

102 FERC ¶ 61, 274
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Cities of Anaheim, Azusa, Banning,
Colton and Riverside, California

Docket No. EL00-111-002

v.

California Independent System
Operator Corporation

Salt River Project Agricultural
Improvement and Power District

Docket No. EL01-84-000

v.

California Independent System
Operator Corporation

California Independent System
Operator Corporation

Docket No. ER01-607-001

ORDER DENYING REHEARING, DENYING COMPLAINT IN PART, AND
REJECTING OFFER OF SETTLEMENT AND SETTLEMENT AGREEMENT

(Issued March 12, 2003)

1. This order rejects a contested offer of settlement and settlement agreement that was intended to resolve the issues raised in two complaints against the California Independent System Operator Corporation (ISO) regarding the ISO's neutrality adjustment charges and the allocation of out-of-market (OOM) dispatch calls. The Commission concludes that the terms of the settlement are not reasonable and that, in fact, the proposed settlement is contrary to prior Commission findings in the complaint proceeding where rehearing was sought and denied. Further, the settlement would effectuate an impermissible retroactive rate adjustment on the non-settling parties, a violation of the filed rate doctrine.

Docket No. EL00-111-002, et al.

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2. The order also denies requests for rehearing of a previous order in this proceeding, denies in part the complaint filed in Docket No. EL01-84-000, and clarifies the scope of the ISO's neutrality adjustment charges.

BACKGROUND

Docket No. EL00-111-000

3. On March 14, 2001, in Docket No. EL00-111-000, the Commission issued an order dismissing as moot in part and granting in part a complaint filed by the Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California (collectively, Southern Cities) against the ISO.¹ On May 14, 2001, the Commission issued an order granting rehearing in part and denying rehearing in part.² Subsequently, the ISO, Southern Cities and the City of Vernon, California (Vernon) sought further rehearing.

4. The complaint arose out of the ISO's treatment of certain charges resulting from energy imbalances. In order to meet real-time energy needs, the ISO administers an imbalance energy market. If this market produces insufficient resources, the ISO must purchase the necessary energy through out-of-market (OOM) dispatch calls. At the time Southern Cities filed its complaint, costs for such dispatch calls were billed to all Scheduling Coordinators in proportion to their metered demand.³

5. In its complaint, Southern Cities alleged that: (1) the ISO's collection of OOM dispatch costs from all Scheduling Coordinators was unjust and unreasonable; and (2) the ISO had violated certain provisions of its Tariff by recovering such costs through

¹Cities of Anaheim, et al. v. California Independent System Operator Corp., 94 FERC ¶ 61,268 (2001) (March 14 Order).

²Cities of Anaheim, et al. v. California Independent System Operator Corp., 95 FERC ¶ 61,197 (2001) (May 14 Order).

³The allocation of ISO dispatch costs (section 11.2.4.2.1 of the ISO Tariff) was previously accepted by the Commission as part of ISO Tariff Amendment No. 23. See California Independent System Operator Corp., 90 FERC ¶ 61,006 at 61,015, reh'g denied, 91 FERC ¶ 61,026 (2000).

neutrality adjustment charges⁴ in excess of a limit established in a prior proceeding.⁵ The March 14 Order dismissed as moot in part Southern Cities' first allegation because an ISO Tariff Amendment, approved on December 8, 2000,⁶ had revised OOM cost allocation consistent with the position of Southern Cities. The December 8 Order accepted a Tariff revision (Amendment No. 33), effective December 12, 2000,⁷ that allocated OOM costs to demand only to the extent that it appears unscheduled in real time (*i.e.*, to those Scheduling Coordinators who create the need for OOM dispatch calls).

6. With respect to Southern Cities' second allegation, the March 14 Order granted that portion of the complaint and found that the ISO had violated its Tariff's stated neutrality adjustment charge limit for OOM charges assessed to the City of Riverside (Riverside) during the period of June 1, 2000 to September 15, 2000. Consequently, the March 14 Order, among other things, directed the ISO to: (1) recalculate the neutrality adjustment charges assessed to Riverside for the relevant period, using the Tariff's stated \$0.095/MWh limit applied on an hourly basis; and (2) prospectively abide by any such applicable limit (pending Commission-approved modification thereof).

7. The ISO, Southern Cities and Vernon requested rehearing of the March 14 Order. The ISO asserted that the March 14 Order erred in determining that the neutrality adjustment charge limit should be applied on an hourly rather than an annual basis. In support of its assertion, the ISO largely reiterated certain arguments it made in its answer to the complaint, *e.g.*, that the ISO is a revenue-neutral entity which should not be required to absorb any costs for maintaining system reliability, and that the omission of the word "annual" from the Tariff language was only an administrative error. The ISO

⁴The neutrality adjustment charge (ISO Tariff section 11.2.9) was previously accepted by the Commission as part of ISO Tariff Amendment No. 6. See California Independent System Operator Corp., 82 FERC ¶ 61,327 (1998).

⁵ISO Tariff section 11.2.9.1, which limits neutrality adjustment charges levied under section 11.2.9 to \$0.095/MWh, was accepted by the Commission as part of ISO Tariff Amendment No. 27, effective June 1, 2000. See California Independent System Operator Corp., 91 FERC ¶ 61,205 (2000), reh'g pending.

⁶California Independent System Operator Corp., 93 FERC ¶ 61,239 (2000), order on reh'g, 97 FERC ¶ 61,275 (2001) (December 8 Order).

⁷There was some confusion regarding whether the revision was effective as of December 10 or December 12, 2000, as discussed later in this order.

also introduced a new argument, that the clerical error constituted "scrivener's error," which the Supreme Court recognizes should be overlooked. Further, the ISO argued that the Commission itself recognized that the neutrality adjustment charge limit was intended for application on an annual basis, and that the Commission should find that the neutrality adjustment charge limit is properly applied on an annual rather than an hourly basis.

8. Southern Cities and Vernon each requested rehearing of two aspects of the March 14 Order. First, Southern Cities and Vernon contended that the March 14 Order erred in dismissing as moot the complaint's allegation regarding OOM cost allocation, arguing that, had the March 14 Order established a refund effective date in response to the complaint, that date would have been November 14, 2000, approximately one month prior to the effective date of the Amendment No. 33 revised allocation methodology accepted in the December 8 Order. Consequently, they argued, this aspect of the complaint could not be found moot for the period of November 14, 2000 through December 10, 2000. They therefore requested that the Commission find the previous allocation methodology to be unjust and unreasonable during that period, and direct the ISO to issue any necessary refunds.

9. Second, Southern Cities and Vernon contended that the March 14 Order improperly limited the ISO's neutrality adjustment charge recalculation. According to Southern Cities and Vernon, the relief requested in the complaint was framed in general terms and was not intended to be limited only to Riverside. They contended that entities other than Riverside were also assessed neutrality adjustment charges in excess of the stated limit during the period of June 1, 2000 through September 15, 2000.

First Rehearing Order

10. In the May 14 Order, the Commission agreed with Southern Cities and Vernon that the issue of the ISO's previous allocation methodology could not be found moot for the period of November 14, 2000 through December 10, 2000. Nevertheless, the Commission denied this aspect of the rehearing requests because neither Southern Cities nor Vernon had provided adequate support for their positions, i.e., that the previous cost allocation was unjust and unreasonable. The order found that, although Southern Cities and Vernon asserted that they were assessed excessive OOM dispatch costs during the relevant period, neither party had provided the Commission with any supporting cogent evidence. The order noted that the parties acknowledged that their calculations were inaccurate because the applicable neutrality adjustment charges included non-quantified

"various other types of costs" in addition to OOM dispatch costs.⁸ Thus, the May 14 Order found that the previous allocation methodology had not been shown to be unjust and unreasonable and rejected Southern Cities' and Vernon's requests for relief during the period November 14, 2000 to December 10, 2000.

11. The May 14 Order rejected the arguments raised by the ISO, finding that regardless of what the ISO intended the tariff language to be, the filed rate doctrine mandated that the ISO charge its customers the actual rate specified in its tariff. Thus, the ISO's alleged administrative error was not an excuse for limiting the neutrality adjustment charge on an annual as opposed to on an hourly basis, and charging greater than \$.095/MWh during the period June 1, 2000 through September 15, 2000.⁹

12. The Commission agreed with Southern Cities' and Vernon's assertions that the relief ordered for Riverside should be applicable to any Scheduling Coordinator that was overcharged and broadened the directive in the March 14 Order for the ISO to recalculate the neutrality adjustment charges assessed to all Scheduling Coordinators for the period of June 1, 2000 to September 15, 2000.¹⁰

Further Requests for Rehearing

13. On June 6, 2001, Southern Cities filed a request for rehearing of the May 14 Order. On June 13, 2001, Vernon and ISO filed requests for rehearing of the May 14 Order.

14. Southern Cities and Vernon raise the same issues and arguments on rehearing, contending that the May 14 Order ignored substantial, uncontroverted evidence presented in the complaint, and erroneously concluded that there was an inadequate showing that the ISO's cost allocation method was unjust and unreasonable. The parties

⁸Southern Cities at 5, n.4.

⁹In another order issued on March 14, 2001, the Commission allowed the ISO to correct its error by accepting for filing a revised neutrality adjustment charge that incorporates an annual rather than a hourly limitation effective as of February 27, 2001. See California Independent System Operator Corporation, 94 FERC ¶ 61,266, reh'g denied, 95 FERC ¶ 61,195 (2001).

¹⁰The order also rejected Southern Cities' and Vernon's assertions that the ISO had exceeded the \$.35/MWh limit in place as of September 15, 2000, as beyond the scope of the proceeding.

refer to facts presented in Southern Cities' complaint, a motion for summary disposition filed on October 13, 2000, as well as Southern Cities' rehearing of the March 14 Order as "more than sufficient quantification" to support their position.¹¹ The parties cite Nantahala Power and Light Co., 20 FERC ¶ 61,430 (1982), as precedent for the premise that the Commission must consider all the evidence presented to it and make its decision based on the "totality of the evidence."¹²

15. The ISO clarifies in its rehearing request that OOM dispatch costs, as well as certain other costs, are not explicitly a part of the neutrality adjustment charge; rather, these costs have previously been included in the ISO's invoices under the heading "neutrality charges" only as a matter of administrative convenience. The ISO acknowledges that the Commission relied on its prior pleadings in this proceeding, in which the ISO referred to all costs allocated to Scheduling Coordinators on the basis of metered demand as "neutrality costs," even though those costs are in fact levied under different provisions of the ISO Tariff (e.g., section 11.2.9 for the true neutrality adjustment charge costs and section 11.2.4.2.1 for OOM dispatch costs).

16. For these reasons, the ISO asserts that, if the Commission affirms its requirement that the stated limit under section 11.2.9.1 be applied on an hourly rather than an annual basis, then the Commission must also recognize the distinction between costs recoverable under section 11.2.9 B which, the ISO asserts, are the only costs subject to the stated limit B and costs recoverable under other Tariff provisions that are allocated to Scheduling Coordinators in a similar manner but are not subject to that limit. The ISO proposes to review its charges to Scheduling Coordinators during the relevant period to determine whether charges properly levied under section 11.2.9 exceeded the stated hourly limit. Upon so doing, it proposes to record any amount in excess of the stated hourly limit in a memorandum account, for inclusion in the amounts to be recovered in the next succeeding hour or hours in which the amounts collected were less than \$0.095/MWh.¹³

¹¹Vernon at 7.

¹²Southern Cities at 11; see also Vernon at 7.

¹³The ISO believes such a recovery mechanism is proper insofar as the March 14 Order allowed the ISO "to reallocate any credited charges to the remaining Scheduling Coordinators in proportion to their metered demands (with the proviso that such reallocated charges may not exceed on an individual basis the limit stated in section 11.2.9.1 of the ISO Tariff)." The March 14 Order, however, did not direct a specific methodology for reallocating the excessive neutrality adjustment charges; thus, the ISO

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After ensuring that the properly-recovered neutrality adjustment charges are limited to \$0.095/MWh during every hour of the relevant period, in the event that an amount remains to be refunded to certain Scheduling Coordinators, the ISO will seek to obtain that amount from those Scheduling Coordinators who received the revenue that the ISO recovered through the neutrality adjustment charges.¹⁴

Docket No. EL01-84-000

17. On June 1, 2001, the Salt River Project Agricultural Improvement and Power District (SRP) filed a complaint against the ISO in Docket No. EL01-84-000 challenging several aspects of the ISO's neutrality adjustment charges. First, SRP requests refunds for the period December 10 to 11, 2000, alleging that the Commission authorized an effective date of December 10, 2000 for the modified OOM cost allocation method, rather than December 12, 2000. Thus, SRP contends that the ISO implemented the new allocation method two days late and that refunds are owed. Second, SRP argues that the ISO violated the neutrality adjustment charge limit throughout the time period January 1, 2000 through December 31, 2000, and seeks refunds of all charges assessed in excess of the \$0.095/MWh limit applied on an hourly basis, with interest. SRP further contends that the ISO improperly raised the limit from \$0.095/MWh to \$0.35/MWh as of September 15, 2000 because it never filed a tariff revision with the Commission under Section 205 of the Federal Power Act (FPA) nor provided proper notice of the rate change to SRP.

18. Notice of SRP's filing was published in the Federal Register, 66 Fed. Reg. 30,897 (2001), with motions to intervene and protests due on or before June 21, 2001. The Public Utilities Commission of the State of California (California Commission) filed a notice of intervention. Timely motions to intervene raising no substantive issues were filed by Southern California Edison Company (SoCal Edison), the California Department of Water Resources (DWR), and the California Electricity Oversight Board (Oversight Board). Motions to intervene and comments in support of the complaint were filed by Metropolitan Water District of Southern California (Metropolitan), the City of Vernon, California (Vernon), and Southern Cities. On October 10, 2001, Pacific Gas and Electric Company (PG&E) filed a motion to intervene out-of-time, which was granted by the Chief Administrative Law Judge by order issued October 25, 2001.

¹³(...continued)

feels it necessary to propose one herein. See March 14 Order at 61,394.

¹⁴The ISO argues that such a methodology is fully consistent with sections 11.6.3.3 and 11.16.1 of its Tariff. See ISO's June 13, 2001 pleading at 31-33.

19. The ISO's answer explains that the December 8 Order mistakenly reported the effective date for the revised cost allocation as December 10, rather than December 12, 2000. The ISO points out that a subsequent order issued on December 15, 2000 stated that the effective date for that tariff revision was, in fact, December 12, 2000.¹⁵ The ISO elaborates that it requested clarification of the effective date intended by the December 8 Order in a motion filed December 12, 2000 in Docket No. ER01-607-001, and suggests that the Commission could put the issue to rest by acting on that request for clarification.

20. Regarding alleged violation of the neutrality adjustment charge limit, the ISO responds as it did in its request for rehearing of the May 14 Order, that OOM charges are not subject to the limitation in Tariff section 11.2.9.1. The ISO further contends that neutrality adjustment charges should be calculated on an annual, rather than an hourly, basis, and that the period prior to June 1, 2000 should be excluded from any potential refunds because section 11.2.9.1 only became effective as of June 1, 2000.¹⁶ Finally, the ISO asserts that explicit language in section 11.2.9.1 permits the ISO Governing Board to increase the neutrality limitation without filing that increase with the Commission. According to the ISO, "when the Governing Board increased the limitation effective as of September 15, 2000, it was not enacting a new rate, but was instead implementing the provisions of section 11.2.9.1 as already accepted by the Commission."¹⁷

Settlement Judge Procedures

21. On June 22, 2001, the ISO, Southern Cities, and SRP filed a motion to institute settlement judge procedures to resolve the issues raised in the two complaints, and shortly thereafter, the Commission issued an order instituting settlement judge procedures.¹⁸ The order did not institute hearing proceedings or authorize designation of a presiding administrative law judge. The order also stated that the further requests for rehearing in Docket No. EL00-111-002 would be addressed at a later date.

¹⁵ISO's Answer at 4, citing San Diego Gas & Electric Co., et al., 93 FERC ¶ 61,294 at 61,991 (2000).

¹⁶The ISO refers to California Independent System Operator Corp., 90 FERC ¶ 61,205 at 61,730 (2000), reh'g pending, accepting Tariff Amendment No. 27.

¹⁷ISO's Answer at 10.

¹⁸Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California v. California Independent System Operator Corp., 96 FERC ¶ 61,024 (2001).

22. The parties participated in numerous settlement conferences to resolve the complaints, and on July 31, 2002, Southern Cities, SRP and the ISO (Settling Parties) submitted to the Commission an Offer of Settlement and Settlement Agreement (Offer of Settlement). In addition to comments supporting the Offer of Settlement from the Settling Parties and trial staff, as described more fully below, PG&E filed comments opposing the Offer of Settlement, and the Commission received motions to intervene out-of-time, and protests or comments in opposition, from Enron Power Marketing, Inc. (Enron), Puget Sound Energy, Inc. (Puget Sound), IDACORP Energy, L.P. (IDACORP), and California Generators.¹⁹ Subsequently, participants filed reply comments. Enron filed a conditional withdrawal of its motion to intervene out-of-time; IDACORP and Puget Sound conditionally withdrew their protests. The Settling Parties and the California Department of Water Resources (DWR) opposed the late interventions.

23. On November 1, 2002, the Settlement Judge issued an order granting the motions to intervene. The order noted that it appeared the Offer of Settlement could not be certified to the Commission if there were material issues of fact to be resolved, and determined that an additional settlement conference should be convened to clarify that question. The settlement judge stated that the late interventions were granted so that the additional intervenors could be included in the next settlement conference. This prompted the Settling Parties to request guidance from the Commission regarding the appropriate procedures to be followed to approve the Offer of Settlement. On December 30, 2002, the Commission issued an order concluding that, where a contested settlement is filed in a case that is pending solely before a settlement judge, the Commission should consider the record in the proceeding and address the issues presented.²⁰ The Commission also noted that, under Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.603 (2002), settlement judges are not empowered to rule on motions to intervene, and that the motions to intervene out-of-time filed in this proceeding would be considered by the Commission in a future order.

¹⁹The California Generators are: Duke Energy North America, LLC; Duke Energy Trading and Marketing, L.L.C.; Dynegy Power Marketing, Inc.; El Segundo Power LLC; Long Beach Generation LLC; Cabrillo Power I LLC; Cabrillo Power II LLC; Mirant Americas Energy Marketing, LP; Mirant California, LLC; Reliant Energy Power Generator, Inc.; Reliant Energy Services, Inc.; and Williams Energy Marketing & Trading Company. The California Generators took no position on the Offer of Settlement.

²⁰Cities of Anaheim, et al. v. California Independent System Operator Corp., 101 FERC ¶ 61,392 (2002).

OFFER OF SETTLEMENT AND SETTLEMENT AGREEMENT

24. The Offer of Settlement provides that the cost allocation methodology in Amendment No. 33, which became effective on December 12, 2000, will be used to allocate Settlement Costs incurred from December 8 through December 11, 2000, on the same basis, to all Scheduling Coordinators. The Offer of Settlement also requires the Settling Parties to request that the Commission not order the ISO to pay refunds for the amounts collected in excess of the hourly limit on neutrality adjustment charges during the period June 1, 2000 through February 26, 2001, nor require the ISO to absorb or reallocate on a prospective basis any Settlement Costs incurred during that period in excess of the hourly limit.

25. The Offer of Settlement lists estimated amounts that the ISO expects would be refunded to each of the Settling Parties as a result of applying the Amendment No. 33 methodology to the December 8 through 11, 2000 period, and establishes a procedure and schedule for determining actual refund amounts, which remain contingent on further changes as a result of other proceedings pending before the Commission and/or the courts. It also provides that, in the event a Settling Party receives less than 85 percent of the amount projected, that party may re-open negotiations on the amount, and if such renegotiations fail, the Settling Parties may terminate the Offer of Settlement.

26. The Settling Parties state that the Offer of Settlement resolves all issues raised in Docket Nos. EL00-111-000 and EL01-84-000 pertaining to the collection and allocation of Settlement Costs²¹ during the period June 1, 2000 through February 26, 2001, and will be applied on a non-discriminatory basis to all Scheduling Coordinators. The Settling Parties claim that the Offer of Settlement fairly and delicately balances the interests of: (1) the Complainants and other Scheduling Coordinators that were allocated costs for energy that was not procured to serve their loads; (2) Scheduling Coordinators for whom the energy was procured; and (3) the ISO, which seeks to collect its costs in a manner that allows it to remain revenue neutral.

Comments

²¹Article 2.1 of the Offer of Settlement defines Settlement Costs as all costs of Dispatch instructions made by the California ISO to avoid an intervention in market operations or to prevent or relieve a System Emergency.

27. Staff's initial comments regarding the Offer of Settlement are that it provides a reasonable solution of the issues in this proceeding, presents no issues of first impression, does not reverse any prior Commission ruling on the issues, and that there does not appear to be any significant Commission policy at stake.

28. ISO states that Commission approval of the Offer of Settlement would help to ensure ISO's status as a non-profit, revenue-neutral entity and provide final resolution of all issues raised in this proceeding. Southern Cities state that the Offer of Settlement represents a compromise among the parties' positions with respect to the issues and provides, as an overall package, a just and reasonable resolution of the proceeding. SRP states that the Offer of Settlement rectifies, at least in part, inequitable cost subsidies that resulted from ISO's prior method of allocating energy costs to all Scheduling Coordinators in neutrality adjustment charges, and assigns responsibility for those costs to those Scheduling Coordinators for whom ISO purchased energy to serve their loads during the period December 8 through 11, 2000.

29. PG&E opposes the proposed Offer of Settlement on the basis that it purports to resolve the ISO neutrality adjustment overcharges by retroactively moving back the effective date of Amendment No. 33 in a way that reallocates tens of millions of dollars of charges to non-settling parties, while precluding PG&E and others from seeking refunds for amounts that they were overcharged for neutrality adjustment charges during the period in question. PG&E contends that the proposed Offer of Settlement fails to correct ISO's violation of the neutrality charge cap in its Tariff, as ordered by the Commission's May 14 Order, and seeks to provide relief to a few, while denying relief to others such as PG&E. PG&E states that the Offer of Settlement therefore is unjust, unreasonable and unduly discriminatory and should be rejected.

30. PG&E argues that by seeking to roll back the effective date of Amendment No. 33 from December 12 to December 8, 2000, the Offer of Settlement violates the rule against retroactive ratemaking. PG&E claims that December 8 through 11, 2000 were the most expensive four days of the 2000-2001 period, and that during this period, ISO procured more energy on behalf of PG&E than any other party. PG&E states that it was charged approximately \$107.1 million for neutrality adjustment charges during these four days. PG&E contends that although settling parties can agree to pay a higher rate for past periods, they cannot lawfully impose the higher rate on parties such as PG&E that do not agree with the arrangement.²²

²²PG&E cites Equitrans, L.P., 85 FERC ¶ 61,395 at 62,527 (1998), reh'g

31. PG&E contends that by ignoring the impact of market manipulation practices on the excessive OOM price levels during the December 8 through 11, 2000 period, which created the need for parties such as PG&E to rely on the ISO's market to serve their loads, the Offer of Settlement fails to follow cost causation principles. PG&E further argues that because the ISO charges, including neutrality adjustment charges, are being recalculated in other proceedings pending before the Commission and/or the court(s), the Offer of Settlement should be dismissed.

32. Finally, PG&E argues that the Offer of Settlement does not satisfy the Commission's standards under Rule 602 for the approval of contested settlements because the Settling Parties have not offered sufficient support or evidence that the neutrality adjustment charges were "caused" by those Scheduling Coordinators on whose behalf the ISO procured energy to serve their loads during the December 8 through 11, 2000 period and because genuine issues of material fact are presented by the Offer of Settlement as discussed above. According to PG&E, the Offer of Settlement cannot be approved as a contested settlement under any of the Commission's four rationales for approving contested settlements because: (1) the Commission already ruled on the merits of the neutrality adjustment overcharges and, to the extent the Offer of Settlement seeks to upset that ruling to limit relief to a few parties, the Offer of Settlement is invalid; (2) the Offer of Settlement as a whole does not provide a just and reasonable result; (3) PG&E's interest is not sufficiently attenuated to warrant using the fair and reasonable standard applicable to uncontested settlements, because any benefits conferred by the Offer of Settlement are dwarfed by the harm it would cause PG&E; and (4) severing PG&E from this proceeding and approving the Offer of Settlement for only the Settling Parties is not an option since PG&E has raised valid issues such that the Offer of Settlement should be modified for all parties.

33. In reply comments, Southern Cities, DWR, Vernon and SRP argue that the comments in opposition of the Offer of Settlement fail to identify any factual issues, but rather involve legal and policy issues, or mischaracterizations of the Offer of Settlement, and that none of the comments provide any legitimate basis for rejecting the Offer of Settlement. The ISO, Southern Cities, DWR, Vernon and SRP argue that the

²²(...continued)

dismissed, 87 FERC ¶ 61,116 (1999) (Equitrans) ("[while a party may agree to a retroactive rate increase in a settlement in order to receive other concessions, [the supporting parties have not] cited any precedent that would permit the Commission to impose such a retroactive rate increase on a party that objects to that increase").

implementation of the Amendment No. 33 methodology for the December 8 through 11, 2000 period does not constitute retroactive ratemaking. They contend that the Settling Parties are not seeking to "roll back" the effective date of Amendment No. 33, but that the Amendment No. 33 methodology was simply used as the model for allocating costs under the Offer of Settlement. They also contend that since Southern Cities filed their complaint in Docket No. EL00-111-000 on September 15, 2000, prospective refunds could have been awarded as early as November 14, 2000 (sixty days after the complaint was filed), but, as a compromise, the Settling Parties agreed to a later starting date for refunds of December 8, 2000 (the date ISO filed Amendment No. 33).

34. Staff's reply comments state that, although initially in support of the Offer of Settlement as fair and equitable and in the public interest, PG&E's comments raise genuine issues of material fact. Staff therefore recommends that the Settlement Judge convene an additional conference to address the matters raised by PG&E.

35. ISO, Southern Cities, DWR, Vernon and SRP state that the motions to intervene out of time will delay and prejudice the proceeding and should be denied. They argue that it would be unreasonable and unfair to allow parties to intervene at such a late stage and to oppose the Offer of Settlement after they elected to ignore the settlement discussions for more than one year, and to do so would render the efforts of active parties and the Commission a waste of time.

DISCUSSION

Procedural Matters

36. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2002), the timely, unopposed motions to intervene in Docket No. EL01-84-000 of the entities that filed them serve to make them parties to that proceeding.

37. Pursuant to Rule 214(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d)(1) (2002), we deny the untimely motions to intervene of Enron, Puget Sound, IDACORP, and California Generators for failure to demonstrate good cause warranting late intervention. To permit these entities' late intervention after issuance of several orders and extensive settlement discussions would result in unjustified delay and disruption of the proceeding and undue burden on other parties.²³

²³As the settlement judge's prior order granting the interventions was not

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Offer of Settlement

38. Under the Commission's procedural regulations, the Commission can approve an uncontested settlement upon a finding that the settlement appears to be fair and reasonable and in the public interest,²⁴ "without a determination on the merits that the rates approved are 'just and reasonable.'"²⁵ However, the Supreme Court has held that where a settlement is contested, the Commission must make an "independent finding supported by substantial evidence on the record as a whole, that the proposal will establish just and reasonable rates."²⁶

39. The Commission finds that it cannot approve the instant Offer of Settlement as to all parties over the objections of a non-settling party. The Commission has previously determined in its March 14 Order on the original complaint, and on rehearing in the May 14 Order, that OOM costs were allocated in accordance with provisions of the ISO Tariff. Further, the Commission in those orders required the ISO to refund neutrality adjustment charges in excess of the stated limit in the ISO Tariff. The instant Offer of Settlement is contrary to both of those findings for both settling and non-settling parties. The proposed Offer of Settlement provides for (1) moving back the effective date of Amendment No. 33 (December 8 as opposed to December 12), which revises the method of allocating OOM amounts to Scheduling Coordinators and (2) eliminating the ISO's refund obligation associated with past overcharges of the neutrality adjustment charge for all customers.

40. The objecting non-settling party correctly contends that the Offer of Settlement violates the rule against retroactive ratemaking and that, although the settling parties can agree to pay a higher rate for past periods, they cannot impose a higher rate on a party that opposes the terms. The Commission agrees that both of the actions proposed by the

²³(...continued)

authorized under the Commission's regulations, these entities will be treated as if never having had party status.

²⁴18 C.F.R. § 385.602(g)(3) (1999).

²⁵ United Municipal Distributors Group v. FERC, 732 F.2d 202, 209 (D.C. Cir. 1984).

²⁶Mobil Oil Corp. v. FERC, 417 U.S. 283, 314 (1974).

Offer of Settlement would effectuate a retroactive rate adjustment by the ISO on parties who have not agreed to the Offer of Settlement.

41. The filed rate and retroactive ratemaking doctrines provide, in effect, that a utility cannot retroactively increase the rate charged a customer to a level higher than the rate on file. Although other parties argue that the implementation of the Amendment No. 33 methodology for the December 8 through 11, 2000 period does not constitute retroactive ratemaking, the Commission does not agree. Even if the Settling Parties are not seeking to "roll back" the effective date of Amendment No. 33, as they contend, and are merely using the cost causation methodology as a model for allocating costs under the Offer of Settlement, the fact remains that OOM charges would, for at least one non-settling party, increase significantly over those previously paid. Second, the Offer of Settlement waives the Commission's required refunds of neutrality adjustment overcharges due non-settling parties. Again, the Commission finds these actions do in fact constitute retroactive ratemaking. As we concluded in Equitrans,²⁷ the Commission will not impose a settlement over the objection of a party that would be subjected to a retroactive rate increase.²⁸ Accordingly, we will reject the Offer of Settlement.

Requests for Rehearing of the May 14 Order

42. After careful review of the ISO's arguments and related Tariff provisions, we agree with the ISO's reasoning that its recovery of OOM dispatch costs is not constrained by section 11.2.9.1's stated hourly limit of \$0.095/MWh. We recognize that the ISO included OOM charges in its neutrality adjustment charge billings as a matter of administrative convenience, and that proper application of the neutrality adjustment charge allocation mechanism – *i.e.*, recovery of the costs explicitly stated under section 11.2.9 – does not include OOM dispatch costs. Thus, while we maintain our finding that the ISO's recovery of neutrality adjustment charges is limited to \$0.095/MWh, we clarify that any other costs assessed under provisions other than section 11.2.9 are not subject to that limit. Hence, the Commission cannot order refunds of any OOM charges on the grounds that they exceeded the neutrality limit, regardless of the period during which they were incurred. We will direct the ISO to separate all costs recoverable under section 11.2.9 from all other costs included in the invoiced "neutrality costs" from June 1, 2000

²⁷See supra n.22.

²⁸Nor could the Commission sever PG&E from the Offer of Settlement as provided in Section 602 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(h)(1)(iii) (2002), because the terms of the Offer of Settlement would impact the charges due to all of the ISO's transmission customers.

forward, and to recalculate each customers' charges for each hour. Such separation of costs must be conducted on an hour by hour basis for all Scheduling Coordinators in all applicable hours.

43. With respect to the ISO's request for rehearing that the neutrality adjustment charges be calculated on an hourly basis, we deny rehearing for the reasons given in the May 14 Order. The ISO has presented no additional arguments or evidence to persuade us otherwise. Thus, the ISO must apply the hourly limit stated under section 11.2.9.1 to the remaining neutrality adjustment charges and reassess them as directed in this and the previous orders in this proceeding. The ISO may not create a rolling true-up mechanism in the stated rate without explicit authorization; proposing to do so now would be revising its tariff retroactively. The ISO is directed to provide the Commission and all affected parties with a report detailing, among other things, the amounts of the various separated charges and the subsequent neutrality adjustment charge recalculations and reassessments. The report must also detail the recalculated OOM dispatch cost amounts, as directed below, as well as any relevant amounts to be reassessed. To ensure timely reassessment of the charges, we will require the ISO to complete all recalculations within 90 days of the date of issuance of this order, and to file a report with the Commission detailing the results of the recalculations.

44. We next address the rehearing positions of Southern Cities and Vernon. When deliberating about the parties' initial rehearing requests, the Commission considered all of the evidence mentioned by Southern Cities and Vernon in their rehearing requests. Although the evidence supplied by Southern Cities and Vernon demonstrates increases in the amount of OOM costs incurred, that evidence does not mandate a finding that the ISO's prior allocation methodology was unjust and unreasonable. The May 14 Order explained that more than one cost allocation methodology may be just and reasonable. This conclusion remains sound. Accordingly, we will deny these rehearing requests.²⁹

SRP Complaint in Docket No. EL01-84-000

December 10 - 12, 2000

45. We disagree with SRP's contention that the ISO incorrectly delayed implementation of Amendment No. 33 by two days. The ordering paragraph of the

²⁹Moreover, we note that the OOM transactions at issue in this proceeding are subject to price mitigation and refund in the refund proceeding in Docket Nos. EL00-95-045 and EL00-98-042.

December 8 Order stated that the proposed revisions would become effective as requested by the ISO, and the ISO had requested an effective date of December 12, 2000 for the revised OOM cost allocation. The order unfortunately contained a typographical error in the body of the order indicating an incorrect effective date. However, the discussion in the body of the order made clear that the effective date would be the date proposed by the ISO. Clearly, the ISO's application proposed December 12, 2000. The ordering paragraph (B) also clearly states that the filing will be accepted as requested, and that overrides the date in the body of the order. As the ISO notes in its Answer, shortly thereafter the Commission stated in another order that the effective date was December 12, 2000.³⁰ The Commission takes note that the Settling Parties, including SRP, acknowledge in the Offer of Settlement that the tariff revision became effective on December 12, 2000. In order to clear up any confusion, however, we will here grant the ISO's request for clarification (filed in Docket No. ER01-607-001) that the cost allocation elements of Amendment No. 33 properly went into effect on December 12, 2000.

Neutrality Adjustment Charge Limit for Calendar Year 2000

46. Last, we will consider SRP's claim for refunds related to the ISO's violation of the neutrality adjustment charge limit throughout 2000. As discussed above, charges other than the five enumerated charges set forth in section 11.2.9 (specifically, OOM charges) are not subject to any neutrality limitations. Thus, SRP is not entitled to any refunds to the extent that OOM charges' inclusion in neutrality billings may have caused them to exceed the \$0.095/MWh limit in section 11.2.9.1 for any time period. Further, the ISO is correct in stating that the neutrality limitation in section 11.2.9.1 did not go into effect until June 1, 2000; therefore, no parties could have been overcharged for neutrality costs prior to that date. As directed above, the ISO will recalculate neutrality adjustment charges excluding OOM charges and other charges not enumerated in section 11.2.9. SRP's complaint claims that the ISO exceeded its neutrality limit through December 2000; thus, the ISO is directed to perform these recalculations for all hours beginning June 1, 2000 through December 31, 2000.

47. Finally, we agree with SRP's allegation that the ISO did not raise the neutrality adjustment charge limitation to \$0.35/MWh in September 2000 in accordance with the requirements of the FPA. The ISO claims that its actions were sufficient because section

³⁰See supra n.15.

11.2.9.1 authorizes the ISO Governing Board to increase the limit for a defined period.³¹ We find, however, that that tariff language does not eliminate the need for the ISO to seek Commission approval of its increase under FPA Section 205 and to file tariff sheets reflecting the revised limit. The effect of the section is to explain the ISO's process for modifying the neutrality limit above and beyond the statutory filing requirement. Hence, the neutrality limitation remains \$0.095/MWh, as provided in the ISO's tariff, for all of 2000. The ISO is directed to use that limitation in its recalculations of the neutrality adjustment charges owed in each hour.

The Commission orders:

(A) The Settling Parties' contested Offer of Settlement is hereby rejected for the reasons discussed in the body of this order.

(B) The requests for rehearing of the May 14 Order are hereby denied, as discussed in the body of this order.

(C) The ISO is hereby directed to file a report detailing the recalculated neutrality adjustment charges within 90 days of the date of this order.

(D) SRP's complaint in Docket No. EL01-84-000 is hereby denied in part, as discussed in the body of this order.

(E) The ISO's request for clarification in Docket No. ER01-607-001 is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

³¹The tariff section provides: The total annual charges levied under Section 11.2.9 shall not exceed \$0.095/MWh, applied to Gross Loads in the ISO Control Area and total exports from the ISO Controlled Grid, unless: (a) the ISO Governing Board reviews the basis for the charges above that level and approves the collection of charges above that level for a defined period; and (b) the ISO provides at least seven days' advance notice to Scheduling Coordinators of the determination of the ISO Governing Board.

Docket No. EL00-111-002, et al.

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Magalie R. Salas,
Secretary.