

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

Docket No. EL02-71-033

v.

British Columbia Power Exchange Corp.

Sempra Energy Trading Corp.

Docket No. EL03-173-008

Sempra Energy Trading Corp.

Docket No. EL03-201-010

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

Docket No. EL09-56-010

v.

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

ORDER CONDITIONALLY APPROVING SETTLEMENT

(Issued December 22, 2010)

1. In this order, the Commission conditionally approves a settlement filed on October 18, 2010 between Sempra Energy, Sempra Energy Trading LLC,¹ and Sempra Energy Solutions LLC (collectively, Sempra) and the California Parties² (collectively, the Parties), as discussed below. The settlement resolves claims arising from events and transactions in the western energy markets during the period January 1, 2000 through

¹ Sempra Energy Trading LLC was formerly known as Sempra Energy Trading Corporation.

² The California Parties are Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), Southern California Edison Company (SoCal Edison), the Public Utilities Commission of the State of California (CPUC), and the People of the State of California *ex rel.* Edmund G. Brown Jr., Attorney General. For purposes of the October 6, 2010 Settlement and Release of Claims Agreement, the California Parties also include the California Department of Water Resources (CERS) (acting solely under authority and powers created by California Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in Sections 80000 through 80270 of the California Water Code).

June 20, 2001 (Settlement Period), as they relate to Sempra.³ The settlement consists of a “Joint Offer of Settlement and Motion for Procedural Relief for Purposes of Disposition of the Settlement” (Joint Offer of Settlement), a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, Settlement).⁴

2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.⁵ The Parties state that they have executed the Settlement Agreement and it became binding when all Parties executed it. Some of the operative provisions, however, only become effective as of, or in relation to, the date on which the Commission has issued both an order approving the Settlement, and an order approving a concurrently filed Long-Term Contract Settlement Agreement between Sempra Generation and the CPUC and the California Department of Water Resources (Settlement Effective Date).⁶ 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.⁷

³ Joint Explanatory Statement at 2 (stating that the Settlement defines the Settlement Period as January 1, 2000 through June 20, 2001, but also resolves claims related to the issues raised in Docket No. EL01-68-000 for all time periods at issue in that proceeding).

⁴ Joint Explanatory Statement at 13. *See* Settlement and Release of Claims Agreement, §§ 1.32, 1.37, 1.53, 1.86, 2.2, 9.1.1. The Settlement also includes a cover sheet that details, among other things, the amount of proceeds that will be provided by Sempra under the terms of the Settlement.

⁵ 18 C.F.R. § 385.602 (2010).

⁶ On October 18, 2010, Sempra and the CPUC and the California Department of Water Resources filed the Long-Term Contract Settlement Agreement, which resolves certain claims at issue in Docket Nos. EL02-60-000, *et al.* and EL02-62-000, *et al.* The Parties to the instant proceeding request that the Commission review and approve this Settlement in conjunction with its review and approval of the settlement embodied in the Long-Term Contract Settlement Agreement. The Commission recently issued an order on the Long-Term Contract Settlement Agreement. *Pub. Utils. Comm’n of Cal. v. Sellers of Long-Term Contracts to the Cal. Dep’t. of Water Res.*, 133 FERC ¶ 61,245 (2010).

⁷ Joint Explanatory Statement at 13. *See* Settlement and Release of Claims Agreement at §§ 2.3, 4.3.

3. The Parties declare that the Settlement benefits customers by resolving claims for refunds and other remedies as between Sempra and the California Parties.⁸ The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.⁹ Moreover, the Parties state that the Settlement is a fair and reasonable resolution of the disputes between Sempra, on the one hand, and settling participants, on the other.¹⁰ In addition, the Parties state that the Settlement fairly protects the rights of non-settling participants.¹¹ 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.¹²
4. As discussed below, the Commission conditionally approves the Settlement.

Background and Description of the Settlement

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)¹³ 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 EL00-98-000.¹⁴ 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. PA02-2-000.¹⁵ In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in western energy markets in

⁸ Joint Offer of Settlement at 6.

⁹ *Id.* at 6-7.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 7.

¹² *Id.* at 7 (citing *Pub. Utils. Comm'n of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002) and *Pub. Utils. Comm'n of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

¹³ 16 U.S.C. § 791, *et seq.* (2006).

¹⁴ *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

¹⁵ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

Docket No. IN03-10-000.¹⁶ On the same day, the Commission issued two orders directing named entities to show cause why they had not participated in certain gaming practices¹⁷ or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.¹⁸

6. The Parties state that the Settlement resolves claims in the above-captioned proceedings as they relate to Sempra.¹⁹ Any entity that directly sold or purchased energy from CAISO and/or CalPX during the Settlement Period (Participant) may elect to be bound by the terms of the Settlement as an “Additional Settling Participant.”²⁰ To opt in to the Settlement, a Participant must provide notice to the Commission, as well as serve notice to parties on the list servs established for the Docket No. EL00-95 proceeding and in Docket No. EL03-137, *et al.*, no later than five business days following the Settlement Effective Date.²¹ The Parties state 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, but will still be paid refunds, if any, to which they are ultimately determined to be due through continued litigation.²²

7. The Settlement’s monetary consideration totals \$270,000,000, plus interest at the FERC interest rate from April 1, 2009 through the date of distribution.²³ The consideration is comprised of: (1) Sempra’s CAISO and CalPX receivables estimated to be \$88,154,827; (2) the estimated interest on receivables amount of \$61,737,237 estimated through March 31, 2010, to be updated through the projected date of

¹⁶ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

¹⁷ *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

¹⁸ *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

¹⁹ Joint Explanatory Statement at 2.

²⁰ *Id.* at 14; *see* Settlement and Release of Claims Agreement at §§ 1.1, 1.58, 8.1.

²¹ Joint Explanatory Statement at 14; *see* Settlement and Release of Claims Agreement at § 8.1.

²² Joint Explanatory Statement at 14; *see* Settlement and Release of Claims Agreement at §§ 1.56, 3.1, 5.5, 8.1.

²³ Joint Explanatory Statement at 14; *see* Settlement and Release of Claims Agreement at § 4.1.2.1.

distribution; and (3) cash consideration exceeding \$120,000,000, which will be paid by Sempra to the Settling Supplier Refund Escrow and/or the California Litigation Escrow following the Settlement Effective Date.²⁴ Under the Settlement, Sempra also transfers to the California Parties Sempra's entitlement to refunds on certain purchases made in the western markets during the Settlement Period.²⁵

8. The Settlement provides that certain of the California Parties (PG&E, SDG&E, SoCal Edison, and CERS) will assume responsibility for, subject to specified limitations, the obligation for Sempra's true-ups of receivables and associated interest on the estimated amounts that have been assigned under the Settlement, any refund amounts that Sempra owes to Non-Settling Participants, any interest shortfall the Commission allocates to Sempra, and any third-party refund offsets that the Commission or a court determines Sempra owes.²⁶ The California Parties' obligation to make payments on behalf of Sempra shall not exceed the total amount allocated and actually paid to the California Parties pursuant to the Settlement.²⁷

9. The Settlement includes an allocation matrix²⁸ that allocates the Settlement proceeds among participants. The Parties state that the proceeds will be distributed from the Settling Supplier Refund Escrow to each of the Settling Participants and/or, in the case of amounts allocated to any Non-Settling Participants, retained until they are paid pursuant to the FERC Refund Determination and the FERC Interest Determination, as those terms are defined in the Settlement.²⁹ The Parties explain that the portion of the Transferred Receivables to be paid into the Settling Supplier Refund Escrow will be net of, among other things, Interest Shortfall on Refunds amount (\$14,481,906) and Settling

²⁴ Joint Explanatory Statement at 14-15; *see* Settlement and Release of Claims Agreement at §§ 4.1, 4.1.1, 4.1.2.

²⁵ Joint Explanatory Statement at 15.

²⁶ *Id.* at 15 (Sempra lists a fuel cost allowance, emissions offset, and cost offset as possible third-party refund offsets); *see* Settlement and Release of Claims Agreement at §§ 4.1.6.2, 5.3, 5.6, 5.7.

²⁷ Joint Explanatory Statement at 16-17; *see* Settlement and Release of Claims Agreement at § 5.8.

²⁸ Settlement and Release of Claims Agreement, Ex. A.

²⁹ Joint Explanatory Statement at 16; *see* Settlement and Release of Claims Agreement at §§ 1.35, 1.40.

Supplier's Interest Shortfall Estimate (\$2,000,000).³⁰ In addition, certain specified Participants are designated as "Deemed Distribution Participants,"³¹ which, according to the terms of the Settlement, are entities that have a net amount outstanding and payable to CAISO or CalPX and accordingly will receive an offset against amounts owed by the Deemed Distribution Participant to CAISO and/or CalPX for purposes of the Settlement.³² The Settlement states that the Commission's approval of the Settlement will allow CalPX to release Sempra's receivables and estimated interest and will authorize CAISO and CalPX to conform their books and records to reflect the distributions.³³

10. The Parties state that the Settlement generally resolves all claims between the California Parties and Sempra relating to transactions in the western energy markets during the Settlement Period for refunds, disgorgement of profits, or other monetary or non-monetary remedies, subject to specified limitations.³⁴ The Settlement also resolves claims related to the issues in Docket No. EL01-68-000 for all time periods at issue in that proceeding.³⁵ Specifically, the Parties state that Sempra 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.³⁶ Likewise, the Parties state that Sempra 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

³⁰ Joint Explanatory Statement at 16; *see* Settlement and Release of Claims Agreement at §§ 4.1.1.4, 5.2, 5.3, 5.5.

³¹ Settlement and Release of Claims Agreement, Ex. B. The Deemed Distribution Participants include: Aquila Power Corp., California Polar Power Brokers, LLC, Illinova Energy Partners, Inc., PG&E, Pacific Gas and Electric Energy Services Co. and Sacramento Municipal Utility District (SMUD).

³² *See* Settlement and Release of Claims Agreement at §§ 1.21, 1.22.

³³ Joint Explanatory Statement at 17; *see* Settlement and Release of Claims Agreement at § 6.1.

³⁴ Joint Offer of Settlement at 4-5.

³⁵ *Id.* at 3.

³⁶ Joint Explanatory Statement at 17; *see* Settlement and Release of Claims Agreement at § 7.2.1.

and line loss charges, market manipulation, unjust enrichment, or payments for electric capacity, energy and/or ancillary services.³⁷ Subject to specified limitations, Additional Settling Participants are deemed to provide and receive from Sempra the releases that the California Parties provide and receive.³⁸

11. The Parties state that they would not object to the Commission acting to assure the CAISO and CalPX that they will be held harmless from their actions to implement the Settlement.³⁹

Procedural Matters

12. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.⁴⁰ For the reasons described in the Joint Offer of Settlement, the Parties request that the Settlement be transmitted directly to the Commission for approval rather than being certified by an administrative law judge.⁴¹

13. Pursuant to Rule 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (2010), initial comments on the offer of settlement were to be submitted no later than November 7, 2010, and reply comments were to be submitted no later than November 17, 2010. Initial comments were timely filed by CAISO and CalPX, either in support of or not opposing the Settlement. Portland General Electric Company (Portland) filed comments that were generally not opposed to the Settlement, as discussed herein. In addition, SMUD filed timely comments opposing the Settlement. Reply comments were timely filed by Sempra and the California Parties (Joint Reply Comments).

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

³⁷ Joint Explanatory Statement at 18; *see* Settlement and Release of Claims Agreement at § 7.3.1.

³⁸ Joint Explanatory Statement at 18; *see* Settlement and Release of Claims Agreement at §§ 7.4, 8.2.

³⁹ Joint Explanatory Statement at 19.

⁴⁰ 18 C.F.R. § 385.602 (2010).

⁴¹ Joint Offer of Settlement at 3-4 (citing *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,082, at P 14 (2010) and *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,259, at P 14 (2009)).

Substantive Matters

A. “Hold Harmless” Protection

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

The Commission recognizes that CalPX will be required to implement this settlement by paying substantial funds from its Settlement Clearing Account at the Commission’s direction. Therefore, except to the extent caused by their own gross negligence, neither officers, directors, employees nor professionals shall be liable for implementing the settlement including but not limited to cash payouts and accounting entries on CalPX’s books, nor shall they or any of them be liable for any resulting shortfall of funds or resulting change to credit risk as a result of implementing the settlement. In the event of any subsequent order, rule or judgment by the Commission or any court of competent jurisdiction requiring any adjustment to, or repayment or reversion of, amounts paid out of the Settlement Clearing Account or credited to a participant’s account balance pursuant to the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.⁴³

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

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

⁴³ CalPX Comments at 4.

⁴⁴ *Id.* at 3-4.

⁴⁵ Joint Reply Comments at 19-20.

Commission Determination

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

B. Portland’s Request for Clarification

18. Portland states that while it generally does not oppose the Settlement, it is concerned with the relationship between the instant Settlement and Sempra’s separate settlement with Commission trial staff (Sempra Trial Staff Settlement).⁴⁸ Portland states that part of this separate settlement provides for the amounts to be paid into an account maintained by the Commission (FERC Settlement Funds Account) and then allocated and disbursed to the settling parties according to an allocation matrix. Portland cites an inconsistency between this arrangement in the Sempra Trial Staff Settlement and the nature of the payments described in section 4.1.2.2 of the instant Settlement. Portland is concerned that under certain circumstances, Sempra could be required, per section 4.1.2.2, to pay amounts into both the FERC Settlement Funds Account as well as the California Litigation Escrow, which could result in either a double payment for Sempra, or may allow the California Parties to “double dip” and collect from both funds in excess of their permitted recovery. Portland asks that this inconsistency between section 4.1.2.2 of the Settlement and the mechanism for disbursing funds under the Sempra Trial Staff

⁴⁶ *Id.* at 19; Joint Explanatory Statement at 19.

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

⁴⁸ Portland Comments at 1-7. The Sempra Trial Staff Settlement in Docket Nos. EL03-173-000 and EL03-201-000 was approved by the Commission in *Sempra Energy Trading Corp.*, 108 FERC ¶ 61,114 (2004), *reh’g denied*, *Coral Power L.L.C.*, 125 FERC ¶ 61,176 (2008).

Settlement be explained and remedied before the Commission approves section 4.1.2.2 of the Settlement.⁴⁹

19. In response, the California Parties state that they intend for the amounts owed to participants under the Sempra Trial Staff Settlement to be preserved.⁵⁰ The California Parties state that in the unlikely event that Sempra fails to make a timely payment of \$7,238,516 to the FERC Settlement Funds Account, it will be required, per section 4.1.2.2 of the Settlement, to pay \$5,700,000 to the California Litigation Escrow.⁵¹ The California Parties state that this potential \$5,700,000 “back-stop” payment is intended to be allocated and paid by the California Parties to those participants who have credit amounts from the Sempra Trial Staff Settlement, pursuant to a separate allocation agreement.⁵² The California Parties acknowledge, however, that this is not stated explicitly in the Settlement Agreement. To remedy this, the California Parties propose that the Commission impose conditions on the approval of the instant Settlement to ensure that the total overall amount received by any participant, once all payments flow, will be the amount that the participants would have received originally under the settlements already in place.⁵³

20. The California Parties therefore propose that the Commission impose two conditions on approval of the Settlement. The California Parties represent that these conditions have been reviewed by Portland, who accepts them as a resolution of the issues raised in its initial comments.⁵⁴ The conditions the California Parties propose are:

- (1) the California Parties agree to distribute any \$5,700,000 payment received from Sempra pursuant to section 4.1.2.2 of the Settlement to participants that have credit amounts in the column of the allocation matrix of the Settlement labeled “Credit for FERC Gaming Settlement,” in the amounts shown in such column; and
- (2) in the event Sempra pays \$5,700,000 to the California Litigation Escrow pursuant to section 4.1.2.2 (rather than making the \$7,238,517 payment, as discussed above), the Commission will: (a) credit Sempra’s \$5,700,000 payment

⁴⁹ Portland Comments at 7.

⁵⁰ Joint Reply Comments at 16.

⁵¹ *Id.* at 18.

⁵² *Id.* at 18. *See also* Settlement and Release of Claims Agreement at § 5.4.

⁵³ Joint Reply Comments at 19.

⁵⁴ *Id.* at 17.

against the obligation Sempra has to pay \$7,238,516 pursuant to the Sempra Trial Staff Settlement; and (b) credit any amounts received by a participant from the \$5,700,000 payment against the amount due to that participant pursuant to (i) the Sempra Trial Staff Settlement and (ii) the allocation table approved in the Phase II settlement in the Gaming and Partnership Proceeding in Docket No. EL03-152, *et al.*⁵⁵

Commission Determination

21. The Commission accepts the conditions proposed by the Parties in their Joint Reply Comments. The Commission notes that the Parties agree that no opportunity for excessive recovery or double-dipping was intended in the language of Settlement section 4.1.2.2,⁵⁶ and that the Parties represent that Portland agrees with the proposed resolution to prevent this potential, but unintended, outcome. The Commission therefore accepts the proposed conditions to this Settlement as a reasonable accommodation agreed to by Portland and the Parties.

C. SMUD's Comments in Opposition to the Settlement

1. Approval of the Settlement Under *Trailblazer's* First Prong

22. SMUD explains that, pursuant to the Commission's *Trailblazer* precedent,⁵⁷ the Commission may approve a contested settlement on the merits only if it "make[s] an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable rates.'"⁵⁸ SMUD notes that this requires that there be an adequate record to address the arguments on the merits. SMUD contends that in prior similar settlements, the Commission erroneously determined that those settlements were not unduly discriminatory based on an unsubstantiated assumption that SMUD owed money to CAISO and the CalPX. However, SMUD asserts, in those cases (as in this one), there was no record evidence on which to base a merits decision that the settlements were not unduly discriminatory, citing earlier orders explaining that the Commission's ruling do not constitute a finding that SMUD or any other entity actually

⁵⁵ Joint Reply Comments at 16-17 (citing *Duke Energy Trading and Mktg., L.L.C., et al.*, 125 FERC ¶ 61,345 (2008)).

⁵⁶ See Joint Reply Comments at 16; Portland Comments at 6.

⁵⁷ *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*).

⁵⁸ SMUD Comments at 3 (quoting *Trailblazer*, 85 FERC ¶ 61,345 at 62,339).

owes money to CAISO and/or CalPX.⁵⁹ SMUD argues that, absent adequate record evidence on which to decide that question, no merits ruling can be made that the Settlement is not unduly discriminatory and that there is therefore no basis for approval of the Settlement under *Trailblazer's* first prong.

2. Commission Determination

23. We reject SMUD's argument regarding approval of the Settlement under the first prong of *Trailblazer*. Under *Trailblazer*, the Commission may approve a contested settlement under one or more of the following four approaches: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission may determine that the settlement provides an overall just and reasonable result; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated; or (4) the Commission may determine that the contesting parties can be severed.⁶⁰ Here, as we have in similar settlement proceedings, we find that SMUD's arguments lack merit.

24. The Commission may decide the merits of a contested settlement if there is substantial evidence in the record or if there is no genuine issue of material fact.⁶¹ *Trailblazer* also explained that consideration of a contested settlement under the first prong was appropriate when the issues are primarily policy issues.⁶² SMUD's objection to the Settlement is whether it is unduly discriminatory with respect to non-jurisdictional entities that are listed as Deemed Distribution Participants. We conclude that SMUD's concern raises the policy question of whether we can approve a voluntary Settlement construct that designates non-jurisdictional entities as Deemed Distribution Participants even while such entities are not subject to the Commission's FPA refund authority.

25. We further find there is no genuine issue of material fact. Resolution of SMUD's objections does not turn on a factual inquiry, as there is no dispute that SMUD is a non-jurisdictional entity that was not subject to the Commission's FPA refund authority during the Settlement Period. There is also no dispute that SMUD was both a buyer and

⁵⁹ *Id.* at 4 (citing *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,256, at P 34 (2009)).

⁶⁰ *Trailblazer*, 85 FERC ¶ 61,345 at 62,342-44.

⁶¹ See 18 C.F.R. § 385.602(h)(1)(i) (2010); *Trailblazer*, 85 FERC ¶ 61,345 at 62,342.

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

a seller in the market during the relevant time period. SMUD itself has noted this.⁶³ Rather, the question before us is whether non-jurisdictional entities that acted as both buyers and sellers in the market during the Settlement Period may be designated as Deemed Distribution Participants for purposes of the Settlement. As discussed herein,⁶⁴ we find that the Settlement establishes a reasonable allocation mechanism that approximates Participants' transactions in the markets operated by CAISO and CalPX for the relevant timeframe, regardless of each Participant's jurisdictional status. It is unnecessary for us to decide whether any non-jurisdictional Participant (or, for that matter, any Deemed Distribution Participant) actually owes monies to CAISO and/or CalPX to resolve SMUD's objections to the Settlement. It is thus appropriate for us to address the merits of SMUD's objections.

26. Our conclusion that SMUD's objections to the Settlement raise policy, rather than factual, issues is supported by the absence of an affidavit detailing any dispute of a genuine issue of material fact, as set forth in our settlement rules.⁶⁵ The lack of an affidavit is consistent with our conclusion that no material facts are in dispute, as the questions we have considered in addressing the Settlement are policy issues rather than factual issues (as discussed above).⁶⁶

27. Upon finding that no genuine issue of material fact exists, and that SMUD's objections to the Settlement raise policy questions, we conclude that we can analyze SMUD's objections under *Trailblazer's* first prong. As discussed herein, we find those objections to be without merit.

⁶³ SMUD Comments at 5 (“SMUD, as an exempt governmental entity, is not subject to the Commission’s refund authority for purposes of *sales in which it engaged during the Settlement period*”) (emphasis added).

⁶⁴ *See infra* P 37.

⁶⁵ *See* 18 C.F.R. § 385.602(f)(4) (2010) (“Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim”).

⁶⁶ *See* 18 C.F.R. § 385.602(h)(1)(i) (2010) (“[T]he Commission may decide the merits of the contested settlement issues, if the record contain substantial evidence upon which to base a reasoned decision *or* the Commission determines there is no genuine issue of material fact”) (emphasis added).

D. Undue Discrimination

1. SMUD's Comments

28. While SMUD believes that the allocation procedure included in the Settlement is a seemingly laudable and efficient process for resolving the issues, including taking into account that some Participants were both buyers and sellers in the market,⁶⁷ it nonetheless argues that the Settlement is unduly discriminatory. Specifically, SMUD asserts that it is an exempt governmental entity, and therefore not subject to the Commission's FPA refund authority for purposes of sales in which it engaged during the Settlement Period, even though it is entitled to FPA refunds as a buyer in the markets. According to SMUD, this jurisdictional issue is not recognized by the Settlement, which requires an entity to pay FPA refunds for its role as a seller as a *quid pro quo* for that party to obtain refunds in its role as a buyer. SMUD contends that the Commission has erroneously found this approach acceptable in prior settlement orders.

29. In SMUD's view, the Commission's decisions approving prior similar settlements on the grounds that they treat jurisdictional and non-jurisdictional sellers alike is a misapplication of the law. SMUD notes that undue discrimination involves both the dissimilar treatment of similarly situated parties and the similar treatment of dissimilar parties.⁶⁸ SMUD claims that by treating it as if made jurisdictional sales is problematic.

30. Next, SMUD points out that the Commission has disclaimed finding that SMUD or any other entity actually owes money to CAISO and/or CalPX and, consequently, there is no evidentiary support for stating that SMUD has amounts outstanding and payable to CAISO and/or CalPX. SMUD further argues that the reason the Commission would not make such a finding is obvious, noting that there is not a claim pending that SMUD owes money to CAISO or CalPX, much less any determination to that effect. SMUD acknowledges there is state court litigation in which the California Parties have made claims that SMUD owes money directly to them, but this litigation does not involve claims that any amounts are owed to CAISO or CalPX, and that there has been no final determination in that litigation that SMUD owes the California Parties anything.

31. Moreover, SMUD complains that settling parties in similar settlements have determined Participants' net liability using an FPA refund-based calculation. However, SMUD asserts, whether a market participant owes refunds depends on jurisdictional status. Again, SMUD explains that it is an exempt governmental entity and does not owe

⁶⁷ SMUD Comments at 4.

⁶⁸ *Id.* at 5 (citing *Alabama Elec. Coop. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982) (*Alabama Electric Cooperative*)).

FPA refunds in the Docket No. EL00-95 refund proceeding.⁶⁹ Thus, according to SMUD, the Settlement unduly discriminates against it by placing it in the same class as entities that are subject to FPA refunds, specifically entities that owe FPA refunds that exceed the amount of refunds they may be owed as buyers. Similarly, SMUD argues that the Settlement attempts to do indirectly what the Commission cannot do directly, namely, determine SMUD's liability as a seller for potential claims related to the settlement Period on the basis of refunds calculated in accordance with the FPA.

32. SMUD asserts that the Commission has in earlier settlement cases sought to avoid the import of the discrimination by stating that those settlements do not suggest that Deemed Distribution Participants (such as SMUD) owe refunds, but that they may owe money to CAISO and/or CalPX and under remedies available outside the context of the FPA.⁷⁰ However, SMUD argues that this statement is inaccurate. First, SMUD claims, the amounts allegedly owed were refund amounts.⁷¹ Second, SMUD argues, the state court litigation to which the Commission referred does not involve any payments owed to CAISO or CalPX, but seeks payments allegedly owed to the California Parties. Further, SMUD argues that the Commission's prior orders fail to explain under what authority it could approve a settlement based on the bare possibility of remedies available outside the context of the FPA, particularly where those remedies do not involve payments to CAISO or CalPX. SMUD also argues that, even if the pending state court litigation involved potential monies owed to CAISO and/or CalPX, the Commission has not and cannot identify what authority would allow it to usurp the court's power to decide those cases in the context of the applicable law by approving a settlement that determines SMUD's alleged liability on the basis of refunds to CAISO and/or CalPX.

33. SMUD argues that the Commission should not apply the same faulty reasoning to approve the Settlement, but should instead find that SMUD was unduly discriminated against by being placed in a class that was defined as market participants that owe a greater amount of refunds to CAISO and/or CalPX than the refunds they are entitled to receive, despite SMUD's having no liability for refunds and not being sued for monies owed to CAISO or CalPX. SMUD notes that Commission precedent bars unduly

⁶⁹ *Id.* at 7 (citing *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 926 (9th Cir. 2005) (*Bonneville*)).

⁷⁰ *Id.* (citing *San Diego Gas & Elec. Co.*, 130 FERC ¶ 61,198, at P 9 (2010)).

⁷¹ *Id.* (citing *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 24, 28 (2007)).

discriminatory settlement offers, and argues that it should be offered the same settlement terms as other purchasers that made no jurisdictional sales and are thus not liable for refunds.⁷²

34. Finally, SMUD attacks the Settlement's opt-in provision, arguing that reliance on the opt-in provision to cure discrimination assumes that if a party does not forfeit existing rights by not joining the discriminatory class, there is no issue. However, SMUD contends, that assumption is faulty and, rather, the correct question is whether the discriminatory action denies benefits or privileges that are extended to others.⁷³ According to SMUD, the Commission's statutory obligation is not to determine whether a party maintains some, albeit inferior, benefits despite the discrimination but to root out the discrimination itself.

2. Commission Determination

35. We find that SMUD's argument that the Settlement is unduly discriminatory is meritless. We conclude that the Settlement's distinction between Net Refund Recipients and Deemed Distribution Participants is reasonable. Such a distinction is not based on whether a Participant is a jurisdictional or a non-jurisdictional entity. Moreover, to the extent that creating two classes of Participants by itself could be construed as discriminatory, we find that it is appropriate to do so under the FPA, which only prohibits *undue* discrimination.⁷⁴ As discussed herein, it is not unduly discriminatory for the Settlement to create two classes of Participants.

36. We can assess whether the Settlement is unduly discriminatory by evaluating the four corners of the Settlement, and we need not make a finding as to whether SMUD, or any other entity, actually owes monies to CAISO and/or CalPX or any other party for

⁷² *Id.* at 8 (citing *Transwestern Pipeline Co.*, 26 FERC ¶ 61,112, at 61,273 (1984) (*Transwestern*) and *Florida Power & Light Co.*, 70 FERC ¶ 63,017, at 65,088 (1995) (*Florida Power*)).

⁷³ *Id.* at 9 (citing *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156, 1170-72 (D.C. Cir. 1979) (*Central Iowa*)).

⁷⁴ *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).

purposes of determining whether the Settlement is just and reasonable.⁷⁵ Specifically, we find that the choice of whether or not to opt into the Settlement remains with each of the Settlement's Participants, including SMUD. SMUD can choose to be classified as a Deemed Distribution Participant, in which case we would view SMUD as *voluntarily* choosing to exchange whatever benefits the Settlement provides (such as ending litigation in these and related proceedings) for whatever burdens it imposes (such as being designated a Deemed Distribution Participant). If SMUD chooses to be a Non-Settling Participant, the Settlement will not resolve any issues as to SMUD.⁷⁶

37. In addition, we conclude that SMUD need not be classified as a Net Refund Recipient as a result of its non-jurisdictional status. The Parties created a structure under which they calculated the amounts that Participants included in the allocation matrix would receive, regardless of the Participants' jurisdictional status. The Parties also found that some Participants were both buyers and sellers in the market, again regardless of jurisdictional status, and thus it would be appropriate for certain Participants – both jurisdictional and non-jurisdictional – to be classified as Deemed Distribution Participants rather than Net Refund Recipients. We find that the Settlement's allocation structure provides a reasonable means of ensuring that Settlement proceeds would be fairly allocated among Participants based on their market activities. This construct recognizes that Deemed Distribution Participants bought power during the relevant time period and that the Deemed Distribution offset should measure what these entities bought against what they sold during the Settlement Period. The Settlement establishes an efficient process to allocate Settlement proceeds, including recognizing that some Participants were both buyers and sellers in the market, as SMUD appears to acknowledge.⁷⁷ If a Participant disagreed with the terms of the Settlement, such as the allocation it would receive or its classification as a Deemed Distribution Participant, it

⁷⁵ SMUD cites to Settlement and Release of Claims Agreement § 5.2.2.2, which states that “FERC’s approval of this Agreement . . . shall constitute approval of the treatment and allocation of Deemed Distributions as provided herein” *See* SMUD Comments at 3. We find that this section does nothing more than require our approval in order for the Settlement’s provisions regarding Deemed Distributions to take effect. It does not mean that we have made any findings outside of the four corners of the Settlement.

⁷⁶ *See* Joint Explanatory Statement at 14 (“If a Participant does not opt in to the Settlement Agreement (‘Non-Settling Participant’): (i) its rights will be unaffected by the Settlement Agreement; (ii) it will have no right to obtain certain benefits of the Settlement Agreement; and (iii) it will be paid the refund, if any, to which it is ultimately determined to be due through continued litigation”).

⁷⁷ *See* SMUD Comments at 4.

could choose not to opt into the Settlement. The Settlement therefore does not require that Participants be bound by it. We find that the Settlement's provisions governing the allocation of proceeds to Participants and the opt-in provision to be an entirely reasonable construct. Thus, we conclude that the Settlement's creation of two classes of Participants, as well as the classification of SMUD as a Deemed Distribution Participant, is not unduly discriminatory.

38. We also find unavailing SMUD's argument that the allocation matrix was developed in accordance with an FPA refund-based methodology. We find that such an approach provides a reasonable mechanism for approximating Participants' transactions in the marketplace during the Settlement Period, and that provides a rational basis for allocating Settlement proceeds. In addition, using an FPA refund-based calculation methodology for allocating Settlement proceeds is not tantamount to an FPA refund determination in Docket No. EL00-95. The Settlement is a voluntary effort to resolve issues in these proceedings as they relate to Sempra, and if SMUD chooses not to join the Settlement, then any refunds it is owed will be determined when the Commission makes its refund determination in Docket No. EL00-95. If, as discussed above, SMUD chooses to join the Settlement, then it will not be paying refunds, but rather voluntarily choosing to receive a credit against amounts it is deemed to owe CAISO and/or CalPX under the terms of the Settlement in exchange for whatever benefits the Settlement provides. For this reason, we also disagree that the Settlement achieves indirectly what the Commission cannot do directly, namely, require non-jurisdictional entities to pay FPA refunds for activities during the Settlement Period. When the Commission makes an FPA refund determination in Docket No. EL00-95, such determination will be consistent with *Bonneville*.⁷⁸ However, as we state above, our approval of the Settlement is not an FPA refund determination.

39. SMUD's comments regarding the Commission's characterization of earlier similar settlements are unpersuasive. First, SMUD complains that the amounts allegedly owed to CAISO and/or CalPX under those settlements were FPA refunds. While there is a relationship between the refund proceeding in Docket No. EL00-95 and the settlements' allocation of proceeds to Participants based on their market activities during the relevant time period, we again emphasize that approval of those settlements did not constitute FPA refund determinations, and that our approval of those settlements was limited to the individual proceedings. As we note above, if an entity chooses not to join these settlements, then any refund it receives will be determined through the Commission's refund determination in Docket No. EL00-95. In addition, as the Parties explain in their reply comments, while the Commission cannot order FPA refunds from non-

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

jurisdictional entities for activities during the Settlement Period, we directed CAISO and CalPX to complete refund calculations for all sellers, including non-jurisdictional entities.⁷⁹ This category of entities includes SMUD, which (as it notes in its comments⁸⁰) was a seller in the markets during the Settlement Period. It is reasonable to use these calculations as a basis for determining which entities should be designated as Deemed Distribution Participants for purposes of the Settlement, regardless of jurisdictional status.

40. SMUD also argues that the state court litigation cited by the Commission in earlier settlement orders was initiated by the California Parties, and not CAISO or CalPX. SMUD appears to be making the point that, even if the California Parties prevail in that litigation, SMUD would not directly owe money to CAISO or CalPX. Regardless of whether this is the case, the important point is that this litigation relates to SMUD's transactions in these markets during the Settlement Period, as the Parties note in their reply comments.⁸¹ That CAISO or CalPX did not initiate this litigation is beside the point. It is not clear what state court claim CAISO or CalPX would pursue against SMUD that the California Parties are not already pursuing. Because CAISO and CalPX served as pass through entities with respect to the energy transactions in its markets, it is the California Parties that are ultimately impacted by the outcome of both the refund and related proceedings before the Commission and the state court litigation. Therefore, we conclude that SMUD's asserted distinction as to which entities it would owe money if it did not prevail in the state court litigation is not a substantive one, and does not have practical effect. Further, we did not base our approval of prior settlements on the "bare possibility" of remedies outside of the FPA.⁸² Rather, we were pointing out a distinction between whether we could require non-jurisdictional entities to pay FPA refunds and whether there were other bases upon which such entities could be required to pay monies as a result of their CAISO and CalPX transactions.⁸³ In any event, irrespective of the potential bases upon which non-jurisdictional entities may be liable for their CAISO and CalPX transactions, we reiterate these settlements are not FPA refund determinations, but

⁷⁹ Joint Reply Comments at 9. *See also San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,067, at P 38, *order on clarification*, 121 FERC ¶ 61,188 (2007), *order on reh'g*, 125 FERC ¶ 61,214 (2008), *appeal pending*.

⁸⁰ SMUD Comments at 5.

⁸¹ Joint Reply Comments at 9.

⁸² *See* SMUD Comments at 7-8.

⁸³ *See, e.g., San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,083, at P 38 (2010).

rather voluntary agreements to resolve claims. If SMUD disagrees with the way it has been characterized in the Settlement and believes the Settlement's benefits are outweighed by its burdens, then SMUD need not join it.⁸⁴

41. Although SMUD argues that the Settlement's opt-in provision "perpetuates" undue discrimination because it creates "an illusion of self-help measures" to solve the problem,⁸⁵ we do not agree. Again, the Settlement is a voluntary construct into which Participants can choose to opt or not. If a Participant chooses to opt into the Settlement, it will receive certain benefits in exchange for whatever burdens the Settlement imposes. If a Participant chooses not to opt into the Settlement, then the Settlement does not resolve any issue as to that Participant.⁸⁶ Far from creating "an illusion of self-help measures," the opt-in provision is an important component of the Settlement because it means that the Settlement will only affect a Participant to the extent that Participant decides it wants to be bound by it. SMUD does not show how such a construct "perpetuates" undue discrimination.

42. In support of its undue discrimination claim, SMUD cites to a number of cases, all of which are inapposite. For example, SMUD cites *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.⁸⁷ 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.⁸⁸ 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 Sempra. In addition, SMUD is similarly situated to other parties facing litigation risk with respect to the California energy crisis. Such risk does not distinguish between jurisdictional sellers and non-

⁸⁴ We also reject SMUD's allegation that we are somehow usurping the court's authority to decide these issues. It is unclear how SMUD believes the Commission can, or is trying to, decide state court cases. This proceeding and the prior proceedings to which SMUD alludes involve voluntary settlements that only bind those entities that choose to join them.

⁸⁵ SMUD Comments at 8.

⁸⁶ See Settlement and Release of Claims Agreement at § 3.1 ("No claims addressed in this agreement shall be deemed settled as to Non-Settling Participants").

⁸⁷ SMUD Comments at 5.

⁸⁸ See, e.g., *San Diego Gas & Elec. Co.*, 130 FERC ¶ 61,198, at P 10 (2010).

jurisdictional sellers. For example, Northern California Power Agency and the Los Angeles Department of Water and Power, both non-jurisdictional entities, have settled with the California Parties.⁸⁹ The Commission has also approved similar settlements between the California Parties and other non-jurisdictional entities in these proceedings.⁹⁰ Additionally, non-jurisdictional entities have opted into a number of similar settlements.⁹¹

43. We also find that SMUD's reliance on *Florida Power* and *Transwestern* in support of its argument that it should have been offered the same terms as other purchasers that made no jurisdictional sales is misplaced. *Florida Power* and *Transwestern* involved the question of whether a regulated company must provide similar settlements or agreements to its similarly situated customers, a question that necessarily raises issues of comparability and undue discrimination.⁹² If, as in *Transwestern*, a regulated company proffered a settlement to one of its two customers that gave that customer better rates, terms, or conditions of jurisdictional service than the only other customer,⁹³ we would be concerned about the potential impact on the customer that did not benefit from the settlement. That question is not before us here. The Settlement is an agreement to

⁸⁹ *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,083, at P 37 (2010); *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,257 (2009), *order denying reh'g*, 130 FERC ¶ 61,197 (2010).

⁹⁰ *See, e.g., San Diego Gas & Elec. Co.*, 125 FERC ¶ 61,085 (2008) (approving settlement between the California Parties and City of Vernon, California).

⁹¹ *See, e.g., Election of City of Riverside, California to Opt-In to Settlement Between Tucson Electric Power Company and the California Parties*, Docket No. EL00-95-243, *et al.* (June 28, 2010); *Election of City of Banning, California to Opt-In to Settlement Between Northern California Power Agency and the California Parties*, Docket No. EL00-95-242, *et al.* (May 6, 2010); *Election of City of Anaheim, California to Opt-In to Settlement Between Public Service Company of New Mexico and the California Parties*, Docket No. EL00-95-241, *et al.* (May 6, 2010).

⁹² In *Florida Power*, an Administrative Law Judge considered the question of whether two settlements offered by a public utility to two different customers were substantially similar. *Florida Power*, 70 FERC ¶ 63,017 at 65,088-65,089. In *Transwestern*, the Commission concluded that a pipeline should have offered one contract demand quantity customer a similar waiver agreement that it had offered its other similarly situated customer as part of a settlement. *Transwestern*, 26 FERC ¶ 61,112 at 61,273.

⁹³ *Transwestern*, 26 FERC ¶ 61,112 at 61,273.

allocate proceeds paid by Sempra to settle certain claims, and each Participant is free to make its own decision about whether it wants to opt into the Settlement or not. Further, we are here faced with a single settlement among the California Parties, Sempra, and Additional Settling Participants. Thus, the facts in this proceeding are far different than those in *Florida Power* and *Transwestern*. To the extent that SMUD's argument is intended to suggest that all of the entities on the Settlement's allocation matrix should be treated in the same manner, which is not what was at issue in *Florida Power* and *Transwestern*, we note that SMUD may choose not to opt into the Settlement and thus would not be bound by its terms. Finally, as discussed above, we reiterate that the Settlement's distinction between Net Refund Recipients and Deemed Distribution Participants does not constitute undue discrimination.

44. SMUD also cites to *Central Iowa*,⁹⁴ which we find to be unavailing. *Central Iowa* involved a pooling agreement under which membership was divided into two classes based on the size of the pool's participants. In the order underlying the petition in that case, the Commission found that this distinction in membership was not reasonably related to the objectives of the pool, such as "the effectuation of reserve sharing so as to best develop through coordination reliable and economic generating capacity."⁹⁵ The Commission continued: "Because of the significant advantages flowing from MAPP [i.e., pool] membership and the corresponding impact of denied access, we do not feel that this size criterion is reasonable."⁹⁶ This Settlement does not involve similar considerations. The Settlement is not the type of complex power pool arrangement at issue in *Central Iowa*, where (as we found) membership criteria based on size would run contrary to the very purpose of the pool. Rather, the Settlement is simply an agreement that resolves claims arising from certain of Sempra's transactions, and allocates monies paid by Sempra in settlement of those claims. The Settlement's distinction between Net Refund Recipients and Deemed Distribution Participants (including SMUD's classification as a Deemed Distribution Participant) does not undermine the purpose of the Settlement. As discussed above, we find that such a distinction is not unduly discriminatory.

45. Finally, SMUD cites to *Associated Gas Distributors v. FERC*⁹⁷ for the proposition that the Commission must adopt corrective measures for rooting out undue

⁹⁴ SMUD Comments at 9.

⁹⁵ *Mid-Continent Area Power Pool Agreement*, 58 FPC 2622, at 2635 (1977).

⁹⁶ *Id.*

⁹⁷ 824 F.2d 981 (D.C. Cir. 1987).

discrimination.⁹⁸ Rooting out undue discrimination is of paramount importance to the Commission. However, for the reasons discussed above, we find that this Settlement is not unduly discriminatory and we therefore reject SMUD's arguments.

E. SMUD's Request for Clarification

1. SMUD's Comments

46. SMUD seeks clarification that the residual underlying obligation of Sempra to pay refunds to Non-Settling Participants remains in place in the event that the refund amounts owed to Non-Settling Participants are determined to exceed the amount allocated to the California Parties. SMUD claims that failure to enforce this obligation would result in Non-Settling Participants being placed in a worse position than they would have been absent the Settlement, something the Settlement states would not happen.

47. SMUD argues that Sempra may not be relieved of its statutory obligation to pay refunds in the event refunds are owed. SMUD cites to section 318 of the Restatement (Second) of Contracts (Restatement) for the proposition that, while an obligor may generally delegate performance of its duties to another, such delegation will not discharge any duty or liability of the original obligor, unless the obligee agrees otherwise. SMUD contends that whether Sempra's refund obligation is contractual or statutory, this principle would apply. That is, if Sempra cannot unilaterally relieve itself of its statutory obligation to pay Non-Settling Participants any refunds it might owe, SMUD asserts that it then follows that Sempra cannot reach agreement with settling parties to assume that obligation. SMUD notes that no Non-Settling Participant has agreed to relieve Sempra from its duty to pay whatever refunds the Commission finds appropriate.⁹⁹

48. SMUD acknowledges that Non-Settling Participants assume the risks that litigation may result in their receiving more or less refund relief than provided in the Settlement. Nonetheless, SMUD argues that the Commission must still "fully protect the objecting party's interest."¹⁰⁰ According to SMUD, absent the proposed assignment of a limited refund obligation to the California Parties, Sempra would be obligated to pay the full amount of any refunds determined to be owed to Non-Settling Participants. If approved, SMUD argues, the refund limitation would deprive Non-Settling Participants of their right to obtain the full amount of any refunds that Sempra might be ordered to

⁹⁸ SMUD Comments at 9.

⁹⁹ *Id.* at 10.

¹⁰⁰ *Id.* (quoting *Southern Cal. Edison Co. v. FERC*, 162 F.3d 116, 119 (D.C. Cir. 1998) (*SoCal Edison v. FERC*)).

owe. SMUD contends that such a limitation would not fully protect the objecting party's interest, and thus cannot restrict Sempra's ultimate obligation in litigation outside the confines of the Settlement.

2. Commission Determination

49. We decline to grant the requested clarification. We understand SMUD's concern to be that there will not be sufficient funds left over from the Settlement proceeds to make Non-Settling Participants whole following a refund determination in these proceedings. However, based on the specific facts before the Commission in this proceeding, we agree with the Parties in their reply comments to SMUD on this point that there will be sufficient funds to pay Non-Settling Participants whatever amount we find that they are ultimately owed by Sempra, regardless of the Settlement's terms.¹⁰¹ We find that this is especially true in the case of SMUD.

50. At the outset, and as discussed above, we find that the Parties' allocation matrix is a reasonable attempt to approximate the amount of Settlement proceeds that would be allocated to Participants as if it was an FPA refund determination in Docket No. EL00-95 (which, as we have emphasized, it is not). As discussed above, we conclude that it was reasonable for the Parties to use an FPA refund-based calculation methodology for determining allocated settlement funds, explaining that approval of a settlement using such a methodology did not mean that the allocation of settlement proceeds is an FPA refund determination and that it was a reasonable mechanism to approximate Participants' transactions in the markets during the relevant timeframe. While the amount allocated to SMUD under the Settlement may be less (or more) than what we ultimately find that it is owed, we conclude that there will be sufficient funds to cover any shortfalls that the California Parties may owe to SMUD should the Commission or a court decide that SMUD is owed more than what is allocated to it under the Settlement's allocation matrix.¹⁰²

51. The allocation matrix provides that SMUD would be allocated \$341,007 or approximately 0.14 percent of the total Settlement proceeds disbursed. At the same time, the California Parties are allocated nearly 98.75 percent of the proceeds in accordance

¹⁰¹ See Joint Reply Comments at 13-14.

¹⁰² The Settlement explains that a refund shortfall would occur when the Commission or a court finds that the funds held in escrow for Non-Settling Participants is insufficient. Settlement and Release of Claims Agreement at § 5.6.1.

with the Settlement's allocation matrix.¹⁰³ Thus, even if we (or a court) were to decide that SMUD is owed more than what had been allocated to it under the Settlement, we note that the California Parties are allocated approximately 695 times more than that allocated to SMUD under the Settlement's allocation matrix. As the Settlement provides, the California Parties are jointly and severally liable for any shortfalls up to their allocated cap.¹⁰⁴ Based on these facts, we agree with the Parties that SMUD's request for clarification is unnecessary.

52. While it appears to be arguing on behalf of all Non-Settling Participants, SMUD is the only entity objecting to the Settlement's proposed allocation matrix. No other Participant has raised any concerns regarding the Settlement's mechanism to make the California Parties jointly and severally liable for paying monies to Non-Settling Participants, up to their allocated cap. We further note that in a similar settlement proceeding where SMUD raised this concern, nearly all Participants listed on the allocation matrix had in fact opted into the settlement.¹⁰⁵ Specifically, in the settlement between the California Parties and Public Service Company of New Mexico (PNM) in Docket No. EL00-95-241, *et al.*, it appears that only five Participants listed on the allocation matrix other than SMUD have not opted into the Settlement to date. Cumulatively, the allocated share of settlement proceeds for these six entities (including SMUD) totaled \$612,122, or approximately 1.5 percent of the total amount disbursed in

¹⁰³ Settlement and Release of Claims Agreement, Ex. A ("Total Disbursed Amount" column). PG&E, SoCal Edison, SDG&E, and CERS are the four California Parties that are responsible for making up shortfalls pursuant to section 5.6 of the Settlement.

¹⁰⁴ Settlement and Release of Claims Agreement at § 5.8.

¹⁰⁵ At this point, it is impossible to determine the number of Participants that ultimately will choose to opt into this Settlement, because notices to opt-in are not required until five business days after Commission approval of the Settlement. Settlement and Release of Claims Agreement at § 8.1. We note, however, that section 8.4 of the Settlement provides that several Participants listed on the allocation matrix will become Additional Settling Participants, including Comision Federal de Electricidad, Cargill Power Markets, LLC, and the Pinnacle West Companies (which include Arizona Public Service Company). We also note that it is conceivable that Participants that have not opted into the Settlement within five business days following Commission action on the Settlement may seek to do so at a later date. *See, e.g., San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,218 (2010) (granting motion to opt into similar settlements out of time).

that settlement.¹⁰⁶ By contrast, the PNM settlement allocated nearly 96 percent of the proceeds to the California Parties. (Additional Settling Participants accounted for the balance.) The significant disparity between the amount allocated to the California Parties and the amount allocated to Non-Settling Participants provides further support that SMUD's concerns are unwarranted. Although we do not know at this time the number of Participants that will opt into the instant Settlement, we do not see any reason why the same basic outcome should not result here. And, as discussed above, SMUD's allocated share is such a small fraction of the total cap that it is reasonable for us to conclude that SMUD will be allocated the full refund amount the Commission or a court ultimately decides is appropriate.

53. Further, SMUD has not explained why section 318 of the Restatement is relevant to this case beyond stating that the principle is equally applicable in cases involving contractual and statutory obligations. SMUD provides no support for its proposition, and we are uncertain why this contract principle necessarily applies to SMUD's concerns regarding refund shortfalls. There is a contract at issue here, namely, the Settlement itself; however, in each of the illustrations included in the Restatement section cited by SMUD, the obligee refers to one of the parties to the contract.¹⁰⁷ By contrast, Non-Settling Participants are not "obligees" within the meaning of the Restatement provision. Non-Settling Participants are not bound by the Settlement.¹⁰⁸ In any event, as discussed above, we find that SMUD's concerns about potential refund shortfalls to be unwarranted based on the facts and circumstances before us.

54. In addition, SMUD states that the Commission must fully protect the interests of Non-Settling Participants, citing to *SoCal Edison v. FERC*.¹⁰⁹ We believe that the

¹⁰⁶ See Joint Offer of Settlement filed by Public Service Company of New Mexico and the California Parties, Settlement and Release of Claims Agreement at Ex. A, Docket No. EL00-95-241, *et al.* (Feb. 12, 2010).

¹⁰⁷ See generally Restatement, § 318, Comments and Illustrations.

¹⁰⁸ See Settlement and Release of Claims Agreement at § 3.1; Joint Explanatory Statement at 14.

¹⁰⁹ See SMUD Comments at 11. We note that SMUD quotes *SoCal Edison v. FERC* out of context. Specifically, in *SoCal Edison v. FERC*, the court stated that the Commission could approve a contested settlement on the merits "or, if it were possible, *executing a severance* that would fully protect the objecting party's interests." *SoCal Edison v. FERC*, 162 F.3d at 119 (emphasis added). Thus, although SMUD excludes the relevant portion of the sentence, the sentence in full specifically refers to severance. As discussed herein, we approve the Settlement under *Trailblazer's* first prong, i.e., on the merits. We are not executing a severance.

interests of Non-Settling Participants, including SMUD, are fully protected, as discussed herein. Specifically, we explain that the rights of Non-Settling Participants are fully protected because the Settlement does not resolve any issues as to such Non-Settling Participants and that they can continue to pursue litigation against Sempra. Additionally, as we discuss above, we find that the Settlement provisions addressing the California Parties' responsibility to make up refund shortfalls adequately protects the right of Non-Settling Participants to receive whatever refunds the Commission or a court ultimately finds that they are owed under the FPA. Thus, we find that, contrary to SMUD's claims, the Settlement's provisions governing the California Parties' responsibility to make up refund shortfalls do not place Non-Settling Participants in a worse position than they would have been absent the Settlement.

55. For these reasons, we reject SMUD's request for clarification. We conclude that, under the Settlement, the interests of Non-Settling Participants are adequately insulated from potential shortfalls, and we find that it is reasonable for the settling parties to allocate the risks of covering shortfalls as provided for in the Settlement.

Conclusion

56. In conclusion, the Commission finds that the Settlement is just and reasonable and therefore conditionally approves it, as discussed in the body of this order.

The Commission orders:

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

By the Commission. Commissioners Spitzer and Moeller are not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.