

129 FERC ¶ 61,257  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly and Philip D. Moeller.

San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services	Docket No. EL00-95-234
Investigation of Practices of the California Independent System Operator and the California Power Exchange	Docket No. EL00-98-219
Puget Sound Energy, Inc. v. Sellers of Energy and/or Capacity	Docket No. EL01-10-050
Investigation of Anomalous Bidding Behavior and Practices in Western Markets	Docket No. IN03-10-051
Fact-Finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices	Docket No. PA02-2-067
American Electric Power Service Corporation	Docket No. EL03-137-016
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-180-045
California Independent System Operator Corporation	Docket No. ER03-746-016
Los Angeles Department of Water and Power	Docket No. EL03-157-006

ORDER APPROVING SETTLEMENT

(Issued December 17, 2009)

1. In this order, the Commission approves a settlement filed on October 28, 2009 between the City of Los Angeles, California, acting by and through the Department of Water and Power (LADWP), and the California Parties<sup>1</sup> (collectively, the Parties). The settlement resolves claims arising from events and transactions in the western energy markets during the period January 1, 2000 through June 20, 2001 (Settlement Period) as they relate to LADWP.<sup>2</sup> The settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement” (Joint Explanatory Statement), and a “Settlement and Release of Claims Agreement” (Settlement and Release of Claims) (collectively, Settlement).

2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.<sup>3</sup> The Parties state that the Settlement became binding when all Parties executed it, and some provisions will become effective upon the Settlement Effective Date, which is the date on which the Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected Party.<sup>4</sup> 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.<sup>5</sup>

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial

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<sup>1</sup> For purposes of this Settlement the California Parties include:

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

<sup>2</sup> *See* Joint Offer of Settlement at 2.

<sup>3</sup> 18 C.F.R. § 385.602 (2009).

<sup>4</sup> Joint Explanatory Statement at 10-11; Settlement and Release of Claims Agreement, §§ 1.82, 2.1, 2.2.2, 4.16.

<sup>5</sup> Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement, §§ 2.2, 4.15.

certainty.<sup>6</sup> The Parties state that the Settlement reaches a fair and reasonable resolution of the issues between LADWP and the California Parties. The Parties further assert that the Settlement protects the rights of non-settling parties.<sup>7</sup> Finally, the Parties note that the Commission and the United States Court of Appeals for the 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.<sup>8</sup> The Parties, therefore, request Commission approval of the Settlement.

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)<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in western energy markets in Docket No. IN03-10-000.<sup>12</sup>

6. The Parties state that the Settlement resolves claims in the above-captioned proceedings as they relate to LADWP.<sup>13</sup> Any entity that directly sold energy or

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<sup>6</sup> Joint Offer of Settlement at 6.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (citing *Pub. Utils. Comm'n of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002); *Pub. Utils. Comm'n. of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9<sup>th</sup> Cir., Oct. 23, 2006)).

<sup>9</sup> 16 U.S.C. § 791, *et seq.* (2006).

<sup>10</sup> *San Diego Gas & Electric Co.*, 92 FERC ¶ 61,172 (2000).

<sup>11</sup> *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

<sup>12</sup> *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

<sup>13</sup> Joint Explanatory Statement at 2.

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.”<sup>14</sup> Such entities must provide notice to the Commission, as well as serve the notice to parties on the ListServs established for the Docket No. EL00-95 proceeding and in Docket No. EL03-137, *et al.*, no later than five business days following the date the Commission issues an order approving the Settlement.<sup>15</sup> The Parties explain that certain entities identified in the Settlement shall automatically become Additional Settling Participants on the Effective Date.<sup>16</sup> 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.<sup>17</sup>

7. The Parties explain that LADWP has CAISO and CalPX receivables estimated to be \$167,786,671, with an estimated interest on receivables amount of \$109,610,345 through September 30, 2009, which will be updated through and including the projected date of distribution.<sup>18</sup> Under the Settlement, LADWP’s receivables will be released by the CalPX, a portion of which will be paid to LADWP and a portion of which will be paid into escrow accounts established by the California Parties (the Settling Supplier Refund Escrow and the California Litigation Escrow).<sup>19</sup> The amount of LADWP’s receivables being transferred into these escrow accounts will be \$113,433,797, subject to an interest adjustment.<sup>20</sup> The CalPX will transfer \$146,463,219, subject to an interest adjustment, to LADWP.<sup>21</sup> In addition, a portion of LADWP’s receivables in the amount

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<sup>14</sup> Joint Explanatory Statement at 12; Settlement and Release of Claims, § 8.1.

<sup>15</sup> Joint Explanatory Statement at 12; Settlement and Release of Claims, §§ 3.2, 8.1.

<sup>16</sup> Settlement and Release of Claims, § 8.4.

<sup>17</sup> Joint Explanatory Statement at 12.

<sup>18</sup> Joint Offer of Settlement at 4; Joint Explanatory Statement at 12; Settlement and Release of Claims, § 4.1.

<sup>19</sup> Joint Offer of Settlement at 4; Joint Explanatory Statement at 12-13.

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

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

of \$17,500,000 will be retained by the CalPX as a holdback against LADWP's share of the Interest Shortfall.<sup>22</sup>

8. The Settlement provides that the California Parties and/or the California Utilities (i.e., PG&E, SoCal Edison, and SDG&E) will assume responsibility for (1) LADWP's true-ups of receivables, (2) any refund amounts that LADWP owes to Non-Settling Participants for transactions in the western energy markets during the Settlement Period, (3) any interest shortfall the Commission allocates to LADWP, (4) any third-party refund offsets the Commission or a reviewing court determines that LADWP owes, and (5) any CalPX wind-up charges assessed against LADWP for all Rate Periods after Rate Period 15 (beginning January 1, 2010).<sup>23</sup>

9. The Settlement includes an Allocation Matrix<sup>24</sup> that provides an allocation of the settlement proceeds from the refund escrow established by the California Parties.<sup>25</sup> Certain specified Participants are labeled as "Deemed Distribution Participants."<sup>26</sup> Under the Settlement, Settling Participants that have net amounts outstanding and payable to the CAISO and/or the CalPX will receive their share of the settlement proceeds in the form of "Deemed Distributions," i.e., credits against such amounts.<sup>27</sup>

10. With respect to settlement proceeds that would have been paid to Non-Settling Participants, such amounts will be credited toward any payments that the Commission ultimately holds to be due as refunds and interest to those Non-Settling Participants for LADWP's transactions in the California energy markets during the Settlement Period.<sup>28</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> Joint Explanatory Statement at 13; Settlement and Release of Claims, §§ 4.2.3, 4.8, 4.9, 5.6, 5.7.1, 5.7.2.

<sup>24</sup> Settlement and Release of Claims, Exhibit A.

<sup>25</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims, §§ 5.2, 5.5.

<sup>26</sup> Settlement and Release of Claims, Exhibit B. The Deemed Distribution Participants are: Aquila Power Corp.; California Polar Power Brokers LLC; Comision Federal de Electricidad; Illinova Energy Partners, Inc., PG&E; Pacific Gas & Electric Energy Services Co.; and Sacramento Municipal Utility District (SMUD).

<sup>27</sup> Settlement and Release of Claims, §§ 1.20, 1.21, 5.2.2.

<sup>28</sup> Settlement and Release of Claims, § 5.5.

The California Parties will make up any shortfall and will receive any excess.<sup>29</sup> In addition, the Settlement provides that a negotiated amount of interest will be distributed to the California Parties and Additional Settling Participants concurrently with principal amounts, consistent with the Allocation Matrix.<sup>30</sup>

11. The Settlement requires the CAISO and the CalPX to conform their books and records to reflect the distributions, offsets, adjustments, transfers, and status of accounts as provided for in the Settlement.<sup>31</sup> The Settlement states that the Commission's approval of the Settlement will constitute the Commission's authorization and direction to the CAISO and the CalPX to take such action.<sup>32</sup>

12. The Parties state that the Settlement generally resolves all claims between LADWP and the California Parties relating to transactions in the western energy markets during the Settlement Period for refunds, disgorgement of profits, costs and attorneys' fees, or other remedies in certain proceedings before the Commission, subject to specified limitations.<sup>33</sup> In addition, the Parties waive and release any existing disputes regarding CAISO settlements and/or CalPX settlements for the Settlement Period.<sup>34</sup> Similarly, the Parties state that LADWP 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.<sup>35</sup> Likewise, the Parties state that LADWP 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.<sup>36</sup> Subject to specified limitations, Additional Settling Participants are

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<sup>29</sup> *Id.*

<sup>30</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims, § 5.3.

<sup>31</sup> Joint Explanatory Statement at 14-15; Settlement and Release of Claims, § 6.1.

<sup>32</sup> *Id.*

<sup>33</sup> Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement, § 7.1.1.

<sup>34</sup> Settlement and Release of Claims Agreement, § 7.1.4.

<sup>35</sup> Joint Explanatory Statement at 15; *see* Settlement and Release of Claims, § 7.2.1.

<sup>36</sup> Joint Explanatory Statement at 15-16; *see* Settlement and Release of Claims,

deemed to provide and receive releases with and from LADWP as those provided in the Settlement for the California Parties.<sup>37</sup> The Settlement further provides that LADWP will withdraw with prejudice all claims that they have filed in the PG&E bankruptcy proceedings.<sup>38</sup>

13. LADWP agrees to forego any claim for refunds resulting from any mitigation of sales by CERS of imbalance energy into the CAISO's real-time market (as well as associated interest and charges) that may be payable under certain Commission orders.<sup>39</sup> 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.<sup>40</sup>

14. Finally, LADWP "expressly disclaims" Commission jurisdiction over the Settlement.<sup>41</sup> The California Parties take no position on LADWP's disclaimer. The Parties have nevertheless agreed to condition the Settlement on securing Commission approval to ensure the release of funds from the CAISO and/or CalPX and to ensure that the Parties' respective claims pending before the Commission are fully resolved.<sup>42</sup>

### **Procedural Matters**

15. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.<sup>43</sup> The Parties request that the Settlement be transmitted directly to the Commission, before which the above-referenced matters are pending.<sup>44</sup> The Parties further request expedited treatment of the Settlement and a

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§ 7.3.1.

<sup>37</sup> Joint Explanatory Statement at 16; Settlement and Release of Claims, §§ 7.4, 8.2.

<sup>38</sup> Settlement and Release of Claims Agreement, §§ 4.17.4, 7.1.7.

<sup>39</sup> Settlement and Release of Claims, § 7.2.2.

<sup>40</sup> Joint Explanatory Statement at 16.

<sup>41</sup> Joint Explanatory Statement at 11; Settlement and Release of Claims, § 2.3.

<sup>42</sup> *Id.*

<sup>43</sup> 18 C.F.R. § 385.602 (2009).

<sup>44</sup> Joint Offer of Settlement at 3.

shortened comment period, in order to ensure that certain termination provisions in the Settlement will not be triggered.

16. Pursuant to Rules 602(d)(2) and 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.602(d)(2) and 385.602(f) (2009), initial comments would be due 20 days after filing of the Settlement, and reply comments would be due 30 days after filing. On November 2, 2009, the Commission issued a Notice Shortening Comment Period,<sup>45</sup> requiring initial comments to be filed on or before November 9, 2009, and reply comments to be filed on or before November 16, 2009. Initial comments were filed by the CAISO<sup>46</sup> and the CalPX, either in support of or not opposing the Settlement. In addition, SMUD and Californians for Renewable Energy, Inc. (CARE) filed comments opposing the Settlement. Joint reply comments were filed by the Parties (Joint Reply Comments).<sup>47</sup> Reply comments were also filed by SMUD.

17. 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.

### **Substantive Matters**

#### **A. "Hold Harmless" Protection**

18. 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

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<sup>45</sup> See Notice Shortening Comment Period, Docket No. EL00-95-234, *et al.* (Nov. 2, 2009).

<sup>46</sup> In its initial comments, the CAISO states that it interprets section 6.1.3.6 of the Settlement ("Accounting Treatment and Calculations for Non-Settling Participants") to mean that LADWP will not owe refunds except as provided for under the Settlement. The CAISO states that it understands this provision is intended to mean that although the CAISO will continue to include LADWP in its refund calculations, at the end of the refund rerun process the CAISO will need to adjust its books to reflect that no refunds will be paid by LADWP in these proceedings to parties in the CAISO markets for the period covered by the Settlement except for those refunds that have been paid out under the Settlement. The CAISO adds that it has discussed this issue with the California Parties, who have expressed agreement with the CAISO's interpretation of this provision. See CAISO Initial Comments at 7-8.

<sup>47</sup> For purposes of the Joint Reply Comments, the California Parties do not include CERS.

directors, officers, employees, and consultants, will implement a number of the Settlement's provisions. 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 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.<sup>48</sup>

19. CalPX states that this is the same "hold harmless" provision that the Commission has approved in other orders approving settlements.<sup>49</sup> In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of "hold harmless" language in the order approving the Settlement.<sup>50</sup>

### **Commission Determination**

20. 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.<sup>51</sup> Consistent with the Commission's precedent,<sup>52</sup> the Commission

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<sup>48</sup> CalPX Initial Comments at 4.

<sup>49</sup> *Id.*; *see San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,186, at P 15, 19 (2005).

<sup>50</sup> *See* Joint Reply Comments at 14-15.

<sup>51</sup> *See San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,186, at P 15, 19 (2005); *see also* Joint Explanatory Statement at 16.

<sup>52</sup> *See, e.g., San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242, at P 19 (2009) (approving "hold harmless language") (*Constellation Settlement Order*); *San Diego Gas* (continued)

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 read to apply to both the CAISO and CalPX.

## **B. Arguments in Opposition to the Settlement**

21. Under the Commission’s *Trailblazer*<sup>53</sup> 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.<sup>54</sup> In this case, we approve the Settlement under *Trailblazer*’s first prong because we find that the arguments submitted by SMUD and CARE are without merit, as discussed herein.

### **1. Forfeiture of Statutory Rights**

22. 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-jurisdictional parties to pay.<sup>55</sup> Thus, SMUD argues that the Settlement offer is “premised on the Commission’s exercise of authority [that] the Commission does not possess.”<sup>56</sup> 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*.<sup>57</sup> SMUD states that the “Commission has frowned on cram down provisions like these, as

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*& Elec. Co.*, 119 FERC ¶ 61,151, at P 19 (2007) (same); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004) (same), *reh’g denied*, 111 FERC ¶ 61,186 (2005).

<sup>53</sup> *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*).

<sup>54</sup> *Trailblazer*, 85 FERC at 62,342-44.

<sup>55</sup> See SMUD Initial Comments at 4.

<sup>56</sup> See *id.*

<sup>57</sup> *ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992).

‘comments that might otherwise be voiced are suppressed.’<sup>58</sup> Accordingly, SMUD states that the Settlement should be rejected.<sup>59</sup>

23. In response, the Parties argue that the Commission should reject SMUD’s “forfeiture of statutory rights” argument because SMUD’s participation in the Settlement is voluntary. The Parties state that if SMUD opposes its classification in the Settlement as a Deemed Distribution Participant, SMUD may elect to not opt-in. The Parties add that SMUD will not forfeit any rights or claims by not opting into the Settlement.<sup>60</sup> The Parties also state that, where an entity has the choice not to opt into a settlement and can show no immediate and irreparable effect, the Commission will find no genuine issue of material fact and will approve the settlement as fair and reasonable and in the public interest.<sup>61</sup> Finally, the Parties state that SMUD’s “cram down” argument is misplaced because the order upon which SMUD relies 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.<sup>62</sup>

### **Commission Determination**

24. 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. As set forth in the Settlement, by electing not to opt-in, non-jurisdictional utilities may continue to pursue claims against LADWP 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 LADWP.

25. 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

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<sup>58</sup> See SMUD Initial Comments at 4 (citing *ANR Pipeline Company*, 59 FERC ¶ 61,347, at 62,260).

<sup>59</sup> See *id.* at 4-5.

<sup>60</sup> See Joint Reply Comments at 5-6 (citing *Constellation Settlement Order*, 128 FERC ¶ 61,242, at P 23-26).

<sup>61</sup> See *id.* at 5 (citing *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,308, at P 31, 34 (2005), *reh’g denied*, 115 FERC ¶ 61,271 (2006)).

<sup>62</sup> See *id.* at 5, n.17.

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.

26. The Commission also rejects SMUD's characterization as a "cram down" those provisions of the Settlement governing the allocation of refunds. 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 LADWP, and the Parties agree to hold back settlement funds so that claims pursued by Non-Settling Participants will be addressed.<sup>63</sup>

27. As was the case in prior settlements,<sup>64</sup> if a non-jurisdictional entity elects to remain in the Settlement, it will be accepting a compromise. Regardless of the Commission's lack of authority to 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. SMUD's decision to opt into the Settlement would represent a reasonable compromise under which SMUD accepts the terms of the Settlement in exchange for the benefits of the Settlement.

## 2. Undue Discrimination

28. SMUD argues that the Settlement is unduly discriminatory. SMUD notes that a substantially similar settlement offer must be made to similarly situated customers.<sup>65</sup> 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 alone to forfeit its statutory rights in order to participate in the receipt of refunds.<sup>66</sup> SMUD adds that

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<sup>63</sup> See Joint Explanatory Statement at 12; Settlement and Release of Claims, § 3.2.

<sup>64</sup> See, e.g., *Constellation Settlement Order*, 128 FERC ¶ 61,242, at P 26; *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 26 (2009); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,297, at P 29 (2007); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 27 (2007).

<sup>65</sup> See SMUD Initial Comments at 5 (citing *Fla. Power & Light Co.*, 70 FERC ¶ 63,017 (1995)).

<sup>66</sup> See *id.*

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.

29. SMUD also asserts that the Commission's response to its undue discrimination argument in similar proceedings offered a *non-sequitur*, namely, that SMUD has not demonstrated that it is being treated differently from other Deemed Distribution Participants. SMUD argues that it has long been settled that undue discrimination involves either the dissimilar treatment of similarly situated parties or the similar treatment of dissimilar parties.<sup>67</sup> SMUD contends that non-jurisdictional entities are differently situated from jurisdictional entities because they cannot be ordered by the Commission to pay refunds; consequently, the Commission's failure to treat SMUD like other purchasers that also do not make jurisdictional sales is unduly discriminatory. SMUD further contends that the Commission's attempt to address SMUD's *non-sequitur* argument in recent orders denying SMUD's request for rehearing of other settlements did not address SMUD's assertions.<sup>68</sup> In those orders, the Commission explained that SMUD had confused the issue of whether the Commission can order SMUD to pay refunds under the FPA with the issue of whether SMUD owes money to the CAISO and/or the CalPX. SMUD notes, however, that it not only denies that it owes any money to the CAISO and/or the CalPX, but that neither entity has ever made any claim against SMUD for refunds. Instead, SMUD argues, the Commission has already found that SMUD is owed monies by these entities, citing the Commission's order on remand<sup>69</sup> from the Ninth Circuit's *Bonneville* decision.<sup>70</sup>

30. In reply, the Parties urge the Commission to reject SMUD's argument that the Settlement is unduly discriminatory. The Parties state that, under the Settlement, a

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<sup>67</sup> See *id.* at 6 (citing *Ala. Elec. Coop. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982) (*Alabama Electric Cooperative*)).

<sup>68</sup> See *id.* at 6-7 (citing *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,241 (2009) (*Puget Sound Settlement Order*) and *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,243 (2009) (*AES Placerita Settlement Order*)).

<sup>69</sup> *San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,067, at P 57 (2007) (*Bonneville Remand Order*), *order on reh'g*, 125 FERC ¶ 61,214 (2008).

<sup>70</sup> *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9<sup>th</sup> Cir. 2005) (*Bonneville*), *order on remand*, 121 FERC ¶ 61,067 (2007), *order on reh'g*, 125 FERC ¶ 61,214 (2008).

participant's classification as a Deemed Distribution Participant is not based on whether that Participant is jurisdictional or non-jurisdictional. Rather, SMUD's classification in the Settlement is based purely upon whether SMUD owes more than it is owed as a result of its transactions in the CAISO and CalPX markets. The Parties argue that SMUD and other non-jurisdictional entities have not been singled out as Deemed Distribution Participants under the Settlement. The Parties state that the Commission has previously rejected similar arguments raised by SMUD.<sup>71</sup>

31. Further, the Parties state that SMUD is incorrect in its assertion that "refund recipients" under the Settlement are Participants that made no jurisdictional sales. Instead, the Parties argue, Participants that receive cash distributions under the Settlement are "Net Refund Recipients." Citing to sections 1.54 and 5.2.1 of the Settlement, the Parties explain that Net Refund Recipients are those Participants, other than Deemed Distribution Participants, that elect to participate in the Settlement and that are owed net refunds after consideration of amounts they may owe to the California markets in the form of refunds. The Parties claim that Participants' categorization as Deemed Distribution Participants has nothing to do with whether their sales were jurisdictional; rather, the categorization is based on whether they have net amounts outstanding and payable to the CAISO or the CalPX.<sup>72</sup>

32. With respect to SMUD's argument that neither the CAISO nor the CalPX has made any claim for money against SMUD, the Parties reply that SMUD is attempting to sidestep the issue, noting that the Commission has directed the CAISO and the CalPX to complete their refund calculations to all suppliers, including governmental entities, that participated in the CAISO and CalPX markets. The Parties also point out that a claim for amounts owed by SMUD for its CAISO and CalPX transactions is being litigated in California state court. The Parties argue that the Commission correctly decided this issue in the *Constellation Settlement Order*, where it stated that SMUD had confused the legal issue of whether the Commission could require it to pay refunds under the FPA with the factual issue of whether SMUD owes money to the CAISO and/or the CalPX.<sup>73</sup>

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<sup>71</sup> See Joint Reply Comments at 8 (citing *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,002, at P 26 (2009)).

<sup>72</sup> See *id.* at 8-9.

<sup>73</sup> See *id.* at 9-10 (citing *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 34).

### **Commission Determination**

33. We disagree with SMUD's contention that the Settlement is unduly discriminatory. First, as we have explained in other orders addressing similar settlements,<sup>74</sup> we find that 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 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 5.2.2 of the Settlement, these parties will receive a credit against their outstanding amounts owed to the CAISO and/or CalPX. Moreover, even if those Settlement provisions governing Deemed Distribution Participants could be construed as discriminatory to the extent they establish two tiers of settlement refund recipients, we conclude that any such discrimination is not undue because, under the Settlement, Deemed Distribution Participants and Net Refund Recipients are not similarly situated. Unlike Deemed Distribution Participants, entities designated as Net Refund Recipients do not have outstanding amounts owing to the CAISO and/or CalPX. Therefore, those provisions of the Settlement do not violate the FPA,<sup>75</sup> which prohibits only undue discrimination.<sup>76</sup>

34. SMUD contends that, because it is a non-jurisdictional entity and, therefore, cannot be ordered by the Commission to pay refunds, SMUD cannot have net amounts payable to the CAISO and/or CalPX. SMUD asserts that it should be considered a refund recipient under the Settlement, rather than a Deemed Distribution Participant. However, as we explained in recent orders,<sup>77</sup> SMUD confuses the *legal* issue of whether the

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<sup>74</sup> See *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 32; *Puget Sound Rehearing Order*, 128 FERC ¶ 61,241 at P 6; *AES Placerita Rehearing Order*, 128 FERC ¶ 61,243 at P 6.

<sup>75</sup> 16 U.S.C. § 791, *et seq.* (2006).

<sup>76</sup> See, e.g., *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369 (2007) (“the FPA does not prohibit all discrimination, only undue discrimination. In general, discrimination is ‘undue’ when there is a difference of rates, terms or conditions among similarly situated customers. The Commission has broad discretion in determining when discrimination is undue.”) (internal citations omitted).

<sup>77</sup> See *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 34; *Puget Sound Rehearing Order*, 128 FERC ¶ 61,241 at P 7; *AES Placerita Rehearing Order*, 128 FERC ¶ 61,243 at P 7.

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. The Settlement does not suggest that SMUD owes refunds pursuant to the FPA, but rather suggests that SMUD may owe money to the CAISO and/or CalPX. While the Ninth Circuit's *Bonneville* decision<sup>78</sup> 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.<sup>79</sup> As such, SMUD's contention 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, are without merit.

35. SMUD argues that this conclusion is incorrect because SMUD not only denies that it owes money to the CAISO and/or the CalPX, but also that neither entity has filed a claim against SMUD. However, SMUD misunderstands the nature of the settlements we have approved in these proceedings, including this Settlement. These settlements are voluntary agreements that entities can choose to join or not to join. They do not constitute any refund determination under section 206 of the FPA. 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 cases, the Commission has found that the settlements are just and reasonable. We have found that the rights of non-settling parties, such as SMUD, are fully protected. Non-settling parties are unaffected by these settlements, and they maintain the right to pursue litigation against the settling suppliers, such as LADWP. Even if SMUD were to choose to join the Settlement, and voluntarily decided to exchange its right to pursue claims against LADWP 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

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<sup>78</sup> *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9<sup>th</sup> Cir. 2005) (*Bonneville*), *order on remand*, 121 FERC ¶ 61,067 (2007), *order on reh'g*, 125 FERC ¶ 61,214 (2008).

<sup>79</sup> *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”).

consistent with the Ninth Circuit's *Bonneville* decision and the Commission's *Bonneville Remand Order*.

36. Finally, and as we also discussed in earlier orders,<sup>80</sup> the Commission finds irrelevant SMUD's reliance on *Alabama Electric Cooperative*. That case involved a public utility's rate design that would have applied to all of its customers, none of which would have had the opportunity to "opt out" of the utility's rates. In contrast, SMUD and others possess the ability not to opt in to the Settlement and are not bound by its provisions, as discussed above.

### 3. Request for Conditional Approval of Settlement

37. SMUD states that the Settlement seeks to pay out over \$100 million to LADWP, and argues that a payout of this size prior to all other claims being resolved would prejudice claimants who have not settled.<sup>81</sup> SMUD asserts that the Commission has in the past recognized this possibility, adding that the Commission, in its June 18, 2009 Order, rejected a joint motion of PG&E and LADWP (Joint Motion) to set aside \$160 million to fund a potential settlement.<sup>82</sup> SMUD contends that it raised similar concerns in that proceeding, adding that while the Commission found its denial of the Joint Motion to render SMUD's concerns moot, it stated that it would consider the issue anew when it had a concrete settlement before it.<sup>83</sup> SMUD argues that the disbursement of funds to LADWP in the Settlement is no less prejudicial to other claimants than the set-aside of funds sought in the Joint Motion.

38. SMUD further contends that no specific facts differentiate LADWP from any other entity that has a claim on funds held in the CalPX Settlement Clearing Account.<sup>84</sup> As such, SMUD argues that any approval of the Settlement by the Commission should be conditioned on the simultaneous release to SMUD from the CalPX of those funds to

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<sup>80</sup> See *Constellation Settlement Order*, 128 FERC ¶ 61,242, at P 35; *Puget Sound Rehearing Order*, 128 FERC ¶ 61,241 at P 8; *AES Placerita Rehearing Order*, 128 FERC ¶ 61,243 at P 8.

<sup>81</sup> See SMUD Initial Comments at 7.

<sup>82</sup> See *id.* (citing *San Diego Gas & Electric Co.*, 127 FERC ¶ 61,268 at P 42, 44 (2009) (June 18, 2009 Order)).

<sup>83</sup> See *id.* at n.11 (citing June 18, 2009 Order, 127 FERC ¶ 61,268 at P 42).

<sup>84</sup> See *id.* at 7.

which the Commission has determined that SMUD and similarly situated entities are entitled.<sup>85</sup> According to SMUD, this will ensure that SMUD and similarly situated entities are treated consistently with LADWP, and will ensure that SMUD's claims will not be put at greater risk even if they prevail in litigation.<sup>86</sup>

39. In reply, the Parties argue that SMUD overlooks the fact that LADWP has chosen to settle in order to resolve disputed claims. The Parties contend that the Commission has made clear that all funds at issue should be held by the CAISO and CalPX until disputed Remedy Proceeding claims are resolved, either by litigation or by settlement.<sup>87</sup> The Parties further argue that SMUD's request that Commission approval of the Settlement be conditioned on the simultaneous release of funds to SMUD represents a collateral attack on the Commission's prior orders in this proceeding that, according to the Parties, have established the timing for disbursement of past due amounts to non-public entities.<sup>88</sup>

40. As such, the Parties state, the Commission has held that non-public utilities, including SMUD, are not already entitled to disbursement of funds. The Parties contend that, absent a settlement by SMUD, SMUD is not entitled to payment on the same schedule as those parties who have settled, including LADWP.<sup>89</sup>

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<sup>85</sup> *See id.* (citing *Bonneville Remand Order*, 121 FERC ¶ 61,067 at P 57).

<sup>86</sup> In its Reply Comments, SMUD adds that the CAISO's initial comments requesting hold harmless treatment lends credence to SMUD's concerns that allowing a pay out of over \$100 million prior to all other claims being resolved may prejudice claimants who have not settled. *See* SMUD Reply Comments at 2 (citing CAISO Initial Comments at 5-6). SMUD argues that if the Commission does not condition approval of the Settlement on the simultaneous release of funds to SMUD from the CalPX, it should not direct that settlement pay-outs be made until the final orders are issued in the Refund Proceeding. *See* SMUD Reply Comments at 2.

<sup>87</sup> *See* Joint Reply Comments at 10-11 (citing *Constellation Power Source, Inc. v. Cal. Power. Exch. Corp.*, 100 FERC ¶ 61,124 at PP 1, 27-39).

<sup>88</sup> *See* Joint Reply Comments at 11-12 (citing *Bonneville Remand Order*, 121 FERC ¶ 61,067 at P 57).

<sup>89</sup> *See* Joint Reply Comments at 12.

### **Commission Determination**

41. We disagree with SMUD's assertion that the monetary consideration in the Settlement is prejudicial to entities that have not settled. SMUD's reliance on the June 18, 2009 Order is inapposite. In that order, the Commission expressed concern that a set-aside of funds might favor LADWP to the detriment of other claimants, but ultimately concluded that it was unable to approve such a benefit without having the opportunity to review and consider all of the terms and conditions of the potential LADWP-California Parties settlement that contemplated such a benefit.<sup>90</sup> Under the terms of the instant Settlement, however, the Parties are not requesting a set-aside of funds, but are instead seeking disbursement of funds pursuant to a settlement agreement.

42. While SMUD argues that the disbursement of funds to LADWP in the Settlement is no less prejudicial to other claimants than the set-aside of funds sought in the Joint Motion, SMUD overlooks the fundamental difference that a disbursement of funds pursuant to a settlement agreement is subject to the Commission's prior finding that, until the Remedy Proceeding is complete, sellers' refunds should not be released.<sup>91</sup> This determination was upheld on appeal by the United States Court of Appeals for the D.C. Circuit.<sup>92</sup>

43. We further disagree with SMUD's claim that nothing differentiates LADWP from other entities that have claims on funds held in the CalPX Settlement Clearing Account, and reject SMUD's argument that approval of the Settlement be conditioned on the simultaneous release to SMUD from the CalPX of those "funds to which the Commission has determined that SMUD and similarly situated entities are entitled."<sup>93</sup> In previous

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<sup>90</sup> See June 18, 2009 Order, 127 FERC ¶ 61,268 at P 41-42. According to LADWP and PG&E, the set-aside requested in the Joint Motion would facilitate finalization of the potential LADWP-California Parties settlement by ensuring that sufficient funds would be available upon approval of the potential settlement. The Commission concluded that the Joint Motion to set aside \$160 million of the funds held in CalPX's Settlement Clearing Account to fund the potential California Parties-LADWP settlement did not constitute an offer of settlement under Rule 602 of the Commission's Rules of Practice and Procedure.

<sup>91</sup> See *Constellation Power Source, Inc. v. Cal. Power. Exch. Corp.*, 100 FERC ¶ 61,124 at PP 1, 27-39.

<sup>92</sup> See *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14 (D.C. Cir. 2006).

<sup>93</sup> SMUD Initial Comments at 7-8.

orders in this proceeding the Commission has established the timing for disbursement of unpaid amounts to non-public entities, and made clear that funds at issue should be held by the CAISO and CalPX until disputed Remedy Proceeding claims are resolved, either by litigation or settlement.<sup>94</sup>

44. Specifically, the Commission held that such disbursement would not take place until adjustments based upon preparatory rerun data, as finalized upon the completion of alternative dispute resolution matters, were completed.<sup>95</sup> The Commission subsequently clarified that it will not direct the disbursement of unpaid amounts owed to governmental entities and other non-public utilities for sales made in the CAISO and/or CalPX spot markets during the Refund Period until it approves compliance filings submitted by the CAISO and CalPX that reflect these preparatory refund adjustments, including dispute resolution matters.<sup>96</sup> As such, the Commission has made clear that, absent a settlement resolving disputed claims, non-public utilities including SMUD are not entitled to disbursement of funds on the same schedule as those parties who have settled.

45. As such, the Commission rejects SMUD's request that approval of the Settlement be conditioned on the simultaneous release of funds to SMUD from the CalPX as a collateral attack on its previous orders. In addition, for the above-stated reasons, we find no reason to further direct that no pay-outs be made pursuant to the Settlement until final orders are issued in the Refund Proceedings.

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<sup>94</sup> See *Constellation Power Source, Inc. v. Cal. Power Exch. Corp.*, 100 FERC ¶ 61,124 at PP 1, 27-39 (stating that only after the Remedy Proceeding is completed can the Commission begin to determine the liabilities of each supplier), *order on reh'g*, 100 FERC ¶ 61,380 (2002); see also *Constellation Power Source, Inc. v. Cal. Power Exch. Corp.*, 111 FERC ¶ 61,147 (2005) (clarifying a prior ruling allowing the release of some funds and explaining that its analysis was based on the specific circumstances and the rule remained that sufficient funds needed to be retained to address all Remedy Proceeding claims); *Coral Power, L.L.C. v. Cal. Power Exch.*, 110 FERC ¶ 61,288 (2005) (The Commission upheld its determination that funds should be held by the CalPX, but clarified that funds with respect to a particular party need only be held until issues are resolved with respect to that party, either at the conclusion of the Remedy Proceeding, or upon settlement by that party of the various claims against it in the Remedy Proceeding.).

<sup>95</sup> See *Bonneville Remand Order*, 121 FERC ¶ 61,067 at P 57.

<sup>96</sup> See *San Diego Gas & Electric Co.*, 125 FERC ¶ 61,214, at P 27 (2008).

#### 4. “Cramming” of Unwanted Goods and Services

46. CARE alleges that the Settlement is flawed because it would “unlawfully allow the ‘cramming’ of additional unwanted goods and services” on the California Utilities’ ratepayers because, under the Settlement, the California Utilities assume responsibility for LADWP’s overcharges. According to CARE, by allowing such “cramming,” the Settlement violates the anti-cramming provisions of the Energy Policy Act of 2005 (EPAc).<sup>97</sup> In this regard, CARE cites a complaint it has filed with the Federal Trade Commission (FTC) against the California Department of Water Resources alleging illegal cramming of unauthorized charges on California ratepayers.<sup>98</sup>

47. In response, the Parties state that the “cramming” provisions of EPAc are not relevant to the Settlement pending before the Commission, and that the Settlement assures that no unwanted additional costs will be imposed upon the California Utilities and their retail ratepayers as the result of the Settlement.<sup>99</sup> The Parties state that section 5.8 of the Settlement provides that any obligation of the California Utilities to make payments to Non-Settling Participants on behalf of LADWP shall not exceed the total amount of Settlement proceeds actually paid to that California Utility. Further, the Parties argue that the Commission does not have jurisdiction to enforce any anti-cramming rules, because that authority is vested with the FTC, and because retail practices of the California Utilities are beyond the Commission’s purview.<sup>100</sup>

#### Commission Determination

48. CARE argues that the Settlement is in violation of section 1287 of EPAc.<sup>101</sup> CARE does not allege, however, that any violation of this section is within the

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<sup>97</sup> CARE Initial Comments at 2-4. CARE defines “cramming” as the selling of unwanted goods and services to an electric consumer, citing EPAc section 1287, 42 U.S.C. § 16471(c) (2006).

<sup>98</sup> *Id.* at 3.

<sup>99</sup> Joint Reply Comments at 12-13.

<sup>100</sup> *Id.* at 13-14 (citing *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,071, at P 38 (2004) (“the Commission does not have the authority to dictate whether wholesale customers must pass on to their retail customers the benefits of . . . refunds [from the Settlement.]”).

<sup>101</sup> EPAc, Pub. L. No. 190-58, § 1287, 119 Stat. 594, 981 (2005).

Commission's jurisdiction. As such, we dismiss CARE's argument with respect to section 1287 of EPAct as being beyond the scope of the Commission's jurisdiction.

## 5. Representation of California Ratepayers

49. CARE argues that its efforts alone are the only direct ratepayer participation in these proceedings.<sup>102</sup> CARE states that all other parties to these proceedings were regulated utility companies, energy commodity traders, governmental "non-public utilities" and state and federal government agencies that, CARE contends, implemented the policies and practices leading to the energy crisis.<sup>103</sup>

50. In response, the Parties state that the Commission has previously found that the CPUC has the requisite authority to represent California's ratepayers in proceedings before the Commission.<sup>104</sup> As such, the Parties argue, CARE does not and cannot displace the CPUC as representative of California's ratepayers.<sup>105</sup>

## Commission Determination

51. We reiterate our previous determination, cited by the Parties, that the CPUC represents California ratepayers.<sup>106</sup> The CPUC, as a constitutionally-established California state agency, has a statutory mandate to represent the interests of electric

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<sup>102</sup> CARE Initial Comments at 3-4.

<sup>103</sup> *Id.*

<sup>104</sup> Joint Reply Comments at 14 (citing *Duke Energy Trading and Mktg., LLC*, 126 FERC ¶ 61,234, at P 45 (2009); *Pacific Gas Transmission Co.*, 76 FERC ¶ 61,246, at 62,272-3 (1996) (Commission approved contested settlement in which CPUC represented California ratepayers noting that the CPUC and other state commissions are the "representatives of ultimate consumers in their states"))).

<sup>105</sup> *Id.* The Parties further state that CARE's comments related to CERS are unrelated to the Settlement.

<sup>106</sup> *Duke Energy Trading and Mktg., LLC*, 125 FERC ¶ 61,345 (2008), *reh'g denied*, 126 FERC ¶ 61,234, at P 45 (2009) ("Even if CARE's citation [to PURPA rather than the FPA] 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. We find that CPUC's participation in these proceedings belies CARE's claim that ratepayers were excluded [from the settlement process]" (footnote omitted)), *appeal docketed*, No. 09-71515 (9th Cir. 2009).

consumers in proceedings before the Commission.<sup>107</sup> Similarly, the California Attorney General has state constitutional and statutory authority to bring actions on behalf of the people of California and the duty to safeguard the public interest.<sup>108</sup> Thus, California ratepayers have not been excluded from these proceedings.

### **Conclusion**

52. 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. The Commission also finds that LADWP's attempt to "expressly disclaim" Commission jurisdiction over the Settlement is not germane in these circumstances.<sup>109</sup> Under the FPA, only the Commission may disclaim its jurisdiction over the Settlement.<sup>110</sup>

### **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.

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<sup>107</sup> Cal. Pub. Util. Code § 307 (2008).

<sup>108</sup> Cal. Const. Art. V § 13; Cal. Gov't. Code § 12511 (2008); Cal. Bus. & Prof. Code § 16700, *et seq.* (2008); Cal. Bus. & Prof. Code § 17200, *et seq.* (2008).

<sup>109</sup> *See supra* P 14.

<sup>110</sup> *See San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,092, at P 29 (2007).