

State of California, *ex rel.* Bill Lockyer, Attorney
General of the State of California

Docket No. EL02-71-028

v.

British Columbia Power Exchange Corp.

Public Service Company of New Mexico

Docket No. EL03-168-007

Public Service Company of New Mexico

Docket No. EL03-200-010

People of the State of California, *ex rel.* Edmund G.
Brown Jr., Attorney General of the State of California,
Complainant

Docket No. EL09-56-005

v.

Powerex Corp. (f/k/a British Columbia Power Exchange
Corp.) *et al.*

ORDER APPROVING SETTLEMENT

(Issued April 29, 2010)

1. In this order, the Commission approves a settlement filed on February 12, 2010 between Public Service Company of New Mexico (PNM) and the California Parties¹ (collectively, the Parties). The settlement resolves claims arising from events and transactions in the western energy markets during the period January 1, 2000 through

¹ 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, Attorney General, and the California Public Utilities Commission (CPUC). 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).

June 20, 2001 (Settlement Period) as they relate to PNM.² The settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, Settlement).³

2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.⁴ The Parties state that the Settlement became binding when all Parties executed it, and some provisions will become effective upon the Effective Date. The Settlement Effective Date requires the CPUC’s execution and approval of the Settlement, and the Commission’s approval of the Settlement without material change or condition unacceptable to any adversely affected Party.⁵ The Parties state that the Settlement shall terminate if the Commission rejects the Settlement in whole or in part, or accepts it with modifications deemed unacceptable to any adversely affected Party, or if the California Parties fail to receive the consideration that they are due under the Settlement.⁶ Further, the Settlement may terminate at the discretion of the Parties if a Commission order on the Settlement is not issued by April 30, 2010.⁷

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.⁸ The Parties state that the Settlement reaches a fair and reasonable resolution of the issues between PNM and the California Parties. The Parties further assert that the

² Joint Offer of Settlement at 2 n.3 (stating that the Settlement defines the Settlement Period as January 1, 2000 through June 20, 2001, but also resolves claims related to the issues raised in Docket No. EL01-68-000 for all time periods at issue in that proceeding); *see* Settlement and Release of Claims Agreement §§ 2.3.1, 2.3.2 and 4.3.

³ The Settlement also includes a cover sheet (Settlement Cover Sheet) that details, among other things, the amount of proceeds that will be provided by PNM under the terms of the Settlement.

⁴ 18 C.F.R. § 385.602 (2009).

⁵ Joint Offer of Settlement at 5; *see* Settlement and Release of Claims Agreement §§ 1.31, 1.81, 2.2 and 9.1.

⁶ Joint Explanatory Statement at 14; *see* Settlement and Release of Claims Agreement §§ 2.3, 4.3.

⁷ Joint Explanatory Statement at 14; *see* Settlement and Release of Claims Agreement §§ 2.3.1 and 2.3.2.

⁸ Joint Offer of Settlement at 7.

Settlement protects the rights of non-settling parties.⁹ Finally, the Parties note that the Commission and the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) have encouraged settlements of claims related to transactions in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) markets in the 2000 and 2001 time period.¹⁰ The Parties, therefore, request that the Commission approve the Settlement on or before April 30, 2010.¹¹

4. As discussed below, the Commission approves the Settlement.

Background and Description of the Settlement

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)¹² to investigate, among other things, the justness and reasonableness of public utility sellers' rates in the CAISO and CalPX markets in Docket Nos. EL00-95-000 and EL00-98-000.¹³ In 2002, the Commission directed its staff to commence a fact-finding investigation into the alleged manipulation of electrical and natural gas prices in the West in Docket No. PA02-2-000.¹⁴ In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in western energy markets in Docket No. IN03-10-000.¹⁵ On the same day, the Commission issued two orders directing named entities to show cause why they had not participated in certain gaming

⁹ *Id.*

¹⁰ *Id.* at 7 (citing *Pub. Utils. Comm'n of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002); *Pub. Utils. Comm'n of Cal. v. FERC*, No. 0-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

¹¹ *Id.* at 6 (citing Settlement and Release of Claims Agreement § 2.3.1).

¹² 16 U.S.C. § 791, *et seq.* (2006).

¹³ *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

¹⁴ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

¹⁵ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

practices¹⁶ or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.¹⁷

6. The Parties state that the Settlement resolves claims in the above-captioned proceedings as they relate to PNM.¹⁸ Any entity that directly sold energy or purchased energy from the CAISO and/or the CalPX during the Settlement Period (Participants) may elect to be bound by the terms of the Settlement by opting into the Settlement as an “Additional Settling Participant.”¹⁹ Such entities must provide notice to the Commission, as well as serve notice to parties on the list serves established for the Docket No. EL00-95 proceeding and in Docket Nos. EL03-137, *et al.*, no later than five business days following the date the Commission issues an order approving the Settlement.²⁰ The Parties note that the rights of Participants that do not wish to opt into the Settlement will be unaffected by the Settlement, and that such Non-Settling Participants will not be guaranteed the benefits of the Settlement.²¹

7. The Settlement’s monetary consideration is comprised of: (1) PNM’s CAISO and CalPX receivables that are held by the CalPX, estimated to be \$7,776,888.09; (2) estimated interest on receivables of \$5,312,737.11 through December 31, 2009, to be updated through the date of distribution; (3) and cash consideration in the amount of \$31,910,374.80.²² In addition, PNM will transfer to the California Parties PNM’s

¹⁶ *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

¹⁷ *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

¹⁸ Joint Explanatory Statement at 2.

¹⁹ Joint Offer of Settlement at 5; *see* Settlement and Release of Claims Agreement §§ 1.1, 1.55 and 8.1.

²⁰ Joint Explanatory Statement at 14-15; *see* Settlement and Release of Claims Agreement § 8.1.

²¹ Joint Explanatory Statement at 15; *see* Settlement and Release of Claims Agreement §§ 1.53, 3.2 and 8.1.

²² Joint Offer of Settlement at 4-5 n.7 (noting that the cash consideration was paid by PNM to the settling supplier refund escrow on January 15, 2010); Settlement Cover Sheet.

entitlement to refunds on purchases made in the western energy markets during the Settlement Period.²³

8. The Settlement provides that certain of the California Parties (PG&E, SDG&E, SoCal Edison and CERS) will assume responsibility for PNM's true-ups of receivables and associated interest on the estimated amounts that have been assigned under the Settlement, any refund amounts that PNM owes to Non-Settling Participants in the settled proceedings, any interest shortfall the Commission allocates to PNM, and any third-party refund offsets that the Commission or a court determines that PNM owes.²⁴ The California Parties' obligation to make payments on behalf of PNM shall not exceed the total amount actually paid to the California Parties pursuant to the Settlement.²⁵

9. The Settlement includes an Allocation Matrix²⁶ that allocates the Settlement proceeds among Participants. The Parties state that the proceeds will be distributed from the settling supplier refund escrow to each of the Settling Participants, and in the case of amounts allocated to any Non-Settling Participants, transferred to the California litigation escrow.²⁷ The Parties explain that the portion of the receivables to be paid into the settling supplier refund escrow will be net of the interest shortfall on refunds amount of \$1,904,415.72 and PNM's interest shortfall estimate of \$1,144,754.58.²⁸ In addition, certain specified Participants are designated as "Deemed Distribution Participants,"²⁹ which, according to the Settlement, is an entity that has a net amount outstanding and

²³ Joint Offer of Settlement at 5.

²⁴ *Id.* at 5 (PNM lists a fuel cost allowance, emissions offset and cost offset as possible third-party refund offsets); *see* Settlement and Release of Claims Agreement §§ 5.3, 5.6 and 5.7.

²⁵ Joint Explanatory Statement at 17; *see* Settlement and Release of Claims Agreement § 5.8.

²⁶ Settlement and Release of Claims Agreement, Ex. A.

²⁷ Joint Offer of Settlement at 5-6.

²⁸ Joint Explanatory Statement at 16; *see* Settlement and Release of Claims Agreement §§ 4.1.1.4, 5.2, 5.3 and 5.5.

²⁹ Settlement and Release of Claims Agreement, Ex. B. The Deemed Distribution Participants include: Aquila Power Corp., California Polar Power Brokers, LLC, Illinova Energy Partners, Inc., PG&E, Pacific Gas and Electric Energy Services Co. and Sacramento Municipal Utility District.

payable to the CAISO and/or the CalPX and accordingly will receive an amount credited to the Settling Participant as an offset to amounts owed by the Participant to the CAISO and/or CalPX.³⁰ The Settlement states that the Commission's approval of the Settlement will allow the CalPX to release PNM's receivables and estimated interest and will authorize the CAISO and CalPX to conform their books and records to reflect the distributions.³¹

10. The Parties state that the Settlement generally resolves all claims as between the California Parties and PNM relating to transactions in the western energy markets during the Settlement Period for refunds, disgorgement of profits, or other monetary or non-monetary remedies, subject to specified limitations.³² The Settlement also resolves claims related to the issues in Docket No. EL01-68-000 for all time periods at issue in that proceeding.³³ Specifically, the Parties state that PNM and the California Parties mutually release each other from all claims before the Commission and/or under the FPA for the Settlement Period relating to payments or unlawful rates for electric capacity, energy and/or ancillary services, transmission congestion or line loss charges, or market manipulation.³⁴ Likewise, the Parties state that PNM and the California Parties mutually release each other from all claims for the Settlement Period for civil damages and/or equitable relief relating to allegations of unlawful rates, transmission congestion and line loss charges, market manipulation, unjust enrichment, or payments for electric capacity, energy and/or ancillary services.³⁵ Subject to specified limitations, Additional Settling Participants are deemed to provide and receive from PNM the releases that the California Parties provide and receive.³⁶

³⁰ See Settlement and Release of Claims Agreement, Ex. A n.2, § 1.21.

³¹ Joint Explanatory Statement at 15, 17; see Settlement and Release of Claims Agreement §§ 1.91, 4.1.1.1 – 4.1.1.3, 6.1.

³² Joint Offer of Settlement at 4, 6.

³³ *Id.* at 4.

³⁴ Joint Explanatory Statement at 18; see Settlement and Release of Claims Agreement § 7.2.1.

³⁵ Joint Explanatory Statement at 18-19; see Settlement and Release of Claims Agreement § 7.3.1.

³⁶ Joint Explanatory Statement at 19; see Settlement and Release of Claims Agreement §§ 7.4, 8.2.

11. The Parties state that they would not object to the Commission acting to assure the CAISO and CalPX that they will be held harmless from their actions to implement the Settlement.³⁷

Procedural Matters

12. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.³⁸ The Parties request that the Settlement be transmitted directly to the Commission for approval rather than be certified by an administrative law judge, because only Docket No. EL02-71 of the above-captioned dockets is currently pending before a presiding judge, the Settlement was reached without the assistance of settlement judges, and the Commission has considered over twenty similar settlements without the assistance of a certification from an administrative law judge.³⁹

13. The Parties requested a shortened comment period. On February 17, 2010, the Commission issued a notice shortening the comment period so that initial comments were due on or before February 26, 2010, and reply comments were due on or before March 5, 2010. Initial comments were timely filed by the CAISO, CalPX and Idaho Power Company and IDACORP Energy L.P. (collectively, Idacorp), either in support of or not opposing the Settlement. In addition, the Sacramento Municipal Utility District (SMUD) filed timely comments opposing the Settlement. Reply comments were filed by the Parties (Joint Reply Comments)⁴⁰ and by Californians for Renewable Energy (CARE). The Parties filed a response to CARE's reply comments, urging the Commission to reject them.

14. We agree with the Parties that it is appropriate for the Commission to review this Settlement without certification by an administrative law judge. For the reasons discussed below, the Commission will approve the Settlement.

³⁷ Joint Explanatory Statement at 19.

³⁸ 18 C.F.R. § 385.602 (2009).

³⁹ Joint Offer of Settlement at 3-4 *citing San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,147 (2009) (the Parties note that certain issues in Docket No. EL00-95 were set for hearing, but suspended pending settlement discussions which remain ongoing).

⁴⁰ For purposes of the Joint Reply Comments, the California Parties do not include CERS.

15. The Commission rejects the reply comments filed by CARE. CARE has filed reply comments that do not address any of the initial comments filed by any of the parties, but rather attacks the Settlement itself. Reply comments must be addressed to initial comments, not to the underlying settlement agreement. Otherwise, parties do not have an opportunity to respond. Such comments are thus more appropriately characterized as initial comments, rather than reply comments. Under our rules, a failure to file timely comments results in that entity waiving objections to the settlement agreement.⁴¹ CARE should have filed its comments as initial comments, and it should have filed these comments on February 26, 2010, the due date for initial comments. Accordingly, we conclude that CARE has waived its objections to the Settlement for failure to file timely initial comments and that its submission of reply comments objecting to the Settlement does not cure this error.

Substantive Matters

A. “Hold Harmless” Protection

16. Both the CAISO and CalPX note that the circumstances of this Settlement warrant hold harmless treatment for the CAISO and CalPX because they, along with their directors, officers, employees, and consultants, will implement a number of the Settlement’s provisions.⁴² Accordingly, CalPX requests that the following “hold harmless” language be incorporated into any Commission order approving the Settlement:

The Commission recognizes that CalPX will be required to implement this settlement by paying substantial funds from its Settlement Clearing Account at the Commission’s direction. Therefore, except to the extent caused by their own gross negligence, neither officers, directors, employees nor professionals shall be liable for implementing the settlement including but not limited to cash payouts and accounting entries on CalPX’s books, nor shall they or any of them be liable for any resulting shortfall of funds or resulting change to credit risk as a result of implementing the settlement. In

⁴¹ See 18 C.F.R. 385.602(f)(3) (2009); *see also, e.g., Williams Nat. Gas Co.*, 43 FERC ¶ 61,227, at 61,586 (1988) (“the Commission shall grant Williams' motion to reject their reply comments to the extent they oppose the settlement because under the Commission's Rules of Practice and Procedure they waived their objections to the settlement by not filing comments”).

⁴² CAISO Initial Comments at 4-7; CalPX Initial Comments at 2-4.

the event of any subsequent order, rule or judgment by the Commission or any court of competent jurisdiction requiring any adjustment to, or repayment or reversion of, amounts paid out of the Settlement Clearing Account or credited to a participant's account balance pursuant to the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.⁴³

17. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.⁴⁴ In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.⁴⁵

Commission Determination

18. The Parties do not oppose a “hold harmless” provision that is similar to the provisions in other settlements involving the California Parties and approved by the Commission.⁴⁶ Consistent with the Commission's precedent,⁴⁷ the Commission determines that CalPX and the CAISO will be held harmless for actions taken to implement this Settlement. Accordingly, this order incorporates the “hold harmless” language set out above, with one modification. Specifically, as incorporated by this order, the language shall be read to apply to both the CAISO and CalPX.

B. Idacorp's Request for Clarification

19. Idacorp notes that section 7.1.2 of the Settlement, regarding Settling Participants not contesting the amount of refund liability that PNM incurs in the EL00-95 proceeding,

⁴³ CalPX Initial Comments at 4.

⁴⁴ *Id.* at 3-4.

⁴⁵ Joint Reply Comments at 13-14.

⁴⁶ *See id.*; *see also* Joint Explanatory Statement at 19.

⁴⁷ *See e.g., San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242, at P 19 (2009) (*Constellation Settlement Order*) (incorporating “hold harmless” language from earlier settlements); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,002, at P 17 (2009) (*Puget Sound Settlement Order*) (same); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,004, at P 21 (2009) (*AES Placerita Settlement Order*) (same); *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 38 (2009) (*NEGT Settlement Order*) (same).

contains a reference to section 7.4.8 of the Settlement. However, Idacorp explains that the Settlement does not contain a Section 7.4.8 and requests that the Parties clarify their intention respecting this reference.⁴⁸

20. In response, the Parties state that they did not intend to include a Section 7.4.8 in the Settlement, and that the reference to Section 7.4.8 in Section 7.1.2 was inadvertent.⁴⁹ The Parties request that the Commission approve the Settlement with the clarification that the needless phrase “subject to Section 7.4.8” in section 7.1.2 has no meaning.

Commission Determination

21. The Commission accepts the Parties’ clarification that the phrase “subject to section 7.4.8,” in section 7.1.2 is superfluous and inoperative, and the Commission modifies the Settlement accordingly.

C. SMUD’s Comments in Opposition to the Settlement

22. Under the Commission’s *Trailblazer*⁵⁰ 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.⁵¹ In this case, we approve the Settlement under *Trailblazer*’s first prong because we find that SMUD’s arguments are without merit, as discussed herein.

1. Forfeiture of Statutory Rights

23. SMUD argues that the Settlement forces non-jurisdictional utilities to forfeit their statutory rights in order to participate in the Settlement, because the Settlement requires them to offset refunds that they are legally owed under the Settlement against refunds that they owe for their charges, which the Commission cannot lawfully require non-

⁴⁸ Idacorp Initial Comments at 2.

⁴⁹ Joint Reply Comments at 14.

⁵⁰ *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*).

⁵¹ *Trailblazer*, 85 FERC ¶ 61,345, at 62,342-44.

jurisdictional parties to pay.⁵² Thus, SMUD argues that the Settlement offer is “premised on the Commission’s exercise of authority [that] the Commission does not possess.”⁵³ SMUD likens the provisions of the Settlement governing the allocation of refunds to the kind of “cram down” provision invalidated by the court in *ANR Pipeline Company*.⁵⁴ SMUD states that the “Commission has frowned on cram down provisions like these, as ‘comments that might otherwise be voiced are suppressed.’ ”⁵⁵ Accordingly, SMUD states that the Settlement should be rejected.⁵⁶

24. In response, the Parties explain that SMUD’s participation in the Settlement is voluntary. The Parties argue that if SMUD does not like the terms of the Settlement, it can choose not to opt in. The Parties state that SMUD does not lose any rights by choosing not to join the Settlement. The Parties also point out that the Settlement states that nothing in it “shall establish any facts or precedents as between the Parties, the Additional Settling Participants, and any third parties as to the resolution of any dispute.”⁵⁷ The Parties also argue that SMUD’s reliance on *ANR Pipeline* is misplaced because that proceeding involved a settlement that, unlike the Settlement here, included a provision that would have denied essential services to any party that contested the settlement for a period of five years.⁵⁸ Finally, the Parties cite to earlier Commission orders in similar settlement proceedings that reject SMUD’s contention that the settlements require non-jurisdictional entities to forfeit their statutory rights.

Commission Determination

25. The Commission rejects SMUD’s argument that the Settlement should not be approved because, by opting into the Settlement, SMUD, along with other non-jurisdictional utilities, must forfeit statutory rights that exempt it from refund obligations. Opting into the Settlement is a voluntary and affirmative action on the part of any party.

⁵² See SMUD Initial Comments at 3.

⁵³ See *id.* at 4-5.

⁵⁴ *ANR Pipeline*, 59 FERC ¶ 61,347, at 62,260 (1992).

⁵⁵ See SMUD Initial Comments at 3, 5 (citing *ANR Pipeline*, 59 FERC ¶ 61,347, at 62,260).

⁵⁶ See *id.* at 5.

⁵⁷ Joint Reply Comments at 5 (*quoting* Settlement and Release of Claims § 11.11).

⁵⁸ See *id.* at n.12.

As set forth in the Settlement, by electing not to opt-in, non-jurisdictional utilities may continue to pursue claims against PNM in the underlying proceedings. Therefore, if SMUD is not satisfied with the terms of the Settlement, it may elect not to opt-in and in doing so, as a Non-Settling Participant, will forfeit no rights or claims against PNM.

26. We disagree with SMUD's assertion that providing parties with the choice to opt into the Settlement is insufficient, and that the Settlement is unjust and unreasonable. The Settlement is a comprehensive and reasonable effort by the Parties to end their litigation and resolve their legal disputes. SMUD does not have to join the Settlement, and its rights as a Non-Settling Participant to continue to litigate are unaffected by the Settlement. Therefore, the Commission finds that the Settlement is not unjust, unreasonable, unduly preferential or unduly discriminatory on this basis.

27. The Commission also rejects SMUD's characterization of the Settlement provisions governing the allocation of refunds as "cram down" provisions. SMUD's reliance on *ANR Pipeline* is misplaced because, in that case, any party contesting the settlement would have been denied essential services for a period of five years. Such is not the case here. As discussed, entities that elect not to opt into the Settlement are free to pursue claims against PNM, and the Parties agree to hold back settlement funds so that claims pursued by Non-Settling Participants will be addressed.

28. As was the case in prior settlements,⁵⁹ if a non-jurisdictional entity elects to remain in the Settlement, it will be accepting a reasonable compromise under which it accepts the terms of the Settlement in exchange for the benefits of the Settlement. Regardless of whether the Commission may order the non-jurisdictional entities to pay refunds in this situation, such an entity may nonetheless opt into a settlement to avail itself of the benefits of that settlement, including release of claims against the non-jurisdictional entity, avoidance of further litigation, and the financial certainty that is embodied in the Settlement.

2. Undue Discrimination

29. SMUD argues that the Settlement is unduly discriminatory. SMUD notes that a substantially similar settlement offer must be made to similarly situated customers.⁶⁰

⁵⁹ See, e.g., *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 26; *Puget Sound Settlement Order*, 128 FERC ¶ 61,002, at P 23 (2009); *AES Placerita Settlement Order*, 128 FERC ¶ 61,004 at P 27; *NEGT Settlement Order*, 126 FERC ¶ 61,007 at P 26.

⁶⁰ See SMUD Initial Comments at 5-6 (citing *Fla. Power & Light Co.*, 70 FERC ¶ 63,017 (1995)).

SMUD argues that the Settlement draws an unreasonable distinction between SMUD, as a non-jurisdictional seller, and all other buyers of power who made no jurisdictional sales. As a result, SMUD asserts that the Settlement requires SMUD to forfeit its statutory rights in order to participate in the receipt of refunds.⁶¹ SMUD adds that treating it as a Deemed Distribution Participant under the Settlement is unreasonable and discriminatory, because it places pressure on non-jurisdictional entities to forfeit their statutory exemption from the Commission's refund authority under the FPA. As such, SMUD argues that it has not been given an offer comparable to those extended to other utility refund recipients.

30. SMUD contends that, in several orders approving similar settlements over its objections, the Commission has offered a *non-sequitur* in responding to those objections, citing language from those orders that explain that SMUD has not demonstrated it is being treated differently from other entities that are Deemed Distribution Participants. SMUD states that being treated as a jurisdictional seller is the essence of SMUD's discrimination claim. SMUD points out that undue discrimination involves both the dissimilar treatment of similarly situated parties and the similar treat of dissimilar parties.⁶² Here, SMUD argues, non-jurisdictional entities are different because they have no net amounts outstanding and payable to the CAISO and/or CalPX because they make no jurisdictional sales and have no refund liability. Thus, SMUD claims, in this respect they are similar to other purchasers that have not been designated Deemed Distribution Participants.

31. Next, SMUD asserts that the Commission's attempt to distinguish entities designated as Deemed Distribution Participants from Net Refund Recipients (i.e., those that are allocated a cash distribution under the settlements) is, as to SMUD, devoid of any factual basis, pointing out that SMUD does not owe any monies and that neither the CAISO nor CalPX have asserted any claims against SMUD for refunds. SMUD also argues that the Commission has ruled that SMUD is owed money by the CAISO and CalPX.⁶³ SMUD contends that the Commission has recognized this fact, noting that the

⁶¹ *See id.*

⁶² *See id.* at 6. (citing *Alabama Elec. Cooperative, Inc. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982) (*Alabama Electric Cooperative*)).

⁶³ *See id.* at 7 (citing *San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,067, at P 57 (2007) (*Bonneville Remand Order*)).

Commission has explained that the settlements did not suggest that SMUD owes refunds pursuant to the FPA, but rather suggests that SMUD *may* owe money to the CAISO or CalPX.⁶⁴

32. In response, the Parties argue that the Settlement does not single out SMUD and other non-jurisdictional entities as Deemed Distribution Participants, noting that PG&E, a jurisdictional public utility, is also a Deemed Distribution Participant under the Settlement. The Parties recite Commission orders making similar findings that whether an entity is a Deemed Distribution Participant is not based on the jurisdictional status of that entity. The Parties further explain that “revenue recipients” under the Settlement are not purchasers that made no jurisdictional sales, as SMUD contends, but rather are Net Refund Recipients, which are entities other than Deemed Distribution Participants that are owed net refunds.⁶⁵ Moreover, the Parties urge the Commission to find that SMUD’s undue discrimination claims, including its argument that its status as a non-jurisdictional entity means that it has no amounts owed to the CAISO and/or CalX are without merit, citing to Commission orders addressing similar settlements.

Commission Determination

33. As SMUD notes, it has raised its undue discrimination claim in similar settlement proceedings.⁶⁶ We reject its claim in this proceeding as well. SMUD argues that it should be provided with a settlement offer that is substantially similar to the settlement that has been provided to similarly situated entities. As we have stated in prior orders on similar settlements, SMUD has been offered the same settlement terms as others, and its designation as a Deemed Distribution Participant under the Settlement is not unduly discriminatory because this designation is not limited to non-jurisdictional entities.⁶⁷

34. Specifically, SMUD asserts that it should be treated similarly to other customers that are *not* Deemed Distribution Participants. However, as we have found in earlier orders,⁶⁸ the Settlement’s designation of certain entities as Deemed Distribution Participants is not unduly discriminatory, because this designation is not based upon the jurisdictional status of any particular entity. Rather, the Settlement designates entities as

⁶⁴ *See id.* (citing *San Diego Gas & Elec. Co.*, 130 FERC ¶ 61,197 (2010)).

⁶⁵ Joint Reply Comments at 8-9 (citing SMUD Initial Comments at 6).

⁶⁶ *See, e.g., San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 30 (2009).

⁶⁷ *See, e.g., id.* P 28-32.

⁶⁸ *See, e.g., id.* P 28.

Deemed Distribution Participants based on whether those entities have amounts outstanding and payable to the CAISO and/or CalPX. Deemed Distribution Participants are not precluded from recovery under the Settlement and, pursuant to section 6.1.3.3 of the Settlement, these parties will receive a credit against any outstanding amounts they may owe 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 clearly do not have outstanding amounts owing to the CAISO and/or CalPX. Therefore, those provisions of the Settlement do not violate the FPA,⁶⁹ which prohibits only undue discrimination.⁷⁰

35. In support of its undue discrimination claim, 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. As we have explained in earlier orders, 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.⁷¹ 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 to pursue claims against PNM, as discussed above. In addition, SMUD is similarly situated to other parties facing litigation risk with respect to the California energy crisis. Such risk does not distinguish between jurisdictional sellers and non-jurisdictional sellers. For example, we are concurrently issuing an order approving a similar settlement between a non-jurisdictional entity, Northern California Power Agency (NCPA), and the California Parties.⁷² We further

⁶⁹ 16 U.S.C. § 791, *et seq.* (2006).

⁷⁰ *See, e.g., Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369 (2007) ("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).

⁷¹ *See, e.g., San Diego Gas & Elec. Co.*, 130 FERC ¶ 61,198, at P 10 (2010).

⁷² *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,083 (2010).

note that the Los Angeles Department of Water and Power (LADWP), another non-jurisdictional seller, has also recently settled with the California Parties.⁷³

36. With respect to SMUD's argument that, because it is a non-jurisdictional entity and thus cannot be ordered by the Commission to pay refunds, it cannot have net amounts payable to the CAISO and/or CalPX, we have previously found that SMUD confuses the *legal* issue of whether the Commission can require it to pay refunds under FPA section 206 with the *factual* issue of whether SMUD owes money to the CAISO and/or CalPX.⁷⁴ Again, these settlements do not suggest that SMUD owes refunds pursuant to the FPA, but rather suggests that SMUD may owe money to the CAISO and/or CalPX. We have explained that while the Ninth Circuit's *Bonneville* decision⁷⁵ did find that the Commission lacked authority to order governmental entities or other non-public utilities to pay refunds under FPA section 206 as then in effect, the Ninth Circuit took no position on whether any remedies were available outside the context of the FPA.⁷⁶ As such, we have concluded that SMUD's contention in the earlier proceedings that its treatment as a Deemed Distribution Participant under the Settlement is unduly discriminatory, and its related claim that its status as a non-jurisdictional entity means that it has no amounts owed to the CAISO and/or CalPX, were without merit.

37. SMUD argues that this response is incorrect because, as a factual matter, it does not owe money to the CAISO and/or the CalPX and neither entity has filed a claim against it. Further, SMUD asserts that the Commission had already found that SMUD is owed monies by these entities, citing the *Bonneville Remand Order*. SMUD, however,

⁷³ See *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,257 (2009), *order denying reh'g*, 130 FERC ¶ 61,197 (2010) (approving settlement between LADWP and California Parties). The Commission has also approved similar settlements between the California Parties and other non-jurisdictional entities in these proceedings. See, e.g., *San Diego Gas & Elec. Co.*, 125 FERC ¶ 61,085 (2008) (approving settlement between the California Parties and City of Vernon, California).

⁷⁴ See, e.g., *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 34; *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,243, at P 7 (2009).

⁷⁵ *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).

⁷⁶ *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").

misunderstands the nature of the settlements we have approved in these proceedings. These settlements are voluntary agreements that entities can choose to join or not to join. They do not constitute any refund determination under FPA section 206. Similarly, they do not constitute a finding that any entity, including SMUD, actually owes money to the CAISO and/or the CalPX. Rather, the Commission evaluates these settlements to ensure that they are just and reasonable under the FPA. In these proceedings, the Commission has found that the settlements are just and reasonable. In particular, we have found that the rights of Non-Settling Participants such as SMUD are fully protected. Non-Settling Participants are unaffected by these settlements, and they maintain the right to pursue litigation against settling suppliers such as PNM. Even if SMUD were to choose to join the Settlement, and voluntarily decided to exchange its right to pursue claims against PNM for the benefits of the Settlement, our approval of the Settlement would not make any affirmative finding that SMUD owed money to the CAISO and/or the CalPX. Therefore, because of the voluntary nature of the Settlement, because the Commission is not making any findings with respect to the question of whether any entity (including SMUD) owes money to the CAISO and/or the CalPX, and because the Commission is not making any findings with respect to refunds under the FPA, we conclude that approval of the Settlement is consistent with the Ninth Circuit's *Bonneville* decision and the Commission's *Bonneville Remand Order*.

38. We also note that 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.⁷⁷ Historically, the Commission has encouraged parties to settle disputes, as it has done throughout these and related proceedings,⁷⁸ 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 on its part that it owes any money to the CAISO and/or CalPX. Rather, its decision to opt into the Settlement would indicate

⁷⁷ See, e.g., *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,259 at P 39 (“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 ¶ 61,257, at P 52 (2009) (same).

⁷⁸ See, e.g., *supra* n.10.

SMUD's desire to avail itself of the benefits of the Settlement in exchange for being characterized as a Deemed Distribution Participant.

39. Finally, 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, if SMUD exercises its option not to join the Settlement, it will not be designated as a Deemed Distribution Participant. Instead, SMUD would be a Non-Settling Participant, and the Settlement provides no issues are resolved by the Settlement as they relate to Non-Settling Participants.⁷⁹ By deciding not to opt into the Settlement, SMUD would retain 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. SMUD cannot be bound by the terms of the Settlement if it chooses not to join it.⁸⁰

3. Clarification Requested by SMUD

40. As noted above, the Settlement provides that certain of the California Parties (PG&E, SDG&E, SoCal Edison and CERS) will assume responsibility for future amounts that PNM owes to Non-Settling Participants in excess of the amount retained for that purpose in the escrow account. However, because the California Parties' obligation to make payments on behalf of PNM shall not exceed the total amount actually paid to the California Parties pursuant to the Settlement,⁸¹ SMUD requests the Commission to make clear that the Commission will enforce the underlying obligation of PNM to pay refunds to Non-Settling Participants. SMUD asserts that failure to enforce the underlying obligation of PNM to pay refunds to the Non-Settling Participants would result in Non-Settling Participants being placed in a worse position than they would have been absent the Settlement.⁸²

⁷⁹ 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 15 ("If a Participant does not opt in to the Settlement Agreement: (i) its rights will be unaffected by the Settlement Agreement; (ii) it will have no right to obtain 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").

⁸⁰ See, e.g., *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,259, at P 23 (2009); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242, at P 25 (2009).

⁸¹ Joint Explanatory Statement at 17; see Settlement and Release of Claims Agreement § 5.8.

⁸² SMUD Initial Comments at 8.

41. SMUD argues that PNM may not be relieved of its statutory obligation to pay refunds in the event refunds are owed. SMUD cites to section 318 of the Restatement (Second) of Contracts (Restatement) for the proposition that, while an obligor may generally delegate performance of its duties to another, such delegation will not discharge any duty or liability of the original obligor, unless the obligee agrees otherwise. SMUD contends that whether PNM's refund obligation to non-settling parties is contractual or statutory, the same principle would apply. That is, if PNM cannot unilaterally relieve itself of its statutory obligation to pay non-settling parties any refunds it might owe, SMUD asserts that it then follows that PNM cannot reach agreement with settling parties to assume that obligation. SMUD notes that no non-settling party has agreed to relieve PNM from its duty to pay whatever refunds the Commission finds appropriate.⁸³

Commission Determination

42. As the Commission recently explained,⁸⁴ with respect to SMUD's argument that the settling parties cannot unilaterally relieve themselves of a *statutory* obligation to pay refunds, we do not believe that the Settlement does this.⁸⁵ The Settlement proposed that

⁸³ *Id.* at 9.

⁸⁴ *San Diego Gas & Elec. Co.*, 130 FERC ¶ 61,198, at P 21-22 (2010).

⁸⁵ While SMUD suggests that PNM's refund obligation is statutory in nature, there is no statutory obligation to pay refunds. Rather, refunds are at the discretion of the Commission. FPA section 206(b) provides "[a]t the conclusion of any proceeding under this section, the Commission *may* order refunds of any amounts paid. . . in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice or contract which the Commission orders to be thereafter observed and in force." 16 U.S.C. § 824e (2006). Courts have long held that the breadth of the Commission's "discretion is, if anything, at zenith" when it is "fashioning [] remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives." *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (emphasis added). *See also Towns of Concord v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992) (citing *Moss v. Civil Aeronautics Board*, 521 F.2d 298, 308-09 (D.C. Cir. 1975) ("Because the 'equitable aspects of refunding past rates are . . . inextricably entwined with the [agency's] normal regulatory responsibility . . . absent some conflict with the explicit requirements or core purposes of a statute, we have refused to constrain agency discretion by imposing a presumption in favor of refunds")); *Con. Edison Co. of N.Y., Inc. v. FERC*, No. 06-10-25, slip op. at 13-14, 2007 U.S. App. 29,213 (D.C. Cir. 2007); *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *La. Pub. Serv. Comm'n* (continued...)

certain of the California Parties will assume responsibility for, among other things, any shortfall in refund amounts that PNM owes to Non-Settling Participants in the refund proceeding. Pursuant to sections 5.6 to 5.8 of the Settlement, any such shortfall in refunds owed by PNM will be allocated among the California Parties, with the cap on each of the California Party's liabilities to Non-Settling Participants being the total amount of PNM refunds and/or deemed distributions allocated to that California Party. The Settlement further provides that, in the event an obligation of any of the California Parties to make a payment on behalf of PNM exceeds the total amount allocated to that California Party, the remaining California Parties to which settlement proceeds are allocated shall be jointly and severally liable to make such payments on behalf of PNM, up to the amount allocated to each such California Party. Because the vast majority of the Settlement funds are allocated to the California Parties under the Allocation Matrix, we find that this is a reasonable approach that is likely to fully cover any refund amounts that the Commission or a court may ultimately find that PNM owes to SMUD.⁸⁶ We thus conclude that approval of the Settlement would provide significant benefits to settling parties while at the same time not adversely affecting the interests of those parties that continue to litigate their claims and ensuring that the interests of non-settling parties are protected. Moreover, we believe that this approach is consistent with direction from both the Commission and the Ninth Circuit that the parties involved in these proceedings settle their disputes rather than engage in costly and time-consuming litigation.⁸⁷

43. In addition, we find that section 318 of the Restatement is not applicable to this case. First, in each of the Restatement's illustrations, the obligee refers to one of the parties to the contract.⁸⁸ By contrast, SMUD is a Non-Settling Participant and is not an

v. FERC, 174 F.3d 218, 225 (D.C. Cir. 1999); *Pub. Utils. Com'n of Cal. v. FERC*, 462 F.3d 1027, 1053 (9th Cir. 2006).

⁸⁶ The Settlement's Allocation Matrix provides that the California Parties will collectively be allocated more than \$40 million in total disbursed amounts, or approximately 96 percent of the total amount allocated. By contrast, SMUD would be allocated \$147,797 in total disbursed amounts, or 0.35 percent of the total amount allocated. While we recognize that the Commission or a court may determine that SMUD is owed more than what has been allocated to it under the Settlement, the Commission or a court would have to find that SMUD is owed almost 272 times more than the amount it is allocated under the Settlement in order to exceed the cap on the California Parties' liability.

⁸⁷ *See supra* n.10.

⁸⁸ *See generally* Restatement, § 318, Comments and Illustrations.

“obligee” within the meaning of the Restatement provision.⁸⁹ Second, SMUD has not demonstrated that PNM had delegated an obligation or, if it did, whether such delegation required the consent of any party, much less Non-Settling Participants. It is important to note that, in the one decision SMUD cites in support of its argument, the court stated: “An obligor is discharged by substitution of a new obligor only *if the contract so provides* or if the obligee makes a binding manifestation of assent to the substitution”⁹⁰ Here, the Settlement provides that the California Parties will be responsible for refund shortfalls.⁹¹ Thus, such a delegation is expressly provided for in the Settlement.

44. Further, SMUD argues that the Commission is obligated to ensure that severance of a non-settling party will still fully protect the interests of that party. In this proceeding, however, the Commission did not reach a determination that SMUD or any other non-settling party is to be severed. Under our *Trailblazer* analysis, severing contested parties is but one of four separate options that the Commission may consider when determining whether a contested settlement should be approved. Thus, the 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.⁹² In this case, we did not need to consider that step because we reject SMUD's objections to the Settlement on the merits, as discussed above.

45. As such, under the Settlement, the interests of Non-Settling Participants are adequately insulated from potential shortfalls, and we find that it is reasonable for the settling parties to allocate the risks of covering shortfalls as provided for in the Settlement.

Conclusion

46. In conclusion, the Commission finds that the Settlement is just and reasonable and therefore approves it, as discussed in the body of this order. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in any proceeding.

⁸⁹ As noted above, Non-Settling Participants are not bound by the Settlement. *See supra* P 6.

⁹⁰ *Security Ben. Life Ins. Co. v. FDIC*, 804 F.Supp. 217, 225 (D. Kan. 1992) (citing Restatement, § 318 cmt. d) (emphasis added).

⁹¹ *See* Settlement and Release of Claims, §§ 5.6-5.8.

⁹² *See, e.g., El Paso Nat. Gas Co.*, 120 FERC ¶ 61,208, at P 52 (2007).

The Commission orders:

The Settlement is hereby approved, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.