

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

San Diego Gas & Electric Co., Complainant Docket No. EL00-95-000, *et al.*

v.

Sellers of Energy and Ancillary Services
Into Markets Operated by the California
Independent System Operator and the
California Power Exchange, Respondents.

Investigation of Practices of the California
Independent System Operator and the California
Power Exchange Docket No. EL00-98-000, *et al.*

California Independent System Operator
Corporation Docket No. ER01-889-000

Mirant California, LLC, Mirant Delta, LLC and
Mirant Potrero, LLC Docket No. ER01-1455-000

California Independent System Operator
Corporation Docket No. ER01-3013-000

California Independent System Operator
Corporation Docket No. ER03-746-000

Public Utilities Commission of the State of
California Docket No. EL02-60-000

v.

Sellers of Long Term Contracts to the California
Department of Water Resources

Docket No. EL00-95-000, *et al.*

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California Electricity Oversight Board

Docket No. EL02-62-000

v.

Sellers of Energy and Capacity Under Long-Term
Contracts with the California Department of Water
Resources

Mirant Americas Energy Marketing, LP,
Mirant California, LLC, Mirant Delta, LLC, and
Mirant Potrero

Docket No. EL03-158-000

Enron Power Marketing, Inc. and Enron Energy
Services Inc., *et al.*

Docket No. EL03-180-000

Pacific Gas and Electric Company

Docket Nos. ER98-495-000
ER98-1614-000
ER98-2145-000
ER99-3603-000

Mirant Delta, LLC and Mirant Potrero, LLC

Docket No. ER03-215-000

Mirant Delta, LLC and Mirant Potrero, LLC

Docket No. ER04-227-000

Mirant Delta, LLC and Mirant Potrero, LLC

Docket No. ER05-343-000

Southern Company Energy Marketing, Inc. and
Southern Company Services, Inc.

Docket No. ER97-4166-000

Southern Energy California, L.L.C.

Docket No. ER99-1841-000

Southern Energy Delta, L.L.C.

Docket No. ER99-1842-000

Southern Energy Potrero, L.L.C.

Docket No. ER99-1833-000

Mirant Americas Energy Marketing, LP

Docket No. ER01-1265-000

Mirant California, LLC

Docket No. ER01-1267-000

Mirant Delta, LLC

Docket No. ER01-1270-000

Docket No. EL00-95-000, *et al.*

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Mirant Potrero, LLC

Docket No. ER01-1278-000

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

Docket No. EL02-71-000

v.

British Columbia Power Exchange Corp.,
Coral Power, LLC, Dynegy Power Marketing, Inc.,
Enron Power Marketing, Inc., Mirant Americas
Energy Marketing, Inc., Reliant Energy Services,
Inc., Williams Energy Marketing & Trading, Co.

Puget Sound Energy, Inc.

Docket No. EL01-10-000

v.

All Jurisdictional Sellers of Energy and/or Capacity
in the Pacific Northwest

Fact-Finding Investigation of Potential
Manipulation of Electric and Natural Gas Prices

Docket No. PA02-2-000

Mirant Americas Energy Marketing, Inc.

Docket No. PA03-8-000

Investigation of Anomalous Bidding Behavior
Docket and Practices in the Western Markets

Docket No. IN03-10-000

ORDER ON SETTLEMENT AGREEMENT

(Issued April 13, 2005)

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 January 31, 2005

in the instant proceedings by the Mirant Parties,¹ the California Parties,² and the Commission's Office of Market Oversight and Investigations (OMOI) (collectively, the Settling Participants). The Settlement consists of: a Joint Offer of Settlement; a Joint Explanatory Statement; a Settlement and Release of Claims Agreement; two "wraparound" Power Purchase and Sale Agreements; an Offer of Settlement involving two Reliability Must-Run Service Agreements (RMR Agreements) affecting certain Mirant Delta and Mirant Potrero generating units; and, numerous supporting documents. The Settlement resolves matters and claims raised in proceedings that were initiated with respect to events in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) energy and ancillary services markets during the period from January 1, 2000 through June 20, 2001 as they relate to Mirant. The Settlement also addresses a number of other dockets pending before the Commission.

2. The order approves the Settlement, subject to conditions discussed below. The Commission's action in approving the Settlement will benefit customers by resolving claims against Mirant for refunds, price adjustments or other remedies arising from Mirant's sale of electricity into California during the period defined in the Settlement. Approval will avoid further costly litigation for parties to the Settlement, eliminate regulatory uncertainty and bring to a close a number of disputes stemming from the California market disruptions during 2000 and 2001 as they relate to Mirant.

¹ The Mirant Parties comprise the following: Mirant Corporation, Mirant Americas, Inc., Mirant Americas Energy Marketing, LP (MAEM), Mirant Americas Energy Marketing Investments, Inc., Mirant Americas Generation, LLC, Mirant California Investments, Inc., Mirant California, LLC, Mirant Delta, LLC (Mirant Delta), Mirant Potrero, LLC (Mirant Potrero), Mirant Special Procurement, Inc., Mirant Services, LLC, and Mirant Americas Development, Inc.

² The California Parties comprise: the People of the State of California, *ex rel.* Bill Lockyer, Attorney General of the State of California (California Attorney General), California Department of Water Resources, acting solely under the authority and powers created in AB1-X, codified in sections 80000 through 80270 thereof and not under its powers and responsibilities with respect to the State Water Resources Department Systems (CERS), the California Energy Oversight Board (CEOB), California Public Utilities Commission (CPUC), Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E).

I. Background and Description of the Settlement

3. The Settlement resolves claims by the California Parties against Mirant in Commission Docket Nos. EL00-95-000³ and EL00-98-000,⁴ and in the Docket No. EL01-10 proceeding. The Settlement also resolves claims against Mirant in Docket Nos. PA02-2, IN03-10, and the Commission's physical withholding investigation, and related appellate proceedings as they relate to Mirant's sales in the CAISO and/or CalPX markets and/or sales to CERS from January 1, 2000 through June 20, 2001 (collectively, the FERC Proceedings). The Settling Participants also have agreed to mutual releases of past, existing and future claims arising at the Commission and/or under the Federal Power Act⁵ with respect to rates, prices, and terms or conditions for energy, ancillary services, or transmission congestion in the western electricity or western natural gas markets during the period from January 1, 2000 through June 20, 2001. The Settlement resolves all claims against Mirant by the Settling Participants and all claims by Mirant against the Settling Participants in the Commission's Gaming Proceeding,⁶ the Commission's reliability must run (RMR) proceedings (prior to and including September 30, 2004),⁷ and the Commission's market based rates proceedings.⁸

³ *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange.*

⁴ *Investigation of Practices of the California Independent System Operator and the California Power Exchange.* This proceeding and the proceeding in Docket No. EL00-95-000, *et al.*, are collectively referred to as the California Refund Proceeding or the Refund Proceeding.

⁵ 18 U.S.C. § 824 *et seq.* (2000).

⁶ Docket Nos. EL03-158-000 and EL03-180-000. The Settlement provides that it does not affect pending Commission Gaming Proceeding settlements with the Commission's trial staff, consideration paid by Mirant pursuant to those settlements, or preclude any Settling Participant from receiving or advocating an allocation of those settlement proceeds. Settlement Agreement at 5.

⁷ *Pacific Gas and Electric Company*, Docket Nos. ER98-495-000, ER98-1614-000, ER98-2145-000 and ER99-3603-000.

4. The Settlement also resolves all claims against Mirant that are based on the factual or legal contentions underlying the appeal to the United States Circuit Court of Appeals for the Ninth Circuit in *Lockyer v. FERC*.⁹ The Settlement resolves certain litigation matters pending in state and federal courts, pending Commission proceedings,¹⁰ and bankruptcy claims identified in Exhibit D in the Settlement Agreement.
5. The Settlement provides an opportunity for all other parties to these proceedings to join the Settlement as Settling Participants, and it provides a period of five days following a Commission order approving the Settlement for parties to make such an election. The Settling Participants state that those electing not to join will not be affected by the Settlement, but they also point out that they will not share in the benefits of the agreement.
6. The Settlement provides for refunds by Mirant and will resolve, among other things, claims by the California Parties against Mirant in the Refund Proceeding, including any additional refund obligations to which Mirant may be subject for sales prior to October 2, 2000, and certain potential civil claims. Exhibit F of the Settlement and Release of Claims Agreement is an Allocation Matrix that sets out the allocation of refunds and payments to parties to the Refund Proceeding. The Allocation Matrix lists the allocation of refunds from Mirant to market participants and is listed according to two time periods: the period from October 2, 2000 through June 20, 2001 (which is further subdivided into a period running from October 2, 2000 through January 17, 2001, or the Pre-January 18 Period, and from January 18, 2001 through June 20, 2001, or the Post-January 17 Period), and the period from January 1, 2000 through October 1, 2000 (Pre-October Period). Exhibit H lists the “Deemed Distribution Participants,” who will receive their allocable refunds in the form of an offset against their outstanding market obligations to the CAISO or the CalPX.

⁸ Docket Nos. ER97-4166-000, ER99-1841-000, ER99-1842-000, ER99-1833-000 (CAISO’s Emergency Motions to Revoke Market Based Rate Authority), and Docket Nos. ER01-1265-000, ER01-1267-000, ER01-1270-000, ER01-1278-000 (Market Based Rate Triennial Updates). The Settlement does not affect any of the Parties’ rights and obligations in any proceedings before the Commission pertaining to the Mirant Parties’ market based rate authority for transactions outside the Settlement Period. Joint Offer of Settlement at 17.

⁹ 383 F.3d 1006 (9th Cir. 2004) (Lockyer Remand Order).

¹⁰ Docket Nos. ER98-495-000, *et al.* and Docket No. EL03-158-000.

7. Under the Settlement, Mirant will assign to the California Parties approximately \$283 million in receivables claimed by Mirant to be due to it from the CAISO and CalPX, plus an additional \$37 million associated with the reversal of the CalPX soft cap adjustment,¹¹ for a total assignment by Mirant of approximately \$320 million. Mirant will also assign to the California Parties any interest due on these assigned funds. The Settlement provides that emissions and fuel cost allocations are based on gross control area load, as the Commission prescribed in prior orders.¹² The emission and fuel cost allocations may be subject to change based on final Commission orders on rehearing or appeal of the allocation determinations in the Refund Proceeding.

8. The Settlement provides the California Parties with an unsecured claim of \$175 million (the Aggregate Allowed Claim) in the bankruptcy of MAEM,¹³ but it acknowledges that the value actually received “will depend on a number of factors pertinent to the bankruptcy estate.”¹⁴ In addition to its allocated share of the Aggregate Allowed Claim, CERS will have a pre-petition, non-priority unsecured claim against MAEM in the Mirant Bankruptcy Proceeding in the aggregate fixed liquidated amount of \$2,250,000 (the CERS Allowed Claim).

9. The Settlement provides that the California Parties will transfer a portion of the cash payment from the CalPX Settlement Account equal to the total of all Non-Settling Participants’ allocable shares of the \$24 million in refunds for the Pre-October Period, as

¹¹ The CalPX soft cap adjustment is the result of a series of Commission orders in the California Refund Proceedings pursuant to which sellers bidding were compensated up to the level of the “soft cap” (also referred to as the “break point”) for bids into the CalPX real-time market. Bids above the soft cap resulted in reporting requirements and the potential for the seller to have to forfeit bid amounts in excess of the soft cap under certain circumstances. The soft cap procedure is set out in *San Diego Gas & Electric Company*, 95 FERC ¶ 61,115, at 61,359 (2001).

¹² See *San Diego Gas & Electric Company*, 105 FERC ¶ 61,066 (2003) (October 16 Main Order), *order on reh’g* 107 FERC ¶ 61,165 (2004).

¹³ Beginning July 14, 2003 Mirant and certain Mirant affiliates commenced proceedings (the Mirant Bankruptcy Proceeding) under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division (the Mirant Bankruptcy Court).

¹⁴ Joint Offer of Settlement at 5.

shown on the Allocation Matrix, to an account designated by OMOI. These funds will be allocated by the Commission as part of its resolution of the anomalous bidding investigation in Docket No. IN03-10-000. The Settlement does not preclude any Settling Participant or any other party from advocating any particular refund allocation or methodology with respect to these funds.¹⁵

10. Mirant has agreed to certain non-monetary terms as part of the Settlement. Prospectively, Mirant will implement the Commission's market rules established in Docket No. EL01-118¹⁶ and will continue to comply with CAISO Tariff provisions regarding must-offer obligations until such time as the Commission approves the termination of such obligations. Mirant agrees to cooperate with the California Parties in pursuing claims against other suppliers relating to the Refund Period,¹⁷ including making certain information and witnesses available. In addition, Mirant will continue to cooperate with the California Attorney General in state investigations and litigation related to the California energy crisis.¹⁸

11. The Settlement provides that, by opting into the Settlement, a Settling Participant will receive any refunds and/or offsets against amounts owed under the Allocation Matrix. If a party does not join the Settlement, the Settlement provides that the party can continue to pursue its claims in the Refund Proceeding but it will not receive the benefits of the Settlement. By the same token, Mirant can continue to litigate all issues with respect to non-settling parties. The Settlement provides that non-settling parties will be paid whatever refunds and amounts, if any, that the Commission or the court ultimately determines are due at the termination of the Refund Proceeding.

¹⁵ *Id.* at 25, *citing* section 6.5.4 of the Settlement Agreement.

¹⁶ In the Docket No. EL01-118 proceeding, the Commission adopted market behavior rules and procedural guidelines applicable to sellers' market-based rate tariffs and authorizations. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC 61,175 (2004), *further order on reh'g*, 110 FERC ¶ 61,336 (2005).

¹⁷ The Refund Period is defined in section 1.1.115 of the Settlement Agreement as the period from October 2, 2000 through June 20, 2001.

¹⁸ Joint Offer of Settlement at 32, *citing* sections 7.1, 7.2, 7.3 and 7.4 of the Settlement Agreement.

12. The Settling Participants request that the Commission issue an order approving the Settlement by April 22, 2005. The Settlement requires the approval of the Commission, the CPUC, the Mirant Bankruptcy Court, and the PG&E Bankruptcy Court.¹⁹ The Settling Participants state that approval is being sought contemporaneously by the bankruptcy courts, and that the CPUC has approved it already.²⁰ The Settlement provides that the Settlement may terminate at the option of any Party upon the occurrence of several events, including a Commission order rejecting the Settlement in whole or in part, rejection of any Mirant Party's plan of reorganization by the Mirant Bankruptcy Court that incorporates a Plan Settlement Solution (as defined in the Settlement), an order of the Mirant Bankruptcy Court denying the Bankruptcy Rule 9019 Motion²¹ or if all necessary approvals have not been obtained by March 31, 2006.²²

II. Comments on the Settlement

13. The Commission received seven initial comments on the Settlement: Calpine Corporation (Calpine) and its wholly-owned subsidiaries Geysers Power Company (Geysers) and Delta Energy Center, LLC (Delta) filed initial comments jointly with Williams Power Company, Inc. (Williams) (collectively Calpine/Williams); CAISO; CalPX; Constellation NewEnergy (NewEnergy);²³ Enron Power Marketing, Inc. (Enron); Northern California Power Agency (NCPA); and City of Vernon, California. Nearly all of these comments opposed all or portions of the Settlement or requested modifications

¹⁹ See PG&E Bankruptcy Plan, In re Pacific Gas and Electric Company, a California corporation, Debtor, Case No. 01-30923 DM, Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company Dated July 31, 2003, as Modified by Modifications Dated November 6, 2003 and December 19, 2003.

²⁰ Joint Offer of Settlement at 5.

²¹ Section 3.2.1 of the Settlement Agreement describes this motion, which the Mirant Parties have agreed to file with the Mirant Bankruptcy Court. Among other things, it seeks approval of the Settlement.

²² *Id.* at 22.

²³ NewEnergy's initial comments stressed its need for additional information from Mirant, which it subsequently obtained. On March 18, NewEnergy filed a Notice of Withdrawal of Comments on the Settlement.

or clarifications of portions of the Settlement. Reply comments were filed by the CAISO; Dynegy; and jointly by the Mirant Parties, the California Parties and OMOI.

14. Although the Commission's rules governing settlements provide only for initial and reply comments,²⁴ two parties filed motions to supplement the record and to supplement comments on the Settlement: CalPX, whose pleading identified a typographical error in a document originally filed in the Mirant Bankruptcy and was withdrawn after Mirant filed a response indicating that the typographical error had been corrected; and Vernon, whose pleading seeks to introduce evidence from the CAISO's nearly complete rerun process in the ongoing Refund Proceeding.²⁵ Motions to Answer and Answers to CalPX's Supplemental Comments were filed by the California Parties and the Settling Participants in which the typographical error was acknowledged. On March 30, CalPX filed a Motion to withdraw its Supplemental Comments in view of the First Amended Disclosure Statement filed on March 25 by Mirant before the Mirant Bankruptcy court correcting the error.²⁶

A. Calpine/Williams Comments and Reply Comments of CAISO, Dynegy and the Settling Participants on the RMR Provisions of the Settlement

15. The comments of Calpine/Williams and reply comments of CAISO and Dynegy focus solely on a provision in the Settlement pursuant to which PG&E and the Mirant Parties "agree to cooperate to request, promptly after the Settlement Effective Date, that [the Commission] issue an order" in Docket No. ER98-495-000, *et al.*, regarding the RMR Initial Decision²⁷ issued in those proceedings.²⁸ In the RMR Initial Decision, an administrative law judge determined that the rates for RMR service at three power plants, now owned by Mirant Delta, LLC and Mirant Potrero, LLC, were unjust and unreasonable. In the Settlement, PG&E and the Mirant Parties "further agree that the

²⁴ 18 C.F.R. § 385.602(f) (2004).

²⁵ Vernon's supplemental motion seeks to introduce the CAISO rerun data in this proceeding as well as in the Williams, Dynegy and Duke Settlement proceedings, which are pending rehearing.

²⁶ CalPX Motion to Withdraw at 3.

²⁷ *Pacific Gas and Elec. Co.*, 91 FERC ¶ 63,008 (2000) (RMR Initial Decision).

²⁸ Section 8.1 of the Settlement and Release of Claims Agreement.

[Initial Decision] shall have no effect upon any charges, including refunds, under the [RMR] Agreements incurred before January 1, 2005.”²⁹ PG&E and the Mirant Parties state that a Commission order addressing the RMR Initial Decision “is expected to provide important guidance on the rate methodology for the RMR Agreements.”³⁰

16. Calpine/Williams oppose this feature of the Settlement, asserting that the Settlement essentially resolves all of the remaining outstanding issues in Docket No. ER98-495-000, thus rendering the RMR Initial Decision moot.³¹ They assert that the RMR Initial Decision is nearly five years old and based on market conditions and circumstances that no longer exist in California. According to Calpine/Williams, the effect of the Wraparound Agreements (Exhibit B to the Settlement Agreement), “specifically the mechanisms by which Mirant will receive Condition 2 revenues, is to keep Mirant financially whole as to its RMR units, regardless of the outcome on the merits of the RMR Initial Decision.”³² Dynegy agrees, saying that “the RMR ID therefore relates to facts specific to the Mirant Parties and is not controlling for – or relevant to – other RMR owners, including Dynegy.”³³

17. In reply to Calpine/Williams, CAISO asserts that the request for the Commission to refrain from ruling on the RMR Initial Decision “is an issue outside of the scope of these proceedings.”³⁴ CAISO states that section 8.1 of the Settlement is an agreement to file a procedural request that affects some but not all parties to the Settlement. CAISO contends that the Calpine/Williams comments “raise substantive issues that are not germane to the only question before the Commission now, whether the Joint Settlement should be approved.”³⁵

²⁹ *Id.*

³⁰ Joint Explanatory Statement at 12.

³¹ Calpine/Williams Comments at 5, 14.

³² *Id.* at 15.

³³ Dynegy Reply Comments at 4.

³⁴ CAISO Reply Comments at 4.

³⁵ *Id.* at 5.

18. The Joint Reply Comments filed by the Mirant Parties, the California Parties and OMOI assert that the RMR Initial Decision is not moot because “Mirant’s accounts continue to reflect rates that are subject to refund based on the final decision in that proceeding.”³⁶ They urge the Commission not to delay approval of the Settlement because of this issue, as it is not contingent upon Commission action on the RMR Initial Decision. Rather, the Settlement provides that the Mirant Parties and PG&E will cooperate to file a request that the Commission rule on the merits of the RMR Initial Decision.³⁷

Commission Determination

19. While the Commission is approving the Settlement and its treatment of RMR claims between the parties, we see no need to address the RMR Initial Decision for purposes of guidance. Previous settlements in Docket No. ER98-495-000, *et al.*, resolved all issues relating to all RMR owners other than the Mirant Parties; therefore, the RMR Initial Decision is based upon facts and circumstances specific to the Mirant RMR units and is not binding on or relevant to other RMR owners or contracts. Because the RMR Initial Decision is only binding upon the Mirant RMR units, and the Settlement resolves all claims with respect to the Mirant Parties that are addressed in the RMR Initial Decision,³⁸ the issues addressed in the RMR Initial Decision are now moot. Accordingly, a further Commission order on the merits is not appropriate.

20. In effect, PG&E and Mirant propose that the Commission issue an advisory opinion based upon the RMR Initial Decision. We see no reason to do so. In this regard, the Commission finds that, in the CAISO’s revised market structure, the use of RMR contracts will change significantly. The record that the RMR Initial Decision was based upon is now more than five-years old and is thus stale. Moreover, because the RMR Initial Decision was fact-specific to the Mirant RMR units, it is not a useful vehicle for setting a generic Commission policy on RMR contract issues. Under these circumstances, the Commission will not entertain a request by PG&E and/or the Mirant

³⁶ Joint Reply Comments at 14.

³⁷ *Id.* at 15.

³⁸ *See* sections 8.1. and 8.2 of the Settlement and Release of Claims Agreement. In addition, the First and Second Wraparound Agreements, Exhibit B of the Settlement, establish payments Mirant will receive for its RMR units and these agreements potentially run through December 31, 2012.

Parties that the Commission issue a guidance order in Docket No. ER98-495-000, *et al.*, regarding the RMR Initial Decision. Given the Commission's determination that the Settlement renders the issues addressed in the RMR Initial Decision moot, the Commission will terminate the proceedings in Docket Nos. ER98-495-000, *et al.*

B. CAISO Comments and CalPX Comments on "Hold Harmless" Protection

21. As was the case in the Williams, Dynegy and Duke settlement proceedings, the CalPX and CAISO request "hold harmless" protection so that they and their officers, directors, consultants and professionals will be held harmless from any liability resulting from steps taken to implement the Settlement.³⁹ As in prior settlement proceedings, this request is unopposed by the Settling Participants and other commenters.

22. CalPX cites to its more extensive comments filed in the Duke Settlement, which are incorporated by reference in CalPX's Comments in this proceeding. Those comments cite several factors as warranting a hold harmless provision: 1) CalPX's continued existence is solely for the purpose of winding up its business affairs ("resolving the extensive litigation arising from the 2000 – 2001 California energy crisis");⁴⁰ 2) it remains subject to significant litigation exposure, which in turn requires it to perpetuate its corporate existence and retain employees, consultants and attorneys to participate in ongoing litigation; 3) it is both difficult to retain officers, directors and other employees if they face liability exposure resulting from a lack of indemnification; and, 4) absence of a hold harmless provision can make insurance premiums more expensive or "simply unavailable."⁴¹

23. In its comments on the Duke Settlement, which CalPX incorporates by reference in this proceeding, CalPX asserted that section 14.1 of its tariff provided that CalPX would be held harmless for its obligations under the CalPX tariff. Similarly, the CAISO also cites a provision of its tariff as being consistent with a "hold harmless" provision applicable to the CAISO's actions to implement the Settlement. Section 14.1 of the

³⁹ CalPX Initial Comments at 2–7; CAISO Initial Comments at 2-7.

⁴⁰ *See* CalPX's Initial Comments on the Duke Settlement, filed October 21, 2004, at 4–5, which CalPX incorporates by reference in its Initial Comments on the instant settlement.

⁴¹ *Id.* at 4-5.

CAISO Tariff provides that the CAISO shall not be held liable in damages to any Market Participant (as defined in the tariff) for “any losses, damages, claims, liability, costs or expenses ... arising from the performance or non-performance of its obligations” under the CAISO Tariff, except to the extent that they result from negligence or intentional wrongdoing.⁴²

24. In addition to “hold harmless” protection, CalPX also requests that the Commission require the Settling Participants to indemnify the CalPX for its actions to implement the Settlement. CalPX asserts that indemnification is warranted because of the significantly larger amounts of funds that it will be required to transfer from its Settlement Clearing Account (\$320 million in the instant proceeding as compared to \$55 million in the Duke Settlement and \$175 million in the Dynege Settlement).⁴³

25. To effect this “hold harmless” and indemnification protection, CalPX asks the Commission to incorporate the following language in the order approving the Settlement (the indemnification language is shown in bold):⁴⁴

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 or willful misconduct, neither CalPX nor its officers, directors, employees or professionals (each, hereinafter, “a CalPX Party”) 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. **Except to the extent caused by gross negligence or willful misconduct of any CalPX Party, the Parties to the Agreement (as defined in the Preamble of the Agreement) shall indemnify each CalPX Party for any damages, losses or expenses, including costs and attorneys’ fees, incurred as a result of any claim, including but not limited to any action, lawsuit, complaint or arbitration against any [sic] CalPX Party, including but not limited to those brought before the Commission, or in any court or bankruptcy court, arising out of or pertaining [to] the implementation of the**

⁴² CAISO Initial Comments at 6.

⁴³ CalPX Initial Comments at 6.

⁴⁴ *Id.* at 6–7.

settlement and/or the settlement agreement by any CalPX Party. 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.

26. In its initial comments, the CAISO supports the Settlement stating that its approval will benefit market participants.⁴⁵ It too seeks "hold harmless" protection, echoing CalPX's concern that the Settlement will involve the flow of substantial dollars. This will necessitate concomitant accounting adjustments by the CAISO that are unprecedented in scope and complexity. Although these accounting adjustments would be performed pursuant to a Commission-approved settlement, CAISO is concerned that some parties could accuse CAISO of taking actions that are not consistent with provisions of the CAISO Tariff. CAISO is concerned that someone could argue that the CAISO, in implementing the Settlement, "did not make appropriate accounting adjustments, and as a result did not reflect the appropriate amount of refunds or receivables owing to that Market Participant."⁴⁶ This would leave the CAISO vulnerable to complaints here at the Commission and additional litigation risk. Finally, CAISO points out that, as the Commission approves more settlements in the Refund Proceeding, the task of implementing those settlements will become more complex, thereby increasing litigation exposure for CAISO as it attempts to implement the settlements.

27. In their joint reply comments, the Settling Participants agree that "hold harmless" protection should be provided to CalPX and CAISO consistent with the Commission's orders in the Williams, Dynegy and Duke settlements. However, they oppose CalPX's request for indemnification, stating that this "would only encourage the CalPX to prolong litigation relating to the Settlement, since the Settling Parties would be footing the bill."⁴⁷

⁴⁵ CAISO Initial Comments at 3.

⁴⁶ *Id.* at 4.

⁴⁷ Settling Participants' Joint Reply Comments at 19.

Commission Determination

28. The Commission finds that both the CalPX and the CAISO have provided the Commission with compelling justification as to why they should be held harmless, along with their officers, directors, employees and contractors, for the steps taken to implement the Settlement. Particularly persuasive is the fact that, although both CalPX and CAISO will be disbursing substantial sums of cash under the terms of the Settlement, they are not protected by the same indemnities that Article IX of the Settlement Agreement provides for the Settling Participants. Their own tariffs provide hold harmless protection for meeting their obligations under their respective tariffs, so the Commission finds that “hold harmless” protection is warranted for CAISO and CalPX for steps taken to implement the Settlement.

29. However, the Commission finds that CalPX has failed to support its request for a requirement that the Settling Participants indemnify it for actions taken to implement the Settlement. Its arguments supporting indemnification are based principally on the fact that this Settlement involves more money than the other settlements and therefore warrants additional protection for CalPX. However, the differences in degree between the other settlements and the instant Settlement are not sufficient to warrant this additional protection.

30. Because the Commission determines that CalPX and CAISO shall be held harmless for actions taken to implement the Settlement, this order will incorporate only the “hold harmless” language requested by CalPX and set out in paragraph 24, which does not include the language shown in bold pertaining to indemnification.

C. Comments of Enron

31. Enron’s brief comments (four sentences) do not specifically allege that the Settlement is discriminatory, but the import of its remarks is that Enron considers the Settlement to be unfair. Enron complains that the Settlement’s methodology for determining or calculating the obligations of non-settling market participants is inconsistent with prior Commission orders, and that the Settlement’s methodology for opting in and resolving claims “is inconsistent with Enron’s obligations under the bankruptcy code and Enron’s confirmed plan of reorganization.”⁴⁸ Enron provides no support for these assertions, such as citations to prior Commission orders or to its plan of reorganization.

⁴⁸ Enron Comments at 2.

Commission Determination

32. Enron's pleading repeats virtually verbatim its comments on the Duke Settlement. In the Duke Settlement Order, the Commission stated that it cannot "weave from whole cloth" the factual support to sustain Enron's allegations that the Settlement's methodology is somehow "inconsistent with prior Commission orders" or that the Settlement is somehow "inconsistent with Enron's obligations under the bankruptcy code and Enron's confirmed plan of reorganization."⁴⁹ Because Enron again fails to provide factual support for these unsupported assertions, the Commission again will reject Enron's objections.

D. Comments of CalPX

1. Effect of the Settlement on Participation in the Mirant Bankruptcy Proceeding

33. Despite asserting that it takes no position on the Settlement, CalPX raises a number of objections to the Settlement and requests several clarifications. CalPX is particularly concerned by the Settlement's requirement that it assign its claims in the Mirant Bankruptcy proceeding to Non-Settling Parties, on whose behalf CalPX asserts it has been pursuing its bankruptcy claims.⁵⁰ The Non-Settling Parties' claims for amounts due from MAEM for the Pre-October Period would be treated as unsecured pre-petition claims. At the heart of CalPX's concern with the assignment is that the Non-Settling Parties may not recover anything from the bankrupt estate, which would leave them worse off under the Settlement.

34. The Settling Participants' Joint Reply Comments dispute CalPX's concerns for the Non-Settling Parties. They point out that the California Parties have agreed to backstop refunds that might be awarded by the Commission to Non-Settling Participants for Mirant's transactions with the CAISO and the CalPX for the Refund Period. For the Pre-October Period, the Settlement provides that market participants (including Non-Settling Parties) will be entitled to an allocable share of a \$24 million cash fund that has been created to handle shortfalls.⁵¹ To the extent that the Non-Settling Parties are awarded

⁴⁹ Duke Settlement Order at P , *citing* Enron Comments at 2.

⁵⁰ Joint Settlement and Release of Claims Agreement at section 2.7.1(iii).

⁵¹ Settling Participants' Joint Reply Comments at 17, *citing* section 6.6.5.1 of the Settlement and Release of Claims Agreement.

additional recoveries, they retain their rights to pursue these claims at the Commission and in the Mirant Bankruptcy. The Settling Participants aver that “no market participant with an actual claim to Pre-October dollars from Mirant has asserted any objection or concern about the Settlement.”⁵²

Commission Determination

35. The Commission finds that the Settlement provides several protections for the Non-Settling Parties, who will be no worse off under the Settlement and, depending on the outcome of the Mirant Bankruptcy proceeding, may actually be better off under the Settlement. The risk of shortfalls in refunds has been assumed by the California Parties and MAEM, a \$24 million escrow has been established to cover Pre-October claims,⁵³ and to the extent those funds are insufficient, the Non-Settling Parties have some potential recovery in the Mirant Bankruptcy proceeding. As holders of unsecured claims, the Non-Settling Parties will receive stock in a reorganized Mirant Corporation plus a share of potential litigation recoveries through interests in a litigation trust. Although no valuation is provided for these assets, clearly Non-Settling Parties would not have this potential for recovery absent the Settlement. Thus, it appears that CalPX’s concerns for the Non-Settling Parties is misplaced.

2. Other Mirant Bankruptcy Concerns

36. CalPX raises several procedural and substantive concerns about the Settlement’s bankruptcy provisions. For example, the Settlement requires that CalPX file a notice of its assignment of bankruptcy claims to the Non-Settling Participants, while Federal Rule of Bankruptcy Procedure Rule 3001(e)(2)⁵⁴ requires the transferee, not the transferor, to file this notice. CalPX also expresses concern that there may be a gap in the prosecution of the Non-Settling Parties’ bankruptcy claim, depending on when the CalPX assignment of claims occurs, and until that time, CalPX should continue its participation on behalf of the Non-Settling Parties.⁵⁵ CalPX asserts that timing for the assignment of claims is complicated by the fact that the Settlement has not been filed with the Mirant Bankruptcy

⁵² *Id.* at 18.

⁵³ Settlement and Release of Claims Agreement at section 6.5.4.

⁵⁴ 11 U.S.C. Appendix § 3001(e)(2) (2000).

⁵⁵ CalPX Initial Comments at 6.

Court, even though its approval is necessary for the Settlement to become effective.⁵⁶ Accordingly, CalPX asserts that, if the Commission finds that the CalPX should continue to assert the Non-Settling Parties' claims in the Mirant Bankruptcy Proceeding until the assignment of bankruptcy claims is effected, the Commission should authorize CalPX to fund its continued participation with its windup fund. Finally, CalPX asks that the Commission clarify that its approval of the Settlement does not require the CalPX to waive, dismiss, or withdraw its proofs of claims in the Mirant Bankruptcy Proceeding, and the Bankruptcy Court has sole discretion to allow the assignment of claims contemplated by the Settlement.

Commission Determination

37. The Commission finds that CalPX's concerns about the Settlement's implications for the prosecution of claims in the Mirant Bankruptcy Proceeding are without merit. The Settlement will not become effective without the express approval of the Mirant Bankruptcy Court.⁵⁷ Procedural and substantive concerns that CalPX raises about the Mirant Bankruptcy Proceeding are more appropriately addressed by that tribunal and not the Commission.

3. Effect of Settlement on Retained Claims Litigation

38. CalPX has sued some of its former officers and directors in the Bankruptcy Court for the Central District of California based on the failure to draw down the \$79.8 million letter of credit posted by Mirant Corporation prior to its expiration.⁵⁸ The letter of credit secured MEAM's obligations to the CalPX. The suit was dismissed on procedural grounds, but CalPX asserts that it has appealed the dismissal and it is subject to reversal on appeal. It has also engaged in settlement negotiations with the insurer that provided the directors' and officers' insurance (D&O Carrier). CalPX is concerned that the defendants in the lawsuit and the D&O Carrier might assert that such Settlement features as the return of collateral to MAEM or the CalPX assignment of its bankruptcy claims to Non-Settling Parties will limit or eliminate their liability to CalPX for damages under the

⁵⁶ *Id.* at 13.

⁵⁷ Settlement and Release of Claims Agreement at section 2.4.1.

⁵⁸ *Reorganized California Power Exchange Corporation v. Lynn Miller (In re California Power Exchange Corporation), et al.*, United States Bankruptcy Court, Central District of California, Case No. 03-02963 (letter-of-credit litigation).

letter-of-credit litigation. CalPX seeks clarification that the Settlement will not affect its rights under the letter-of-credit litigation and that the Non-Settling Parties may reassign their claims to the CalPX to facilitate payment of any recovery ultimately achieved against the D&O Carrier.⁵⁹

39. In their reply comments, the Settling Participants state that CalPX's concerns about the effect of the Settlement on the letter-of-credit litigation are "unnecessary and inappropriate," because the courts hearing the letter-of-credit litigation are the proper forum for the determination of the effects of the Settlement on that litigation. However, the Settling Participants indicate that they would not oppose the Commission's clarification that the Settlement does not preclude the Non-Settling Parties from assigning their claims in the litigation to the CalPX "solely to facilitate payment of any recovery against the D&O carrier in the letter-of-credit litigation."⁶⁰

Commission Determination

40. The Commission agrees that the question of how the Settlement affects the letter-of-credit litigation is more appropriately resolved by the courts before which the letter-of-credit litigation is pending. However, the Commission will provide the clarification requested by CalPX and agreed to by the Settling Participants: the Non-Settling Parties may assign their claims to the CalPX solely to facilitate payment of any recovery against the D&O carrier in the letter-of-credit litigation.

4. Release of MAEM Collateral

41. Section 2.7.1(i) of the Settlement provides that the CalPX will return to MAEM the cash collateral it holds and give up claims for additional collateral to the extent such collateral would apply to liabilities that are released under the terms of the Settlement. CalPX asserts that this section contemplates that CalPX will retain Mirant collateral as security for Non-Settling Parties' claims for the Pre-October Period and the CalPX's own wind-up cost claims.⁶¹ On the other hand, CalPX points out the section 6.9.7 provides that the Mirant Parties are entitled to a release of "any and all collateral posted by any of

⁵⁹ CalPX Initial Comments at 25.

⁶⁰ Settling Participants' Joint Reply Comments at 24.

⁶¹ CalPX Initial Comments at 29–30.

the Mirant Parties.”⁶² CalPX believes that these sections create inconsistent obligations and it seeks a clarification of its obligation to return collateral under the Settlement.⁶³

42. The Settling Parties assert that CalPX misreads the Settlement provisions and that no clarification is necessary.⁶⁴

Commission Determination

43. There is no conflict between section 6.9.7 and section 2.7.1 in terms of the collateral that the CalPX is to release under the Settlement. Section 2.7.1(i)(d) does require that the CalPX retain certain collateral to Non-Settling Parties. Section 6.9.7 requires that the CalPX return only whatever collateral is available to the Mirant Parties after the amounts retained for the Non-Settling Parties are taken into account.

5. Additional Requests for Clarification

44. CalPX cites other provisions of the Settlement that it believes require clarification. For example, CalPX asserts that the Commission should clarify how the CalPX wind-up costs should be apportioned among the California Parties. Section 5.3.3 of the Settlement provides that the California Parties will assume responsibility for Mirant’s share of the CalPX’s wind-up costs for the period after the Settlement Effective Date. CalPX expresses the concern that it will not collect the full amount of these claims and that the Commission should devise some manner for allocating the shortfall. CalPX also asserts that section 2.7.1(i) of the Settlement is vague in its requirement that the CalPX must take no action “inconsistent” with the Settlement.

45. The Settling Participants assert that clarification is not necessary on either of these requests. As to the wind-up charges, the Settlement provides that CalPX’s wind-up charge payments are assured: after the Settlement Effective Date, those costs will be paid by the California Parties, and prior to the Settlement Effective Date, these charges are treated as an allowed administrative claim for which the CalPX is “virtually ... assured

⁶² *Id.* at 29, *citing* section 6.9.7 of the Settlement and Release of Claims Agreement.

⁶³ CalPX Initial Comments at 29–30.

⁶⁴ Settling Participants’ Joint Reply Comments at 26.

payment.”⁶⁵ With respect to the term “inconsistent,” they assert that the Settlement contains a number of specific provisions that create certain rights and obligations. If CalPX’s actions are not in conflict with specific terms of the Settlement, its actions are not “inconsistent” with the Settlement. Consequently, the Settlement requires no additional clarification.⁶⁶

Commission Determination

46. The Commission finds that the Settlement is clear as to how CalPX’s wind-up charges will be addressed. No further clarification is necessary. In addition, the Commission finds no need to clarify CalPX’s obligation under section 2.7.1 to refrain from taking actions inconsistent with the Settlement.

E. Comments of NCPA

47. NCPA’s comments track very closely the comments it filed objecting to the Williams, Dynegy and Duke settlements. Much of NCPA’s focus appears to stem from its relationship with PG&E. NCPA is a load-serving entity and a public agency engaged in the generation and transmission of electric power and energy. From May 2000 to June 20, 2001, NCPA operated in California both as a Scheduling Coordinator in its own right and under the terms of an Interconnection Agreement with PG&E that terminated August 31, 2002.⁶⁷ In addition, NCPA members also received power supply from Western Area Power Administration (Western), which was scheduled by PG&E.⁶⁸ NCPA states that “in this settlement, as in others, PG&E appears to be handing over the whole proceeds of the refund docket starting January 17, 2001 to CERS on behalf of its retail and its wholesale Scheduling Coordinators [Irrigation Districts].”⁶⁹ NCPA expresses the concern that, by entering into the Settlement, PG&E is settling claims arising from its

⁶⁵ *Id.* at 23–24.

⁶⁶ *Id.* at 25.

⁶⁷ NCPA at 5.

⁶⁸ *Id.*

⁶⁹ *Id.* at 6.

role as Scheduling Coordinator on behalf of its wholesale customers, which deprives them of a meaningful opportunity to opt out.⁷⁰

48. NCPA asserts that the Settlement should be clarified or conditioned as follows:

- a. The Commission should adopt an order that ensures that PG&E's wholesale customers obtain refunds arising from the refund proceeding;
- b. The Commission should require that PG&E pay an portion of the \$43 million it receives from Mirant under the RMR Settlement to Western;
- c. The Commission should require PG&E to submit its market based rate and any necessary section 203 authorization for review by the Commission if it reacquires from Mirant the Mirant Delta and Mirant Potrero generating facilities described in the Settlement, notwithstanding the provisions of the Settlement;
- d. The Commission should require PG&E to provide its customers full information and an opportunity to opt out of the Settlement with respect to transactions that were scheduled by PG&E;
- e. The Commission should require the Settling Participants to use the current fuel cost allocation methodology in lieu of the methodology in the Settlement; and,
- f. The Commission should condition its approval of the Settlement on the CPUC's agreement to reduce exit fees for departing municipal customers to take into account the value received in the Settlement.

49. In reply, the Settling Participants urge the Commission to continue to deny NCPA's argument that PG&E should be required to flow its refunds through to its wholesale customers. They point out that the contracts governing NCPA's relationship with PG&E contain appropriate mechanisms for determining the extent to which NCPA and other wholesale customers are entitled to any portion of PG&E's refunds under the Settlement.⁷¹

⁷⁰ *Id.* at 8.

⁷¹ Settling Participants' Joint Reply Comments at 9.

50. With respect to NCPA's request that PG&E be required to give a portion of the money it receives from Mirant under the RMR Settlement to Western, the Settling Participants point out that Western has not spoken in support of this request. It also points out that NCPA's request would result in a special "carve-out" for Western from the Mirant RMR Settlement, which specifies exactly the same treatment of RMR-related refunds resulting from this Settlement under PG&E's Transmission Owner Tariff as all other Reliability Service costs and refunds. The Settling Participants state that this would give Western an undue preference vis-à-vis other PG&E customers, and it is based on facts not in the record, *i.e.*, the amount of Reliability Service charges incurred each year for the periods encompassed by the RMR Settlement. In short, there is simply no basis upon which to justify such a "carve-out."⁷²

51. The Settling Participants also oppose NCPA's position that the transfer of generating assets from Mirant to PG&E, which is envisioned by but not perfected in the Settlement, should trigger review by the Commission of PG&E's market based rate and a review under section 203 of the Federal Power Act.⁷³ The Settling Participants agree to cooperate with any Commission review of the asset transfer, but they assert that the transfer does not trigger review under section 203 "since the transfer involves merely an incomplete generation facility and no jurisdictional contracts or facilities."⁷⁴

52. On the assertion that the Settlement incorporates an outdated fuel cost allowance methodology, the Settling Participants reply that the Settlement uses gross load as a proxy for determining initial distributions, but that this is "subject to an adjustment and 'true up' to comply with the FERC Allowances Determination."⁷⁵

53. Finally on the exit fee issue, the Settling Participants assert that the amount of exit fees imposed by the CPUC is not relevant to the proceeding.⁷⁶

⁷² *Id.* at 10.

⁷³ 18 U.S.C. § 824b (2000).

⁷⁴ Settling Participants' Joint Reply Comments at 11.

⁷⁵ *Id.* at 12, *citing* section 6.4.1 of the Settlement and Release of Claims Agreement.

⁷⁶ *Id.* at 13.

Commission Determination

54. Many of NCPA's requests that the Commission clarify or condition the Settlement rely on objections it has raised and the Commission has rejected in the Williams, Dynege and Duke Settlements. The Commission has already determined that NCPA has ample information with which to determine whether it is in its best interests to join the Settlement or to continue litigation.⁷⁷ NCPA may opt in or continue to litigate. None of its objections warrants rejecting or conditioning the Settlement in such a way as to affect adversely its benefits for those who choose to opt into the Settlement.

55. NCPA asks that the Commission clarify that this proceeding will not prejudice the question of whether PG&E can pass along costs or benefits of the Settlement to NCPA. As the Commission has stated previously, this question arises in the context of transactions that took place under the PG&E Interconnection Agreement and is thus a question of contract interpretation between NCPA and PG&E.⁷⁸ NCPA does not point to any specific provision in the Settlement that would affect its rights under the Interconnection Agreement.

56. The only new issue presented by NCPA relates to the proposed sale of certain generating facilities, the Contra Costa Unit 8 (CC8) Project, by Mirant to PG&E. These transactions are described in the section 8.7.3 of the Settlement and Release of Claims Agreement. The assets in question are an incomplete generation facility and involve no jurisdictional contracts or facilities. The Commission granted PG&E market-based rate authority in an unpublished letter order issued in Docket No. ER03-198 on December 19, 2002. PG&E is required to notify the Commission promptly of any change in status or in the characteristics upon which the Commission relied in granting market-based rate authority.⁷⁹ Among the changes that would trigger a report to the Commission is a change in ownership or control of generation facilities or inputs to electric power production.⁸⁰ In the Joint Reply Comments of the Settling Participants, PG&E has

⁷⁷ See Williams Settlement Order at P 51; Dynege Settlement Order at P 36; Duke Settlement Order at PP 37–38.

⁷⁸ *Id.* at 7.

⁷⁹ Market-Based Rate Authorization at Appendix A; *Reporting Requirements for Change in Status for Public Utilities with Market-based Rate Authority*, 110 FERC ¶ 61,097 (2005) (Order No. 652).

⁸⁰ *Id.*

committed to submit a timely notice to the Commission concerning the CC8 Facility, consistent with the requirements of Order No. 652. At this point, however, the asset transfer has not taken place, and the facilities in question are in the early stages of development.⁸¹

57. As to NCPA's assertion that review of the CC8 asset transfer requires an application under section 203, the Commission finds that such review does not appear to be required at this time; if the transfer (when it happens) involves any jurisdictional assets, a section 203 application will be required for prior Commission approval.

F. Initial Comments of Vernon

58. Just as it did in comments on the Williams, Dynegy and Duke settlements, Vernon alleges that the refund allocation methodology in the Settlement discriminates against parties like Vernon, which was a net seller in the CalPX market but was a net purchaser in the CAISO market. Vernon also claims that it is unfair and discriminatory to allow Settling Participants to receive refunds ahead of parties who choose not to opt into the Settlement.⁸² "By allowing Mirant's receivables to offset payables on a dollar-for-dollar basis, without recognition of undercollections, effectively places Mirant's receivables at a higher level of priority for collection compared to the accounts receivables of [market] participants such as Vernon."⁸³ This creates a preference for settling parties, according to Vernon, which will be exacerbated by a shortfall in collections, and subjects Non-Settling Parties to greater risk of obtaining refunds through litigation.⁸⁴

59. Vernon also expresses concern about the sufficiency of the \$24 million cash payment the California Parties will transfer to OMOI to cover Non-Settling Participants' allocable share of Pre-October Period. If the funds are not sufficient, the Commission

⁸¹ Settling Parties' Reply Comments at 11.

⁸² Vernon Initial Comments at 6–8.

⁸³ *Id.* 5.

⁸⁴ *Id.* 7.

should retain authority to award additional relief from Mirant for the benefit of Non-Settling Participants attributable to the Pre-October Period. Vernon asserts that these funds should inure to the benefit of all market participants.⁸⁵

60. Finally, Vernon presents hypothetical scenarios purporting to demonstrate that Non-Settling Parties bear the risk of undercollections, which in turn demonstrates that the Settlement discriminates against Non-Settling Parties.⁸⁶ On March 18, Vernon filed a Motion to Supplement the Record and Supplemental Comments on Settlement, seeking to supplement the record of the Williams, Dynegy, Duke and Mirant Settlements. Vernon purports to evaluate data from the CAISO rerun process in support of its allegations that the Settlement is discriminatory. The CAISO's rerun process is nearly complete and it is circulating the results to individual customers for review and potential correction. Vernon concludes that the rerun data prove that "in order to join in the proffered settlements,"⁸⁷ Vernon would have to give up nearly one-half of the refunds it would otherwise be entitled to, while receiving no reductions in the Vernon refund obligations Vernon would continue to have in the [Cal]PX market.⁸⁸ Thus, Vernon states that the data establish that Vernon will fare better proceeding with its litigation than it would under the Allocation Matrix in the Settlement.⁸⁹

61. The Settling Participants reply that the Commission has addressed Vernon's position in prior orders on the Williams, Dynegy and Duke settlements. The settlement is not discriminatory, provides for those Non-Settling Parties who choose to continue litigation, and addresses the potential for shortfalls.⁹⁰ On April 4, the California Parties filed an answer opposing Vernon's motion to supplement the records of the four settlements, stating that Vernon's pleading reiterates arguments that have been

⁸⁵ *Id.* at 7.

⁸⁶ *Id.* at 11–16.

⁸⁷ Vernon evaluated the data in terms of its refund posture in the Allocation Matrices in the Williams, Dynegy, Duke and Mirant settlements.

⁸⁸ Motion to Supplement at 7.

⁸⁹ *Id.*

⁹⁰ Settling Participants' Joint Reply Comments at 6–7.

considered already by the Commission. The California Parties state that the alleged discrepancies between the CAISO's latest rerun data and the amounts estimated in the four Settlements as owed and owing do not invalidate the settlements, as "the point of a settlement is to fix the settlement amounts and terms before the case is fully decided."⁹¹

Commission Determination

62. The Commission finds that the Settlement is not unduly discriminatory. The Settlement provides an opportunity for all participants to opt-in and would provide significant benefits, including certainty and finality on major issues, to the Settling Participants. The Settlement anticipates that some parties will choose to continue to litigate rather than join the Settlement, and the Settling Participants have agreed to share the risk of shortfalls in the refund process. "The Settlement will not reduce in any way the amount of refunds the Commission ultimately determines are due to [Non-Settling Parties.]"⁹²

63. In addition, Settlement provides that, for the Refund Period, the California Parties will pay to the CAISO and the CalPX from the Mirant Refund Escrow, the California Litigation Escrow or otherwise, any refunds due to Non-Settling Parties by the Mirant Parties, as determined by the Commission in the Refund Proceeding. As for the Pre-October Period, the Commission's OMOI will direct distribution of \$24 million which will be set aside for refunds to Non-Settling Parties. The Commission finds that these measures will protect Non-Settling Parties from underrecovery and evince an effort to ensure that the Settlement does not discriminate against Non-Settling Parties.

64. The Commission finds that Vernon's hypotheticals confirm rather than undercut the Settlement's claim that Non-Settling Parties will not be worse off under the Settlement than if they pursue litigation. While the Commission recognizes that it is possible that not all parties will pay their obligations under a final settlement of accounts, the risk of shortfalls has been allocated to the California Parties for the Refund Period, and a fund has been set aside to cover shortfalls in the Pre-October Period. The Commission reads the hypotheticals to show that the Settling Participants have a greater risk of underrecovery when parties fail to pay their allocable share of refund liability than do Non-Settling Parties. In any event, the hypotheticals are based on speculative behavior and not probative. The Commission finds that the Settlement adequately

⁹¹ California Parties' Answer at 4.

⁹² *Id.* at 7.

anticipates and provides for the need to protect Non-Settling Parties from the risk of undercollections.

65. The Commission grants Vernon's Motion to Supplement, but it finds the conclusions to be drawn from Vernon's analysis of the rerun data to be equivocal at best. At the end of the day, Vernon is in the best position to determine whether it is in its economic best interest to pursue litigation or to opt into this Settlement.

The Commission orders:

(A) The Commission hereby approves the Offer of Settlement and Settlement Agreement, as discussed in the body of this order.

(B) The CalPX is authorized and directed to implement the Settlement, as discussed in the body of this order.

(C) The CAISO is authorized and directed to implement the Settlement, as discussed in the body of this order.

(D) The Commission directs that the CalPX and the CAISO will be held harmless from their actions to implement the Settlement, as discussed in the body of this order.

(E) The Commission hereby terminates as moot the proceedings in *Pacific Gas and Electric Company*, Docket Nos. ER98-495-000, ER98-1614-000, ER98-2145-000 and ER99-3603-000, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.