

102 FERC ¶ 61, 164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company,)	Docket Nos. EL00-95-075
Complainant,)	
)	
v.)	
)	
Sellers of Energy and Ancillary Services)	
into Markets Operated by the California)	
Independent System Operator Corporation)	
and the California Power Exchange,)	
Respondent.)	
)	
Investigation of Practices of the California)	EL00-98-063
Independent System Operator and the California))	
Power Exchange)	

ORDER ON CLARIFICATION AND REHEARING

(Issued February 10, 2003)

1. In this order, we grant in part and deny in part requests for clarification and rehearing of our November 20, 2002 order (Discovery Order)¹ that allowed the parties in this proceeding to conduct additional discovery into market manipulation by various sellers during the western power crisis of 2000 and 2001, and specified procedures for adducing this information. This order provides all parties an opportunity to ensure that all relevant evidence is adduced in this proceeding, but also will bring closure and certainty to these proceedings (to sellers and customers alike) fairly and quickly.

¹ San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv., et al., 101 FERC ¶ 61, 186 (2002).

Background

2. The Discovery Order addressed a motion for discovery filed by the State of California, the California Electricity Oversight Board, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company, and Southern California Edison Company (collectively, the California Parties). In the Discovery Order, we allowed the California Parties and other parties in this proceeding to conduct additional discovery for the period January 1, 2000 to June 20, 2001 for the purpose of obtaining evidence of market manipulation by various sellers. We cautioned the parties against duplicating the discovery conducted in other Commission proceedings, but permitted submission of evidence from those proceedings in their filings in this proceeding, to the extent relevant. The Discovery Order also required that no later than February 28, 2003 the parties submit directly to the Commission additional evidence and propose new and/or modified findings of fact with specific citations to the record to support any proposed substantive recommendations. Parties were directed to provide relevant documents and citations to the record to support any proposed substantive recommendations. Additionally, we stated that these discovery procedures would be sufficient to meet the concerns of the California Parties and that no additional discovery procedures following the February 28, 2003 submission of evidence and substantive recommendations would be needed.

Requests for Rehearing and Clarification

3. Duke Energy North America, LLC and Duke Energy Trading and Marketing, L.L.C. (collectively, Duke), Competitive Supplier Group and Calpine Corporation (collectively, Calpine), and TransCanada Energy Ltd. (TransCanada) argue that the procedure for submission of adduced evidence established by the Discovery Order violates the respondents' due process rights, as it does not provide for reply filings. In connection with this, they request that the Commission establish filing dates for reply comments and findings following initial submissions on February 28, 2003. Calpine adds that the parties must be allowed reasonable time after the initial filings are made on February 28, 2003 to cross-examine adverse parties' witnesses.

4. Upon reconsideration, we will afford parties the opportunity to respond to submissions made by adverse parties on February 28, 2003. The parties will have until March 17, 2003 to file directly with the Commission reply comments. To the extent the parties believe that there is a need for cross-examination, the parties should so inform the Commission in their reply comments, and identify any disputed issues of material fact.

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5. We also use this opportunity to provide the parties in this proceeding guidance on how to present any additional evidence in an effort to ensure a thorough and expeditious review by the Commission. The submissions due on February 28 must include testimony by sponsoring witnesses. The submissions due on March 17 need not include testimony. Submittals due on February 28 and March 17 must include an executive summary explaining what findings of fact each indexed item addresses (see below for description of the index) and what it is intended to show. For each proposed finding there must be a cite, by index number, to the relevant evidence supporting the proposal. Parties must provide a clear explanation of what relief or action is requested based on specific references to information contained in the additional evidence. A template to be used for all executive summaries will be posted on the Commission's website later this week.

6. The submissions due on February 28 and March 17 should include an index of all relevant material contained in the filing for each affected proceeding. That is, an index of the material should be provided for the above-captioned proceeding, and a separate index should be provided for each other pending or proposed proceeding for which the filer claims its submission is relevant. Each index entry should consist of an exhibit number (party-specific and starting with "1") and include the abbreviated name of the submitter. The indices shall include (in this order): (1) whether the item contains privileged material; (2) the title of the document, author and date; (3) indicate the specific finding made or proposed and the case and docket numbers to which it pertains, and which time period is at issue (before October 2000; between October 2000 and June 2001; or after June 2001); (4) identify if the material is new additional material or if it is from an existing record with references to the existing record included; (5) an explanation of what the evidence purports to show; and (6) the name of the party or parties performing any alleged manipulation. A template to be used for all indices will be posted on the Commission's website later this week.

7. Electronic files must be submitted for each executive summary and index using the Commission's eFiling system at www.ferc.gov.

8. Unless mutually agreed otherwise, complete sets of the filings submitted on February 28 must be served concurrently on all parties identified by the submitter as having performed the alleged manipulation at issue in the filing, except that privileged material may be withheld from any party that has not executed the applicable authorization(s) pursuant to the terms of a protective order. Unless mutually agreed otherwise, complete sets of the filings submitted on March 17 must be served concurrently on all parties having made the allegations at issue in the filing, except that privileged material may be withheld from any party that has not executed the applicable authorization(s) pursuant to the terms of a protective order.

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9. Each exhibit submitted must have a cover page identifying: the exhibit number; the submitter; and whether the document contains privileged information.

10. For documents that do not contain privileged information, we encourage parties to use the Commission's eFiling system at www.ferc.gov, provided the submission meets the file size limitations (50 MB total) for that system. Select the filing type "Production of Document" after logging on to the system. If the eFiling system is not an option, then parties must file an original and two copies on either CD ROM or paper. For documents that contain privileged information, parties must file an original and two copies of both the complete (unredacted) and redacted versions of their submissions. The original and copies may be filed on either CD ROM or paper, with each version clearly marked "Non-Public" or "Redacted."

11. TransCanada also argues that the Commission erred in allowing discovery for the period that is outside of the established refund period (*i.e.*, October 2, 2000 through June 20, 2001). It also believes that the scope of the discovery is overbroad to the extent that the Discovery Order permits discovery with respect to transactions other than spot market transactions for energy and ancillary services in the markets operated by the California Power Exchange (PX) and the California Independent System Operator (ISO).

12. In the Discovery Order, we allowed parties in this proceeding to conduct discovery into market manipulation by various sellers for the period January 1, 2000 to June 20, 2001. The Order explained that, in allowing parties to submit additional evidence concerning potential refunds for spot market bilateral sales transactions, its goal was "to provide all parties an opportunity to ensure that all relevant evidence is adduced in this proceeding."² For example, it is possible that market manipulation involving transactions outside the PX and ISO affected transactions in those organized markets. Also, in addressing the California Parties' motion in the Discovery Order, the Commission acted pursuant to an order of the United States Court of Appeals for the Ninth Circuit, which granted the California Parties' motion for leave to adduce before the Commission additional evidence of market manipulation for the period from Spring 2000 through June 2001.³ While TransCanada is correct that the Commission cannot order refunds under FPA section 206 for transactions that occurred prior to the refund effective date, we

² See Discovery Order at 61,733.

³ See Motion of the California Parties for Leave to Adduce Additional Evidence before FERC at 18 (9th Cir. Docket Nos. 01-71051, et al. June 5, 2002); Public Utilities Commission of the State of California, et al. v. FERC, Order of August 21, 2002 (9th Cir. Docket Nos. 01-71051, et al.).

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disagree that discovery outside the refund period is inappropriate since the Commission does have remedial authority to address any tariff violations that occurred prior to that date. Accordingly, we reject TransCanada's contentions and deny in part its request for rehearing.

13. The California Parties request that the Commission clarify that the Discovery Order: (1) does not prejudice the question of whether additional discovery procedures and/or evidentiary hearing will be necessary; and (2) allows parties to obtain and introduce into evidence in this case any material discovered or obtained in other proceedings, whether or not such information has been introduced into evidence in those other proceedings.

14. We reiterate in this order that we intend to finalize the issues in these dockets expeditiously.⁴ We fully expect that the discovery procedures established by the Discovery Order and supplemented by this order will be sufficient to meet the concerns of the California Parties. We also clarify that the Discovery Order was meant to encompass all relevant material in other Commission dockets, and was not intended to refer only to "introduced evidence" or otherwise limit the material that could be adduced from other proceedings.

The Commission orders:

(A) Requests for rehearing by Duke Energy North America, LLC and Duke Energy Trading and Marketing, L.L.C., and Competitive Supplier Group and Calpine Corporation are hereby granted, as discussed in the body of this order.

(B) TransCanada Energy Ltd. is hereby granted in part and denied in part, as discussed in the body of this order.

⁴ See Discovery Order at 61,737.

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(C) California Parties' request for clarification is hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.