

132 FERC ¶ 61,083
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Trans Bay Cable, LLC

Docket No. ER10-116-001

ORDER DENYING REHEARING
AND INSTITUTING SECTION 206 PROCEEDING

(Issued July 29, 2010)

1. On January 15, 2010, the Public Utilities Commission of the State of California (CPUC) filed a request for rehearing of a December 17, 2009 Commission order on Trans Bay Cable, LLC's (Trans Bay) request to establish its initial transmission revenue requirement.¹ In addition, on January 19, 2010, the California Department of Water Resources State Water Project (SWP) also filed a request for rehearing of the December 2009 Order. The December 2009 Order accepted Trans Bay's revenue requirement proposal, suspended it to become effective on the day that Trans Bay's project achieves commercial operation and is transferred to the operational control of the California Independent System Operator Corporation (CAISO), and set Trans Bay's proposal for hearing, subject to refund, and settlement judge procedures. In addition, the December 2009 Order directed Trans Bay to update its transmission revenue requirement filing with actual cost data within sixty days following the completion of construction and commercial operation. The December 2009 Order affirmed Trans Bay's previously established return on equity (ROE) of 13.5 percent and denied Trans Bay's request for a 50 basis point adder. This order denies the requests for rehearing of the CPUC and SWP, and institutes a Federal Power Act (FPA) section 206 proceeding.²

I. Background

2. Trans Bay's transmission revenue requirement filing was intended to establish the revenue requirement associated with Trans Bay's 53-mile, high voltage, direct current,

¹ *Trans Bay Cable, LLC*, 129 FERC ¶ 61,225 (2009) (December 2009 Order).

² 16 U.S.C. § 824e (2006).

submarine transmission line underneath San Francisco Bay and the associated facilities (the Project). The Project will be used to transmit approximately 400 megawatts of electricity from an existing substation adjacent to the City of Pittsburg, California, to an existing substation within the City of San Francisco.

3. On May 19, 2005 Trans Bay filed with the Commission an Operating Memorandum between Trans Bay, the City of Pittsburg, California (the City) and Pittsburg Power Company (Pittsburg Power). The Operating Memorandum set forth the rate principles and operational responsibilities by which Trans Bay, the City and Pittsburg Power will pursue development, financing, construction and operation of the Project. Specifically, the Operating Memorandum proposed (1) a post-tax ROE of 13.5 percent, (2) an assumed capital structure of 50 percent equity and 50 percent debt, (3) a three-year moratorium on Trans Bay's transmission revenue requirement, and (4) a thirty-year depreciation period for the Project.

4. On July 22, 2005, the Commission issued an order accepting the Operating Memorandum, to be effective on the date the Project enters service.³ The Operating Memorandum Order found that the rate treatments proposed by Trans Bay are appropriate based on the Project's benefits and the higher level of risk borne by Trans Bay as a start-up project.⁴

5. The Operating Memorandum Order described the potential benefits that the CAISO market and San Francisco Bay area would experience if the Project comes to fruition. For example, the Commission stated that potential benefits could include reduced congestion costs and reliability must run requirements in San Francisco, a decrease in the levels of local pollution, and elimination of radial electrical service by the completion of a transmission loop resulting in increased system reliability.⁵

6. The Operating Memorandum Order also described the nature of the increased risks borne by Trans Bay in developing the Project as a new and independent entity. For instance, the Commission noted siting and permitting issues, potential business disruption, housing value depreciation, environmental concerns, and visual impacts.⁶ The Commission further found that, as a new and independent entity, Trans Bay faced

³ *Trans Bay Cable, LLC*, 112 FERC ¶ 61,095 (2005) (Operating Memorandum Order), *order on clarification*, 114 FERC ¶ 61,031 (2006).

⁴ Operating Memorandum Order, 112 FERC ¶ 61,095 at P 23.

⁵ *Id.* P 24.

⁶ *Id.* P 25.

development, financing and construction risks that are greater than those of an ongoing, investor-owned utility.⁷ In light of the benefits and risks, the Operating Memorandum Order found that a 13.5 percent return on equity is justified, an imputed capital structure of 50 percent debt and 50 percent equity is reasonable, a three-year rate moratorium is acceptable, and that a thirty-year depreciation life is reasonable.⁸

II. Trans Bay's Transmission Revenue Requirements Filing

7. On October 23, 2009, Trans Bay submitted a filing pursuant to section 205 of the FPA⁹ and Part 35 of the Commission's rules and regulations¹⁰ to establish its transmission revenue requirement as a participating transmission owner in the CAISO control area, in connection with the Project.

8. Trans Bay proposed an estimated annual revenue requirement of \$149.3 million, including an overall ROE of 14 percent. Trans Bay's proposed 14 percent ROE included a request for Commission approval of a 50 basis point adder beyond the 13.5 percent ROE approved in the Operating Memorandum Order, for Trans Bay's participation in the CAISO, pursuant to Order No. 679.¹¹

9. Trans Bay's transmission revenue requirement filing further stated that Trans Bay's proposed transmission revenue requirement estimate was made while construction was still underway and committed to update its filing with actual cost data within sixty days following completion of the project. Trans Bay added that in no event will such an update to its transmission revenue requirement filing result in an increase in the requested annual revenue requirement. In addition, Trans Bay requested an effective date of its transmission revenue requirement to coincide with the commercial operation date of the Project.

10. The December 2009 Order found that Trans Bay's filing raised material issues of fact that warranted hearing and settlement judge procedures. Accordingly, the December 2009 Order set for hearing Trans Bay's stated cost of debt, O&M and A&G expenses,

⁷ *Id.*

⁸ *See id.* P 26-28.

⁹ 16 U.S.C. § 824d (2006).

¹⁰ 18 C.F.R. Part 35 (2009).

¹¹ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

prepayments, and property lease payments, among other things.¹² Trans Bay was directed to update its filing with actual cost data within sixty days following the completion of construction and the occurrence of commercial operation.¹³

11. In addition to setting Trans Bay's proposed transmission revenue requirement for hearing and settlement judge proceedings, the December 2009 Order explicitly reaffirmed the Commission's acceptance of the principles previously accepted in the Operating memorandum Order. Specifically, the Commission reaffirmed Trans Bay's (1) 30-year depreciation of the facilities, (2) 3-year rate moratorium, (3) use of a hypothetical 50/50 capital structure, and (4) use of a 13.5 percent ROE.¹⁴

12. The December 2009 Order rejected the CPUC's request to conduct a new discounted cash flow (DCF) analysis, as well as Trans Bay's request to include a 50 basis point adder in its ROE for participation in the CAISO.¹⁵

13. The December 2009 Order accepted Trans Bay's revenue requirement, to become effective on the day that Trans Bay's Project achieves commercial operation and is transferred to the operational control of the CAISO.¹⁶

III. CPUC's Request for Rehearing and SWP's ROE Issue

A. Issues

14. The CPUC objects to the Commission's decision affirming Trans Bay's ROE at the previously established 13.5 percent level for three basic reasons. First, the CPUC states that the December 2009 Order violates the CPUC's due process rights because it did not set the ROE issue for hearing. Secondly, the CPUC asserts that the December 2009 Order is arbitrary and capricious because it ignored Commission precedent of setting ROE issues for hearing and did so without explanation. Finally, the CPUC states that the Commission's decision to affirm Trans Bay's previously established ROE was not the product of reasoned decision making because it failed to balance the need to attract capital with consumer protection, and failed to take account of the current state of the economy.

¹² December 2009 Order, 129 FERC ¶ 61,225 at P 19.

¹³ *Id.* Ordering Paragraph (B).

¹⁴ *Id.* P 20.

¹⁵ *Id.* P 21.

¹⁶ *Id.* Ordering Paragraph (A).

15. SWP states in its request for rehearing that Trans Bay's 13.5 percent ROE is excessive and fails to consider updated record evidence. In addition, SWP asserts that the Commission's approval of a 13.5 percent ROE for Trans Bay fails to consider the financial impact on ratepayers and will result in unjust and unreasonable rates.

B. Commission Determination

16. Both the CPUC and SWP's requests for rehearing are based on arguments that the Operating Memorandum Order was "preliminary in nature,"¹⁷ and that Trans Bay's transmission revenue requirement filing necessitates the establishment of an ROE by means of an evidentiary hearing in the same manner as if there had been no ROE finding in the Operating Memorandum Order. However, the CPUC and SWP's arguments fail to give the Operating Memorandum Order appropriate effect. As we said in the December 2009 Order, the intent of the Operating Memorandum Order was to establish certainty with respect to Trans Bay's initial rates. Indeed, there would have been little reason to issue the Operating Memorandum Order if that had not been the intent.

17. The Operating Memorandum Order explicitly accepted the Operating Memorandum and indicated that the Operating Memorandum would become effective on the date Trans Bay's project enters service.¹⁸ The Operating Memorandum Order was intended to establish rate principles, including the 13.5 percent ROE that would be effective when Trans Bay's Project was in operation and receiving revenues. As summarized in the Operating Memorandum Order, it is likewise clear that the parties to that docket understood that the effect of approving the Operating Memorandum would occur during the first three years after Trans Bay's Project achieved commercial operation.¹⁹

18. The CPUC's arguments that the December 2009 Order violates its due process rights to a hearing and is arbitrary and capricious are based on the presumption that the December 2009 Order establishes Trans Bay's ROE. But the December 2009 Order is

¹⁷ See CPUC Request for Rehearing at 13; SWP Request for Rehearing at 4.

¹⁸ Operating Memorandum Order, 112 FERC ¶ 61,095 at P 32.

¹⁹ See *e.g., id.* P 13 (noting that PG&E requested that the Commission's approval of the rate principles be conditioned upon "a requirement that, to be eligible for the rate principles, the Project must be placed under ISO operational control"), P 17, (noting the CPUC's argument regarding the three year rate moratorium "that the Commission should require Trans Bay to submit a new rate filing at least once every three years thereafter, and that none of the terms of the Commission's initial approval of rate principles for the project should carry over into any such subsequent filings").

explicit in stating that it is affirming Trans Bay's previously established ROE, not accepting it in the first instance.²⁰

19. The CPUC and SWP both suggest conducting an ROE inquiry in Trans Bay's transmission revenue requirement case in the same manner as they argue would be done before the Commission in any traditional utility case.

20. Again, we find that the Operating Memorandum Order already established Trans Bay's initial ROE for purposes of its initial transmission revenue requirement. As we have said previously, the Commission will not relitigate issues already decided on the merits.²¹ The CPUC and SWP's arguments constitute collateral attacks on the Operating Memorandum Order and the CPUC and SWP's requests for rehearing on the issue of the ROE are denied.²²

IV. SWP's Request for Rehearing Regarding Suspension of Trans Bay's Proposed Rates

A. Issue

21. SWP argues that, because Trans Bay stated that the update to its transmission revenue requirement filing will not result in an increase to the requested revenue requirement, Trans Bay's rates should have been suspended for the maximum five-month statutory period. SWP also notes that in Trans Bay's answer to protests, filed November

²⁰ See December 2009 Order, 129 FERC ¶ 61,225 at P 20-23.

²¹ See *Pacific Gas & Electric Company*, 121 FERC ¶ 61,065 (2007) (denying motion to relitigate the same issue in successive rate cases); *Entergy Services, Inc.*, 127 FERC ¶ 61,226, at P 10 (2009) (explaining that the Commission applies *res judicata* and collateral estoppel in appropriate circumstances, and as a matter of policy, relitigation of issues on the merits is not sound administrative practice where the issues have been fully litigated and decided on the merits and no new evidence or circumstances would justify relitigation).

²² See *Dynegy Power Marketing, Inc., et al. v. California Independent System Operator Corporation*, 101 FERC ¶ 61,369, at P 18-20 (2002) (dismissing Dynegy's complaint against the CAISO's use of out-of-market pricing provisions as a collateral attack on the Commission's earlier decision accepting the alternative payment option for out-of-market calls, even though the Commission recognized that the alternative payment option might, on occasion, result in payments that overcompensate generators or, on other occasions, fail to consider all opportunity costs).

30, 2009, Trans Bay stated that Trans Bay's updated revenue requirement would likely be lower than what Trans Bay requested in its transmission revenue requirement filing.²³

22. In addition, SWP states that the Commission's suspension policy is well-known and holds that proposed rates are to be suspended for the maximum five-month statutory period if the Commission's initial review finds that they may be excessive.²⁴

Furthermore, SWP asserts that the December 2009 Order does not meet standards of reasoned decision making because it provides no reasoning for the lack of suspension and cannot be reconciled with the Commission's suspension policy.

B. Commission Determination

23. The Commission's suspension policy is that rate filings should generally be suspended for the maximum five-month statutory period where the filing may be substantially excessive, i.e., where it appears that ten percent or more of the requested increase appears to be excessive.²⁵ Of course, the Commission retains the flexibility to allow for a shorter suspension in instances where extraordinary circumstances exist.²⁶

24. Notwithstanding the issue of Commission authority to suspend Trans Bay's rates in this matter, SWP's argument in support of a five month suspension period fails in two different ways. First, as noted above in arguing that Trans Bay's final rates would be lower than those in Trans Bay's initial filing, SWP relies on Trans Bay's answer that was rejected by the Commission. The Commission declines to give weight to a pleading that it has rejected.

25. Additionally, SWP's requested maximum suspension in Docket No. ER10-116-000 ignores significant details of the suspension policy. First, the filing submits an

²³ We note that pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), answers to protests are prohibited unless the decisional authority orders otherwise. The Commission decision in this matter rejected Trans Bay's answer, and we decline to consider arguments based on Trans Bay's answer.

²⁴ SWP Request for Rehearing at 8, citing *West Texas Utilities Co.*, 18 FERC ¶ 61,189, at 61,374 (1982) (West Texas).

²⁵ See *Southern California Edison Co.*, 128 FERC ¶ 61,287, at P 16 (2009).

²⁶ See *West Texas*, 18 FERC ¶ 61,189 at 61,375.

initial rate, there is no pre-existing rate and thus no increase.²⁷ Accordingly, the specifics of *West Texas*' methodology for determining whether or not a proposed increase is substantially excessive – focusing on whether the amount of the proposed increase over the pre-existing rate is or is not more than ten percent excessive – are inapplicable here.

26. Second, SWP does not consider the harsh and inequitable results that a maximum suspension would cause for Trans Bay. Since this proceeding is Trans Bay's initial transmission revenue requirement proceeding, Trans Bay has no rates in place to charge during a suspension period. Thus, a five month suspension would require Trans Bay to forego all revenue for the first five months after its Project achieved commercial operation. Such a result would be unduly punitive and is not supported by SWP's arguments in support of a maximum suspension. SWP's request for rehearing is therefore denied.

27. However, to fully address SWP's concerns of excessive initial rates and make clear that in Docket No. ER10-116-000 refunds will accrue should we ultimately find that the proposed rate is indeed excessive, we will institute, in Docket No. ER10-116-000, a proceeding under section 206 of the FPA to investigate whether Trans Bay's proposed rates are just and reasonable.²⁸

28. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than publication of notice of the Commission's initiation of its investigation in the *Federal Register*, and no later than five months subsequent to that date. In order to give maximum protection to customers, and consistent with our precedent,²⁹ we will establish a refund date at the earliest possible date. This date will be the date on which the notice of our investigation in this proceeding is published in the *Federal Register*, or the date Trans Bay's rates in Docket

²⁷ See *Southwestern Electric Power Co.*, 39 FERC ¶ 61,099 (1987) (explaining the Commission's definition of "initial rate" as compared to "change in rate" for purposes of FPA sections 205 and 206. An initial rate filing is one which provides for a new service to a new customer, and that both the service and the customer must be new).

²⁸ Although the December 2009 Order on Trans Bay's filing to establish its initial revenue requirement contained an ordering paragraph establishing a hearing pursuant to the FPA and sections 205 and 206 thereof, the Commission wishes to clarify it is instituting an FPA section 206 proceeding.

²⁹ See, e.g., *PJM Interconnection, L.L.C.*, 90 FERC ¶ 61,137 (2000); *Cambridge Elec. Light Co.*, 75 FERC ¶ 61,177, *clarified*, 76 FERC ¶ 61,020 (1996); *Canal Elec. Co.*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

No. ER10-116-000 become effective, whichever is later, but in the case of the latter, in no event later than 5 months from the date of publication of the notice. The Commission is also required by section 206 to indicate when it expects to issue a final order. In this case, the Commission expects that it will be able to issue a final order, should the case go to an initial decision, within one year of the date of an initial decision.

The Commission orders:

(A) The Commission denies the requests for rehearing filed by the CPUC and SWP, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), an investigation is hereby instituted, in Docket No. ER10-116-000, concerning the justness and reasonableness of the rates proposed by Trans Bay in Docket No. ER10-116-000.

(C) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the investigation ordered in Ordering Paragraph (B) above, under section 206 of the Federal Power Act.

(D) The refund effective date established in Docket No. ER10-116-000 is the date on which the notice of our investigation in this proceeding is published in the *Federal Register*, or the date Trans Bay's rates in Docket No. ER10-116-000 become effective, whichever is later, but in the case of the latter, in no event later than 5 months from the date of publication of the notice.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.