

155 FERC ¶ 61,137  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Southern California Water Company

Docket No. EL02-129-005

ORDER ON COMPLIANCE FILING

(Issued May 4, 2016)

**I. Introduction**

1. On March 28, 2008, Golden State Water Company (Golden State), formerly named Southern California Water Company (SoCal Water), submitted a compliance filing in response to the Commission's Order on Remand in this proceeding.<sup>1</sup> The Order on Remand addressed the United States Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) opinion that reversed and remanded prior Commission orders in this proceeding. In those orders, the Commission ordered SoCal Water to provide refunds to Mirant Americas Energy Marketing LP (Mirant Energy Marketing) because it found that SoCal Water had made an unauthorized market-based rate sale.<sup>2</sup> In this order, we accept Golden State's compliance filing.

**II. Background**

**A. SoCal Water's Sale to Mirant**

2. The background of this proceeding is discussed in detail in the Order on Remand and is repeated only as relevant here. Before April 2001, SoCal Water served its retail load, which typically ranged from 12 to 17 MW, by purchasing power under two contracts: (1) a contract with Dynegy Power Marketing, Inc. (Dynegy) to purchase 12 MW of around-the-clock power at \$35.50 per MWh, which expired on April 30, 2001, and (2) a contract with Illinova Energy Partners (Illinova) to purchase any hourly demand in excess of those 12 MW at the South of Path 15 zonal price (SP15). In order to replace

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<sup>1</sup> *Southern California Water Co.*, 122 FERC ¶ 61,161 (2008) (Order on Remand).

<sup>2</sup> *Southern California Water Co. v. FERC*, 433 F.3d 840 (D.C. Cir. 2005).

its expiring contract with Dynegy, SoCal Water entered into a long-term contract with Mirant Energy Marketing to purchase 15 MW of around-the-clock power at \$95/MWh effective April 1, 2001. To address the overlap between its contracts with Dynegy and Mirant Energy Marketing during April 2001, SoCal Water entered into an additional contract to sell Mirant Energy Marketing 15 MW of around-the-clock power at the SP15 spot price minus \$20 per MWh during April 2001.

## **B. Prior Orders**

3. In prior orders in this proceeding,<sup>3</sup> the Commission found that SoCal Water had made a market-based sale to Mirant Energy Marketing before obtaining the necessary Commission authorization. Consequently, the Commission ordered SoCal Water to refund to Mirant Energy Marketing “the difference, if any, between the market-based rate it charged Mirant [Energy Marketing] and a cost-justified rate.”<sup>4</sup>

4. Specifically, in the March 2004 Order, the Commission found that since SoCal Water did not have market-based rate authority and was a member of the Western Systems Power Pool (WSPP) at the time of the sale to Mirant Energy Marketing, SoCal Water was subject to the cost-based rate cap in the WSPP Agreement.<sup>5</sup> The Commission stated that this cap consisted of a seller’s forecasted incremental cost and a fixed cost adder, and that SoCal Water improperly made a sale at market-based rates that exceeded this cap. The Commission also disagreed with SoCal Water’s position that its forecasted incremental cost was the SP15 spot price.<sup>6</sup> The Commission reasoned that SoCal Water did not procure the energy it sold to Mirant Energy Marketing from the spot market but simply resold energy it was contractually committed to purchase from Mirant Energy

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<sup>3</sup> *Southern California Water Co.*, 106 FERC ¶ 61,305 (March 2004 Order), *reh’g denied*, 108 FERC ¶ 61,168 (August 2004 Order), *order clarifying prior orders*, 109 FERC ¶ 61,121 (2004) (November 2004 Order).

<sup>4</sup> November 2004 Order, 109 FERC ¶ 61,121 at P 11.

<sup>5</sup> At the time of the transaction, the Commission permitted members of the WSPP to make sales at negotiated rates pursuant to and subject to the limitations of the WSPP Agreement. *Western System Power Pool*, 55 FERC ¶ 61,099, at 61,319-322, *order on reh’g*, 55 FERC ¶ 61,495, at 62,713-15 (1991), *aff’d*, *Environmental Action v. FERC*, 996 F.2d 401 (D.C. Cir. 1993); *NorthPoint Energy Solutions, Inc.*, 107 FERC ¶ 61,181 (2004).

<sup>6</sup> SoCal Water explained that it owned no generation of its own and its only source of energy to meet its peak load needs was its agreement to buy energy at the SP15 spot price from Illinova. March 2004 Order, 106 FERC ¶ 61,305 at P 9.

Marketing at \$95 per MWh. Thus, the Commission concluded that SoCal Water's forecasted incremental cost was the \$95 per MWh contract price, and that refunds of \$644,153.55 (the difference between the approximately \$1.67 million actually charged and the \$1.02 million that should have been charged), plus interest, were due to Mirant Energy Marketing.<sup>7</sup>

5. In the August 2004 Order, the Commission denied SoCal Water's request for rehearing of the March 2004 Order. The Commission rejected SoCal Water's argument that the Commission should balance the equities of the transaction in mandating a refund remedy. The Commission reasoned that it had followed precedent in mandating a refund remedy for SoCal Water's failure to file a tariff authorizing its market-based rate sale. The Commission also rejected SoCal Water's argument that its forecasted incremental cost under the WSPP Agreement was the SP15 spot price and that any refunds should be reduced to account for the fixed cost adder of the cost-based rate cap in the WSPP Agreement. The Commission stated that the March 2004 Order required the use of SoCal Water's forecasted incremental cost at the time of the sale, but the SP15 spot price would be SoCal Water's incremental cost once the sale to Mirant was consummated. The Commission also found that there are no fixed costs associated with the transaction because SoCal Water does not own any resources.<sup>8</sup>

6. In the November 2004 Order, the Commission clarified that it was appropriate for SoCal Water to reduce its refund to Mirant Energy Marketing to reflect the WSPP Agreement's fixed cost adder and that SoCal Water could reduce the refund to Mirant Energy Marketing by the amount of the adder.<sup>9</sup>

### **C. D.C. Circuit Opinion**

7. SoCal Water appealed the Commission's orders in this proceeding. On appeal, the D.C. Circuit framed the issue as "whether the Commission coherently explained its conclusion" that the price of SoCal Water's sale to Mirant Energy Marketing exceeded the cost-based rate cap established by the WSPP Agreement.<sup>10</sup> The D.C. Circuit found

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<sup>7</sup> March 2004 Order, 106 FERC ¶ 61,305 at P 17.

<sup>8</sup> August 2004 Order, 108 FERC ¶ 61,168 at PP 4-7, 10-15.

<sup>9</sup> November 2004 Order, 109 FERC ¶ 61,121 at PP 12-13. In response to the November 2004 Order, SoCal Water filed a refund report indicating that the appropriate refund due to Mirant Energy Marketing was \$429,048.60. SoCal Water's refund report was accepted via unpublished letter order. *Southern California Water Co.*, Docket Nos. EL02-129-002 and EL02-129-003, at 1-2 (Mar. 1, 2005) (unpublished letter order).

<sup>10</sup> 433 F.3d at 842.

“no rational explanation” for the Commission’s view that SoCal Water’s forecasted incremental cost under the WSPP Agreement for the sale was \$95 per MWh. Accordingly, the court reversed and remanded the Commission’s orders. The D.C. Circuit stated that if on remand the Commission should find that SoCal Water’s forecasted incremental cost was below SP15 minus \$20/MWh, “it must address the issue of remedy.”<sup>11</sup> In response to the Commission’s argument that, contrary to SoCal Water’s claims before the court, it was not required to apply equitable principles in considering the remedy because SoCal Water had made an unlawful sale, the court stated that “any conclusion based on such reasoning will require re-examination.”<sup>12</sup>

#### **D. Order on Remand**

8. In its Order on Remand, the Commission modified its prior holdings concerning how SoCal Water was to determine a cost-justified rate for the sale to Mirant Energy Marketing. The Commission found that, on balance, the appropriate interpretation of an “additional increment of energy,” which establishes the forecasted incremental cost under the WSPP Agreement, is the weighted average cost per MW of the entire sale to Mirant.<sup>13</sup> The Commission directed SoCal Water to make a compliance filing calculating the cost-based rate cap applicable to its sale to Mirant Energy Marketing, and comparing its actual revenues from the Mirant Energy Marketing sale with the revenues it would have collected under the cost-based rate cap. In order to calculate the cost-based rate cap, the Commission stated that SoCal Water must determine what its reasonably forecasted incremental cost would have been on March 30, 2001, by calculating the weighted average cost of the energy it was obligated to sell to Mirant Energy Marketing in April 2001. The Commission stated that this would include the cost of any amounts it could reasonably forecast it would have purchased from Mirant Energy Marketing at \$95 per MWh and from Illinova at the SP15 spot price in order to make the sale to Mirant Energy Marketing.<sup>14</sup>

9. The Commission noted that the D.C. Circuit held that its prior decisions required the Commission to apply equitable principles in determining a remedy and any related refunds. The Commission stated that to the extent that the compliance filing shows that SoCal Water collected revenues in excess of the cost-based rate cap, the Commission will consider the issue of the appropriate remedy consistent with the court’s decision. The

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<sup>11</sup> 433 F.3d at 846.

<sup>12</sup> *Id.*

<sup>13</sup> Order on Remand, 122 FERC ¶ 61,161 at P 19.

<sup>14</sup> *Id.* P 24.

Commission further added that at that time it did not know whether SoCal Water collected revenues above the WSPP Agreement's cost-based rate cap, or if it did, by what amount. Therefore, the Commission stated that it would defer determination of the remedy and any equitable considerations until SoCal Water made its compliance filing.<sup>15</sup>

### **III. Compliance Filing**

10. On March 24, 2008, Golden State submitted its compliance filing. According to Golden State, on March 30, 2001, it could reasonably forecast that the weighted average cost of the energy purchased during April 2001 under SoCal Water's contracts with Mirant Energy Marketing and Illinova was \$117.34 per MWh.<sup>16</sup> Golden State states that the fixed cost adder for the Mirant Energy Marketing sale was \$19.94 per MWh.<sup>17</sup> Based on these estimates, Golden State calculates that the weighted average cost for the Mirant Energy Marketing sale was \$137.29 per MWh (i.e., the sum of \$117.34 per MWh and \$19.94 per MWh), and the total revenue allowed for the sale under the WSPP Agreement's cost-based rate cap was \$1,480,669.<sup>18</sup> Golden State notes that the actual revenue from the Mirant Energy Marketing sale was \$1,668,728.55. Thus, Golden State concludes that the actual revenue exceeded its estimate of the revenues permitted under the cost-based rate cap by \$188,059.55.<sup>19</sup>

### **IV. Responsive Pleadings**

11. Notice of the compliance filing was published in the *Federal Register*, 73 Fed. Reg. 19,829-19,830 (2009), with interventions or protests due on or before April 14,

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<sup>15</sup> *Id.* P 25.

<sup>16</sup> Golden State states that it could reasonably forecast that SoCal Water's cost during April 2001 was \$485,301 to purchase 2,082 MWh under its contract with Illinova and \$1,024,575 to purchase 10,785 MWh under its contract with Mirant Energy Marketing. Golden State Compliance Filing at 4-7.

<sup>17</sup> Golden State states that this estimate was previously accepted in the March 1 Letter Order. *Id.* at 7.

<sup>18</sup> Golden State explains that \$1,480,669 is the product of the weighted average cost (\$137 per MWh) and the total energy sold to Mirant Energy Marketing (10,785 MWh). *Id.*

<sup>19</sup> *Id.* at 7-8.

2008. On April 14, 2008, Mirant Corporation (Mirant) filed comments, which we will treat as a protest.<sup>20</sup> On April 29, 2008, Golden State filed an answer.

12. In its comments, Mirant states that when SoCal Water refunded \$644,153.55 to Mirant Energy Marketing, then-existing Mirant Corporation (Old Mirant) and certain of its subsidiaries, including Mirant Energy Marketing, had filed voluntary chapter 11 petitions in the United States Bankruptcy Court for the Northern District of Texas. Mirant asserts that SoCal Water did not take any action to delay the payment of the refunds in light of the bankruptcy. Mirant adds that SoCal Water did not place the refunds in escrow, pending appeal, as other entities have done in similar circumstances, nor did SoCal Water file an administrative claim against Mirant Energy Marketing related to the refunds. Furthermore, Mirant states that the Bankruptcy Plan<sup>21</sup> became effective on January 3, 2006, and that the Bankruptcy Plan provided that Mirant and Mirant Energy Trading<sup>22</sup> have no successor liability for the claims, liabilities, or obligations of Old Mirant or Mirant Energy Marketing, respectively, except to the extent that such obligations were expressly assumed. Mirant contends that none of the obligations to SoCal Water related to the transactions at issue in this proceeding were assumed under the Bankruptcy Plan. Mirant also maintains that under the Bankruptcy Plan and the Bankruptcy Code, all liabilities, obligations, and claims of Old Mirant and Mirant Energy Marketing were discharged, and Golden State is barred from pursuing any alleged action against Mirant Energy Marketing in connection with any transaction or occurrences that took place prior to January 3, 2006.

## V. Discussion

### A. Procedural Issues

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Golden State's answer and therefore reject it.

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<sup>20</sup> *Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,247, at P 5 (2009).

<sup>21</sup> Mirant Protest at 3 (citing *Amended and Restated Second Amended Joint Chapter 11 Plan of Reorganization for Mirant Corporation and Its Affiliated Debtors*, December 9, 2005 (Bankruptcy Plan)).

<sup>22</sup> According to Mirant, under the Bankruptcy Plan, Old Mirant transferred all of its assets to Newco Corporation, which was renamed Mirant Corporation (Mirant), and Mirant Energy Marketing's assets were transferred to Mirant Energy Trading LLC (Mirant Energy Trading).

## B. Substantive Issues

14. We find that Golden State has satisfied the compliance requirements in the Order on Remand. In that order, the Commission directed SoCal Water to make a compliance filing calculating the cost-based rate cap applicable to its sale to Mirant Energy Marketing, and comparing its actual revenues from the Mirant Energy Marketing sale with the revenues it would have collected under the cost-based rate cap.<sup>23</sup> In its compliance filing, Golden State calculates that the cost-based rate cap applicable to SoCal Water's sale to Mirant Energy Marketing was \$1,480,669.<sup>24</sup> Golden State also calculates that the actual revenue of \$1,668,728.55 from the sale exceeds this cost-based rate cap by \$188,059.55. We find that Golden State's calculations are consistent with the Commission's Order on Remand, and thus we accept Golden State's compliance filing.

15. In the Order on Remand, the Commission stated that to the extent that the compliance filing shows that SoCal Water collected revenues in excess of the WSPP Agreement's cost-based rate cap, the Commission will consider the issue of the appropriate remedy consistent with the D.C. Circuit's decision.<sup>25</sup> After consideration of the record, including the compliance filing and Mirant's protest, we find that circumstances arising after the D.C. Circuit's decision, which was issued on December 30, 2005, render moot further consideration of the appropriate remedy in this case. As Mirant explains, none of Mirant Energy Marketing's obligations to SoCal Water related to the transactions at issue in this proceeding were assumed by Mirant or Mirant Energy Trading under the Bankruptcy Plan that became effective on January 3, 2006.<sup>26</sup> As such, there is no relevant counterparty to enable us to consider a potential remedy. We find these changes in circumstance to be relevant considerations in determining the nature of any remedy at issue here. For the reasons discussed above, we conclude that we need not consider whether additional refunds to, or the recoupment of refunds previously received by, Mirant Energy Marketing are appropriate remedies in this case.

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<sup>23</sup> Order on Remand, 122 FERC ¶ 61,161 at P 24.

<sup>24</sup> Golden State considered the cost associated with energy purchased from Mirant Energy Marketing and Illinova, as directed by the Commission. *Id.*

<sup>25</sup> *Id.* P 25. While the D.C. Circuit indicated that it may be appropriate to consider equitable factors, it did not provide guidance on how to apply equitable principles under the facts presented in this proceeding.

<sup>26</sup> Mirant Protest at 3.

The Commission orders:

The Commission hereby accepts Golden State's compliance filing, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.