

UNITED STATES OF AMERICA  
U.S. DEPARTMENT OF ENERGY  
BEFORE THE  
BONNEVILLE POWER ADMINISTRATION

Residential Exchange Program                    )  
Settlement Agreement Proceeding            )        BPA Docket No. REP-12

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SUPPLEMENTAL DIRECT AND REBUTTAL TESTIMONY  
OF

Northwest Requirements Utilities; Public Utility District No. 1 of Cowlitz County,  
Washington; Eugene Water & Electric Board; Public Utility District No. 1 of Benton  
County, Washington; the Public Power Council; The City of Seattle; Public Utility  
District No. 1 of Snohomish County, Washington; the City of Tacoma; and Pacific  
Northwest Generating Cooperative and its Members.

JOINT PARTY 2

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WITNESSES:

Paul M. Murphy  
Jeffrey R. Kallstrom

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March 15, 2011

REP-12-E-JP02-04

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Paul Murphy  
Jeffrey Kallstrom

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JOINT PARTY 2

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TESTIMONY OF

Paul Murphy and Jeffrey Kallstrom

1 **Section 1: Introduction and Purpose of Testimony.**

2 *Q. Please state your names and your qualifications to provide this testimony.*

3 A. My name is Paul M. Murphy.

4 A. My name is Jeffrey R. Kallstrom.

5 *Q. Have both of you previously testified and submitted qualification statements in*  
6 *this proceeding?*

7 A. Yes.

8 *Q. What is the purpose of this testimony?*

9 A. In this testimony, we address portions of the final Settlement Agreement that  
10 differ from the draft Settlement Agreement we described in our initial testimony.  
11 The final Settlement Agreement has been uploaded and marked as document  
12 REP-12-E-BPA-11. We also submit this testimony to address errors or  
13 mischaracterizations in the testimony of certain other parties.

14 **Section 2: Changes to the Draft Settlement Agreement.**

15 *Q. What recent changes between the draft and final Settlement Agreement do you*  
16 *address?*

17 A. We address modifications to section 3 of the Settlement Agreement to respond to  
18 misunderstandings or mischaracterizations of that section contained in the  
19 testimony of Alcoa and of the Western Public Agencies Group (“WPAG”). We  
20 also address section 14, which was not included in the earlier draft.

1 Q. How was the earlier draft of section 3 of the Settlement Agreement modified and  
2 why?

3 A. Jack Speer asserts in his testimony that REP benefits available to IOUs under the  
4 REP Settlement are not calculated pursuant to section 5(c) of the Pacific  
5 Northwest Power Planning and Conservation Act of 1980 (“NWPA”) based on  
6 the difference between participating utilities’ ASCs and the PF exchange rate.  
7 REP-12-E-AL-01 p 9. In a legal memorandum submitted by Alcoa, Alcoa asserts  
8 that BPA “unlawfully delegated” its rate-setting obligations for the FY 2012-2028  
9 rate periods. REP-12-B-AL-01. Both of these claims are incorrect, and section 3  
10 was modified to avoid a misinterpretation of the intent of the Settlement  
11 Agreement that might foster these erroneous claims.

12 Q. Please explain the modifications to section 3?

13 A. Section 3 was modified to add a new section 3.1.2 and to replace section 3.7 in its  
14 entirety. The Parties to the Settlement Agreement had always intended that, if  
15 BPA decided it could lawfully enter into the Settlement Agreement, then BPA  
16 would set rates, determine Refund Amounts, and determine the REP benefits to  
17 IOUs consistent with the Settlement Agreement unless and until a court with  
18 jurisdiction were to rule that BPA may not do so. The original language in  
19 section 3.7 provided that BPA would do so. We fully understood that BPA would  
20 enter into the Settlement Agreement only if it concluded that the Settlement  
21 Agreement was lawful and it was appropriate for BPA to abide by the original  
22 language in section 3.7. Evaluating that question is the precise purpose of this  
23 REP-12 proceeding. When it became apparent that Alcoa, and potentially other

1 parties, would attempt to mischaracterize the Settlement Agreement as an  
2 improper delegation, the Parties revised section 3 by adding a new section 3.1.2  
3 and replacing section 3.7. The new language is intended to make clear that BPA  
4 is delegating nothing. Rather, the Administrator will evaluate the evidence and  
5 the arguments submitted in this proceeding and determine whether he may  
6 lawfully and should enter into the Settlement Agreement and perform its terms.  
7 The amendments to section 3 simply clarify, in language less susceptible to  
8 mischaracterization, that the issues of the lawfulness and appropriateness of the  
9 Settlement Agreement must be addressed by the Administrator in this proceeding.  
10 *See* REP-12-E-BPA-10 p 3.

11 *Q. How do you respond to Mr. Speer's and the WPAG's witnesses' contentions that*  
12 *the REP benefits are not being determined using ASC and the PF exchange rate?*  
13 REP-12-E-AL-01 p 9.

14 *A.* They are both wrong. The Parties, with considerable input from BPA, developed  
15 the Scheduled Amounts of IOU REP benefits and the rate provisions in section 3  
16 of the Settlement Agreement only after very careful consideration of forecasts of  
17 future ASCs and PF exchange rates prepared by a technical panel assisted by BPA  
18 staff during the mediation process. BPA staff continued to work with the  
19 negotiators and their technical staffs during the negotiations of the rate provisions  
20 in section 3 and the allocation provision in section 6. BPA has further refined its  
21 forecasts and analysis in this proceeding and presumably will enter into the  
22 Settlement Agreement only if it concludes that the REP benefits and the recovery  
23 in rates of the costs of such benefits pursuant to the Settlement Agreement are

1 consistent with sections 5(c) and 7 of the NWPA. The fact that only the net of the  
2 REP benefits available to the IOUs and the Refund Amounts for the COUs are  
3 displayed in Settlement Agreement does not mean that those amounts were not  
4 calculated taking into account forecasts of ASCs and PF exchange rates and  
5 recognition of the Lookback liabilities of the IOUs.

6 *Q. What is the purpose of the new section 14 of the Settlement Agreement?*

7 A. Section 14 addresses a contingency beyond the range of scenarios analyzed as  
8 part of the negotiation and evaluation of the Settlement Agreement. Specifically,  
9 section 14 addresses the possibility that the law or regulations applicable to BPA  
10 may change BPA's cost based rate directives in section 7(b) or 7(g) of the NWPA  
11 during the term of the Settlement Agreement (a "Requirements Change") such  
12 that the underlying basis for the Settlement Agreement would no longer be valid.  
13 The underlying basis of the section 5(c) exchange and the Settlement Agreement  
14 is that rates set based on BPA's costs are lower than rates set based on IOUs'  
15 costs. Under certain specified conditions, if a Requirement Change is in effect,  
16 the Settlement Agreement may be terminated. These circumstances are first,  
17 there must be a "Material Cost Change," that is, BPA must have established PF  
18 preference rates for the rate period greater than 79% of the arithmetic load-  
19 weighted average of the ASCs of the IOUs. This condition assures that minor  
20 changes in the cost basis for the PF rates will not trigger the termination option.  
21 Second, 60% of the COUs by utility count and by TOCA load or 60% of the IOUs  
22 must provide timely notice of termination. Section 14 also provides for binding

1 arbitration if there is a dispute whether the conditions for termination have been  
2 met.

3 **Section 3: The IOU Claims for Enhanced REP Benefits.**

4 *Q. The IOUs have argued in their testimony JP04-01 that, if BPA does not approve*  
5 *and execute the Settlement Agreement, then BPA should provide the IOUs*  
6 *significantly higher REP benefits in FY 2012 and FY 2013. Do you agree with*  
7 *this contention?*

8 *A. No. As noted in JP02-05, the IOUs restate previous arguments already included*  
9 *in the record by incorporation of the WP-07S and WP-10 records. The COUs’*  
10 *disagreements with the IOUs’ claims have been amply addressed in briefing*  
11 *before the Ninth Circuit and before BPA. If BPA were to fail to approve and*  
12 *execute the Settlement Agreement, then REP benefits for FY 2012 and FY 2013*  
13 *should be determined as described in testimony and briefs filed by various COUs*  
14 *in the WP-07S and WP-10 cases as more fully articulated in the COUs’ briefs in*  
15 *the APAC cases.*<sup>1</sup>

16 **Section 4: Potential for Forecast Error.**

17 *Q. Both APAC and WPAG have questioned BPA’s use of multi-year forecasts to*  
18 *assess the reasonableness and lawfulness of the Settlement Agreement. Do you*  
19 *believe that the duration of the Settlement makes it inherently unreasonable?*

20 *A. No. As explained in the testimony REP-12-E-JP02-05, forecasts extending for*  
21 *longer than 17 years are frequently used to inform important decisions. In*

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<sup>1</sup> The APAC lawsuits are encompassed by the Settlement Agreement’s definition of “Current Litigation.”

1 addition, as explained in REP-12-E-BPA-01 pp 25-26, the effect of the section  
2 7(b)(2) rate test and the subsequent reallocation of REP costs under section  
3 7(b)(3) affect only REP benefits and which rate pools pay for the REP. Thus,  
4 basing the Settlement Agreement on multiple years of forecasted data is a  
5 problem only if section 7(b)(2) or section 7(b)(3) prohibit such long-term  
6 forecasts.

7 *Q. Does either section 7(b)(2) or section 7(b)(3) speak to the appropriate duration of*  
8 *any forecast?*

9 A. No. Section 7(b)(2) states the “projected amounts to be charged” for general  
10 requirements in any year and the ensuing four years may not exceed BPA’s  
11 projection of power costs based on the five assumptions specified in section  
12 7(b)(2). There is nothing in section 7(b)(2) that addresses when such projections  
13 should be made or the period of time to be covered by the projections. In the past,  
14 BPA projections used to determine compliance with section 7(b)(2) have covered  
15 periods of six, seven and nine years, corresponding to two-, three- and five-year  
16 rate periods. We see no reason that BPA should not make longer projections if  
17 there are good reasons to do so. The Settlement Agreement does not establish  
18 rates; it simply specifies how one particular cost is to be treated. In our opinion,  
19 BPA’s use of longer-term projections is fully warranted by the long-term certainty  
20 customers gain with respect to REP benefits and costs and the hope of ending the  
21 profusion of pending (and potential future) litigation.

22  
23

1 **Section 5: Estimates of Litigation Risk.**

2 *Q. APAC argues that BPA's analysis of the Settlement Agreement is flawed because*  
3 *BPA does not generally assess the likelihood of success of any of the Parties'*  
4 *litigation positions. REP-12-E-AP-01 pp 5-7. Do you agree this constitutes a*  
5 *flaw in BPA's analysis?*

6 *A. No. BPA is a litigant in all the litigation over the REP. We do not believe that*  
7 *the discussion by one litigant of its estimate of the likelihood that its litigation*  
8 *position will or will not prevail over other litigants' positions would be useful.*  
9 *We think it is reasonable to assume that BPA believes its handling of the REP and*  
10 *Lookback issues since FY 2008 is lawful. We also think that the other litigants*  
11 *would disagree; the IOUs have argued that they are entitled to more REP benefits*  
12 *and no Lookback reductions whereas the COUs and APAC have argued the*  
13 *opposite. None of the litigants, including BPA, could reasonably concede their*  
14 *positions in this proceeding. BPA may conclude the Settlement Agreement is not*  
15 *appropriate, in which case the issues will be resolved in the pending litigation.*  
16 *Any statements by BPA or other litigants that might suggest anything other than*  
17 *100% support for their own litigation positions could prejudice them in the*  
18 *litigation. Therefore, the comments of any litigant, including BPA, on the*  
19 *probability of success on the merits of the various issues in litigation would not be*  
20 *credible.*

1 **Section 6: Refund Amounts.**

2 *Q. The witnesses for Alcoa and for WPAG contend that under the Settlement*  
3 *Agreement, the Refund Amounts serve to increase the PF IP rate and cause PF*  
4 *and IP customers to pay for the refunds paid to COUs. Are these contentions*  
5 *correct?*

6 A. No, and it is notable that WPAG’s witnesses themselves offer varying testimony  
7 on this issue. Two of the three WPAG witnesses in panel WG-01 also testify for  
8 Clark PUD on panel CL-01. The WG-01 panel contends that the Refund  
9 Amounts are simply an artificial increase to PF rates paid for by PF customers.  
10 On the other hand, the CL-01 panel notes that the Scheduled Amounts of IOU  
11 REP benefits, before any reduction for Lookback amounts, has been reduced from  
12 BPA’s estimates of a starting point of \$331 million per year and ending point of  
13 \$640 million per year in FY 2028 to a start and end of \$182 million per year and  
14 \$286 million per year in 2028 under the Settlement Agreement, respectively.  
15 REP-12-E-CL-01 p 9. They attribute the IOU’s willingness to accept this  
16 reduction to the litigation risks faced by the IOUs. *Id.* The CL-01 panel  
17 specifically includes the IOUs’ Lookback liability as among the litigation risks  
18 reflected in the Scheduled Amounts of IOU REP benefits. REP-12-E-CL-01 p 13.  
19 In other words, the CL-01 panel recognizes that the Scheduled Amounts cannot  
20 be equated with forward going REP benefits because the Scheduled Amounts  
21 have Lookback amounts netted out of them. The basic analysis of the CL-01  
22 panel is correct, and the assertions of the WP-01 panel and the AL-01 witness are  
23 incorrect. The Refund Amounts do not increase the PF or IP rate inappropriately;

1 they are a recognition of the IOUs' Lookback liability that the COUs are entitled  
2 to have refunded to them. The "REP Recovery Amounts," which are the sum of  
3 the Scheduled Amounts and the Refund Amounts, are the measure of the costs of  
4 future IOU REP benefits. The Scheduled Amounts replace both the IOUs'  
5 Lookback obligations and BPA's future section 5(c) obligations and they cannot  
6 be equated with future REP benefits. As I note in Section 8 of this testimony,  
7 however, I believe the CL-01 panel exaggerates the implicit Lookback reduction  
8 in the Scheduled Amount and the consequence of this would be to increase  
9 Clark's future REP benefits.<sup>2</sup>

10 *Q. Who does pay for the Refund Amounts?*

11 *A.* The IOUs pay for the Refund Amount in the form of Scheduled Amounts reduced  
12 to reflect their Lookback liabilities that are extinguished under the Settlement  
13 Agreement. As we explained in our direct testimony, the payments to which the  
14 IOUs are entitled under the Settlement Agreement are the net of a stream of future  
15 benefits reduced to reflect a refund to the COUs to offset claimed overcharges  
16 from FY 2002 through FY 2011. REP-12-E-JP02-02 p 23. The Refund Amounts,  
17 which are paid for by the IOUs by these reductions to the Scheduled Amounts, are  
18 refunded to COUs under section 3.4 of the Settlement Agreement in a manner that  
19 most of the COUs agreed fairly reflected the individual COUs entitlement to  
20 refunds. In other words, the Refund Amounts do not increase customers' rates for  
21 power delivered in the future; they are a mechanism to get the refunds for past

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<sup>2</sup> Neither the Public Power Council nor Snohomish PUD joins in this sentence or in Section 8 of this testimony. Jeffery Kallstrom has not contributed to these referenced sections.

1 overcharges into the right hands. It was simply easier to describe the rate  
2 allocations in the Settlement Agreement, many of which address allocations  
3 among the IOUs, by reference to the “Scheduled Amounts” than by reference to  
4 REP benefits, from which Refund Amounts would need to be subtracted to  
5 ascertain the net amounts available for the IOUs. But that means Refund  
6 Amounts would need to be added to the Scheduled Amounts to ascertain the  
7 forward looking REP benefits. If the Settlement Agreement had not recognized  
8 that the Scheduled Amounts payable to the IOUs were decreased due to past  
9 overcharges, then refunds due to COUs that incurred overcharges would have  
10 been transferred to DSIs and to other COUs that suffered lesser harm.

11 *Q. Do you agree with Alcoa’s claim that it too was overcharged during the WP-02*  
12 *rate period and is equally entitled to refunds as are the COUs?*

13 *A.* No. Alcoa contends that the IP rate was also excessive during the period prior to  
14 FY 2009. However, Alcoa ignores the fact that BPA’s legal error during the WP-  
15 02 period (that is, implementing the Subscription Strategy instead of the section  
16 5(c) exchange) lowered Alcoa’s base rate substantially and shielded Alcoa from  
17 section 7(b)(3) surcharges that lawfully should have been reflected in the IP-02  
18 rate. BPA’s “Subscription Step” in the WP-02 rate case, the step to implement  
19 BPA’s erroneous contention that the cost of the REP Settlement was not a REP  
20 cost for purposes of section 7(b)(2), shifted cost both from the mislabeled RL-02  
21 rate (actually the effective PF exchange rate for IOUs) and from the IP-02 rate on  
22 to the PF preference rate. Moreover, because BPA treated the REP Settlement  
23 costs as immune from section 7(b)(2), when the cost of the REP Settlement

1 escalated dramatically as the result of the 2000-01 power crisis, BPA recovered  
2 those escalated REP costs as part of the CRAC applicable to all rates. Had BPA  
3 recognized the true nature of the REP Settlement costs, BPA would have been  
4 required to recalculate all base rates in phase 2 of the WP-02 rate case and the  
5 section 7(b)(3) surcharge applicable to the IP rate would have been much higher.  
6 There is no reason to believe that Alcoa's cost was increased in aggregate by  
7 virtue of BPA's error in the WP-02 and WP-07 cases. In any event, Alcoa did not  
8 challenge the IP-02 rate in the *GNA*<sup>3</sup> case on that basis and made no claims in the  
9 WP-07S case that it was entitled to any refund. Moreover, Alcoa purchased no  
10 power from BPA during FYs 2007-09, did not pay the IP rate, and therefore could  
11 not have been overcharged by BPA during that period. Alcoa is certainly not  
12 entitled in this case to claim any share of the refund due the COUs.

13 *Q. Is Alcoa entitled to have the future IP rate reduced as if the Refund Amounts were*  
14 *a reduction to future PF rates?*

15 *A. No. The Refund Amounts are refunds for past overcharges notwithstanding that*  
16 *a portion of the refunds are allocated based on future loads. The particular*  
17 *allocation methodology was agreed to as a means to refund the past overcharges*  
18 *among COUs in a manner acceptable to the vast majority of them.*

19 *Q. Is Alcoa correct that BPA has proposed to exclude the application of the REP*  
20 *Surcharge to surplus sales?*

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<sup>3</sup> *Golden Northwest Aluminum v. BPA*, 501 F.3d 1037 (9th Cir. 2007) (“*GNA*”).

1 A. Again, Alcoa confuses the arithmetic applied to certain numbers in the Settlement  
2 Agreement with the effect of that arithmetic. Arithmetically, the surplus sales are  
3 not subject to the “REP Surcharge” under the Settlement Agreement. As we note  
4 in our direct testimony, BPA’s recent practice of computing the section 7(b)(3)  
5 surcharge as if surplus sales were contributing to the recovery of the section  
6 7(b)(2) protection amount does not in fact recover any amount. Surplus revenues  
7 are what they are irrespective of sections 7(b)(2) and 7(b)(3). BPA’s reallocation  
8 of part of the surplus revenues to offset section 7(b)(3) amounts recoverable from  
9 surchargable rates does nothing more than lower the section 7(b)(3) surcharge to  
10 such rates. As the panel in JP02-05 points out, the formula for the REP Surcharge  
11 provided in the Settlement Agreement was constructed as if BPA continued to  
12 apply the “section 7(b)(3) surcharge” to surplus sales in the manner that BPA did  
13 in the WP-10 case. Thus, the REP Surcharge has been reduced to achieve the  
14 same effect as applying a “section 7(b)(3) surcharge” to surplus sales. Sections  
15 3.3.1 and 3.5 together preclude BPA from performing a second allocation to  
16 surplus revenues to further reduce the section 7(b)(3) amounts to be recovered  
17 from the IP rate. Moreover, as pointed out in JP02-05, the REP Surcharge  
18 applicable to the IP rate is less than the corresponding section 7(b)(3) surcharge  
19 BPA would apply absent a settlement. This occurs because the Settlement  
20 Agreement provides the IOUs less REP benefits than BPA, under its current  
21 interpretations of 7(b)(2) and 7(b)(3), would provide them absent a settlement.  
22 We note that both the Scheduled Amounts and the REP Surcharge are also  
23 calculated to reflect that the PF exchange rate is also subject to the section 7(b)(3)

1 surcharge. Alcoa has simply ignored the inputs into the calculations called for  
2 under the Settlement Agreement when it complains that the calculations are not  
3 based on the provisions of the NWPA.

4 **Section 7: DSI Load in Section 7(b)(2).**

5 *Q. Alcoa claims that BPA is required to perform the section 7(b)(2) rate test as if*  
6 *certain DSI loads that it does not expect to serve during the rate period were*  
7 *served by COUs in the 7(b)(2) Case. Is there any merit to this contention?*

8 A. No. Alcoa argues erroneously that “the Section 7(b)(2) rate test is designed to  
9 assure that COUs pay rates no higher than they would have paid had the NW  
10 Power Act not been enacted.” REP-12-E-AL-01 p 16. From this erroneous  
11 hypothesis, Alcoa speculates which DSI might be operating if the NWPA had not  
12 been enacted. However, it is clear from language in section 7(b)(2) itself that  
13 7(b)(2) is not a “no-Act” case. Section 7(b)(2)(D)(i) speaks to “resources  
14 purchased by the Administrator pursuant to section 6 [of the NWPA].” Section 6  
15 of the NWPA provided the Administrator for the first time authority to purchase  
16 resources. Section 7(b)(2) very plainly is not based on an assumption that the  
17 NWPA had not been adopted. It is a requirement that BPA’s rates for general  
18 requirements not exceed a limit based on certain specified assumptions. One  
19 such assumption is that the DSI loads “served by the Administrator” and that are  
20 within and adjacent to COU service territories be treated as if served by the  
21 COUs. The extra loads Alcoa seeks to add to the 7(b)(2) Case are not served by  
22 the Administrator, and they should not be added to the 7(b)(2) Case.

1 **Section 8: COU Exchange Benefits.**<sup>4</sup>

2 *Q. On what do you base your earlier statement that the CL-01 panel exaggerates the*  
3 *implicit Lookback reduction in the Scheduled Amounts?*

4 A. First, I should be clear that in this section I am addressing only Lookback  
5 differences that result from interpretation of sections 7(b)(2) or 7(b)(3), and  
6 consequently affect only the IOU exchange, not the COU exchange. These are  
7 issues unique to the IOUs, such as BPA's treatment of power BPA sold to certain  
8 IOUs and later repurchased under the "load reduction agreements." The only  
9 available evidence of how the Parties valued the Lookback claims, as opposed to  
10 claims that would have lowered future REP benefits, are the Scheduled Amounts,  
11 the Refund Amounts and the Initial IOU Adjustment Amounts set out in the  
12 Settlement Agreement. The Initial IOU Adjustment Amounts are based on how  
13 much of each IOU's Lookback obligation, as measured by BPA in the WP-07S  
14 case, will have been paid off by FY 2012. Although we are not sure of the precise  
15 calculation done by the IOUs to arrive at these Adjustment Amounts, the unpaid  
16 Lookback amount as computed by BPA as of FY 2012 is \$510 million. The level  
17 of the Scheduled Amounts and the Refund Amounts in the Settlement Agreement  
18 reflect the values that the overwhelming majority of the COUs placed on their  
19 claims, taking into account the uncertainty and cost of continued litigation. The  
20 Refund Amounts are based on assigning a settlement value of \$510 million to the  
21 Lookback claims as of FY 2012. The additional hypothetical refund amount

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<sup>4</sup> The Public Power Council and Snohomish PUD do not join in this section 8 of this testimony and take no position on the issue it addresses. Paul Murphy is the sole witness for this section.

1 Clark has requested implicitly assigns a settlement value of the Lookback claims  
2 of approximately \$913 million on a net present value basis, well over twice the  
3 recoverable Lookback amount of \$398 million under BPA's WP-07S decision. If  
4 the COUs had really believed they could reach a settlement encompassing  
5 additional refund amounts, as implied by the CL-01 panel's recommendation  
6 (CL-01 p 15), they would not have been willing to settle for the amounts they did.  
7 I think the implicit valuation of the Lookback claims of \$510 million reflected in  
8 the Settlement Agreement is a more reasonable adjustment to REP benefits for  
9 purposes of calculating COU REP benefits.

10 *Q. Does this conclude your testimony?*

11 *A. Yes.*

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