

UNITED STATES OF AMERICA 115 FERC ¶61,230  
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company Docket No. EL00-95-000

v.

Sellers of Energy and Ancillary Services

Investigation of Practices of the California Docket No. EL00-98-000  
Independent System Operator Corporation  
and the California Power Exchange

Puget Sound Energy, Inc. Docket No. EL01-10-000

v.

All Jurisdictional Sellers of Energy and/or  
Capacity at Wholesale Into Electric  
Energy and/or Capacity Markets in the  
Pacific Northwest, Including Parties to  
the Western System Power Pool  
Agreement

Investigation of Anomalous Bidding Behavior Docket No. IN03-10-000  
And Practices in Western Markets

Fact-Finding Investigation Into Potential Docket No. PA02-2-000  
Manipulation of Electric and Natural Gas  
Prices

Idaho Power Company Docket No. EL03-156-000

Idaho Power Company Docket No. EL03-189-000

Cities of Anaheim, Azusa, Banning, Colton, Docket Nos. EL00-111-000, and  
And Riverside, California EL00-111-008

v.

California Independent System Operator  
Corporation

Docket No. EL00-95-000, *et al.*

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Salt River Project Agricultural Improvement  
And Power District

Docket No. EL01-84-000

v.

California Independent System Operator  
Corporation

California Independent System Operator  
Corporation

Docket No. ER01-607-000

## ORDER APPROVING SETTLEMENT AGREEMENT

(Issued May 22, 2006)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement Agreement (collectively, the Settlement) filed on February 17, 2006 in the instant proceedings by Idaho Power Company, IDACORP Energy L.P.,<sup>1</sup> the California Parties,<sup>2</sup> and the Commission's Office of Market Oversight and Investigations (OMOI) (collectively, the Parties). The February 17 filing consists of the "Joint Offer of Settlement," a "Joint Explanatory Statement," a "Settlement and Release of Claims Agreement," and other supporting documentation and was filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.<sup>3</sup> The Settlement resolves matters and claims raised in the captioned proceedings arising from events in the California Independent System Operator (CAISO) and California Power Exchange (CalPX) energy

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<sup>1</sup> Pursuant to the Settlement, Idaho Power Company and IDACORP Energy L.P. are referred to as "IDACORP."

<sup>2</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 Department of Water Resources acting solely under the authority and powers created by California Assembly Bill 1 from the First Extraordinary Session of 2000-2001, codified in sections 80000 through 80270 of the California Water Code (CERS); the California Electricity Oversight Board (CEOB); and the California Public Utilities Commission (CPUC).

<sup>3</sup> 18 C.F.R. § 385.602 (2005).

and ancillary services markets during the period of January 1, 2000 through June 20, 2001<sup>4</sup> as they relate to IDACORP. This order approves the Settlement, with conditions discussed *infra*.

## **I. Background on Proceedings Affected by the Settlement**

2. The Settlement resolves all claims against IDACORP by the Settling Participants,<sup>5</sup> and all claims against the Settling Participants by IDACORP, for damages, refunds, disgorgement of profits, or other monetary or non-monetary remedies, in the Commission's Refund Proceeding (Docket Nos. EL00-95-000 and EL00-98-000), the Pacific Northwest proceeding (Docket No. EL01-10-000), the Gaming Proceeding (Docket No. EL03-156-000), the Partnership Proceeding (Docket No. EL03-189-000),<sup>6</sup> and the Commission's enforcement proceedings (Docket Nos. PA02-2-000 and IN03-10-000), except that the Settlement does not resolve claims that IDACORP may have against Additional Settling Participants in Docket Nos. EL00-95-000 and EL01-10-000 as discussed below. The Settlement also resolves claims by the California Parties against IDACORP arising from the *Lockyer v. FERC* Remand.<sup>7</sup>

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<sup>4</sup> Section 1.60 defines this time period as the "Settlement Period."

<sup>5</sup> Section 1.59 of the Settlement defines "Settling Participants" as the California Parties and "Additional Settling Participants." Section 1.1 defines an "Additional Settling Participant" as a Participant that has elected to participate in the Settlement, as provided in Article VII of the Settlement. Section 1.42 defines "Participants" as those entities that directly sold energy to or purchased energy from the CAISO or the CalPX during part or all of the Settlement Period.

<sup>6</sup> In a January 22, 2004 Order, the Commission granted Trial Staff's motion to dismiss IDACORP from the show cause order in the Partnership Proceeding. *See Colorado River Comm'n of Nevada, et al.*, 106 FERC ¶ 61,022 (2004). No party filed a timely request for rehearing with respect to IDACORP.

<sup>7</sup> As defined in section 1.36, the *Lockyer v FERC* Remand means proceedings conducted by the Commission in Docket No. EL02-71 pursuant to the decision of the U.S. Court of Appeals for the Ninth Circuit in *Lockyer v FERC*, 9<sup>th</sup> Cir. Case No. 02-73093, to the extent these proceedings involve refunds from the establishment of just and reasonable rates in the California markets during the Settlement Period.

3. On the same date the Settlement was filed, IDACORP and Idaho Power Company filed a motion with the Commission for an order directing the CalPX to return all chargeback amounts obtained from IDACORP.<sup>8</sup> As provided in section 7.1.8 of the Settlement, the California Parties support this motion. According to the motion, IDACORP is owed \$2.27 million in chargeback amounts that are held by the CalPX.<sup>9</sup> The CalPX answer, filed March 6, 2006 takes no position on the motion, but CalPX raises concerns that it will have insufficient funds to cover payments required by the settlement. CalPX raises the same concerns in its comments on the Settlement, discussed *infra*.<sup>10</sup> The IDACORP motion is unopposed.

4. In addition, the Settlement resolves disputes related to IDACORP's appeal of the Commission's orders involving the CAISO's neutrality charge in Docket Nos. EL00-111-000, EL01-84-000, and ER01-607-000.<sup>11</sup> The Commission issued orders in

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<sup>8</sup> Section 1.12 of the Settlement defines "chargeback amounts" as amounts collected by CalPX "in response to alleged defaults by PG&E and Southern California Edison Company, as generally described in *Pacific Gas and Electric Company v. California Power Exchange Corp.*, 95 FERC ¶ 61,020 (April 6, 2001)." The CalPX's use of the chargeback mechanism has been subject to considerable litigation and a number of Commission orders. In early 2001, PG&E and SoCal Edison defaulted on a total of over \$1.2 billion owed to the CalPX. Among the steps taken by CalPX to deal with these defaults was the application of the chargeback mechanism to market participants. A chargeback is an allocation mechanism intended to allow the CalPX to recover the uncollected receivables of a defaulting CalPX debtor from the other remaining market participants. In the order cited in section 1.12 of the Settlement, the Commission determined that the chargeback mechanism was unjust and unreasonable and ordered the CalPX to rescind prior chargeback actions and refrain from taking future chargeback actions. In response, the CalPX credited chargebacks on account summaries issued to CalPX participants, but it did not return the cash collected pursuant to the chargeback mechanism. The Commission recently clarified that chargeback amounts may be retained only until it is determined that an individual seller will owe nothing as a result of the Refund Proceeding or it settles its portion of the Refund Proceeding. *Coral Power, L.L.C., et al. v. FERC*, 110 FERC ¶61,288 (2006).

<sup>9</sup> IDACORP motion at 2, n.2. IDACORP filed its motion in the EL00-95-000 and EL00-00-98-000 dockets.

<sup>10</sup> CalPX answer at 3-4; CalPX comments at 2-4.

<sup>11</sup> *IDACORP Energy L.P. v. FERC*, D.C. Cir. No. 04-1145 (the *Neutrality Case*).

October 2003 and March 2004 approving recovery of certain charges by the CAISO, called “neutrality charges.”<sup>12</sup> IDACORP and others appealed these orders, and on January 10, 2006, the U.S. Court of Appeals for the D.C. Circuit issued an order upholding portions of the orders and finding certain other portions of the orders to be arbitrary and capricious. The court’s mandate has not issued.<sup>13</sup>

5. Finally, the Settlement would give effect to an earlier settlement between the Commission’s Trial Staff and Idaho Power under which IDACORP agreed to pay \$83,373 into a Deposit Fund Account established by the U.S. Treasury on behalf of the Commission for the purpose of collecting settlement funds from market participants identified in the show cause order in the Gaming Proceeding. According to the Presiding Administrative Law Judge’s order certifying this settlement to the Commission, the settlement payment represents the total amount of congestions revenues (as opposed to profits) received by Idaho Power as a result of so-called “circular scheduling,”<sup>14</sup> and this amount was more than Idaho Power could have been compelled to pay had the case been

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<sup>12</sup> *Cities of Anaheim, et al. v. California Independent System Operator Corp.*, 105 FERC ¶ 61,021 (2003), *reh’g denied*, 106 FERC ¶ 61,205 (2004).

<sup>13</sup> *Supra*, n.8. On February 16, 2006, IDACORP requested an extension of the date upon which requests for rehearing of the court’s decision were due, and thus the date upon which the mandate would issue, pending the Commission’s consideration of this Settlement.

<sup>14</sup> As defined by the Gaming Practices Show Cause Order, *American Electric Power Service Corp., et al*, 103 FERC ¶ 61,345 at P.43 (2003), “circular scheduling” is described as follows:

The Circular Scheduling practice involved the market participant scheduling a counterflow in order to receive a congestion relief payment. In conjunction with the counterflow, the market participant scheduled a series of transactions that included both energy imports and exports into and out of the [CA]ISO control area and a transaction outside the [CA]ISO control area in the opposite direction of the counterflow back to the original place of origin. With the same amount of power scheduled back to the point of origin, however, power did not actually flow and congestion was not relieved. Circular Scheduling was profitable as long as the congestion relief payments were greater than the cost of scheduled transmission.

litigated to conclusion.<sup>15</sup> In return, the settlement provided that Idaho Power would be released from further scrutiny of its trading activities in California during the Settlement Period, other than in the Refund Proceeding, and in Docket No. EL03-180-000, *et al.* and Docket No. IN03-10-000, *et al.* The settlement provided that allocation of the settlement amount would be subject to future Commission direction. The Commission approved the Trial Staff-IDACORP settlement on March 4, 2004.<sup>16</sup> The California Parties<sup>17</sup> and others filed requests for rehearing of this order, which are still pending. Pursuant to the instant Settlement, the California Parties will withdraw their request for rehearing of the March 4 Order. If the Commission's disposition of the remaining requests for rehearing<sup>18</sup> approves the Trial Staff-IDACORP settlement without modification, IDACORP will not delay the payment of this obligation pursuant to the instant Settlement.<sup>19</sup>

## II. Description of the Settlement

### A. Monetary Consideration

6. The Settlement estimates that IDACORP's current unpaid receivables on the CAISO's books (the Estimated Receivable Amount)<sup>20</sup> total at least \$35,982,885 as of February 1, 2006.<sup>21</sup> IDACORP will assign to the California Parties monetary

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<sup>15</sup> *Idaho Power Co.*, 105 FERC ¶ 63,048 at P.57 (2003).

<sup>16</sup> *Idaho Power Co.*, 106 FERC ¶ 61,208 (2004) (the March 4 Order).

<sup>17</sup> SDG&E did not oppose the Trial Staff – Idaho Power settlement and did not joint the California Parties' request for rehearing.

<sup>18</sup> Remaining parties requesting rehearing of the March 4 Order are the Port of Seattle, Washington, individually and as part of "Certain Pacific Northwest Parties," a group comprising Public Utility District No. 1 of Snohomish County, Washington, City of Tacoma, Washington and Port of Seattle, Washington.

<sup>19</sup> Section 4.1.2.

<sup>20</sup> The estimated total excludes interest and is without regard to the Preparatory Rerun or Mitigation or soft cap adjustments in the California Refund proceeding. However the estimated total does reflect debits for the CalPX wind-up charge.

<sup>21</sup> Section 4.1 of the Settlement.

consideration of \$24,250,000 (the Transferred Receivable Amount) from the receivables currently held by the CAISO and the CalPX. The assignment of the Transferred Receivable Amount essentially funds the Settlement. The Settlement provides for the following cash transfers:

- Transfer to the IDACORP Refund Escrow – The CalPX will transfer the IDACORP Refunds, which consist of \$23,701,581, (1) minus the amount of Settling Participants’ Deemed Distribution<sup>22</sup> amounts, (2) plus the amounts owed by Participants with negative allocations on the Allocation Matrix.<sup>23</sup> Section 5.1 provides the following allocation of the IDACORP Refunds:
  - \$23,447,452 – will be allocated to the Pre-January 18, 2001 Period
  - \$254,129 – will be allocated to the Pre-October, 2000 Period
  - \$0 – no allocation to the Post-January 17, 2001 Period
- Transfer to the California Litigation Fund – The CalPX will transfer \$548,919 from the CalPX Settlement Clearing Account to the California Litigation Escrow Account.
- Transfer to IDACORP – The CalPX will transfer to IDACORP an amount equal to the remaining IDACORP Receivables minus the sum of (1) the Transferred Receivables Amount, and (2) the Retained Amount.<sup>24</sup> This

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<sup>22</sup> A number of Settling Participants will receive “Deemed Distributions,” which are credits to offset amounts owed by the Settling Participants to the CAISO or the CalPX. Deemed Distribution Participants are identified in Exhibit B to the Settlement.

<sup>23</sup> Exhibit A to the Settlement, the Allocation Matrix, lists the allocation percentages and settlement proceeds applicable to each Settling Participant. The amounts shown in the Allocation Matrix are based upon a calculation of IDACORP’s total estimated refund liability in the Refund Proceeding, allocated over two periods: Pre-October, 2000, and October 2, 2000 - January 17, 2001. Amounts shown indicate the cost recovery by IDACORP, if any and yield a net refund (or net amount owed to IDACORP if the cost recovery due from an entity exceeds the amount of the indicated refund).

<sup>24</sup> The Retained Amount, \$ 1.5 million in IDACORP receivables, will be retained by the CAISO and the CalPX to assure payments of any refunds ultimately determined to be due from IDACORP to those entities that do not opt into the Settlement.

amount will be approximately \$ 13,232,885 (\$35,982,885 minus the sum of \$24,250,000 plus \$1,500,000).

- Transfer to U.S. Treasury – IDACORP will pay \$83,373 into a Deposit Fund Account established by the U.S. Treasury on behalf of the Commission pursuant to an earlier settlement in the Gaming Proceeding between the Commission’s Trial Staff and Idaho Power, discussed *supra*.

#### **B. Non-Monetary Consideration**

7. IDACORP agrees to cooperate with the California Parties’ pursuit of claims and potential claims arising from the disruptions in the western energy markets for a period of 24 months from the Settlement Effective Date.<sup>25</sup>

8. IDACORP, the California Parties and any Additional Settling Participants agree to certain mutual releases of existing and future claims arising at the Commission and/or under the Federal Power Act<sup>26</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. The California Parties will withdraw their comments on IDACORP’s cost filing, as will Additional Settling Participants.<sup>27</sup>

9. In a Supplement to the Settlement filed on February 24, 2006, IDACORP and the California Parties, responded to requests for clarification of section 8.2 (“Releases”) of the Settlement. The Supplement asserted that a number of parties considering whether to opt into the Settlement and become Additional Settling Participants sought clarification of their rights vis-à-vis IDACORP in the Pacific Northwest Proceeding, Docket No. EL01-10-000.<sup>28</sup> The Supplement clarifies that the intention of this section is that the

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<sup>25</sup> Article IV of the Settlement sets out IDACORP’s non-monetary consideration and prospective commitments.

<sup>26</sup> 16 U.S.C. § 824 *et seq.* (2000).

<sup>27</sup> The mutual releases and waivers are set out in Article VII of the Settlement.

<sup>28</sup> *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348 (2003); *Order Granting Rehearing*, 105 FERC ¶ 61,183 (2003). Appeals are pending in *Port of Seattle, Washington, et al. v. FERC*, Case Nos. 03-74139, *et al.* (9<sup>th</sup> Cir., filed November 12, 2003).



California Parties and IDACORP will mutually release each other from their claims in the Pacific Northwest Proceeding, but neither IDACORP nor the Additional Settling Participants will be releasing their claims against one another in the Pacific Northwest Proceeding.

### C. Opt-in/Opt-out Procedures

10. In addition to the monetary sums, the Settlement offered an opportunity for non-signatory parties to opt into the Settlement. Section 8.1 provides that parties may opt into the Settlement at any time from the time it is filed with the Commission up to five days following the Settlement Effective Date.<sup>29</sup> However, by order issued January 26, 2006, the Commission required all parties to the proceedings in Docket Nos. EL00-95-147 and EL00-98-134 to indicate whether they intended to opt into the Settlement within five days of the filing of the Settlement.<sup>30</sup> The Settling Participants indicate that they do not view this modification to the Settlement's opt-in procedures as material.<sup>31</sup> Six entities filed timely notices that they would opt into the Settlement, and twenty entities filed timely notices that they would opt out of the Settlement. Four entities filed untimely notices, each of whom indicating that they would opt out of the Settlement. Appendix A to this order lists these companies and the nature of their elections.

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<sup>29</sup> Settlement Effective Date is defined in Section 1.58 as the day the Commission issues an order approving the Settlement.

<sup>30</sup> *San Diego Gas & Electric Co.*, 114 FERC ¶ 61,069 (2006). In a February 23 Order on Clarification and Notice, the Commission established March 9, 2006 as the due date for parties to indicate whether they would opt into or out of the Settlements. 114 FERC 61,195 (2006).

<sup>31</sup> *See* letter of transmittal accompanying the Settlement, at 4.

#### **D. Provisions for Non-Settling Participants**

11. Parties that do not opt into the Settlement will receive none of the Settlement benefits, but their interests in continuing to litigate their claims with IDACORP will be unaffected. In addition, the interests of non-settling participants in the Refund Proceeding are backstopped by IDACORP, which agrees to make up any shortfall in refunds that are ultimately determined to be due to non-settling participants. IDACORP will receive any excess in refunds.<sup>32</sup> Finally, the CAISO and CalPX will retain \$1.5 million in IDACORP receivables to assure payments of any refunds ultimately determined to be due from IDACORP to any non-settling participant.<sup>33</sup>

### **III. Comments on the Settlement and Discussion**

12. Initial comments were filed by the CAISO, CalPX and the Port of Seattle, Washington (Port). IDACORP, the California Parties and OMOI filed joint reply comments. CAISO supports the Settlement and requests clarification of several issues. CalPX takes no position on the Settlement and raises two issues. Only Port opposes the Settlement.

#### **A. CAISO and CalPX Requests for “Hold Harmless” Protection**

13. The CAISO and CalPX ask that the Commission grant “hold harmless” protection for their actions taken to implement the terms of the Settlement, and they cite prior Commission orders that have required that they be afforded “hold harmless” protection.<sup>34</sup> Although expressing support for the Settlement, CAISO asserts that the magnitude of the Settlement will require it to make “unprecedented accounting adjustments” pursuant to

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<sup>32</sup> Section 5.5 of the Settlement.

<sup>33</sup> Section 6.2 of the Settlement.

<sup>34</sup> CalPX Comments at 4-7; CAISO Comments at 4-7, *citing San Diego Gas & Electric Corp.* 111 FERC ¶ 61,186 (2004) (order on rehearing of the order accepting the *Williams* settlement); 109 FERC ¶ 61,257 (2004) (order accepting the *Duke* settlement); 111 FERC ¶ 61,107 (2005) (order accepting *Mirant* settlement); 113 FERC ¶ 61,171 (order accepting the *Enron* settlement); 113 FERC ¶ 61, 235 (2005) (order accepting the *Public Service Company of Colorado* settlement); and 113 FERC ¶ 61,308 (2005) (order accepting the *Reliant* settlement). In addition to the orders cited by CAISO, the Commission granted the CalPX’s request for “hold harmless” protection in the order approving the *Dynegy* settlement, 109 FERC ¶ 61,071 (2004).

Settlement terms that were determined by a subset of parties to the proceedings. Hence, CAISO is concerned about its exposure to claims that its accounting adjustments are incorrect.<sup>35</sup> While taking no position on the merits of the Settlement, CalPX expresses concern about the large number of accounting entries it will be required to make, and it asserts that it faces litigation risk arising from the fact that CalPX will be required to transfer substantial sums from its Settlement Clearing Account pursuant to the Settlement.<sup>36</sup> In addition, CalPX requests that the Commission approve specific language as a “hold harmless” provision.<sup>37</sup>

14. The Settlement’s Joint Explanatory Statement anticipated the request for “hold harmless” protection, stating that “The California Parties and IDACORP do not oppose Commission action to provide similar assurances to the [CA]ISO and [Cal]PX with respect to the instant settlement.”<sup>38</sup>

### **Commission Determination**

15. The Commission finds that the CAISO and CalPX have provided the Commission with compelling justification as to why they should be held harmless, along with their officers, directors, employees and contractors, for the steps taken to implement the Settlement. Particularly persuasive is the fact that, although both CalPX and CAISO will be required to make numerous complex accounting entries and disbursing substantial sums of cash, they are not protected by the same waivers of liability that Article VII of the Settlement Agreement provides for the Settling Participants. Their own tariffs provide hold harmless protection for actions they take to meet their tariff obligations. Thus, the Commission finds that “hold harmless” protection is warranted for CAISO and CalPX for steps taken to implement the Settlement, and it directs the Settling Participants to provide this protection. Finally, the Commission notes that it has granted the requests of CAISO and CalPX for “hold harmless” protection in the orders accepting recent settlements in the Refund Proceeding and related dockets.<sup>39</sup>

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<sup>35</sup> CAISO Comments at 5.

<sup>36</sup> CalPX Initial Comments at 4.

<sup>37</sup> *Id.* at 6-7.

<sup>38</sup> Joint Explanatory Statement at 15, *citing* the *PS Colorado* settlement order, 113 ¶ 61,235, at P.20 (2005).

<sup>39</sup> *See* n.35, *supra*.

**B. CAISO Comments**

16. The CAISO requests clarification of section 6.1.3 of the Settlement, which addresses CAISO and CalPX calculations and accounting with respect to distributions under the Settlement. This section requires the CAISO and the CalPX to “calculate the amount, if any, that Idacorp would owe in refunds ... for each of three time periods: the Pre-October Period, the Pre-January 18 Period and the Post January 17, 2001 Period (“Unsettled Idacorp Refund Amounts.”). Because the Commission’s refund orders provide only for refunds for the period October 2, 2000 through June 20, 2001 (the Refund Period), CAISO seeks clarification that it will not be required to perform calculations for the Pre-October Period unless the Commission expands the scope of the Refund Period by issuing an order stating that refunds should be paid for the Pre-October Period.<sup>40</sup>

17. In their Reply Comments, the Settling Participants state that Section 6.1.3 would not require calculation for the Pre-October Period “unless the Commission ultimately requires refunds for that period.”<sup>41</sup>

18. The CAISO also asks that the Commission, in any order approving the Settlement, not take any action that would compromise IDACORP’s liability for charges incurred in its role as a Scheduling Coordinator “that are not related to the specific releases provided for in the Settlement Agreement.”<sup>42</sup> The CAISO cites specifically adjustments relating to the resolution of ADR proceedings involving the CAISO.<sup>43</sup>

**Commission Determination**

19. The Settling Participants have clarified the CAISO (and CalPX) obligation to perform calculations for the Pre-October Period under section 6.1.3 of the Settlement. Therefore, further Commission action is not required.

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<sup>40</sup> CAISO comments at 8.

<sup>41</sup> Settling Participants’ reply comments at 10.

<sup>42</sup> CAISO comments at 9.

<sup>43</sup> *Id.*

20. With respect to the CAISO's concern about IDACORP's continued liability for Scheduling Coordinator-related charges, the CAISO has not pointed to specific language in the Article VII Release and Waivers provisions that would "compromise" IDACORP's liability, either generally or with respect to adjustments for ADR proceedings. The Settling Participants do not address this concern in their reply comments. Absent reference to a specific provision that casts IDACORP's continued liability for these charges into doubt, the Commission cannot provide CAISO with the assurance it requests.

### C. CalPX Comments

21. CalPX outlines its obligations under section 4.1 ("Idacorp Monetary Consideration") with respect to transfers of IDACORP Receivables and other funds under the Settlement. It states that with respect to future settlements by the California Parties in the Refund Proceeding, CalPX will be required to pay amounts owed to IDACORP in cash, "irrespective of whether IDACORP has a debit balance with CalPX as a result of the Refund Rerun or other adjustments."<sup>44</sup> The implication is that CalPX is concerned that IDACORP's credit balance with the CalPX may not be sufficient to fund payments by the CalPX under the Settlement. CalPX raises the same concern in its answer to the IDACORP motion for return of the chargeback funds held by the CalPX. Notwithstanding this concern, CalPX asks only that the Commission grant it "hold harmless protection" and clarify IDACORP's responsibility for unpaid wind-up charges under section 4.1.4 of the Settlement.

22. With respect to the adequacy of the Settlement proceeds, the Settling Participants point out that the Allocation Matrix shows that some 98 percent of IDACORP's refund obligation is owed to the California Parties or to market participants that have opted into the Settlement. The amount of the unsettled refund obligation is less than \$600,000. Section 6.2 of the Settlement provides that the CalPX will retain \$1.5 million of IDACORP's receivables to assure payments of any refunds ultimately determined to be due from IDACORP to those entities that do not opt into the Settlement. In addition, some \$359,406 in the IDACORP Refund Escrow are unclaimed by non-settling participants. Thus, the Settling Participants conclude that the Settlement sets aside more than adequate funds to cover IDACORP's maximum refund exposure.<sup>45</sup> IDACORP

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<sup>44</sup> CalPX initial comments at 3.

<sup>45</sup> Settling Participants' reply comments at 8-9.

makes these same assertions in response to CalPX's answer to the IDACORP motion for return of the chargeback funds.<sup>46</sup>

23. CalPX expresses the concern that, because the Settlement does not appear to take into account a portion of IDACORP's wind-up charges, IDACORP may not pay wind-up charges that are unpaid as of the Settlement Effective Date.<sup>47</sup> CalPX asks that the Commission clarify whether IDACORP will be required to pay its unpaid wind-up charges in cash upon approval of the Settlement.

24. The Settling Participants reply that section 4.1.4 of the Settlement requires IDACORP to pay any unpaid wind-up charges in cash upon approval of the Settlement, including wind-up charges that were not included in the total amount of IDACORP Receivables.<sup>48</sup>

### **Commission Determination**

25. The Commission finds that the Settlement sets aside adequate funding to address IDACORP's maximum refund obligations. The Settling Participants have clarified that IDACORP will pay in cash any unpaid wind-up charges that were not included in the total amount of IDACORP receivables.

26. Finally, with respect to the IDACORP motion for return of chargeback funds, the Commission recently determined that "the return of the chargeback payments should be made either at the conclusion of the Refund Proceedings, once it is determined that an individual seller will owe nothing as a result of the Refund Proceedings, or when a seller that made a chargeback payment settles its portion of the Refund Proceeding."<sup>49</sup> Inasmuch as the Settlement resolves IDACORP's portion of the Refund Proceeding and the motion is unopposed, the Commission will grant IDACORP's motion. The Commission directs the CalPX to return all chargeback amounts paid by IDACORP.

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<sup>46</sup> IDACORP response at 3-4.

<sup>47</sup> CalPX initial comments at 4.

<sup>48</sup> Settling Participants' reply comments at 9.

<sup>49</sup> *Coral Power, L.L.C., et al. v. FERC*, 110 FERC ¶ 61,288 (2006).

### C. Comments of Port

27. Port opposes the Settlement and raises four objections in support of its assertion that approval of the Settlement would be inconsistent with Rule 602 of the Commission's Rules of Practice and Procedure:<sup>50</sup> 1) the Settlement distributes proceeds in a manner that is inconsistent with previous Commission orders; 2) there are material facts in dispute; 3) the Settlement's distribution of proceeds is unjust, unreasonable, unduly preferential and unduly discriminatory; and 4) the Settlement should not be approved prior to resolution of petitions for review of the Commission's orders on the scope of the Show Cause Proceedings.<sup>51</sup>

#### 1. Consistency with Prior Orders

28. Port alleges that the Settlement's allocation of the proceeds from the Trial Staff-IDACORP settlement, approved by the Commission's March 4 Order,<sup>52</sup> violates "the letter, spirit, and intent" of a series of orders by the Commission and the Chief Administrative Law Judge, including specifically the Commission's September 24, 2003 Order that bifurcated the Gaming Proceeding into a liability phase and a distribution phase.<sup>53</sup> In support of its position, Port cites numerous Commission orders and orders of the Chief Judge that purport to prevent the distribution of Settlement proceeds until the liability phase of the Gaming proceeding has concluded.<sup>54</sup>

29. In reply, the Settling Participants assert that the Settlement does not prevent non-settling participants from pursuing allocation issues against IDACORP in the Gaming Proceeding, nor will it limit Port's ability to pursue its claims in the Refund Proceeding. They point out that section 4.1.2 of the Settlement specifically provides that non-settling participants "shall remain free to assert any position they choose concerning the proper allocation by FERC of such settlement amount."<sup>55</sup>

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<sup>50</sup> 18 CFR § 385.602 (2005).

<sup>51</sup> Port Comments at 28-30.

<sup>52</sup> *Idaho Power, supra*, n.13.

<sup>53</sup> Port comments at 28-29.

<sup>54</sup> Port comments at 28, n.129.

<sup>55</sup> Joint reply comments at 5.

### **Commission Determination**

30. After reviewing section 4.1.2 of the Settlement, the Commission agrees with the Settling Participants that the Settlement does not in any way limit the ability of Port to continue pursuing its claims or pursuing allocation issues in the Gaming Proceeding. Moreover, in Docket No. ER03-154-000, the portion of the Gaming Proceeding dealing with similar allegations against Enron, the Chief Judge issued an order on July 20, 2005, suspending the procedural schedule expressly to provide the California Parties, Enron and others with opportunities to conclude settlement discussions. Approval of this Settlement is procedurally consistent with the ongoing settlement process taking place under the aegis of the Commission's administrative law judges in the Enron proceeding. Thus, the Commission finds that approval of this Settlement is consistent with prior orders of the Commission in the Gaming Proceeding and other orders in these proceedings.

#### **2. Existence of Material Facts**

31. Port points out that Rule 602 of the Commission's Rules of Practice and Procedure requires that contested settlements cannot be certified and approved if there are material issues of fact in dispute, and if there is an inadequate record upon which to resolve such disputes. Port alleges numerous issues of material fact with respect to the Settlement. Rule 602 of the Commission's Rules of Practice and Procedure requires that any comment contesting an offer of settlement by alleging a dispute as to genuine issues of material fact be supported by an affidavit with specific references to portions of the record that support the allegation.<sup>56</sup>

32. Appended to Port's comments is an Affidavit of Robert F. McCullough (McCullough Affidavit) citing numerous portions of the record and asserting the existence of genuine issues of material fact. Attachment B to Port's comments is the Declaration of Peter Fox-Penner, upon which Port also relies to support its contention that material issues exist that preclude approval of the Settlement: "One need only point to materials submitted by the California Parties in their Opposition to IDACORP's October 16, 2003 Settlement Agreement with Trial Staff to demonstrate that genuine issues of material fact are in dispute, and that these issues cannot be resolved without an evidentiary hearing."<sup>57</sup>

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<sup>56</sup> 18 C.F.R. § 602(f)(4) (2005).

<sup>57</sup> Port comments at 29.



33. The crux of Port's allegation is that, because the California Parties have submitted pleadings in opposition to the 2003 settlement between IDACORP and Commission Trial Staff, and because those pleadings have alleged the existence of genuine issues of material fact, the California Parties should be estopped from arguing otherwise in the instant proceedings.<sup>58</sup> In a footnote, Port argues that the common law concept of judicial estoppel applies ("the common law concept of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.").<sup>59</sup>

34. The Settling Parties point out that the Commission may decide the merits of a contested settlement if the record contains substantial evidence upon which to base a reasoned decision or if the Commission determines that there remain no genuine issues of material fact in dispute as alleged by a contesting party. The Settling Parties assert that Port's claim that material facts are in dispute is based solely on the California Parties' pleading in opposition to the October 16, 2003 IDACORP-Trial Court settlement. Thus, they conclude that, because the California Parties have now settled their dispute with IDACORP in these proceedings, no genuine issues of material fact remain in dispute. Moreover, because the Commission's approval of the Settlement will not result in any findings by the Commission that would be binding on Port, the Settling Participants assert that Port can continue to attempt to prove its factual claims in any forum that is available to it.<sup>60</sup>

35. Settling Participants urge the Commission to find that Port's comments are "incurably deficient," because they do not comply with the requirements of Rule 602 of the Commission's regulations, which require that:

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, citing *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391 (5<sup>th</sup> Cir. 2003). The doctrine of judicial estoppel applies only where, as a result of prior testimony, parties have relied upon that testimony and changed positions by reason of that testimony. See *KN Energy, Inc.*, 36 FERC ¶ 63,040 (1986), citing *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 488 n.23 (4<sup>th</sup> Cir. 1986). Such is not the case where, as here, the California Parties are withdrawing testimony in these proceedings, as well as a request for rehearing challenging a prior settlement as a condition to the instant settlement. There is no inconsistency as between the Settling Participants, and no party will be induced to change its litigation position as a result of the California Parties' actions in complying with the Settlement.

<sup>60</sup> Settling Participant's reply comments at 5-6.

Any comment that contests an offer of settlement by alleging dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim.

Settling Participants assert that Port's comments do not meet the requirements of Rule 602(f)(4) in that the affidavit does not correctly identify the genuine issues of material fact with respect to the Settlement. They base this assertion on the fact that Port's supporting affidavit of Mr. McCullough is recycled material from earlier pleadings, and that the Fox-Penner affidavit is more than two years old and lacks any indication that Dr. Fox-Penner endorses his prior declaration for the purpose of supporting Port's pleading.<sup>61</sup>

### **Commission Determination**

36. The Commission agrees with the Settling Participants that there are no material issues of genuine fact that remain in dispute, despite Port's opposition to the Settlement. Clearly, 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 IDACORP in the underlying proceedings. Moreover, the specific terms of the Settlement itself make it clear that the Settlement establishes no facts or precedents as to non-settling participants. The Settlement does not affect Port's ability to pursue litigation against IDACORP, and whatever rights it may have are unaffected by the Settlement.

37. With respect to the alleged procedural deficiencies of Port's comments opposing the Settlement, the Commission agrees that Mr. McCullough's affidavit and the Declaration of Dr. Fox-Penner are irrelevant to the instant Settlement between IDACORP, the California Parties and OMOI and therefore do not support the existence of genuine issues of material fact. The matters contained in these attachments to Port's comments are irrelevant to the Settlement, and as pointed out by the Settling Participants, there is no indication that Dr. Fox-Penner endorses his prior declarations for the purpose of supporting Port's opposition to the Settlement.

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<sup>61</sup> *Id.* at 7.

**3. Settlement is unjust, unreasonable, unduly preferential and unduly discriminatory**

38. Port argues that, because 98.7 percent of the proceeds of the Settlement are “destined for California,” the Settlement ignores the fact that the conduct at issue largely took place within the Pacific Northwest, and that the majority of the profits were made outside of California. Therefore, Port asserts that the allocations reflected in the Settlement are unjust, unreasonable, unduly preferential and unduly discriminatory. Port describes the allocations in the Settlement as “an arbitrary and capricious power grab” by the California parties.<sup>62</sup>

**Commission Determination**

39. The Commission disagrees with Port’s characterization of the Settlement as a “power grab.”<sup>63</sup> Rather, the Settlement is a comprehensive and reasonable effort by the Settling Participants 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, and in fact is protected by, the Settlement. Because the Settlement does not preclude Port from pursuing whatever claims it believes it has against IDACORP, the Commission finds that the Settlement is not unjust, unreasonable, unduly preferential and unduly discriminatory.

**4. Relevance of the Appeals to the Show Cause Proceedings**

40. Port argues that, because petitions for review are pending in federal court challenging the scope of the show cause proceedings, a Commission decision accepting the Settlement could radically alter and expand the scope of these proceedings. For this reason, Port asserts that the Commission should decline to act on the Settlement until the Ninth Circuit resolves the pending petitions for review.<sup>64</sup>

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<sup>62</sup> Port Comments at 29-30.

<sup>63</sup> *Id.* at 30.

<sup>64</sup> *Id.*

### Commission Determination

41. The Commission has approved a number of settlements that resolve outstanding challenges to settlements in the Gaming Proceeding,<sup>65</sup> and it therefore finds that the pendency of appeals in the Gaming Proceeding does not prevent the Commission from evaluating and approving the Settlement. Moreover, nothing in the Settlement Agreement prevents Port from pursuing its claims against IDACORP in the Gaming Proceeding. Therefore, the Commission finds that there is no reason to defer action on the Settlement pending action by the Ninth Circuit on appeals in the Gaming Proceeding.

#### The Commission orders:

(A) The Commission hereby approves the Offer of Settlement and Settlement Agreement, as discussed in the body of this order.

(B) The CalPX is authorized and directed to implement the Settlement, as discussed in the body of this order.

(C) The CAISO is authorized and directed to implement the Settlement, as discussed in the body of this order.

(D) The Commission directs that the CalPX and the CAISO will be held harmless from their actions to implement the Settlement, as discussed in the body of this order.

(E) IDACORP's motion for return of chargeback funds held by the CalPX is granted, as discussed in the body of this order.

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<sup>65</sup> *San Diego Gas & Electric Corp.* 108 FERC ¶ 61,002 (2004) (order accepting *Williams* settlement); 109 FERC ¶ 61,107 (2004) (order accepting *Duke* settlement); *reh'g. denied*, 111 FERC ¶ 61,186 (order on rehearing of the *Williams, Dynegy and Duke* settlements); 111 FERC ¶ 61,017 (2005) (order accepting *Mirant* settlement), *reh'g denied*, 111 FERC ¶ 61,354 (2005); 113 FERC ¶ 61,171 (2005) (order accepting *Enron* global settlement), *reh'g denied*, 115 FERC ¶ 61,032 (2006); 113 FERC ¶ 61,171 (2005) (order accepting the *Enron-SRP* settlement), *reh'g denied*, 115 FERC ¶ 61,032 (2006); 113 FERC ¶ 61,235 (2005) (order accepting the *Public Service Company of Colorado* settlement); 113 FERC ¶ 61,308 (2005) (order accepting the *Reliant* settlement); and, 114 FERC ¶ 61,067 (2006) (order accepting *Nevada Companies* settlement).

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(F) CalPX is directed to return the chargeback funds to IDACORP, as discussed in the body of this order, within ten days of this order and to notify the Commission in writing of its compliance with this directive.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

**Appendix A****Timely Opt-in Notices**

Aquila Merchant Services, Inc.  
 Arizona Public Service Company and Pinnacle West Capital Corporation (Jointly)  
 City of Banning, California  
 City of Riverside, California  
 Reliant Energy Power Generation, Inc., Reliant Energy Services, Inc., Reliant Energy  
 Coolwater, Inc., Reliant Energy Ellwood, Inc., Reliant Energy Eliwanda, Inc.,  
 Reliant Energy Mandalay, Inc., and Reliant Energy Ormond Beach, Inc. (Jointly,  
 as "Reliant")  
 Salt River Project Agricultural Improvement and Power District

**Timely Opt-out Notices**

Arizona Electric Power Cooperative, Inc.  
 APX, Inc.  
 Avista Energy, Inc.  
 Cities of Anaheim, Azuza, and Colton, California  
 City of Pasadena, California  
 City of Redding, California  
 City of Santa Clara, d/b/a Silicon Valley Power (Jointly as SVP)  
 Constellation Energy Commodities Group, Inc.  
 Coral Power, L.L.C.  
 Enron Power Marketing, Inc.  
 Public Utility District No. 2 of Grant County, Washington  
 Modesto Irrigation District  
 Northern California Power Agency  
 NEGT Energy Trading-Power  
 Nevada Power Company and Sierra Pacific Power Company (Jointly as the Nevada  
 Companies)  
 Portland General Electric Company  
 Powerex Corp.  
 Puget Sound Energy, Inc.  
 Sacramento Municipal Utility District  
 Western Area Power Administration

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Late Filed Notices

City of Seattle, Washington  
City of Tacoma, Washington  
Hafslund Energy Trading, LLC  
Public Service Company of New Mexico