

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Pacific Gas and Electric Company

Docket No. ER04-689-002

ORDER DENYING REHEARING

(Issued May 6, 2005)

1. The Sacramento Municipal Utility District (SMUD) requests rehearing of the Commission's December 3, 2004 Order in Docket No. ER04-689-000 and ER04-689-001.<sup>1</sup> That order addressed a request by Pacific Gas and Electric Company (PG&E) to terminate service under the Contract Between California Companies and Sacramento Municipal Utility District For Extra High Voltage Transmission and Exchange Service (EHV Contract),<sup>2</sup> which was entered into as part of a set of contracts related to the construction and use of the Pacific Northwest-Pacific Southwest Intertie (Pacific Intertie), a two-line facility that runs between the Pacific Northwest and California.<sup>3</sup> The Commission accepted the proposed termination of the EHV Contract. In this order we deny rehearing of the *Termination Order*.

**Background**

2. PG&E requested, in Docket No. ER04-689-000, termination of service under the EHV Contract. This contract was set to expire by its own terms on January 1, 2005.<sup>4</sup> On

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<sup>1</sup> *Pacific Gas and Electric Co.*, 109 FERC ¶ 61,255 (2004) (*Termination Order*).

<sup>2</sup> PG&E Rate Schedule FERC No. 37 and So Cal Edison Rate Schedule FERC No. 39. The California Companies are PG&E, San Diego Gas and Electric Company and Southern California Edison Company.

<sup>3</sup> In northern California, the Western Area Power Administration (Western) owns one of the Pacific Intertie transmission lines, while PG&E controls the other.

<sup>4</sup> See Article 34 of the EHV Contract.

January 6, 2004, PG&E notified SMUD in writing of its intent to make a filing to cancel service.

3. Under the EHV Contract, the Companies provided SMUD with 200 MW of bi-directional transmission service between the California-Oregon border and SMUD's electric system. According to PG&E, this transmission service enabled SMUD to purchase, sell, and exchange power with entities in the Pacific Northwest and entities accessible via the transmission system in the Pacific Northwest.

4. Upon notice by PG&E that it was going to file to cancel the EHV contract, SMUD filed a complaint in Docket No. EL04-2-000 requesting that the Commission direct PG&E to continue providing the same amount of firm bi-directional service for an additional 20 years beyond the termination date. The Commission denied this complaint.<sup>5</sup> The issue in SMUD's complaint before the Commission was whether the California utilities' refusal to honor SMUD's existing EHV Contract beyond its own term based on section 2.2 of the *pro forma* tariff violates Order No. 888. The Commission denied the complaint because the Order No. 888 right of first refusal provision does not contemplate contract extension beyond the term of the relevant contract, as SMUD had requested.<sup>6</sup> Accordingly, SMUD's request to compel extension of the contract using this provision was rejected. Furthermore, the Commission stated that, because SMUD would, upon expiration of its EHV Contract, take service under the rates, terms and conditions of the CAISO tariff, it would not be denied access to transmission service.

5. On March 31, 2004, PG&E filed a notice of cancellation of the EHV Contract. In its request to terminate service, PG&E represented that replacement transmission service is available to SMUD upon termination of the EHV Contract. According to PG&E, SMUD has other contracts, which do not terminate in the near future, through which its electric system is connected with PG&E's system. PG&E contended that these agreements, together with the CAISO Tariff, would allow SMUD to continue to transfer power between the Pacific Northwest and its system in the same manner as all other CAISO customers.

6. On December 3, 2004, the Commission issued the *Termination Order*, which accepted the proposed notice of cancellation. That order also accepted other notices of cancellation, as well as settlements reached between the California Companies and Western under which Western will provide the CAISO capacity on its portion of the Pacific Intertie (Transmission Exchange Agreement). Under the Transmission Exchange

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<sup>5</sup> *Sacramento Municipal Utility District*, 105 FERC ¶ 61,358 (2003) (*SMUD Complaint Order*), *reh'g denied* 107 FERC ¶ 61, 237 (2004).

<sup>6</sup> *See* Order No. 888 at 31,665.

Agreement, Western will provide the CAISO 1,200 MW (north to south) and 919 MW (south to north) of capacity between the Malin and Round Mountain substations of the Pacific Intertie. The portion of the Pacific Intertie owned by Western shall remain in the CAISO control area for the term of the agreement.

7. In the *Termination Order*, we noted that the Commission had previously denied SMUD's complaint seeking to extend the term of service under the EHV Contract. The Commission also stated that SMUD would not be denied access to transmission service because SMUD would take service under the rates, terms and conditions of the CAISO Tariff.

8. The *Termination Order* also denied a request by SMUD that it should be offered a long-term arrangement similar to the Transmission Exchange Agreement between the California Companies and Western because it is similarly situated to Western. The order stated that SMUD was requesting a long-term "set aside" of capacity, which would give SMUD an unfair advantage over potential competitors who must acquire transmission service in the CAISO Tariff Day-Ahead and Hour-Ahead markets. In contrast, the order explained that the Transmission Exchange Agreement involves an exchange of capacity between two electric systems. Under that agreement, the capacity acquired is made available to all market participants under the rates, terms, and conditions of either the CAISO Tariff or Western's Open Access Transmission Tariff (OATT). Finally, we denied SMUD's request for a hearing on the grounds that it raised no disputed issues of material fact.

### **Request for Rehearing**

9. SMUD requests rehearing of the Commission's acceptance of the termination of the SMUD EHV Contract. First, SMUD claims that the Commission accepted the cancellation without making a finding that the cancellation is in the public interest. SMUD argues that the Commission has previously stated that before service has been terminated, the proposed termination must be shown to be in the public interest.<sup>7</sup> It claims that the Commission erred in failing to reach a specific determination that the termination of the EHV Contract was in the public interest and not unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.

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<sup>7</sup> Request for Rehearing at 3, citing *Florida Power & Light Co.*, 3 FERC ¶ 61,081 (1978) (*FP&L*); *Pennsylvania Water and Power Co. v. FPC*, 343 U.S. 414, 422-24 (1952) (*Penn Water & Power*); *El Paso Electric Co.*, 107 FERC ¶ 61,314 (2004) (*El Paso*); *Cinergy Services, Inc.*, 93 FERC ¶ 61,308 (2000) (*Cinergy*); *Public Service Commission of Indiana*, 10 FERC ¶ 61,277 (1980).

10. SMUD contends that the Commission erred in not setting the termination of its EHV Contract for hearing. It claims that it has shown that material issues of fact related to a public interest determination are in dispute. Specifically, SMUD has alleged that: (1) the CAISO's offer of long-term, congestion-protected service to Western alone is discriminatory; (2) termination will frustrate Congress' intent and SMUD's reasonable expectations of continued service; and (3) termination of the EHV Contract will leave SMUD with no offer of comparable service choice.

11. SMUD also argues that termination of the EHV Contract would not be in the public interest because the CAISO does not offer a reasonable substitute service. SMUD claims that there is no comparable service and that SMUD will be unable to secure firm delivery of power it has purchased under long-term firm supply contracts. SMUD also argues that the Commission recognizes that the current CAISO market design does not provide for long-term firm transmission service, therefore taking service under the CAISO Tariff is inadequate. Although the Commission stated that long-term firm transmission service would be addressed in the CAISO market redesign proceeding in Docket No. ER02-1656-000, SMUD argues that this forum is inadequate because the redesign is not slated to be finalized until 2007.

12. SMUD argues that extending long-term firm, congestion-protected transmission service to Western under the Transmission Exchange Agreement while denying SMUD a comparable successor arrangement is discriminatory. SMUD claims that it took service from PG&E under a similar agreement to Western and also sought a successor agreement. SMUD contends that the Commission erred in holding that it is not similarly situated to Western.

13. Further, SMUD argues that its ability to offer a transmission exchange to the CAISO similar to Western's should not be dispositive because the Commission has held that lack of transmission facilities to exchange in kind should not foreclose a utility from access to transmission services, provided that it is willing to compensate the transmission owners monetarily for such services.<sup>8</sup> SMUD claims that it is willing to compensate the CAISO and/or PG&E for the service it seeks.

14. SMUD points to the similarities between the types of contracts to which SMUD and Western were parties and the successor agreements they both sought to show that the CAISO discriminatorily refused to negotiate with SMUD while it was negotiating with Western. SMUD asserts that it offered to exchange some of its existing capacity, to reduce the long-term capacity it would purchase and would drop pending litigation for an exchange agreement similar to that offered to Western by PG&E.

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<sup>8</sup> Request for Rehearing at 13.

15. SMUD also argues that termination of its EHV Contract defeated SMUD's reasonable expectation of continued service and states that the Commission did not consider this argument in the underlying order. SMUD contends that termination of the EHV Contract is contrary to Congressional intent.<sup>9</sup> In this regard, SMUD claims that although the EHV Contract had a finite term, "Congress plainly contemplated interstate transmission and, ...it was well known that the such [sic] interstate service would continue past the contract expiration date unless the Federal Power Commission permitted service cancellation."<sup>10</sup>

16. Finally, SMUD contends that the Commission erred in citing the order in Docket No. EL04-2-000<sup>11</sup> to support its decision to terminate service, claiming that it is not relevant to the question at hand. SMUD argues that it is raising a different question in the instant proceeding – the statutory determination of whether it is in the public interest to deny the termination of service.

### **Discussion**

17. We deny SMUD's request for rehearing. First, we reject SMUD's contention that a trial-type evidentiary hearing was required.

18. SMUD claims that it raised issues of material fact alleging that the CAISO's Transmission Exchange Agreement with Western is discriminatory, that termination will frustrate Congressional intent and SMUD's expectation of continued service and that, upon termination, there is no comparable service available to SMUD. However, the first two matters referred to by SMUD involve issues of law, not fact, which require no hearing. With respect to the comparable service issue, we find that SMUD has made no points that cannot be resolved on the basis of the written record. In the *Termination Order*, we found that the service available to SMUD under the CAISO Tariff and other contracts suffices to replace the service SMUD received under its EHV Contract. SMUD argues that the Commission erred in not making a specific determination that the termination was in the public interest. We disagree. In these cases the Commission determined that it should make a just and reasonable determination, and not the public interest determination as alleged by SMUD, before termination of those contracts. Furthermore, in each of the cases relied on by SMUD, there was no defined termination date under the contract, or the termination date had not yet arrived. In *FP&L*, FP&L filed an unexecuted service agreement with Fort Pierce Utilities Authority (Ft. Pierce) on

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<sup>9</sup> See Request for Rehearing at 15-17.

<sup>10</sup> *Id.* at 17.

<sup>11</sup> *SMUD Complaint Order*, 105 FERC ¶ 61,358 (2003).

March 29, 1978 under which it had already commenced service. One of the terms of the unexecuted agreement was that the agreement terminated May 31, 1978.<sup>12</sup> Ft. Pierce had accepted FP&L's contract, but had notified the company of its refusal to accept the termination date before service commenced. Therefore, Ft. Pierce, unlike SMUD, never acquiesced to the contract termination date.

19. Similarly, in *Penn Water & Power* and *Cinergy*, the contracts had not provided for a termination date.

20. In *El Paso*, El Paso filed a notice of cancellation on April 27, 2004, requesting the termination of a contract effective December 31, 2002. El Paso claimed that the contract expired by its own terms on December 31, 2002 and that administrative oversight had caused it not to file the notice of cancellation in a timely manner. The Texas-New Mexico Power Company protested the filing, arguing that El Paso had failed to request waiver of the Commission's prior notice requirements or demonstrate the requisite extraordinary circumstances to explain the 18-month delay in providing the required notices to justify a retroactive effective date. The Commission found that El Paso's notice of cancellation raised issues of material fact that could not be resolved on the record and had not been shown to be just and reasonable. Therefore, the Commission ordered a hearing. In the case of the EHV Contract, there had been no such dispute as to the effective date, and PG&E filed the notice of termination before the termination date.

21. SMUD also claims that it will be unable to secure firm delivery of power it has purchased under long-term firm supply contracts. While SMUD admits that long-term service does exist under the CAISO regime, it argues that the annual nature of that service is not sufficient. However, as we stated previously, SMUD is in the same position as all other CAISO customers. To require additional service would give SMUD an unfair advantage over competitors. Although SMUD argues that the Commission has held that the lack of transmission facilities to exchange in kind should not foreclose a utility from access to transmission service, this is not relevant to SMUD's situation. SMUD is not being denied access to the transmission system, it is merely required to access it in the same manner as other CAISO customers.

22. SMUD argues that we should address the fact that the CAISO does not provide long-term firm transmission service in this proceeding. However, in the order on rehearing of the *SMUD Complaint Order*, the Commission noted that that proceeding was not the appropriate forum in which to address SMUD's concerns about the CAISO market structure. It is firmly established that it is within the Commission's purview to determine how best to allocate its resources for the most efficient resolution of matters

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<sup>12</sup> *FP&L*, 3 FERC ¶ 61,081 (1978).

before it.<sup>13</sup> The CAISO's comprehensive market redesign proposal in Docket No. ER02-1656-000 is an ongoing proceeding to resolve market design issues in the CAISO. That proceeding is best suited for determining whether or not, and in what manner, the CAISO should offer long-term transmission service. SMUD should pursue its concerns regarding long-term transmission service in that proceeding.

23. The Commission rejects SMUD's argument that our approval of the Transmission Exchange Agreement without providing for a similar agreement between the CAISO and SMUD was discriminatory. In the *Termination Order*, we noted that the Transmission Exchange Agreement involves an exchange of capacity between two electric systems. As part owner of the Pacific Intertie, Western is able to exchange transmission capacity over the very lines created by the various contracts used to build that Intertie. As SMUD states, Congress intended to create a private-public partnership to build the Pacific Intertie so that utilities in California have access to the Pacific Northwest. Allowing the capacity exchange between the CAISO and Western will continue this relationship. SMUD, however, does not own any portion of the Pacific Intertie and cannot offer a similar capacity exchange between California and the Pacific Northwest markets. SMUD is not, therefore, similarly situated to Western and the *Termination Order* correctly acknowledged this fact.

24. In addition, SMUD did not object to the Transmission Exchange Agreement and did not request rehearing of its acceptance. The Commission cannot force utilities to enter into contracts, and cannot force the CAISO to negotiate with SMUD for a capacity exchange agreement. If SMUD believed that the Transmission Exchange Agreement provided for discriminatory service, it should have requested rehearing of the determination to accept the agreement. However, neither SMUD nor any other party requested rehearing of the acceptance of the Transmission Exchange Agreement. Therefore, the Transmission Exchange Agreement has been found just and reasonable, and SMUD's claim that it is discriminatory or preferential is outside the scope of this proceeding.

25. We disagree with SMUD's contention that termination of the EHV Contract contravenes Congressional intent. Indeed, Congress specifically allowed that the Federal Power Commission to permit service cancellation.<sup>14</sup> The provision of a date certain for

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<sup>13</sup> *E.g. Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001 (1984), citing *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333-34 (1976); *Richmond Power & Light Co. v. F.E.R.C.*, 574 F.2d 610, 624 (D.C. Cir. 1978), citing *City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967); *Superior Oil Co. v. F.E.R.C.*, 563 F.2d 191, 201 (5th Cir. 1977), citing *Mobil Oil Corp. v. F.P.C.*, 483 F.2d 1238, 1252 (D.C. Cir. 1973).

<sup>14</sup> See Article 34 of the SMUD EHV Contract.

contract termination shows that the parties to the contract intended for the Commission to review and permit cancellation of the contract

26. Furthermore, the EHV Contract and the other contracts at issue in the underlying order fulfilled the purpose intended by Congress – to build the Pacific Intertie. Now that the Pacific Intertie has been built, all utilities in California have access to the Pacific Northwest through the CAISO Tariff. The exchange between Western and the CAISO of capacity over the Pacific Intertie through the Transmission Exchange Agreement furthers this goal. However, as stated above, SMUD does not own any part of the Pacific Intertie. Thus, an exchange between it and the CAISO does not further Congress' intent in providing for the construction of the Pacific Intertie. PG&E and Western own the Pacific Intertie and the Transmission Exchange Agreement allows the CAISO to use a portion of Western's capacity to serve its customers, including SMUD.

The Commission orders:

SMUD's request for rehearing of the Commission's *Termination Order* is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.