

128 FERC ¶ 61,165
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Independent Energy Producers Association

v.

Docket No. EL05-146-008

California Independent System Operator Corporation

ORDER ON REMAND

(Issued August 18, 2009)

1. This order addresses the remand by the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), *City of Anaheim v. FERC*.¹ In *Anaheim*, the court held that the Commission could not order a retroactive rate increase in response to a complaint concerning the rate for providing backstop capacity services to the California Independent System Operator Corporation (CAISO).² Focusing on the “plain language” of section 206 of the Federal Power Act (FPA),³ the court declared no rate increase could be made before the date of the Commission order “fixing” new rates “to be thereafter observed and in force.”⁴ The court remanded the case to the Commission for further consideration of when the rates at issue, the Reliability Capacity Services Tariff (RCST) rates for backstop capacity services, became legally fixed.

¹ 558 F.3d 521 (D.C. Cir. 2009) (*Anaheim*).

² *Id.* at 522.

³ 16 U.S.C. § 824e (2006).

⁴ *Anaheim*, 558 F.3d at 522.

2. The Commission finds that the RCST rates were legally fixed upon issuance of the February 13, 2007 Order on Paper Hearing, when the Commission determined that the formula RCST rates filed with the Commission were just and reasonable.⁵ As explained below, the February 13, 2007 Order on Paper Hearing approved the specific RCST capacity payment rates formulas and cost allocation methodologies, enabling parties to “supply their own inputs to the formula and thereby *know* the numerical rates” charged.⁶

I. Background

A. Procedural History

3. This case harkens back to the California energy crisis of 2000 - 2001. As part of its response to the crisis, the Commission established a temporary, real-time market mitigation measure called the must-offer obligation. The must-offer obligation required most generators serving California wholesale electricity markets to offer all of their capacity in real time during all hours if it was available and not already scheduled to run through bilateral agreements. The CAISO implemented the must-offer obligation beginning July 20, 2001.

4. While the must-offer obligation originated as a short-term solution, it remained in place over several years while the California Public Utilities Commission (CPUC) and market participants designed a resource adequacy program to help ensure reliability in California. In a June 17, 2004 order,⁷ the Commission recognized the CPUC’s plan to phase in resource adequacy requirements, and suggested that if the CAISO were to determine that these resource adequacy requirements were sufficient to meet its reliability needs, these requirements and obligations could replace the existing must-offer obligation.⁸ Additionally, on July 8, 2004,⁹ the Commission advised the Independent

⁵ *Indep. Energy Producers Ass’n v. Cal. Indep. Sys. Operator Corp.*, 118 FERC ¶ 61,096 (2007) (February 13, 2007 Order on Paper Hearing).

⁶ *Anaheim*, 558 F.3d at 524 (citing *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 952 (1990) (*Transwestern*) (emphasis added)).

⁷ *Cal. Indep. Sys. Operator Corp.*, 107 FERC ¶ 61,274 (June 17, 2004 Order), *order on reh’g*, 108 FERC ¶ 61,254 (2004).

⁸ *See* June 17, 2004 Order, 107 FERC ¶ 61,274 at P 26-28.

Electricity Producers' Association (IEP) that if it considered the must-offer obligation to be unjust and unreasonable, it may file a complaint under section 206 of the FPA challenging the rate and seeking implementation of an alternative one.¹⁰

5. On August 26, 2005, IEP filed a complaint against the CAISO, alleging that the must-offer obligation was flawed and no longer just and reasonable, in part because it failed to compensate generators for the backstop reliability capacity services they provided. The Complaint also requested the Commission to direct the CAISO to implement an interim set of tariff provisions to compensate generators for their capacity services, the RCST, to remain in effect until the start-up of the CAISO's market redesign.¹¹ Numerous parties intervened and commented, and on November 14, 2005, IEP requested that the Commission defer action on the Complaint pending settlement discussions with the parties.¹²

6. On March 31, 2006, certain parties (the Settling Parties)¹³ filed a contested Offer of Settlement, proposing the institution of an RCST with a June 1, 2006 effective date (Settlement). The RCST provided a backstop capacity procurement mechanism to the CAISO that included provisions establishing the following features: (1) formula must-offer capacity payment rates to compensate resources needed to meet short-term reliability requirements;¹⁴ (2) formula RCST rates resulting from a Significant Event;¹⁵

⁹ *Cal. Indep. Sys. Operator Corp.*, 108 FERC ¶ 61,022 (July 8, 2004 Order), *order on reh'g*, 109 FERC ¶ 61,097 (2004).

¹⁰ July 8, 2004 Order, 108 FERC ¶ 61,022 at P 115.

¹¹ The market redesign is the CAISO's Market Redesign and Technology Upgrade, also known as MRTU, which went into effect March 31, 2009.

¹² IEP and the CAISO filed joint motions to continue deferral of action on IEP's Complaint on December 9, 2005, and on December 19, 2005.

¹³ The Settling Parties are: IEP; the CAISO; the CPUC; Pacific Gas and Electric Company; San Diego Gas & Electric Company; and Southern California Edison Company (SoCal Edison).

¹⁴ The Settlement provided for daily must-offer obligation rates that are a percentage of the monthly RCST capacity charge for each day that a unit not already under a capacity contract is denied its request to waive its must-offer obligation. *See* February 13, 2007 Order on Paper Hearing, 118 FERC ¶ 61,096 at P 18-19 (approving this formula rate).

(3) formula RCST rates resulting from deficiency in resource adequacy showings; and (4) bid adder payments to frequently mitigated units that are not designated as RCST units and are not eligible for the must-offer capacity payments. In addition to establishing the formula rates for procuring backstop generation capacity, the RCST established the methodology for allocating the costs incurred and the rules by which the CAISO could procure RCST capacity.¹⁶

7. The Settlement also included two secondary provisions relating to automatic mitigation procedures (AMP) and ancillary services. Specifically, the Settlement proposed to clear ancillary services markets using market-based offers before using cost-based bids from certain reliability must-run units.¹⁷ In addition, the Settlement proposed to revise the AMP price screen by raising the AMP threshold from \$91.87 to \$200/MWh effective June 1, 2006. It also provided that mitigation measures would not be applied to

¹⁵ The Settlement provided that generation capacity designated under the RCST would be paid a monthly RCST payment based on the following formula: $\text{RCST Payment} = [(\text{Monthly RCST Charge}) - (\text{Monthly PER} \times .95)] \times (\text{Availability Factor}) \times (\text{Net Qualifying Capacity})$. *Id.* P 21. The Monthly RCST Charge is calculated by multiplying the target capacity price of \$73/kW-yr by monthly shaping factors, which are intended to weight the value of capacity according to demand. The target capacity price is the annualized fixed cost of a hypothetical new combustion turbine generator, identified as the reference resource. *Id.* P 22. Monthly PER, or peak energy rent, is the revenue that the hypothetical reference resource would earn in excess of its variable costs from sales of energy and non-spinning reserves. *Id.* P 23. For further explanation of this formula, see generally *Indep. Energy Producers Ass'n v. Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,276, at P 14 & nn. 18 and 19, P 27-37 (2007) (December 20, 2007 Order on Rehearing).

¹⁶ Under the terms of the Settlement, and as initially approved by the Commission, the RCST would have expired on December 31, 2007, or on midnight of the date immediately before the MRTU becomes effective, whichever is earlier. The Commission extended the RCST until the earlier of the implementation of MRTU or the approval of an alternative backstop capacity procurement mechanism. *Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,281, at P 53 (2007). The RCST was ultimately replaced by the Temporary Capacity Procurement Mechanism, which went into effect June 1, 2008. *Cal. Indep. Sys. Operator Corp.*, 123 FERC ¶ 61,280, at P 3 (2008).

¹⁷ February 13, 2007 Order on Paper Hearing, 118 FERC ¶ 61,096 at P 28 & n.19.

energy bids projected to be dispatched as imbalance energy in hours in which the zonal energy price is projected to be below the \$200/MWh threshold.¹⁸

8. In a July 20, 2006 Order on Complaint and Offer of Settlement,¹⁹ the Commission found that, under the pre-MRTU market design in place at the time, the compensation to generators under the must-offer obligation was no longer just and reasonable. However, the Commission was unable to find that the Settlement's proposed RCST rates and cost allocation mechanism were just and reasonable. Accordingly, in the July 20, 2006 Order, the Commission established paper hearing procedures to gather evidence to further assess the rates and cost allocation issues presented by the Settlement. The July 20, 2006 Order also permitted each seller of eligible capacity as defined under the terms of the Settlement, at its election, to collect the Settlement rates from the date of the order, so long as the seller agreed that all of these revenues would be subject to refund, even if they were collected after the statutory refund period ended.²⁰

9. On September 27, 2006, the Commission issued an Order on Clarification of the July 20, 2006 Order.²¹ The Commission clarified that, among other things, the July 20, 2006 Order implemented the backstop capacity-related Settlement rates on an interim basis and subject to refund, provided the seller had elected to collect those rates pursuant to the July 20, 2006 Order. The Commission specified that the CAISO was authorized to implement the following Settlement provisions: must-offer capacity payment rates; RCST rates due to designation resulting from a significant event; RCST rates resulting from deficiency in resource adequacy showings, payments to frequently mitigated units; the cost allocation methodologies; all reporting and procedural requirements. The

¹⁸ *Id.* P 29.

¹⁹ *Indep. Energy Producers Ass'n v. Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,069 (2006) (July 20, 2006 Order).

²⁰ Section 206(b) of the FPA authorizes the Commission to order refunds of any amounts paid "in excess of those which would have been paid under the just and reasonable rate" for the 15-month period following an established refund effective date. 16 U.S.C. § 824e(b) (2006). Notices of election were filed by Calpine Corporation; GWF Energy, LLC; La Paloma Generating Company, LLC; LS Power Generation, LLC; Mirant Corporation; NRG; Powerex Corp.; Reliant Reliant Energy Services, Inc.; and Williams Power Company, Inc.

²¹ *Indep. Energy Producers Ass'n v. Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,297 (2006) (September 27, 2006 Order).

Commission stated, however, that it was not authorizing the CAISO to implement on an interim basis the provisions in the Settlement relating to AMP and ancillary services.²²

10. The September 27, 2006 Clarification Order also directed the CAISO to file tariff sheets implementing the provisions the Commission had approved on an interim basis pending the results of the paper hearing.²³

11. On October 20, 2006, the CAISO filed the interim RCST tariff sheets as directed by the July 20, 2006 and September 27, 2006 Orders (October 2006 Compliance Filing) reflecting, among other things, the removal of the provisions relating to AMP and ancillary services.²⁴

12. In the February 13, 2007 Order on Paper Hearing, the Commission approved with modification, the Settlement as just and reasonable, and made it effective June 1, 2006, in accordance with Settling parties request.²⁵ Specifically, the Commission found that all of the RCST rate formulas, terms and conditions proposed in the Settlement were just and reasonable. The only modification the Commission required to the original Settlement involved the provisions related to AMP and ancillary services. Finding these provisions to be beyond the scope of the proceeding and not related to the primary issue underlying the Complaint (i.e., the appropriate compensation for backstop capacity services provided under the must-offer obligation), the Commission required their removal.²⁶ The

²² *Id.* P 15 (citing sections 5.1 (AMP) and 9.2 (ancillary services) of the Settlement).

²³ *Id.* P 11.

²⁴ Specifically, in its October 2006 Compliance Filing, the CAISO explained that the proposed tariff sheets were based on the *pro forma* tariff sheets filed with the Offer of Settlement, with modifications to reflect the following: (1) the fact that there will not be any 2006 forward local RCST designations; (2) other language changes resulting from the removal of the 2006 local RCST tariff provisions; (3) elimination of the AMP and RMR Condition 2 provisions; and (4) certain clean-up changes. *See* CAISO October 20, 2006 Compliance Filing, Docket No. EL05-146-002, at 3.

²⁵ February 13, 2007 Order on Paper Hearing, 118 FERC ¶ 61,096 at P 2, 200.

²⁶ *See id.* P 197 (finding proposed AMP modification beyond the scope of the proceeding because it would affect the revenues of all units alike, whether or not the unit was operating under the must-offer obligation or under a resource adequacy program);

(continued...)

Commission directed the CAISO to submit a compliance filing with tariff sheets implementing the approved Settlement.

13. On March 15, 2007, the CAISO submitted tariff sheets to comply with the February 13, 2007 Order on Paper Hearing (March 2007 Compliance Filing). The CAISO's proposed tariff revisions were consistent with the interim tariff sheets filed on October 20, 2006, except that the revised sheets accomplished the following objectives: (1) included non-substantive tariff language modifications requested by parties;²⁷ and (2) established a June 1, 2006 effective date for all relevant tariff provisions included in the interim tariff sheets. No comments were filed in response to CAISO's March 2007 Compliance Filing.

14. On June 11, 2007, the Commission denied requests for rehearing of the July 20, 2006 and September 27, 2006 Orders.²⁸ The June 11, 2007 Order, among other things, accepted the CAISO's March 2007 Compliance Filing submitted in response to the Commission's directives in the February 13, 2007 Order on Paper Hearing. The Commission also rejected as moot the interim RCST tariff sheets proposed in the October 2006 Compliance Filing because the Commission had since found that, "as a result of the

see id P 187 (agreeing with parties that the proposed modification concerning ancillary services bids was beyond the scope of the proceeding).

²⁷ Specifically, the proposed tariff revisions were consistent with the interim tariff sheets with modifications to reflect the following: (1) the removal of language regarding notice and refund because the charges would no longer be effective on an interim basis; (2) section 43.5.1 was revised to more accurately reflect the language in the Offer of Settlement regarding the obligation of Eligible Capacity designated as RCST to offer Ancillary Services, as requested by Williams Power Company, Inc. in its protest of the October 20, 2006 Compliance Filing; (3) changes requested by the California Department of Water Resources State Water Project (SWP) in its protest of the October 20, 2006 Compliance Filing, and agreed to by the CAISO in its answer, correcting erroneous references to "section 43.9" and replacing them with references to "section 40.14", and replacing the undefined term "SCRA" with "SC-RA Entity" and incorporating the definition of "SC-RA Entity" into Appendix A of the tariff; and, finally; (4) revised to account for revisions to CAISO's Low Voltage Transmission Revenue Requirements accepted by the Commission in Docket No. ER06-1395-000. *See* February 13, 2007 Order on Paper Hearing, 118 FERC ¶ 61,096 at P 59-63.

²⁸ *Indep. Energy Producers Ass'n v. Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,266 (June 11, 2007 Compliance Order), *order on reh'g*, 121 FERC ¶ 61,276 (2007).

additional evidence provided in the paper hearing,” the RCST rates were just and reasonable.²⁹

15. The Cities filed a timely petition for review at the D.C. Circuit challenging the Commission’s orders in this proceeding to the extent that they permitted RCST rates to apply retroactively. Thus, the sole issue on appeal concerned the June 1, 2006 effective date of the RCST rates.

II. The Anaheim Decision

16. In *Anaheim*, the court agreed with the Cities that a rate increase following a complaint cannot be instituted before the date of the Commission order “fixing” new rates “to be thereafter observed and in force,” within the language of section 206 of the FPA.³⁰ The court remanded the case to the Commission for further consideration on the issue of when the RCST rates became legally fixed.

17. Specifically, the court explained that when the Commission receives a complaint under section 206(a) of the FPA and finds that the rate charged by an energy supplier is unjust or unreasonable, the Commission is required by statute to “determine the just and reasonable rate . . . to be thereafter observed and in force, and shall fix the same by order.”³¹ The court emphasized that the “plain text” of the FPA prohibits the Commission from setting rates retroactively in cases governed by section 206(a).³²

18. The court pointed out that, while the Commission’s July 20, 2006 Order agreed with sellers (generators) that the must-offer obligation, which required them to offer their available generating capacity into the California markets at a rate of zero, was no longer just and reasonable, it did not find the proposed RCST rates to be just and reasonable. Rather, in its February 13, 2007 Order on Paper Hearing, the court found that the Commission determined that the RCST rates were just and reasonable – and “made those rates effective *retroactively* to June 1, 2006.”³³ Explaining how its own precedents

²⁹ June 11, 2007 Order, 119 FERC ¶ 61,266 at P 64; February 13, 2007 Order on Paper Hearing, 118 FERC ¶ 61,096 at P 2.

³⁰ *Anaheim*, 558 F.3d at 522.

³¹ *Id.* (citing 16 U.S.C. § 824e(a)).

³² *Anaheim*, 558 F.3d at 523 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)).

³³ *Anaheim*, 558 F.3d at 523.

reinforce the point, the court determined that “the plain language of [section] 206(a) controls” and, thus, “retroactive rate increases of this kind flatly violate the plain language of § 206(a).”³⁴

19. In reaching its decision, the Court explained that section 206(b) of the FPA does not support the retroactive effective date because section 206(b) only authorizes retroactive refunds, not retroactive rate increases.³⁵ The Court also distinguished cases involving section 205 of the FPA that prohibit the Commission from setting rates retroactively before the date buyers have sufficient notice of a possible rate change.³⁶ Focusing on the fact that this case began with a section 206 complaint, the Court declared that “section 206 involves an entirely different – and stricter – set of procedures than section 205.”³⁷

20. While the court determined that the Commission violated the statute by making the RCST rates effective retroactively to June 1, 2006, the court remanded to the Commission to interpret its statute and decide, in the first instance, at what point in time the rates became fixed in accordance with the FPA. The court directed the Commission to consider and reasonably explain whether the RCST rates were fixed: (1) on February 13, 2007, when the Commission found the RCST rates were just and reasonable; or (2) on June 11, 2007, when the Commission accepted the final compliance filing; or (3) on some other date after February 13, 2007.³⁸

III. Discussion

21. As explained below, the Commission finds that the RCST rates were fixed on February 13, 2007, the date that the Commission determined that the RCST rates were just and reasonable. The February 13, 2007 Order on Paper Hearing approved the

³⁴ *Id.* at 523-524 (citing *Electrical District No. 1 v. FERC*, 774 F.2d 490, 492 (D.C. Cir. 1985); *Transwestern*, 897 F.2d at 578; *Towns of Concord, Norwood & Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 72 (D.C. Cir. 1992)).

³⁵ *Id.* at 524.

³⁶ *Id.* at 524-525.

³⁷ *Id.* at 525. The court also found off point cases recognizing the Commission’s power to remedy its own errors after being reversed in court because the Commission did not impose retroactive surcharges in response to a court decision. *Id.*

³⁸ *Id.*

specific RCST capacity payment rate formulas and cost allocation methodologies, enabling parties to “supply their own inputs to the formula and thereby *know* the numerical rates” charged.³⁹

22. We begin our analysis with the language of the statute. Under section 206(a) of the FPA, when the Commission finds a rate to be unjust and unreasonable, the Commission “shall determine the just and reasonable rate . . . to be thereafter observed and in force,” and “shall fix” that rate by order.⁴⁰

23. The salient question is, what does it mean to “fix” a rate by order? In *Electrical District v. FERC*,⁴¹ the D.C. Circuit attempted to answer this question, holding that the Commission does not “fix” a rate until the rate is numerically “specified.”⁴² *Electrical District* involved a utility’s contracts with customers that required all new rates to be fixed by the Commission in section 206 proceedings. When the utility filed to increase its rates, the Commission held that the proposed rates produced an excessive return, and in some cases misallocated the burden of return among customers. Consequently, the Commission directed the utility to make a compliance filing revising its cost of service, rate schedule and tariff sheets in accordance with its broad directives. The Commission’s order primarily only set revenue levels, however, and left to the utility the task of filing new rates on compliance to implement these revenue levels.⁴³ While the Commission ultimately made the new rates effective as of the date of the initial order “outlining the factors on the basis of which the rates should be calculated,”⁴⁴ the court reversed, and made the rates effective as of the date the Commission accepted the compliance filing.⁴⁵ Linking the term “fix” with the “filed rate doctrine,” the court reasoned that section 206(a) must be read “in light of the Federal Power Act’s primary purpose of protecting

³⁹ *Anaheim*, 558 F.3d at 524 (citing *Transwestern*, 897 F.2d at 578) (emphasis added).

⁴⁰ 16 U.S.C. § 824e(a).

⁴¹ 774 F.2d 490 (D.C. Cir. 1985).

⁴² *Id.* at 492.

⁴³ *Id.*

⁴⁴ *Id.* at 491.

⁴⁵ *Id.* at 492-93

the utility's customers."⁴⁶ The court explained that "providing the necessary predictability is the whole purpose of the well-established filed rate doctrine, which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate regulatory authority."⁴⁷ Accordingly, in *Electrical District*, the court found that the Commission had directly frustrated the filed rate doctrine by making rates effective as of the date of an order setting forth "no more than the basic principles pursuant to which the new rates are to be calculated."⁴⁸

24. Subsequently, the D.C. Circuit further elaborated on the question of what it means to "fix" rates in the context of addressing whether and at what point a formula rate becomes fixed. In *Transwestern*, the court held that the Commission can "fix" rates within the meaning of section 5 of the Natural Gas Act (the parallel provision to section 206 of the FPA) through announcement of a rate formula, so long as purchasers can supply their own inputs to the formulas and thereby know the numerical rates.⁴⁹ The

⁴⁶ *Id.*

⁴⁷ *Id.* at 493.

⁴⁸ *Id.*

⁴⁹ We note that the Commission has been accepting formula rates since the early 1970s, a practice which has survived judicial scrutiny. See *Public Utilities Commission of the State of California v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) ("[i]t can hardly be doubted at this late date that the Commission 'need not confine rates to specific, absolute numbers'" but may approve a tariff containing a rate "formula" or a rate "rule") (citing *Transwestern*, 897 F.2d at 578); *Me. Yankee Atomic Power Co.*, 42 FERC ¶ 61,307, at 61,923 (1988). As defined by the Commission, a formula rate specifies the cost components that form the basis of the rates a utility charges its customers. *Hampshire Gas Co.*, 6 FERC ¶ 61,249, at 61,607 (1979). The Commission's acceptance of formula rates is premised on the rate design's "fixed, predictable nature," *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,552 (1994) (*Ocean State Power II*), which both allows a utility to recover costs that may fluctuate over time and prevents a utility from utilizing excessive discretion in determining the ultimate amounts charged to customers. See *id.* Thus, "when the Commission accepts a formula rate as a filed rate, it grants waiver of the filing and notice requirements of [§ 205 of the FPA] [, and] the utility's rates, then, can change repeatedly, without notice to the Commission, provided those changes are consistent with the formula." *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1567-68 (D.C. Cir. 1993) (quoting *San Diego Gas & Elec. Co.*, 46 FERC ¶ 61,363, at 62,129-30 (1989)). As further explained, because "the formula itself is the rate, not the particular components of the formula, ... periodic adjustments made in accordance with (continued...)

court “carefully heeded *Electrical District’s* analysis,”⁵⁰ but acknowledged that “decisions on the necessary notice have not been altogether clear.”⁵¹ In particular, the court reconciled its holding in *Electrical District* by explaining that *Electrical District* simply stands for the proposition that the Commission may not “announce some formula and later reveal that the formula was to govern from the date of announcement (as it had done in *Electrical District*).”⁵² The court recognized that this limiting clarification failed to implement *Electrical District’s* objective of “eliminating the problems of drawing lines as to what notice is adequate,” but found that “where the Commission explicitly adopts a formula and indicates when it will take effect, courts may not (without invading the Commission’s province) say that such a formula may never qualify as a ‘rate’ within the meaning of [the statute].”⁵³

25. More recently, in *Entergy Services, Inc.*,⁵⁴ the Commission addressed the degree of rate specificity required to “fix” rates. In *Entergy*, the Commission agreed with the court’s decision in *Electrical District* that, in cases where the initial ratemaking order “only decides general ratemaking issues, but does not fix the actual rates to be charged to customers, then the effective date properly should be set based on the date when the rates were fixed, rather than the date of issuance of the ratemaking order.”⁵⁵ Nevertheless, in *Entergy*, the Commission found that it had fixed the actual rates in the initial ratemaking order because, in that order, “the Commission did not merely make findings on general ratemaking principles that required translation into something more concrete in the

the Commission-approved formula do not constitute changes in the rate itself and accordingly do not require [section] 205 filings.” *Ocean State Power II*, 69 FERC ¶ 61,146 at 61,544-45 (footnote omitted).

⁵⁰ *Id.*

⁵¹ *Id.* at 577. See also *Public Service Co. of New Hampshire v. FERC*, 600 F.2d 944 (D.C. Cir. 1979).

⁵² *Transwestern*, 897 F.2d at 578 (emphasis in original); see also *Anaheim*, 558 F.3d at 524.

⁵³ *Transwestern*, 897 F.2d at 578 (citing *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

⁵⁴ 122 FERC ¶ 61,259, order denying reh’g, 125 FERC ¶ 61,128 (2008) (*Entergy*).

⁵⁵ *Id.* P 10.

compliance filing.”⁵⁶ The Commission explained that, in the initial ratemaking order, it “determined that the customers should be charged under Service Schedule MSS-4, a tariff specifying the actual rates to be charged to customers” pursuant to precise “formulas for calculating the payment by one operating company to another for the sale of capacity and energy.”⁵⁷ Thus, the Commission determined that it had properly established an effective date based on the date of the initial ratemaking order.

26. Applying the legal standard for determining when rates are “fixed” under section 206(a) of the FPA, the Commission finds that the modified RCST rates were fixed on February 13, 2007, the date we determined that the RCST rates were just and reasonable.⁵⁸ The February 13, 2007 Order on Paper Hearing approved the specific RCST capacity payment rates formulas and cost allocation methodologies, enabling parties to “supply their own inputs to the formula and thereby know the numerical rates” charged.⁵⁹

27. As discussed in the background section, the Settlement filed March 31, 2006 proposed to modify the must-offer obligation under the then-existing CAISO tariff by implementing a detailed RCST to enable the CAISO to procure backstop capacity for reliability purposes. The Settlement proposed specific formula rates for procuring backstop generation capacity, as well as the method for allocating the costs incurred.

28. In the July 20, 2006 Order on Complaint and Offer of Settlement, the Commission found that the compensation to generators under the must-offer obligation was no longer just and reasonable, but was not able to determine on the basis of the record the justness and reasonableness of the specific proposed formula RCST rates, terms and conditions. While the July 20, 2006 Order established paper hearing procedures to review evidence on whether the rates and cost allocation under the Settlement were just and reasonable, the Commission authorized the CAISO to implement, on an interim basis, all of the RCST rate terms as proposed in the Settlement (with the exception of two provisions related to AMP and ancillary services).⁶⁰ Specifically, the July 20, 2006 Order permitted each seller of eligible capacity, at its election, to collect the Offer of Settlement rates

⁵⁶ *Id.* P 11.

⁵⁷ *Id.* P 2 n.7.

⁵⁸ *Anaheim*, 558 F.3d at 523.

⁵⁹ *Id.* at 524 (citing *Transwestern*, 897 F.2d at 578) (emphasis added).

⁶⁰ July 20, 2006 Order, 116 FERC ¶ 61,069 at P 38.

from the date of the order, so long as such seller agreed that all of these revenues would be subject to refund, even if collected after the statutory refund period ended.⁶¹ On October 20, 2007, in accordance with the Commission's directives in the September 2007 Clarification Order, the CAISO filed interim tariff sheets implementing the RCST backstop capacity procurement features, including: (1) a daily must-offer capacity payment formula; (2) formula rates for RCST designations due to Significant Events; (3) formula rates for RCST designations due to resource adequacy insufficiency; and (4) a bid adder for frequently mitigated units.

29. In the February 13, 2007 Order on Paper Hearing, the Commission found that, as a result of the additional evidence provided in the paper hearing, the detailed RCST provisions proposed in the Settlement were just and reasonable.⁶² The Commission accepted all provisions of the Settlement relating to the sale of capacity as filed, including the rules for procuring capacity, the price paid for capacity, and the methodologies for allocating the costs incurred from purchasing capacity.⁶³ The only modifications the Commission made to the original Settlement were the elimination of the AMP and ancillary services provisions that the Commission determined were beyond the scope of the proceeding.⁶⁴ Those provisions, however, the Commission had already directed the CAISO to exclude from its interim tariff sheets as of October 20, 2006, in compliance with the July 20, 2006 Order.

30. Thus, in the February 13, 2007 Order on Paper Hearing, the Commission did not merely make findings on "general ratemaking principles that required translation into something more concrete in a compliance filing."⁶⁵ Instead, the Commission determined that the CAISO could implement the precise RCST payment terms laid out in the Settlement and that each potential seller of capacity was authorized to collect the RCST rates. In fact, the CAISO's filing to comply with the February 13, 2007 Order on Paper Hearing only contained tariff language modifications wholly unrelated to the RCST rate formula, which had been requested by protestors to the CAISO's October 2007 interim tariff sheet filing. Therefore, the specific RCST capacity payment formulas and cost

⁶¹ *Id.* P 40.

⁶² February 13, 2007 Order on Paper Hearing, 118 FERC ¶ 61,096 at P 48.

⁶³ *Id.* P 197.

⁶⁴ *Id.* and P 187.

⁶⁵ *Entergy*, 125 FERC ¶ 61,128 at P 11.

allocation that the Commission approved in the February 13, 2007 Order on Paper Hearing allowed purchasers to “supply their own inputs to the formula and thereby *know* the numerical rates” charged.⁶⁶ The compliance filing and final order on compliance filing in this case were not integral to customers’ ability to know the specific RCST backstop capacity rate formulas, allocation methodologies and other pertinent terms and conditions. This case, therefore, is clearly distinguishable from *Electrical District*, in which the Commission made general pronouncements in its initial determination, but left the significant details of implementing the rate for the utility to propose in its compliance filing.⁶⁷ This determination is consistent with the language of section 206(a) of the FPA, which requires the Commission to fix the rate prospectively “by order.” The statute does not specifically require the Commission to fix the rate by order on compliance filing.

31. The Commission’s February 13, 2007 Order on Paper Hearing originally permitted eligible sellers to charge RCST rates effective June 1, 2006, rather than on February 13, 2007. Under the D.C. Circuit’s ruling in *Anaheim*, however, sellers of eligible capacity, as defined under the terms of the Settlement, were improperly allowed to charge RCST rates for an approximately seven-month period between the original June 1, 2006 effective date, which the court subsequently found improper, and February 13, 2007, the date the rate was “fixed.” In compliance with the court’s findings, and pursuant to our equitable powers to remedy what a court has determined was wrongfully done, the Commission directs sellers of eligible capacity to refund, with interest, any RCST revenues collected from June 1, 2006, to February 13, 2007.⁶⁸

The Commission orders:

Within thirty (30) days from the date of this order, sellers of eligible capacity, as defined under the terms of the Settlement, shall refund, with interest determined in accordance with the Commission’s regulations (18 C.F.R. § 35.19a), any RCST revenues collected pursuant to the February 13, 2007 Order on Paper Hearing, for the period June 1, 2006, to February 13, 2007. Within fifteen (15) days thereafter, such sellers shall

⁶⁶ *Anaheim*, 558 F.3d at 524 (citing *Transwestern*, 897 F.2d at 578) (emphasis added).

⁶⁷ *Electrical District*, 774 F.2d at 495 (“The Commission cannot fix a rate, as it purports to have done here, without ever seeing it.”).

⁶⁸ See *Anaheim*, 558 F.3d at 525. See also *Arizona Public Service Company*, 34 FERC ¶ 61,153, at 61,262 (1986) (ordering refunds pursuant to the Commission’s equitable powers to remedy errors when its earlier order is reversed on appeal).

file a compliance report with the Commission showing monthly billing determinants, revenues under the prior and present rates, the monthly revenue refund, and the monthly interest computed, together with a summary of such information for the total refund period. A copy of the refund report shall also be sent to affected State Commissions.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.