

98 FERC 61, 281
 UNITED STATES OF AMERICA
 FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company	Docket No. ER01- 2998-000
Pacific Gas and Electric Company	Docket No. ER02-358- 000
Northern California Power Agency	
v.	Docket No. EL02-64-000 (Not Consolidated)
Pacific Gas and Electric Company and the California Independent System Operator Corporation	

ORDER CONDITIONALLY ACCEPTING FOR FILING AND SUSPENDING,
 SUBJECT TO REFUND, INTERCONNECTION AGREEMENTS,
 AND SUBJECT TO FURTHER COMMISSION ORDER

(Issued March 14, 2002)

On August 31, 2001 and November 16, 2001, Pacific Gas and Electric Company (PG&E) filed notices of termination of interconnection agreements with the Northern California Power Agency (NCPA) and Silicon Valley Power (Silicon Valley), respectively, and unexecuted Interconnection Agreements intended to replace the terminated agreements.

On February 27, 2002, NCPA filed an emergency petition seeking an expedited declaratory order confirming PG&E's continuing contractual obligations under existing Interconnection Agreements and Contract 2948A. NCPA also requests the Commission to institute a technical conference or other settlement resolution procedure that will allow NCPA, PG&E, and other interested parties, including the California Independent Systems Operator (California ISO) and Western Area Power Administration (WAPA) to reach agreement on the terms of replacement Interconnection Agreements, and any related implementation issues.

In this order, we conditionally accept the unexecuted replacement Interconnection Agreements for filing, suspend them for five months, to become effective on September 1, 2002, subject to refund, and subject to further Commission order. We

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also accept the notices of termination of existing interconnection agreements, suspend them for five months, to become effective concurrent with the replacement Interconnection Agreements. We also affirm that PG&E will continue to operate under the terms of existing Interconnection Agreements and Contract 2948A until the parties have worked out the terms of the replacement agreements and any related implementation issues. Finally, we are directing staff to convene a technical conference at Commission headquarters for the parties in these proceedings to discuss the terms and implementation of the replacement Interconnection Agreements.

Our actions in this order will allow for the continuation of transmission service under existing Interconnection Agreements and Contract 2948A and, if subsequently authorized, a transition to non-discriminatory open access transmission service without any interruption of service.

I. BACKGROUND

A. Existing Interconnection Agreement with NCPA

NCPA, a public agency organized under the laws of the State of California, and PG&E entered into the existing Interconnection Agreement in November 1991, and the Commission accepted the Agreement as PG&E Rate Schedule No. 142 on May 12, 1992. Under the terms of the existing Interconnection Agreement, PG&E provides interconnection, transmission, reliability and energy services to NCPA. PG&E notes that section 9.4 of the existing Interconnection Agreement provides that either party may terminate the agreement upon three (3) years' notice. PG&E gave notice to NCPA on July 21, 1997 that it was terminating the existing Interconnection Agreement effective July 31, 2000. PG&E and NCPA subsequently agreed to extend the termination date until March 31, 2002. The existing Interconnection Agreement therefore will terminate as of April 1, 2002, if the Commission accepts the notice of termination.

B. Existing Interconnection Agreement with Silicon Valley

Silicon Valley, a public agency organized under the laws of the State of California, and PG&E entered into the existing Interconnection Agreement in September 1983, and the Commission accepted the Agreement as PG&E Rate Schedule No. 85 on October 27, 1983. Under the terms of the existing Interconnection Agreement, PG&E provides interconnection, transmission, reliability and energy services to Silicon Valley. PG&E notes that section 9.4 of the existing Interconnection Agreement provides that either party may terminate the agreement upon three (3) years' notice. PG&E gave notice to Silicon Valley on May 6, 1998 that it was terminating the existing Interconnection Agreement effective May 31, 2001. PG&E and Silicon Valley

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subsequently agreed to extend the termination date until March 31, 2002. The existing Interconnection Agreement therefore will terminate as of April 1, 2002 if the Commission accepts the notice of termination.

C. Contract 2948A Transmission Service Obligations

Contract 2948A is an agreement between PG&E and the U.S.

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Department of the Interior, contracting on behalf of WAPA. Under the terms of the contract, PG&E obtains excess energy from WAPA's hydropower resources, and provides energy to WAPA during periods when WAPA resources are unable to meet the needs of its customers. PG&E also provides transmission service to WAPA's municipal customers, including NCPA, for the transmission of WAPA's power. The scheduling provisions for the transmission service agreed upon by PG&E, WAPA and NCPA are incorporated in Contract 2948A and in PG&E's existing Interconnection Agreement with NCPA. WAPA supplies one half of NCPA's pool requirements.

D. The Replacement Interconnection Agreements

PG&E asserts that since the notice of termination, it has engaged in good faith negotiations with both NCPA and Silicon Valley on replacement Interconnection Agreements; however the parties have been unable to reach an agreement. Consequently, PG&E has filed unexecuted replacement Interconnection Agreements for those services PG&E believes are required to meet any ongoing

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service obligation to the parties. PG&E seeks an April 1, 2002 effective date for the replacement Interconnection Agreements. PG&E contends that the replacement Interconnection Agreements, which will provide only transmission service, combined with the interconnection, energy and reliability services available under the California ISO Tariff and the PG&E TO Tariff will provide NCPA and Silicon Valley with services comparable to those provided under the existing Interconnection Agreements. PG&E also argues that the replacement Interconnection Agreements will

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Contract 2948A is on file at the Commission as PG&E Rate Schedule No. 79. Contract 2948A will terminate on January 1, 2005. To date, PG&E is not seeking to terminate Contract 2948A. However, NCPA alleges in its petition in Docket No. EL02-64-000 that, according to PG&E, certain transmission scheduling services in Contract 2948A and the existing Interconnection Agreements will terminate under the Notice of Termination of the existing Interconnection Agreements. See NCPA's Petition for Declaratory Order at p. 20 and Attachment E.

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PG&E further indicates that, upon termination of the existing Interconnection Agreements, NCPA and Silicon Valley would obtain certain services previously provided by PG&E directly from the California ISO.

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remove inconsistencies within, and administrative burdens to, the operation of the California ISO and the new market structure.

NCPA argues that PG&E is seeking to evade its contractual and license obligations to NCPA, to turn those contractual and license obligations over to the California ISO without NCPA's or the California ISO's permission, and to preempt decisions in

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matters pending in other dockets at the Commission. According to NCPA, PG&E is abrogating its service obligation under the existing Interconnection Agreement because it is obligated to provide certain transmission- and generation-related services

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under a 1991 Settlement Agreement. Finally, NCPA argues that PG&E did not engage in good faith negotiations on the terms of the replacement Interconnection Agreement.

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The City of Santa Clara, California (Santa Clara) argues that its replacement Interconnection Agreement with PG&E fails to address long-standing agreements between the parties; does not ensure Silicon Valley's access to Western Area Power Administration power or to Silicon Valley's California-Oregon Transmission Project; and no longer requires PG&E to continue services required under a 1991 Settlement Agreement and

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NCPA also questions whether it will be able to procure the services required under the existing Interconnection Agreement from the California ISO (NCPA Protest at 27-30). NCPA questions the ability of the California ISO to provide the services that NCPA would require. We will not address in this order the issue of if, and whether, the California ISO can provide the services that would otherwise be provided under the existing Interconnection Agreement with PG&E.

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According to NCPA, the 1991 Settlement Agreement between PG&E and NCPA implemented the Stanislaus Commitments. The Stanislaus Commitments are a 1976 agreement between PG&E and the Department of Justice regarding conditions included in PG&E's Nuclear Regulatory Commission license for its Diablo Canyon Nuclear Plant. The Stanislaus Commitments, which resolved antitrust concerns against PG&E, describe conditions under which PG&E will provide interconnection, transmission, reliability and energy services to other utilities requesting such service.

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Santa Clara is a city which owns and operates Silicon Valley Power, a municipal electric utility system engaged in the generation, transmission, distribution, purchase and sale of electric power and energy at wholesale and retail. Santa Clara purchases a portion of its energy requirements and certain transmission and coordination services from PG&E pursuant to certain contracts, including the Interconnection Agreement at issue in this proceeding and designated as PG&E Rate Schedule FERC No. 85.

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Stanislaus Commitments. Santa Clara then identifies a number of specific perceived shortcomings, errors, inconsistencies and improper provisions in the replacement Interconnection Agreement. Santa Clara requests that, if the Commission will not reject PG&E's filing, we suspend the Notice of Termination and replacement Interconnection Agreement for five months subject to further order by the Commission prior to the end of the suspension period.

E. NCPA Request for Technical Conference

On February 27, 2002, NCPA filed an emergency petition seeking a declaratory order and a request for a technical conference. NCPA notes its ongoing negotiations with the Cal ISO on the terms of new Interconnection Agreements to provide services that will no longer be provided under PG&E's proposed replacement Interconnection Agreements have not been successful to date. Among other things, NCPA notes that the parties are negotiating on a Vertically Integrated Utility operating agreement concept that would allow vertically integrated utilities such as NCPA and its members to operate competitively with other market participants in the Cal ISO market. According to NCPA, there are aspects in the design of the Cal ISO operations that will penalize entities like NCPA without some accommodation.

Concurrently with the negotiations with the Cal ISO, NCPA notes that it is engaged in negotiations with PG&E on the replacement Interconnection Agreements. These negotiations with PG&E include not only the terms of the replacement Interconnection Agreements but also Contract 2948A, a contract between PG&E and WAPA that covers nearly half of NCPA's energy loads. NCPA notes that PG&E and NCPA disagree on PG&E's surviving service obligations to NCPA and to WAPA that NCPA contends will not end with the termination of the existing Interconnection Agreements. If PG&E's service obligations are not agreed upon by the parties before the replacement Interconnection Agreements take effect, then under the Cal ISO tariff, PG&E will provide operating instructions as to the interpretation of Contract 2948A. In that situation, PG&E's view will prevail until the contract dispute is resolved. NCPA argues

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According to Santa Clara, under the 1991 Settlement Agreement and the Stanislaus Commitments, PG&E is committed to provide services to Silicon Valley as a Neighboring Entity and Neighboring Distribution System. Based on the 1991 Settlement Agreement, PG&E withdrew a series of suits against its customers, including litigation against Santa Clara, on the understanding that the Settlement Agreement would bind PG&E to implement and be bound by the Stanislaus Commitments through January 1, 2050. See Santa Clara Amended Protest and Request for Rejection, pp. 10-11.

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that if PG&E does not comply with its obligations under Contract 2948A, it cannot finalize new Interconnection Agreements with the Cal ISO. NCPA thus seeks a declaratory order that confirms PG&E's continuing contractual obligations under the existing Interconnection Agreements and Contract 2948A until the parties develop suitable replacement arrangements and procedures. NCPA also seeks a technical conference, or settlement or other less formal procedure for NCPA, the Cal ISO, PG&E and WAPA, to work out these issues with the assistance of Commission staff.

II NOTICE OF FILING AND PLEADINGS

A. Docket No. ER01-2998-000

Notice of PG&E's filing was published in the Federal Register, 66 Fed. Reg. 48,128 (2001), with comments, interventions and protests due on September 21, 2001. On September 19, 2001, the Commission issued a notice of extension of time to file interventions and protests until September 28, 2001.

The Public Utilities Commission of California (California PUC) filed a notice of intervention and comments in support of PG&E's filing. The California Electricity Oversight Board (California Oversight Board) filed a timely motion to intervene and comments in support of PG&E's filing.

NCPA filed a motion to intervene and protest and a motion to reject PG&E's filing on September 28, 2001. The Modesto Irrigation District (Modesto) and Santa Clara filed separate timely motions to intervene. On October 1, 2001, the City of Roseville, California filed a motion to intervene and protest out of time. The California ISO filed a motion to intervene out of time on November 13, 2001.

On October 12, 2001, PG&E filed an answer to NCPA's protest and motion to reject on October 12, 2001. NCPA filed a reply to PG&E's answer on October 29, 2001.

B. Docket No. ER02-358-000

Notice of PG&E's filing was published in the Federal Register, 66 Fed. Reg. 59,588 (2001), with comments, interventions and protests due on December 7, 2001. Modesto filed a timely motion to intervene. NCPA and Santa Clara filed separate timely motions to intervene and protest. Santa Clara subsequently filed an amended protest and request for rejection or, in the alternative, suspension and hearing.

PG&E filed an answer to Santa Clara's protest and request for rejection on December 26, 2001.

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C. Docket No. EL02-64-000

Notice of NCPA's filing was published in the Federal Register, 67 Fed. Reg. 10,395 (2001), with comments, interventions and protests due on March 11, 2002. PG&E filed an answer and motion to dismiss NCPA's complaint on March 8, 2002. The California ISO, Southern California Edison Company and Santa Clara filed timely motions to intervene on March 11, 2002.

III. DISCUSSION

A. Preliminary Matters

We note that on April 6, 2001, PG&E filed for Chapter 11 bankruptcy protection. Although the Bankruptcy Code provides that the filing of a bankruptcy petition automatically stays

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certain actions against the debtor, the Code also provides an exception from this automatic stay for:

An action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's

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police or regulatory power.

The Commission has found in the past that actions taken under the authority granted it by the Federal Power Act and the controlling regulations fit within this exception, and, 9 therefore, are exempt from the automatic stay provision. In the instant matter, we are exercising our regulatory power under section 205 of the Federal Power Act as permitted by section 362(b)(4) of the Bankruptcy Code to issue an order that does not

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11 U.S.C. 362(a)(1) (1994 & Supp. 2000).

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11 U.S.C. 362(b)(4) (1994 & Supp. 2000).

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See Virginia Electric and Power Co., 84 FERC 61,254 (1998); and Century Power Corp., 56 FERC 61,087 (1991). The Commission conclusion on this matter is consistent with judicial precedent regarding the scope of the exemption to the automatic stay. E.g., Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32 (1991); SEC v. Brennan, 250 F.3d 65 (2nd Cir. 2000); NLRB v. Continental Hagen Corp., 932 F.2d 828 (9th Cir. 1991); United States v. Commonwealth Cos. Inc. 913 F.2d 518 (8th Cir. 1990); NLRB v. Edward Cooper Painting, Inc. 804 F.2d 934 (6th Cir. 1986); Penn Terra Ltd. v. Dept. of Env'tl. Resources, 733 F.2d 267 (3rd Cir. 1984); see generally 3 Collier on Bankruptcy 362.05 (15th ed. rev. 2000).

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threaten the bankruptcy court's control over the property of the

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bankruptcy estate.

B. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the timely motions to intervene in the dockets in which they intervened, serve to make those who filed a party to that proceeding.

Due to the early stage of the proceeding in Docket No. ER01-2998-000, their interest in the proceeding, and the lack of undue prejudice or delay, we find good cause to grant the untimely motions of the City of Roseville and the California ISO.

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits the filing of an answer to a protest or answer unless permitted by the decisional authority. We are not persuaded to permit PG&E's answers and NCPA's reply in Docket Nos. ER01-2998-000 and ER02-358-000. Accordingly, we reject them. We accept PG&E's answer in Docket No. EL02-64-000 as a valid answer pursuant to Rule 213(a)(1) of the Commission's Rules of Practice and Procedure.

C. Commission Determination

We are unable to determine, on the record before us, whether termination of the existing Interconnection Agreements is appropriate. Furthermore, PG&E has not shown that the replacement Interconnection Agreements are just and reasonable and they therefore may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the replacement Interconnection Agreements for filing and shall suspend for them for five months, subject to refund, to become effective on September 1, 2002. However, as discussed below, we will make these proceedings subject to further Commission order.

In light of the arguments raised in the protests and the petition for declaratory order, the Commission is concerned that terminating the existing Interconnection Agreements for NCPA and Silicon Valley without appropriate arrangements for replacement service that reflects the service obligations embodied in various agreements between the parties may be unjust and unreasonable. In addition, the protesters raise a number of issues with respect to the reasonableness of the scope of services as well as the terms and conditions of such services in the replacement Interconnection Agreements. In light of these concerns, as

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This order does not change any monetary obligations, and therefore, has no effect on the estate.

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discussed above, we will suspend the Notices of Termination and the replacement Interconnection Agreements for five months.

Although an evidentiary hearing is one means to resolve the contested issues, the parties appear to be trying to reach an agreement on replacement service arrangements with the California ISO that will supercede PG&E's existing Interconnection Agreements.

We note that, on February 27, 2002, NCPA filed a request for technical conference in Docket No. EL02-64-000. The Commission directs Commission staff to schedule a technical conference at Commission headquarters inviting the parties in all three dockets to negotiate the terms and implementation of replacement Interconnection Agreements. In the meantime, we affirm PG&E's continuing contractual obligations to NCPA under the existing Interconnection Agreement and Contract 2948A, and PG&E's duty to comply with those obligations. Based on the outcome of our action in this order and the technical conference, the Commission will issue a subsequent order in these proceedings.

The Commission orders:

(A) PG&E's replacement Interconnection Agreements with NCPA and Silicon Valley are conditionally accepted for filing, suspended for a five-month period, to become effective September 1, 2002, subject to refund, and subject to further Commission order, as discussed in the body of this order.

(B) The notices of termination filed in Docket Nos. ER01-2998-000 and ER02-358-000, respectively, are hereby conditionally accepted for filing, suspended for a five-month period, to become effective September 1, 2002, and subject to further Commission order, as discussed in the body of this order.

(C) Commission staff is directed to schedule a technical conference for the parties to negotiate the terms and implementation of the replacement Interconnection Agreements.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.

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