

Decision 97-09-053 September 3, 1997

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 et al.

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

ORIGINAL

**OPINION ON PETITION TO MODIFY D.96-08-038 AND D.96-10-044,
REQUEST TO APPROVE AMENDMENTS TO THE ISO AND PX TRUST
AGREEMENTS, AND REQUEST TO APPROVE APPOINTMENT OF TRUSTEE**

I. Summary of Decision

In this decision, we approve the "Amended and Restated ISO Restructuring Trust Agreement," "Amended and Restated PX Restructuring Trust Agreement," "Coordination Agreement Between ISO Restructuring Trust and the California Independent System Operator Corporation," and "Coordination Agreement Between PX Restructuring Trust and the California Power Exchange Corporation," as submitted to the Commission on August 18, 1997 and requested in the "Petition to Modify Commission Orders and Amend the ISO and PX Restructuring Trust Agreements" (Petition), dated August 11, 1997. The Petition was filed by the Trustee of the ISO Restructuring Trust and PX Restructuring Trust (Trustee), Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (Edison) (the Petitioners). We also select Susan Uecker to succeed S. David Freeman as Trustee. Although we do not modify Decision (D.) 96-08-038 and D.96-10-044 (the Trust Decisions) in the ways Petitioners request, we make affirmative, prospective orders to accomplish similar results.

II. Background

In the Policy Decision (D.95-12-063, as modified by D.96-01-009), the Commission articulated its policy for promoting competition and market mechanisms in the electric generation industry and described its vision for the functioning of the restructured market for generation. The cornerstones of that vision are two new institutions, the Power Exchange (PX), a forum for the purchase and sales of short-term energy, and the Independent System Operator (ISO), which will have responsibility for dispatching energy to meet demand and for operating, but not owning, the transmission system in California. The Commission ordered PG&E, SDG&E, and Edison (the utilities) to file proposals with the Federal Energy Regulatory Commission (FERC) to establish the PX and ISO. The utilities made a joint filing with FERC on April 29, 1996.

In the Policy Decision, the Commission also set a goal of January 1, 1998, for the start of the new market structure. When it began to appear that initial obstacles associated with financing the development of the PX and ISO might frustrate achievement of that goal, the Commission and the utilities took action. On May 1, 1996, the Coordinating Commissioner issued a ruling requesting PG&E, SDG&E, and Edison to make a joint filing at the Commission to establish trusts, with the three utilities as Trustors, to provide start-up and development funding for the ISO and PX. On May 31, 1996, the utilities filed advice letters to establish memorandum accounts to record development expenditures made while the application was being processed, and the Commission authorized those memorandum accounts on July 17 in Resolution E-3459. On July 9, 1996, the utilities filed their joint application. On August 2, in D.96-08-038, the Commission acted on the application and authorized the utilities to guarantee loans to the ISO and PX Trusts for hardware and software development and further authorized the establishment of the trusts. That decision was modified on October 15 by D.96-10-044 to reflect the provisions of Assembly Bill (AB) 1890, the Legislature's landmark pronouncement on electric industry restructuring, which was signed into law on September 23, 1996. The Petition seeks to modify these two decisions.

The Petitioners supplemented their Petition on August 18, 1997, when they filed their "Submission of Documents and Proposal for a New Trustee" (Submission). The

Submission included documents entitled "Amended and Restated ISO Restructuring Trust Agreement," "Amended and Restated PX Restructuring Trust Agreement" (Amended Trust Agreements), "Coordination Agreement Between ISO Restructuring Trust and the California Independent System Operator Corporation," "Coordination Agreement Between PX Restructuring Trust and the California Power Exchange Corporation" (Coordination Agreements), "ISO Asset Transfer Agreement," and "PX Asset Transfer Agreement." The Submission also requested the Commission to select Susan Uecker as successor Trustee and included information on her background and qualifications.

In response to Petitioners' "Motion for Expedited Treatment and Shortened Protest Period" of August 11, a ruling of the Administrative Law Judge (ALJ) on August 12 shortened the time for responding to the petition. No responses to the petition were filed.

III. The Petitioners' Requests

A. Modifications of the Trust Decisions

1. Description

Petitioners seek modification of D.96-08-038 and D.96-10-044 to allow for some changes they desire to the role of the Trustee and to the transfer of responsibility from the Trustee to the California Independent System Operator Corporation and the California Power Exchange Corporation (ISO and PX Corporations).

D.96-08-038 noted that the Trustee had a fiduciary duty to carry out the purposes of the trusts now known as the California PX Trust and the California ISO Trust (Trusts). The primary purpose of the Trusts was "to assist the collaborative efforts of the industry in preparing for the restructuring the California electric industry by developing computer hardware and software systems for the eventual implementation of a Statewide electric power exchange (PX Trust) and for the centralized provision of electric transmission and related services (ISO Trust) by California public benefit nonprofit corporations" (D.96-08-038, slip op. at 24). In support of this role, the decision also described the roles of advisory committees for

each Trust. The advisory committees were to include representatives of interests affected by the restructuring and were given substantial responsibilities. (See D.96-08-038, slip op. at 27-30.)

Work on the ISO and PX has progressed considerably since last year. The ISO and PX have been established as independent corporations, as contemplated by Public Utilities (PU) Code § 340, with governing boards as required by PU Code §§ 337 and 338. The shared interest of the ISO and PX Corporations and the ISO and PX Trusts in developing the hardware and software needed to commence operations on January 1, 1998, has resulted in a blending of the functions of the corporations and trusts. Many members of the Trusts' advisory boards are also members of the Corporations' governing boards. The hand-off of responsibility from the Trusts to the Corporations has proceeded as expected.

Another development, however, has led the Petitioners to request a formal transfer of responsibility somewhat earlier than apparently contemplated in the Trust Decisions. The Trust Decisions seem to expect a formal transfer to the corporations near the time operations commence on January 1, 1998, although the point is not expressly discussed. The current Trustee, however, has resigned and will leave that position effective September 4, 1997. This development presents a convenient opportunity to make the formal transfer of responsibility to the Corporations and to redefine the duties of the Trustee just before a new Trustee assumes office.

As a result of these circumstances, the Trustee, the Trust advisory committees, the Corporations, and the utilities all agree that development responsibility should be transferred more formally to the Corporations. Accordingly, Petitioners propose to amend the Trust Agreements and to modify the Trust Decisions to allow this transfer. In particular, the transfer of responsibilities will require a redefinition of the duties of the Trustee. The Trust Decisions gave the Trustee considerable authority to pursue the development necessary to have the ISO and PX operational by January 1, 1998. It is appropriate to transfer much of that authority to the Corporations. Thus, the duties of the Trustee as outlined in the Trust Decisions must be modified to allow the transfer of responsibility.

2. Discussion

Petitioners propose to modify the Trust Decisions to reflect the changes in the duties of the Trustee and the transfer of responsibilities to the Corporations that Petitioners hope to place in effect starting September 4. We agree with the intent of these modifications, but it does not make sense at this point to go back and modify the Trust Decisions to erase, in effect, the structure that has governed the development of the Trusts for much of the past year. Instead, we will incorporate Petitioners' points in our order, to describe prospectively the duties of the Trustee and the relation between the Trusts and the Corporations.

We understand Petitioners' proposed modifications to accomplish the following:

- To phase out the Trust advisory committees
- To transfer the following responsibilities of the Trust advisory committees to the Corporations' governing boards:
 - Making recommendations on expense authorizations
 - Submitting quarterly reports to the Corporations
 - Submitting quarterly reports to the Commission's Energy Division
- To authorize the Trustors (the utilities) to execute the Amended Trust Agreements with the successor Trustee
- To affirm that the Trust Decisions' treatment of recovery of development costs is not affected by the amendments to the Trust Agreements

Rather than modifying the Trust Decisions as Petitioners propose, our order will reflect Petitioners' requests and will operate prospectively. We intend for today's order to supersede any inconsistent portions of the Trust Decisions; in all other (*i.e.*, consistent) respects, the Trust Decisions will remain in effect.

B. Amendment of the Trust Agreements

1. Description

In addition to the modifications to the Trust Decisions, the Petition asks the Commission to approve amendments to the Trust Agreements.¹ (Identical Sections 9.3 of the current ISO and PX Trust Agreements require the Commission's approval before the Trustee may execute amendments to the Agreements.) The proposed Amended Trust Agreements were included in Petitioners' supplemental Submission of August 18. The amendments are intended to "redefine the role of the Trustee to reflect financial disbursement obligations, with development responsibilities moved to the Corporations."

2. Discussion

In general, the amendments effect the transfer of responsibilities to the ISO and PX Corporations. References to the Trust advisory committees are removed, and the Corporations assume many of the advisory committees' functions. The role of the Trustee is redefined, in keeping with the diminished role of the Trusts. The Trust Agreements are brought up to date to reflect that many of the requirements of the initial Trust Agreements, such as the securing of the loan guarantees and the formation of the Corporations, have been achieved.

The amendments are in keeping with the transfer of responsibility outlined in the Trust Decisions, and we will approve them.

¹ This type of request is not appropriate as part of a petition for modification, since Petitioners do not in this regard ask the Commission "to make changes to the text of an issued decision" (Rule 47(a) of the Commission's Rules of Practice and Procedure). A request for the Commission to take specific action other than modifying the text of a decision should be presented as a motion. (Rule 45(b).) In this case, we will overlook this defect because the request is closely related to the subject of the petition for modification (see Rule 3(b)) and because one of the primary procedural distinctions between a motion and petition for modification, the different response periods (compare Rule 45(f) with Rule 47(f)), was eliminated by the ALJ's Ruling Shortening Time. All parties to this proceeding have had notice of all aspects of Petitioners' request and have had an opportunity to respond.

C. Selection of the New Trustee

1. Description

In the August 18 Submission, Petitioners note that they have sent out a request for proposals for a replacement Trustee and have interviewed four candidates. They further "propose that the Commission select one of these candidates, Susan Uecker, as Trustee" (p. 4), and the Submission includes a list of her qualifications.²

2. Discussion

Under California law, a vacancy in the office of trustee may be filled in three ways. First, "If the trust instrument provides a practical method of appointing a trustee or names the person to fill the vacancy, the vacancy shall be filled as provided in the trust instrument." (Probate Code § 15660(b).) Neither the Trust Agreements nor the Trust Decisions describe the process for selecting and approving a replacement Trustee,³ so this statute cannot apply here. Second, a vacancy may be filled on agreement of all adult beneficiaries. (Probate Code § 15660(b).) That agreement would be impractical to obtain from the Trusts' beneficiaries, who are defined as the general public of the State of California, specifically purchasers of electricity in the state. (Trust Agreements, § 1.2.) Third, if neither other method for filling the vacancy can be used, on petition of any interested person, the court⁴ may appoint a trustee. (Probate Code § 15660(c).)

The Commission has played a major role in the creation and short lives of the Trusts. The Trusts were created in response to our orders, and we specified many of the provisions to be included in the Trust Agreements. The Trust Agreements permit

² Again, this request should have been made more explicitly as a motion, but we will overlook this procedural shortcoming for the reasons stated in note 1.

³ Identical Sections 6.1 of the initial Trust Agreements, titled "Successor Trustee," primarily address the resignation or removal of the Trustee. The sole provision concerning the successor trustee describes how amendments "necessitated by the selection of a successor Trustee" are to be made.

⁴ As a general rule, the Superior Court will have jurisdiction over most trusts. (Probate Code § 17000.)

us to issue advisory opinions on decisions within the Trustee's authority, which the Trustee may follow without fear of liability. (Trust Agreements, § 1.8.) The Commission is stated to be the exclusive forum for legal actions against the Trustee. (Trust Agreements, § 6.1.) In many ways, the powers granted to the Commission by the Trust Agreements exceed the normal jurisdiction of the Superior Court over other trusts. In light of the Commission's extensive involvement in the creation and operation of these Trusts, it is fair to conclude that the Commission's role in relation to these Trusts is analogous to the role of the Superior Court regarding other types of trusts. Acting on that analogy and on the basis of Probate Code § 15660(c), we will authorize the appointment of Susan Uecker as successor Trustee, as proposed by Petitioners.

D. The Asset Transfer Agreements

1. Description

In their August 18 Submission, Petitioners included copies of the ISO Asset Transfer Agreement and PX Asset Transfer Agreement between the ISO and PX Corporations and the respective Trusts. These agreements formalize the transfer of hardware, software and related assets from the Trusts to the Corporations in exchange for the Corporations' notes and cash, as directed by the Trust Decisions.

2. Discussion

Petitioners do not believe that approval of the Asset Transfer Agreements is necessary, because the transfer of the Trusts' assets for notes was contemplated and authorized in the Trust Decisions. Appendix B of the Application describes some principles affecting the transfer of assets from the Trusts to the Corporations, and we ratified those principles when we approved the loan guarantees in D.96-08-038 (Ordering Paragraph 3). In addition, PU Code § 361, added by AB 1890, requires the Commission to ensure that development funds secured by the Trusts are placed at the disposal of the Corporations. In D.96-10-044, we acknowledged that D.96-08-038 should be modified to reflect the requirements of § 361 (slip op. at 2, 7-8 (Ordering Paragraph 2)). Sections 2.2 of the existing Trust Agreements also authorize

the Trustee to exchange the Trust's assets for the Corporation's notes or cash, and we have approved those Agreements by means of our delegation of authority to the assigned Commissioner. (D.96-08-038, Ordering Paragraph 3.) Under these circumstances, we agree that our further authorization of the Asset Transfer Agreements would be redundant and unnecessary.

E. The Coordination Agreements

1. Description

In the August 18 Submission, Petitioners also included copies of Coordination Agreements describing the prospective division of responsibilities between the Trusts and the Corporations. Petitioners explain that:

"The parties originally intended to include such provisions in the Amended and Restated Trust Agreements and the Asset Transfer Agreements. The petition thus references two sets of agreements, not three. Subsequently, the parties have decided that the better course is to place such provisions in a separate agreement, resulting in the Coordination Agreements." (Submission, p. 3, n.1.)

In general, the Coordination Agreements clarify the activities, rights, and duties of the Corporations and the Trusts along the lines described in the Petition and Amended Trust Agreements. The Corporations, for example, will be responsible for "conducting all procurement, development, testing, acceptance and operating activities" associated with the transferred assets. The Corporations assume many of the former functions of the advisory committees, including preparing and submitting Quarterly Expenditure Plans, identifying any recommendations that will necessarily delay market implementation beyond January 1, 1998, and balancing specified criteria in deciding whether to make a proposed expenditure. Each Corporation will also serve as the Trustee's agent with regard to assets not yet transferred to the Corporation, make requests for payment by the Trustee, direct or request the Trustee with respect to any matter pertaining to the transferred assets, and make decisions regarding investment and borrowing by the corresponding Trust. The Corporation has the right

to reasonable access to the Trust's books and records, and can request an audit of the Trust.

With the increased role of the Corporations, the role of the Trustee is reduced. The Trustee's responsibilities include maintaining inventories of assets not yet transferred to the Corporations in a way that facilitates the transfer or interim use of those assets by the Corporations. The Trustee must also notify the Corporations when insufficient funds are available for the Trustee to perform the Trustee's obligations, and the Trustee must perform actions directed by the Corporations pursuant to the Amended Trust Agreements and the Coordination Agreements.

2. Discussion

Petitioners have not specifically requested our approval of the Coordination Agreements, and it is unclear whether the Petitioners seek our approval or whether our approval is required. The Coordination Agreements are consistent with the changes requested to the Trust Decisions and the Trust Agreements. We have previously explained why we agree with the points of the requested modifications to the Trust Decisions, and we have granted our approval to the amendments to the Trust Agreements. Consistent with those determinations, we approve the Coordination Agreements to the extent that our approval is necessary.

IV. Commission Monitoring of the Development of the ISO's and PX's Computer Resources

To fulfill the original responsibility of the Commission-appointed Trustee to ensure that the ISO's and the PX's computer software and hardware are in place and fully operational when the two corporations are scheduled to begin operations on January 1, 1998, we will require that a Commission staff member be appointed to *monitor* the two corporations' computer development programs. This appointee will be responsible both for monitoring the computer development necessary for the initial operations that begin on January 1, 1998, and for monitoring the systems necessary to complete the staged functions scheduled to be introduced subsequently during 1998. This monitoring will be coordinated with the Oversight Board's oversight of the two

corporations, as laid out below in the description of the appointee's role with respect to the Board.

The Commission staff member we assign to perform this monitoring function on behalf of the Commission is Mr. John L. Scadding. The ISO and PX Corporations are requested to agree to do the following to facilitate Mr. Scadding's monitoring function:

- advise Mr. Scadding of any significant event affecting the corporations' progress toward the January 1, 1998 deadline and deadlines for subsequent "staging" of functions to be carried out by the corporations
- permit Mr. Scadding to attend meetings of the two corporations' Boards of Governors, including access under reasonable terms to those portions of Executive sessions of those meetings addressing computer development
- provide Mr. Scadding with notice of all meetings of the two corporations involving computer development, and permit him to attend those meetings
- provide Mr. Scadding with copies of all documents involving computer development that he requests
- provide Mr. Scadding with access at reasonable times and upon reasonable notice to any of the two corporations' respective facilities.

The two corporations are asked to submit to us a letter of agreement between them specifying that they will provide Mr. Scadding with the information and access to their facilities and deliberations specified above.

If Mr. Scadding should note as part of his monitoring activities any events or decisions relating to computer development that in his opinion could seriously call into question the ability of either corporation to meet its January 1, 1998 or subsequent staging deadlines, he would notify in writing the Chief Executive Officer and Governing Board of the relevant corporation or corporations of his concerns. As well, he would notify the Oversight Board of the State of California of his concerns, and inform all Commissioners of this process by providing them with a copy of his notification to the Oversight Board and corporations. To facilitate the process of Mr. Scadding communicating with the Oversight Board, we will appoint Mr. Scadding as the Commission's formal liaison with the Oversight Board.

Findings of Fact

1. On August 11, 1997, Petitioners filed their Petition seeking modification of the Trust Decisions and approval of amendments to the Trust Agreements.
2. On August 18, 1997, Petitioners filed their Submission presenting drafts of the Amended Trust Agreements, Coordination Agreements, and Asset Transfer Agreements, and requesting selection of a successor Trustee.
3. Since we issued the Trust Decisions, the ISO and PX have been established as independent corporations, as contemplated by PU Code § 340, with governing boards as required by PU Code §§ 337 and 338.
4. Many members of the Trusts' advisory boards are also members of the Corporations' governing boards.
5. The current Trustee has resigned and will leave that position effective September 4, 1997.
6. The Trustee, the Trust advisory committees, the Corporations, and the utilities all agree that development responsibility should be transferred more formally to the Corporations at this time.
7. The transfer of responsibilities from the Trusts to the Corporations will require a redefinition of the duties of the Trustee.
8. The Amended Trust Agreements are in keeping with the transfer of responsibility from the Trusts to the Corporations, as outlined in the Trust Decisions.
9. Neither the Trust Agreements nor the Trust Decisions describe the process for selecting and approving a replacement Trustee.
10. It would be impractical to obtain agreement on a successor Trustee from all of the Trusts' adult beneficiaries.
11. The transfer of the Trusts' assets for notes was contemplated and authorized in the Trust Decisions.
12. The Coordination Agreements are consistent with the changes requested to the Trust Decisions and the Trust Agreements.

Conclusions of Law

1. The duties of the Trustee as outlined in the Trust Decisions should be modified to allow the transfer of responsibility from the Trusts to the Corporations.
2. It does not make sense at this point to go back and modify the Trust Decisions to erase, in effect, the structure that has governed the development of the Trusts for much of the past year.
3. Today's order should supersede any inconsistent portions of the Trust Decisions.
4. The Amended Trust Agreements and Coordination Agreements should be approved.
5. In many ways, the powers granted to the Commission by the Trust Agreements exceed the normal jurisdiction of the Superior Court over other trusts.
6. The Commission's role in relation to these trusts is analogous to the role of the Superior Court regarding other types of trusts.
7. Susan Uecker should be selected to succeed S. David Freeman as Trustee of the ISO Restructuring Trust and PX Restructuring Trust.
8. Our further authorization of the Asset Transfer Agreements is unnecessary.
9. In order to allow timely appointment of the successor Trustee, to allow for the transfer of responsibilities from the Trusts to the Corporations, and to keep development of the ISO and PX on a schedule that will allow them to begin operations on January 1, 1998, this decision should be effective today.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (Edison), in their capacities as Trustors of the ISO Restructuring Trust and PX Restructuring Trust, and the Trustee of the ISO Restructuring Trust and PX Restructuring Trust (Trustee) shall act to phase out the advisory committees to the ISO Restructuring Trust and the PX Restructuring Trust, as described in Decision (D.) 96-08-038, as modified by D.96-10-044.

2. In connection with the phase-out of the advisory committees ordered in the preceding paragraph:

- a. The rights and duties of the advisory committees set forth in Ordering Paragraphs 1(a), 1(b), and 1(c) of D.96-08-038 shall be assumed by the respective governing boards of the California Independent System Operator Corporation (ISO Corporation) and the California Power Exchange Corporation (PX Corporation).
- b. The rights and duties of the respective advisory committees set forth in Ordering Paragraphs 1(j) and 1(m) of D.96-08-038 shall be assumed by the ISO and PX Corporations, as described in the "Coordination Agreement Between ISO Restructuring Trust and the California Independent System Operator Corporation" and the "Coordination Agreement Between PX Restructuring Trust and the California Power Exchange Corporation."
- c. References to the Trusts' advisory committees in Ordering Paragraphs 1(d), 1(e), 1(g), 1(i), 1(n), and 1(p) of D.96-08-038 remain effective only to the extent necessary during the phase-out of the advisory committees as described in Paragraph 1 above, and shall become ineffective and be superseded by the provisions of this order when the phase-out of the advisory committees is completed.
- d. Ordering Paragraphs 1(f) and 1(l) of D.96-08-038 are no longer effective and are superseded by the provisions of this order.

3. The "Amended and Restated ISO Restructuring Trust Agreement," "Amended and Restated PX Restructuring Trust Agreement," "Coordination Agreement Between ISO Restructuring Trust and the California Independent System Operator Corporation," and "Coordination Agreement Between PX Restructuring Trust and the California Power Exchange Corporation" are approved. The provisions for recovery of development costs adopted in D.96-08-038 and D.96-10-044 are not affected by the changes these documents make to the ISO Restructuring Trust Agreement and PX Restructuring Trust Agreement.

4. Susan Uecker is selected to succeed S. David Freeman as Trustee.

5. PG&E, SDG&E, and Edison, in their capacities as Trustors of the ISO Restructuring Trust and PX Restructuring Trust, shall on September 4, 1997, execute the Amended and Restated ISO Restructuring Trust Agreement and the Amended and

A.96-07-001 ALJ/BTC/sid *

Restated PX Restructuring Trust Agreement, respectively, in substantially the same form and substance as the documents we approve today, with the Trustee.

6. Any portions of D.96-08-038 and D.96-10-044 that are inconsistent with this order are hereby superseded. All other portions of D.96-08-038 and D.96-10-044 remain in effect.

7. Except to the extent granted in this order, the "Petition to Modify Commission Orders and Amend the ISO and PX Restructuring Trust Agreements," dated August 11, 1997, is denied.

This order is effective today.

Dated September 3, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners