

155 FERC ¶ 61,218
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

California Power Exchange Corporation

Docket No. ER16-1173-000

ORDER ON PETITION FOR EXTENSION OF EXISTING SETTLEMENT

(Issued May 31, 2016)

1. On March 14, 2016, the California Power Exchange Corporation (CalPX) filed a Petition to Extend the Existing Wind-Up Charge Settlement, pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure,¹ proposing to amend the existing settlement agreement approved in Docket No. ER05-167-000, *et al.* (Settlement) by extending its terms for three years.² This order grants CalPX's Petition.

I. Background and Instant Filing

2. CalPX is a public utility established in 1996 by the State of California to provide various auction markets for the trading of electricity under a Commission-approved tariff (Tariff) and rate schedules. As a result of the California energy crisis of 2000-2001, the Commission terminated CalPX's 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 its operations through its Tariff. While no longer in operation, CalPX remains the custodian

¹ 18 C.F.R. § 385.207(a)(5) (2015).

² Cal. Power Exch. Corp. Petition at 1-2 (Petition).

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

⁴ *Id.*

of the market transactions, financial collateral, and funds for transactions that occurred during the California energy crisis for the refund period defined by the Commission.⁵

3. On August 6, 2004, the Commission issued an order asking market participants to comment on whether CalPX should still be funded or how it should be funded.⁶ On November 1, 2004, CalPX filed proposed amendments to its Rate Schedule No. 1 to recover projected expenses for the wind-up period.⁷ The Commission accepted the filing, subject to refund, and ordered settlement judge procedures.⁸ On September 1, 2005, CalPX filed the Settlement, which authorized CalPX to assess a wind-up charge to the participants in its markets to fund its operations through December 31, 2007. The Commission approved the Settlement on October 11, 2005, and has granted three extensions of the Settlement period.⁹ Currently, the Settlement is set to expire on December 31, 2016.¹⁰

4. CalPX's current sole function is to wind-up its business affairs pursuant to ongoing Commission orders and oversight. Its wind-up activities include: (1) maintaining any funds and assets it holds in trust, as ordered by the Commission in the California Refund Proceeding, Docket No. EL00-95-000, *et al.* (Refund Proceeding); (2) maintaining its books and records; and (3) producing revised settlement statements and conducting analyses as may be required by the Commission in the Refund Proceeding.¹¹

⁵ Cal. Power Exch. Corp., Application, Docket No. ER02-2234-000 (filed July 2, 2002) (asserting 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 Corporation (CAISO), and approximately \$1.2 billion in cash in its Settlement Clearing Account).

⁶ *Cal. Power Exch. Corp.*, 108 FERC ¶ 61,162 (2004).

⁷ Cal. Power Exch. Corp., Application, Docket No. ER05-167-000, at 1 (filed Nov. 1, 2004).

⁸ *Cal. Power Exch. Corp.*, 109 FERC ¶ 61,259 (2004).

⁹ *Cal. Power Exch. Corp.*, 113 FERC ¶ 61,017 (2005); *Cal. Power Exch. Corp.*, 120 FERC ¶ 61,006 (2007); *Cal. Power Exch. Corp.*, 131 FERC ¶ 61,099 (2010); *Cal. Power Exch. Corp.*, 144 FERC ¶ 61,173 (2013) (Order Approving Extension).

¹⁰ Order Approving Extension, 144 FERC ¶ 61,173.

¹¹ *Cal. Power Exch. Corp.*, 108 FERC ¶ 61,199, at P 3 (2004).

5. CalPX notes that its annual wind-up costs during the current rate extension have ranged from approximately \$2.6 million to \$3.3 million,¹² and estimates that it will be required to perform wind-up activities beyond December 31, 2016, due to milestones in related refund proceedings that will not be completed until late 2019. However, CalPX will not have a mechanism in place for recovering the costs of those wind-up activities beyond December 31, 2016, when the Settlement expires.¹³

6. To provide for the continued funding of its wind-up activities beyond December 31, 2016, CalPX proposes to modify Sections 3 and 3-B of the Settlement.¹⁴ Specifically, Section 3, as previously amended,¹⁵ states: “The ‘Effective Period’ of this Settlement shall be from the Effective Date until December 31, 2016, 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 substituting “2019” for “2016” in Section 3.¹⁶ Section 3-B, as previously amended,¹⁷ further provides: “If the [Cal]PX is in existence after the end of 2016, any [Cal]PX Market Participant has the right to reopen the issue of allocation of Going Forward costs for periods in 2017 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, 2016.” CalPX proposes substituting “2019” for “2016” and “2020” for “2017” in Section 3-B.¹⁸

¹² Petition at 5.

¹³ *Id.* at 5-8.

¹⁴ *Id.* at 8. CalPX notes that the other terms of the Settlement will remain unchanged. *Id.*

¹⁵ Order Approving Extension, 144 FERC ¶ 61,173.

¹⁶ Petition at 7; Appendix B at 48.

¹⁷ Order Approving Extension, 144 FERC ¶ 61,173.

¹⁸ Petition at 8; Appendix B at 48.

II. Notice, Intervention, and Responsive Pleadings

7. Notice of the Petition was published in the *Federal Register*, 81 Fed. Reg. 15,299 (2016), with interventions and protests due on or before April 4, 2016.

8. Timely motions to intervene were filed by the Salt River Project Agricultural Improvement and Power District, Pacific Gas & Electric Company (PG&E), Modesto Irrigation District, IDACORP Energy Services Company and Idaho Power Company, and the City of Santa Clara. Midway Sunset Cogeneration Company (Midway Sunset) filed a timely motion to intervene and protest (Protest). San Diego Gas & Electric Company (SDG&E) filed a motion to intervene out-of-time on April 5, 2016, which asserted that good cause existed to grant the motion given the status of the proceeding and the lack of prejudice to any party.

9. On April 19, 2016, CalPX filed a motion for leave to answer and an answer in response to Midway Sunset's Protest (Answer).

III. Protests and Answers

10. Midway Sunset, a California independent cogenerator, opposes the Petition and urges the Commission to reject it, asserting that CalPX's current funding mechanism imposes unjust and unreasonable rates on market participants that have settled and liquidated their CalPX escrow accounts.¹⁹ Midway Sunset argues that it imposes no further operating responsibilities or administrative burdens on CalPX. It asserts that the CalPX's on-going activities are related to (1) preserving funds in PG&E's settlement account and protecting those claims in the PG&E bankruptcy proceeding, and (2) assisting with accounting activity related to claims in the Refund Proceeding that have not been settled.²⁰ Midway Sunset argues that it does not benefit from these activities and that the costs associated with them should be paid by those parties that do.

11. As a proposed solution, Midway Sunset suggests that the CalPX fund its post-2016 activities from the remaining escrow funds under its control. Midway Sunset states that when the Refund Proceeding is complete and refunds are disbursed, the costs accrued by CalPX after December 31, 2016 can be deducted pro rata from the participant escrow accounts that remain.²¹

¹⁹ Protest at 2-4. According to Midway Sunset, it settled its liability in 2007 and its CalPX escrow account has been fully disbursed. *Id.* at 2.

²⁰ *Id.* at 3.

²¹ *Id.* at 3-4.

12. In its Answer, CalPX argues that Midway Sunset's Protest is without merit and that the Commission should approve the Petition under either Rule 602(h) of the Commission's Rules of Practice and Procedure²² or the *Trailblazer* standard.²³

13. According to CalPX, the global settlements in the Refund Proceeding and other energy crisis-related dockets, including Midway Sunset's global settlement, require CalPX to perform additional and substantial wind-up activities.²⁴ For example, Dr. Lawrence Conn, Director of Operations at CalPX, explains that each global settlement must be overlaid on the refund rerun that is performed by CalPX in the Refund Proceeding.²⁵ According to CalPX, this overlay phase of the Refund Proceeding includes accounting work to track the funds paid out under Midway Sunset's global settlement compared to participants' final refund balances under the refund rerun.²⁶ CalPX further states that it must account for any final true-ups and continue to perform all of the refund rerun and interest calculations for settling suppliers under the global settlements to release or collect any amounts owed.²⁷ CalPX further argues that each of the global settlements, including Midway Sunset's, results in additional wind-up activities because the amounts allocated for participants that opt into a settlement often change with each

²² 18 C.F.R. § 385.602(h) (2015).

²³ *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,342 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999) (*Trailblazer*).

²⁴ Answer at 4.

²⁵ *Id.*; Dr. Lawrence R. Conn Aff. ¶¶ 4-8 (Conn Aff.).

²⁶ Answer at 4; Conn Aff. ¶ 5.

²⁷ Answer at 4-5; Conn Aff. ¶ 6.

new global settlement that is approved by the Commission.²⁸ Lastly, CalPX states that it must ensure that the accounting set forth by the California Parties²⁹ reconciles with CalPX's accounting of the funds and credits transferred under the global settlements.³⁰

14. Specifically, as related to Midway Sunset, CalPX argues that, during the global settlement overlay phase of the Refund Proceeding, it will have to compare the funds it paid out under Midway Sunset's global settlement with its final balance under the refund rerun calculation. According to CalPX, Midway Sunset's global settlement provides that the refund rerun balances of non-settling participants will not be affected, so CalPX must ensure that clearinghouse funds are available to pay these parties their final balances. CalPX also points to section 5.6.1 of Midway Sunset's global settlement, which provides CalPX with authority to address receivables shortfalls in Midway Sunset's account, and section 6.1.3, which requires CalPX to continue to perform all of the refund rerun and interest calculations for Midway Sunset.³¹ Additionally, CalPX asserts it must perform the final cash clearing at the conclusion of the Refund Proceeding for all market participants, including those that entered global settlements. In sum, CalPX states the global settlements generally, and specifically Midway Sunset's global settlement, create substantial wind-up activities that benefit the parties to them.

15. Based on these facts, CalPX argues that Midway Sunset's Protest is without merit and should be rejected under the Commission's regulations. Specifically, CalPX urges the Commission to rely on 18 C.F.R. § 385.602(h)(1)(ii)(B), which CalPX asserts allows the Commission to "focus on the purpose of CalPX's Petition, which is simply to extend

²⁸ Answer at 6; Conn Aff. ¶ 7. CalPX states that this occurs because a global settlement typically provides that the settling supplier will opt into all prior global settlements if they have not already done so.

²⁹ In the Refund Proceeding and other related proceedings, the California Parties are the People of the State of California *ex rel.* Kamala D. Harris, Attorney General of the State of California, the Public Utilities Commission of the State of California, the California Electricity Oversight Board, PG&E, SDG&E, and Southern California Edison Company (SoCal Edison).

³⁰ Answer at 4; Conn Aff. ¶ 8.

³¹ Answer at 5-6 (citing Midway Sunset and California Parties' Rate Case Settlement Agreement and Release of Claims Agreement, General Terms and Conditions, Section 4.1.5 (submitted Dec. 27, 2007); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 123 FERC ¶ 61,004 (2008) (Midway Sunset Global Settlement)).

the expiration of the Rate Case Settlement to enable CalPX to continue its wind-up operations.”³²

16. Alternatively, CalPX argues the Petition may be approved under a *Trailblazer* analysis.³³ Specifically, CalPX argues that the Commission may approve the Petition under the first *Trailblazer* approach,³⁴ and issue a decision on the merits based on a determination that there is no genuine issue of material fact. CalPX asserts that Midway Sunset’s sole basis for opposing the Petition is that its global settlement does not impact the CalPX, but as this basis is incorrect for the reasons stated above, its Protest should be denied.³⁵

17. CalPX further states that the Commission may decide the merits of a contested settlement on policy or precedent grounds if it determines that the record is adequate to do so. CalPX argues that there is substantial evidence on the record as a whole to support a finding that the Settlement will set just and reasonable rates and cites prior Commission precedent establishing that temporary rates, including tracker true-ups, transition costs, stranded costs, and exit fees, may be decided by the Commission in a contested settlement. CalPX alleges that its wind-up charges are analogous to these temporary charges in that they are designed to recover a utility’s costs for a temporary period of time for a specific purpose.

18. CalPX also argues that Midway Sunset’s interest in this proceeding is too small and attenuated, and thus, immaterial on a monetary basis.³⁶ Here, CalPX notes that Midway Sunset’s allocation is 1.25 percent of CalPX’s wind-up costs, which amounted to \$23,794.21 in its last rate case. Thus, according to CalPX, the Commission could

³² *Id.* at 2.

³³ *Id.* at 9.

³⁴ *Id.* at 9-12.

³⁵ CalPX notes that the third approach under *Trailblazer*, i.e., finding that the objecting party’s concerns are too attenuated, may not be appropriate here because there is not another proceeding to address the extension of CalPX’s Settlement and wind-up fee allocations thereunder. *Id.* at 3 n.6. CalPX also notes that the fourth approach under *Trailblazer*, i.e., severance, may not be appropriate here because Midway Sunset has not requested to be severed from the Settlement and CalPX does not recommend severance for the minimal amount of its wind-up fees. *Id.* at 3 n.7.

³⁶ *Id.* at 11 (citing *Overthrust Pipeline Co.*, 83 FERC ¶ 61,003 (1998)).

alternatively approve the Petition on the grounds that Midway Sunset's objection is immaterial.

19. Additionally, CalPX argues that the Petition may be approved under the second *Trailblazer* approach by determining on balance that it is just and reasonable to extend the term of the Settlement.³⁷ According to CalPX, this approach is suitable where, as here, the parties have expressed their intent that a settlement agreement be considered as a package, and it involves a balancing of costs and benefits. CalPX argues that the parties' intent should continue to be honored here. CalPX further asserts that Midway Sunset would not likely end up in a better position if the Settlement were to be reopened and the issues litigated. As such, the CalPX urges the Commission to approve the extension as being overall just and reasonable.

20. Finally, CalPX argues that Midway Sunset's proposed solution to funding CalPX is vague and not viable, and thus should be rejected.³⁸ Specifically, CalPX asserts that Midway Sunset's proposal can be interpreted to refer to solely the California Utilities³⁹ or may include other market participants that have not entered into global settlements. CalPX further argues that Midway Sunset does not clearly state from which "escrow accounts" Midway Sunset would have CalPX withdraw funds. According to CalPX, it maintains reserve accounts for settling suppliers pursuant to the terms of multiple global settlements, but such accounts were expressly established as collateral for potential future obligations. CalPX also points out that its costs are ongoing and current, and cannot accrue to be deducted from certain accounts at the end of the Refund Proceeding.

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 (2015), the notices of intervention and timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2015), we grant SDG&E's unopposed motion to intervene out-of-time, given its interest in the proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

³⁷ *Id.* at 12.

³⁸ *Id.* at 7-9.

³⁹ The California Utilities are PG&E, SDG&E, and SoCal Edison.

22. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), 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 Midway Sunset's objection, we will treat the extension of the Settlement proposed in the Petition as a contested settlement pursuant to Rule 602(h) of the Commission's Rules of Practice and Procedure.⁴⁰ In determining whether to approve a contested settlement under Rule 602(h)(1)(i) of the Commission's Rules of Practice and Procedure, the Commission may 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.⁴¹ In *Trailblazer*, the Commission set forth four approaches for reviewing contested settlements, the first two of which are appropriate here.⁴² Under the first approach, the Commission can approve the contested settlement by addressing each contested issue on the merits, and if the contentions lack merit, the Commission can approve the contested settlement on that ground.⁴³ Under the second approach, "[e]ven 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."⁴⁴

24. After considering Midway Sunset's arguments regarding the justness and reasonableness of the continued allocation of CalPX's wind-up costs, 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 description of the additional activities that each global settlement creates for CalPX and find that the temporary wind-up charges are

⁴⁰ 18 C.F.R. § 385.602(h) (2015). This approach is consistent with the Order Approving Extension, where we considered a contested extension request under Rule 602(h) and performed a *Trailblazer* analysis. See Order Approving Extension, 144 FERC ¶ 61,173 at PP 23-28.

⁴¹ *Id.*

⁴² *Trailblazer*, 85 FERC ¶ 61,345 at 62,342-45.

⁴³ *Id.* at 62,342.

⁴⁴ *Id.* at 62,342-43. Because we approve the Settlement extension under these two *Trailblazer* approaches, we do not address the other approaches under *Trailblazer* or CalPX's alternative arguments.

appropriately allocated among market participants pursuant to the original settlement. Thus, we find no merit in Midway Sunset's position that it imposes no administrative burden on CalPX and does not benefit from the CalPX's wind-up activities that extend beyond the current rate extension.

25. Additionally, we continue to find that the Settlement represents an integrated package.⁴⁵ As the Commission has noted before, the Settlement was entered into after a lengthy litigation phase, at the end of which 50 parties, including Midway Sunset, signed onto an uncontested agreement. Moreover, we find that the Settlement will benefit not only the settling parties, but also ratepayers generally because it helps establish an orderly process for CalPX to wind-up its affairs and a mechanism for funding these necessary activities. Given the record, we find the overall result of extending the Settlement will be just and reasonable.

26. Further, we find that Midway Sunset's proposed solution to reexamine CalPX's funding mechanism is unjustified. Midway Sunset proposes "the funding mechanism for any remaining activity after 2016 recognize that the [CalPX's] continuing activities are caused by and benefit those whose remaining entitlement to refunds has not been fully liquidated."⁴⁶ However, as the CalPX articulated in its Answer, settling suppliers create additional and substantial work for CalPX, and that this additional work is set forth in each of the global settlements, including the global settlement Midway Sunset entered into with the California Parties. In addition, Midway Sunset's proposal that CalPX fund itself with the escrow accounts under its control is not viable because those accounts are governed by the terms of Commission-approved global settlements. Therefore, we reject Midway Sunset's proposal to reexamine CalPX's funding mechanism.

27. 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 the Refund Proceeding. At present, these proceedings are still in progress, making it likely that CalPX will need to perform the related wind-up activities beyond December 31, 2016, the current expiration date of the Settlement. We also note that we are approving only a three-year extension of the Settlement and that, to the extent CalPX finds it needs additional time beyond the end of 2019, it must justify such a further extension of time before the Commission. 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.

⁴⁵ See Order Approving Extension, 144 FERC ¶ 61,173.

⁴⁶ Protest at 3.

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.