

129 FERC ¶ 61,256
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. EL00-95-235

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. EL00-98-220

Puget Sound Energy, Inc.

Docket No. EL01-10-051

v.

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. IN03-10-052

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

Docket No. PA02-2-068

California Independent System Operator Corporation

Docket No. ER03-746-017

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

Docket No. EL02-71-024

v.

British Columbia Power Exchange
Corporation, *et al.*

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

Docket No. EL09-56-001

v.

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

ORDER APPROVING SETTLEMENT

(Issued December 17, 2009)

1. In this order, the Commission approves a settlement filed on October 6, 2009 between Comision Federal de Electricidad (CFE) 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 CFE.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 the Settlement became binding when

¹ For purposes of this Settlement, 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.* Edmund G. Brown, Attorney General, and the California Public Utilities Commission (CPUC). 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 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 CFE under the terms of the Settlement.

⁴ 18 C.F.R. § 385.602 (2009).

all Parties executed it, and some provisions will become effective upon 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 if the Commission rejects the Settlement in whole or in part, or accepts it with modifications deemed unacceptable to any adversely affected Party, or if the California Parties fail to receive the consideration that they are due under the Settlement.⁶

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.⁷ The Parties state that the Settlement reaches a fair and reasonable resolution of the issues between CFE and the California Parties. The Parties further assert that the Settlement protects the rights of non-settling parties.⁸ 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.⁹ 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)¹⁰ 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 EL00-98-000.¹¹ In 2002, the Commission directed its staff to commence a fact-

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

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

⁷ Joint Offer of Settlement at 6.

⁸ *Id.*

⁹ *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 (9th Cir., Oct. 23, 2006)).

¹⁰ 16 U.S.C. § 791, *et seq.* (2006).

¹¹ *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

finding investigation into the alleged manipulation of electrical and natural gas prices in the West in Docket No. PA02-2-000.¹² In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in western energy markets in Docket No. IN03-10-000.¹³

6. The Parties state that the Settlement resolves claims in the above-captioned proceedings as they relate to CFE.¹⁴ 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.”¹⁵ Such entities must provide notice to the Commission, as well as serve the notice to parties on the ListSrvs 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.¹⁶ The Parties explain that certain entities identified in the Settlement shall automatically become Additional Settling Participants on the Effective Date.¹⁷ 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.¹⁸

7. The Parties explain that CFE has CAISO and CalPX receivables estimated to be \$9,713,349, with an estimated interested on receivables amount of \$5,985,244 through June 30, 2009, which will be updated through and including the projected date of distribution.¹⁹ Under the Settlement, CFE’s receivables will be released by the CalPX, a portion of which will be paid to CFE and a portion of which will be paid into an escrow

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

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

¹⁴ Joint Explanatory Statement at 3.

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

¹⁶ *Id.*

¹⁷ Joint Explanatory Statement at 12; Settlement and Release of Claims, § 8.4.

¹⁸ Joint Explanatory Statement at 12.

¹⁹ *Id.* at 4.

account established by the California Parties (CFE Refund Escrow).²⁰ The amount of CFE's receivables being transferred into the CFE Refund Escrow will be \$11,356,733, subject to an interest adjustment.²¹ The CalPX will transfer \$3,601,860, subject to an interest adjustment, to CFE.²²

8. The Settlement includes an Allocation Matrix²³ that provides an allocation of the settlement proceeds from the CFE Refund Escrow.²⁴ Certain specified Participants are labeled as "Deemed Distribution Participants."²⁵ Under the Settlement, Settling Participants that have net amounts outstanding and payable to the CAISO and/or the CalPX will receive their share of settlement proceeds in the form of "Deemed Distributions," i.e., credits against such amounts.²⁶ With respect to amounts allocated to entities that do not opt into the Settlement, the Settlement provides that such amounts will be credited toward any payments that the Commission ultimately holds to be due as refunds and interest to those non-settling parties for CFE's transactions in the California markets.²⁷ The Settlement states that CFE will make up any shortfall and receive any excess.²⁸ In addition, the Settlement provides that a negotiated amount of interest will be distributed to the California Parties and Additional Settling Participants concurrently with principal amounts, consistent with the Allocation Matrix.²⁹

²⁰ Joint Explanatory Statement at 4; Settlement and Release of Claims, § 4.1.4.

²¹ Joint Explanatory Statement at 4; Settlement and Release of Claims, § 4.1.1.4.

²² Joint Explanatory Statement at 4; Settlement and Release of Claims, § 4.1.1.6.

²³ Settlement and Release of Claims, Exhibit A.

²⁴ Joint Explanatory Statement at 13; Settlement and Release of Claims, § 5.2.

²⁵ Settlement and Release of Claims, Exhibit B. The Deemed Distribution Participants are: Aquila Power Corp.; California Polar Power Brokers LLC; Illinova Energy Partners, Inc.; PG&E; Pacific Gas & Electric Energy Services Co.; and Sacramento Municipal Utility District (SMUD).

²⁶ Joint Explanatory Statement at 13; Settlement and Release of Claims, § 5.2.2.

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

²⁸ *Id.*

²⁹ Joint Explanatory Statement at 13; Settlement and Release of Claims, §§ 4.1.1.2, 4.1.3, and 5.3.

9. The Parties explain that CFE was a net purchaser in the CAISO and CalPX markets during the pre-October 2, 2000 period but was a net seller during the refund period, i.e., October 2, 2000-June 20, 2001.³⁰ As a result, CFE had been a Deemed Distribution Participant in a number of earlier settlements in Docket No. EL00-95, *et al.*³¹ Under the Settlement, CFE will automatically become an additional settling participant in settlements between the California Parties and various suppliers listed in section 2 of Appendix C to the Settlement.³² In addition, the Settlement provides the California Parties' consent for CFE to opt-in out of time to the settlements listed in Exhibit C that require the consent of both the California Parties and the relevant settling supplier.³³ The Settlement also provides that the California Parties will not contest any motion that CFE may file with the Commission seeking permission to opt into those earlier settlements.³⁴

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

³⁰ Joint Explanatory Statement at 4.

³¹ Joint Explanatory Statement at 4-5.

³² Joint Explanatory Statement at 4-5; Settlement and Release of Claims, Exhibit C at § 2. Section 2 of Exhibit C lists prior settlements that require only the agreement of the California Parties to opt in out of time. These settlements are between the California Parties and: (1) City of Vernon, California; (2) Puget Sound Energy, Inc.; and (3) PECO/Exelon.

³³ Joint Explanatory Statement at 5; Settlement and Release of Claims, § 4.1.10. *See also* Settlement and Release of Claims, Exhibit C at § 1. Section 1 of Exhibit C lists those prior settlements that require both the consent of the California Parties and the relevant settling supplier to opt in out of time. These settlements are between the California Parties and: (1) the Williams Companies; (2) the Dynegy parties; (3) the Duke parties; (4) the Mirant parties; (5) the Enron parties; (6) Public Service Company of Colorado; (7) the Reliant parties; (8) Idacorp; (9) Eugene Water & Electric Board; (10) Portland General Electric Company; (11) PacifiCorp; (12) PPM Energy, Inc.; (13) Conectiv Energy Supply, Inc.; (14) Midway Sunset Cogeneration Company; (15) Public Utility District No. 2 of Grant County, Washington; (16) City of Riverside, California; (17) City of Anaheim, California; (18) City of Azusa, California; (19) Strategic Energy, LLC; (20) AES Placerita, Inc.; and (21) Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.

³⁴ Joint Explanatory Statement at 5; Settlement and Release of Claims, § 4.1.10.

as provided for in the Settlement.³⁵ 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.³⁶

11. The Parties state that the Settlement generally resolves all claims as between the California Parties and CFE relating to transactions in the western energy markets during the Settlement Period for refunds, disgorgement of profits, costs and attorneys' fees, or other remedies in certain proceedings before the Commission, subject to specified limitations.³⁷ In addition, the Parties waive and release any existing disputes regarding CAISO settlements and/or CalPX settlements for the Settlement Period.³⁸ Similarly, the Parties state that CFE 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.³⁹ Likewise, the Parties state that CFE 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.⁴⁰ Subject to specified limitations, Additional Settling Participants are deemed to provide and receive releases with and from CFE as those provided in the Settlement for the California Parties.⁴¹ The Settlement further provides that CFE will withdraw with prejudice all claims that it has filed in the PG&E bankruptcy proceedings.⁴²

³⁵ Joint Explanatory Statement at 14; Settlement and Release of Claims, § 6.1.

³⁶ *Id.*

³⁷ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, § 7.1.1.

³⁸ Settlement and Release of Claims Agreement, § 7.1.5.

³⁹ Joint Explanatory Statement at 15; *see* Settlement and Release of Claims, § 7.2.1.

⁴⁰ Joint Explanatory Statement at 15; *see* Settlement and Release of Claims, § 7.3.1.

⁴¹ Joint Explanatory Statement at 16; Settlement and Release of Claims, §§ 7.4, 8.2.

⁴² Settlement and Release of Claims Agreement, § 7.1.7.

12. CFE 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.⁴³

13. The Parties state that they would not object to the Commission acting to assure the CAISO and CalPX that they will be held harmless from their actions to implement the Settlement.⁴⁴

Procedural Matters

14. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.⁴⁵ 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.⁴⁶

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 October 26, 2009, and reply comments were due on or before November 5, 2009. Initial comments were timely filed by the CAISO and CalPX, either in support of or not opposing the Settlement. In addition, SMUD filed timely comments opposing the Settlement. Joint reply comments were filed by the Parties (Joint Reply Comments).⁴⁷

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.

⁴³ Joint Explanatory Statement at 15; Settlement and Release of Claims, § 7.2.2.

⁴⁴ Joint Explanatory Statement at 15.

⁴⁵ 18 C.F.R. § 385.602 (2009).

⁴⁶ Joint Offer of Settlement at 2, 3.

⁴⁷ For purposes of the Joint Reply Comments, the California Parties do not include CERS.

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.⁴⁸ Accordingly, CalPX requests that the following “hold harmless” language be incorporated into any Commission order approving the Settlement:

The Commission recognizes that CalPX will be required to implement this settlement by paying substantial funds from its Settlement Clearing Account at the Commission’s direction. Therefore, except to the extent caused by their own gross negligence, neither officers, directors, employees nor professionals shall be liable for implementing the settlement including but not limited to cash payouts and accounting entries on CalPX’s books, nor shall they or any of them be liable for any resulting shortfall of funds or resulting change to credit risk as a result of implementing the settlement. In the event of any subsequent order, rule or judgment by the Commission or any court of competent jurisdiction requiring any adjustment to, or repayment or reversion of, amounts paid out of the Settlement Clearing Account or credited to a participant’s account balance pursuant to the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.⁴⁹

18. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.⁵⁰ In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.⁵¹

⁴⁸ CAISO Initial Comments at 3-7; CalPX Initial Comments at 2-4.

⁴⁹ CalPX Initial Comments at 4.

⁵⁰ *Id.*; see *San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,186 at P 15, 19 (2005).

⁵¹ See Joint Reply Comments at 10.

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.⁵² Consistent with the Commission’s precedent,⁵³ 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.

B. SMUD’s Arguments in Opposition to the Settlement

20. Under the Commission’s *Trailblazer*⁵⁴ 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.⁵⁵ 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.⁵⁶ Thus, SMUD argues that the Settlement offer is “premised

⁵² *See id.*; *see also* Joint Explanatory Statement at 16.

⁵³ *See, e.g., San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242 at P 19 (2009) (approving “hold harmless language”) (*Constellation Settlement Order*); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,151 at P 19 (2007) (same); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004) (same), *reh’g denied*, 111 FERC ¶ 61,186 (2005).

⁵⁴ *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*).

⁵⁵ *Trailblazer*, 85 FERC at 62,342-44.

⁵⁶ *See* SMUD Initial Comments at 4.

on the Commission's exercise of authority [that] the Commission does not possess."⁵⁷ 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*.⁵⁸ SMUD states that the "Commission has frowned on cram down provisions like these, as 'comments that might otherwise be voiced are suppressed.'"⁵⁹ Accordingly, SMUD states that the Settlement should be rejected.⁶⁰

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. The Parties add that SMUD will not forfeit any rights or claims by not opting into the Settlement.⁶¹ The Parties also 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.⁶² 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.⁶³

2. Commission Determination

23. The Commission rejects SMUD's argument that the Settlement should not be approved because, by opting into the Settlement, SMUD, along with other non-jurisdictional utilities, must forfeit statutory rights that exempt it from refund obligations. Opting into the Settlement is a voluntary and affirmative action on the part of any party.

⁵⁷ *See id.*

⁵⁸ *ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992).

⁵⁹ *See* SMUD Initial Comments at 4 (citing *ANR Pipeline Company*, 59 FERC ¶ 61,347, at 62,260).

⁶⁰ *See id.*

⁶¹ *See* Joint Reply Comments at 5-6 (citing *Constellation Settlement Order*, 128 FERC ¶ 61,242, at P 23-26).

⁶² *See id.* at 4-5 (citing *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,308, at P 31, 34 (2005), *reh'g denied*, 115 FERC ¶ 61,271 (2006)).

⁶³ *See id.* at 4, n.14.

As set forth in the Settlement, by electing not to opt-in, non-jurisdictional utilities may continue to pursue claims against CFE in the underlying proceedings. Therefore, if SMUD is not satisfied with the terms of the Settlement, it may elect not to opt-in and in doing so, as a Non-Settling Participant, will forfeit no rights or claims against CFE.

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 also 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 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 CFE, and the Parties agree to hold back settlement funds so that claims pursued by Non-Settling Participants will be addressed.⁶⁴

26. As was the case in prior settlements,⁶⁵ 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.

⁶⁴ See Joint Explanatory Statement at 13; Settlement and Release of Claims, § 5.5.

⁶⁵ See, e.g., *Constellation Settlement Order*, 128 FERC ¶ 61,242, at P 26; *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).

3. Undue Discrimination

27. SMUD argues that the Settlement is unduly discriminatory. SMUD notes that a substantially similar settlement offer must be made to similarly situated customers.⁶⁶ SMUD argues that the Settlement draws an unreasonable distinction between SMUD, as a non-jurisdictional seller, and all other buyers of power who made no jurisdictional sales. As a result, SMUD asserts that the Settlement requires SMUD alone to forfeit its statutory rights in order to participate in the receipt of refunds.⁶⁷ 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 involves either the dissimilar treatment of similarly situated parties or the similar treatment of dissimilar parties.⁶⁸ 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. SMUD further contends that the Commission's attempt to address SMUD's *non sequitur* argument in recent orders denying SMUD's request for rehearing of other settlements did not address SMUD's assertions.⁶⁹ In those orders, the Commission explained that SMUD had confused the issue of whether the Commission can order SMUD to pay refunds under the FPA with the issue of whether SMUD owes money to the CAISO and/or the CalPX. SMUD notes, however, that it not only denies that it owes any money to the CAISO and/or the CalPX, but that neither entity has ever made any claim against

⁶⁶ See SMUD Initial Comments at 5-6 (citing *Fla. Power & Light Co.*, 70 FERC ¶ 63,017 (1995)).

⁶⁷ See *id.*

⁶⁸ See *id.* at 5-6 (citing *Ala. Elec. Coop. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982) (*Alabama Electric Cooperative*)).

⁶⁹ See *id.* at 6 (citing *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,241 (2009) (*Puget Sound Settlement Order*) and *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,243 (2009) (*AES Placerita Settlement Order*)).

SMUD for refunds. Instead, SMUD argues, the Commission has already found that SMUD is owed monies by these entities, citing the Commission's order on remand⁷⁰ from the Ninth Circuit's *Bonneville* decision.⁷¹

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 SMUD owes more than it is owed as a result of its 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.⁷²

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 sections 1.50 and 5.2.1 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 they 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.

31. With respect to SMUD's argument that neither the CAISO nor the CalPX has made any claim for money against SMUD, the Parties reply that SMUD is attempting to sidestep the issue, noting that the Commission has directed the CAISO and the CalPX to complete their refund calculations to all suppliers, including governmental entities, that participated in the CAISO and CalPX markets. The Parties also point out that a claim for amounts owed by SMUD for its CAISO and CalPX transactions is being litigated in

⁷⁰ *San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,067, at P 57 (2007) (*Bonneville Remand Order*), *order on reh'g*, 125 FERC ¶ 61,214 (2008).

⁷¹ *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (*Bonneville*), *order on remand*, 121 FERC ¶ 61,067 (2007), *order on reh'g*, 125 FERC ¶ 61,214 (2008).

⁷² See Joint Reply Comments at 6-7 (citing *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,002, at P 26 (2009)).

California state court. The Parties argue that the Commission correctly decided this issue in the *Constellation Settlement Order*, where it stated that SMUD had confused the legal issue of whether the Commission could require it to pay refunds under the FPA with the factual issue of whether SMUD owes money to the CAISO and/or the CalPX.⁷³

Commission Determination

32. We disagree with SMUD's contention that the Settlement is unduly discriminatory. First, as we have explained in other orders addressing similar settlements,⁷⁴ we find that the Settlement's designation of certain entities as Deemed Distribution Participants is not unduly discriminatory, because this designation is not based upon 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 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,⁷⁵ which prohibits only undue discrimination.⁷⁶

⁷³ See *id.* at 9-10 (citing *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 34).

⁷⁴ See *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 32; *Puget Sound Rehearing Order*, 128 FERC ¶ 61,241 at P 6; *AES Placerita Rehearing Order*, 128 FERC ¶ 61,243 at P 6.

⁷⁵ 16 U.S.C. § 791, *et seq.* (2006).

⁷⁶ 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).

33. 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, as we explained in recent orders,⁷⁷ 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 Ninth Circuit's *Bonneville* decision did find that the Commission lacked authority to order governmental entities or other non-public utilities to pay refunds under FPA section 206 as then in effect, the Ninth Circuit took no position on whether any remedies were available outside the context of the FPA.⁷⁸ 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.

34. SMUD argues that this conclusion is incorrect because SMUD not only denies that it owes money to the CAISO and the CalPX, but also that neither entity has filed a claim against SMUD. However, SMUD misunderstands the nature of the settlements we have approved in these proceedings, including this Settlement. These settlements are voluntary agreements that entities can choose to join or not to join. They do not constitute any refund determination under section 206 of the FPA. Similarly, they do not constitute a finding that any entity, including SMUD, actually owes money to the CAISO and/or the CalPX. Rather, the Commission evaluates these settlements to ensure that they are just and reasonable under the FPA. In these cases, the Commission has found that the settlements are just and reasonable. We have found that the rights of non-settling parties, such as SMUD, are fully protected. Non-settling parties are unaffected by these settlements, and they maintain the right to pursue litigation against the settling suppliers, such as CFE. Even if SMUD were to choose to join the Settlement, and voluntarily decided to exchange its right to pursue claims against CFE for the benefits of the Settlement, our approval of the Settlement would not make any affirmative finding that

⁷⁷ See *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 34; *Puget Sound Rehearing Order*, 128 FERC ¶ 61,241 at P 7; *AES Placerita Rehearing Order*, 128 FERC ¶ 61,243 at P 7.

⁷⁸ *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”).

SMUD owed money to the CAISO and/or the CalPX. Therefore, because of the voluntary nature of the Settlement, because the Commission is not making any findings with respect to the question of whether any entity (including SMUD) owes money to the CAISO and/or the CalPX, and because the Commission is not making any findings with respect to refunds under the FPA, we conclude that approval of the Settlement is consistent with the Ninth Circuit's *Bonneville* decision and the Commission's *Bonneville Remand Order*.

35. Finally, and as we also discussed in earlier orders,⁷⁹ the Commission finds irrelevant SMUD's reliance on *Alabama Electric Cooperative*. That case involved a public utility's rate design that would have applied to all of its customers, none of which would have had the opportunity to "opt out" of the utility's rates. In contrast, SMUD and others possess the ability not to opt in to the Settlement and are not bound by its provisions, as discussed above.

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. Commission Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁷⁹ See *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 35; *Puget Sound Rehearing Order*, 128 FERC ¶ 61,241 at P 8; *AES Placerita Rehearing Order*, 128 FERC ¶ 61,243 at P 8.