

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Philip D. Moeller,  
and Jon Wellinghoff.

San Diego Gas & Electric Company

Docket Nos. EL00-95-000

v.

Sellers of Energy and Ancillary Services

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

EL00-98-000

Puget Sound Energy, Inc.

EL01-10-000

v.

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior and  
Practices in Western Markets

IN03-10-000

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

PA02-2-000

PacifiCorp

EL03-163-000

PPM Energy, Inc. (f/k/a PacifiCorp Power Marketing,  
Inc.)

EL03-197-000

California Independent System Operator Corporation

ER03-746-000

ORDER APPROVING SETTLEMENT

(Issued June 21, 2007)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement and Release of Claims Agreement (collectively, the Settlement) filed on April 11, 2007 in the above-captioned proceedings by PacifiCorp<sup>1</sup> and the California Parties<sup>2</sup> (collectively, the Parties). The Settlement consists of a “Joint Explanatory Statement” and a “Settlement and Release of Claims Agreement”<sup>3</sup> among PacifiCorp and the California Parties, filed pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.<sup>4</sup> The Settlement resolves matters and claims in the above-captioned proceedings (*i.e.*, the Refund Proceedings) related to PacifiCorp and arising from events and transactions in the Western Energy Markets<sup>5</sup> during the period January 1, 2000 through June 20, 2001 (Settlement Period).

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<sup>1</sup> For the purposes of this filing, PacifiCorp means the entity legally called PacifiCorp, which sold power to the California Independent System Operator Corporation (CAISO) under two Scheduling Coordinator Identification numbers (SCIDs): PAC1 (BAID 1006) and PAC3 (BAID 3563). Reference to PacifiCorp does not include PacifiCorp Power Marketing, Inc. (BAID 3174), now known as PPM Energy, Inc.

<sup>2</sup> The California Parties consist of Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, and the California Department of Water Resources acting solely under the authority and powers created by Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in sections 80000 through 80270 of the California Water Code.

<sup>3</sup> The Settlement and Release of Claims Agreement includes: 1) a Cover Sheet that specifies certain terms and includes Exhibit A (Allocation Matrix) and Exhibit B (Deemed Distribution Participants); and 2) General Terms and Conditions.

<sup>4</sup> 18 C.F.R. § 385.602 (2006).

<sup>5</sup> The Settlement defines the Western Energy Markets as those markets for electric capacity, energy, and/or ancillary services in the territories covered by the Western Electricity Coordinating Council, including the California markets of the CAISO and the California Power Exchange Corporation (CalPX). Settlement sections 1.88 and 1.9.

2. The Parties state that the Settlement reaches a fair and reasonable resolution of issues between PacifiCorp and Settling Participants.<sup>6</sup> Therefore, the Parties request that the Commission approve the Settlement. In this order, the Commission approves the Settlement, finding it to be fair and reasonable and in the public interest.

### **I. Background and Description of the Settlement**

3. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA) to investigate, among other things, the justness and reasonableness of rates of public utility sellers into the CAISO and CalPX markets for a specific period (Docket Nos. EL00-95-000 and EL00-98-000). Also in 2000, the Commission ordered an evidentiary hearing to help determine whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest for a specific period (Docket No. EL01-10-000). In 2002, the Commission directed Staff to commence a fact-finding investigation of manipulation of electric energy and natural gas prices in the west (Docket No. PA02-2-000). In 2003, the Commission directed its Office of Market Oversight and Investigation (OMOI) to conduct an investigation to determine whether individual market participants may have violated a prohibition against anomalous market behavior (Docket No. IN03-10-000). Also in 2003, the Commission instituted the Gaming/Partnership Proceeding by issuing an order directing 43 entities, including PacifiCorp, to show cause why they had not participated in activities that constitute gaming and/or anomalous market behavior in violation of the CAISO and CalPX tariffs (*see* Docket Nos. EL03-137-000, *et al.* and EL03-163-000). The Settlement is meant to resolve various PacifiCorp-related claims stemming from these proceedings.

4. Settlement article VIII provides the terms by which Participants may elect to participate in the Settlement. Participants are entities that directly sold energy to or purchased energy from the CAISO or the CalPX during part or all of the Settlement Period. The Parties state that the Settlement permits, but does not require, Participants to join the Settlement as Additional Settling Participants.<sup>7</sup> Participants that elect to join the

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<sup>6</sup> Settling Participants include the California Parties and Additional Settling Participants. Settlement section 1.77. Additional Settling Participants are those Participants (*i.e.* entities that directly sold energy to or purchased energy from the CAISO or the CalPX during part or all of the Settlement Period) that have elected to join the Settlement in accordance with Settlement article VIII. Settlement sections 1.1 and 1.52.

<sup>7</sup> *See supra* n.6.

Settlement shall be “bound by its terms.”<sup>8</sup> Participants that do not elect to join the Settlement are deemed Non-Settling Participants.<sup>9</sup> Settlement section 3.2 provides for the protection of Non-Settling Participants’ rights, as well as the Parties’ rights with regard to Non-Settling Participants, stating that “no claims addressed in this Agreement shall be deemed settled as to Non-Settling Participants, and . . . all defenses, claims, or allegations made or asserted, or that could be made or asserted by the Parties and Additional Settling Participants against Non-Settling Participants are unaffected by this Agreement . . . .” Also with regard to Non-Settling Participants, the Settlement provides that the California Utilities<sup>10</sup> will be responsible, as of the Settlement’s effective date, for the payment of any refunds by the “Settling Supplier” (*i.e.*, PacifiCorp) to Non-Settling Participants in the Commission proceedings listed above.

5. Pursuant to the monetary consideration provisions listed in Settlement article IV, PacifiCorp will provide Settlement proceeds in the amount of \$27,975,973.<sup>11</sup> As of the Settlement’s effective date, PacifiCorp will assign to the California Parties the “Settling Supplier Receivables”—*i.e.*, generally, all of PacifiCorp’s rights and claims to payment by or from the CalPX and the CAISO, before mitigation in the EL00-95 Proceeding, for sales of energy and ancillary services in the California markets during the Settlement Period.<sup>12</sup> According to Settlement section 4.1.1.1, the unpaid amount of Settling Supplier Receivables, including interest, is \$11,575,973.<sup>13</sup> The CalPX will transfer such funds out of its Settlement Clearing Account and into the Settling Supplier Refund Escrow (an account to be established by the California Parties). The total amount that the CalPX will

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<sup>8</sup> Settlement section 8.1.

<sup>9</sup> *Id.*; *see also* Settlement section 1.50.

<sup>10</sup> Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company.

<sup>11</sup> *See* Settlement section 4.1 and Settlement Cover Sheet section 4.1. This amount includes an estimate of interest that is subject to adjustment pursuant to various provisions in Settlement articles IV and V.

<sup>12</sup> Settlement section 4.1.1.2 and 1.79. Settlement section 4.1.1.1 and Settlement Cover Sheet section 4.1.1.1.

<sup>13</sup> The Settlement refers to the amount of Settling Supplier Receivables to be transferred pursuant to the Settlement (*i.e.*, \$11,575,973) as the “Transferred Receivables.”

actually transfer to the Settling Supplier Refund Escrow is \$11,575,973, minus all Deemed Distributions under the Settlement,<sup>14</sup> plus the amounts owed by Participants with negative allocations under the Settlement.<sup>15</sup> Settlement article IV also provides that PacifiCorp will pay cash consideration totaling \$16,400,000 to the California Parties.<sup>16</sup> Of the \$16,400,000, PacifiCorp will transfer \$13,785,285 into the Settling Supplier Refund Escrow,<sup>17</sup> and \$2,614,715 into the California Litigation Escrow.<sup>18</sup>

6. Settlement article V provides for the disposition and allocation of Settlement proceeds. The Allocation Matrix shows the various allocation percentages of Settlement proceeds (*i.e.*, refunds from PacifiCorp) that are applicable to each Participant.<sup>19</sup> Settling Participants that have net amounts outstanding to the CAISO or the CalPX are considered Deemed Distribution Participants and will receive their share of the Settlement proceeds in the form of credits against such amounts. Settling Participants classified as Net Refund Recipients will receive their allocated distributions in the form of cash payments from the Settling Supplier Refund Escrow. Article V also addresses allocation of and responsibility for shortfalls and excesses for both receivables and refunds, as well as the potential effects of subsequent Commission orders and appeals on the Settlement.

7. Article VI of the Settlement, which addresses CalPX and CAISO accounting, provides authorization for the CalPX and the CAISO to implement the terms of the

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<sup>14</sup> A Deemed Distribution is an amount credited to a Deemed Distribution Participant as an offset to amounts owed by that Participant to the CalPX and/or the CAISO. Settlement section 1.22. The Deemed Distribution Participants for the Settlement are identified in Settlement Cover Sheet Exhibit B.

<sup>15</sup> Settlement section 4.1.1.4.

<sup>16</sup> Settlement section 4.1.2. This amount is in addition to the Settling Supplier Receivables amount.

<sup>17</sup> Thus, the Settling Supplier Refund Escrow will receive funds from both the CalPX and PacifiCorp.

<sup>18</sup> The California Parties are responsible for establishing the California Litigation Escrow, as well as the Settling Supplier Refund Escrow. Settlement section 4.1.4. Distribution of funds in the California Litigation Escrow is addressed in Settlement section 5.4.

<sup>19</sup> *See* Settlement sections 1.4 and 5.2.

Settlement, and the steps they shall take to do so. These steps include, *e.g.*, conforming their books and records to reflect the distributions, offsets, transfers, adjustments, and status of accounts provided for in the Settlement; calculating various refund and interest amounts; and their accounting treatment of distributions under the Settlement.<sup>20</sup>

8. Pursuant to section 4.1.7 of the Settlement, PacifiCorp shall opt into each subsequent and substantially similar settlement reached by the California Parties with other suppliers. PacifiCorp shall also attempt to opt into substantially similar settlements reached by the California Parties prior to the Settlement's effective date, to the extent PacifiCorp has not already done so.

9. Settlement article VII provides for releases and waivers such as: (1) all claims between PacifiCorp and the California Parties shall be deemed settled as related to transactions in the Western Energy Markets during the Settlement Period; (2) PacifiCorp, the California Parties, and Additional Settling Participants will not contest the amount of refund liability and/or offsets or other relief PacifiCorp incurs in the EL00-95 Proceeding, the EL01-10 Proceeding, the "*Lockyer v. FERC Remand*,"<sup>21</sup> the "*BPA v. FERC Remand*,"<sup>22</sup> and the "*CPUC v. FERC Remand*,"<sup>23</sup> and (3) PacifiCorp and the California Parties agree to release each other for the Settlement Period from certain claims before the Commission and/or under the FPA, and from certain past, existing and future claims for civil damages and/or equitable relief.<sup>24</sup>

10. The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty. They state that the Settlement reaches a fair and reasonable resolution between PacifiCorp and Settling Participants. Accordingly, the Parties request that the Commission approve the Settlement.

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<sup>20</sup> See Settlement sections 6.1.1-6.1.4.

<sup>21</sup> *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

<sup>22</sup> *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005).

<sup>23</sup> *California Public Utilities Commission v. FERC*, 474 F.3d 587 (9th Cir. 2006).

<sup>24</sup> *Id.* at sections 7.2-7.3.

## **II. Comments on the Settlement**

11. Initial comments on the Settlement were due on May 1, 2007 and reply comments were due on May 11, 2007. The CAISO filed initial comments in support of the Settlement and the CalPX filed initial comments neither supporting nor opposing the Settlement. Aquila Merchant Services, Inc. (Aquila), Sacramento Municipal Utility District (SMUD) and the Port of Seattle, Washington (Port of Seattle) filed initial comments opposing the Settlement.<sup>25</sup> In response, the Parties filed joint reply comments.

### **A. “Hold Harmless” Protection for the CalPX and the CAISO**

12. In its comments, the CAISO states that, as with previous settlements filed and approved by the Commission in the Refund Proceedings, the circumstances of the Settlement make it necessary to hold harmless the market operators (the CAISO and the CalPX) tasked with implementing the Settlement. Therefore, the CAISO contends, the Commission should state in any order approving the Settlement that the CAISO, along with its directors, officers, employees and consultants, will be held harmless with respect to the accounting activities it will have to perform to implement the Settlement and will not be responsible for recovering any funds dispersed pursuant to the Settlement should repayment of such funds be required subsequently.

13. The CAISO avers that the factors that justified holding the CAISO and the CalPX harmless with respect to other settlements (*e.g.*, the Duke, Williams, Mirant, Enron, PS Colorado, Reliant, APX, IDACORP, and Eugene Water Board settlements) apply equally to the instant Settlement. As with previous settlements, the CAISO states, the flow of funds pursuant to the instant Settlement will require unprecedented accounting adjustments by the CAISO, which will not be made under the terms of its tariff, but rather under the Settlement terms. The CAISO contends that a market participant might bring suit against the CAISO and its agents claiming that it did not make the appropriate accounting adjustments and as a result did not arrive at the appropriate amount of funds owing to that market participant. In addition, the CAISO states that, because the Settlement has been filed prior to final orders in the Refund Proceedings, PacifiCorp and the California Parties' estimates of payables and receivables may not be accurate, which could result in actions against the CAISO due to unforeseen impacts on market participants. The CAISO states that, as the volume of settlements increase, the task of implementing them will become more complicated and the possibility of an action against one of the market operators will also increase. Further, the CAISO posits that, as

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<sup>25</sup> Aquila also requests modification of the Settlement in its comments.

a non-profit public benefit corporation, it would not be reasonable to subject its officers, employees and consultants to suits claiming individual liability for engaging in the accounting necessary to implement the Settlement.

14. For these reasons, the CAISO states that it is important that the Commission hold harmless the CAISO, its directors, officers, employees and consultants, for implementation of this Settlement. Finally, the CAISO notes that PacifiCorp and the California Parties have stated in their Joint Explanatory Statement that they do not oppose the Commission adopting hold harmless provisions for the CAISO and the CalPX.<sup>26</sup>

15. Likewise, the CalPX requests in its initial comments that the Commission incorporate in any order approving the Settlement a hold harmless provision similar to those the Commission has approved in previous settlements. The CalPX states that it and the CAISO each requested to be held harmless in connection with implementing the prior Williams, Duke, Dynegy, Mirant, Reliant, PS Colorado, IDACORP, APX, and Eugene Water Board settlements and that the Commission granted those requests. Further, the CalPX points out that the California Parties either supported or did not oppose the previous requests for hold harmless protection, and similarly, the parties to this Settlement have stated that they do not oppose such protection.<sup>27</sup> In support of its position, the CalPX cites the Commission order approving the Williams settlement, 111 FERC ¶ 61,186 (2005), in which the Commission found that the CalPX and the CAISO provided compelling justification as to why they should be held harmless.

16. The CalPX reasons that a hold harmless provision is appropriate here because: (1) the Settlement requires it to pay funds from its Settlement Clearing Account; (2) the CalPX will be required to make numerous accounting entries; (3) the Parties are to supply the amounts to be paid out under the Settlement; (4) the CalPX is required to pay out interest on refund balance calculations that are not final; (5) PacifiCorp's final market obligations have not been determined; and (6) the CalPX is required under the Settlement to payout to a non-CalPX participant.

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<sup>26</sup> CAISO April 30, 2007 Initial Comments at 7, *citing* Joint Explanatory Statement at 15.

<sup>27</sup> CalPX April 30, 2007 Initial Comments at 2, *citing* Joint Explanatory Statement at 15.

17. The CalPX requests the following “hold harmless” language to be incorporated in 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.<sup>28</sup>

The CalPX states that this is the same hold harmless provision that the Commission approved in the Duke, Dynegy, Williams, Mirant, Reliant, IDACORP, APX, and Eugene Water Board global settlements.

18. In their joint reply comments, PacifiCorp and the California Parties affirm the position taken in their Joint Explanatory Statement that they would not oppose a hold harmless provision for the CalPX and the CAISO.

#### **Commission Determination**

19. The Commission finds that both the CAISO and the CalPX have provided the Commission with compelling justification as to why they should be held harmless, along with their officers, directors, employees, and consultants, for the steps taken to implement the Settlement. Further, the parties to the Settlement agree to a hold harmless

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<sup>28</sup> CalPX Initial Comments at 3-4.

provision.<sup>29</sup> Therefore, consistent with Commission precedent,<sup>30</sup> the Commission determines that the CalPX and the CAISO shall be held harmless for actions taken to implement the Settlement and this order will incorporate the “hold harmless” language requested by the CalPX and set out above. Further, the CAISO will not be responsible for recovering any funds dispersed pursuant to the Settlement that are subsequently required to be repaid.

**B. Deemed Distribution Participant Treatment**

**i. Aquila Comments**

20. In its initial comments, Aquila states that it opposes the Settlement as unjust and unduly discriminatory to the extent that the Settlement categorizes Aquila as a Deemed Distribution Participant. Aquila explains that, under the terms of the Settlement, Additional Settling Participants that have been designated as Deemed Distribution Participants are to receive their share of Settlement proceeds in the form of credits against amounts owed to the CalPX or the CAISO.<sup>31</sup> According to Aquila, PacifiCorp and the California Parties have not provided support for the allegation that Aquila has net amounts outstanding to the CalPX or the CAISO. Aquila also avers that “it has been established that [Aquila] was a net seller in the Commission-defined ‘refund period’ (October 2, 2000 through June 20, 2001).”<sup>32</sup> Aquila concedes that, pursuant to the holding of the United States Court of Appeals for the Ninth Circuit in *Public Utilities Comm’n of State of Cal v. FERC*,<sup>33</sup> the Commission has the authority to remedy tariff violations that may have occurred prior to October 2, 2000, but that neither the Commission nor any adjudicatory body has found that Aquila engaged in tariff violations.

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<sup>29</sup> See Joint Explanatory Statement at 15.

<sup>30</sup> See, e.g., *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,071 (2004) (approving hold harmless language in the Dynegy settlement), and *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,257 (2004) (approving hold harmless language in the Duke settlement), *reh’g denied*, 111 FERC ¶ 61,186 (2005).

<sup>31</sup> Aquila April 2, 2007 Initial Comments at 2, *citing* Settlement section 5.2.2.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> 462 F.3d 1027 (9th Cir. 2006).

21. Aquila also avers that the Settlement is unreasonable in that, by designating Aquila as a Deemed Distribution Participant, it treats Aquila differently from other net sellers. Aquila argues that Commission precedent requires that substantially similar settlement offers must be made to similarly situated customers,<sup>34</sup> and that treating Aquila differently from other net sellers is contrary to such precedent. Aquila states that the ability to opt out of the Settlement does not remedy the discriminatory treatment because other net sellers not designated as Deemed Distribution Participants are not required to forego Settlement participation. Thus, other net sellers can obtain timely receipt of the amounts owed to them. For the foregoing reasons, Aquila requests that the Commission modify the Settlement to remove its designation as a Deemed Distribution Participant.

**ii. SMUD Comments**

22. SMUD objects to the Settlement, arguing that its clear intent and effect is that, if non-jurisdictional entities elect to participate, they must forfeit their statutory exemption from refund obligations in order to participate. SMUD states that, by being designated as a Deemed Distribution Participant, it is not being treated commensurately with other entities that qualify as Participants under the Settlement.<sup>35</sup> SMUD states that other Participants who elect to participate under the Settlement who qualify as buyers would receive funds by electing to become Additional Settling Participants, but SMUD gets nothing if it elects to become an Additional Settling Participant. SMUD points out that, under the Settlement's Allocation Matrix, it would be entitled to refunds for the October 2000 through January 2001 period, and the pre-October period. However, as a designated Deemed Distribution Participant, SMUD is treated as if it is subject to Commission refund jurisdiction. This is because, as a Deemed Distribution Participant, SMUD "receives" an allocable share of the PacifiCorp refunds as offsets of amounts "owed" to the CAISO and/or the CalPX. Thus, SMUD argues, in order to receive any refunds at all, even "deemed" refunds, SMUD must accept a settlement offer premised on the Commission's exercise of authority the Commission does not possess.

23. SMUD argues that, although the Settlement permits parties to opt in, in order to participate in the Settlement, non-jurisdictional entities (who are exempt from the Commission's refund authority) are required to forfeit their statutory rights. They must pay refunds they do not legally owe in order to receive refunds of overcharges that are

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<sup>34</sup> Aquila Comments at 4, *citing Florida Power & Light Co.*, 70 FERC ¶ 63,017, at 65,088 (1995) (*Florida Power*).

<sup>35</sup> Again, Participants are those entities that directly sold energy to or purchased energy from the CAISO and/or the CalPX during part or all of the Settlement Period.

legally owned by jurisdictional sellers. SMUD states that the Commission has frowned on “cram down” provisions like these.<sup>36</sup> SMUD also raises the same argument as Aquila, that Commission precedent requires that a substantially similar settlement offer be made to similarly situated customers.<sup>37</sup> SMUD argues that, by virtue of their non-jurisdictional status, customers like SMUD are unreasonably distinguished from all other buyers of power in the marketplace who made no jurisdictional sales. SMUD states that this is patently unreasonable and places pressure on non-jurisdictional entities to forfeit their statutory exemption from the Commission’s refund authority in order to participate in the receipt of refunds. SMUD states that the Commission should reject the Settlement because the opt-out provision does not cure the discrimination.

### iii. Reply Comments

24. In their joint reply comments, PacifiCorp and the California Parties first respond to Aquila’s comments, stating that these comments should be dismissed. They state that Aquila is not required to join the Settlement, and if Aquila chooses not to opt in then its rights are fully protected and will suffer no adverse impacts.<sup>38</sup> PacifiCorp and the California Parties next aver that Aquila is incorrect in claiming that it has been improperly identified as a Deemed Distribution Participant. They state that, based on the entire Settlement Period and the updated data from the CalPX and the CAISO, the California Parties determined that eight entities, including Aquila, should be Deemed Distribution Participants because they may owe refunds for one of the time periods to which the Settlement applies.<sup>39</sup> They contend that all eight entities, including Pacific Gas and Electric Company (one of the California Parties), were designated under the Settlement as Deemed Distribution Participants, and Aquila is not being treated differently from other similarly situated entities. Finally as to Aquila, PacifiCorp and the California Parties note that if Aquila decides to opt in, such a decision would not mean

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<sup>36</sup> SMUD May 1, 2007 Comments at 1, *citing ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992).

<sup>37</sup> SMUD Comments at 4, *citing Florida Power & Light Co.*, 70 FERC ¶ 63,017, at 65,088.

<sup>38</sup> PacifiCorp and California Parties May 11, 2007 Joint Reply Comments at 10, *citing* Settlement section 11.11.

<sup>39</sup> PacifiCorp and the California Parties note that the Settlement addresses and resolves issues regarding transactions in the CalPX and the CAISO markets over a greater time period than the Refund Period.

Aquila admitted to refund liability. If Aquila is ultimately found to owe refunds, it will receive a credit against those refunds, and if Aquila is ultimately found to not owe refunds, it will receive cash at that time.

25. In response to SMUD, PacifiCorp and the California Parties again point out that an entity's participation in the Settlement is totally voluntary, and that if SMUD disagrees with its classification as a Deemed Distribution Participant, it need not opt in. They state that SMUD suffers no loss of rights by not participating and can continue to litigate against PacifiCorp in the underlying proceedings. The Parties also note that the Settlement does not have "cram down" provisions like the ones contemplated in *ANR Pipeline Co.*, which involved settlement provisions that would have denied essential services for five years to any party contesting the settlement. Further, they argue that, as explained in their response to Aquila, SMUD and other non-jurisdictional entities have not been singled out as Deemed Distribution Participants under the Settlement.

### **Commission Determination**

26. The Commission will not modify the Settlement to remove Aquila's designation as a Deemed Distribution Participant. Aquila has not provided factual support for its contention that it does not owe funds to the CAISO and/or the CalPX for the Settlement Period, rather than the Refund Period. Nor has Aquila demonstrated that it is being treated differently from similarly situated entities simply because of its designation. Aquila will not suffer harm by remaining a Deemed Distribution Participant; clearly, the Settlement does not resolve anything as to Aquila if it does not opt into the Settlement, and Aquila retains the ability to make a showing to the Commission that it does not have net amounts outstanding to the CalPX or the CAISO for the Settlement Period. The specific terms of the Settlement make clear that, as to Non-Settling Participants, claims addressed in the Settlement shall not be deemed settled. For the foregoing reasons, at this time the Commission will not modify the Settlement as Aquila has requested.

27. The Commission rejects SMUD's argument that its designation as a Deemed Distribution Participant requires SMUD to forfeit its statutory rights. SMUD is not required to opt into the Settlement and may continue to litigate against PacifiCorp in the underlying proceedings. If SMUD chooses to participate in the Settlement, then SMUD will do so as a Deemed Distribution Participant, as provided in the Settlement. SMUD's decision to opt in 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<sup>40</sup>) in exchange for the

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<sup>40</sup> See *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005).

benefits of the Settlement: release of claims against SMUD, avoidance of further litigation, and financial certainty. Because the Commission does not have the authority to order non-jurisdictional entities like SMUD to pay refunds into the California markets for the transactions at issue, SMUD may still have to litigate whether it owes funds to the CAISO, the CalPX, and *e.g.*, PacifiCorp, in an appropriate venue, such as in state court. Participation in the Settlement by SMUD would obviate the prospect of such litigation.

28. SMUD also has not demonstrated that, as a Deemed Distribution Participant, it is being treated differently from similarly situated entities. The Parties have based their designation on whether a market participant will owe market refunds or payables to the market, post-mitigation, in Phase II of the Commission's EL00-95 Proceeding.<sup>41</sup> This designation explicitly does not distinguish between jurisdictional and non-jurisdictional market participants. For the foregoing reasons, the Commission rejects SMUD's arguments that the Settlement is unjust and unreasonable and contrary to the public interest.

### **C. Port of Seattle Objections**

#### **i. Port of Seattle Comments**

29. Port of Seattle raises four objections to the Settlement: (1) the Settlement distributes proceeds in a manner that is inconsistent with previous Commission orders; (2) there are material facts in dispute; (3) the Settlement's distribution of proceeds is unjust, unreasonable, unduly preferential and unduly discriminatory; and (4) the Settlement should not be approved prior to resolution of petitions for review of the Commission's orders on the scope of the Show Cause (*i.e.* Gaming/Partnership) Proceedings.<sup>42</sup> Appended to Port of Seattle's comments are two attachments: the first is a Declaration of Dr. Peter Fox-Penner (Fox-Penner Declaration);<sup>43</sup> and the second is an Affidavit of Robert F. McCullough (McCullough Affidavit).<sup>44</sup>

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<sup>41</sup> See Allocation Matrix at n.3. Whether a party "owes" funds is distinguishable from whether the Commission can require that party to pay those funds.

<sup>42</sup> Port of Seattle May 1, 2007 Comments at 26-28.

<sup>43</sup> The Fox-Penner Declaration was attached to the California Parties September 30, 2003 Comments, which opposed PacifiCorp's August 29, 2003 Settlement Agreement with Trial Staff. In his declaration, Dr. Fox-Penner describes testimony he

30. According to Port of Seattle, the Gaming/Partnership Proceeding was bifurcated into two phases: one, “a liability phase to determine monetary and non-monetary penalties, if any;” and two, “a distribution phase in which it would be determined to whom and in what amounts to allocate the amounts collected in the liability phase.”<sup>45</sup> Port of Seattle alleges that the Settlement’s allocation of proceeds violates the “letter, spirit, and intent” of the Commission’s September 24, 2003 Order,<sup>46</sup> “which was to permit all parties in the Gaming and Partnership Proceedings to have a fair opportunity . . . to set forth their claims to the proceeds resulting from the Gaming and Partnership Proceedings.”

31. Port of Seattle points out that Rule 602 of the Commission’s Rules of Practice and Procedure<sup>47</sup> requires that contested settlements cannot be certified and approved if there are material issues of fact in dispute, and if there is an inadequate record up which to resolve such disputes. Port of Seattle states that “[o]ne need only point to the materials submitted by the California Parties in Opposition to PacifiCorp’s August 29, 2003 Settlement Agreement with Trial Staff [footnote omitted] to demonstrate that genuine issues of material fact are in dispute, and that these issues cannot be resolved without an

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provided in March 2003, Docket No. EL00-95-000, *et al.*, regarding Enron trading strategies and evidence that certain parties had potentially engaged in these and other manipulative trading strategies.

<sup>44</sup> The McCullough Affidavit is the same affidavit submitted in support of Port of Seattle comments regarding the IDACORP Settlement. *See* Port of Seattle March 9, 2006 IDACORP Settlement Comments. The IDACORP Settlement was filed with the Commission on February 17, 2006 and was approved by the Commission in *San Diego Gas & Electric Co. v. Sellers of Energy & Ancillary Serv.*, 115 FERC ¶ 61,230 (IDACORP Order), *reh’g denied*, 117 FERC ¶ 61,020 (2006).

<sup>45</sup> Port of Seattle Comments at 22.

<sup>46</sup> Port of Seattle states that petitions for review of the Commission’s June 25, 2003 Order (which initiated the Gaming/Partnership Proceeding) are now pending before the Ninth Circuit. Port of Seattle Comments at n.97.

<sup>47</sup> 18 C.F.R. § 385.602 (2006).

evidentiary hearing.”<sup>48</sup> Port of Seattle argues that the California Parties should be estopped from arguing otherwise, and that the issues they raised previously do not evaporate because a settlement has been submitted for approval.

32. Port of Seattle further argues that the Settlement’s ear-marking of all proceeds to the California Parties ignores the fact that the conduct at issue was perpetrated outside of California, largely took place in the Pacific Northwest, and generated substantial profits outside of California. Accordingly, Port of Settlement argues that the allocations reflected in the Settlement are unjust, unreasonable, unduly preferential and unduly discriminatory, and reflect nothing more than “an arbitrary and capricious power grab by the California Parties”<sup>49</sup> that is intended to exclude Port of Seattle and other injured Pacific Northwest parties from settlement proceeds.

33. Finally, Port of Seattle argues that, because petitions for review are pending in the United States Court of Appeals for the Ninth Circuit challenging the scope of the Show Cause Proceedings, a Commission decision accepting the Settlement could radically alter and expand the scope of these proceedings. For this reason, Port of Seattle asserts that the Commission should decline to act on the Settlement until the Ninth Circuit resolves the pending petitions for review.<sup>50</sup>

## ii. Reply Comments

34. PacifiCorp and the California Parties first note that Port of Seattle filed comments that repeat “verbatim” its arguments regarding the IDACORP Settlement, and that the Commission approved that settlement over Port of Seattle’s objections. They go on to argue that there are no genuine issues of material fact in dispute, and that Port of Seattle has “missed the mark” on two independent bases: (1) it has not shown that the Settlement will affect its interests if it chooses not to opt in; and (2) it has failed to adhere to Commission requirements for contesting a settlement on the grounds that there are material facts in dispute.

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<sup>48</sup> Port of Seattle Comments at 27.

<sup>49</sup> *Id.* at 28.

<sup>50</sup> *Id.*

35. Regarding the first argument, that Port of Seattle will not be harmed if it chooses not to opt in, the Parties cite Commission precedent stating that:

If a party's interests are not immediately and irreparably affected by approval of a settlement in a consolidated docket, that party's opposition does not create a genuine, material issue. In the absence of any genuine, material issue, we can dispose of the matter before us in a summary fashion. We shall, therefore, treat this as an uncontested offer of settlement.<sup>51</sup>

The Parties state that Port of Seattle has made no showing as to how it would be immediately and irreparably affected by the Commission's approval of the Settlement because there is no requirement that Port of Seattle opt in. They state that Port of Seattle is "wrong on all counts" because it need not join the Settlement and the Settlement does not preclude it from pursuing any claims it believes it has in the docketed proceedings. The Parties also note that the Settlement provides, with respect to PacifiCorp's Partnership/Gaming settlement, that entities "shall remain free to assert any position they choose concerning the proper allocation by [the Commission] of such settlement amount."<sup>52</sup>

36. The Parties' second argument is that Port of Seattle's comments fail to conform to the Commission's requirements regarding contested settlements and that reference to a prior California Parties' filing—namely, California Parties' September 30, 2003 Comments in Opposition to PacifiCorp's August 29, 2003 Settlement Agreement with Trial Staff—does not demonstrate the existence of a current dispute of material facts. The Parties cite the text of Rule 602(f), which provides that:

Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim.<sup>53</sup>

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<sup>51</sup> *San Diego Gas & Electric Co. v. Sellers of Energy & Ancillary Serv.*, 113 FERC ¶ 61,171, at P 40 (2005), *reh'g denied*, 115 FERC ¶ 61,032 (2006).

<sup>52</sup> Settlement section 4.4.

<sup>53</sup> 18 C.F.R. § 602(f)(4) (2006).

The Parties argue that Port of Seattle's comments are incurably deficient and should be rejected because there is no affidavit detailing the genuine issues of material fact in dispute with respect to the Settlement as required by Rule 602(f)(4). The Parties note that Port of Seattle's attachments—the Fox-Penner Declaration and the McCullough Affidavit—fail to support Port of Seattle's claim that there are material issues of fact “*with respect to the present Settlement.*”<sup>54</sup>

37. The Parties state that in its order on the IDACORP Settlement, the Commission rejected the very same arguments Port of Seattle repeats here with respect to this Settlement. In the IDACORP Order, the Commission found that the IDACORP Settlement was consistent with prior proceedings; that there were no material issues of genuine fact remaining in dispute and that the McCullough Affidavit and Fox-Penner Declaration (also submitted by Port of Seattle in the IDACORP Settlement proceeding) were irrelevant to the IDACORP Settlement; that the IDACORP Settlement was not discriminatory; and that the pendency of appeals did not prevent the Commission from evaluating and approving the IDACORP Settlement.<sup>55</sup> The Parties state that the instant Settlement is “on all fours” with the IDACORP Settlement and that the Commission should reject Port of Seattle's comments here for the same reason it rejected Port of Seattle's comments in the IDACORP Order.

#### **Commission Determination**

38. The Commission rejects as incorrect Port of Seattle's claim that this Settlement violates its ability to pursue claims in the Gaming/Partnership Proceeding. The Settlement does not in any way limit the ability of Port of Seattle to continue pursuing such claims. In Docket No. ER03-154-000, the portion of the Gaming/Partnership Proceeding dealing with similar allegations against Enron, the Chief Judge issued an order suspending the procedural schedule expressly to provide the California Parties, Enron and others with opportunities to conclude settlement discussions. Approval of this Settlement is procedurally consistent with the settlement process that took place under the aegis of the Commission's administrative law judges in the Enron proceeding. Thus, the Commission finds that approval of this Settlement is consistent with prior orders of the Commission in the Gaming/Partnership Proceeding and other orders in these proceedings.

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<sup>54</sup> PacifiCorp and California Parties Joint Reply Comments at 7.

<sup>55</sup> IDACORP Order, 115 FERC ¶ 61,230 at P 30-41.

39. Rule 602 requires that any comment contesting an offer of settlement by alleging a dispute as to genuine issues of material fact be supported by an affidavit with specific references to portions of the record that support the allegation.<sup>56</sup> The Commission agrees with the Parties that there are no material issues of genuine fact that remain in dispute, despite Port of Seattle's opposition to the Settlement. Clearly, the Settlement does not resolve anything as to Port of Seattle, and Port of Seattle retains the ability to pursue its claims against PacifiCorp in the underlying proceedings. Moreover, the specific terms of the Settlement make it clear that the Settlement establishes no facts or precedents as to Non-Settling Participants. The Settlement does not affect Port of Seattle's ability to pursue litigation against PacifiCorp, and whatever rights it may have are unaffected by the Settlement.

40. We disagree with Port of Seattle's claim that the comments submitted by the California Parties in opposition to PacifiCorp's August 29, 2003 Settlement Agreement with Trial Staff demonstrate that genuine issues of material fact are in dispute. We find that comments, affidavits, and declarations that have not been prepared and/or submitted for the purpose of identifying material facts in the instant Settlement are insufficient to support an allegation that there are remaining genuine issues of material fact for the Commission to consider. The McCullough Affidavit and the Fox-Penner Declaration are irrelevant to the instant Settlement between PacifiCorp and the California Parties. There is no indication that Dr. Fox-Penner endorses his prior declarations for the purpose of Port of Seattle's opposition to the Settlement. The McCullough affidavit was prepared for the IDACORP Settlement, so it too should not be applied to this Settlement.<sup>57</sup> Thus, we find that there are no material facts in dispute.

41. Further, the Commission disagrees with Port of Seattle's characterization of the Settlement as a "power grab." Rather, the Settlement is a comprehensive and reasonable effort by the Parties to end their litigation and resolve their legal disputes. Port of Seattle does not have to join the Settlement, and its right to continue to litigate is unaffected by, and in fact is protected by, the Settlement. Because the Settlement does not preclude Port of Seattle from pursuing whatever claims it believes it has against PacifiCorp, the Commission finds that the Settlement is not unjust, unreasonable, unduly preferential and unduly discriminatory.

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<sup>56</sup> 18 C.F.R. § 385.602(f)(4) (2006).

<sup>57</sup> And in the IDACORP Order, the Commission found that "Mr. MCCullough's affidavit and the Declaration of Dr. Fox-Penner are irrelevant to the instant (IDACORP) Settlement . . ." IDACORP Order, 115 FERC ¶ 61,230 at P 36.

42. The Commission has approved a number of settlements that resolve outstanding challenges to settlements in the Gaming/Partnership Proceeding,<sup>58</sup> and it therefore finds that the pendency of appeals does not prevent the Commission from evaluating and approving the Settlement. Moreover, nothing in the Settlement prevents Port of Seattle from pursuing its claims against PacifiCorp in the Gaming/Partnership Proceeding. Therefore, the Commission finds that there is no reason to defer action of the Settlement pending action by the Ninth Circuit on appeals in the Gaming/Partnership Proceeding.

43. For the foregoing reasons, the Commission finds that the Settlement is fair and reasonable and in the public interest; it is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this or any other proceeding.

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<sup>58</sup> *San Diego Gas & Electric Co. v. Sellers of Energy & Ancillary Serv.*, 108 FERC ¶ 61,002 (2004) (order accepting Williams settlement); 109 FERC ¶ 61,107 (2004) (order accepting Duke settlement); *reh'g denied*, 111 FERC ¶ 61,186 (2005) (order on rehearing of the Williams, Dynegy and Duke settlements); 111 FERC ¶ 61,017 (2005) (order accepting Mirant settlement), *reh'g denied*, 111 FERC P 61,354 (2005); 113 FERC ¶ 61,171 (2005) (order accepting Enron global settlement), *reh'g denied*, 115 FERC ¶ 61,032 (2006); 113 FERC ¶ 61,171 (2005) (order accepting Enron-SRP settlement), *reh'g denied*, 115 FERC ¶ 61,032 (2006); 113 FERC ¶ 61,235 (2005) (order accepting Public Service Company of Colorado settlement); 113 FERC ¶ 61,308 (2005) (order accepting Reliant settlement); 114 FERC ¶ 61,067 (2006) (order accepting Nevada Companies settlement); 115 FERC ¶ 61,230 (2005) (order accepting IDACORP settlement), *reh'g denied*, 117 FERC ¶ 61,020 (2006); 118 FERC ¶ 61,168 (2007) (order accepting APX settlement); 119 FERC ¶ 61,092 (2007) (order accepting Eugene Water Board settlement); and, 119 FERC ¶ 61,151 (2007) (order accepting Portland General settlement).

The Commission orders:

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

By the Commission. Commissioner Spitzer not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.