

121 FERC ¶ 61,014  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

San Diego Gas & Electric Company

v.

Docket No. EL00-95-195

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-179

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-023

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior and  
Practices in Western Markets

Docket No. IN03-10-023

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

Docket No. PA02-2-041

PPM Energy, Inc. (f/k/a PacifiCorp Power Marketing,  
Inc.)

Docket No. EL03-197-007

ORDER APPROVING AND MODIFYING SETTLEMENT

(Issued October 4, 2007)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement and Release of Claims Agreement (collectively, the Settlement) filed on June 22, 2007 in the above-captioned proceedings by PPM Energy, Inc. (f/k/a PacifiCorp Power

Marketing, Inc.) (PPM) and the California Parties<sup>1</sup> (collectively, the Parties). The Settlement consists of a “Joint Explanatory Statement” and a “Settlement and Release of

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<sup>1</sup> The California Parties consist of Pacific Gas and Electric Company, Southern

Claims Agreement”<sup>2</sup> among PPM and the California Parties, filed pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.<sup>3</sup> The Settlement resolves matters and claims in the above-captioned proceedings (i.e., the FERC Proceedings) related to PPM and arising from events and transactions in the Western Energy Markets<sup>4</sup> during the period January 1, 2000 through June 20, 2001 (Settlement Period).

2. The Parties state that the Settlement reaches a fair and reasonable resolution of issues between PPM and Settling Participants.<sup>5</sup> Therefore, the Parties request that the Commission approve the Settlement. In this order, the Commission approves the Settlement, with one modification, as discussed below.

### **I. Background and Description of the Settlement**

3. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA) to investigate, among other things, the justness and reasonableness of rates of public utility sellers into the CAISO and CalPX markets during a specific period (Docket Nos. EL00-95-000 and EL00-98-000). Also in 2000, the Commission ordered an evidentiary hearing to help determine whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest during a specific period (Docket No. EL01-10-000). In 2002, the Commission directed Staff to commence a fact-finding investigation of manipulation of electric energy and natural gas

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California Edison Company, San Diego Gas & Electric Company, the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, and 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.

<sup>2</sup> The Settlement and Release of Claims Agreement includes: 1) a Cover Sheet that specifies certain terms and includes Exhibit A (Allocation Matrix) and Exhibit B (Deemed Distribution Participants); and 2) General Terms and Conditions.

<sup>3</sup> 18 C.F.R. § 385.602 (2007).

<sup>4</sup> The Settlement defines the Western Energy Markets as those markets for electric capacity, energy, and/or ancillary services in the territories covered by the Western Electricity Coordinating Council, including the California markets of the California Independent System Operator Corporation (CAISO) and the California Power Exchange Corporation (CalPX). Settlement sections 1.89 and 1.9.

<sup>5</sup> Settling Participants include the California Parties and Additional Settling Participants. Settlement section 1.75. Additional Settling Participants are those Participants (defined in P 4, *infra*) that have elected to join the Settlement in accordance with Settlement article VIII. Settlement sections 1.1 and 1.53.

prices in the west (Docket No. PA02-2-000). In 2003, the Commission directed its Office of Market Oversight and Investigation (OMOI) to conduct an investigation to determine whether individual market participants may have violated a prohibition against anomalous market behavior (Docket No. IN03-10-000). Also in 2003, the Commission instituted the Gaming/Partnership Proceeding by issuing orders directing a number of entities, including PPM, to show cause why they had not participated in activities that constitute gaming and/or anomalous market behavior in violation of the CAISO and CalPX tariffs (*see* Docket Nos. EL03-137-000, *et al.* and EL03-180-000, *et al.*).<sup>6</sup> The Settlement is meant to resolve various PPM-related claims stemming from these proceedings.

4. Settlement article VIII provides the terms by which Participants may elect to participate in the Settlement. Participants are entities that directly sold energy to or purchased energy from the CAISO or the CalPX during part or all of the Settlement Period. The Parties state that the Settlement permits Participants to join the Settlement as Additional Settling Participants.<sup>7</sup> Participants that elect to join the Settlement shall be “bound by its terms.”<sup>8</sup> Participants that do not elect to join the Settlement are deemed Non-Settling Participants<sup>9</sup> and their rights are not affected by the Settlement. Settlement section 3.2 specifically provides for the protection of Non-Settling Participants’ rights, as well as the Parties’ rights with regard to Non-Settling Participants, stating that “no claims addressed in this Agreement shall be deemed settled as to Non-Settling Participants, and ... the Parties shall be deemed to retain any and all claims and defenses they have or may claim to have against Non-Settling Participants.”

5. Pursuant to the monetary consideration provisions in Settlement sections 4.1 – 4.1.12, the “Settling Supplier” (i.e., PPM) will provide Settlement proceeds in the amount of \$305,125.<sup>10</sup> This amount includes a cash payment of \$279,003, which PPM will pay to the California Parties by transferring \$257,003 to the Settling Supplier Refund Escrow and \$22,000 to the Settling Supplier Interest Shortfall Escrow;<sup>11</sup> both of these escrow

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<sup>6</sup> Although PacifiCorp, rather than PPM, was initially named as a respondent in the Partnership Proceeding under Docket No. EL03-197-000, PacifiCorp was removed as the named party in that docket and appropriately substituted with “PPM Energy, Inc.” *See Enron Power Marketing, Inc. and Enron Energy Services, Inc., et al.*, 103 FERC ¶ 61,346 (2003). *See also Order Granting Motions to Change Designations of Show Cause Respondents*, 104 FERC ¶ 61,222 (2003).

<sup>7</sup> *See supra* n.5.

<sup>8</sup> Settlement section 8.1.

<sup>9</sup> *Id.* section 1.51.

<sup>10</sup> *See Id.* section 4.1 and Settlement Cover Sheet item 4.1.

<sup>11</sup> Settlement section 4.1.2. and Settlement Cover Sheet item 4.1.2.

accounts will be established and maintained by the California Parties pursuant to Settlement section 4.1.4. PPM also assigns to the California Parties its rights to the remaining \$26,122 in Settlement proceeds, an amount that will ultimately be adjusted based on the Parties' calculations of estimated interest accruing between January 1, 2007 and the date such receivables are distributed pursuant to the Settlement.<sup>12</sup> These funds, which are assigned to the California Parties pursuant to Settlement section 4.1.1.2, are held by the CalPX. Thus, the CalPX will transfer the funds, in cash, from its Settlement Clearing Account to the Settling Supplier Refund Escrow, minus all Deemed Distributions under the Settlement,<sup>13</sup> minus the total estimated interest shortfall on refunds,<sup>14</sup> and plus the amounts owed by Participants with negative allocations under the Settlement.<sup>15</sup> In addition, PPM assigns to the California Parties its rights to all future net refunds and interest thereon that PPM may receive from Settling Participants for the Pre-

October Period (May 1, 2000 through October 1, 2000) or for the Refund Period (October 2, 2000 through June 20, 2001), after taking into account applicable adjustments, offsets and netting.<sup>16</sup>

6. Settlement article V provides for the disposition and allocation of Settlement proceeds. Settlement section 5.1 states that PPM shall be deemed to have provided a

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<sup>12</sup> These funds (also referred to in the Settlement as the Settling Supplier Receivables, or the Transferred Receivables, or the Unadjusted Transferred Receivables, depending on the stage of the Settlement transaction process) for the most part represent PPM's rights and claims to payment by or from the CalPX and/or the CAISO (before mitigation in the Commission's Docket No. EL00-95-000 proceeding) for sales of energy and ancillary services into the California markets during the Settlement Period. *See* Settlement sections 1.79, 1.83, 1.84, and 4.1.1.2-4.1.1.3.

<sup>13</sup> A Deemed Distribution is an amount credited to a Deemed Distribution Participant as an offset to amounts owed by that Participant to the CalPX and/or the CAISO. Settlement section 1.21. The Deemed Distribution Participants for the Settlement are identified in Settlement Cover Sheet Exhibit B.

<sup>14</sup> According to Settlement section 1.45, the interest shortfall on refunds is the amount set forth in Cover Sheet item 4.1.1.4. However, the Settlement Cover Sheet does not contain an item 4.1.1.4. Although the Settlement does not clearly indicate the interest shortfall on refunds amount, an "interest shortfall" in the Settlement is the difference between the interest actually earned on funds held by the CalPX and/or the CAISO and the interest that would be earned through application of the Commission's interest rate. Settlement section 1.44.

<sup>15</sup> Settlement section 4.1.1.4. It does not appear that any Participants listed in the Allocation Matrix have negative allocations.

<sup>16</sup> Settlement section 4.1.8.

total principal refund in the amount of \$199,000, which shall be distributed among Settling Participants pursuant to the Settlement's Allocation Matrix. Settling Participants that owe amounts to the CAISO or the CalPX are considered Deemed Distribution Participants and will receive their share of the Settlement proceeds as offsets against such amounts. Settling Participants classified as Net Refund Recipients will receive their allocated distributions in the form of cash payments from the Settling Supplier Refund Escrow. Amounts specified in the Allocation Matrix for Non-Settling Participants will be retained in applicable escrow or trust accounts until the Commission issues a refund determination.

7. Article VI of the Settlement, which addresses CalPX and CAISO accounting, provides authorization for the CalPX and the CAISO to implement the terms of the Settlement, and the steps they shall take to do so. These steps include, e.g., conforming their books and records to reflect the distributions, offsets, transfers, adjustments, and status of accounts provided for in the Settlement; calculating various refund and interest amounts; and detailing how the CalPX and the CAISO will treat distributions under the Settlement.<sup>17</sup>

8. Pursuant to section 4.1.7 of the Settlement, PPM shall opt into each subsequent and substantially similar settlement reached by the California Parties with other suppliers. PPM shall also attempt to opt into substantially similar settlements reached by the California Parties prior to the Settlement's effective date, to the extent permitted by the Commission.

9. Settlement article VII provides for releases and waivers such as: (1) all claims between PPM and the California Parties shall be deemed settled as related to transactions in the Western Energy Markets during the Settlement Period; (2) PPM, the California Parties, and Additional Settling Participants will not contest the amount of refund liability and/or offsets or other relief PPM incurs in the proceedings in Docket Nos. EL00-95-000, *et al.*, and EL01-10-000, *et al.*, the "*Lockyer v. FERC Remand*,"<sup>18</sup> the "*BPA v. FERC*

*Remand*,"<sup>19</sup> and the "*CPUC v. FERC Remand*,"<sup>20</sup> or the outcome of the other FERC Proceedings; and (3) PPM and the California Parties agree to mutually release each other for the Settlement Period from certain claims before the Commission and/or under the FPA, and from certain past, existing and future claims for civil damages and/or equitable relief.

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<sup>17</sup> See Settlement sections 6.1.1-6.1.4.

<sup>18</sup> *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

<sup>19</sup> *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005).

<sup>20</sup> *California Public Utilities Commission v. FERC*, 474 F.3d 587 (9th Cir. 2006).

10. The Parties states that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty. They state that the Settlement reaches a fair and reasonable resolution between PPM and Settling Participants. Accordingly, the Parties request that the Commission approve the Settlement. If the Commission issues an order accepting the Settlement with material conditions or modifications deemed unacceptable to any adversely affected party, the Settlement shall terminate.

## **II. Comments on the Settlement**

11. Initial comments on the Settlement were due on July 12, 2007 and reply comments were due on July 20, 2007. The CAISO filed initial comments in support of the Settlement and the CalPX filed initial comments neither supporting nor opposing the Settlement.

### **A. “Hold Harmless” Protection for the CalPX and the CAISO**

12. In its comments, the CAISO states that, as with previous settlements filed and approved in the FERC Proceedings, the circumstances of the Settlement make it necessary to hold harmless the market operators (the CAISO and the CalPX) tasked with implementing the Settlement. Therefore, the CAISO contends, the Commission should state in any order approving the Settlement that the CAISO, along with its directors, officers, employees and consultants, will be held harmless with respect to the accounting activities it will have to perform to implement the Settlement and will not be responsible for recovering any funds dispersed pursuant to the Settlement should repayment of such funds be required subsequently.

13. The CAISO avers that the factors that justified holding the CAISO and the CalPX harmless with respect to other settlements (e.g., the Duke, Williams, Mirant, Enron, PS Colorado, Reliant, IDACORP, Eugene Water and Electric Board, APX, Portland General Electric, El Paso Marketing, and PacifiCorp settlements) apply equally to the instant Settlement. As with previous settlements, the CAISO states, the flow of funds pursuant to the instant Settlement will require unprecedented accounting adjustments by the CAISO, which will not be made under the terms of its tariff, but rather under the Settlement terms. The CAISO contends that a market participant might bring suit against the CAISO and its agents claiming that it did not make the appropriate accounting adjustments and as a result did not arrive at the appropriate amount of funds owing to that market participant. In addition, the CAISO states that, because the Settlement has been filed prior to final orders in the FERC Proceedings, PPM and the California Parties’ estimates of payables and receivables may not be accurate, which could result in actions against the CAISO due to unforeseen impacts on market participants. The CAISO states that, as the volume of settlements increases in the FERC Proceedings, the task of implementing them will become more complicated and the possibility of an action against one of the market operators will also increase. Further, the CAISO posits that, as a non-profit public benefit corporation, it would not be reasonable to subject its officers,

employees and consultants to suits claiming individual liability for engaging in the accounting necessary to implement the Settlement.

14. For these reasons, the CAISO states that it is important that the Commission hold harmless the CAISO, its directors, officers, employees and consultants, for implementation of this Settlement. Finally, the CAISO notes that PPM and the California Parties have stated in their Joint Explanatory Statement that they do not oppose the Commission adopting hold harmless provisions for the CAISO and the CalPX.<sup>21</sup>

15. Likewise, the CalPX requests in its initial comments that the Commission incorporate in any order approving the Settlement a hold harmless provision similar to those the Commission has approved in previous settlements. The CalPX states that it and the CAISO each requested to be held harmless in connection with implementing a number of prior settlements, and that the Commission granted those requests. Further, the CalPX points out that the California Parties and PPM do not oppose hold harmless protection with respect to this Settlement.<sup>22</sup> In support of its position, the CalPX cites the Commission order approving the Williams settlement, 111 FERC ¶ 61,186 (2005), in which the Commission found that the CalPX and the CAISO provided compelling justification as to why they should be held harmless.

16. The CalPX reasons that a hold harmless provision is appropriate here because: (1) the Settlement requires it to pay funds from its Settlement Clearing Account; (2) the CalPX will be required to make numerous accounting entries; (3) the Parties are to supply the amounts to be paid out under the Settlement; (4) the CalPX is required to pay out interest on refund balance calculations that are not final; and (5) PPM's final market obligations have not been determined.

17. The CalPX requests the following "hold harmless" language to be incorporated in 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

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<sup>21</sup> CAISO July 16, 2007 Initial Comments at 6, *citing* Joint Explanatory Statement at 13.

<sup>22</sup> CalPX July 12, 2007 Initial Comments at 2, *citing* Joint Explanatory Statement at 13.

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.<sup>23</sup>

The CalPX states that this is the same hold harmless provision that the Commission approved in the Duke, Dynegy, Williams, Mirant, Reliant, APX, Enron, Portland General Electric, El Paso Marketing, PacifiCorp and IDACORP global settlements.

### **Commission Determination**

18. The Commission finds that both the CAISO and the CalPX have provided the Commission with compelling justification as to why they should be held harmless, along with their officers, directors, employees, and consultants, for the steps taken to implement the Settlement. Further, the parties to the Settlement agree to a hold harmless provision.<sup>24</sup> Therefore, consistent with Commission precedent,<sup>25</sup> the Commission determines that the CalPX and the CAISO shall be held harmless for actions taken to implement the Settlement and this order will incorporate the "hold harmless" language requested by the CalPX and set out above. Further, the CAISO will not be responsible for recovering any funds dispersed pursuant to the Settlement that are subsequently required to be repaid.

### **B. Allocation of PPM Wind-Up Charges**

19. The CalPX points out that section 4.1.5 of the Settlement provides that "Settling Supplier [(PPM)] shall have no responsibility for a share of PX Wind-up Charges after December 31, 2007."<sup>26</sup> The CalPX explains that it pays its operating expenses with the wind-up charges assessed to market participants pursuant to an uncontested settlement (Wind-Up Charge Settlement) approved by the Commission in 2005.<sup>27</sup> The Wind-Up

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<sup>23</sup> CalPX Initial Comments at 4.

<sup>24</sup> See Joint Explanatory Statement at 13.

<sup>25</sup> See, e.g., *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,071 (2004) (approving hold harmless language in the Dynegy settlement), and *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,257 (2004) (approving hold harmless language in the Duke settlement), *reh'g denied*, 111 FERC ¶ 61,186 (2005).

<sup>26</sup> CalPX Initial Comments at 4, *citing* Settlement section 4.1.5.

<sup>27</sup> *Id.*, *citing Cal. Power Exchange Corp.*, 113 FERC ¶ 61,017 (2005).

Charge Settlement provides that PPM shall be allocated .045 percent of market participant wind-up charges after December 31, 2004. The CalPX states that it is highly unlikely that it will complete its wind-up duties prior to December 31, 2007.

20. The CalPX notes that it filed a petition in 2007 to extend the Wind-Up Charge Settlement until December 31, 2010, and that this petition was not opposed by any party, including PPM. The Commission approved the CalPX's uncontested petition for extension in July 2007.<sup>28</sup> The CalPX states that, if it were not for the instant Settlement, PPM would continue to be liable for .045 percent of the CalPX's wind-up charges until the earlier of December 31, 2010 or the date that CalPX's wind-up duties are finalized pursuant to Commission order.

21. According to the CalPX, approval of the Settlement will create a deficiency in its recovery of wind-up charges, which the Commission should address. The CalPX states that the Settling Parties have not proposed a methodology for allocating the wind-up charge deficiency, nor have they proposed that PPM's wind-up charges will be paid by the California Parties. The CalPX suggests that the Commission should continue to permit the CalPX to withdraw the authorized amount of its wind-up charges each six months from the Settlement Clearing Account as it does now, including the .045 percent allocation to PPM. Then, states the CalPX, the Commission can address the wind-up charge deficiency when it issues orders on the financial accounting in Docket Nos. EL00-95-000, *et al.*

### **Commission Determination**

22. We find that Settlement section 4.1.5 should be modified, in accordance with our recent extension of the Wind-Up Charge Settlement, to extend PPM's responsibility for its share of CalPX wind-up charges through December 31, 2010. The CalPX continues to provide services to its market participants and to the Commission, including: (1) maintaining and preserving its books and records and producing any required information; (2) serving as custodian of its Settlement Clearing Account; (3) and participating in ongoing Commission and judicial proceedings, including the FERC Proceedings. Indeed, the CalPX is facilitating the accounting for and disposition of funds in the instant Settlement, just as it has in many similar settlements approved by the Commission, and just as it may for future settlements that resolve issues in the FERC Proceedings. While we recognize PPM's interest in minimizing or limiting the amount of wind-up charges it pays to the CalPX (an interest no doubt shared by all market participants), the Wind-Up Charge Settlement continues to provide cost allocation certainty to CalPX market participants and a reliable methodology for funding the CalPX's limited, but useful, operations (including completion of wind-up calculations related to the energy crisis of 2000-2001). The Commission finds that failure to modify

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<sup>28</sup> *Id.* 5, citing *Cal. Power Exchange Corp.*, 120 FERC ¶ 61,006 (2007).

the instant Settlement to address CalPX's concern could undermine the Wind-Up Charge Settlement.

23. Moreover, the Commission approved the CalPX's petition for extension of the Wind-Up Charge Settlement on July 2, 2007, two weeks *after* the Parties' June 22, 2007 submission of the instant Settlement to the Commission for approval. Thus, the Settlement, when filed, reflected the most current version of the Wind-Up Charge Settlement, including an identical deadline for wind-up charge payments. We note that the Parties did not file reply comments opposing the CalPX's requested modification. For these reasons, we will modify Settlement section 4.1.5 by replacing "December 31, 2007" with "December 31, 2010" in the three places where the date appears.

24. The Commission finds that the Settlement is fair and reasonable and in the public interest; it is hereby approved, with one modification. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in the FERC Proceedings or any other proceeding.

The Commission orders:

The Commission hereby approves and modifies the Settlement, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Acting Deputy Secretary.