

125 FERC ¶ 61,345
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Jon Wellinohoff.

Duke Energy Trading and Marketing, L.L.C.	Docket No. EL03-152-002
Bonneville Power Administration	Docket No. EL03-141-002
California Power Exchange	Docket No. EL03-143-002
Cargill-Alliant, L.L.C.	Docket No. EL03-144-002
City of Anaheim, California	Docket No. EL03-145-002
City of Azusa, California	Docket No. EL03-146-002
City of Glendale, California	Docket No. EL03-147-002
City of Pasadena, California	Docket No. EL03-148-002
City of Riverside, California	Docket No. EL03-150-002
Coral Power, L.L.C.	Docket No. EL03-151-002
Dynegy Power Marketing, Inc., Dynegy Power Corp., El Segundo Power L.L.C., Long Beach Generation L.L.C., Cabrillo Power I, L.L.C., and Cabrillo Power II, L.L.C.	Docket No. EL03-153-002
Enron Power Marketing, Inc., and Enron Energy Services, Inc.	Docket No. EL03-154-002
FP&L Energy	Docket No. EL03-155-002
Los Angeles Department of Water and Power	Docket No. EL03-157-002

Northern California Power Agency	Docket No. EL03-161-002
PGE Energy Services	Docket No. EL03-164-002
Public Service Company of Colorado	Docket No. EL03-167-002
Public Service Company of New Mexico	Docket No. EL03-168-002
Salt River Project Agricultural Improvement and Power District	Docket No. EL03-171-002
Sierra Pacific Power Company	Docket No. EL03-174-002
TransAlta Energy Marketing (U.S.), Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-176-002
Tucson Electric Power Company	Docket No. EL03-177-002
Western Area Power Administration	Docket No. EL03-178-002
American Electric Power Services Corporation	Docket No. EL03-137-002
Aquila Merchant Services, Inc.	Docket No. EL03-138-003
Arizona Public Service Company	Docket No. EL03-139-002
Automated Power Exchange, Inc.	Docket No. EL03-140-002
California Department of Water Resources	Docket No. EL03-142-002
City of Redding, California	Docket No. EL03-149-002
Idaho Power Company	Docket No. EL03-156-002
Mirant Americas Energy Marketing, L.P., Mirant California, L.L.C., Mirant Delta, L.L.C., and Mirant Potrero, L.L.C.	Docket No. EL03-158-002
Modesto Irrigation District	Docket No. EL03-159-002
Morgan Stanley Capital Group	Docket No. EL03-160-002

Pacific Gas and Electric Company	Docket No. EL03-162-002
PacifiCorp	Docket No. EL03-163-002
Portland General Electric Company	Docket No. EL03-165-002
Powerex Corporation (f/k/a British Columbia Power Exchange Corp.)	Docket No. EL03-166-002
Puget Sound Energy, Inc.	Docket No. EL03-169-002
Reliant Resources, Inc., Reliant Energy Power Generation, and Reliant Energy Services, Inc.	Docket No. EL03-170-002
San Diego Gas & Electric Company	Docket No. EL03-172-002
Sempra Energy Trading Corporation	Docket No. EL03-173-002
Southern California Edison Company	Docket No. EL03-175-002
Williams Energy Services Corporation	Docket No. EL03-179-002
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-180-003
Aquila, Inc.	Docket No. EL03-181-003
City of Glendale, California	Docket No. EL03-182-002
City of Redding, California	Docket No. EL03-183-002
Colorado River Commission	Docket No. EL03-184-002
Constellation Power Source, Inc.	Docket No. EL03-185-002
Coral Power, L.L.C.	Docket No. EL03-186-002
El Paso Merchant Energy, L.P.	Docket No. EL03-187-002
Eugene Water and Electricity Board	Docket No. EL03-188-003
Idaho Power Company	Docket No. EL03-189-002

Koch Energy Trading, Inc.	Docket No. EL03-190-002
Las Vegas Cogeneration, L.P.	Docket No. EL03-191-002
MIECO	Docket No. EL03-192-002
Modesto Irrigation District	Docket No. EL03-193-002
Montana Power Company	Docket No. EL03-194-002
Morgan Stanley Capital Group	Docket No. EL03-195-002
Northern California Power Agency	Docket No. EL03-196-002
PacifiCorp	Docket No. EL03-197-003
PECO	Docket No. EL03-198-002
Powerex Corporation (f/k/a British Columbia Power Exchange Corporation)	Docket No. EL03-199-002
Public Service Company of New Mexico	Docket No. EL03-200-002
Sempra Energy Trading Corporation	Docket No. EL03-201-002
TransAlta Energy Marketing (U.S.), Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-202-002
Valley Electric Association, Inc.	Docket No. EL03-203-002
Portland General Electric Company	Docket No. EL02-114-005
Enron Power Marketing, Inc.	Docket No. EL02-115-006

ORDER CONDITIONALLY APPROVING
CONTESTED SETTLEMENT AGREEMENT

(Issued December 22, 2008)

1. On August 11, 2008, a number of entities (the Parties) filed a Joint Offer of Settlement (Settlement Agreement) in the captioned proceedings. The Settlement Agreement proposes to distribute funds that are currently in, or may in the future be paid into, Commission-controlled accounts to various entities in accordance with an Allocation Matrix that is set forth in Exhibit B to the Settlement Agreement. The presiding Settlement Judge certified the Settlement Agreement to the Commission on September 18, 2008 as a contested settlement.¹ In this order, the Commission conditionally approves the Settlement Agreement.

I. Background

2. Following severe dysfunctions in the western United States power markets, the Commission established what are commonly called the “Gaming and Partnership Proceedings” on June 25, 2003. In the Gaming and Partnership Proceedings, the Commission issued show cause orders to a total of 67 entities, directing these entities to show cause why they should not be found to have engaged in certain gaming practices in violation of the tariffs of the California Independent System Operator Corporation (CAISO) or the California Power Exchange.²

3. Pursuant to Commission-approved settlements negotiated by the Commission’s Trial Staff and several of the named entities, the Commission began receiving monies that resolved each of these entities’ liability under the Show Cause Orders. The Chief Administrative Law Judge then consolidated into one proceeding all of the issues regarding the appropriate distribution of these settlement proceeds to parties that were harmed by the alleged conduct of these entities.³ Thus began “Phase II” or the “Distribution Phase” of the Gaming and Partnership Proceedings.

4. In addition, a series of settlement conferences beginning in 2005 resulted in a number of settlements among previously non-settling parties. The first such

¹ *Duke Energy Trading and Marketing, L.L.C.*, 124 FERC ¶ 63,021 (2008) (Certification).

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

³ *Duke Energy Trading and Marketing, L.L.C., et al.*, Docket No. EL03-152-002, *et al.* (Dec. 22, 2003).

settlement, among the California Parties,⁴ Enron Power Marketing, Inc., and the Commission's former Office of Market Oversight and Investigation (OMOI),⁵ was approved by the Commission in November 2005.⁶ Several additional settlements followed and, in January 2008, the final settlements were approved by the Commission.⁷ The Commission recently issued five orders on rehearing that had been pending in several of the underlying Gaming and Partnership Proceedings.⁸ The Commission subsequently issued a further order on rehearing in Docket Nos. EL03-166-004 and EL03-199-004.⁹

5. In November 2007, Trial Staff initiated a settlement process to determine whether monies paid to the Commission by named entities as part of their respective settlements could be divided among those parties harmed by the alleged wrongdoing rather than resorting to litigation.¹⁰ A number of parties actively participated in the subsequent settlement talks that were led by Trial Staff. Finally, on August 11, 2008, the Parties filed the instant Settlement Agreement.

⁴ The California Parties consist of: Pacific Gas & Electric Co.; Southern California Edison Co.; San Diego Gas & Electric Co.; the People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General; the California Department of Water Resources; the California Electricity Oversight Board; and the California Public Utility Commission.

⁵ OMOI was subsequently reorganized and is now the Office of Enforcement.

⁶ *San Diego Gas & Electric Co., et al.*, 113 FERC ¶ 61,171 (2005).

⁷ *Enron Power Marketing, Inc.*, 122 FERC ¶ 61,015 (2008); *Enron Power Marketing, Inc. and Enron Energy Services, Inc.*, 122 FERC ¶ 61,002 (2008).

⁸ *See Modesto Irrigation Dist., et al.*, 125 FERC ¶ 61,173 (2008); *Modesto Irrigation Dist.*, 125 FERC ¶ 61,174 (2008); *Aquila Merchant Svcs., et al.*, 125 FERC ¶ 61,175 (2008); *Coral Power, L.L.C., et al.*, 125 FERC ¶ 61,176 (2008); *Arizona Pub. Serv. Co.*, 125 FERC ¶ 61,177 (2008).

⁹ *Powerex Corp.*, 125 FERC ¶ 61,218 (2008).

¹⁰ As Trial Staff explains in its initial comments, it was advised by OMOI that certain monies received by the Commission as a result of enforcement actions could also be considered for distribution.

II. The Settlement Agreement

6. The Settlement Agreement provides for the distribution of approximately \$16.4 million currently held by the Commission to the “Settlement Fund Recipients,” i.e., certain entities that will receive a set percentage of “Settlement Funds” in accordance with the terms of the Settlement Agreement. The Settlement Funds are those monies paid into a Commission-held account as a result of certain approved settlements that are listed in Exhibit A to the Settlement Agreement (Covered Settlements).¹¹ If additional monies are paid to the Commission following the resolution of pending rehearing requests or petitions for judicial review, such additional funds will also be distributed to Settlement Fund Recipients.¹²

7. A key feature of the Settlement Agreement is the “Allocation Matrix,” which is a table negotiated by the settling parties that establishes the percentages for the allocation of the Settlement Funds.¹³ The Settlement Agreement provides that each Settlement Fund Recipient will receive the percentage allocation set forth in the Allocation Matrix so long as it does not oppose the Settlement Agreement and complies with its requirements. If, however, a Settlement Fund Recipient decides to challenge the Settlement Agreement or does not otherwise comply with its requirements, that Settlement Fund Recipient will no longer be eligible to receive any of the Settlement Funds, and its portion will be redistributed among the remaining Settlement Fund Recipients on a *pro rata* basis.¹⁴ The Settlement Agreement provides that, prior to this allocation, there will be an upfront distribution to four entities.¹⁵

¹¹ The vast majority (24) of the Covered Settlements are those entered into in the Gaming and Partnership Proceedings. Seven of the Covered Settlements were entered into in the proceedings initiated by the Commission to investigate market dysfunction in California (Global Settlements).

¹² As noted above, we recently issued five rehearing orders in several of the underlying proceedings, which will result in the release of additional Settlement Funds to be allocated in accordance with the Settlement Agreement.

¹³ The Allocation Matrix is Exhibit B to the Settlement Agreement.

¹⁴ Settlement Agreement at § 2.2.

¹⁵ *Id.* § 2.4. The four entities are APX, Inc., City of Anaheim, City of Riverside, and City of Azusa.

8. The Settlement Agreement provides that if future Settlement Funds are paid into the Commission's settlement funds account, the Commission shall distribute such future funds among the Settlement Fund Recipients in accordance with the Allocation Matrix (after taking into account any necessary adjustments that are detailed in the Settlement Agreement).¹⁶ Further, if the Commission or a court subsequently determines that an entity is no longer required to provide the full amount of settlement funds under a Covered Settlement, then the amount required to be paid must be allocated according to the percentages established in the Allocation Matrix.¹⁷ If, on the other hand, the Commission or a court determines that an entity must pay more than what is provided for in the applicable Covered Settlement, then the amount set forth in Exhibit A must be allocated pursuant to the Allocation Matrix, with any additional amount paid as directed by the Commission.¹⁸

9. The Settlement Agreement states that it is intended to resolve only the allocation of Settlement Funds received by the Commission as part of the Covered Settlements (and any future settlement funds, as discussed above). Entities not designated as Settlement Fund Recipients and that do not object to the Settlement Agreement "shall be deemed to have forfeited any past, present or future claim to receive a portion of the Settlement Funds allocated by this Settlement."¹⁹

10. The Settlement Agreement provides that all Parties and other Settlement Fund Recipients retain their rights to challenge issues, or to oppose such challenges, related to the Covered Settlements that are not expressly resolved by this Settlement Agreement.²⁰ This includes pursuing requests for rehearing or judicial review of Commission orders related to the Covered Settlements. Nothing in the Settlement Agreement constitutes a waiver of any claim or defense that any Party or Settlement Fund Recipient may assert in any matters or proceedings before courts or the Commission, including arguments that such Party or Settlement Fund Recipient is not subject to Commission jurisdiction.

¹⁶ *Id.* § 3.1.

¹⁷ *Id.* § 3.2.

¹⁸ *Id.*

¹⁹ *Id.* § 4.1.

²⁰ *Id.* § 5.1.

11. The Settlement Agreement states that the Parties agree to cooperate in the preparation and submission necessary to obtain Commission approval of the Settlement Agreement, and that the Settlement Agreement shall terminate on the date of a final Commission order not approving the Settlement Agreement in whole or in material part, or accepting the Settlement Agreement with material modification deemed unacceptable to any adversely affected Party or Settlement Fund Recipient.²¹ The Settlement Agreement discusses the process that will occur should the Commission reject or materially modify the Settlement Agreement. If the Commission approves the Settlement Agreement in full, it will become binding upon each of the Parties and other Settlement Fund Recipients on the Settlement Effective Date, regardless of any objections that may have been raised. Approval of the Settlement Agreement will not have the effect of modifying or amending or giving rights to third parties with respect to the Covered Settlements. The Parties additionally agree not to unilaterally seek modification of the Settlement.

III. Comments on the Settlement Agreement

A. Initial Comments

12. Initial comments supporting the Settlement Agreement were filed by Trial Staff and Indicated Parties.²² Initial comments opposing the Settlement Agreement were filed by Northern California Power Agency (NCPA).

13. In its initial comments, Trial Staff urges that the Settlement Agreement be certified, explaining that it was the result of extensive settlement talks among a broad and diverse group of participants. Trial Staff argues that approval of the Settlement Agreement will promote efficiency and preserve Commission resources. Indicated Parties argue that the Settlement Agreement is fair and reasonable and in the public interest. Indicated Parties state that approval of the Settlement Agreement will prevent costly litigation.

14. NCPA filed comments opposing the Settlement Agreement, complaining that the Allocation Matrix is a “black box” that fails to explain why settling parties listed in the matrix are entitled to allocated amounts.²³ NCPA also notes that the

²¹ *Id.* § 6.1.

²² Indicated Parties are: Avista Corporation, Puget Sound Energy, Inc., IDACORP Energy, LP Idaho Power Company, and Portland General Electric Company.

²³ NCPA Comments at 8-9.

Settlement Agreement does not contain a provision that addresses the rights of non-settling parties if the Settlement Agreement, or related agreements, are rejected or modified on rehearing or appeal.

15. NCPA states that the “most important reason why” the Settlement Agreement will not work “is that it assumes that Commission decisions that have not yet been made will be made in accordance with the desires and positions of the [California Parties], and disposes of money consistent with those positions, without the potential of recapture” if those positions are rejected.²⁴ NCPA asserts that the legal standard for approving contested settlements has not been met in this case, and that the Commission lacks substantial evidence to approve the Settlement Agreement.

16. NCPA argues that the Settlement Agreement allows the California Parties to “double dip.”²⁵ NCPA explains that the California Parties “have already taken the lion’s share of the money” in the California Refund Proceedings “before any of it was allocated to these Phase II dockets.”²⁶ NCPA notes that, under the Settlement Agreement, the California Parties will receive approximately 73 percent of the Phase II settlement funds, and that “[t]his is simply an add-on to the amounts they got” under certain of the Global Settlements.²⁷ Meanwhile, parties that have not yet settled or agreed to the Allocation Matrix will get nothing. According to NCPA, this amounts to “double dipping” by allocating to the Settlement Fund Recipients a portion of the Global Settlement funds that were expressly reserved for non-settling parties and depriving those non-settling parties their set-aside.²⁸

17. NCPA also complains that all of the settlements reached by the California Parties only allocated money to net purchasers in the California spot markets and not to those such as NCPA “who bought energy in expensive hours while doing

²⁴ *Id.* at 11.

²⁵ *Id.* at 17-28.

²⁶ *Id.* at 20.

²⁷ *Id.* at 27.

²⁸ NCPA cites to a number of the Global Settlements and Commission orders approving them that contain language regarding the rights of non-settling parties, including the setting aside of unallocated settlement funds. NCPA Comments at 22-26.

their best to provide power to the markets when they could do so, or to those purchasing in any of the non-spot markets.”²⁹ NCPA also describes the harm it suffered as a result of participating in the spot markets, as well as in bilateral transactions. Further, NCPA states that the issue of whether the methodology for distributing refunded monies to only “net” buyers is still pending before the Commission.³⁰

18. In addition, NCPA proposes an alternative distribution mechanism under which disgorged monies would be allocated to entities that purchased power in non-organized markets during the “meltdown” period, which in NCPA’s view, would be fairer than the Settlement Agreement’s “black box” mechanism.³¹

19. NCPA notes that the California investor-owned utilities have been found to have manipulated the markets and violated the CAISO tariff and they therefore should be precluded from receiving such a significant share of the Settlement Funds.

20. NCPA also states that, “having chosen to forego the amounts that might be available had it participated in the proposed settlement and to oppose the settlement, it will continue to be attacked by the [California Parties] and that those entities will urge that NCPA’s protest be dismissed.”³² NCPA goes on to describe arguments raised by the California Parties on rehearing of the Commission’s approval of a settlement between Trial Staff and NCPA in Docket No. EL03-196.³³

²⁹ *Id.* at 35-36.

³⁰ *Id.* at 39-41 (citing pleadings filed on December 4, 2007 in Docket Nos. EL00-95-164 and EL00-98-184).

³¹ *Id.* at 43-44.

³² *Id.* at 47.

³³ *See Northern Cal. Power Agency*, 108 FERC ¶ 61,112 (2004) (approving contested settlement between Trial Staff and NCPA). The Commission recently addressed the California Parties’ rehearing request in *Coral Power, L.L.C., et al.*, 125 FERC ¶ 61,176 (2008).

B. Reply Comments

21. Reply comments were timely filed by Trial Staff, Indicated Parties, the California Parties, Constellation NewEnergy, Inc. (Constellation), and Salt River Agricultural and Improvement District (Salt River Project), all of which are opposed to NCPA's Initial Comments.³⁴ All of the reply comments assert that NCPA failed to raise a genuine issue of material fact and failed to submit the affidavit demonstrating such issue in accordance with Rule 602(f)(4). Other arguments raised in the reply comments are noted below.

22. In its reply comments, Trial Staff also argues that the Settlement Agreement could be certified by the ALJ in accordance with at least two of the four prongs that the Commission established for certifying contested settlements in its *Trailblazer* decision,³⁵ because it could make a merits decision on each contested issue or it could determine that the overall result of the Settlement Agreement is just and reasonable.

23. In their reply comments, Indicated Parties state that NCPA's legal arguments are without merit, and NCPA's arguments regarding the "net versus gross" question is not at issue in the Gaming and Partnership Proceedings and that issue should not prevent certification. Finally, Indicated Parties explain that there is nothing inherently wrong with a "black box" settlement.

24. Constellation takes issue with NCPA's argument that the pending "net versus gross" issue should preclude certification, and states that NCPA has not demonstrated that the allocation of monies under the Settlement Agreement was based on such a distinction. Even so, Constellation argues that it is consistent with earlier Commission settlement orders to allocate the settlement funds to net buyers rather than net sellers.³⁶

³⁴ Californians for Renewable Energy (CARE) filed untimely reply comments in support of NCPA's comments. These comments were not accepted by the Settlement Judge. *See* Certification at n.15.

³⁵ *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,005 (1999) (*Trailblazer*).

³⁶ Constellation Reply Comments at 11 (citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 113 FERC ¶ 61,171, at P 32 (2005) (approving settlement agreement)).

25. Salt River Project notes that the Commission often approves “black box” settlements, contrary to NCPA’s complaint that the Settlement Agreement is such a “black box.”

C. NCPA’s Motion for Clarification

26. Following the Settlement Judge’s certification of the Settlement Agreement, NCPA filed a motion for clarification of its comments. In its motion, NCPA argues that its comments addressed legal and policy issues, and not factual ones. NCPA raises several issues that it claims are matters of law and policy. NCPA states that because these issues are not factual, Rule 602 does not require NCPA to submit an affidavit. However, NCPA argues that its legal and policy issues are not waived because it filed comments and, therefore, rejection of the Settlement Agreement is warranted until those issues are decided.

27. Trial Staff filed an answer, urging the Commission to reject the motion for clarification and arguing that the four issues raised by NCPA address factual issues. CARE filed an answer in support of NCPA’s motion for clarification.

IV. Commission Determination

A. Procedural Matters

28. We reject NCPA’s motion to clarify its comments. The Commission’s rules governing comment periods provide an ample opportunity for parties to air their concerns about a settlement agreement. NCPA submitted initial comments, and that vehicle should have clearly identified NCPA’s concerns. Moreover, it is not clear to whom the motion for clarification is addressed, particularly because the Settlement Judge has already certified the Settlement Agreement to the Commission. Regardless of whether the motion was directed to the Settlement Judge or the Commission, NCPA’s action constitutes an unusual procedural step that is contemplated neither in the Commission’s rules nor in practice. Because we are rejecting NCPA’s motion, we need not address Trial Staff’s and CARE’s answers.

B. Substantive Matters

29. When a settlement is contested, the Commission “must make an independent finding supported by ‘substantial evidence on the record as a whole’ that the proposal will establish ‘just and reasonable’ rates.”³⁷ Rule 602(h)(1)(i) of

³⁷ *Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974); *Trailblazer*, 85 FERC at 62,339.

the Commission's settlement rules provides that the Commission may decide the merits of the contested issues if the record contains substantial evidence upon which to base a reasoned decision or the Commission finds that there is no genuine issue of material fact.³⁸ In *Trailblazer*, we outlined four scenarios under which we may approve contested settlements: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission determines that the settlement provides an overall just and reasonable result; (3) the Commission determines that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated; and (4) the Commission determines that the contesting parties can be severed.³⁹ Consistent with *Trailblazer*, we find that NCPA's contentions lack merit, as discussed below, and that the overall result of the Settlement Agreement is just and reasonable.

30. As an initial matter, we note that the Settlement Agreement was the product of intensive negotiations involving Trial Staff and a broad and diverse group of participants from several western states, representing a number of different interests. The resulting Settlement Agreement is widely supported, not only by Trial Staff, but by the numerous entities that participated in these negotiations. As the Certification notes, entities in seven western states are signatories to the Settlement Agreement.⁴⁰ Indeed, only one entity that participated in the settlement discussions (but did not become a signatory to the resulting Settlement Agreement) – NCPA – opposes the Settlement Agreement.⁴¹

31. Broad support by itself does not justify approving a contested settlement as just and reasonable, and we therefore address NCPA's opposition to the Settlement Agreement. We note at the outset that NCPA failed to comply with the Commission's regulations requiring an entity opposing a settlement agreement to

³⁸ 18 C.F.R. § 385.602(h)(1)(i) (2008).

³⁹ *Trailblazer*, 85 FERC, at 62,342-45.

⁴⁰ Certification at P 32.

⁴¹ Although NCPA claims that other entities oppose the Settlement Agreement, it has not presented evidence of other such entities nor did any such entity file comments opposing the Settlement Agreement. While CARE filed comments in support of NCPA (which have not been accepted, as noted above), it did not participate in settlement discussions. The Commission also finds that interested parties had more than adequate notice of the settlement proceedings resulting in the Settlement Agreement.

submit an affidavit demonstrating that there is an issue of material fact.⁴² Because NCPA did not include such an affidavit in its comments, we can only find that there is no genuine issue of material fact in this case. Accordingly, we can, under Rule 602(h)(1)(i), make a merits decision on the contested issues.

32. NCPA complains that the Allocation Matrix is a “black box.” The Allocation Matrix is certainly a product of compromise, particularly given the number and diversity of participating entities, as well as the nature of settlement negotiations in general. The Commission’s role, however, is to ensure that the resulting rate is just and reasonable, even if the process for arriving at that final product may result from negotiated compromise. For the reasons discussed herein, we find that the overall result is just and reasonable.

33. We disagree with NCPA that the pending status of the “net versus gross” issue it raises in its comments should prevent certification and approval of the Settlement Agreement. Indeed, as NCPA itself has noted and as discussed above, the Settlement Agreement is in some respects a “black box” and the result of negotiation and compromise. Accordingly, we do not find that that approving this Settlement Agreement while the “net versus gross” issue is pending would lead to an unjust and unreasonable result.⁴³

34. We find that NCPA’s argument that the California Parties are “double dipping” into monies reserved for non-settling parties in the covered Global Settlements is without merit. First, a number of entities that had previously elected not to opt into one or more of the Global Settlements have either signed the Settlement Agreement or are Settlement Fund Recipients that do not oppose it.⁴⁴ Further, these settlements explicitly provided that the California Parties (or, in some cases, other entities) would assume the risk of shortfalls should the Commission determine non-settling parties were owed monies under the Global Settlements. The Settlement Agreement does not alter this fundamental component of the underlying Global Settlements. Given the assumption of risk by the California Parties (or, in some cases, by other entities), the ability of non-

⁴² See 18 C.F.R. § 385.602(f)(4) (2008).

⁴³ We emphasize that we are not deciding the “net versus gross” issue in this order.

⁴⁴ For example, several municipal entities that are Parties to the Settlement Agreement or are Settlement Fund Recipients had not opted into one or more of the Global Settlements, although they would have been allocated settlement funds had they opted into them, and were therefore non-settling parties.

settling parties to obtain monies under the Global Settlements is not foreclosed by the Settlement Agreement. Further, while the Global Settlements did set aside monies for non-settling parties, there was no guarantee that non-settling parties would ultimately recover any such funds.⁴⁵ Moreover, if NCPA (or other non-settling party) still has an available legal remedy to pursue with respect to a Covered Settlement, it is free to do so. The Settlement Agreement does not in any way alter the rights, if any, of NCPA or any other non-settling party to seek Commission or judicial relief with respect to the merits of any proceeding underlying a Covered Settlement. Finally, the Settlement Agreement is the result of a negotiated compromise involving a large number of parties representing a variety of interests, including entities that had not opted into one or more of the covered Global Settlements. Despite these divergent interests, the Parties concluded that the California Parties should be allocated a portion of the Settlement Funds that come from the covered Global Settlements. This proposal is just and reasonable. As discussed above, non-settling parties retain any rights they may have to obtain monies under a proceeding underlying the Global Settlements. Accordingly, there is no reason to require the Parties to exclude the California Parties from the allocation of this portion of the Settlement Funds.

35. We need not address NCPA's claim that the California investor-owned utilities should be barred from receiving the "lion's share" of the Settlement Funds because of their own behavior. The Settlement Agreement does not address, and does not need to address, the behavioral problems that occurred in the western power markets and who was responsible for them. The Settlement Agreement is limited in scope to allocating monies received under the Covered Settlements to various entities, including the California Parties.⁴⁶

36. We also find that the concerns NCPA raised regarding the matters in Docket No. EL03-196 are not relevant to our decision whether to approve the Settlement Agreement.⁴⁷ The Commission recently issued an order addressing rehearing requests in that docket.⁴⁸

⁴⁵ We emphasize that this order does not purport to address whether NCPA or other non-settling parties are owed monies under a proceeding underlying the Global Settlements.

⁴⁶ We also need not address NCPA's proposed alternative distribution mechanism. We are approving the Settlement Agreement, including the Allocation Matrix, as just and reasonable.

⁴⁷ See NCPA Comments at 47.

⁴⁸ See *Coral Power, L.L.C., et al.*, 125 FERC ¶ 61,176 (2008).

37. Finally, we find that the allocation of the Settlement Funds under the Settlement Agreement will preserve the resources of the Commission and the numerous parties (most of whom are signatories to the Settlement Agreement) that were affected by these proceedings, and will prevent potentially costly litigation that could extend these proceedings even further into the future.

38. In sum, we find that the Settlement Agreement is just and reasonable and we therefore approve it. It is the product of substantial negotiations involving a diverse group of participants, will preserve Commission resources, and will reduce costly litigation going forward. Moreover, we find that NCPA has not raised a genuine issue of material fact, and that its substantive arguments are without merit.

39. Section 7.5 of the Settlement Agreement provides that the Parties agree not to seek modification to the agreement unilaterally. However, the Explanatory Statement explains that “[o]nce approved, the Parties intend for the Settlement to not be subject to unilateral changes by any Party to the Settlement *or any Settlement Fund Recipient*.”⁴⁹ Our review of the Allocation Matrix indicates that not all of the Settlement Fund Recipients are Parties to the Settlement Agreement.⁵⁰ In light of *Maine Pub. Util. Comm’n v. FERC*, 520 F.3d 464, 477-78 (D.C. Cir. 2008), the Commission cannot accept the standard of review as currently written. As such, the Settlement Agreement is approved conditioned on the Parties revising the standard of review applicable to non-settling Settlement Fund Recipients.⁵¹ An acceptable substitute would be the “most stringent standard permissible under applicable law.” The Parties are directed to submit a compliance filing consistent with this precedent within 30 days of the date of this order.

40. The Commission’s conditional approval of this Settlement Agreement does not constitute approval of, or precedent regarding, any principle or interest in these proceedings.

⁴⁹ Explanatory Statement at 8 (emphasis added).

⁵⁰ Specifically, several municipal entities that are designated as Settlement Fund Recipients under the Allocation Matrix have not signed the Settlement Agreement. *See also* Explanatory Statement at n.1.

⁵¹ The Settlement Agreement is silent as to the standard of review applicable to non-settling third parties that are not Settlement Fund Recipients.

The Commission orders:

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

(B) The Parties must submit a compliance filing within 30 days of the date of the issuance of this order modifying the standard of review applicable to non-settling Settlement Fund Recipients.

By the Commission. Commissioner Kelly and Wellinghoff concurring in part with a separate joint statement attached.
Commission Moeller not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix: List of Parties and Other Settlement Fund Recipients

APX, Inc.
Arizona Public Service Company
Avista Corporation
Bonneville Power Administration
California Polar Power Brokers
City and County of San Francisco
City of Anaheim
City of Banning
City of Colton
City of Riverside
City of Santa Clara
City of Tacoma
Constellation New Energy Inc.
Idacorp Energy LLC
Pacific Gas and Electric Company
Pinnacle West
Port of Seattle
Portland General Electric Company
Powerex Corp.
Public Service Company of New Mexico
Puget Sound Energy
Sacramento Municipal Utility District
Salt River Project Agricultural and Improvement District
San Diego Gas & Electric Company
Snohomish Public Utility District
Southern California Edison Company
State of Montana
State Water Contractors
The Metropolitan Water District of Southern California
Tucson Electric Power Company
Wah Chang
Western Area Power Administration

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Duke Energy Trading and Marketing, L.L.C.	Docket No. EL03-152-002
Bonneville Power Administration	Docket No. EL03-141-002
California Power Exchange	Docket No. EL03-143-002
Cargill-Alliant, L.L.C.	Docket No. EL03-144-002
City of Anaheim, California	Docket No. EL03-145-002
City of Azusa, California	Docket No. EL03-146-002
City of Glendale, California	Docket No. EL03-147-002
City of Pasadena, California	Docket No. EL03-148-002
City of Riverside, California	Docket No. EL03-150-002
Coral Power, L.L.C.	Docket No. EL03-151-002
Dynegy Power Marketing, Inc., Dynegy Power Corp., El Segundo Power L.L.C., Long Beach Generation L.L.C., Cabrillo Power I, L.L.C., and Cabrillo Power II, L.L.C.	Docket No. EL03-153-002
Enron Power Marketing, Inc., and Enron Energy Services, Inc.	Docket No. EL03-154-002
FP&L Energy	Docket No. EL03-155-002
Los Angeles Department of Water and Power	Docket No. EL03-157-002
Northern California Power Agency	Docket No. EL03-161-002
PGE Energy Services	Docket No. EL03-164-002
Public Service Company of Colorado	Docket No. EL03-167-002

Public Service Company of New Mexico	Docket No. EL03-168-002
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Sierra Pacific Power Company	Docket No. EL03-174-002
TransAlta Energy Marketing (U.S.), Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-176-002
Tucson Electric Power Company	Docket No. EL03-177-002
Western Area Power Administration	Docket No. EL03-178-002
American Electric Power Services Corporation	Docket No. EL03-137-002
Aquila Merchant Services, Inc.	Docket No. EL03-138-003
Arizona Public Service Company	Docket No. EL03-139-002
Automated Power Exchange, Inc.	Docket No. EL03-140-002
California Department of Water Resources	Docket No. EL03-142-002
City of Redding, California	Docket No. EL03-149-002
Idaho Power Company	Docket No. EL03-156-002
Mirant Americas Energy Marketing, L.P., Mirant California, L.L.C., Mirant Delta, L.L.C., and Mirant Potrero, L.L.C.)	Docket No. EL03-158-002
Modesto Irrigation District	Docket No. EL03-159-002
Morgan Stanley Capital Group	Docket No. EL03-160-002
Pacific Gas and Electric Company	Docket No. EL03-162-002
PacifiCorp	Docket No. EL03-163-002
Portland General Electric Company	Docket No. EL03-165-002

Powerex Corporation (f/k/a British Columbia Power Exchange Corp.)	Docket No. EL03-166-002
Puget Sound Energy, Inc.	Docket No. EL03-169-002
Reliant Resources, Inc., Reliant Energy Power Generation, and Reliant Energy Services, Inc.	Docket No. EL03-170-002
San Diego Gas & Electric Company	Docket No. EL03-172-002
Sempra Energy Trading Corporation	Docket No. EL03-173-002
Southern California Edison Company	Docket No. EL03-175-002
Williams Energy Services Corporation	Docket No. EL03-179-002
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Aquila, Inc.	Docket No. EL03-181-003
City of Glendale, California	Docket No. EL03-182-002
City of Redding, California	Docket No. EL03-183-002
Colorado River Commission	Docket No. EL03-184-002
Constellation Power Source, Inc.	Docket No. EL03-185-002
Coral Power, L.L.C.	Docket No. EL03-186-002
El Paso Merchant Energy, L.P.	Docket No. EL03-187-002
Eugene Water and Electricity Board	Docket No. EL03-188-003
Idaho Power Company	Docket No. EL03-189-002
Koch Energy Trading, Inc.	Docket No. EL03-190-002
Las Vegas Cogeneration, L.P.	Docket No. EL03-191-002
MIECO	Docket No. EL03-192-002

Modesto Irrigation District	Docket No. EL03-193-002
Montana Power Company	Docket No. EL03-194-002
Morgan Stanley Capital Group	Docket No. EL03-195-002
Northern California Power Agency	Docket No. EL03-196-002
PacifiCorp	Docket No. EL03-197-003
PECO	Docket No. EL03-198-002
Powerex Corporation (f/k/a British Columbia Power Exchange Corporation)	Docket No. EL03-199-002
Public Service Company of New Mexico	Docket No. EL03-200-002
Sempra Energy Trading Corporation	Docket No. EL03-201-002
TransAlta Energy Marketing (U.S.), Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-202-002
Valley Electric Association, Inc.	Docket No. EL03-203-002
Portland General Electric Company	Docket No. EL02-114-005
Enron Power Marketing, Inc.	Docket No. EL02-115-006

(Issued December 22, 2008)

WELLINGHOFF and KELLY, Commissioners, *concurring in part*:

This order states that the Commission's review of the Allocation Matrix associated with the instant settlement indicates that not all of the Settlement Fund Recipients are parties to the settlement. This order also refers to the Parties' intention that the settlement, once approved, will not be subject to unilateral changes by any party thereto or any Settlement Fund Recipient.

In light of the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *Maine Public Utilities Commission v. FERC*,⁵² this order states that the Commission may not accept the standard of review as written in the settlement. This order further states that an acceptable substitute provision would apply the "most stringent standard permissible under applicable law" to future changes sought by non-settling Settlement Fund Recipients.

The U.S. Supreme Court has held that whenever the Commission reviews certain types of contracts, the Federal Power Act (FPA) requires it to apply the presumption that the contract meets the "just and reasonable" requirement imposed by the FPA.⁵³ The contracts that are accorded this special application of the "just and reasonable" standard are those "freely negotiated wholesale-energy contracts" that were given a unique role in the FPA.⁵⁴ In contrast, the D.C. Circuit determined that the proper standard of review for a different type of agreement, with regard to changes proposed by non-contracting third parties, was the "'just and reasonable' standard in section 206 of the Federal Power Act."⁵⁵ The agreement at issue in *Maine PUC* was a multilateral settlement negotiated in a Commission adjudication of a utility's proposal to revise its tariff substantially to enable it to establish and operate a locational installed electricity capacity market.

Our review of the agreement in question here – which arose from the Commission's issuance of show cause orders directing certain entities to explain why they should not be found to have engaged in gaming and/or anomalous market behavior in violation of the California Independent System Operator Corporation's and the California Power Exchange's tariffs – indicates that it more closely resembles the *Maine PUC* adjudicatory settlement than the *Morgan Stanley* wholesale-energy sales contracts, which, for example, were freely negotiated outside the regulatory process. Therefore, the "most stringent standard permissible under applicable law" as applied here to changes proposed by non-parties means the "just and reasonable" standard of review.

⁵² 520 F.3d 464, 478, *petition for reh'g denied*, No. 06-1403, slip op. (D.C. Cir. Oct. 6, 2008) (*Maine PUC*).

⁵³ *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733, 2737 (2008) (*Morgan Stanley*).

⁵⁴ *Id.*

⁵⁵ *Maine PUC*, 520 F.3d at 478.

For these reasons, we concur in part.

Jon Wellinohoff
Commissioner

Suedeem G. Kelly
Commissioner

