



ORDER DENYING REHEARING

(Issued October 5, 2006)

1. This order denies a request for rehearing of the Commission's May 22, 2006 Order<sup>1</sup> approving a settlement of disputes between IDACORP,<sup>2</sup> the California Parties,<sup>3</sup> and the Commission's Office of Market Oversight and Investigations (OMOI) (collectively, the Settling Parties) in the captioned dockets (the Settlement). The Settlement was filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure<sup>4</sup> on February 17, 2006. Three entities filed timely initial comments on the Settlement, and a joint reply was filed by IDACORP, the California Parties and OMOI (the Settling Parties). The May 22 Order accepted the Settlement with conditions. The Port of Seattle, Washington (Port) filed a timely request for rehearing, which the Commission will deny as discussed *infra*.

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<sup>1</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 115 FERC ¶ 61,230 (2006) (May 22 Order).

<sup>2</sup> Pursuant to the Settlement, Idaho Power Company and IDACORP Energy L.P. are referred to as IDACORP.

<sup>3</sup> The California Parties include: Pacific Gas & Electric Company (PG&E); Southern California Edison Company (SCE); San Diego Gas & Electric Company (SDG&E); the People of the State of California, *ex rel.* Bill Lockyer, Attorney General (California Attorney General); the California Department of Water Resources acting solely under the authority and powers created by California Assembly Bill 1 from the First Extraordinary Session of 2000-2001, codified in sections 80000 through 80270 of the California Water Code (CERS); the California Electricity Oversight Board (CEOB); and the California Public Utilities Commission (CPUC).

<sup>4</sup> 18 C.F.R. § 385.602 (2006).

## **I. Summary of the Settlement and the May 22 Order**

2. The Settlement resolved all claims against IDACORP by the Settling Parties,<sup>5</sup> and all claims against the Settling Parties by IDACORP, for damages, refunds, disgorgement of profits, or other monetary or non-monetary remedies, in the Commission's Refund Proceeding (Docket Nos. EL00-95-000 and EL00-98-000), the Pacific Northwest proceeding (Docket No. EL01-10-000), the Gaming Proceeding (Docket No. EL03-156-000), the Partnership Proceeding (Docket No. EL03-189-000),<sup>6</sup> and the Commission's enforcement proceedings (Docket Nos. PA02-2-000 and IN03-10-000). The Settlement also resolved claims by the California Parties against IDACORP arising from the *Lockyer v. FERC* Remand.<sup>7</sup>

3. The Settlement involved monetary and non-monetary consideration. With respect to monetary consideration, the Settlement required IDACORP to assign to the California Parties \$24,250,000 (the Transferred Receivable Amount) from the receivables currently held by the CAISO and the CalPX. The assignment of the Transferred Receivable Amount essentially funds the Settlement. In addition, IDACORP was required to pay \$83,373 into a Deposit Fund Account established by the U.S. Treasury on behalf of the Commission pursuant to the Idaho Power-Trial Staff settlement, discussed *infra*. In addition, the CAISO and CalPX have retained \$1.5 million in IDACORP receivables to

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<sup>5</sup> Section 1.59 of the Settlement defines "Settling Parties" as the California Parties and "Additional Settling Parties." Section 1.1 defines an "Additional Settling Participant" as a Participant that has elected to participate in the Settlement, as provided in Article VII of the Settlement. Section 1.42 defines "Participants" as those entities that directly sold energy to or purchased energy from the CAISO or the CalPX during part or all of the Settlement Period.

<sup>6</sup> In a January 22, 2004 Order, the Commission granted Trial Staff's motion to dismiss IDACORP from the show cause order in the Partnership Proceeding. *See Colorado River Comm'n of Nevada, et al.*, 106 FERC ¶ 61,022 (2004). No party filed a timely request for rehearing with respect to IDACORP.

<sup>7</sup> As defined in section 1.36, the *Lockyer v FERC* Remand means proceedings conducted by the Commission in Docket No. EL02-71 pursuant to the decision of the U.S. Court of Appeals for the Ninth Circuit in *Lockyer v FERC*, 9<sup>th</sup> Cir. Case No. 02-73093, to the extent these proceedings involve refunds from the establishment of just and reasonable rates in the California markets during the Settlement Period.

assure payments of any refunds ultimately determined to be due from IDACORP to any non-settling participant.<sup>8</sup>

4. The Settlement contained a number of mutual covenants in addition to the monetary consideration. The Settlement requires IDACORP to cooperate with the California Parties' pursuit of claims and potential claims arising from the disruptions in the western energy markets for a period of 24 months from the Settlement Effective Date.<sup>9</sup> IDACORP, the California Parties and any Additional Settling Parties agreed to certain mutual releases of existing and future claims arising at the Commission and/or under the Federal Power Act<sup>10</sup> with respect to rates, prices, and terms or conditions for energy, ancillary services, or transmission congestion in the western energy markets during the period from January 1, 2000 through June 20, 2001. IDACORP and the California Parties agreed to withdraw certain pleadings, and on June 6, 2006, IDACORP and the California Parties filed notices of withdrawal consistent with the covenants contained in the Settlement.<sup>11</sup>

5. The Settlement also resolved disputes related to IDACORP's appeal of the Commission's orders involving the CAISO's neutrality charge in Docket Nos. EL00-111-000, EL01-84-000, and ER01-607-000.<sup>12</sup> The Commission issued orders in October 2003 and March 2004 approving recovery of certain charges by the CAISO, called "neutrality charges."<sup>13</sup> IDACORP and others appealed these orders, and on January 10,

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<sup>8</sup> Section 6.2 of the Settlement.

<sup>9</sup> Article IV of the Settlement sets out IDACORP's non-monetary consideration and prospective commitments.

<sup>10</sup> 16 U.S.C. § 824 *et seq.* (2000).

<sup>11</sup> In addition to withdrawing its request for rehearing of the March 4 Order, discussed *supra*, the California Parties withdrew their comments on IDACORP's cost filing in the California Refund Proceeding (*see* section 7.1.3 of the Settlement). Pursuant to section 7.5.2 of the Settlement, IDACORP withdrew its requests for rehearing of the Commission's August 8, 2005 order in *San Diego Gas & Electric Co.*, 112 FERC ¶ 61,176 (2005), and the Commission's March 27, 2006 order rejecting IDACORP's cost filing in Docket Nos. EL00-95-147, *et al.*, 114 FERC ¶ 61,310 (2006).

<sup>12</sup> *IDACORP Energy L.P. v. FERC*, D.C. Cir. No. 04-1145 (the *Neutrality Case*).

<sup>13</sup> *Cities of Anaheim, et al. v. California Independent System Operator Corp.*, 105 FERC ¶ 61,021 (2003), *reh'g denied*, 106 FERC ¶ 61,205 (2004).

2006, the U.S. Court of Appeals for the D.C. Circuit issued an order upholding portions of the orders and finding certain other portions of the orders to be arbitrary and capricious. The court's mandate has not issued.<sup>14</sup>

6. The Settlement also gave effect to an earlier settlement between the Commission's Trial Staff and Idaho Power under which IDACORP agreed to pay \$83,373 into a Deposit Fund Account established by the U.S. Treasury on behalf of the Commission for the purpose of collecting settlement funds from market participants identified in the show cause order in the Gaming Proceeding. In return, the earlier settlement provided that Idaho Power would be released from further scrutiny of its trading activities in California during the Settlement Period, other than in the Refund Proceeding, and in Docket No. EL03-180-000, and Docket No. IN03-10-000. The settlement was approved by the Commission on March 4, 2004.<sup>15</sup> The California Parties<sup>16</sup> and others filed requests for rehearing of this order, which are still pending. Pursuant to section 4.1.2 of the Settlement approved in the May 22 Order, the California Parties agreed to withdraw their request for rehearing of the March 4 Order, and on June 6, 2006, the California Parties filed the notice of withdrawal.

7. In addition to approving the Settlement, the May 22 Order also granted IDACORP's unopposed motion seeking a Commission order directing the CalPX to return all chargeback amounts obtained from IDACORP.<sup>17</sup> IDACORP asserted that it is

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<sup>14</sup> *Supra*, n.7. On February 16, 2006, IDACORP requested an extension of the date upon which requests for rehearing of the court's decision were due, and thus the date upon which the mandate would issue, pending the Commission's consideration of this Settlement.

<sup>15</sup> *Idaho Power Co.*, 106 FERC ¶ 61,208 (2004) (the March 4 Order).

<sup>16</sup> SDG&E did not oppose the Trial Staff – Idaho Power settlement and did not join the California Parties' request for rehearing.

<sup>17</sup> Section 1.12 of the Settlement defines "chargeback amounts" as amounts collected by CalPX "in response to alleged defaults by PG&E and Southern California Edison Company, as generally described in *Pacific Gas and Electric Company v. California Power Exchange Corp.*, 95 FERC ¶ 61,020 (April 6, 2001)." The issue of the CalPX's use of the chargeback mechanism and its relevance as an issue resolved by the Settlement are discussed in full in the May 22 Order at n.8.

owed \$2.27 million in chargeback amounts that are held by the CalPX.<sup>18</sup> On June 6, 2006, the CalPX filed with the Commission a notice that it has complied with the Commission's directive by refunding IDACORP's chargeback funds, pursuant to Ordering Paragraph (F) of the May 22 Order.

## **II. Issues on Rehearing**

8. As stated above, only Port filed a request for rehearing, to which the Settling Parties filed a joint reply. The Commission's rules do not provide for responsive pleadings to requests for rehearing; however, the Commission will accept this reply, as it has assisted in the Commission's decision making process.

9. Port's Statement of Issues identifies the following issues:

- Where the law of the case provides that penalties and settlements obtained from Respondents during the liability phase of this proceeding are to be placed in a fund to be allocated among competing parties in a subsequent, allocation phase of this proceedings (sic), does the distribution, prior to and outside of the allocation phase of this proceeding constitute a) an unreasonable, unexplained, and unsupported departure from the law of the case; and b) unduly preferential treatment toward settling parties and/or unduly discriminatory treatment toward non-settling parties? Yes.
- Has the Commission complied with the requirement of the FPA and Rule 602 that it make a determination that a proposed settlement is fair and reasonable and in the public interest where: a) with respect to the proposed settlement, there are disputed facts with respect to, and the Commission has not and cannot quantify, the financial injury that resulted from the conduct that is the subject of this proceeding; b) the settlement distributes proceeds in a manner that is discriminatory toward non-settling parties; and c) the scope of the underlying proceeding is currently under judicial review and could be substantially expanded as a result of such review? No.

Instead of discussing these issues in the body of its pleading, Port discusses the following issues that appear to be related to some but not all of the issues in the Statement of Issues:

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<sup>18</sup> IDACORP motion at 2, n.2. IDACORP filed its motion in the EL00-95-000 and EL00-00-98-000 dockets.

- The Settlement distributes proceeds in a manner that is inconsistent with previous Commission orders;
- There are material facts in dispute;
- The Settlement's distribution of proceeds is unjust, unreasonable, unduly preferential and unduly discriminatory; and
- The Settlement should not be approved prior to resolution of petitions for review of the Commission's orders on the scope of the Show Cause Proceedings.<sup>19</sup>

The wording of the issues identified in Port's Statement of Issues is not consistent with the issues identified in the body of its request for rehearing, which makes it difficult to establish a correlation between these two portions of Port's request for rehearing.<sup>20</sup> Issues identified in the Statement of Issues are not discussed at all in the body of Port's request for rehearing.<sup>21</sup> Port's discussion of the issues fails to cite or explain the

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<sup>19</sup> Port Rehearing Request at 28-31.

<sup>20</sup> The Commission refers Port to the Commission's Order No. 663-A, issued on March 17, 2006, with a March 23, 2006 effective date, and now codified in 18 C.F.R. 385.713 (2006). This order requires that requests for rehearing contain a separate section, "Statement of Issues," that sets forth the issues that will be addressed and the Commission precedent and case law upon which the party will rely in its request for rehearing. *See Revision of Rules of Practice and Procedure Regarding Issue Identification*, 114 FERC ¶ 61,284 (2006), 71 *Fed. Reg.* 14640 (2006). The Commission has addressed Port's apparent confusion concerning the requirements of Order No. 663-A in two recent orders on rehearing, one involving a settlement among Enron, the California Parties, OMOI, and the SRP Parties, and the other involving Reliant settlement.<sup>20</sup> Both of these orders were issued prior to the date Port filed its request for rehearing in the instant proceeding and therefore should have informed Port's request for rehearing. *See San Diego Gas & Electric Co.*, 115 FERC ¶ 61,032 (2006) (the *Enron* Rehearing Order) and *San Diego Gas & Electric Co.* 115 FERC ¶ 61,271 (2006) (the *Reliant* Rehearing Order).

<sup>21</sup> *E.g.*, Port does not explain or support its allegation that "the Commission has not and cannot quantify, the financial injury that resulted from the conduct that is the subject of this proceeding." Port Rehearing Request at 4.

relevance of any of the cases or Commission precedent identified in its Statement of Issues.

10. The Commission will deny rehearing on each issue discussed in the body of Port's pleading.

**A. Consistency with Prior Orders**

11. Port refers to a series of orders by the Chief Judge and the Commission and asserts that these orders preclude approval of the Settlement's allocation of the Settlement proceeds. Port argues that distribution of any of the Settlement proceeds at this point violates "the letter, spirit, and intent" of these orders.<sup>22</sup> Port specifically refers to the Commission's September 24, 2003 Order that bifurcated the Gaming Proceeding into a liability phase and a distribution phase.<sup>23</sup> Port states that numerous Commission orders and orders of the Chief Judge prohibit the distribution of Settlement proceeds until the liability phase of the Gaming proceeding has concluded.<sup>24</sup>

12. In reply, the Settling Parties assert that the Settlement does not prevent non-Settling Parties from pursuing allocation issues against IDACORP in the Gaming Proceeding, and that section 4.1.2 of the Settlement specifically provides that non-Settling Parties "shall remain free to assert any position they choose concerning the proper allocation by FERC of the \$83,373 in refunds" under the Trial Staff-Idaho Power Settlement approved by the March 4 Order.<sup>25</sup>

**Commission Determination**

13. The Commission addressed Port's argument comprehensively in paragraph 30 of the May 22 Order, finding that approval of the Settlement is consistent with prior orders of the Commission and the Chief Judge. Port has not offered any new evidence, arguments or precedent to support its assertion that the May 22 Order erred in making this finding. Port repeats the argument it made in its comments on the Settlement and

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<sup>22</sup> Port Request for Rehearing at 28-29.

<sup>23</sup> *Id.*

<sup>24</sup> Port Request for Rehearing at 28, n.115.

<sup>25</sup> Settling Parties' Reply Comments at 4.

asserts that the Commission “erred” in finding that the Settlement is consistent with prior orders of the Commission and the Chief Judge. The Commission is not persuaded by the addition of this conclusory sentence to Port’s original argument. The Commission therefore denies rehearing on this issue.

**B. Existence of Material Facts**

14. Port alleges the existence of issues of material fact with respect to the Settlement, and that Rule 602 of the Commission’s Rules of Practice and Procedure precludes approval of a contested settlement “if there is an inadequate (sic) record upon which to resolve such disputes.”<sup>26</sup> Without specifically discussing any such facts,<sup>27</sup> Port cites materials submitted by the California Parties in 2003 as supporting the existence of genuine issues of material facts and asserts that the California Parties, as parties to the Settlement, “should be estopped from arguing otherwise.”<sup>28</sup>

15. The Settling Parties reply that Port’s reliance on *Hall* is misplaced because *Hall* involves the doctrine of judicial estoppel, which does not apply to these regulatory proceedings. Moreover, the Settling Parties assert that Port has not explained why IDACORP or OMOI, the other parties to the Settlement, should be barred from arguing that there are no genuine issues of material fact, nor has it explained why the Commission cannot conclude that there are no genuine issues of material fact. “Ultimately, the Port fails to show how the core purposes of the judicial estoppel doctrine – preventing unfair advantage to the party proposed to be estopped or unfair detriment to the party seeking estoppel -- are advanced by the Port’s invocation of the doctrine.”<sup>29</sup> Moreover, because the Commission’s approval of the Settlement will not result in any findings by the

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<sup>26</sup> Port Request for Rehearing at 29.

<sup>27</sup> Port’s Statement of Issues alleges without further explanation that “there are disputed issues of facts with respect to, and the Commission has not and cannot quantify, the financial injury that resulted from the conduct that is the subject of this proceeding.” Port Request for Rehearing at 4.

<sup>28</sup> *Id.*, citing *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391 (5<sup>th</sup> Cir. 2003) (*Hall*).

<sup>29</sup> Settling Parties’ Reply Comments at 5.

Commission that would be binding on Port, the Settling Parties assert that Port can continue to attempt to prove its factual claims in any forum that is available to it.<sup>30</sup>

### **Commission Determination**

16. The Commission addressed Port's arguments comprehensively in paragraphs 36 and 37 of the May 22 Order. Port has offered no new arguments or precedent to persuade the Commission that its order was in error. In fact, Port fails to discuss the single issue of material fact that it alleges is in dispute; *i.e.*, that the Commission has not and cannot quantify the financial harm that was caused by the actions of IDACORP. We note that article IV of the Settlement contains a detailed quantification of the payments to be made by IDACORP as a result of its actions in the California market disruptions of 2000-2001. The Settlement provides that IDACORP will pay \$24,250,000 in monetary consideration. In addition, the Settlement gives effect to an earlier settlement in which IDACORP agreed to pay \$83,373 to the U.S. Treasury on behalf of the Commission in the Gaming Proceeding. Finally, the CAISO and CalPX have retained \$1.5 million in IDACORP receivables to assure payments of any refunds ultimately determined to be due from IDACORP to any non-settling participant.

17. Clearly, the Settlement quantifies the financial harm with respect to the Settling Parties, and it sets aside funds for non-settling participants. Thus, Port is incorrect in asserting that there is a genuine issue of material fact in dispute with respect to the financial harm addressed by the Settlement. For these reasons, the Commission will deny rehearing on this issue.

### **C. The Settlement is unjust, unreasonable, unduly preferential and unduly discriminatory**

18. Port argues that the fact that the bulk of Settlement proceeds are earmarked for the California Parties "completely ignores the fact that the conduct at issue largely took place within the [Pacific Northwest], and generated substantial profits *outside* of California." Therefore, Port asserts that the allocations reflected in the Settlement are unjust, unreasonable, unduly preferential and unduly discriminatory, amounting to "an arbitrary and capricious power grab" by the California Parties.<sup>31</sup> Port asserts that the Commission's May 22 Order erred in concluding that the Settlement is not discriminatory because it does not affect the ability of non-Settling Parties to continue litigating their claims against IDACORP. Port asserts that the Settlement is discriminatory "because it

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<sup>30</sup> *Id.* at 6.

<sup>31</sup> Port Request for Rehearing at 30.

allocates settlement proceeds in a manner that is inconsistent with the evidence regarding the distribution of the injury caused by the Respondents' conduct."<sup>32</sup>

### **Commission Determination**

19. The May 22 Order addressed Port's argument on this issue comprehensively in paragraph 39. On rehearing, Port offers no new evidence, argument or precedent to support its assertion that the Commission's May 22 Order was in error. The Settlement does not preclude Port from pursuing whatever claims it believes it has against IDACORP, including advocating "the evidence regarding the distribution of the injury" caused by IDACORP's conduct. Inasmuch as Port's ability to pursue its claims are unaffected by the Settlement, the Commission correctly found that the Settlement is not unjust, unreasonable, unduly preferential and unduly discriminatory. For these reasons, the Commission will deny rehearing on this issue.

#### **D. Relevance of the Appeals to the Show Cause Proceedings**

20. Port argues that, because petitions for review are pending in the United States Court of Appeals for the Ninth Circuit challenging the scope of the show cause proceedings, a decision in favor of the petitioners could radically alter and expand the scope of these proceedings.<sup>33</sup> For this reason, Port asserts that the Commission should

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<sup>32</sup> *Id.*

<sup>33</sup> *San Diego Gas & Electric Corp.* 108 FERC ¶ 61,002 (2004) (order accepting *Williams* settlement); 109 FERC ¶ 61,107 (2004) (order accepting *Duke* settlement); *reh'g. denied*, 111 FERC ¶ 61,186 (order on rehearing of the *Williams, Dynegy and Duke* settlements); 111 FERC ¶ 61,017 (2005) (order accepting *Mirant* settlement), *reh'g denied*, 111 FERC ¶ 61,354 (2005); 113 FERC ¶ 61,171 (2005) (order accepting *Enron* global settlement), *reh'g denied*, 115 FERC ¶ 61,032 (2006); 113 FERC ¶ 61,171 (2005) (order accepting the *Enron-SRP* settlement), *reh'g denied*, 115 FERC ¶ 61,032 (2006); 113 FERC ¶ 61,235 (2005) (order accepting the *Public Service Company of Colorado* settlement); 113 FERC ¶ 61,308 (2005) (order accepting the *Reliant* settlement); 114 FERC ¶ 61,067 (2006) (order accepting *Nevada Companies* settlement); 115 FERC ¶ 61,376 (2006) (order accepting *Enron-Trial Staff-Valley Electric-Santa Clara* settlement; and 115 FERC ¶ 61,377 (2006) (order accepting *Enron-Metropolitan Water* settlement).

decline to act on the Settlement until the Ninth Circuit resolves the pending petitions for review.<sup>34</sup>

### **Commission Determination**

21. As stated in the May 22 Order, the Commission has approved a number of settlements that resolve outstanding challenges to settlements in the Gaming Proceeding. Port has offered no new arguments or precedent to support its assertion that the Commission cannot approve the Settlement until the Ninth Circuit has acted on Port's appeals. Therefore, the Commission will deny rehearing on this issue.

#### **The Commission orders:**

(A) The Commission hereby denies Port's request for rehearing, as discussed in the body of this order.

(B) The Settling Parties' motion to file response to Port's request for rehearing is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Spitzer not participating.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>34</sup> *Id.* Port cites the fact that Ninth Circuit determinations are pending in *Port of Seattle, Washington v. FERC*, Case No. 04-71331 (filed March 22, 2004), *sub. nom.*, *Pacific Gas & Electric Co., et al. v. FERC*, Case Nos. 05-71008, *et al.* as precluding "a rational determination that the settlement is in the public interest ... ." The Ninth Circuit still has not acted.