

109 FERC ¶ 61,071
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

v.

Sellers of Energy and Ancillary Services

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

Puget Sound Energy, Inc. Docket No. EL01-10-000, *et al.*

v.

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

Investigation of Anomalous Bidding Behavior and Practices in the Western Markets Docket No. IN03-10-000

Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices Docket No. PA02-2-000

ORDER ON SETTLEMENT AGREEMENT

(Issued October 25, 2004)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement Agreement (collectively, the Settlement) filed on June 28, 2004 in the instant proceedings by the Dynegy Parties,¹ the California Parties,² and the Federal Energy Regulatory

¹ Under the terms of the Settlement, the Dynegy Parties include: Dynegy, Inc., NRG Energy, Inc., and West Coast Power, LLC (on behalf of itself and each of the El

(continued)

Commission's Office of Market Oversight and Investigations (OMOI) (collectively, the Settling Parties). The June 28 filing consists of the "Joint Offer of Settlement," a "Joint Explanatory Statement," a "Settlement and Release of Claims Agreement," and other supporting documentation. This order approves the Settlement, with conditions discussed *infra*. The Commission's action in approving this Settlement will benefit customers by resolving claims against the Dynegy Parties for refunds, price adjustments or other remedies for actions arising out of the Dynegy Parties' sale of electricity and natural gas into California during the period defined in the Settlement Agreement. Approval will avoid further costly litigation, eliminate regulatory uncertainty and bring to a close a number of disputes stemming from the California market disruptions during 2000 and 2001 as they relate to the Dynegy Parties.

I. Background and Description of the Settlement

2. The Settlement resolves all refund issues in the EL00-95, *et al.* proceeding (the Refund Proceeding) and in the EL01-10 proceeding (the PNW Proceeding), as well as claims against Dynegy in Docket Nos. PA02-2, IN03-10, and the Commission's investigation into allegations of physical withholding (the Enforcement Proceedings) insofar as these proceedings pertain to: 1) the Dynegy Parties' sales to the California Independent System Operator (CAISO) and the California Power Exchange (CalPX); and 2) the Dynegy Parties' out-of-market sales to CERS – each occurring within the time frame from January 1, 2000 through June 20, 2001 (collectively, the Settled FERC Proceedings).

3. The Settlement provides an opportunity for all other parties to these proceedings to join the Settlement and become Settling Participants. The Settling Parties state that those electing not to join will not be affected by the Settlement, but they also point out that they will not share in the benefits of the agreement.

Segundo Power, LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC, each a Delaware limited liability company).

² The California Parties include: Pacific Gas & Electric Company (PG&E); Southern California Edison Company (SCE); San Diego Gas & Electric Company (SDG&E); the California Department of Water Resources acting through its Electric Power Fund (CERS), separate and apart from its powers and responsibilities with respect to the State Water Resources Development System; the California Electricity Oversight Board (CEOB); the California Public Utilities Commission (CPUC); and the People of the State of California, *ex rel.* Bill Lockyer, Attorney General.

4. The Settlement is based upon a calculation of the Dynegy Parties' total estimated refund amounts for spot sales in the CAISO and CalPX markets in the Refund Proceeding and allocating them between two time periods: the period from October 2, 2000 through June 20, 2001 (the Refund Period), and the period from January 1, 2000 through October 1, 2000 (Pre-October Period). Exhibit A of the Settlement and Release of Claims Agreement (the Allocation Matrix) sets out the calculation and allocation of refunds and payments to parties to the Refund Proceeding. Exhibit B lists the "Net Payers," *i.e.*, market participants that owe amounts following the allocation of the Settlement Proceeds. Exhibit C lists the "Deemed Distribution Participants," who will receive credits against amounts shown on the Allocation Matrix that they owe to the CAISO or the CalPX.

5. According to the Settling Parties, the allocation percentages are a calculation of how the refunds for this period will be allocated in the current CAISO and CalPX rerun process, based on a rerun of settlements conducted by the California Parties using available CAISO and CalPX data.³ Emissions and fuel cost allocations are based on gross control area load, as the Commission prescribed in prior orders.⁴ The emission and fuel cost allocations may be subject to change based on final Commission orders on rehearing or appeal of the allocation determinations in Docket No. EL00-95, *et al.* By opting into the Settlement, a Settling Participant will receive any refunds and/or payments as set out in the Settlement and in the Allocation Matrix. If a party does not join the Settlement, the Settlement provides that the party can continue to pursue its claims in the Refund Proceeding but it will not receive the benefits of the Settlement. By the same token, the Dynegy Parties can continue to litigate all issues with respect to non-settling parties. Non-settling parties will be paid whatever refunds and amounts, if any, that the Commission or the court ultimately determines are due at the termination of the Refund Proceeding.

6. The Settlement provides for the following payments by the Dynegy Parties covering two periods of time:

Pre-October Period- \$50.93 million will be refunded to the market, which is a negotiated amount allocated by gross load, and it does not include any interest.⁵

³ See Joint Reply Comments of the Dynegy Parties, OMOI and the California Parties (*Joint Reply Comments*) in Support of Offer of Settlement at 7.

⁴ See San Diego Gas & Electric Company, *et al.*, 105 FERC ¶ 61,066 (2003) (October 16 Main Order), *order on reh'g* 107 FERC ¶ 61,165 (2004).

⁵ See Settlement Agreement, Article IV, section 4.4.3.

The Refund Period - \$216 million, which consists of a refund amount minus (or net of) the Dynegy Parties' allowance for fuel and emissions.⁶ These amounts and the allocations for each market participant are shown in the Allocation Matrix. The Allocation Matrix reflects Dynegy's fuel cost allowance at 50 percent of the amount claimed by Dynegy in its May 12, 2003 filing in the Refund Proceeding. The allocation of the fuel and emissions allowances may change, depending on the resolution of pending rehearing requests and further litigation, and the Settlement provides that the allocation of these allowances is subject to a true-up based on a final order on rehearing or appeal in the Refund Proceeding. For Settling Parties and Settling Participants, the overall amount of the gas and emissions allowances is fixed, but the allocation of those costs shown in the Allocation Matrix is subject to change.

In addition, the Settlement provides for additional payments as follows:

EL03-153 Settlement Amount – The Settlement incorporates a prior settlement between the Dynegy Parties and Commission Trial Staff involving the show cause proceedings and call for the Dynegy Parties to pay \$3.01 million in a manner to be determined by a Commission administrative law judge.

CERS Transactions - \$3.6 million would be allocated to CERS to settle its claims against the Dynegy Parties on the issue of whether prices paid by CERS to Dynegy Parties were just and reasonable.

Payment to the California Parties – The Settlement calls for Dynegy to pay the California Parties a sum of \$8 million.

To the extent parties identified in the Allocation Matrix opt not to participate in the Settlement and instead choose to continue litigation, the Settlement provides that 30 percent of the Pre-October Period refunds shall be transferred to another account specified by OMOI to be distributed and allocated by the Commission in its resolution of Docket No. EL03-153.

7. The Settlement provides that, if the amount deposited into the Dynegy Refund Escrow, plus accrued interest, is not sufficient to fund all required cash refunds to Settling Participants, the California Parties shall be responsible for covering the shortfall. On the other hand, if the amount is greater than what is ultimately determined to be

⁶ *Id.* at section 4.2.2.

owing to the market participants, then the remaining balance shall be transferred to the California Parties' Escrow.

8. The Settlement provides that the obligations of the California Parties to cover a refund shortfall are limited: any shortfall will be allocated and paid by the California Utilities on a *pro rata* basis to the extent that the transactions occurred either during the Pre-October Period or during the period from October 2, 2000 through January 17, 2001. If the related transaction occurred during the period from January 18, 2001 through June 20, 2001, CERS will be responsible for the shortfall from the amounts allocated to it through the Settlement.

9. The Settlement calls for the Settling Parties and Settling Participants not to contest refund liability or offsets as they pertain to the Dynegy Parties but would allow the Settling Parties and Settling Participants to continue to assert their respective litigation positions for periods after the Refund Period. In addition, the Dynegy Parties will withdraw their claims against PG&E in the PG&E Bankruptcy proceedings.

10. The Settlement would require the Settling Parties to withdraw or otherwise extinguish all settlement disputes arising from the Eleven Day Contract.⁷ The Dynegy Parties and the California Parties would release and discharge each other from all past, existing and future claims arising at the Commission or under the Federal Power Act (FPA)⁸ arising from the Refund Proceeding and from the claims of market manipulation and economic or physical withholding discussed in the Final FERC Staff Report in Docket No. PA02-2 from the beginning of the Pre-October Period through the end of the Refund Period.

11. Prospectively, the Dynegy Parties will implement the Commission's market rules established in Docket No. EL01-118⁹ and will continue to comply with CAISO Tariff

⁷ The Eleven Day Contract is a letter agreement dated December 5, 2000 between Dynegy Power Marketing, Inc., as agent for West Coast Power LLCs, and the CAISO regarding the sale of energy and ancillary services. *See* sections 1.22 and 1.23 of the Settlement Agreement.

⁸ 16 U.S.C. § 824 (2004).

⁹ In the EL01-118 proceeding, the Commission adopted market behavior rules and procedural guidelines applicable to sellers' market-based rate tariffs and authorizations. *See* Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003), *reh'g* 107 FERC ¶ 61,175 (2004).

provisions regarding must-offer obligations until such time as the Commission approves the termination of such obligations. The Dynegy Parties will retain at their own expense an independent engineering company to perform semi-annual audits of the technical and economic basis, justification and rationale for outages that occur at the Dynegy Parties' generating facilities in California during the preceding six months. The results of these audits will be provided to OMOI without prior review by the Dynegy Parties.

12. Finally, the Settlement provides that the Dynegy Parties will continue to pursue fuel cost allowance claims against non-settling participants. None of the Settling Participants will intervene in or otherwise seek relief or assist any other party's defense against the Dynegy Parties.

13. The effective date of the Settlement is the date upon which the Commission issues an order approving the Settlement without material change or condition unacceptable to any Party. The execution of the Settlement by the CPUC constitutes the required approval as to SCE.

II. Comments on the Settlement

14. The Commission received nine initial comments on the Settlement,¹⁰ and one reply comment.¹¹ Two commenters, the CAISO and the CDWR-SWP, support the Settlement, while five commenters, AEPCO, CARE, NewEnergy, NCPA and Vernon either raise significant concerns with or oppose the settlement. Salt River seeks clarification or modification of the Settlement, alleging that certain provisions are internally inconsistent.¹² Similarly, NewEnergy states that there are "certain technical flaws" in the Allocation Matrix attributed to NewEnergy which it believes are "oversights" and, once corrected will enable it to join the Settlement.¹³ CalPX takes a

¹⁰ Initial Comments were filed by: Arizona Electric Power Cooperative, Inc. (AEPCO); CAISO, CalPX; Californians for Renewable Energy, Inc. (CARE); City of Vernon, California (Vernon); Constellation NewEnergy, Inc. (NewEnergy); and Northern California Power Agency (NCPA); Salt River Project Agricultural Improvement and Power District (Salt River); and the California Department of Water Resources (DWR) State Water Project (SWP), separate and apart from its responsibilities with respect to CERS. The CDWR-SWP comments were filed one day out-of-time.

¹¹ Joint Reply Comments were filed by the Dynegy Parties, the California Parties, and OMOI.

¹² Salt River Initial Comments at 2.

neutral position in these proceedings but it seeks a “hold harmless” provision as it did with respect to another settlement in the Refund Proceedings involving the Williams Companies.¹⁴ CalPX asks that the Commission hold it, as well as its officers, directors and professionals harmless from any liability resulting from steps taken by the CalPX to implement the Settlement.¹⁵

15. Most of the issues raised by the parties opposing the Settlement are familiar to the Commission, having been considered and rejected in the Williams Settlement Order. A common theme is that the Settlement is somehow discriminatory or will have a detrimental effect on parties that choose not to opt into the settlement and pursue the path of continued litigation in the Refund Proceeding. Parties also express concern as to whether the Settlement refund amounts are accurately calculated and fairly allocated. Fuel cost allowance issues are also raised by the Dynegy Parties and by NCPA. The Dynegy Parties filed a request jointly with Williams Power Company, Inc.¹⁶ seeking a waiver of the Commission’s May 12, 2004 Order establishing generic procedures to resolve outstanding fuel cost allowance issues in the Refund Proceeding.¹⁷ NCPA claims that issues related to the ongoing audits to establish fuel cost allowances should be resolved in the context of this Settlement. Finally, several parties have raised other issues in comments on the settlement that will be discussed *infra*.

¹³ NewEnergy Initial Comments at 1 – 2. In their Joint Reply Comments, the Settling Parties indicate their agreement to “work with NewEnergy to verify the underlying data and seek to resolve the error.” Joint Reply Comments at 9.

¹⁴ *See* San Diego Gas & Electric Company, 108 FERC ¶ 61,002 (2004) (the Williams Settlement Order).

¹⁵ CalPX Initial Comments at 2.

¹⁶ Expedited Joint Request of the Dynegy Parties, Williams Power Company, Inc. and the California Parties for Waiver of the Fuel Cost Allowance Filing Requirements, filed June 14, 2004 in Docket Nos. EL00-95-045, EL00-95-083, EL00-95-087, EL00-98-071, EL00-98-074.

¹⁷ San Diego Gas & Electric Co., 107 FERC ¶ 61,166 (2004) (the May 12 Fuel Cost Allowance Order).

III. Discussion

A. Whether the Settlement is unduly discriminatory

Comments

16. Just as it did in comments on the Williams settlement, Vernon alleges that the refund allocation percentages in the Settlement are discriminatory against parties like Vernon. Vernon states that it was a net seller in the CalPX market but was a net purchaser in the CAISO market. Thus, “Dynergy and other net sellers in the [CA]ISO market should owe Vernon refunds,” according to Vernon.¹⁸ However, this is not what would occur under the Settlement, which lists Vernon as a Net Payer.¹⁹ NCPA is in a similar position under the Settlement and it, too, cites this result as one reason why it cannot opt into the Settlement.²⁰ Vernon asserts that its position as a Net Payer is especially egregious because “the allocation percentages for the Settlement, just as they were in the Williams settlement, are only figures agreed to by the settling parties and are not, in fact, the result of an approved Commission refund methodology.”²¹

17. Vernon also claims that it is unfair and discriminatory to allow Settling Parties to receive refunds ahead of parties who choose not to opt into the Settlement, as it provides them with “a preference to receive 100 percent of their payments while non-settling parties may receive only a portion of their shares” if there is a shortfall.²² Moreover, Vernon asserts that it is unfair for the Settlement to allocate only 30 percent of the Pre-October Period refund to an account specified by OMOI in the Non-Settling Reserve for non-settling parties. The Non-Settling Reserve will be allocated and distributed by the Commission in Docket No. EL03-153-000 or as the Commission otherwise directs.

¹⁸ Vernon Comments at 5.

¹⁹ *See* Settlement Appendix A (Allocation Matrix) and Appendix B (list of Net Payers).

²⁰ NCPA Comments at 4.

²¹ Vernon Comments at 4.

²² *Id.* at 9.

Vernon states that it is unfair to limit non-settling parties' potential refund amount in such a way.²³

18. AEPCO asserts that approval of the Settlement will prejudice non-jurisdictional entities such as AEPCO, because it expects the courts to nullify the Commission's assertion of jurisdiction over their wholesale transactions and thereby eliminate any responsibility for refunds.²⁴ In this regard, AEPCO calls on the Commission to "address the predicament of non-jurisdictional sellers such as AEPCO . . . with more specificity and clarity than it did with the Williams Offer."²⁵

Commission Determination

19. The Commission finds that the Settlement is not unduly discriminatory. The Settlement would provide significant benefits, including certainty and finality on major issues, to the Settling Parties. In addition, the Settlement would not adversely affect the interests of those parties that choose to continue to litigate their claims in the Refund Proceeding rather than opt into the Settlement. The Commission disagrees with Vernon and NCPA that the Settlement is somehow inconsistent with the Commission's approved refund methodology. According to the Settling Parties, "the total Settlement refund amount for the Refund Period is the amount they estimate Dynegy will be found to owe for this period under the Commission's existing orders in the Refund Proceeding."²⁶ The Settlement also includes a "true-up" procedure that, according to the Settling Parties, "will assure that the refund amounts received by all Settling Participants reflect the Commission's final approved methodology."²⁷ Thus, the Commission finds that the Settlement, with its true-up procedure, is consistent with the Commission's orders in the Refund Proceeding.

²³ *Id.* at 8, *citing* section 5.3.4.4 of the Settlement Agreement.

²⁴ AEPCO at 1 – 2.

²⁵ *Id.* at 2, *citing* the Williams Settlement Order.

²⁶ Joint Reply Comments at 7.

²⁷ *Id.* at 8.

20. The Settlement anticipates that some parties will choose to continue to litigate rather than join the Settlement, and it creates the Non-Settling Reserve account for such parties. In addition, the California Parties have agreed to bear the risk of shortfalls: Section 5.2.4.4 provides that the California Parties must pay any additional amounts that ultimately may be owed to non-settling participants out of their *pro rata* share of the total proceeds transferred under the Settlement Agreement by the Dynegy Parties. The Commission finds that this provision clearly rebuts any assertion that the Settlement discriminates against non-settling participants by allowing the distribution of funds to Settling Parties first.

21. Vernon's concern that the Non-Settling Reserve account places an unfair limit on its potential refund recovery for the Pre-October Period is misplaced. The Settling Parties point out that the 30 percent figure represents OMOI's estimate of what would have been made available to market participants if OMOI's investigation of anomalous bidding by the Dynegy Parties had run its course.²⁸ Vernon would have no basis for claiming any more than this amount if it pursues continued litigation. In short, Vernon cannot justify its claim of discrimination based upon the distribution of refund amounts under the Settlement when its own potential recovery is anticipated and provided for by the terms of the Settlement.

B. Whether the Settlement refund amounts are fairly allocated and accurately calculated

Comments

22. Although it elected to opt into the Williams settlement, Salt River expresses concern about the true-up provision in section 13.4 of the Settlement, which it alleges "creates uncertainty and appears to conflict with other provisions in the Settlement . . . regarding who bears the risks of shortfalls and the benefits of surpluses when FERC makes a Receivables Determination²⁹ or a Refund Determination."³⁰ Section 13.4 of the

²⁸ *Id.* at 6 – 7.

²⁹ The Settlement defines "FERC Receivables Determination" as "the FERC order, following the Preparatory Rerun Process, establishing the amount of the Dynegy Receivables, regardless of whether such order is subject to requests for rehearing or appeals." *See* Settlement section 1.33.

³⁰ The Settlement defines "FERC Refund Determination" as "the FERC order establishing the amount of refunds or other monetary remedies owed to Non-Settling

Settlement provides that:

13.4 Effect of Subsequent FERC Orders and Appeals. If, as a result of a FERC order on rehearing, reconsideration or remand, or an order by a court of appeals, the FERC Interest Determination, FERC Allowances Determination, FERC Receivables Determination or FERC Refund Determination is changed in any way that changes the calculation of amounts paid under this Agreement or by any Settling Participants other than the Dynegy Parties, then the amounts paid to or from each such Settling Participant shall be subject to true-up among such Settling Participants, by way of refund or surcharge, with interest, to incorporate the change from such prior FERC determination into the calculation of the amounts paid by or to Settling Participants under this Agreement.

Salt River is concerned that the true-up procedure is in conflict with provisions of the Settlement by which the California Parties agree to bear the risk of shortfalls in receivables and refunds and will also share in any surplus in receivables and refunds after refunds are paid.³¹ Salt River states that the true-up language should be modified or clarified to make clear that Settling Participants do not bear the risks of shortfalls in receivables or refunds.

Commission Determination

23. The Commission finds that, under the terms of the Settlement, the true-up procedure is distinct from the Settlement's allocation of the risk of shortfalls in receivables or refunds to the California Parties. According to the Settling Parties:

Under the Offer of Settlement, refund dollars will flow promptly without waiting for final resolutions of various issues at the Commission and in the courts. ... While section 13.4 also deals with other decisions that could affect the settlement, it does not change sections 5.1.3 or 5.2.6, which place certain risks associated with

Participants under this Agreement, regardless of whether such order is subject to requests for rehearing or appeals." *See* Settlement section 1.34.

³¹ Sections 5.1.3 and 5.2.6 of the Settlement specify that the California Parties will make up any shortfalls in receivables and refunds and will retain any surplus in receivables and refunds.

receivables and refunds explicitly on the California Parties. ... In sum, section 13.4 does not shift these shortfall risks associated with receivables or refunds to other Settling Participants.³²

The Commission finds that the language of the Settlement is clear that the California Parties bear the sole risk of shortfalls in receivables or refunds, and that no clarification or modification is necessary.

C. **Whether the Commission should provide clarification to the CalPX regarding the amount of money to be transferred from the CalPX Settlement Clearing Account to the Dynegy Refund Escrow**

Comments

24. In their Joint Reply Comments, the Settling Parties raise an issue that has also been brought to the Commission in requests for rehearing of the Williams Settlement Order.³³ The Settling Parties assert that two “mechanical adjustments” need to be made to the amount specified in the Offer of Settlement that will be transferred from the CalPX Settlement Clearing Account to the Dynegy Refund Escrow.³⁴ Section 5.1.2 of the Settlement Agreement provides a formula for determining the amount, which as of the date of the Settlement was \$169,827,334.31. The Settling Parties state that there are two factors that will affect this total. First, to the extent that the CAISO or CalPX pays the Dynegy Parties any of its unpaid receivables, those CAISO or CalPX payments would reduce, dollar for dollar, the amount to be transferred.³⁵

³² Joint Reply Comments at 9 – 10.

³³ See CalPX Request for Clarification and/or Rehearing of the Williams Settlement Order at 9 – 13.

³⁴ Joint Reply Comments at 11 - 13.

³⁵ See section 1.71 of the Settlement, which defines “Transferred Dynegy Receivables” as “the Estimated Dynegy Receivables minus the Paid Dynegy Receivables.”

25. The second adjustment arises in the context of how to account for the “Deemed Distribution Participants”³⁶ who do not opt into the Settlement. The Settlement provides that only Settling Participants are eligible for Deemed Distributions. According to the Settling Parties, “The \$169,827,334.31 calculation in the Offer of Settlement was based on the assumption that all potential Deemed Distribution Participants will opt into the Settlement Agreement.”³⁷ If a Deemed Distribution Participant does not join the settlement, the amount to be transferred from the CalPX Settlement Clearing Account to the Dynegy Refund Escrow account would be increased by the refund amount listed in the Allocation Matrix for that Participant. This amount “would be held in the Dynegy Refund Escrow to fund, as needed, the payment of refunds to Non-Settling Participants after the FERC Refund Determination.”³⁸

Commission Determination

26. The Commission finds that the two adjustments described by the Dynegy Parties are appropriate. Clearly, the funds transferred from the CalPX Settlement Trust Account to the Dynegy Refund Escrow should be adjusted to account for any unpaid receivables that are paid to the Dynegy Parties since the date of the Settlement Agreement. Likewise, funds attributable to Deemed Distribution Participants that do not opt into the Settlement should be held in the Dynegy Refund Escrow for refunds to Non-Settling Participants pending the determination by the Commission of “who owes what to whom.”

³⁶ Under both the Dynegy and the Williams settlements, “Deemed Distributions” are offsets against the amount a party owes to the CAISO or the CalPX. *See* section 5.2.2 of the Dynegy Settlement. Exhibit C of the Settlement lists the Deemed Distribution Participants.

³⁷ Joint Reply Comments at 12.

³⁸ Joint Reply Comments at 12. *See* section 1.34 of the Settlement, which defines “FERC Refund Determination” as “the FERC order establishing the amount of refunds or other monetary remedies owed to Non-Settling Participants under this Agreement, regardless of whether such order is subject to requests for rehearing or appeals.”

D. Whether the fuel cost allowance audit issues should be addressed in the context of the Settlement

Background and Comments

27. On June 14, Dynegy, Williams, and the California Parties (Joint Movants) filed an Expedited Joint Request for Waiver of the Commission's May 12 Fuel Cost Allowance Order, which established generic procedures to resolve outstanding fuel cost allowance disputes. The May 12 Fuel Cost Allowance Order directed parties seeking to recover their fuel costs to participate in an audit to ensure that fuel costs are properly calculated and verified. According to the Request for Waiver, the Settlement resolves the Dynegy Parties' fuel allowance claim as between the Settling Parties. Inasmuch as the California Parties were the only parties to protest the fuel allowance claims of the Dynegy Parties, the Joint Movants assert that it would be "inefficient and unduly burdensome" to comply with the audit procedures outlined in the May 12 Fuel Cost Allowance Order.³⁹

28. Only NCPA filed a response to the waiver request, opposing "a broader waiver that would release Dynegy and Williams as a general matter from the independent auditor and other requirements of [the May 12 Fuel Cost Allowance Order] simply because they may have settled with some of the parties."⁴⁰ NCPA's comments on the Settlement echo its opposition to the requested waiver, based upon Dynegy's expressed intention "to seek recovery of the full amount of its fuel costs from parties that choose not to participate in the settlement."⁴¹ NCPA asks that the Commission direct Dynegy to participate in the audit in order to seek recovery of any fuel costs from Non-Settling Participants.⁴²

29. The Settling Parties' joint reply comments reiterate their view that the Commission "may need to take appropriate action at a later time to require compliance with all or part of the May 12 Order as it may relate to parties that choose not to opt into the settlements."⁴³ In the meantime, they assert that the Joint Waiver Request is under

³⁹ Joint Request for Waiver at 2.

⁴⁰ NCPA Response to Joint Waiver Request at 1 - 2.

⁴¹ NCPA Comments at 5.

⁴² *Id.* at 5 - 6.

⁴³ Joint Answer at 11, *citing* Joint Waiver Request at 3.

separate consideration by the Commission and independent of the merits of the Settlement. Accordingly, the Settling Parties argue that the issue of the Dynegy Parties' participation in the audit process should not affect or delay the Commission's consideration of the Settlement.

Commission Determination

30. On September 2, the Commission issued an order that granted in part and denied in part the Joint Waiver Request.⁴⁴ The Commission stated that it could not "approve a general waiver of the requirements established by the May 12 Order for any claimant because at least one party has decided not to opt-into the Williams settlement, and others may choose the same course with respect to other pending settlements."⁴⁵ As a result, the Settling Parties have been directed to participate in the audit process, and NCPA's comments on this issue are moot.

E. Other Issues

1. CalPX "Hold Harmless" Request

31. As was the case in the Williams settlement proceedings, the CalPX requests that the Commission hold it, its officers, directors and professionals harmless from any liability resulting from steps the CalPX takes to implement the Settlement.⁴⁶ Although the Settling Parties do not oppose this request, they note that the Commission rejected the request in the order approving the Williams settlement.⁴⁷ CalPX requests that the Commission incorporate the following language in the 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 or willful misconduct, neither CalPX nor its officers, directors,

⁴⁴ San Diego Gas & Electric Company, *et al.*, 108 FERC ¶ 61,219 (2004) (September 4 Order).

⁴⁵ *Id.* at Paragraph 22 (*footnote omitted*).

⁴⁶ CalPX Comments at 2 – 7.

⁴⁷ Joint Reply Comments at 3.

employees or professionals shall be liable for implementing the settlement including but not limited to cash payouts and accounting entries on CalPX's books, nor shall they or any of them be liable for any resulting shortfall of funds or resulting change to credit risk as a result of implementing the settlement. In the event of any subsequent order, rule or judgment by the Commission or any court of competent jurisdiction requiring any adjustment to, or repayment or reversion of, amounts paid out of the Settlement Clearing Account or credited to a participant's account balance pursuant to the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.

Virtually all of CalPX's comments on the Settlement focus on the "hold harmless" issue.

32. CalPX cites several factors as warranting a hold harmless provision: 1) CalPX's continued existence is solely for the purpose of winding up its business affairs ("resolving the extensive litigation arising from the 2000 – 2001 California energy crisis");⁴⁸ 2) it remains subject to significant litigation exposure, which in turn requires it to perpetuate its corporate existence and retain employees, consultants and attorneys to participate in ongoing litigation; 3) it is both difficult to retain officers, directors and other employees if they face liability exposure resulting from a lack of indemnification; and, 4) absence of a hold harmless provision can make insurance premiums more expensive or "simply unavailable." As a result of the costs incurred as a result of ongoing litigation, CalPX states that, because it is not an operating utility, it "would have to continue to collect wind-up rates from its participants for the duration of the litigation." Based on these factors, CalPX asserts that the public interest is not served by requiring CalPX to continue to charge wind-up rates to participate in litigation arising from the implementation of settlements ordered by the Commission for the purpose of resolving and minimizing litigation."⁴⁹

33. CalPX points to section 14.1 of its tariff, which provides that CalPX will be held harmless for its obligations under the tariff. In approving that provision, the Commission found such indemnification provisions to be "reasonable."⁵⁰ CalPX acknowledges that, in taking actions required of it under the Settlement, it will not be acting pursuant to its

⁴⁸ CalPX Comments at 4.

⁴⁹ *Id.* at 4 - 5.

⁵⁰ *Citing Pacific Gas & Electric Co., et al.*, 81 FERC ¶ 61,122 (1997) at 61,519.

tariff; rather it will be acting pursuant to a Commission order approving the Settlement. CalPX also points out that the Settlement itself contains five pages of mutual releases and waivers, “the effect of which is to ‘hold harmless’ the Settling Parties themselves from numerous existing and potential claims.”⁵¹ Finally, CalPX points out that it is the only entity not a party to the Settlement that will be required to disburse cash. As such, CalPX has exposure to third-party litigation “because implementation of the ‘black box’ settlement may result in some participant’s claim that it did not receive its due from the market.”⁵²

Commission Determination

34. The Commission finds that the CalPX has provided the Commission with compelling justification as to why it should be held harmless, along with its officers, directors, employees and contractors, for the steps it takes to implement the Settlement. Particularly persuasive is the fact that, although the CalPX is the only non-party to the Settlement that will be disbursing cash under the terms of the Settlement, it is not protected by the same indemnities that Article VII of the Settlement Agreement provides for the Settling Parties. The Commission thus determines that CalPX shall be held harmless for actions taken to implement the Settlement and this order incorporates the language requested by CalPX and set out in Paragraph 31, *supra*.

2. NCPA’s Concern about PG&E’s Participation in the Settlement

35. NCPA’s comments on the Settlement reflect concerns that appear to arise principally from its relationship with PG&E, which serves as NCPA’s Scheduling Coordinator in the CAISO markets. NCPA is a load-serving entity and a public agency engaged in the generation and transmission of electric power and energy. From May 2000 to June 20, 2001, NCPA operated in California under the terms of an Interconnection Agreement with PG&E that terminated August 31, 2002.⁵³ NCPA expresses the concern that, by entering into the Settlement, PG&E is settling claims arising from its role as Scheduling Coordinator on behalf of its wholesale customers in the CAISO markets without providing them with the opportunity to opt in or not.⁵⁴ As a

⁵¹ *Citing* Article VII of the Settlement Agreement.

⁵² CalPX Comments at 7.

⁵³ NCPA Comments at 3 - 4.

⁵⁴ *Id.* at 2.

result, NCPA claims that it does not have sufficient information with which to make a determination on whether to opt into the Settlement.

36. The Commission does not believe that NCPA's comments require modification to or delay in our consideration of the merits of the Settlement. PG&E was acting within its authority as Scheduling Coordinator for its wholesale customers when it entered into the Settlement. The Commission's review of the Interconnection Agreement leads to the conclusion that it does not require PG&E to notify NCPA in advance of entering into a settlement such as the Settlement at issue here. In any event, NCPA as a CalPX participant in its own right, has the opportunity to evaluate and to opt into the Settlement or to continue litigation if it so chooses. Finally, it is disingenuous to assert, as NCPA has, that it does not have sufficient information with which to make a determination as to whether it should opt into the Settlement. The Settlement Agreement, the Allocation Matrix and supporting documentation, as well as the voluminous record of the Refund Proceeding, provide ample bases for making such a determination.

3. Whether the Commission should direct that any refunds issued to PG&E must be passed directly to the California ratepayers

37. CARE and NCPA take different positions on whether the Commission should direct PG&E as to how it must allocate any refunds it receives. NCPA asks that the Commission clarify that "if PG&E fails to do so the question of whether PG&E can pass along costs or benefits to NCPA not be decided implicitly or explicitly in this forum."⁵⁵ The Commission infers that NCPA does not seek a determination as to whether PG&E must pass through any refunds it receives to customers such as NCPA. On the other hand, CARE seeks a Commission determination that both PG&E and CDWR must pass on any refunds from the Settlement to retail customers.⁵⁶

38. The Commission reminds NCPA and CARE that its statutory mandate under the FPA requires it to ensure that prices paid for transmission services and electric power are just and reasonable.⁵⁷ The crux of the Refund Proceeding, from which this Settlement stems, is that California wholesale markets were dysfunctional and subject to market

⁵⁵ *Id.* at 7.

⁵⁶ CARE Request for End User Pass Through Agreement and Comments and Objections at 5 – 8.

⁵⁷ 16. U.S.C. §§ 824d - 824e (2004).

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manipulation that had an adverse impact on the prices paid by wholesale customers. Providing remedies for those wholesale customers is at the heart of the Refund Proceeding. That said, the Commission does not have the authority to dictate whether wholesale customers must pass on to their retail customers the benefits of those refunds or related settlements, such as the instant Settlement,.

The Commission orders:

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

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

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

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

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.