

128 FERC ¶ 61,242  
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. EL00-95-228

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. EL00-98-213

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-046

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior  
And Practices in Western Markets

Docket No. IN03-10-047

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

Docket No. PA02-2-063

American Electric Power Service Corporation

Docket No. EL03-137-013

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

Docket No. EL03-180-042

California Independent System Operator Corporation

Docket No. ER03-746-013

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

Docket No. EL02-71-020

v.

British Columbia Power Exchange Corp.

Docket No. EL03-185-007

Constellation Power Source, Inc.

## ORDER APPROVING SETTLEMENT

(Issued September 14, 2009)

1. In this order, the Commission approves a settlement filed on July 2, 2009 among Constellation Energy Commodities Group (CCG), Constellation NewEnergy, Inc. (NewEnergy), and the California Parties<sup>1</sup> (collectively, the Parties). The settlement resolves claims arising from events and transactions in the western energy markets during the period January 1, 2000 through June 20, 2001 (Settlement Period) as they relate to CCG and NewEnergy.<sup>2</sup> 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).<sup>3</sup>
2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.<sup>4</sup> The Parties state that they have executed the Settlement and it will become binding as of the Effective Date, which is the date on which the

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<sup>1</sup> 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).

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

<sup>3</sup> The Settlement also includes a cover sheet (Settlement Cover Sheet) that details, among other things, the amount of proceeds that will be provided by CCG and NewEnergy under the terms of the Settlement.

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

Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected Party.<sup>5</sup> The Parties state that the Settlement shall terminate on the date the Commission rejects the Settlement in whole or in part, or accepts it with modifications deemed unacceptable to any adversely affected Party, or if the California Parties fail to receive the consideration that they are due under the Settlement.<sup>6</sup>

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.<sup>7</sup> The Parties state that the Settlement reaches a fair and reasonable resolution of the issues between CCG, NewEnergy, and the California Parties. The Parties further assert that the Settlement protects the rights of non-settling parties.<sup>8</sup> 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.<sup>9</sup> 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)<sup>10</sup> to investigate, among other things, the justness and reasonableness of public utility sellers' rates in the CAISO and CalPX markets in Docket Nos. EL00-95-000 and EL00-98-000.<sup>11</sup> In 2002, the Commission directed its staff to commence a fact-

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<sup>5</sup> Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement, §§ 2.2, 9.1.1.

<sup>6</sup> Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement, §§ 2.3, 4.3.

<sup>7</sup> Joint Offer of Settlement at 6.

<sup>8</sup> *Id.*

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

<sup>10</sup> 16 U.S.C. § 791, *et seq.* (2006).

<sup>11</sup> *San Diego Gas & Electric Co.*, 92 FERC ¶ 61,172 (2000).

finding investigation into the alleged manipulation of electrical and natural gas prices in the West in Docket No. PA02-2-000.<sup>12</sup> In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in western energy markets in Docket No. IN03-10-000 (Anomalous Bidding Investigation).<sup>13</sup>

6. The Parties state that the Settlement resolves certain claims related to the captioned proceedings as to CCG and NewEnergy.<sup>14</sup> Any entity that directly sold energy or purchased energy from the CAISO and/or the CalPX during the Settlement Period (Participants) may elect to be bound by the terms of the Settlement by opting into the Settlement as an “Additional Settling Participant.”<sup>15</sup> 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.<sup>16</sup> The Parties note that the rights of Participants that do not wish to opt into the Settlement will be unaffected by the Settlement, and that such Non-Settling Participants will not be guaranteed the benefits of the Settlement.

7. Under the Settlement, CCG and NewEnergy will allow the CalPX to release certain proceeds from their unpaid receivables arising from transactions through markets operated by the CalPX or the CAISO.<sup>17</sup> CCG will pay \$200,000 from its receivables.<sup>18</sup> NewEnergy will pay from its receivables being held by the CalPX the following: (1) \$386,939, plus interest; (2) an amount equal to any refunds in the captioned proceedings for the period May 1, 2000 through October 1, 2000 (Pre-October Period) that NewEnergy was paid after November 6, 2008 through and including the Settlement’s

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<sup>12</sup> *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

<sup>13</sup> *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

<sup>14</sup> Joint Explanatory Statement at 2.

<sup>15</sup> Joint Explanatory Statement at 12; Settlement and Release of Claims, § 8.1.

<sup>16</sup> Joint Explanatory Statement at 12; Settlement and Release of Claims, §§ 3.2, 8.1.

<sup>17</sup> Joint Explanatory Statement at 12-13; Settlement and Release of Claims, §§ 4.1.1.2-4.1.1.4, 4.17; Settlement Cover Sheet, Items 4.1, 4.1.1.2-4.1.1.4.

<sup>18</sup> Joint Explanatory Statement at 12; Settlement and Release of Claims, § 4.1.1.2; Settlement Cover Sheet, Items 4.1, 4.1.1.2.

effective date; and (3) interest at the Commission's interest rate on any such Pre-October Period refund amounts.<sup>19</sup> The Parties states that, in addition to the aforementioned payments, NewEnergy will provide consideration in the form of an assignment to PG&E, SoCal Edison, and SDG&E of any refunds that NewEnergy (1) is or becomes entitled to receive, including interest, relating to the Pre-October Period as a result of any future settlements, and (2) is or becomes entitled to receive after November 6, 2008, including interest, in certain proceedings related to NewEnergy's transactions in the California markets during the Pre-October Period.<sup>20</sup>

8. In accordance with an Allocation Matrix included as part of the Settlement,<sup>21</sup> each Settling Participant will be allocated its respective share of the portion of settlement proceeds held in the refund escrow established by the California Parties.<sup>22</sup> Certain specified Participants are labeled as "Deemed Distribution Participants,"<sup>23</sup> which, according to the Settlement, are entities that have net amounts outstanding and payable to the CAISO and/or the CalPX.<sup>24</sup> Under the Settlement, the Deemed Distribution Participants will receive their share of the settlement proceeds in the form of credits against such amounts.<sup>25</sup> The Settlement provides that any amount distributed to PG&E, which is a Deemed Distribution Participant, will be transferred to the CalPX rather than to PG&E for deposit into the CalPX Settlement Clearing Account, but the Settlement explains that any such transfers are for the benefit of PG&E, and that the CalPX will credit PG&E's account for any such amounts.<sup>26</sup>

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<sup>19</sup> Joint Explanatory Statement at 12-13; Settlement and Release of Claims, §§ 4.1.1.2-4.1.1.4, 4.17; Settlement Cover Sheet, Items 4.1, 4.1.1.2-4.1.1.4.

<sup>20</sup> Joint Explanatory Statement at 13-14; Settlement and Release of Claims, §§ 4.17, 5.2.1-5.2.2; Settlement Cover Sheet, Item 4.1.

<sup>21</sup> Settlement and Release of Claims, Exhibit A.

<sup>22</sup> Joint Explanatory Statement at 13; Settlement and Release of Claims, § 5.2.

<sup>23</sup> Settlement and Release of Claims, Exhibit B. The Deemed Distribution Participants include: Aquila Power Corp.; California Polar Power Brokers LLC; Comision Federal de Electricidad; PG&E; Pacific Gas & Electric Energy Services Co.; and Sacramento Municipal Utility District (SMUD).

<sup>24</sup> Joint Explanatory Statement at 13; Settlement and Release of Claims, § 5.2.2.

<sup>25</sup> Joint Explanatory Statement at 13; Settlement and Release of Claims, § 5.2.2.

<sup>26</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims, § 5.2.2.2.

9. With respect to settlement proceeds that would have been paid 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 CCG's and NewEnergy's transactions in the California energy markets during the Settlement Period.<sup>27</sup> The California Parties will make up any shortfall and will receive any excess.<sup>28</sup>

10. Within 20 business days of the Settlement's effective date, the CalPX will transfer to CCG and NewEnergy as cash payments their estimated receivables amount and estimated interest, minus their Transferred Receivables and the Settling Suppliers' Interest Shortfall Estimate.<sup>29</sup> The Settling Suppliers' Interest Shortfall Estimate will be released to CCG and NewEnergy to the extent that such amounts are not otherwise needed to satisfy their obligations under the Settlement, upon further dispositive Commission orders.<sup>30</sup>

11. The Settlement requires the CAISO and the CalPX to conform their books and records to reflect the distributions, offsets, adjustments, transfers, and status of accounts as provided for in the Settlement.<sup>31</sup> The Settlement states that the Commission's approval of the Settlement will constitute the Commission's authorization and direction to the CAISO and the CalPX to take such action.<sup>32</sup> 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.<sup>33</sup>

12. The Settlement resolves all claims between CCG and NewEnergy and the California Parties relating to transactions in the western energy markets during the

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<sup>27</sup> Joint Explanatory Statement at 13; Settlement and Release of Claims, § 5.5.

<sup>28</sup> Joint Explanatory Statement at 13; Settlement and Release of Claims, § 5.5.

<sup>29</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims, §§ 4.1.1.1, 4.1.1.7. The Transferred Receivables are described in P 7, *supra*. The Settling Suppliers' Interest Shortfall Estimate is set forth in the Settlement Cover Sheet, Item 4.1.1.1(d).

<sup>30</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims, §§ 5.3, 6.2.

<sup>31</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims, § 6.1.

<sup>32</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims, § 6.1.

<sup>33</sup> Joint Explanatory Statement at 16.

Settlement Period.<sup>34</sup> In addition, the Parties waive and release any existing disputes regarding CAISO settlements and/or CalPX settlements for the Settlement Period.<sup>35</sup> Similarly, the Parties state that CCG and NewEnergy and the California Parties mutually release each other from all claims before the Commission and/or under the FPA for the Settlement Period relating to payments or unlawful rates for electric capacity, energy and/or ancillary services, transmission congestion or line loss charges, or market manipulation.<sup>36</sup> Likewise, the Parties state that CCG and NewEnergy 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.<sup>37</sup> Subject to specified limitations, Additional Settling Participants are deemed to provide and receive releases with and from CCG and NewEnergy as those provided in the Settlement for the California Parties.<sup>38</sup> The Settlement further provides that CCG and NewEnergy will withdraw with prejudice all claims that they have filed in the PG&E bankruptcy proceedings,<sup>39</sup> and they agree not to oppose the settlement between the CalPX and PG&E concerning the transfer of funds from the PG&E bankruptcy escrow to the CalPX filed in Docket Nos. EL00-95, *et al.* on April 10, 2009.<sup>40</sup>

13. CCG and NewEnergy agree 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.<sup>41</sup>

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<sup>34</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, § 7.1.1.

<sup>35</sup> Settlement and Release of Claims Agreement, § 7.1.5.

<sup>36</sup> Joint Explanatory Statement at 15; *see* Settlement and Release of Claims, § 7.2.1.

<sup>37</sup> Joint Explanatory Statement at 15; *see* Settlement and Release of Claims, § 7.3.1.

<sup>38</sup> Joint Explanatory Statement at 16; Settlement and Release of Claims, §§ 7.4, 8.2.

<sup>39</sup> Settlement and Release of Claims Agreement, § 7.1.6.

<sup>40</sup> Settlement and Release of Claims Agreement, § 7.1.8.

<sup>41</sup> Settlement and Release of Claims, § 7.2.2.

### **Procedural Matters**

14. The Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.<sup>42</sup> 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.<sup>43</sup>

15. Pursuant to Rules 602(d)(2) and 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.602(d)(2) and 385.602(f) (2009), initial comments were due on or before July 22, 2009, and reply comments were due on or before August 3, 2009. Initial comments were filed by the CAISO and the CalPX, either in support of or not opposing the Settlement. In addition, SMUD filed comments opposing the Settlement. Joint reply comments were filed by the Parties (Joint Reply Comments).<sup>44</sup>

16. 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. "Hold Harmless" Protection**

17. 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,

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<sup>42</sup> 18 C.F.R. § 385.602 (2009).

<sup>43</sup> Joint Offer of Settlement at 2, 3.

<sup>44</sup> For purposes of the reply comments, the California Parties do not include CERS.

neither officers, directors, employees nor professionals shall be liable for implementing the settlement including but not limited to cash payouts and accounting entries on CalPX's books, nor shall they or any of them be liable for any resulting shortfall of funds or resulting change to credit risk as a result of implementing the settlement. In the event of any subsequent order, rule or judgment by the Commission or any court of competent jurisdiction requiring any adjustment to, or repayment or reversion of, amounts paid out of the Settlement Clearing Account or credited to a participant's account balance pursuant to the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.<sup>45</sup>

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

#### **Commission Determination**

19. The Parties do not oppose a "hold harmless" provision that is similar to the provisions in other settlements involving the California Parties and approved by the Commission.<sup>48</sup> Consistent with the Commission's precedent,<sup>49</sup> the Commission determines that CalPX and the CAISO will be held harmless for actions taken to implement this Settlement. Accordingly, this order incorporates the "hold harmless" language set out above, with one modification. Specifically, as incorporated by this order, the language shall read to apply to both the CAISO and CalPX.

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<sup>45</sup> CalPX Initial Comments at 4.

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

<sup>47</sup> *See* Joint Reply Comments at 10.

<sup>48</sup> *See* Joint Explanatory Statement at 16.

<sup>49</sup> *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).

## **B. SMUD's Arguments in Opposition to the Settlement**

20. Under the Commission's *Trailblazer*<sup>50</sup> analysis, there are four approaches under which the Commission may approve a contested settlement: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission determines that the settlement provides an overall just and reasonable result; (3) the Commission determines that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated; or (4) the Commission determines that the contesting parties can be severed.<sup>51</sup> In this case, we approve the Settlement under *Trailblazer's* first prong because we find that SMUD's arguments are without merit, as discussed herein.

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

21. SMUD argues that the Settlement forces non-jurisdictional utilities to forfeit their statutory rights in order to participate in the Settlement, because the Settlement requires them to offset refunds that they are legally owed under the Settlement against refunds that they owe for their charges, which the Commission cannot lawfully require non-jurisdictional parties to pay.<sup>52</sup> Thus, SMUD argues that the Settlement offer is "premised on the Commission's exercise of authority [that] the Commission does not possess."<sup>53</sup> SMUD likens the provisions of the Settlement governing the allocation of refunds to the kind of "cram down" provision invalidated by the court in *ANR Pipeline Company*.<sup>54</sup> SMUD states that the "Commission has frowned on cram down provisions like these, as 'comments that might otherwise be voiced are suppressed.'"<sup>55</sup> Accordingly, SMUD states that the Settlement should be rejected.<sup>56</sup>

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<sup>50</sup> *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

<sup>51</sup> *Trailblazer*, 85 FERC at 62,342-44.

<sup>52</sup> *See* SMUD Initial Comments at 5.

<sup>53</sup> *See id.* at 5.

<sup>54</sup> *ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992) (*ANR Pipeline*).

<sup>55</sup> *See* SMUD Initial Comments at 5 (citing *ANR Pipeline Company*, 59 FERC ¶ 61,347, at 62,260 (1992)).

<sup>56</sup> *See id.*

22. 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 CCG and NewEnergy. 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.<sup>57</sup> 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.<sup>58</sup>

### **Commission Determination**

23. 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 CCG and NewEnergy 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 CCG and NewEnergy.

24. 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.

25. 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* is misplaced because, in that case, any party contesting the settlement

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<sup>57</sup> See Joint Reply Comments at 5 (citing *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,308, at P 31, 34 (2005), *reh'g denied*, 115 FERC ¶ 61,271 (2006)).

<sup>58</sup> See *id.* at 5 n.10.

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 CCG and NewEnergy, and the Parties agree to hold back settlement funds so that claims pursued by Non-Settling Participants will be addressed.

26. As was the case in prior settlements,<sup>59</sup> if a non-jurisdictional entity elects to remain in the Settlement, it will be accepting a compromise. 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 would represent a reasonable compromise under which SMUD accepts the terms of the Settlement in exchange for the benefits of the Settlement.

## 2. Undue Discrimination

27. SMUD argues that the Settlement is unduly discriminatory. SMUD notes that, under the Commission's decision in *Florida Power & Light Company*,<sup>60</sup> a substantially similar settlement offer must be made to similarly situated customers. SMUD argues that the Settlement draws an unreasonable distinction between SMUD, as a non-jurisdictional seller, and other buyers of power who made no jurisdictional sales. As a result, SMUD asserts that the Settlement requires SMUD to forfeit its statutory rights in order to participate in the receipt of refunds.<sup>61</sup> SMUD adds that treating it as a Deemed Distribution Participant under the Settlement is unreasonable and discriminatory, because it places pressure on non-jurisdictional entities to forfeit their statutory exemption from the Commission's refund authority under the FPA. As such, SMUD argues that it has not been given an offer comparable to those extended to other utility refund recipients.

28. SMUD also asserts that the Commission's response to its undue discrimination argument in similar proceedings offered a *non-sequitur*, namely, that SMUD has not demonstrated that it is being treated differently from other Deemed Distribution Participants. SMUD argues that it has long been settled that undue discrimination

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<sup>59</sup> 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).

<sup>60</sup> See SMUD Initial Comments at 6 (citing *Fla. Power & Light Co.*, 70 FERC ¶ 63,017 (1995)).

<sup>61</sup> See *id.*

involves either the dissimilar treatment of similarly situated parties or the similar treatment of dissimilar parties.<sup>62</sup> SMUD contends that non-jurisdictional entities are differently situated from jurisdictional entities because they cannot be ordered by the Commission to pay refunds; consequently, the Commission's failure to treat SMUD like other purchasers that also do not make jurisdictional sales is unduly discriminatory.

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. Rather, SMUD's classification in the Settlement is based purely upon whether they owe more than they are owed as a result of their transactions in the CAISO and CalPX markets. The Parties argue that SMUD and other non-jurisdictional entities have not been singled out as Deemed Distribution Participants under the Settlement. The Parties state that the Commission has previously rejected similar arguments raised by SMUD.<sup>63</sup>

30. Further, the Parties state that SMUD is incorrect in its assertion that "refund recipients" under the Settlement are Participants that made no jurisdictional sales. Instead, the Parties argue, Participants that receive cash distributions under the Settlement are "Net Refund Recipients." Citing to section 1.54 of the Settlement, the Parties explain that Net Refund Recipients are those Participants, other than Deemed Distribution Participants, that elect to participate in the Settlement and that are owed net refunds after consideration of amounts it may owe to the California markets in the form of refunds. The Parties claim that Participants' categorization as Deemed Distribution Participants has nothing to do with whether their sales were jurisdictional; rather, the categorization is based on whether they have net amounts outstanding and payable to the CAISO or the CalPX. The Parties state that it is clear from the Settlement that SMUD is simply wrong in asserting that the determination of whether a Participant receives a cash payment or a credit as a Deemed Distribution Participant is based on that Participant's status as a jurisdictional entity.

31. Finally, the Parties object to SMUD's claim that the Settlement is discriminatory because it provides for dissimilar treatment of similarly situated customers. The Parties contend that SMUD's argument is confused and its citation to *Alabama Electric*

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<sup>62</sup> See *id.* at 6 (citing *Ala. Elec. Coop. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982) (*Alabama Electric Cooperative*)).

<sup>63</sup> See Joint Reply Comments at 6-7 (citing *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 27-28 (2007)).

*Cooperative* is inapposite because that case did not involve a settlement but instead concerned the imposition of a rate design on parties rather than offering an option to participate.

### **Commission Determination**

32. The Commission disagrees with SMUD that it has offered a *non-sequitur* in response to SMUD's contentions concerning undue discrimination in other similar settlement proceedings. SMUD argues that it should be provided with a settlement offer that is substantially similar to the settlement that has been provided to similarly situated entities. In prior orders on similar settlements, the Commission correctly responded that SMUD has been offered the same settlement terms as others, and its designation as a Deemed Distribution Participant under the Settlement is not unduly discriminatory because this designation is not limited to non-jurisdictional entities.<sup>64</sup>

33. SMUD attempts to clarify its previous argument that it should be offered a settlement that is substantially similar to the settlement agreement offered to similarly situated customers. Specifically, SMUD asserts that it should be treated similarly to other customers that are *not* Deemed Distribution Participants.<sup>65</sup> We disagree with SMUD's contention that the Settlement is unduly discriminatory, even in light of this clarification. First, we reiterate that we continue to find that the Settlement's designation of certain entities as Deemed Distribution Participants is not unduly discriminatory, because this designation does not take into account the jurisdictional status of any particular entity. Rather, the Settlement designates entities as Deemed Distribution Participants based on whether those entities have amounts outstanding and payable to the CAISO and/or CalPX. Deemed Distribution Participants are not precluded from recovery under the Settlement and, pursuant to section 5.2.2 of the Settlement, these parties will receive a credit against their outstanding amounts owed to the CAISO and/or CalPX. Moreover, even if those Settlement provisions governing Deemed Distribution Participants could be construed as discriminatory to the extent they establish two tiers of

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<sup>64</sup> See, e.g., *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 28-32 (2009).

<sup>65</sup> Although SMUD claims that the Commission has only offered it a *non sequitur* in response to its undue discrimination claim, we note that SMUD has only recently taken the opportunity to assert that the Commission incorrectly interpreted SMUD's argument, despite the fact that the Commission previously addressed this same argument, and reached similar conclusions, in several similar proceedings. See, e.g., *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 28-32 (2009) (addressing SMUD's undue discrimination argument); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,297, at P 29-30 (2007); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 28 (2007). SMUD did not seek rehearing or clarification of these earlier orders.

settlement refund recipients, we conclude that any such discrimination is not undue because, under the Settlement, Deemed Distribution Participants and Net Refund Recipients are not similarly situated. Unlike Deemed Distribution Participants, entities designated as Net Refund Recipients do not have outstanding amounts owing to the CAISO and/or CalPX. Therefore, those provisions of the Settlement do not violate the FPA,<sup>66</sup> which prohibits only undue discrimination.<sup>67</sup>

34. SMUD contends that, because it is a non-jurisdictional entity and, therefore, cannot be ordered by the Commission to pay refunds, SMUD cannot have net amounts payable to the CAISO and/or CalPX. SMUD asserts that it should be considered a refund recipient under the Settlement, rather than a Deemed Distribution Participant. However, SMUD confuses the *legal* issue of whether the Commission can require it to pay refunds under FPA section 206 with the *factual* issue of whether SMUD owes money to the CAISO and/or CalPX. The Settlement does not suggest that SMUD owes refunds pursuant to the FPA, but rather suggests that SMUD may owe money to the CAISO and/or CalPX. While the United States Court of Appeals for the Ninth Circuit's (Ninth Circuit) *Bonneville* decision<sup>68</sup> did find that the Commission lacked authority to order governmental entities or other non-public utilities to pay refunds, the Ninth Circuit took no position on whether any remedies were available outside the context of the FPA.<sup>69</sup> As such, SMUD's contention that its treatment as a Deemed Distribution Participant under the Settlement is unduly discriminatory, and its related claim that its status as a non-jurisdictional entity means that it has no amounts owed to the CAISO and/or CalPX, are without merit.

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<sup>66</sup> 16 U.S.C. § 791, *et seq.* (2006).

<sup>67</sup> *See, e.g., Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 369 (2007) (“the FPA does not prohibit all discrimination, only undue discrimination. In general, discrimination is ‘undue’ when there is a difference of rates, terms or conditions among similarly situated customers. The Commission has broad discretion in determining when discrimination is undue.”) (internal citations omitted).

<sup>68</sup> *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9<sup>th</sup> Cir. 2005) (*Bonneville*), *order on remand*, 121 FERC ¶ 61,067 (2007), *order on reh'g*, 125 FERC ¶ 61,214 (2008).

<sup>69</sup> *Bonneville*, 422 F.3d at 925 (“The focus on the agreements between the Public Entities and ISO and CalPX only serves to demonstrate that the remedy, if any, may rest in a contract claim, not a refund action.”); *see id.* at 926 (“we take no position on remedies available outside of the FPA.”).

35. The Commission also finds irrelevant SMUD's reliance on *Alabama Electric Cooperative*. That case involved a public utility's rate design that would have been equally applicable to all of its customers, none of which would have had the opportunity to "opt out" of the utility's rates. In contrast, according to the terms of the Settlement at issue here, SMUD and others possess the ability to not opt in to the Settlement and are not bound by its provisions.

### **Conclusion**

36. 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 not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.