

123 FERC ¶ 61,316
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Philip D. Moeller,
and Jon Wellenhoff.

San Diego Gas & Electric Company

v.

Docket No. EL00-95-213

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-198

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-037

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. IN03-10-039

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

Docket No. PA02-2-054

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued June 30, 2008)

1. In this order, the Commission approves a joint settlement filed on April 30, 2008 in the above-captioned proceedings between Strategic Energy LLC (Strategic) and the California Parties¹ (collectively, the Parties) resolving claims arising from events and

¹ California Parties consist of Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, and the California Public Utilities Commission. For purposes of this settlement, 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 (CERS)).

transactions in western electricity markets during the period from January 1, 2000 through June 20, 2001 (Settlement Period) as they may relate to Strategic. The settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement” (collectively, the Settlement).

2. The Settlement was filed by the Parties pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.² The Parties note that, with the exception of certain provisions, the Settlement became effective on April 25, 2008, the execution date of the Settlement.³ The Parties state that some of the operative provisions will become effective as of, or in relation to, the date on which the Commission issues an order approving the Settlement without material change or condition unacceptable to any adversely affected party.⁴

3. The Parties declare that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty. The Parties also state that the Settlement reaches a fair and reasonable resolution of the issues between Strategic and Settling Participants, and protects the rights of Non-Settling Participants.⁵ 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.⁶ The Parties, therefore, request Commission approval of the Settlement.

4. As discussed below, the Commission approves the Settlement, finding it to be fair and reasonable and in the public interest.

² 18 C.F.R. § 385.602 (2008).

³ See Joint Explanatory Statement at 8, Settlement and Release of Claims Agreement, Cover Sheet at 1, and General Terms and Conditions, section 1.26.

⁴ See Joint Explanatory Statement at 8, and Settlement and Release of Claims Agreement, General Terms and Conditions, sections 2.2 and 9.1.

⁵ Settling Participants include the California Parties and Additional Settling Participants. Non-Settling Participants include participants other than Settling Supplier, i.e., Strategic, and the California Parties, that do not elect to participate in the Settlement. See Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.72, 1.1, 1.48, and 8.1, respectively. See also Joint Explanatory Statement at 3-4.

⁶ See Joint Offer of Settlement at 4-5 (citing *Public Utilities Commission of California*, 99 FERC ¶ 61,087, at 61,384 (2002), and *Public Utilities Commission of California v. FERC*, No. 01-71051, slip op. at 3 (9th Cir. Oct. 23, 2006)).

I. Background and Description of Settlement

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)⁷ to investigate, among other things, the justness and reasonableness of rates of public utility sellers into the CAISO and CalPX markets during a specific period (Docket Nos. EL00-95-000 and EL00-98-000). In 2002, the Commission directed Staff to commence a fact-finding investigation into allegations of the manipulation of electric energy and natural gas prices in the west (Docket No. PA02-2-000). The Commission also directed Staff to commence a fact-finding investigation into possible manipulation of electric and natural gas prices (Docket No. IN03-10-000).

6. According to the Parties, the Settlement resolves all claims or rights to remedies stemming from the captioned proceedings between Strategic and the California Parties. The Parties state that, upon Commission approval of the Settlement, Strategic will allow CalPX to release proceeds from Strategic's unpaid receivables from transactions through markets operated by CalPX and the CAISO.⁸ Specifically, the Parties state that the amount of unadjusted transferred receivables is \$1,625,025. This consideration is comprised of a principal settlement amount of \$1,238,804 plus estimated interest on refunds of \$386,221.⁹ The Parties state that these unpaid receivables will be paid into a Settling Supplier Refund Escrow account created by the California Parties.¹⁰ The Parties explain that the proceeds will be held in an escrow account from which distributions will be made to Settling Participants, and/or held in the escrow account on behalf of any Non-Settling Participants.¹¹

7. The Parties declare that the total monetary consideration to be paid by Strategic in this settlement is \$1,625,025, including interest accrued at the Commission's interest rate through December 31, 2007. The Parties note that an interest shortfall on refunds in the amount of \$47,134 as of December 31, 2007 will be withheld from payment into the escrow account. According to the Parties, the amounts paid into the escrow account include accruals of estimated interest on refunds and will be net of accruals of estimated interest shortfall on refunds through the projected date of distribution to the escrow

⁷ 16 U.S.C. § 824e (2000).

⁸ *See* Joint Explanatory Statement at 2-3; Allocation Matrix, Exhibit A to Settlement and Release of Claims Agreement Cover Sheet.

⁹ *See* Joint Explanatory Statement at 3.

¹⁰ *See* Joint Explanatory Statement at 2.

¹¹ *Id.*

account. The Parties state, further, that the Settlement provides for a true-up of interest payments pursuant to further Commission orders on the calculation and allocation of interest and the interest shortfall.¹²

8. The Parties declare that Strategic's receivables, including interest, remaining after assignment of the transferred receivables, minus a \$50,000 retained amount and a \$249,192 settling supplier's interest shortfall estimate, will be distributed in cash to an independent escrow account established by Strategic. According to the Parties, these amounts, including accrued interest, will be released to Strategic to the extent those amounts are not needed to satisfy Strategic's obligations under further Commission orders.¹³

9. According to the Parties, the Settlement permits, but does not require, market participants, i.e., entities that directly sold energy to, or purchased energy from the CAISO and CalPX during the Settlement time period, to join Strategic and the California Parties in the Settlement as "Additional Settling Participants (collectively, Settling Participants)." The Parties state that the rights of Non-Settling Participants, i.e., parties electing not to join the Settlement, are unaffected by the Settlement. Entities wishing to opt into the instant settlement must notify the Commission within five business days of the approval of this Settlement.¹⁴ The Parties state, further, that Strategic will be responsible for paying any increase in the amount owed to Non-Settling Participants above what is calculated in the Settlement, and will be entitled to the benefits of any decrease in the amount that it may be found to owe Non-Settling Participants.¹⁵

10. The Parties state that the Commission's approval of the Settlement will constitute the Commission's authorization and direction to the CAISO and CalPX to conform their books and records to reflect the distributions, offsets, adjustments, transfers, and status of accounts as provided for in the Settlement.¹⁶ The Parties also state that in prior orders approving settlements in the Commission Proceedings, the Commission has provided the

¹² *Id.*

¹³ *Id.*

¹⁴ Settlement and Release of Claims Agreement, General Terms and Conditions, section 8.1.

¹⁵ *See* Joint Explanatory Statement at 4.

¹⁶ Settlement and Release of Claims Agreement, General Terms and Conditions, section 6.1.

CAISO and CalPX with “hold harmless” assurances for the steps taken to implement those settlements.¹⁷ The Parties state that they do not oppose Commission action to provide similar assurances to the CAISO and CalPX with respect to the Settlement.¹⁸

11. Subject to certain limitations, the Parties state that the Settlement resolves all claims by the California Parties against Strategic relating to transactions in western energy markets during the Settlement Period for refunds, disgorgement of profits, or other remedies in the Commission proceedings.¹⁹ The Parties also state that the Settlement provides mutual release of claims for civil damages and equitable relief.²⁰ The Parties, therefore, request Commission approval of the Settlement.

II. Comments on the Settlement

12. Pursuant to Rules 602(d)(2) and 602(f) of the Commission’s Rules of Practice and Procedures, 18 C.F.R. §§ 385.602(d)(2) and 385.602(f) (2008), initial comments were due on or before May 20, 2008, and reply comments were due on or before May 30, 2008. CalPX and the CAISO filed timely initial comments. No reply comments were filed.

“Hold Harmless” Protection

13. In its initial comments, the CAISO states that it supports the general principle of settlement as embodied in the Settlement offered by the Parties. The CAISO states that approval of the Settlement will allow certain amounts of cash to flow sooner than would otherwise be the case and, in that respect, will benefit market participants. The CAISO also supports the inclusion in the Settlement of a duty to cooperate on the part of the Settling Parties.²¹ According to the CAISO, this duty to cooperate is essential so that the

¹⁷ See Joint Explanatory Statement at 13 (*citing San Diego Gas & Electric Company*, 119 FERC ¶ 61,151, at P 19 (2007) (approving hold harmless protection for the CAISO and CalPX in connection with the Portland General Electric Company settlement)).

¹⁸ *Id.*

¹⁹ *Id.* at 4.

²⁰ *Id.* at 12; *see also* Settlement and Release of Claims Agreement, General Terms and Conditions, section 7.1.1.

²¹ CAISO initial comments at 3 (*citing* Settlement and Release of Claims Agreement, General Terms and Conditions, section 6.4).

proper financial adjustments can be made in accordance with the Settlement.²² In its initial comments, CalPX takes no position in support of, or in opposition to, the Settlement.

14. Both CalPX and the CAISO note that, as with previous settlements approved by the Commission, the circumstances of this Settlement warrant hold harmless treatment for the CAISO and CalPX because they will implement a number of provisions of the Settlement, along with their directors, officers, employees and consultants. CalPX and the CAISO request that, in the order approving the Settlement, the Commission state that the CAISO and CalPX will be held harmless with respect to the settlement and accounting activities performed pursuant to the Settlement, and that neither the CAISO, CalPX, nor their directors, officers, employees or consultants, will be responsible for recovering any funds disbursed pursuant to the Settlement that are subsequently required to be repaid.²³ For these reasons, CalPX requests the following “hold harmless” language to be incorporated in 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.²⁴

15. CalPX states that this is the same hold harmless provision that the Commission approved in the Duke, Dynegy, Williams, Mirant, Reliant, APX, Enron, Portland General, El Paso Marketing, PacifiCorp, IDACORP, Conectiv, and Midway Sunset global settlements.²⁵

²² *Id.*

²³ CalPX initial comments at 2-4; CAISO initial comments at 3-7.

²⁴ CalPX initial comments at 3-4; *see also San Diego Gas & Electric Company, et al.*, 111 FERC ¶ 61,186, at P 15 (2005).

²⁵ CalPX initial comments at 3.

Commission Determination

16. The Parties do not oppose a “hold harmless” provision that is similar to provisions in other settlements involving the California Parties and approved by the Commission.²⁶ Consistent with this Commission precedent,²⁷ the Commission determines that CalPX and the CAISO will be held harmless for actions taken to implement this Settlement. This order will incorporate the “hold harmless” language requested by CalPX and set out above.

17. In conclusion, the Commission finds that the Settlement is fair and reasonable and in the public interest; it is hereby approved, 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 the Refund Proceeding or any other proceeding.

The Commission orders:

The Commission hereby approves the Settlement, as discussed in the body of this order.

By the Commission. Commissioner Spitzer not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁶ See Joint Explanatory Statement at 13.

²⁷ See, e.g., *San Diego Gas & Electric Company*, 109 FERC ¶ 61,071 (approving “hold harmless” language in the Dynegy settlement), *see also San Diego Gas & Electric Company*, 109 FERC ¶ 61,257 (2004) (approving “hold harmless” language in the Duke settlement), *reh’g denied*, 111 FERC ¶ 61,186 (2005).