

123 FERC ¶ 61,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

v.

Docket No. EL00-95-210

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-195

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-034

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. IN03-10-036

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

Docket No. PA02-2-051

City of Anaheim, California

Docket No. EL03-145-004

ORDER APPROVING SETTLEMENT

(Issued June 4, 2008)

1. In this order, the Commission approves a joint settlement filed on February 28, 2008 in the above-captioned proceedings between the City of Anaheim, California

(Anaheim) and the California Parties¹ (the Parties) resolving claims arising from events and transactions in western electricity markets during the period from January 1, 2000 through June 20, 2001 (Settlement Period) as they may relate to Anaheim. The settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement).

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, with the exception of certain provisions, the Settlement became effective on February 21, 2008, the execution date of the Settlement.³ The Parties state that some of the operative provisions will become effective as of, or in relation to, the date on which the Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected party.⁴

3. The Parties declare 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 the issues between Anaheim and Settling Participants, and protects the rights of Non-Settling Participants.⁵ The Parties note that the Commission and the United States Court of Appeals for the Ninth Circuit have encouraged settlements of

¹ California Parties consist 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, California Parties also include the California Electricity Oversight Board and 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 18 C.F.R. § 385.602 (2007).

³ *See* Joint Explanatory Statement at 9, Settlement and Release of Claims Agreement, Cover Sheet at 1, and General Terms and Conditions, section 1.29.

⁴ *See* Joint Explanatory Statement at 9, and Settlement and Release of Claims Agreement, General Terms and Conditions, sections 2.2 and 9.1.

⁵ Settling Participants include the California Parties and Additional Settling Participants. Non-Settling Participants include participants other than Settling Supplier, *i.e.*, Anaheim, and the California Parties, that do not elect to participate in the Settlement. *See* Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.76, 1.51, and 8.1, respectively. *See also* Joint Explanatory Statement at 4.

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.⁶ The Parties, therefore, request Commission approval of 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)⁷ to investigate, among other things, the justness and reasonableness of rates of public utility sellers into the CAISO and CalPX markets during a specific period (Docket Nos. EL00-95-000 and EL00-98-000). In 2002, the Commission directed Staff to commence a fact-finding investigation into allegations of the 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. According to the Parties, the Settlement resolves all claims stemming from the captioned proceedings between Anaheim and the California Parties. The Parties state that, upon Commission approval of the Settlement, Anaheim will allow CalPX to release \$1,250,000 plus interest on that amount to an escrow account to be established by the California Parties. This amount represents a portion of Anaheim's estimated unpaid receivables from transactions that took place in markets operated by CalPX and CAISO. The \$1,250,000 payment reflects a deemed Fuel Cost Allowance of \$465,000. The Parties state that this monetary consideration will be held in an escrow account from which allocations will be made to Settling Participants.⁸

7. In addition, the Parties state that the Settlement provides for the release of \$30,000, identified as the Settling Supplier's interest shortfall amount, to the California Litigation Escrow established by the California Parties. The remaining receivables owed to Anaheim, plus associated interest, will be released to Anaheim, except for a \$25,000 Retained Amount to be held by the CalPX pending final action by the Commission in the

⁶ See Joint Offer of Settlement at 5 (citing *Public Utilities Commission of California*, 99 FERC ¶ 61,087, at 61,384 (2002), and *Public Utilities Commission of California v. FERC*, No. 01-71051, *slip op.* at 3 (9th Cir. Oct. 23, 2006)).

⁷ 16 U.S.C. § 824e (2000).

⁸ See Joint Explanatory Statement at 2-3; Allocation Matrix, Exhibit A to Settlement and Release of Claims Agreement Cover Sheet.

proceedings in Docket Nos. EL00-95-000 and EL00-98-000 (EL00-95 Proceeding)⁹ with respect to Anaheim's transactions in the California markets during the Settlement Period.¹⁰ The Parties state that Anaheim shall be entitled, to the same extent as entities that are not within the scope of section 201(f) of the FPA,¹¹ to refunds, interest, credits, and other payments in the Commission proceedings. The Parties also state that under the Settlement, Anaheim assigns to the California Parties Anaheim's right to refunds allocated to it for the Refund Period, and that Anaheim retains the right, to the same extent as entities that are not within the scope of section 201(f) of the FPA, to refunds for the Pre-October Period.¹²

8. The Parties state that Anaheim is responsible for any true-ups of receivables and interest on the estimated amounts that have been assigned under the Settlement. The Parties also declare that Anaheim will be responsible for refund "offsets" and associated interest allocated to Anaheim as a result of the EL00-95 Proceeding, up to and including the total amount of \$1,400,000, including interest. The Parties state that, subject to specified limitations, the California Parties will be responsible for refund offsets, including interest, allocated to Anaheim exceeding \$1,400,000. Under the Settlement, Anaheim will waive its right to refunds on account of sales by CERS into the CAISO and CalPX markets. The Parties state that Anaheim's obligation to Settling Participants for any interest shortfall on Settling Supplier refunds or on Settling Supplier receivables is fully satisfied by the payment of the Settling Supplier's interest shortfall amount.¹³

9. 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 Anaheim and the California Parties in the Settlement as "Additional Settling Participants."¹⁴ The Parties state that the rights of Non-Settling

⁹ Section 1.24 of the Settlement defines the EL00-95 Proceeding as "the FERC proceeding conducted in Docket Nos. EL00-95, *et al.* and EL00-98, *et al.* and related appeals of orders in that proceeding and any proceedings upon remand."

¹⁰ Joint Explanatory Statement at 3.

¹¹ 16 U.S.C. § 824(f) (2000).

¹² Joint Explanatory Statement at 3. Section 1.61 of the Settlement states that the Pre-October Period "means the period May 1, 2000 through October 1, 2000."

¹³ Joint Explanatory Statement at 3-4.

¹⁴ *Id.* at 4.

Participants, i.e., parties electing not to join the Settlement, are unaffected by the Settlement. Entities wishing to opt-into the instant settlement must notify the Commission within five business days of Commission approval of this Settlement.¹⁵

10. 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.¹⁶ The Parties also state that in prior orders approving settlements in the Commission Proceedings, the Commission has provided the CAISO and CalPX with "hold harmless" assurances for the steps taken to implement those settlements.¹⁷ The Parties state that they do not oppose Commission action to provide similar assurances to the CAISO and CalPX with respect to the Settlement.

11. Subject to certain limitations, the Parties state that the Settlement resolves all claims by the California Parties against Anaheim and certain of Anaheim's claims against the Settling Participants relating to transactions in western energy markets during the Settlement Period for refunds, disgorgement of profits, or other remedies in the Commission proceedings. The Parties also state that the Settlement provides for mutual releases of claims for civil damages and equitable relief.¹⁸ The Parties, therefore, request Commission approval of the Settlement.

II. Comments on the Settlement

12. 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 March 19, 2008, and reply comments were due on or before March 31, 2008. CalPX and CAISO filed timely initial comments.

"Hold Harmless" Protection

13. 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

¹⁵ *Id.* at 10; *see also* Settlement and Release of Claims Agreement, General Terms and Conditions, section 8.1.

¹⁶ Settlement and Release of Claims Agreement, General Terms and Conditions, section at 6.1.

¹⁷ Joint Explanatory Statement at 15 (citing *San Diego Gas & Electric Company*, 119 FERC ¶ 61,151, at P 19 (2007)).

¹⁸ *Id.* at 13-14; *see also* Settlement and Release of Claims Agreement, General Terms and Conditions, section at 7.1.1.

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.¹⁹ In its initial comments, CalPX takes no position in support of, or in opposition to, the Settlement.

14. Both CalPX and CAISO note that, as with previous settlements approved by the Commission, the circumstances of this Settlement warrant hold harmless treatment for CAISO and CalPX because they will implement a number of provisions of the Settlement, along with their directors, officers, employees and consultants. They request that, in the order approving the Settlement, the Commission state that CAISO and CalPX will be held harmless with respect to the settlement and accounting activities performed pursuant to the Settlement, and that neither CAISO, CalPX, nor their directors, officers, employees or consultants, will be responsible for recovering any funds disbursed pursuant to the Settlement that are subsequently required to be repaid.²⁰

Commission Determination

15. 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.²¹ Consistent with this Commission precedent,²² 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, 2007.²³

¹⁹ Initial Comments of CAISO at 3.

²⁰ Initial Comments of CalPX at 2-4; Initial Comments of CAISO at 4-7.

²¹ See Joint Explanatory Statement at 15.

²² 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 (2004) (approving “hold harmless” language in the Duke settlement), *reh’g denied*, 111 FERC ¶ 61,186 (2005).

²³ *San Diego Gas & Electric Company*, 119 FERC ¶ 61,151 (2007) (approving hold harmless protection for the CAISO and CalPX in connection with the Portland General Electric Company settlement).

16. In conclusion, the Commission finds that the Settlement is fair and reasonable and in the public interest; it is hereby approved, as discussed in the body of this order. 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.