

108 FERC ¶ 61,199  
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 Nos. ER02-2234-010
	ER03-139-006
	ER03-791-003
	ER04-111-002
	ER04-785-001

ORDER PROVIDING ADDITIONAL TIME  
TO CONDUCT SETTLEMENT DISCUSSIONS

(Issued August 20, 2004)

1. On July 9, 2004, the United States Court of Appeals for the District of Columbia Circuit (Court or D.C. Circuit) issued an opinion in *Pacific Gas and Electric Co. v. FERC*.<sup>1</sup> In its opinion, the Court vacated and remanded numerous Commission orders that authorized the California Power Exchange Corporation (CalPX or PX) to charge a “wind-up” rate to fund its ongoing operations.<sup>2</sup> In light of the Court’s decision, the Commission issued an order requesting comments from parties concerning the future of the CalPX.<sup>3</sup> Having reviewed the comments that were filed, the Commission, in this order, grants the parties’ request for additional time during which to conduct settlement discussions. Additionally, this order establishes a timetable to expedite and guide the settlement discussions.

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<sup>1</sup> *Pacific Gas and Electric Co. v. FERC*, Case No. 03-1025, *et al.* (July 9 Opinion).

<sup>2</sup> The Court’s opinion applies to the Commission’s orders accepting the “wind-up” rate for the first, second and third rate periods in Docket Nos. ER02-2234, ER03-139, and ER03-791, respectively. The most recently filed petition for review of the orders that accepted the “wind-up” rate for the fourth rate period in Docket No. ER04-111, has been held in abeyance pending the Court’s ruling on the prior appeals (*see* D.C. Circuit Case No. 04-1122). Additionally, rehearing of the order conditionally accepting the “wind-up” rate schedule for the fifth rate period is currently pending before the Commission in Docket No. ER04-785-001.

<sup>3</sup> *California Power Exchange Corp.*, 108 FERC ¶ 61,162 (2004) (August 6 Order).

## **Background**

2. The CalPX is a public utility that provided auction markets for the trading of electricity and provided certain other functions in relation to the California power markets. After the summer of 2000 witnessed significant increases in the wholesale price of electricity in the California market, the Commission adopted a number of remedies to address flaws it found in that market and its governing rules.<sup>4</sup> These actions led, among other things, to the termination of the CalPX's rate schedules and the suspension of operations in its markets. By the end of January 2001, the CalPX had suspended trading in its markets and began to wind-up its operations. On March 9, 2001, the CalPX filed for bankruptcy, and shortly thereafter, on April 30, 2001, the CalPX's rate schedules were terminated by this Commission.<sup>5</sup>

3. After the CalPX closed its markets, the Commission granted the CalPX permission to charge "wind-up" rates in order to fund its ongoing activities. These activities include: (1) maintaining and preserving the CalPX's books and records, and to produce any required information for proceedings before this Commission, or in other fora; (2) performing calculations to implement the Commission's decision in the Refund Proceeding in Docket No. EL00-95-045, *et al.*; and (3) serving as the custodian of approximately \$1.2 billion in the Settlement Clearing Account, representing funds that the CalPX holds in trust for those who bought and sold electricity in its markets.<sup>6</sup>

4. The Commission found that the CalPX's proposed "wind-up" rate schedule, as modified, was an appropriate mechanism to allow the CalPX to fund its continuing operations. The Commission also required the CalPX to return to the Commission every six months to provide justification for its expenses and to receive new authorization to continue charging the rate. *California Power Exchange Corp.*, 100 FERC ¶ 61,178 at P 25-26, *reh'g denied*, 101 FERC ¶ 61,330 (2002). The Commission explained that because the CalPX was still performing functions that were imperative to protect the public interest, it was appropriate to fund its ongoing operations. *Id.* at P 21.

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<sup>4</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 93 FERC ¶ 61,294 at 61,999-62,001 (2000).

<sup>5</sup> *Id.* at 62,000 and 62,020.

<sup>6</sup> *See California Power Exchange Corp.*, 103 FERC ¶ 61,001 at P 11 (2003).

5. However, on July 9, 2004, the D.C. Circuit held that the “wind-up” rates were a form of retroactive ratemaking and that the method that the Commission had used to allocate the “wind-up” rates was unreasonable. The Court explained that “the imposition of additional charges on CalPX’s customers . . . without reflection of any new jurisdictional services directly violates the filed-rate doctrine or the rule against retroactive ratemaking.”<sup>7</sup> Therefore, the Court found that “any imposition of new costs based on these previous transactions is prohibited.” *Id.*

6. The Commission subsequently issued its August 6 Order which sought comments from the parties as to “whether the services that CalPX provides are still necessary, and if so, how the CalPX could be funded in light of the Court’s ruling.”<sup>8</sup> The Commission explained that it would consider such comments when determining what action it should take.<sup>9</sup> Additionally, the order stated that the CalPX should prepare for the termination of its operations and suggested that it may transfer its functions to the California Independent System Operator Corporation (ISO) or “some other appropriate entity.”<sup>10</sup>

7. On August 16, 2004, several parties filed comments in Docket Nos. ER02-2234-010, ER03-139-006, ER03-791-003.

### **Comments**

8. The parties filing comments overwhelmingly support the continued operations and existence of the CalPX. Southern California Edison Company (Edison) states that the CalPX performs certain “vital services that must continue to be performed by a public utility subject to this Commission’s jurisdiction.”<sup>11</sup> Also supporting the CalPX’s

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<sup>7</sup> Slip op. at 8.

<sup>8</sup> August 6 Order at P 1.

<sup>9</sup> *Id.* at P 4.

<sup>10</sup> *Id.* at P 6.

<sup>11</sup> Edison’s comments at 3.

continued efforts, Indicated Intervenors state “the CalPX clearly is the entity that knows and understands its markets and software and is in the best position to conduct final billing settlement of its markets, along with the appropriate refund calculations.”<sup>12</sup>

9. Similarly, the California Parties recognize that the CalPX plays an important role in the refund process and requests “that the Commission take no action to terminate funding of the PX” at this time.<sup>13</sup> Indicated Generators also believe that “the CalPX should be maintained for the purpose of providing assistance with the calculation and implementation of refunds . . . provided that the Commission approves and implements an equitable allocation scheme that recovers the CalPX’s costs from those that benefit from the Refund Proceeding.”<sup>14</sup>

10. In response to the Commission’s suggestion that the CalPX should contemplate transferring its books and records to the ISO or another appropriate entity, the reactions were mixed. The consensus of commenters, however, is that the CalPX should be retained to efficiently wrap up the remaining tasks in the Refund Proceeding.

11. In particular, the ISO makes clear that it is not ready or able to accept the transfer of the CalPX’s responsibilities onto itself. The ISO states that such a transfer “would be extremely burdensome and disruptive and could raise obstacles that go to the core of the CAISO’s functioning.”<sup>15</sup> Moreover, in addition to great expense, the ISO explains that many thorny legal and regulatory issues would need to be addressed before such a transfer could occur. The ISO, therefore, suggests that the Commission should identify “a different ‘appropriate entity’” to which the CalPX’s assets can be transferred.<sup>16</sup>

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<sup>12</sup> The “Indicated Intervenors” consist of Avista Energy, Inc., Coral Power, L.L.C., El Paso Merchant Energy, L.P., Idaho Power Company and Idacorp Energy LLP, and Powerex Corp. Comments at 2.

<sup>13</sup> The “California Parties” consist of Pacific Gas and Electric Company (PG&E); Southern California Edison Company (Edison); the People of the State of California *ex rel.* Bill Lockyer, Attorney General; the California Electricity Oversight Board; and the California Public Utilities Commission. Comments at 9.

<sup>14</sup> The “Indicated Generators” consist of Reliant Energy Power Generation, Inc., Williams Power Company, Inc., Mirant Americas Energy Marketing, LP, and Mirant California, LLC. Comments at 1.

<sup>15</sup> ISO’s comments at 3.

<sup>16</sup> *Id.* at 5.

12. Similarly, Indicated Generators agree that the suggestion to transfer the CalPX's responsibilities to the ISO "is especially ill-advised considering that the refund proceeding is nearing completion."<sup>17</sup> The CalPX does not disagree either, stating that "the transfer of its assets presents substantial practical and legal difficulties."<sup>18</sup> California Parties also believe that forcing another entity to step into the shoes of the CalPX would necessarily face challenges. Standing alone, however, Edison contends that in the event that the PX is terminated, the Commission should order that its records be transferred to the ISO. Edison believes that while "the ISO may not wish to take on these extra responsibilities the ISO is uniquely positioned to assume these responsibilities in the event that the PX must cease operations."<sup>19</sup>

13. Although the commenters did not provide the Commission with any detailed proposals for an acceptable "wind-up" rate methodology, they did state that several parties have expressed an active interest in trying to find a solution to the issue of cost allocation by means of a negotiated settlement, and that settlement talks have begun. CalPX states that while it cannot disclose the principles under discussion, because they are confidential, it strongly urges the Commission to provide a reasonable opportunity for the parties to resolve this issue by settlement, before the Commission issues a remand order.

14. Other parties, such as California Parties, state that they are willing to work with each other to achieve a settlement if the Commission can hold its proceedings on remand in abeyance pending conclusion of the parties' ongoing settlement discussions. Furthermore, California Parties state that if the Commission provides the parties with additional time, it will agree to provide the Commission with a progress report on settlement discussions at 60-day intervals.<sup>20</sup>

### **Other Requests**

15. California Parties, along with its comments, filed a motion to defer consideration of PG&E's "motion for immediate stay or vacatur" that PG&E filed in Docket No. ER04-785-001. In light of the pending settlement negotiations, California Parties (which

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<sup>17</sup> Indicated Generators' comments at 2.

<sup>18</sup> CalPX's comments at 33.

<sup>19</sup> Edison's comments at 4.

<sup>20</sup> California Parties' comments at 12, n.22.

includes PG&E) request that the Commission defer taking any action on PG&E's motion and PG&E's request for rehearing of the pending "wind-up" rate filing in Docket No. ER04-785-001.<sup>21</sup> California Parties state that a temporary deferral of Commission action "will permit settlement discussions to proceed on an orderly basis, which serves the interests of all market participants."<sup>22</sup>

16. Finally, the CalPX, Indicated Generators, and Indicated Intervenors request that the Commission give the parties the opportunity to file reply comments and to discuss any proposals to facilitate potential agreement on an appropriate allocation methodology.

### **Discussion**

17. The Commission is encouraged that the CalPX and its market participants are actively engaged in settlement negotiations that seek to resolve the issue of the PX's funding predicament. In light of the fact that the parties perceive value in the PX's continued operations, the Commission cannot underscore enough the need for the CalPX and its participants to reach agreement on the means of funding the PX's wind-up operations. In order to assist this process, the parties may avail themselves of the Commission's Dispute Resolution Service if they believe doing so would be useful.<sup>23</sup>

18. However, due to the time sensitive nature of this proceeding, the Commission will not permit the settlement negotiations to continue indefinitely. Instead, the Commission will give the parties 90 days to conduct settlement negotiations. During this period, the Commission will hold its proceedings on remand in abeyance pending the conclusion of this 90-day period. In the interim, the CalPX is directed to continue to perform its essential functions with the funds that it has already withdrawn from the Settlement Clearing Account pursuant to the terms of the June 10 Order. Additionally, the Commission will accept California Parties' offer to provide the Commission with a

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<sup>21</sup> On June 10, 2004, the Commission conditionally accepted the CalPX's "wind-up" rate filing for Rate Period 5 (July 1, 2004 to December 31, 2004). *See* California Power Exchange Corp., 107 FERC ¶ 61,265 (2004) (June 10 Order).

<sup>22</sup> California Parties' comments at 7.

<sup>23</sup> If the parties wish to pursue alternative dispute resolution, they can contact Richard Miles, the Director of the Dispute Resolution Service, at 1-877-FERC ADR (337-2237).

progress report on the settlement discussions. Again, however, due to the time sensitive nature of this proceeding, the Commission directs California Parties to file a status report at 30-day intervals instead of 60-day intervals.

19. The Commission will also grant California Parties' motion to defer consideration of PG&E's rehearing and its pending "motion for immediate stay or vacatur" that was filed on July 12, 2004 in Docket No. ER04-785-001. The Commission agrees with California Parties that deferring consideration of PG&E's July 12 pleading will permit settlement discussions with the CalPX to proceed on an orderly basis. Accordingly, the Commission will hold the proceeding in Docket No. ER04-785-001 in abeyance pending the conclusion of this 90-day period.

20. Finally, the Commission grants the request of the CalPX, Indicated Generators, and Indicated Intervenors to allow for reply comments in response to the initial comments that were filed on August 16, 2004. Reply comments must be filed within 10 days of the date of this order.

The Commission orders:

(A) The commenters' request for additional time to conduct settlement negotiations is granted. The Commission will defer taking action in response to the D.C. Circuit's July 9 Opinion for a period of 90 days from the date this order issues.

(B) California Parties must file a progress report of the settlement discussions at 30-day intervals in the above-captioned dockets.

(C) California Parties' request for deferral of PG&E's pending request for rehearing and its "motion for immediate stay or vacatur" is granted. The Commission will hold the proceeding in Docket No. ER04-785-001 in abeyance pending the conclusion of the 90-day period.

(D) Parties may file reply comments in response to the initial comments on or before August 30, 2004.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.