

100 FERC ¶ 61, 124
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Constellation Power Source, Inc.

Docket No. EL02-63-000

v.

California Power Exchange Corporation

California Power Exchange Corporation
000

Docket No. EL02-104-
000

ORDER ON COMPLAINT AND
ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued July 30, 2002)

1. On February 25, 2002, as amended on February 26, 2002, Constellation Power Source, Inc. (Constellation) filed a complaint in Docket No. EL02-63-000 against the California Power Exchange Corporation (CalPX) requesting the Commission to direct CalPX to release three letters of credit that Constellation provided as collateral for participating in CalPX's markets. In this order, we reject Constellation's complaint and direct CalPX to retain the collateral posted by Constellation and other market participants in accordance with CalPX's tariff. The Commission's ruling on this complaint promotes regulatory certainty, as it ensures adherence to the terms of the previously accepted tariff even under such unusual circumstances as presented here.
2. In a matter with related issues, on July 3, 2002, as amended on July 10, 2002, CalPX filed a petition for declaratory order in Docket No. EL02-104-000 requesting that the Commission issue a declaratory order that would provide the U.S. Bankruptcy Court with guidance regarding a number of issues related to CalPX's reorganization. We grant this petition, and address the issue of collateral posted by market participants, as well as other issues raised by CalPX that fall within our jurisdiction under the Federal Power Act (FPA). This declaratory order benefits customers since it provides important guidance on a matter currently pending before a United States Bankruptcy Court.
3. Due to the related issues between these two dockets, we have chosen to address both the concerns of Constellation and CalPX jointly in this order.

I. Background

4. CalPX, a product of the California legislature's 1996 restructuring of its state's power industry, commenced operations in March 1998. As a nonprofit entity, CalPX provided auction markets for the trading of electricity. These auction markets included both the spot market for day-ahead and day-of electricity trading (core markets) and, as of summer 1999, the block forward market (BFM) for long-term electricity contracts. As a public utility, CalPX is subject to the jurisdiction of the Commission under the FPA¹ and operated pursuant to a Commission-approved tariff and wholesale rate schedule.² CalPX suspended operations in its core markets on April 30, 2001 and its rate schedules in those markets terminated on May 1, 2001.³ On March 9, 2001, CalPX filed for protection under Chapter 11 of the Bankruptcy Code.⁴

II. Docket No. EL02-63-000

A. Complaint

5. Constellation is a power marketer authorized to sell power at market-based rates.⁵ It trades on wholesale markets nationwide and participated in CalPX's BFM and core markets when those markets existed. 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 CalPX. Two letters of credit were posted as security for Constellation's participation in the BFM, and a third letter was posted so that Constellation could participate in CalPX's core market. These

¹ 16 U.S.C. §§ 796, *et seq.*

² *See* Pacific Gas & Electric Co., 77 FERC ¶ 61,204, at 61,803-05 (1996), *reh'g denied*, 81 FERC ¶ 61,122 (1997).

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

⁴ 11 U.S.C. §§ 101, *et seq.* (1994).

⁵ *See* Constellation Power Source, Inc., 79 FERC ¶ 61,167 (1997).

letters of credit are still in place today because CalPX has refused to release Constellation's collateral.

6. Constellation requests that the Commission direct CalPX to release the collateral posted by Constellation. Constellation explains that it has fully and finally discharged its potential obligations in CalPX's BFM and core markets and that because CalPX filed for bankruptcy, there is no potential for Constellation to participate in any of CalPX's markets. It thus concludes that its collateral serves no further purpose and there is no basis under CalPX's tariff to require Constellation to maintain it. According to Constellation, CalPX's tariff requires a CalPX participant to post collateral as security for potential defaults arising from this participant's failure to fulfill its own obligations, not those of other participants. Constellation adds that it is incurring substantial and unnecessary costs to maintain its letters of credit.

7. Further, Constellation asserts that there is no basis for allowing CalPX to retain the collateral for a number of reasons. First, it argues that the collateral cannot be used to secure potential refunds that might be ordered upon the completion of the refund proceeding before Administrative Law Judge Birchman in Docket Nos. ER00-95-045 and EL00-98-042. That hearing proceeding was established by the July 25, 2001 order (July 25 Order),⁶ to calculate refunds related to transactions in the spot markets operated by CalPX and in the California Independent System Operator (CAISO) market. In connection with this, Constellation asserts that the letters of credit were pledged not as a surety for potential refunds, but to ensure Constellation's performance to settle its accounts in CalPX markets when billed.

8. Constellation adds that the conversion of the collateral into a guaranty of payment of refunds for overcharges is inconsistent with CalPX's tariff and the Commission policy. According to Constellation, the Commission does not require economic assurances of refunds of potential overcharges absent extraordinary circumstances, such as the company's inability to refund any amounts ordered to be repaid. Moreover, Constellation argues that the use of the collateral as a guaranty of payment of potential refunds will violate the filed rate doctrine, as it would constitute a modification of CalPX's tariff on a retroactive basis. In addition, the complainant states that the Offer of Settlement

⁶San Diego Gas & Electric Company, et al., 96 FERC ¶ 61,120, on reh'g, 97 FERC ¶ 61,275 (2001)

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submitted by the Official Committee of Participant Creditors (Participants Committee)⁷ in Docket No. EL00-95-000 also provides for release of collateral.

9. Constellation argues that there is no legal basis to retain the collateral until the Commission determines how to account for defaults of other CalPX participants. In support, the complainant cites PG&E Company, et al., 95 FERC ¶ 61,020 (2001) (Chargeback Order) addressing complaints against CalPX concerning the use by CalPX of a chargeback mechanism⁸ against sellers into its markets to cover for the defaults of PG&E Company (PG&E) and Southern California Edison Company (SoCal Edison). In that order, the Commission found that the application of the chargeback mechanism was inappropriate in light of the great magnitude of the default. Constellation concludes that a logical reading of the Chargeback Order similarly prohibits CalPX from retaining the collateral of non-defaulting parties to cover PG&E's and SoCal Edison's defaults.

10. Constellation also argues that a preliminary injunction issued by the United States District Court for the Central District of California in Enron Power Marketing, Inc. v. California Power Exchange Corp., Case No. 01-00901 provides no basis for the Commission to decline to direct the release of collateral. Subsequent to the filing of the chargeback complaint with the Commission, a number of CalPX participants brought a lawsuit before the U.S. District Court against CalPX seeking to prevent CalPX from attaching the collateral posted by these market participants pending the Commission consideration of the chargeback issues.

11. On March 5, 2001, the U.S. District Court issued a preliminary injunction preventing CalPX from releasing the collateral or security posted by market participants until further order of the court after the Commission reached a decision in the chargeback proceeding. Constellation asserts that by deferring to the Commission's jurisdiction to resolve all issues surrounding the use of the collateral to cover the defaults of other

⁷Participants Committee was appointed by the Office of United States Trustee to represent in CalPX bankruptcy proceeding the interest of the market participants who assert that they are owed money for sales into CalPX-administered markets or are owed money for sales into the CAISO real-time market for which CalPX acted as a scheduling coordinator for investor-owned utilities.

⁸Chargeback is an allocation mechanism intended to allow CalPX to recover the uncollected receivables of a defaulting CalPX debtor from the remaining participants in CalPX market. The chargeback mechanism is described in Section 5.3 of CalPX's tariff. See PG&E Company, et al., 95 FERC ¶ 61, 020 at 61,040 (2001).

CalPX participants, the preliminary injunction was intended to prevent CalPX from wasting the collateral pending the completion of the chargeback proceeding. The parties were free to petition the U.S. District Court to modify injunction after the Commission acted on the merits of the chargeback complaint.

B. Responsive Pleadings to the Complaint

1. CalPX's Answer

12. In its answer, CalPX states that if the Commission orders release of any portion of collateral, it should make definite rulings on several other related matters. Specifically, CalPX requests that the order be directed at all market participants, not only the complainant, to avoid multiplicity of complaints seeking the same relief. Further, the respondent requests that the Commission determine if collateral should be released regardless of whether a market participant is in bankruptcy or has a credit rating that is below investment grade and whether it should be released based on the current CalPX account statements, including the amount of refunds that may ultimately be due by a participant. In connection with the latter, CalPX argues that in view of the pending refund proceeding and other related dockets, as well as the continued CAISO adjustments that CalPX receives, the transactions in CalPX's markets have not been finally "billed and settled." Further, CalPX suggests that the Commission will need to determine how to handle unpaid balances from any participant who fails to pay upon the final accounting, but for which there is no retained collateral. Finally, it requests that if the Commission orders a partial release of collateral, it must clearly set forth the criteria by which some collateral should be released and other collateral retained.

2. Comments and Protests

13. SoCal Edison,⁹ PG&E¹⁰, and California Electricity Oversight Board (CEOB) argue that contrary to Constellation's assertions, Constellation's outstanding obligations to CalPX have not been determined, much less "billed and settled." PG&E states that as recently as March 11, 2002, CalPX issued new invoices for adjustments and revisions to its bills going back 18 months to August 2000. SoCal Edison, CEOB, and PG&E further state that Constellation is yet to be billed by CalPX for the amount of the refund, which will be determined in the refund proceeding currently before Judge Birchman. PG&E explains that the July 25 Order establishing the refund hearing proceeding directed CalPX to rerun their settlement/billing process for the period from October 2, 2000 through June 20, 2001 using methodology described in that order. This, in PG&E's opinion, will lead to new billing statements that will revise both the amounts owed to net sellers into the markets and the amounts owed by the net buyers. These new billing and settlement determinants, PG&E continues, will necessarily affect any refunds owed by or to any supplier. In addition, SoCal Edison and PG&E also cite California Power Exchange Corp., 98 FERC ¶ 61,097 (2002) (January 31 Order), which stated that "although the PX markets are closed, the trades made previously in the PX markets are not yet fully resolved."

14. SoCal Edison further argues that Constellation's remaining obligations to CalPX will be determined only after the Commission decides the ultimate question of how to account for shortfalls in CalPX's markets caused by bankruptcy of certain market participants. PG&E also believes that various bankruptcy proceedings, as well as Commission orders and numerous dispute resolution processes currently pending pursuant to CalPX's tariff, will also affect the "billed and settled" amounts owed by and to CalPX participants. PG&E and CEOB also assert that the release of collateral would violate CalPX's tariff given all these numerous proceedings currently underway.

⁹In its motion to intervene, the California Public Utilities Commission (CPUC) agrees with the position advanced by SoCal Edison in its protest. We also note that on June 24, 2002, the CPUC filed a motion requesting that the Commission assert jurisdiction over the PX collateral. Constellation and the Competitive Supplier Group filed an answer to CPUC's motion, arguing that the Commission should reject CPUC's motion.

¹⁰On July 19, 2002, PG&E filed a motion for immediate Commission action requesting that the Commission expedite the issuance of an order directing sellers in the CalPX to maintain their collateral.

15. SoCal Edison also expresses concern that Constellation may not be able to pay refunds when ordered to do so. In SoCal Edison's opinion, the retention of collateral is necessary to ensure that Constellation and other CalPX participants are able to meet all of their obligations in the CalPX market, including refund obligations.

16. Furthermore, SoCal Edison argues that Constellation's complaint should be dismissed, as it constitutes an impermissible collateral attack on Commission prior orders in which the Commission declined to order the release of collateral. In particular, SoCal Edison refers to the Chargeback Order in which, according to SoCal Edison and PG&E, the Commission acted to preserve the collateral by deferring further action on the issue of how CalPX should account for defaults of certain market participants. SoCal Edison and PG&E also believe that the Commission chose to preserve the collateral when it declined to address, at that time, the Offer of Settlement filed in Docket No. EL00-95-000, et al. proposing to release the collateral.¹¹ SoCal Edison also cites the January 31 Order in which, according to SoCal Edison, the Commission held that a similar scheme to release the collateral before refunds have been paid may be inconsistent with CalPX's tariff.

17. Participants Committee strongly supports the release of collateral to all market participants having posted collateral with CalPX, except for those subject to bankruptcy or similar proceedings. Participants Committee states that its Offer of Settlement filed with the Commission and its proposed plan submitted to the U.S. Bankruptcy Court provide for the release of the collateral to the Participant Creditors. It further asserts that if the U.S. Bankruptcy Court affirms the Plan and the U.S. District Court modifies the preliminary injunction, the collateral will be released without further action by the Commission. In addition, Participants Committee asserts that the purpose served by the collateral requirement no longer exists because Constellation's obligations to CalPX have been billed and settled.

18. SoCal Edison opposes Participants Committee's motion to intervene. It argues that because the collateral is not a part of CalPX's bankruptcy estate, Participants Committee, as a creditor's committee, has no interest that is directly affected by the outcome of the instant proceeding. Further, it alleges that Participants Committee is mainly comprised of the very sellers that charged unjust and unreasonable rates that led to California's power crisis and that they are now seeking an order that would permit

¹¹San Diego Gas & Electric Co. v. Seller of Energy and Ancillary Services, et al., 97 FERC ¶ 61,301 (2001) (Order on Certification).

them to seize a billion dollars in collateral from CalPX before the Commission has determined how the collateral should be allocated.¹²

19. AES NewEnergy, Inc. (AES), Reliant Energy Services, Inc. (Reliant), Tucson Electric Power Company (Tucson), Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC (collectively, Duke), Northern California Power Agency (NPCA), Hafslund Energy Trading, LLC (Hafslund), and Public Service Company of New Mexico (PNM) also support Constellation's complaint. In particular, they argue that the collateral posted by all non-defaulting market participants should be released. PNM, Hafslund, and Duke assert that there is no basis under CalPX's tariff for CalPX to retain the collateral, at least as applied to those participants that do not owe payment to CalPX for sales and purchases on the CalPX market. Reliant also states that the purpose served by the collateral no longer exists, since Constellation, like Reliant, is current on all obligations to CalPX. Tucson and NPCA urge the Commission to require CalPX to release the collateral posted by other sellers that, like Tucson, have settled all outstanding obligations to CalPX. Duke also argues that the conversion of the collateral into a surety against potential refunds would constitute an after-the-fact expansion of CalPX's tariff, which is a violation of the filed rate doctrine. Hafslund contends that there is no basis for retention of collateral until the Commission resolves the question of how to account for the default of PG&E and SoCal Edison. AES concludes that allowing CalPX to retain the collateral sends the wrong message to the financial community about the state of the energy markets. Duke and Hafslund add that the U.S. District Court-issued preliminary injunction does not bar the Commission from directing the release of collateral because the injunction was intended to prevent waste of assets by CalPX, pending a further Commission determination.

3. Constellation's Response

20. In response, Constellation argues that in accordance with Section 2 of Schedule 2 of CalPX's tariff, the collateral requirement is not intended to cover all of Constellation's obligations to CalPX, but only those left unpaid during the period between cash clearing cycles, *i.e.*, the period in which the liabilities are incurred and when payment is billed and settled. Constellation states that because it has paid all of its obligations between cash

¹²The Commission has requested that CalPX provide a list of all collateral held by CalPX, showing the total amount of collateral posted by each individual participant, and a breakdown of the collateral amounts by form, *i.e.*, cash, letters of credit, other liquid collateral, surety bond, or corporate guarantee.

clearing cycles to CalPX, it thus has no outstanding obligation to CalPX under the tariff. It concludes that the contention that the collateral should be retained to secure the potential refund liability is inconsistent with the tariff because a liability between cash clearing cycles does not relate to a contingent liability that may or may not arise at some date after those cycles have closed.

21. Constellation further states that the potential that it may be ordered to make refunds to CalPX creates, at most, a contingent liability, whereas CalPX's tariff requires collateral to cover an outstanding liability. Moreover, Constellation alleges that CalPX has already released collateral in other forms, such as surety bonds and corporate guaranties. In Constellation's opinion, CalPX's failure to release Constellation's letters of credit is also impermissible under the tariff, since Section 2 of Schedule 2 refers to collateral in general, not solely to letters of credit. Constellation reasons that if the assertion that the collateral cannot be released until the completion of the refund proceeding were accurate, CalPX could not have released collateral of other forms.

C. Procedural Matters in Docket No. EL02-63-000

22. Notice of Constellation's complaint was published in the Federal Register, 67 Fed. Reg. 9,965 and 10,899 (2002), with comments, protests, or interventions due on or before March 18, 2002. Timely motions to intervene were filed by entities listed in the Appendix to this order. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), the filing of a timely motion to intervene that has not been opposed makes the movant a party to the proceeding.

23. Participants Committee's motion to intervene has been opposed by SoCal Edison. Specifically, SoCal Edison alleges that Participants Committee does not have an interest directly affected by the outcome of the instant proceeding. We disagree since Rule 214(b)(2)(ii) states that a movant should have or represent "an interest which may be directly affected by the outcome of the proceeding, including ... any interest as a security holder of a party." Participants Committee is comprised of market participants who assert they are owed money for sales into the markets administered by CalPX or are owed money for sales into the real-time market administered by the CAISO for which CalPX acted as a scheduling coordinator for investor-owned utilities. We believe that Participants Committee's motion to intervene satisfies the above criterion. Moreover, Participants Committee represents interests of market participants that have posted collateral with CalPX and thus there could be no dispute that their interests are directly

affected by the outcome of the instant proceeding. For these reasons, we will grant Participants Committee's motion to intervene.

24. Tucson, PG&E Energy Trading-Power L.P., and CEOB filed late motions to intervene. Given the lack of undue prejudice and the parties' interests, we find good cause to grant under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), these unopposed, untimely motions to intervene in this proceeding.

25. Also, Constellation, SoCal Edison, and Participants Committee filed answers to an answer. These answers to answers are prohibited under Rule 213 of the Commission's Rules of Practice and Procedure, unless otherwise permitted. We will allow these filings only to the extent they assist the Commission's understanding of the issues raised.¹³

D. Discussion of the Complaint

26. The issue here is one of tariff interpretation. Schedule 2, Section 2.2 "Collateral Requirement" of CalPX's tariff states in pertinent part:

Each CalPX Participant shall maintain sufficient collateral to cover its aggregate outstanding liabilities ... to and from the CalPX between clearing cycles or during the period in which the liabilities are incurred and when payment is billed and settled.

27. Based on our review of CalPX's tariff, we find that the tariff language provides a basis for retaining the collateral, since outstanding liabilities have not been billed and settled, as required by the tariff. Under the provisions of CalPX's tariff, a market participant is required to post collateral as security for potential defaults arising from this participant's failure to pay its outstanding liabilities to CalPX. Outstanding obligations are not extinguished until they are billed and settled. We agree with CalPX, SoCal Edison, PG&E, CEOB and the California Commission that the final billing and settlement has not yet taken place given the numerous ongoing contested proceedings regarding the transactions that occurred in the PX markets. As we previously stated in our January 31 Order, the trades made in the PX markets are not yet fully resolved.

¹³See, e.g., Atlantic City Electric Co., 90 FERC ¶ 61,268 at 61,898 (2000) and New York Independent System Operator, Inc., 91 FERC ¶ 61,128 (2000).

28. We disagree with the distinction Constellation attempts to make between outstanding and contingent liabilities in this case. The amount of Constellation's outstanding liability is not yet known. For example, in the refund proceeding in Docket No. EL00-95-045, 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 in the July 25 Order and subsequently clarified in San Diego Gas and Electric Co., et al., 99 FERC ¶ 61,160 at 61,655-57 (2002); and (3) the amount owed to each supplier (with separate quantities due from each entity) by the CAISO, the investor-owned utilities, and the State of California. Only after that proceeding is completed can the Commission begin to determine the liabilities of each supplier. Until those figures are determined, the process of final billing and settling cannot start. Further, irrespective of the refund proceeding that is currently underway in Docket No. ER00-95-045 et al., we recognize that as recently as March 11, 2002, CalPX has continued to issue new invoices to market participants which reflect adjustments and revisions that date as far back as August 2000, and may continue to do so. Thus, we find, in the circumstances of this case, that these accounts have not been "billed and settled" pursuant to CalPX's tariff. Consequently, CalPX should not release any collateral at this time.

29. The Commission has reached this conclusion after giving due consideration to the arguments that the collateral should be released at this time. The Commission recognizes the importance of liquidity in the financial markets and the need for entities like Constellation to obtain financing for numerous transactions. The Commission is, however, faced with circumstances that were not contemplated when the Commission approved the "billed and settled" provision of the CalPX tariff. The CalPX is no longer operating and therefore cannot adjust future bills when outstanding liabilities are finally determined; the CalPX and certain market participants that made trades in the CalPX markets are now in bankruptcy proceedings and may not be able to pay their outstanding liabilities when ordered to do so.¹⁴ 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 has since ruled that such commandeering "crossed the

¹⁴Even the Participants Committee does not support the release of collateral of entities that are subject to bankruptcy or similar proceedings.

'bright line' between state and federal jurisdiction established by the FPA."¹⁵ All these ongoing matters continue to delay the final billing and settlement of transactions in the CalPX markets.

30. Under these unusual circumstances, the Commission finds that retaining the collateral is in the public interest because we are enforcing the terms of the tariff to assure that all market participants meet their outstanding obligations and the ultimate CalPX creditors are paid.

III. Docket No. EL02-104-000

A. Petition for Declaratory Order

31. In its petition, CalPX reminds the Commission that the U.S. Bankruptcy Court presently has before it competing reorganization plans from CalPX and from Participants Committee. CalPX requests that the Commission issue a declaratory order stating principles that will guide the U.S. Bankruptcy Court as it addresses issues raised by the reorganization plans. First, CalPX requests that the Commission declare that upon reorganization, the Commission will continue to have exclusive jurisdiction over the public utility property of CalPX, and that no disbursement or disposition of property, including collateral, should occur without Commission approval. CalPX is concerned that the Participants Committee's reorganization plan will enable the reorganized PX to evade Commission jurisdiction in several ways. For example, the reorganized PX could seek to dispose of jurisdictional property upon order of either the Commission or a U.S. District Court, in violation of Section 201 of the FPA.

32. Second, CalPX requests that the Commission declare that the reorganized CalPX's governance should be subject to Commission approval and oversight, arguing that since the reorganized PX will continue to be a public utility that performs public utility functions and holds jurisdictional property, the PX should continue to be subject to Commission oversight. Also, with regard to the issue of whether suppliers can assert direct claims against PG&E and SoCal Edison, CalPX requests that the Commission declare that asserting any direct claims would conflict with the refund proceeding currently before Judge Birchman in Docket No. EL00-95-045, *et al.*, and encroaches on the Commission's jurisdiction to establish rates in the CalPX markets.

¹⁵Duke Energy Trading and Marketing, LLC v. Gray Davis, 267 F.3d 1042 at 1056 (9th Cir. 2001).

33. Additionally, CalPX argues that the reorganized CalPX should not be able to liquidate assets, destroy records, or terminate operations without prior approval of the Commission. CalPX contends that the Commission and not certain market participants should decide when the reorganized CalPX's operations have been completed, and requests that the Commission declare as such.

34. Finally, CalPX requests the Commission to find that the Energy Litigation LLC, as proposed by the Participants Committee, is not independent and violates the Commission's January 31, 2002 declaratory order¹⁶ in Docket EL02-48-000. The CalPX claims that the Board of Trustees of Energy Litigation LLC would be selected by Participants Committee and that Energy Litigation LLC would control the ongoing litigation of CalPX, including litigation before the Commission.

35. CalPX argues that the Commission should entertain its request because, in the absence of such guidance, the Court may approve a bankruptcy plan that violates Commission policies, may allow creation of a reorganized CalPX that evades Commission jurisdiction, and may not safeguard the interests of consumers. CalPX states that the public utility facilities referred to in the filing are not part of the bankruptcy estate but are held in trust by CalPX as part of its clearinghouse functions and are subject to the exclusive jurisdiction of the Commission.

36. On July 10, 2002, in Docket No. EL02-104-001, CalPX amended its petition to notify the Commission that the plaintiffs ("the Enron Parties") in Case No. 01-00901-CM in the U.S. District Court for the Central District of California dismissed their action. CalPX argues that the dismissal of the action will have the effect of terminating the court's jurisdiction to uphold its injunction requiring the CalPX to retain the collateral of the market participants pending a ruling by this Commission. Further, the dismissal would effectively rescind the court's order to permit the CalPX to use funds in the Settlement Clearing Account to reimburse CalPX for its operating costs. Thus, CalPX requests that the Commission issue an order on or before July 29, 2002, in order to protect the Commission's ability to decide the issue of collateral on the merits, in addition to allowing CalPX to recover its operating costs from the Settlement Clearing Account.

B. Responsive Pleadings to the Petition

¹⁶98 FERC ¶ 61,097 (2002).

1. Parties in Support of CalPX's Petition

37. In its answer, California Parties¹⁷ announce their support for CalPX's petition for a declaratory order, finding that an order by this Commission would be helpful to the parties and the U.S. Bankruptcy Court. California Parties believe that the Commission can provide guidance to the U.S. Bankruptcy Court concerning aspects of a proposed reorganization plan that would ultimately have to be found invalid if approved by the bankruptcy court because it infringes on matters subject to this Commission's jurisdiction.

38. In addition to granting CalPX's petition, the California Parties also argue that the Commission should direct the suppliers to maintain their collateral until such time as there is a final accounting of the various accounts. California Parties remind the Commission that the PX tariff requires the sellers to maintain their collateral until their accounts are billed and settled.

39. Additionally, PG&E filed comments in support of CalPX's petition, arguing that the sellers' collateral be maintained and that funds held in trust be preserved until a final determination of the financial obligations of all parties is made.

2. Parties Opposed to CalPX's Petition

40. In its answer to CalPX's petition, Participants Committee states that the Commission should reject CalPX's petition since the provisions of the Participants Committee's reorganization plan "are reasonable, necessary, [and] do not offend public policy or impede the Commission's own jurisdiction . . .".¹⁸ The Participants Committee contends that while its proposed reorganization plan would preserve the Commission's jurisdiction, the Commission does not have exclusive jurisdiction over its proposed reorganization plan and the matters raised in CalPX's petition.

¹⁷California Parties consists of the People of the State of California, the California Electricity Oversight Board, the California Public Utilities Commission, and the Southern California Edison Company.

¹⁸Participants Committee's Answer at 2.

41. With regard to its reorganization plan, Participants Committee states that its proposal for governance of the PX is reasonable and necessary, contrary to CalPX's claim that its Board of Directors would not be independent. Further, with regard to its proposal to create the Energy Litigation LLC, Participants Committee states that the nature of the claims to be pursued (e.g., claims against PG&E and SoCalEd) requires that the claims be controlled by the real parties in interest (i.e., the Participants Committee). In addition, Participants Committee states that Energy Litigation LLC may bring claims against CalPX's current officers and directors. Therefore, adverse parties should not be permitted to participate in governing the Energy Litigation LLC, because that would only impede or prevent its ability to fulfill its function under the Participants Committee's proposed reorganization plan.

42. On the issue of direct claims by suppliers against the IOUs, the Participants Committee contends that § III.D.8 of its proposal states that nothing in its plan will prejudice the rights of a supplier to assert direct claims against an IOU. Participants Committee states that this provision would not interfere with the authority of the Commission or any other judicial body to determine such direct claims.

43. Finally, with regard to the dissolution of the reorganized CalPX, Participants Committee argues that the U.S. Bankruptcy Court, and not this Commission, has primary jurisdiction over the winding up of CalPX's affairs. Participants Committee also claims that the Commission's involvement in the dissolution would require additional proceedings, prolong the winding down process, and bring additional unnecessary costs and delays.

44. Additionally, Powerex Corp., Public Service Company of New Mexico (PNM), and Williams Energy Marketing & Trading Company filed protests or comments in support of the Participants Committee's answer requesting that CalPX's petition be denied. PNM specifically states that participant collateral should be released, finding that transactions in the PX markets have been billed and settled and that the CalPX is now using the collateral for purposes that are entirely different from the tariff requirement.

C. Procedural Matters in Docket No. EL02-104-000

45. Notice of CalPX's petition was published in the Federal Register, 67 Fed. Reg. 47,361 (2002), with comments, protests, or interventions due on or before July 19, 2002. Timely motions to intervene were filed by entities listed in the Appendix to this order. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R.

§ 385.214 (2002), the filing of a timely motion to intervene that has not been opposed makes the movant a party to the proceeding. Further, granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

D. Discussion of the Petition

46. As we have stated in earlier orders, even though the PX is currently in the process of "winding down" operations, it remains a public utility with significant responsibilities that are within the Commission's jurisdiction.¹⁹ The Commission has addressed the importance of an independent PX to ensure that the PX markets would be just and reasonable,²⁰ and although the PX markets are closed, the trades made previously in the PX markets are not yet fully resolved. We also continue to believe that the PX should be independent of any individual market participant and avoid the appearance of control by any class of participants, for purposes of carrying out its remaining responsibilities, including the calculation of participant refunds.

47. With regard to the Commission's jurisdiction over the public utility property of CalPX, there should be no doubt that any reorganized PX must continue to comply with the FPA and must explicitly seek approval from this Commission prior to the disposing of any jurisdictional assets.

48. Consequently, we are concerned that the proposed reorganization plan of the Participants Committee contains a number of provisions that are inconsistent with and would violate the FPA. Specifically, it appears that under the Participants Committee's plan, a participant's collateral can be released upon the order of either the U.S. District Court or this Commission. In light of the discussion of Constellation's complaint, above, this Commission restates that the U.S. District Court would not be authorized to order the release of collateral. We therefore remind the parties that the disbursement of the collateral, or any disposition of jurisdictional property under a reorganized PX must be consistent with the CalPX tariff and, to the extent applicable, subject to review and approval by this Commission under Section 203 of the FPA.

¹⁹Pacific Gas & Electric Co., 77 FERC ¶ 61,204 at 61,803-05 (1996), reh'g denied, 81 FERC ¶ 61,122 (1997).

²⁰See Pacific Gas and Electric Company, et al., 77 FERC ¶ 61,204 at 61,816-19 (1996); and Pacific Gas and Electric Company, et al., 81 FERC ¶ 61,122 (1997).

49. As a part of its reorganization plan, the Participants Committee also proposes to create a \$10 million expense reserve for the Energy Litigation LLC to be obtained from funds in the CalPX Operating Account or, if necessary, from the Settlement Clearing Account. As we understand the plan, the Energy Litigation LLC would be staffed by generators and could apply for an order authorizing an increased expense reserve either from the Commission or a U.S. District Court. Under the proposal, the Energy Litigation LLC would be responsible for all of the ongoing litigation of CalPX. Pursuant to Section III.D.5.b of its reorganization proposal, Energy Litigation LLC would be governed by a Board of Trustees, whose five members are selected exclusively by the Participants Committee and approved by the U.S. Bankruptcy Court.

50. Upon review of the Participants Committee's proposed plan, the Commission finds that the Energy Litigation LLC would not be independent since its Board of Trustees would be exclusively chosen and controlled by one class of participants, the generators. The lack of independence of the Energy Litigation LLC is in direct violation of our January 31 Order which requires that the CalPX be independent. In addition, the jurisdictional assets of the CalPX cannot be used to create an expense reserve for Energy Litigation LLC without explicitly seeking and obtaining our approval.

51. On the issue of the governance of a reorganized PX, the Participants Committee's plan provides for a seven-member Board of Directors of which three members would be selected by the Participants Committee, three members would be selected by each of the investor-owned utilities, and the seventh member would be selected by a majority of the other six members. We remain concerned that the composition of this Board may not allow for sufficient independence and we therefore recommend that there should be at least three neutral or independent board members, with a seventh member appointed by a majority of the other six. With at least three neutral members, the PX will ensure that no one class of participants will dominate. Further, we believe that any governance plan must be approved by this Commission and be subject to continuing oversight since the reorganized PX will continue to perform jurisdictional operations.

52. With regard to CalPX's claim that the Participants Committee's plan encroaches on the Commission's exclusive jurisdiction to establish rates in the CalPX markets, we agree. In particular, Section III.D.8 of Participants Committee's provides that suppliers participating in the PX markets can assert direct claims against PG&E and SoCal Edison for the participant's individual share of any amount owed. Since ALJ Birchman is currently conducting a refund proceeding in Docket No. EL00-95-045 et al., to specifically determine the amounts owed to each supplier by the ISO, the investor-owned utilities, and the State of California, we find that the Participants Committee's provision encroaches on the Commission's exclusive jurisdiction. Any claims by suppliers against

PG&E and SoCal Edison should be addressed in Judge Birchman's proceeding. However, we do not address here direct claims seeking to recover amounts determined to be owed pending Commission review of Judge Birchman's ruling; we only address direct claims seeking to determine those amounts.

53. Finally, as to the issue of when the reorganized PX will be dissolved, we find that the Participants Committee's proposed plan also encroaches on the Commission's exclusive jurisdiction. It is this Commission that must decide when the CalPX's jurisdictional responsibilities have been completed consistent with the FPA and relevant Commission orders.

54. In responding to CalPX's petition, we emphasize that our discussion has been limited to those matters that fall within our FPA jurisdiction, as related to our prior orders and findings concerning CalPX's markets. We disagree with the implications in the Participants Committee's answer that we are asserting jurisdiction over reorganization plans pending before the U.S. Bankruptcy Court. The rulings in this order are meant only to clarify issues raised by the reorganization plans that affect our jurisdiction.

E. Request for Waiver of the Filing Fee

55. We will grant CalPX's petition for waiver of the filing fee. CalPX states that payment of the filing fee would cause "financial distress" because it would cause the expenditure of resources CalPX has no means of replacing.²¹ CalPX supports its petition by stating that (1) it has no operating revenues since it has not operated its exchange services since January 2001; (2) it is currently the Debtor in a bankruptcy proceeding; and (3) its cash reserves are needed to complete the process of "winding-down" its business affairs. Based on these facts, we find that the PX has demonstrated that payment of the filing fee would place it in "financial distress." Accordingly, we will grant its petition for waiver.

The Commission orders:

(A) Constellation's complaint is hereby denied for the reasons discussed in the body of this order.

²¹See 18 C.F.R. § 381.106 (2002).

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(B) The Participants Committee's motion to intervene is hereby granted for reasons discussed in the body of this order.

(C) CalPX's petition for a declaratory order is hereby granted to the extent discussed in the body of this order.

(D) CalPX's petition for waiver of the filing fee requirement is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Brownell dissenting with a separate statement to be issued later.

(S E A L)

Magalie R. Salas,
Secretary.

Docket Nos. EL02-63-000 and EL02-104-000

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Appendix

Constellation Power Source, Inc. v. California Power Exchange Corporation
Docket No. EL02-63-000

AES NewEnergy, Inc.*
California Electricity Oversight Board*
California Public Utilities Commission*
City of Santa Clara, California
Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC*
Hafslund Energy Trading, LLC*
Northern California Power Agency*
Official Committee of Participant Creditors*
Pacific Gas & Electric Company*
PG&E Energy Trading-Power, L.P.
Pinnacle West Companies
Public Service Company of New Mexico*
Reliant Energy Services, Inc.*
Southern California Edison*
Tucson Electric Power Company*

California Power Exchange Corporation
Docket No. EL02-104-000

AES NewEnergy, Inc.
Avista Energy, Inc.
California Electricity Oversight Board
California Public Utilities Commission*
City of Los Angeles Department of Water and Power
City of Santa Clara, California
Constellation Power Source, Inc.
Coral Power, L.L.C.
Modesto Irrigation District
Northern California Power Agency
Official Committee of Participant Creditors*
Pacific Gas and Electric Company*
PG&E Energy Trading-Power, L.P.**
Powerex Corp.*
People of the State of California and Southern California Edison (jointly)*

Docket Nos. EL02-63-000 and EL02-104-000

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Pinnacle West Capital Corporation
Public Service Company of New Mexico*
Sempra Energy Trading Corp.
Williams Energy Marketing & Trading Company*

"*" Indicates that the party filed a protest and/or comments.

"**" Indicates that party filed a motion to intervene out of time.