

127 FERC ¶ 61,145
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

ORDER APPROVING SETTLEMENT

(Issued May 21, 2009)

1. In this order, the Commission approves a settlement filed on November 10, 2008 in the above-captioned proceedings between Mirant Corporation (Mirant), the Southern Company (Southern) and the California Power Exchange Corporation (CalPX) (collectively, the Parties). The settlement resolves claims arising from events and transactions in the western energy markets as they relate to Mirant, Southern and CalPX. The settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement” and a “Settlement and Release Agreement” (collectively, Settlement).
2. The Settlement provides, mainly, that Southern will pay \$300,000 to CalPX in return for: (1) CalPX’s release of liability on guarantees provided by Southern and the return of the original guarantees to Southern; and (2) CalPX’s release of \$393,086 in cash collateral to Mirant.
3. The Parties state that the Settlement provides a comprehensive resolution to several complex, interrelated matters that otherwise would require time-consuming litigation. The Parties explain that CalPX’s participants will benefit by realizing the \$300,000 immediately. Thus, the Parties assert the Settlement is fair and reasonable.

Background

4. The Parties state that pre-2001 CalPX administered wholesale electricity markets in California. In 1998 and 2000 Southern executed two guarantees in favor of CalPX to satisfy collateral requirements for Mirant's predecessors, MC 2005, LLC and Mirant Americas Energy Marketing, LP (collectively, Old Mirant) so that Old Mirant could participate in the CalPX markets. Old Mirant also deposited cash collateral with CalPX, which currently consists of \$393,086.¹

5. Old Mirant filed for bankruptcy in 2003. CalPX filed proofs of claim against Old Mirant on behalf of its market participants. CalPX states that it incurred approximately \$1.2 million in legal fees to participate in the Old Mirant bankruptcy on behalf of its market participants. Market participants funded the costs of prosecuting the CalPX's claims in the Old Mirant bankruptcy. In 2006, CalPX made a formal demand that Southern pay this amount under the guarantees. Southern and Mirant dispute that Southern is obligated to pay CalPX under the guarantees.

6. CalPX also filed a proof of claim against Old Mirant for CalPX's own account. CalPX asserted this claim was secured by the cash collateral deposited by Old Mirant.

7. The proof of claim for CalPX's own account for its wind-up charges has been resolved and paid. In implementing the California Settlement,² the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division (Bankruptcy Court) established that CalPX's only administrative claim for wind-up charges attributable to Old Mirant was for work before April 15, 2005. The Parties state this claim has now been paid.³

8. CalPX's claims on behalf of market participants were either settled by the California Settlement or extinguished by the Bankruptcy Court. Parties that opted-in to the California Settlement received an allocation of funds and any duplicative proofs of claim were extinguished. Proofs of claim asserted for non-settling participants were

¹ Joint Explanatory Statement at 2-4.

² *San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,017 (2005), *reh'g denied*, 111 FERC ¶ 61,354 (2005).

³ Joint Explanatory Statement at 5, 7 (stating that CalPX was paid an administrative claim of approximately \$575,000).

transferred to those non-settling participants. Subsequently, the Bankruptcy Court disallowed some of the claims when the claimants failed to respond to Old Mirant's objections. The remaining claimants stipulated to the disallowance of their proofs of claim.⁴

9. The Parties state that CalPX maintained Old Mirant's cash collateral after the California Settlement because the above-described claims had not been fully resolved. Further, the California Settlement did not expressly address Southern's liability under the guarantees, an issue that is resolved by this Settlement.

10. Thus, the Parties state that there is no need for CalPX to retain collateral or the guarantees to satisfy its own claims or to secure non-participants' claims. The Parties state that the Commission should approve the Settlement and allow CalPX to release the collateral because the Commission has approved such releases previously when the party receiving the collateral has provided adequately for any remaining liabilities in the California markets.⁵

Description of the Settlement

11. The Settlement provides that Southern will pay \$300,000 to CalPX. This payment settles CalPX's claims against the Southern guarantees and provides for a release of those claims by CalPX. In return, CalPX will release the guarantees and return them to Southern. CalPX will also return Old Mirant's cash collateral of approximately \$393,086 to Mirant. Southern will receive a class three claim of \$300,000 in Old Mirant's bankruptcy proceeding in satisfaction of Mirant's obligation to indemnify Southern for payments made under the guarantees.⁶

⁴ Joint Explanatory Statement at 8-9.

⁵ Citing *San Diego Gas & Elec. Co.*, 118 FERC ¶ 61,168, at P 91 (2007) (the Commission directed CalPX to release Enron's collateral finding that Enron had settled a significant amount of claims for its actions and had adequately protected non-settling parties by setting aside funds); *San Diego Gas & Electric Co.*, 110 FERC ¶ 61,086, at P 8-9 (2005) (the Commission granted a joint motion of Williams Power Co. and Dynergy Power Marketing, Inc. to release collateral they had posted with CalPX because they had settled with the California parties and the Commission found the non-settling parties had protections built into each settlement).

⁶ Settlement and Release Agreement at 4-5.

12. The Settlement also specifies its effect on several proceedings.⁷ CalPX and Southern will mutually release each other from any claims involving the guarantees. Mirant and CalPX will stay pending proceedings in the Bankruptcy Court and Mirant will dismiss its adversary proceeding against CalPX. The Settlement will not have preclusive effect in other proceedings involving the Parties except to the extent it resolves specific claims. The conditions precedent to the Settlement becoming effective are: (1) all Parties must execute the Settlement; (2) approval by the United States District Court for the Northern District of Georgia; (3) approval by this Commission; and (4) approval by the Bankruptcy Court. The Settlement further states the Parties' good faith obligation to act so that the Settlement becomes effective. Finally, the Settlement states the events that may trigger an automatic termination of the Settlement, including this Commission's rejection or modification in a manner unacceptable to the Parties.

Procedural Matters

13. The Parties filed the Settlement pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,⁸ requesting the Secretary submit the Settlement to the Commission.

14. Pursuant to Rules 602(d)(2) and 602(f) of the Commission's Rules of Practice and Procedure,⁹ initial comments were due on or before December 1, 2008, and reply comments were due on or before December 10, 2008. CalPX filed initial comments and the California Parties¹⁰ filed initial comments and a request for clarification. Reply comments were filed by CalPX.

Substantive Matters

A. CalPX's Request for "Hold Harmless" Language

15. As it has done in similar settlement proceedings, CalPX requests that any Commission order on the Settlement expressly include a "hold harmless" provision similar to those included in other settlement orders. In its comments CalPX requests that

⁷ Settlement and Release Agreement at 5-10.

⁸ 18 C.F.R. § 385.602(b)(2) (2008).

⁹ 18 C.F.R. §§ 385.602(d)(2), 385.602(f).

¹⁰ For purposes of these comments, the "California Parties" means Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SoCal Edison), the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General (California Attorney General) and the California Public Utilities Commission (CPUC).

the Commission incorporate the following language that it has approved for other, similar settlements:

The Commission recognizes that CalPX will be required to implement this settlement by releasing substantial collateral to Mirant and returning Guarantees to Southern 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 resorting 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. Provided that neither CalPX nor the above-identified individuals shall be held harmless from any claims for breach of the Settlement and Release Agreement brought by any of the parties to that agreement.

16. The Parties' Joint Explanatory Statement states that Mirant and Southern do not oppose a hold harmless assurance for CalPX.

Commission Determination

17. Consistent with this Commission's precedent,¹¹ the Commission determines that CalPX should be held harmless for actions taken to implement this Settlement. Accordingly, this order incorporates the "hold harmless" language set out above.

¹¹ See e.g., *San Diego Gas & Elec. Co.*, 126 FERC ¶ 61,007, at P 38 (2009) (incorporating "hold harmless" language in the NEGTT settlement order); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,151, at P 19 (2007) (approving "hold harmless" protection for CalPX for the Portland General Electric Co. settlement); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,071, at P 34 (2004) (approving "hold harmless" language in the Dynergy, Inc. settlement order); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004), *reh'g denied*, 111 FERC ¶ 61,186, at P 19 (2005) (approving "hold harmless" language in the

(continued)

B. Disposition of the Settlement Proceeds**1. Allocation Matrix and Going-Forward Costs**

18. The California Parties state that they support the Settlement but seek clarification on two points. First, the California Parties state that CalPX should allocate the \$300,000 in Settlement proceeds back to market participants based on the allocation for both historical costs and going-forward costs¹² set forth in Attachment A to the CalPX Rate Case Settlement Agreement, i.e., the allocation should be in proportion to the costs that market participants ultimately incurred in funding the litigation in the Old Mirant bankruptcy proceeding.¹³ The Attachment A matrix provides an allocation of CalPX's costs across the market. The California Parties state that the costs CalPX incurred in the Old Mirant bankruptcy were subject to that allocation and therefore it is appropriate that the Settlement proceeds be allocated back to market participants pursuant to this matrix. The California Parties note that to accomplish this allocation CalPX should itemize when it incurred the litigation costs subject to this Settlement.

19. In its reply comments, CalPX states that it will allocate the \$300,000 in Settlement proceeds back to market participants pursuant to the terms of the CalPX Rate Case Settlement Agreement and the allocation matrix in Attachment A. However, CalPX states that by the terms of that agreement, CalPX must allocate all of the Settlement proceeds to the going-forward period.¹⁴ CalPX notes that PG&E and SoCal Edison agree

Duke Energy Corp. settlement order).

¹² Historical costs ranged from 12/5/01 to 12/31/04 and going-forward costs are after 12/31/04.

¹³ Cal. Power Exch. Corp., September 1, 2005 Offer of Settlement, Docket No. ER05-167-000, Appendix A (CalPX Rate Case Settlement Agreement); *Cal. Power Exch. Corp.*, 113 FERC ¶ 61,017 (2005) (approving CalPX Rate Case Settlement Agreement); *Cal. Power Exch. Corp.*, 120 FERC ¶ 61,006 (2007) (letter order approving an extension of the CalPX Rate Case Settlement Agreement through 2010).

¹⁴ CalPX December 10, 2008 Reply Comments at 2-3 (citing section five of the CalPX Rate Case Settlement Agreement that states, “[e]xcept as provided later in this paragraph, such currently unknown or unknowable costs or credits shall not be applied to adjust the Historical Costs, but shall instead be included and reflected in the Going-Forward Costs . . .”).

with this analysis and that it had not received a response from the office of the California Attorney General at the time it filed reply comments.¹⁵

2. Effect of Global Settlements on Allocation

20. The California Parties also state that the funds allocated to Duke, Reliant, Mirant and PacifiCorp should instead be paid to the California Parties pursuant to the global settlements entered into by certain California parties.¹⁶ The California Parties state that they assumed liability to pay the CalPX wind-up charges of these entities after the effective dates of the settlements. Therefore, they assert that they are entitled to the portion of the Settlement proceeds attributable to the CalPX wind-up charges paid by the California Parties pursuant to the global settlements.

21. In its reply comments, CalPX states that it will credit the California Parties for the allocations given to Duke, Reliant, Mirant and PacifiCorp, as required by those global settlements.

Commission Determination

22. The Commission agrees with CalPX's reading of the CalPX Rate Case Settlement Agreement which specified that those costs or credits associated with CalPX's activities during the historical period that were unknown at the time of that settlement should be reflected in the going-forward costs.¹⁷ Therefore, it is unnecessary for CalPX to itemize its litigation costs. Moreover, given CalPX and California Parties' agreement on the allocation of the Settlement proceeds, we find that it is appropriate for CalPX to allocate the \$300,000 in Settlement proceeds pursuant to the terms of the CalPX Rate Case Settlement Agreement and the allocation matrix in Attachment A.

¹⁵ CalPX also notes that San Diego Gas and Electric (SDG&E) agreed with the analysis, but the Commission omits SDG&E because it is not included in the California Parties as defined in these comments.

¹⁶ For purposes of the global settlements the California parties are: PG&E, SoCal Edison, SDG&E, the California Attorney General, CPUC, the California Department of Water Resources acting through its Electric Power Fund, separate and apart from its powers and responsibilities with respect to the State Water Resources Development System and the California Electricity Oversight Board.

¹⁷ Cal. Power Exch. Corp., September 1, 2005 Offer of Settlement, Docket No. ER05-167-000, at 5.

23. However, the Commission agrees with CalPX and the California Parties that certain market participants with global settlements¹⁸ should not receive an allocation of the Settlement proceeds, because the California parties assumed liability for CalPX wind-up charges after the effective dates of the settlements.¹⁹ The Commission agrees that the Settlement proceeds that would go to Reliant, Mirant, Duke and PacifiCorp under the Attachment A allocation matrix should be re-allocated to the California parties as that group was defined in the applicable global settlements.

24. In conclusion, the Commission approves the Settlement as fair and reasonable and in the public interest, and directs CalPX to make a refund report with the Commission within 30 days of the date on which CalPX has provided refunds pursuant to the Attachment A matrix as modified by the global settlements discussed above. The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

The Commission orders:

(A) The Settlement is hereby approved as fair and reasonable and in the public interest, as discussed in the body of this order.

¹⁸ *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,308 (2005) (approving Reliant global settlement); California Settlement, 111 FERC ¶ 61,017 (2005) (approving Mirant global settlement); *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004) (approving Duke global settlement); *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,296 (2007) (approving PacifiCorp settlement).

¹⁹ See Reliant October 14, 2005 Joint Offer of Settlement, Docket No. EL00-95-000, § 8.7.7 (“The California Parties shall be responsible for all PX Wind-Up Charges that Reliant would have been responsible for absent this agreement with respect to the PX’s activities from and after the Settlement Effective Date.”); Mirant January 31, 2005 Settlement and Release of Claims Agreement, § 5.3.3 (“The California Parties will assume [Mirant Americas Energy Marketing, LP’s] share, as may be determined by FERC, of all PX wind-up expenses associated with PX work performed after the Settlement Effective Date.”); Duke October 1, 2004 Joint Offer of Settlement, Docket No. EL00-95-000, § 4.1.17 (“The California Parties will assume Duke’s share, as may be determined in FERC Docket No. ER02-2234-000, of PX wind-up expenses associated with PX work performed after the Settlement Effective Date.”); PacifiCorp April 11, 2007 Joint Offer of Settlement, Docket No. EL00-95-000, § 4.1.5 (“the California Parties will pay any such charges that are assessed against Settling Supplier after the date the cash payment required by Section 4.1.2 is made.”).

(B) CalPX shall file a refund report in this docket within 30 days of making refunds indicating its distribution of the Settlement proceeds, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.