

PECO Energy Company

Docket No. EL03-198-005

California Power Exchange Corporation

Docket No. ER05-167-003

California Power Exchange Corporation

Docket No. ER07-861-001

ORDER APPROVING SETTLEMENT

(Issued December 17, 2009)

1. In this order, the Commission approves a settlement filed on November 20, 2008 in the above-captioned proceedings between Exelon Corporation, Exelon Generation Company, LLC, Commonwealth Edison Company, and PECO Energy Company (together, PECO/Exelon) 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 PECO/Exelon.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), San Diego Gas & Electric Company (SDG&E), Southern California Edison Company (SoCal Edison), the People of the State of California, *ex rel.* Edmund G. Brown Jr., 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 PECO/Exelon 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 PECO/Exelon 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 California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) markets in Docket Nos. EL00-95-000

⁵ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement, §§ 2.2, 9.1.

⁶ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement, §§ 2.3, 4.3.

⁷ Joint Offer of Settlement at 5.

⁸ *Id.*

⁹ *Id.* at 5-6 (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)).

¹⁰ 16 U.S.C. § 791a (2006).

and EL00-98-000.¹¹ 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. PA02-2-000.¹² In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in the western energy markets in Docket No. IN03-10-000 (Anomalous Bidding Investigation).¹³ On the same day it initiated the Anomalous Bidding Investigation, the Commission issued two orders directing named entities to show cause why they had not participated in certain gaming practices (Gaming Proceeding)¹⁴ or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior (Partnership Proceeding).¹⁵ PECO/Exelon was not a named entity in the Gaming Proceeding, but was named in the Partnership Proceeding. In 2004, the Commission dismissed PECO/Exelon from the Partnership Proceeding based on a finding that PECO/Exelon did not engage in prohibited gaming practices during the relevant time period. However, this dismissal was subject to certain conditions agreed to by PECO/Exelon and the California Parties.¹⁶

6. The Parties state that the Settlement resolves claims in the above-captioned proceedings as they relate to PECO/Exelon.¹⁷ 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.”¹⁸ 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

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

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

¹⁵ *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

¹⁶ *Las Vegas Cogeneration Co., L.P.*, 106 FERC ¶ 61,199, at P 22-23 (2004).

¹⁷ Joint Explanatory Statement at 2.

¹⁸ Joint Explanatory Statement at 3, 12; Settlement and Release of Claims, § 8.1.

Settlement.¹⁹ 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.²⁰ The Settlement provides that no claims will be deemed settled as to Non-Settling Participants.²¹

7. Under the Settlement, the CalPX will release proceeds from PECO/Exelon's unpaid receivables from transactions through markets operated by the CalPX and the CAISO.²² The Settlement provides that the California Parties will take steps to establish, maintain, and administer a "Settling Supplier Refund Escrow" (Supplier Escrow) and a "California Litigation Escrow."²³ The receivables that will be released by the CalPX under the Settlement include PECO/Exelon's CAISO and CalPX receivables, which are estimated to be \$2,920,950, and the estimated interest on receivables, estimated to be \$1,735,983 through September 30, 2008.²⁴ These proceeds, along with a cash payment of \$1,614,409 by PECO/Exelon, will be transferred to the escrow accounts in settlement of claims related to events in the California and western energy markets in 2000 and 2001.²⁵ In addition, PECO/Exelon will assign to the California Parties their entitlement to refunds on purchases made in the western energy markets during the Settlement Period.²⁶

8. Proceeds will be distributed from the Supplier Escrow to each of the Settling Participants in accordance with an Allocation Matrix that is included as Exhibit A to the Settlement.²⁷ The Allocation Matrix includes a list of all Participants and the amount of money they would receive if they opted to join the Settlement. Certain specified

¹⁹ Joint Explanatory Statement at 12-13; Settlement and Release of Claims, § 8.1.

²⁰ Joint Explanatory Statement at 4.

²¹ Settlement and Release of Claims, §§ 3.2, 7.1.1.

²² Joint Explanatory Statement at 3, 13.

²³ Joint Explanatory Statement at 3, 14; Settlement and Release of Claims, § 4.1.4.

²⁴ Joint Explanatory Statement at 13. The interest on receivables will be updated through and including the projected date of distribution. *See id.*

²⁵ Joint Explanatory Statement at 3, 13; Settlement Cover Sheet, § 4.1.1.1.

²⁶ Joint Explanatory Statement at 13; Settlement and Release of Claims, § 4.1.8.

²⁷ Settlement and Release of Claims, Exhibit A.

Participants are labeled as “Deemed Distribution Participants.”²⁸ 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.²⁹ With respect to amounts specified on the Allocation Matrix as being allocated to Non-Settling Participants, the Settlement provides that such amounts will be retained in escrow until such time that they are paid in accordance with the terms of the Settlement.³⁰ The Settlement states that, subject to specified limitations, certain of the California Parties will be responsible for the payment of any refunds, including interest, owed by PECO/Exelon to Non-Settling Participants in connection with claims in certain Commission proceedings arising from PECO/Exelon’s transactions in the California markets during the Settlement Period.³¹ Further, the Settlement provides that certain of the California Parties will be responsible for excesses and shortfalls in receivables, as well as refund excesses and shortfalls, subject to specified limitations.³²

9. 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.³³ The Settlement states that the Commission’s

²⁸ Settlement and Release of Claims, Exhibit B. The Deemed Distribution Participants are: Aquila Power Corp.; California Polar Power Brokers LLC; Cargill Alliant, LLC; Comision Federal de Electricidad; Illinova Energy Partners, Inc.; PG&E; Pacific Gas & Electric Energy Services Co.; and Sacramento Municipal Utility District (SMUD).

²⁹ Settlement and Release of Claims, § 5.2.2.

³⁰ Settlement and Release of Claims, § 5.5.

³¹ Settlement and Release of Claims, § 7.1.4. *See also* Settlement and Release of Claims, § 5.8.

³² Joint Explanatory Statement at 14; Settlement and Release of Claims, §§ 5.6-5.8. Section 5.6 of the Settlement and Release of Claims addresses these responsibilities during the different periods of time covered by the Settlement Period. In general, PG&E, SoCal Edison, and SDG&E are responsible for both shortfalls and excesses for the January 1, 2000-October 1, 2000 Period and the Pre-January 18, 2001 Period, while CERS is responsible for shortfalls and excesses for the Post-January 17, 2001 Period, except to the extent that any refunds paid to CERS for this period pursuant to the allocation matrix are subsequently reallocated to PG&E, SoCal Edison, and SDG&E by separate agreement.

³³ Joint Explanatory Statement at 15; Settlement and Release of Claims, § 6.1.

approval of the Settlement will constitute the Commission's authorization and direction to the CAISO and the CalPX to take such action.³⁴

10. The Parties state that the Settlement generally resolves all claims as between the California Parties and PECO/Exelon 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.³⁵ In addition, the Parties waive and release any existing disputes regarding CAISO settlements and/or CalPX settlements for the Settlement Period.³⁶ Similarly, the Parties state that the California Parties and, with respect to PECO/Exelon, the Additional Settling Participants, on the one hand, and PECO/Exelon, on the other hand, 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.³⁷ Likewise, the Parties state that the California Parties and the Additional Settling Participants, on the one hand, and PECO/Exelon, on the other hand, 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.³⁸ In addition, the Settlement states that PECO/Exelon will withdraw with prejudice all claims that they have filed in the PG&E bankruptcy proceedings.³⁹ The Settlement further provides that the California Parties will withdraw any request for rehearing or petition for review of any settlement between PECO/Exelon and Trial Staff or of any dismissal approved by Commission order in the Gaming and Partnership Proceedings.⁴⁰

³⁴ *Id.*

³⁵ Joint Explanatory Statement at 15; Settlement and Release of Claims, § 7.1.1.

³⁶ Settlement and Release of Claims Agreement, § 7.1.5.

³⁷ Joint Explanatory Statement at 16; Settlement and Release of Claims, § 7.2.1.

³⁸ Joint Explanatory Statement at 16-17; Settlement and Release of Claims, § 7.3.1.

³⁹ Settlement and Release of Claims, §7.1.7.

⁴⁰ Settlement and Release of Claims, §4.4.

11. 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.⁴¹

Procedural Matters

12. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.⁴² 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. EL02-71,⁴³ and the Commission has considered a number of similar settlements without the assistance of a certification from an administrative law judge.⁴⁴

13. 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 December 10, 2008, and reply comments were due on or before December 22, 2008. Initial comments were timely filed by the CAISO and CalPX, either in support of or not opposing the Settlement. In addition, SMUD, and Californians for Renewable Energy (CARE) filed timely comments opposing the Settlement. Joint reply comments were filed by the Parties (Joint Reply Comments).⁴⁵

14. 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.

⁴¹ Joint Explanatory Statement at 17.

⁴² 18 C.F.R. § 385.602 (2009).

⁴³ On January 12, 2009, the settlement judge assigned to Docket No. EL02-71-004 submitted a report to the Commission summarizing the settlement and comments received on the settlement. *See Report of Settlement Judge on Contested Settlement*, Docket No. EL02-71-004 (Jan. 12, 2009).

⁴⁴ Joint Offer of Settlement at 2, 3.

⁴⁵ For purposes of the Joint Reply Comments, the California Parties do not include CERS.

Substantive Matters

A. “Hold Harmless” Protection

15. 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.⁴⁶ 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.⁴⁷

16. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.⁴⁸ In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.⁴⁹

⁴⁶ CAISO Initial Comments at 4-7; CalPX Initial Comments at 2-4.

⁴⁷ CalPX Initial Comments at 4.

⁴⁸ *Id.*; see *San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,186, at P 15, 19 (2005).

⁴⁹ See Joint Reply Comments at 12.

Commission Determination

17. 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.⁵⁰ Consistent with the Commission’s precedent,⁵¹ 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. Comments in Opposition to the Settlement

18. Under the Commission’s *Trailblazer*⁵² 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.⁵³ In this case, we approve the Settlement under *Trailblazer*’s first prong because we find that SMUD’s and CARE’s arguments are without merit, as discussed herein.

1. SMUD’s Arguments

a. Forfeiture of Statutory Rights

19. 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

⁵⁰ See *id.*; see also Joint Explanatory Statement at 17.

⁵¹ See e.g., *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242, at P 19 (2009) (*Constellation Settlement Order*) (incorporating “hold harmless” language from earlier settlements); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,002, at P 17 (2009) (*Puget Sound Settlement Order*) (same); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,004, at P 21 (2009) (*AES Placerita Settlement Order*) (same); *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 38 (2009) (*NEGT Settlement Order*) (same).

⁵² *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*).

⁵³ *Trailblazer*, 85 FERC at 62,342-44.

they owe for their charges, which the Commission cannot lawfully require non-jurisdictional parties to pay.⁵⁴ Thus, SMUD argues that the Settlement offer is “premised on the Commission’s exercise of authority [that] the Commission does not possess.”⁵⁵ 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*.⁵⁶ SMUD states that the “Commission has frowned on cram down provisions like these, as ‘comments that might otherwise be voiced are suppressed.’ ”⁵⁷ Accordingly, SMUD states that the Settlement should be rejected.⁵⁸

20. 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 argue that if SMUD does not like the terms of the Settlement, it can choose not to opt in. The Parties state that SMUD does not lose any rights by choosing not to join the Settlement, and that it may continue to litigate against PECO/Exelon in the underlying proceedings. The Parties also point out that the Settlement states that nothing in it “shall establish any facts or precedents as between the Parties, the Additional Settling Participants, and any third parties as to the resolution of any dispute.”⁵⁹ 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.⁶⁰

Commission Determination

21. 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.

⁵⁴ See SMUD Initial Comments at 5.

⁵⁵ See *id.* at 5.

⁵⁶ *ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992).

⁵⁷ See SMUD Initial Comments at 5 (citing *ANR Pipeline Company*, 59 FERC ¶ 61,347, at 62,260).

⁵⁸ See *id.*

⁵⁹ Joint Reply Comments at 5 (*quoting* Settlement and Release of Claims, § 11.11).

⁶⁰ See *id.* at n.12.

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 PECO/Exelon 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 PECO/Exelon.

22. 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.

23. The Commission also rejects SMUD's characterization of the Settlement provisions governing the allocation of refunds as "cram down" provisions. 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 PECO/Exelon, and the Parties agree to hold back settlement funds so that claims pursued by Non-Settling Participants will be addressed.

24. As was the case in prior settlements,⁶¹ if a non-jurisdictional entity elects to remain in the Settlement, it will be accepting a reasonable compromise under which it accepts the terms of the Settlement in exchange for the benefits of the Settlement. 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.

b. Undue Discrimination

25. SMUD argues that the Settlement is unduly discriminatory. SMUD notes that a substantially similar settlement offer must be made to similarly situated customers.⁶²

⁶¹ See, e.g., *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 26; *Puget Sound Settlement Order*, 128 FERC ¶ 61,002 at P 23 (2009); *AES Placerita Settlement Order*, 128 FERC ¶ 61,004 at P 27; *NEGT Settlement Order*, 126 FERC ¶ 61,007 at P 26.

⁶² See SMUD Initial Comments at 5-6 (citing *Fla. Power & Light Co.*, 70 FERC ¶ 63,017 (1995)).

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.⁶³ 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.

26. In response, the Parties argue that SMUD's assertion that the Settlement violates the principle that a substantially similar settlement offer must be made to similarly situated customers is illogical and confused. According to the Parties, SMUD is arguing that it is not similar to other customers because it is a non-jurisdictional entity and, therefore, it does not need to be provided with a comparable offer. The Parties also state that SMUD and other non-jurisdictional entities have not been singled out in the Settlement as Deemed Distribution Participants, because the classification is not based on a Participant's status as a jurisdictional or non-jurisdictional entity. The Parties point out that PG&E, a jurisdictional Participant, is also a Deemed Distribution Participant. The Parties also state that the Commission has already considered and rejected SMUD's arguments in connection with the California Parties' settlement with PacifiCorp.⁶⁴

Commission Determination

27. SMUD has raised these issues in similar settlement proceedings,⁶⁵ and we reject its arguments in this proceeding as well. 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. As we have stated in prior orders on similar settlements, 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.⁶⁶

28. In subsequent settlement proceedings, SMUD has attempted to clarify its previous argument that it should be offered a settlement that is substantially similar to the

⁶³ *See id.*

⁶⁴ *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 27-28 (2007).

⁶⁵ *See, e.g., San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 30 (2009).

⁶⁶ *See, e.g., id.* at P 28-32.

settlement agreement offered to similarly situated customers.⁶⁷ Specifically, SMUD asserts that it should be treated similarly to other customers that are *not* Deemed Distribution Participants. 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 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,⁶⁸ which prohibits only undue discrimination.⁶⁹

29. In these subsequent proceedings, SMUD has contended 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.⁷⁰ SMUD has asserted that it should be considered a refund recipient under the Settlement, rather than a Deemed Distribution Participant. However, in those proceedings, we responded that 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

⁶⁷ See, e.g., *Initial Comments of the Sacramento Municipal Utility District* at 6, Docket No. EL00-95-228, *et al.* (July 22, 2009).

⁶⁸ 16 U.S.C. § 791, *et seq.* (2006).

⁶⁹ 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).

⁷⁰ See, e.g., *Initial Comments of the Sacramento Municipal Utility District* at 6, Docket Nos. EL00-95, *et al.* (Oct. 26, 2009).

CAISO and/or CalPX.⁷¹ The settlements at issue in the earlier proceedings, as well as this Settlement, do not suggest that SMUD owes refunds pursuant to the FPA, but rather suggests that SMUD may owe money to the CAISO and/or CalPX. We explained that while the United States Court of Appeals for the Ninth Circuit's (Ninth Circuit) *Bonneville* decision⁷² 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.⁷³ As such, we concluded that SMUD's contention in the earlier proceedings 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, were without merit.

30. In subsequent settlement proceedings, to counter the Commission's conclusion that the legal issue of whether the Commission can order SMUD to pay refunds is different from the factual issue of whether SMUD owes money to the CAISO and/or CalPX, SMUD has contended that it does not owe money to the CAISO and/or the CalPX and that neither entity has filed a claim against SMUD.⁷⁴ Further, SMUD has asserted that the Commission had already found that SMUD is owed monies by these entities, citing the Commission's order on remand⁷⁵ from the Ninth Circuit's *Bonneville* decision. We note, however, that SMUD misunderstands the nature of the settlements we have approved in these proceedings. 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

⁷¹ See, e.g., *Constellation Settlement Order*, 128 FERC ¶ 61,242 at P 34; *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,243, at P 7 (2009).

⁷² *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).

⁷³ *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.").

⁷⁴ See n.70, *supra*.

⁷⁵ *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).

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 Participants, such as SMUD, are fully protected. Non-Settling Participants are unaffected by these settlements, and they maintain the right to pursue litigation against the settling suppliers, such as PECO/Exelon. Even if SMUD were to choose to join the Settlement, and voluntarily decided to exchange its right to pursue claims against PECO/Exelon for the benefits of the Settlement, our approval of the Settlement would not make any affirmative finding that 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*.

c. **Clarification of PECO/Exelon's Obligation to Pay Refunds to Non-Settling Participants**

31. SMUD argues that if the Commission approves the Settlement, then it should clarify that it will enforce the residual underlying obligation of PECO/Exelon to pay refunds to Non-Settling Participants.⁷⁶ SMUD points out that the Settlement limits the California Parties' obligations to pay refunds to Non-Settling Participants. According to SMUD, if PECO/Exelon's underlying obligation to pay refunds to Non-Settling Participants is not enforced then Non-Settling Participants would be placed in a worse position than they would have absent the Settlement.⁷⁷

32. The Parties argue that the Commission should reject SMUD's request that the Commission clarify that it will enforce the underlying obligation of PECO/Exelon to pay refunds due to Non-Settling Participants.⁷⁸ The Parties contend that this issue does not need to be addressed because Non-Settling Participants are sufficiently protected from

⁷⁶ SMUD Initial Comments at 7.

⁷⁷ *Id.*

⁷⁸ Joint Reply Comments at 7-8.

potential shortfalls.⁷⁹ The Parties point to other settlements where the Commission addressed this issue.⁸⁰

Commission Determination

33. The Commission rejects SMUD's request for clarification. Paragraphs 6 and 8, *supra*, state unambiguously the Settlement's allocations of the risks of shortfalls in receivables and refunds among the settling parties. The interests of Non-Settling Participants, then, are specifically anticipated and provided for under the Settlement, and the Settlement incorporates measures to address concerns about the impact of shortfalls. Consistent with our determinations in similar settlement proceedings, we will not condition approval of the Settlement on further measures to address potential shortfalls.⁸¹

2. CARE's Comments

34. CARE filed comments opposing the Settlement, asserting that it alone represents "electric consumers," as that term is defined in Chapter 46 of 16 U.S.C. § 2602(5), before the Commission and the courts. CARE argues that the Settlement harms the prospect of refunds to ratepayers associated with overcharges by the settling parties for their wholesale energy and ancillary services sales. CARE cites to an unpublished Ninth Circuit order in which the court held that "parties to these consolidated and stayed petitions are admonished that similar motions to lift the stay with respect to individual parties and orders are strongly discouraged."⁸² CARE contends that settlement negotiations without the participation of "electric consumer(s)" are a violation of this decision. CARE cites to the recent United States Supreme Court decision in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County et al.*,⁸³ in which the Court held that contract rates are presumptively reasonable only where the Commission had an initial opportunity to review the contract without applying the

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* (citing *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257, at P 39-40 (2004), *reh'g denied*, 111 FERC ¶ 61,186 (2005)).

⁸¹ *See, e.g., San Diego Gas & Elec. Co., et al.*, 128 FERC ¶ 61,002, at P 30, *order denying reh'g*, 128 FERC ¶ 61,242, at P 10-13 (2009) (denying similar request filed by SMUD).

⁸² CARE Comments at 3 (quoting *Public Utils. Comm'n of the State of Cal. v. FERC*, No. 01-71934, *et al.*, Order (Nov. 17, 2008)).

⁸³ 128 S.Ct. 2733 (2008) (*Morgan Stanley*).

Mobile-Sierra presumption and therefore that the presumption should not apply to contracts entered into under market-based tariffs.

35. The Parties dispute CARE's position that it alone represents electric consumers in California. The Parties point out that the CPUC, which executed the Settlement, is authorized under California law to represent the state's ratepayers. The Parties also state that CARE may continue to pursue settlement of its claims, choose not to opt-in to the Settlement, and to pursue its pending petition for review. The Parties contend that the Ninth Circuit's stay of appellate proceedings does not operate to stay settlement negotiations or proceedings before the agency to determine whether the settlements should be approved. The Parties state that it is unclear how *Morgan Stanley* supports CARE's opposition to the Settlement.

Commission Determination

36. We conclude that CARE's arguments are without merit. First, we reiterate our previous determination that the CPUC represents California ratepayers.⁸⁴ The CPUC, as a constitutionally-established California state agency, has a statutory mandate to represent the interests of electric consumers in proceedings before the Commission.⁸⁵ Similarly, the California Attorney General has state constitutional and statutory authority to bring actions on behalf of the people of California and the duty to safeguard the public interest.⁸⁶ Thus, California ratepayers have not been excluded from these proceedings.⁸⁷

⁸⁴ *Duke Energy Trading and Mktg., LLC*, 125 FERC ¶ 61,345 (2008), *reh'g denied*, 126 FERC ¶ 61,234, at P 45 (2009) ("Even if CARE's citation [to PURPA rather than the FPA] were relevant, CARE is not the only ratepayer advocate. For example, the California Public Utilities Commission (CPUC), which is one of the California Parties, represents California ratepayers. We find that CPUC's participation in these proceedings belies CARE's claim that ratepayers were excluded [from the settlement process]" (footnote omitted)), *appeal docketed*, No. 09-71515 (9th Cir. 2009).

⁸⁵ Cal. Pub. Util. Code § 307 (2008).

⁸⁶ Cal. Const. Art. V § 13; Cal. Gov't. Code § 12511 (2008); Cal. Bus. & Prof. Code §§ 16700, *et seq.*, 17200, *et seq.* (2008).

⁸⁷ Moreover, we note that CARE cites to a provision of the Public Utility Regulatory Policies Act of 1978 (PURPA) in support of its contention that it alone represents "electric consumers." However, our action here is pursuant to the FPA, not PURPA.

37. Next, we conclude that CARE's citation to the Ninth Circuit order is unavailing. In support of its proposition that the Ninth Circuit stayed the proceedings, CARE cites to an unpublished order that simply rejected a motion to lift the court-ordered stay on different proceedings before the court. We disagree with CARE's suggestion that the Ninth Circuit's stay of these proceedings operates as a bar to our action here. For example, we note that the Ninth Circuit granted a motion for voluntary withdrawal filed by NEGT Energy Trading-Power, L.P. (NEGT) in accordance with the provisions of a similar Commission-approved settlement agreement in Docket No. EL00-95, *et al.*⁸⁸ The Ninth Circuit's grant of withdrawal to NEGT undermines CARE's assertion that the Ninth Circuit's stay imposed a bar on our approval of settlements in Docket No. EL00-95, *et al.*

38. Finally, we reject CARE's arguments concerning the Supreme Court's *Morgan Stanley* decision.⁸⁹ The Commission's December 18, 2008 order explained the scope of the *Morgan Stanley* remand proceeding.⁹⁰ In that order, we stated "that this order concerns only those contracts at issue in *Morgan Stanley*."⁹¹ Thus, we find that neither the *Morgan Stanley* decision nor the remand proceeding operate as a bar to Commission action on this Settlement.

Conclusion

39. 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.

⁸⁸ See *Public Utils. Comm'n of the State of Cal. v. FERC*, No. 01-71934, *et al.*, Order (Feb. 10, 2009) (stating that NEGT's motion was granted, that NEGT was withdrawn as an intervenor, and that the stay remained in effect). See also *NEGT Settlement Order*, 126 FERC ¶ 61,007 (approving NEGT settlement).

⁸⁹ While we agree with the Parties that CARE's arguments regarding *Morgan Stanley* do not appear to be fully developed, we have interpreted CARE's argument to be that we should not act on this Settlement until the conclusion of the *Morgan Stanley* remand proceeding.

⁹⁰ *Nevada Power Co. and Sierra Pacific Power Co. v. Enron Power Marketing, Inc., et al.*, 125 FERC ¶ 61,312 (2008), *reh'g pending* (*Morgan Stanley Remand Order*).

⁹¹ *Morgan Stanley Remand Order*, 125 FERC ¶ 61,312, at n.65.

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.