155 FERC ¶ 61,307
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Puget Sound Energy, Inc. Docket No. EL01-10-138

v.

All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement

ORDER ON REHEARING

(Issued June 24, 2016)

I. Background

1. This order denies a request for rehearing filed by Idaho Power Company and IDACORP Energy, L.P. (collectively, IDACORP) of the Commission's November 3, 2015 order on remand[1] of a Ninth Circuit opinion in the above-captioned proceeding.[2] In the Order on Remand, the Commission reviewed a settlement agreement between IDACORP and City of Tacoma, Washington (Tacoma Settlement)[3] and a settlement

[1] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 153 FERC ¶ 61,136 (2015) (Order on Remand).

[2] *Idaho Power Company v. FERC*, 801 F. 3d 1055 (9th Cir. 2015) (Settlement Remand).

[3] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 141 FERC ¶ 61,053 (2012). On June 13, 2012, the Commission found that the Tacoma Settlement appeared fair and reasonable and in the public interest as between IDACORP

(continued...)

agreement between IDACORP and Powerex Corp. (Powerex Settlement)[4] under the applicable standards of review for contested and uncontested settlements, consistent with the direction from the Settlement Remand. In the Order on Remand, the Commission conditionally approved the Settlements, and directed further compliance filings. The Settlements[5] were entered into after an earlier Ninth Circuit remand order involving the Commission's decision to deny refunds to wholesale electricity buyers in the Pacific Northwest.[6]

---

and Tacoma, and conditionally approved it, subject to the removal of language purporting to foreclose claims by parties other than IDACORP and Tacoma. *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 139 FERC ¶ 61,209 (2012).

[4] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 145 FERC ¶ 63,018 (2013). The Commission found that certain provisions of the Powerex Settlement between IDACORP and Powerex did not accord with the Commission's policy regarding the preservation of potential ripple claims by third-parties, and therefore conditionally approved the settlement subject to the removal of those provisions. *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 146 FERC ¶ 61,123 (2014).

[5] The settlements address litigation between the settling parties that included: (i) whether there were amounts paid for energy and/or capacity in the Pacific Northwest spot market during the time from December 25, 2000 to and including June 21, 2001, including energy purchased in the Pacific Northwest that ultimately was consumed in California, that the Commission might find to have been unjust and unreasonable; (ii) if so, whether any remedy should be awarded; (iii) and whether evidence of market manipulation, submitted after the Administrative Law Judge made factual findings would affect the Commission's award or denial of refunds in the proceeding. Each settlement was certified as uncontested. *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 139 FERC ¶ 63,004 (2012) and *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 145 FERC ¶ 63,018 (2013).

[6] *Port of Seattle v. FERC*, 499 F. 3d 1016 (9th Cir. 2007), *cert. denied sub nom. Puget Sound Energy, Inc. v. California*, 558 U.S. 1136 (2010). On remand, the Commission set the underlying issues for hearing, but held the hearings in abeyance to allow for settlement judge procedures. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 137 FERC ¶ 61,001 (2011).

2. In the Order on Remand, the Commission reevaluated the Tacoma Settlement under the *Trailblazer* standard for reviewing contested settlements,[7] and conditionally approved it. Additionally, the Commission required, as a condition for approval of the Tacoma Settlement, modification of that settlement so as to remove any language extinguishing the rights of non-parties.[8] As for the Powerex Settlement, the Commission found that it was appropriately reviewed under the standard for uncontested settlements, i.e., that the settlement needs to be fair, reasonable, and in the public interest. The Commission also found that certain provisions of the Powerex Settlement did not accord with the Commission's policy regarding the preservation of potential ripple claims[9] by third parties, and conditioned its approval on removal of those provisions.[10]

3. On December 3, 2015, IDACORP filed a request for rehearing of the Order on Remand. On December 22, 2015, IDACORP moved to lodge new relevant authority.[11]

4. As discussed below, we deny IDACORP's request for rehearing.

II. Rehearing Request

5. IDACORP's first basis for rehearing is that, in the Order on Remand, the Commission failed to consider the Tacoma and Powerex Settlements under the proper standards for each. IDACORP argues that the Commission "failed to respond to any of

[7] *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

[8] Order on Remand, 153 FERC ¶ 61,136 at P 17.

[9] In 2001, the judge in the underlying docket defined "ripple claims" as "sequential claims against a succession of sellers in a chain of purchasers that are triggered if the last wholesale purchase in the chain is entitled to a refund." *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 96 FERC ¶ 63,044, at 65,300 (2001).

[10] IDACORP's compliance filing was accepted by delegated letter order on April 29, 2016 in Docket No. EL01-10-139.

[11] IDACORP moved to lodge the December 17, 2015 Ninth Circuit decision that it believes supports its arguments that no ripple claims can easily be pursued. *People of the State of Cal., ex rel. Harris v. FERC*, 809 F. 3d 491 (9th Cir. 2015) (December 17 Opinion).

[its] arguments in a way that reflected reasoned consideration."[12] IDACORP also finds fault with the manner in which the Commission conducted the *Trailblazer* analysis in the Order on Remand.[13] IDACORP states that the Commission was required to specifically describe the non-parties and the exact interests it was seeking to protect when it ordered the removal of the disputed language in both the Tacoma and Powerex Settlements.[14] IDACORP alleges that the Commission failed to appropriately balance the benefits of the Tacoma Settlement against the nature of the objections, as required by the *Trailblazer* analysis.[15] IDACORP argues that the Commission should have given no weight to the objections to the Tacoma Settlement because those objections were rendered moot by virtue of the Powerex Settlement.[16]

6. IDACORP also states that the Order on Remand is arbitrary and capricious due to the Commission's insistence on the preservation of ripple claims.[17] IDACORP argues that the Commission's policy of preserving ripple claims[18] runs counter to an earlier Commission order in which the Commission foreclosed a market-wide remedy in the Pacific Northwest.[19] IDACORP states that the Commission erred by not explicitly responding to its contention that because the pursuit of ripple claims depends on a market-wide remedy, when the Commission foreclosed the possibility of such a remedy, the potential for ripple claims is extinguished as well.[20]

---

[12] Request for Rehearing at 11.

[13] *Id.* at 17.

[14] Order on Remand, 153 FERC ¶ 61,136 at PP 24, 28.

[15] Request for Rehearing at 14.

[16] *Id.*

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

[18] Order on Remand, 153 FERC ¶ 61,136 at P 21.

[19] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 137 FERC ¶ 61,001 (2011).

[20] Request for Rehearing at 20.

7. Finally, IDACORP claims that the Commission did not provide a sufficient explanation for its rejection of certain provisions of the Powerex Settlement.[21]

III. Procedural Matters

8. The Commission denies IDACORP's motion to lodge the December 17, 2015 Ninth Circuit decision. The Commission "can take official notice of any judicial decision at any time, so there is no need to reopen the record for this purpose."[22] The Commission also notes that the December 17 Opinion does not address ripple claims.

IV. Commission Determination

9. We deny IDACORP's request for rehearing. First, we find that the Commission followed the Ninth Circuit's direction in the Settlement Remand correctly. In the Settlement Remand, the Ninth Circuit instructed the Commission to "either consider the . . . Tacoma settlement under the proper standards or provide an explanation for why a different approach is appropriate in [that] case."[23] As for the Powerex Settlement, the court stated that, because of the "interdependency" of the two settlements, the Powerex Settlement was to be reconsidered along with the Tacoma Settlement on remand. As discussed herein, we find that the Tacoma and Powerex Settlements were considered under the proper standards for each, and therefore deny rehearing.

10. In response to the Ninth Circuit's remand instruction, the Commission in the Order on Remand, appropriately concluded that the Tacoma Settlement is a contested settlement, and thus must be scrutinized using the *Trailblazer* analysis applicable to such settlements. IDACORP argues on rehearing that the Tacoma Settlement actually is not contested,[24] because there are no longer any objections to it.[25] However, as the

[21] *Id.* at 21, 28; *see also* Order on Remand, 153 FERC ¶ 61,136 at PP 26-28.

[22] *Pacific Gas & Elec. Co.*, 109 FERC ¶ 61,205, at P 7 (2004).

[23] Settlement Remand, 801 F.3d at 1059.

[24] Request for Rehearing at 12. The Commission notes that IDACORP previously argued that the Tacoma Settlement was incorrectly categorized as uncontested when it should have been viewed as contested. *See Request for Rehearing and Clarification of Idaho Power Co. and IDACORP Energy Services, LP*, Docket No. EL01-10-096, at 12 (July 12, 2012). The Commission notes that now, IDACORP states that it was error for the Commission to view the Tacoma Settlement as contested.

[25] Request for Rehearing at 12, 27-28.

Commission found in the Order on Remand, the Tacoma Settlement remains contested. While Powerex may have withdrawn its objections to the Tacoma Settlement by virtue of the subsequent Powerex Settlement,[26] the record does not show that PPL Companies have withdrawn their objections to the Tacoma Settlement either before or after the Order on Remand was issued. Accordingly, the Commission's evaluation of the Tacoma Settlement under the *Trailblazer* standard was reasonable and was consistent with the Ninth Circuit's remand instructions.[27]

11. With respect to the specific application of the *Trailblazer* standard to the Tacoma Settlement in the Order on Remand, we deny rehearing. We continue to find that the Tacoma Settlement cannot be approved as it was originally submitted because it unreasonably impaired the rights of non-parties. As discussed in the Order on Remand, the Commission has previously noted its concern with protecting the rights of non-parties in global settlements in related Western energy crisis proceedings.[28] That concern is more pronounced here, in the context of what is otherwise a bilateral settlement resolving claims as between IDACORP and Tacoma. Neither the Tacoma Settlement itself nor IDACORP in any subsequent pleading provide a reasonable basis for so impairing the rights of non-parties in this case.

12. The Commission finds, as it did in the Order on Remand, that the goal of a final resolution in this proceeding should not be outweighed by the limitations imposed on non-parties, even if ripple claims in this proceeding appear remote.[29] IDACORP asserts that the Commission did not properly consider the specific benefits of the Tacoma Settlement.[30] However, the benefits of the Tacoma Settlement *were* considered by the Commission and noted in the Order on Remand. The Commission stated:

---

[26] *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 145 FERC ¶ 63,018, at PP 3-4 (2013).

[27] In any event, assuming *arguendo* that the PPL Companies did in fact withdraw their objections to the Tacoma Settlement, we would still find that the ripple claims provisions would need to be removed for the reasons discussed in connection with the uncontested Powerex Settlement. *See infra* PP 17-18.

[28] Order on Remand, 153 FERC ¶ 61,136 at P 21; *see also infra* PP 14-15.

[29] Order on Remand, 153 FERC ¶ 61,136 at P 23.

[30] Request for Rehearing at 26.

> In so finding [that the inclusion of the language in the Tacoma Settlement extinguishing the claims of non-parties means that we cannot conclude under the second prong of the *Trailblazer* analysis that the Tacoma Settlement as a package provides an overall just and reasonable result], we have balanced whether the benefits of the settlement, i.e., the resolution of issues between two parties in this lengthy proceeding, outweighed the nature of the objections.[31]

"The benefits of the settlement" and the "resolution of issues between [the] two parties" encompass many different elements, all of which the Commission considered. While IDACORP may not agree with the Commission's determination, it does not follow that the Commission did not consider the benefits of the Tacoma Settlement as a whole. We also reject IDACORP's contention that the Order on Remand's *Trailblazer* analysis was "superficial."[32] The Order on Remand reasonably explored the various *Trailblazer* prongs and concluded that it would not be appropriate to fully approve the Tacoma Settlement.[33] At bottom, the Commission found, and we now affirm, that settlement provisions binding non-parties in this proceeding could not be approved. We discuss this issue more fully in the following paragraphs.

13. IDACORP states that, in the Settlement Remand, the court rejected the Commission's reliance on *San Diego Gas & Electric*,[34] and it was therefore error for the Commission to cite that order in its analysis in the Order on Remand.[35] Here, we provide a further explanation of why *SDG&E* is relevant to the Commission's consideration of the Tacoma Settlement. The settlement at issue in *SDG&E* involved what are commonly called "global settlements" in various Western energy crisis proceedings. In general, these global settlements resolve claims as between the California Parties and the settling supplier and often include an allocation matrix, explaining how the monetary consideration is allocated among the entities that opt into the settlement. An entity that opts in also agrees to provide (and is provided) the same releases as the settling parties. These settlements make clear that the choice to opt in is the decision of each entity and, to the extent an entity chooses not to opt in and pursue litigation, its rights as a non-

---

[31] Order on Remand, 153 FERC ¶ 61,136 at P 23.

[32] Request for Rehearing at 23.

[33] Order on Remand, 153 FERC ¶ 61,136 at PP 17-24.

[34] *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,171 (2005) (*SDG&E*).

[35] Request for Rehearing at 21-22.

settling party will not be affected. Indeed, *SDG&E* states that "it appears to the Commission that the rights of the Non-Settling Participants are amply protected by the Settlement."[36] In the same order, the Commission rejected one commenter's argument by explaining that "its rights in these proceedings are not affected by the Settlement and it is free to pursue its claims against" the settling supplier.[37] Not so here. Unlike the settlement at issue in *SDG&E*, there is no opportunity for others to opt into the Tacoma Settlement to provide for releases of claims, nor is there explicit language preserving the rights of non-settling parties to pursue litigation. To the contrary, the rights of non-settling parties to pursue claims in these proceedings are expressly curtailed in the Tacoma Settlement.[38]

14. In any event, even putting aside *SDG&E*, we would still deny rehearing. In reviewing a contested settlement, the Commission must determine whether the settlement is just and reasonable, and typically makes this determination using the framework set forth in *Trailblazer*. As the Commission found in the Order on Remand, the Tacoma Settlement fails under the *Trailblazer* standard. We affirm that decision here. IDACORP has not provided any reasonable basis for using a bilateral settlement between IDACORP and Tacoma to curtail the rights of other, non-settling parties to pursue claims in these proceedings, and we can find no reasonable basis for doing so. The Commission has approved a significant number of bilateral settlements in this proceeding[39] that, but for the provisions at issue here, are largely similar to the Tacoma and Powerex Settlements, and we see no reason why the Commission would not have approved the Tacoma and

---

[36] *SDG&E*, 113 FERC ¶ 61,171 at P 25.

[37] *Id.* P 32.

[38] For these reasons, we disagree with IDACORP's suggestion that what *SDG&E* "really said was that carving out a contesting party converted the settlement from a contested settlement into an uncontested settlement." Request for Rehearing at n.34. We note that more recent orders on settlements similar to the one approved in *SDG&E* have treated those settlements as contested. *See, e.g.*, n.42, *infra*.

[39] *See e.g., Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 143 FERC ¶ 61,013 (2013); *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 142 FERC ¶ 61,060 (2013); *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 141 FERC ¶ 61,215 (2012); *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 141 FERC ¶ 61,164 (2012); *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 141 FERC ¶ 61,104 (2012); *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 141 FERC ¶ 61,093 (2012).

Powerex Settlements here had they not attempted to curtail the rights of non-settling parties to pursue claims in these proceedings. However, it is unreasonable to have a settlement, ostensibly between two parties, include provisions that curtail such litigation rights of entities that are not parties to the settlement and were not privy to its negotiation. Thus, while IDACORP complains that it has been "trapped in this seemingly endless litigation for a decade and a half,"[40] it is notable that other parties that submitted otherwise similar settlements in this proceeding would not have the same complaint since their settlements were approved by the Commission. Nor, to the best of our knowledge, has anyone pursued ripple claims against those settled parties, though their settlements did not include similar objectionable language barring their rights to pursue such claims.[41]

15. Moreover, in response to IDACORP's argument that there is no Commission policy against settlements that impair the rights of non-parties, we note that in several orders the Commission has rejected comments opposing settlements in Western energy crisis-related proceedings, at least in part, by explaining that the settlements did not impair the rights of non-parties.[42] The Western energy crisis, unprecedented in scope and scale, involves complicated legal and factual issues, encompassing numberless parties and transactions and, consequently, the Commission has expressed concern about the impacts of settlements on non-settling parties that may wish to continue to litigate their

[40] Request for Rehearing at 27.

[41] These parties also evidently were not troubled by the Commission's allegedly "deflective and ambiguous" language in describing ripple claims in Docket No. EL01-10 that prompted IDACORP to include these provisions in the first place. *Id.* at 26.

[42] *See, e.g.*, *San Diego Gas & Elec. Co.*, 133 FERC ¶ 61,249, at PP 36, 41 (2010) (approving contested settlement and stating that "[i]f SMUD chooses to be a Non-Settling Participant, the Settlement does not resolve any issues as to SMUD[,]" and "the opt-in provision is an important component of the Settlement because it means that the Settlement will only affect a Participant to the extent that Participant decides it wants to be bound by it."); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,241, at P 12 (2009) (finding that "approval of the Settlement would provide significant benefits to settling parties while at the same time not adversely affecting the interests of those parties that continue to litigate their claims and ensuring that the interests of non-settling parties are protected."); *San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,017, at PP 62-63 (2005) (finding that certain measures in a settlement "will protect Non-Settling Parties from underrecovery and evince an effort to ensure that the Settlement does not discriminate against Non-Settling Parties.").

claims.[43] While the Commission encourages settlements, and settlements in these proceedings in particular, we also find that it is important to recognize that non-parties' rights to pursue claims must be respected as well.

16. While IDACORP argues that the possibility of ripple claims is remote and that the Commission's foreclosure of a market-wide remedy in this proceeding "eliminates the potential for ripple claims to occur, at least as they were originally conceived,"[44] we find that such an argument points in favor of removing the provisions at issue. Putting aside IDACORP's qualifier in the quoted sentence, even if ripple claims are remote, and possibly so remote that no entity would be able to pursue them, that does not explain why such a provision is necessary in the context of a bilateral settlement resolving claims between two parties. Indeed, it appears that the pursuit of ripple claims by third parties is irrelevant as far as the resolution of claims as between IDACORP and Tacoma. Given the Commission's concerns about a settlement impairing the litigation rights of non-parties in Western energy crisis litigation, as discussed above, we find that approving a settlement that included such a provision – even a provision that is effectively a nullity – would put the Commission's stamp of approval on similar provisions in future settlements in these proceedings.

17. Finally, we affirm the Order on Remand's determination with respect to the disposition of the Powerex Settlement. In the Settlement Remand, the court stated that the Powerex Settlement was to be reconsidered alongside the Tacoma Settlement. The court made no findings as to the Commission's holding with regard to the Powerex Settlement in the orders it reviewed.[45] On remand, the Commission did just as it was instructed; the Commission reconsidered the Powerex Settlement, determined that it was properly characterized as uncontested, and thus analyzed it under the "fair, reasonable, and in the public interest" standard. The Commission sufficiently supported its holding that the provisions in question, those that the Commission found would foreclose non-parties from bringing ripple claims, ran counter to the Commission's policy of

[43] *See generally* n.42, *supra*. The Commission's concern in Western energy crisis proceedings to preserve non-settling parties' litigation rights also answers IDACORP's argument that the Commission failed to identify any entity whose interest it is protecting in requiring the removal of these provisions. Request for Rehearing at 17-18.

[44] Request for Rehearing at 20.

[45] Settlement Remand, 801 F. 3d at 1059.

reviewing settlements in these proceedings with respect for the rights of non-parties to pursue claims.[46]

18. For the reasons discussed above concerning the Tacoma Settlement, we find that the provisions in question in the Powerex Settlement raise the same problems. Specifically, we find no reasonable basis to include the provisions that impact the rights of non-settling parties in the Powerex Settlement, which settles claims as between IDACORP and Powerex. Thus, just as the Tacoma Settlement fails to pass muster under *Trailblazer*, the Powerex Settlement fails to do so under the fair and reasonable and in the public interest standard. Therefore, we conclude that the Commission properly approved the Powerex Settlement subject to the condition that the ripple claims provisions be removed, and therefore denies rehearing.

[46] Order on Remand, 153 FERC ¶ 61,136 at PP 26-28. We note that the fact that a settlement may be uncontested does not absolve the Commission of its responsibility to ensure that such a settlement is fair and reasonable and in the public interest. *See Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, at 701 (D.C. Cir. 2007) ("the Commission may adopt an uncontested settlement only after finding it 'fair and reasonable and in the public interest;' that is, the Commission has a duty to disapprove uncontested settlements that are unfair, unreasonable, or against the public interest.'") (*Petal Gas*); *Mobil Oil Corp. v. FPC*, 417 U.S. 283, at 314 (1974) (settlement proposal enjoying unanimous support can be adopted "if approved in the general interest of the public"); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, at 1165 (D.C. Cir. 1998) (even if customers unanimously support the proposed settlement, "the Commission would still have the responsibility to make an independent judgment as to whether the settlement is 'fair and reasonable and in the public interest'"); *Saltville Gas Storage Co., L.L.C.*, 128 FERC ¶ 61,257, at P 9 (2009) ("Indeed, the Commission exercises this authority when necessary, attaching conditions to uncontested settlements, and even rejecting some entirely . . . . The Commission exercises this authority particularly when the settlement, as this one, may have an impact on future parties or others not present during the negotiations.") (*Saltville*); *Tuscarora Gas Transmission Co.*, 127 FERC ¶ 61,217 (2009) (uncontested settlement approval conditioned upon revision of section that may adversely affect similarly-situated shippers across the grid). Indeed, the courts have held that even where a settlement is uncontested, the Commission has an obligation to reject settlements that are unfair, unreasonable, and not in the public interest. *See, e.g., Petal Gas*, 496 F.3d at 701; *Saltville*, 128 FERC ¶ 61,257 at P 9.

The Commission orders:

The request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.