

106 FERC ¶ 61,263
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

San Diego Gas & Electric Company Docket Nos. EL00-95-000, et al.

Investigation of Practices of the California EL00-98-000, et al.
Independent System Operator and the
California Power Exchange

ORDER DENYING MOTION FOR CESSATION OF REFUND DISTRIBUTION

(Issued March 22, 2004)

1. In this order, we deny the California Parties'¹ Motion for Immediate Cessation of Distribution of Refund Period Funds by the California Independent System Operator Corporation (CAISO). This order benefits customers by ensuring that ISO customers do not face further delays in receiving payments.

Background

2. On March 12, 2004, the California Parties filed a Motion for Immediate Cessation of Distribution of Refund Period Funds by CAISO (the Motion) until the calculation of amounts due and owing in Docket Nos. EL00-95-000, et al., and EL00-98-000, et al., (Refund Proceeding) is completed.

3. On February 24, 2004, CAISO issued a market notice stating that it planned to release over \$45 million in "defaulted receivables" to creditors for the month of November 2000. The notice stated that CAISO would wait fifteen business days before releasing the funds during the week of March 23, 2004. The funds derive from various dates, some of which are within the Refund Period in the Refund Proceeding. CAISO,

¹ The California Parties are the California Public Utilities, the People of the State of California ex rel. Bill Lockyer, Attorney General; the California Electricity Oversight Board; Pacific Gas and Electric Company (PG&E); and Southern California Edison Company (SoCalEd).

pursuant to the process established in Tariff Amendment No. 53, proposes to release the entire amount to creditors during the oldest month for which there are unpaid creditors, November 2000.

4. On March 4, 2004, the Commission issued an order in Docket No. ER03-942-002 (Rehearing Order) in which we denied a request for rehearing in which PG&E raised concerns with disbursements of funds to creditors during the Refund Period and asked the Commission to require CAISO to hold in escrow payments associated with this period.² The Commission found that this request was not appropriately raised in the Tariff Amendment No. 53 proceeding.³ However, we addressed the substance of the argument and found that PG&E had not sufficiently justified the deferral of payments to existing creditors. The Commission also found that receivables are distinguishable from collateral and funds being held by the California Power Exchange Corporation (PX) and that they should be timely disbursed absent some compelling reason for deferring payment.

5. The California Parties argue that there is no compelling reason to require that funds be disbursed to creditors given the substantial revisions to debtor and creditor balances in the CAISO and PX markets that will occur in the near future. In addition, they argue that the fact that certain major creditors in these markets are currently in bankruptcy is an even more compelling reason to cease the disbursement of funds. They contend that in the absence of a Commission-approved settlement of the amounts owed by a seller in the Refund Proceeding, a payment to a bankrupt entity may, depending on applicable bankruptcy law and the status of claims in the CAISO and PX markets, be returned only at cents on the dollar if it is later determined in the Refund Proceeding that the bankrupt entity owes funds. The California Parties argue that this creates a potential for irreparable harm if the funds are disbursed prior to the time the final CAISO and PX balances are known, offsets are made, and amounts are due and determined.

6. The California Parties also argue that disbursement at this time would send inaccurate amounts of money to recipients – in some cases to recipients who may owe funds once the refunds are completed. They assert that this would create additional and unnecessary re-adjustment and collection problems in the Refund Proceeding.

7. According to the California Parties, ceasing the distribution of funds would be consistent with CAISO's proposal to defer the disbursement of funds in Docket No. ER01-889-015 (relating to a reallocation of funds in January 2001) and with the

² California Independent System Operator Corporation, 106 FERC ¶ 61,201 (2004).

³ California Independent System Operator Corporation, 105 FERC ¶ 61,284, reh'g denied, 106 FERC ¶ 61,201 (2004).

Commission's orders stating that neither PX funds nor collateral relating to the Refund Period will be disbursed by the PX until the conclusion of the Refund Proceeding and related proceedings.⁴ They claim that in this instance, as in those cases, the alternative to holding funds would be to distribute funds for a period where the credit balances are based on rates that have been found to be unjust and unreasonable and that "it would be manifestly inconsistent with the interests of justice to permit payments to creditors whose current balances are known to be the result of rates that are not just and reasonable."⁵

8. The California Parties also argue that CAISO's proposed distribution of funds is conceptually inconsistent with the Commission's approach to cash flows for the Refund Period. They contend that Refund Period invoices should be calculated on a net basis to reflect the results of offsetting all amounts owed to each Market Participant for the Refund Period, "including both refunds owed and owing and *other amounts* owed or owing for the same period."⁶

Comments

9. The City of Los Angeles Department of Water and Power; Portland General Electric Company; the California Generators;⁷ Arizona Electric Power Cooperative, Inc.; IDACORP, Inc.; PPL Montana, LLC and PPL EnergyPlus, LLC; and Avista Energy, Inc., Coral Power, Portland General Electric Company, Puget Sound Energy, Inc., Sempra Energy Trading Corporation, TransAlta Energy Marketing (CA), Inc., and TransAlta Energy Marketing (US), Inc. (collectively, Protesters) filed timely answers in opposition to the California Parties' motion.

10. The California Parties filed an answer to the Protesters' answers. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the California Parties' answer and will, therefore, reject it.

⁴ Citing, *Pacific Gas and Electric Co.*, 95 FERC ¶ 61,020 at 61,045 (2001); *Constellation Power Source, Inc.*, 100 FERC ¶ 61,124, order on reh'g, 100 FERC ¶ 61,380 (2002); *Powerex Corp.*, 102 FERC ¶ 61,328, order denying reh'g 104 FERC ¶ 61,119 (2003); *PG&E Energy Trading-Power, L.P.*, 102 FERC ¶ 61,091 (2003).

⁵ Motion at 5.

⁶ Motion at 6 (emphasis in original).

⁷ The California Generators are subsidiaries of Dynegy, Mirant, Reliant, and Williams.

11. Protesters generally argue that the Motion merely restates requests made by PG&E and SoCalEd during the Amendment 53 proceeding and that CAISO should make the disbursements in accordance with its tariff. For instance, they state that both the California Parties in their Motion and PG&E and SoCalEd in the Amendment 53 proceeding argued that the Refund Proceeding is to be completed in the near future, that distributing the funds may send inaccurate amounts of money to the recipients and create unnecessary readjustment and collection problems, and that the Commission should prevent disbursement to non-creditworthy parties that may be unable to reimburse the CAISO when the final adjustments and inventories are prepared.

12. In addition, the Protesters contend that creditworthy suppliers should not be denied compensation because of a potential that disbursements would be paid to a small number of bankrupt suppliers who might not be able to repay CAISO if it is determined in the Refund Proceeding that they owe more in refunds than they are owed by the market. They argue that delaying payment to entities who are owed millions of dollars for sales made over three years ago would “compound the injustice and iniquity in requiring sellers to provide a commodity but then allowing buyers years to pay for it.”⁸ They also argue that any further delay in the distribution of these funds should be premised on a compelling demonstration of harm. Some Protesters state that, at most, the concern surrounding the disbursement of funds to bankrupt entities justifies imposing conditions on disbursement to only the bankrupt parties.

13. The California Generators also argue that CAISO’s ability to make disbursements is separate from the calculation of refunds in the Refund Proceeding. They state that the California Parties are essentially requesting that the Commission sanction an ISO violation of its Tariff in order to mandate the manner in which bankrupt entities are to be paid. The California Generators contend that if the Commission grants the Motion, the California Parties will have succeeded in having money owed to all parties withheld in order to elevate or securitize their claims against bankrupt entities, at the expense of the rest of the bankrupt entity’s unsecured creditors. In addition, they argue that while the Commission has the authority to order a bankrupt entity to pay refunds, it may not dictate the time and manner in which refunds are paid.

Discussion

14. The Commission denies the California Parties’ Motion to Cease Disbursement. The Commission addressed the California Parties’ arguments in the Rehearing Order. We stated that CAISO’s creditors should not have to face further delays in receiving payments, and defaulted receivables should be timely disbursed, unless some compelling

⁸ Answer of Portland General at 2.

reason for deferring disbursement is provided. We reaffirm that position in the instant proceeding and find no compelling reason to delay disbursement.

15. In the Rehearing Order, the Commission found that PG&E had not provided sufficient justification for withholding the disbursement of funds. The only further justification given by the California Parties to delay disbursement was that certain entities to receive funds, namely Mirant Corporation and Enron Power Marketing, Inc., are currently in bankruptcy. We stated that “the mere possibility of a market participant receiving payment for default receivables and later not being able to make payment for its refund obligation is not sufficient reason to require the deferral of payments.”⁹ PG&E had not provided sufficient information on this point. The California Parties have provided no further information and, therefore, have not provided a compelling reason to further delay disbursement of funds.

16. The Commission also rejected the contention that disbursement at this time would send “inaccurate amounts of money to recipients – in some cases to recipients who may even *owe* funds once the refund calculations are completed – thus creating additional and unnecessary re-adjustment and collection problems for the Refund Proceeding.”¹⁰ The California Parties simply repeated, almost verbatim, PG&E’s argument in its rehearing request¹¹ and have failed to demonstrate how any adjustments that would be necessary as a result of disbursement would be so complicated as to warrant a delay in paying creditors.¹²

17. The argument that delaying disbursement would be consistent with Commission orders regarding the PX and the ISO’s proposal in Docket No. ER01-889-015¹³ was discussed in the Rehearing Order.¹⁴ The Commission also addressed the California Parties’ contention that disbursements should be delayed until all amounts owed during

⁹ Rehearing Order at P 10.

¹⁰ Motion at 5 (emphasis in original).

¹¹ See PG&E’s Request for Rehearing in Docket No. ER03-942-001 at 2.

¹² See Rehearing Order at P 10.

¹³ The ISO proposed to delay the invoicing and disbursement of funds associated with the re-allocation of CERS payments for January 2001 until the ISO issues invoices for the settlement re-run process that CAISO is undertaking in connection with the Refund Proceeding. CAISO Compliance Filing in Docket No. ER01-998-015. The Commission has not yet acted on CAISO’s filing.

¹⁴ Rehearing Order at P 7, 10.

Docket Nos. EL00-95-000, et al., and EL00-98-000, et al.

- 6 -

this period, including amounts not involved in the Refund Proceeding, are offset. We reiterate that while the period of accrual of some of the defaulted receivables to be disbursed may coincide with the Refund Period in the Refund Proceeding, this does not mean that the funds to be disbursed are monies included in the Refund Proceeding and are distinguishable from collateral and funds held by the PX. We find no compelling reason to withhold disbursement of funds to ISO creditors simply because the period of accrual of these funds coincides with the period in the Refund Proceeding.

18. Moreover, we agree with the California Generators that the distribution of funds from the estate of a bankrupt entity is properly an issue for the Bankruptcy Court to decide.

The Commission orders:

The California Parties' Motion is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.