

145 FERC ¶ 61,151
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Trans Bay Cable LLC

Docket No. ER13-2412-000

ORDER ACCEPTING AND SUSPENDING PROPOSED TARIFF CHANGES AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued November 21, 2013)

1. On September 20, 2013, Trans Bay Cable LLC (Trans Bay) filed revisions to its transmission owner tariff (TO Tariff) increasing its transmission revenue requirement (TRR) from \$132,500,000 to \$139,134,000. In this order, we accept Trans Bay's proposed TRR subject to refund; establish settlement judge and hearing procedures to determine, among other things, the discounted cash flow (DCF) range of reasonable returns for Trans Bay's return on equity (ROE); and find that the resulting ROE should be set at the upper end of that range, not to exceed 13.5 percent, as discussed below.

I. Background

2. Trans Bay owns a 53-mile, 400 MW high-voltage, direct-current submarine transmission line buried beneath the San Francisco Bay, with converter stations at each end (Project). The Project provides direct electric transmission between Pacific Gas and Electric Company's (PG&E) Pittsburg and Potrero substations, both located in San Francisco, California. Trans Bay states that in 2012, the Project delivered power to approximately 57 percent of San Francisco's load. As a participating transmission owner member of the California Independent System Operator Corporation (CAISO), Trans Bay recovers its high voltage TRR through CAISO's transmission wheeling access charge pursuant to CAISO's open access transmission tariff.

3. On July 22, 2005, the Commission accepted a proposed operating memorandum¹ setting forth the rate principles and operational responsibilities pursuant to which Trans Bay would undertake the development, financing, construction, and operation of the

¹ The proposed operating memorandum was filed by Trans Bay, the City of Pittsburg, California, and Pittsburg Power Company in Docket No. ER05-985-000.

Project upon its completion.² Specifically, the Commission approved the following requested rate principles for the Project: (1) a post-tax 13.5 percent ROE; (2) a three-year rate moratorium beginning with its first TRR filing; (3) a 50/50 debt/capital structure for the first three years of the Project's commercial operation; and (4) a 30-year depreciation period. In granting these rate principles, the Commission stated that Trans Bay, as a newly-formed, transmission-only company, faced unique and elevated risks that justified the "enhanced" 13.5 percent ROE, particularly in light of the reliability and economic benefits the Project would provide in addressing the critical need for generation within the City of San Francisco.³

4. On October 23, 2009, Trans Bay filed its initial rate case, proposing an annual TRR of \$149.3 million for the Project under its transmission owner tariff (TO Tariff), which included the same rate principles as the 2005 operating memorandum.⁴ On December 17, 2009, the Commission accepted Trans Bay's rate filing, subject to refund and hearing procedures, and affirmed its previous acceptance of these rate principles, including the 13.5 percent ROE. While the Commission made an up-front determination on Trans Bay's ROE, the Commission stated that issues of material fact remained. After extensive negotiations, the parties reached a "black box" settlement that established an annual TRR for the Project of \$132.5 million. The settlement, which the Commission accepted on December 30, 2011, also required Trans Bay to file its next rate case by September 20, 2013.⁵

II. Trans Bay's Filing

5. Trans Bay proposes to revise its TO Tariff to increase its annual TRR from \$132,500,000 to \$139,134,000 without refund, suspension, or hearing, to become effective November 23, 2013. Trans Bay also requests that, in approving its proposed TRR and associated cost of service, that the Commission provide an up-front

² *Trans Bay Cable LLC*, 112 FERC ¶ 61,095 (2005) (Operating Memorandum Order).

³ The Commission stated that these benefits include the potential to reduce congestion costs and the reliability must-run requirements in San Francisco, decrease local pollution, and increase system reliability. Trans Bay September 20, 2013 Transmittal Letter (Transmittal Letter) at 3 (citing Operating Memorandum Order, 112 FERC ¶ 61,095 at P 24).

⁴ Trans Bay later reduced its requested TRR to \$140.4 Million based on actual cost data. See Docket No. ER10-116-000.

⁵ *Trans Bay Cable LLC*, 137 FERC ¶ 61,258 (2011) (Settlement Order).

determination approving its request for a continued 13.5 percent incentive ROE. Specifically, Trans Bay asserts that an ROE of 13.5 percent is consistent with Commission's policy of granting incentive rate treatment for projects with significant benefits and risks, previous Commission orders approving Trans Bay's request for an incentive ROE of 13.5 percent, the Commission's traditional rate of return analysis, and similarly-situated participating transmission owners, as discussed below.

6. Trans Bay states that the Commission should affirm its request for a continued 13.5 percent incentive ROE as a matter of policy given the reliability and economic benefits that the Project provides. Trans Bay explains that the project provides reliability benefits by meeting San Francisco's contingency needs if more than one resource is out of service, and by enhancing the reliability of that service by providing a direct source of energy into the city. In addition, Trans Bay explains that the Project greatly reduces the cost of energy for San Francisco by directly connecting less expensive generation in the East Bay to load in San Francisco in addition to increasing the number of suppliers competing to supply energy within the transmission network. Therefore, Trans Bay asserts that the Project continues to meet the Commission's criteria for an incentive-based ROE.

7. Trans Bay also argues that the Project's owners undertook extraordinary financial risks during its development and construction based on their expectation that they would receive a 13.5 percent ROE. Trans Bay contends that the Commission's approval of its request to continue its 13.5 percent ROE is consistent with the policy adopted in Order No. 1000⁶ and a previous Commission order addressing an ROE incentive for Atlantic Path 15, LLC (Atlantic Path).⁷ Moreover, Trans Bay argues that the Commission's affirmation of its request for a continued 13.5 percent ROE will encourage the development of more transmission projects similar to its Project while meeting the need for stability and regulatory certainty for investment in critical infrastructure. Alternatively, if the Commission does not affirm its request for the continuation of a

⁶ Trans Bay states that the Commission has recognized that "'investors making long-term investment in long-lived facilities must be assured that a ratemaking proposal adopted prior to construction of those facilities will not be later altered in a manner that undermines the basis for financing those facilities.'" Transmittal Letter at 8 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs., Regulations Preambles ¶ 31,323 (2011), *order on reh'g and clarification*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012)).

⁷ *Id.* at 9 (citing *Atlantic Path 15, LLC*, 122 FERC ¶ 61,135, at P 21 (2008) (*Atlantic Path 2008*)).

13.5 percent ROE, Trans Bay warns that such a decision would signal to other investors that the Commission does not stand behind its incentives for the long term.

8. Further, Trans Bay states that its request for an ROE of 13.5 percent is just and reasonable because it falls within the range of reasonableness of its DCF analysis – 6.32 percent to 13.55 percent.⁸ Trans Bay explains that current conditions have produced artificially low ROE values and that the risks and benefits associated with the Project, as mentioned above, warrant an ROE in the upper end of the range. For example, Trans Bay asserts that conducting its DCF analysis based on a broader range of companies comparable to Trans Bay in terms of business risk, such as Trans Bay’s “alternative sample” analysis or the inclusion of ITC Holdings Corp. (ITC) in the proxy group, yield a higher range of reasonable returns. Lastly, Trans Bay argues that the continuation of its 13.5 percent incentive ROE is consistent with the Commission’s approval of a continued 13.5 percent ROE for Atlantic Path.⁹

9. For these reasons, Trans Bay asserts that it has provided ample support for the Commission to affirm its request for a continued 13.5 percent ROE without hearing. However, if the Commission chooses to set its ROE for hearing, Trans Bay requests that the Commission, at minimum, affirm that the ROE must be set in the upper end of the zone of reasonableness, consistent with previous Commission orders.¹⁰

10. Trans Bay also proposes three other revisions to its TO Tariff. First, Trans Bay proposes an actual capital structure of 45 percent debt and 55 percent equity, consistent with the Commission’s holding that Trans Bay submit its actual capital structure for filing within 36 months of the Project’s commercial operation. Second, Trans Bay proposes an updated cost of service to reflect Period I (July 1, 2012, to June 30, 2013) and Period II (January 1, 2014, to December 31, 2014), which includes nine significant capital additions to rate base, operation and maintenance (O&M) expenses, and administrative and general (A&G) expenses based on the forecasted costs and estimated in-service dates of these additions. Last, Trans Bay proposes to allocate 7.1 percent of its TRR to low-voltage transmission, consistent with CAISO’s open access transmission tariff.

⁸ *Id.* at 11.

⁹ *Id.* at 16 (citing *Atlantic Path 2008*, 122 FERC ¶ 61,135 at PP 16-18; *Atl. Path 15, LLC*, 135 FERC ¶ 61,037, at PP 19-20 (2011) (*Atlantic Path 2011*), *order on reh’g*, 138 FERC ¶ 61,005, *order on reh’g*, 139 FERC ¶ 61,148 (2012)).

¹⁰ *Id.* at 17 (citing *Startrans IO, LLC*, 141 FERC ¶ 61,271 (2012) (*Startrans 2012*)).

11. Finally, Trans Bay requests waiver of section 35.13 of the Commission's regulations to the extent necessary, stating that several of the filing requirements are inapplicable to its proposal.¹¹ Trans Bay also requests confidential treatment of Exhibit Nos. TBC-8 and TBC-11, which it states contain commercially sensitive data that could have a debilitating effect on its business enterprise if released to the public.¹²

III. Notice of Filing and Responsive Pleadings

12. Notice of Trans Bay's filing was published in the *Federal Register*, 78 Fed. Reg. 59,921 (2013), with interventions and comments due on or before October 11, 2013. Timely motions to intervene were filed by the City of Santa Clara, California, and the M-S-R Public Power Agency; the Transmission Agency of Northern California; DATC Path 15, LLC; Startrans IO, LLC; and Valley Electric Association, Inc. Timely motions to intervene and comments or protests were filed by Pacific Gas and Electric Company (PG&E); Modesto Irrigation District (Modesto); the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities); Southern California Edison Company (SoCal Edison); and the California Department of Water Resources State Water Project (SWP). Answers were filed by Trans Bay and Six Cities. A motion to accept a late-filed notice of intervention, protest and request for hearing was filed by the Public Utilities Commission of California (CPUC).¹³

13. Protestors generally assert that the Commission should set Trans Bay's entire filing for hearing and settlement procedures. In particular, CPUC, Six Cities, SoCal Edison, and SWP raise several concerns with Trans Bay's request for a continued 13.5 percent ROE and request that the Commission address Trans Bay's ROE and range of reasonableness during the hearing.¹⁴ Specifically, these parties argue that Trans Bay's DCF range of reasonableness does not follow Commission precedent because Trans Bay

¹¹ Specifically, Trans Bay requests waiver of the requirement to file cost-of-service statements AG, AR, AT, AU, AW, AX, BA through BF, BI, BL, and BM, stating that these documents are inapplicable. Ex. TBC-8 at 4.

¹² On October 4, 2013, Trans Bay filed a Proposed Form of Protective Agreement through which parties may request access to the privileged information.

¹³ CPUC explains that its filing was late because Trans Bay failed to serve its tariff revisions on CPUC as required by the Commission's Rules 35.1 and 35.2, 18 C.F.R. §§ 35.1, 35.2 (2013).

¹⁴ In addition, these parties state that the Commission should reject the alternative studies and support Trans Bay includes in its filing, such as its comparison to ITC's ROE and its own "Alternative Sample," as inconsistent with Commission precedent.

used outdated data in its DCF analysis and an outdated growth rate. Six Cities and SWP contend that Trans Bay's requested 13.5 percent ROE does not fall within their separate calculations of Trans Bay's range of reasonableness.¹⁵ SoCal Edison also provides its own calculation of Trans Bay's range of reasonableness, but argues that Trans Bay's ROE should be set at the median of that updated range.¹⁶

14. Protestors also contest other elements of Trans Bay's filing, such as the proposed capital additions, increase in O&M and A&G expenses and depreciation rates. Protestors assert that Trans Bay's filing contains insufficient information to determine whether these aspects of the proposed TRR are just and reasonable. Six Cities and CPUC request that, in addition to the hearing, the Commission initiate an investigation under 206 of the Federal Power Act (FPA) to determine whether Trans Bay's current rate, i.e., the rate established by the Settlement Order, remains just and reasonable. Six Cities explains that, in the Initial Rate Order, the Commission approved Trans Bay's request for a three-year rate moratorium during which its rates would not change (until November 23, 2013). Thus, Six Cities requests that the Commission establish a refund effective date of November 23, 2013, in order to provide maximum protection to CAISO customers between the time Trans Bay's three-year rate moratorium ends and the date that the suspended rates proposed in the instant filing become effective.

IV. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities who filed them parties to this proceeding.

16. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2013), the Commission will grant CPUC's motion to accept its late-filed notice of intervention, protest and request for hearing given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

17. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by Trans Bay or by Six Cities and will, therefore, reject them.

¹⁵ Six Cities at 3, 5-6; SWP at 5-7.

¹⁶ SoCal Edison October 11, 2013 Comments at 6.

B. Commission Determination

18. Trans Bay's proposed TRR, including the requested 13.5 percent ROE, raises issues of material fact that cannot be resolved based upon the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. At the hearing, the presiding judge shall consider the justness and reasonableness of all issues arising out of Trans Bay's proposed TRR increase, with one limited exception discussed below involving where to set the ROE within the range of reasonable returns. In addition, our preliminary analysis indicates that the proposed rates may yield substantially excessive revenues.¹⁷ Therefore, we will accept Trans Bay's proposed TRR, suspend it for the maximum five-month period, to become effective April 23, 2014, subject to refund, and set it for hearing and settlement judge procedures, discussed further below.

19. In the Operating Memorandum Order, and reaffirmed in the Initial Rate Order, the Commission approved Trans Bay's request for a 13.5 percent ROE, among other rate principles, in light of the fact that the Project was being undertaken by a start-up entity, the benefits stemming from the Project, and the elevated risk levels that Trans Bay would assume.¹⁸ We note that Trans Bay's 13.5 percent incentive ROE was established prior to Order No. 679¹⁹ and constitutes an overall ROE without specific incentive adders.²⁰ Historically, the Commission has allowed certain transmission companies qualifying for enhanced rate treatment to maintain an incentive ROE of 13.5 percent so long as that level of return fell within the company's DCF range of reasonableness.²¹ In the instant proceeding, our preliminary analysis of Trans Bay's proposed ROE indicates that the

¹⁷ *W. Tex. Utils. Co.*, 18 FERC ¶ 61,189, at 61,375 (1982).

¹⁸ Operating Memorandum Order, 112 FERC ¶ 61,095 at P 26; Initial Rate Order, 129 FERC ¶ 61,225 at P 21.

¹⁹ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007) (Order No. 679).

²⁰ The Commission rejected Trans Bay's request to include a 50 basis point adder for its participation in CAISO in the Initial Rate Order. Initial Rate Order, 129 FERC ¶ 61,225 at P 23.

²¹ *Atlantic Path 2008*, 122 FERC ¶ 61,135 at P 19; *Startrans 2008*, 122 FERC ¶ 61,306 at P 26; *Atlantic Path 2011*, 135 FERC ¶ 61,037 at P 20; *Startrans 2012*, 141 FERC ¶ 61,271 at P 19.

13.5 percent ROE may no longer fall within the zone of reasonable returns. While Trans Bay's proposed TRR, including the 13.5 percent ROE, has not been shown to be just and reasonable, and may be unjust and unreasonable, the rationale for granting an enhanced ROE to a project that provides, and is expected to continue to provide, significant benefits and that was undertaken by a start-up entity remains, even if the zone of reasonable returns has changed. Consistent with the Initial Rate Order, section 219 of the FPA,²² the principles set forth in Order No. 679, and precedent regarding critically needed infrastructure projects,²³ we direct the presiding judge to determine the appropriate range of reasonable returns and set the ROE at the upper end of this range, not to exceed the filed 13.5 percent ROE.

20. The Commission will grant the requested waiver of the filing requirements under section 35.13 with respect to the specific cost-of-service statements noted above; however, this finding does not preclude parties at the hearing from demonstrating the need for additional information to allow for a full evaluation of Trans Bay's proposed ROE and overall TRR. We also note that the parties will have the ability to request access to the privileged portions of Trans Bay's filing pursuant to the Commission's regulations.²⁴

21. Finally, we dismiss Six Cities' and CPUC's request for the Commission to initiate an investigation under section 206 of the FPA to determine whether Trans Bay's current rates remain just and reasonable during the five-month suspension period from November 23, 2013, through April 22, 2014. Neither the Operating Memorandum Order nor the Settlement Order state that the rate principles approved in the Initial Rate Order would terminate on November 23, 2013. Instead, the Commission found that Trans Bay was entitled to receive those rates for three full years and that Trans Bay would be required to file revised rates by September 20, 2013, which Trans Bay has done. Therefore, we find that Trans Bay has complied with the Commission's directives and a further investigation into previously settled rates is unwarranted.

C. Hearing and Settlement Judge Procedures

22. Other than the issue summarily resolved above, Trans Bay's proposed rates raise issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing ordered below.

²² 16 U.S.C. 824s (2012).

²³ *Atlantic Path 2008*, 122 FERC ¶ 61,135 at P 21; *Atlantic Path 2011*, 135 FERC ¶ 61,037 at PP 19, 20.

²⁴ 18 C.F.R. § 388.112(b)(2) (2013).

23. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before the hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.²⁵ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding, otherwise the Chief Judge will select a judge for this purpose.²⁶ The settlement judge shall report to the Chief Judge and the Commission within thirty days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge. Should the settlement judge ultimately determine that a hearing is warranted, PG&E shall file a full case in chief pursuant to the Commission's regulations to support its proposed rate structure at hearing.

The Commission orders:

(A) Trans Bay's proposed TRR is hereby accepted for filing and suspended for the maximum five-month period, to become effective on April 23, 2014, subject to refund, and subject to hearing and settlement judge procedures, as discussed in the body of this order.

(B) Trans Bay's request for waiver of specific cost-of-service statements in section 35.13 of the Commission's regulations is hereby granted, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a

²⁵ 18 C.F.R. § 385.603 (2013).

²⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of the date of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

public hearing shall be held in Docket No. ER13-2412-000 concerning the justness and reasonableness of Trans Bay's proposed TRR, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D), (E), and (F) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2013), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(E) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.