

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

NEO California Power LLC

Docket No. EL02-18-001

ORDER ON COMPLIANCE REPORT AND
ESTABLISHING HEARING AND SETTLEMENT PROCEDURES

(Issued May 20, 2003)

1. In this order, the Commission considers a compliance report that the March 1, 2002 Order¹ required the California Independent System Operator (California ISO or ISO) to file to substantiate its claims that overdue payments to NEO California Power LLC (NEO California) have been paid and, therefore, NEO California's complaint is moot. Because the California ISO's compliance report is not sufficiently transparent to determine whether the California ISO has complied with the March 1 Order and remitted these payments to NEO California, we establish hearing procedures to help facilitate resolution of this proceeding but hold the hearing in abeyance pending settlement judge procedures.
2. This order benefits customers by providing the parties an opportunity to resolve their disagreements over payment for capacity supplied by NEO California to the California ISO through settlement negotiations.

I. Background

3. On August 24, 2000, the California ISO issued a Request for Bids (RFB) that sought proposals from new generation facilities to provide peaking capability (up to 3,000 MW) in order to ensure the reliability of the California ISO's Control Area for the Summer Period.² In response to the RFB, NEO California submitted a proposal to construct a 49 MW unit located in Chowchilla, California (Chowchilla) and a 45 MW unit in Red Bluff, California (Red Bluff). Subsequently, NEO California and the California ISO executed a

¹NEO California Power LLC, 98 FERC ¶ 61,228 (2002) (March 1 Order).

²For the purposes of the RFB, "Summer Period" is defined as the period from June 1 through October 31 of a calendar year.

Summer Reliability Agreement (SRA)³ for each unit, which entitled the California ISO to dispatch capacity from each of these units for up to 500 hours during the Summer Periods of 2001, 2002, and 2003. In return for providing this capacity, the California ISO agreed to pay NEO California a monthly fixed price during the Summer Period (within 30 days after receiving an invoice from NEO California). NEO California began commercial operations of Chowchilla on June 13, 2001 and Red Bluff on August 11, 2001.

4. On November 13, 2001, NEO California filed a complaint asserting non-payment of invoiced amounts by the California ISO for the 2001 Summer Period. NEO California requested that the Commission require the California ISO to: (1) provide immediate payment to NEO California for invoiced amounts of capacity that were provided by NEO California; (2) comply with the July 12 Order⁴ by providing NEO California with either a creditworthy buyer or an assurance of payment for future transactions; or (3) show cause that it had not violated the Commission's creditworthiness orders (*i.e.*, the July 12 Order and November 7 Order)⁵ and the California ISO's Tariff.

³The California ISO recovers costs incurred under the SRAs pursuant to Section 2.3.5.1.8 of its Tariff, which states that: "all costs incurred by the ISO . . . shall be charged to each Scheduling Coordinator pro rata based upon the same proportion as the Scheduling Coordinator's metered hourly Demand (including exports) bears to the total metered hourly Demand (including exports) served in that hour." *See, e.g.*, California ISO Answer to Complaint at 3 (discussing the California ISO's method for recovering costs incurred under the SRAs). In other words, costs associated with the SRAs are charged on a pro rata basis to each scheduling coordinator based upon the scheduling coordinator's metered hourly demand to the total hourly demand served in that hour.

⁴San Diego Gas & Electric Company, *et al.*, 95 FERC ¶ 61,275 (May 25 Order), *reh'g denied*, 96 FERC ¶ 61,051 (2001) (July 12 Order) (denying rehearing of the Commission's decision in the May 25 Order that the California ISO must ensure the presence of a creditworthy buyer for all transactions with all generators who offer power in compliance with the must-offer requirement in the mitigation plan).

⁵California Independent System Operator Corporation, 97 FERC ¶ 61,151 (2001) (November 7 Order) (directing the California ISO to enforce the creditworthiness requirements of its Tariff and the Commission's creditworthiness orders by, among other things: (1) invoicing the California Department of Water Resources (DWR) for all the California ISO transactions that it entered into on behalf of Southern California Edison Company and Pacific Gas & Electric Company; and (2) filing a report with the Commission that indicates overdue amounts and a schedule for payment of those overdue amounts).

5. On December 3, 2001, the California ISO filed an answer that states that NEO California's complaint was mooted by California ISO's compliance with the November 7 Order; therefore, the complaint should be denied.

6. In order to substantiate this claim, the March 1 Order directed the California ISO to submit to the Commission, within 15 days from the issuance of that order, a report demonstrating that overdue payments were remitted by DWR and other scheduling coordinators to the California ISO and that the California ISO, in turn, made payment to NEO California.⁶

II. Notice of Filings and Responses

7. Notice of the California ISO's compliance report was published in the Federal Register, 67 FR 15379 (2002), with comments, protests, and motions to intervene due on or before April 17, 2002.

8. The California ISO requests confidential treatment for its compliance report and Attachments D, E, F, and G because they contain privileged financial data.⁷ The California ISO states that the supporting documents it submitted with its filing demonstrate that it has satisfied the requirements in the March 1 Order and, therefore, this proceeding is moot.

9. NEO California filed a timely protest to the California ISO's compliance report, stating that the California ISO made only partial payments in response to invoices sent for both SRAs and, as of April 10, 2002, the California ISO still owed NEO California approximately \$1,722,860 for the 2001 Summer Period.

10. The City of Redding (Redding) also filed a timely protest, disputing the accuracy of the California ISO's Attachment C (Certification of Market Settlement) to its compliance report, which is intended to reflect the status of overdue payments from scheduling coordinators other than the DWR. Redding protests the calculations contained in that attachment and requests that the Commission not accept those amounts (including those owed by the Western Area Power Administration-Redding), because NEO California's complaint was not intended to resolve billing disputes between Redding and the California ISO.

⁶March 1 Order, 98 FERC ¶ 61,228 at 61,919.

⁷Specifically, the California ISO states that those documents contain data specific to DWR's and NEO California's transactions, costs, and payments.

11. On August 12, 2002, NEO California filed a motion for expedited action, stating that, in addition to the amounts for the 2001 Summer Period, the California ISO did not pay some of NEO California's invoices for the 2002 Summer Period, which totaled \$7,449,160. Accordingly, NEO California requests that the Commission direct the California ISO to pay all outstanding balances from the 2001 and 2002 Summer Periods, plus applicable interest, and that the California ISO pay for all invoices after August 2002 in full, within 30 days of receipt, as required under the terms of the SRAs.

12. On August 27, 2002, the California ISO filed an answer to NEO California's motion for expedited action, arguing that its compliance report demonstrates that to the extent the California ISO received funds from DWR and other scheduling coordinators, the California ISO disbursed such funds to NEO California for the 2001 Summer Period in accordance with Section 9.4 of the SRAs, which states that: "The ISO's obligation to make any payments required under Article 9 is expressly conditioned on the ISO's recovery under the ISO Tariff of costs it incurs under this Agreement." Accordingly, the California ISO states that the remaining unpaid amounts due to NEO California for the 2001 Summer Period will be paid when the California ISO receives funds from the ongoing bankruptcy proceedings of the California Power Exchange and Pacific Gas and Electric Company. In addition, the California ISO maintains that it did not make payments for June and July of the 2002 Summer Period because it did not receive invoices for that period from NEO California.⁸

13. On September 11, 2002, NEO California filed an answer to the California ISO's answer, contesting the California ISO's assertion that its remaining delinquent payments for the 2001 Summer Period are the result of the bankruptcies of the California Power Exchange. NEO California states that the California Power Exchange suspended operations, filed for bankruptcy protection, and terminated its rate schedules prior to the effective date of the SRAs. NEO California also notes that the California ISO paid for capacity sales made during the 2002 Summer Period.

III. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), NEO California's and Redding's timely motions to intervene

⁸In particular, the California ISO claims that, as of August 26, 2002, NEO California did not submit June and July invoices to an electronic inbox; therefore, the California ISO did not disburse funds for that period. In addition, the California ISO asserts that the August 2002 Summer Period invoice was not yet overdue at that time.

and protest make them a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2), prohibits an answer to an answer unless otherwise permitted by the decisional authority. We find that good cause exists to allow NEO California's answer to the California ISO's answer because it assists us in our decision-making process in this proceeding by clarifying the issues before us.

B. Commission's Response

15. Although the California ISO asserts that the compliance report substantiates its claim that NEO California has been paid in full for all overdue amounts, NEO California still asserts that the California ISO has a delinquent outstanding balance for the 2001 Summer Period.⁹ We find that the California ISO's compliance report is deficient in demonstrating whether the California ISO has paid NEO California in full for all overdue amounts for the 2001 Summer Period; therefore, we cannot conclude that this proceeding is moot.

16. Accordingly, because there remains material issues of fact in dispute, we will establish an evidentiary hearing but hold that hearing in abeyance and direct, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, settlement judge procedures in order to assist the parties in resolving these matters. If the parties desire, they may, by mutual agreement, request a specific judge as a settlement judge in this proceeding; otherwise, the Chief Administrative Law Judge will select a judge for that purpose.¹⁰ The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of the settlement discussions. Based on that 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.

⁹Despite the fact that NEO California requests in its Motion for Expedited Action that the Commission direct the California ISO to pay it for delinquent amounts for the 2002 Summer Period, as well as for the 2001 Summer Period, NEO California concedes in its Answer to the California ISO's Answer that the California ISO has made payment for the 2002 Summer Period. Therefore, we find that the issue of whether the California ISO has paid for capacity from NEO California for the 2002 Summer Period is no longer at issue.

¹⁰If 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 issuance of this order. The Commission's website contains a listing of the Commission's judges and a summary of their background and experience (www.ferc.gov- click on Office of Administrative Law Judges).

17. We disagree with Redding that NEO California's complaint was not intended to resolve billing disputes between the California ISO and scheduling coordinators other than DWR. Given that the SRA program relates to system-wide reliability and the California ISO allocates the cost of that program to each scheduling coordinator (not just DWR) based on metered demand,¹¹ it is necessary to determine whether all scheduling coordinators, as well as DWR, have paid the California ISO for transactions connected to NEO California's complaint. Consequently, to the extent that scheduling coordinators other than DWR are in arrears for payments to the California ISO that are related to amounts that NEO California claims are owed by the California ISO to it, the settlement proceedings and the hearing (if it is held) should consider the status of payments from these other scheduling coordinators (including Redding), as set forth in the California ISO's listing in Attachment C of the compliance report.¹²

The Commission orders:

(A) 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 the Federal Power Act (in particular, Sections 205 and 206 thereof) 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 whether the California ISO has paid NEO California in full for all overdue amounts for the 2001 Summer Period and, therefore, whether NEO's California's complaint is moot and this proceeding can be terminated. As discussed in the body of this order, we will hold the hearing in abeyance to provide time for settlement judge procedures.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603, the Chief Administrative Law Judge is hereby directed to appoint a settlement judge within 15 days of the issuance 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.

(C) Within 60 days of the issuance of this order, the settlement judge shall file a report with the Chief Judge and the Commission on the status of the settlement

¹¹See supra note 3.

¹²Thus, those proceedings should also consider Redding's related claim regarding the accuracy of the California ISO's calculations in Attachment C, if it is determined that any of the scheduling coordinators listed in that attachment have overdue payments related to NEO California's complaint.

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

(D) If the settlement judge procedures fail, and a trial-type evidentiary hearing is to be held, a presiding judge that is designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately 15 days of the date the Chief Judge designates the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E. Washington, D.C. 20426. Such 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)

Magalie R. Salas,
Secretary.