

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**San Diego Gas & Electric Company,
Complainant,**

v.

Docket No. EL00-95-045

**Sellers of Energy and Ancillary Service Into
Markets Operated by the California
Independent System Operator Corporation
and the California Power Exchange,
Respondents.**

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

Docket No. EL00-98-042

**RESPONSE OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR
CORPORATION TO THE PRESIDING JUDGE'S ORDER REQUESTING
PARTICIPANTS VIEWS ON CERTIFICATION OF OFFER OF SETTLEMENT**

On October 26, 2001, the Presiding Judge issued a Report to the Commission Concerning Impact of Offer of Settlement on Evidentiary Procedures and Order Requesting Participants Views on Certification of Offer of Settlement ("October 26 Order"). *San Diego Gas & Electric Company, et al.*, 97 FERC ¶ 63,011. The October 26 Order noted that on October 5, 2001, the Official Committee of Participant Creditors of the PX (Creditors Committee) filed an offer of settlement in Docket Nos. EL00-95-000, EL00-98-000, "and all related subdockets." The Order cited and agreed with concerns expressed by the Commission Staff that the Offer of Settlement is inconsistent with the instructions to the Presiding Judge in the Commission's July 25, 2001 hearing order.

"To ensure that further appropriate views can be provided to the Commission with regard to compliance with the Commission's July 25 hearing order *and*, that

important aspects of the settlement as it concerns these consolidated proceedings are addressed,” the October 26 Order at 3 requested that the Creditors Committee, Trial Staff, and all interested participants to respond to a series of seven questions.

The ISO’s response to the important issues raised by the Judge are presented below.

1. The Major Implications of the Settlement Vis a Vis the Resolution of Issues (1),(2), and (3) That Is Required by the Commission’s July 25 Hearing Order

The two primary provisions of the Offer of Settlement which pose issues with respect to the Refund Proceeding are Sections 9 and 12. They state as follows:

Section 9

It is anticipated that any refunds or credits that may be ordered by the Commission or any other tribunal against CalPX Participants or ISO Scheduling Coordinators will be allocated by order and will be administered by the buyers and sellers that are involved. However, if CalPX is ordered to settle or bill any refunds or credits to be distributed, and if such order fails to provide a methodology for allocating such refunds or credits among the buyers, any refunds or credits to be distributed through the CalPX shall be allocated to the buyers for the time periods indicated in any Commission or court order in the markets administered by the CalPX based upon the share fraction allocation method used by CalPX under the CalPX Tariff.

Section 12

The CalPX continues to receive notices regarding adjustments being made by the CallSO to amounts purchased and sold in the real time market for the period prior to February 28, 2001, when the CalPX was acting as the Scheduling Coordinator for the IOUs and others in that market. These adjustments are based upon, among other things, corrections to meter readings and agreed upon changes in the real time market. However, these real time market adjustments require the CalPX to perform recalculations of the amounts owed to CalPX Participants and ISO Scheduling Coordinators, and require additional time and resources to implement and invoice. The Commission should order that all adjustments by the CallSO for the period prior to February 28, 2001 must

be complete and final within 10 days after the Commission issues its order approving this Offer of Settlement.

At the outset, the ISO would agree with the comments of the California Attorney General that the Offer of Settlement is “not a model of clarity from which any of the parties can fully discern its impact.”¹ While the ISO does not believe the Offer of Settlement was designed to effect the outcome of the Refund Proceeding, the Presiding Judge’s Order provides an important opportunity to ensure that such an outcome is avoided.

First, the ISO understands that the proposed cut-off date for billing adjustments in Section 12 of the Offer of Settlement would not apply to the Refund Proceeding, which is addressed in Section 9. However, simply carving out the Refund Proceeding is insufficient to protect Market Participants who have valid billing disputes. As the ISO explained in its October 25, 2001 comments, apart from potential amounts associated with the Refund Proceeding, the ISO is currently working on alternative dispute resolutions, good faith negotiations, and billing disputes with a claimed value of almost \$100 million that relate in the whole or in part to the period prior to February 28, 2001.² Thus, the ISO urged that the Offer of Settlement be clarified to provide a process by which these disputes could be resolved and bills then adjusted appropriately. If the intent of the Creditors Committee was otherwise, and Section 12 of the Offer of Settlement is meant as a bar to the resolution of these claims, then Section 12 would, in fact, have a material impact on the litigation of issues set for resolution in the Refund Proceeding. The ISO would strongly oppose such an interpretation and outcome.

¹ Comments of the People of the State of California Ex. Rel. Bill Lockyer, dated October 25, 2001 at 1.

² Comments of the California Independent System Operator on the Offer of Settlement, dated October 25, 2001 at 6. A copy of these comments is included as Attachment A to this pleading.

In their comments, Trial Staff interpreted the Offer of Settlement as potentially bypassing litigation of Issue (2), the amount of potential refunds owed by each supplier, and Issue (3), the amount currently owed to each supplier.³ Apart from the concern about the Offer of Settlement's effect on disputes, the ISO is not sure that this interpretation is correct. The two sentences of Section 9 of the Offer of Settlement appear to recognize and support the fact that the Commission has a broad grant of discretion in the Refund Proceeding to determine the amount of refunds and credits related to transactions in the California energy markets during the relevant time period, as well as the means of allocation. Nothing in the Offer of Settlement appears to limit further litigation of Issue (1), determination of the mitigated price in each hour, or Issues (2) and (3) -- based on the resolution of issue (1), who owes what to whom. According to Section 9 of the Offer of Settlement, only if no allocation process is provided for as a result of the Refund Proceeding is there a need for the default methodology as set forth therein.

Nevertheless, we are concerned about Staff's interpretation. If correct, the Offer of Settlement would have a prejudicial effect on the outcome of the Refund Proceeding. Other commenters, including the ISO, have protested other provisions of the Offer of Settlement. It should be made absolutely clear that nothing "resolved" by the Offer of Settlement will interfere to any extent with the resolution of issues in the Refund Proceeding either by the Presiding Judge or the Commission.

³ Commission Trial Staff's Limited Comments Concerning Offer of Settlement, dated October 25, 2001 at 4.

- 2. Whether the Settlement Raises Policy Concerns as Concerns Resolution of Issues (1),(2), and (3) That Are Consistent or Inconsistent with the Commission’s July 25 Hearing Order**
- 3. Whether the Settlement Involves Issues of First Impression as Concerns Resolution of Issues (1),(2), and (3)**
- 4. Whether and the Extent to Which These Consolidated Proceedings, Are Affected**

As noted above, the answer to these questions depends on the interpretation of Section 9 of the Offer of Settlement. If Section 9 is read as a deferral to the determination of the amount and allocation of potential refunds and credits as established in the ongoing proceeding, the Offer of Settlement would not be inconsistent with the July 25 Hearing Order. However, any contrary interpretation would raise significant issues of first impression and substantial policy concerns.

The ISO has made every effort to support the current Refund Proceeding. We believe that any attempt to “short circuit” that process other than through a consensual resolution reached among a broad spectrum of interested participants in that proceeding would be improper and should be rejected.

- 5. Whether the Settlement Raise Genuine Issues of Material Fact as Concerns the Resolution of Issues (1), (2) and (3) And, If So, Provide an Appropriate Affidavit**

The ISO does not believe the proposed Offer of Settlement introduces new material issues of fact.

- 6. Whether the Record Contains Substantial Evidence on Which the Commission May Reach a Reasoned Decision on the Merits of the Contested Issues**

If the question is directed to the Refund Proceeding, contested issues have yet to be addressed. If the question is meant to refer to the “PX” proceedings, to the extent that the Offer of Settlement is interpreted to preempt the resolution of issues pending

either in the Refund Proceeding or to interfere with the resolution of billing disputes, the absence of substantial evidence precludes a Commission resolution at this time.

7. Whether You Agree to the Omission of an Initial Decision And/or Omission of the Certification of Proposed Findings of Facts Required by the Commission's Hearing Order of July 25, 2001

The ISO does not agree that omission of an initial decision and/or omission of the certification of proposed findings of facts required by the Commission's hearing order of July 25, 2001 is appropriate. The Refund Proceeding should go forward in accordance with the procedural process and schedule established by the Presiding Judge. The Offer of Settlement provides no sound basis for resolution of any issues pending before Judge Birchman, and to the extent that any provision of the Offer of Settlement is interpreted as being inconsistent with the Refund Proceeding, that provision should be rejected or modified to preclude any prejudice or limitation on the exercise of discretion by either the Presiding Judge or the Commission.

Respectfully submitted,

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Dated: October 31, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in the above-captioned docket.

Dated at Washington, DC, on this 31st day of October, 2001.

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