

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

San Diego Gas & Electric Co.

Docket No. EL00-95-171

v.

Sellers of Energy and Ancillary Services

Investigation of the Practices of the California  
Independent System Operator and the  
California Power Exchange

Docket No. EL00-98-157

Investigation of Anomalous Bidding Behavior  
and Practices in Western Markets

Docket No. IN03-10-018

Fact-Finding Investigation into Potential  
Manipulation of Electric and Natural Gas Prices

Docket No. PA02-2-032

Reliant Resources, Inc. *et al.*

Docket No. EL03-170-005

Enron Power Marketing, Inc. and  
Enron Energy Services, Inc.

Docket No. EL03-180-019

Reliant Energy Services, Inc., *et al.*

Docket No. EL03-59-005

ORDER DENYING REHEARING

(Issued May 30, 2006)

1. This order addresses a request for rehearing of the Commission's December 22, 2005 Order<sup>1</sup> approving a settlement of disputes between Reliant,<sup>2</sup> the California Parties,<sup>3</sup> and the Commission's Office of Market Oversight and Investigations (OMOI) (collectively, the Settling Parties) in the captioned dockets. The settlement was filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure<sup>4</sup> on October 14, 2005. Five entities filed timely initial comments, and a joint reply was filed by Reliant, the California Parties and OMOI. The December 22 Order accepted the Settlement with conditions. The Port of Seattle, Washington (Port) filed a timely request for rehearing, which the Commission will deny as discussed *infra*.

### **I. Description of the Settlement**

2. The Settlement resolves claims against Reliant for refunds, disgorgement of profits, billing adjustments or other monetary and non-monetary remedies in Commission Docket Nos. EL00-95-000 and EL00-98-000, *et al.* (the Refund Proceeding), EL03-170-000, *et al.*, EL03-180-000, *et al.*, PA02-2-000 *et al.*, IN03-10-000, *et al.*, the Commission's physical withholding investigation, and related appellate proceedings insofar as these proceedings relate to Reliant's sales in the CAISO and/or CalPX markets from January 1, 2000 through June 20, 2001 (collectively, the FERC Proceedings).

3. The Settlement provides at least \$512,000,000 in monetary consideration, including: 1) assignment of Reliant's receivables in the CalPX and CAISO; 2) amounts related to Reliant's prior settlements with the Commission's Trial Staff and OMOI,

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<sup>1</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 113 FERC ¶ 61,308 (2005) (December 22 Order).

<sup>2</sup> Under the terms of the Settlement, "Reliant" refers to the following entities: Reliant Energy, Inc.; Reliant Energy Services, Inc.; Reliant Energy Power Generation, Inc.; Reliant Energy California Holdings, Inc.; Reliant Energy Coolwater, Inc.; Reliant Energy Ellwood, Inc.; Reliant Energy Etiwanda, Inc.; Reliant Energy Mandalay, Inc.; Reliant Energy Ormond Beach, Inc.; and each of the affiliates and subsidiaries of Reliant Energy, Inc. listed on Exhibit A to the Settlement and Release of Claims Agreement filed by the parties to the Settlement.

<sup>3</sup> The California Parties include: Pacific Gas & Electric Company (PG&E); Southern California Edison Company (SCE); San Diego Gas & Electric Company (SDG&E); the People of the State of California, *ex rel.* Bill Lockyer, Attorney General (California Attorney General); the California Electricity Oversight Board (CEOB); and the California Public Utilities Commission (CPUC).

<sup>4</sup> 18 C.F.R. § 385.602 (2005).

negotiated in the Reliant Gaming Settlement,<sup>5</sup> amounts previously negotiated between Reliant and FERC staff with respect to withholding during the period of June 20 and 21, 2000,<sup>6</sup> and amounts previously negotiated by Reliant and OMOI in the Reliant/OMOI Settlement;<sup>7</sup> 3) Assignment to the California Parties of any interest Reliant is owed by the CAISO and CalPX with respect to transactions from January 1, 2000 through June 20, 2001; 4) a cash payment by Reliant to the Reliant Refund Escrow established by the California Parties for distribution to Settling Participants entitled to refunds in the Refund Proceeding; and 5) cash payments to each of the Additional Claimants.<sup>8</sup>

4. The Settling Parties agreed to mutual releases of past, existing and future claims arising at the Commission and/or under the Federal Power Act<sup>9</sup> with respect to rates, prices, and terms or conditions for energy, ancillary services, or transmission congestion in the western energy markets during the period from January 1, 2000 through June 20, 2001. In addition, the Settlement resolves certain civil claims that have been or could be asserted against Reliant by the California Parties, the Additional Claimants and/or representatives of all persons and entities in the State of California who indirectly purchased electric power from the California and western energy markets.

5. The Parties agreed to certain actions with respect to litigation pending in federal courts. The Settlement releases all claims by the California Parties against Reliant in the petition for review pending before the U.S. Court of Appeals for the Ninth Circuit in *PG&E v. FERC* (Case Nos. 03-72872, *et al.*), and Reliant will withdraw from the proceeding.<sup>10</sup> This release is specific to Reliant and the California Parties. That is, there is no settlement or release of claims as between the Commission and the California Parties in this litigation. The Settlement also requires the Parties to cooperate with respect to the order of the U.S. District Court in *State of California, ex rel Bill Lockyer*,

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<sup>5</sup> See Agreement and Stipulation in Docket No. EL03-170-000, *Reliant Energy Services, Inc.*, 106 FERC ¶ 61,207 (2004).

<sup>6</sup> See Fact Finding Investigation into Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-001, 102 FERC ¶ 61,108 (2003).

<sup>7</sup> See Stipulation and Consent Agreement in Docket Nos. EL03-59-000, IN03-59-000, IN03-10-000, and PA02-2-000, *et al.* (the Reliant/OMOI Settlement). This settlement was approved in *Reliant Energy Services, Inc., et al.*, 105 FERC ¶ 61,008 (2003), as modified in *Reliant Energy Services, Inc., et al.*, 108 FERC ¶ 61,278 (2004).

<sup>8</sup> December 22 Order at P.22.

<sup>9</sup> 16 U.S.C. § 824 *et seq.* (2000).

<sup>10</sup> See section 8.7.4 of the Settlement.

*et al. v. Reliant Energy, et al.*<sup>11</sup> that stayed the action in this proceeding in its entirety pending action by the Commission and the CPUC either approving or rejecting the Settlement.<sup>12</sup>

6. The Settlement provided an opportunity for all other parties to these proceedings to join the Settlement as Settling Participants for a period of five days following the Commission order approving the Settlement. The Parties state that those electing not to join will not be affected by the Settlement, but they also point out that Non-Settling Participants will not share in the benefits of the agreement. If a party does not opt into the Settlement, it may continue to pursue whatever claims it believes it has against Reliant in the Refund Proceeding and other litigation that is covered by the Settlement. By the same token, Reliant can continue to litigate all issues with respect to Non-Settling Participants.

7. Participants in the Settlement will receive refunds and/or offsets against amounts owed according to the Allocation Matrix included as Exhibit B of the Settlement and Release of Claims Agreement. The Allocation Matrix reflects agreed-upon amounts for Emissions Offsets and Fuel Cost Allowances, with allocations of these amounts based on gross control area load. They will be subject to a “true-up” after the Commission issues its allowances determination directing the payment of Fuel Cost Allowances in the Refund Proceeding.<sup>13</sup> Deemed distribution of refunds, in the form of offsets to amounts owed to the CAISO or the CalPX, will be made to other California Parties and to certain other Opt-in Participants listed on Exhibit C of the Settlement and Release of Claims Agreement.

8. Interest on refunds under the Settlement will be paid to the Parties when a Commission order directing the payment of interest in the Refund Proceeding has been issued and has taken effect. All net interest due to Reliant for transactions from January 1, 2000 through June 20, 2001 will be paid to the California Parties.<sup>14</sup>

9. With respect to potential shortfalls in receivables or refunds, the Settlement provides that the California Utilities will be responsible for a portion of shortfalls in receivables or refunds for the Pre-October Period and for the Pre-January 18, 2001

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<sup>11</sup> *Lockyer v. Reliant*, Case No. C-02-1788-VRW (N.D. Cal.).

<sup>12</sup> *See* section 10.3 of the Settlement.

<sup>13</sup> *Id.* at sections 1.26 and 6.4.4 of the Settlement.

<sup>14</sup> *Id.* at sections 1.27 and 4.1.5 of the Settlement.

Period.<sup>15</sup> To the extent there is any excess in receivables or refunds for the Pre-October Period or the Pre-January 18, 2001 Period, the California Utilities are entitled to the excess.<sup>16</sup> CERS will be responsible for any shortfalls in receivables or refunds for the Post-January 17, 2001 Period,<sup>17</sup> and it will be entitled to payment in the amount of any excess in receivables or refunds for the Post-January 17, 2001 Period, except to the extent that any refunds paid to CERS for this period are subsequently reallocated to the California Utilities by agreement of CERS and the California Utilities.<sup>18</sup>

10. Reliant agreed to provide non-monetary compensation, including certain behavioral commitments: 1) Reliant will continue to abide by a must-offer obligation to which it agreed pursuant to a settlement with OMOI<sup>19</sup> for an additional two years beyond the term provided in that settlement;<sup>20</sup> 2) Reliant will continue to abide by the Commission's market behavior rules and applicable CAISO tariff provisions;<sup>21</sup> 3) Reliant will continue to comply with its obligation under the Reliant/OMOI Settlement to report to OMOI and provide OMOI with data regarding sales of electricity in the United States' portion of the Western Electricity Coordinating Council (WECC);<sup>22</sup> 4) Reliant will be subject to semi-annual independent audits of outages, and Reliant's communications will be subject to OMOI review with respect to transactions in the United States portion of the WECC;<sup>23</sup> and, 5) Reliant will institute an antitrust compliance program for officers, directors and employees of Reliant's western commercial operations. This program will include mandatory training for each officer and employee, distribution of written

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<sup>15</sup> Section 1.54 of the Settlement defines the Pre-January 18, 2001 Period as the period from October 2, 2000 through January 17, 2001. When applied to CalPX transactions, the Pre-January 18, 2001 Period means the period from October 2, 2000 through January 31, 2001.

<sup>16</sup> *Id.* at sections 6.5.1 and 6.5.2 of the Settlement.

<sup>17</sup> Section 1.53 of the Settlement defines the Post-January 17 2001 Period as the period from January 18, 2001 through June 20, 2001.

<sup>18</sup> *See* sections 6.5.3, 6.9 and 6.11 of the Settlement.

<sup>19</sup> *See* Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 102 FERC ¶ 61,108 at 61,289 (2003).

<sup>20</sup> *See* section 5.1 of the Settlement.

<sup>21</sup> *Id.* at section 5.2 of the Settlement.

<sup>22</sup> *Id.* at section 5.5.1 of the Settlement.

<sup>23</sup> *Id.* at section 5.5.1 through 5.5.3 of the Settlement.

compliance standards to each officer and employee and an annual review of the compliance program by the officers and directors of Reliant.<sup>24</sup>

11. The Settlement became effective upon approval by the Commission's December 22 Order. Only Port filed a request for rehearing.

## II. Port's Request for Rehearing

12. Port's Statement of Issues identified the following issues in its rehearing request:<sup>25</sup>

- A. Whether the Commission erred in approving the settlement under the Rule 602 "fair and reasonable and in the public interest" standard, when there are genuine issues of material fact in dispute with respect to the financial injury resulting from the conduct alleged in these proceedings;
- B. Whether the Commission's approval of the distribution of settlement proceeds is an unreasonable departure from prior orders in these proceedings or unduly preferential; and,

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<sup>24</sup> *Id.* at section 5.7 of the Settlement.

<sup>25</sup> The Commission observes that Port's "Statement of Issues" in its rehearing request does not accurately describe the issues that are actually presented for discussion in Port's "Discussion," the portion of its request for rehearing that purports to expand upon the issues outlined in the "Statement of Issues." The wording of the issues identified in Port's "Statement of Issues" is inconsistent with the manner in which Port describes and discusses the issues later in the body of the rehearing request. Moreover, Port fails to discuss a number of the citations and Commission precedents identified in the "Statement of Issues" as supporting its arguments in the body of its pleadings. The result is that Port's request for rehearing is a disorganized explication of issues and incomplete discussion of legal precedent upon which Port claims to rely. Finally, because Port's "Statement of Issues" is more in the nature of a series of rhetorical questions, the Commission is restating them as issues for purposes of addressing Port's rehearing requests. The Commission refers Port to the Commission's Order No. 663-A, issued on March 17, 2006, with a March 23, 2006 effective date. This order requires that requests for rehearing contain a separate section, "Statement of Issues," that sets forth the issues that will be addressed and the Commission precedent and case law upon which the party will rely in its request for rehearing. Order No. 663-A is a clarification of Order No. 663, which was in effect when Port filed its request for rehearing. However, the requirements for requests for rehearing in Order No. 663 were not changed by Order No. 663-A. *See Revision of Rules of Practice and Procedure Regarding Issue Identification*, 114 FERC ¶61,284 (2006), 71 *Fed. Reg.* 14640 (2006).

- C. Whether the record supports the Commission's determination that the Settlement provides adequate protection of the interests of Non-Settling Participants.

Port raised these and other issues in its comments on the Settlement, and the Commission determined that they were without merit.<sup>26</sup>

- A. **Whether the Commission erred in approving the settlement under the Rule 602 "fair and reasonable and in the public interest" standard, when there are genuine issues of material fact in dispute with respect to the financial injury resulting from the conduct alleged in these proceedings.**

13. Port argues that the Commission cannot approve the Settlement, because it is contested, there are genuine issues of material fact that remain in dispute, and there is an inadequate record upon which to resolve the factual disputes. Therefore, Port asserts that the Commission cannot approve the Settlement under the "public interest standard" set out in Rule 602 of the Commission's regulations.<sup>27</sup> In support of its assertion that the record does not support the Commission's determinations in the December 22 Order, Port asserts:

[T]he Commission cannot possibly make such a public interest determination based upon the record, where there has been absolutely no quantification of the injury that the settlement is designed to address. ... The Commission seems satisfied simply because the parties to the settlement are satisfied; but it is well settled that the settling parties are happy about the terms of a settlement are inadequate to support a finding of public interest as to any settlement under the Federal Power Act and implementing precedents."<sup>28</sup>

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<sup>26</sup> December 22 Order at PP.26-40.

<sup>27</sup> Port rehearing request at 38, *citing* 18 C.F.R. § 385.602(g) (3). Under Rule 602(g) (3) of the Commission's Rules of Practice and Procedure, the Commission may approve an uncontested offer of settlement if it finds that the settlement "is fair and reasonable and in the public interest." If a settlement is contested, the Commission may approve it if it finds that the record contains sufficient evidence to base a reasoned decision or the Commission determines that there is no genuine issue of material fact. 18 C.F.R. § 385.206 (h) (1) (i).

<sup>28</sup> *Id.* at 38, *citing High Island Offshore System, L.L.C.*, 110 FERC ¶ 61,043 (2005), which in turn quotes from *Tejas Power Corp.*, 908 F.2d 998, 1003 (D.C. Cir. 1990), which is the case cited in Port's "Statement of Issues" in its rehearing request at 4.

Port claims that the Commission, in approving the Settlement, has not fulfilled its duty “to make a fact based determination that the settlement provisions are in the public interest, and not just in the ‘private’ interests of the settling parties.”<sup>29</sup>

14. In support of its assertion that the Commission is precluded from approving the Settlement because of the existence of material issues of fact in dispute, Port cites pleadings by the California Parties opposing three earlier settlements in this proceeding involving Reliant and units of the Commission’s staff.<sup>30</sup> Among the California Parties’ allegations were that each of these settlements was based on an incomplete record and provided inadequate remedies. In addition, with respect to the Reliant III settlement, the California Parties alleged the existence of disputed issues of material fact.<sup>31</sup> Port acknowledges that it adopted the Comments and Exhibits of the California Parties (except with respect to comments pertaining to the distribution of settlement proceeds) in its April 5, 2004 request for rehearing of the Reliant III settlement.<sup>32</sup> Port cites the California Parties’ position on the earlier settlements as indicating that material facts remain in dispute and the record does not support approval of the settlement.

### **Commission Determination**

15. The crux of Port’s argument is that the Commission erred in approving the Reliant Settlement under Rule 602, because of the existence of disputes as to material facts and the inadequacy of the record to support a determination that the Settlement is fair and reasonable and in the public interest. In its request for rehearing, Port fails to identify any material issues of fact in dispute, other than unsupported assertions that “there has been absolutely no quantification of the injury that the settlement is designed to address,” and vague references to the California Parties’ prior pleadings opposing prior Reliant settlements.

16. For example, Port asserts that “one need only point to the materials submitted by the California Parties . . . to demonstrate that genuine issues of material fact are in

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

<sup>30</sup> Port at 28-32, describes these settlements as the Reliant I Settlement, between Reliant and the Commission’s Investigative Staff; the Reliant II Settlement, between Reliant and OMOI; and the Reliant III Settlement between Reliant and the Commission’s Trial Staff. The December 22 Order describes these settlements at 113 FERC ¶61,308, P.6 and n.11-13 (2005).

<sup>31</sup> *Id.* at 30-32.

<sup>32</sup> *Id.* at 39.

dispute.”<sup>33</sup> Yet Port does not even summarize these purported issues of fact. In addition, a cursory reading of section 4.1 of the Settlement reveals a detailed quantification of the payments to be made as a result of the actions of Reliant in the California market disruptions of 2000-2001. The Settlement provides that Reliant will provide at least \$512,000,000 in monetary consideration, including the following:

- Assignment to the California Parties of Reliant’s rights and claims to payment by or from the CalPX and/or the CAISO for the sales of energy and ancillary services into the California power markets during the period from January 1, 2000 through June 20, 2001. According to the Settlement, the assigned receivables are estimated to total \$299,546,045, before interest, which includes \$31,253,850 that reflects a reversal of the CalPX soft cap adjustment;<sup>34</sup>
- Amounts related to Reliant’s prior settlements with the Commission’s Trial Staff and OMOI. These consist of: \$836,000.16 previously negotiated in the Reliant Gaming Settlement;<sup>35</sup> \$13,817,274 previously negotiated between Reliant and FERC staff with respect to withholding during the period of June 20 and 21, 2000;<sup>36</sup> and \$50,000,000 previously negotiated by Reliant and OMOI in the Reliant/OMOI Settlement;<sup>37</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> See section 4.1.1 of the Settlement. The CalPX soft cap adjustment is the result of a series of Commission orders in the California Refund Proceedings pursuant to which sellers bidding were compensated up to the level of the “soft cap” (also referred to as the “break point”) for bids into the CalPX real-time market. Bids above the soft cap resulted in reporting requirements and the potential for the seller to have to forfeit bid amounts in excess of the soft cap under certain circumstances. The soft cap procedure is set out in *San Diego Gas & Electric Company*, 95 FERC ¶ 61,115, at 61,359 (2001).

<sup>35</sup> See Agreement and Stipulation in Docket No. EL03-170-000, *Reliant Energy Services, Inc.*, 106 FERC ¶ 61,207 (2004).

<sup>36</sup> See *Fact Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, Docket No. PA02-2-001, 102 FERC ¶ 61,108 (2003).

<sup>37</sup> See Stipulation and Consent Agreement in Docket Nos. EL03-59-000, IN03-59-000, IN03-10-000, and PA02-2-000, *et al.* (the Reliant/OMOI Settlement). This settlement was approved in *Reliant Energy Services, Inc., et al.*, 105 FERC ¶ 61,008 (2003), as modified in *Reliant Energy Services, Inc., et al.*, 108 FERC ¶ 61,278 (2004).

- Assignment to the California Parties of any interest Reliant is owed by the CAISO and CalPX with respect to transactions from January 1, 2000 through June 20, 2001. The Settlement estimates that the interest on Reliant's receivables could range from \$10 million to \$25 million;<sup>38</sup>
- Cash payment of \$131,503,955 by Reliant to the Reliant Refund Escrow established by the California Parties for distribution of proceeds to Settling Participants entitled to refunds in the Refund Proceeding and for other claims and other purposes;<sup>39</sup> and,
- Cash payments of \$3,500,000 to each of the Additional Claimants.

In addition, the Settlement imposes a number of behavioral requirements on Reliant, including semi-annual independent audits of outages and the institution of an antitrust compliance program for the officers, directors and employees of Reliant's western commercial operations.<sup>40</sup> The amounts outlined above arise directly from Reliant's activities during the Settlement Period and are based on calculations of Reliant's refund obligations, as well as its potential exposure to disgorgement of profits in the Gaming Proceeding. The Commission certainly has an understanding of the nature and extent of the injuries the Settlement will address. In approving the Settlement, the Commission concluded that the monetary and non-monetary remedies provided by the Settlement, balanced against the costs and risks of continued litigation, resulted in a Settlement that is in the public interest. Therefore, far from failing to quantify the injuries addressed by the Settlement, it contains detailed allocations of Settlement proceeds to parties that have spent years and considerable resources litigating claims of wrongdoing by Reliant, and it requires Reliant to address concerns about its market behavior.

17. Port's position appears to be that as long as a litigant continues to press its issues, even if supported by only vague allegations of adverse impacts, genuine issues of material fact remain, and a settlement cannot be approved under the "fair and reasonable and in the public interest" standard in Rule 602. The Commission's December 22 Order rejected this argument, finding that "the Settlement does not resolve anything as to Port if it does not opt into the Settlement, and Port retains the ability to pursue its claims against Reliant in the underlying proceedings."<sup>41</sup>

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<sup>38</sup> *Id.* at section 4.1.5 of the Settlement.

<sup>39</sup> *Id.* at section 6.2 of the Settlement.

<sup>40</sup> *See, e.g.*, section 5.5 of the Settlement.

<sup>41</sup> December 22 Order at P.31.

18. The Commission has spoken to the issue of the application of Rule 602 in proceedings in which parties opposing a settlement allege the existence of material factual disputes. In *El Paso Natural Gas*,<sup>42</sup> the Commission stated that:

If a party's interests are not immediately and irreparably affected by approval of a settlement in a consolidated docket, that party's opposition does not create a genuine, material issue. In the absence of any genuine, material issue, we can dispose of the matter before us in a summary fashion. We shall, therefore, treat this as an uncontested offer of settlement.<sup>43</sup>

The December 22 Order found that Port had not supported its assertion of the existence of material facts in dispute or that the Settlement would adversely affect its ability to continue to pursue its claims against Reliant in these proceedings. In its request for rehearing, Port has not provided the Commission with any additional argument to support a finding that its interests are "immediately and irreparably affected by approval" of the Settlement.<sup>44</sup> The Settlement does not settle Port's claims, and it specifically provides that "Nothing herein shall establish any facts or precedents as between the Parties, the Opt-in Participants, and any third parties as to the resolution of any dispute."<sup>45</sup> Having established that there are no remaining genuine issues of material fact, the Commission correctly applied its precedent in approving these settlements as fair and reasonable and in the public interest. For these reasons, the Commission will deny rehearing on this issue.

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<sup>42</sup> 25 FERC ¶ 61,292 (1983).

<sup>43</sup> *Id.* at 61,673.

<sup>44</sup> The Commission notes that Port's rehearing request at 38-39 cites *High Island Offshore System, L.L.C.*, 110 FERC ¶ 61,043 (2005), which in turn quotes from *Tejas Power Corp.*, 908 F.2d 998, 1003 (D.C. Cir. 1990). Port relegates its discussion of these cases to a footnote, which appears to imply that these cases support its assertion that the Commission approved the Reliant Settlement "simply because the parties to the settlement are satisfied." This is incorrect. The Commission weighed carefully the terms of the Settlement, the comments received on the Settlement and determined that the Settlement meets the requirements for approval set out in Rule 602.

<sup>45</sup> See section 15.3 of the Settlement.

**B. Whether the Commission’s approval of the distribution of settlement proceeds is an unreasonable departure from prior orders in these proceedings or unduly preferential.**<sup>46</sup>

19. Port avers that the settlement violates a series of orders of the Commission and the Chief Administrative Law Judge (to which it refers to as “the law of the case”) providing that the allocation of settlements and amounts awarded in the liability phase of the proceedings would not be determined until that phase concluded.<sup>47</sup> Port argues that the Commission’s December 22 Order violates “the law of the case” by allowing the distribution of settlement proceeds “prior to and outside of the allocation phase of this proceeding,” and that, by so doing, the Commission’s orders are unduly preferential and/or unduly discriminatory toward the parties to the settlements.<sup>48</sup>

**Commission Determination**

20. Port has presented neither legal authority nor persuasive arguments as to why the Commission’s December 22 Order “violates the law of the case” by approving the allocation of funds from the earlier Reliant settlements. As was pointed out by the Settling Parties in their joint reply comments, the Settlement does not limit Port’s ability to assert claims in the Gaming Proceeding should the scope of that proceeding be expanded as a result of actions by the reviewing court.<sup>49</sup>

21. With respect to whether the settlement violates the prior orders of the Chief Administrative Law Judge, Port made identical arguments in opposing two similar settlements, one involving Enron, the California Parties and OMOI, and the other involving Enron and Salt River Project Agricultural Improvement and Power District. The Presiding Administrative Law Judge dismissed the identical arguments, finding that: “Port’s allegations concerning allocation of funds are premature since there is a mechanism in place to distribute monetary awards in the Partnership/Gaming proceeding, a distribution phase after the liability phase. *See Duke Energy Trading and Mktg, L.L.C,*

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<sup>46</sup> Port’s Statement of Issues cites five Commission precedents upon which it purports to rely in its discussion of this issue, but none of these cases are cited, much less discussed in Port’s discussion of this issue.

<sup>47</sup> Port rehearing request at 34-37.

<sup>48</sup> *Id.* at 5, 34-36.

<sup>49</sup> Joint reply comments of Reliant, the California Parties and OMOI, at n.21, citing *Port of Seattle v. FERC*, No. 04-71331 (9<sup>th</sup> Cir.) and *Pacific Gas & Elec. Co., et al.*, Nos. 05-71008, *et al.* (appeals of the Gaming Settlement and other gaming proceedings in Docket Nos. EL03-137-000, *et al.*).

Order of the Chief Judge Consolidating Distribution Issue for Hearing (December 22, 2003).<sup>50</sup>

22. Finally, the Settlement itself provides that “the allocable share of the \$50 million attributable to Non-Settling Participants will be held for later distribution in the Partnership/Gaming Proceeding.”<sup>51</sup> For these reasons, the Commission denies rehearing on this issue.

**C. Whether the record supports the Commission’s determination that the Settlement provides adequate protection of the interests of Non-Settling Participants.**

23. Port asserts that its interests are adversely affected by the distribution of settlement proceeds, because the Settlement does not adequately protect non-settling parties. For this reason, Port explains that it wants the proceeds of the prior settlements to be held in “a segregated fund for allocation in Phase II of these proceedings.”<sup>52</sup> Port also continues to allege that it will be adversely affected by the settlement, because it “simply allows the settling parties to take the money and run,” without any basis for concluding that the settlement is in the public interest. Port asserts that the fact that the Settlement does not establish any facts or precedents with respect to non-settling participants “is among its failings, not its virtues.”<sup>53</sup> Finally, Port asserts that, because the bulk of the Settlement proceeds are “destined for California,” the Settlement is “nothing more than an arbitrary and capricious power grab by the California Parties, intended to exclude the Port of Seattle and other Pacific Northwest Parties from the settlement proceeds.” Therefore, Port concludes that the Settlement is unduly discriminatory.<sup>54</sup>

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<sup>50</sup> See Certification of Partial Contested Settlement, 113 FERC ¶ 63,002, at P.77 (2005) (Global Settlement). With respect to the Enron-SRP Settlement, the presiding administrative law judge’s Certification of Partial Contested Settlement makes a similar finding under Rule 602 (h)(i)-(ii). See 113 FERC ¶ 62,025 at P.24 (2005).

<sup>51</sup> Joint Explanatory Statement at 11, n.23. See also section 4.1.2 (iii) of the Settlement.

<sup>52</sup> *Id.* at 36.

<sup>53</sup> *Id.* at 37.

<sup>54</sup> *Id.* at 40.

**Commission Determination**

24. As was stated in the December 22 Order, the Settlement provides a number of protections for Non-Settling Participants. For example, section 9.1 ensures that Non-Settling Participants will not be bound by the Settlement. Section 6.4.8 governs the disposition of refunds to Non-Settling Participants at the conclusion of the Refund Proceeding, and section 6.5 of the Settlement provides backstop protection insulating Non-Settling Participants against potential shortfalls in refunds and receivables. Section 8.1.1 specifically provides that the Settlement does not settle the claims of Non-Settling Participants in the Refund Proceeding. For these reasons, the December 22 Order found that the Settlement protects the rights of Non-Settling Participants, and their ability to pursue claims against Reliant will not be adversely affected by the Settlement.

25. With respect to Port's allegations that the Settlement is unduly discriminatory because of the percentage of funds that will go to California interests, the Commission notes that a number of refund recipients listed in the Allocation Matrix (Exhibit B to the Settlement) are not California entities. Moreover, the Attorneys General for the States of Oregon and Washington will receive payments as Additional Settling Parties. As the December 22 Order stated, "The Settlement is a comprehensive and reasonable effort by the Parties to end their litigation and resolve their legal disputes. Port does not have to join the Settlement, and its right to continue to litigate is unaffected by the Settlement. Therefore, the Commission finds that the Settlement is not unjust, unreasonable, unduly preferential and unduly discriminatory." For these reasons, the Commission will deny rehearing on this issue.

**The Commission orders:**

(A) Port's request for rehearing of the December 22 Order is denied as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.