

147 FERC ¶ 61,189
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Cities of Anaheim, Azusa, Banning,
Colton, Pasadena, and Riverside,
California

v.

Docket No. EL14-15-001

Trans Bay Cable L.L.C.

Trans Bay Cable L.L.C.

Docket No. ER13-2412-002

(Consolidated)

ORDER ON REQUEST FOR REHEARING AND CLARIFICATION

(Issued June 6, 2014)

1. On March 24, 2014, Trans Bay Cable L.L.C. (Trans Bay) filed a request for rehearing and clarification (Rehearing Request) of an order issued by the Commission on February 20, 2014.¹ For the reasons discussed herein, the Commission denies Trans Bay's Rehearing Request.

I. Background

2. Trans Bay owns a 53-mile, 400 MW high-voltage, direct-current submarine transmission line buried beneath the San Francisco Bay, with converter stations at each end (Project) that provides direct electric transmission between Pacific Gas and Electric

¹ Order on Complaint, Motion to Consolidate, and Request for Rehearing, *Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, Cal. v. Trans Bay Cable, L.L.C.*, 146 FERC ¶ 61,100 (2014) (Complaint Order).

Company's Pittsburg and Potrero substations, both located in San Francisco, California.² Trans Bay is a participating transmission owner in the California Independent System Operator Corporation (CAISO), and recovers its Transmission Revenue Requirement (TRR) through CAISO's open access transmission tariff. While the Project was under development, the Commission accepted a proposed operating memorandum setting forth the rate principles and operational responsibilities pursuant to which Trans Bay would undertake the development, financing, construction and operation of the Project upon its completion.³ In an offer of settlement accepted by the Commission on December 30, 2011,⁴ Trans Bay committed to file another rate case by September 20, 2013, with an effective date of November 23, 2013.⁵

3. Prior to the termination of the three-year rate moratorium that was included in the 2011 TRR Settlement, on September 20, 2013, Trans Bay proposed to increase its annual TRR, from \$132.5 million to approximately \$139.1 million, which included a continuation of its previously authorized 13.5 percent incentive return on equity (ROE).⁶ On November 21, 2013, the Commission accepted Trans Bay's proposed TRR, subject to refund, suspended the proposed TRR for the maximum five-month suspension to become effective April 23, 2014, and set the proposed TRR for hearing and settlement judge procedures.⁷ Hearing and settlement procedures began on December 17, 2013, in Docket No. ER13-2412-000.

4. In the Trans Bay TRR Order, the Commission also dismissed requests filed by the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities) and the California Public Utilities Commission for a Commission-initiated

² A more detailed discussion of the background of this proceeding can be found in the Commission's Order Accepting and Suspending Proposed Tariff Changes and Establishing Hearing and Settlement Judge Procedures, *Trans Bay Cable LLC*, 145 FERC ¶ 61,151 (2013) (Trans Bay TRR Order).

³ *Trans Bay Cable LLC*, 112 FERC ¶ 61,095 (2005) (Operating Memorandum Order).

⁴ *Trans Bay Cable LLC*, 137 FERC ¶ 61,258 (2011) (Settlement Order).

⁵ See *Trans Bay Cable LLC*, Offer of Settlement and Stipulation, Docket No. ER10-116-000, at art. 5 § 5.1 (filed Nov. 8, 2011) (2011 TRR Settlement).

⁶ *Trans Bay Cable L.L.C.*, Docket No. ER13-2412-000 (2013 Rate Filing).

⁷ *Trans Bay TRR Order*, 145 FERC ¶ 61,151 at P 18.

investigation under section 206 of the Federal Power Act (FPA)⁸ to determine whether the rates that Trans Bay would charge during the five-month suspension period (November 23, 2013, through April 22, 2014) were just and reasonable.⁹

II. Six Cities' Complaint and Motion to Consolidate

5. On December 17, 2013, Six Cities filed its complaint (Complaint) against Trans Bay and a motion to consolidate the Complaint with the ongoing hearing and settlement judge proceedings established in Docket No. ER13-2412-000. In the Complaint, Six Cities argued that Trans Bay's current TRR, which is the continuation of the rate established in the 2011 TRR Settlement during the five-month suspension period, is excessive and therefore not just and reasonable.¹⁰

6. In the Complaint Order, the Commission, among other things, set the Complaint for hearing and settlement judge procedures, consolidated the Complaint with the ongoing hearing and settlement judge proceedings established in Docket No. ER13-2412-000 regarding Trans Bay's TRR, and established a refund effective date for the Complaint of December 17, 2013.

⁸ 16 U.S.C. § 824e (2012).

⁹ Trans Bay TRR Order, 145 FERC ¶ 61,151 at P 21.

¹⁰ On December 20, 2013, Six Cities also filed a limited request for rehearing of the Trans Bay TRR Order to the extent that the Commission purported to rule that the Operating Memorandum Order or Settlement Order prohibits a reduction in Trans Bay's TRR upon the expiration of the three-year rate moratorium. The Commission denied this request for rehearing, clarifying that:

the Commission made no such determination in the Trans Bay TRR Order. The Commission exercised its discretion not to initiate its own investigation of the current TRR in that case. The Commission did not, based on the 2011 [TRR S]ettlement or the 2005 Operating Memorandum, make any determination that other parties could not initiate their own FPA section 206 complaint regarding the current TRR.

See Complaint Order, 146 FERC ¶ 61,100 at P 29.

III. Trans Bay's Rehearing Request

7. In its Rehearing Request, Trans Bay alleges four primary points of error. Trans Bay first contends that when a party requests a section 206 investigation into whether rates are just and reasonable in the course of a protest, that “request is, in effect, a complaint” under section 206.¹¹ Trans Bay argues that, in the Trans Bay TRR Order, the Commission effectively considered and denied Six Cities’ request for a section 206 investigation into Trans Bay’s current TRR, which, according to Trans Bay, is tantamount to having affirmatively considered and dismissed Six Cities’ “prior complaint.”¹² Therefore, according to Trans Bay, the Commission should have dismissed Six Cities’ Complaint as an impermissible collateral attack on the Trans Bay TRR Order.¹³

8. Next, Trans Bay asserts that rehearing is warranted because the Trans Bay TRR Order was, in relevant part, a decision on the merits and that it correctly concluded, in rejecting Six Cities’ protest, that Trans Bay’s rates for the section 205 suspension period between November 23, 2013, and April 22, 2014, were “previously settled rates.” According to Trans Bay, because the Commission had already rendered a decision on the merits, Six Cities’ Complaint should have been dismissed for violating the doctrines of *res judicata* and collateral estoppel.¹⁴

9. Next, Trans Bay argues that, when the Complaint Order set a refund effective date during a period of “previously settled rates,” it also violated the prohibition against retroactive ratemaking and the last-clean-rate doctrine. Trans Bay urges the Commission to grant rehearing to dismiss Six Cities’ Complaint or, in the alternative, to synchronize the refund effective date under section 206 with the end of the section 205 proceeding’s

¹¹ Rehearing Request at 13 (citing *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,198, at P 66 (2011) (*PJM Interconnection*) (“[B]y requesting that the Commission [establish an investigation pursuant to Section 206], [the protestor’s] request is, in effect, a complaint.”); *Entergy Servs., Inc.*, 104 FERC ¶ 61,084, at P 13 (2003)).

¹² Trans Bay, in its Rehearing Request characterizes Six Cities’ Complaint as the “second complaint” and to Six Cities’ original protest to Trans Bay’s 2013 Rate Filing as Six Cities’ “first complaint.” We will explain herein why this characterization is not accurate.

¹³ *Id.* at 1, 2, 9-10, 12-14 (citing *Pac. Gas & Elec. Co. v. Delta Energy Ctr., LLC*, 116 FERC ¶ 61,004, at P 36 (2006)).

¹⁴ *Id.* at 2, 10, 15-18.

suspension period, i.e., the Commission should exercise its discretion to reset the refund effective date for Six Cities' Complaint to April 23, 2014.¹⁵

10. Finally, Trans Bay states that the Complaint Order is unclear and potentially unsettles issues that Trans Bay, Six Cities, and the Commission, among others, previously addressed in the 2011 TRR Settlement. Trans Bay requests that the Commission clarify that the Complaint Order did not alter the parties' agreement in the 2011 TRR Settlement that Trans Bay's future rates will be determined using Period II data.¹⁶

IV. Commission Determination

11. We again find that the Complaint is not an impermissible collateral attack on the Commission's Trans Bay TRR Order. In the Trans Bay TRR Order, the Commission, exercising its discretion, declined to initiate its own FPA section 206 investigation as to the justness and reasonableness of the current TRR.¹⁷ Trans Bay incorrectly relies on *PJM Interconnection* for the proposition that, "by requesting that the Commission [establish an investigation pursuant to FPA section 206], [the protestor's] request is, in effect, a complaint."¹⁸ Trans Bay ignores the operative part of the same paragraph where the Commission, having declined to establish a Commission investigation, stated that, if a party believes a rate is unjust and unreasonable, that party may file a complaint pursuant to FPA section 206. This is exactly what the Commission did in the Trans Bay TRR Order. While the Commission did not initiate its own investigation, the Commission made no finding that other parties were precluded from initiating their own FPA section 206 complaints. Therefore, we deny Trans Bay's Rehearing Request on this basis.

¹⁵ *Id.* at 2, 11, 18-22 (citing *Bangor Hydro-Elec. Co.*, 120 FERC ¶ 61,093, at P 16 (2007)).

¹⁶ *Id.* at 2-3, 11-12, 22-24 (citing 2011 TRR Settlement, Offer of Settlement and Stipulation § 5.2; also citing *Blue Ridge Power Agency v. Appalachian Power Co.*, 55 FERC ¶ 61,509, at 62,787 (1991); *Dynegy Midwest Generation, Inc.*, 121 FERC ¶ 61,025, at P 23 (2007); *So. Cal. Edison Co.*, 92 FERC ¶ 61,070, at 61,267 (2000)).

¹⁷ The Commission may, within its discretion, determine not to initiate an investigation under FPA section 206. *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016, 1027 (9th Cir. 2007).

¹⁸ See footnote 11, *supra*.

12. Next, we reaffirm that the doctrines of *res judicata* and collateral estoppel do not bar the Complaint.¹⁹ Critical to the application of these doctrines is that there was, in fact, an “original judgment on the merits” so as to foreclose relitigation of a “question decided.” Here, however, the Commission’s decision not to open a section 206 investigation in the Trans Bay TRR Order does not constitute a judgment on the merits, i.e., the Commission made no findings as to the justness and reasonableness of the current TRR that would preclude Six Cities from filing a section 206 complaint against Trans Bay regarding that issue. As previously noted, the appropriate TRR for the November 23, 2013, to April 22, 2014 suspension period has never been litigated or decided and thus, the Trans Bay TRR Order did not establish previously settled rates. Therefore, we deny rehearing on this basis.

13. Next, we do not agree with Trans Bay that failure to synchronize the refund effective date with the end of the suspension period would violate established ratemaking principles. As we have explained above, neither the Trans Bay TRR Order nor the Complaint Order established previously settled rates for the Project, let alone for the TRR applicable to the suspension period. Thus, there cannot be a violation of retroactive ratemaking or the last-clean-rate doctrine. In cases where, as here, the Commission institutes an investigation on a complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date a complaint is filed, but no later than five months after the filing date. Consistent with our general policy of providing maximum protection to customers²⁰ and Complainants’ requested relief, and within the Commission’s proper exercise of its discretion, we will not alter the December 17, 2013 refund effective date we established for the Complaint.

¹⁹ “*Res judicata* applies . . . where a second suit or proceeding is brought on the same cause of action between the same parties or those in privity with them. The original judgment on the merits is conclusive not only as to matters actually raised but also to matters which could have been raised and litigated. Collateral estoppel . . . forecloses a party from relitigating the same question decided adversely to him by a prior judgment on another cause of action.” *Brian Hamilton v. El Paso Natural Gas Co.*, 141 FERC ¶ 61,229, at P 37 & n.44 (2012) (citing *McCulloch Interstate Gas Corp.*, 9 FERC ¶ 61,152, at 61,305 (1979), quoting *Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588, 602 (3rd Cir. 1977)).

²⁰ See, e.g., *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Elec. Co.*, 46 FERC ¶ 61,153, at 61,539 (1989), *reh’g denied*, 47 FERC ¶ 61,275 (1989).

14. Finally, as to Trans Bay's request for clarification, Trans Bay is correct that the terms of the 2011 TRR Settlement required Trans Bay to file a section 205 rate case by September 20, 2013, with an effective date of November 23, 2013, based on a Period II test year of January 1, 2014, through December 31, 2014. This fact, however, is not necessarily dispositive as to whether only Period II data may be utilized in analyzing the allegations raised by Six Cities in its section 206 Complaint. As indicated in the Trans Bay TRR Order, Trans Bay may present its evidence and arguments, including its evidence and arguments regarding the data that should be used in establishing the correct TRR, in the settlement and hearing judge proceedings; however, we will not make a determination on this issue in this order.²¹

The Commission orders:

Trans Bay's Request for Rehearing and Clarification is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²¹ Trans Bay TRR Order, 145 FERC ¶ 61,151 at P 23.