

109 FERC ¶ 61,074
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company,
Complainant,

Docket No. EL00-95-111

v.

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

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

Docket No. EL00-98-098

ORDER DENYING REQUESTS FOR REHEARING
AND CLARIFICATION, AND
GRANTING EXTENSION OF TIME
UNTIL FURTHER COMMISSION ACTION

(Issued October 27, 2004)

1. This order addresses requests for rehearing and clarification of our September 2, 2004 Order,¹ in which we assigned an independent auditor to review data from fuel cost allowance claimants. Specifically, parties challenge the September 2 Order rulings on the auditor selection, auditing process, audit costs, and the applicability of the audit requirement to parties who have settled. Certain parties also request extension of time to submit their fuel cost allowance claims. In this order, we deny requests for rehearing and clarification, as discussed below, and grant extension of time for submission of fuel cost allowance claims until further Commission action.

¹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., et al.*, 108 FERC ¶ 61,219 (2004) (September 2 Order).

2. This order benefits customers because it finalizes certain key issues pertaining to the fuel cost allowance, which in its turn will permit final settlements to be calculated and refunds to be made for transactions in the organized spot markets in California during the period from October 2, 2000 through June 20, 2001.

Background

3. The September 2 Order was preceded by a series of orders establishing and subsequently clarifying the process for calculating fuel cost allowance amounts and submitting claims.² The March 26 Order directed parties to file their actual daily cost of gas information, using the Commission-prescribed methodology. Twenty two sellers submitted their fuel cost allowance claims, and the California Parties³ filed a motion to reject those claims. The May 12 Order modified the methodology for calculating and allocating the fuel cost allowance, and directed that before the fuel cost allowance claims are submitted directly to the CAISO, they must be verified by an independent auditor and attested to by a responsible company official. Subsequently, the September 2 Order assigned Ernst & Young to be the sole independent fuel cost allowance auditor.

4. Several parties, including Williams Power Company, Inc. (Williams); California Parties; Dynegy Power Marketing, Inc., El Segundo Power, LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC (Dynegy); the Modesto Irrigation District (Modesto); CP Kelco U.S., Inc. (CP Kelco); and the City of Redding and Silicon Valley Power of the City of Santa Clara (Cities) filed requests for rehearing and clarification.

² *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., et al.*, 107 FERC ¶ 61,166 (2004) (May 12 Order); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., et al.*, 103 FERC ¶ 61,078 (2003); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., et al.*, 102 FERC ¶ 61,317 (2003) (March 26 Order).

³ California Parties are comprised of the People of the State of California, *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Pacific Gas and Electric Company, and Southern California Edison Company.

Discussion

Waiver of the Audit Requirement

5. In the September 2 Order, the Commission examined the issue of whether parties, such as Williams and Dynegy, who had settled their refund claims through Commission-certified settlement agreements, should be exempt from the auditor requirement. The September 2 Order allowed the claims unopposed by any other party to the instant proceeding to be filed directly with the CAISO with only an attestation by a responsible official and without auditor verification. However, the Commission also directed that any entity deciding not to opt-in to the Settlement Agreement with Williams should notify the Commission of its objections within 10 days. Notices of objection were filed by Enron Power Marketing, Inc; the Cities of Anaheim, Azusa, Banning, Colton, and Riverside; Northern California Power Agency; Exelon Corporation;⁴ the City of Seattle; Powerex Corp.; and the City of Pasadena.⁵

6. On rehearing, Williams and Dynegy argue that they should be exempted from the requirement that their fuel cost allowance claims be verified by an independent auditor for several reasons. First, Williams and Dynegy contend that notices of opposition to their claims are untimely, since opposing parties have had several opportunities to raise objections to their claims earlier in the proceeding and failed to do so. Dynegy argues that by allowing notices of opposition to be filed at this stage of the proceeding, the Commission created new rights for parties that failed to raise their objections earlier. Williams also believes that the oppositions lack merit because they are based on the arguments and assertions previously rebutted by Williams. The California Parties support Williams' and Dynegy's contentions.

7. We find these arguments to be without merit. Williams and Dynegy have not presented any compelling reasons to exempt them from the independent auditor requirement. The May 12 Order, among other things, revised the methodology for allocating the fuel cost allowance and prescribed a modified format for fuel cost allowance submissions. These new developments in the instant proceeding gave rise to parties' objections to Williams' fuel cost allowance claim. Moreover, by allowing notices of opposition to be filed in this proceeding, the Commission did not create new

⁴ Exelon Corporation filed its notice of opposition on behalf of Exelon Generation Company, L.L.C., Peco Energy Company, and Commonwealth Edison Company.

⁵ The California Parties' motion to reject filed in opposition to the fuel cost allowance claims submitted by various parties, including Williams, has been withdrawn to the extent it applies to Williams' claim.

rights or invite new protests to Williams' claim. The Commission simply asked the parties who decided not to opt-in to the Settlement Agreement with Williams to notify the Commission of their opposition in this proceeding in the same manner they would notify the Commission in the proceeding on the settlement agreement. Specifically, the Commission stated:

Any entity deciding not to opt-in to a settlement approved by the Commission must notify the Commission, within 10 days of the Commission order approving the settlement, of its decision whether to oppose or not to oppose that claimant's fuel cost allowance claim. Such notifications regarding the Williams claim shall be filed within 10 days of the issuance of this order.⁶

By allowing notices of opposition, the Commission simply ensured that the rights of non-settling parties to object to the fuel cost allowance claims by settling parties would not be overlooked.

Auditor Selection

8. The September 2 Order appointed Ernst & Young as the sole independent auditor to verify data inputs and calculations used to determine the fuel cost allowance claims.

9. On rehearing, the California Parties argue that the Commission erred in rejecting their proposal to designate Potomac Economics as an auditor in addition to Ernst & Young. The California Parties again question the expertise and independence of Ernst & Young on the basis that Ernst & Young performed the auditing services for Reliant's⁷ 2003 fuel cost allowance claim and made a calculation mistake. In addition, Williams requests that the Commission allow Williams to engage a different auditor to verify its fuel cost allowance claim provided its request for a waiver of the audit requirement is denied. Williams explains that due to potential conflict of interests, it cannot use the services of Ernst & Young.

⁶ See September 2 Order at P 23.

⁷ Reliant is comprised of Reliant Energy Services, Inc., Reliant Energy Coolwater, Inc., Reliant Energy Ellwood, Inc., Reliant Energy Etiwanda, Inc., Reliant Energy Mandalay, Inc., and Reliant Energy Ormond Beach, Inc.

10. In the September 2 Order, we responded to the above contentions. Specifically, we stated:

We are not convinced by [the] assertion that Ernst & Young is not sufficiently independent to perform the functions assigned to the independent auditor in this proceeding. California Parties do not substantiate this claim, other than to point out that Ernst & Young was involved in auditing Reliant's May 2003 submission. The Commission finds that the earlier work does not prejudice Ernst & Young and in fact provides them with experience in auditing generators' submissions. The auditor is an independent firm bound by professional accounting standards. [Also],... making a mistake (which it subsequently corrected) does not amount to a lack of objectivity. To the contrary, to the degree that Ernst & Young has previous experience performing an audit of similar function, we believe this will help provide expertise in efficiently and appropriately applying the directives of our May 12 Order.⁸

11. Further, we find Williams' contention that it would not be able to utilize Ernst & Young's services due to potential conflict of interests to be without merit. For the second time on rehearing, Williams makes this contention and fails to provide any explanation other than that Ernst & Young performed work as Williams' auditor on other matters.⁹ Ernst & Young is one of the "big four" accounting firms that employs a great number of professional accountants to work on various projects. Ernst & Young is bound by professional ethics standards, and we expect that Ernst & Young will undertake every precaution to avoid any potential conflict of interests when performing the claim verification task for parties to the instant proceeding. For these reasons, we deny Williams' and California Parties' requests for rehearing.

Audit Process

12. The May 12 Order directed parties to submit their auditor-verified claims directly to the CAISO, not the Commission, to expedite the processing of the fuel cost allowance claims. Accordingly, in the September 2 Order, the Commission rejected the idea of requiring the auditor to submit status reports for Commission review before the fuel cost allowance claims are finalized.

⁸ See September 2 Order at P 12.

⁹ Expedited Joint Request of the Dynege Parties, Williams Power Company., Inc. and the California Parties for Waiver of Fuel Cost Allowance Filing Requirements, Docket No. EL00-95-045, *et al.*, June 14, 2004, n. 9

13. On rehearing, the California Parties argue that the September 2 Order fails to address their concerns about the auditing process. California Parties believe that the Commission's finding that parties may negotiate with the auditor to review an interim report before the final claims are ready for submission does not sufficiently address the California Parties' concern. Specifically, in its prior filing,¹⁰ the California Parties argued that the auditor should be required to submit an interim report for Commission review to bring to the Commission's and parties' attention any problems with the auditing process arising from the ambiguities found in the Commission orders. The California Parties also proposed to provide parties with the opportunity to comment on the interim report. In their request for rehearing of the September 2 Order, the California Parties argue that by rejecting their proposed requirement to have an interim report from the auditor filed with the Commission, the Commission deprived parties of any meaningful opportunity to review or comment upon the auditor's work product.

14. As we have previously stated, our intent in establishing the independent auditor requirement is to streamline this proceeding and to make sure that the claims filed meet the standards set in our May 12 Order and that the models are consistent with the methodology laid out in our earlier orders.¹¹ The Commission has spelled out the fuel cost allowance methodology and the auditor is merely verifying that the source data used in the fuel cost calculations are correct and comprehensive and that the calculations performed to determine a fuel cost allowance conform to the Commission's directives. Moreover, parties to this proceeding have had a number of opportunities to comment on the methodology for calculating the fuel cost allowance. The Commission Staff has held two technical conferences on various issues in this proceeding.¹² Following each of these conferences, parties had the opportunity to submit comments. Most of the issues pertaining to the fuel cost allowance methodology have been resolved. Few remaining issues are currently pending before the Commission and will be addressed in a separate order after the Commission considers filings submitted by various parties. In light of these facts, we do not believe that parties should be afforded an additional opportunity to comment on the auditors' interim work product.

¹⁰ See California Parties' Proposal for the Independent Auditor of Fuel Cost Allowance Claims, Docket No. EL00-95-045, *et al.*, June 14, 2004.

¹¹ See September 2 Order at P 10.

¹² See Notice of Technical Conference, Docket Nos. EL00-95-045 and EL00-98-042, April 24, 2003; and Notice of Technical Conference, EL00-95-000, *et al.*, September 27, 2004.

Audit Fees

15. In the September 2 Order, in addressing the auditor selection issue, the Commission noted that parties had informed the Commission that the audit fees would be allocated among the parties on a *pro rata* basis and would constitute approximately 1-3 percent of an individual claim. The Commission held that a party may choose to forego filing a fuel cost allowance claim if it believes that the audit costs would exceed the benefit of a fuel cost allowance offset.

16. On rehearing, Williams states that the filed notices of opposition were motivated in part by the desire to force Williams into a cost-prohibitive audit to compel Williams to drop its claim. According to Williams, the Commission-imposed auditor requirement as applied to Williams is inconsistent with the auditor requirement's original intent to resolve the fuel cost allowance claims in an efficient and equitable manner. Williams argues that because 95 percent of Williams' refund liability has already been settled through the Settlement Agreement,¹³ the requirement to have the remaining 5 percent verified by an auditor would defeat the efficiency goal behind the auditor requirement.

17. The Cities also complain about the allegedly disproportionate auditing costs. They argue that the Commission's conclusions in the September 2 Order were based on wrong assumptions that all generators will be billed a *pro rata* share of the overall audit costs and that audit fees will be limited to 1-3 percent of the total fuel cost allowance claim. The Cities inform the Commission that Ernst & Young does not plan to bill generators on a *pro rata* basis and that the audit fees will exceed approximately ten times the Commission's estimated 1-3 percent of the claim amount. The Cities thus request that the Commission allow each generator to use an auditor of its choice and suggests that in such case the uniformity desired by the Commission in using one auditor could be achieved through the standard data submission format proposed by the CAISO.¹⁴ Alternatively, the Cities ask the Commission to allocate the audit costs in proportion to the dollar amount of each generator's claim, and cap the audit cost for any generator at 2 percent of its claim absent verifiable, material data problems. Modesto also believes that the audit costs should be allocated in proportion to the dollar amount of the claim and requests that the Commission clarify how the audit costs will be allocated among claimants. It argues that the Commission's guidance on this issue is necessary because the audit costs are substantial.

¹³ See *San Diego Gas & Electric Co., et al.*, 106 FERC ¶ 61,216 (2004).

¹⁴ See Indicated Generators' Emergency Motion to Reject the CAISO's Non-Complying Template, Docket No. EL00-95-098, *et al.*, September 28, 2004.

18. In response to Williams' concern, we reiterate that any generators that would incur greater preparatory and auditor costs than the benefits they would receive from submitting their claims are free to forego their fuel cost allowance claims.

19. Our finding regarding the audit costs and their allocation among the claimants was based on the information submitted in the joint filing by 14 parties proposing to appoint Ernst & Young as the independent auditor.¹⁵ We note that Modesto was among the supporters of the proposal, and the Cities did not express any opposition to the proposal.¹⁶ The Commission's decision to appoint Ernst & Young as the sole auditor for the claim verification task was based on representations made by Ernst & Young to parties in this proceeding. In its Proposal to Serve,¹⁷ Ernst & Young estimated the audit costs to be approximately 1-3 percent of a total claim. Ernst & Young also proposed to allocate audit costs for common time on a *pro rata* basis in accordance with the size of the claim with a true-up at completion based on a *pro rata* allocation of actual hours billed. We expect Ernst & Young to bill parties based upon the estimates provided to the Commission as part of the auditor proposal filing. Where the actual charges exceed the estimates by a substantial margin, Ernst & Young should explain the basis for the variance to the affected claimant.

20. In response to the Cities' request to allow parties to retain a separate auditor for the claim verification, we reiterate that it is our belief that the use of one auditor, rather than many, will allow for increased efficiency and consistency in reviewing, verifying and evaluating the fuel cost allowance claims.¹⁸ When we made this ruling in the September 2 Order, we expected that all claims would be presented in the same format. Since the time the CAISO filed its proposed template for claims submission, our position has not changed. We believe that verification by the same auditor of all claims calculated in accordance with the same uniform standards will warrant consistency and uniformity.

Extension of Time

21. The September 2 Order established an October 29, 2004 deadline for submission of fuel cost allowance claims to the CAISO.

¹⁵ See Designated Claimants' Proposed Fuel Cost Allowance Auditor Filing, Docket No. EL00-95-000, *et al.*, June 14, 2004.

¹⁶ See *id.* n. 2.

¹⁷ See *id.* Appendix A.

¹⁸ See September 2 Order at P 14.

22. On rehearing, Williams requests an extension of time to submit its fuel cost allowance claim. According to Williams, it lost 10 days while awaiting notices of opposition in response to the September 2 Order, and now it must await a further Commission order authorizing the use of an alternative auditor. Dynegy also requests clarification of the timeframe for filing the fuel cost allowance claim.

23. At present, several issues pertaining to the allocation of the fuel cost allowance and the format for submitting claims are pending resolution.¹⁹ Before these issues are addressed by the Commission, the claim verification process cannot be completed by the auditor. For this reason, we will grant extension of time for submission of auditor-verified fuel cost allowance claims until further Commission action.

CP Kelco's Late Intervention

24. In the September 2 Order, the Commission rejected CP Kelco's motion to intervene out-of-time on the ground that no good cause existed to grant the late intervention after the dispositive order had been issued. Specifically, the Commission found that because CP Kelco did not sell directly in the California Power Exchange (PX) or CAISO-operated markets and as such is not a respondent in the refund proceeding, its contractual relationship with San Diego Gas & Electric Co. (SDG&E) is outside the scope of the instant proceeding.

25. CP Kelco asks for reconsideration of the Commission's rejection of CP Kelco's motion to intervene out-of-time. It argues that it did sell directly into the PX and CAISO markets through SDG&E as its Scheduling Agent. Under this arrangement, SDG&E submitted bids to the PX on behalf of CP Kelco, using quantity information provided by CP Kelco. If the bids were accepted, the PX settled payment with SDG&E, and SDG&E then passed the payments received from the PX to CP Kelco. SDG&E also passed to CP Kelco imbalance revenues from the CAISO and imbalances charges due to the CAISO. For performing these tasks, SDG&E charged CP Kelco a monthly Scheduling Agent fee of \$2,461. In addition, CP Kelco states that it has been informed that SDG&E may seek refunds from CP Kelco in connection with sales made on its behalf of CP Kelco. CP Kelco thus concludes that it has a direct interest in the instant proceeding because it may potentially be subject to refunds without the benefit of the fuel cost allowance offset to its refund liability.

¹⁹ The CAISO's August 17, 2004 compliance filing and the numerous protests and comments submitted in response thereto raised a number of new issues. On October 7, 2004, the Commission Staff held a technical conference to facilitate a better understanding of these issues. The Commission also solicited comments following the October 7, 2004 technical conference.

26. We reiterate here that CP Kelco has not met the burden of showing good cause for the granting of its late intervention. Contrary to its assertion, CP Kelco did not sell power directly into markets operated by CAISO or the PX; it used SDG&E's scheduling coordinator services to make transactions in those markets. CP Kelco did not have direct contractual relationships with either CAISO or PX and thus is not a respondent in the Docket EL00-95, *et al.* complaint proceeding. The refunds, if any, established in that proceeding will be assessed to SDG&E, not CP Kelco. The issue of whether SDG&E has the right under the contract with CP Kelco to pass its refund liability to the latter is beyond the scope of this proceeding. For these reasons, we will deny CP Kelco's request for rehearing.

The Commission orders:

(A) The requests for rehearing and clarification are hereby denied for the reasons stated in the body of this order.

(B) The extension of time for submission of fuel cost allowance claims is hereby granted until further Commission action.

By the Commission. Commissioner Kelly not participating.

Linda Mitry,
Acting Secretary.