

130 FERC ¶ 61,160
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Trans Bay Cable LLC

Docket No. EC10-30-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued March 4, 2010)

1. On December 18, 2009, as supplemented January 13, 2010, Trans Bay Cable LLC (Trans Bay) filed an application¹ under section 203(a)(1) of the Federal Power Act (FPA)² requesting Commission authorization for the disposition of jurisdictional facilities. Specifically, Trans Bay requests authorization to transfer to Pittsburg Power Company (Pittsburg Power) title of its 400 megawatt (MW) high voltage, direct current (HVDC) transmission line and associated facilities (the Project).
2. The Commission has reviewed the proposed transaction under the Commission's Merger Policy Statement.³ As discussed below, we will authorize the proposed transaction as consistent with the public interest.

¹ Application of Trans Bay Cable LLC for Authorization to Dispose of Jurisdictional Facilities (December 18, 2009) (Application).

² 16 U.S.C. § 824b (2006).

³ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

I. Background

A. Description of Parties

3. Trans Bay, a Delaware limited liability company, is in the final stages of constructing the Project, an approximately fifty-three mile, 400 MW HVDC transmission line and associated facilities, to establish a direct connection between Pacific Gas & Electric Company's (PG&E's) Pittsburg Substation located in Pittsburg, California and PG&E's Potrero substation in the City of San Francisco. On September 8, 2005, the Governing Board of the California Independent System Operator Corporation (CAISO) approved the Project as the preferred long-term transmission alternative to address reliability concerns in the greater San Francisco peninsula area. Trans Bay's Application to become a Participating Transmission Owner under the Transmission Control Agreement has been approved by the CAISO conditioned upon Trans Bay's filing with the Commission and the Commission's acceptance of its Transmission Owners Tariff and the Commission's establishment of Trans Bay's transmission revenue requirement prior to the commencement of commercial operations of the Project. Trans Bay currently anticipates that the Project will enter commercial service in March 2010.

4. Pittsburg Power is a California municipal joint powers authority established in 1996 between the City of Pittsburg, California and the Redevelopment Agency of the City of Pittsburg.

B. Proposed Transaction

5. As described in the Application, the proposed transaction will be carried out in accordance with the terms of the Purchase and Sale Agreement, dated November 6, 2006 (PSA), between Pittsburg Power and Trans Bay.⁴ Under the terms of the PSA, Trans Bay will transfer to Pittsburg Power all of its right, title and interest in and to the Project as of the commercial operation date of the Project for \$1.00 plus Pittsburg Power's agreement

⁴ As noted by Trans Bay, the relationship between Trans Bay and Pittsburg Power relating to the development, financing, construction, ownership, operation and maintenance of the Project is set forth in an Operating Memorandum, which was filed with the Commission on May 19, 2005, in Docket No. ER05-985-000. The Operating Memorandum expresses the parties' intention "that all reasonable costs incurred by each Party in connection with the development, financing, construction, operation, maintenance and repair of the Project . . . will be recovered through the transmission revenue requirement and transmission rates established by FERC." (Operating Memorandum at 3.4) The Commission accepted the Operating Memorandum, and certain "rate principles" set forth therein, for filing in *Trans Bay Cable LLC*, 112 FERC ¶ 61,095 (2005) (July 2005 Order), *order on clarification*, 114 FERC ¶ 61,031 (2006).

to assume and discharge obligations under certain contracts reasonably necessary for the operation of the Project. Trans Bay will retain, among other things, the transmission system rights for the Project, which will entitle Trans Bay to collect from the ratepayers of the CAISO the costs associated with the operations of the Project through Commission-approved rates.⁵ Trans Bay will also remain solely liable for costs related to the Project under agreements that are not specifically assumed by Pittsburg Power, including Trans Bay's obligations under credit agreements entered into to finance construction of the Project.

6. On October 23, 2009, Trans Bay submitted in Docket No. ER10-116-000, pursuant to section 205, supporting materials to establish its revenue requirement. With the exception of certain unexpired lease obligations, discussed further below, these materials did not account for certain incremental costs associated with the proposed transaction. The Commission accepted and suspended Trans Bay's transmission revenue requirement, subject to refund, and established hearing and settlement procedures.⁶ Settlement discussions are still ongoing.

7. Under the terms of a Project Administration Agreement, also dated November 6, 2006, Pittsburg Power will be responsible for the ownership, supervision, operation and maintenance of the Project after transfer of the Project and will be reimbursed by Trans Bay for the costs Pittsburg Power incurs in fulfilling those responsibilities. In turn, Trans Bay states that it will seek to recover those costs as part of its transmission revenue requirement filed in Docket No. ER10-116-000.

II. Notice of Filing and Responsive Pleadings

8. Notice of the Application was published in the *Federal Register*, 75 Fed. Reg. 355 (2010), with comments, protests, or interventions due on or before January 8, 2010. Notice of Trans Bay's supplemental filing was published in the *Federal Register*, 75 Fed. Reg. 3721 (2010), with comments, protests or interventions due on or before January 27, 2010.

9. Timely motions to intervene were filed by Southern California Edison Company (SoCal Edison) and the California Public Utilities Commission (CPUC). PG&E filed a timely motion to intervene and a protest. Pittsburg Power filed an untimely motion to intervene in support of the Application. San Diego Gas & Electric (SDG&E) filed a motion for leave to intervene out of time.

⁵ See *Trans Bay Cable LLC*, 129 FERC ¶ 61,225 (2009).

⁶ *Trans Bay Cable LLC*, 129 FERC ¶ 61,225 (2009).

10. On January 19, 2010, Trans Bay filed a response to PG&E's protest. On January 26, 2010, PG&E filed a motion for leave to answer and an answer.
11. On January 27, 2010, the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities) filed a timely protest.
12. On January 28, 2010, SoCal Edison filed an untimely response to Trans Bay's supplemental filing and response to PG&E's protest and a motion for leave to file out of time.

III. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁷ we will grant the timely motions to intervene which serve to make SoCal Edison, PG&E and the CPUC parties to this proceeding. We will also accept Pittsburg Power's and SDG&E's untimely motions to intervene, given their interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.
14. Rule 213(a)(2) prohibits answers to protests or answers, unless otherwise permitted by the decisional authority. We will accept Trans Bay's and PG&E's answers and SoCal Edison's response, because they have provided information that assisted us in the decision-making process.

B. Standard of Review under Section 203

15. Section 203(a)(4) of the FPA requires the Commission to approve a proposed transaction if it determines that the transaction will be consistent with the public interest. The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.⁸ Section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization,

⁷ 18 C.F.R. § 385.214 (2009).

⁸ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

pledge, or encumbrance will be consistent with the public interest.”⁹ As discussed below, we will approve the proposed transaction because it meets these statutory standards.

C. Analysis under Section 203

1. Effect on Competition

16. Trans Bay states that the proposed transaction will not have an adverse effect on competition in any of the relevant markets, because the transaction raises neither horizontal nor vertical market power issues. Specifically, Trans Bay asserts that, upon entering commercial operation, the Project will be placed under the operational control of the CAISO, which will integrate the Project into its transmission network and provide service under its open access transmission tariff.¹⁰

17. Trans Bay has shown that the proposed transaction will not harm competition in any relevant market. We agree with Trans Bay’s analysis that the proposed transaction raises neither horizontal nor vertical market power issues. The Project will be under the operational control of the CAISO, and Trans Bay does not own or control generating assets, and is not affiliated with any market participants.¹¹ No party asserted that the proposed transaction would adversely affect competition.

2. Effect on Rates

a. Applicant’s Analysis

18. Trans Bay states that, from the commercial operation date onwards, Pittsburg Power will manage, operate, maintain and provide care, custody and control over the Project and will be reimbursed by Trans Bay for the costs Pittsburg Power incurs in fulfilling those responsibilities. As noted, Trans Bay, in turn, will seek to recover those costs as part of its transmission revenue requirement filed in Docket No. ER10-116-000. In the initial filing in this proceeding, Trans Bay stated that Trans Bay and Pittsburg Power were engaged in discussions regarding costs to be reimbursed and was therefore

⁹ 16 U.S.C. § 824b(a)(4) (2006); Order No. 669, FERC Stats. & Regs. ¶ 31,200 at P 164.

¹⁰ Application at 15-16.

¹¹ *ITC Holdings, Corp.*, 116 FERC ¶ 61,271, at P 25 (2006).

unable to address the effect of the transaction on rates. Trans Bay committed to supplement the Application as soon as those discussions concluded.¹²

19. On January 13, 2010, Trans Bay filed a supplement to the Application to address the effect of the proposed transaction on customer rates. Trans Bay identifies four categories of incremental costs that are expected to be incurred following the transfer of the Project to Pittsburg Power and provides estimates of those incremental costs as follows. First, the cost of personnel directly employed by Pittsburg Power is estimated to be approximately \$875,000 per year. Second, the direct, out-of-pocket costs to be incurred by Pittsburg Power, such as for consultants and legal fees, is approximately \$400,000 per year. The third category is the increased cost of property and casualty insurance due to the level of insurance coverage and the amount of the deductible required by Pittsburg Power. The incremental costs associated with insurance are estimated to be approximately \$1 million per year. Finally, under Pittsburg Power's ownership, Trans Bay states that it will seek to recover in current rates the unexpired lease obligation described in the transmittal letter to Trans Bay's October 23, 2009 rate filing in Docket No. ER10-116-000.¹³ Trans Bay estimates that the unexpired lease amount will be approximately \$2.2 million per year. In total, Trans Bay estimates the incremental costs under Pittsburg Power's ownership to be approximately \$4.475 million per year compared to on-going ownership, operation and management by Trans Bay directly. Trans Bay further states that it expects to reach a final agreement prior to the Project's commercial operation date and that the agreed-to level of costs will be reflected in Trans Bay's cost of service update filing to be made in Docket No. ER10-116-000 in accordance with Ordering Paragraph (B) of the Commission's December 17, 2009 Order on Transmission Revenue Requirement Filing.¹⁴ Trans Bay asserts that these costs will be incurred pursuant to longstanding contractual commitments "that form part of the fundamental underpinnings of the successful development of the Project," subject to the just and reasonable standard under section 205 of the FPA.¹⁵

b. Responsive Pleadings

¹² Application at 16.

¹³ Trans Bay Cable LLC Cost of Service Rate Filing at 11-12 (Oct. 23, 2009). In this filing, Trans Bay estimated the unexpired lease obligation to be approximately \$2.3 million per year, \$100,000 higher than in the Application in this proceeding.

¹⁴ *Trans Bay Cable LLC*, 129 FERC ¶ 61,225 (2009).

¹⁵ Trans Bay Supplemental filing at 2-3.

20. In its January 8, 2010 protest, PG&E states that it does not oppose Trans Bay's proposed transfer of the Project to Pittsburg Power, so long as the transfer's approval is not determinative of what costs may be included in Trans Bay's transmission revenue requirement.¹⁶ PG&E asserts that any order in this proceeding authorizing the transfer "should not hold or be deemed to imply that incorporation of Trans Bay's payments to Pittsburg in Trans Bay's rates has been found to be just and reasonable."¹⁷ PG&E asserts that all factors underlying Trans Bay's proposed transmission revenue requirement should be reviewed in Trans Bay's section 205 rate case.¹⁸

21. In its January 19, 2010 response to PG&E's protest, Trans Bay states that it agrees with PG&E that any order approving the Application in this proceeding should not hold or be deemed to imply that incorporation of Trans Bay's payments to Pittsburg Power in Trans Bay's rates has been found to be just and reasonable.¹⁹ Trans Bay further acknowledges that "any issue with respect to the justness and reasonableness of any payment made by Trans Bay Cable to Pittsburg Power will be determined in the rate case pending in Docket No. ER10-116-000 and [that] a Commission order approving the Application will not be determinative of those issues."²⁰ Nevertheless, Trans Bay asserts that the structure of the transaction, which will result in certain incremental costs to ratepayers (that is, the payments to Pittsburg Power following transfer of the Project), "are not substantial in relation to the overall costs of the Project and the significant benefits that the Project will provide to those ratepayers."²¹ Accordingly, while acknowledging that the Commission's approval of the transfer of the Project to Pittsburg Power will not determine the justness and reasonableness of any payments to Pittsburg Power associated with the ownership structure that will be created, Trans Bay asserts that the ownership structure itself should not be an issue in Trans Bay's rate case pending in Docket No. ER10-116-000 and that the costs associated with that structure should not be subject to challenge as to the prudence of entering into the agreements underlying the transaction.

¹⁶ PG&E Motion at 3.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 3.

¹⁹ Trans Bay's Response at 2.

²⁰ *Id.*

²¹ *Id.*

22. In its Answer, PG&E asserts that Trans Bay's statements in its supplemental filing in this proceeding conflict with statements that Trans Bay has made in its section 205 filing and create confusion as to whether Trans Bay expects to seek recovery of the amounts paid to Pittsburg Power. Accordingly, PG&E requests that the Commission clarify that approval of the proposed transaction under section 203 precludes intervenors from objecting to the transfer of ownership of the Project to Pittsburg Power and the consequent structure of the arrangement, that is, that Trans Bay will be obligated to make certain payments to Pittsburg Power, but that the justness and reasonableness of the actual amounts of Trans Bay's payments to Pittsburg Power and Pittsburg Power's justifications for its costs are subject to scrutiny in Trans Bay's pending rate case in Docket No. ER10-116-000.

23. Six Cities and SoCal Edison request that the Commission make it clear that approval of the proposed transaction does not constitute authorization or approval of any specific costs that Trans Bay may seek to include in the transmission revenue requirement to be determined in Docket No. ER10-116-000.²² SoCal Edison also requests that the Commission make clear that approval of the proposed transaction would "not constitute any ruling, finding or determination as to whether any costs (or the contractual provisions associated therewith) incurred by Trans Bay as the result of the proposed Transfer and/or under agreements with [Pittsburg Power] are prudent . . . [or] just and reasonable."²³ Additionally, SoCal Edison states that it is unclear how the Commission can determine that the proposed transaction will not cause an "undue impact" on rates, since ratepayers will bear additional costs as a result of the transfer.²⁴

c. Commission Determination

24. One element of our analysis under section 203 is on the effect that the proposed transaction will have on rates and whether that effect is adverse.²⁵ Although no party to this proceeding claims that the proposed transaction will have an adverse effect on rates or has raised any objections to the proposed transfer of the Project to Pittsburg Power, SoCal Edison questions whether the record in this proceeding is sufficiently complete to enable the Commission to conclude, as it must, that the proposed transaction will not have any adverse effect on rates. We find, however, that, based on the record in this

²² Comments of Six Cities at 2; SoCal Edison Response at 7.

²³ *Id.*

²⁴ *Id.* at 5.

²⁵ *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at P 25 (2008) (*Startrans*); *see also ITC Holdings Corp.*, et al., 121 FERC ¶ 61,229, at P 120 (2007) (*ITC*).

proceeding and our determinations in the July 2005 Order, that the proposed transaction will not have an adverse effect on rates. Importantly, in accepting the rate principles and operational responsibilities set forth in the Operating Memorandum in the July 2005 Order, the Commission has already accepted the ownership structure contemplated for the Project, which Trans Bay and Pittsburg Power now seek to consummate. Moreover, we note that the Operating Memorandum expressly contemplates that the parties would seek to recover, through Trans Bay's transmission revenue requirement and transmission rates approved by this Commission, all of the costs, incurred by each party in connection with the development, construction, operation, maintenance and repair of the Project.²⁶ These cost categories include the kinds of incremental costs identified in Trans Bay's January 13 supplemental filing.

25. We also emphasize that the proposed transaction does not involve the transfer of in-service transmission facilities from one entity to another where new or incremental costs are incurred by the new owner. The proposed transaction instead concerns a transfer of ownership of transmission facilities that are not yet in service and for which a transmission revenue requirement has not yet been determined. We note that our finding that the proposed transaction will not have an adverse impact on rates is not determinative of whether costs incurred in developing, constructing, owning or operating the Project (including any payments to Pittsburg Power) were prudently incurred and just and reasonable.²⁷ The Commission will consider the costs and set the just and reasonable rate in Docket No. ER10-116-000.

3. Effect on Regulation

26. The Application states that Trans Bay is, and will, after completion of the proposed transaction, remain subject to the Commission's jurisdiction under Part II of the FPA. Trans Bay will apply for all Commission approvals for the annual revenue requirement to support payment of Project expenses and the value of the transmission system rights.²⁸

²⁶ Operating Memorandum at 3-4

²⁷ In that regard, in the July 2005 Order, the Commission stated that acceptance of the Operating Memorandum and the rate principles therein was intended solely to allow Trans Bay to move forward with financing and preliminary matters and does not constitute final Commission review of jurisdictional rates, terms and conditions associated with the project. July 2005 Order at P 29, 31 and 32 (2005).

²⁸ Application at 17.

27. Based on the facts presented in the Application, the Commission finds that the proposed transaction will not adversely affect regulation. We note that no party alleges that regulation would be impaired by the proposed transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

4. Cross-Subsidization

28. FPA section 203(a)(4) requires that the Commission find that a transaction will not result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge or encumbrance will be consistent with the public interest. In Order Nos. 669, 669-A, and 669-B, the Commission established specific filing requirements requiring applicants to demonstrate that this requirement is met. This information is to be included in Exhibit M of applications.

29. Because no franchised public utility with captive customers is involved in the proposed transaction, Trans Bay argues that the proposed transaction qualifies for the first “safe harbor” which the Commission has established as a class of transactions unlikely to raise cross-subsidization concerns.²⁹ In addition, Trans Bay states that, other than the indebtedness for which Commission approval was obtained in Docket No. ES07-31-000 and the refinancing authorization obtained in Docket No. ES10-4-000, there are no existing pledges and/or encumbrances of the assets of Trans Bay.³⁰

30. Trans Bay asserts that, based on facts and circumstances known to it or that are reasonably foreseeable, the proposed transaction will not result in, at the time of the closing or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of assets of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional facilities for the benefit of an associate company. Trans Bay states that the proposed transaction will not result, now or in the future, in: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns, or provides transmission service over, jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that

²⁹ *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) at P 17, *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008).

³⁰ Application at 17-18.

owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review under sections 205 and 206 of the FPA.

31. Based on the facts as presented in the Application, we find that the proposed transaction will not result in cross-subsidization, or the pledge or encumbrance of utility assets for the benefit of an associate company.

D. Accounting Issue

32. The proposed transaction presents a novel accounting issue with respect to the Commission's accounting policy regarding the recognition of transmission revenue rights pursuant to this transaction. Trans Bay's filing shows proposed journal entries in which Trans Bay records the \$1 received from Pittsburg Power as revenue. However, Trans Bay also removes the original cost of the facility (\$530 million) from the plant accounts, with a corresponding \$530 million addition to plant Account 303, Miscellaneous Intangible Plant, representing "the value of transmission rights received."

33. Trans Bay shall account for the transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. Trans Bay shall submit its final accounting entries within 6 months of the date that the transaction is consummated, and the accounting submissions shall provide all of the accounting entries and amounts related to the transaction along with narrative explanations describing the basis for the entries.

The Commission orders:

(A) We hereby grant authorization under section 203(a)(1) for the proposed transaction, as discussed in the body of this order, effective as of the date of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted;

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) Trans Bay shall make appropriate filings under section 205 of the FPA, as necessary, to implement the proposed transaction.

(F) Trans Bay shall account for the transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. Trans Bay shall submit its final accounting entries within 6 months of the date that the transaction is consummated, and the accounting submissions shall provide all of the accounting entries and amounts related to the transaction along with narrative explanations describing the basis for the entries.

(G) Trans Bay must inform the Commission within 30 days of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the transaction.

(H) Trans Bay shall notify the Commission within 10 days of the date that the disposition of jurisdictional facilities has been consummated.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.