

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

v.

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

Puget Sound Energy, Inc.

Docket No. EL01-10-140

v.

All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western System Power Pool Agreement

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued October 27, 2016)

1. In this order, the Commission approves an uncontested settlement filed on August 24, 2016 between Mieco Inc. (Mieco) 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 Mieco. The settlement consists of a

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 (CPUC), 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 3.

“Joint Offer of Settlement,” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the 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 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

3. The Parties state that the Settlement benefits customers by resolving claims for refunds and other remedies as between Mico on the one hand and the California Parties on the other relating to Mico’s transactions in the Western energy markets during the Settlement Period.⁷ The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.⁸ 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

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

⁴ 18 C.F.R. § 385.602 (2016).

⁵ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at §§ 2.2, 1.65.

⁶ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at § 2.3.

⁷ Joint Offer of Settlement at 5.

⁸ *Id.*

California Power Exchange Corporation (Cal PX) markets in the 2000 and 2001 time period.⁹

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)¹⁰ 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 EL00-98-000.¹¹ 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. PA02-2-000.¹² Also in 2002, the Attorney General of the State of California filed a complaint with the Commission in Docket No. EL02-71-000, alleging that generators and marketers selling power in the Western energy markets, as well as those making spot sales of energy to CERS, had failed to file their rates as required by the Commission's market-based rate program.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

⁹ *Id.* at 5-6 (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. Comm'n of the State of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

¹⁰ 16 U.S.C. § 791, *et seq.* (2012).

¹¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 92 FERC ¶ 61,172 (2000).

¹² *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

¹³ *State of California ex rel. Lockyer v. British Columbia Power Exchange Corp.*, 99 FERC ¶ 61,247, *order on reh'g*, 100 FERC ¶ 61,295 (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).

anomalous bidding behavior.¹⁶ In 2009, the Attorney General of the State of California filed a complaint with the Commission in Docket No. EL09-56-000, alleging that certain energy suppliers made short-term bilateral sales to CERS at unjust and unreasonable prices.¹⁷

6. The Parties state that the Settlement resolves claims against Mieco in the above-captioned proceedings during the Settlement Period as they relate to Mieco.¹⁸ 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.”¹⁹ 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 the Docket No. EL00-137, *et al.* proceeding, no later than five business days following the Settlement Effective Date.²⁰ 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.²¹

7. The Parties state that the monetary consideration flowing to Mieco under the Settlement totals \$185,370.34 before final adjustments.²² This amount will be funded from interest that has accrued on Mieco’s cash collateral account with CalPX.²³ Under

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

¹⁷ *State of California ex rel. Brown v. Powerex Corp.*, 135 FERC ¶ 61,178 (2011).

¹⁸ Joint Explanatory Statement at 3.

¹⁹ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at §§ 1.1, 1.47, 8.1.

²⁰ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at § 8.1.

²¹ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at §§ 1.45, 3.2, 5.5, 8.1.

²² Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement, Cover Sheet.

²³ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at § 4.1.1.

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

9. The Parties state that the obligation of any of the California Parties to make payments on behalf of Mico under the Settlement shall not exceed the total amount that Mico would have received in refunds if there had been no global settlements.²⁶ 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.²⁷

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 Mico 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.²⁸

11. The Parties state that the Settlement provides for the California Parties and Mico 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

²⁴ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at §§ 4.1.6, 4.1.7, 4.1.8.

²⁵ Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at §§ 4.1.3, 4.1.4, 5.2, and 5.4.

²⁶ Joint Explanatory Statement at 19; Settlement and Release of Claims Agreement at § 5.4.

²⁷ Joint Explanatory Statement at 19; Settlement and Release of Claims Agreement at § 6.1.

²⁸ Joint Explanatory Statement at 19; Settlement and Release of Claims Agreement at §§ 3.1, 7.1.1.

Settlement Period that: (1) Mico 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) Mico 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 Mico for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.²⁹

12. In addition, the Parties state that the Settlement provides for the California Parties and Mico 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) Mico 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) Mico or any California Party manipulated the Western energy markets in any fashion during the Settlement Period; (3) Mico 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 Mico for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement Period.³⁰

13. Subject to certain limitations, Participants that elect to participate in the Settlement as Additional Settling Participants are deemed to provide and receive from Mico the releases that the California Parties provide and receive.³¹

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.³²

²⁹ Joint Explanatory Statement at 19-20; Settlement and Release of Claims Agreement at § 7.2.1.

³⁰ Joint Explanatory Statement at 20-21; Settlement and Release of Claims Agreement at § 7.3.1.

³¹ Joint Explanatory Statement at 21; Settlement and Release of Claims Agreement at §§ 7.4, 8.2.

³² Joint Explanatory Statement at 21.

Procedural Matters

15. Pursuant to Rule 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (2016), initial comments on the Settlement were to be submitted no later than September 13, 2016, and reply comments were to be submitted no later than September 23, 2016. 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.³³ 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.³⁴

³³ CAISO Comments at 3-5; CalPX Comments at 3-6.

³⁴ CalPX Comments at 5.

CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.³⁵

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.³⁶

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,³⁷ 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.

³⁵ *Id.* at 3-4.

³⁶ Joint Reply Comments at 3-4.

³⁷ *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 153 FERC ¶ 61,018, at P18 (2015) (incorporating “hold harmless” language from earlier settlements); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 145 FERC ¶ 61,015, at P 25 (2013) (same); *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)

Kimberly D. Bose,
Secretary.