

98 FERC 61, 228
 UNITED STATES OF AMERICA
 FEDERAL ENERGY REGULATORY COMMISSION

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

NEO California Power LLC

Docket No. EL02-18-000

ORDER ON COMPLAINT

(Issued March 1, 2002)

On November 13, 2001, NEO California Power LLC (NEO California) filed a complaint requesting an order to compel and show cause, or in the alternative, an evidentiary hearing with fast track processing against the California Independent System Operator (Cal ISO), alleging that the Cal ISO has not paid for all the capacity purchased under Summer Reliability Agreements (SRAs) from NEO California's new generation facilities, not provided NEO California with a creditworthy buyer for capacity sales, and not assured NEO California that it would be paid for capacity sales.

Cal ISO filed an answer claiming that NEO California's complaint is moot now that Cal ISO has complied with the Commission's order in California Independent System Operator Corporation, 97 FERC 61,151 (2001) (November 7 Order), in which Cal ISO was directed to invoice DWR as a scheduling coordinator for outstanding payments. This order benefits customers by expediting the resolution of a dispute over payment to one of Cal ISO's energy suppliers, and thus preventing future difficulties for Cal ISO in obtaining adequate supplies.

Background

On August 23, 2000, the Commission initiated an
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 investigation, pursuant to section 206 of the Federal Power Act,
 to determine whether the rates for energy and ancillary services
 of public utility sellers in the Cal ISO and PX markets were just
 and reasonable, and whether the tariffs, contracts, institutional
 structures, and bylaws of the Cal ISO and California Power
 Exchange (PX) were adversely affecting the wholesale markets in

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 16 U.S.C. 824e (1994).

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California. The Commission recognized one of the foremost factors contributing to the California energy crisis was the

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shortage of generation and transmission facilities.

On August 24, 2000, the Cal ISO issued a Request for Bids (RFB) seeking proposals to provide 3,000 MW of new generation in the form of peaking capability to the Cal ISO Control Area during the summer months, which could be dispatched if necessary to support the reliability of the Cal ISO Control Area.

In response to the RFB, NEO California submitted a proposal to construct a 49 MW plant (Chowchilla II) and a 45 MW plant (Red Bluff). NEO California and Cal ISO executed SRAs on November 22 and 27, 2000, respectively, for each project. Under each SRA, Cal ISO is entitled to dispatch capacity from the projects for up to 500 hours each during the period of June 1 through October 31 for three years. In return, the Cal ISO agreed to pay NEO California a monthly payment, for each month during the summer period, based on the construction and operating costs of the Chowchilla II and Red Bluff projects.

On March 15, 2001, NEO California filed in Docket No. ER01-1558-000 a request for market-based rate authorization and a copy of the SRAs under which NEO California would sell capacity to the Cal ISO. The Commission's Director of the Division of Corporate Applications accepted, by delegated letter order, the SRAs and

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granted NEO California market-based rate authorization. NEO California began commercial operations of Chowchilla II and Red Bluff on June 13, 2001 and August 11, 2001, respectively.

On May 23, 2001, NEO California and Cal ISO executed a

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Participating Generating Agreement (PGA). NEO California states that it entered into a PGA in order to comply with the

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Commission's April 26 Order that established a price monitoring

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See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services Operated by the California Independent System Operator Corporation and the California Power Exchange, et al., 92 FERC 61,172 (2000).

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92 FERC at 61,605.

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NEO California Power LLC, Docket No. ER01-1558-000, unpublished letter order (April 27, 2001).

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On June 5, 2001, in Docket No. ER01-2226-000, Cal ISO filed a copy of NEO California's PGA.

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San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California

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and mitigation plan for California. Accordingly, the April 26 Order required all generators with PGAs to comply with the "must offer" requirement, i.e. offer available power in real time to Cal ISO.

On June 25, 2001, NEO California requested that the
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Commission clarify that the May 25 Order requires the Cal ISO to provide NEO California a creditworthy buyer or assurance of payment for capacity under the SRAs. On July 12, 2001, the Commission issued an order stating that it expects the Cal ISO to ensure a creditworthy buyer for all transactions with all generators who offer power in compliance with the must-offer

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requirement in the mitigation plan.

Complaint

NEO California states that as of October 31, 2001, it has provided Cal ISO with six invoices (four for Chinchilla II and two for Red Bluff) totaling more than \$4.8 million for guaranteed monthly payments under the SRAs. According to the complaint, as of October 24, 2001, Cal ISO has paid about \$1 million, or 20% of its bill, and has failed to provide NEO California with either a creditworthy buyer or assurance of payment. Therefore, NEO California requests that the Commission require immediate payment for invoiced amounts in compliance with the July 12 Order by providing NEO California with a creditworthy buyer or assurance of payment for future transactions, to show cause why it has not violated the Commission's July 12 and November 7 orders and its tariff, and to suspend NEO California's obligations under the SRAs until Cal ISO complies with the July 12 Order and Cal ISO's tariff. In the alternative, NEO California requests that the Commission establish an evidentiary hearing with fast track processing.

Notice and Interventions

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Independent System Operator and the California Power Exchange, et al., 95 FERC 61,115 (2001) (April 26 Order).

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San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, et al., 95 FERC 61,275 (2001) (May 25 Order).

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San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, et

al., 96 FERC 61,051 at 61,128 (2001) (July 12 Order).

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Notice of NEO California's complaint was published in the Federal Register, 66 Fed. Reg. 58,137 (2001), with interventions due on or before December 3, 2001. On December 3, 2001, Turlock Irrigation District; Cities of Redding & Santa Clara, California and the M-S-R Public Power Agency; RAMCO; and the California Public Utilities Commission filed interventions. Also on December 3, 2001, Cal ISO filed an answer to NEO California's complaint and the California Electricity Oversight Board (EOB) filed a motion to intervene and protest.

Cal ISO's answer states that NEO California's complaint has been mooted by Cal ISO's compliance with the November 7 Order, because it has invoiced DWR for amounts due. Further, Cal ISO contends that it has not violated the terms of its own tariff because it states that, in complying with the November 7 Order, it has done all that is within its power to ensure that entities (e.g. NEO California) receive the payments that are due to them. Cal ISO further argues that Article 9 of each SRA states that:

The ISO's obligation to make any payments required under this Article 9 is expressly conditioned on the ISO's recovery under the ISO Tariff of costs it incurs under this
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Agreement.[]

Cal ISO states that in its November 21, 2001 compliance filing, filed pursuant to the November 7 Order, it explains that it has invoiced DWR for all charges including SRA charges. Cal ISO states that although it has provided all the necessary invoices, it has not received payment. Further, Cal ISO states that it will make all applicable outstanding payments to entities such as NEO California once it receives those amounts.

EOB states that it does not protest NEO California's right to receive full payment, but that the Commission's November 7
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Order has rendered NEO California's complaint moot. EOB asserts that Cal ISO has invoiced California Energy Resources
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Scheduler (CERS) as a scheduling coordinator, but that Cal ISO has not been fully paid. Therefore, non-payment alone is not a violation of the terms of NEO California's SRAs and does not justify the requested relief. However, EOB argues, to the extent that the Commission can extend jurisdiction over CERS, the

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See Section 9.4 of the SRA between the ISO and NEO California concerning the Chowchilla II generating plant, included as Exhibit A to the NEO California complaint.

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California Independent System Operator Corporation, 97 FERC 61,151 (2001) (November 7 Order), reh'g pending.

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CERS is the marketing branch of DWR.

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complaint fails to include CERS as a necessary party and, as such, cannot afford full and effective relief.

With respect to creditworthiness, EOB contends that the "paid when paid" provision of the SRA demonstrates that Cal ISO did not assume an unqualified obligation to pay and the Commission has not independently created such an obligation. Moreover, EOB states, the SRAs predate the Commission's orders on creditworthiness. While Cal ISO has made good faith efforts to provide NEO California with a creditworthy backer, Cal ISO does not have the power, and the Commission has not required Cal ISO, to compel an independent party to guarantee pre-existing obligations.

Discussion

A. Procedural Issues

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.214 (2001), the timely, unopposed motions to intervene serve to make interveners parties to this proceeding.

B. Commission Decision

The November 7 Order directed Cal ISO to enforce the billing and settlement procedures in its tariff and reiterated Cal ISO's duty to enforce the tariff's creditworthiness provisions as

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discussed in previous orders on this issue. The Commission also directed Cal ISO to "invoice, collect payments from, and distribute payments to DWR as the scheduling coordinator for all scheduled and unscheduled transactions made on behalf of DWR, including transactions where DWR serves as the creditworthy counterparty for the applicable portion of PG&E's and SoCal

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Edison's load." In the November 7 Order, the Commission ordered Cal ISO to file a report with the Commission within 15 days of the date of the order, indicating overdue amounts from DWR and a schedule for payment of those overdue amounts within three months. In other words, DWR was required to pay all overdue amounts by February 7, 2002. We note, however, that Cal

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See California Independent System Operator Corporation, et al., 94 FERC 61,132 (2001) (February 14 Order); California Independent System Operator Corporation, et al., 95 FERC 61,026 (2001) (April 6 Order); San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, et al., 96 FERC 61,051 at 61,128 (2001) (July 12 Order).

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Id. at 61,159.

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ISO's answer in the instant proceeding is dated December 3, 2001.

Cal ISO must substantiate its claim that it has complied with the November 7 Order, and that NEO California's complaint is thus moot. Cal ISO must demonstrate that it has in fact submitted invoices to DWR, that DWR has remitted the overdue payments to Cal ISO, and that Cal ISO has in turn made payments

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to NEO California. Without such a showing, we cannot make a determination in this proceeding as to whether NEO California's complaint is moot. Therefore, we direct Cal ISO to substantiate its claim.

We disagree with EOB's argument that the parties signed the SRAs prior to any pronouncement on creditworthiness, and that therefore, Cal ISO does not have the power to compel creditworthiness for pre-existing obligations. Cal ISO's tariff has contained creditworthiness provisions since before the

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execution of the SRAs between NEO California and Cal ISO. The Commission's orders on creditworthiness simply require Cal ISO to enforce the creditworthiness provisions already existing in its tariff.

The Commission orders:

Cal ISO is hereby directed to submit to the Commission, within 15 days from the date of this order, a report demonstrating that the overdue payments have been remitted by DWR and other scheduling coordinators, and that Cal ISO has made the payments to NEO California.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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Cal ISO's compliance filing, pursuant to the November 7 Order, will be further addressed in a subsequent order in Docket Nos. ER01-3013-002 and ER01-889-010.

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California Independent System Operator Corporation, FERC Electric Tariff, First Replacement Volume No. 1, Original Sheet

No. 5, 2.2.3 et seq. (October 13, 2000).