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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Item 44 Item 3952

ENERGY DIVISION **RESOLUTION E-3893**

November 19, 2004

R E S O L U T I O N

Resolution E-3893. San Diego Gas & Electric Company (SDG&E) seeks approval to transfer Federal Energy Regulatory Commission (FERC) -jurisdictional approved settlement refunds to specific procurement related accounts. Approved, as modified.

By SDG&E Advice Letter 1601-E filed on July 19, 2004.

SUMMARY

SDG&E is receiving energy crisis settlement refunds covering October 2000 to mid-January 2001 from Williams Energy Companies (Williams) pursuant to a FERC order issued on July 2, 2004. We adopt SDG&E's proposal to pass through the refund monies with modifications.

- SDG&E will record actually incurred litigation costs in a separate memorandum account.
- SDG&E is authorized to recover litigation costs actually incurred on the refund settlements, but total recovery shall not exceed the total of amounts provided for under the Claimants' Escrow accounts in the refund settlements. Should SDG&E's litigation expenses exceed the totals of the Claimants' Escrow, SDG&E should file separately to the Commission for recovery.
- Recovery of litigation fees is subject to review under the Energy Resource Recovery Account (ERRA) proceeding.
- In acting on this proposal, our policy is to ensure that ratepayers receive the maximum benefit from the refunds obtained, in a timely fashion. We will apply this over-arching policy to future refund case settlements as well.

BACKGROUND

FERC has approved the Williams' settlement under which Williams will refund money to SDG&E, as well as PG&E and SCE, for overcharges during the energy crisis period of October 2000 to mid-January 2001. SDG&E is likely to receive refunds soon from Dynegy and Duke.

On July 2, 2004, the FERC issued an order (Docket No. EL00-95, et al.) approving a settlement agreement (Williams-IOU[1] Settlement), also approved by the California Public Utilities Commission (CPUC), between PG&E, SDG&E, SCE, the Williams Companies, Inc., and Williams Power Company Settlement (Williams). SDG&E is soon likely to receive similar refunds from Dynegy and Duke. These refunds relate to purchases of energy and ancillary services made by SDG&E on behalf of electric utility bundled service customers in markets operated by the California Independent System Operator Corporation (CAISO) and the California Power Exchange (PX).

The Williams-IOU Settlement allocates $14.1 – 15.7 million to SDG&E and separately allocates an additional $500,000 to SDG&E through the Settling Claimants Escrow, for a total allocation of $14.6 - $16.2 million. The lower range values above represent the initial refund to be transferred to SDG&E on behalf of ratepayers. The upper range values above represent additional amounts the FERC must still rule on for this particular case. All amounts identified above are stated before interest.

SDG&E estimates that it will receive $14.6 million from Williams; SDG&E reimburses SCE $3.0 million for SONGS operational responsibility.

SDG&E estimates that it will receive $14.6 million from Williams. Of this amount, SDG&E states that it is obligated to reimburse SCE $3.0 million for SDG&E's share of the San Onofre Nuclear Generating Station (SONGS), representing that this amount is a refund liability due to SCE from the Williams-

[1] IOU stands for Investor Owned Utility.

IOU Settlement for its operational responsibility of SONGS, not accounted for separately for SDG&E by the CAISO or the PX.

SDG&E requests authority to retain $0.5 million for litigation costs.

In accordance with the Williams-IOU Settlement, SDG&E requests authority to retain $500,000 for litigation costs.

SDG&E proposes to pass through $11.1 million of refund money to bundled customers through existing, procurement-related accounts.

SDG&E proposes to pass through 70% of the refunds to bundled customers as a credit to the Energy Revenue Shortfall Account (ERSA), which is a sub-account of the Transition Cost Balancing Account (TCBA) for the residential and small commercial customers under AB 265. This AB 265 sub-account contains an under-collection at present. After the AB 265 under-collection has been reduced to zero, SDG&E proposes to apply any further refunds due to bundled electric customers resulting from future settlements with power producers to an AB 265 sub-account of the Energy Resource Recovery Account (ERRA). SDG&E proposes to pass through the remaining 30% to large, bundled customers through the ABX1 43 sub-account of the ERRA. The ERRA is a balancing account used to record power procurement expenses. This account is subject to reasonableness review and is used to establish procurement rates annually.

NOTICE

Notice of AL 1601-E was made by publication in the Commission's Daily Calendar. SDG&E states that a copy of the Advice Letters was mailed and distributed in accordance with Section III-G of General Order 96-A.

PROTESTS

No protests were made to SDG&E Advice Letter 1601-E.

DISCUSSION

SDG&E's advice letter was reviewed to ensure a compliant refund disposition.

Energy Division has reviewed SDG&E's AL 1601-E for compliance with Public Utilities Code § 453.5 and with decisions related to the energy crisis and refunds. Under Public Utilities Code § 453.5, the Commission "shall require public utilities to pay refunds to all current utility customers, and when practicable, to prior customers, on an equitable pro rata basis....". These particular refunds cover the time period of post October 2000 through January 17, 2001.

Energy Division requested SDG&E to provide additional support for its advice letter request by explaining three items: the $3.0 million liability for SONGS power to be paid to SCE, the basis for splitting the net proceeds to bundled customers using a 70%-30% split, and what accounts would be credited with the litigation fees separately identified under the Williams-IOU Settlement.

SDG&E should be authorized to pay $ 3.0 million out of this refund to SCE for SONGS refund liability

Regarding the SONGS refund liability, SDG&E replies:

> "...because sales into the PX from SONGS are subject to FERC's price mitigation, SCE, as the entity responsible for SONGS, received all of the attendant refund liability. Hence, an adjustment is necessary to compensate SCE for SDG&E's share of the SONGS refund liability. SDG&E's refund liability for SONGS was calculated as SDG&E's entitlement to the SONGS output as a fraction of all supply in the ISO & PX markets, multiplied by the total of buyers' refund entitlements in the PX and ISO markets during the October 2, 2000 through January 17, 2001 period. SCE and SDG&E agreed that the $3 million adjustment to the distributions from the settlement escrow account is needed to account for SDG&E's 20% ownership (of SONGS)."

Energy Division agrees that SDG&E should transfer this refund liability for SONGS' operation to SCE. Future, similar transfers for SONGS refund liabilities from SDG&E to SCE will accompany each of the FERC refund settlements.

These funds will be added to SCE's refund memorandum account, as addressed under Resolution E-3894.

SDG&E proposes to split the remaining refund 70%-30% between residential and small commercial bundled customers (subject to AB 265) and large bundled customers (subject to ABX1 43) based on the ratio of consumption by each group.

Energy Division requested that SDG&E explain its proposal to split the net refund amount 70%-30% to small and large bundled customers. SDG&E explains that the 70%-30% split reflects the approximate percentage of electric commodity consumption by residential and small commercial bundled customers subject to AB 265 and large bundled customers subject to ABX1 43 and excludes all direct access customers. [2]

Per SDG&E, a $29.5 million AB 265 under-collection remains as of July 31, 2004. Consistent with previous decisions and our instruction to SDG&E to reduce the AB 265 under-collection by viable options other than a rate increase (e.g., see D.02-12-064, D.03-10-087, Resolutions E-3798 and E-3813), we adopt SDG&E's proposal to apply 70% of the net refunds to the AB 265 under-collection. When the existing under-collection has been paid, SDG&E should direct future energy crisis refunds to a sub-account under its ERRA for AB 265 customers, as proposed.

The remaining 30% of the net refunds, representing the energy consumption of SDG&E's larger, bundled customers (ABX1 43), should be applied to the existing

[2] On September 7, 2002, we required SDG&E to implement various portions of AB 265. (D.00-09-040) Among other things, we required SDG&E to place a 6.5 cent per kilowatt-hour (kWh) ceiling on the electric commodity rate retroactive to June 1, 2000 for specified SDG&E customer classes, primarily residential and small commercial and lighting customers. We further directed SDG&E to establish an account to record the difference between the 6.5 ¢/kWh rate ceiling and the actual commodity rate. These expenses were tracked to the Energy Rate Ceiling Revenue Shortfall Account, later renamed the Energy Revenue Shortfall Account (ERSA), a sub-account to the TCBA. The 70% allocation is consistent with the treatment adopted in D.02-12-064 regarding the AB 265 surcharge.

ERRA sub-account for these same customers. SDG&E states that it makes direct refunds to its larger, ABX 1 43 customers from this sub-account when it becomes overcollected. The CPUC is notified of such refunds by advice letter.

The Williams-IOU Settlement coupled with the pending refunds from Dynegy and Duke should write down the AB 265 under-collection shortly. In anticipation of this event, SDG&E should add an AB 265 customer sub-account under the ERRA for receipt of future refunds and interest. The AB 265 and ABX1 43 sub-accounts should be subject to audit. Both ERRA sub-accounts should be interest-bearing accounts using the actual 3-month Commercial Paper rates as published by the Federal Reserve.

SDG&E should establish this mechanism under an advice letter to be filed within 10 days of the effective date of this Resolution, along with the establishment of another memorandum account, as described below. This advice letter filing and the disposition of the refunds should be referenced in and coordinated with SDG&E's next ERRA application, expected to be filed on October 1, 2004, to ensure a timely refund.

SDG&E should retain litigation fees related to energy crisis cases.

SDG&E proposes to retain $0.5 million of the Williams-IOU Settlement refund to offset some of its litigation fees. In response to a data request from Energy Division, SDG&E explains "to date SDG&E has expended over $1.3 million just in legal costs alone for internal and outside legal counsel." The $0.5 million amount is SDG&E's share of $11.5 million placed into the Settling Claimants Escrow pursuant to Section 5.4.2 of the Williams-IOU Settlement.[3]

SDG&E notes in AL 1601-E that it expects to receive similar, separate allocations from each of the pending Dynegy and Duke refund settlements. At that time, SDG&E states that it will seek to retain additional reimbursement of refund-related litigation fees. Both the October 2001 Settlement Agreement between

[3] Summary information provided by SDG&E indicates that internal refund case project hours were over 6,600 hours for SDG&E and SEMPRA attorneys, and outside costs and fees incurred totaled over $37,300.

Southern California Edison and the CPUC (Southern California Edison Co. v. Loretta Lynch, et al., U.S. Dist. Ct. (C.D.Cal)) and the global settlement reached last year with El Paso (D.03-10-087) provide for the recovery of attorneys' fees. Both of these earlier settlements were approved by the CPUC. Together, the earlier settlements establish a CPUC policy precedent authorizing recovery of attorneys' fees in cases where the IOUs expend extraordinary efforts on behalf of ratepayers.

IOU attorneys' fee recovery for energy crisis litigation is an exception to established policy.

Allowing the IOUs to recover attorneys' fees provides them an incentive to continue to fight for ratepayer interests when otherwise they might take a more limited role. This policy represents an exception to the general rule that IOUs should not recover attorneys' fees because a representative amount is already allocated to litigation costs in general rates.[4] It is reasonable for the Commission to apply this policy consistently to SDG&E for litigation fees associated with obtaining refunds related to the energy crisis.

This Resolution authorizes SDG&E to recover litigation costs actually incurred that are reasonably related to each refund settlement up to the total of amounts provided for in the Claimants' Escrow amounts of the refund settlements. However, should SDG&E's litigation expenses exceed the totals of the Claimants' Escrow, SDG&E may apply separately to the Commission for recovery.

Energy Division asked SDG&E to detail what accounts would be credited with the litigation fees. SDG&E responded that the litigation fees would be split into three different accounts: two for outside litigation expenses and services and one for internal litigation costs.

[4] In the global settlement reached with El Paso, the settlement agreement specified that attorney's fees were capped at a specific amount and the IOUs were required to demonstrate: (1) the extent of their fees; and (2) that the fees arose from refund work related to El Paso.

SDG&E should recover the costs actually incurred on each refund case. We understand that in each settlement, there is an amount set aside in the form of a Claimants Escrow account for litigation costs which may be higher or lower than the costs actually incurred. SDG&E should retain the amount that is set aside in each settlement as each refund is received and track it along with the actually incurred costs. After all the refunds are received, the memorandum account should be settled in the ERRA to provide SDG&E recovery of all actual incurred costs, but no more than those costs.

A separate memorandum account for recording the litigation costs related to refunds is essential because the litigation fees associated with the energy crisis are not part of the revenue requirement authorized in general rate cases.

SDG&E should establish the separate memorandum account for these fees by filing an advice letter within 10 days of the effective date of this resolution. The memorandum account should be subject to audit under the ERRA proceeding. The ERRA should review the extent of the fees in the account and should only allow recovery of those amounts arising from refund work related to each associated energy crisis refund case. Any remaining balance in the SDG&E litigation memorandum account after SDG&E has fully recovered its incurred litigation costs and paid off any outstanding liabilities related to refunds should be added to the net refund balance to be split proportionately between AB 265 and ABX1 43 customers according to their respective consumption. Should SDG&E's litigation expenses exceed the totals of the Claimants' Escrow, SDG&E should apply separately to the Commission for recovery.

Utility recovery of litigation fees or other costs of recovery should <u>not</u> be made until the actual funds are received from each settlement. As stated above, additional adjustments above the known settlement amounts approved by the FERC will be made at a later time. These additional amounts should be booked into the appropriate ERRA sub-accounts and should be addressed under a subsequent ERRA proceeding.

<u>Comments</u>

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day

period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this resolution was reduced upon a stipulation made by parties. Accordingly, this draft resolution was mailed to parties for comments.

SDG&E comments clarify that a separate ERRA tracking account for AB 265 customers will be unnecessary once the AB 265 undercollection is recovered.

SDG&E filed timely comments on October 18, 2004. No reply comments were received. SDG&E states that a separate tracking account in the ERRA balancing account for AB 265 customers is unnecessary, explaining that once the AB 265 undercollection is recovered, tracking refund allocations between AB 265 and ABX1 43 customers is handled by the ERRA rate design methodology. The existing ABX1 43 subaccount within the ERRA will only exist to record the ongoing amortization of the account's overcollection, as authorized in Commission Resolution E-3781. In addition, a review of the refunds will not occur until the reasonableness phase of SDG&E's ERRA in June, 2005, rather than the current October 2004 ERRA filing.

We concur with SDG&E's comments and modify the findings and orders to delete the requirements to add another subaccount for AB 265 customers to the ERRA and recognize that the review of the refunds will occur in June 2005 rather than in October 2004.

FINDINGS

1. On July 2, 2004, the FERC issued an order (Docket No. EL00-95, et al.) approving a settlement agreement also approved by the California Public Utilities Commission (CPUC) with the Williams Companies, Inc and Williams Power Company Settlement (Williams). Additional settlements with other energy companies are pending.

2. The Williams-IOU Settlement allocates $14.1 - $15.7 million to SDG&E and separately allocates an additional $500,000 to SDG&E through the Settling Claimants Escrow for litigation costs.

3. SDG&E is obligated to reimburse SCE $3.0 million from the Williams-IOU Settlement to settle its refund liability for SCE's operation of SONGS associated with this particular refund.

4. SDG&E has a $29.5 million AB 265 under-collection as of July 31, 2004.

5. SDG&E should reduce its outstanding AB 265 under-collection by crediting up to 70% of the net refunds from the Williams-IOU Settlement. The 70% represents small bundled customers' energy consumption ratio.

6. SDG&E should apply the remaining 30% of the Williams-IOU Settlement net refunds to its ABX1 43 sub-account of the ERRA, representing large bundled customer's energy load.

7. SDG&E should establish a memorandum account for refund settlement litigation fees associated with the energy crisis of 2000-2001.

8. SDG&E is authorized to recover litigation costs actually incurred that are reasonably related to each refund settlement, but recovery should not exceed the total of amounts provided for under the Claimants' Escrow amounts of the refund settlements.

9. Any litigation fee amounts found in excess of the actual costs in the litigation memorandum account upon ERRA review should be added to the net refund balance to be split proportionately between AB 265 and ABX1 43 customers according to their respective consumption.

10. Should SDG&E's litigation expenses exceed the totals of the Claimants' Escrow, SDG&E should file separately to Commission for recovery.

THEREFORE IT IS ORDERED THAT:

1. San Diego Gas & Electric Company's request to distribute energy crisis settlement refunds as proposed in Advice Letter 1601-E is approved, as modified.

2. San Diego Gas & Electric Company shall file an advice letter within 10 business days of this Resolution to establish a memorandum account for energy

crisis settlement refund litigation fees and to establish a provision in its ERRA for future refunds applicable to all customers. The advice letter shall be effective upon filing subject to the Energy Division determining that it is in compliance with this order. Both the litigation memorandum account and the future refunds credited to the ERRA will be subject to audit under the annual ERRA proceeding. The refunds will accrue interest at the 3-month Commercial Paper rate as published by the Federal Reserve and as provided for under the ERRA Balancing Account.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held November 19, 2004, the following Commissioners voting favorably thereon:

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STEVE LARSON
Executive Director