

125 FERC ¶ 61,177
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Arizona Public Service Company	Docket Nos.	EL03-139-003
Bonneville Power Administration		EL03-141-003
City of Redding California		EL03-149-003 EL03-182-004
Los Angeles Department of Water and Power		EL03-157-003
Public Service Company of Colorado		EL03-167-003
Public Service Company of New Mexico		EL03-168-003
Puget Sound Energy, Inc.		EL03-169-003
TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc.		EL03-176-003 EL03-202-005
Tucson Electric Power Company		EL03-177-003

ORDER DENYING REHEARING

(Issued November 14, 2008)

1. In this order, the Commission denies requests for rehearing of two orders that approved settlement agreements in the captioned proceedings for City of Redding, California (City of Redding)¹ and Puget Sound Energy, Inc. (Puget Sound).² These settlement agreements (whose named settling parties are collectively referred to as

¹ *City of Redding, California*, 106 FERC ¶ 61,023 (2004).

² *Puget Sound Energy, Inc.*, 106 FERC ¶ 61,026 (2004). The City of Redding and Puget Sound settlement orders are collectively referred to as the January Settlement Orders.

Settling Parties) resolve disputes that arose as a result of events in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) energy and ancillary services markets during the period from January 1, 2000, through June 1, 2001, as they relate to City of Redding and Puget Sound. Although each settlement agreement is slightly different, the basic elements are nearly the same. Thus, for the sake of administrative efficiency, the Commission will address these requests for rehearing together in the instant order. As discussed below, this order also addresses the request for rehearing of the Commission orders dismissing a number of show cause proceedings that were instituted against various entities by the Gaming and Partnership Orders.³ The Commission will deny the requests for rehearing for the reasons discussed below.

I. Background

2. Following alleged market abuses in the Western energy markets in 2000 and 2001, the Commission issued two show cause orders directing certain entities to explain why they should not be found to have engaged in gaming and/or anomalous market behavior in violation of the CAISO and CalPX tariffs. Commission Trial Staff subsequently entered into settlement agreements with several of the entities named in those Show Cause Orders.

3. Both of the settlement agreements at issue in this proceeding involve common settling parties, *viz.*, Commission Trial Staff and City of Redding and Puget Sound, respectively. Moreover, just as these settlement agreements involve common parties, comments on the settlement agreements and, ultimately, on rehearing raise similar concerns and objections.

4. In addition to the settlement agreements, Commission Trial Staff also filed motions to dismiss other entities from the proceedings initiated by the Show Cause Orders, which include Arizona Public Service Company (APSC), Bonneville Power Administration (BPA), Los Angeles Department of Water and Power (LADWP), Public Service Company of Colorado (PSCC), Public Service Company of New Mexico (PSCNM), TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc. (TransAlta), and Tucson Electric Power Company (Tucson Electric). In the Gaming and Partnership Dismissal Orders,⁴ the Commission granted these motions.

³ *American Electric Power Service Corporation, et al.*, 103 FERC ¶ 61,345 (2003) (Gaming Order); *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Order) (collectively, Show Cause Orders).

⁴ *Ariz. Pub. Serv. Co.*, 106 FERC ¶ 61,021 (2004) (Gaming Dismissal Order); *Colo. River Comm'n of Nev.*, 106 FERC ¶ 61,022 (2004) (Partnership Dismissal Order) (collectively, Dismissal Orders).

II. Requests for Rehearing

5. On February 23, 2004, California Parties⁵ filed a single request for rehearing of the Commission's orders approving the City of Redding, Puget Sound, and Williams settlement agreements.⁶ Further, California Parties included a request for rehearing of the Dismissal Orders. On March 17, 2004, Puget Sound filed an answer to California Parties' request for rehearing, styled as a motion to dismiss. California Parties replied to Puget Sound's answer on April 1, 2004. Subsequently, on July 27, 2005, the Port of Seattle, Washington (Port of Seattle) filed separate requests for rehearing of the City of Redding, and Puget Sound settlement agreements.⁷

A. California Parties

6. At the outset, California Parties state that they are not contesting the dismissal of every show cause respondent addressed in the Dismissal Orders. Rather, California Parties state they only seek rehearing of the dismissal of APSC,⁸ BPA, LADWP, PSCC,

⁵ California Parties include the following entities: People of the State of California, *ex rel.* Bill Lockyer, Attorney General (California Attorney General); the California Electricity Oversight Board (CEOB); the California Public Utilities Commission (CPUC); Pacific Gas and Electric Company (PG&E); and Southern California Edison Company (SoCal Edison).

⁶ *Williams Energy Servs. Corp.*, 106 FERC ¶ 61,027 (2004). California Parties state that the California Attorney General, CEOB, and CPUC did not oppose the Williams settlement agreement and PG&E and SoCal Edison intend to withdraw their request for rehearing if, and when, the settlement agreement between Williams and the California Utilities (i.e., PG&E and SoCal Edison) becomes effective. Indeed, on July 8, 2004, the California Utilities opted into the Williams settlement agreement, rendering their prior objection to the settlement moot. *See Duke Energy Trading and Mktg. Co.*, 117 FERC ¶ 61,039 (2006) (addressing requests for rehearing of the order approving the Williams settlement agreement). Accordingly, this order does not address the California Parties' rehearing request as it relates to the Williams settlement agreement.

⁷ *Mirant Americas Energy Mktg, LP*, 111 FERC ¶ 61,488 (2005).

⁸ On July 22, 2008, California Parties filed a notice to withdraw their request for rehearing of the order dismissing APSC, in Docket No. EL03-139-003. Because California Parties were the only entities seeking rehearing of that order, its withdrawal eliminates any need for the Commission to issue an order on rehearing with respect to the APSC dismissal order. Accordingly, Docket No. EL03-139-003 is terminated. *See* 18 C.F.R. § 385.216 (2008).

PSCNM, TransAlta, and Tucson Electric. With respect to the January Settlement Orders and the Dismissal Orders, California Parties contend the following.

7. California Parties first state that the Commission failed to address and correct the documented tariff violations in the January Settlement Orders. Second, they state that the January Settlement Orders impermissibly deviate from the Commission's policy for approving contested settlement agreements, which is governed by the four-pronged approach that was articulated in *Trailblazer Pipeline Company*.⁹ California Parties contend that the Commission did not address their explanations of why approval was not warranted under the *Trailblazer* principles, and they reiterate why the Commission could not approve the settlement agreements at issue here under the *Trailblazer* approaches.¹⁰ Next, California Parties contend that the Commission ignored the genuine issues of material fact raised by the California Parties' comments opposing the Puget Sound and City of Redding settlement agreements. They dispute the Commission's conclusions that the issues do not, as the Commission stated, go to the scope of the proceedings addressed by the Gaming and/or Partnership Orders (and therefore are not beyond the scope of this proceeding).

8. Further, California Parties contend that the Commission's approval of the TransAlta, PSCC, and LADWP dismissals likewise ignored genuine issues of material fact. According to California Parties, the Commission impermissibly precluded the development of an evidentiary record—the commencement of discovery and evidentiary procedures—prior to approving the settlement agreements in the January Settlement Orders.

9. California Parties posit that any fair evaluation of whether the City of Redding settlement agreement should be approved and whether TransAlta should be dismissed must take into account the fact that City of Redding and TransAlta never provided the "Paragraph 47" materials relating to their partnerships, alliances, or other arrangements, which include correspondence, e-mails, memoranda, tapes, phone logs, transaction data, billing statements, and agreements.¹¹ California Parties aver that it is entirely possible that, if these sellers were required to submit all of the Paragraph 47 materials, Trial Staff would have reached different determinations concerning whether, and for what amount, the charges against these sellers should be settled.

⁹ 85 FERC ¶ 61,345 (1998), *reh'g denied*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

¹⁰ California Parties Request for Rehearing at 9-13.

¹¹ At paragraph 47 of the Partnership Order, the Commission required that such materials be provided. Partnership Order, 103 FERC ¶ 61,346 at P 47.

10. California Parties next challenge the Commission's choice of remedies in the approved settlement agreements (i.e., profit disgorgement) as being inadequate, providing only "cents on the dollar" relief. According to California Parties, the profit calculations in these settlement agreements are only a tiny fraction of the actual profits earned by these sellers; that is to say, the monetary remedies do not match the actual profits earned from the tariff violations. Moreover, California Parties contend that the Commission ignored their comments as well as the Gaming and Partnership Orders with respect to its failure to consider non-monetary remedies.

11. Finally, California Parties state that the Commission erred in denying their request that if evidence of other harmful trading strategies on the part of any entity that has had its docket dismissed is presented, then that docket should be reopened for consideration of appropriate remedies; they contend that the Commission also erred in not eliminating the general release provision from the Puget Sound settlement agreement.

B. Port of Seattle

12. Port of Seattle filed individual requests for rehearing of the Commission orders approving the City of Redding and Puget Sound settlement agreements. In each request, Port of Seattle argues that the Commission erred by approving the contested settlement agreements in contravention of Rule 602 of the Commission's Rules of Practice and Procedure,¹² which requires that contested settlement agreements cannot be certified and approved if there are material issues of fact in dispute and if there is an inadequate record upon which to resolve such disputes. Port of Seattle maintains that the record demonstrates that genuine issues of material fact are in dispute, and these issues cannot be resolved without an evidentiary hearing. It asserts that the City of Redding and Puget Sound settlement agreements are a culmination of a proceeding intended to elicit the full extent to which the City of Redding and Puget Sound profited by their gaming practices. Port of Seattle contends that the settlement agreements were entered into prior to any opportunity for discovery by any intervenor. Finally, with respect to the City of Redding and Puget Sound settlement agreements, Port of Seattle asserts that the Commission did not take into account positions of the non-implicated intervenor parties, none of whom supported the settlement agreements.

C. Puget Sound

13. On March 17, 2004, Puget Sound filed a response to California Parties' request for rehearing. Puget Sound maintains that California Parties have no right to seek rehearing

¹² 18 C.F.R. § 385.602(h)(1)(i).

of decisions settling or terminating investigations and prosecutorial proceedings conducted by the Commission.¹³ Further, Puget Sound complains about California Parties' improper form of grouping various requests for rehearing in unconsolidated proceedings.¹⁴

14. On April 1, 2004, California Parties filed an answer to Puget Sound's response. California Parties explain that the proceeding in which the Puget Sound settlement order was issued is not an investigative proceeding and, thus, California Parties are not barred from seeking rehearing.¹⁵ California Parties also explain that they combined requests for rehearing of multiple orders in the interest of efficiency and because these orders give rise to identical and overlapping issues.

III. Discussion

A. Procedural Matters

15. Rules 213(a)(2) and 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), .713(d) (2008), prohibit answers to a request for rehearing unless otherwise ordered by the decisional authority. We are not persuaded to accept Puget Sound's answer or California Parties' response and will, therefore, reject them.

B. Commission Determination

16. Without further explanation or detail, California Parties assert that the Commission failed to address the Settling Parties' tariff violations.¹⁶ At the outset, the Commission finds that California Parties have failed to plead with sufficient specificity in support of this position and reject the California Parties' argument for that reason. They have not identified specific tariff provisions in question or the impact of the alleged violations. In addition, the Commission agrees with and reiterates the findings of the presiding administrative law judges in their certification orders that the Commission has exclusive authority to enforce the Federal Power Act and that its decisions as to the scope

¹³ Puget Sound Motion to Dismiss, Docket No. EL03-169-000, at 2-3.

¹⁴ *Id.* at 6 ("This misuse ... of the rehearing process ignores the Commission's clear directive that each California-related proceeding be disposed of individually.") (citing *San Diego Gas & Elec. Co.*, 103 FERC ¶ 61,359 (2003)).

¹⁵ California Parties Answer at 7 & n.19 (citing related proceedings where requests for rehearing were addressed).

¹⁶ California Parties Request for Rehearing at 7-8.

of the issues it will pursue in an enforcement proceeding are non-reviewable.¹⁷ The Commission has broad discretion in managing its proceedings.¹⁸ The Commission, rather than intervenors in its proceedings, determines what issues shall be the subject of enforcement proceedings and whether the balance of concessions and assumptions in settlement agreements produces a just and reasonable result.¹⁹ The Commission's broad discretion extends, among other things, to the decision whether to initiate an enforcement proceeding,²⁰ as well as the conduct of the proceeding and any settlement efforts.²¹

17. The Commission agrees with the presiding judges who certified these settlement agreements that the settlement agreements are correctly confined to the scope of the False Import issue, which the Commission mandated in the Gaming Order. As previously explained, other issues discussed by California Parties and Port of Seattle—such as opportunity for discovery and choice of remedies—are appropriately addressed, if at all, in requests for rehearing of the Show Cause Orders,²² and not in the context of these individual settlement proceedings, with limited exception as discussed below.

¹⁷ *City of Redding, California*, 105 FERC ¶ 63,015, at P 42 (2003); *Puget Sound Energy, Inc.*, 105 FERC ¶ 63,024, at P 37 (2003); *see also infra* note 30 and accompanying text.

¹⁸ *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case); *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion).

¹⁹ *Ex Parte Contacts and Separation of Functions*, Order No. 718, 125 FERC ¶ 61,063, at P 9 (2008) (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (agency decisions regarding conduct of enforcement actions are presumptively unreviewable by the courts)).

²⁰ *Id.* (citing *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) (“agency's decision not to exercise its enforcement authority, or to use it in a particular way, is committed to its absolute discretion”)).

²¹ *Id.* (citing *Baltimore Gas*, 252 F.3d at 458 (decision to settle is committed to FERC's non-reviewable discretion)).

²² *City of Redding*, 106 FERC ¶ 61,023 at P 4; *Puget Sound*, 106 FERC ¶ 61,026 at P 4.

18. Moreover, Port of Seattle’s contentions relating to the Gaming and Partnership Orders—for example, that these orders are predicated on no factual record and, thus, there is no factual record in these instant proceedings—should have been raised in the requests for rehearing of the Gaming and Partnership Orders and not in the instant proceedings. Port of Seattle’s challenges here are an impermissible collateral attack on these prior orders.²³ Collateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.²⁴

19. A few arguments, however, are properly put before the Commission on rehearing as they raise issues with the settlement agreements themselves and not the underlying proceedings that led to the settlements. For example, California Parties contend that the general release provisions in the Puget Sound settlement agreement are too broad. The Commission will address such issues in turn.

20. In its evaluation of a contested settlement agreement, the Commission must be able to make an independent determination based on substantial record evidence that the settlement agreement will result in just and reasonable rates,²⁵ or in the context of the proceeding, will produce an acceptable outcome.²⁶ *Trailblazer* outlines four circumstances under which the Commission may approve a contested settlement: (1) the Commission may make a merits determination on each contested issue; (2) even if some aspects of a settlement are problematic, the Commission nevertheless may approve a contested settlement as a package upon determining that the overall result of the settlement is just and reasonable; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections and the contesting parties’ interest is too attenuated; or (4) the Commission may sever the contesting parties, approving the

²³ Collateral estoppel prohibits a party from bringing a different claim on an issue that has already been decided, provided the issue was actually litigated and determined, and the determination was essential to that judgment. *Norfolk and Western Ry. Co. v. United States*, 768 F.2d 373 (D.C. Cir. 1985); *see also* Restatement (Second) of Judgments §§ 17(c), 27.

²⁴ *See, e.g., Pac. Gas & Elec. Co.*, 121 FERC ¶ 61,065, at P 38 (2007); *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 107 FERC ¶ 61,142, at P 22 (2004); *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003), *order on reh’g*, 110 FERC ¶ 61,033, at P 56 (2005) (Commission “will not allow relitigation of our station power precedent”), *affirmed sub nom. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006).

²⁵ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

²⁶ *Trailblazer*, 85 FERC at 62,342.

settlement agreement as uncontested as to the settling parties only and leaving the contesting parties free to pursue their claims through continued litigation. Further, if a party's interests are not immediately and irreparably affected by approval of a settlement agreement in a consolidated docket, that party's opposition to a settlement agreement does not create a genuine, material issue.²⁷ In the absence of any genuine, material issue, the Commission can dispose of the matter before it in a summary fashion.

21. Despite Port of Seattle's opposition to the settlement agreements, there are no genuine issues of material fact that remain in dispute. Clearly, the settlement agreements that Port of Seattle contests do not resolve anything as to Port of Seattle because Port of Seattle is not a party to them, and Port of Seattle retains the ability to pursue its claims against the Settling Parties in the underlying proceedings. Therefore, based on the record taken as a whole, the Commission finds that the settlement agreements provide acceptable outcomes to the contested issues in these cases.

22. Notwithstanding the release provisions, the Commission does not abdicate its statutory duty to investigate complaints, because the Commission finds the release provisions of these settlement agreements to apply only within the context of the proceedings specifically named in the settlement agreements. There is ample precedent for parties to proceedings set for trial-type evidentiary hearings to work with Trial Staff, as in this case, to resolve disputes through settlement agreements.²⁸ Parties enter such settlement agreements to resolve specific disputes. It is not uncommon to draft the release provisions broadly in anticipation of future disputes related to the matters addressed in the settlement agreement that inevitably will arise. In this case, the agreed upon release provisions in the settlement agreements are delimited by the issues within the scope of the investigation and enforcement proceedings that resulted in the Commission's issuance of the Gaming and Partnership Orders. Further, the Commission's release of Settling Parties with respect to the matters addressed in the settlement proceedings via settlement agreements is an act within the Commission's discretion to enforce or to settle.²⁹

23. On balance, the approval of these settlement agreements would provide significant benefits, including certainty and finality on major issues, to the Settling Parties. In addition, the settlement agreements would not adversely affect the interests of those parties that continue to litigate their claims.³⁰ Accordingly, under the second *Trailblazer*

²⁷ *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983).

²⁸ *See, e.g.*, Gaming Order, 103 FERC ¶ 61,345 at P 73.

²⁹ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (enforcement discretion); *Burlington Res. Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008) (same).

³⁰ The interests of the "non-implicated" parties of which Port of Seattle speaks have been considered and are protected under their right to litigate their claims.

approach, the Commission approved these settlement agreements as packages that produce overall just and reasonable results. In the same vein, under the third approach, the Commission finds that the benefit of these settlement agreements outweighs the nature of the objections of those opposing the settlement agreements. As the Commission reasoned in the orders below, a principal benefit of these settlement packages is that the Settling Parties will return the total revenues from their participation in the alleged gaming practices, not merely the profits, and a settlement that will return total revenues as opposed to profits alone may be more than would be achieved through litigation.³¹ The broad release provisions in the settlement agreements, for example, are part of the balance of risks and rewards—or losses and gains—assumed by the Settling Parties and found by the Commission to be acceptable outcomes of the contested issues. Therefore, the Commission properly approved the settlement agreements in accord with Rule 602.³²

24. Finally, California Parties have failed to plead with sufficient specificity in support of their assertion that the dismissal of certain parties from the show cause proceedings under the Gaming and Partnership Orders constitutes reversible error.

The Commission orders:

The requests for rehearing are hereby denied as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³¹ Gaming Order, 103 FERC ¶ 61,345 at P 1, 2, 72; Partnership Order, 103 FERC ¶ 61,346 at P 2, 3, 48.

³² 18 C.F.R. § 385.602(h)(1)(i) (2008).