

128 FERC ¶ 61,241
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services	Docket No. EL00-95-232
Investigation of Practices of the California Independent System Operator and the California Power Exchange	Docket No. EL00-98-217
Puget Sound Energy, Inc. v. Sellers of Energy and/or Capacity	Docket No. EL01-10-049
Investigation of Anomalous Bidding Behavior and Practices in Western Markets	Docket No. IN03-10-050
Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices	Docket No. PA02-2-066
American Electric Power Service Corporation	Docket No. EL03-137-015
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-180-044
California Independent System Operator Corporation	Docket No. ER03-746-015
State of California, ex rel. Bill Lockyer, Attorney General of the State of California v. British Columbia Power Exchange Corporation	Docket No. EL02-71-023
Puget Sound Energy, Inc.	Docket No. EL03-169-010

ORDER DENYING REHEARING

(Issued September 14, 2009)

1. In this order, the Commission denies a request for rehearing filed by the Sacramento Municipal Utility District (SMUD) of the Commission's July 1, 2009 order approving a settlement agreement (Settlement) between the California Parties¹ and Puget Sound Energy, Inc. (Puget) (collectively, the Parties) in the above-captioned proceedings.²

Background

2. On May 8, 2009, the California Parties and Puget filed the Settlement, which resolved certain claims arising from events and transactions in the western energy markets during the period January 1, 2000 through June 20, 2001 as they relate to Puget, the California Parties and the California Power Exchange (CalPX). The Settlement's monetary consideration comprised \$59,849,314, plus interest, flowing from Puget to the California Parties. These proceeds would be distributed in accordance with an allocation matrix that was included as part of the Settlement. Under the Settlement, SMUD and other specified entities were classified as Deemed Distribution Participants, which, according to the Settlement, means that these entities owed more to the CAISO or the CalPX than what they were owed under the allocation matrix. Under the Settlement, Deemed Distribution Participants would therefore receive a credit against what they owe to the CAISO or CalPX rather than receiving a cash payment.

¹ The California Parties include: Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SoCal Edison), San Diego Gas & Electric Company (SDG&E), the People of the State of California, *ex rel.* Edmond G. Brown, Jr., Attorney General, and the California Public Utilities Commission (CPUC). For purposes of this Settlement, the California Parties also include the California Department of Water Resources (CERS) (acting solely under authority and powers created by California Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in sections 80000 through 80270 of the California Water Code).

² *San Diego Gas & Electric Co.*, 128 FERC ¶ 61,002 (July 1 Order).

3. The July 1 Order approved the Settlement over the objections of SMUD, finding that the overall result of the Settlement was just and reasonable and rejecting SMUD's arguments on the merits.

Request for Rehearing

4. SMUD raises two arguments on rehearing. First, SMUD argues that the Commission erred in rejecting its contention that the Settlement was unduly discriminatory because it classified SMUD as a Deemed Distribution Participant. Second, SMUD argues that the Commission erred by not clarifying in the July 1 Order that Puget remains responsible for any amounts Puget may owe to non-settling participants in the refund proceeding, and as such the Commission did not properly preserve the full litigation rights of non-settling parties. We address each of these arguments below.

Undue Discrimination

5. In its rehearing request, SMUD asserts that the Commission erred in approving the Settlement because the Settlement effectively forces SMUD to waive its statutory rights in order to receive the benefits of the Settlement and therefore discriminates against SMUD in its capacity as a non-jurisdictional entity. SMUD claims that the Commission's response to this argument in the July 1 Order offered a *non sequitur*, namely, by stating that SMUD had not demonstrated that it is being treated differently from other Deemed Distribution Participants. SMUD argues that it has long been settled that undue discrimination involves either dissimilar treatment of similarly situated parties or the similar treatment of dissimilar parties.³ SMUD contends that non-jurisdictional entities are differently situated from jurisdictional entities because the Commission has no authority to order them to pay refunds. Therefore, SMUD argues that it is unduly discriminatory for the Commission to fail to treat SMUD like other purchasers that also do not make jurisdictional sale.

6. The Commission denies rehearing. SMUD attempts to clarify its previous argument that it should be offered a settlement that is substantially similar to the settlement agreement offered to similarly situated customers. Specifically, SMUD asserts that it should be treated similarly to other customers that are *not* Deemed Distribution

³ SMUD Rehearing Request at 4-5 (citing *Ala. Elec. Coop. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982) (*Alabama Electric Cooperative*)).

Participants.⁴ We disagree with SMUD's contention that the Settlement is unduly discriminatory, even in light of this clarification. Instead, we continue to find that the Settlement's designation of certain entities as Deemed Distribution Participants is not unduly discriminatory, because this designation does not take into account the jurisdictional status of any particular entity. Rather, the Settlement designates entities as Deemed Distribution Participants based on whether those entities have amounts outstanding and payable to the CAISO and/or CalPX. Deemed Distribution Participants are not precluded from recovery under the Settlement and, pursuant to Section 5.2.2 of the Settlement, these parties will receive a credit against their outstanding amounts owed to the CAISO and/or CalPX. Moreover, even if those Settlement provisions governing Deemed Distribution Participants could be construed as discriminatory to the extent they establish two tiers of settlement refund recipients, we conclude that any such discrimination is not undue because, under the Settlement, Deemed Distribution Participants and Net Refund Recipients are not similarly situated. Unlike Deemed Distribution Participants, entities designated as Net Refund Recipients do not have outstanding amounts owing to the CAISO and/or CalPX. Therefore, those provisions of the Settlement do not violate the Federal Power Act (FPA),⁵ which prohibits only undue discrimination.⁶

⁴ Although SMUD claims that the Commission has only offered it a *non sequitur* in response to its undue discrimination claim, we note that SMUD has only recently taken the opportunity to assert that the Commission incorrectly interpreted SMUD's argument, despite the fact that the Commission previously addressed this same argument, and reached similar conclusions, in several similar proceedings. *See, e.g., San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 28-32 (2009) (addressing SMUD's undue discrimination argument); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,297, at P 29-30 (2007); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 28 (2007). SMUD did not seek rehearing or clarification of these earlier orders.

⁵ 16 U.S.C. § 791, *et seq.* (2006).

⁶ *See, e.g., Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369 (2007) ("the FPA does not prohibit all discrimination, only undue discrimination. In general, discrimination is 'undue' when there is a difference of rates, terms or conditions among similarly situated customers. The Commission has broad discretion in determining when discrimination is undue.") (internal citations omitted).

7. SMUD contends that, because it is a non-jurisdictional entity and, therefore, cannot be ordered by the Commission to pay refunds, SMUD cannot have net amounts payable to the CAISO and/or CalPX. Therefore, SMUD asserts that it should be considered a refund recipient under the Settlement, rather than a Deemed Distribution Participant. However, SMUD confuses the *legal* issue of whether the Commission can require it to pay refunds under FPA section 206⁷ with the *factual* issue of whether SMUD owes money to the CAISO and/or CalPX. The Settlement does not suggest that SMUD owes refunds pursuant to the FPA, but rather suggests that SMUD may owe money to the CAISO and/or CalPX. While the United States Court of Appeals for the Ninth Circuit's (Ninth Circuit) *Bonneville* decision,⁸ did find that the Commission lacked authority to order governmental entities or other non-public utilities to pay refunds, the Ninth Circuit took no position on whether any remedies were available outside the context of the FPA.⁹ As such, SMUD's contention that its treatment as a Deemed Distribution Participant under the Settlement is unduly discriminatory, and its related claim that its status as a non-jurisdictional entity means that it has no amounts owed to the CAISO and/or CalPX, are without merit.

8. The Commission also finds irrelevant SMUD's reliance on *Alabama Electric Cooperative*. That case involved a public utility's rate design that would have been equally applicable to all of its customers, none of which would have had the opportunity to "opt out" of the utility's rates. In contrast, according to the terms of the Settlement at issue here, SMUD and others possess the ability not to opt in to the Settlement and in doing so forfeit no rights of claims against Puget.

Puget's Obligation to Non-Settling Participants

9. SMUD also contends that the Commission erred in the July 1 Order because it relieved Puget of its statutory obligation to pay refunds to non-settling parties. SMUD challenges the Commission's assertion in the July 1 Order that the interests of non-

⁷ 16 U.S.C. § 824e (2006).

⁸ *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (*Bonneville*), *order on remand*, 121 FERC ¶ 61,067 (2007), *order on reh'g*, 125 FERC ¶ 61,214 (2008).

⁹ *Bonneville*, 422 F.3d at 925 ("The focus on the agreements between the Public Entities and ISO and CalPX only serves to demonstrate that the remedy, if any, may rest in a contract claim, not a refund action."); *see id.* at 926 ("we take no position on remedies available outside of the FPA.").

settling parties are anticipated and provided for under the Settlement. SMUD argues, instead, that absent the approval of the non-settling parties, the parties to the Settlement cannot relieve Puget of its statutory obligation to pay such refunds to non-settling parties should the California Parties fail to perform those obligations. SMUD contends that, under principles of contract law, the delegation of performance of duty does not discharge any duty or liability of the original obligor unless the obligee agrees otherwise. SMUD argues that this same principle applies even where Puget's refund obligation to non-settling parties is statutory in nature. Accordingly, SMUD argues that Puget cannot unilaterally relieve itself of its statutory obligation to pay non-settling parties any refunds it might owe.¹⁰

10. SMUD further contends that while non-settling parties assume the risks of further litigation, the Commission is still obligated to ensure that severance of non-settling parties does not prejudice the rights of such non-settling parties in litigation.¹¹ SMUD

¹⁰ While SMUD argues that Puget's refund obligation is statutory in nature, there is no statutory obligation to pay refunds. Rather, refunds are at the discretion of the Commission. FPA section 206(b) provides "[a]t the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid. . . in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice or contract which the Commission orders to be thereafter observed and in force." 16 U.S.C. § 824e (2006). Courts have long held that the breadth of the Commission's "discretion is, if anything, at zenith" when it is "fashioning [] remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives." *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967). *See also* *Towns of Concord v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992) (citing *Moss v. Civil Aeronautics Board*, 521 F.2d 298, 308-09 (D.C. Cir. 1975) ("Because the 'equitable aspects of refunding past rates are . . . inextricably entwined with the [agency's] normal regulatory responsibility,' . . . absent some conflict with the explicit requirements or core purposes of a statute, we have refused to constrain agency discretion by imposing a presumption in favor of refunds")); *Con. Edison Co. of N.Y., Inc. v. FERC*, No. 06-10-25, slip op. at 13-14, 2007 U.S. App. 29,213 (D.C. Cir. 2007); *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999); *Public Utilities Com'n of Cal. v. FERC* 462 F.3d 1027, 1053 (9th Cir. 2006).

¹¹ SMUD Rehearing Request at 6 (citing *Southern California Edison Co. v. FERC*, 162 F.3d 116, 119 (D.C. Cir. 1998) (*Southern California Edison Co.*)).

states that, by depriving non-settling parties of their right to seek recourse against Puget, the Commission does not fully protect the interests of those parties objecting to the Settlement. According to SMUD, the Commission should not have approved the Settlement as it extinguishes Puget's statutory obligation to pay refunds to non-settling participants. Thus, SMUD requests that the Commission grant rehearing and declare that the Settlement does not relieve Puget of its statutory obligation to pay refunds.

11. We deny rehearing. SMUD claims that the Commission is obligated to ensure that severance of a non-settling party will still fully protect the interests of that party. In this proceeding, however, the Commission did not reach a determination that SMUD or any other non-settling party is to be severed. Under our *Trailblazer* standard for addressing contested settlements,¹² severing contesting parties is but one of four separate options that the Commission may consider when determining whether a contested settlement should be approved.¹³ Thus, the Commission is not required to sever contesting parties in order to approve a contested settlement. Indeed, we have stated that severance should be the option of last resort.¹⁴ In this case, we did not need to consider that step because we rejected SMUD's objections to the Settlement on the merits and found the overall result of the Settlement to be just and reasonable, consistent with *Trailblazer*.¹⁵ In the July 1 Order, the Commission found that the Settlement's provisions addressing allocation of the risks of shortfalls in receivables and refunds among the settling parties specifically provided for, and anticipated the interests of, non-settling participants.¹⁶

¹² *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,005 (1999) (*Trailblazer*).

¹³ The four options are: (1) the Commission makes a decision on the merits of each contested issue; (2) the Commission determines that the settlement provides an overall just and reasonable result; (3) the Commission determines that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated; or (4) the Commission determines that the contesting parties can be severed. *Trailblazer*, 85 FERC ¶ 61,345, at 62,342-45.

¹⁴ *See, e.g., El Paso Nat. Gas Co.*, 120 FERC ¶ 61,208, at P 52 (2007).

¹⁵ July 1 Order, 128 FERC ¶ 61,002, at P 31.

¹⁶ *Id.* P 30.

12. Specifically, the Settlement proposed that certain members of the California Parties will assume responsibility for, among other things, any shortfall in refund amounts that Puget owes to non-settling participants in the Refund Proceeding. Pursuant to sections 5.6 and 5.7 of the Settlement, such shortfall in refunds owed by Puget will be allocated among the California Parties, with the cap on each of the California Party's liabilities to non-settling participants being the total amount of Puget refunds and/or deemed distributions allocated to that California Party. The Settlement further provides that, in the event an obligation of any of the California Parties to make a payment on behalf of Puget exceeds the total amount allocated to that California Party, the remaining California Parties to which settlement proceeds are allocated shall be jointly and severally liable to make such payments on behalf of Puget, up to the amount allocated to each such California Party. Therefore, the funds available to pay Commission-ordered refunds to non-settling participants will be sufficient. We affirm that this is a reasonable approach, and 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.

13. As such, under the Settlement, the interests of non-settling participants are adequately insulated from potential shortfalls. Therefore, we deny SMUD's request for rehearing on these grounds.

The Commission orders:

SMUD's request for rehearing is denied, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.