

111 FERC ¶61,147
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Constellation Power Source, Inc.

v.

California Power Exchange Corporation

Docket No. EL02-63-002

ORDER ON REQUESTS
FOR REHEARING AND CLARIFICATION,
AND MOTION

(Issued May 5, 2005)

1. This order addresses several requests for rehearing and clarification of a September 30, 2002 Order.¹ In that order, we directed the California Power Exchange Corporation (CalPX) to retain \$10 million of collateral posted with the CalPX by Constellation Power Source, Inc. (Constellation) and to release the collateral in excess of that amount. In this order, we deny requests for rehearing and a procedural motion. We also grant in part and deny in part a request for clarification. The Commission's decision benefits customers because it promotes regulatory certainty.

I. Background

2. As a condition for participating in CalPX's markets, Constellation was required, in accordance with CalPX's tariff, to post collateral for 100 percent of its requirements in CalPX's markets in excess of its unsecured line of credit. As a result, Constellation posted three letters of credit with the CalPX to cover its aggregate outstanding liabilities

¹*Constellation Power Source, Inc.*, 100 FERC ¶ 61,380 (2002) (September 30 Order).

to CalPX, as required by the CalPX's tariff. After CalPX suspended operations in its core markets² on January 31, 2001 and its tariff terminated on May 1, 2001,³ CalPX refused to release Constellation's collateral.

3. In response, Constellation filed a complaint requesting that the Commission direct CalPX to release the collateral posted by Constellation. By order issued on July 30, 2002,⁴ the Commission rejected Constellation's complaint and directed CalPX to retain the collateral posted by Constellation and other market participants in accordance with CalPX's tariff on the ground that the amount of Constellation's outstanding liability was not yet known.

4. In the July 30 Order, the Commission stated that only after the completion of the refund proceeding in Docket No. EL00-95, *et al.*,⁵ could the liabilities of each supplier, including Constellation, be determined. In addition, the July 30 Order provided that it was impossible to determine Constellation's outstanding liabilities because the CalPX was no longer operating and therefore could not adjust future bills when outstanding liabilities were finally calculated. The July 30 Order also noted that Governor Davis commandeered certain block forward contracts, thereby removing the CalPX's discretion to liquidate the block forward contracts to cover defaults in the CalPX markets, although the U.S. Court of Appeals for the Ninth Circuit had since ruled that such commandeering

² The core markets are the spot market for day-ahead and the spot market for day-of electricity trading.

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

⁴ See *Constellation Power Source, Inc.*, 100 FERC ¶ 61,124 (2002) (July 30 Order).

⁵ *San Diego Gas & Electric Company*, 101 FERC ¶ 63,026 (2002). In that proceeding, the Commission directed the presiding judge to certify findings of fact on three issues: (1) the mitigated price in each hour of the refund period; (2) the amount of refunds owed by each supplier according to a refund methodology established by the Commission; and (3) the amount owed to each supplier (with separate quantities due from each entity) by the California Independent System Operator investor-owned utilities, and the State of California. See *San Diego Gas & Electric Company*, 96 FERC ¶ 61,120 at 61,520 (2001).

"crossed the 'bright line' between state and federal jurisdiction established by the Federal Power Act."⁶ In the Commission's opinion, all these ongoing matters also continued to delay the final billing and settlement of transactions in the CalPX markets.⁷

5. In response to Constellation's emergency motion and request for rehearing of the July 30 Order, the Commission issued an order granting in part and denying in part the rehearing request. In particular, the Commission concluded that Constellation must maintain collateral with CalPX in the amount of \$10 million, which, by the Commission's conservative estimate, was sufficient to cover the potential refund liability resulting from Constellation's transactions in the CalPX's and California Independent System Operator's (ISO) markets, and directed CalPX to release the collateral in excess of \$10 million.⁸

6. Four parties seek rehearing of the September 30 Order: California Electricity Oversight Board (CEOB), Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SoCal Edison), and Northern California Power Agency (NCPA)

II. Discussion

1. CEOB's, PG&E's, and SoCal Edison's Requests for Rehearing

7. CEOB, PG&E, and SoCal Edison, for the most part, reiterate the arguments they made in their protests to Constellation's complaint and responses to its emergency motion. In particular, these parties argue that the Commission erred in directing the CalPX to release Constellation's collateral in excess of \$10 million because Constellation's CalPX accounts are subject to many on-going controversies and thus, final billing and settlement pursuant to the CalPX tariff has not yet taken place.

⁶ *Duke Energy Trading and Marketing, L.L.C.*, 267 F.3d 1042(2001). See 16 U.S.C. §§ 796, *et seq.* (2004).

⁷ See September 30 Order at 62,697.

⁸ See *Id.*

8. In the September 30 Order, we recognized that Constellation's transactions have not yet been "billed and settled" pursuant to the CalPX tariff given the numerous ongoing contested proceedings regarding the transactions that occurred in the CalPX markets.⁹ For this reason, we directed Constellation to maintain collateral with the CalPX in the amount of \$10 million, which we determined would be sufficient to cover the potential refund liability resulting from Constellation's transactions in the CalPX's and ISO's markets.¹⁰

9. CEOB, PG&E, and SoCal Edison further challenge whether the 10 million dollar figure that the Commission determined in the September 30 Order is sufficient to ensure payment of potential refunds by Constellation. Specifically, CEOB contends that parties in this proceeding were not provided with an opportunity to comment on this figure because of the redacted nature of Constellation's filings. In addition, SoCal Edison and PG&E argue that the Commission's determination that Constellation need only maintain \$10 million of collateral appears to be based on no evidence at all, especially in light of changes to the refund methodology that Commission Staff has proposed, and the instruction by the U.S. Circuit Court of Appeal for the Ninth Circuit that the Commission allow parties in the Docket No. EL00-95, *et al.* refund proceeding to adduce evidence of market manipulation into the record of that proceeding.¹¹

10. While certain parts of Constellation's relevant filings were redacted, as they contain confidential information, the potential refund calculations that Constellation provided to the Commission in support of its request for rehearing of the July 30 Order appear unredacted in the public version of the filing. Moreover, the parties could have requested the unredacted version of Constellation's filings pursuant to the protective order the Commission adopted on March 13, 2002.¹² In any event, the Commission carefully considered its decision to require the CalPX to retain \$10 million of collateral. In particular, in determining the adequate amount of collateral for Constellation to maintain

⁹See July 30 Order at 61,486 and September 30 Order at 62,697.

¹⁰*See Id.*

¹¹In response to the Ninth Circuit Court's directive, the Commission issued an order allowing discovery into market manipulation during the western power crisis of 2000-2001. *See San Diego Gas & Electric Company*, 101 FERC ¶ 61,186 (2002), *order on clarification and reh'g*, 102 FERC ¶ 61,164 (2003).

¹²*See Constellation Power Source, Inc.*, 98 FERC ¶ 61,258 (2002) (Protective Order).

with the CalPX, we took into account the fact that potential refunds may increase as a result of the proposed changes to the refund methodology. We used the most conservative estimates and concluded that the \$10 million of collateral would be sufficient to cover Constellation's potential refund liability. Moreover, regardless of whether a party has sufficient collateral posted with the CalPX, it is under a legal obligation to pay ordered refunds.

11. SoCal Edison further argues that the Commission erred when it rejected and failed to consider SoCal Edison's answer to Constellation's request for rehearing of the July 30 Order. SoCal Edison contends that the Commission should have allowed its answer to the rehearing request because it was in response to the issue raised for the first time on rehearing. In particular, the issue that SoCal refers to is that of ordering the CalPX to release collateral Constellation claimed to be related to the CalPX's block forward markets (BFM).

12. SoCal Edison is mistaken in its contention that the question of release of Constellation's collateral posted for the purpose of participating in the BFM was raised for the first time on rehearing of the July 30 Order. As we stated in the September 30 Order, "[t]his issue was addressed in the July 30 Order at 100 FERC at 61,486, paragraph 29. In particular, we found that Constellation's accounts in the BFM could not be considered 'billed and settled' pursuant to CalPX's tariff, as they were subject to ongoing controversy."¹³

13. Furthermore, PG&E asks the Commission to clarify that the circumstances under which the CalPX was allowed to release collateral is limited to Constellation and does not authorize the release of collateral held by the CalPX to any other CalPX participant. In addition, PG&E states that the Commission should clarify that it will not allow the release of collateral or principal that the CalPX retains for any other CalPX participant until all outstanding liabilities of CalPX participants have been billed and settled.

14. We grant in part and deny in part this request. We clarify that the Commission's finding regarding Constellation's collateral is only applicable to Constellation and is not determinative for other CalPX participants. In fact, we have denied similar requests submitted by PG&E Energy Trading-Power, L.P.,¹⁴ Powerex Corporation,¹⁵ and

¹³ See September 30 Order at 62,697.

¹⁴ See *PG&E Energy Trading-Power, L.P.*, 102 FERC ¶ 61,091 (2003).

La Paloma Generating Company, LLC¹⁶ because specific facts of those cases did not warrant the release of collateral. We, however, will not make the other clarification requested by PG&E. We cannot rule that in all other circumstances release of part or all of collateral is not justified, as it would be equivalent to prejudging an outcome of a case that is not yet before us.

2. NCPA's Request for Rehearing

15. NCPA argues that the Commission erred in extending the collateral requirement to the ISO markets. In NCPA's opinion, the CalPX tariff specifically requires that collateral be kept for transactions in the CalPX markets only.

16. We disagree. Section 2.2 of the CalPX tariff states in pertinent part:

Real Time Market

Each PX Participant shall maintain sufficient collateral to cover the estimated potential *Real Time* aggregate outstanding liabilities to and from the PX between cash clearing cycles... (*emphasis provided*).

From reviewing the definition section of the CalPX tariff, it appears that "Real Time" market means "[t]he competitive generation market controlled and coordinated by the ISO for arranging real time Imbalance Energy"¹⁷ Therefore, the CalPX tariff requires market participants to post collateral to cover potential liabilities resulting from real-time transactions in the ISO markets. These transactions are currently the subject of controversy in the EL00-95, *et al.* refund proceeding. For this reason, in our estimates of Constellation's potential refund liability, we included refund calculations for the ISO markets.

17. NCPA also argues that the Commission erred in failing to direct release of all collateral substantially in excess of potential refund liability in the CalPX markets to all CalPX participants who have posted collateral.

¹⁵ See *Powerex Corporation*, 102 FERC ¶ 61,328 (2003).

¹⁶ See *La Paloma Generating Company, LLC*, 110 FERC ¶ 61,386 (2005).

¹⁷ CalPX Tariff, Original Sheet No. 230.

18. As discussed above, our determination concerning the need for collateral is very fact-specific. In the July 30 Order and September 30 Order, we acted on the specific request before us. We had no information or data on which to base such a sweeping determination and to order release of collateral posted by all market participants.

3. PG&E's Emergency Motion for Release of Data Requests

19. On June 3, 2002, the Commission sent the CalPX a data request, asking the CalPX to provide: (1) a list of all collateral held by the PX, showing the total amount of collateral posted by each individual participant; and (2) a breakdown of the collateral amounts by form, *i.e.*, cash, letters of credit, or other form. On June 13, 2002, the CalPX provided the response to the data request on a confidential basis.

20. On October 18, 2002, PG&E filed an emergency motion for the immediate public release of the CalPX's data responses. In the alternative, PG&E seeks release of the data responses pursuant to the Protective Order established in this proceeding. PG&E argues that it needs this information in order to accurately and comprehensively present its arguments on rehearing, and to evaluate the potential impacts of release of collateral. In addition, PG&E states that ongoing proceedings including the refund proceeding call into question whether the CalPX will have adequate collateral from CalPX participants to satisfy the potential refund liability being determined in those proceedings. PG&E further states that there is nothing in the information regarding the CalPX participants' collateral that contains confidential, commercially sensitive material, the release of which could cause competitive harm to CalPX participants. PG&E attaches a CalPX exhibit from the Docket No. EL00-95, *et al.* refund proceeding that it says gives information on the amount of cash collateral owed and owing by CalPX participants, and is already part of the record. PG&E explains that it seeks to review the June 13, 2002 data responses: (1) because the data responses may contain additional information that the CalPX has not already provided; and (2) to ensure that there are no inconsistencies in the information that the CalPX has already provided.

21. Constellation and CalPX filed answers to PG&E's emergency motion. Constellation argues that the Commission should deny PG&E's request for public release of the data, but states that it does not object to PG&E's alternative request that the data be provided pursuant to the existing Protective Order. Constellation does not believe that either of PG&E's proffered justifications supports the release of Constellation's confidential information. Further, Constellation contends that because PG&E has already filed a request for rehearing, the basis for its motion is now moot.

22. Constellation adds that PG&E's suggestion that it needs the data request responses to assess the impact of the September 30 Order on other CalPX participants' ability to pay refunds is based on the faulty premise that many other PX participants will seek to have collateral released or reduced. Constellation submits that if such filings are made, PG&E will have ample opportunity at that time and in those proceedings to obtain access to the data, and that there is no reason to convert the instant proceeding, which addresses only Constellation's collateral, into a generic proceeding.

23. CalPX states that it does not have objections of its own to the release of the data. However, it is concerned that other CalPX participants would have reservations regarding the release of the confidential information. For this reason, CalPX suggests, that the Commission should afford these parties an opportunity to be heard before the data are released.

24. PG&E replied to CalPX's answer. Answers to answers are generally not permitted pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), unless otherwise permitted by the decisional authority. We are not persuaded to allow PG&E's answer to answer.

25. The data request responses in question contain confidential information involving entities that are not parties to this proceeding. For this reason, these data cannot be released pursuant to the Protective Order because the Protective Order is applicable only to "the use of all Protected Materials produced by, or on behalf of, [Constellation]."¹⁸ We are also not persuaded that other grounds proposed by PG&E justify the requested release of confidential information. We, therefore, deny PG&E's motion.

The Commission orders:

(A) CEOB's, PG&E's, SoCal Edison's, and NCPA's requests for rehearing are hereby denied, as discussed in the body of this order.

(B) PG&E's request for clarification is hereby granted in part and denied in part, as discussed in the body of this order.

¹⁸ See Protective Order at 62,029.

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(C) PG&E's motion is hereby denied, as discussed in the body of this order.

By the Commission. Chairman Wood concurring. Commission Brownell dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

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Nora Mead BROWNELL, Commissioner, *dissenting in part*:

I have previously dissented from orders, including the July 30 Order, that have allowed the CalPX to retain collateral pending resolution of the refund proceeding. I believe those orders illegally converted funds pledged for one purpose into a source of payment for different obligations, inexplicably departed from Commission precedent on when to require guarantees for potential refund liability, and needlessly tied up funds that could have been put to more productive use. While the September 30 Order was a step in the right direction, I would have granted NCPA's request for rehearing and ordered additional releases of collateral to Constellation as well as other CalPX participants.

Nora Mead Brownell