

99 FERC ¶ 63,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company,
Complainant,

v.

Docket No. EL00-95-045

Sellers of Energy and Ancillary Service Into
Markets Operated by the California
Independent System Operator Corporation
and the California Power Exchange,
Respondents.

Investigation of Practices of the California
Independent System Operator and the
California Power Exchange

Docket No. EL00-98-042

**ORDER CONCERNING DISCOVERY CONFERENCE RULINGS AND
REVISED TRIAL SCHEDULE**

(Issued May 23, 2002)

1. A discovery conference was convened on May 15 and 16, 2001 to address resolution of outstanding PX and ISO data requests, further streamlining of the discovery process, concerns related to the Commission's May 15, 2001 Order on Rehearing, 99 FERC ¶ 61,160 (2002) (May 15 Order) , and oral argument on motions to compel data from the ISO, including certain matter claimed by the ISO to be privileged. As required by 18 C.F.R. § 403(b), please be advised of the following:

2. Revision of Trial Schedule with regard to Corrected PX Evidence: As reproduced below, the trial schedule was revised principally to provide supplemental data which corrects Exhibit (Ex.). CPX-26 filed on May 6, 2002 to assure that the calculations concerning breakpoint adjustments conform to the Commission's May 15 Order clarification of item "Mitigated Market Clearing Prices as Cap During Refund Period", mimeo at 17-21; and to correct PX Ex. CPX-2, Summary of total charges by transaction type and refunds netted by CalPex Participant, and Ex. CPX-3, a compact disc, filed under seal on January 25, 2002. Under the revised trial schedule, the PX will file supplemental corrective compliance filing data by July 8, 2002, certain coding data will be provided in

discovery prior to July 8, 2002, and certain source data will be provided in discovery no earlier than the coding data. I ruled that the discovery process in these respects was not to interfere with the correction of PX data essential to a resolution of remaining issues 2 and 3 concerning "who owes what to whom".

3. The Commission's May 14, 2002 Order Denying the ISO's Motion to Phase the Hearing, 99 FERC ¶ 61,157 (2002), approved my recommendation to the Commission and denied the ISO's motion that the on-going hearing be phased and that the Presiding Judge's certification of Proposed Findings would address the three issues set for hearing, rather than address only the issue concerning the appropriate mmcp and, pending a final Commission order, defer adjudication of the other two issues set for hearing concerning actual refund liability in terms of who owes what to whom. The Commission concluded, as I had recommended, that denial of the ISO's motion and non-phasing of the adjudication benefitted customers by ensuring a more efficient and timely resolution of this proceeding.

4. Mislogging Issue and the Commission's May 15 Order: As discussed below, under the Commission's May 15 Order, item "Whether Out of Market Calls May Set the Mitigated Prices During the Refund Period", mimeo at 16-17, the Commission directed that I address a "mis-logging" issue which was adjudicated at the March hearing on mmcp issues under stipulated issue "I.D. What units are eligible to set the MMCP for each 10-minute interval in the refund period?, "f. OOM?", 98 FERC ¶ 63,026 (2002). The mislogging issues concerned whether certain Out of Sequence (OOS) non-congestion related transactions had been mischaracterized as OOM transactions. To put this issue in context, at the March hearing on mmcp issues, the Generators sponsored pre-filed rebuttal testimony by Mr. Trainen which, at the discovery conference they observed, "goes through the process of sort of data sleuthing to say here's how you can tell. . .and of course, Mr. Trainen was operating, you know, in a bit of a vacuum in terms of transaction data at that point, unfortunately, and in terms of internal ISO data." Tr. at 3147. The Trainen rebuttal testimony antedated discovery of several Project X documents that are now Exs. GEN 30, 31, 32, and 33. I also noted that the Project X documents were not part of the Generators' expert witnesses affirmative cases-in-chief, which included Mr. Trainen's pre-filed rebuttal testimony.¹ Tr.

¹ In this context, I further observed, "In part you mentioned in passing to me during the trial, well, we didn't do that because we kept asking the ISO questions, and we got back this and we got back that, and it took a lot of time, et. cetera. There was a compulsory process, and the judge was sitting there all the time, and you could have asked the judge for an order if you were unhappy with the discovery process that was ongoing and rolling. That didn't happen. You had certain rights and opportunities. And the evidence is [what] it is." Tr. at 3281.

at 3280. The several documents were used by the Generators at the mmcp hearing to cross-examine ISO witness, Dr. Hildebrandt. The documents identify "Project X" as an independent audit of the ISO that resulted in recommendations with regard to a comprehensive assessment of control room dispatch documentation for the period from November 1, 2000 through May 13, 2001. These exhibits and other evidence on mislogging or mischaracterization of transactions during the refund period were admitted in evidence, the record of the mmcp hearing was closed, and the participants had submitted initial and reply briefs in the form of Proposed Findings on this issue and other stipulated mmcp issues prior to the Commission's May 15 Order. Subsequent to the mmcp hearing, the Generators addressed the Project X documents in their Update Request for Clarification of the California Generators filed on May 8, 2002.

5. The May 15 Order clarified that OOM calls can not set the mitigated MCP. May 15 Order, mimeo at 17. The Commission further clarified that with regard to non-congestion related OOS dispatches,

"If the presiding judge finds information, through either an internal ISO audit or other disclosures, that out-of sequence non-congestion transactions were not logged according to the ISO's Tariff provisions, the ISO must recalculate each clearing price during the refund period where an out-of-sequence non-congestion transaction was "mis-logged" and use these corrected clearing prices in the refund hearing." May 15 Order, mimeo at 17.

6. Consistent with the Commission's May 14 Order to not phase the adjudication and its May 15 directions regarding the possible need to require the ISO to recalculate mmcps, at the discovery conference, with the consent of all participants, I indicated my preliminary, interim, and non-appealable interlocutory finding, that will be set forth fully in my certification of Proposed Findings at the conclusion of the adjudicatory hearing and briefing process on all of the issues set for hearing. Preliminarily, I noted that "It's most unusual in the course of an APA proceeding for the Judge to announce his findings on the merits before the conclusion of the proceeding. I would assume. . .based on my preliminary review of the record to date with regard to this issue, among others that we've already adjudicated, that any such suggestions would be purely interlocutory in nature and not subject to an appeal because they wouldn't be fully explanatory of my views as they would be set forth in my proposed findings." Tr. at 3152. With this understanding, to comport with the Commission's May 15 direction, I noted that "there was evidence that there was mischaracterization of transactions. One can't take that a step further based on what the generators have provided to determine. . .in the MMCP phase, what the significance of that mischaracterization was in relationship to the MMCP. . .certainly a case wasn't made with regard to the MMCP issues". Tr. at 3242. I further observed that "the extent of that

mischaracterization and how many transactions or the number of specific transactions that may not have been OOM and may have been something else, we don't know." Tr. at 3159. Subsequently, I reiterated that "in terms of what we adjudicated, that "the evidence, on its face, indicates that there was a mis-logging problem and it was significant in nature. The significance of that nature, however, was not demonstrated. So ... I wouldn't be requiring the ISO to do anything more than it's already done." Transcript (Tr.) at 3275 (Emphasis supplied). I further noted that "I wouldn't take that evidence and require the ISO, because of the mischaracterization, to do anything because I don't think the people who had the ultimate burden of persuasion made a case. Something was missing and it wasn't shown". Tr. at 3276. Further, "You made an effort. But it came up short. That's what Im trying to tell you at least two or three times this morning." Tr. at 3281.

7. I further ruled that with regard to the remaining issues to be adjudicated– the who owes what to whom issues– that "the question of mischaracterization goes to revenue and it's a relevant inquiry" for adjudication in the remaining phase of the adjudication. Tr. at 3276. Earlier, in this connection, I noted that:

"it's not inappropriate to pursue for purposes of revenue and settlement whether that known mischaracterization affects payment and refund liability. . .So, if something should be showing up as OOS on the ISO's box, OOS non-congestion, and it shows up on the ISO's settlement sheet as OOM, it may indeed will be that refunds may be due..." Tr. at 3160. I further noted that "And if its' properly characterized as OOM, as the Commission itself indicated, then it won't ... set the mitigated MCP during the refund period." Tr. at 3160, as corrected at Tr. 3342. See generally, Tr. 3130 to 3162, 3274-83, 3342.

8. Out of State Generators and the MCP: In light of the Commission's May 15 Order concerning item "Whether Out of State Generators May Set the Mitigated Prices During the Refund Period", I ruled that the trial schedule should be modified to require the filing of a status report by May 24, 2002, which proposes procedures for addressing this issue as concerns Arizona Electric Power Cooperative, Inc. (Arizona Power), including reopening of the record of the mmcp hearing to admit Arizona Power's evidence, and the like concerns of any other similarly situated parties. In this respect, I noted that the Commission's May 15 Order, clarified that "if out of state generators bid into the Imbalance Energy market during the refund period and they can provide the heat rate information to the ISO for the unit used to supply the power, that unit should be eligible to set the mitigated market clearing price during the refund period." May 15 Order, mimeo at 16. In connection with stipulated mmcp issue I.d.vii, "Should units outside the ISO control area be eligible to set the MMCP?", at the March hearing on mmcp issues I ruled that Arizona Power's proffer of evidence on this issue was precluded by the Commission's December 19 Order on

Clarification and Rehearing, 97 FERC ¶ 61,275 (2002), which permitted such bids prospectively but not during the refund period. Arizona Power's counsel conceded that he was not sure that the evidence it sought to proffer was permitted by the December 19 Order. Arizona Power Ex. AEP-12 and 13 were not admitted in evidence and it made an offer of proof. In light of the Commission's May 15 Order, it is appropriate to address the concerns of Arizona Power and any other similarly situated parties.

9. ISO discovery concerns: At the discovery conference there was considerable discussion and clarification with regard to ISO "source data" relating to its direct testimony on issues 2 and 3-the who owes what to whom issues- that was filed on March 1, 2002. Additionally, there was a wide ranging discussion of issues regarding outstanding discovery requests of the ISO. In the latter respect, agreement was reached on the provision of requested data to date, and I required streamlining of the discovery process to include the establishment of steering committees through which parties with common interests, including the generators and municipal entities, would group their discovery requests to the ISO. Discrete individual data requests are the exception to the rule and are permitted only if there are extraordinary circumstances.

10. PX discovery concerns: As noted under 2. above, the PX, which noted that Ex. CPX-26 which was part of its May 6 revised Sworn Reconciliation Statement Regarding Issues 2 and 3, was not in conformity with the Commission's subsequent May 15 Order, was required to file a corrected Ex. CPX-26. The PX also was required to correct its earlier filed Exs. CPX-2 and 3. Additionally, to facilitate resolution of outstanding discovery requests, the PX was required to convene an informal discovery conference on May 3, 2002 and, as noted, certain procedures were agreed to with regard to the provision of responses to coding data and source data to ensure that the PX's July 8, 2002 corrective filing was not hampered.

11. Motions to Compel: Dynegy filed a motion to compel the ISO to produce certain Project X data which the ISO claimed was subject to the attorney-client privilege and limited work-product immunity or privilege, and Trans-Alta Energy Marketing Inc. (TransAlta) filed a motion to compel the ISO to respond to requests for admissions. As concerns the privilege claims, the ISO provided an affidavit of Charles Robinson, its General Counsel, and a Privilege Log, as corrected at my direction. The ISO provided me with 6 documents under seal which I reviewed in camera prior to oral argument on the Dynegy motion. I granted in part and denied in part the Dynegy motion to compel production of ISO documents as follows: the redacted portions of ISO 1 were found to be privileged under the attorney-client privilege and, alternatively, as the matter reflected sensitive mental impressions of the attorney to his client, the ISO, also under the work-product privilege, Tr. at 3411-12, and were not required to be disclosed; the redacted

portions of ISO 2, part of which related to the same privileged matters as ISO, was found to be privileged under the attorney-client and work-product privileges for the same reasons as my ruling on ISO 1, Tr. at 3413-15, and were not required to be disclosed; the first redacted "bullet" of ISO 3 was privileged for the same reasons ruled previously and was not required to be disclosed, and the second and third redacted "bullets" were not shown to be privileged and required to be promptly disclosed, for the reasons set forth at Tr.3424-26; the first redacted bullet of ISO 4 was found to be privileged for the reasons set forth in earlier rulings and was not required to be disclosed, and the second and third redacted bullets were not shown to be privileged and were required to be disclosed for the reasons set forth at Tr. 3427-28; the redacted portion of ISO 5 was ruled as privileged for the same reasons set forth in earlier rulings, Tr. at 3436, and was not required to be disclosed; and the redacted portions of ISO 6 were found to be privileged for the reasons set forth at Tr. 3439 and were not required to be disclosed.

12. The TransAlta motion to compel was denied as the sought discovery was neither relevant nor reasonably calculated to lead to the production of evidence germane to disposition of the issues set for hearing. Tr. at 3453.

13. The trial schedule was revised as follows and does not alter the August 19-23 hearing that is scheduled to be convened in San Francisco, California:

- May 24, 2002: Status Report on Arizona Power issue as discussed under ¶ 7 above and consensus proposed deadline for filing of initial Joint Narrative Stipulation of Issues as soon as possible after July 8, 2002.
- June 6, 2002: Prehearing Conference at 10:00 A.M.
- July 8, 2002: PX corrected and revised Exs. PX 2, 3, and 26, supporting testimony of same, and narrative summaries, and participants simultaneous

responsive testimony on Issues 2 and 3, including APX evidence, and narrative summary of material points, including page and line references.

July 26, 2002: Simultaneous rebuttal testimony on Issues 2 and 3, including APX evidence and narrative summaries, and simultaneous supplemental testimony on July 8 PX testimony and issues, and narrative summaries

August 9, 2002: Simultaneous Reply Testimony on July 8 PX testimony and issues, and narrative summaries

August 12, 2002: Filing of Revised and Updated Joint Narrative Stipulation of Issues with courtesy copy to the Presiding Judge, and motions to strike, to be filed by 10:00A.M. and list of other rebuttal testimony that may be affected by ruling granting motions to strike

August 14, 2002: Oral Argument on motions to strike and on showing of cause to continue to apply the protective order at the hearing, 10:00 A.M., followed, if appropriate, by a Prehearing Conference to address procedural matters

August 19 to
August 23, 2002: Hearing² in San Francisco, 10:00 A.M. P.S.T., in a conference room of the Federal Building, second floor, 450 Golden Gate Avenue, San Francisco, California

14. E-mail and hard courtesy copies of all filings under this schedule shall be made concurrent with any filing.

Bruce L. Birchman
Presiding Administrative Law Judge

² As noted at the discovery conference, in the event that additional days of hearing are required to adjudicate issues 2 and 3, the who owes what to whom issues, the hearing will be continued and resumed in a hearing room at the Commission in Washington,.D.C. during the following week and as soon as is practical.