

July 8, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Applications for Exception

Names of Petitioners: CPKelco Cogeneration, *et al.*

Dates of Filings: May 31, 2002, *et al.*

Case Numbers: VEE-0088, *et al.*

This Decision decides the merits of five Applications for Exception filed with the Office of Hearings and Appeals (OHA) of the U.S. Department of Energy (DOE) under the provisions of 10 C.F.R. § 1003.20. *See infra* Appendix. These Applications concern annual revenues and sales data pertaining to each firm's sale of electricity that the DOE Energy Information Administration (EIA) collects through Form EIA-861, "Annual Electric Power Industry Report." EIA publishes this data, by state, in firm-specific form. The present exception request seeks to have the Applicants' data withheld as confidential. In their Applications for Exception, the Applicants incorporated an Application for Stay to prevent release of some of the information contained in Form EIA-861 pending resolution of the exception request. The Applications for Stay were denied on June 26, 2002, and July 2, 2002. *Cargill, Incorporated*, Case No. VES-0092 (June 26, 2002); *CPKelco Cogeneration, et al.*, Case Nos. VES-0088, *et al.* (July 2, 2002).

I. Background

The EIA reporting requirements arise from domestic dislocations of crude oil and petroleum products that occurred during the 1970s. Specifically, in 1979 Congress found that the lack of reliable information concerning the supply, demand and prices of petroleum products impeded the nation's ability to respond to an oil crisis. Congress therefore authorized the DOE to collect data on petroleum product supply and price. Form EIA-861 collects annual information, regarding the retail sales and associated revenue from the retail sales of electricity of individual firms identified as energy service providers. As energy providers, the Applicants are required to submit Form EIA-861. Normally, due to the public interest in the material filed with EIA, with few exceptions, the material is required to be released to the public. In the case of the Form EIA-861, release of the material by EIA occurs approximately one year following the period for which the data is furnished.

An Application for Exception may be granted where the reporting requirement causes a "special hardship, inequity, or unfair distribution of burdens." 42 U.S.C. § 7194(a);

10 C.F.R. § 1003.25(b)(2). Because all reporting firms are burdened to some extent by the reporting requirements, exception relief is appropriate only where a firm can demonstrate that it is adversely affected by the reporting requirement in a way that differs significantly from the impact of the requirement on other reporting firms.

II. Analysis

In their submissions, the Applicants make various general assertions as to the competitive disadvantage they will experience if the material to be submitted to EIA is released. For example, CPKelco Cogeneration, argues that disclosure of the material would put it at a disadvantage in future negotiations for contracts to sell electricity to third parties because its current contract calls for transactions that are below market rates. There is, however, no explanation of how the terms of the present contract might harm the firm in a future dealings. This type of very general assertion might be made by any firm that files corporate data with the Federal Government. Therefore, these type of arguments cannot support an exception which would relieve the applicant of a filing obligation with which all, similarly situated firms must comply. A successful application for this relief must include specific material and detailed fact-based explanations as to how, specifically, the applicant, doing business in its particular competitive market area and with its customers and competitors, will be harmed by the release of the data in question. In this case, such a showing should include consideration of the fact that when the data is to be released it will be in aggregate form and, on average, more than one year old.

We requested additional, supporting information from each of the Applicants in this proceeding. None, however, responded with the type of material we requested, and hence there is nothing in the record that would lead us to conclude the requested exception is warranted. As a result, the Applicants have not demonstrated that they will succeed on the merits of the Application for Exception.

III. Conclusion

In accordance with the above discussion, we find that an Exception is not warranted in these cases, because the arguments are insufficient to support the claim that the Applicant will experience any injury or competitive disadvantage. Consequently, the Department of Energy has determined that the Applications for Exception filed by the Applicants listed on the Appendix to this Decision should be denied.

It Is Therefore Ordered That:

1. The Applications for Exception filed by the Applicants listed in the Appendix to this Decision are hereby denied.

2. Administrative review of this Decision and Order may be sought by any person who is aggrieved or adversely affected by the denial of exception relief. Such review shall be commenced by the filing of a petition for review with the Federal Energy Regulatory Commission within 30 calendar days of the date of this Decision and Order pursuant to 18 C.F.R. Part 385, Subpart J.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 8, 2003

APPENDIX

<i>Name</i>	<i>Case Number</i>
CPKelco Cogeneration	VEE-0088
Smurfitt Stone Container Corp.	VEE-0090
Jefferson Smurfit Corp.	VEE-0091
Cargill, Incorporated	VEE-0092
OLS Energy-Camarillo	VEE-0095

