

145 FERC ¶ 61,114
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

San Diego Gas & Electric Company

v.

Docket No. EL00-95-272

Sellers of Energy and Ancillary Services

Investigation of Practices of the California
Independent System Operator and the California
Power Exchange

Docket No. EL00-98-251

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-124

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior and
Practices in Western Markets

Docket No. IN03-10-079

Fact-Finding Investigation Into Possible
Manipulation of Electric and Natural Gas Prices

Docket No. PA02-2-094

American Electric Power Service Corporation

Docket No. EL03-137-040

Enron Power Marketing, Inc. and Enron Energy
Services Inc.

Docket No. EL03-180-069

California Independent System Operator
Corporation

Docket No. ER03-746-045

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

v.

Docket No. EL02-71-042

British Columbia Power Exchange Corp.

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued November 8, 2013)

1. In this order, the Commission approves an uncontested settlement filed on August 12, 2013 between Arizona Electric Power Cooperative, Inc. (AEPCO) and the California Parties¹ (collectively, the Parties), as discussed below. The settlement resolves claims arising from events and transactions in the Western energy markets during the period January 1, 2000 through June 20, 2001 (Settlement Period),² as they relate to AEPCO. The settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement).³
2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.⁴ The Parties state that the Settlement became binding as of

¹ 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 authority and powers created by California Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in Sections 80000 through 80270 of the California Water Code).

² Joint Explanatory Statement at 2.

³ On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL00-95-000, 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.

⁴ 18 C.F.R. § 385.602 (2013).

the execution date; however, some of the operative provisions only become effective as of, or in relation to, the Settlement Effective Date, which is the date of a Commission order approving the Settlement, subject to certain conditions in the event the Commission modifies or conditions its approval of the Settlement and/or AEPCO files a “Good Faith Motion” in the Los Angeles County Superior Court.⁵ 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.⁶ The Parties also state that the Settlement may terminate if the California Parties fail to receive consideration that they are due under it.⁷

3. The Parties state that the Settlement benefits customers by resolving claims for refunds and other remedies as between AEPCO on the one hand and the California Parties on the other relating to AEPCO’s transactions in the Western energy markets during the Settlement Period.⁸ The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.⁹ 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

⁵ Joint Explanatory Statement at 13-14; Settlement and Release of Claims Agreement at §§ 1.41, 1.91, 2.2, 9.1. Under section 4.5 of the Settlement and Release of Claims Agreement, AEPCO may elect to, within 10 business days after the execution date, request authorization from the Los Angeles Superior Court in *The Electric Refund Cases*, JCCP No. 4512, to file a motion for determination of a good faith settlement under the California Code of Civil Procedure. That provision also explains that AEPCO shall have the right to waive its right to file the motion, as well as its right to terminate the Settlement if such a motion is denied. *See also* Settlement and Release of Claims Agreement at § 2.3.1.3.

⁶ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 2.3.

⁷ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 4.14.

⁸ Joint Offer of Settlement at 7.

⁹ *Id.*

(CAISO) and California Power Exchange (CalPX) markets in the 2000 and 2001 time period.¹⁰

4. The Settlement states that AEPSCO disclaims Commission jurisdiction over any aspect of the Settlement, but that the Parties have agreed to condition the Settlement on securing the Commission's approval to ensure the release of funds from CAISO and/or CalPX and to ensure that the Parties' respective claims pending before the Commission are fully resolved.¹¹

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

Background and Description of the Settlement

6. 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

¹⁰ *Id.* at 8 (citing *Pub. Utils. Comm'n of the State of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002) and *Pub. Utils. Comm'n of the State of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

¹¹ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at § 2.3.4.

¹² 16 U.S.C. § 791, *et seq.* (2012).

¹³ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange*, 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

7. The Parties state that the Settlement resolves claims against AEPCO in the above-captioned proceedings as they relate to AEPCO.¹⁸ Any entity that directly sold or purchased energy through CAISO and/or CalPX during the Settlement Period (Participant) may elect to be bound by the terms of the Settlement as an “Additional Settling Participant.”¹⁹ To opt into the Settlement, a Participant must provide notice to the Commission, as well as serve notice to parties on the ListServes established for the Docket No. EL00-95 proceeding, no later than five business days following the Settlement Effective Date.²⁰ The Parties state that the rights of Participants that do not wish to opt into the Settlement will be unaffected by the Settlement, and that such Non-Settling Participants will have no right to obtain certain benefits of the Settlement, but will still be paid refunds, if any, to which they are ultimately determined to be due through continued litigation.²¹

8. The Parties state that the monetary consideration flowing from AEPCO in the Settlement totals \$9,499,286 before final adjustments.²² This amount will be funded from: (1) AEPCO’s receivables held by CAISO and CalPX, estimated to be \$2,372,511; (2) the estimated interest on receivables of \$1,997,419 through June 30, 2013 (which will be updated through and including the projected date of distribution); and (3) a cash payment of \$5,250,000 from AEPCO to the California Parties.²³ AEPCO also transfers

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 3.

¹⁹ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 1.1, 1.52, 8.1.

²⁰ Joint Explanatory Statement at 14-15; Settlement and Release of Claims Agreement at § 8.1.

²¹ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 1.65, 3.2, 5.5, 8.1.

²² Joint Explanatory Statement at 15. The Settlement and Release of Claims Agreement Cover Sheet states that the Settlement proceeds are \$9,619,930.

²³ Joint Explanatory Statement at 15-16.

to the California Parties its entitlement to refunds on certain purchases made in the California markets during the Settlement Period.²⁴

9. The Settlement provides that certain of the California Parties will assume responsibility, if any, for: (1) any true-up of interest on AEPCO's receivables; (2) any refund amounts that AEPCO owes to Non-Settling Participants in certain proceedings; (3) any refund shortfall, receivables shortfall, or interest shortfall relating to AEPCO resulting from certain Commission determinations; (4) any third-party refund offsets (Fuel Cost Allowance, Emissions Offset, and Cost Offset) that the Commission or a court determines that AEPCO owes; (5) dispute resolution charges; and (6) any CalPX wind-up charges attributable to AEPCO that are assessed after March 21, 2012.²⁵

10. The Settlement includes a matrix that allocates the Settlement proceeds among Participants.²⁶ The proceeds will be distributed from the Settling Supplier Refund Escrow, the costs of which will be the responsibility of the California Parties, to each of the Settling Participants, except those who are Deemed Distribution Participants, and/or, in the case of amounts allocated to any Non-Settling Participants, allocated to the California utilities and/or CERS.²⁷ The obligation of any of the California Parties to make payments on behalf of AEPCO under the Settlement shall not exceed the total amount allocated and actually paid to that California Party as set forth under the Settlement.²⁸ The Settlement also states that the Commission's approval of the

²⁴ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at § 4.1.8.

²⁵ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at §§ 4.15, 4.1.6, 5.3, 5.5, 5.6, 5.7.

²⁶ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at Ex. A.

²⁷ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at §§ 4.1.1.4, 5.2, 5.3, 5.5. Under the terms of the Settlement, Deemed Distribution Participants are entities that have a net amount outstanding and payable to CAISO or CalPX and accordingly will receive an offset against amounts owed by the Deemed Distribution Participant to CAISO and/or CalPX for purposes of the Settlement. Settlement and Release of Claims Agreement at §§ 1.20, 1.21.

²⁸ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at § 5.8.

Settlement will authorize CAISO and CalPX to conform their books and records to reflect the distributions.²⁹

11. The Parties explain that, in return for the specified consideration and subject to specified limitations, the Settlement resolves all claims between the California Parties on the one hand and AEPCO on the other, relating to transactions in the Western energy markets during the Settlement Period for damages, refunds, disgorgement of profits, costs and attorneys' fees, or other remedies.³⁰

12. The Parties state that the Settlement provides for the California Parties and AEPCO to mutually release and discharge 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) AEPCO 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) AEPCO 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; or (3) any California Party is liable for payments to AEPCO for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.³¹

13. In addition, the Parties state that the Settlement provides for the California Parties and AEPCO mutually to 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) AEPCO or any California Party charged or collected unjust, unreasonable, or otherwise unlawful rates, terms, or conditions for capacity, energy, ancillary services, or transmission congestion in the Western energy markets during the Settlement Period; (2) AEPCO or any California Party manipulated the Western energy markets in any fashion during the Settlement Period; (3) AEPCO 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; or (4) any California Party is liable for payments AEPCO for

²⁹ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at § 6.1.

³⁰ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at §§ 3.1, 7.1.1.

³¹ Joint Explanatory Statement at 18-19; Settlement and Release of Claims Agreement at § 7.2.1.

congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement Period.³²

14. Subject to certain limitations, Participants that elect to participate in the Settlement as Additional Settling Participants are deemed to provide and receive from AEPCO the releases that the California Parties provide and receive.³³

15. 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.³⁴

Procedural Matters

16. Pursuant to Rule 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (2013), initial comments on the Settlement were to be submitted no later than September 3, 2013, and reply comments were to be submitted no later than September 11, 2013. Initial comments were filed by CAISO and CalPX, either in support of or not opposing the Settlement. Reply comments were filed by the Parties (Joint Reply Comments).

Settlement Comments

17. 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 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

³² Joint Explanatory Statement at 19; Settlement and Release of Claims Agreement at § 7.3.1.

³³ Joint Explanatory Statement at 19; Settlement and Release of Claims Agreement at §§ 7.4, 8.2.

³⁴ Joint Explanatory Statement at 20.

³⁵ CAISO Comments at 3-6; CalPX Comments at 2-5.

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

18. 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

19. In its comments, CAISO states that it interprets section 6.1.3.6 of the Settlement, which is entitled "Accounting Treatment of Calculations for Non-Settling Participants," to mean that although CAISO will continue to include AEPCO in its refund calculations, at the end of the refund rerun process CAISO will need to adjust its books to reflect that no refunds will be paid by AEPCO in these proceedings to parties in the CAISO markets for the period covered by the Settlement, except for those that have been paid out under the Settlement.³⁹ CAISO notes that identical language was included in earlier similar settlements.

20. In their Joint Reply Comments, the Parties confirm that they do not oppose a "hold harmless" provision that is similar to the provisions in other Commission orders approving similar settlements involving the California Parties.⁴⁰

³⁶ CalPX Comments at 5.

³⁷ *Id.* at 2-5.

³⁸ Joint Reply Comments at 3.

³⁹ CAISO Comments at 7.

⁴⁰ Joint Reply Comments at 2-3.

Commission Determination

21. Consistent with the Commission's precedent,⁴¹ 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. In addition, consistent with Commission precedent regarding similar settlements, we find that CAISO's interpretation of section 6.1.3.6 of the Settlement is reasonable.⁴²

22. 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 also concludes that AEPCO's attempt to "disclaim" Commission jurisdiction over the Settlement is not germane in these circumstances.⁴³ Only the Commission may disclaim its jurisdiction under the FPA.⁴⁴

⁴¹ See, e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 145 FERC ¶ 61,015, at P 25 (2013) (incorporating "hold harmless" language from earlier settlements); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 133 FERC ¶ 61,249, at P 17 (2010) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 128 FERC ¶ 61,242, at P 19 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 128 FERC ¶ 61,002, at P 17 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 128 FERC ¶ 61,004, at P 21 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 126 FERC ¶ 61,007, at P 38 (2009) (same).

⁴² See, e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 136 FERC ¶ 61,023, at P 22 (2011); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,269, at P 22 (2011); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 131 FERC ¶ 61,083, at P 23 (2010).

⁴³ See *supra* P 4.

⁴⁴ See, e.g., *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 135 FERC ¶ 61,059, at P 25 (2011); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 131 FERC ¶ 61,083 at P 42 (2010); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 119 FERC ¶ 61,092, at P 29 (2007).

The Commission orders:

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

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.