

144 FERC ¶ 61,173
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

California Power Exchange Corporation

Docket No. ER13-1252-000

ORDER ON PETITION FOR EXTENSION OF EXISTING SETTLEMENT

(Issued August 30, 2013)

1. On April 3, 2013, the California Power Exchange Corporation (CalPX) filed a Petition to Extend Existing Wind-Up Charge Settlement (Petition), pursuant to Rule 207(a)(5),¹ proposing to amend the existing settlement agreement approved in Docket No. ER05-167-000, *et al.*, (Settlement) by extending its term for three years.² This order grants CalPX's Petition.

I. Background and Instant Filing

2. CalPX, a public utility, was established in 1996 by the State of California to provide various auction markets for the trading of electricity under FERC-approved tariff and rate schedules. As a result of the California energy crisis, the Commission terminated the CalPX FERC Electric Tariff (Tariff) on May 1, 2001.³ Consequently, CalPX suspended operations in its core markets on April 30, 2001.⁴ The suspension terminated CalPX's ability to assess to market participants an administration charge that funded CalPX's operations through its Tariff. While no longer in operation, the CalPX remains the custodian of the of market transactions, financial collateral, and funds for

¹ 18 C.F.R. § 385.207(a)(5) (2013).

² California Power Exchange Corporation April 3, 2013 Petition (Petition).

³ *California Power Exchange Corp.*, 100 FERC ¶ 61,178, at P 2 (2002) (citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 93 FERC ¶ 61,294, at 61,999 (2000)).

⁴ *Id.*

transactions that occurred during the California energy crisis for the refund period defined by the Commission.⁵

3. CalPX's current sole function is to wind-up its business affairs pursuant to ongoing Commission orders and oversight. Wind-up activities include: (1) maintaining any funds and assets held in trust by the CalPX as ordered by the Commission in the California Refund Proceeding, Docket No. EL00-95-000, et al.; (2) maintaining books and records of the CalPX; and (3) producing revised settlement statements and conducting analyses as may be required by the Commission in the California Refund Proceeding.⁶

4. On August 6, 2004, the Commission issued an order asking market participants to comment on whether CalPX should still be funded or on how CalPX should be funded.⁷ On November 1, 2004, CalPX filed proposed amendments to its Rate Schedule No. 1 to recover projected expenses for the wind-up period.⁸ The Commission accepted the filing, subject to refund, and ordered settlement judge procedures.⁹ On September 1, 2005, CalPX filed a Settlement Agreement (Settlement) reflecting an agreement authorizing CalPX to assess a wind-up charge to the participants in its markets to fund its operations through December 2007. The Commission accepted the Settlement on October 11, 2005, and has granted two extensions of the Settlement period.¹⁰ Currently, the Settlement is set to expire on December 31, 2013.¹¹

⁵ California Power Exchange Corporation, Application, Docket No. ER02-2234-000 (filed July 2, 2002) (July 2002 Filing) (According to the filing, CalPX is the custodian of certain financial rights consisting of approximately \$3 billion in amounts owed by and to participants and the California Independent System Operator, and approximately \$1.2 billion in cash in its Settlement Clearing Account.); CalPX Reply Comments at 2 (The refund period is the timeframe of October 2, 2000 through June 20, 2001.).

⁶ *California Power Exchange Corp.*, 108 FERC ¶ 61,199, at P 3 (2004).

⁷ *California Power Exchange Corp.*, 108 FERC ¶ 61,162 (2004) (August 6 Order).

⁸ California Power Exchange Corporation, Application, Docket No. ER05-167-000, at 1 (filed Nov. 1, 2004).

⁹ *California Power Exchange Corp.*, 109 FERC ¶ 61,259 (2004).

¹⁰ *California Power Exchange Corp.*, 113 FERC ¶ 61,017 (2005); *California Power Exchange Corp.*, 120 FERC ¶ 61,006 (2007); *California Power Exchange Corp.*, 131 FERC ¶ 61,099 (2010) (Order Approving Extension).

¹¹ Order Approving Extension, 131 FERC ¶ 61,099.

5. The current projected annual cost of CalPX's wind-up activities is approximately \$4 million per year.¹² CalPX estimates that it will be required to perform wind-up activities beyond December 31, 2013, due to milestones in related proceedings that will not be completed until late 2013, but CalPX will not have a mechanism in place for recovering the costs of those wind-up activities after the Settlement expires.¹³

6. To provide for the funding of wind-up activities beyond December 31, 2013, CalPX proposes to modify Sections 3 and 3B of the Settlement. CalPX notes that the other terms of the Settlement will remain unchanged.¹⁴ Specifically, section 3 states, "[t]he 'Effective period' of this Settlement shall be from the Effective Date until December 31, 2013, unless the [Cal]PX ceases operations and fully winds up its affairs prior to that date, in which case the Effective Period will terminate on such earlier date." In its Petition, CalPX proposes to substitute "2016" for "2013" in section 3. Section 3B provides that: "If the [Cal]PX is in existence after the end of 2013, any [Cal]PX Market Participant has the right to reopen the issue of allocation of Going Forward costs for periods in 2014 and beyond in response to a [Cal]PX filing to recover such Going Forward costs. In no event shall any such reopening result in any change to the allocation percentages for the Historical or Going Forward Costs agreed to herein through December 31, 2013." CalPX proposes to substitute "2016" for "2013" in Section 3B.¹⁵

II. Notice, Interventions, and Responsive Pleadings

7. Notice of the Petition was published in the *Federal Register*, 78 Fed. Reg. 21926 (2013), with interventions and protests due on or before April 24, 2013.

8. Timely motions to intervene were filed by the City of Santa Clara, California; Midway Sunset Cogeneration Company; Powerex Corporation; Salt River Project Agricultural Improvement and Power District; and Modesto Irrigation District. Portland General Electric Company (Portland General) and PG&E filed timely motions to intervene and comments.

9. On April 29, 2013, CalPX filed a motion requesting that the Commission set a deadline of May 10, 2013 for reply comments. On May 2, 2013, the Commission issued a notice granting CalPX's request. On May 10, 2013, CalPX filed reply comments in response to Portland General's comments.

¹² Petition at 4.

¹³ *Id.* at 5-7.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 8.

III. Comments and Protests

10. PG&E and Portland General support CalPX's proposal to extend the effective date of the Settlement. Both parties note that the Settlement has successfully allocated wind-up costs among the participants for the time period that it has been in effect.¹⁶ Portland General, however, argues that the negotiated cost allocations contained in the Settlement are applicable only to transactions that occurred during the original Refund Period, which is defined as the timeframe of October 2, 2000 through June 20, 2001. Portland General explains that the Commission is now conducting a second refund proceeding that covers transactions entered into between May 1, 2000 and October 1, 2000 (Summer Period), but has not yet issued a final decision in that proceeding. Portland General asserts, therefore, that it is not currently known whether or to what extent CalPX may be required to do additional work in relation to the Summer Period. Portland General argues that, without knowing these material facts, the Commission cannot determine whether the Settlement is just and reasonable as it may apply to CalPX's operations during the Summer Period.¹⁷

11. Further, Portland General explains that because it entered into a comprehensive settlement to resolve all issues in the Docket No. EL00-95-000, *et al.* (Global Settlement), which covered both the Refund Period and the Summer Period transactions, it was not a respondent in the proceeding related to the Summer Period and will not owe refunds for that period.¹⁸ Consequently, Portland General argues, there is no factual basis to justify holding it accountable for CalPX's wind-up costs for the Summer Period wind-up activities.¹⁹

12. In sum, Portland General asks the Commission to grant the extension, but only as it applies to the Refund Period. Further, Portland General recommends that after the cost parameters for the Summer Period wind-up activities are known, the parties to the Settlement should meet to discuss the procedures to address future cost responsibility.²⁰

13. In its reply comments, CalPX argues that the Commission should extend the existing Settlement, as is, and deny Portland General's request to exclude from its allocation CalPX's wind-up costs for the Summer Period. CalPX explains that under

¹⁶ PG&E April 24, 2013 Comments at 4; Portland General April 22, 2013 Comments at 3 (Portland General Comments).

¹⁷ Portland General Comments at 4.

¹⁸ *Id.*

¹⁹ *Id.* at 4-5.

²⁰ *Id.* at 5.

18 C.F.R. § 385.602 (2012), the Commission, when approving a settlement agreement, may focus on the purpose of the Petition and the extension of the effective dates, rather than perform a *de novo* review of the settlement agreement.²¹ Also, CalPX contends that under *Trailblazer Pipeline Corp.*,²² the Commission may approve a contested settlement under certain circumstances including: (1) if there is no genuine issue of material fact, or if after finding that the record contains substantial record, the Commission issues a decision on the merits of the contested issue; and (2) if the settlement taken as a whole is just and reasonable.²³ CalPX contends that, under the first approach, the Commission may decide that there is no genuine issue of material fact when the claim is not material, is considered a policy issue, or opposes a methodology that is consistent with precedent.

14. CalPX argues that the Petition should be approved under the first *Trailblazer* approach because Portland does not assert a genuine issue of material fact. CalPX contends that the Commission could deny Portland General's objection because it is insubstantial, and thus not material. CalPX explains that Portland General's total cost allocation amounts to only 1.37 percent, and of that percentage, only a fraction will be related to the Summer Period wind-up expenses.²⁴ CalPX also argues that the Commission may deny Portland General's claims on policy grounds because wind-up costs, which are temporary costs, have been characterized as a policy issue.²⁵

15. Also, under the first approach, CalPX asserts that since the record of this case contains substantial evidence, the Commission can issue a decision on the merits denying Portland General's claim. First, CalPX asserts that the record shows that Summer Period costs have always been included in the Settlement. CalPX explains that the Settlement allocates costs to market participants based on the time period in which CalPX incurred the cost. Specifically, "Historical Costs" were wind-up costs that were incurred by CalPX through December 31, 2004, and "Going Forward" costs are those incurred after that date. Thus, CalPX argues that distinctions between activities related to the Summer Period versus the Refund Period are not relevant to the question of cost allocation under the Settlement.²⁶

²¹ CalPX May 10, 2013 Reply Comments at 3 (CalPX Reply Comments).

²² 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999), *reh'g denied*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

²³ CalPX Reply Comments at 3-4.

²⁴ *Id.* at 6.

²⁵ *Id.* at 4-5.

²⁶ *Id.* at 7-8.

16. Moreover, CalPX explains that Section 5 of the Settlement states that the Going Forward costs shall include the “Necessary Functions” of CalPX after December 31, 2004. Among the list of enumerated Necessary Functions are the tasks of “managing the Settlement Clearing Account and any funds or assets held in trust by the [Cal]PX as ordered by FERC in the California Refund Proceeding, Docket Nos. EL00-95-000, et al.,” maintaining the books and records of the [Cal]PX, producing statements, and conducting analyses as may be required by FERC in the California Refund Proceeding.²⁷ According to CalPX, because the Summer Period litigation in FERC Docket No. EL00-95-248 is a sub docket of the main Docket No. EL00-95-000, activities related to that sub docket are Necessary Functions under the Settlement and, therefore, Portland General’s request to exclude the Summer Period wind-up costs from its allocation should be rejected.²⁸

17. Next, CalPX asserts that during the Settlement negotiations, Portland General was aware that CalPX may be required to conduct wind-up activities for the Summer Period transactions. CalPX explains that when the Settlement was submitted for approval, issues regarding the Summer Period were already briefed and argued in the *Public Utilities Commission of California v. FERC*²⁹ proceeding, to which Portland General was a respondent. Therefore, CalPX argues, Portland General had notice that the wind-up activities covered by the Settlement might include the Summer Period transactions.³⁰

18. In addition, CalPX asserts that by joining the Global Settlement, Portland General incurred an ongoing obligation to pay CalPX’s wind-up charges. CalPX also observes that parties that settled with Portland General and opted into the Global Settlement expected that Portland General would continue to pay its allocated CalPX wind-up fees. Thus, CalPX asserts that excluding Portland General from costs incurred in relation to the Summer Period would require CalPX to reallocate these costs to remaining market participants, thereby potentially denying some settling parties the benefit of their bargain with Portland General.³¹

19. Finally, CalPX asserts that it would be burdensome to CalPX, and more expensive for parties to the Settlement, for CalPX to carve out from its wind-up activities the

²⁷ *Id.* at 8-9.

²⁸ *Id.*

²⁹ *Pub. Utils. Comm’n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006).

³⁰ CalPX Reply Comments at 8.

³¹ *Id.* at 10-11.

transactions that solely impact Portland General for the Summer Period.³² For example, CalPX notes that it would need to establish a separate tracking system for its personnel and contractors. CalPX argues that these efforts would make little sense in light of CalPX's expectation that it may have limited or no wind-up duties related to the Summer Period.³³

20. Alternatively, under the second approach outlined in *Trailblazer*, CalPX asserts that even if the Commission does find that Portland General raised a genuine issue of material fact, the Commission could approve the Petition by finding that, on balance, it is just and reasonable overall. According to CalPX, Portland General's anticipated savings from excluding the wind-up fees associated with the Summer Period would be immaterial and outweighed by Portland General's litigation expense. Further, CalPX contends that the settlement should be viewed as a package, such that any modification would disturb the interrelated nature of the agreement. Lastly, CalPX maintains that the Settlement has benefited all of the parties for the last eight years, and other than Portland General, all other parties unconditionally support the extension.³⁴

IV. Discussion

A. Procedural Matters

21. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept CalPX's answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

23. Due to Portland General's objection to including costs for the Summer Period in the Settlement extension, we will treat the extension proposed in the Petition as a contested settlement pursuant to Rule 602.³⁵

³² *Id.* at 13.

³³ *Id.*

³⁴ *Id.* at 13-14.

³⁵ 18 C.F.R. § 385.602(h) (2013).

24. In order to approve CalPX's proposed extension of the Settlement over the objection raised by Portland General, the Commission must find that the settlement is just and reasonable.³⁶ In determining whether to approve a contested settlement under that standard, section 385.602(h)(1)(i)³⁷ of the Commission's settlement rules permits the Commission to decide the merits of the contested issues, if the record contains substantial evidence on which to base a reasoned decision, or if the Commission determines there is no genuine issue of material fact. In addition, as the Commission held in *Trailblazer*, "even if some individual aspects of a settlement may be problematic, the Commission may be able to approve a contested settlement as a package on the ground that the overall result of the settlement is just and reasonable."³⁸

25. After considering Portland General's arguments regarding the allocation of costs for the Summer Period, we find that the record contains substantial evidence on which to base a reasoned decision on this issue. Specifically, we are persuaded by CalPX's interpretation of the scope of wind-up activities covered under the Settlement and find that the Summer Period costs are appropriately included in the Settlement. If the Commission ultimately directs CalPX to perform work related to the Summer Period, we find that such costs are expressly contemplated in Section 5 of the Settlement as costs associated with managing funds held in trust by CalPX as part of the proceeding in Docket No. EL00-95-000, *et al.*, which includes the Summer Period. Thus, we find no merit in Portland General's request to limit its approval and applicability of the Settlement extension to the original Refund Period.

26. We also find that the Settlement represents an integrated package. The Settlement was entered into after a lengthy litigation phase, at the end of which fifty parties signed onto an uncontested agreement. Given the record and the unanimous support for the Settlement, we find the overall result of extending the Settlement will be just and reasonable.

27. Further, we find that Portland General's request to revisit the scope of the Settlement is unjustified. As CalPX articulated, pursuant to the Global Settlement, CalPX will be required to perform wind-up related activities associated with Portland General's Summer Period transactions. In addition, the Summer Period costs, as explained above, are included in the Settlement. We find, therefore, that it would be unreasonable to burden the other parties to the Settlement with the cost of re-opening and re-litigating the cost allocation issue.

³⁶ *Trailblazer*, 85 FERC ¶ 61,345 at 62,339.

³⁷ 18 C.F.R. § 385.602(h)(1)(i) (2013).

³⁸ *Trailblazer*, 85 FERC ¶ 61,345 at 62,342-62,343.

28. Finally, without the extension, it is likely that the Settlement will expire before the completion of the wind-up activities enumerated in the Settlement. As CalPX notes, the Settlement covers wind-up activities associated with the Commission's orders in Docket No. EL00-95-000, *et al.* At present, the proceedings related to the Summer Period, in Docket No. EL00-95-248, are still in progress, making it likely that CalPX will need to perform the related wind-up activities beyond December 31, 2013, the current expiration date of the Settlement. Accordingly, we find that extending the Settlement for an additional three-year term results in an overall just and reasonable result by permitting CalPX to carry on with its wind-up activities.

The Commission orders:

A three-year extension of the Settlement is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.