

118 FERC ¶ 61, 189  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

La Paloma Generating Company, LLC

Docket No. EL05-54-001

v.

California Independent System Operator Corporation

ORDER DENYING REHEARING

(Issued March 8, 2007)

1. This order denies a request for rehearing filed by La Paloma Generating Company, LLC (La Paloma) of the Commission's March 29, 2005 order in this proceeding.<sup>1</sup> In that order, the Commission denied a complaint filed by La Paloma against the California Independent System Operator Corporation (CAISO), seeking the release of collateral posted with the CAISO as a condition for participating in the CAISO-operated markets. Specifically, the Commission found that the CAISO's retention of the collateral in question did not violate the CAISO's tariff.

**I. Background**

**A. La Paloma's Complaint**

2. In order to perform transactions in the CAISO-operated market, La Paloma, an exempt wholesale generator, temporarily engaged Scheduling Coordinator services of NEGT Energy Trading-Power, L.P. (ET). ET posted a cash collateral with the CAISO on

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<sup>1</sup> *La Paloma Generating Company, LLC v. California Independent System Operator Corporation*, 110 FERC ¶ 61,386 (2005) (*March 29 Order*). Commissioner Brownell dissented from the *March 29 Order*.

La Paloma's behalf first in December 2002, and again in March 2003. Currently, the amount of the cash collateral is \$6,414,540.

3. In May 2003, ET ceased providing Scheduling Coordinator services to La Paloma<sup>2</sup> and, subsequently, filed for bankruptcy under Chapter 11 of the Bankruptcy Code.<sup>3</sup> ET later requested the return of the posted collateral, which the CAISO refused to do. In November 2003, La Paloma and ET executed an assignment agreement under which ET assigned to La Paloma all of its rights in the cash collateral posted with the CAISO.

4. On January 11, 2005, La Paloma filed a complaint seeking a Commission ruling requiring the return of the cash collateral, arguing that doing so is consistent with the CAISO's tariff and Commission precedent.<sup>4</sup> La Paloma contended that the CAISO mistakenly attributes to La Paloma transactions entered into during the Refund Period (*i.e.*, October 2, 2000 through June 20, 2001) by La Paloma's Scheduling Coordinator, ET, while La Paloma was not a market participant during the Refund Period and has no potential refund liability.

5. In its answer to La Paloma's complaint, the CAISO argued that the complaint misrepresented material facts and failed to discuss applicable agreements and CAISO tariff provisions, and requested summary disposition of La Paloma's complaint. In response, La Paloma argued that the CAISO always knew that the collateral was provided through La Paloma's funds for the sole purpose of enabling La Paloma to schedule its generation in the CAISO's market and that the CAISO's tariff is unjust and unreasonable.

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<sup>2</sup> At that time, Coral Power, L.L.C. (Coral), who the CAISO has deemed creditworthy, commenced serving as La Paloma's Scheduling Coordinator.

<sup>3</sup> 11 U.S.C. § 1101 *et seq.* (2004).

<sup>4</sup> La Paloma January 11, 2005 Complaint at 17-18. In support, La Paloma cited to the Commission's decision in *Constellation Power Source, Inc. v. California Power Exchange Corp.*, 100 FERC ¶ 61,380 at P 14 (2002) (*Constellation Reh'g I*). However, since La Paloma filed its complaint, the Commission issued an order on rehearing of *Constellation Reh'g I* in *Constellation Power Source, Inc. v. California Power Exchange Corp.*, 111 FERC ¶ 61,147 (2005) (*Constellation Reh'g II*). As discussed below, the D.C. Circuit Court of Appeals recently upheld the Commission's decision in *Constellation Reh'g II*.

**B. The March 29 Order**

6. In the *March 29 Order*, the Commission denied La Paloma's complaint finding that no contractual relationship exists between the CAISO and La Paloma, as far as the collateral is concerned.<sup>5</sup> The Commission reasoned that the collateral at issue was posted by ET in accordance with the CAISO tariff requirement that Scheduling Coordinators satisfy certain credit obligations to cover all applicable outstanding and estimated liabilities.<sup>6</sup> Further, it is the Scheduling Coordinator, not its clients, that has the primary responsibility to the CAISO under the CAISO tariff.<sup>7</sup> The Commission explained that "ET participated in the CAISO's markets during the Refund Period and faces a significant refund liability, which has not been finalized at this time...[and that] the collateral in question is retained by the CAISO to secure all ET's obligations, not only those arising from La Paloma's transactions."<sup>8</sup>

7. In addition, the Commission held that: ET's potential refund liability is not extinguished by virtue of transferring its rights in the collateral to La Paloma; the rights that La Paloma received to the collateral under the assignment agreement are exactly the same as ET's rights; and, because the collateral was posted to secure ET's outstanding and estimated liabilities, it can be returned only after ET's obligations to the CAISO are satisfied.

**II. La Paloma's Request for Rehearing**

8. On April 28, 2005, La Paloma filed a request for rehearing of the *March 29 Order*. On rehearing, La Paloma argues that the Commission failed to give reasoned consideration to relevant and undisputed facts, policy, and precedent in denying its

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<sup>5</sup> *March 29 Order*, 110 FERC ¶ 61,386 at P 12.

<sup>6</sup> CAISO Tariff 2.2.3.2.

<sup>7</sup> CAISO Tariff 2.2.1.

<sup>8</sup> The Commission also noted that it previously had rejected ET's request for release of its collateral retained by the PX on the ground that the refund proceeding in Docket No. EL00-95, *et al.*, has not been yet completed and that only after its completion will the liabilities of each supplier be determined. *March 29 Order*, 110 FERC ¶ 61,386 at 12 (citing *PG&E Energy Trading-Power, L.P. v. California Power Exchange Corporation*, 102 FERC ¶ 61,091 (2003) (*ET Order*). See also *San Diego Gas & Electric Company*, 101 FERC ¶ 63,026 (2002).

complaint. Specifically, it states that the Commission based its decision on an erroneous fact, which Commissioner Brownell observed in her dissent, that the collateral was posted to secure *ET*'s outstanding and estimated liabilities. La Paloma explains that the CAISO never challenged *ET*'s representation that the collateral was posted "for the benefit and at the direction of" La Paloma.<sup>9</sup> It argues that the majority failed to explain why it overlooked that *ET*'s potential liability from the Refund Period arose more than 18 months before the collateral was posted and relates to transactions that have no relationship to La Paloma. La Paloma asserts that the collateral was posted exclusively to secure La Paloma's anticipated and existing obligations in connection with scheduling power on the CAISO system in 2003.<sup>10</sup>

9. La Paloma also argues that the Commission's determination in *Constellation Reh'g I* dictates that market participants during the Refund Period can only be obligated to maintain an amount of collateral bearing a relationship to the amount of its potential refund proceeding liability. In *Constellation Reh'g I*, it states, the Commission held that the allowable collateral should be limited to "10 million dollars, which by our conservative estimate will be sufficient to cover the potential refund liability resulting from Constellation's transactions in the CalPX's and CAISO's markets."<sup>11</sup> Thus, La Paloma argues that because its refund liability during the Refund Period under the most "conservative estimate" was zero, the CAISO should be ordered to refund the collateral.<sup>12</sup>

10. La Paloma further argues that the Commission failed to protect the public interest by relying on CAISO tariff provisions that do not permit the CAISO's retention of the collateral and by authorizing an unjust and unreasonable administration of the CAISO tariff. Specifically, it states that while *ET* may have outstanding and estimated liabilities

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<sup>9</sup> La Paloma Rehearing Request at 8 (*citing* Notice of Assignment of Cash Collateral from Robert W. Barron, NEGTEnergy Trading Holdings Corporation, to James Blatchford, California Independent System Operator Corp. (Nov. 3, 2003)).

<sup>10</sup> La Paloma also distinguishes the *ET Order* stating that the complaint rejected there involved a complainant that had significant potential refund liability and had posted the collateral to cover its own transactions during the California crisis.

<sup>11</sup> *Constellation Reh'g I*, 100 FERC ¶ 61,380 at P 14. We note that, in *Constellation Reh'g II*, the Commission upheld this portion of its earlier decision.

<sup>12</sup> La Paloma Rehearing Request at 12.

under CAISO tariff sections 2.2.3.2 and 2.2.7.3<sup>13</sup> for the Refund Period, when the La Paloma collateral was first posted in December 2002, no outstanding liabilities were associated with La Paloma's generation. Thus, La Paloma argues that those sections of the CAISO tariff are not applicable to the posting of the La Paloma collateral.

11. Further, La Paloma argues that the Commission failed to follow its policy and precedent prohibiting a utility's use of collateral as a guaranty for the payment of refunds absent extraordinary circumstances.<sup>14</sup> It also asserts that by authorizing the CAISO to retain the La Paloma collateral to serve as a guaranty for ET's potential Refund Period obligations, the Commission has made La Paloma jointly responsible for ET's obligations, in violation of Commission precedent.<sup>15</sup>

12. La Paloma also argues that the Commission failed to address its argument that the CAISO's retention of the collateral results in disparate treatment of similarly situated market participants in an unlawful discriminatory manner. It explains that the discrimination occurs when the CAISO subjects a market participant that chooses to use a Scheduling Coordinator that had been one during the Refund Period to more onerous credit requirements than a market participant that uses a Scheduling Coordinator that was not one during the Refund Period.<sup>16</sup> In this sense, La Paloma asserts that the Commission sanctions the CAISO's discrimination against La Paloma.

13. Finally, La Paloma argues that the Commission erred in basing its decision on and making its highest priority be to ensure that enough funds are available for potential refunds in Docket Nos. EL00-95-045, *et al.*, without regard to: (a) the FPA requirement that the terms and conditions of the CAISO tariff must be just and reasonable; (b) the overwhelming equities; and (c) the best interests of California electric consumers.

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<sup>13</sup> Section 2.2.7.3 of the CAISO tariff covers outstanding and estimated liability for either (i) Grid Management Charge; and/or (ii) Imbalance Energy, Ancillary Services, Grid Operations Charge, Wheeling Access Charge, High Voltage Access Charge, Transition Charge, Usage Charges, and FERC Annual Charges.

<sup>14</sup> *Distrigas of Massachusetts Corporation*, 33 FERC ¶ 61,406 at 61,776 (1985).

<sup>15</sup> La Paloma Rehearing Request at 19.

<sup>16</sup> *Id.* at 20.

### **III. Procedural Matters**

14. On May 13, 2005, as amended on May 16, 2005, the CAISO filed an answer to La Paloma's request for rehearing. The Commission's Rules of Practice and Procedure prohibit answers to requests for rehearing,<sup>17</sup> and, accordingly, we will reject the CAISO's answer.

### **IV. Commission Determination**

15. We deny La Paloma's request for rehearing. We note that many of the arguments that La Paloma raises on rehearing, it also raised in its complaint and were addressed in the *March 29 Order*. Here, we reiterate our holding that no contractual relationship exists between the CAISO and La Paloma, as far as the collateral is concerned. La Paloma is a Participating Generator under the CAISO tariff.<sup>18</sup> Participating Generators are required to comply with all applicable provisions of the CAISO tariff and must execute and have approved by the Commission Participating Generator Agreements (PGA) with the CAISO. The CAISO tariff also provides that generators (such as La Paloma) seeking to use the CAISO grid must use a Scheduling Coordinator.<sup>19</sup>

16. Under the CAISO tariff, the CAISO transacts business through its Scheduling Coordinators (in this case, ET), who are required to execute and have approved by the Commission *pro forma* Scheduling Coordinator Agreements with the CAISO.<sup>20</sup> Scheduling Coordinators "have the primary responsibility to the ISO, as principal, for all Scheduling Coordinator payment obligations under the ISO Tariff."<sup>21</sup> As the financially responsible parties under the CAISO tariff, Scheduling Coordinators must satisfy certain credit obligations to cover "all applicable outstanding and estimated liabilities under

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<sup>17</sup> 18 C.F.R. § 385.713(d)(1) (2005).

<sup>18</sup> CAISO Tariff Appendix B.2.

<sup>19</sup> CAISO Tariff 2.1.1, 2.2.3.

<sup>20</sup> The ET *pro forma* agreement with the CAISO was accepted on July 13, 1999, by letter order, in Docket No. ER99-2985.

<sup>21</sup> CAISO Tariff 2.2.1.

Section 2.2.7.3.”<sup>22</sup> In contrast, the CAISO tariff does not subject Participating Generators to any credit requirements because the Scheduling Coordinators are the principles in all transactions. In sum, because ET is the financially responsible party under the CAISO tariff, the collateral in question is retained by the CAISO to secure all of ET’s obligations, not only those arising from La Paloma’s transactions.

17. As noted in the *March 29 Order*, ET participated in the CAISO markets during the Refund Period and faces a significant refund liability, which has not been finalized at this time. The collateral was posted to secure ET’s outstanding and estimated liabilities and thus can be returned only after ET’s obligations to the CAISO are satisfied. ET’s potential refund liability is not extinguished by virtue of transferring ET’s rights in the collateral to La Paloma. The assignment agreement between ET and La Paloma conferred upon La Paloma the right in the collateral, an amount which the Commission will not be able to determine until the conclusion of the refund proceeding; it did not result in substitution of ET by La Paloma in scheduling coordinator contracts between the CAISO and ET.

18. We also reject La Paloma’s argument that the Commission’s determination in *Constellation Reh’g I* dictates that the CAISO should return the collateral in its entirety to La Paloma. Recently, the D.C. Circuit Court of Appeals upheld the Commission’s determination in *Constellation Reh’g I* and *II*, finding that the Commission’s “considered calculation” allowing the PX to retain only \$10 million of collateral, a figure based upon “the most conservative estimates” of Constellation’s refund liability, was reasonable.<sup>23</sup> In addition, the court rejected arguments that the Commission’s decision to release a portion of Constellation’s collateral conflicts with Commission precedent.<sup>24</sup> Instead, the court found that the Commission’s decision in *Constellation Reh’g II* was “fully consistent with the orders in Constellation’s case,” including the *March 29 Order* and the

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<sup>22</sup> CAISO Tariff 2.2.3.2. Section 2.2.7.3 of the CAISO tariff covers outstanding and estimated liability for either (i) Grid Management Charge; and/or (ii) Imbalance Energy, Ancillary Services, Grid Operations Charge, Wheeling Access Charge, High Voltage Access Charge, Transition Charge, Usage Charges, and FERC Annual Charges.

<sup>23</sup> *Constellation Energy Commodities Group, Inc. v. Federal Energy Regulatory Commission*, 457 F.3d 14, 24 (2006) (*Constellation III*).

<sup>24</sup> This argument was raised by the purchaser petitioners Southern California Edison Company and Pacific Gas and Electric Company who cited to both the *March 29 Order* and the *ET Order*.

*ET Order*.<sup>25</sup> Specifically, the court explained that in the other decisions “the Commission either (1) was unable to calculate the seller’s refund liability because the seller was subject to further discovery regarding market manipulation, or (2) found the seller’s estimated refund liability exceeded the amount of its posted collateral.”<sup>26</sup> Thus, the court found that “it is within the scope of the agency’s expertise to make ... a prediction about the market it regulates, and a reasonable prediction deserves our deference.”<sup>27</sup> Here, because ET faces a significant refund liability, which we can not determine at this time, the CAISO’s retention of the La Paloma collateral is reasonable.

19. We also reject La Paloma’s argument that the Commission’s decision is contrary to Commission precedent prohibiting a utility’s use of collateral as a guaranty for the payment of refunds absent extraordinary circumstances. In *Constellation III*, the court rejected a similar argument and found that in contrast to *Distrigas* and similar cases the Commission did not require a guaranty for the payment of refunds, but rather enforced the terms of the PX tariff regarding retention of collateral. The court also found that the Commission’s position that the sellers’ liabilities have not yet been “billed and settled” until the refund proceedings are complete was both reasonable and consistent with precedent. Specifically, it stated that:

decisions such as *Distrigas* in no way precluded the parties from entering into an agreement -- more properly from maintaining and accepting a tariff -- that provides billing and settlement would not take place, and consequently collateral would be required, until any refund proceedings were complete. Indeed, we believe the Commission reasonably concluded the parties did just that, with the result that the sellers’ liabilities for transactions during the refund period will not

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<sup>25</sup> *Id.* The court cited to the *March 29 Order* (refund liability not finally determined) and the *ET Order* (company’s potential refund liability “substantially exceeds the amount of its collateral”). The court also cited to *Powerex Corp. v. California Power Exchange*, 102 FERC ¶ 61,138 at 62,123 (refund liability uncertain because Powerex still subject to market manipulation proceedings).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (DC Cir. 1991)). In *Constellation’s* case, the court stated that the Commission reasonably required the CalPX to retain collateral worth more than double its highest estimate of *Constellation’s* liability, thereby leaving room for the increase in refund liability the purchasers are predicting.



be “settled” until the Commission determines the maximum just and reasonable price at which they could lawfully sell power during the refund period. Furthermore, the Commission’s interpretation, which will help ensure “market participants meet their outstanding obligations and the ultimate CalPX creditors are paid,” is consistent with both the text of § 2.2, which nowhere limits which liabilities must be collateralized, and the general purpose of the provision requiring that market transactions be secured.<sup>28</sup>

20. Finally, we reject La Paloma’s argument that the CAISO’s retention of the collateral results in disparate treatment of similarly situated market participants in an unlawful discriminatory manner. As discussed above, and consistent with *Constellation III*, here, the Commission is treating ET and La Paloma exactly the same as it has treated other market participants in the same situation. Thus, once ET’s refund liability is determined, La Paloma’s rights to the collateral will also be determined.

The Commission orders:

La Paloma’s request for rehearing is hereby denied.

By the Commission.

( S E A L )

Philis J. Posey,  
Acting Secretary.

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<sup>28</sup> *Constellation III*, 457 F.3d 14, 21.