

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

Docket No. EL02-71-034

v.

British Columbia Power Exchange Corp.

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

Docket No. EL09-56-011

v.

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

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued June 16, 2011)

1. In this order, the Commission approves an uncontested settlement filed on January 10, 2011 between PPL Montana LLC and PPL EnergyPlus, LLC (together, PPL Montana) 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), as they relate to PPL Montana.² The settlement also resolves claims related to issues raised in Docket No. EL01-68-000 for all time periods at issue in that proceeding.³ The settlement consists of a “Joint Offer of Settlement and Motion for Procedural Relief for

¹ The California Parties are Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), Southern California Edison Company (SoCal Edison), the Public Utilities Commission of the State of California (CPUC), 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 (CERS) (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 *Id.* at 3.

Purposes of Disposition of the Settlement” (Joint Offer of Settlement), a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, 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 becomes binding as of 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 of a Commission order, subject to certain conditions in the event the Commission modifies or conditions its approval of the Settlement.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.⁸

3. The Parties state that the Settlement may be considered to benefit customers by resolving claims for refunds and other remedies as between PPL Montana and the California Parties, and reaches a fair and reasonable resolution of issues between PPL Montana 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 In addition, the Parties assert that the Settlement fairly

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 §§ 1.28, 1.79, 2.2, 9.1.1.

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.

⁹ Joint Offer of Settlement at 6.

¹⁰ *Id.*

protects the rights of non-settling participants.¹¹ 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.¹²

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)¹³ 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 EL00-98-000.¹⁴ 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. PA02-2-000.¹⁵ In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in western energy markets in Docket No. IN03-10-000.¹⁶ On the same day, the Commission issued two orders directing named entities to show cause why they had not participated in certain gaming practices¹⁷ or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.¹⁸

¹¹ *Id.*

¹² *Id.* (citing *Pub. Utils. Comm'n of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002); *Pub. Utils. Comm'n of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

¹³ 16 U.S.C. § 791, *et seq.* (2006).

¹⁴ *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

¹⁵ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

¹⁶ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

¹⁷ *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

¹⁸ *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

6. The Parties state that the Settlement resolves claims in the above-captioned proceedings as they relate to PPL Montana.¹⁹ 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.”²⁰ To opt into the Settlement, a Participant must provide notice to the Commission, as well as serve notice to parties on the ListServs established for the Docket No. EL00-95 proceeding and in Docket No. EL03-137, *et al.*, no later than five business days following the Settlement Effective Date.²¹ 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 not be guaranteed the benefits of the Settlement, but will still be paid refunds, if any, to which they are ultimately determined to be due through continued litigation.²²

7. The Settlement’s monetary consideration includes a principal amount of \$16,000,000 plus interest.²³ That amount will be funded from PPL Montana’s receivables, estimated to be \$16,876,194 and the estimated interest on receivables in the amount of \$11,934,688 estimated through September 30, 2010, to be updated through the projected date of distribution.²⁴ PPL Montana will receive the balance of the receivables and interest, estimated to be approximately \$1,595,600.²⁵ Under the Settlement, payments from transferred receivables will be made to the “Settling Supplier Refund Escrow,” subject to withholding certain amounts, including for any Deemed Distributions

¹⁹ Joint Explanatory Statement at 2.

²⁰ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 1.1, 1.52, 8.1.

²¹ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 8.1.

²² Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 1.50, 3.2, 5.5, 5.6, 8.1.

²³ Joint Explanatory Statement at 14.

²⁴ *Id.*

²⁵ Joint Explanatory Statement at 14-15; Settlement and Release of Claims Agreement at § 4.1.1.

and PPL Montana's Interest Shortfall Estimate.²⁶ PPL Montana also assigns to the California Parties its entitlement to refunds on certain purchases made in the California markets.²⁷

8. The Settlement provides that certain of the California Parties (PG&E, SDG&E, SoCal Edison, and CERS) will, subject to specified limitations, assume responsibility for the obligation for: (1) true-ups of PPL Montana's receivables and associated interest that have been assigned under the Settlement; (2) any refund amounts that the Commission determines that PPL Montana owes to Non-Settling Participants in certain proceedings; (3) any interest shortfall amounts that the Commission allocates to PPL Montana; (4) any third-party refund offsets (Fuel Cost Allowance, Emissions Offset, and Cost Offset) attributable that the Commission or a court determines that PPL Montana owes; and (5) any CalPX wind-up charges attributable to PPL Montana that are assessed after the Settlement Effective Date.²⁸ The California Parties' obligation to make payments on behalf of PPL Montana shall not exceed the total amount allocated and actually paid to the California Parties pursuant to the Settlement.²⁹

9. The Settlement includes an allocation matrix that allocates the Settlement proceeds among participants.³⁰ The proceeds will be distributed from the Settling Supplier Refund Escrow to each of the Settling Participants and/or, in the case of amounts allocated to any Non-Settling Participants, transferred to the California Parties in accordance with the Settlement.³¹ In addition, certain specified Participants are designated as "Deemed

²⁶ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 4.1.1.4, 4.1.1.5. "Interest Shortfall" is defined as the difference between the interest actually earned on funds held by CalPX or CAISO and the interest that would be earned through application of the FERC interest rate, as set forth 18 C.F.R. § 35.19a(a)(2)(iii). Settlement and Release of Claims Agreement at §1.43.

²⁷ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at § 4.1.8.

²⁸ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 4.1.5, 4.1.6, 5.3, 5.6, 5.7.

²⁹ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at § 5.8.

³⁰ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at Ex. A.

³¹ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at §§ 5.2, 5.3, 5.5.

Distribution Participants,”³² which, according to the terms of the Settlement, 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.³³ The Settlement provides that an estimated amount of interest (less a reserve for an estimated Interest Shortfall on Refunds) will be distributed to the California Parties and Additional Settling Participants concurrently with the principal amounts, but that there will be a true-up of the interest and Interest Shortfall distributions to Settling Participants following the Commission’s determination of interest issues regarding CAISO and CalPX settlement rerun and refund calculations.³⁴ The Settlement states that the Commission’s approval of the Settlement will allow CalPX to release PPL Montana’s receivables and estimated interest and will authorize CAISO and CalPX to conform their books and records to reflect the distributions.³⁵

10. 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 PPL Montana relating to transactions in the western energy markets during the Settlement Period for refunds, disgorgement of profits, or other monetary or non-monetary remedies, subject to specified limitations.³⁶ The Parties state that PPL Montana and the California Parties 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 relating to payments or unlawful rates for electric capacity, energy and/or ancillary services, transmission congestion or line loss charges, or market manipulation.³⁷

³² Settlement and Release of Claims Agreement, Ex. B.

³³ Settlement and Release of Claims Agreement at §§ 1.19, 1.20.

³⁴ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at § 5.3.

³⁵ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at § 6.1.

³⁶ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at § 7.1.1.

³⁷ Joint Explanatory Statement at 17-18; Settlement and Release of Claims Agreement at § 7.2.1.

11. In addition, the Parties state that PPL Montana 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) PPL Montana 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) PPL Montana or any California Party engaged in market manipulation in the western energy markets during the Settlement Period; (3) PPL Montana 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 to PPL Montana for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement period.³⁸

12. Subject to specified limitations and exclusions, Additional Settling Participants are deemed to provide and receive from PPL Montana the releases that the California Parties provide and receive.³⁹ Neither PPL Montana nor Additional Settling Participants waive or release claims or defenses as to bilateral transactions outside the California markets.⁴⁰

13. 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.⁴¹

Procedural Matters

14. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.⁴² 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.⁴³

³⁸ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at § 7.3.1.

³⁹ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at §§ 7.4, 8.2.

⁴⁰ Joint Explanatory Statement at 18.

⁴¹ *Id.* at 19.

⁴² 18 C.F.R. § 385.602 (2011).

⁴³ Joint Offer of Settlement at 3-4 (citing *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,082, at P 14 (2010); *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,259, at P 14

15. 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 January 31, 2011, and reply comments were to be submitted no later than February 9, 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 PPL Montana and the California Parties (Joint Reply Comments).⁴⁴

16. 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

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.⁴⁵ 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

(2009)).

⁴⁴ We note that initial comments in opposition to the Settlement were timely filed by Sacramento Municipal Utility District (SMUD). However, SMUD indicated that its comments were provisional and would be withdrawn in the event that the Commission approved a settlement between SMUD and the California Parties that was expected to be filed with the Commission in the near future. On February 22, 2011, SMUD and the California Parties filed a settlement resolving all claims among them in these proceedings. The Commission has now approved that settlement. *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,059 (2011). SMUD subsequently filed a notice of withdrawal of its comments on this Settlement. Accordingly, SMUD no longer opposes this Settlement, and we will therefore not address its comments here.

⁴⁵ CAISO Comments at 3-6; CalPX Comments at 2-4.

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.⁴⁶

18. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.⁴⁷ In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.⁴⁸

Commission Determination

19. 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 Commission.⁴⁹ Consistent with the Commission's precedent,⁵⁰ 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

⁴⁶ CalPX Comments at 4.

⁴⁷ *Id.* at 3-4.

⁴⁸ Joint Reply Comments at 10.

⁴⁹ *Id.*; Joint Explanatory Statement at 19.

⁵⁰ *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).

20. 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)

Kimberly D. Bose,
Secretary.