

UNITED STATES OF AMERICA 100 FERC ¶ 61,188
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
And Nora Mead Brownell.

El Paso Electric Company
Enron Power Marketing, Inc.
Enron Capital and Trade Resources Corporation

Docket No. EL02-113-000

ORDER INITIATING INVESTIGATION, AND ESTABLISHING HEARING
PROCEDURES AND REFUND EFFECTIVE DATE

(Issued August 13, 2002)

1. In this order we are initiating an investigation into instances of possible misconduct by El Paso Electric Company (El Paso Electric) and two affiliates of Enron Corporation: Enron Power Marketing, Inc. (EPMI), and Enron Capital and Trade Resources Corporation (Enron Capital) (collectively, Enron) to determine whether the misconduct occurred and, if so, to determine remedies, including possibly refunds and/or revocation of El Paso Electric's and/or Enron's market-based rate authority.
2. As discussed below, we will set the possible misconduct for hearing and establish a refund effective date under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (1994), to provide for refunds should the hearing indicate that they are warranted.

Background

3. On February 13, 2002, the Commission directed a Staff fact-finding investigation into whether any entity manipulated short-term prices in electric energy or natural gas markets in the West or otherwise exercised undue influence over wholesale prices in the West for the period January 1, 2000 forward.¹

¹Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas
(continued...)

4. On May 8, 2002, in accord with the Commission's directive, Commission Staff issued a data request concerning various trading strategies of sellers of wholesale electricity and/or ancillary services in the United States portion of the Western System Coordinating Council during 2000-2001. Among the sellers to whom the data request was sent are public utilities who were granted market-based rate authority by this Commission based on a finding that they lacked market power and there was no evidence of affiliate abuse or reciprocal dealing.

5. On June 4, 2002, the Commission issued an order² finding that El Paso Electric and others had failed to cooperate with the Commission investigation and ordered those companies to show cause why their authority to charge market-based rates should not be revoked as a result of their failure to comply with the Commission-ordered investigation.

Discussion

6. In a Commission Staff interim report, being publicly released concurrently with this order,³ Commission Staff states that it has uncovered preliminary evidence that El Paso and Enron may have engaged in actions that adversely affected prices; may have violated open access transmission requirements; may have failed to file jurisdictional rate schedules or disposed of (through ceding control of) jurisdictional assets without prior Commission approval; and may have failed to timely notify the Commission of material changes to the circumstances under which they were granted market-based rate authority.

7. For example, information gathered in Staff's investigation indicates that the joint dealings between Enron and El Paso Electric may have adversely affected prices and

¹(...continued)

Prices, 98 FERC 61,165 (2002) (February 13 Order).

²Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 99 FERC ¶ 61,272 (2002) (Show Cause Order). On July 29, 2002, El Paso Electric was notified in a letter order that it had responded to the Show Cause Order.

³Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Initial Report on Company-Specific Separate Proceedings and Generic Reevaluations; Published Natural Gas Price Data; and Enron Trading Strategies, Docket No. PA02-2-000, August , 2002. This report is available on the Commission's website at: <http://www.ferc.gov/electric/bulkpower/pa02-2/pa02-2.htm>

markets in the West. In addition, Enron and El Paso Electric's merchant function may have received preferential access to El Paso Electric's transmission system in violation of the Commission's open access transmission requirements, in order to engage in highly profitable sale/buyback transactions with Mexican entities.

8. Also, until the Commission Staff obtained the relevant documents through the discovery process in Docket No. PA02-2-000, the Commission had no means of knowing that Enron was acting on El Paso Electric's behalf, including controlling some of El Paso Electric's assets pursuant to a contractual arrangement. As public utilities with market-based rate authority, El Paso Electric and Enron are obligated under the terms of the Commission orders granting such authority, to notify the Commission of material changes of circumstances or include the information in an updated market power analysis.

9. In light of El Paso Electric's possibly ceding control of its assets to Enron in a contractual relationship, the investigation ordered herein should determine if El Paso Electric and Enron should have made any filings pursuant to sections 203 and/or 205 of the FPA. To the extent that the result of that proceeding is a finding that El Paso Electric or Enron improperly failed to file jurisdictional rate schedules or contracts, or receive prior Commission approval for a disposition of jurisdictional facilities, appropriate remedies may be in order.

10. In conclusion, the Staff's evidence warrants the institution of further proceedings, apart from Docket No. PA02-2-000, in which El Paso Electric and Enron⁴ may respond to the Staff's findings, further evidence may be submitted, and remedies (including possibly refunds and/or revocation of El Paso Electric's and/or Enron's market-based rate authority⁵) may be imposed, as appropriate, for any findings of improper conduct, or disregard of Commission filing requirements and standards of conduct requirements. Accordingly, we will set the issues summarized above for hearing under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (1994), as ordered below.

⁴According to documents in Staff's possession, El Paso Electric's dealings were with at least two Enron affiliates, Enron Power Marketing, Inc. (EPMI) and its parent, Enron Capital and Trade Resources Corp.

⁵See El Paso Electric Company, 87 FERC ¶ 61,219 (1999) (granting El Paso Electric market-based rate authority); Enron Power Marketing, Inc., 65 FERC ¶ 61,305 (1993) (granting EPMI market-based rate authority).

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11. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the Commission's investigation in the Federal Register, and no later than five months subsequent to expiration of the 60-day period. In order to give maximum protection to consumers, we will establish the refund effective date at the earliest date allowed,⁶ 60 days after publication of notice of initiation of the Commission's investigation in Docket No. EL02-113-000 in the Federal Register.

12. Section 206(b) also requires that if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. To implement that requirement, we will direct the presiding judge to provide a report to the Commission 15 days in advance of the refund effective date or the conclusion of the 180-day period, whichever is earlier, in the event the presiding judge has not by the earlier of those two dates certified to the Commission: (1) a settlement which, if accepted, would dispose of the proceeding; or (2) an initial decision. The judge's report, if required, shall advise the Commission of the status of the investigation and provide an estimate of the expected date of certification of a settlement or an initial decision.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held in Docket No. EL02-113-000, concerning the matters discussed in the body of this order.

(B) The Secretary shall promptly publish a notice of the Commission's initiation of the proceeding in Docket No. EL02-113-000 in the Federal Register.

⁶See, e.g., Canal Electric Company, 46 FERC ¶ 61,153, reh'g denied, 47 FERC ¶ 61,275 (1989).

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(C) The refund effective date in Docket No. EL02-113-000 will be 60 days following publication in the Federal Register of the notice discussed in Ordering Paragraph (B) above.

(D) A presiding judge to be designated by the Chief Judge shall convene a conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, at a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

(E) The presiding judge shall advise the Commission, no later than 15 days prior to the refund effective date, in the event that the presiding judge has not by that date certified to the Commission a settlement which, if accepted, would dispose of the proceeding or issued an initial decision, as to the status of the proceeding and the best estimate of when the proceeding will be disposed of by the presiding judge.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.