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FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

February 21, 2014

In Reply Refer To:
Puget Sound Energy, Inc. v. All
Jurisdictional Sellers of Energy and/or
Capacity at Wholesale into Electric
Energy and/or Capacity Markets in the
Pacific Northwest, Including Parties to
the Western System Power Pool
Agreement
Docket No. EL01-10-129

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Dear Counsel:

1. On November 26, 2013, Idaho Power Company and IDACORP Energy Services Company (collectively, IDACORP) and Powerex Corp. (Powerex) (collectively, the Settling Parties) filed a Settlement Agreement in the above-referenced proceeding. On December 6, 2013, Commission Trial Staff filed comments in support of the Settlement

Agreement. On December 20, 2013, the Settlement Judge certified the uncontested Settlement Agreement to the Commission.¹

2. The Settlement Agreement addresses claims arising from events and transactions in the Pacific Northwest and the remainder of the Western Markets as they may relate to transactions between the Settling Parties. Pursuant to the Settlement Agreement, the standard of review as between the Settling Parties will be the “public interest” application of the just and reasonable standard as set forth in *Mobile-Sierra*. For modifications to the Settlement proposed by the Commission acting *sua sponte* or by a non-settling party, the most stringent standard permissible under applicable law will apply. Because the Settlement Agreement appears to invoke the *Mobile-Sierra* “public interest” presumption or, alternatively, the most stringent standard permissible under applicable law with respect to the Commission acting *sua sponte* and third parties, we will analyze the applicability here of that more rigorous application of the just and reasonable standard.

3. The *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. In *New England Power Generators Association v. FERC*,² however, the D.C. Circuit determined that the Commission is legally authorized to impose a more rigorous application of the statutory “just and reasonable” standard of review on future changes to agreements that fall within the second category described above.

4. The Commission finds that the Settlement Agreement involves contract rates to which the *Mobile-Sierra* presumption applies. The Settlement Agreement addresses litigation between the Settling Parties that included: (i) whether there were amounts paid for energy and/or capacity in the Pacific Northwest spot market during the time from December 25, 2000 to and including June 21, 2001, including energy purchased in the Pacific Northwest that ultimately was consumed in California, that the Commission

¹ *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 145 FERC ¶ 63,018 (2013).

² *New England Power Generators Ass’n, Inc. v. FERC*, 707 F.3d 364, 370-371 (D.C. Cir. 2013).

might find to have been unjust and unreasonable; (ii) if so, whether any remedy should be awarded; (iii) whether evidence of market manipulation, submitted after the Administrative Law Judge made factual findings would affect the Commission's award or denial of refunds in the proceeding. The Settlement Agreement applies to transactions between IDACORP and Powerex only. These circumstances distinguish the Settlement Agreement in this case from the settlements in other cases, such as *High Island Offshore System, LLC*,³ which the Commission held did not involve contract rates to which the *Mobile-Sierra* presumption applied. The settlements in those cases involved the pipelines' generally applicable rate schedules for its open access transportation services.

5. The Settlement Agreement consists primarily of mutual releases and waivers between IDACORP and Powerex and resolves all claims between them, including ripple claims.⁴ However, we find that certain provisions of the Settlement Agreement do not accord with the Commission's express policy regarding the preservation of potential ripple claims by third-parties, and we therefore reject them.

6. On June 13, 2012, the Commission conditionally approved a settlement between IDACORP and the City of Tacoma, Washington (Tacoma) (March 12, 2012 Settlement) that resolved claims between them associated with their market activities in the Pacific Northwest for the January 1, 2000 through June 20, 2001 settlement period. In that order, the Commission required the removal of reciprocal waiver provisions that Powerex and the PPL Companies⁵ challenged as affecting their rights to bring ripple claims. Following the Commission's denial of IDACORP's request for rehearing of the June 13, 2012 Order, IDACORP petitioned the Ninth Circuit for review of the Commission orders.⁶

³ 135 FERC ¶ 61,105 (2011); *see also Panhandle Eastern Pipe Line Co., LP*, 143 FERC ¶ 61,041 (2013); *Southern LNG Co., LLC*, 135 FERC ¶ 61,153 (2011); *Carolina Gas Transmission Corp.*, 136 FERC ¶ 61,014 (2011).

⁴ In 2001, the ALJ in the underlying docket defined "ripple claims" as "sequential claims against a succession of sellers in a chain of purchases that are triggered if the last wholesale purchaser in the chain is entitled to a refund." *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy*, 96 FERC ¶ 63,044, at 65,300 (2001) (Cintron, J.).

⁵ The relevant PPL Companies are PPL Montana, LLC and PPL EnergyPlus, LLC.

⁶ *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy*, Letter Order, 139 FERC ¶ 61,209, *reh'g denied*, 141 FERC ¶ 61,148 (2012), *on appeal*, *Idaho Power Co. v. FERC*, No. 13-72220 (9th Cir. June 24, 2013) (Case No. 13-72220). The appeal was held in abeyance at the request of IDACORP, as this proposed settlement had the potential to resolve the appeal.

7. Article III, section 8 of the Settlement Agreement provides that within five days of Commission approval of the Settlement Agreement, the Commission will seek leave from the Ninth Circuit for the Commission to issue further orders so as to modify its earlier orders to approve the March 12, 2012 Settlement *as it was originally filed*, subject to the addition of a new article that would preserve the PPL Companies' ability to pursue ripple claims. Thus, PPL Companies could still pursue ripple claims, but all other non-parties would be foreclosed from pursuing them.⁷ Article III, section 9 of the Settlement Agreement states that IDACORP will withdraw its petition for review in the Ninth Circuit within five days of the occurrence of the above conditions.

8. Together, these two provisions contravene the Commission's policy regarding the preservation of potential ripple claims by third parties. In its order on the March 12, 2012 Settlement, the Commission approved the settlement on the condition that those portions of the settlement that purport to preclude potential ripple claims of non-parties be removed.⁸ In its rehearing and compliance filing, IDACORP requested rehearing of the Commission's position on ripple claims, and on compliance, provided two alternative settlement versions for the Commission's consideration. Alternative (1) modified the settlement so as to preserve rights of Powerex and PPL Companies alone to litigate their potential ripple claims. Alternative (2) modified the settlement so that it preserved the right of any non-settling party to pursue potential ripple claims. The Commission accepted Alternative (2) stating that it "intended that no non-settling third party, not just Powerex and PPL Companies, should have any potential rights extinguished by the Settlement."⁹ IDACORP then filed its petition for review.

9. In light of the foregoing, the Commission rejects Article III, section 8 in its entirety, as well as the portion of Article III, section 9 that refers to the occurrence of the conditions described in Article III, section 8 of the Settlement Agreement, as they are contrary to the Commission's explicit policy regarding ripple claims and constitute an impermissible collateral attack on the Commission's prior orders. In accordance with our prior holdings, we reaffirm that the proposed Settlement Agreement cannot be used to extinguish potential claims of others.¹⁰ Removal of these provisions is consistent with

⁷ Note that the parties to the Settlement Agreement (IDACORP and Powerex) seek to amend the March 12, 2012 Settlement between IDACORP and Tacoma. Tacoma filed no comments with respect to the instant Settlement Agreement.

⁸ *Puget Sound Energy, Inc.*, 139 FERC ¶ 61,209 at PP 6-7.

⁹ *Puget Sound Energy, Inc.*, 141 FERC ¶ 61,148 at P 16.

¹⁰ *See Puget Sound Energy, Inc.*, 139 FERC ¶ 61,209 at P 7; *Puget Sound Energy, Inc.*, 141 FERC ¶ 61,148 at P 10.

the history of this proceeding, which preserved potential ripple claims.¹¹ It is also consistent with the Commission's policy to favor settlement agreements that do not impair the rights of non-parties.¹² The remainder of the Settlement Agreement appears to be just and reasonable and in the public interest. Accordingly, the Commission approves the Settlement Agreement on the condition that it is modified so as to remove the rejected provisions as set forth herein. IDACORP and Powerex are directed to submit a compliance filing within thirty days of the issuance of this order consistent with the body of this order.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

cc: To All Parties

¹¹ See, e.g., *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 103 FERC ¶ 61,348, at PP 47-50 (2003) (stating that the "ALJ determined that all parties reserved their rights to pursue claims if the Commission was to direct further proceedings to determine refunds"). See also *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, Docket No. EL01-10-026, at P 10 (Nov. 23, 2011) (Order of the Chief Judge Confirming Settlement Procedures) ("This Order shall not be construed to either diminish or enlarge the right of any Party to assert its position with respect to Ripple Claims.").

¹² See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,171, at P 40 (2005).