

128 FERC ¶ 61,002
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services	Docket No. EL00-95-225
Investigation of Practices of the California Independent System Operator and the California Power Exchange	Docket No. EL00-98-210
Puget Sound Energy, Inc. v. Sellers of Energy and/or Capacity	Docket No. EL01-10-044
Investigation of Anomalous Bidding Behavior and Practices in Western Markets	Docket No. IN03-10-045
Fact-finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices	Docket No. PA02-2-061
American Electric Power Service Corporation	Docket No. EL03-137-012, <i>et al.</i>
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-180-041, <i>et al.</i>
California Independent System Operator Corporation	Docket No. ER03-746-012
State of California, ex rel. Bill Lockyer. Attorney General of the State of California v. British Columbia Power Exchange Corporation	Docket No. EL02-71-018
Puget Sound Energy, Inc.	Docket No. EL03-169-008

ORDER APPROVING SETTLEMENT

(Issued July 1, 2009)

1. In this order, the Commission approves a settlement filed on May 8, 2009 in the above-captioned proceedings between Puget Sound Energy, Inc. (Puget), 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 Puget, the California Parties and the California Power Exchange (CalPX). The settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement” and a “Settlement and Release Agreement” (collectively, Settlement).
2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.² The Parties state that, with the exception of the CPUC, they have executed the Settlement Agreement, which will become binding only upon CPUC approval, as of the date the CPUC executes it (Execution Date).³ The Parties explain that some of the Settlement’s provisions will only become effective on the Settlement Effective Date, which is the earliest date on which all of the following have occurred: (1) the Execution Date; (2) the required approvals of the Commission and the CPUC; and (3) the required approvals set forth in the Renewable Power Agreement, including the independent approval of the Renewable Power Agreement by the CPUC through its

¹ California Parties consist of Pacific Gas and Electric Company, Southern California Edison Company (SoCal Edison), San Diego Gas & Electric Company, the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General. For purposes of this settlement, California Parties also include the California Department of Water Resources (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), and the California Public Utilities Commission (CPUC) in the event the CPUC approves and executes the settlement. The California Electricity Oversight Board is an Additional Settling Participant.

² 18 C.F.R. § 385.602 (2008).

³ See Joint Explanatory Statement at 12; see Settlement and Release of Claims Agreement, section 1.26.

advice letter process.⁴ The Parties state that the Settlement shall terminate (1) upon CPUC rejection of the Renewable Power Agreement; or (2) on the date the Renewable Power Agreement terminates pursuant to its terms upon failure to obtain all of the required approvals as set forth in the Renewable Power Agreement; or (3) 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.⁵ On June 23, 2009, the California Parties submitted a filing in the above-referenced dockets informing the Commission that, on June 22, 2009, the CPUC officially approved the Settlement. As part of its filing, the California Parties submitted a copy of the CPUC's executed signature page to the Settlement.⁶

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty. The Parties state that the Settlement reaches a fair and reasonable resolution of the issues between Puget and the California Parties. The Parties note that the Commission and the United States Court of Appeals for the Ninth Circuit have encouraged settlements of claims related to transactions in the California Independent System Operator Corporation (CAISO) and CalPX markets in the 2000 and 2001 time period.⁷ The Parties, therefore, request Commission approval of the Settlement.

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

Background and Description of Settlement

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)⁸ to investigate, among other things, the justness and reasonableness of public utility sellers' rates in the CAISO and CalPX markets (Docket Nos. EL00-95-000

⁴ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement, sections 1.73, 2.2, 9.1.

⁵ Joint Explanatory Statement at 12-13; Settlement and Release of Claims Agreement, section 2.3.

⁶ See California Parties June 23, 2009 Filing, Docket Nos. EL00-95-000, *et al.*

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

⁸ 16 U.S.C. § 791a (2006).

and EL00-98-000). In 2002, the Commission directed Staff to commence a fact-finding investigation into the alleged manipulation of electrical and natural gas prices in the west (Docket No. PA02-2-000). Also, in 2003, the Commission directed Staff to investigate anomalous bidding behavior and practices in western markets (Docket No. IN03-10-000).

6. The Parties state that the Settlement resolves all claims related to the FERC Proceedings,⁹ the *Lockyer v. FERC* Remand,¹⁰ the *BPA v. FERC* Remand, and the *CPUC v. FERC* Remand (collectively, the Settled Proceedings) between Puget and the California Parties.¹¹ The Parties further state that the Settlement permits other market participants to join Puget and the California Parties in the Settlement as “Additional Settling Participants.”¹² The Settlement, therefore, contains an opt-in provision for additional settling participants, including any entity that directly sold energy into or purchased energy from the CAISO or the CalPX during the Settlement Period. Entities wishing to opt-in must so notify the Commission no later than five business days after issuance of a Commission order approving the Settlement.

7. The Settlement provides for CalPX to release \$59,849,314, the principal amount of Puget’s receivables from sales made by Puget into markets operated by the CalPX and the CAISO during the Settlement Period.¹³ In addition, the monetary consideration flowing from Puget in this settlement includes interest on its receivables in the amount of \$36,800,810 through December 8, 2008, to be updated through and including the projected date of distribution from CalPX.¹⁴ The Parties note that under the Settlement,

⁹ For the purposes of the Settlement, the term “FERC Proceedings” means the proceedings in Docket Nos. EL00-95, EL01-10, PA02-2, and IN03-10. The term also includes the Gaming/Partnership Proceeding and the ISO Re-Run Proceeding. *See generally* Joint Explanatory Statement at 5-12; Settlement and Release of Claims Agreement, section 1.31.

¹⁰ *See* Joint Explanatory Statement at 10-12 (discussing *Cal. ex rel. Bill Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), cert. denied, 127 S. Ct. 2972 (2007)).

¹¹ Joint Explanatory Statement at 16.

¹² Joint Offer of Settlement at 4-5; *see also* Joint Explanatory Statement at 3-4, 13.

¹³ Joint Offer of Settlement at 4; Joint Explanatory Statement at 3, 13-14; *see* Settlement and Release of Claims Agreement, section 4.1.

¹⁴ Joint Explanatory Statement at 13-14; Settlement and Release of Claims Agreement, section 4.1.

Puget will also transfer to the California Parties Puget's entitlement to refunds on purchases made in the western energy markets during the Settlement Period.¹⁵ According to the Parties, proceeds from the Settlement will be distributed from the Settling Supplier Refund Escrow to each of the Settling Participants and, in the case of amounts allocated to Non-Settling Participants, transferred to the California Litigation Escrow.¹⁶

8. The Parties state that under the Settlement, the California Parties will assume the obligation for (a) any of Puget's true-ups of receivables and associated interest on the estimated amounts assigned under the Settlement, (b) any refund amounts that Puget owes to Non-Settling Participants, (c) interest shortfall amounts that the Commission allocated to Puget, and (d) any third-party refund offsets that the Commission or a reviewing court determines that Puget owes.¹⁷

9. The Parties further state that, concurrent with this Settlement, Puget has agreed to sell, and SoCal Edison has agreed to buy, California Renewables Portfolio Standard-eligible energy, the terms of which are set forth in a separate Renewable Power Agreement, which is subject to independent review and approval by the CPUC.¹⁸ The Parties add that the Settlement Effective Date requires approval of the Settlement by both the CPUC¹⁹ and the Commission, as well as the CPUC's independent approval of the Renewable Power Agreement through its advice letter process.²⁰ Finally, the Parties

¹⁵ Joint Offer of Settlement at 4; Joint Explanatory Statement at 3, 13-14; *see* Settlement and Release of Claims Agreement, section 4.1.

¹⁶ Joint Offer of Settlement at 5; Joint Explanatory Statement at 4, 15; *see* Settlement and Release of Claims Agreement, section 4.1.

¹⁷ Joint Offer of Settlement at 5; Joint Explanatory Statement at 4; *see* Settlement and Release of Claims Agreement, sections 4.1.5, 5.8, 7.1.4.

¹⁸ Joint Offer of Settlement at 4; Joint Explanatory Statement at 3.

¹⁹ As stated above, on June 23, 2009, the California Parties submitted a filing in the above-referenced dockets informing the Commission that, on June 22, 2009, the CPUC officially approved the Settlement. *See* California Parties June 23, 2009 Filing, Docket Nos. EL00-95-000, *et al.*

²⁰ Joint Offer of Settlement at 4; Joint Explanatory Statement at 3, 12; *see* Settlement and Release of Claims Agreement, section 1.73.

agree to the mutual release of claims against each other with respect to the FERC Proceedings and with respect to civil litigation related to the western energy crisis.²¹

10. The Parties state that the Commission's approval of the Settlement will constitute the Commission's authorization and direction to the CAISO and CalPX to conform their records to reflect the distributions, offsets, adjustments, transfers, and status of accounts as provided for in the Settlement.²² The Parties state that they agree to deal with each other in good faith, to cooperate with each other, to take all reasonable steps required to effectuate the terms of the Settlement, and to exchange such data and other assistance as necessary to implement the Settlement.²³ The Parties note that, in orders approving prior settlements, the Commission has provided the CAISO and CalPX with "hold harmless" assurances for the steps taken to implement those settlements, and add that the Parties do not oppose Commission action to provide similar assurance here.²⁴

11. The Parties assert that the Settlement resolves all claims between Puget and the California Parties relating to transactions in the western energy markets during the Settlement Period.²⁵ In addition, the Parties waive and release any existing disputes regarding CAISO settlements and/or CalPX settlements for the Settlement Period.²⁶ Similarly, the Parties state that Puget 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.²⁷

²¹ Joint Offer of Settlement at 5; Joint Explanatory Statement at 13, 17; *see Settlement and Release of Claims Agreement*, section 7.3.

²² Joint Explanatory Statement at 16; *see Settlement and Release of Claims Agreement*, section 6.1.

²³ Settlement and Release of Claims Agreement, section 6.4.

²⁴ Joint Explanatory Statement at 17.

²⁵ Settlement and Release of Claims Agreement, section 7.1.1.

²⁶ Settlement and Release of Claims Agreement, section 7.1.5.

²⁷ Joint Explanatory Statement at 16-17; *see Settlement and Release of Claims Agreement*, section 7.2.

Likewise, the Parties state that Puget 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.²⁸

Procedural Matters

12. The Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.²⁹ 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.³⁰

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) (2008), initial comments were due on or before May 28, 2009, and reply comments were due on or before June 9, 2009. Initial comments were filed by the CAISO, CalPX and the Sacramento Municipal Utility District (SMUD). Joint reply comments were filed by Puget and the California Parties.

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.

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

²⁸ Joint Explanatory Statement at 16-17; *see* Settlement and Release of Claims Agreement, section 7.3.

²⁹ 18 C.F.R. § 385.602(b)(2) (2008).

³⁰ Joint Offer of Settlement at 2, 3.

Settlement's provisions. Accordingly, CalPX requests that the following "hold harmless" language be incorporated into any Commission order approving the Settlement:

The Commission recognizes that CalPX will be required to implement this settlement by paying substantial funds from its Settlement Clearing Account at the Commission's direction. Therefore, except to the extent caused by their own gross negligence, neither officers, directors, employees nor professionals shall be liable for implementing the settlement including but not limited to cash payouts and accounting entries on CalPX's books, nor shall they or any of them be liable for any resulting shortfall of funds or resulting change to credit risk as a result of implementing the settlement. In the event of any subsequent order, rule or judgment by the Commission or any court of competent jurisdiction requiring any adjustment to, or repayment or reversion of, amounts paid out of the Settlement Clearing Account or credited to a participant's account balance pursuant to the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.³¹

16. CalPX states that this is the same "hold harmless" provision that the Commission has approved in other orders approving settlements.³² In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of "hold harmless" language in the order approving the Settlement.³³

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.³⁴ Consistent with the Commission's precedent,³⁵ the Commission

³¹ See CalPX Initial Comments at 4.

³² *Id.*; see *San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,186, at P 15, 19 (2005).

³³ See Joint Reply Comments at 10.

³⁴ See Joint Explanatory Statement at 17-18.

³⁵ 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).

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. Forfeiture of Statutory Rights

18. 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.³⁶ Thus, SMUD argues that the Settlement offer is “premised on the Commission’s exercise of authority [that] the Commission does not possess.”³⁷ 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*.³⁸ SMUD states that the “Commission has frowned on cram down provisions like these, as ‘comments that might otherwise be voiced are suppressed.’”³⁹ Accordingly, SMUD states that the Settlement should be rejected.⁴⁰

19. 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 Puget. 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.⁴¹ Finally, the Parties state

³⁶ See SMUD Initial Comments at 4.

³⁷ See SMUD Initial Comments at 5.

³⁸ *ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992).

³⁹ See SMUD Initial Comments at 3 (citing *ANR Pipeline Company*, 59 FERC ¶ 61,347, at 62,260 (1992)).

⁴⁰ See SMUD Initial Comments at 7.

⁴¹ See Joint Reply Comments at 5-6 (citing *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,308, at P 31, 34 (2005), *reh’g denied*, 115 FERC ¶ 61,271 (2006)).

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.⁴²

Commission Determination

20. 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 Puget 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 Puget.

21. 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.

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

23. As was the case in prior settlements,⁴³ if a non-jurisdictional entity elects to remain in the Settlement, it will be accepting a compromise under which it agrees that it may be a net owner of funds to the CalPX and/or CAISO. Regardless of the

⁴² See Joint Reply Comments at 5 n.10.

⁴³ 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).

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

C. Undue Discrimination

24. SMUD argues that the Settlement is unduly discriminatory. SMUD notes that, under the Commission's decision in *Florida Power & Light Co.*,⁴⁴ a substantially similar settlement offer must be made to similarly situated customers. SMUD argues that, as a non-jurisdictional seller, it is unreasonably distinguished from other buyers of power who made no jurisdictional sales, and is required to forfeit statutory rights in order to participate in the receipt of refunds.⁴⁵ SMUD adds that this has the effect of treating it as a Deemed Distribution Participant under the Settlement which, SMUD argues, is unreasonable and discriminatory insofar as it places pressure on non-jurisdictional entities to forfeit their statutory exemption from the Commission's refund authority under the FPA. As such, SMUD argues that it has not been given an offer comparable to those extended to other utility refund recipients.

25. In reply, the Parties urge the Commission to reject SMUD's argument that the Settlement is unduly discriminatory. The Parties state that, under the Settlement, a participant's classification as a Deemed Distribution Participant is not based on whether that Participant is jurisdictional or non-jurisdictional. The Parties argue that SMUD and other non-jurisdictional entities have not been singled out as Deemed Distribution Participants under the Settlement. The Parties further state that the Commission has previously rejected similar arguments raised by SMUD.⁴⁶

⁴⁴ See SMUD Initial Comments at 5-6 (citing *Fla. Power & Light Co.*, 70 FERC ¶ 63,017 (1995)).

⁴⁵ See SMUD Initial Comments at 5.

⁴⁶ See Joint Reply Comments at 7 (citing *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 27-28 (2007)).

Commission Determination

26. The Commission finds that SMUD has not demonstrated that, as a Deemed Distribution Participant, it is being treated any differently from other entities that are also Deemed Distribution Participants. The Settlement designates parties as Deemed Distribution Participants based on whether they have net amounts outstanding and payable to the CAISO and/or CalPX.⁴⁷ This designation does not distinguish between jurisdictional and non-jurisdictional entities in any way. Moreover, the Settlement's list of Deemed Distribution Participants identifies both jurisdictional and non-jurisdictional entities.⁴⁸ Therefore, the Commission finds that the Settlement is not unduly discriminatory.

D. Request for Clarification

27. SMUD also requests clarification regarding refund amounts that the Commission ultimately determines are due to Non-Settling Participants with respect to sales by Puget. Specifically, SMUD states that, according to the Settlement, the California Parties will assume responsibility for any refund amounts that Puget owes to Non-Settling Participants in the Refund Proceeding. According to SMUD, however, the Settlement describes certain limitations on the California Parties to make payments on behalf of Puget.⁴⁹ As such, SMUD requests that the Commission clarify that the residual underlying obligation of Puget remains in place in the event that the refund amounts owed to the Non-Settling Participants exceed the amount allocated to the California Parties. SMUD asks the Commission to make clear that it will enforce the underlying obligation of Puget to pay refunds to the Non-Settling Participants.

28. In its reply, the Parties argue that the Commission should reject SMUD's request for clarification, because the interests of Non-Settling Participants are adequately insulated from any such potential shortfalls.⁵⁰ Specifically, the Parties contend that the Settlement provides that the amount due to a Non-Settling Participant shall, in the first instance, be paid from funds set aside for payment of Non-Settling Participants in the

⁴⁷ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, section 5.2.2.

⁴⁸ See Settlement and Release of Claims Agreement, Exhibit B.

⁴⁹ See SMUD Initial Comments at 6 (citing Joint Explanatory Statement at 15).

⁵⁰ See Joint Reply Comments at 8 (citing Settlement and Release of Claims Agreement, sections 3.2, 5.3, 5.6, 5.7.1, 5.7.2, 7.1.4).

Settling Supplier Escrow, with any shortfall in Puget refunds owed to Non-Settling Participants being borne by the California Parties.⁵¹

29. The Parties explain that the Settlement allocates among the California Parties any potential shortfalls in Puget refunds owed to Non-Settling Participants, and state that the cap on each California Party's liability to Non-Settling Participants is the total amount of Puget refunds and/or Deemed Distributions allocated to that California Party. The Parties state that, under the terms of the Settlement, in the event an obligation of any California Party exceeds the total amount allocated to that California Party, the remaining California Parties to which Settlement Proceeds are allocated shall be jointly and severally liable to make payments on behalf of the Settling Supplier, up to the amount allocated to each California Party.⁵² As such, the Parties contend, the funds that would be available to pay Commission-ordered refunds to SMUD, or others electing to be Non-Settling Participants, will be sufficient regardless of the Settlement.

Commission Determination

30. The Commission rejects SMUD's request for clarification. Paragraph 8, *supra*, states 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. We will not condition approval of the Settlement on further measures to address potential shortfalls.

Conclusion

31. 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.

⁵¹ See Joint Reply Comments at 9 (citing Settlement and Release of Claims Agreement, sections 5.5, 5.6).

⁵² See Joint Reply Comments at 9 (citing Settlement and Release of Claims Agreement, section 5.8).

The Commission orders:

The Commission hereby approves the Settlement, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.