

1. In this order, the Commission approves a joint settlement filed on May 12, 2008 in the above-captioned proceedings between NEGT Energy Trading-Power, L.P. (ET Power) and NEGT Energy Trading Holdings Corporation (ET Holdings) (together, the ET Parties), and the California Parties¹ (collectively, the Parties) resolving claims arising from events and transactions in western energy markets during the period from December 13, 1995 through June 20, 2001 (Settlement Period) as they may relate to the ET Parties.² The Settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement).

2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.³ The Parties note that, with the exception of certain provisions, the Settlement became effective on May 8, 2008 (Execution Date).⁴ The Parties state that some of the Settlement’s provisions will become effective on the latest of the dates on which the Commission, the CPUC, and the Bankruptcy Court⁵ approve the Settlement.⁶ The Parties state that the Settlement shall terminate if the Commission

¹ The California Parties are Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E), the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, and the California Public Utilities Commission (CPUC). For purposes of this Settlement, the term “California Parties” also includes the California Electricity Oversight Board and the California Department of Water Resources (CERS) acting solely under the authority and powers created by California Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in sections 80000 through 80270 of the California Water Code.

² *See* Joint Offer of Settlement at 2.

³ 18 C.F.R. § 385.602 (2008).

⁴ *See* Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement, Cover Sheet, item 1.40; Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.40.

⁵ Under the Settlement, Bankruptcy Court means the United States Bankruptcy Court for the District of Maryland (Greenbelt Division). *See* Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.8 and 1.10. The Bankruptcy Court issued an order approving the Settlement on July 28, 2008. *See In re National Energy & Gas Transmission, Inc., et al.*, No. 03-30459 (Bankr. D. Md. July 28, 2008)

⁶ *See* Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.92, 1.98, 2.2, and 9.1.

or the Bankruptcy Court rejects the Settlement or accepts it with modifications deemed unacceptable to an adversely affected Party.⁷

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty. The Parties state that the Settlement reaches a fair and reasonable resolution of the issues between the ET Parties and other settling parties, and protects the rights of parties that opt-out of the Settlement. The Parties note that the Commission and the United States Court of Appeals for the Ninth Circuit have encouraged settlements of claims related to transactions in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) markets in the 2000 and 2001 time period.⁸ The Parties, therefore, request Commission approval of the Settlement.

4. As discussed further below, the Commission approves the Settlement.

Background and Description of Settlement

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)⁹ to investigate, among other things, the justness and reasonableness of public utility sellers' rates in the CAISO and CalPX markets (Docket Nos. EL00-95-000 and EL00-98-000). In 2002, the Commission directed Staff to commence a fact-finding investigation into the alleged manipulation of electrical and natural gas prices in the west (Docket No. PA02-2-000). Also, in 2003, the Commission directed Staff to investigate anomalous bidding behavior and practices in western markets (Docket No. IN03-10-000).

6. The Parties state that, subject to certain exceptions, the Settlement resolves all claims related to the FERC Proceedings,¹⁰ and the Commission proceedings conducted

⁷ See Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement, General Terms and Conditions, section 2.4.

⁸ See Joint Offer of Settlement at 5 (citing *Public Utilities Commission of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002); *Public Utilities Commission of Cal. v. FERC*, No. 01-71051, *slip op.* at 3 (9th Cir. Oct. 23, 2006)).

⁹ 16 U.S.C. § 791a (2006).

¹⁰ For the purposes of the Settlement, the term "FERC Proceedings" means the proceedings in Docket Nos. EL00-95, EL01-10, IN03-10, and PA02-2 to the extent that the proceeding in Docket No. PA02-2 concerns ET Power's sales in the western energy markets and sales to CERS during the Settlement Period. The term also includes the Gaming/Partnership Proceeding, the ISO Re-Run Proceeding, and the Physical Withholding Investigation. See Settlement and Release of Claims Agreement, General (continued...)

pursuant to the decisions of the U.S. Court of Appeals for the Ninth Circuit in *Lockyer v. FERC, BPA v. FERC*, and *CPUC v. FERC* (collectively, the Settled Proceedings) between the ET Parties and the “Settling Participants.”¹¹ The Parties define “Settling Participants” as the California Parties and the Additional Settling Participants.¹² According to the Parties, any entity that sold or purchased energy in the western energy markets that does not opt-out of the Settlement is an Additional Settling Participant.¹³ The Parties state that an entity may opt-out of the Settlement by:

1. providing written notice that it opts out of the Settlement to each person designated on the ListServs established for the EL00-95 Proceeding and the Gaming/Partnership Proceeding;¹⁴ and
2. sending written notice to the ET Parties of the entity’s good faith estimate of the liquidated amount that it claims to be owed by each of the ET Parties.¹⁵

7. The Parties explain that an entity that opts out will become a Non-Settling Participant. The Parties claim that the Settlement will not affect the rights of Non-Settling Participants to pursue their claims in the Settled Proceedings, and that a Non-Settling Participant will remain entitled to any refunds that the Commission and the Bankruptcy Court ultimately determine are owed to the entity. The Parties note,

Terms and Conditions, sections 1.45 and 1.101; Settlement and Release of Claims Agreement, Cover Sheet, item 1.101.

¹¹ See Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.13, 1.30, 1.64, and 3.1.

¹² See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.100.

¹³ See Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.1.

¹⁴ Under the Settlement, Gaming/Partnership Proceedings means the proceedings in FERC Docket Nos. EL03-137, *et al.*, and EL03-180, *et al.*, and any related appeals and/or petitions for review and any proceedings on remand. See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.52.

¹⁵ See Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement, General Terms and Conditions, section 8.1.

however, that Non-Settling Participants will not be guaranteed the benefits of the Settlement.¹⁶

8. The Parties state that, subject to certain deductions, ET Power will allow the CalPX and the CAISO to release the following assets, which are assigned to the California Parties under the Settlement, to an escrow account established by the California Parties (Settling Supplier Refund Escrow): 1) ET Power's unpaid receivables and associated interest held in the accounts of CalPX and the CAISO, estimated to be \$20,780,893 and \$11,419,347, respectively; 2) ET Power's CalPX cash escrow account balance, estimated to be \$38,185;¹⁷ and 3) the CAISO Collateral Balance¹⁸ of \$9,368,196.¹⁹

9. The Parties explain that ET Power assigns its right to all refunds, interest, credits and other payments that ET Power is or becomes entitled to receive after the Effective Date to the California Parties, which shall be deposited into an escrow account established by the California Parties (California Litigation Escrow).²⁰ The Parties state that CalPX shall also deposit the proceeds of the following allowed claims into the California Litigation Escrow: 1) a claim for \$19,000,000 secured by a letter of credit issued by M&T Bank on November 1, 2005 on behalf of ET Power; 2) a claim for \$9,000,000 secured by the proceeds of the PG&E Corporate Guarantees; 3) a claim for \$5,000,000 secured by the proceeds of a surety bond issued by American Home

¹⁶ See Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.68, 3.2, 5.5, 7.1.1, 7.5.2, 8.2 and 8.4.

¹⁷ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.20; Settlement and Release of Claims Agreement, Cover Sheet, item 4.1.3.2.

¹⁸ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.60.

¹⁹ See Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 4.1, 4.1.1.1, 4.1.1.2, 4.12, 4.1.3, and 4.1.4; Settlement and Release of Claims Agreement, Cover Sheet, items 4.1.3.1(b), 4.1.3.1(c), 4.1.3.2, and 4.1.3.3.

²⁰ See Settlement and Release of Claims Agreement, General Terms and Conditions, sections 4.1.4.1 and 4.1.4.2.

Assurance on November 12, 1999; and 4) a \$20,000,000 unsecured claim.²¹ According to the Parties, the California Parties will distribute the funds in the California Litigation Escrow among themselves in accordance with a separate agreement among the California Parties (Allocation Agreement).²²

10. The Parties declare that for the purpose of allocating the Settlement's monetary consideration, ET Power shall be deemed to have provided a refund of \$54,527,119.²³ The Parties explain that, under the Settlement, an entity's refund position is calculated over three periods: May 1, 2000 to October 1, 2000, October 2, 2000 to January 17, 2001, and January 18, 2001 to June 20, 2001.²⁴ The Parties state that each Settling Participant shall be allocated its share of the refunds in accordance with the Settlement's Allocation Matrix.²⁵ The Parties state that an estimated amount of interest, adjusted for an estimated Interest Shortfall on Refunds,²⁶ will be distributed to the Settling

²¹ See Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.63, 1.76, 1.107, 4.1.5.1, 4.1.5.2, 4.1.5.3, and 4.1.5.4.

²² See Settlement and Release of Claims Agreement, General Terms and Conditions, section 5.4.

²³ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 5.1; Settlement and Release of Claims Agreement, Cover Sheet, item 5.1(e).

²⁴ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 5.1; Settlement and Release of Claims Agreement, Cover Sheet, items 5.1(a), 5.1(b), and 5.1(d).

²⁵ See Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 5.1 and 5.2.

²⁶ The Settlement defines "Interest Shortfall on Refunds" as those amounts of the Interest Shortfall allocated to Participants (including Deemed Distribution Participants) that are allocated refunds. See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.58. Further, the Parties state that "Interest Shortfall" is the difference between the interest actually earned on funds held by the CalPX and the CAISO and the interest that would be earned through application of the FERC Interest Rate, which is the interest rate prescribed in 18 C.F.R. § 35.19a(a)(2)(iii) or any successor provision. Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.44 and 1.57.

Participants at the same time that the principal amounts are distributed.²⁷ The Parties explain, however, that there will be a true-up of the interest and Interest Shortfall distributions to Settling Participants after the Commission determines the amount of Interest Shortfall allocable to different entities based on the CAISO and CalPX settlement reruns and refund calculations.²⁸

11. The Parties explain that each California Party that is a Net Refund Recipient²⁹ will receive cash distributions from the California Litigation Escrow in accordance with the Allocation Agreement.³⁰ Further, the Parties state that Additional Settling Participants that are Net Refund Recipients shall receive cash distributions from the Settling Supplier Refund Escrow.³¹ The Parties also state that each Additional Settling Participant that is listed as a Deemed Distribution Participant³² will have the amount owed to them credited against the amounts that they owe to the CalPX and/or the CAISO.³³

12. The Parties explain that the amounts allocated to Non-Settling Participants in the Allocation Matrix will be retained in the Settling Supplier Refund Escrow.³⁴ Refunds

²⁷ See Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, General Terms and Conditions, section 5.3.

²⁸ See Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.43 and 5.3.

²⁹ Under the Settlement, a Net Refund Recipient is a Settling Participant, other than a Deemed Distribution Participant, that is owed net refunds after consideration of refunds that the Participant may owe into the California Markets. See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.66.

³⁰ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 5.2.

³¹ See Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.66 and 5.2.1.

³² Deemed Distribution Participants, Exhibit B to Settlement and Release of Claims, Cover Sheet.

³³ See Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.31, 1.32, 5.2, and 5.2.2; Deemed Distribution Participants, Exhibit B to Settlement and Release of Claims Agreement, Cover Sheet.

³⁴ See Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 5.5 and 8.2.

determined to be owed to a Non-Settling Participant in the Settled Proceedings that are allowed against the ET Parties in the Bankruptcy Cases³⁵ and that arise from ET Power's transactions in the CAISO and/or CalPX during the Settlement Period (Non-Settling Participant Allowed Claims) will be paid from the amounts retained in the Settling Supplier Refund Escrow for the Non-Settling Participant.³⁶ The Parties note that if the amount retained in the Settling Supplier Refund Escrow for Non-Settling Participants is insufficient to pay all Non-Settling Participant Allowed Claims, the California Utilities³⁷ shall pay the shortfall.³⁸ Conversely, the Parties also note that the California Utilities are entitled to any amount that exceeds the amount necessary to pay Non-Settling Participant Allowed Claims and to pay Settling Participants pursuant to the Allocation Matrix.³⁹

13. The Parties state that the Commission's approval of the Settlement will constitute the Commission's authorization to the CAISO and CalPX to conform their records to reflect the offsets, adjustments, transfers, and status of accounts as provided for in the Settlement. The Parties state that each party shall cooperate in good faith and take all reasonable steps to secure the acts of the CAISO and CalPX necessary to implement the Settlement.⁴⁰ The Parties note that, in orders approving prior settlements, the Commission has provided the CAISO and CalPX with "hold harmless" assurances for the

³⁵ Under the Settlement, Bankruptcy Cases means, collectively, the cases commended under Chapter 11 of the Bankruptcy Code by the ET Parties and certain of their affiliates on or after July 8, 2003, styled in *In re National Energy & Gas Transmission, Inc. (f/k/a/ PG&E National Energy Group, Inc.)*, Chapter 11 Case No. 03-30459 (PM), Jointly Administered, pending before the Bankruptcy Court. Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.8 and 1.56.

³⁶ See Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.67, 5.2.1, 5.5, 5.6, and 8.2.

³⁷ Under the Settlement, the California Utilities are PG&E, SCE, and SDG&E. See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.19.

³⁸ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 5.5.

³⁹ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 5.2.1 and 5.5.4.

⁴⁰ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 6.3.

steps taken to implement those settlements, and they do not oppose Commission action to provide similar assurances here.⁴¹

14. The Parties assert that the Settlement resolves all claims between the ET Parties and the Settling Participants relating to transactions in the western energy markets during the Settlement Period for monetary or non-monetary remedies in the Settled Proceedings. Similarly, the Parties state that the California Parties and, with respect to the ET Parties, the Additional Settling Participants, on the one hand, and the ET Parties, on the other hand, mutually release each other from all claims before the Commission and/or under the FPA relating to unlawful rates, market manipulation, and charges for congestion, energy, line loss or ancillary services. Likewise, the Parties state that the Settling Participants and the ET Parties mutually release each other from all claims for civil damages and/or equitable relief relating to allegations of unlawful rates, unjust enrichment, market manipulation, and charges for congestion, energy, line loss or ancillary services.⁴² The Parties, therefore, request Commission approval of the Settlement.

Comments on the Settlement

15. Pursuant to Rules 602(d)(2) and 602(f) of the Commission's Rules of Practice and Procedures, 18 C.F.R. §§ 385.602(d)(2) and 385.602(f) (2007), initial comments were due on or before June 2, 2008, and reply comments were due on or before June 12, 2008. Aquila Merchant Services, Inc. (Aquila),⁴³ the Cities of Santa Clara and Redding, California (together, the Cities), Arizona Electric Power Cooperative, Inc. (AEPCO), the Northern California Power Agency (NCPA), the Sacramento Municipal Utility District (SMUD),⁴⁴ CalPX, the CAISO, and the Bonneville Power Administration (BPA) jointly with the Western Area Power Administration (WAPA) filed timely initial comments. On June 11, 2008, AEPCO, NCPA, SMUD, the Cities, the City of Burbank, Modesto

⁴¹ See Joint Explanatory Statement at 17.

⁴² See Joint Explanatory Statement at 15-16; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 7.1.1, 7.2.1, and 7.3.1.

⁴³ On June 11, 2008, Aquila filed an erratum to its initial comments explaining that its initial comments misstated the amount that it claims to be owed (\$29,000,000), when it actually claims to be owed \$25,000,000.

⁴⁴ On June 3, SMUD requested that the Commission accept corrected comments, as it had inadvertently omitted references to Docket Nos. EL03-137-000, EL03-180-000, and ER03-746-000 in the caption to its initial comments. The Commission accepts its corrected comments.

Irrigation District, and Turlock Irrigation District (the Indicated Parties) jointly filed reply comments. Also, the Parties filed a joint reply on June 12, 2008.

A. Section 8.1 – The Opt-Out Provisions

16. Several commenters oppose the opt-out provisions of the Settlement. The commenters argue that it is unreasonable to place the burden of opting out on non-settling parties, and that the requirement improperly imposes a *Mobile-Sierra*⁴⁵ burden on non-settling parties who later seek to challenge the terms of the Settlement.⁴⁶ Further, several commenters oppose the Settlement’s requirement that, in order to opt-out and become a Non-Settling Participant, an entity must provide an estimate of the amount it claims to be owed by the ET Parties. They argue that failing to provide an estimate should not limit the rights of Non-Settling Participants, and that little will be gained from the requirement because there are still proceedings pending.⁴⁷

17. In their joint reply, the Parties state that the commenters have neither explained how the Settlement imposes an undue burden on parties that wish to opt-out nor cited any precedent supporting the unreasonableness of an opt-out provision. The Parties state that the claim that the Settlement imposes a *Mobile-Sierra* burden on non-settling parties is baseless, as the Settlement does not contain a provision imposing a *Mobile-Sierra* burden.⁴⁸ Further, the Parties argue that the good faith estimate requirement is reasonable in light of the fact that the ET Parties are in bankruptcy, as the requirement promotes certainty and finality, which are primary purposes of bankruptcy proceedings.⁴⁹ In addition, the Parties claim that, under Rule 602 of the Commission’s rules, any party contesting an offer of settlement by disputing a material fact must make a “strong showing” detailing the existence of any genuine issue by reference to specific documents,

⁴⁵ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Co.*, 350 U.S. 349 (1956).

⁴⁶ AEPCO Initial Comments at 2; SMUD Corrected Initial Comments at 6 (citing *Me. Public Utilities Comm’n v. FERC*, 520 F.3d 464 (2008)); NCPA Initial Comments at 2.

⁴⁷ See AEPCO Initial Comments at 2-3 (“A party seeking to opt-out should not be required to engage in computation of such uncertainties.”); Cities Initial Comments at 3; BPA and WAPA Joint Initial Comments at 2-3.

⁴⁸ See Joint Reply Comments of the Parties at 5-6.

⁴⁹ See Joint Reply Comments of the Parties at 6 and 8.

testimony or other items.⁵⁰ The Parties argue that the commenters have failed to meet the requirements of Rule 602 because the commenters have not submitted affidavits detailing why they should not be expected to provide a good faith estimate of their claims. Accordingly, the Parties state that the Commission should reject the commenters' arguments.⁵¹

Commission Determination

18. The Commission rejects the commenters' arguments that the opt-out provisions of the Settlement are unreasonable and impose a *Mobile-Sierra* burden on non-settling parties. The commenters' reliance on *Maine Public Utilities Commission v. FERC*⁵² is misplaced. Unlike the settlement in *Maine Public Utilities Commission*, the instant Settlement does not include a provision imposing a *Mobile-Sierra* burden on any entity, regardless of its status as a participant in the settlement or as a non-settling party, nor have the commenters clearly articulated why *Mobile-Sierra* would apply in this case.

19. In addition, the commenters have failed to provide sufficient facts to support their arguments that the opt-out provisions impose an unreasonable and undue burden on parties wishing to opt-out of the Settlement. Moreover, the Commission has approved similar opt-out provisions in other settlements.⁵³

20. Likewise, the commenters have failed to provide sufficient facts to support their contentions that the good faith estimate requirement is unreasonable. The Settlement merely requires parties to provide a good faith estimate of the amount that they claim to be owed by the ET Parties. The Commission disagrees with commenters' allegations that such a requirement is unduly burdensome.⁵⁴ The parties have been involved in these highly contested and public proceedings and pursuing claims against the ET Parties for years. In addition, we note that the ET Parties are subject to bankruptcy proceedings

⁵⁰ See Joint Reply Comments of the Parties at 8 (citing Rule 602(f)(4) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f)(4)), and Alternative Dispute Resolution, 60 Fed. Reg. 19,494, 19,502 (Apr. 19, 1995)).

⁵¹ See Joint Reply Comments of the Parties at 9 (citing *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,151, at P 23 (2007)).

⁵² *Me. Public Utilities Comm'n. v. FERC*, 520 F.3d 464, 477 (2008).

⁵³ See *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,297 (2007); *San Diego Gas & Elec. Co.*, 118 FERC ¶ 61,168 (2007).

⁵⁴ See, e.g., SMUD Initial Comments at 5-6; AEPCO Comments at 2; Cities Comments at 2.

wherein claims involving the parties have been closely contested. In light of the circumstances, we find that the opt-out provisions are reasonable and do not place an undue burden on non-settling parties. Further, at this advanced stage of the proceedings, we do not find that providing a good faith estimate of the amount that they claim to be owed would unduly burden any of the parties. Also, we find that only a “good faith estimate” is required, which allows the parties to adjust their claims if necessary as the proceedings develop further. Moreover, the requirement will provide the ET Parties with a clearer idea of the size of the few remaining outstanding claims against the estates of the ET Parties. Thus, we find that the opt-out provisions, including the good faith estimate requirement, are fair, reasonable, and in the public interest.

B. Forfeiture of Statutory Rights

21. SMUD argues that the Settlement forces non-jurisdictional utilities to forfeit their statutory rights in order to participate in the Settlement because they would be required to accept offsets of refunds that they are legally owed against refunds that they owe for their charges, which the Commission cannot lawfully require non-jurisdictional utilities to pay.⁵⁵ Thus, SMUD argues that the Settlement offer is “premised on the Commission’s exercise of authority it does not possess.”⁵⁶ SMUD likens the provisions of the Settlement governing the allocation of refunds to the kind of “cram down” provision invalidated by the court in *ANR Pipeline Company*.⁵⁷ SMUD states that the “Commission has frowned on cram down provisions like these, as ‘comments that might otherwise be voiced are suppressed’”⁵⁸ Accordingly, SMUD states that the Settlement should be rejected.⁵⁹

22. Both SMUD and the Indicated Parties argue that the Settlement will have a detrimental impact on the ability of CalPX and the CAISO to meet their obligations to non-jurisdictional sellers.⁶⁰ SMUD notes that CalPX has stated that it has insufficient

⁵⁵ See SMUD Corrected Initial Comments at 3 (citing *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005), *cert. denied*, 76 U.S.L.W. 3303 (2007)).

⁵⁶ See SMUD Corrected Initial Comments at 5.

⁵⁷ *ANR Pipeline Co.*, 59 FERC ¶ 61,347, at 62,260 (1992).

⁵⁸ See SMUD Corrected Initial Comments at 2 (citing *ANR Pipeline Company*, 59 FERC ¶ 61,347, at 62,260 (1992)).

⁵⁹ See SMUD Corrected Initial Comments at 8.

⁶⁰ See Indicated Parties Answer at 4.

funds to pay both pending settlements and amounts owed to non-jurisdictional utilities.⁶¹ The Indicated Parties echo this concern and argue that the shortfall identified by CalPX would be addressed if PG&E were to advance escrowed funds to the CalPX. The Indicated Parties argue that, before the Commission allows the CAISO and the CalPX to transfer funds to any party, the Commission should order PG&E to transfer funds from its escrow or its general fund in order to ensure that the CalPX has sufficient funds to pay non-jurisdictional utilities.⁶²

23. In response, the Parties state that SMUD's "cram down" argument is misplaced because the order upon which SMUD relies involved a settlement that, unlike the Settlement here, included a provision that would have denied essential services to any party that contested the settlement for a period of five years.⁶³ The Parties argue that the Commission should reject SMUD's "forfeiture of statutory rights" argument because SMUD has the right to opt-out and pursue further litigation against the ET Parties. Also, the Parties state that even if SMUD did not opt-out, it would be accepting that it may be a net owner of funds to the CalPX and the CAISO in exchange for the benefits of the Settlement. The Parties also challenge the assertion that the rights of non-jurisdictional entities will be adversely affected by the Settlement. The Parties state that "while the [Cal]PX has advised about the potential that it could run out of funds if certain events occur and its escrow is not replenished, at this time the CalPX remains funded."⁶⁴

Commission Determination

24. The Commission disagrees with the contention that, by requiring entities to opt-out of the Settlement, non-jurisdictional entities will forfeit important statutory rights. Because these "important statutory rights" have not been identified, the Commission declines to speculate what they might be and instead evaluated the opt-out provisions in terms of the impact on entities that choose to exercise the right to opt-out. The Commission finds that opting out of the Settlement enables non-jurisdictional utilities to continue litigating their claims against ET Parties. Of equal importance to a non-settling entity is that the Settlement provides that monies will be held back to ensure that the claims asserted by Non-Settling Participants will be addressed adequately. Thus, non-

⁶¹ See SMUD Corrected Initial Comments (citing CalPX May 23, 2008 Answer at 2).

⁶² See Indicated Parties Answer at 4.

⁶³ See Joint Reply Comments of the Parties at 10.

⁶⁴ See Joint Reply Comments of the Parties at 10 n.40.

jurisdictional entities that opt-out of the Settlement do not forfeit their rights in any sense but will be able to continue litigating their claims.

25. The Commission rejects SMUD's characterization as a "cram down" the Settlement's provisions governing the distribution of refunds to Settling Participants. SMUD's reliance on *ANR Pipeline* is misplaced, because in that case, any party contesting the settlement would have been denied essential services for five years. Such is not the case here. As discussed, entities that opt-out of the Settlement are free to pursue their claims against ET Parties, and the Parties agree to hold back settlement funds so that Non-Settling Participants' claims will be addressed.

26. As was the case in the El Paso and PacifiCorp settlements,⁶⁵ if a non-jurisdictional entity elects to remain in the Settlement, it will be accepting a compromise under which it agrees that it may be a net owner of funds to the CalPX and/or the CAISO. Regardless of the Commission's lack of authority to order the non-jurisdictional entities to pay refunds in this situation, such an entity may nonetheless opt into the Settlement to avail itself of the benefits of the Settlement, including release of claims against the non-jurisdictional entity, avoidance of further litigation, and the financial certainty that is embodied in the Settlement.

27. The Commission also rejects the arguments made by SMUD and the Indicated Parties that the rights of non-jurisdictional utilities that opt-out are compromised based on allegations that the CalPX has insufficient funds to cover existing claims by non-jurisdictional entities. We note that the CalPX is currently funded and that PG&E and CalPX are currently engaged in settlement discussions for the purpose of transferring a portion of the PG&E bankruptcy escrow account to CalPX in order to ensure that the CalPX will be able to fund future settlements and make other payments as directed by the Commission.⁶⁶ The possibility that shortfalls could arise sometime in the future does not mean that the rights of non-jurisdictional utilities that opt-out are not protected. As stated above, the Settlement provides that an amount equal to the sum of the amounts estimated to be owed to each Non-Settling Participant will be held back to address these claims. To the extent that the amounts held back prove insufficient to pay allowed claims in full, the California Utilities are obligated to make up the difference.⁶⁷

⁶⁵ *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,297, at P29 (2007); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P27 (2007).

⁶⁶ See PG&E July 31, 2008 Status Report on Class 6 Escrow Issues, Docket Nos. EL00-95-000 and EL00-98-000, at 2.

⁶⁷ See Joint Reply Comments of the Parties at 15 (citing Settlement and Release of Claims Agreement, General Terms and Conditions, sections 8.2 and 5.5.1).

C. Undue Discrimination

28. SMUD argues that the Settlement is unduly discriminatory. SMUD notes that, under the Commission's decision in *Florida Power & Light*,⁶⁸ a substantially similar settlement offer must be made to similarly situated customers. SMUD argues that the Settlement fails to do so on several grounds. First, SMUD states that the Settlement does not extend to SMUD and other non-jurisdictional customers offers comparable to the offers extended to other buyers that have no refund obligations because only non-jurisdictional customers are required to forfeit their statutory rights in order to participate in the receipt of refunds.⁶⁹ Second, SMUD states that CERS, a non-jurisdictional seller, is not treated as a Deemed Distribution Participant even though CERS would owe the market several billion dollars in refunds under the offset theory applied to SMUD. SMUD states that the Settlement does not explain why CERS would qualify for \$3,000,000 in refunds even though it seems likely that CERS would be a Deemed Distribution Participant if it received comparable treatment.⁷⁰

29. In reply, the Parties urge the Commission to reject SMUD's argument that the Settlement is unduly discriminatory, arguing that SMUD has failed to meet its burden under Rule 602, which requires SMUD to submit a detailed affidavit demonstrating that it is being treated differently from similarly situated entities.⁷¹ Further, the Parties state that SMUD and CERS are not similarly situated, as "CERS, unlike SMUD, is a net refund recipient during the only time period in which it transacted business in the CAISO and CalPX markets."⁷²

Commission Determination

30. The Commission finds that SMUD's reliance on *Florida Power & Light Co.*⁷³ is inapposite. The Commission finds no evidence to support SMUD's allegation that the Settlement treats non-jurisdictional entities differently from other entities encompassed

⁶⁸ See SMUD Corrected Initial Comments at 7 (citing *Fla. Power & Light*, 70 FERC ¶ 63,017 (1995)).

⁶⁹ See SMUD Corrected Initial Comments at 6-7.

⁷⁰ *Id.* at 7.

⁷¹ See Joint Reply Comments of the Parties at 11 (citing *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 28 (2007)).

⁷² See Joint Reply Comments of the Parties at 12.

⁷³ *Fla. Power & Light*, 70 FERC ¶ 63,017 (1995).

by the Settlement. As explained above, the Settlement does not force non-jurisdictional utilities to forfeit their statutory rights. The Settlement provides jurisdictional entities and non-jurisdictional entities with exactly the same choice: accept the Settlement and its corresponding benefits, or opt-out and continue litigation.

31. In addition, SMUD has failed to demonstrate that it is similarly situated with CERS. SMUD alleges that the Settlement treats CERS differently. This is because CERS will receive the funds shown on the Allocation Matrix, even though, according to SMUD, “CERS would owe the market several *billion* dollars in refunds.”⁷⁴ However, SMUD offers no evidence to support this contention other than its “understanding” that this is the case. The Settlement designates parties as Deemed Distribution Participants based on whether they have net amounts outstanding and payable to the CAISO and/or CalPX.⁷⁵ This designation does not distinguish between jurisdictional and non-jurisdictional entities in any way. Both the Settlement’s Allocation Matrix and the list of Deemed Distribution Participants identify both jurisdictional and non-jurisdictional entities. Likewise, the opt-out provision applies with equal measure to jurisdictional and non-jurisdictional entities.

32. The Commission declines to overturn the Settlement’s characterization of CERS or any other entity encompassed by the Settlement on the basis of SMUD’s “understanding.” Therefore, the Commission finds that the Settlement is not unduly discriminatory.

D. Rights of Non-Settling Participants

33. According to Aquila, the Settlement fails to protect the rights of those choosing to opt-out of the Settlement. Aquila states that if it opts out, it runs the risk that it will not receive the refunds owed to it. This is because the ET Parties’ assets will be out of Aquila’s reach, as refunds will only be paid to a Non-Settling Participant if the Bankruptcy Court determines that the Non-Settling Participant’s claims are allowed. Aquila asserts that it is unlikely that the Bankruptcy Court would accept a proof of claim from Aquila at this time.⁷⁶

34. Responding to Aquila’s comments, the Parties state that the Settlement fully protects the rights of Aquila and other Non-Settling Participants, as Non-Settling

⁷⁴ SMUD Initial Comments at 7.

⁷⁵ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement, General Terms and Conditions, section 5.2.2.

⁷⁶ Aquila Initial Comments at 11-12.

Participants retain their rights to pursue their claims through litigation. In addition, the Parties note that under the Settlement, an amount equal to the sum of the amounts estimated to be owed to each Non-Settling Participant will be held back, and, to the extent that the hold backs prove insufficient to pay allowed claims in full, the California Utilities are obligated to make up the difference.⁷⁷

Commission Determination

35. The Commission finds that the Settlement protects the rights of Aquila and other Non-Settling Participants. Under the Settlement, a Non-Settling Participant, including Aquila, retains the right to pursue further action against the ET Parties before the Commission and the Bankruptcy Court, including asserting a claim that its failure to file a proof of claim should not bar it from recovery.⁷⁸ In addition, the Settlement explicitly provides that the amount allocated to Non-Settling Participants in the Allocation Matrix shall be held back to satisfy the allowed claims of Non-Settling Participants,⁷⁹ and that the California Utilities assume responsibility for any shortfall.⁸⁰ Although a Non-Settling Participant that pursues its claims through litigation faces certain risks, such risks are no different from those faced by any other litigant and the inherent uncertainty that accompanies litigation is a primary reason that parties enter into settlement agreements. Therefore, the Commission finds Aquila's argument unavailing.

E. "Hold Harmless" Protection

36. Both CalPX and the CAISO note that the circumstances of this Settlement warrant hold harmless treatment for the CAISO and CalPX because they, along with their directors, officers, employees, and consultants, will implement a number of provisions of the Settlement. Accordingly, CalPX requests that the following "hold harmless" language 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

⁷⁷ See Joint Reply Comments of the Parties at 15 (citing Settlement and Release of Claims Agreement, General Terms and Conditions, sections 8.2 and 5.5.1).

⁷⁸ Settlement and Release of Claims Agreement, General Terms and Conditions, section 8.4.

⁷⁹ Settlement and Release of Claims Agreement, General Terms and Conditions, section 8.2.

⁸⁰ Settlement and Release of Claims Agreement, General Terms and Conditions, section 5.5.1.

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.⁸¹

37. The CalPX states that this is the same hold harmless provision that the Commission approved in the order approving a settlement with Portland General Electric Company issued on May 17, 2007⁸² and other orders. In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of "hold harmless" language in the order approving the Settlement.⁸³

Commission Determination

38. The Parties do not oppose a "hold harmless" provision that is similar to provisions in other settlements involving the California Parties and approved by the Commission.⁸⁴ Consistent with this Commission's precedent,⁸⁵ the Commission determines that CalPX and the CAISO will be held harmless for actions taken to implement this Settlement. Accordingly, this order incorporates the "hold harmless" language set out above with one

⁸¹ See CalPX Initial Comments at 4.

⁸² See *San Diego Gas & Electric Co.*, 119 FERC ¶ 61,151 (2007) (approving hold harmless protection for the CAISO and CalPX in connection with the Portland General Electric Company settlement).

⁸³ See Joint Reply Comments of the Parties at 3.

⁸⁴ See Joint Explanatory Statement at 15.

⁸⁵ See *e.g.*, *San Diego Gas & Electric Co.*, 109 FERC ¶ 61,071 (2004) (approving "hold harmless" language in the Dynegy settlement); *San Diego Gas & Electric Co.*, 109 FERC ¶ 61,257 (2004) (approving "hold harmless" language in the Duke settlement), *reh'g denied*, 111 FERC ¶ 61,186 (2005).

modification. Specifically, as incorporated by this order, the language shall be read to apply to both the CAISO and CalPX.

F. Excess Collateral Amounts

39. The CAISO notes that part of the Settlement's monetary consideration is ET Power's collateral account balance with the CAISO, which the Settlement estimates at \$9,300,000.⁸⁶ The CAISO explains that, because the collateral balance is accruing interest, the amount is slightly greater than the \$9,300,000 used for purposes of the Settlement.⁸⁷ The CAISO asks the Parties to clarify how the CAISO should treat amounts exceeding \$9,300,000.⁸⁸

40. In reply, the Parties explain that section 1.60 of the Settlement defines the CAISO collateral account balance to encompass all accrued interest.⁸⁹ The Parties also explain that, under the Settlement, the CAISO must transfer the ISO Collateral Balance to the Settling Supplier Refund Escrow no later than 10 business days after the Effective Date.⁹⁰ Therefore, the Parties state that the Settlement requires the CAISO to transfer the \$9,300,000 specified in the Settlement along with any excess amount to the Settling Supplier Refund Escrow.⁹¹

Commission Determination

41. In light of the Parties' joint reply comments, the Commission determines that the CAISO should transfer ET Power's entire collateral account balance, including both the \$9,300,000 specified in the Settlement and any accrued interest, to the Settling Supplier Refund Escrow no later than 10 business days after the Effective Date.

⁸⁶ See CAISO Initial Comments at 7. See also Settlement and Release of Claims Agreement, Cover Sheet, item 4.1.3.3 (stating that, as of December 17, 2007, the CAISO Collateral Balance was \$9,368,196).

⁸⁷ See CAISO Initial Comments at 7.

⁸⁸ See CAISO Initial Comments at 7.

⁸⁹ See Joint Reply Comments of the Parties at 4.

⁹⁰ See Joint Reply Comments of the Parties at 4 (citing Settlement and Release of Claims Agreement, General Terms and Conditions, section 4.1.4.1(iii)).

⁹¹ See Joint Reply Comments of the Parties at 4.

G. Treatment of Aquila as a Deemed Distribution Participant

42. Aquila contends that the Settlement's characterization of Aquila as a Deemed Distribution Participant is unjust, unfair and prejudicial. Aquila states that the Settlement incorrectly assumes that Aquila owes the CalPX or the CAISO markets more money for the pre-October 2, 2000 period than it is owed for the October 2, 2000 through June 20, 2001 period, despite the fact that Aquila is owed \$25,000,000 in refunds for the latter period. Aquila argues that, under Rule 602, the Settling Parties must support their characterization of Aquila as a Deemed Distribution Participant by providing "[c]opies of, or references to, any document, testimony, or exhibit . . . and any other matters that the offerer considers relevant to the offer of settlement."⁹² Aquila claims that the Settling Parties have failed to meet that burden, as they have not produced any evidence supporting the Settlement's characterization but have merely provided the off-record calculations of the California Parties.⁹³ In addition, Aquila argues that the Settlement's characterization must be rejected as a collateral attack on the Commission's prior rulings because the Commission has ruled that it has no jurisdiction to order refunds for any period prior to October 2, 2000 refund effective date in EL00-95.⁹⁴

43. In response, the Parties argue that Aquila has failed to provide any factual support for its assertion that it owes no refunds for periods outside of the October 2, 2000 through June 20, 2001 period. The Parties note that Aquila has advanced the same argument, which was rejected by the Commission, in connection with the PacifiCorp and Portland settlements.⁹⁵

Commission Determination

44. The Commission will not modify the Settlement to remove Aquila's designation as a Deemed Distribution Participant. We reject Aquila's argument that the Settlement's characterization of Aquila constitutes a collateral attack on the Commission's holding that the Commission has no jurisdiction to order refunds for any period before October 2,

⁹² Aquila Initial Comments at 6-7 (citing *Southwestern Public Service Co.*, 51 FERC ¶ 61,130, at 61,371 (1990); 18 C.F.R. § 385.602(c)(iii)).

⁹³ Aquila Initial Comments at 7.

⁹⁴ Aquila Initial Comments at 8 (citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 96 FERC ¶ 61,120, at 61,500 (2001)).

⁹⁵ See Joint Reply Comments of the Parties at 13 (citing *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296, at P 26 (2007); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,151, at P 23(2007)).

2000. The Settlement merely offers parties the option of accepting that they may owe refunds for periods before October 2, 2000 in exchange for the benefits of the Settlement and does not attempt to cast doubt upon the Commission's prior holdings.

45. We find that Aquila has failed to provide sufficient evidence to support its argument that the Settlement's characterization of Aquila as a Deemed Distribution Participant is unjust, unfair and prejudicial. We note that, under Rule 602, a comment contesting a settlement by alleging a dispute as to an issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to supporting evidence.⁹⁶ Aquila did not file an affidavit supporting its contention that it is not a Deemed Distribution Participant, nor has it provided any other evidence that would enable the Commission to determine that this characterization is not correct.

46. The only evidence that Aquila has provided are copies of emails that Aquila argues show that Aquila is owed \$25 million in refunds for the October 2, 2000 through June 20, 2001 period. As Aquila itself admits, the Settlement's characterization of Aquila as a Deemed Distribution Participant assumes that Aquila owes refunds in the pre-October period. Yet, the evidence presented by Aquila only shows that it is owed refunds for purchases it made between October 2, 2000 and June 20, 2001 and does not cast doubt upon the Settlement's characterization.⁹⁷ If Aquila disagrees with the Settlement's characterization, Aquila may opt-out. If Aquila chooses to opt-out, its rights will be unaffected by the Settlement, and it will retain the right to demonstrate to the Commission that it does not owe CalPX or the CAISO more money for the pre-October period than it is owed for the latter period. For the foregoing reasons, the Commission will not modify the Settlement as Aquila has requested.

H. Parties That Have Indicated Their Intentions to Opt-Out of the Settlement

47. In their pleadings, both NCPA and SMUD indicate that if the Commission approves the Settlement, they exercise their option to opt-out.⁹⁸

Commission Determination

48. In light of the fact that this order approves the Settlement, the Commission deems both NCPA and SMUD to have provided notice of their respective intentions to opt-out. However, in order to perfect the exercise of their rights to opt-out, the Commission

⁹⁶ 18 C.F.R. § 385.602(f)(4) (2008).

⁹⁷ Aquila Errata to Initial Comments at 3.

⁹⁸ See SMUD Corrected Initial Comments at 8; NCPA Initial Comments at 1.

directs NCPA and SMUD to comply with section 8.1 of the Settlement and provide a good faith estimate if NCPA and SMUD still desire to opt-out.⁹⁹ Specifically, SMUD and NCPA must, within five business days of the day that this order is issued: (i) provide written notice that it opts out to each person designated on the ListServ established for the EL00-95 Proceeding and the ListServes established for the Gaming/Partnership Proceeding; and (ii) provide the ET Parties with written notice of its good faith estimate of the liquidated amount that it claims to be owed by each of the ET Parties.

49. In conclusion, the Commission finds that the Settlement is fair and reasonable and in the public interest. Therefore, the Commission approves the Settlement, as discussed in the body of this order. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in the Refund Proceeding or any other proceeding.¹⁰⁰

The Commission orders:

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

(B) If SMUD and NCPA desire to opt-out of the Settlement, they must fully comply with all the provisions of the Settlement governing the election of a party to opt-out of the Settlement.

By the Commission. Commissioners Spitzer and Moeller not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁹⁹ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 8.1.

¹⁰⁰ The Commission notes that the Settlement contains several provisions concerning the effect of this order. See *e.g.*, Settlement and Release of Claims Agreement, General Terms and Conditions, sections 4.1.5.1, 4.1.5.2, 4.1.5.3, and 5.2.2.3. We reiterate that the Commission's approval of this Settlement does not constitute precedent regarding any principle or issue in any other proceeding.