

UNITED STATES OF AMERICA 103 FERC ¶ 61,113
FEDERAL ENERGY REGULATORY COMMISSION

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

California Independent System Operator
Corporation

Docket Nos. ER03-218-001
ER03-219-001
EC03-81-000

ORDER GRANTING AND DENYING REHEARING
AND DENYING LATE INTERVENTION

(Issued May 2, 2003)

1. In this order, we grant rehearing and deny rehearing of an order issued on January 24, 2003.¹ In that order, the Commission addressed filings in which the California Independent System Operator Corporation (CAISO) sought to amend its Transmission Control Agreement (TCA) to provide for the addition of the Cities of Anaheim, Azusa, Banning, and Riverside, California (collectively, Southern Cities) as participating transmission owners (PTO) and to revise its Open Access Transmission Tariff (Tariff) in order to implement those amendments to the TCA.

2. This order benefits customers because it will encourage the participation of non-public utilities in the CAISO by removing the financial risk of participating in the CAISO for these entities.

I. Discussion

A. Withdrawal Provision

1. Request for Rehearing

3. The Southern Cities and Colton; the California Electricity Oversight Board; San Diego Gas & Electric Company; and the CAISO (collectively, the Parties) each filed a

¹102 FERC ¶ 61,061 (2003) (January 24 Order).

request for rehearing of the January 24 Order's directive that Section 3.4.1 (Right to Withdraw Due to Adverse Tax Action)² of the proposed revised TCA be changed to reflect that any withdrawal from the CAISO by a PTO will require a Federal Power Act (FPA) Section 203 and 205³ filing by the CAISO to transfer control over the jurisdictional facilities under the control of the CAISO back to the PTO and approval by the Commission before such a transfer becomes effective. According to the Parties, if there is an actual or impending adverse tax action that could result in the loss of the tax-exempt status for bonds that the Southern Cities used to acquire their facilities and/or entitlements, the Southern Cities must be able to withdraw their transmission facilities and entitlements from the CAISO's operational control without approval from the Commission. Without such a withdrawal provision, the Parties maintain that the Southern Cities will not participate in the CAISO as PTOs.

4. In addition, the Parties maintain that the January 24 Order's directive: (1) exceeds the Commission's authority, because the Commission does not have jurisdiction over municipal entities and may not impose an obligation to seek the Commission's approval for the right to withdraw from an arrangement involving a transfer of operational control;⁴ (2) is inconsistent with the Commission's policy of encouraging the participation

²That proposed section states: "[I]n the event an Adverse Tax Action Determination identifies an Impending Adverse Tax Action or an Actual Adverse Tax Action, A Tax Exempt [PTO] may exercise its right to Withdraw for Tax Reasons. The right to Withdraw for Tax Reasons . . . shall not be subject to any approval by the ISO, the FERC or any other Party."

³See 16 U.S.C. §§ 824b, -d (2000).

⁴See, e.g., CAISO's Request for Clarification/Rehearing at 16 (citing *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002)).

of non-jurisdictional entities in RTOs without jeopardizing the tax-exempt status of their financing;⁵ and is contrary to the Commission's precedent.⁶

2. The Commission's Response

5. Upon reconsideration, we agree with the Parties that the Commission should allow the Southern Cities to withdraw their transmission facilities and entitlements from the CAISO's operational control without the Commission's specific approval in the limited circumstance when an impending or actual adverse tax action creates a risk that the tax-exempt status of their financing may be lost. As the Parties state, this withdrawal provision is necessary to ensure that the transfer of operational control of Southern Cities' facilities and entitlements in transmission facilities to the CAISO will not jeopardize the status of their federal tax-exempt bonds.⁷ Furthermore, granting such a

⁵See, e.g., CAISO's Request for Clarification/Rehearing at 10-15 (citing Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 at 31,762 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part, remanded in part on other grounds sub nom. Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002) (Order No. 888) and Regional Transmission Organizations, FERC Stats. & Regs. ¶ 31,089 at 31,200-02 (1999), 65 Fed. Reg. 810 (2000), order on reh'g, Order No. 2000-A, FERC Stats. & Regs. ¶ 30,092, 65 Fed. Reg. 12,088 (2000), aff'd, Public Utility District No. 1 v. FERC, 272 F.3d 607 (D.C. Cir 2001) (Order No. 2000)).

⁶See, e.g., Southern Cities Request for Rehearing at 13 (citing Central Hudson Gas & Elec. Corp., 86 FERC ¶ 61,062, order on reh'g, 88 FERC ¶ 61,138 at 61,403 (1999)).

⁷Although we note that the IRS has recently issued final regulations that will clarify certain issues with respect to the participation by tax-exempt entities in ISOs and RTOs, we note that those regulations do not address and, therefore, do not resolve all the concerns of the Southern Cities regarding possible actions that likely would adversely

(continued...)

withdrawal provision is consistent with the Commission's stated policy of encouraging the participation of non-public utilities in regional organizations without jeopardizing the tax-exempt status of their financing.⁸ Because the public interest is served by having the Southern Cities participate in the CAISO, pursuant to Section 203 of the FPA, we pre-authorize the Southern Cities to withdraw their transmission facilities and entitlements from the CAISO's operational control (*i.e.*, the CAISO is pre-authorized to dispose those jurisdictional facilities back to the Southern Cities) in the limited circumstances discussed above.⁹

6. Accordingly, we will no longer require, as we did in the January 24 Order, that the CAISO revise Section 3.4.1 of the TCA so that it states that any notice of withdrawal by a tax-exempt PTO from the CAISO must be filed with the Commission and may become effective only upon the Commission's approval. As a result, we note that a withdrawal from the CAISO by a tax-exempt PTO will not require a FPA Section 203 and 205 filing to transfer control over the jurisdictional facilities under the control of the CAISO back to the PTO. Furthermore, the CAISO is no longer required to file Procedures to Relinquish Operational Control (*i.e.*, what procedures it will use to effectuate a tax-exempt PTO's withdrawal from the CAISO) with the Commission.

7. Nevertheless, we require the CAISO to make an informational filing with the Commission within 15 days upon receipt of a notice of withdrawal from any of the Southern Cities for tax reasons. In addition, we require the CAISO to make a further informational filing with the Commission within 15 days from the date the CAISO relinquishes operational control over the affected transmission lines, associated facilities, or entitlements to any of the Southern Cities.¹⁰

⁷(...continued)

affect the tax-exempt status of their bonds. See Treasury Decision 9016, Treas. Reg. §§1.141-7 et seq.; 26 C.F.R. §§1.141-7 et seq. (2002).

⁸See generally Order No. 888 and Order No. 2000.

⁹Applications of electric public utilities for authority to dispose facilities, pursuant to Section 203 of the FPA, are docketed with an "EC" as a prefix; accordingly, we have assigned Docket No. EC03-81-000 to this proceeding.

¹⁰The purpose of these informational filings is to notify the Commission of a withdrawal of a tax-exempt PTOs facilities from the CAISO and is not for the purposes of the Commission issuing a dispositive order on such a withdrawal.

B. Dispute Resolution Relating to Encumbrances**1. Request for Rehearing**

8. Pacific Gas and Electric Company (PG&E) filed a late intervention¹¹ that seeks rehearing of the Commission's directive in the January 24 Order that certain parties, including PG&E, pursue resolution of the issues regarding Encumbrances numbers 27 and 43, pursuant to Section 13 of the Tariff (Dispute Resolution Procedures). PG&E states that it did not intervene during the timely intervention period or before the issuance of the January 24 Order, because it believed that "the TCA amendments were expected to be non-controversial and its counsel dealing with TCA matters were greatly occupied with bankruptcy matters."¹²

2. The Commission's Response

9. With regard to PG&E's motion for intervention, we note that when late intervention is sought after the issuance of an order disposing of an application, the prejudice to the other parties and burden upon the Commission of granting late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.¹³ PG&E has not met its burden of justifying late intervention.

C. Generation Tie Lines

¹¹Comments, protests, and motions to intervene in Docket Nos. ER03-218-000 and ER03-219-000 were due on or before December 16, 2002 and, as discussed, that order was issued on January 24, 2003. PG&E did not file its motion to intervene in that proceeding until February 25, 2003.

¹²PG&E's Request for Rehearing at 3-4.

¹³See, e.g., Midwest Indep. Transmission Sys. Operator, Inc., 102 FERC ¶ 61,250 at P 7 (2003).

1. Request for Rehearing

10. The State Water Project of the California Department of Water Resources (DWR) argues that the January 24 Order, in authorizing the CAISO to remove the Transmission Register from public view, failed to address DWR's argument that such an approval should be conditioned on the CAISO's compliance with Section 203 of the FPA for all transfers of facilities to the CAISO's operational control. Furthermore, DWR states that many of the new entitlements proposed to be turned over to the CAISO's operational control by the Southern Cities are generation tie lines (Gen Ties) and, therefore, should not be transferred to the CAISO. According to DWR, compliance with Section 203 of the FPA could prevent inappropriate facilities, such as Gen Ties, from being transferred to the CAISO.

11. DWR contends the Commission relied on its approval of the disposition of the Southern Cities' facilities to the CAISO in another proceeding¹⁴ to support its conclusion that this matter had been determined and would not be revisited in the January 24 Order. However, according to DWR, the Disposition Order was "fatally flawed" because the Disposition Order "does not so much as acknowledge the concern about generation tie."¹⁵

12. In addition, DWR states that even if the Disposition Order had addressed the issue of the disposition of the Southern Cities' facilities to the CAISO, it did not address DWR's concerns regarding the possibility that further facilities, which should not be transferred to the CAISO (in particular, Gen Ties), could be transferred in the future from PTOs to the CAISO without complying with Section 203 of the FPA. Therefore, DWR argues that the January 24 Order should have, at a minimum, considered this issue. For the above reasons, DWR seeks rehearing of the Commission's January 24 Order.

2. The Commission's Response

13. In the January 24 Order, the Commission stated that it had approved the transfer of Southern Cities' facilities and entitlements to the CAISO in the Disposition Order and

¹⁴See California Independent System Operator Corp., 101 FERC ¶ 62,191 (2002), order on reh'g, 102 FERC ¶ 61,058 (2003) (collectively, Disposition Order).

¹⁵DWR's Request for Rehearing at 5.

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would not revisit that decision.¹⁶ We reiterate, to the extent that DWR seeks rehearing of our authorization of the transfer of the Southern Cities' facilities and entitlements to the CAISO (i.e., the Disposition Order), it is making an impermissible collateral attack on that proceeding. Accordingly, insofar as DWR's argument constitutes a collateral attack on a prior Commission order, we deny its request for rehearing.

14. With regard to DWR's argument that the future transfer of PTOs' facilities must comply with Section 203 of the FPA, we agree with DWR that any transfer of facilities to the CAISO from a PTO must be first approved by the Commission in a Section 203 proceeding.¹⁷

The Commission orders:

(A) PG&E's motion for late intervention is hereby denied, as discussed in the body of this order.

(B) PG&E's and DWR's requests for rehearing are hereby denied, as discussed in the body of this order.

(C) The Parties' request for rehearing is granted, as discussed in the body of this order.

(D) The CAISO is required to make informational filings with the Commission when one of the Southern Cities seeks to withdraw its facilities and entitlements from the CAISO's operational control, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,

¹⁶January 24 Order, 102 FERC ¶ 61,061 at 15.

¹⁷Moreover, the Disposition Order affirms that it is the Commission's policy to require a Section 203 filing for the transfer of operational control of transmission facilities to the CAISO.

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Secretary.