98 FERC ¶ 61, 097
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

California Power Exchange Corporation Docket No. EL02-48-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER IN PART

(Issued January 31, 2002)

On January 15, 2002, the California Power Exchange Corporation (the PX) filed a petition for a declaratory order requesting that the Commission state that it is in the public interest for any successor of the PX to remain an independent entity that is not controlled by any segment of electric industry participants. The PX filed a concurrent motion requesting that the Commission set an abbreviated time for parties to respond to its petition, which would enable the Commission to issue the declaratory order in time to allow its consideration by the United States Bankruptcy Court, Central District of California, Los Angeles Division at a February 1, 2002 hearing.[1] In this order, we address matters the PX raises in its petition for a declaratory order that fall within our jurisdiction under the Federal Power Act (FPA). This declaratory order benefits customers because it provides important analysis on a matter currently pending before a United States Bankruptcy Court.

Background

The PX, a product of the California legislature's 1996 restructuring of its state's power industry, commenced operations in March 1998. As a nonprofit entity, the PX provided auction markets for the trading of electricity. These auction markets included both the spot market for day-ahead and day-of electricity trading and, as of summer 1999, the block forward market for long-term electricity contracts. As a public utility, the PX

[1] See In re: California Power Exchange Corporation, a California non-profit public benefit corporation, Debtor, Tax Identification No. 95-4640368, Case No. LA01-16577-ES (Bankr. C.D. Cal. 2001).

is subject to the jurisdiction of the Commission under the FPA and operated pursuant to a Commission approved tariff and wholesale rate schedule.[2]

In the summer of 2000, prices in the PX spot markets increased significantly, resulting in billions of dollars of debt for the three California investor-owned utilities (IOUs), which were unable to pass their wholesale costs on to their customers. In response to this crisis, the Commission issued an order finding that, under certain conditions, short-term wholesale power rates in the California market were "unjust and unreasonable" within the meaning of section 206(a) of the FPA.[3] The Commission found that a primary structural flaw of the California restructuring plan that contributed to the crisis was the over-reliance on the spot markets.

In December 2000, the Commission instituted changes to remedy the California electricity market flaws, including the elimination of the PX's mandatory buy/sell requirement. In taking this action, the Commission stated that "eliminating any mandated reliance on the spot market represents the single most important aspect of wholesale market reform and is one of the most critical components of all the immediate market reforms necessary to correct the problems in California electricity markets and provide long-term protection of customers."[4] Despite overwhelming support from interested parties to eliminate the mandatory buy/sell requirement, the California Public Utilities Commission (California Commission) took the contrary position that its buy requirement would remain in place until the California Commission itself removed it.[5]

In order to prevent the California Commission's requirement that the IOUs continue to buy and sell the bulk of their needs from the PX from undermining interstate wholesale power markets, the Commission took the "unusual step" of terminating the PX's wholesale tariffs, which enabled it to operate as a mandatory exchange. The Commission concluded that "it is only by eliminating the PX's exclusive mandatory exchange that we can assure that prices in California wholesale markets will be just and

---

[2]Pacific Gas & Electric Co., 77 FERC ¶ 61,204 at 61,803-05 (1996), reh'g denied, 81 FERC ¶ 61,122 (1997).

[3]San Diego Gas & Electric Company, et al., 93 FERC ¶ 61,121 (2000).

[4]San Diego Gas & Electric Company, et al., 93 FERC ¶ 61,294 at 61,999 (2000) (December 15 Order).

[5]Id.

reasonable" pursuant to our statutory obligations.[6] At the same time, the Commission invited the PX to reconstitute itself as an "independent exchange with no regulatory mandated products and offer the services needed by market participants."[7]

The PX suspended operations in its spot markets at the end of January 2001. Furthermore, the PX chose not to file new rate schedules that would have allowed it to operate a bilateral forward market. The PX filed for protection under Chapter 11 of the Bankruptcy Act on March 9, 2001. Its original rate schedule, modified to comply with the Commission's order to eliminate the mandatory buy/sell requirement, remains on file with the Commission.

The PX's Petition for Declaratory Order

The Official Committee of Participant Creditors (Participants Committee) proposed a reorganization plan for the PX on November 14, 2001, as amended on January 23, 2002. The PX states that, under the plan, the Participants Committee would take over responsibilities for fulfillment of the PX's continued obligations. These responsibilities include the calculation of market participant refunds, the determination of final participant payables and receivables, the maintenance of participant collateral, the collection of amounts due to the PX on behalf of participants in accordance with Commission approved rate schedules, the disbursement of funds to market participants, and the preservation of participant records and the production of documents in response to subpoenas as well as governmental audits and investigations.

The PX argues that, if electric industry participants with substantial stakes and self-interest in PX matters are allowed control over it, the integrity of the Commission's orders concerning the PX and the maintenance of the PX's books and records would be compromised. Furthermore, the PX states that the Participants Committee's proposal to release all participant collateral upon taking control of the PX will prevent the Commission from addressing this issue at an appropriate time.

The PX requests that the Commission apprise the Bankruptcy Court of the Commission's position on whether public policy requires that the PX remain an independent entity. The PX cites two Commission cases that comment on the PX's independence: (1) Pacific Gas and Electric Company, et al., 77 FERC ¶ 61,204 at 61,816 (1996), where the Commission stated that "[t]he participation of an independent ISO and

---

[6] Id.

[7] Id. at 62,000, n.46.

PX is essential to the development of a complete and credible Phase II filing to implement the California restructuring proposal. . . ."; and (2) Pacific Gas and Electric Company, et al., 81 FERC ¶ 61,122 at 61,854 (1997), where the Commission, in defining the PX as a "Scheduling Coordinator," stated that it "is independent of both the ISO and all other Market Participants." Moreover, the PX states that the Commission has also required that the PX operate in a non-discriminatory fashion.[8]

Motions to Intervene, Notices, Answers and Comments

The Commission issued a notice of petition for declaratory order in which we set an abbreviated time for parties to respond to the PX petition.[9]

The following parties filed timely motions to intervene that raised no substantive issues: Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Potrero, LLC and Mirant Delta, LLC (collectively, Mirant); Modesto Irrigation District; Sacramento Municipal Utility District; Salt River Project Agricultural Improvement and Power District; and Williams Energy Marketing & Trading Company. The Pinnacle West Companies filed a motion to intervene out of time.

The following parties filed comments and motions to intervene or a notice of intervention: Participants Committee; California Electricity Oversight Board, the Public Utilities Commission of the State of California, and the State of California (collectively, California State Parties); Cities of Anaheim and Riverside, California (Anaheim/Riverside); Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC (collectively, Duke); Dynegy Power Marketing, Inc. (Dynegy); Pacific Gas & Electric Company (PG&E); Public Service Company of New Mexico (PNM); Southern California Edison (SoCal Edison); and the Western Area Power Administration (WAPA).

The California State Parties, PG&E, SoCal Edison, and WAPA submitted comments in support of the PX petition. All of these parties raise concerns over the continued independence of the reorganized PX. The California State Parties state that most, if not all, of the PX creditors are litigants in the California refund proceeding before a Commission Administrative Law Judge (ALJ). Since the PX is currently responsible for calculating each creditor's refund liability pursuant to the Commission's refund methodology, until the ALJ determines each creditor's refund liability, the

---

[8] See PX FERC Electric Tariff, Introductory Statement.

[9] See 67 Fed. Reg. 2,873 (2002).

California State Parties contend that the creditors should have no ability to influence, let alone control, the operations of the PX. PG&E states that the integrity of the PX's books and records must be maintained and that this responsibility cannot be shifted without a formal filing with the Commission.

The parties in support of the PX petition argue that the public interest would be harmed if the Participants Committee seizes control of the PX and its facilities. SoCal Edison contends that the Participants Committee proposal would harm the public for the following reasons: (1) the Participants Committee would be in control of the data needed to calculate refunds; (2) the Participants Committee would seize $1 billion in collateral from the PX before the Commission determines how that collateral is to be allocated; (3) the proposal grants Participant Committee members an undue preference or advantage and would unduly prejudice and disadvantage SoCal Edison and others who are likely to be owed refunds by the members of the Participants Committee for unjust and unreasonable rates charged through the PX; and (4) the proposal would harm competition, and thus the public interest, by giving the Participant Committee members control of the confidential information currently owned by the PX.

The Participants Committee states that the PX omitted a fundamental fact in arguing that it is in the public interest to have the informational archives of the PX remain under the control of a neutral entity. Specifically, the Participants Committee contends that the information from the archives is already outside the control of the PX's successor, as it has been produced pursuant to numerous subpoenas. Also, the Participants Committee argues that the PX, and not the PX's successor, will be responsible for producing the information requested in the refund proceeding.[10] Finally, the Participants Committee argues that the remaining PX functions do not require continuance of the current management and board and that release of the billion dollar collateral to certain parties does not violate public policy.

Several parties join the Participants Committee in opposing the PX's petition. PNM states that it is not in the public interest for the Commission to grant the PX's petition because the issuance of a Commission declaratory order would disrupt the process currently underway before the Bankruptcy Court, thus prejudicing the creditors. Dynegy contends that the Commission should only grant the PX's petition to the limited extent of informing the Bankruptcy Court of its views related to "ongoing participation in Docket No. EL00-95-045" and compliance with Commission orders related to the treatment of the PX's books and records. Dynegy states that the Commission's

---

[10] See San Diego Gas & Electric Company, et al., 98 FERC ¶ 63,003 (2002).

consideration of other issues in the PX petition is premature. Similarly, Duke argues that a Commission declaratory order is premature because the PX petition inappropriately rests on the premise that the proposed reorganization plan would invariably lead to conflicts with Commission jurisdictional obligations. Anaheim/Riverside state that the Bankruptcy Court is the appropriate forum for determining the merits of the Participants Committee's proposed reorganization plan.

On January 25, 2002, the PX replied to the comments and protests filed in opposition to its petition for declaratory order. This filing did not raise any new issues.

The Participants Committee also filed a motion for an extension of time to oppose the PX petition. In their motion, the Participants Committee stated that the deadline limited the Commission's opportunity to consider comments and, for reasons set forth in the motion, shortened their time to prepare a full response to the petition. In a January 18, 2002 notice, the Commission denied the motion because the Participants Committee did not provide good cause to grant an extension of time beyond the abbreviated response time necessary to allow the Commission to issue a ruling before February 1, 2002, as requested. The Commission found that the abbreviated time to file a response was not prejudicial to the Participants Committee's ability to respond and, thus, we denied the request. In fact, within the abbreviated response time, the Participants Committee filed extensive comments containing two affidavits and lengthy arguments. Given the number and depth of comments from both sides, the Commission believes that the issues have been fully ventilated.

Discussion

Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[11] the timely, unopposed motions to intervene and notice of intervention serve to make the movants parties to this proceeding. Regarding the untimely motion to intervene from the Pinnacle West Companies, given its interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay from granting late intervention, we will grant this party's intervention.

---

[11] 18 C.F.R. § 385.214 (2001).

Commission Concerns

Even though the PX is currently in the process of "winding down" operations, it remains a public utility with significant responsibilities that are within the Commission's jurisdiction.[12] As an initial matter, we note that the Commission has in past orders addressed the importance of an independent PX to ensure that the PX markets would be just and reasonable.[13] Although the PX markets are closed, the trades made previously in the PX markets are not yet fully resolved. We continue to believe that the PX should be independent of any individual market participant and avoid the appearance of control by any class of participants, for purposes of carrying out its remaining responsibilities, including the calculation of participant refunds.

The proposed reorganization plan, as amended on January 23, 2002, would be, if approved, inconsistent in certain respects with Commission statements concerning the PX's independence. Specifically, we have serious concerns over the proposed makeup of the Board of Governors. The proposed plan would establish a three-person Board of Governors, one of whom would be a Manager that the Participants Committee selects. The proposed plan also allows the Participants Committee to choose a second member of the Board. Under the proposed plan, the IOUs would choose the third position. If the IOUs fail to designate a Board member, the Participants Committee would select the third member. We believe that allowing the Participants Committee to choose at least two, and possibly all, of the three Board members would be inconsistent with Commission policy. There may be many ways to satisfy our independence requirements. One possibility would be to allow the Participants Committee and the IOUs to each select one Board member, and then have both those members agree on the selection of a Board of Governors Manager. This is consistent with Section III.D.2.b. of the proposed plan outlining the procedures for the replacement of the Manager.

In its reorganization plan, the Participants Committee proposes that, on or before the effective date of the plan, the Reorganized Debtor would release to each Participant all collateral posted by that Participant.[14] The PX Tariff provision that is on file at the Commission pursuant to section 205 of the FPA requires each PX Participant to maintain a specific amount of collateral until all payments related to its transactions in the PX

---

[12] See supra n.2.

[13] See Pacific Gas and Electric Company, et al., 77 FERC ¶ 61,204 at 61,816-19 (1996); and Pacific Gas and Electric Company, et al., 81 FERC ¶ 61,122 (1997).

[14] See Reorganization Plan Section IV.E. "Release of Collateral."

markets are "billed and settled."[15] The proposal of the Participants Committee to release the collateral immediately may be inconsistent with that provision. However, at this time, the Commission has not acted to interpret this provision as applied in these circumstances.

In responding to the PX request, our discussion has been limited to those matters that fall within our FPA jurisdiction, as related to our prior orders and findings concerning the PX markets.

Request for Waiver of the Filing Fee

We will grant the PX's petition for waiver of the filing fee. The PX states that payment of the filing fee would cause "financial distress" because it would cause the expenditure of resources the PX has no means of replacing.[16] The PX supports its petition by stating that (1) it has no operating revenues since it has not operated its exchange services since January 2001;[17] (2) it is currently the Debtor in a bankruptcy proceeding;[18] and (3) its cash reserves are needed to complete the process of "winding-down" its business affairs. Based on these facts, we find that the PX has demonstrated that payment of the filing fee would place it in "financial distress." Accordingly, we will grant its petition for waiver.

The Commission orders:

(A) The PX's petition for a declaratory order is hereby granted to the extent discussed in the body of this order.

(B) The PX's petition for waiver of the filing fee requirement is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Breathitt dissented in part
with a separate statement attached.

(S E A L)

---

[15] PX FERC Electric Tariff, Schedule 2, Section 2.2 "Collateral Requirement."

[16] See 18 C.F.R. § 381.106 (2001).

[17] See December 15 Order at 61,199.

[18] See supra note 1.

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

California Power Exchange Corporation EL02-48-000

(Issued January 31, 2002)

Breathitt, Commissioner, dissenting in part:

I am dissenting from this order to the extent it declines to find Participants Committee's proposal to immediately liquidate collateral held by the PX to be inconsistent with the PX tariff language on file at the Commission. As today's order notes, the pertinent provision of the PX Tariff requires each PX Participant to maintain a specific amount of collateral until all payments related to its transactions in the PX markets are "billed and settled." The proposal of the Participants Committee to release the collateral immediately is clearly inconsistent with the tariff provision. This tariff language, which has been in effect since August 1, 2000,[1] put all parties on notice that the collateral would remain with the PX until transactions are settled.[2] The proposal to release the collateral immediately would undermine the safeguards put in place to ensure that parties are creditworthy. It is hard to imagine how the PX's accounts will ever be settled if the parties that owe money to the PX no longer have collateral at risk. Liquidation would leave parties with no incentive to settle their accounts. Accordingly, I dissent in part.

_____

[1] See California Power Exchange Corporation, 92 FERC ¶ 61,096 (2000).

[2] Although we terminated the PX Tariff, its terms still control the contract terms of those transactions that took place prior to its termination.

Linda K. Breathitt
Commissioner