

3. Further, because the CAISO's filing represented a rate decrease, the Commission found that should it be determined that CAISO's proposed GMC rates are unjust and unreasonable, and that lower GMC rates would be just and reasonable, the Commission would institute an investigation of the CAISO's proposed GMC rates pursuant to Section 206 of the Federal Power Act. Accordingly, the Commission instituted a proceeding in Docket No. EL04-47-000, and it established a refund effective date, and consolidated the Section 206 proceeding with Docket No. ER04-115-000 for hearing and decision.

PG&E's Filing

4. On November 28, 2003, PG&E filed in Docket No. ER04-242-000, its revised Pass-Through Tariff. Pursuant to its Pass-Through Tariff, PG&E recovers the GMC from entities for which PG&E acts as scheduling coordinator. In the instant proceeding, PG&E seeks to recover the GMC-related costs that the CAISO proposes to allocate to PG&E² with respect to scheduling coordinator service that PG&E provides to wholesale customers under existing Control Area Agreements. PG&E states that the revised Pass-Through Tariff is forecasted to result in a rate decrease of approximately 9 percent. PG&E requests an effective date of January 1, 2004 or the date upon which the Commission makes the CAISO's GMC filing effective. PG&E states that the instant filing will align its Pass-Through Tariff with the CAISO's proposed GMC filing of October 31, 2003. PG&E also proposed certain revisions to the Pass-Through Tariff that, it states, are required in accordance with the Commission's finding in Opinion No. 463.³

5. PG&E proposes to continue to pass-through the GMC and to modify the Pass-Through Tariff to make that tariff consistent with the CAISO's proposal. Consistent with the CAISO's proposal in Docket No. ER04-115-000, PG&E proposes to develop a demand-related unit charge for Core Reliability Services and charge customers for this service based on a customer's monthly non-coincident peak as a billing determinant.

6. PG&E's five customers are the Bay Area Rapid Transit District, Modesto Irrigation District, San Francisco, Turlock Irrigation District and Western Area Power Administration. Control Area Agreements with Northern California Power Agency, Silicon Valley Power, and Sacramento Municipal Utility District are no longer in effect.⁴

² The ISO filed revisions to its GMC with the Commission on October 31, 2003 in FERC Docket No. ER04-115-000.

³ 103 FERC ¶ 61,114 (2003).

⁴ FERC Electric Tariff, Original Sheet No. 17.

Notice and Interventions

7. Notice of PG&E's Pass-Through Tariff revisions was published in the Federal Register, 68 Fed. Reg. 69,677 (2003), with motions to intervene and protests due on or before December 19, 2003. The following parties filed timely motions to intervene raising no substantive issues: The San Francisco Bay Area Rapid Transit District, the Transmission Agency of Northern California, the Cities of Redding and Santa Clara, California, and the M-S-R Public Power Agency.

8. The following parties filed timely interventions and protests: the Western Area Power Administration (WAPA), Turlock Irrigation District (Turlock), Modesto Irrigation District, and the City and County of San Francisco.

9. The California Department of Water Resources State Water Project (SWP) and Northern California Power Agency (NCPA) filed motions to intervene out of time. SWP explained that it would have filed a timely intervention but PGE did not serve it with a copy of the instant filing. NCPA states that it failed to file a timely intervention because the filing was made during the holiday season when key personnel were on vacation. SWP and NCPA assert their late intervention herein will not prejudice any party.

10. On January 7, 2004, PG&E filed a request for leave to answer and an answer to the protests.

Protests

11. The City and County of San Francisco protest the proposed revised rate structure and demand-related cost allocation methodology and request suspension and consolidation with CAISO's rate change in Docket No. ER04-115-000. The Modesto Irrigation District objects to the pass-through of costs as not authorized by any contractual provision between it and PG&E, asserts that the proposal is a new rate, rather than simply a change in PG&E's existing pass-through tariff, and requests that this proceeding be consolidated with the CAISO's proposed rate revisions in Docket No. ER04-115-000. Turlock requests that the Pass-Through Tariff be rejected because the tariff fails to meet the requirement as a filed rate under the filed rate doctrine. Turlock states that it cannot determine the charge from the tariff PG&E has submitted. Alternatively, Turlock requests that the filing be suspended for five months and set for hearing. Turlock also protests the proposed dispute resolution provision in PG&E's filing as unjust and unreasonable. WAPA protests the filing and asserts that PG&E's proposed pass-through methodology is unjust and unreasonable and may result in double billing to WAPA.

Procedural Matters

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. ' 385.214 (2003), the timely, unopposed motions to intervene referenced above serve to make those submitting them parties to this proceeding. In addition, we will grant

the late motions to intervene given the entities' interest in this proceeding, the early stage of the proceeding, and the absence of any undue prejudice or delay.

13. 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 a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept PG&E's answer and will, therefore, reject it.

Preliminary Matters

14. 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 certain actions against the debtor,⁵ 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 police or regulatory power.⁶

15. 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

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

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

exception, and, therefore, are exempt from the automatic stay provision.⁷ Here, we are exercising our regulatory power under Section 205 of the Federal Power Act.

Discussion

16. WAPA asserts that its contract with PG&E requires mutual consent for any change and since it has not consented to this rate change, the filing should be rejected. We find that, consistent with our findings in Opinion No. 463, PG&E's proposed Pass-Through Tariff is a new tariff for a new service. Therefore, WAPA's request for rejection is denied.

17. Our preliminary analysis indicates that the revised Pass-Through Tariff has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will accept it for filing, suspend it for a nominal period, and make it effective January 1, 2004, subject to refund, and set it for hearing as ordered below.

18. Furthermore, because a further rate decrease below the proposed rate decrease may be appropriate, we will institute a Section 206 investigation in Docket No. EL04-50-000 with respect to the justness and reasonableness of PG&E's proposed rate decrease. In cases where, as here, the Commission institutes a Section 206 investigation on its own motion, Section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the Commission's investigation in the Federal Register, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent, we will establish a refund effective date in Docket No. EL04-50-000 at the earliest date allowed. This date will be 60 days from the date on which the notice of our initiation of the investigation is published in the Federal Register.

19. Section 206 also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon the initiation

⁷See *Virginia Electric and Power Co.*, 84 FERC ¶ 61,254 (1998) and *Century Power Corp.*, 56 FERC ¶ 61,087 (1991). The Commission's 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 Environmental Resources*, 733 F.2d 267 (3rd Cir. 1984); see generally 3 *Collier on Bankruptcy* § 362.05 (15th ed. rev. 2000).

of a proceeding pursuant to Section 206, whichever is earlier, the Commission shall state the reasons why it failed to do so and shall state its best estimate of when it reasonably expects to make such a decision. To implement that requirement, we will direct the presiding judge to provide a report to the Commission no later than 15 days in advance of the refund effective date in Docket No. EL04-50-000 in the event the presiding judge has not, by that date: (1) certified to the Commission a settlement which, if accepted, would dispose of the proceeding; or (2) issued an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification of a settlement or issuance of an initial decision. Given the common issues of fact and law, we will consolidate Docket Nos. ER04-242-000 and EL04-50-000 for purposes of hearing and decision.

20. Finally, because there are common issues of law and fact, we will consolidate California Independent System Operator Corporation's Docket Nos. ER04-115-000 and EL04-47-000 and Pacific Gas & Electric Company's Docket Nos. ER04-242-000 and EL04-50-000 for purposes of hearing and decision.

The Commission orders:

(A) PG&E's revised tariff is hereby accepted for filing and suspended for a nominal period, to become effective on January 1, 2004, subject to refund.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. ER04-242-000 concerning the justness and reasonableness of PG&E's revised tariff.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402 of the Department of Energy Organization Act and by the Federal Power Act, particularly Section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL04-50-000 concerning the justness and reasonableness of PG&E's revised tariff.

(D) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within approximately 15 days of the date of issuance of this order, in a hearing

room of the Federal Energy Regulatory Commission, 888 First Street NE, Washington D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding administrative law judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(E) The Secretary shall promptly publish a notice of the Commission's initiation of the investigation under Section 206 of the Federal Power Act in Docket No. EL04-50-000 in the Federal Register.

(F) The refund effective date in Docket No. EL04-50-000, established pursuant to Section 206(b) of the Federal Power Act, will be 60 days following publication in the Federal Register of the notice discussed in Ordering Paragraph (E) above.

(G) Docket Nos. ER04-115-000 and EL04-47-000 and ER04-242-000 and EL04-50-000 are hereby consolidated for purposes of hearing and decision.

(H) The presiding administrative law judge shall advise the Commission, no later than 15 days prior to the refund effective date established in Docket No. EL04-50-000, in the event that the presiding judge has not by that date certified to the Commission a settlement, which, if accepted, would dispose of the proceeding, or issued an initial decision, as to the status of the proceeding and a best estimate when the proceeding will be disposed of by the presiding judge.

By the Commission. Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company

Docket Nos. ER04-242-000
EL04-50-000

California Independent System Operator
Corporation

Docket Nos. ER04-115-000
EL04-47-000

(Issued January 23, 2004)

Joseph T. KELLIHER, Commissioner *dissenting*:

1. I dissent from the Commission's finding in this order that, consistent with an earlier Commission order (Opinion No. 463),⁸ PG&E's proposed revised Grid Management Charge Pass-Through Tariff is a new tariff for a new service. In Opinion No. 463, the Commission found that PG&E designed its proposed tariff revision to pass through costs to its wholesale transmission contract customers, known as Control Area Agreement (CAA) customers, for "distinct services that are performed by the ISO in its role as control area operator, for which it is billing PG&E."⁹

2. In my view, the transmission service that these customers receive is not a new service warranting the imposition of costs that would otherwise be unrecoverable under the existing transmission contracts. At hearing, the Commission's Trial Staff concluded that there is no new service justifying pass through of the Grid Management Charge to CAA Customers because no new benefit is conferred under the Pass-Through Tariff and the CAA Customers do not receive anything above and beyond the service PG&E used to provide.¹⁰ According to Trial Staff, "[A]ll that has changed is the manner in which service

⁸ See California Independent System Operator Corporation et al., 103 FERC ¶61,114 (2003) (Opinion No. 463).

⁹ Id. at P. 51.

¹⁰ California Independent System Operator Corporation et al., 99 FERC ¶ 63,020 at 65,161 (2002).

is procured for the same CAA Customers. PG&E is procuring service from a new control area operator (the ISO) instead of providing the service itself as a control area operator.”¹¹ I agree.

3. Throughout the development of independent system operators and regional transmission organizations, the Commission has had a policy of honoring existing transmission contracts. This is true even though the Commission has the authority to reform contracts when it finds that doing so is in the public interest.

4. The Commission also has had a competing policy goal, namely preventing “tapped costs” at independent system operators and regional transmission organizations. I agree that we should try to minimize or avoid “trapped costs.” However, I simply do not think the new service rationale is a sound basis for doing so in this circumstance. Accordingly, I would reject PG&E’s revised Grid Management Charge Pass-Through Tariff.

Joseph T. Kelliher

¹¹ Id. at 65,165.