

125 FERC ¶ 61,297  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Philip D. Moeller,  
and Jon Wellinghoff.

San Diego Gas & Electric Company

Docket Nos. EL00-95-164

v.

Sellers of Energy and Ancillary Services Into Markets  
Operated by the California Independent System  
Operator Corporation and the California Power  
Exchange Corporation

EL00-98-184

Investigation of Practices of the California Independent  
System Operator Corporation and the California Power  
Exchange Corporation

ORDER ON DESIGNATIONS

(Issued December 18, 2008)

1. In this order, we act on filings made by certain parties that seek designation as a “non-public utility” for the purposes of the California refund proceedings. As discussed below, we accept the unopposed requests for designation as a “non-public utility” for all those parties listed in Appendix A. Furthermore, we accept the opposed requests for designation as a “non-public utility” for the City of Palo Alto (Palo Alto), the City of Redding (Redding), the Imperial Irrigation District (IID) and the Arizona Electric Power Cooperative (AEPCO).
2. However, we deny the designation requests of the Californians for Renewable Energy (CARE) and the Eugene Water and Electric Board (Eugene) without prejudice.

## **Background**

3. The Remand Order contains a detailed description of the background and history of this proceeding.<sup>1</sup>

4. In brief, the Commission ordered certain governmental entities and other non-public utilities that participated in the centralized single clearing price auction markets operated by the California Independent System Operator (CAISO) and the California Power Exchange (PX) to make refunds for the period of October 2, 2000 to June 20, 2001 (Refund Period).<sup>2</sup> However, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) subsequently held that Federal Power Act (FPA) section 206 did not grant the Commission refund authority over wholesale electric energy sales made by such entities during the Refund Period.<sup>3</sup> Accordingly, the Commission issued the Remand Order vacating its prior orders to the extent that they subjected governmental entities and other non-public utilities to the Commission's refund authority. In the Remand Order, the Commission also directed all entities seeking designation as a "non-public utility," for purposes of the California refund proceedings, to make a filing requesting this designation.<sup>4</sup>

5. More specifically, in the Remand Order, we vacated each of the Commission's California refund orders to the extent that they subjected non-public utility entities to the Commission's FPA section 206 refund authority.<sup>5</sup> Because the non-public utility entities have no refund obligations in this proceeding, we ordered the disbursement of past due amounts owed to these entities as sellers.<sup>6</sup> However, in response to concerns raised by the PX regarding which entities are non-public utility entities and therefore entitled to

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<sup>1</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 121 FERC ¶ 61,067, P 4-16 (2007) (Remand Order).

<sup>2</sup> *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 96 FERC ¶ 61,120, at 61,499, *order on reh'g*, 97 FERC ¶ 61,275 (2001).

<sup>3</sup> *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9<sup>th</sup> Cir. 2005) (*Bonneville*).

<sup>4</sup> Remand Order, 121 FERC ¶ 61,067 at P 78.

<sup>5</sup> *Id.* P 2 and P 57.

<sup>6</sup> *Id.* P 42.

receive the money owed to them as sellers, we directed all entities who believed they should be classified as a non-public utility entity to make a filing so designating themselves.<sup>7</sup>

6. Twenty-nine entities timely filed requesting designation as a “non-public utility.”<sup>8</sup> The California Parties<sup>9</sup> opposed the filings of AEPCO, Palo Alto, Redding and IID. On February 8, 2008, AEPCO filed an answer to the California Parties opposition. On February 25, 2008 the California Parties filed an answer to AEPCO’s answer.

## **Discussion**

### **A. Procedural Matters**

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are persuaded to accept AEPCO’s answer to the California Parties’ opposition as well as the California Parties’ response to AEPCO’s answer because these filings have provided information that assisted us in our decision making process.

### **B. Applicable Statutory Provisions**

8. The Commission derives its refund authority from Part II of the Federal Power Act (FPA) which governs the regulation of electric utilities engaged in interstate commerce.<sup>10</sup> The Commission’s refund authority is determined by the definition of “public utility” set forth in FPA section 201(e)<sup>11</sup> and the exemptions enumerated in FPA section 201(f).<sup>12</sup>

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<sup>7</sup> *Id.* P 57 and P 78.

<sup>8</sup> CARE filed requesting designation as an “electric consumer.”

<sup>9</sup> The California Parties are the People of California *ex rel.* Edmund G. Brown Jr., Att’y Gen., Pacific Gas and Electric Company, Southern California Edison Company, California Electric Oversight Board and the California Public Utility Board.

<sup>10</sup> 16 U.S.C. § 824, *et seq.* (2006).

<sup>11</sup> 16 U.S.C. § 824(e) (2006).

<sup>12</sup> 16 U.S.C. § 824(f) (2000). The Energy Policy Act of 2005 (EPAAct 2005) altered the Commission’s refund authority prospectively. *See* EPAAct 2005, Pub. L. No. 109-58, § 1286 (codified as 16 USC § 824e(e)(2)). Those changes are not applicable to this proceeding.

9. Under FPA section 201, the Commission has authority to regulate “the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce.”<sup>13</sup> However, under section 201(f) of the FPA, the Commission traditionally does not regulate governmental entities under Part II of the FPA “unless [a provision of Part II of the FPA] makes specific reference thereto.”<sup>14</sup> Thus, based on section 201, the Commission does not regulate governmental entities under Part II of the FPA unless the specific terminology or definition used in a particular provision under Part II of the FPA provides such authority.<sup>15</sup>

10. Further, during the Refund Period, the Commission’s refund authority under FPA sections 205<sup>16</sup> and 206<sup>17</sup> specifically applied to “public utilities” and not to governmental entities or non-public utilities.<sup>18</sup> “Public Utility” is defined under FPA section 201(e) as “any *person* who owns or operates facilities subject to the jurisdiction of the Commission under this Part...”<sup>19</sup> “Person” is an “individual or a corporation.”<sup>20</sup> Under FPA section 3(3), municipalities are specifically excluded from the term “corporation.”<sup>21</sup> Finally, under FPA section 3(7) “municipality” is defined as a “city, county, irrigation district,

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<sup>13</sup> 16 U.S.C. § 824(b)(1)(2006).

<sup>14</sup> 16 U.S.C. § 824(f) (2006). Section 201 (f) was amended by EPAct 2005, section 1291 (c). The amendment is not applicable to this proceeding.

<sup>15</sup> EPAct 2005 amended the Commission’s refund authority to include any entity described in section 201(f) who voluntarily makes a short-term sale of electric energy through an organized market. EPAct 2005, section 1286, amending section 206 of the FPA (16 USC § 824e). As noted previously, these amendments to EPAct 2005 do not apply to this proceeding.

<sup>16</sup> 16 U.S.C. § 824d (2006).

<sup>17</sup> 16 U.S.C. § 824e (2006).

<sup>18</sup> *Bonneville*, 422F.3d at 916.

<sup>19</sup> 16 U.S.C. § 824(e) (2006) (emphasis added).

<sup>20</sup> 16 U.S.C. § 796(4) (2006).

<sup>21</sup> 16 U.S.C. § 796(3) (2006).

drainage district, or other political subdivision or agency of a State...”<sup>22</sup> Therefore, prior to the passage of EAct 2005, governmental entities such as State agencies or political subdivisions are exempt from the Commission’s FPA refund jurisdiction.

**C. Ruling on Unopposed Designation Requests**

11. After having reviewed the designation requests of the 24 entities listed in Appendix A, we find these filings are sufficient to establish that those entities are “non-public utilities.”<sup>23</sup> Therefore, under the *Bonneville* decision, those entities were exempt from liability for refunds under the FPA for purposes of the California refund proceedings.<sup>24</sup>

**D. Designation Requests of Palo Alto, Redding and IID.**

12. As noted previously, in the Remand Order, we ordered the disbursement of past due amounts owed to these non-public utility entities as sellers because these entities have no refund obligations in this proceeding.<sup>25</sup> However, in response to concerns raised by the PX regarding which entities are non-public utility entities and therefore entitled to receive the money owed to them as sellers, we directed all entities who believed they should be classified as a non-public utility entity to make a filing so designating themselves.<sup>26</sup>

13. The California Parties object to the designation requests of Palo Alto, Redding and IID. The California Parties argue that the status of these entities is not relevant or material and serves no purpose to this proceeding since none of the entities were Scheduling Coordinators in the CAISO market or market participants in the PX during the refund period.<sup>27</sup>

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<sup>22</sup> 16 U.S.C. § 796(7) (2006).

<sup>23</sup> We note that no party objected to the designation requests of these entities.

<sup>24</sup> As we have noted previously, while these parties have no refund liability under the FPA related to the transactions in question, they may have liability pursuant to other legal theories. Remand Order, 121 FERC ¶ 61,067 at P 3 and P 37.

<sup>25</sup> *Id.* P 42.

<sup>26</sup> *Id.* P 57 and P 78.

<sup>27</sup> California Parties Jan. 16, 2008 Answer to the Proposed Designations as Non-Public Utility Entities of the City of Redding, Cal., the City of Palo Alto, Cal., and the Imperial Irrigation District at 2-3. (California Parties Answer).

14. The California Parties cite the December 12, 2002, Certification of Proposed Findings on California Refund Liability, Appendix, “Who Owes What to Whom,”<sup>28</sup> noting that Redding, Palo Alto and IID are not included in this list of entities.<sup>29</sup> The California Parties further argue that the Commission has held that refund liability attaches to the Scheduling Coordinator of the transactions and does not attach to suppliers who are not their own Scheduling Coordinators, such as Palo Alto, Redding and IID.<sup>30</sup> According to the California Parties, no purpose would be served by designating Palo Alto, Redding and IID as non-public utility entities.<sup>31</sup>

15. We grant the requests of Palo Alto, Redding, and IID to be designated non-public utilities. The California Parties misconstrue the rationale underlying these filings. The purpose of these filings is to determine which entities may receive payment of past due amounts they are owed *as non-jurisdictional sellers* prior to the completion of the refund proceeding. Whether the entity ultimately would have owed refunds in the absence of the *Bonneville* decision is irrelevant to our consideration of these filings since the purpose of these filings is to determine which entities are entitled to receive the money owed to them as non-jurisdictional sellers prior to the completion of the refund proceeding. The California Parties have failed to allege that these entities are not owed money for sales they made during the refund period. Thus, the designation requests are relevant and material and are therefore granted.<sup>32</sup>

#### **E. Eugene Request for Designation**

16. On April 26, 2007 the Commission approved a settlement between Eugene and the California Parties, resolving all matters and claims raised in the above captioned

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<sup>28</sup> California Parties Answer at 3, *citing San Diego Gas & Electric Co.*, 101 FERC ¶ 63,026, at Appendix (2002)(Certification of Proposed Finding on California Refund Liability).

<sup>29</sup> California Parties Answer at 3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> We further note that the Appendix relied upon by the California Parties was not intended to be determinative. The Certification of Proposed Findings labels the Appendix “APPENDIX and *Rough* Identification of Who Owes What to Whom.” *See San Diego Gas & Elec. Co.*, 101 FERC ¶ 61,166, at P 886 (2002) (emphasis added). It is clear that this document was not intended to be the final word on this subject. We find that the document is not sufficient to support the denial of the requested designations.

proceedings as they relate to Eugene and all pending civil proceedings against Eugene initiated by the California Parties arising from events and transactions in the western electricity markets, including the markets of the CAISO and PX, during the period of January 1, 2000 through June 20, 2001.<sup>33</sup>

17. Eugene states that its request for designation as a non-public utility “is made as a precautionary measure.”<sup>34</sup> We find that Eugene’s request for designation is moot. No purpose is served by granting Eugene’s request for designation since that designation would only apply to the California refund proceedings and Eugene is no longer a participant in those proceedings. Therefore, we deny Eugene’s request for designation without prejudice to seek that designation at a later date should clarification of its status become necessary.

#### **F. CARE Request**

18. CARE seeks a declaration that it is an “electric consumer” as defined by the Public Utility Regulatory Policies Act (PURPA) section 3(5).<sup>35</sup>

19. The Remand Order directed all parties seeking designation as a “non-public utility” under the FPA for the purpose of the California Refund proceedings to file such a request within 60 days of the issuance of the Remand Order.<sup>36</sup> CARE’s request for designation as an “electric consumer” is beyond the scope of this proceeding and is irrelevant to the California refund proceedings. Therefore, we deny CARE’s request to be designated an “electric consumer” under PURPA without prejudice to seek that designation in the future should clarification of its status become necessary.

#### **G. AEPCO Request for Designation**

20. AEPCO is a non-profit rural electric generation and transmission cooperative. AEPCO claims it should be designated a “non-public utility” because it is a rural cooperative with mortgage financing from the Rural Utilities Service of the United States Department of Agriculture (RUS). AEPCO relies on the Commission’s decision in

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<sup>33</sup> *San Diego Gas & Elec. Co.*, 119 FERC ¶ 61,091 at P 1 (2007).

<sup>34</sup> Eugene December 12, 2007 Designation as a Non-Public Utility Entity at 2. We note that no party filed an objection to Eugene’s request.

<sup>35</sup> 16 U.S.C. § 2602(5) (2006).

<sup>36</sup> Remand Order, 121 FERC ¶ 61,067 at Ordering Paragraph (I).

*Dairyland Power Cooperative*<sup>37</sup> to support its contention.<sup>38</sup> The California Parties object to AEPCO's request for designation.<sup>39</sup> On February 8, 2008, AEPCO responded to the California Parties objections.<sup>40</sup>

21. AEPCO argues that the Commission would be revisiting "nearly forty years of its jurisprudence" under *Dairyland* by reclassifying it as a "public utility." AEPCO contends that it has sufficiently shown that it is a RUS rural electric cooperative, and that the precedent in *Dairyland* exempts RUS cooperatives from FPA jurisdiction.<sup>41</sup>

22. The California Parties argue that AEPCO's reliance on *Dairyland* is flawed and that *Dairyland* stated that only some, but not all, RUS cooperatives should be exempt from Commission jurisdiction.<sup>42</sup> The California Parties maintain that *Dairyland* never intended to exempt major or larger RUS-cooperatives such as AEPCO.<sup>43</sup> However, AEPCO asserts that it is not a "large" cooperative, having sold only slightly over the 4 million MWH threshold during 2000 and less than the threshold for 2001.<sup>44</sup>

23. We find that AEPCO is entitled to the *Dairyland* exemption. While *Dairyland* does not stand for the proposition that all RUS-financed electric cooperatives are not public utilities under the FPA, *Dairyland* did hold that only **major** generating and transmission cooperatives participating in interstate commerce would be subject to the Commission's jurisdiction.<sup>45</sup>

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<sup>37</sup> 37 FPC 12 (1967) (*Dairyland*).

<sup>38</sup> AEPCO December 10, 2007 Designation at 2.

<sup>39</sup> California Parties January 9, 2008 Objection to Proposed Designation of AEPCO.

<sup>40</sup> AEPCO February 8, 2008, Answer to the California Parties' Objections.

<sup>41</sup> AEPCO Answer at 2-4.

<sup>42</sup> California Parties Objection at 9.

<sup>43</sup> *Id.* at 11.

<sup>44</sup> AEPCO Answer at 13. AEPCO appears to be relying on the Small Business Administration's definition of a small electric utility. *See* 13 C.F.R. § 121.201.

<sup>45</sup> *Dairyland*, 37 FPC at 27-28 (emphasis added).

24. According to AEPCO, its sales have been below 4 million MWh in all its 46 years of existence except for two, 1997 and 2000.<sup>46</sup> AEPCO also contends that for those two years, its sales exceeded 4 million MWh by less than 1 million MWh combined.<sup>47</sup> We note that while EAct 2005 does not apply to this proceeding, in that act Congress amended the exclusions contained in section 201(f) of the FPA to specifically exclude an electric cooperative that sells less than 4 million MWh of electricity per year.<sup>48</sup> This amendment appears to reflect the Congressional view that entities which sell under 4 million MWh per year do not warrant full regulation by the Commission. Given this Congressional directive, the Commission finds that an entity that exceeds the 4 million MWh threshold only twice in almost 50 years is not a major utility under *Dairyland*. Based upon this information, we conclude that AEPCO is not a major generating and transmission cooperative. Thus, AEPCO is entitled to the *Dairyland* exemption. Therefore, we grant AEPCO's request to be designated a non-public utility.<sup>49</sup>

#### **H. Effect of this Order**

25. In the Remand Order, we directed disbursement of past due amounts owed to non-public utility entities after the unpaid amounts were adjusted based upon preparatory rerun data, as finalized upon completion of alternative dispute resolution matters and after our ruling on the designation filings.<sup>50</sup> In our recently issued order addressing the rehearing requests filed regarding the Remand Order, we clarified that disbursement of unpaid amounts would occur after we approve compliance filings submitted by the CAISO and PX that reflect preparatory rerun adjustments, including dispute resolution matters.<sup>51</sup> Thus, any disbursement of past due amounts will occur after our approval of the compliance filings.

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<sup>46</sup> AEPCO Answer at 13.

<sup>47</sup> *Id.* at 13, n. 6.

<sup>48</sup> EAct 2005, Pub. L. No. 109-58, § 1291 (codified as 16 USC § 824(f)).

<sup>49</sup> AEPCO also argues that the California Parties opposition to its designation request is untimely, represents a collateral attack on previous Commission orders as well as the *Bonneville* decision, and that reclassifying it as a public utility now would violate the notice requirement of FPA section 206. In light of our determination that AEPCO should be designated a non-public utility, we find that AEPCO's other arguments are moot.

<sup>50</sup> Remand Order, 121 FERC 61,067 at P 57.

<sup>51</sup> *San Diego Gas & Elec. Co.*, 125 FERC ¶ 61,214, at P 25 (2008).

26. However, in the Remand Order we also directed the CAISO and PX to release the governmental entities collateral.<sup>52</sup> Our ruling on the designation requests clarifies which entities are entitled to receive their collateral prior to the completion of the refund proceedings. The CAISO and the PX are directed to return the collateral to all those entities listed in Appendix A and to Palo Alto, Redding, IID and AEPCO within 20 days of the issuance of this order.

The Commission orders:

(A) The requests for designation as a “non-public utility” are granted for those entities listed in Appendix A.

(B) The requests for designation as a “non-public utility” filed by Palo Alto, Redding, IID, and AEPCO are granted.

(C) The request for designation as a “non-public utility” filed by Eugene is denied without prejudice.

(D) The request for designation as an “electric consumer” filed by CARE is denied without prejudice.

(E) The CAISO and PX are directed to return the collateral to all designated non public utility entities, as described above, within 20 days of the issuance of this order.

By the Commission. Commissioner Spitzer not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>52</sup> *Id.* P 68.

# APPENDIX A

City of Anaheim, California

City of Azusa, California

City of Banning, California

Bonneville Power Administration

City of Burbank, California

California Department of Water Resources

California Energy Resources Scheduling

City of Colton, California

City of Glendale, California

City of Los Angeles Department of Water and Power

Metropolitan Water District of Southern California

Modesto Irrigation District

Northern California Power Agency

City of Pasadena, California

Public Utility District No. 2 of Grant County, Washington

City of Riverside, California

Sacramento Municipal Utility District

Salt River Project Agricultural Improvement & Power District

City of Santa Clara, California

City of Seattle, Washington

City of Tacoma, Washington

Turlock Irrigation District

City of Vernon, California

Western Area Power Administration