122 FERC ¶ 61,008
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services	Docket Nos. EL00-95-000
Investigation of Practices of the California Independent System Operator and the California Power Exchange	EL00-98-000
Fact-Finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices	PA02-2-000

ORDER APPROVING SETTLEMENT SUBJECT TO CONDITION

(Issued January 4, 2008)

1. In this order, the Commission approves, subject to condition, a joint settlement filed on October 9, 2007 in the above-captioned proceedings between Conectiv Energy Supply, Inc. (Conectiv) and the California Parties[1] (the Parties) resolving claims arising from events and transactions in western electricity markets during the January 1, 2000 through June 20, 2001 (Settlement Period) as

[1] California Parties consists of Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas and Electric Company, the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General, the California Electricity Oversight Board, 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.

they relate to Conectiv. 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 October 9, 2007, 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 declare, further, that the Settlement reaches a fair and reasonable resolution of issues between Conectiv 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 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.

[2] 18 C.F.R. § 385.602 (2007).

[3] *See* Joint Offer of Settlement, at p. 7, Settlement and Release of Claims Agreement, Cover Sheet, at p. 1, and General Terms and Conditions, section 1.29.

[4] *See* Joint Offer of Settlement, at p. 7, and Settlement and Release of Claims Agreement, 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., Conectiv, 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 1.75, 1.51, and 8.1, respectively.

[6] *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).

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

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 of manipulation of electric energy and natural gas prices in the west (Docket No. PA02-2-000). This Settlement results from a series of orders issued in these proceedings.

6. According to the Parties, the Settlement filed with the Commission on October 9, 2007 resolves all claims or rights to remedies stemming from the captioned Commission proceedings between Conectiv and the California Parties. The Parties state that, upon Commission approval of the Settlement, Conectiv will allow CalPX to release proceeds from Conectiv's unpaid receivables account from transactions through markets operated by CalPX and CAISO into an escrow account established by the California Parties.[8] The Parties state that the proceeds will be distributed from the escrow account to each of the Settling Participants and/or held in the escrow account or a successor trust account on behalf of any Non-Settling Participants.

7. The Parties declare that the total monetary consideration to be paid by Conectiv is $689,792, including interest accrued at the Commission's interest rate through June 30, 2007, and is comprised of a principal settlement amount of $480,859 plus estimated interest on refunds of $208,933. The Parties note that an interest shortfall on refunds reserve in the amount of $62,680 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 the reserve for estimated interest shortfall on refunds through the projected date of distribution to the escrow account. The Parties state, further, that the Settlement provides for true-up of interest payments pursuant to further Commission orders on the calculation and allocation of interest and the interest shortfall.[9]

---

[7] 16 U.S.C. § 824e.

[8] *See* Allocation Matrix, Exhibit A to Settlement Agreement Cover Sheet.

[9] *See* Joint Explanatory Statement at p. 3.

8. The Parties declare that Conectiv's receivables, including interest, remaining after assignment of the transferred receivables,[10] minus a $1,000 retained amount estimate and a $25,000 settling supplier's interest shortfall estimate, will be distributed in cash to Conectiv. According to the Parties, these amounts, including accrued interest, will be released to Conectiv to the extent those amounts are not needed to satisfy Conectiv's obligations under further Commission orders.[11] The Parties note that the Settlement provides that, in the event the amounts calculated in this Settlement as Conectiv's receivables, interest shortfall obligation, and offsets are modified by the Commission, Conectiv will be responsible for paying any increase in the amount that it owes and will be entitled to receive the benefits of any decrease in the amount that it owes.[12]

9. According to the Parties, 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 time period, to join Conectiv 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. The Parties state, further, that Conectiv 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.

10. Subject to certain limitations, the Parties state that the Settlement provides for the release of all Settling Participants' claims against Conectiv and all Conectiv's claims against the Settling Participants for refunds, disgorgement of profits, or other monetary or non-monetary remedies in the Commission's proceedings and other specified proceedings. The Parties also state that the Settlement provides mutual releases of claims for civil damages and equitable relief. The Parties, therefore, request Commission approval of the Settlement.

---

[10] According to the Parties, this amount is $689,792 as adjusted for the additional accrual of interest at the Commission's interest rate through the projected date of distribution of the escrow account.

[11] *See* Joint Explanatory Statement, at p. 3.

[12] *Id.*

II. Comments on the Settlement

11. 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) (2007), initial comments were due on or before October 29, 2007, and reply comments were due on or before November 8, 2007. PacifiCorp and Strategic Energy, LLC filed motions to opt-in to the Settlement. PacifiCorp and CalPX filed initial comments. The California Parties filed reply comments.

A. Cross Reference to Section 7.4.8

12. In its initial comments, PacifiCorp takes no position in support of, or in opposition to, the Settlement. PacifiCorp points out, however, that, although there is a reference to section 7.4.8 in section 7.1.2 of the Settlement, the Settlement does not include a section 7.4.8. As a result, PacifiCorp states that it is unclear what conditions the Settlement places on the rights and obligations of those parties electing to opt-in to the Settlement as Additional Settling Participants. PacifiCorp, therefore, requests the Parties and/or the Commission to clarify this ambiguity.

13. In their reply comments, the California Parties state that section 7.4.8 was inadvertently omitted from the Settlement. The California Parties request that the Commission approve the Settlement subject to the condition that the Parties make a compliance filing revising the Settlement to include language in section 7.4.8 similar to the language included in the PacifiCorp and PPM Energy settlements.[13]

Commission Determination

14. The California Parties declare that, if section 7.4.8 were included in this Settlement, it would state:

> 7.4.8 The releases set forth in this Article VII do not constitute a waiver or release of any claims that any Additional Settling Participant has or may claim to have against Settling Participant has or may claim to have against Settling Supplier in the EL01-10 Proceeding, or that Settling Supplier has or may claim to have

---

[13] *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*,, 119 FERC ¶ 61,296 (2007) (order approving settlement between PacifiCorp and the California Parties), and *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 121 FERC ¶ 61,014 (2007) (order approving and modifying settlement between PPM Energy and the California Parties).

> against any Additional Settling Participant in the EL01-10 Proceeding.[14]

The California Parties state that this language is substantively the same as section 7.4.8 in settlements approved for PacifiCorp and PPM Energy. The California Parties propose including the similar section 7.4.8 language in this Settlement. As this proposal is unopposed and as the Commission has approved two other settlements with a similar provision, the Commission directs the Parties to file a revised Settlement Agreement including a section 7.4.8 similar to the section 7.4.8 approved by the Commission in the PacifiCorp and PPM Energy, Inc. settlements in a compliance filing to be made within 30 days of the date of this order.

B. "Hold Harmless" Protection and Additional Accounting Credits Provision for CalPX

15. CalPX's initial comments (which neither support nor oppose the Settlement) seek clarification that the accounting credit that CAISO is to provide CalPX under the Settlement, in return for CalPX paying out Conectiv's receivables in the CAISO markets, should not be reduced if the final Conectiv receivables are less than what was calculated under the Settlement or if Conectiv ultimately owes amounts to the Non-Settling Participants. CalPX also points out that Conectiv was not a participant in its markets. CalPX also asks that the Commission determine that CalPX will be held harmless for implementing the Settlement, consistent with provisions in previous Commission orders.

16. In response to CalPX's concern about a "hold harmless" provision, the California Parties state that, as noted in their Joint Explanatory Statement, the Parties to this Settlement do not oppose a "hold harmless" assurance to CalPX for the steps taken to implement the Settlement similar to assurances provided in other settlements.[15] With respect to CalPX's concern about potential shortfalls, the California Parties assert that the Commission need not address additional, hypothetical concerns vis-à-vis accounting credits because the Settlement already

---

[14] *See* California Parties' Reply Comments.

[15] *Citing San Diego Gas & Electric Company*, 119 FERC ¶ 61,151 at P 17-19 (2007) (approving hold harmless protection for the CAISO and CalPX in connection with the Portland General Electric Company settlement). *See* Joint Explanatory Statement, at p. 12.

provides that Conectiv will be responsible for any receivables shortfall and any refund payments.[16]

Commission Determination

17. We note that the Parties agreed to a "hold harmless" provision similar to the provision included in similar settlements the California Parties agreed to with other parties approved by the Commission in connection with these proceedings.[17] Consistent with Commission precedent,[18] the Commission determines that CalPX will be held harmless for actions taken to implement this Settlement. This order will incorporate the "hold harmless" language requested by CalPX and approved by the Commission in the order approving a settlement with Portland General Electric Company issued on May 12, 2007.[19]

18. The Commission finds CalPX's concern over its potential liability for shortfalls or funds owed to Non-Settling Participants to be misplaced. The Settlement is clear that, in the event that a Commission "Receivables Determination" is less than $480,859, "[Conectiv] shall pay any remaining shortfall in cash to the [CA]ISO or [Cal]PX, as applicable."[20] Likewise, the Settlement is clear that Conectiv will be responsible for "remedies payable by [Conectiv] to Non-Settling Participants"[21] should the funds allocated to Conectiv's Escrow for Non-Settling Participants prove insufficient. The Settlement does not contemplate allocating such shortfalls to any party other than Conectiv.

19. Further, the Settlement provides that CalPX and CAISO "shall reflect on their books and records *all* distributions from the [Cal]PX Settlement Clearing

---

[16] *Citing* Settlement and Release Claims Agreement, sections 5.6.1 and 5.5, respectively.

[17] *See* Joint Explanatory Statement, at 12.

[18] *See, e.g., San Diego Gas & Electric Company*, 109 FERC ¶ 61071 (2004) (approving "hold harmless" language in the Dynegy settlement), and *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).

[19] *See supra* note 9.

[20] *See* Settlement section 5.6.1.

[21] *Id.* at section 7.1.4.

Account to [Conectiv] and [Conectiv's] Refund Escrow that represent payment of amounts owed by the [CA]ISO to [Conectiv] for [Conectiv's] Receivables . . . ."(emphasis added).[22] This language pertains to accounting activities for *all* of CalPX's distributions on behalf of CAISO, not some distributions, or all distributions unless there is a shortfall. We do not interpret the Settlement to allow the CAISO to alter CalPX's accounting credits based on Conectiv's inability to pay potential shortfalls.

20. Because Conectiv is liable for the particular shortfalls about which CalPX is concerned, and the Settlement language does not state or even suggest that a reduction to CalPX's accounting credits would be appropriate (provided CalPX makes the requisite payouts stipulated under the Settlement), the Commission finds that CalPX's accounting credits shall not be reduced should Conectiv fail to make up the shortfalls for which it is liable.

21. In conclusion, the Commission finds that the Settlement is fair and reasonable and in the public interest; it is hereby approved, subject to the condition regarding section 7.4.8, 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.

<u>The Commission orders</u>:

(A) The Commission hereby approves the Settlement, subject to condition, as discussed in the body of this order.

(B) The Parties are directed to file a compliance filing within 30 days of the date of this order, as directed in the body of this order.

By the Commission. Commissioner Spitzer not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

[22] *Id.* at section 6.1.2.