

129 FERC ¶ 61,258
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

Docket No. EL00-95-000

v.

Sellers of Energy and Ancillary Services
into Markets Operated by the California
Independent System Operator Corporation and the
California Power Exchange Corporation

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

Docket No. EL00-98-000

Puget Sound Energy, Inc.

Docket No. EL01-10-000

v.

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. IN03-10-000

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

Docket No. PA02-2-000

American Electric Power Service Corporation

Docket No. EL03-137-000

Enron Power Marketing, Inc. and Enron Energy
Services Inc.

Docket No. EL03-180-000

California Independent System Operator Corporation

Docket No. ER03-746-000

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

Docket No. EL02-71-000

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,
Complainant

Docket No. EL09-56-000

v.

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

Cargill-Alliant, LLC

Docket No. EL03-144-000

ORDER APPROVING SETTLEMENT

(Issued December 17, 2009)

1. In this order, the Commission approves a settlement filed on October 14, 2009 between Cargill Power Markets, LLC (Cargill) and the California Parties¹ (collectively, the Parties). 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) as they relate to Cargill.² The settlement consists of a “Joint Offer of

¹ For purposes of this Settlement, the California Parties include:

Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SoCal Edison), San Diego Gas & Electric Company (SDG&E), the People of the State of California, *ex rel.* Edmund G. Brown, Attorney General, and the California Public Utilities Commission (CPUC). For purposes of this Settlement, the California Parties also include the California Department of Water Resources (CERS) (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).

² See Joint Offer of Settlement at 2.

Settlement,” a “Joint Explanatory Statement” (Joint Explanatory Statement), and a “Settlement and Release of Claims Agreement” (Settlement and Release of Claims) (collectively, 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 when all Parties executed it, and some provisions will become effective upon the Effective Date, which is the date on which the Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected Party.⁵ The Parties state that the Settlement shall terminate if the Commission rejects the Settlement in whole or in part, or accepts it with modifications deemed unacceptable to any adversely affected Party, or if the California Parties fail to receive the consideration that they are due under the Settlement.⁶

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.⁷ The Parties state that the Settlement reaches a fair and reasonable resolution of the issues between Cargill and the California Parties. The Parties further assert that the Settlement protects the rights of non-settling parties.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 California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) markets in the 2000 and 2001 time period.⁹ The Parties, therefore, request Commission approval of the Settlement.

³ The Settlement also includes a cover sheet (Settlement Cover Sheet) that details, among other things, the amount of proceeds that will be provided by Cargill under the terms of the Settlement.

⁴ 18 C.F.R. § 385.602 (2009).

⁵ Joint Explanatory Statement at 13; *see* Settlement and Release of Claims Agreement, §§ 1.28, 1.76, 2.2, 9.1.

⁶ Joint Explanatory Statement at 13; *see* Settlement and Release of Claims Agreement, §§ 2.3, 4.3.

⁷ Joint Offer of Settlement at 6.

⁸ *Id.*

⁹ *Id.* at 6-7 (citing *Pub. Utils. Comm’n of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002); *Pub. Utils. Comm’n of Cal. v. FERC*, No. 0-71051, slip op. at 3

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 CAISO and 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 electrical and natural gas prices in the West in Docket No. PA02-2-000.¹² In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in western energy markets in Docket No. IN03-10-000.¹³

6. The Parties state that the Settlement resolves claims in the above-captioned proceedings as they relate to Cargill.¹⁴ Any entity that directly sold energy or purchased energy from the CAISO and/or the CalPX during the Settlement Period (Participants) may elect to be bound by the terms of the Settlement by opting into the Settlement as an "Additional Settling Participant."¹⁵ Such entities must provide notice to the Commission, as well as serve notice to parties on the ListServes established for the Docket No. EL00-95 proceeding and in Docket No. EL03-137, *et al.*, and may need to provide Cargill with its bank routing information no later than five business days following the date the Commission issues an order approving the Settlement.¹⁶ The Parties explain that certain entities identified in the Settlement shall automatically become Additional Settling Participants on the Effective Date.¹⁷ The Parties note that the rights of Participants that

(9th Cir. Oct. 23, 2006)).

¹⁰ 16 U.S.C. § 791, *et seq.* (2006).

¹¹ *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

¹² *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

¹³ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

¹⁴ Joint Explanatory Statement at 2.

¹⁵ *Id.* at 4, 13-14; *see* Settlement and Release of Claims, §§ 1.1, 1.52, 8.1.

¹⁶ Joint Explanatory Statement at 4.

¹⁷ *Id.* at 4 n.5; Settlement and Release of Claims, § 8.4.

do not wish to opt into the Settlement will be unaffected by the Settlement, and that such Non-Settling Participants will not be guaranteed the benefits of the Settlement.¹⁸

7. Under the Settlement, Cargill will allow the CalPX to release its unpaid receivables arising from transactions through markets operated by the CalPX or the CAISO, estimated to be \$42,852 as of March 31, 2009, plus interest.¹⁹ Cargill will also provide cash consideration in the amount of \$761,301, plus interest. Finally, Cargill will assign any refunds, interest, credits or other payments that Cargill is or becomes entitled to receive after the Settlement Effective Date.²⁰

8. The Settlement provides that the California Utilities (i.e., PG&E, SoCal Edison, and SDG&E) assume responsibility for Cargill's true-ups of receivables, any refund amounts that Cargill owes to Non-Settling Participants for transactions in the western energy markets during the Settlement Period, and any interest shortfall the Commission allocates to Cargill.²¹ The Parties state that all or a portion of the Settling Supplier Receivables will be retained by CalPX to backstop these obligations, but that the California Utilities have the option to direct CalPX to release Cargill's receivables.²² The California Utilities' obligation to make payments on behalf of Cargill shall not exceed the total amount actually paid to the California Utilities under the Allocation Matrix, which is described below.²³

9. The Settlement includes an Allocation Matrix²⁴ that provides an allocation of the settlement proceeds from the refund escrow established by Cargill.²⁵ The Parties explain that the proceeds will be distributed as refunds to Settling Participants who are not Deemed Distribution Participants,²⁶ and to CalPX to fund Deemed Distributions and to

¹⁸ *Id.* at 4-5.

¹⁹ *Id.* at 3, 15; Settlement Cover Sheet; *see* Settlement and Release of Claims, §§ 4.1.1.2, 4.1.2, 4.1.3 and 4.1.8.

²⁰ Joint Explanatory Statement at 3, 15.

²¹ *Id.* at 3, 16.

²² Joint Offer of Settlement at 4 n.5; Joint Explanatory Statement at 15.

²³ Joint Explanatory Statement at 16; *see* Settlement and Release of Claims Agreement, § 5.8.

²⁴ Settlement and Release of Claims, Exhibit A.

²⁵ Joint Offer of Settlement at 5; Joint Explanatory Statement at 16.

establish reserves for the interest shortfall on refunds. Any remaining excess after distributions will be paid to the California Utilities.²⁷

10. The Settlement requires the CAISO and the CalPX to conform their books and records to reflect the distributions, offsets, adjustments, transfers, and status of accounts provided for in the Settlement.²⁸ The Settlement states that the Commission's approval of the Settlement will constitute the Commission's authorization and direction to the CAISO and the CalPX to take such action.²⁹

11. The Parties state that the Settlement generally resolves all claims as between the California Parties and Cargill relating to transactions in the western energy markets during the Settlement Period for refunds, disgorgement of profits, costs and attorneys' fees, or other remedies in certain proceedings before the Commission, subject to specified limitations.³⁰ In addition, the Parties waive and release any existing disputes regarding CAISO settlements and/or CalPX settlements for the Settlement Period.³¹ Similarly, the Parties state that Cargill and the California Parties 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.³² Likewise, the Parties state that Cargill 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

²⁶ Settlement and Release of Claims, Exhibit B. The Deemed Distribution Participants include: Aquila Power Corp., California Polar Power Brokers, LLC, Illinova Energy Partners, Inc., and PG&E.

²⁷ Joint Explanatory Statement at 17.

²⁸ *Id.*; *see* Settlement and Release of Claims Agreement, § 6.1.

²⁹ Joint Explanatory Statement at 17; *see* Settlement and Release of Claims Agreement, § 6.1.

³⁰ Joint Explanatory Statement at 5, 17-18; *see* Settlement and Release of Claims Agreement, §§ 3.1, 7.1.1.

³¹ *See* Settlement and Release of Claims Agreement, § 7.1.5.

³² Joint Explanatory Statement at 17-18; *see* Settlement and Release of Claims, § 7.2.1.

ancillary services.³³ Subject to specified limitations, Additional Settling Participants are deemed to provide and receive releases with and from Cargill as those provided in the Settlement for the California Parties.³⁴ The Settlement further provides that Cargill will withdraw with prejudice all claims that they have filed in the PG&E bankruptcy proceedings.³⁵

12. The Parties state that they would not object to the Commission acting to assure the CAISO and CalPX that they will be held harmless from their actions to implement the Settlement.³⁶

Procedural Matters

13. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.³⁷ The Parties request that the Settlement be transmitted directly to the Commission for approval rather than be certified by an administrative law judge, because only Docket No. EL02-71 of the above-captioned dockets is pending before a presiding judge, the Settlement was reached without the assistance of the settlement judge assigned to Docket No. EL02-71, and the Commission has considered over twenty similar settlements without the assistance of a certification from an administrative law judge.³⁸

14. 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) (2009), initial comments were due on or before November 3, 2009, and reply comments were due on or before November 13, 2009. Initial comments were timely filed by the CAISO and CalPX, either in support of or not opposing the Settlement. In addition, CALifornians for Renewable Energy, Inc.

³³ Joint Explanatory Statement at 18-19; *see* Settlement and Release of Claims, § 7.3.1.

³⁴ Joint Explanatory Statement at 19; *see* Settlement and Release of Claims Agreement, §§ 7.4, 8.2.

³⁵ Settlement and Release of Claims Agreement, § 7.1.7.

³⁶ Joint Explanatory Statement at 19.

³⁷ 18 C.F.R. § 385.602 (2009).

³⁸ Joint Offer of Settlement at 3.

(CARE) filed timely comments opposing the Settlement. Joint reply comments were filed by the Parties (Joint Reply Comments).³⁹

15. We agree with the Parties that it is appropriate for the Commission to review this Settlement without certification by an administrative law judge. For the reasons discussed below, the Commission will approve the Settlement.

Substantive Matters

A. “Hold Harmless” Protection

16. Both the CAISO and CalPX 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.⁴⁰ Accordingly, CalPX requests that the following “hold harmless” language be incorporated into 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.⁴¹

³⁹ For purposes of the Joint Reply Comments, the California Parties do not include CERS.

⁴⁰ CAISO Initial Comments at 4-7; CalPX Initial Comments at 2-4.

⁴¹ CalPX Initial Comments at 4.

17. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.⁴² In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.⁴³

Commission Determination

18. The Parties do not oppose a “hold harmless” provision that is similar to the provisions in other settlements involving the California Parties and approved by the Commission.⁴⁴ Consistent with the Commission’s precedent,⁴⁵ the Commission determines that CalPX 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. CARE’s Arguments in Opposition to the Settlement

19. Under the Commission’s *Trailblazer*⁴⁶ analysis, there are four approaches under which the Commission may approve a contested settlement: (1) the Commission may make a decision on the merits of each contested issue; (2) the Commission determines that the settlement provides an overall just and reasonable result; (3) the Commission determines that the benefits of the settlement outweigh the nature of the objections, and the contesting parties’ interests are too attenuated; or (4) the Commission determines that the contesting parties can be severed.⁴⁷ In this case, we approve the Settlement under *Trailblazer*’s first prong because we find that CARE’s arguments are without merit, as discussed herein.

⁴² *Id.* at 3-4.

⁴³ Joint Reply Comments at 8.

⁴⁴ *See id.*; *see also* Joint Explanatory Statement at 19.

⁴⁵ *See, e.g., San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242, at P 19 (2009) (approving “hold harmless language”); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,151, at P 19 (2007) (same); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004) (same), *reh’g denied*, 111 FERC ¶ 61,186 (2005).

⁴⁶ *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh’g*, 87 FERC ¶ 61,110, *reh’g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

⁴⁷ *Trailblazer*, 85 FERC at 62,342-44.

1. “Cramming” of Unwanted Goods and Services

20. CARE alleges that the Settlement is flawed because it would “unlawfully allow the ‘cramming’ of additional unwanted goods and services” on the California Utilities’ ratepayers because, under the Settlement, the California Utilities assume responsibility for amounts Cargill may be determined to owe Non-Settling Participants, as well as any interest shortfall the Commission allocates to Cargill. According to CARE, by allowing such “cramming,” the Settlement violates the anti-cramming provisions of the Energy Policy Act of 2005 (EPAAct).⁴⁸ In this regard, CARE cites a complaint it has filed with the Federal Trade Commission against California Department of Water Resources alleging illegal cramming of unauthorized charges on California ratepayers.⁴⁹

21. In response, the Parties state that the “cramming” provisions of EPAAct are not relevant to the Settlement pending before the Commission, and that the Settlement assures that no unwanted additional costs will be imposed upon the California Utilities and their retail ratepayers as the result of the Settlement.⁵⁰ The Parties state that section 5.8 of the Settlement provides that any obligation of the California Utilities to make payments to Non-Settling Participants on behalf of Cargill shall not exceed the total amount of Settlement proceeds actually paid to that California Utility. Further, the Parties argue that the Commission does not have jurisdiction to enforce any anti-cramming rules, because that authority is vested with the Federal Trade Commission, and because retail practices of the California Utilities are beyond the Commission’s purview.⁵¹

Commission Determination

22. CARE argues that the Settlement is in violation of section 1287 of EPAAct.⁵² CARE does not allege, however, that any violation of this section is within the

⁴⁸ CARE Initial Comments at 3, 7. CARE defines “cramming” as the selling of unwanted goods and services to an electric consumer, citing EPAAct section 1287, 42 U.S.C. § 16471(c) (2006).

⁴⁹ *Id.* at 3.

⁵⁰ Joint Reply Comments at 6-7.

⁵¹ *Id.* at 7 (citing *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,071, at P 38 (2004) (“the Commission does not have the authority to dictate whether wholesale customers must pass on to their retail customers the benefits of . . . refunds [from the] Settlement”)).

⁵² EPAAct, Pub. L. No. 190-58, § 1287, 119 Stat. 594, 981 (2005).

Commission's jurisdiction. As such, we dismiss CARE's argument with respect to section 1287 of EPAct as being beyond the scope of the Commission's jurisdiction.

2. Representation of California Ratepayers

23. CARE argues that its efforts alone are the only direct ratepayer participation in these proceedings.⁵³ CARE states that the CPUC has a conflict of interest between its duty to protect the ratepayers from unjust and unreasonable rates and its interest representing the state as a wholesale market participant.⁵⁴

24. In response, the Parties state that the Commission has previously found, and CARE itself acknowledges, that the CPUC has the requisite authority to represent California's ratepayers in proceedings before the Commission.⁵⁵

Commission Determination

25. We reiterate our previous determination, cited by CARE and the Parties, that the CPUC represents California ratepayers.⁵⁶ The CPUC, as a constitutionally-established California state agency, has a statutory mandate to represent the interests of electric consumers in proceedings before the Commission.⁵⁷ Similarly, the California Attorney General has state constitutional and statutory authority to bring actions on behalf of the

⁵³ CARE Initial Comments at 6.

⁵⁴ *Id.* at 4.

⁵⁵ Joint Reply Comments at 8 (citing *Duke Energy Trading and Mktg., LLC*, 126 FERC ¶ 61,234, at P 45 (2009); *Pacific Gas Transmission Co.*, 76 FERC ¶ 61,246, at 62,272-3 (1996) (Commission approved contested settlement in which CPUC represented California ratepayers noting that the CPUC and other state commissions are the "representatives of ultimate consumers in their states"))).

⁵⁶ *Duke Energy Trading and Mktg., LLC*, 125 FERC ¶ 61,345 (2008), *reh'g denied*, 126 FERC ¶ 61,234, at P 45 (2009) ("Even if CARE's citation [to PURPA rather than the FPA] were relevant, CARE is not the only ratepayer advocate. For example, the California Public Utilities Commission (CPUC), which is one of the California Parties, represents California ratepayers. We find that CPUC's participation in these proceedings belies CARE's claim that ratepayers were excluded [from the settlement process]" (footnote omitted)), *appeal docketed*, No. 09-71515 (9th Cir. 2009).

⁵⁷ Cal. Pub. Util. Code § 307 (2008).

people of California and the duty to safeguard the public interest.⁵⁸ Thus, California ratepayers have not been excluded from these proceedings.

Conclusion

26. In conclusion, the Commission finds that the Settlement is just and reasonable and therefore approves it, 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 proceeding.

The Commission orders:

The Settlement is hereby approved, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁸ Cal. Const. Art. V § 13; Cal. Gov't. Code § 12511 (2008); Cal. Bus. & Prof. Code §§ 16700, *et seq.*, 17200, *et seq.* (2008).