

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued June 28, 2011)

1. In this order, the Commission approves an uncontested settlement filed on March 10, 2011 between City of Burbank, California (Burbank) 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 Burbank.² The settlement consists of a “Joint Offer of Settlement” (Joint Offer of Settlement), a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, 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 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 and/or Burbank files a “Good Faith Motion” in the Los Angeles County Superior Court.⁵ Additionally, the Parties explain that the

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 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.

⁴ 18 C.F.R. § 385.602 (2011).

⁵ Joint Explanatory Statement at 10; Settlement and Release of Claims Agreement at §§ 2.1.1, 1.79, 4.17. Under section 4.17 of the Settlement, Burbank may elect to,

(continued...)

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 the Settlement.⁷

3. The Parties state that the Settlement benefits customers by resolving claims for refunds and other remedies as between Burbank and the California Parties, and reaches a fair and reasonable resolution of issues between Burbank and settling participants.⁸ The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.⁹ In addition, the Parties assert that the Settlement fairly protects the rights of non-settling participants.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

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 Burbank 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 § 2.2.1.3.

⁶ Joint Explanatory Statement at 10; Settlement and Release of Claims Agreement at § 2.2.1.

⁷ Joint Explanatory Statement at 10; Settlement and Release of Claims Agreement at § 4.16.

⁸ Joint Offer of Settlement at 5-6.

⁹ *Id.* 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. 2006)).

4. The Settlement states that Burbank “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.¹²

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)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

7. The Parties state that the Settlement resolves claims in the above-captioned proceedings as they relate to Burbank.¹⁹ Any entity that directly sold or purchased

¹² Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement at § 2.3.

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).

¹⁹ Joint Explanatory Statement at 2.

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 in to the Settlement, a Participant must provide notice to the Commission, as well as serve notice to parties on the ListSrvs 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

8. The Settlement provides that Burbank’s transferred receivables are estimated to be \$123,585 as of December 31, 2010, plus interest.²³ Under the Settlement, Burbank assigns all of its rights to those transferred receivables, as well as additional interest that accrues from January 1, 2011 to the date of transfer.²⁴ In addition, the Settlement states that Burbank will provide a cash payment in the amount of \$106,415 to the California Parties, which it has already paid into a refund escrow.²⁵ The Settlement states that, not later than 15 business days after the Settlement Effective Date, Burbank will make a cash payment of \$3,600 to CalPX, which represents its share of the Interest Shortfall estimate

²⁰ Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement at §§ 1.1, 1.53, 8.1.

²¹ Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement at § 8.1.

²² Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement at §§ 1.53, 3.2, 8.1.

²³ Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement at § 4.1.

²⁴ Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement at §§ 4.1, 4.6.

²⁵ Joint Explanatory Statement at 11-12; Settlement and Release of Claims Agreement at § 4.6.2.

(subject to later true-up once Burbank's actual share is established).²⁶ Burbank's transferred receivables and additional interest will be transferred by CalPX to the refund escrow, subject to withholding certain amounts, including for any Deemed Distributions.²⁷

9. The Settlement provides that Burbank will assume responsibility for any: (1) difference between Burbank's actual receivables (as determined by later Commission order) and the transferred receivables, plus associated interest on any such shortfall or excess; (2) any refund shortfall associated with refunds to Non-Settling Participants, as determined by later Commission order); (3) any refund offsets or other charges related to the California markets that may be allocated to Burbank on account of sales by entities other than Burbank (e.g., fuel cost allowance, emissions offset, and cost offset); (4) CalPX wind-up charges attributable to Burbank, as well as any future Commission orders requiring a substantially similar charge by CalPX to be assessed against Burbank; and (5) any CAISO or CalPX dispute resolution allocations attributable to Burbank.²⁸ Burbank must reimburse the California Parties in cash for any CalPX wind-up charges deducted by CalPX from Burbank's transferred receivables.²⁹

10. 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

²⁶ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement at § 4.3. "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 interest rate set forth under the Commission's regulations. Settlement and Release of Claims Agreement at § 1.48. *See also* 18 C.F.R. § 35.19a(a)(2)(iii) (2011).

²⁷ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement at § 4.6.1.

²⁸ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement at §§ 3.2, 4.13, 4.9, 4.10, 5.4., 5.5.

²⁹ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement at §§ 46.3, 4.9.

³⁰ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at Ex. A.

sections 5.2 and 5.5 of the Settlement.³¹ In addition, certain specified Participants are designated as “Deemed 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 states that the Commission’s approval of the Settlement will allow CalPX to release Burbank’s receivables and estimated interest and will authorize CAISO and CalPX to conform their books and records to reflect the distributions.³⁴

11. 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 Burbank 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.³⁵ The Parties state that Burbank 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.³⁶

12. In addition, the Parties state that Burbank 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) Burbank or any California Party collected or charged unjust, unreasonable, or otherwise unlawful rates, terms, or conditions for capacity, energy, ancillary services, or transmission congestion

³¹ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at §§ 5.2, 5.5.

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

³³ Settlement and Release of Claims Agreement at §§ 1.27, 1.28.

³⁴ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at § 6.1.

³⁵ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 7.1.1.

³⁶ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 7.2.1.

during the Settlement Period; (2) Burbank or any California Party engaged in market manipulation in the western energy markets during the Settlement Period; (3) Burbank 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) that any California Party is liable for payments to Burbank for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement period.³⁷

13. Subject to specified limitations and exclusions, Additional Settling Participants are deemed to provide and receive from Burbank the releases that the California Parties provide and receive.³⁸

14. 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.³⁹

Procedural Matters

15. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.⁴⁰ 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.⁴¹

16. 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 March 30, 2011, and reply comments were to be submitted no later than April 11, 2011. Initial comments were timely filed by CAISO and CalPX, either in

³⁷ Joint Explanatory Statement at 14-15; Settlement and Release of Claims Agreement at § 7.3.1.

³⁸ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 7.4, 8.2.

³⁹ Joint Explanatory Statement at 15.

⁴⁰ 18 C.F.R. § 385.602 (2011).

⁴¹ Joint Offer of Settlement at 3-4 (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)).

support of or not opposing the Settlement. Reply comments were timely filed by Burbank and the California Parties (Joint Reply Comments).⁴²

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

Substantive Matters

A. “Hold Harmless” Protection

18. 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.⁴³ 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

⁴² 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 had recently been filed with the Commission. 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 on May 4, 2011. Accordingly, SMUD no longer opposes this Settlement, and we will therefore not address its comments here.

⁴³ CAISO Comments at 3-6; CalPX Comments at 2-4.

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.⁴⁴

19. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.⁴⁵ In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.⁴⁶

Commission Determination

20. 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.⁴⁷ Consistent with the Commission's precedent,⁴⁸ 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.

B. CAISO's Interpretation of Section 6.1.3.6 of the Settlement

21. In its comments, CAISO states that it interprets section 6.1.3.6 of the Settlement (“Accounting Treatment of Calculations for Non-Settling Participants”) to mean that, although CAISO will continue to include Burbank 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 Burbank in these proceedings to parties in the CAISO markets for the Settlement Period, except for those monies that have been paid out under the Settlement.

⁴⁴ CalPX Comments at 4.

⁴⁵ *Id.* at 3.

⁴⁶ Joint Reply Comments at 10.

⁴⁷ *Id.*; Joint Explanatory Statement at 17.

⁴⁸ *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).

CAISO notes that in proceedings involving other settlements between the California Parties and non-jurisdictional entities, the California Parties had confirmed that CAISO's interpretations of identical provisions were correct. Thus, CAISO assumes that section 6.1.3.6 of this Settlement should be interpreted in the same manner. CAISO states that, as with other adjustments necessary to implement the Settlement, as well as other settlements entered into by the California Parties in these proceedings, it will work closely with settling parties to make appropriate modifications to its books and records.⁴⁹

Commission Determination

22. Consistent with earlier orders addressing similar settlement agreements,⁵⁰ we find that CAISO's interpretation of section 6.1.3.6 of the Settlement is reasonable.

Conclusion

23. 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 Burbank's attempt to "disclaim" Commission jurisdiction over the Settlement is not germane in these circumstances.⁵¹ Only the Commission may disclaim its jurisdiction under the FPA.⁵²

⁴⁹ In the Joint Explanatory Statement, the Parties explain that the Commission expressly noted the effect of CAISO's interpretation of that same provision in an earlier order addressing a similar settlement agreement and that the Parties rely upon that interpretation as well. Joint Explanatory Statement at n.38 (citing *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,257, at n.46 (2009)).

⁵⁰ See, e.g., *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,083, at P 23 (2010).

⁵¹ See *supra* P 4.

⁵² See, e.g., *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,059, at P 25 (2011); *San Diego Gas & Elec. Co.*, 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. Commissioners Spitzer and Moeller are not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.