

102 FERC ¶ 61, 208
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. ER02-2234-005
ER02-2234-006
ER02-2234-007
ER03-139-001
ER03-139-002

ORDER ACCEPTING COMPLIANCE FILINGS, SUBJECT TO MODIFICATION
AND DENYING REQUESTS FOR REHEARING

(Issued February 25, 2003)

1. On December 31, 2002 and January 8, 2003, the California Power Exchange Corporation (CalPX) submitted compliance filings in response to orders issued by this Commission on December 20, 2002 and December 31, 2002, respectively.¹ These related orders directed the CalPX to revise its compliance filing to allocate any expenses incurred by the Official Committee of Participant Creditors (Participants Committee) to the Committee's members.
2. In this order we clarify that any market participant that is represented by the Participants Committee is responsible for paying its share of any expenses incurred for its benefit. This order benefits the public by ensuring that the CalPX will implement the proposed "wind-up" rate schedule as intended by this Commission.

Background

3. 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. On August 8, 2002, the Commission found that the proposed rate schedule, subject to modification, was an appropriate mechanism to allow

¹California Power Exchange Corp., 101 FERC ¶ 61,330 (2002) (December 20 Order), and 101 FERC ¶ 61,403 (2002) (December 31 Order).

the CalPX to fund its continuing operations.² 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.

4. The August 8 Order also found that the CalPX's proposed allocation methodology grouped market participants in an apparently arbitrary and unsupported manner. The Commission stated 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. On September 9, 2002, as amended, the CalPX filed a revised rate schedule in compliance with the Commission's August 8 Order.

5. In the December 20 Order, the Commission found that the CalPX failed to fully comply with the directives of the August 8 Order and directed the CalPX to comply. Additionally, the Commission found that in the context of this rate schedule, the expenses incurred by Participants Committee were for the benefit of its members, and as such, these costs should be allocated entirely to members of the Participants Committee. CalPX was therefore directed to modify its allocation of Participants Committee expenses for the first six-month period (July 10, 2002 through December 31, 2002). Similarly, the December 31 Order directed that expenses for the second six-month period (January 1, 2003 through June 30, 2003) be modified to conform with the December 20 Order.

Notice of Filings and Responsive Pleadings

6. Notices of CalPX's filings to comply with the December 20 Order were published in the Federal Register, 68 Fed. Reg. 1,838, and 2,338 (2003), with motions to intervene and protests due on or before January 21, 2003 and January 29, 2003, respectively. Notice of CalPX's filing to comply with the December 31 Order was published in the Federal Register, 68 Fed. Reg. 2,328 (2003), with motions to intervene and protests due on or before January 29, 2003.

7. Participants Committee; the City of Los Angeles Department of Water and Power (LADWP); Avista Energy, Inc. (Avista) and Sempra Energy Trading Corp. (Sempra) (jointly) filed requests for rehearing of the December 20 Order.³ Participants Committee,

²California Power Exchange Corp., 100 FERC ¶ 61,178 (2002) (August 8 Order).

³In response to Participants Committee's request for rehearing, Southern

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SoCal, and Pacific Gas and Electric Company (PG&E) also protest the compliance filing made by CalPX in response to the December 20 Order.

8. Participants Committee and PG&E also filed requests for rehearing of the December 31 Order, and protests the compliance filing made by CalPX in response to the December 31 Order.

Requests for Rehearing and Protests

9. Participants Committee requests rehearing of the Commission's determination that expenses incurred by the Participants Committee are to be borne solely by members of the Participants Committee. Participants Committee contends that this determination violates the United States Bankruptcy Code as well as the final orders of the United States Bankruptcy Court for the Central District of California (Bankruptcy Court), and argues that the December 20 Order should be corrected to reflect that "all of the Participants Committee expenses should be paid . . . as administrative expenses from the assets of CalPX"⁴

10. Participants Committee explains that it was appointed by the United States Trustee "to represent the interests of market participants ("Participants") who assert they are owed money for sales into the markets administered by CalPX..." and that there are more than seventy such Participants.⁵ Moreover, the Committee states that the United States Trustee appointed nine of these Participants to serve as members of the Participants Committee and that these nine members act in a representative and fiduciary capacity for the class of Participants as a whole.⁶

³(...continued)

California Edison (SoCal) filed an answer in opposition this request. The Commission's regulations prohibit the filing of such answers, unless otherwise permitted by the decisional authority (See 18 C.F.R. § 385.213(a)(2) (2002)). Accordingly, SoCal's answer is rejected.

⁴Participants Committee's (January 8, 2003) Filing at 2-3.

⁵Id. at 6.

⁶Participants Committee state that "such committees have fiduciary duties to the class of claimants for interest holders that the committee represents." Id. at 7.

11. Participants Committee states that to hold its nine members responsible for all the Committee's costs, without spreading these costs, at a very minimum, among all Participants would be unjust, unreasonable and unduly discriminatory. Participants Committee also reminds the Commission that the Bankruptcy Court has entered numerous final orders approving their employment of professionals, and that such expenses are paid for by the debtor's estate, not by committee members.⁷ As such, Participants Committee contends that the December 20 Order improperly shifts the burden of a single category of administrative expense from the estate as a whole to the nine Participants who serve on the Participants Committee. Similarly, for this reason, Participants Committee also requests rehearing of the related December 31 Order and protests the CalPX's compliance filings to both the December 20 and December 31 Orders.

12. LADWP, Avista and Sempra also filed requests for rehearing of the December 20 Order by summarizing the arguments presented by Participants Committee. Since LADWP, Avista and Sempra are individual members of the Participants Committee, they argue that they would be exposed to very substantial costs if the Commission does not clarify or correct its determination that costs incurred by Participants Committee for the benefit of its members be allocated entirely to members of the Participants Committee. Accordingly, these parties request that the Commission should make clear that the CalPX should not allocate the Participant's Committee's litigation and other expenses to its individual members.

13. SoCal protests the CalPX's compliance filing responding to the December 20 Order stating that the CalPX failed to properly allocate all expenses incurred by Participants Committee to its members. SoCal argues that the CalPX improperly excluded expenses related to the commandeering of the block forward contracts and the surety bond litigation from the expenses that should be exclusively borne by Participants Committee's members. SoCal explains that while it would not have objected to such expenses if they were handled by an independent and non-discriminatory entity, it objects to paying for such expenses since they were handled by Participants Committee. Additionally, SoCal contends that the CalPX failed to properly allocate expenses to members of the Participants Committee that relate to "PG&E Bankruptcy Claims" in the amount of \$114,194, and "Participant Committee Claims Litigation" in the amount of \$750,000.

⁷Id. at 11-12.

14. PG&E's protest and rehearing request, in large part, repeats the arguments it has made to prior CalPX compliance filings. Basically, PG&E continues to advocate the allocation of all of CalPX's expenses to net sellers instead of to all CalPX market participants. PG&E also continues to object to the use of the original March 13, 2002 account balances to determine what the initial allocation of CalPX's expenses to its customers should be. At the same time, PG&E supports the December 20 Order's rejection of CalPX's updated March 13 account balances even though they would have resulted in a reduced allocation to PG&E (58 percent instead of the current 76 percent).

15. PG&E also claims that CalPX's failure to consider the California ISO's account balance introduces another distortion into the calculation of the initial allocation. PG&E claims that CalPX's debt to the ISO for real-time purchases would represent the single largest account balance if it were not excluded and, thus, its exclusion results in PG&E being allocated more than its fair share of CalPX's expenses.⁸

Discussion

Rehearing Requests

16. At the outset, we reiterate and clarify that the Participants Committee expenses at issue here are separate and distinct from any such expenses that are, have been, or can be recovered from the CalPX estate under the rightful authority of the Bankruptcy Court. As noted in the December 20 Order, disposition of the CalPX's estate, which does not include the contents of the much larger Settlement Clearing Account, is undeniably under Bankruptcy Court authority. We have not, with our orders, intended to interfere with that process or to reverse the court-approved disposition of the CalPX's estate among its creditors. Thus any Participants Committee expenses which have been, or will be, recovered directly from the CalPX estate under court authority, should not be incorporated into the CalPX's proposed rates here and are not under consideration here. That debt has already been settled appropriately under Court oversight and there is no need for this Commission to attempt to reimburse the CalPX estate for that already-settled debt.

⁸On page 7 of its protest, PG&E appears to contend that the August 8 Order discussed some sort of allocation that split CalPX's costs 50/50 between those who owe money and those who are owed money with no single party being allocated more than 50 percent of the costs. We have been unable to comprehend this portion of PG&E's protest. There is no such discussion in the August 8 Order. Accordingly, we will not discuss this contention further.

17. Our concern arises from another aspect of the Court-approved Modified Bankruptcy Plan (Modified Plan). As noted in the December 20 Order, the Modified Plan permits certain expenses beyond those recoverable from the CalPX's estate to be recovered from the Settlement Clearing Account. The contents of the Settlement Clearing Account belong to market participants who traded through the CalPX, and our directive applies only to that portion of the Participants Committee expenses which, under the Modified Plan, would be withdrawn from this pool of non-CalPX funds. The mere fact that CalPX administers these funds on behalf of the market participants does not, in our view, make the funds available to the CalPX's creditors through the bankruptcy process. As we stated in the December 20 Order, the only venue that exists for ultimate disposition of these market participant funds is the refund proceeding before us in San Diego Gas and Electric Co., et al., Docket Nos. EL00-95-045, et al. (Refund Proceeding). Thus, it was appropriate to approve a CalPX rate schedule designed to reimburse the Settlement Clearing Account for any funds withdrawn from it under the Bankruptcy proceeding. Further, as with any Commission jurisdictional rate schedule, it was appropriate for the Commission to direct an allocation of the Participants Committee expenses that is consistent with our standard practice; *i.e.*, that is based on customer benefits and cost incurrence. Doing so has not in any way contravened the Court's undisputed authority over the CalPX estate.

18. As to petitioners' other request, we clarify that it was never the Commission's intent to allocate all of the Participants Committee's expenses to only the nine individual members that officially serve on the Participants Committee. Instead, the Commission intended that any market participant who is represented by the Participants Committee (*i.e.*, participants who assert they are owed money for sales into the markets administered by the CalPX) should be responsible for paying the expenses incurred by the Participants Committee.⁹ This outcome is reasonable since costs should be allocated, where possible, to customers based on customer benefits and cost incurrence, as we previously stated in the December 20 Order. Accordingly, the CalPX is directed to revise its wind-up rate schedule to reflect that expenses of the Participants Committee will be allocated to all the market participants that it represents, not just the nine official members of the Participants Committee, except for expenses of litigating the claims involving the commandeering of block forward contracts or litigating surety bond claims, which are discussed below.

⁹Participants Committee states that there are more than seventy such Participants. As such, each of these Participants should bear its respective share of the Committee's expenses.

Protests of the Compliance Filings

19. While SoCal contends that it should not pay for expenses related to the block forward contract and surety bond litigation solely because these expenses were incurred by the Participants Committee, we disagree. First, we note that the Participants Committee was selected to pursue this litigation by the United States Trustee, under authority of the Bankruptcy Court. We have no say in such matters. Second, it is undisputable that SoCal, like other market participants, received some benefit from this commandeering and surety bond litigation, and as such, our cost-causation principal requires that SoCal pay its share of these expenses. The Commission therefore clarifies that the CalPX properly allocated these expenses to all market participants in its compliance filing. However, SoCal correctly notes that the CalPX did not limit its allocation of expenses related to "PG&E Bankruptcy Claims" in the amount of \$114,194, and "Participant Committee Claims Litigation" in the amount of \$750,000, to only the market participants represented by the Participants Committee. These expenses appear to only benefit those represented by the Participants Committee. Accordingly the Commission directs the CalPX to include these expenses among those that are to be exclusively borne by market participants represented by the Participants Committee.

20. We have already fully addressed PG&E's claim that only net sellers should have to pay CalPX's ongoing expenses.¹⁰ As we have explained in prior orders, CalPX is now operating primarily to support the effort to properly resolve outstanding claims in the Refund Proceeding.¹¹ Essentially, its ongoing operations revolve around the proper settlement of the account balances. Thus it is appropriate that its expenses should be allocated to those who have account balances in proportion to the size of their balances. As we have stated all along, each subsequent six-month rate filing should be based on the latest account balance information available and the initial six-month rate filing was appropriately based on the original March 13 account balance, the most recent balance available at the time of that filing.

21. Regarding PG&E's argument that the ISO account balance should be considered in the calculation of the initial allocation, we disagree. CalPX was not a traditional market participant. Its only purpose was to operate its energy markets and serve as Scheduling Coordinator for its energy market customers. It had no load of its own. Accordingly, any real-time energy charges assessed to CalPX by the ISO would have

¹⁰See December 20 Order at P 16.

¹¹See December 20 Order at P 14.

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been assessed to it as a Scheduling Coordinator for its customers; i.e., entities like PG&E. Since those amounts in turn, clearly would be recoverable from CalPX's customers, it follows that those amounts are already reflected in the account balances that have been used to determine the initial allocation. Thus, PG&E's proposal would result in the same costs being counted twice for purposes of cost allocation. Even ignoring for the moment the propriety of double-counting in this manner, the resulting shift of cost responsibility for CalPX's ongoing operations to the ISO would be extremely difficult to support since the ISO, like CalPX itself, is a non-profit entity with no real stake in the outcome of the Refund Proceeding. Any money that may flow to the ISO under the Refund Proceeding would be destined for other parties. As noted above, CalPX's customers for its on-going operations are essentially those entities with a stake in the Refund Proceeding; i.e., entities like PG&E. Accordingly, PG&E's argument is without merit.

The Commission orders:

(A) The requests for rehearing are denied and clarification is granted as discussed in the body of this order.

(B) CalPX's compliance filings of December 31, 2002 and January 8, 2003 are hereby accepted, subject to modification, as discussed above.

(C) CalPX is hereby directed to make a revised compliance filing within 15 days of the date of this order reflecting the modifications discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.