

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 No. EL04-28-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER AND APPROVING
SETTLEMENT

(Issued January 28, 2004)

1. On November 24, 2003, the California Power Exchange Corporation (CalPX) filed a petition for declaratory order (Petition) requesting the Commission's approval of a proposed settlement among the CalPX, Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E). CalPX states that, if approved, the settlement will resolve two disputes arising from the CalPX's markets – the first concerns a billing dispute regarding the obligations of SCE and SDG&E to CalPX; the second concerns a dispute over subscription fees for the CalPX Trading Services (CTS). This order approves the settlement since the resolution of CalPX's claim will expedite the resolution of issues relating to its settlement clearing account.

Background

2. CalPX states that in March 2002, SCE paid over \$878 million which represented substantially all of the outstanding amounts it owed to the CalPX settlement clearing account.¹ However, CalPX states, two items on SCE's Account Summary Statement remained outstanding. The first item involved a charge for approximately \$13 million incurred by the San Onofre Nuclear Generating Station (SONGS)² in the CalPX Core market. SCE disputed the charge and claimed CalPX had erroneously billed SCE rather than SDG&E for those charges. The second item was for a subscription fee invoice issued by the CalPX to SCE in July 2000 for \$2.5 million for the CTS Market. SCE

¹ See San Diego Gas & Electric Co., et al., 102 FERC ¶ 61,317 (2003) (California Refund Proceeding), order on clarification, 103 FERC ¶ 61,078 (2003), order on reh'g, 105 FERC ¶ 61,066 (2003), reh'g pending.

² SONGS is jointly owned by SCE, SDG&E and others.

argued that this invoice was not valid because its CTS subscription fee had been paid in full through the end of 2000. In addition, CalPX also reviewed the identical subscription fee invoice that was sent to PG&E for \$2.5 million, as well as a subscription fee invoice to SDG&E for \$500,000.

3. Under the settlement, SDG&E will pay into the CalPX settlement clearing account approximately \$13 million, the entire principal amount due for the SONGS invoice at issue. In addition, SCE would pay into the CalPX settlement clearing account approximately \$1.7 million, which represents the interest on the principal amount of the SONGS billing. Regarding the subscription fee invoice dispute, under the settlement, the CalPX agrees that the invoices were issued erroneously³ and the respective invoices did not properly reflect the relevant subscription fees for CTS for SCE, PG&E and SDG&E. Accordingly, CalPX will reverse the invoices issued to SCE and PG&E.⁴

Cal PX's Petition

4. CalPX states that it is seeking Commission approval of its settlement of these billing disputes. CalPX states that the relevant account summary statements are part of the evidentiary record in the California Refund Proceeding. Moreover, the account summary statements are the basis for the allocation of CalPX's wind-up charges. Finally, the settlement would require payments into the CalPX settlement clearing account, the jurisdictional pool of participant monies that is available for ultimate refunds and charges in this proceeding as part of the Commission's investigation of the California energy crisis.

5. CalPX also petitions for waiver of the filing fee associated with its petition, claiming that good cause exists for the Commission to waive this fee. CalPX reminds the Commission that it has not operated its exchange services since January 2001 and states that payment of the filing fee would cause financial distress since it is trying to conserve its limited resources while it winds down its business affairs.

³ CalPX further notes that it did not book any of the relevant invoices to its books as an account receivable, another indication that these invoices were not obligations of the Investor Owned Utilities.

⁴ CalPX states that for unknown reasons, the \$500,000 for the invoiced subscription fee for SDG&E was never placed on SDG&E's Account Summary Statement and therefore need not be reversed. By the settlement, however, CalPX agrees that it will not seek to enforce the invoice against SDG&E.

Notice of Filing and Responsive Pleadings

6. Notice of the petition was published in the Federal Register, 68 Fed. Reg. 67,666 (2003), with motions to intervene and protests due on or before December 15, 2003. Timely motions to intervene were filed by SDG&E, the City of Santa Clara, California, and Powerex Corp. Motions to intervene out of time were filed by SCE and PG&E with PG&E also filing comments.

7. In its comments, PG&E states that it supports the CalPX's decision to waive the \$2.5 million fee assessed to both PG&E and SCE. In addition, PG&E requests that any Commission order affirming the settlement expressly direct the CalPX to waive the \$2.5 million in CTS subscription fees for both PG&E and SCE.

Preliminary Matters

8. We note that on March 9, 2001, CalPX filed for Chapter 11 bankruptcy protection. Although the Bankruptcy Code provides that the filing of a bankruptcy petition automatically stays certain actions against the debtor,⁵ the Code also provides an exception from this automatic stay for:

An action or proceeding by a governmental unit ... to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.⁶

9. The Commission has found in the past that actions taken under the authority granted it by the Federal Power Act and the controlling regulations fit within this exception, and therefore, are exempt from the automatic stay provision.⁷ Here, we are exercising our regulatory power under Section 205 of the Federal Power Act as permitted

⁵ 11 U.S.C. § 362(a)(1) (1994 & Supp. 2000).

⁶ 11 U.S.C. § 362(a)(4) (1994 & Supp. 2000).

⁷ See *Virginia Electric and Power Co.*, 84 FERC ¶ 61,254 (1998) and *Century Power Corp.*, 56 FERC ¶ 61,087 (1991). The Commission's conclusion on this matter is consistent with judicial precedent regarding the scope of the exemption to the automatic stay. *E.g.*, *Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32 (1991); *SEC v. Brennan*, 250 F.3d 65 (2nd Cir. 2000); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828 (9th Cir. 1991); *United States v. Commonwealth Cos. Inc.*, 913 F.2d 518 (8th Cir. 1990); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 267 (3rd Cir. 1984); see generally 3 *Collier on Bankruptcy* § 362.05 (15th ed. rev. 2000).

by Section 362(b)(4) of the Bankruptcy Code to issue an order that does not threaten the bankruptcy court's control over the property of the bankruptcy estate.⁸

Discussion

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant the motions to intervene out of time by SCE and PG&E given their interests in this proceeding, the early stage of the proceeding and the absence of any undue prejudice or delay.

11. The settlement among the CalPX, SCE and SDG&E is in the public interest and is hereby approved, subject to the condition discussed below. We note that while the CalPX's transmittal letter expresses its intent to reverse the subscription fee invoice for PG&E, this intent is not explicitly reflected in the settlement agreement. Accordingly, we direct the CalPX to reverse the subscription fee invoice for PG&E. The Commission finds that the settlement has the potential to expedite the resolution of issues relating to the settlement clearing account and, in turn, disbursements to sellers and buyers in the California Refund Proceeding.⁹ The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings. The Commission retains the right to investigate the rates, terms and conditions under the just and reasonable and not unduly discriminatory or preferential standard of Section 206 of the Federal Power Act, 16 U.S.C. § 824e (2000).

12. We will also grant CalPX's petition for waiver of the filing fee.¹⁰ CalPX states that the payment of the filing fee would cause "financial distress" because it would cause the expenditure of resources CalPX has no means of replacing.¹¹ CalPX supports its petition by stating that (1) it has no operating revenues since it has not operated its exchange services since January 2001, and (2) its cash reserves are needed to complete the process of "winding-down" its business affairs. Based on these facts, we find that the

⁸ This order does not change any CalPX monetary obligations, and therefore, has no effect on the estate.

⁹ The Commission considers the proposed agreement to be a contract which affects or relates to jurisdictional rates, charges, classifications and services. See, 16 U.S.C. § 824d(c) (2000).

¹⁰ The Commission has previously ruled that CalPX meets the criteria for waiver of the filing fee. See, e.g., California Power Exchange Corp., 98 FERC ¶ 61,097 (2002) and 100 FERC ¶ 61,124 (2002).

¹¹ See 18 C.F.R. § 381.106 (2003).

CalPX has demonstrated that payment of the filing fee would place it in “financial distress.”

The Commission orders:

(A) CalPX’s petition for declaratory order is hereby granted, as discussed in the body of this order.

(B) CalPX’s proposed settlement agreement is hereby approved, subject to the condition discussed in the body of this order.

(C) CalPX’s petition for waiver of the filing fee requirement is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Brownell dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

California Power Exchange Corporation

Docket No. EL04-28-000

(Issued January 28, 2004)

Nora Mead BROWNELL, Commissioner *dissenting in part*:

1. As I explained in my separate statement in Midwest Independent Transmission System Operator, Inc., 105 FERC ¶ 61,073 (2003), I can no longer support making our acceptance of settlement agreements subject to a Commission reservation of authority to make future revisions under the just and reasonable standard, as opposed to the Mobile-Sierra public interest standard--unless, of course, the agreement itself includes language requesting such a reservation. If the Commission has objections to a settlement, we should articulate them when we first review it, instead of approving the settlement with the cloud of uncertainty that we might make subsequent changes under a lower-than-public-interest standard after market participants have come to rely on it. Therefore, I would have accepted this agreement without reserving the option of revisiting it under a just and reasonable standard.

Nora Mead Brownell