

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

Docket No. EL02-71-039

v.

British Columbia Power Exchange Corp.

State of California, *ex rel.* Edmund G. Brown Jr.,
Attorney General of the State of California

Docket No. EL09-56-016

v.

Powerex Corp. (f/k/a British Columbia Power
Exchange Corp.) *et al.*

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued November 22, 2011)

1. In this order, the Commission approves an uncontested settlement filed on September 29, 2011 by AEP¹ and the California Parties² (collectively, the Settling Parties) as discussed below. The settlement resolves claims arising from events and

¹ For purposes of the Settlement, AEP includes American Electric Power Service Corporation, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, AEP Texas Central Company, and AEP Texas North Company.

² The California Parties are Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, the Public Utilities Commission of the State of California, and the People of the State of California *ex rel.* Kamala D. Harris, Attorney General. For purposes of the Settlement, the California Parties also include the California Department of Water Resources (acting solely under the authority and powers created by Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in Sections 80000 through 80270 of the California Water Code) (CERS).

transactions in the western energy markets during the period January 1, 2000 through June 20, 2001 (Settlement Period), as they relate to AEP.³ The settlement consists of a “Joint Offer of Settlement and Motion for Procedural Relief for Purposes of Disposition of the Settlement” (Joint Offer of Settlement), a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement).⁴

2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.⁵ The Parties state that the Settlement became binding on the execution date, and note that some of the operative provisions become effective only as of, or in relation to, the Settlement Effective Date, which is defined as the date the Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected party.⁶ Additionally, the Parties explain that the Settlement will terminate on the date of a final order rejecting the Settlement in whole or material part or accepting the Settlement with material conditions or modifications deemed unacceptable to any adversely affected Party.⁷ The Parties also state that the Settlement may terminate if the California Parties fail to receive consideration that they are due under the Settlement, subject to AEP’s cure rights.⁸

3. The Parties state that the Settlement may be considered to benefit customers by resolving claims for refunds and other remedies as between AEP and the California

³ Joint Explanatory Statement at 2.

⁴ On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL00-95, documenting her decision, based on a memorandum from the Office of General Counsel’s General and Administrative Law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

⁵ 18 C.F.R. § 385.602 (2011).

⁶ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at §§ 1.31, 1.61, 2.2, 7.1.

⁷ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at § 2.3.

⁸ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at § 4.3.

Parties, and reaches a fair and reasonable resolution of issues between AEP and settling participants.⁹ The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.¹⁰ Finally, the Parties note that the Commission and the United States Court of Appeals for the Ninth Circuit have encouraged settlements of claims related to transactions in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) markets in the 2000 and 2001 time period.¹¹

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

Background and Description of the Settlement

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)¹² to investigate, among other things, the justness and reasonableness of public utility sellers' rates in the CAISO and CalPX markets in Docket Nos. EL00-95-000 and EL00-98-000.¹³ In 2002, the Commission directed its staff to commence a fact-finding investigation into the alleged manipulation of electric and natural gas prices in the West in Docket No. PA02-2-000.¹⁴ In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in western energy markets in Docket No. IN03-10-000.¹⁵ On the same day, the Commission issued two orders directing named entities to show cause why they had not participated in certain gaming

⁹ Joint Offer of Settlement at 6.

¹⁰ *Id.*

¹¹ *Id.* (citing *Pub. Utils. Comm'n of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002) and *Pub. Utils. Comm'n of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

¹² 16 U.S.C. § 791, *et seq.* (2006).

¹³ *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

¹⁴ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

¹⁵ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

practices¹⁶ or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.¹⁷

6. The Settlement's monetary consideration flowing from AEP to CERS totals \$645,000 and will be funded from AEP's late opt-ins to certain earlier settlements between the California Parties and other settling suppliers (Prior Settlements), up to the amount of the Settlement proceeds.¹⁸ Except as otherwise provided in the Settlement, AEP shall be entitled to all other refunds attributable to it, including payments from late opt-ins to Prior Settlements, subject to applicable offsets and adjustments as ordered by the Commission in Docket No. EL00-95.¹⁹ The Settlement permits the release to AEP of the estimated amount of its CAISO and CalPX receivables and interest minus AEP's Interest Shortfall amount, subject to subsequent adjustments as a result of a Commission determination for any receivables shortfall or excess, as well as any Interest Shortfall true-up.²⁰

7. The Parties state that the estimated receivables reflect an \$851,814.19 reduction to the amounts otherwise due to AEP by CalPX.²¹ The Parties explain that this reduction represents AEP's 4.8675097 percent apportionment of CalPX's maximum claim against Enron as determined by the Enron Interpleader Settlement Agreement²² and consistent with the Commission's July 19, 2011 order providing guidance on the Enron Interpleader

¹⁶ *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

¹⁷ *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

¹⁸ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at §§ 4.1, 4.71, and 4.7.2. *See also* Settlement and Release of Claims Agreement at Ex. A (listing Prior Settlements).

¹⁹ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 4.1, 4.4, 4.7, and 6.2.2.

²⁰ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 4.5 and 4.6.

²¹ Joint Explanatory Statement at 14.

²² The "Enron Interpleader Settlement Agreement" refers to the July 7, 2008 Settlement Agreement approved by the United States Bankruptcy Court for the Southern District of New York. *See* Settlement and Release of Claims Agreement at § 1.21.

Settlement Agreement overlay.²³ The Parties also explain that AEP did not opt into the Commission-approved Enron-FERC Settlement in 2005.²⁴ The Parties state that if AEP opts into the Enron-FERC Settlement following its settlement with the California Parties, then it shall waive any rights to payment in connection with the Enron-FERC Settlement.²⁵ Under the Settlement (and consistent with the Enron Interpleader Settlement Agreement), by waiving its rights to payment in connection with the Enron-FERC Settlement, AEP shall not forfeit or disgorge any payment made pursuant to the Enron Interpleader Settlement Agreement.²⁶

8. Under the Settlement, AEP remains responsible for its share, if any, of CAISO and CalPX dispute resolution charges and CalPX wind-up charges.²⁷ The Settlement states that the Commission's approval of the Settlement will allow CalPX to release AEP's receivables and estimated interest and will authorize CAISO and CalPX to conform their books and records to reflect the distributions.²⁸

²³ Joint Explanatory Statement at 14 (citing *In re Enron Corp., et al.*, Chap. 11 Case No. 01-16034 (AJG) (U.S. Dist. Ct., S.D.N.Y.), Exhibit A; *San Diego Gas & Elec. Co.*, 136 FERC ¶ 61,036, at P 51 (2011)).

²⁴ Joint Explanatory Statement at 14. The "Enron-FERC Settlement" refers to the August 24, 2005 Agreement between Enron, the Commission's Office of Market Oversight and Investigations, the California Parties, the Oregon Attorney General, and the Washington Attorney General that was approved by the Commission in *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,171 (2005), as amended, *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,017 (2007). *See* Settlement and Release of Claims Agreement at § 1.22.

²⁵ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 4.5.4.

²⁶ Joint Explanatory Statement at 14-15; Settlement and Release of Claims Agreement at § 4.5.4.

²⁷ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 4.8 and 4.9.

²⁸ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at § 5.1.

9. The Parties state that, in return for the specified consideration and subject to specified limitations, the Settlement resolves all claims between the California Parties and AEP relating to transactions in the western energy markets during the Settlement Period for refunds, disgorgement of profits, costs and attorneys' fees, or other remedies in the settled proceedings.²⁹

10. The Parties state that AEP and the California Parties mutually release each other as of the Settlement Effective Date from all existing and future claims before the Commission and/or under the FPA for the Settlement Period that: (1) AEP or any California Party charged or collected unjust, unreasonable, or otherwise unlawful rates, terms, or conditions for electric capacity, energy, ancillary services, or transmission congestion in the western energy markets during the Settlement Period; (2) AEP or any California Party manipulated the western energy markets in any fashion, or otherwise violated any applicable tariff, regulation, law, rule, or order relating to the western energy markets during the Settlement Period; (3) any California Party is liable for payments to AEP for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period; and (4) AEP is liable for payment to any California Party for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.³⁰

11. In addition, the Parties state that AEP and the California Parties mutually release each other from all past, existing, and future claims for civil damages and/or equitable relief concerning, pertaining to, or arising from allegations that: (1) AEP or any California Party collected or charged unjust, unreasonable, or otherwise unlawful rates, terms, or conditions for capacity, energy, ancillary services, or transmission congestion during the Settlement Period; (2) AEP or any California Party engaged in market manipulation in the western energy markets in any fashion during the Settlement Period; (3) AEP or any California Party was unjustly enriched by the released claims or otherwise violated any applicable tariff, regulation, law, rule, or order relating to transactions in the western energy markets during the Settlement Period; (4) any California Party is liable for payments to AEP for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period; and (5) AEP is liable

²⁹ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 3.1, 6.1.1.

³⁰ Joint Explanatory Statement at 15-16; Settlement and Release of Claims Agreement at § 6.2.1.

for payment to any California Party for congestion charges, transmission line losses, or energy or ancillary services during the Settlement Period.³¹

12. Finally, the Parties state that they would not object to the Commission assuring CAISO and CalPX that they will be held harmless for their actions to implement the Settlement.³²

Procedural Matters

13. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.³³ For the reasons described in the Joint Offer of Settlement, the Parties request that the Settlement be transmitted directly to the Commission for approval rather than being certified by an administrative law judge.³⁴

14. Pursuant to Rule 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (2011), initial comments on the Settlement were to be submitted no later than October 19, 2011, and reply comments were to be submitted no later than October 31, 2011. Initial comments were timely filed by CAISO and CalPX, either in support of or not opposing the Settlement. Reply comments were timely filed by AEP and the California Parties (Joint Reply Comments).

15. We agree with the Parties that it is appropriate for the Commission to review this Settlement without certification by an administrative law judge.

"Hold Harmless" Protection

16. Both CAISO and CalPX note that the circumstances of this Settlement warrant hold harmless treatment for CAISO and CalPX because they, along with their directors, officers, employees, and consultants, will implement a number of the Settlement's

³¹ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at § 6.3.1.

³² *Id.* at 17.

³³ 18 C.F.R. § 385.602 (2011).

³⁴ Joint Offer of Settlement at 3 (citing *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,082, at P 14 (2010) and *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,259, at P 14 (2009)).

provisions.³⁵ Accordingly, CalPX requests that the following “hold harmless” language be incorporated into any Commission order approving the Settlement:

The Commission recognizes that CalPX will be required to implement this settlement by paying substantial funds from its Settlement Clearing Account at the Commission’s direction. Therefore, except to the extent caused by their own gross negligence, neither officers, directors, employees nor professionals shall be liable for implementing the settlement including but not limited to cash payouts and accounting entries on CalPX’s books, nor shall they or any of them be liable for any resulting shortfall of funds or resulting change to credit risk as a result of implementing the settlement. In the event of any subsequent order, rule or judgment by the Commission or any court of competent jurisdiction requiring any adjustment to, or repayment or reversion of, amounts paid out of the Settlement Clearing Account or credited to a participant’s account balance pursuant to the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.³⁶

17. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.³⁷ In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.³⁸

Commission Determination

18. The Parties do not oppose a “hold harmless” provision that is similar to the provisions in other settlements involving the California Parties and approved by the

³⁵ CAISO Comments at 4-7; CalPX Comments at 2-4.

³⁶ CalPX Comments at 4.

³⁷ *Id.* at 2-4.

³⁸ Joint Reply Comments at 3.

Commission.³⁹ Consistent with the Commission's precedent,⁴⁰ the Commission determines that CalPX and CAISO will be held harmless for actions taken to implement this Settlement. Accordingly, this order incorporates the "hold harmless" language set out above, with one modification. Specifically, as incorporated by this order, the language shall be read to apply to both CAISO and CalPX.

Conclusion

19. The Settlement appears to be fair and reasonable and in the public interest, and is hereby approved. The Commission's approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

The Commission orders:

The Settlement is hereby approved, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁹ *Id.*; see also Joint Explanatory Statement at 17.

⁴⁰ See, e.g., *San Diego Gas & Elec. Co.*, 133 FERC ¶ 61,249, at P 17 (2010) (incorporating "hold harmless" language from earlier settlements); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242, at P 19 (2009) (same); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,002, at P 17 (2009) (same); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,004, at P 21 (2009) (same); *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 38 (2009) (same).