

109 FERC ¶61,257
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
Complainants

Docket No. EL00-95-100, *et al.*

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 No. EL00-98-000, *et al.*

Puget Sound Energy, Inc.

Docket No. EL01-10-000, *et al.*

v.

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

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. IN03-10-00

Fact-Finding Investigation of Potential
Market Manipulation of Electric
And Natural Gas Prices

Docket No. PA02-2-000

Duke Energy Trading and Marketing, L.L.C.

Docket No. EL03-152-000

State of California, *ex rel.*, Bill Lockyer,
Attorney General of the State of California,

Docket No. EL02-71-000, *et al.*

v.

British Columbia Power Exchange Corp, *et al.*

ORDER ON SETTLEMENT AGREEMENT

(Issued December 7, 2004)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement Agreement (collectively, the Settlement) filed on October 1, 2004 in the instant proceedings by Duke,¹ the California Parties,² the Other Claimant Parties,³ and the Commission's Office of Market Oversight and Investigations (OMOI) (collectively, the Settling Parties). The October 1 filing consists of the "Joint Offer of Settlement," a "Joint Explanatory Statement," a "Settlement and Release of Claims Agreement," and other supporting documentation. The Settlement resolves matters and claims raised in the captioned proceedings arising from events in the California Independent System Operator (CAISO) and California Power Exchange (CalPX) energy and ancillary services markets during the period of January 1, 2000 through June 23, 2001 as they relate to

¹ Under the terms of the Settlement, "Duke" refers to the following entities: Duke Energy Corporation; Duke Capital LLC; Duke Energy Americas, LLC; Duke Energy Merchants, LLC; Duke Energy Trading and Marketing, L.L.C. (DETM); Duke Energy North America, LLC; Duke Energy Morro Bay LLC; Duke Energy Moss Landing LLC; Duke Energy Oakland LLC; Duke Energy South Bay, LLC; DETMI Management, Inc.; DE Power Generating, LLC; Duke Energy California, LLC; Duke Energy Generation Services, LLC; Duke Energy Fossil-Hydro, LLC; Duke Energy Fossil-Hydro California, Inc.; Catawba River Investments II, LLC; and DE Power Generating Holdings, LLC. Individually or collectively, these entities may be referred to herein as Duke.

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

³ For purposes of the instant Settlement, the "Other Claimant Parties" are: the San Diego District Attorney's Office (SDDA); the Attorney General of the State of Washington in her capacity as chief law enforcement officer of the State; and to the greatest extent permitted by law (Washington Attorney General); and the Attorney General of the State of Oregon in his capacity as chief law enforcement officer of the State, and to the greatest extent permitted by law (Oregon Attorney General).

Duke. In addition, the Settlement would resolve certain class action proceedings pending in state and federal courts, subject to the separate approval of the relevant courts.⁴

2. This order approves the Settlement, with conditions discussed *infra*. The Commission's action in approving this Settlement will benefit customers by resolving claims against Duke for refunds, price adjustments or other remedies for actions arising out of Duke's sale of electricity and natural gas into California during the period defined in the Settlement Agreement. Approval will avoid further costly litigation, eliminate regulatory uncertainty and bring to a close a number of disputes stemming from the California market disruptions during 2000 and 2001 as they relate to Duke.

I. Background and Description of the Settlement

3. The Settlement resolves all refund issues in Commission Docket Nos. EL00-95-000⁵ and EL00-98-000,⁶ and in the EL01-10 proceeding.⁷ The Settlement also resolves claims against Duke in Docket Nos. PA02-2, IN03-10, and the Commission's physical withholding investigation, and related appellate proceedings insofar as these proceedings pertain to Duke's sales in the CAISO and/or CalPX markets and/or sales to CERS from January 1, 2000 through June 20, 2001 (collectively, the FERC Proceedings). The Settling Parties also have agreed to mutual releases of past, existing and future claims

⁴ The class action proceedings involve the "California Class" and the "Egger Class." The California Class comprises the plaintiff class representatives in several state court proceedings that are described fully in section 1.7 of the Settlement Agreement. The Egger Class refers to the plaintiffs in a federal class action suit described in section 1.34 of the Settlement, and the Egger Class consists of persons residing in Oregon, Washington, Utah and Idaho who directly or indirectly purchased electric power since July 1, 1998. Collectively, the California Class and the Egger Class are referred to as the Class Action Parties.

⁵ San Diego Gas & Electric Company v. Sellers of Ancillary Services.

⁶ Investigation of Practices of the California Independent System Operator and the California Power Exchange. This proceeding and the proceeding in Docket No. EL00-95 are collectively referred to as the California Refund Proceeding.

⁷ Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity in the Pacific Northwest (the Pacific Northwest Proceeding).

arising at the Commission and/or under the Federal Power Act⁸ with respect to rates, prices, and terms or conditions for energy, ancillary services, or transmission congestion in the western electricity or western natural gas markets during the period from January 1, 2000 through June 20, 2001.

4. Finally, the Settlement also resolves all claims against Duke that are based on the factual or legal contentions underlying the appeal to the United States Court of Appeals for the Ninth Circuit in *Lockyer v. FERC*.⁹ Upon approval of the Settlement, the California Attorney General and other California Parties in that litigation have agreed to file with the Commission requests to withdraw all claims against Duke in the *Lockyer* proceedings and will ask that the Commission dismiss Duke as a party to that proceeding.

5. The Settlement provides an opportunity for all other parties to these proceedings to join the Settlement as Settling Participants, and it provides a period of five days following a Commission order approving the Settlement for parties to make such an election. The Settling Parties state that those electing not to join will not be affected by the Settlement, but they also point out that they will not share in the benefits of the agreement.

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

7. According to the Settling Parties, the allocation percentages are a calculation of how the refunds for this period will be allocated in the current CAISO and CalPX rerun process, based on a rerun of settlements conducted by the California Parties using

⁸ 16 U.S.C. § 824 *et seq.* (2000).

⁹ 383 F.3d 1006 (9th Cir. 2004) (*Lockyer* Remand Order).

available CAISO and CalPX data.¹⁰ The Settlement provides that emissions and fuel cost allocations are based on gross control area load, as the Commission prescribed in prior orders.¹¹ The emission and fuel cost allocations may be subject to change based on final Commission orders on rehearing or appeal of the allocation determinations in the Refund Proceeding.

8. The Settlement provides that, by opting into the Settlement, a Settling Participant will receive any refunds and/or offsets against amounts owed under 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, Duke can continue to litigate all issues with respect to non-settling parties. The Settlement provides that 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.

9. Under the Settlement, Duke will provide a total of \$207,500,000 in monetary consideration, consisting of: 1) assignment to the California Parties of Duke's CAISO and CalPX receivables; 2) cash payments to a Duke Refund Escrow established for distribution to Settling Participants entitled to refunds in the Refund Proceeding; 3) cash payments into a separate escrow fund; 4) the transfer of amounts paid or obligated to be paid by Duke pursuant to settlements with the FERC OMOI staff and the FERC trial staff;¹² and 5) cash payments available to Class Action Plaintiffs for an award of court-approved attorneys' fees.¹³

¹⁰ See Joint Reply Comments of the Dynegy Parties, OMOI and the California Parties (*Joint Reply Comments*) in Support of Offer of Settlement at 7.

¹¹ 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).

¹² See *Duke Energy North America, LLC*, 105 FERC ¶ 61,307, (2003), *reh'g dismissed*, 106 FERC ¶ 61,177 (2004), which approved a settlement between Duke and OMOI and resulted in Duke's payment to OMOI of \$2,500,000. Duke also paid \$549,973 in a settlement with the Commission's trial staff of claims against Duke in Docket No. EL03-153-000.

¹³ The amounts described are net of any interest charges that may ultimately apply. The amount of interest to be paid under the Settlement will be determined in accordance with the Commission's determination of interest issues in the Refund Proceeding. Such

(continued)

10. The assignment of receivables also incorporates a March 1, 2001 settlement between DETM and PG&E, revised on July 12, 2004, in which DETM and PG&E agreed to offset \$165,114,222.39 in the amounts owed by PG&E to the CalPX, and in turn owed by the CalPX to the CAISO for energy and ancillary services supplied by DETM to the CAISO during the November 2000 through January 2001 period.¹⁴ As of June 30, 2004, the unpaid amount of Duke's accounts receivables in the accounts of CAISO and CalPX is \$305,290,229.¹⁵ Taking into account the receivables allocated in the DETM/PG&E settlement, the assigned receivables are valued at \$140,176,006.61 (*i.e.*, \$305,290.229 minus \$165,114,222.39). This is without regard to any adjustments resulting from the Preparatory Rerun process, any mitigation in the Refund Proceeding and does not include interest.

11. The Settlement provides for refunds by Duke covering two periods of time:

Pre-October Period (i.e., May 1 2000 through October 1, 2000) -- \$38,115,608 in refunds will be allocated by gross load and does not include interest;

Refund Period (i.e., from October 2, 2000 through June 20, 2001) -- \$122,105,245, which consists of a refund amount minus (or net of) Duke's allowance for fuel and emissions. These amounts and the allocations for each market participant are shown in the Allocation Matrix. The Allocation Matrix reflects Duke's fuel cost allowance at 50 percent of Duke's \$72 million Fuel Cost Allowance claim in the Refund Proceeding. The allocation of the fuel and emissions allowances may change, depending on the resolution of pending rehearing requests and further litigation, and the Settlement provides that the allocation of these allowances is subject to a true-up based on a final order on rehearing or appeal in the Refund Proceeding. For the Settling Parties and Settling Participants, the overall amount of the gas and emissions allowances is fixed, but the allocation of those costs shown in the Allocation Matrix is subject to change.

interest will be added to the portion of the Settlement allocated to the Refund Period. The calculation of the receivables owed to Duke also will include interest.

¹⁴ See Settlement at section 4.1.1.3.

¹⁵ *Id.* at section 4.1.1.1.

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

EL03-152 Settlement Amount – The Settlement incorporates a prior settlement between Duke and the Commission’s Trial Staff involving the show cause proceedings and calls for Duke to pay \$549,973, which will be allocated and refunded as directed by the Commission.¹⁶

CERS Transactions - Duke agrees to forego any claims for refunds resulting from any mitigation of CERS’ sales of imbalance electricity into the CAISO real time market, as well as surcharges associated with those sales, that may be required by the Commission’s May 12 Order in the Refund Proceeding¹⁷ or any subsequent order.

Settlement with the Commission’s OMOI Staff – The Settlement acknowledges an earlier settlement with OMOI in which Duke paid \$2,500,000 to a Treasury escrow account for distribution of refunds in accordance with the Allocation Matrix. This amount is to be attributed to the Pre-October Period, and the portion of this amount that is allocated to non-settling participants pursuant to the Allocation Matrix will remain in the Treasury escrow account for distribution as directed by the Commission.¹⁸

12. The Settlement obligates Duke to pay \$5,000,000 into an interest bearing account Rerun Shortfall Escrow to ensure payment in the event that Duke’s receivables are less than the stated value of receivables assigned to the California Parties under the Settlement.¹⁹ Shortfalls in excess of this amount will be paid by the California Parties. The Settlement treats shortfalls differently, depending on whether the shortfall is: 1) in the Pre-October Period (borne by the California Utilities alone);²⁰ 2) in the Pre-January 18, 2001 Period (borne by the California Utilities, including shortfalls

¹⁶ See Settlement at section 5.5.3.2.

¹⁷ San Diego Gas & Electric Co., 107 FERC ¶ 61,165 (2004) (the May 12 Order).

¹⁸ See Settlement at section 5.5.3.2.

¹⁹ *Id.* at section 4.1.3.

²⁰ PG&E, SCE and SDG&E.

attributable to transactions in the CalPX market in the period from January 18 – January 31, 2001; and 3) Post January 17 Period (borne by CERS, except for the CalPX transactions noted above).²¹ Any excess receivable or refund amounts will be allocated to the entities that would bear the risk for shortfalls in the relevant time periods.

13. The Settlement calls for the Settling Parties and Settling Participants not to contest refund liability or offsets as they pertain to Duke but would allow them to continue to assert their respective litigation positions for periods after the Refund Period. Once the Settlement is effective, Duke will withdraw its claims against PG&E in the PG&E Bankruptcy proceedings. Duke and the California Parties would release each other from all past, existing and future claims arising at the Commission or under the FPA arising from the Refund Proceeding and from the claims of market manipulation and economic or physical withholding discussed in the Final FERC Staff Report in Docket No. PA02-2 from the beginning of the Pre-October Period through the end of the Refund Period.

14. Duke has agreed to certain non-monetary terms. Prospectively, Duke will implement the Commission's market rules established in Docket No. EL01-118²² and will continue to comply with CAISO Tariff provisions regarding must-offer obligations until such time as the Commission approves the termination of such obligations. Duke will retain at its own expense an independent engineering company to perform semi-annual audits of the technical and economic basis, justification and rationale for outages that occur at Duke's generating facilities in California during the preceding six months. The results of these audits will be provided to OMOI without prior review by Duke.

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

16. The effective date of the Settlement is the date upon which the Commission issues an order approving the Settlement without material change or condition unacceptable to

²¹ See Settlement at section 5.11.6.1 through 5.11.6.3.

²² In the EL01-118 proceeding, the Commission adopted market behavior rules and procedural guidelines applicable to sellers' market-based rate tariffs and authorizations. See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

any Party. The execution of the Settlement by the CPUC constitutes the required approval as to SCE.

II. Comments on the Settlement

17. The Commission received seven initial comments on the Settlement,²³ and two reply comments.²⁴ Four commenters, CARE, Enron, NCPA and Vernon either raise significant concerns, discussed *infra*, or oppose the settlement. Salt River endorses language in the Settlement that addresses a concern raised in Salt River's comments on the Dynegy Settlement.²⁵ Specifically, Salt River endorses language in section 13.3 of the Settlement that provides that "Distributions of refunds and Deemed Distributions to Settling Participants will not be affected by the FERC Receivables Determination or FERC Refunds Determination." The CAISO supports the Settlement, but it seeks a provision in the Settlement that would "hold harmless" CAISO, its officers, directors, consultants and professionals from any liability resulting in its implementation of the Settlement.²⁶ CalPX takes a neutral position on the Settlement, but it also seeks a "hold harmless" provision²⁷ as it did with respect to the recently-approved Settlements involving the Williams Companies and Dynegy in the Refund Proceedings.²⁸

²³ Initial Comments were filed by: CAISO, CalPX; Californians for Renewable Energy, Inc. (CARE); Enron Power Marketing, Inc. (Enron), Northern California Power Agency (NCPA); Salt River Project Agricultural Improvement and Power District (Salt River); and City of Vernon, California (Vernon).

²⁴ Joint Reply Comments in support of the settlement were filed by Duke, the California Parties, the Other Claimant Parties and OMOI (collectively, the Settling Parties).

²⁵ Salt River Initial Comments at 4, *citing* Joint Reply Comments of the Dynegy Parties, OMOI and the California Parties in Support of Offer of Settlement at 9, in Docket No. EL00-95-000, *et al.*

²⁶ CAISO Initial Comments at 4 – 7.

²⁷ CalPX Initial Comments at 2 - 7.

²⁸ *See* San Diego Gas & Electric Company, 108 FERC ¶ 61,002 (2004) (the Williams Settlement Order), and San Diego Gas & Electric Company, 109 FERC ¶ 61,071 (2004) (the Dynegy Settlement Order).

18. The issues raised by the parties opposing the Settlement are familiar to the Commission, having been considered and rejected in orders approving the Williams and Dynege settlements. Parties opposing the Settlement continue to express a common theme that the Settlement is discriminatory, unfair, and will have a detrimental effect on parties that choose not to opt into the Settlement and pursue the path of continued litigation in the Refund Proceeding. Parties also express concern as to whether the Settlement refund amounts are accurately calculated and fairly allocated. NCPA asserts that the Commission should require Duke to participate in the fuel cost allowance audit procedure and that issues related to the ongoing audits to establish fuel cost allowances should be resolved in the context of this Settlement.

III. Discussion

A. Whether the Settlement is unduly discriminatory

1. Vernon's Comments

19. Just as it did in comments on the Williams and Dynege settlements, Vernon alleges that the refund allocation methodology in the Settlement discriminates against parties like Vernon, which was a net seller in the CalPX market but was a net purchaser in the CAISO market. According to Vernon, "Duke and other net sellers in the [CA]ISO market should owe Vernon refunds."²⁹ However, Vernon states that this is not what would occur under the Settlement, which lists Vernon as a net payer.³⁰ Vernon also complains that the Settlement would release Duke from any liability for claims by non-settling participants arising from sales into the CAISO and CalPX markets in both the Pre-October and Refund Periods.

20. Vernon asserts that it is unfair and discriminatory to allow Settling Parties to receive refunds ahead of parties who choose not to opt into the Settlement, as it provides them with "a preference to receive 100 percent of their payments while non-settling parties may receive only a portion of their shares" if there is a shortfall. This creates a preference for settling parties and subjects non-settling parties to more risk in collecting refunds from others that may be less creditworthy and unable to perform."³¹

²⁹ Vernon Initial Comments at 3.

³⁰ See Settlement Appendix A (Allocation Matrix) and Appendix B (list of Net Payers).

³¹ Vernon Initial Comments at 7.

21. Vernon identifies several Settlement provisions that it asserts will result in preferential treatment for Settling Parties. First, Vernon asserts that section 4.1.1.2 of the Settlement appears to assign \$1,026,136 in such a way as to give back to the CAISO interest payments that have been paid by Duke. Vernon asserts that this will adversely affect non-settling parties.³² Second, Vernon states that section 4.1.1.3 is discriminatory in that it reflects a private offset “arrangement” by PG&E and Duke that benefits only those two parties. “It would be discriminatory to allow PG&E and Duke to exchange priority rights as to the \$165,114,222.39 covered by this provision.”³³ Vernon sets out a hypothetical example that purports to illustrate how non-settling parties could be adversely affected by the PG&E – Duke offset.³⁴

22. Vernon objects to the Settlement’s allocation of \$ 38,115,608 to the Pre-October Period, stating that these refunds “should be allocated to all market participants on the same basis as those who are agreeing to the settlement as a whole.”³⁵

2. CARE’s Comments

23. CARE’s comments on the Settlement echo similar concerns expressed with respect to the Williams and Dynegy Settlements; *i.e.*, that the Settlement treats CARE unfairly, favors settling parties at the expense of non-settling parties and “would provide CARE with less than it could reasonably expect to receive as the result of any foreseeable litigation scenario.”³⁶ CARE asserts that the Settlement would release Duke from “any liability for claims by a non-settling participant arising from such parties’ sales in the CAISO and CalPX markets in both the pre-October period and the Refund period.”³⁷ Although CARE acknowledges the assumption of the risk of shortfalls undertaken by the

³² *Id.* at 8.

³³ *Id.*

³⁴ *Id.* at 8 – 11.

³⁵ *Id.* at 6.

³⁶ CARE Initial Comments at 2.

³⁷ *Id.* at 5.

California Parties, it asserts that such liability is capped and the liability assumed by the California Parties is therefore “incomplete.”³⁸

24. CARE also agrees with Vernon that the Pre-October Period refund amount (\$38,115,608) should accrue to the benefit of all market participants, and the fact that it does not is another factor in why CARE characterizes the Settlement as unfair and discriminatory. CARE asserts that the entire amount of the Pre-October Period refund should be passed through directly to “end-user ratepayers and consumers of the Settling Parties, more specifically the California Parties and other Non-jurisdictional Parties to the Settlement.”³⁹

3. Enron’s Comments

25. Enron’s brief comments (five sentences) do not specifically allege that the Settlement is discriminatory, but the import of its remarks is that Enron considers the Settlement to be unfair. Enron complains that the Settlement’s methodology for determining or calculating the obligations of non-settling market participants is inconsistent with prior Commission orders, and that the Settlement’s methodology for opting in and resolving claims “is inconsistent with Enron’s obligations under the bankruptcy code and Enron’s confirmed plan of reorganization.”⁴⁰ Enron did not provide any support for these assertions, such as citations to prior Commission orders or its plan of reorganization.

4. NCPA’s Comments

26. NCPA is concerned that the Settlement benefits only net purchasers in the CAISO and CalPX markets, specifically investor-owned utilities and the California Department of Water Resources (CDWR).⁴¹ According to NCPA, as a Scheduling Coordinator and net seller, it will be required to pay to join the Settlement Agreement. Because it competes with PG&E, a net purchaser, NCPA claims to be at a disadvantage in determining whether to opt into the Settlement. NCPA expresses concern that it should

³⁸ *Id.*

³⁹ *Id.* at 7.

⁴⁰ Enron Comments at 2.

⁴¹ CARE Initial Comments at 4.

be given “meaningful notice of the financial impact of such a choice on NCPA itself.”⁴²

27. NCPA’s comments echo Vernon’s concern that the decision not to join the settlement could adversely affect the ability to receive refunds in the Refund Proceeding. NCPA states that “the parties to the proposed settlement should not be allowed to determine what the non-settling parties can and cannot recover in the future. That authority resides with the Commission. The agreement is unfair since it affects the rights of the non-settling parties to collect funds due to them at the conclusion of the current proceeding at the Commission.”⁴³

28. NCPA’s comments on the Settlement follow closely the comments NCPA filed in response to the Dynegey Settlement. 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, 2002.⁴⁴ NCPA expresses the concern that, by entering into the Settlement, PG&E is settling claims arising from its role as Scheduling Coordinator on behalf of its wholesale customers in the CAISO markets without providing them with the opportunity to opt in or not.⁴⁵ As a result, NCPA claims that it does not have sufficient information with which to make a determination on whether to opt into the Settlement.

29. NCPA asserts that the fuel cost allocation methodology used to develop the Allocation Matrix is outdated and inconsistent with the Commission’s May 12 Order that required the CAISO to develop a different methodology, which it has done. Use of the outdated methodology, which imposes costs on control area gross load, will lead to inequitable results and is not just and reasonable, according to NCPA.⁴⁶

30. NCPA asks that the Commission clarify that this proceeding will not prejudice the question of whether PG&E can pass along costs or benefits of the Settlement to NCPA.

⁴² NCPA Comments at 5.

⁴³ *Id.* at 6.

⁴⁴ *Id.* at 3 - 4.

⁴⁵ *Id.* at 2.

⁴⁶ *Id.* at 6 -7.

Because any purchases or sales took place under the Interconnection Agreement, this question is one of contract interpretation between NCPA and PG&E.⁴⁷ NCPA does not point to any specific provision in the Settlement that would affect its rights under the Interconnection Agreement.

Commission Determination

31. The Commission finds that the Settlement is not unduly discriminatory. The Settlement provides an opportunity for all participants to opt-in and would provide significant benefits, including certainty and finality on major issues, to the Settling Parties. The Settlement anticipates that some parties will choose to continue to litigate rather than join the Settlement, and it would set aside \$5 million in a Rerun Shortfall Escrow for refund shortfalls and in order to “account for uncertainties in the not-yet-final Preparatory Rerun.”⁴⁸ Moreover, section 5.9 of the Settlement provides that the amount of Duke refunds to which any non-settling participant is entitled will be determined in the Commission’s Refund Proceeding and not by the Settlement, which should alleviate non-settling parties’ concerns that, by pursuing continued litigation of their claims in the Refund Proceeding they will in anyway reduce the amount of refunds the Commission ultimately determines they are due.

32. In addition, section 5.11.6 of the Settlement provides that the California Parties will bear the risk of shortfalls in refunds, and this risk is apportioned among the California Utilities and CERS depending upon the time period for which the shortfalls occur.⁴⁹ The Commission finds that this provision clearly rebuts any assertion that the Settlement discriminates against non-settling participants by allowing the distribution of funds to Settling Parties first.

33. The Commission finds without merit Vernon’s concern about an interest credit provided by the Settlement against amounts Duke owed to the CAISO. While it is true that 4.1.1.2 of the Settlement provides Duke with a credit against Duke Receivables, this credit is for interest Duke already paid on amounts it owed to the CAISO for energy for the period of January through May 2001. According to the settling parties’ joint reply comments, the credit is intended to recognize that Duke has paid interest in the amount

⁴⁷ *Id.* at 7.

⁴⁸ Joint Reply Comments at 8.

⁴⁹ *See* Settlement at sections 5.11.6.1 – 5.11.6.3.

specified, without a parallel crediting of those payments against Duke Receivables. The interest credit provided under section 4.1.1.2 is intended to ensure that the Duke Receivables that fund the Settlement are calculated on a pre-interest basis, which is consistent with the Settlement's overall interest methodology. Thus, this credit does not alter the total amount that Duke is paying under the Settlement and thus is not discriminatory against non-settling parties.⁵⁰

34. Likewise the Commission finds without merit Vernon's concerns about a Receivables Offset of \$165,114,222.39 in section 4.1.1.3 of the Settlement. Under the Settlement, this offset is the result of an earlier agreement between Duke and PG&E, and it recognizes that PG&E will not have to pay twice and Duke will not receive twice amounts that flow through the CalPX and CAISO refund process. According to the Settling Parties, PG&E has put into an escrow account subject to the bankruptcy court's oversight an amount sufficient to pay its refund obligations to the market, so the "default risk" Vernon hypothesizes is illusory.⁵¹

35. Vernon's concern that the Non-Settling Reserve account places an unfair limit on its potential refund recovery for the Pre-October Period is misplaced. The cap on each California Party's liability to non-settling parties is the total amount of Duke refunds and/or Deemed Distributions allocated to each California Party pursuant to the Settlement Agreement for each applicable time period. The California Parties have agreed to bear the risk of shortfalls for parties who choose to continue litigating their claims in the Refund Proceeding. Section 5.9 of the Settlement provides that the amounts due to non-settling participants, as determined by the Commission in the Refund Proceeding, will be satisfied first from funds that will be set aside under the Settlement for non-settling parties. Sections 5.11 through 5.11.7 allocate how the California Parties will bear any potential shortfalls in refunds due to non-settling parties. In short, Vernon cannot justify its claim of discrimination based upon the distribution of refund amounts under the Settlement when its own potential recovery is anticipated and provided for by the terms of the Settlement.

36. As to Enron's objections, the Commission cannot "weave from whole cloth" the factual support to sustain Enron's allegations that the Settlement's methodology is somehow "inconsistent with prior Commission orders" or that the Settlement is somehow "inconsistent with Enron's obligations under the bankruptcy code and Enron's confirmed

⁵⁰ Joint Reply Comments at 7 – 8.

⁵¹ *Id.* at 8.

plan of reorganization.”⁵² Accordingly, the Commission can only reject Enron’s objections as lacking support in the record.

37. With respect to NCPA’s comments on the unfair nature of the Settlement, it appears that NCPA’s concerns arise principally from its relationship with PG&E, which serves as NCPA’s Scheduling Coordinator in the CAISO markets. During the period addressed in the Settlement Agreement, NCPA operated both as a Scheduling Coordinator in its own right and as a CalPX participant under the Interconnection Agreement with PG&E. In the Dynegy Settlement Order, the Commission determined that the NCPA-PG&E Interconnection Agreement did not bar PG&E from entering into a settlement with Dynegy,⁵³ and the same is true with respect to the instant Settlement. NCPA has requested clarification that the Commission not prejudge in this proceeding the issue of whether PG&E may pass on any costs or benefits of the Duke Settlement to NCPA.⁵⁴ The Settling Parties point out that “no provision of the Duke Settlement Agreement requires FERC to address this issue” and agrees that disputes concerning NCPA’s contractual rights under the Interconnection Agreement are beyond the scope of the instant proceedings.⁵⁵ Although the Dynegy Settlement Order attempted to provide this clarification, the Commission once again will state that disputes involving the Interconnection Agreement are beyond the scope of this proceeding and will not be resolved in this forum.

38. NCPA’s comments and concerns about its rights vis-à-vis PG&E under the Interconnection Agreement do not require modification to or delay in consideration of the merits of the Duke Settlement. Moreover, NCPA as a CalPX participant in its own right, has the opportunity to evaluate and to opt into the Settlement or to continue litigation if it so chooses. As the Commission stated in the Dynegy Settlement Order, NCPA has “sufficient information with which to make a determination as to whether it should opt into the Settlement.” The Commission explained that the Settlement Agreement, the

⁵² Enron Comments at 2.

⁵³ Dynegy Settlement Order at P 36.

⁵⁴ NCPA Comments at 5.

⁵⁵ Joint Reply Comments at 11.

Allocation Matrix and supporting documentation, as well as the voluminous record of the Refund Proceeding, “provide ample bases for making such a determination.”⁵⁶

B. Whether Non-settling parties are adequately protected from shortfalls

39. Vernon asserts that section 5.11.7 of the Settlement would effectively cap the California Parties’ assumption of the risk of shortfalls, which renders any protection against shortfalls intended by the Settlement illusory from Vernon’s perspective. This is because, according to Vernon, section 5.11.7 caps the shortfall liability for payments to non-settling parties, rendering the liability assumed by the California Parties “incomplete.”⁵⁷ CARE also objects to the Settlement’s allocation of shortfalls in collections of refunds, stating that this issue has “not been properly addressed” by the Commission.⁵⁸ At the heart of their concerns about potential shortfalls is the apparent belief that parties that do not opt into the Settlement will somehow not receive refunds to which they are entitled, a result that CARE describes as “demonstrably improper and unfair.”⁵⁹

Commission Determination

40. Paragraph 21 *supra* sets out the Settlement’s allocations of the risks of shortfalls in receivables and refunds among the settling parties. The interests of non-settling parties are specifically anticipated and measures to address concerns about the impact of shortfalls on these parties are incorporated in the Settlement. Depending on the timeframe and particular circumstances, the Settlement allocates the risk of shortfalls among Duke and the California Parties.⁶⁰ The Commission therefore finds that the interests of non-settling parties are adequately insulated from potential shortfalls and will not condition approval of the Settlement on further measures to address potential shortfalls.

⁵⁶ Dynegy Settlement Order at P 36.

⁵⁷ Vernon Initial Comments at 4.

⁵⁸ CARE Initial Comments at 3

⁵⁹ *Id.* at 3.

⁶⁰ *See* sections 5.11 through 5.11.8.

C. Whether the Commission should grant requests by CalPX and CAISO for “hold harmless” protection for actions taken to implement the Settlement

41. As was the case in the Williams and Dynegy settlement proceedings, the CalPX requests that the Commission hold it, its officers, directors and professionals harmless from any liability resulting from steps the CalPX takes to implement the Settlement.⁶¹ CAISO also asks that the Commission provide a “hold harmless” determination for actions taken by the CAISO, its officers, directors, employees and consultants to implement the settlement.⁶² The Settling Parties support both requests, although they state incorrectly that the Commission granted “hold harmless” language for both parties in the Dynegy Settlement order.⁶³

42. CalPX requests that the Commission incorporate the following language in the order approving the Settlement:

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

Virtually all of the comments by CalPX and CAISO on the Settlement focus on the “hold harmless” issue.

⁶¹ CalPX Comments at 2 – 7.

⁶² CAISO Comments at 4 – 7.

⁶³ Joint Reply Comments at 15.

43. CalPX cites several factors as warranting a hold harmless provision: 1) CalPX's continued existence is solely for the purpose of winding up its business affairs ("resolving the extensive litigation arising from the 2000 – 2001 California energy crisis");⁶⁴ 2) it remains subject to significant litigation exposure, which in turn requires it to perpetuate its corporate existence and retain employees, consultants and attorneys to participate in ongoing litigation; 3) it is both difficult to retain officers, directors and other employees if they face liability exposure resulting from a lack of indemnification; and, 4) absence of a hold harmless provision can make insurance premiums more expensive or "simply unavailable." As a result of the costs incurred as a result of ongoing litigation, CalPX states that, because it is not an operating utility, it "would have to continue to collect wind-up rates from its participants for the duration of the litigation." Based on these factors, CalPX asserts that the public interest is not served by requiring CalPX to continue to charge wind-up rates to participate in litigation arising from the implementation of settlements ordered by the Commission for the purpose of resolving and minimizing litigation."⁶⁵

44. CalPX points to section 14.1 of its tariff, which provided that CalPX would be held harmless for its obligations under the tariff. In approving that provision, the Commission found such indemnification provisions to be "reasonable."⁶⁶ CalPX acknowledges that, in taking actions required of it under the Settlement, it will not be acting pursuant to its tariff; rather it will be acting pursuant to a Commission order approving the Settlement. CalPX also points out that the Settlement itself contains over ten pages of mutual releases and waivers, "the effect of which is to 'hold harmless' the Settling Parties themselves from numerous existing and potential claims."⁶⁷ Finally, CalPX points out that it is the only entity not a party to the Settlement that will be required to disburse cash. As such, CalPX has exposure to third-party litigation "because implementation of the 'black box' settlement may result in some participant's claim that it did not receive its due from the market."⁶⁸

⁶⁴ CalPX Comments at 4 - 5.

⁶⁵ *Id.* at 4 - 5.

⁶⁶ *Citing* Pacific Gas & Electric Co., 81 FERC ¶ 61,122 at 61,519 (1997).

⁶⁷ CalPX Comments at 6, *citing* Article VII of the Settlement Agreement.

⁶⁸ *Id.* at 7.

45. The CAISO also cites a provision of its tariff as being consistent with a “hold harmless” provision applicable to the CAISO’s actions to implement the Settlement. section 14.1 of the CAISO Tariff provides that the CAISO shall not be held liable in damages to any Market Participant (as defined in the tariff) for “any losses, damages, claims, liability, costs or expenses ... arising from the performance or non-performance of its obligations” under the CAISO Tariff, except to the extent that they result from negligence or intentional wrongdoing.

46. The CAISO points out that the Settlement will involve the flow of substantial dollars necessitating concomitant accounting adjustments by the CAISO that are unprecedented in scope and complexity. Although these accounting adjustments would be performed pursuant to a Commission-approved settlement, CAISO is concerned that some parties could accuse CAISO of taking actions that are not consistent with provisions of the CAISO Tariff. CAISO is concerned that someone could argue that the CAISO, in implementing the Settlement, “did not make appropriate accounting adjustments, and as a result did not reflect the appropriate amount of refunds or receivables owing to that Market Participant.”⁶⁹ This would leave the CAISO vulnerable to complaints here at the Commission and additional litigation risk. Finally, CAISO points out that, as the Commission approves more settlements in the Refund Proceeding, the task of implementing those settlements will become more complex, thereby increasing litigation exposure for CAISO as it attempts to implement the settlements. In its reply comments, Vernon relies on the CAISO’s comments to assert that the Commission should condition any order approving the Settlement on settling parties holding non-settling parties harmless “from any effect of the settlement, foreseen or unforeseen.”⁷⁰

Commission Determination

47. The Commission finds that both the CalPX and the CAISO have provided the Commission with compelling justification as to why they should be held harmless, along with their officers, directors, employees and contractors, for the steps taken to implement the Settlement. Particularly persuasive is the fact that, although both CalPX and CAISO will be disbursing substantial sums of cash under the terms of the Settlement, they are not protected by the same indemnities that Article VII of the Settlement Agreement provides for the Settling Parties. Their own tariffs provide hold harmless protection for meeting

⁶⁹ CAISO Comments at 5.

⁷⁰ Vernon Reply Comments at 4.

their obligations under their respective tariffs, so the Commission finds that this same protection is warranted for CAISO and CalPX as they implement the Settlement. The Commission thus determines that CalPX and CAISO shall be held harmless for actions taken to implement the Settlement, and this order incorporates the language requested by CalPX and set out in paragraph 42, *supra*.

48. The Commission denies Vernon's request that approval of the Settlement be conditioned on the settling parties holding non-settling parties harmless from the impacts of the Settlement. The Commission has found that the Settlement appropriately anticipates shortfalls in refunds and receivables and allocates the risks among the settling parties. In short, Vernon's concerns about the impact of potential shortfalls on non-settling parties are adequately addressed in the Settlement. The Commission also points out that parties to the Settlement have agreed to a series of waivers and mutual releases in Article VII that could serve to provide Vernon with additional protection should it choose to opt into the Settlement.

D. Whether Fuel Cost Allowance issues should be determined in the context of the Settlement

49. NCPA seeks clarification that Duke must participate in the audit of fuel cost allowance claims ordered by the Commission in the May 12 Fuel Cost Allowance Order.⁷¹

Commission Determination

50. On September 2, the Commission issued an order that granted in part and denied in part the Joint Waiver Request of Dynegy, Williams and the California Parties seeking waiver of the audit requirement in view of their respective settlements.⁷² The Commission stated that it could not "approve a general waiver of the requirements established by the May 12 Order for any claimant because at least one party has decided not to opt-into the Williams settlement, and others may choose the same course with respect to other pending settlements."⁷³ As a result, the Settling Parties have been

⁷¹ San Diego Gas & Electric Company, 107 FERC ¶ 61,160 (2004) (May 12 Fuel Cost Allowance Order).

⁷² San Diego Gas & Electric Company, 108 FERC ¶ 61,219 (2004) (September 4 Order).

⁷³ *Id.* at P 22 (footnote omitted).

directed to participate in the audit process, and NCPA's comments on this issue are moot.

E. CalPX's Requests for Clarification

51. Although CalPX does not object to the Settlement, it requests that the Commission provide clarification or guidance with respect to several implementation issues. CalPX asks that the Commission clarify the mechanism by which it must adjust the amount of cash to be transferred from the CalPX Settlement Clearing Account to the Duke Refund Escrow. Section 5.3.1.2 of the Settlement provides:

Transfer of Cash from [Cal]PX Settlement Clearing Account. No later than ten (10) Business Days after the Settlement Effective Date, a cash transfer shall be made from the [Cal]PX Settlement Clearing Account to the Duke Refund Escrow of \$140,176,006.61, (i) less an amount equal to the total of all Deemed Distributions applicable to Settling Participants pursuant to section 5.5.2, (ii) less any Paid Duke Receivables, (iii) plus the amounts owed Participants with negative allocations shown on the Allocation Matrix in Exhibit A.

CalPX asserts that the Commission should specify a mechanism for calculating the adjustments in subparagraphs (i) through (iii). It also states that the Commission should state that the CalPX is entitled to rely on those calculations in implementing the Settlement.

52. Because the allocations of fuel and emissions allowance costs are subject to change (by means of a true-up), and a separate determination on interest on receivables will be made in the future, the CalPX states that it will need to make additional cash transfers or credits at some future time after the initial transfer of funds under section 5.3.1.2, the CalPX has requested that the Commission provide specific instructions "as to the precise dollar amount to be credited or paid to each individual payee."⁷⁴

53. Finally, CalPX points out that section 6.2 of the Settlement provides that "FERC's approval of this Agreement in the FERC Settlement Order shall constitute direction to the [Cal]PX to release any and all of the Duke Parties' collateral as herein provided."⁷⁵ CalPX states that it currently holds \$31,000 in cash collateral and two letters of credit

⁷⁴ CalPX Comments at 8.

⁷⁵ *Id.* at 8, *citing* the Settlement Agreement at section 6.2.

each in the amount of \$1.5 million on behalf of Duke. In addition, the CalPX holds approximately \$241,000 in Duke chargeback funds.

54. The Settling Parties concur with these requests. As to the distribution of chargeback amounts, the Settling Parties seek to distinguish the Commission's October 7 Rehearing Order in *PG&E Co. v. CalPX*⁷⁶ (which declined to allow the release of collateral and chargeback funds that were improperly collected until after the completion of the Refund Proceeding) from the Williams Settlement Order, which approved the distribution of funds from the CalPX to Williams on the ground that the Williams Settlement constituted a determination of "who owes what to whom" with respect to that settlement. The Settling Parties assert that the Commission should find that section 6.2 of the Settlement directs the CalPX to release and distribute to Duke its collateral and chargeback amounts.⁷⁷

Commission Determination

55. Section 5.3.1.2 appears to require straightforward mathematical functions (*i.e.*, subtraction and addition) and that, rather than a mechanism, CalPX needs the inputs to perform the mathematical functions described in section 5.3.1.2. CalPX asks the Commission to require the Settling Parties to provide the calculations to the CalPX and to state that the CalPX may rely on those calculations. In addition, the Settlement recognizes that further adjustments to the allocation percentages in the Allocation Matrix (for fuel cost and emissions allowances) will be required as the result of true-up calculations once the Refund Proceeding has culminated in a final determination of who owes what to whom. The Settling Parties support CalPX's request as to implementation of section 5.3.1.2 and state that the Commission should specify that CalPX can rely on calculations provided by the Settling Parties and any true-up calculations that are expected to result from the Refund Proceeding. The Commission concurs with these requests and directs the Settling Parties to provide the calculations needed by the CalPX to satisfy the requirements of section 5.3.1.2. The Commission further finds that CalPX may rely on these calculations.

56. The Commission will deny CalPX's request that the Commission provide it with precise dollar amounts to be credited or paid to each individual payee. The Settlement provides that allocations set out in the Allocation Matrix may change based on final

⁷⁶ 109 FERC ¶ 61,027 (2004) (October 7 Rehearing Order).

⁷⁷ Joint Reply Comments at 14 – 15.

determinations on fuel cost and emissions, plus interest calculations, and it provides for a “true-up” process. It is simply premature at this time to specify precise dollar amounts to be credited or paid to each individual payee. And, in any event, the CalPX should file a refund compliance filing that shows the dollar amounts to be credited and paid.

57. Finally, the Commission agrees with the CalPX and the Settling Parties that, consistent with section 6.2 of the Settlement, as well as prior settlement orders in these proceedings, the CalPX may release and distribute to Duke its collateral and chargeback funds.

The Commission orders:

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

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

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

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

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.