UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company, Complainant	Docket No. EL00-95-000, et al.
v.	
Sellers of Energy and Ancillary Services Into the Markets Operated By The California Independent System Operator And The California Power Exchange, Respondents	
Investigation of the Practices of the California Independent System Operator and the California Power Exchange	Docket No. EL00-98-000, et al.

ANSWER OF THE CALIFORNIA ISO
TO THE "MOTION OF PACIFIC GAS AND ELECTRIC COMPANY
FOR CLARIFICATION OF REFUND RERUN ISSUE"

This is the Answer of the California Independent System Operator to the "Motion" – *i.e.*, the "Motion of Pacific Gas and Electric Company for Clarification of Refund Rerun Issue," filed May 8, 2008.

The Motion concerns a series of "Transactions" – excess energy sales by "SVP" – *i.e.*, the City of Santa Clara, California, d/b/a Silicon Valley Power – on 13 days in December 2000 and two days in January 2001.[1] The CAISO settled the Transactions by crediting them to PG&E, the Scheduling Coordinator for SVP. After more than seven years and a great deal of activity in this docket, the Motion now disputes the CAISO's

[1] Motion at 4.

treatment of these transactions in its initial settlement statements. The Motion argues that a recent ruling from PG&E's bankruptcy court shows that the Transactions should not have been billed to PG&E, and asks the Commission to direct the CAISO to revise its settlement statements. The Motion also asks that, if necessary to grant the requested relief, the Commission reconsider any inconsistent orders in these dockets, such as the orders that denied disputes that SVP and NCPA brought concerning the same Transactions.[2]

The Motion should be denied. There is no new information, let alone old information that would justify revisiting these long resolved matters. PG&E's position on Transactions and other excess energy sales by the northern munis has been unchanged for seven years: PG&E has always asserted it was not a party to the sales, *only the Scheduling Coordinator for them*. But this admission conclusively resolves the Motion against PG&E, because the CAISO Tariff and other Commission orders require the CAISO to credit excess energy sales to the Scheduling Coordinator. The bankruptcy court order actually affirmed PG&E's status as Scheduling Coordinator for the Transactions. More important, the Commission rejected disputes that are identical to the Motion two years ago. Nothing has changed since then; PG&E has simply decided to try the argument again for itself.

Specifically:

(1) The Motion is procedurally improper.

- It is too late. Both the CAISO tariff and the Commission's orders bar PG&E from raising its dispute at this late stage; and

[2] Motion at 14 n. 17.

- It is an improper attack on the Commission's orders rejecting the same argument as brought by SVP and NCPA;

(2) The Motion is wrong on the merits.

- The CAISO's settlement statements are correct because PG&E was the Scheduling Coordinator for the Transactions. Although it hints to the contrary, the Motion does not actually dispute this fact; and
- The bankruptcy court order establishes only one fact that is relevant here: it binds PG&E to the representations it made to the bankruptcy court, which include representations that it was the Scheduling Coordinator for the Transactions;

(3) Granting the Motion would open several new issues that would complicate and delay the ultimate financial clearing, and require the CAISO to perform several months of additional work.

The CAISO does agree with PG&E that the Commission should decide the Motion now, before the CAISO moves forward to the next stage of the refund proceedings in which it will account for the global settlements and invoice the cash clearing. The reason is that a ruling in favor of PG&E would require the CAISO to revise the calculations that will form the basis for this next phase.

I. Background

A. Muni Excess Energy Sales – E-516

The Transactions were sales of "muni excess energy" under CAISO Operating Procedure E-516, which was earlier known as M-427. The parties presented a great deal

of testimony about procedure E-516 in this proceeding. For present purposes, the essential points are two.

- the procedure applied to northern munis that had interconnection agreements with PG&E but did not have Participating Generator Agreements with the CAISO.[3]

- "Under E-516, the ISO settled with S[cheduling] C[oordinator]s."[4]

B. Settlement and Dispute Process

In early 2001, the Transactions appeared on PG&E's settlement statements. PG&E disputed the quantities for some of the Transactions, arguing that SVP had delivered greater amounts than the CAISO had credited. However, PG&E did not disclaim any of the Transactions, or otherwise dispute that it was the Scheduling Coordinator. PG&E pursued its quantity dispute through Good Faith Negotiations under Section 13 of the CAISO tariff. The CAISO agreed to credit additional amounts to PG&E on certain Transactions, and with that agreement the dispute was closed in June 2001. SVP did not participate in these negotiations and says that it did not even learn they occurred until years later.[5]

C. PG&E's Position About Excess Energy Sales

Since its negotiations with the CAISO, and throughout this refund proceeding, PG&E has taken the same position that it later advanced in the bankruptcy court – *i.e.*, that it was the Scheduling Coordinator for Transactions, but not a party to them. A

[3] December 12, 2002 Certification of Proposed Findings on California Refund Liability, ¶ 326 & n. 28.
[4] *Id*. at 328.
[5] City of Santa Clara, dba Silicon Valley Power's Reply to Pacific Gas & Electric Company's Opposition to Motion for Leave to Amend "Known Claim A" in Proof of Claim Number 12602, In re Pacific Gas & Electric Co., Case No. 01-30923 (N.D. Cal. Bankr.), filed January 18, 2008 ("SVP Reply"), (Attached as Exhibit A).

PG&E witness testified in the bankruptcy dispute that, at the time of the negotiations, which concluded in June 2001, PG&E believed that "these transactions were really between the seller and the ISO."[6]

A few months later, in August 2001, PG&E responded to data requests from Commission staff by stating that municipal utilities supplied "excess energy . . . to the ISO" with PG&E "act[ing] as billing agent."[7] In response to a September follow-up request, PG&E explained that "the municipal entities" included SVP, and that they did not "have Participating Generator Agreements (PGAs) for their generating resources *scheduled through PG&E's Scheduling Coordinators* (SCs)" (Emphasis added).[8]

D. The Commission Rejected This Dispute as Brought by SVP and NCPA

To expedite resolution of the proceeding consistent with due process, the Commission set a deadline of December 1, 2005 "for parties to file with the Commission any disputes with reruns and offsets."[9] SVP submitted a dispute that explained the then-ongoing bankruptcy court proceedings between PG&E and SVP "respecting who sold the energy to the CAISO,"[10] and argued that "the rerun process cannot be finalized unless the correct seller is determined."[11] It argued that "[i]f these Transactions are not considered to be sales from SVP to PG&E, but rather directly to the CAISO," they "should be excluded from the refund calculations because SVP is a non-jurisdictional entity

[6] Exhibit A hereto (Appendix B at 58).
[7] Exhibit S-19 in this docket.
[8] Exhibit S-20 in this docket.
[9] 112 FERC 61,176, ¶ 116 (2005).
[10] Notice of Dispute of the City of Santa Clara, California, filed December 1, 2005 ("SVP Dispute"), at 3 ¶ 6.
[11] Id. ¶ 8.

protected under the recent court decision."[12] In addition, SVP raised its price and quantity disputes concerning these sales exceeding $3 million, contending that "[t]he inputs to the CAISO's refund rerun are incorrect."[13]

NCPA brought a parallel dispute, stating that "NCPA and PG&E agree that the sales were made between NCPA and the ISO."[14] "Given the decision in *BPA*" *v. FERC*, it argued that its sales would have to be exempt from mitigation.[15]

In response to SVP, PG&E made three points.

- SVP's price and quantity dispute should be addressed by the CAISO instead of PG&E. It represented that "PG&E did not take title to the power delivered by SVP, *but instead acted as a Scheduling Coordinator for SVP* for the power that was sold by SVP into the ISO market."[16] [Emphasis added.]

- the Commission "need not . . . resolve [the dispute] in this proceeding" because "these issues await resolution in the Bankruptcy Court."[17]

- Like other "sales into the ISO markets that go through a jurisdictional Scheduling Coordinator," the Transactions should be "subject to refund."[18]

The CAISO answered that any forthcoming ruling from the bankruptcy court would not bind the CAISO markets, only the actual parties (SVP and PG&E), and that the decision on this dispute between these parties would not affect the CAISO's rerun.[19]

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[12] 116 FERC 61,167, ¶ 35 (2006); see also SVP Dispute at 3-4 ¶ 6.
[13] SVP Dispute at 4-5, ¶¶ 9-10.
[14] Notification of the Northern California Power Agency Regarding Potential Outstanding Disputes, filed December 1, 2005, at 3.
[15] Id.
[16] California Parties' Response to December 1, 2005 Filings of Powerex Corp., City of Santa Clara, California, Portland General Electric Company, APX Participants, and the Northern California Power Agency Relating to Outstanding Refund Re-Run Disputes, filed December 16, 2005 at 8; see also 116 FERC 61,167, ¶ 38 (2006).
[17] Id.
[18] Id. at 8 n.21.
[19] Answer of the California Independent System Operator Corporation to Disputes Filed by Various Parties, filed December 16, 2005 in Docket No. EL00-95, at pp. 9-10.

The CAISO also expressed concern that the dispute was, even at that point, too late by several years.[20] Neither PG&E nor SVP responded to this point.

On August 23, 2006, FERC rejected the disputes of both SVP and NCPA, agreeing that the only relevant issue was the identity of the Scheduling Coordinator:

> Since the CAISO interacted only with Scheduling Coordinators, the Transactions from both SVP and NCPA are identified by the CAISO as being completed by PG&E. The Commission has generally held that refund liability in this proceeding attaches to the Scheduling Coordinator of the transaction. Thus, the Transactions at issue here are subject to mitigation. The specific issues pertaining to the Transactions between SVP and PG&E, and NCPA and PG&E, respectively, are beyond the scope of this proceeding. Therefore, the disputes made by NCPA and SVP as to refund liability for sales made by PG&E to the CAISO are rejected.[21]

Although PG&E sought rehearing of other points in the August 23 order, neither PG&E nor SVP challenged the rejection of SVP's dispute. Both parties proceeded through the next two years, including their bankruptcy trial, aware of the CAISO's positions that 1) the dispute was already too late and 2) the resolution would not bind the CAISO markets or affect the rerun.

E. The Bankruptcy Court's Ruling

On November 26, 2007, the bankruptcy court denied SVP's claim against PG&E based on the quantity dispute. The court's written order, which is included with the Motion, states only the court's decision and not its reasoning. The court's reasoning is explained, however, in *oral* findings of fact and conclusions of law, which the CAISO has attached to this Answer as Exhibit B.

[20] Id. at 10.
[21] 116 FERC 61,167, ¶ 45 (2006), (emphasis added, footnotes omitted).

Most important, the court accepted PG&E's central argument, which was that it did not purchase the power but, instead, was SVP's Scheduling Coordinator for the Transactions.

> I so find that the sales were between SVP and the ISO and P.G. & E., through [sic, *though] the scheduling coordinator or middleman*, does not make the purchaser.[22]

The court also found that CAISO operating procedure E-516, which governed the transactions, contemplated that "payment would be through an entity such as P.G. & E. as scheduling coordinators."[23]

Otherwise, the findings focus on SVP's uncertainty at the time of Transactions, its lack of clear communications with PG&E, and ultimately its failure to meet its burden of proving that the parties understood at the time of the Transactions that they fell within the Interconnection Agreement between SVP and PG&E. Over four pages of text, the court explains why there was no "meeting of the minds"[24] at the time of the Transactions. The court concluded that "[t]his is all about contract formation, and from the evidence I'm not able to . . . . find the facts necessary to reach the conclusion that SVP would have me reach."[25]

The court also cited to entries in the operator logs of SVP and the CAISO to the effect that "ISO agreed to purchase" "ISO met its price" "ISO authorizing the payment."[26] But these references did not amount to proof that SVP transacted with the CAISO, only the lack of contemporaneous agreement with PG&E:

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[22] Bankruptcy Court Transcript from hearing on November 26, 2007, (Attached as Exhibit B), at 12; see also id. at 10 (citing "SVP's acknowledgment that P.G. & E. is the middleman.")
[23] Id. at 6.
[24] Id. at 6-10.
[25] Id. at 12.
[26] Id. at 10.

> There are somewhat inconclusive or non-specific entries on other days . . . . I just looked at an overall pattern of the way the parties generally were conducting themselves, and in my mind, they weren't conducting themselves in accordance with a sale under 4.1 of the Interconnection Agreement. So all of that leads me to conclude that there was no contemplation by anyone before the fact at least that the sales were made in accordance with Paragraph 4.1.[27]

The court did not find that PG&E had proven a contract was formed with CAISO, only that this was not impossible:

> The fact that the Interconnection Agreement regulated certain sales . . . . and the fact that there was no writing between Cal ISO and SVP to set the stage for the sales, neither of those two sets of facts means that there couldn't be a contract formed orally or formed by conduct between SVP and ISO.[28]

F. The Commission Denied Rehearing of NCPA's Dispute

Just two months ago, the Commission denied NCPA's request for rehearing on its related dispute. NCPA had "challenge[d] the Commission's finding in the August 2006 Order that all transactions with the CAISO on behalf of NCPA were conducted by PG&E, as a Scheduling Coordinator." As evidence, NCPA cited PG&E's documented agreement that NCPA had sold directly to the CAISO. The Commission found this evidence insufficient, again ruling that the principals in the CAISO markets were the Scheduling Coordinators:

> Apart from allegations and statements made by PG&E in its private correspondence with NCPA, NCPA failed to present factual evidence demonstrating that the sales in question were in fact transactions between the CAISO and NCPA. NCPA acknowledged that it did not have an agreement with the CAISO covering the sales in question, nor did it receive the payment for these Transactions directly from the CAISO. Moreover, the CAISO's records indicate that these Transactions were settled with PG&E as the Scheduling Coordinator. For these reasons, we reiterate here that because the refund liability in this proceeding attaches

[27] Id. at 10-11.
[28] Id. at 11.

> to the Scheduling Coordinator, the dispute made by NCPA as to refund liability for sales made by PG&E to the CAISO is beyond the scope of this proceeding and therefore rejected.
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> . . . In addition, we also find that NCPA's contention that the refund liability should not attach to PG&E because it took no title to the energy sold is a collateral attack on the Commission's prior orders in this proceeding. The Commission has generally held that refund liability in this proceeding attaches to the Scheduling Coordinator of the transaction.[29]

Weeks later, on May 8, PG&E filed this Motion.

II. The Motion is Procedurally Defective

The Motion is procedurally defective. PG&E has had at least three discrete opportunities to raise the issue of the proper characterization of the Transactions: (1) through the CAISO tariff's process for disputing settlement statements; (2) in the refund hearing process that was conducted by Presiding Judge Birchman during 2001-2002; (3) in response to the Commission's August 8, 2005 order directing parties to raise any outstanding disputes regarding the CAISO's refund calculations by December 1, 2005. PG&E did not avail itself of any of these opportunities. As noted above, however, SVP raised this issue in response to the Commission's August 8, 2005 order, and the Commission ruled in response. Therefore, not only is PG&E's motion too late, it also constitutes a collateral attack on the Commission's previous ruling on this issue.

A. The Motion is Too Late

PG&E has waived any claim that it was not the Scheduling Coordinator by failing to raise this argument in response to its Preliminary Settlement Statements. But rather

[29] See 122 FERC 61,274, ¶¶ 46-50 (2008).

than disclaiming the Transactions, it claimed that it had not been paid enough. The CAISO tariff provides under the heading "validation":

> Each Scheduling Coordinator shall have the opportunity to review the terms of the Preliminary Settlement Statements that it receives. The Scheduling Coordinator shall be deemed to have validated each Preliminary Settlement Statement unless it has raised a dispute or reported an exception within eight (8) Business Days from the date of issuance. Once validated a Preliminary Settlement Statement shall be binding on the Scheduling Coordinator to which it relates, unless the ISO performs a Settlement re-run pursuant to Section 11.6.3 of the ISO Tariff.[30]

Although settlement statements can be changed through re-runs, this does not throw open the gates for new disputes that could have been raised initially but were not. Consequently, the settlement dispute raised in the Motion is barred by the CAISO tariff.

The Motion is also too late under the procedures the Commission established for this docket. Parties had ample opportunity to raise issues regarding the CAISO's refund calculations, and seek relevant discovery, during the year-long hearing process conducted by Presiding Judge Birchman. In addition, the Commission afforded parties yet another opportunity to raise concerns with the CAISO's data in its August 8, 2005 order. Two and a half years have passed since disputes were due on December 1, 2005. During that time, the Commission has resolved all of the disputes that were raised.

The Motion offers no reason to re-open this window. It barely addresses the question of timeliness, claiming that the Commission should hear this new re-run dispute because "the CAISO is still finalizing re-run data."[31] This is incorrect. The re-run data has been final for three years. And all of the disputes about the re-runs that were timely brought on December 1, 2005 have been resolved. The only issues that remain open, as

[30] CAISO Tariff § 11.7.2; *accord* § 11.7.3 (final settlement statements are binding unless disputed within ten business days, and otherwise identical to § 11.7.2).
[31] Motion at 16.

described in the CAISO's recent status reports, are legal issues over a) offset calculations that were performed after December 1, 2005, and b) implementation of the Commission's October 19, 2007 order concerning *BPA v. FERC*. Re-opening disputes about the baseline rerun data would set back this proceeding substantially and require the CAISO to change, among other things, its allocation of cost offsets (which is based on each party's net refunds, and the associated interest).

Accordingly, the Motion is barred by the Commission's order of August 8, 2005, and the CAISO tariff.

B. The Commission Has Already Decided This Issue, and the Motion is a Collateral Attack or an Untimely Request for Rehearing

The Commission has twice rejected the argument raised in the Motion, as detailed in Sections I.(D) and I.(F), above. Anticipating this problem, PG&E asserts that the Motion "is not a collateral attack on a Commission order or an untimely request for rehearing"[32] because it involves a "different request for relief based on new evidence."[33] This is not correct for a couple of reasons.

As a threshold matter, the Motion misreads the law about collateral attack. The order in *Ameren Services Company* did not open quite as wide a hole for late challenges as the Motion asserts. The ruling was a straightforward application of the rule that, after circumstances change, rates that were approved earlier can become unreasonable. The order says:

> . . . the mere fact that a tariff provision implementing a particular rate was at one time found to be just and reasonable does not preclude the

[32] Motion at 14.
[33] Motion at 14 n. 17; see also id. at 13.

> Commission from later reviewing the tariff provision to determine whether it continues to be just and reasonable.[34]

In contrast to *Ameren Services Company*, the Motion relies on evidence that existed (and was even produced in discovery) at the time of the earlier decision, but for some reason was not presented to the Commission.

Even if the Commission's earlier rulings could be vacated through a "different request for relief based on new evidence," neither factor is present here. The Motion does not request relief different than SVP; it simply makes additional arguments for the same relief. SVP challenged "whether the Transactions should be mitigated."[35] PG&E wants the same relief, as explained in its February letter to the CAISO: "PG&E is concerned that the CAISO might attempt to impose a 'refund' obligation on PG&E relating to the amounts paid SVP for excess energy."[36] And mitigation is central to the Motion itself. Given that the Transactions have no financial impact on PG&E due to its 100% pass-through,[37] PG&E has standing only because its gross refund obligation would be reduced by re-assigning the Transactions to a municipal supplier (SVP). While the Motion technically seeks revisions of invoices so that SVP is credited, rather than a specific exemption from mitigation as SVP and NCPA requested, the effect is the same.

Likewise, there is no new evidence. The Motion does not claim to have "new evidence," only "information recently produced,"[38] which it describes as "logs." If that refers to the CAISO's SLIC logs, those were available through discovery in this

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[34] 121 FERC 61,205, ¶ 33 (2007); s*ee also Black Oak Energy, et al. v. PJM Interconnection*, 122 FERC 61,208, ¶ 27 (2008), ("a rate previously found just and reasonable may be found unjust and unreasonable in a later proceeding"); *Oxy USA v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995) ("The fact that a rate was once found reasonable does not preclude a finding of unreasonableness in a subsequent proceeding.")
[35] Motion at 13.
[36] Motion Attachment C at 3; see generally id. at 2-3.
[37] Motion at 4-5.
[38] Motion at 2.

proceeding. The challenged order, moreover, does not resolve an evidentiary dispute,[39] it merely states an uncontested fact. The full passage reads:

> Since the CAISO interacted only with Scheduling Coordinators, the Transactions from both SVP and NCPA are identified by the CAISO as being completed by PG&E.

The Commission's statement that PG&E was the Scheduling Coordinator is based on, among other things, PG&E's own representation.[40]

For all of these reasons, the Commission's previous orders rejecting the claim of the Motion should not be disturbed.

III. On the Merits, the Motion Does Not Support the Relief Requested

A. Even if the Dispute Had Been Brought on Time, It Would Have Been Denied Because PG&E was the Scheduling Coordinator for the Transactions

The CAISO deals only with Scheduling Coordinators. PG&E represented this to the bankruptcy court, the Commission has held this,[41] and the CAISO tariff is specific on the point: "The ISO shall not schedule Energy or Ancillary Services . . . other than through a Scheduling Coordinator."[42] In the settlement process, it is the associated Scheduling Coordinator – as opposed to the Participating Generator or other Market Participant that supplied the energy – that must be credited for all sales, including the imbalance energy Transactions at issue here:

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[39] The Motion asserts "[t]he Commission based its determination on the CAISO's identification of the SVP excess energy sales 'as being completed by PG&E'" and suggests that new evidence is available to counter this "finding." Motion at 13.

[40] California Parties' Response to December 1, 2005 Filings of Powerex Corp., City of Santa Clara, California, Portland General Electric Company, APX Participants, and the Northern California Power Agency Relating to Outstanding Refund Re-Run Disputes, filed December 16, 2005 at 8; see also 116 FERC 61,167, ¶ 38 (2006).

[41] 122 FERC 61,274, ¶¶ 49-50 (2008).

[42] Conformed CAISO Tariff as of October 13, 2000 Section 5 (introduction).

> . . . charges or payments for Uninstructed Imbalance Energy shall be settled by debiting or crediting, as the case may be, the Scheduling Coordinator with an amount for each BEEP Interval of each Settlement Period equal to the product of the net deviation . . . .[43]

Payments then flow to and from Scheduling Coordinators.[44] Indeed, the fact that the ISO deals with Scheduling Coordinators and not the SC's customers has been a fundamental assumption of this proceeding.

Accordingly, to determine whether the Transactions were properly settled in PG&E's settlement statements, the only question is whether PG&E was the Scheduling Coordinator for the Transactions. This is beyond dispute.

PG&E has told the Commission that it was the Scheduling Coordinator for the Transactions. In its answer to the dispute that SVP filed on December 1, 2005, PG&E stated that it

> did not take title to the power delivered by SVP, but instead acted as a Scheduling Coordinator for SVP for the power that was sold to SVP into the ISO market.[45]

PG&E told the bankruptcy court the same thing, as detailed in Section III.(B) below.

The Motion does not dispute that PG&E was the Scheduling Coordinator for the Transactions. The passages that might be read that way are phrased delicately:

> the CAISO has identified certain excess energy sales . . . as being Transactions completed by PG&E as a Scheduling Coordinator ("SC"). However, information produced by the CAISO and a decision by the [bankruptcy court] . . . have made clear that these Transactions were not completed by PG&E, but instead were directly between the CAISO and SVP.

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[43] Conformed CAISO Tariff as of October 13, 2000 § 11.2.4.1; *see generally* CAISO Tariff § 11.1.2 ("The ISO shall be responsible for calculating Settlement balances for all Transactions carried out by Scheduling Coordinators on the ISO Controlled Grid in each Settlement Period").

[44] See Conformed CAISO Tariff as of October 13, 2000 § 11.13 and definition of "ISO Creditor" (Appendix A).

[45] California Parties' Response to December 1, 2005 Filings of Powerex Corp., City of Santa Clara, California, Portland General Electric Company, APX Participants, and the Northern California Power Agency Relating to Outstanding Refund Re-Run Disputes, filed December 16, 2005 at 8.

In other words, although the CAISO identifies PG&E "as a Scheduling Coordinator," the bankruptcy court ruling demonstrates only that the "Transactions were not completed by PG&E." The difference is unclear, and the reader is invited to conclude that the CAISO is wrong about the former point. But the Motion does not claim that. The closest the Motion comes to disputing Scheduling Coordinator status for the Transactions are the following passages, which also leave the ultimate issue to implication:

> Because PG&E . . . acted as [SVP's] SC for certain Transactions, the CAISO asked PG&E to contact SVP.[46] [Emphasis added.]

And

> [T]he SVP excess sales were unique and were not a part of the SC arrangement. . . . These were not typical SC Transactions, nor was it the function of an SC to act in this kind of intermediary role. The CAISO cannot simply point to PG&E's general role as an SC for SVP, and make the blanket assertion that all of its Transactions with SVP were actually with PG&E.[47]

Again, while the Motion lists details that invite a certain conclusion, it does not affirmatively deny that PG&E was the Scheduling Coordinator for the Transactions. The Commission should not decide an argument that the Motion is not willing to make.

In short, PG&E was the Scheduling Coordinator for the Transactions at issue, and thus they were properly settled with PG&E and should remain on its settlement statements and invoices.

[46] Motion at 3.
[47] Motion at 11-12.

B. If the Bankruptcy Court's Order on SVP's Claim is Entitled to Any Weight, It Establishes Conclusively That PG&E Was the Scheduling Coordinator for the Transactions

The Motion concedes that the bankruptcy court ruling is not binding here,[48] but argues that FERC should implement it nevertheless.[49] It further suggests that the Commission should grant this relief without hearing further evidence, which might include the record before the bankruptcy court, because that would be more "administratively efficient."[50]

But the ruling of the bankruptcy court does not support the Motion. On the issue that is critical here, the court accepted PG&E's representation that it was the Scheduling Coordinator for the Transactions, as detailed in Section I.(E), above. Consequently, the ruling cannot be read to show that the CAISO's settlement statements are wrong.

In its trial brief, which is attached to the Motion, PG&E argued that it was SVP's Scheduling Coordinator for the Transactions. As background, it explained that

> One of the features of the new ISO market was that PG&E became a "Scheduling Coordinator" ("SC") for SVP and several other Munis. SCs are the primary interface between participants in the California energy markets and the ISO. All Transactions on the ISO-controlled grid have to be scheduled with the ISO by an SC.[51]

The trial brief then describes PG&E's actions as Scheduling Coordinator:

> As an SC, PG&E received an invoice from the ISO for Muni Transactions, which could include charges or credits. When PG&E received credits for excess energy provided by Munis, it passed on these credits to the Munis in the amount it received. PG&E did not retain any payments itself and did not profit from any of these Transactions.[52]

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[48] "PG&E is not asserting that the Commission is bound by the Bankruptcy Court determination." Motion at 14.
[49] Motion at 14.
[50] Motion at 15.
[51] Motion Exhibit A at 3.
[52] Motion Exhibit A at 5.

These details became the basis for PG&E's objection to the SVP claim:

> SVP argued . . . that the fact that SVP sent "emergency invoices" to PG&E and not the ISO establishes that PG&E bought the energy at issue. The argument fails. As SVP's SC, PG&E facilitated Transactions between SVP and the ISO, which included passing invoices and energy payments between the ISO and SVP. The evidence will show that SVP fully understood that this was the process in the new ISO market, and that the ISO payments would be passed through PG&E to SVP for the energy sales.[53]

And this was the ultimate point of the trial brief, which stated as its "conclusion" that

> [t]he best evidence in this case . . . establishes that PG&E facilitated sales of excess energy by SVP to the ISO as an agent or "middleman." SVP understood that at the time of the sales.[54]

The bankruptcy court accepted PG&E's representations that it was the Scheduling Coordinator, as descried in Section I.(E), above. The principle of judicial estoppel precludes parties from abandoning positions that prevailed in earlier litigation. "[I]f you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events."[55] So if the bankruptcy court ruling has any independent value for the issues before the Commission on this Motion, then PG&E is bound to the representations it made to obtain that ruling, including that it was the Scheduling Coordinator for the Transactions.

C. Granting the Motion Would Delay the Proceeding Substantially

Granting the Motion would set back the proceeding by several months, and open a brand new set of issues for the Commission and other decision makers.

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[53] Motion Exhibit A at 14.
[54] Motion Exhibit A at 15.
[55] *Eagle Foundation, Inc. v. Dole*, 813 F.2d 798, 810 (7th Cir. 1987). See also, e.g., *Davis v. Wakelee*, 156 U.S. 680, 689 (1895); *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

At its core, the Motion asks the Commission to reopen evidentiary hearings on the question of when refund liability should rest with Scheduling Coordinators as opposed to the generators who were their customers. The Commission's decision that refund liability attaches to Scheduling Coordinators and APX participants has been foundational in this proceeding.[56] It permeates the important decisions on which the refund calculations are based – which Transactions to mitigate (e.g., "sleeving" deals), the need for supplier offsets, especially for overall entity revenue shortfall, the level and allocation of other supplier offsets (particularly fuel cost allowance), and how to implement the Ninth Circuit's decision in *BPA v. FERC*. In other words, though the facts may be unique, the issue is not discrete.

On a more concrete level, there is SVP's quantity dispute of approximately $3.5 million. The bankruptcy court avoided this issue by ruling that SVP had not proven the sales fell within the Interconnection Agreement. But if the sales were removed from PG&E's invoices and somehow assigned to SVP, SVP could be expected to pursue the quantity dispute that the CAISO previously resolved only with PG&E. PG&E claims that it is not raising the quantity dispute, but only "in this motion."[57] Unless SVP is willing to drop its quantity dispute, the CAISO faces the prospect of full system reruns for the intervals of the adjusted Transactions, and then re-creating its offset and interest calculations. Our present estimate is that this would require five months.

And it is not clear that relief could be limited to SVP. Other municipal utilities supplied excess energy through PG&E, including NCPA, and will certainly claim to be similarly situated. They would also claim that an order affirmatively recognizing (for

[56] See, e.g., May 2004 Order, 107 FERC 61,166 at ¶ 18 (2004).
[57] Motion at 11 n.13.

the first time) some kind of agreement directly with the CAISO triggers a discovery rule exception to California's statute of limitations for breach of contract claims.

These and other potential new issues provide additional reasons for the Commission to deny the Motion, and do so now so that CAISO data will be settled for the final phase of this proceeding.

IV. CONCLUSION

For all of these reasons, the CAISO requests that the Commission deny the Motion.

Respectfully submitted,

May 23, 2008

/s/ Daniel J. Shonkwiler
Daniel J. Shonkwiler
California ISO
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Folsom, California 95630
(916) 351-4400

Exhibit A

Silicon Valley Power (SVP) Reply to Pacific Gas & Electric's (PG&E) Opposition to SVP's Motion for Leave to Amend "Known Claim A"

Declaration of Ken Kohtz in Support of SVP's Motion for Leave to Amend "Known Claim A"

Appendix B to SVP's Reply to PG&E's Opposition to SVP's Motion for Leave to Amend "Known Claim A"

May 5, 2008

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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

(San Francisco Division)

In re PACIFIC GAS and ELECTRIC COMPANY, a California corporation Debtor. Tax I.D. No. 94-0742640	Case No. 01-30923 SFM 11 Chapter 11 **City Of Santa Clara, dba Silicon Valley Power's Reply to Pacific Gas and Electric Company's Opposition to Motion For Leave to Amend "Known Claim A" in Proof of Claim Number 12602**

The City of Santa Clara, dba "Silicon Valley Power" ("SVP") submits the following reply to Pacific Gas and Electric Company's Opposition to SVP's Motion For Leave to Amend "Known Claim A" in Proof of Claim Number 12602.

I. INTRODUCTION

In opposition to SVP's motion for leave to amend its Known Claim A, Pacific Gas and Electric Company ("PG&E") argues that the motion should be denied because: (1) SVP's proposed amendment does not "relate back" to its original proof of claim; and (2) SVP is not

entitled to amend its claim on the basis of excusable neglect, because SVP has unreasonably delayed in seeking to amend its claim.

In this reply, SVP maintains that its proposed amended claim arises from the same series of transactions that underlie its original "Known Claim A," and involve the same energy sales transactions as the original claim and, therefore, the amended claim "relates back" to the original claim. Equitable considerations also weigh in favor of allowing the amendment.

In the event the Court determines that the proposed amendment does not relate back to SVP's original proof of claim, SVP requests that the court nonetheless allow the amendment on the basis of excusable neglect. SVP maintains that the earliest that SVP became aware of the facts underlying the proposed amended claim was on January 11, 2007, when SVP deposed PG&E employee Terrence Goodell. At that deposition, SVP learned for the first time any specifics about discussions between PG&E and the CAISO concerning the disputes and what information PG&E had (and had not) provided to the CAISO in the dispute process.

Given the circumstances, SVP's delay after discovery of facts supporting an amendment to its claim was not unreasonable. Litigation of SVP's claim has not yet commenced, with the exception of one limited issue. Thus, the lapse of less than one year since SVP discovered facts supporting the amendment has not prejudiced PG&E or its creditors.

II. ARGUMENT

A. SVP's Proposed Amendment Relates Back to SVP's Original Proof of Claim.

As this court noted in *In re Pacific Gas & Electric Company,* 311 B.R. 84, 88 (N.Cal.Bankr.Ct. 2004), it is the operative facts that control the question of relation back, not the theory of liability applied to those facts. The question is whether the facts alleged in the original claim would *"reasonably alert Debtor to the possibility of assertion of new theories based upon those facts to support the amended claims, whether or not those facts or events were foreseeable." Id.* at 88-89. In its opposition, PG&E construes the description of Known Claim A and the facts underlying that claim far too narrowly.

SVP's proof of claim contains allegations that, given what PG&E *alone* knew about the origins of SVP's Known Claim A, should have alerted PG&E to the possibility that SVP would assert breach of fiduciary duty as a theory of liability to support SVP's Known Claim A.

In opposition to this motion, PG&E mischaracterizes SVP's Known Claim A as *"simply stat[ing] that SVP had made energy sales under the Interconnection Agreement to PG&E and that PG&E was contractually liable for the full amount of these sales."* (Opposition, p. 6, lines 8-10). PG&E also mistakenly asserts that SVP did not, in connection with Known Claim A, assert that PG&E had liability based on fiduciary and other duties. (Opposition, p. 6, lines 13-14).

Nowhere in SVP's proof of claim ("Claim") does SVP limit PG&E's liability for Known Claim A to "contractual liability." The Claim contains a six page attachment which describes the bases for the various subparts of the claim. (A true and correct copy of SVP's Proof of Claim, is attached hereto for the court's convenience as Appendix A). The first four pages of the attachment to the Claim describe the basis for the Claim and include the general statement:

"The City's Known Claims and Reserved Claims include, but are not limited to, PG&E's obligations under the 'Supporting Documents' (as defined in Section 7, below), any other agreements or understandings between PG&E and the City, ***any other act or failure to act by PG&E (arising in contract, law, equity or otherwise) and PG&E's breach of its duties under the Supporting Documents, including fiduciary duties.****"* (Claim, Appendix A, attachment, p. 1).

The Claim states that Known Claim A specifically consists of *"Energy sold to PG&E by the City under the Interconnection Agreement between Pacific Gas and Electric Company and the City of Santa Clara, as further described in Section 7, Supporting Documents . . ."* (Claim, Appendix A, attachment, p. 2). The amount of Known Claim A is set forth at page 6 of the attachment as $3,241,097.53 (total of invoices A-F).

Thus, Known Claim A asserts a claim for non-payment for energy that SVP believed was sold under the Interconnection Agreement. However, SVP specifically provides notice of

possible alternative theories of recovery for Known Claim A, including theories based on *"any other act or failure to act by PG&E"* including possible breach of fiduciary duties.

While the Claim does not specifically allege all facts underlying Known Claim A in the way that a complaint would necessarily allege all facts supporting a cause of action, the Claim does specifically identify the claim as being the amount which remains unpaid for energy sold by SVP in December 2000 and January 2001. The "conduct, transaction, or occurrence" underlying Known Claim A thus consists not only of the energy sales themselves, but the facts and circumstances surrounding the non-payment for that energy. SVP now seeks to specifically assert that the non-payment of Known Claim A directly resulted from a "failure to act by PG&E," including a breach of fiduciary duty by PG&E. This is the same claim amount, arising from the same conduct, transaction or occurrence as is stated in the original Known Claim A, albeit stated more specifically with respect to PG&E's alleged "failure to act."

Under these circumstances, SVP's original Claim reasonably alerts PG&E to the possibility that SVP would assert a claim for breach of fiduciary duty as a means of recovering Known Claim A from PG&E's bankruptcy estate.

B. Equitable Considerations Weigh in Favor of Allowing the Proposed Amendment to SVP's Known Claim A.

SVP can demonstrate that it is requesting the proposed amendment in good faith. First, as it presently stands, the original Claim arguably provides latitude for SVP to assert a breach of fiduciary duty claim, even without amendment. SVP is requesting leave to amend its claim out of an abundance of caution and in an effort to apprise PG&E in as specific terms as possible what facts and theories SVP will assert in support of its Claim.

Second, SVP was not aware of the specific facts supporting a breach of fiduciary duty claim in October 2001, when SVP filed the Claim, despite PG&E's suggestions to the contrary. In its opposition, PG&E argues that SVP was aware in March of 2001, before SVP filed its proof of claim, *"that PG&E was raising the partial payment issue with the CAISO."* (Opposition, at p. 9, lines 11-12). PG&E then cites a March 27, 2001 letter from Cameron Sammi at PG&E to Wayne Ware at SVP (the "Sammi letter") (attached as Exhibit A to the

Declaration of Charles Middlekauf in Opposition to Motion to Amend Claim). The Sammi letter does not disclose, however, the facts that underlie the proposed amendment. The Sammi letter does not: (1) indicate that PG&E has actually initiated formal settlement disputes with the CAISO; (2) indicate that the CAISO and PG&E are having difficulty validating the amount of energy provided by SVP; (3) indicate that PG&E and the CAISO have already met to discuss the CAISO's difficulty in validating the energy provided by SVP; or (4) indicate that at such meeting, neither PG&E nor the CAISO was able to propose or develop a method by which SVP's energy deliveries could be accurately validated. These facts, which support SVP's claim for breach of fiduciary duty, only came to light through the deposition testimony of PG&E employee Terrence Goodell on January 11, 2007.

PG&E also points out that SVP became aware, as early as January 2004, that PG&E had submitted actual billing disputes with the CAISO. PG&E appears to be correct on this point. In its moving papers, SVP maintained that it was not aware of the settlement disputes until 2006 -2007. In October 2006, PG&E produced copies of the settlement dispute forms in the litigation of the limited Disputed Issue relating to SVP's Claim. That was the first that SVP is aware of receiving copies of the dispute forms. Even then, SVP was not aware of the substance of discussions that had taken place between PG&E and the CAISO, and had no idea what information might have been exchanged between PG&E and the CAISO in the dispute process. The substance of those discussions was not disclosed to SVP until the Goodell deposition. *See,* Declaration of Ken Kohtz in Support of Motion For Leave to Amend Known Claim A in Proof of Claim No. 12602, filed herewith.

At Terrence Goodell's deposition, SVP learned for the first time what had transpired in discussions between PG&E and the CAISO during the dispute process. SVP learned for the first time what PG&E and the CAISO did to address the CAISO's difficulty in segregating and validating the quantity of energy that any one specific municipal generator (such as SVP) supplied during emergency conditions.

Of significance in Terrence Goodell's testimony is the fact that PG&E was unable to verify to the CAISO the amounts of energy that SVP provided. *See,* Excerpt from Terrence

Goodell deposition (pp. 51-53) attached hereto as Appendix B. Also of significance is Terrence Goodell's testimony that PG&E believed in 2001, at the time of the disputes, that the real parties-in-interest in the disputes were the CAISO and SVP (and other energy sellers) and that PG&E left it to the sellers to "press their case" and challenge the CAISO's determinations on the disputes. *See,* Excerpt from Terrence Goodell deposition (pp. 58, lines 5-15) attached hereto as Appendix B.

As of Terrence Goodell's deposition, the trial of the limited "Disputed Issue" between SVP and PG&E was scheduled to begin on the first available and mutually convenient trial date after April 30, 2007. *See,* Order on Stipulation Re Scheduling Order For Pacific Gas and Electric Company's Objection to a Portion of the Claim of the City of Santa Clara, dba "Silicon Valley Power" (Claim No. 12602), entered May 19, 2006. If the limited issue had been determined in SVP's favor, any issue regarding PG&E's handling of the CAISO settlement disputes would likely have become moot, since PG&E would have been found to be the purchaser of SVP's energy and would owe SVP for that energy regardless. Further, the litigation of the remainder of SVP's Claim, including any alternative theories of liability for Known Claim A, had not commenced when SVP discovered the additional facts regarding PG&E's handling of the dispute process (and such claims litigation has yet to commence). Thus, there was no apparent urgency in January 2007 to amend SVP's claim to assert the newly discovered facts in support of a breach of fiduciary duty claim.

Based on the foregoing facts, there is also no prejudice to PG&E in allowing the proposed amendment. Since claims litigation has not commenced in any meaningful way, not only with respect to SVP's claim, but with respect to all similar generator claims, PG&E is not prejudiced by SVP asserting the specifics of a claim for breach of fiduciary duty. This is particularly true, given that SVP provided notice of the possibility of such a claim in SVP's original proof of claim.

C. SVP's Proposed Amendment to Known Claim A May be Allowed as a Late Filed Claim Under the Doctrine of Excusable Neglect.

In the event that this Court determines that the proposed amendment to SVP's claim does not "relate back" to SVP's original proof of claim, SVP requests that the court allow the amendment as a late-filed claim, on the basis of excusable neglect.

SVP's delay – from January 11, 2007 until December 21, 2007 when it filed this motion – is not unreasonable delay, given that litigation of SVP's claim has effectively been stayed since the claim was filed in October 2001. The argument above, regarding the equities of allowing a "relation back" amendment, also support allowing a late filed claim by SVP.

At the time it filed its original Claim in October 2001, SVP was unaware that PG&E had submitted settlement disputes with the CAISO. Obviously, SVP was also unaware of the manner in which PG&E had handled those disputes. That information was exclusively within PG&E's and the CAISO's control. PG&E was uniquely aware of the facts upon which SVP seeks to assert a claim for breach of fiduciary duty. Given the language of SVP's original Claim, providing notice to PG&E that SVP would assert such a claim, SVP's good faith in bringing a motion to amend its claim within a reasonable time after discovering the additional facts, and the lack of prejudice to PG&E and the creditors of the bankruptcy estate, grounds exist to allow a late-filed claim on the basis of excusable neglect.

III. CONCLUSION

For the foregoing reasons, SVP respectfully requests that the Court grant SVP leave to amend its Claim as requested herein.

DATED: January 18, 2008

McPHARLIN SPRINKLES & THOMAS LLP

By: /s/ Paul S. Avilla
Paul S. Avilla
Attorneys for CITY OF SANTA CLARA, dba, SILICON VALLEY POWER

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Attorneys for Creditor
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UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

(San Francisco Division)

In re PACIFIC GAS and ELECTRIC COMPANY, a California corporation Debtor. Tax I.D. No. 94-0742640	Case No. 01-30923 SFM 11 Chapter 11 **Declaration of Ken Kohtz in Support of City Of Santa Clara, dba Silicon Valley Power's Motion For Leave to Amend "Known Claim A" in Proof of Claim Number 12602**

I, Ken Kohtz, declare as follows:

1. I am an employee of the City of Santa Clara, dba "Silicon Valley Power" in the City's Resources Department ("SVP"). I first became employed at SVP in the Fall of 2001. My duties since that time have included, among other things, monitoring and facilitating SVP's involvement in proceedings before the Federal Energy Regulatory Commission, as well as being involved in the prosecution and attempts to settle SVP's claim in the PG&E bankruptcy.

This declaration is being submitted in support of SVP's Motion For Leave to Amend Known Claim A in Proof of Claim Number 12602. This declaration is to clarify the timing of SVP's discovery of substantive facts supporting SVP's proposed amendment to its proof of claim.

2. PG&E is correct that SVP learned, possibly as early as January 2004 or before, that PG&E had previously submitted settlement disputes to the California Independent System Operator ("CAISO") with respect to the SVP energy sales that are the subject of SVP's Known Claim A in the PG&E bankruptcy. SVP learned that information via various discussions with or communications from the CAISO or PG&E , some of which were during SVP's attempts to explore potential settlement of its claim. While general information was disclosed to SVP that PG&E had previously submitted disputes, I do not recall SVP receiving any substantive or detailed information regarding the disputes or what precise correspondence had transpired between PG&E and the CAISO during the dispute process.

3. In October, 2006, in discovery in the limited claims litigation between SVP and PG&E (on the issue of whether SVP's claim arose from energy sales to PG&E or to the CAISO) PG&E produced copies of the dispute forms it had submitted to the CAISO in early 2001. I do not recall SVP receiving copies of the actual dispute forms before that time. Furthermore, the actual dispute forms contain limited information about the nature of the disputes. The forms indicate the quantities and prices of energy, trading zones and hours for which the CAISO's settlement is being contested, and indications of the CAISO's determinations on the disputes. The dispute forms do not contain any substantive information about what transpired between PG&E and the CAISO during the dispute process, other than to indicate that *"several meetings were held in order to determine appropriate resolution for this issue, at this time discussions continue." See,* excerpt of Trial Exhibit 26, attached hereto as Exhibit A.

4. On January 11, 2007, at the deposition of Terrence Goodell in discovery in litigation of the limited Disputed Issue, SVP learned substantially more about the substance of the discussions that took place in meetings between PG&E and the CAISO during the settlement dispute process and discovered information at that time that SVP believes support a

claim against PG&E for breach of fiduciary duty. To my recollection, prior to January 11, 2007, neither PG&E nor the CAISO had disclosed to SVP the details of their discussions, as was disclosed in Terrence Goodell's deposition.

5. The breach of fiduciary duty claim that SVP is seeking to assert is based on the premise that PG&E had information at the time of the disputes from which PG&E should have been able to accurately verify the quantity of energy supplied by SVP. What became clear from Terrence Goodell's deposition is that PG&E apparently failed to provide or adequately explain that information to the CAISO, and then PG&E apparently failed to appropriately challenge the CAISO's determinations and allowed the appeal period to lapse without, in a timely manner, seeking SVP's assistance in filing or prosecuting such disputes.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on January 18, 2008.

Ken Kohtz

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re PACIFIC GAS AND ELECTRIC COMPANY, a California corporation,	)	Case No. 01-30923 DM
	)	Chapter 11 Case
Debtor.	)	
Federal I.D. No. 94-0742640	)	

DEPOSITION OF TERRENCE LEE GOODELL

Date: Thursday, January 11, 2007
1:03 p.m

Place: Pacific Gas & Electric Company
77 Beale St.
San Francisco, CA

Reported by: Linda J. Pugliese, C.S.R.
License No. 4764

CRS, INC.
CERTIFIED COURT REPORTERS AND VIDEO
111 W. Saint John St., Suite 420
San Jose, CA 95113
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Appendix B

BY MR. AVILLA:

Q. In the meeting that you had with the ISO, did you propose to the ISO any way, any different way that they could verify the amounts of energy that were being provided?

A. I don't think so. I guess what -- I don't think we -- we could figure out any other way to verify the amounts of energy that was provided. I think the gist of what we were trying to convince the ISO was that they had to look at the whole portfolio, and they couldn't look at specific resource I.D.s. And the way -- they separate out their deviation settlements by there's a deviation on load and there's a deviation on supply. So they were focusing on the supplies, and they were saying you didn't deliver all of your energy, so we're not going to pay you.

And like I explained before, that the principal thing we were trying to get them to understand is that supply meter could be lower, a lot lower than the schedule, for valid reasons under their interconnection agreement. And they needed to go and look at the load and see if the load meter had dropped a corresponding amount.

And in that case, if let's say the supply had dropped 25 megawatts and the load meter dropped

25 megawatts, then any supply above that amount was excess energy. So in this example, if they had sold 25 megawatts of excess energy but their supply meter was 25 megawatts below their schedule, the ISO said, well, they didn't deliver anything.

And what we were trying to convince the ISO is that, no, you can't look at it that way. If it dropped 25 and the load dropped 25, they did deliver the 25 megawatts of excess energy. Because they have, under their interconnection agreement, they could change their schedule anytime -- some of them 20 minutes into the hour. And so it's the -- the ISO rule of the deviation is calculated from your hour ahead final schedule was working against the fairness of these payments.

So that was the gist of the discussion we were having, was getting them to understand that they had to net out the supplies and the loads, and they had to do it across the whole portfolio because one party may be selling to another party within the portfolio. So there was all these complications that could happen that are all legitimate. And if you didn't take all of those into consideration, then you would unfairly penalize the seller of that excess energy.

So that's the gist of the discussion, was getting them to understand that they had to look at the

whole portfolio. And if the portfolio overdelivered supply, then they had to make some leaps and decide who delivered the excess energy of all these different sellers.

So sometimes you couldn't determine for sure who didn't deliver and who did. And I don't remember exactly what we did, but I would imagine at that time then we maybe did a pro rata reduction of all of those. So that was the gist of the discussion at that time at the ISO.

Q. Was it the case that logical meter -- a logical meter scenario would even complicate that further because you have aggregation within one meter of both load and supply; is that right?

A. Yeah. That was part of the problem, but in some cases, it was just the amount of flexibility that the ETCs had to do transactions within this portfolio didn't fit with the ISO's way of scheduling and reporting those transactions. So it was just -- this stuff has been a headache from day one. And the ISO didn't necessarily -- they don't necessarily grasp all the ins and outs of the math doing this. And so we were presenting to them what we thought was the best and fairest way to do the settlement.

Q. Was it also the case that if a particular

determinations on these disputes with anyone within PG&E?

A. I have no specific recollection of reviewing any of the resolutions with anyone in PG&E. I may have.

Q. Do you recall any discussions about whether PG&E should in any way challenge the ISO's determinations on these disputes?

A. I don't recall any discussions. I have a recollection of being told that this -- these, really these transactions were between the seller and the ISO, and somebody was going to tell the seller that they really needed to press their case with the ISO. So based on that, I'm gathering that I didn't spend a whole lot of time once the resolution came out pushing them forward.

Q. Do you know who it is that told you that the sellers would be told that they should press these issues with the ISO?

A. No, I just -- I have a recollection of discussions, meetings, and PG&E coming to that conclusion, but I don't specifically remember who said it or -- I imagine that probably whoever was the manager at the time was the one who was officially on the hook for making that decision.

Q. Up to the point where you received the ISO's

Exhibit B

Transcripts of Proceedings

Telephone Trial Ruling re: PG&E's Objection to

A Portion of the Claim of SVP

May 5, 2008

Y UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

(SAN FRANCISCO DIVISION)

In re:

PACIFIC GAS AND ELECTRIC COMPANY, a California Corporation,

Debtor.
_____/

Case No. 01-30923

Chapter 11

San Francisco,California
November 26, 2007
2:59 p.m.

TRANSCRIPT OF PROCEEDINGS
TELEPHONE TRIAL RULING RE P.G.&E'S OBJECTION TO A PORTION OF THE CLAIM OF THE CITY OF SANTA CLARA (SILICON VALLEY POWER)

BEFORE THE HONORABLE DENNIS MONTALI
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the City of Santa Clara:

McPHARLIN, SPRINKLES & THOMAS, LLP
BY: PAUL S. AVILLA, ESQ.
10 Almaden Boulevard, Suite 1460
San Jose, California 95113

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	-and-
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P R O C E E D I N G S

November 26, 2007 2:59 p.m.

---oOo---

THE CLERK: Matter of Pacific Gas and Electric Company.

THE COURT: Good afternoon. May we have appearances, please? Appearances on the phone? Can you all hear me?

MR. AVILLA: This is Paul Avilla. There's a bad echo and some squeaking and squawking.

THE COURT: Is one of you on a speaker phone?

MS. BRUMFIEL: No.

THE COURT: Or a cell phone?

MR. AVILLA: I'm on an ear piece.

THE COURT: Is it better now?

MR. AVILLA: It's better. I can hear you now, but I'm getting an echo.

THE COURT: Ms. Brumfiel, can you hear me all right.

MS. BRUMFIEL: I can hear you. I have just a slight echo.

MR. MIDDLEKAUFF: Your Honor, Charles Middlekauff. I can just barely hear you, and I'm also getting the feedback too.

THE COURT: All right. Let's do a little repair

work here. Got an idea there, Ms. Parada? Every time we think our new phone system is working okay, it fools us.

MS. BRUMFIEL: Well, you sound perfect now.

MR. MIDDLEKAUFF: You now sound much better.

MR. AVILLA: That sounds better to me.

THE COURT: Okay. Well, whatever it is, let's not mess with it. All right. Well thank you, for being available. This is as I promised you -- or no, I didn't promise you, but as my Clerk told you that this is going to be my ruling on the trial we had on the objection to the Silicon Valley Power Proof of Claim. So I'm going to repeat things that are obvious to you for the record, but I'll state it anyway so that my ruling is all in one place and intact, if there's any further review of it.

The objection per stipulation between P.G. & E. and the SVP or the County of Clara through Silicon Valley Power was limited to one issue, that is, what the parties described as known claim A, which arises out of market sales of power in December of 2000 for an unpaid price of approximately 3.2 million dollars and the issue of whether those sales were from Silicon Valley Power to P.G. & E. in accordance with Paragraph 4.1 of the parties' 1983 Interconnection Agreement or whether they were alternatively sales by SVP to the California Independent Systems Operator, Cal ISO, through P.G. & E. as scheduling

coordinator.

There's another $65,000 of sales that occurred in January of 2001 that I think I was led to believe are not part of the same issue, in which case I don't have to decide it. If I'm incorrect on that point, that they are part of the same issue, then the outcome will be the same as to those smaller amounts.

I don't intend to issue written findings of fact or written conclusions of law, but rather that my oral decision that I'm announcing now is permitted to include findings and conclusions in accordance with Bankruptcy Rule 7052. And so all I intend to do is issue a simple order that reflects my ruling.

I've considered the testimony of the witnesses, the oral arguments, the written arguments of counsel, the deposition excerpts that were presented to me, the numerous exhibits, the agreements, the transaction logs, the transcripts of conversations between ISO and P.G. & E., between P.G. & E. and SVP, between SVP and ISO, and various other evidence that the parties submitted.

I've concluded and come to the conclusion that the sales were not in accordance with the Interconnection Agreement, but were in fact sales by SVP to the Cal ISO via P.G. & E., and thus, I'm prepared to enter an order sustaining P.G. & E.'s objections to known claim A. And

the reasons that I reached that result are as follows. I worked through at some times very conflicting impressions, sort of after-the-fact characterizations, statements, testimony, were not always reconcilable, but nevertheless, I came out with a common theme that in my inquiry began with the two witnesses from the ISO, primarily Mr. Doudna (Phonetic) who developed procedures to deal with anticipated sales as the predicted 2000 energy crisis approached. And Mr. Doudna's thinking, as I read it, was that the ISO would cover the actual costs of power even though settlement and payment would be through an entity such as P.G. & E. as scheduling coordinators.

And specifically, Mr. Doudna testified as I interpret it, that what his role -- he envisioned the role of the ISO could include agreeing to a price quoted by Muni in excess of what the parties have called the ex-post price. Mr. Hoffman, the other witness with the ISO said nothing inconsistent with Mr. Doudna and in fact I interpreted Mr. Hoffman's testimony to include his note that buyers of the lode furnished through the scheduling coordinators were to be making the payments.

The ISO developed procedures that are in evidence, first called M—427 and later E-516. Those procedures were silent on the payment issue. They identified the responsibilities of the three principal

parties, the Muni, the ISO and the P.G. & E., but the silence on the payment doesn't really help me, but the predicate testimony is that witnesses did.

From P.G. & E.'s side, Mr. Moore, who I'm going to call a management level person as distinguished from -- distinguishing his role from what I'll call the line personnel, the real time traders and some of the other people who testified, was very much involved in contractual relationships between the utility and the Munis, and here comes the problem, and Mr. Moore didn't want to buy power for the Munis in accordance with these procedures that were being developed, and he didn't consider Paragraph 4.1 of the Interconnection Agreement as a source. It was in his mind not even applicable to the process that would be getting power to ISO.

On the other hand, or not inconsistent with that, I guess, was Mr. Camachio (Phonetic), another management level person, this one from SVP, who didn't want to sell to the ISO and could only sell to P.G. & E. via the Interconnection Agreement. The problem of course is he didn't communicate that position to P.G. & E., but the fact that the settlement and the invoicing was the same as with other sales that P.G. & E. might have engaged in with SVP is not convincing to establish that the particular sales in question were necessarily covered by the same

Interconnection Agreement.

So what I conclude from the testimony of those two gentlemen is that there really was no meeting of the minds at their level that would establish an agreement between the utility and the Muni. So then moving to a different level, Mr. Hance (Phonetic), the SVP witness and probably the principal client contact, I guess, or certainly the trial, was very much involved in the transactions, but even in the first transaction, under these arrangements, in June of 2000, he was not sure what kind of sale it was.

In Exhibit 108, June 14th, 2000, he asked how should we show it, meaning how to show the contract for the transaction, and it seems to me the question "how should we show it," is inconsistent with a sale in accordance with the Interconnection Agreement. In my mind, someone in Mr. Hance's position should have no doubt about how to do it, if it were in accordance with the Interconnection Agreement.

Then later, several months later, as reflected in Exhibit 96, Mr. Hance again asked, I'd like to know what contract, referring to what contract covers the transactions that he was discussing at that later date, and again that's not consistent with a contention later on that it's clearly in accordance with the Interconnection

Agreement.

There were, of course, various discussions among various parties, Mr. Hance, Mr. Mathai (Phonetic) of P.G. & E., Mr. Blake and others. Their testimony is somewhat inconsistent. Again, I don't mean to imply that any one witness is internally inconsistent or I don't imply any mischief. I'm just saying it's an inconsistency with the notion that SVP is advancing. The fact that Mr. Mathai assumed that there was a contract in place but didn't really know which contract doesn't mean necessarily that sales were in accordance with the contract that in fact existed.

Now, Mr. Blake's testimony was a little more persuasive from Silicon Valley Power's point of view, because he certainly implied, perhaps contrary to some of the other pieces of evidence, that perhaps these were sales to P.G. & E. His own understanding and his subsequent clarification of some of his terminology convinces me that that won't overcome the several instances in the record where ISO is identified as the purchaser. Those instances by and large are tracked in P.G. & E.'s trial brief, but I don't rely on P.G. & E.'s trial brief; I looked at the exhibits and I will highlight some of those instances in the next couple of minutes.

First, the Exhibit 73 reflects an ISO log entry

on December 4th consistent with the phrase -- or the phrase being ISO agreed to purchase. Exhibit 89, a December 5th entry, I believe this was not an ISO log -- I've forgotten exactly what it is -- but Exhibit 89, Mr. Hance made a statement that Iso was buying the extra power. On December 6th, Exhibits 43 and 53 reflect that SVP was prepared to operate if ISO met its price. Exhibit 90, P.G. & E. recorded -- reflected that ISO was buying -- that SVP needed the verification of that. On December 7th, Exhibit 91, reflects someone named Dennis at ISO authorizing the payment of $750 to Knoll (Phonetic) at SVP who acknowledged that price. On December 8th, the SVP log, Exhibit 43, reflects a sale to ISO. December 9th, similar. December 10th, similar. December 13th, Exhibit 90, SVP's acknowledgment that P.G. & E. is the middleman.

There are somewhat inconclusive or non-specific entries on other days, December 11, December 20, 22nd and 23rd, and I don't draw any inferences from that. But those remarks do not mean that I do this on a -- did the contract apply on some day and not on some other day. On the contrary, I just looked at an overall pattern of the way the parties generally were conducting themselves, and in my mind, they weren't conducting themselves in accordance with a sale under 4.1 of the Interconnection Agreement.

So all of that leads me to conclude that there

was no contemplation by anyone before the fact at least that the sales were made in accordance with Paragraph 4.1. The people that I call the line people can't create the contract, but their conduct is inconsistent with SVP's theory of its case. So to state it otherwise, the fact that the Interconnection Agreement regulated certain sales, specifically 4.1, the sale of the surplus power, and 4.2, the sales under emergency circumstances, and the fact that there was no writing between Cal ISO and SVP to set the stage for the sales, neither of those two sets of facts means that there couldn't be a contract formed orally or formed by conduct between SVP and ISO. Or to state it yet again, the fact that there is an existing writing which everybody calls the Interconnection Agreement, doesn't mean that it follows obviously that all sales had to be in accordance with that contract.

The fact that the only extant contract was the Interconnection Agreement does not lead to the conclusion that all sales had to be made per that agreement. And to say that that is so is kind of an ex-post -- I use the term "ex-post" again in a different context, ex-post fitting the transactions into a pigeonhole called Interconnection Agreement, when in fact there was no such meeting of the minds ex-ante or before the fact, and that just doesn't support the theory the way I read the evidence.

So P.G. & E. is right. This is all about contract formation, and from the evidence, I'm not able to reach the -- find the facts necessary to reach the conclusion that SVP would have me reach. And just to touch a couple of other bases, the fact that there was an emergency services contract executed between P.G. & E. and NCPA only proves that fact. At the absence of such an agreement with SVP and SVP not having ever signed a simpler emergency services agreement, doesn't mean that the Interconnection Agreement necessarily applies and necessarily governs the sales that were made.

So in conclusion, I've come to the conclusion that SVP has not established that known claim A arises under the agreement. The evidence supports the finding, and I so find that the sales were between SVP and the ISO, and P.G. & E., through the scheduling coordinator or middleman, does not make it the purchaser. So I will sustain the objection to known claim A. I need counsel for P.G. & E. to tell me what form of order I should be signing because I don't know whether you want me to sign an order that disallows that claim or disposes of it in some fashion. I'll leave that to you, either tell me now or tell me later.

MR. AVILLA: Your Honor, this is Paul Avilla. If I might make a comment?

THE COURT: Sure.

MR. AVILLA: Because my understanding the way this was teed up, it was just the determination of this single issue and did not dispose of the claim entirely and wouldn't translate necessarily into a sustaining of the objection.

THE COURT: Okay. But I have to resolve it by some form of order. I don't -- that's been the big mystery to me is what I'm doing here, whether I'm rendering an advisory opinion.

MR. AVILLA: I think the Court make a factual legal finding on a bifurcated issue that we identified, and that's the extent of it. It doesn't necessarily resolve the entire claim or dispose of all issues related to the claim or the objection.

THE COURT: Okay. Well, again, I'm not trying to take issue with that if your opposing counsel agrees with you. I'm just trying to -- I'm thinking about well, does that terminate this contested matter or does this get litigated somewhere else or, you know, you have to realize that you're talking to a trial judge who's also an appellate judge on the Bankruptcy Appellate Panel. So I tend to think in terms of finality. Is there a final order that I issue that disposes of any of this?

So let me ask P.G. & E.'s counsel. What form of

order do you think should come from all this?

MS. BRUMFIEL: Charles, do you have a thought on that?

MR. MIDDLEKAUFF: Your Honor, I guess my thought is, I do agree with Mr. Avilla that we had agreed to look at the issue -- to tee up this as a kind of threshold issue, but it would not completely get rid of the claim. So I do agree with him about that. I guess -- I would view it as a final order and a determination on this aspect of liability, and I think if the Court issues an order on it, I don't know if SVP would want to be able to appeal it now or to wait until we litigated any other issues related to this claim. They implied in their brief that there were other -- if they weren't to prevail here, that there were other feelings that they would have on the claim.

THE COURT: But -- yes, I understand that, but what's not been clear to me is prevail where, in this Court or somewhere else? Can you help me on that, Mr. Avilla? I mean, leaving aside appellate recourse, where do we go from here based upon my ruling?

MR. AVILLA: There's no intention, for example, to -- that I know of right now to take this ruling and use it in another proceeding, for example, what may be going on with FERC.

THE COURT: Okay.

MR. AVILLA: The expectation was simply that it's a bifurcated issue, that we're on the road to trying to fully resolve this claim and the objection to it in this Court, and in a way it is sort of an interlocutory order, like I said we did -- the stipulation refers to it as a bifurcated issue.

THE COURT: No, you did. There's no question. I know it's time to get out of that. I'm not --

MR. AVILLA: Yeah, No, no --

THE COURT: But I think -- there's no question in my mind, it's an interlocutory order because, you know, in bankruptcy terminology, the objection to claim creates a contested matter, and the contested matter is disposed of by an order that allows or disallows the objection, and if all we're doing is sustaining it in part, that's okay. It's an interlocutory order. My only question again is not to question the strategies here, but to ask you, okay, what happens next. What do I do to manage this docket? I tell the Clerk, okay, I've issued an order that says -- that finds and concludes that the transactions weren't in accordance with the Interconnection Agreement. What's next?

MR. AVILLA: Well, practically speaking, next is going to be further settlement discussions between the parties and if we're not able to resolve it, I think we'll

be back trying to frame the balance of the objection to the claim so that that can be litigated if necessary.

MR. MIDDLEKAUFF: Your Honor, maybe it would make sense if we can agree to a status conference some time, and I agree with Mr. Avilla, I think it gives the parties a chance to talk and maybe we can agree, if we're unable to reach any kind of conclusion between the two parties, that we would have some kind of status conference where we could come up with a schedule to address exactly your question as to what is next, you know, what kind of additional theories would SVP pursue on its claim, and how would we litigate those so that we could come to final resolution.

THE COURT: Okay. I mean I think it is a little bit of a strange procedure where you kind of come up to bat in the first inning and you strike out, and you get to come back in the third inning. It's not a good baseball analogy, but I won't stand in your way, and I hope you can get it resolved. I guess, let me put it this way, if we have to have another evidentiary trial on similar issues, I will feel a little concerned that it's unnecessarily duplicative.

Now maybe the other issues are more legal in nature rather than factual, but again, I don't know what they are. If someone said to me, well, okay, what's left that the parties are disputing, I wouldn't know. But I

don't need to know. If you don't get it resolved, if the parties don't reach an agreement by the next status conference, then I think I will have to know. But I don't need to know now. So how much time do you think you need to get there, recognizing the holidays and so on?

MR. AVILLA: Could we have 90 days or so, Your Honor?

THE COURT: Okay. Is that okay for P.G. & E.?

MR. MIDDLEKAUFF: That's fine, Your Honor.

THE COURT: And, Mr. Middlekauff, do you anticipate that in the meantime I will or will not sign some sort of an order that --

MR. MIDDLEKAUFF: I do. I would anticipate there would be because I think that would be helpful. I think it would be like what you said an interlocutory order that would, you know, state what your findings are on this.

THE COURT: Okay. Well, why don't you and Ms. Brumfiel decide on how you think that order should read. You then run it by Mr. Avilla, and if he's satisfied with it and approves it as to form, chances are I'll sign it without debate, and you can just refer to this ruling. You don't have to try to replicate it. You can just say for the reasons stated on the record on November 26th, you know, A, B, C. And we'll give you a status conference with the understanding that I do need to know then what to do next

and let us know in the meantime if it is settled. So how about right around the end of February?

MR. MIDDLEKAUFF: That sounds great for us.

THE COURT: Let's put it on say 11:00 o'clock on the law and motion calendar. Okay. Once second, and we'll check the date for you.

THE CLERK: February 29th at 11:00 o'clock?

THE COURT: Does that work for everybody?

MS. BRUMFIEL: Yes, Your Honor.

MR. MIDDLEKAUFF: Yes, Your Honor. And what we'll try to do, Your Honor, is if we're not able to resolve it, on the 29th we'll try to come in -- so far the parties have worked pretty well together, so we'll try to come in with some kind of proposal about how we would want to proceed, what the issues are we would identify and how we want to proceed.

THE COURT: Okay. Well, and as I said to you when you submitted the argument -- and all of you have been extremely professional and extremely courteous and extremely competent in terms of carrying your clients' goals here. This was not an easy case, but it was certainly well presented to me and well documented, and, you know, I can understand how SVP might have been optimistic about coming out the other way.

But in any event, best wishes for the holidays.

I'll see you on the 29th at 11:00, February '08. I wrote down '09; wouldn't that be something?

(Laughter.)

And if you get it resolved in the meantime, please notify my courtroom deputy. Thanks very much.

ALL COUNSEL: Thank you, Your Honor.

THE COURT: Okay. Bye.

(Whereupon, the proceedings are concluded at 3:24 p.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter.

DATED: December 12, 2007

By: /S/ Jo McCall

Certificate of Service

I hereby certify that I have this day served a copy of this document upon all parties listed on the official service list compiled by the Secretary in the above-captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated this 23rd day of May, 2008 at Folsom, California.

/s/ Anna Pascuzzo

Anna Pascuzzo