

123 FERC ¶ 61,004
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

v.

Docket No. EL00-95-000

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-000

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. EL03-10-000

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

Docket No. PA02-2-000

ORDER APPROVING SETTLEMENT SUBJECT TO CONDITION

(Issued April 2, 2008)

1. In this order, the Commission approves, subject to condition, a joint settlement filed on December 21, 2007 in the above-captioned proceedings between Midway Sunset Cogeneration Company (Midway) and the California Parties¹ (the Parties) resolving

¹ California Parties consists of Pacific Gas and Electric Company, Southern 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, and the California Public Utilities Commission. For purposes of this settlement, 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.

claims arising from events and transactions in western electricity markets during the January 1, 2000 through June 20, 2001 (Settlement Period) as they may relate to Midway. The settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement).

2. The Settlement was filed by the parties pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.² The Parties note that, with the exception of certain provisions, the Settlement became effective on December 20, 2007, the execution date of the Settlement.³ The Parties state that some of the operative provisions will become effective as of, or in relation to, the date on which the Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected party.⁴

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty. The Parties state, further, that the Settlement reaches a fair and reasonable resolution of the issues between Midway and Settling Participants, and protects the rights of Non-Settling Participants.⁵ 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.⁶ The Parties, therefore, request Commission approval of the Settlement.

² 18 C.F.R. § 385.602) (2007).

³ See Joint Explanatory Statement at 7, Settlement and Release of Claims Agreement, Cover Sheet at 1, and General Terms and Conditions, section 1.30.

⁴ See Joint Explanatory Statement at 8, and Settlement and Release of Claims Agreement, sections 2.2 and 9.1.

⁵ Settling Participants include the California Parties and Additional Settling Participants. Non-Settling Participants include participants other than Settling Supplier, i.e., Midway, and the California Parties, that do not elect to participate in the Settlement. See Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.77, 1.52, and 8.1, respectively.

⁶ Citing *Public Utilities Commission of California*, 99 FERC ¶ 61,087, at 61,384 (2002), and *Public Utilities Commission of California v. FERC*, No. 01-71051, *slip op.* at 3 (9th Cir. Oct. 23, 2006).

4. As discussed further below, the Commission approves the Settlement, subject to condition, finding it to be fair and reasonable and in the public interest.

I. Background and Description of Settlement

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)⁷ 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). In 2002, the Commission directed Staff to commence a fact-finding investigation into allegations of the manipulation of electric energy and natural gas prices in the west (Docket No. PA02-2-000). The Commission also directed Staff to commence a fact-finding investigation into possible manipulation of electric and natural gas prices (Docket No. IN03-10-000).

6. According to the Parties, the Settlement filed with the Commission on December 21, 2007 resolves all claims or rights to remedies stemming from the captioned proceedings between Midway and the California Parties. The Parties state that, upon Commission approval of the Settlement, Midway will allow CalPX to release proceeds from Midway's unpaid receivables account from transactions through markets operated by CalPX and CAISO into an account established by the California Parties.⁸ The Parties state that the proceeds will be distributed from the escrow account to each of the Settling Participants and/or held in the escrow account on behalf of any Non-settling Participants.

7. The Parties declare that the total monetary consideration to be paid by Midway is \$85,747,167, including interest accrued at the Commission's interest rate through June 30, 2007, and is comprised of a principal settlement amount of \$56,063,823 plus estimated interest on refunds of \$27,683,344. The Parties state that the amount of unadjusted transferred receivables is \$79,787,159. According to the Parties, the amounts paid into the escrow account include accruals of estimated interest on refunds and estimated interest shortfall on refunds through the projected date of distribution to the escrow account. The Parties state, further, that the Settlement provides for true-up of interest payments pursuant to further Commission orders on the calculation and allocation of interest and the interest shortfall.⁹

⁷ 16 U.S.C. § 824e.

⁸ See Allocation Matrix, Exhibit A to Settlement and Release of Claims Agreement Cover Sheet.

⁹ See Joint Explanatory Statement at 3.

8. The Parties note that an interest shortfall on refunds reserve in the amount of \$5,580,827 plus Midway's interest shortfall estimate of \$1,426,422 will be paid into Midway's refund escrow account. According to the Parties, these amounts will be released to Midway to the extent that those amounts are not needed to satisfy Midway's obligations under further Commission orders.¹⁰

9. According to the Parties, the Settlement permits, but does not require, market participants, i.e., entities that directly sold energy to, or purchased energy from the CAISO and CalPX during the Settlement time period, to join Midway and the California Parties in the Settlement as "Additional Settling Participants (collectively, Settling Participants)." The Parties state that the rights of Non-Settling Participants, i.e., parties electing not to join the Settlement, are unaffected by the Settlement. Entities wishing to opt-into the instant settlement must notify the Commission within five business days of the approval of this Settlement.¹¹

10. The Parties note that, pursuant to certain bilateral agreements between Midway and Southern California Edison Company (SCE) and Midway and Pacific Gas and Electric Company (PG&E), Midway owes certain funds to the two utilities, and the two utilities owe certain funds to Midway. According to the Parties, these obligations arose in connection with Midway's sales of energy and capacity to the utilities as a qualifying facility under the Public Utility Regulatory Policies Act of 1978.¹² The Parties state that SCE and PG&E agreed to a reduced distribution of the amounts allocated to them under a separate supplemental settlement agreement between Midway, SCE and PG&E. The Parties state, further, that this reduction is reflected in the Allocation Matrix of this Settlement.

11. Subject to certain limitations, the Parties state that the Settlement provides for the release of all Settling Participants' claims against Midway and all Midway's claims against the Settling Participants for refunds, disgorgement of profits, or other monetary or non-monetary remedies in the Commission's proceedings and other specified proceedings. The Parties also state that the Settlement provides for mutual releases of claims for civil damages and equitable relief. The Parties, therefore, request Commission approval of the Settlement.

¹⁰ *Id.*

¹¹ Section 8.1 of the Settlement.

¹² 16 U.S.C. § 2601 *et seq.*

II. Comments on the Settlement

12. Pursuant to Rules 602(d)(2) and 602(f) of the Commission's Rules of Practice and Procedures, 18 C.F.R. §§ 385.602(d)(2) and 385.602(f) (2007), initial comments were due on or before January 10, 2008, and reply comments were due on or before January 21, 2008. CalPX filed timely initial comments. CAISO filed initial comments out-of-time. The Parties filed reply comments.

A. Section 4.1.1.6

13. In its initial comments, CalPX takes no position in support of, or in opposition to, the Settlement. CalPX points out, however, that, while the text of section 4.1.1.6 of the Settlement provides that the California Parties will make a cash transfer from Midway's refund escrow account to Midway, the title of that section is captioned "Transfer by PX to Settling Supplier." According to CalPX, the title represents an inadvertent clerical error. CalPX requests the Commission clarify that the California Parties, not CalPX, will make the transfer identified in section 4.1.1.6.

14. In their reply comments, the Parties agree that, as CalPX surmised, the title for section 4.1.1.6 is incorrect and the result of an inadvertent clerical error. Therefore, the Parties assert that it is appropriate for the Commission to clarify that the California Parties, not CalPX, will fulfill the transfer obligations under section 4.1.1.6.

Commission Determination

15. The text in section 4.1.1.6 of the Settlement provides that the California Parties will make a cash transfer from Midway's refund escrow account to Midway. The title for section 4.1.1.6, however, reads "Transfer by PX to Settling Supplier." The Commission clarifies that the California Parties, not CalPX, are responsible for the transfer obligations in this section, and directs the Parties to file a revised Settlement Agreement including the corrected title for section 4.1.1.6 in a compliance filing to be made within 30 days of the date of this order.

B. "Hold Harmless" Protection

16. In its initial comments, CAISO states that it supports the general principle of settlement as embodied in the Settlement. CAISO states that approval of the Settlement will allow certain amounts of cash to flow sooner than would otherwise be the case and, in that respect, will benefit Market Participants. CAISO also supports the inclusion of a duty to cooperate on the part of the settling parties in the Settlement. According to CAISO, this duty to cooperate is essential so that the proper financial adjustments can be made in accordance with the Settlement.

17. Both CalPX and CAISO note that, as with previous settlements approved by the Commission, the circumstances of this Settlement warrant hold harmless treatment for CAISO and CalPX because they will implement a number of provisions of the Settlement, along with their directors, officers, employees and consultants. They request that, in the order approving the Settlement, the Commission state that CAISO and CalPX will be held harmless with respect to the settlement and accounting activities performed pursuant to the Settlement, and that neither CAISO, CalPX, nor their directors, officers, employees or consultants, will be responsible for recovering any funds disbursed pursuant to the Settlement that are subsequently required to be repaid.

18. In response to CalPX's and CAISO's concern about a "hold harmless" provision, the Parties state that, as noted in their Joint Explanatory Statement, the Parties do not oppose a "hold harmless" assurance to CalPX and CAISO for the steps taken to implement the Settlement similar to "hold harmless" assurances provided in other settlements.¹³

Commission Determination

19. The Parties agreed to a "hold harmless" provision that is similar to provisions in other settlements involving the California Parties and approved by the Commission.¹⁴ Consistent with this Commission precedent,¹⁵ the Commission determines that CalPX and CAISO will be held harmless for actions taken to implement this Settlement. This order will incorporate by reference the "hold harmless" language requested by CalPX and approved by the Commission in the order approving a settlement with Portland General Electric Company issued on May 12, 2007.¹⁶

20. In conclusion, the Commission finds that the Settlement is fair and reasonable and in the public interest; it is hereby approved subject to the condition regarding section

¹³ *Citing San Diego Gas & Electric Company*, 119 FERC ¶ 61,151, at P 17-19 (2007) (approving hold harmless protection for the CAISO and CalPX in connection with the Portland General Electric Company settlement). *See* Joint Explanatory Statement at 12.

¹⁴ *See* Joint Explanatory Statement at 12.

¹⁵ *See, e.g., San Diego Gas & Electric Company*, 109 FERC ¶ 61,071 (approving "hold harmless" language in the Dynegy settlement), and *San Diego Gas & Electric Company*, 109 FERC ¶ 61,257 (2004) (approving "hold harmless" language in the Duke settlement), *reh'g denied*, 111 FERC ¶ 61,186 (2005).

¹⁶ *Supra* note 12.

4.1.1.6, discussed in the body of this order. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in the Refund Proceeding or any other proceeding.

The Commission orders:

(A) The Commission hereby approves the Settlement subject to condition, as discussed in the body of this order.

(B) The Parties are directed to file a compliance filing within 30 days of the date of this order, as directed in the body of this order.

By the Commission. Commissioner Spitzer not participating.

(S E A L)

Kimberly D. Bose,
Secretary.