

157 FERC ¶ 61,062
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

Docket No. EL00-95-294

v.

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-266

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

Docket No. EL02-71-056

v.

British Columbia Power Exchange Corp.

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

Docket No. EL09-56-027

v.

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

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued October 27, 2016)

1. In this order, the Commission approves an uncontested settlement filed on August 24, 2016 between Commerce Energy, Inc. f/k/a Commonwealth Energy Corporation (Commerce) 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 Commerce. 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

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 date on which the Commission issues the order approving the Settlement.⁵ Additionally, the Parties explain that the Settlement will terminate on the date of a final order rejecting the

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 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 11; Settlement and Release of Claims Agreement at §§ 2.1, 2.2, 1.36.

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 Commerce on the one hand and the California Parties on the other relating to Commerce'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 Western energy markets.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 California Independent System Operator Corporation (CAISO) and California Power Exchange Corporation (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

⁶ Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement at § 2.3.

⁷ Joint Offer of Settlement at 5.

⁸ *Id.*

⁹ *Id.* at 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).

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 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 Commerce made bilateral sales of energy to CERS for less than one month during the Settlement Period and that Commerce was an APX Participant.¹⁸ The Parties state that the Settlement resolves claims against Commerce in the above-captioned proceedings during the Settlement Period as they relate to Commerce.¹⁹ The Settlement does not provide for the participation of other Market Participants because Commerce was not a direct participant in the CAISO and CalPX energy markets during the Settlement Period and the settlement consideration relates to CERS bilateral sales.²⁰

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).

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. An APX Participant is an entity that purchased or sold capacity, energy, and/or ancillary services in APX markets during part or all of the Settlement Period. Settlement and Release of Claims Agreement at § 1.4.

¹⁹ Joint Explanatory Statement at 2-3.

²⁰ *Id.* at 4.

7. The Parties state that the monetary consideration flowing from Commerce to CERS will be \$3,500,000.²¹ This amount represents certain bilateral sales Commerce made to CERS in these proceedings, as adjusted by the mitigating market clearing price and other factors.²² Commerce will receive a credit of this amount, which will be applied against the amount that Commerce is found to owe, if any, to the California Parties pursuant to the Commission's APX Determination,²³ up to a specified amount, subject to the conditions that: (1) the Settlement will not provide a basis for reducing or increasing the amounts determined to be owed to the California Parties pursuant to the Commission's APX Determination; and (2) liability for Commerce's APX credit will not be shifted to APX or any APX participants and will instead reduce the overall refunds and interest, if any, to be received by the California Parties from APX or the APX Participants pursuant to the APX Determination.²⁴

8. The Parties explain that, in return for the specified consideration and subject to specified limitations, the Settlement generally resolves all claims between the California Parties on the one hand and Commerce on the other, relating to reporting errors or transactions in the Western energy markets during the Settlement Period for damages, refunds, disgorgement of profits, or other monetary or non-monetary remedies.²⁵

9. The Parties state that the Settlement provides for the California Parties and Commerce 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) Commerce 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

²¹ Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement at § 4.1 and Cover Sheet.

²² Settlement and Release of Claims Agreement at § 4.1.1.

²³ The APX Determination refers to Commission orders that establish the obligations, if any, that APX owes to the California Parties for its participation in the California energy markets during a specified time period. Settlement and Release of Claims Agreement at § 1.17.

²⁴ Joint Explanatory Statement at 3, 11-12; Settlement and Release of Claims Agreement at § 3.2.

²⁵ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement at § 5.1.1.

markets during the Settlement Period; (2) Commerce 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 Commerce for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.²⁶

10. In addition, the Parties state that the Settlement provides for the California Parties and Commerce 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) Commerce 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) Commerce or any California Party manipulated the Western energy markets in any fashion during the Settlement Period; (3) Commerce 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 Commerce for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement Period.²⁷

11. 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.²⁸

Procedural Matters

12. 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 and neither opposed the Settlement. Reply comments were filed by the Parties (Joint Reply Comments).

²⁶ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement at § 5.2.1.

²⁷ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at § 5.3.1.

²⁸ Joint Explanatory Statement at 13-14.

Settlement Comments

13. 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, may implement Commission findings in the APX Determination, which is implicated by this Settlement.²⁹ Accordingly, CalPX requests that the following “hold harmless” language be incorporated into any Commission order approving the Settlement:

The Commission recognizes that the settlement between the Parties resolves claims in the FERC Refund Proceedings during the Settlement Period of January 1, 2000 through June 20, 2001. Therefore, except to the extent caused by their own gross negligence, neither officers, directors, employees nor professionals shall be liable for the impacts, if any, of the settlement on the CalPX markets including but not limited to 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 due to the CalPX as a result of the settlement, CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.³⁰

CalPX states that this is a similar “hold harmless” provision that the Commission has approved in other orders approving settlements.³¹

14. 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.³²

²⁹ CAISO Comments at 2-3; CalPX Comments at 2-5.

³⁰ CalPX Comments at 5.

³¹ *Id.* at 2, 5.

³² Joint Reply Comments at 2-3.

Commission Determination

15. 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,³³ 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.

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.

³³ 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).