UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company	)	**Docket Nos. EL00-95-000**
v.	)	
Sellers of Energy and Ancillary Services	)	
	)	
Investigation of Practices of the California Independent System Operator and the California Power Exchange	)	**Docket Nos. EL00-98-000**
	)	
Puget Sound Energy, Inc.	)	**Docket No. EL01-10-000**
v.	)	
Sellers of Energy and/or Capacity	)	
	)	
Investigation of Wholesale Rates of Public Utility Sellers of Energy and Ancillary Services in the Western Market Systems Coordinating Council	)	**Docket No. EL01-68-000**
	)	
Investigation of Anomalous Bidding Behavior and Practices in Western Markets	)	**Docket No. IN03-10-000**
	)	
Fact-Finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices	)	**Docket No. PA02-2-000**
	)	
American Electric Power Service Corporation	)	**Docket Nos. EL03-137-000, *et al*.**
	)	
Enron Power Marketing, Inc. and Enron Energy Services Inc.	)	**Docket Nos. EL03-180-000, *et al*.**
	)	
California Independent System Operator Corporation	)	**Docket No. ER03-746-000**
	)	
State of California, *ex rel*. Bill Lockyer, Attorney General of the State of California	)	**Docket No. EL02-71-000**
v.	)	
British Columbia Power Exchange Corp.	)	
	)	
Sempra Energy Trading Corp.	)	**Docket No. EL03-173-000**
	)	
Sempra Energy Trading Corp.	)	**Docket No. EL03-201-000**
	)	
State of California, ex rel. Bill Lockyer, Attorney General of the State of California	)	**Docket No. EL09-56-000**
v.	)	
Powerex Corp. (f/k/a British Columbia Power Exchange Corp.) *et al*.	)	

COMMENTS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION IN SUPPORT OF THE JOINT OFFER OF SETTLEMENT INVOLVING SEMPRA

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) (2010), the California Independent System Operator Corporation ("ISO")[1] hereby submits its comments on the Joint Offer of Settlement ("Settlement Agreement") filed by Sempra Energy, Sempra Energy Trading LLC (f/k/a Sempra Energy Trading Corp.), Sempra Energy Solutions, LLC,[2] and the California Parties[3] (collectively, the "Settling Parties"), in the above-captioned proceedings on October 18, 2010.

I. COMMENTS

A. The Settlement Agreement Directly Affects the ISO's Interests.

Although the ISO is not a signatory to the Settlement Agreement, the ISO, along with the California Power Exchange ("PX"), will be responsible for the financial implementation of this settlement on its books of account and in the financial clearing phase of the market re-runs that have been ordered by the Commission.[4] In particular, as explained below, a portion of the funding for this

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1 Capitalized terms not otherwise defined herein are used as defined in Appendix A to the ISO Tariff, or in the Settlement and Release of Claims Agreement referred to in the text.

2 The Sempra parties are referred to herein collectively as "Sempra."

3 For purposes of the Settlement Agreement, the "California Parties" means, collectively, 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, the California Public Utilities Commission, 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.

4 *See*, in particular, 105 FERC ¶ 61,066 (2003), the Commission's Order on Rehearing, Docket Nos. EL00-95-081, *et al.*

settlement will come from amounts currently held by the ISO relating to "generator fines." For this reason, the ISO has a direct and substantial interest in the Commission's treatment of the Settlement Agreement.

B. The ISO Supports the Settlement Agreement.

The ISO has always supported the general principle that the end to complex litigation through settlement is the preferred process as opposed to the continuation of that litigation for all litigants, or for even a selected subset of the litigants. In addition, this Commission has consistently encouraged parties to resolve disputes whenever possible through settlement.[5] The Refund Proceeding has now been ongoing for over eight years. Against this backdrop, the ISO continues to support the general principle of settlement as embodied in the Settlement Agreement offered by the Settling Parties. The approval of the proposed Settlement Agreement will allow certain amounts of cash to flow sooner than would otherwise be the case and in that respect will clearly benefit Market Participants.

The ISO also notes and supports the inclusion in the Settlement Agreement of a duty to cooperate on the part of the Settling Parties.[6] This duty to cooperate includes providing assistance to the ISO and PX as necessary in order to implement the Settlement Agreement. It will be absolutely essential that the cooperation of the Settling Parties be maintained from the ISO's perspective, so

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

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

that the proper financial adjustments can be made so as to properly implement the Settlement Agreement.

The ISO thanks the Settling Parties for their efforts to work together and reach agreement. It is the ISO's hope that the Commission will not have to become involved in any implementation disputes involving this Settlement Agreement. However, recognizing that it is not possible to foresee every contingency that might arise, the procedural framework is in place to handle such disputes, if indeed they do arise.

C. 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 this Settlement Agreement make it necessary to hold harmless the market operators (*i.e.*, the ISO and the PX) that are ultimately tasked with implementing this Settlement Agreement,[7] 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

[7] The ISO has requested hold harmless treatment in comments on previous settlements filed in this proceeding with respect to Duke, Williams, Mirant, Enron, PS Colorado, Reliant, IDACORP, Eugene Water and Electric Board, the Automated Power Exchange, Portland General, El Paso Merchant Energy, PacifiCorp, PPM Energy, Inc, Connectiv, Midway Sunset, the Cities of Anaheim, Azusa and Riverside, Grant County, Strategic Energy, Pinnacle West, NEGT, PECO/Excelon, Salt River Project, Puget Sound, AES, Constellation, CFE, Cargill, LADWP, NCPA, Public Service Company of New Mexico, and Tucson Electric. The Commission has, to date, provided the ISO with hold harmless treatment with respect to all of these settlements on which it has ruled.

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. As noted above, the Commission has already approved hold harmless language for the ISO and the PX in the context of 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 also 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, and make billing adjustments accordingly. 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.

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 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 ISO's implementation of the Settlement Agreement.

These problems may be amplified as the Commission approves additional settlement agreements in these proceedings. As the number and variety of approved settlements increases, the task of implementing those settlements will become more complicated. Likewise, the possibility a party will bring an action against one, or both, of the market operators also increases. For this reason, the ISO believes that it is critically important that the Commission hold the ISO (along with its directors, officers, employees, and consultants) harmless with respect to the implementation of all of the settlements reached in these proceedings that involve the flow of monies through the ISO Markets.

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.[8]

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.

D. The ISO Will Fund a Portion of the Settlement With Retained Generator Fine Amounts.

As noted in the Explanatory Statement accompanying the Settlement Agreement, Section 4.1.1.4(i) of the Settlement Agreement provides that the settlement will be funded, in part, by a transfer of amounts held by the ISO.[9]

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[8] *See* Joint Explanatory Statement at 18-19 (Attachment A to Settlement Agreement).

[9] *See id*. at 15, n. 48.

Specifically, the ISO will transfer approximately $43.8 million to the Settlement Supplier Escrow within 15 business days of the effective date of the Settlement Agreement. This $43.8 million represents amounts that the ISO collected from December 2000 through June 2001 as "Generator Fines," and interest accrued on those amounts through August 1, 2010, which are owed back to ISO market creditors during this period. In its Forty-Fifth Status Report on Settlement Re-Run Activity, filed with the Commission on July 16, 2010, the ISO explained that it planned to return these amounts to the market by funding an upcoming global settlement in these proceedings. The Settlement Agreement at issue is the first global settlement to be filed subsequent to the Forty-Fifth Status Report and, therefore, the ISO indicated to the settling parties that the $43.8 million could be used to partially fund the Settlement Agreement. In order to ensure that parties understand the source and disposition of these "Generator Fine" amounts, the ISO offers the following explanation, which is similar to the one that it included in its Forty-Fifth Status Report.

Amendment No. 33 to the ISO Tariff added Section 5.6.3, which subjected participating generators to penalties if they failed to comply with ISO dispatch instructions during actual or threatened system emergencies.[10] These provisions were in place from December 8, 2000 to June 21, 2001.[11] Generator Fines were charged to participating generators under Charge Type 485 in the ISO's settlements system, and thus became known as "CT 485 Penalties." The ISO invoiced a total of $122.1 million in Generator Fines, on which it received only

[10] *See* 93 FERC ¶ 61,239 (December 8, 2000).

[11] *See* 97 FERC ¶ 61,293, at 62,367 (June 21, 2001) (directing ISO to remove these penalties from the ISO Tariff, effective June 21, 2001).

$60.6 million in payments. The unpaid remainder of $61.5 million was due to the default of the PX. Although the PX was assessed only $4.1 million in CT 485 Penalties, its non-payment nevertheless resulted in a much larger shortfall due to the pooled nature of ISO cash clearing.

The settlement charges associated with the fines have undergone two adjustments already. First, adjustments made during the preparatory rerun resulted in an increase in Generator Fines of $20.5 million, yielding total Generator Fines of approximately $142.6 million. Second, because the amount of each fine depended in part on the price of energy during the interval when the generator failed to respond, the fines were adjusted after application of the mitigated market clearing price ("MMCP"), pursuant to FERC orders in Docket Nos. EL00-95 and EL00-98. The net effect of the MMCP adjustment was to reduce the fines by approximately $113.1 million, to total net fines of $29.5 million.

A third adjustment was also necessary to account for FERC's order that Section 202(c) transactions, ordered by the Department of Energy, not be mitigated.[12] Full compliance with this order required the ISO to increase generator fines in any intervals when 202(c) sales were made at prices higher than the MMCP. This resulted in an increase in the generator fines of approximately $1.4 million before interest (which results in an equal reduction in the amount of fines due back to the market). The ISO circulated to parties CDs

[12] *See* 102 FERC ¶ 61,317, P 85, P88 (March 26, 2003), *aff'd on rehearing*, 105 FERC ¶ 61,066, P 81 (Oct.16, 2003).

showing this adjustment in August of 2010, requesting comments by October 7, 2010. The ISO did not receive any comments on the adjustment.

After this adjustment, the total net fines were $30.9 million, which are applied to reduce the ISO's Grid Management Charge, per Section 6.5.2 of the ISO's Scheduling and Billing Protocol in place at the time the fines were collected. The remainder of the sums that the ISO is currently holding, $29.7 million plus interest, is owed back to market creditors. This reflects the $60.6 million of cash received minus the $30.9 million of net fines, before interest. The ISO determined that the most straightforward and expedient way to return this money to the market was to use it to partially fund the next global settlement reached in this proceeding.

In June of 2010, during negotiation of the Settlement Agreement, the ISO informed the settling parties that $43.8 million in Generator Fines would be available for use to partially fund the Settlement Agreement, representing the $29.7 million in principal plus interest accrued on this amount through August 1, 2010. There will be a small amount of interest still remaining to be disbursed after this Settlement Agreement becomes effective, including the additional interest that has accrued since August 1. Assuming this settlement is approved, the ISO will find an appropriate mechanism to disburse the remaining amounts to market creditors.

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: November 2, 2010

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 2nd day of November, 2010, in Washington, DC.

/s/ Michael Kunselman
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