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. Complainants v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents	Docket Nos. EL00-95-000, *et al.*, EL00-95-108, EL00-95-116 and EL00-95-122
Investigation of the Practices of the California Independent System Operator and the California Power Exchange	Docket Nos. EL00-98-000, *et al.*, EL00-98-095, EL00-98-103 and EL00-98-109
Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity in the Pacific Northwest	Docket Nos. EL01-10-000, *et al.*, EL01-10-015 and EL01-10-017
Investigation of Anomalous Bidding Behavior and Practices in the Western Markets	Docket No. IN03-10-000 *et al.*, IN03-10-007, IN03-10-009 and IN03-10-011
Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices	Docket No. PA02-2-000 *et al.*, PA02-2-023, PA02-2-024 and PA02-2-026

Williams Energy Services Corporation	Docket No. EL03-179-005
Williams Energy Marketing & Trading Company	Docket No. PA03-11-003
AES Southland, Inc. and Williams Marketing & Trading Company	Docket No. IN01-3-003
Duke Energy Trading and Marketing, L.L.C.	Docket No. EL03-152-005
State of California, *ex rel*., Bill Lockyer, Attorney General Of the State of California v. British Columbia Power Exchange, *et al.*	Docket No. EL02-71-005

ORDER ON REHEARING

(Issued May 9, 2005)

1. In this order, the Commission addresses requests for rehearing and/or clarification of three orders that approved settlements in the captioned proceedings for Williams,[1]

[1] The Williams Companies, Inc. and Williams Power Company, Inc. are referred to as "Williams." *See* 108 FERC ¶ 61,002 (2004) (Williams Settlement). The specific dockets involved in the Williams Settlement are: Docket Nos. EL00-95-000, *et al.*, EL00-95-108; EL00-98-000 *et al.*, EL00-98-095; IN03-10-000, *et al.*, IN03-10-007; PA02-2-000, *et al.*, PA02-2-023; EL03-179-005; PA03-11-003; IN01-3-003; and EL03-152-005.

Dynegy,[2] and Duke[3] and their respective settling parties.[4] These settlements resolve disputes that arose as a result of 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 Williams, Dynegy and Duke. Although each settlement is slightly different, the

[2] Dynegy, Inc., NRG Energy, Inc., and West Coast Power (comprising El Segundo Power, LLC, Long Beach Generation, LLC, Cabrillo Power I LLC and Cabrillo Power II LLC) are collectively referred to as "Dynegy." *See* 109 FERC ¶ 61,071 (2004) (Dynegy Settlement). The specific dockets involved in the Dynegy Settlement are: Docket Nos. EL00-95-000, *et al.*, EL00-95-116; EL00-98-000 *et al.*, EL00-98-103; IN01-10-000, *et al.*, IN01-10-015; IN03-10-000, *et al.*, IN03-10-009; PA02-2-000, *et al.*, and PA02-2-024.

[3] Duke Energy Corporation; Duke Capital LLC; Duke Energy Americas, LLC; Duke Energy Merchants, LLC; Duke Energy Trading and Marketing, L.L.C. (DETM); Duke Energy North America, LLC; Duke Energy Morro Bay LLC; Duke Energy Moss Landing LLC; Duke Energy Oakland LLC; Duke Energy South Bay, LLC; DETMI Management, Inc.; DE Power Generating, LLC; Duke Energy California, LLC; Duke Energy Generation Services, LLC; Duke Energy Fossil-Hydro, LLC; Duke Energy Fossil-Hydro California, Inc.; Catawba River Investments II, LLC; and DE Power Generating Holdings, LLC. Collectively, these companies are referred to as "Duke." *See* 109 FERC ¶ 61,257 (2005) (Duke Settlement). The specific dockets involved in the Duke Settlement are: Docket Nos. EL00-95-000, *et al.*, EL00-95-122; EL00-98-000 *et al.*, EL00-98-109; EL01-10-000, *et al.*, EL01-10-017; IN03-10-000, *et al.*, IN03-10-011; PA02-2-000, *et al.*, PA02-2-026; and EL02-71-005.

[4] Duke Energy Corporation; Duke Capital LLC; Duke Energy Americas, LLC; Duke Energy Merchants, LLC; Duke Energy Trading and Marketing, L.L.C. (DETM); Duke Energy North America, LLC; Duke Energy Morro Bay LLC; Duke Energy Moss Landing LLC; Duke Energy Oakland LLC; Duke Energy South Bay, LLC; DETMI Management, Inc.; DE Power Generating, LLC; Duke Energy California, LLC; Duke Energy Generation Services, LLC; Duke Energy Fossil-Hydro, LLC; Duke Energy Fossil-Hydro California, Inc.; Catawba River Investments II, LLC; and DE Power Generating Holdings, LLC. Collectively, these companies are referred to as "Duke." *See* 109 FERC ¶ 61,257 (2005) (Duke Settlement). The specific dockets involved in the Duke Settlement are: Docket Nos. EL00-95-000, *et al.*, EL00-95-122; EL00-98-000 *et al.*, EL00-98-109; EL01-10-000, *et al.*, EL01-10-017; IN03-10-000, *et al.*, IN03-10-011; PA02-2-000, *et al.*, PA02-2-026; and EL02-71-005.

basic elements are nearly the same, as are the parties. Thus, the Commission determined that, for the sake of administrative efficiency, it would address the requests for rehearing of these orders in the instant order. The order generally denies requests for rehearing, makes a number of clarifications and grants rehearing requests by CalPX and CAISO for "hold harmless" protection in the Williams Settlement. This order will benefit customers by allowing these settlements to proceed, thereby averting further costly litigation for parties to the settlements, eliminating regulatory uncertainty and bringing to a close disputes stemming from the California market disruptions during 2000 and 2001 as they relate to Williams, Dynegy and Duke.

I. Background on the Settlement Orders

2. All three settlements involve common settling parties, as well as settling parties that were unique to particular settlements. For example, the California Parties[5] and the Commission's Office of Market Oversight and Investigations (OMOI) are parties to the Dynegy and Duke Settlements, while the Williams Settlement is between Williams and the California Utilities.[6] Because the Duke Settlement resolves proceedings in state and federal courts, that settlement includes parties to those state and federal proceedings who are thus unique to that settlement. In addition to the parties to the settlements, market participants were given an opportunity to opt into the settlements after the Commission issued orders approving the settlements.[7]

---

[5] The California Parties include: Pacific Gas & Electric Company (PG&E); Southern California Edison Company (SCE); San Diego Gas & Electric Company (SDG&E); the California Department of Water Resources acting through its Electric Power Fund (CERS), separate and apart from its powers and responsibilities with respect to the State Water Resources Development System; the California Electricity Oversight Board (CEOB); the California Public Utilities Commission (CPUC); and the People of the State of California, *ex rel.* Bill Lockyer, Attorney General.

[6] For purposes of the Williams Settlement, the California Utilities are PG&E, SCE and SDG&E.

[7] The Williams Settlement Order provided that market participants could opt into the Williams Settlement for up to five days after the Commission's order on that settlement issued. *See* Williams Settlement Order at P 30 and P 48. The Dynegy and Duke Settlements provided a five-day opt-in period after issuance of the Commission's orders on those Settlements. *See* Article IX of the Dynegy Settlement Agreement and Article VIII of the Duke Settlement Agreement.

3. Just as the settlements involve common parties, comments on the settlements and ultimately on rehearing raise similar concerns and objections. Nevertheless, the Commission approved each of the settlements with minor modifications, and a number of entities have chosen to opt into each settlement rather than to continue litigating their claims against Williams, Dynegy and Duke in the California Refund Proceeding.[8]

II. Requests for Rehearing and/or Clarification

4. Seven entities filed requests for rehearing and/or clarification, or other pleadings in response to the Commission's order in the Williams Settlement: Automated Power Exchange, Inc. (APX);[9] Avista Energy, Inc. (Avista); Allegheny Energy Supply Company, LLC (AE Supply); CAISO; CalPX; Northern California Power Agency (NCPA); and City of Vernon, California (Vernon). In addition, Williams and the California Utilities filed a joint answer to the CalPX's request for clarification and/or rehearing. With respect to the Dynegy Settlement, the Californians for Renewable Energy, Inc. (CARE) filed a motion for clarification and/or rehearing, Vernon filed a request for rehearing and clarification, and APX filed a request for additional time to opt-in to the settlement. In response to the Duke Settlement, APX filed a pleading identical to those it filed in Williams and Dynegy, which Avista supported as it did in the Williams Settlement. Vernon filed a request for rehearing of the Duke Settlement order.

5. Several issues were raised only with respect to specific settlements and will be addressed separately. In addition, many of the rehearing requests raise issues that are implicated in more than one of the settlements and will be discussed on an issue-by-issue basis.

---

[8] *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,* Docket No. EL00-95-000, *et al.* and *Investigation of Practices of the California Independent System Operator and the California Power Exchange,* Docket No. EL00-98-000, *et al*. are collectively referred to as the California Refund Proceeding.

[9] APX's pleading was a request for additional time to consider whether to opt into the Williams Settlement, which the Commission regards as a request for clarification.

III. Settlement-Specific Issues Raised on Rehearing

A. Whether the CalPX should pay out Williams' chargeback funds as part of the Williams Settlement.

6. The Commission's order in the Williams Settlement directed the CalPX to implement the Settlement, including disbursement of funds according to specific allocations set out in the Allocation Matrix as Attachment 4 to the Settlement. On rehearing, CalPX acknowledges withholding two sets of funds pending the Commission's clarification. The first set of funds, some $2,868,558.59, were chargeback funds that CalPX had collected from Williams (as well as others not involved in the Williams proceeding) under its tariff when SCE and PG&E defaulted on their obligations in the CalPX markets. CalPX alleges that these funds were not previously included in the Settlement Agreement and that they were subject to rehearing in a separate proceeding.[10]

7. Williams/California Utilities respond that, although their reply comments on the settlement created some confusion concerning the chargeback funds, Section 1.21 of the settlement defines "Pre-Mitigation Receivables" in such a way as to encompass the chargeback funds:

> "Pre-Mitigation Receivables" means the amount of money, currently estimated to be $261.7 million, which the [Cal]PX and the CAISO markets would owe to Williams for sales of energy and ancillary services during the Refund Period without reference to the market mitigation measures ordered in FERC Docket No. EL00-95.

According to Williams/California Utilities, the chargeback amounts were considered a part of the Pre-Mitigation Receivables. Thus, the chargeback amounts should have been included by CalPX in its disbursements under the Settlement. Moreover, they assert that the Williams Settlement expressly provides for the transfer of funds based on a settled estimate of amounts owed, and that those amounts are subject to a true-up by Williams once the CAISO and CalPX market reruns are completed in the California Refund Proceeding.[11]

---

[10] CalPX (Williams Settlement) at 6-7, *citing Order on Complaints Concerning Use of Chargebacks and Liquidation of Collateral*, 95 FERC ¶ 61,046 (2001).

[11] Williams/California Utilities Answer at 5-8.

Commission Determination

8. The Settling Parties state that they intended that the settled estimate of receivables to be paid by the CalPX to Williams would include Williams' chargeback funds held by the CalPX. CalPX has provided no convincing rationale for why it should continue to retain these funds, other than to cite a discrepancy between the Williams/California Utilities' reply comments and the terms of the Settlement. The Commission finds that the language of the Settlement envisions the chargeback funds to be part of the Pre-Mitigation Receivables CalPX was to have paid to Williams under the Settlement and therefore denies rehearing.

9. Even if the intentions of the parties were not clear in the Settlement, the Commission now has precedent regarding the circumstances under which chargeback funds will be disbursed, and this precedent applies to the disbursement of funds at issue here. At the time the Commission considered the Williams Settlement, the issue of whether CalPX could pay out chargeback funds was the subject of pending proceedings in another docket during the rehearing period. However, in the intervening months since the Williams Settlement, the Commission has established its policy as to when chargeback funds are to be paid:

> the chargeback funds held by the [Cal]PX are not to be used to make up any general shortfall, but may be retained only until the individual [Cal]PX account of the [Cal]PX participant that made a chargeback payment is resolved either in the Refund Proceedings or when the [Cal]PX participant that made the chargeback payment settles its portion of the Refund Proceeding.[12]

The Williams Settlement resolves its portion of the California Refund Proceeding. Therefore, consistent with our policy, the Commission directs CalPX to pay Williams the chargeback amounts it has been withholding.

---

[12] *Coral Power, L.L.C., Enron Power Marketing, Inc., Arizona Public Service Company, Cargill Alliant, LLC, San Diego Gas & Electric Company, Avista Energy, Inc., Sempra Energy Trading Corp., PacifiCorp and Constellation Power Source v. California Power Exchange*, 110 FERC ¶ 61,288 at P 3 (2005).

B. Whether the amount of funds transferred to the Williams Settlement Escrow pursuant to the Williams Settlement Agreement by CalPX should include amounts for market participants who owe refunds into the CalPX but who did not opt into the Settlement.

10. The Williams Settlement provides that the CalPX will distribute certain funds into specific escrow accounts established to hold those funds until they can be disbursed to settling parties, non-settling parties and to Williams. The Settlement provides for initial cash distributions based on estimates in the Settlement of the receivables owed to Williams, with a subsequent adjustment (or true-up) based upon potential shortfalls in receivables and other variables not known at the time the Settlement Agreement was executed.[13] CalPX has expressed the concern that, because not all the parties originally thought by the settling parties to want to opt into the settlement have chosen to opt-in, it should retain funds to cover those contingent liabilities. Consequently, CalPX retained $7,790,488 to cover Deemed Distribution Participants who did not opt into the Williams Settlement.

11. Williams/California Utilities dispute both the retention of funds by CalPX, and the amount of funds retained by CalPX that should instead have been transferred by the CalPX to the Williams Settlement Escrow account. The Settlement provides that only Settling Participants are eligible for Deemed Distributions, and the amount originally indicated by Williams for payouts from the Williams Settlement Escrow was based on the incorrect assumption that all Deemed Distribution Participants would opt into the settlement. Once it was clear that certain parties would not opt-in, which could not be ascertained until after the Commission's order approving the settlement issued and the opt-in period ended, the Settling Parties were required by section 5.1.1 to adjust the amount to be transferred by the CalPX to the Williams Settlement Escrow. Section 5.1.1 provides as follows:

> within ten Business Days after the Effective Date and pursuant to an order issued by FERC, the [Cal]PX shall cause funds to be released from the [Cal]PX Settlement Clearing Account and transferred to the Williams Settlement Escrow, in an amount equal to (i) the Base Settlement Amount, plus any adjustments to the Settlement Amount pursuant to section 4.2 that have been determined as of the Effective Date, (ii) less the portion of the Settlement Amount allocated to the Deemed Distribution Participants pursuant to section 5.3.3, (iii) plus an amount equal to the amount owed by Net Payers pursuant to section 5.4.2.

---

[13] Williams Settlement Order at P 25.

Williams/California Utilities point out that under the Settlement, Deemed Distribution Participants are defined as Settling Participants, and if they have not opted into the Settlement, they cannot be classified as Deemed Distribution Participants.[14] As a result, if a Deemed Distribution Participant does not join the settlement, the amount to be transferred from the CalPX Settlement Clearing Account to Williams Settlement Escrow account should be increased by the refund amount listed in the Settlement's Allocation Matrix for that Participant. This amount would be held in the Williams Settlement Escrow to fund, as needed, the payment of refunds to Non-Settling Participants after the FERC Refund Determination.

Commission Determination

12. The Commission finds that the Williams/California Utilities correctly interpret the Settlement to require the CalPX to transfer additional funds to the Williams Settlement Escrow to account for Deemed Distribution Participants that did not opt into the Settlement. It appears that the CalPX has underpaid the Williams Settlement Escrow by $8,884,042,[15] and it has retained all amounts associated with Deemed Distribution Participants who did not join the settlement. Consequently, the Commission directs the CalPX to remit these funds to the Williams Settlement Escrow. The Commission further finds that these funds should be held in the Williams Settlement Escrow for refunds to Non-Settling Participants pending completion of the CAISO refund reruns and the final determination by the Commission of "who owes what to whom."

C. Whether the CalPX and the CAISO should be held harmless for their actions taken to implement the Williams Settlement.

13. Both the CalPX and the CAISO requested that the Commission, in approving the Williams Settlement, provide that they be held harmless for actions taken to implement the Settlement. However, the Commission declined to grant this request, finding that neither CalPX nor CAISO had justified hold harmless protection. Moreover, the Commission stated that, "if the CalPX and CAISO believe that any of the Commission's

[14] Williams/California Utilities Answer at 10, *citing* section 1.8 of the Settlement.

[15] According to Williams/California Utilities, $57,192,560 was to have been remitted to the Williams Settlement Escrow by CalPX, but it remitted only $48,308,518. The difference is $8,884,042. *See* Williams/California Utilities Answer at 11-12.

regulations will serve as an impediment to their complying with the directives in this order, they may file a request for waiver of those regulations."[16]

14. Both CalPX and CAISO seek rehearing on this issue.[17] CalPX cites 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");[18] 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."[19] As a result of the costs incurred as a result of ongoing litigation, CalPX states that, because it is not an operating utility, it would have to find a source of funding for its participation in potential litigation.[20] CalPX points out that section 8 of the Williams Settlement provides more than five pages of mutual releases and waivers for the Settling Parties and that it should be entitled to the same degree of protection for its actions to implement the settlement.[21]

15. CalPX cites as additional support for a hold harmless provision section 14.1 of its tariff, which provides that CalPX will be held harmless for its obligations under the tariff. In approving that provision, the Commission found such indemnification provisions to be "reasonable."[22] CalPX acknowledges that, in taking actions required of it under the Settlement, it will not be acting pursuant to its tariff; rather it will be acting pursuant to a

---

[16] Williams Settlement Order at P 47.

[17] CalPX at 14-20; CAISO at 2-8.

[18] CalPX at 16-17.

[19] *Id*. at 18.

[20] *Id*. at 17.

[21] *Id.* at 18.

[22] *Citing Pacific Gas & Electric Co., et al.*, 81 FERC ¶ 61,122 (1997) at 61,519.

Commission order approving the Settlement. CalPX's rehearing request cites its comments on the Williams Settlement, in which it requested that the Commission incorporate the following language in granting rehearing on this issue:

> 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 employees or 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.[23]

Although CalPX's request for rehearing does not explicitly ask that this language be adopted by the Commission on rehearing, the Commission infers that CalPX continues to want this language, as it has sought it in the Dynegy, Duke and Mirant Settlements.

16. CAISO's request for rehearing focuses only on the hold harmless issue and provides similar justification for a grant of rehearing. For example, the CAISO 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 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.[24]

17. The CAISO points out that the Settlement will involve the flow of substantial dollars necessitating 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

---

[23] CalPX at 14.

[24] CAISO at 6.

some parties could accuse CAISO of taking actions that are not consistent with provisions of the CAISO Tariff. For example, a market participant could file a complaint or sue the CAISO, its officers and directors, asserting 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 participant."[25] Lack of hold harmless protection leaves the CAISO vulnerable to complaints 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.[26]

18. The Williams/California Utilities assert that the Commission should grant the CalPX and the CAISO whatever waivers are "appropriate and necessary" to ensure that they are able to implement the Settlement, but their answer to requests for rehearing does not endorse "hold harmless" protection.[27] No other party to the Settlement has opposed hold harmless protection, and no other comments on rehearing addressed this issue.

Commission Determination

19. 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 CalPX will be disbursing substantial sums of cash under the terms of the Settlement and CAISO will be accounting for substantial cash transactions among market participants, they are not afforded the same degree of protection that section 8 of the Settlement Agreement provides for the Settling Parties. Their own tariffs provide them with hold harmless protection for actions taken to meet their tariff obligations; thus, the Commission finds that this same protection is warranted for CAISO and CalPX as they implement the Williams Settlement. The Commission thus determines that CalPX and CAISO shall be held harmless for actions taken to implement the Settlement, and this order incorporates the language requested by CalPX and set out in paragraph 15, *supra*.

---

[25] *Id.* at 4.

[26] *Id.* at 5.

[27] Williams/California Utilities at 14-15.

D. Whether the Commission erred in determining that PG&E was authorized to act on behalf of NCPA and other entities for whom it served as Scheduling Coordinator in the CAISO and CalPX markets (Williams Settlement).

20. NCPA's comments on the Williams Settlement were echoed in its later comments on the Dynegy, Duke and Mirant[28] Settlements. 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 under the terms of an Interconnection Agreement with PG&E that terminated August 31, 2002.[29] NCPA asks that the Commission grant rehearing of its determination in the Williams Settlement order that PG&E is authorized to settle claims arising from its role as Scheduling Coordinator on behalf of its wholesale customers in the CAISO markets, including NCPA. NCPA asserts that, by allowing PG&E this authority, PG&E's wholesale customers such as NCPA do not have sufficient information with which to make a determination on whether to opt into the Settlement..[30] NCPA points out that NCPA and PG&E "have generally had adverse interests" throughout this proceeding, which heightens its concerns about the Commission's determination to allow Scheduling Coordinators the ability to settle on behalf of their wholesale customers.[31]

21. NCPA also asks that the Commission clarify that the Williams Settlement Order does not prejudge the question of whether PG&E can pass along costs or benefits of the Settlement to NCPA. Because any purchases or sales took place under the PG&E Interconnection Agreement, NCPA asserts that this question is one of contract interpretation between NCPA and PG&E.[32] NCPA does not point to any specific provision in the Settlement that would affect its rights under the Interconnection Agreement.

---

[28] *San Diego Gas & Electric Company, et al.* 111 FERC 61,017 (2005) (Mirant Settlement).

[29] NCPA at 4, note 8.

[30] *Id.* at 5.

[31] *Id.* at 4.

[32] *Id.* at 9-10.

Commission Determination

22. NCPA's concerns about the Williams Settlement appear to arise principally from its relationship with PG&E, which serves as NCPA's Scheduling Coordinator in the CAISO markets. During the period addressed in the Settlement Agreement, NCPA operated both as a Scheduling Coordinator in its own right and as a CalPX participant under the Interconnection Agreement with PG&E. In the Dynegy Settlement Order, the Commission determined that the NCPA-PG&E Interconnection Agreement did not bar PG&E from entering into a settlement with Dynegy, [33] a finding later reiterated in the order approving the Duke Settlement.[34] The Commission makes that finding here in the context of the Williams Settlement Order.

23. The Commission finds unpersuasive NCPA's concerns that PG&E's participation in the settlement has somehow deprived it of sufficient information upon which to evaluate the impact of the settlement. NCPA as a Scheduling Coordinator and CalPX participant in its own right, had the opportunity to evaluate the copious record of this proceeding and the settlement documents in order to make an informed determination as to whether it was in its best interest to opt into the Settlement or to continue litigation. As the Commission stated in the Dynegy Settlement Order, NCPA has "sufficient information with which to make a determination as to whether it should opt into the Settlement."[35]

24. Finally, NCPA requests clarification that the Commission does not prejudge in this proceeding the issue of whether PG&E may pass on any costs or benefits of the Duke Settlement to NCPA.[36] As the Commission previously held in the Dynegy and Duke Settlement Orders,[37] disputes involving the Interconnection Agreement are beyond the scope of this proceeding and will not be resolved in this forum. The Commission reiterates this determination on rehearing.

---

[33] Dynegy Settlement Order at P 36.

[34] Duke Settlement Order at P 37.

[35] Dynegy Settlement Order at P 36.

[36] NCPA Comments at 5.

[37] Dynegy Settlement Order at P 36; Duke Settlement Order at P 37.

E. Whether the Commission should require OMOI to allocate $8 million paid by Williams to settle issues attributable to the Pre-Refund Period[38] to all market participants.

25. The Williams Settlement involved payment of $8 million to resolve numerous issues between Williams and OMOI in several non-public investigations identified in the Settlement. Vernon argues on rehearing that, because the $8 million allocated to the Pre-Refund Period is, in part, a settlement of the Commission's investigation of anomalous bidding and physical withholding, the $8 million should be refunded immediately for the benefit of all market participants, not just for those who opt into the Williams Settlement.[39] Vernon correctly asserts that the Williams Settlement Order did not address this issue.

Commission Determination

26. The Commission will deny rehearing. The OMOI has entered into other settlements with other companies resolving investigations into the same practices of other companies, and it has not distributed any money as yet. All of it has been placed in a separate government account pending a future order as to allocation.[40] The Williams Settlement provides that those who opt to join the settlement will receive their allocated share as set forth in the Settlement Agreement. The allocated shares of those who do not opt into the settlement are placed in the same government account pending a future order on allocation.[41] Accordingly, the Commission finds that the Settlement Agreement treats the allocation of settlement funds consistent with how prior settlements in the anomalous bidding and physical withholding proceedings have treated those funds.

[38] Defined in section 1.22 of the Williams Settlement as the period of May 1, 2000 through October 1, 2000.

[39] Vernon at 8-10.

[40] Section 5.6 of the Williams Settlement Agreement *citing* the Commission's proceedings in Docket Nos. EL03-137, *et al.*

[41] *Id.*

F. Whether the Duke Settlement places the risk of default unfairly on non-settling parties.

27. In approving the Duke Settlement, the Commission found that a Duke-PG&E receivables offset contained in section 4.1.1.3 was not unduly discriminatory or unjust and unreasonable. Vernon continues to argue that section 4.1.1.3 of the Duke Settlement is unduly discriminatory because it places the risk of defaults by third parties away from settling parties to non-settling parties. Vernon presents a hypothetical illustration of how it claims non-settling parties will bear the risk of default by third parties.

Commission Determination

28. The Commission will deny rehearing. Apparently, Vernon believes that, because the Commission did not agree with its position, it did not understand it. On the contrary, the Commission sees clearly that Vernon believes the Duke-PG&E receivables offset in section 4.1.1.3 shifts the risk of defaults by third parties to non-settling parties. However, this belief does not survive critical analysis. The offset in section 4.1.1.3 was the result of a 2001 settlement between Duke and PG&E and was intended to resolve a dispute that arose in the context of PG&E's bankruptcy proceeding.[42] PG&E has put into an escrow account subject to oversight by the Bankruptcy Court an amount that is sufficient to pay its obligations to the market. Likewise, the Duke Settlement provides that the risk of shortfalls in revenues will be borne by Duke and the California Parties.[43] Therefore, the Commission finds that the Duke Settlement adequately protects non-settling parties from the risk of default by third parties and finds Vernon's concerns to be without merit. Moreover, as the Commission found in the Mirant Settlement when addressing a similar hypothetical filed in that proceeding: "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 anticipates and provides for the need to protect Non-Settling Parties from the risk of undercollections."[44]

---

[42] *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.

[43] *See* Duke Settlement sections 4.1.3, and 5.11.6.1 through 5.11.6.3.

[44] Mirant Settlement Order at P 64.

G. Whether the Commission erred in not requiring Scheduling Coordinators such as PG&E to flow through refunds under the Dynegy Settlement to their retail customers.

29. In its comments on the Dynegy Settlement, CARE sought a Commission determination that both PG&E and CDWR must pass on any refunds from the Dynegy Settlement to their retail customers. The Commission declined to do so and on rehearing, CARE "is seeking to determine if the FERC is abandoning the field as regards to refunds issued to 'retail customers' and whether or not Petitions for refunds to benefit these customers should more appropriately be made before the CPUC . . . ."[45]

Commission Determination

30. The Commission will state unequivocally that the issue of whether PG&E and CDWR must pass through any refunds received as a result of the Dynegy Settlement to retail customers is a matter for determination by the appropriate state authorities.

IV. Cross-cutting Issues Implicated in Multiple Settlements

A. Whether the Commission erred in not recognizing the unique positions of entities who were net sellers in the CalPX market and net purchasers in the CAISO market.

31. In all three settlements, Vernon has argued that its unique position as a net seller in the CalPX market and as a net purchaser in the CAISO markets has not been taken into account, making it impossible for Vernon to opt into the Settlements. Vernon asserts that, because of the way the Settlements' methodologies net the CAISO and CalPX markets, Vernon would do worse under the Settlements' calculations. It thus reasons that the Settlements are unduly discriminatory vis-à-vis similarly situated entities.[46] NCPA makes a similar plea that its unique circumstances were not recognized by the Commission in its order approving the Williams Settlement.[47] In approving the Settlements, the Commission determined that they were not unduly discriminatory.

---

[45] CARE Motion for Clarification at 2.

[46] Vernon's Williams Rehearing Request at 3-8, 9; Vernon's Dynegy Rehearing Request at 2-4, 9; and Vernon's Duke Rehearing Request at 2-8.

[47] NCPA at 2-8.

Vernon seeks rehearing in all three settlement proceedings, and NCPA seeks rehearing of the Dynegy Settlement on this issue.

Commission Determination

32. Each of the Settlements provided parties such as Vernon and NCPA with an opportunity to evaluate the manner in which refund obligations were established, the allocation of risks and rewards among the settling participants, and a period of time within which to opt into the Settlement or to choose to continue litigating their claims. The Commission finds that these opportunities were provided to all market participants, and a number of entities opted into each settlement within the allotted time frame. Ultimately, each market participant must weigh its own unique circumstances in determining whether the settlements adequately balance the rewards of certainty as contained in a settlement versus the risks of continued litigation. Therefore, the Commission will deny rehearing.

B. Whether APX must opt-into the Williams, Dynegy and Duke Settlements on behalf of its 37 wholesale customers or must they opt in on an individual basis.

33. In each of the Settlements, APX has filed a request for additional time to consider whether to opt-in. APX was a Scheduling Coordinator during the refund period for 37 market participants, and it likens its role in the Refund Proceeding to that of CAISO and CalPX in that it "should merely implement what the CAISO and CalPX process as a result of settlements." APX claims to need more data from the settling parties and commits to continue to work with the settling parties to "determine an appropriate time for APX to address" the settlements.[48] Avista, which did not file an election to opt into any of the Settlements, filed in support of APX's request for sufficient information to make the opt-in determination. For example in the Dynegy proceeding, Avista stated that "Because APX is listed in the attachments to the Dynegy Settlement as a 'Deemed Distribution Participant,' Avista Energy (for whom APX transacted certain trades) may have a substantial interest in supporting the settlement, but more information is needed before such a determination can be made."[49] AEPCO supported APX's request on rehearing in the Williams Settlement, expressing the concern that it was not certain whether it must opt-in on its own or through APX, its Scheduling Coordinator.

[48] APX Dynegy and Duke requests at 3.

[49] Avista Dynegy request at 2

Commission Determination

34. Whether APX may have additional time to opt-in to the Settlements is an issue for the settling parties to determine. In this regard, however, the Commission notes that in the Williams Settlement, MEICO, Inc. sought permission from the Williams Settling Parties to opt in after the opt-in period had elapsed, which request was granted.[50] Moreover, given the passage of time and the recent completion by the CAISO of its refund rerun process, additional data are now available to enable parties to conduct a thorough evaluation of whether they will fare better under the settlements or by continuing to litigate. In the final analysis, however, only the parties to the settlements can determine whether to allow an entity to opt-in after expiration of the period allotted for these decisions.

C. Whether Vernon should be allowed additional time to consider whether to opt into the Dynegy and Duke Settlements.

35. As discussed above, Vernon cites numerous errors and needed clarifications in its requests for rehearing of the Settlement Orders. With respect to Dynegy and Duke, Vernon requested that the Commission allow it additional time after an order on rehearing in these proceedings within which to consider making an election to opt into the Settlements. Presumably, if the Commission were to grant all of its requests for rehearing and/or clarification, Vernon would opt into the Settlements.

Commission Determination

36. As noted above, the decision as to whether Vernon may opt into any of the settlements will depend on the specific provisions in those settlements governing party status and, if there are discretionary rights to elect party status at this point in time, whether the settling parties are amenable to allowing Vernon to opt in.

The Commission orders:

(A) Requests for rehearing are denied and granted as discussed in the body of this Order.

(B) Requests for clarification are denied and granted as discussed in the body of this Order.

[50] Election of MEICO, Inc. at 2.

(C) The CalPX is directed to pay $2,868,558.59 in chargeback funds to Williams and $8,884,042 to the Williams Settlement Escrow, as discussed in the body of this order.

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

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.