

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-180-000
Aquila Merchant Services, Inc. (f/k/a Aquila, Inc.)	Docket No. EL03-181-000
City of Redding, California	Docket No. EL03-182-000
City of Glendale, California	Docket No. EL03-183-000
Colorado River Commission of Nevada	Docket No. EL03-184-000
Constellation Power Source, Inc.	Docket No. EL03-185-000
Coral Power, LLC	Docket No. EL03-186-000
El Paso Merchant Energy, L.P.	Docket No. EL03-187-000
Eugene Water & Electric Board	Docket No. EL03-188-000
Idaho Power Company	Docket No. EL03-189-000
Koch Energy Trading, Inc.	Docket No. EL03-190-000
Las Vegas Cogeneration, L.P.	Docket No. EL03-191-000
MIECO Inc.	Docket No. EL03-192-000
Modesto Irrigation District	Docket No. EL03-193-000
Montana Power Company (now d/b/a NorthWestern Energy, LLC)	Docket No. EL03-194-000
Morgan Stanley Capital Group	Docket No. EL03-195-000
Northern California Power Agency	Docket No. EL03-196-000
PPM Energy, Inc. (f/k/a PacifiCorp Power Marketing, Inc.)	Docket No. EL03-197-000
PECO Energy Company	Docket No. EL03-198-000
Powerex Corporation (f/k/a British Columbia Power Exchange Corporation)	Docket No. EL03-199-000
Public Service Company of New Mexico	Docket No. EL03-200-000
Sempra Energy Trading Corporation	Docket No. EL03-201-000
TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-202-000
Valley Electric Association, Inc.	Docket No. EL03-203-000 (Consolidated)

ORDER GRANTING INTERLOCUTORY APPEAL AND MOTION

(Issued December 23, 2003)

I. Introduction

1. By order issued on December 8, 2003 (December 8 Order), the presiding administrative law judge (presiding judge) in this proceeding, pursuant to Rule 715 of the Commission Rules of Practice and Procedure,¹ granted a motion to permit an interlocutory appeal by 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 (collectively, California Parties) of his ruling with respect to his authority to enforce Paragraph 47 of the June 25, 2003 order in the so-called Partnership Gaming proceeding.² In so doing, the presiding judge also requested that the Commission clarify its intent regarding Paragraph 47.

2. As discussed below, this order clarifies that the information requested in Paragraph 47 includes information related to partnerships, alliances or other arrangements to engage in activities that constitute gaming and/or anomalous market behavior during the relevant period, and not just support for revenue figures concerning such partnerships, alliances or other arrangements. It further clarifies that the requirement in Paragraph 47 was intended to expedite the discovery process, and therefore the hearing, in the Partnership Gaming proceeding. Consequently, this order

¹ 18 C.F.R. § 385.715 (2003).

² Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,346 (2003) (June 25 Order). Paragraph 47 of the June 25 Order states as follows:

47. We also require the Partnership Entities to (1) inventory all revenues from their partnerships, alliances or other arrangements discussed above and (2) file these revenue figures as well as file all related correspondence, e-mail, memoranda, tapes, phone logs, transaction data, billing statements and agreements as part of their show cause responses. This requirement applies to both sides of an agreement regardless of whether the entity is supplying or receiving service. If a Partnership Entity does not provide this information and it is later discovered that such agreements exist, that may be grounds for other possible remedies.

determines that the presiding judge has the same authority regarding the information sought in Paragraph 47 that presiding judges typically exercise over the discovery process in a typical trial-type evidentiary hearing. Thus, the presiding judge has the authority to vary the mode and extent of compliance with Paragraph 47, e.g., through issuing a protective order.

3. On December 5, 2003, the California Parties also filed, concurrently with their motion for leave to file an interlocutory appeal, a motion for enforcement of Paragraph 47. They state that they filed the motion for enforcement with the Commission in addition to the motion to the presiding judge for leave to file an interlocutory appeal out of an abundance of caution to ensure compliance with Rule 715. Their motion makes the same arguments for enforcement of Paragraph 47 by the presiding judge or the Commission as they make in their interlocutory appeal. Consequently, our determination concerning their interlocutory appeal also applies to their motion.

II. Background

4. The June 25 Order instituted a show cause proceeding concerning alleged partnerships, alliances or other arrangements through which certain entities identified in the order appeared to have engaged in gaming and/or other anomalous market behavior in violation of the tariffs of the California Power Exchange Corporation and the California Independent System Operator Corporation, during the period from January 1, 2000 to June 20, 2001.

5. In the show cause proceeding, the California Parties filed a motion for the presiding judge to compel certain of the respondents to produce all audio tapes of their conversations during the relevant period. Trial Staff filed an answer to the motion, supporting the California Parties' position and requesting that the Respondents be sanctioned by extending the deadline for Trial Staff and the California Parties to file their case-in-chief evidence. The California Parties filed a second motion, asking the presiding judge to direct eleven of the respondents to file additional materials pursuant to Paragraph 47 of the June 25 Order. Answers to both motions were filed by many of the respondents. Among the issues raised by those answers were whether the presiding judge has authority to enforce Paragraph 47 or whether the Commission has exclusive authority to do so.

6. The presiding judge denied both motions. The presiding judge found that several of the respondents had failed to file materials in compliance with Paragraph 47 and that

the reasons they gave for failure to comply were largely unpersuasive.³ The presiding judge also rejected arguments that Paragraph 47 sought only audio tapes that concerned revenue calculations. Rather, he interpreted Paragraph 47 to seek the filing of audio tapes so that the Commission could determine whether, and to what extent, each respondent was engaging in a joint effort with Enron and perhaps others to profit by gaming and/or anomalous market behavior in violation of the ISO and PX tariffs. However, the presiding judge further held that his authority did not extend to enforcement of the filing requirements of Paragraph 47. Rather, he held that, if Paragraph 47 required that the materials be filed with the Commission, only the Commission could enforce that requirement pursuant to the June 25 Order. If, on the other hand, the parties wished to elicit the information called for by Paragraph 47 via the discovery process, then he was authorized to administer the discovery process.⁴ The presiding judge also denied the California Parties' motion, without prejudice, with respect to respondents that are the subject of pending settlements and Trial Staff-sponsored motions to dismiss.⁵

7. On December 5, 2003, the California Parties filed a motion for leave to file an interlocutory appeal of the presiding judge's December 3 Order. They argue that Paragraph 47 was designed to provide a broad evidentiary foundation for further investigation into the alleged collusive Gaming Practices by the named respondents through a trial-type evidentiary proceeding. They argue that the respondents have sought to avoid compliance with Paragraph 47 and that Trial Staff and the intervenors need access to that information in order to fully develop their case-in-chief testimony in the evidentiary proceeding.⁶ They contend that Paragraph 47 was intended to "jump-start" the proceedings by providing a comprehensive collection of materials from which Trial Staff and the parties could investigate the facts. They argue that the presiding judge has

³ See Enron Power Marketing, Inc., et al., Docket No. EL03-180-000, et al., presiding judge's Order Denying Motions to Compel Production of Certain Audio Tapes and Other Materials at P 15-19 (Dec. 3, 2003) (unpublished) (presiding judge's December 3 Order). This order was revised slightly the following day.

⁴ Id. at P 20-24.

⁵ Id. at P 8, 15.

⁶ When the California Parties filed their motion, the Trial Staff's and intervenors' case-in-chief was due on December 19, 2003. By order issued on December 11, 2003, the presiding judge amended the procedural schedule, which, among other things, revised the dates for Trial Staff's and intervenors' case-in-chief to January 16, 2004.

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authority to enforce Paragraph 47 pursuant to Rules 504(b)(18) and (20),⁷ which they argue gives the presiding officer the power to require further evidence upon any issue and the power to take any other action necessary or appropriate to the discharge of the duties of the presiding officer.

8. Moreover, the California Parties argue that, by the time discovery began, the presiding judge had already ruled that the respondents were required to serve unredacted copies of their show cause responses on the parties and Trial Staff by October 3, 2003. They contend that this necessarily included the Paragraph 47 materials. Thus, they contend that there was no need for discovery to obtain the Paragraph 47 materials. They also assert that, by the time the presiding judge ruled on the motions to compel, the last day for discovery had passed. They further argue that the proceeding should be delayed until the respondents comply with Paragraph 47. They request that Paragraph 47 be enforced, either by the presiding judge or by the Commission.

9. Public Utility District No. 1 of Snohomish County, Washington, the City of Tacoma, Washington, and the Port of Seattle, Washington (collectively, Pacific Northwest Parties) filed an answer in support of the California Parties. They further argue that the Paragraph 47 requirement should also extend to those respondents for which settlements and motions to dismiss were submitted after September 2, 2003, the date that show cause responses were due. They contend that the tapes and phone logs required by Paragraph 47 are likely to reveal whether respondents knowingly engaged in collusive arrangements with Enron that are not reflected in the written contracts and other materials the Commission required respondents to file. They also argue that the presiding judge's suggestion that, if authorized to enforce Paragraph 47, he would enforce compliance with Paragraph 47 consistent with rules of discovery and would not impose unduly burdensome requirements on respondents is inconsistent with Paragraph 47, which requires that the materials must be filed.

10. Answers in opposition to the California Parties were filed by: Coral Power, L.L.C.; Modesto Irrigation District; Public Service Company of New Mexico; and Eugene Water & Electric Board. They argue that: (1) literal compliance with Paragraph 47 would be unduly burdensome or is not feasible; (2) Paragraph 47 concerns only materials related to revenue calculations; (3) Paragraph 47 should not apply to respondents with pending settlements or Trial Staff-sponsored motions to dismiss; and (4) they have offered parties access to the tapes, but the parties have not availed themselves of that opportunity. Eugene Water & Electric Board also argues that it cannot immediately file its tapes because it is having them converted into a usable format.

⁷ 18 C.F.R. §§ 385.504(b)(18), 385.504(b)(20) (2003).

11. In his December 8 Order, the presiding judge made the following determinations and posed the following questions to the Commission:

6. Having reviewed the motion for leave to take an interlocutory appeal, I have concluded it has merit and ought to be granted. I find that there are extraordinary circumstances which make Commission review of my ruling at this stage of the proceeding appropriate.

a. As noted in Paragraph 21 of my December 3, 2003 order, the question whether an administrative law judge is authorized to enforce a Commission directive in a hearing order to file materials appears to be one of first impression.

b. It is not clear what purpose is served by such a directive or what relationship, if any, it has to the conduct of a hearing in which the parties would ordinarily have the right to seek information under the Commission's normal discovery process.

c. The California Parties seem to argue a priori that the purpose of the Paragraph 47 filing requirements is to make information available to them so that they can use it to pin blame for the costs of the California Energy Crisis on one or more of the Respondents, thereby enhancing their entitlement to reparations and/or damages. It is unclear whether this is the case. This is an enforcement proceeding. In such a proceeding normally only the Commission Staff is entitled to act in a prosecutorial role; intervenors (such as the California Parties) participate only as advisors to and encouragers of the Staff and enjoy only limited rights to discovery. Here certain of the intervenors seek to take over the leading role in the proceeding rather than acting as a Greek Chorus. It would be extremely helpful, and would avert considerable expensive litigation, for the Commission to clarify the respective roles of these participants.

d. Paragraph 47 is ambiguous, and it would be very helpful to have a definitive ruling on the question whether the filing requirements relate only to data that is concerned with revenue figures or has a broader reach to cover all materials in the possession of the Respondents that relate in any way to their culpability. Several of the Respondents have construed Paragraph 47 narrowly to reach only revenue information. On the other hand, the requirement for producing "tapes" and "phone logs," among other things, seems to suggest that it has a broader reach. The Commission is respectfully requested to clarify its intentions on this point.

e. If the Commission rules that the Presiding Judge does have the authority to enforce Paragraph 47, it is requested to indicate whether the Presiding judge also has the authority to vary the mode and extent of compliance with the Paragraph 47 filing requirements as an ALJ can do when issuing a protective order under Rule 410(c) of the Commission's Procedural Rules. For example, several of the Respondents have argued that literal compliance with paragraph 47 would be unduly burdensome in light of the sheer volume of record of taped telephone conversations. If this claim is judged meritorious, a Presiding Judge acting under Rule 410(c) could substitute a right to examine tapes in situ for the filing of this voluminous material with the Commission. Can the same, or a similar, substitution of discovery techniques be employed to carry out Paragraph 47?

7. The answers to the foregoing questions will facilitate the prompt and efficient conduct of the hearing in this proceeding. Hence, there is good reason to grant the motion and to authorize an interlocutory appeal to the Commission.^[8]

III. Discussion

12. The Commission grants the California Parties' interlocutory appeal, and we clarify the June 25 Order.

13. Our intent in Paragraph 47 was to facilitate the discovery process and thus the hearing by making relevant materials available at the outset to Trial Staff and the intervenors. In that regard, it was not our intent to limit the presiding judge's role regarding discovery of such materials. Thus, the presiding judge in these dockets shall have the same authority that presiding judges typically have over discovery in typical trial-type evidentiary hearings. Such authority includes, for example, the authority to vary the mode and extent of compliance with Paragraph 47, such as with a protective order under Rule 410(c) of the Commission's Procedural Rules.

14. We also did not intend that Paragraph 47 be construed narrowly. Paragraph 47 was intended to have a broad reach, to cover all materials in the possession of the Respondents that relate to their culpability. While some parties focus on the words "all related correspondence, . . ." in Paragraph 47 (emphasis added) for a narrower interpretation, we note that the range of materials identified was broad (including such things as tapes, phone logs and agreements), and, at the end of that paragraph, the

⁸ December 8 Order at P 6-7 (emphasis in original).

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Commission stated that "[i]f a Partnership Entity does not provide this information and it is later discovered that such agreements exist, that may be grounds for other possible remedies."⁹ The use of the word "related" therefore was not meant to narrow the materials to only revenue-related materials, but to cast a wide net to cover a broad range of materials related to "partnerships, alliances or other arrangements . . . to engage in activities that constitute gaming and/or anomalous market behavior."¹⁰

15. With respect to the role of intervenors in the show cause proceeding, we note that after discussing respondents' burden of going forward and the Commission's ultimate burden, the June 25 Order stated: "To that end, the Commission is aware that many parties in California and elsewhere in the West have sought a forum in which to address the issues raised in this proceeding. Those parties may participate in this proceeding upon requesting and being granted intervenor status."¹¹ We allowed intervenors' participation in this proceeding, and we intended that they should be afforded the same opportunity to participate in the discovery process and the hearing as any other intervenor in any other proceeding.

16. With respect to respondents that are the subject of pending settlements or Trial Staff-sponsored motions to dismiss, we agree with the presiding judge that it would be inappropriate to require those respondents to comply with Paragraph 47 at this time (while such filings are pending).¹²

The Commission orders:

The California Parties' interlocutory appeal and motion for enforcement of Paragraph 47 of the June 25 Order are hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

⁹ 103 FERC ¶ 61,346 at P 47 (emphasis added).

¹⁰ Id. at P 1; accord id. at P 45.

¹¹ Id., at P 48 n.55.

¹² See December 3 Order at P 8, 15.