

131 FERC ¶ 61,062
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, and John R. Norris.

San Diego Gas & Electric Company

Docket Nos. EL00-95-221
EL00-98-205

v.

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

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

ORDER ON REHEARING

(Issued April 22, 2010)

1. In this order, the Commission denies a request for rehearing filed by the California Parties¹ of the Commission's December 18, 2009 order resolving requests by parties who sought designation as a "non-public utility" for purposes of the California refund proceedings.² Specifically, we uphold our determination that the Arizona Electric Power Cooperative, Inc. (AEPCO) should be designated a "non-public utility."

¹ For purposes of the request for rehearing, the California Parties include Pacific Gas and Electric Co., Southern California Edison Co., San Diego Gas & Electric Co., the People of the State of California *ex rel.* Edmund G. Brown Jr., Attorney General, and the California Public Utilities Commission.

² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 125 FERC ¶ 61,297 (2008) (Designation Order).

Background

2. The Remand Order contains a detailed description of the background and history of this proceeding.³

3. 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).⁴ 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.⁵ 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.⁶

4. 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.⁷ 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.⁸ 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

³ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 121 FERC ¶ 61,067, at P 4-16 (2007) (Remand Order).

⁴ *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).

⁵ *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (*Bonneville*).

⁶ Remand Order, 121 FERC ¶ 61,067 at P 78.

⁷ *Id.* P 2 and P 57.

⁸ *Id.* P 42.

should be classified as a non-public utility entity to make a filing so designating themselves.⁹

5. Twenty-nine entities timely filed requesting designation as a “non-public utility.” The California Parties opposed the designation request of AEPCO, among others.

6. On December 18, 2008, the Commission issued an order resolving all designation requests.¹⁰ The Commission granted all but two requests for designation.¹¹ With regard to AEPCO’s request, we found that as a rural cooperative with mortgage financing from the Rural Utilities Service of the United States Department of Agriculture (RUS), AEPCO was entitled to the *Dairyland* exemption.¹²

7. On January 21, 2009, the California Parties filed a timely request for rehearing. On February 4, 2009, AEPCO filed an answer.

Rehearing Request

8. The California Parties request rehearing of our designation of AEPCO as a non-public utility.¹³ The California parties contend that the Commission failed to follow the *Dairyland* standard.¹⁴ According to the California Parties, the *Dairyland* exemption was never intended to extend to RUS-financed cooperatives that generate and transmit electric energy for sale in interstate commerce. The California Parties argue that the use of the word “major” by the Commission in *Dairyland* to describe that type of cooperative that should be exempt simply pertained to whether the cooperative is a seller in interstate

⁹ *Id.* P 57 and P 78.

¹⁰ Designation Order, 125 FERC ¶ 61,297 (2008).

¹¹ We denied the designation requests of the Californians for Renewable Energy and the Eugene Water and Electric Board without prejudice. *Id.* at P 2, P 16-P 19.

¹² *Dairyland Power Cooperative*, 37 FPC 12 (1967) (*Dairyland*). See Designation Order, 125 FERC ¶ 61,297 at P 20-P 24 for the Commission discussion regarding the application of the *Dairyland* exemption to AEPCO.

¹³ California Parties January 21, 2009 Request for Rehearing at 4 (Rehearing Request).

¹⁴ *Id.* at 5.

commerce to non-cooperatives for ultimate distribution to customers of investor –owned utilities.¹⁵

9. The California Parties also object to the Commission’s application of the four million MWh threshold. The California Parties contend that use of this threshold is inconsistent with the Federal Power Act (FPA) that was in force in 2000-2001.¹⁶ Furthermore, the California Parties argue that the Commission improperly relied upon the standards of the Energy Policy Act of 2005 (EPAct 2005) in evaluating AEPCO’s request for designation as a non-public utility.¹⁷ Moreover, the California Parties contend that, under *Dairyland*, generating and transmission cooperatives that sell to investor-owned utilities in interstate commerce are part of the interstate business of transmitting and selling electric energy at wholesale for ultimate distribution to the public and should not be exempt from Commission jurisdiction. Finally, the California Parties contend that even if the four million MWh threshold applied, AEPCO would still be subject to the Commission’s jurisdiction for the year 2000, because AEPCO’s sales for that year exceeded the threshold.¹⁸

Discussion

A. Procedural Matters

10. The Commission's Rules of Practice and Procedure prohibit answers to requests for rehearing unless otherwise ordered by the decisional authority.¹⁹ Accordingly, AEPCO’s answer to the California Parties’ request for rehearing will be rejected.

B. Substantive Matters

11. We will deny the California Parties’ request for rehearing. We disagree with the California Parties interpretation the *Dairyland* decision. In *Dairyland*, our predecessor, the Federal Power Commission (FPC), decided not to regulate REA-financed

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 7.

¹⁷ *Id.* at 7-8.

¹⁸ *Id.* at 9.

¹⁹ 18 C.F.R. § 385.713(d)(1) (2009).

cooperatives²⁰ as "public utilities" subject to its general jurisdiction under FPA on the grounds that the cooperatives' rates were already subject to regulation and oversight by the REA, such that FPC regulation could lead to undesirable conflict between the agencies. However, the FPC went on to note a concern regarding the possibility that "major cooperatives who actively participate in the wholesale market should not be outside the FPC's jurisdiction. The FPC suggested that Congress should address this concern.

12. Thus, we find that the California Parties' interpretation of *Dairyland* is incorrect. The FPC did not establish a separate regulatory regime for "major" cooperatives selling and transmitting power in the wholesale market, but in fact was suggesting that legislative action was necessary. This conclusion is supported by the fact that the Dairyland Power Cooperative sold electric energy in four states and to at least five investor-owned utilities.²¹ Similarly, the Minnokota Power Cooperative involved in the case engaged in business in two states and sold electric energy at wholesale to customers other than electric cooperatives.²² Despite these facts, the FPC found it did not have jurisdiction over either of these two entities. Thus, the California Parties interpretation of *Dairyland* is contradicted by the FPC's decision in *Dairyland* itself. Moreover, the FPC expressly stated that it could not conclude that cooperatives were "public utilities" under the FPA for some purposes, but not for others, stating that the FPA "does not permit a distinction between part of a company's activities being regulated but other parts not being regulated."²³

13. Finally, we have concluded that the California Parties reliance on the FPC's discussion regarding "major" companies is misplaced. The FPC stated:

While it is our opinion that the respondents here are not subject to our jurisdiction under the Power Act, we wish to make in clear that jurisdiction over major generating and transmission cooperatives in interstate commerce, as opposed to those that merely transmit and distribute electric energy (including those generating small amounts of power), **would** be in

²⁰ At the time of the *Dairyland* decision, the cooperatives received the funding from the Rural Electrification Administration (REA) under the Department of Agriculture. The program was subsequently renamed the Rural Utilities Service (RUS), but this change does not impact the analysis of *Dairyland*.

²¹ *Dairyland*, 37 FPC 12 at 14-15 (1967).

²² *Id.* at 15.

²³ *Id.* at 26.

the public interest. These G&T cooperatives have become increasingly important in recent years in the amount of revenues realized and in power generated. They sell electric energy to REA distribution cooperatives. They also sell to, and exchange power with, investor-owned utilities and engage in interstate pooling of electric energy. Such operations are part of the interstate business of transmitting and selling electric energy for ultimate distribution to the public including not only the members of the cooperatives, but the ultimate customers served through the investor-owned utilities with which the generating and transmission cooperatives are interconnected. Since the generating and transmission cooperatives have become an important segment of the interstate electric industry, at least in certain parts of the country, they should not be exempt from regulation. **While there may be incipient conflicts between regulation by this Commission and the Administrator of REA, as argued by the respondents here, we are confident that these could be resolved by the Congress in the most appropriate manner.**²⁴

14. In the above discussion, the FPC was noting its concern that generation and transmission cooperatives who actively participate in the wholesale market should not be outside the FPC's jurisdiction.²⁵ The FPC then suggested that Congress should resolve this concern. Thus, contrary to the California Parties assertion, the FPC was not creating a regulatory regime for large cooperatives that operated in the interstate market. Therefore, the California Parties arguments regarding whether AEPCO is a "major" cooperative which should be regulated by the Commission are irrelevant. Until the passage of EAct 2005, the Commission simply did not regulate RUS-financed cooperatives even where those cooperatives generated and transmitted electric energy for sale in interstate commerce.²⁶

²⁴ *Id.* at 27-28.

²⁵ The District of Columbia Court of Appeals describes this statement as the FPC issuing "a precatory word to Congress." See *Salt River Project Agricultural Improvement and Power District v. Federal Power Commission*, 391 F.2d 470 at 474 n. 8 (D.C. Cir. 1968).

²⁶ In light of this determination, we find that the other arguments raised by the California Parties are moot.

The Commission orders:

The California Parties request for rehearing is denied for the reasons set forth above.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.