

129 FERC ¶ 61,225
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Trans Bay Cable LLC

Docket No. ER10-116-000

ORDER ON TRANSMISSION REVENUE REQUIREMENT FILING,
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 17, 2009)

1. This order addresses a filing by Trans Bay Cable LLC (Trans Bay) submitted pursuant to section 205 of the Federal Power Act (FPA)¹ and Part 35 of the Commission's rules and regulations.² Trans Bay proposes to establish its Transmission Revenue Requirement (TRR), as a Participating Transmission Owner (PTO) in the California Independent System Operator Corporation (CAISO) control area, in connection with Trans Bay's 400 megawatt submarine transmission line and associated facilities (the Project). This order accepts Trans Bay's TRR and suspends it, subject to refund, to become effective on the date the Project commences commercial operation and is turned over to the operational control of the CAISO. This order also establishes hearing and settlement judge procedures.

I. Background

2. Trans Bay states that the Project resulted from a need for investment in new generation and transmission to meet the future energy needs within the City of San Francisco. The Project is a 53-mile, high voltage, direct current, submarine transmission line underneath San Francisco Bay, that will be used to transmit approximately 400 megawatts of electricity from an existing substation adjacent to the City of Pittsburg, California, to an existing substation within the City of San Francisco.

3. On May 19, 2005, Trans Bay filed with the Commission an Operating Memorandum between and among Trans Bay, the City of Pittsburg, California (the City)

¹ 16 U.S.C. § 824(d) (2006).

² 18 C.F.R. §35.0 *et seq.* (2009).

and Pittsburg Power Company (Pittsburg Power), which set forth the rate principles and operational responsibilities by which Trans Bay, the City and Pittsburg Power will pursue development, financing, construction and operation of the project. Specifically, the Operating Memorandum proposed (1) a post-tax return on equity (ROE) of 13.5 percent, (2) an assumed capital structure of 50 percent equity and 50 percent debt, (3) a three-year moratorium on Trans Bay's TRR, and (4) a thirty-year depreciation period for the Project.

4. On July 22, 2005, the Commission issued an order accepting the Operating Memorandum.³ The Commission found that the significant reliability and environmental benefits offered by the Project, and the high risk borne by Trans Bay as a new and independent entity, justified accepting Trans Bay's proposed rate principles and enhanced ROE.⁴ Furthermore, in the Operating Memorandum Order, the Commission also stated that the acceptance of the Operating Memorandum and the rate principles was intended solely to allow Trans Bay to move forward with the Project, and did not constitute final Commission review of jurisdictional rates, terms and conditions associated with the Project.

5. On August 11, 2006, the CAISO filed with the Commission an amendment to its Transmission Control Agreement recognizing Trans Bay as a PTO. In that submittal, the CAISO stated that the CAISO Governing Board had accepted the Project, and approved Trans Bay's application for PTO status. The CAISO noted that the Governing Board's approval was conditioned upon approval of Trans Bay's Transmission Owner Tariff and TRR.⁵ On October 10, 2006, the Commission accepted the CAISO's revised Transmission Control Agreement.⁶

³ *Trans Bay Cable LLC*, 112 FERC ¶ 61,095 (2005) (Operating Memorandum Order), *order on clarification*, 114 FERC ¶ 61,031 (2006).

⁴ *Id.* P 24.

⁵ On November 13, 2009, Trans Bay submitted a proposed PTO tariff to establish itself as a new PTO within the CAISO. This proceeding was assigned Docket Nos. ER10-266-000 and ER10-266-001, and is pending before the Commission.

⁶ *See California Independent Sys. Operator Corp.*, 117 FERC ¶ 61,029 (2006), *order on clarification*, 117 FERC ¶ 61,181 (2006).

II. Description of Filing

6. Trans Bay proposes an estimated annual revenue requirement of \$149.3 million, including an overall ROE of 14 percent.⁷ Trans Bay notes that although the Operating Memorandum Order authorized an initial post-tax ROE of 13.5 percent, Trans Bay seeks Commission approval of a 50 basis point adder to its overall ROE for its participation in the CAISO, pursuant to Order No. 679.⁸ Trans Bay states that while the Commission has previously ruled that this type of additional rate incentives will not be granted for projects that have already been constructed, Trans Bay's request here is for joining and its continued commitment to remain a PTO of the CAISO. In support of the adder, Trans Bay asserts that when using the Commission-accepted Discounted Cash Flow (DCF) methodology, Trans Bay's proposed 14 percent ROE remains within the zone of reasonable returns.⁹ Trans Bay argues that the Commission has consistently approved up to a 50 basis point adder for ISO and RTO membership, citing *Green Power Express*, *ITC Great Plains LLC*, and *Pioneer Transmission, LLC*.¹⁰

7. In addition, Trans Bay states that its proposed TRR estimate is made while construction is still underway, and commits to update its filing with actual cost data within sixty days following the completion of construction and commercial operation of the Project. Trans Bay adds that in no event will such an update to this filing result in an increase in the requested annual revenue requirement.¹¹

8. Trans Bay also states that consistent with requirements of the CAISO, Trans Bay separated its revenue requirement between high and low voltage transmission revenue requirements. According to Trans Bay, the share of revenue requirement that is

⁷ Trans Bay transmittal letter at 10 and 11.

⁸ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

⁹ Trans Bay transmittal letter at 10.

¹⁰ *See Green Power Express*, 127 FERC ¶ 61,031 (2009), *ITC Great Plains LLC*, 126 FERC ¶ 61,223 (2009), and *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281 (2009).

¹¹ Trans Bay transmittal letter at 11.

attributable to low voltage activities should be 7.1 percent, as only a portion of the project is below 200 kV.¹²

9. Trans Bay also seeks Commission guidance as to whether certain land lease payments for the real property where Trans Bay substations are located qualify for treatment as asset retirement obligations within the meaning of Order No. 631.¹³ Trans Bay states that although its cost-of-service is based on a thirty-year depreciation period, Trans Bay is obligated to pay three different property owners under leases with terms in excess of thirty years.¹⁴ Trans Bay states that its TRR includes amounts of approximately \$2.3 million per year to recover the remaining lease payment obligations that will be owed after the first thirty years. Trans Bay requests that the Commission summarily rule on this issue.¹⁵

10. Trans Bay requests an effective date of its TRR to coincide with the commercial operation date of the Project, and requests any waivers necessary to allow Trans Bay's TRR to become effective as requested. Trans Bay specifically requests waiver of the requirement to file the Period I cost of service data, because no actual data is available since the Project involves new construction and the anticipated date of commercial operations is on or about February 1, 2010. Furthermore, Trans Bay requests waiver of the requirement to file certain cost of service statements that Trans Bay states are inapplicable to the Project.¹⁶

III. Notice of Filing and Responsive Pleadings

11. Notice of Trans Bay's filing was published in the *Federal Register*, 74 FR 57302 (2009) with interventions and protests due on or before November 13, 2009. Timely motions to intervene were filed by the Modesto Irrigation District, Metropolitan Water District of Southern California, Pittsburg Power Company, Northern California Power

¹² *Id.* Trans Bay specifically points out certain 115 kV facilities between the direct current converter station and the point of connection with the facilities of Pacific Gas & Electric Company.

¹³ *Accounting, Financial Reporting, and Rate Filing Requirements for Asset Retirement Obligations*, Order No. 631, FERC Stats. & Regs. ¶ 31,142 (2003).

¹⁴ Trans Bay states that these lease payments are for three separate parcels of real property on which the Pittsburg converter station is located.

¹⁵ Trans Bay transmittal letter at 12.

¹⁶ Trans Bay states that cost of service statements regarding power production, wholesale customers, revenue data, and fuel factors are inapplicable to Trans Bay.

Agency, Atlantic Path 15, LLC, M-S-R Public Power Agency and the Cities of Santa Clara, Palo Alto and Alameda, California. Southern California Edison Company (SoCal Edison) and the Cities of Anaheim, Azusa, Banning, Colton, Pasadena and Riverside, California (the Six Cities) each submitted a motion to intervene and protest. The California Department of Water Resources State Water Project (State Water Project) and Pacific Gas and Electric Company (PG&E) each filed a motion to intervene and comments. San Diego Gas & Electric Company (SDG&E) filed a motion to intervene, request for hearing and protest. The California Public Utilities Commission (CPUC) filed a notice of intervention, protest and request for hearing. Trans Bay filed a motion for leave to answer and answer.

12. Protestors other than the CPUC generally support the 13.5 percent return on equity as previously established by the Commission. Protestors argue that Trans Bay's new 50 basis point adder to the original ROE request is unwarranted, unsupported, unjust and unreasonable, and should be rejected. In addition, protestors contend that if the Commission reopens the approved ROE for the purpose of including a 50 basis point adder incentive, Commission policy requires that the currently-approved 13.5 percent ROE also be reopened entirely.¹⁷ Furthermore, protestors argue that the 13.5 percent ROE package already included incentives for the Project (including CAISO participation) and that no further incentives are necessary. The CPUC further asserts that Trans Bay's requested return is significantly higher than the amount necessary to attract capital.¹⁸ In addition, the CPUC and the Six Cities also argue that a Commission-approved DCF analysis including the appropriate proxy groups should be performed.¹⁹ PG&E specifically requests that the Commission confirm that the 13.5 percent ROE already considered Trans Bay's participation in the CAISO.

13. State Water Project argues that Trans Bay's 14 percent ROE request would impose significantly higher rates on ratepayers. For example, State Water Project states that Trans Bay's first year \$149 million transmission revenue requirement would increase the CAISO's system-wide transmission access charge rates by 17 percent; thereby increasing transmission access charge rates by approximately \$0.65/MWh.²⁰ In addition, the Six Cities argue that Trans Bay has not demonstrated that its newly proposed ROE is just and

¹⁷ See e.g., PG&E protest at 3-4 and Six Cities protest at 9.

¹⁸ CPUC protest at 6.

¹⁹ *Id.* at 3-6.

²⁰ State Water Project comments at 6.

reasonable, and that the same risks and challenges for which Trans Bay has already been granted an incentive ROE, do not warrant an additional 50 basis point adder.²¹

14. Protestors also argue that Trans Bay's proposed TRR has several other issues that need to be further analyzed and should be set for hearing. For instance, protestors assert that Trans Bay's cost of debt, and projected Operating and Maintenance Expenses and Administrative and General Expenses (O&M and A&G expenses) appear to be excessive. In addition, SoCal Edison and the Six Cities argue that certain prepayments in working capital and Trans Bay's Allowance for Funds Used During Construction require further analysis to evaluate whether they are appropriate.²²

15. PG&E also argues that Trans Bay should not be allowed to recover any amounts related to the funding of unexpired lease expenses. PG&E states that in one instance Trans Bay has entered into a forty-nine year lease, subject to Trans Bay's right to terminate the lease after thirty-nine years. PG&E argues that, since these facilities will provide service longer than their thirty-year book life, it is unreasonable to include these annual lease costs as part of Trans Bay's annual cost of service over the first thirty years.²³

IV. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009) the timely, unopposed notice and motions to intervene serve to make those parties who filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Trans Bay's answer and will, therefore, reject it.

B. Property Lease Payments and Other Issues

17. As noted above, Trans Bay seeks guidance and requests that the Commission summarily rule whether the land lease payments in excess of the thirty-year depreciation period qualify for treatment as asset retirement obligations within the meaning of Order No. 631.

²¹ See Six Cities protest at 4.

²² See *Id.* at 14.

²³ PG&E protest at 5-6.

18. We find that the treatment of land lease payments for real property where Trans Bay substations are located raises issues that require further investigation and is more appropriately addressed in the hearing ordered below. Accordingly, all issues surrounding the land lease payments are set for hearing.²⁴

19. Protestors raised several concerns regarding Trans Bay's TRR. Our initial review indicates that Trans Bay's filing raises issue of material fact that warrant hearing and settlement judge proceedings. Accordingly, as discussed below, we will set for hearing Trans Bay's stated cost of debt, O&M and A&G expenses, prepayments, and property lease payments, among other things.

C. Trans Bay's Rate Principles

20. While we set Trans Bay's proposed TRR for hearing and settlement judge proceedings, we reaffirm our acceptance of the principles previously accepted in the Operating Memorandum Order. Specifically, we reaffirm Trans Bay's (1) 30 year depreciation of the facilities, (2) 3-year rate moratorium, and (3) the use of a hypothetical 50/50 capital structure. As we stated in the Operating Memorandum Order, the Project offers significant reliability and environmental benefits to the CAISO market and San Francisco area.²⁵ In addition, as discussed below, we also reaffirm Trans Bay's use of an ROE of 13.5 percent.

D. Return On Equity

21. We will not conduct a new DCF analysis as requested by the CPUC. In approving Trans Bay's ROE, the Commission found that the 13.5 percent is justified in light of the fact that Trans Bay is a start-up entity developing a new Project, and faces elevated risk.²⁶ We find that the CPUC has not raised any new issues here that would lead us to revisit the findings in the Operating Memorandum Order with regards to a reasonable ROE for Trans Bay. Accordingly, we reaffirm our previous acceptance of Trans Bay's use of a 13.5 percent ROE.

22. Further, Trans Bay proposes to include a 50 point basis adder in its overall ROE for its participation in the CAISO, pursuant to Order No. 679. Trans Bay states that when using the Commission-accepted DCF methodology, Trans Bay's 14 percent overall ROE

²⁴ For example, Trans Bay has not provided copies of the land leases or supported its associated costs in order for the Commission or parties to properly evaluate.

²⁵ Operating Memorandum Order, 112 FERC ¶ 61,095 at P 24.

²⁶ *Id.* P 25-26.

request remains within the zone of reasonable returns, and asserts that this request is just and reasonable.

23. We reject Trans Bay's request to include a 50 basis point adder in its overall ROE to reflect CAISO participation. Before adopting Order No. 679, the Commission exercised its authority under section 205 of the FPA, on a case-by-case basis, to encourage investment in infrastructure and allow for appropriately incentivized returns. In accepting Trans Bay's rate principles, including Trans Bay's proposed 13.5 percent overall ROE in the Operating Memorandum Order, the Commission considered the full spectrum of risks faced by Trans Bay, as well as the benefits provided by the Project.²⁷ The Commission also took note of several other factors contained in the original application, including Trans Bay's commitment to turn over operational control of the Project to the CAISO.²⁸ Together, these factors allowed the Commission to determine that Trans Bay's proposed rate principles, including Trans Bay's requested ROE, was just and reasonable. Accordingly, we reject Trans Bay's request to include an additional adder to its ROE.²⁹

E. Hearing and Settlement Judge Procedures

24. As discussed above, Trans Bay's TRR raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Among the issues to be considered during those proceedings are Trans Bay's debt cost rate, O&M and A&G expenses, prepayments, and whether the land lease payments made by Trans Bay qualify for treatment as asset retirement obligations pursuant to Order No. 631.

²⁷ *See Id.* P 24-25.

²⁸ The Commission noted as such in its Operating Memorandum Order, stating that "[a]t this juncture it is sufficient that section 3.3 of the Operating Memorandum clearly states that operational control will be vested with the CAISO." Operating Memorandum Order at P 30. Accordingly, Trans Bay subsequently applied and was granted PTO status, subject to the Commission's approval of its PTO tariff. *See California Independent Sys. Operator Corp.*, 117 FERC ¶ 61,029 (2006).

²⁹ We note that certain protesters raised the issue of whether Trans Bay's request in this proceeding requires the Commission to review the appropriateness of the initial 13.5 percent figure before deciding on the 50 basis point adder. *See, e.g.,* PG&E protest at 3-4, Six Cities protest at 9, and SoCal Edison protest at 4-5. We do not need to address their issue, because we reject Trans Bay's request.

25. Our preliminary review of Trans Bay's filing indicates that the proposed rates embodied within Trans Bay's TRR proposal have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Trans Bay's proposed TRR effective on the date the project is in commercial operation, subject to refund and the conditions set forth in this order, and set it for hearing and settlement judge procedures.

26. While we are setting these matters for trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³⁰ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.³¹ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this 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.

The Commission orders:

(A) Trans Bay's proposal to establish Trans Bay's revenue requirement is accepted, suspended to become effective on the day that Trans Bay's Project achieves commercial operation and is transferred to the operational control of the CAISO, and is hereby set for hearing, subject to refund, and settlement judge procedures.

(B) Trans Bay is directed to update this filing with actual cost data, as discussed herein within sixty days following the completion of construction and the occurrence of the commercial operation date.

(C) Trans Bay's ROE, previously established at 13.5 percent, is affirmed. Trans Bay's request for a 50 basis point adder is denied, as discussed herein.

³⁰ 18 C.F.R. § 385.603 (2009).

³¹ If 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 this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

(D) 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, particularly 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 Trans Bay's proposed revenue requirement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009), the Chief Administrative law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date 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. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(F) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(G) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a 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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.