

146 FERC ¶ 61,100
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

Docket No. EL14-15-000

v.

Trans Bay Cable L.L.C.

Trans Bay Cable L.L.C.

Docket No. ER13-2412-000
(Consolidated)

Trans Bay Cable L.L.C.

Docket No. ER13-2412-001

ORDER ON COMPLAINT, MOTION TO CONSOLIDATE,
AND REQUEST FOR REHEARING

(Issued February 20, 2014)

1. On December 17, 2013, the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities) filed a complaint (Complaint) against Trans Bay Cable L.L.C. (Trans Bay) and a motion to consolidate the Complaint with the ongoing hearing and settlement proceedings established in Docket No. ER13-2412-000 regarding Trans Bay's Transmission Revenue Requirement (TRR). On December 20, 2013, Six Cities filed a limited request for rehearing (Rehearing Request) of the Commission's order on Trans Bay's TRR.¹ In this order, we set the Complaint for hearing and settlement judge procedures, grant the motion to consolidate and deny Six Cities'

¹ 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).

Rehearing Request, as discussed below. We also establish a refund effective date of December 17, 2013.

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 Company's (PG&E) 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 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

² A more detailed discussion of the background of this proceeding can be found in the 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 (September 20 Filing).

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

4. The Commission also dismissed Six Cities' and the California Public Utilities Commission's requests for a Commission-initiated 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 from November 23, 2013, to April 23, 2014, were just and reasonable. In its Trans Bay TRR Order, the Commission stated:

Neither the Operating Memorandum Order nor the Settlement Order state that the rate principles approved in the Initial Rate Order would terminate on November 23, 2013. Instead, the Commission found that Trans Bay was entitled to receive those rates for three full years and that Trans Bay would be required to file revised rates by September 20, 2013, which Trans Bay has done. Therefore, we find that Trans Bay has complied with the Commission's directives and a further investigation into previously settled rates is unwarranted.⁹

Hearing and settlement procedures began on December 17, 2013, in Docket No. ER13-2412-000.

II. Complaint and Motion to Consolidate

5. Six Cities argues that Trans Bay's current TRR, which is the continuation of the settlement rate during the five-month suspension period from November 23, 2013, through April 22, 2014, is not just and reasonable. Six Cities contends that the Period I data Trans Bay submitted as part of its September 20 Filing demonstrates that Trans Bay's current TRR of \$132.5 million is excessive.¹⁰ Six Cities explains that this data supports a TRR of \$124.9 million, \$7.6 million lower than its current TRR.¹¹ In addition, Six Cities asserts that Trans Bay's use of a 13.5 percent ROE to calculate its Period I and II TRR further inflates its actual cost of service because a 13.5 percent ROE falls outside of Trans Bay's range of reasonable returns. Instead, Six Cities states that its own analysis supports a range of reasonableness of 6.56 to 11.92 percent.

6. Six Cities requests that the Commission find that Trans Bay's current TRR is unjust and unreasonable, set it for hearing and settlement procedures, and order refunds with interest for the difference between the current TRR and the TRR resulting from the

⁸ 16 U.S.C. § 824e (2012).

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

¹⁰ Trans Bay calculated its cost of service for Period I (July 1, 2012 to June 30, 2013) and Period II (January 1, 2014 to December 31, 2014), consistent with the requirements of the 2011 settlement. *See* September 20 Filing at P 17.

¹¹ Complaint at 7-8.

hearing as of the date of the Complaint. Six Cities also requests that the Commission consolidate the Complaint with the ongoing hearing and settlement procedures concerning the September 20 Filing in Docket No. ER13-2412-000. Six Cities argues that consolidating the two proceedings will increase efficiency because the Complaint and the September 20 Filing concern the same issues, i.e. establishing a just and reasonable TRR and ROE for Trans Bay.

III. Rehearing Request

7. Six Cities requests rehearing of the Commission's Trans Bay TRR Order regarding the rate moratorium applicable to Trans Bay's current TRR. Six Cities contends that the Commission erred in concluding that the Operating Memorandum Order and Settlement Order preclude an investigation into Trans Bay's current TRR at the end of the three-year rate moratorium. Six Cities asserts that the operating memorandum specifically states that, following the expiration of the three-year rate moratorium, "a change in the Company's [TRR] proposed by a [p]arty, a non-party, or the [Commission] acting *sua sponte* shall be reviewed under the 'just and reasonable standard' under [s]ections 205 or 206 of the [FPA]."¹² Therefore, Six Cities requests that the Commission reverse its findings in 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.

IV. Notice and Responsive Filings

8. Notice of Trans Bay's complaint was published in the *Federal Register*, 78 Fed. Reg. 78,349 (2013), with interventions and protests due on or before January 6, 2014. The City of Santa Clara, California and the M-S-R Public Power Agency; DATC Path 15, LLC; Modesto Irrigation District; Northern California Power Agency; PG&E; and Southern California Edison Company filed timely motions to intervene. The California Department of Water Resources State Water Project (SWP) filed a timely motion to intervene and comments. Trans Bay filed a motion to dismiss, answers to the Complaint and to the motion consolidate the proceedings, and a request for attorneys' fees. Separately, Trans Bay filed a motion for leave to file an answer and an answer to Six Cities' rehearing request. Six Cities filed an answer to Trans Bay's motion to dismiss, answers to the Complaint and to the motion consolidate the proceedings, and a request for attorneys' fees. Trans Bay filed a motion for leave to answer and answer to Six Cities' response.

9. SWP supports both Six Cities' Complaint and motion to consolidate the proceeding with the ongoing hearing and settlement proceedings in Docket No.

¹² Rehearing Request at 6.

ER13-2412-000. SWP agrees with Six Cities that, as demonstrated by the September 20 Filing, Trans Bay's current TRR is excessive and should be reduced.

10. Trans Bay argues that the Commission should summarily dismiss Six Cities' complaint with prejudice as an impermissible collateral attack on the Trans Bay TRR Order. Trans Bay explains that, in the Trans Bay TRR Order, the Commission considered and denied Six Cities' request for a section 206 investigation into Trans Bay's current TRR. Moreover, since Six Cities filed a request for rehearing of the Trans Bay TRR Order, Trans Bay adds that the Complaint is a collateral attack on an order pending on rehearing, which also constitutes grounds for dismissal.¹³

11. In addition, Trans Bay asserts that Six Cities' Complaint is barred by the doctrines of *res judicata* and collateral estoppel. First, Trans Bay claims that Six Cities' Complaint raises the same issues that it raised in its protest to the September 20 Filing. Second, Trans Bay contends that the issue of whether its TRR is just and reasonable was litigated and accepted in the Settlement Order and recently confirmed in the Trans Bay TRR Order. Thus, Trans Bay argues that the issues Six Cities raises in its Complaint are barred as *res judicata* and by collateral estoppel and should be dismissed with prejudice.¹⁴

12. Further, Trans Bay claims that the Complaint is facially deficient because Six Cities failed to satisfy the procedural requirements of Rule 206 of the Commission's regulations.¹⁵ Trans Bay argues that Six Cities failed to quantify both the financial impact and the practical, operational, or other nonfinancial impacts caused by Trans Bay's current TRR, as required by Rule 206(b)(4) and (b)(5). Trans Bay also contends that Six Cities failed to explain why the timely resolution of the Complaint cannot be achieved through participation in the ongoing hearing and settlement proceedings in Docket No. ER13-2412-000, as required by Rule 206(b)(6). Trans Bay argues that the Commission has dismissed complaints for failure to satisfy the basic requirements of Rule 206 and should do so here.¹⁶

¹³ Trans Bay Motion to Dismiss, Answer to Complaint, and Answer to Motion to Consolidate Proceedings (Trans Bay Answer) at 7-10 (citing *Pac. Gas & Elec. Co.*, 116 FERC ¶ 61,004, at P 36 (2006) (having previously determined in an earlier order that the subject agreements permitted respondent market participants to change their cost methodology, the Commission dismissed the complaint against them as "no more than a collateral attack on that [prior] determination")).

¹⁴ *Id.* at 10-12.

¹⁵ 18 C.F.R. § 385.206 (2013).

¹⁶ Trans Bay Answer at 12-15.

13. Should the Commission choose not to dismiss the Complaint, Trans Bay requests that the Commission deny the Complaint on its merits, arguing that Six Cities failed to establish a *prima facie* case under section 206 of the FPA. Trans Bay claims that Six Cities failed to provide evidence to show that Trans Bay's current TRR or ROE is unjust and unreasonable or that Six Cities' proposed TRR or ROE is just and reasonable. Trans Bay contends that it is inappropriate to use Period I data to establish its current TRR because Period I reflects its cost of service from July 1, 2012, to June 30, 2013, whereas the period during which the current TRR will apply begins on or after December 17, 2013, and ends on April 22, 2014. Thus, Trans Bay argues that an analysis of its current cost of service conditions based on Period II data would more accurately represent costs for the 2014 calendar year, which include the construction of nine significant additions to the Project.¹⁷

14. Trans Bay requests that the Commission also deny Six Cities' request to consolidate the Complaint with the ongoing proceedings in Docket No. ER13-2412-000. Six Cities argues that requiring the Commission to investigate and the parties to relitigate "previously settled rates" would unduly delay the matters already set for hearing.

15. Finally, Trans Bay asserts that the Complaint is so "clearly frivolous" that the Commission should require Six Cities to pay Trans Bay's legal fees incurred in defending itself against the Complaint.¹⁸

V. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2013), prohibits an answer to a request for rehearing. Accordingly, we reject the answer filed by Trans Bay.

18. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits answers to answers. We are not persuaded to accept Six Cities' answer to Trans Bay's motion to dismiss, answer to the Complaint and to the motion to consolidate the proceedings, and the request for attorneys' fees, nor Trans Bay's answer to Six Cities' response and will, therefore, reject them.

¹⁷ *Id.* at 16-17.

¹⁸ *Id.* at 21-22.

B. Commission Determination

1. Complaint

19. We find that the Complaint contains information sufficient to raise issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in the hearing ordered below, and we establish a refund effective date of December 17, 2013. Also, Six Cities' complaint concerning Trans Bay's current TRR is based on similar facts and arguments at issue in the ER13-2412-000 proceeding covering Trans Bay's proposed TRR increase. Due to the common issues of law and fact, we will consolidate the Complaint with the hearing and/or settlement judge procedures currently pending in Docket No. ER13-2412-000.¹⁹ Consistent with our instructions in the Trans Bay TRR Order, we direct the presiding judge to determine the appropriate range of reasonable returns and the appropriate ROE applicable for the current TRR at the upper end of this range, not to exceed 13.5 percent ROE.²⁰

20. We deny Trans Bay's motion to dismiss because we 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.²¹ The Commission, however, made no finding that other parties were precluded from initiating their own FPA section 206 complaints.²² Thus, we find that the Complaint is not an impermissible collateral attack on an order pending on rehearing.

21. Further, we find that the Complaint is not barred by the doctrines of *res judicata* and collateral estoppel. The Commission has previously explained that:

¹⁹ The Commission will consolidate proceedings where there are common issues of law and fact or if greater administrative efficiency will result from consolidation. *See, e.g., So. Cal. Edison Co.*, 129 FERC ¶ 61,304, at P 26 (2009); *ISO New England, Inc.*, 124 FERC ¶ 61,013, at P 36 (2008); *Ameren Servs. Co.*, 121 FERC ¶ 61,205, at PP 22-23 (2007).

²⁰ Trans Bay TRR Order, 145 FERC ¶ 61,151 at P 19.

²¹ 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).

²² *See, e.g., PJM Interconnection, LLC*, 135 FERC ¶ 61,198, at P 66 (2011) (declining to establish a Commission investigation but stating that if a party believes a rate is unjust and unreasonable that party may file a complaint pursuant to FPA section 206).

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.^[23]

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.” Trans Bay contends that the issue of whether its current TRR is just and reasonable was litigated and accepted in the Settlement Order and recently confirmed in the Trans Bay TRR Order. This contention is not correct. As Six Cities correctly states, the 2011 settlement covered November 23, 2010 through November 30, 2013; however, the Settlement Order was not a judgment on the period beginning December 1, 2013, which is the subject of the Complaint. Similarly, as discussed above, when the Commission exercised its discretion and elected not to open a section 206 investigation in the TRR Order, this did not constitute a judgment on the merits that would preclude Six Cities from filing a section 206 complaint. Thus, the Complaint is not barred by the doctrines of *res judicata* or collateral estoppel.

22. Further, we deny Trans Bay’s motion to dismiss the Complaint as facially deficient for failure to satisfy a strict application the procedural requirements of Rule 206 of the Commission’s Rules of Practice and Procedure. We find that Six Cities has substantially complied with the Commission’s complaint regulations in good faith.²⁴ Implicit in Six Cities’ testimony and exhibits are the impacts that an excessive current TRR would have on Six Cities during the suspension period. Further, given the Commission’s decision not to initiate its own FPA section 206 investigation of the current TRR, it is evident why the timely resolution of the Complaint could not be achieved through participation in the ongoing hearing and settlement proceedings in Docket No. ER13-2412-000.

²³ See *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)).

²⁴ See *La. Pub. Serv. Comm’n v. Entergy Corp.*, 129 FERC ¶ 61,205, at P 26 n.20 (2009) (denying a request to dismiss a complaint when the complaint “substantially complies” with Rule 206(b)’s requirements); *E.ON U.S. LLC*, 131 FERC ¶ 61,025, at P 41 n.60 (2010) (same).

23. Six Cities has established a *prima facie* case under section 206 of the FPA, and we will not dismiss it on that basis.²⁵ Trans Bay contends that Six Cities should not have used Period I data to establish its current TRR because Period I reflects its cost of service from July 1, 2012, to June 30, 2013, whereas the period during which the current TRR will apply begins on or after December 17, 2013, and ends on April 22, 2014 and that Period II data would more accurately represent costs for the 2014 calendar year. Trans Bay is welcome to present this and other evidence and arguments in the settlement and hearing proceedings, but we will not make a determination on this issue in this order.

24. Trans Bay also requests that the Commission deny Six Cities' motion to consolidate the Complaint with the ongoing proceedings in Docket No. ER13-2412-000 because doing so would amount to relitigation "previously settled rates." We disagree. As noted, the specific issue of the appropriate current TRR has never been litigated. Furthermore, consolidation will prevent the potential for duplicative discovery and allow the parties to more effectively utilize their resources in addressing issues common to both dockets.

25. Finally, for the reasons discussed above, we do not view the Complaint as "clearly frivolous," and we deny Trans Bay's request for legal fees.

26. While we are setting these matters for a 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. The settlement judge or presiding judge, as appropriate, designated in Docket No. ER13-2412-000, shall determine the procedures best suited to accommodate the consolidation ordered herein. The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order 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.

27. In cases where, as here, the Commission institutes an investigation on 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 was filed, but no later than five months after the filing date. Consistent with our general policy of providing

²⁵ As set forth in the Commission's regulations, a complainant establishes a *prima facie* case if the complainant: (1) clearly identifies the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements; and (2) the complainant explains how the action or inaction violates the applicable statutory standards or regulatory requirements. *See* 18 C.F.R. § 385.206(b)(1)-(2) (2013). To that effect, the Commission requires that the complainant provide the Commission with evidentiary materials, including documents that support the facts in the complaint. *See* 18 C.F.R. § 385.206(b)(8) (2013).

maximum protection to customers,²⁶ and consistent with Complainants' requested relief, we will set the refund effective date at December 17, 2013.

28. Section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record, we expect that, if this case does not settle, the presiding judge should be able to render a decision within nine months of the commencement of hearing procedures, or, if the case were to go to hearing immediately, by November 30, 2014. Thus, we estimate that if the case were to go to hearing immediately, we would be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions, or by July 31, 2015.

2. Rehearing Request

29. Six Cities requests that the Commission grant rehearing of the Trans Bay TRR Order to the extent that it determined that the 2011 TRR Settlement or the 2005 Operating Memorandum precludes either the Commission acting *sua sponte* or any party from seeking a reduction in Trans Bay's TRR following the expiration of the initial three-year rate moratorium. As clarified herein, 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 settlement or the 2005 Operating Memorandum, make any determination that other parties could not initiate their own FPA section 206 complaint regarding the current TRR. Therefore, we deny the Rehearing Request.

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, particularly section 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 in Docket No. EL14-15-000 concerning Trans Bay's TRR, as discussed in the body of this order.

²⁶ 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).

(B) Six Cities' motion to consolidate is hereby granted and this proceeding is consolidated with the ongoing hearing and settlement judge proceedings in Docket No. ER13-2412-000.

(C) The refund effective date established in Docket No. EL14-15-000 pursuant to section 206(b) of the Federal Power Act is December 17, 2013.

(D) The settlement judge or presiding judge, as appropriate, designated in Docket No. ER13-2412-000 shall determine the procedures best suited to accommodate the consolidation ordered herein.

(E) Trans Bay's motion to dismiss is hereby denied, as discussed in the body of this order.

(F) Trans Bay's request for attorneys' fees is hereby denied, as discussed in the body of this order.

(G) Six Cities' Rehearing Request is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.