

109 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company
v.
California Power Exchange Corporation
Docket No. EL01-29-001

Southern California Edison Company
v.
California Power Exchange Corporation
Docket No. EL01-33-001

Coral Power, LLC, 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.
California Power Exchange Corporation
Docket No. EL01-36-001

Salt River Project Agricultural Improvement
and Power District and Sacramento
Municipal Utility District
v.
California Power Exchange Corporation
Docket No. EL01-37-001

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

ORDER ON REHEARING

(Issued October 7, 2004)

1. In this order we address on rehearing an order relating to the use of chargebacks by the California Power Exchange Corporation (PX) in response to alleged defaults by Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (SoCal Edison) in early 2001. In an April 6, 2001 Order the Commission found that the PX's use of the chargeback procedures was unjust and unreasonable under the circumstances and ordered the PX to rescind the chargebacks and stated that it would later address how the PX should account for the nonpayments by SoCal Edison and PG&E. The PX took actions to reverse the chargebacks, but has retained \$15 million in cash that are a result of chargebacks.¹ At issue in this order is whether the PX should disburse this \$15 million prior to the completion of the Refund Proceeding and how the PX should account for shortfalls. As discussed below, we will not require the PX to disburse the chargeback funds until the completion of the Refund Proceeding. We also find that, because SoCal Edison has made a substantial payment to the PX and PG&E has placed a large payment into an escrow account, the issue of how to account for shortfalls has changed and would best be decided in the Refund Proceeding after a determination of who owes what to whom. The order will benefit customers because it will assure an equitable determination and allocation of shortfalls.

Background

The Complaints

2. In early 2001, SoCal Edison and PG&E were experiencing significant financial problems. On January 16 and 17, 2001, the credit and debt ratings of SoCal Edison and PG&E were downgraded to "junk" status. On January 16, 2001, SoCal Edison filed a Form 8-K with the Securities and Exchange Commission (SEC) disclosing that it would suspend indefinitely certain obligations including a \$215 million payment to the PX, and subsequently failed to make payment on the due date of January 18, 2001. On February 1, 2001, PG&E filed a Form 8-K with the SEC stating its intention to default on payments of over \$1 billion due to the PX and certain Qualifying Facilities.

3. The PX took several steps in response to these developments. Among them, the PX began applying the chargeback mechanism to market participants.² A chargeback is an allocation mechanism intended to allow the PX to recover the uncollected receivables

¹ Other chargebacks did not result in payments of cash, but rather in a reduction in the dollar amount of payments made to market participants. The PX has "rescinded" this category of chargebacks through accounting entries.

² The PX also demanded collateral from SoCal Edison and PG&E and informed SoCal Edison that it intended to liquidate SoCal Edison's block forward contracts.

of a defaulting PX debtor from the remaining participants in the PX market. The chargeback was described in Section 5.3 of the PX tariff, which stated that:

In the event that amounts owed to the PX Participants on a payout date cannot be fully paid due to an insufficiency of funds in the PX clearing accounts, the PX will allocate the shortage to the PX Participants using the proportional charge-back methodology described below. If payments are recovered, they will be remitted to the relevant PX Participants on the same basis using the same ratio as the original charge-back.

Default charge-back to PX CORE MARKET Participants shall be assessed using the following methodology:

The PX Participant's outstanding default amount will be charged back to all current PX Participants based upon the percentage of its gross sales in MWhs to the total gross MWhs sales in the Core Market during the three calendar months preceding the event plus the current month-to-date.

4. The Commission had accepted the PX chargeback mechanism as part of PX tariff Amendment No. 18.³
5. In response to the PX's actions with respect to liquidating the block forward contracts and with respect to implementing the chargeback procedures, a number of complaints were filed.
6. In Docket No. EL01-29-000, PG&E filed a motion requesting an immediate order directing the PX to stay liquidation of PG&E's block forward contracts. PG&E argued that the PX's attempts to cover SoCal Edison's nonpayments in the Core Markets by both withholding payments due under PG&E's block forward contracts and liquidating those contracts violated the PX tariff. According to PG&E, the PX tariff required the PX to handle accounts in the CTS Markets separately from accounts in the Core Markets.⁴

³ See *California Power Exchange Corporation*, 92 FERC ¶61,096 (2000).

⁴ The PX began operations in 1998. The PX initially operated a single price auction for day-ahead and day-of electricity trading. In the summer of 2000, the PX opened its CalPX Trading Services (CTS) division to operate a block forward market by matching supply and demand bids for longer-term electricity contracts.

7. In Docket No. EL01-33-000, SoCal Edison filed a motion requesting a cease-and-desist order to stop the PX from liquidating its block forward contracts. SoCal Edison argued that the PX's proposed method of liquidating SoCal Edison's block forward contracts would cause irreparable harm to SoCal Edison and its customers by essentially allowing the counterparties to buy them at distress terms.

8. In Docket No. EL01-36-000, Complainants argued that the PX should not be allowed to use the chargeback mechanism. They requested that the Commission suspend the PX's further use of the chargeback. Complainants contended that such a suspension would be in the public interest because it would preserve the *status quo ante* while questions surrounding the PX's dissolution were resolved in an orderly fashion. Complainants also contended that such a suspension was necessary because it would prevent the situation in California from causing irreparable harm to PX market participants.

9. In Docket No. EL01-37-000, a complaint was filed that was substantially similar to the complaint in Docket No. EL01-36-000. In addition, Complainants in Docket No. EL01-37-000 argued that the PX's use of the chargeback mechanism was not proper because PG&E and SoCal Edison were in the process of disputing the charges assessed to them by the PX and because they had contested the default notices issued against them. Complainants asked the Commission to direct the PX to cease the issuance of default notices to market participants and to rescind any previously issued default notices.

10. In Docket No. EL01-43-000 a complaint was filed that largely reiterated the assertions made in the other complaints and the relief requested by others with respect to the chargebacks. In addition Public Service Company of New Mexico (PSNM) requested that the Commission direct the PX to refund to PSNM all amounts the PX has offset against amounts owed.

April 6, 2001 Order

11. The Commission addressed the five complaints in a single order on April 6, 2001.⁵ The Commission dismissed the complaints filed in Dockets Nos. EL01-29-000 and EL01-33-000 (concerning the block forward contracts) as moot.⁶

⁵ *Pacific Gas and Electric Company v. California Power Exchange Corporation*, 95 FERC ¶ 61,020 (2001) (April 6, 2001 Order).

⁶ The Commission stated that there was no need for the Commission to stop the PX from liquidating the block forward contracts because the Governor of California already took that action. *Id.* at 61,045.

12. With respect to the complaints in Docket Nos. EL01-36-000, EL01-37-000 and EL01-43-000, the Commission found that the PX's use of the chargeback mechanism has had and will continue to have an impact on the otherwise creditworthy PX participants that will exacerbate the existing adverse market conditions in California. The Commission further found that under these circumstances, the chargebacks would cause virtually all PX participants to default, thereby compounding adverse market conditions throughout the entire Western region. The Commission concluded that the chargeback provision in the PX tariff had not been designed to address a default of this magnitude and that thus, its application under the circumstances was unjust and unreasonable.⁷ The Commission directed "the PX to: (1) rescind all prior chargeback actions related to PG&E's and SoCal Edison's liabilities; and (2) refrain from taking any future chargeback action related to PG&E's and SoCal Edison's liabilities."⁸

13. The Commission noted that proceedings in other fora⁹ could have significant implications on how the PX should account for the nonpayments by SoCal Edison and PG&E and directed the PX to file a report within 30 days of resolution of any of those proceedings. If those proceedings were not resolved within 90 days of the date of the order, the PX was required to file a status report within 100 days of the date of the order.¹⁰

Requests for Clarification or Rehearing

14. On May 7, 2001, the PX filed a request for clarification, or alternatively rehearing. The PX states that while the Commission, in the April 6, 2001 Order, directed the PX to rescind all prior chargeback actions and to refrain from future chargeback actions, which

⁷ *Id.* at 61,045.

⁸ *Id.* at 61,045 & 61,046 Ordering Paragraph (B).

⁹ Those proceedings were a claim filed by the PX for \$1 billion submitted to the California Victim Compensation and Government Claims Board (Government Claims Board Complaint) and a complaint filed by SoCal Edison in the Superior Court of the State of California for the County of Los Angeles (State Court Complaint) seeking a declaratory judgment that it could not be found in default in the PX markets because its performance had been prevented by Uncontrollable Forces, as that term is defined in the PX tariff.

¹⁰ *Id.* at 61,045 & 61,046 Ordering Paragraph (C).

the PX, in the pleading, claims to have done,¹¹ the Commission did not resolve how the PX should address the non-payments by SoCal Edison and PG&E. On rehearing, the PX asked the Commission to clarify the April 6, 2001 Order to state that the PX remains unable to pay-out to creditors of its clearinghouse functions, including the California Independent System Operator (CAISO) because the Commission has deferred decision on how to handle shortfalls in the PX markets. The PX also asked the Commission to clarify that the PX cannot make any final determinations as to participant collateral and that the PX remains unable to return collateral to participants at this time. Finally, the PX asked the Commission to clarify “its limited clearinghouse functions.”¹²

15. On May 7, 2001, Enron Power Marketing, Inc. (EPMI), Arizona Public Service Company, Cargill Alliant, LLC, Avista Energy, Inc., Sempra Energy Trading Corp., PacifiCorp, and Constellation Power Source (the Complainants in Docket No. EL01-36-000) filed a request for clarification of the Commission’s April 6, 2001 Order. The Complainants asked that the Commission clarify that nothing in the April 6, 2001 Order affects or prevents the PX from returning the collateral pledged by PX Participants to the PX in connection with each Participant’s right to participate in the PX’s markets. They further asked the Commission to enforce the PX’s obligation under its tariff to return all collateral to Participants having no remaining liability to the PX, or with respect to Participants that remain obliged to the PX, to return the collateral in excess of any remaining liability.

16. On May 22, 2001, the Complainants in Docket No. EL01-36-000 filed an answer to the PX’s request for rehearing. The Complainants urged that compliance with the Commission’s April 6, 2001 Order requires the PX to actually return monies provided to the PX. The Complainants asked the Commission to direct the PX to file an accounting of the chargeback revenues it has received and to whom they were flowed through, and establish dates certain on which (1) those market participants that received funds return them to the PX and (2) the PX flows them through to PX participants that were improperly required by the PX to pay chargebacks.

¹¹ As discussed below, whether the PX complied with the Commission’s directive is an outstanding issue in this proceeding.

¹² Request for Rehearing at 3.

Subsequent Filings

PX's Status Report

17. On July 6, 2001, the PX filed the status report required by the April 6, 2001 Order. The PX reported that it was clear that neither SoCal Edison's State Court Complaint nor the PX's Government Claims Board Complaint would be resolved any time soon. The PX stated that the market participants' trading positions and their collateral will continue to be at a standstill until a determination is reached on the ultimate question of how the PX should deal with the shortfall caused by the SoCal Edison and PG&E nonpayments. The PX urged that while the State Court Complaint and the Claims Board Complaint would have an impact on the amount of money ultimately to be distributed among participants, these proceedings would not determine the methodology by which the shortfall would be handled. The PX concluded by urging the Commission to determine promptly how the cash shortfall caused by the nonpayments should be handled by the PX.

18. On July 23, 2001, San Diego Gas & Electric Company (SDG&E) filed an answer to the PX's status report. SDG&E submits that the Commission, in its April 6, 2001 Order has already determined that shortfalls in the PX markets should not be allocated to PX Participants; SDG&E concludes that the Commission should make no further determinations concerning allocation of shortfalls. As an alternative, SDG&E suggests that the Commission should issue an order permitting PX Participant creditors to pursue remedies directly against PX debtors.

19. On July 20, 2001, the Official Committee of Participant Creditors (Participants Committee) appointed in the Chapter 11 bankruptcy case of the PX submitted comments on the PX's status report. The Participants Committee, responding to the PX's statement that the Commission should proceed swiftly with determining how existing shortfalls should be allocated in lieu of the default chargeback mechanism found by the Commission to be unjust and unreasonable, stated that the Participants Committee is considering a proposal that would address: (a) the distribution of cash presently held in the PX's settlement clearing accounts; (b) the adoption of a simple methodology for allocating short payments and defaults by SoCal Edison and PG&E; (c) the return of cash, letters of credit and surety bonds posted by participants to support performance of their obligations; (d) adoption of a simple formula for allocating participants' unpaid claims directly against SoCal Edison and PG&E; (e) winding up, maintenance and completion of the PX's obligations under the Federal Power Act and the PX tariff; and (f) maintaining the PX's books and records. The Participants Committee asked the Commission to permit it to complete its efforts to achieve a consensus among parties to resolve the issues facing the PX in a manner the PX could accept.

Settlement Agreement

20. On October 5, 2001, the Participants Committee filed an Offer of Settlement (settlement) of issues affecting the PX along with supporting documents and a motion to intervene in Docket Nos. EL01-36-000, EL01-37-000 and EL01-43-000.¹³ According to the Participants Committee, PG&E then owed the PX approximately \$1.7 billion while SoCal Edison owed the PX approximately \$820 million (excluding interest); at that time the PX owed approximately \$520 million to PX Participants and \$2.4 billion to the CAISO. The settlement states that a number of PX Participants paid approximately \$15 million to the PX on account of the chargeback invoices. In addition, in the period from approximately January 18, 2001 through March 5, 2001 (when Judge Moreno of the United States District Court of the Central District of California issued an injunction prohibiting the use of the chargeback mechanism until a determination was made whether the chargeback mechanism should be used at all), the PX distributed to PX Participants and the CAISO approximately \$385 million on account of prior sales into markets administered by the PX, which distributions were based on allocations that included the chargeback methodology. The settlement further recites that the PX was then holding approximately \$1 billion of collateral from market participants, and was holding approximately \$409 million of cash in its Settlement Clearing Account, including the \$15 million in chargeback cash payments that is held in a segregated account.

21. The settlement proposed a methodology to account for the nonpayments by PG&E and SoCal Edison and their impact on the PX, the CAISO and market participants that assert they are owed money for sales into the markets administered by the PX or are owed money for sales into the real time market administered by the CAISO for which the PX acted as scheduling coordinator for the investor owned utilities. Among other things the settlement provides for the return of cash paid by participants for rescinded chargebacks. The settlement states that approximately \$15 million would be distributed to approximately 20 participants under this provision.¹⁴

¹³ The settlement was filed in Docket Nos. EL00-95-000 and EL00-98-000 as well as in the chargeback proceedings, EL01-36-000, EL01-37-000 and EL01-43-000.

¹⁴ The settlement also provided, among other things, for: (1) an expense reserve for PX costs and expenses; (2) distribution of remaining cash from settlement clearing account; (3) no distributions to PG&E and SoCal Edison and others that failed to make payments; (4) an allocation of cash and short payments among PX participants on a pro rata basis; (5) the immediate release of all collateral (6) a recognition that the PX and the CAISO and market participants may have contractual claims enforceable under California state law and federal law in state or federal courts; (7) a cutoff for adjustments by the CAISO.

22. Responses were filed by numerous parties including: the PX, SoCal Edison, PG&E, Sal River Project Agricultural Improvement & Power District, the California Electricity Oversight Board, Mirant Americas Energy Marketing, Dynergy Power Marketing, Inc., Modesto Irrigation District, the City of Redding, California, Reliant Energy Services, Inc., City of Santa Clara, California, City of Vernon, California, Public Service Company of New Mexico, Metropolitan Water District of Southern California, Puget Sound Energy Inc., Enron Power Marketing, Inc. and Constellation Power Source, Inc.. Replies were also filed.

23. A number of parties opposed the Participants Committee motion to intervene. They point out that the Participants Committee's interests are well represented in the chargeback proceedings by its individual members (all eight member of the Participants Committee are already parties to the chargeback proceedings). Moreover, SoCal Edison points out that the Participants Committee does not represent the interests of all market participants – most particularly it does not represent the interests of SoCal Edison or PG&E.

24. In general, the comments filed by generation interests supported the settlement¹⁵, while the California Electricity Oversight Board, SoCal Edison, PG&E, and the municipal entities opposed the settlement. Those who favored the settlement generally believed that a quick return of collateral and payout of cash held by the PX would benefit the financial health of sellers into the PX. Those who opposed object to numerous provisions of the settlement – especially those that relate to a cutoff date for making settlement and billing adjustments. They suggest that this provision is intended to “short circuit” the Refund Proceeding. They also note that the settlement does not contemplate or provide for that as a result of the Refund Proceedings and other pending proceedings changes in the allocation of who is owed what may occur, including the fact that net creditors of the PX may become net debtors. They further contest the formula for allocating payouts and suggest that the allocation method is inconsistent with the PX tariff. The California Electricity Oversight Board claims that the settlement appears to

¹⁵ Not all generation interests supported the settlement. For example Duke Energy objected to the provision of the settlement that assured that the participants who paid chargeback invoices would be paid before everyone else. Mirant Americas Energy marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Portero LLC (collectively, Mirant), stated that it is a member of the Participants Committee, and that it did not support the settlement. Mirant objected to the process contained in the settlement for returning chargeback funds, stating that it discriminates between two types of participants: (1) those that paid their chargeback shortfall allocations through receiving less money from the PX, and (2) those that paid their chargeback shortfall allocation directly.

have the effect of improperly circumventing many aspects of the Bankruptcy Code as well as the Refund Proceedings in a way that benefits only the Participants Committee. The California Electricity Oversight Board claims that the settlement also circumvents the development of an equitable refund allocation methodology. Finally the California Electricity Oversight Board states that the settlement impermissibly grants the Participants Committee rights to confidential data about PG&E, SoCal Edison and other market participants. The California Electricity Oversight Board asks the Commission to reject the settlement.

25. The Commission, in an order issued on December 19, 2001, ruled that the issues raised by the Offer of Settlement would be addressed in the chargeback proceedings (Docket Nos. EL01-36-000, EL01-37-000 and EL01-43-000) rather than in the context of the refund proceeding.¹⁶

Joint Motion for Immediate Action

26. On March 22, 2002, Reliant Energy Power Generation, Inc. Reliant Energy Service, Inc. Dynegy Power Marketing, Inc., Mirant Americas Energy Marketing, LP and Williams Energy Marketing & Trading Company (collectively, Suppliers) filed a joint motion seeking immediate Commission action to resolve the question of how to allocate the shortfall caused by the non-payment of certain participants in the PX markets and how to distribute the over \$1 billion then being held by the PX. In the motion, the Suppliers pointed out that in the April 6, 2001 Order, the Commission found that the chargeback provision of the PX tariff was unjust and unreasonable, but did not order the PX to at that time propose an alternative methodology to account for the nonpayments by SoCal Edison and PG&E. The Suppliers pointed out that the Commission deferred resolution of the ultimate question of how to account for the nonpayments pending resolution of two proceedings: SoCal Edison's State Court Complaint and the PX's Government Claims Board Complaint. The Suppliers contended that the outcome of both proceedings was then either known, or will not affect the final resolution of the chargeback issue so that there is no reason for further delay in requiring the filing of revised tariff provisions to substitute for the unreasonable chargeback provisions.

27. The Suppliers noted that SoCal Edison had recently paid \$875 million into the PX toward the satisfaction of its default and that as a result the PX was then holding \$1.3 billion in cash, including interest that the Suppliers claimed was owed to PX Participants and participants in markets operated by CAISO. Suppliers urged the Commission to

¹⁶ *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange*, 97 FERC ¶ 61,301 (2001) (December 19, 2001 Order).

immediately adopt a tariff provision that would permit the PX to distribute funds attributable to the PX market operations on a *pro rata* basis to PX Participants and pay to the CAISO the portion of available funds owed to participants in the CAISO markets. The Suppliers asked the Commission to direct the PX to make a compliance filing to conform its tariff to permit such payments.

28. Regarding the proceedings in other fora, the Suppliers claimed that “the question of whether the [State of California] is obligated to pay for the market value of the [block forward contracts] at the time of its unlawful seizure does not impact the ultimate determination of how the PX is to distribute available funds.”¹⁷ The Suppliers also claimed that SoCal Edison’s payment of \$875 million in the PX negated the need for an allocation of the prior shortfall attributable to SoCal Edison, so that the State Court Complaint should have no bearing on the Commission’s resolution of the allocation issue.¹⁸

29. Suppliers further claim that distribution of “long-overdue payments” will benefit the California market. According to the Suppliers, the PX maintains that these funds cannot be distributed until the Commission has adopted a methodology to replace the chargeback provision that the Commission found to be unjust and unreasonable. Suppliers claim that a *pro rata* distribution of the funds held will provide a just and reasonable resolution in these dockets.

Responses to Joint Motion for Immediate Action

30. The PX filed a response to the Joint Motion. The PX does not object to the adoption of the *pro rata* methodology advanced by the Suppliers for dealing with a cash shortfall in the PX clearinghouse function. The PX does, however, object to the disbursements of funds Suppliers seek; the PX says it supports the requirement for a refund reserve because the lack of such a reserve could cause the PX to incur additional obligations to pursue participants for any final unpaid balances which collection activities could in turn delay the wind down of the PX’s operations. The PX also states that if all funds in the Settlements Clearing Account were disbursed at this time, the PX would be left without funds for its ongoing operations.

31. The PX states that it has created Account Summary forms in order to provide participants with a summary of their account status, reflecting the activities billed and collected since January 2001. The balances due represent the billing periods for December 2000 and January 2001 Day-Ahead, Day-of billings and CTS (block forward)

¹⁷ Suppliers March 22, 2002 Motion at 5.

¹⁸ *Id.*

billings for December 2000 through February 2001; they also represent the October 2001 Final CAISO billings and the preliminary and final billings from the CAISO for the periods November 2000 through November 2001.

32. The PX states that it has reversed the chargeback invoices on the Account Summaries of all Participants to comply with the April 6, 2001 Order requiring that the chargebacks be rescinded. The PX states that it has determined how much of the remaining balance on each Account Summary reflected an amount owed by the PX to participants in excess of the non-chargeback invoices. The PX states that these excess amounts were removed from the Account Summaries and the monies were moved from the Settlements Clearing Account to the Prepayment Account. The PX states that if subsequent billings showed that an amount was due the PX by a participant, funds were moved from the Prepayment Account to the Settlements Clearing Account to pay for such amounts due the PX. The PX states that approximately \$15 million belonging to 26 PX Participants has been segregated in the Prepayment Account pending further Commission orders on the chargeback issue. The PX states that if the Commission requires distribution of these funds, they will not affect the balance in the Settlements Clearing Account.

33. In conclusion the PX states that it does not oppose the *pro rata* methodology for allocating the current cash shortfall in the PX clearinghouse function. However, it is speculative what the participants' final positions will be after any refunds and other CAISO billing adjustments are made. Participants that are currently creditors may well move to the debtor side of the balance sheet, which has already occurred as a result of Commission-ordered recalculations. The PX stresses that it must be allowed to set aside a reserve from the Settlements Clearing Account to fund its ongoing operations and costs of the trade creditors' and Participant Creditors' Committees through December 2004.

34. SoCal Edison filed a response to the Joint Motion. SoCal Edison states that while the Commission in the Chargeback Proceedings has held in abeyance the issue of how to deal with nonpayments by SoCal Edison and PG&E, the Commission already has a process in place to determine specific supplier refunds in the California Refund Proceeding. In that proceeding, Judge Birchman has been directed to determine 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. SoCal Edison also claims that the Commission has stated that it would resolve in a future order in the Refund Proceeding how funds are to be allocated for past sales through the PX and for collateral held by the PX, but that the Commission would do so only after necessary

information was available.¹⁹ SoCal Edison concludes that any release of cash held by the PX would be inappropriate and premature, given the numerous proceedings currently underway which will likely revise the billed and settlement amounts. SoCal Edison urges that until all of the disputes regarding the financial obligations of participants in the PX markets are resolved, no collateral or cash should be released by the PX to a PX participant.

35. The Salt River Project Agricultural Improvement and Power District (Salt River) filed a response opposing the Joint Motion. Salt River states that the Joint Motion is saying that the Commission no longer needs to defer the question on how to account for the nonpayments by SoCal Edison and PG&E because SoCal Edison recently made a payment of \$875 million and the outcome of the state proceedings are either unknown or will not affect the final resolution of the issue. Salt River argues that neither is justification for now deciding the issue. Salt River further argues that the proposal to require the PX to now amend its tariff to provide an immediate *pro rata* distribution of PX funds, under which each seller would receive an amount equal to that seller's proportionate share of the total amount it charged to the PX that has not been paid by the PX, is outside the scope of the original relief requested in the chargeback complaints and circumvents the requirements of section 206 of the FPA. Salt River also argues that the Commission has already ruled that amounts owed to suppliers by the PX will be determined in the Docket No. EL00-95 Refund Proceeding and that amounts owed to a supplier by the PX will be offset by the supplier's refund liability once that liability is determined in the Refund Proceeding.²⁰

36. PG&E filed an answer in opposition to the Joint Motion. PG&E strongly opposed any distribution of funds by the PX and the CAISO to any PX Participants at that time. PG&E urged that the Suppliers' proposed methodology would not accurately calculate payments owed and owing to PX Participants because the amounts owed in the CAISO Market and in the PX Core Markets are all being determined in new settlement runs that the Commission has ordered in the ongoing Refund Proceeding.²¹ The Suppliers'

¹⁹ SoCal Edison cites *San Diego Gas & Electric Co.*, 97 FERC ¶ 61,275 at 62,223-23 (2001). SoCal Edison states that the Commission there said that it would determine “the mechanism by which refunds should flow” after the Commission reviews “the judge’s findings of fact in the refund hearing” and issues “an order addressing refunds.”

²⁰ Salt River cites *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service into Markets Operated by the California Independent System Operator and the California Power Exchange*, 96 FERC ¶ 61,120 at 61,520, *clarified*, 97 FERC ¶61,275 at 62,254 (2001).

²¹ PG&E cites *San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 61,120 (2001).

proposed methodology also fails to take into account the possibility that parties who are owed amounts according to the settlement statements that the PX issued in prior periods may in fact owe even larger amounts of money back to the PX as a result of the ongoing Refund Proceeding as well as other pending proceedings. PG&E continues that if payments are distributed before resolution of these proceedings, the PX and CAISO may have already disbursed all of the available funds at their disposal and may not have the ability to properly distribute payment to those who are actually owed money as a result of the recalculated settlement statements. PG&E argues that given the questionable finances of many of the suppliers, it is not sound policy to force the PX and ISO to distribute funds to those suppliers based on billing statements that the Commission has found to be faulty. PG&E concludes that the actions requested by Sellers are contrary to the Commission's directives, and will significantly impact the resolution of the myriad of ongoing proceedings before the Commission and in state and federal courts, and should therefore be rejected. PG&E noted that the Commission has encouraged the parties to the various disputes related to charges in the California markets to reach settlements. Should some sellers and buyers actually reach settlements, it may be appropriate to revisit the issue of release of funds owed by those buyers to those sellers. PG&E believes that granting the Joint Motion will likely have the perverse effect of hardening positions and impeding settlements that might have been reached.

37. Coral Power, LLC, Arizona Public Service Company IDACORP Energy, L.P. and Portland General Electric Company filed an answer in support of the Joint Motion. The Los Angeles Department of Water and Power filed an answer in support of the Joint Motion. The Participants Committee filed an answer in support of the Joint Motion. Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC (collectively Duke Energy) filed an answer in support of the Joint Motion.

PG&E July 19, 2002 Motion

38. On July 19, 2002, PG&E filed a motion in the chargeback proceedings as well as other proceedings²² asking the Commission to immediately issue an order directing the PX to retain the balances in its Settlement Account and directing sellers to the PX who have outstanding collateral to maintain that collateral.

²² Docket Nos. EL02-43-000, EL02-48-000, EL02-63-000 and EL00-95-000.

August 2, 2004 filings in Docket No. EL00-95-000

39. In response to a July 29, 2004 *Notice of Comment Procedures* in Docket No. EL00-95-000 concerning matters relating to the procedures, remaining steps and timeline for completing the calculation of refunds, filings were received that included comments relating to the chargeback proceedings.

40. On August 2, 2004 the PX made a filing stating that the issue of chargeback funds is pending rehearing. The PX states that it does not take a position on when or under what conditions participant collateral and chargeback funds should be ordered disbursed by the Commission. The PX states, however, that to the extent the Commission orders the PX to disburse collateral or chargeback funds prior to a final determination of “who owes what to whom” in the Refund Proceeding, including a true up as a result of any settlements, the PX asks to be held harmless from any third party claims for disbursing such funds and assets. The PX also asks for a determination that to the extent that collateral and/or chargeback funds are released, and it is later determined that a participant owes funds back as a result in the final refund/settlement calculations, the PX will not have the responsibility to recover such funds for the marketplace.²³

41. In its August 2, 2004 Comments, the PX also states that the Commission will need to determine the timing of the final disbursement of settlement clearing account cash and an allocation of any shortfall for interest, defaults/bankruptcy. The PX notes that settlements in the Refund Proceeding have the capability of reducing cash in the Settlement Clearing Account substantially and that \$1.6 billion of the PX’s \$1.7 billion claim against PG&E is held in an escrow account established by PG&E outside of the Settlement Clearing Account and outside of the PX’s control. The PX states another possible shortfall may result from the Mirant Corporation (Mirant) bankruptcy proceeding where Mirant has sought an order denying the PX the right of offset, regardless of any Commission determination to the contrary, of amounts owed to Mirant pursuant to the Refund Proceeding; in short, Mirant seeks to have any amounts owed to it in the PX’s markets paid in full, but then to the extent it owes refunds under the Refund Proceedings, to pay those refunds under the auspices of the bankruptcy court at what will likely be significantly reduced amounts.²⁴

²³ PX August 2, 2004 Comments on July 26, 2004 Technical Conference Matters at 7-8.

²⁴ *Id.* at 5-7.

42. The California Parties²⁵ also filed comments on August 2, 2004. The California Parties urge that the Commission should require that collateral and chargeback balances be retained until the final refund reruns are computed and the process of who owes what to whom is concluded. The California Parties state that it would be highly prejudicial to release any of these funds prior to the completion of this process, barring a settlement with a supplier of the amounts owed, in which case it may be appropriate to permit the release of such funds as a condition for settlement. The California Parties note that there is still a potential for shortfalls resulting from a possible outcome of the Mirant bankruptcy proceeding. The California Parties also note that there may be other entities that may not be able to meet their obligations once the refund reruns are completed and the amounts due and owing are computed. The California Parties conclude that the retention of collateral and cash that can be used in the event of such shortfalls is critical to ensuring the maximum recovery of refunds for consumers and that it would be inconsistent with Commission rulings to date to prematurely release such funds on the eve of a final resolution of refunds in the Refund Proceeding – absent a settlement with a specific supplier.²⁶

Discussion

43. We will not require the disbursement of chargeback funds until the completion of the Refund Proceedings.

44. In the April 6, 2001 Order the Commission ordered “the PX to: (1) rescind all prior chargeback actions related to PG&E’s and So Cal Edison’s liabilities; and (2) refrain from taking any future chargeback action related to PG&E’s and SoCal Edison’s liabilities.”²⁷ At issue on clarification/rehearing is whether the PX has complied with that order.

45. The PX has credited the chargebacks on the Account Summaries that it has issued to PX participants, but has not returned disbursed cash collected pursuant to the chargeback mechanism. On rehearing, the PX asked the Commission to clarify that it remained unable to pay all claims and to clarify how the PX is to handle any shortfall.

²⁵ The California Parties consist of the People of the State of California *ex rel.* Bill Lockyer, Attorney General, the California Oversight Board, the California Public Utilities Commission, SoCal Edison, PG&E and SDG&E.

²⁶ California Parties August 2, 2004 Comments on July 26, 2004 Technical Conference Matters at 8.

²⁷ 95 FERC ¶ 61,020 at 61,045 & 61,046 Ordering Paragraph (B).

On rehearing, the Complainants in Docket No. EL01-36-000 asked the Commission to clarify that the PX should return collateral to all PX participants. The Complainants in Docket No. EL01-36-001, after reading the PX's request for rehearing, apparently realized that the PX did not believe that the April 6, 2001 Order required disbursement of the chargeback funds and filed an answer to the PX's request for rehearing. The Complainants asked that the PX be required to disburse the chargebacks collected, and asked the Commission to require the PX to file an accounting of the chargeback revenues it has received and to whom they were flowed through, and establish dates certain on which (1) those market participants that received funds should return them to the PX and (2) the PX will flow refunds through to PX participants that were improperly required by the PX to pay chargebacks.

46. As is apparent by a review of the background above, a great deal of paper has been filed in this proceeding. Various parties desired that the Commission address issues beyond the narrow issue of the propriety of the chargebacks in the chargeback proceedings, filed in Docket Nos. EL01-36-000, EL01-37-000 and EL01-43-000. These issues included the issue of the return of PX participants' collateral, and how the PX should account for nonpayments by SoCal Edison and PG&E.²⁸ Events have overtaken these issues. The Commission has addressed the collateral issues in other dockets.²⁹ Given that SoCal Edison made a payment of \$875 million to the PX in 2002 while PG&E has deposited \$1.6 billion into an escrow account (outside of the PX's control), the issue of how to account for the nonpayments by SoCal Edison and PG&E, particularly in light of the Refund Proceedings where amounts due sellers will be substantially reduced (and as a result of which some sellers may become net debtors of the PX) has changed. Accordingly, we now believe the issue may be whether there will be any shortfall as a result of PG&E's and SoCal Edison's nonpayments at the conclusion of the Refund Proceedings, rather than how to account for such shortfalls. However, as pointed out by the California Parties, shortfalls may now occur as a result of actions in the Mirant

²⁸ In the April 2, 2001 Order, the Commission indicated that it would address the shortfall issue in this proceeding. *Id.* at 61,045-46. Following submission of the Settlement Agreement, the Commission, on December 19, 2001, indicated that it would address the Settlement Agreement in this proceeding. *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Service into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange*, 97 FERC ¶ 61,301 (2001).

²⁹ See *Powerex Corporation v. California Power Exchange Corporation*, 102 FERC ¶ 61,328 (2003), *order granting clarification and denying reh'g* 104 FERC ¶ 61,119 (2003); *Constellation Power Source, Inc.*, 100 FERC ¶ 61,124, *order on reh'g*, 100 FERC ¶ 61,380 (2002), *reh'g pending*.

bankruptcy proceedings, or as a result of the inability of various sellers to make refunds required by the Refund Proceedings. We therefore find that how to account for shortfalls is best decided in the Refund Proceedings after the computation of the final refund reruns and the determination of who owes what to whom is concluded. At that time it will become clear whether there are shortfalls and the extent of any shortfalls, following which a determination can be made on how to account for those shortfalls.

47. Turning to the issue of when to require disbursement of chargebacks. In light of our belief that the Refund Proceedings will soon be concluded, we believe that the disbursement of funds should wait until a final computation of who owes what to whom. This is particularly important given the chance that shortfalls, other than one caused by PG&E's and SoCal Edison's failure to pay, may occur and a determination of how to allocate that shortfall will need to be made. In the event that there is a shortfall of payments due from sellers, the shortfall may need to be allocated such that a seller with chargebacks that are being held by the PX, may not be entitled to the entire amount previously paid as a shortfall.³⁰ The retention of the chargeback amounts until the conclusion of the Refund Proceedings will accordingly assure the proper allocation of the chargeback funds upon the conclusion of the Refund Proceedings.

The Commission orders:

Rehearing of the Commission's April 2, 2001 Order is hereby denied as discussed in the body of this order. Clarification is granted, as discussed in the body of this order.

By the Commission. Commissioner Brownell dissenting in part with a separate statement.

(S E A L)

Linda Mitry,
Acting Secretary.

³⁰ This will also assure that those who paid their chargeback through receiving a reduced payment from the PX will be treated similarly to those who paid the chargeback in cash, both will receive a similar allocation of any shortfall.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company

v.

California Power Exchange Corporation

Docket No. EL01-29-001

Southern California Edison Company

v.

California Power Exchange Corporation

Docket No. EL01-33-001

Coral Power, LLC, 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.

California Power Exchange Corporation

Docket No. EL01-36-001

Salt River Project Agricultural Improvement
and Power District and Sacramento
Municipal Utility District

v.

California Power Exchange Corporation

Docket No. EL01-37-001

Public Service Company of New Mexico

v.

California Power Exchange Corporation

Docket No. EL01-43-000

(Issued October 7, 2004)

Nora Mead BROWNELL, Commissioner *dissenting in part*:

I am writing separately to express my opposition to the decision to allow the PX to continue to retain funds collected through the chargeback mechanism. On April 6, 2001, the Commission ordered the PX to “rescind all prior chargeback actions related to PG&E’s and So Cal Edison’s liabilities.” *Pacific Gas and Electric Company v. California Power Exchange Corporation*, 95 FERC ¶ 61,020 at 61,045 & 61,046 Ordering Paragraph B (2001). The PX did stop issuing new chargeback bills and ceased efforts to collect on chargeback bills it had already issued. However, despite the

Commission's clear directive, the PX apparently has never disbursed any funds to those unfortunate market participants who actually paid the chargeback bills the PX issued to them before April 6, 2001. On March 27, 2003, I concurred with the decision to defer action on the enforcement of the April 6, 2001 mandate pending the rehearing of that order; however, I did so based on my explicit understanding that the Commission would act promptly on that rehearing. *Powerex Corporation v. California Power Exchange Corporation*, 102 FERC ¶ 61,328 at 62,124 (2003). Today, a year and a half since I wrote that separate statement, the Commission is finally ruling on the rehearing of the April 6, 2001 order and is choosing to allow the PX to continue to retain the chargeback amounts that we directed it to release over three and a half years ago.

I have previously dissented from orders that have allowed the PX to retain collateral pending resolution of the refund proceeding. As I explained in a statement issued on August 8, 2002, in *Constellation Power Source, Inc. v. California Power Exchange Corporation*, Docket No. EL02-104-000, 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. For the same reasons, I regret that we have allowed the PX to retain the chargeback amounts for as long as it has and would order the PX to release these funds immediately. Therefore, I dissent from this portion of today's order.

Nora Mead Brownell