

138 FERC ¶ 61,170
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

San Diego Gas & Electric Company

v.

Docket No. EL00-95-268

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-249

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-077

Sellers of Energy and/or Capacity

Investigation of Wholesale Rates of Public Utility
Sellers of Energy and Ancillary Services in the
Western Market Systems Coordinating Council

Docket No. EL01-68-043

Investigation of Anomalous Bidding Behavior and
Practices in Western Markets

Docket No. IN03-10-077

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

Docket No. PA02-2-092

American Electric Power Service Corporation

Docket No. EL03-137-038

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

Docket No. EL03-180-067

California Independent System Operator
Corporation

Docket No. ER03-746-043

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

Docket No. EL02-71-040

v.

British Columbia Power Exchange Corp.

State of California, *ex rel.* Edmund G. Brown Jr.,
Attorney General of the State of California

v.

Docket No. EL09-56-017

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

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued March 15, 2012)

1. In this order, the Commission approves an uncontested settlement filed on January 17, 2012 between EMMT/Citizens¹ and the California Parties² (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), as they relate to EMMT/Citizens.³ The settlement

¹ EMMT/Citizens include Edison Mission Marketing & Trading, Inc., Edison Source Corporation, Citizens Power Sales, LLC, and Peabody Energy Corporation and Gold Fields Mining, LLC (together, Peabody).

² The California Parties are Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company, Southern California Edison Company (SoCal Edison), the Public Utilities Commission of the State of California (CPUC), 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).

³ Joint Explanatory Statement at 2.

consists of a “Joint Offer of 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 the Settlement becomes binding as of the execution date, and note that some of the operative provisions become effective only as of, or in relation to, the Settlement Effective Date, which is defined as the later of the date that the CPUC executes the Settlement or the date the Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected Party.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, subject to EMMT/Citizens’ cure rights.⁸

3. The Parties believe that the Settlement benefits customers by resolving claims for refunds and other remedies as between EMMT/Citizens and the California Parties relating to EMMT/Citizens’ transactions in the Western energy markets during the period January 1, 2000 through June 20, 2001.⁹ The Parties state that approval of the Settlement

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 (2011).

⁶ Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement at §§ 1.30, 1.80, 2.2, 9.1.

⁷ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at § 2.3.

⁸ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at § 4.3.

⁹ Joint Offer of Settlement at 5.

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

¹⁰ *Id.*

¹¹ *Id.* (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).

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

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

6. The Parties state that the Settlement resolves claims in the above-captioned proceedings as they relate to EMMT/Citizens.¹⁸ Any entity that directly sold or purchased energy 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 ListServs 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 Settlement’s monetary consideration totals \$1,420,487, and will be funded from an assignment to the California Parties of EMMT/Citizens’ Chargeback Amount and from cash consideration to be paid by EMMT and Peabody.²² According to the Settlement, “Chargeback Amount” means amounts collected by CalPX from Participants in response to alleged defaults by PG&E and SoCal Edison.²³ The monetary consideration includes an estimate of interest, subject to adjustment.²⁴ The Settlement provides that, with specified exemptions, interest shall cease to accrue on EMMT/Citizens’ refunds after December 31, 2011, and shall cease to accrue on EMMT/Citizens’ receivables as of the date which EMMT/Citizens make payment to

¹⁸ Joint Explanatory Statement at 3.

¹⁹ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at §§ 1.1, 1.54, 8.1.

²⁰ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at § 8.1.

²¹ Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at §§ 1.52, 3.2, 5.5, 5.6, 8.1.

²² Joint Explanatory Statement at 13; Settlement and Release of Claims Agreement at §§ 4.1.1, 4.1.2.

²³ Settlement and Release of Claims Agreement at 1.14. *See also Pacific Gas & Elec. Co. v. Cal. Power Exchange Corp.*, 95 FERC ¶ 61,020 (2001).

²⁴ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 4.1., 4.1.1.2, 4.1.1.3, 5.7.1.

CAISO of amounts owed relating to the Estimated Receivables Amount, Estimated Interest on Receivables Amount, and certain good faith negotiation and alternative dispute resolution charges.²⁵ EMMT/Citizens also assign to the California Parties their entitlement to refunds on purchases made in the Western energy markets during the Settlement Period.²⁶

8. The Settlement provides that certain of the California Parties will, subject to specified limitations, assume responsibility for the obligation for: (1) EMMT/Citizens' true-ups of receivables and associated interest that have been assigned under the Settlement; (2) any refund amounts that EMMT/Citizens owe to Non-Settling Participants in certain proceedings; (3) any interest shortfall amounts that the Commission allocates to EMMT/Citizens; (4) any third-party refund offsets (Fuel Cost Allowance, Emissions Offset, and Cost Offset) that the Commission or a court determines that EMMT/Citizens owe; and (5) dispute resolution charges to the extent that such charges are not included in the determination of EMMT/Citizens' receivables.²⁷ EMMT/Citizens shall pay in cash any assessed and unpaid CalPX wind-up charges as of the Settlement Effective Date and shall remain responsible for their share, if any, of CalPX wind-up charges assessed after the Settlement Effective Date.²⁸

9. The Settlement includes an allocation matrix that allocates the Settlement proceeds among Participants.²⁹ The proceeds will be distributed from the Settling Supplier Refund Escrow to each of the Settling Participants and/or, in the case of amounts allocated to any Non-Settling Participants, transferred to certain of the California Parties in accordance

²⁵ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 4.1.1.6, 4.1.6, 5.3. The Estimated Receivables Amount and Estimated Interest on Receivables Amount are set forth in the Cover Sheet to the Settlement and Release of Claims Agreement. *See also* Settlement and Release of Claims Agreement at § 4.1.1.1.

²⁶ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at § 4.1.8.

²⁷ Joint Explanatory Statement at 14; Settlement and Release of Claims Agreement at §§ 4.1.6, 5.3, 5.6, 5.7.

²⁸ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 4.1.5.

²⁹ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at Ex. A.

with the Settlement.³⁰ In addition, certain specified Participants are designated as “Deemed Distribution Participants,”³¹ 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 and/or CalPX for purposes of the Settlement.³² The Settlement states that the Commission’s approval of the Settlement will allow CalPX to release EMMT/Citizens’ receivables and estimated interest and will authorize CAISO and CalPX to conform their books and records to reflect the distributions.³³

10. The Parties state that, in return for the specified consideration and subject to specified limitations, the Settlement resolves all claims between the California Parties and EMMT/Citizens 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.³⁴

11. The Parties state that EMMT/Citizens and the California Parties mutually release and discharge each other 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) EMMT/Citizens 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) EMMT/Citizens or any California Party manipulated the Western energy

³⁰ Joint Explanatory Statement at 15; Settlement and Release of Claims Agreement at §§ 4.1.1.4, 5.2, 5.3, 5.5.

³¹ Settlement and Release of Claims Agreement, Ex. B.

³² Settlement and Release of Claims Agreement at §§ 1.20, 1.21.

³³ Joint Explanatory Statement at 15-16; Settlement and Release of Claims Agreement at § 6.1.

³⁴ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at §§ 3.1, 7.1.1.

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 EMMT/Citizens for congestion charges, transmission line losses, energy, or ancillary services during the Settlement Period.³⁵

12. In addition, the Parties state that EMMT/Citizens and the California Parties mutually release each other from all past, existing, and future claims for civil damages and/or equitable relief concerning, pertaining to, or arising from allegations that: (1) EMMT/Citizens 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) EMMT/Citizens or any California Party engaged in market manipulation in the Western energy markets during the Settlement Period; (3) EMMT/Citizens 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 EMMT/Citizens for congestion charges, transmission line losses, energy, capacity, or ancillary services during the Settlement Period.³⁶

13. 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.³⁷

Procedural Matters

14. As noted above, the Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.³⁸ 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.³⁹

³⁵ Joint Explanatory Statement at 16; Settlement and Release of Claims Agreement at § 7.2.1.

³⁶ Joint Explanatory Statement at 16-17; Settlement and Release of Claims Agreement at § 7.3.1.

³⁷ Joint Explanatory Statement at 17.

³⁸ 18 C.F.R. § 385.602 (2011).

³⁹ 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 (2010)).

15. Pursuant to Rule 602(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(f) (2011), initial comments on the Settlement were to be submitted no later than February 6, 2012, and reply comments were to be submitted no later than February 16, 2012. Initial comments were timely filed by CAISO and CalPX, either in support of or not opposing the Settlement. Reply comments were timely filed by EMMT/Citizens and the California Parties (Joint Reply Comments).

16. 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

17. 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.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

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

⁴¹ CalPX Comments at 3-4.

18. 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

19. 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 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

20. 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.

⁴² *Id.* at 2-4.

⁴³ Joint Reply Comments at 4.

⁴⁴ *Id.*; Joint Explanatory Statement at 17.

⁴⁵ *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.

(S E A L)

Kimberly D. Bose,
Secretary.