

filed reply comments. Enron filed a conditional withdrawal of its motion to intervene out-of-time; IDACORP and Puget Sound conditionally withdrew their protests. The Settling Parties and the California Department of Water Resources (DWR) opposed the interventions.

6. On November 1, 2002, the Settlement Judge issued an order granting the motions to intervene. The order noted that it appears the Offer of Settlement cannot be certified to the Commission if, as alleged by PG&E and trial staff, there are material issues of fact to be resolved. The judge determined that an additional settlement conference should be convened to clarify whether there are any material issues of fact remaining. The judge stated that the motions to intervene out-of-time were granted so that the additional intervenors could be included in the next settlement conference.

7. The November 1 Order prompted the Settling Parties to file a request for guidance from the Commission, on an expedited basis, regarding the appropriate procedures to be followed to approve the Offer of Settlement. The Settling Parties state that they are concerned that, without guidance from the Commission on the appropriate decisional authority, action on the Offer of Settlement will be delayed or will become sidetracked if the negotiation process is to begin again before a new settlement judge and to include additional parties.

8. The request for guidance posits that, under the Commission's Rules of Practice and Procedure, settlement judges are not authorized to certify a settlement or to make other substantive rulings, and that the Commission is the appropriate authority to act on the Offer of Settlement because the proceedings were never set for hearing before a presiding administrative law judge. The Settling Parties also question the settlement judge's authority to act on the motions to intervene out-of-time, and they state that the Commission should have ruled on the motions.

9. PG&E and IDACORP and Puget filed answers to the request for guidance. PG&E states that it does not take issue with the procedural questions raised in the request, but objects that the Settling Parties have attempted to reargue the merits of the Offer of Settlement. IDACORP and Puget remark that the Offer of Settlement fails to ensure that all entities who are owed refunds, and not just the Settling Parties, will receive them. They continue that denial of their motions to intervene in this proceeding would be

shortsighted because, if excluded, they could simply file complaints and seek consolidation with the ongoing proceeding.

#### Discussion

10. Rule 602 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.602 (2002), provides procedures for the submission of offers of settlement. An uncontested offer of settlement may be certified to the Commission upon a finding that the offer is not contested by any participant.<sup>5</sup> Where an offer of settlement is contested, it may be certified to the Commission if there is no genuine issue of material fact or if the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.<sup>6</sup> The section does not expressly discuss settlement judges, the role they play in the settling of cases, or the handling of such settlements.

11. Rule 603 provides procedures for negotiating settlements before a settlement judge. The powers and duties of settlement judges include convening and presiding over conferences and settlement negotiations, assessing the practicalities of a potential settlement, reporting to the Chief Administrative Law Judge or the Commission describing the status of the negotiations, and recommending the termination or continuation of settlement negotiations.<sup>7</sup> The section does not expressly discuss certification of settlements to the Commission.

12. As stated above, the Commission set this case for settlement judge procedures under Rule 603. Although settlement judges typically will certify to the Commission uncontested settlements,<sup>8</sup> the substantive determinations necessary to certify a contested settlement, as described in Rules 602(h)(2)(ii) and (iii), are not appropriately made by a settlement judge. Given that the settlement judge may well be privy to confidential, non-record information and given that the settlement judge may have had off-the-record discussions about the merits of issues and not all parties may have been present, Rule 603 does not empower settlement judges to make substantive findings regarding a contested offer of settlement or to certify a contested offer of settlement.<sup>9</sup> Further, it is not

necessary that the settlement judge do so. Where a contested settlement is filed in a case that is pending solely before a settlement judge, the contested settlement is already before the Commission itself.<sup>10</sup> (We add that, insofar as the settlement judge is to report to the Chief Judge and/or the Commission, in the future when a settlement is contested the settlement judge should report the fact that a filed settlement has been contested, and identify what the matters at issue may be.<sup>11</sup>)

13. The Commission thus does not need the settlement judge in this case to pursue the question of whether, in fact, any genuine issues of material fact remain. The Commission will consider the record in this proceeding as it has been developed to date, address the merits of the issues presented, and also determine what, if any, additional procedures may be necessary. At the same time, the Commission will address the motions to intervene out-of-time, and oppositions thereto, filed by Enron, Puget Sound, IDACORP, and the California Generators. Rule 603 does not empower settlement judges to rule on motions to intervene; these will be addressed by the Commission in this case (and interventions sought in similar circumstances in future cases should be addressed by the Chief Judge<sup>12</sup>), as appropriate.

#### The Commission orders:

(A) The Commission hereby responds to the Settling Parties' request for guidance, as set forth in the body of this order.

(B) The Secretary shall promptly publish this order in the **Federal Register**.

By the Commission.

**Linwood A. Watson, Jr.,**

*Deputy Secretary.*

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<sup>5</sup> 18 CFR § 385.602(g) (2002).

<sup>6</sup> 18 CFR § 385.602(h)(2)(ii) and (iii) (2002).

<sup>7</sup> 18 CFR § 385.603(g) (2002).

<sup>8</sup> We find that their doing so is appropriate and not inconsistent with our regulations.

<sup>9</sup> See American Electric Power Service Corp. and American Electric Power Company, Inc., 100 FERC ¶ 61,346 at P 41-42 (2002), *reh'g pending*.

<sup>10</sup> See 18 CFR 385.602(b) (2002).

<sup>11</sup> However, the settlement judge, as noted, should not make substantive findings on the matters at issue.

<sup>12</sup> See 18 CFR 375.304(a), 385.102(a), 385.214(c) and (d), and 385.504(b)(12) (2002).