

101 FERC ¶ 61,330
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

California Power Exchange Corporation

Docket Nos. ER02-2234-002
ER02-2234-003
ER02-2234-004

ORDER REJECTING REQUESTS FOR REHEARING
GRANTING CLARIFICATION AND
REJECTING COMPLIANCE FILING

(Issued December 20, 2002)

1. On September 9, 2002,¹ as amended on September 19, 2002,² the California Power Exchange Corporation (CalPX) filed a revised rate schedule in compliance with the Commission's August 8, 2002 order.³ In this order we reject the CalPX's compliance filing, as amended, for its failure to comply with our August 8th Order. Additionally, we deny the various requests for rehearing of our August 8th Order and grant clarification regarding one issue as discussed below.⁴ This order benefits the public by ensuring that the CalPX will implement the proposed rate schedule as intended by this Commission.

I. Background

2. On July 3, 2002, as amended on July 10, 2002, the CalPX proposed a "wind-up" rate which was intended to provide it with a means of funding its ongoing activities while it winds-up its affairs. In the August 8th Order, the Commission found that the

¹See Docket No. ER02-2234-003.

²See Docket No. ER02-2234-004.

³California Power Exchange Corp., 100 FERC ¶ 61,178 (2002) (August 8th Order).

⁴Rehearing requests were assigned to Docket No. ER02-2234-002.

proposed rate schedule, subject to modification, was an appropriate mechanism to allow the CalPX to fund its continuing operations. The Commission accepted the CalPX's proposed six-month budget of approximately \$6.3 million, with a matching reserve from the Settlement Clearing Account, for the initial six-month period, and required the CalPX to renew its request for subsequent six-month periods.

3. The Commission also found that the CalPX's proposed allocation methodology grouped market participants in an apparently arbitrary and unsupported manner. The Commission found that 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.⁵ Accordingly, the Commission directed the CalPX to either adopt our method or to fully support the appropriateness of its original proposal. Finally, the Commission directed the CalPX to make a compliance filing within 30 days of the August 8th Order. However, in the event that a rehearing was requested, the Commission ordered that the required compliance filing would be due 30 days after a final order addressing any requests for rehearing was issued.

II. Notice of Filings and Responsive Pleadings

4. Notices of the filings were published in the Federal Register, 67 Fed. Reg. 59,281 and 62,046 (2002), with motions to intervene and protests due on or before October 10, 2002. Southern California Edison (SoCal), Pacific Gas and Electric Company (PG&E), Constellation NewEnergy, Inc. (Constellation), and the Competitive Supplier Group (CSG) filed protests in response to the CalPX's compliance filing. In addition, the Official Committee of Participant Creditors of the CalPX (Participants Committee) filed comments in support of CSG's protest.

III. Requests for Rehearing, Reconsideration, and/or Clarification

5. SoCal, PG&E, and Participants Committee filed timely requests for rehearing, reconsideration, and/or clarification of the August 8th Order. Further, in response to the Participants Committee's request for rehearing or reconsideration, both SoCal and PG&E filed answers recommending that the Commission reject Participants Committee's request.

⁵The account balances in question (Account Balances) come from the balances in each customers' Account Summary on March 13, 2002. See August 8th Order at PP. 8 and 23-25.

6. SoCal requests clarification or rehearing regarding one aspect of the August 8th Order. SoCal renews its argument that net buyers should not be charged for costs incurred by the Participants Committee which provide no benefit to net buyers. While SoCal states that it does not object to paying its fair share of CalPX's legal expenses, such as those related to the commandeering of the block forward contracts and the AIG surety bond litigation, it does not believe that it should be required to pay for Participant Committee expenses such as those itemized as "Participant Committee Claims Litigation" and "Financial Consultants to Committee". SoCal contends that it would be unjust, unreasonable, and unduly discriminatory for CalPX to charge SoCal and other net buyers for their opponents' legal expenses, and that it would be arbitrary and capricious for the Commission to allow CalPX to do so.

7. PG&E states that the August 8th Order erred by approving an allocation methodology based on the absolute value of March 13 Account Balances. PG&E contends that this date has no relationship to the costs being allocated and that using these balances constitutes illegal retroactive ratemaking since it will bill charges based on historic balances. PG&E also argues that CalPX's proposal violates the filed rate doctrine since net buyers and sellers have already paid for the operations related to those sales and purchases. Finally, PG&E claims that the Commission erred in accepting rates without making them subject to refund, since PG&E does not believe that CalPX has demonstrated that such rates are just and reasonable and because the March 13 Account Balances, upon which cost allocations to customers are made, could themselves change following the outcome of on-going proceedings.

8. Participants Committee requests that the Commission reconsider its August 8th Order in light of the subsequent agreement reached between Participants Committee and CalPX in the bankruptcy proceeding.⁶ Participants Committee requests that the Commission revise its order to provide for the establishment of reserves from the Settlement Clearing Account in an amount consistent with the Modified Plan.⁷ Further, Participants Committee asserts that the wind-up rate schedule should not take away the

⁶The referenced agreement relates to modifications to the terms of the Chapter 11 plan for CalPX (Modified Plan). We note that subsequent to making its request for rehearing or reconsideration, Participants Committee, on November 20, 2002, filed the final revised Chapter 11 plan that was approved by the Bankruptcy Court on October 28, 2002. See Docket Nos. EC03-20-000, et al.

⁷Participants Committee does not, however, take issue with the six-month review process implemented by the August 8th Order. Participants Committee Motion at 4.

ability of the CalPX's new Board to control the level of expenses during the wind-up period.

9. Participants Committee also requests that the Commission grant rehearing to reconsider the billing procedures proposed by CalPX. Participants Committee does not believe that it would be reasonable to require net sellers to pay any additional amounts to CalPX on a monthly or other billing basis. Instead, Participants Committee contends that it would be more appropriate if net sellers are charged their share of expenses in the form of offsets that accrue against the amounts that they will ultimately be due from the Settlement Clearing Account.⁸

10. Finally, Participants Committee states that the Commission was unclear when it held that "[t]he use by the CalPX of the revenues made available under this rate schedule may be subject to approval of the U.S. Bankruptcy Court . . ." ⁹ Participants Committee requests clarification that this provision was intended to preserve the Bankruptcy Court's jurisdiction over approval of the actual Chapter 11 administrative expenses of CalPX.

11. PG&E and SoCal filed responses in opposition to Participants Committee's request for rehearing. PG&E states that the Participants Committee's request should be rejected to the extent that it seeks approval from this Commission of the modified Chapter 11 plan that the Participants Committee negotiated with the CalPX. If any such approval is needed, PG&E asserts that it should be sought in a separate filing subject to full notice procedures, not in the instant proceeding. SoCal makes similar arguments and also disputes the reasonableness of the modified Chapter 11 plan on various grounds.

⁸As noted in the August 8th Order at P. 9, the request to establish a reserve was made in recognition of the fact that, rather than pay up front, customers might choose to have these charges factored into the final accounting for refunds. Since the August 8th Order approved the establishment of a reserve, we believe that this aspect of Participants Committee's request has been fully addressed and needs no further discussion.

⁹August 8th Order at P 28.

Discussion

12. Rules 213(a)(2) and 713(d)(1) of the Commission's Rules of Practice and Procedure¹⁰ generally prohibit answers to request for rehearings¹¹ unless otherwise ordered by the decisional authority. In this instance, we will accept the answers of SoCal and PG&E because they provide information that clarifies the issues in Participant Committee's request and aids us in the decisional process.

13. Regarding SoCal's renewed argument that it would be unjust, unreasonable, and unduly discriminatory for the CalPX to charge, under this rate schedule, net buyers like SoCal for the litigation expenses incurred by the Participants Committee, we will grant clarification. At the outset we note that, as Participants Committee asserts, the bankruptcy court has both the jurisdiction and the ability to govern outlays from the bankrupt estate. Thus, our approval of the Modified Plan filed on November 20, 2002, correctly deferred to the court's finding that the estate should pay Participants Committee's expenses.

14. As part of the Modified Plan, however, certain funds in excess of those recoverable from CalPX's estate, were to be withdrawn from the Settlement Clearing Account in satisfaction of outstanding bankruptcy claims. The Settlement Clearing Account is, of course, composed of funds that do not belong to the CalPX estate and that must be returned to their rightful owners through the refund proceeding before this Commission in San Diego Gas and Electric Co., et al., Docket Nos. EL00-95-045, et al. (Refund Proceeding). Thus, in addition to simply reimbursing CalPX for its on-going jurisdictional activities, the instant proceeding can be construed to provide a means to reimburse the Settlement Clearing Account, prior to the conclusion of the Refund Proceeding, for funds withdrawn from it related to both CalPX's expenses and the conclusion of the bankruptcy proceeding. Any litigation expenses of the Participants Committee that were recovered from the Settlement Clearing Account through the bankruptcy proceeding, should thus be included in the instant rate so that the Settlement Clearing Account can be made whole.

15. As in any rate case, costs should be allocated, where possible, to customers based on customer benefits and cost incurrence. Here, the costs at issue were clearly incurred

¹⁰18 C.F.R. § 385.213(a)(2) and § 385.713(d)(1) (2002).

¹¹We also recognize that the Participant Committee's request was tailored as a request for either a "rehearing or reconsideration."

by Participants Committee for the benefit of its members.¹² Accordingly, in the context of this rate schedule, we find that these costs should be allocated entirely to members of the Participants Committee. CalPX is hereby directed to modify its allocation of Participants Committee expenses accordingly.

16. We deny PG&E's request for rehearing. PG&E's contentions confuse two distinct issues: rates previously charged for transactions in the PX market (which is not being decided here) and responsibility for the PX's newly incurred wind-up administrative costs. The Commission has directed CalPX to engage in certain administrative activities necessary to wind up its operations. While these administrative wind-up activities include compiling information necessary to resolve PX market pricing issues related to prior transactions, the costs related to these activities are newly incurred by the PX and thus are properly reflected in prospective rates at issue here. All customers are responsible for these new administrative wind-up costs, as the costs are being incurred to resolve matters related to the market as it operated during their participation. In short, the rates for these new services are based on newly incurred costs and, therefore, are not an additional charge associated with past services as PG&E contends. Moreover, contrary to PG&E's claims, the parties were on notice that CalPX would have to perform these wind-up activities, as the Commission instituted the requirements in publicly issued orders. PG&E's retroactive ratemaking and filed rate doctrine arguments are misplaced and mistaken.

17. Additionally, while the approved allocation of these costs to customers is based on information that may be subject to change, i.e., the March 13 Account Balances, it is reasonable given the unique nature of the ongoing activities. We believe that the primary focus of CalPX's on-going activities is to support this Commission's efforts to calculate just and reasonable rates and associated refunds, if any, for participants in CalPX's markets. At the time of CalPX's filing, each participant's Account Balance was the best approximation of what the participant would ultimately owe to, or be owed by, the CalPX. The August 8th Order essentially found that the magnitude of each Account Balance correlates with the importance to each participant of the Commission's efforts to calculate just and reasonable rates and associated refunds, if any, because the larger the Account Balance, the greater the impact of the refund proceeding on the participant. Accordingly, except as provided above regarding Participants Committee expenses, it is

¹²These costs were associated with Participants Committee's prosecution of its claims in the bankruptcy proceeding. See Participants Committee's October 24th Motion for Leave to File Answer and Answer in the Compliance proceeding at 3-4.

appropriate to allocate the costs of CalPX's on-going activities on the basis of the most recent Account Balances available at the time of filing.¹³

18. We also reject PG&E's arguments that the CalPX charges should be subject to refund. As to PG&E's first assertion that the rates should be subject to refund because they have not been shown to be just and reasonable, we disagree. The August 8th Order found that these rates are reasonable for the initial six-month period, and provided a framework to ensure that the Commission and interested parties will be able to review the proposed updated rates and underlying costs every six months. Such protections are adequate in these unique circumstances. Regarding PG&E's other argument, that the rates should be subject to refund because the March 13 Account Balances may change as a result of on-going proceedings, we also disagree. As explained above, the March 13 Account Balances were used only to allocate costs for the initial six-month period and, given the limitations of the situation, it was reasonable to do so. Furthermore, making the initial six-month rates subject to refund so that the cost allocation can later change to reflect the final March 13 Account Balances would add yet another level of complexity to an already complex situation and, thus, increase the regulatory uncertainty of all participants in the California markets. Since the CalPX's wind-up activities are expected to last for only a limited period, we see no advantage to making the rates subject to refund that would offset the substantial drawback of increased regulatory uncertainty identified above.

19. We will also reject Participants Committee's request for rehearing or reconsideration. The August 8th Order is not in conflict with the reserve determination contained in the Modified Plan nor with the new board's ability to control CalPX expenses as provided in the Modified Plan. The August 8th Order merely addressed the instant rate filing to ensure that it provides for just and reasonable rates and made no findings regarding the board's ability to control actual expenses. Furthermore, the August 8th Order's approval of a matching reserve in the Settlement Clearing Account will be superseded by the Modified Plan, when approved.

IV. Protests of the Compliance Filing

20. SoCal, PG&E, Constellation, and CSG all contend that the CalPX's compliance filing should be rejected for its failure to comply with the Commission's August 8th

¹³Similarly, as provided in the August 8th Order, the most up-to-date Account Balance information available at the time shall be used in any subsequent filings by CalPX to renew its rate request for additional six-month periods.

Order. Among their arguments, the parties contend that the CalPX's compliance filing includes termination costs, \$1,258,277, and working capital costs, \$911,686, that were neither reviewed nor approved by the Commission. PG&E argues that the CalPX did not disclose these costs in its July 3, 2002 or July 10, 2002 filings, and that there is no justification for the CalPX to add additional costs at its own discretion. Further, SoCal states that the CalPX has made no attempt to justify the costs associated with its working capital requirements, and if the CalPX incurs such costs, it must file separately to recover them and provide adequate cost support.

21. PG&E, Constellation, and CSG also recommend rejecting the compliance filing on the ground that the filing is premature. The protesting parties state that in the August 8th Order, the Commission directed CalPX to make its compliance filing thirty days after a final order is issued on any requests for rehearing.¹⁴ PG&E, SoCal, and Participants Committee filed timely requests for rehearing. Thus, in light of these requests, the protesting parties argue that the compliance filing was premature and should be rejected.

22. PG&E and SoCal also protest CalPX's decision to adjust the March 13 Account Balances for refunds based on its more recent filing in the refund proceeding in Docket Nos. EL00-95-045 et al. PG&E states that the CalPX's application of the refund adjustments is based on Account Balances that have not been fully litigated. PG&E contends that it is inappropriate for the CalPX to adjust for a "moving target" estimate of refunds in a compliance filing using Account Balances that have changed and are likely to change in the future. Further, SoCal argues that in the August 8th Order, the Commission clearly stated that the CalPX would have the opportunity to adjust the Account Balances in subsequent six-month filings. SoCal therefore contends that the CalPX should be required to make a compliance filing that makes allocations based on the original March 13 Account Balances, as required by the August 8th Order.

23. Finally, SoCal protests the fact that CalPX's revised rate schedule still contains funding for some of the Participants Committee's activities. SoCal states that the August 8th Order did not authorize the CalPX to charge SoCal and other net buyers for litigation expenses incurred by the Participants Committee. As in its rehearing request, SoCal contends that it would be unjust, unreasonable, and unduly discriminatory for CalPX to

¹⁴Ordering Paragraph (B) of the August 8th Order states that "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."

charge SoCal and other net buyers for their opponents' legal expenses, and that it would be arbitrary and capricious for the Commission to allow CalPX to do so.

Discussion

24. CalPX's compliance filing of September 9, 2002, as amended, does not comply with the directives in our August 8th Order.

25. CalPX's attempt to add termination and working capital costs to its rate schedule is not permissible in this compliance filing. The purpose of a compliance filing is to make only the revisions directed by the Commission. As such, additional charges that the Commission has neither seen nor approved cannot be included in this filing. Additionally, while the August 8th Order did approve CalPX's inclusion of a certain allocation of expected termination costs in the initial six-month budget, it did not approve the inclusion of all potential termination costs in the initial six-month period. Accordingly, CalPX's revised compliance filing should only include the amount of termination costs included in the first six-month budget approved by the August 8th Order. Further, in the event that CalPX believes it must recover any additional costs, such as working capital, it must make a new section 205 rate filing and provide the appropriate cost support.

26. CalPX should also not have modified the March 13 Account Balances in response to its recent filing in the refund proceeding in Docket No. EL00-95-045, et al. While we recognize that the Account Balances will continue to change, the purpose of this compliance filing is merely to reflect the six-month budget already accepted by the August 8th Order, without modification. In the August 8th Order, we stated that we would "not allow the allocation to stand indefinitely based on this [March 13, 2002] snapshot. Rather, we will require CalPX to prospectively modify its allocation, as needed, in any subsequent six-month filing . . . to track any changes in the balances contained in its Account Summaries."¹⁵ As such, CalPX will have an opportunity to adjust the Account Balances in its subsequent six-month filings. The Commission therefore directs CalPX to calculate allocations based on the original March 13 Account Balances.

27. With regard to SoCal's argument that net buyers should not be expected to pay for expenses related to the Participants Committee, as we explain above in the rehearing discussion, in the context of this rate schedule we agree. In its revised compliance filing,

¹⁵August 8th Order at P 25.

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CalPX should allocate costs incurred by the Participants Committee as discussed in the rehearing section of this order.

28. Finally, since we are rejecting CalPX's compliance filing, we need not address the intervenors' concern that this compliance filing was premature.

The Commission orders:

(A) Requests for rehearing are rejected and clarification is granted as discussed in the body of this order.

(B) CalPX's compliance filing of September 9, 2002, as amended on September 19, 2002, is hereby rejected, for the reasons discussed.

(C) CalPX is hereby directed to make a revised compliance filing within 30 days of the date of this order reflecting the modifications discussed in the body of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.