

settlements at issue (described below) resolved all issues that the Gaming Order set for hearing in Docket Nos. EL03-152-000, EL03-156-000, EL03-170-000, and EL03-179-000.

3. On September 21, 2004, in Docket No. EL03-152-000, the Commission approved a contested settlement between Trial Staff and Duke, which included a settlement amount of \$549,973 for Duke's participation in alleged gaming practices.² The Commission concluded that the objections to the settlement went to the scope of the proceedings and thus were essentially requests for rehearing of the Gaming Order that, in fact, were addressed in and denied on rehearing of the Gaming Order. Also at issue in this proceeding was a disagreement between Duke and the California Independent System Operator Corporation (CAISO) regarding whether the CAISO Tariff requires replacement reserves to remain unloaded (*i.e.*, unavailable for sale) at all times except when dispatched by the CAISO.³ The Commission concluded that the CAISO Tariff did not require replacement reserves to remain unloaded and, therefore, when Duke sold this capacity it did not engage in double selling with respect to the replacement reserve capacity. The Commission further concluded that, given its determination in the rehearing of the Gaming Order not to expand the scope of this proceeding, the release provisions in article IV, section 4.5, and article V, section 5.2 of the settlement agreement, releasing Duke from further scrutiny of its trading activities in California during the period January 1, 2000 through June 20, 2001 (with the exception of the proceeding in Docket Nos. IN03-10-000 and EL00-95-000, *et al.*), were reasonable.

4. On March 4, 2004, in Docket No. EL03-156-000, the Commission approved a contested settlement between Trial Staff and Idaho Power, which included a settlement amount of \$83,373.00, which comprised the total revenues associated with Idaho Power's alleged participation in the gaming practice of circular scheduling.⁴ The Commission also concluded that, given its determination on rehearing of the Gaming Order not to expand the scope of this proceeding, the release provision in article IV, section 5 of the settlement agreement, releasing Idaho Power from further scrutiny of its trading activities in California during the period January 1, 2000 through June 20, 2001 (with the exception of the proceeding in Docket Nos. IN03-10-000, EL03-180-000, *et al.*, and EL00-95-000, *et al.*), was reasonable. The Commission concluded that the objections to the settlement went to the scope of the proceedings and thus were essentially requests for rehearing of

² *Duke Energy Trading & Marketing Co.*, 108 FERC ¶ 61,259 (2004).

³ The settlement agreement stated that if the Commission determined that replacement reserves were required to remain unloaded the settlement amount would have been increased by \$1,539,351.

⁴ *Idaho Power Co.*, 106 FERC ¶ 61,208 (2004).

the Gaming Order that, in fact, were addressed in and denied on rehearing of the Gaming Order.⁵

5. On March 4, 2004, in Docket No. EL03-170-000, the Commission approved a contested settlement between Trial Staff and Reliant, which included a settlement amount of \$836,000.16, which comprised the total revenues associated with Reliant's alleged participation in the gaming practice of double selling.⁶ The Commission also concluded that, given its determination on rehearing of the Gaming Order not to expand the scope of this proceeding, the release provision in article IV, section 4.5 of the settlement agreement, releasing Reliant from further scrutiny of its trading activities in California during the period January 1, 2000 through June 20, 2001 (with the exception of the proceeding in Docket No. IN03-10-000), was reasonable.

6. On January 22, 2004, in Docket No. EL03-179-000, the Commission approved a contested settlement between Trial Staff and Williams, which included a settlement amount of \$45,230.00, which comprised the total revenues associated with Williams's alleged participation in gaming practices.⁷

7. In each instance, the Commission concluded that the settlement agreement at issue constituted a reasonable resolution of the proceeding, and the agreements themselves reasonably addressed and resolved all charges against each respondent that were set for hearing in the Gaming Order. Also, the Commission explained that since the settlement amounts represented total revenues, rather than profits, each settlement offered more than could be achieved in litigation.⁸ Rejecting the objections to each of the settlements in these orders, the Commission concluded that the objections went to the scope of the proceedings and thus were essentially requests for rehearing of the Gaming Order that, in fact, were addressed in and denied on rehearing of the Gaming Order.

8. Timely requests for rehearing of the order approving the Duke settlement were filed by CAISO, Pacific Northwest Parties,⁹ and, in a joint request, Duke and the

⁵ Gaming Order, 103 FERC ¶ 61,345 at P 17.

⁶ *Reliant Resources, Inc.*, 106 FERC ¶ 61,207 (2004).

⁷ *Williams Energy Services Corp.*, 106 FERC ¶ 61,027 (2004). The Commission explained in a footnote that, with respect to the monies associated with so-called paper trading, the amount returned equaled the profits. *Id.* at P 3 n.7.

⁸ *But see id.* (explaining that for Williams the monies associated with paper trading represented the profits).

⁹ Pacific Northwest Parties comprises Public Utility District No. 1 of Snohomish County, Washington and the Port of Seattle, Washington.

California Parties.¹⁰ In response to the Commission's order approving the Duke settlement, Duke and the California Parties jointly filed on October 5, 2004, a motion to strike those portions of that order that address the replacement reserve issue. Timely requests for rehearing of the order approving the Idaho Power settlement were filed by the California Parties; the Port of Seattle, Washington (Port); and Pacific Northwest Parties.¹¹ Timely requests for rehearing of the order approving the Reliant settlement were filed by California Parties; Port; and Pacific Northwest Parties.¹² A timely request for rehearing of the order approving the Williams settlement was submitted jointly by the Southern California Edison Company and Pacific Gas and Electric Company.¹³

Discussion

9. Several requests for rehearing make similar arguments regarding two or more settlement proceedings. Therefore, we will first address issues common to two or more proceedings, and then address issues particular to individual proceedings.

¹⁰ For the purposes of the requests for rehearing addressed in this order, California Parties comprises People of the State of California ex rel. Bill Lockyer, Attorney General; the California Electricity Oversight Board; the California Public Utilities Commission; Pacific Gas and Electric Company; and Southern California Edison Company. California Parties also explains that the "California Parties" referred to in the Duke settlement itself also includes San Diego Gas & Electric Company and the California Department of Water Resources acting solely under the authority and powers created by AB1-X, codified in sections 80000 through 80270 thereof, and not under its powers and responsibilities with respect to the State Water Resources Development System.

¹¹ The California Parties withdrew their request for rehearing of the Idaho Power settlement order in a subsequent settlement. *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 115 FERC ¶ 61,230 (2006).

¹² The California Parties withdrew their request for rehearing of the Reliant settlement order in a subsequent settlement. *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 113 FERC ¶ 61,308 (2005), *reh'g denied*, 115 FERC ¶ 61,271 (2006).

¹³ Southern California Edison Company and Pacific Gas and Electric Company withdrew their request for rehearing of the Williams settlement order in a subsequent settlement. *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,002 (2004), *order on reh'g*, 111 FERC ¶ 61,186 (2005). There are no other pending requests for rehearing of the Williams settlement order. Hence, there is no need to address further the Williams settlement order.

Approval of Idaho Power and Reliant Contested Settlements Under Rule 602

10. Port argues that the Commission did not satisfy the requirements of Rule 602(h) for approving the contested settlements in the Idaho Power and Reliant proceedings. Factual evidence of additional Idaho Power and Reliant actions is part of the record, Port continues, but is not addressed in the settlements. Port also argues that the Commission neither explained its proposition that an adequate record here supports approval of the settlements nor took into account positions of the intervenor parties, none of whom supported the settlement agreement.

Commission Response

11. Under Rule 602(h)(1)(i) of the Commission's Rules of Practice and Procedure, the Commission can approve a contested settlement "if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact."¹⁴ Courts have confirmed the Commission's authority to approve contested settlements, so long as the proposal will establish just and reasonable rates.¹⁵ The Commission may approve contested settlements under any one of four approaches: (1) by rendering a binding merits decision on each contested issue, (2) by approving the settlement based on a finding that the overall settlement as a package is just and reasonable, (3) by determining that the benefits of the settlement outweigh the nature of the objections, and the interests of the contesting party are too attenuated, and (4) by approving the settlement as uncontested for the consenting parties, and severing the contesting parties to allow them to litigate the issues raised.¹⁶

12. The Commission strongly favors settlements, particularly in cases that are hotly contested and complex.¹⁷ These settlements resolve issues raised in the Gaming Order that were difficult and contentious matters, the resolution of which will bring needed stability to the industry, end protracted litigation, and thereby benefit customers.

¹⁴ 18 C.F.R. § 385.602(h)(1)(i) (2006).

¹⁵ *See New Orleans Public Service, Inc. v. FERC*, 659 F.2d 509, 511-12 (5th Cir. 1981) (citing *Placid Oil Co. v. FPC*, 483 F.2d 880, 893 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-13 (1974)).

¹⁶ *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 at 62,342-44(1998), *reh'g denied*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

¹⁷ *Idaho Power*, 109 FERC ¶ 61,308 at P 5; *e.g.*, *Devon Power LLC*, 115 FERC ¶ 61,340 at P 66 (2006).

13. Moreover, here, the contested settlements are just and reasonable. In instituting these proceedings, the Commission identified particular conduct in a particular time period that should be investigated.¹⁸ And the Commission indicated that the monetary remedy would be “disgorgement of unjust profits.” The settlements provide for payments that reflect total revenues, not just unjust profits. The settlements therefore provide for more relief than would result if litigation were to continue; total revenues, by definition, would exceed any profits (just and unjust both) from the transactions at issue.¹⁹ Moreover, the records before us, identified and explained at length in the presiding judge’s certifications²⁰ and laid out in even greater length in the underlying pleadings and other documents referenced by the presiding judges, provided a more than sufficient basis to find that the settlements represented a reasonable resolution with regard to Idaho Power’s and Reliant’s actions at issue.

14. As for the arguments regarding the scope of the proceedings, in our order denying rehearing of the Gaming Order, we declined to broaden the scope of the proceedings, noting our discretion to pursue certain activities and not pursue others. The presiding judges viewed the comments objecting to the settlements as seeking rehearing of the Gaming Order.²¹ We did not, in response, change that determination in our earlier orders approving the settlements. We likewise see no reason, in response to the rehearing requests, to change that determination.

Release Language in Idaho Power, Reliant, and Duke Settlements

15. The Pacific Northwest Parties argue that the Commission should not have approved the contested settlements in the Idaho Power, Reliant, and Duke proceedings because the settlements’ overly broad release provisions excuse the respondents from further investigation and liability for trading activities and causes of action outside the scope of the show cause proceedings. The Pacific Northwest Parties explain that in the orders approving the settlements the Commission rejected arguments against the broad

¹⁸ *See supra* note 1.

¹⁹ In one instance, described *supra* note 7, one of the settlements provides for refund of profits. That result is the same as what would be achieved in litigation, but without the expense of litigation or the delay that would result from years of litigation.

²⁰ *Idaho Power Co.*, 105 FERC ¶ 63,048 (2004); *Reliant Resources, Inc.*, Docket No. EL03-70-000, Certification of Contested Settlement (Dec. 9, 2003) (unpublished).

²¹ *See Idaho Power Co.*, 105 FERC ¶ 63,048 at P 56 (2004); *Reliant Resources, Inc.*, Docket No. EL03-70-000, Certification of Contested Settlement at P 63 (Dec. 9, 2003) (unpublished).

release provisions for being essentially requests for rehearing of the original show cause orders that sought to expand the scope of the proceedings. The Pacific Northwest Parties argue that, contrary to the Commission's conclusion in the show cause orders, it did not seek to expand the scope of the instant proceedings, but limit them by restricting the release language.

16. Even if the settlements constitute a reasonable resolution of the gaming schemes within the scope of these proceedings, Pacific Northwest Parties continue, they did not constitute a reasonable resolution of other investigations into, or causes of action for, activities outside the scope of these proceedings. Furthermore, Pacific Northwest Parties argues, the settlements are void ab initio because Trial Staff lacked authority to agree to release respondents from claims outside the scope of these proceedings, as Trial Staff itself admits in settlement comments. Pacific Northwest Parties further argues that the settlements also violate the Federal Power Act, because the Commission has a statutory duty to ensure that all rates, charges, and classifications are just and reasonable under sections 205 and 206, and customers have a right to bring complaints under sections 206 and 306. According to Pacific Northwest Parties, with these settlements, the Commission has effectively deprived parties of their appellate rights and the reviewing court of the ability to meaningfully correct any errors that may have occurred when the Commission limited the scope of the proceedings.

Commission Response

17. The settlements at issue here and our orders to date,²² and the subsequent settlements in Docket Nos. EL00-95-000 and EL03-10-000, among others, and the orders approving those settlements²³ together resolve all disputes that arose as a result of the

²² *E.g.*, *Idaho Power Co.*, 106 FERC ¶ 61,208 (2004); *Reliant Resources, Inc.*, 106 FERC ¶ 61,207 (2004); *Duke Energy Trading & Marketing Co.*, 108 FERC ¶ 61,259 (2004).

²³ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 115 FERC ¶ 61,230 (2006) (addressing Idaho Power); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 113 FERC ¶ 61,308 (2005), reh'g denied, 115 FERC ¶ 61,271 (2006) (addressing Reliant); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services* 109 FERC ¶ 61,257 (2004), order on reh'g, 111 FERC ¶ 61,186 (2005) (addressing Duke).

events in California markets during the period from January 1, 2000 through June 20, 2001 as they relate to Idaho Power, Reliant, and Duke.²⁴

18. Moreover, the release of liability provisions here were and are no more than a part of the negotiations, the give-and-take, necessary to resolve the matters at issue and to provide for the monetary relief that Idaho Power, Reliant, and Duke have agreed to provide. Accordingly, we find that the contested settlements, including the release of liability provisions here, are just and reasonable.

19. To the extent that the Pacific Northwest Parties are concerned that a court may direct that the Commission initiate a further investigation in the future, should a court so direct we would be obligated to do as the court directs; it would be for the parties to argue to the court that the release of liability should or alternatively should not stay the court's hand so that the court does not or alternatively does direct the Commission to further investigate.

Distribution of Proceeds in the Reliant Settlement

20. With respect to the Reliant settlement agreement, Port argues that it improperly precludes certain wholesale purchasers from any distribution of the settlement amount. Port explains that, under the Reliant settlement agreement, all settlement amounts are payable to CAISO accounts, and none of the injured wholesale purchasers of power within the Western Electricity Coordinating Council (WECC), who are entitled to damages, will receive a distribution. Port argues that the Commission should not have approved this settlement because the distribution of settlement amounts constitutes a disputed issue of material fact. Port also observes that the Reliant settlement agreement is the only settlement arising from the show cause proceedings that provides for distribution. Port argues that there was no basis for approving a distribution under the Reliant settlement agreement when all other show cause proceedings treat this issue as a disputed issue of material fact warranting a separate hearing. Port concludes that the Commission should set the distribution for hearing as a disputed issue of material fact.

²⁴ Subsequent to the filing of the requests for rehearing addressed here, the D.C. Circuit issued its decision in *Public Utilities Commission of the State of California v. FERC*, No. 01-71051, *et al.* (D.C. Cir. Aug. 2, 2006). That decision addressed appeals of, and affirmed in part and remanded in part, a series of other Commission orders. We do not read the court's decision as dictating any change in our underlying orders; nothing the court did dictates that we now should reverse our earlier orders and reject the settlements.

Commission Response

21. We disagree with Port's argument that the Reliant settlement agreement improperly addressed distribution. The Commission's order allowing for separate consideration of the distribution issue expressly allowed for comments concerning the distribution of settlement proceeds to be considered as part of the Reliant settlement proceeding.²⁵ And because this proceeding was intended to address alleged anomalous market behavior under and violations of the CAISO and PX tariffs,²⁶ it is appropriate that the proceeds be distributed only to buyers directly harmed by the alleged violations. Because Port seeks to extend distribution of proceeds to wholesale purchasers of power within the WECC, rather than just the California markets, we conclude that its request amounts to an improper expansion of the scope of this proceeding.

Replacement Reserves Issue in the Duke Settlement

22. The proper treatment of replacement reserves was a contested issue in the settlement between Trial Staff and Duke Energy. CAISO argues the Commission erred in the order approving the Duke settlement when it determined that the CAISO Tariff does not require replacement reserves to remain unloaded at all times except when dispatched by the CAISO. CAISO identifies tariff provisions that it claims support the conclusion that a unit cannot sell any ancillary service, including replacement reserves, unless the capacity remains unloaded. According to CAISO, the Commission erroneously concluded that replacement reserve need not remain unloaded because the definition of replacement reserves in the CAISO tariff (unlike spinning reserves) does not explicitly state that it remain unloaded. CAISO also argues that Commission precedent, including the gaming show cause order, affirms the obligation of scheduling coordinators to hold in reserve any capacity sold as ancillary services.

23. California Parties explain that after the settlement filed in the Duke proceeding was certified by the administrative law judge, Duke and California Parties reached an agreement in principle to broadly settle claims that Duke had overcharged for wholesale electricity during the California energy crisis of 2000-2001, and which addressed issues raised in a number of Commission proceedings, including Docket No. EL03-152-000. After the agreement in principle was reached, but before that agreement was memorialized and executed, the Commission issued its order on the Duke settlement in this proceeding and concluded that replacement reserves must remain unloaded until called upon by CAISO. Less than a week later, on September 27, 2004, the agreement in principle was memorialized in a Settlement and Release of Claims Agreement executed

²⁵ *American Electric Power Service Corp.*, 104 FERC ¶ 61,323 at P 6 (2003)

²⁶ *See Gaming Order*, 103 FERC ¶ 61,345 at P 2.

by Duke, California Parties, and the Commission's Office of Market Oversight and Investigations. The agreement provides that California Parties will withdraw their opposition to the Staff-Duke settlement in the instant proceeding and will withdraw any claim that the amount of the settlement should have been increased based on the treatment of replacement reserves. Pursuant to the same agreement, Duke and California Parties filed a joint motion to strike the portions of the Duke settlement order addressing the replacement reserves issue in Docket No. EL03-152-000. With the withdrawal of the California Parties' claim, Duke and California Parties argue, there is no need for a Commission ruling on the merits of the replacement reserves issue, and the discussion of this issue in the Duke settlement order should be withdrawn. In this instance, Duke and California Parties continue, when all interested parties agree to withdrawal and resolution of the dispute that led to the ruling at issue, when the disputed ruling is moot and not relevant to other parties, and when the settlement is predicated on a joint effort to vacate the moot portion of the order, it is appropriate for the Commission to vacate that portion of the order. Duke and California Parties repeat their request to withdraw the relevant portions of the Duke settlement order in a request for rehearing of the Duke settlement order.

Commission Response

24. We will grant the request to vacate the portions of the Duke settlement order that address the replacement reserve issue, thus also rendering moot the CAISO's request for rehearing. Important here is the fact that the parties and the Commission's Office of Market Oversight and Investigations (now the Commission's Office of Enforcement) reached an agreement before the Commission issued the order.

The Commission orders:

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

(B) Portions of the Duke settlement order are hereby vacated, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.