UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company, Complainant,	)	
v.	)	Docket No. EL00-95-012
Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange	)	
Investigation of Practices of the California Independent System Operator and the California Power Exchange	)	Docket No. EL00-98-000
California Independent System Operator Corporation	)	Docket No. RT01-85-000
Investigation of Wholesale Rates of Public Utility Sellers of Energy and Ancillary Services in the Western Systems Coordinating Council	)	Docket No. EL01-68-000

COMMENTS OF THE CALIFONIA INDEPENDENT SYSTEM OPERATOR CORPORATION
ON THE COMMISSION'S PROPOSED ESCROW ACCOUNT
FOR PAST UNPAID BILLS

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2000), the California Independent System Operator Corporation ("ISO") hereby provides its comments on the questions of whether the Commission should and could institute a surcharge as proposed in the April 26th Order in these dockets.

To begin with, the ISO wishes to express its dismay at the very suggestion that a surcharge be instituted to collect amounts nominally "owed" suppliers. The

beneficiaries of the proposed surcharge mechanism are the very entities that have precipitated the "apocalypse" in California's electric industry,[1] including pushing the two largest utilities in the State to the brink of bankruptcy and, in one case, beyond. To propose they be granted another mechanism to collect amounts incurred based on manifestly unjust and unreasonable prices is, quite frankly, inexplicable particularly as it will result in an assurance of recovery that is unprecedented. With California consumers already facing a summer of catastrophically high power prices and frequent rolling blackouts, and with those prices already taking a significant toll on the economy of the State if not the nation, the surcharge proposal is particularly prejudicial and untimely. Acting as a collection agent is certainly not a role that the ISO covets, and it strongly urges the Commission to discard the proposal.

I. THE SURCHARGE PROPOSED IS PREMISED ON AN ERRONEOUS PREMISE: THAT THE COMMISSION NOW IS IN A POSITION TO CONCLUDE THAT THERE ARE AMOUNTS DUE SUPPLIERS

The surcharge proposal is based on an inherently flawed premise: that the Commission can now state with confidence that payments are actually due suppliers participating in the California market. But the Commission has only begun to examine the justness and reasonableness of those charges and has yet to apply the correct standard namely, that once it should have been clear that the Generators were in a position to exercise market power, a reversion to cost-based rates was mandated.

There can be no dispute that beginning at least as early as May 2000, wholesale power prices charged in California's Energy and capacity markets were infected with the

[1] *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 93 FERC ¶ 61,249 (2000) at 62,030 (Massey, W., concurring) ("December 15 Order").

exercise of market power. The studies by Dr. Eric Hildebrandt[2] and by Dr. Anjali Sheffrin,[3] of the ISO's Department of Market Analysis ("DMA") conclusively demonstrate this fact. In the face of those analyses, indeed in the face of the Commission's own findings that market power has been exercised,[4] the surcharge proposal is at best perplexing if not a complete emasculation of the consumer protection responsibility which is the heart and soul of the Commission's obligation under the Federal Power Act. Assuming, therefore, that a surcharge along the lines proposed ever lawfully could be imposed, its invocation here is entirely premature. Even under the Commission's inadequate refund methodology, it is not yet possible to know whether any amounts remain due Generators. The refund analysis issue is far from complete. But there is an even more fundamental point: the Commission cannot lawfully adopt the surcharge proposal, the dispositive issue to which we now turn.

II. EVEN ASSUMING ARGUENDO THAT THERE ARE AMOUNTS DUE SUPPLIERS, THE COMMISSION CANNOT NOW CONCLUDE THAT ABSENT A SURCHARGE SUPPLIERS WILL NOT BE PAID AND, EVEN IF THAT WERE THE CASE, THE SURCHARGE PROPOSAL COULD NOT LAWFULLY BE IMPOSED

A. Fundamental to the proposal is the assumption that the Commission has the legal competence, indeed the obligation, to assure recovery of wholesale power charges. That is absolutely wrong. The Commission's responsibility ends with the

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[2] *Further Analyses of the Exercise and Cost Impacts of Market Power in California's Wholesale Energy Market*, filed in Docket No. EL00-95-012 (March 2001).

[3] *Empirical Evidence of Strategic Bidding in California ISO Real-Time Market*, filed in Docket No. EL00-95-012 (March 21, 2001).

[4] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 93 FERC ¶ 61,121 at 61,350 (2000) (noting that "there is clear evidence that the California market structure and rules provide the opportunity for sellers to exercise market power when supply is tight and can result in unjust and unreasonable rates under the FPA").

establishment of just and reasonable prices.[5] Whether and how those charges get paid is the province of others, traditionally state courts in contract or collection actions.[6] There may be any number of contract reasons why part or all of Commission-approved charges need not be paid. Historically, therefore, the Commission has been appropriately hesitant to inject itself into this well-established judicial process.[7]

For the Commission to reverse course here would be particularly inappropriate – raising, unnecessarily, novel legal issues. Pacific Gas & Electric Company ("PG&E") is, of course, the subject of a Chapter 11 Bankruptcy Proceeding. All pre-petition (pre-April 6th) obligations are subject to the automatic stay provision of 11 U.S.C. § 362(a)(3). No party may, consistent with that stay, be placed in a preferential position with respect to pre-petition obligations outside of a plan of reorganization approved by the Bankruptcy Court. The surcharge proposal would be a direct assault on the established Chapter 11 process and undoubtedly would precipitate complex, protracted litigation – adding yet another obstacle to a timely, successful reorganization of PG&E.

B. The bankruptcy proceeding itself underscores another critical point. Presumably the Commission has advanced its surcharge proposal in the belief that absent unprecedented action on its part, suppliers will remain unpaid. But PG&E itself

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[5] *See, e.g., Jupiter Energy Corporation*, 41 FERC ¶ 63,008, at 65,019 (1987) ("[B]asic to ratemaking principles is the doctrine that the Commission is not required to guarantee cost recovery; rather it must provide a reasonable opportunity . . . to recover costs prudently incurred.").

[6] *See South Carolina Public Service Authority,* et al. v. *South Carolina Electric & Gas Co.*, 46 FERC ¶ 61,141 (1989) (declining to exercise jurisdiction over a claim by a utility for late payments and interest, characterizing it as "essentially a billing dispute between the [utility and its customers]");

[7] *See Arkansas-Louisiana Gas Company v. Hall*, et al., 7 FERC ¶ 61,175 (1979) (concluding that the Commission should limit its review of "contractual issues otherwise litigable in state courts" to those situations in which the Commission has some special expertise, there is a need for "uniformity of interpretation," and the case is "important in relation to the regulatory responsibilities of the Commission").

has expressed the view that through reorganization, it will satisfy all of its lawful obligations,[8] and the State of California is taking unprecedented steps to restore the economic vitality of Southern California Edison Company.[9]

The Commission is in no position now to conclude that a surcharge even is needed.

C. Finally, there are serious questions – questions that also will precipitate years of litigation if the surcharge proposal is adopted – as to the Commission's legal competence to act in this fashion. First, there is a non-frivolous question of retroactive ratemaking. While we recognize that the surcharge would only recover amounts "lawfully" charged in the past, a new assurance of recovery procedure, not previously part of the ISO Tariff and not previously part of the bargain struck with suppliers, will have been put in place – with retroactive effect. We seriously doubt the legality of altering the balance retroactively.

Second, unquestionably the balance will have been altered, providing suppliers with a collection mechanism not previously available. Assuming arguendo that collection issues properly are the subject of Commission action, an alteration of the ISO Tariff would be required which can only be implemented following invocation and completion of the procedures of Federal Power Act § 206. In that proceeding, parties would be free to show that the existing balance, without an absolute assurance of recovery, is consistent with the public interest.

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[8] *See, e.g.,* Energy Daily, April 9, 2001

[9] Several days after PG&E filed for bankruptcy, Edison signed a Memorandum of Understanding with the State of California, in which Edison agreed to sell some 12,000 miles of its high-voltage

III. CONCLUSION

For the foregoing reasons, the surcharge proposal – a proposal of questionable legality and propriety – must not be adopted.

Respectfully submitted,

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Dated: May 25, 2001

transmission lines to the State for $2.76 billion. This would allow Edison to begin paying off its outstanding power costs. *See, e.g.,* Fosters Natural Gas Report, April 12, 2001.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 25th day of May, 2001.

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Michael Kunselman

May 25, 2001

The Honorable David P. Boergers
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: San Diego Gas & Electric Co. v.
Sellers of Energy and Ancillary Services, *et al*.
Docket Nos. EL00-95-012, et al.

Dear Secretary Boergers:

Enclosed are an original and fourteen copies of the Comments of the California Independent System Operator Corporation on the Commission's Proposed Escrow Account for Past Unpaid Bills. Also enclosed are two extra copies of the filing to be stamped with the date and time and returned to the messenger. Thank you for your assistance.

Respectfully submitted,

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Enclosures

cc: Service List