

138 FERC ¶ 61,084  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

v.

Docket No. EL00-95-266

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-247

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-074

Sellers of Energy and/or Capacity

Investigation of Wholesale Rates of Public Utility  
Sellers of Energy and Ancillary Services in the  
Western Market Systems Coordinating Council

Docket No. EL01-68-041

Investigation of Anomalous Bidding Behavior and  
Practices in Western Markets

Docket No. IN03-10-075

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

Docket No. PA02-2-090

American Electric Power Service Corporation

Docket No. EL03-137-036

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

Docket No. EL03-180-065

California Independent System Operator  
Corporation

Docket No. ER03-746-041

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

General of the State of California

v.

Docket No. EL02-71-038

British Columbia Power Exchange Corp.

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

v.

Docket No. EL09-56-015

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

## ORDER APPROVING UNCONTESTED SETTLEMENT

(February 2, 2012)

1. In this order, the Commission approves an uncontested settlement filed on September 1, 2011 between Nevada Power Company and Sierra Pacific Power Company, dba NV Energy (together, NV Energy) and the California Parties<sup>1</sup> (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 NV Energy.<sup>2</sup> The settlement consists of a “Joint Offer of Settlement and Motion for Procedural Relief for Purposes of Disposition of the Settlement” (Joint Offer of Settlement), a “Joint Explanatory

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<sup>1</sup> 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).

<sup>2</sup> Joint Explanatory Statement at 2.

Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement).<sup>3</sup>

2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.<sup>4</sup> 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 later of the date that the CPUC executes the Settlement or the date the Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected party.<sup>5</sup> 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.<sup>6</sup> The Parties also state that the Settlement may terminate if the California Parties fail to receive consideration that they are due under the Settlement.<sup>7</sup>

3. The Parties state that the Settlement may be considered to benefit customers by resolving claims for refunds and other remedies as between NV Energy and the California Parties, and reaches a fair and reasonable resolution of issues between NV Energy and settling participants.<sup>8</sup> The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.<sup>9</sup> In addition, the Parties assert that the

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<sup>3</sup> 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.

<sup>4</sup> 18 C.F.R. § 385.602 (2011).

<sup>5</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 1.30, 1.80, 2.2, 9.1.

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

<sup>7</sup> Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 4.3.

<sup>8</sup> Joint Offer of Settlement at 6.

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

Settlement fairly protects the rights of non-settling participants.<sup>10</sup> 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.<sup>11</sup>

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)<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in western energy markets in Docket No. IN03-10-000.<sup>15</sup> On the same day, the Commission issued two orders directing named entities to show cause why they had not participated in certain gaming practices<sup>16</sup> or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.<sup>17</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (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)).

<sup>12</sup> 16 U.S.C. § 791, *et seq.* (2006).

<sup>13</sup> *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

<sup>14</sup> *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

<sup>15</sup> *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

<sup>16</sup> *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

<sup>17</sup> *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 NV Energy.<sup>18</sup> 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.”<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

7. The Settlement’s monetary consideration totals \$39,978,093, as of June 30, 2011 and will be funded from the following sources: (1) NV Energy’s receivables, estimated to be \$21,611,167, including \$144,652 in NV Energy’s cash collateral, and estimated interest on receivables of \$16,366,925 through June 30, 2011, and which will be updated through and including the projected date of distribution; and (2) a cash payment by NV Energy of \$2,000,000, plus interest accruing on and after July 1, 2011 through the date of payment.<sup>22</sup> Under the Settlement, payments from transferred receivables will be made to the “Settling Supplier Refund Escrow” and/or the “California Refund Escrow,” subject to withholding certain amounts, including for any Deemed Distributions, the estimated Interest Shortfall on Refunds, and NV Energy’s Interest Shortfall Estimate.<sup>23</sup>

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<sup>18</sup> Joint Explanatory Statement at 2.

<sup>19</sup> Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 1.1, 1.54, 8.1.

<sup>20</sup> Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at § 8.1.

<sup>21</sup> Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 1.52, 3.2, 5.5, 5.6, 8.1.

<sup>22</sup> Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 4.1.1, 4.1.2.

<sup>23</sup> Joint Explanatory Statement at 16; 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 §1.45.

NV Energy also assigns to the California Parties its entitlement to refunds on certain purchases made in the California markets.<sup>24</sup>

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) NV Energy's true-ups of receivables and associated interest that have been assigned under the Settlement; (2) any refund amounts that the Commission determines that NV Energy owes to Non-Settling Participants in certain proceedings; (3) any interest shortfall amounts that the Commission allocates to NV Energy; (4) any third-party refund offsets (Fuel Cost Allowance, Emissions Offset, and Cost Offset) that the Commission or a court determines that NV Energy owes; (5) dispute resolution charges; and (6) any CalPX wind-up charges attributable to NV Energy that are assessed after January 1, 2012.<sup>25</sup>

9. The Settlement includes an allocation matrix that allocates the Settlement proceeds among participants.<sup>26</sup> 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.<sup>27</sup> In addition, certain specified Participants are designated as "Deemed Distribution Participants,"<sup>28</sup> 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.<sup>29</sup> 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

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

<sup>25</sup> Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at §§ 4.1.5, 4.1.6, 5.3, 5.6, 5.7.

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

<sup>27</sup> Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at §§ 4.1.1.4, 5.2, 5.3, 5.5.

<sup>28</sup> Settlement and Release of Claims Agreement, Ex. B.

<sup>29</sup> Settlement and Release of Claims Agreement at §§ 1.21, 1.22.

and Interest Shortfall distributions to Settling Participants following the Commission's determination of interest issues regarding CAISO and CalPX settlement rerun and refund calculations.<sup>30</sup> The Settlement states that the Commission's approval of the Settlement will allow CalPX to release NV Energy's receivables and estimated interest and will authorize CAISO and CalPX to conform their books and records to reflect the distributions.<sup>31</sup>

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 NV Energy relating to transactions in the western energy markets during the Settlement Period for refunds, disgorgement of profits, or other monetary or non-monetary remedies, as well as claims related to issues raised in Docket No. EL01-68 for all time periods at issue in that proceeding.<sup>32</sup>

11. The Parties state that NV Energy 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 that: (1) NV Energy 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) NV Energy 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 NV Energy for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.<sup>33</sup>

12. In addition, the Parties state that NV Energy 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) NV Energy or any California Party collected or charged unjust, unreasonable, or otherwise unlawful

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<sup>30</sup> Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at § 5.3.

<sup>31</sup> Joint Explanatory Statement at 17-18; Settlement and Release of Claims Agreement at § 6.1.

<sup>32</sup> Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at §§ 3.1, 7.1.1.

<sup>33</sup> Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at § 7.2.1.

rates, terms, or conditions for capacity, energy, ancillary services, or transmission congestion during the Settlement Period; (2) NV Energy or any California Party engaged in market manipulation in the western energy markets during the Settlement Period; (3) NV Energy 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 NV Energy for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement period.<sup>34</sup>

13. Subject to specified limitations, Additional Settling Participants are deemed to provide and receive from NV Energy the releases that the California Parties provide and receive.<sup>35</sup> Neither NV Energy nor Additional Settling Participants waive or release claims or defenses as to bilateral transactions outside the California markets.<sup>36</sup>

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.<sup>37</sup>

### **Procedural Matters**

15. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.<sup>38</sup> 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.<sup>39</sup>

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

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<sup>34</sup> Joint Explanatory Statement at 19; Settlement and Release of Claims Agreement at § 7.3.1.

<sup>35</sup> Joint Explanatory Statement at 19; Settlement and Release of Claims Agreement at §§ 7.4, 8.2.

<sup>36</sup> Joint Explanatory Statement at 19.

<sup>37</sup> *Id.* at 19-20.

<sup>38</sup> 18 C.F.R. § 385.602 (2011).

<sup>39</sup> 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 (2009)).

no later than September 21, 2011, and reply comments were to be submitted no later than October 3, 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 NV Energy and the California Parties (Joint Reply Comments).

17. 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**

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.<sup>40</sup> 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 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>41</sup>

19. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.<sup>42</sup> In their Joint Reply Comments, the

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<sup>40</sup> CAISO Comments at 4-7; CalPX Comments at 2-4.

<sup>41</sup> CalPX Comments at 4.

<sup>42</sup> *Id.* at 2-4.

Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.<sup>43</sup>

### **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.<sup>44</sup> Consistent with the Commission’s precedent,<sup>45</sup> 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**

21. 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. Chairman Wellinghoff is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>43</sup> Joint Reply Comments at 3.

<sup>44</sup> *Id.*; Joint Explanatory Statement at 19-20.

<sup>45</sup> *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).