UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services	)	**Docket Nos. EL00-95-000, *et al.***
Investigation of Practices of the California Independent System Operator and the California Power Exchange	)	**Docket Nos. EL00-98-000, *et al.***
Puget Sound Energy, Inc. v. Sellers of Energy and/or Capacity	)	**Docket Nos. EL01-10-000, *et al.***
Investigation of Wholesale Rates of Public Utility Sellers of Energy and Ancillary Services in the Western Market Systems Coordinating Council	)	**Docket Nos. EL01-68-000, *et al.***
Fact-Finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices	)	**Docket No. PA02-2-000**
Bonneville Power Administration	)	**Docket No. EL03-141-000**
Western Area Power Administration	)	**Docket No. EL03-178-000**
California Independent System Operator Corporation	)	**Docket Nos. ER03-746-000, *et al.***
Investigation of Anomalous Bidding Behavior and Practices in Western Markets	)	**Docket No. IN03-10-000**

COMMENTS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION IN SUPPORT OF JOINT OFFER OF SETTLEMENT INVOLVING BONNEVILLE POWER ADMINISTRATION AND WESTERN AREA POWER ADMINISTRATION

Pursuant to Rule 602(f) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"), 18 C.F.R. § 385.602(f) (2017), the California Independent System Operator Corporation ("ISO") hereby submits its comments on the Joint Offer of Settlement ("Settlement Agreement") between the United States of America, acting through the Bonneville Power Administration ("BPA") and the Western Area Power Administration ("WAPA"), and the California Parties[1] (collectively, the "Settling Parties"), in the above-captioned proceedings submitted on February 8, 2018.

I. COMMENTS

A. The ISO Supports the Settlement Agreement

The ISO has always supported the general principle that settlement is the preferred means for resolving complex disputes, even if the settlement involves only a selected subset of the litigants. In addition, this Commission has consistently encouraged parties to resolve disputes whenever possible through settlement.[2] Against this backdrop, the ISO continues to support the general principle of settlement as embodied in the Settlement Agreement. The approval of the proposed Settlement Agreement will allow significant amounts of cash to flow sooner than would otherwise be the case and in that respect will clearly benefit Market Participants.

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[1] For purposes of the Settlement Agreement, "California Parties" means collectively, Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, the Public Utilities Commission of the State of California ("CPUC"), and the People of the State of California *ex rel.* Xavier Becerra, Attorney General, 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"). Under the Settlement Agreement, the California Electricity Oversight Board is an Additional Settling Participant.

[2] *Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California v. California Independent System Operator Corporation*, 96 FERC ¶ 61,024, at 61,065 (2001).

The ISO also notes and supports the inclusion in the Settling Agreement of a duty to cooperate on the part of the Settling Parties.[3] It will be absolutely essential that the cooperation of the Settling Parties be maintained from the ISO's perspective, so that the proper financial adjustments can be made so as to properly implement the Settlement Agreement.

B. The Commission Should State that the ISO's Directors, Officers, Employees and Consultants Will Be Held Harmless With Respect to the Settlement and Accounting Activities that the ISO Will Have To Perform in Order To Implement the Settlement Agreement.

As with previous settlements filed and approved in these proceedings, the circumstances of the Settlement Agreement make it necessary to hold harmless the market operators (*i.e.*, the ISO and the California Power Exchange Corporation ("PX")) that are ultimately tasked with implementing the Settlement Agreement,[4] along with their directors, officers, employees and consultants. Therefore, in any order approving this Settlement Agreement, the Commission should state that the ISO, along with its directors, officers, employees and consultants, will be held harmless with respect to the settlement and accounting activities that it will have to perform in order to implement the Settlement Agreement, and that neither the ISO, nor its directors, officers, employees or consultants, will be responsible for recovering any funds disbursed pursuant to the Settlement Agreement, which are subsequently required to be repaid. The Commission has already approved hold harmless language for the ISO and the PX in the context of

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[3] *See*, in particular, Section 6.4 (Duty of Cooperation) of the Settlement and Release of Claims Agreement (Attachment B to Settlement Agreement).

[4] The ISO has requested hold harmless treatment in comments on previous settlements filed in this proceeding. The Commission has, to date, provided the ISO with hold harmless treatment with respect to the settlements on which it has ruled.

the California Parties' settlements with a number of entities. The factors that justified holding the ISO and PX harmless with respect to the implementation of these other settlements apply equally to the instant Settlement Agreement.

First, as with previous settlement agreements in these proceedings, the flow of funds pursuant to the Settlement Agreement will require unprecedented accounting adjustments on the part of the ISO. These accounting adjustments will not be made under the terms of the ISO Tariff, but rather pursuant to the Settlement Agreement, the terms of which have been determined by a subset of parties to these proceedings. As the Commission is well aware, the ISO Markets ordinarily are not bilateral in nature. However, this settlement requires the ISO to adopt that fiction as between the Settling Parties. A Market Participant might file a complaint or bring suit against the ISO, and/or its directors, officers, employees and consultants, claiming that the ISO did not make appropriate accounting adjustments, and as a result did not reflect the appropriate amount of refunds or receivables owing to that Market Participant.[5]

Moreover, because the Settlement Agreement has been filed prior to the final orders in the Refund Proceeding, it is not certain that the Settling Parties' estimates of payables and receivables are accurate, and due to the complexity of the settlement, there may be additional, unforeseen impacts to ISO Market Participants. It is possible

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[5] As with previous settlements in this proceeding involving the California Parties, the Settlement Agreement provides that the ISO and PX will calculate the refunds and interest that BPA and WAPA would be owed pursuant to the Commission's orders in this proceeding and provide those calculations to the Commission "at the same time that they submit their calculations of refunds and/or interest for other Participants." *See* Section 6.1.3 of the Settlement and Release of Claims Agreement (Attachment B to Settlement Agreement). Counsel for the California Parties confirmed that this language is a reference to the ISO's compliance filing obligation in Docket Nos. EL00-95, *et al.*, which the ISO satisfied on May 4, 2016. *See Compliance Filing of the California Independent System Operator Corporation ("ISO") Regarding Orders About the Refund Rerun, Financial Adjustments and Interest*, Docket Nos. EL00-95-000, *et al.* (May 4, 2016).

that such impacts would cause Market Participants to bring actions against the ISO (or its directors, officers, employees and consultants), as a result of the implementation of the Settlement Agreement.

A hold harmless provision would also be appropriate because the ISO is a non-profit public benefit corporation, and 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 Agreement. These individuals should not be subjected to litigation, along with its attendant costs and expenditure of time, for merely implementing a settlement authorized by the Commission.

Finally, there is nothing in the Settlement Agreement that counsels against, or is inconsistent with, granting the ISO and the individuals associated with it the protection requested here. Indeed, the Settlement Agreement provides for numerous mutual releases and waivers, which will effectively "hold harmless" the Settling Parties from existing and potential claims. Moreover, the Settling Parties state that they do not oppose the Commission adopting hold harmless provisions for the ISO and PX.[6]

For these reasons, the Commission, in any order approving the Settlement Agreement, should state that the ISO, along with its directors, officers, employees, and consultants, will be held harmless with respect to the settlement and accounting activities that the ISO will have to perform in order to implement the Settlement Agreement, and that neither the ISO, nor its directors, officers, employees, or consultants will be responsible for recovering any funds disbursed pursuant to the Settlement Agreement, which are subsequently required to be repaid.

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[6] *See* Joint Explanatory Statement at 21 (Attachment A to Settlement Agreement).

C. The Settlement Agreement Will Not Change the Accounting Treatment with Respect to the Resolution of Certain Disputes

The ISO wishes to memorialize its understanding, as confirmed by the California Parties, that the language in Section 4.1.7 of the Settlement Agreement is not intended to modify the way that the ISO has accounted for the resolution of certain disputes (good faith negotiations or "GFNs"). For example, the second sentence of that provision states that "[t]he Parties acknowledge that the charges for CERS good faith negotiations and for the California-Oregon Transmission Project 1 & 2 dispute resolution were deducted from amounts previously paid to Settling Supplier and have been retained at the ISO and/or PX, and shall be paid to CERS and PG&E in the future."[7] GFN charges were reflected in the ISO's preparatory rerun, which was approved by the Commission,[8] and then accounted for in the distribution to the Settling Parties ordered by the Commission pursuant to the BPA remand.[9] The ISO's concern is with the portion of the sentence referring to amounts that have been "retained at the ISO and/or PX, and shall be paid to CERS and PG&E in the future." Because CERS is a governmental entity like Settling Suppliers, the amounts that were due to CERS under the GFNs were paid to CERS as part of the BPA remand distribution. With respect to PG&E, which is a debtor to the PX, amounts due to PG&E under the GFNs will be deducted from PG&E's PX balance. As such, there is no cash "retained" by the ISO or PX for payment to CERS or PG&E. Despite this ambiguity, the ISO has confirmed with counsel for the California

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[7] Settlement and Release of Claims Agreement, Section 4.1.7. (Attachment B to Settlement Agreement).

[8] *See San Diego Gas & Electric Co., et al.*, 136 FERC ¶ 61,036 (2011).

[9] *See San Diego Gas & Electric Co., et al.*, 121 FERC ¶ 61,067 (2007).

Parties that the language in Section 4.1.7 is not intended to change accounting outcomes associated with the GFNs, but rather, is meant to ensure that the settlement does not operate to undo them. The ISO agrees with and supports this interpretation.

II. CONCLUSION

Wherefore, for the reasons stated above the ISO respectfully states that it supports the Settlement Agreement. The ISO also respectfully requests that the Commission state, in any order approving the Settlement Agreement, that the ISO, along with its directors, officers, employees, and consultants, will be held harmless with respect to the settlement and accounting activities that it will have to perform in order to implement the Settlement Agreement, and that neither the ISO, nor its directors, officers, employees, or consultants will be responsible for recovering any funds disbursed pursuant to the Settlement Agreement, which are subsequently required to be repaid.

Respectfully Submitted,

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Dated: February 28, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this document upon the email listserv established by the Commission for this proceeding.

Dated this 28th day of February, 2018 in Washington, DC.

/s/ Michael Kunselman

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