

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

Docket No. EL02-71-041

v.

British Columbia Power Exchange Corp.

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued February 1, 2013)

1. In this order, the Commission approves an uncontested settlement filed on October 31, 2012 between Energy Services Ventures, Inc. (ESV) and Chevron U.S.A., Inc. (CES) (collectively, Settling Assignees) and the California Parties¹ (collectively, the Parties), as discussed below. 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),² as they relate to California Polar Power Brokers (Cal Polar) and Settling Assignees.³ The settlement consists of a “Joint Offer of

¹ The California Parties are Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, the Public Utilities Commission of the State of California, and the People of the State of California *ex rel.* Kamala D. Harris, Attorney General. For purposes of the Settlement, the California Parties also include 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).

² Joint Explanatory Statement at 2.

³ Cal Polar is not a party to the Settlement. According to the Joint Explanatory Statement, Cal Polar ceased active business operations in 2002. Joint Explanatory Statement at 3. In 2003, Cal Polar assigned to ESV all of its receivables held on Cal Polar’s account in the California Independent System Operator Corporation (CAISO) and California Power Exchange Corporation (CalPX) markets, as well as certain collateral and other rights with respect to those markets. *Id.* ESV subsequently assigned a portion of its rights to CES. *Id.* n.6. According to the Parties, ESV and CES have participated in settlements involving the California Parties in these proceedings, exercising the rights assigned to them. *Id.* at 4. The Parties explain that Cal Polar has

(continued...)

Settlement and Motion for Procedural Relief for Purposes of Disposition of the Settlement” (Joint Offer of Settlement), a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement).⁴

2. The Parties filed the Settlement pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.⁵ The Parties state that some of the operative provisions become effective only as of, or in relation to, the Settlement Effective Date, which is the date the Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected Party and certain other required approvals have been granted, including approval of the bankruptcy court in certain proceedings involving ESV.⁶ Additionally, the Parties explain that the Settlement will terminate on the date of a final order rejecting the Settlement in whole or material part or accepting the Settlement with material conditions or modifications deemed unacceptable to any adversely affected Party.⁷ The Parties also state that the Settlement may terminate if the California Parties fail to receive consideration that they are due under the Settlement.⁸

3. The Parties state that the Settlement benefits customers by resolving claims for refunds and other remedies as between Cal Polar and Settling Assignees on the one hand and the California Parties on the other relating to Cal Polar’s transactions in the Western

been designated as an “Additional Settling Party,” so that it can provide and receive releases under the Settlement. Joint Offer of Settlement n.11.

⁴ On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. EL00-95-000, documenting her decision, based on a memorandum from the Office of General Counsel’s General and Administrative Law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

⁵ 18 C.F.R. § 385.602 (2012).

⁶ Joint Explanatory Statement at 13-14; Settlement and Release of Claims Agreement at §§ 1.41, 1.91, 2.2, 9.1.

⁷ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 2.3.

⁸ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 4.14.

energy markets during the period January 1, 2000 through June 20, 2001.⁹ The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty.¹⁰ 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.¹¹

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)¹² 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 EL00-98-000.¹³ In 2002, the Commission directed its staff to commence a fact-finding investigation into the alleged manipulation of electric and natural gas prices in the West in Docket No. PA02-2-000.¹⁴ In 2003, the Commission directed its staff to investigate anomalous bidding behavior and practices in Western energy markets in Docket No. IN03-10-000.¹⁵ On the same day, the Commission issued two orders directing named entities to show cause why they had not participated in certain gaming

⁹ Joint Offer of Settlement at 7.

¹⁰ *Id.*

¹¹ *Id.* at 8 (citing *Pub. Utils. Comm'n of the State of Cal.*, 99 FERC ¶ 61,087, at 61,384 (2002) and *Pub. Utils. Comm'n of the state of Cal. v. FERC*, No. 01-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

¹² 16 U.S.C. § 791, *et seq.* (2006).

¹³ *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

¹⁴ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

¹⁵ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

practices¹⁶ or why their arrangements with other entities did not constitute gaming and/or anomalous bidding behavior.¹⁷

6. The Parties state that the Settlement resolves claims against Cal Polar in the above-captioned proceedings as they relate to Cal Polar and Settling Assignees.¹⁸ Any entity that directly sold or purchased energy, capacity, and/or ancillary services through CAISO and/or CalPX during the Settlement Period (Participant) may elect to be bound by the terms of the Settlement as an “Additional Settling Participant.”¹⁹ To opt into the Settlement, a Participant 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.*, no later than five business days following the Settlement Effective Date.²⁰ The Parties state that the rights of Participants that do not wish to opt into the Settlement will be unaffected by the Settlement, and that such Non-Settling Participants will have no right to obtain certain benefits of the Settlement, but will still be paid refunds, if any, to which they are ultimately determined to be due through continued litigation.²¹

7. The Parties state that the monetary consideration flowing to the California Parties from Settling Assignees in the Settlement consists of a principal amount of \$1,860,000, plus interest, and that Settling Assignees receive a credit against the interest payment in the amount of \$470,000, an agreed-upon amount reflecting uncertainties over the continued accrual of interest associated with the bankruptcy proceedings involving ESV.²² Payments under the Settlement to the California Parties totaling \$3,072,856, subject to adjustment for additional accrued interest, will be funded from: (1) Cal Polar’s receivables, estimated to be \$313,906; (2) the estimated interest on receivables, estimated

¹⁶ *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

¹⁷ *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

¹⁸ Joint Explanatory Statement at 3.

¹⁹ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 1.1, 1.67, 8.1.

²⁰ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 8.1.

²¹ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 1.65, 3.2, 5.5, 8.1.

²² Joint Explanatory Statement at 15.

to be \$668,114, as of March 31, 2012; and (3) refunds allocated to Cal Polar under certain earlier settlements between the California Parties and other suppliers, estimated as of March 31, 2012 to be \$2,807,497.²³ Settling Assignees will receive the balance of the Cal Polar receivables, interest, Cal Polar collateral, and allocated refunds (including refunds available under future settlements).²⁴

8. The Settlement provides that Settling Assignees will, subject to specified limitations, assume joint and several liability for Cal Polar's responsibility, if any, for: (1) Cal Polar's true-ups of receivables and associated interest that have been assigned under the Settlement; (2) any refund amounts that Cal Polar owes to Non-Settling Participants in certain proceedings; (3) any interest shortfall amounts that the Commission allocates to Cal Polar; (4) any third-party refund offsets (Fuel Cost Allowance, Emissions Offset, and Cost Offset) that the Commission or a court determines that Cal Polar owes; and (5) any CalPX wind-up charges attributable to Cal Polar that are assessed after the Settlement Effective Date.²⁵

9. The Settlement includes a matrix that allocates the Settlement proceeds among Participants.²⁶ The proceeds will be distributed from the Cal Polar Refund Escrow, the costs of which will be the responsibility of the California Parties, to each of the Settling Participants and/or, in the case of amounts allocated to any Non-Settling Participants, to be held in escrow for potential future refund liabilities, in accordance with the Settlement.²⁷ In addition, certain specified Participants are designated as "Deemed Distribution Participants,"²⁸ which, according to the terms of the Settlement, are entities that have a net amount outstanding and payable to CAISO or CalPX and accordingly will receive an offset against amounts owed by the Deemed Distribution Participant to CAISO

²³ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 4.1, 4.2.1, 4.2.3, 4.2.4, 4.4.

²⁴ Joint Explanatory Statement at 15.

²⁵ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at §§ 4.10, 5.3, 5.5, 5.6, 5.7, 5.8.

²⁶ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at Ex. A.

²⁷ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at §§ 4.9, 5.2, 5.5.

²⁸ Settlement and Release of Claims Agreement, Ex. B.

and/or CalPX for purposes of the Settlement.²⁹ The Settlement also states that the Commission's approval of the Settlement will authorize CAISO and CalPX to conform their books and records to reflect the distributions.³⁰

10. The Parties explain that, in return for the specified consideration and subject to specified limitations, the Settlement resolves all claims between the California Parties on the one hand and Cal Polar and Settling Assignees (to the extent Settling Assignees sold, purchased, or scheduled energy, capacity, or ancillary services through Cal Polar in Western energy markets) on the other, relating to transactions in the Western energy markets during the Settlement Period for damages, refunds, disgorgement of profits, costs and attorneys' fees, or other remedies in the settled proceedings.³¹

11. The Parties state that the Settlement provides for mutual reciprocal releases and discharges among the California Parties, Cal Polar, and Settling Assignees (to the extent that Settling Assignees transacted through Cal Polar) as of the Settlement Effective Date from all existing and future claims before the Commission and/or under the FPA for the Settlement Period that: (1) Cal Polar, Settling Assignees, or any California Party charged or collected unjust, unreasonable, or otherwise unlawful rates, terms, or conditions for electric capacity, energy, ancillary services, or transmission congestion in the Western energy markets during the Settlement Period; (2) Cal Polar, Settling Assignees, or any California Party manipulated the Western energy markets in any fashion, or otherwise violated any applicable tariff, regulation, law, rule, or order relating to the Western energy markets during the Settlement Period; or (3) any California Party is liable for payments to Cal Polar or Settling Assignees for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.³²

12. In addition, the Parties state that the Settlement provides for mutual reciprocal releases and discharges among the California Parties, Cal Polar, and Settling Assignees (to the extent that Settling Assignees transacted through Cal Polar) from all past, existing, and future claims for civil damages and/or equitable relief concerning, pertaining to, or

²⁹ Settlement and Release of Claims Agreement at §§ 1.29, 1.30.

³⁰ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at § 6.1.

³¹ Joint Explanatory Statement at 17; Settlement and Release of Claims Agreement at §§ 3.1, 7.1.1.

³² Joint Explanatory Statement at 18; Settlement and Release of Claims Agreement at § 7.2.1.

arising from allegations that: (1) Cal Polar, Settling Assignees, or any California Party collected or charged unjust, unreasonable, or otherwise unlawful rates, terms, or conditions for capacity, energy, ancillary services, or transmission congestion during the Settlement Period; (2) Cal Polar, Settling Assignees, or any California Party engaged in market manipulation in the Western energy markets during the Settlement Period; (3) Cal Polar, Settling Assignees, or any California Party was unjustly enriched by the released claims or otherwise violated any applicable tariff, regulation, law, rule, or order relating to transactions in the Western energy markets during the Settlement Period; or (4) any California Party is liable for payments to Cal Polar or Settling Assignees for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement Period.³³

13. Subject to certain limitations, Participants that elect to participate in the Settlement as Additional Settling Participants are deemed to provide and receive from Cal Polar and Settling Assignees the releases that the California Parties provide and receive.³⁴

14. The Parties state that they would not object to the Commission assuring CAISO and CalPX that they will be held harmless for their actions to implement the Settlement.³⁵

Procedural Matters

15. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.³⁶ For the reasons described in the Joint Offer of Settlement, the Parties request that the Settlement be transmitted directly to the Commission for approval rather than being certified by an administrative law judge.³⁷

16. Pursuant to Rule 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (2012), initial comments on the Settlement were to be submitted

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

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

³⁵ Joint Explanatory Statement at 19.

³⁶ 18 C.F.R. § 385.602 (2012).

³⁷ Joint Offer of Settlement at 3-4 (citing *San Diego Gas & Elec. Co.*, 137 FERC ¶ 61,156, at P 15 (2011); *San Diego Gas & Elec. Co.*, 131 FERC ¶ 61,082, at P 14 (2009)).

no later than November 20, 2012, and reply comments were to be submitted no later than November 30, 2012. Initial comments were filed by CAISO and CalPX, either in support of or not opposing the Settlement.³⁸ Reply comments were filed by the Parties (Joint Reply Comments).

17. We agree with the Parties that it is appropriate for the Commission to review this Settlement without certification by an administrative law judge.

“Hold Harmless” Protection

18. Both CAISO and CalPX note that the circumstances of this Settlement warrant hold harmless treatment for CAISO and CalPX because they, along with their directors, officers, employees, and consultants, will implement a number of the Settlement’s provisions.³⁹ 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,

³⁸ CAISO asks that the Commission accept its initial comments out of time, explaining that it had administrative difficulties in filing before 5:00 pm and that it filed its comments within an hour after the deadline passed (and posted it to the Docket No. EL00-95 ListServ). CAISO Comments at 2. In their Joint Reply Comments, the Parties state that they do not object to CAISO’s request. Joint Reply Comments at n.3. In these circumstances, we find that accepting CAISO’s comments out-of-time will not prejudice any participant in these proceedings, and we therefore accept them.

³⁹ CAISO Comments at 4-7; CalPX Comments at 2-4.

CalPX shall not be responsible for recovering or collecting such funds or amounts represented by such credits.⁴⁰

19. CalPX states that this is the same “hold harmless” provision that the Commission has approved in other orders approving settlements.⁴¹ In their Joint Reply Comments, the Parties reiterate that they do not oppose incorporation of “hold harmless” language in the order approving the Settlement.⁴²

Commission Determination

20. 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.⁴³ Consistent with the Commission’s precedent,⁴⁴ the Commission determines that CalPX and 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 CAISO and CalPX.

Conclusion

21. The Settlement appears to be fair and reasonable and in the public interest, and is hereby approved. The Commission’s approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

⁴⁰ CalPX Comments at 4.

⁴¹ *Id.* at 2-4.

⁴² Joint Reply Comments at 3.

⁴³ *Id.*; Joint Explanatory Statement at 19.

⁴⁴ *See, e.g., San Diego Gas & Elec. Co.*, 133 FERC ¶ 61,249, at P 17 (2010) (incorporating “hold harmless” language from earlier settlements); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,242, at P 19 (2009) (same); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,002, at P 17 (2009) (same); *San Diego Gas & Elec. Co.*, 128 FERC ¶ 61,004, at P 21 (2009) (same); *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 38 (2009) (same).

The Commission orders:

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

By the Commission. Commissioner Moeller is voting present.

(S E A L)

Kimberly D. Bose,
Secretary.