

126 FERC ¶ 61,234  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;  
Suedeem G. Kelly, and Marc Spitzer,

Duke Energy Trading and Marketing, L.L.C.	Docket No. EL03-152-007
Bonneville Power Administration	Docket No. EL03-141-005 Docket No. EL03-141-006
California Power Exchange	Docket No. EL03-143-004
Cargill-Alliant, L.L.C.	Docket No. EL03-144-004
City of Anaheim, California	Docket No. EL03-145-005
City of Azusa, California	Docket No. EL03-146-006
City of Glendale, California	Docket No. EL03-147-007
City of Pasadena, California	Docket No. EL03-148-004
City of Riverside, California	Docket No. EL03-150-006
Coral Power, L.L.C.	Docket No. EL03-151-007
Dynegy Power Marketing, Inc., Dynegy Power Corp., El Segundo Power L.L.C., Long Beach Generation L.L.C., Cabrillo Power I, L.L.C., and Cabrillo Power II, L.L.C.	Docket No. EL03-153-007
Enron Power Marketing, Inc., and Enron Energy Services, Inc.	Docket No. EL03-154-029
FP&L Energy	Docket No. EL03-155-004

Los Angeles Department of Water and Power	Docket No. EL03-157-005
Northern California Power Agency	Docket No. EL03-161-004
PGE Energy Services	Docket No. EL03-164-004
Public Service Company of Colorado	Docket No. EL03-167-006
Public Service Company of New Mexico	Docket No. EL03-168-005 Docket No. EL03-168-006
Salt River Project Agricultural Improvement and Power District	Docket No. EL03-171-004 Docket No. EL03-171-005
Sierra Pacific Power Company	Docket No. EL03-174-004
TransAlta Energy Marketing (U.S.), Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-176-005
Tucson Electric Power Company	Docket No. EL03-177-005 Docket No. EL03-177-006
Western Area Power Administration	Docket No. EL03-178-004 Docket No. EL03-178-005
American Electric Power Services Corporation	Docket No. EL03-137-010
Aquila Merchant Services, Inc.	Docket No. EL03-138-009
Arizona Public Service Company	Docket No. EL03-139-007 Docket No. EL03-139-008
Automated Power Exchange, Inc.	Docket No. EL03-140-004 Docket No. EL03-140-005
California Department of Water Resources	Docket No. EL03-142-004
City of Redding, California	Docket No. EL03-149-006
Idaho Power Company	Docket No. EL03-156-007

Mirant Americas Energy Marketing, L.P., Mirant California, L.L.C., Mirant Delta, L.L.C., and Mirant Potrero, L.L.C.	Docket No. EL03-158-007
Modesto Irrigation District	Docket No. EL03-159-007
Morgan Stanley Capital Group	Docket No. EL03-160-006
Pacific Gas and Electric Company	Docket No. EL03-162-003 Docket No. EL03-162-004
PacifiCorp	Docket No. EL03-163-006
Portland General Electric Company	Docket No. EL03-165-009 Docket No. EL03-165-010
Powerex Corporation (f/k/a British Columbia Power Exchange Corp.)	Docket No. EL03-166-008
Puget Sound Energy, Inc.	Docket No. EL03-169-006 Docket No. EL03-169-007
Reliant Resources, Inc., Reliant Energy Power Generation, and Reliant Energy Services, Inc.	Docket No. EL03-170-007
San Diego Gas & Electric Company	Docket No. EL03-172-004 Docket No. EL03-172-005
Sempra Energy Trading Corporation	Docket No. EL03-173-007
Southern California Edison Company	Docket No. EL03-175-004 Docket No. EL03-175-005
Williams Energy Services Corporation	Docket No. EL03-179-008
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-180-039
Aquila, Inc.	Docket No. EL03-181-010
City of Glendale, California	Docket No. EL03-182-009

City of Redding, California	Docket No. EL03-183-005
Colorado River Commission	Docket No. EL03-184-006
Constellation Power Source, Inc.	Docket No. EL03-185-006
Coral Power, L.L.C.	Docket No. EL03-186-008
El Paso Merchant Energy, L.P.	Docket No. EL03-187-008
Eugene Water and Electricity Board	Docket No. EL03-188-007
Idaho Power Company	Docket No. EL03-189-009
Koch Energy Trading, Inc.	Docket No. EL03-190-006
Las Vegas Cogeneration, L.P.	Docket No. EL03-191-005
MIECO	Docket No. EL03-192-006
Modesto Irrigation District	Docket No. EL03-193-008
Montana Power Company	Docket No. EL03-194-005
Morgan Stanley Capital Group	Docket No. EL03-195-007
Northern California Power Agency	Docket No. EL03-196-008
PacifiCorp	Docket No. EL03-197-009
PECO	Docket No. EL03-198-006
Powerex Corporation (f/k/a British Columbia Power Exchange Corporation)	Docket No. EL03-199-008
Public Service Company of New Mexico	Docket No. EL03-200-008 Docket No. EL03-200-009
Sempra Energy Trading Corporation	Docket No. EL03-201-009

TransAlta Energy Marketing (U.S.), Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-202-007
Valley Electric Association, Inc.	Docket No. EL03-203-005
Portland General Electric Company	Docket No. EL02-114-030
Enron Power Marketing, Inc.	Docket No. EL02-115-034

ORDER ON REHEARING, MOTION FOR CONDITIONS, AND  
COMPLIANCE FILING

(Issued March 19, 2009)

1. In this order, the Commission denies requests for rehearing filed by the Northern California Power Agency (NCPA) and Californians for Renewable Energy (CARE) of its December 22, 2008 order in the above-captioned proceedings.<sup>1</sup> The Commission also denies NCPA's motion for conditions on approval of the Settlement Agreement. Finally, the Commission accepts a filing submitted by the Settling Parties in compliance with the December 22 Order.

**I. Background**

2. These proceedings began with the western power markets crisis of 2000 and 2001 (Western Crisis). As a result of market dysfunctions, the Commission instituted the Gaming and Partnership Proceedings on June 25, 2003.<sup>2</sup> As explained in more detail in the December 22 Order, a number of settlement agreements were entered into between the subjects of the Gaming and Partnership Proceedings and the Commission's Trial Staff.<sup>3</sup> The Chief Administrative Law Judge then consolidated into one proceeding all of the issues regarding the

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<sup>1</sup> *Duke Energy Trading and Marketing, L.L.C.*, 125 FERC ¶ 61,345 (2008) (December 22 Order).

<sup>2</sup> *See American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003); *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003) (Show Cause Orders).

<sup>3</sup> *See* December 22 Order, 125 FERC ¶ 61,345, at P 3-4.

appropriate distribution of these settlement proceeds to parties that were harmed by the alleged conduct of these entities.<sup>4</sup>

3. As particularly relevant here, the Western Crisis led to investigations initiated in Docket No. IN03-10 by the Commission's Office of Market Oversight and Investigations (OMOI) into the actions of various power suppliers, including allegations of anomalous bidding (Anomalous Bidding Investigation).<sup>5</sup> The Anomalous Bidding Investigation resulted in the execution of a number of settlements between OMOI and certain power suppliers (OMOI Settlements). These settlements provided for the payment of monies by the suppliers to OMOI (OMOI Settlement Funds). The OMOI Settlement Funds were held in U.S. Treasury accounts.

4. Further, the California refund proceedings in Docket No. EL00-95, *et al.*, resulted in a number of "Global Settlements" among certain power suppliers, the California Parties, and OMOI.<sup>6</sup> Each of the Global Settlements incorporated the OMOI Settlement Funds that had been paid by the settling power suppliers in accordance with the OMOI Settlements. Each of the Global Settlements also included provisions governing the distribution of the OMOI Settlement Funds.<sup>7</sup> The Global Settlements were approved by the Commission in various orders in 2004 and 2005.<sup>8</sup>

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<sup>4</sup> *Duke Energy Trading and Marketing, L.L.C.*, Docket No. EL03-152-002, *et al.*, "Order of Chief Judge Consolidating Distribution Issue for Hearing and Decision and Granting Clarification," (Dec. 22, 2003).

<sup>5</sup> OMOI is now known as the Office of Enforcement.

<sup>6</sup> *See* n.8, *infra*.

<sup>7</sup> The Global Settlements are discussed in additional detail in section III.B.1, *infra*.

<sup>8</sup> *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,308 (2005) (approving Reliant Global Settlement); *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,171 (2005) (approving Enron Global Settlement); *San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,017 (2005) (approving Mirant Global Settlement); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004) (approving Duke Global Settlement); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,071 (2004) (approving Dynegy Global Settlement); *San Diego Gas & Elec. Co.*, 108 FERC ¶ 61,002 (2004) (approving Williams Global Settlement).

5. In November 2007, Trial Staff initiated a settlement process to determine whether monies held by the Commission as part of the Gaming and Partnership settlements could be divided among those parties harmed by the alleged wrongdoing rather than resorting to litigation. A number of parties actively participated in the subsequent settlement talks that Trial Staff initiated.

6. On August 11, 2008, several parties (Settling Parties) filed a Settlement Agreement that proposed to allocate the settlement funds held by the Commission as a result of the Gaming and Partnership Proceedings settlements, as well as the OMOI Settlement Funds portion of the Global Settlements. The Settlement Agreement included an Allocation Matrix under which these funds would be allocated to both the Settling Parties and certain Settlement Fund Recipients that did not execute the Settlement Agreement.<sup>9</sup>

7. Trial Staff and a number of the Settling Parties filed comments supporting the Settlement Agreement, while NCPA filed initial comments opposing it.<sup>10</sup> The positions advocated by these entities are summarized in the December 22 Order.<sup>11</sup> As relevant here, NCPA asserted that the Settlement Agreement allocated OMOI Settlement Funds that had been set aside for non-settling parties in the Global Settlements proceedings to the California Parties, including the California investor-owned utilities.<sup>12</sup> As a result, NCPA asserted that the California investor-owned utilities were double-dipping into these reserved funds.<sup>13</sup> In addition,

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<sup>9</sup> The December 22 Order explains the provisions of the Settlement Agreement in additional detail. December 22 Order, 125 FERC at P 6-11.

<sup>10</sup> CARE filed reply comments that supported NCPA's position. The presiding Settlement Judge rejected these reply comments as untimely because they were filed after the filing deadline. The Settlement Judge also noted that CARE's reply comments were really initial comments and thus should have been filed at that time. *See* Certification at n.15.

<sup>11</sup> December 22 Order, 125 FERC at P 12-20.

<sup>12</sup> The California Parties are Pacific Gas & Electric Co.; Southern California Edison Co.; San Diego Gas & Electric Co.; the People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General; the California Department of Water Resources; the California Electricity Oversight Board; and the California Public Utility Commission.

<sup>13</sup> Although NCPA uses the term "California Parties" throughout both its comments and its rehearing request, we note that the California Parties include governmental entities as well as the three California investor-owned utilities.

NCPA urged the Commission to reject the Settlement Agreement because the settlement funds were being allocated pursuant to a methodology that was still pending before the Commission in a separate proceeding. While the Settlement Agreement was pending before the Commission, the Settlement Judge certified the Settlement Agreement to the Commission as a contested settlement.<sup>14</sup>

8. The Commission subsequently issued the December 22 Order, which conditionally approved the Settlement Agreement. The December 22 Order explained that, because NCPA had not filed an affidavit as required under Rule 602(f)(4) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f)(4) (2008), there was no issue of material fact and the Commission could therefore address the Settlement Agreement on the merits. Consistent with the Commission's *Trailblazer* precedent for addressing contested settlements,<sup>15</sup> the December 22 Order concluded that the overall result of the Settlement Agreement was just and reasonable and that NCPA's contentions were without merit, and therefore the Settlement Agreement could be approved.<sup>16</sup>

9. In response to NCPA's arguments, the December 22 Order found that the California investor-owned utilities were not double dipping into funds set aside for non-settling parties in the Global Settlements proceedings, noting that several such non-settling parties had either executed the Settlement Agreement or were otherwise Settlement Fund Recipients.<sup>17</sup> The December 22 Order also explained that the Global Settlements allocated the risk of making up shortfalls of monies owed to non-settling parties to the California investor-owned utilities (or, in some

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NCPA's arguments appear to stem from its concern that the three investor-owned utilities in California are being allocated approximately 73 percent of the Settlement Funds under the Settlement Agreement's Allocation Matrix. *See, e.g.*, NCPA Rehearing Request at 13-14.

<sup>14</sup> *Duke Energy Trading and Marketing, L.L.C.*, 124 FERC ¶ 63,021 (2008) (Certification).

<sup>15</sup> *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,005 (1999) (*Trailblazer*).

<sup>16</sup> The December 22 Order also rejected a motion for clarification filed by NCPA after the Settlement Judge certified the Settlement Agreement. As a result, we did not address the answers to NCPA's motion filed by Trial Staff and CARE. December 22 Order, 125 FERC at P 28.

<sup>17</sup> December 22 Order, 125 FERC at P 34.

cases, other parties). As a result, if NCPA (and, to the extent there were any, other non-settling parties) still had available remedies to pursue, they could still do so and still be paid any monies ultimately determined to be owed to them under the proceedings underlying the Global Settlements, even if there was a shortfall.<sup>18</sup> The December 22 Order also emphasized that the Commission was not making any determination with respect to any refunds owed to non-settling parties in the refund proceedings in Docket No. EL00-95, *et al.*<sup>19</sup>

10. With respect to NCPA's assertions regarding the "gross" versus "net" allocation methodology, the December 22 Order stated that the Settlement Agreement was a "black box" settlement and the result of compromise among the numerous parties negotiating the agreement. Therefore, the December 22 Order found that NCPA's contentions regarding the allocation methodology did not provide a sufficient basis for the Commission to reject the Settlement Agreement.<sup>20</sup>

11. The December 22 Order also directed the Settling Parties to revise the standard of review provision to be consistent with existing precedent.<sup>21</sup>

## **II. Requests for Rehearing and Compliance Filing**

12. NCPA and CARE sought rehearing of the December 22 Order. NCPA's request also included a motion asking that the Commission condition the Settlement Agreement on the California Parties (as well as other relevant counterparties) expressly stating that they have made guarantees regarding refund shortfalls and will honor those guarantees. The California Parties filed an answer to NCPA's request for rehearing and motion for conditions.

13. The Settling Parties submitted a compliance filing on January 21, 2009. Notice of the compliance filing was published in the *Federal Register*, 74 Fed. Reg. 5930 (2009), with interventions due on or before February 17, 2009. The Commission subsequently issued an errata notice on February 3, 2009 to correct the dockets referenced in the original notice. No adverse comments or protests were received.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* n.45.

<sup>20</sup> *Id.* P 33.

<sup>21</sup> *Id.* P 39.

### III. Discussion

#### A. Procedural Matters

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits answers to certain types of pleadings. Answers to rehearing requests are prohibited unless permitted by the decisional authority. However, answers to motions are permitted under the Commission's rules.<sup>22</sup> We have evaluated the California Parties' answer and conclude that it responds to NCPA's motion for conditions and not the request for rehearing, although it is styled as a response to both. Accordingly, we will allow the California Parties' answer.

#### B. Substantive Matters

##### 1. NCPA's Request for Rehearing

15. NCPA filed a timely request for rehearing of the December 22 Order.<sup>23</sup> In its request, NCPA states that the Commission erred in approving the Settlement Agreement. First, NCPA argues that the December 22 Order approved the Settlement Agreement notwithstanding that the Global Settlements, and the Commission orders approving them, contain explicit language providing that the OMOI Settlement Funds were set aside specifically for non-settling parties.<sup>24</sup>

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<sup>22</sup> See 18 C.F.R. § 385.213(d)(1) (2008) ("Any answer to a motion . . . must be made within 15 days after the motion . . . is filed . . .").

<sup>23</sup> NCPA's motion for conditions is discussed at P 47-49, *infra*.

<sup>24</sup> NCPA specifically cites to the Reliant, Mirant, Dynegy, and Duke Global Settlements. See Joint Offer of Settlement and Settlement Agreement filed by Reliant, the California Parties, and OMOI, Docket No. EL00-95-000, *et al.* (Nov. 3, 2005); Joint Offer of Settlement and Settlement and Release of Claims filed by the Mirant Parties, the California Parties, and OMOI, Docket No. EL00-95-000, *et al.* (Jan. 31, 2005); Joint Offer of Settlement and Settlement Agreement filed by the Dynegy Parties, the California Parties, and OMOI, Docket No. EL00-95-000, *et al.* (June 8, 2004); Joint Offer of Settlement and Settlement Agreement filed by Duke, the California Parties, OMOI, and Other Claimant Parties, Docket No. EL00-95-100, *et al.* (Oct. 1, 2004). NCPA also cites to Commission orders on the Global Settlement, including the Mirant Global Settlement. See *San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,017, at P 63 (2005) (approving Mirant Global Settlement) (Mirant Global Settlement Order). See also n.8, *supra*, for citations to Commission orders on the Global Settlements.

NCPA states that the Commission is not free to ignore the terms of prior, approved settlements,<sup>25</sup> and contends that the Commission failed to explain how it could ignore the terms of the Global Settlements. NCPA further asserts that the California Parties were ineligible to receive an allocation of these set-aside funds, stating that the California Parties cannot be both settling parties and non-settling parties under the Global Settlements. NCPA explains that, absent an extraordinary public interest finding to the contrary, the non-settling parties believed that only they would receive the monies set aside for them in the Global Settlements. NCPA states that it does not matter that the Settling Parties agreed to allocate the portion of the settlement funds from the Global Settlements set aside for non-settling parties to the California Parties because such an agreement is contrary to the plain terms of the Global Settlements. NCPA contends that double-dipping into the reserved funds, primarily by the California Parties, is in contravention of the Commission's prior orders on the Global Settlements, and that this renders the Settlement Agreement unjust and unreasonable under the Federal Power Act (FPA).<sup>26</sup> According to NCPA, the California Parties are double-dipping because the California Parties were allocated monies in the Global Settlements and now are receiving a portion of the funds set aside for non-settling parties in those Global Settlements.

16. NCPA also states that while the California Parties guaranteed refunds to non-settling parties as to certain matters, it is likely that the market will be short of refund monies. NCPA points out that the California Department of Water Resources has filed a shortfall of \$2.2 billion or, alternatively, may be treated as a non-jurisdictional entity from which the Commission cannot order refunds. NCPA also contends that the California Parties' guarantees do not address the problem of making non-settling parties whole, stating that the dollars at issue are different and indemnification--even if it does happen--does not completely solve the problem. NCPA further states that the fact that the Global Settlements reserved funds for non-settling parties cannot be changed by the California Parties' guarantees, because the parties and opt-in participants to the Global Settlements had contracted away their rights to those funds. NCPA states that, contrary to the December 22 Order's findings, the Settlement Agreement undermines some of the fundamental assumptions of the Global Settlements by allocating funds to some entities when those funds had been expressly reserved for others.

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<sup>25</sup> In support of its assertion, NCPA cites to *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 128 S.Ct. 2733 (2008).

<sup>26</sup> 16 U.S.C. § 824, *et seq.* (2006).

17. Finally, NCPA notes that the settlements crafted by the California Parties have long placed non-jurisdictional entities in untenable positions. NCPA explains that such entities have been forced out of settling in the Global Settlements proceedings although they may have purchased energy in the organized electricity markets. According to NCPA, this is because the methodology used to allocate monies in the Global Settlements was based on a net calculation rather than a gross calculation so that NCPA would owe monies instead of being owed refunds.<sup>27</sup> NCPA states that these settlements used a methodology that the Commission has since rejected.<sup>28</sup> Moreover, NCPA states that the settling parties and opt-in participants are also taking funds reserved for entities that would not settle because of this flawed methodology.

### **Commission Determination**

18. We are not persuaded by NCPA's arguments and deny NCPA's request for rehearing, thereby upholding our earlier decision to approve the Settlement Agreement.

19. The contested settlement arises from long, protracted, and complex proceedings related to the Western Crisis. In reaching its decision to approve the Settlement Agreement, the Commission carefully considered NCPA's arguments. However, we continue to find that approval of the Settlement Agreement is just and reasonable. Below we address each of NCPA's arguments in further detail. First, we explain why we disagree with NCPA's contention that the Global Settlement provisions require that the unallocated OMOI Settlement Funds were to be reserved solely for entities that did not opt into the Global Settlements. Second, we explain why we find that the overall result of the Settlement Agreement is just and reasonable under *Trailblazer*, regardless of NCPA's contention. Finally, we reject NCPA's arguments regarding the net versus gross allocation methodology as irrelevant to our consideration of the instant Settlement Agreement.

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<sup>27</sup> In its initial comments on the Settlement Agreement, NCPA argued that because prices are set by the California Independent System Operator Corporation (ISO) and the California Power Exchange (PX) for specified intervals of time, the sales and purchases in the markets they administer should be netted over those intervals. NCPA further argued that netting over the entire refund period was illegitimate. *See Comment of Northern California Power Agency in Opposition to Certification of Joint Offer of Settlement to the Commission and Opposing Joint Offer of Settlement*, Docket No. EL03-152-002, at 39-40 (Sept. 2, 2008).

<sup>28</sup> NCPA cites to *San Diego Gas & Elec. Co.*, 125 FERC ¶ 61,214, at P 16-19 (2008).

20. As the December 22 Order explained, in *Trailblazer* we outlined four separate grounds under which we may approve contested settlements: (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.<sup>29</sup> The December 22 Order found that the overall result of the Settlement Agreement was just and reasonable, and it rejected the merits of NCPA's arguments.<sup>30</sup> In this order, we affirm the December 22 Order's conclusion that the contested Settlement Agreement should be approved consistent with *Trailblazer*. As noted herein, our approval of the Settlement Agreement is also consistent with our longstanding policy of encouraging settlements, particularly in the Western Crisis proceedings.<sup>31</sup>

**Trailblazer's First Prong: Addressing the Merits of the Contested Issues**

21. In this section, we find that the December 22 Order properly concluded that the Settlement Agreement could be approved under the first *Trailblazer* prong. We also affirm that NCPA's contentions are without merit.<sup>32</sup> In particular, we find that, contrary to NCPA's claim, the relevant provisions of the Global Settlements provide the Commission with flexibility in distributing the unallocated OMOI Settlement Funds. We thus reject NCPA's contention that we ignored the terms of prior settlements.<sup>33</sup>

22. NCPA argues that the Global Settlements should be interpreted as providing for the distribution of unallocated OMOI Settlement Funds only to non-settling parties. NCPA cites to provisions contained in several of the Global

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<sup>29</sup> *Trailblazer*, 85 FERC ¶ 61,345 at 62,342-45.

<sup>30</sup> Because we focused on the first two *Trailblazer* prongs, and found the Settlement Agreement to be just and reasonable under either prong, the December 22 Order did not address whether the third and fourth prongs applied.

<sup>31</sup> See P 39, *infra*.

<sup>32</sup> We address NCPA's arguments regarding the net versus gross methodology at P 40-41, *infra*.

<sup>33</sup> See NCPA Rehearing Request at 6-7.

Settlements, including the Reliant Global Settlement, the Mirant Global Settlement, the Dynegy Global Settlement, and the Duke Global Settlement, that it argues supports its claim.<sup>34</sup> In addition, NCPA cites to the Mirant Global Settlement Order, where we stated that provisions concerning the OMOI Settlement Funds provided protections to non-settling parties.<sup>35</sup> Moreover, NCPA explains that several of the relevant provisions in the Global Settlements provide that unallocated OMOI Settlement Funds would be distributed to other parties in the Gaming and Partnership Proceedings or elsewhere, as the Commission may determine, and that these other parties may be different from the entities that signed or opted into the Global Settlements.<sup>36</sup>

23. Notwithstanding NCPA's claims, and regardless of whether or not its position is reasonable, we read the relevant provisions of the Global Settlements differently. The Global Settlements provide that the OMOI Settlement Funds are to be distributed in the Gaming and Partnership Proceedings and the Anomalous Bidding Investigation<sup>37</sup> as the Commission may determine. We read these

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<sup>34</sup> In this order, we generally focus on those Global Settlements cited by NCPA, but our determinations here are applicable to all of the Global Settlements. We note here that the Enron Global Settlement and the Williams Global Settlement contain similar provisions regarding the distribution of unallocated OMOI Settlement Funds. *See* Enron Global Settlement at § 6.2.4; Williams Global Settlement at § 5.6.

<sup>35</sup> Mirant Global Settlement Order at P 63 (“[a]s for the Pre-October Period, the Commission’s OMOI will direct distribution of \$24 million which will be set aside for refunds to Non-Settling Parties. The Commission finds that these measures will protect Non-Settling Parties from underrecovery and evince an effort to ensure that the Settlement does not discriminate against Non-Settling Parties”).

<sup>36</sup> The California Parties, on the other hand, contend that the previously unallocated OMOI Settlement Funds are “unclaimed funds” that could be distributed in the distribution phase of the Gaming and Partnership Proceedings. *Reply Comments of the California Parties*, Docket No. EL03-152-002, *et al.*, at 11 (Sept. 10, 2008). In addition, according to Trial Staff, the Office of Enforcement advised Trial Staff that the OMOI Settlement Funds could be allocated in the distribution phase of the Gaming and Partnership Proceedings. *See Initial Comments of Commission Trial Staff*, Docket No. EL03-152-002, *et al.*, at 12 (Sept. 2, 2008).

<sup>37</sup> As noted in P 3, *supra*, the Anomalous Bidding Investigation was instituted by the Commission to investigate allegations of market manipulations in

provisions as providing the Commission with discretion in how and to whom the funds set aside for non-settling parties would ultimately be allocated. The courts have recognized that the Commission is afforded discretion in the interpreting the terms of jurisdictional settlement agreements.<sup>38</sup>

24. In this case, we carefully examined the provisions of the Global Settlements cited by NCPA, and we have reasonably interpreted those provisions as providing the Commission with flexibility in allocating the remaining OMOI Settlement Funds. For example, the Duke Global Settlement states that “[t]he portion of the \$2,500,000 paid by Duke to FERC pursuant to the Duke-OMOI Settlement that is allocated to Non-Settling Participants pursuant to the Allocation Matrix shall remain in the U.S. Treasury Account where the funds are currently located, for distribution as FERC shall determine.”<sup>39</sup> The Reliant Global Settlement includes similar language and further provides that the OMOI Settlement Funds would be distributed in the Gaming and Partnership Proceedings.<sup>40</sup> In addition, the Dynegy Global Settlement provides that the unallocated OMOI Settlement Funds are to be distributed by the Commission in the Dynegy Gaming and Partnership Proceeding or as it may otherwise direct.<sup>41</sup> Therefore, consistent with these provisions, the December 22 Order approving the Settlement Agreement, which distributed certain unallocated monies from the earlier settlements, is a determination by the Commission in the Gaming and Partnership Proceedings.

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the western power markets. *See generally Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

<sup>38</sup> *See, e.g., National Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1249 (D.C. Cir. 1990) (“We afford broad deference to the Commission’s construction of a settlement agreement because we recognize that settlement interpretation implicates both the Commission’s superior knowledge of industry conditions and practices, and the Commission’s exercise of its congressionally delegated powers . . .”) (internal citations and quotations omitted).

<sup>39</sup> Duke Global Settlement at §5.5.3.2.

<sup>40</sup> Reliant Global Settlement at § 4.1.2(iii).

<sup>41</sup> Dynegy Global Settlement at § 5.2.4.4. This provision also states that “[n]othing herein shall preclude any Settling Participant from advocating any particular methodology in Docket No. EL03-153-000 [the Dynegy Gaming and Partnership Proceeding] . . . .”

25. NCPA argues that the California Parties cannot be both parties to the Global Settlements and “other parties” with respect to the unallocated portion of OMOI Settlement Funds. The Commission disagrees with NCPA that the identity of “other parties” eligible for unallocated portions of the OMOI Settlement Funds cannot include entities, such as the California Parties, that had already been allocated a portion of the OMOI Settlement Funds. For example, section 4.1.2(iii) of the Reliant Global Settlement, which NCPA cites to in its rehearing request,<sup>42</sup> provides that some portion of the OMOI Settlement Funds will be distributed to the Global Settlement parties and opt-in participants, with distributions to “other parties” to occur in the Gaming and Partnership Proceeding. NCPA contends that the term “other parties” refers solely to non-settling parties; however, if that were the intent, the Reliant Global Settlement could simply have stated that the remainder would be distributed to “Non-Settling Participants,” which is a defined term under that agreement.<sup>43</sup> This would have eliminated any ambiguity, and yet this is not what was done. Thus, we find that these provisions give us the flexibility as to whom these unallocated OMOI Settlement Funds should be distributed.

26. NCPA observes that the Commission relied on language in the Mirant Global Settlement that set aside money for refunds for non-settling parties to show that the non-settling parties were not unduly discriminated against in that settlement.<sup>44</sup> After reviewing the relevant provision of the Mirant Global Settlement in its entirety, we find that the set-aside for non-settling parties was not unconditional. In particular, the Mirant Global Settlement expressly states the monies set aside in an account specified by OMOI are limited to refunds for the pre-October period to “be allocated by FERC as part of its resolution of the anomalous bidding investigation in Docket No. IN03-10” and continues that “[n]othing herein shall preclude any Party from advocating any particular refund methodology with respect to this amount.”<sup>45</sup> Moreover, as in the Duke Global

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<sup>42</sup> NCPA Rehearing Request at 9-11.

<sup>43</sup> Reliant Global Settlement at § 1.45.

<sup>44</sup> *See* NCPA Rehearing Request at 11 (citing the Mirant Global Settlement Order at P 64).

<sup>45</sup> Mirant Global Settlement at § 6.5.4. The “Pre-October Period” refers to the period running from January 1, 2000 through October 1, 2000. *See id.* at § 1.1.106. The Pre-October Period corresponds with the time period investigated by the Commission in the Anomalous Bidding Investigation in Docket No. IN03-10.

Settlement, the Mirant Global Settlement’s reference to “Non-Settling Participants” in this context is in reference to the shares of the OMOI Settlement Funds that would have been allocated to Non-Settling Participants pursuant to additional proceedings, and does not address how those shares would ultimately be allocated.

27. For the reasons described in this section, we conclude that the set-asides for non-settling parties in the Global Settlements were not unconditional and that the relevant provisions of the Global Settlements provide the Commission with discretion as to how those monies were to be allocated in the Gaming and Partnership Proceedings.

28. Further, most of the Global Settlements include provisions stating that those agreements did not confer rights or benefits on third parties (i.e., entities that were not settling parties or opt-in participants).<sup>46</sup> The inclusion of such provisions means that NCPA, as a third party, should not have any reasonable expectation of receiving monies under these Global Settlements. We note that the Settlement Agreement does not affect the rights, if any, of NCPA in pursuing litigation in the proceedings underlying the Global Settlements. The Global Settlements, however, do not guarantee that non-settling parties will receive any specific amount of monies.

29. Therefore, regardless of NCPA’s position, we find that our interpretation of the relevant Global Settlement provisions is reasonable. Accordingly, we affirm our determination that the Settlement Agreement may be approved under *Trailblazer’s* first prong.

**Trailblazer’s Second Prong: The Overall Result of the Settlement Agreement is Just and Reasonable**

30. As we state in the preceding section, we find that NCPA’s contentions regarding the appropriate interpretation of the Global Settlements are without merit. In this section, we address whether the overall result of the Settlement Agreement is just and reasonable under the second prong of the *Trailblazer* analysis. We find that while the language in the Global Settlements and several of the orders approving them evince an intent to protect non-settling parties, our decision to approve the Settlement Agreement does not undermine this intent.

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<sup>46</sup> See *Dynegy Global Settlement* at § 13.3; *Mirant Global Settlement* at § 14.7; *Reliant Global Settlement* at § 15.3; *Enron Global Settlement* at § 13.4; *Williams Global Settlement* at § 16.3.

Accordingly, we conclude that, regardless of NCPA's position, the Settlement Agreement leads to an overall just and reasonable result.

31. First, as we explained in the December 22 Order, several entities that had been non-settling parties under the Global Settlements joined this Settlement Agreement. For example, municipal entities that had opted out of some or all of the Global Settlements decided to execute, or otherwise become Settlement Fund Recipients under, the instant Settlement Agreement. Indeed, it appears that there is no other non-settling party that either did not join or actively opposes the Settlement Agreement.<sup>47</sup> The presence of entities that had not signed on to the Global Settlements and that either have signed the Settlement Agreement or otherwise support it helps assure us that the overall result of the Settlement Agreement is just and reasonable. Had these entities believed that the Settlement Agreement improperly allocates monies reserved for non-settling parties, it would have presumably been in their interest to either not join or actively oppose the Settlement Agreement.

32. Second, a significant factor that went into our decision-making process in the December 22 Order was the protection of entities that chose not to join the Settlement Agreement. We affirm our determination in the December 22 Order that the Settlement Agreement does not alter NCPA's rights, if any are still available, in pursuing litigation in the proceedings underlying the Global Settlements.<sup>48</sup> For instance, section 7.4 of the Settlement Agreement expressly provides that "FERC approval of the Settlement will not have the effect of modifying or amending any of the Covered Settlements . . . ."<sup>49</sup> At the same time,

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<sup>47</sup> Trial Staff, in its reply comments, suggested that NCPA was the only non-settling party. *See, e.g., Trial Staff Reply Comments*, Docket No. EL03-152-002, *et al.* at 10 (Sept. 10, 2008) ("[t]he fact that NCPA cannot identify a single non-settling party other than itself is a direct result of Trial Staff's broad-based effort to ensure that any party with a potential claim for a share of monies collected in these proceedings had an opportunity to participate in settlement negotiations"). The Settlement Judge also made this finding. *See Certification* at P 32 ("[t]he Settlement discussions had ample notice and as pointed out by the comments all parties who alleged to have been harmed during the energy crisis participated in the settlement discussions") (internal footnote omitted).

<sup>48</sup> *See* December 22 Order, 125 FERC at P 34.

<sup>49</sup> Settlement Agreement at § 7.4. In section 5.1, the Settlement Agreement sets forth a limitation on pursuing claims with respect to a covered settlement, but that provision is only applicable to the Settling Parties and other Settlement Fund

the Global Settlements themselves provide backstop protection in the form of guarantees by the California investor-owned utilities (or, in some cases, other entities) to make up shortfalls, subject to specified limitations. If this Commission or a court determines that NCPA (or any other non-settling party) is entitled to monies in accordance with the proceedings underlying the Global Settlements, those settlements have provisions in place to ensure that they are in fact paid, even if there is a shortfall.<sup>50</sup> Because NCPA may be able to continue to pursue its litigation options in the underlying Global Settlements proceedings, and because it is protected by the guarantees included in the Global Settlement, we conclude that NCPA is in no worse a position than if we had rejected the Settlement Agreement.

33. We disagree with NCPA's unsupported assertion that the California Parties' guarantees involve a different set of dollars.<sup>51</sup> The Global Settlements included allocation matrices identifying entities that were to receive monies under the settlement and the amount of each distribution, and the OMOI Settlement Funds were included in that package.<sup>52</sup>

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Recipients. Because NCPA is neither a Settling Party nor other Settlement Fund Recipient, it is not bound by this limitation.

<sup>50</sup> *See, e.g.*, Duke Global Settlement at §§ 5.11, *et seq.*; Mirant Global Settlement at §§ 6.6, *et seq.*; Reliant Global Settlement at §§ 6.5, *et seq.* (describing California Parties' obligation to make up refund shortfalls).

<sup>51</sup> *See* NCPA Rehearing Request at 14.

<sup>52</sup> While the Global Settlements were separately negotiated and thus contain different language, they include variations on the same theme with respect to the disposition of the OMOI Settlement Funds. For example, under section 5.2.4.4 of the Dynegy Global Settlement, if monies were to be provided to certain entities pursuant to that agreement's allocation matrix and those entities chose not to join the settlement, then thirty percent of those funds would be distributed into an account designated by OMOI for distribution in Docket No. EL03-153-000 (i.e., the Dynegy Gaming and Partnership Proceeding). The Mirant Global Settlement provides, at § 6.5.4, that after the transfer of refund monies to the Mirant Refund Escrow, "a portion of the cash payments transferred . . . equal to the total of all Non-Settling Participants' allocable shares of the \$24,000,000 in refunds for the Pre-October Period as shown on the Allocation Matrix shall be transferred to an account specified by OMOI . . . ." Section 4.2.5 of the Reliant Global Settlement provides that "FERC shall cause to be transferred to an account designated by the California Parties any and all amounts paid by Reliant pursuant to the Reliant/OMOI Settlement that are allocable to Parties and Opt-In Participants as established by the Allocation Matrix, but not Reliant/OMOI

34. Moreover, at least one of the Global Settlements expressly provided that if monies are owed to non-settling parties, the first source of payment would be the unallocated OMOI Settlement Funds, then payment would be made from the refund escrow described in that agreement, and, finally, payment would come from the California utilities themselves. Specifically, the Duke Global Settlement provides:

The amount of Duke Refunds allocable to a Non-Settling Participant so determined in the FERC Refund Determination shall, in the first instance, be paid from funds set aside for payment of Non Settling Participants from the OMOI Settlement and the EL03-152 Settlement, and then from the Duke Refund Escrow. Any shortfall in the Duke Refund Escrow with respect to Duke Refunds owed to Non-Settling Participants shall be covered as provided in Section[s] 5.11 through 5.11.7.<sup>53</sup>

35. In turn, Sections 5.11 through 5.11.7 of the Duke Global Settlement govern the responsibility of the California investor-owned utilities to make up shortfalls, subject to specified limitations. These provisions provide assurance that, if and when the Commission makes a determination regarding monies owed to non-settling parties, those parties will be paid whatever amount is determined to be owed, even if the balance of the OMOI Settlement Funds had already been disbursed. In any event, as discussed above, we find that the Global Settlements indicate that the OMOI Settlement Funds are part of each agreement's overall settlement package that included those funds and other sources, as set forth in those agreements' respective allocation matrices.<sup>54</sup>

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Settlement amounts allocable to Non-Settling Participants, which shall be allocated in the Partnership/Gaming Proceeding.” Finally, section 5.5.3.2 of the Duke Global Settlement provides that the OMOI Settlement Funds “shall be attributed to the Pre-October Period, allocated as provided in Section 4.1.2.6 and in the Allocation Matrix . . . and distributed to all Settling Participants from the Duke Refund Escrow in accordance with the Allocation Matrix” with the portion allocated to entities that did not join the agreement to remain in U.S. Treasury accounts “for distribution as FERC shall determine.”

<sup>53</sup> Duke Global Settlement at § 5.9.

<sup>54</sup> *See* n.52, *supra*.

36. NCPA argues that there is a risk of not recovering monies that are held by private parties.<sup>55</sup> However, this is no different from the risk any party takes when it chooses to pursue litigation instead of opting for settlement. What we found to be critical in approving the Settlement Agreement was that NCPA (and other non-settling parties, if any) will still be protected, because the Settlement Agreement does not undermine the provisions in the Global Settlements that provide a backstop for payment of any obligation found to be owed to NCPA (and other non-settling parties, if any) in the proceedings underlying them.

37. We also find that the Settlement Agreement will promote certainty with respect to these particularly contentious proceedings. This Settlement Agreement constitutes a significant resolution of a piece of such proceedings. This is evidenced by the broad and diverse support the Settlement Agreement received, including from entities that previously had been non-settling parties. The Settlement Agreement provides a great deal of certainty not only to the Settling Parties, but also ratepayers in the western United States who have been waiting for these nearly decade-long proceedings to come to a close.

38. Moreover, we find that the Settlement Agreement will avoid costly litigation going forward. Although the Settlement Agreement is contested by NCPA and CARE, we believe that litigation would be more protracted and costly without the agreement in place. Many of the Settling Parties have divergent interests from one another; yet, they came together to agree on a number of compromises that will allow the Settling Parties to cease litigation and gain certainty going forward. These Settling Parties recognized that there was a value to avoiding potentially costly and resource-intensive litigation before this Commission and before the courts.<sup>56</sup>

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<sup>55</sup> See NCPA Rehearing Request at 14-15.

<sup>56</sup> See, e.g., *Reply Comments of Salt River Project Agricultural Improvement and Power District*, Docket No. EL03-152-002, *et al.* at 6 (Sept. 10, 2008) (“[e]veryone participating in the Settlement agreed to a compromise that avoids the expenditure of additional litigation costs and enables money to flow more quickly”); *Reply Comments of Constellation NewEnergy, Inc.*, Docket No. EL03-152-002, *et al.* at 9 (Sept. 10, 2008) (“[h]ad NewEnergy adhered to its litigation position, it...likely would have received two percent of the refunds. NewEnergy’s agreement to settle for only 1.67 percent of the refunds was thus a substantial compromise of its litigation position”); *Reply Comments of Indicated Parties*, Docket No. EL03-152-002, *et al.* at 15-16 (Sept. 10, 2008) (“every party assessed the advantage of agreeing to some accepted allocated share rather than risk losing entirely the value of what might be won eroded by the loss of the time value of money”).

39. Even though the Settlement Agreement is contested, we still find that its overall result is just and reasonable for all of the reasons discussed herein: the rights of NCPA and other non-settling parties, if any, are fully protected, and the Settlement Agreement reflects broad-based support that will provide certainty to ratepayers and reduce the costs of protracted litigation. Approval of the Settlement Agreement is also consistent with our longstanding policy to encourage settlements,<sup>57</sup> a policy that we have emphasized in the Western Crisis proceedings.<sup>58</sup> Therefore, consistent with *Trailblazer*, we affirm the December 22 Order's approval of the Settlement Agreement.

### **Net and Gross Allocation Methodologies**

40. Finally, we reject NCPA's arguments regarding the gross versus net methodology. As we explained in the December 22 Order, the Settlement Agreement is a black box and the result of a negotiated compromise among the various Settling Parties. We have previously found that it would undermine the give-and-take of comprehensive settlements, such as the Settlement Agreement, if we required parties to provide detailed support for such black box settlements.<sup>59</sup>

41. In any event, NCPA's rehearing request suggests that it is concerned not with the allocation methodology under the Settlement Agreement but rather with

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<sup>57</sup> See, e.g., *Southern Cal. Edison Co.*, 125 FERC ¶ 61,329, at P 25 (2008) (“we encourage the parties to make every effort to settle their disputes, and encourage the parties to participate in any settlement proceedings conducted” in the proceedings); *Northeast Utils. Serv. Co.*, 117 FERC ¶ 61,337, at n.22 (2006) (“[w]e also note that it is the longstanding policy of the Commission to encourage settlement among the parties”).

<sup>58</sup> 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”).

<sup>59</sup> See, e.g., *Southwestern Pub. Serv. Co.*, 124 FERC ¶ 61,232, at P 29 (2008) (quoting *El Paso Nat. Gas Co.*, 82 FERC ¶ 61,337, at 62,340 (1998)).

the methodology under the previously approved Global Settlements.<sup>60</sup> That concern is not relevant to the instant Settlement Agreement. NCPA is free to pursue whatever strategy it has available and finds suitable (e.g., through litigation or settlement) to make its case in the appropriate proceeding regarding the use of a gross buyer methodology.

## 2. CARE's Request for Rehearing

42. In its timely rehearing request, CARE objects to the procedural barriers that the December 22 Order creates for it. CARE asserts that it is the lone representative of electric consumers, citing 16 U.S.C. § 2602(5) of the Public Utility Regulatory Policies Act of 1978 (PURPA). CARE asserts that the Settlement Agreement “did not explain how ratepayers would participate in any refunds so CARE does not believe that FERC has been presented with an acceptable means to support the agreement and to protect the public interest.”<sup>61</sup> CARE argues that the Settlement Agreement is unlawful and will not resolve issues associated with the distribution phase of the Gaming and Partnership Proceedings, and asserts that ratepayers were not included in settlement negotiations or in the distribution of settlement proceeds.

43. In addition, CARE argues that the Settlement Agreement should not be certified and that the matter should be held in abeyance pending the outcome of the Commission's review of power market contracts on remand from the recent United States Supreme Court opinion in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008) (*Morgan Stanley*). CARE cites to the Court's statement in *Morgan Stanley* that the Commission should not presume a contract is just and reasonable “if it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations....”<sup>62</sup>

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<sup>60</sup> See NCPA Rehearing Request at 15 (“We [non-jurisdictional entities] have been forced out of settling in the Global Settlements in spite of the fact that we may have purchased in the organized markets – as NCPA did – because the methodology used is one that the Commission recently rejected (the ‘net’ calculation instead of the ‘gross’ calculation – or to be more precise, the latter is a calculation which allows netting only over individual billing interval”).

<sup>61</sup> CARE Rehearing Request at 7.

<sup>62</sup> *Morgan Stanley*, 128 S.Ct. at 2750.

### Commission Determination

44. The Commission denies CARE's request for rehearing. We find that CARE has raised these issues for the first time in its rehearing request.<sup>63</sup> The Commission looks with disfavor on parties raising issues for the first time at this stage because it deprives other parties of the opportunity to respond, since our rules prohibit answers to requests for rehearing.<sup>64</sup> Accordingly, we deny CARE's rehearing request.

45. In any event, even if we were to consider CARE's arguments on the merits, we would still deny rehearing. CARE cites to 16 U.S.C. § 2602(5), which is a PURPA provision, but our action here is pursuant to the FPA and not PURPA. In any event, even if CARE's citation were relevant, CARE is not the only ratepayer advocate. For example, the California Public Utilities Commission (CPUC), which is one of the California Parties, represents California ratepayers.<sup>65</sup> We find that the CPUC's participation in these proceedings belies CARE's claim that ratepayers were excluded.<sup>66</sup>

46. CARE cites to *Morgan Stanley* for the proposition that the Commission should not presume that contracts are just and reasonable under the FPA if one of the parties to the underlying contract negotiations engaged in extensive market

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<sup>63</sup> CARE filed reply comments, which raised the issues it is addressing here. CARE's reply comments were rejected by the Settlement Judge, who found that the reply comments were untimely and should have been filed as initial comments, not reply comments. *See* n.10, *supra*. The December 22 Order did not address these untimely comments.

<sup>64</sup> *See, e.g., PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,030 at P 15 and n.10 (2009) (“[t]he Commission has held that raising issues for the first time on rehearing is disruptive to the administrative process and denies parties the opportunity to respond”). *See also* 18 C.F.R. § 385.213(a)(2) (2008) (prohibiting answers to rehearing requests).

<sup>65</sup> *See, e.g., Public Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 157 (D.C. Cir. 1993) (noting that the CPUC represents ratepayers).

<sup>66</sup> Further, we note that CARE does not claim that it specifically was denied access to settlement negotiations. The record indicates that CARE, which is on the official service lists in the dockets in which the settlement conference notices were distributed, had fair notice and opportunity to participate, whether it chose to do so or not.

manipulation. Although CARE's argument is not clearly articulated, we interpret it to mean that the Settlement Agreement should not have been approved until the Commission's remand proceeding in Docket No. EL02-28-006, *et al.*, is completed in order to determine whether the contracts at issue were just and reasonable (Remand Proceeding).<sup>67</sup> We reject CARE's rehearing request on this issue as well. As we noted in the Remand Order, "we remind parties that this order concerns only those contracts at issue in *Morgan Stanley*."<sup>68</sup> The Remand Proceeding thus involves a discrete group of contracts between various utilities and various suppliers. While there may be similar issues, and while all of these cases had a similar origin, this proceeding is distinct from the Remand Proceeding.<sup>69</sup>

### 3. NCPA's Motion for Conditions

47. As explained above, NCPA argues that the guarantees made by the California Parties in the Global Settlements may end up being meaningless because of potentially significant refund shortfalls. Thus, NCPA states that, at a minimum, the Commission should expressly hold as a condition of disbursement that the California Parties, or relevant counterparties, have made those guarantees and will actually back them in the future. NCPA acknowledges that disbursements have been made already under the Settlement Agreement, but requests that the Commission order repayment if the conditions are not accepted.

48. The California Parties request that the Commission reject NCPA's motion for conditions, arguing that NCPA did not explain why it would be necessary to revisit obligations that already are in place. The California Parties state that

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<sup>67</sup> On December 18, 2008, the Commission issued an order on remand of the *Morgan Stanley* decision. *Nevada Power Co. and Sierra Pac. Power Co. v. Enron Power Marketing, Inc.*, 125 FERC ¶ 61,312 (2008), *reh'g pending* (Remand Order).

<sup>68</sup> Remand Order, 125 FERC ¶ 61,312, n.65.

<sup>69</sup> Even if CARE could support its assertion, we note that parties enter into settlements with the knowledge that there could be future agency determinations that may detrimentally affect them. *See, e.g., Wisconsin Pub. Serv. Corp.*, 120 FERC ¶ 61,269, at P 96 (2007) ("[i]n negotiating the settlements, all parties had to take into account the risks of possible future action by the Commission. That WPS Companies now believe that they may have fared better had they negotiated differently is not at issue.") (citing *Union Pac. Fuels Inc. v. FERC*, 129 F.3d 157 (D.C. Cir. 1997) (internal footnote omitted)).

NCPA alternatively may be requesting an extension of those obligations, but if that is the case, NCPA has not defined or explained the parameters of that expansion. The California Parties further assert that there is no legal basis to impose an additional condition on the Settlement Agreement, and that NCPA's motion is a collateral attack on the December 22 Order. The California Parties argue that the December 22 Order, as well as earlier orders, expressly provide that non-settling parties can pursue claims for relief and that NCPA does not need and is not entitled to further assurances. Finally, the California Parties argue that the Commission can address payment responsibility issues if and when NCPA or other entities obtain relief and encounter difficulties in obtaining repayment.

49. We deny NCPA's motion for conditions. As discussed above, we find that the guarantees included in the Global Settlements provide a commitment that the California Parties (or other entities, as appropriate) will be responsible to make up any shortfalls if this Commission or a court determines that NCPA or other non-settling parties are entitled to monies under the proceedings underlying the Global Settlements. We find that the Global Settlements provide a process for non-settling parties to obtain relief, should the need arise, through the backstop guarantees provided in those settlements. Thus, there is no need to condition the instant Settlement Agreement in the manner requested by NCPA.

#### **4. Compliance Filing**

50. The Settling Parties submitted a compliance filing on January 21, 2009, and no adverse comments or protests were received. We find the compliance filing satisfactorily complies with our directive in the December 22 Order, and we therefore accept it.

#### **The Commission orders:**

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) NCPA's motion for conditions is hereby denied, as discussed in the body of this order.

(C) The Settling Parties' compliance filing is hereby accepted, as discussed in the body of the order.

By the Commission. Commissioner Moeller is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.