

131 FERC ¶ 61,083  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller and John R. Norris.

San Diego Gas & Electric Company Docket No. EL00-95-242

v.

Sellers of Energy and Ancillary Services

Investigation of Practices of the California  
Independent System Operator and the  
California Power Exchange Docket No. EL00-98-226

Puget Sound Energy, Inc. Docket No. EL01-10-057

v.

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior  
And Practices in Western Markets Docket No. IN03-10-059

Fact-Finding Investigation Into Possible  
Manipulation of Electric and Natural Gas Prices Docket No. PA02-2-074

American Electric Power Service Corporation Docket No. EL03-137-021

Enron Power Marketing, Inc. and Enron Energy  
Services, Inc. Docket No. EL03-180-050

California Independent System Operator Corporation Docket No. ER03-746-023

Northern California Power Agency Docket No. EL03-161-000

Northern California Power Agency Docket No. EL03-196-000

## ORDER APPROVING SETTLEMENT

(Issued April 29, 2010)

1. In this order, the Commission approves a settlement filed on February 1, 2010 in the above-captioned proceedings between Northern California Power Agency (NCPA) 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 NCPA.<sup>2</sup> In addition, the settlement resolves certain claims arising from and related to bilateral transactions between NCPA and PG&E during the period January 1, 2000 through October 31, 2007 that are pending in PG&E's bankruptcy proceedings.<sup>3</sup> The settlement consists of a "Joint Offer of Settlement," a "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>4</sup> The Parties state that the Settlement became binding when all Parties executed it, and some provisions will become effective upon the 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>5</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

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

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

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

<sup>4</sup> 18 C.F.R. § 385.602 (2009).

<sup>5</sup> Joint Explanatory Statement at 13; Settlement and Release of Claims, §§ 1.83, 2.1, 2.2.2.

that they are due under the Settlement.<sup>6</sup> Further, the Settlement provides that NCPA may file a “Good Faith Motion” with the Los Angeles Superior Court (Superior Court) in related state court litigation, and should the Superior Court deny the motion based on an express finding that the Settlement is not in good faith, NCPA may elect to terminate the Settlement.<sup>7</sup> We note that NCPA did file such a motion and, on April 1, 2010, Judge Carl J. West of the Superior Court found that the Settlement “is a good faith settlement” within the applicable provision of California’s Code of Civil Procedure.<sup>8</sup>

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.<sup>9</sup> The Parties state that the Settlement reaches a fair and reasonable resolution of the issues between NCPA and the California Parties. The Parties further assert that the Settlement protects the rights of non-settling parties.<sup>10</sup> Finally, the Parties note that the Commission and the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) have encouraged settlements of claims related to transactions in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) markets in the 2000 and 2001 time period.<sup>11</sup> The Parties, therefore, request Commission approval of the Settlement. The Parties request that the Commission approve the Settlement on or before April 30, 2010 in order to insure the timely termination of litigation.<sup>12</sup>

4. The Parties state that NCPA disclaims Commission jurisdiction over the Settlement and the consideration provided thereunder. However, the Parties state that they have agreed to condition the Settlement on Commission approval to ensure the

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<sup>6</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims, § 4.16.

<sup>7</sup> Joint Explanatory Statement at 13-14; Settlement and Release of Claims, § 2.2.1.3.

<sup>8</sup> Superior Court of California, County of Los Angeles, *Elec. Refund Cases*, JCCP No. 4512 (April 1, 2010) (J. West).

<sup>9</sup> Joint Offer of Settlement at 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 7-8 (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>12</sup> Joint Offer of Settlement at 7.

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>13</sup>

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

### **Background and Description of the Settlement**

6. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)<sup>14</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>15</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>16</sup> In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in the western energy markets in Docket No. IN03-10-000.<sup>17</sup> On the same day, the Commission issued two orders directing named entities to show cause why they had not participated in certain gaming practices<sup>18</sup> or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.<sup>19</sup>

7. The Parties state that the Settlement resolves claims in the above-captioned proceedings as they relate to NCPA.<sup>20</sup> Any entity that directly sold energy or purchased energy from the CAISO and/or the CalPX during the Settlement Period (Participants) may elect to be bound by the terms of the Settlement by opting into the Settlement as an "Additional Settling Participant."<sup>21</sup> Such entities must provide notice to the Commission,

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<sup>13</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims, § 2.3.

<sup>14</sup> 16 U.S.C. § 791a (2006).

<sup>15</sup> *San Diego Gas & Electric Co.*, 92 FERC ¶ 61,172 (2000).

<sup>16</sup> *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

<sup>17</sup> *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

<sup>18</sup> *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

<sup>19</sup> *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

<sup>20</sup> Joint Explanatory Statement at 2.

<sup>21</sup> Joint Explanatory Statement at 14-15; Settlement and Release of Claims, § 8.1.

as well as serve the notice to parties on the list serve 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>22</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>23</sup> The Settlement provides that no claims will be deemed settled as to Non-Settling Participants.<sup>24</sup>

8. Under the Settlement, the CalPX will release proceeds from NCPA's unpaid receivables from transactions through markets operated by the CalPX and the CAISO.<sup>25</sup> The Settlement provides that the California Parties will take steps to establish, maintain, and administer a "Settling Supplier Refund Escrow" and a "California Litigation Escrow."<sup>26</sup> NCPA's unpaid CAISO and CalPX receivables are estimated to be \$5,344,787, with interest estimated to be \$3,695,194 through December 21, 2009.<sup>27</sup> These proceeds, along with a cash payment of \$3,246,067 by NCPA,<sup>28</sup> will be transferred to the escrow accounts in settlement of claims related to events in the California and western energy markets in 2000 and 2001, less \$399,154 of receivables that will be held back by CalPX to account for NCPA's estimated "Interest Shortfall."<sup>29</sup> The Settlement

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<sup>22</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims, § 8.1.

<sup>23</sup> Joint Explanatory Statement at 5-6.

<sup>24</sup> Settlement and Release of Claims, §§ 3.2, 7.1.1.

<sup>25</sup> Joint Explanatory Statement at 4, 15.

<sup>26</sup> Joint Explanatory Statement at 16; Settlement and Release of Claims, § 4.8.

<sup>27</sup> Joint Explanatory Statement at 15. The interest on receivables will be updated through and including the projected date of distribution. *See id.*

<sup>28</sup> A portion of this cash payment will be paid by PG&E as a result of the Settlement's resolution of claims between these NCPA and PG&E in PG&E's bankruptcy proceedings. Joint Explanatory Statement at 15-16.

<sup>29</sup> Joint Explanatory Statement at 15; Settlement and Release of Claims, § 4.3. The "Interest Shortfall" is defined in the Settlement as the difference between the interest actually earned on funds held by the CalPX and/or CAISO and the interest that would be earned through the application of the Commission's interest rate, as set forth in 18 C.F.R. § 35.19a(a)(2)(iii). Settlement and Release of Claims, §§ 1.33, 1.44.

provides that NCPA will assign to the California Parties its entitlement to refunds on purchases made in the western energy markets during the Settlement Period.<sup>30</sup>

9. Proceeds will be distributed from the Supplier Escrow to each of the Settling Participants in accordance with an Allocation Matrix that is included as Exhibit A to the Settlement.<sup>31</sup> The Allocation Matrix includes a list of all Participants and the amount of money they would receive if they opted to join the Settlement. Certain specified Participants are designated as “Deemed Distribution Participants.”<sup>32</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 settlement proceeds in the form of “Deemed Distributions,” i.e., credits against such amounts.<sup>33</sup> The Parties state that the Settlement provisions addressing the Allocation Matrix reflect decisions of the California Parties, and that NCPA disclaims responsibility for these provisions.<sup>34</sup>

10. The Settlement provides that certain of the California Parties (PG&E, SDG&E, SoCal Edison, and CERS) will assume responsibility for NCPA’s true-ups of receivables and associated interest on the estimated amounts that have been assigned under the Settlement, any refund amounts that NCPA owes to Non-Settling Participants in the settled proceedings, any interest shortfall the Commission allocates to NCPA, any third-party refund offsets that the Commission or a court determines that NCPA owes, certain CalPX wind-up charges attributable for NCPA, and NCPA’s share of the Interest Shortfall attributable to its sales to the CAISO and CalPX from May 1, 2000 through June 20, 2001.<sup>35</sup> The California Parties’ obligation to make payments on behalf of

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<sup>30</sup> Joint Explanatory Statement at 15; Settlement and Release of Claims, §§ 4.11, 4.12, 4.14.

<sup>31</sup> Settlement and Release of Claims, Ex. A.

<sup>32</sup> Settlement and Release of Claims, Ex. B. The Deemed Distribution Participants are: Aquila Power Corp.; California Polar Power Brokers LLC; Illinova Energy Partners, Inc.; PG&E; Pacific Gas & Electric Energy Services Co.; and Sacramento Municipal Utility District (SMUD).

<sup>33</sup> Settlement and Release of Claims, § 5.2.2.

<sup>34</sup> Joint Explanatory Statement at 6, n.8.

<sup>35</sup> Joint Explanatory Statement at 6, 16; Settlement and Release of Claims Agreement §§ 5.3, 5.6 and 5.7.

NCPA shall not exceed the total amount actually paid to the California Parties pursuant to the Settlement.<sup>36</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>37</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>38</sup>

12. The Parties state that the Settlement generally resolves all claims as between the California Parties and NCPA 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>39</sup> The Settlement also states that NCPA, the California Parties, and Additional Settling Participants agree that they will not contest the amount of refund liability and/or offsets or other relief attributable to sales by NCPA in the western energy markets during the Settlement Period in Docket Nos. EL00-95 and EL01-10, or the outcome of other specified Commission proceedings as they are resolved by the Settlement.<sup>40</sup> The Parties state that the California Parties and NCPA 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, ancillary services, or transmission congestion, or market manipulation, as well as to claims that any California Party is liable for payments to NCPA for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement Period.<sup>41</sup> Likewise, the Parties state that the California Parties and NCPA 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, or unjust enrichment, as well as to claims that any

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<sup>36</sup> Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement § 5.8.

<sup>37</sup> Joint Explanatory Statement at 18; Settlement and Release of Claims, § 6.1.

<sup>38</sup> Joint Explanatory Statement at 18; Settlement and Release of Claims, § 6.1.

<sup>39</sup> Joint Explanatory Statement at 18; Settlement and Release of Claims, § 7.1.1.

<sup>40</sup> Settlement and Release of Claims, § 7.1.2.

<sup>41</sup> Joint Explanatory Statement at 18-19; Settlement and Release of Claims, § 7.2.1.

California Party is liable for payments to NCPA for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement Period.<sup>42</sup>

13. The Settlement obligates certain California Parties and NCPA to terminate litigation and withdraw claims. Specifically, the Settlement provides that the California Parties that are named plaintiffs in certain litigation and NCPA will dismiss with prejudice claims against the other, including certain specified pending cases, as well as any other lawsuits that may have been filed by the California Parties (or any of them) or NCPA against the other but have not yet been served “related to transactions in the western energy markets during the Settlement Period.”<sup>43</sup> Additionally, the Settlement that Settling Participants that are parties specified Commission proceedings will withdraw any claims against NCPA relating to NCPA transactions in the western energy markets during the settlement period.<sup>44</sup>

14. Finally, the Settlement resolves separate claims between NCPA and PG&E that are pending in PG&E’s bankruptcy proceeding, and which arise from reliability must-run (RMR) and out-of-market transactions occurring during the Settlement Period and from certain RMR transactions occurring from January 1, 2000 through October 31, 2007.<sup>45</sup> The Settlement provides that, in return for PG&E’s net payment of \$2,234,110 (plus accrued interest), certain of NCPA’s claims in the bankruptcy proceeding will be settled and resolved,<sup>46</sup> as well as all claims between PG&E and NCPA relating to NCPA’s sales to PG&E, or through PG&E in its role as a scheduling coordinator, occurring between January 1, 2000 through October 31, 2007 of RMR energy and energy sold pursuant to a July 10, 2000 Emergency Services Agreement between them. Specifically, the Settlement provides that, as of the Effective Date, PG&E and NCPA shall be deemed to have forever released the other from all past, existing, and future claims concerning, pertaining to, or arising from transactions pursuant to the emergency services agreement and RMR transactions occurring during the period January 1, 2000 through October 31, 2007.<sup>47</sup> In addition, the Settlement provides for NCPA to withdraw or

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<sup>42</sup> Joint Explanatory Statement at 19; Settlement and Release of Claims, § 7.3.1.

<sup>43</sup> Settlement and Release of Claims, § 4.18.1.

<sup>44</sup> Settlement and Release of Claims, § 4.18.2.

<sup>45</sup> Joint Explanatory Statement at 20.

<sup>46</sup> Joint Explanatory Statement at 20; Settlement and Release of Claims, § 9.1. This includes certain claims by City of Palo Alto against PG&E, which claims were assigned to NCPA. Joint Explanatory Statement at 20.

<sup>47</sup> Joint Explanatory Statement at 20; Settlement and Release of Claims, § 9.4.

resolve certain claims in the bankruptcy proceedings and specified state court proceedings, as well as related claims in Docket No. EL00-95.<sup>48</sup>

15. 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>49</sup>

### **Procedural Matters**

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 were due on or before February 22, 2010, and reply comments were due on or before March 3, 2010. Initial comments were timely filed by the CAISO and CalPX, either in support of or not opposing the Settlement. In addition, SMUD filed timely comments opposing the Settlement. Reply comments were filed by the Parties (Joint Reply Comments)<sup>50</sup> and by Californians for Renewable Energy (CARE). The Parties filed a response to CARE's reply comments, urging the Commission to reject them.

17. The Commission rejects the reply comments filed by CARE. CARE has filed reply comments that do not address any of the initial comments filed by any of the parties, but rather attacks the Settlement itself. Reply comments must be addressed to initial comments, not to the underlying settlement agreement. Otherwise, parties do not have an opportunity to respond. Such comments are thus more appropriately characterized as initial comments, rather than reply comments. Under our rules, a failure to file timely comments results in that entity waiving objections to the settlement agreement.<sup>51</sup> CARE should have filed its comments as initial comments, and it should have filed these comments on February 22, 2010, the due date for initial comments. Accordingly, we conclude that CARE has waived its objections to the Settlement for

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<sup>48</sup> Joint Explanatory Statement at 20; Settlement and Release of Claims, § 9.5.

<sup>49</sup> Joint Explanatory Statement at 21.

<sup>50</sup> For purposes of the Joint Reply Comments, the California Parties do not include CERS.

<sup>51</sup> See 18 C.F.R. § 385.602(f)(3) (2009). See also, e.g., *Williams Nat. Gas Co.*, 43 FERC ¶ 61,227, at 61,586 (1988) ("the Commission shall grant Williams' motion to reject their reply comments to the extent they oppose the settlement because under the Commission's Rules of Practice and Procedure they waived their objections to the settlement by not filing comments").

failure to file timely initial comments and that its submission of reply comments objecting to the Settlement does not cure this error.

### **Substantive Matters**

#### **A. “Hold Harmless” Protection**

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 directors, officers, employees, and consultants, will implement a number of the Settlement’s provisions.<sup>52</sup> 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>53</sup>

19. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.<sup>54</sup> In their Joint Reply Comments, the

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<sup>52</sup> CAISO Initial Comments at 4-7; CalPX Initial Comments at 2-4.

<sup>53</sup> CalPX Initial Comments at 4.

<sup>54</sup> *Id.*; see *San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,186, at P 15, 19 (2005).

Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.<sup>55</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>56</sup> Consistent with the Commission’s precedent,<sup>57</sup> the Commission determines that CalPX and the CAISO will be held harmless for actions taken to implement this Settlement. Accordingly, this order incorporates the “hold harmless” language set out above with one modification. Specifically, as incorporated by this order, the language shall read to apply to both the CAISO and CalPX.

### **B. CAISO’s Interpretation of Certain Settlement Provisions**

21. In its comments supporting the Settlement, the CAISO states that it interprets section 6.1.3.6 of the Settlement (“Accounting Treatment of Calculations for Non-Settling Participants”) to mean that, although the CAISO will continue to include NCPA in its refund calculations, the CAISO will need to adjust its books at the end of the refund rerun process to reflect that no refunds will be paid by NCPA in these proceedings to parties in the CAISO markets for the Settlement Period except for those that have been allocated monies under the Settlement.<sup>58</sup> Further, the CAISO states that it understands that the resolution of RMR claims between PG&E and NCPA under Article IX of the Settlement is intended to resolve any outstanding invoices on the CAISO’s books related to RMR transactions between PG&E and NCPA during the covered time period.<sup>59</sup> The CAISO states that, in both cases, it will work closely with the parties to make the appropriate modifications to its books and records in order to reflect the intended result.

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<sup>55</sup> See Joint Reply Comments at 11.

<sup>56</sup> See *id.*; see also Joint Explanatory Statement at 21.

<sup>57</sup> See *e.g.*, *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242, at P 19 (2009) (*Constellation Settlement Order*) (incorporating “hold harmless” language from earlier settlements); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,002, at P 17 (2009) (*Puget Sound Settlement Order*) (same); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,004, at P 21 (2009) (*AES Placerita Settlement Order*) (same); *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 38 (2009) (*NEGT Settlement Order*) (same).

<sup>58</sup> CAISO Initial Comments at 7-8.

<sup>59</sup> *Id.* at 8-9.

22. The Parties have not expressly addressed the CAISO's comments on these issues in their Joint Reply Comments, but the CAISO's comments state that the California Parties agree with both of its interpretations.

### **Commission Determination**

23. We find that the CAISO's interpretations of the two Settlement provisions are reasonable. In addition, we note that neither the Parties nor any other entity has objected to the CAISO's interpretation of these provisions.

### **C. SMUD's Comments in Opposition to the Settlement**

24. Under the Commission's *Trailblazer*<sup>60</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>61</sup> In this case, we approve the Settlement under *Trailblazer's* first prong because we find that SMUD's arguments are without merit, as discussed herein.

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

25. 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>62</sup> Thus, SMUD argues that the Settlement offer is "premised on the Commission's exercise of authority [that] the Commission does not possess."<sup>63</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>64</sup>

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<sup>60</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>61</sup> *Trailblazer*, 85 FERC at 62,342-44.

<sup>62</sup> *See* SMUD Initial Comments at 4.

<sup>63</sup> *See id.* at 4.

<sup>64</sup> 59 FERC ¶ 61,347, at 62,260 (1992) (*ANR Pipeline*).

SMUD states that the “Commission has frowned on cram down provisions like these, as ‘comments that might otherwise be voiced are suppressed.’”<sup>65</sup> Accordingly, SMUD states that the Settlement should be rejected.<sup>66</sup>

26. In response, the Parties explain that SMUD’s participation in the Settlement is voluntary. The Parties argue that if SMUD does not like the terms of the Settlement, it can choose not to opt in. The Parties state that SMUD does not lose any rights by choosing not to join the Settlement. The Parties also point out that the Settlement states that nothing in it “shall establish any facts or precedents as between the Parties, the Additional Settling Participants, and any third parties as to the resolution of any dispute.”<sup>67</sup> The Parties also argue that SMUD’s reliance on *ANR Pipeline* is misplaced because that proceeding involved a settlement that, unlike the Settlement here, included a provision that would have denied essential services to any party that contested the settlement for a period of five years.<sup>68</sup> Finally, the Parties cite to earlier Commission orders in similar settlement proceedings that reject SMUD’s contention that the settlements require non-jurisdictional entities to forfeit their statutory rights.

#### **Commission Determination**

27. 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 NCPA 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 NCPA.

28. We disagree with SMUD’s assertion that providing parties with the choice to opt into the Settlement is insufficient, and that the Settlement is unjust and unreasonable. The Settlement is a comprehensive and reasonable effort by the Parties to end their litigation and resolve their legal disputes. SMUD does not have to join the Settlement,

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<sup>65</sup> See SMUD Initial Comments at 4-5 (citing *ANR Pipeline*, 59 FERC ¶ 61,347, at 62,260).

<sup>66</sup> See *id.* at 5.

<sup>67</sup> Joint Reply Comments at 5 (quoting Settlement and Release of Claims, § 12.11).

<sup>68</sup> See *id.* at n.17.

and its rights as a Non-Settling Participant to continue to litigate are unaffected by the Settlement. Therefore, the Commission finds that the Settlement is not unjust, unreasonable, unduly preferential or unduly discriminatory on this basis.

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

30. As was the case in prior settlements,<sup>69</sup> if a non-jurisdictional entity elects to remain in the Settlement, it will be accepting a reasonable compromise under which it accepts the terms of the Settlement in exchange for the benefits of the Settlement. Regardless of whether the Commission may order the non-jurisdictional entities to pay refunds in this situation, such an entity may nonetheless opt into a settlement to avail itself of the benefits of that settlement, including release of claims against the non-jurisdictional entity, avoidance of further litigation, and the financial certainty that is embodied in the Settlement.

## 2. Undue Discrimination

31. SMUD argues that the Settlement is unduly discriminatory. SMUD notes that a substantially similar settlement offer must be made to similarly situated customers.<sup>70</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>71</sup> SMUD adds that treating it as a Deemed Distribution Participant under the Settlement is unreasonable and discriminatory, because it places pressure on non-jurisdictional entities to forfeit their statutory exemption from the Commission's refund authority under the FPA. As such,

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<sup>69</sup> See, e.g., *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 26; *Puget Sound Settlement Order*, 128 FERC ¶ 61,002 at P 23 (2009); *AES Placerita Settlement Order*, 128 FERC ¶ 61,004 at P 27; *NEGT Settlement Order*, 126 FERC ¶ 61,007 at P 26.

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

<sup>71</sup> See *id.*

SMUD argues that it has not been given an offer comparable to those extended to other utility refund recipients.

32. SMUD contends that, in several orders approving similar settlements over its objections, the Commission has offered a *non-sequitur* in responding to those objections, citing language from those orders that explain that SMUD has not demonstrated it is being treated differently from other entities that are Deemed Distribution Participants. SMUD states that being treated as a jurisdictional seller is the essence of SMUD's discrimination claim. SMUD points out that undue discrimination involves both the dissimilar treatment of similarly situated parties and the similar treatment of dissimilar parties.<sup>72</sup> Here, SMUD argues, non-jurisdictional entities are different because they have no net amounts outstanding and payable to the CAISO and/or CalPX because they make no jurisdictional sales and have no refund liability. Thus, SMUD claims, in this respect they are similar to other purchasers that have not been designated Deemed Distribution Participants.

33. Next, SMUD asserts that the Commission's attempt to distinguish entities designated Deemed Distribution Participants from Net Refund Recipients (i.e., those that are allocated a cash distribution under the settlements) is, as to SMUD, devoid of any factual basis, pointing out that SMUD does not owe any monies and that neither the CAISO nor CalPX have asserted any claims against SMUD for refunds. SMUD also argues that the Commission has ruled that SMUD is owed money by the CAISO and CalPX.<sup>73</sup> SMUD contends that the Commission has recognized this fact, noting that the Commission has explained that the settlements did not suggest that SMUD owes refunds pursuant to the FPA, but rather suggests that SMUD *may* owe money to the CAISO or CalPX.<sup>74</sup> SMUD also notes that while SDG&E, PG&E, and SoCal Edison have filed breach of contract claims in state court, the Commission should not rely on the existence of such claims as evidence SMUD owes anything to the CAISO and/or CalPX.

34. In response, the Parties argue that the Settlement does not single out SMUD and other non-jurisdictional entities as Deemed Distribution Participants, noting that PG&E, a jurisdictional public utility, is also a Deemed Distribution Participant under the Settlement. The Parties recite Commission orders making similar findings that whether an entity is a Deemed Distribution Participant is not based on the jurisdictional status of

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<sup>72</sup> See *id.* at 6 (citing *Alabama Elec. Cooperative, Inc. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982) (*Alabama Electric Cooperative*)).

<sup>73</sup> See *id.* at 7 (citing *San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,067, at P 57 (2007) (*Bonneville Remand Order*)).

<sup>74</sup> See *id.* (citing *San Diego Gas & Elec. Co.*, 130 FERC ¶ 61,197 (2010)).

that entity. The Parties further explain that “revenue recipients” under the Settlement are not purchasers that made no jurisdictional sales, as SMUD contended, but rather are Net Refund Recipients, which are entities other than Deemed Distribution Participants that are owed net refunds.<sup>75</sup> Moreover, the Parties urge the Commission to find that SMUD’s undue discrimination claims, including its argument that its status as a non-jurisdictional entity means that it has no amounts owed to the CAISO and/or CalX are without merit, citing to Commission orders addressing similar settlements.

### **Commission Determination**

35. As SMUD notes, it has raised its undue discrimination claim in similar settlement proceedings.<sup>76</sup> We reject its claim in this proceeding as well. SMUD argues that it should be provided with a settlement offer that is substantially similar to the settlement that has been provided to similarly situated entities. As we have noted in prior orders on similar settlements, the Commission has found no evidence to support SMUD’s allegation that the Settlement treats non-jurisdictional entities different from other entities.<sup>77</sup> SMUD has thus been offered the same settlement terms as other Participants, and its designation as a Deemed Distribution Participant under the Settlement is not unduly discriminatory because this designation is not limited to non-jurisdictional entities.<sup>78</sup>

36. Specifically, SMUD asserts that it should be treated similarly to other customers that are *not* Deemed Distribution Participants. However, as we have found in earlier orders,<sup>79</sup> 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 under the terms of the Settlement. 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 outstanding amounts they may owe to the CAISO and/or CalPX. Moreover, even if those

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<sup>75</sup> Joint Reply Comments at 8 (citing SMUD Initial Comments at 5).

<sup>76</sup> *See, e.g., NEGT Settlement Order*, 126 FERC ¶ 61,007 at P 28.

<sup>77</sup> *See, e.g., id.* P 30.

<sup>78</sup> *See, e.g., id.* Additionally, as discussed below, SMUD has the choice not to opt into the Settlement if it does not like its terms.

<sup>79</sup> *See, e.g., NEGT Settlement Order*, 126 FERC ¶ 61,007 at P 31.

Settlement provisions governing Deemed Distribution Participants could be construed as discriminatory to the extent they establish two tiers of settlement refund recipients, we conclude that any such discrimination is not undue because, under the Settlement, Deemed Distribution Participants and Net Refund Recipients are not similarly situated. Unlike Deemed Distribution Participants, entities designated as Net Refund Recipients clearly do not have outstanding amounts owing to the CAISO and/or CalPX. Therefore, those provisions of the Settlement do not violate the FPA, which prohibits only undue discrimination.<sup>80</sup>

37. In support of its undue discrimination claim, SMUD cites to *Alabama Electric Cooperative* for the proposition that undue discrimination involves both the dissimilar treatment of similarly situated parties and the similar treatment of dissimilar parties. As we have explained in earlier orders, however, that case involved a public utility's rate design that would have been applicable to all of its customers, none of which would have had the opportunity to "opt out" of the utility's rates.<sup>81</sup> In contrast, according to the terms of the Settlement at issue here, SMUD and others possess the ability not to opt in to the Settlement and in doing so forfeit no rights to pursue claims against NCPA, as discussed above. In addition, SMUD is similarly situated to other parties facing litigation risk with respect to the California energy crisis. Such risk does not distinguish between jurisdictional and non-jurisdictional sellers. For example, in this proceeding, NCPA itself is a non-jurisdictional entity, similar to SMUD, but has nonetheless decided to settle with the California Parties in order to avoid further litigation.<sup>82</sup> We further note that the Los Angeles Department of Water and Power (LADWP), another non-jurisdictional seller, has also recently settled with the California Parties.<sup>83</sup>

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<sup>80</sup> See, e.g., *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369 (2007) ("In general, discrimination is 'undue' when there is a difference of rates, terms or conditions among similarly situated customers. The Commission has broad discretion in determining when discrimination is undue.") (internal citations omitted).

<sup>81</sup> See, e.g., *San Diego Gas & Elec. Co.*, 130 FERC ¶ 61,198, at P 10 (2010).

<sup>82</sup> See *supra* P 3 (noting that the Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, and enhance financial certainty).

<sup>83</sup> See *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,257 (2009), *order denying reh'g*, 130 FERC ¶ 61,197 (2010) (approving settlement between LADWP and California Parties). The Commission has also approved similar settlements between the California Parties and non-jurisdictional entities in these proceedings. See, e.g., *San Diego Gas & Elec. Co.*, 125 FERC ¶ 61,085 (2008) (approving settlement between the California Parties and City of Vernon, California).

38. With respect to SMUD's argument that, because it is a non-jurisdictional entity and thus cannot be ordered by the Commission to pay refunds, it cannot have net amounts payable to the CAISO and/or CalPX, we have previously found that SMUD confuses the *legal* issue of whether the Commission can require it to pay refunds under FPA section 206 with the *factual* issue of whether SMUD owes money to the CAISO and/or CalPX.<sup>84</sup> Again, these settlements do not suggest that SMUD owes refunds pursuant to the FPA, but rather suggests that SMUD may owe money to the CAISO and/or CalPX. We have explained that while the Ninth Circuit's *Bonneville* decision<sup>85</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>86</sup> As such, we have concluded that SMUD's contention in the earlier proceedings that its treatment as a Deemed Distribution Participant under the Settlement is unduly discriminatory, and its related claim that its status as a non-jurisdictional entity means that it has no amounts owed to the CAISO and/or CalPX, were without merit.

39. SMUD argues that this response is incorrect because, as a factual matter, it does not owe money to the CAISO and/or the CalPX and neither entity has filed a claim against it. Further, SMUD asserts that the Commission had already found that SMUD is owed monies by these entities, citing the *Bonneville Remand Order*. SMUD, however, misunderstands the nature of the settlements we have approved in these proceedings. These settlements are voluntary agreements that entities can choose to join or not to join. They do not constitute any refund determination under FPA section 206. Similarly, they do not constitute a finding that any entity, including SMUD, actually owes money to the CAISO and/or the CalPX. Rather, the Commission evaluates these settlements to ensure that they are just and reasonable under the FPA. In these proceedings, the Commission has found that the settlements are just and reasonable. In particular, we have found that the rights of Non-Settling Participants such as SMUD are fully protected. Non-Settling Participants are unaffected by these settlements, and they maintain the right to pursue litigation against settling suppliers such as NCPA. Even if SMUD were to choose to join

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<sup>84</sup> See, e.g., *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 34; *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,243, at P 7 (2009).

<sup>85</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>86</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").

the Settlement, and voluntarily decided to exchange its right to pursue claims against NCPA for the benefits of the Settlement, our approval of the Settlement would not make any affirmative finding that SMUD owed money to the CAISO and/or the CalPX. Therefore, because of the voluntary nature of the Settlement, because the Commission is not making any findings with respect to the question of whether any entity (including SMUD) owes money to the CAISO and/or the CalPX, and because the Commission is not making any findings with respect to refunds under the FPA, we conclude that approval of the Settlement is consistent with the Ninth Circuit's *Bonneville* decision and the Commission's *Bonneville Remand Order*.

40. We also note that nearly all orders approving settlement agreements in these proceedings contain language that provides that the orders hold no precedential value beyond approval of the individual settlements themselves.<sup>87</sup> Historically, the Commission has encouraged parties to settle disputes, as it has done throughout these and related proceedings,<sup>88</sup> and we recognize that parties will at times agree to accept certain burdens in exchange for the benefits of a settlement. For this reason, a settlement may not be used in other proceedings as evidence of an admission against that settling party's interest. Therefore, our orders approving settlements contain language specifying that Commission approval does not constitute approval of, or precedent regarding, any principle or issue in these settlement proceedings or any other proceedings. Here, for instance, if SMUD opted to join the Settlement as a Deemed Distribution Participant, its decision to do so would not constitute an admission on its part that it owes any money to the CAISO and/or CalPX. Rather, its decision to opt into the Settlement would indicate SMUD's desire to avail itself of the benefits of the Settlement in exchange for being characterized as a Deemed Distribution Participant.

41. Finally, the Settlement only binds Participants if they affirmatively choose to join the Settlement. Similarly, Participants can choose not to opt into the Settlement and thus not be bound by its terms. Here, if SMUD exercises its option not to join the Settlement, it will not be designated as a Deemed Distribution Participant. Instead, SMUD would be a Non-Settling Participant, and the Settlement provides no issues are resolved by the Settlement as they relate to Non-Settling Participants.<sup>89</sup> By deciding not to opt into the

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<sup>87</sup> See, e.g., *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,259, at P 39 (2009) ("The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in any proceeding."); *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,256, at P 36 (2009) (same); *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,257, at P 52 (2009) (same).

<sup>88</sup> See, e.g., *supra* n.11.

<sup>89</sup> See Settlement and Release of Claims, § 3.2 ("No Claims addressed in this Agreement shall be deemed settled as to Non-Settling Participants"); see also Joint

Settlement, SMUD would retain its rights to pursue litigation and attempt to receive a greater benefit for itself than it would have received had it opted into the Settlement. SMUD cannot be bound by the terms of the Settlement if it chooses not to join it.<sup>90</sup>

### **Conclusion**

42. 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 NCPA's attempt to "disclaim" Commission jurisdiction over the Settlement is not germane in these circumstances.<sup>91</sup> Only the Commission may disclaim its jurisdiction under the FPA.<sup>92</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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Explanatory Statement at 14-15 ("If a Participant does not opt in to the Settlement Agreement . . . (i) its rights will be unaffected by the Settlement Agreement, (ii) it will not be guaranteed certain benefits of the Settlement Agreement, and (iii) it will be paid the refunds, if any, to which it is ultimately determined to be due through continued litigation").

<sup>90</sup> *See, e.g., San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,259, at P 23 (2009); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242, at P 25 (2009).

<sup>91</sup> *See supra* P 4.

<sup>92</sup> *See San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,092, at P 29 (2007).