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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re PACIFIC GAS & ELECTRIC COMPANY, a California Corporation, Debtor.	Case No. 01-30923 DM Chapter 11 **OPPOSITION OF CORAL POWER, L.L.C. TO DEBTOR'S OMNIBUS OBJECTION TO PX CHARGE-BACK CLAIMS** Date: March 27, 2003 Time: 1:30 p.m. Place: 235 Pine Street, 22nd Floor, San Francisco, California Judge: Hon. Dennis Montali

A001 Add: Rids Ogc Mail Center

Creditor Coral Power, L.L.C. ("Coral") files this Opposition to Debtor's Omnibus Objection to PX Charge-Back Claims, filed January 28, 2002 (the "Objection"). Coral accounts for approximately $253, 379.97 of the $10 million that Pacific Gas & Electric Company ("PG&E") seeks to disallow through the Objection.

The Objection seeks to have this Court decide issues that arise under the California Power Exchange ("PX") FERC tariff and that are currently pending before FERC. FERC has repeatedly deferred consideration of any decision on the issues PG&E is asking this Court to decide. Instead of waiting for FERC to decide all issues relating to PX claims, as contemplated by PG&E's own Plan of Reorganization, PG&E is seeking to "pick and choose" line item entries from PX account statements and have this Court disallow selected items because PG&E believes that FERC could not possibly assess liability against PG&E for those items.

Any action by this Court to delve into certain elements of PX account statements and select which line item entries should or should not be assessed against PG&E, completely out of context and in conflict with FERC jurisdiction over these matters, is unwise, unnecessary and potentially prejudicial to Coral should FERC ultimately not follow suit. Furthermore, the Objection is contrary to both PG&E's proposed Plan and the already confirmed PX Plan of Reorganization, both of which contemplate that the amounts owed to energy sellers for sales through the PX and ISO markets will be determined by FERC.

The Objection should be denied.

I. BACKGROUND

In January and February, 2001, when PG&E and Southern California Edison ("SCE") defaulted in payment of their debts to the PX, the PX invoked the seldom used "chargeback" provisions of the PX tariff. The tariff provided that payment defaults of any market participants were to be allocated among (*i.e.*, "charged back" against) all other market participants based on their gross

sales into the PX for the prior three-month period.

Commencing with SCE's default on January 18, 2001, PX invoiced chargebacks to market participants. In some cases, participants paid the invoices. In other cases, the charges were a debit on the participants' "rolling" PX account statements. Thus, if a market participant had a receivable owing from the PX at the time, the chargeback would be debited against and reduce what would otherwise be owing to the participant.

The PX collected some $15 million in cash paid by market participants for chargebacks. (Request for Judicial Notice attached to Opposition of Powerex Corp., Portland General Electric Co., Avista Energy, Inc., Idaho Power Company, and AES Placerita, Inc.'s to Debtor's Omnibus Objection to PX Chargeback Claims ("RJN"), Ex. K, at 4, ¶ 7.) The cash payments, however, were only a small portion of the chargebacks that market participants effectively paid through offsets against what the PX would otherwise have paid to them. During the period of January 18, 2001 (when the first chargebacks were assessed) through March 5, 2001 (when they were halted by a preliminary injunction, discussed below), the PX distributed some $385 million to participants for prior energy sales, using allocations that incorporated the chargebacks. (RJN, Ex. F, at 4, ¶ 7.) Thus, the Objection is misleading in its references to market participants who "paid" chargebacks, as if the only chargebacks that were paid were those reflected in cash payments collected by the PX for SCE chargebacks. Chargebacks were also effectively "paid" on account of PG&E's default, even though they may not have been paid in cash.

Soon after the chargebacks began, a number of market participants filed suit in the U.S. District Court for the Central District of California to halt the chargebacks. Market participants also initiated five proceedings before FERC challenging the chargebacks ("the Chargeback Proceedings").[1]

[1] The Chargeback Proceedings are FERC Docket Nos. EL01-29-000 (filed by PG&E), EL0133-000, EL01-36-000,

On March 5, 2001, the U.S. District Court issued a preliminary injunction to enjoin further chargebacks pending determination of the Chargeback Proceedings at FERC. (RJN, Ex. A.). In the preliminary injunction, the District Court acknowledged that "FERC has jurisdiction over the issues before it relating to the 'chargebacks'." (*Id.* at 2.). The District Court enjoined the PX from issuing invoices for chargebacks, or collecting chargebacks, either in cash by offsets against what may otherwise be due. (*Id.* at 3.).

On April 6, 2001, as PG&E notes in the Objection, FERC issued an order (the "April 6 Order") in the Chargeback Proceedings terminating the chargebacks, ruling that the chargeback provision in the PX tariff "was not designed to address default of this magnitude and, thus, its application in these circumstances is unjust and unreasonable." (RJN, Ex. B, at 13-14.). Accordingly, FERC directed the PX to rescind all prior chargeback actions related to PG&E and SCE defaults and refrain from taking any future chargeback actions. (*Id.*).[2]

What PG&E fails to disclose in its Objection is that in the same April 6 Order in which FERC suspended the chargebacks, FERC deferred action on an alternative methodology to account for the nonpayments by SCE and PG&E. FERC stated that two pending state court proceedings—a SCE suit alleging that its nonpayment was excused, and the PX's claim before the Government Claims Board seeking compensation for the Governor's commandeering of forward contracts posted as security for SCE and PG&E's obligations—might have "significant implications" on FERC's decision. (RJN, Ex. B, at 14.). FERC stated:

> With regard to the ultimate question of how the PX should account for the nonpayments by SoCal Edison and PG&E, we note that a decision on either SoCal Edison's State Court Complaint, concerning whether it is, in fact, in default, or the PX's Government Claims Board Complaint, seeking compensation for the State of

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ELOI-37-000 and ELOI-43-000.

[2] After the FERC issued its April 6 Order, the PX reversed the chargebacks in the market participants' account statements, but it did not return the cash payments, nor did it make compensating payments for the chargeback offsets that were reversed. Since the District Court's preliminary injunction, all undistributed amounts collected by the PX, including the cash chargeback payments, have been held in suspense by the PX, awaiting FERC determination as to the amounts owed by and to each market participant, including the utilities.

> California's commandeering of PG&E and SoCal Edison's block forward contracts, would have significant implications. Therefore, we will defer further action on this matter.

(RJN, Ex. B, at 14). FERC instructed the PX to report on the status of the unresolved state court proceedings within 100 days of the April 6 Order, after which the PX would consider "further action" in the chargeback proceedings. (*Id.* at 16.).

To this date, FERC has not taken further action on the allocation of the SCE and PG&E defaults—notwithstanding various parties' request that it do so. The issue is *still* pending before FERC. FERC may be delaying any further rulings until after the "refund" and possibly other proceedings are completed. Moreover, as demonstrated below, PG&E has been in the forefront in opposing any action by FERC to adopt an alternative allocation methodology in advance of the completion of the "refund" and other proceedings.

On July 1, 2001, PX filed its "100 day" report as directed by FERC in the April 6 Order. (RJN, Ex. C.). The PX reported that neither of the two state court proceedings referenced in the April 6 Order had been resolved, nor were they likely to be resolved in the immediate future. The PX urged FERC not to wait any longer and to proceed promptly to decide on a replacement formula for allocating SCE's and PG&E's defaults in lieu of the chargeback mechanism that FERC reversed in the April 6 Order. (*Id.*, at 4-5.). The PX noted that a final settlement of the market participants' trading positions would continue to be at a standstill "until a determination is reached on the ultimate question of how PX is to deal with the shortfall caused by the SCE and PG&E nonpayments." (*Id.* at 5.). Still, FERC took no action.

Subsequently, the official PX Participants Committee appointed by the Bankruptcy Court in the PX bankruptcy case (the "Participants Committee") and a group consisting of five of the largest power generators (the "Generator Group") filed separate motions in the FERC Chargeback Proceedings, both urging FERC to decide on an alternative mechanism for allocating SCE and PG&E

shortfalls, so that funds held by the PX could be distributed. (RJN, Ex. D, G.). Both groups made proposals for how the SCE and PG&E defaults should be allocated.

The Participants Committee's proposal (an "Offer of Settlement" under FERC terminology), filed on October 5, 2001, included a specific recommendation that the $15 million that the PX had collected in cash chargeback payments be returned to the participants who paid them. (RJN Ex. D, at 8, Ex. E, at 14-16.). PG&E opposed the Participants Committee's proposal, including return of cash chargebacks, arguing that it "fails to take into account that the same amounts owed to and by the various PX Participants . . . are the subject of disputes pending in various forums, including various FERC proceedings . . . ." (RJN, Ex. H, at 3.). PG&E specifically opposed any return of the cash chargeback payments separate from the "true-up" of all other debits and credits owing between the market participants and the utilities. (*Id.* at 4-5.).

On December 19, 2001, FERC stayed consideration of the Participants Committee's proposal, and reaffirmed its intent to delay action on an alternative to the chargebacks for allocating liability for defaults, again citing the two state court proceedings referenced in its April 6 Order. (RJN, Ex. I.). The FERC also directed that the Participants Committee's proposal not be considered in the "refund" proceedings, stating:

> [T]he matters proposed to be resolved by the Offer of Settlement [i.e., the Participants Committee's proposal], will likely be impacted by other pending proceedings. . . . Likewise, in PG&E v. CalPX [the Chargeback Proceedings], the Commission noted that the question of how the CalPX should account for the nonpayments by SoCalEdison and PG&E would be significantly impacted by a decision on either SoCal Edison's Complaint, concerning whether it is, in fact, in default, or Cal PX's Government Claims Board Complaint, seeking compensation for the State of California's 'commandeering' of PG&E and SoCal Edison's block forward contracts.
>
> Because of the related, ongoing proceedings before the Commission and in other forums, it is inappropriate for the Offer of Settlement to be considered in the context of the refund proceeding. Rather, the Commission will address the Offer of Settlement at a future time.

(RJN, Ex. I, at 3-4.). The FERC has to this date still not addressed the chargeback allocation issues

in the Participants Committee proposal, or modified its April 6 Order deferring consideration of how PG&E and SCE defaults should be allocated until other proceedings are completed.

In the Generator Group's allocation proposal, filed on March 22, 2002—nearly a year after the April 6 Order—the Generator Group argued that because of subsequent events, it no longer served any purpose for FERC to delay action on account of the two state court proceedings cited in the April 6 Order. (RJN, Ex. G, at 4-5.). The Generator Group noted that SCE had made a payment of $875 million to the PX toward satisfaction of its default, thus "effectively negating the need for an allocation of the prior shortfall attributable to SCE." (*Id.* at 5.).

PG&E disagreed. Not only did PG&E oppose any distribution of funds held by the PX (including the chargeback payments and the $875 million paid by SCE), it opposed any action by FERC to determine an allocation formula, on the ground that not only the FERC "refund" proceedings, but other proceedings "have the potential to result in reallocation of tens or hundreds of millions of dollars in charges leading to further modifications in the billed and settlement amounts for PX Market and ISO Market transactions." (RJN, Ex. J, at 9.).

PG&E cited FERC's prior rulings that the "ultimate question" of allocating PG&E and SCE's nonpayments was to be deferred pending the ongoing state proceedings involving SCE and the commandeering action. (*Id.* at 10.). PG&E argued, contrary to the Generator Group's claim of changed circumstances, that the state proceedings had not been resolved and that "the circumstances on which the Commission based its decision to defer its consideration of these issues have remained essentially the same." (*Id.* at 11-12.). Finally, PG&E quoted to FERC its December 19, 2001 ruling declining to act on the Participants Committee's allocation proposal "because of the related, ongoing proceedings before the Commission and in other forums." (*Id.* at 10.).

To Coral's knowledge, FERC has never ruled on the Generator Group's proposal, just as it has never ruled on the Participants Committee's proposal or on the PX's repeated requests that FERC

adopt a replacement to the chargebacks for allocating the PG&E and SCE defaults. Thus, the issue is still before FERC.

II. ARGUMENT

A. This Court Should Not Usurp FERC's Function in Allocating Responsibility for Defaults and Chargebacks.

PG&E offers a simplistic and superficial argument that it cannot possibly be held liable for the chargebacks payments because PX attributes them to SCE's default. The response is equally simple. Although FERC terminated the chargeback mechanism in the PX tariff and ordered the chargebacks rescinded, it has yet to rule on the "ultimate question" of how to allocate the nonpayments by SCE and PG&E. It is FERC's responsibility to do so, and until it does, no part of the market participants' loss attributable to either SCE or PG&E's nonpayment can be arbitrarily disallowed.

FERC has repeatedly directed, by express order or inaction, the PX not take any action to apportion the burden for SCE and PG&E defaults until FERC decides on a replacement for the chargebacks. Until then, it is premature and inappropriate for this Court to determine, as a matter of law, that SCE defaults could not possibly affect the amount owed by PG&E to Coral, or reduce Coral's claim by the amount of cash payments it made to the PX for SCE-related chargebacks.

The PX account statements consist of a series of debits and credits, resulting in a net amount owed to (or by) market participants who transacted in the PX markets. As PG&E has noted, most energy sellers have filed claims against PG&E for the entire unpaid amounts owed for their sales into the PX. Until FERC rules "on the ultimate question" of how to apportion the unpaid energy debt attributable to SCE's and PG&E's default, energy sellers cannot determine how much of their unpaid energy bill will ultimately be the liability of SCE, and how much will be borne by PG&E.

PG&E's request that the Court disallow a portion of the participants' claims, in advance of FERC's decision and based on the amount that the PX states is attributable to cash payments for SCE

chargebacks, is a dangerous and slippery slope. Undoubtedly, PG&E or this Court could go through each PX account statement in detail and disallow portions of the claims based on individual line items that the PX attributes to SCE or parties other than PG&E. For that matter, it would be equally possible for the Court to go through the account statements and partially allow participant claims based on those line items stated by the PX to be attributable to PG&E's nonpayment.

The fact is that FERC has not made any determination regarding the PX account statements, including the PX's apportionment of responsibility for chargebacks, for or against any party. The accuracy and validity of PX and ISO account statements and interpretations are not without dispute and controversy. Even if Coral was to accept as absolutely infallible the characterizations made by PX in its account statements, it has no assurance that all other interested parties will agree or that FERC will follow suit. There is no assurance that FERC will ultimately decide to apportion solely to SCE the chargebacks that PX assessed on account of SCE's default, while apportioning solely to PG&E the chargebacks PX assessed on account of PG&E's defaults. While this may seem eminently logical to PG&E, or to the Court, that simple proposition has yet to be adopted by FERC despite numerous opportunities to do so. This Court should not intervene to make determinations on liability for chargebacks when FERC has thus far refused to do so and when the matter is still pending before FERC and is undisputedly within the jurisdiction of FERC.

B. The Fact that the PX is Holding the Cash Chargeback Payments is Not Reason for Disallowance of Claims Attributable to Chargebacks.

PG&E attempts to portray the issue as whether PG&E can be legally held liable for "PX's failure to return the Claimants' PX Charge-backs arising from SCE's default, which PX collected and currently holds." (Objection at 6.) None of the proofs of claim referenced in the Objection and accompanying Orbeta Declaration seek to hold PG&E liable because of the PX's failure to return the cash chargebacks. Rather, the chargebacks, whether paid by cash or offset against amounts owing to Coral, are included in the claims because they reflect unpaid amounts owed to Coral on account

of its transactions in the PX markets. As discussed above, until FERC determines PG&E's share of the liability for the unpaid energy debt, there is no basis for this Court picking and choosing which line items in the PX account statements should be allowed and which should be disallowed.

That the PX is holding the funds in a segregated account (a decision made by PX on its own), has no bearing on PG&E's potential liability, or lack thereof, for chargebacks. The PX Plan of Reorganization—which PG&E has attached to its Objection—itself recognizes that the chargeback payments held by the PX cannot be released until FERC authorizes release. While Coral would be the first to welcome a FERC decision that the $15 million held by the PX should be paid back to those sellers who paid the cash chargebacks, FERC has yet to agree. Until FERC so orders, this Court cannot assume that the funds will be distributed to those who paid the cash chargebacks.

While PG&E now cites the availability of the PX fund in seeking to disallow Coral's claim in this Court, PG&E has consistently objected to FERC authorizing the PX to distribute the $15 million to the market participants who paid the money. As discussed above, PG&E has itself argued repeatedly that repayment of chargebacks and determination of chargeback issues—including FERC's decision on an alternative mechanism for apportioning liability for PG&E's and SCE's nonpayment—must await not only the "refund" proceedings but the conclusion of a "myriad of proceedings affecting the financial obligations of the participants in the PX and ISO markets." (RJN, Ex. J, at 12.). PG&E's contradictory statements in this Court should be rejected. Indeed, PG&E's contrary position before FERC should judicially estop PG&E from taking a different position before this Court.

C. The Objection Violates the Agreement with Class 6 Creditors that Allowance of Claims for PX Transactions Would be Determined in FERC.

When a number of PX market participants objected to the PG&E Plan of Reorganization, PG&E entered into a stipulation (the "Stipulation") with the objecting creditors that included Plan modifications pertaining to the allowance and payment of Class 6 claims, which are the claims arising

out of PX and ISO transactions. (RJN, Ex. K, at 3, ¶ 1(d).). Pursuant to the Stipulation, PG&E modified its Plan on October 18, 2002 to provide that Class 6 claims would automatically become Allowed Claims in the PG&E bankruptcy on the date designated by FERC for payment of PX/ISO related debts in an FERC unstayed order, or within 45 days after the FERC order, if no payment date was designated. (RJN, Ex. L, at 4, ¶ 2 (a).). This agreement between PG&E and Class 6 creditors acknowledged that the participants' claims for PX and ISO unpaid debts would be determined at FERC, not in the Bankruptcy Court.

Even prior to the Stipulation, PG&E had represented in its approved Disclosure Statement that the PX/ISO claims would be determined at FERC:

> The Debtor agrees that for purposes of final determination of Allowed ISO, PX and Generator Claims, the Debtor will prosecute its contentions before the FERC and will not attempt to obtain a determination of such matters before the Bankruptcy Court or any other form, except . . . to the extent the Debtor has an objection unrelated to the subject matter of the FERC proceedings.

Disclosure Statement, at 121-22, n.65. These representations were added to the Disclosure Statement by PG&E expressly for the purpose of resolving, and obtaining withdrawal of, a Disclosure Statement objection filed by the Participants Committee. PG&E can hardly claim that the chargeback issues are "unrelated to the subject matter of the FERC proceedings" when there are proceedings pending at FERC in which the chargebacks are the subject matter.

The PX Plan of Reorganization, proposed by the Participants Committee and confirmed by the Bankruptcy Court in the PX bankruptcy case, also provides that the amount of each participant's claim "shall be determined in accordance with a calculation methodology or allocation established pursuant to rule, order or judgment of FERC." (PG&E Objection, Ex. C, Ex. 3 ["Allowance and Distribution Procedures"], at 5.). As noted above, the PX Plan expressly provides that the $15 million held by PX for cash chargeback payments may be distributed only when authorized by FERC. The PX Plan was extensively negotiated with PG&E and ultimately supported by PG&E before it

was confirmed.

PG&E's attempt to have this Court selectively disallow portions of the participants' claims based on what PX account statements may or may not attribute to PG&E's payment default is contrary to the Stipulation between Class 6 creditors and PG&E, under which objecting Class 6 creditors withdrew their objections to the PG&E Plan and agreed to vote for the Plan. The Objection is contrary to the representations PG&E made in its approved Disclosure Statement circulated to 30,000 creditors. It is also contrary to the PX Plan that was confirmed with PG&E's consent.

III. CONCLUSION

For the various reasons discussed above, Coral requests that the Court deny PG&E's Omnibus Objection to PX Charge-back Claims, and leave the determination on allocation of liability for chargeback payments to FERC.

DATED: February 27, 2003

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By _____
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Coral Power, L.L.C.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Coral Power, L.L.C.'s Opposition to Debtor's Omnibus Objection to PX Charge-Back Claims has been served by first class U.S. mail, postage prepaid on this 27th day of February, 2003 to the parties on the attached Service List.

_____
Robert E. Darby