

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company	Docket Nos. ER97-2358-008 ER00-565-019 ER04-1233-007
Southern California Edison Company	Docket Nos. ER97-2355-014 ER98-2322-007
San Diego Gas & Electric Company	Docket Nos. ER97-2364-009 ER97-4235-008 ER98-497-008 ER98-2371-006

ORDER ON REHEARING

(Issued May 22, 2006)

1. The Sacramento Municipal Utility District and the Modesto Irrigation District (collectively, Joint Parties) question the Commission's December 20, 2005 Order in the above referenced proceedings.¹ Pacific Gas and Electric Company (PG&E) also requests clarification, or in the alternative, rehearing, of that order. The City of Santa Clara, California, Silicon Valley Power, the Northern California Power Agency and the City and County of San Francisco (collectively Answering Parties) filed an answer in support of PG&E and in limited support of the Joint Parties. PG&E and Commission Trial Staff (Trial Staff) also filed an answer.
2. In light of a decision by the United States Court of Appeals for the District of Columbia Circuit² vacating the Commission's orders that denied recovery by Southern

¹ *Pacific Gas and Electric Co.*, 113 FERC ¶ 61,296 (2005) (Remand Order).

² *Southern Cal. Edison Co. v. FERC*, 415 F.3d 17 (D.C. Cir. 2005) (D.C. Circuit Remand).

California Edison Company, PG&E, and San Diego Gas and Electric Company (collectively, Companies)³ of cost differentials from their transmission owner (TO) Tariff customers,⁴ the Commission, in the Remand Order, allowed the Companies to recover such costs through the Transmission Revenue Balancing Account Adjustment (TRBA) in their TO Tariffs. The Remand Order, in pertinent part, granted motions that requested that the Commission, given the remand, issue an order directing PG&E to allocate the cost differentials at issue to its TO Tariff customers through the TRBA in its TO Tariff, and dismissed a proceeding concerning PG&E's alternate tariff mechanism, its Scheduling Coordinator Services Tariff (SCS Tariff), for recovering those cost differentials. As explained below, we grant rehearing but deny motions to vacate.

Discussion

Procedural Matters

3. As noted above, PG&E, Trial Staff and the Answering Parties filed answers. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2005), prohibits answers to requests for rehearing. Accordingly, we will reject the answers.

Requests for Rehearing

4. PG&E requests that the Commission clarify that it can recover all of the costs it incurred as a Scheduling Coordinator for its wholesale transmission customers with existing contracts through its TRBA or, alternatively, requests rehearing of the Commission's dismissal of the SCS Tariff proceeding and the termination of all dockets related to that proceeding. It asks that the Commission confirm that, in using the terminology "cost differentials" when describing the costs PG&E can recover through the TRBA, the Commission meant all Scheduling Coordinator costs. PG&E notes that it entered into settlement agreements with six of the eight Scheduling Coordinator customers in the SCS proceeding. Under three of the settlements, PG&E is required to return the settlement payments if two conditions are satisfied: (1) the D.C. Circuit vacates and/or remands Opinion Nos. 458 and 458-A; and (2) as a result of any D.C. Circuit decision, the Commission issues a final order confirming that the TRBA is the appropriate means for recovering the Scheduling Coordinator costs that PG&E incurred

³ The Companies function as the CAISO's scheduling coordinators (SC) for transmission customers that have existing transmission contracts with the Companies. As the SCs for those customers, the Companies are billed by the CAISO for the costs that the CAISO incurs in providing them access to the CAISO grid.

⁴ *Pacific Gas and Elec. Co.*, 100 FERC ¶ 61,156 at P 28 (Opinion No. 458), *reh'g denied*, 101 FERC ¶ 61,151 at P 23 (2002) (Opinion No. 458-A).

acting as a Scheduling Coordinator for Existing Contracts.⁵ Therefore, given that the first condition has been satisfied, if the Remand Order allows PG&E to recover through the TRBA all of the Scheduling Coordinator costs it incurred as a Scheduling Coordinator for the Scheduling Coordinator Customers through the TRBA, the second condition of the three settlements will be satisfied once the Commission order becomes final and PG&E can return the settlement amounts as provided for in the settlement agreements.

5. The Joint Parties urge that: (1) PG&E must immediately refund all amounts paid pursuant to the SCS Tariff; (2) the Commission delay termination of the SCS Tariff proceeding for the sole purpose of allowing PG&E to file a refund report in that docket; (3) the Commission state that the Remand Order vacated Opinion No. 477 and the Phase I Initial Decision in the SCS Tariff proceeding;⁶ and (4) the Commission state that the SCS Tariff itself is terminated, null and void.

6. The Joint Parties state that the necessary result of the Remand Order is that PG&E must refund any and all amounts recovered under the SCS Tariff, with interest. However, they state that, without clarification, it could remain unclear as to when PG&E must make refunds under the SCS Tariff. The Joint Movants note that PG&E will be kept whole if it is required to make immediate and full refunds because the D.C. Circuit held that the CAISO tariff provided two valid means by which PG&E could recover the cost differentials and that PG&E can now immediately assign the cost differentials to its TRBA. The Joint Parties further state that, while they agree with the termination of the SCS Tariff proceeding, the docket should remain open until PG&E files its refund report. The Joint Parties also ask the Commission to clarify that, when it said in the Remand Order that the SCS Tariff is moot, it meant that the SCS Tariff is terminated, null and void.

7. Finally, the Joint Parties state that the Commission should clarify, or, in the alternative, rule, that Opinion No. 477 and the Phase I Initial Decision in the SCS Tariff proceeding are vacated. The Joint Parties explain that the termination of the SCS Tariff proceeding and the declaration that the SCS Tariff is moot has rendered Opinion No. 477 and the Phase I Initial Decision unappealable.⁷ The Joint Parties state that they requested

⁵ See *Pacific Gas and Electric*, 111 FERC ¶ 61,472 (2005) (SVP partial settlement at 6-7); *Pacific Gas and Electric*, 111 FERC ¶ 61,508 (2005) (NCPA settlement with the same language); *Pacific Gas and Electric*, 112 FERC ¶ 61,076 (2005) (CCSF settlement with the same language).

⁶ *Pacific Gas and Electric Co.*, 107 FERC ¶ 63,030 (2004) (Phase I Initial Decision); *Pacific Gas and Electric Co.*, 109 FERC ¶ 61,093 at P 54 (Opinion No. 477).

⁷ The Joint Parties' and PG&E's requests for rehearing of Opinion No. 477 were pending at the time that proceeding was terminated.

rehearing of Opinion No. 477 not only because of the financial impact of the SCS Tariff, but also to prevent generic precedent which would permit utilities to unilaterally assess the cost of ‘new services’ to pre-existing customers who had requested no such new service, had not executed an agreement to take the new service and had pre-existing agreements which, they claim, expressly preclude the unilateral addition of a new service or rate. However, they claim that the Commission now will not rule on rehearing. Thus, they urge that the Commission vacate Opinion No. 477 and the Phase I Initial Decision.

8. The Joint Parties also claim that the courts have made it clear that when “happenstance” creates an impediment to dispositive adjudication, vacation of the prior judgments should be ordered. They argue that, without a live dispute, it is possible that neither the Commission nor an appellate court would consider the Joint Parties’ requests for rehearing or appeal. The Joint Parties assert that the Commission has granted motions to vacate mooted orders, even though it has stated that it is “disinclined to devote [its] time and limited resources ... to address motions to vacate.”⁸ They claim that the Commission has granted motions to vacate when happenstance has mooted Commission orders such that “failure to vacate may leave on the books precedent that has not been tested substantively on rehearing (and thus a failure to vacate may prejudice the parties who sought rehearing).”⁹ The Joint Parties argue that failure to vacate Opinion No. 477 in particular will leave untested precedent that may be barred from appellate review.

Commission Determination

9. The Remand Order states that “the Commission allows the Companies [including PG&E] to recover [Scheduling Coordinator] Costs through the [TRBA] in their TO Tariffs.”¹⁰ When the Commission said PG&E could allocate the cost differentials at issue to its TO Tariff customers through the TRBA, it meant that PG&E could recover all of the costs it incurred as the Scheduling Coordinator for Existing Contracts, *i.e.*, all Scheduling Coordinator costs. Furthermore, in order to ensure that no double recovery occurs, PG&E should credit to the TRBA payments it receives under the Existing Contracts that relate to Scheduling Coordinator costs and should not recover through the TRBA costs recovered under a separate tariff.

10. We clarify that because PG&E may recover these costs through its TRBA and recovery through the SCS Tariff has been disallowed, PG&E must immediately refund all amounts paid pursuant to the SCS Tariff and provide the Commission with a refund report in the SCS Tariff proceeding. Finally, we clarify that in stating that the D.C.

⁸ *New England Power Co.*, 75 FERC ¶ 61,214 at 61,720 (1996).

⁹ Joint Parties Rehearing at 14-15.

¹⁰ Remand Order at P 1, 17-18.

Circuit Remand rendered the SCS Tariff moot, the Commission intended that the SCS Tariff itself be terminated, null and void.

11. However, the Commission will not vacate Opinion No. 477 or the underlying Phase I Initial Decision. The Joint Parties admit that Commission policy is that the Commission is “disinclined to devote [its] time and limited resources ... to address motions to vacate.”¹¹ The Joint Parties have not shown circumstances that warrant vacating Opinion No. 477. In *Town of Neligh v. Kinder Morgan Interstate Gas Transmission*,¹² the Commission refused to vacate an order, finding that the order had value as a policy statement and noting that the Commission “often expends valuable resources to reach a decision in a proceeding and that it would be disruptive to Commission proceedings to vacate orders simply because the parties have settled.” In other recent cases, the Commission likewise has declined to vacate orders that provide useful information to the public.¹³

12. As in *New PJM Companies*, where the Commission declined to vacate an order because it was the first time the Commission had considered whether to invoke section 205 of the Public Utility Regulatory Policies Act of 1978, the SCS Tariff proceeding was a case of first impression on an important Commission policy. The SCS Tariff proceeding was the first instance in which the Commission considered the issue of cost recovery for new services in an ISO context, and the parties, as well as the Commission, expended time and resources in litigation over six years.

13. The Joint Parties argue that the Commission should nevertheless vacate Opinion No. 477 because the analysis is irrelevant and unappealable. We disagree. The Commission has referenced that analysis in several later cases. For instance, in *Transmission Owners of the Midwest Independent Transmission System Operator, Inc.*¹⁴ transmission owners in the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) argued, and the Commission agreed, that certain charges to be recovered under a proposed rate schedule involved new services and that the transmission owners should be allowed to recover such charges from the customers under specified

¹¹ *New England Power Co.*, 75 FERC ¶ 61,214 at 61,720 (1996).

¹² 94 FERC ¶ 61,075 at 61,348 (2001) (*Town of Neligh*).

¹³ See *New PJM Companies*, 110 FERC ¶ 61,009 (2005). We note that the circumstances of this proceeding, and particularly the D.C. Circuit’s vacating the earlier order in this proceeding, would not qualify as “happenstance” that would warrant vacating Opinion No. 477 or the Phase I Initial Decision.

¹⁴ 113 FERC ¶ 61,122 (2005); See also *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,043 (2005).

grandfathered agreements consistent with the policy announced in Opinion No. 477. Opinion No. 477 thus informed the Commission's decision in that case and will continue to do so in the future.

14. We also reject the Joint Parties argument that the Commission should vacate Opinion No. 477 because it may leave on the books precedent that has not been tested substantively on rehearing and may prejudice the parties who sought rehearing. The D.C. Circuit in *Panhandle Eastern*¹⁵ noted that in such circumstances a Commission order serves as a general policy statement. Therefore, Opinion No. 477 cannot prejudice the parties who sought rehearing. As with any policy statement, the determination in Opinion No. 477 would not establish a binding norm, and in any future proceeding the Commission will have to support its application based on the specific facts and circumstances of that case. The D.C. Circuit also noted that Panhandle was not aggrieved in that case because the Commission never issued final judgments disposing of Panhandle's filings. Similarly, the Joint Parties are not aggrieved by Opinion No. 477 because the Commission has not issued a final judgment in the SCS Tariff proceeding.

15. Further, in *Panhandle Eastern*, the Commission stated that "[i]n future cases, Panhandle or any other person may seek an outcome contrary to Opinion Nos. 395 and 404, either based on arguments similar to those contained in the requests for rehearing of Opinion Nos. 395 and 404 or for other reasons, and the Commission will consider those contentions."¹⁶ Similarly, in future cases involving a party contending that it is providing a new service, the Joint Parties or other parties may seek an outcome contrary to Opinion No. 477. Therefore, the Joint Parties' request that Opinion No. 477 be vacated is denied.

The Commission orders:

(A) PG&E's request for rehearing is hereby granted, as discussed in the body of this order.

(B) The Joint Parties' requests that PG&E must immediately refund all amounts paid pursuant to the SCS Tariff and provide the Commission with a refund report in the SCS Tariff docket are thereby granted, as discussed in the body of this order.

(C) The Joint Parties' request that the Commission intended that the SCS Tariff itself is terminated, null and void is hereby granted, as discussed in the body of this order.

¹⁵ *Panhandle Eastern Pipeline Co.*, 83 FERC ¶ 61,008 at 61,031 (1998).

¹⁶ *Id.* at 61,031.

(D) The Joint Parties' request that Opinion No. 477 and the underlying Initial Decision be vacated is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.