

125 FERC ¶ 61,085
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, and Jon Wellinghoff.

San Diego Gas & Electric Company

v.

Docket No. EL00-95-216

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-201

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-040

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior and Practices in Western Markets

Docket No. IN03-10-042

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

Docket No. PA02-2-057

American Electric Power Service Corporation

Docket No. EL03-137-007

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

Docket No. EL03-180-036

California Independent System Operator Corporation

Docket No. ER03-746-008

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

v.

Docket No. EL02-71-012

British Columbia Power Exchange Corporation

City of Vernon, California

Docket No. EL00-105-011 and
ER00-2019-020

City of Vernon, California

Docket No. EL08-54-001

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued October 23, 2008)

1. In this order, the Commission approves an uncontested joint settlement by the City of Vernon (Vernon) and the California Parties¹ filed on July 16, 2008 in the above-captioned proceedings to resolve claims arising from events and transactions in California and western energy markets from January 1, 2000 through June 20, 2001 as they relate to Vernon² and concerning Vernon's transmission revenue requirement (TRR).³ The settlement consists of a "Joint Offer of Settlement," a "Joint Explanatory Statement," and a "Settlement and Release of Claims Agreement" (collectively, the Settlement).⁴
2. As discussed further below, the Commission approves the Settlement, finding it to be fair and reasonable and in the public interest.

¹ California Parties refers to Pacific Gas and Electric Company, San Diego Gas & Electric Company, Sothern California Edison Company, the People of the State of California, *ex rel.* Edmund G. Brown, Jr., Attorney General, and the California Public Utilities Commission. California Utilities refers to Pacific Gas and Electric Company, San Diego Gas and Electric Company and Southern California Edison Company.

² Vernon disclaims Commission jurisdiction over the settlement agreement, but the Parties have agreed to condition the agreement on securing Commission's approval to ensure the release of funds from the CAISO and CalPX and to ensure the Parties respective claims pending at the Commission are fully resolved.

³ Except as otherwise defined herein, the capitalized terms used herein shall have the meaning set forth in Article I of the Settlement Agreement.

⁴ In addition to Vernon and the California Parties, the Settlement applies to the California Department of Water Resources acting solely under the authority and powers created by Assembly Bill 1 of the First Extraordinary Session of 2001-2002, codified in Sections 80000 through 80270 of the California Water Code. Under the Settlement Agreement, the California Electricity Oversight Board is an Additional Settling Participant.

I. Background

3. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)⁵ to investigate, among other things, the justness and reasonableness of the rates of public utility sellers into the California Independent System Operator Corporation (CAISO) and California Power Exchange (CalPX) markets during a specific period⁶ (Docket Nos. EL00-95-000 and EL00-98-000). In 2002, the Commission directed Staff to commence a fact-finding investigation into allegations of manipulation of electric energy and natural gas prices in the west⁷ (Docket No. PA02-2-000). The Commission also directed Staff to commence a fact-finding investigation into possible manipulation of electric and natural gas prices⁸ (Docket No. IN03-10-000). The CAISO also filed a motion seeking Commission authorization to use a lower TRR in calculating its Transmission Access Charge, effective to January 1, 2001⁹ (Docket Nos. EL00-105-011 and ER00-2019-020).

II. Settlement

4. The Settlement was filed by the Parties pursuant to Rule 602 of the Commission's Rules of Practice and Procedure. The Parties note that they have executed the Settlement, and it became binding as of the Execution Date. Some of the operative provisions, however, only 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.¹⁰

5. The Parties state that the Settlement benefits customers by resolving claims for refunds and other remedies as between Vernon and the California Parties relating to Vernon's TRR and to Vernon's transactions in California and western energy markets

⁵ 16 U.S.C. § 824e (2006).

⁶ *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

⁷ *Order Directing Staff Investigation*, 98 FERC ¶ 61,165 (2002).

⁸ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

⁹ CAISO's November 13, 2007 Motion for Order Authoring Adjustment of Rates, Docket Nos. EL00-105-011 and ER00-2019-020.

¹⁰ Vernon and California Parties' July 16, 2008 Joint Explanatory Statement at 14 (Joint Explanatory Statement).

during the Settlement Period.¹¹ The Parties further 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 Vernon and Settling Participants, and protects the rights of Non-Settling Participants. 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 CAISO and CalPX markets in the 2000 and 2001 time period. The Parties, therefore, request Commission approval of the Settlement.

6. According to the Parties, upon Commission approval of the Settlement, CalPX will be allowed to release proceeds from Vernon's unpaid receivables from transactions through markets operated by CalPX and the CAISO.¹² A portion of the proceeds shall be transferred to the CAISO for distribution, pursuant to its tariff, in settlement of proceedings related to Vernon's TRR. Other portions of the proceeds will be transferred to escrow accounts to be established by the California Parties in settlement of claims related to events in the California and western energy markets during the years 2000 and 2001.¹³

7. The Parties state that the monetary consideration flowing from Vernon in the Settlement includes: (a) Vernon's CAISO and CalPX Receivables (i.e., Settling Supplier's Receivables) estimated to be \$5,056,989 as of June 30, 2008, and (b) the Estimated Interest on Receivables Amount of \$3,190,554 through June 30, 2008, to be

¹¹ Settlement Period refers to January 1, 2000 through June 20, 2001.

¹² Joint Explanatory Statement at 3. Vernon and California Parties' July 16, 2008 Joint Offer of Settlement at 3 (Joint Offer of Settlement).

¹³ Pursuant to Rule 602(b)(3), the California Parties and Vernon requested that the Commission consider this Joint Offer of Settlement, which addresses matters pending in multiple dockets, without referring the Joint Offer of Settlement to a presiding officer in the *Lockyer* proceeding. On July 21, 2008, the Chief Judge in the *Lockyer* proceedings issued an order waiving the requirement under Rule 602 that the presiding officer certify an Offer of Settlement to the Commission in a case set for hearing in order that the Commission consider the Settlement, which addresses matters pending in dockets not set for hearing, and hereby terminates settlement judge procedures as to Vernon. Order of Chief Judge Terminating Settlement Judge Procedures as to the City of Vernon, California, July 21, 2008, Docket No. EL02-71-004.

updated through and including the projected date of distribution.¹⁴ Under the Settlement, Vernon would also transfer to the California Parties Vernon's entitlement to refunds on purchases made in the western energy markets during the Settlement Period.

8. Under the Settlement, \$5,500,000 will be transferred to the CAISO for distribution consistent with the CAISO's Commission-approved tariff and in settlement of all issues pertaining to Vernon's TRR that are pending in the TRR Proceedings (Docket Nos. EL00-105 and ER00-2019).¹⁵

9. Also, according to the Parties, the Settlement provides for the release of \$540,000 from Vernon, identified as Settling Supplier's Interest Shortfall Estimate.¹⁶ The Parties also state the Settlement provides that the portion of the Transferred Receivables to be paid into the Settling Supplier Refund Escrow will be net of, among other things, accruals of the reserve for estimated Interest Shortfall on Refunds (\$223,863 as of June 30, 2008) and Settling Supplier's Interest Shortfall Estimate (\$540,000 as of June 30, 2008).¹⁷

10. According to the Parties, under the Settlement, the California Utilities assume, subject to specified limitations: (a) Vernon's obligations for true-ups of receivables and associated interest on the estimated amounts that have been assigned under the Settlement, (b) any refund amounts owed to Non-Settling Participants in the Refund Proceeding, (c) interest shortfall amounts allocated to Vernon by the Commission, and (d) any third-party refund offsets (Fuel Cost Allowance, Emissions Offset, and Cost Offset) owed by Vernon as determined by the Commission or a reviewing court.¹⁸

11. The Parties state that the Settlement permits, but does not require, "Participants" (i.e., entities that directly sold energy to or purchased energy from the CAISO and CalPX during the Settlement Period) to join Vernon and the California Parties in the Settlement as "Additional Settling Participants."¹⁹ With the exception of certain TRR claims, the Settling Parties assert that the rights of those parties electing not to join the Settlement, "Non-Settling Participants," are unaffected by the Settlement.

¹⁴ Joint Explanatory Statement at 3; Joint Offer of Settlement at 3.

¹⁵ Joint Offer of Settlement at 4.

¹⁶ *Id.*

¹⁷ *Id.* Vernon and California Parties' July 16, 2008 Settlement and Release of Claims Agreement at Ex. A.

¹⁸ *Id.* 4-5.

¹⁹ *Id.* at 5.

12. According to the Parties, subject to certain limitations, the Settlement provides for the release of all Settling Participants' claims against Vernon and certain of Vernon's claims against the Settling Participants for refunds, disgorgement of profits, or other monetary or non-monetary remedies in the above-captioned proceedings.²⁰ The Settlement also provides mutual releases of claims for civil damages and equitable relief. The Settlement provides that in the event the Commission has not issued an order on Vernon's Petition for Declaratory Order filed April 4, 2008 regarding proposed "interim" and "final" TRRs for Vernon prior to the date of the Commission Settlement Order, the Commission Settlement Order shall constitute the Commission's order granting such Petition for Declaratory Order. On July 2, 2008, the Commission issued an order granting Vernon's Petition for Declaratory Order.²¹

III. Comments on the Settlement

13. 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 August 5, 2008, and reply comments were due on or before August 15, 2008. The CAISO and CalPX filed timely initial comments, and Strategic Energy, LLC (Strategic) filed to support the Settlement.

A. Opting-in

14. On July 17, 2008 Strategic filed its support of the Settlement. Strategic stated in its filing that although it was not a signatory to the Settlement, it supported it and elected to become an Additional Settling Participant pursuant to Section 8.1 of Article VIII of the Settlement. As there has been no opposition to Strategic opting-in to the Settlement, pursuant to the terms of the Settlement, Strategic becomes an Additional Settling Participant under the terms of the Settlement.²²

B. "Hold Harmless" Protection

15. 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

²⁰ *Id.*

²¹ *City of Vernon, California*, 124 FERC ¶ 61,005 (2008).

²² Vernon and California Parties' July 16, 2008 Settlement and Release of Claims Agreement at Section 8.1.

also supports the inclusion in the Settlement of a duty to cooperate on the part of the Settling Parties. According to the CAISO, this duty to cooperate is essential so that the proper financial adjustments can be made in accordance with the Settlement. In its initial comments, CalPX takes no position in support of, or in opposition to, the Settlement.²³

16. 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.²⁴ 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.²⁵ 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.²⁶

²³ CalPX’s August 5, 2008 Comments at 1 (CalPX Comments).

²⁴ CAISO’s August 5, 2008 Comments at 6 (CAISO Comments); CalPX Comments at 2.

²⁵ CalPX’s Comments at 2-4; CAISO Comments at 4-7.

²⁶ CalPX’s Comments at 3-4; *see also San Diego Gas & Elec. Co.*, 111 FERC ¶ 61,186, at P 15 (2005).

17. 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, Midway Sunset, Grant County, Strategic Energy, Pinnacle West and Southern Cities global settlements.²⁷

Commission Determination

18. 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.²⁸ Consistent with this Commission precedent,²⁹ 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.

19. 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. Commissioners Spitzer and Moeller are not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁷ CalPX’s Comments at 3.

²⁸ See Joint Explanatory Statement at 13.

²⁹ See, e.g., *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,071 (approving “hold harmless” language in the Dynegy settlement), see also *San Diego Gas & Elec. Co.*, 109 FERC ¶ 61,257 (2004) (approving “hold harmless” language in the Duke settlement), *reh’g denied*, 111 FERC ¶ 61,186 (2005).