

119 FERC ¶ 61,151
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 Docket No. EL00-95-000

v.

Sellers of Energy and Ancillary Services

Investigation of Practices of the California Independent System Operator and the California Power Exchange Docket No. EL00-98-000

Puget Sound Energy, Inc. Docket No. EL01-10-000

v.

Sellers of Energy and/or Capacity

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

Portland General Electric Company Docket No. EL03-165-000

ORDER APPROVING SETTLEMENT

(Issued May 17, 2007)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement and Release of Claims Agreement (collectively, the Settlement) filed on March 12, 2007 in the above-captioned proceedings by Portland General Electric Company (PGE) and the

California Parties¹ (collectively, the Parties). The Settlement consists of a “Joint Explanatory Statement” and a “Settlement and Release of Claims Agreement”² among PGE and the California Parties, filed pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.³ The Settlement resolves matters and claims in the above-captioned proceedings (*i.e.*, Refund Proceedings) related to PGE and arising from events and transactions in the Western Energy Markets⁴ during the period January 1, 2000 through June 20, 2001 (Settlement Period).

2. The Parties state that the Settlement reaches a fair and reasonable resolution of issues between Portland and Settling Participants.⁵ Therefore, the Parties request that the Commission approve the Settlement. In this order, the Commission approves the Settlement, finding it to be fair and reasonable and in the public interest.

¹ The 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, 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, the California Electricity Oversight Board, and the California Public Utilities Commission.

² The Settlement and Release of Claims Agreement includes: 1) a Cover Sheet that specifies certain terms and includes Exhibit A (Allocation Matrix) and Exhibit B (Deemed Distribution Participants); and 2) General Terms and Conditions.

³ 18 C.F.R. § 385.602 (2006).

⁴ The Settlement defines the Western Energy Markets as those markets for electric capacity, energy, and/or ancillary services in the territories covered by the Western Electricity Coordinating Council, including the California markets of the California Independent System Operator, Inc. (CAISO) and the California Power Exchange (CalPX). Settlement sections 1.81 and 1.7.

⁵ Settling Participants include the California Parties and Additional Settling Participants. Settlement section 1.69. Additional Settling Participants are those Participants (*i.e.* entities that directly sold energy to or purchased energy from the CAISO or the CalPX during part or all of the Settlement Period) that have elected to join the Settlement in accordance with Settlement article VIII. Settlement sections 1.1 and 1.47.

I. Background and Description of the Settlement

3. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA) to investigate, among other things, the justness and reasonableness of rates of public utility sellers into the CAISO and CalPX markets for a specific period (Docket Nos. EL00-95-000 and EL00-98-000). Also in 2000, the Commission ordered an evidentiary hearing to help determine whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest for a specific period (Docket No. EL01-10-000). 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). In 2003, the Commission directed its Office of Market Oversight and Investigation (OMOI) to conduct an investigation to determine whether individual market participants may have violated a prohibition against anomalous market behavior (Docket No. IN03-10-000). Also in 2003, the Commission issued an order directing 43 entities, including PGE, to show cause why they had not participated in activities that constitute gaming and/or anomalous market behavior in violation of the CAISO and CalPX tariffs (see Docket Nos. EL03-137-000, *et al.* and EL03-165-000; this proceeding is known as the Gaming/Partnership Proceeding). The Settlement is meant to resolve various PGE-related claims stemming from these proceedings.

4. Settlement article VIII provides the terms by which Participants may elect to participate in the Settlement. Participants are entities that directly sold energy to or purchased energy from the CAISO or the CalPX during part or all of the Settlement Period. The Parties state that the Settlement permits, but does not require, Participants to join the Settlement as Additional Settling Participants.⁶ Participants that elect to join the Settlement shall be “bound by its terms.”⁷ Participants that do not elect to join the Settlement are deemed Non-Settling Participants⁸ and their rights are not affected by the Settlement. Settlement section 3.2 specifically provides for the protection of Non-Settling Participants’ rights, as well as the Parties’ rights with regard to Non-Settling Participants, stating that “no claims addressed in this Agreement shall be deemed settled as to Non-Settling Participants, and . . . the Parties shall be deemed to retain any and all claims and defenses they have or may claim to have against Non-Settling Participants.”

⁶ See *supra* n.5.

⁷ Settlement section 8.1.

⁸ *Id.* at section 1.46.

5. Pursuant to the Settlement's monetary consideration provisions in Settlement sections 4.1 – 4.1.12, the “Settling Supplier” (*i.e.*, PGE) will provide Settlement proceeds in the amount of \$65,365,081.⁹ This amount includes a principal settlement amount of \$48,400,000 plus estimated interest on refunds of \$16,965,081. PGE is receiving a credit of \$6,100,000 for a payment it made to certain of the California Parties pursuant to a settlement in the Gaming/Partnership Proceeding,¹⁰ thus reducing the funds to be paid to the California Parties under the Settlement by the same amount.¹¹ As of the Settlement's effective date, PGE will assign to the California Parties \$59,265,081 (*i.e.*, \$65,365,081 – \$6,100,000), which the CalPX will pay out of its Settlement Clearing Account and into the Settling Supplier Refund Escrow (an account to be established by the California Parties pursuant to Settlement section 4.1.4). The total amount that the CalPX will actually transfer to the Settling Supplier Refund Escrow is \$59,265,081 minus all Deemed Distributions under the Settlement,¹² minus the total estimated interest shortfall on refunds,¹³ and plus the amounts owed by Participants with negative allocations under the Settlement.¹⁴

⁹ See Settlement section 4.1 and Settlement Cover Sheet section 4.1.

¹⁰ See *Portland General Electric Co. and Enron Power Marketing, Inc.*, 105 FERC ¶ 61,302 (2003) (Commission approving settlement submitted to Commission on September 26, 2003 in Docket Nos. EL02-114-000 and EL02-115-001) (Gaming Settlement).

¹¹ See Settlement section 4.4; *see also* Allocation Matrix, Settlement Cover Sheet Exhibit A.

¹² A Deemed Distribution is an amount credited to a Deemed Distribution Participant as an offset to amounts owed by that Participant to the CalPX and/or the CAISO. Settlement section 1.17. The Deemed Distribution Participants for the Settlement are identified in Settlement Cover Sheet Exhibit B.

¹³ Settlement Cover Sheet section 4.1.1.4 indicates that the estimated interest shortfall on refunds is \$3,433,290. The interest shortfall represents the difference between the interest actually earned on the funds held by the CalPX and/or the CAISO and the interest that would be earned through application of the Commission's interest rate. Settlement section 1.39.

¹⁴ Settlement section 4.1.1.4. It does not appear that any Participants listed in the Allocation Matrix have negative allocations.

6. Settlement article V provides for the disposition and allocation of Settlement proceeds. The Allocation Matrix shows funds PGE already paid pursuant to the settlement in the Gaming/Partnership Proceeding, as well as the various allocation percentages of Settlement proceeds that are applicable to each Participant.¹⁵ Settling Participants that have net amounts outstanding to the CAISO or the CalPX are considered Deemed Distribution Participants and will receive their share of the Settlement proceeds in the form of credits against such amounts. Settling Participants classified as Net Refund Recipients will receive their allocated distributions in the form of cash payments from the Settling Supplier Refund Escrow.

7. Article VI of the Settlement, which addresses CalPX and CAISO accounting, provides authorization for the CalPX and the CAISO to implement the terms of the Settlement, and the steps they shall take to do so. These steps include, *e.g.*, conforming their books and records to reflect the distributions, offsets, transfers, adjustments, and status of accounts provided for in the Settlement; calculating various refund and interest amounts; and their accounting treatment of distributions under the Settlement.¹⁶

8. Pursuant to section 4.1.7 of the Settlement, PGE shall opt into each subsequent and substantially similar settlement reached by the California Parties with other suppliers. PGE shall also attempt to opt into substantially similar settlements reached by the California Parties prior to the Settlement's effective date, with the exception of the IDACORP settlement.

9. Settlement article VII provides for releases and waivers such as: (1) all claims between PGE and the California Parties shall be deemed settled as related to transactions in the Western Energy Markets during the Settlement Period, and for the "*Lockyer v. FERC Remand*,"¹⁷ the "*BPA v. FERC Remand*,"¹⁸ and the "*CPUC v. FERC Remand*"¹⁹ (collectively, Remand Cases);²⁰ (2) PGE, the California Parties, and Additional Settling

¹⁵ See Settlement sections 1.3 and 5.2.

¹⁶ See Settlement sections 6.1.1-6.1.4.

¹⁷ *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

¹⁸ *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005).

¹⁹ *California Public Utilities Commission v. FERC*, 474 F.3d 587 (9th Cir. 2006).

²⁰ *Id.* at section 7.1.1; see also, respectively, Settlement sections 1.42, 1.4, and 1.16.

Participants will not contest the amount of refund liability and/or offsets or other relief PGE incurs in the proceedings in Docket Nos. EL00-95-000, *et al.*, and EL01-10-000, or the Remand Cases;²¹ and (3) PGE and the California Parties agree to mutually release each other for the Settlement Period from certain claims before the Commission and/or under the FPA, and from certain past, existing and future claims for civil damages and/or equitable relief.²²

10. The Parties state that approval of the Settlement will avoid further litigation, provide monetary consideration, eliminate regulatory uncertainty, and enhance financial certainty. They state that the Settlement reaches a fair and reasonable resolution between Portland and Settling Participants. Accordingly, the Parties request that the Commission approve the Settlement.

II. Comments on the Settlement

11. Initial comments on the Settlement were due on April 2, 2007 and reply comments were due on April 11, 2007. The CAISO filed initial comments in support of the Settlement and the CalPX filed initial comments neither supporting nor opposing the Settlement. Aquila Merchant Services, Inc. (Aquila) filed initial comments opposing the Settlement and requesting modifications. In response, the Parties filed joint reply comments.

A. “Hold Harmless” Protection for the CalPX and the CAISO

12. In its comments, the CAISO states that, as with previous settlements filed and approved in the Refund Proceeding, the circumstances of the Settlement make it necessary to hold harmless the market operators (the CAISO and the CalPX) tasked with implementing the Settlement. Therefore, the CAISO contends, the Commission should state in any order approving the Settlement that the CAISO, along with its directors, officers, employees and consultants, will be held harmless with respect to the accounting activities it will have to perform to implement the Settlement and will not be responsible for recovering any funds dispersed pursuant to the Settlement should repayment of such funds be required subsequently.

13. The CAISO avers that the factors that justified holding the CAISO and the CalPX harmless with respect to other settlements (*e.g.*, the Duke, Williams, Mirant, Enron, PS Colorado, Reliant, APX, and IDACORP settlements) apply equally to the instant

²¹ *Id.* at section 7.1.2.

²² *Id.* at sections 7.2-7.3.

Settlement. As with previous settlements, the CAISO states, the flow of funds pursuant to the instant Settlement will require unprecedented accounting adjustments by the CAISO, which will not be made under the terms of its tariff, but rather under the Settlement terms. The CAISO contends that a market participant might bring suit against the CAISO and its agents claiming that it did not make the appropriate accounting adjustments and as a result did not arrive at the appropriate amount of funds owing to that market participant. In addition, the CAISO states that, because the Settlement has been filed prior to final orders in the Refund Proceeding, PGE and the California Parties' estimates of payables and receivables may not be accurate, which could result in actions against the CAISO due to unforeseen impacts on market participants. The CAISO states that, as the volume of settlements increases in the Refund Proceeding, the task of implementing them will become more complicated and the possibility of an action against one of the market operators will also increase. Further, the CAISO posits that, as a non-profit public benefit corporation, it would not be reasonable to subject its officers, employees and consultants to suits claiming individual liability for engaging in the accounting necessary to implement the Settlement.

14. For these reasons, the CAISO states that it is important that the Commission hold harmless the CAISO, its directors, officers, employees and consultants, for implementation of this Settlement. Finally, the CAISO notes that PGE and the California Parties have stated in their Joint Explanatory Statement that they do not oppose the Commission adopting hold harmless provisions for the CAISO and the CalPX.²³

15. Likewise, the CalPX requests in its initial comments that the Commission incorporate in any order approving the Settlement a hold harmless provision similar to those the Commission has approved in previous settlements. The CalPX states that it and the CAISO each requested to be held harmless in connection with implementing the prior Williams, Duke, Dynegy, Mirant, Reliant, PS Colorado, IDACORP, and APX settlements and that the Commission granted those requests. Further, the CalPX points out that the California Parties either supported or did not oppose the previous requests for hold harmless protection, and similarly, the parties to this Settlement have stated that they do not oppose such protection.²⁴ In support of its position, the CalPX cites the

²³ CAISO April 2, 2007 Initial Comments at 7, *citing* Joint Explanatory Statement at 16.

²⁴ CalPX April 2, 2007 Initial Comments at 2, *citing* Joint Explanatory Statement at 16.

Commission order approving the Williams settlement, 111 FERC ¶ 61,186 (2005), in which the Commission found that the CalPX and the CAISO provided compelling justification as to why they should be held harmless.

16. The CalPX reasons that a hold harmless provision is appropriate here because: (1) the Settlement requires it to pay funds from its Settlement Clearing Account; (2) the CalPX will be required to make certain accounting entries; (3) the Parties are to supply the amounts to be paid out under the Settlement; (4) the CalPX is required to pay out interest on refund balance calculations that are not final; and (5) PGE's final market obligations have not been determined.

17. The 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.²⁵

The CalPX states that this is the same hold harmless provision that the Commission approved in the Duke, Dynegy, Williams, Mirant, Reliant, APX and IDACORP global settlements.

18. In their joint reply comments, PGE and the California Parties affirm the position taken in their Joint Explanatory Statement that they would not oppose a hold harmless provision for the CalPX and the CAISO.

²⁵ CalPX Initial Comments at 3-4.

Commission Determination

19. The Commission finds that both the CAISO and the CalPX have provided the Commission with compelling justification as to why they should be held harmless, along with their officers, directors, employees, and consultants, for the steps taken to implement the Settlement. Further, the parties to the Settlement agree to a hold harmless provision.²⁶ Therefore, consistent with Commission precedent,²⁷ the Commission determines that the CalPX and the CAISO shall be held harmless for actions taken to implement the Settlement and this order will incorporate the “hold harmless” language requested by the CalPX and set out above. Further, the CAISO will not be responsible for recovering any funds dispersed pursuant to the Settlement that are subsequently required to be repaid.

B. Aquila’s Status as a Deemed Distribution Participant

20. In its initial comments, Aquila states that it opposes the Settlement as unjust and unduly discriminatory to the extent that the Settlement categorizes Aquila as a Deemed Distribution Participant. Aquila explains that, under the terms of the Settlement, Additional Settling Participants that have been designated as Deemed Distribution Participants are to receive their share of Settlement proceeds in the form of credits against amounts owed to the CalPX or the CAISO.²⁸ According to Aquila, PGE and the California Parties have not provided support for the allegation that Aquila has net amounts outstanding to the CalPX or the CAISO. Aquila also avers that “it has been established that [Aquila] was a net seller in the Commission-defined ‘refund period’ (October 2, 2000 through June 20, 2001).”²⁹ Aquila concedes that, pursuant to the holding of the United States Court of Appeals for the Ninth Circuit in *Public Utilities Comm’n of State of Cal v. F.E.R.C.*, 462 F.3d 1027 (9th Cir. 2006), the Commission has the authority to remedy tariff violations that may have occurred prior to October 2, 2000, but that neither the Commission nor any adjudicatory body has found that Aquila

²⁶ See Joint Explanatory Statement at 16.

²⁷ See, e.g., *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,071 (2004) (approving hold harmless language in the Dynegy settlement), and *San Diego Gas & Elec., et al.*, 109 FERC ¶ 61,257 (2004) (approving hold harmless language in the Duke settlement), *reh’g denied*, 111 FERC ¶ 61,186 (2005).

²⁸ Aquila April 2, 2007 Initial Comments at 2, *citing* Settlement section 5.2.2.

²⁹ *Id.* at 2.

engaged in tariff violations. For the foregoing reasons, Aquila requests that the Commission modify the Settlement to remove its designation as a Deemed Distribution Participant.

21. In their joint reply comments, PGE and the California Parties state that Aquila's comments should be dismissed. They first note that Aquila is not required to join the Settlement, and if Aquila chooses not to opt in then its rights are fully protected and will suffer no adverse impacts.³⁰ PGE and the California Parties next contend that the Commission has previously addressed the issue raised by Aquila in an order approving a similar settlement between Reliant and the California Parties—*San Diego Gas & Electric Co. v. Sellers of Ancillary Serv.*, 113 FERC ¶ 61,308 (2005) (Reliant Settlement Order). PGE and the California Parties state that, in the Reliant Settlement Order, the Commission rejected Port of Seattle's complaints about that settlement because Port of Seattle had the option not to join it; the Commission found no genuine issues of material fact; and that the same result is required here.³¹

22. PGE and the California Parties aver that Aquila is incorrect in claiming that it has been improperly identified as a Deemed Distribution Participant. They state that the Settlement addresses and resolves issues regarding transactions in the CalPX and the CAISO markets over a greater time period than the Refund Period,³² and that based on the entire Settlement Period and the updated data from the CalPX and the CAISO, the California Parties determined that eight entities, including Aquila, should be Deemed Distribution Participants. Finally, PGE and the California Parties contend that the Settlement is "uncontested as a matter of law" because, by not including an affidavit to support its claim, Aquila's comments do not raise a genuine issue of material fact.³³

³⁰ PGE and California Parties April 11, 2007 Joint Reply Comments at 4, *citing* Settlement section 11.11.

³¹ *Id.* at 4, *citing* Reliant Settlement Order, 113 FERC ¶ 61,308 (2005), *order denying reh'g*, 115 FERC ¶ 61,271, at PP 16-18, 24 (2006).

³² The Refund Period extends from October 2, 2000 through June 20, 2001, while the Settlement Period extends from January 1, 2000 through June 20, 2001 (*i.e.*, for an additional nine months).

³³ *See* PGE and California Parties Joint Reply Comments at 5-6, and n.9.

Commission Determination

23. The Commission will not modify the Settlement to remove Aquila's designation as a Deemed Distribution Participant. Aquila has not supplied sufficient facts to support its contention that it does not owe funds to the CAISO and/or the CalPX for the Settlement Period, rather than the Refund Period. Nor will Aquila suffer harm by remaining a Deemed Distribution Participant; clearly, the Settlement does not resolve anything as to Aquila if it does not opt into the Settlement, and Aquila retains the ability to make a showing to the Commission that it does not have net amounts outstanding to the CalPX or the CAISO for the Settlement Period. The specific terms of the Settlement make clear that, as to Non-Settling Participants, claims addressed in the Settlement shall not be deemed settled. For the foregoing reasons, at this time the Commission will not modify the Settlement as Aquila has requested.

24. The Commission finds that the Settlement is fair and reasonable and in the public interest; it is hereby approved. 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.