

127 FERC ¶ 61,268
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 Nos. EL00-95-000
EL00-95-224

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 Corporation and the California
Power Exchange Corporation

Docket Nos. EL00-98-000
EL00-98-209

ORDER CONDITIONALLY APPROVING SETTLEMENT
AND DENYING JOINT MOTION

(Issued June 18, 2009)

1. In this order, the Commission approves a settlement filed on April 10, 2009 between Pacific Gas and Electric Company (PG&E) and the California Power Exchange Corporation (CalPX) (collectively, the Parties). The settlement consists of a “Joint Offer of Settlement and Motion for Expedited Order,” a “Joint Explanatory Statement” and a “Settlement Agreement” (collectively, PG&E-CalPX Settlement). The Parties state that the Commission’s approval of the PG&E-CalPX Settlement will allow PG&E to transfer \$700 million to CalPX so that CalPX will have adequate funds to pay settlements or refund claims as authorized by the Commission or a court.
2. The Commission also denies a joint motion filed by PG&E and the Los Angeles Department of Water and Power (LADWP) to set aside \$160 million presently held in

CalPX's Settlement Clearing Account to fund a settlement between the California Parties¹ and LADWP that is currently being finalized (Potential California Parties-LADWP Settlement).²

Background

3. The relevant transactions here occurred when PG&E purchased power from sellers through the California Independent System Operator Corp. (CAISO) and CalPX prior to April 6, 2001.³ Subsequently, PG&E initiated its Bankruptcy Case.⁴ PG&E's power sellers and CalPX, acting on its own behalf and on behalf of its market participants, filed claims (the Class 6 Claims) against PG&E.⁵ PG&E maintains its Class 6 Escrow account for payment of disputed Class 6 Claims, and the account presently contains approximately \$1.2 billion.⁶

4. The Parties summarize that the PG&E-CalPX Settlement involves PG&E making a payment of \$700 million from its Class 6 Escrow account to CalPX's Settlement Clearing Account, toward PG&E's outstanding CalPX bill to avert a cash shortfall in CalPX's Settlement Clearing Account.⁷ The Commission has previously held that payment could be made from the Class 6 Escrow to the extent payment is consistent with

¹ The "California Parties" are PG&E, Southern California Edison, San Diego Gas & Electric, the California Public Utilities Commission, the California Attorney General, and the California Scheduling Division of the California Department of Water Resources. *See* Joint Motion at n.2.

² PG&E and LADWP's Joint Motion for Approval of the Set Aside of Funds to Implement Settlement filed in Docket Nos. EL00-95-000 and EL00-98-000 on May 22, 2009 (Joint Motion).

³ PG&E-CalPX Settlement at 1.

⁴ In re Pacific Gas and Electric Co., a California corp., Debtor, Case No. 01-30923 DM pending in the United States Bankruptcy Court for the Northern District of California, San Francisco Division (PG&E Bankruptcy Court).

⁵ PG&E-CalPX Settlement at 1.

⁶ *Id.* at 3.

⁷ Transmittal Letter attached to PG&E-CalPX Settlement (Transmittal Letter) at 2.

PG&E's Plan of Reorganization.⁸ However, the Parties state that PG&E's Plan of Reorganization only allows funds to flow in narrowly specified circumstances, and generally requires resolution of bankruptcy claims first, which thwarts settlement efforts and other payments ordered by the Commission in these proceedings.⁹ According to the Parties, the PG&E and CalPX settlement ensures that claims payments can occur promptly.¹⁰

5. The Parties explain that they chose the \$700 million amount over smaller amounts so that only one negotiation and settlement approval will be necessary.¹¹ The Parties request prompt Commission action to avert a potential cash shortfall in CalPX's Settlement Clearing Account.¹²

Description of the PG&E-CalPX Settlement

6. Section 6 of the PG&E-CalPX Settlement provides that the transferred amount may only be used to fund settlements or pay refunds owed in the CAISO or CalPX markets, as authorized by the Commission or a court of competent jurisdiction. Section 6 states that this does not modify CalPX's right to transfer funds subject to Commission approval pursuant to the wind-up charges settlement in Docket Nos. ER05-167-000 and ER07-861-000. Section 1 provides specific safeguards for how the transferred amount

⁸ *Id.* at 4, citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 125 FERC ¶ 61,214, at P 46 (2008) (providing that payments related to the CalPX markets could be made directly from the PG&E Class 6 Escrow if needed to avert a shortfall, if payments are consistent with the PG&E Plan of Reorganization, orders of the PG&E Bankruptcy Court and relate to purchases made by PG&E); PG&E-CalPX Settlement at 2, citing Plan of Reorganization under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Co. dated July 31, 2003, as modified by Modifications dated November 6, 2003 and December 19, 2003 confirmed by the PG&E Bankruptcy Court on December 22, 2003.

⁹ Joint Explanatory Statement at 3.

¹⁰ *Id.*

¹¹ *Id.* at 3-4.

¹² Transmittal Letter at 4.

must be maintained to comply with the CalPX Plan¹³ and the agreement for collateralization between JP Morgan and CalPX.

7. Section 2 provides that the PG&E-CalPX Settlement will become effective when each of the following have occurred: (1) Commission approval without modification; (2) PG&E Bankruptcy Court approval without modification; (3) CalPX Bankruptcy Court approval without modification; and (4) CalPX has provided evidence to PG&E that the re-negotiated collateralization agreement between CalPX and JP Morgan is in effect. If the PG&E-CalPX Settlement is not effective on or before August 1, 2009, either party has the unilateral option to terminate the PG&E-CalPX Settlement.¹⁴ If the Commission or the Bankruptcy Courts modify the PG&E-CalPX Settlement, either party may elect to terminate the PG&E-CalPX Settlement within twenty days.¹⁵

8. Section 4 provides that the accrual of interest owed by PG&E on the transferred amount will stop from the date of the transfer. Thereafter the funds will be treated as CalPX funds for purposes of interest calculations, and interest shall be paid by CalPX with respect to payments from such funds in the manner specified by the Commission for such funds.¹⁶

9. Section 5.1 provides that PG&E shall not bear “double liability” for any Class 6 Claims in its Bankruptcy Case or related interest. Section 5.1 states that double liability means any liability for the transactions underlying the Class 6 Claims in excess of the liability determined by the Commission or the PG&E Bankruptcy Court. Thus, when CalPX and an individual seller have both filed claims relating to the same transaction, the claim will only be paid by PG&E once, either to CalPX or to the individual seller.¹⁷ If PG&E believes it has been subjected to double liability it reserves the right to file a

¹³ PG&E-CalPX Settlement at 1-2, citing *In re Cal. Power Exch. Corp.*, a non-public benefit corp., Debtor, Case No. 01-16577 ES, Official Committee of Participant Creditors’ Fifth Amended Chapter 11 Plan, as Modified (Revised October 1, 2002), confirmed by the November 1, 2002 order of the United States Bankruptcy Court for the Central District of California, Los Angeles Division (CalPX Bankruptcy Court).

¹⁴ PG&E-CalPX Settlement § 2.2.

¹⁵ *Id.* § 3.

¹⁶ *Id.* § 4.

¹⁷ *Id.* § 5.1.

motion with the Commission or the PG&E Bankruptcy Court.¹⁸ In addition, section 5.3 states that it does not modify the rights of any entity with regard to interest allocation issues arising from several Commission orders.¹⁹

10. Section 6 states that PG&E's transfer shall not constitute resolution of the Class 6 Claims in PG&E's Bankruptcy Case. Upon completing the transfer PG&E will receive a credit against the Class 6 Claims equal to the transferred amount, to the extent the claims are determined by the Commission or a court of competent jurisdiction and therefore allowed pursuant to the PG&E Plan of Reorganization.²⁰ If the Commission or the Bankruptcy Court does not specify the resolved amount of any given claim then any party may seek such a determination.²¹

11. Sections 8.1 and 8.2 state that the PG&E-CalPX Settlement is not intended to affect Class 6 claimants' rights or to preclude any entity from making arguments regarding liability, refunds or damages. PG&E further reserves its right to appeal its allocation of an interest shortfall.²²

12. Section 11 provides that future transfers may be made. Section 11 provides that at least thirty (30) days before making another transfer PG&E or CalPX must file a notice with the Commission, the PG&E Bankruptcy Court, and the CalPX Bankruptcy Court, and serve notice on all parties to the California Refund Proceeding²³ detailing the amount of the transfer. Section 10 of the PG&E-CalPX Settlement and the CalPX Plan provide a process for the return of an overpayment.

¹⁸ *Id.* § 5.2.

¹⁹ *Citing San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, order on reh'g, 107 FERC ¶ 61,165 (2004), order on reh'g, 109 FERC ¶ 61,218 (2004), order on reh'g, 110 FERC ¶ 61,336 (2005), reh'g denied, 112 FERC ¶ 61, 226 (2005), app. pending sub nom., *PG&E v. FERC*, Case No. 05-71831 (9th Cir).

²⁰ PG&E-CalPX Settlement § 7.

²¹ *Id.*

²² *Id.* § 8.3.

²³ The California Refund Proceeding relates to transactions in markets operated by the CAISO and CalPX during the period of October 2, 2000 through June 20, 2001. See *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, Docket Nos. EL00-95, *et al.* and *Investigation of Practices of the Cal. Indep. Sys. Operator Corp. and the Cal. Power Exch. Corp.*, EL00-98, *et al.*

13. The PG&E-CalPX Settlement states that any challenge or modification to the Settlement by “any Party to this Agreement is subject to the most stringent standard permissible under applicable law.”²⁴

Procedural Matters

14. The Parties filed the PG&E-CalPX Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure,²⁵ requesting that the Secretary submit the PG&E-CalPX Settlement to the Commission.

15. Pursuant to Rules 602(d)(2) and 602(f) of the Commission’s Rules of Practice and Procedure,²⁶ initial comments were due on or before April 30, 2009, and reply comments were due on or before May 11, 2009. The City of Los Angeles acting by and through the Department of Water and Power (LADWP) and the Northern California Power Agency (NCPA) filed initial comments. The Parties filed joint reply comments.

16. Subsequently, PG&E and LADWP filed their Joint Motion. On May 26, 2009, the Commission issued a notice shortening the answer period for the Joint Motion with answers due on or before June 2, 2009. Sacramento Municipal Utility District (SMUD) filed an answer in opposition to the Joint Motion. On June 5, 2009, PG&E and LADWP filed a motion for leave to answer and answer to SMUD. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure²⁷ prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept PG&E and LADWP’s answer to SMUD’s answer and will, therefore, reject it.

Substantive Matters

A. LADWP’s Comments on the PG&E-CalPX Settlement

17. LADWP objects to three aspects of the PG&E-CalPX Settlement as unjust and unreasonable. First, LADWP states that the PG&E-CalPX Settlement does not address how PG&E will fulfill its obligation to pay the Commission interest rate described under

²⁴ PG&E-CalPX Settlement § 13.

²⁵ 18 C.F.R. § 385.602(b)(2) (2008).

²⁶ 18 C.F.R. §§ 385.602(d)(2), 385.602(f).

²⁷ 18 C.F.R. § 385.213(a)(2) (2008).

section 35.19a of the Commission's Rules and Regulations on the transferred \$700 million.²⁸ LADWP states that PG&E must pay the full Commission interest rate on amounts owed to sellers in the CalPX markets for the period of October 2, 2000 through June 21, 2001, from the time such payments first became due until the Class 6 Claims are paid.²⁹ LADWP points out that the PG&E-CalPX Settlement does not state whether PG&E's \$700 million payment is principal only, or a payment of principal and interest.³⁰ Thus, LADWP requests clarification that PG&E will satisfy its interest payment obligation.

18. Second, LADWP states that the PG&E-CalPX Settlement will significantly increase the CalPX interest shortfall to be allocated among CalPX market participants under prior Commission orders.³¹ LADWP points to section 4 of the PG&E-CalPX Settlement that states PG&E's obligation to pay interest on the transferred amount ceases when it pays that amount to CalPX and thereafter the funds will be treated as CalPX funds for purposes of interest calculations.³² Thus, LADWP explains that from the time of PG&E's transfer to CalPX to the time CalPX makes payments to sellers, the transferred amount will earn the lower CalPX interest rate and increase the interest shortfall. LADWP also objects to the combined effect of section 4 and section 8.3 of the PG&E-CalPX Settlement in which PG&E reserves the right to appeal its allocation of the interest shortfall.

²⁸ 18 C.F.R. § 35.19a (2008). The Commission interest rate is an average prime rate for each calendar quarter, *available at* <http://www.ferc.gov/legal/acct-matts/interest-rates.asp>.

²⁹ L.A. Dept. of Water & Power April 30, 2009 Comments in Opposition to the Joint Offer of Settlement of PG&E and CalPX at 2 n.2, citing *San Diego Gas & Elec. Co.*, 110 FERC ¶ 61,336, at P 36 (2005).

³⁰ *Id.* at 4, citing PG&E-CalPX Settlement Agreement § 4 ("From the date that the Transferred Amount is transferred by PG&E to the PX pursuant to this Agreement . . . the accrual of interest owed by PG&E on such funds shall cease.").

³¹ *Id.* at 5, citing *San Diego Gas & Elec. Co.*, 110 FERC ¶ 61,336, at P 41, 56 (2005) (allocating the interest shortfall based upon the final net interest position for each participant in relation to the total amount of the interest shortfall).

³² *Id.* at 4, citing PG&E-CalPX Settlement Agreement § 4 ("Such funds will be treated as PX funds after the date of such transfer for purposes of interest calculations, and interest shall be paid by the PX with respect to payments from such funds in the manner specified by FERC for such funds.").

19. LADWP's third objection involves section 11 of the PG&E-CalPX Settlement that allows future transfers from the PG&E Class 6 Escrow to CalPX's Settlement Clearing Account upon written agreement of the Parties and thirty days' notice to the Commission. LADWP states that the Commission should require procedures to ensure that PG&E and CalPX do not unilaterally deplete PG&E's Class 6 Escrow. LADWP argues these procedures must ensure that PG&E will satisfy its obligation to pay principal amounts due plus the Commission interest rate without unnecessarily increasing the amount of the CalPX interest shortfall.

20. Finally, LADWP states that it agrees with the goals of the Settlement, to allow CalPX to have adequate funds to make settlement payments. LADWP suggests the alternative arrangement of a settlement that would provide that the Commission require necessary funds to be transferred as it approves settlements or otherwise orders payments by CalPX, instead of providing for a lump sum payment of \$700 million.

B. NCPA's Comments on the PG&E-CalPX Settlement

21. NCPA acknowledges that a transfer of funds from the custody of PG&E to CalPX will modify the interest rate of the transferred amount, and does not object to that result if it is part of a rapid payment process to NCPA and other sellers whom the Commission has directed to be paid.³³ However, NCPA argues that aside from the change in interest rates, to the extent that sections 5.3 and 7 of the PG&E-CalPX Settlement may seek to modify PG&E's obligations under section 5.15(c) of PG&E's Plan of Reorganization, they cannot.³⁴ NCPA asks that the Commission accept the PG&E-CalPX Settlement, but recognize that it cannot abridge the terms of PG&E's obligations to its creditors established by the Bankruptcy Court including the process for resolving sellers' claims.

C. The Parties' Reply Comments on the PG&E-CalPX Settlement

22. The Parties assert that the PG&E-CalPX Settlement leaves intact the rights of market participants to argue about refund liability, refund calculations and interest allocations and thus LADWP and NCPA's concerns about the accrual of interest on funds

³³ N. Cal. Power Agency April 30, 2009 Comments on the Offer of Settlement between CalPX and PG&E at 2.

³⁴ The Commission notes that NCPA may have intended to refer to section 4.15(c) of PG&E's Plan of Reorganization.

transferred to CalPX are without merit. The Parties also state that LADWP did not raise a material issue of fact because it did not include a declaration with its protest.³⁵

23. The Parties respond to LADWP and NCPA's concerns about interest by stating that the PG&E-CalPX Settlement does not affect the substantive rights of parties to the California Refund Proceeding and is consistent with PG&E's Plan of Reorganization.³⁶ The Parties state that CAISO and CalPX will make interest calculations from the time the invoices were initially issued until the time that PG&E pays the funds to CalPX.

24. In response to LADWP's statements that the transfer will increase CalPX's interest shortfall, the Parties argue that LADWP has not identified any right to interest accrual that the PG&E-CalPX Settlement would impair. The Parties explain that interest shortfalls arise in the Commission's refund process because interest accrues on refunds at the Commission interest rate, but funds held at CalPX earn market interest rates, which are lower. The Parties assert that the PG&E-CalPX Settlement does not affect how interest will be paid or how shortfalls will be allocated. The Parties also maintain that PG&E will comply with its Plan of Reorganization by paying the Commission interest rate on net unpaid amounts until such time as payment is made by PG&E. They also suggest that LADWP's argument that the PG&E-CalPX Settlement conflicts with PG&E's Plan of Reorganization, albeit incorrect, should be raised before the PG&E Bankruptcy Court. The Parties argue that Commission precedent provides that when amounts due to CalPX are paid, the accrual of interest at the Commission interest rate ceases.³⁷

25. Regarding LADWP's third objection to the PG&E-CalPX Settlement provision allowing for future fund transfers, the Parties state that these terms do not prejudice LADWP's rights. The Parties emphasize that the provision is a mechanism to ensure CalPX has adequate future funding without securing multiple, time-consuming

³⁵ Pac. Gas & Elec. Co and Cal. Power Exch. Corp. May 11, 2009 Joint Reply Comments at 2, citing 18 C.F.R. § 385.602(f)(4) (2008).

³⁶ *Id.* at 3 n.7 (stating that PG&E's Plan of Reorganization specifies that Class 6 Claims accrue interest at the Commission interest rate).

³⁷ *Id.* at 5-6, citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 102 FERC ¶ 61,317, at P 142 (2003) ("First, as discussed above, we will adopt the presiding judge's finding that Section 35.19a interest should apply to unpaid balances.... We agree that its decision to pay those invoices early should not be allowed to impact the final interest rate it paid for the period of time from when the invoices were due until when the invoices were paid.").

Commission and court approvals but still subject to the safeguards set forth in the PG&E-CalPX Settlement.

26. Finally, the Parties oppose LADWP's suggestion of an alternative payment scheme and state that LADWP may not rewrite the PG&E-CalPX Settlement.

D. PG&E and LADWP's Joint Motion

27. In their Joint Motion, PG&E and LADWP seek a Commission order setting aside \$160 million of funds presently held in CalPX's Settlement Clearing Account to ensure that sufficient funds are available at CalPX for the Potential California Parties-LADWP Settlement.³⁸ PG&E asserts that it is authorized to state that the other California Parties support this set aside of funds to ensure payments to implement the Potential California Parties-LADWP Settlement.³⁹ CalPX does not take a position on the Joint Motion.⁴⁰

28. According to PG&E and LADWP, the California Parties and LADWP recently reached an agreement in principle to settle refund claims pending against LADWP, and to release to LADWP a portion of the funds for LADWP in CalPX's Settlement Clearing Account. They explain that the parties are continuing to negotiate and finalize the agreement. They do not expect that the PG&E-CalPX Settlement will receive all the necessary approvals before funds are needed to pay LADWP under the Potential California Parties-LADWP Settlement.⁴¹

29. PG&E and LADWP contend that upon the Commission's approval of the Potential California Parties-LADWP Settlement, all or a portion of the set aside funds would be disbursed in accordance with the terms of that settlement and no separate escrow will be required.⁴²

30. PG&E and LADWP argue that the set aside will not impair the funding of any other currently pending settlements, funding to governmental entities pursuant to the Commission's order in *San Diego Gas & Elec. Co.*,⁴³ or other currently expected CalPX

³⁸ Joint Motion at 1-2.

³⁹ *Id.* at n.2.

⁴⁰ *Id.* at 2.

⁴¹ *Id.*

⁴² *Id.*

⁴³ 125 FERC ¶ 61,214 (2008).

expenditures because after PG&E's transfer of \$700 million to CalPX, CalPX's Settlement Clearing Account balance will be adequate to fund payments that may be required in the foreseeable future.⁴⁴

31. PG&E and LADWP assert that this set aside will provide assurance that sufficient funds will be available to make the payments under the Potential California Parties-LADWP Settlement upon approval of the settlement. They state that this assurance will facilitate the finalization of the Potential California Parties-LADWP Settlement. They also state if the Commission allows the set-aside, LADWP will withdraw its comments in opposition to the PG&E-CalPX Settlement permitting expeditious review of that settlement.⁴⁵

32. Finally, PG&E and LADWP request that the set aside remain in effect until the first of the following occur: (i) the Commission approves the Potential California Parties-LADWP Settlement and payment to LADWP is made pursuant to the terms of the settlement; (ii) the parties terminate their negotiations of the Potential California Parties-LADWP Settlement; (iii) the Potential California Parties-LADWP Settlement is not filed with the Commission within sixty days of the filing of the Joint Motion; (iv) the Potential California Parties-LADWP Settlement is not approved by the Commission on or before December 31, 2009; or (v) the Potential California Parties-LADWP Settlement terminates in accordance with its own terms.⁴⁶

E. SMUD's Answer in Opposition to the Joint Motion

33. SMUD states that it would not oppose the Joint Motion if the Commission conditioned its approval on the requirement that the set aside does not occur until other non-jurisdictional utilities are paid the principal amounts due to them on power they sold that is not subject to the Commission's refund authority. SMUD states that, absent such a condition, it opposes the Joint Motion because it fails to comply with Rule 602 of the Commission's Rules of Practice and Procedure.⁴⁷ SMUD argues that absent a final,

⁴⁴ Joint Motion at 3.

⁴⁵ LADWP observes that it is the only party that filed comments in opposition to the PG&E-CalPX Settlement. It notes that while NCPA filed comments, it did not oppose the settlement and that no other entity filed comments. *Id.* at 3 and n.4.

⁴⁶ *Id.* at 4.

⁴⁷ Sacramento Mun. Util. Dist. June 2, 2009 Answer in Opposition to the Joint Motion of PG&E and LADWP at 2, citing 18 C.F.R. § 385.602 (2008).

written settlement agreement filed with the Commission, PG&E and LADWP should not be allowed to avail themselves of the settlement procedures allowed by the Commission in Rule 602.

34. Further, SMUD argues that the Commission should deny the Joint Motion because PG&E and LADWP have failed to demonstrate that the set aside is necessary and appropriate. SMUD asserts that the set aside is unnecessary if, as PG&E and LADWP claim, CalPX has sufficient funds to pay out both settlements and unsettled claims. SMUD then states that the set aside is inappropriate because it would unduly discriminate against other entities with rights or claims to funds held by CalPX.⁴⁸ SMUD reasons that LADWP's withdrawal of its opposition to the PG&E-CalPX Settlement does not bolster the Joint Motion because LADWP's opposition to PG&E-CalPX Settlement lacked merit and failed to comply with Rule 602. Finally, SMUD states that the Commission's approval of the Joint Motion would inappropriately involve the Commission in PG&E and LADWP's settlement negotiations and result in poor public policy.

Commission Determination

35. The Commission approves the PG&E-CalPX Settlement as just and reasonable. Approval of the PG&E-CalPX Settlement will allow PG&E to transfer \$700 million to CalPX so that CalPX will have adequate funds to pay settlements or refund claims as authorized by the Commission or a court, and will also streamline, to some extent, the payment process. The Commission's approval is consistent with our previous determination that payments could be disbursed from PG&E's Class 6 Escrow.⁴⁹ The Commission considers the PG&E-CalPX Settlement a contested settlement because of LADWP's opposition, and notes that under our Rules of Practice and Procedure, "the Commission may decide the merits of the contested settlement issues, if ... the

⁴⁸ *Id.* at 4, citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,067, at P 42, 58 (2007).

⁴⁹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 125 FERC ¶ 61,214, at P 46 (2008) ("Thus, to the extent that past due amounts owed to governmental entities and other non-public utilities are the result of purchases by or are otherwise attributable to PG&E, those amounts should be paid from the PG&E Bankruptcy Escrow Account."); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 108 FERC ¶ 61,002, at P 36 (2004) ("The PG&E Bankruptcy Escrow has \$1.6 billion in it for payment to the CalPX, and it appears that, pursuant to the Class 6 Settlement Order provisions, distributions can be made as soon as the Commission issues an order directing disbursement to the parties and that order is approved by the Bankruptcy Court.").

Commission determines there is no genuine issue of material fact.”⁵⁰ LADWP’s protest raises primarily policy issues concerning the PG&E-CalPX Settlement’s potential effect on the California Refund Proceeding. The Commission utilizes the first approach from *Trailblazer Pipeline Co.*,⁵¹ and approves the settlement because we find that LADWP’s contentions lack merit.

36. The Commission does not opine on NCPA’s arguments that sections 5.3 and 7 of the PG&E-CalPX Settlement could be construed to abridge PG&E’s obligations to its creditors as provided in the PG&E Plan of Reorganization. The Commission approves the PG&E-CalPX Settlement in this order, but does not purport to address any modification to PG&E’s obligations under the PG&E Plan of Reorganization. The Commission notes that the PG&E-CalPX Settlement must be approved by the PG&E Bankruptcy Court, which could resolve any potential conflict.

37. LADWP argues that the PG&E-CalPX Settlement is unclear regarding PG&E’s obligations to pay the Commission interest rate on the transferred amount until the Class 6 Claims are paid. It argues that PG&E’s obligation to pay interest at the Commission interest rate does not cease after the \$700 million is transferred to the CalPX, but instead only ceases after sellers have been paid by the CalPX. The Commission disagrees with LADWP. Under the PG&E Plan of Reorganization, PG&E is required to pay the Commission interest rate on Class 6 Claims “through the date of payment.”⁵² The PG&E-CalPX Settlement does not modify this obligation. The PG&E-CalPX Settlement specifies that once funds are transferred the “accrual of interest owed by PG&E on such funds shall cease.”⁵³ The Commission rejects LADWP’s argument because it finds that PG&E’s transfer constitutes a payment to the CalPX, and PG&E’s interest obligation ceases the date payment is made.

⁵⁰ 18 C.F.R. § 385.602(h) (2008).

⁵¹ 85 FERC ¶ 61,345, at 62,342 (1998) (“Approach No. 1: Merits Decision on Each Contested Issue ... If each of the contesting party’s contentions lacks merit, the Commission can approve the contested settlement on that ground This approach is appropriate, where, as in *Overthrust*, the issues are primarily policy issues”), *order on reh’g*, 87 FERC ¶ 61,110 (1999).

⁵² Plan of Reorganization § 5.4(g)(i) (Stating that a disputed claim shall earn interest through the date of payment in accordance with Exhibit B, which states the interest rate applicable to Class Six Claims is determined pursuant to section 35.19a of the Commission’s regulations.)

⁵³ PG&E-CalPX Settlement § 4.

38. LADWP argues that the PG&E-CalPX Settlement unreasonably contributes to the interest shortfall because once PG&E transfers \$700 million, PG&E will no longer be paying interest at the higher Commission rate on this amount and instead PX will be earning the lower market rate interest on this amount. The Commission is not convinced by LADWP's argument that PG&E should be prevented from paying the amounts it owes to CalPX in order to allow LADWP and other entities to maximize the interest they earn. LADWP's desire to increase the interest payments it may recover does not justify denying a settlement that will avoid a potential shortfall in CalPX's Settlement Clearing Account and facilitate the payment of settlements or refund claims. The Commission has already determined how to allocate the interest shortfall arising from the difference in the interest rates earned by PG&E's Class 6 Escrow and CalPX's Settlement Clearing Account, and specifically addressed PG&E's obligations.⁵⁴ The PG&E-CalPX Settlement does not affect the rights of market participants to argue and challenge the Commission's future determinations concerning interest shortfall allocations.⁵⁵

39. Regarding LADWP's argument about the Parties potentially depleting PG&E's Class 6 Escrow without preserving interest payments, the Commission agrees that it is unclear whether the \$700 million transfer is a payment of principal only, or a payment of principal and interest. Because the Commission has not yet determined interest allocations and it is presently unknown how the \$700 million will be disbursed from CalPX,⁵⁶ PG&E must continue to maintain a record of the amount of interest earned at the Commission interest rate on the original principal in its Class 6 Escrow, and the

⁵⁴ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, order on *reh'g*, 109 FERC ¶ 61,218, at P 32 (2004) (“[B]oth buyers and sellers alike should share the burden of the shortfall equally.”), order on *reh'g*, 110 FERC ¶ 61,336, at P 36 (2005) (“Likewise, the Commission finds unavailing PG&E's argument that it should be exempted from the CalPX shortfall allocation because it has not yet paid any funds to the CalPX on which a shortfall may accrue but that it will eventually pay the CalPX at the Commission's interest rate. We find that it is not a redundant charge.”), *reh'g denied*, 112 FERC ¶ 61, 226 (2005), *app. pending sub nom.*, *PG&E v. FERC*, Case No. 05-71831 (9th Cir).

⁵⁵ PG&E-CalPX Settlement § 5.3.

⁵⁶ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 121 FERC ¶ 61,067, at P 58 (2007) (“In the instant case we believe it would be very difficult to determine the governmental entities' *pro rata* share of the interest shortfalls prior to the completion of the refund calculations and disbursement. Therefore, we direct PX to retain any potential interest payments on past due amounts to the governmental entities until the refund calculations are complete”).

amount of interest earned at the Commission interest rate for each amount transferred to the CalPX pursuant to the PG&E-CalPX Settlement, until the Commission makes its interest allocation determinations and orders interest payments to be made.

40. The Commission declines to adopt LADWP's alternative suggestion of ordering individual payments from PG&E's Class 6 Escrow. This option remains available regardless of the PG&E-CalPX Settlement.⁵⁷

41. The Commission also denies the Joint Motion. In support of the Joint Motion, PG&E and LADWP first argue that the set aside requested in the Joint Motion will facilitate finalization of the Potential California Parties-LADWP Settlement by ensuring that sufficient funds will be available upon approval of the Potential California Parties-LADWP Settlement.⁵⁸ However, PG&E and LADWP do not explain how the set aside will facilitate the Potential California Parties-LADWP Settlement. Rather, as they also point out in the Joint Motion, the CalPX will likely have sufficient funds available in the foreseeable future to cover both the amount subject to the set aside and its other current obligations.⁵⁹

⁵⁷ See generally Settlement at 3 (“Whereas, Sections 4.15(c) and 5.4(g)(i) of the PG&E Plan provide for FERC to determine whether amounts owed by PG&E for Class 6 Claims will be paid directly to sellers pursuant to the Individual Seller Class 6 Claims, or instead will be paid directly to the PX pursuant to the PX Class 6 Claims, and then paid by the PX to various sellers.”); Williams Companies, Inc. April 27, 2004 Offer of Settlement and Request for Shortened Comment Period, Attachment A Settlement Agreement and Release of Claims § 5.3.3 (stating “the FERC order approving this Agreement shall give PG&E the right, subject to approval by the Bankruptcy Court, to withdraw funds in an amount equal to PG&E’s allocated portion of the Settlement Amount from the PG&E Bankruptcy Escrow.”), *approved in San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 108 FERC ¶ 61,002 (2004).

⁵⁸ Joint Motion at 3.

⁵⁹ *Id.* LADWP and PG&E have not made the Commission aware of any immediately pending claims to the CalPX Settlement Clearing Account funds that necessitate the set aside. Further, presuming PG&E and CalPX are able to obtain the other required approvals and implement the fund transfer contemplated in the PG&E-CalPX Settlement, CalPX’s Settlement Clearing Account is expected to contain in excess of \$1 billion. In the event that CalPX’s Settlement Clearing Account is drained of funds and the PG&E-CalPX Settlement is not implemented, the parties to the Potential California Parties-LADWP Settlement could seek funding directly from PG&E’s Class 6 Escrow.

42. Further to the extent that the set aside provides a benefit to LADWP, the Commission cannot approve such a benefit without having the opportunity to review and consider all of the terms and conditions of the settlement that contemplated such a benefit. The Commission has encouraged settlements in the California Refund Proceeding,⁶⁰ and continues to urge parties wishing to settle their claims to file settlements with the Commission. However, PG&E and LADWP's Joint Motion to set aside \$160 million of the funds presently held in CalPX's Settlement Clearing Account to fund the Potential California Parties-LADWP Settlement does not constitute an offer of settlement under Rule 602 of the Commission's Rules of Practice and Procedure.⁶¹ As PG&E and LADWP indicate in their Joint Motion, "[t]he parties are continuing to negotiate and finalize the [Potential California Parties-LADWP Settlement]."⁶² However, we are concerned that the Joint Motion may provide a benefit anticipated in the Potential California Parties-LADWP Settlement (i.e., the set aside in favor of LADWP) that may favor LADWP to the detriment of other claimants. Without having the opportunity to review the complete terms and conditions of the Potential California Parties-LADWP Settlement, the Commission finds this potential discrimination against the other claimants to be undue.⁶³

43. PG&E and LADWP also argue that if the Commission allows the set-aside, LADWP will withdraw its comments in opposition to the PG&E-CalPX Settlement, permitting expeditious review of that settlement.⁶⁴ As discussed above, we have already denied LADWP's protest, thus the withdrawal of the protest is not necessary and is moot.

44. In light of our denial of the Joint Motion, we do not need to address SMUD's arguments that sought denial of the motion.

⁶⁰ *Pub. Utilities Comm'n for the State of Cal. v. Sellers of Long Term Contracts to the Cal. Dep't of Water Res.*, 99 FERC ¶ 61,087, at 61,384 (2002) ("That being said, we want to strongly encourage all parties involved in disputes arising from the California crisis to seriously negotiate settlements."); *Cal. ex rel. Lockyer v. B.C. Power Exch. Corp.*, 122 FERC ¶ 61,260, at P 36 (2008).

⁶¹ 18 C.F.R. § 385.602 (2008).

⁶² Joint Motion at 3.

⁶³ If and when the Potential California Parties-LADWP Settlement is filed, at that time, the Commission expects to have sufficient information on the complete settlement to properly rule on it.

⁶⁴ Joint Motion at 3-4.

45. We reiterate our policy encouraging settlements in the California Refund Proceeding and urge parties seeking to settle their claims to promptly file settlements that comply with Rule 602. It is the Commission's practice to act expeditiously on settlements submitted to the Commission for its review.

46. In order to keep the Commission apprised of funding levels of CalPX's Settlement Clearing Account that may affect settlement payouts, the Commission requires that the Parties notify the Commission of the PG&E-CalPX Settlement transfer within five (5) days of the transfer.

The Commission orders:

(A) The PG&E-CalPX Settlement is hereby conditionally approved as just and reasonable, as discussed in the body of this order.

(B) PG&E is hereby directed to maintain a record of the amount of interest earned at the Commission interest rate on the original principal in its Class 6 Escrow, and the amount of interest earned at the Commission interest rate for each amount transferred to CalPX pursuant to the PG&E-CalPX Settlement, as discussed in the body of this order.

(C) The Joint Motion is hereby denied, as discussed in the body of this order.

(D) The Commission requires that the Parties notify the Commission of the PG&E-CalPX Settlement transfer within five (5) days of the transfer.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.