Nos. 06-72957 and 06-75044 (consolidated)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PORT OF SEATTLE, WASHINGTON,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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MAY 30, 2008

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STATEMENT OF THE ISSUE

Whether the Commission reasonably approved settlements by individual parties in complex proceedings arising out of the 2000-2001 Western energy crisis despite the objections of a sole party, the Port of Seattle ("Port"), where the settlements in question in no way impaired Port's interests or its ability to pursue claims against the settling parties, and where Port failed to demonstrate the

existence of any material issue of fact that required resolution prior to approving the settlements.

COUNTERSTATEMENT OF JURISDICTION

This Court lacks jurisdiction to consider Port's petitions for review. As explained further in Argument Section II below, Port is not aggrieved within the meaning of FPA § 313(b), 16 U.S.C. §825*l*(b), because the settlements approved in the challenged Commission orders in no way impair Port's interests or inhibit Port's ability to pursue any claims it possesses against the settling parties. For the same reason, Port is entitled to no exception from the general rule that non-settling parties in multi-party cases lack standing to challenge partial settlements by other parties, where the non-settling party suffers no plain legal prejudice from the settlement. *See Waller v. Financial Corp. of America*, 828 F.2d 579, 582 (9th Cir. 1987).

Further, Port must be aggrieved by the orders under review, *not* orders *previously* issued by the Commission. *See Wisconsin Public Power Inc. v. FERC*, 493 F.3d 239, 269 (D.C. Cir. 2007). Port purports to challenge several settlements in this proceeding that were approved in prior Commission orders that are not under review here. Even if Port were aggrieved by those settlements, Port's remedy is limited to the appeal of the orders approving those settlements, not the

orders challenged here. *Id*. To the extent that the Reliant Settlement altered the previously-approved distribution of the proceeds of prior settlements, it did so only to the potential benefit of Port, not to its detriment.

A number of the settlements challenged by Port are also settlements of non-public investigations conducted under Part 1b of the Commission's regulations, 18 C.F.R. § 1b.1, *et seq*. As this Court has recognized, the Court lacks subject matter jurisdiction to review decisions that implicate FERC's prosecutorial discretion. *Pacific Gas & Electric Co. v. FERC*, 464 F.3d 861, 863 (9th Cir. 2006). This includes the Commission's decision to settle enforcement proceedings. *Public Utils. Comm'n of the State of California v. FERC*, 462 F.3d 1027, 1050 (9th Cir. 2006). In a non-public §1b prosecutorial investigation, "FERC may settle claims without review, and need not justify its decision to order refunds, or to decline to order refunds." *Id*. Thus, the Court lacks jurisdiction to hear Port's challenges to the settlement of non-public Commission enforcement actions, as the Commission has unreviewable discretion to decide whether and how to settle such claims and how to distribute the settlement proceeds.

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

At issue in this case are two settlements, the Reliant Settlement and the IDACORP Settlement, in which Reliant[1] and IDACORP[2] settled potential liabilities arising from the Western energy crisis of 2000-2001 with the California Parties[3] and Commission staff. Port is the sole party contesting these settlements.

Under the Commission's regulations, the Commission may approve contested settlements if it finds no material issues of fact. *See* 18 C.F.R. § 385.602(h)(1)(i). In the challenged orders, the Commission approved the settlements over Port's objections, finding that Port's opposition to the settlements

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[1] In the Reliant 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.

[2] In the IDACORP Settlement, IDACORP refers to Idaho Power Company and IDACORP Energy L.P.

[3] The California Parties include: Pacific Gas & Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, the People of the State of California, ex rel. Bill Lockyer, Attorney General, the California Department of Water Resources, the California Electricity Oversight Board, and the California Public Utilities Commission.

failed to create a material issue of fact precluding settlement approval. Port suffers no immediate and irreparable harm from the settlements as the settlements in no way impair any claims possessed by Port nor in any way inhibit Port's ability to pursue those claims. Further, Port failed to substantiate any of the purported issues of fact it raised in opposition to the settlements. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 113 FERC ¶ 61,308 (2005) (Reliant Settlement Order) RE 109, *reh'g denied*, 115 FERC ¶ 61,271 (2006) (Reliant Rehearing Order) RE 169; *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 115 FERC ¶ 61,230 (2006) (IDACORP Settlement Order) RE 256, *reh'g denied*, 117 FERC ¶ 61,020 (2006) (IDACORP Rehearing Order) RE 316.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

Under Rule 602(h) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(h), FERC has broad discretion in addressing contested settlements. *Arctic Slope Reg. Corp. v. FERC*, 832 F.2d 158, 164 (D.C. Cir. 1987). Pursuant to this regulation, the Commission may make a determination on the merits regarding contested issues if it finds that the record contains substantial evidence or that there are no issues of material fact. 18 C.F.R. § 385.602(h)(1)(i).

The procedure of approving a contested settlement in the absence of genuine issues of material fact "permits the resolution of issues without lengthy and costly hearings on every issue and 'is in effect a 'summary judgment' granted on 'motion' by the litigants when there is no issue of fact.'" *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 208 (D.C. Cir. 1984) (quoting *Pennsylvania Gas & Water Co. v. FPC*, 463 F.2d 1242, 1246 (D.C. Cir. 1972)). Accordingly, in the event that a contesting party fails to raise a material issue of fact in opposition to the settlement, the settlement may be approved under the standard for uncontested settlements and be decided in a summary fashion. Reliant Rehearing Order P 18, RE 180 (citing *El Paso Natural Gas*, 25 FERC ¶ 61,292 (1983)).

An uncontested settlement may be approved as to the consenting parties under Rule 602(g), 18 C.F.R. § 385.602(g), which provides that "an uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest." *See* Port Br. at 54 (acknowledging that the applicable standard is "'fair and reasonable and in the public interest'") (quoting 18 C.F.R. § 385.602(g)(3)). *See generally*, *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 701 (D.C. Cir. 2007); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990). This standard permits the

Commission to approve the uncontested offer of settlement without a determination on the merits that the rates approved are "just and reasonable." *United*, 732 F.2d at 207 n.8.

In Commission enforcement actions, the Commission enjoys prosecutorial discretion in settling its own claims. *Public Utils. Comm'n*, 462 F.3d at 1050. Thus, in a non-public investigation under Part 1b of the Commission's regulations, 18 C.F.R. § 1b.1, *et seq*., "FERC may settle claims without review, and need not justify its decision to order refunds, or to decline to order refunds." *Id*. *See also Burlington Resources, Inc. v. FERC*, 513 F.3d 242, 247 (D.C. Cir. 2008); *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456 (D.C. Cir. 2001); *Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349, 354 (D.C. Cir. 2000).

B. Efforts to Settle the Myriad Cases Arising from the Western Energy Crisis

The Western energy crisis of 2000-2001, and its consequences, is all too familiar to this Court. *See, e.g., In re California Power Exchange Corp*., 245 F.3d 1110, 1115 (9th Cir. 2001) (describing events). *See also, e.g., California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1008 (9th Cir. 2004); *Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Marketing, Inc*., 384 F.3d 756, 758-59 (9th Cir. 2004); *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005); *Public Utils. Comm'n*, 462 F.3d 1027.

In short, the energy crisis resulted in a sharp rise in wholesale electricity prices throughout the West, frequent system emergencies and occasional blackouts in California, and severe financial distress to certain utilities, energy consumers and other market participants. In response, the Commission initiated a series of adjudicatory and investigative proceedings, intended both to settle and reform markets going forward and, where appropriate, to provide ratepayer relief retroactively. *See, e.g.*, *California Power Exchange*, 245 F.3d at 1125 (approving of FERC's decision to focus first on prospective remedies before turning to possible retroactive relief).

Unfortunately, but predictably, given the magnitude of the energy crisis and the huge sums of money involved, the Commission's actions generated a flood of litigation on appellate review of FERC orders. To manage its appellate case load arising from FERC orders, this Court, after several years of procedural wrangling among the parties, adopted complex case management procedures. *See* Order, *Pub. Utils. Comm'n v. FERC*, No. 01-71051 (9th Cir. August 2, 2006) ("We direct Senior Circuit Judge Edward Leavy to oversee and explore with the parties possible resolution through mediation."); *Public Utils. Comm'n*, 462 F.3d at 1034 n.1 (noting the mediation of Senior Judge Edward Leavy and other Court officials, and commending the parties, in "organizing judicial management of the cases").

Out of the dozens of pending FERC appeals, the Court selected a representative few to go forward first for appellate review. *See Public Utils. Comm'n*, 462 F.3d 1027 (refund effective date and scope issues); *Bonneville*, 422 F.3d 908 (FERC jurisdiction over governmental entities); *Port of Seattle, Washington v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (Pacific Northwest Refund Proceeding).

Following issuance of *Public Utils. Comm'n*, 462 F.3d 1027, in 2006, further efforts have been made to settle cases arising from the Western energy crisis. Settlement conferences, held in San Francisco, involving dozens of parties, were held on September 6, 2006 and October 11, 2007. Many orders have been issued in this Court's Docket No. 01-71051 on this topic, halting litigation and encouraging settlement, *i.e*. initiating and continuing a "settlement time out." *See, e.g*., Orders issued in Docket Nos. 01-71051, *et al*., on August 2, 2006, August 4, 2006, October 23, 2006, February 16, 2007, April 25, 2007, June 12, 2007 and August 6, 2007. Similar efforts have been undertaken to encourage settlement of the Pacific Northwest Refund Proceeding. *See* Orders of September 18, 2007 and January 7, 2008 in Docket Nos. 03-74139, *et al*.

At their October 11, 2007 conference, the parties agreed that it was time to go forward on certain of the pending appeals concerning the agency's consideration of settlements. The parties, working with Court officials, decided

that it was appropriate to schedule briefing on certain of the Port appeals contesting the Commission's approval of certain contested settlements. Port's appeals of two settlement approvals are at issue in this appeal.

The Commission similarly has been focused from the beginning on settlement as the most expeditious and reasonable means of resolving the myriad claims arising from the Western energy crisis. *Pub. Utils. Comm'n of the State of California v. Sellers of Energy*, 99 FERC ¶ 61,087 at 61,384 (2002) ("[W]e want to strongly encourage all parties involved in disputes arising from the California crisis to seriously negotiate settlements.") As early as June 19, 2001, the Commission convened a settlement conference for the purpose of settling accounts in the California markets. *San Diego Gas & Elec. Co*., 95 FERC ¶ 61,418 (2001). The Commission further clarified that the settlement proceeding could also be a forum for settling past accounts related to sales in the Pacific Northwest. *San Diego Gas & Elec. Co*., 95 FERC ¶ 61,425 (2001). *See also California ex rel Lockyer v. Powerex*, 122 FERC ¶ 61,260 n.69 (2008) ("The Commission does not intend to interfere with – and indeed encourages – any court-mediated settlement efforts [related to the California energy crisis].")

The Commission has likewise encouraged targeted parties to settle Commission investigatory and enforcement proceedings with Commission staff.

See, e.g., *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 at P 73 (2003) (Gaming Order), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (Gaming Rehearing Order), *appeals pending sub nom. Pacific Gas and Electric Co., et al. v. FERC*, 9th Cir. Nos. 05-71008, *et al*. (encouraging identified parties in investigation of gaming and/or anomalous market behavior to settle with Commission staff); *Duke Energy Trading and Marketing Co*., 117 FERC ¶ 61,039 at P 12 (2006) ("The Commission strongly favors settlements, particularly in cases that are hotly contested and complex." Resolution by settlement brings needed stability to the industry, ends protracted litigation, and thereby benefits customers).

FERC Chairman Kelliher has repeatedly emphasized the importance of negotiated resolutions of energy crisis disputes. *See, e.g*., Statement of FERC Chairman Kelliher on the announcement of a settlement agreement between Enron, the California Parties and FERC Staff (July 15, 2005) ("it is in the best interests of everyone – consumers and power providers, as well as the health of the California energy market that supports the state's economy – to settle the remaining disputes over power sales in 2000 and 2001"); Press Release, *Chairman Urges Settlement of 2000-01 Energy Crisis Disputes as Federal Judge Opens Mediation Talks in San Francisco* (Sept. 6, 2006) ("[s]ettlement of lingering disputes arising from the 2000-2001 energy crisis in California and other Western states is the surest and

best course of action for consumers" and "will provide certain results far faster than litigation. . . .").

Congress itself has urged the rapid resolution of Western energy crisis claims. In the Energy Policy Act of 2005, Pub. L. No. 109-58, section 1824, 119 Stat. 594, Congress specifically directed the Commission to "seek to conclude its investigation into the unjust or unreasonable charges incurred by California during the 2000-2001 electricity crisis as soon as possible," and to submit a report by December 31, 2005 describing the actions taken by the Commission to date under this section and timetables for further actions. In the Commission's report to Congress pursuant to this direction, the Commission emphasized the importance of expeditious resolution of the energy crisis claims. *See* Report to Congress at 4, 25, 26 (Dec. 27, 2005).

C. The Challenged Reliant and IDACORP Settlements

The Reliant and IDACORP Settlements challenged in this appeal involve the settlement of claims in a number of proceedings arising out of the Western energy crisis. The Settlements include *new* agreements to settle claims from two generic refund proceedings (the California Refund Proceeding and the Pacific Northwest Refund Proceeding). The settlements also concern distribution of settlement proceeds from *prior*, *previously-approved* settlements of a number of supplier-specific investigatory proceedings initiated by the Commission. The Reliant and

IDACORP Settlements are described in more detail below.

1. The Reliant Settlement

On November 3, 2005, a joint offer of settlement was filed by Reliant, the California Parties, and the Commission staff. Reliant Settlement Order, 113 FERC ¶ 61,308 at P 1, ER 109. The Settlement resolved claims against Reliant relating to Reliant's sales in the California ISO and California Power Exchange markets from January 1, 2000 through June 20, 2001. Reliant Settlement Order at P 2, RE 111.

a. Settlement of California Refund Proceeding Claims

The Reliant Settlement provided for the settlement of certain claims against Reliant arising in the generic California Refund Proceeding. The California Refund Proceeding resulted from an August 2, 2000 complaint filed against all sellers of energy and ancillary services into the California ISO and California Power Exchange markets subject to FERC jurisdiction.[4] The Commission set for investigation the justness and reasonableness of the rates for all sales in the

[4] In California's 1996 restructuring, California's major utilities were required to divest a substantial portion of their generation and to sell the output of their remaining generation capacity to a newly created wholesale clearinghouse, the California Power Exchange. The California Power Exchange operated an auction market for the purchase and sale of electricity in the "day-ahead" and "day-of" markets, and would set market-clearing prices applicable to all bids accepted by the California Power Exchange. The California ISO was also created to manage the transmission network. As part of its network reliability responsibility, the California ISO operated a real-time, or spot, market to balance supply and demand at precise points in time. *See Pub. Util. Dist. No. 1*, 384 F.3d at 759.

California ISO and California Power Exchange markets, and established a framework for determining refunds for past sales in the California ISO and California Power Exchange spot markets. *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 (2001). Specifically, a mitigated market clearing price methodology was set as a benchmark against which to judge prices during the refund period. *Id*.

After a hearing, an administrative law judge determined, in December 2002, that suppliers in the California ISO and Power Exchange markets owe approximately $1.8 billion in refunds for sales at rates in excess of a just and reasonable level. *San Diego Gas & Elec. Co.*, 101 FERC ¶ 63,026 (2002). The Commission adopted in part, and modified in part, the administrative law judge's proposed findings in an order issued March 26, 2003. *San Diego Gas & Elec. Co.*, 102 FERC ¶ 61,317 (2003). The Commission subsequently issued numerous orders addressing requests for rehearing or clarification of its earlier orders determining the methodology for calculating refunds. *See, e.g., San Diego Gas & Elec. Co.*, 107 FERC ¶ 61,165 (2004); *San Diego Gas & Elec. Co.*, 107 FERC ¶ 61,166 (2004); *San Diego Gas & Elec. Co.*, 108 FERC ¶ 61,311 (2004); and *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,218 (2004). *See also San Diego Gas & Elec. Co.*, 108 FERC ¶ 61,219 (2004), *order on reh'g*, 109 FERC ¶ 61,074 (2004).

Over 100 petitions for review, submitted by dozens of petitioners, have been

filed in (or transferred to) this Court to review various combinations of California Refund Proceeding orders. In *Public Utils. Comm'n*, 462 F.3d 1027 (refund effective date and scope issues), and *Bonneville*, 422 F.3d 908 (authority over governmental entities), this Court addressed Phase I briefing on certain threshold legal issues. Phase II briefing of the consolidated California Refund Proceedings, under the caption *Public Utilities Commission of the State of California, et al. v. FERC*, 9th Cir. Nos. 01-71934, *et al*., which is not yet scheduled, will address remaining refund calculation issues.

Under the Reliant Settlement, Reliant is deemed to have provided a total refund available to participants in the California Refund Proceeding in the amount of $251,166,376, before applicable interest. Reliant Settlement Order at P 7, RE 113. 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. Reliant Settlement Order at P 10, RE 113.

b. Prior Settlements with Staff of Investigatory Claims

In addition to the settlement of generic California Refund Proceeding claims, the Reliant Settlement also specified the distribution of proceeds from three *prior* Commission-approved settlements of investigatory proceedings between Reliant and Commission staff: (1) the $836,000 settlement of the Gaming Proceeding; (2) the $13.8 million settlement for alleged withholding on June 21 and 22, 2000; and (3) the $50 million settlement of various Commission investigatory proceedings. Reliant Settlement Order at P 6, RE 112-13.

(1) The $836,000 Gaming Proceeding Settlement

On June 25, 2003, the Commission instituted the Gaming Proceeding directing dozens of entities to show cause, in evidentiary hearings, why their conduct after January 1, 2000 did not constitute gaming and/or anomalous market behavior in violation of applicable tariffs.[5] *See* Gaming Order, 103 FERC ¶ 61,345 at P 71. The Commission required that all unjust profits for the period

[5] The Commission additionally instituted "Partnership Show Cause Proceedings," based on evidence that Enron entered into partnerships with other entities to gain market share, acquire commercially sensitive data and decision-making authority, and promote reciprocal dealings and equity sharing of profits. *Enron Power Mktg., Inc*., 103 FERC ¶ 61,346 at PP 1, 31 (2003). Reliant was never a respondent in the Partnership Show Cause Proceeding, and Idaho Power was later dismissed. *See Col. River Comm'n of Nev*., 106 FERC ¶ 61,022 at PP 22-24 (2004).

January 1, 2000 to June 20, 2001 be disgorged in their entirety. *Id*. The Commission encouraged identified parties in the Gaming Proceeding to settle with Commission staff. *Id*. at P 73.

On August 29, 2003, Commission staff and Reliant jointly submitted a settlement of all issues related to Reliant in the Gaming Proceeding. *Reliant Resources, Inc*., Docket No. EL03-170 at P 5 (Dec. 9, 2003). The settlement stated that staff concluded that the claims of gaming practices alleged against Reliant were unsupported, *id*. at PP 17-24, except for claims of alleged Double Selling.[6] Reliant agreed to pay $836,000 in settlement of the Double Selling claim, an amount equal to the total revenues potentially received by Reliant from this practice. *Id*. at P 26.

On March 4, 2004, the Commission approved the Gaming Proceeding settlement between Reliant and Commission staff. *Reliant Resources, Inc*., 106 FERC ¶ 61,207 (2004). Because the $836,000 payments represented total revenues associated with Reliant's alleged participation in the practice of Double Selling, and not merely profits, it was more than could have been recovered in

[6] Double Selling involved selling ancillary services in the day-ahead market from resources that were initially available, but later selling those same resources as energy in the hour-ahead or real-time markets, thus selling capacity that the market participant had already committed to reserve as ancillary services, making that capacity no longer available in real time it the California ISO were to call upon that resource to provide ancillary services.

litigation. *Id*. at P 4 (citing Gaming Order, 103 FERC ¶ 61,345 at PP 1, 2, 71). Rehearing of this approval was denied. *Duke Energy*, 117 FERC ¶ 61,039 at P 10, *appeal pending, Port of Seattle, Washington v. FERC*, 9th Cir. No. 06-75045. The Commission's rejection of calls to expand the scope of the Gaming Proceeding generally, *see* Gaming Rehearing Order, 106 FERC ¶ 61,020 at P 85, is currently on review in this Court in *Pacific Gas and Electric Co., et al. v. FERC*, 9th Cir. Nos. 05-71008, *et al*.

As originally approved, the Reliant Gaming Proceeding settlement provided that the $836,000 settlement proceeds would be paid into a U.S. Treasury deposit fund account, earmarked for payment into the California ISO's settlement accounts, for disbursement to Scheduling Coordinators in accordance with the California ISO's settlement process. *Reliant Resources, Inc*., Docket No. EL03-170 at P 26 (Dec. 9, 2003). The Reliant Settlement, here, however, provided instead that the $836,000 proceeds of the Reliant Gaming Proceeding settlement would be "distributed pursuant to future FERC Orders in the gaming proceedings, FERC Docket Nos. EL03-170." Reliant Settlement § 4.1.2(i), RE 32.

(2) The $13.8 Million Settlement

The $13.8 million settlement resolved a non-public investigation of Reliant regarding alleged incidents of withholding on June 21 and 22, 2000. Reliant

settled this investigation by the payment of $13.8 million directly to purchasers of energy from the California Power Exchange on the days in question. *See Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, 102 FERC ¶ 61,108 at P 6 (2003). This amount reflected the maximum impact the alleged withholding could have had on the California Power Exchange market. *Id*.

The Commission approved the settlement on January 31, 2003. *Id*. at P 1. While petitions were filed for review of the orders approving the Reliant $13.8 million settlement, *see Pacific Gas & Electric Co. v. FERC*, 9th Cir. Nos. 03-72874, *et al*., the Court (after briefing and argument) granted a motion for voluntary dismissal on October 4, 2006.

By the time of the Reliant Settlement, the $13.8 million settlement proceeds had already been distributed, and the Reliant Settlement provided that those allocations shall not be revised. Reliant Settlement Agreement § 4.1.2 (ii), RE 32.

(3) The $50 Million Settlement

The $50 million settlement settled claims against Reliant arising from a variety of Commission enforcement investigations, including: (1) issues raised in the March 26, 2003 Final Report issued by Commission staff identifying instances

of alleged market power abuses and tariff violations;[7] (2) a show cause order regarding certain transactions in Palo Verde;[8] (3) an investigation into alleged withholding;[9] and (4) an investigation into anomalous bidding.[10] *Reliant Energy Services, Inc.*, 105 FERC ¶ 61,008 at P 2 (2003). The $50 million settlement was separate from the California Refund Proceeding or the Gaming Proceeding. *Id*. at P 18 n.4. The settlement provided for, *inter alia*, the payment of $50 million into a deposit fund account established by the United States Treasury on behalf of the Commission for ultimate distribution for the benefit of California and Western electricity consumers. *Id*. at PP 19-22.

On October 2, 2003, the Commission approved the $50 million settlement. *See Reliant Energy*, 105 FERC ¶ 61,008 (the settlement was later modified in a manner not relevant here in *Reliant Energy Services, Inc.*, 108 FERC ¶ 61,278 (2004)). While petitions were filed for review of the orders approving the Reliant $50 million settlement, *see Pacific Gas & Electric Co. v. FERC*, 9th Cir. Nos. 03-

[7] Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, FERC Docket No. PA02-2 (Mar. 26, 2003) (Staff Final Report).

[8] *See Reliant Energy Services, Inc.*, 102 FERC ¶ 61,315 (2003).

[9] *See Reliant Energy Services, Inc*., 105 FERC ¶ 61,008 (2003).

[10] *See Investigation of Anomalous Bidding Behavior and Practices in Western Markets*, 103 FERC ¶ 61,347 (2003).

72874, *et al*., the Court granted a motion for voluntary dismissal on October 4, 2006.

The $50 million settlement provided that the monies due thereunder would be paid into a deposit account established for that settlement. *Reliant Energy*, 105 FERC ¶ 61,008 at P 19 (order approving settlement); Stipulation and Consent Agreement § 4, p. 14 (attached to order approving settlement). This settlement and deposit fund were separate from any settlement in the Gaming Proceeding. *Reliant Energy*, 105 FERC ¶ 61,008 at P 18 n.4. However, the Reliant Settlement challenged here provides that "the allocable share of the $50 million attributable to Non-Settling Participants will be held for later distribution in the Partnership/Gaming Proceeding." Reliant Rehearing Order at P 22, RE 182. Distribution of those funds allocated to the Gaming Proceeding will be determined by further FERC order in the Partnership/Gaming Proceeding. Reliant Settlement Agreement § 4.1.2(ii), RE 32.1.

2. The IDACORP Settlement

On February 17, 2006, a joint offer of settlement was filed by IDACORP, the California Parties, and Commission staff. IDACORP Settlement Order at P 1, RE 256.

a. Settlement of the California and Pacific Northwest Refund Proceedings

The IDACORP Settlement resolved claims against IDACORP by the Settling Parties in the California Refund Proceeding, as well as the Pacific Northwest Refund Proceeding. The Settlement offered an opportunity for non-signatory parties to opt into the Settlement. IDACORP Settlement Order at P 10, RE 263. Parties that did not opt into the Settlement would receive none of the Settlement benefits, but their interests in continuing to litigate their claims with IDACORP would be unaffected. *Id*. at P 11, RE 264.

The Pacific Northwest Refund Proceeding arose from an October 26, 2000, complaint regarding the Pacific Northwest wholesale power markets. This complaint ultimately resulted in an investigation of past spot market sales in the Pacific Northwest. *San Diego*, 96 FERC ¶ 61,120. The Commission considered refunds for the Pacific Northwest market in a proceeding separate from California because spot market sales outside of California were not made in a centralized, single price auction, but rather through bilateral contracts, which added additional complexity to the proceedings. *Id*. at 61,520. Following a hearing before an administrative law judge, and based on the particular circumstances presented, the Commission denied refunds for energy purchases in the Pacific Northwest spot market. *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348, *on reh'g*, 105 FERC ¶

61,183 (2003). On appeal, this Court granted in part petitions for review of those Commission orders and remanded the issue of refunds to the Commission for further consideration. *Port of Seattle*, 499 F.3d 1016.

b. Prior Settlement of the Gaming Proceeding

The IDACORP Settlement also gave effect to an earlier settlement under which IDACORP agreed to pay $83,373 in settlement of Commission investigatory claims against it in the Gaming Proceeding. IDACORP Settlement Order at P 5, RE 259. That amount represented the total revenues, and not merely the profits, associated with Idaho Power's alleged participation in the gaming practice of Circular Scheduling.[11] *Idaho Power Co.*, 106 FERC ¶ 61,208 at P 4 (2004). As this result was better than what could have been achieved in litigation, *see* Gaming Order, 103 FERC ¶ 61,345 at PP 1, 2, 71, the Commission approved the settlement as a reasonable resolution of the Gaming Proceeding against Idaho Power. *Idaho Power*, 106 FERC ¶ 61,208 at P 4. The Commission denied

[11] Circular Scheduling involved a 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 California ISO control area and a transaction outside the California 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.

requests for rehearing of this approval. *Duke Energy*, 117 FERC ¶ 61,039 at P 10, *appeal pending, Port of Seattle, Washington v. FERC*, 9th Cir. No. 06-75045.

The settlement provided that the $83,373 proceeds would be paid into a settlement fund established for the Gaming Proceeding. *Idaho Power Co.*, 105 FERC ¶ 63,048 at P 22 & n.13 (2003). The IDACORP Settlement § 4.1.2, RE 214-15, provides that the $83,373 proceeds of IDACORP's Gaming Proceeding settlement will be paid according to the terms of the original settlement.

D. The Orders Approving the Reliant and IDACORP Settlements

Over Port's protests, the Commission approved the Reliant and IDACORP Settlements. Reliant Settlement Order at P 1, RE 110; IDACORP Settlement Order at P 1, RE 257. Fundamentally, because the Settlements fully preserved Port's ability to continue to pursue any claims it may have against Reliant and IDACORP, the Commission rejected Port's contentions that: (1) there were material issues of fact precluding approval (Reliant Settlement Order at P 31, RE 120; IDACORP Settlement Order at P 36, RE 272); (2) the settlements were contrary to orders bifurcating the Gaming Proceeding into liability and damages phases (Reliant Settlement Order at P 28, RE 119; IDACORP Settlement Order at P 30, RE 270); and (3) the allocations of settlement proceeds were unjust and unreasonable (Reliant Settlement Order at P 33, RE 121; IDACORP Settlement

Order at P 39, RE 273). Moreover, the Commission determined that Port failed to provide the evidence required by the Commission's regulations to support its claimed issues of material fact. IDACORP Settlement Order at PP 36-37, RE 272; Reliant Settlement Order at P 31, RE 120.

E. The Orders on Rehearing

In its requests for rehearing of the Reliant and IDACORP Settlement Orders, Port reiterated its arguments that: (1) approval of the settlements was inconsistent with Commission orders bifurcating liability and damages phases of the Gaming Proceeding, RE 157, RE 305; (2) there are material facts in dispute, RE 161-62, RE 306-07; and (3) the allocation of the settlement proceeds injures Port and is unreasonable and unduly discriminatory, RE 159-60, 163, RE 307. The Commission denied rehearing.

First, under the Commission's regulations, if a party's interests are not immediately and irreparably affected by approval of a settlement in a consolidated docket, that party's opposition does not create a genuine, material issue of fact. Reliant Rehearing Order at P 18, RE 180 (citing *El Paso*, 25 FERC ¶ 61,292). In the absence of a genuine, material issue of fact, the Commission can treat the settlement as uncontested and dispose of it in a summary fashion. *Id*. Here, as the challenged Settlements do not resolve Port's interests or claims, the Commission

concluded that Port's opposition created no material issue of fact. Reliant Rehearing Order at P 18, RE 180; IDACORP Rehearing Order at PP 16-17, RE 325.

The Commission further rejected Port's purported evidence as to material issues of fact. Reliant Rehearing Order at PP 16-17, RE 177-78; IDACORP Rehearing Order at P 16, RE 325. In the case of Reliant, Port only made "vague references" to the California Parties' prior pleadings opposing Reliant settlements as support for the existence of material issues of fact. Reliant Rehearing Order at P 15, RE 177. Similarly, on rehearing of the IDACORP Settlement Order, "[w]ithout specifically discussing any such facts, Port cite[d] materials submitted by the California Parties in 2003 as supporting the existence of genuine issues of material facts. . . ." The Commission reasonably concluded that this rehearing effort "offered no new arguments or precedent to persuade the Commission that its order was in error." IDACORP Rehearing Order at P 16, RE 325. *See also* Reliant Rehearing Order at P 18, RE 180.

The only purported unresolved issue of fact proffered by Port – that there was no quantification of the injury the settlement is designed to address – was unsupported in both cases. Reliant Settlement Order at P 15, RE 177; IDACORP Settlement Order at P 16, RE 325. The Commission found that it had a clear

understanding of the nature and extent of the injuries addressed by the settlements. Reliant Settlement Order at P 16, RE 179; IDACORP Settlement Order at P 16, RE 325. The settlement amounts were based on calculations of Reliant and IDACORP's refund obligations, as well as their potential exposure to disgorgement of profits in investigatory proceedings. Reliant Settlement Order at P 16, RE 179; IDACORP Settlement Order at P 16, RE 325.

Moreover, the Settlement approvals are not inconsistent with orders bifurcating the Gaming Proceeding into liability and allocation phases, because Port remains free to pursue any claims in the allocation portion of the proceedings. Reliant Rehearing Order at P 20, RE 181; IDACORP Order at P 13, RE 323 (citing IDACORP Settlement Order at P 30, RE 270).

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to consider Port's petitions for review of the orders approving the Reliant and IDACORP Settlements. Port is not aggrieved within the meaning of FPA § 313(b), 16 U.S.C. §825*l*(b), and lacks standing to challenge the Settlements, because the Settlements in no way resolve any of Port's claims nor preclude Port's ability to pursue those claims. Also, the Court lacks jurisdiction to review the settlements of non-public investigations conducted under Part 1b of the Commission's regulations, 18 C.F.R. § 1b.1, *et seq*., which are subject to the Commission's non-reviewable discretion.

Further, Port purports to challenge several settlements in this proceeding that were approved in prior Commission orders that are not under review here. Even if Port were aggrieved by these other settlements, Port's remedy is limited to the appeal of the orders approving those settlements, not the orders challenged here. To the extent that the Reliant Settlement altered the previously-approved distribution of the proceeds of prior settlements, it did so only to the potential benefit of Port, not to its detriment.

Assuming *arguendo* that the Court has jurisdiction to reach the merits of Port's claims, those claims must fail. Under the Commission's regulations, the Commission may approve a contested settlement where the Commission finds that

there are no material issues of fact in dispute. Here, the Commission reasonably approved the Reliant and IDACORP Settlements over Port's objections, upon finding that Port's opposition to the settlements failed to create a material issue of fact precluding settlement approval. Port suffers no immediate and irreparable harm from the Settlements as the Settlements in no way resolve any claims possessed by Port nor in any way inhibit Port's ability to pursue those claims. Further, because the Reliant and IDACORP Settlements in no way impaired Port's interests, the Commission also reasonably rejected Port's arguments that the Settlements were discriminatory, and that the Settlements deprived Port of potential recovery in the Gaming Proceeding in contravention of Commission orders governing settlement distribution in that proceeding.

Port's argument that its contested issues should be severed was never raised on rehearing, and therefore cannot be heard by the Court. In any event, because Port's interests are not resolved by the challenged Settlements, no need arises to sever Port's concerns for consideration.

Port in any event failed to substantiate any of the purported issues of fact it raised in opposition to the Settlements. Port's vague references to pleadings filed by other parties in other cases, and its recycling of affidavits from prior cases, failed to satisfy the Commission's standards for evidence in opposition to a

contested settlement. The Commission also reasonably rejected Port's contention that the Commission failed to adequately assess the injuries caused by Reliant's and IDACORP's conduct, finding that the settlement amounts in each case were fully supported.

ARGUMENT

I. STANDARD OF REVIEW

Court review "of a FERC decision is limited to whether the decision was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law, 5 U.S.C. § 706(2)(A)[.]" *California Dep't of Water Resources v. FERC*, 341 F.3d 906, 910 (9th Cir. 2003) (citation omitted). FERC's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003). FERC's interpretations of its own regulations are entitled to deference, unless the interpretation is plainly erroneous. *City of Centralia v. FERC*, 799 F.2d 475, 481 (9th Cir. 1986); *Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1386 (9th Cir. 1984). Likewise, absent evidence of an abuse of discretion, the Commission is entitled to deference to its determination that a controversy raises no disputed issues of material fact. *Public Utils. Comm'n. of the State of California v, FERC*, 24 F.3d 275, 282 (D.C. Cir. 1994); *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1565 (D.C. Cir. 1993); *Vermont Dep't of Pub. Serv. v. FERC*, 817 F.2d 127, 140 (D.C. Cir. 1987).

In the context of approval of a contested settlement, FERC satisfies the standard of review by examining the relevant data and articulating a satisfactory

explanation for its actions. *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 470 (D.C. Cir. 2008). *See also NorAm Gas*, 148 F.3d at 1162 ("[I]n reviewing the Commission's approval of a contested settlement, we must determine whether the Commission has supplied a 'reasoned decision' that is supported by 'substantial evidence.'") (quoting 18 C.F.R. § 385.602(h)(1)(I)). Thus, even if Port's evidence were accepted as reliable and relevant to the points it makes, the Commission must nonetheless be affirmed if substantial evidence supports its findings. *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1379 (9th Cir. 1978).

II. THE COURT LACKS JURISDICTION TO HEAR PORT'S CHALLENGES TO THE SETTLEMENTS.

This Court lacks jurisdiction to consider Port's petitions for review because: (1) Port is not aggrieved within the meaning of FPA § 313(b), 16 U.S.C. §825*l*(b), and lacks standing to challenge the Reliant and IDACORP Settlements, because the settlements in no way impair Port's interests or inhibit Port's ability to pursue any claims it possesses against the settling parties; (2) Port must be aggrieved by the orders under review, not orders previously issued by the Commission; Port purports to challenge settlements in this proceeding that were approved in prior Commission orders not under review here; and (3) a number of the settlements challenged by Port are settlements of non-public enforcement investigations; the

Court lacks jurisdiction to review Commission decisions regarding the settlement of such enforcement proceedings.

A. Port Is Not Aggrieved By and Lacks Standing to Challenge the Commission's Orders.

A party seeking judicial review of a FERC order must be aggrieved by that order. *See* FPA § 313(b), 16 U.S.C. § 825*l*(b); *Covelo Indian Community v. FERC*, 895 F.2d 581, 584 (9th Cir. 1990); *State of California v. FERC*, 966 F.2d 1541, 1561 (9th Cir. 1992). Parties seeking judicial review are likewise held to the constitutional requirements of standing. *Port of Seattle*, 499 F.3d at 1028. Both aggrievement and standing require that the petitioner establish, "'at a minimum, 'injury in fact' to a protected interest.'" *Id*. (quoting *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1200 (D.C. Cir. 1995)).

In this case, Port cannot show injury from the orders approving the Reliant and IDACORP Settlements. The Commission here rejected Port's challenges to the Settlements precisely because the Settlements had no effect on any of Port's claims against the settling parties, nor did they preclude Port from pursuing any of its claims against the settling parties. IDACORP Settlement Order at P 36, RE 272; IDACORP Rehearing Order at P 19, RE 326; Reliant Settlement Order at P 31, RE 120; Reliant Rehearing Order at P 18, RE 180.

Indeed, in general, a non-settling party in a multi-party case lacks standing to object to a partial settlement by another party. *Waller*, 828 F.2d at 582; *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993). Exceptions to this rule are permitted in cases of plain legal prejudice, such as where the settlement "purports to strip [the contesting party] of a legal claim or cause of action." *Waller*, 828 F.2d at 583. *See also Mayfield*, 985 F.2d at 1094. Where, however, as here, none of Port's claims are compromised by the Reliant or IDACORP Settlements, Port lacks standing to challenge those Settlements.

B. Port Cannot Challenge In This Appeal Prior Commission Orders Under Review In Other Proceedings.

Port must be aggrieved by the orders under review, *not* orders *previously* issued by the Commission. *See Wisconsin*, 493 F.3d at 269 ("The fact that a petitioner may be aggrieved by other, related orders does not cure a failure to show an injury in fact caused by the order actually under review.") Accordingly, Port cannot sustain claims regarding those settlements, previously approved by the Commission, which are referenced in the challenged Settlements. The Reliant Settlement at issue in this appeal concerned the distribution of the proceeds from three *prior* settlements of Commission investigatory proceedings: (1) the $836,000 Settlement of the Gaming Proceeding; (2) the $13.8 million settlement of alleged withholding; and (3) the $50 million settlement of various investigatory

proceedings. Reliant Settlement Order at P 6, RE 112; Reliant Rehearing Order at P 3, RE 171-72. Similarly, the IDACORP Settlement at issue in this appeal concerned the distribution of the proceeds of IDACORP's *prior* settlement of the Gaming Proceeding. IDACORP Settlement Order at PP 2, 5, RE 257, 259; IDACORP Rehearing Order at P 3, RE 318.

All of these prior settlements were approved in Commission orders *not* at issue in this appeal. *See* IDACORP Settlement Order at P 5 & n.16, RE 260 (citing *Idaho Power*, 106 FERC ¶ 61,208); Reliant Rehearing Order at P 16 & nn.35-37, RE 178 (citing *Fact-Finding Investigation*, 102 FERC ¶ 61,108 (Reliant $13.8 million settlement); *Reliant Energy*, 105 FERC ¶ 61,008 (Reliant $50 million settlement); *Reliant Energy*, 106 FERC ¶ 61,207 (Reliant Gaming Proceeding settlement)). While petitions for review were filed of the orders approving the Reliant $13.8 million and $50 million settlements, *see Pacific Gas & Electric Co. v. FERC*, 9th Cir. Nos. 03-72874, *et al*., the Court granted a motion for voluntary dismissal on October 4, 2006. Petitions for review of the scope of the Gaming Proceeding are pending in *Pacific Gas & Elec. Co. v. FERC*, 9th Cir. Nos. 05-71008, *et al*. Port's petitions for review of orders approving the Reliant and IDACORP Gaming Proceeding settlements are pending before this Court in *Port of Seattle, Wash. v. FERC*, 9th Cir. Nos. 06-75040, 06-75045, 06-75048.

Consequently, Port cannot be heard to challenge these other settlements in this appeal; if Port is aggrieved by these settlements, Port's remedy is limited to the appeal of the orders approving these settlements, not the orders challenged here. *Wisconsin*, 493 F.3d at 269.

Although the Reliant Settlement altered the distribution of the proceeds of the prior Reliant $50 million and Gaming Proceeding settlements, the new distributions provided for in the Reliant Settlement in fact improve Port's prospects for recovery in the Gaming Proceeding, as compared to the distribution of settlement proceeds provided for in those settlements as originally approved.

First, the Reliant Settlement directed payment of Reliant's $836,000 settlement of the Gaming Proceeding to the deposit fund for that proceeding, whereas in the previously-approved settlement the funds were earmarked for California Parties. The Reliant Gaming Proceeding settlement originally provided that the $836,000 settlement proceeds would be paid into a U.S. Treasury deposit fund account, and "earmarked for payment into the [California ISO's] settlement accounts, for disbursement to scheduling coordinators in accordance with the [California ISO's] settlement process." *Reliant Resources, Inc.*, Docket No. EL03-170 at P 26 (Dec. 9, 2003). The Reliant Settlement, here, however, provided instead that the proceeds of the Reliant Gaming Proceeding settlement would be

"distributed pursuant to future FERC Orders in the gaming proceedings, FERC Docket Nos. EL03-170." Reliant Settlement § 4.1.2(i), RE 32. This provides additional consideration to be distributed in the Gaming Proceeding, which may potentially benefit Port.

Second, the Reliant Settlement directed payment of a portion of the proceeds of the Reliant $50 million settlement to the Gaming Proceeding settlement account, whereas the $50 million settlement, as originally approved, directed no settlement proceeds to the Gaming Proceeding. The $50 million settlement as originally approved provided that the monies due thereunder would be paid into a deposit account established for that settlement. *Reliant Energy*, 105 FERC ¶ 61,008 at P 19 (order approving settlement); Stipulation and Consent Agreement §4, p. 14 (attached to order approving settlement). The $50 million settlement was expressly separate from, and did not affect any obligations Reliant might have, in the Gaming Proceeding. *Reliant Energy*, 105 FERC ¶ 61,008 at P 18 & n.4. Thus, under the $50 million settlement as originally approved, none of the $50 million settlement proceeds were directed to the Gaming Proceeding settlement fund. Accordingly, Port benefits from the fact that the Reliant Settlement now provides that a portion of the $50 million proceeds will be paid into the Gaming Proceeding. *See* Reliant Rehearing Order at P 22, RE 182 (under the Reliant Settlement, "the

allocable share of the $50 million attributable to Non-Settling Participants will be held for later distribution in the Partnership/Gaming Proceeding").

C. The Court Lacks Jurisdiction to Review the Commission's Settlement of Non-Public Investigatory Proceedings.

The $13.8 and $50 million Reliant investigatory settlements arose from non-public investigatory proceedings instituted by the Commission under of its regulations, 18 C.F.R. § 1b.1, *et seq*. *Reliant Energy*, 105 FERC ¶ 61,008 at P 26 n.6 (Reliant $50 million settlement); *Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, 103 FERC ¶ 61,019 at P 6 & n.4 (2003) (Reliant $13.8 million settlement). The Court lacks subject matter jurisdiction to review decisions that implicate FERC's prosecutorial discretion. *Pacific Gas*, 464 F.3d at 863. As the FPA gives FERC "'wide latitude in its enforcement decisions,'" the Court is prohibited under *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985), from reviewing FERC's decision not to prosecute or enforce. *Pacific Gas*, 464 F.3d at 867 (quoting *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1171 (9th Cir. 2001), *amended by* 282 F.3d 609 (9th Cir. 2002)).

This prosecutorial discretion includes the Commission's decision to settle enforcement proceedings. *Public Utils. Comm'n*, 462 F.3d at 1050. In a non-public Part 1b prosecutorial investigation, "FERC may settle claims without review, and need not justify its decision to order refunds, or to decline to order

refunds." *Id*. Thus, the Court could "no sooner question the soundness of [the agency's] bargain than [it] could a unilateral decision not to prosecute *ab initio*." *Schering Corp. v. Heckler*, 779 F.2d 683, 687 (D.C. Cir. 1985). *See also Baltimore Gas*, 252 F.3d 456 (FERC's non-reviewable discretion extends to decisions regarding how to settle enforcement actions).

Under this settled caselaw, the Court is unable to hear Port's challenges to the $13.8 million and $50 million Reliant settlements. Port was not a party to either proceeding. *See Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices*, 105 FERC ¶ 61,063 (2003) (denying all interventions to non-public Part 1b investigations); *Public Utils. Comm'n*, 462 F.3d at 1050 ("[b]ecause § 1b investigations are prosecutorial in nature, third parties do not participate") (citing 18 C.F.R. § 1b.11). Standing to challenge the settlements only would arise when the Commission's settlement purported to cancel or release private claims. *See Burlington*, 513 F.3d at 247. Thus Port lacks standing to challenge any settlement of such actions or the distribution of such settlement proceeds. *See, e.g., Covelo Indian Community*, 895 F.2d at 585-86 (a party denied party status below is "not a party eligible to seek rehearing or judicial review of the merits of the [Commission's] decision.").

While Port is a party to certain of the proceedings settled in the Reliant and IDACORP Settlements, that status does not empower Port to challenge the Commission's settlement of investigatory proceedings. Even where a party is permitted to intervene in Commission enforcement proceedings, such parties are nevertheless unable to challenge the Commission's unreviewable discretion in settling investigations. *See Baltimore Gas*, 252 F.3d at 457 (intervenor in enforcement proceeding has no standing to challenge adequacy of Commission's settlement of that action); *Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices*, 105 FERC ¶ 61,281 at PP 11-15 (2003) (relying on *Baltimore Gas* in rejecting arguments that entities are entitled to pursue their claims for damages in a Commission Part 1b investigation).

Thus, the fact that Port is a party to certain of the proceedings in which claims are being settled in the Reliant and IDACORP settlements in no way affords Port authority it did not possess before to challenge the Commission's disposition of non-public Part 1b investigatory proceedings. The Court continues to lack jurisdiction to review the Commission's approval of the Reliant $13.8 million and $50 million settlements, including the manner of distributing the settlement proceeds.

III. THE COMMISSION REASONABLY APPROVED THE RELIANT AND IDACORP SETTLEMENTS.

Courts have recognized a general policy favoring settlement of administrative proceedings. *See Arctic Slope*, 832 F.2d at 165; *United*, 732 F.2d at 209; *Pennsylvania Gas*, 463 F.2d at 1247. Further, courts have recognized the particular public interest considerations involved in the resolution of "extraordinarily complex and burdensome proceedings," such as those at issue here. *Arctic Slope*, 832 F.2d at 164. *See also, e.g., Laclede Gas Co. v. FERC*, 997 F.2d 936, 947 (D.C. Cir. 1993) (finding it "perfectly appropriate for FERC to weigh the prospects for protracted litigation in determining whether a remedial settlement offer should be accepted").

The Western energy crisis claims have proven extremely burdensome and complex. In this regard, as explained in further detail in the Statement of Facts, Section B *supra*, both this Court and the Commission have urged settlement of Western energy crisis cases as the most equitable and expeditious manner of resolving cases of such complexity. *See, e.g.*, Order, *Pub. Utils. Comm'n v. FERC*, 9th Cir. No. 01-71051 (9th Cir. August 2, 2006) ("We direct Senior Circuit Judge Edward Leavy to oversee and explore with the parties possible resolution through mediation."); *Duke Energy*, 117 FERC ¶ 61,039 at P 12 ("The Commission strongly favors settlements, particularly in cases that are hotly contested and

complex." Resolution by settlement will bring "needed stability to the industry, end protracted litigation, and thereby benefit customers.") Indeed, in the Energy Policy Act of 2005, Pub. L. No. 109-58, section 1824, 119 Stat. 594, Congress itself urged the rapid resolution of Western energy crisis claims.

In response to this encouragement, the Reliant and IDACORP Settlements challenged here represent "a comprehensive and reasonable effort by the Parties to end their litigation and resolve their legal disputes." Reliant Rehearing Order at P 25, RE 183. *See also* IDACORP Settlement Order at P 39, RE 273 (finding that "the Settlement is a comprehensive and reasonable effort by the Settling Participants to end their litigation and resolve their legal disputes.") As the Commission was well within its considerable discretion in approving these Settlements, the Commission orders should be affirmed.

A. The Commission Has Broad Discretion to Approve Contested Settlements.

Under Rule 602(h) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(h), FERC has broad authority and discretion to address contested settlements. *See, e.g.*, *Arctic Slope*, 832 F.2d at 164; *United*, 732 F.2d at 208. Pursuant to 18 C.F.R. § 385.602(h), the Commission may make a determination on the merits regarding any contested issue if it finds no issues of material fact. 18 C.F.R. § 385.602(h)(1)(i). In the event that a contesting party fails to raise a

material issue of fact in opposition to the settlement, the settlement may be approved under the standard for uncontested settlements and be decided in a summary fashion. Reliant Rehearing Order at P 18, RE 180 (citing *El Paso*, 25 FERC ¶ 61,292); *United*, 732 F.2d at 208; *New Orleans Pub. Serv., Inc. v. FERC*, 659 F.2d 509, 512 (5th Cir. 1981) ("approval of a contested settlement is like the granting of a motion for summary judgment when there exist no genuine issues of material fact"); *Pennsylvania*, 463 F.2d at 1246 (approval of a contested settlement in the absence of a material issue of fact is "in effect a 'summary judgment' granted on 'motion' by the litigants").

As an uncontested settlement, the settlement may be approved as to the consenting parties under Rule 602(g), 18 C.F.R. § 385.602(g), which provides that "an uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest." *See* Reliant Rehearing Order at P 13 n.27, RE 176. *See also* Port Br. at 54 (acknowledging that the applicable standard is "'fair and reasonable and in the public interest'") (quoting 18 C.F.R. § 385.602(g)(3)); Port Request for Rehearing of the Reliant Settlement Order at 38, RE 161. *See also Amoco Production Co. v. FERC*, 271 F.3d 1119, 1121 (D.C. Cir. 2001) (citing *United*, 732 F.2d at 207 n.8). This standard permits the Commission to approve the offer of settlement without a

determination on the merits that the rates approved are "just and reasonable." *United*, 732 F.2d at 207 n.8.

B. As No Material Issues of Fact Exist With Regard to the Challenged Settlements, The Commission Reasonably Approved the Settlements as Fair and Reasonable and in the Public Interest.

1. As Port's Interests Are Not Affected by the Challenged Settlements, Port's Opposition to Those Settlements Raises No Material Issues of Fact.

a. Under the Commission's Regulations, Contesting Parties Raise No Material Issue of Fact if Their Interests Are Not Affected By the Challenged Settlement.

In the challenged orders, the Commission found that the IDACORP and Reliant Settlements in no way affected any of Port's claims against Reliant or IDACORP. IDACORP Settlement Order at P 36, RE 272 ("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."); IDACORP Rehearing Order at P 19, RE 326 ("The Settlement does not preclude Port from pursuing whatever claims it believes it has against IDACORP. . . .");

Reliant Settlement Order P 31, RE 120 ("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."); Reliant Rehearing Order at P 18, RE 180 (The Settlement does not settle Port's claims, and it specifically provides that "[n]othing herein shall establish any facts or precedents as between the Parties, the Opt-In Participants, and any third parties as to the resolution of any dispute.") (citing Reliant Settlement § 15.3, RE 71).

Because the Settlements had no impact on Port's claims against IDACORP and Reliant, the Commission reasonably rejected Port's arguments, Port Br. at 54-60, that there were material issues of fact in dispute precluding settlement approval. *See* IDACORP Settlement Order at P 36, RE 272; IDACORP Rehearing Order at PP 16-17, RE 325; Reliant Settlement Order at P 31, RE 120; Reliant Rehearing Order at P 18, RE 180.

Courts have recognized, in denying standing, that non-settling parties in a multi-party case are not injured by the partial settlements of other parties, absent some plain legal prejudice, such as where the settlement purports to strip the party of a legal claim. *Waller*, 828 F.2d at 582-83; *Mayfield*, 985 F.2d at 1092, 1094. Similarly, the Commission has held that, where, as here, a party's interests are not immediately and irreparably affected by the approval of a settlement in a

consolidated docket, a party's opposition to the settlement does not create a genuine, material issue of fact under 18 C.F.R. § 385.602(h)(1)(i). Reliant Rehearing Order at P 18, RE 180 (citing *El Paso*, 25 FERC at 61,673). *See, e.g., Tejas*, 908 F.2d at 1003 (a contesting party's challenge triggers an obligation on the part of the Commission to examine the potential impact of the settlement on the contesting party's interests).

The Court must defer to the Commission's interpretation of its own rules, unless the interpretation is plainly erroneous. *Centralia*, 799 F.2d at 481; *Pacific Gas*, 746 F.2d at 1386. Further, without evidence of an abuse of discretion, the Commission is entitled to deference to its determination that a controversy raises no disputed issues of material fact. *Public Utils. Comm'n*, 24 F.3d at 282; *Alabama Power*, 993 F.2d at 1565; *Vermont Dep't of Pub. Serv.*, 817 F.2d at 140.

Accordingly, here, the Commission should be upheld where it reasonably determined that, as Port cannot show any immediate or irreparable effect on its interests from the settlements, Port's opposition to the settlements fails to raise a material issue of fact precluding settlement approval under the Commission's regulations. Reliant Rehearing Order at P 18, RE 180; Reliant Settlement Order at P 31, RE 120; IDACORP Settlement Order at P 36, RE 272; IDACORP Rehearing Order at P 16, RE 325.

b. Port's Claims of Harm from the Reliant and IDACORP Settlements Rest Upon A Flawed Factual Assumption.

Port claims to be harmed by the Reliant and IDACORP Settlements because the Settlements allegedly distribute settlement proceeds to the California Parties that should be deposited into the settlement fund for the Gaming Proceeding, and reserved for distribution in Phase II of that proceeding to all Gaming Proceeding participants, including Port.[12] *See, e.g*. Port Br. at 42, 48-52.

The Commission found Port's claims fundamentally in error because, contrary to Port's contentions, neither the Reliant nor the IDACORP Settlements in any way affected Port's ability to pursue its claims in the Gaming Proceeding or

[12] Port is concerned with its potential recovery in the Gaming Proceeding, *see* Port Br. at 48-49; 50-52, because it has no claim on the settlement proceeds for any of the other actions settled in the Reliant and IDACORP Settlements. During the period at issue, Port purchased its full electric requirements at wholesale from Puget Sound Energy, Inc. Port Br. at 7-8; Port Request for Rehearing at 13 n. 53, RE 136. Port was not a purchaser in the California ISO and California Power Exchange markets, and therefore has no claim against Reliant or IDACORP for refunds in the California Refund Proceeding. *Public Utils. Comm'n,* 462 F.3d at 1065 (the California Refund Proceeding is limited to transactions in the California Power Exchange and California ISO markets, and excludes bilateral transactions in other markets). Also, because Port purchased its requirements from Puget, Port's claims in the Pacific Northwest Refund Proceeding are against Puget, not IDACORP or Reliant. Port Br. at 52. The $13.8 million and $50 million Reliant investigatory settlements arose from Part 1b non-public Commission investigatory proceedings, see *Reliant Energy*, 105 FERC ¶ 61,008 at P 26 n.6; *Fact-Finding Investigation*, 103 FERC ¶ 61,019 at P 6 & n.4, to which Port was not a party. *See* 18 C.F.R. § 1b.11; *Fact-Finding Investigation,* 105 FERC ¶ 61,063 (denying interventions to non-public Part 1b investigations).

limited Port's potential recovery in that proceeding. IDACORP Settlement Order at P 36, RE 272; IDACORP Rehearing Order at P 19, RE 326; Reliant Settlement Order P 31, RE 120; Reliant Rehearing Order at P 18, RE 180.

As Port acknowledges, *see* Port Br. at 52, the amount of IDACORP and Reliant's liability in the Gaming Proceeding has been fixed in prior Commission orders approving Reliant and IDACORP's settlements of the Gaming Proceedings claims asserted against them. *See Duke Energy*, 117 FERC ¶ 61,039 (affirming approval of Reliant and IDACORP Gaming Proceeding settlements), *appeal pending, Port of Seattle, Washington v. FERC*, 9th Cir. No. 06-75045. *See also Pacific Gas & Elec. Co. v. FERC*, 9th Cir. Nos. 05-71008, *et al*. (petitions for review of the scope of the Gaming Proceeding).

The Reliant and IDACORP Settlements provide for the *full amount* of Reliant and IDACORP's Gaming Proceeding settlement proceeds to be paid into the deposit fund for that proceeding. Reliant Settlement § 4.1.2(i), RE 32, provides that the payment of $836,000 "previously negotiated by Reliant with respect to the Reliant Gaming Settlement" "shall be distributed pursuant to future FERC orders in the gaming proceedings." IDACORP Settlement § 4.1.2, RE 214-15, provides that the $83,373 proceeds of IDACORP's Gaming Proceeding settlement will be paid according to the terms of the original settlement. The original settlement, in

turn, provided that the $83,373 proceeds would be paid into a settlement fund established to collect settlements from market participants in the Gaming Proceeding. *Idaho Power*, 105 FERC ¶ 63,048 at P 22 & n.13.

Indeed, the Reliant Settlement directed payment of Reliant's $836,000 settlement of the Gaming Proceeding to the deposit fund for that proceeding, whereas in the previously-approved Reliant Gaming Proceeding settlement the funds were earmarked for California Parties. The Reliant Gaming Proceeding settlement originally provided that the $836,000 settlement proceeds would be paid into a U.S. Treasury deposit fund account, and "earmarked for payment into the [California ISO's] settlement accounts, for disbursement to Scheduling Coordinators in accordance with the [California ISO's] settlement process." *Reliant Resources, Inc*., Docket No. EL03-170 at P 26 (Dec. 9, 2003). The Reliant Settlement, here, however, provided instead that the proceeds of the Reliant Gaming Proceeding settlement would be "distributed pursuant to future FERC Orders in the gaming proceedings, FERC Docket Nos. EL03-170." Reliant Settlement § 4.1.2(i), RE 32. This provides additional consideration to be distributed in the Gaming Proceeding, which potentially may benefit Port.

Thus, as the Reliant and IDACORP Settlements provide for the full amount of IDACORP and Reliant's settlement of the Gaming Proceeding to be paid into

the Gaming Proceeding deposit fund, Port's ability to pursue its claims in the Gaming Proceeding with regard to IDACORP and Reliant is in no way impaired.

c. Port's Claim To Be Harmed By the Distribution of the Reliant $50 Million Settlement Proceeds Is Without Merit.

The Reliant Settlement provides that the proceeds of the Reliant $50 million settlement will be allocated to parties and opt-in participants pursuant to an allocation matrix, and the allocable share of the $50 million attributable to non-settling participants will be held for later distribution in the Gaming Proceeding. Reliant Settlement § 4.1.2(iii), RE 32, and § 4.2.5, RE 35; Reliant Rehearing Order P 22, RE 182. Port complains that it is harmed by the fact that only a portion -- rather than *all* -- of the Reliant $50 million settlement proceeds will be deposited into the Gaming Proceeding settlement account. *See* Port Br. at 50-51.

Port does not attempt to explain – because it cannot – *why* the entirety of the $50 million settlement proceeds should be deposited into the Gaming Proceeding settlement account. To the contrary, as originally approved, the $50 million settlement required no payment of proceeds into the Gaming Proceeding settlement fund. The $50 million settlement provided that the monies due thereunder would be paid into a deposit account established for that settlement. *Reliant Energy*, 105 FERC ¶ 61,008 at P 19 (order approving settlement); Stipulation and Consent

Agreement §4, p. 14 (attached to order approving settlement). The $50 million settlement was expressly separate from, and did not affect any obligations Reliant might have, in the Gaming Proceeding. *Reliant Energy*, 105 FERC ¶ 61,008 at P 18 & n.4.

Although Port points to the language in the settlement providing that the monies were "for ultimate distribution for the benefit of California and Western electricity consumers," *see* Port Br. at 33, that language could in no way create an entitlement to settlement proceeds *in Port*. As the Commission observed, the Reliant Settlement allocated settlement monies to a number of recipients (listed in the Allocation Matrix, Exhibit B to the settlement) that were not California entities. Reliant Rehearing Order at P 25, RE 183. Port has no standing and no claim on which to base an argument that it was entitled to be included in that allocation matrix.

Thus, rather than suffering harm, Port *benefitted* from the fact that, under the terms of the Reliant Settlement, "the allocable share of the $50 million attributable to Non-Settling Participants will be held for later distribution in the Partnership/Gaming Proceeding." Reliant Rehearing Order at P 22, RE 182. Under the Reliant Settlement distribution, at least a portion of the proceeds of the

$50 million settlement will be paid into the Gaming Proceeding settlement fund, where Port may potentially assert a claim to them.

Port accuses the Commission of being "disingenuous" in finding that Port would benefit from the allocation of the Non-Settling Participant's share of the $50 million to the Gaming Proceeding, because Port does not fall within the Settlement definition of "Non-Settling Participants." Port Br. at 50-51. Apparently, Port is of the view that the portion of the $50 million allocated to the Gaming Proceeding will be reserved only for those parties who qualify as Non-Settling Participants under the Reliant Settlement. *Id*.

That is, however, not what the Reliant Settlement provides. Once those eligible market participants opt not to claim their allocated share, § 4.1.2(iii) of the Reliant Settlement provides that amounts allocable to non-settling parties will be subject to allocations "to be determined by further FERC order in the Partnership/Gaming Proceeding." Settlement § 4.1.2(iii) RE 32. *See* Reliant Rehearing Order P 6, RE 173 (noting that Non-Settling Participants will not share in the benefits of the settlement agreement).

Thus, the Commission correctly concluded that the Settlements in no way impair Port's ability to pursue its claims in the Gaming Proceeding, or elsewhere. IDACORP Settlement Order at P 36, RE 272; IDACORP Rehearing Order at P 19,

RE 326; Reliant Settlement Order at P 31, RE 120; Reliant Rehearing Order at P 18, RE 180.

d. The Absence of Any Injury to Port Disposes of Port's Arguments Regarding Discrimination, Conflict with Prior Commission Orders, and Severance.

The absence of any impact on Port disposes of Port's argument, *see* Port Br. at 51, that the Reliant and IDACORP Settlements were unduly discriminatory for allegedly favoring California interests over those of Pacific Northwest market participants. IDACORP Settlement Order at P 39, RE 273; IDACORP Rehearing Order at P 19, RE 326; Reliant Settlement Order at P 34, RE 121; Reliant Rehearing Order at PP 24-25, RE 183. In order to prevail on an undue discrimination claim with regard to a contested settlement, Port must show not only that the California Parties were treated differently than Port, but *also* that Port and the California Parties are similarly situated. *See Washington Water Power Co. v. FERC*, 201 F.3d 497, 504 (D.C. Cir. 2000). Obviously, Port can make no such showing where the California Parties received proceeds of the settlement of actions in which they, unlike Port, had claims against Reliant and IDACORP. As Port receives under the Settlements the full value of the proceeds of all Settlements to which Port potentially has a claim, the challenged settlements do not unduly discriminate against Port. IDACORP Settlement Order at P 39, RE 273;

IDACORP Rehearing Order at P 19, RE 326; Reliant Settlement Order at P 34, RE 121; Reliant Rehearing Order at PP 24-25, RE 183.

Similarly, Port's argument that the Settlements contravene the Commission and administrative law judge orders bifurcating the Gaming Proceeding into liability and distribution phases is without merit.[13] *See* Port Br. at 44-54. This argument is based on the false premise that that the Settlements permit the distribution to the California Parties of settlement proceeds that should be deposited into the settlement fund for the Gaming Proceeding. *See, e.g.* Port Br. at 42, 48-52. As all of the settlement proceeds to which Port has a claim in the Gaming Proceeding are being deposited in the settlement fund in that proceeding for distribution in Phase II, and Port remains free to assert any claim it has to such settlement proceeds, there is no conflict. *See* IDACORP Settlement Order at P 30, RE 270 (finding that, as "the Settlement does not in any way limit the ability of Port to continue pursuing its claim or pursuing allocation issues" in the Gaming Proceeding, approval of the challenged settlements is not inconsistent with prior

[13] On September 16, 2003, in the Gaming Proceeding, Port, among others, filed a motion to phase the Gaming Proceedings, seeking in the first phase to settle potential liability and settlement amounts, and deposit such amounts into a deposit fund, and in a separate phase address the issue of the appropriate distribution of those settlement funds. *American Elec. Power Serv. Corp*., 104 FERC ¶ 61,323 at P 3 (2003). The Commission granted the motion to the extent that the administrative law judge could certify and the Commission approve settlements on liability in these proceedings before distribution of proceeds is resolved. *Id*. at P 6.

orders in the Gaming Proceeding); Reliant Settlement Order at P 28, RE 119 (same). Port in fact benefits from additional funds available for distribution in the Gaming Proceeding under the Reliant Settlement.

Port's claim that the Commission erred in failing to sever Port's purported contested issues from the remainder of the proposed settlement, *see* Port Br. at 60-61, likewise fails. As Port failed to raise this issue on rehearing of either the IDACORP Settlement Order or the Reliant Settlement Order, Port is barred from asserting the issue here. FPA § 313(b), 16 U.S.C. §825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in application for rehearing unless there is reasonable ground for failure to do so.").

In any event, the absence of harm to Port also disposes of this argument. Where no material issue of fact was raised, there was no need for any severance, and the settlement could be approved as fair and reasonable. *See Amoco*, 271 F.3d at 1121 (upholding Commission in denying severance of a contesting party and approving a contested settlement that actually did impact the contesting party, where the party could fare no better than the challenged settlement by litigating the rate issue being settled). Here, where Port's claims are in no way affected or

impaired by the challenged settlements, the Commission plainly was not required to sever Port's challenges to the settlement for additional hearing.

2. Port In Any Event Failed to Adequately Identify and Support Any Material Issues of Fact.

a. Port Failed to Specify and Support Its Alleged Material Issues of Fact As Required By Commission Regulations.

Port in any event failed to adequately identify and support any material issues of fact that would preclude settlement approval. Although Port asserts that the Commission "ignored" Port's purported evidence of claimed material issues of fact, *see* Port Br. at 56, the Commission in fact examined the proffered evidence and found it insufficient to support Port's claims. Reliant Settlement Order at P 31, RE 120; Reliant Rehearing Order at PP 15-18, RE 177-180; IDACORP Settlement Order at PP 36-37, RE 272; IDACORP Rehearing Order at P 16, RE 325. *See, e.g.*, *New Orleans*, 659 F.2d at 515 (upholding approval of a contested settlement without an evidentiary hearing where the petitioner had the opportunity to present its opposition to the settlement and the Commission addressed the petitioner's objections).

Under the Commission's regulations, a party contesting an offer of settlement on the ground that genuine issues of material fact exist is required to submit in its comments an affidavit specifying the material facts it contends are at

issue. The affidavit must also provide references to documents, testimony, or other items that support that party's claim. *See* 18 C.F.R. § 385.602(f)(4); Reliant Settlement Order at P 29, RE 120; IDACORP Settlement Order at PP 35-37, RE 271-72.

In the case of Reliant, Port only made "vague references" to the California Parties' prior pleadings opposing Reliant settlements as support for the existence of material issues of fact. Reliant Rehearing Order at P 15, RE 177. *See* Port Request for Rehearing at 39, RE 162. Port failed even to summarize the purported issues of fact shown by these pleadings. Reliant Rehearing Order at P 16, RE 177-78. Such vague assertions can give rise to no material issue of fact.

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

Reliant Rehearing Order at P 17, RE 179 (quoting Reliant Settlement Order at P 31, RE 120). *See, e.g.*, *Public Utils. Comm'n*, 24 F.3d at 282 ("Petitioners' mere assertion that a material issue of fact remains will not enable them to force a hearing, particularly where we have said that 'without evidence of an abuse of

discretion, we defer to an agency's determination that a controversy raises' no disputed issues.") (quoting *Alabama Power Co.*, 993 F.2d at 1565). *See also Bear Lake Watch*, 324 F.3d at 1077 n.8 (an issue "mentioned" but not really briefed is not sufficiently raised).

In its comments in opposition to the IDACORP Settlement, Port relied upon recycled affidavits from prior proceedings, which the Commission found irrelevant to the instant settlements and without indication that at least one of the affiants supported his prior declaration for the purpose of opposing the current settlements. IDACORP Settlement Order at P 37, RE 272. On rehearing, Port simply "point[ed] to the materials submitted by the California Parties" in their Opposition to IDACORP's Gaming Proceeding settlement as evidence of material issues of fact. *See* Port Request for Rehearing at 29, RE 306. Thus, "[w]ithout specifically discussing any such facts, Port cite[d] materials submitted by the California Parties in 2003 as supporting the existence of genuine issues of material facts. . . ." IDACORP Rehearing Order P 14, RE 324. The Commission reasonably concluded that this rehearing effort "offered no new arguments or precedent to persuade the Commission that its order was in error." *Id*. at P 16, RE 325.

b. Port Failed to Support its Claim that the Commission Inadequately Considered the Financial Impact of the Claims Being Settled, Where the Commission Found Ample Evidence to Support the Settlement Amounts.

Before the Commission, Port failed to discuss the one issue of fact it actually identified, *see* Port Br. at 58-60, the alleged failure of the Commission to quantify adequately the financial harm caused by IDACORP and Reliant's actions. IDACORP Rehearing Order at P 16, RE 325; Reliant Rehearing Order at P 15, RE 177. In the first instance, it is of course well settled that, even in evaluating a contested settlement, the Commission is not required to issue a binding decision on the merits of an issue. *Maine Pub. Utils. Comm'n*, 520 F.3d at 473. To the contrary, such a requirement would "largely vitiate the purpose of a settlement." *Id*. Where the settlement is designed to provide a remedy in an enforcement proceeding, the Commission has broad discretion in approving even contested settlements without the obligation to "scrutinize the joint settlement offer to ensure that it provided dollar-for-dollar refunds" to customers. *Laclede*, 997 F.2d at 943-44.

In any event, the Commission found that Port's allegations in this regard were entirely unsupported. IDACORP Rehearing Order at P 9 n.21, RE 322; Reliant Rehearing Order at P 15, RE 177. To the contrary, the Commission reasonably concluded in both cases that there was ample evidence to fully justify

the settlement amounts. Reliant Rehearing Order at PP 15-16, RE 177-78; IDACORP Rehearing Order at P 16, RE 325; IDACORP Settlement Order at PP 5-6 & n.23, RE 259.

In the case of Reliant, the Commission found the settlement amounts fully supported:

> The amounts outlined above [the settlement amounts] arise directly from Reliant's activities during the Settlement Period and are based on calculations of Reliant's refund obligations, as well as its potential exposure to disgorgement of profits in the Gaming Proceeding. The Commission certainly has an understanding of the nature and extent of the injuries the Settlement will address. In approving the Settlement, the Commission concluded that the monetary and non-monetary remedies provided by the Settlement, balanced against the costs and risks of continued litigation, resulted in a Settlement that is in the public interest. Therefore, far from failing to quantify the injuries addressed by the Settlement, it contains detailed allocations of Settlement proceeds to parties that have spent years and considerable resources litigating claims of wrongdoing by Reliant, and it requires Reliant to address concerns about its market behavior.

Reliant Rehearing Order at P 16, RE 179. Thus, Reliant's settlement of the California Refund Proceeding was based on Reliant's potential refund obligation. *Id*. It should be noted in this regard that refund amounts due in the California Refund Proceeding were preliminarily determined by the administrative law judge in *San Diego*, 101 FERC ¶ 63,026 (*see* Appendix), as modified in *San Diego*, 102 FERC ¶ 61,317 and subsequent orders, although the calculations remain on appeal

in *Public Utilities Commission of the State of California, et al. v. FERC*, 9th Cir. Nos. 01-71934, *et al*. (Phase II appeals).

The amounts related to prior settlements, *see* Reliant Settlement § 4.1.2, RE 32, were, as the Commission noted, approved in *prior* proceedings in which those amounts were fully justified. *See* Reliant Rehearing Order at P 16 & nn.35-37, RE 178, in which the Commission cited:

(1) *Reliant Energy*, 106 FERC ¶ 61,207 at P 4: approving Reliant's $836,000 settlement of the Gaming Proceeding, finding that the settlement amount represented the payment of the total revenues from the challenged transactions, rather than merely the profits, and therefore represented a greater recovery than could have been achieved in litigation;

(2) *Fact-Finding Investigation*, 102 FERC ¶ 61,108 at P 6: approving the $13.8 million settlement of alleged withholding on two days in June, 2000, finding that the amount reflects the worst case scenario of the effect of Reliant's withholding on the California market; and

(3) *Reliant Energy*, 105 FERC ¶ 61,008, as modified in *Reliant Energy*, 108 FERC ¶ 61,278: approving the $50 million settlement of various investigatory claims against Reliant based upon the attached Stipulation and Consent Agreement which, in PP 1-6, details staff findings in the various investigatory proceedings being settled.

Accordingly, the Commission had ample basis for a finding that the Reliant Settlement was well-supported.

Likewise, with regard to IDACORP, the settlement amounts for both the California Refund Proceeding, as well as the previously-approved Gaming Proceeding settlement, were fully supported. The IDACORP Settlement provided

that IDACORP would pay $24,250,000 in settlement of claims against it in the California Refund Proceeding. *See* IDACORP Rehearing Order at P 16, RE 325. This amount was calculated in an Allocation Matrix based upon IDACORP's estimated refund liability in the California Refund Proceeding. IDACORP Settlement Order at P 6 n.23, RE 261.

The amount of IDACORP's Gaming Proceeding settlement had been previously approved. IDACORP Rehearing Order at P 16, RE 325. In previously approving that settlement amount, the Commission expressly found that the $83,373 payment represented the payment of the total revenues from the challenged transactions, rather than merely the profits, and therefore represented a greater recovery than could have been achieved through litigation. IDACORP Settlement Order at P 5, RE 259 (citing *Idaho Power*, 105 FERC ¶ 63,048 at P 57).

Accordingly, the Commission had ample basis for finding the settlement amounts of both the Reliant and IDACORP Settlements well-supported, and therefore the Commission reasonably rejected Port's claims that a material issue of fact, warranting further hearing, existed with regard to the Settlements. Reliant Rehearing Order at P 15, RE 177; Reliant Settlement Order at P 31, RE 120; IDACORP Rehearing Order at P 16, RE 325; IDACORP Settlement Order at P 36, RE 272.

CONCLUSION

For the reasons stated, Port's petitions for review should be dismissed for lack of jurisdiction. Alternatively, Port's petitions should be denied on the merits and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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May 30, 2008

STATEMENT OF RELATED CASES

These consolidated cases, selected for immediate briefing and decision following complex case management, are related to the following petitions for review now pending before this Court:

Pub. Utils. Comm'n of the State of California v. FERC, Nos. 01-71051, *et al*.
Pub. Utils. Comm'n of the State of California v. FERC, Nos. 01-71934, *et al*.
Pacific Gas & Elec. Co. v. FERC, Nos. 05-71008, *et al*.
Port of Seattle, Washington v. FERC, Nos. 03-74139, *et al*.
Port of Seattle, Washington v. FERC, No. 05-71175
Port of Seattle, Washington v. FERC, No. 06-74363
Port of Seattle, Washington v. FERC, No. 06-75708
Port of Seattle, Washington v. FERC, No. 06-75039
Port of Seattle, Washington v. FERC, No. 06-75040
Port of Seattle, Washington v. FERC, No. 06-75045
Port of Seattle, Washington v. FERC, No. 06-75048
Port of Seattle, Washington v. FERC, No. 08-70429

In addition, there are numerous petitions for review pending before the Court of FERC orders initiating supplier-specific investigative and enforcement proceedings, and approving supplier-specific settlements, arising from the events of the Western energy crisis of 2000-2001 that do not involve the petitioner or suppliers involved in the challenged settlements here.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. RULE 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NOS. 06-72957 AND 06-75044 (CONSOLIDATED)

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, and this Court's order of January 18, 2008, establishing a 16,800 word limit for Respondent, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 13,784 words.

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May 30, 2008