

127 FERC ¶ 61,218
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, and Marc Spitzer.

Aquila Merchant Services, Inc.	Docket Nos.	EL03-138-007
		EL03-181-008
Portland General Electric Company		EL03-165-008
Powerex Corp.		EL03-166-006
		EL03-199-006
Powerex Corp.		EL03-166-007
		EL03-199-007
Arizona Public Service Company		EL03-139-006
Bonneville Power Administration		EL03-141-004
City of Redding California		EL03-149-005
		EL03-182-008
Los Angeles Department of Water and Power		EL03-157-004
Public Service Company of Colorado		EL03-167-005
Public Service Company of New Mexico		EL03-168-004
Puget Sound Energy, Inc.		EL03-169-005
TransAlta Energy Marketing (U.S.) Inc. and		EL03-176-004
TransAlta Energy Marketing (California) Inc.		EL03-202-006
Tucson Electric Power Company		EL03-177-004
Coral Power L.L.C.		EL03-151-006
		EL03-186-007
Dynegy Power Marketing, Inc.		EL03-153-006
Sempra Energy Trading Corp.		EL03-173-006
		EL03-201-008
City of Glendale, California		EL03-147-005
		EL03-182-008
Northern California Power Agency		EL03-196-007
Modesto Irrigation District		EL03-159-006
Modesto Irrigation District		EL03-193-007
Public Service Company of New Mexico		EL03-200-006

ORDER DENYING IN PART AND GRANTING IN PART REHEARING AND
CLARIFICATION

(Issued June 3, 2009)

1. In this order, the Commission denies rehearing in part and grants rehearing in part of three orders (November Rehearing Orders) that grouped together and denied individual requests for rehearing of the orders approving settlement agreements in the captioned proceedings. In particular, the November Rehearing Orders address the settlement agreements relating to Aquila Merchant Services, Inc. (Aquila); Portland General Electric Company (Portland General); Powerex Corporation (Powerex); and Public Service Company of Colorado (PSC-Colorado).¹ The Commission also clarifies in part the November Rehearing Orders, as discussed herein. The settlement agreements at issue (whose named settling parties are collectively referred to as 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 the captioned entities. The Commission will address the requests for rehearing and clarification as discussed below.

2. The Commission will also address revisions submitted in compliance that are related to the standard of review for the settlement agreements applicable to non-settling third parties. As discussed below, the Commission will accept these compliance filings.

I. Background

3. 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.² Commission Trial Staff subsequently

¹ The November Rehearing Orders, for which rehearing or clarification is sought in this proceeding, are: *Aquila Merchant Servs., Inc.*, 125 FERC ¶ 61,175 (2008) (Aquila Settlement Rehearing Order); *Ariz. Pub. Serv. Co.*, 125 FERC ¶ 61,177 (2008) (Arizona Settlement Rehearing Order); *Powerex Corp.*, 125 FERC ¶ 61,218 (2008) (Powerex Further Rehearing Order). The Commission addressed the Powerex settlement agreement in the Aquila Settlement Rehearing Order and subsequently in the Powerex Further Rehearing Order.

² *Am. Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003) (Gaming Order); *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Order) (collectively, Show Cause Orders).

entered into settlement agreements with several of the entities named in those Show Cause Orders.

4. The Commission addressed the settlement agreements at issue in these proceedings in groups because they involved common settling parties, similar comments on the settlement agreements, and, ultimately, raised similar concerns and objections on rehearing.³ In the November Rehearing Orders, the Commission affirmed the findings of the administrative law judges and denied requests for rehearing of the initial orders approving the settlement agreements.

II. Requests for Rehearing or Clarification

5. On December 12, 2008, Aquila requested rehearing or clarification with respect to the Aquila Settlement Rehearing Order. On the same date, Portland General requested rehearing of the Aquila Settlement Rehearing Order. On December 15, 2008, Powerex requested rehearing or clarification with respect to the Aquila Settlement Rehearing Order and the Powerex Further Rehearing Order. On the same date, California Parties⁴ requested rehearing or clarification of the Aquila and Arizona Settlement Rehearing Orders and the Powerex Further Rehearing Order.

6. On December 29, 2008, California Parties filed an answer to Powerex's and Aquila's rehearing requests. On the same date, City of Tacoma, Washington (City of Tacoma) filed an answer to Aquila's rehearing request. On December 30, 2008, Powerex filed an answer to California Parties' rehearing request, and City of Tacoma filed an answer to California Parties' and Powerex's rehearing requests. Finally, on January 14, 2009, Aquila filed a response to City of Tacoma's and California Parties' answers to Aquila's request for rehearing.

³ The settlement rehearing orders were address in six global orders as follows: Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 (2008); Arizona Settlement Rehearing Order, 125 FERC ¶ 61,177 (2008); *Coral Power L.L.C.*, 125 FERC ¶ 61,176 (2008) (Coral Settlement Rehearing Order); *Modesto Irrigation District*, 125 FERC ¶ 61,173 (2008) (*Modesto I*); *Modesto Irrigation District*, 125 FERC ¶ 61,174 (2008) (*Modesto II*); Powerex Further Rehearing Order, 125 FERC ¶ 61,218 (2008) (collectively, Six Global Settlement Rehearing Orders).

⁴ In this filing, California Parties include the following entities: Pacific Gas and Electric Company, Southern California Edison Company, People of the State of California *ex rel.* Edmund G. Brown Jr., Attorney General, and the California Public Utilities Commission.

A. Scope of Settlement Agreement

1. Comments

7. Powerex seeks clarification as to the scope of the Powerex settlement agreement vis-à-vis the Show Cause proceedings.⁵ It asks that the Commission clarify paragraphs 9 and 10 of the Powerex Further Rehearing Order, which it states create a mistaken impression that the Show Cause proceedings that led to the settlement agreement (relating to Powerex) involved only Partnership Order issues.⁶ Powerex contends that the settlement agreement resolved all issues as to Powerex that were raised in both the Gaming and Partnership Orders.

8. Powerex also requests a clarification of paragraph 14 of the Aquila Settlement Rehearing Order, which it states appears to confine the scope of the settlement agreement to the False Import issue. Powerex maintains that the settlement agreement also extended to the Cutting Non-Firm, Circular Scheduling, Scheduling Counter Flows on Out-of-Service Lines, Load Shift, and Paper Trading issues that were alleged in the Gaming Order. Powerex quotes section 4.4 of the settlement agreement, which lists these issues and affirms that “[p]ayment of the Settlement Amount constitutes complete and total satisfaction of the[se] causes of action...”⁷

9. Aquila asks that the Commission clarify that the Aquila Settlement Rehearing Order did not modify the terms of the Aquila settlement agreement, which precludes any party from relitigating the three Show Cause allegations involving Aquila—False Import, Cutting Non-Firm, and Circular Trading—and that the Aquila settlement agreement constitutes a full and final resolution of all Show Cause allegations against Aquila.⁸

10. Aquila asserts that, unlike the global settlements that the California Parties have reached with individual parties, the Aquila settlement agreement is structured differently: no party is given the option to opt-in or opt-out. Rather, Aquila explains that the Aquila settlement agreement was intended to be binding on all parties. Further, according to Aquila a central component of the settlement agreement is that it constitutes a final and

⁵ See *supra* note 2.

⁶ Powerex Rehearing Request at 6, 7-8 (citing *inter alia* Powerex Settlement Agreement § 1.2, which discusses allegations against Powerex in the Gaming and Partnership Orders).

⁷ *Id.* at 9. Powerex states that the Commission Trial Staff’s affidavit exonerates Powerex of each of the allegations. *Id.* at 8-9.

⁸ Aquila Rehearing Request at 5-7.

complete resolution; allowing further litigation would be a material modification. Aquila asks that the Commission clarify that the discussion in paragraphs 18 and 21 of the Aquila Settlement Rehearing Order regarding pursuing claims in the “underlying proceedings” refers solely to litigation in the existing appeals of the Gaming and Partnership Orders.⁹

2. Answers

11. In its answer to Aquila’s rehearing request, City of Tacoma asserts that, if the Commission grants clarification as Aquila requests, the Commission should specify that the “litigation restriction [suggested by Aquila’s discussion of the release provisions] does not equate to a blanket release as to *other* proceedings in which such market manipulation strategies may appropriately be raised by parties.”¹⁰

12. In response to City of Tacoma, Aquila states that it sought clarification by the Commission that nothing in the Aquila Settlement Rehearing Order modifies sections of the Aquila settlement agreement that provide that the settlement agreement was intended as a full and final resolution of all Show Cause issues related to Aquila.¹¹ Specifically, Aquila explains that it sought only a finding that the settlement agreement barred relitigation of the allegations against Aquila in Docket Nos. EL03-138 and EL03-181 in any present or future Commission proceeding.¹² According to Aquila,

[i]t would have made no sense for Aquila to agree to disgorge any amount, much less more than the maximum amount, to resolve the Circular Trading allegation, while agreeing to relitigate the same issues (and be subject to additional disgorgement) in other dockets for the same underlying transactions.[¹³]

Aquila states that the central function of the settlement agreement was to provide finality of the Show Cause allegations against Aquila.

⁹ *Id.* at 10.

¹⁰ City of Tacoma Answer at 2.

¹¹ Aquila Response at 2.

¹² *Id.* at 3, 4.

¹³ *Id.* at 5.

B. Scope of the Release Provisions

1. Comments

13. California Parties request rehearing of the Commission’s Powerex Further Rehearing Order, which further denied rehearing of the order approving the Powerex settlement agreement.¹⁴ California Parties assert that in several of the Six Global Settlement Rehearing Orders the Commission significantly limited the scope of the release provisions in the settlement agreements.¹⁵ They contend, however, that the Commission’s holding in the Powerex Further Rehearing Order with respect to the release is less clear. They explain that the Commission did not repeat, as it did in some of the Six Global Settlement Rehearing Orders, that the release provisions “apply only within the context of the proceedings specifically named in the settlement agreements,” and that the “release provisions in the settlement agreements are delimited by the issues within the scope of the investigation and enforcement proceedings” that led to the Gaming and Partnership Orders.¹⁶ They request that the Commission clarify that the Powerex Further Rehearing Order relates only to the Gaming and Partnership proceedings and “does not affect the rights of California Parties to pursue Powerex in other proceedings related to the electricity crisis of 2000 and 2001.”¹⁷

14. In support, California Parties point out that the final sentence in section 4.5 of the Powerex settlement agreement reads, “Powerex recognizes that [the Commission Trial Staff] has no authority to address issues outside of those specifically raised in the Gaming and Partnership Orders and Staff’s concurrence to this Agreement is with that reservation.”¹⁸ California Parties aver that three aspects of the decision in the Powerex Further Rehearing Order suggest that the Commission did not intend to affect California

¹⁴ Powerex Further Rehearing Order, 125 FERC ¶ 61,218 (2008). As mentioned above, the earlier Aquila Settlement Rehearing Order previously addressed the order approving the Powerex settlement agreement.

¹⁵ California Parties Rehearing Request at 4 (citing Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 19-20; Arizona Settlement Rehearing Order, 125 FERC ¶ 61,177 at P 22; Coral Settlement Rehearing Order, 125 FERC ¶ 61,176 at P 16; *Modesto I*, 125 FERC ¶ 61,173 at P 19).

¹⁶ *Id.* at 7 (citing Arizona Settlement Rehearing Order, 125 FERC ¶ 61,177 at P 22; *Modesto I*, 125 FERC ¶ 61,173 at P 19; Coral Settlement Rehearing Order, 125 FERC ¶ 61,176 at P 16).

¹⁷ *Id.* at 6 & n.14 (providing examples of “other proceedings”).

¹⁸ *Id.* at 5-6 (quoting Powerex Settlement Agreement § 4.5).

Parties' claims against Powerex in other proceedings related to the 2000-2001 crisis. First, California Parties state that the Commission did not provide assurance that Powerex will not be subject to further scrutiny with respect to its alleged actions during the 2000-2001 period, as required by section 4.5 of the Powerex settlement agreement. Second, California Parties point out that the Commission provides that "the settlement agreement would not adversely affect the interests of those parties that continue to litigate their claims."¹⁹ Finally, California Parties note that in the Powerex Further Rehearing Order the Commission refers to the earlier Aquila Settlement Rehearing Order that contains an explicit limitation on the Powerex release provision and does not state or suggest any intention to revisit or alter that limitation on the release.²⁰

15. In its request for rehearing, Powerex states that the Aquila Settlement Rehearing Order and the Powerex Further Rehearing Orders appear to allow contesting parties to continue to litigate claims relating to matters covered by the settlement agreements in other proceedings. Powerex points out that, on one hand, paragraphs 19 and 20 of the Aquila Settlement Rehearing Order state that the release provisions apply to "the issues within the scope of the investigation and enforcement proceedings that resulted in the ... Gaming and Partnership Orders" and apply "within the context of the proceedings specifically named in the settlement agreements."²¹ On the other hand, Powerex notes that paragraph 18 of that order provides that "Port of Seattle retains the ability to pursue its claims against the Settling Parties in the underlying proceedings." Further, Powerex points out that language in both the Aquila Settlement Rehearing Order and the Powerex Further Rehearing Order provides that the Powerex settlement agreement "would not adversely affect the interest of those parties that continue to litigate their claims."²² It asks the Commission to clarify that the Powerex settlement agreement's release provisions preclude contesting parties from raising the settled issues in these proceedings or in future claims or litigation.

16. In support, Powerex asserts that the release provisions in sections 4.2, 4.3, and 4.4 of the Powerex settlement agreement go beyond the issues set for hearing by the Gaming and Partnership Orders and extend to "all matters specified in the Agreement regarding

¹⁹ *Id.* at 6 (quoting Powerex Further Rehearing Order, 125 FERC ¶ 61,218 at P 12).

²⁰ *Id.* at 6 (citing Powerex Settlement Rehearing Order, 125 FERC ¶ 61,218 at P 1).

²¹ Powerex Rehearing Request at 14 (citing Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 19, 20).

²² *Id.* at 14 (citing Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 18, 21; Powerex Settlement Rehearing Order, 125 FERC ¶ 61,218 at P 11).

Powerex's transactions in California's organized power markets during the period January 1, 2000 through June 20, 2001."²³

17. Powerex also contends that the Commission's approval of a contested settlement agreement binds non-severed objecting parties to the terms of the settlement agreement. Powerex cites a number of cases, including *Mobil Oil Corp. v. FPC*,²⁴ for the proposition that "it is well-established law that parties that contest a settlement approved by the Commission are nonetheless bound by the terms of that settlement."²⁵ Moreover, Powerex contends that the Commission acknowledged that the assurance that other parties would not be able to initiate or sustain further or additional proceedings against Powerex with regard to settled matters was an important contingency for the Powerex settlement agreement. As such, Powerex asserts that section 4.5 of the settlement agreement effectively provided such assurance and, with the Commission's approval of the settlement agreement, all parties are precluded from litigating issues settled by the Powerex settlement agreement.²⁶ Powerex further contends that certainty and finality are not provided if opponents to the settlement agreement are left free to pursue the same settled issues before the Commission.²⁷

2. Answers

18. In their answer to Powerex's and Aquila's rehearing requests, California Parties ask that the Commission deny Powerex's and, to the extent it seeks the same relief, Aquila's request to expand the release provisions beyond the specific provisions of their respective settlements. They contend that the arguments that Powerex advances depend on a selective reading of the relevant settlement provisions.²⁸ California Parties state that

²³ *Id.* at 15 (quoting Powerex Settlement Agreement § 4.2).

²⁴ 417 U.S. 283 (1974) (*Mobil Oil*).

²⁵ Powerex Rehearing Request at 18 (citing *Mobil Oil*, 417 U.S. at 312-14).

²⁶ *Id.* at 16. Section 4.5 provides that "at no time and under no circumstances shall Powerex be subject to further scrutiny, investigation or proceedings of any kind for its trading activities in the State of California during the period January 1, 2000 through June 20, 2001" (with the exception of the Commission's ongoing anomalous bidding investigation, terminated as to Powerex, and refund proceedings in Docket No. EL00-95). *Id.* at 15.

²⁷ *Id.* at 16 (referring to Powerex Settlement Rehearing Order, 125 FERC ¶ 61,218 at P 12).

²⁸ California Parties Answer at 3 (referring to Powerex Rehearing Request at 13-15).

the Aquila Settlement Rehearing Order and Powerex Further Rehearing Order construed the release provisions of the settlement agreements as not interfering with the rights of California Parties to pursue Powerex in other proceedings related to the 2000-2001 electricity crisis.²⁹ They also contend that the Aquila Settlement Rehearing Order and the Powerex Further Rehearing Order “do not provide a release as to any claims or allegations to the extent that those are raised within the scope of proceedings that are separate from the dockets that were settled.”³⁰ Thus, regardless of whether California Parties are bound by the Powerex settlement agreement, they maintain that the settlement agreement does not affect their rights to pursue Powerex in other proceedings.

19. California Parties contend that Powerex has misapplied *Mobil Oil*, which they aver Powerex cites as support for the principle that the terms of the settlement agreement preclude California Parties and others from pursuing further or additional proceedings against Powerex with regard to these matters.³¹ California Parties explain that, here, the record developed by Powerex and Commission Trial Staff was narrowly focused and thus does not support a merits decision on a broader set of claims. Having thus narrowed the scope, California Parties maintain that it would be arbitrary, capricious, and a violation of due process for the Commission to hold that Powerex and Aquila are released from claims raised in proceedings other than the Gaming and Partnership proceedings and that parties such as California Parties are precluded from pursuing those claims.³² Citing the Ninth Circuit Court of Appeals’ decision in *Public Utility Commission of California v. FERC*, they also maintain that the Powerex settlement agreement cannot prejudice California Parties from seeking further relief—beyond any limited relief that the Commission may have provided—from Powerex and other sellers in the refund proceedings or other proceedings.³³

20. In its answer, Powerex challenges the California Parties’ characterization of the scope of Powerex’s settlement agreement and the suggestion that the release provisions contravene a decision by the Ninth Circuit Court of Appeals. First, Powerex avers that its settlement agreement extends beyond the Gaming and Partnership Orders unlike the Aquila, Portland General, and Morgan Stanley settlement agreements to which California

²⁹ *Id.* at 3 & n.8 (recognizing that “releases are limited to the Gaming and Partnership Show Cause Proceedings”).

³⁰ *Id.* at 4.

³¹ *Id.* at 4-5 (citing Powerex Rehearing Request at 6).

³² *Id.* at 5.

³³ *See id.* at 6 (citing *Pub. Util. Comm’n of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006) (*CPUC v. FERC*)).

Parties refer; Powerex states that only two areas were expressly excluded from the scope of the Powerex settlement agreement.³⁴ Powerex maintains that no aspect of these broad release provisions falls outside the scope of inquiry set out in the Commission's investigation under Docket No. PA02-2. Second, Powerex states that the Ninth Circuit's decision in *CPUC v. FERC* "does not purport to adjudicate the propriety of any contested settlement resolving disputes related to the California Energy Crisis," rather, the decision "reverses the Commission's order that categorically denied the California Parties relief for the Summer 2000 period."³⁵ Powerex contends that "[i]f California Parties wish to seek additional relief against Powerex in new or in settled proceedings, their sole recourse is to seek appellate reversal of the Powerex-Trial Staff Settlement."³⁶

21. In City of Tacoma's answer to California Parties' and Powerex's rehearing requests, City of Tacoma opposes Powerex's broader reading of the release provisions in its settlement agreement and supports, along with California Parties, the narrower reading of these provisions. City of Tacoma states that nowhere in the Powerex Further Rehearing Order does the Commission withdraw or modify the explicit limitation on the release provisions that it set out in the Aquila Settlement Rehearing Order, namely, that "the release provisions ... apply only within the context of the proceedings specifically named in the settlement agreements."³⁷ Further, City of Tacoma contends that the Western energy crisis decisions of the Ninth Circuit Court of Appeals provide that Commission action in separate enforcement proceedings cannot serve to deny relief sought through complaints in other proceedings.³⁸

³⁴ Powerex Answer at 2-3. The two areas excluded from the scope of the Powerex settlement agreement are (1) those issues, if any, identified with respect to Powerex in the investigation initiated by the Commission's June 25, 2003 order on investigation of anomalous market behavior (103 FERC ¶ 61,347 (2003)) and (2) any obligation for refunds for the period from October 2, 2000, through June 20, 2001, encompassed by the proceedings in Docket No. EL00-95, *et al.* See also *id.* at 4.

³⁵ *Id.* at 5.

³⁶ *Id.* at 6.

³⁷ City of Tacoma Answer at 3 (quoting Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 20).

³⁸ *Id.* at 3 (citing *Port of Seattle, Washington v. FERC*, 499 F.3d 1016, 1035 (9th Cir. 2007), and *CPUC v. FERC*, 462 F.3d 1027, 1052 (9th Cir. 2006)).

C. Status of Port of Seattle and “Non-implicated” Parties**Comments**

22. Powerex seeks clarification concerning the status of Port of Seattle, Washington (Port of Seattle). It avers that in the Aquila Settlement Rehearing Order the Commission stated that Port of Seattle “is not a party.”³⁹ Powerex asserts that, because of this statement, the Commission concluded that the settlement agreement does “not resolve anything as to Port of Seattle.”⁴⁰ Powerex states that Port of Seattle intervened in the Gaming and Partnership proceedings and, therefore, like all parties to these proceedings, Port of Seattle is bound to the terms of the settlement agreement.

23. Aquila maintains that certain statements in the Aquila Settlement Rehearing Order suggest that Port of Seattle was severed from the settlement agreement under the fourth *Trailblazer* approach and therefore is allowed to litigate the issues resolved by the settlement agreement.⁴¹ Aquila states that, according to the Commission, Port of Seattle is counted among the “non-implicated” parties whose interests are protected under their right to litigate their claims.⁴² Aquila requests that the Commission clarify that the Aquila settlement agreement was approved for and is binding on all parties and that no party remains free to litigate any matter that was resolved by the settlement agreement.⁴³

D. Portland General’s Withdrawal**Comments**

24. Portland General explains that the Aquila Settlement Rehearing Order purported to address requests for rehearing of the Commission’s 2004 Order approving a settlement

³⁹ Powerex Rehearing Request at 9.

⁴⁰ *Id.* at 10 (quoting Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 18).

⁴¹ Aquila Rehearing Request at 4 (citing *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh’g*, 87 FERC ¶ 61,110, *reh’g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*). The four *Trailblazer* approaches are described at *Trailblazer*, 85 FERC at 62,342-44).

⁴² *Id.* at 5 (quoting Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 21 n.33); *see also id.* at 7-8 (quoting Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 18).

⁴³ *Id.* at 5.

agreement between Portland General and the Commission's Trial Staff.⁴⁴ According to Portland General, several California parties who opposed that settlement agreement filed a joint request for rehearing. Subsequently, Portland General and the California Parties entered into a comprehensive settlement agreement in Docket No. EL00-95-000 *et al.*,⁴⁵ which resulted in the June 1, 2007 withdrawal of the request for rehearing by those California parties who jointly filed for rehearing.⁴⁶ Portland General asserts that, with the withdrawal of the only other outstanding request for rehearing by Port of Seattle on December 18, 2007, there are no rehearing requests pending in Docket No. EL03-165-000. Therefore, Portland General asserts that the Commission should have terminated this proceeding rather than denying the previously withdrawn requests for rehearing in the Aquila Settlement Rehearing Order.⁴⁷

25. In addition, Portland General points out that the California Attorney General was not a party to the request for rehearing that was filed by a number of California parties who sought rehearing of the order approving the Portland General-Commission Trial Staff settlement agreement.

26. To correct these errors, Portland General requests that the Commission issue an errata notice to the Aquila Settlement Rehearing Order or grant its request for rehearing.⁴⁸

27. California Parties agree with Portland General that, because California Parties had withdrawn their requests for rehearing of the orders approving the Portland General and PSC-Colorado settlement agreements there was no need for the Commission to act on their rehearing requests.⁴⁹ Thus, the Commission should clarify that these settlements should not have been addressed in either the Aquila Settlement Rehearing Order or the Arizona Settlement Rehearing Order.

⁴⁴ *Portland General Elec. Co.*, 106 FERC ¶ 61,236 (2004).

⁴⁵ *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,151 (2007).

⁴⁶ *See* Portland General Rehearing Request at 2, 3.

⁴⁷ *Id.* at 3.

⁴⁸ *Id.* at 4.

⁴⁹ California Parties Rehearing Request at 3, 8-10 (referring to the Aquila and Arizona Settlement Rehearing Orders).

III. Discussion

A. Requests for Rehearing

28. As a preliminary matter, Rules 213(a)(2) and 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), § 385.713(d)(1) (2008), prohibit an answer to a request for rehearing unless otherwise ordered by the decisional authority. We will accept the answers and responses to answers because they have provided information that assisted us in our decision-making process.

29. California Parties, Powerex, and Aquila principally contend that the Commission's discussion in the Aquila Settlement Rehearing Order and the Powerex Further Rehearing Order is unclear with respect to the scope of the settlement agreements and their release provisions. They also question whether Port of Seattle—and any other non-settling, or “non-implicated,” party—is bound under the settlement agreements' terms. In light of these rehearing requests and upon further review of the settlement agreements, the Commission will clarify the Aquila Settlement Rehearing Order, and the Powerex Further Rehearing Order as discussed below and deny rehearing.

30. Notwithstanding the broad language of the release provisions in these settlement agreements, the Commission finds that the release provisions are defined and limited by the issues raised during the investigation and enforcement proceedings that resulted in the issuance of the Show Cause Orders.⁵⁰ Despite some broad language,⁵¹ the Powerex settlement agreement qualifies the general release, stating that

[t]his Agreement constitutes a full and final resolution of all issues related to *Powerex Corp.* set for hearing on June 25, 2003 in *American Electric Power Service Corp., et al.*, 103 FERC ¶ 61,345 (2003), specifically in *Powerex Corp.*, Docket No. EL03-166-000, and in *Enron Power Marketing, Inc. and Enron Energy Services, Inc. et al.*, 103 FERC ¶ 61,346 (2003), specifically in *Powerex Corp.*, Docket No. EL03-199-000, and of all matters specified in this Agreement regarding Powerex's transactions in California's organized power markets during the period January 1, 2000 through June 20, 2001.^{52]}

⁵⁰ Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 19.

⁵¹ *See* Powerex Settlement Agreement § 4.4 (A “complete and total satisfaction of any unknown and/or unasserted causes of action....”).

⁵² *Id.* § 4.2; *see also id.* § 4.4.

Thus, matters outside the listed docket numbers and which are not specified in the settlement agreement do not fall within the release provisions of the Powerex settlement agreement.

31. As we previously reasoned, although 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 may arise. The Commission reiterates that these release provisions apply only within the context of the proceedings specifically named in the settlement agreements.⁵³ Thus, we clarify that the release provisions only apply to issues relating to the events in CAISO and CalPX energy and ancillary services markets during the period from January 1, 2000, through June 20, 2001, and which are within the scope of the Show Cause Orders.⁵⁴

32. Accordingly, we further clarify that the “underlying proceedings” in which Port of Seattle or another party might pursue a claim refer solely to litigation in existing appeals of the Show Cause Orders.⁵⁵ We agree that parties retain rights to pursue claims that are not directly related to the issues presented within the Show Cause proceedings and settled in these settlement agreements, as specifically delimited by the terms of the individual settlement agreements.⁵⁶ The settlement agreements by their own terms constitute full and final resolutions of all Show Cause allegations against Aquila and Powerex.

33. In the Aquila Settlement Rehearing Order and the Powerex Further Rehearing Order, the Commission discussed the four *Trailblazer* approaches to addressing contested settlement agreements.⁵⁷ As we explained, *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

⁵³ Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 20.

⁵⁴ See Aquila Settlement Agreement §§ 4.1, 4.3; Powerex Settlement Agreement §§ 4.4, 4.5.

⁵⁵ See Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 18.

⁵⁶ See *id.* P 21 & n.33; see also Powerex Further Rehearing Order, 125 FERC ¶ 61,218 at P 12.

⁵⁷ See Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 17; Powerex Further Rehearing Order, 125 FERC ¶ 61,218 at P 11.

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 settlement agreement as uncontested as to the settling parties only and leaving the contesting parties free to pursue their claims through continued litigation.⁵⁸ Aquila and Powerex query whether the Commission intended to sever Port of Seattle (or any other party) as a contesting party; they maintain that all parties are bound to the settlement agreements' terms and thus no party is free to litigate the settled issues.⁵⁹ We did not.

34. On rehearing, the Commission did not apply the fourth *Trailblazer* approach, i.e., by severing those who opposed the settlement agreements. Rather, the Commission affirmed the underlying orders approving the Aquila and Powerex settlement agreements and found that they were just and reasonable under the second and third *Trailblazer* approaches.⁶⁰ The Commission concluded that on balance, as packages, the settlement agreements produce overall just and reasonable results.⁶¹ The Commission further concluded that the benefits of the settlement agreements outweigh the nature of the objections of those opposing the settlement agreements.⁶² By these findings, the Commission affirmed that the settlement agreements are just and reasonable. Accordingly, all entities that intervened in the underlying proceedings that resulted in the issuance of the Show Cause Orders, such as Port of Seattle, are bound to the terms of the settlement agreements.

35. We agree with Powerex and clarify that the Powerex settlement agreement resolved issues beyond those resolved in the Partnership Order. The settlement agreement also considered issues raised in the Gaming Order.⁶³ Section 4.4 of the Powerex settlement agreement provides that

[p]ayment of the Settlement Amount constitutes complete and total satisfaction of the causes of action in the instant dockets

⁵⁸ *Trailblazer*, 85 FERC at 62,342-44.

⁵⁹ Aquila Request at 7-9; Powerex Rehearing Request at 10, 14-15, 17.

⁶⁰ See Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 21; Powerex Further Rehearing Order, 125 FERC ¶ 61,218 at P 12.

⁶¹ Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 21; Powerex Further Rehearing Order, 125 FERC ¶ 61,218 at P 12.

⁶² *Id.*

⁶³ See Powerex Settlement Agreement §§ 4.4, 4.5 (specifically mentioning both Partnership and Gaming Orders).

related to Powerex allegedly engaging in False Import, Cutting Non-Firm, Circular Scheduling, Scheduling Counterflows on Out of Service Lines, Load Shift or Paper Trading or any other Gaming Practice identified in the Commission's Gaming Order and/or Partnership Order.

Accordingly, we clarify that the Powerex settlement agreement resolved issues beyond the False Import issue, as described in section 4.4 of the Powerex settlement agreement quoted above.

36. Lastly, we recognize that the Commission did not need to act on the requests for rehearing of the orders approving the Portland General settlement agreement and dismissing PSC-Colorado from the proceedings initiated by the Show Cause Orders, which were addressed in the Aquila and Arizona Settlement Rehearing Orders, respectively,⁶⁴ because the requests for rehearing had been withdrawn.⁶⁵ Accordingly, we will grant rehearing in part and will vacate those portions of the Aquila and Arizona Settlement Rehearing Orders to the limited extent that they refer to these withdrawn requests for rehearing and Docket Nos. EL03-165-004 and EL03-167-003.

B. Compliance Filings

37. In the Aquila, Coral, *Modesto I*, and *Modesto II* Settlement Rehearing Orders,⁶⁶ the Commission concluded that in light of *Maine Public Utilities Commission v. FERC*,⁶⁷ it may not accept the standards of review as currently written in the settlement agreements. Therefore, the Commission directed the Settling Parties to revise the standards of review.

38. Shell Energy North America (U.S.), L.P., on behalf of Coral; Aquila; Portland General; Powerex; Northern California Power Agency; Modesto; Dynegy Power

⁶⁴ Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 1 n.3, P 4; Arizona Settlement Rehearing Order, 125 FERC ¶ 61,177 at P 4 & n.4, P 5, 6.

⁶⁵ California Parties withdrew the only pending request for rehearing in Docket No. EL03-165 on June 1, 2007, and in Docket No. EL03-167 on December 16, 2005. We also acknowledge that the California Attorney General was not a party to California Parties' April 5, 2004 request for rehearing in Docket No. EL03-165.

⁶⁶ Aquila Settlement Rehearing Order, 125 FERC ¶ 61,175 at P 22; Coral Settlement Rehearing Order, 125 FERC ¶ 61,176 at P 19; *Modesto I*, 125 FERC ¶ 61,173 at P 15; *Modesto II*, 125 FERC ¶ 61,174 at P 22.

⁶⁷ 520 F.3d 464, 477-78 (D.C. Cir. 2008).

Marketing, Inc.; and Sempra Energy Trading LLC timely submitted amended settlement agreement language in compliance with the Commission's directives. On December 16, 2008, City of Glendale, California (City of Glendale), submitted a motion for leave to file one day out-of-time and amended tariff language in compliance.

39. We will grant City of Glendale's motion, based on its representations, for good cause shown. We will also accept the above-noted compliance filings as consistent with the Commission's directives.

The Commission orders:

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

(B) The compliance filings are hereby accepted, as discussed in the body of this order.

By the Commission. Commissioner Moeller is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.