

148 FERC ¶ 61,128  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, John R. Norris,  
Tony Clark, and Norman C. Bay.

San Diego Gas & Electric Company

Docket No. EL00-95-278

v.

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-257

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued August 15, 2014)

1. In this order, the Commission approves a settlement filed on May 30, 2014 between the Dynegy Amending Parties<sup>1</sup> and the California Parties<sup>2</sup> (collectively, the Parties), as discussed below. The settlement consists of a “Joint Offer of Settlement to Amend and Supplement the 2004 Dynegy-California Parties Settlement Agreement and Request for Expedited Action,” a “Joint Explanatory Statement,” and a “First

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<sup>1</sup> The Dynegy Amending Parties are Dynegy Inc. and Dynegy Power Marketing, LLC.

<sup>2</sup> The California Parties are Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, the Public Utilities Commission of the State of California, and the People of the State of California *ex rel.* Kamala D. Harris, Attorney General. For purpose of the First Amendment, the 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).

Amendment to Settlement and Release of Claims Agreement” (collectively, First Amendment).<sup>3</sup>

2. The Parties filed the First Amendment pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.<sup>4</sup> The Parties state that approval of the First Amendment will benefit customers by further resolving issues relating to the Dynegy Amending Parties’ transactions in California energy markets during 2000 and 2001.<sup>5</sup> The Parties also state that the First Amendment will become effective as of the First Amendment Effective Date, which is defined as the sixth business day after the Commission issues an order approving the Settlement.<sup>6</sup> The First Amendment will terminate on the date of a final Commission order rejecting the First Amendment in whole or in material part or accepting the First Amendment with material conditions or modifications deemed unacceptable to any adversely affected Party.<sup>7</sup>

3. As discussed below, the Commission approves the First Amendment.

### **Background and Description of the Settlement**

4. In August 23, 2000, the Commission instituted formal hearing procedures under the Federal Power Act<sup>8</sup> to investigate, among other things, the justness and reasonableness of public utility sellers’ rates in the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) markets in Docket Nos. EL00-95-000 and EL00-98-000.<sup>9</sup> In 2002, the Commission directed its staff

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<sup>3</sup> On March 11, 2011, then-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 (2014).

<sup>5</sup> Joint Explanatory Statement at 2-3.

<sup>6</sup> *Id.* at 11; First Amendment to Settlement and Release of Claims Agreement at §§ 1.19, 1.21.

<sup>7</sup> Joint Explanatory Statement at 12; First Amendment to Settlement and Release of Claims Agreement at § 2.4.1.2.

<sup>8</sup> 16 U.S.C. § 791, *et seq.* (2012).

<sup>9</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 92 FERC ¶ 61,172 (2000).

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>10</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>11</sup> On the same day, the Commission issued two orders directing named entities to show cause that they had not participated in gaming practices<sup>12</sup> or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.<sup>13</sup>

5. On June 28, 2004, the Dynegy Parties<sup>14</sup> and the California Parties executed a comprehensive settlement (2004 Settlement) relating to the Dynegy Parties' transactions in the CAISO and CalPX markets during the years 2000 and 2001, which the Commission subsequently approved.<sup>15</sup> The Parties explain that the 2004 Settlement resolved certain significant issues between and among the Dynegy Parties and the California Parties and resulted in refunds to settling participants, funded by the Dynegy Parties.<sup>16</sup> In addition to a cash payment, the Dynegy Parties assigned all of their right, title, and interest in and to the outstanding CAISO and CalPX receivables "owed to or claimed by the Dynegy Parties, before mitigation in the EL00-95 et al. proceeding, relating to all transactions during the period from the beginning of the Pre-October Period [i.e., January 1, 2000 through October 1, 2000] through the end of the Refund Period

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<sup>10</sup> *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

<sup>11</sup> *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

<sup>12</sup> *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

<sup>13</sup> *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

<sup>14</sup> Joint Explanatory Statement at 7. Under the 2004 Settlement, the Dynegy Parties included: Dynegy Inc.; NRG Energy, Inc.; and West Coast Power, LLC (on behalf of itself and El Segundo Power, LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC).

<sup>15</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 109 FERC ¶ 61,071 (2004) (2004 Settlement Order), *order on reh'g*, 111 FERC ¶ 61,186 (2005).

<sup>16</sup> Joint Explanatory Statement at 8. Any party to the Docket No. EL00-95 Proceeding could elect to join the 2004 Settlement and become a Settling Participant along with the California Parties, thus the settlement also included an allocation of refunds and payments to parties other than the California Parties. *Id.* at 7; 2004 Settlement Order, 109 FERC ¶ 61,071 at 61,283.

[i.e., October 2, 2000 through June 20, 2001]” as established pursuant to Commission orders.<sup>17</sup> The Parties state that, as of February 29, 2004, the value of those receivables was an estimated \$259 million, exclusive of interest.<sup>18</sup>

6. The Parties state that the 2004 Settlement, similar to other early settlements the California Parties entered into in these proceedings, deferred determination and payment of interest on the receivables assigned to the California Parties, and on the refunds paid to settling participants, until issuance of a Commission order directing the payment of interest on receivables and refunds based on CAISO and CalPX calculations.<sup>19</sup> The 2004 Settlement provided that if the value of the receivables assigned to the California Parties was ultimately determined to be different from the amount estimated at that time, then the California Parties would be entitled to receive, or be required to pay, the difference.<sup>20</sup>

7. On July 6, 2012, one of the Dynegy Parties—Dynegy Inc.—filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code.<sup>21</sup> Thereafter, the California Parties filed claims in the Bankruptcy Proceeding to preserve their rights under the 2004 Settlement. The Parties state that on October 1, 2012, Dynegy Inc. emerged from bankruptcy.<sup>22</sup> As “Disbursing Agent” under its Chapter 11 Plan of Reorganization, Dynegy Inc. began the task of resolving the claims asserted in the Bankruptcy Proceeding, including the claims asserted by the California Parties. The Parties explain that the First Amendment is the product of those efforts.<sup>23</sup>

8. The Parties state that the First Amendment, when approved, will: (1) enable immediate distribution of nearly \$56 million of interest and other receivables that were assigned and conveyed to the California Parties in the 2004 Settlement and are held in the CalPX settlement clearing account; (2) revise the CAISO and CalPX accounting provisions in the 2004 Settlement to enable them to properly account for the monetary transfers and distributions provided for in the First Amendment and to further align the

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<sup>17</sup> Joint Explanatory Statement at 7 (quoting 2004 Settlement at § 1.18).

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.* at 8-9.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> Joint Explanatory Statement at 3; *see also In re Dynegy, Inc.* 486 B.R. 585, 588 (S.D.N.Y. Feb. 15, 2013).

<sup>22</sup> Joint Explanatory Statement at 4.

<sup>23</sup> *Id.*

2004 Settlement accounting provisions with those used by the California Parties in their refunds settlements since 2007; and (3) resolve claims filed by the California Parties in the Dynegy Inc. Bankruptcy Proceeding.<sup>24</sup> Furthermore, the Parties state that nothing contained in the First Amendment will enlarge any obligation or duty of, create any new obligation or duty for, or affect in any way any benefit, release, or waiver received any of the non-Amending Parties under the terms and conditions of the 2004 Settlement.<sup>25</sup> The Parties explain that the rights of Non-Settling Participants are unaffected and that, except as expressly provided in the First Amendment, the rights of the Dynegy Amending Parties under the terms and conditions of the 2004 Settlement remain unchanged.<sup>26</sup>

9. Under the First Amendment, not later than 20 business days after the effective date, CalPX will transfer from its settlement clearing account to a refund escrow a cash payment in the amount of \$35,078,597, subject to specified interest adjustments.<sup>27</sup> In addition, not later than 20 business days after the effective date, CalPX will transfer from its settlement clearing account to a separate escrow a cash payment of \$8,589,556, again subject to specified interest adjustments.<sup>28</sup> CalPX will retain from the estimated unpaid Dynegy receivables \$8,999,390, which is Dynegy's interest shortfall estimate.<sup>29</sup> The

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<sup>24</sup> *Id.*; First Amendment to Settlement and Release of Claims Agreement at §§ 3.1-3.3, 4.1-4.4, 5.1.

<sup>25</sup> Joint Explanatory Statement at 4-5; First Amendment to Settlement and Release of Claims Agreement at § 2.35.

<sup>26</sup> Joint Explanatory Statement at 11; First Amendment to Settlement and Release of Claims Agreement at § 5.1.4.4. In this regard, the Joint Explanatory Statement references section 6.2 ("Illinova Payments"), section 6.3 ("Future Opt-Ins to the Settlement Agreement"), and section 6.4 ("The Dynegy Amending Parties' Participation in Other Settlements") of the First Amendment"). Joint Explanatory Statement at 11-12, 14.

<sup>27</sup> Joint Explanatory Statement at 12; First Amendment to Settlement and Release of Claims Agreement at § 3.2.3.

<sup>28</sup> Joint Explanatory Statement at 12-13; First Amendment to Settlement and Release of Claims Agreement at § 3.2.4.

<sup>29</sup> Joint Explanatory Statement at 13; First Amendment to Settlement and Release of Claims Agreement at § 3.3. The interest shortfall is the difference between the interest actually earned on funds held by CalPX and/or CAISO and the interest that would be earned through application of the Commission's interest rate. First Amendment to Settlement and Release of Claims Agreement at § 1.24.

First Amendment includes a matrix that sets forth the amount of Interest on Refund Period Refunds payable to each Settling Participant.<sup>30</sup>

10. The Parties state that they do not oppose Commission action to provide “hold harmless” assurances to CAISO and CalPX for the actions taken to implement the First Amendment, similar to what the Commission provided to CAISO and CalPX in similar proceedings.<sup>31</sup>

### **Procedural Matters**

11. Pursuant to Rule 602(f) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (2014), initial comments on the First Amendment were to be submitted no later than June 19, 2014, and reply comments were to be submitted no later than June 30, 2014. Initial comments were filed by CAISO and CalPX, either in support of or not opposing the First Amendment. Joint reply comments were filed by the Dynegey Amending Parties and the California Parties.

### **Settlement Comments**

12. Both CAISO and CalPX assert that the circumstances of the First Amendment warrant “hold harmless” treatment for CAISO and CalPX because they, along with their directors, officers, employees, and consultants, will implement several of the First Amendment’s provisions.<sup>32</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

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<sup>30</sup> Joint Explanatory Statement at 13; First Amendment to Settlement and Release of Claims Agreement at Appendix A.

<sup>31</sup> Joint Explanatory Statement at 14.

<sup>32</sup> CAISO Comments at 3-6; CalPX Comments at 2-5.

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>33</sup>

13. CalPX states that this is the same "hold harmless" provision that the Commission has approved in other orders approving settlements.<sup>34</sup> In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of "hold harmless" language in the order approving the Settlement.<sup>35</sup>

### **Commission Determination**

14. Consistent with the Commission's precedent,<sup>36</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.

15. The First Amendment appears to be fair and reasonable and in the public interest, and it is hereby approved. The Commission's approval of the First Amendment does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

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<sup>33</sup> CalPX Comments at 5.

<sup>34</sup> *Id.* at 2-3 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 145 FERC ¶ 61,015 (2013)).

<sup>35</sup> Joint Reply Comments at 2.

<sup>36</sup> *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 145 FERC ¶ 61,015, at P 25 (2013) (incorporating "hold harmless" language from earlier settlements); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 133 FERC ¶ 61,249, at P 17 (2010) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 128 FERC ¶ 61,242, at P 19 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 128 FERC ¶ 61,004, at P 21 (2009) (same); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 126 FERC ¶ 61,007, at P 38 (2009).

The Commission orders:

The First Amendment is hereby approved, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.