

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Co., Complainant

EL00-95-130

v.

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

EL00-98-117

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

ORDER DENYING REHEARING

(Issued August 25, 2005)

1. In this order, the Commission addresses Pacific Gas and Electric Company's (PG&E's) request for rehearing of the March 24 Order on Rehearing,¹ in these proceedings. That order provided clarification of the method for calculating refunds for electricity purchases made in the organized spot markets in California during the period from October 2, 2000 through June 20, 2001 (the Refund Period), and it provided further guidance on certain interest issues.

¹ See *San Diego Gas & Electric Company, et al.*, 110 FERC ¶ 61,336 (2005) (the March 24 Order).

2. In the March 24 Order, the Commission addressed numerous requests for rehearing and/or clarification of the Commission's November 23 Order on Rehearing² in these proceedings. In addition to denying the requests for rehearing and granting clarification on certain issues, the March 24 Order accepted the CalPX's December 8 compliance filing and its proposed "Method D" for dealing with shortfalls in interest in the CalPX Settlement Trust Account.³

3. The only timely rehearing request⁴ was filed by PG&E, and it reiterates arguments previously made on the CalPX compliance filing and the Commission's November 23 Order. Briefly, PG&E asserts that the Commission's decision to require PG&E to pay interest at the Commission's prescribed rate "fails to reflect reasoned decision making, is discriminatory, arbitrary and capricious, is not based on substantial evidence, and violates the filed rate doctrine and rule against retroactive ratemaking."⁵ For reasons set forth below, the Commission disagrees and will deny rehearing.

² See *San Diego Gas & Electric Company, et al.*, 109 FERC ¶ 61,218 (2004) (the November 23 Order).

³ The November 23 Order directed the CalPX to file, within fifteen days, its proposed methodology for allocating the CalPX interest shortfall among its participants. The CalPX submitted its compliance filing on December 8, 2004. The filing was noticed on January 18, 2005,³ in Docket Nos. EL00-95-123 and EL00-98-110. See November 23 Order at P 34 and Ordering Paragraph D. The interest shortfall is the difference between the interest rate prescribed by the Commission's regulations and the interest rate actually earned by the CalPX on monies held in the CalPX Settlement Trust Account.

⁴ In addition to the PG&E rehearing request, Commerce Energy, Inc. (Commerce) filed a motion to intervene out-of-time and request for expedited consideration, alleging that it "has come to understand that it cannot rely on APX to adequately protect its interests in the California Refund proceeding . . ." Commerce at 4. The Commission finds unpersuasive Commerce's explanation as to why it should be allowed to intervene in a proceeding that has been pending at the Commission for a number of years. Although Commerce's motion is not opposed, the Commission will deny its request for late intervention.

⁵ PG&E at 3.

Discussion

A. Whether the Commission erred in determining that, as a participant in the CalPX markets, PG&E will be required to pay a *pro rata* allocation of the CalPX interest shortfall (the difference between the interest rate required by the Commission's regulations and the interest rate actually earned by the CalPX on monies held in the CalPX Settlement Trust Account).

4. On rehearing, PG&E argues once again that the Commission should take into account its creation of a separate escrow account containing funds that would otherwise reside in the CalPX's settlement clearing account and PG&E's commitment to pay the Commission's required rate on net amounts due from the escrow account. PG&E asserts that maintaining this escrow account and agreeing to pay interest on this fund at the Commission's prescribed interest rate avoids an additional shortfall on this portion of the funds, a shortfall that the entire CalPX market would otherwise have to pay. PG&E argues that had it paid the funds directly to the CalPX, the amount of interest shortfall being accrued by the CalPX would more than double. Therefore, PG&E argues that the Commission should excuse it from any additional payment for interest shortfalls relating to the CalPX's escrow account. Alternatively, PG&E argues that the Commission should at least give it a credit equal to the amount of the CalPX shortfall avoided as a result of PG&E holding these funds in its separate escrow account for the benefit of the CalPX and its market participants.⁶

5. Next, PG&E argues that it is being assessed additional interest simply because it successfully emerged from bankruptcy and agreed as part of a negotiation with other participants and the CalPX to pay the pre-bankruptcy petition amounts it owes in full, with interest, from a non-PX escrow account. As a result, PG&E contends that it will pay proportionally more interest than other market participants in violation of the Federal Power Act's prohibitions against undue preference or discrimination.⁷

6. Finally, PG&E interprets the Commission's action in assessing PG&E responsibility for a *pro rata* share of the CalPX shortfall as the result of a faulty conclusion that PG&E is somehow at fault and should pay more than the Commission's required rate "as punishment."⁸ PG&E then asserts that the unlawful charges at issue

⁶ *Id.* at 12.

⁷ *Id.* at 14, *citing* 16 U.S.C. §§ 824d(b) and 824e(a) (2000).

⁸ *Id.*

arose because of unlawful market manipulations by companies such as Enron, which “drove PG&E into bankruptcy.” According to PG&E, “Misplaced attributions of fault toward the victims of the overcharges, and ill-considered allocations based on such thinking, led to the Commission’s error in the PX funding proceeding, charging an excessive portion of the PX’s ongoing costs to PG&E, in a set of orders that have (sic) now been reversed”⁹ PG&E argues that the Commission is committing the same error here.¹⁰

7. The Commission disagrees. Once again, PG&E presents the Commission with arguments relating to hypothetical situations (*i.e.*, if PG&E had paid the CalPX rather than holding funds in the PG&E escrow account) that we cannot address. The situation is as it is: the CalPX escrow account will have an interest shortfall, and the Commission has determined that the most equitable means of allocating that shortfall is for all market participants to bear a *pro rata* share of the shortfall. As stated in the March 24 Order, “all participants will pay what they owe at the Commission’s rate. In addition, PG&E will be allocated a share of the shortfall, as will all buyers and sellers.”¹¹

8. The Commission also disagrees with PG&E’s contention that it is being assessed interest “simply because it has successfully emerged from bankruptcy.”¹² The Commission is assessing a portion of the interest shortfall on PG&E based upon the net amount owed as determined in this proceeding, as are all the other participants. In addition, the CalPX interest shortfall is being assessed to all the participants through a pooled allocation based upon final net interest positions. Because the allocation of the shortfall is proportional to the final net interest positions, PG&E’s arguments concerning “proportional discrimination” are without merit. Further, arguments concerning the magnitude of PG&E’s proportional share are irrelevant.

9. With respect to PG&E’s suggestion that the Commission may be “suggesting that PG&E is somehow at fault here and should pay more than the Commission’s required rate as punishment”, we reiterate that the method of allocation for the CalPX shortfall is proportional. The Commission is not attempting to punish PG&E; rather, as stated in the

⁹ *Id.* at 15, citing *Pacific Gas and Electric Co. v. FERC*, 373 F.3d 1315 (D.C. Cir. 2004).

¹⁰ *Id.* at 14-15.

¹¹ March 24 Order at P 36.

¹² PG&E at 14.

March 24 Order, “all participants will pay what they owe at the Commission’s rate. In addition, PG&E will be allocated a share of the shortfall, as will all buyers and sellers.”¹³

B. Whether the Commission’s requirement that PG&E pay a *pro rata* allocation of the CalPX interest shortfall violates the filed rate doctrine and the rule against retroactive ratemaking.

10. PG&E once again argues that the Commission’s determination that PG&E, as a CalPX market participant, should bear a *pro rata* responsibility for its portion of the CalPX interest shortfall, violates the filed rate doctrine and rule against retroactive ratemaking.¹⁴ PG&E attempts to distinguish its argument on rehearing from arguments in its prior pleadings in these proceedings, stating that “the arguments in the instant request for rehearing are predicated on a different factual basis.”¹⁵ That factual basis is PG&E’s new assertion that the Commission’s requirement that PG&E will join other CalPX market participants in sharing *pro rata* responsibility for the CalPX interest shortfall constitutes a surcharge, which “provides even more of a basis for finding that the allocation of these shortfalls constitutes violations of the filed rate doctrine and rule against retroactive ratemaking.”¹⁶ PG&E goes on to assert that none of the market participants were “on notice that the Commission would at some future time assess them not only a just and reasonable rate for energy plus full FERC interest through the date of payment, but also additional interest . . .”¹⁷ Citing *Pacific Gas and Electric Co.*¹⁸ to support its argument that such “surcharges” violate the filed rate doctrine and rule against

¹³ *Id.*

¹⁴ PG&E at 15–18.

¹⁵ *Id.* at 15, n.35.

¹⁶ *Id.*

¹⁷ *Id.* at 16.

¹⁸ 373 F.3d. 1315 (D.C. Cir. 2004)(*PG&E*).

retroactive ratemaking, PG&E asserts that “these surcharges on past service *may* constitute precisely the type of account balances that the D.C. Circuit Court of Appeals explained in [*PG&E*] that FERC cannot impose.”¹⁹

11. The Commission is not persuaded by PG&E’s “new” factual argument. As we said in the March 24 Order: “even assuming one could argue that the interest shortfall amounted to a new charge, the CAISO and CalPX participants have been on notice that rates were subject to change since August 23, 2000.”²⁰ The Commission stated that the justness and reasonableness of the rates, charges, and practices of public utility sellers of wholesale power into the CAISO and CalPX markets, as well as the CAISO and CalPX tariffs, agreements and institutions were being set for hearing.²¹ Furthermore, in the March 26 Order,²² the Commission pointed out that it had reserved for itself the right to determine at a later date what to do regarding shortfalls resulting from applying section 35.19a interest²³ and explicitly stated that it was overriding both the CAISO and CalPX tariffs with regard to interest calculations on unpaid balances and refunds.²⁴

12. The March 24 Order rejected PG&E’s filed rate doctrine/rule against retroactive ratemaking argument, finding that “PG&E’s argument has no merit.”²⁵ Its attempt to characterize the Commission’s determination that market participants share in the interest shortfall as a new surcharge is unavailing. Therefore, the Commission will deny rehearing on this issue.

¹⁹ PG&E at 17 (emphasis added).

²⁰ *San Diego Gas & Electric Company*, 92 FERC ¶ 61,172 (2000). This order initiated hearing proceedings to investigate justness and reasonableness of rates of public utility sellers in CAISO and CalPX markets and to investigate CAISO and CalPX tariffs, contracts, institutional structures and bylaws; and providing further guidance to California entities.

²¹ *Id.*

²² *San Diego Gas & Electric Company, et al.*, 102 FERC ¶ 61,317 (2003) (Order on Proposed Findings on Refund Liability) (the March 26 Order).

²³ *Id.* at P 136.

²⁴ *Id.* at P 142.

²⁵ March 24 Order at P 34.

The Commission orders:

The Commission hereby denies rehearing as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.