

relate to EWEB and all pending civil proceedings against EWEB initiated by PG&E, SCE, CEOB, and SDG&E arising from events and transactions in the western electricity markets, including markets of the California Independent System Operator, Inc. (CAISO) and the California Power Exchange (CalPX), during the period January 1, 2000 through June 20, 2001 (Settlement Period).

2. EWEB and the California Parties state that the Settlement reaches a fair and reasonable resolution; as such, they request the Commission's approval. In this order, the Commission approves the Settlement, finding it to be fair and reasonable and in the public interest.

I. Background and Description of the Settlement

3. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA) to investigate certain competitive anomalies in the California energy markets in 2000 and 2001. EWEB and the California Parties state that the Settlement resolves matters in the California Refund Proceeding, conducted in Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*, with respect to EWEB's sales to the CAISO during the Settlement Period.⁴ They further state that the Settlement provides for the release of all claims against EWEB by the Settling Participants,⁵ and all claims against the Settling Participants by EWEB, for refunds, disgorgement of profits, or other monetary or non-monetary remedies in the Refund Proceeding. Further, as to EWEB only, the Settlement resolves all pending civil proceedings initiated by PG&E, SEC, CEOB, and SDG&E that are pending in U.S. District Court.⁶

⁴ Settlement section 1.22.

⁵ Settling Participants are the California Parties and other entities that participated in the CAISO and CalPX markets during the Settlement Period and have elected to join the Settlement in accordance with Settlement article VIII.

⁶ The Settlement lists the following cases: *Pac. Gas & Elec. Co., et al. v. Ariz. Elec. Power Coop., Inc., et al.*, Case No. 2:06-CV-0559, pending in the U.S. District Court for the Eastern District of California, Sacramento Division, and *San Diego Gas & Elec. Co. v. Ariz. Elec. Power Coop., Inc., et al.*, Case No. 2:06-cv-0592, pending in the U.S. District Court for the Eastern District of California, Sacramento Division. *See* Settlement section 1.30.

4. EWEB and the California Parties state that the Settlement “fairly protects the rights of those that do not opt into the Settlement.”⁷ The Settlement permits, but does not require, Participants—generally, entities that participated in the CAISO and CalPX markets during the Settlement Period—to join as Additional Settling Participants.⁸ The rights of parties that do not elect to opt into the Settlement (i.e., Non-Settling Participants) will not be affected by its terms; they will not receive any of the Settlement’s benefits and will not be subject to its obligations.

5. Regarding the Settlement’s monetary consideration provisions, as of the execution date of the Settlement, EWEB and the California Parties agree that the unpaid amount of EWEB Receivables,⁹ as stated in the CAISO’s accounts, is at least \$477,086.¹⁰ Of this amount, EWEB assigns \$432,042 plus interest to the California Parties. The CalPX will pay this \$432,042 out of its Settlement Clearing Account, and in exchange, the CAISO will adjust its books to credit this same amount of funds to the CalPX, thereby reducing amounts payable by the CalPX to the CAISO. The CalPX is to transfer the funds to the EWEB Escrow (an account to be established by the California Parties and EWEB pursuant to Settlement section 4.1.3), less an amount equal to all Deemed Distributions¹¹ (discussed *infra*), plus the amounts owed by Participants with negative allocations shown in the Allocation Matrix.¹² The CalPX is to pay the remaining EWEB Receivables—that

⁷ Joint Offer of Settlement at 3.

⁸ *See* Settlement article VIII.

⁹ EWEB Receivables represent all of EWEB’s rights and claims to payment by or from the CAISO, before mitigation in the Refund Proceeding, for sales of energy and ancillary services into the California power markets during the Settlement Period. Settlement section 1.16.

¹⁰ Settlement section 4.1.1.1. *See also, generally,* Settlement article IV, “Consideration.”

¹¹ A Deemed Distribution is an amount credited to a Deemed Distribution Participant (identified in Settlement Exhibit B) as an offset to amounts owed by the Participant to the CalPX and/or the CAISO. Settlement section 1.11.

¹² The Allocation Matrix, attached to the Settlement as Exhibit A, sets forth the various allocation percentages with respect to certain assigned EWEB Receivables that are applicable to each Participant pursuant to the Settlement. It does not appear that any parties listed in the Allocation Matrix have negative allocations.

is, whatever portion of the \$477,086 that is not transferred to the EWEB Escrow—to EWEB within the later of ten business days of the Settlement’s effective date, or ten business days of EWEB providing the CalPX with adequate transfer instructions.

6. Settlement article V provides for the disposition and allocation of Settlement proceeds, shortfalls, and excesses. Each of the Settling Participants will be allocated their respective share of the assigned EWEB Receivables (i.e., Settlement proceeds) in accordance with the Allocation Matrix. Settling Participants that have net amounts outstanding to the CAISO or the CalPX are considered Deemed Distribution Participants and will receive their share of the Settlement proceeds in the form of credits against such amounts. Settling Participants classified as Net Consideration Recipients will receive their allocated distributions in the form of cash payments from the EWEB Escrow. Any amounts allocated to Non-Settling Participants in the Allocation Matrix will be retained in the EWEB Escrow until the earlier of: (1) the issuance of a Commission refund determination, or (2) the date that is three years following the Settlement effective date.¹³ EWEB is responsible for any shortfalls to Non-Settling Participants not covered by the amounts set aside in the EWEB Escrow. All excess funds retained in the EWEB Escrow after payments to Net Consideration Recipients and not withheld for Non-Settling Participants will be distributed among the California Parties in accordance with the California Parties’ separate allocation agreement.¹⁴

7. Settlement section 5.6, which specifically addresses EWEB Receivables shortfalls or excesses, provides that, if the Commission ultimately determines that the amount of EWEB Receivables is less than \$477,086, EWEB shall pay such shortfall to the CAISO. However, if the Commission ultimately determines that the amount of EWEB Receivables exceeds \$477,086, then “such excess shall be transferred to EWEB”¹⁵

8. Settlement article VI provides the details of CAISO and CalPX accounting, pursuant to which both entities shall conform their books and records to reflect the distributions, offsets, transfers and status of accounts provided for in the Settlement. In addition, when sufficient data become available, the CAISO is to calculate and concurrently submit to the Commission for confirmation the following: (1) the amount

¹³ Settlement section 5.5. If the Commission does not issue such an order within three years of the Settlement effective date, the funds will be transferred to EWEB. *Id.* at sections 5.5.1 and 5.5.2.

¹⁴ *Id.* at section 5.4.

¹⁵ *Id.* at section 5.6.2.

EWEB would owe in refunds if the refund pricing methodology in the Commission's Orders in the Refund Proceedings were applied to EWEB for the pre-January 18, 2001 period;¹⁶ and (2) the portions of the amount determined above that, absent this Settlement, would be deemed owed to each Participant entitled to refunds, using the formula provided in Settlement section 6.1.3.1 to calculate such amounts.

9. Settlement article VII provides for releases and waivers such as: (1) in return for the consideration specified in the Settlement, and subject to certain limitations, all claims by the Settling Participants against EWEB for the Settlement Period for refunds, disgorgement of profits, or other remedies in the refund proceedings and in related lawsuits shall be deemed settled;¹⁷ and (2) the California Parties and EWEB agree to mutually release and discharge each other for the Settlement Period from certain claims before the Commission and/or under the FPA,¹⁸ and from certain past, existing and future claims for civil damages and/or equitable relief.¹⁹

10. According to the Settlement, EWEB "expressly disclaims" Commission jurisdiction over the terms of the Settlement and the consideration provided thereunder.²⁰ The California Parties take no position on EWEB's disclaimer. EWEB and the California Parties have nevertheless agreed to condition the Settlement on obtaining Commission approval so as to ensure release of funds from the CalPX and to ensure that EWEB's and the California Parties' respective claims pending at the Commission are fully resolved.

11. EWEB and the California Parties request that the Commission approve the Settlement. They explain that they have executed the Settlement, which became binding as of the date of execution; many of the operative provisions, however, only become effective as of the date on which the Commission issues an order approving the Settlement without material change or condition unacceptable to any party. In their request for Commission approval, EWEB and the California Parties state that the Settlement benefits customers by resolving claims for refunds and other remedies relating to EWEB's sale of electricity to the CAISO for the Settlement Period. They also state that approval of the Settlement will avoid further litigation, provide monetary

¹⁶ Settlement section 6.1.3.

¹⁷ *Id.* at section 7.1.1.

¹⁸ *Id.* at section 7.2.

¹⁹ *Id.* at section 7.3.

²⁰ *Id.* at section 3.1.3.

consideration, eliminate regulatory uncertainty, and establish financial certainty, and that the Settlement reaches a fair and reasonable resolution.

II. Comments on the Settlement

12. Initial comments on the Settlement were due on August 29, 2006 and reply comments were due on September 8, 2006. The CAISO filed initial comments in support of the Settlement and the CalPX filed initial comments neither supporting nor opposing the Settlement. EWEB filed reply comments, the CalPX filed comments in response to EWEB's reply comments, and the California Parties filed an answer limited to the issues raised in EWEB's reply comments and the CalPX's response comments.

A. "Hold Harmless" Protection for the CalPX and the CAISO

13. In its comments, the CAISO states that, as with previous settlements filed and approved in the Refund Proceeding, the circumstances of the Settlement make it necessary to hold harmless the market operators (the CAISO and the CalPX) tasked with implementing the Settlement. Therefore, the CAISO contends, the Commission should state in any order approving the Settlement that the CAISO, along with its directors, officers, employees and consultants, will be held harmless with respect to the accounting activities it will have to perform to implement the Settlement and will not be responsible for recovering any funds dispersed pursuant to the Settlement should repayment of such funds be required subsequently.

14. The CAISO avers that the factors that justified holding the CAISO and the CalPX harmless with respect to other settlements (e.g., the Duke, Williams, Mirant, Enron, PS Colorado, Reliant, and IDACORP settlements) apply equally to the instant Settlement. As with previous settlements, the CAISO states, the flow of funds pursuant to the instant Settlement will require unprecedented accounting adjustments by the CAISO, which will not be made under the terms of its tariff, but rather under the Settlement terms. The CAISO contends that a market participant might bring suit against the CAISO and its agents claiming that it did not make the appropriate accounting adjustments and as a result did not arrive at the appropriate amount of funds owing to that market participant. In addition, the CAISO states that, because the Settlement has been filed prior to final orders in the Refund Proceeding, EWEB and the California Parties' estimates of payables and receivables may not be accurate, which could result in actions against the CAISO due to unforeseen impacts on market participants. The CAISO states that, as the volume of settlements increases in the Refund Proceeding, the task of implementing them will become more complicated and the possibility of an action against one of the market operators will also increase. Further, the CAISO posits that, as a non-profit public benefit corporation, it would not be reasonable to subject its officers, employees and

consultants to suits claiming individual liability for engaging in the accounting necessary to implement the Settlement.

15. For these reasons, the CAISO states that it is important that the Commission hold harmless the CAISO, its directors, officers, employees and consultants, for implementation of this Settlement. Finally, the CAISO notes that EWEB and the California Parties have stated in their Joint Explanatory Statement that they do not oppose the Commission adopting hold harmless provisions for the CAISO and the CalPX.²¹

16. Likewise, the CalPX requests in its initial comments that the Commission incorporate in any order approving the Settlement a hold harmless provision similar to those the Commission has approved in previous settlements. The CalPX states that it and the CAISO each requested to be held harmless in connection with implementing the prior Williams, Duke, Dynegy, Mirant, Reliant, PS Colorado, and IDACORP settlements and that the Commission granted those requests. Further, the CalPX points out that the California Parties either supported or did not oppose the previous requests for hold harmless protection, and similarly, the parties to this Settlement have stated that they do not oppose such protection.²² In support of its position, the CalPX cites the Commission order approving the Williams settlement, 111 FERC ¶ 61,186 (2005), in which the Commission found that the CalPX and the CAISO provided compelling justification as to why they should be held harmless.

17. The CalPX reasons that a hold harmless provision is appropriate here because: (1) the Settlement requires it to pay funds from the CalPX Settlement Clearing Account on behalf of EWEB (a non-CalPX participant); (2) the CalPX will be required to make certain accounting entries based on the estimated EWEB Receivables from the CAISO; (3) the Settlement's payouts and credits were determined by EWEB and the California Parties and not calculated or verified by the CalPX; and (4) EWEB's final market obligations have not been determined.

²¹ CAISO August 29, 2006 Initial Comments at 6, *citing* Joint Explanatory Statement at 11.

²² CalPX August 29, 2006 Initial Comments at 6, *citing* Joint Explanatory Statement at 11.

Commission Determination

18. The Commission finds that both the CAISO and the CalPX have provided the Commission with compelling justification as to why they should be held harmless, along with their officers, directors, employees, and consultants, for the steps taken to implement the Settlement. Further, the parties to the Settlement agree to a hold harmless provision.²³ Therefore, consistent with Commission precedent,²⁴ the Commission determines that the CalPX and the CAISO shall be held harmless for actions taken to implement the Settlement and will not be responsible for recovering any funds dispersed pursuant to the Settlement which are subsequently required to be repaid.

B. CalPX's Concern Over Liability for Shortfalls

19. The CalPX requests a Commission determination that the accounting credit the CAISO is to provide the CalPX under the Settlement (in return for the CalPX paying out EWEB's Receivables) should not be reduced if the final amount of EWEB Receivables is less than what the Settlement provides,²⁵ or if EWEB ultimately owes amounts to Non-Settling Participants due to its trades in the CAISO markets. The CalPX explains that EWEB was not a participant in any of the CalPX's markets, and thus, the EWEB Receivables are based solely on EWEB's rights and claims to payments from the CAISO.²⁶ The CalPX states that under the terms of the Settlement it is directed to transfer \$477,086,²⁷ most of which will go to the EWEB Escrow and the remainder to

²³ See Joint Explanatory Statement at 11.

²⁴ See, e.g., *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,071 (2004) (approving hold harmless language in the Dynegy settlement), and *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,257 (2004) (approving hold harmless language in the Duke settlement), *reh'g denied*, 111 FERC ¶ 61,186 (2005).

²⁵ In which case, EWEB would owe money to the CAISO.

²⁶ CalPX Initial Comments at 2, *citing* Settlement sections 1.16 and 4.1.1.1.

²⁷ CalPX Initial Comments at 2, *citing* Settlement section 4.1.2. Section 4.1.2 does not explicitly provide that \$477,086 is the exact amount the CalPX is to transfer; rather, it provides that the CalPX is to transfer "a cash payment in the amount of \$432,042, (i) less an amount equal to all Deemed Distributions pursuant to [s]ection 5.2.2, (ii) plus the amounts owed by Participants with negative allocations shown in the Allocation Matrix," and that the CalPX is to transfer the remaining EWEB Receivables to EWEB.

EWEB, and that the CalPX and the CAISO are required to conform their respective books and records to reflect the distributions, offsets, transfers and status of accounts provided for in the Settlement. Accordingly, the CalPX states that the Settlement terms provide that the CAISO will recognize, as a reduction in the amounts payable by the CalPX to the CAISO, all distributions from the CalPX Settlement Account that represent payments of amounts the CAISO owes as EWEB Receivables, including Deemed Distributions.

20. The CalPX next discusses the liability provisions in the Settlement relating to certain potential shortfalls. First, the CalPX states that EWEB, and not the California Parties, will be responsible for any funds owed to the CAISO should the amount allocated as EWEB Receivables under the Settlement be greater than the final amount of EWEB Receivables as determined by a Commission order. Second, the CalPX states that EWEB, and not the California Parties, will be responsible for making up any shortfalls to Non-Settling Participants if Settlement funds prove insufficient to cover the final amount of refunds EWEB owes to Non-Settling Participants. Given these liability provisions, the CalPX expresses concern that its accounting credit with the CAISO could be reduced or eliminated if EWEB fails to pay the CAISO or Non-Settling Participants for any such shortfalls. The CalPX states that any reduction of its accounting credit would cause a shortfall in CalPX's markets that it would have to allocate to market participants, which it asserts would be an "unfair" result.

21. The CalPX explains why any shortfalls on behalf of EWEB should not accrue directly to the CalPX or its market participants through a reduction in CalPX's accounting credit. Because EWEB was not a participant in the CalPX's markets, the CalPX asserts that its market participants never agreed to cover EWEB shortfalls through their pooled obligations; thus, EWEB does not maintain collateral with the CalPX to cover such a shortfall. Moreover, the Commission would have to determine a methodology to allocate the shortfall because the CalPX's tariff does not contemplate how to allocate the default obligation of a non-market participant. Additionally, the CalPX states that, given EWEB's non-CalPX market participant status, the CalPX would be "unduly hampered in any effort to collect any shortfall from EWEB"²⁸ because EWEB did not sign a market participation agreement with the CalPX or trade under its tariffs. Further, the CalPX states that EWEB's location in Oregon would make collection efforts expensive and time consuming, and that EWEB disclaiming of Commission jurisdiction could further complicate any attempted shortfall recovery by the CalPX.

²⁸ CalPX Initial Comments at 4.

22. Finally, the CalPX states that “[i]n contrast, EWEB, as a CAISO Scheduling Coordinator, is subject to the CAISO’s tariffs and the tariff default provisions.”²⁹ Therefore, the CalPX suggests, any shortfalls should be handled in accordance with the CAISO’s normal tariff procedures. For this reason, and those given above, the CalPX requests that its accounting treatment under the Settlement remain intact. The CalPX further requests that its credit with the CAISO for payments the CalPX makes under the Settlement not be reduced should any shortfalls occur with respect to the final total of EWEB Receivables or final amount of refunds due to Non-Settling Participants.

23. In its reply comments, EWEB takes no position with regard to the accounting credit or potential liability between the CalPX and the CAISO. EWEB also states that the CalPX’s characterization of EWEB as a “CAISO Scheduling Coordinator” is “a significant factual error.”³⁰ EWEB wants the record in this proceeding to be clear that it was not a participant in (i.e., did not conduct any wholesale power transactions in) the CAISO or CalPX organized markets,³¹ and that its relationship with the CAISO stems from a limited number of bilateral transactions, including ten hourly transactions on December 11, 2000 and two hourly transactions the next day, December 12, 2000. EWEB states that these transactions, the only ones EWEB conducted with the CAISO during the Settlement Period, were bilateral transactions negotiated between EWEB and the CAISO. For these reasons, EWEB asserts that it is not subject to the CAISO tariffs, but acknowledges that the California Parties may take a contrary position. EWEB states that it is not requesting a Commission ruling on this issue, and EWEB avers that is not necessary for the Commission to address this specific issue in an order approving the Settlement.

24. The CalPX responds to EWEB’s reply comments by stating that, if the Commission accepts EWEB’s position that it is not a CAISO Scheduling Coordinator, then this would provide even more reason for the Commission to grant the CalPX’s request that it and its market participants not bear any of EWEB’s financial liabilities, as discussed above. The CalPX reasons that if EWEB did not act as a CAISO Scheduling Coordinator, and is not subject to the CAISO tariffs or a CAISO participation agreement,

²⁹ *Id.* The CalPX’s characterization of EWEB as “a CAISO Scheduling Coordinator” generated the bulk of the reply and response comments on this Settlement.

³⁰ EWEB September 8, 2006 Reply Comments at 2.

³¹ EWEB states that it did not sign the Commission-approved Scheduling Coordinator Agreement or the Participating Generator Agreement, applicable to the CAISO and the CalPX organized markets, respectively.

then the CalPX is even further removed from EWEB's transactions with the CAISO than previously believed. The CalPX states that EWEB's declared lack of privity with the CAISO's markets would only complicate or render impossible any effort by the CalPX to collect a shortfall from EWEB.

25. The California Parties, in their limited answer to EWEB's reply comments and the CalPX's response, state that while they disagree with EWEB as to whether EWEB is a CAISO Scheduling Coordinator, there is no need for the Commission to address this issue when ruling on the Settlement (which is between EWEB and the California Parties).³² The California Parties contend that in the context of the Settlement the Commission should express no opinion on whether certain EWEB sales were subject to the CAISO tariffs.

Commission Determination

26. The Commission finds the CalPX's concern over its potential liability for shortfalls or funds owed to Non-Settling Participants to be misplaced. The Settlement is clear that, in the event that a Commission "Receivables Determination" is less than \$477,086, "EWEB shall pay any remaining shortfall in cash to the [CA]ISO."³³ Likewise, the Settlement is clear that "EWEB shall be solely responsible for any EWEB refunds or other relief ultimately payable to Non-Settling Participants"³⁴ should the funds allocated to the EWEB Escrow for Non-Settling Participants prove insufficient. The Settlement does not contemplate allocating such shortfalls to any party other than EWEB.

27. Further, the Settlement provides that the CalPX and the CAISO "shall reflect on their books and records *all* (i) distributions by the [Cal]PX that represent payments of amounts owed by the [CA]ISO to the EWEB for the EWEB Receivables" (emphasis added). This language pertains to accounting activities for *all* of the CalPX's distributions on behalf of the CAISO, not some distributions, or all distributions unless

³² The California Parties state that the Commission previously addressed this very issue in *San Diego Gas & Elec. Co. v. Sellers of Ancillary Serv.*, 109 FERC ¶ 61,218, at PP 66-67 (2004), *order on reh'g*, 110 FERC ¶ 61,336, at PP 66-67 (2005), when it was raised by Public Utility District No. 2 of Grant County, Washington, and that the Commission determined that sales of power to the CAISO by Grant County were subject to the CAISO tariffs.

³³ Settlement section 5.6.1.

³⁴ *Id.* at section 7.1.4.

there is a shortfall. We do not interpret the Settlement to allow the CAISO to alter the CalPX's accounting credits based on EWEB's inability to pay potential shortfalls.

28. Because EWEB is liable for the particular shortfalls about which the CalPX is concerned, and the Settlement language does not state or even suggest that a reduction to the CalPX's accounting credits would be appropriate (provided the CalPX makes the requisite payouts stipulated under the Settlement), the Commission finds that the CalPX's accounting credits shall not be reduced should EWEB fail to make-up the shortfalls for which it is liable.

29. The Commission agrees with EWEB and the California Parties that the issue of whether EWEB is a CAISO Scheduling Coordinator is not germane to whether the Settlement is fair and reasonable and in the public interest. Indeed, the issue has been addressed in a separate Commission proceeding and it need not be revisited here. The Commission also finds that EWEB's attempt to "expressly disclaim" Commission jurisdiction over the Settlement is not germane in these circumstances.³⁵ Under the Federal Power Act, only the Commission may disclaim its jurisdiction over the Settlement.

30. In conclusion, the Commission finds that the Settlement is fair and reasonable and in the public interest; it is hereby approved. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in the Refund Proceeding or any other proceeding.

The Commission orders:

The Commission hereby approves the Settlement, as discussed in the body of this order.

By the Commission. Commissioner Spitzer not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁵ *See supra* P 10.

