

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

San Diego Gas & Electric Company)	Docket No. EL00-95-000
)	
v.)	
)	
Sellers of Energy and Ancillary)	
Service Into Markets Operated)	
by the California Independent)	
System Operator Corporation)	
and the California Power)	
Exchange Corporation)	
)	
Investigation of Practices of the)	Docket No. EL00-98-000
California Independent System)	
Operator and the California)	
Power Exchange)	
)	
Coral Power, L.L.C., Enron Power)	
Marketing, Inc., Arizona Public)	
Service Company, Cargill Alliant,)	
LLC, San Diego Gas & Electric)	
Company, Avista Energy, Inc.,)	
Sempra Energy Trading Corp.,)	
PacifiCorp, and Constellation)	
Power Source)	
)	
v.)	Docket No. EL01-36-000
)	
California Power Exchange Corporation)	
)	
Salt River Project Agricultural)	
Improvement and Power District)	
and Sacramento Municipal Utility)	
District)	
)	
v.)	Docket No. EL01-37-000
)	
California Power Exchange Corporation)	

Public Service Company of New Mexico)	
)	
)	
v.)	Docket No. EL01-43-000
)	
California Power Exchange Corporation)	

COMMENTS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION ON THE OFFER OF SETTLEMENT SUBMITTED BY THE OFFICIAL COMMITTEE OF PARTICIPANT CREDITORS OF THE CALIFORNIA POWER EXCHANGE CORPORATION

I. INTRODUCTION

On October 5, 2001, the “Official Committee of Participant Creditors” (“PCs”)¹ filed an Offer of Settlement in the above-captioned dockets. The Offer of Settlement is designed *inter alia*: (1) to establish a reserve for the administrative expenses of the California Power Exchange Corporation (“Cal PX”); (2) to resolve litigation over the certain complaints regarding the “chargeback” methodology of the Cal PX; (3) to provide for the distribution of funds held by the Cal PX; and (4) to allocate the remaining debts of the Cal PX in proportionate amounts to Pacific Gas and Electric Company (“PG&E”) and Southern California Edison Company (“SCE”). If approved by the Commission, the PCs will file with the Bankruptcy Court to implement the settlement.

While the ISO supports the objectives of establishing an administrative fund for the PX, resolving the chargeback litigation, and promptly disposing the funds held by the Cal PX, two aspects of the Offer of Settlement require modification or clarification. First, sums owed to the ISO for Cal PX transactions in the ISO markets should be paid

¹ The PCs are comprised of the following entities: the Automated Power Exchange; Avista Energy. Inc.; Enron Power Marketing, Inc.; Los Angeles Department of Water and Power; Mirant Americas Energy Marketing LP; Powerex Corp.; Reliant Energy Services, Inc.; Salton Sea Power Generation; and Sempra Energy Trading Corp. Motion of the Official Committee of Participant Creditors of the California Power

directly to the ISO and not to an escrow agent. The use of an escrow procedure could lead to substantial and unnecessary delays in the distribution of funds to ISO Creditors.² Second, the Commission must clarify how the proposed cut-off for ISO billing adjustments to the Cal PX contained in the Offer of Settlement is consistent with the ISO's dispute resolution responsibilities under the Commission-approved ISO Tariff.

II. BACKGROUND

Prior to January 31, 2001, the Cal PX administered its Day-Ahead and Day-Of markets for electricity in California pursuant to California law and the tariff on file with the Commission. The Cal PX also served as the Scheduling Coordinator (most notably for PG&E, SCE, and San Diego Gas & Electric Company ("SDG&E")) with respect to transmission service and the markets administered by the ISO. Indeed, up until mid January 2001, the Cal PX was by far the largest Scheduling Coordinator, at times accounting for over 90% of the electrical energy transmitted on the ISO Controlled Grid.

On December 15, 2000, the Commission found, among other things, that the markets administered by the Cal PX were not functioning as intended and ordered the Cal PX to take certain remedial actions.³ In January 2001, SCE failed to make approximately \$214 million in payments to the Cal PX for power purchased by SCE in the markets administered by the Cal PX. Subsequently, PG&E defaulted on its obligations to the Cal PX.

Exchange Corporation to Intervene Out of Time and Request For Expedited Consideration dated October 5, 2001 at p. 6 n. 4.

² Capitalized terms not otherwise defined herein are defined in the Master Definitions Supplement, ISO Tariff Appendix A, as filed August 15, 1997, and subsequently revised.

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

On January 31, 2001, the Cal PX suspended the operations of the Day-Ahead and Day-Of markets. By February 28, 2001, the Cal PX also stopped performing as the Scheduling Coordinator for others with respect to the real time market administered by the ISO.

The Cal PX filed for chapter 11 bankruptcy protection with the United States Bankruptcy Court for the Central District of California in Los Angeles (the "Bankruptcy Court") on March 9, 2001. The Cal PX's rate schedules were terminated by Commission order as of the end of April 2001.⁴

At present, Cal PX has failed to pay approximately \$2.4 billion to the ISO for real time purchases by PG&E and SCE through the Cal PX as their Scheduling Coordinator. The PCs estimate that the Cal PX also owes approximately \$520 million to its other market participants for net sales into the markets administered by the Cal PX.

III. COMMENTS

A. The Proposal to Distribute Sums Due to the ISO to An Escrow Agent Is Unwarranted; Payment Should Be Made Directly to the ISO

Under Section 7 of the Offer of Settlement, the PCs propose that cash available for distribution to the ISO be given to an escrow agent. The ISO is to give the escrow agent, the PCs, and all Scheduling Coordinators written instructions detailing how distributions are to be made. If the escrow agent receives any objection by the PCs, the escrow agent cannot make distributions until the earlier of: (1) an agreement is reached by the ISO and the PCs as to the instructions, (2) the agent receives an order from the Commission, or (3) the escrow agent receives a court order. In the Explanatory Statement, the purported justification for the use of an escrow agent is that "the

independence of the Cal ISO has been questioned” and that “the Committee is concerned that Cal ISO may fail to promptly distribute amounts owed to Scheduling Coordinators in accordance with the ISO Tariff.” Explanatory Statement at 19. The PCs proposal to place funds due to the ISO with an escrow agent should be rejected.

First, the PCs offer no support for their “concern” that the ISO will fail to promptly and properly disburse any payment received from the Cal PX. To the contrary, the record demonstrates that the ISO has made every effort to disburse available funds to market participants. The ISO Tariff provides for disbursement of funds the same day that they are received. Even with the current financial turmoil being experienced by the ISO, disbursements of payments requiring pro-rata allocations due to short payments by Scheduling Coordinators typically have been made within five business days.

Second, under Section 7 of the Offer of Settlement, the PCs have reserved for themselves the right to dispute instructions and thereby prevent the distribution of funds to other ISO Market Participants. More than seventy-five Scheduling Coordinators are eligible to participate in the ISO Market. A select few should not be permitted to delay payment for potentially significant periods of time.⁵ Moreover, the ISO Tariff already has a Commission-approved alternative dispute resolution process for resolving issues concerning prompt and proper billing.

Third, this is an unnecessary additional administrative expense. The suppliers have used their own “questioning” of the independence of the ISO Governing Board to object to numerous ISO actions. For example, they have sought to have the ISO’s

⁴ See *id.* at 61,982.

⁵ The PCs state that the funds would be disbursed if the escrow agent receives an order from the Commission. However, it is unclear if the agent would be subject to the Commission’s jurisdiction. Moreover, not all the PCs are subject to the Commission’s jurisdiction.

comments on market monitoring struck and sought to be excused from providing data purporting to justify above proxy market clearing price bids due to the composition of the Governing Board. The Commission has rejected these actions by suppliers and should not countenance this unwarranted procedure in this case.⁶

The PCs have offered no basis for the use of an escrow agent. Funds owed to the ISO should be paid directly to the ISO. The ISO will then disburse these funds promptly in accordance with its Tariff.

B. The Commission Must Clarify the Relationship Between the Proposed Cut-Off Date for ISO Adjustments to Its Bills of the Cal PX and the Dispute Resolution Process Under the ISO Tariff

Section 12 of the Offer of Settlement requests that the Commission order the ISO to complete all adjustments for the period prior to February 28, 2001 within ten days of an order approving the Offer of Settlement. The ISO believes that this provision requires clarification.

Section 13 of the ISO Tariff establishes a Commission-approved alternative dispute resolution (ADR) process. The ISO currently is working ADRs, good faith negotiations, and billing disputes with a claimed value approaching \$100 million that relate in whole or in part to the period prior to February 28, 2001. These disputes could result in adjustments to the bills of all Scheduling Coordinators, including the Cal PX.

The ISO is unsure of how the PCs believe the proposed cut-off in section 12 of the Offer of Settlement will affect these ongoing disputes. One possibility is that the cut-off for adjustments in the ISO bills to the Cal PX will also serve as a cut-off for all ISO disputes with its Market Participants not resolved in the ten day window. A second

⁶ See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator Corporation and the California Power*

possibility is that rather than sending an adjusted bill to the Cal PX, the PCs anticipate that the ISO would send adjusted bills directly to PG&E and Edison possibly in their respective 67.5% and 32.5% obligations as identified in section 1 of the Offer of Settlement.⁷

As noted above, as a Scheduling Coordinator the Cal PX often accounted for more than 90% of the volume of power flowing over the ISO Controlled Grid. It would be manifestly unfair if, by virtue of this provision of the Offer of Settlement, the PCs intend that any ISO billing adjustments subsequent to the ten-day window would be borne by all other Scheduling Coordinators on a proportionate basis.

The Commission and the PCs must recognize that as a revenue-neutral, not-for-profit entity, the ISO must be in a position to pass billing adjustments on to Scheduling Coordinators who engaged in transactions during the relevant period. In addition, the Commission has recognized that the ISO Tariff is a formula rate.⁸ Formula rates are not subject to the prohibition against retroactive rate adjustments.⁹ If there is to be a cut-off date for billing adjustments from the ISO to the Cal PX, the Commission must ensure that procedures are in place to permit orderly and proper resolution of Market Participant's disputes related to ISO billings.

IV CONCLUSION

Wherefore, for the reasons stated herein, the ISO respectfully requests that the Commission modify and clarify the Offer of Settlement: (1) to eliminate the use of an

Exchange Corporation, 97 FERC ¶ 61,012 (2001).

⁷ Of course, these percentages may bear no resemblance to actual responsibilities for the Scheduling Coordinator services used in the relevant billing adjustment period. Moreover, SDG&E, which also used the PC as a Scheduling Coordinator, would not be paying a share of potential adjustments.

⁸ See *California Independent System Operator Corporation*, 90 FERC ¶ 61,315, at 62,042 (2000).

escrow agent for monies due the ISO and (2) to ensure that there is an orderly process for the ISO to make adjustments required by the resolution of billing disputes or other Commission orders.

Respectfully submitted,

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⁹ *Connecticut Yankee Atomic Power Co.*, 40 FERC ¶ 63,009, *aff'd in relevant part*, 40 FERC ¶ 61,372 (1987).