

155 FERC ¶ 61,045
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

San Diego Gas & Electric Company

Docket No. ER15-553-001

ORDER DENYING REHEARING

(Issued April 21, 2016)

1. On October 26, 2015, the California Public Utilities Commission (CPUC) filed a request for rehearing of the Commission's September 23, 2015 order in this proceeding.¹ In this order, we deny the CPUC's request for rehearing, as discussed below.

I. Background

2. On December 1, 2014, San Diego Gas and Electric Company (SDG&E) filed an informational filing pursuant to a Commission-approved Settlement Agreement that sets forth a formula rate template and implementation protocols for SDG&E to recover its base transmission revenue requirement for wholesale and retail end-use customers.² Specifically, the Settlement Agreement sets forth the fourth version of SDG&E's formula rate (TO4) and requires SDG&E to submit, on an annual basis,³ an informational filing establishing its base transmission revenue requirement. In its TO4 Cycle 2 filing,

¹ *San Diego Gas & Elec. Co.*, 152 FERC ¶ 61,233 (2015) (September 23 Order).

² SDG&E, December 1, 2014 Informational Filing at 1; *see also San Diego Gas & Elec. Co.*, 147 FERC ¶ 61,150 (2014) (approving Settlement Agreement).

³ The annual filings are referred to as "Cycles." The September 23 Order accepted SDG&E's second information filing (Cycle 2) that it submitted using the TO4 formula rate.

SDG&E included, as an input to its formula rate, \$23.17 million for wildfire damage expenses that it incurred in 2007.⁴

3. The CPUC protested the filing, arguing, among other things, that the Commission should hold in abeyance SDG&E's request to recover the 2007 wildfire damage expenses until after the United States Court of Appeals for the Ninth Circuit issues a decision on the CPUC's appeal of related Commission Orders.⁵ The CPUC asserted that in its protest to SDG&E's prior informational filing, it asked the Commission hold in abeyance the consideration of the 2007 wildfire costs until after it reviews SDG&E's prospective request for retail recovery.⁶ According to the CPUC, reviewing the 2007 wildfire costs in this order is necessary to allow it to maintain its ability to act as an impartial decision-maker. The CPUC claimed that after the Commission denied its motions, it appealed those decisions to the Ninth Circuit.⁷ Because SDG&E seeks cost recovery of the 2007 wildfire costs in the TO4 Cycle 2 proceeding, the CPUC argued, the Commission should also hold that proceeding in abeyance.

4. The Commission in the September 23 Order accepted SDG&E's TO4 Cycle 2 filing. In addition, the Commission rejected the CPUC's request to hold the TO4 Cycle 2 proceeding in abeyance until after the Ninth Circuit Court of Appeals (Ninth Circuit) acts on the CPUC's challenge to certain Commission orders.⁸

5. In denying the CPUC's request, the Commission found that the CPUC had not demonstrated that it would be at risk of prejudging the prudence of the 2007 wildfire damages if it continued to participate in the proceeding. The Commission based its decision, in part, on a finding that in the SDG&E TO3 Cycle 6 proceeding leading up to the CPUC's appeal, the CPUC specifically asked the Commission to set the recovery of SDG&E's wildfire damage expense for hearing. This position directly contradicted the CPUC's argument, which it made after settlement discussion and during the hearing

⁴ September 23 Order, 152 FERC ¶ 61,233 at PP 17-18.

⁵ CPUC December 22, 2014 Comments at 6-7.

⁶ *Id.*

⁷ *Id.* at 6 (citing *San Diego Gas & Elec. Co.*, 144 FERC ¶ 63,022 (2013)).

⁸ Brief for Petitioner, *Cal. Pub. Util. Commission v FERC*, 624 F.App'x 603 (No. 13-74361) (9th Cir. July 25, 2014), *appeal dismissed*, *Cal. Pub. Util. Commission v. FERC*, 624 F.App'x 603 (9th Cir. 2015).

proceeding, that its continued participation would cause it to prejudge the issues.⁹ In addition, the Commission found that holding the TO4 Cycle 2 filing in abeyance until after the outcome of the Ninth Circuit's decision, and potentially, the CPUC's review of SDG&E's future, voluntary retail-rate filing could delay the proceeding indefinitely and, therefore, frustrate the terms of the Settlement Agreement.¹⁰ Lastly, the Commission found that the CPUC's appeal was premature because well-established case law supports denying a rehearing request of an interlocutory decision,¹¹ such as the Chairman's notice denying the CPUC's request for interlocutory appeal.¹²

II. Request for Rehearing

6. The CPUC seeks rehearing of Commission's decision denying its request to hold the TO4 Cycle 2 filing in abeyance until after the Ninth Circuit issues a decision on its appeal. First, the CPUC argues that the Commission's decision was premised on facts that are now outdated. Specifically, the CPUC contends that, because SDG&E recently filed an application with the CPUC to recover wildfire damages and the Ninth Circuit announced that it will hear oral arguments on a specific date, the time period for the abeyance is more certain.¹³

7. Second, the CPUC argues that the Commission erred because it declined to make its acceptance of SDG&E's Cycle 2 filing subject to refund and the outcome of its appeal.¹⁴ The CPUC argues that because of the similarities between its disputes over the wildfire damages in the TO3 Cycle 6 proceeding and the TO4 Cycle 2 proceeding, delaying the TO4 Cycle 2 proceeding until the outcome of the appeal would improve regulatory efficiency. In addition, the CPUC argues that the Commission ignored the

⁹ September 23 Order, 152 FERC ¶ 61,233 at P 26 (citing CPUC, Motion to Intervene and Protest, Docket No. ER12-2454-000 at 7-8 (filed Sept. 4, 2012)).

¹⁰ *Id.* P 27 (finding that the CPUC does not aver that SDG&E is required by law to file for retail-rate recovery of the 2007 wildfire damages).

¹¹ *Id.* (citing *Duke Power*, 117 FERC ¶ 61,303, at PP 5-7 (2006) and *Cities of Riverside and Colton v. FERC*, 765 F.2d 1434, 1438 (9th Cir. 1985) (finding that an interlocutory decision is not subject to rehearing as it is not the agency's final decision)).

¹² Notice of Determination by the Chairman, Docket No. ER12-2454-000 (filed Oct. 2, 2013).

¹³ CPUC Rehearing Request at 17-18

¹⁴ *Id.* at 18-19.

Ninth Circuit's precedent, namely *Steamboaters v. FERC*,¹⁵ which held that once an agency issues a decision that affects a party's legal position through the remainder of the proceeding and future proceedings, the order is considered final and immediately reviewable.¹⁶

8. Third, the CPUC argues that the Commission's decision was contrary to the "cooperative federalism principles under the Federal Power Act [FPA]," and does not consider the CPUC's expertise and jurisdiction on safety issues concerning electric utility transmission and distribution activities in California.¹⁷ The CPUC argues that the Commission has treated it "as just another party," which contradicts the purpose of the FPA.¹⁸ As support, the CPUC asserts that, in enacting Part II of the FPA, Congress contemplated a system that encouraged cooperation between federal and State commissions, and in *Connecticut Light & Power*,¹⁹ the court held that the new part is "in no sense a usurpation of State regulatory authority....and contain[s] directions...to the Federal Power Commission to receive and consider the views of State commissions."²⁰ Further, the CPUC argues that because the wildfire damages impacted the safety of California residents, the Commission should defer to the CPUC.²¹

9. Finally, the CPUC argues that the Commission erred by rejecting the CPUC's argument that allowing the proceeding to continue would cause the CPUC to prejudge the issues. As support, the CPUC contends that the Commission and the courts have held

¹⁵ 759 F.2d 1382 (9th Cir. 1985).

¹⁶ CPUC Rehearing Request at 19 (citing *Steamboaters v. FERC*, 759 F.2d 1382 (9th Cir. 1985) and *City of Fremont v. FERC*, 336 F.3d 910 (9th Cir. 2003)).

¹⁷ *Id.* at 22-26.

¹⁸ *Id.* at 24.

¹⁹ *Conn. Light & Power*, 324 U.S. 515 (1945).

²⁰ CPUC Rehearing Request at 23 (citing *Conn. Light & Power*, 324 U.S. 515, 525-527 (1945)).

²¹ *Id.* at 24.

that it is improper for a neutral fact finder to prejudge issues that will come before it.²² While the CPUC concedes that it asked the Commission to set the wildfire damage expense issues for hearing in the TO3 Cycle 6 proceeding, it asserts that its protest raised issues that were similar to its position on SDG&E's Wildfire Expense Balancing Account application, which SDG&E filed at the CPUC prior to the TO3 Cycle 6 filing.²³ The CPUC asserts that holding the issue on wildfire cost recovery in abeyance until after the CPUC addresses this issue will ensure that it is not subject to a prejudgment challenge.²⁴ Further, the CPUC claims that the abeyance would allow the Commission "the benefit of the CPUC's finding on the prudence of these [wildfire damage] costs...."²⁵

10. On November 9, 2015, SDG&E filed a motion to answer the CPUC's request for rehearing.

III. Discussion

A. Procedural Matters

11. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2015), prohibits an answer to a request for rehearing. Accordingly, we will reject SDG&E's answer.

B. Substantive Matters

12. We affirm the Commission's findings in the September 23 Order and deny rehearing. First, we find that Ninth Circuit's subsequent decision denying the CPUC's challenge of prior Commission orders renders moot the CPUC's argument that the Commission should have held the proceeding in abeyance pending the disposition of the

²² *Id.* at 20-21 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,241, at P 24 (2009) (*MISO*); *Am. Gen. Ins. Co. v. FTC*, 589 F.2d 462, 464-65 (9th Cir. 1979) (*American General*); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1055 (9th Cir. 2005) (*Lopez-Umanzor*); *Jefferson v. Bd. Of Assessment & Appeals No. 3 of Orange Cnty.*, 695 F.3d 960, 965-66 (9th Cir. 2012) (*Jefferson*); *Cinderella Career Finishing Sch. v. FTC*, 425 F.2d 583, 590-91 (D.C. Cir. 1970) (*Cinderella*)).

²³ CPUC Rehearing Request at 20-21 (stating that it rejected SDG&E's application because SDG&E did not meet its burden to demonstrate that it should be allowed to recover the wildfire costs at issue).

²⁴ *Id.* at 21.

²⁵ *Id.*

appeal.²⁶ Notably, in applying *Steamboaters v. FERC* and other cases to determine that it did not have jurisdiction over the appeal, the Ninth Circuit considered:

(1) “whether the order is final”; (2) “whether, if unreviewed, it would inflict irreparable harm on the party seeking review”; and (3) “whether judicial review at this stage of the process would invade the province reserved to the discretion of the agency.”²⁷

13. Upon considering the relevant factors, the court held that “the orders [subject to the appeal] are not final in the relevant sense,”²⁸ and “review of an interlocutory order denying an abeyance would interfere with FERC's discretion.”²⁹ Further, the court held “that immediate review [of the Commission’s orders] was not necessary to avert irreparable harm, largely because the harm of which CPUC complains was of its own making.”³⁰ The court explained that the CPUC chose not to participate in the relevant proceedings.³¹ Given the foregoing, we find that the Ninth Circuit’s decision moots the CPUC’s arguments regarding holding this proceeding in abeyance and making SDG&E’s filing subject to refund based on the outcome of the appeal, as well as its argument regarding the increased timing certainty resulting from the Ninth Circuit’s scheduling of oral argument on the Petition.

14. As for the argument concerning prejudging cost recovery for the SDG&E’s wildfire damage expenses, we deny rehearing. As an initial matter, we note that on the one hand, the CPUC claims that, in a proceeding held in its forum, it already decided that SDG&E did not meet its burden to demonstrate that it could recover the 2007 wildfire damage expenses at issue when it rejected SDG&E’s Wildfire Expense Balancing

²⁶ *Cal. Pub. Util. Commission v. FERC*, 624 F.App’x 603 (9th Cir. 2015) (memorandum).

²⁷ *Id.* at 603, 604 (citing *Steamboaters v. FERC*, 759 F.2d 1382, 1387–88 (9th Cir.1985); *Fed. Power Commission v. Metro. Edison Co.*, 304 U.S. 375, 383–84, 58 S.Ct. 963, 82 L.Ed. 1408 (1938)).

²⁸ *Id.* at 604.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Account application.³² However, on the other hand, the CPUC claims that submitting evidence to support its position in both the TO3 Cycle 6 and TO4 Cycle 2 proceedings would require it to prejudge the very same issues.³³ Thus, while the CPUC argues that submitting evidence in the Commission proceedings would cause the CPUC to prejudge issues before its own forum, it also concedes that it found in its own proceeding that SDG&E did not meet its burden to recover wildfire costs.

15. In any case, we find that the precedent the CPUC cites to support its position regarding its prejudgment concern is inapposite. The CPUC has not shown how the issues in those cases are relevant to the CPUC's argument in this proceeding. For example, the CPUC cites to *MISO* for the proposition that the Commission has previously recognized that it is inappropriate for a neutral fact-finder to prejudge issues that may come before it. However, in *MISO*, the Commission explained that it "cannot evaluate the merits of the...compliance filing until the public comment period has closed. We decline to prejudge that filing...."³⁴ Thus, that case involved a pending compliance filing in the same proceeding *before a single agency*. The other cases cited by the CPUC also involve issues distinct from the CPUC's prejudgment argument here concerning the timing of two distinct proceedings conducted by two separate agencies.³⁵ The CPUC does not cite to any cases with a similar situation to the issue that it raises here, where one regulatory body is, as the CPUC claims, unable to participate in a proceeding before a different regulatory body, this Commission, because of prejudgment concerns.

16. In any event, as mentioned in the September 23 Order, in the TO3 Cycle 6 proceeding in Docket No. ER12-2454-000, the CPUC specifically asked the Commission to set for hearing issues of the material fact in dispute over the wildfire damages.³⁶

³² See CPUC Rehearing Request at 20.

³³ See *id.* at 20-21.

³⁴ *MISO*, 127 FERC ¶ 61,241 at P 24.

³⁵ See, e.g., *American General*, 589 F.2d 462 (holding that an agency commissioner should have disqualified himself from that agency's proceeding when he had previously participated in the proceeding as counsel); *Lopez-Umanzor*, 405 F.3d 1049 (holding that due process principles prohibit an immigration judge from declining to hear relevant testimony due to prejudgment about a witness's credibility or the probative value of the testimony); *Jefferson*, 695 F.3d 960 (discussing potential for bias concerning an agency's investigative and adjudicative functions); *Cinderella*, 425 F.2d 583 (finding that agency Chairman had prejudged issue before the agency via public remarks on the issue before the agency issued an order).

³⁶ See *supra* P 5.

Although the Commission did in fact set that filing for hearing, not only did the CPUC decline to submit evidence before the presiding Administrative Law Judge (ALJ), but it also declined to submit a brief on exceptions to the ALJ's initial decision,³⁷ which are options available to all parties, including State commissions, participating in the matters that the Commission sets for hearing.

17. Finally, we deny rehearing of the CPUC's argument that the September 23 Order violated cooperative federalism principles under the FPA by failing to hold this proceeding in abeyance. State commissions like the CPUC may intervene and participate in Commission proceedings as a matter of right.³⁸ Beyond this right, however, State commissions are not generally provided a unique role under the FPA or the Commission's regulations when the Commission is considering a public utility's rate filing, such as SDG&E's filing in this proceeding. When rendering a decision on a rate filing, the Commission considers the views of the parties to a proceeding, including State commissions. Here, the Commission did so, and concluded that, based on the record and taking into account the CPUC's protest, it would not hold this proceeding in abeyance and it provided reasons for its disagreement with the CPUC's position that not holding this proceeding in abeyance would force the CPUC to prejudge issues that may come before it.³⁹ By declining to hold this proceeding in abeyance, the Commission did not usurp the CPUC's authority over matters within the CPUC's jurisdiction or otherwise interfere with the CPUC's ability to conduct its own proceeding.

The Commission orders:

The CPUC's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁷ See *San Diego Gas & Elec. Co.*, 146 FERC ¶ 63,017, at P 44 (2014) ("CPUC failed to file any testimony....").

³⁸ See 18 C.F.R. § 385.214(a)(2) (2015).

³⁹ See September 23 Order, 152 FERC ¶ 61,233 at PP 26-27.