

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

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

v.

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

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

EL00-98-000,
et al.

ORDER APPROVING SETTLEMENT AGREEMENT AND RULING ON MOTION

(Issued March 1, 2007)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement and Release of Claims Agreement (collectively, the Settlement) filed on January 5, 2007 in the instant proceedings by Parties¹ to the Settlement. The January 5 filing consists of

¹ Parties include: APX, Inc. (APX); American Electric Power Service Corp.; Avista Energy, Inc.(Avista); Calpine Energy Services, L.P. (Calpine); El Paso Marketing, LP (f/k/a El Paso Merchant Energy, LP); UC Davis Medical Center, owned and operated by the Regents of the University of California; Merrill Lynch Capital Services, Inc.; BP Energy Company; Tractebel Energy Marketing Inc. (n/k/a Suez Energy Marketing NA, Inc.); Aquila Merchant Services, Inc.; Salt River Project Agricultural Improvement and Power District; Allegheny Energy Supply Company, LLC; TransAlta Energy Marketing (US) Inc.; Sempra Energy Solutions LLC; Constellation NewEnergy, Inc.(Constellation NewEnergy); Commonwealth Energy Corporation (n/k/a Commerce Energy, Inc.); Sacramento Municipal Utility District; Morgan Stanley Capital Group Inc.; Enron Energy Services, Inc. (EESI) and Enron Power Marketing, Inc. (EMPI, and together with EESI, Enron or Enron Parties); and Sierra Pacific Industries (collectively, Sponsoring Parties, as discussed *infra* at P 12). Coral Power, L.L.C. (Coral Power), Puget Sound Energy, Inc. (Puget Sound), and Avista are Supporting Parties, as discussed *infra* at P 8.

the “Joint Offer of Settlement and Motion for Expedited Review,” the “Joint Explanatory Statement,” the “APX Settlement and Release of Claims Agreement,” and other supporting documentation, filed pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.² The Settlement resolves certain matters and claims raised in the captioned proceedings relating to APX’s participation in the markets of the California Power Exchange Corporation (CalPX) and the California Independent System Operator Corporation (CAISO) during the period from May 1, 2000 through June 20, 2001 (Settlement Period).

2. The Parties state that the Settlement will terminate if the Commission does not approve it by March 1, 2007 and therefore request that the Commission approve the Settlement without modification by such date. This order approves the Settlement without modification, subject to APX Sponsoring Parties making a compliance filing, as discussed below.

3. In this order, the Commission also acts on EPMI’s July 20, 2006 Motion for Release of Collateral Held by CalPX.³ The terms of the Settlement resolve all objections to this motion. Therefore, the Commission will grant EPMI’s motion, subject to certain provisions of the Settlement being met, as discussed below.

I. Background and Description of the Settlement

4. According to the Parties to the Settlement, APX submitted schedules, bids, and offers for energy and ancillary services in the CalPX and CAISO markets during the time period from October 2, 2000 through June 20, 2001 (Refund Period).⁴ APX based its submissions on schedules, bids, and offers of APX Participants,⁵ in accordance with APX rules. The Parties state that, based on data provided by the CAISO relating to the California Refund Proceeding,⁶ APX will be a net refund recipient for the Settlement

² 18 C.F.R. § 385.602 (2006).

³ See EPMI July 20, 2006 Motion for Release of PX Collateral, Docket No. EL00-95-000, *et al.* and EL00-98-000, *et al.* (EPMI Motion). The collateral that is the subject of this motion will hereinafter be referred to as the PX Collateral.

⁴ The Settlement Period covers both the Refund Period and the earlier period from May 1, 2000 through October 1, 2000 (Summer Period).

⁵ APX Participants are the entities identified in Exhibit A to the Settlement and their respective guarantors. Settlement section 1.7.

⁶ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*

Period. The Parties explain that the Settlement resolves, on a comprehensive and final basis, all disputes and claims among APX Participants regarding appropriate allocation of net refunds due to APX Participants. Further, the Parties state that the Settlement also resolves the potential applicability of refund liability within the APX market itself.

5. The Parties state that the Settlement is a final resolution of Commission proceedings and cases pending before the United States Court of Appeals for the Ninth Circuit, insofar as they relate to actions and transactions of APX and APX Participants during the Settlement Period.⁷ Accordingly, they aver that the Settlement also resolves issues related to APX transactions in the Settlement Period that could be presented to the Commission or to any other trier of fact in the future. The significant terms of the Settlement are summarized in the following section.

A. Settlement Terms

6. Exhibit B of the Settlement and Release of Claims Agreement sets out the allocation of payments and refunds to Parties. The Settlement generally designates Parties as either Net Buyers or Sellers (based on their transactions in the APX market during the Refund Period). Under the Settlement, APX Participants designated as Net Buyers are entitled to refunds, collectively totaling nearly \$63 million. The following funds, to be distributed by APX to APX Payment Recipients (*i.e.*, APX Participants entitled to receive a net payment pursuant to the Settlement) in accordance with Exhibit B (and subject to certain adjustments), will be paid into the APX Escrow Account:⁸ (1) Net Sellers will collectively provide APX with \$1.25 million; (2) the CalPX and the CAISO will pay all refunds, interest on refunds, and Short Payments⁹ owed to APX for APX transactions during the Refund Period; and (3) APX will provide approximately

⁷ See APX Settlement Exhibit C for a list of proceedings to be affected by the Settlement, including pending Ninth Circuit cases, and proceedings pending before the Commission in *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*

⁸ This is a segregated account to be established by APX for the purpose of effectuating the agreements contained in the Settlement. Settlement section 4.5.

⁹ Short Payments are all funds owed to any APX Participant by the CalPX or the CAISO in connection with APX transactions during the Settlement Period. This includes unpaid soft cap reversals and CalPX default payment funds that the CalPX is holding in escrow, and \$234,799 of CAISO Short Payments due to APX Participants for the period from July to August 2001.

\$7.2 million from its accounts.¹⁰ Funds from the APX Escrow Account will be distributed to Net Buyers within ten days of the Settlement's effective date.

7. The Settlement also provides that approximately \$17.3 million will be set aside by Enron for the Enron Settlement Reserve -- an account available to settle the claims of Enron Non-Settling Parties.¹¹ Under the Settlement, the \$17.3 million will be held in escrow by the CalPX, and includes payments from three separate sources: (1) \$11 million from the APX Escrow Account;¹² (2) \$3.5 million from the Enron PX Collateral Account;¹³ and (3) approximately \$2.8 million already set aside in escrow pursuant to the Enron Settlement.

8. As part of the Settlement, the Supporting Parties (Puget Sound, Avista, and Coral Power), *i.e.* parties that filed objections to EPMI's July 20, 2006 motion for release of PX Collateral, discussed below, will withdraw their objections to EPMI's motion so that the PX Collateral may be transferred to the United States Bankruptcy Court for the Southern

¹⁰ The \$7.2 million includes approximately \$5.1 million held in the APX Holding Account (according to Settlement section 1.5, this is the account APX uses to "cash clear" CalPX and CAISO amounts for APX Participants) and approximately \$2.1 million APX is holding as collateral for Enron.

¹¹ Enron Non-Settling Parties are parties that did not settle under the Enron-California Parties Settlement (Enron Settlement) filed with the Commission on August 24, 2005 in Docket No. EL00-95-000, *et al.* and approved in *San Diego Gas & Elec. Co., et al.*, 113 FERC ¶ 61,171 (2005) (Enron Settlement Order), *reh'g denied*, 115 FERC ¶ 61,032 (2006). The definition of Enron Non-Settling Parties has the same meaning in this Settlement as "Non-Settling Participant" does in the Enron Settlement. The Enron Settlement Reserve is available to Enron Non-Settling Parties only if certain refund amounts owed them from EPMI are not paid, due to bankruptcy or otherwise.

¹² The \$11 million due to Enron from the APX Escrow Account will not be subject to any adjustment for any reason under the Settlement, unlike other payments due to Net Buyers, which may be altered on a pro rata basis under circumstances outlined in the Settlement. For example, if Calpine does not obtain the necessary bankruptcy court approval, as discussed in paragraph 9, *infra*, then the amounts paid to Net Buyers shall be reduced on a pro rata basis by the amount of Calpine's contribution to the Settlement.

¹³ The Enron PX Collateral Account contains funds totaling approximately \$142 million (PX Collateral), *i.e.*, the assets held by the CalPX in excess of the Enron Settlement Reserve, plus applicable interest. The PX Collateral represents funds posted by EPMI with the CalPX as collateral for trading activities in the CalPX markets, based on the level of EPMI's trading activities.

District of New York (Enron Bankruptcy Court) for payment to EPMI's creditors.¹⁴ Under the Settlement, the Supporting Parties agree to withdraw their objections in exchange for Enron's agreement to limit its claim in the APX market to \$11 million and to set aside the \$3.5 million from the PX Collateral for the Enron Settlement Reserve.¹⁵

9. Also under the Settlement, Calpine is required to obtain approval of the United States Bankruptcy Court for the Southern District of New York (Calpine Bankruptcy Court)¹⁶ by February 28, 2007.¹⁷ If Calpine does not obtain the required approval, then Calpine, a Net Seller, shall be excluded from the Settlement and the amounts paid to Net Buyers (as reflected in Exhibit B) shall be reduced on a pro rata basis by the amount of Calpine's contribution to the Settlement. In addition, and subject to Calpine Bankruptcy Court approval of the Settlement, APX, Enron, and Constellation NewEnergy agree under the settlement to withdraw their claims against Calpine in its bankruptcy proceedings.

10. Within five business days of the Settlement's effective date, APX is required under the Settlement to initiate actions to opt into the existing global settlements listed in Exhibit F to the Settlement and provide status reports of its efforts to the Net Buyers. Any refunds provided to APX under existing global settlements (should APX

¹⁴ Enron's bankruptcy cases are defined in section 1.22 of the Settlement as, collectively, the cases commenced under Chapter 11 of the Bankruptcy Code (Title 11 of the United States Code) by Enron Debtors (EPMI and EESI) and certain affiliates on or after the Initial Petition Date, styled *In re Enron Corp., et al.*, Chapter 11 Case No. 01-16034 (AJG), Jointly Administered, pending before the Enron Bankruptcy Court.

¹⁵ Under the Settlement, the Supporting Parties will withdraw their objections to EPMI's motion upon establishment of the Enron Settlement Reserve. The Settlement allocates each Supporting Party a specific amount from this account. *See* Settlement, Exhibit D.

¹⁶ Section 1.16 of the Settlement addresses Calpine's bankruptcy proceedings, defining the Calpine bankruptcy cases as, collectively, the cases commenced under Chapter 11 of the Bankruptcy Code (Title 11 of the United States Code) by Calpine Corporation and certain affiliates on or after the initial petition date of December 20, 2005, styled *In re Calpine Corp., et al.*, Chapter 11 Case Nos. 05-60200 (BRL), *et al.*, Jointly Administered, pending before the Calpine Bankruptcy Court.

¹⁷ On February 7, 2007, the Calpine Bankruptcy Court approved Calpine's participation in the Settlement and authorized Calpine to "grant the Settlement Releases as contained in the Settlement Agreement," and to "allocate the Short Payments as provided in the Settlement Agreement." Calpine Bankruptcy Court Order at 2.

successfully opt in) and any refunds applicable to the pre-Refund Period that become available in the future, will be dispersed pro rata to the Net Buyers.

11. Section 6 of the Settlement sets forth the scope of the Settlement and the releases and waivers. Under section 6, Enron and Calpine, subject to approval of the Calpine Bankruptcy Court, agree to release the Parties from any and all claims or obligations under various sections of the Bankruptcy Code. The Parties also agree under the Settlement to release each other from all existing and future claims before the Commission and/or under the Federal Power Act (FPA), and any amendments to the FPA pursuant to the Energy Policy Act of 2005, for the Settlement Period, relating to APX-related claims in the Western electricity markets that the Parties: (1) received unreasonable or unlawful rates, terms or conditions; (2) manipulated the markets in any fashion; and (3) entered into APX transactions when the markets were non-competitive.¹⁸

12. Section 9 of the Settlement provides the Parties' opt-in and exclusion rights. APX Participants¹⁹ that did not execute the Settlement by January 5, 2007 are Subject Parties. Under section 9, a Subject Party may become a Sponsoring Party, and entitled to any benefits of the Settlement, by providing notice on or before the Settlement effective date. Each Subject Party is also given notice and opportunity to show cause why it should be excluded from the Settlement. Under section 9, if the Commission order on the Settlement specifically excludes a Subject Party, then amounts set forth in Exhibit B will be adjusted by APX as appropriate to reflect the deletion, and that Subject Party will no longer be a party to the Settlement. All Subject Parties that do not elect to become a Sponsoring Party and who are not excluded from the agreement shall be deemed to have consented to the Settlement and be bound by its terms.

13. Section 12.5 provides that absent agreement of all Sponsoring Parties to a proposed change, the standard of review for any changes to the Settlement proposed by a Party, a non-party, or the Commission acting *sua sponte* shall be the *Mobile-Sierra* "public interest" standard of review.²⁰

¹⁸ The Parties also agree under section 6 to release each other from claims for civil damages, equitable relief and/or attorneys fees related to various causes of action for the Settlement Period.

¹⁹ See Settlement Exhibit A.

²⁰ *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

14. Section 7 of the Settlement covers necessary approvals. In addition to the Commission's approval,²¹ the Settlement requires the approval of the Enron Bankruptcy Court.²² The Parties request that the Commission approve the Settlement without modification or condition no later than March 1, 2007. The Parties state that prompt approval will avoid the expense, delay, and uncertainty of further litigation, eliminate regulatory uncertainty, and establish financial certainty. This approval date is also dictated by the need to obtain Enron Bankruptcy Court approval of the Settlement in a timely period, so as to enable the cash flows to be effected promptly. The Parties explain that any later approval would result in disbursements not being available until six months later. The Parties state that, pursuant to the Settlement's terms, if the Commission does not approve the Settlement without modification or condition by March 1, 2007, unless the Sponsoring Parties agree to any modification or condition, the Settlement shall terminate and be of no further force and effect.

B. EPMI's Motion for Release of PX Collateral

15. On July 20, 2006, EPMI filed a motion requesting that the Commission direct the CalPX to release the collateral posted by EPMI with the CalPX, asserting that there was no longer a reason for the CalPX to retain the collateral.²³ In its motion, EPMI asserts that it settled its potential refund liability arising from its transactions in the CalPX market in the Enron Settlement, which the Commission approved in November, 2005.²⁴ EPMI states that the Enron Settlement resolves claims by the California Parties and

²¹ According to the Parties, for the Settlement to become effective, and unless this Commission order specifies a contrary finding, the Commission order must be deemed and construed as an order finding and concluding that: (1) the \$17.3 million set aside in the Enron Settlement Reserve is sufficient and adequate to protect the interests of Enron Non-Settling Parties; (2) the allocation of the Enron Settlement Reserve for Supporting Parties appropriately protects their interests and the interests of other Enron Non-Settling Parties; and (3) EPMI's motion for release of the PX Collateral is reasonable, and the CalPX is ordered to release immediately the balance of \$141,952,947 from the Enron PX Collateral Account to EPMI, for payment to its creditors. *See* Joint Explanatory Statement at 7, summarizing Settlement section 2.

²² On January 25, 2007, the Enron Bankruptcy Court issued an order approving the Settlement after determining "that the legal and factual bases set forth in the Motion [for Order Approving Settlement Agreement] establish just cause for relief granted herein and that the Settlement Agreement is fair and reasonable." Enron Bankruptcy Court Order at 1-2.

²³ *See supra* n. 3, citing EPMI Motion.

²⁴ Enron Settlement Order, 113 FERC ¶ 61,171 (2005).

additional claimants against EPMI and its affiliates for refunds, disgorgement of profits, and other monetary and non-monetary remedies in the California Refund Proceeding, the Partnership/Gaming Proceeding (Docket No. EL03-180-000, *et al.*), and the Refund Related Proceedings (including Docket Nos. PA02-2-000 and IN03-10-000). In addition, EPMI states that pursuant to the Enron Settlement, the California Parties have agreed to support EPMI's motion. EPMI lists a variety of parties with whom it has settled, and many of these parties have either agreed to support EPMI's motion or have agreed not to oppose it.²⁵

16. EPMI asserts that EPMI's transactions with the California Parties, who represent 95 percent of the market, have been "billed and settled." EPMI further states that, after 12 additional parties opted-in to the Enron Settlement pursuant to its provisions, EPMI has settled 99 percent of the CalPX Refund Period market and 97 percent of the pre-Refund Period market. As a result of the Enron Settlement and subsequent opt-ins, Enron argues that only \$2,033,742 remains potentially due to Enron Non-Settling Parties out of the consideration received by the California Parties, and this amount has been earmarked for payment to such Non-Settling Parties upon a Commission order determining EPMI's final refund liability with respect to those participants. EPMI states in its motion that in the Enron Settlement Order, the Commission found that the Enron Settlement adequately protects the rights of Enron Non-Settling Parties.²⁶

17. EPMI also states that the Commission has consistently released collateral to CalPX market participants where obligations for refund and other CalPX obligations have been either fully satisfied or otherwise resolved. EPMI lists instances where the circumstances have warranted release of collateral held by CalPX, such as: (1) when the Commission granted the Dynegy/Williams joint motion for release of collateral posted with the CalPX following Commission approval of the Williams and Dynegy settlements,²⁷ and (2) when the Commission directed the release of collateral in

²⁵ Pursuant to the terms of the settlement approved in *Enron Power Marketing, Inc., et al.*, 115 FERC ¶ 61,376 (2006), Commission Trial Staff agreed to support EPMI's motion. EPMI also lists the Nevada Companies (Nevada Power Company, Sierra Pacific Power Company and Sierra Pacific Resources), the SRP Parties (New West Energy Corporation and Salt River Project Agricultural Improvement and Power District), The City of Santa Clara d/b/a Silicon Valley Power, Valley Electric Association, Inc., and the Metropolitan Water District of Southern California as parties that have released all claims for refunds in the CalPX market.

²⁶ EPMI Motion at 7, citing Enron Settlement Order at P 25.

²⁷ See *San Diego Gas & Elec. Co., et al.*, 110 FERC ¶ 61,086 (2005) (Dynegy/Williams Order).

connection with the Duke settlement, where such release was explicitly made part of the settlement.²⁸ According to EPMI, the circumstances present with respect to its collateral, where the Commission has determined that the interests of non-settling parties are protected, and where the process of billing and settling is substantially complete, are similar to the circumstances where the Commission has granted release of collateral,²⁹ and distinguishable from cases where the Commission has declined to order release of collateral posted by CalPX participants. In such distinguishable cases, the Commission found that the process of billing and settling had not been completed.³⁰

18. Therefore, EPMI asserts, the Commission should release the PX Collateral to EPMI, consistent with the Commission practice of doing so when a party has settled the substantial majority of its refund liability, and where the Commission has determined that the interests of non-settling participants are adequately protected. EPMI states that the Enron Settlement and other settlements reached between EPMI and participants in the CalPX market, as well as EPMI's status as a net CalPX buyer, preclude the possibility of refund obligations with respect to its transactions in the CalPX market.

1. Responses to EPMI's Motion

19. Avista, Coral Power, and Puget Sound (*i.e.*, the Supporting Parties in the Settlement) opposed EPMI's motion. Commission Trial Staff and the California Parties filed answers supporting EPMI's motion. The CalPX took a neutral position on EPMI's motion, but raised issues regarding the potential release of the collateral, discussed below.

2. Settlement Terms Related to Release of PX Collateral

20. Settlement section 2.2.3 provides that, subject to the terms and conditions of the Settlement, EPMI's motion for release of the PX Collateral is reasonable and requires the

²⁸ See *San Diego Gas & Elec. Co., et al.*, 109 FERC ¶ 61,257 (2004) (Duke Order).

²⁹ EPMI Motion at 9-11, citing *Dynegy/Williams Order*, *Duke Order*, and *Constellation Power Source, Inc. v. Cal. Power Exchange Corp.*, 100 FERC ¶ 61,124, *reh'g granted*, 100 FERC ¶ 61,380 (2002), *order on reh'g*, 111 FERC ¶ 61,147 (2005), *aff'd sub nom.*, *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14 (2006).

³⁰ *Id.* at 11-12, citing *Powerex Corp. v. Cal. Power Exch. Corp.*, 104 FERC ¶ 61,119 at P 12 (2003); *PG&E Energy-Trading Power, L.P. v. Cal. Power Exch. Corp.*, 102 FERC ¶ 61,091 at P 14 (2003); *Pacific Gas & Electric Co. v. Cal. Power Exch. Corp.*, 109 FERC ¶ 61,027 (2004).

CalPX to immediately release from the Enron PX Collateral Account to EPMI, for payment to its creditors, the balance of EPMI's assets held by the CalPX in excess of the Enron Settlement Reserve, plus applicable interest, in the amount of \$141,952,947.00, plus interest accrued on this amount after November 30, 2006.³¹

21. Settlement section 6.4 addresses the impact of the Settlement on the PX Collateral and states that the Supporting Parties (Avista, Coral Power, and Puget Sound) agree that any objections to EPMI's July 20, 2006 motion for release of the Enron PX Collateral are resolved by the terms of this Settlement. The Supporting Parties also agree to withdraw their objections upon establishment of the Enron Settlement Reserve in accordance with Settlement Exhibit D, and the occurrence of the Settlement effective date.

II. Comments on the Settlement

22. Initial comments on the Settlement were filed by the CAISO, the CalPX, the California Parties,³² APX, NRG Power Marketing, Inc. (NRG PMI),³³ Midway Sunset Cogeneration Company (Midway),³⁴ and East Bay Municipal Utility District (EBMUD).³⁵ Of these initial comments, only the California Parties, the CalPX, and the CAISO raised substantive comments, and only the California Parties submitted comments in opposition to the Settlement. The CAISO supports the Settlement, subject to certain qualifications and clarifications. The CalPX, while it neither supports nor

³¹ According to the Settlement, the \$141,952,947 reflects the balance in the Enron PX Collateral account as of November 30, 2006, plus the Enron Settlement Amount (\$11 million) less the Enron Settlement Reserve (\$14.5 million).

³² The California Parties are Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, the People of the State of California *ex rel.* Edmund G. Brown Jr., Attorney General, the California Electricity Oversight Board, and the California Public Utilities Commission.

³³ NRG PMI supports the Settlement and has elected to become a Sponsoring Party.

³⁴ Midway also elected to become a Sponsoring Party, but states that as to third parties, it is not waiving rights, claims or defenses for the Summer Period and that as a qualifying facility, it is not subject to refund liability under section 206 of the FPA.

³⁵ EBMUD will determine whether to become a Sponsoring Party before the Settlement effective date and reserves all rights, claims, and defenses with respect to its status as a non-jurisdictional public agency that is not subject to refund liability under section 206 of the FPA.

opposes the Settlement, requests clarification of certain actions it would be required to take under the Settlement. Enron and the CalPX filed reply comments.

23. APX Sponsoring Parties³⁶ and the California Parties filed joint reply comments with an APX/California Parties Term Sheet (Term Sheet) attached. In their joint reply comments, the California Parties withdraw their opposition to the Settlement, and request that the Commission approve the Settlement based on the agreed upon terms provided in the Term Sheet, and subject to a compliance filing by APX that implements those terms as a pre-condition to the distribution of any funds to APX. The Term Sheet is also meant to resolve most of the concerns raised by the CalPX and the CAISO in their respective initial comments.

24. APX Sponsoring Parties believe that the Commission should find the Settlement to be in the public interest. They state that the Settlement is fair and balanced as to all APX Participants who will be directly bound by it, and addresses the concerns of each non-APX participant that filed comments on it.

A. Term Sheet Summary

25. Term Sheet section 1 (Determination of Amounts Transferred from the CalPX) acknowledges that all funds initially transferred pursuant to the Settlement will be based on good faith estimates of the amounts APX is entitled to under existing Commission orders, and will include adjustments for all known or likely offsets to refunds or adjustments to receivables. Also, APX and APX Payment Recipients will specify exact dollar amounts to be transferred in the Settlement compliance filing. Section 1 lists certain estimated offsets and adjustments that should be reflected in the initial refund and receivables amounts to be transferred by the CalPX to APX. Finally, section 1 requires the CalPX to pay or credit to the account of the CAISO all amounts owed by APX to the CAISO.

26. Section 2 (True-Ups) provides for true-ups, and the interest rate thereon, to the extent that the initial estimated amounts paid to the APX are greater or less than the final amounts due to APX. Under section 2, any true-up obligations to be paid by APX Net Buyers, through APX, will be paid first from the holdback amount described in Term Sheet section 3.

³⁶ The reply comments list ten Sponsoring Parties, in addition to those listed *infra* at n. 1, who have joined the Settlement since it was filed with the Commission on January 5, 2007. These additional parties are: ACN Power Inc.; Consumer Telcom, Inc. f/k/a Clean Earth Energy, Inc.; Duke Energy Shared Services, Inc. f/k/a Cinergy Services, Inc.; FPL Energy Power Marketing, Inc.; Midway; NRG PMI; Preferred Energy Services, Inc. d/b/a GoGreen; Powersource Corp.; Torch Operating Company; and Turlock Irrigation District.

27. Section 3 (Holdbacks) provides that the amount transferred to APX will be reduced by a holdback equal to \$5 million plus 30 percent of the total estimated interest on APX's refunds and receivables. Pursuant to section 3, this holdback amount will be held in an escrow account managed by APX and will be used for any necessary true-ups pursuant to Term Sheet section 2. This section also allocates responsibility between APX and the Net Buyers for any shortfalls in the holdback amount.

28. Section 4 (Cost Offsets) provides that Avista's cost recovery filing will be reduced by \$400,000 in order to address concerns raised by the California Parties in their initial comments opposing the Settlement. This section also sets up negotiations between the California Parties and the relevant APX Participant should an already-rejected cost filing receive future favorable treatment by the Commission or a court.³⁷ For APX Participants who submit future offset filings in the California Refund Proceeding, they are generally prevented from claiming costs associated with sales transactions via APX.

29. Section 5 (Prior Global Settlements) provides that the California Parties agree to permit APX to opt-in to the prior global settlements listed in Exhibit F to the Settlement, subject to the approval of the necessary global-settlement counter-parties. Also, under section 5 the California Parties will not object to APX being permitted to receive cash payments as a Net Refund Recipient under each prior global settlement, pursuant to a Commission order on the Settlement approving such treatment. However, APX will not be entitled to a cash payment associated with any amounts transferred to the Commission pursuant to a particular global settlement unless the Commission provides for release of such amounts back to the escrow account established for that global settlement.

30. Section 6 (California Energy Resource Scheduler (CERS) Refunds) states that the California Parties dispute that CERS owes refunds in the California Refund Proceeding and reserves certain rights for CERS and the California Parties related to APX and APX Participants. Section 6 also provides that certain monies from the Enron Settlement Reserve will be used to indemnify CERS for refunds paid to APX that result from CERS's sales to the CAISO between January 17, 2001 and June 20, 2001, to the extent funds remain in the reserve after payment to Enron Non-Settling Participants.

³⁷ The California Parties explained in their initial comments (now withdrawn) that the Commission has already rejected multiple proposed cost filings, including Allegheny Energy Supply Company LLC's, El Paso Marketing's, and Merrill Lynch Commodities, Inc.'s, to name a few. *See* California Parties January 19, 2007 Initial Comments at 15, citing, *e.g.*, *San Diego Gas & Elec. Co., et al.*, 114 FERC ¶ 61,070 (2006) (rejecting Allegheny, El Paso, and Merrill Lynch cost filings). The California Parties expressed concerns in their initial comments that the Settlement failed to address the disposition of cost filings other than Tractebel's. *See* Settlement section 4.1.1.4.

31. Section 7 (Modification to Joint and Several Liability of APX for Pre-October Period) states that, to the extent APX is either owed or liable for any refund amounts from the pre-Refund Period, such amounts will be determined on an aggregate basis and handled by APX, rather than by individual APX Participants. Under section 7, if APX is found to owe refunds for this period, APX and its participants will provide a schedule showing, with percentages, the specific APX Participants that will be obligated to pay.

32. Section 8 (Withdrawal of Pleadings) provides that various parties to the Settlement will withdraw any pending pleadings, comments, and petitions at the Commission or the courts of appeal arising from the California Refund Proceeding for the Refund Period, with an exception for certain parties' pleadings related to their respective cost offset filings.

33. Section 9 (APX Non-Settling Party Risk) addresses the risk of parties that are excluded from participation in the Settlement and states that APX shall be solely responsible for resolution of APX-related claims under the Settlement brought by any non-settling APX Participant.

34. Section 10 (California Parties' Reservation of Rights) reserves certain rights for the California Parties against APX Participants and third parties, as to APX-related receivables, refunds, interest or offsets, and for participation in certain existing or future proceedings, such as proceedings addressing issues concerning market structure, market rates, and scheduling rules.

B. Issues Raised in CalPX and CAISO Comments that are Addressed by the Term Sheet

1. Establishing Amounts the CalPX and the CAISO Shall Pay to APX

35. The CAISO expresses concern that its data on APX's position in the CAISO markets, which are being used to make distributions pursuant to the Settlement, are unlikely to be final by the Settlement's effective date of March 1, 2007. Any distribution to APX, explains the CAISO, should reflect the best estimate of the CAISO's liabilities based on available data, but such data are unlikely to be available by March 1, 2007 because: (1) the CAISO has yet to finalize, upload, and determine interest on calculations concerning the allocation of fuel cost allowances and cost filings and may not know the impact of these components on APX by the Settlement's effective date; and, (2) there are a number of issues arising out of the two Ninth Circuit Court of Appeals decisions concerning this proceeding that may significantly affect positions of market participants during the Refund Period. Given these uncertainties, the CAISO proposes to make a best estimate at the time of the Settlement effective date of the financial effects that any outstanding calculations will have on APX. It will apply its

estimate to determine APX's balance, and then "perform a 'true-up' at the time it invoices the results of this proceeding."³⁸

36. The CalPX asserts that, unlike other global settlements in the California Refund Proceeding, this Settlement does not provide a total amount that the CalPX is to pay out, or a formula for calculating the payout amount. The CalPX seeks confirmation from the Commission that APX's suggested basis³⁹ represents the appropriate amount for the CalPX to pay to APX pursuant to section 4.5 of the Settlement. Noting that certain amounts provided in APX's suggested basis may change before payout is ordered, the CalPX also seeks Commission guidance as to whether it should pay APX's suggested amounts pursuant to a Commission order approving the Settlement, or whether its payout to APX should reflect the most current calculations at the time of the payout.

37. The CalPX also states that, while it can calculate interest on the refunds at the Commission rate,⁴⁰ in accordance with Settlement sections 4.1.3 and 4.5(a), the Commission should recognize that this calculation may not approximate the final interest calculation with any degree of accuracy. This is because the estimated refund balance does not include fuel cost or cost recovery offsets, which will decrease APX's estimated credit refund balance because APX was a net buyer during the Refund Period. Without the fuel cost or cost recovery data, the CalPX states that it cannot estimate the degree to which APX's current estimated refund balance will decrease.

38. The APX/California Parties reply that section 1 of the Term Sheet confirms that the Settlement is to be implemented on a "best estimates" basis, and that any amounts paid out will be subject to final adjustment (up or down) upon final settlement of the California Refund Proceeding.

Commission Determination

39. The Commission finds that using "best estimates" to determine the funds initially transferred pursuant to the Settlement is appropriate. The provisions of Term Sheet section 1 sufficiently address the CAISO's concerns about initial calculations as well as the CalPX's concern that its calculation of interest on the refunds might not accurately

³⁸ CAISO January 19, 2007 Initial Comments at 6.

³⁹ *See* CalPX January 19, 2007 Initial Comments at 3, providing the components of the suggested basis.

⁴⁰ The Commission determined in *San Diego Gas & Elec. Co., et al.*, 109 FERC ¶ 61,218, at P 32 (2004), that the CalPX is to calculate interest on refunds and unpaid balances in the manner set forth in the Commission's regulations, 18 C.F.R. § 35.19(a) (2006). CalPX Initial Comments at 5.

approximate the final interest calculation. Term Sheet section 1.2.3 specifically provides that the estimated refund and receivables amounts to be initially transferred shall be adjusted to reflect known and estimated future fuel costs and cost recovery offsets. In addition, the true-up provisions of Term Sheet section 2, as discussed below, will sufficiently account for any inaccurate initial interest calculations.

40. The CalPX requested clarification and/or confirmation from the Commission on whether: (1) APX's suggested basis, as listed in the CalPX's initial reply comments, represents the appropriate amount for the CalPX to pay to APX pursuant to Settlement section 4.5; and (2) the CalPX should pay the estimated refund balances specified by APX, or instead pay to APX an amount that reflects the most current calculations at the time of the issuance of this order. The Commission finds that Term Sheet section 1 sufficiently clarifies these issues by providing that all good-faith best estimate calculations will be subject to verification by APX, the APX Sponsoring Parties, the California Parties, the CAISO, and the CalPX. Moreover, the Term Sheet provides that APX Payment Recipients will jointly specify the dollar amounts to be transferred from the CalPX to APX in the compliance filing on this Settlement. The Commission expects the dollar amounts specified in the compliance filing to reflect accurately the best estimate calculations arrived at and verified by the necessary parties.

41. The Commission's approval of this Settlement is subject to a compliance filing by APX that implements the terms set forth in the Term Sheet, and this filing is a pre-condition to the distribution of any funds to APX.

2. Direct Payment of APX's Debit Balance from the CalPX to the CAISO

42. The CAISO is concerned with the mechanism by which funds will be transferred from the CalPX to APX and states that distribution to APX should reflect the net of its balances in the CAISO and CalPX markets -- APX is a creditor in the CalPX markets (owed approximately \$54 million) and a debtor in the CAISO's markets (owing approximately \$6.2 million). The CAISO asserts that the CalPX should not distribute the full amount of funds it owes to APX without making some provision for the amounts owed by APX to the CAISO markets; otherwise, APX and its participants will have payment priority over non-settling parties. According to the CAISO, the CalPX has agreed, upon approval of the Settlement, to distribute to the CAISO the amount owed by APX (approximately \$6.2 million), based on the CAISO's best calculation of what APX owes to its markets at the time. The CAISO will hold this amount until such time as the Commission orders a distribution.

43. The CalPX agrees to pay APX's approximately \$6.2 million debit balance directly to the CAISO, pursuant to CalPX's understanding that APX and the CAISO have agreed that such distribution is appropriate. Because the Settlement does not expressly provide

for such an arrangement, the CalPX seeks Commission authorization to pay these funds directly to the CAISO.

44. APX Sponsoring Parties state that they agree to this procedure, as evidenced in Term Sheet section 1.2.4.

Commission Determination

45. The Commission authorizes the CalPX to pay APX's CAISO debit balance directly to the CAISO using funds from APX's current credit balance with the CalPX. Payment of such funds shall comply with the Settlement as well as the applicable provisions of the Term Sheet. The Commission finds that these procedures address the concerns raised by the CAISO.

3. True-Up Provisions

46. The CAISO states that the Settlement does not appear to provide for the situation where adjustments to refund calculations, made after Settlement approval, increase APX's or its participants' liability to the CAISO and the CalPX markets. The CAISO seeks Commission clarification that the Settlement does not absolve settling parties from the obligation to pay any additional funds determined post-Settlement approval to be owed to the CAISO markets. The CAISO explains that such clarification is crucial because any shortfalls in payments owed to the CAISO could leave it unable to clear its markets at the conclusion of these proceedings, with CAISO's market participants ultimately bearing such a shortfall pursuant to the CAISO tariff. The CAISO contends that this would unfairly burden market participants that are not a party to the Settlement with obligations incurred as a direct result of APX's participation in the CAISO markets.

47. The CalPX states that the refund calculation proposed by APX is not a final calculation, because it may be revised to include offsets and shortfall allocations and remains subject to future Commission or court orders. However, the CalPX observes that the Settlement does not directly address the issue of which parties will be responsible should the estimated refund payout amounts prove to be overstated based on final calculations.⁴¹ The CalPX therefore requests clarification as to whether it should true-up APX's final account balance so that APX shall pay to the CalPX any overstatement of the payout amount, in addition to the CalPX paying to APX any underestimated payout amount (as already provided for in the Settlement).

⁴¹ The Settlement only addresses how APX shall distribute additional funds.

48. The CalPX also requests clarification as to whether it should true-up the interest paid to APX on the refund amount if the interest it pays under the Settlement is ultimately determined to have been overstated or understated.⁴²

49. According to the APX/California Parties reply comments, these concerns are addressed by Term Sheet sections 2 (True-Ups) and 3 (Holdbacks).

Commission Determination

50. The Commission finds that, pursuant to the provisions of the Term Sheet, the Settlement does not absolve settling parties from the obligation to pay any additional funds determined to be owed to the CAISO or the CalPX markets post-Settlement approval. The Commission agrees that Term Sheet sections 2 and 3 address the CAISO and CalPX concerns and requests for clarification. Further, the timing of any true-ups necessary on APX's final refund balance vis-à-vis the entire CalPX market and on interest paid to APX under the Settlement shall comply with Term Sheet section 2.2 with respect to necessary true-ups.

4. Interest Rate on Refunds

51. The CalPX states that the interest to be paid on the refund balance under the rate specified in Commission regulations⁴³ is higher than the actual earned interest that has accrued on the CalPX Settlement Clearing Account, resulting in an interest shortfall. The CalPX explains that, even with the Settlement providing for a refund interest reserve (or holdback) of 25 percent, there is still an interest shortfall of \$2.901 million. The CalPX asserts that as the California Refund Proceeding continues, the amount of interest shortfall between the Commission interest rate and the actual earned rate will continue to increase. Thus, CalPX seeks Commission verification that it is to calculate interest at the Commission rate on the current estimated refund balance.

52. APX Sponsoring Parties state their belief that the CalPX's concerns are adequately addressed by the true-up and holdback commitments contained in Term Sheet sections 2 and 3, and by the fact that the interest holdback amount has been increased to 30 percent in Term Sheet section 3.1.

⁴² See *infra* at P 85-86, and 94, for further discussion of interest calculations and potential interest shortfalls.

⁴³ See 18 C.F.R. § 35.19(a) (2006).

Commission Determination

53. The CalPX shall calculate interest on the refund balance at the rate specified in Commission regulations.⁴⁴ The Commission agrees that the CalPX's concerns have been adequately addressed by the true-up and holdback commitments contained in Term Sheet sections 2 and 3, and by the fact that the interest holdback amount has been increased to 30 percent in Term Sheet section 3.1.

5. Interest on APX Chargeback Amount

54. The CalPX requests that the Commission clarify whether any interest is to be paid on the \$1,488,239.88 CalPX chargeback that the CalPX is to release under Settlement sections 1.71⁴⁵ and 4.5, and if so, whether the actual earned interest rate should be used. The CalPX explains that while the Settlement specifies only that "applicable" interest be paid on the chargeback amount, CalPX's Plan of Reorganization, approved by the Commission in April, 2003,⁴⁶ provides that:

"Any release of Collateral or distribution of funds to a Claimant from the Claims Segregated Account shall also include, subject to FERC approval, any interest actually earned on the Collateral retained or the funds to be distributed on account of that Claimant's Allowed Claim . . ."⁴⁷

Therefore, the CalPX seeks an express Commission order confirming whether the actual interest rate is to be used.

55. The APX Sponsoring Parties submit that interest should be paid on the APX chargeback amount, and that the actual earned interest rate should be used. Further, they state that payment of interest will be subject to true-up pursuant to Term Sheet section 2.

⁴⁴ *Id.*

⁴⁵ Settlement section 1.71 defines Short Payments. For the full definition, see *supra* n. 9.

⁴⁶ *See Cal. Power Exch. Corp.*, 103 FERC ¶ 61,001 (2003).

⁴⁷ CalPX Initial Comments at 10, *citing* Official Committee of Participant Creditors' of the California Power Exchange Corporation Fifth Amended Chapter 11 Plan, as Modified (Revised October 1, 2002), Exhibit 3 – Allowance and Distribution Procedures, Section C2.

Commission Determination

56. The Commission finds that interest should be paid on the APX chargeback amount, and approves the CalPX's use of the actual earned interest rate because such treatment is consistent with the CalPX's Plan of Reorganization, and the agreement among the APX Sponsoring Parties.

6. CalPX Wind-up Charges

57. The CalPX states that the Settlement does not appear to settle APX's market-wide claims and liabilities and does not address APX's payment of the CalPX's wind-up charges. Therefore, the CalPX explains that it appears that it should continue to charge APX its allocation of CalPX wind-up fees under each approved CalPX rate case.

58. APX Sponsoring Parties state that they do not take issue with the CalPX's assumption that it should continue to charge APX its allocation of CalPX's wind-up fees under each approved CalPX rate case. Further, the APX Sponsoring Parties assert that Term Sheet section 1.2.3(e) does in fact contemplate that the CalPX should reflect in its payout amount under the Settlement its estimate of APX's proportionate share of CalPX wind-up charges.

Commission Determination

59. Based on the representations of the APX Sponsoring Parties and the Term Sheet provisions cited in their reply comments, the Commission finds that the CalPX should continue to charge APX its allocation of CalPX wind-up fees under each approved CalPX rate case.

7. CalPX Accounting for Opt-In to Global Settlements

60. The CalPX seeks Commission confirmation that allocations on behalf of APX under prior global settlements set aside in various settlement clearing accounts that were funded by payments from the CalPX Settlement Clearing Account should be subtracted from the amount the CalPX will be required to pay to APX under the Settlement. If the Commission determines these funds should be subtracted, the CalPX states that it will need to obtain from the California Parties the precise global settlement payout amounts allocated to APX for each settlement, and will need to make appropriate interest adjustments.⁴⁸ The CalPX thus seeks confirmation from the California Parties that \$2,951,657 is the total amount of CalPX cash payouts that have been allocated to APX

⁴⁸ The California Parties assert that the total amount allocated to APX under the global settlements is \$2,951,657, rather than the \$945,837 as originally estimated by the CalPX in its initial comments. CalPX Reply Comments at 3.

under the eight global settlements, including payments to the Commission in resolution of certain investigations.⁴⁹

61. Regarding APX's status under prior global settlements, the CalPX states that it has "learned that APX may have been initially classified as a Deemed Distribution Participant, rather than as a Cash Participant, in error"⁵⁰ in the global settlements listed in Settlement Exhibit F.⁵¹ The CalPX states that if APX's status in any of these settlements is that of a Cash Participant instead of a Deemed Distribution Participant, the Commission should expressly provide for that revision in any order approving the Settlement at issue here. The CalPX explains that the distinction between the two classifications is important for its accounting of the \$2,951,657 in cash payments that were allocated to APX as a Deemed Distribution Participant under the global settlements. The CalPX also explains that it will need to subtract the \$2,951,657 from the total payout to APX under the Settlement, regardless of APX's classification as a Deemed Distribution Participant or a Cash Participant.

62. The CalPX indicates that it paid out \$2,951,657 in cash into the various global settlement escrow accounts for APX as a Deemed Distribution Participant, and that "[i]f APX remains a Deemed Distribution Participant in each of the eight global settlements, then the funds paid by CalPX [into the global settlement escrow accounts maintained by the California Parties] to provide for APX will no longer be needed and should be refunded to CalPX upon the effectiveness of APX's opt-in to each settlement."⁵² The CalPX states that its corresponding credit for its prior Deemed Distribution payments into the respective escrow accounts will correspondingly be eliminated. Therefore, according to the CalPX, if APX remains a Deemed Distribution Participant, then the Commission

⁴⁹ The amount of \$2,951,657 remains subject to confirmation by the California Parties, and any reference to this amount hereafter does not constitute Commission endorsement of the number nor abrogate the necessity of confirmation by the California Parties.

⁵⁰ CalPX Reply Comments at 4.

⁵¹ Under the eight approved global settlements, a Deemed Distribution is an amount credited to a participant under the settlement as an offset to amounts the participant owes to the CalPX or the CAISO. Thus, a Deemed Distribution is not paid to the participant (e.g. APX), but is credited to the amounts that participant owes to the CalPX or the CAISO. The designation as a Deemed Distribution Participant applies regardless of whether the participant was a settling or non-settling party. In contrast, a Cash Participant is entitled to receive settlement payments in cash due to the participant's credit balances with the CalPX and the CAISO.

⁵² CalPX Reply Comments at 5.

should confirm that the California Parties are to return to the CalPX the \$2,951,657 it paid into the various settlement escrow accounts under the global settlements. In addition, the CalPX states that if APX remains a Deemed Distribution Participant, the Commission should specify whether the return of the \$2,951,657 to the CalPX from the settlement escrow accounts should also include interest calculated at the Commission's interest rate.

63. The CalPX explains that, for its settlement escrow account to be cleared properly in the Final Financial Phase of the California Refund Proceeding, the cash payments it made under the global settlements must be correctly accounted for on the CalPX books. The CalPX understands from the California Parties that, with one exception, the various escrow accounts established for each global settlement contain sufficient funds to return the cash paid by the CalPX into the global settlement escrow accounts on behalf of APX. The exception is the Reliant escrow account, which holds \$346,437 in cash allocated to APX. The CalPX states that it paid out \$819,462 in cash on behalf of APX under the Reliant settlement, and the shortfall is apparently attributable to funds transferred to the U.S. Treasury on behalf of the Commission under the terms of the Reliant settlement in resolution of certain Commission investigations. The difference is a cash shortfall of \$473,025.

64. The CalPX explains that if APX opts into the Reliant Settlement and remains a Deemed Distribution Participant, the CalPX clearinghouse accounts will not balance due to the \$473,025 shortfall. In such a case, the CalPX requests that the Commission direct how the shortfall is to be alleviated, and suggests: (1) a return of the funds that had been transferred to the U.S. Treasury on behalf of the Commission; (2) the assumption of the shortfall by the California Parties, which serve as a backstop for amounts owed by Reliant pursuant to the terms of the Reliant settlement section 4.2.2; or (3) some other allocation among participants.

65. APX Sponsoring Parties assert that Term Sheet section 5 deals with some of these concerns. It provides that the California Parties will not object to allowing APX, on behalf of the APX Participants, to opt-in to one or more of the global settlements as a Cash Participant (resulting in early payout of amounts due), rather than a Deemed Distribution Participant (resulting in deferred payout). APX Sponsoring Parties state that this is an important option for them, and that they intend to add this provision to the Settlement in their compliance filing. Also, APX Sponsoring Parties state that Term Sheet section 5.2 confirms that the California Parties will not object to APX filing to recover all or part of APX's proportionate share of the monies paid to the U.S. Treasury

on behalf of the Commission from the Reliant global settlement fund. APX Sponsoring Parties express their intent to make such a request of the Commission in the near future.⁵³

Commission Determination

66. Although the CalPX states that it has “learned” that APX may have been erroneously classified as a Deemed Distribution Participant in prior global settlements, the CalPX provides no explanation of how it learned of such alleged error. Further, no other party has submitted evidence supporting the CalPX’s assertion or demonstrated that APX’s status in any of the global settlements is not as a Deemed Distribution Participant. On the contrary, each of the global settlements listed in Settlement Exhibit F classifies APX as a Deemed Distribution Participant. No party provides the Commission with evidence that APX was indeed erroneously classified in the prior global settlements or provides compelling justification that APX should be reclassified as a Cash Participant. Accordingly, the Commission declines to consider whether to change APX’s status. Therefore, APX will remain a Deemed Distribution Participant for the settlements in which it was classified as such. Should the APX Sponsoring Parties’ compliance filing address the issue of opting-in to one or more of the global settlements as a Cash Participant, as their reply comments indicate, the Commission will consider the arguments raised at that time.

67. The Commission agrees with the CalPX’s concern that the California Parties should confirm whether \$2,951,657 is the total amount of CalPX’s cash payouts that have been allocated to APX under the eight global settlements listed in Settlement Exhibit F. Such confirmation will ensure that any amounts paid to APX by the CalPX pursuant to this Settlement accurately reflect APX entitlements under this Settlement and are in accordance with prior global settlements. Pursuant to Term Sheet section 1.2, all amounts transferred under the Settlement will be subject to verification by, among others, the California Parties. Therefore, the Commission finds that Term Sheet section 1.2 adequately addresses CalPX’s concern as to confirmation of the total amount of CalPX’s cash payouts that have been allocated to APX under the eight global settlements, as these cash payouts will be factored into amounts transferred under the Settlement.

68. As the Commission understands it, the CalPX seeks Commission confirmation that: (1) if APX opts-in to the global settlements, “CalPX should subtract the \$2,951,657 (or other amount confirmed by the California Parties) in total amount in global settlement cash payments from APX’s payout under the APX Settlement;” and (2) “if APX remains a Deemed Distribution Participant, the California Parties should return the \$2,952,657 to

⁵³ APX Sponsoring Parties state that the Commission’s disposition of such a request is not a precondition to this Settlement’s effectiveness. *See* APX/California Parties February 7, 2007 Reply Comments at 7.

CalPX in exchange for the elimination of the CalPX's accounting credits with respect to the global settlements."⁵⁴ It appears to the Commission that the CalPX is requesting to reduce its payout to APX under the Settlement at issue here by approximately \$2.9 million, based on the argument that the CalPX has already paid those funds for APX's benefit under prior global settlements. Thus, for each global settlement APX opts into, APX will receive (or be credited with paying) a portion of that approximately \$2.9 million. Meanwhile, the CalPX seems to be simultaneously requesting a return of funds from the global settlement escrow accounts that have been set aside for APX which are equal to the funds paid by the CalPX on APX's behalf.

69. The Commission agrees that, to the extent the CalPX paid funds on behalf of APX into the escrow accounts of the global settlements listed in Settlement Exhibit F, the CalPX may reduce its payout to APX under this Settlement by such amount. In this regard, the Commission directs the California Parties to confirm the specific total amount of prior payouts the CalPX has made on behalf of APX, as discussed above.⁵⁵ However, the Commission will not direct the California Parties to return to CalPX the funds CalPX paid on behalf of APX that are maintained in the global settlement escrow accounts at this time. The Commission is concerned that, if the CalPX reduces its payout amount to APX under this Settlement by approximately \$2.9 million, then it may in effect double-recover this amount if the Commission also requires the global settlement escrow accounts to refund to CalPX the same approximately \$2.9 million in payments CalPX made on APX's behalf under the prior global settlements. As the approximately \$2.9 million will not be returned to the CalPX from the settlement escrows, the Commission need not consider the interest rate that would be applied to such funds.

70. Regarding the alleged \$473,025 cash shortfall to APX under the Reliant settlement, the Commission finds that any such shortfall will be resolved pursuant to Reliant settlement section 4.2.2, which provides that any additional amounts owed by Reliant from January 1, 2000 through June 20, 2001 become the responsibility of the California Parties (including the California Utilities: PG&E, SCE, and SDG&E). The Reliant settlement sections 6.5.1, 6.5.2, and 6.5.3 further allocate responsibilities for any refund and receivable shortfalls and excesses among the California Utilities.

71. As noted above, the APX Sponsoring Parties state that they intend to file to recover from the Commission all or part of APX's proportionate share of the monies paid to the Commission from the Reliant global settlement fund. They also state that the

⁵⁴ CalPX Reply Comments at 8.

⁵⁵ If APX does not successfully opt-in to certain global settlements, the CalPX shall true-up with APX, pursuant to the provisions of Term Sheet section 2, the amounts represented by those settlements for which APX remains a non-settling party.

disposition of any such request is not a precondition to this Settlement's effectiveness. Therefore, while the Commission will allocate responsibility for the expected \$473,025 cash shortfall under the Reliant settlement, upon APX Sponsoring Parties filing with the Commission to recover such funds, the Commission may reconsider the matter of this initial allocation in light of all information presented with, or in response to, such filing.

C. Settlement Issues Not Addressed in the Term Sheet

1. Extension of Time for Interest Calculation and Payment

72. The CalPX requests sufficient time after the issuance of a Commission order on this Settlement to make the appropriate interest calculations. The CalPX suggests that if the Commission orders interest to be calculated on APX's estimated refund balance, that the principal should be paid out immediately, and the CalPX should be given ten business days to perform the corresponding interest calculations.⁵⁶

73. APX Sponsoring Parties state that they are amenable to this extension.

Commission Determination

74. The Commission will require interest on APX's estimated refund balance to be calculated at the Commission's interest rate, and will also grant CalPX's request for a ten business day extension so that it can make the corresponding interest calculations.

2. "Hold Harmless" Protection for the CAISO and the CalPX

75. The CAISO requests that the Commission state in any order approving the Settlement that the CAISO, along with its directors, officers, employees, and consultants be held harmless with respect to the settlement and accounting activities the CAISO will have to perform in order to implement the Settlement, and will not be responsible for recovering any funds disbursed pursuant to the Settlement that are subsequently required to be repaid. The CAISO asserts that the Commission has approved hold harmless language already for the CAISO and the CalPX in the context of the California Parties' settlements with a number of entities, and that the factors in those settlements that justified holding the CAISO and the CalPX harmless apply with equal force to this Settlement.

76. The CAISO states that, as with previous agreements approved in the California Refund Proceeding, the flow of funds pursuant to the Settlement will require unprecedented accounting adjustments on the part of the CAISO, which will be made

⁵⁶ The CAISO supports the CalPX's proposal for a ten day business window after Settlement approval to complete interest calculations.

under the terms of the Settlement rather than the terms of the CAISO tariff. Moreover, the CAISO contends, because this Settlement arrives prior to final orders in the refund proceeding, Settling Parties' estimates of payables and receivables may not be accurate, and the complexity of the Settlement may generate unforeseen impacts on market participants. The CAISO anticipates that a market participant might file a complaint or bring suit against the CAISO and associated individuals, as a result of its implementation of this complex Settlement. The CAISO further anticipates that, as the Commission approves more settlements in the refund proceeding in addition to the settlements already approved, and the task of implementation becomes more complicated, the problems contemplated here may be amplified. Thus, the CAISO states that it is critically important that the Commission hold the CAISO harmless with respect to implementation of this and other settlements reached in this proceeding.

77. A hold harmless provision would also be appropriate, the CAISO explains, because the CAISO is a non-profit public benefit corporation and it and its officers, employees, and consultants should not be subject to liability for merely implementing a settlement authorized by the Commission. Finally, the CAISO argues, there is nothing in the Settlement that counsels against, or is inconsistent with, granting the CAISO and the individuals associated with it the hold harmless protection it requests.

78. Likewise, the CalPX requests that it should be held harmless for actions it takes to implement the Settlement. The CalPX summarizes its potential exposure under the Settlement as arising from: (1) the requirement to transfer substantial funds from its Settlement Clearing Account; (2) the numerous accounting entries the Settlement requires the CalPX to make; (3) the fact that neither the precise principal and interest payout amounts, nor a calculation formula on which to base the payouts, are specified in the Settlement; (4) the requirement that the CalPX calculate and pay out interest on refund balance calculations that are not final; (5) the fact that fuel cost and cost recovery offsets are not included in the refund balance to be paid out to APX and cannot be estimated at this time since the CalPX has no data on these offsets; and (6) the final market obligations of APX, including wind-up charges, have not been determined by the Commission.

79. The CalPX requests the following "hold harmless" language to be incorporated in any Commission order approving the Settlement:

"The Commission recognizes that CalPX will be required to implement this settlement by paying substantial funds from its Settlement Clearing Account at the Commission's direction. Therefore, except to the extent caused by their own gross negligence, neither officers, directors, employees nor professionals shall be liable for implementing the settlement including but not limited to cash payouts and accounting entries on CalPX's books, nor shall they or any of them be liable for any resulting shortfall of funds or resulting change to credit risk as a result of implementing the settlement. In the event of any subsequent order, rule or

judgment by the Commission or any court of competent jurisdiction requiring any adjustment to, or repayment or reversion of, amounts paid out of the Settlement Clearing Account or credited to a participant's account balance pursuant to the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.”

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

80. APX Sponsoring Parties state that they are agreeable to a hold harmless provision for both the CAISO and the CalPX.

Commission Determination

81. The Commission finds that both the CAISO and the CalPX have provided the Commission with compelling justification as to why they should be held harmless, along with their officers, directors, employees, and consultants, for the steps taken to implement the Settlement. Further, the parties to the Settlement agree to a hold harmless provision. Therefore, consistent with Commission precedent,⁵⁷ the Commission determines that the CalPX and the CAISO shall be held harmless for actions taken to implement the Settlement, and this order will incorporate the “hold harmless” language requested by the CalPX and set out above.

D. Enron Issues Relating to the Settlement and to EPMI's Motion for Release of the PX Collateral

1. Issues Raised by the CalPX Answer to EPMI's Motion

82. The CalPX takes a neutral position on EPMI's motion to release the PX Collateral, but highlights certain factors it believes the Commission should consider in making its decision on the motion. The CalPX states that, to the extent it is directed to release any of EPMI's cash collateral, the CalPX should be held harmless for implementing such an order.

83. The CalPX states that the Commission should consider EPMI a net seller in the CalPX markets, regardless of whether “net seller” is defined using pre- or post-mitigation settlement records, or whether megawatts or dollars are used as the measure of activity.

⁵⁷ See, e.g., *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,071 (2004) (approving hold harmless language in the Dynegy settlement), and *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,257 (2004) (approving hold harmless language in the Duke settlement), *reh'g denied*, 111 FERC ¶ 61,186 (2005).

Also, the CalPX states that the final amount of EPMI's receivables is uncertain due to a number of factors, such as the fact that the Commission has not issued final orders determining "who owes what to whom," and that the Enron Settling Parties' calculations of receivables were not independently verified by the CalPX or the CAISO. The CalPX states that for these and other reasons, the Enron Settlement may have overestimated EPMI's receivables and that in such case, unless the deficiency is made up from another source, the Enron Settlement will necessarily be implemented by drawing on receivables that are due to market participants other than EPMI. Further, the CalPX states that due to uncertainties in the Enron Settlement, the Commission may have to allocate deficiencies among market participants.

84. The CalPX also asserts that if the PX Collateral is released, a Non-Settling Participant's only source of compensation would be a claim in EPMI's bankruptcy case. Nevertheless, the CalPX recognizes that the Commission has broad discretion regarding the collateral and that it can lawfully direct that some portion of the approximately \$142 million in cash collateral be maintained to provide a backstop if the Commission determines such action is appropriate to protect CalPX market participants.

2. Issues Raised in Comments on APX's Settlement

i. Applicable Interest Rate on PX Collateral

85. The CalPX requests "clarification on the 'applicable' interest rate CalPX is to apply to the \$133,957,021.03 in principle cash collateral maintained on behalf of [EPMI] that CalPX is to pay out under [Settlement] section 2.2.3."⁵⁸ The CalPX seeks an express Commission order determining that actual interest earned on the principal is the "applicable" amount that has accrued on the account. The CalPX explains that the Settlement specifies only that "applicable" interest be paid on this amount, and that payment of such applicable interest -- presumably, the actual interest earned on the funds -- is subject to Commission approval.⁵⁹

86. The Enron Parties stipulate and agree that the intent of the Settlement section 2.2.3 is that the Enron Parties be paid the balance of the Enron PX Collateral Account, including actual interest earned on the funds held in that account through the date of distribution by the CalPX under the terms of the Settlement, less the Enron Settlement Reserve. The Enron Parties request that the Commission direct the CalPX to pay actual interest earned on the funds held in the Enron PX Collateral Account.

⁵⁸ CalPX Initial Comments at 10.

⁵⁹ See *infra* P 54-56 for a related discussion on interest to be paid on APX chargeback amount.

ii. Release of the Enron PX Collateral

87. The CalPX states that, while it took a neutral position on EPMI's motion for release of its cash collateral, it did submit an answer to EPMI's motion to provide the Commission and parties with the status of EPMI's position in the CalPX markets and the potential impacts release of the cash collateral would have. The CalPX asserts in its answer that, among other things: (1) the Enron-California Parties Settlement provided that EPMI must reimburse CalPX for any deficiency should the final calculation result in a determination that the remaining Enron receivables are negative; and (2) due to EPMI's bankruptcy, the cash collateral maintained by the CalPX provides the only source from which the CalPX markets can be reimbursed for any obligation of EPMI.

88. The Enron Parties state that, while the CalPX concludes that the cash collateral is the only basis for EPMI to meet any reimbursement obligation to the CalPX, "the reality is that the Enron Settlement Reserve is incremental to other forms of protection that already exist"⁶⁰ for parties with claims remaining against Enron. Enron points out that only three parties (Avista, Coral Power, and Puget Sound) opposed release of the cash collateral and that those parties have joined this Settlement as Supporting Parties, as a means to resolve their objections. Additionally, Enron explains that the Sponsoring Parties and other Enron Non-Settling Parties are protected by the terms of the Enron-California Parties Settlement.⁶¹ Therefore, Enron states that the Commission should find that the Enron Settlement Reserve is sufficient and adequate to protect the interests of Enron Non-Settling Parties.

iii. Wind-Up Charges

89. The CalPX also asserts that the PX Collateral provides the only source available for payment of EPMI's ongoing share of the CalPX's wind-up charges. As part of the Enron-California Parties Settlement,⁶² the CalPX was granted a \$1 million administrative claim for its wind-up fees in the Enron bankruptcy proceeding. However, the CalPX explains, EPMI has incurred over \$1,033,386.76 in wind-up charges through the current rate period, leaving EPMI to owe \$33,382.76. In addition, the CalPX asserts that EPMI

⁶⁰ Enron Parties Reply Comments at 3.

⁶¹ Enron Reply Comments at 3. *See also* Enron-California Parties Settlement sections 6.7 and 6.8, filed August 24, 2005 in Docket No. EL00-95-000, *et al.*, and Enron Settlement Order, 113 FERC ¶ 61,171, at P 22-26.

⁶² *See supra* n. 11.

faces the prospect of additional incurred charges for each future rate period.⁶³ The CalPX states that, to the extent no PX Collateral is maintained to secure EPMI's wind-up charges, the Commission should instruct the CalPX on how to allocate these fees to other participants in the CalPX markets.

90. The Enron Parties state that, for the sole purpose of the Commission order on this Settlement, they are willing to stipulate that the CalPX should be granted an allocation of the Enron Settlement Reserve, not to exceed \$200,000, and subject to all other terms and conditions of the Settlement, for wind-up fees.

Commission Determination

91. The Commission will grant EPMI's motion to release the PX Collateral based upon the finding that the Enron Settlement Reserve is adequate to protect the interests of Enron Non-Settling Parties. In support of this finding, the Commission notes that a significant percentage of claims against Enron for its actions in the western energy markets during the Refund Period and pre-Refund Period have been settled. Moreover, the three parties that opposed EPMI's motion to release the PX Collateral have joined the Settlement at issue here as Supporting Parties and thus can be deemed to have waived their objections. Finally, APX's Settlement is uncontested and no party has suggested that its provisions for Enron Non-Settling Parties are inadequate.

92. Therefore, consistent with Settlement section 2.2.3, the Commission finds that EPMI's motion for release of the Enron PX collateral is reasonable, and the CalPX is ordered to release from the Enron PX Collateral Account to EPMI, subject to the terms and conditions of the Settlement, for payment to its creditors, the balance of EPMI's assets held by the CalPX in excess of the Enron Settlement Reserve (\$11 million plus applicable interest). The amount to be released, per the terms of the Settlement, is \$141,952,947, plus interest accrued on the Enron PX Collateral, as it is defined in Settlement section 1.30, after November 30, 2006. The final amount of collateral to be released to EPMI shall be subject to verification by the CalPX and EPMI, and must comply with the terms of the Settlement. The Commission further finds that establishment of the Enron Settlement Reserve, in accordance with Settlement Exhibit D, is integral to the Commission's decision to grant EPMI's motion.

93. The Commission agrees that the CalPX shall be held harmless for actions it takes in releasing the PX Collateral. The Commission has granted the CalPX hold harmless protection in both the Enron Settlement and the Settlement at issue here. Given that CalPX's release of the PX Collateral is meant to enable the terms of both settlements to

⁶³ Each rate period covers a term of approximately six months. The CalPX states that "EPMI's wind-up charges for each of the last two rate periods have been about \$40,000." CalPX Initial Comments at 12.

be carried out (though it was not a condition of the Enron Settlement), the Commission finds that the CalPX shall be held harmless for actions it takes to release the PX Collateral, in accordance with the gross negligence standard as provided in the CalPX's language, laid out in paragraph 79, *supra*. This gross negligence standard shall apply for actions the CalPX is directed to take in furtherance of this Settlement, which includes release of the PX Collateral.

94. The Commission further directs the CalPX to pay actual interest earned on the funds held in the Enron PX Collateral Account. The Commission finds that this is the appropriate interest rate pursuant to the terms of the CalPX's Plan of Reorganization, as discussed above. Moreover, Settlement section 2.2.3 provides for a specific sum to be paid as of November 30, 2006, and that the amount of interest to be paid in addition to that specific sum shall include interest accrued on the Enron PX Collateral after November 30, 2006.

95. The Commission approves the Enron Parties' stipulation that CalPX should be granted an allocation of the Enron Settlement Reserve, not to exceed \$200,000, and subject to all other terms and conditions of the Settlement. The Commission finds that such allocation of funds exceeds the \$1,000,000 Enron was originally required to pay under the plain language of the Enron-California Parties Settlement.⁶⁴ Because approximately \$165,000 surplus is now allocated for EPMI's wind-up fees, which have been accruing at a rate of approximately \$40,000 per rate period (*i.e.*, every six months), the Commission finds that this \$200,000 allocation is likely to be sufficient to cover EPMI's wind-up fees for the next two years. Given the late stage of the California Refund Proceeding, the Commission will not at this time project beyond the estimated two years covered by EPMI's \$200,000 stipulated allocation to determine how to allocate any future EPMI wind-up costs in excess of the \$200,000.

III. Commission Conclusion

96. In light of the Commission's determinations above, the Commission finds that the Settlement is fair and reasonable and in the public interest; it is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in the California Refund Proceeding or any other proceeding. The standard of review for any modifications to this Settlement requested by a Settling Party that are not agreed to by all Settling Parties shall be the "public interest"

⁶⁴ Enron-California Parties Settlement section 4.2. provides that "[t]he amount Enron is required to pay for its share of [Cal]PX Wind-Up Charges shall be determined by the FERC, but shall not exceed \$1,000,000."

standard under the *Mobile-Sierra* doctrine.⁶⁵ The Commission will also grant EPMI's motion and orders the CalPX to release the PX Collateral, subject to the terms and provisions of the Settlement, as discussed above.

The Commission orders:

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

(B) APX Sponsoring Parties are directed to submit a compliance filing, as discussed in the body of this order, as a pre-condition to the distribution of any funds to APX.

(C) The Commission hereby grants EPMI's motion, as discussed in the body of this order.

By the Commission. Commissioner Kelly concurring with a separate statement attached.
Commissioner Spitzer not participating.
Commissioner Wellinghoff dissenting in part with a separate statement attached.

Magalie R. Salas,
Secretary.

⁶⁵ *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). As a general matter, parties may bind the Commission to the public interest standard. *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993). Under limited circumstances, such as when the agreement has broad applicability, the Commission has the discretion to decline to be so bound. *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir 2006). In this case we find that the public interest standard should apply.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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(Issued March 1, 2007)

KELLY, Commissioner, *concurring*:

The settling parties request that the Commission apply the *Mobile-Sierra* “public interest” standard of review for any future modifications to the settlement proposed by a party, a non-party, or the Commission acting *sua sponte*. The Settlement resolves certain matters and claims raised in the captioned proceedings relating to APX’s participation in the markets of the California Power Exchange Corporation (CalPX) and the California Independent System Operator Corporation (CAISO) during the period from May 1, 2000 through June 20, 2001 (Settlement Period). It involves the exchange of monetary and non-monetary consideration for the settling parties and leaves non-settling participants in the relevant Commission proceedings unaffected. This settlement is uncontested, resolves issues between the parties for a prior period, and does not contemplate ongoing performance under the settlement into the future, which would raise the issue of what standard the Commission should apply in reviewing any possible future modifications. Indeed, in a sense, the standard of review is irrelevant here. Therefore, while I do not agree with the reasoning of the majority regarding the applicability of the *Mobile-Sierra* “public interest” standard of review (*see* footnote 65), I concur with the order’s approval of this settlement agreement.

Suedeen G. Kelly

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(Issued March 1, 2007)

WELLINGHOFF, Commissioner, dissenting in part:

The parties in this case have asked the Commission to apply the “public interest” standard of review when it considers future changes to the instant settlement that may be sought by any of the parties, a non-party, or the Commission acting *sua sponte*.

Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,¹ I believe that it is inappropriate for the Commission to grant the parties’ request and agree to apply the “public interest” standard to future changes to the settlement sought by a non-party or the Commission acting *sua sponte*. In addition, for the reasons that I identified in *Southwestern Public Service Co.*,² I disagree with the Commission’s characterization in this order of case law on the applicability of the “public interest” standard.

Finally, it is worth noting that the standard of review is, in a sense, irrelevant here for the reasons set forth in Commissioner Kelly’s separate statement.

For these reasons, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

¹ 117 FERC ¶ 61,055 (2006).

² 117 FERC ¶ 61,149 (2006).