

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

Docket Nos. EL00-95-191

v.

Sellers of Energy and Ancillary Services

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

EL00-98-176

Puget Sound Energy, Inc.

EL01-10-021

v.

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior and  
Practices in Western Markets

IN03-10-024

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

PA02-2-038

El Paso Merchant Energy, L.P.

EL03-187-006

ORDER APPROVING SETTLEMENT

(Issued June 21, 2007)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement and Release of Claims Agreement (collectively, the Settlement) submitted to the Commission on April 2, 2007 in the above-captioned proceedings by El Paso Marketing

LP<sup>1</sup> (El Paso) and San Diego Gas & Electric Company (SDG&E) (collectively, the Sponsoring Parties). Pacific Gas and Electric Company (PG&E) is a Supporting Party to the Settlement.<sup>2</sup> The Settlement consists of a “Joint Explanatory Statement” and a “Settlement and Release of Claims Agreement” filed pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.<sup>3</sup> The Sponsoring Parties state that the Settlement resolves matters and claims in the above-captioned proceedings relating to El Paso and arising from events and transactions in the Western Energy Markets<sup>4</sup>—including the markets of the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX)—during the period January 1, 2000 through June 20, 2001 (Settlement Period).<sup>5</sup>

2. The Sponsoring Parties state that the Settlement reaches a fair and reasonable resolution of issues between El Paso and Subject Parties.<sup>6</sup> Therefore, the Sponsoring

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<sup>1</sup> f/k/a El Paso Merchant Energy, LP and El Paso Power Services Company.

<sup>2</sup> PG&E is a signatory to the Settlement as a Supporting Party for the sole purpose of resolving disputes regarding implementation of section 5.4 of the Master Settlement Agreement (or MSA), a settlement agreement by and among El Paso Corporation, El Paso Natural Gas Company, El Paso Merchant Energy, L.P. (n/k/a El Paso Marketing, L.P.), and certain other parties, which was filed with the Commission for informational purposes on June 27, 2003 in Docket No. RP00-241-000, *et al.* Settlement sections 1.55 and 1.34 and Joint Offer of Settlement at n.2.

<sup>3</sup> 18 C.F.R. § 385.602 (2006).

<sup>4</sup> The Settlement defines the Western Energy Markets as those markets for electric power in the territories covered by the Western Electricity Coordinating Council, including the California markets. Settlement section 1.57.

<sup>5</sup> The Settlement Period covers various specified periods of time: (1) the Refund Period from October 2, 2000 through June 20, 2001; and (2) the Pre-October Period from May 1, 2000 through October 1, 2000. *See* Joint Explanatory Statement at 7. The Refund Period is further subdivided into a Pre-January 18, 2001 Period (from October 2, 2000 through January 17, 2001) and a Post-January 17, 2001 Period (from January 18, 2001 through June 20, 2001). Settlement sections 1.41 and 1.42.

<sup>6</sup> Subject Parties are those entities identified in Settlement Exhibit A (which lists over 70 entities). Settlement section 1.54. All parties listed in Exhibit A that do not elect to opt out of the Settlement will be deemed to have consented to the Settlement and will be bound by the Settlement’s terms as Subject Parties. Settlement section 10.1.

Parties request that the Commission approve the Settlement. In this order, the Commission approves the Settlement, finding it to be fair and reasonable and in the public interest.

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

3. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA) to investigate, among other things, the justness and reasonableness of rates of public utility sellers into the CAISO and CalPX markets. The dockets in which these inquiries and proceedings are being conducted are defined in the Settlement as the EL00-95 Proceeding. The Sponsoring Parties explain that the Commission established, in an order issued in the EL00-95 Proceeding, the scope and methodology for calculating refunds related to transactions in the spot markets operated by the CAISO and the CalPX during the Refund Period. The parties to the EL00-95 Proceeding, including El Paso and the California Parties,<sup>7</sup> then litigated issues related to the scope of refunds and the refund methodology. These issues are the subject of ongoing proceedings at the Commission and at the United States Court of Appeals for the Ninth Circuit. The Sponsoring Parties state that the Settlement will resolve, as to El Paso and the Subject Parties, refund issues and other claims against El Paso in the “FERC Proceedings.”<sup>8</sup>

4. Pursuant to the monetary consideration provisions listed in Settlement article IV, El Paso, PG&E, and the Subject Parties acknowledge that the unpaid amount of El Paso Receivables is at least \$56,115,677.<sup>9</sup> As of the Settlement’s effective date, El Paso will assign to the Subject Parties \$9,372,577, plus interest, which will be allocated among the

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<sup>7</sup> The California Parties consist of PG&E, Southern California Edison Company, SDG&E, the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, and the California Department of Water Resources acting solely under the authority and powers created by Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in Sections 80000 through 80270 of the California Water Code (CERS).

<sup>8</sup> The Settlement defines the “FERC Proceedings” as the EL00-95 Proceeding, and proceedings in Docket Nos. PA02-2, IN03-10, EL01-10, EL03-187 and the Physical Withholding Investigation, insofar as these proceedings concern El Paso’s sales in the CAISO and/or the CalPX markets and/or sales to CERS during the Settlement Period.

<sup>9</sup> Settlement section 4.1.1.1.

Subject Parties as set forth in the refund allocations in the Allocation Matrix.<sup>10</sup> The CalPX will transfer such funds out of its Settlement Clearing Account and into the El Paso Refund Escrow (an account to be established by El Paso pursuant to Settlement section 4.1.2). The total amount that the CalPX will actually transfer to the El Paso Refund Escrow is \$9,372,577, plus interest, minus all Deemed Distributions under the Settlement,<sup>11</sup> minus a Deferred Distribution amount,<sup>12</sup> plus the amounts owed by Participants with negative allocations under the Settlement,<sup>13</sup> plus interest on those amounts.

5. Pursuant to Master Settlement Agreement (MSA) section 5.4<sup>14</sup> and section 5.4 of this Settlement, El Paso has also agreed to assign to PG&E \$25,500,000, subject to a reduction specified in Settlement section 5.4, and plus interest as detailed in Settlement section 5.3. PG&E has the right to receive the \$25,500,000, subject to reductions, as a cash transfer or as a Deemed Distribution.<sup>15</sup> If PG&E chooses to receive the funds as a

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<sup>10</sup> Settlement section 4.1.1.3. The Allocation Matrix is labeled as Settlement Schedule 4.1.1.3.

<sup>11</sup> A Deemed Distribution is an amount, including interest, credited to a Subject Party or a Supporting Party as an offset to amounts owed to the CalPX and/or the CAISO. The Settlement provides that Subject Parties that are not Net Refund Recipients because they have a net outstanding payable to the CalPX and/or the CAISO, or who owe refunds to these markets for various the Pre-October Period, the Pre-January 18, 2001 Period, or the Post-January 17, 2001 Period are to receive their allocable share of the El Paso Refund as offsets against amounts owed to the CalPX or the CAISO.

<sup>12</sup> Pursuant to Settlement section 5.2.3, refund amounts allocated to Aquila Merchant Services, Inc. (Aquila) shall be retained in the CalPX's Settlement Clearing Account for a period not to exceed six months as a "Deferred Distribution."

<sup>13</sup> Settlement section 4.1.1.4.

<sup>14</sup> *See supra* n.2. The MSA is a part of multi-part settlement that resolved all claims against El Paso Natural Gas Company and El Paso Merchant Energy Company relating to, among other things, any alleged actions that, during the period September 1, 1996 through March 20, 2003, increased or could have increased natural gas prices, natural gas pipeline capacity prices, or electric power prices in California.

<sup>15</sup> Settlement section 4.1.1.2.

cash transfer, the CalPX will transfer such funds to PG&E. In return for the consideration provided in the Settlement between El Paso and PG&E, all claims by PG&E against El Paso related to MSA section 5.4 shall be deemed resolved.

6. Pursuant to Settlement sections 4.1.1.3 and 4.1.1.7, El Paso will receive the residual El Paso Receivables (\$56,111,677 minus amounts to PG&E and Subject Parties, plus amounts owed by Participants with negative allocations under the Settlement, plus interest on those amounts) as a cash transfer from the CalPX no later than 10 business days after the Settlement's effective date.

7. Settlement article V provides for the disposition and allocation of Settlement proceeds. Of the \$9,372,577 allocated for distribution among Subject Parties according to the Allocation Matrix, the Settlement provides that \$7,543,162 is allocable to the Pre-January 18, 2001 Period, and the remainder is allocable to the Pre-October Period. Subject Parties that are "Net Refund Recipients" (*i.e.*, generally, Subject Parties that are owed net refunds after accounting for amounts owed to the CAISO and/or the CalPX for the Settlement Period) will receive their refunds as cash distributions from the CalPX. Subject Parties that have net amounts outstanding to the CAISO or the CalPX are considered Deemed Distribution Participants and will receive their share of the Settlement proceeds in the form of credits against such amounts.<sup>16</sup> Aquila will receive its refunds as a Deferred Distribution pursuant to Settlement section 5.2.3.<sup>17</sup> Article V also addresses interest on funds to be paid out under the Settlement and the allocation of and responsibility for shortfalls and excesses for receivables.

8. Article VI details El Paso's obligation to seek to opt into Subject Parties' global settlements. Pursuant to Settlement section 6.1, El Paso shall seek to opt into the global settlements by the Subject Parties listed in Settlement Exhibit B, and any settlements that may be entered into between the Settlement's execution date and effective date. El Paso shall also opt into each subsequent and substantially similar settlement reached by the California Parties with other suppliers.<sup>18</sup>

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<sup>16</sup> Settlement section 5.2 and 5.2.2.1. *See also* Settlement Schedule 5.2.2.1 for a list of Deemed Distribution Participants.

<sup>17</sup> *See supra* n.12.

<sup>18</sup> This provision is broadly intended to apply to settlements between a seller, the California Parties, and possibly others, in Docket No. EL00-95, *et al.*, that generally resolve refund issues relating to January 1, 2000 through June 20, 2001, or a substantially similar period.

9. Article VII of the Settlement, which addresses CalPX and CAISO accounting, provides authorization for the CalPX and the CAISO to implement the terms of the Settlement, and the steps they shall take to do so. These steps include, *e.g.*, conforming their books and records to reflect the distributions, offsets, transfers, adjustments, and status of accounts provided for in the Settlement; calculating various refund and interest amounts; and their accounting treatment of distributions under the Settlement.<sup>19</sup>

10. Settlement article VIII provides for releases and waivers such as: (1) El Paso and the Subject Parties shall discharge each other from all claims and liabilities during the Settlement Period arising out of or related to transactions by El Paso in the Western Energy Markets; (2) El Paso and the Subject Parties will not contest the amount of refund liability and/or offsets or other relief attributable to El Paso in the EL00-95 Proceeding, the “*Lockyer v. FERC Remand*,”<sup>20</sup> the “*CPUC v. FERC Remand*,”<sup>21</sup> or the other FERC Proceedings; (3) all outstanding challenges to orders in the FERC Proceedings with respect to El Paso shall be deemed withdrawn or waived or released, provided that El Paso may continue to challenge any matter involving prospective mitigation for periods after June 20, 2001, or interest (and parties will likewise be able to assert their positions on those issues); (4) El Paso shall retain all claims and defenses against parties that opt out of the Settlement and El Paso will be solely responsible for refunds owed to such parties; and (5) El Paso and Subject Parties agree to release each other for the Settlement Period from certain claims before the Commission and/or under the FPA, and from certain past, existing and future claims for civil damages and/or equitable relief.<sup>22</sup>

11. The Sponsoring Parties state that the Settlement benefits customers by resolving claims for refunds and other remedies between El Paso and the Subject Parties relating to El Paso’s transactions in the Western Energy Markets during the Settlement Period. They state that Commission approval of the Settlement will avoid further litigation (including El Paso’s rehearing request of the Commission’s order in the EL00-95 Proceeding issued January 26, 2006<sup>23</sup>), provide monetary consideration, eliminate

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<sup>19</sup> See Settlement sections 7.1.1-7.1.4.

<sup>20</sup> *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

<sup>21</sup> *California Public Utilities Commission v. FERC*, 474 F.3d 587 (9th Cir. 2006).

<sup>22</sup> Settlement sections 8.1.1-8.1.2.

<sup>23</sup> *San Diego Gas & Electric Co. v. Sellers of Energy & Ancillary Serv.*, 114 FERC ¶ 61,070 (2006).

regulatory uncertainty, and enhance financial certainty. Accordingly, the Sponsoring Parties request that the Commission approve the Settlement, which will become effective upon approval of the Commission without material change or condition unacceptable to any party.

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

12. Initial comments on the Settlement were due on May 15, 2007 and reply comments were due on May 22, 2007.<sup>24</sup> The CAISO filed initial comments in support of the Settlement and the CalPX filed initial comments neither supporting nor opposing the Settlement. Sacramento Municipal Utility District (SMUD) filed initial comments opposing the Settlement and exercising its right to opt out. El Paso, SDG&E, and PG&E filed joint reply comments.

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

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

14. The CAISO avers that the factors that justified holding the CAISO and the CalPX harmless with respect to other settlements (*e.g.*, the Duke, Williams, Mirant, Enron, PS Colorado, Reliant, APX, IDACORP, Eugene Water Board, APX, and Portland General settlements) apply equally to the instant Settlement. As with previous settlements, the CAISO states, the flow of funds pursuant to the instant Settlement will require unprecedented accounting adjustments by the CAISO, which will not be made under the terms of its tariff, but rather under the Settlement terms. The CAISO contends that a market participant might bring suit against the CAISO and its agents claiming that it did not make the appropriate accounting adjustments and as a result did not arrive at the appropriate amount of funds owing to that market participant. In addition, the CAISO states that, because the Settlement has been filed prior to final orders in the Refund

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<sup>24</sup> See Notice of Extension of Time, April 26, 2007, Docket Nos. EL00-95-000, *et al.*

Proceedings, the Settlement's estimates of payables and receivables may not be accurate, which could result in actions against the CAISO due to unforeseen impacts on market participants. The CAISO states that, as the volume of settlements increase, the task of implementing them will become more complicated and the possibility of an action against one of the market operators will also increase. Further, the CAISO posits that, as a non-profit public benefit corporation, it would not be reasonable to subject its officers, employees and consultants to suits claiming individual liability for engaging in the accounting necessary to implement the Settlement.

15. For these reasons, the CAISO states that it is important that the Commission hold harmless the CAISO, its directors, officers, employees and consultants, for implementation of this Settlement. Finally, the CAISO notes that the Sponsoring Parties have stated in their Joint Explanatory Statement that they do not oppose the Commission adopting hold harmless provisions for the CAISO and the CalPX.<sup>25</sup>

16. Likewise, the CalPX requests that the Commission incorporate in any order approving the Settlement a hold harmless provision. The CalPX states that the Settlement provides that a Commission order approving the Settlement will constitute Commission direction to the CAISO and the CalPX to implement the Settlement. The CalPX states that it and the CAISO each requested to be held harmless in connection with implementing the prior Williams, Duke, Dynegy, Mirant, Reliant, IDACORP, and APX settlements. The CalPX points out that the parties to the Settlement do not oppose a hold harmless provision,<sup>26</sup> and states that a hold harmless provision is necessary and consistent with Commission precedent. In support of its position, the CalPX cites the Commission order approving the Williams settlement, 111 FERC ¶ 61,186 (2005), in which the Commission found that the CalPX and the CAISO provided compelling justification as to why they should be held harmless.

17. The CalPX states that its potential exposure under the Settlement arises from: (1) the requirement to transfer substantial funds from its Settlement Clearing Account; (2) the numerous accounting entries it will be required to make; (3) the fact that the Parties are to supply the amounts to be paid out under the Settlement; (4) the requirement

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<sup>25</sup> CAISO April 23, 2007 Initial Comments at 6, *citing* Joint Explanatory Statement at 11.

<sup>26</sup> CalPX April 23, 2007 Initial Comments at 2, *citing* Joint Explanatory Statement.



that the CalPX pay out interest on refund balance calculations that are not final; (5) the fact that El Paso's final market obligations have not been determined; and (6) the CalPX's payout under the Settlement to a non-CalPX participant (City of Banning).

18. Due to the foregoing factors, the CalPX requests the following "hold harmless" language to be incorporated in any Commission order approving the Settlement:

The Commission recognizes that CalPX will be required to implement this settlement by paying substantial funds from its Settlement Clearing Account at the Commission's direction. Therefore, except to the extent caused by their own gross negligence, neither officers, directors, employees nor professionals shall be liable for implementing the settlement including but not limited to cash payouts and accounting entries on CalPX's books, nor shall they or any of them be liable for any resulting shortfall of funds or resulting change to credit risk as a result of implementing the settlement. In the event of any subsequent order, rule or judgment by the Commission or any court of competent jurisdiction requiring any adjustment to, or repayment or reversion of, amounts paid out of the Settlement Clearing Account or credited to a participant's account balance pursuant to the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.<sup>27</sup>

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

19. In their joint reply comments, El Paso, SDG&E, and PG&E affirm the position taken in their Joint Explanatory Statement that they would not oppose a hold harmless provision for the CalPX and the CAISO.

### **Commission Determination**

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

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<sup>27</sup> CalPX Initial Comments at 3-4.

provision.<sup>28</sup> Therefore, consistent with Commission precedent,<sup>29</sup> the Commission determines that the CalPX and the CAISO shall be held harmless for actions taken to implement the Settlement and this order will incorporate the “hold harmless” language requested by the CalPX and set out above. Further, the CAISO will not be responsible for recovering any funds dispersed pursuant to the Settlement that are subsequently required to be repaid.

### **B. Calculation of Refunds**

21. The CAISO states that Settlement section 7.1.3 provides that the CAISO and the CalPX will calculate the amount of refunds, if any, that El Paso would owe if the Commission’s refund methodology were to be applied for the Pre-October Period (May 1, 2000 through October 1, 2000), and that they will submit these calculations to the Commission at the same time they submit their calculations of refunds for other market participants. The CAISO states that, currently, the Commission’s refund orders only provide for refunds for the Refund Period (October 2, 2000 through June 20, 2001). The CAISO explains that that the Ninth Circuit’s decision, *Public Utilities Commission of California v. FERC* found that the Commission has authority to order adjustments to transactions that occurred during the Pre-October Period and required the Commission to determine whether such adjustments were appropriate, but the Commission has yet to issue a mandate on this decision.

22. The CAISO states that it understands the reference to “if any” in Settlement section 7.1.3 means that the CAISO would be required to calculate refunds relating to the Pre-October Period only if the Commission, in an order on remand, explicitly requires the CAISO to calculate refunds for the Pre-October Period. The CAISO requests that this interpretation be explicitly adopted as part of any order approving the Settlement.

### **Commission Determination**

23. The Commission adopts the CAISO’s interpretation of Settlement section 7.1.3, and confirms that the CAISO will only be required to calculate refunds relating to the

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<sup>28</sup> See Joint Explanatory Statement at 11.

<sup>29</sup> See, e.g., *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,071 (2004) (approving hold harmless language in the Dynegy settlement), and *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,257 (2004) (approving hold harmless language in the Duke settlement), *reh’g denied*, 111 FERC ¶ 61,186 (2005).

Pre-October Period if the Commission explicitly issues an order requiring the CAISO to calculate refunds for this period.

**C. Deemed Distribution Participant Status for Non-Jurisdictional Entity**

24. SMUD objects to the Settlement because, in order to qualify for refunds, non-jurisdictional entities must forfeit their statutory rights. SMUD states that the Settlement provides benefits for parties that settle by providing customers overcharged by El Paso with refunds for the Refund Period and by offering refunds for the Pre-October Period. SMUD explains that it falls into a category of participants designated as Deemed Distribution Participants, which includes non-jurisdictional utilities who are net sellers in one period, net buyers in the other period, but who, on balance “owe” refunds. SMUD explains that, as a Deemed Distribution Participant, it is treated under the Settlement as one of the Subject Parties that is not a net refund recipient because it owes net refunds to the CAISO or the CalPX for the Pre-January 18, 2001 Period or the Post-January 17, 2001 Period.<sup>30</sup> Thus, according to SMUD, in order to receive any refunds at all for the periods where it is a net seller, even “deemed” refunds, it must accept an offer premised on the Commission’s exercise of authority it does not possess.<sup>31</sup>

25. SMUD claims that the terms of the Settlement are unreasonable in two respects. First, SMUD argues that the Settlement forces non-jurisdictional utilities to forfeit their statutory rights in order to receive the benefits of the Settlement because they must pay refunds they do not legally owe in order to receive refunds of overcharges that are legally owed by jurisdictional sellers. SMUD states that the Commission has frowned on “cram down” provisions like these.<sup>32</sup> SMUD states that it is not enough to give parties the right to opt out of the Settlement, and that the Settlement must be rejected as not just and reasonable or otherwise in the public interest.

26. Second, SMUD argues that, by virtue of their status as non-jurisdictional sellers, customers like SMUD are unreasonably distinguished from all other buyers of power in

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<sup>30</sup> *See supra* n.5.

<sup>31</sup> SMUD explains that “the Ninth Circuit has held that the Commission cannot lawfully require governmental entities to refund charges for power that they have sold.” SMUD Comments at 1, *citing Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005).

<sup>32</sup> SMUD Comments at 2, *citing ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992).

the marketplace who made no jurisdictional sales because they alone are required to forfeit their statutory rights in order to participate in the receipt of refunds. SMUD avers that Commission precedent requires that a substantially similar settlement offer be made to similarly situated customers,<sup>33</sup> which has not occurred in this case because SMUD and other non-jurisdictional customers have not been given offers comparable to those extended to other utility refund recipients like PG&E and Southern California Edison. SMUD states that the Commission should reject the Settlement because the opt-out provision does not cure the discrimination.

27. El Paso, SDG&E, and PG&E, in their joint reply comments, contend that SMUD's comments provide no grounds for denying approval of the Settlement and should be dismissed. They note that participation in the Settlement is voluntary and that, if SMUD does not agree with the terms of the Settlement, then it has the choice to opt out—a choice that it has exercised. Accordingly, El Paso, SDG&E, and PG&E argue, SMUD's rights are fully protected and SMUD can continue to litigate against El Paso in the underlying proceedings.

28. El Paso, SDG&E, and PG&E further aver that SMUD's second argument—that the Settlement violates the principle that a substantially similar settlement offer must be made to similarly situated customers—is unfounded and misplaced. They note that neither PG&E nor Southern California Edison is a Subject Party under the Settlement. They also state that if SMUD is not similarly situated to other parties under the Settlement, it need not be given a comparable offer.

### **Commission Determination**

29. The Commission rejects SMUD's comments and finds that the Settlement is fair and reasonable and in the public interest. First, we note that SMUD has elected to opt out of the Settlement and may continue to litigate against El Paso in the underlying proceedings. Because SMUD has chosen to opt out, SMUD has not forfeited its claimed statutory rights. Moreover, if SMUD had elected to participate in the Settlement, SMUD's decision to opt in would not represent a "forfeit of statutory rights," but rather a compromise under which SMUD accepts that it may be a net owner of funds to the CalPX and/or the CAISO (which the Commission does not have the authority to order SMUD to pay<sup>34</sup>) in exchange for the benefits of the Settlement: release of claims against SMUD,

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<sup>33</sup> SMUD Comments at 4, citing *Florida Power & Light Co.*, 70 FERC ¶ 63,017, at 65,088 (1995).

<sup>34</sup> See *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005).

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

30. SMUD also has not demonstrated that it is being treated differently from similarly situated entities. The Settlement designated parties as Deemed Distribution Participants based on whether they have a net outstanding payable to the CalPX and/or the CAISO, or whether they owe net refunds for the various periods covered by the Settlement, as calculated in the evidentiary hearing in the EL00-95 Proceedings.<sup>35</sup> This designation explicitly does not distinguish between jurisdictional and non-jurisdictional market participants. For the foregoing reasons, the Commission rejects SMUD's arguments.

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

The Commission orders:

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

By the Commission. Commissioner Spitzer not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>35</sup> Settlement section 5.2.2.1.