

128 FERC ¶ 61,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly and Philip D. Moeller.

San Diego Gas & Electric Company

Docket No. EL00-95-231

v.

Sellers of Energy and Ancillary Services
into Markets Operated by the California
Independent System Operator Corporation and the
California Power Exchange Corporation

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

Docket No. EL00-98-216

Puget Sound Energy, Inc.

Docket No. EL01-10-048

v.

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. IN03-10-049

Fact-Finding Investigation Into Possible
Manipulation of Electric and Natural Gas Prices

Docket No. PA02-2-065

State of California, *ex rel.* Bill Lockyer, Attorney
General of the State of California

Docket No. EL02-71-022

v.

British Columbia Power Exchange Corp.

ORDER DENYING REHEARING

(Issued September 14, 2009)

1. In this order, the Commission denies a request for rehearing filed by the Sacramento Municipal Utility District (SMUD) of the Commission's July 1, 2009 order approving a settlement agreement (Settlement) between the California Parties¹ and AES Placerita, Inc. (AES Placerita) (collectively, the Parties) in the above-captioned proceedings.²

Background

2. On May 13, 2009, the California Parties and AES Placerita filed the Settlement, which resolved certain claims arising from events and transactions in the western energy markets during the period January 1, 2000 through June 20, 2001 as they relate to AES Placerita.³ According to the Settlement's Explanatory Statement, AES Placerita owns a 120 MW generating facility in Newhall, California, from which it made sales during the settlement period. However, the Parties also pointed out that the facility is currently mothballed and had suffered a compressor failure that caused significant damage to one of the facility's gas turbines. The Settlement's monetary consideration consists of an approximately \$6 million insurance payment that AES Placerita received as a result of the compressor failure. These proceeds would be distributed in accordance with an allocation matrix that was included as part of the Settlement. Under the Settlement, SMUD and other specified entities were classified as Deemed Distribution Participants, which, according to the Settlement, means that these entities owed more to the California Independent System Operator Corporation (CAISO) or the California Power Exchange (CalPX) than what they were owed under the allocation matrix. Under the Settlement,

¹ The California Parties include: Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SoCal Edison), San Diego Gas & Electric Company (SDG&E), the People of the State of California, *ex rel.* Edmond G. Brown, Attorney General, and the California Public Utilities Commission (CPUC). For purposes of this Settlement, the California Parties also include the California Department of Water Resources (CERS) (acting solely under authority and powers created by California Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in sections 80000 through 80270 of the California Water Code).

² *San Diego Gas & Electric Co.*, 128 FERC ¶ 61,004 (2009) (July 1 Order).

³ *See* Joint Offer of Settlement at 1-2.

Deemed Distribution Participants would therefore receive a credit against what they owe to the CAISO or CalPX rather than receive a cash payment.

3. The July 1 Order approved the Settlement over the objections of SMUD, finding that the overall result of the Settlement was just and reasonable and rejecting SMUD's arguments on the merits.

Request for Rehearing

4. SMUD raises two arguments on rehearing. First, SMUD argues that the Commission erred in rejecting its contention that the Settlement was unduly discriminatory because it classified SMUD as a Deemed Distribution Participant. Second, SMUD argues that the Commission erred in approving the Settlement because the Settlement disposes of all of AES Placerita's assets to settling participants, thereby unduly discriminating against non-settling parties. We address each of these arguments below.

Undue Discrimination

5. In its rehearing request, SMUD asserts that the Commission erred in approving the Settlement because the Settlement effectively forces SMUD to waive its statutory rights in order to receive the benefits of the Settlement and therefore discriminates against SMUD in its capacity as a non-jurisdictional entity. SMUD claims that the Commission's response to this argument in the July 1 Order offered a *non sequitur*, namely, by stating that SMUD had not demonstrated that it is being treated differently from other Deemed Distribution Participants. SMUD argues that it has long been settled that undue discrimination involves either the dissimilar treatment of similarly situated parties or the similar treatment of dissimilar parties.⁴ SMUD contends that non-jurisdictional entities are differently situated from jurisdictional entities because non-jurisdictional entities cannot be ordered by the Commission to pay refunds; consequently, the Commission's failure to treat SMUD like other purchasers that also do not make jurisdictional sales is unduly discriminatory.

6. The Commission denies rehearing. SMUD attempts to clarify its previous argument that it should be offered a settlement that is substantially similar to the settlement agreement offered to similarly situated customers. Specifically, SMUD asserts that it should be treated similarly to other customers that are *not* Deemed Distribution

⁴ SMUD Rehearing Request at 4 (citing *Ala. Elec. Coop. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982) (*Alabama Electric Cooperative*)).

Participants.⁵ We disagree with SMUD's contention that the Settlement is unduly discriminatory, even in light of this clarification. Instead, we continue to find that the Settlement's designation of certain entities as Deemed Distribution Participants is not unduly discriminatory, because this designation does not take into account the jurisdictional status of any particular entity. Rather, the Settlement designates entities as Deemed Distribution Participants based on whether those entities have amounts outstanding and payable to the CAISO and/or CalPX. Deemed Distribution Participants are not precluded from recovery under the Settlement and, pursuant to section 5.2.2 of the Settlement, these parties will receive a credit against their outstanding amounts owed to the CAISO and/or CalPX. Moreover, even if those Settlement provisions governing Deemed Distribution Participants could be construed as discriminatory to the extent they establish two tiers of settlement refund recipients, we conclude that any such discrimination is not undue because, under the Settlement, Deemed Distribution Participants and Net Refund Recipients are not similarly situated. Unlike Deemed Distribution Participants, entities designated as Net Refund Recipients do not have outstanding amounts owing to the CAISO and/or CalPX. Therefore, those provisions of the Settlement do not violate the Federal Power Act (FPA),⁶ which prohibits only undue discrimination.⁷

7. SMUD contends that, because it is a non-jurisdictional entity and, therefore, cannot be ordered by the Commission to pay refunds, SMUD cannot have net amounts payable to the CAISO and/or CalPX. SMUD asserts that it should be considered a refund recipient under the Settlement, rather than a Deemed Distribution Participant. However,

⁵ Although SMUD claims that the Commission has only offered it a *non sequitur* in response to its undue discrimination claim, we note that SMUD has only recently taken the opportunity to assert that the Commission incorrectly interpreted SMUD's argument, despite the fact that the Commission previously addressed this same argument, and reached similar conclusions, in several similar proceedings. *See, e.g., San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 28-32 (2009) (addressing SMUD's undue discrimination argument); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,297, at P 29-30 (2007); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 28 (2007). SMUD did not seek rehearing or clarification of these earlier orders.

⁶ 16 U.S.C. § 791, *et seq.* (2006).

⁷ *See, e.g., Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369 (2007) ("the FPA does not prohibit all discrimination, only undue discrimination. In general, discrimination is 'undue' when there is a difference of rates, terms or conditions among similarly situated customers. The Commission has broad discretion in determining when discrimination is undue.") (internal citations omitted).

SMUD confuses the *legal* issue of whether the Commission can require it to pay refunds under FPA section 206 with the *factual* issue of whether SMUD owes money to the CAISO and/or CalPX. The Settlement does not suggest that SMUD owes refunds pursuant to the FPA, but rather suggests that SMUD may owe money to the CAISO and/or CalPX. While the United States Court of Appeals for the Ninth Circuit's (Ninth Circuit) *Bonneville* decision⁸ did find that the Commission lacked authority to order governmental entities or other non-public utilities to pay refunds, the Ninth Circuit took no position on whether any remedies were available outside the context of the FPA.⁹ As such, SMUD's contention that its treatment as a Deemed Distribution Participant under the Settlement is unduly discriminatory, and its related claim that its status as a non-jurisdictional entity means that it has no amounts owed to the CAISO and/or CalPX, are without merit.

8. The Commission also finds irrelevant SMUD's reliance on *Alabama Electric Cooperative*. That case involved a public utility's rate design that would have been equally applicable to all of its customers, none of which would have had the opportunity to "opt out" of the utility's rates. In contrast, according to the terms of the Settlement at issue here, SMUD and others possess the ability not to opt in to the Settlement and are not bound by its provisions.

Disposition of AES Placerita's Assets

9. SMUD also contends that the July 1 Order erred because it failed to reject the Settlement's preferential disposition of AES Placerita's insurance proceeds. SMUD contends that this feature of the Settlement unduly discriminates against non-settling parties. SMUD notes that the Commission can approve a contested settlement and sever non-settling parties, but only where severance does not prejudice the rights of such non-settling parties in litigation.¹⁰ While SMUD acknowledges that it and other non-settling parties assume the risk that the refunds ultimately ordered in litigation may be less than

⁸ *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (*Bonneville*), *order on remand*, 121 FERC ¶ 61,067 (2007), *order on reh'g*, 125 FERC ¶ 61,214 (2008).

⁹ *Bonneville*, 422 F.3d at 925 ("The focus on the agreements between the Public Entities and ISO and CalPX only serves to demonstrate that the remedy, if any, may rest in a contract claim, not a refund action."); *see id.* at 926 ("we take no position on remedies available outside of the FPA.").

¹⁰ SMUD Rehearing Request at 5 (citing *Southern Cal. Edison Co. v. FERC*, 162 F.3d 116, 119 (D.C. Cir. 1998)).

what they could have obtained under a settlement, it argues that if the terms of a settlement diminish the ability of non-settling parties to receive any refunds ultimately ordered if they prevailed in litigation, then they have been unduly and unlawfully prejudiced. SMUD points to the Commission's recent rejection of a request to set aside \$160 million of the funds held in the CalPX's Settlement Clearing Account to fund a potential settlement based, in substantial part, on the determination that such a set aside may favor the Los Angeles Department of Water and Power (LADWP) to the detriment of other claimants.¹¹ SMUD notes that the Commission found the potential discrimination to be undue.

10. SMUD argues that if the revenues allocated under the Settlement were the sole funds available to satisfy AES Placerita's refund obligation, its ability to pursue its claims against AES Placerita would be an illusory right.¹² The fact that the insurance proceeds will be unavailable to satisfy any refund obligation to SMUD through continued litigation means that non-settling parties will not simply be assuming the risks of litigation that would have been incurred had there been no Settlement. Rather, in such a circumstance, non-settling parties will be pursuing their claims against an entity that is essentially judgment proof.

11. We deny rehearing. First, under our *Trailblazer* standard for addressing contested settlements,¹³ severing contesting parties is but one of four separate options that the Commission may consider when determining whether a contested settlement should be approved.¹⁴ The Commission is therefore not required to sever contesting parties in order to approve a contested settlement. Indeed, we have stated that severance should be

¹¹ *Id.* at 6 (citing *San Diego Gas & Electric Co.*, 127 FERC ¶ 61,268, at P 42 (2009) (*LADWP Settlement Order*)).

¹² SMUD states, without further elaboration, that other revenues are available to pay refunds to contesting parties. *See* SMUD Rehearing Request at n.2.

¹³ *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,005 (1999) (*Trailblazer*).

¹⁴ The four options are: (1) the Commission makes a decision on the merits of each contested issue; (2) the Commission determines that the settlement provides an overall just and reasonable result; (3) the Commission determines that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated; or (4) the Commission determines that the contesting parties can be severed. *Trailblazer*, 85 FERC ¶ 61,345 at 62,342-45.

the option of last resort.¹⁵ In this case, we did not need to consider that step because we rejected SMUD's objections to the Settlement on the merits and found the overall result of the Settlement to be just and reasonable, consistent with *Trailblazer*.¹⁶ The July 1 Order found that allocating the \$6 million in insurance proceeds was a reasonable means of ensuring that ratepayers are allocated monies related to AES Placerita's transactions during the settlement period.¹⁷ AES Placerita has no significant assets other than the \$6 million in insurance proceeds it received for its facility's compressor failure. The Settlement proposed to allocate all of those proceeds to settling participants and, ultimately, to ratepayers. We affirm that this is a reasonable approach to ensure that ratepayers receive settlement proceeds related to AES Placerita's transactions during the settlement period. In the absence of this arrangement, it may be difficult for ratepayers to receive any settlement monies related to these transactions. Further, if SMUD had chosen to opt into the Settlement, it would have received a specified allocation (in the form of credits, as provided for in the Settlement). SMUD would be in no worse position than if the case were litigated because the amount that would have been allocated to it under the Settlement will be held back by AES Placerita.¹⁸ Therefore, if SMUD prevailed in litigation, it would be in a position to receive at least the amount it would have been allocated had it opted into the Settlement.¹⁹

12. We further find that SMUD's reliance on the *LADWP Settlement Order* is misplaced. The *LADWP Settlement Order* involved an entirely different set of considerations, not least of which is that the requested set aside was not even part of the underlying settlement that was the primary subject of that order. Instead, the issue was raised in a separate motion filed subsequent to the settlement under consideration. The motion requested the set aside so that there would be sufficient funds related to a *potential* future settlement between LADWP and the California Parties. In response, the Commission stated that "[w]ithout having the opportunity to review the complete terms and conditions of the Potential California Parties-LADWP Settlement, the Commission

¹⁵ See, e.g., *El Paso Nat. Gas Co.*, 120 FERC ¶ 61,208, at P 52 (2007).

¹⁶ July 1 Order, 128 FERC ¶ 61,004 at P 18.

¹⁷ *Id.* P 33.

¹⁸ See Settlement, § 5.5.

¹⁹ As noted above, SMUD suggests that other revenues are available to satisfy refund obligations, if any are ultimately determined to be owed to contesting parties, above what is provided for in the Settlement. See SMUD Rehearing Request at n.2.

finds that this potential discrimination to be undue.”²⁰ Thus, the Commission did not reject the set-aside out of hand; rather, it stated that it would review any set-aside in the context of an actual settlement. By contrast, in this case, we have reviewed the terms and conditions of the Settlement, and have found that the Settlement provides a just and reasonable mechanism for ensuring that ratepayers ultimately receive settlement monies as a result of AES Placerita’s transactions during the settlement period.

13. Moreover, as SMUD also notes, the *LADWP Settlement Order* expressly stated that the effect of the set aside might be to effectively benefit a single entity – LADWP – at the expense of all other claimants.²¹ That is not the case here. Indeed, SMUD is the only party that is opposed to the Settlement, and a number of entities have opted into it. To the extent that other non-settling parties exist, they have neither chosen to seek intervenor status nor have they indicated any fault with the Settlement’s mechanism for allocating the settlement funds. Therefore, it is not the case that the “set aside” of the insurance proceeds in the Settlement benefits one or even a select few at the expense of all others. We therefore find unavailing SMUD’s attempt to compare this proceeding with the *LADWP Settlement Order* proceeding.

14. Finally, contrary to SMUD’s assertion, we do not agree that the July 1 Order’s discussion of SMUD’s litigation risk misses the point of its argument. As we noted in the July 1 Order,²² and as SMUD acknowledges in its rehearing request,²³ non-settling parties assume litigation risks when they choose not to join a settlement, including the risk of recovering less than what it would have received had it opted into a settlement. Moreover, a non-settling party also will not be able to take advantage of other benefits of a settlement, such as the release of certain claims. We find it appropriate to note that SMUD has taken the risk of recovering less than what it would receive under the terms of the Settlement. The Commission continues to conclude that the Settlement’s disposition of AES Placerita’s insurance proceeds presented a just and reasonable mechanism for ensuring that ratepayers obtain settlement monies related to AES Placerita’s transactions in the California energy markets during the settlement period. We acknowledge that it is possible that SMUD could obtain a greater recovery than what is provided in the

²⁰ *LADWP Settlement Order*, 127 FERC ¶ 61,268 at P 42.

²¹ *See id.*

²² July 1 Order, 128 FERC ¶ 61,004 at P 33.

²³ SMUD Rehearing Request at 6.

Settlement. However, that is the risk that SMUD voluntarily undertook. As discussed above, we are not convinced by SMUD's arguments and find that the Settlement may be approved under *Trailblazer*.

The Commission orders:

SMUD's request for rehearing is denied, as discussed in the body of this order.

By the Commission. Commissioner Spitzer not participating.

(S E A L)

Kimberly D. Bose,
Secretary.