

147 FERC ¶ 61,223  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;  
Philip D. Moeller, John R. Norris,  
and Tony Clark.

Puget Sound Energy, Inc.

v.

Docket Nos. EL01-10-132  
EL01-10-133

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  
Systems Power Pool Agreement

ORDER ON REHEARING AND COMPLIANCE

(Issued June 17, 2014)

1. On March 24, 2014, Idaho Power Company and IDACORP Energy Services Company (collectively, IDACORP) filed a request for rehearing (Rehearing Request) of a February 21, 2014 Commission letter order<sup>1</sup> that conditionally approved a settlement agreement (Settlement) between IDACORP and Powerex Corp. (Powerex) in the above-referenced proceeding. Also on March 24, 2014, IDACORP made a filing with the Commission (Compliance Filing) to comply with the directives of the Settlement Order. In this order we accept the Compliance Filing and deny the Rehearing Request.

**I. Background**

2. On November 26, 2013, IDACORP and Powerex filed the Settlement to resolve all issues between them associated with their market activities in the Pacific Northwest for the January 1, 2000 through June 20, 2001 settlement period. Trial Staff filed

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<sup>1</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy*, 146 FERC ¶ 61,123 (2014) (Settlement Order).

comments in support of the Settlement on December 6, 2013. The Settlement Judge certified the Settlement to the Commission as uncontested on December 20, 2013.<sup>2</sup>

3. The Settlement consisted primarily of mutual releases and waivers between IDACORP and Powerex and resolved all claims between them, including “ripple claims.”<sup>3</sup> However, in the Settlement Order, the Commission found that certain provisions of the Settlement did not accord with the Commission’s policy regarding the preservation of potential ripple claims by third-parties, and therefore accepted the Settlement subject to the removal of those provisions in a compliance filing.<sup>4</sup>

**A. The Commission’s Prior Orders on Ripple Claims**

4. In support of its decision, the Commission referred to its June 13, 2012 order in which it conditionally approved a similar settlement between IDACORP and the City of Tacoma, Washington (Tacoma) (March 12, 2012 Settlement) that resolved claims between them arising out of the same proceeding. In that order, the Commission also required the removal of reciprocal waiver provisions that Powerex and the PPL Companies<sup>5</sup> 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 Settlement Order, IDACORP petitioned the Ninth Circuit for review of the Commission orders.<sup>6</sup>

5. In the June 13, 2012 Settlement Order, the Commission approved the settlement on the condition that those portions of the settlement that preclude potential ripple claims of non-parties be removed.<sup>7</sup> IDACORP requested rehearing of the Commission’s

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<sup>2</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 145 FERC ¶ 63,018 (2013).

<sup>3</sup> 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.).

<sup>4</sup> Settlement Order, 145 FERC ¶ 63,018 at PP 5-9.

<sup>5</sup> The relevant PPL Companies are PPL Montana, LLC and PPL EnergyPlus, LLC.

<sup>6</sup> *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) (June 13, 2012 Settlement Order), *on appeal, Idaho Power Co. v. FERC*, No. 13-72220 (9th Cir. June 24, 2013) (Case No. 13-72220).

<sup>7</sup> June 13, 2012 Settlement Order, 139 FERC ¶ 61,209 at PP 6-7.

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."<sup>8</sup> IDACORP then filed its petition for review in that case.

### **B. The Current Settlement's Improper Provisions**

6. In this matter, Article III, section 8 of the Settlement provided that within five days of Commission approval of the Settlement, the Commission would seek leave from the Ninth Circuit for the Commission to issue further orders to modify its earlier orders to approve the March 12, 2012 Settlement between IDACORP and Tacoma as it was originally filed. This modification would reinstate the reciprocal waiver provisions that the Commission had required to be removed from the March 12, 2012 Settlement. Also, section 8 of the Settlement would add a new article to this Settlement 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.<sup>9</sup> Article III, section 9 of the Settlement stated that IDACORP would withdraw its petition for review in the Ninth Circuit within five days of the occurrence of the above conditions. The Commission found that together, these two provisions contravened the Commission's policy regarding the preservation of potential ripple claims by third parties.<sup>10</sup>

7. Therefore, consistent with its earlier rulings, the Commission rejected Article III, section 8 in its entirety, as well as the portion of Article III, section 9 that referred to the occurrence of the conditions described in Article III, section 8 of the Settlement. The Commission found the provisions were contrary to the Commission's policy regarding ripple claims and constituted an impermissible collateral attack on the Commission's

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<sup>8</sup> *Puget Sound Energy, Inc.*, 141 FERC ¶ 61,148 at P 16.

<sup>9</sup> We note that IDACORP and Powerex, the parties to this Settlement, sought to amend the March 12, 2012 Settlement between IDACORP and a different party, i.e., Tacoma. Tacoma filed no comments with respect to the instant Settlement.

<sup>10</sup> See, e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,171, at P 40 (2005), *reh'g denied*, 115 FERC ¶ 61,032, at P 23 (2006) (Commission policy favors settlement agreements that do not impair the rights of non-parties).

prior orders.<sup>11</sup> The Commission then reaffirmed that the proposed Settlement could not be used to extinguish potential claims of others.<sup>12</sup> The Commission emphasized that removal of these provisions was consistent with the history of this proceeding, which preserved potential ripple claims.<sup>13</sup> The Commission also found that removal of those provisions was consistent with the Commission's policy to favor settlement agreements that do not impair the rights of non-parties.<sup>14</sup>

8. The Settlement Order then found that the remainder of the Settlement appeared to be just and reasonable and in the public interest. Accordingly, the Commission approved the Settlement on the condition that the rejected provisions be removed and directed IDACORP and Powerex to submit a compliance filing within thirty days of the issuance of the Settlement Order.

## **II. IDACORP's Rehearing Request**

9. In its Rehearing Request, IDACORP argues that the Commission should not reject portions of the Settlement based on the Commission's statement that it disfavors settlements that impair the rights of non-parties. IDACORP contends this preference should not be applied as if it were a rule. Further, IDACORP contends that the Commission also failed to identify any segment of the public that would be adversely affected by the Settlement and what public interest was served by its partial rejection of the Settlement.<sup>15</sup>

10. IDACORP next argues that ripple claims are irrelevant and illusory. IDACORP states the Settlement Order's inclusion of the definition of ripple claims from Judge

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<sup>11</sup> Settlement Order, 146 FERC ¶ 61,123 at P 9.

<sup>12</sup> See *Puget Sound Energy, Inc.*, 139 FERC ¶ 61,209 at P 7; *Puget Sound Energy, Inc.*, 141 FERC ¶ 61,148 at P 10.

<sup>13</sup> 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.").

<sup>14</sup> See footnote 10, *supra*.

<sup>15</sup> Rehearing Request at 2, 5-6, 8-9.

Carmen A. Cintron's 2001 Recommendations and Proposed Findings of Fact (*see* footnote 3, *supra*) reflects the status of the case at the time, but it does not fit within the case the Commission described in its Order on Remand.<sup>16</sup> IDACORP argues that this case is now confined to seller-specific and contract-specific claims and remedies, not market-wide claims and remedies.<sup>17</sup>

11. Finally, IDACORP argues the Settlement Order could be read to direct IDACORP to withdraw its petition for review in the Ninth Circuit.<sup>18</sup> IDACORP states that if this provision was intended to require IDACORP to withdraw its petition for review, it is contrary to the statutory right of review created by the Federal Power Act (FPA) and would exceed the Commission's authority.<sup>19</sup>

### **III. Commission Determination**

12. IDACORP contends that the Commission's policy of disfavoring settlements that impair the rights of non-parties "does not exist and cannot be applied as if was a rule[.]"<sup>20</sup> pointing to cases in which the Commission has approved settlements as to non-settling parties that did not challenge the settlements.<sup>21</sup> However, the Commission possesses authority to approve settlements involving non-settling parties only if the Commission is able to make the necessary findings, including that the settlement is in the public interest.<sup>22</sup> Accordingly, it is well-settled that the Commission has an independent

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<sup>16</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy*, 137 FERC ¶ 61,001 (2011) (Order on Remand).

<sup>17</sup> Rehearing Request at 2, 6-7, 16-19.

<sup>18</sup> IDACORP states that it believes that the Commission did not so intend.

<sup>19</sup> Rehearing Request at 7-8, 19-21 (citing FPA section 313(b), 16 U.S.C. § 825l(b) (2012)).

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* at 8-15.

<sup>22</sup> *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, at 701 (D.C. Cir. 2007) ("the Commission may adopt an uncontested settlement only after finding it 'fair and reasonable and in the public interest;' that is, the Commission has a duty to disapprove uncontested settlements that are unfair, unreasonable, or against the public interest."); *Mobil Oil Corp. v. FPC*, , 417 U.S. 283, at 314 (1974) (settlement proposal enjoying unanimous support can be adopted "if approved in the general interest of the public"); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, at 1165 (D.C. Cir. 1998) (even if customers unanimously support the proposed settlement, "the Commission would still

responsibility to assess the impact of a settlement on the public interest, including its impact on non-parties to the settlement.<sup>23</sup>

13. *Petal Gas*, for example, affirmed the Commission's rejection of an uncontested settlement between a pipeline and certain shippers, "the active parties to the settlement," based upon "the interests of its inactive parties," finding this to represent the "independent consideration of fairness and reasonableness and the public interest the Commission is duty-bound to give."<sup>24</sup> Similarly, courts have affirmed Commission orders lowering the rate agreed to in an uncontested settlement, based upon its impact on third parties.<sup>25</sup>

14. Here, the Commission found that preserving the potential for future ripple claims was "consistent with the Commission's policy to favor settlement agreements that do not impair the rights of non-parties."<sup>26</sup> The Commission determined that the settlement language foreclosing ripple claims was not fair and reasonable and in the public interest. On that basis, the Commission determined not to approve the uncontested settlement with language that would "extinguish potential claims of others."<sup>27</sup> This determination is well within the Commission's discretion, and we deny rehearing on this basis.

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have the responsibility to make an independent judgment as to whether the settlement is 'fair and reasonable and in the public interest'"); *Saltville Gas Storage Co., L.L.C.*, 128 FERC ¶ 61,257, at P 9 (2009) ("Indeed, the Commission exercises this authority when necessary, attaching conditions to uncontested settlements, and even rejecting some entirely....The Commission exercises this authority particularly when the settlement, as this one, may have an impact on future parties or others not present during the negotiations."); *Tuscarora Gas Transmission Co.*, 127 FERC ¶ 61,217 (2009) (uncontested settlement approval conditioned upon revision of section that may adversely affect similarly-situated shippers across the grid).

<sup>23</sup> *See id.*

<sup>24</sup> 496 F.3d at 701.

<sup>25</sup> *Penn. Elec. Co. v. FERC*, 11 F.3d 207, 210 (D.C. Cir. 1993) ("FERC's responsibility under [Federal Power Act] section 205 is to ensure just and reasonable rates for native load customers and for third parties. Whether a rate satisfies this requirement is to be determined by FERC, not the parties to an agreement, however voluntary their agreement may be.").

<sup>26</sup> Settlement Order, 145 FERC ¶ 63,018 at P 9.

<sup>27</sup> Settlement Order, 145 FERC ¶ 63,018 at P 9.

15. IDACORP next argues that the perseveration of ripple claims makes little sense in light of the Commission's Order on Remand that foreclosed the availability of a market-wide remedy. However, in its Settlement Order, the Commission found that foreclosing ripple claims would be contrary to the history of the Pacific Northwest refund proceeding, in which the rights of parties to assert ripple claims in the future should circumstances arise had been preserved.<sup>28</sup> Even prior to the remand of the Pacific Northwest refund proceeding, the Commission held that all parties reserved their rights to pursue ripple claims in the event of further proceedings to determine refunds.<sup>29</sup>

16. The Commission has previously acknowledged that the potential for ripple claims was, at best, speculative.<sup>30</sup> Nevertheless, the Commission weighed the interest in finality with the possible foreclosure of a non-party's claim, and determined it could not approve the uncontested Settlement with language that would foreclose even remotely possible third party claims.

17. Also, as we previously noted,<sup>31</sup> there has never been any intent to foreclose ripple claims, to the extent they could arise.<sup>32</sup> Accordingly, we reaffirm that the Settlement between IDACORP and Powerex cannot be used to extinguish potential claims of non-settling parties. IDACORP also retains its right to argue that there is no basis for a ripple claim should some party attempt to make such a claim; it simply cannot preclude non-settling parties from even making such a claim. We therefore deny rehearing on this basis.

18. Finally, we clarify that the Settlement Order did not direct IDACORP to withdraw its petition for review. The Commission merely directed those portions of the Settlement that would foreclose potential ripple claims be removed from the Settlement in the Compliance Filing.

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<sup>28</sup> See footnote 13, *supra*.

<sup>29</sup> *Id.*

<sup>30</sup> June 13, 2012 Settlement Order, 139 FERC ¶ 61,209 at P 7.

<sup>31</sup> *Id.* P 7 & n.3.

<sup>32</sup> See, e.g., *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.”).

**IV. Compliance Filing**

19. IDACORP's March 24, 2014 Compliance Filing removes Article III, sections 8 and 9 in their entirety, corrects a misspelled word, and makes no other changes.<sup>33</sup> Notice of the Compliance Filing was published in the *Federal Register*, 79 Fed. Reg. 18,292 (2014), with comments due on or before April 14, 2014. No comments were filed.

20. In its Compliance Filing, IDACORP states that it proposes to remove the entire section 8, as directed by the Commission, and section 9 to ensure that there is not a requirement that IDACORP withdraw its petition for review currently pending before the United States Court of Appeals for the Ninth Circuit, because the necessary operative pre-condition would be removed.

21. We accept IDACORP's Compliance Filing as in compliance with the Settlement Order.

The Commission orders:

(A) IDACORP's request for rehearing of the Settlement Order is denied, and the Settlement Order is clarified as discussed in the body of this order.

(B) IDACORP's Compliance Filing is accepted as in compliance with the Settlement Order

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>33</sup> IDACORP states that it provided a copy of the compliance filing to Powerex in advance of it being filed and is authorized to state that Powerex did not object to its being filed.