

106 FERC ¶ 61,305
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern California Water Company

Docket No. EL02-129-000

ORDER ON COMPLIANCE FILING

(Issued March 26, 2004)

1. In a letter order issued on September 27, 2002, granting market-based rate authority to Southern California Water Company (SCWC),¹ the Commission established this docket in order to gather information concerning a power sale made by SCWC to Mirant Americas Energy Marketing, LP (Mirant) during 2001. Our review of SCWC's compliance filing in this docket, and Mirant's response, indicates that SCWC charged Mirant a market-based rate without prior Commission authorization to enter into market-based rate sales. Therefore, we require SCWC to make refunds, with interest, to Mirant. This order benefits customers by enforcing the filing requirements of the Federal Power Act (FPA), and the Commission's policies thereunder.

Background

2. On July 31, 2002, SCWC submitted for filing with the Commission, in Docket No. ER02-2400-000, an application for market-based rate authority under which SCWC would engage in wholesale electric power and energy transactions at market-based rates. SCWC requested a March 26, 2002, effective date for its market-based rate authority, noting two sales made by SCWC through the Automated Power Exchange (APX) in APX-administered power markets in California on March 26 and April 4, 2002.

3. Mirant filed a motion to intervene and protest. Mirant did not contest SCWC's application for market-based rates, but rather informed the Commission that it had entered into an earlier power purchase agreement with SCWC (the SCWC Sale Agreement) on March 30, 2001, under which SCWC sold wholesale power to Mirant at market-based rates. Mirant contended that because SCWC did not have market-based

¹ Southern California Water Company, 100 FERC ¶ 61,373 (2002) (September 27 Order).

rate authority at that time, the Commission should require SCWC to refund to Mirant the difference between the market-based rate that Mirant paid SCWC pursuant to the SCWC Sale Agreement, and SCWC's cost for the electric energy, with interest on the revenues collected.

4. SCWC filed an answer to the protest, contesting Mirant's allegations on various grounds. SCWC argued that Mirant's request for a refund for the earlier sale by SCWC to Mirant was essentially a complaint under Section 206 of the FPA, which should not be considered in the context of SCWC's request for market-based rate authority. SCWC further argued that Mirant's request for a refund sidestepped the dispute resolution provision of the Western Systems Power Pool Agreement (WSPP Agreement), under which the transaction took place. In addition, SCWC argued that its membership in the WSPP permitted it to make market-based rate sales.

5. SCWC also contended that Mirant's proposed refund calculations ignored the cost-based-cap formula rate in the WSPP Agreement, which allows SCWC to charge a rate up to its forecasted Incremental Cost (as that term is defined in the WSPP Agreement), plus a cost-based adder. According to SCWC, applying this formula rate to SCWC's purchased power portfolio confirmed that no overcharge occurred and no refund would be appropriate or legally sustainable under the WSPP Agreement. Finally, SCWC asserted that, assuming arguendo that SCWC's sale exceeded the cost-based-cap formula rate of the WSPP Agreement, a refund would unjustly enrich Mirant at the expense of SCWC's retail electric customers, because Mirant had already been able to resell the energy Mirant purchased from SCWC at a profit.

6. Mirant subsequently filed a response to SCWC's answer, challenging SCWC's allegations and responding to SCWC's arguments.

7. Having reviewed these pleadings, the Commission expressed concern about SCWC's earlier sale to Mirant, and established the instant docket to collect relevant information from the parties to assist in addressing those issues. The September 27 Order instructed SCWC to provide the following information: (1) documentation demonstrating that SCWC and/or the WSPP made the appropriate filing for SCWC to become a party to, and make sales under, the WSPP Agreement; (2) a demonstration that the index-based price in the SCWC Sale Agreement falls below the WSPP Agreement's cost-based rate cap, as well as identification of SCWC's incremental costs as forecasted on the date the SCWC Sale Agreement was executed; and (3) hourly billing data for the sales to Mirant during the April 2001 period that includes SCWC's actual sales price and associated quantities.²

² Id. at P 16-17.

8. In its November 12, 2002, compliance filing (as corrected on November 19, 2002), SCWC asserted that it has been a party to the WSPP Agreement since November 1997, and therefore was eligible to engage in sales under that agreement. SCWC clarified that, when it executed the WSPP Agreement, it was not a public utility subject to FPA jurisdiction, but only a purchaser under the WSPP Agreement. SCWC further stated that, while it did not make a filing with the Commission to become a member of the WSPP, WSPP had subsequently filed amended tariff sheets with the Commission containing notice of SCWC's membership.

9. SCWC went on to contend that its forecasted incremental cost was the spot market price for energy. SCWC explained that it had no generation of its own and its only source of energy to meet its peak needs was an agreement with Illinova Energy Partners, Inc. (IEP).³ SCWC asserted that it paid a spot market price for any energy purchased from IEP and, therefore, it is SCWC's position that its incremental cost was the spot market price. SCWC concluded that the SP15⁴ minus \$20.00/MWh price it charged Mirant under the SCWC Sale Agreement could never have exceeded the WSPP cost-based rate cap, which consists of a seller's incremental cost plus an adder.

10. SCWC stated that it is unable to provide the hourly billing data requested by the Commission. An invoice for power sales to Mirant is included in its filing, however.

11. On December 2, 2002, Mirant filed comments in response to SCWC's compliance filing. Mirant contended that SCWC did not adequately comply with the Commission's order. According to Mirant, SCWC failed to (1) demonstrate any filing with the Commission to make it a member of the WSPP; (2) present evidence that its forecasted incremental costs for April 2001 were equal to daily spot prices; and (3) provide hourly billing data for sales to Mirant. Mirant reiterated its refund request plus interest.

12. Mirant further asserted that a participant to the WSPP Agreement may make market-based rate sales only if those sales are made pursuant to a market-based rate tariff approved by the Commission. Mirant alleged that SCWC's interpretation of the WSPP

³ At the time the SCWC Sale Agreement was executed, SCWC had a contract with Dynegy Power Marketing, Inc., to purchase 12MW -- SCWC's typical load -- at \$35.50/MWh. SCWC had also recently contracted with Mirant to purchase 15W at \$95/MWh. Finally, SCWC had a contract with IEP to meet any excess demand, for which SCWC paid a passthrough price.

⁴ SP15 (South of Path 15) is a zone in Southern California, defined by the California Independent System Operator's tariff, which is commonly used as a delivery point for energy. The Dow Jones Index reports energy prices at SP15, and these index-based prices were incorporated in the SCWC Sale Agreement rate charged Mirant.

Agreement pricing provisions blurs the distinction between market-based sales and the cost-based rate cap. It argued that, given SCWC's lack of market-based rate authority, and facing an incremental cost of \$95/MWh, SCWC should have charged Mirant \$1,024,575 for power during April 2001. Instead, according to Mirant's billing information, SCWC charged \$1,668,728.55. Thus, Mirant concluded, SCWC overcharged it \$644,153.55.⁵

13. Notice of SCWC's filing in this docket was published in the Federal Register, 69 Fed. Reg. 8945 (2004), with motions to intervene and protests due or before March 5, 2004. No further pleadings were filed.

Discussion

14. The Commission finds that SCWC was a member of WSPP in March 2001, when it entered into the power sales agreement with Mirant. However, membership in the WSPP does not confer on an entity the right to make sales at rates other than cost-based rates. In accepting the WSPP Agreement, we stated:

The Commission does not believe that the WSPP has met its burden in requesting market-based rates of explaining either that WSPP participants lack, or have adequately mitigated, market power in generation or transmission. Thus, we cannot find that the market-based price ceilings in the WSPP Agreement would ensure that the resulting rates would be just and reasonable under the FPA.⁶

15. Based on the information supplied by the parties, the Commission holds that SCWC improperly made a sale at market-based rates that exceeded the WSPP Agreement's cost-based rate, without previously having filed for and received authority from the Commission to charge such rates. Section 205 of the FPA, 16 U.S.C. § 824d

⁵ On December 17, 2002, SCWC filed a request for leave to file an answer to Mirant's response. This prompted Mirant to file a motion to reject SCWC's request, or, in the alternative, a motion for leave to file a response to SCWC's answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), forbids the filing of an answer to an answer, unless otherwise ordered by decisional authority. The Commission finds that Mirant's response is an impermissible answer, and therefore denies SCWC's request. Mirant's motion to reject and alternative response are therefore dismissed as moot.

⁶ Western Systems Power Pool, 55 FERC ¶ 61,099 at 61,319, order on reh'g, 55 FERC ¶ 61,495 at 62,713-15 (1991), aff'd, 996 F.2d 401 (D.C. Cir. 1993).

(2000), explicitly requires that rates be timely filed with the Commission.⁷ In this regard, the Commission has explained that it cannot “ignore its statutory duty to determine whether rates are just and reasonable by permitting utilities to submit filings whenever convenient,” and that it “must have the opportunity to examine proposed rates, terms, and conditions of jurisdictional service before that service commences.”⁸ Thus, a regulated entity must timely file its rates to allow the Commission to fulfill its statutory mandate, namely, determining whether the rates being charged are just and reasonable. The Commission has further made plain that it “does not allow market-based rates to go into effect before a filing has been tendered with the Commission.”⁹ As noted in the September 27 Order,¹⁰ in such circumstances, in addition to returning the time value of the revenues collected for the period the rate was charged without Commission authorization, we have firmly established the remedy for failure to file:

The utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and the cost-justified rate. . . . [T]he late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized filing of cost-based rates, until the date of Commission authorization.[¹¹]

16. Whether or not Mirant actually suffered any harm is irrelevant to our inquiry here. As we recently observed, the injury being remedied by refunds for late filing is not merely redress for the customer, but particularly directed to “the Commission’s ability to enforce FPA Section 205’s requirement that there be prior notice and that the rates charged be just and reasonable at the time they are being charged.”¹²

⁷ See El Paso Electric Co., 105 FERC ¶ 61,131 at P 9-11 (2003) (El Paso).

⁸ Id. at P 14.

⁹ El Segundo Power, LLC, et al., 84 FERC ¶ 61,011 at 61,060, order on reh’g, 85 FERC ¶ 61,123 (1998), order on reh’g, 87 FERC ¶ 61,208 (1999), order on reh’g, 90 FERC ¶ 61,036 (2000).

¹⁰ September 27 Order, 100 FERC ¶ 61,373 at P 13.

¹¹ Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61,980, order on reh’g, 65 FERC ¶ 61,081 (1993); see 16 U.S.C. § 825h (2000). See also Public Service Co. of Colorado, 85 FERC ¶ 61,146 at 61,588 (1998); Carolina Power & Light Co., 87 FERC ¶ 61,083 at 61,356 (1999) (Carolina Power).

¹² El Paso, 105 FERC ¶ 61,131 at P 21 (footnote omitted), citing Carolina Power, 87 FERC at 61,356.

17. In calculating the appropriate refunds due, we note that the WSPP Agreement during the relevant time period permitted participants to make sales at an incremental cost-plus-adder rate. We disagree with SCWC's position that its incremental cost was the spot market price for energy, because SCWC did not procure the energy it sold to Mirant from the spot market (or self-generate), but simply resold energy it was contractually committed to purchase from Mirant at \$95/MW. While SCWC may have had spot market purchases from IEP during the hours it sold energy to Mirant, these purchases were independent of its sale agreement with Mirant. Accordingly, we find that SCWC's incremental price was the \$95/MWh contract price. Therefore, we conclude that refunds of \$644,153.55 (the difference between the \$1.67 million actually charged and the \$1.02 million that should have been charged) are due to Mirant, plus interest.¹³

The Commission orders:

(A) SCWC is hereby ordered to make refunds to Mirant, with interest, within 30 days of the date of this order, as discussed in the body of the order.

(B) SCWC is hereby directed to file a refund report with the Commission within 15 days of the date refunds are made.

By the Commission.

(S E A L)

Magalie R. Salas
Secretary.

¹³See 18 C.F.R. § 35.19a (2003).