

135 FERC ¶ 61,136  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Puget Sound Energy, Inc.

Docket No. EL01-10-137

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  
Systems Power Pool Agreement

ORDER ON REMAND

(Issued November 3, 2015)

1. This case is before the Commission on remand from the United States Court of Appeals for the Ninth Circuit (Ninth Circuit).<sup>1</sup> The proceedings involve settlements<sup>2</sup> entered into after an earlier Ninth Circuit remand order involving the Commission's

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<sup>1</sup> *Idaho Power Company v. FERC*, 801 F. 3d 1055 (9<sup>th</sup> Cir. 2015) (Settlement Remand).

<sup>2</sup> The settlements address 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 might find to have been unjust and unreasonable; (ii) if so, whether any remedy should be awarded; (iii) and 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.

decision to deny refunds to wholesale electricity buyers in the Pacific Northwest.<sup>3</sup> In light of the Ninth Circuit's Settlement Remand, the Commission has reviewed the settlements under the appropriate Commission standard for each. Based on our review of the settlements and the record in these proceedings, the Commission conditionally approves the settlements and directs further compliance filings, as discussed below.

## **I. Background**

### **A. Commission Proceedings**

#### **1. Tacoma Settlement**

2. On March 12, 2012, Idaho Power Company and IDACORP Energy, L.P. (collectively, IDACORP) and the City of Tacoma, Washington (Tacoma) filed a settlement (Tacoma Settlement) to resolve all issues in the referenced proceeding, except for claims between the City of Seattle and IDACORP.<sup>4</sup> Of relevance here, section 6 of the Tacoma Settlement stated:

(1) ...[t]he Commission will not entertain or consider any other claim against IDACORP that has been or could be presented for monetary or non-monetary remedies in connection with IDACORP's sales of energy or capacity or trading activities in the Pacific Northwest during the Settlement Period<sup>5</sup> without regard to the identity of the buyer, the term of the underlying purchase and sales agreements, the compensation paid or the basis for any such claims; (2) [t]he Commission's Final Order approving this Settlement will amount to a Commission determination that except for claims by Seattle, IDACORP will not be subject to further proceedings, investigations or scrutiny for any claims for its sales of energy or capacity

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<sup>3</sup> *Port of Seattle v. FERC*, 499 F. 3d 1016 (9<sup>th</sup> Cir. 2007), *cert. denied sub nom. Puget Sound Energy, Inc. v. California*, 558 U.S. 1136 (2010). On remand, the Commission set the underlying issues for hearing, but held the hearings in abeyance to allow for settlement procedures. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 137 FERC ¶ 61,001 (2011) (Commission Hearing Order).

<sup>4</sup> The Commission approved an uncontested settlement between the City of Seattle and IDACORP on October 19, 2012. *See Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 141 FERC ¶ 61,053 (2012).

<sup>5</sup> The Settlement Period is January 1, 2000 to June 20, 2001. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 139 FERC ¶ 63,004 (2012).

or trading activities in the Pacific Northwest during the Settlement Period; and (3) [t]he Commission's Final Order approving this Settlement will amount to the dismissal of IDACORP as a Respondent in the Pacific Northwest Proceedings, except for claims that may be advanced by Seattle.<sup>6</sup>

3. In separately-filed comments, PPL Companies<sup>7</sup> and Powerex Corp. (Powerex) stated that while they did not contest the terms of the Tacoma Settlement with respect to claims between the settling parties, they were concerned that the Tacoma Settlement would extinguish non-parties' rights to bring "ripple claims" against IDACORP in the future.<sup>8</sup> Specifically, PPL Companies and Powerex objected to language in the Tacoma Settlement (Article II Section 4), which stated that "the only persons that have claims against IDACORP . . . are Tacoma and Seattle." PPL Companies and Powerex also objected to the language in Article III, section 6, mentioned above,<sup>9</sup> that appeared to block any future claims against IDACORP in connection with its sales of energy or capacity in the Pacific Northwest during the Settlement Period. PPL Companies and Powerex requested that the Commission reject these portions of the Tacoma Settlement that purport to cut off claims of non-parties.<sup>10</sup>

4. In reply, IDACORP stated that possible ripple claims are irrelevant and cannot be reconciled with an orderly disposition of this case.<sup>11</sup> IDACORP argued that this case involves specific claims against specific sellers, and not a market-wide remedy, and, as a result, PPL Companies and Powerex cannot rely upon a theory of ripple claims.<sup>12</sup> Also in

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<sup>6</sup> *Id.* P 15.

<sup>7</sup> The PPL Companies are PPL Montana, LLC and PPL EnergyPlus, LLC.

<sup>8</sup> In 2001, the judge in the underlying docket defined "ripple claims" as "sequential claims against a succession of sellers in a chain of purchasers that are triggered if the last wholesale purchase in the chain is entitled to a refund." *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 96 FERC ¶ 63,044, at 65,300 (2001).

<sup>9</sup> *See supra* P 2.

<sup>10</sup> PPL Companies April 2, 2012 Initial Comments at 4-9; Powerex April 2, 2012 Initial Comments at 5-9.

<sup>11</sup> IDACORP April 12, 2012 Reply Comments at 5-6.

<sup>12</sup> *Id.*

reply, Trial Staff stated that it does not oppose the Tacoma Settlement, and noted that the circumstances that could give rise to potential ripple claims have never occurred. Trial Staff added that, given the high probability that the issue of ripple claims would be eventually adjudicated, the Commission could note, when it approves the Tacoma Settlement, that its acceptance of the Tacoma Settlement would be revisited if the Commission's Hearing Order<sup>13</sup> was reversed or remanded by an appellate court. At that time, Trial Staff stated, the Commission could weigh an interest in finality with the possible elimination of other parties' claims.<sup>14</sup>

5. The settlement judge certified the Tacoma Settlement to the Commission as uncontested on April 24, 2012.<sup>15</sup> On June 13, 2012, the Commission found that the Tacoma Settlement appeared fair and reasonable and in the public interest as between IDACORP and Tacoma, and conditionally approved it, subject to the removal of the language purporting to foreclose claims by parties other than IDACORP and Tacoma.<sup>16</sup> The Commission stated that:

[w]hile the potential for ripple claims is speculative, the Settlement between IDACORP and Tacoma cannot be used to extinguish potential claims of others. Removing such language is consistent with the history of this proceeding, which preserved potential ripple claims. It is also consistent with the Commission's policy to favor settlement agreements that do not impair the rights of non-parties.<sup>17</sup>

6. IDACORP made its compliance filing with the modified language and sought rehearing of the Commission's Tacoma Settlement Order. In its rehearing request, IDACORP argued that, in the Tacoma Settlement Order, the Commission should have

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<sup>13</sup> See *supra* note 3.

<sup>14</sup> Commission Trial Staff April 12, 2012 Reply Comments at 8-9.

<sup>15</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 139 FERC ¶ 63,004 (2012).

<sup>16</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 139 FERC ¶ 61,209 (2012) (Tacoma Settlement Order).

<sup>17</sup> Tacoma Settlement Order at 3.

treated the settlement as contested, and used a *Trailblazer*<sup>18</sup> analysis to determine if it should be approved, rejected, or modified.<sup>19</sup> IDACORP stated that neither Powerex nor PPL Companies claimed there was a genuine issue of material fact and that the Commission should have made a decision on any contested issues based on the record before it. IDACORP further argued that, even if there were an issue with the Tacoma Settlement, the Commission could have approved it as being overall just and reasonable, after balancing settlement versus continued litigation. IDACORP also made the argument that, under the third prong of *Trailblazer*, the Commission could have approved the Tacoma Settlement as just and reasonable if it made a finding that Powerex's and PPL Companies' concerns about ripple claims were too attenuated. Finally, IDACORP stated that, in the Tacoma Settlement Order, it appeared that the Commission impermissibly severed non-contesting parties with its decision.<sup>20</sup>

7. The Commission accepted IDACORP's compliance filing, but denied rehearing, stating:

No person or entity objected to the fundamental aspects of the settlement that concerned the settling parties, to wit IDACORP and Tacoma. Powerex and PPL Companies merely requested that the Commission not permit the uncontested Settlement to affect the rights of non-settling parties adversely. Accordingly, the Settlement Judge properly certified the Settlement to the Commission as uncontested on April 24, 2012. Thus, a *Trailblazer* analysis was not needed to approve the essentially uncontested Settlement as to the settling parties.<sup>21</sup>

IDACORP petitioned for review of the Tacoma Rehearing Order.

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<sup>18</sup> Tacoma Rehearing Request at 12 (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*)).

<sup>19</sup> Tacoma also sought clarification that the Commission only meant to exclude Powerex and PPL Companies from any adverse impact of the settlement, and not non-settling parties generally. Tacoma also made arguments pertaining to the merit of ripple claims. Tacoma Rehearing Request at 12, 14-15.

<sup>20</sup> *Id.* at 16-21.

<sup>21</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 141 FERC ¶ 61,148, at 4 (2012) (Tacoma Rehearing Order). The Commission denied rehearing on all issues raised by IDACORP.

## 2. Powerex Settlement

8. On November 26, 2013, IDACORP and Powerex filed a settlement (Powerex Settlement) to dispose of disputes between IDACORP and Powerex in this proceeding while IDACORP's petition for review of the Tacoma Rehearing Order was pending in the Ninth Circuit. Section 1 of the Powerex Settlement states that IDACORP and Powerex waive and release any and all claims, of any and every kind, that each may have brought against the other. Section 3 states that the Commission shall not entertain or consider any claims against IDACORP that have been or could be presented in connection with IDACORP's sales of energy or capacity to Powerex in markets in the Pacific Northwest during the Settlement Period. Similarly, section 4 states that the Commission shall not entertain or consider any claims against Powerex that have been or could be presented in connection with Powerex's sales of energy or capacity to IDACORP in markets in the Pacific Northwest during the Settlement Period.<sup>22</sup> Section 8 provides that within five days of Commission approval of the settlement, the Commission "shall cause its counsel to request that the Ninth Circuit . . . grant leave to the Commission to issue further orders in connection with the [Tacoma] Settlement, for the purpose of modifying at the earliest practicable date, its earlier orders to approve the [Tacoma] Settlement, as it was originally filed, subject to the addition of a new section 7 to Article II of the [Tacoma] Settlement."<sup>23</sup>

9. Initial Comments were filed by Trial Staff and IDACORP. Trial Staff stated that the Powerex Settlement allows IDACORP and Powerex to put their dispute behind them,

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<sup>22</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 145 FERC ¶ 63,018, at 3-4 (2013). The Powerex Settlement also states that Powerex no longer challenges the Tacoma Settlement and requires Powerex to file a motion to withdraw any briefs filed with the Ninth Circuit in connection with the then ongoing litigation concerning the Tacoma Settlement. *Id.*

<sup>23</sup> This new section 7 provides:

The restrictions on further Commission proceedings, investigations or scrutiny respecting sales in the Pacific Northwest by IDACORP during the Settlement Period shall not be applied to restrict Commission consideration of any 'Ripple Claims' PPL Companies may assert against IDACORP or that IDACORP may assert as counterclaims or otherwise against the PPL Companies, provided however, that any such claims shall remain subject to such other valid defenses and arguments either the PPL Companies or IDACORP may raise against the other in a timely response to the presentation of any such claim.

minimizing their litigation costs, and providing them with increased certainty in planning their future affairs. Trial Staff also stated that the Powerex Settlement's effectiveness is contingent upon the Commission causing its counsel to request leave of the Ninth Circuit to issue further orders to approve the Tacoma Settlement. Trial Staff stated that the Settling Parties aver that otherwise, the Powerex Settlement does not affect any other pending cases. Accordingly, Trial Staff did not oppose the Powerex Settlement.<sup>24</sup>

10. IDACORP stated that neither the Powerex Settlement nor the Tacoma Settlement establishes any principle regarding the viability of ripple claims. IDACORP asserted that neither settlement limits any party's ability to pursue ripple claims against any other entity, except that IDACORP and Powerex mutually release one another from ripple claims, and by operation of the Tacoma Settlement, IDACORP exchanges mutual releases with all parties, except PPL Companies. IDACORP avers that Powerex was a principal advocate of preserving ripple claims as a matter of principle, and opposed the Tacoma Settlement on that basis; however, IDACORP stated, Powerex's opposition has been eliminated by the specific terms of the Powerex Settlement. IDACORP affirmed that the only remaining opponent to the Tacoma Settlement was PPL Companies, whose rights were not affected by the Powerex Settlement. Moreover, IDACORP noted that, when the Tacoma Settlement was filed, no other party had achieved a settlement in this proceeding, and the potential for ripple claims was of much greater concern to the parties. IDACORP stated that, in the interim, there were numerous settlements with the result that only ten sellers were defending direct claims in this proceeding. Accordingly, IDACORP states, the potential for ripple claims is of much less concern, as evidenced by the fact that no comments in opposition to the Powerex Settlement were filed.<sup>25</sup>

11. No Reply Comments were filed in this proceeding, and the settlement judge certified the Powerex Settlement to the Commission as uncontested on December 20, 2013.<sup>26</sup>

12. Similar to the Tacoma Settlement Order, the Commission found that certain provisions of the Powerex Settlement did not accord with the Commission's policy regarding the preservation of potential ripple claims by third-parties, and therefore conditionally accepted the Powerex Settlement subject to the removal of those provisions in a compliance filing. Specifically, the Commission directed removal of section 8,

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<sup>24</sup> Commission Trial Staff December 6, 2013 Initial Comments at 5-7.

<sup>25</sup> IDACORP December 6, 2013 Initial Comments at 4-6.

<sup>26</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 145 FERC ¶ 63,018 (2013).

which would have resulted in the addition of the aforementioned new section 7 language. As to section 8, the Commission found that, since only the claims of PPL Companies were preserved in the new section 7 language, then potential ripple claims of all other non-parties were impermissibly foreclosed.<sup>27</sup> The Commission also directed removal of section 9 of the Powerex Settlement, which provided that IDACORP would withdraw its petition for review in the Ninth Circuit within five days of the occurrence of conditions set forth in section 8.

13. IDACORP submitted its compliance filing and sought rehearing. IDACORP argued that the Commission should not reject portions of the Powerex Settlement based on the Commission's statement that it disfavors settlements that impair the rights of non-parties. IDACORP repeated arguments made in its request for rehearing of the Tacoma Settlement Order regarding the illusory nature of ripple claims, and also argued that this case is now confined to seller-specific and contract-specific claims and remedies, not market-wide claims and remedies.<sup>28</sup> The Commission accepted IDACORP's compliance filing and denied rehearing on the basis that it was within the Commission's discretion to condition approval of the Powerex Settlement upon the removal of the language in question. The Commission also reaffirmed that the Powerex Settlement could not be used to extinguish potential claims of non-settling parties, and stated that IDACORP retains its right to argue that there is no basis for a ripple claim should some party attempt to make such a claim, but cannot preclude non-settling parties from even making such a claim.<sup>29</sup> IDACORP again petitioned for review.

## **B. Ninth Circuit**

14. The Ninth Circuit stated that it "reviews[s] [Commission] decisions to determine whether they are 'arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law,'"<sup>30</sup> The court specifically focused on the

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<sup>27</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 146 FERC ¶ 61,123, at PP 5-9 (2014) (Powerex Settlement Order). The Commission also considered the modification of the Tacoma Settlement Order "as originally filed" to be an impermissible collateral attack on that order. *Id.* P 9.

<sup>28</sup> Powerex Rehearing Request at 2, 5-6, 8-9.

<sup>29</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 147 FERC ¶ 61,223, at 6-7 (2014) (Powerex Order on Rehearing).

<sup>30</sup> Settlement Remand, 801 F. 3d at 1055 (citing *Cal. Dept. of Water Res. v. FERC*, 341 F.3d 906, 910 (9<sup>th</sup> Cir. 2003)).

Commission's decision to treat the Tacoma Settlement as uncontested, and pointed out that, under the Commission's rules, the Commission can approve an uncontested settlement if the settlement appears to be "fair and reasonable and in the public interest."<sup>31</sup> Alternatively, the court notes, there are specific procedures to be followed for contested settlements,<sup>32</sup> including the framework laid out in *Trailblazer*.<sup>33</sup>

15. In remanding the proceedings to the Commission, the Ninth Circuit held that the Commission "abused its discretion by foregoing the *Trailblazer* analysis and merits analysis dictated by [its] regulations."<sup>34</sup> The court noted that there was evidence in the record of the Tacoma Settlement's being contested, including the fact that the Commission itself described some of the language as "disputed," and that IDACORP, Powerex, and PPL Companies all described that settlement as contested.<sup>35</sup> The court stated that, despite acknowledging that the Tacoma Settlement contained this disputed language, the Commission did not conduct a *Trailblazer* analysis or any other analysis of the merits of the contested issues.<sup>36</sup> The court held that this was an abuse of discretion, and therefore granted IDACORP's petition and remanded the case to the Commission to "either consider the proposed Tacoma settlement under the proper standards or provide an explanation for why a different approach is appropriate in [that] case."<sup>37</sup>

16. As for the Powerex Settlement, the court stated that IDACORP would not have proposed the Powerex Settlement had it been satisfied with the treatment of the contested issues in the Tacoma Settlement. Because of this and the "interdependency" of the

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<sup>31</sup> 18 C.F.R. § 385.602(g)(3) (2015).

<sup>32</sup> *See* 18 C.F.R. § 385.602(h) (2015).

<sup>33</sup> Settlement Remand, 801 F. 3d at 1055.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* The court also mentioned that the Commission failed to persuasively justify in the Tacoma Settlement Order or the Tacoma Rehearing Order why it was not necessary to conduct the *Trailblazer* analysis, given the facts of the case.

<sup>37</sup> *Id.*

settlements, the court also granted the petition in the Powerex Settlement case, and remanded it for reconsideration with the Tacoma Settlement.<sup>38</sup>

## II. Commission Determination

### A. Tacoma Settlement

17. The Ninth Circuit directed the Commission to “either consider the proposed Tacoma [S]ettlement under the proper standards or provide an explanation for why a different approach is appropriate in [that] case.”<sup>39</sup> In light of this direction, we have reevaluated the Tacoma Settlement under the *Trailblazer* standard for reviewing contested settlements. As discussed below, we conditionally approve the Tacoma Settlement as just and reasonable, based on the evidence in the record in this proceeding. As explained further, the Commission requires, as a condition for approval of the Tacoma Settlement, modification of the Tacoma Settlement so as to remove any language extinguishing the rights of non-parties.

18. Treating the Tacoma Settlement as contested, the Commission may approve the Tacoma Settlement if we find, based on substantial evidence in the record as a whole, that it will establish just and reasonable rates.<sup>40</sup> *Trailblazer* outlined several approaches the Commission can take as a basis for approving a contested settlement: (1) if there is an adequate record, the Commission can make a decision on the merits of each contested issue; (2) even if individual aspects of an agreement might be problematic, the Commission may be able to determine that the settlement as a package provides an overall just and reasonable result; or (3) the Commission may be able to find that the benefits of the settlement outweigh the nature of the objections, and the contesting parties’ interests are too attenuated. If the Commission determines that it cannot impose the settlement on contesting parties, severing the contesting parties might be an option.<sup>41</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

<sup>41</sup> *Trailblazer*, 85 FERC ¶ 61,345 at 62,342-44, *order on reh’g*, 87 FERC ¶ 61,110, *reh’g denied*, 88 FERC ¶ 61,168 (1999).

The Commission can decide the merits of a contested settlement if there is substantial evidence in the record or if there is no genuine issue of material fact.<sup>42</sup>

19. As stated above, the Commission's order in *Trailblazer* provides guidance regarding the standards and procedures for ruling on contested settlements. Where there is an adequate record, the first approach of *Trailblazer* provides that the Commission may examine the merits of each contested issue.<sup>43</sup> The contested issue in the Tacoma Settlement is whether particular language of the Tacoma Settlement can be read to extinguish the rights of non-parties to bring ripple claims. Based on the record in this proceeding, we find that the provision in question can be read to extinguish inappropriately the claims of non-parties. Therefore, we condition our approval of the Tacoma Settlement on that provision's removal, as discussed further below.

20. Section 6 of the Tacoma Settlement states that "any other claim against IDACORP that has been or could be presented for monetary or non-monetary remedies in connection with IDACORP's sales of energy or capacity or trading activities in the Pacific Northwest during the Settlement Period" would not be considered by the Commission.<sup>44</sup> Other language in section 6 of the Tacoma Settlement provides that:

except for claims by Seattle, IDACORP will not be subject to further proceedings, investigations or scrutiny for any claims for its sales of energy or capacity or trading activities in the Pacific Northwest during the Settlement Period, and . . . [t]he Commission's Final Order approving this Settlement will amount to the dismissal of IDACORP as a Respondent in the Pacific Northwest Proceedings....<sup>45</sup>

21. IDACORP argued that the issue of ripple claims is irrelevant and the potential so remote as to be illusory.<sup>46</sup> The Commission disagrees. As stated in the earlier

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<sup>42</sup> See 18 C.F.R. § 385.602(h)(1)(i) (2015); *Trailblazer*, 85 FERC ¶ 61,345 at 62,342.

<sup>43</sup> *Trailblazer*, 85 FERC ¶ 61,345 at 62,342. See also *Mobil Oil Corp. v. FPC*, 417 U.S. 283 at 313-14 (1974) ("No one seriously doubts the power – indeed the duty – of the Commission to consider the terms of a proposed settlement, which fails to receive unanimous support as a decision on the merits.").

<sup>44</sup> See *supra* P 2.

<sup>45</sup> See *supra* note 6.

<sup>46</sup> See *supra* note 11.

proceedings, it is the Commission's policy to favor settlement agreements that do not impair the rights of non-parties.<sup>47</sup> The provisions above, where they do specifically mention a party who can make a claim against IDACORP, only include Seattle. We find that this results in an inappropriate impairment of the rights of non-parties. Although the Commission has stated previously that the potential for ripple claims is speculative, we find that the Tacoma Settlement, a settlement between IDACORP and Tacoma, cannot be used to extinguish potential claims of others. It is consistent with both Commission policy and the history of this proceeding, which have preserved potential ripple claims, to condition our approval of the Tacoma Settlement on removal of the language in question.<sup>48</sup>

22. For these reasons, we also find that the potential of ripple claims and the contesting parties' interests are not too attenuated, and therefore conclude that we cannot approve the Tacoma Settlement as filed under that prong of the *Trailblazer* analysis. While ripple claims may seem to be a remote possibility, they nonetheless have been the subject of consideration in Docket No. EL01-10. Moreover, while many parties have entered into settlements in this proceeding since the filing of the Tacoma Settlement, we note that there are still active respondents in this case and that the remedy phase of the hearing in Docket No. EL01-10 has not yet occurred.<sup>49</sup>

23. Further, while the Tacoma Settlement reasonably resolves claims as between Tacoma and IDACORP, we find that the inclusion of the language in the Tacoma Settlement extinguishing the claims of non-parties means that we cannot conclude under the second prong of the *Trailblazer* analysis that the Tacoma Settlement as a package

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<sup>47</sup> See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,171, at P 40 (2005).

<sup>48</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>49</sup> See *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 151 FERC ¶ 61,173, at P 219 (2015) ("[T]he determination of what constitutes a just and reasonable rate in the Pacific Northwest bilateral spot market would be a remedy issue for Phase II of the proceeding, to the extent Phase II is necessary.")

provides an overall just and reasonable result. In so finding, we have balanced whether the benefits of the settlement, i.e., the resolution of issues between two parties in this lengthy proceeding, outweighed the nature of the objections made by Powerex and PPL Companies. Although we believe that it is important to move toward final resolution of this proceeding, and while settlements between the parties can help achieve that goal, we cannot conclude that this goal should outweigh the limitations imposed on non-parties, even if ripple claims in this proceeding appear remote.<sup>50</sup>

24. Accordingly, based on the evidence in the record before us, the Commission approves the Tacoma Settlement on the condition that it is modified so as to remove the disputed language extinguishing the rights of third parties. IDACORP and Tacoma are directed to submit a compliance filing within 30 days of the issuance of this order consistent with the body of this order.

### **B. Powerex Settlement**

25. The Ninth Circuit directed the Commission to reevaluate the Powerex Settlement due to how closely it is tied to the Tacoma Settlement. Unlike the Tacoma Settlement, the Powerex Settlement was uncontested, and as a result, we find that it was appropriately reviewed by the Commission under the standard for uncontested settlements. However, as noted by the Ninth Circuit, the Commission has an independent responsibility to assess the impact of a settlement on the public interest, including its impact on non-parties to the settlement.<sup>51</sup> In light of this responsibility, we find that certain provisions of the Powerex

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<sup>50</sup> The very fact that the parties to the Tacoma Settlement felt a need to include such language certainly suggests that the possibility of ripple claims is not so remote as to be worth ignoring entirely.

<sup>51</sup> See *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 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

(continued ...)

Settlement do not accord with the Commission's policy regarding the preservation of potential ripple claims by third-parties. Therefore, we condition our approval of the Powerex Settlement on removal of those provisions, as discussed below.<sup>52</sup>

26. In reevaluating the Powerex Settlement on remand, we find that sections 3 and 4 contain very similar language to that of section 6 of the Tacoma Settlement, the removal of which is a condition to the Commission's approval of that settlement. Sections 3 and 4 of the Powerex Settlement provide:

the Commission shall not entertain or consider any claims against IDACORP that have been or could be presented in connection with IDACORP's sales of energy or capacity to Powerex in markets in the Pacific Northwest during the Settlement Period; [and] the Commission shall not entertain or consider any claims against Powerex that have been or could be presented in connection with Powerex's sales of energy or capacity to IDACORP....<sup>53</sup>

Although this language is more specific than the language used in section 6 of the Tacoma Settlement (i.e., "IDACORP's sales of energy or capacity to Powerex and Powerex's sales of energy or capacity to IDACORP"),<sup>54</sup> the provisions still fail to state claims *by whom*. Because section 1 of Article III of the Powerex Settlement contains the mutual releases between the parties, the most reasonable conclusion is that the claims in question are those advanced by non-parties. Therefore, for the same reasons discussed above, the Commission conditions our approval of the Powerex Settlement on removal of this language.<sup>55</sup>

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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>52</sup> The Commission notes that due to the fact that the Powerex Settlement was executed and filed before the disposition of IDACORP's petition for review of the Tacoma Settlement, many of the provisions that make reference to that case are now moot. The parties may eliminate those provisions on compliance.

<sup>53</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity*, 145 FERC ¶ 63,018, at P 10 (2013).

<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> *See supra* P 21.

27. The Commission continues to take issue with other language in the Powerex Settlement as well. Specifically, Article III, section 8 of the Powerex Settlement provides that, within five days of Commission approval of the Powerex Settlement, 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 Tacoma Settlement *as it was originally filed*, subject to the addition of a new article<sup>56</sup> that would preserve the PPL Companies' ability to pursue ripple claims. This is problematic for two reasons. First, the Tacoma Settlement "as originally filed" contains the language in section 6, discussed above. Second, the additional language the parties propose to add, by preserving only the right of PPL Companies to pursue ripple claims, effectively eliminates the ability of all other non-parties to pursue such claims. In light of the foregoing, the Commission rejects section 8 in its entirety, as it is contrary to the Commission's current policy regarding ripple claims.

28. Accordingly, the Commission approves the Powerex Settlement on the condition that it is modified so as to remove the provisions discussed above. IDACORP and Powerex are directed to submit a compliance filing within 30 days of the issuance of this order consistent with the body of this order.

The Commission orders:

(A) The Tacoma Settlement and Powerex Settlement are hereby conditionally approved, as discussed in the body of this order.

(B) IDACORP and Tacoma are hereby directed to submit a compliance filing within 30 days of the date of issuance of this order, as discussed in the body of this order.

(C) IDACORP and Powerex are hereby directed to submit a compliance filing within 30 days of the date of issuance of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>56</sup> See *supra* note 23.