

149 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

San Diego Gas & Electric Company

Docket No. EL00-95-279

v.

Sellers of Energy and Ancillary Services

Investigation of Practices of the California
Independent System Operator and the California
Power Exchange

Docket No. EL00-98-258

Puget Sound Energy, Inc.

Docket No. EL01-10-134

v.

Sellers of Energy and/or Capacity

American Electric Power Service Corporation

Docket No. EL03-137-045

Enron Power Marketing, Inc. and Enron Energy
Services Inc.

Docket No. EL03-180-074

California Independent System Operator
Corporation

Docket No. ER03-746-050

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

Docket No. EL02-71-047

v.

British Columbia Power Exchange Corp.

ORDER APPROVING CONTESTED SETTLEMENT

(Issued November 10, 2014)

1. In this order, the Commission approves a contested settlement filed on August 21, 2014 between the California Department of Water Resources, State Water Project (“SWP”) and the California Parties¹ (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 June 20, 2001 (Settlement Period),² as they relate to SWP. The settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement).³

2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.⁴ The Parties state that the Settlement became binding as of the execution date; however, some of the operative provisions only become effective as of, or in relation to, the Settlement Effective Date, which is the twenty-first Business Day after issuance of a Commission order approving the Settlement, regardless of whether such order is subject to rehearing or appeal, provided that such order has not been stayed pending such rehearing or appeal.⁵ Additionally, the Parties explain that the Settlement

¹ The California Parties are Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, and the Public Utilities Commission of the State of California. For purposes of the 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).

² Joint Explanatory Statement at 2.

³ On March 11, 2011, then-Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL00-95-000, documenting her decision, based on a memorandum from the Office of General Counsel’s General and Administrative Law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

⁴ 18 C.F.R. § 385.602 (2014).

⁵ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement at §1.74.

will terminate on the date of a final order rejecting the Settlement in whole or material part or accepting the Settlement with material conditions or modifications deemed unacceptable to any adversely affected Party.⁶ The Parties also state that the Settlement may terminate if the California Parties fail to receive consideration that they are due under it.⁷

3. The Parties state that the Settlement benefits customers by resolving claims for refunds and other remedies as between SWP and the California Parties relating to SWP's transactions in the Western energy markets during the Settlement Period.⁸ The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.⁹ 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.¹⁰

4. The Settlement states that SWP "disclaims" Commission jurisdiction over any aspect of the Settlement, but that the Parties have agreed to condition the Settlement on securing the Commission's approval to ensure the release of funds from CAISO and/or CalPX and to ensure that the Parties' respective claims pending before the Commission are fully resolved.¹¹

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

⁶ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement at § 2.3.

⁷ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement at § 4.3.

⁸ Joint Offer of Settlement at 5.

⁹ *Id.*

¹⁰ *Id.* (citing *Pub. Utils. Comm'n of the State of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002) and *Pub. Utils. Comm'n of the State of Cal. v. FERC*, No. 01-71051, slip op., at 3 (9th Cir. Oct. 23, 2006)).

¹¹ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at §§ 2.3.3, 3.2.4.

Background and Description of the Settlement

6. In 2000, the Commission instituted formal hearing procedures under section 206 of the Federal Power Act (FPA)¹² to investigate, among other things, the justness and reasonableness of public utility sellers' rates in the CAISO and CalPX markets in Docket Nos. EL00-95-000 and EL00-98-000.¹³ In 2002, the Commission directed its staff to commence a fact-finding investigation in Docket No. PA02-2-000 into the alleged manipulation of electric and natural gas prices in the West.¹⁴ In 2003, the Commission directed its staff to investigate in Docket No. IN03-10-000 anomalous bidding behavior and practices in Western energy markets.¹⁵ On the same day, the Commission issued two orders directing named entities to show cause why they should not be found to have participated in certain gaming practices¹⁶ or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.¹⁷

7. The Parties state that the Settlement resolves claims against SWP in the above-captioned proceedings.¹⁸ Any entity that directly sold or purchased energy through 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."¹⁹ To opt into the Settlement, a Participant must provide notice to the Commission, as well as serve notice to parties on the ListServes established for the Docket No. EL00-95 proceeding, no later

¹² 16 U.S.C. § 824e, *et seq.* (2012).

¹³ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange*, 92 FERC ¶ 61,172 (2000).

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

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

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

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

¹⁸ Joint Explanatory Statement at 2.

¹⁹ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at §§ 1.1, 1.48, 8.1.

than five business days following the Settlement Effective Date.²⁰ 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 have no right to obtain certain benefits of the Settlement, but will still be paid refunds, if any, to which they are ultimately determined to be due through continued litigation.²¹

8. The Parties state that the monetary consideration flowing from SWP in the Settlement totals \$26,599,321 before final adjustments.²² This amount will be funded from: (1) SWP's CAISO and CalPX receivables, estimated to be (\$720,927), and (2) the estimated interest on receivables of \$20,317,095 through March 31, 2013 (which will be updated through and including the projected date of distribution).²³ In addition, SWP will make a cash payment to CalPX in the amount of \$7,003,153, plus interest accruing on and after September 1, 2013, within 10 business days after the Execution Date.²⁴ SWP also transfers to the California Parties its entitlement to refunds on certain purchases made in the California markets during the Settlement Period.²⁵ A portion of the Settlement proceeds will be paid to CalPX to satisfy CAISO-computed refund offsets, and will constitute full satisfaction of SWP's liability for refund offsets it owes to other Participants in earlier settlements or that it will owe through future settlements.²⁶

9. The Settlement provides that certain of the California Parties will assume responsibility, subject to specified limitations, for: (1) any true-up of interest on SWP's receivables resulting from Commission determinations; (2) any refund amounts that SWP owes to Non-Settling Participants in certain proceedings for the Settlement Period; (3) any refund shortfall, receivables shortfall, or interest shortfall relating to SWP

²⁰ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at § 8.1.

²¹ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at §§ 1.46, 3.2, 5.5, 5.6, 8.1.

²² Joint Explanatory Statement at 13. The Settlement and Release of Claims Agreement Cover Sheet states that the Settlement proceeds are \$26,599,321.

²³ Joint Explanatory Statement at 13-14.

²⁴ Joint Explanatory Statement at 14.

²⁵ *Id.*; Settlement and Release of Claims Agreement at § 4.1.8.

²⁶ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at §§ 4.1.8.1, 4.7.

resulting from certain Commission determinations; (4) any third-party refund offsets (Fuel Cost Allowance, Emissions Offset, and Cost Offset) that the Commission or a court determines that SWP owes; (5) dispute resolution charges; and (6) any CalPX wind-up charges attributable to SWP that are assessed after March 21, 2012.²⁷

10. The Settlement includes a matrix that allocates the Settlement proceeds among Participants.²⁸ The proceeds will be distributed from the Settling Supplier Refund Escrow, the costs of which will be the responsibility of the California Parties, to each of the Settling Participants, except those who are Deemed Distribution Participants, and/or, in the case of amounts allocated to any Non-Settling Participants, allocated to the California utilities and/or CERS.²⁹ The obligation of any of the California Parties to make payments on behalf of SWP under the Settlement shall not exceed the total amount allocated and actually paid to that California Party as set forth under the Settlement.³⁰ The Settlement also states that the Commission's approval of the Settlement will authorize CAISO and CalPX to conform their books and records to reflect the distributions.³¹

11. The Parties explain that, in return for the specified consideration and subject to specified limitations, the Settlement resolves all claims between the California Parties on the one hand and SWP on the other, relating to transactions in the Western energy

²⁷ Joint Explanatory Statement at 14-15; Settlement and Release of Claims Agreement at §§ 4.1.5, 4.1.6, 4.7, 5.3, 5.6, 5.7.

²⁸ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at Ex. A.

²⁹ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 5.1, 5.2, 5.3, 5.5. Under the terms of the Settlement, Deemed Distribution Participants 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. Settlement and Release of Claims Agreement at §§ 1.18, 1.19.

³⁰ Joint Explanatory Statement at 15-16; Settlement and Release of Claims Agreement at § 5.8.

³¹ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at § 6.1.

markets during the Settlement Period for damages, refunds, disgorgement of profits, costs and attorneys' fees, or other remedies.³²

12. The Parties state that the Settlement provides for the California Parties and SWP to mutually release and discharge each other as of the Settlement Effective Date from all existing and future claims before the Commission and/or under the FPA for the Settlement Period that: (1) SWP or any California Party charged or collected unjust, unreasonable, or otherwise unlawful rates, terms, or conditions for electric capacity, energy, ancillary services, or transmission congestion in the Western energy markets during the Settlement Period; (2) SWP or any California Party manipulated the Western energy markets in any fashion, or otherwise violated any applicable tariff, regulation, law, rule, or order relating to the Western energy markets during the Settlement Period; or (3) any California Party is liable for payments to SWP for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.³³

13. In addition, the Parties state that the Settlement provides for the California Parties and SWP mutually to release each other from all past, existing, and future claims for civil damages and/or equitable relief concerning, pertaining to, or arising from allegations that: (1) SWP or any California Party charged or collected unjust, unreasonable, or otherwise unlawful rates, terms, or conditions for capacity, energy, ancillary services, or transmission congestion in the Western energy markets during the Settlement Period; (2) SWP or any California Party manipulated the Western energy markets in any fashion during the Settlement Period; (3) SWP or any California Party was unjustly enriched by the released claims or otherwise violated any applicable tariff, regulation, law, rule, or order relating to transactions in the Western energy markets during the Settlement Period; or (4) any California Party is liable for payments to SWP for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement Period.³⁴

³² Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at §§ 3.1, 7.1.1.

³³ Joint Explanatory Statement at 16-17; Settlement and Release of Claims Agreement at § 7.2.1.

³⁴ Joint Explanatory Statement at 17-18; Settlement and Release of Claims Agreement at § 7.3.1.

14. Additionally, the Parties release one another from claims arising from certain bilateral transactions during the Settlement Period.³⁵ Subject to certain limitations, Participants that elect to participate in the Settlement as Additional Settling Participants are deemed to provide and receive from SWP the releases that the California Parties provide and receive.³⁶

15. The Parties state that they would not object to the Commission assuring CAISO and CalPX that they will be held harmless for their actions to implement the Settlement.³⁷

Procedural Matters

16. Pursuant to Rule 602(f)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f)(2) (2014), initial comments on the Settlement were to be submitted no later than September 10, 2014, and reply comments were to be submitted no later than September 22, 2014. Initial comments were filed by CAISO and CalPX, either in support of or not opposing the Settlement. Reply comments were filed by the California Parties. On September 26, 2014, CalPX filed a motion to file supplemental comments. The California Parties filed an answer to the supplemental comments on October 1, 2014.

17. The Commission will accept CalPX's supplemental comments and the California Parties' answer to those supplemental comments because they have provided information that has assisted the Commission in its decision-making process.

Initial Settlement Comments

18. 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.³⁸ Accordingly, in its comments, CalPX requests that the following "hold harmless" language be incorporated into any Commission order approving the Settlement:

³⁵ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at § 7.4.

³⁶ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at §§ 7.5, 8.2.

³⁷ Joint Explanatory Statement at 18.

³⁸ CAISO Comments at 3-6; CalPX Comments at 2-5.

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.³⁹

CalPX states that this is the same "hold harmless" provision that the Commission has approved in other orders approving settlements.⁴⁰

19. In its comments, CAISO states that it interprets sections 4.1.8.1 and 4.7 of the Settlement, which address refund calculations and offset payments, to apply only to refunds distributed to SWP through other similar settlements, and not to impact CAISO's refund calculations, including refund offset determinations. CAISO states that if adjustments will need to be made to its calculations to reflect the application of these provisions, such adjustments would be made as part of the process for integrating settlements, which will occur after CAISO submits its refund rerun compliance filing. CAISO states that it has discussed this issue with the California Parties, who concurred with CAISO's interpretation.⁴¹

³⁹ CalPX Comments at 12.

⁴⁰ *Id.* at 11.

⁴¹ CAISO Comments at 6-7.

20. In its comments, CalPX states that it does not take a position on the Settlement with one exception, regarding section 5.2.2.2.⁴² That section provides, in relevant part, that approval of the Settlement constitutes the Commission's determination that the escrow established in connection with the PG&E Bankruptcy Proceedings⁴³ may be reduced by an amount equal to PG&E's share of the Settling Supplier Refunds. CalPX states that the Class 6 Escrow currently contains \$279.8 million, while CalPX has calculated that PG&E will owe the CalPX markets over \$290.5 million, in addition to nearly \$100 million that represents PG&E's current application of the interest shortfall in CalPX's markets (which amount will increase over time).⁴⁴ CalPX argues that recent developments impacting PG&E's finances, as well as potentially significant fines and damages that PG&E faces related to the San Bruno, California natural gas explosion incident, greatly increases the likelihood that other PG&E creditors will attempt to claim any such receivable.⁴⁵ Additionally, CalPX contends that the multitude of litigation and enforcement proceedings against PG&E arising from the San Bruno explosion has brought the sufficiency of the cash collateral in the Class 6 Escrow to the forefront at the same time PG&E seeks further disbursements from that account.⁴⁶

⁴² CalPX Comments at 2.

⁴³ "PG&E Bankruptcy Proceedings" refers to the proceedings associated with the voluntary bankruptcy petition filed under Chapter 11 of the United States Bankruptcy Code by PG&E on April 6, 2001, in the United States Bankruptcy Court for the Northern District of California, San Francisco Division, designated as Case No. 01-30923 (DM). *See* Settlement and Release of Claims Agreement at § 1.52. The escrow at issue is generally referred to as the "Class 6 Escrow" and in some documents as the "Disputed Claims Escrow." CalPX appends to its comments materials related to the PG&E Bankruptcy Proceedings.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* CalPX cites to the following items that it states significantly impact PG&E's finances and potential for insolvency: (1) CPUC's September 2, 2014 Presiding Officers' Decision; (2) PG&E's September 2, 2014 Form 8-K; (3) the July 29, 2014 federal grand jury indictment of PG&E with 28 counts; (4) a shareholder lawsuit accusing PG&E's officers and directors of violating their fiduciary duty in connection with the San Bruno incident; (5) PG&E's July 31, 2014 10-Q; and (6) Standard & Poor's rating of PG&E's long-term issuer credit of BBB. *Id.* at 5-6.

21. CalPX states that the Commission should defer to the Bankruptcy Court the issue of whether it is appropriate for further cash collateral in the Class 6 Escrow to be disbursed to PG&E under a settlement and, consequently, the Commission should strike that portion of section 5.2.2.2 providing for such a payment to PG&E or make that provision operative only upon the Bankruptcy Court approving such disbursement.⁴⁷ Alternatively, if the Commission declines to defer to the Bankruptcy Court on this issue, then CalPX states the Commission should determine that the Class 6 Escrow claims should not be reduced by payment to PG&E in an amount equal to PG&E's share of Settling Supplier Refunds in view of PG&E's current financial condition, the potentially significant fines and damages it faces, and the shortfall that a drawdown would engender. CalPX states, in that case, the Commission should strike the relevant portion of section 5.2.2.2 pursuant to such a determination.⁴⁸

Reply Comments

22. In their Reply Comments, the California Parties confirm that they agree that the Bankruptcy Court will determine whether funds are paid from the bankruptcy escrow, but they disagree with CalPX's suggestion to strike section 5.2.2.2.⁴⁹ Specifically, the California Parties posit that the Commission has previously stated that the process for releasing funds from the Class 6 Escrow always requires a decision from the Bankruptcy Court.⁵⁰ The California Parties state that CalPX is incorrect in asserting that the Commission's approval of the Settlement results in the release of such funds, and explain that section 5.2.2.2 does not authorize payments to PG&E from the Class 6 Escrow; rather, Commission approval of the Settlement is the first of a multi-step process.⁵¹ According to the California Parties, other steps include the settling supplier withdrawing its proof of claims and PG&E filing a reasonably noticed motion before the Bankruptcy Court seeking that court's approval to release the funds.⁵² Thus, the California Parties

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 9.

⁴⁹ Reply Comments at 2-3.

⁵⁰ *Id.* at 3 (citing *San Diego Gas & Elec. Co.*, 108 FERC ¶ 61,002, at P 36 (2004) (Williams Settlement Order)).

⁵¹ *Id.* at 6.

⁵² *Id.*

explain, it is the Bankruptcy Court that will make the determination whether to disburse funds from the Class 6 Escrow.

23. The California Parties further state that PG&E has sought Bankruptcy Court approval for drawdowns of the Class 6 Escrow in every settlement in which it has sought a cash payment.⁵³ The California Parties explain that the procedure was first established in the Williams Settlement Order, in which the Commission held, in response to a protest by CalPX, that Bankruptcy Court approval of that settlement was not required but that the Bankruptcy Court's approval was required prior to any disbursements from the Class 6 Escrow.⁵⁴ The California Parties state that the procedures established in the Williams Settlement Order and the underlying settlement are still in effect today, and that PG&E has followed those procedures.⁵⁵ According to the California Parties, PG&E will continue to follow that process for the instant Settlement, and that it will do so in connection with any future settlements in these proceedings.⁵⁶ The California Parties thus contend that CalPX will have an opportunity to argue before the Bankruptcy Court any appropriate bankruptcy-related concerns it has with the Settlement.⁵⁷ The California Parties also note that CalPX is currently opposing PG&E's motion to the Bankruptcy Court for the release of funds in connection with two earlier Commission-approved settlements.⁵⁸ Therefore, the California Parties argue, striking section 5.2.2.2 from the Settlement would not bolster CalPX's ability to have its objections heard, but instead eliminate one step in a process in which it has previously participated.⁵⁹

24. Next, the California Parties contend that the Commission should treat the Settlement as uncontested, because CalPX did not submit any evidence to support its objections. The California Parties assert that where a party contesting a settlement disputes a genuine issue of material fact, that party must submit an affidavit detailing any such dispute.⁶⁰ Should the Commission find that the Settlement is contested, the

⁵³ *Id.* at 6-7.

⁵⁴ *Id.* at 7.

⁵⁵ *Id.*

⁵⁶ *Id.* at 8.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 9 (citing 18 C.F.R. 385.602(f)(4) (2014)).

California Parties assert that the Commission's *Trailblazer* approach for analyzing contested settlements supports their contention that the Settlement should be approved.⁶¹ Specifically, the California Parties argue that the Commission: (1) can make a determination on the merits of the contested issue; (2) determine that the benefits of the Settlement outweigh the objections, and the contesting parties' interests are too attenuated; and (3) find that the Settlement provides an overall just and reasonable result.⁶² Finally, the California Parties contend that striking section 5.2.2.2 can jeopardize this and other settlements.⁶³

25. With respect to CalPX's and CAISO's request for "hold harmless" treatment, the California Parties state that they do not oppose such assurances. The California Parties also agree with CAISO's interpretation of section 4.1.8.1 and section 4.7.⁶⁴

Further Pleadings

26. In its supplemental comments, CalPX provides information regarding the potential investigations and fines facing PG&E that have occurred since CalPX submitted its initial comments. Specifically, CalPX references allegations of *ex parte* contacts between PG&E and the CPUC, potentially significant fines related to those communications, and a potential criminal investigation.⁶⁵ These allegations, CalPX states, underscore why the Bankruptcy Court was given the authority by PG&E and its creditors to determine if drawdowns from the Class 6 Escrow are warranted in the context of PG&E's financial position as a bankruptcy debtor. CalPX also refutes the California Parties' assertion that the Commission determination is an "essential" and "necessary" step in PG&E plan of reorganization, noting that the California Parties do not cite to anything in that plan to support the claim.⁶⁶ CalPX further argues that the California Parties are incorrect in claiming that CalPX failed to provide any evidence to support its objection to

⁶¹ *Id.* at 11 (citing *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998)).

⁶² *Id.*

⁶³ *Id.* at 12-13.

⁶⁴ *Id.* at 13.

⁶⁵ CalPX Supplemental Comments at 3-4.

⁶⁶ *Id.* at 5.

section 5.2.2.2, noting that the declaration of its Director of Operations it appended to its initial comments satisfied the Commission's requirements.⁶⁷

27. The California Parties then sought leave to respond to the Supplemental Comments. In their answer, the California Parties largely reiterate the points they made in their Reply Comments. The California Parties also point out that, although CalPX stated that it included the declaration of its Director of Operations, it failed to note that it was submitted as part of an 850-page attachment of Bankruptcy Court materials. They also note that CalPX did not cite or rely on that declaration in its comments.⁶⁸

Commission Determination

28. As discussed below, we conclude that the Settlement is contested by CalPX and thus disagree with the California Parties that the Settlement is uncontested. However, we find that CalPX's arguments are without merit and we therefore approve the Settlement as just and reasonable.

29. Although the California Parties argue that the Settlement should be viewed as uncontested because CalPX failed to raise a dispute as to a genuine issue of material fact, we find that CalPX has contested the Settlement. The Commission has deemed a settlement to be contested where, as here, parties have raised policy concerns.⁶⁹ In this case, we conclude that CalPX raises a policy concern about the effect of the process set forth in section 5.2.2.2 and the relationship between the Commission's approval of the Settlement and the disbursement of Class 6 Escrow funds. We therefore reject the California Parties' argument that we should treat the Settlement as uncontested.

30. Having found that the Settlement is contested, the Commission must next make an independent finding supported by substantial evidence on the record as a whole that the Settlement will establish just and reasonable rates, in order to approve it.⁷⁰ *Trailblazer* outlined several approaches the Commission can take in approving contested settlements: (1) if there is an adequate record, the Commission can make a decision on the merits of each contested issue; (2) even if individual aspects of an agreement might be problematic,

⁶⁷ *Id.* at 6-7.

⁶⁸ California Parties Answer at 4.

⁶⁹ *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 133 FERC ¶ 61,249, at PP 24-27 (2010) (treating a settlement as contested where a commenter had raised policy concerns).

⁷⁰ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

the Commission may be able to determine that the settlement as a package provides an overall just and reasonable result; or (3) the Commission may be able to find that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated. If the Commission determines that it cannot impose the settlement on contesting parties, severing the contesting parties might be an option.⁷¹ The Commission can 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.⁷²

31. We find that there is an adequate record to conclude that CalPX's arguments are without merit, and thus reject its arguments under *Trailblazer's* first prong. As an initial matter, section 5.2.2.2 does not mandate any release of the Class 6 Escrow funds. That is within the Bankruptcy Court's authority. The Commission's approval of a settlement such as this one starts the process, as set out in the Williams Settlement Order,⁷³ under which PG&E can request that the Bankruptcy Court disburse funds from the Class 6 Escrow. This interpretation of the provision is consistent with its language, i.e., that Commission approval of the Settlement constitutes its determination that the escrow established in connection with the PG&E Bankruptcy Proceedings *may* be reduced by an amount equal to PG&E's share of the Settling Supplier Refunds.⁷⁴ In our view, this does not constitute a determination that the Class 6 Escrow funds *must* be released. In other words, the Commission's approval of the Settlement permits PG&E to then petition the Bankruptcy Court regarding such disbursement.

32. Moreover, as the Parties point out, the language in section 5.2.2.2 has been part of a number of previous settlements between the California Parties and settling suppliers stretching back a decade. And as the Parties further note, CalPX has recently used this process in contesting PG&E's motion before the Bankruptcy Court to disburse Class 6

⁷¹ *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,342-44 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

⁷² *See* 18 C.F.R. § 385.602(h)(1)(i) (2014); *Trailblazer*, 85 FERC ¶ 61,345 at 62,342.

⁷³ Williams Settlement Order, 108 FERC ¶ 61,002 at P 36.

⁷⁴ Settlement and Release of Claims Agreement, § 5.2.2.2.

Escrow funds in connection with two earlier settlements.⁷⁵ CalPX has provided no convincing reason why the process is flawed. Nor has it provided any basis to suggest that it lacks any ability to contest a PG&E motion with the Bankruptcy Court regarding the disbursement of Class 6 Escrow funds. We therefore reject CalPX's argument that section 5.2.2.2 should be struck from the Settlement.

33. With respect to CalPX's and CAISO's request for "hold harmless" protection, we note that the California 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. We also note that the California Parties confirm CAISO's interpretation of sections 4.1.8.1 and 4.7 of the Settlement.⁷⁶ Consistent with prior orders addressing similar settlements,⁷⁷ 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.

34. Finally, we note that SWP's attempt to "disclaim" Commission jurisdiction over the Settlement is misplaced, as SWP cannot disclaim the Commission's statutory authority under the FPA.⁷⁸

⁷⁵ See Reply Comments at 8.

⁷⁶ *Id.* at 13; Joint Explanatory Statement at 18.

⁷⁷ See, e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 133 FERC ¶ 61,249, at P 17 (2010) (incorporating "hold harmless" language from earlier settlements); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 128 FERC ¶ 61,242, at P 19 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 128 FERC ¶ 61,002, at P 17 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 128 FERC ¶ 61,004, at P 21 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 126 FERC ¶ 61,007, at P 38 (2009) (same).

⁷⁸ See *supra* P 4.

The Commission orders:

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.