127 FERC ¶ 61,251
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas and Electric Company
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.

Docket No. EL00-95-203

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

Docket No. EL00-98-188

ORDER REJECTING REHEARING

(Issued June 18, 2009)

1. In this order, the Commission rejects a request for rehearing by Salt River Project Agricultural Improvement and Power District (Salt River)[1] of the Order Denying Rehearing issued November 19, 2007,[2] upon finding that Salt River's request for rehearing improperly raises issues that have been previously raised on rehearing and denied.[3]

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[1] Salt River's December 19, 2007 Request for Rehearing, Docket Nos. EL00-95-203 and EL00-98-188 (Salt River Rehearing Request).

[2] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 121 FERC ¶ 61,184 (2007) (November 19, 2007 Order Denying Rehearing).

[3] *See, e.g ., Midwest Indep. Trans. Sys. Operator Inc.*, 122 FERC ¶ 61,127, at P 26 (2008) (*Midwest ISO*) ("The Commission does not allow parties to seek rehearing of an order denying rehearing.") (citing *Bridgeport Energy, LLC*,

(continued…)

I. Background

2. Early on in this proceeding, the Commission determined that the California electricity market structure and rules for wholesale sales of electric energy were seriously flawed, which, along with other factors, resulted in unjust and unreasonable rates from October 2, 2000 through June 20, 2001 (Refund Period).[4] To remedy this problem, the Commission determined that prices in the California Independent System Operator, Inc. (CAISO) and California Power Exchange (PX) markets during the Refund Period should be reset to just and reasonable levels. Accordingly, the Commission adopted a mitigated market clearing price (MMCP) that would serve as a proxy for competitively-set market clearing prices in the CAISO and PX markets during Refund Period.[5]

3. In an order issued on December 19, 2001, the Commission recognized that sellers had not been provided an opportunity to present evidence of their actual marginal costs, and that the true impact of the MMCP refund methodology would not be known until the end of the refund proceeding.[6] Accordingly, to ensure due process, the Commission declared that it would provide an opportunity for marketers and those reselling purchased power or hydroelectric power to submit cost evidence demonstrating the impact of the MMCP refund methodology on their overall revenues for transactions in the CAISO and PX markets during the Refund Period.[7] The Commission further stated that it would consider these cost offset filings "in light of the regulatory principle that sellers are guaranteed only an

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114 FERC ¶ 61,265, at P 8 (2006) (*Bridgeport*) (citing *Southern Company Servs., Inc.* 111 FERC ¶ 61,329 (2005) (*Southern Company Servs.*); *AES Warrior Run, Inc. v. Potomac Edison Co. d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004) (*AES)*; *Southwestern Pub. Serv. Co.*, 65 FERC ¶ 61,088 (1993) (*Southwestern*))).

[4] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 93 FERC ¶ 61,121, at 61,349-50, 61,366 (2000).

[5] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 96 FERC ¶ 61,120 (2001).

[6] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 97 FERC ¶ 61,275, at 62,254 (2001) (December 19, 2001 Order).

[7] *Id.*

opportunity to make a profit."[8]

4. In a rehearing order issued on May 15, 2002, the Commission granted the Competitive Suppliers Group's request for clarification that cost offset filings pertain to the revenue shortfalls in the CAISO and PX markets and not to all transactions from all sources. In addition, a May 15, 2002 order extended to all sellers the opportunity to make a cost offset filing to demonstrate a revenue shortfall due to application of the MMCP refund methodology.[9] The Commission subsequently referred to this cost offset filing opportunity as a "safety valve" mechanism to ensure that the MMCP refund methodology does not result in a confiscatory rate for any seller that has to pay refunds.[10]

5. On December 10, 2004, the Commission issued an order directing interested parties to submit comments on certain specific issues related to the cost offset filings, including the appropriate scope of transactions, required data support, and timing for resolution of the cost filings.[11] After considering these comments, the Commission issued the August 8, 2005 Cost Filing Framework Order,[12] which established the framework that sellers must use to submit evidence demonstrating that the MMCP refund methodology does not allow them to recover their costs for sales into the CAISO and/or PX markets during the Refund Period. The August 8, 2005 Cost Filing Framework Order reaffirmed the Commission's previous determination that the cost offset filings' analyses should be limited to transactions in the CAISO and PX markets.[13]

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[8] *Id*. P 62,194 (emphasis in the original).

[9] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services,* 99 FERC ¶ 61,160, at 61,656 (2002).

[10] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services,* 105 FERC ¶ 61,066, at P 22 (2003).

[11] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 109 FERC ¶ 61,264, at P 7 (2004).

[12] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services,* 112 FERC ¶ 61,176(2005) (August 8, 2005 Cost Filing Framework Order).

[13] *Id.* P 32.

6. In the August 8, 2005 Cost Filing Framework Order, the Commission required cost offset filers to first match specific sales to specific resources whenever possible. Alternatively, cost filers were required to verify that documentation was unavailable to match sales to specific resources. For those transactions that could not be matched to specific resources, the August 8, 2005 Cost Filing Framework Order required sellers to calculate their average energy costs based on the subset of a "resource portfolio that was available for sale into the [CA]ISO and PX markets."[14] The August 8, 2005 Cost Filing Framework Order further required all sellers to "submit fully supported actual costs and transactions with testimony."[15] In that order, the Commission also set a deadline for the submission of cost offset filings, and directed its staff to convene a technical conference to assist parties with questions concerning cost offset filings and to finalize a uniform template for cost filings (Cost Filing Template).[16] The technical conference took place on August 25, 2005, and on August 26, 2005, the Commission staff's suggested Cost Filing Template was placed in the above-captioned dockets. On the same day, sellers were granted an extension of the cost filing deadline. On September 14, 2005, 23 entities submitted cost filings, which the Commission ruled on in orders dated January 26, 2006 and November 2, 2006.[17]

7. A number of parties filed timely requests for rehearing of the August 8, 2005 Cost Filing Framework Order, including Salt River.[18] Among other things, the November 19, 2007 Order Denying Rehearing denied all rehearing requests concerning the August 8, 2005 Cost Filing Framework Order, including Salt

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[14] *Id*. P 68.

[15] *Id.*

[16] *Id.* P 115.

[17] *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 114 FERC ¶ 61,070 (2006) (January 26, 2006 Order)*; San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services,* 117 FERC ¶ 61,151 (2006) (November 2, 2006 Order).

[18] November 19, 2007 Order Denying Rehearing, 121 FERC ¶ 61,184 at P 11.

River's rehearing request.[19]

II. Discussion

A. Salt River's Request for Rehearing

8. Salt River seeks rehearing "in an abundance of caution" to give the Commission an opportunity to correct what Salt River perceives to be a "fundamental flaw" relating to cost allocation: the Commission's decision to combine CAISO and PX purchases for purposes of allocating costs to buyers.[20] Salt River argues that the November 19, 2007 Order Denying Rehearing inappropriately combined transactions in the CAISO and PX markets, thus, violating the Federal Power Act, court and Commission precedent.[21] Salt River argues that combining these markets to determine cost offsets is contrary to cost causation principles, resulting in cost subsidization and unjust, unreasonable, unduly discriminatory and unduly preferential rates.[22] Salt River contends that this approach conflicts with previous determinations in the refund proceeding, which required separate calculation of refunds in CAISO and PX markets.[23] Salt River asserts both that the "new justifications" provided in the November 19, 2007 Order Denying Rehearing – "premised on the MMCP, cherry-picking and simplicity" – lack a reasoned foundation, and that they cannot exempt the Commission from its statutory duty to protect customers from unjust and unreasonable rates.[24] Salt River also contends that the Commission contradicted itself within the November 19, 2007 Order Denying Rehearing by ordering combined markets in some instances, but not in others.[25] Salt River further asserts that by combining CAISO and PX markets, the Commission abandoned the concept of

[19] *Id.* P 1.

[20] Salt River Rehearing Request at 1-2.

[21] *Id.* at 3.

[22] *Id.* at 1-5, 7-8.

[23] *Id*. at 4.

[24] *Id.* at 2.

[25] *Id*. at 6.

matching specific transactions with actual costs.[26]

B. Commission Determination

9. The Commission must reject Salt River's rehearing request because it seeks rehearing of the November 19, 2007 Order Denying Rehearing, which denied all requests for rehearing of the August 8, 2005 Cost Filing Framework Order, including Salt River's.[27] Rehearing of an order on rehearing is only proper when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.[28] Rehearing of an order on rehearing "does not lie" when a party simply seeks to revisit the Commission's rationale for reaching an unfavorable determination in the order denying rehearing.[29]

10. In Salt River's request for rehearing of the August 8, 2005 Cost Filing Framework Order, Salt River argued exactly what it argues in the rehearing request presently before us: the cost offset methodology must be applied separately to the CAISO and PX markets. According to Salt River, if energy was purchased to support a sale in the CAISO market, any costs should be offset only against the seller's refund liability in the CAISO market, but not used as an offset to the seller's liability in the PX market.[30] Because the November 19, 2007 Order

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[26] *Id*. at 6-7.

[27] November 19, 2007 Order Denying Rehearing, 121 FERC ¶ 61,184 at P 1 (denying rehearing of the following orders: August 8, 2005 Cost Filing Framework Order, 112 FERC ¶ 61,176; September 2, 2005 order clarifying return on investment permitted marketers, *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,249 (2005); and August 24, 2005 order denying transcription of technical conference, *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,222 (2005)).

[28] *Midwest ISO*, 122 FERC ¶ 61,127, at P 27 and n.34 (citing *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999)).

[29] *See id.*

[30] Salt River Request for Clarification or Rehearing of the August 8, 2005 Cost Filing Framework Order in Docket Nos. EL00-95-000 and EL00-98-000 at 4-5 (September 7, 2005).

Denying Rehearing expressly denied Salt River's rehearing request on precisely the same issue raised here, the reasonableness of combining CAISO and PX markets for cost offset purposes,[31] Salt River's rehearing request does not lie and must be rejected.[32]

11. To elaborate, the August 8, 2005 Cost Filing Framework Order required sellers submitting cost offset filings to combine CAISO and PX markets and net all revenues from all associated costs to determine cost offsets. Describing the link between the MMCP refund methodology and the scope of transactions (CAISO and PX markets) for cost offset purposes, the Commission explained:

> The purpose of the cost filing procedure is to assess whether the MMCP refund methodology results in an overall shortfall for [a seller's] transactions into the [CA]ISO and PX spot markets during the refund period. Consequently, the logical scope of transactions to consider in analyzing whether application of the MMCP causes a seller to experience a revenue shortfall for its transactions in the *California . . .markets* is the revenues from sales into the [CA]ISO/PX during the refund period, and the costs incurred to serve those *California markets* and generate those revenues.[33]

12. In addition, the Commission also reasoned that sellers seeking offsets were required to combine CAISO and PX markets to prevent cherry-picking of the transactions most likely to yield cost offsets. Specifically, the August 8, 2005 Cost Filing Framework Order required sellers to calculate cost offsets by netting all revenues from all transactions into CAISO and PX markets during the Refund Period, mitigated and unmitigated, on a portfolio basis, with all associated costs.[34]

13. On rehearing of the August 8, 2005 Cost Filing Framework Order, Salt River raised the same objection raised on rehearing here, arguing that CAISO and PX markets should not be combined for purposes of determining offsets from

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[31] *See id.*

[32] *See, e.g., Duke Power,* 114 FERC ¶ 61,148, at P 2 (2006).

[33] August 8, 2005 Cost Filing Framework Order, 112 FERC ¶ 61,176 at P 35 (quoting December 19, 2001 Order, 97 FERC ¶ 61,275 at 62,254) (quoted in November 19, 2007 Order Denying Rehearing, 121 FERC ¶ 61,184 at P 29).

[34] *Id.* P 37.

refunds.[35] In the November 19, 2007 Order Denying Rehearing, the Commission expressly rejected Salt River's request, repeating the same justifications for combining CAISO and PX markets for cost offset calculation purposes that were set forth in the August 8, 2005 Cost Filing Framework Order: consistency with the MMCP methodology because the MMCP was applied to both CAISO and PX markets and prevention of cherry-picking. The Commission also expressed its intent to avoid compounding the complexity of the refund process, which would be the result if it were to require separation of California markets for offset calculation and allocation purposes.[36] The Commission stated:

> We reject Salt River Project's arguments that refunds owed in one [CA]ISO or PX market should not be offset with costs incurred to supply energy in a different [CA]ISO or PX market. As stated in previous orders, the [August 8, 2005 Cost Filing Framework] Order directed sellers to calculate cost offsets by netting all revenues with all associated costs. This approach is *consistent with the application of a single MMCP across all markets, helps avoid cherry-picking and is consistent with our intention of not making refunds even more complicated.* Salt River Project has not justified why the cost offset should be limited by market.[37]

14. Because the Commission, in the November 19, 2007 Order Denying

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[35] November 19, 2007 Order Denying Rehearing, 121 FERC ¶ 61,184 at P 118 (citing Salt River Request for Clarification or Rehearing at 3-4).

[36] *Id.* P 121 (citations omitted). We note that the fact raised by Salt River on rehearing that some sellers separated their CAISO and PX data in their cost offset submissions does not make it easy to separate these markets for cost offset purposes, particularly with respect to allocating net cost offset amounts to net buyers. Because refunds are calculated by applying a single MMCP across both California markets, it is more appropriate to combine markets for cost offset purposes. Furthermore, we note that the since the preponderance of sellers could not match specific transactions in specific markets, and therefore utilized the average portfolio methodology for valuing transactions, (which was derived by combining CAISO and PX costs), Salt River's proposal raises the thorny question of how to match the transactions in a seller's average portfolio to the appropriate market.

[37] *Id.*

Rehearing, expressly denied Salt River's first rehearing request on this issue, we must reject Salt River's subsequent rehearing request concerning exactly the same issue. The Commission does not allow parties to seek rehearing of an order denying rehearing; otherwise litigation before the Commission would drag on indefinitely.[38] Any other result would lead to never-ending litigation as every response by the Commission to a party's arguments would provide yet another opportunity for rehearing.[39] Even "an improved rationale" by the Commission does not justify a further request for rehearing.[40] Consequently, Salt River's expansion of prior arguments and addition of new arguments that it could have raised on rehearing of the August 8, 2005 Cost Filing Framework Order, does not warrant revisiting this issue yet again.[41]

15. But even if the Commission were to consider the merits of Salt River's request for rehearing, we would not be persuaded to change our decision. First, Salt River's assertion that the November 19, 2007 Order Denying Rehearing is internally inconsistent with respect to mixing markets and products is simply wrong. Salt River argues that the language in paragraph 30 of the order "acknowledged that it is inappropriate to mix products and markets" and asserts that this language regarding cost offset methodology somehow stands for the proposition that the CAISO and PX markets should not be combined in the cost offset methodology.[42] However, the language in paragraph 30 actually addressed

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[38] *Midwest ISO*, 122 FERC ¶ 61,127 at P 26 (citing *Bridgeport*, 114 FERC ¶ 61,265 at P 8 (citing *Southern Company Servs.*, 111 FERC ¶ 61,329; *AES*, 106 FERC ¶ 61,181; *Southwestern*, 65 FERC ¶ 61,088 at 61,533)).

[39] *Id*. (citing *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of "infinite regress" that would "serve no useful end")).

[40] *Id*. (*citing Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) *citing Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)).

[41] *See* 18 C.F.R. § 385.713(c)(3) (2008); *see also Keyspan-Ravenswood LLC v. N.Y. Indep. Sys. Operator Inc.*, 119 FERC ¶ 61,319, at n.12 (2007); *Trans Alaska Pipeline Sys.*, 67 FERC ¶ 61,175, at 61,531 (1994).

[42] Salt River Rehearing Request at 5.

the issue of whether the Western Electricity Coordinating Council (WECC)[43] markets should be combined with the CAISO and PX markets in the cost offset methodology.[44]

16. Furthermore, the November 19, 2007 Order Denying Rehearing is not only internally consistent in its determination that the combined CAISO and PX markets are the proper scope for the cost offset methodology, but contrary to Salt River's assertion, it is also consistent with the precedent in this proceeding.[45] The main focus of this refund proceeding has been to ensure that buyers pay a just and reasonable rate for power purchased during the Refund Period, the secondary focus has been to provide sellers the opportunity to recover the costs of power sold in California markets during that same time frame.[46] While the presiding administrative law judge required separate calculation of refunds in the CAISO and PX markets,[47] these amounts will be combined, and offsets will be netted from refunds, prior to payment of refunds.[48] Also consistent with the main purpose of the refund proceeding, however, the Commission required sellers to calculate cost offsets by combining CAISO and PX markets to ensure that a seller does not overstate its losses, i.e., that its gains in one California market do not offset its

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[43] The WECC was formed after the Refund Period on April 18, 2002, and is the successor to what was the Western Systems Coordinating Council.

[44] August 8, 2005 Cost Filing Framework Order, 112 FERC ¶ 61,176 at P 30.

[45] November 19, 2007 Order Denying Rehearing, 121 FERC ¶ 61,184 at P 28-29.

[46] *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 115 FERC ¶ 61,171 (2006) (May 12, 2006 Cost Allocation Order), *order denying rehearing*, 127 FERC ¶ 61,250 [update cite to E-20].

[47] *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 101 FERC ¶ 63,026, at P 789 (2002), *order on proposed findings*, 102 FERC ¶ 61,317 (2003), *order on reh'g on other grounds*, 105 FERC ¶ 61,066 (2003).

[48] *See* August 8, 2005 Cost Filing Framework Order, 112 FERC ¶ 61,176 at P 115 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 105 FERC ¶ 61,066 at P 180(2003)).

losses in the other California market.[49]

17. Moreover, the Commission did not abandon the concept of matching, as Salt River suggests.[50] Salt River blurs the various calculations to be made within the context of the cost offset methodology, thereby confusing matching for purposes of calculating a cost offset with the concept of how the final approved cost offset is to be allocated. Matching of transactions was but one step in the methodology used to verify that a sale to the CAISO or PX actually took place, and how that transaction should be valued, in order to measure whether the seller should be entitled to a cost offset. This matching step is independent of the allocation of cost offsets.[51] In the cost offset process, first, sellers are required to match costs and revenues to the extent possible, followed by the netting of costs and revenues, after which the CAISO will allocate approved cost offsets. The November 19, 2007 Order Denying Rehearing reiterated the August 8, 2005 Cost Filing Framework Order's requirement that sellers should first match cost and sales on a transaction basis, before using an average cost.[52] For these reasons, Salt River's argument that the Commission abandoned its matching requirement lacks merit.

18. We further disagree with Salt River's assertion that the justifications in the November 19, 2007 Order Denying Rehearing fail to support combining CAISO and PX markets for cost offset calculation and allocation purposes. In allocating cost offsets, we determined, and continue to find, that it is equitable and efficient to allocate all approved offsets across the combined CAISO and PX markets.[53] As we have explained elsewhere, this is consistent with the way cost offsets are calculated, because: (1) cost offsets include more than single market-specific costs (i.e., transmission costs, return, collateral costs, etc.); and (2) cost offsets were

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[49] May 12, 2006 Cost Allocation Order, 115 FERC ¶ 61,171.

[50] Salt River Rehearing Request at 6-7.

[51] We note that the preponderance of sellers could not match specific transactions in specific markets, and therefore utilized the average portfolio methodology for valuing transactions. Therefore, even if we were to require the market separation that Salt River seeks, it would be difficult to match the transactions in a seller's average portfolio to the respective market.

[52] November 19, 2007 Order Denying Rehearing, 121 FERC ¶ 61,184.

[53] *Id.* P 45.

determined based upon the overall revenues from both the CAISO and PX markets, netted against the costs demonstrated to make those sales.[54] It is reasonable to allocate this "net" cost-offset across both California markets because the derivation of the cost offset itself is largely non-market specific.

19. In addition to the inherent difficulty in allocating to separate California markets the average portfolio costs, which were derived from combining CAISO and PX transactions, we reiterate the CAISO's concern that allocating cost offsets specifically to the individual CAISO or PX market would be time and labor-intensive.[55]

20. With respect to Salt River's allegation that combining markets results in cost shifting and cross-subsidization, we note that the Commission is not required to use cost causation as its sole basis for correcting unjust and unreasonable rates.[56] The Commission has much discretion when fashioning remedies,[57] and it was within our discretion to weigh the pros and cons of requiring the CAISO to separate markets, and to conclude that the justifications provided in the orders on rehearing – consistency with the MMCP methodology, avoidance of cherry picking, and intent not to further complicate the refund process – support

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[54] *Id.* P 121 (citing August 8, 2005 Cost Filing Framework Order, 112 FERC ¶ 61,176 at P 37); *see also* May 12, 2006 Cost Allocation Order, 115 FERC ¶ 61,171 at P 45-47, *reh'g denied,* 127 FERC ¶ 61,250 [updated cite to E-20]

[55] May 12, 2006 Cost Allocation Order, 115 FERC ¶ 61,171 at P 42.

[56] *See, e.g., Midwest ISO v. FERC,* 373 F.3d 1361, 1368-69 (D.C. Cir. 2004) (costs need not be allocated with exact precision); *Sithe/Independence Power Partners, L.P. v. FERC,* 285 F.3d 1, 5 (D.C. Cir. 2002) ("FERC is not bound to reject any rate mechanism that tracks the cost-causation principle less than perfectly."); *Alabama Electric Cooperative v. FERC,* 684 F.2d 20, 27 (D.C. Cir. 1982) (declaring that the Commission is not required to use a particular formula or combination of formulae to determine whether rates are just and reasonable).

[57] *See, e.g., Town of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) ("Agency discretion is often at its 'zenith' when challenged action relates to the fashioning of remedies."); *Niagara Mohawk Power Corp. v. FPC,* 379 F.2d 153, 159 (D.C. Cir. 1967).

combining markets to determine offsets.[58]

21. In sum, as discussed above, the Commission must reject Salt River's rehearing request.

The Commission orders:

Salt River's Request for Rehearing of the November 19, 2007 Order Denying Rehearing is hereby rejected, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

[58] *See* November 19, 2007 Order Denying Rehearing, 121 FERC ¶ 61,184 at P 121.