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Decision 96-10-014 October 15, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint application of Pacific Gas and Electric Company, San Diego Gas and Electric Company, and Southern California Edison Company for Ex Parte Interim Approval Of A Loan Guarantee And Trust Mechanism to Fund The Development of An Independent System Operator (ISO) And A Power Exchange (PX) Pursuant to Decision 95-12-063 as modified.

Application 96-07-001 (Filed July 9, 1996) ORIGINAL

INTERIM OPINION: INDEPENDENT SYSTEM OPERATOR (ISO) AND POWER EXCHANGE (PX) FUNDING

I. Summary

Joint Petitioners Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) have sought interim ex parte modifications to Decision (D.) 96-08-038 (Trust Decision) that will: (1) conform the decision to recent changes in law (Assembly Bill (AB) 1890), and (2) expand the authority granted for applicants' entry into loan guarantees to include credit supports. This decision grants in part and denies in part the relief requested.

First, we approve modifications that would ultimately be needed for changes in law, although we disagree with applicants that changes effectuating new law are as extensive or as detailed as those requested. We agree that it is appropriate to make this change now, as the Trust Agreements have not yet been finalized. Trust funds should be available to the newly formed ISO and PX Boards as soon as they exist and this can be more readily accomplished if the Trust Agreements are changed now rather than amended later, as they could be.

Second, voluntary collaborative efforts to find through competitive solicitation an institution willing to serve as a trustee have proved unsuccessful. We

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deny applicants' request to modify the Trust Decision to move trustee duties to the level of advisory committee level. Instead, we order the execution of complying trust agreements within ten days.

Third, we deny changes to the Trust Decision with respect to credit supports because the authority to enter into negotiated loan guarantees, which may involve a variety of obligations and related costs, is already provided for in the Decision. Applicants have the ability to negotiate, subject only to a compliance finding by the assigned office, and should use that procedural vehicle rather than seeking a petition to modify.

Finally, this decision in no way affects the Trust Decision's advisory ratemaking provision for all authorized loan guarantees up to the authorized limit, even though we recognize that the ISO and PX Boards will have the legally required access to use of those funds.

II. Public Utilities (PU) Code Section 361

Recently enacted PU Code Section 361 provides:

"The commission shall ensure that any funds secured by the restructuring trusts established for the purposes of developing the Independent System Operator and the Power exchange shall be placed at the disposal of the Independent System Operator and the Power Exchange respectively."

We agree with utilities that the Trust Decision should be modified to reflect that the ISO and PX, as soon as their Boards are capable of making decisions, have access to trust funds. We disagree that the code requires any limitation or condition be placed upon the ISO and PX use of the funds. The statute does not suggest, despite other provisions in the law, that the access to the funding be conditional. We think it sufficient to leave the ISO and PX to make their own decisions regarding how to use the funds that are at their disposal.

We therefore see no reason to modify and expand the scope of the Trustees authority or scope of work, since by definition the work undertaken by the ISO and PX Boards will use trust funds but will not be obligations carried out by the Trustees. By this, we do not suggest that the ISO and PX Board would be precluded from relying upon or using in any way they deem appropriate the advice of the trust advisory committees. That decision is more appropriately left to the ISO and PX Boards, which will have a broader array of options for fulfilling their objectives, including but not limited to any technical advisory committee that the ISO Board may establish or select under PU Code Section 347. The change needed to place Trust funds at the disposal of the ISO and PX Boards does not require: (1) that Trustees bear additional obligations associated with start-up of the ISO and PX, or (2) that the ISO and PX Boards should be burdened by effectuating their duties with fiduciary obligations that attach to the Trustees. The former would divert the Trustees from the obligation to build the hardware and software on time. The latter would subject the ISO and PX Boards to additional and unnecessary risks at a time when their new statutory obligations are already quite challenging.

Although the Trust Decision removed from the Trust's scope of work various estimated "start up" expenses, we did not reduce the amount of loan guarantee authority. Start up expenses were requested in the application to reimburse ISO and PX start-up costs that may or may not conform exactly over time to the unconditional needs of the ISO or PX Boards. Because we have authorized two separate trusts and

¹ Further, we leave to the future managerial discretion of the ISO and PX Board the flexibility to use different committees, agents, consultants, or project managers that they deem appropriate for each of the different tasks they will be undertaking. Nothing in this decision limits the ISO or PX Boards from delegating any task or project to an individual or group deemed appropriate by them, or from selecting the means by which they secure advice.

want these trusts to fulfill their obligations to build the necessary hardware and software on time, we ask applicants to file a petition to modify the Trust Decision and expand the authority if: (1)(a) the combined use of ISO and PX Trust funds by the ISO and PX Boards exceeds \$12 million, or (b) the combined use of ISO and PX Trust funds by the ISO or the PX Board is reasonably anticipated to exceed \$13 million in the next quarter, and (2) either the PX or the ISO Trustee has indicated that further expenditures of funds by the ISO and PX Boards will compromise their ability to fulfill their obligations to build the hardware and software on time.

To effectuate the statutory requirement, we need merely add the requirement that each Trust shall expend to their correlative Boards funds requested by that Board, and inform applicants when these expenditures are impairing the availability of funds for work that is within the Trust's scope.

III. Modification of the Role of Trustee

We decline to modify the role of the trustee at this time as requested by applicants because: (1) a suitable trustee has been identified, (2) new law does not require changes to the role of the trustee, (3) the requested changes would a) impair timely project development, b) subject to continuing transition and uncertainty the process for formulating advice to the trustee, and c) leave the authority of the trustee unclear, confusing fiduciary project development (a trustee duty) with obligations of the new ISO and PX Boards (a non-fiduciary, statutory duty accomplished with trust funds). Project development work needs to proceed immediately, and the role of the trustee as previously specified is designed to accomplish this important trust purpose. The trust advisory committees are already charged with providing recommendations that avoid duplication of effort, and we are certain cooperation will continue to prevail as new Boards form because many of the future ISO and PX Board members will represent stakeholders already, deeply involved in cooperative restructuring efforts.

We therefore order applicants to execute trust agreements within ten days of the effective date of this order with David Freeman, and complete changes requested by the assigned office prior to that time so that the necessary finding that the agreements are in compliance with our decisions is obtained before execution.

Order IV

IV. Request for Credit Supports

Applicants request an expansion of authority to include credit supports. The supporting offer of evidence is the Affidavit of Alan Lindstrom, which states:

"As a result of my negotiations with the banks, it is anticipated that in connection with the loan guarantees... the terms of the guarantees may require the guarantors to provide the lending bank credit supports in certain circumstances such as a change in the financial condition of the guarantor or in order to remove the applicability of certain covenants." (Petition Appendix C, para. 4, emphasis added.)

One illustrative example of such a credit support would be a loan guarantee that provided for a supplemental letter of credit from the guarantor in the event that the guarantor's credit rating fell below a level specified in the guarantee.

If the credit supports are "in connection" with the terms and covenants of the loan guarantee, then they are already within the scope of the loan guarantee authority ordered. The Trust Decision provides applicants with the authority under PU Code Sections 701 and 830 to enable loans to two trusts. (Conclusion of Law 1, p. 57). The loan guarantees will be reviewed for compliance with Attachment B of the application: none of those principles conflict with negotiating a loan guarantee that calls for credit support in certain circumstances. (Ordering Paragraph 3.) Costs or liabilities that might be associated with credit supports entered "in connection" with loan guarantees are costs permitted in memorandum accounts because they are "costs and liabilities arising from" the loan guarantees. (Ordering Paragraph 6.)

with a fiduciary obligation

Applicants should use the already ordered procedure for filing conforming loan guarantee agreements. As interpreted here, the ordering paragraphs are already sufficiently broad to accommodate the possibility of credit supports.

V. Protests

The time for protests was shortened due to the urgency of project development and the requirement that the hardware and software be operational by January 1, 1998. Protests were due October 3, 1995. No timely protests were received.

Findings of Fact

1. Urgency legislation facilitating electric industry restructuring was approved by the Governor on September 23, 1996.
2. The date of formation of the Oversight Board, the ISO Board, and the PX Board are uncertain at this time.
3. There is insufficient time between today and the date the ISO and PX must be operational (January 1, 1998) to delay developing the hardware and software necessary for these new entities to reliably provide new services.
4. It is appropriate at this time to make minor modifications to D.96-08-038 before the ISO and PX Trust Agreements are executed.
5. The applicants have been unable to find a trustee to serve as either the ISO or PX trustee.

Conclusions of Law

1. The Commission should ensure that funds secured by the ISO and PX trusts are placed at the disposal of the ISO and PX.
2. The scope of work that trustees are obligated to perform need not be changed.
3. The ISO and PX are not required to perform statutory duties in a manner that satisfies all legal requirements for trusts, including performing actions congruent with a fiduciary obligation.

4. The applicants should inform the Commission if the use of trust funds by the ISO and PX Boards exceeds \$12 million, or is expected in the next quarter to exceed \$13 million, and either the PX or ISO Trustees have indicated that further expenditures of funds by the ISO or PX Boards will compromise their ability to fulfill their obligations to build the hardware and software on time.

5. Trustees should expend to their correlative Boards funds requested, and inform applicants when these expenditures are impairing the availability of funds for work that is within the Trustee's scope of work.

6. Applicants should appoint David Freeman to be the ISO and PX Trustee at least until early January, 1997, and execute compliant trust agreements within 10 days from today.

7. The Trust Decision provides applicants with the authority under PU Code Sections 701 and 830 to enter into credit supports in connection with the loan guarantees.

P. GREGORY COMON
President

INTERIM ORDER

IT IS ORDERED that:

1. Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company (applicants) shall petition to modify the Trust Decision (D.96-08-038) if and when use of Independent System Operator (ISO) Trust funds and Power Exchange (PX) Trust funds are, in the opinion of either the ISO or PX Trustee, no longer adequate for the Trustees to perform their obligations, and the ISO and PX Boards have expended \$12 million or are expected to expend \$13 million in the next quarter.

2. Ordering Paragraph 1 of the Trust Decision is supplemented to add the following:

"1(q) The ISO Trustee expends Trust funds upon the request of the ISO Board, and the PX Trustee expends Trust funds upon the request of the PX Board;

however neither the ISO or the PX Trustee are obligated to perform any additional obligations associated with those expenditures.

"1(r) The ISO and PX Trustee shall inform applicants if it determines that Trust funds are inadequate to perform the Trustee's obligations

3. All other aspects of the Trust Decision are unmodified by today's order.

4. Applicants shall execute Trust Agreements for the ISO and PX with David Freeman within the next ten days, but only after securing a finding that the Trust Agreements comply with our decisions from Commission staff, as authorized and directed by the assigned Commissioner.

This order is effective today.

Dated October 15, 1996, at San Francisco, California.

P. GREGORY CONLON
President

DANIEL Wm. FESSLER
JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER
Commissioners

INTERIM ORDER