UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company	)	
	)	
v.	)	**Docket No. EL00-95, *et al.***
	)	
Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange	)	
	)	
Investigation of Practices of the California Independent System Operator and the California Power Exchange	)	**Docket No. EL00-98, *et al.***

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

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) (2003), the California Independent System Operator Corporation ("ISO")[1] hereby submits its comments on the Joint Offer of Settlement ("Settlement Agreement") filed by Duke, the California Parties,[2] Other Claimant Parties,[3] and the Commission's Office of Market Oversight and Investigations (collectively, the

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

[2] The California Parties consist of Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), and San Diego Gas & Electric Company ("SDG&E"), the California Attorney General, CERS, the California Public Utility Commission, and the California Electricity Oversight Board.

[3] The Other Claimant Parties consist of the San Diego District Attorney's Office, the Attorney General of the State of Washington, and the Attorney General of the State of Oregon.

"Settling Parties") in the above captioned proceedings on October 1, 2004. The ISO comments as follows on the Settlement Agreement as filed with the Commission.

I. COMMENTS

A. The ISO Supports the Settlement Agreement

The ISO is a non-profit public benefit corporation organized under the laws of the state of California and is responsible for the reliable operation of the transmission grid comprising the transmission systems of SCE, SDG&E, PG&E, and various municipalities. The ISO is not a signatory to the Settlement Agreement. However, it is the ISO that will be responsible for the financial implementation of this settlement on its books of account and in the financial clearing phase of the market reruns that have been ordered by the Commission as a part of the Refund Proceeding.[4]

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 approximately three years. Against this backdrop, the ISO feels compelled to state that it continues to support the general principle

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

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

embodied in the Settlement Agreement offered by the Settling Parties and supports the settlement as filed. The approval of the proposed Settlement Agreement will allow certain amounts of cash to flow sooner[6] than would otherwise be the case and 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.[7] This duty to cooperate includes providing assistance to the ISO 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 that the proper financial adjustments can be made at the end of the market reruns taking place in this proceeding to properly reflect this settlement.

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.

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6 *See* Section 4 of the Settlement Agreement.

7 See Section 6.3 of 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 it Will Have to Perform in Order to Implement the Settlement Agreement.

The unique circumstances of this Settlement Agreement make it necessary to hold harmless the market operators (*i.e*., the ISO and PX) that are ultimately tasked with implementing this Settlement Agreement and others like it,[8] 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.

First, the financial impact of this Settlement Agreement is substantial – over $150 million dollars. 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 this proceeding. As the

[8] The ISO has requested hold harmless treatment in comments on previous settlements filed in this proceeding with respect to Dynegy and Williams. In its July 2, 2004 order accepting the Williams settlement, 108 FERC ¶ 61,002 (2004), the Commission denied the ISO and PX's request for a hold harmless provision. The ISO sought rehearing of this ruling.

Commission is well aware, the ISO Markets 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 could 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 that 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 (and even its directors, officers, employees and consultants), as a result of the ISO's implementation of the Settlement Agreement.

All of these problems will be amplified as the Commission approves more settlement agreements in this proceeding. The Commission has already approved the settlement reached between Williams and the California Parties, and now has settlements involving Duke and Dynegy pending before it. As the volume of settlements increases, the task of implementing those settlements will become more and 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 this proceeding 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 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 recommends 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. It is unreasonable to permit the Settling Parties to insulate themselves in this manner without providing similar protection to the entities that will be required to financially reflect and implement the Settlement Agreement. A hold harmless provision of the type requested by the ISO is also consistent with the approved terms of the ISO Tariff, which provides that the ISO shall not be liable in damages to any Market Participant for "any losses, damages, claims, liability, costs or expenses . . . arising from the performance or non-performance of its obligations" under the ISO Tariff, except to the extent that they result from

negligence or intentional wrongdoing on the part of the ISO. ISO Tariff, Section 14.1.

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 it will have to perform in order to implement the Settlement Agreement, and that neither the ISO, nor its directors, officers, or employees, or consultants will be responsible for recovering any funds disbursed pursuant to the Settlement Agreement, which are subsequently required to be repaid.

II. CONCLUSION

Wherefore, for the reasons stated above the ISO respectfully states that it supports the Settlement Agreement as filed and will work with the Settling Parties to implement it. The ISO also respectfully requests that the Commission state, in any order approving the Settlement Agreement, that 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, or 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,

/s/ Michael Kunselman

Charles F. Robinson
General Counsel
Gene L. Waas
Regulatory Counsel

The California Independent System Operator Corporation
151 Blue Ravine Road
Folsom, CA 95630
Telephone: (916) 608-7049

J. Phillip Jordan
Michael Kunselman

Swidler, Berlin, Shereff and Friedman, LLP
3000 K Street, Ste. 300
Washington, D.C. 20007
Telephone: (202) 424-7500

Dated: October 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served copies of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Folsom, CA, this 20th day of October, 2004.

/s/ Gene L. Waas

Gene L. Waas