

123 FERC ¶ 61,315
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. EL00-95-212

Sellers of Energy and Ancillary Services

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

Docket No. EL00-98-197

Puget Sound Energy, Inc.

v.

Docket No. EL01-10-036

Sellers of Energy and/or Capacity

Investigation of Anomalous Bidding Behavior
And Practices in Western Markets

Docket No. IN03-10-038

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

Docket No. PA02-2-053

Arizona Public Service Company

Docket No. EL03-139-005

ORDER APPROVING SETTLEMENT SUBJECT TO CLARIFICATION

(Issued June 30, 2008)

1. In this order, the Commission approves a joint settlement filed on May 2, 2008 in the above-captioned proceedings, as well as in additional proceedings listed below, between the Arizona Public Service Company (APS), Pinnacle West Capital Corporation, APS Energy Services Company, Inc. (collectively, the Pinnacle West Companies) and the

California Parties¹ (together, the Pinnacle West Companies and the California Parties are referred to as the Parties). The settlement resolves 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 the Pinnacle West Companies. 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 state that the Settlement shall become effective on the date that the Commission issues an order approving the Settlement without material change or condition deemed unacceptable by any adversely affected Party (Effective Date).³

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 the Pinnacle West Companies and the California Parties. The Parties note that the Commission and the United States Court of Appeals for the

¹ The California Parties are 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 (2008).

³ *See* Joint Explanatory Statement at 8; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.30, 1.61, 2.2 and 8.1.

Ninth Circuit have encouraged settlements of claims related to transactions in Western Energy Markets⁴ during the 2000 and 2001 time period.⁵ The Parties, therefore, request Commission approval of the Settlement.

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

Background and Description of Settlement

5. In 2000, the Commission instituted formal hearing procedures under the Federal Power Act (FPA)⁶ to investigate, among other things, the justness and reasonableness of rates of public utility sellers into the California Independent Systems Operator (CAISO) and the California Power Exchange (CalPX) markets during a specific period (Docket No. EL00-95 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).

⁴ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.72 (“Western Energy Markets” means those markets for electric capacity, energy, and/or ancillary services in the territories covered by the Western Electricity Coordinating Council (f/k/a the Western Systems Coordinating Council) including the California Markets.).

⁵ See Joint Offer of Settlement at 4, 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 2 (9th Cir. Aug. 6, 2007).

⁶ 16 U.S.C. § 824e (2000).

6. According to the Parties, the Settlement resolves all claims related to the FERC Proceedings,⁷ the *Lockyer v. FERC* Remand,⁸ the *BPA v. FERC* Remand,⁹ and the *CPUC v. FERC* Remand¹⁰ (collectively, the Settled Proceedings). According to the Parties, the estimated unpaid receivables and associated unpaid interest on CAISO's and CalPX's books owed to the Pinnacle West Companies are \$4,835,671 and \$1,672,468, respectively.¹¹ The Parties state that the Settlement requires Pinnacle West Companies to

⁷ Under the Settlement, the term "FERC Proceedings" means the proceedings in Docket Nos. EL00-95, EL01-10, IN03-10, ER03-746 concerning ISO re-run activity, the EL03-137 Proceedings, the EL03-180 Proceedings, and the undocketed fact-finding investigation into the alleged physical withholding of generation described in the *Initial Report on Physical Withholding by Generators Selling into the California Market and Notification to Companies*, including any related appeals and any proceedings upon remand. See Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.28 (defining FERC Proceedings), 1.35 (defining Gaming/Partnership Proceedings), 1.41 (defining ISO Re-Run Proceedings), and 1.49 (defining Physical Withholding Investigation). Further, under the Settlement, FERC Proceedings includes proceedings in Docket No. PA02-2 to the extent that the proceeding concerns the Pinnacle West Companies' sales in the CalPX and CAISO markets, or sales to the California Department of Water Resources. See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.28.

⁸ The Settlement defines the term "*Lockyer v. FERC* Remand" as proceedings conducted by the Commission pursuant to the decision of the U.S. Court of Appeals for the Ninth Circuit in *Lockyer v. FERC*, No. 02-73093. See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.42.

⁹ Under the Settlement, the term "*BPA v. FERC* Remand" means proceedings conducted by the Commission pursuant to the decision of the U.S. Court of Appeals for the Ninth Circuit in *Bonneville Power Administration v. FERC*, No. 02-70262, *et al.* See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.2.

¹⁰ Section 1.15 defines the term "*CPUC v. FERC* Remand" as proceedings conducted by the Commission pursuant to the decision of the U.S. Court of Appeals for the Ninth Circuit in *Public Utilities Commission of California v. FERC*, No. 01-71051. See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.15.

¹¹ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 4.1.1.1; Settlement and Release of Claims Agreement, Cover Sheet, items 4.1.1.1(b) and 4.1.1.1(c).

provide to CERS the following: 1) \$1,135,418; 2) an amount equal to the sum of the future refunds to which the Pinnacle West Companies are entitled in these proceedings; 3) the amount of interest on future or past refunds paid to the Pinnacle West Companies on or before the Effective Date; 4) the value of the transmission access credit posted by the CalPX to the Pinnacle West Companies' accounts; and 5) the amount of interest on the transmission access credit (collectively, the Settlement Proceeds).¹² The Parties also state that within 10 days of the Effective Date, CalPX shall transfer the Settlement Proceeds to CERS from the Pinnacle West Companies' CAISO and CalPX accounts receivable (Settling Supplier Receivables).¹³

7. The Parties state that the Pinnacle West Companies shall retain all refunds, credits and other payments to which the Pinnacle West Companies are entitled pursuant to settlements filed with the Commission in the FERC Proceedings before August 9, 2006.¹⁴ However, the Parties state that the Pinnacle West Companies shall not retain interest on such refunds, credits, or payments unless the interest was actually paid to and received by the Pinnacle West Companies on or before June 21, 2007.¹⁵

8. According to the Parties, the Pinnacle West Companies' responsibility for the difference between the interest actually earned on the receivables held by the CAISO and CalPX and the interest that would have been earned through application of the FERC Interest Rate¹⁶ for transactions during the October 2, 2000 and June 20, 2001 period is

¹² See Joint Explanatory Statement at 9; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 4.1 and 4.1.1.2; and Settlement and Release of Claims Agreement, Cover Sheet, items 4.1 and 4.1.1.2.

¹³ See Joint Explanatory Statement at 9; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 4.1.1.1., 4.1.1.2 and 4.1.1.4; Settlement and Release of Claims Agreement, Cover Sheet, items 4.1.1.1. and 4.1.1.2.

¹⁴ See Joint Offer of Settlement at 3; Joint Explanatory Statement at 9; Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.51, 1.66 and 4.1.5.

¹⁵ See Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.66 and 4.1.5.

¹⁶ The Settlement states that the term "FERC Interest Rate" has the meaning set forth in 18 C.F.R. § 35.19a(a)(2)(iii) or any successor thereto. See Settlement and Release of Claims Agreement, General Terms and Conditions, section 1.27.

limited to \$900,000.¹⁷ The Parties state that CERS shall be responsible for any difference between the interest actually earned and the interest that would have been earned to the extent the difference exceeds \$900,000.¹⁸

9. The Parties state that if the amount of the Settling Supplier Receivables determined by the FERC Receivables Determination¹⁹ is less than the estimated unpaid receivables, the shortfall shall be deducted from the amount remaining in the Pinnacle West Companies' accounts and will be paid by CERS to the extent the shortfall exceeds the amount remaining in the Pinnacle West Companies' accounts.²⁰ Conversely, the Parties state that if the amount of receivables determined by the FERC Receivables Determination exceeds the estimated unpaid receivables, CERS shall be entitled to receive the excess amount.²¹ Finally, the Parties state that if the FERC Receivables Determination is changed in a manner that increases or decreases the Pinnacle West Companies' rights to payments from the CalPX or the CAISO, CERS will receive any increase and will be responsible for any decrease.²²

10. The Parties state that CalPX shall transfer the remaining Settling Supplier Receivables and associated interest to the Pinnacle West Companies within 20 days of

¹⁷ See Settlement and Release of Claims Agreement, General Terms and Conditions, sections 4.1.4, 1.39, and 1.27; Settlement and Release of Claims Agreement, Cover Sheet, item 4.1.4.

¹⁸ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 4.1.4.

¹⁹ The Settlement defines "FERC Receivables Determination" as the Commission "order or orders, including orders on rehearing, issued in the EL00-95 Proceeding following the Preparatory Rerun establishing the unpaid Settling Supplier Receivables and effectuating the payment of receivables, regardless of whether such order or orders is/are subject to requests for stay rehearing, or appeal, provided that such order or orders has/have not been stayed pending such rehearing or appeal." *Id.* section 1.29.

²⁰ *Id.* section 5.1.1.

²¹ *Id.* section 5.1.2.

²² *Id.* section 5.1.3.

the Effective Date.²³ Also, the Parties state that the Pinnacle West Companies shall be entitled to the release by the CalPX of all collateral and security that the Pinnacle West Companies posted as well as all interest earned by the CalPX on the returned collateral.²⁴

11. According to the Parties, the Pinnacle West Companies must cooperate with the California Parties in pursuing claims against other entities relating to events in the Western Energy Markets from January 1, 2000 through June 20, 2001.²⁵ Such cooperation will include providing access to relevant non-privileged documents and to witnesses over which the Pinnacle West Companies exercise control for a period of 5 years after the Effective Date.²⁶

12. In addition, the Parties state that the Pinnacle West Companies' responsibility for a share of the CalPX wind-up charges shall be governed by the settlement approved by the Commission's orders in Docket No. ER05-167²⁷ and any future order assessing a substantially similar charge on the Pinnacle West Companies.²⁸ The Parties state that the Pinnacle West Companies shall pay any unpaid CalPX wind-up charges for which it is responsible in cash within 10 days of the Effective Date.²⁹ Additionally, the Parties state that the Pinnacle West Companies shall pay any unpaid grid management charges to the CAISO for January 1, 2000 through June 20, 2001 within 10 days of the Effective Date.³⁰

²³ See Joint Explanatory Statement at 9; Settlement and Release of Claims Agreement, General Terms and Conditions, section 4.1.1.5; Settlement and Release of Claims Agreement, Cover Sheet, item 4.1.1.5.

²⁴ See Joint Explanatory Statement at 9; Settlement and Release of Claims Agreement, General Terms and Conditions, section 6.3; Settlement and Release of Claims Agreement, Cover Sheet, item 6.3.

²⁵ See Joint Explanatory Statement at 9-10; Settlement and Release of Claims, General Terms and Conditions, section 4.2.2.

²⁶ *Id.*

²⁷ See *California Power Exchange Corp.*, 113 FERC ¶ 61,017 (2005), and 120 FERC ¶ 61,006 (2007).

²⁸ See Settlement and Release of Claims Agreement, General Terms and Conditions, section 4.1.2.

²⁹ *Id.*

³⁰ *Id.*

13. 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.³¹ The Parties 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.³² The Parties note that they do not oppose Commission action to provide similar assurances to the CAISO and CalPX with respect to the Settlement.³³

14. Subject to certain limitations, the Parties state that the Settlement resolves all claims by the California Parties against the Pinnacle West Companies relating to transactions in Western Energy Markets during the Settlement Period for refunds, disgorgement of profits, or other remedies in the Settled Proceedings.³⁴ The Parties also state that, subject to certain limitations, the Parties mutually release each other from all claims before the Commission and/or under the Federal Power Act relating to unlawful rates, market manipulation, and charges for congestion, energy, line loss or ancillary services.³⁵ Likewise, the Parties state that the Settlement provides for the mutual release of all claims for civil damages and equitable relief.³⁶ In addition, the Parties state that the Pinnacle West Companies forgo and assign to CERS any claims that it may have had to

³¹ See Joint Explanatory Statement at 10; Settlement and Release of Claims Agreement, General Terms and Conditions, section 6.1.

³² See Joint Explanatory Statement at 12, citing *San Diego Gas & Electric Company*, 113 FERC ¶ 61,235, at P 20 (2005).

³³ See Joint Explanatory Statement at 12.

³⁴ See Joint Explanatory Statement at 10; Settlement and Release of Claims Agreement, General Terms and Conditions, section 3.1.

³⁵ See Joint Explanatory Statement at 10; Settlement and Release of Claims Agreement, General Terms and Conditions, section 7.2.

³⁶ See Joint Explanatory Statement at 11; Settlement and Release of Claims Agreement, General Terms and Conditions, section 7.3.1.

the proceeds of the Commandeering Litigation.³⁷ Finally, the Parties state that the Pinnacle West Companies agree to forgo claims for refunds resulting from mitigation of sales by CERS in the CAISO and CalPX markets that may be payable under Commission orders, including associated interest and charges.³⁸ The Parties, therefore, request Commission approval of the Settlement.

Comments on the Settlement

15. 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 22, 2008, and reply comments were due on or before June 2, 2008. CAISO and CalPX filed timely initial comments. The Pinnacle West Companies and the California Parties filed joint reply comments.

A. "Hold Harmless" Protection

16. In its initial comments, the CAISO states that it supports the general principle of settlement as embodied in the instant Settlement. CAISO states that approval of the Settlement will benefit Market Participants because it will allow certain amounts of cash to flow sooner than would otherwise be the case. CAISO also supports the inclusion in the Settlement of a duty to cooperate on the part of the Parties. According to CAISO, the duty to cooperate is essential so that the proper financial adjustments can be made in accordance with the Settlement.³⁹ In its initial comments, CalPX states that it does not support or oppose the Settlement.⁴⁰

17. 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, along with their directors, officers, employees, and

³⁷ See Settlement and Release of Claims Agreement, General Terms and Conditions, sections 1.11 ("Commandeering Litigation" means the litigation arising from the commandeering by California Governor Davis of the PX block forward contracts of PG&E and SCE, including the coordinated proceedings pending before the Superior Court for the State of California for the County of Sacramento known as the Inverse Condemnation Cases, Judicial Council Coordination Proceeding No. 4203.") and 4.1.6.

³⁸ See Joint Explanatory Statement at 12; Settlement and Release of Claims Agreement, General Terms and Conditions, section 7.2.2.

³⁹ Comments of CAISO at 3.

⁴⁰ Initial Comments of CalPX at 2.

consultants, will implement a number of provisions of the Settlement. Accordingly, 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.⁴¹

The CalPX states that this is the same hold harmless provision that the Commission approved in the order approving a settlement with Portland General Electric Company issued on May 17, 2007⁴² and other orders.

18. In their joint reply comments, Pinnacle West Companies and the California Parties state that, they do not oppose a “hold harmless” provision for the CalPX and the CAISO, as noted in the Joint Explanatory Statement.⁴³

Commission Determination

19. 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.⁴⁴

⁴¹ Initial Comments of CalPX at 4.

⁴² *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).

⁴³ Joint Reply Comments of the Pinnacle West Companies and the California Parties at 2.

⁴⁴ See Joint Explanatory Statement at 15.

Consistent with this Commission's precedent on this issue,⁴⁵ the Commission determines that CalPX and CAISO will be held harmless for actions taken to implement this Settlement and this order will incorporate the "hold harmless" language requested by the CalPX and set out above.

B. Refund Shortfalls

20. In its comments, CAISO expresses concern about a potential shortfall resulting from a difference between the Settlement's estimate of APS's obligation in the CAISO Markets and APS's obligations as reflected in recent CAISO data.⁴⁶ CAISO challenges the Joint Explanatory Statement's assertion that "the Pinnacle West Companies do not owe refunds . . . for transactions during the Settlement Period," and instead alleges that its current rerun data show that APS owes refunds of approximately \$100,000 in the CAISO market before interest.⁴⁷ CAISO states that it believes that the Parties to the Settlement intended to cover any shortfall resulting from a larger than anticipated refund obligation for APS, but that this intention is not clearly expressed in the Settlement.⁴⁸ CAISO notes that it is formulating a statement with the APS and CERS to address this concern,⁴⁹ and that the statement shall be submitted in reply comments, which the Parties will ask the Commission to adopt.⁵⁰

21. In reply, the Pinnacle West Companies and the California Parties state that they have assured the CAISO that the potential shortfall identified by CAISO will be eliminated by supplier offset amounts allocated and paid by APS, which are not yet reflected in CAISO's most recent rerun data.⁵¹ Further, the Pinnacle West Companies

⁴⁵ See, e.g., *San Diego Gas & Electric Company*, 109 FERC ¶ 61,071 (approving "hold harmless" language in the Dynegy settlement); *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).

⁴⁶ Comments of CAISO at 7.

⁴⁷ *Id.*

⁴⁸ *Id.* at 8, citing Settlement and Release of Claims Agreement, General Terms and Conditions, sections 4.1.2, 5.1, 5.2, and 5.3.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Joint Reply Comments of the Pinnacle West Companies and the California Parties at 3.

and the California Parties state that, under the Settlement, the shortfalls identified by CAISO as well as any other shortfalls that arise in the final CAISO accounting that could be attributed to APS would be the responsibility of either APS or CERS, and would not be the responsibility of CAISO.⁵² The Parties state that an order confirming the Settlement will confirm the responsibility of CERS and APS for any such shortfalls. According to the Parties, CAISO has authorized APS and CERS to state that the concern voiced in CAISO's comments has been addressed by the reply comments of the Pinnacle West Companies and the California Parties.⁵³

Commission Determination

22. In view of the representations of the Pinnacle West Company and the California Parties, as well as the specific terms of the Settlement, it is clear that any shortfalls that arise as part of the final CAISO accounting that are attributable to APS are the responsibility of either APS or CERS. The Commission also determines that any shortfalls attributable to APS that arise as part of the final CAISO accounting are not the responsibility of CAISO under the Settlement.

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 clarification regarding potential shortfalls that may arise as part of the CAISO final accounting 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 proceedings in Dockets Nos. EL00-95, EL00-98, or any other docket.

The Commission orders:

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

By the Commission. Commissioner Spitzer not participating.
Commissioner Moeller concurring in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

⁵² *Id.*

⁵³ *Id.*

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(Issued June 30, 2008)

MOELLER, Commissioner *concurring in part*:

I support approval of this settlement between the Pinnacle West Companies and the California Parties. I am writing separately to note that the Western Energy Crisis of 2000-2001 has resulted in a very complex proceeding that involves multiple parties, multiple issues, multiple dockets and multiple venues. Today, I am approving this order in the above-listed dockets but understand that our approval impacts several other related dockets.

Philip D. Moeller
Commissioner