

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

California Power Exchange Corporation

Docket No. ER05-910-000

ORDER ACCEPTING AND SUSPENDING TARIFF FILING AND ESTABLISHING  
SETTLEMENT JUDGE PROCEDURES

(Issued June 30, 2005)

1. This order accepts for filing the California Power Exchange Corporation's (CalPX) tariff relating to the recovery and allocation of CalPX expenditures for the July 1, 2005 through December 31, 2005 period (Rate Period 7). This order also suspends the proposed rate schedule sheet for a nominal period, subject to refund and further order, and establishes settlement judge procedures to assist the CalPX and other parties to this proceeding in reaching agreement on all issues, including expenses for Rate Period 7 and the cost allocation methodology. Our action provides a forum for the CalPX and the parties to this proceeding to resolve their disputes regarding the issues in the instant proceeding, including the allocation of CalPX expenditures.

**I. Background**

**Court Remand and Settlement Negotiations**

2. On July 9, 2004, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in *Pacific Gas and Electric Company v. FERC*<sup>1</sup> that vacated and remanded numerous Commission orders that authorized the CalPX to charge a "windup" rate to fund its limited operations. Subsequently, the Commission issued an order requesting comments from parties concerning the future of the CalPX.<sup>2</sup> Based on the filed comments, on August 20, 2004, the Commission issued an order deferring action

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<sup>1</sup> *Pacific Gas and Electric Company v. FERC*, 373 F.3d 1315 (D.C. Cir. 2004).

<sup>2</sup> *California Power Exchange Corp.*, 108 FERC ¶ 61,162 (2004).

in response to the court remand for 90 days, until November 18, 2004, while the parties conduct settlement negotiations.<sup>3</sup>

3. On November 1, 2004, the parties' failure to reach an agreement by the November 18, 2004, deadline, the California Parties<sup>4</sup> filed its third and final progress report on settlement clearing account to meet its projected expenses. Although negotiations had not produced a settlement, the participants indicated in status reports that that negotiations were continuing. On December 8, 2004, the Commission issued an order establishing settlement judge procedures to assist the CalPX and other parties in reaching a settlement.<sup>5</sup>

4. During the following months, the Commission's settlement judge convened several settlement conferences, the most recent being held on May 10-11, 2005. In his most recent progress report of June 14, 2005, the settlement judge indicated that productive settlement negotiations have continued to take place and both he and the parties believe that it is worthwhile to continue settlement talks.

#### **The CalPX's April 29 Filing**

5. On April 29, 2005, the CalPX filed proposed alternative amendments to its Rate Schedule No. 1 in order to recover projected expenses for Rate Period 7. The CalPX's projected wind-up expenses for the period are \$5,879,077, including an estimated cash shortfall of \$3,980,721 (Shortfall). The CalPX has proposed an allocation methodology and three alternatives for cost recovery.<sup>6</sup>

6. The CalPX proposes three alternatives for cost recovery. In Billing Alternative 1,<sup>7</sup> the CalPX proposes to transfer the Shortfall described above from the CalPX Settlement Clearing Account (Clearing Account) to meet its projected expenses for Period 7, and any

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<sup>3</sup> *California Power Exchange Corp.*, 108 FERC ¶ 61,199 (2004).

<sup>4</sup> The California Parties consist of the People of the State of California *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Southern California Edison Company, Pacific Gas and Electric Company and San Diego Gas and Electric Company.

<sup>5</sup> *California Power Exchange Corp.*, 109 FERC ¶ 61,259 (2004) (December 8 Order).

<sup>6</sup> The CalPX's proposed allocation methodology and timing for billing are supported by the testimony of Lawrence R. Conn, Director of Operations for the CalPX. The proposed rates for Rate Period 7, and the expenses and estimated expenses incurred are supported by David K. Gottlieb, Interim Chief Executive Officer of the CalPX.

<sup>7</sup> Billing Alternative 1 has been filed as Original Sheet 1F.

unused amount would be carried over to the subsequent rate period. Upon completion of the final financial phase in Docket No. EL00-95 *et al.* (the California Refund Proceeding), and a determination of “who owes what to whom,” the Shortfall for Period 7 would be billed by the CalPX to its participants using an allocation method based upon the number and dollar value adjustment transactions processed by the CalPX beginning on July 10, 2002, the effective date of the first rate period, through a final date specified by the Commission. The CalPX also proposes to bill participants for any shortfalls approved for Rate Periods 1 through 6 based upon the same methodology.

7. The CalPX’s Proposed Billing Alternative 2<sup>8</sup> would use the same allocation method described in Billing Alternative 1, but would bill participants immediately and perform a true-up upon completion of the Refund Proceeding. Proposed Billing Alternative 3<sup>9</sup> would allow the CalPX to continue funding Shortfalls through withdrawals from the Clearing Account, defer billing to CalPX participants and, upon completion of the Refund Proceeding, allocate any wind-up fee deficiencies pursuant to a methodology prescribed by the Commission at that time.

8. The CalPX requests an effective date of July 1, 2005. It asserts that many of the requirements of Part 35 for a rate filing for a traditional utility are not appropriate for the CalPX’s unique situation. The CalPX therefore requests waiver of all of Part 35 regulations that might otherwise apply, in particular, requests waiver of sections 35.13(d) and (h) which deal respectively with cost of service test period requirements and cost of service statements AA through BM.

## **II. Notice, Interventions, Protests, and Comments**

9. Notice of the CalPX’s filing was published in the *Federal Register*, 70 Fed. Reg. 25,040 (2005), with comments, protests, or motions to intervene due on or before May 20, 2005.

10. Timely motions to intervene were filed by Williams, Pinnacle West Capital Corporation, the Northern California Power Agency, Salt River Project Agricultural Improvement and Power District, San Diego Gas and Electric Company, the Modesto Irrigation District, the Cogeneration Association of California and the Energy Producers and Users Coalition, Portland General Electric Company, Idaho Power Company, and the City of Santa Clara, California. Timely motions to intervene and protest were filed by Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SoCal), and Powerex Corporation (Powerex). Timely motions to intervene and

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<sup>8</sup> Billing Alternative 2 has been filed as First Alternate Original Sheet 1F.

<sup>9</sup> Billing Alternative 3 has been filed as Second Alternate Original Sheet 1F.

comment were filed by Public Service Company of New Mexico (PNM), the California Electricity Oversight Board (CEOB), and Williams Power Company, Inc. (Williams).

11. Coral Power, L.L.C. (Coral) and Constellation New Energy, Inc. (Constellation) filed motions to intervene out of time.

### **III. Protests and Comments**

12. PNM comments that the ongoing settlement discussions have been productive and is hopeful of a consensual resolution of wind-up charge issues. PNM, however, remains concerned about the CalPX's continued accumulation of expenses and believes that a definitive determination must be made to terminate CalPX activities and proposes a temporal limit of December 31, 2005. Similarly, the CEOB is hopeful of a settlement but is concerned about the amount of expenses incurred by the CalPX, particularly on legal services. Williams also supports the ongoing settlement efforts. It adds that, if settlement is not reached, it supports the CalPX's request to defer the actual allocation of expenses until the Commission determines "who owes what to whom" in the refund proceeding.

13. Powerex prefaces its protest that it is hopeful of settlement. To the extent settlement is not reached, Powerex supports the CalPX's proposal to establish an allocation methodology for recovery of wind-up expenses and to bill those expenses now, subject to later true-up. Powerex protests that the CalPX's proposed allocation methodology for Period 7, which is based on a methodology using the number of adjustments by the CalPX and the California Independent System Operator Corporation (CAISO) from and after July 10, 2002, has not been shown to be just and reasonable. In particular, Powerex is concerned that the CalPX has not provided details on the adjustments and questions the validity of the adjustment data, noting that Williams' relative percentage allocation changed from Period 6 to Period 7 without any apparent reason for the shift.

14. PG&E and SoCal contend that the CalPX's proposed allocation methodology violates the D.C. Circuit's decision. They argue that the proposal violates the filed rate doctrine and disregards principles of cost causation. PG&E and SoCal express concern regarding the level of CalPX spending, especially regarding amounts spent on litigation expenses. They propose that the Commission establish an evidentiary hearing to examine the reasonableness and prudence of the CalPX's expenditures. PG&E also objects to the CalPX's alternative proposal that would allow the CalPX to recover costs now but defer the allocation of such costs to an unknown future date and methodology.

#### IV. Discussion.

##### A. Procedural Matters.

15. Pursuant to Rule 214(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(c) (2004), the timely, unopposed motions to intervene the remaining parties filed serve to make them parties to this proceeding. Coral and Constellation filed motions to intervene out-of-time. These parties have demonstrated an interest in this proceeding which cannot be adequately represented by any other party. The Commission finds that granting their late-filed motions to intervene will not delay, disrupt, or otherwise prejudice this proceeding, or place an additional burden on existing parties. Therefore, for good cause shown, we will grant the late filed motions to intervene.<sup>10</sup>

16. Given the CalPX's unique characteristics, many of the requirements for rate filings are not appropriate. For example, when operating its markets the CalPX did not provide transmission services, and now that its markets are closed its activities consist of winding up unresolved issues related to those markets. Thus, we find that it is not necessary for the CalPX to adhere to the full requirements of Part 35. Accordingly, we hereby grant the requested waivers.

##### B. The CalPX Filing

17. Our preliminary analysis indicates that the CalPX's proposed recovery and allocation methodology has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept and suspend the CalPX's proposed Original Sheet No. 1F for a nominal period, to be effective July 1, 2005, subject to refund and further order. Our suspension of the CalPX's Original Sheet No. 1F is not intended to foreclose all parties, including the CalPX, from pursuing alternative rate proposals in the ordered settlement proceedings.<sup>11</sup>

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<sup>10</sup> 18 C.F.R. § 385.214(d) (2004).

<sup>11</sup> We deny PG&E's and SoCal's request for an evidentiary hearing. The CalPX has provided specific information regarding its litigation expenses and we are not persuaded that an evidentiary hearing is needed. *See* Exh. CPX-1B "Direct Testimony of David K. Gottlieb" at 12-30, 39-40, identifying the various categories of CalPX legal expenses and describing why they are necessary and non-duplicative. In addition, setting this matter for an evidentiary is at odds with our directing settlement judge procedures. Further, we have previously considered and denied similar arguments by SoCal regarding the CalPX's litigation expenditures. *See California Power Exchange Corp.*, 107 FERC ¶ 61,265 at 18-19 (2004).

18. The Commission previously directed settlement judge procedures to assist the parties involved in the CalPX's semi-annual rate filings to reach a settlement.<sup>12</sup> In response to the CalPX's April 29 filing relating to Period 7, almost all intervenors that submitted comments or protests expressed support for the ongoing settlement judge proceedings. Thus, in order to assist the parties in resolving the immediate matter, we will direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>13</sup> If the parties desire, they may, by mutual agreement, request a specific judge as a settlement judge in this proceeding, otherwise, the Chief Administrative Law Judge will select a judge for this purpose.. The settlement judge shall report to the Commission within 30 days of the date of this order concerning the status settlement discussions, and at 30-day intervals thereafter.

The Commission orders:

(A) The CalPX's proposed Original Sheet No. 1F regarding the recovery and allocation of CalPX expenditures for the period July 1, 2005 through December 31, 2005 (Rate Period 7) is hereby accepted and suspended for a nominal period, to be effective July 1, 2005, subject to refund, and subject to a further order by the Commission, as discussed in the body of this order.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge.

(C) Within 30 days of the date of issuance of this order, the settlement judge shall file a report with the Commission on the status of the settlement discussions. The settlement judge shall continue to file status reports at thirty-day intervals.

(D) PG&E and SoCal's request for an evidentiary hearing is denied, as discussed in the body of this order.

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<sup>12</sup> See December 8 Order, 109 FERC ¶ 61,259 at P 19.

<sup>13</sup> 18 C.F.R. § 385.604 (2004). However, we are not consolidating the immediate proceeding with those previously set for settlement judge procedures in the December 8 Order.

(E) The CalPX's petition for waiver of the full requirements of Part 35 is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.