

113 FERC ¶ 61,235
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services	Docket No. EL00-95-000
Investigation of Practices of the California Independent System Operator and the California Power Exchange	Docket No. EL00-98-000, <i>et al.</i>
Puget Sound Energy, Inc. v. Sellers of Energy and/or Capacity	Docket No. EL01-10-000, <i>et al.</i>
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
Public Service Company of Colorado	Docket No. EL03-167-000

ORDER ON SETTLEMENT AGREEMENT

(Issued December 2, 2005)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement Agreement (collectively, the Settlement) filed on September 14, 2005 in the instant proceedings by the Public Service Company of Colorado (PS Colorado), the California

Parties,¹ and the Commission's Office of Market Oversight and Investigations (OMOI) (collectively, the Settling Parties). The September 14 filing consists of the "Joint Offer of Settlement," a "Joint Explanatory Statement," a "Settlement and Release of Claims Agreement," and other supporting documentation. The Settlement resolves matters and claims raised in the captioned proceedings arising from events in the California Independent System Operator (CAISO) and California Power Exchange (CalPX) energy and ancillary services markets during the period January 1, 2000 through June 20, 2001, as they relate to PS Colorado.

2. This order approves the Settlement, with conditions discussed *infra*. The Commission's action in approving the Settlement will benefit customers by resolving claims against PS Colorado for refunds, price adjustments or other remedies for actions arising out of PS Colorado's sale of electricity into California during the period defined in the Settlement Agreement. Approval will avoid further costly litigation, eliminate regulatory uncertainty and bring to a close a number of disputes stemming from the California market disruptions during 2000 and 2001 as they relate to PS Colorado.

I. Background and Description of the Settlement

3. The Settlement resolves all refund issues in the EL00-95, *et al.* proceeding (the Refund Proceeding), the EL01-10, *et al.* proceeding (the PNW Proceeding), the EL03-167-000 proceeding (the Gaming Proceeding), as well as claims against PS Colorado in Docket Nos. PA02-2, IN03-10, and the Commission's investigation into allegations of physical withholding (the Enforcement Proceedings), and related appellate proceedings insofar as these proceedings pertain to PS Colorado's sales in the CAISO market and/or sales to CERS from January 1, 2000 through June 20, 2001 (collectively, the FERC proceedings).

4. The Settlement provides an opportunity for all other parties to these proceedings to join the Settlement and become Settling Participants. The Settling Parties state that those

¹ The California Parties include: Pacific Gas & Electric Company (PG&E); Southern California Edison Company (SCE); San Diego Gas & Electric Company (SDG&E); the California Department of Water Resources acting through its Electric Power Fund (CERS), separate and apart from its powers and responsibilities with respect to the State Water Resources Development System; the California Electricity Oversight Board (CEOB); the California Public Utilities Commission (CPUC); and the People of the State of California, *ex rel.* Bill Lockyer, Attorney General.

electing not to join will not be affected by the Settlement, but they also point out that they will not share in the benefits of the agreement.

5. The Settlement is based upon a calculation of PSC's total estimated refund amounts associated with transactions in the ISO markets² in the Refund Proceeding and allocating them between two periods: the period from October 2, 2000 through June 20, 2001 (the Refund Period), and the period from January 1, 2000 through October 1, 2000 (Pre-October Period). Exhibit A of the Settlement and Release of Claims Agreement (the Allocation Matrix) sets out the calculation and allocation of refunds and payments to parties to the Refund Proceeding. Exhibit B lists the "Deemed Distribution Participants," who will receive credits against amounts shown on the Allocation Matrix that they owe to the CAISO or the CalPX.

6. According to the Settling Parties, the amount of interest to be paid to the California Parties and Additional Settling Participants will be determined and paid in accordance with the Commission's determination of interest issues regarding the CAISO and CalPX settlement rerun and refund calculations. Under the Settlement Agreement, the Commission will direct how and to whom the interest amounts are paid.³ The Settlement provides that emissions and fuel cost allocations are based on gross control area load, as the Commission prescribed in prior orders.⁴ The emission and fuel cost allocations may be subject to change based on final Commission orders on rehearing or appeal of the allocation determinations in the Refund Proceeding.

7. The Settlement provides that, by opting into the Settlement, a Settling Participant will receive any refunds and/or offsets against amounts owed under the Allocation Matrix. If a party does not join the Settlement, the Settlement provides that the party can continue to pursue its claims in the Refund Proceeding but it will not receive the benefits of the Settlement. By the same token, PS Colorado can continue to litigate all issues with respect to non-settling parties. Non-settling parties will be paid whatever refunds and

² PS Colorado made no sales through the CalPX during the Settlement Period. *See* Joint Explanatory Statement at 8, fn. 21.

³ Joint Explanatory Statement at 10; Settlement Agreement, Article V, section 5.3.

⁴ *See San Diego Gas & Electric Co., et al.*, 105 FERC ¶ 61,066 (2003) (October 16 Main Order), *order on reh'g*, 107 FERC ¶ 61,165 (2004).

amounts, if any, that the Commission or the court ultimately determines are due at the termination of the Refund Proceeding.⁵

8. Under the Settlement, PS Colorado will provide a total of \$7,289,837 in monetary consideration consisting of: (1) assignment to the California Parties of PS Colorado's CAISO receivables; (2) cash payments to a PS Colorado Refund Escrow established for distribution to Settling Participants entitled to refunds in the Refund Proceeding; and (3) cash payments into a separate escrow account designated as the California Litigation Escrow. Under the Settlement Agreement, \$2,229,850 will be allocated to the Refund Period and \$4,839,989 will be allocated to the Pre-October Period.⁶

9. The Settlement provides that, if the amount of the PS Colorado Receivables is less than \$2,187,538.28, PS Colorado will be responsible for covering the shortfall. On the other hand, if the amount is greater than \$2,187,538.28, PS Colorado will be entitled to receive such excess.⁷ Under the Settlement Agreement, PS Colorado will assign to the California Parties \$1,750,030.62 from the PS Colorado Receivables. Subject to Section 6.2 of the Settlement Agreement, all PS Colorado Receivables in excess of this amount will remain the property of PS Colorado on and after the Settlement Effective Date.

10. Pursuant to the Settlement Agreement, PS Colorado will make two separate cash payments totaling \$5,321,806.38, by wire transfer, from funds other than the PS Colorado Receivables, into the PS Colorado Refund Escrow. PS Colorado will also make a cash payment of \$218,000, by wire transfer, from funds other than the PS Colorado Receivables, into the California Litigation Escrow.⁸

11. Pursuant to the Settlement Agreement, the California Parties and PS Colorado will execute one or more escrow agreements with a reputable financial institution to establish and govern the PS Colorado Refund Escrow and the California Litigation Escrow. The costs of maintaining the PS Colorado Refund Escrow will be shared equally between the California Parties and PS Colorado, but in no event will PS Colorado be responsible for

⁵ Joint Explanatory Statement at 2-3.

⁶ Settlement Agreement, Article V, section 5.1.

⁷ *Id.*, Article, V, section 5.6.1 and 5.6.2.

⁸ *Id.*, Article IV, section 4.1.2.

more than \$10,000 of the costs annually. The costs of maintaining the California Litigation Escrow will be the responsibility of the California Parties.⁹

12. The Settlement also provides for certain non-monetary consideration and prospective commitments. The Settlement Agreement states that PS Colorado has implemented the Commission's market behavior rules established in Docket No. EL01-118.¹⁰ According to the terms of the Settlement Agreement, PS Colorado will not challenge the Commission's orders issued in the EL01-118 proceeding.¹¹ Furthermore, PS Colorado has committed to cooperate for a period of 24 months after the Settlement Effective Date¹² with the California Parties in their pursuit of claims or potential claims relating to the operation of western electricity markets and western natural gas markets during the Settlement Period,¹³ provided that such cooperation will not obligate PS Colorado to waive any privileges.¹⁴

13. Pursuant to the Settlement Agreement, PS Colorado and the California Parties will release and discharge each other from all past, existing and future claims arising at the Commission or under the Federal Power Act¹⁵ arising from the Refund Proceeding and from the claims of market manipulation and economic or physical withholding discussed

⁹ *Id.*, Article IV, section 4.1.3.

¹⁰ In the Docket No. EL01-118 proceeding, the Commission adopted market behavior rules and procedural guidelines applicable to sellers' market-based rate tariffs and authorizations. *See* Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004), *further order on reh'g*, 110 FERC ¶ 61,336 (2005).

¹¹ Settlement Agreement, Article IV, section 4.2.1.

¹² The Settlement Effective Date is defined as the date upon which the Commission issues an order approving the Settlement Agreement. *See* Settlement Agreement, Article I, section 1.53.

¹³ The Settlement Period is defined as the period January 1, 2000 through June 20, 2001. *See* Settlement Agreement, Article I, section 1.55.

¹⁴ Settlement Agreement, Article IV, section 4.2.2.

¹⁵ 16 U.S.C. § 824 (2004).

in the Final FERC Staff Report in Docket No. PA02-2 from the beginning of the Pre-October Period through the end of the Settlement Period.¹⁶

14. The Settling Parties request that the Commission approve the Settlement Agreement before December 31, 2005. The Settling Parties state that the Settlement Agreement has been executed by the Settling Parties and that the approval of the CPUC has been obtained. The Settling Parties state that the Settlement Agreement will become effective upon Commission approval without material change unacceptable to any Settling Party.

II. Comments on the Settlement Agreement

15. The Commission received two initial comments on the Settlement from the CAISO and the CalPX. The CAISO supports the Settlement. The CalPX takes a neutral position in these proceedings. Both the CAISO and the CalPX seek a “hold harmless” provision. The Settling Parties filed reply comments.

16. The CAISO and CalPX ask that the Commission hold each entity and its officers, directors and professionals harmless from any liability resulting from steps taken by the CAISO or the CalPX to implement the Settlement.

17. The CalPX requests that the Commission include a “hold harmless” provision in its order approving the Settlement similar to those approved for previous settlements. Specifically, the CalPX states that the Commission should adopt the language it approved in its order on rehearing issued May 9, 2005 concerning certain orders on settlements in this proceeding.¹⁷ However, the CalPX states that the first sentence of that provision should be modified for purposes of this PS Colorado settlement.¹⁸ The provision would then read as follows:

The Commission recognizes that CalPX will be required to implement this settlement by making substantial modifications to its books and records to reflect an adjustment of its accounts at the Commission’s direction. Therefore, except to

¹⁶ Settlement Agreement, Article VII, section 7.3.1.

¹⁷ *See San Diego Gas & Electric Co., et al.*, 111 FERC ¶ 61,186 at P 15 (2005) (May 9 Order).

¹⁸ CalPX Initial Comments at 4, fn. 3.

the extent caused by their own gross negligence or employees or 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.¹⁹

18. With regard to the calculation of refund amounts, the CAISO states that, currently, the Commission's refund orders only provide for refunds for the period October 2, 2000 through June 20, 2001 (*i.e.*, the Refund Period). The CAISO states that it understands the reference to "if any" in section 6.1.3.1 of the Settlement Agreement to mean that the CAISO would be required to calculate refunds relating to the Pre-October Period only if the Commission expands the scope of the Refund Period by issuing an order stating that refunds should be made for the Pre-October Period. The CAISO requests that this interpretation be adopted as part of any order approving the Settlement Agreement.²⁰

19. In its reply comments, the Settling Parties reaffirm that they do not oppose a hold harmless provision in the order approving the Settlement.²¹ Also, the Settling Parties state that they agree that the CAISO is required to calculate refunds for the period May 1, 2000 to October 2, 2001 only if the Commission ultimately requires refunds for that period. The Settling Parties state the CAISO's requested clarification is consistent with the language and intent of Section 6.1.3.1 of the Settlement Agreement.²²

¹⁹ See CalPX Initial Comments at 4, fn 3; See *San Diego Gas & Electric Co.*, 111 FERC ¶ 61,186 at P 15.

²⁰ CAISO Initial Comments at 7-8.

²¹ The Settling Parties stated in the Joint Offer of Settlement that they did not oppose Commission action to approve hold harmless protections for the CAISO and CalPX with respect to the instant settlement. See Joint Explanatory Settlement at 12-13.

²² Joint Reply Comments at 2-3.

III. Discussion

20. The Commission finds that the hold harmless provision is consistent with similar provisions we have found reasonable in other settlements in this proceeding. Therefore, we will accept the hold harmless provision. The Commission thus determines that CalPX and the CAISO shall be held harmless for actions taken to implement the Settlement and this order incorporates the language previously approved in our May 9 Order.

21. The Commission clarifies that the CAISO will only be required to calculate refunds relating to the Pre-October Period only if the Commission issues an order explicitly expanding the scope of the Refund Period.

The Commission orders:

(A) The Commission hereby approves the Offer of Settlement and Settlement Agreement, as discussed in the body of this order.

(B) The CalPX is authorized and directed to implement the Settlement, as discussed in the body of this order.

(C) The CAISO is authorized and directed to implement the Settlement, as discussed in the body of this order.

(D) The Commission directs that the CalPX and the CAISO will be held harmless from their actions to implement the Settlement, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.