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*50-275/323*

Attorney for Creditor  
 CORAL POWER, L.L.C.

UNITED STATES BANKRUPTCY COURT  
 NORTHERN DISTRICT OF CALIFORNIA

In re	)	Case No. 01-30923 DM
	)	Chapter 11
PACIFIC GAS & ELECTRIC	)	<b>OPPOSITION OF CORAL</b>
COMPANY, a California Corporation,	)	<b>POWER, L.L.C. TO DEBTOR'S</b>
	)	<b>OMNIBUS OBJECTION TO PX</b>
	)	<b>CHARGE-BACK CLAIMS</b>
	)	Date: March 27, 2003
Debtor.	)	Time: 1:30 p.m.
	)	Place: 235 Pine Street, 22 <sup>nd</sup> Floor,
	)	San Francisco, California
	)	Judge: Hon. Dennis Montali
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1           Creditor Coral Power, L.L.C. ("Coral") files this Opposition to Debtor's Omnibus Objection  
2 to PX Charge-Back Claims, filed January 28, 2002 (the "Objection"). Coral accounts for  
3 approximately \$253,379.97 of the \$10 million that Pacific Gas & Electric Company ("PG&E") seeks  
4 to disallow through the Objection.

5  
6           The Objection seeks to have this Court decide issues that arise under the California Power  
7 Exchange ("PX") FERC tariff and that are currently pending before FERC. FERC has repeatedly  
8 deferred consideration of any decision on the issues PG&E is asking this Court to decide. Instead  
9 of waiting for FERC to decide all issues relating to PX claims, as contemplated by PG&E's own Plan  
10 of Reorganization, PG&E is seeking to "pick and choose" line item entries from PX account  
11 statements and have this Court disallow selected items because PG&E believes that FERC could not  
12 possibly assess liability against PG&E for those items.

13  
14           Any action by this Court to delve into certain elements of PX account statements and select  
15 which line item entries should or should not be assessed against PG&E, completely out of context  
16 and in conflict with FERC jurisdiction over these matters, is unwise, unnecessary and potentially  
17 prejudicial to Coral should FERC ultimately not follow suit. Furthermore, the Objection is contrary  
18 to both PG&E's proposed Plan and the already confirmed PX Plan of Reorganization, both of which  
19 contemplate that the amounts owed to energy sellers for sales through the PX and ISO markets will  
20 be determined by FERC.

21  
22           The Objection should be denied.

23           **I. BACKGROUND**

24           In January and February, 2001, when PG&E and Southern California Edison ("SCE")  
25 defaulted in payment of their debts to the PX, the PX invoked the seldom used "chargeback"  
26 provisions of the PX tariff. The tariff provided that payment defaults of any market participants were  
27 to be allocated among (*i.e.*, "charged back" against) all other market participants based on their gross  
28

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

2 Commencing with SCE's default on January 18, 2001, PX invoiced chargebacks to market  
3 participants. In some cases, participants paid the invoices. In other cases, the charges were a debit  
4 on the participants' "rolling" PX account statements. Thus, if a market participant had a receivable  
5 owing from the PX at the time, the chargeback would be debited against and reduce what would  
6 otherwise be owing to the participant.  
7

8 The PX collected some \$15 million in cash paid by market participants for chargebacks.  
9 (Request for Judicial Notice attached to Opposition of Powerex Corp., Portland General Electric Co.,  
10 Avista Energy, Inc., Idaho Power Company, and AES Placerita, Inc.'s to Debtor's Omnibus  
11 Objection to PX Chargeback Claims ("RJN"), Ex. K, at 4, ¶ 7.) The cash payments, however, were  
12 only a small portion of the chargebacks that market participants effectively paid through offsets  
13 against what the PX would otherwise have paid to them. During the period of January 18, 2001  
14 (when the first chargebacks were assessed) through March 5, 2001 (when they were halted by a  
15 preliminary injunction, discussed below), the PX distributed some \$385 million to participants for  
16 prior energy sales, using allocations that incorporated the chargebacks. (RJN, Ex. F, at 4, ¶ 7.) Thus,  
17 the Objection is misleading in its references to market participants who "paid" chargebacks, as if the  
18 only chargebacks that were paid were those reflected in cash payments collected by the PX for SCE  
19 chargebacks. Chargebacks were also effectively "paid" on account of PG&E's default, even though  
20 they may not have been paid in cash.  
21  
22

23 Soon after the chargebacks began, a number of market participants filed suit in the U.S.  
24 District Court for the Central District of California to halt the chargebacks. Market participants also  
25 initiated five proceedings before FERC challenging the chargebacks ("the Chargeback  
26 Proceedings").<sup>1</sup>  
27

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<sup>1</sup> The Chargeback Proceedings are FERC Docket Nos. ELO1-29-000 (filed by PG&E), ELO133-000, ELO1-36-000,

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

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

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

23           With regard to the ultimate question of how the PX should account for the  
24 nonpayments by SoCal Edison and PG&E, we note that a decision on either SoCal  
25 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

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

27 <sup>2</sup> After the FERC issued its April 6 Order, the PX reversed the chargebacks in the market participants’ account  
28 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.

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

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

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

13  
14 On July 1, 2001, PX filed its "100 day" report as directed by FERC in the April 6 Order.  
15 (RJN, Ex. C.). The PX reported that neither of the two state court proceedings referenced in the April  
16 6 Order had been resolved, nor were they likely to be resolved in the immediate future. The PX  
17 urged FERC not to wait any longer and to proceed promptly to decide on a replacement formula for  
18 allocating SCE's and PG&E's defaults in lieu of the chargeback mechanism that FERC reversed in  
19 the April 6 Order. (*Id.*, at 4-5.). The PX noted that a final settlement of the market participants'  
20 trading positions would continue to be at a standstill "until a determination is reached on the ultimate  
21 question of how PX is to deal with the shortfall caused by the SCE and PG&E nonpayments." (*Id.*  
22 at 5.). Still, FERC took no action.

23  
24 Subsequently, the official PX Participants Committee appointed by the Bankruptcy Court in  
25 the PX bankruptcy case (the "Participants Committee") and a group consisting of five of the largest  
26 power generators (the "Generator Group") filed separate motions in the FERC Chargeback  
27 Proceedings, both urging FERC to decide on an alternative mechanism for allocating SCE and PG&E  
28

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

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

12  
13  
14 On December 19, 2001, FERC stayed consideration of the Participants Committee's proposal,  
15 and reaffirmed its intent to delay action on an alternative to the chargebacks for allocating liability  
16 for defaults, again citing the two state court proceedings referenced in its April 6 Order. (RJN, Ex.  
17 I.). The FERC also directed that the Participants Committee's proposal not be considered in the  
18 "refund" proceedings, stating:

19 [T]he matters proposed to be resolved by the Offer of Settlement [i.e., the Participants  
20 Committee's proposal], will likely be impacted by other pending proceedings. . . .  
21 Likewise, in PG&E v. CalPX [the Chargeback Proceedings], the Commission noted  
22 that the question of how the CalPX should account for the nonpayments by  
23 SoCal Edison and PG&E would be significantly impacted by a decision on either  
24 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.

25 Because of the related, ongoing proceedings before the Commission and in other  
26 forums, it is inappropriate for the Offer of Settlement to be considered in the context  
27 of the refund proceeding. Rather, the Commission will address the Offer of  
28 Settlement at a future time.

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

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

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

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

16  
17 PG&E cited FERC's prior rulings that the “ultimate question” of allocating PG&E and SCE's  
18 nonpayments was to be deferred pending the ongoing state proceedings involving SCE and the  
19 commandeering action. (*Id.* at 10.). PG&E argued, contrary to the Generator Group's claim of  
20 changed circumstances, that the state proceedings had not been resolved and that “the circumstances  
21 on which the Commission based its decision to defer its consideration of these issues have remained  
22 essentially the same.” (*Id.* at 11-12.). Finally, PG&E quoted to FERC its December 19, 2001 ruling  
23 declining to act on the Participants Committee's allocation proposal “because of the related, ongoing  
24 proceedings before the Commission and in other forums.” (*Id.* at 10.).

25  
26 To Coral's knowledge, FERC has never ruled on the Generator Group's proposal, just as it  
27 has never ruled on the Participants Committee's proposal or on the PX's repeated requests that FERC  
28

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

## 3 II. ARGUMENT

### 4 A. This Court Should Not Usurp FERC's Function in Allocating 5 Responsibility for Defaults and Chargebacks.

6 PG&E offers a simplistic and superficial argument that it cannot possibly be held liable for  
7 the chargebacks payments because PX attributes them to SCE's default. The response is equally  
8 simple. Although FERC terminated the chargeback mechanism in the PX tariff and ordered the  
9 chargebacks rescinded, it has yet to rule on the "ultimate question" of how to allocate the  
10 nonpayments by SCE and PG&E. It is FERC's responsibility to do so, and until it does, no part of  
11 the market participants' loss attributable to either SCE or PG&E's nonpayment can be arbitrarily  
12 disallowed.  
13

14 FERC has repeatedly directed, by express order or inaction, the PX not take any action to  
15 apportion the burden for SCE and PG&E defaults until FERC decides on a replacement for the  
16 chargebacks. Until then, it is premature and inappropriate for this Court to determine, as a matter of  
17 law, that SCE defaults could not possibly affect the amount owed by PG&E to Coral, or reduce  
18 Coral's claim by the amount of cash payments it made to the PX for SCE-related chargebacks.  
19

20 The PX account statements consist of a series of debits and credits, resulting in a net amount  
21 owed to (or by) market participants who transacted in the PX markets. As PG&E has noted, most  
22 energy sellers have filed claims against PG&E for the entire unpaid amounts owed for their sales into  
23 the PX. Until FERC rules "on the ultimate question" of how to apportion the unpaid energy debt  
24 attributable to SCE's and PG&E's default, energy sellers cannot determine how much of their unpaid  
25 energy bill will ultimately be the liability of SCE, and how much will be borne by PG&E.  
26

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



1 chargebacks, is a dangerous and slippery slope. Undoubtedly, PG&E or this Court could go through  
2 each PX account statement in detail and disallow portions of the claims based on individual line items  
3 that the PX attributes to SCE or parties other than PG&E. For that matter, it would be equally  
4 possible for the Court to go through the account statements and partially allow participant claims  
5 based on those line items stated by the PX to be attributable to PG&E's nonpayment.  
6

7 The fact is that FERC has not made any determination regarding the PX account statements,  
8 including the PX's apportionment of responsibility for chargebacks, for or against any party. The  
9 accuracy and validity of PX and ISO account statements and interpretations are not without dispute  
10 and controversy. Even if Coral was to accept as absolutely infallible the characterizations made by  
11 PX in its account statements, it has no assurance that all other interested parties will agree or that  
12 FERC will follow suit. There is no assurance that FERC will ultimately decide to apportion solely  
13 to SCE the chargebacks that PX assessed on account of SCE's default, while apportioning solely to  
14 PG&E the chargebacks PX assessed on account of PG&E's defaults. While this may seem eminently  
15 logical to PG&E, or to the Court, that simple proposition has yet to be adopted by FERC despite  
16 numerous opportunities to do so. This Court should not intervene to make determinations on liability  
17 for chargebacks when FERC has thus far refused to do so and when the matter is still pending before  
18 FERC and is undisputedly within the jurisdiction of FERC.  
19

20  
21 **B. The Fact that the PX is Holding the Cash Chargeback Payments is Not  
22 Reason for Disallowance of Claims Attributable to Chargebacks.**

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

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

4  
5 That the PX is holding the funds in a segregated account (a decision made by PX on its own),  
6 has no bearing on PG&E's potential liability, or lack thereof, for chargebacks. The PX Plan of  
7 Reorganization—which PG&E has attached to its Objection—itself recognizes that the chargeback  
8 payments held by the PX cannot be released until FERC authorizes release. While Coral would be  
9 the first to welcome a FERC decision that the \$15 million held by the PX should be paid back to  
10 those sellers who paid the cash chargebacks, FERC has yet to agree. Until FERC so orders, this  
11 Court cannot assume that the funds will be distributed to those who paid the cash chargebacks.

12  
13 While PG&E now cites the availability of the PX fund in seeking to disallow Coral's claim  
14 in this Court, PG&E has consistently objected to FERC authorizing the PX to distribute the \$15  
15 million to the market participants who paid the money. As discussed above, PG&E has itself argued  
16 repeatedly that repayment of chargebacks and determination of chargeback issues—including  
17 FERC's decision on an alternative mechanism for apportioning liability for PG&E's and SCE's  
18 nonpayment—must await not only the "refund" proceedings but the conclusion of a "myriad of  
19 proceedings affecting the financial obligations of the participants in the PX and ISO markets." (RJN,  
20 Ex. J, at 12.). PG&E's contradictory statements in this Court should be rejected. Indeed, PG&E's  
21 contrary position before FERC should judicially estop PG&E from taking a different position before  
22 this Court.  
23

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

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

1 out of PX and ISO transactions. (RJN, Ex. K, at 3, ¶ 1(d)). Pursuant to the Stipulation, PG&E  
2 modified its Plan on October 18, 2002 to provide that Class 6 claims would automatically become  
3 Allowed Claims in the PG&E bankruptcy on the date designated by FERC for payment of PX/ISO  
4 related debts in an FERC unstayed order, or within 45 days after the FERC order, if no payment date  
5 was designated. (RJN, Ex. L, at 4, ¶ 2 (a)). This agreement between PG&E and Class 6 creditors  
6 acknowledged that the participants' claims for PX and ISO unpaid debts would be determined at  
7 FERC, not in the Bankruptcy Court.  
8

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

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

15 Disclosure Statement, at 121-22, n.65. These representations were added to the Disclosure Statement  
16 by PG&E expressly for the purpose of resolving, and obtaining withdrawal of, a Disclosure Statement  
17 objection filed by the Participants Committee. PG&E can hardly claim that the chargeback issues  
18 are "unrelated to the subject matter of the FERC proceedings" when there are proceedings pending  
19 at FERC in which the chargebacks are the subject matter.  
20

21 The PX Plan of Reorganization, proposed by the Participants Committee and confirmed by  
22 the Bankruptcy Court in the PX bankruptcy case, also provides that the amount of each participant's  
23 claim "shall be determined in accordance with a calculation methodology or allocation established  
24 pursuant to rule, order or judgment of FERC." (PG&E Objection, Ex. C, Ex. 3 ["Allowance and  
25 Distribution Procedures"], at 5.). As noted above, the PX Plan expressly provides that the \$15  
26 million held by PX for cash chargeback payments may be distributed only when authorized by FERC.  
27 The PX Plan was extensively negotiated with PG&E and ultimately supported by PG&E before it  
28

1 was confirmed.

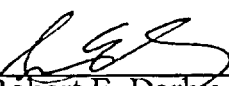
2 PG&E's attempt to have this Court selectively disallow portions of the participants' claims  
3 based on what PX account statements may or may not attribute to PG&E's payment default is  
4 contrary to the Stipulation between Class 6 creditors and PG&E, under which objecting Class 6  
5 creditors withdrew their objections to the PG&E Plan and agreed to vote for the Plan. The Objection  
6 is contrary to the representations PG&E made in its approved Disclosure Statement circulated to  
7 30,000 creditors. It is also contrary to the PX Plan that was confirmed with PG&E's consent.

9 **III. CONCLUSION**

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

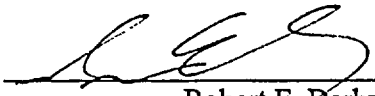
14 DATED: February 27, 2003

ROBERT E. DARBY  
FULBRIGHT & JAWORSKI L.L.P.

17 By   
18 Robert E. Darby  
19 Attorney for Creditor  
Coral Power, L.L.C.

20 **CERTIFICATE OF SERVICE**

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

25   
Robert E. Darby