

133 FERC ¶ 61,014
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company

v.

Docket Nos. EL00-95-000
EL00-98-000

Sellers of Energy and Ancillary Services Into Markets
Operated by the California Independent System
Operator Corporation and the California Power
Exchange Corporation

Investigation of Practices of the California Independent
System Operator Corporation and the California Power
Exchange Corporation

ORDER ON MOTION FOR CLARIFICATION

(Issued October 5, 2010)

1. In this order, we deny Pacific Gas & Electric Company's (PG&E) May 8, 2008 request for clarification of a refund rerun issue. Thus, we will not direct the California Independent System Operator (CAISO) to remove energy sales involving the City of Santa Clara, doing business as Silicon Valley Power (SVP) for December 2000 and January 2001 from PG&E's settlement statements and invoices.

Background

2. The history of this proceeding is long and has been thoroughly described in previous orders. Thus, that history will only be described briefly here.

3. On July 25, 2001, the Commission issued an order that established the scope and methodology for calculating refunds related to transactions in the market operated by the CAISO and the California Power Exchange (PX) during the period of October 2, 2000

through June 20, 2001.¹ The July 25 Order also initiated formal evidentiary proceedings to further develop the record with regard to the implementation of the mitigated market clearing price (MMCP) methodology and a determination of what refunds were owed.² The Commission directed the CAISO and PX to rerun their settlement billing processes and provide both the presiding administrative law judge and the parties with this data. The Commission determined that the revised settlement data should form the basis of any offset requests by the parties.³

4. The evidentiary proceeding instituted by the July 25 Order was conducted by Judge Birchman. During these proceedings, parties were permitted to file testimony and dispute the CAISO's data.⁴ Judge Birchman expressly stated that the CAISO's settlement rerun data was to be the template for determining who owes what to whom.⁵

5. In the August 8, 2005 order addressing the framework for submitting cost filings, the Commission emphasized its desire to expedite the resolution of the refund proceeding and announced a December 1, 2005 deadline for market participants to submit to the Commission any disputes with regard to the refund reruns, among other things.⁶

6. In August 2006, the Commission issued an order resolving the timely raised disputes.⁷ Among the disputes addressed were the issues raised by both SVP and the Northern California Power Agency (NCPA) regarding whether their sales in December 2000 and January 2001 were directly to the CAISO. The Commission found that resolution of this issue was not necessary because liability attached to the Scheduling

¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 61,120, at 61,516-61,519 (2001) (July 25 Order).

² *Id.* at 61,519-20.

³ *Id.* at 61,519.

⁴ *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 63,035 (2001).

⁵ *Id.* P 765.

⁶ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 112 FERC ¶ 61,176, at P 116 (2005) (August 8 Order).

⁷ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 116 FERC ¶ 61,167 (2006) (August 2006 Order).

Coordinator, and, as such, PG&E was identified as having completed the transactions at issue.⁸

7. In a related matter, on April 6, 2001, PG&E filed for bankruptcy. On October 3, 2001, SVP filed a claim in PG&E's bankruptcy proceeding, asserting, among other things, that it had been underpaid for energy sales in December 2000 and January 2001. PG&E argued that SVP's remedy was against the CAISO for the outstanding amount, not against PG&E. The bankruptcy case proceeded on a parallel track with the Commission's refund proceeding. After SVP and PG&E conducted discovery, the United States Bankruptcy Court, Northern District of California, San Francisco Division (Bankruptcy Court) conducted a three day bench trial. On December 12, 2007, the Bankruptcy Court issued an order finding that the energy sales in December 2000 and January 2001 "were sales by SVP directly to the [CAISO] and not sales of power by SVP to PG&E...."⁹

8. On May 8, 2008, PG&E filed a motion for clarification of a refund rerun issue. Answers to the motion were filed by the CAISO, SVP, and NCPA. PG&E filed a reply to those responses on June 9, 2008.

PG&E's Motion

9. On May 8, 2008, PG&E filed a motion for clarification of a refund rerun issue. PG&E contends with regard to certain energy sales involving SVP, that the CAISO incorrectly identified PG&E as the Scheduling Coordinator. PG&E claims that information recently produced by the CAISO and a decision by the Bankruptcy Court make clear that these transactions were not completed by PG&E, but instead were directly between the CAISO and SVP.

10. More specifically, PG&E contends that in the Bankruptcy Court proceeding, hundreds of pages of documents were produced, including internal CAISO documents. According to PG&E, the Bankruptcy Court determined that the SVP sales were directly between the CAISO and SVP, with PG&E acting as the "middleman." PG&E argues that the SVP energy sales were unique and were not a part of its Scheduling Coordinator arrangement with SVP. PG&E states that it is seeking to have the CAISO revise, as a part of the refund proceeding rerun, invoices and settlement statements to reflect what it claims is the accurate nature of the SVP energy sales.

⁸ *Id.* P 45.

⁹ PG&E May 8, 2008 Motion for Clarification of Refund Rerun Issue, (PG&E Motion), Attachment B (Bankruptcy Court Order) at 2.

Answers

11. The CAISO, SVP, and NCPA filed answers to PG&E's motion. Both the CAISO and SVP objected to PG&E's request. The CAISO argues that PG&E's motion is untimely under both the CAISO tariff and our August 8 Order; that the motion is an improper collateral attack on our August 2006 Order; and that the Bankruptcy Court found that PG&E was the Scheduling Coordinator for the transactions at issue.

12. SVP argues that the Commission has previously ruled that PG&E was the Scheduling Coordinator for the transactions at issue and that neither PG&E's new arguments nor the Bankruptcy Court ruling justify overturning the previous Commission determination or reopening the record. According to SVP, PG&E's motion represents a collateral attack on the previous Commission order. SVP also argues that PG&E's contention that it was not the Scheduling Coordinator is not consistent with PG&E's prior representations to the Commission. Therefore, PG&E should be stopped from taking this new position. SVP also claims that the Bankruptcy Court decision is irrelevant and non-binding. Finally, SVP contends that PG&E has failed to justify reopening the record. According to SVP, PG&E's motion does not present any new evidence.

13. NCPA argues in support of reopening the record and reconsideration of the Commission's previous orders. NCPA argues that the Bankruptcy Court decision is dispositive on these issues and that the Commission's previous orders are inconsistent with the Bankruptcy Court order. NCPA suggests that the Commission also should reopen the recent decision involving its transactions and asks that its response be treated as a motion for reconsideration. NCPA contends that granting PG&E's requested relief requires the Commission to reopen and reconsider those earlier decisions.

Discussion**A. Procedural Matters**

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2010) prohibits an answer to an answer unless otherwise permitted by the decisional authority. We are not persuaded to allow PG&E's answer to the answers filed in this proceeding and will, therefore, reject it.

B. Effect of Previous Commission Order

15. While PG&E has styled this filing as a motion for clarification, we are not obligated to accept a filing solely on the basis of its party-bestowed title. Instead, we

examine the substance of the pleading.¹⁰ We find that PG&E's motion cannot be interpreted to be a motion for clarification because PG&E is not asking that we clarify any previous Commission order. Rather, we find PG&E's motion to be an untimely attempt by PG&E to seek rehearing of a prior Commission order.

16. First we note that the CAISO billing provisions in effect at the time of the transaction gave PG&E several opportunities to correct any alleged misperception that it was a party to the transactions.¹¹ PG&E did not do so. In addition to these CAISO tariff provisions setting forth the settlement procedures governing any alleged errors in charges, the Commission gave market participants several opportunities to correct the CAISO's settlement transaction records. During the formal evidentiary proceedings instituted by the Commission and conducted by Judge Birchman, parties were permitted to file testimony and dispute the CAISO's data.¹² Judge Birchman expressly stated that the CAISO's settlement rerun data was to be the template for determining who owes what to whom.¹³ PG&E does not argue that it attempted to correct the transactions at issue in this motion during those proceedings.

17. Further, in an effort to expedite resolution of the refund issues, the Commission directed parties to file any remaining disputes regarding the refund reruns with the Commission by December 1, 2005.¹⁴ Again, PG&E did not raise any issues regarding the transactions at issue with the Commission. However, SVP did submit a dispute regarding them.

¹⁰ *Friends of Keeseville, Inc.*, 39 FERC ¶ 61,269, *reh'g denied*, 41 FERC ¶ 61,071 (1987), *aff'd* 859 F.2d 230 (D.C. Cir. 1988). *See also Gulf Coast Engineering Management, Inc.*, 51 FERC ¶ 61,314, at 62,037 (1990) (Rejecting a purported "motion to lodge" because it was in fact an impermissible answer to an answer).

¹¹ *See* CAISO tariff sections 11.6.1.1, 11.7.2, and 11.7.3. All transactions conducted in the CAISO market are governed by the CAISO tariff. These sections will be discussed in further detail below.

¹² *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 96 FERC ¶ 63,035.

¹³ *Id.* P 765.

¹⁴ August 8 Order, 112 FERC ¶ 61,176 at P 116.

18. SVP stated that its dispute involved “who sold energy to the CAISO” and argued that the correct seller had to be determined.¹⁵ NCPA raised a similar dispute, stating that its sales were made between NCPA and the CAISO. NCPA argued that based on this relationship, the transactions at issue should be exempt from mitigation.¹⁶

19. In the August 2006 Order, we stated with regard to this matter that:

Since the CAISO interacted only with Scheduling Coordinators, the transactions from both SVP and NCPA are identified by the CAISO as being completed by PG&E. The Commission has generally held that refund liability in this proceeding attaches to the Scheduling Coordinator of the transaction. Thus, the transactions at issue here are subject to mitigation. The specific issues pertaining to the transactions between SVP and PG&E, and NCPA and PG&E, respectively, are beyond the scope of this proceeding. Therefore, the disputes made by NCPA and SVP as to refund liability for sales made by PG&E to the CAISO are rejected.¹⁷

20. PG&E did not seek rehearing of the determination that the transactions are identified as being completed by PG&E or that PG&E served as the Scheduling Coordinator who is generally held to have refund liability.¹⁸ Under section 313 of the Federal Power Act, parties may seek rehearing within 30 days of issuance of a Commission order.¹⁹ Furthermore, filing a request for rehearing within the 30-day period is a statutory prerequisite for rehearing and the courts have repeatedly recognized that the

¹⁵ SVP December 1, 2005 Notice of Dispute Docket Nos. EL00-95-000; EL00-98-000; and ER03-746-000 at P 6 and P 8.

¹⁶ NCPA December 1, 2005 Notification Regarding Potential Outstanding Disputes Docket Nos. EL00-95-000 and EL00-98-000 at 3.

¹⁷ August 2006 Order, 116 FERC ¶ 61,167 at P 45 (footnotes omitted).

¹⁸ However NCPA did request rehearing on this issue. The Commission rejected NCPA’s arguments, relying on the established facts that: (1) NCPA did not have an agreement with the CAISO covering the sales in question; (2) NCPA did not receive payment for the transactions at issue directly from the CAISO; and 3) these transactions were settled with PG&E. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 122 FERC ¶ 61,274, at P 46-50 (2008).

¹⁹ 16 U.S.C. § 8251 (2006). *See also* 18 C.F.R. § 385.713(b) (2010).

Commission has no discretion to extend the deadline.²⁰ Accordingly, the Commission itself has long held that we lack the authority to consider requests for rehearing filed more than 30 days after the issuance of a Commission order.²¹ As explained below, if we construe PG&E's filing as a motion for rehearing, that motion must be denied as untimely. Thus, not only is PG&E's request to alter the settlement statements untimely given our previous direction to file all disputes by December 1, 2005, the request also represents a collateral attack on our August 2006 Order in which we expressly found that PG&E was the Scheduling Coordinator having liability for these transactions.

21. PG&E's attempt to avoid the collateral effect of these orders is equally unavailing. PG&E argues that when the Commission addressed SVP's dispute, the Commission did not have before it any of the information obtained by PG&E through the bankruptcy proceeding discovery.²² PG&E does not attempt to justify either its failure to obtain this information in a timely manner,²³ its failure to file a dispute as directed by the August 8 Order, or its failure to timely request rehearing of our August 2006 Order. PG&E also contends that the issue raised in its motion is different from that resolved by our August 2006 Order.²⁴ However, in the August 2006 Order we were called upon to determine who would be liable for the very same transactions which PG&E now attempts to disavow in its motion. The finding that PG&E completed the transactions and was the Scheduling Coordinator was central to our determination. Thus, PG&E cannot avoid the collateral effect of either our August 8 Order or our August 2006 Order.

22. The issue regarding these transactions was presented to PG&E on numerous occasions and it did not timely dispute the issue. First, the issue was presented as part of the CAISO's billing process. Then, the Commission also offered opportunities for PG&E to make its case regarding liability for these transactions in the August 8 Order and, importantly, on rehearing of the August 2006 Order. PG&E, however, did not avail itself of these opportunities to challenge the findings that it completed these transactions. PG&E seeks a Commission ruling that the transactions were completed by SVP directly and should not be attributed to PG&E. This directly questions our finding in the August

²⁰ See, e.g., *Boston Gas Co. v. FERC*, 575 F.2d 975 (1st Cir. 1978). See also *Dayton Power & Light Co. v. FPC*, 251 F.2d 875, 877 (D.C. Cir. 1957).

²¹ *Southern California Edison Co.*, 116 FERC ¶ 61,287, at P 17 (2006).

²² PG&E Motion at 13.

²³ This aspect of PG&E's argument pertains more to a request to reopen the record. That issue is discussed in further detail below.

²⁴ *Id.*

2006 Order. Thus, we find PG&E's motion is a request for rehearing of the August 2006 Order. Since this request was filed more than 30 days after the August 2006 Order, it is untimely, and, therefore, PG&E's motion must be denied.

C. Request to Reopen the Record

23. In its motion, PG&E states that if we find that the August 2006 Order is dispositive, we should grant reconsideration. PG&E argues that such a grant would be appropriate "in these circumstances where evidence not previously available has been adduced."²⁵ We deny this aspect of PG&E's motion as described below.

24. The Commission may reopen the record in its discretion where there is good cause.²⁶ The Commission views good cause as consisting of extraordinary circumstances, that is, a change in circumstances that is more than just material, but goes to the very heart of the case.²⁷ In deciding whether to exercise its discretion, "the Commission looks to whether or not the movant has demonstrated the existence of extraordinary circumstances that outweigh the need for finality in the administrative process."²⁸ As the Commission has previously explained, "we recognize of course that changes have occurred since the close of the record. But such changes always occur. Yet litigation must come to an end at some point. Hence, the general rule is that the record once closed will not be reopened."²⁹

25. Furthermore, we have recognized that in addressing requests to reopen the record, we have "an obligation to preserve the integrity of our processes, and so due diligence must be used to obtain and present evidence in a timely manner."³⁰ Allowing parties to behave with less than due diligence would cripple the orderly resolution of disputes.³¹

²⁵ PG&E Motion at 14, n.17.

²⁶ 18 C.F.R. § 385.716 (2010).

²⁷ *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,624, *reh'g denied*, 56 FERC ¶ 61,361 (1991).

²⁸ *East Texas Elec. Coop. Inc. v. Central & South West Serv., Inc.*, 94 FERC ¶ 61,218, at 61,801 (2001).

²⁹ *Transwestern Pipeline Co.*, Opinion No. 238, 32 FERC ¶ 61,009 (1985), *reh'g denied*, Opinion No. 238-A, 36 FERC ¶ 61,175, at 61,453 (1986).

³⁰ *Central Maine Power Co.*, 55 FERC ¶ 61,060, at 61,170 (1991).

³¹ *Id.*

Previously, the Commission has denied a request to reopen the record when the requesting party could not explain why it could not produce the proposed evidence at hearing.³²

26. In this instance, we find that PG&E's filing does not satisfy the above standards for reopening the record. First, PG&E has not met the due diligence standard. PG&E offers no explanation regarding why it waited so long to seek this information. PG&E was aware that these transactions were an issue when it received the original settlement statements from the CAISO. The transactions were further highlighted in October 2001 when SVP initially filed its claim with the Bankruptcy Court. Yet, despite several discovery opportunities during the seven years since the initiation of the refund proceeding, including after the Commission issued its August 2006 Order holding that PG&E completed these transactions, PG&E does not appear to have sought the information at issue. To seek to reopen the record after all these years, on the basis of material which could have been available at the start of this proceeding, is the antithesis of due diligence.

27. Similarly, PG&E has failed to demonstrate any extraordinary circumstances which would warrant reopening the record. The information relied upon by PG&E is not "new evidence." These documents appear to have been created contemporaneously when the transactions occurred in December 2000 and January 2001. PG&E does not allege that the CAISO inappropriately withheld the documents. PG&E knew that these transactions were at issue, yet it failed to attempt to discover the information associated with those transactions until years later. The only reason the information remained unavailable for so long is PG&E's failure to timely request the documents. This inaction on PG&E's part certainly is not an extraordinary circumstance warranting the reopening of the record.

D. Application of the CAISO Tariff

28. Under CAISO tariff section 11.6.1.1, the CAISO was required to provide each Scheduling Coordinator a Preliminary Settlement Statement ("Statement") of charges payable to or owed by the Scheduling Coordinator. After receiving the Statement, the Scheduling Coordinator had 8 Business Days to notify the CAISO of any errors.³³ Importantly, CAISO Tariff section 11.7.2 provides that failure to notify the CAISO of any errors results in the Statement being deemed validated and therefore binding on the Scheduling Coordinator.

³² *Transcontinental Gas Pipe Line Corp.*, 23 FERC ¶ 61,152, at 61,337 (1983).

³³ CAISO Tariff, section 11.6.1.2.

29. Similarly, CAISO Tariff section 11.7.3 provides that the Scheduling Coordinator had 10 Business Days to review a Final Statement. Once again, failure to notify the CAISO of any errors in the Final Statement results in the Final Statement being deemed validated and therefore binding on the Scheduling Coordinator.

30. According to both PG&E and the CAISO, although PG&E filed disputes on the original settlement transactions in 2001, claiming that the quantities designated for SVP were incorrect, PG&E did not raise any contention alleging that it was not the Scheduling Coordinator for the transactions listed in the statements.³⁴

31. To the contrary, PG&E appears to have acted as SVP's Scheduling Coordinator by raising objections to the quantities paid for on SVP's behalf.³⁵ PG&E never asserted the issue of its relationship to SVP in a timely manner. Thus, based on the CAISO tariff in affect at the time, the transactions at issue became final over seven years ago.

E. Implications of the Bankruptcy Court Order

32. PG&E asserts that the Bankruptcy Court found that the December 2000 and January 2001 transactions were not initiated by or completed by PG&E after considering hundreds of pages of discovery.³⁶ PG&E disputes the CAISO's assertion that it was the Scheduling Coordinator for these transactions.³⁷ According to PG&E, the internal documents produced by the CAISO during the bankruptcy proceeding and the subsequent Bankruptcy Court Order warrant the revision of the December 2000 and January 2001 invoices and settlement statements.³⁸

33. PG&E's reliance on the Bankruptcy Court determination is misplaced. PG&E fails to recognize the Commission's need for finality in its proceedings. PG&E had

³⁴ See PG&E Motion, Attachment D (CAISO Response Letter) at 1; PG&E Motion, Attachment E (PG&E Response Letter) at 2; and CAISO May 23, 2008 Answer to PG&E Motion for Clarification (CAISO Answer) at 4. See also SVP May 23, 2008 Answer to PG&E Motion for Clarification (SVP Answer) at 5.

³⁵ CAISO May 23, 2008 Answer to PG&E Motion at 4. See also CAISO December 16, 1005 Answer to Disputes filed by Various Parties, Docket No. EL00-95 at 10-11.

³⁶ PG&E Motion at 10.

³⁷ *Id.* at 11.

³⁸ *Id.* at 10. It should be noted that PG&E concedes that the Commission is not bound by the Bankruptcy Court's determination. *Id.* at 14.

numerous opportunities to question the CAISO's data and oppose the Commission's determination that it had completed the transactions at issue and was the Scheduling Coordinator. It failed to do so in a timely manner. Nothing in the Bankruptcy Court's order requires us to violate our own statutes and regulations governing timely actions by parties, and we decline to do so.

F. NCPA's Answer

34. As noted previously, NCPA filed an answer in support of PG&E's motion. However, NCPA's answer actually suggests that the Commission should reconsider the previous orders addressing these issues, expanding PG&E's motion beyond its somewhat narrow original request. NCPA expressly asks that we treat its answer as a motion for reconsideration.³⁹ For the reasons discussed below, we will deny NCPA's request.

35. We find that NCPA's request for reconsideration is actually an untimely request for rehearing similar to PG&E's motion. As noted above, filing a request for rehearing within the 30 day time period is a statutory prerequisite for rehearing. Labeling an improper request for rehearing as a motion for reconsideration cannot cure this deficiency. Thus, NCPA's request is untimely and must be rejected for the same reasons as PG&E's motion.

The Commission orders:

(A) PG&E's Motion for Clarification is denied for the reasons discussed in the body of this order.

(B) NCPA's request to treat its answer as a request for reconsideration is denied for the reasons discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁹ NCPA Answer at 5.