

131 FERC ¶ 61,259
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller and John R. Norris.

San Diego Gas & Electric Company

v.

Docket No. EL00-95-243

Sellers of Energy and Ancillary Services

Investigation of Practices of the California
Independent System Operator and the
California Power Exchange

Docket No. EL00-98-227

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-058

Sellers of Energy and/or Capacity

Investigation of Wholesale Rates of Public Utility Sellers
of Energy and Ancillary Services in the Western Market
Systems Coordinating Council

Docket No. EL01-68-034

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. IN03-10-060

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

Docket No. PA02-2-075

American Electric Power Service Corporation

Docket No. EL03-137-022, *et al.*

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

Docket No. EL03-180-051, *et al.*

California Independent System Operator Corporation

Docket No. ER03-746-024

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

v.

Docket No. EL02-71-030

British Columbia Power Exchange Company

Tucson Electric Power Company

Docket No. EL03-177-007

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

v.

Docket No. EL09-56-007

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

ORDER APPROVING SETTLEMENT

(Issued June 21, 2010)

1. In this order, the Commission approves a settlement filed on April 15, 2010 in the above-captioned proceedings between Tucson Electric Power Company (Tucson Electric) 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 December 31, 2001 (Settlement Period) as they relate to Tucson Electric.² The settlement consists of a “Joint Offer of Settlement, Motion for a Shortened

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.

Comment Period, and Motion for Procedural Relief for Purposes of Disposition of the Settlement” (Joint Offer of Settlement), a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (Settlement and Release of Claims) (collectively, Settlement). Parties requested Commission action on or before July 15, 2010. To that end, on April 15, 2010 the Commission granted the Parties’ Motion for Shortened Comment Period making initial comments due on or before April 29, 2010, with reply comments due on or before May 6, 2010.

2. The Parties filed the Settlement pursuant to Rule 602(b) of the Commission’s Rules of Practice and Procedure.³ The Parties request that the Settlement be transmitted directly to the Commission for approval rather than be certified by an Administrative Law Judge, for the following reasons: (1) just two of the above captioned proceedings are pending before Settlement Judges (with the balance pending before the Commission or Court of Appeals); (2) the settlement that is the subject of the Joint Offer was reached without the assistance of the Settlement Judges; and (3) the Commission has considered over thirty similar settlements without the assistance of a certification from an administrative law judge.

3. The Parties state that the Settlement became binding when all Parties executed it, and some provisions will become effective upon the Settlement 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.⁴ The Parties state that the Settlement shall terminate if the Commission rejects the Settlement in whole or in material 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.⁵

4. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.⁶ The Parties state that the Settlement reaches a fair and reasonable resolution of the issues between Tucson Electric and the California Parties. The Parties further assert that the Settlement protects the rights of Non-Settling Participants. Finally, the Parties note that the Commission and the United States Court of Appeals for the

³ 18 C.F.R. § 385.602(b) (2009).

⁴ Joint Explanatory Statement at 13; Settlement and Release of Claims §§ 1.28, 1.78, 2.2, 9.1.

⁵ Joint Explanatory Statement at 13; Settlement and Release of Claims § 4.3.

⁶ Joint Offer of Settlement at 6.

Ninth Circuit (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.⁷ The Parties, therefore, request Commission approval of the Settlement.

5. 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.

Background and Description of the Settlement

6. 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 CAISO and CalPX markets in Docket Nos. EL00-95-000 and EL00-98-000.⁹ In 2002, the Commission directed a fact-finding investigation into the alleged manipulation of electric and natural gas prices in the west in Docket No. PA02-2-000.¹⁰ In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in the western energy markets in Docket No. IN03-10-000.¹¹ On the same day, the Commission issued two orders directing named entities to show cause why they had not participated in certain gaming practices¹² or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.¹³

⁷ *Id.* (citing *Pub. Utils. Comm'n of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002); *Pub. Utils. Comm'n of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9th Cir. 2006)).

⁸ 16 U.S.C. § 824 (2006).

⁹ *San Diego Gas & Electric Co.*, 92 FERC ¶ 61,172 (2000).

¹⁰ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

¹¹ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

¹² *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

¹³ *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003). This proceeding was instituted for Tucson Electric in Docket No. EL03-177-000. Tucson Electric was later dismissed from this proceeding. *Ariz. Pub. Serv. Co.*, 106 FERC ¶ 61,021 (2004),

(continued...)

7. In 2001, the Commission issued an order in Docket No. EL01-68 that (1) commenced an investigation into the reasonableness of the rates for wholesale sales in the spot markets in the Western Systems Coordinating Council;¹⁴ and (2) established a prospective mitigation and monitoring plan for CAISO wholesale markets. In 2009, the State of California filed a complaint in Docket No. EL09-56 against certain entities, including Tucson Electric. The complaint sought refunds for all sales that were made to CERS between June 20, 2001 and December 19, 2001 at rates exceeding the proxy market clearing price.

8. The Parties state that the Settlement resolves the claims in the above-captioned proceedings as they relate to Tucson Electric.¹⁵ Specifically the Settlement provides for the settlement of claims against Tucson Electric arising from events and transactions in western energy markets during the Settlement Period as they relate to Tucson Electric, as well as claims related to the issues raised in Docket No. EL01-68-000 for all time periods at issue in that proceeding. Any entity that directly sold energy or purchased energy from 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.¹⁶ Such entities must provide notice to the Commission, as well as serve the notice to parties on the list serve established for the Docket No. EL00-95 proceeding and in Docket Nos. EL03-137, *et al.*, no later than five business days following the date the Commission issues an order approving the Settlement.¹⁷ The Parties note that the rights of Participants that do not wish to opt into the Settlement will be unaffected by the Settlement, and that such Non-Settling Participants will not be guaranteed the benefits of the Settlement.¹⁸ The Settlement provides that no claims will be deemed settled as to Non-Settling Participants.¹⁹

reh'g denied, 125 FERC ¶ 61,177 (2008), *appeal filed*, *Cal. ex rel. Brown v. FERC*, No. 09-71763 (9th Cir. June 9, 2009) (consolidated with No. 01-71934, *et al.* and stayed).

¹⁴ Western Systems Coordinating Council is now the Western Electric Coordinating Council.

¹⁵ Joint Explanatory Statement at 3.

¹⁶ Joint Explanatory Statement at 3, 14; Settlement and Release of Claims §§ 1.1 and 8.1.

¹⁷ Joint Explanatory Statement at 14; Settlement and Release of Claims § 8.1.

¹⁸ Joint Explanatory Statement at 14.

¹⁹ Settlement and Release of Claims §§ 3.2, 7.1.1.

9. The Settlement's monetary consideration is comprised of the following: (1) Tucson Electric's CAISO and CalPX receivables that are held by CalPX, estimated to be \$14,326,047; (2) estimated interest on receivables of \$9,824,208 through December 31, 2009, to be updated through the date of distribution; and (3) cash consideration in the amount of \$6,349,745.²⁰ The Settlement provides that Tucson Electric will assign to the California Parties its entitlement to refunds on purchases made in the western energy markets during the Settlement Period.²¹ The California Parties are responsible for the costs associated with establishing and maintaining two escrow accounts, the Settling Supplier Refund Escrow and the California Litigation Escrow.²²

10. Pursuant to the Settlement, certain of the California Parties (PG&E, SDG&E, SoCal Edison, and CERS) will assume responsibility for, subject to specified limitations, the obligation for (a) Tucson Electric's true-ups of receivables and associated interest on the estimated amounts that have been assigned under the Settlement, (b) any refund amounts that Tucson Electric owes to Non-Settling Participants in certain specified proceedings, (c) any interest shortfall amounts that the Commission allocates to Tucson Electric, and (d) any third-party refund offsets that the Commission or a reviewing court determines that Tucson Electric owes.²³ The obligation of any of the California Parties to make payments on behalf of Tucson Electric under the Settlement shall not exceed the total amount allocated and actually paid to such California Party.²⁴

11. The Settlement includes an Allocation Matrix that allocates the Settlement proceeds from the Settling Supplier Refund Escrow to Participants.²⁵ In the case of amounts allocated to any Non-Settling Participants, such amounts will be retained until they are paid pursuant to future Commission orders.²⁶ The Parties state that the portion of Tucson Electric's transferred receivables paid into the Settling Supplier Refund Escrow will be the net of, among other things, the "Interest Shortfall on Refunds" amount

²⁰ Joint Explanatory Statement at 14.

²¹ Joint Explanatory Statement at 15; Settlement and Release of Claims § 4.1.8.

²² Joint Explanatory Statement at 15; Settlement and Release of Claims § 4.1.4.

²³ Joint Explanatory Statement at 15; Settlement and Release of Claims §§ 4.1.6, 5.3, 5.6, 5.7.

²⁴ Joint Explanatory Statement at 16; Settlement and Release of Claims § 5.8.

²⁵ Settlement and Release of Claims, Ex. A.

²⁶ Joint Explanatory Statement at 16; Settlement and Release of Claims § 5.5.

(\$2,804, 963) and the “Settling Supplier’s Estimated Interest Shortfall” (\$500,000).²⁷ In addition, certain specified Participants are designated as “Deemed Distribution Participants.”²⁸ Settling Participants that have net amounts outstanding and payable to CAISO and/or CalPX according to the Settlement will receive their share of Settlement proceeds in the form “Deemed Distributions,” i.e., credits against such amounts.²⁹

12. Upon occurrence of the Settlement Effective Date, the Commission’s approval of the Settlement will constitute the Commission’s authorization and direction to the CAISO and CalPX to conform their books and records to reflect the distributions, offsets, adjustments, transfers, and status of accounts provided for in the Settlement.³⁰

13. In return for the specified consideration, and subject to specified limitations, the Settlement resolves all claims between the California Parties and Tucson Electric relating to transactions in western energy markets during the Settlement Period for damages, refunds, disgorgement of profits, costs and attorneys’ fees, or other remedies in the Settled Proceedings, as well as claims related to the issues raised in Docket No. EL01-68-000 for all time periods at issue in that proceeding.³¹

14. Subject to certain specified limitations, the Settlement provides for the California Parties and Tucson Electric to release and discharge each other as of the Settlement Effective Date from all existing and future claims before the Commission and/or under the FPA for the Settlement Period that:

²⁷ Joint Explanatory Statement at 16; Settlement and Release of Claims § 4.1.1.4. “Interest Shortfall” is defined in the Settlement as the difference between the interest actually earned on funds held by CalPX and/or CAISO and the interest that would be earned through the application of the Commission’s interest rate, as set forth in 18 C.F.R. § 35.19a(a)(2)(iii). Settlement and Release of Claims §§ 1.32, 1.43.

²⁸ Settlement and Release of Claims, Ex. B. The Deemed Distribution Participants are: Aquila Power Corporation; California Polar Power Brokers LLC; Illinova Energy Partners, Inc; Pacific Gas & Electric Company; Pacific Gas & Electric Energy Services Company; and Sacramento Municipal Utility District.

²⁹ Settlement and Release of Claims § 5.2.2.

³⁰ Joint Explanatory Statement at 16-17; Settlement and Release of Claims § 6.1.

³¹ Joint Explanatory Statement at 17; Settlement and Release of Claims §§ 3.1, 7.1.1.

(i) Tucson Electric or any California Party charged or collected unjust, unreasonable, or otherwise unlawful rates, terms or conditions for electric capacity, energy, ancillary services, or transmission congestion in the [w]estern [e]nergy [m]arkets during the Settlement Period;

(ii) Tucson Electric or any California Party manipulated the [w]estern [e]nergy [m]arkets in any fashion (including, but not limited to, claims of economic or physical withholding, gaming, forms of electricity market manipulation discussed in the Final Staff Report, or any other forms of electricity market manipulation), or otherwise violated any applicable tariff, regulation, law, rule, or order relating to the [w]estern [e]nergy [m]arkets during the Settlement Period; or
(iii) Any California Party is liable for payments to Tucson Electric for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.³²

15. The Settlement also provides, subject to certain specified limitations, for the California Parties and Tucson Electric mutually to release the other from all past, existing, and future claims for civil damages and/or equitable relief concerning, pertaining to, or arising from allegations that:

(i) Tucson Electric or any California Party charged or collected unjust, unreasonable, or otherwise unlawful rates, terms or conditions for capacity, energy, ancillary services, or transmission congestion in the [w]estern [e]nergy [m]arkets during the Settlement Period;
(ii) Tucson Electric or any California Party, during the Settlement Period, manipulated [w]estern [e]nergy [m]arkets in any fashion (including, but not limited to, claims of economic or physical withholding, gaming, ... or any other forms of market manipulation);
(iii) Tucson Electric or any California Party was unjustly enriched by the foregoing released claims or otherwise violated any applicable tariff, regulation, law, rule, or order relating to transactions in [w]estern [e]nergy [m]arkets during the Settlement Period; or
(iv) Any California Party is liable for payments to Tucson Electric for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.³³

³² Joint Explanatory Statement at 17; Settlement and Release of Claims § 7.2.1.

³³ Joint Explanatory Statement at 18; Settlement and Release of Claims § 7.3.1.

16. Subject to the limitations of sections 7.4 and 8.2 of the Settlement, Additional Settling Participants are deemed to provide to and receive from Tucson Electric the releases that the California Parties provide and receive.³⁴

17. The Parties state that they would not object to the Commission acting to assure CAISO and CalPX that they will be held harmless from their actions to implement the Settlement.³⁵

Procedural Matters

18. 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 April 29, 2010, and reply comments were due on or before May 6, 2010. Initial comments were timely filed by CAISO and CalPX, either in support of or not opposing the Settlement. In addition, the Sacramento Municipal Utility District (SMUD) filed timely comments opposing the Settlement. CALifornians for Renewable Energy, Inc. (CARE) filed comments opposing the Settlement out-of-time. Reply comments were filed by jointly by Tucson Electric and the California Parties.

19. The Commission rejects the out-of time comments filed by CARE. Under our rules, failure to file timely comments results in that entity waiving objections to the settlement agreement.³⁶ CARE should have filed its comments no later than April 29, 2010, the due date for initial comments.³⁷ Accordingly, we conclude that CARE has waived its objections to the Settlement for failure to file timely initial comments.

Substantive Matters

A. "Hold Harmless" Protection

20. Both CAISO and CalPX note that the circumstances of this Settlement warrant hold harmless treatment for CAISO and CalPX because they, along with their directors, officers, employees, and consultants, will implement a number of the Settlement's

³⁴ Joint Explanatory Statement at 18; Settlement and Release of Claims §§ 7.4, 8.2.

³⁵ Joint Explanatory Statement at 18-19.

³⁶ *See* 18 C.F.R. § 385.602(f)(3) (2009).

³⁷ We also note that CARE did not provide the Commission with any explanation as why its comments were untimely, nor did it seek leave from the Commission to file its comments out-of-time.

provisions.³⁸ 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.³⁹

In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.⁴⁰

Commission Determination

21. 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.⁴¹ Thus, the Commission determines that CalPX and CAISO will be held harmless for actions taken to implement this Settlement.⁴² Accordingly, this order

³⁸ CAISO Initial Comments at 4-7; CalPX Initial Comments at 2-4.

³⁹ CalPX Initial Comments at 4.

⁴⁰ *See* Joint Reply Comments at 14.

⁴¹ *See id.*; *see also* Joint Explanatory Statement at 21.

⁴² *See e.g., San Diego Gas & Electric Co.*, 128 FERC ¶ 61,242, at P 19 (2009) (incorporating “hold harmless” language from earlier settlements); *San Diego Gas & Electric Co.*, 128 FERC ¶ 61,002, at P 17 (2009); *San Diego Gas & Electric Co.*, 128 FERC ¶ 61,004, at P 21 (2009); *San Diego Gas & Electric Co.*, 126 FERC ¶ 61,007, at P 38 (2009).

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 CAISO and CalPX.

B. SMUD’s Comments in Opposition to the Settlement

1. Preliminary Findings

22. Under the Commission’s *Trailblazer*⁴³ analysis, the Commission may approve a contested settlement under the following four approaches: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission may determine that the settlement provides an overall just and reasonable result; (3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections, and the contesting parties’ interests are too attenuated; or (4) the Commission may determine that the contesting parties can be severed.⁴⁴ In this case, we approve the Settlement under *Trailblazer*’s first prong because we find that SMUD’s arguments are without merit, as discussed herein.

23. SMUD contends that the Commission cannot approve the Settlement under *Trailblazer*’s first prong because there is not an adequate evidentiary record upon which the Commission could find that SMUD’s arguments were without merit. Specifically, SMUD argues that, because the Commission has not made a finding whether any entity (including SMUD) actually owes money to CAISO and/or CalPX, there is no evidence upon which the Commission may make a merits determination. We disagree with SMUD. The Commission carefully considered SMUD’s arguments and found that they were without merit, as discussed below. The Commission may decide the merits of a contested settlement if there is substantial evidence in the record or if there is no genuine issue of material fact.⁴⁵ We find that SMUD’s objections raise a policy issue as to whether non-jurisdictional entities not subject to the Commission’s FPA refund authority can be designated Deemed Distribution Participants under the Settlement. Further, under our rules, a contesting party that is alleging a genuine issue of material fact must submit an affidavit that details what that genuine issue is.⁴⁶ SMUD has not submitted the

⁴³ *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*).

⁴⁴ *Id.* at 62,342-44.

⁴⁵ See 18 C.F.R. § 385.602(h)(1)(i) (2009); *Trailblazer*, 85 FERC ¶ 61,345, at 62,342.

⁴⁶ See 18 C.F.R. § 385.602(f)(4) (2009).

requisite affidavit.⁴⁷ Thus, SMUD has not alleged any genuine issue of material fact. Moreover, as discussed below, the Commission is not making any factual determination that SMUD actually owes money to CAISO and/or CalPX. For these reasons, no genuine issue of material fact exists; thus, the Commission may address SMUD's arguments on the merits.

2. Undue Discrimination

24. SMUD argues that the Settlement is unduly discriminatory. SMUD states that, as an exempt governmental entity, it is not subject to the Commission's refund authority for purposes of sales in which it engaged during the Settlement Period, even though it is entitled to FPA refunds as a buyer in the markets. SMUD explains that this jurisdictional dichotomy is not recognized in the Settlement, which makes acceptance of a requirement that a party, in its role as a seller, pay FPA refunds the *quid pro quo* for that party, in its role as a buyer, obtaining FPA refunds. SMUD provides that the other class, the Deemed Distribution Participants, is defined solely on whether a participant "owes more than it is owed as a result of its transactions in the CAISO and CalPX markets."⁴⁸

25. SMUD argues that the Commission's decisions in similar settlements to treat jurisdictional and non-jurisdictional sellers alike, is unduly discriminatory.⁴⁹ Specifically, SMUD objects to the Commission treating it as if it made sales subject to the Commission's FPA refund authority, i.e., as a Deemed Distribution Participant. SMUD contends that despite saying that the classification was based on amounts owing to CAISO and CalPX, the Commission disclaimed finding that "any entity, including SMUD, owes money to the CAISO and/or the CalPX."⁵⁰ SMUD asserts that there is no evidentiary support for the Commission's finding that SMUD has amounts outstanding and payable to CAISO and/or CalPX. SMUD provides that the reason the Commission

⁴⁷ Nor has SMUD submitted an affidavit detailing a genuine issue of material fact with respect to any of the other settlements in these proceedings that we have approved.

⁴⁸ SMUD's Initial Comments at 5 (citing *San Diego Gas & Electric Co.*, 129 FERC ¶ 61,256, at P 29 (2009)) (SMUD Comments).

⁴⁹ Specifically, SMUD asserts that it has long been settled that undue discrimination involves both the dissimilar treatment of similarly situated parties and the *similar* treatment of dissimilar parties. *Id.* at 5 (citing *Alabama Electric Coop., Inc. v. FERC*, 684 F.2d 20, 21 (D.C. Cir. 1982)) (*Alabama Electric Cooperative*).

⁵⁰ *Id.* (citing *San Diego Gas & Electric Co.*, 129 FERC ¶ 61,256, at P 34 (2009)).

would not make such a finding is because there is not a claim pending that SMUD owes money to CAISO or CalPX.⁵¹

26. SMUD argues that the “amounts outstanding and payable to the CAISO and/or CalPX” used to determine participants’ net liability under the instant and prior similar settlement proposals were determined using an FPA-based refund calculation.⁵²

However, SMUD provides that whether a market participant may owe refunds “in Phase II of the Commission’s EL00-95 Proceeding” depends on its jurisdictional status; in particular, SMUD, as an exempt governmental entity, does not owe FPA refunds in that proceeding.⁵³ Thus, SMUD contends that the Settlement unduly discriminates against it by placing it in the same class as entities that are liable for FPA refunds, specifically entities that owe FPA refunds that exceed the amount of refunds they may be owed as buyers.

27. SMUD asserts that the Commission has stated “the Settlement does not suggest that Deemed Distribution Participants owe refunds pursuant to the FPA, but instead suggests that SMUD may owe money to the CAISO and/or CalPX,” and “under remedies available outside the context of the FPA.”⁵⁴ SMUD contends that this is inaccurate in the following two respects: (1) the amounts allegedly owed were FPA refund amounts; and (2) the state-court litigation to which the Commission referred does not involve any payments owed to CAISO or CalPX, but seeks payments allegedly owed to the California Parties. Moreover, SMUD contends that even if the pending state court litigation involved potential monies owed to CAISO or CalPX, the Commission has not identified what authority would allow it to decide those cases by approving a settlement that determines SMUD’s alleged liability on the basis of FPA refunds to CAISO and CalPX.⁵⁵

28. SMUD asserts that the Commission should find that SMUD was unduly discriminated against by being placed in a class that was defined as market participants

⁵¹ *Id.* at 6. SMUD submits that there is ongoing state court litigation in which the California Parties have made claims that SMUD owes money directly to them, but this litigation does not involve claims that any amounts are owed to CAISO or CalPX.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 7 (citing *San Diego Gas & Electric Co.*, 130 FERC ¶ 61,198, at P 9 (2010)).

⁵⁵ *Id.* at 7-8.

who owe a greater amount of FPA refunds to CAISO and CalPX than the FPA refunds they are entitled to receive. SMUD argues that Commission precedent bars unduly discriminatory settlement offers, as is presented here by treating SMUD as if it has FPA refund obligations, rather than being offered the same settlement terms as other purchasers who made no jurisdictional sales and thereby are not liable for FPA refunds.⁵⁶

29. Moreover, SMUD argues that an opt-in provision perpetuates undue discrimination by creating an illusion that self-help measures solve the problems. SMUD explains that reliance on the opt-in provision to cure discrimination wrongly assumes that if a party does not forfeit any existing rights by not joining the discriminatory class, no problem arises. Rather, SMUD asserts that the Commission should consider whether the discriminatory action denies benefits or privileges that are extended to others.⁵⁷

30. SMUD provides that the Settlement's treatment of it as a Deemed Distribution Participant is unduly discriminatory, as it fails to recognize SMUD's exempt status, which bars requiring SMUD to pay FPA refunds as a condition for receiving refunds. Accordingly, SMUD contends that condition must be removed so that SMUD can obtain the same benefits enjoyed by other buyers with little or no FPA refund obligations as sellers under the Settlement.⁵⁸

31. In response, the Parties argue that the Settlement does not single out SMUD and other non-jurisdictional entities as Deemed Distribution Participants, noting that PG&E, a jurisdictional public utility, is also a Deemed Distribution Participant under the Settlement. The Parties recite Commission orders making similar findings that whether an entity is a Deemed Distribution Participant is not based on the jurisdictional status of that entity. Moreover, the Parties urge the Commission to find that SMUD's undue discrimination claims, including its argument that its status as a non-jurisdictional entity means that it has no amounts owed to CAISO and/or CalPX are without merit, citing to Commission orders addressing similar settlements.

Commission Determination

32. The Settlement provides that a Participant that decides to join the Settlement will receive a share of the Settlement proceeds either in cash, or, if it is a Deemed Distribution Participant, in the form of credits against amounts that it may owe for its CAISO and

⁵⁶ *Id.* at 8 (referencing *Transwestern Pipeline Co.*, 26 FERC ¶ 61,112, at 61,273 (1984), cited in *Florida Power & Light Co.*, 70 FERC ¶ 63,017, at 65,088 (1995)).

⁵⁷ *Id.* at 9.

⁵⁸ *Id.* at 10.

CalPX transactions.⁵⁹ We have previously stated that the classification as a Deemed Distribution Participant is not based on whether the Participant is a jurisdictional or non-jurisdictional entity. Specifically, the Commission found that a 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 [but, rather] . . . on whether those entities have amounts outstanding and payable to the CAISO and/or CalPX."⁶⁰ Thus, SMUD, as a non-jurisdictional entity, has not been inappropriately singled out as Deemed Distribution Participant under the Settlement. Moreover, as we have also explained, Deemed Distribution Participants are not precluded from recovery under the Settlement and such entities will receive a credit against outstanding amounts they may owe to CAISO and/or CalPX, as provided for in the Settlement.⁶¹ We have also found that classifying Participants as either Net Refund Recipients or Deemed Distribution Participants is not unduly discriminatory because, under the Settlement, Net Refund Recipients are those entities that clearly do not have outstanding amounts owing to CAISO and/or CalPX.⁶²

33. In support of its undue discrimination claim, SMUD improperly relies on *Alabama Electric Cooperative* for the proposition that undue discrimination involves both the dissimilar treatment of similarly situated parties and the similar treatment of dissimilar parties.⁶³ As we have previously explained, that case involved a public utility's rate design that would have been applicable to all of its customers, none of which would have had the opportunity to opt out of the utility's rates.⁶⁴ In contrast, in the Settlement at hand, SMUD and others possess the ability not to opt into the Settlement and in doing so forfeit no rights to pursue claims against Tucson Electric. In addition, we find that SMUD is similarly situated to other parties facing litigation risk with respect to the California Energy Crisis. Such risk does not distinguish between jurisdictional and non-jurisdictional sellers. For example, Northern California Power Agency and the

⁵⁹ Settlement and Release of Claims §§ 5.2.1 and 5.2.2.

⁶⁰ *San Diego Gas & Electric Co.*, 129 FERC ¶ 61,259, at P 28 (2009).

⁶¹ *Id.*; *see also* Settlement and Release of Claims § 5.2.2.

⁶² *See e.g., San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,083, at P 36 (2010) (NCPA Settlement Order).

⁶³ SMUD Comments at 5 (citing *Alabama Electric Cooperative*).

⁶⁴ NCPA Settlement Order, 131 FERC ¶ 61,083 at P 37.

Los Angeles Department of Water and Power, both non-jurisdictional entities, have recently settled with the California Parties.⁶⁵

34. SMUD's assertions that, as an exempt governmental entity it does not owe FPA refunds, misconstrues the Commission's findings. The Commission has previously found:

SMUD confuses the *legal* issue of whether the Commission can require it to pay refunds under FPA section 206 with the *factual* issue of whether SMUD owes money to the CAISO and/or CalPX. The Settlement does not suggest that SMUD owes refunds pursuant to the FPA, but rather suggests that SMUD may owe money to the CAISO and/or CalPX. While the Ninth Circuit. . . did find that the Commission lacked authority to order governmental entities or other non-public utilities to pay refunds . . . the Ninth Circuit took no position on whether any remedies were available outside the context of the FPA. . . . These settlements are voluntary agreements that entities can choose to join or not to join. They do constitute a refund determination under FPA section 206. Similarly, they do not constitute a finding that any entity, including SMUD, actually owes money to the CAISO and/or the CalPX.⁶⁶

35. That discussion is applicable here as well. The Commission has made no finding that SMUD owes FPA refunds or actually owes money to CAISO and/or CalPX, and approval of the instant Settlement does not include such a determination. Thus, if SMUD were to opt into the Settlement, and voluntarily decided to exchange its right to pursue claims against Tucson Electric for the benefits of the Settlement, our approval of the Settlement would not make any affirmative finding that SMUD owed money to CAISO and/or CalPX. Accordingly, we find SMUD's argument that as an exempt governmental entity it does not owe FPA refunds to be irrelevant in this context.

36. We also note that nearly all orders approving settlement agreements in these proceedings, including this one, contain language that provides that the orders hold no

⁶⁵ See *id.* P 37; *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,257 (2009), *order denying reh'g*, 130 FERC ¶ 61,197 (2010). The Commission has also approved similar settlements between the California Parties and non-jurisdictional entities in these proceedings. See, e.g., *San Diego Gas & Elec. Co.*, 125 FERC ¶ 61,085 (2008) (approving settlement between the California Parties and City of Vernon, California).

⁶⁶ *San Diego Gas & Electric Co.*, 129 FERC ¶ 61,257, at P 34-35 (2009).

precedential value beyond approval of the individual settlements themselves.⁶⁷ Historically, the Commission has encouraged parties to settle disputes, as it has done throughout these and related proceedings,⁶⁸ and we recognize that parties will at times agree to accept certain burdens in exchange for the benefits of a settlement. For this reason, a settlement may not be used in other proceedings as evidence of an admission against that settling party's interest. Therefore, our orders approving settlements contain language specifying that Commission approval does not constitute approval of, or precedent regarding, any principle or issue in these settlement proceedings or any other proceedings. Here, for instance, if SMUD opted to join the Settlement as a Deemed Distribution Participant, its decision to do so would not constitute an admission on its part that it owes any money to CAISO and/or CalPX. Rather, its decision to opt into the Settlement would indicate SMUD's desire to avail itself of the benefits of the Settlement in exchange for any burdens imposed by the Settlement.

37. The Commission rejects SMUD's assertions that the voluntary opt-in provision of the Settlement is not an adequate cure for discrimination. 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. The opt-in provision provides SMUD and other Participants with the ability not to opt into the Settlement, thereby allowing such entities to continue litigation. Contrary to its allegations, SMUD does not show how the opt-in provision perpetuates undue discrimination "by creating an illusion that self-help measures solve the problems."⁶⁹ It also fails to acknowledge that the rights of Non-Settling Participants are unaffected by the Settlement and that participation in the Settlement is entirely voluntary. As we discussed in the *NCPA Settlement Order*, 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 whether the Commission may 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

⁶⁷ See e.g., *San Diego Gas & Electric Co.*, 129 FERC ¶ 61,259 at P 39 ("The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in any proceeding."); *San Diego Gas & Electric Co.*, 129 FERC ¶ 61,256, at P 36 (2009) (same); *San Diego Gas & Electric Co.*, 129 FERC ¶ 61,257, at P 52 (2009) (same).

⁶⁸ See e.g., *supra* n.7.

⁶⁹ SMUD Comments at 8.

entity, avoidance of further litigation, and the financial certainty that is embodied in the Settlement.⁷⁰

38. The same reasoning applies to the instant Settlement. We reiterate that the Settlement is not binding on parties that do not opt into it, non-jurisdictional entities are not singled out for treatment as Deemed Distribution Participants, the settlement is not precedential and, therefore, does not limit Non-Settling Participants' actions going-forward, and that approval of the settlement is not an FPA refund determination. We find that because SMUD has the election of opting into and receiving the benefits of the Settlement, and that because SMUD's rights are not diminished by not opting into the Settlement, SMUD has failed to articulate how any action being taken in this Settlement denies it benefits or privileges that are extended to others. For these reasons, we conclude SMUD's claims that the Settlement is unduly discriminatory to be without merit.

39. Finally, we are not persuaded by SMUD's objections to the use of an FPA-based calculation for determining the Allocation Matrix. We find that using a refund-based calculation methodology is a reasonable approach in determining how to allocate the Settlement funds among various Participants. We do not find that employing such a calculation for purposes of allocating Settlement funds is tantamount to making a refund determination. Similarly, we emphasize that our approval of the Settlement is not a refund determination. Rather, the Settlement is a voluntary agreement that will bind only those entities that choose to opt into the Settlement.

3. Request for Clarification

40. SMUD requests clarification that the residual underlying obligation of Tucson Electric remains in place in the event that the refund amounts owed to the Non-Settling Participants are determined to exceed the amount allocated to the California Parties. Specifically, SMUD requests clarification that approval of the Settlement would not decrease Tucson Electric's underlying obligation to pay the full amount of any refunds determined to be owed to Non-Settling Participants. According to SMUD, failure to enforce this obligation would result in Non-Settling Participants being placed in a worse position than they would have been absent the settlement.⁷¹

41. SMUD argues that the parties to the Settlement cannot relieve Tucson Electric of its obligation to pay the full amounts of refunds determined to be owed to Non-Settling Participants if the Settlement's limitations on the California Parties' obligations result in

⁷⁰ NCPA Settlement Order, 131 FERC ¶ 61,083 at P 28, 30.

⁷¹ SMUD Comments at 10.

less than full refund recovery.⁷² Thus, SMUD asserts that Tucson Electric cannot relieve itself of its obligation to pay Non-Settling Participants the full amount of any refunds it might owe by agreement with the California Parties. SMUD provides that none of the Non-Settling Participants have agreed to relieve Tucson Electric of its obligation to pay full refunds if they are found to be owed.

42. Finally, SMUD asserts that absent the proposed assignment of a limited refund obligation to the California Parties, Tucson Electric would be obligated to pay the full amount of any refunds determined to be owed to Non-Settling Participants. SMUD explains that the refund limitation would deprive Non-Settling Participants of their right to obtain the full amount of any refunds that Tucson Electric might be ruled to owe. Accordingly, SMUD argues that such a limitation would not protect the objecting party's interest, and thus cannot restrict Tucson Electric's ultimate obligation in litigation outside the confines of the Settlement.⁷³

43. The Parties respond that SMUD's request for clarification should be denied, noting that there is no need for the Commission to address this speculative issue. The Parties assert that the interests of Non-Settling Participants are adequately insulated from potential shortfalls, citing to Settlement provisions detailing the California Parties' responsibilities for shortfalls. The Parties also note that the Settlement does not determine Tucson Electric's refunds to Non-Settling Participants; rather, that will be determined by the Commission in a future order.

Commission Determination

44. For the following reasons, we deny the requested clarification. As the Commission recently explained,⁷⁴ with respect to SMUD's argument that the Settling Participants cannot unilaterally relieve themselves of a *statutory* obligation to pay refunds, we do not believe that the Settlement does this.⁷⁵ The amount of Tucson

⁷² SMUD states that under the common law of contracts, an obligor may generally delegate performance of its duties to another. However such delegation will not discharge any duty or liability of the original obligor, unless the obligee agrees otherwise. *Id.* at 11 (citing Restatement (Second) of Contracts § 318(3) (1981) and *Security Ben. Life Ins. Co. v. FDIC*, 804 F. Supp. 217, 225 (1992)).

⁷³ SMUD Comments at 11-12.

⁷⁴ *San Diego Gas & Electric Co.*, 130 FERC ¶ 61,198, at P 21-22 (2010).

⁷⁵ While SMUD suggests that Tucson Electric's refund obligation is statutory in nature, there is no statutory obligation to pay refunds. Rather, refunds are at the discretion of the Commission. FPA section 206(b) provides "[a]t the conclusion of any
(continued...)

Electric refunds to which any Non-Settling Participant is entitled will not be determined under the Settlement. The Settlement provides that the amount due to a Non-Settling Participant, as determined in Commission orders upon completion of the EL00-95 Proceeding (and other specified proceedings), shall in the first instance be paid from funds set aside for payment of Non-Settling Participants in the Settling Supplier Refund Escrow.⁷⁶ Any shortfall in Tucson Electric refunds owed to Non-Settling Participants shall be borne by the California Parties.⁷⁷ Sections 5.6 and 5.7 of the Settlement allocate among the California Parties any such potential shortfalls in Tucson Electric refunds owed to the Non-Settling Participants. The cap on each California Party's liability to Non-Settling Participants is the total amount of Tucson Electric refunds and/or Deemed Distributions allocated to that California Party. If an obligation of any California Party under this Agreement to make payment on behalf of Tucson Electric exceeds the total amount allocated to that California Party, as set forth in the Allocation Matrix with respect to transactions in the California Markets, the remaining California Parties to which Settlement Proceeds are allocated shall be jointly and severally liable to make such

proceeding under this section, the Commission *may* order refunds of any amounts paid. . . in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice or contract which the Commission orders to be thereafter observed and in force.” 16 U.S.C. § 824e (2006). Courts have long held that the breadth of the Commission's “discretion is, if anything, at zenith” when it is “fashioning [] remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.” *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (emphasis added). *See also Towns of Concord v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992) (citing *Moss v. Civil Aeronautics Board*, 521 F.2d 298, 308-09 (D.C. Cir. 1975) (“Because the ‘equitable aspects of refunding past rates are . . . inextricably entwined with the [agency’s] normal regulatory responsibility . . . absent some conflict with the explicit requirements or core purposes of a statute, we have refused to constrain agency discretion by imposing a presumption in favor of refunds”)); *Con. Edison Co. of N.Y., Inc. v. FERC*, No. 06-10-25, slip op. at 13-14, 2007 U.S. App. 29,213 (D.C. Cir. 2007); *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *La. Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 225 (D.C. Cir. 1999); *Pub. Utils. Com'n of Cal. v. FERC*, 462 F.3d 1027, 1053 (9th Cir. 2006).

⁷⁶ Settlement and Release of Claims § 5.5.

⁷⁷ *Id.* § 5.6.

payments on behalf of Settling Supplier up to the amount allocated to each such California Party.⁷⁸

45. Because the vast majority of the Settlement funds are allocated to the California Parties under the Allocation Matrix, we find that this is a reasonable approach that is likely to fully cover any refund amounts that the Commission or a court may ultimately find that Tucson Electric owes to SMUD.⁷⁹ We thus conclude that approval of the Settlement would provide significant benefits to Settling Participants while at the same time not adversely affecting the interests of those parties that continue to litigate their claims and ensuring that the interests of Non-Settling Participants are protected. Moreover, we believe that this approach is consistent with direction from both the Commission and the Ninth Circuit that the parties involved in these proceedings settle their disputes rather than engage in costly and time-consuming litigation.⁸⁰

46. In addition, we find that section 318 of the Restatement is not applicable to this case. First, in each of the Restatement's relevant illustrations, the obligee refers to one of the parties to the contract.⁸¹ By contrast, SMUD is a Non-Settling Participant and is not an "obligee" within the meaning of the Restatement provision.⁸² Second, SMUD has not demonstrated that Tucson Electric had delegated an obligation or, if it did, whether such delegation required the consent of any party, much less Non-Settling Participants. It is important to note that, in the one decision SMUD cites in support of its argument, the court stated: "An obligor is discharged by substitution of a new obligor only *if the contract so provides* or if the obligee makes a binding manifestation of assent to the

⁷⁸ *Id.* § 5.8.

⁷⁹ The Settlement's Allocation Matrix provides that the California Parties will collectively be allocated almost \$26 million in total disbursed amounts, or approximately 96 percent of the total amount allocated. By contrast, the Allocation Matrix shows that SMUD would be allocated \$50,807, or approximately 0.18 percent of the total amount allocated. While we recognize that the Commission or a court may determine that SMUD is owed more than what has been allocated to it under the Settlement, the Commission or a court would have to find that SMUD is owed more than 500 times more than the amount it is allocated under the Settlement in order to exceed the cap on the California Parties' liability.

⁸⁰ *See supra* n.7.

⁸¹ *See generally* Restatement § 318, Comments and Illustrations.

⁸² As noted above, Non-Settling Participants are not bound by the Settlement. *See supra* P 8.

substitution”⁸³ Here, the Settlement provides that the California Parties will be responsible for refund shortfalls.⁸⁴ Thus, such a delegation is expressly provided for in the Settlement.

47. Therefore, the interests of Non-Settling Participants are adequately insulated from potential shortfalls, and we find that it is reasonable for the Settling Participants to allocate the risks of covering shortfalls as provided for in the Settlement. For these reasons, we deny SMUD’s request for clarification.

Conclusion

48. In conclusion, the Commission finds that the Settlement is just and reasonable and therefore approves it, as discussed in the body of this order. The Commission’s approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in any proceeding.

The Commission orders:

(A) The Settlement is hereby approved, as discussed in the body of this order.

(B) SMUD’s request for clarification is hereby denied, 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.

⁸³ *Security Ben. Life Ins. Co. v. FDIC*, 804 F.Supp. 217, 225 (D. Kan. 1992) (citing Restatement § 318 cmt. d) (emphasis added).

⁸⁴ *See* Settlement and Release of Claims §§ 5.6-5.8.