136 FERC ¶ 61,034
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.

City of Anaheim, California Docket No. ER11-3594-000

ORDER ACCEPTING PROPOSED TRANSMISSION
REVENUE REQUIREMENT AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued July 15, 2011)

1. On May 18, 2011, the City of Anaheim, California (Anaheim) submitted revisions to its Transmission Owner Tariff (TO Tariff). Anaheim requests that the Commission approve its: (1) revised base Transmission Revenue Requirement (TRR); (2) revised High Voltage Transmission Revenue Requirement (High Voltage TRR); and (3) modified Gross Load calculation. Anaheim requests an effective date of July 1, 2011, and consents to return any payments it receives from the California Independent System Operator Corporation (CAISO) for Anaheim's revised rates in excess of those ultimately approved by the Commission. As discussed below, we accept Anaheim's revised TO Tariff rates for filing, effective July 1, 2011, and set the matter for hearing and settlement judge procedures.

I. Background

2. Anaheim is not a public utility but it is a Participating Transmission Owner (Participating TO) in the CAISO. Anaheim is reimbursed for its TRR by the CAISO through CAISO's collection of a Transmission Access Charge (TAC) from all users of the CAISO grid. The TAC rate is a formula rate based on the TRRs of all Participating TOs. Rate changes that impact the CAISO TAC require a section 205 filing under the

Federal Power Act (FPA)[1] and full review by this Commission to ensure that the proposed rate revisions will result in a just and reasonable TAC rate.[2]

3. Section 26.1.1 of the CAISO tariff requires non-jurisdictional Participating TOs to file their proposed High Voltage TRR with the Commission. In 2003, Anaheim filed, and the Commission accepted, Anaheim's initial TO Tariff.[3] This tariff included Anaheim's base TRR, Transmission Revenue Balancing Account Adjustment (TRBAA), and the High Voltage TRR to be used to calculate the TAC paid by CAISO transmission customers for service over Anaheim's facilities and Entitlements (as defined in the CAISO tariff). Since joining the CAISO in 2003, Anaheim has filed one revision to its TRR. The currently-effective TRR of $25,300,000 was established by a settlement agreement, which was approved by the Commission.[4]

4. In this docket, Anaheim proposes a revised base TRR of $30,826,424 on an annual basis.[5] Anaheim states that its TRBAA, which serves as a revenue credit or negative adjustment to the TRR, will not change as a result of this filing and will remain $366,070.62. The revised High Voltage TRR (i.e., Anaheim's base TRR with the TRBAA adjustment) would become $31,192,494.62. Anaheim also proposes a decrease in its Gross Load. According to Anaheim, its Gross Load is determined by using a forecasting process based on variables such as weather observations, economic conditions, and seasonal load patterns.[6]

5. Anaheim states that the proposed TRR is the result of adjustments to its Entitlements costs in the Southern Transmission System (STS), the Mead-Adelanto

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[1] 16 U.S.C. § 824d (2006).

[2] *City of Vernon, California*, Opinion No. 479, 111 FERC ¶ 61,092, at P 42-44, *order on reh'g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh'g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006).

[3] *City of Anaheim, California*, 105 FERC ¶ 61,293 (2003); *City of Anaheim, California*, Opinion No. 483, 113 FERC ¶ 61,091 (2005), *order on reh'g*, Opinion No. 483-A, 114 FERC ¶ 61,311 (2006).

[4] *See* Offer of Settlement and Settlement Agreement, City of Anaheim, California, Docket No. EL05-131-000 (filed December 7, 2005); *City of Anaheim, California*, 114 FERC ¶ 61,044 (2006) (approving Offer of Settlement and Settlement Agreement).

[5] Anaheim's proposed TRR reflects a $5,526,424 increase.

[6] Anaheim states that its proposed Gross Load is consistent with the forecast Anaheim provided to the California Energy Commission.

Transmission Project, the Mead-Phoenix Transmission Project, contracts for various Entitlements with the Los Angeles Department of Water and Power, contracts for transmission capacity on Pacific Northwest DC Intertie, administrative and general expenses, regulatory expenses, and right-of-way fees and payments to Anaheim's general fund.

6. Anaheim explains that its Entitlements in the STS, the Mead-Adelanto Project, and the Mead-Phoenix Project are all financed by the Southern California Public Power Authority (SCPPA) and are the most significant revisions to the proposed TRR. Additionally, Anaheim states that for fiscal year 2012, the general fund transfer amount will be 4 percent and the right-of-way fee will be 1.5 percent of Anaheim's annual gross electric operating revenue. Anaheim asserts that both the general fund transfer and the right-of-way fee are conceptually similar to franchise fees and a return on equity.

7. Anaheim requests an effective date of July 1, 2011, the start of its fiscal year.

II. Notice of Filing and Responsive Pleadings

8. Notice of Anaheim's filing was published in the *Federal Register*, 76 Fed. Reg. 30,699 (2011), with interventions, comments, and protests due on or before June 8, 2011. The California Department of Water Resources State Water Project, San Diego Gas and Electric Company, the City of Santa Clara, California and the M-S-R Public Power Agency, and the Modesto Irrigation District filed motions to intervene. Atlantic Path 15, LLC filed a motion to intervene out of time. Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (SoCal Edison) filed motions to intervene and protests. Anaheim filed an answer to the protests.

A. Protests

9. PG&E objects to Anaheim including in its TRR payments to its general fund because CAISO ratepayers should not be required to pay a TAC rate that includes amounts that enable Anaheim to provide services solely for the benefit of its residents. PG&E suggests that Anaheim should recover any required general fund transfers though its retail electric rates, which are charged to the Anaheim residents who directly benefit from the transfer.[7] SoCal Edison argues that Anaheim has not established that it is appropriate for CAISO ratepayers to be responsible for paying fees that Anaheim assesses.[8] SoCal Edison maintains that, even if the general fund fee assessment should apply to CAISO ratepayers, it is not evident that the 4 percent general fund fee is a

[7] *See* PG&E Protest at 3.

[8] *See* SoCal Edison Protest at 4.

reasonable rate. SoCal Edison points out that the City Charter pages included in the workpapers indicate that 4 percent is the maximum percentage that could be applied, not the actual amount that will be applied.[9]

10. PG&E asserts that none of the transmission facilities included in Anaheim's TRR are located within its boundaries; therefore, the right-of-way fee, which is intended to recover costs associated with facilities located in city streets, is not applicable to the transmission facilities used to calculate the proposed TRR.[10]

11. SoCal Edison states that Anaheim is seeking an increase of $3,730,461 for the STS portion of the SCPPA costs as compared with the costs it incurred in 2010. However, according to SoCal Edison, comparing Anaheim's STS costs with its last TRR filing in Docket No. EL05-131-000 reveals a significant cost increase. SoCal Edison states that STS accounted for $14,408,754 in Anaheim's last TRR filing, but in the present filing, Anaheim forecasts the cost of STS to be $20,105,115, an increase of 40 percent.[11] SoCal Edison states that given the limited testimony and evidence showing that such a cost increase is justified, the Commission should set Anaheim's TRR for hearing.[12]

12. SoCal Edison argues that it is not clear that the forecast for Anaheim's regulatory expenses was developed consistent with Commission policy. SoCal Edison states that Anaheim's testimony indicates that it has analyzed legal and consulting fees over a six-month period to develop its forecast expense for a 12-month period. SoCal Edison asserts that there is no explanation as to why this methodology is reasonable.[13]

13. PG&E states that Anaheim has not provided enough information for it to determine whether Anaheim's updated Gross Load figure is just and reasonable. PG&E and SoCal Edison state that, given the factual issues raised, it is appropriate for Anaheim's TRR to be accepted, subject to refund, and set for hearing.[14]

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[9] *See* SoCal Edison Protest at 4.

[10] *See* PG&E Protest at 4-5.

[11] *See* SoCal Edison Protest at 3.

[12] *Id.*

[13] *Id.* at 3-4.

[14] *See* PG&E Protest at 6; SoCal Edison Protest at 2.

B. Answer

14. Anaheim filed an answer to SoCal Edison's and PG&E's protests. Anaheim asserts that the testimony of Robert C. Smith, Exh. No. ANA-1, and the work papers included in the filing adequately explain and support Anaheim's STS costs.[15] Anaheim asserts that it has provided substantially more support for its STS Entitlement costs, "than SCE [SoCal Edison] has included in its own filings for similar types of costs that are based upon contracts with other entities."[16] Anaheim points out that the Commission has expressly approved Anaheim's recovery of its STS Entitlement costs because the STS is a CAISO networked facility whose costs are recoverable from CAISO transmission customers.[17]

15. Anaheim answers SoCal Edison's and PG&E's objections to including the costs of its transfer to the City General Fund and payment of the right-of-way fees by analogizing these costs to the returns that CAISO transmission customers pay to SoCal Edison and PG&E shareholders, because the Anaheim residents are in essence shareholders in the City utility system.[18]

16. Anaheim notes that Mr. Smith's testimony, Exh. No. ANA-1, fully supports its regulatory expense forecast based on historical incurred costs. In addition, Anaheim asserts that its methodology for calculating regulatory expenses is not unlike those that SoCal Edison seeks to recover in Docket No. ER11-3697-000. Anaheim further states that to the extent necessary it will provide further documentation of its regulatory expenses to parties that sign a Non-Disclosure Certificate and agree to abide by the terms of the Commission's Model Protective Order.[19]

17. Anaheim reiterates that its Gross Load forecast for fiscal year 2012 is the same forecast that it provides to the California Energy Commission. It further states that it uses

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[15] *See* Anaheim Answer at 3.

[16] Anaheim Answer at 4, n.5, citing Southern California Edison Co., Docket No. ER11-3697-000 (filed June 3, 2011).

[17] *See* Anaheim Answer at 5, *citing City of Anaheim, California,* Opinion No. 483, 113 FERC ¶ 61,091, at P 1, 47, 58 (2005), *reh'g denied,* Opinion No. 483-A, 114 FERC ¶ 61,311 (2006).

[18] *See* Anaheim Answer at 6.

[19] *See* Anaheim Answer at 8-9.

the forecast for its own City budgeting and resource planning and procurement purposes.[20]

III. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

19. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2011), the Commission will grant the late-filed motion to intervene of Atlantic Path 15, LLC, given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Anaheim's answer for filing because it has provided information that assisted us in our decision-making process.

B. Standard of Review

21. The Commission has addressed the issue of review to be applied to petitions involving non-jurisdictional TRRs in an opinion reviewing the TRR filed by the City of Vernon, California (Vernon).[21] In Opinion No. 479, the Commission recognized that, as a municipally-owned utility, Vernon was not subject to its section 205 jurisdiction. However, the Commission noted that because Vernon voluntarily submitted its TRR as a component of a jurisdictional rate, Vernon's TRR is "subject to a full and complete section 205 review as part of our section 205 review of that jurisdictional rate."[22] The Commission explained that, in *Pacific Gas & Elec. Co. v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit held that the Commission has statutory authority to review Vernon's TRR "'to the extent necessary to ensure that the CAISO

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[20] *Id.* at 9.

[21] *See City of Vernon, California*, Opinion No. 479, 111 FERC ¶ 61,092, *order on reh'g*, Opinion No. 479-A, 112 FERC ¶ 61,207 (2005), *reh'g denied*, Opinion No. 479-B, 115 FERC ¶ 61,297 (2006).

[22] Opinion No. 479, 111 FERC ¶ 61,092 at P 44.

rates are just and reasonable.'"[23] Subsequently, the court upheld the Commission's decision that subjecting the TRRs of non-jurisdictional utilities (like Vernon) to a full section 205 review is "the only way to ensure that CAISO's rate is just and reasonable."[24]

22. However, in *TANC*, the court rejected the Commission's authority to order Vernon to pay refunds. The court held that the structure of the FPA clearly reflects Congress's intent to exempt governmental entities and non-public utilities from the Commission's refund authority over wholesale electric energy sales.[25] The court reasoned that FPA section 201(f) exempts from Part II of the FPA "any political subdivision of a state."[26]

23. Therefore, while Anaheim is not within the Commission's jurisdiction under FPA section 205, we find that, based on the court's rulings, it is appropriate for review purposes to apply the just and reasonable standard of section 205 to Anaheim's TO Tariff rates. To determine the justness and reasonableness of Anaheim's TO Tariff rates, we find that, as discussed below, hearing and settlement judge procedures are appropriate.

24. Furthermore, consistent with the court's findings in *TANC*, Anaheim is not subject to section 205 (aside, that is, from our applying a just and reasonable standard), including Commission-imposed rate suspension and refund obligations. However, we note that Anaheim has agreed to refund any payment it receives from the CAISO for Anaheim's revised rates in excess of those ultimately approved by the Commission.[27]

C. Hearing and Settlement Judge Procedures

25. Anaheim's proposed TO Tariff rate revisions raise issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

26. Our preliminary analysis indicates that Anaheim's TRR has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept Anaheim's TO Tariff

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[23] *Id.* at P 43 (quoting *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1117 (D.C. Cir. 2002)).

[24] *Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 672 (D.C. Cir. 2007) (*TANC*).

[25] *Id.* at 673-74.

[26] *Id.* at 674.

[27] Transmittal Letter at 7.

rates for filing, make them effective as of July 1, 2011, as requested, and set them for hearing and settlement judge procedures.

27. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[28] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding, otherwise the Chief Judge will select a judge for this purpose.[29] The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge. Should the settlement judge ultimately determine that a hearing is warranted, Anaheim shall file a full case in chief pursuant to the Commission's regulations to support its proposed rate structure at hearing.

The Commission orders:

(A) Anaheim's proposed Transmission Owner Tariff rates, as incorporated in revised tariff provisions, are hereby conditionally accepted for filing, effective July 1, 2011, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act 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), a public hearing shall be held concerning Anaheim's Transmission Owner Tariff rates, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

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[28] 18 C.F.R. § 385.603 (2011).

[29] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the date of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (http://www.ferc.gov/legal/adr/avail-judge.asp).

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.