

PORT OF SEATTLE
MEMORANDUM

COMMISSION AGENDA

Item No. 5i

ACTION ITEM

Date of Meeting September 11, 2012

DATE: September 4, 2012

TO: Tay Yoshitani, Chief Executive Officer

FROM: David Soike, Director, Aviation Facilities and Capital Program
Trevor Emtman, Senior Systems Engineer/Utility Business Manager
Traci Goodwin, Senior Port Counsel

SUBJECT: Proposed Settlement of Pacific Northwest Refund Action

Net proceeds to the Port: In-kind infrastructure construction valued at \$1 million to \$2 million.

ACTION REQUESTED:

Request Commission acceptance of the settlement offer from Puget Sound Energy (PSE) dated August 22, 2012, and authorization for the Chief Executive Officer to execute a settlement agreement with PSE resolving all claims in litigation related to the Port's claims as an interested party against PSE in the Pacific Northwest Refund action. The settlement agreement will be negotiated with PSE pursuant to the terms of the settlement offer and may include additional matters involving mutual cooperation between the Port and PSE. In exchange for agreeing to settle the litigation, the Port would be required to dismiss all actions against PSE currently pending before FERC.

SYNOPSIS:

The Pacific Northwest Refund action is a refund claim filed by the Port before the Federal Energy Regulatory Commission (FERC) in 2001 that seeks to recover excess charges that were imposed on the Port during the 2001 California Energy crises. Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al., Federal Energy Regulatory Commission Docket No. EL01-10-085. After lengthy proceedings, defendant PSE has offered to resolve the Port's claim against it by funding and constructing a new electrical service feeder at the Airport, the construction cost of which is estimated to be approximately \$1 million to \$2 million.

Accepting PSE's settlement offer and executing a settlement agreement will directly benefit the Port by providing an in-kind payment to resolve this long-running litigation and assures the Port of receiving a dedicated underground electrical feeder valued at \$1 million to \$2 million. The new feeder improves the reliability of the Port's electrical service, increases capacity and backup generation preparedness, anticipates future growth along International Boulevard and improves fault coordination on the Port's property. By accepting the settlement, the Port would be required to dismiss all actions against PSE currently pending before FERC.

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BACKGROUND:

In 2001, the Port of Seattle intervened in an action before the FERC seeking refunds from for “unjust and unreasonable” energy prices charged by PSE between December 25, 2000, and June 20, 2001. The Port estimates that it paid approximately \$18 million in excess energy charges during this time period because of manipulation of the energy markets in California and the Pacific Northwest by PSE, Enron, and other parties. The Port and other plaintiffs from the Pacific Northwest, including the cities of Tacoma and Seattle, asserted that these unjust and unreasonable prices came about as a result of PSE’s role during the California energy crisis.

The refund claims of the Pacific Northwest plaintiffs, including the Port’s claims, were originally heard by a FERC Hearing Judge in September 2001 who concluded that the price increases in the Pacific Northwest were an expected and predictable response to a confluence of unusual market factors. She also concluded that the market was a functional competitive market, that the prices were not “unreasonable or unjust,” and denied the refund claims of the Pacific Northwest plaintiffs. After seeking and being denied relief from the full FERC Commission, the Port and other Pacific Northwest parties filed requests for rehearing before the Ninth Circuit Court of Appeals. On August 24, 2007, the court granted the request for rehearing and remanded the matter back to FERC with instructions to consider the market manipulation evidence of the plaintiffs in light of related decisions of the court concerning the energy crisis.

On October 23, 2007, the Port Commission authorized the Chief Executive Officer to execute a settlement agreement resolving all claims in litigation related to the Port’s claims as an interested party against Enron for \$150,000.

FERC issued an order on May 24, 2011, establishing the scope of the evidentiary hearing on the Ninth Circuit’s remand order. The Pacific Northwest parties disagreed that the scope of the evidentiary hearing was consistent with the Ninth Circuit’s remand order and filed a motion with FERC for reconsideration of the order in November 2011. A decision on the motion for reconsideration is still pending. On July 16, 2012, FERC issued an order that established the procedural schedule for a hearing on the merits and scheduled a prehearing conference for the hearing on the merits.

On August 22, 2012, PSE proposed a settlement of this litigation to the Port in which PSE would pay for and construct an additional electrical service feeder from its Bow Lake substation to the Port’s point of delivery at South 160th Street. The settlement offer will remain effective for 30 days (until September 21, 2012).

The benefits of the new dedicated underground feeder to the Port would include the following:

- 1) Reliability - Underground feeders are inherently more reliable because they are not subject to vehicle accidents or severe weather events such as windstorms and lightning;
- 2) Fault coordination - The system protection is not currently coordinated between the two agencies at this point of delivery. A system fault on the Port system may cause interruption of service to the entire PSE feeder. PSE will correct this system protection issue at their expense;

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- 3) Backup generation preparedness - A PSE dedicated feeder serving only the Port will allow operational flexibility by enabling the Port and PSE to quickly and efficiently segregate Port distribution systems from PSE distribution. This segregation or “islanding” will allow the Port to provide backup generation services in the future to our systems and customers without adversely effecting PSE customers, systems, and services; and
- 4) Increased capacity - PSE will install a new larger conductor and increase the third service capacity to 6.5 Mega Volt Amperes (MVA).
- 5) Predictable maintenance costs – PSE will only charge the Port per established Washington Utilities and Transportation Commission tariff rates.
- 6) Technical cooperation – PSE will provide technical staff cooperation to the Port to facilitate smooth operation should the airport move forward to build and operate it’s own back-up power generation facility in the future.

The new feeder should also accommodate anticipated future growth along International Boulevard, improve certain reliability issues that may arise when the Port operates in parallel with other customers, and improve fault coordination on the Port’s property. The construction cost of this new feeder line is estimated to be approximately \$1 million to \$2 million. In exchange for agreeing to have PSE construct the new feeder line, the Port would dismiss all actions against PSE currently pending before FERC. In recent months, the Cities of Tacoma and Seattle, which also have claims pending against PSE in the Pacific Northwest Refund action, have entered into a series of settlements of many claims. These settlements have been for significantly less than the cities’ original claims for relief.

FINANCIAL IMPLICATIONS:

None. By accepting the settlement, the Port will realize a fair settlement and avoid incurring additional legal costs.

ALTERNATIVES CONSIDERED AND THEIR IMPLICATIONS:

1. Port staff has reviewed the proposed settlement offer and believes it would be beneficial for the Port. As noted above, this litigation has been underway since 2001, and has involved multiple complex proceedings and appeals. Settlement of the litigation would terminate the expenditure of funds for outside counsel resources and would result in PSE funding and constructing a valuable infrastructure improvement at the Airport. As noted above, the other Pacific Northwest parties are evaluating their options and attempting to settle claims whenever possible.

It is recommended that the Commission approve the acceptance of the settlement offer and authorize the Chief Executive Officer to execute the settlement agreement with PSE as described in the settlement offer of August 22, 2012, and further authorize the Chief Executive Officer to execute the settlement agreement to include any additional matters involving mutual cooperation between the Port and PSE that the parties would find beneficial. Finally, the value of the new feeder line is a reasonable amount to accept in settlement given the progress of the litigation, the settlements that the Cities of Tacoma and

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Seattle have recently accepted and the likelihood of prevailing at the hearing before FERC. **This is the recommended alternative.**

2. The alternative to accepting this settlement is preparation for hearing in the Pacific Northwest refund proceeding, which would be costly. In addition, the expenditure of the resources to prepare for the hearing would not necessarily mean that the Port would achieve a successful outcome at the hearing. Accepting the settlement means that the Port will not expend resources preparing for the hearing and will receive a valuable infrastructure improvement funded and constructed by PSE.

OTHER DOCUMENTS ASSOCIATED WITH THIS REQUEST:

None.

PREVIOUS COMMISSION ACTIONS OR BRIEFINGS:

On October 23, 2007, the Port Commission authorized the Chief Executive Officer to execute a settlement agreement resolving all claims in litigation related to the Port's claims against Enron arising from the 2001 California energy crisis for \$150,000.