

127 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

NEO California Power LLC

Docket No. EL02-18-002

San Diego Gas & Electric Company

Docket No. EL00-95-223

v.

Sellers of Energy and Ancillary Services
into Markets Operated by the California
Independent System Operator Corporation and the
California Power Exchange Corporation

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

Docket No. EL00-98-208

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued May 21, 2009)

1. On March 4, 2009, as revised on April 10, 2009, the California Independent System Operator Corporation (CAISO) filed an Explanatory Statement and Settlement Agreement (Settlement) in the above-referenced dockets on behalf of itself and California Power Holdings, LLC (California Power Holdings), Harbor Cogeneration Company, and MMC Energy North America, LLC (the SRA Owners)¹ (together, the Settling Parties). In this order, we approve the uncontested settlement.²

¹ “SRA” is an acronym for Summer Reliability Agreements. Because the term SRA Owners is used throughout the Settlement, we use it here as well.

² As discussed in further detail below, commenters had expressed concerns

(continued...)

Background

2. On August 24, 2000, the CAISO sought proposals from suppliers to provide up to 3,000 MW of new generation in the form of peaking capability to the CAISO control area during the summer months of 2001, 2002 and 2003, and which could be dispatched if necessary to support reliability in the control area. Several generators responded to the CAISO's request, and the CAISO selected bids from the SRA Owners to either build new generation units or add to the capability of existing generation units. The CAISO subsequently executed Summer Reliability Agreements (SRAs) with the SRA Owners.³

3. In accordance with the terms of the SRAs, the CAISO's payment for these services was conditioned on its recovery of costs from scheduling coordinators. The CAISO therefore established the "SRA Trust Account" to facilitate recovery of these costs, and the SRA Owners would be paid from this account. The SRA Owners issued invoices to the CAISO for the provision of their services under the SRAs. However, the SRA Owners were not fully compensated for the services they provided in July and August 2001 as a result of the default of the California Power Exchange (CalPX) on its market invoices. Due to the CalPX's bankruptcy, the SRA Trust Account only received a portion of what it should have received for July and August 2001 and, consequently, the CAISO only paid a portion of the amount due to the SRA Owners.

4. In November 2001, NEO filed a complaint against the CAISO seeking the monies owed to it under the SRAs. The CAISO responded that it would be unable to pay NEO until the funds controlled by the CalPX were distributed by the Commission pursuant to its authority under the CalPX's plan of reorganization. The Commission directed the CAISO to submit a compliance report demonstrating that overdue payments had been remitted by the applicable scheduling

over certain aspects of the Settlement filed on March 4, 2009. Subsequently, the Settling Parties submitted a revised Settlement on April 10, 2009 to address those concerns. The revised Settlement was certified to the Commission as an uncontested settlement by Settlement Judge Joseph R. Nacy in Docket No. EL02-18 on April 23, 2009. *NEO California Power LLC*, 127 FERC ¶ 63,006 (2009).

³ The original SRA Owners were NEO California Power LLC (NEO), RAMCO Inc. (RAMCO) and Harbor Cogeneration Company. California Power Holdings, one of the Settling Parties, is the successor to NEO. MMC Energy North America, LLC, another Settling Party, is the successor to RAMCO.

coordinators, and that the CAISO had made payments to NEO.⁴ The Commission subsequently found the CAISO's compliance report to be deficient and established hearing and settlement judge procedures.⁵

5. With the assistance of the Settlement Judge, the CAISO and the SRA Owners negotiated and filed the Settlement.

Description of the Settlement Filed on March 4, 2009

6. Under the Settlement filed on March 4, 2009,⁶ the CAISO will provide compensation, including interest, to the SRA Owners for providing reliability services in accordance with the SRAs.

7. Within 30 days of the Settlement's effective date, the CalPX will pay principal payments to each SRA Owner from its Settlement Clearing Account (the SRA Principal Receivable Amount). The CAISO will credit these amounts to its books, which will reduce the amounts payable by the CalPX to the CAISO.⁷ The SRA Principal Receivable Amount for each SRA Owner is set forth in Exhibit A to the Settlement as follows: \$485,996.88 for California Power Holdings, \$38,356.26 for MMC Energy North America, LLC, and \$47,313.19 for Harbor Cogeneration Company.

8. The Settlement also addresses the payment of interest to the SRA Owners. Upon distribution of the SRA Principal Receivable Amount, interest will cease to accrue on the principal but will continue to compound on any unpaid SRA Interest.⁸ The version of the Settlement filed on March 4, 2009 provides that the CalPX will pay to the SRA Trust Account an amount of interest to be determined at a later date by the Commission, but no later than when the CalPX makes distributions to non-jurisdictional suppliers in accordance with the Commission's

⁴ *NEO California Power LLC*, 98 FERC ¶ 61,228 (2002).

⁵ *NEO California Power LLC*, 103 FERC ¶ 61,206 (2003).

⁶ The revisions to the Settlement are described in P 17, *infra*.

⁷ Settlement, § 2.1.

⁸ "SRA Interest" is defined in section 1 of the Settlement as the interest that has accrued on the SRAs.

October 19, 2007 order in Docket No. EL00-95-164.⁹ Within 10 business days after receiving this payment, the CAISO will distribute any proceeds on a *pro rata* basis to the SRA Owners.¹⁰

9. The Settlement provides that Commission approval of the Settlement and the payment of principal and interest to the SRA Owners will resolve the issues set forth in the complaint proceeding in Docket No. EL02-18.¹¹ Within 30 days of receiving the SRA Principal Receivable Amount, California Power Holdings will request that the complaint in this proceeding be held in abeyance. Within 30 days of receiving the SRA Interest Receivable Amount, California Power Holdings will withdraw the complaint. The SRA Owners retain the right to contest the calculation of SRA Interest.¹²

10. The Settlement will become effective upon Commission approval of the Settlement in its entirety without condition or modification or with such conditions or modifications agreed to by the Settling Parties.¹³ With regard to the standard of review, section 5.4 of the Settlement provides that “the Commission’s review of any modifications to this Settlement Agreement, regardless of who proposes the modification, shall be based on the just and reasonable standard and not the public interest standard.”

11. The Settlement states that, upon the Commission’s approval of the Settlement, the CAISO and the CalPX will conform their books and records by reflecting the payment of the SRA Principal Receivable Amount to the SRA Owners as a credit against amounts due by the CalPX to the CAISO.¹⁴ In addition, upon distribution of the SRA Interest Receivable Amount, the CAISO and the CalPX will confirm their books and records to reflect this payment.¹⁵

⁹ *San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,067, at P 58 (2007).

¹⁰ Settlement, § 2.2.

¹¹ Settlement, § 2.3.

¹² Settlement, § 2.5. Attachment B to the Settlement sets forth the calculation of SRA Interest.

¹³ Settlement, § 3.1.

¹⁴ Settlement, § 4.1.

¹⁵ Settlement, § 4.2.

Finally, the Settlement includes a “hold harmless” provision that states that the CAISO and the CalPX will be held harmless from their efforts to implement the terms of the Settlement.¹⁶

Comments on the Settlement

12. Initial comments were due on March 24, 2009, with reply comments due on April 3, 2009. The due date for reply comments was subsequently extended to April 10, 2009 by the Chief Administrative Law Judge.¹⁷ The Commission’s Trial Staff filed initial comments stating that it did not oppose the Settlement.

13. The California Parties¹⁸ filed initial comments seeking clarification or, in the alternative, rejection of the Settlement. The California Parties sought clarification that: (1) any amounts paid to the CalPX pursuant to the Settlement will be credited against total amounts owed by the CalPX to the CAISO; (2) the SRA Owners would not be exempt from any responsibility for principal or interest shortfalls that may arise in the CalPX (and thereby shifting this responsibility onto other market participants); and (3) the CAISO would remain involved in implementation of the Settlement. If these clarifications are not provided, the California Parties state that they would oppose the Settlement.

14. The CalPX filed initial comments asking the Commission to allow CalPX to provide: (1) for the accounting treatment of any principal shortfall allocation in its markets that the CAISO and ultimately the SRA Owners would receive absent the Settlement; and (2) that any interest shortfall allocation attributable to the SRA Owners would be accounted for by the CalPX in connection with its final accounting with the CAISO. The CalPX also requests that the Commission ensure that CalPX’s payment of the settlement amount is credited pursuant to the CAISO’s tariff beginning with the CalPX’s oldest debt (from October 2000) rather than the July-August 2001 date of the SRA transactions. According to the CalPX, this would avoid exacerbating the interest shortfall in the CalPX Settlement

¹⁶ Settlement, § 4.4.

¹⁷ *Order of Chief Judge Extending Time to File Reply Comments*, Docket No. EL02-18-001, *et al.* (April 2, 2009).

¹⁸ The California Parties are Pacific Gas & Electric Company, Southern California Edison Company, the California Public Utilities Commission, and People of the State of California *ex rel.* Edmond G. Brown Jr., Attorney General.

Clearing Account. Finally, the CalPX asks the Commission to ensure that the Settlement's "hold harmless" provision be included in any final settlement approved by the Commission.

Los Angeles Department of Water and Power (LADWP) filed reply comments on April 3, 2009. LADWP states that it concurs with the initial comments filed by the California Parties and the CalPX regarding the deficiencies in the Settlement, and asserts that the Commission should reject the Settlement's requirement that the CalPX pay the SRA Owners the CAISO's settlement amount from the CalPX Settlement Clearing Account for several reasons: (1) the Settlement requires the CalPX to pay amounts that the CAISO owes to the SRA Owners as a result of underpayments caused by the CAISO's accounting errors that are unrelated to the SRAs; (2) immediate payment of principal amounts due under the Settlement to the SRA Owners could result in a principal shortfall in the CalPX Settlement Clearing Account, and the Settlement's deferred interest payment provision will exacerbate the existing interest shortfall in that account; and (3) the SRA Owners did not participate in the CalPX markets and they are not parties to the California refund proceedings in Docket No. EL00-95, *et al.* According to LADWP, a more effective remedy would be to require the CAISO to follow similar procedures to those included in its tariff regarding billing and payment errors.

Revised Settlement

15. On April 10, 2009, the CAISO, on behalf of the Settling Parties, filed revisions to the Settlement, which the CAISO states resolved the concerns raised by the commenters. Accordingly, the CAISO explains that the revised Settlement is now uncontested.

16. Specifically, the Settling Parties have made the following revisions to the Settlement: (1) clarify section 2.1 to provide that in the event of a principal shortfall in the CalPX Settlement Clearing Account at the conclusion of the refund proceeding, a *pro rata* portion of such shortfall will be allocated to the SRA Owners; (2) revise section 2.2 to provide that the SRA Interest Receivable Amount will be reduced on a *pro rata* basis as a result of any interest shortfalls allocated among CalPX market participants, as well as by the amount of any principal shortfalls, and that the SRA Owners shall not have any other claim for interest except as provided in this section; (3) clarify that same section to state that the CalPX will pay the CAISO, *not* the SRA Trust Account, an amount to be determined by the Commission at a later date but not later than when the CalPX makes distributions to "market participants," *not* "suppliers that are not public utilities," pursuant to the Commission's October 2007 order in Docket No. EL00-95-164; (4) modify section 4 to provide that settlement payments will be applied as a credit against amounts due by the CalPX to the CAISO; (5) revise section 4.1

to provide that the CalPX payments will be applied in order of the creation of the debt, in accordance with the CAISO's tariff; and (6) clarify in section 4.4 that the CAISO will continue to be involved with the implementation of the Settlement.

17. The Settling Parties also state that they agree with the CalPX that the "hold harmless" provision in section 4.4 should be included in the final approved version of the Settlement.

18. On April 20, 2009, the CAISO, on behalf of the Settling Parties, filed an executed version of the revised Settlement.

Commission Determination

19. As discussed below, we approve the revised Settlement. To address the CalPX's specific request, our approval of the revised Settlement includes approval of the "hold harmless" provision in section 4.4.

20. The Settling Parties state that the revised Settlement resolves all issues set for hearing in Docket No. EL02-18-000. In addition, no party objects to the revised Settlement. We find that the revised Settlement is fair and reasonable and in the public interest, and is hereby approved effective as of the date of this order. The Commission retains the right to investigate the rates, terms and conditions under the just and reasonable and not unduly discriminatory or preferential standard of section 206 of the Federal Power Act, 16 U.S.C. § 824e (2006). The Commission's approval of the revised Settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

21. This order terminates Docket Nos. EL02-18-002, EL00-95-223, and EL00-98-208.

The Commission orders:

The revised Settlement is hereby approved, as discussed in the body of this order.

By the direction of the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.