

126 FERC ¶ 61,288  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services	Docket Nos. EL00-95-222
Investigation of Practices of the California Independent System Operator and the California Power Exchange	EL00-98-207
Puget Sound Energy, Inc. v. Sellers of Energy and/or Capacity	EL01-10-043
Investigation of Anomalous Bidding Behavior And Practices in the Western Markets	IN03-10-044
Fact-Finding Investigation Into Possible Manipulation Of Electric and Natural Gas Prices	PA02-2-060
American Electric Power Service Corp., <i>et al.</i>	EL03-137-011
Enron Power Marketing, Inc. and Enron Energy Services, Inc., <i>et al.</i>	EL03-180-040
California Independent System Operator Corp.	ER03-746-011

ORDER APPROVING SETTLEMENT

(Issued March 30, 2009)

1. In this order, the Commission approves a joint settlement filed on January 29, 2009 in the above-captioned proceedings between the Salt River Project Agricultural and

Power District (SRP) and the California Parties<sup>1</sup> (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 SRP.<sup>2</sup> 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 Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.<sup>3</sup> The Parties note that, with the exception of certain provisions, the Settlement became binding on January 28, 2009 (Execution Date).<sup>4</sup> The Parties explain that some of the Settlement's provisions will become effective on the date on which the Commission issues an order approving the Settlement (Settlement Effective Date).<sup>5</sup> The Parties state that the Settlement shall terminate if the Commission rejects the Settlement or accepts it with modifications deemed unacceptable to an adversely affected Party.<sup>6</sup>

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<sup>1</sup> For purposes of the Joint Offer of Settlement, the California Parties are Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric Company (SDG&E), Southern California Edison Company (SCE), the People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General, the California Electricity Oversight Board, and the California Public Utilities Commission. For purposes of the Settlement and Release of Claims Agreement, dated January 28, 2009 (Settlement Agreement), the California Parties are the aforementioned entities as well as the California Department of Water Resources acting solely under the authority and powers created by Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in Sections 80000 through 80270 of the California Water Code.

<sup>2</sup> Joint Offer of Settlement at 2.

<sup>3</sup> 18 C.F.R. § 385.602 (2008).

<sup>4</sup> *See* Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement, Article 1.9; Signature Page to Settlement and Release of Claims Agreement Between California Parties and SRP, California Department of Water Resources.

<sup>5</sup> Joint Explanatory Statement at 12; *see* Settlement and Release of Claims Agreement, Article 1.34.

<sup>6</sup> Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement, Article 2.2.

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 state that the Settlement reaches a fair and reasonable resolution of the issues between SRP and the California Parties. 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 California Power Exchange (CalPX) markets in the 2000 and 2001 time period.<sup>7</sup> The Parties, therefore, request Commission approval of the Settlement.

4. As discussed below, the Commission approves the Settlement.

### **Background and Description of Settlement**

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)<sup>8</sup> to investigate, among other things, the justness and reasonableness of public utility sellers' rates in the CAISO and CalPX markets (Docket Nos. EL00-95-000 and EL00-98-000). In 2002, the Commission directed Staff to commence a fact-finding investigation into the alleged manipulation of electrical and natural gas prices in the west (Docket No. PA02-2-000). Also, in 2003, the Commission directed Staff to investigate anomalous bidding behavior and practices in western markets (Docket No. IN03-10-000).

6. The Parties state that the Settlement resolves all claims related to the FERC Proceedings<sup>9</sup> and the *Lockyer v. FERC* Remand<sup>10</sup> (collectively, the Settled Proceedings) between the California Parties and SRP.<sup>11</sup> The Parties further state that, because SRP was a net buyer in the CalPX and CAISO markets during the Settlement Period, it is a net refund recipient. As a result, and because SRP owes no refunds to other market

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<sup>7</sup> See Joint Offer of Settlement at 4 (citing *Pub. Utilities Comm'n of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002); *Pub. Utilities Comm'n of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

<sup>8</sup> 16 U.S.C. § 791a (2006).

<sup>9</sup> For the purposes of the Settlement, the term "FERC Proceedings" means the proceedings in Docket Nos. EL00-95, EL01-10, PA02-2, and IN03-10. The term also includes the Gaming/Partnership Proceeding and the ISO Re-Run Proceeding. See generally Joint Explanatory Statement at 5-11.

<sup>10</sup> See Joint Explanatory Statement at 8-9 (discussing *Cal. ex rel. Bill Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007)).

<sup>11</sup> Joint Explanatory Statement at 15.

participants, unlike other settlements involving California Parties and suppliers, the Settlement Agreement contains no provisions for other market participants to join as “Additional Settling Participants.”<sup>12</sup> The Settlement Agreement therefore contains no opt-in provision for additional settling participants.

7. The Settlement provides for CalPX to release to SRP \$3,768,665.14, the principal amount of its unpaid receivables from sales made by SRP into markets operated by the CAISO during the Settlement Period.<sup>13</sup> In addition, SRP is entitled to receive from CalPX interest owed on its receivables, which will cease to accrue upon payment of the principal amount to SRP.<sup>14</sup> According to the Parties, the Settlement will reduce the amount of refund shortfalls in the CAISO and CalPX markets, as determined by the Commission in response to *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005).<sup>15</sup> The Parties note, however, that there should be no refund shortfall with respect to SRP’s sales into the CAISO and CalPX markets.<sup>16</sup> Finally, the Parties agree to mutual

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<sup>12</sup> Joint Offer of Settlement at 4; *see also* Joint Explanatory Statement at 3, 17-18.

<sup>13</sup> Joint Offer of Settlement at 2-3; Joint Explanatory Statement at 3, 12-13; *see* Settlement and Release of Claims Agreement, Article 3.2.

<sup>14</sup> Joint Explanatory Statement at 13 & n.40; Settlement and Release of Claims Agreement, Article 3.2.

<sup>15</sup> *See* Joint Offer of Settlement at 3 & n.3; Explanatory Statement at 3 & n.4; Settlement and Release of Claims Agreement, Articles 1.30, 3.1.

<sup>16</sup> The Parties acknowledge that SRP is a governmental, non-jurisdictional entity subject to section 201(f) of the Federal Power Act, *see San Diego Gas & Elec. Co.*, 125 FERC ¶ 61,297 (2008), but have agreed that the amount of any additional, future refunds shall be calculated using the methodology applicable to jurisdictional entities not within the scope of section 201(f), such as PG&E, SCE and SDG&E. According to the Parties, this methodology nets refund amounts to be paid on sales against refund amounts to be received on purchases. Because SRP will receive refunds under the Settlement for sales made into the CalPX and CAISO markets, the Parties argue that there should be no refund shortfall with respect to SRP. The Parties stress that they are not asking FERC to order SRP to pay any refunds under the Settlement but that they have simply agreed on a methodology for calculating the amount of refunds received by SRP that protects the California Parties against a Refund Shortfall. *See* Joint Offer of Settlement at 3; Joint Explanatory Statement at 3-4 & n.6, 14; Settlement and Release of Claims Agreement, Articles 1.30, 3.1.

releases of claims against each other with respect to FERC proceedings under the FPA and to civil litigation related to the Western energy crisis.<sup>17</sup>

8. The Parties state that the Commission's approval of the Settlement Agreement will constitute the Commission's authorization and direction to the CAISO and CalPX to conform their records to reflect the distributions, offsets, adjustments, transfers, and status of accounts as provided for in the Settlement Agreement.<sup>18</sup> The Parties state that they agree to deal with each other in good faith and to cooperate with each other as reasonably required to carry out the purposes of the Settlement Agreement, and to exchange, on a confidential basis where appropriate, such information as reasonably necessary to effectuate the Settlement Agreement.<sup>19</sup> The Parties note that, in orders approving prior settlements, the Commission has provided the CAISO and CalPX with "hold harmless" assurances for the steps taken to implement those settlements, and they do not oppose Commission action to provide similar assurances here.<sup>20</sup>

9. The Parties assert that the Settlement resolves all claims between SRP and the California Parties in the FERC Proceedings.<sup>21</sup> In addition, the Parties waive and release any existing disputes regarding CAISO settlements and/or CalPX settlements for the Settlement Period.<sup>22</sup> Similarly, the Parties state that SRP and the California Parties

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<sup>17</sup> Joint Offer of Settlement at 3; *see also* Joint Explanatory Statement at 4, 15-17; *see generally* Settlement and Release of Claims Agreement, Article V.

<sup>18</sup> Joint Explanatory Statement at 15; *see* Settlement and Release of Claims Agreement, Article 4.1.

<sup>19</sup> Settlement and Release of Claims Agreement, Article 8.1.

<sup>20</sup> Joint Explanatory Statement at 18.

<sup>21</sup> The FERC Proceedings refer to Docket Nos. EL00-95-000, *et al.*, EL00-98-000, *et al.*, EL01-10-000, *et al.*, IN03-10-000, *et al.*, PA02-2-000, *et al.*, EL02-71-000, *et al.*, EL03-137-000, *et al.*, EL03-180-000, *et al.*, ER03-746-000, *et al.*, the Physical Withholding Investigation, and related appeals of orders in those proceedings and any proceeding upon remand. *See* Settlement and Release of Claims Agreement, Article 5.1.1 (discussing claims in "the FERC Proceedings"); *id.* Article 1.13 (defining "the FERC Proceedings"); *id.* Article 1.24 ("Physical Withholding Investigation" means 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 of Companies, issued by FERC staff on August 1, 2003."). *See also* Joint Explanatory Statement at 5-11.

<sup>22</sup> Settlement and Release of Claims Agreement, Article 5.1.2.

mutually release each other from all claims before the Commission and/or under the FPA for the Settlement Period relating to payments or unlawful rates for electric capacity, energy and/or ancillary services, transmission congestion or line loss charges, or market manipulation.<sup>23</sup> Likewise, the Parties state that SRP and the California Parties mutually release each other from all claims for the Settlement Period for civil damages and/or equitable relief relating to allegations of unlawful rates, transmission congestion and line loss charges, market manipulation, unjust enrichment, or payments for electric capacity, energy and/or ancillary services.<sup>24</sup> In addition, the Settlement would resolve a number of State and bankruptcy proceedings.<sup>25</sup>

### **Comments on the Settlement**

10. Pursuant to Rules 602(d)(2) and 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.602(d)(2) and 385.602(f) (2008), initial comments were due on or before February 18, 2009, and reply comments were due on or before March 2, 2009. Initial comments were filed by the CAISO and CalPX. Joint reply comments were filed by the California Parties<sup>26</sup> and SRP.

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<sup>23</sup> Joint Explanatory Statement at 15-16; *see* Settlement and Release of Claims Agreement, Article 5.2.

<sup>24</sup> Joint Explanatory Statement at 16-17; *see* Settlement and Release of Claims Agreement, Article 5.3.

<sup>25</sup> The Parties also mutually release one another from claims made in actions filed by PG&E, SCE and SDG&E in the U.S. District Court for the Eastern District of California in Case Nos. 2:06-cv-00559-MCE-KJM and 2:06-cv-00592-WBS-DAD. All civil claims tolled in the SRP Tolling Agreement are also extinguished and released, and SRP agrees that its existing claims in PG&E's bankruptcy proceeding will be limited to what PG&E owes SRP pursuant to the FERC Refund and Interest Determinations. Joint Explanatory Statement at 16-17; *see* Settlement and Release of Claims Agreement, Articles 5.3.6, 5.5. Finally, SRP waives claims against CERS for refunds associated with mitigation of CERS's sales in the California energy markets during the Settlement Period, and CERS releases SRP from claims arising from bilateral sales by SRP to CERS. Joint Explanatory Statement at 17; *see* Settlement and Release of Claims Agreement, Article 5.4. All of the releases discussed above are subject to specified limitations. *See generally* Settlement and Release of Claims Agreement, Article 5.6. The Parties, therefore, request Commission approval of the Settlement.

<sup>26</sup> For purposes of the filed comments, the California Parties do not include the California Department of Water Resources.

**A. “Hold Harmless” Protection**

11. Both CalPX and the CAISO note that the circumstances of this Settlement warrant hold harmless treatment for the CAISO and CalPX because they, along with their directors, officers, employees and consultants, will implement a number of the Settlement’s provisions. Accordingly, CalPX requests that the following "hold harmless" language be incorporated in 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.<sup>27</sup>

12. CalPX states that this is the same hold harmless provision that the Commission has approved in other orders approving settlements.<sup>28</sup> In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of "hold harmless" language in the order approving the Settlement.<sup>29</sup>

**Commission Determination**

13. 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.<sup>30</sup> Consistent with this Commission’s precedent,<sup>31</sup> the Commission determines that CalPX

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<sup>27</sup> CalPX Initial Comments at 4.

<sup>28</sup> *Id.*; see *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 36 (2009).

<sup>29</sup> Joint Reply Comments at 2-3.

<sup>30</sup> See Joint Explanatory Statement at 18.

<sup>31</sup> See, e.g., *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,151, at P 19 (2007) (approving hold harmless language in the Portland General Electric settlement); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004) (approving "hold harmless" language  
(continued)

and the 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 the CAISO and CalPX.

**B. CalPX’s Wind-Up Charges**

14. The Commission has authorized CalPX to recover from its market participants “wind-up charges” that cover CalPX’s operating costs incurred in determining and calculating refunds.<sup>32</sup> CalPX asserts that wind-up charges are allocated to each CalPX participant under a Commission-approved settlement,<sup>33</sup> and that the Settlement at issue here provides that SRP will continue to be responsible for such charges.<sup>34</sup> Specifically, CalPX notes that SRP has a debit balance on its CalPX Account Summary Statement and that SRP has requested that its current balance of wind-up fee charges of \$410,332.94 be deducted from the payout to SRP under this settlement.<sup>35</sup> The California Parties and SRP have stated in reply that they do not oppose this request;<sup>36</sup> neither does CalPX.<sup>37</sup> The CalPX states that, unless the Commission directs otherwise, it will deduct these charges from its payout to SRP upon Commission approval of the Settlement.<sup>38</sup>

**Commission Determination**

15. In light of the representations made by SRP and the California Parties that they do not oppose the requests made by the CAISO and CalPX, and that no other parties oppose

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in the Duke settlement), *reh'g denied*, 111 FERC P 61,186 (2005); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,071 (2004) (approving "hold harmless" language in the Dynegy settlement).

<sup>32</sup> CalPX Initial Comments at 4 (citing *Cal. Power Exch. Corp.*, 120 FERC ¶ 61,006 (2007); *Cal. Power Exch. Corp.*, 113 FERC ¶ 61,017 (2005)).

<sup>33</sup> CalPX Initial Comments at 4.

<sup>34</sup> CalPX Initial Comments at 5 (discussing Settlement and Release of Claims Agreement, Article 3.5).

<sup>35</sup> CalPX Initial Comments at 5.

<sup>36</sup> *See* Joint Reply Comments at 3.

<sup>37</sup> *See* CalPX Initial Comments at 5.

<sup>38</sup> *Id.*

the Joint Offer of Settlement,<sup>39</sup> the Commission determines that CalPX should deduct the stated amount of wind-up charges from its payout to SRP under the Settlement.

16. The Commission finds that the Settlement is fair and reasonable and in the public interest. Therefore, the Commission approves the Settlement, 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 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 is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>39</sup> Joint Reply Comments at 2-3.