

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

Docket No. EL02-71-000

v.

British Columbia Power Exchange Corp.

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

Docket No. EL09-56-000

v.

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

ORDER ON MOTION TO OPT INTO SETTLEMENT AGREEMENTS OUT OF TIME

(Issued March 23, 2012)

1. On December 21, 2011, AEP¹ filed a motion to opt into 40 settlement agreements in these proceedings out of time, in accordance with the terms of its settlement agreement with the California Parties² (AEP Settlement). As discussed herein, we grant in part and deny in part AEP's motion.³

¹ AEP includes American Electric Power Service Corporation, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, AEP Texas Central Company, and AEP Texas North Company.

² California Parties include Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, the People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General, 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.

³ 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

(continued...)

Background

2. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act to investigate, among other things, the justness and reasonableness of public utility sellers' rates in the California Independent System Operator Corporation and California Power Exchange markets.⁴ In 2002, the Commission directed Staff to commence a fact-finding investigation into the alleged manipulation of electrical and natural gas prices in the west.⁵ Further, in 2003, the Commission directed Staff to investigate anomalous bidding behavior and practices in western markets.⁶

3. On September 29, 2011, AEP and the California Parties filed the AEP Settlement, which resolved matters and claims related to AEP arising out of events and transactions in the western energy markets during the period from January 1, 2000 through June 20, 2001.⁷ On November 22, 2011, the Commission approved the unopposed AEP

4. Settlement, finding that it appeared to be fair and reasonable and in the public interest.⁸

AEP's Motion

5. On December 20, 2011, AEP filed its motion requesting Commission authorization for it to opt into certain Commission-approved settlements, in accordance with section 4.7.1.1 of the AEP Settlement. AEP requests authorization to opt into the following settlements.

Administrative Law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

⁴ *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

⁵ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

⁶ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

⁷ The proceeding was under Docket Nos. EL00-95-267, EL00-98-248, EL01-10-075, EL01-68-042, IN03-10-076, PA02-2-091, EL03-137-037, EL03-180-066, ER03-746-042, EL02-71-039, and EL09-56-016.

⁸ *San Diego Gas & Elec. Co.*, 137 FERC ¶ 61,156 (2011) (AEP Settlement Order).

- i. the Williams Companies, as approved in *San Diego Gas & Elec. Co.*, 108 FERC ¶ 61,002 (2004);
- ii. the Dynegy Parties, as approved in *San Diego Gas & Electric. Co.*, 109 FERC ¶ 61,071 (2004);
- iii. the Duke Parties or Duke, as approved in *San Diego Gas & Electric. Co.*, 109 FERC ¶ 61,257 (2004);
- iv. the Mirant Parties, as approved in *San Diego Gas & Electric. Co.*, 111 FERC ¶ 61,017 (2005);
- v. the Enron Parties, as approved in *San Diego Gas & Electric. Co.*, 113 FERC ¶ 61,171 (2005) and as later amended, *San Diego Gas & Elec. Co.*, et al., 119 FERC ¶ 61,135 (2007);
- vi. Public Service Company of Colorado, as approved in *San Diego Gas & Electric. Co.*, 113 FERC ¶ 61,235 (2005);
- vii. the Reliant Parties, as approved in *San Diego Gas & Electric. Co.*, 113 FERC ¶ 61,308 (2005)
- viii. Idacorp (Idaho Power Company and IDACORP Energy L.P.), as approved in *San Diego Gas & Electric. Co.*, 115 FERC ¶ 61,230 (2006);
- ix. Eugene Water & Electric Board, as approved in *San Diego Gas & Electric. Co.*, 119 FERC ¶ 61,092 (2007);
- x. Portland General Electric Company, as approved in *San Diego Gas & Electric. Co.*, 119 FERC ¶ 61,151 (2007);
- xi. PacifiCorp, as approved in *San Diego Gas & Electric. Co.*, 119 FERC ¶ 61,296 (2007);
- xii. PPM Energy, Inc., as approved in *San Diego Gas & Electric. Co.*, 121 FERC ¶ 61,014 (2007);
- xiii. Conectiv Energy Supply, Inc., as approved in *San Diego Gas & Electric. Co.*, 122 FERC ¶ 61,008 (2008);
- xiv. Midway Sunset Cogeneration Company, as approved in *San Diego Gas & Electric. Co.*, 123 FERC ¶ 61,004 (2008);

- xv. Public Utility District No. 2 of Grant County, Washington, as approved in *San Diego Gas & Elec. Co.*, 123 FERC ¶ 61,200 (2008);
- xvi. City of Riverside, California, as approved in *San Diego Gas & Elec. Co.*, 123 FERC ¶ 61,242 (2008);
- xvii. City of Anaheim, California, as approved in *San Diego Gas & Elec. Co.*, 123 FERC ¶ 61,243 (2008);
- xviii. City of Azusa, California, as approved in *San Diego Gas & Elec. Co.*, 123 FERC ¶ 61,244 (2008);
- xix. Strategic Energy, LLC, as approved in *San Diego Gas & Elec. Co.*, 123 FERC ¶ 61,316 (2008);
- xx. Puget Sound Energy, Inc., as approved in *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,002 (2008);
- xxi. AES Placerita, Inc., as approved in *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,004 (2009);
- xxii. Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc., as approved in *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242 (2009);
- xxiii. Comision Federal de Electricidad, as approved in *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,256 (2009);
- xxiv. City of Vernon, California, as approved in *San Diego Gas & Elec. Co.*, 125 FERC ¶ 61,085 (2008);
- xxv. PECO/Exelon, as approved in *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,259 (2009);
- xxvi. Cargill Power Markets, LLC, as approved in *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,258 (2009);
- xxvii. City of Los Angeles acting by and through the Department of Water and Power, as approved in *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,257 (2009);
- xxviii. Public Service Company of New Mexico, as approved in *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,082 (2010);

- xxix. Northern California Power Agency, as approved in *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,083 (2010);
- xxx. Tucson Electric Power Company, as approved in *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,259 (2010);
- xxxii. Sempra Energy, Sempra Energy Trading LLC and Sempra Energy Solutions LLC, as approved in *San Diego Gas & Elec. Co.*, 133 FERC ¶ 61,249 (2010);
- xxxiii. City of Santa Clara, California d/b/a Silicon Valley Power, as approved in *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,247 (2011);
- xxxiiii. PPL Montana, LLC and PPL EnergyPlus, LLC, as approved in *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,248 (2011);
- xxxv. City of Seattle, Washington, as approved in *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,246 (2011);
- xxxvi. City of Pasadena, California, as approved in *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,249 (2011);
- xxxvii. Sacramento Municipal Utility District, as approved in *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,059 (2011);
- xxxviii. City of Glendale, California, as approved in *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,267 (2011);
- xxxix. City of Burbank, California, as approved in *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,268 (2011);
- xl. Modesto Irrigation District, as approved in *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,269 (2011); and
- xli. Turlock Irrigation District, as approved in *San Diego Gas & Elec. Co.*, 136 FERC ¶ 61,023 (2011).

The Three Cities' Opposition to AEP's Motion

6. The City of Anaheim, the City of Azusa, and the City of Riverside (collectively, the Three Cities) filed an opposition to AEP's motion. The Three Cities explain that each of their respective settlements into which AEP seeks to opt into require the consent of both the California Parties and the settling supplier in order for a party to opt into these settlements out of time. The Three Cities acknowledge that they have consented to

similar opt-in requests in the past, but assert that the AEP Settlement differs from other settlements in these proceedings. Accordingly, the Three Cities urge the Commission to deny AEP's motion insofar as it attempts to opt into the Three Cities' settlements out of time.

7. AEP filed an answer to the Three Cities' opposition, asking that the Commission reject the opposition and permit AEP to opt into all of the settlements, including the Three Cities' settlements. In support, AEP notes that the Three Cities did not oppose the AEP Settlement, nor did they seek rehearing of the AEP Settlement Order. AEP also notes that the Three Cities only state that the AEP Settlement includes significant differences from prior settlements, but that they do not provide any explanation as to what these differences are or why such differences should lead the Commission to deny AEP's motion. Additionally, AEP states that it is not aware of any instance where the Three Parties or any other settled participant in these proceedings have opposed the effort of another settling party to opt into prior settlements out of time. Next, AEP argues that the ability to opt into prior settlements out of time and receive the funds it was allocated in those settlements was a key component of the AEP Settlement, and that such provisions are likely to be key components of future settlements in these proceedings. Finally, AEP contends that it would be unduly discriminatory for the Commission to deny the motion because it would treat AEP differently from every other similarly situated settling party that has requested, and has been granted, leave to opt-in late to the Three Cities' settlements. AEP believes this result would diminish faith in the settlement process and in settlements approved by the Commission.

8. The Three Cities responded to AEP's answer, providing additional details as to why they oppose AEP's motion. Specifically, the Three Cities state that the AEP Settlement contains two significant differences from other settlements in these proceedings: (1) the AEP Settlement does not contain a provision allowing other parties to opt into it; and (2) all of the proceeds from the AEP Settlement are allocated to the California Energy Resources Scheduling Division of the California Department of Water Resources (CERS), as opposed to being distributed more broadly. The Three Cities also responded to other arguments raised by AEP in its answer.

Discussion

A. Procedural Matters

9. Pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 285.213(a)(2) (2011), answers to answers are prohibited unless otherwise permitted by the decisional authority. We will accept the answers filed by AEP and the Three Cities because they have assisted us in the decision-making process.

B. Substantive Matters

10. Previously in these proceedings, the Commission determined that whether an entity may opt into a settlement after the period for opting in has expired is an issue for the settling parties to determine.⁹ Nonetheless, AEP has filed the motion seeking Commission authorization to opt into the listed settlements. Because AEP is seeking specific Commission authorization to opt into the listed settlements, we will entertain the motion.

11. In this instance, the Three Cities have opposed AEP's motion insofar as AEP seeks to opt into the Three Cities' settlements out of time. The Three Cities correctly characterize the provision in their respective settlements governing the procedure to opt into them.¹⁰ Specifically, each of those settlements provides that a participant may opt into the settlement on a timely basis by providing the requisite notice within five business days following the effective date of the settlement. If a participant seeks to opt into the settlement after this period, then it must obtain the consent of both the California Parties and the settling supplier. Otherwise, it will be deemed a Non-Settling Participant for purposes of that settlement. Notwithstanding AEP's arguments that it should be permitted to opt into the Three Cities' settlements, we find that the terms of these settlements provide that the Three Cities must consent to untimely efforts to opt into them. Thus, the Three Cities' objection is permissible in light of the terms of their respective settlements.

12. AEP points out that the Three Cities did not object to the AEP Settlement and did not seek rehearing of the AEP Settlement Order. However, the Three Cities are not required to oppose or otherwise comment on the AEP Settlement in order for the Three

⁹ See, e.g., *San Diego Gas & Electric Co.*, 111 FERC ¶ 61,186, at P 34 (2005). We note that certain provisions of most of the listed settlements provide that, with respect to late opt-ins, any participant that has not provided notice to participate in a settlement on or prior to the date that is five business days following the issuance of the Commission's settlement order shall have no right to participate in that settlement absent the written consent of the California Parties and (in most instances) the relevant settling supplier. As discussed herein, this is the case with the Three Cities' settlements. Thus, these settlements set forth the process for opting into them out of time.

¹⁰ See Settlement and Release of Claims Agreement between the California Parties and City of Anaheim at § 8.1, Docket No. EL00-95-210, *et al.* (Feb. 28, 2008); Settlement and Release of Claims Agreement between the California Parties and City of Azusa at § 8.1, Docket No. EL00-95-211, *et al.* (Feb. 29, 2008); Settlement and Release of Claims Agreement between the California Parties and City of Riverside at § 8.1, Docket No. EL00-95-209, *et al.* (Feb. 26, 2008).

Cities to exercise their right to withhold consent to an attempt to opt into their settlements out of time. While AEP argues that the Three Cities failed to provide any support for their statement that the AEP Settlement differed from other settlements where they had provided their consent, we note that the Three Cities' subsequent response to AEP highlighted their concerns with the AEP Settlement.¹¹

13. We also disagree with AEP's claim that it would be unduly discriminatory for the Commission to deny the motion because it would effectively treat AEP differently from other settling parties that have been able to opt into the settlements out of time. First, as noted above, whether a participant can opt into a settlement out of time is a matter for the parties to determine. The Commission recognizes that motions such as the one AEP filed provide an efficient mechanism to opt into a large number of settlements out of time and, accordingly, we have entertained such motions. However, we will not override a settling supplier's decision to withhold consent to a late opt-in if it has the ability to do so under the terms of its settlement. Second, in similar cases in these proceedings, no settling parties, including the Three Cities, have opposed motions to opt into their settlements out of time. Consequently, there was no reason for the Commission to deny such motions in the past. Here, however, the Three Cities have filed such an opposition. We are thus faced with a different circumstance. Third, the AEP Settlement does in fact differ from other settlements in these proceedings, including the Three Cities' settlements. Specifically, the AEP Settlement does not include a mechanism for entities to opt into it and be allocated a portion of the settlement proceeds because the proceeds flow to only CERS. Finally, the Three Cities' settlements provide a mechanism for opting into their settlements in a timely manner. If a participant chooses not to timely opt into these settlements, then it assumes the risk that it will not be able to secure the necessary consents to opt into the settlements out of time.¹² We thus disagree with AEP that denying the motion would be unduly discriminatory.

14. With respect to AEP's contention that denying the motion will lessen faith in the settlement process and in Commission-approved settlements, we believe that AEP overstates the issue. As an initial matter, AEP is permitted to opt into 37 settlements listed above, as discussed below. AEP, therefore, will be able to obtain proceeds allocated to it in those settlements. In any event, as discussed above, entities in similar circumstances should understand that there is a risk that a party to an earlier settlement

¹¹ *See supra* P7.

¹² The AEP Settlement recognizes that the Three Cities' settlements require both the consent of the California Parties and the settling supplier. *See* AEP Settlement, Settlement and Release of Claims Agreement at Exhibit A (listing settlements that require the consent of both the California Parties and settling suppliers, as well as those settlements that require only the consent of the California Parties).

may not consent to an untimely attempt to opt into that settlement. We do not believe that this risk will lessen faith in Commission-approved settlements. Indeed, the risk appears to be relatively small. As AEP itself notes, this is an unusual instance of a settling party in these proceedings filing a motion to oppose a motion to opt into settlements out of time.¹³

15. As noted above, none of the other parties to the listed settlements has opposed AEP's motion. Therefore, the Commission infers from the lack of opposition that the parties to each of these settlements assent to AEP's effort to opt into those settlements out of time.¹⁴ Furthermore, because the Commission has previously found that the AEP Settlement appeared to be fair and reasonable and in the public interest,¹⁵ the Commission finds that it is reasonable to grant AEP's motion with respect to the 37 settlements where no opposition was filed. However, for the reasons discussed herein, we deny the motion with respect to AEP's efforts to opt into the Three Cities' settlements out of time.

The Commission orders:

AEP's motion is granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³ See AEP Answer at 5 (“AEP is not aware of any instance where *any* previously settled party has opposed the effort of another settling party to opt-in to a prior settlement out of time in this proceeding, and the Three Cities point to no such precedent.”) (emphasis in original).

¹⁴ See *San Diego Gas & Electric Co.*, 120 FERC ¶ 61,201, at P 10 (2007).

¹⁵ AEP Settlement Order, 137 FERC ¶ 61,156 at P 19.