

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 GRANTING LATE INTERVENTION AND CLARIFYING PRIOR ORDERS

(Issued November 1, 2004)

1. In an order issued on March 26, 2004, the Commission held 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 required SCWC to make refunds, with interest, to Mirant.<sup>1</sup> On August 9, 2004, the Commission denied SCWC's request for rehearing of that order.<sup>2</sup> On September 2, 2004, Western Systems Power Pool (WSPP) filed a request for late intervention in the proceeding, in order to seek clarification of our decision insofar as it interprets the WSPP Agreement. As discussed below, the Commission grants WSPP's request for late intervention and clarifies its prior orders. This order benefits customers by ensuring the consistent interpretation of rate provisions in the WSPP Agreement.

**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. Mirant did not contest SCWC's application for market-based rates, but contended that a prior power purchase agreement into which it had entered with SCWC was unlawful because SCWC had 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

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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*, 108 FERC ¶ 61,168 (2004) (August 9 Order).

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>3</sup>

3. In the March 26 Order, the Commission held that: (1) while SCWC was a member of the WSPP in March 2001, this did not confer upon it the right to make sales at market-based rates when it entered into the power sales agreement with Mirant; (2) SCWC had improperly made a sale to Mirant at a market-based rate without previously having filed for and received market-based rate authority from the Commission; (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.

4. In its request for rehearing of the March 26 Order, SCWC argued, among other things, that any refunds due should be reduced to account for the "adder" portion of the incremental cost-plus-adder rate cap set forth in the WSPP Agreement.<sup>4</sup> However, the Commission found that "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."<sup>5</sup> As such, we denied rehearing and ordered a refund of all monies in excess of SCWC's incremental cost of \$95/MWh.

5. On September 2, 2004, WSPP filed its motion for clarification and to intervene in this proceeding. In support of its late intervention, WSPP states that it has a clear interest in this proceeding because it believes that the August 9 Order interprets the WSPP Agreement in a manner contrary to how the WSPP administers the WSPP Agreement. WSPP maintains that it did not intervene earlier because it has a policy of non-involvement in disputes between its members. However, with the issuance of the August 9 Order, WSPP explains:

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<sup>3</sup> *Southern California Water Company*, 100 FERC ¶ 61,373 (2002).

<sup>4</sup> See WSPP Agreement, Service Schedule C-3.7.

<sup>5</sup> August 9 Order at P 15.

Good cause exists for this late intervention as the issues are of substantial importance to the administration of the WSPP Agreement, the WSPP has a clear interest which cannot be adequately represented by any other party as the WSPP is the sole party charged with administering the WSPP Agreement, there should be no disruption of this proceeding given our taking the record as it stands, and there should be no substantial burdens imposed on any party to this proceeding as the clarification requests are directed to the Commission.<sup>[6]</sup>

6. On the merits, WSPP seeks clarification regarding the Commission's finding that SCWC is not entitled to the adder portion of the rate cap. In its filing, WSPP explains that, "under the WSPP Agreement the rate caps consist of forecasted incremental costs plus an adder. . . and do not differentiate between power sources that are purchased and resold and those that are generated by the seller."<sup>7</sup> Thus, WSPP states, the remedy established by the Commission's orders conflicts with the WSPP Agreement.

7. WSPP goes on to request that the Commission clarify whether it intended "merely to develop an appropriate remedy limited to the matter before it," or rather was proposing a modification of the terms of the WSPP Agreement. If the latter, WSPP maintains, the Commission would be required to act under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000).

8. WSPP's motion to intervene was unopposed. SCWC, however, filed a response on the merits.

## **Discussion**

### **A. The Motion to Intervene**

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>8</sup> the Commission grants WSPP's late motion to intervene in this proceeding. Because of potential prejudice to other parties and burden upon the Commission, movants seeking to

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<sup>6</sup> WSPP Motion at 6-7 (citation omitted).

<sup>7</sup> *Id.* at 4.

<sup>8</sup> 18 C.F.R. § 385.214 (2003).

intervene in a proceeding after the issuance of dispositive order “bear a higher burden to demonstrate good cause” for their action.<sup>9</sup> Here, we find that WSPP has met this burden.

10. First, WSPP quite reasonably explains that generally it does not get involved in disputes between its members. Thus, it was only when the August 9 Order misinterpreted the WSPP Agreement that WSPP found it essential to intervene here, and did so expeditiously. Second, no party has opposed WSPP’s late intervention. In any event, any prejudice to parties (or burden on the Commission) resulting from the delay is outweighed by the need to interpret the WSPP Agreement correctly.

### **B. The Motion to Clarify**

11. The Commission grants WSPP’s requested clarification. As explained above, the intent of the remedy established in these orders was only to require SCWC to refund “the difference, if any, between the market-based rate it charged Mirant and a cost-justified rate.”<sup>10</sup>

12. Our rejection of SCWC’s contention that any refund should be reduced to account for the WSPP Agreement’s adder was premised solely on our view that the adder applied only in the case of owned resources. However, as WSPP has explained, this is not the case. For sales not at market-based rates, the WSPP Agreement states:

[T]he price shall not exceed the Seller’s forecasted Incremental Cost plus up to: \$7.32/kW/month; \$1.68/kW/week; 33.78 cents/kW/day; 14.07 mills/kWh; or 21.11 mills/kWh for service of sixteen (16) hours or less per day.<sup>11</sup>

Thus, the WSPP Agreement makes no distinction between owned resources and purchase contracts in authorizing a party to employ the cost adder. Finally, it bears emphasis that the Commission’s concern in this proceeding is not to assure Mirant of any particular refund amount, but to uphold the filing requirements of the FPA.

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<sup>9</sup> *E.g., Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 & n.10 (2003), citing *Florida Power & Light Co.*, 99 FERC ¶61,318 at 62,358 (2002); *Garnet Energy LLC*, 99 FERC ¶61,165 at 61,672 (2002); *Edison Mission Energy*, 96 FERC ¶61,032 at 61,082-83 (2001).

<sup>10</sup> August 9 Order at P 3.

<sup>11</sup> WSPP Agreement, Service Schedule C-3.7.

13. Therefore, in light of this new information, we find it appropriate for the refund by SCWC to Mirant to reflect the WSPP Agreement's cost adder. Accordingly, SCWC may reduce its refund to Mirant by the amount of the adder, in conformity with the terms of the WSPP Agreement.

The Commission orders:

(A) WSPP's motion to intervene is hereby granted.

(B) WSPP's request for clarification is hereby granted, as explained in the body of this order.

(C) Within 15 days of the date of the issuance of this order, SCWC is hereby ordered to make a compliance filing setting out its calculation of the refund to Mirant, taking into account the cost adder set out in Service Schedule C-3.7 of the WSPP Agreement.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.