

100 FERC ¶ 61, 380
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.

v.

Docket No. EL02-63-001

California Power Exchange Corporation

California Power Exchange Corporation

Docket No. EL02-104-001

ORDER ON REHEARING

(September 30, 2002)

This order addresses several requests for rehearing of our July 30, 2002 order (July 30 Order).¹ In that order, we addressed two interrelated filings concerning disposition of jurisdictional assets of the bankrupt California Power Exchange (CalPX): (1) Constellation Power Source, Inc.'s (Constellation) complaint in Docket No. EL02-63-000 against CalPX requesting the Commission to direct CalPX to release three letters of credit that Constellation provided as collateral for participating in CalPX's markets and (2) CalPX's 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.

1. In this order, we will deny in part and grant in part a request for rehearing filed by Constellation. In particular, we direct CalPX to retain 10 million dollars of the collateral and release the collateral in excess of this amount. Furthermore, we will deny requests for rehearing submitted by the California Electricity Oversight Board (CEOB) and the Official Committee of Participant Creditors (Committee).²

¹ Constellation Power Source, Inc, *et al.*, 100 FERC ¶ 61,124 (2002) (July 30 Order).

² The Committee was appointed by the Office of United States Trustee to
(continued...)

2. Our decision in this order is in the public interest because it will help to increase liquidity in the financial markets, allow Constellation to obtain financing, ensure that Constellation meets its outstanding obligations, and ensure that the ultimate CalPX creditors are paid. This order will also promote regulatory certainty and facilitate industry-wide uniformity.

Docket No. EL02-63-001

A. Background

3. 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 to CalPX, as required by the CalPX's tariff. After CalPX suspended operations in its core markets³ on January 31, 2001 and its tariff terminated on May 1, 2001,⁴ CalPX refused to release Constellation's collateral.

4. In response, Constellation filed a complaint requesting that the Commission direct CalPX to release the collateral posted by Constellation. The July 30 Order 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.

²(...continued)

represent in the CalPX bankruptcy proceeding the interest of the market participants who assert that they are owed money for sales into the CalPX-administered markets or are owed money for sales into the California Independent System Operator (CAISO) real-time market for which CalPX acted as a scheduling coordinator for investor-owned utilities.

³ The core markets are the spot market for day-ahead and the spot market for day-of electricity trading.

⁴ See San Diego Gas & Electric Company, et al., 93 FERC ¶ 61,294, at 61,999 (2000).

5. In the July 30 Order, the Commission stated that only after the completion of the refund proceeding in Docket No. EL00-95-045, 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 "crossed the 'bright line' between state and federal jurisdiction established by the FPA. In the Commission's opinion, all these ongoing matters also continued to delay the final billing and settlement of transactions in the CalPX markets.⁶

B. Request for Rehearing, Emergency Motion, and Comments

6. On August 29, 2002, Constellation filed a request for rehearing of the July 30 Order asking that the Commission direct release of the collateral, or in the alternative, require that CalPX retain sufficient collateral to cover the potential refund liability being determined in the refund proceeding in Docket No. EL00-95-045, et al. and to release the excess of that amount.

7. In addition, Constellation filed an emergency motion for partial interim relief in which it also requests that the amount of collateral required to be posted with CalPX be significantly reduced. In its motion, Constellation requests Commission action by September 29, 2002. Constellation explains that the expedited action by the Commission will allow Constellation to avoid expenses associated with reposting of the collateral, which is due on September 30, 2002.

⁵ 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 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 investor-owned utilities, and the State of California.

⁶ See the July 30 Order at 61,486.

8. Southern California Edison Company (SoCal Edison) and Pacific Gas and Electric Company (PG&E) filed answers in opposition to Constellation's emergency motion. They argue that Constellation's motion should be rejected because the amount of Constellation's refund liability cannot be determined with certainty until the completion of the refund proceedings in Docket No. EL00-95-045, et al.

C. Procedural Matters

9. SoCal Edison, PG&E, and CalPX filed answers to Constellation's request for rehearing. Pursuant to Rule 713(d) of the Commission's Rules of Practice and Procedure,⁷ the Commission does not permit answers to requests for rehearing.

D. Commission Determination

10. On rehearing, Constellation, in most part, reiterates the arguments that it made in its complaint. In particular, Constellation argues that the Commission erred in refusing to release the collateral because there is no basis under CalPX's tariff to require Constellation to maintain collateral, since all of Constellation's accounts have been "billed and settled" pursuant to CalPX's tariff. We addressed this issue in our July 30 Order at 100 FERC at 61,489, paragraphs 26-28. We found that the final billing and settlement have not yet taken place given the numerous ongoing contested proceedings regarding the transactions that occurred in the CalPX markets.

11. Constellation further argues that the Commission erred in finding that the collateral pledged by Constellation to participate in block forward market (BFM) is related to Constellation's separate obligations in the core markets. Thus, Constellation continues, collateral posted to cover liabilities in the BFM may not be used to secure the refund liability in the core markets and should be released.

12. This 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. Further, Constellation argues that the Commission failed to consider Constellation's alternative proposal to maintain collateral in the amount sufficient to

⁷ 18 C.F.R. § 385.713(d) (2002).

cover the refund claims in the refund proceeding in Docket No. EL00-95-045, et al. and to have the collateral in excess of that amount released.

14. Upon reconsideration, we believe that Constellation must maintain collateral with CalPX in the amount of 10 million dollars, which by our conservative estimate will be sufficient to cover the potential refund liability resulting from Constellation's transactions in the CalPX's and CAISO's markets. Accordingly, we direct CalPX to release the collateral in excess of 10 million dollars.

15. Based on the above, Constellation's request for rehearing is hereby granted in part and denied in part. Constellation's emergency motion is also granted in part and denied in part.

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A. Background

16. On July 10, 2002, CalPX filed a petition for declaratory order to remind the Commission that the U.S. Bankruptcy Court had before it competing reorganization plans from CalPX and from the Committee. CalPX requested that the Commission issue a declaratory order stating principles designed to guide the U.S. Bankruptcy Court in addressing issues raised by these reorganization plans. In the July 30 Order, we declared that:

(1) upon reorganization of the CalPX, the Commission would continue to have exclusive jurisdiction over jurisdictional property of the CalPX, and any disbursement or disposition of jurisdictional property, including collateral, must be consistent with the CalPX's tariff, and to the extent applicable, subject to Commission review and approval;

(2) the reorganized CalPX's governance must be subject to Commission approval and continuing oversight;

(3) any claims by suppliers against PG&E and SoCal Edison, except direct claims seeking to recover amounts already determined to be owed, must be addressed in the refund proceeding in Docket No. EL00-95-045, et al.;

(4) the Commission would decide when the CalPX's jurisdictional responsibilities are completed consistent with the Federal Power Act (FPA)⁸ and relevant Commission orders;

(5) the Energy Litigation LLC, as proposed by the Committee, was not independent and violated the Commission's January 31, 2002 Declaratory Order in Docket EL02-48-000⁹ and the CalPX's jurisdictional assets could not be used to create an expense reserve without first seeking Commission approval.

B. Procedural Matters

17. PG&E filed an answer to the Committee's request for rehearing. Pursuant to Rule 713(d) of the Commission's Rules of Practice and Procedure,¹⁰ the Commission does not permit answers to requests for rehearing.

C. Requests for Rehearing

18. CEOB filed a request for rehearing challenging the Commission's determination in regard to the CalPX governance structure. Specifically, it argues that the Commission does not have statutory authority to change CalPX's corporate governance structure because CalPX is incorporated under the laws of the State of California and CalPX's bylaws are not a rate or term or condition within the meaning of section 205 or 206 of the FPA.¹¹ CEOB had an opportunity but failed to raise this issue prior to the issuance of the July 30 Order. Absent compelling reasons demonstrated by the petitioner, the Commission, as a general matter, will not entertain issues raised for the first time on rehearing.¹² In addition to the procedural flaw, the argument raised is substantively

⁸ 16 U.S.C. §§ 796, et seq. (1994).

⁹ California Power Exchange Corporation, 98 FERC 61,097 (2002).

¹⁰ 18 C.F.R. § 385.713(d) (2002).

¹¹ 16 U.S.C. §§ 824(d) or 824(e) (1994).

¹² See generally Nevada Power Co. and Sierra Pacific Power Co. v. Duke Energy Trading and Mktg, L.P., et al., 100 FERC ¶ 61,273 (2002); Sierra Pacific Power Company, 96 FERC ¶ 61,050 (2001); Niagara Mohawk Power Corporation, 96 FERC ¶

without merit for the reasons stated in our July 17, 2002 order on governance issues and the order denying rehearing of that order.¹³

19. The Committee filed a request for rehearing, stay, and reconsideration of the July 30 Order in which it informs the Commission that on August 29, 2002, it filed with the U.S. Bankruptcy Court the Modified Plan of Reorganization, which addresses the concerns expressed by the Commission in the July 30 Order. According to the Committee, the Modified Plan as filed is supported by CalPX. The Committee believes that the Commission should vacate the July 30 Order because it does not provide guiding principles to the CalPX bankruptcy court, which is now considering a plan that differs from the one considered by the Commission. The Committee also states that the July 30 Order is inconsistent with the U.S. District Court's recent decision in In re Pacific Gas and Electric Company, No. C-2-1550-VRW, Northern District of California (September 3, 2002) providing that 11 U.S.C. section 1123(a) expressly preempts non-bankruptcy laws, in connection with the confirmation of a plan, and permits a Chapter 11 plan to include provisions that may contravene other state or federal law.

20. The determination to vacate orders is an equitable one, requiring exceptional circumstances.¹⁴ We are not persuaded that there are exceptional circumstances present requiring vacatur of the relevant part of the July 30 Order. We recognize that the July 30 Order may be less relevant to the instant controversy, since the Committee states that it has voluntarily complied with the Commission's recommendations in the July 30 Order. However, we believe that the July 30 Order will continue to provide guidance to the bankruptcy judge as to the Commission's position on the certain issues. Our

¹²(...continued)

61,011 (2001); New England Power Pool, 95 FERC ¶ 61,346, 62,305 (2001); Baltimore Gas and Electric Company, et al., 92 FERC ¶ 61,043, 61,114 (2000); Baltimore Gas & Electric Company, et al., 91 FERC ¶ 61,270, at 61,922 (2000); Northern States Power Company (Minnesota), et al., 64 FERC ¶ 61,172, at 62,522 (1993); and Cities and Villages of Albany and Hanover, Illinois, et al., 61 FERC ¶ 61,362, at 62,451 (1992).

¹³ Mirant Delta, LLC and Mirant Potrero, LLC v. California Independent System Operator Corp., 100 FERC ¶ 61,059, rehearing denied 100 FERC ¶ 61,271 (2002)

¹⁴ Vermont Yankee Nuclear Power Corporation, 96 FERC ¶ 61,286 (2001); Town of Neligh, et al., 94 FERC ¶ 61,075, at 61,348 (2001), citing Edwards Manufacturing Company, Inc. and City of Augusta, Maine, 84 FERC ¶ 61,228 (1998) and U.S. Bancorp, 513 U.S. 18, 26 (1994).

understanding is that the bankruptcy judge is yet to rule on the Committee's proposed Modified Plan of Reorganization. Moreover, Commission orders, declaratory orders, opinions, and policy statements serve to provide significant informational benefits to the public by announcing the Commission's intentions for the future; further, this opportunity to anticipate the agency's actions facilitates long range planning within the regulated industry and promotes uniformity.¹⁵

21. We thus see no inequity in leaving the July 30 Order in place, as no party's interests will be prejudiced thereby. The July 30 Order is a declaratory order, which does not require compliance but rather provides Commission guidance on the subject matter of a controversy.¹⁶ Therefore the vacatur of the July 30 Order will not have the effect of reversing Commission directions. Voluntary compliance with the declaratory order does not, under present circumstances, serve as a basis for vacatur.

22. We also disagree with the Committee's assertion that the July 30 Order must be vacated because it is preempted by the bankruptcy law. In the July 30 Order, we stated that we were not asserting jurisdiction over reorganization plans pending before the U.S. Bankruptcy Court. The rulings in the July 30 Order were "meant only to clarify issues raised by the reorganization plans that affect our jurisdiction."¹⁷

23. For the above stated reasons, we deny the Committee's motion for rehearing.

The Commission orders:

(A) Constellation's request for rehearing is hereby granted in part and denied in part for the reasons stated in the body of this order.

(B) Constellation's emergency motion for interim relief is hereby granted in part and denied in part for the reasons stated in the body of this order.

¹⁵ Panhandle Eastern Pipe Line Company v. FERC, 198 F.3d 266, 269 (D.C. Cir. 1999), quoting, Pacific Gas & Electric Company v. FERC, 506 F.2d 33, 38 (D.C. Cir. 1974).

¹⁶ See generally 18 C.F.R. § 385.207(a)(2) (2002).

¹⁷ See July 30 Order at 61,489.

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(C) CalPX is hereby directed to release Constellation's collateral in excess of 10 million dollars.

(D) CEOB's request for rehearing is hereby denied for the reasons stated in the body of this order.

(E) The Committee's request for rehearing is hereby denied for the reasons stated in the body of this order.

By the Commission. Commissioner Massey dissented in part with a separate statement attached.

(S E A L) Commissioner Brownell concurred with a separate statement attached.

Linwood A. Watson, Jr.,
Deputy Secretary.

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MASSEY, Commissioner, dissenting in part:

I do not agree with the decision to lower the amount of collateral Constellation must maintain to cover its potential liability resulting from transactions in the CalPX and CAISO markets. I continue to believe that our July 30 order made the right call. Final billing and settlement has not yet taken place, and ongoing matters continue to delay final settlement and billing. There is still too much uncertainty regarding these markets to place much confidence in an estimate of the potential refund liability of Constellation. Therefore, I would deny rehearing on this issue.

For these reasons, I dissent in part from today's order.

William L. Massey
Commissioner

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BROWNELL, Commissioner, concurring

1. As I stated in my partial dissent from the July 30 Order, I do not think there is a basis for taking collateral pledged for one legal purpose—ensuring Constellation's settlement of accounts when billed by the CalPX—and converting it into a guaranty for a totally different purpose—payment of any future Commission-ordered refunds that Constellation may owe. However, this order at least takes a step in the right direction by releasing some of Constellation's collateral. Therefore, I respectfully concur.

Nora Mead Brownell