

108 FERC ¶ 61,002
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 Company Docket Nos. EL00-95-104

v.

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

Investigation of Practices of the California
Independent System Operator and the
California Power Exchange Docket Nos. EL00-98-092

Williams Energy Services Corporation Docket No. EL03-179-004

Fact-Finding Investigation of Potential
Market Manipulation of Electric
And Natural Gas Prices Docket No. PA02-2-022

Williams Energy Marketing & Trading Company Docket No. PA03-11-002

AES Southland, Inc.
Williams Energy Marketing & Trading Company Docket No. IN01-3-002

Investigation of Anomalous Bidding Behavior
And Practices in the Western Markets Docket No. IN03-10-006

ORDER ON SETTLEMENT AGREEMENT

(Issued July 2, 2004)

1. In this order, the Commission acts on an Offer of Settlement and Request for Shortened Comment Period filed on April 27, 2004 in the instant proceedings by The Williams Companies, Inc., Williams Power Company, Inc. (together, Williams), Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SCE), and

San Diego Gas and Electric Company (SDG&E), collectively, the “Settling Parties” or “Williams/California Utilities.” The April 27 filing consists of a “Settlement Agreement and Release of Claims,” an “Offer of Settlement,” an “Explanatory Statement” and other supporting documentation.¹ The order approves the settlement, with conditions, as discussed below. The Commission’s action in approving the Settlement will benefit customers by resolving claims against Williams for refunds, price adjustments or other remedies arising from Williams’ sale of electricity and natural gas into California during the period defined in the Settlement Agreement. Approval will also avoid further costly litigation, eliminate regulatory uncertainty and bring to a close a number of disputes stemming from the California market disruptions of 2000 – 2001.

Background and Description of the Settlement

2. The Settlement resolves, as to the Settling Parties, the issues concerning Williams in Docket Nos. EL00-95, *et al.*, EL00-98, *et al.* (the Refund Proceeding) and EL03-179-000 (the Show Cause Proceeding); all issues as to Williams in Docket Nos. IN01-3-000, IN03-10-000, and PA02-2-000; and, as between Williams and the Commission’s Office of Market Oversight and Investigation (OMOI) staff, all issues under Docket No. PA03-11-000. The Settlement provides an opportunity to other parties to the Refund Proceeding to join or “opt into” the Settlement and become “Settling Participants.” The Settlement also seeks to resolve any other claims and issues that the Settling Parties, and those parties that become Settling Participants, may have against Williams for refunds, price adjustments, or other remedies arising from Williams’ sales of electricity and natural gas into California during the periods defined in the Settlement Agreement.²

3. The Settlement is based upon a calculation and allocation of Williams’ total refund amounts associated with its spot sales into markets operated by the California Independent System Operator Corporation (CAISO) and the California Power Exchange (CalPX) for the period from October 2, 2000 to June 20, 2001 (the Refund Period). It also resolves all claims among the Settling Parties against Williams for the May 1, 2000 – October 1, 2000 “Pre-refund Period.” Attachment 4 of the Settlement Agreement (the Allocation Matrix) lists the calculation and allocation of refunds and payments to parties to the Refund Proceeding and provides that any party to the Refund Proceeding may opt into the Settlement by providing the Commission and all parties with written notice of the exercise of this option.

¹ The order refers to these agreements collectively as the “Settlement” or the “Settlement Agreement,” unless specific reference is made to one of the constituent documents.

² See sections 1.12, 1.17 and 1.22 of the Settlement Agreement for the time periods covered by the Settlement.

4. The refund amounts in the Allocation Matrix are based on estimates of market-wide refunds performed by the Settling Parties. Emissions and fuel adder allocations were allocated based on gross control area load, as the Commission has prescribed in prior orders.³ The emission and fuel adder 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, Williams 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.

5. The Settlement provides for payments over three periods of time:

October 2, 2000 – January 17, 2001 - \$107.2 million, which consists of a refund amount less an amount for fuel and emissions.⁴ As between Settling Parties as well as those who become Settling Participants, the allocation percentages in the

³ 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).

⁴ The Commission’s March 26, 2003 Order in the Refund Proceeding (102 FERC ¶ 61,317 (2003), as clarified by the April 22, 2003 Clarification Order (103 FERC ¶ 61,078 (2003), modified the gas component of the Mitigated Market Clearing Price (MMCP) formula to use producing area gas prices plus a tariff rate transportation allowance. Prior to the March 26 Order, the gas component of the MMCP was determined by a formula using California spot gas prices. Because of the claims that some generators may have paid more for gas than the costs used in the revised MMCP calculation, the March 26 Order provided generators with an opportunity to recover a fuel cost allowance to reflect actual gas costs incurred above the amounts the generators otherwise could have recovered under the March 26 Order’s revised gas methodology. Accordingly, Williams filed a claim for a fuel gas adder on May 12, 2003. Similarly, the Commission has allowed Williams and other generators to seek to offset their refund liability with their emissions costs incurred during the Refund Period. The emissions adders reflect all demonstrable emissions costs, including NOx credits, credits required to comply with SOx emissions restrictions and actual and verifiable compliance fees. The March 26 Order determined that Williams had adequately demonstrated its claimed emissions costs (\$17,847,842), but this amount will be reduced somewhat on the Commission’s subsequent determination that emissions costs may only be claimed during mitigated intervals. 105 FERC ¶ 61,066 at 61,385 (2003), the October 16 Order.

Allocation Matrix reflect Williams' fuel gas adder at 50 percent of the amount Williams claimed in its May 12, 2003 filing in the Refund Proceeding. Williams' emissions adder remains at 100 percent of the amount claimed by Williams for this period. The adders are allocated based on gross load, which is consistent with the Commission's orders in the Refund Proceeding. The allocation of the adders may change, depending on the resolution of pending rehearing requests and further litigation, and the Settlement Agreement provides that the allocation of these adders is subject to a true-up based on a final order on rehearing or appeal in the Refund Proceeding. For Settling Parties and the Settling Participants, the overall amount of the adders is fixed, but the allocation of those costs shown on the Allocation Matrix is subject to change.

January 18, 2001 – June 20, 2001 - \$10.5 million, which reflects the fact that Williams previously has settled approximately 95 percent of its potential refund liability through a settlement with various California governmental entities. The Commission has dismissed Williams from the Refund Proceeding with regard to any claims for refunds these governmental entities, including the California Energy Resources Scheduler (CERS), may have against Williams. The Settling Parties estimate that this amount will cover the total refunds that Williams will be found to owe under the Commission's existing orders in the Refund Proceeding applying the MMCP methodology, reduced by Williams's fuel and emissions adders. As with the period from October 2, 2000 – January 17, 2001, the fuel gas adder is 50 percent of the amount Williams claimed in its May 12, 2003 filing in the Refund Proceeding.

May 1, 2000 – October 1, 2000 - \$8 million, which is a negotiated amount allocated by gross load. The estimated allocation percentages are set out in the Allocation Matrix.

In addition to payments linked to the three time periods above, the Settlement Agreement provides for the payment of \$11.5 million to PG&E, SCE and SDG&E for the release of certain existing and potential civil and regulatory claims against Williams. Finally, the Settlement Agreement creates a "Surplus Account" of \$10 million funded by Williams and held in escrow until the refund claims of all non-settling participants are finally resolved and refunds to them, if any, are paid, or until such time as the Commission issues an order allowing Williams to terminate the account and withdraw any remaining funds. The Settlement Agreement provides for the creation of a number of accounts from which funds will be disbursed as provided in the Settlement Agreement.⁵ The CalPX will be required to release funds, pursuant to a Commission order, from its Settlement

⁵ See Settlement Agreement Explanatory Statement, flowchart labeled "Williams Settlement Agreement Escrow Accounts."

Clearing Account and transfer them to certain escrow accounts created by Williams to handle disbursements under the Settlement Agreement. The CalPX will transfer an amount equal to \$108.3 million, which is Williams' estimated net receivables from the CalPX, to the accounts as described in the Settlement Agreement.⁶ If the funds in these accounts are not sufficient to cover Williams' liability to non-settling participants, Williams will remain liable for any amounts ultimately found owing to non-settling participants. The Settlement Agreement provides a mechanism for payment if Williams' receivables calculated by the CAISO and the CalPX are less than \$261.7 million.

6. The issues of the amount of interest to be paid to the Settling Participants associated with the refunds discussed above and the amount of interest associated with Williams' receivables are reserved for the Commission's determination in the Refund Proceeding, and the Settlement does not preclude any party, including Settling Parties, from advancing any position at the Commission concerning the amount or allocation of interest or interest shortfalls. No interest will be paid on the amounts attributed to the May 1, 2000 – October 1, 2000 Pre-refund period or on the \$11.5 million to be paid to PG&E, SCE and SDG&E under the Settlement Agreement.

7. The Settlement contains non-monetary covenants in addition to the payments described above, including Williams' agreement to maintain a policy governing transmission or generation transactions in the CAISO service area.⁷ Under this policy, only authorized Williams personnel may execute transactions, which must be in full compliance with applicable law. Williams commits to mandatory employee training with respect to such policy, and an employee's failure to comply will result in disciplinary action, including termination. Williams also agrees to cooperate with ongoing investigations of the California electricity and gas markets for the period preceding June 21, 2001.

⁶ According to the Settlement Agreement, the \$108.3 million net receivables consist of:
(a) Williams' pre-mitigation receivables currently calculated to be \$261.7 million;
(b) less the combined \$125.7 million attributed to the three periods discussed above;
(c) less the \$6.2 million potentially associated with CAISO Charge Type 485;
(d) less \$11.5 million that Williams has agreed to pay PG&E, SCE and SDG&E; and,
(e) less \$10 million for funding the Surplus Account.

⁷ See section 10.3 of the Settlement Agreement.

8. Certain issues would be “carved out” of the Settlement, meaning that Williams’ refund liability could increase depending on their ultimate resolution: (1) a potential increase in refunds associated with Williams’ resolution with the CAISO of a mislogging dispute;⁸ (2) a potential increase in refunds of \$14.2 million and a corresponding increase in Williams’ receivables associated with the CalPX’s implementation of the \$150 breakpoint for January 2001; and (3) a potential \$6.2 million increase in refunds associated with MMCP mitigation of the CAISO Charge Type 485 penalties that the CAISO assessed against Williams during the Refund Period. Additional refunds resulting from the resolution of these carved out issues would be allocated according to the percentage shares indicated for the allocation of refund amounts set out in the Allocation Matrix for the October 1, 2000 – January 17, 2001 period.⁹

9. The Effective Date for the Settlement Agreement is date upon which the later of the following approvals occurs: (1) the Commission issues an order approving the Settlement in its entirety; and, (2) the California Public Utilities Commission (CPUC) has approved the Settlement by filing comments with the Commission indicating its support of the Settlement. As will be discussed *infra*, CPUC has indicated its support in its Comments on the Settlement.¹⁰

⁸ This issue is part of the CAISO Amendment 51 proceedings. *See* California Independent System Operator Corp., 106 FERC ¶ 61,085 (2001).

⁹ In Further Comments on the Williams Settlement, which will be discussed *infra*, CalPX states that Williams/California Utilities have made certain clarifications and commitments in response to its concerns about the “carved out” issues. *See* CalPX Further Comments at 4-5.

¹⁰ Comments of the CPUC at 2, 4.

Comments on the Settlement

10. The Commission received 17 initial comments on the Settlement¹¹ and 5 reply comments.¹² In addition to these timely filed initial comments, the Northern California Power Agency (NCPA) filed a Motion for Leave to File Comments Out of Time and Comments on the Settlement, to which Williams/California Utilities filed a response, discussed below. The CalPX filed Further Comments based on subsequent discussions with the Settling Parties, which will be discussed below. Several commenters indicated support for the Settlement: the CPUC, CAISO, IDACORP, and Salt River.

11. Although some individual commenters raise specific objections to the Settlement based on their particular circumstances, commenters expressed the overarching concern that the Settlement should not adversely affect non-settling parties. In this vein, several common themes emerge from the comments opposing the settlement:

The Settlement is unduly discriminatory, in that it: (1) allows settling parties to receive refunds from the CalPX Settlement Clearing Account before entities that chose to continue the litigation; (2) reduces by 50 percent the fuel gas adder for settling parties, while those who continue to litigate may end up paying all of Williams' claimed fuel gas adder; (3) treats net sellers and buyers differently; and (4) would exempt The State of California Department of Water Resources (DWR) from Williams' gas adder claim.

The funds available for refunds to those who opt into the Settlement may not be sufficient to cover Williams' potential liability to those who choose to continue litigation.

¹¹ Initial comments were filed by: Arizona Electric Power Cooperative, Inc. (AEPCO); Avista Energy Inc. (Avista); CAISO, CalPX; CPUC; Californians for Renewable Energy, Inc. (CARE); Cities of Anaheim, Azusa, Banning, Colton and Riverside, California (Southern Cities); City of Pasadena, California (Pasadena); City of Vernon, California (Vernon); El Paso Merchant Energy, L.P. (EPME); IDACORP Energy L.P. and Idaho Power Company (IDACORP); TransAlta Energy Marketing (CA) Inc.; Coral Power, L.L.C.; PPL Energy Plus, LLC, and PPL Montana LLC. (Indicated Parties); Merrill Lynch Capital Services, Inc. (Merrill Lynch); Portland General Electric Company (Portland General); Puget Sound Energy, Inc. (Puget); Salt River Project Agricultural Improvement and Power District (Salt River); and State Water Contractors and the Metropolitan Water District of Southern California (SWC/MWD).

¹² Reply comments were filed by: CAISO; CalPX; CARE; Salt River; Vernon; and Williams/California Utilities, jointly. California Utilities comprise PG&E; SCE and SDG&E.

The Settlement does not include sufficient information to allow for an informed determination as to whether it offers parties benefits sufficient to offset potential litigation risks.

The Commission cannot approve the Settlement without the approval of the bankruptcy courts overseeing the CalPX and the PG&E bankruptcies.

In addition, the Indicated Parties assert that the Commission cannot approve the Settlement as a contested settlement, as it does not meet the criteria for approval of contested settlements laid out in *Trailblazer Pipeline Company*.¹³

12. Finally, SWC/MWD indicated it would support the Settlement if ambiguities concerning the allocation of fuel and emissions adders were clarified, and these ambiguities were addressed and clarified in the reply comments of Williams/California Utilities. According to Williams/California Utilities, “Williams will not seek either such adder [fuel gas or emissions] as against CDWR, and, by extension, SWP.”¹⁴ The Commission believes that this commitment by Williams should satisfy SWC/MWD.

Whether the Settlement is Unduly Discriminatory

Comments

13. Several commenters argue that the Settlement will have discriminatory impacts on non-settling parties and thus should be rejected. Broadly, many commenters oppose the Settlement because it would allow refunds to be paid to Settling Parties and Settling Participants from funds that are now in the CalPX Settlement Clearing Account, while those who choose not to join in the Settlement but continue to litigate will have to wait until the conclusion of the Refund Proceeding to obtain refunds.¹⁵ Some commenters

¹³ *Trailblazer Pipeline Company*, 85 FERC ¶ 61,345 (1998) (*Trailblazer*), *order on reh'g* 87 FERC ¶ 61,005 (1999). *See* Comments of Indicated Parties Opposing the Offer of Settlement by Williams and IOUs and Request for Rehearing of Order Shortening Comment Period on Offer of Settlement at 10-12.

¹⁴ Williams/California Utilities Reply Comments in Support of Offer of Settlement at 26.

¹⁵ Indicated Parties' Comments Opposing the Offer of Settlement at 6-9; Puget Sound Comments on Offer of Settlement at 6-8; and Vernon Comments in Opposition to Settlement at 5-7.

argue that allowing funds to flow to the Settling Parties and Settling Participants will shift to non-settling parties the burden of potential shortfalls needed to pay refunds and receivables. According to Indicated Parties, “. . . allowing the distribution of [Cal]PX funds now to a select few without any assurance that others will not be harmed by such distribution is wrong and unfair.”¹⁶

14. In addition to arguing that disbursements under the Settlement will discriminate against those who choose not to opt into the settlement, some commenters assert that Williams’ agreement to reduce by 50 percent its fuel gas adder claim for Settling Parties and Settling Participants discriminates against those who do not join the settlement. According to the commenters, this is because these parties may end up paying 100 percent of Williams’s fuel gas adder, as well as the portion of Williams’ claim that the Settlement would reduce as to the Settling Parties and Settling Participants.¹⁷ According to Vernon, “This is patently unduly discriminatory and unjust and unreasonable. It is an outrageous attempt to coerce a settlement agreement by threatening to shift costs from settling parties to the non-settling parties.”¹⁸

15. AEPCO and Pasadena assert that the Settlement discriminates against those who were net sellers into the CalPX and CAISO markets, as these entities will not receive refunds and yet will be required to pay a share of the gas and emissions adders.¹⁹ Pasadena asserts that it was a net seller during the Refund Period in the CAISO market and did not participate in the CalPX market. However, with respect to Williams, Pasadena was a net buyer (as a load serving entity) and thus should be entitled to refunds as to Williams.²⁰ On the other hand, CARE asserts that the Settlement refund allocations are discriminatory in that CARE, a net purchaser of energy in the CAISO market, will not be able to collect refunds from sellers in the CAISO market, but the California Parties,²¹ who were net purchasers in both the CAISO and CalPX markets, will collect refunds.

¹⁶ Indicated Parties’ Comments at 7.

¹⁷ Initial Comments of CARE on the Offer of Settlement at 6-8; Indicated Parties at 6-9; Pasadena Comments on Settlement at 3 and 5; Southern Cities Comments at 2-6; and, Vernon Comments at 5-7.

¹⁸ Vernon Comments at 5.

¹⁹ AEPCO Comments on the Offer of Settlement at 3-5; Pasadena Comments *id.*

²⁰ Pasadena Comments at 2.

²¹ The “California Parties” are the People of the State of California *ex rel.* Bill Lockyer, Attorney General, the California Energy Oversight Board (CEOB), the CPUC, SoCal Edison, PG&E and SDG&E.

“Therefore, the option of participating in the settlement cannot be viewed as providing to all parties fair, equal, and non-discriminatory treatment.”²²

16. Southern Cities cite as discriminatory the Settlement’s exemption for the DWR from the fuel gas adder and the emissions adder: “The fact that the settlement appears to expose non-settling load-serving entities in California to disproportionate liability for Williams’ gas cost adder claim is particularly troublesome given that the terms of settlement hold the DWR harmless ‘from amounts due from DWR for DWR’s allocated share of liability for Williams Gas Cost Adder claim.’”²³ Southern Cities urges the Commission to reject the Settlement’s exemption for DWR.²⁴

Williams/California Utilities Reply Comments

17. In their reply comments, Williams/California Utilities address each of the discrimination arguments. As to the allegation that it is unfair to let settling parties get their refunds early, Williams/California Utilities point out that the prompt release of funds “is an *essential* feature of the settlement that does not prejudice non-settling parties” because the Settlement provides that Williams ultimately will be responsible for its share of any shortfalls in the PX Settlement Clearing Account. Thus, they argue that non-settling parties will be no worse off as a result of pursuing their claims through continued litigation.²⁵ To this end, the Settlement establishes the “Surplus Escrow,” an escrow account funded by Williams at \$10 million for the express purpose of ensuring that funds will be available to ensure that non-settling parties will not be prejudiced by a decision not to join the Settlement.²⁶

18. Williams/California Utilities address the assertion that the Settlement would require non-settling parties to shoulder a greater portion of the gas adder than borne by those who choose to join the settlement. This assertion is based on the concern that

²² CARE Initial Comments at 5.

²³ Southern Cities’ Comments at 4.

²⁴ SWC/MDW also raise a concern with this exemption, discussed *infra*.

²⁵ Williams/California Utilities Reply Comments at 6 (emphasis in the pleading).

²⁶ See Sections 5.4 - 5.7 of the Settlement Agreement.

Williams may seek to recover from non-settling parties the difference (50 percent) between the amounts claimed by Williams in its fuel adder filing and the amount of the fuel adder paid by the Settling Parties and Settling Participants. Williams/California Utilities deny this, saying:

While it is true that Williams will continue to seek 100 percent of its claimed fuel adder as against non-settling parties, this amount will be allocated to non-settling parties as if there had been no settlement. Thus, the Settlement does not permit Williams to recover from non-settling parties that portion of the fuel adder that would be allocated to Settling Participants absent the Settlement, and the rights of non-settling parties are therefore not affected by the Settlement.²⁷

Thus, Williams/California Utilities seek to clarify that non-settling parties stand to pay no more than their allocated portion of the adders.

19. Pasadena and CARE express concern about the disparate treatment afforded to net sellers vis-à-vis net purchasers under the Settlement.²⁸ Pasadena's concern is raised in the context of the gas and emissions adders, with Pasadena alleging that it is discriminatory to require net sellers to pay a share of these adders while allocating to these entities none of the refunds. Williams/California Utilities reply that the Settlement Agreement allocates the gas and emissions adders on the basis of gross load, which is consistent with the Commission's order issued October 16, 2003 in these proceedings.²⁹ According to Williams/California Utilities, "This allocation does result in some market participants with load in the control area being allocated gas and emissions costs even if they are net sellers in the [CA]ISO and [Cal]PX markets."³⁰ Section 5.2.5 of the Settlement Agreement provides that allocation of the gas and emissions adders is subject to modification based on a final determination of this issue in the Refund Proceeding: "Thus, regardless of whether or not a market participant opts into the settlement, it will be subject to the allocation methodology finally adopted by the Commission for gas and emissions."³¹

²⁷ Williams/California Utilities Reply Comments at 29.

²⁸ Pasadena Comments at 5 and CARE Initial Comments at 5.

²⁹ See October 16 Main Order.

³⁰ Williams/California Utilities Reply Comments at 28.

³¹ *Id.*

Discussion

20. The Commission does not believe that the release of funds under the Settlement is unduly discriminatory; rather, we believe that the Settlement would provide significant benefits, including certainty and finality on major issues, to the Settling Parties and Settling Participants. The Commission believes that Williams/California Utilities have addressed most of the discrimination allegations adequately in their Reply Comments. However, the Commission will address two issues in addition to those discussed above and addressed in the Williams/California Utilities Reply Comments.

21. First, the Indicated Parties cite the Commission's orders in the *Constellation* and *Powerex* proceedings³² to support their contention that it would be inappropriate to release funds under the Settlement if there is any possibility that shortfalls would render it impossible to pay refunds to the parties that do not join the settlement.³³ Indicated Parties urge the Commission to condition its approval of the Settlement by directing the California Utilities to backstop any shortfall that may occur under the Settlement.³⁴ The Commission believes that Indicated Parties' reliance on *Constellation* and *Powerex* is inapposite. While it is correct that, in each of these proceedings, the Commission rejected proposals to release funds pending a final determination of "who owes what to whom," our decisions were based on the concern that, at that point, such payouts would have caused a disruption in the process of making this determination. With respect to Williams, the Settlement would make the determination of "who owes what to whom" as between Williams and the parties that join the Settlement. Moreover, the release of funds at this time pursuant to the Settlement's allocations is consistent with the Commission's October 16 Main Order, which stated: "amounts owed by and to parties, as determined in this proceeding, will be offset against each other and only the net result of this offset will flow to or from parties."³⁵

³² *Constellation Power Source, Inc. v. California Power Exchange Corp.*, 100 FERC ¶ 61,124 (2002), *order on reh'g*, 100 FERC ¶ 61,380 (2002); and *Powerex Corp.*, 102 FERC ¶ 61,328, *order on reh'g*, 104 FERC ¶ 61,119 (2003).

³³ Indicated Parties at 9.

³⁴ *Id.*

³⁵ October 16 Main Order at P 180.

22. Second, as to Southern Cities' concern that the Settlement is discriminatory in that it exempts DWR from the gas and emissions adders,³⁶ this exemption is part of a November 11, 2002 settlement between Williams and a number of governmental entities in these proceedings. Williams filed that settlement with the Commission on November 4, 2003, and it has been posted on DWR's website since November 2002. As a result of this settlement, the Commission dismissed Williams from the Refund Proceeding with regard to any claims for refunds to these government entities, including the CERS and DWR, may have against Williams.³⁷ For this reason, the substance of these releases has been a matter of public record for some time now. Thus, the Commission concurs with Williams/California Utilities that the exemption is not discriminatory, but it gives effect to the mutual releases among the parties to that settlement.

23. Finally, as mentioned above, the SWC/MWD express concern about whether the emissions adder is part of the DWR exemption and whether it applies to the California State Water Project (SWP). Williams/California Utilities clarify that the emissions adder indeed is part of the exemption and that, pursuant to the November 11, 2002 settlement, it will waive the emissions adder allocated to DWR (and by extension to SWP) under the Settlement.³⁸

Whether sufficient funds will be available to cover potential shortfalls

Comments on the Settlement

24. Several parties expressed concern that payouts under the Settlement would deplete the amount of money available to provide refunds to parties that do not join the settlement but continue to litigate their claims in the Refund Proceeding.³⁹ Avista and Indicated Parties advocate a condition directing the California Utilities to retain a portion of their refunds under the Settlement to "backstop" any potential shortfalls. The sources of the potential shortfall are many, according to the commenters: shortfalls in interest earned in the CalPX Settlement Clearing Account;⁴⁰ interest owed on amounts due to

³⁶ Southern Cities at 4-5.

³⁷ San Diego Gas and Electric Corp., *et al.*, 101 FERC ¶ 61,391 (2002).

³⁸ Williams/California Utilities Reply Comments at 26.

³⁹ See Avista Energy, Inc. Comments at 3-5; AEPCO Comments at 6; CalPX at 18; CARE at 3; Indicated Parties at 8; and, Portland at 5 and 6.

⁴⁰ Avista at 4.

sellers in the CAISO and CalPX markets;⁴¹ use of the Settlement Clearing Account to pay CalPX bankruptcy wind-up costs; the ability of certain entities in or near bankruptcy (*e.g.*, Enron and Mirant) to pay amounts that are due at the end of the Refund Proceeding;⁴² changes in the amounts owed by parties (both settling and non-settling) resulting from CAISO's ongoing rerun calculations;⁴³ movement of the settlement of Reliability Must Run (RMR) contracts from the CAISO market to the CalPX market leading to an increased refund shortfall for CalPX participants who had demand;⁴⁴ and, the potential for PG&E to seek interest for the portion of refunds allocated to the Refund Period.⁴⁵

25. Williams/California Utilities reply that such shortfalls are unlikely, irrelevant or otherwise covered by the Settlement. The Settlement will result in an initial release of funds by the CalPX into various escrow accounts from which Settling Parties and Settling Participants will be paid as shown on Schedule 4 of the Williams Settlement Escrow. Amounts that are indicated as being due to non-settling parties will remain in escrow pending the outcome of litigation, at which time, the non-settling parties will be paid according to the Commission's final order in the Refund Proceeding indicating "who owes what to whom." There will be a "true-up" based on the Commission's determination of "who owes what to whom" following completion of the CAISO and CalPX rerun process.

26. Under the Settlement, if the Commission finds that there is a shortfall in principal amounts due at the end of this process, Williams will pay the difference. No interest will be released from the CalPX Settlement Clearing Account or paid to Williams or any

⁴¹ Puget at 3.

⁴² Avista at 4.

⁴³ CalPX at 18.

⁴⁴ CalPX's Further Comments state that, based on recent discussions with the Settling Parties, it agrees with the Settling Parties that the Settlement will not affect the amounts due to non-settling parties in view of Williams' agreement to be responsible for additional refunds amounts that may ultimately result from the Refund Proceeding, regardless of how the RMR contract path issue is resolved in the Refund Proceeding. *See* CalPX Further Comments at 3-4.

⁴⁵ Indicated Parties at 7-8.

Settling Party or Settling Participant until the Commission issues an order determining the amount of interest and when/to whom it will flow. This determination is not a part of the Settlement. According to Williams/California Utilities:

[T]he ultimate amount of Williams' receivables from the [CA]ISO and the [Cal]PX and the amount of its refunds to non-settling parties will be based, not on the Settlement Agreement, but on the Commission's orders, as will the amount of interest. . . . Section 4.3 [of the Settlement Agreement] is explicit that the refunds are paid before interest and that the interest rate 'shall be as determined by FERC as part of its determination of interest issues associated with the current CAISO and [Cal]PX settlement reruns and refund calculations and will be paid in accordance with such FERC determinations.'⁴⁶

Williams/California Utilities assert that concerns about shortfalls in interest are immaterial, as the Settlement does not address interest issues. Alleged shortfalls arising from the CalPX wind-up process ignore the fact that the Commission already has authorized a separate rate for the recovery by the CalPX of its wind-up charges.⁴⁷ Finally, Williams/California Utilities assert that concerns about Enron and Mirant creating shortfalls are misplaced, as both of these entities are owed substantial amounts by the CAISO and the CalPX that could be used to pay refunds. In any event, the true-up mechanism and Williams' obligation under the Settlement to be the ultimate backstop for shortfalls in principal should assuage commenters concerns.⁴⁸

Discussion

27. The Commission believes that the Settlement Agreement provides ample protection to parties, whether they opt into the Settlement or continue to litigate, against the risk of any shortfall. Williams has agreed to underwrite any shortfall that remains after the true-up provisions in the Settlement Agreement. Thus, we see no reason to

⁴⁶ Williams/California Utilities at 11-12.

⁴⁷ See California Power Exchange Corp., 100 FERC ¶ 61,178 (2002) (August 8 Order). Subsequent Orders clarifying and approving extensions of time to recover costs: See California Power Exchange Corp., 101 FERC ¶ 61,330 (2002); 101 FERC ¶ 61,403 (2002); 102 FERC ¶ 61,208 (2003); 103 FERC ¶ 61,220 (2003); and, 104 FERC ¶ 61,005 (2003). For the most recent Commission order extending the time period from January, 2004 to June, 2004 to recover costs, see California Power Exchange Corp., 105 FERC ¶ 61,329 (2003).

⁴⁸ Williams/California Utilities Reply Comments at 13.

impose further conditions on the Settlement or to require the California Utilities to agree to backstop any potential shortfalls in principal that may exist at the conclusion of these proceedings.

Whether the Settlement provides sufficient information to allow parties to make an informed determination as to whether they should opt into the Settlement or continue to litigate

Comments of the Parties

28. Several parties complain that the Settlement Agreement, along with the supporting documentation filed by Williams/California Utilities on April 27, do not provide sufficient information to allow them to assess the risk of continuing to litigate their interests in the Refund Proceeding against the benefits of opting into the Settlement.⁴⁹ Portland and Puget ask for additional procedures to provide an opportunity to evaluate the additional information needed to assess the Settlement. The additional information sought by the commenters is vaguely described as “workpapers” that support the allocations shown in the Appendix 4 Allocation Matrix.

Williams/California Utilities Reply Comments

29. Williams/California Utilities respond to these requests for additional information by pointing out that:

while workpapers were not provided, the Settling Parties note that they offered to make their respective business and technical people who were responsible for the calculations underlying the Settlement available to those who requested such workpapers. Ironically, some of the parties that now complain about not being permitted to view workpapers failed to take advantage of this opportunity.⁵⁰

Williams/California Utilities also assert that the Settlement is intended to preserve intact the rights of those who choose not to join the Settlement, so the Commission should not delay its consideration of the Settlement on the grounds that commenters do not have enough information to make an informed judgment.

⁴⁹ See Indicated Parties at 3, 15-18; Merrill Lynch at 2; NCPA at 2, 6 and 7; Pasadena at 4; Portland at 3 and 4; and, Puget at 3- 6.

⁵⁰ Williams/California Utilities at 7, footnote 7.

Discussion

30. The Commission believes that the record of this proceeding is replete with information sufficient to enable an interested party to make an informed judgment weighing the pros and cons of opting into the Settlement or continuing to litigate. The Settlement documents explain with sufficient detail how the refunds were calculated and how the gas and emissions adders were factored into each participant's "bottom line." Nevertheless, the Commission believes that there is merit to the view that additional time might facilitate further consideration of the Settlement and supporting documents in the April 27 filing, but also for each party to evaluate the comments and reply comments in response to the Settlement. For this reason, the Commission will allow an additional five days from the date of this order for parties to indicate their intention to opt into the Settlement. Implementation of this five-day process will be discussed *infra*.

Whether the Commission can approve the Settlement without the prior approval of the bankruptcy courts overseeing the CalPX and PG&E bankruptcy proceedings

31. Indicated Parties and the CalPX both question whether the Commission can approve the Settlement without prior approval of the bankruptcy courts overseeing the CalPX and PG&E bankruptcies.⁵¹ According to CalPX, the Chapter 11 plan for the CalPX bankruptcy (the CalPX Plan) was approved by the U.S. Bankruptcy Court for the Central District of California on November 1, 2002. The CalPX Plan provides that the amount of claims and timing of distributions on account of claims arising from the markets administered by CalPX and CAISO are to be based on determinations by the Commission.⁵² However, CalPX also asserts that "assuming the Commission approves the settlement, CalPX nevertheless will be obligated to seek approval from the Bankruptcy Court to implement the distribution arrangements set forth in the settlement because they differ from those contemplated in the CalPX Plan."⁵³ Indicated Parties, citing Paragraphs B.2., B.3. and B.4. of the CalPX Plan, assert that distributions to certain classes of claimants "shall be subject to applicable FERC order, including such

⁵¹ Indicated Parties at 12-14, and CalPX at 10-14.

⁵² CalPX at 13.

⁵³ *Id.*

adjustments and priorities, and in such manner as may be established by FERC.” They further state that the amount of claims in Class 6⁵⁴ “shall be determined in accordance with a calculation methodology or allocation established pursuant to rule, order or judgment of FERC, *and in conformance with Section III.C.3. of the Plan.*”⁵⁵

32. With respect to the PG&E bankruptcy, CalPX points out that the Chapter 11 plan for PG&E, which became effective April 12, 2004, provides that any reduction in the amount deposited in the \$1.6 billion escrow for Class 6 claims “shall be made only upon the order of the U.S. Bankruptcy Court for the Northern District of California, pursuant to a reasonably noticed motion.”⁵⁶ According to CalPX, although PG&E could file such a motion and seek approval to withdraw funds, the Commission should be mindful of the possibility that some parties might object to such a withdrawal. CalPX concludes that “It is unclear what effect either an approval or denial of such an order by the PG&E Bankruptcy Court would have on the proposed settlement.”⁵⁷

Williams/California Utilities Reply Comments

33. Williams/California Utilities dispute CalPX’s interpretation of the CalPX Bankruptcy Plan, asserting that the Bankruptcy Court’s approval for FERC-directed distributions from the Settlement Clearing Account is not required by the terms of the Bankruptcy Plan: Rather, they assert that the Bankruptcy Plan “provides explicitly that any such distribution is subject to FERC order, and that FERC’s determination overrides any contrary methodology in the [Cal]PX plan.”⁵⁸ As to the PG&E bankruptcy, Williams/California Utilities assert that the Bankruptcy Court’s approval is not required for the Settlement Agreement to become effective. However, PG&E must seek the Bankruptcy Court’s approval for the withdrawal of funds from the bankruptcy escrow that would be required by the Settlement. PG&E commits to seek this approval “after the Commission addresses the issue in its order on the Settlement.”⁵⁹

⁵⁴ Class 6 and Class 7 Claims are amounts owed by for transactions in the CAISO and the CalPX markets.

⁵⁵ *Id.*, emphasis in Indicated Parties’ comments.

⁵⁶ CalPX Comments at 14.

⁵⁷ *Id.*

⁵⁸ Williams/California Utilities Reply Comments at 21.

⁵⁹ *Id.* at 22.

CalPX Further Comments

34. On June 17, CalPX filed further comments on the Settlement, over one month after the deadline for comments set by the Commission. Nevertheless, the Commission will accept these comments as they provide additional information to assist our consideration of the Settlement. With respect to CalPX's assertion that the Bankruptcy Court must approve the Settlement's distribution plan inasmuch as it differs from the CalPX Bankruptcy Plan, CalPX now states that it "has agreed to make an immediate filing with the Bankruptcy Court for such approval so that the matter may proceed on parallel rather than sequential tracks before the Commission and the Bankruptcy Court." CalPX stated that it would file a motion to this effect on June 18, and that it has obtained a July 13 hearing date before the Bankruptcy Court on this motion. CalPX does not anticipate impediments to approval of the motion by the Bankruptcy Court.⁶⁰

Discussion

35. The CalPX's argument that its Bankruptcy Plan requires approval of the Bankruptcy Court before Commission-ordered distributions can occur is inconsistent with the explicit terms of the CalPX Bankruptcy Plan. Section III.D.4.c. (Maintenance of the Settlement Clearing Account) provides as follows:

. . . the Settlement Clearing Account shall be maintained by the Reorganized Debtor [CalPX], . . . subject, however, to orders of FERC. The Reorganized Debtor shall not hinder such distributions, and shall make such distributions promptly following such FERC orders whether or not such orders are pending rehearing, reconsideration or appeal, except as may be otherwise provided in such FERC orders or FERC regulations or during the pendency and to the extent of the stay of any such orders.⁶¹

Clearly, the CalPX Bankruptcy Plan envisions and provides for Commission-ordered distributions from the Settlement Clearing Account and directs the CalPX to comply with such orders. Nevertheless, based on CalPX's Further Comments, the Commission will

⁶⁰ Further Comments of the California Power Exchange Corporation on Offer of Settlement at 2-3.

⁶¹ See CalPX Bankruptcy Plan, Bk. No. LA01-16557-ES, In re California Power Exchange Corporation, a non-public benefit corporation, Debtor, "Official Committee of Participant Creditors' Fifth Amended Chapter 11 Plan, as Modified (Revised October 1, 2002).

rely on CalPX's commitment to pursue approval by the Bankruptcy Court of the distributions required under the Settlement. CalPX is directed to file with the Commission a copy of its motion to the Bankruptcy Court seeking approval of distributions under the Settlement.

36. In view of the Williams/California Utilities' Reply Comments on the effect of the PG&E bankruptcy proceedings, the Commission believes that the Settlement may proceed. However, PG&E will have to seek Bankruptcy Court approval for any disbursements from the PG&E Bankruptcy Escrow to implement its obligations under the Settlement. Section 5.4.(g)(i) of the PG&E Bankruptcy Plan⁶² clearly envisions distributions from the PG&E Bankruptcy Escrow will be subject to approval by the Bankruptcy Court. However, the Bankruptcy Court also approved a settlement in its ongoing proceeding addressing certain concerns by the Class 6 creditors that provides:

Pursuant to Section 5.4(g)(i) of the Plan, PG&E is further authorized and directed to instruct the [escrow] Agent to pay, in accordance with the FERC Refund Order, any Disputed Claim in Class 6 within five (5) business days of the later to occur of (a) the date such Claim becomes an Allowed Claim pursuant to the Plan and (b) the receipt of wire instructions from the Class 6 Claimant.⁶³

The PG&E Bankruptcy Plan provides that a claim becomes an "Allowed Claim," *inter alia*, when the Bankruptcy Court approves a settlement of such claim. The PG&E Bankruptcy Escrow has \$1.6 billion in it for payment to the CalPX, and it appears that, pursuant to the Class 6 Settlement Order provisions, distributions can be made as soon as the Commission issues an order directing disbursement to the parties and that order is approved by the Bankruptcy Court. PG&E has agreed to seek such approval after the Commission acts on the Settlement, and the Commission will direct that PG&E do so.

⁶² See PG&E Bankruptcy Plan, In re Pacific Gas and Electric Company, a California corporation, Debtor, Case No. 01-30923 DM, Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company Dated July 31, 2003, as Modified by Modifications Dated November 6, 2003 and December 19, 2003.

⁶³ See Stipulation Resolving Objections of Class 6 Objectors to Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Pacific Gas and Electric Company Proposed by Pacific Gas and Electric Company, PG&E Corporation, and the Office Committee of Unsecured Creditors, dated July 31, 2003, Case No. 01-30923 DM, filed November 13, 2003, United States Bankruptcy Court, Northern District of California; and Order on Debtor's Motion for Approval re Disputed Claims Escrow Accounts, Case No. 01-30923 DM, issued March 4, 2004 (attached to Williams/California Utilities Reply Comments as Attachment 2; the "Class 6 Settlement Order").

Whether the Settlement is consistent with the *Trailblazer* criteria governing approval of contested settlements

37. Indicated Parties assert that judicial and Commission precedent do not support a Commission determination to approve this contested settlement. Indicated Parties state that the Supreme Court has found that the Commission can approve a contested settlement only through an independent finding, supported by substantial record evidence, that the settlement will result in just and reasonable rates.⁶⁴ Moreover, Indicated Parties argue that none of the four circumstances discussed in *Trailblazer Pipeline Company* for the approval of contested settlements can be shown to exist in this case.⁶⁵

Discussion

38. Indicated Parties correctly recite the Supreme Court precedent applicable to approving a contested settlement: the Commission must be able to make an independent determination based on substantial record evidence that the settlement will result in just and reasonable rates, or in the context of these proceedings, will produce a reasonable resolution of the proceedings. Moreover, the Commission's settlement rules provide that the Commission may decide the merits of contested settlement issues only if the record contains substantial evidence or the Commission determines that there is no genuine issue of material fact.⁶⁶ We find that this Settlement meets these requirements and will therefore approve it, effective five days after the date of this order.

39. *Trailblazer* outlines four circumstances under which the Commission may approve a contested settlement: 1) the Commission may make a merits determination on each contested issue; 2) even if some aspects of a settlement are problematic, the Commission nevertheless may approve a contested settlement as a package upon determining that the overall result of the settlement is just and reasonable; 3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections and the contesting parties' interest is too attenuated; or, 4) the Commission may sever the contesting parties, approving it as uncontested as to the settling parties only and leaving the contesting parties free to pursue their claims through continued litigation. Indicated Parties assert that the Commission cannot approve the Settlement under any of the *Trailblazer* approaches. We disagree.

40. In approving the Settlement, the Commission has evaluated and discussed the

⁶⁴ *Citing Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

⁶⁵ Indicated Parties' Initial Comments at 10-12.

⁶⁶ 18 C.F.R. section 385.602(h)(1)(i).

issues raised by protesters, and we have made merits determinations on the protested issues. The Commission has determined, based on substantial record evidence that the Settlement is not unduly discriminatory for those who choose not to opt in. We have determined that the Settlement adequately considers and provides for any potential shortfalls in the various Settlement escrow accounts to fund all of Williams' remaining liability in the Refund Proceeding: Williams' establishment of the Surplus Escrow Account and its agreement to backstop any shortfalls if the Surplus Escrow Account. The Commission has determined that the Settling Parties provided sufficient information to enable parties to evaluate the benefits of the settlement versus the risks of pursuing further litigation. Finally, we have determined that the concerns about the role of the CalPX and PG&E Bankruptcy Courts can be satisfactorily addressed.

41. However, even if these findings were deemed not to address adequately the issues raised by the Indicated Parties, another approach for approving this contested settlement is available under *Trailblazer*: the Commission can find that the overall result of the Settlement is just and reasonable, and we find that to be the case with the instant Settlement. We do not agree with Indicated Parties that Williams/California Utilities and the Settlement propose that the Commission and the parties "simply accept their word that the settlement amounts are fair, accurate and appropriate."⁶⁷ While the Commission occasionally approves settlements that constitute "black boxes," such is not the case here (except for the \$8 million negotiated amount Williams will pay under the Settlement for the pre-Refund Period from May 1 to October 1, 2002). The Settlement lays out the refund allocations, the amount of fuel and emissions adders that apply to each party and a "bottom line" for each party. The Settlement explains how these amounts were determined; additionally, Williams offered to meet with parties and to provide access to their technical experts to explain how the refund allocations were derived. The Settlement provides a "true-up" process to ensure that Settling Parties and Settling Participants will not be disadvantaged by any differences between the Settlement's refund allocations and a final determination of "who owes what to whom" on completion of the CAISO and CalPX rerun process. Finally, the Settlement provides a process under which Williams will serve as the ultimate "backstop" for any shortfalls under the Settlement. In addition to setting aside \$10 million in an escrow account to cover potential refunds to parties that choose not to opt into the Settlement, section 6.6.3 provides that Williams will pay the balance of any receivables shortfall that remains after the Commission issues an order establishing "who owes what to whom" following the CAISO/CalPX rerun process.

42. Thus, it appears that this Settlement, far from being a "black box," anticipates that

⁶⁷ *Id.* at 10.

there may be a need to address changes in parties' refund positions as the rerun process is completed. The Settlement covers this contingency, both for those who participate in the Settlement and for those who choose to litigate, by establishing the Williams Surplus Escrow, which Williams will fund at \$10 million. If there are shortfalls in receivables that exceed the \$10 million in this fund, Williams agrees to make up the difference from its own funds. Parties that choose not to opt-in will face the litigation risk of paying 100 percent of their allocated share of Williams' claim for additional fuel costs (the gas adder), because under the Settlement, Williams agrees to forego 50 percent of its claim for each Settling Party and Settling Participant. The presence of this litigation risk for non-settling parties does not undermine the integrity of the Settlement, but it is a factor that each party must evaluate as it determines whether to join the Settlement or continue with litigation.

43. Indicated Parties misstate the second *Trailblazer* condition to mean that the Commission cannot approve the Settlement, because "the proponents have failed to present any evidence showing that the early pay-out will not have material adverse consequences on subsequently paid parties, despite a well-established record that indicates the likelihood of revenue shortfalls."⁶⁸ *Trailblazer* does not require the Commission to find that the Settlement will not result in risks for those who choose not to opt in. Rather, *Trailblazer* found that a contested settlement could be approved "as a package on the ground that the overall result of the settlement is just and reasonable."⁶⁹ From the Commission's perspective, the Settlement represents a fair resolution of the issues in these complex proceedings and will provide much needed certainty for Williams/California Utilities and the parties as the Refund Proceeding winds its way toward an ultimate conclusion. Thus, consistent with the second *Trailblazer* approach, the Commission finds that the Settlement as a package is just and reasonable.

44. The Indicated Parties assert that the Commission cannot approve the Settlement under the third *Trailblazer* condition – that the interests of the contesting parties are so attenuated that the settlement can be evaluated under the less rigorous "fair and reasonable" standard that applies to uncontested settlements. The Commission reads the protest by Indicated Parties to indicate strong objections to the Settlement that may result in their continued litigation of certain issues in the California Refund proceedings. Although we do not find those interests to be "attenuated," this fact alone does not preclude approval of this contested settlement. The *Trailblazer* case, however, states that the fact that a litigant may have other avenues to pursue its claims could support approval of this contested settlement. As an example, the *Trailblazer* order discussed a Natural Gas Act Section 4 rate case involving an association of Canadian producers whose gas was shipped on Northern Natural and which opposed a settlement. The Commission

⁶⁸ Indicated Parties Initial Comments at 11.

⁶⁹ *Trailblazer* at 62,342.

nevertheless approved the settlement finding that it provided substantial benefits to Northern Natural and contained provisions preventing cost shifts to Northern Natural's other customers. The Commission found that the pipeline's commitment in the settlement to file a new rate case in less than two years would provide the contesting parties with an opportunity to pursue their concerns about the pipeline's rate design.⁷⁰ Thus, the Commission finds that the Settlement meets the third circumstance outlined by *Trailblazer* for approval of contested settlements.

45. Finally, the *Trailblazer* order indicates that severance of a contesting party, while a measure of last resort, will also permit a contested settlement to go forward with Commission approval. We do not find this to be necessary in this case. For reasons stated above, the Commission finds that the Settlement can be approved, though it is contested, under circumstances outlined in *Trailblazer*.

Miscellaneous Comments

CalPX/CAISO "Hold Harmless" Request

46. Both the CalPX and the CAISO request that the Commission hold them, their officers, directors and professionals harmless from any liability resulting from steps they take to implement the Settlement.⁷¹ Williams/California Utilities also support indemnification for both CalPX and CAISO.⁷² In its Further Comments, CalPX reiterates its concern about the impact resulting from the Settlement's change in the market in which the RMR contracts are settled from the CAISO's to the CalPX's markets. CalPX states that the RMR settlements did not occur in CalPX markets but occurred exclusively in CAISO's RMR market. CalPX cites this as further support for its request for indemnification for implementing the Settlement.⁷³

47. We do not believe that such indemnification is necessary or that CalPX and

⁷⁰ *Trailblazer* at 62,344, *citing* Northern Natural Gas Co., 76 FERC ¶ 61,109, *reh'g denied*, 76 FERC ¶ 61,330 (1996).

⁷¹ CalPX Comments at 20; and, CAISO Addendum to Reply Comments at 3.

⁷² Williams/California Utilities Reply Comments at 24-25.

⁷³ CalPX Further Comments at 4. This concern was originally raised in the CalPX Comments at 21.

CAISO have justified such a provision. Moreover, no other entity involved in these proceedings has sought indemnification. However, if the CalPX and CAISO believe that any of the Commission's regulations will serve as an impediment to their complying with the directives in this order, they may file a request for waiver of those regulations.

48. As stated above, the Offer of Settlement and Settlement Agreement are approved, effective five days after the date of issuance of this order. The Commission is adopting this effective date in order to provide parties additional time to evaluate whether, based on this order, they should opt into the Settlement or continue to litigate.

NCPA Comments on the Settlement and the Williams/California Utilities Reply

49. NCPA filed a motion to file comments out of time and comments on the Settlement expressing a number of concerns, principally arising 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, 2002.⁷⁴ The thrust of NCPA's comment appears to be a concern that, by entering into the Settlement, PG&E may be settling claims arising from its role as Scheduling Coordinator for wholesale customers in the CAISO markets.⁷⁵ Modesto Irrigation District and City of Santa Clara/Silicon Valley Power filed identical answers supporting NCPA's comments on the Settlement.

50. Williams/California Utilities answer that PG&E, as Scheduling Coordinator for NCPA pursuant to wholesale contracts between them, has the authority to act in the CAISO and CalPX markets on behalf of NCPA and the other entities for which it serves as Scheduling Coordinator. The Settlement allocates costs and refunds among Scheduling Coordinators in the CAISO and market participants in the CalPX. According to Williams/California Utilities, "under the [CA]ISO and [Cal]PX Tariffs, market participants act through a scheduling coordinator or [Cal]PX market participant. . . . NCPA had wholesale arrangements through PG&E, and the relevant PG&E scheduling coordinator IDs are encompassed in the amounts allocated to PG&E through the

Settlement."⁷⁶ Williams/California Utilities also challenge NCPA's assertion that PG&E

⁷⁴ NCPA Motion for Leave to File Comments Out of Time and Comments on The Williams Settlement at 3.

⁷⁵ *Id.*

⁷⁶ Williams/California Utilities Answer to NCPA motion and comments at 4.

may not enter into the Settlement without NCPA's prior approval as being devoid of "any specific citations to contractual language."⁷⁷

51. 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. Although NCPA is correct in asserting that its Interconnection Agreement with PG&E requires notice if there is a "significant regulatory change," or a "significant operational change,"⁷⁸ the Settlement does not meet the definitions of these terms contained in the agreement: The Interconnection Agreement defines "Significant Regulatory Change" as:

a situation in which 'FERC, [or] the [Public Utilities Commission of the State of California] . . . issues an order or decision or adopts or modifies a tariff or filed contract, or enacts a law that significantly interferes with the ability of either Party to perform any of its obligations under this Agreement.'⁷⁹

"Significant Operational Change" is defined:

as a situation in which, for example, NCPA or its member customer acquires ownership or control of or rights to generation facilities within Northern or Central California.⁸⁰

It appears that neither of these provisions would require PG&E to notify NCPA in advance of the Settlement, and that the Interconnection Agreement does not preclude PG&E from entering into the Settlement. In any event, NCPA, as a scheduling coordinator and 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.

CalPX's Other Issues and Williams/California Utilities Reply

52. As mentioned above, CalPX raised concerns in its Initial Comments on the

⁷⁷ *Id.* at 6.

⁷⁸ *See* Interconnection Agreement Between Pacific Gas and Electric Company and The Northern California Power Agency, *et al.*, FERC Electric Tariff, Sixth Revised Volume No. 5, Service Agreement No. 17 (effective Sept. 1, 2002) at § 10.

⁷⁹ *Id.* at § 10.1.

⁸⁰ *Id.* at § 10.2.

Settlement and in its Further Comments pertaining to the issues that were “carved out” of the settlement. In response, Williams/California Utilities’ Reply Comments made certain clarifications and undertakings related to these concerns. Accordingly, CalPX now states that “these clarifications and commitments, if approved and implemented by the Commission, provide satisfactory resolution of these issues.”⁸¹ As stated above, the Commission is reluctant to provide the indemnification requested by CalPX but will consider any requests for waivers of the Commission’s regulations that CalPX believes it requires in order to implement the 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 and is authorized and directed to implement the Settlement, as discussed in the body of this order. The CalPX may seek such waivers as it believes necessary to carry out its obligations under the Settlement.

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

(D) PG&E is directed to request approval of the Bankruptcy Court for the disbursal of funds from the PG&E escrow account, as provided in the Settlement Agreement and as discussed in the body of this order.

(E) The CalPX is directed to file with the Commission a copy of its motion to the Bankruptcy Court seeking approval of distributions under the Settlement.

By the Commission. Commissioner Kelly not participating.

(SEAL)

Magalie R. Salas,
Secretary.

⁸¹ CalPX Further Comments at 5.