

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company

Docket No. ER06-836-003

ORDER DENYING REHEARING

(Issued January 31, 2007)

1. On October 2, 2006, the California Department of Water Resources State Water Project (SWP) filed a request for rehearing of the Commission's August 31, 2006 Order,¹ in which the Commission accepted Pacific Gas and Electric's (PG&E) amendment to its Transmission Owner Tariff (TO Tariff) to recover certain costs related to its Existing Transmission Contracts (ETCs). As discussed below, the Commission will deny the request for rehearing.

I. Background

2. The August 31, 2006 Order provides a detailed account of the events that led to the issuance of that order. Briefly, as a result of restructuring of California's electric industry, PG&E, Southern California Edison Company and San Diego Gas and Electric Company (collectively, Companies) were obligated to serve, on a transitional basis, as the scheduling coordinators (SC) for certain wholesale customers under pre-restructuring ETCs. In 1998, when the Companies filed the non-rate terms and conditions of their TO Tariffs they stated that there were mismatches between the ETC revenues they received under the ETCs and the charges that the CAISO billed to them as the SC for the ETCs.² The Companies sought to recover these shortfalls (*i.e.*, ETC Cost Differentials) through the Transmission Revenue Balancing Account Adjustment (TRBAA) of the TO Tariffs, which were billed to TO Tariff customers.

¹ *Pacific Gas and Electric Co.*, 116 FERC ¶ 61,202 (2006) (August 31, 2006 Order).

² *See* Docket No. ER97-2358-000, *et al.*

3. In Opinions Nos. 458 and 458-A, the Commission found that the CAISO Tariff provided no basis for the Companies to shift the costs in question from the ETC customers to the TO Tariff customers.³ On appeal, the D.C. Circuit found that the CAISO Tariff permits the Companies to recover the ETC Cost Differentials through their TO Tariffs⁴ and remanded the case to the Commission for further proceedings.⁵ On remand, the Commission found that the Companies could recover the ETC Cost Differentials through either bilateral negotiations between the parties to the ETCs or through the TRBAA in the TO Tariffs.⁶

4. In response to the Remand Order, on April 4, 2006, as amended on June 22, 2006, PG&E submitted an amendment to its TO Tariff to recover the ETC Cost Differentials through its TRBAA. In the August 31, 2006 Order, the Commission accepted PG&E's tariff revisions.

II. Request for Rehearing

A. SWP's Arguments

5. On rehearing, SWP argues that the Commission failed to recognize that a 1998 amendment to its ETC with PG&E constitutes a bilateral agreement under the CAISO Tariff and that PG&E has already recovered ETC Cost Differentials from SWP through that agreement. SWP states that, under that agreement, it became its own SC on July 1, 1998, and from that date forward, including the entire period for which PG&E seeks recovery (*i.e.*, January 1, 2001 through September 30, 2005), it paid its own SC-related costs directly to the CAISO. According to SWP, the ETC Cost Differentials consist of costs for the same services that the amendment provided SWP would pay directly to the

³ *Pacific Gas and Elec. Co.*, Opinion No. 458, 100 FERC ¶ 61,156, *reh'g denied*, Opinion No. 458-A, 101 FERC ¶ 61,151 (2002).

⁴ *Southern Cal. Edison Co. v. FERC*, 415 F.3d 17, 21 (D.C. Cir. 2005) (*SoCal Edison*).

⁵ *Id.* at 23.

⁶ *Pacific Gas and Elec. Co.*, 113 FERC ¶ 61,296 at P 18 (2005) (Remand Order).

CAISO. SWP argues that the amendment “constituted a bilateral agreement under the CAISO Tariff and resolved in full the matter of recovery of all relevant SC-related costs as to SWP for the entire period for which PG&E seeks recovery.”⁷

6. In addition, SWP argues that the Commission failed to observe applicable decision-making standards by disregarding SWP’s argument that the allocation to SWP of any ETC Cost Differentials incurred by PG&E would allow PG&E to violate its ETC with SWP. SWP claims that the August 31, 2006 Order’s sole response to its argument is a statement that neither the D.C. Court of Appeals or the Remand Order make any distinctions for instances where certain customers with ETCs paid for their own SC-related costs while receiving service under their ETCs. SWP states that it is irrelevant whether or not prior orders made this distinction and that the Commission is compelled to address the issue because it has not been previously addressed.

7. Finally, SWP argues that the August 31, 2006 Order violates the prohibition against retroactive ratemaking. SWP claims that the August 31, 2006 Order raises the rates SWP agreed to pay, and paid, for past services pursuant to its ETC with PG&E. SWP also states that at no time did PG&E put SWP on notice that it would seek further changes to the ETC in order to collect additional ETC Cost Differentials. SWP requests that the Commission reverse its approval of the allocation of ETC Cost Differentials to SWP and direct PG&E to refund or credit SWP for the increase in Wheeling Access Charges attributed to ETC Cost Differentials.

B. PG&E Answer

8. On October 17, 2006, PG&E filed a motion of leave to answer and an answer to SWP’s request for rehearing. Rule 713(d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to requests for rehearing. Accordingly, we will reject PG&E’s answer.

C. Commission Determination

9. SWP asserts that the 1998 amendment to its ETC with PG&E constitutes a bilateral agreement under the CAISO Tariff which precludes PG&E from allocating ETC Cost Differentials to SWP through the TO Tariff. To the extent that the August 31, 2006

⁷ SWP Request for Rehearing at 11.

Order may have been unclear,⁸ we hereby clarify that the 1998 amendment to the ETC between SWP and PG&E does not and could not constitute such a bilateral agreement under the CAISO Tariff.

10. As we have stated, the Companies can recover the ETC Cost Differentials through either bilateral negotiations between the parties to the ETCs or through the TRBAA in the TO Tariffs.⁹ To recover the ETC Cost Differentials under the CAISO Tariff, such bilateral negotiations would have to address the ETC Cost Differentials. The 1998 agreement, as described by SWP, does not do so. SWP asserts that the 1998 agreement resolved the recovery of all relevant SC-related costs as to SWP for the entire period for which PG&E seeks recovery.¹⁰ We disagree. The ETC Cost Differentials are the mismatches between the charges that the CAISO billed to PG&E as the SC for ETC customers and the ETC revenues PG&E received under the ETCs (*i.e.*, the amount by which charges billed to PG&E exceeded the revenues received by PG&E). The SC-related costs which were the subject of the 1998 agreement and which SWP agreed to pay directly to the CAISO, however, were not ETC Cost Differentials because they were not the mismatches paid by PG&E as the SC for ETC customers.¹¹

11. In addition, the allocation to SWP of ETC Cost Differentials incurred by PG&E does not violate the ETC between PG&E and SWP. We note that, the charges that SWP agreed to pay directly to the CAISO are not part of the ETC Cost Differentials. Further, as we explained in the August 31, 2006 Order, SWP's obligation to pay a portion of the ETC Cost Differentials is unrelated to its status as an ETC customer. Rather, SWP, like any wholesale customer who purchases service under the TO and CAISO Tariffs, is obligated to pay a portion of the ETC Cost Differentials based on its status as a TO and CAISO Tariff customer.

⁸ In fact, as we explained, that certain customers paid for their own SC-related costs did not and does not warrant our reaching a different result, as that fact, the court has made clear, is immaterial. *See* August 31, 2006 Order, 116 FERC ¶ 61,202 at P 37.

⁹ *Id.* at P 5 & n.8.

¹⁰ *See* SWP Request for Rehearing at 11.

¹¹ The SC-related costs under the 1998 agreement included costs, which SWP paid directly to the CAISO, associated with scheduling and dispatching transmission services under the ETC and costs associated with Losses and Ancillary Services. *See Id.* at 10.

12. Finally, SWP argues that the August 31, 2006 Order violates the prohibition against retroactive ratemaking and that PG&E did not put it on notice that PG&E would seek “further changes” to the ETC to collect “additional” ETC Cost Differentials.¹² First, contrary to SWP’s assertions, the recovery of the ETC Cost Differentials through the TO Tariff (*i.e.*, through the TO Tariff’s TRBAA) does not change the rates the SWP agreed to pay under its ETC with PG&E. Rather, PG&E is collecting costs incurred by PG&E (*i.e.*, the ETC Cost Differentials) through its TO Tariff rates (*i.e.*, through the TO Tariff TRBAA). Second, courts have previously recognized the Commission’s authority to order retroactive rate adjustments when an earlier order disallowing a rate is reversed on appeal, *i.e.*, a Commission order is later determined to be unlawful.¹³ Here, where an appeals court reversed and remanded, the Commission’s decision to reject PG&E’s tariff to recover the ETC Cost Differentials,¹⁴ and the Commission subsequently allowed the costs to be recovered under its remedial authority,¹⁵ the rule against retroactive ratemaking is not violated.¹⁶

13. With regard to notice, the issue of recovery of the ETC Cost Differentials has been in litigation since 1998 in Docket No. ER97-2358-000, *et al.* After the Commission rejected the Companies’ proposals, the Commission’s decision was challenged on rehearing and judicial review. SWP, an ETC customer at that time, could and should reasonably have known that the Commission’s decision rejecting the cost recovery mechanism was therefore subject to later revision.¹⁷

14. For the reasons stated above, we deny SWP’s request for rehearing.

¹² *See Id.* at 15.

¹³ *See Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 162 (D.C. Cir. 1993) (*Cal PUC*); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1074 (D.C. Cir. 1992) (*per curiam*); *Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d 336, 339 n.8 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946, (1975).

¹⁴ *See SoCal Edison*, 415 F.3d at 21.

¹⁵ *See Remand Order*, 113 FERC ¶ 61,296 at P 20.

¹⁶ *See Cal PUC*, 988 F.2d at 162.

¹⁷ *See Id.* at 164.

The Commission orders:

SWP's request for rehearing of the August 31, 2006 Order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.