

113 FERC ¶ 61,308
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. EL00-95-000

v.

Sellers of Energy and Ancillary Services

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

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

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

Reliant Resources, Inc. *et al.* Docket No. EL03-170-000

Enron Power Marketing, Inc. and Enron Energy Services, Inc., *et al.* Docket No. EL03-180-000

Reliant Energy Services, Inc. *et al.* Docket No. EL03-59-000

ORDER ON SETTLEMENT AGREEMENT

(Issued December 22, 2005)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement Agreement (collectively, the Settlement) filed on November 3, 2005 in the instant proceedings by Reliant,¹ the California Parties,² and the Commission's Office of Market

¹ 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.

Oversight and Investigations (OMOI) (collectively, the Parties).³ The November 3 filing consists of the “Joint Offer of Settlement,” a “Joint Explanatory Statement,” a “Settlement and Release of Claims Agreement,” and other supporting documentation. 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 and ancillary services markets during the period of January 1, 2000 through June 20, 2001 as they relate to Reliant. In addition, the Settlement contains mutual releases of claims between Reliant and certain class action parties⁴ and certain local governmental parties.⁵ This order approves the Settlement, with conditions discussed *infra*.

² 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).

³ According to the Parties, other entities that are not parties to the captioned proceedings are or will become parties to the Settlement. These entities include the California Department of Water Resources acting solely under the authority and powers created by AB1-X, codified in sections 80000 through 80270 thereof, and not under its powers and responsibilities with respect to the State Water Resources Development System (CERS), the Attorneys General of Oregon and Washington (the Additional Claimants), as well as Local Governmental Parties and Class Action Parties as defined in sections 1.15 and 1.39 of the Settlement.

⁴ The class action proceedings involve the “California Class” and the “Egger Class.” The California Class comprises the plaintiff class representatives in the “Wholesale Electricity Antitrust Cases,” which are antitrust cases pending in a number of state courts, as defined in Section 1.86 of the Settlement. The Egger Class refers to the plaintiffs in a federal class action suit described in section 1.22 of the Settlement, and the Egger Class consists of persons residing in Oregon, Washington, Utah, Nevada, Idaho, New Mexico, Montana and Arizona who purchased electric power for purposes other than resale or distribution since July 1, 1998. Collectively, the California Class and the Egger Class are referred to as the Class Action Parties.

⁵ The following comprise the “Local Governmental Parties” who executed the Settlement: The City and County of San Francisco; the City of Oakland; the County of Santa Clara; the County of Contra Costa; Valley Center Municipal Water District; Padre Dam Municipal Water District; Ramona Municipal Water District; Helix Water District; Vista Irrigation District; Yuima Municipal Water District; Fallbrook Public Utility District; Borrego Water District; Metropolitan Transit Development Board; San Diego Trolley, Inc.; San Diego Transit Corporation; and Sweetwater Authority.

I. Background and 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 Settling Parties also have agreed to mutual releases of past, existing and future claims arising at the Commission and/or under the Federal Power Act⁶ 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.

4. The Settlement contains certain commitments of the Parties 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.⁷ 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, et al. v. Reliant Energy, et al.*⁸ that stayed the action in this proceeding in its entirety pending action by the Commission and the CPUC either approving or rejecting the Settlement.⁹

5. The Settlement provides an opportunity for all other parties to these proceedings to join the Settlement as Settling Participants, and it provides a period of five days following a Commission order approving the Settlement for parties to make such an election. 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.

⁶ 16 U.S.C. § 824 *et seq.* (2000).

⁷ See section 8.7.4 of the Settlement.

⁸ Case No. C-02-1788-VRW (N.D. Cal.) (*Lockyer v. Reliant*).

⁹ See section 10.3 of the Settlement.

6. The Settlement consists of both monetary and non-monetary consideration to be provided by Reliant. 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;¹⁰
- 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;¹¹ \$13,817,274 previously negotiated between Reliant and FERC staff with respect to withholding during the period of June 20 and 21, 2000;¹² and \$50,000,000 previously negotiated by Reliant and OMOI in the Reliant/OMOI Settlement;¹³
- 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;¹⁴

¹⁰ 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).

¹¹ See Agreement and Stipulation in Docket No. EL03-170-000, *Reliant Energy Services, Inc.*, 106 FERC ¶ 61,207 (2004).

¹² See Fact Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-001, 102 FERC ¶ 61,108 (2003).

¹³ 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).

¹⁴ *Id.* at section 4.1.5 of the Settlement.

- 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;¹⁵ and,
- Cash payments of \$3,500,000 to each of the Additional Claimants.

7. With respect to the Refund Proceeding, the Settlement deems Reliant to have provided a total refund available to participants in the Refund Proceeding in the amount of \$251,166,376, before applicable interest. Of this amount, \$193,827,171 is credited to the period from October 2, 2000 through June 20, 2001 (the Refund Period), and \$57,339,205 is credited to the period from May 1, 2000 through October 1, 2000 (the Pre-October Period).

8. The Settlement provides that, by opting into the Settlement, Opt-in Participants will receive any 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 an agreed-upon Emissions Offset of \$14,604,291 and an agreed upon Fuel Cost Allowance of \$63,250,845. Allocations of these charges are 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.¹⁶ 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.

9. 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.¹⁷

10. 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.

11. 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

¹⁵ *Id.* at section 6.2 of the Settlement.

¹⁶ *Id.* at sections 1.26 and 6.4.4 of the Settlement.

¹⁷ *Id.* at sections 1.27 and 4.1.5 of the Settlement.

Period.¹⁸ 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.¹⁹ CERS will be responsible for any shortfalls in receivables or refunds for the Post-January 17, 2001 Period,²⁰ 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.²¹

12. The Settlement requires Reliant to provide a number of behavioral commitments as non-monetary consideration. Reliant agrees to the following: 1) Reliant will continue to abide by a must-offer obligation to which it agreed pursuant to a settlement with OMOI²² for an additional two years beyond the term provided in that settlement;²³ 2) Reliant will continue to abide by the Commission's market behavior rules and applicable CAISO tariff provisions;²⁴ 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);²⁵ 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;²⁶ and, 5) Reliant will institute an antitrust compliance program for officers, directors and employees of Reliant's western commercial operations. This program will include

¹⁸ 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.

¹⁹ *Id.* at sections 6.5.1 and 6.5.2 of the Settlement.

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

²¹ *See* sections 6.5.3, 6.9 and 6.11 of the Settlement.

²² *See* Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 102 FERC ¶ 61,108 at 61,289 (2003).

²³ *See* section 5.1 of the Settlement.

²⁴ *Id.* at section 5.2 of the Settlement.

²⁵ *Id.* at section 5.5.1 of the Settlement.

²⁶ *Id.* at section 5.5.1 through 5.5.3 of the Settlement.

mandatory training for each officer and employee, distribution of written compliance standards to each officer and employee and an annual review of the compliance program by the officers and directors of Reliant.²⁷

13. The effective date of the Settlement is the date upon which the Commission issues an order accepting the Settlement without material change or condition unacceptable to any Party. The Settlement also requires the approval of the CPUC, which is evidenced by the CPUC's execution of the Settlement. CPUC approval constitutes permission for SCE to consummate the Settlement.²⁸ The Parties have requested Commission approval prior to December 31, 2005.

II. Comments on the Settlement

14. Initial comments on the Settlement were due on November 11, 2005 and reply comments were due on November 14, 2005. Timely initial comments were filed by APX, Inc., (APX), CAISO, CalPX, the Indicated Parties,²⁹ and the Port of Seattle, Washington (Port). Timely reply comments were filed jointly by Reliant, the California Parties, and OMOI.

A. Comments of APX

15. APX states that it does not want to "stand in the way" of the Settlement, but it seeks clarifications that are necessary to establish that the Settlement will not affect the rights of parties who do not opt into the settlement but instead continue to pursue their claims against Reliant in the ongoing proceedings. APX claims that its concern stems from the fact that the only place in the package of Settlement documents that makes it clear that the Settlement will not adversely affect the rights of Non-Settling Participants is in the Joint Explanatory Statement but not in the actual Settlement and Release of Claims Agreement itself.³⁰

16. APX cites as an example of its concern section 6.5.3 of the Settlement pursuant to which CERS agrees to assume the responsibility to pay Non-Settling Participants for any revenue shortfalls in the Post-January 17, 2001 Period. APX asserts that this obligation is capped by section 6.9 of the Settlement, which could adversely affect the ability of a

²⁷ *Id.* at section 5.7 of the Settlement.

²⁸ *Id.* at sections 2.4 and 10.1 of the Settlement.

²⁹ For purposes of these proceedings, the Indicated Parties consists of Coral Power, L.L.C., Constellation Energy Commodities Group, Inc., IDACORP Energy LP, Puget Sound Energy, Inc. and Avista Energy, Inc.

³⁰ APX Initial Comments at 2-3, *citing* Joint Explanatory Statement at 11.

Non-Settling Participant to recover the refund amount ultimately allocated to it by the Commission in the Refund Proceeding.

17. APX asks that the Commission clarify that: 1) Non-Settling Participants' rights will be unaffected by the Settlement; 2) Non-Settling Participants will not be guaranteed certain benefits of the Settlement; 3) Non-Settling Participants will be paid the refunds, if any, to which they are ultimately determined to be owed through continued litigation; and 4) Non-Settling Participants face potential exposure to higher fuel cost allowance payments than are provided under the Settlement.

18. In their Joint Reply comments, the Parties assert that the Settlement Agreement itself contains provisions that are intended to protect the rights of Non-Settling Participants. For example, the Parties assert that section 9.1 of the Settlement specifically provides that no party is bound by the Settlement's terms unless it affirmatively opts-in. Moreover, with respect to CERS' ability to backstop any revenue or refund shortfall, the Parties point out that the amount of money allocated to CERS for the Post-January 17, 2001 Period, "some \$21.9 million," represents 96.94 percent of all refunds payable during this period and shown on the Exhibit B Allocation Matrix. "Thus, it is difficult to imagine any set of circumstances under which CERS' receivables or refund shortfall liability to Non-Settling Participants might ever even remotely approach \$21.9 million."³¹

Commission Response

19. The Commission does not believe that clarification is necessary. The Settlement provides in a number of places protections for Non-Settling Participants. As correctly noted by the Parties, 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. Thus, the Commission finds that the Settlement clearly provides that the rights of Non-Settling Participants to pursue their claims against Reliant will not be adversely affected by the Settlement, and no further clarification is necessary.

B. Comments of CAISO and CalPX

20. 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

³¹ Joint Reply Comments at 6.

Commission orders that have required that they be afforded “hold harmless” protection.³² Although expressing support for the Settlement, CAISO asserts that the magnitude of the Settlement will require it to make “unprecedented accounting adjustments” pursuant to 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.³³ 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.³⁴

21. The Settlement’s Joint Explanatory Statement anticipated the request for “hold harmless” protection, stating that “The California Parties, the Additional Claimants, and Reliant do not oppose Commission action to provide similar assurances [to those provided in the orders accepting the *Williams, Dynegy, Duke, and Mirant* settlements] ... with respect to the Reliant Settlement.”³⁵

Commission Determination

22. 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 8 of the Settlement Agreement provides for the Parties. Their own tariffs provide hold harmless protection for actions they take to meet their obligations under their respective tariffs. 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 Parties to provide

³² CAISO Comments at 4-7; CalPX Comments at 2-3, *citing San Diego Gas & Electric Corp.* 108 FERC ¶ 61,002 (2004) (order accepting *Williams* settlement); 109 FERC ¶ 61,071 (2004) (order approving *Dynegy* settlement); 109 FERC ¶ 61,107 (2004) (order accepting *Duke* settlement); and, 111 FERC ¶ 61,186 (2005) (order accepting *Mirant* settlement).

³³ CAISO Comments at 5.

³⁴ CalPX Comments at 4.

³⁵ Joint Explanatory Statement at 15.

this protection. Finally, the Commission notes that it has granted CAISO and CalPX “hold harmless” protection in orders accepting recent settlements.³⁶

C. Comments of the Indicated Parties

23. Although they do not oppose the Settlement in general, the Indicated Parties ask that the Commission delete two sections of the Settlement, sections 7.1.3 and 7.1.4, as “unnecessary and burdensome.”³⁷ These sections address the calculation of refunds for the period prior to October 2, 2000. Indicated Parties point out that, at this point, the Commission has not ordered refunds for the period prior to October 2, 2000, but these sections “seek to impose a needless and potentially burdensome requirement ... that will distract the [CA]ISO from other more pressing matters, and will dissipate the limited operating funds that the [Cal]PX has available to it.”³⁸ While not opposing these provisions of the Settlement, the CAISO asks that the Commission clarify that the CAISO would be required to calculate refunds relating to the Pre-October 2, 2000 Period only if the Commission expands the scope of the Refund Proceeding by issuing an order stating that refunds should be made for the Pre-October 2, 2000 Period.³⁹

24. In their Joint Reply Comments, Reliant, the California Parties, and OMOI affirm that the calculation of refunds contemplated by sections 7.1.3 and 7.1.4 would be required only if a court or the Commission orders that refunds will be paid for the Pre-October 2, 2000 Period in the Refund Proceeding.

Commission Determination

25. The Parties have provided the clarification requested by the CAISO with respect to the obligations imposed on it and the CalPX under sections 7.1.3 and 7.1.4. Therefore, the Commission rejects the Indicated Parties’ request that these provisions be deleted from the Settlement.

D. Comments of Port

26. Port opposes the Settlement and raises five objections in support of its assertion that approval of the Settlement would be inconsistent with Rule 602 of the Commission’s

³⁶ See *San Diego Gas & Electric Co.*, 113 FERC ¶ 61,235 (2005) (Enron-Public Service of Colorado settlement); 113 FERC ¶ 61,171 (2005) (Enron global settlement); and, 113 FERC ¶ 61,244 (2005) (Enron-Salt River Project Corrected Settlement Order).

³⁷ Indicated Parties Comments at 2-3.

³⁸ *Id.* at 2.

³⁹ CAISO Comments at 7-8.

Rules of Practice and Procedure:⁴⁰ 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; 4) there is no legal or factual basis to include the Attorney General of Oregon and the Class Action Parties in the Settlement; and 5) 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.⁴¹

Consistency with Prior Orders

27. Port alleges that the distribution to the Settling Participants and Opt-in Participants of certain of the Settlement proceeds pursuant to the settlement agreements approved by the Commission in Docket Nos. EL03-170-000 (the Gaming Settlement)⁴² violates "the letter, spirit, and intent of the Commission's previous orders" by allowing the Settling Parties to receive Settlement Proceeds in advance of other parties with claims against Reliant.⁴³ 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.⁴⁴ In reply, the Parties assert that the Settlement has no effect on the distribution of Settlement amounts in the Gaming Case, nor does it prevent Non-Settling Participants from pursuing allocation issues in that case as to the OMOI Settlement amount. The Parties further aver that the Settlement does not otherwise limit Port's ability to assert its claims in the Gaming Settlement should the scope of that proceeding be enlarged as a result of actions by the reviewing court.⁴⁵

Commission Determination

28. After reviewing section 4.1.2 of the Settlement, the Commission agrees with the Parties 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 Case as to the OMOI settlement amount. Thus, the Commission finds that approval of this Settlement is

⁴⁰ 18 CFR § 385.602 (2005).

⁴¹ Port Comments at 35-40.

⁴² *Reliant Resources, Inc.*, 106 FERC ¶ 61,207 (2004).

⁴³ Port Comments at 35-36.

⁴⁴ Port comments at 27, n119.

⁴⁵ Joint Reply Comments at 9, *citing Port of Seattle v. FERC*, No. 04-71331 (9th Cir. filed Mar.22, 2004), *Pacific Gas & Electric Co.* Nos. 05-71008 (appeals of the Gaming Settlement and other gaming proceedings in Docket No. EL03-137-000, *et al.*

consistent with prior orders of the Commission in the Gaming Case and other orders in these proceedings.

Existence of Material Facts

29. 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. Appended to its comments is an Affidavit of Robert F. McCullough (McCullough Affidavit) referring to numerous portions of the record and asserting the existence of genuine issues of material fact. 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.⁴⁶ The crux of Port's allegation is that, because the California Parties have submitted pleadings in opposition to prior settlements between Reliant and Commission Staff, and because those pleadings have alleged the existence of genuine issues of material fact, the California Parties ought to be estopped from arguing otherwise in the instant proceedings.⁴⁷

30. The Parties deny that there remain any genuine issues of material fact. They describe Port's argument that the California Parties' prior pleadings in these proceedings are evidence of the existence of a genuine issue of material fact as a "bootstrap argument."⁴⁸ The Parties assert that, because the California Parties have now settled these matters with respect to Reliant, their prior assertions in these proceedings are not relevant. Moreover, because the Commission's approval of the Settlement will not result in any findings by the Commission that would be binding on Port, it can continue to attempt to prove its factual claims in any forum that is available to it.⁴⁹

Commission Determination

31. The Commission agrees with the Parties 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 Reliant 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

⁴⁶ 18 C.F.R. § 602(f)(4) (2005).

⁴⁷ Port Comments at 36.

⁴⁸ Joint Reply Comments at 9.

⁴⁹ *Id.* at 10.

Settlement does not affect Port's ability to pursue litigation against Reliant, and whatever rights it may have are unaffected by the Settlement.⁵⁰

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

32. 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.⁵¹

33. The Parties reply that Port's allegation that the Settlement is unjust, unreasonable, unduly preferential and unduly discriminatory because Reliant made sales outside of California as a *non sequitur*. The Parties point out that the Settlement resolves issues between Reliant and the parties to the Settlement, including those who choose to opt-into the Settlement. Because the Settlement does not preclude Port from pursuing whatever claim it believes it has with respect to Reliant, the Settlement is not unjust, unreasonable, unduly preferential and unduly discriminatory.

Commission Determination

34. The Commission disagrees with Port's characterization of the Settlement as a "power grab." Rather, 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.

**Inclusion of the Attorney General of Oregon
and the Class Action Plaintiffs in the Settlement**

35. Port argues that there is no legal or factual basis upon which to settle state and federal actions in the context of the instant proceedings. Furthermore, Port states that the Commission has no jurisdiction over the state and federal proceedings and that the Class Action Parties are not parties to the Commission proceedings. Finally, Port asserts that it would be inappropriate to allocate any portion of the Settlement proceeds to the Attorney General of Oregon, because that official has never intervened "in the relevant

⁵⁰ See section 8.1.1 of the Settlement and discussion in P19, *supra*.

⁵¹ Port Comments at 38-39.

proceedings” and has not asserted a civil or criminal claim against Reliant “so far as can be determined.”⁵²

36. The Parties reply that the inclusion of the Oregon Attorney General and the Class Action Parties is of no consequence to Port, as the Settlement will have no effect on Non-Settling Participants.⁵³

Commission Determination

37. The Commission’s acceptance of the Settlement extends only to parties and claims over which the Commission has jurisdiction pursuant to the FPA. The Commission has recognized this principle in orders accepting prior settlements that have included both participants and issues outside the ambit of the Commission proceedings that were being settled.⁵⁴ Thus, the Commission’s approval of this Settlement is not in any way compromised legally because it includes state and federal proceedings that are not within the Commission’s statutory jurisdiction or because it would affect parties that have not intervened in Commission proceedings.

Relevance of the Appeals to the Show Cause Proceedings

38. Port argues that, because there is pending in federal court petitions for review 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.⁵⁵

39. The Parties respond that the pendency of appeals of the Gaming Settlement in the Ninth Circuit does not act as a bar to this Settlement, and it states that nothing in the Settlement would prevent Port from pursuing any claims it might have in that case should the Ninth Circuit order that the scope of the underlying proceedings be expanded.⁵⁶

⁵² *Id.* at 39-40.

⁵³ Joint Reply Comments at 10-11.

⁵⁴ See order accepting the Mirant settlement in *San Diego Gas & Electric Co.*, 111 FERC ¶ 61,017 (2005), at P4.

⁵⁵ Port Comments at 40.

⁵⁶ Joint Reply Comments at 11.

Commission Determination

40. The Commission has approved a number of settlements that resolve outstanding challenges to settlements in the Gaming Proceedings in Docket Nos. EL03-197-000,⁵⁷ and it therefore finds that the pendency of appeals in the Gaming Settlement does not prevent the Commission from evaluating and approving the Settlement. Moreover, nothing in the Settlement Agreement prevents Port from pursuing its claims against Reliant 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 Settlement.

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.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁵⁷ See *San Diego Gas & Electric Co.*, 109 FERC ¶ 61,257 (2004) (Duke settlement order); 108 FERC ¶ 61,002 (2004) (Williams settlement order); and 111 FERC ¶ 61,017 (2005) (Mirant settlement order).