

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern California Water Company

Docket No. EL02-129-001

ORDER DENYING REHEARING

(Issued August 9, 2004)

1. In an order issued on March 26, 2004, the Commission determined that Southern California Water Company (SCWC) charged Mirant Americas Energy Marketing, LP (Mirant) a market-based rate without prior Commission authorization to enter into market-based rate sales and, therefore, required SCWC to make refunds, with interest, to Mirant.<sup>1</sup> SCWC requests rehearing of the March 26 Order with respect to both whether a refund was appropriate here and, if so, the proper measure by which a refund should be calculated. As discussed below, the Commission denies rehearing. This order, like the March 26 Order, benefits customers by enforcing the filing requirements of the Federal Power Act (FPA), and the Commission's policies thereunder.

**Background**

2. This case arose from Mirant's protest to SCWC's submission, in Docket No. ER02-2400-000, of its application for market-based rate authority. While Mirant did not contest SCWC's application for market-based rates, it contended that a prior power purchase agreement which it had entered into with SCWC (the SCWC Sale Agreement) on March 30, 2001, was unlawful because SCWC sold wholesale power to Mirant at market-based rates absent Commission authority. Mirant sought a refund from SCWC of 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. In the order issued in that docket, the Commission initiated this proceeding to compile information about the power sale in question.<sup>2</sup>

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<sup>1</sup> Southern California Water Company, 106 FERC ¶ 61,305 (2004) (March 26 Order).

<sup>2</sup> Southern California Water Company, 100 FERC ¶ 61,373 (2002).

3. Having evaluated the filing made by SCWC and Mirant's response thereto, the Commission concluded in the March 26 Order that: (1) while SCWC was a member of the Western Systems Power Pool (WSPP) in March 2001, when it entered into the power sales agreement with Mirant, this did not confer upon it the right to make sales at rates other than cost-based rates; (2) 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; (3) as a result, SCWC was required to refund all revenues resulting from the difference, if any, between the market-based rate it charged Mirant and a cost-justified rate; and (4) because the WSPP Agreement during the relevant time period permitted participants to make sales at an incremental cost-based rate, the incremental cost was the appropriate measure for the refund. The March 26 Order determined that SCWC's incremental cost was the \$95/MWh contract price that SCWC paid to Mirant for power it purchased from Mirant and then resold (pursuant to that contract), and that SCWC should refund Mirant \$644,153.55 (the difference between the \$1.67 million actually charged and the \$1.02 million that should have been charged), plus interest.

### **Discussion**

4. On rehearing, SCWC attacks the legal basis of the March 26 Order, as well as the measure of damages employed. On the former topic, SCWC first takes issue with the Commission's rejecting consideration of the equities of the transaction between the parties in mandating a refund remedy.<sup>3</sup> While the Commission explained that "the injury being remedied by refunds for late filing is not merely the redress for the customer," but also the requirement of section 205 of the FPA "that there be prior notice and that the rates charged be just and reasonable at the time they are being charged,"<sup>4</sup> SCWC views the situation differently:

[T]he remedy the Commission ordered in this case was not for a "late filing" but rather for selling at a price exceeding the filed rate, *i.e.*, the WSPP Agreement's cost-based rate cap. . . . It is true that if SCWC had a market-based rate tariff in effect March 30, 2001, the WSPP Agreement's

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<sup>3</sup> SCWC Request for Rehearing at 21. The equities that SCWC believes should have figured in the Commission's reasoning are that the sale provided no windfall to SCWC and benefited SCWC's customers, that the sale benefited Mirant and its customers, as well, and that the ordered refund provides a windfall to Mirant at the expense of SCWC's customers. *Id.* at 23-26.

<sup>4</sup> March 26 Order, 106 FERC ¶ 61,305 at P 16.

rate cap would not have applied. But that fact does not mean that SCWC was “late” in filing its market-based rate tariff; it only means that the WSPP Agreement’s rate cap remained effective for this transaction.<sup>[5]</sup>

5. The flaw in this argument is that the remedy established by the Commission here was indeed because SCWC engaged in a jurisdictional transaction, a wholesale power sale at market-based rates, without first having made the required filing, *i.e.*, a market-based rate tariff. SCWC filed its application for market-based rate authority on July 31, 2002, which the Commission accepted with an effective date of September 30, 2002. The SCWC Sale Agreement at issue in this docket was, however, entered into by the parties on March 30, 2001.

6. It is, of course, true that the WSPP Agreement was already on file with the Commission. But as we established in the March 26 Order, that compact “does not confer on an entity the right to make sales at other than cost-based rates.”<sup>6</sup> SCWC would, of course, prefer to characterize its sale to Mirant as one pursuant to the WSPP Agreement.<sup>7</sup> The facts, however, reveal that it is more accurate to describe the transaction as a sale made by SCWC at market-based rates without SCWC having filed a tariff authorizing such a sale.<sup>8</sup>

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<sup>5</sup> SCWC Request at 22.

<sup>6</sup> March 26 Order, 106 FERC ¶ 61,305 at P 14.

<sup>7</sup> SCWC, in its request for rehearing, among other places, stated that it “sold 15 MW of energy around-the-clock to Mirant in April 2001 pursuant to the [WSPP] Agreement.” SCWC Request at 1; *accord* SCWC Corrected Compliance Filing at 5, 10, and 12 (November 19, 2002). In this regard, there is no basis on this record to conclude that the transactions were intended by either SCWC or Mirant to take advantage of the policies outlined in Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States, 94 FERC ¶ 61,272, *further order*, 95 FERC ¶ 61,225, *order on reh’g*, 96 FERC ¶ 61,155, *order on reh’g*, 97 FERC ¶ 61,024 (2001).

<sup>8</sup> Indeed, in this regard, the requirement of a timely filing in section 205 allows the Commission the opportunity to review the proposed rates before they are charged, and so to ensure that customers are not charged unjust and unreasonable rates. The failure of the timely filing of a rate, in contrast, leaves the customer without the protection that the statute expressly provides. *See* 16 U.S.C. § 824d (2000); *El Paso Electric Co.*, 105 FERC ¶ 61,131 at P 52 (2003).

7. In these circumstances, there was no need for the March 26 Order to further balance the equities of the situation, because the Commission had already done so when it first established the measure of damages for a company's failure to file a market-based rate tariff.<sup>9</sup>

8. SCWC's second argument is that the March 26 Order is at odds with the Commission's decision in *Nevada Power Co. v. Enron Power Marketing, Inc. (Nevada Power)*.<sup>10</sup> There, SCWC asserts, the Commission held that section 6.1 of the WSPP Agreement bars either party to a contract referencing the WSPP from unilaterally seeking a change in rates, which means that any such request must be reviewed under a strict "public-interest standard" in accordance with the *Mobile-Sierra* doctrine.<sup>11</sup> By contrast, SCWC argues, the March 26 Order

abrogates the SCWC-Mirant negotiated agreement and reduces the agreed-upon sales price without making any such public-interest finding and without distinguishing, repudiating, or even mentioning its prior orders requiring such a finding when the Commission modifies WSPP transactions.[<sup>12</sup>]

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<sup>9</sup> To put it another way, the Commission had previously weighed the public interest of the notice and filing requirements of the FPA against the impact of the remedy on offenders in setting the refund requirement for failure to file market-based rate tariffs. *See* Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61,979-80, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (*Prior Notice*), relied on by the March 26 Order, 106 FERC ¶ 61,305 at P15 & n.11.

<sup>10</sup> 103 FERC ¶ 61,353, *reh'g denied*, 105 FERC ¶ 61,185 (2003), *appeal pending sub nom.* Public Utility District No. 1 of Snohomish County, Washington v. FERC, No. 03-74208 (9<sup>th</sup> Cir. Nov. 19, 2003).

<sup>11</sup> SCWC Request at 26-27, citing *Nevada Power*, 103 FERC ¶ 61,353 at P 36.

<sup>12</sup> *Id.* at 27. SCWC is particularly piqued that the March 26 Order nonetheless employs the transaction at issue in *Nevada Power* to establish SCWC's incremental cost. *Id.*

Furthermore, SCWC observes, in *Nevada Power* the Commission applied the public interest standard “to changes in a contract rate even where the contract rate should have been filed but was not – *i.e.* late filed rates.”<sup>13</sup> SCWC goes on to argue that the Commission has no basis for modifying the SCWC Sale Agreement pursuant to the public interest standard.

9. The Commission finds that *Nevada Power* is not on point and that the issue of whether modifications to the contract between the parties is subject to a public interest standard of review is not relevant. Unlike the situation in *Nevada Power*, in which parties were seeking to modify a contract that had been pre-authorized by the Commission through its umbrella market-based rate authorization, in this case the seller transacted with no rate authorization whatsoever under the FPA. The Commission is not modifying a pre-authorized rate or contract; rather, it is exercising its responsibility to remedy a violation of the FPA and the Commission’s filing regulations (as well as the WSPP Agreement itself) by establishing just and reasonable rates for the first time.

10. Concerning the measure of refunds, SCWC argues that the Commission erred in the March 26 Order by finding that \$95/MWh was SCWC’s incremental cost and that a refund is due to Mirant. SCWC asserts that the WSPP Agreement allows parties to make sales whose price “shall not exceed the Seller’s forecasted Incremental Cost” plus an adder. SCWC claims that the price it charged Mirant was less than its forecasted incremental cost and, therefore, below the rate cap established in the WSPP Agreement. SCWC goes on to contend that, if \$95/MWh was indeed its incremental cost, the Commission erred in making no allowance for the adder and consequently any refund due to Mirant should be reduced by the amount of the applicable adder.

11. SCWC argues that the spot market price was the incremental cost it faced. However, SCWC did not need to go to the spot market. Rather, SCWC already was contractually committed to purchase energy at the time of the sale.<sup>14</sup>

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<sup>13</sup> *Id.* at 28, citing *Nevada Power*, 103 FERC ¶ 61,353 at P 7.

<sup>14</sup> The WSPP Agreement presumes that, at the time of the contract, the seller assesses its available resources and determines its “forecasted incremental cost.” A seller that owns generating resources, for example, would be able to forecast which plant would be needed to provide energy to the buyer and would estimate its incremental cost accordingly. In this case, however, SCWC owns no generating resources. Instead, we must assess, and did assess, the resources it was contractually committed to purchase at the time of the sale.

12. SCWC's available resources on March 30, 2001 included: (1) a contract with Dynegy for 12 MW of round-the-clock firm energy at \$35.50/MWh, (2) the purchase contract with Mirant for an additional 15 MW of firm energy at \$95/MWh, and (3) a Daily Purchasing Agreement with Illinova Energy Partners, Inc. (IEP Agreement). The IEP Agreement provides for SCWC to purchase the total amount of energy required to satisfy SCWC load on a daily to monthly forward basis. Additionally, SCWC states the price is effectively the spot market price for energy delivered in Southern California.

13. SCWC argues, in essence, that given this portfolio, with a sale of 15 MW to Mirant effective April 1, 2001, its incremental cost is the spot market price for energy delivered in Southern California because its retail load exceeded the 12 MW of resources from Dynegy and the 15 MW purchase from Mirant was committed back to Mirant.

14. SCWC's argument regarding its incremental cost has two flaws. First, the spot market price would only be SCWC's incremental cost once the sale to Mirant is consummated. Until then, SCWC's power supply portfolio is 27 MW (12 MW from Dynegy and 15 MW from Mirant) and it would have no need for spot market purchases. Our March 26 Order required the use of SCWC's incremental cost *at the time of the sale*, which SCWC fails to recognize. Second, SCWC's position, if adopted, would effectively produce the unreasonable result of SCWC simultaneously selling energy to Mirant at the SP15 - \$20/MWh price and then having to purchase IEP energy at the SP15 price. Therefore, SCWC's arguments for using the IEP energy to measure its incremental cost are rejected.

15. We also disagree with SCWC's claim that any refunds due should be reduced to account for the "addor" portion of the incremental cost-plus-adder rate cap. Again, the WSPP Agreement was written at a time when most participants owned generation and lacked market-based rate authority. The incremental cost-based plus adder cap was intended to provide sellers with a contribution to their fixed costs, thus encouraging participation in the market.<sup>15</sup> Because SCWC owns no resources and its incremental cost is a purchase contract, there are no fixed costs associated with the SCWC sale to Mirant that would need to be recovered in an adder. SCWC's request to mitigate the refund amount is therefore denied.

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<sup>15</sup> See *Western Systems Power Pool*, 55 FERC ¶ 61,099 at 61,325, *reh'g denied*, 55 FERC ¶ 61,495 (1991), *aff'd sub nom. Environmental Action v. FERC*, 996 F.2d 401 (D.C. Cir. 1993).

The Commission orders:

SCWC's request for rehearing is hereby denied, as discussed in the body of the order.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.