

130 FERC ¶ 61,197
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller and John R. Norris.

San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services	Docket No. EL00-95-239
Investigation of Practices of the California Independent System Operator and the California Power Exchange	Docket No. EL00-98-223
Puget Sound Energy, Inc. v. Sellers of Energy and/or Capacity	Docket No. EL01-10-054
Investigation of Anomalous Bidding Behavior and Practices in Western Markets	Docket No. IN03-10-055
Fact-Finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices	Docket No. PA02-2-071
American Electric Power Service Corporation	Docket No. EL03-137-019
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-180-048
California Independent System Operator Corporation	Docket No. ER03-746-020
Los Angeles Department of Water and Power	Docket No. EL03-157-008

ORDER DENYING REHEARING

(Issued March 18, 2010)

1. In this order, the Commission denies a request for rehearing filed by the Sacramento Municipal Utility District (SMUD) of the Commission's December 17, 2009 order approving a settlement agreement (Settlement) between the City of Los Angeles, California, acting by and through the Department of Water and Power (LADWP), and the California Parties¹ (collectively, the Parties) in the above-captioned proceedings.²

Background

2. On October 28, 2009, the California Parties and LADWP filed the Settlement, which resolved certain claims arising from events and transactions in the western energy markets during the period January 1, 2000 through June 20, 2001 as they relate to LADWP. The Settlement's monetary consideration comprised \$167,786,671, plus interest, flowing from LADWP to the California Parties. These proceeds would be distributed in accordance with an allocation matrix that was included as part of the Settlement. Under the Settlement, SMUD and other specified entities were classified as Deemed Distribution Participants, which, according to the Settlement, means that these entities owed more to the CAISO or the CalPX than what they were owed under the Settlement's allocation matrix. Under the Settlement, Deemed Distribution Participants would therefore receive a credit against what they owe to the CAISO or CalPX rather than receiving a cash payment.³

3. The December 17 Order approved the Settlement, rejecting SMUD's arguments on the merits.

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

² *San Diego Gas & Electric Co.*, 129 FERC ¶ 61,257 (2009) (December 17 Order).

³ By contrast, entities designated as "Net Refund Recipients" under the Settlement's allocation matrix receive a cash payment. *See* Settlement and Release of Claims, §§ 1.54, 5.2.

Request for Rehearing

4. On rehearing, SMUD argues that the Commission's approval of the Settlement under the first prong of the *Trailblazer*⁴ analysis was inappropriate as there was no record evidence on which to base a merits decision on the issue of undue discrimination. Similarly, SMUD argues that the Commission erred in rejecting its contention that the Settlement was unduly discriminatory because it classified SMUD as a Deemed Distribution Participant. Finally, SMUD argues that the Commission erred in approving a settlement that prejudices claims of non-settling parties. We address each of these arguments below.

Undue Discrimination and Approval of the Settlement Under the Commission's *Trailblazer* Analysis

5. SMUD argues that its treatment as a Deemed Distribution Participant under the Settlement is unduly discriminatory and forces SMUD to forfeit its statutory rights in order to qualify for refunds by requiring it to net refund obligations against its refund rights. According to SMUD, the Commission concluded in the December 17 Order that the Settlement distinguishes between Deemed Distribution Participants and Net Refund Recipients based on whether entities have amounts outstanding and payable to the CAISO and/or CalPX, rather than on the jurisdictional status of an entity. However, SMUD argues that the Commission goes on to state that the settlements do not constitute a finding that any entity owes money to the CAISO and/or CalPX. Therefore, SMUD contends that the Commission's finding that the Settlement is not unduly discriminatory bears no logical connection to its finding that there is no evidence that SMUD owes money to the CAISO and/or CalPX. SMUD also argues that the Commission lacks grounds for treating SMUD differently from other purchasers who made no jurisdictional sales.

6. Further, SMUD denies owing money to the CAISO and/or CalPX, and it states that neither entity has ever made a claim against SMUD for refunds. SMUD also asserts

⁴ *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*). Under the Commission's *Trailblazer* analysis, there are four approaches under which the Commission may approve a contested settlement: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission determines that the settlement provides an overall just and reasonable result; (3) the Commission determines that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated; or (4) the Commission determines that the contesting parties can be severed. *See Trailblazer*, 85 FERC at 62,342-44.

that the Commission has already found that SMUD is owed monies by these entities.⁵ Therefore, SMUD contends there is no basis for the Commission's distinction between SMUD and Net Refund Recipients. SMUD argues that it has long been settled that undue discrimination involves both the dissimilar treatment of similarly situated parties and the similar treatment of dissimilar parties.⁶ SMUD contends that it is similar to other purchasers who are not Deemed Distribution Participants because Deemed Distribution Participants, unlike Net Refund Recipients, owe money to the CAISO and/or CalPX. Finally, SMUD notes that a substantially similar settlement offer must be made to similarly situated customers,⁷ and it argues that while SMUD is similarly situated to the Settlement's refund recipients, SMUD has not been given an offer comparable to those extended to other refund recipients.

7. Finally, SMUD asserts that the Commission erred in approving the Settlement using the first prong of the *Trailblazer* analysis for contested settlements, namely, the December 17 Order's rejection of SMUD's arguments on the merits. Specifically, SMUD argues that by not making any affirmative finding of whether SMUD or other entities actually owed monies to the CAISO and/or CalPX, the Commission does not have an adequate record on which to make a merits determination regarding the justness and reasonableness of the Settlement.

Commission Determination

8. We deny rehearing. We disagree with SMUD's contention that the Settlement is unduly discriminatory. Instead, as we concluded in the December 17 Order, we find that the Settlement's designation of certain entities as Deemed Distribution Participants is not unduly discriminatory, because this designation does not make any distinctions based upon the jurisdictional status of any particular entity. Rather, under the Settlement, certain entities are designated as Deemed Distribution Participants based on whether those entities have amounts outstanding and payable to the CAISO and/or CalPX as set forth in the allocation matrix. Deemed Distribution Participants are not precluded from

⁵ SMUD Rehearing Request at 7 (citing *San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,067, at P 57 (2007) (*Bonneville Remand Order*), *order on reh'g*, 125 FERC ¶ 61,214 (2008)).

⁶ *Id.* (citing *Ala. Elec. Coop. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982) (*Alabama Electric Cooperative*)).

⁷ *Id.* at 8 (citing *Fla. Power & Light Co.*, 70 FERC ¶ 63,017 (1995) (*Florida Power*)).

recovery under the Settlement and, pursuant to Section 5.2.2 of the Settlement, these parties will receive a credit against any outstanding amounts owed to the CAISO and/or CalPX. Moreover, even if those Settlement provisions governing Deemed Distribution Participants could be construed as discriminatory to the extent they establish two tiers of settlement refund recipients, we conclude that any such discrimination is not undue because, under the Settlement, Deemed Distribution Participants and Net Refund Recipients are not similarly situated. Unlike Deemed Distribution Participants, entities designated as Net Refund Recipients do not have outstanding amounts owing to the CAISO and/or CalPX under the terms of the Settlement. Therefore, those provisions of the Settlement do not violate the Federal Power Act (FPA),⁸ which prohibits only undue discrimination.⁹

9. In the December 17 Order, the Commission closely considered the rights of non-settling participants and whether non-jurisdictional entities labeled as Deemed Distribution Participants were unduly discriminated against. Ultimately, we found that it was reasonable that some entities, including some non-jurisdictional entities, were characterized as Deemed Distribution Participants based on whether those entities would have amounts owed to the CAISO and/or CalPX *under the terms of the Settlement*. We further concluded that the Settlement does not distinguish between jurisdictional and non-jurisdictional entities, and that the distinction between Deemed Distribution Participants and Net Refund Recipients is reasonable. In addition, the December 17 Order found that the Settlement does not suggest that Deemed Distribution Participants owe refunds pursuant to the FPA, but instead suggests that SMUD may owe money to the CAISO and/or CalPX.¹⁰ Therefore, as we explained in the December 17 Order, the Settlement's classification of certain non-jurisdictional entities as Deemed Distribution Participants is not inconsistent with the United States Court of Appeals for the Ninth Circuit's (Ninth Circuit) *Bonneville* decision.¹¹ The December 17 Order pointed out that, while

⁸ 16 U.S.C. § 791, *et seq.* (2006).

⁹ *See, e.g., Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369 (2007) (“the FPA does not prohibit all discrimination, only undue discrimination. In general, discrimination is ‘undue’ when there is a difference of rates, terms or conditions among similarly situated customers. The Commission has broad discretion in determining when discrimination is undue.”) (internal citations omitted).

¹⁰ *See* December 17 Order, 129 FERC ¶ 61,257 at P 34.

¹¹ *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (*Bonneville*), *order on remand*, 121 FERC ¶ 61,067 (2007), *order on reh'g*, 125 FERC ¶ 61,214 (2008).

Bonneville found that the Commission lacked authority to order governmental entities or other non-public utilities to pay refunds, the Ninth Circuit took no position on whether any remedies were available outside the context of the FPA.¹² For these reasons, the Commission concluded that the Settlement was just and reasonable, and dismissed SMUD's protests on the merits. SMUD's arguments on rehearing do not persuade us otherwise.

10. SMUD cites to *Alabama Electric Cooperative* for the proposition that undue discrimination involves both the dissimilar treatment of similarly situated parties and the similar treatment of dissimilar parties.¹³ As we explained in the December 17 Order, however, that case involved a public utility's rate design that would have been applicable to all of its customers, none of which would have had the opportunity to "opt out" of the utility's rates. In contrast, according to the terms of the Settlement at issue here, SMUD and others possess the ability not to opt in to the Settlement and in doing so forfeit no rights of claims against LADWP.

11. Moreover, we find that SMUD's reliance on *Florida Power* is misplaced. In that case, an Administrative Law Judge considered whether *two* settlements were substantially similar, i.e., whether one party had offered substantially similar settlements to two different parties. Here, however, we are faced with a single settlement among the California Parties, LADWP, and other "opt-in" participants. Thus, the facts in this proceeding do not implicate the question of whether the California Parties should offer a substantially similar settlement to SMUD. Even if SMUD's argument were intended to suggest that all of the entities on the Settlement's allocation matrix should be treated in the same manner, which is far different from what was at issue in *Florida Power*, we note that SMUD may choose not to opt into the Settlement and thus would not be bound by its terms. Indeed, this is what SMUD has done. Finally, as noted above, we find that the Settlement's distinction between Net Refund Recipients and Deemed Distribution Participants does not constitute undue discrimination.¹⁴

12. On rehearing, SMUD argues that because the Commission, in approving the Settlement, makes no affirmative finding that SMUD actually owed money to the CAISO

¹² *Bonneville*, 422 F.3d at 925 ("The focus on the agreements between the Public Entities and ISO and CalPX only serves to demonstrate that the remedy, if any, may rest in a contract claim, not a refund action."); *see id.* at 926 ("we take no position on remedies available outside of the FPA.").

¹³ SMUD Rehearing Request at 7.

¹⁴ *See* P 8, *supra*.

and/or CalPX, then there is no record on which to conclude that the Settlement is just and reasonable. We disagree. The Commission, in its review of contested settlements, must ensure that settlement provisions are just and reasonable, a review that is conducted using the analysis outlined in *Trailblazer*. We reviewed the merits of each contested issue and decided to approve this Settlement under the *Trailblazer* framework after concluding that SMUD's arguments were without merit, as discussed above. Specifically, we held that the Settlement was neither unduly discriminatory, nor did it force non-jurisdictional entities to forfeit their statutory rights.

13. While SMUD asserts that this conclusion is inconsistent with our decision not to make an affirmative finding that SMUD actually owed money to the CAISO and/or CalPX had it joined the Settlement, the language in the December 17 Order is consistent with Commission precedent regarding the approval of settlements. Nearly all orders approving settlement agreements in these proceedings contain language that provides that the orders hold no precedential value beyond approval of the individual settlements themselves.¹⁵ Historically, the Commission has encouraged parties to settle disputes, as it has done throughout these and related proceedings,¹⁶ and we recognize that parties will at times agree to accept certain burdens in exchange for the benefits of a settlement. For this reason, a settlement may not be used in other proceedings as evidence of an admission against that settling party's interest. Therefore, our orders approving settlements contain language specifying that Commission approval does not constitute approval of, or precedent regarding, any principle or issue in these settlement proceedings or any other proceedings. Here, for instance, if SMUD opted to join the Settlement as a Deemed Distribution Participant, its decision to do so would not constitute an admission

¹⁵ See, e.g., December 17 Order, 129 FERC ¶ 61,257 at P 52 (“The Commission’s approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in any proceeding.”); *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,256, at P 36 (2009) (same); *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,259, at P 39 (2009) (same).

¹⁶ See, e.g., *Nevada Power Co. and Sierra Pac. Power Co. v. Enron Power Marketing, Inc.*, 125 FERC ¶ 61,312, at P 16 (2008) (“[t]his dispute is now seven years old, and the Commission has encouraged the parties to resolve this matter outside of litigation. The Commission continues to encourage resolution through settlement if possible” (internal footnotes omitted)); *Enron Power Marketing, Inc.*, 115 FERC ¶ 61,376, at P 2, *order denying reh’g*, 117 FERC ¶ 61,257 (2006) (“The Commission continues to believe that fair and reasonable settlements, rather than costly, protracted Commission and court litigation, are the most effective and efficient way to bring closure to the numerous proceedings spawned by the California energy crisis”).

on its part that it owes any money to the CAISO and/or CalPX. Rather, its decision to opt into the Settlement would indicate SMUD's desire to avail itself of the benefits of the Settlement in exchange for being characterized as a Deemed Distribution Participant.

14. Moreover, the Settlement only binds participants if they affirmatively choose to join the Settlement. Similarly, participants can choose not to opt into the Settlement and thus not be bound by its terms. Here, SMUD has exercised its option not to join the Settlement and, therefore, is not a Deemed Distribution Participant. Instead, SMUD is a Non-Settling Participant, and the Settlement provides no issues are resolved by the Settlement as they relate to Non-Settling Participants.¹⁷ By deciding not to opt into the Settlement, SMUD has retained its rights to pursue litigation and attempt to receive a greater benefit for itself than it would have received had it opted into the Settlement. As we explained in the December 17 Order and earlier orders addressing other settlements reached by the California Parties and settling suppliers, SMUD cannot be bound by the terms of the Settlement if it chooses not to join it.¹⁸

15. Finally, we uphold our approval of the Settlement using the *Trailblazer* analysis conducted in the December 17 Order. As discussed above, we previously found SMUD's claim that the Settlement is unduly discriminatory to be unfounded. Therefore, we rejected SMUD's arguments on the merits and found the Settlement to be just and reasonable. In addition, as discussed above, we reject SMUD's argument that there was not an adequate record upon which to make this decision. Accordingly, we find that our analysis of the Settlement using *Trailblazer* was appropriate.¹⁹

¹⁷ See Settlement and Release of Claims, § 3.2 (“No Claims addressed in this Agreement shall be deemed settled as to Non-Settling Participants”); see also Joint Explanatory Statement at 12 (“If a Participant does not opt in to the Settlement Agreement ... (i) its rights will be unaffected by the Settlement Agreement, (ii) it will not be guaranteed certain benefits of the Settlement Agreement, and (iii) it will be paid the refunds, if any, to which it is ultimately determined to be due through continued litigation”).

¹⁸ See December 17 Order, 129 FERC ¶ 61,257 at P 34; see also, e.g., *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242, at P 25 (2009).

¹⁹ SMUD also states that it was “curious” that the Commission approved the Settlement under *Trailblazer's* second prong, when it appeared that the Settlement severed non-settling parties. SMUD Rehearing Request at 5. We note here that the Commission did not, in its approval of the Settlement, require the severance of contesting parties. Rather, the framework of the Settlement itself allows parties to not opt into it.

The Settlement Prejudices Claims of Non-Settling Participants

16. SMUD contends that the Commission erred in the December 17 Order by approving a settlement that prejudices non-settling parties, and argues that the Commission's response to SMUD's concerns was arbitrary. Specifically, SMUD challenges the Commission's statement that "the Parties to the Settlement are not requesting a set-aside of refunds, but are instead seeking a disbursement of funds pursuant to a settlement agreement,"²⁰ adding that the disbursement of funds under the Settlement is no less prejudicial to other claimants than the set-aside of such funds. SMUD argues that, in both cases, funds are no longer available to other claimants, thereby putting claims of non-settling parties at greater risk even if they prevail in litigation.

17. SMUD further contends that while non-settling parties assume the risks of further litigation, the Commission is still obligated to ensure that severance of non-settling parties does not prejudice the rights of such non-settling parties in litigation.²¹ According to SMUD, by authorizing the disbursement of funds pursuant to the Settlement, prior to the completion of all litigation, the Commission does not fully protect the interests of those parties objecting to the Settlement. SMUD argues that the Commission should not have approved a settlement that reduces the corpus of funds to pay refunds to all parties including non-settling parties. Therefore, SMUD requests that the Commission grant rehearing and declare that no payouts under the Settlement will occur until all claims are resolved.

Commission Determination

18. We deny rehearing. SMUD claims that the Commission is obligated to ensure that severance of a non-settling party will still fully protect the interests of that party. This argument is falsely premised on the belief that the Commission reached a determination in this proceeding that SMUD or any other non-settling party is to be severed. This is not the case. Under our *Trailblazer* standard for addressing contested settlements, severing contesting parties is but one of four separate options that the Commission may consider when determining whether a contested settlement should be approved.²² Therefore, the

²⁰ December 17 Order, 129 FERC ¶ 61,257 at P 41.

²¹ SMUD Rehearing Request at 9 (citing *Southern Cal. Edison Co. v. FERC*, 162 F.3d 116, 119 (D.C. Cir. 1998) (*Southern Cal. Edison Co.*)).

²² See *Trailblazer*, 85 FERC ¶ 61,345, at 62,342-45.

Commission is not required to sever contesting parties in order to approve a contested settlement. Indeed, we have stated that severance should be the option of last resort.²³ In any event, in this case we did not need to consider that step because we rejected SMUD's objections to the Settlement on the merits, as discussed above.²⁴

19. Further, we reject SMUD's claim that the terms of the Settlement prejudice claims of other non-settling parties, and that the disbursement of funds under the Settlement is no less prejudicial to other claimants than the set-aside of such funds. This argument was previously posited by SMUD, and rejected by the Commission in the December 17 Order.²⁵ As we explained in the December 17 Order, and again in this order, SMUD overlooks the fundamental difference that a disbursement of funds pursuant to a settlement agreement is subject to the Commission's prior finding that, until the Remedy Proceeding is complete, sellers' refunds should not be released.²⁶ The Commission, then, already has made clear that all funds at issue should be held by the CAISO and CalPX until disputed Remedy Proceeding claims are resolved, either by litigation or by settlement.²⁷ This determination was upheld on appeal by the United States Court of Appeals for the D.C. Circuit.²⁸

20. While SMUD contends that, in both instances, funds may no longer be available to other claimants, thereby putting claims of non-settling parties at greater risk even if they prevail in litigation, we note that this is a fundamental risk of continuing to litigate, and one which is well understood by non-settling parties as well as SMUD. Here, LADWP has chosen to settle in order to resolve disputed claims. For these reasons we deny SMUD's request for rehearing.

²³ See, e.g., *El Paso Nat. Gas Co.*, 120 FERC ¶ 61,208, at P 52 (2007).

²⁴ December 17 Order, 129 FERC ¶ 61,257 at P 52.

²⁵ See *Id.* P 42.

²⁶ See *Constellation Power Source, Inc. v. Cal. Power. Exch. Corp.*, 100 FERC ¶ 61,124, at PP 1, 27-39 (2002).

²⁷ *Id.*

²⁸ See *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14 (D.C. Cir. 2006).

The Commission orders:

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

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.