

128 FERC ¶ 61,004
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

Docket No. EL00-95-226

v.

Sellers of Energy and Ancillary Services
into Markets Operated by the California
Independent System Operator Corporation and the
California Power Exchange Corporation

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

Docket No. EL00-98-211

Puget Sound Energy, Inc.

Docket No. EL01-10-045

v.

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. IN03-10-046

Fact-Finding Investigation Into Possible
Manipulation of Electric and Natural Gas Prices

Docket No. PA02-2-062

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

Docket No. EL02-71-019

v.

British Columbia Power Exchange Corp.

ORDER APPROVING SETTLEMENT

(Issued July 1, 2009)

1. In this order, the Commission approves a settlement filed on May 13, 2009 between AES Placerita, Inc. (AES Placerita) and the California Parties¹ (collectively, the Parties). The settlement resolves claims arising from events and transactions in the western energy markets during the period January 1, 2000 through June 20, 2001 (Settlement Period) as they relate to AES Placerita.² The settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement” (Joint Explanatory Statement), and a “Settlement and Release of Claims Agreement” (Settlement and Release of Claims) (collectively, Settlement).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 they have executed the Settlement and it will become binding as of the Effective Date, which is the date on which the Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected Party.⁵ The Parties state that the Settlement shall terminate on the date the Commission rejects the Settlement in whole or in part, or accepts it with modifications deemed

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

² *See* Joint Offer of Settlement at 1-2.

³ The Settlement also includes a cover sheet (Settlement Cover Sheet) that details, among other things, the amount of proceeds that will be provided by AES Placerita under the terms of the Settlement.

⁴ 18 C.F.R. § 385.602 (2008).

⁵ Joint Explanatory Statement at 10; Settlement and Release of Claims Agreement, §§ 2.2, 9.1.

unacceptable to any adversely affected Party, or if the California Parties fail to receive the consideration that they are due under the Settlement.⁶

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty. The Parties state that the Settlement reaches a fair and reasonable resolution of the issues between AES Placerita and the California Parties. 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.⁷ The Parties, therefore, request Commission approval of the Settlement.

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

Background and Description of the Settlement

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)⁸ 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 EL00-98-000.⁹ 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. PA02-2-000.¹⁰ In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in western energy markets in Docket No. IN03-10-000.¹¹

⁶ Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement, § 4.3.

⁷ See Joint Offer of Settlement at 6 (citing *Pub. Utils. Comm'n of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002); *Pub. Utils. Comm'n of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9th Cir., Oct. 23, 2006)).

⁸ 16 U.S.C. § 791a (2006).

⁹ *San Diego Gas & Electric Co.*, 92 FERC ¶ 61,172 (2000).

¹⁰ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

¹¹ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

6. The Parties explain that AES Placerita owns a two-on-one combined cycle, gas-fired generating facility with a nameplate rating of 120 MW located in Newhall, California. AES Placerita generated electricity from the facility and made sales in the California energy markets during the Settlement Period, and for some time thereafter. The Parties also note that the facility has not operated for over 18 months and is currently mothballed, and they explain that one of the gas turbines at the facility experienced a compressor failure in August 2007 that resulted in the compressor being destroyed and the turbine being significantly damaged. As a result of this damage, AES Placerita received an insurance payment of \$6 million. The Parties state that, besides the generating facility and site, AES Placerita has no other assets of significant value.¹²

7. The Parties state that the Settlement resolves certain claims related to the captioned proceedings as to AES Placerita.¹³ Any entity that directly sold energy or purchased energy from the CAISO and/or the CalPX during the Settlement Period (Participants) may elect to be bound by the terms of the Settlement by opting into the Settlement as an “Additional Settling Participant.”¹⁴ Such entities must provide notice to the Commission, as well as serve the notice to parties on the list serve established for the Docket No. EL00-95 proceeding and in Docket Nos. EL03-137, *et al.*, no later than five business days following the date the Commission issues an order approving the Settlement.¹⁵ The Parties note that the rights of Participants that do not wish to opt into the Settlement will be unaffected by the Settlement, and that such Non-Settling participants will not be guaranteed the benefits of the Settlement. The rights of Non-Settling participants will be unaffected by the Settlement and they will be paid refunds, if any, determined through continued litigation.¹⁶

8. Under the Settlement, AES Placerita will make a cash payment of \$6 million into the “Settling Supplier Refund Escrow” (Refund Escrow) within five business days of the execution date.¹⁷ The Refund Escrow will be established by the Parties.¹⁸ Once the

¹² Joint Explanatory Statement at 2-3.

¹³ Joint Explanatory Statement at 2.

¹⁴ Joint Explanatory Statement at 11; Settlement and Release of Claims, § 8.1.

¹⁵ Joint Explanatory Statement at 11; Settlement and Release of Claims, § 8.1.

¹⁶ Joint Explanatory Statement at 4-5, 11.

¹⁷ Joint Explanatory Statement at 11; Settlement and Release of Claims, § 4.1.2; Settlement Cover Sheet at 2.

Commission approves the Settlement, AES Placerita will allow the CalPX to pay into the Refund Escrow its estimated receivables amount that the CalPX is currently holding.¹⁹ The Parties explain that the amount of monetary consideration from AES Placerita in this Settlement is \$6,168,119, which will be updated to the projected date of distribution.²⁰ Moreover, an “Interest Shortfall on Refunds” reserve will be withheld from payment into the Refund Escrow.²¹

9. In accordance with an Allocation Matrix included as part of the Settlement,²² each Settling Participant will be allocated its respective share of the portion of settlement proceeds held in the Refund Escrow.²³ Certain specified Participants are labeled as “Deemed Distribution Participants,”²⁴ which are entities that have net amounts outstanding and payable to the CAISO and/or the CalPX.²⁵ The Deemed Distribution Participants will receive their share of the settlement proceeds in the form of credits against such amounts.²⁶ With respect to settlement proceeds that would have been paid

¹⁸ Settlement and Release of Claims, § 4.1.4.

¹⁹ Joint Explanatory Statement at 11-12.

²⁰ Joint Explanatory Statement at 12; Settlement Cover Sheet at 1.

²¹ Joint Explanatory Statement at 12; Settlement Cover Sheet at 2.

²² Settlement and Release of Claims, Exhibit A. The entities included on the Allocation Matrix are: PG&E; SoCal Edison; SDG&E; New Energy Inc.; Salt River Project; Automated Power Exchange; Comision Federal de Electricidad; Sacramento Municipal Utility District (SMUD); American Electric Power Service Corp.; Arizona Public Service Co.; Aquila Power Corp.; Pacific Gas & Electric Energy Services Co.; Cargill Alliant, LLC; City of Vernon; and California Polar Power Brokers LLC.

²³ Joint Explanatory Statement at 12; Settlement and Release of Claims, §§ 4.1.1.4, 4.1.4.

²⁴ Settlement and Release of Claims, Exhibit B. The Deemed Distribution Participants include: Aquila Power Corp.; California Polar Power Brokers LLC; Comision Federal de Electricidad; Illinova Energy Partners, Inc.; PG&E; Pacific Gas & Electric Energy Services Co.; and SMUD.

²⁵ Joint Explanatory Statement at 12; Settlement and Release of Claims, § 5.2.2.

²⁶ Joint Explanatory Statement at 12; Settlement and Release of Claims, § 5.2.2.

to Non-Settling Participants, such amounts will be credited toward any payments that the Commission ultimately holds to be due as refunds and interest to those Non-Settling Participants for AES Placerita's transactions in the California markets during the Settlement Period.²⁷ AES Placerita will make up any shortfall and will receive any excess.²⁸ The Settlement further provides that a negotiated amount of interest will be distributed to the California Parties and Additional Settling Participants concurrently with the principal amounts, consistent with the Allocation Matrix.²⁹

10. The Settlement requires the CAISO and the CalPX to conform their books and records to reflect the distributions, offsets, adjustments, transfers, and status of accounts as provided for in the Settlement.³⁰ The Settlement states that the Commission's approval of the Settlement will constitute the Commission's authorization and direction to the CAISO and the CalPX to take such action.³¹ The Parties state that they would not object to the Commission acting to assure the CAISO and the CalPX that they will be held harmless from their actions to implement the Settlement.³²

11. The Parties assert that the Settlement resolves all claims between AES Placerita and the California Parties relating to transactions in the western energy markets during the Settlement Period.³³ In addition, the Parties waive and release any existing disputes regarding CAISO settlements and/or CalPX settlements for the Settlement Period.³⁴ Similarly, the Parties state that AES Placerita and the California Parties mutually release each other from all claims before the Commission and/or under the FPA for the

²⁷ Joint Explanatory Statement at 12; Settlement and Release of Claims, § 5.5.

²⁸ Joint Explanatory Statement at 12; Settlement and Release of Claims, § 5.5.

²⁹ Joint Explanatory Statement at 13; Settlement and Release of Claims, § 5.3.

³⁰ Joint Explanatory Statement at 13; Settlement and Release of Claims, § 6.1.

³¹ Joint Explanatory Statement at 13; Settlement and Release of Claims, § 6.1.

³² Joint Explanatory Statement at 15.

³³ Settlement and Release of Claims Agreement, § 7.1.1.

³⁴ Settlement and Release of Claims Agreement, § 7.1.5.

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.³⁵ Likewise, the Parties state that AES Placerita and the California Parties mutually release each other from all claims for the Settlement Period for civil damages and/or equitable relief relating to allegations of unlawful rates, transmission congestion and line loss charges, market manipulation, unjust enrichment, or payments for electric capacity, energy and/or ancillary services.³⁶ Subject to specified limitations, Additional Settling Participants are deemed to provide and receive releases with AES Placerita that the California Parties receive.³⁷

12. AES Placerita agrees to forego any claim for refunds resulting from any mitigation of sales by CERS of imbalance energy into the CAISO's real-time market (as well as associated interest and charges) that may be payable under certain Commission orders.³⁸

Procedural Matters

13. The Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.³⁹ The Parties request that the Settlement be transmitted directly to the Commission for approval rather than be certified by an administrative law judge, because only Docket No. EL02-71 of the above-captioned dockets is pending before a presiding judge, the Settlement was reached without the assistance of the settlement judge assigned to Docket No. EL02-71, and the Commission has considered over twenty similar settlements without the assistance of a certification from an administrative law judge.⁴⁰

14. Pursuant to Rules 602(d)(2) and 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.602(d)(2) and 385.602(f) (2008), initial comments were due

³⁵ Joint Explanatory Statement at 13-14; *see* Settlement and Release of Claims, § 7.2.

³⁶ Joint Explanatory Statement at 14; *see* Settlement and Release of Claims, § 7.3.

³⁷ Joint Explanatory Statement at 15; Settlement and Release of Claims, §§ 7.4, 8.2.

³⁸ Joint Explanatory Statement at 14; Settlement and Release of Claims, § 7.2.2.

³⁹ 18 C.F.R. § 385.602 (2008).

⁴⁰ Joint Offer of Settlement at 2, 3.

on or before June 2, 2009, and reply comments were due on or before June 12, 2009. Initial comments were filed by the CAISO and the CalPX. In addition, SMUD filed comments opposing the Settlement. Joint reply comments were filed by the Parties (Joint Reply Comments).⁴¹

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

Substantive Matters

A. The Settlement is Just and Reasonable

16. The Commission must first determine whether this Settlement is contested under Rule 602 of our Rules of Practice and Procedure. We conclude that it is. SMUD has raised issues that have been decided definitively in earlier orders on similar settlements, and we find that it has not advanced any reason why its arguments warrant a different outcome in this proceeding. However, SMUD raises an additional issue that has not been raised previously pertaining to the disposition of AES Placerita's assets. Because SMUD did not submit an affidavit raising this issue as a genuine issue of material fact, as required by Rule 602(f)(4),⁴² we find that it is not a disputed issue of material fact. We conclude that SMUD's arguments concerning the effect of the disposition of assets on parties who choose not to opt into the Settlement is a disputed policy issue.

17. Under the Commission's *Trailblazer*⁴³ analysis, there are four approaches under which we may approve a contested settlement: (1) the Commission may make a merits determination on each contested issue; (2) even if some aspects of a settlement are problematic, the Commission nevertheless may approve a contested settlement as a package upon determining that the overall result of the settlement is just and reasonable; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections and the contesting parties' interest is too attenuated; or (4) the Commission may sever the contesting parties, approving the settlement agreement as

⁴¹ For purposes of the reply comments, the California Parties do not include CERS.

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

⁴³ *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*).

uncontested as to the settling parties only and leaving the contesting parties free to pursue their claims through continued litigation.⁴⁴

18. In this case, the Commission finds that the Settlement may be approved under either the first or second *Trailblazer* prongs. Under the first prong and as discussed more fully below, the Commission will make a merits determination on each issue raised by SMUD, finding that none of SMUD's arguments, including its contentions regarding the disposition of AES Placerita's assets, have merit. Under the second prong, as discussed below, the Commission has determined that, even if SMUD's argument regarding the disposition of these assets had merit, the overall result of the Settlement is just and reasonable. The Settlement provides certainty and finality for Settling Participants, as well as ratepayers, with respect to AES Placerita's transactions in the western energy markets during the Settlement Period, and the Settlement itself provides that entities that do not join the Settlement are free to pursue litigation against AES Placerita in these proceedings, and the Parties have agreed to hold back Settlement funds so that Non-Settling Participants' claims will be addressed. Thus, the Commission finds that it may approve the Settlement under either of the first two prongs of *Trailblazer*.

B. "Hold Harmless" Protection

19. Both the CAISO and CalPX note that the circumstances of this Settlement warrant hold harmless treatment for the CAISO and CalPX because they, along with their directors, officers, employees and consultants, will implement a number of the Settlement's provisions. 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

⁴⁴ *Trailblazer*, 85 FERC at 62,342-44.

not be responsible for recovering or collecting such funds or amounts represented by such credits.⁴⁵

20. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.⁴⁶ In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.⁴⁷

Commission Determination

21. 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.⁴⁸ Consistent with the Commission’s precedent,⁴⁹ the Commission determines that CalPX and the CAISO will be held harmless for actions taken to implement this Settlement. Accordingly, this order incorporates the “hold harmless” language set out above, with one modification. Specifically, as incorporated by this order, the language shall read to apply to both the CAISO and CalPX.

C. Forfeiture of Statutory Rights

22. SMUD argues that the Settlement forces non-jurisdictional utilities to forfeit their statutory rights in order to participate in the Settlement, because the Settlement requires them to offset refunds that they are legally owed under the Settlement against refunds that they owe for their charges, which the Commission

⁴⁵ CalPX Initial Comments at 4-5.

⁴⁶ *Id.*; *see San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,186, at P 15 and 19 (2005).

⁴⁷ *See* Joint Reply Comments at 8.

⁴⁸ *See* Joint Explanatory Statement at 15.

⁴⁹ *See, e.g., San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,151, at P 19 (2007) (approving “hold harmless” language in the Portland General Electric settlement); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004) (approving “hold harmless” language in the Duke settlement), *reh’g denied*, 111 FERC ¶ 61,186 (2005); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,071 (2004) (approving “hold harmless” language in the Dynegy settlement).

cannot lawfully require non-jurisdictional parties to pay.⁵⁰ Thus, SMUD argues that the Settlement offer is “premised on the Commission’s exercise of authority [that] the Commission does not possess.”⁵¹ SMUD likens the provisions of the Settlement governing the allocation of refunds to the kind of “cram down” provision invalidated by the court in *ANR Pipeline Co.*⁵² SMUD states that the “Commission has frowned on cram down provisions like these, as ‘comments that might otherwise be voiced are suppressed.’”⁵³ Accordingly, SMUD states that the Settlement should be rejected.⁵⁴

23. In response, the Parties argue that the Commission should reject SMUD’s “forfeiture of statutory rights” argument because SMUD’s participation in the Settlement is voluntary. The Parties state that if SMUD opposes its classification in the Settlement as a Deemed Distribution Participant, SMUD may elect to not opt-in and to pursue further litigation against AES Placerita. The Parties add that SMUD will not forfeit any rights or claims by not opting into the Settlement. The Parties go on to state that, where an entity has the choice not to opt into a settlement and can show no immediate and irreparable effect, the Commission will find no genuine issue of material fact and will approve the settlement as fair and reasonable and in the public interest.⁵⁵ Finally, the Parties state that SMUD’s “cram down” argument is misplaced because the order upon which SMUD relies involved a settlement that, unlike the Settlement here, included a provision that would have denied essential services to any party that contested the settlement for a period of five years.⁵⁶

⁵⁰ See SMUD Initial Comments at 4.

⁵¹ See *id.* at 4.

⁵² *ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992).

⁵³ See SMUD Initial Comments at 5 (citing *ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992)).

⁵⁴ See *id.*

⁵⁵ See Joint Reply Comments at 5 (citing *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,308, at P 31 and 34 (2005), *reh’g denied*, 115 FERC ¶ 61,271 (2006)).

⁵⁶ See *id.* at 5 n.10.

Commission Determination

24. The Commission rejects SMUD's argument that the Settlement should be rejected because, by opting into the Settlement, SMUD, along with other non-jurisdictional utilities, must forfeit statutory rights to be exempt from refund obligations. Opting into the Settlement is a voluntary and affirmative action on the part of any party. As set forth in the Settlement, by electing not to opt-in, non-jurisdictional utilities may continue to pursue claims against AES Placerita in the underlying proceedings. Therefore, if SMUD is not satisfied with the terms of the Settlement, it may elect to not opt-in and in doing so, as a Non-Settling Participant, will forfeit no rights or claims against AES Placerita.

25. We disagree with SMUD's assertion that providing parties with the choice to opt into the Settlement is insufficient, and that the Settlement is unjust and unreasonable. The Settlement is a comprehensive and reasonable effort by the Parties to end their litigation and resolve their legal disputes. SMUD does not have to join the Settlement, and its rights as a Non-Settling Participant to continue to litigate are unaffected by the Settlement. Therefore, the Commission finds that the Settlement is not unjust, unreasonable, unduly preferential or unduly discriminatory.

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

27. As was the case in prior settlements,⁵⁷ if a non-jurisdictional entity elects to remain in the Settlement, it will be accepting a compromise under which it agrees that it may be a net owner of funds to the CalPX and/or CAISO. Regardless of the Commission's lack of authority to order the non-jurisdictional entities to pay refunds in this situation, such an entity may nonetheless opt into a settlement to avail itself of the benefits of that settlement, including release of claims against the non-jurisdictional entity, avoidance of further litigation, and the financial certainty that is embodied in the Settlement. SMUD's decision to opt into the Settlement

⁵⁷ See *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 26 (2009); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,297, at P 29 (2007); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 27 (2007).

would represent a reasonable compromise under which SMUD accepts that it may be a net owner of funds to the CalPX and/or the CAISO (which the Commission does not have the authority to order SMUD to pay) in exchange for the benefits of the Settlement.

D. Undue Discrimination

28. SMUD argues that the Settlement is unduly discriminatory. SMUD notes that, under the Commission's decision in *Florida Power & Light Co.*,⁵⁸ a substantially similar settlement offer must be made to similarly situated customers. SMUD argues that, as a non-jurisdictional seller, it is unreasonably distinguished from other buyers of power who made no jurisdictional sales, and is required to forfeit statutory rights in order to participate in the receipt of refunds.⁵⁹ SMUD adds that this has the effect of treating it as a Deemed Distribution Participant under the Settlement which, SMUD argues, is unreasonable and discriminatory insofar as it places pressure on non-jurisdictional entities to forfeit their statutory exemption from the Commission's refund authority under the FPA. As such, SMUD argues that it has not been given an offer comparable to those extended to other utility refund recipients.

29. In reply, the Parties urge the Commission to reject SMUD's argument that the Settlement is unduly discriminatory. The Parties state that, under the Settlement, a participant's classification as a Deemed Distribution Participant is not based on whether that Participant is jurisdictional or non-jurisdictional. The Parties argue that SMUD and other non-jurisdictional entities have not been singled out as Deemed Distribution Participants under the Settlement. The Parties further state that the Commission has previously rejected similar arguments raised by SMUD.⁶⁰

Commission Determination

30. The Commission finds that SMUD has not demonstrated that, as a Deemed Distribution Participant, it is being treated any differently from other entities that are also Deemed Distribution Participants. The Settlement designates parties as

⁵⁸ See SMUD Initial Comments at 5 (citing *Fla. Power & Light Co.*, 70 FERC ¶ 63,017 (1995)).

⁵⁹ See *id.*

⁶⁰ See Joint Reply Comments at 6-7 (citing *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 27-28 (2007)).

Deemed Distribution Participants based on whether they have net amounts outstanding and payable to the CAISO and/or CalPX.⁶¹ This designation does not distinguish between jurisdictional and non-jurisdictional entities in any way. Moreover, the Settlement's list of Deemed Distribution Participants identifies both jurisdictional and non-jurisdictional entities.⁶² Therefore, the Commission finds that the Settlement is not unduly discriminatory.

E. Disposition of AES Placerita's Assets

31. SMUD argues that if the Commission accepts the Settlement, it will essentially be guaranteeing that AES Placerita will have no other assets available to pay refund obligations to non-settling parties. SMUD states that the Commission should not allow AES Placerita to dispose the bulk of its assets until litigation surrounding its obligations to pay refunds has been concluded. Otherwise, the settling parties would be unfairly favored to the detriment of non-settling parties.

32. In response, the Parties argue that AES Placerita is not currently an operational entity, and the bulk of funds to be received by settlement participants come from insurance proceeds received by AES Placerita following a compressor failure. The Parties state that if the Settlement is not implemented, the payments for claims arising from the Settlement Period funded by those insurance proceeds may not be available until some point in the future. The Parties argue that there is no legal or logical basis to delay implementation of the Settlement due to vague claims of entities that hope to achieve greater recoveries through continued litigation than what is provided for under the Settlement. The Parties contend that those entities that choose not to join the Settlement and continue litigating against AES Placerita properly bear the risk of recovering whatever future relief they may ultimately be awarded. Therefore, the Parties argue, SMUD's attempts to prevent closure of the litigation surrounding the western markets energy crisis should be rejected.

Commission Determination

33. We reject SMUD's argument. We agree with the Parties that when an entity chooses not to join a settlement and continues to litigate, then it bears the risk associated with such litigation. Again, if SMUD decides that it is more advantageous for it to

⁶¹ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement, § 5.2.2.

⁶² See Settlement and Release of Claims, Exhibit B.

continue to litigate against AES Placerita in the underlying proceedings rather than joining the Settlement, it loses the financial certainty and other benefits associated with the Settlement. This includes the guaranteed cash payment that AES Placerita will pay into the Refund Escrow and which will be distributed to Settling Participants in accordance with the terms of the Settlement, including the Allocation Matrix.⁶³ We find that the Settlement leads to an overall just and reasonable result. We find that the Settlement's proposed distribution of the insurance proceeds that AES Placerita received as a result of the compressor failure provides a reasonable means of ensuring that ratepayers are allocated monies related to AES Placerita's transactions during the Settlement Period. For these reasons, we reject SMUD's argument on the merits.

Conclusion

34. In conclusion, the Commission finds that the Settlement is just and reasonable and therefore approves it, as discussed in the body of this order. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in any proceeding.

The Commission orders:

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

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶³ We note that the Parties have agreed to hold back Settlement funds so that Non-Settling Participants' claims will be addressed. *See* Settlement and Release of Claims, § 5.5.