

153 FERC ¶ 61,018
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

San Diego Gas & Electric Company

Docket No. EL00-95-285

v.

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-260

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

Docket No. EL01-68-049

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

Docket No. EL02-71-050

v.

British Columbia Power Exchange Corp.

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

Docket No. PA02-2-100

American Electric Power Service Corporation

Docket No. EL03-137-047

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

Docket No. EL03-180-076

Koch Energy Trading, Inc.

Docket No. EL03-190-008

California Independent System Operator
Corporation

Docket No. ER03-746-052

Investigation of Anomalous Bidding Behavior and Practices in Western Markets Docket No. IN03-10-085

People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General of the State of California Docket No. EL09-56-024

v.

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

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued October 8, 2015)

1. In this order, the Commission approves an uncontested settlement filed on June 5, 2015 between Koch Energy, LLC, as successor to Koch Energy Trading, Inc. (Koch), 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),² as they relate to Koch. The settlement consists of a “Joint Offer of Settlement”, a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement).³

¹ 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 purposes of the Settlement, 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 (CERS)).

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. EL00-95-000, documenting her decision, based on a memorandum from the Office of General Counsel’s General and

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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 became binding as of the execution date; however, some of the operative provisions only become effective as of, or in relation to, the Settlement Effective Date, which is defined as the sixth business day following the date on which the Commission approves the Settlement.⁵ 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.⁶ The Parties also state that the Settlement may terminate if the California Parties fail to receive consideration that they are due under it.⁷

3. The Parties state that the Settlement benefits customers by resolving claims for refunds and other remedies as between Koch on the one hand and the California Parties on the other relating to Koch's transactions in the Western energy markets during the Settlement Period.⁸ The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.⁹ 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.¹⁰

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

⁴ 18 C.F.R. § 385.602 (2015).

⁵ Joint Explanatory Statement at 14-15; Settlement and Release of Claims Agreement at §§ 2.2, 2.3.1.

⁶ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at § 2.3.

⁷ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at § 4.3.

⁸ Joint Offer of Settlement at 4.

⁹ *Id.* at 4-5.

¹⁰ *Id.* at 5 (citing *San Diego Gas & Elec. Co.*, 145 FERC ¶ 61,015, at P 26 (2013); *Pub. Utils. Comm'n of the State of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002); *Pub. Utils.*

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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)¹¹ 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 EL00-98-000.¹² 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. PA02-2-000.¹³ In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in Western energy markets in Docket No. IN03-10-000.¹⁴ On the same day, the Commission issued two orders directing named entities to show cause why they had not participated in certain gaming practices¹⁵ or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.¹⁶

6. The Parties state that the Settlement resolves claims against Koch in the above-captioned proceedings during the Settlement Period as they relate to Koch.¹⁷ 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

Comm'n of the State of Cal. v. FERC, No. 01-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

¹¹ 16 U.S.C. § 791, *et seq.* (2012).

¹² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 92 FERC ¶ 61,172 (2000).

¹³ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

¹⁴ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

¹⁵ *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

¹⁶ *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

¹⁷ Joint Explanatory Statement at 3.

an “Additional Settling Participant.”¹⁸ To opt into the Settlement, a Participant must provide notice to the Commission, as well as serve notice to parties on the ListServes established for the Docket No. EL00-95 proceeding and the Docket No. EL00-137, *et al.* proceeding, no later than five business days following the Settlement Effective Date.¹⁹ 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.²⁰

7. The Parties state that the monetary consideration flowing from Koch under the Settlement totals \$4,125,287 before final adjustments.²¹ This amount will be funded in part from Koch’s receivables held by CAISO and CalPX, which is estimated to be \$369,649, as well as estimated interest on those receivables in the amount of \$205,638 through December 31, 2014 (which will be updated through and including the projected date of distribution).²² In addition, under the Settlement terms, Koch will make a payment of \$3,550,000 to the California Parties.²³ Koch also transfers to the California Parties its entitlement to refunds on certain purchases made in the California markets during the Settlement Period.²⁴

8. The Settlement provides that certain of the California Parties will assume responsibility for: (1) any true-up of interest on Koch’s receivables resulting from

¹⁸ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 1.1, 1.53, 8.1.

¹⁹ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at § 8.1.

²⁰ Joint Explanatory Statement at 15-16; Settlement and Release of Claims Agreement at §§ 1.51, 3.2, 5.5, 8.1.

²¹ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement, Cover Sheet.

²² Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at § 4.1.1.

²³ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at § 4.1.2.

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

Commission determinations; (2) any refund amounts that Koch owes to Non-Settling Participants in certain proceedings; (3) any refund shortfall, receivables shortfall, or interest shortfall relating to Koch resulting from certain Commission determinations; (4) any third-party refund offsets (Fuel Cost Allowance, Emissions Offset, and Cost Offset) that the Commission or a court determines that Koch owes; (5) certain dispute resolution charges; and (6) any CalPX wind-up charges attributable to Koch that are assessed after the Settlement Effective Date.²⁵

9. The Settlement includes a matrix that allocates the Settlement proceeds among Participants.²⁶ The proceeds will be distributed from the Settling Supplier Refund Escrow, the costs of which will be the responsibility of the California Parties, to each of the Settling Participants that receive an allocation of funds, except those who are Deemed Distribution Participants.²⁷ In the case of amounts allocated to any Non-Settling Participants, such amounts may be allocated to the California utilities and/or CERS.²⁸ The obligation of any of the California Parties to make payments on behalf of Koch under the Settlement shall not exceed the total amount allocated and actually paid to that California Party as set forth under the Settlement.²⁹ The Settlement also states that the Commission's approval of the Settlement will authorize CAISO and CalPX to conform their books and records to reflect the distributions.³⁰

²⁵ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at §§ 4.15, 4.1.6, 5.3, 5.6, 5.7.

²⁶ Joint Explanatory Statement at 17-18; Settlement and Release of Claims Agreement at Ex. A.

²⁷ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at §§ 5.1, 5.2, 5.3, 5.4. Under the terms of the Settlement, Deemed Distribution Participants 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. Settlement and Release of Claims Agreement at §§ 1.20, 1.21.

²⁸ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at § 5.5.

²⁹ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at § 5.8.

³⁰ Joint Explanatory Statement at 18-19; Settlement and Release of Claims Agreement at § 6.1.

10. The Parties explain that, in return for the specified consideration and subject to specified limitations, the Settlement resolves all claims between the California Parties on the one hand and Koch on the other, relating to transactions in the Western energy markets during the Settlement Period for damages, refunds, disgorgement of profits, costs and attorneys' fees, or other remedies.³¹

11. The Parties state that the Settlement provides for the California Parties and Koch to 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) Koch 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) Koch 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 Koch for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.³²

12. In addition, the Parties state that the Settlement provides for the California Parties and Koch mutually to 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) Koch or any California Party charged or collected unjust, unreasonable, or otherwise unlawful rates, terms, or conditions for capacity, energy, ancillary services, or transmission congestion in the Western energy markets during the Settlement Period; (2) Koch or any California Party manipulated the Western energy markets in any fashion during the Settlement Period; (3) Koch 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 Koch for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement Period.³³

³¹ Joint Explanatory Statement at 19; Settlement and Release of Claims Agreement at §§ 3.1, 7.1.1.

³² Joint Explanatory Statement at 19-20; Settlement and Release of Claims Agreement at § 7.2.1.

³³ Joint Explanatory Statement at 20; Settlement and Release of Claims Agreement at § 7.3.1.

13. Subject to certain limitations, Participants that elect to participate in the Settlement as Additional Settling Participants are deemed to provide and receive from Koch the releases that the California Parties provide and receive.³⁴

14. Finally, 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.³⁵

Procedural Matters

15. Pursuant to Rule 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (2015), initial comments on the Settlement were to be submitted no later than June 25, 2015, and reply comments were to be submitted no later than July 6, 2015. Initial comments were filed by CAISO and CalPX, either in support of or not opposing the Settlement. Reply comments were filed by the Parties (Joint Reply Comments).

Settlement Comments

16. 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.³⁶ 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

³⁴ Joint Explanatory Statement at 20-21; Settlement and Release of Claims Agreement at §§ 7.4, 8.2.

³⁵ Joint Explanatory Statement at 21.

³⁶ CAISO Comments at 3-6; CalPX Comments at 3-5.

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.³⁷

CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.³⁸

17. In their Joint Reply Comments, the Parties confirm that they do not oppose a “hold harmless” provision that is similar to the provisions in other Commission orders approving similar settlements involving the California Parties.³⁹

Commission Determination

18. 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. Consistent with the Commission's precedent,⁴⁰ 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.

³⁷ CalPX Comments at 5.

³⁸ *Id.* at 3-5.

³⁹ Joint Reply Comments at 3.

⁴⁰ 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 ¶ 61,002, at P 17 (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) (same).

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.