

100 FERC ¶ 61, 178
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. ER02-2234-000
ER02-2234-001

ORDER ACCEPTING FOR FILING SPECIAL
PURPOSE RATE SCHEDULE

(Issued August 8, 2002)

1. On July 3, 2002, as amended on July 10, 2002, California Power Exchange Corporation (CalPX) tendered for filing a proposed rate schedule intended to provide CalPX with a means of funding its ongoing activities that will replace the current funding method. The current method was created as part of a Preliminary Injunction issued on March 5, 2001, by a United States District Judge, and this method may shortly become unavailable to CalPX. CalPX requests waiver of the Commission's notice requirements to permit an effective date of July 10, 2002, the date of the amendment filed herein. The Commission will accept the proposed rate schedule for filing, effective for six months beginning July 10, 2002, and will require CalPX to request renewed effectiveness for this rate schedule for any six-month period thereafter, as discussed below. This action benefits the public interest by ensuring that the CalPX has adequate resources to fulfill its ongoing responsibilities as a public utility while preserving the Commission's ability to review the costs expended on these ongoing activities.

I. Background

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

utility, CalPX is subject to the jurisdiction of the Commission under the FPA¹ and originally operated pursuant to a Commission approved tariff and wholesale rate schedule.² CalPX suspended operations in its core markets on April 30, 2001 and its rate schedules in those markets terminated on May 1, 2001.³ On March 9, 2001, CalPX filed for protection under Chapter 11 of the Bankruptcy Code.⁴

II. Application

3. CalPX indicates that it has many jurisdictional functions left to perform before winding up its operations. These include: (1) acting as custodian for certain financial rights associated with jurisdictional services; (2) acting as custodian for an extensive body of records of public utility transactions in the California markets; (3) participating in various regulatory actions; and (4) pursuing various actions in court related to market transactions that occurred during the period that CalPX operated markets.

4. Under the Preliminary Injunction, a copy of which was included in CalPX's July 10, 2002 amendment, CalPX is permitted to fund its ongoing operations by drawing, as needed, on an interest-bearing escrow account set up for payments by California market participants in connection with CalPX's normal invoicing process for its former markets (Settlement Clearing Account).⁵

¹ 16 U.S.C. §§ 796, et seq.

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

³ See San Diego Gas & Electric Company, et al., 93 FERC ¶ 61,294, at 61,999 (2000).

⁴ 11 U.S.C. §§ 101, et seq. (1994).

⁵ See p.5, lines 2-12 of the Preliminary Injunction attached to CalPX's July 10, 2002, filing. We note that this document is marked "Proposed" and the filing is devoid of information to indicate whether any final version of the document exists and, if so, whether that version differs in any material respect from this version.

5. In its original July 3, 2002 filing, CalPX states that its current reserve of operating funds from the District Court "set-aside" will be exhausted at the end of August 2002.⁶ In its July 10, 2002 amendment, CalPX notes that on June 28, 2002, certain participants in the California electricity market, led by Enron Power Marketing, Inc. (collectively, Enron Parties), moved to withdraw the litigation they had initiated against CalPX in the United States District Court for the Central District of California. The effect of this withdrawal, CalPX argues, could be to dissolve the Preliminary Injunction under which CalPX is currently operating, effective June 28, 2002. Accordingly, CalPX indicates that its current funding mechanism, which it originally claimed would have been exhausted by the end of August, may have actually dissolved along with the Preliminary Injunction when Enron Parties withdrew their litigation. If the Commission fails to provide CalPX with an alternative funding mechanism, CalPX states that it will have no choice but to end its operations, dispose of its assets, and dismiss its staff.

6. CalPX contends that its proposed rate schedule would allow it to apportion the costs of its "wind-up" and ongoing activities equitably among the participants for whose benefit CalPX is continuing those activities. As a first step, CalPX projects that it will require a budget of approximately \$26.1 million for its remaining activities including wind-up. This budget determination assumes that all remaining activities, including the various regulatory actions that require CalPX participation, will be completed by December 31, 2004. This budget also assumes that CalPX will ultimately be responsible for all litigation costs associated with the cases in which it is involved. The actual budget was calculated primarily on the basis of the labor, legal, and capital costs which CalPX expects to incur over this period, and includes a five percent contingency component to cover unexpected expenses. Excluding the contingency component, direct legal expenses account for roughly 42 percent of this budget. As part of its determination of the overall budget, CalPX determined a budget for the first six-month period of approximately \$6.3 million.

⁶Despite the fact that the proposed Preliminary Injunction before us clearly allows CalPX to draw on the Settlements Clearing Account without any pre-defined dollar limit or "set-aside," CalPX filed a motion under the Preliminary Injunction for the right to draw \$9.9 million dollars from the Settlements Clearing Account. This request was granted by the presiding District Court Judge on December 4, 2001, and this amount appears to be what CalPX refers to as the "set-aside."

7. The proposed rate schedule makes use of a formula rate based on the current six-month budget. The formula nets CalPX's Cash Available⁷ against the six-month budget so that if CalPX has enough cash to cover its budgeted expenses during the period, no bill will be issued for the period. If it does not otherwise have enough cash, bills will be issued to recover the difference between the Cash Available and the budgeted expenses for the period. Since actual costs will likely differ from budgeted costs, any cash remaining at the end of the period will carry through to the next period as Cash on Hand.⁸

8. Regarding the invoices which individual customers will receive, the proposed rate schedule allocates the net cost billed each period among CalPX's customers based on customer group. CalPX has identified 8 customer groups based on the absolute value of the cash balances each customer either owes the CalPX or is due from the CalPX based on the March 13, 2002, balances in each customer's individual Account Summary.⁹ For example, group one is made up of customers who individually owe the CalPX, or are due, at least \$150 million and group two is made up of those who owe or are due between \$50 million and \$150 million. Each customer group is allocated a fixed percentage of the six-month budgeted expenses with Customer groups at the higher end of the cash value scale responsible for greater percentages of the Budgeted Expenses than are Customer Groups at the lower end. This allocation is meant to recognize that the higher cash-value customer groups have the greatest stake in the CalPX's ongoing activities which will lead eventually to the determination of appropriate rate levels and associated refunds that customers will be permitted to receive. Based on this formula, each invoice will contain a flat monthly fee for the six-month period. The proposed rate schedule provides that CalPX will make an informational filing with this Commission at least one month before each billing period containing the projected budget for the next six-month period.

⁷Cash Available is defined as Cash on Hand at the beginning of the six-month period less termination expenses and cash working capital (15 percent of the budgeted expenses for the current period).

⁸Similarly, any under-recovery would carry over to the next billing period as a reduction to the Cash on Hand.

⁹According to the application, CalPX began keeping individual account summaries (Account Summaries) for all market participants after PG&E and SoCal defaulted.

9. As a final matter, CalPX requests that the Commission allow it to establish a \$26.1 million reserve in the Settlement Clearing Account as security for the charges under its proposed rate schedule. CalPX recognizes that, rather than pay their monthly fees, customers may choose to have these amounts factored into the final accounting for refunds, default allocations, and return of collateral which will eventually be determined in the ongoing proceedings. Accordingly, in order to avoid a potential cash-flow problem that could drive it out of business prematurely, CalPX's proposed rate schedule provides that an amount equal to the entire projected budget will be reserved in the Settlements Clearing Account over the relevant period (Reserved Amount). Thus, if real-time revenues under the proposed rate schedule do not cover CalPX's actual costs, it will have recourse to the Reserved Amount. If any portion of the Reserved Amount is not needed to pay for CalPX's expenses, the rate schedule provides that it shall be released for distribution to the customers. CalPX also notes that any unpaid charges under this rate schedule will be netted out of any future refunds to the affected customers.

10. In addition to its request for waiver of the Commission's notice requirements, CalPX argues that the full filing requirements of Part 35 are not appropriate for CalPX's unique situation. CalPX requests waiver of all Part 35 regulations that might otherwise apply and, 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.

III. Notices of Filings and Responsive Pleadings

11. Notices of the filings were published in the Federal Register, 67 Fed. Reg. 46,650 and 48,170 (2002), with motions to intervene and protests due on or before July 31, 2002. The parties shown on the attachment to this order filed timely motions to intervene.¹⁰ Of those parties, PG&E, SoCal, Midway, Edison Mission, Transalta, Avista, Suppliers, SMUD, and Participants Committee filed protests as well.

IV. Protests

¹⁰On July 22, 2002, PG&E Energy Trading Power, L.P. filed a motion to intervene out of time and on July 24, 2002, Edison Mission Marketing and Trading, Inc. (Edison Mission) submitted a motion to intervene out of time and protest. However, as the comment due date had been reset to July 31, 2002, these interventions were timely as well.

12. While PG&E and SoCal agree that CalPX must have a funding mechanism to carry it through to the completion of its duties, they protest CalPX's rate schedule/billing proposal. Rather than the proposed semi-annual billing of customers under a rate schedule, they advocate simply adopting the other portion of CalPX's funding mechanism; *i.e.*, granting CalPX the authority to withdraw funds from the Reserved Amount as needed.¹¹ They argue that the cost allocation method in the proposed rate schedule is unsupported. Furthermore, PG&E contends that none of CalPX's wind-up costs should be allocated to net-buyers like itself who, it claims, were powerless to affect prices in the California markets. SoCal advocates the initiation of a hearing into the issue of appropriate allocation of CalPX wind-up costs to participants.

13. SoCal also argues that the single largest line item in CalPX's projected budget is inappropriate, unsupported, and unexplained. This item is titled "Participant Committee Claims Litigation" and equals approximately \$4.2 million (16 percent of the total). SoCal contends that if this line item represents the litigation expenses of the Participants Committee, it should not be included in CalPX's wind-up expenses and should not be recovered from participants other than those on the Participants Committee because these particular litigation efforts provide no benefit to net-buyers such as SoCal, PG&E, and the California ISO.¹² SoCal asserts that the Participants Committee should pay for its own litigation expenses.

14. If the Commission approves the suggestion that CalPX expenses should be recovered from the Reserved Amount, SoCal urges that CalPX be required to submit a projected budget to the Commission on a quarterly basis and at least two months prior to the date the budget will be effective so that parties will have adequate opportunity to dispute a proposed budget and file a Section 206 complaint that can provide a timely refund-effective date. PG&E makes a similar request.

15. Midway and PG&E argue that the proposed rate schedule violates the Commission's filed rate doctrine. They contend that market participants have already satisfied their obligations to the PX by paying the CalPX's administrative charge during the period of each individual participant's transactions, and cannot now be charged additional amounts. Midway also contends that ongoing CalPX activities may benefit a

¹¹Edison Mission and Participants Committee also advocate this course.

¹²Members of the Participants Committee are all net-sellers into the California markets.

completely different group of participants than merely those with current payables or receivables with the CalPX.

16. Edison Mission, SoCal, PG&E, and Midway object to the proposed allocation methodology. They point out that while the allocation methodology is based on the amount of money each participant owes to, or is owed by, the CalPX, the filing does not contain any support for these values. They also point out that these values are a snapshot taken on March 13, 2002, do not reflect subsequent Commission actions that resulted in recalculation of these values, and are otherwise in dispute. Edison Mission, in particular, alleges that the value assigned to it is too high.

17. While Participants Committee agrees that CalPX's ongoing activities must be funded, Participants Committee contends that the salient question revolves around jurisdiction. Participants Committee argues that, as a debtor in Chapter 11 bankruptcy reorganization proceedings, CalPX's ongoing administrative expenses are within the jurisdiction of the Bankruptcy Court. Accordingly, Participants Committee argues that the proposed budget and associated Reserved Amount should be summarily rejected as being outside this Commission's jurisdiction.

18. However, Participants Committee asserts that this Commission does retain jurisdiction over the allocation methodology used to determine distributions to participants from the Settlements Clearing Account and, thus, over how administrative expenses authorized by the Bankruptcy Court should be allocated through that account to participants. Participants Committee urges the Commission to assert such jurisdiction and determine an appropriate allocation methodology. In this regard, Participants Committee argues that SoCal and PG&E should be responsible for the majority of CalPX's administrative expenses, just as they were under CalPX's tariff. Participants Committee is silent, however, as to the proposed groupings.

19. Transalta, Avista, and SMUD support and adopt by reference the protest of Participants Committee.

20. Like Participants Committee, Suppliers argue that the budget for CalPX's administrative charge is within the jurisdiction of the Bankruptcy Court. Accordingly, Suppliers argue that the proposed budget should be rejected and the proposed rate schedule should be suspended for the maximum five-month period in order to afford the Bankruptcy Court adequate time to determine an appropriate budget. Suppliers state that, contrary to CalPX's assertion that it is running out of money, it actually has \$11 million to draw on; more than enough to fund five months of operations, even at the proposed

levels which Suppliers believe are excessive. That said, Suppliers support the proposed allocation methodology because it assigns substantial responsibility for the CalPX's ongoing expenses to SoCal and PG&E.

V. Discussion

21. We agree with CalPX that the orderly completion of its ongoing activities is imperative from the standpoint of protecting the public interest. CalPX is custodian of various monetary obligations that must be returned to market participants once an appropriate distribution is determined in the ongoing proceedings. Similarly, determining an appropriate distribution will require access to the data which CalPX maintains and the expertise which CalPX's employees and contractors possess. Accordingly, CalPX should have an appropriate funding mechanism in place until its ongoing operations are completed.

22. We find that the proposed rate schedule, as modified below, is an appropriate mechanism for CalPX to fund its continuing operations. Contrary to protestors' filed-rate doctrine arguments, we find that CalPX is not proposing a new charge to be applied to past service. Rather, by (1) maintaining data that will enable the Commission to determine appropriate rate levels and associated refunds for the past period, (2) maintaining the financial rights and accounts that will help ensure that any refunds and additional charges can be appropriately disbursed, and (3) otherwise remaining prepared to aid the Commission in the needed calculations, CalPX is requesting funding for prospective activities that were not recovered through the CalPX's prior administrative charge. The proposal, therefore, does not violate the filed-rate doctrine and it is completely appropriate for CalPX to be reimbursed for these activities under a modified version of the proposed rate schedule. The modified rate schedule removes any uncertainty as to the responsibility of participants for CalPX's expenses associated with these new activities. Accordingly, as modified below, we find that CalPX's proposed rate schedule is appropriate. However, we will limit its initial applicability to the first six-month period, as discussed further below.

23. As to Midway's argument that CalPX may not have identified all of the appropriate participants to be billed under the proposed rate schedule, we find the argument speculative. While, there may be participants who do not have outstanding balances with CalPX, whether positive or negative, but who nevertheless may be subject to additional refunds or charges following completion of the ongoing proceedings, Midway has not identified any such participant. We find that CalPX's list of proposed

customers, which includes 58 separate participants, represents as detailed and comprehensive a list as is possible at this time.

24. Regarding the arguments raised by various intervenors concerning CalPX's proposed allocation method, we find that CalPX's proposal, with some modifications, is reasonable. Initially, we agree with CalPX that participants should be allocated CalPX's costs in proportion to their relative exposure as measured by the absolute value of their current payables and receivables with the CalPX. This is consistent with the fact that CalPX's ongoing activities are essentially centered around the appropriate and orderly disposition of these payables and receivables. However, we agree with the protestors who argue that the proposed groupings, and associated allocation percentages, are arbitrary and unsupported. For example, while both SoCal and PG&E fall into CalPX's group 1, the absolute values of their respective account balances differ by more than \$700 million, a far larger gap than exists between members of any of the other proposed groups. For that matter, no reason has been given why customers should be grouped at all. A simpler method would be to allocate costs to customers based on the ratio of each customer's account balance to the total of all customer account balances on an absolute value basis. This method directly accounts for participants' relative exposure. Accordingly, we hereby direct CalPX to either adopt this method in the compliance filing we order below or fully support the appropriateness of its original proposal.

25. Regarding the actual account balances being utilized by CalPX to determine allocation, as noted by protestors, these balances are taken from CalPX's Account Summaries as of March 13, 2002. These summaries may include amounts calculated on the basis of disputed rates. As such, these amounts may be subject to change based on the outcome of the ongoing proceedings where the disputes of participants such as Edison Mission, regarding the balances shown in the account summaries, will be addressed. In addition, individual balances may change because participants who owe money choose to pay down their balances prior to completion of the ongoing proceedings.¹³ As discussed above, we find that the March 13, 2002, Account Summaries are an acceptable means of identifying the customer base for this rate schedule and we hereby find that the balances drawn from these Account Summaries are an acceptable means of initially allocating costs to that customer base. However, in recognition of the fact that the balances in these Account Summaries change over time for various reasons, we will not allow the allocation to stand indefinitely based on this

¹³According to its intervention and protest, SoCal has already followed this course.

snapshot. Rather, we will require CalPX to prospectively modify its allocation, as needed, in any subsequent six-month filing to renew its rate authority, to track any changes in the balances contained in its Account Summaries.

26. Regarding the proposed budget, we find that CalPX's initial six-month budget projection is based on reasonable assumptions about labor, legal and capital expenses. However, we find the proposal to extrapolate an additional two years worth of budget projections from this initial six-month budget to be: (1) speculative because it relies on assumptions as to the timing of completion of the various ongoing proceedings; (2) potentially problematic because of the assumptions that must be made in order to carry a short-term budget projection forward for two additional years;¹⁴ and (3) ultimately unnecessary. Accordingly, we will only approve the initial six-month budget and will limit the initial effectiveness of the proposed rate schedule to the first six-month period. CalPX must, therefore, renew its request for authority to utilize this rate schedule by submitting a new section 205 filing for the next six-month period, sixty days prior to the end of the first six-month period. This new filing, and any subsequent filing, should provide detailed information as to the costs faced by CalPX over the course of the current six month period and fully support the assumptions which underlie the budget projection for the next six-month period. At a minimum, CalPax must demonstrate that its requested labor and capital expenses correlate directly with its on-going activities and that its requests for reasonable legal expenses are necessary and not duplicative. With regard to labor expenses, salary and benefits should be delineated by function. Furthermore, CalPax must demonstrate why funding its ongoing operations is the least expensive means of maintaining data, maintaining financial rights and accounts, and performing calculations. This specificity should address many of the concerns raised by the protesters because it will provide them with an adequate opportunity and the information to review and evaluate CalPx's proposed budgets.

27. Regarding the proposed reserve in the Settlements Clearing Account, we find that, as adjusted to reflect the change to a six-month budget discussed above, it is reasonable as it provides an alternative mechanism for customer billings and any unused portion of the Reserved Amount will be refunded to customers.

¹⁴For example, there are various "inflation factors" incorporated into the proposed budget which are applied to elements of the initial six-month budget in order to carry those elements forward to each subsequent year.

28. Our preliminary analysis indicates that the proposed rate, as modified, is reasonable and has not been shown to be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful. Accordingly, we will accept the proposed rate without suspension or hearing, require a compliance filing reflecting the modifications discussed above, and grant waiver of our notice requirements to permit the rate to become effective July 10, 2002. The use by the CalPX of the revenues made available under this rate schedule may be subject to approval by the U.S. Bankruptcy Court or the U.S. District Court for the Central District of California.

29. Given CalPX's unique characteristics, we find that adherence to the full requirements of Part 35 is not necessary for CalPX's submittal. Accordingly, we hereby grant the requested waivers and accept CalPX's proposed rate schedule for filing as discussed above.

The Commission orders:

(A) CalPX's proposed rate schedule, and associated designation, is hereby accepted as discussed in the body of this order, effective for six months beginning July 10, 2002, as discussed above.

(B) CalPX is hereby directed to make a compliance filing within 30 days of the date of this order reflecting the modifications discussed in the body of this order. However, if rehearing is requested, the required compliance filing will be due 30 days after the Commission issues a final order addressing any requests for rehearing.

(C) CalPX's proposal to reserve funds in the Settlement Clearing Account is hereby approved as discussed in the body of this order.

(D) The motions to intervene filed by the parties shown on the attachment to this order are hereby granted.

(E) 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)

Docket Nos. ER02-2234-000 and ER02-2234-001

-12-

Linwood A. Watson, Jr.,
Deputy Secretary.

Timely Interventions

- AES NewEnergy, Inc.
- California Electricity Oversight Board
- City of Santa Clara, California
- Cities of Anaheim, Banning, and Riverside, California
- City of Los Angeles Department of Water and Power
- Constellation Power Source, Inc.
- Coral Power LLC
- Modesto Irrigation District
- Northern California Power Agency
- Pinnacle West Capital Corp
- Powerex Corp.
- Sempra Energy Trading Corp.
- PG&E Energy Trading Power, L.P.
- IDACORP Energy L.P.
- Western Area Power Administration
- Public Service Company of New Mexico (PSNM)

Timely Interventions/Protests

- Avista Energy, Inc.
- Pacific Gas & Electric Co. (PG&E)
- Reliant Energy Services, Inc., Mirant Delta, LLC, Mirant California, LLC, Mirant Potrero, LLC, Williams Energy Trading & Marketing Company, and Dynegy Power Marketing, Inc. (Collectively "Suppliers")
- The Official Committee of Participant Creditors of California Power Exchange Corporation made up of: Automated Power Exchange, Avista Energy, Inc., Los Angeles Department of Water and Power, Mirant Americas Energy Marketing LP, Powerex Corp., Reliant Energy Services, Inc., Salton Sea Power Generation, Sempra Energy Trading Corp, and Dynegy Power Marketing, Inc. (Collectively "Participants Committee")
- Southern California Edison Company (SoCal)
- Midway Sunset Generation Company (Midway)
- Edison Mission Marketing and Trading, Inc. (Edison Mission)
- Transalta Energy Marketing (U.S.) Inc. and Transalta Energy Marketing (California) Inc. (together "Transalta")
- Sacramento Municipal Utility District (SMUD)