

109 FERC ¶ 61, 259
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

California Power Exchange Corporation Docket Nos. ER05-167-000
ER02-2234-010
ER03-139-006
ER03-791-003
ER04-111-002
ER04-785-001

ORDER ACCEPTING AND SUSPENDING TARIFF FILING
AND ESTABLISHING SETTLEMENT JUDGE PROCEDURES

(Issued December 8, 2004)

1. This order accepts for filing the California Power Exchange Corporation's (CalPX) tariff filing relating to the recovery and allocation of CalPX expenditures for the period January 1, 2005 through June 30, 2005, 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 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 present in the instant proceedings, 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 Co. v. FERC*¹ that vacated and remanded numerous Commission orders that authorized the CalPX to charge a "wind up" rate to fund its limited operations. Subsequently, the Commission issued an order

¹ *Pacific Gas and Electric Co. v. FERC*, 373 F.3d 1315 (D.C. Cir. 2004)(PG&E).

requesting comments from parties concerning the future of the CalPX.² Based on the filed comments, on August 20, 2004, the Commission issued an order deferring action in response to the court remand for 90 days, until November 18, 2004, while the parties conduct settlement negotiations.³ The Commission directed the California Parties⁴ to file ongoing progress reports on the status of the settlement discussions.

3. On November 19, 2004, following the parties' failure to reach an agreement by the November 18, 2004, deadline, the California Parties filed its third and final progress report on settlement discussions and requested settlement judge procedures. The California Parties believe that a negotiated settlement remains the best solution to solve the CalPX funding issues, and that formal settlement procedures before a Commission administrative law judge would facilitate the parties in reaching a settlement.

The CalPX's November 1 Filing

4. On November 1, 2004, the CalPX filed, pursuant to section 205 of the Federal Power Act,⁵ proposed Original Sheet No. 1E to its Rate Schedule FERC No. 1 to recover projected expenses for the period January 1, 2005 through June 30, 2005 (Rate Period 6).⁶ The CalPX states that its projected wind-up expenses for Rate Period 6 are \$6,653,478 and the cash shortfall is projected to be \$8,015,197. The CalPX proposes a methodology to allocate its expenses for Rate Period 6 pursuant to which the CalPX would take funds from the settlement clearing account to meet its projected expenses.⁷

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

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

⁴ For purposes of the filing, the California Parties are 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.

⁵ 16 U.S.C. § 824d (2000).

⁶ Docket No. ER05-167-000. The CalPX states that the Commission required the CalPX to make rate filings at six-month intervals to recover the expenses of its operations to wind-up its business affairs. *Citing California Power Exchange Corp.*, 100 FERC ¶ 61,178 (2002).

⁷ The CalPX's filing is supported by the testimony of David K. Gottlieb, the interim chief executive officer of the CalPX. The CalPX's proposed allocation methodology is supported by the testimony of Lawrence R. Conn, Director of Operations for the CalPX. The CalPX's proposed rate schedule for Rate Period 6 is supported by

It would then allocate expenses based on the number of adjustment transactions and the dollar value of those transactions that the CalPX has processed since the effective date of its first rates schedule on July 10, 2002, until the conclusion of the final financial phase in Docket No. EL00-95 *et al.* (California Refund Proceeding), and a determination of “who owes what to whom.” The CalPX states that this methodology is also appropriate on a retroactive basis to re-allocate CalPX wind-up expenses for rate periods 1 through 5.

5. The CalPX contends that its proposed methodology comports with *PG&E v. FERC*. According to the CalPX, its proposal, which ties costs to the functions performed by the CalPX after July 10, 2002, when it began recovering wind-up costs, is consistent with the filed rate doctrine and cost causation principles.

6. While the CalPX indicates that it prefers the allocation methodology described above, it also proposes two alternatives.⁸ The CalPX’s first alternative proposal would permit the CalPX to use the same allocation methodology as described above, but rather than deferring recovery until after the final financial phase of the refund proceeding, would instead immediately bill its market participants. The CalPX would perform a true-up billing at the end of the California Refund Proceeding. The CalPX’s second alternative proposal would defer billing, continue to fund itself through withdrawals from the settlement clearing account, and wait until the end of the final financial phase of the refund proceeding before allocating any wind-up fees deficiencies, base on a methodology to be prescribed by the Commission at that time.

7. The CalPX requests an effective date of January 1, 2005 and expedited action by December 10, 2004 in order that it may plan its business affairs in response to the Commission’s order. The CalPX also contends that the full filing requirements of Part 35 are not appropriate for the PX’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 Answer

8. Notice of the CalPX’s November 1, 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 67,343 (2004), with interventions and protests due no later than November 15, 2004.

Charles B. Renfrew, of the CalPX Board of Directors.

⁸ The CalPX has filed these alternatives as First and Second Alternate Rate Schedule Sheet No. 1E.

9. Timely motions to intervene were filed by Pacific Gas and Electric Company (PG&E), Sempra Energy Trading Corp., Exelon Corp., El Paso Merchant Energy, L.P., Duke Energy North America, LLC and Duke Energy Trading and Marketing LLC (collectively “Duke”), Avista Energy, Inc. (Avista), Sacramento Municipal Utility District (SMUD), Williams Power Company, Inc. (Williams), Pinnacle West Capital Corp., Midway Sunset Cogeneration Co., Powerex Corp. (Powerex), Public Service Company of New Mexico (PNM), Portland General Electric Co., Los Angeles Department of Water & Power (LADWP), NEG Energy Trading-Power, L.P., Northern California Power Agency, San Diego Gas and Electric Co. (SDG&E), Western Area Power Administration, City of Santa Clara, California, Modesto Irrigation District, Aquila Merchant Services, Inc., Salt River Project Agricultural Improvement and Power District and Southern California Edison Company (SoCal). Protests were filed by SoCal, SMUD, PG&E and SDG&E.

10. The California Independent System Operator Corporation (CAISO), Enron Power Marketing, Inc. (Enron), and Idaho Power Company (Idaho Power) filed motions to intervene out of time.

11. On November 22, 2004, the CalPX filed an answer to the protests and comments. On November 24, 2004, PG&E filed a supplemental protest and leave to answer the CalPX’s answer.

III. Comments and Protests

12. Avista, Powerex and LADWP generally support the allocation methodology proposed by the CalPX as reasonable and addressing the concerns of the D.C. Circuit. Avista supports the proposal that the CalPX wait until the end of the California Refund Proceeding before billing market participants, while Powerex prefers the alternative proposal of immediately billing market participants with a later true-up. Powerex also states that the CalPX’s proposal should only apply to the rate period for the year 2005.

13. PNM states that it does not object to the CalPX filing, but is concerned about the continued accumulation of CalPX wind-up expenses. Williams states that it cannot gauge the impact of the CalPX proposal, and prefers deferral of the actual allocation until the “who owes what to whom” phase of the California Refund Proceeding. Duke seeks clarification that, if approved, the post-final financial phase true-up of allocation percentages should not include adjustments for unmitigated block-forward and contract-path RMR transactions.

14. SMUD, SDG&E, PG&E and SoCal contend that the proposed allocation methodology violates the D.C. Circuit’s decision. They argue that the proposal violates the filed rate doctrine because former CalPX participants would still be assessed new

charges based on past transactions. They also contend that the proposal disregards principles of cost causation. They also express concern regarding the level of CalPX spending and, litigation expenses in particular. They support settlement as the best means of resolving CalPX funding issues.

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. The CAISO, Enron and Idaho Power 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.⁹

16. The Commission's Rules generally prohibit answers to answers, 18 C.F.R. § 385.213(a)(2) (2004). We are not persuaded to allow the CalPX's answers or PG&E's supplemental protest and answer to the CalPX; accordingly, we reject them.

17. Given the CalPX's unique characteristics, 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. Settlement Judge Procedures

18. 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. 1E for a nominal period, to be effective January 1, 2005, subject to refund and further order. Our suspension of the CalPX's Original Sheet No. 1E is not intended to foreclose all parties, including the CalPX, from pursuing alternative rate proposals in the ordered settlement proceedings.

19. In order to assist the parties in resolving this matter, we will direct settlement judge procedures, pursuant to Rule 603 of the Commission's Rules of Practice and

⁹ 18 C.F.R. § 385.214(d) (2004).

Procedure.¹⁰ 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.¹¹ 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.¹²

The Commission orders:

(A) The CalPX's proposed Original Sheet No. 1E regarding the recovery and allocation of CalPX expenditures for the period January 1, 2005 through June 30, 2005 (Rate Period 6) is hereby accepted and suspended for a nominal period, to be effective January 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. § 385.604 (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.

¹⁰ 18 C.F.R. § 385.604 (2004).

¹¹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a listing of the Commission's judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

¹² In *California Power Exchange Corp.*, 108 FERC ¶ 61,199 at P 19, the Commission granted California Parties' motion to defer consideration of PG&E's request for rehearing and pending motion for immediate stay or vacatur, filed on July 12, 2004 in Docket No. ER04-785-001. The Commission held the proceeding in abeyance pending the conclusion of the 90-day settlement window. The Commission will continue to hold the proceeding in abeyance pending the conclusion of settlement judge procedures.

(D) 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)

Magalie R. Salas,
Secretary.