

123 FERC ¶ 61,244
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

v.

Docket No. EL00-95-211

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-196

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-035

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. IN03-10-037

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

Docket No. PA02-2-052

City of Azusa, California

Docket No. EL03-146-004

ORDER APPROVING SETTLEMENT SUBJECT TO CONDITION

(Issued June 4, 2008)

1. In this order, the Commission approves, subject to condition, a joint settlement filed on February 29, 2008 in the above-captioned proceedings between the City of

Azusa, California (Azusa) and the California Parties¹ (the Parties) resolving claims arising from events and transactions in western electricity markets during the period from January 1, 2000 through June 20, 2001 (Settlement Period) as they may relate to Azusa. 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 February 21, 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 Azusa 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

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 Electricity Oversight Board and 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).

² 18 C.F.R. § 385.602 (2007).

³ *See* Joint Explanatory Statement at 8, Settlement and Release of Claims Agreement, Cover Sheet at 1, and General Terms and Conditions, section 1.29.

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., Azusa, 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, 1.50, and 8.1, respectively. *See also* Joint Explanatory Statement at 4.

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 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 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 Azusa and the California Parties. The Parties state that, upon Commission approval of the Settlement, Azusa will allow CalPX to release \$370,000 to an escrow account to be established by the California Parties, called the Settling Supplier Refund Escrow. This amount represents Azusa's estimated unpaid receivables from transactions that took place in markets operated by CalPX and CAISO, Azusa's estimated entitlement to refunds from other sellers, and an amount representing estimated accrued interest.⁸

7. In addition, the Parties state that Azusa will make a cash payment of \$485,000. The cash payment and the \$370,000 released by the CalPX results in a total consideration by Azusa of \$855,000. All of this consideration will be held in the Settling Supplier Refund Escrow account from which allocations will be made to Settling Participants. The Settlement also provides for a cash payment by Azusa of \$50,000, identified as Settling Supplier's Interest Shortfall Amount, to a California Litigation Escrow to be established by the California Parties. The Parties also state that Azusa shall be entitled,

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)).

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.

to the same extent as entities that are not within the scope of section 201(f) of the FPA,⁹ to refunds, interest, credits, and other payments in the Commission proceedings from other sellers, other than CERS.¹⁰

8. The Parties state that except for any interest shortfall, Azusa is responsible for any true-ups of receivables and interest on the estimated amounts that have been assigned under the Settlement. The Parties also declare that Azusa will be responsible for refund “offsets” allocated to Azusa as a result of the Commission proceedings in Docket Nos. EL00-95-000 and EL00-98-000 (EL00-95 Proceeding),¹¹ up to an amount not to exceed \$150,000, inclusive of interest. The Parties also state that the California Parties will be responsible for “offsets” and associated interest to the extent the total exceeds \$150,000. Under the Settlement, Azusa will waive its right to refunds on account of sales by CERS into the CAISO and CalPX markets. The Parties state that Azusa’s obligation to Settling Participants for any interest shortfall on Settling Supplier refunds or on Settling Supplier receivables is fully satisfied by the payment of the Settling Supplier’s interest shortfall amount.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 Period, to join Azusa and the California Parties in the Settlement as “Additional Settling Participants.”¹³ 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 Commission approval of this Settlement.¹⁴

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

⁹ 16 U.S.C. § 824(f) (2000).

¹⁰ Joint Explanatory Statement at 3.

¹¹ Section 1.24 of the Settlement defines the EL00-95 Proceeding as “the FERC proceeding conducted in Docket Nos. EL00-95, *et al.* and EL00-98, *et al.* and related appeals of orders in that proceeding and any proceedings upon remand.”

¹² Joint Explanatory Statement at 3.

¹³ *Id.* at 3-4.

¹⁴ *Id.* at 10; *see also* Settlement and Release of Claims Agreement, General Terms and Conditions, section 8.1.

accounts as provided for in the Settlement.¹⁵ The Parties also state that in prior orders approving settlements in the Commission Proceedings, the Commission has provided the CAISO and CalPX with “hold harmless” assurances for the steps taken to implement those settlements.¹⁶ The Parties state that they do not oppose Commission action to provide similar assurances to the CAISO and CalPX with respect to the Settlement.

11. Subject to certain limitations, the Parties state that the Settlement resolves all claims by the California Parties against Azusa relating to transactions in western energy markets during the Settlement Period for refunds, disgorgement of profits, or other remedies in the Commission proceedings. The Parties also state that the Settlement provides for mutual releases of claims for civil damages and equitable relief.¹⁷ 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) (2007), initial comments were due on or before March 20, 2008, and reply comments were due on or before March 31, 2008. CalPX, CAISO, and Constellation NewEnergy, Inc. (NewEnergy) filed timely initial comments. The Parties filed reply comments.

A. Section 7.4.8

13. In its initial comments, NewEnergy states that it has generally opted into the settlements that the California Parties have reached in Docket Nos. EL00-95, *et al.*, with other sellers, and it contemplates that it would opt-into the Azusa settlement pursuant to section 8.1 of the Settlement and become an Additional Settling Participant. However, NewEnergy states section 7.4.8 of the Settlement should be revised to clarify that

¹⁵ Settlement and Release of Claims Agreement, General Terms and Conditions, section at 6.1.

¹⁶ Joint Explanatory Statement at 14 (citing *San Diego Gas & Electric Company*, 119 FERC ¶ 61,151, at P 19 (2007)).

¹⁷ *Id.* at 13-14; *see also* Settlement and Release of Claims Agreement, General Terms and Conditions, section at 7.1.1.

Additional Settling Participants retain all rights in Docket No. EL03-54.¹⁸ NewEnergy states that it has a substantial interest in the outcome of Docket No. EL03-54 and would not be able to participate in the Settlement if its rights in Docket No. EL03-54 would in any manner be compromised or affected by opting into the Settlement.

14. In their reply comments, the Parties state that they do not intend to diminish the rights of parties in Docket No. EL03-54 who become Additional Settling Participants. The Parties state that they believe the language of section 7.4.8 is sufficiently clear that the rights of Additional Settling Participants in Docket No. EL03-54 are not diminished, thus they do not believe that any change to the language of section 7.4.8 is needed. However, they state that if the Commission agrees with NewEnergy that section 7.4.8 is unclear as to the rights of Additional Settling Participants, the Parties would have no objection to the Commission ordering the modification to that section requested by NewEnergy in its initial comments.¹⁹

Commission Determination

15. Section 7.4.8 of the Settlement provides that “[n]otwithstanding anything to the contrary contained in this Agreement, the releases set forth in this Article VII do not cover, and all Parties retain all rights in relation to, the charges at issue in FERC Docket No. EL03-54 and related review proceedings.” In order to avoid any ambiguity, and because the Parties have no objection to the modification to section 7.4.8 requested by NewEnergy, we will approve the new language proposed by NewEnergy. Accordingly, the Commission directs the Parties to revise section 7.4.8 to read: “Notwithstanding anything to the contrary contained in this Agreement, the releases set forth in this Article VII do not cover, and all Parties and Additional Settling Participants retain all rights in relation to, the charges at issue in FERC Docket No. EL03-54 and related review proceedings.” The Commission directs the Parties to file a revised Settlement and Release of Claims Agreement that includes this revision to section 7.4.8 in a compliance filing to be made within 30 days of the date of this order.

¹⁸ Docket No. EL03-54 concerns certain costs billed by the CAISO for dispatch to replace unavailable Reliability Must Run units during a six week period in early July 2000. On March 29, 2007, the Commission vacated an earlier order in that proceeding and reinstated the award of an arbitrator. *Cities of Anaheim, et al. v. Cal. Indep. Sys. Operator Corp.*, Order Granting Rehearing, 118 FERC ¶ 61,255 (2007) (rehearing pending).

¹⁹ Joint Reply Comments of the City of Azusa, California and the California Parties at 2, 3.

B. Exhibit B

16. NewEnergy also states that it is listed on Exhibit B to the Cover Sheet of the Settlement as a Deemed Distribution Participant under the Settlement, rather than a cash refund recipient. NewEnergy states that this characterization is incorrect for NewEnergy, which was a net purchaser in the relevant CAISO and CalPX markets during the refund period, and thus is a net recipient of refunds in Docket No. EL00-95. NewEnergy states that it should receive cash refunds if it opts-into the Settlement, not a credit. NewEnergy also states that it has discussed this matter with the California Parties and Azusa, who agree that the Settlement improperly lists NewEnergy as a Deemed Distribution Participant on Exhibit B. NewEnergy requests that the Commission remove it from Exhibit B and provide in its order on the Settlement that NewEnergy will be entitled to cash refunds if it opts-into the Settlement.²⁰

17. In their reply comments, the Parties agree that the characterization of NewEnergy as a Deemed Distribution Participant is incorrect. The Parties state that they would have no objection to the Commission ordering the modification to Exhibit B to remove NewEnergy from the list of Deemed Distribution Participants.²¹

Commission Determination

18. Because the Parties agree that the characterization of NewEnergy as a Deemed Distribution Participant is incorrect, the Commission clarifies that NewEnergy is improperly listed as a Deemed Distribution Participant on Exhibit B, should be removed from Exhibit B, and will be entitled to cash refunds if it opts-into the Settlement. Accordingly, the Commission directs the Parties to file a revised Settlement Agreement including the corrected Exhibit B in a compliance filing to be made within 30 days of the date of this order.

C. “Hold Harmless” Protection

19. In its initial comments, the CAISO states that it supports the general principle of settlement as embodied in the Settlement. 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. CAISO also supports the inclusion of a duty to cooperate on the part of the settling parties in the Settlement. According to

²⁰ Initial Comments of NewEnergy at 3.

²¹ Joint Reply Comments of the City of Azusa, California and the California Parties at 3-4.

CAISO, this duty to cooperate is essential so that the 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.

20. Both CalPX and CAISO note that, as with previous settlements approved by the Commission, the circumstances of this Settlement warrant hold harmless treatment for CAISO and CalPX because they will implement a number of provisions of the Settlement, along with their directors, officers, employees and consultants. They request that, in the order approving the Settlement, the Commission state that CAISO and CalPX will be held harmless with respect to the settlement and accounting activities performed pursuant to the Settlement, and that neither 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

21. In response to CalPX's and CAISO's concern about a "hold harmless" provision, the Parties state that, as noted in the Joint Explanatory Statement, the Parties do not oppose a "hold harmless" assurance to CalPX and CAISO for the steps taken to implement the Settlement similar to "hold harmless" assurances provided in other settlements.²⁴

Commission Determination

22. 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.²⁵ Consistent with this Commission precedent,²⁶ the Commission determines that CalPX and CAISO will be held harmless for actions taken to implement this Settlement. This

²² Initial Comments of CAISO at 3.

²³ Initial Comments of CalPX at 2-4; Initial Comments of CAISO at 4-7.

²⁴ Joint Reply Comments of the City of Azusa, California and the California Parties at 4 (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). *See* Joint Explanatory Statement at 14.

²⁵ *See* Joint Explanatory Statement at 14.

²⁶ *See, e.g., San Diego Gas & Electric Company*, 109 FERC ¶ 61,071 (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).

order will incorporate by reference 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 17, 2007.²⁷

23. In conclusion, the Commission finds that the Settlement is fair and reasonable and in the public interest; it is hereby approved subject to the conditions regarding section 7.4.8 and Exhibit B, 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:

(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.

²⁷ *San Diego Gas & Electric Company*, 119 FERC ¶ 61,151 (2007) (approving hold harmless protection for the CAISO and CalPX in connection with the Portland General Electric Company settlement).