

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION  
100 FERC ¶ 63,025

San Diego Gas & Electric Company,  
Complainant,

v.

Docket Nos. EL00-95-045

Sellers of Energy and Ancillary Service Into  
Markets Operated by the California  
Independent System Operator Corporation  
And the California Power Exchange,  
Respondents.

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

Docket No. EL00-98-042

ORDER REJECTING MOTION

(Issued September 4, 2002)

1. By a motion filed on August 29, 2002, The City of Burbank, California (Burbank) requests that I permit an interlocutory appeal under 18 C.F.R. ' 385.715 of my ruling on August 14, 2002, which granted motions filed by the ISO and the California Parties to strike certain testimony as beyond the scope of the issues set for hearing, including that portion of Burbank's testimony cited in its motion. The motion for interlocutory appeal is inappropriate and is rejected because Burbank entered into a Joint Stipulation discussed below under which it and 10 other participants, including Trial Staff, agreed, in light of my ruling, to exclude the struck or excluded evidence as listed in Attachment A to a Joint Stipulation that is now of record as JS-II.2. Under JS-II.2, Burbank and the other listed participants further agreed that their excluded testimony would be preserved in the record as offers of proof under 18 C.F.R. ' 385.509(f). On that basis, and as a result of that stipulated agreement by Burbank and the other parties to the Joint Stipulation, and the agreement or non-objection by all participants to the proceedings to my approval and adoption of JS-II.2, the hearing on issues 2 and 3 concerning Awho owes what to whom@ is adjudicating the issues set for hearing as further stipulated by all participants and reflected by my Order issued on August 26, 2002, which

adopted a Final Joint Narrative Stipulation of Issues on Issues 2 and 3 (FJS), 100 FERC & 63,013 (2002). Simply put, Burbank and others right of due process is governed by JS-II.2, to which it is a signatory, and my adoption of JS-II.2 which reflects the understanding of all of the participants to these evidentiary proceedings that the hearing is to adjudicate **only** the stipulated issues set for hearing and **not** issues that are the subject of Burbank's offer of proof.

2. Consequently, Burbank's motion seeking an interlocutory appeal of a ruling of mine and my consideration of its motion is precluded by the stipulated agreement that comprises JS-II.2. Burbank's agreement, thereunder, is to have its excluded evidence addressed at this stage of the proceeding **only** as an offer of proof for later review following certification of my Proposed Findings on all of the issues set for hearing, and the agreement of all of the participants to the proceedings to adjudicate only the stipulated issues set forth in my August 26, 2002 Order.

3. It is well established that the effect of an offer of proof is to preserve excluded material for later review by the Commission following certification to the Commission of the record in an adjudicatory proceeding such as those set for hearing in these captioned dockets.

4. Burbank, and the other signatories to JS-II.2, entered into a 3-page Joint Stipulation which they resubmitted to me on August 20, 2002 with some corrections and cleanup over the weekend and requested that I mark, per yesterday's convention JS-II.2. Transcript page 4355. I adopted and approved as JS-II.2, A Stipulation of Parties Regarding Testimony and Exhibits on Certain Short-Term Transactions To Be Excluded and Made Offers of Proof. This Joint Stipulation is reproduced in the transcript immediately following Transcript page. 4355. Subsequently, under the governing trial schedule, on September 3, 2002 Burbank resubmitted its offer of proof as OP-BUR-1. Transcript page 5538.

5. Burbank, like Grant County Public Utility District No. 1 whose somewhat similar motion was rejected by my order issued on August 29, 2002, is one of the undersigned parties to JS-II.2 and is listed as such in Attachment A to the Joint Stipulation.

6. As an undersigned party, Burbank further agreed in paragraph 1 of JS-II.2 that the following issue will be removed from the Joint Narrative Stipulation of Issues and will not be litigated before Judge Birchman: **I.A.2.a. Spot Transactions** Should certain short-term (24 hours or less) bilateral sales to the ISO be exempt from mitigation, and, if so, which transactions? (Emphasis added)

7. As an undersigned party to JS-II.2, Burbank further agreed in paragraph 2 that the parties ask the Presiding Judge to approve this Joint Stipulation. Subject to the agreement of the participants to JS-II.2 and the agreement or non-objection by all participants to these proceedings, I adopted and approved JS-II.2.

8. By adopting and approving JS-II.2, Burbank agreed to exclusion of portions of their struck testimony that are specified in Attachment A to JS-II.2. Burbank agreed that its excluded testimony was to be treated **solely** as an offer of proof on the matters asserted. Burbank further agreed to adjudicate **only** the issues set for hearing that are covered by the FJS. In other words, Burbank made an offer of proof with regard to its struck or excluded evidence as designated in Attachment A to JS-II.2, agreed **not** to adjudicate the matters asserted, and agreed to adjudicate only the stipulated issues in the FJS. Consequently, my consideration of Burbank's motion seeking interlocutory appeal is **foreclosed** by its agreement to my adoption and approval of JS-II.2 under which Burbank agreed to **not** adjudicate the matters asserted by its offer of proof and to adjudicate **only** the issues set forth in the Final Joint Narrative Stipulation of Issues. Simply put, Burbank has had its day in court.

9. For the reasons stated above, it is inappropriate for me to act on Burbank's motion for certification of an interlocutory appeal. Burbank's motion is rejected. To be clear, in the unique circumstances present here, I have not made any findings under Rule 715 which would be the predicate for a timely and appropriate interlocutory appeal because such a motion and the requisite findings are precluded by the participants' agreement to my adoption of JS-II.2.

Bruce L. Birchman  
Presiding Administrative Law Judge