

123 FERC ¶ 61,200
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

San Diego Gas & Electric Company

Docket No. EL00-95-206

v.

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-191

Puget Sound Energy, Inc.

Docket No. EL01-10-030

v.

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior
and Practices in Western Markets

Docket No. IN03-10-033

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

Docket No. PA02-2-047

ORDER APPROVING SETTLEMENT

(Issued May 23, 2008)

1. In this order, the Commission approves a joint settlement filed on May 6, 2008 in the above-captioned proceedings between the Public Utility District No. 2 of Grant

County, Washington (Grant) and the California Parties¹ (collectively, the Parties) resolving claims arising from events and transactions in Western Energy Markets during the period from January 1, 2000 through June 20, 2001 (Settlement Period) as they may relate to Grant. The settlement consists of a “Joint Offer of Settlement and Motion for a Shortened Comment Period and for Expedited Disposition (Joint Offer of Settlement),” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement or Settlement Agreement).

2. The Settlement was filed by the Parties pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.² The Parties note that the Settlement includes certain deadlines for completing payments to Grant.³ The Parties state that if those payments are not completed by June 1, 2008, the California Parties must pay a penalty of two months additional interest to Grant.⁴ Accordingly, to avoid incurrence of this penalty, the Parties request that the Commission consider the Offer of Settlement on an expedited basis, with initial comments due within 10 days of this filing, reply comments due within five days thereafter, and Commission approval of the Settlement Agreement no later than May 23, 2008 to allow payment to be made by June 1, 2008. The Parties also state that the Settlement provides that it will terminate if payments are not completed by August 1, 2008.⁵ Thus, if the Settlement is not approved by May 23, 2008, the Parties request that the Commission approve the Settlement no later than July 25, 2008 to comply with the August 1, 2008 deadline.

¹ California Parties consists of Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, the People of the State of California *ex rel.* Edmund G. Brown, Jr., Attorney General, and the California Public Utilities Commission. For purposes of this settlement, the California Parties also include the California Electricity Oversight Board (CEOB) and the California Department of Water Resources acting solely under authority and powers created by California Assembly Bill 1 from the First Extraordinary Session of 2001-2002, codified in section 80000 through 80270 of the California Water Code (CERS).

² 18 C.F.R. § 385.602 (2007).

³ *See* Joint Explanatory Statement at 2-3; *see also* Settlement and Release of Claims Agreement, section 2.4.

⁴ *Id.* at 4; *see also* Settlement and Release of Claims Agreement, section 3.1.1.2

⁵ *Id.* at 4; *see also* Settlement and Release of Claims Agreement, section 2.4.

3. The Parties explain that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty. The Parties also state that the Settlement reaches a fair and reasonable resolution of issues between Grant and the Settling Participants,⁶ and protects the rights of Non-Settling Participants.⁷ The Parties note that both the Commission and the United States Court of Appeals for the Ninth Circuit have actively 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.⁸ The Parties, therefore, request that the Commission approve the Settlement.

4. As discussed further below, the Commission approves the Settlement, finding it to be fair and reasonable and in the public interest.

I. Background and Description of Settlement

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)⁹ to investigate, among other matters, the justness and reasonableness of the rates of public utility sellers into the CAISO and CalPX markets during a specific period (Docket Nos. EL00-95 and EL00-98). In 2002, the Commission directed Staff to commence a fact-finding investigation into allegations of manipulation of electric energy and natural gas prices in the West (Docket No. PA02-2-000). The Commission also directed Staff to commence a fact-finding investigation into possible manipulation of electric and natural gas prices (Docket No. IN03-10-000).

⁶ “Settling Participants” is defined by section 1.57 of the Settlement and Release of Claims Agreement to mean the California Parties and any Additional Settling Participant (i.e., an entity that elects to join the Settlement pursuant to Article 7 of the Settlement).

⁷ Settling Participants include the California Parties and Additional Settling Participants. Non-Settling Participants include participants, other than Grant and the California Participants, that do not elect to participate in the Settlement. *See* Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.57, 1.40 and 7.1 respectively. *See also* Joint Explanatory Statement at 3.

⁸ *See* Joint Offer of Settlement at 6, (*citing Public Util. Comm’n of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002), and *Public Utils. Comm’n of Cal. v. FERC*, No. 01-71051, *slip op.* at 3 (9th Cir. October 23, 2003)).

⁹ 16 U.S.C. § 824e (2000).

6. According to the Parties, the Settlement resolves all claims or rights to remedies stemming from the captioned proceedings between the Grant and the California Parties. The Parties state that, upon Commission approval of the Offer of Settlement, the CalPX will release \$11.5 million to Grant. The Parties explain that this amount represents a portion of Grant's estimated unpaid receivables from sales to the CAISO. The remaining receivables owed to Grant, plus associated interest, will be transferred to an escrow account to be established by the California Parties. The Parties also state that the California Parties estimate that amount to be approximately \$6 million in principal, plus \$9 million in interest, for a total of \$15 million.¹⁰ The Parties state that, as with other settlements in these proceedings, these transfers will be adjusted to reflect certain "deemed distributions" that are made via accounting entries rather than actual cash payments.

7. Further, according to the Parties, the Settlement permits, but does not require, "Participants" (i.e. entities that directly sold energy to, or purchased energy from, the CAISO and CalPX during the Settlement Period) to join Grant and the California Parties in the Settlement as "Additional Settling Participants."¹¹ The Parties state that the rights of those parties electing not to join the Settlement, "Non-Settling Participants," are unaffected by the Settlement.¹² Entities wishing to opt-into the Settlement must notify the Commission within five business days of Commission approval of this Settlement.¹³

8. The Parties explain that the monetary consideration assigned to the California Parties will be held in an escrow account from which allocations will be made to Settling Participants. The Parties state that the California Parties are responsible for any true-ups of refunds, receivables, and interest on the estimated amounts that have been assigned under the Settlement. In addition, the California Parties shall satisfy any refunds that the Commission orders Grant to pay to Non-Settling Participants in the Commission Proceedings¹⁴ on account of the CAISO/CalPX or CERS transactions.¹⁵

¹⁰ See Joint Explanatory Statement at 2-3.

¹¹ *Id.* at 3; see also Settlement and Release of Claims Agreement at 1.1.

¹² *Id.* at 4; see also Settlement and Release of Claims Agreement, section 2.2 and 7.1.

¹³ *Id.* at 8-9; see also Settlement and Release of Claims Agreement, section 7.1.

¹⁴ Section 1.42(vi) of the Settlement and Release of Claims Agreement defines "Commission Proceedings" to include the following: Docket Nos. EL00-95, *et al.*, EL00-98, *et al.*; Docket Nos. EL01-10, *et al.*; EL03-137 *et al.* and EL03-180, *et al.*; Docket

9. The Parties state that the Allocation Matrix, which is included as Exhibit A to the Settlement Agreement, allocates certain proceeds of the Settlement among affected Participants. The Parties state that these proceeds will be distributed from an escrow account to Settling Participants following the approval of the Settlement by the Commission.¹⁶

10. The Parties state that, subject to specified limitations, the Settlement provides for the release of all Settling Participants' claims, as well as any claims of the CAISO and CalPX, against Grant, and Grant's claims against the Settling Participants for refunds, disgorgement of profits, or other monetary or non-monetary remedies in the Commission Proceedings. The Parties also state that the Settlement provides mutual releases of claims for civil damages and equitable relief.¹⁷

11. The Parties state that all Parties other than the CEOB have executed the Settlement. The Parties explain that, at present, there is no individual who has authority to execute the Settlement on behalf of the CEOB. The Parties explain that the California Parties are attempting to resolve this issue as quickly as possible. Grant and the California Parties ask the Commission to proceed with its review of the Settlement despite the fact that the CEOB has not executed it. The Parties explain that the Agreement provides that CEOB may execute it after Commission approval; alternatively, Grant may waive the requirements of the CEOB's signature entirely.¹⁸

No. IN03-10; Docket No. PA02-2 (insofar as that proceeding concerns Grant's sales into the California markets and/or sales to CERS during the Settlement Period); Docket No. ER03-746 concerning ISO re-run activity for the Refund Period; FERC's undocketed fact-finding investigation regarding alleged physical withholding of generation, as described in Initial Report on Physical Withholding by Generators Selling into the California Market and Notification to Companies, issued by FERC staff on August 1, 2003; and related appeals of orders in any of the proceedings enumerated in this section and any proceedings upon remand including but not limited to the *BPA v. FERC* Remand, *Lockyer v. FERC* Remand and *CPUC v. FERC* Remand.

¹⁵ See Joint Explanatory Statement at 10; *see also* Settlement and Release of Claims Agreement, section 4.7.

¹⁶ *Id.* at 9; *see also* Settlement and Release of Claims Agreement, section 3.2.

¹⁷ *Id.* at 12; *see also* Settlement and Release of Claims Agreement, section 6.3.

¹⁸ *Id.* at 7; *see also* Settlement and Release of Claims Agreement, section 8.1-8.3.

12. The Parties state that the Commission's approval of the Settlement will constitute the Commission's authorization and direction to the CAISO and CalPX to conform their books and records to reflect the distributions, offsets, adjustments, transfers, and status of accounts as provided for in the Settlement.¹⁹ Further, the Parties comment that the Settlement provides that Grant's accounts will not be subject to the shortfall allocation mechanism applicable to municipal power sellers, and that its refunds instead will be calculated in the same manner as for jurisdictional sellers.²⁰

13. The Parties acknowledge that in prior orders approving settlements in Commission proceedings, the Commission has provided the CAISO and CalPX with "hold harmless" assurances for the steps taken to implement those settlements.²¹ The Parties state that they do not oppose Commission action to provide similar assurances to the CAISO and CalPX with respect to the Settlement.

14. Subject to certain limitations, the Parties state that the Settlement resolves all claims by the California Parties against Grant relating to transactions in Western Energy Markets during the Settlement Period for refunds, disgorgement of profits, or other remedies in the Commission's pending proceedings.²² The Parties also state that the Settlement provides, subject to certain specific limitations, for the mutual release as to the California Parties and Grant of claims for civil damages and/or equitable relief.²³ The Parties, therefore, request Commission approval of the Settlement.

II. Comments on the Settlement

15. Pursuant to Rules 602(d)(2) and 602(f) of the Commission's Rules of Practice and Procedures, 18 C.F.R. §§ 385.602(d)(2) and 385.602(f) (2007), initial comments were due on or before May 16, 2008 and reply comments were due on or before May 21, 2008. CalPX and the CAISO filed timely initial comments. The Parties filed timely joint reply comments.

¹⁹ *Id.* at 10; *see also* Settlement and Release of Claims Agreement, section 5.1.

²⁰ *Id.* at 10; *see also* Settlement and Release of Claims Agreement section 5.1.3.

²¹ *Id.* at 13 (*citing San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,151, at P 19 (2007)).

²² *Id.* at 11; *see also* Settlement and Release of Claims Agreement, section 6.1.

²³ *Id.* at 12; *see also* Settlement and Release of Claims Agreement, section 6.3.

A. “Hold Harmless” Protection

16. In its initial comments, the CAISO states that it supports the general principle of settlement as embodied in the Settlement. CAISO states that approval of the Settlement will allow certain amounts of cash to flow sooner than would otherwise be the case and, in that respect, will benefit market Participants. CAISO also supports the inclusion of a duty to cooperate on the part of the settling parties in the Settlement. According to CAISO, this duty to cooperate is essential so that the proper financial adjustments can be made in accordance with the Settlement.²⁴ In its initial comments, CalPX states that it takes no position in support of, or in opposition to, the Settlement.

17. Both CalPX and CAISO note that, as with previous settlements approved by the Commission, the circumstances of this Settlement warrant “hold harmless” treatment for CalPX because it will implement a number of provisions of the Settlement, along with its directors, officers and consultants. CalPX requests that in the order approving the Settlement, the Commission state that CalPX will be held harmless with respect to the Settlement and accounting activities performed pursuant to the Settlement, and that neither CalPX nor its directors, officers, employees or consultants, will be responsible for recovering any funds disbursed pursuant to the Settlement that are subsequently required to be repaid.²⁵

18. In response to CalPX’s and CAISO’s concerns about a “hold harmless” provision, the Parties comment in the Joint Explanatory Statement that in prior orders approving settlements in Commission proceedings, the Commission has provided CalPX and CAISO with “hold harmless” assurances for the steps taken to implement those settlements. Further, the Parties state that neither the California Parties nor Grant oppose Commission action to provide “hold harmless” assurances to CalPX and CAISO with respect to the Settlement.²⁶

19. In the joint reply comments, the Parties affirm their statement that they do not oppose the inclusion of a “hold harmless” provision.

²⁴ CAISO initial comments at 3.

²⁵ CalPX initial comments at 2-4.

²⁶ See Joint Explanatory Statement at 13 (*citing San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,151, at P 19 (2007)).

Commission Determination

20. As discussed above, the Parties do not oppose a “hold harmless” provision that is similar to provisions in other settlements involving the California Parties and approved by the Commission. Consistent with Commission precedent,²⁷ the Commission determines that CalPX and CAISO will be held harmless for actions taken to implement this Settlement. This order will incorporate by reference the “hold harmless” language requested by CalPX and approved by the Commission in the order approving a settlement with Portland General Electric Company issued on May 17, 2007.²⁸

B. Trigger Date

21. In its initial comments, the CAISO states that section 6.9 of the Settlement provides that “Grant shall take such actions as are necessary to dismiss or withdraw with prejudice all claims against the California Parties *and the PX and ISO*, for damages, refunds, disgorgement of profits, costs and attorneys’ fees, or other monetary or non-monetary remedies in the Pending Proceedings.” The CAISO also states that this obligation, with respect to the litigation brought by Grant against the CAISO in the U.S. District Court, is contingent upon “the withdrawal of any and all claims or potential claims by the ISO against Grant arising out of Grant’s sales during the Settlement Period or the Pending Proceedings.”²⁹ The CAISO represents that currently it has no claims against Grant arising out of Grant’s sales made during the period covered by the Settlement, and that the CAISO has no intention of bringing such claims in the future. For these reasons, the CAISO requests that the Commission clarify in any order approving the Settlement that Grant’s obligation to release all of its claims against the CAISO relating to the proceedings covered by the Settlement is triggered as of the effective date of the Settlement, without the need for any further action by the CAISO.

22. In response to the CAISO’s comments regarding Grant’s release of claims by the CAISO, the Parties state that they agree with the CAISO that Grant’s obligation to

²⁷ See, e.g., *San Diego Gas & Electric Company*, 109 FERC ¶ 61,071 (2004) (approving “hold harmless” language in the Dynegy settlement), and *San Diego Gas & Electric Company*, 109 FERC ¶ 61,257 (approving “hold harmless” language in the Duke settlement), *reh’g denied*, 111 FERC ¶ 61,186 (2005).

²⁸ *San Diego Gas & Electric Company*, 119 FERC ¶ 61,151 (2007) (approving “hold harmless” protections for the CAISO and CalPX in connection with the Portland General Electric Company settlement).

²⁹ Settlement and Release of Claims Agreement, section 6.9.

dismiss its claims against the CAISO is contingent upon the CAISO's withdrawal or dismissal of claims against Grant.³⁰ The Parties also state that other sections of the Settlement not mentioned in the CAISO's comments provide for mutual releases between Grant and the CAISO. The Parties refer to sections 6.5(i) of the Settlement, which provides that the Commission's order "shall constitute a release of Grant" by the CalPX and the CAISO, and section 6.5(iii) of the settlement, which provides for Grant's release of the CAISO and the CalPX. The Parties also refer to the CAISO's statement that the CAISO has no claims against Grant and has no intention to assert claims against Grant.³¹

23. However, the Parties state that they agree with the CAISO's requested clarification, subject to two corrections and two conditions. According to the Parties, one correction is that section 6.9 of the Settlement addresses dismissals, not releases as Grant asserts. The second correction is that pursuant to section 6.9 of the Settlement, Grant's obligation to dismiss its claims against the CAISO is triggered by the payment to Grant, and is not triggered by the Settlement Effective Date. The Parties state that the proper clarification would be that "Grant County's obligation to dismiss all of its claims against the [CA]ISO relating to the proceedings covered by the Settlement Agreement is triggered as of the date of the payments and assignments provided for in [s]ection 3.1, without the need for further action by the [CA]ISO."

24. The Parties also state that they agree to the CAISO's requested clarification only on the conditions that: (i) the CAISO has not filed any claims against Grant as of the date of the payment and assignment provided for in section 3.1 of the Settlement, and (ii) the Commission order approving the Settlement not include any language in derogation of (or that could be construed in derogation of) the mutual releases set forth in section 6.5 of the Settlement. The Parties explain that these conditions are intended to ensure that all claims between Grant and the CAISO related to the transactions addressed in the Settlement are extinguished, which the Parties state is the intent of the Settlement.

25. The Parties state that the CAISO authorized the Parties to represent that the proposed clarification, as set forth above, resolves the concerns that the CAISO raised in its comments.

³⁰ Joint Reply Comments at 3, n.8, *citing* Settlement and Release of Claims Agreement, section 6.9.

³¹ *Id.* at 3, *citing* CAISO Comments at 8.

Determination

26. As discussed above, the CAISO and the Parties agree on the trigger date clarification proposed by the CAISO, as further clarified by the Parties. A careful reading of the Settlement supports this clarification. Section 1.55 defines the Settlement Effective Date as the date upon which the required approvals (the Commission and the CPUC) are obtained, and the CEOB has either executed the Settlement or Grant has waived CEOB's execution of the Settlement. The Parties are correct that the Grant's obligation to dismiss its claims against the CAISO is triggered by the payments and assignments of consideration set out in section 3.1 of the Settlement, which occur shortly after the Settlement Effective Date. Accordingly, we find that these proposals, taken together, clarify the obligations of the Parties under the Settlement. Therefore, as requested by the CAISO and the Parties, the Commission finds that Grant's obligation to release all of its claims against the CAISO relating to the proceedings covered by the Settlement is triggered as of the date of the payments and assignment provided for in section 3.1 of the settlement, without the need for any further action by the CAISO.

27. 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:

- (A) The Commission hereby approves the Settlement.
- (B) The Commission clarifies Grant's obligation with respect to release of claims against the CAISO, as discussed in the body of the order.

By the Commission. Commissioner Moeller concurring in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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(Issued May 23, 2008)

MOELLER, Commissioner *concurring in part*:

I support approval of this settlement between Grant County PUD and the California Parties. I am writing separately to note that the Western Energy Crisis of 2000-2001 has resulted in a very complex proceeding that involves multiple parties, multiple issues, multiple dockets and multiple venues. Today, I am approving this order in the above-listed dockets but understand that our approval impacts several other related dockets.

Philip D. Moeller
Commissioner