

108 FERC ¶ 61,162
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

California Power Exchange Corporation Docket Nos. ER02-2234-010
 ER03-139-006
 ER03-791-003

ORDER REQUESTING COMMENTS AND
REQUIRING CONTINGENCY ACTIONS

(Issued August 6, 2004)

1. On July 9, 2004, the United States Court of Appeals for the District of Columbia Circuit (Court) issued an opinion in *Pacific Gas and Electric Co. v. FERC*.¹ In this opinion, the Court vacated and remanded numerous Commission orders that provided for the California Power Exchange Corporation (CalPX) to charge a “wind-up” rate to fund its ongoing operations.² In light of the Court’s opinion, the Commission is seeking comments as to whether the services that CalPX provides are still necessary, and if so, how the CalPX could be funded in light of the Court’s ruling. This order also directs the CalPX to prepare for the possibility of its termination in the event that an alternative funding mechanism is not timely implemented.³

¹ Pacific Gas and Electric Co. v. FERC, Case No. 03-1025, *et al.*

² The Court’s opinion applies to the Commission’s orders accepting the “wind-up” rate for the first, second and third rate periods in Docket Nos. ER02-2234, ER03-139, and ER03-791, respectively. The most recently filed petition for review of the orders that accepted the “wind-up” rate for the fourth rate period in Docket No. ER04-111, has been held in abeyance pending the Court’s ruling on the prior appeals (*see* D.C. Circuit Case No. 04-1122). Additionally, rehearing of the order conditionally accepting the “wind-up” rate schedule for the fifth rate period is currently pending before the Commission in Docket No. ER04-785.

³ On August 31, 2004, the Court’s mandate is expected to issue, an event which could be construed as immediately terminating the current funding mechanism.

2. To date, CalPX's "wind-up" operations have consisted of maintaining records, compiling information to resolve market pricing issues related to prior transactions, performing various refund calculations, and assisting the Commission with other matters relating to the ongoing California refund proceeding.⁴ CalPX has recently stated that without continued funding, it "would immediately need to terminate its employees and consultants, shut down its systems used for calculating the reruns/refunds, and provide for the transfer of participant funds and collateral, as well as CalPX's books and records to some other entity."⁵

3. Moreover, CalPX stated that the termination of its operations at this point "would be deleterious to many parties, including PG&E, which will likely receive hundreds of millions of dollars of refunds in the CalPX market by the end of the Refund Proceeding"⁶

4. The CalPX's imminent lack of a funding source poses a predicament regarding whether and how another charge may be imposed to replace the defective "wind-up" rate.⁷ Therefore, the Commission invites any suggestions that the parties may have. Any party interested in commenting on whether the CalPX should still be funded or suggesting a method to fund the CalPX should file comments with the Commission within 10 days of the date of this order. These comments will be considered in determining what further actions may be taken by the Commission.

5. Comments should be filed in the above-captioned Dockets. The Commission anticipates issuing a remand order by August 31, 2004.

⁴ See San Diego Gas and Electric Co., *et al.*, Docket Nos. EL00-95-045, *et al.*

⁵ See CalPX's "Answer to PG&E's Motion to Reject Rate Filing or, Alternatively, For Other Related Actions" filed in Docket No. ER04-785-001 at pg. 3 (July 23, 2004).

⁶ *Id.* at pg. 4.

⁷ In its opinion, the Court vacated the cost-allocation methodology for the "wind-up" rate as violating "the filed-rate doctrine or the rule against retroactive ratemaking," and not comporting with the principles of cost-causation. *See* slip op. at 6-10.

6. Additionally, the Commission directs the CalPX to begin preparing for the termination of its operations in the event that an alternative funding source is not timely implemented. These preparations should include procedures by which the CalPX, to the extent allowed by law, *could* transfer its participant funds and collateral, as well as its relevant books, records, and other materials to the custody of the California Independent System Operator (ISO) or some other appropriate entity.⁸

The Commission orders:

(A) Interested parties to the above-captioned proceedings are invited to file comments on the issues discussed above on or before August 16, 2004.

(B) CalPX is directed to prepare for the possible termination of its operations by establishing procedures to effectuate the transfer of its relevant books, records, and other materials to the custody of the ISO or some other appropriate entity.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁸ Parties may also file comments regarding how the CalPX should handle and secure participant funds and collateral in the event that the CalPX terminates operations.