that Sunrise's cost offset claim may not exceed its refund liability or, alternatively, grant rehearing.

37. Second, Cal Parties again argue that the Commission directed Edison Mission to make a compliance filing that included both the Sunrise data and Edison Mission data and that the Edison Mission data was submitted to the CAISO impermissibly late.[108] Cal Parties also complain that neither the Commission nor any other party to the case became aware of Edison Mission's October 2006 submission to the CAISO until April 2007 and that no interested party had the opportunity to review and comment on it in violation of due process.[109] Cal Parties request that the Commission reject Edison Mission's entire cost offset filing for failure to comply with the applicable compliance procedures or, alternatively, find that the Sunrise cost offset claim may not exceed the refund liability attributable to Sunrise.

Commission Determination

38. First, it is unnecessary to clarify that Sunrise's cost offset claim may not exceed its refund liability. The Commission already made this clarification in its November 19, 2007 Order.[110] In that order, Commission explained that "[t]his cost offset is an offset to any refund liability; thus, a seller may use the cost offset to reduce its refund liability but may not use the cost offset to receive additional revenues than it would have received prior to mitigation."[111] Further clarification, therefore, is unnecessary. Accordingly, we deny Cal Parties' request for clarification or, alternatively, rehearing on this issue.

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[106] Cal Parties Rehearing Request of June 18, 2009 Order at 9 (citing Cal Parties Motion for Clarification on Refund Rerun Calculations at 4).

[107] *Id*. (citing March 14, 2006 CAISO Cost Offset Data Distribution, Excel Data file labeled: Reconciled Cost Filing (sunrise).xls).

[108] *Id*. at 10-11.

[109] *Id*. at 10 (citing April 10, 2007 CAISO Cost Offset Data Distribution, Excel Data file labeled: Cost Based Offsets 0400907.xls).

[110] *See* November 19, 2007 Order, 121 FERC ¶ 61,184 at P 140.

[111] *Id*.

39. Next, we deny Cal Parties' rehearing request with respect to the timing of Edison Mission's submission of its cost offset data to the CAISO. We reiterate that the Commission only directed Edison Mission to make a compliance filing with respect to the Sunrise data. Cal Parties are correct that the Commission directed Edison Mission to "make the changes discussed in the body of [the] order as reflected in Appendix B, and to submit its final cost offset reflecting these changes to the [CAISO]." However, the Commission did not stop there. In Appendix B, the Commission directed Edison Mission to reconcile errors in revenue calculations discovered by Commission staff, as shown in Appendix E. Appendix E indicated, in turn, that the staff-identified revenue errors were limited to CAISO uninstructed energy sales (or the portion of the Edison Mission cost offset filing submitted on Sunrise's behalf). Because the cost offset filing Edison Mission submitted to the Commission on behalf of Sunrise was distinct from its own cost offset filing and the corrections directed were related to the Sunrise submission, it follows that the compliance obligation related to the Sunrise cost offset submission alone. Furthermore, the Commission did not set a particular deadline for the filing of the revised Sunrise cost offset data or the Edison Mission cost offset data to the CAISO; therefore, Cal Parties' assertion that the Edison Mission cost offset submission to the CAISO was untimely is unfounded. For these reasons, we reject Cal Parties' request that the Commission reject Edison Mission's entire cost offset filing for failure to comply with the applicable compliance procedures.

40. We also find Cal Parties' assertion that no interested party had the opportunity to review and comment on Edison Mission's cost offset submission to the CAISO on its own behalf lacks merit. The Commission responded to this argument in the June 18, 2009 Order.[112] Cal Parties present no additional counter-arguments on rehearing.[113] We continue to reject this assertion for the reasons set forth in the June 18, 2009 Order.[114] Accordingly, we deny rehearing on this issue.

4. PPL Energy

41. In the June 18, 2009 Order, the Commission agreed with Cal Parties that PPL Energy's "other operational costs" were insufficiently supported and therefore did not meet the August 8, 2005 Order's prerequisite for cost recovery.[115] Consequently, the Commission granted rehearing and directed PPL Energy to remove the "other operational

[112] June 18 Order, 127 FERC ¶ 61,269 at P 307.

[113] *See* Cal Parties Rehearing Request of June 18, 2009 Order at 10.

[114] June 18 Order, 127 FERC ¶ 61,269 at P 307.

[115] *Id*. P 359.

costs" from its production cost calculations in its cost analysis.[116] The Commission stated that this change would reduce PPL Energy's cost offset by $331,174.[117] The Commission noted that this amount was a consequence of deleting the $23.29/MWh "other operational costs" component utilized in the calculation of PPL Energy's average hourly cost.[118]

42. On rehearing, Cal Parties argue that the Commission erred in its recalculation of PPL Energy's cost offset because it erroneously excludes the impact of other cost offset reductions directed by the Commission in the January 26, 2006 Order, which reduced PPL Energy's cost offset to zero.[119] Cal Parties note that PPL Energy's March 14, 2006 submission to the CAISO reflected a zero offset calculation based upon these corrections.[120] Cal Parties state that, because PPL Energy's cost offset was already zero, the new reductions should also yield a zero cost offset. Cal Parties request that the Commission clarify that PPL Energy's cost offset is zero or, alternatively, grant rehearing.

Commission Determination

43. We disagree that the Commission's determination was erroneous. Because the CAISO has not calculated the final financial settlement data yet, it is premature for the Commission to find that PPL's cost offset is zero. Therefore, we deny rehearing on this issue.

D. Idacorp

44. On March 20, 2006, Idacorp filed a motion for summary disposition of its cost offset filing.[121] On March 27, 2006, the Commission summarily rejected Idacorp's cost

[116] *Id*.

[117] *Id*.

[118] *Id*. at n.739 (citing 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)).

[119] Cal Parties Rehearing Request of June 18, 2009 Order at 12.

[120] *See id*.; Att. A.

[121] Motion of Idacorp for Summary Disposition of Its Cost Filing, Docket Nos. EL00-95-147 and EL00-98-134 (March 20, 2006). *See also* March 27, 2006 Order, 114 FERC ¶ 61,310 at P 5-8 (providing procedural history of Idacorp's cost offset filing).

offset filing because it was non-compliant and incomplete.[122] The Cities of Pasadena and Vernon, California (Pasadena and Vernon, respectively) requested clarification of the March 27, 2006 Order.[123] On April 26, 2006, Idacorp filed an answer to Vernon's request for clarification (Idacorp's April 26, 2006 answer to Vernon's clarification request)[124] and a request for rehearing of the March 27, 2006 Order (Idacorp's request for rehearing of the March 27, 2006 Order).[125]

45. In a May 22, 2006 Order, the Commission approved a settlement agreement filed by Idacorp, Cal Parties and the Commission's OMOI (Idacorp Settlement).[126] On June 6, 2006, Idacorp filed a Notice of Withdrawal of Idacorp's request for rehearing of the March 27, 2006 Order.[127]

46. In the June 18, 2009 Order, the Commission determined that, due to Idacorp's Notice of Withdrawal, the pleadings now before it were only Pasadena and Vernon's request for clarification of the March 27, 2006 Order and Idacorp's April 26, 2006 answer to Vernon's clarification request.[128]

1. Notice of Withdrawal of Idacorp's Request for Rehearing of the March 27, 2006 Order

47. Idacorp asks the Commission to act on Idacorp's request for rehearing of the March 27, 2006 Order with respect to parties that did not opt into the Idacorp Settlement.

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[122] *See* March 27, 2006 Order, 114 FERC ¶ 61,310 at 15-19.

[123] City of Pasadena, California March 29, 2006 Request for Clarification of March 27, 2006 Order, Docket Nos. EL00-95-147 and EL00-98-134; City of Vernon April 12, 2006 Request for Clarification of March 27, 2006 Order, Docket Nos. EL00-95-147 and EL00-98-134.

[124] Idacorp April 26, 2006 Answer to Request of City of Vernon for Clarification of March 27, 2006 Order, Docket Nos. EL00-95-147 and EL00-98-134.

[125] Idacorp April 26, 2006 Request for Rehearing of Order Rejecting Cost Filing, Docket Nos. EL00-95-147 and EL00-98-134 (Idacorp Rehearing Request of March 27, 2006 Order).

[126] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,230 (2006).

[127] Idacorp June 6, 2006 Notice of Withdrawal, Docket No. EL00-95-000, *et al.*

[128] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 386.

Idacorp points out that its Notice of Withdrawal applies only to the extent that Idacorp's request for rehearing of the March 27, 2006 Order related to participants in the Idacorp Settlement.[129] Idacorp argues that Commission action is still necessary because, once the CAISO completes the refund calculations, it might be determined that non-participants to the Idacorp Settlement are net refund recipients (and thus responsible for their proportionate share of cost offset amounts).[130] Idacorp contends that action is also necessary because, although final, the Commission's Cost Allocation Orders may be subject to petitions for review and therefore may remain in limbo for a prolonged period of time. If the Commission determines that the Commission's summary rejection of Idacorp's cost offset filing in the March 27, 2006 Order is moot due to the Cost Allocation Orders, then Idacorp requests that the Commission vacate its rejection of Idacorp's cost offset filing. Idacorp argues that vacatur is appropriate in cases like this one where the underlying proceeding has been terminated prior to final disposition and such termination is not due to the action of the party requesting vacatur.[131]

Commission Determination

48. We grant rehearing on this issue. We agree that the Notice of Withdrawal did not apply to parties that opted out of the Idacorp Settlement. We also agree with Idacorp that, although the Commission determined in the Cost Allocation Orders that net refund recipients will be responsible for the costs of the cost offsets, the identity of the net refund recipients will not be known until the CAISO completes its refund calculations. Therefore, the issues in Idacorp's request for rehearing of the March 27, 2006 Order are still before us to the extent they may affect future net refund recipients. Accordingly, we grant rehearing and address Idacorp's request for rehearing of the March 27, 2006 Order.

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[129] Idacorp July 8, 2009 Request for Rehearing of June 18, 2009 Order, Docket Nos. EL00-95-227 and EL00-98-212, at 5-6; Att. at 3 (Idacorp Rehearing Request of June 18, 2009 Order).

[130] *Id*. at 6 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 115 FERC ¶ 61,171 (2006); *reh'g denied*, 127 FERC ¶ 61,250 (2009) (collectively, Cost Allocation Orders)).

[131] *Id*. at 7 (citing *United States v. Munsingwear*, 340 U.S. 36 (1950)). Idacorp distinguishes *U.S. Bancorp Mortgage Co. v. Bonner P'ship*, 513 U.S. 18 (1994). *Id*. at 7. Idacorp acknowledges that *Munsingwear* and *US Bancorp* apply to federal court actions but claims, without providing support, that the Commission has observed their precepts. *Id*. at n.2.

2. Idacorp's Request for Rehearing of the March 27, 2006 Order

a. Commission Orders

49. In the August 8, 2005 Order, the Commission differentiated between the way marketers and load-serving entities could calculate costs when they were unable to match and document transactions to specific resources.[132] The Commission directed marketers to calculate an average cost of energy for their unmatched sales based on their portfolio of short-term purchases.[133] Based on marketers' general operational practices, the Commission found that a reasonable definition of short-term purchases for marketers includes all transactions of less than one month in term.[134] The Commission added that, for cost offset calculation purposes, this portfolio must exclude any short-term purchases previously committed or unavailable for sale into the California markets.[135]

50. The Commission also directed load serving entities to calculate an average cost of energy for their unmatched sales, but with certain limitations.[136] The Commission reiterated that it would not allow load serving entities to justify sales above the mitigated market clearing prices based on their cost of purchased energy.[137] The Commission again noted that load serving entities' general business practice is to purchase energy sufficient to serve their native load obligations and that, to the extent they have excess energy to sell, the proceeds from such sales reduce the energy costs their customers would otherwise pay.[138] To the extent a load serving entity could demonstrate that it sold energy in the California markets that it had initially purchased for native load but that subsequently became available for resale to other customers in real time, it could include the costs of this energy in its cost offset filing.[139] The Commission did not, however,

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[132] August 8, 2005 Order, 112 FERC ¶ 61,176 at P 70-71.

[133] *Id*. P 70.

[134] *Id*.

[135] *Id*.

[136] *Id*. P 71.

[137] *Id*.

[138] *Id*.

[139] *Id*. (citing *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, 62 Fed. Reg. 12274 (March 14, 1997), FERC Statutes and Regulations ¶ 31,048 at 30,253 (1997)).

allow a load serving entity to include in its cost offset filing any costs from purchase/resale transactions that were entered into on an "opportunity basis," i.e., purchased with the intent of reselling rather than to use to serve native load.[140] The Commission stated that, in entering such transactions, load serving entities took on a risk that their customers should not have to bear.[141] Accordingly, the Commission determined that a load serving entity's average cost of energy for unmatched sales must be based on its portfolio of generation and allowed purchased energy, to the extent this portfolio was not used to meet primary native load service obligations.[142] This portfolio was to exclude (1) resources, as determined from a stacking analysis, that were utilized to meet native load requirements; (2) resources previously committed or unavailable for sale into the California markets; and (3) purchased/resale transactions that were entered into on an opportunity basis.[143]

51. In the March 27, 2006 Order, the Commission rejected Idacorp's request to be treated as a marketer.[144] The Commission noted that Idacorp's sales in the CAISO and CalPX markets during the majority of the Refund Period were made by Idaho Power under its market-based rate tariff.[145] The Commission found that Idaho Power was clearly a load serving entity, and the separation of the Operations and Non-Operations Books for accounting purposes did not constitute reason for Idaho Power to be treated as a marketer.[146] The Commission explained that a power marketer is an entity that has its own market-based rate tariff and affiliate code of conduct, which Idacorp Energy did not have until the end of the Refund Period.[147] Specifically, the Commission approved Idacorp Energy's market-based rate tariff and associated code of conduct effective April 28, 2001, and Idacorp Energy began transacting under its own name on June 1, 2001.[148]

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[140] *Id*. P 71.

[141] *Id*.

[142] *Id*.

[143] *Id*.

[144] March 27, 2006 Order, 114 FERC ¶ 61,310 at P 15.

[145] *Id*.

[146] *Id*.

[147] *Id*.

[148] *Id*. at n.30.

52. While Idacorp calculated its cost offset as if it were a marketer, the Commission determined that it was more appropriate to classify Idacorp as a load serving entity for cost offset purposes because that was Idacorp's primary function.[149] Upon reviewing Idacorp's cost offset filing using the criteria required for load serving entities, the Commission found the company's filing flawed in three main respects: (1) given that Idacorp indicated it could not match, the stacking methodology Idacorp claimed to have utilized was expressly rejected by the August 8, 2005 Order; (2) Idacorp failed to include any stacking analysis with its data and conclusions; and (3) the mere provision of this data did not comply with the August 8, 2005 Order, which required ordering of resources by cost (i.e., performing a stacking analysis), removing lowest cost resources attributable to native load, and then averaging the cost of the remaining resources in the stack.[150] As a result, the Commission found that Idacorp did not file sufficient information to validate its generation and purchases through the stacking analysis required by the August 8, 2005 Order.[151]

53. In reaching its determination, first, the Commission noted that Idacorp stated that the utility side of Idaho Power served its native load with its generation and lowest cost purchases, and thus the appropriate way to calculate Idacorp's purchased energy costs, if treated as a load serving entity, would be to stack all purchases, long-term and short-term, in each hour, and assign the top of the stack (i.e., its most expensive purchases/generation) to its sales into the CAISO/CalPX markets.[152] The Commission pointed out that the August 8, 2005 Order explicitly rejected the top-of-the-stack methodology Idacorp claimed to have utilized in situations like this where sellers did not match specific resources with specific sales transaction-by-transaction.[153]

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[149] *See id.*

[150] *Id*. P 16.

[151] *Id*.

[152] *Id*.

[153] *Id*. (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 67-72). The Commission added that Idacorp's cost offset filing also included opportunity costs, which the August 8, 2005 Order expressly prohibited. *Id*. at n.31 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 66). The Commission also noted that it only included data for October through December of 2000, ignoring the remainder of the Refund Period. *Id*. at n.31.

54. Second, the Commission pointed out that Idacorp only submitted its short-term and long-term purchases, along with its hourly generator-specific and load data,[154] without organizing this voluminous data into any kind of stacking analysis or usable format.[155] Idacorp simply showed the hourly results of this calculation in Table BA attached to its cost offset filing**,** without including the necessary demonstrative support to explain how it arrived at the figures in Table BA.[156] The Commission found that the mere provision of this data did not constitute a stacking analysis and did not provide the transaction-by-transaction matching of resources with sales that the August 8, 2005 Order required for the top-of-the-stack methodology.[157] Third, the Commission found that Idacorp's proffered data was insufficient to perform the proper analysis required by the August 8, 2005 Order.[158] The Commission stated that, in order to accomplish the required stacking analysis, Idacorp needed to apply its experience and knowledge of its system to its load, generation and purchased power data.[159] The Commission explained that simply providing raw data lacking any functional format did not adequately support its cost offset filing.[160]

55. The Commission pointed out that the August 8, 2005 Order unequivocally placed the burden on an individual seller to justify that its costs exceeded its revenues for transactions into the CAISO/CalPX markets during the Refund Period.[161] The Commission stated that Idacorp had been on notice of this opportunity since at least May

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[154] The Commission noted that the purchase data was submitted in Tables AU and AV, the generator cost data in Table AW, scheduled and metered generation data in Table AX, and scheduled and metered load data in Table AY. *Id*. at n.32.

[155] *Id*. P 17.

[156] *Id*.

[157] *Id*.

[158] *Id*. P 18.

[159] *Id*.

[160] *Id*.

[161] *Id*. P 19 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 116 ("The burden will be on the filer to present actual data in a manner that supports its claim."); *id.* P 1 ("The Commission will require these cost [offset] filings to reflect fully-supported actual costs."); *id.* P 103-04 (requiring complete tagging or line-by-line accounting for each matched transactions; submission of "[a]ll calculations and supporting schedules," and "[r]elevant testimony with explanatory detail.")).

15, 2002. The Commission noted that its order issued on December 10, 2004[162] prompted several rounds of comments that culminated in the August 8, 2005 Order establishing the cost offset filing framework.[163] The August 8, 2005 Order expressly rejected the stacking methodology used by Idacorp in its cost offset filing, as well as the inclusion of opportunity costs.[164] The Commission concluded, therefore, that Idacorp failed to include the stacking analysis required by the August 8, 2005 Order and the data the company provided was insufficient to perform the necessary stacking analysis.[165] The Commission stated that summary disposition is appropriate where there are no genuine issues of material fact concerning whether a filing constitutes a clear violation of Commission directives.[166] The Commission found that there was no dispute over the material facts relevant to Idacorp's cost offset filing and that Idacorp had failed to comply with the August 8, 2005 Order.[167] Consequently, the Commission rejected Idacorp's cost offset filing.[168]

b. Rehearing Request

56. On rehearing, Idacorp first disagrees with the distinction the Commission drew in the August 8, 2005 Order between the manner in which marketers and load serving entities could calculate costs when they were unable to match and document transactions to specific resources.[169]

57. Idacorp then argues that, even if this distinction holds, the Commission should not have treated Idacorp as a load serving entity because it demonstrated that it was active as

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[162] *See San Diego Gas & Elec. v. Sellers of Energy and Ancillary Servs.*, 109 FERC ¶ 61,264 (2004).

[163] March 27, 2006 Order, 114 FERC ¶ 61,310 at P 19.

[164] *Id*. (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 66, 69).

[165] *Id*.

[166] *Id*. (citing *El Pas Natural Gas Co.*, 112 FERC ¶ 61,150 at P 30 (2005) (Commission may summarily reject parts of a proposed filing if it concludes there are no material issues of fact in dispute and the filing is in clear violation of an applicable statue, regulation or Commission policy)).

[167] *Id*.

[168] *Id*.

[169] Idacorp Rehearing Request of March 27, 2006 Order at 5-14.

a marketer. Idacorp claims that its marketing activities were not incidental to its load-serving activities or a means to shed supply found at the last moment to be excess to native load needs. Idacorp states that, prior to and during the Refund Period, it was engaged both in utility-type operations for native load customers (including the purchase and sale of energy) and trading and marketing operations for third parties on a non-utility basis. Idacorp asserts that, for all accounting and ratemaking purposes, transactions relating to balancing system load and system reliability were strictly and formally separated from speculative trading in Idacorp's Operations Book and Non-Operations Book. Idacorp states that the transactions in each book were treated differently for financial reporting purposes (i.e., the Operations Book transactions were on settlement accounting, and the Non-Operations Book transactions were accounted for using mark-to-market, or fair value, accounting). Idacorp adds that purchases were classified at the time of the transaction and transfers between the books were made at index prices.

58. Idacorp claims that, like any other marketer, it entered into a variety of transactions in its Non-Operations Book: real-time, day-ahead, balance of month, and term transactions. Idacorp argues that there is no meaningful distinction between Idacorp's Non-Operations Book activity before and after the transfer of the Non-Operations Book from Idaho Power to Idacorp Energy and all existing Non-Operations Book contracts, obligations, receivables and payables were transferred to Idacorp Energy. Idacorp states that it has always represented itself to the Commission as a power marketer whose predecessor was the power marketing division of Idaho Power. Idacorp adds that it does not fit the description in the August 8, 2005 Order of a load serving entity that purchases energy to serve native load obligations and, to the extent it has excess capacity to sell, proceeds of such sales would reduce the cost of power that its customers would otherwise pay.[170] Idacorp claims that the transactions in Idacorp's Non-Operations Book were not used to serve native load and its native load customers were never exposed to either profits or losses from the Non-Operations Book. Idacorp argues that, therefore, there is no reason to treat Idacorp's power marketing activity differently from other energy marketers.

59. Idacorp contends that the Commission had approved an almost identical pricing mechanism when it approved the Electricity Supply Management Service Agreement between Idaho Power and Idacorp Energy (ESMS Agreement) when Idacorp Energy succeeded to the Non-Operations Books, effective June 1, 2001.[171] Idacorp states that it

[170] *See id*. at 16 (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 71).

[171] Idacorp states that, as of June 1, 2001, Idaho Power terminated its trading operations and those were handled by IES, which changes its name to Idacorp Energy effective June 2, 2001. *Id*. at 16. Idacorp further states that the Commission approved the formal separation on April 27, 2001 and accepted for filing IES' market-based rate

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had an Energy Trading and Financial Risk Management Policy specific to its Non-Operations Book activities. Idacorp adds that its state regulators (the Idaho Public Utilities Commission and the Oregon Public Utilities Commission) reviewed, approved and expected this separate treatment of operations and non-operations activity for purposes of retail ratemaking.

60. Idacorp asserts that the Commission's disregard of the evidence of the two sides of Idaho Power's business and the conclusion that it was all the same is arbitrary and capricious and lacks any attribute of reasoned decision-making.[172] Idacorp also claims that the Commission's conclusion that a power marketer must have its own market-based rate tariff and affiliate code of conduct cannot stand. Idacorp states that, although a power marketer that is not affiliated with a traditional utility is not required to have an affiliate code of conduct in its tariff,[173] it makes no sense to contend that such an entity, by virtue of not having an affiliate code of conduct in its tariff, had to make a cost offset filing as a load serving entity.

61. Idacorp adds that the Commission's failure in the March 27, 2006 Order to address any of the evidence submitted by Idacorp in support of its status as a power marketer is alone sufficient to find that the decision was not made on a reasoned basis.

62. Finally, Idacorp challenges the Commission's rejection of Idacorp's cost offset filing. Idacorp states that the Commission inexplicably and inaccurately asserted that Idacorp failed to include a stacking analysis at all and that Idacorp merely provided the data required by August 8, 2005 Order without analysis.[174] Idacorp states that the Commission also criticized Idacorp for including "opportunity costs"[175] and found fault

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tariff and the ESMS Agreement. *Id*. Idacorp adds that Idacorp Energy succeeded to the non-operations trading as well as its obligations, including those from the Refund Period. *Id*. We note that Idacorp has not identified for which entity "IES" is an acronym.

[172] *Id*. at 16-17 (citing *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001); *North Carolina Utils. Comm'n v. FERC*, 42 F.3d 659, 666 (D.C. Cir. 1994); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1988)).

[173] *Id*. at 17 (citing *Exelon Generation Co.*, 112 FERC ¶ 61,027, at P 25 n.21 (2005); *Elec. Energy, Inc.*, 113 FERC ¶ 61,245, at P 36 (2005)).

[174] *Id*. at 18 (citing March 27, 2006 Order, 114 FERC ¶ 61,310 at P 16).

[175] Idacorp states that the Commission really meant the costs of what the Commission now claims are "opportunity sales" or short-term purchases. *Id*. at 18.

with Idacorp for providing data for only October through December 2000.[176] Idacorp argues that the Commission ignored the stacking analysis that Idacorp performed that compared the volume of sales to the CAISO/CalPX markets with the top of its purchased power stack.[177] Idacorp states that this simple calculation does not require an elaborate explanation and can be replicated using Tables AA-AF, AU and AV attached to its cost offset filing compared against the results in Table BA.[178] Idacorp asserts that the Commission's criticism of the use of the October-December 2000 data is irrational because, in the cost offset filings, revenues and costs are calculated independently of one another. Therefore, Idacorp contends that, to the extent it only provided cost data for a portion of the Refund Period while providing revenue data for the entire Refund Period, it disadvantaged itself, not potential refund recipients.

63. Idacorp claims that the Commission's rejection of Idacorp's cost offset filing is inconsistent with that of similarly situated sellers. Idacorp points to the Commission's disparate treatment of Portland, a load serving entity that Idacorp asserts also performed a top-of-the-stack allocation to sales rather than allocating the bottom of the stack to load and primary obligations.[179] Idacorp states that, even though Portland, like Idacorp, included short-term energy purchases in its portfolio, the Commission allowed Portland to revise its cost offset filing, rather than rejecting it.[180] Idacorp argues that it should not be subject to the cursory disallowance of the costs of purchases it made to serve the CAISO and CalPX. Idacorp asserts that, if the Commission insists on rigid application of the erroneous precepts of its August 8, 2005 Order, then the result will be that zero cost is allocated to the purchases used to make sales to the CAISO and CalPX. Idacorp states

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[176] *Id*. (citing March 27, 2006 Order, 114 FERC ¶ 61,310 at n.31).

[177] *Id*. (citing Smith Testimony at 32). Idacorp also states that it submitted the required data regarding short-term and long-term purchases, generator-specific cost data by hour, scheduled and metered generation and scheduled and metered load. *Id*. at 17 (citing Tables AU, AV, AW, AX, and AY). Idacorp adds that, because it could not match specific purchases to sales, it calculated an average portfolio cost for each hour by implementing a stacking analysis using a top-of-the-stack allocations methodology. *Id*. (citing Smith Testimony, Exh. IDA-1, at 32; Table BA). Idacorp explains that it used the purchase data from Tables AU and AV and the sales data from Tables AA-AF to perform its stacking analysis. *Id*. (citing Smith Testimony, Exh. IDA-1 at 31-32).

[178] *Id*. at 18 (citing Smith Testimony at 32).

[179] *Id*. at 19 (citing Stathis Testimony (Exh. PGE-1) at 13 (Sept. 14, 2005)).

[180] *Id*. at 19 (citing January 26, 2006 Order, 114 FERC ¶ 61,070 at P 253, 257; Stathis Testimony (Exh. PGE-1) at 29 (Sept. 14, 2005)).

that this result is confiscatory and ignoring this defect will not achieve certainty in the CAISO and CalPX calculations.

c. Commission Determination

64. We deny rehearing. First, Idacorp's challenge to the Commission's distinction between the purchases included in load serving entity's versus marketer's cost offset filings constitutes an impermissible collateral act on the August 8, 2005 Order.[181] The appropriate avenue to challenge the August 8, 2005 Order was through a request for rehearing of that order. Indeed, Idacorp raised this issue in its September 7, 2005 rehearing request on the August 8, 2005 Order.[182] On November 17, 2007, the Commission denied rehearing of the August 8, 2005 Order, including Idacorp's request for rehearing on this issue.[183] The August 8, 2005 Order is now final. Accordingly, we deny rehearing on this issue.

65. We also continue to reject Idacorp's argument that the prohibition on recovery of costs associated with a load serving entity's opportunity purchases should not apply to Idacorp. In the August 8, 2005 Order, in response to requests from sellers that any cost recovery methodology must reflect the manner in which they operated their business,[184] the Commission established a methodology that corresponded to the business practices of each type of seller.[185] Marketers were provided an opportunity to calculate their costs according to their characteristic risk management procedures, which generally strongly encourage the offsetting of short-term purchases with short-term sales. Load serving entities were provided with an opportunity to calculate their costs using a stacking analysis and in accordance with how their primary obligation to serve native load customers is generally approached: higher priced energy is sold into the market to reduce the rates for native load.[186] Opportunity power purchases were never made with native

[181] *See Florida Mun. Power & Light Agency v. FERC*, No. 09-1060, Slip Op. at 16 (D.C. Cir. Apr. 16, 2010).

[182] Idacorp September 7, 2005 Request for Rehearing of August 8, 2005 Order, Docket Nos. EL00-95-136 and EL00-98-123.

[183] *See* November 19, 2007 Order, 121 FERC ¶ 61,184 at P 62-73.

[184] *See id*. P 69 (citing Comments of Stand-Alone Marketers (Constellation, Coral and TransAlta) at 12, Docket No. EL00-95-000, *et al.* (January 10, 2005); and Comments of Indicated Sellers (Portland, Idacorp, BP Energy Company, PNM and Puget Sound) at 19-20, Docket No. EL00-95-000, *et al.* (January 10, 2005)).

[185] *See id*. (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 66-68).

load in mind, but rather were made with the intention of turning a profit for the company.[187]

66. Although Idacorp claims that during the Refund Period, it structured its business so that its marketing efforts were distinctly separate from its native load service, we do not find that this essentially informal distinction qualifies Idacorp for marketer status. Idacorp admits that energy transfer activity occurred between its Operations Book and Non-Operations book.[188] Idacorp even notes that it could save certain hydroelectric resources for future use by making market purchases.[189] This evidence supports the Commission's finding that Idacorp operated as a load serving entity because it used its marketing function to serve native load.

67. We also reiterate that, while Idaho Power was permitted by its state regulators to engage in non-regulated marketing and trading activities during the Refund Period, it was not until April 28, 2001, shortly before the end of the Refund Period, that the Commission accepted and made effective tariff sheets for Idaho Power's affiliated marketing entity, Idacorp Energy.[190] Because Idacorp's affiliated marketing entity was only authorized to make market-based sales for a small portion of the Refund Period, we continue to find the company's arguments unpersuasive.[191] For these reasons, we reject Idacorp's argument that the Commission improperly treated it as a load serving entity for purposes of assessing its cost offset claim. Accordingly, we deny rehearing on this issue.

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[186] *See id*. (citing August 8, 2005 Order, 112 FERC ¶ 61,176 at P 71).

[187] *See id*. P 69.

[188] *See* Idacorp Rehearing Request of March 27, 2006 Order at 15 ("Transfers between the Operations Book and Non-Operations Book were made at index prices.").

[189] *See id*. at 13 (citing Att. 2 at 35) ("the Commission's position regarding opportunity transactions fails to take into account the role that short-term purchases play in a company's resource allocation. This is particularly true when, like [Idacorp], a load serving entity has significant hydroelectric resources which can be saved for future use, making short-term purchases the better option. Attached as Attachment 2 is [Idacorp]'s June 2000 *Integrated Resource Plan* which demonstrates that during the refund period, [Idacorp] was short in long-term resources for native load and needed to purchase certain amounts for native load, including short-term purchases.").

[190] *See* November 19, 2007 Order, 121 FERC ¶ 61,184 at P 74 (citing *Idaho Power Co.*, 95 FERC ¶ 61,147 (2001)).

[191] *See id*.

68. We also deny rehearing of the Commission's rejection of Idacorp's cost offset filing. As a load serving entity, the Commission applied to Idacorp the same requirement (i.e., the exclusion of opportunity sales from its cost offset filing) it applied to other load serving entity sellers, including Portland.[192] Unlike Portland, Idacorp's filing was patently deficient because Idacorp stacked only its short-term power purchases. Idacorp failed to provide any data regarding its generation fleet availability, as compared to load, and further failed to demonstrate that the short-term purchases were made for native load use but were not otherwise needed. These were the requisite showings load serving entities were required to make to justify a cost offset.[193] Idacorp's attempt to file as a marketer and simultaneously assert that the data was sufficient to support a load serving entity seller demonstration contravenes the Commission's direction in the August 8, 2005 order, thus making Idacorp's filing patently deficient. Similarly, Idacorp's argument that its submittal is similar to that of Portland is unfounded. Unlike Idacorp, Portland submitted the necessary data as a load serving entity. But the Commission questioned Portland's use of the top of the stack selection, noting that Portland may have had generation available from the fleet of units that it owned. Due to this difference in the entities' filings, the Commission was able to direct Portland to revise its filing, rather than reject it in its entirety. We also disagree with Idacorp's contention that the Commission's criticism of the use of the October-December data was irrational. The Commission criticized the use of that data because the Commission was not able to incorporate revenues from that period that may have had a substantial effect on Idacorp's position during the Refund Period.[194] For these reasons, we find that Idacorp's arguments regarding the Commission's rejection of Idacorp's cost offset filing are unfounded. Accordingly, we deny rehearing on this issue.

3. Status of City of Vernon

69. On April 12, 2006, the City of Vernon requested clarification of paragraph 8 and footnote 24 of the March 27, 2006 Order.[195] Vernon stated that, although it opted out of

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[192] *See id*. P 70 ("costs incurred from opportunity purchases – those purchases made with the intent to resell at a profit and not for service to native load – have nothing to do with [a load serving entity]'s primary business function or charged franchise requirements, and thus are not relevant costs here").

[193] *See* August 8, 2005 Order, 112 FERC ¶ 61,176 at P 71-72.

[194] *See* January 26, 2006 Order, 114 FERC ¶ 61,070 at P 274; June 18, 2009 Order, 127 FERC ¶ 61,269 at P 356-357.

[195] Paragraph 8 states: "On March 9, 2006, a number of parties opted in to the Idacorp Settlement, and some parties opted out as well." March 27, 2006 Order, 114 FERC ¶ 61,310 at P 8. Footnote 24 states that "Opt outs include: . . . ." and lists

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the Idacorp Settlement, it was not listed in footnote 24, which listed entities included among the opt-outs. Because the June 18, 2009 Order would affect the final disbursement of money in the financial settlement phase of this proceeding, Vernon asked the Commission to clarify that Vernon is among the parties that opted out of the Idacorp Settlement.

70. In Idacorp's April 26, 2006 answer to Vernon's clarification request, Idacorp asserted that Vernon was not a victim of a ministerial error because Vernon ignored the Commission's requirement in the February 23, 2006 Order[196] to either opt into or opt out of the Idacorp Settlement by March 9, 2006. Therefore, Idacorp asserted that Vernon should be deemed to have opted into the Idacorp Settlement.

71. In the June 18, 2009, the Commission granted the clarifications requested by Vernon, finding that it had opted out of the Idacorp Settlement.[197] Although the Commission required parties to notify the Commission of their intent to *either* opt into *or* opt out of the Idacorp Settlement and stated that the elections would be binding on the parties,[198] the Commission found that neither the Commission nor the Idacorp Settlement stated that a party's failure to submit a notice would be treated as an election to opt into the Idacorp Settlement.[199] The Commission concluded that, because Vernon had not provided notice of its intent to opt-in, as required by the Idacorp Settlement, it was not a settling party, according to the terms of the Idacorp Settlement.[200]

72. On rehearing of the June 18, 2009 Order, Idacorp argues that, in light of filings submitted subsequent to its request for rehearing of the March 27, 2006 Order, which the Commission did not consider in the June 18, 2009 Order, Vernon is permitted to opt into the Idacorp Settlement. For support, Idacorp points to a global settlement between Cal Parties and Vernon approved by the Commission on October 23, 2008 (Vernon Settlement), which authorizes Cal Parties to act on Vernon's behalf to opt into

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entities included among the opt-outs. *Id.* n.24

[196] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 114 FERC ¶ 61,195 (2006) (February 23, 2006 Order).

[197] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 390.

[198] *Id*. (citing *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).

[199] June 18, 2009 Order, 127 FERC ¶ 61,269 at P 390.

[200] *Id*. (citing Joint Offer of Settlement, Docket No. EL00-95-000, Attachment A, Joint Explanatory Statement, at 11).

settlements that Cal Parties had reached with other suppliers.[201] Idacorp states that, on November 10, 2008, Cal Parties filed a motion seeking leave from the Commission to opt into settlements identified on a list included in the motion, which included the Idacorp Settlement. Idacorp states that, on the same date, it consented and requested to opt into the Vernon Settlement. Idacorp adds that that the Commission has approved Vernon and Idacorp respectively as participants in one another's settlements.

Commission Determination

73. We clarify that Vernon is now a settling party to the Idacorp Settlement because subsequent to the issuance of the June 18, 2009 Order, the Commission granted Cal Parties' motion, on behalf of Vernon, to allow Vernon to opt into the Idacorp Settlement.[202]

The Commission orders:

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

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

[201] Idacorp Rehearing Request of June 18, 2009 Order at 3 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 125 FERC ¶ 61,085 (2008)).

[202] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 128 FERC ¶ 61,260 (2009).