

106 FERC ¶ 61,020  
 UNITED STATES OF AMERICA  
 FEDERAL ENERGY REGULATORY COMMISSION

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

American Electric Power Service Corporation	Docket No. EL03-137-001
Aquila Merchant Services, Inc. (f/k/a Aquila, Inc.)	Docket No. EL03-138-001
Arizona Public Service Company	Docket No. EL03-139-001
Automated Power Exchange, Inc.	Docket No. EL03-140-001
Bonneville Power Administration	Docket No. EL03-141-001
California Department of Water Resources	Docket No. EL03-142-001
California Power Exchange Corporation	Docket No. EL03-143-001
Cargill-Alliant, LLC	Docket No. EL03-144-001
City of Anaheim, California	Docket No. EL03-145-001
City of Azusa, California	Docket No. EL03-146-001
City of Glendale, California	Docket No. EL03-147-001
City of Pasadena, California	Docket No. EL03-148-001
City of Redding, California	Docket No. EL03-149-001
City of Riverside, California	Docket No. EL03-150-001
Coral Power, LLC	Docket No. EL03-151-001
Duke Energy Trading and Marketing Company	Docket No. EL03-152-001
Dynegy Power Marketing Inc., Dynegy Power Corp., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC	Docket No. EL03-153-001
Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-154-001
FPL Energy	Docket No. EL03-155-001
Idaho Power Company	Docket No. EL03-156-001
Los Angeles Department of Water and Power	Docket No. EL03-157-001
Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC	Docket No. EL03-158-001
Modesto Irrigation District	Docket No. EL03-159-001
Morgan Stanley Capital Group	Docket No. EL03-160-001
Northern California Power Agency	Docket No. EL03-161-001
Pacific Gas and Electric Company	Docket No. EL03-162-001

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PacifiCorp	Docket No. EL03-163-001
PGE Energy Services	Docket No. EL03-164-001
Portland General Electric Company	Docket No. EL03-165-001
Powerex Corporation (f/k/a British Columbia Power Exchange Corp.)	Docket No. EL03-166-001
Public Service Company of Colorado	Docket No. EL03-167-001
Public Service Company of New Mexico	Docket No. EL03-168-001
Puget Sound Energy, Inc.	Docket No. EL03-169-001
Reliant Resources, Inc., Reliant Energy Power Generation, and Reliant Energy Services, Inc.	Docket No. EL03-170-001
Salt River Project Agricultural Improvement and Power District	Docket No. EL03-171-001
San Diego Gas & Electric Company	Docket No. EL03-172-001
Sempra Energy Trading Corporation	Docket No. EL03-173-001
Sierra Pacific Power Company	Docket No. EL03-174-001
Southern California Edison Company	Docket No. EL03-175-001
TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-176-001
Tucson Electric Power Company	Docket No. EL03-177-001
Western Area Power Administration	Docket No. EL03-178-001
Williams Energy Services Corporation	Docket No. EL03-179-001 (Consolidated)
Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-180-001
Aquila Merchant Services, Inc. (f/k/a Aquila, Inc.)	Docket No. EL03-181-001
City of Redding, California	Docket No. EL03-182-001
City of Glendale, California	Docket No. EL03-183-001
Colorado River Commission of Nevada	Docket No. EL03-184-001
Constellation Power Source, Inc.	Docket No. EL03-185-001
Coral Power, LLC	Docket No. EL03-186-001
El Paso Merchant Energy, L.P.	Docket No. EL03-187-001
Eugene Water & Electric Board	Docket No. EL03-188-001
Idaho Power Company	Docket No. EL03-189-001
Koch Energy Trading, Inc.	Docket No. EL03-190-001
Las Vegas Cogeneration, L.P.	Docket No. EL03-191-001
MIECO Inc.	Docket No. EL03-192-001
Modesto Irrigation District	Docket No. EL03-193-001

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Montana Power Company (now d/b/a NorthWestern Energy, LLC)	Docket No. EL03-194-001
Morgan Stanley Capital Group	Docket No. EL03-195-001
Northern California Power Agency	Docket No. EL03-196-001
PPM Energy, Inc. (f/k/a PacifiCorp Power Marketing, Inc.)	Docket No. EL03-197-001
PECO Energy Company	Docket No. EL03-198-001
Powerex Corporation (f/k/a British Columbia Power Exchange Corporation)	Docket No. EL03-199-001
Public Service Company of New Mexico	Docket No. EL03-200-001
Sempra Energy Trading Corporation	Docket No. EL03-201-001
TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-202-001
Valley Electric Association, Inc.	Docket No. EL03-203-001 (Consolidated)

## ORDER DENYING REHEARING

(Issued January 22, 2004)

### **I. Introduction**

1. In this order, we deny requests for rehearing of two Commission orders issued on June 25, 2003.<sup>1</sup> In so doing, we decline to broaden the scope of the show cause

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<sup>1</sup> American Electric Power Service Corp., et al., 103 FERC ¶ 61,345 (2003) (Gaming Practices Order); Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,346 (2003) (Partnership Gaming Order) (collectively, Show Cause Orders). This order addresses the requests for clarification and rehearing of both Show Cause Orders, as a number of the issues raised are common to both orders. However, the pending Gaming Practices show cause proceeding and the pending Partnership Gaming show cause proceeding remain separate proceedings.

The abbreviated names and acronyms used for the various parties are identified in the Appendices to this order.

proceedings, noting our prosecutorial discretion to pursue certain activities and not to pursue others.

2. This order benefits customers by reaffirming procedures established in the Show Cause Orders to address activities that appeared to be inconsistent with the California Independent System Operator Corporation's (ISO) and California Power Exchange's (PX) tariffs during the relevant period, consistent with due process.

## II. Background

### A. The Show Cause Orders

3. The Gaming Practices Order found that certain entities identified therein appeared to have participated in activities (Gaming Practices) that constitute gaming and/or anomalous market behavior in violation of the ISO and PX tariffs<sup>2</sup> during the period January 1, 2000 to June 20, 2001, that warrant a monetary remedy of disgorgement of unjust profits and that may warrant other additional, appropriate non-monetary remedies. The Commission based these determinations on certain of the tariffs' provisions, an ISO study, a report by Commission Staff (Staff Final Report), and evidence and comments submitted by market participants.

4. In the Partnership Gaming Order, the Commission found that, based on the Staff Final Report, and evidence and comments submitted by market participants, there was evidence that Enron Power Marketing, Inc. and Enron Energy Services Inc. (Enron) and a number of entities identified in the order (collectively, Partnership Entities) appeared to have worked in concert through partnerships, alliances or other arrangements (jointly, Partnerships) to engage in Gaming Practices in violation of the ISO and PX tariffs during the period January 1, 2000 to June 20, 2001. The order also found that there was evidence that a number of Partnership Entities appeared to have had similar partnerships, which could have been attempts to engage in similar activities as the Enron partnerships.

5. In both Show Cause Orders, the Commission directed the identified entities, in trial-type evidentiary hearings to be held before administrative law judges (ALJs), to show cause why their behavior, as set forth in the order, during the period January 1,

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<sup>2</sup> In relevant part, the terms of the ISO tariff and the PX tariff are substantially the same. Thus, for convenience, the Show Cause Orders often referred only to the ISO's tariff, and we do so in this order as well. See 103 FERC ¶ 61,345 at P 8 n.8; 103 FERC ¶ 61,346 at P 8 n.11.

2000 to June 20, 2001<sup>3</sup> did not constitute gaming and/or anomalous market behavior as defined in the ISO and PX tariffs. Further, the Commission directed the ALJs to hear evidence and render findings and conclusions quantifying the full extent to which the identified entities may have been unjustly enriched as a result of their conduct. The ALJs were authorized to recommend the monetary remedy of disgorgement of unjust profits and any other additional, appropriate non-monetary remedies.<sup>4</sup>

**B. Requests for Rehearing, and Responsive Pleadings**

6. On July 11, 2003, California Parties<sup>5</sup> filed what they characterized as a motion for clarification of the Gaming Practices Order. Answers were filed by the parties listed in Appendix A. On July 11, 2003, California Parties also filed what they characterized as a motion for clarification of the Partnership Gaming Order. Answers to California Parties' motion were filed by the parties listed in Appendix B.

7. Generally, California Parties contend that the Show Cause Orders did not require show cause responses for all of the entities and transactions that were listed under the ISO's market screens and Dr. Fox-Penner's proposed market screens, and they suggest that such omissions may have been inadvertent. The answers argue that California Parties actually seek rehearing of the Show Cause Orders, to broaden the scope of the proceeding ordered by the Commission, and that such arguments are improperly made in a motion for clarification. They also contend that the Show Cause Orders explicitly did not rely exclusively on Dr. Fox-Penner's testimony, finding that the screens were overbroad and would encompass legitimate behavior. They further dispute California Parties' factual allegations.

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<sup>3</sup> June 20, 2001 was selected as the end date of the relevant period in these proceedings, because that is when a prospective mitigation and market monitoring plan took effect. 103 FERC ¶ 61,345 at P 2 n.1; 103 FERC ¶ 61,346 at P 1 n.1.

<sup>4</sup> This potential disgorgement would apply to the period January 1, 2000 to June 20, 2001 and would be in addition to any refunds owed for the period after October 2, 2000, the refund effective date in the so-called California Refund Proceeding. 103 FERC ¶ 61,345 at P 2 n.3; 103 FERC ¶ 61,346 at P 3 n.6.

<sup>5</sup> California Parties consist of the California Attorney General, the California Public Utilities Commission, the California Electricity Oversight Board, Pacific Gas and Electric Company, and Southern California Edison Company.

8. On July 14, 2003, Modesto filed what they characterized as a motion for clarification of the Partnership Gaming Order, arguing that the order did not specify the allegations against Modesto.

9. Timely requests for rehearing of the Gaming Practices Order were filed by the parties listed in Appendix C to this order.<sup>6</sup> On August 5, 2003, Indicated Respondents filed a citation of supplemental authority. On August 11, 2003, California ISO filed an answer to the requests for rehearing. California Parties, California ISO and City of San Diego argue that the scope of the show cause proceedings is too narrow and that the potential remedies do not go far enough. The other parties seeking rehearing oppose the show cause proceedings.

10. On August 1, August 11, and August 28, 2003, respectively, Duke, PacifiCorp and Powerex filed motions to strike new testimony of Dr. Fox-Penner that was appended to California Parties' request for rehearing of the Gaming Practices Order. On September 12, 2003, California Parties filed an answer opposing Powerex's motion.<sup>7</sup>

11. Timely requests for rehearing of the Partnership Gaming Order were filed by the parties listed in Appendix D to this order. On August 5, 2003, Indicated Partnership Entities filed a citation of supplemental authority. On August 11, 2003, California Parties filed an answer to what they characterize as motions to dismiss and for clarification contained in the requests for rehearing. On August 11, 2003, NCPA filed an answer to California Parties' request for rehearing. On August 8, 2003, the City of Tacoma, Washington filed an answer in support of Port of Seattle's request for rehearing. On October 29, 2003, Eugene Electric filed a motion to lodge a Commission order.<sup>8</sup>

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<sup>6</sup> In their requests for rehearing of the Gaming Practices Order and the Partnership Gaming Order, California Parties state that, to the extent that the Commission does not grant their motions for clarification, they seek rehearing on those issues.

<sup>7</sup> California Parties appended the same newly-proffered Fox-Penner testimony to their request for rehearing of the Partnership Gaming Order, and the motions to strike and the answer to those motions described above also concern that testimony. California Parties explicitly oppose only Powerex's motion to strike, but they note that Duke and PacifiCorp make similar arguments in their motions to strike.

<sup>8</sup> Eugene Electric moves to lodge a Commission order issued on October 16, 2003, San Diego Gas & Elec. Co., et al., 105 FERC ¶ 61,066 (2003).

12. On October 21, 2003, California Parties filed a motion for expedited determination of scope of proceedings issues and temporary suspension of procedural schedule pending ruling on expedited determination. Answers were filed by the entities listed in Appendix E.

### **III. Procedural Matters**

13. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure<sup>9</sup> prohibits answers to requests for rehearing. Accordingly, we will reject such answers.

14. To the extent that California Parties' October 21, 2003 motion for expedited clarification makes arguments on the merits, we will deny it as an untimely request for rehearing of the Show Cause Orders.

15. The requests for rehearing filed by several of the show cause respondents are moot in view of orders which grant motions to dismiss filed by Trial Staff or approve settlements involving those show cause respondents.<sup>10</sup> Further, there are pending more recent Trial Staff motions to dismiss other show cause respondents and settlements involving other show cause respondents. Since dismissals or settlements would moot the rehearing arguments of those other entities, we defer consideration of their requests for rehearing, subject to the outcome of the pending motions to dismiss and settlements. Consequently, this order addresses the remaining requests for rehearing of the Gaming Practices Order, i.e., those filed by: California Parties; California ISO; San Diego; Enron; and Indicated Generators, with respect to the rehearing arguments of Dynegy.<sup>11</sup>

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<sup>9</sup> 18 C.F.R. § 385.713(d)(1) (2003).

<sup>10</sup> In orders being issued concurrently, the Commission grants in part and denies in part several motions to dismiss certain show cause respondents from the proceedings, and, in other orders being issued concurrently, the Commission approves contested settlements involving certain show cause respondents. E.g., Arizona Public Service Co., et al., 106 FERC ¶ 61,021 (2004) (order on motions to dismiss); Colorado River Commission of Nevada, et al., 106 FERC ¶ 61,022 (2004) (order on motions to dismiss); City of Redding, California, 106 FERC ¶ 61,023 (2004) (order approving contested settlement); Williams Energy Services Corp., 106 FERC ¶ 61,027 (2004) (order approving contested settlement).

<sup>11</sup> Mirant and Williams, the other entities that comprise Indicated Generators, have filed settlements.

This order also addresses the remaining requests for rehearing of the Partnership Gaming Order, i.e., those filed by: California Parties; California ISO; Enron; Glendale; CRCN; Indicated Partnership Entities, with respect to the rehearing arguments of PSNM;<sup>12</sup> Modesto; NCPA; and Port of Seattle.

#### **IV. Substantive Matters**

##### **A. The Commission's Authority in this Case**

##### **1. Commission Authority with Respect to the Period Prior to October 2, 2000**

##### **The Show Cause Orders**

16. The Commission noted its determination in the California Refund Proceeding that, for the period prior to the October 2, 2000 refund effective date established in that case, it can order disgorgement of monies (in addition to the post-October 2, 2000 refunds ordered in the California Refund Proceeding) if it finds that a seller did not charge the filed rate or violated the ISO's and PX's tariffs.<sup>13</sup> Further, the Commission noted that, for the period after October 2, 2000 (i.e., to June 20, 2001), while refund protection has been in effect for sales in the ISO and PX short-term energy markets since October 2, 2000, the Commission can additionally order disgorgement of unjust profits for tariff violations that occurred after October 2, 2000.<sup>14</sup>

##### **Requests for Rehearing**

17. Some parties contend that the Commission lacks authority to order disgorgement, arguing that the Federal Power Act (FPA) does not provide for disgorgement and that the FPA does not specify penalties. They further argue that while the FPA authorizes the Commission to establish just and reasonable rates, the authority to enforce tariffs rests

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<sup>12</sup> The other entities that comprise Indicated Partnership Entities (see Appendix D) either filed settlements or are the subjects of Trial Staff motions to dismiss.

<sup>13</sup> 103 FERC ¶ 61,345 at P 12, citing San Diego Gas & Electric Co., et al., 96 FERC ¶ 61,120 at 61,506-11 (July 25, 2001 Order), order on clarification and reh'g, 97 FERC ¶ 61,275 (2001).

<sup>14</sup> Id.

with the courts, not the Commission.<sup>15</sup> They also maintain that the disgorgement remedy under the Show Cause Orders is an unlawful retroactive refund and violates the filed rate doctrine.<sup>16</sup> Enron also argues that the Commission would have to find the relevant rates unjust and unreasonable, specify the proper rate, and determine that the result is not confiscatory.

18. California Parties, California ISO and San Diego maintain that the Show Cause Orders' remedies do not go far enough, arguing that relief should include excess profits from the sales by all public utilities at the inflated market-clearing price. They believe that the Commission could apply its mitigated market clearing price remedy to the period prior to October 2, 2000 under the filed rate doctrine.

19. California ISO believes that disgorgement provides no disincentive to sellers to engage in Gaming Practices and that the disgorgement approach ultimately prevents customers from being made whole for the full costs imposed by gaming. It suggests the implementation, as a baseline, of a proxy mitigated price methodology of the type proposed by California Parties, and endorsed by the ISO, in their filings in the 100 Days proceeding.

### **Commission Determination**

20. In discussing the Commission's authority in these proceedings, the Show Cause Orders noted that the Commission, in the California Refund Proceeding, had previously determined its authority to order disgorgement of unjust profits.<sup>17</sup> Therefore, we deny the rehearing arguments challenging the Commission's statutory authority to order disgorgement for the same reasons stated in our orders in the California Refund Proceeding.

21. The argument that we have authority to set just and reasonable rates, terms and conditions but not enforce the tariffs is unpersuasive. Indeed, the FPA and the Commission's authority under Sections 205 and 206 (and 309) of the FPA<sup>18</sup> would be virtually meaningless if we had no authority to enforce the tariffs that the statute requires

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<sup>15</sup> Enron, Glendale, Indicated Generators, Modesto.

<sup>16</sup> E.g., Enron, Indicated Generators.

<sup>17</sup> See supra P 16.

<sup>18</sup> 16 U.S.C. §§ 824d, 824e, 825h (2000).

must be filed with and reviewed by us. The filing of the ISO and PX tariffs with the Commission, and accordingly market participants' commitment to abide by the rules of those Commission-regulated markets, was and is an essential predicate to the ISO's and PX's authorizations to operate electricity markets and to sellers to make sales at market-based rates in those markets.

22. With respect to Enron's argument that we must specify the just and reasonable rate and determine that it is not confiscatory, the amount of any unjust enrichment as a result of Gaming Practices and Partnership Gaming, and the just and reasonable rates, will be addressed after evidence is heard in the respective show cause proceedings.

23. California Parties, California ISO and San Diego essentially reiterate arguments rejected in the California Refund Proceeding concerning the Commission's determination that it lacked authority to order refunds (as opposed to other remedies such as disgorgement of unjust profits) for the period prior to the October 2, 2000 refund effective date.<sup>19</sup> We deny their arguments for the reasons stated in our orders in the California Refund Proceeding.

24. California ISO's argument that disgorgement does not provide a disincentive to sellers to engage in Gaming Practices is not persuasive. We believe that the possibility of disgorgement of unjust profits does provide a disincentive to engaging in Gaming Practices as a goal of engaging in Gaming Practices – to obtain unjust profits – is thwarted. In this regard, we further note that longer term market reforms were adopted or instituted in the California Refund Proceeding. Those measures should provide an additional disincentive to Gaming Practices in the future.

## **2. Commission Authority with Respect to Governmental Entities**

### **The Show Cause Orders**

25. The Commission determined that the disgorgement of unjust profits for the pre-October 2, 2000 period should apply to sales made by governmental entities, as well as to those by the other identified entities. It cited the July 25, 2001 Order, where it explained that its jurisdiction attached to the subject matter of the affected transactions: wholesale sales of electric energy in interstate commerce through a Commission-regulated centralized clearinghouse that sets a market clearing price for all wholesale seller participants, including governmental entities. Thus, jurisdiction may properly be asserted

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<sup>19</sup> See July 25, 2001 Order, 96 FERC at 61,504-11.

over sales in these markets by governmental entities. The Commission determined that the same rationale applied equally with respect to violations of provisions of the ISO's Market Monitoring Information Protocol (MMIP) that prohibit gaming and/or anomalous market behavior, as such provisions apply to all transactions in the California market.<sup>20</sup>

### **Requests for Rehearing**

26. Parties argue that the Commission lacks jurisdiction over governmental entities under Section 201(f) of the Federal Power Act, which they state provides that the FPA does not apply to a State or any political subdivision of a state, or any state agency, authority or instrumentality.<sup>21</sup>

27. NCPA also argues that the Commission has determined that it lacked authority to address the market-based rates of a subsidiary of Salt River<sup>22</sup> and that a refund requirement imposed on members of the Mid-Continent Area Power Pool (MAPP) did not apply to Nebraska Public Power District (NPPD) because NPPD was not a public utility and, therefore, not subject to the Commission's jurisdiction.<sup>23</sup>

### **Commission Determination**

28. With respect to the rehearing arguments that reiterate arguments previously rejected by the Commission in the California Refund Proceeding, we reject them for the same reasons stated in the Commission's prior orders.<sup>24</sup> Further, NCPA's argument fails to account for the fact that governmental entity participants in the Commission-regulated ISO and PX markets are bound to abide by the market rules. NCPA became subject to the Commission's authority, with respect to its activities in the ISO and PX markets, by virtue of its participation in those markets.

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<sup>20</sup> 103 FERC ¶ 61,345 at P 13-15.

<sup>21</sup> CRCN, Glendale, Modesto, NCPA.

<sup>22</sup> See New West Energy Corp., 83 FERC ¶ 61,004 (1998).

<sup>23</sup> See Mid-Continent Area Power Pool, 89 FERC ¶ 61,135 (1999), reh'g denied, 92 FERC ¶ 61,229 (2000).

<sup>24</sup> E.g., 103 FERC ¶ 61,345 at P 13-15.

**B. The MMIP's Provisions Concerning Gaming and/or Anomalous Market Behavior**

**The Show Cause Orders**

29. The Commission determined that the MMIP puts market participants on notice regarding their rights and obligations in the marketplace. It serves as the rules of the road for market participants. It also contemplates that these rules will be enforced by the Market Surveillance Unit, in the form of monitoring and reporting, or by the appropriate body or bodies (including this Commission), in the form of corrective actions. And the Commission noted that it has independent authority to enforce filed tariffs.

30. The Commission also agreed with the Staff Final Report that market participants cannot reasonably argue that they were not on notice that conduct such as the Gaming Practices would be a violation of the ISO and PX tariffs and that such conduct could be subject to corrective or enforcement action, by either the ISO in the first instance or by the Commission, whose role includes enforcing the terms and conditions of filed rate schedules.

31. Accordingly, the Commission determined that it was appropriate for it to institute the show cause proceedings.<sup>25</sup>

**Requests for Rehearing**

32. Several parties maintain that the MMIP did not provide adequate notice to market participants that it was enforceable through retroactive penalties. They contend that the MMIP contained no provision for imposition of retroactive refund liability for gaming behavior. They argue that the MMIP was not intended to be an enforceable code of conduct, but was only a market screening tool. They further contend that definitions in the MMIP, such as “unfair advantage” and “normal behavior,” are vague and overbroad and, thus, fail to provide market participants with the requisite ascertainable certainty. They further assert that the Commission has required ISOs and RTOs to better specify conduct that would trigger mitigation. They also argue that the meaning of the MMIP definitions should have been set for hearing.<sup>26</sup> They maintain that the PX, in its 100 Days

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<sup>25</sup> 103 FERC ¶ 61,345 at P 23-27.

<sup>26</sup> Enron, Glendale, Indicated Generators, NCPA, Duke.

Evidence testimony, and the ISO, in testimony before the United States Senate, testified that the intent of the MMIP was ambiguous.<sup>27</sup>

33. California Parties argue that the Commission failed to acknowledge that the show cause respondents also violated state law, under which the ISO and PX Tariffs incorporate an obligation of "good faith" which was breached by sellers. They also argue that conduct by sellers violated tariff provisions not cited by the Commission, included evasion of Western System Coordinating Council (WSCC) standards and WSCC reliability criteria, through strategies that including withholding tactics, submitting either no bids or high bids during system emergencies, placing generation on shutdown during system emergencies, and not bringing generation back on-line in a timely fashion after outages. They believe that the Commission should, at a minimum, address these concerns in the investigation into withholding practices in Docket No. IN03-10-000.<sup>28</sup>

34. California Parties also claim that the alleged Gaming Practices encompass violations of other ISO Tariff provisions that were not cited in the Show Cause Orders. They further allege that three of the five largest generators violated Amendment No. 13's prohibition of Double Selling. They also argue that the numerous contractual and profit sharing arrangements among sellers were not filed, in violation of section 203 of the FPA.

### **Commission Determination**

35. Parties argue that the MMIP is only intended to be a guide, with the ISO to change the tariff prospectively in response to monitoring. They also claim a lack of adequate notice, both as to the specific behavior encompassed by the MMIP and as to the fact that certain conduct was prohibited. They claim that the ISO never enforced the MMIP and that the PX market monitor testified that market participants might not have understood what the MMIP prohibited.

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<sup>27</sup> Enron, Indicated Generators.

<sup>28</sup> The scope of Docket No. IN03-10-000 is not at issue in these proceedings. See infra P 91. To the extent that California Parties urge the Commission to expand these proceedings beyond violations of the MMIP, we decline to do so. We have exercised our prosecutorial discretion to pursue violations of the MMIP, as discussed further below, and we are not persuaded to go further. Finally, violations of state law can be pursued in appropriate state fora.

36. We reaffirm our interpretation of the MMIP. Regardless of the ISO's enforcement of the MMIP, the Commission has an independent statutory duty to ensure that rates, terms and conditions on file are just and reasonable<sup>29</sup> and that parties subject to them abide by them.<sup>30</sup> Similarly, we reject the position that the MMIP is no more than a "guide," given that the Commission found that the protocols, including the MMIP, "govern a wide range of matters which traditionally and typically appear in agreements that should be filed with and approved by the Commission[,]" and directed the ISO and PX to file the MMIP as part of their filed rate schedules.<sup>31</sup> The Commission's order was actual notice to the parties that the Commission viewed the MMIP as part of an enforceable rate schedule. And a filed rate schedule contains rates, terms, and conditions that the Commission must find to be just and reasonable; such rates, terms, and conditions can be enforced by the Commission.<sup>32</sup> If the Commission regarded the MMIP as something less than an enforceable tariff provision, more akin to, for example,

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<sup>29</sup> See, e.g., *Public Service Commission v. FPC*, 543 F.2d 757, 800 (D.C. Cir. 1975) (Natural Gas Act "[n]owhere condone[s] any rate or charge other than the one that would be just and reasonable"); see also *FPC v. Texaco, Inc.*, 417 U.S. 380, 397-98 (1974) (in light of circumstances that were "distorting the market price for natural gas," the "prevailing price in the marketplace" could not be "the final measure of 'just and reasonable' rates mandated by the [Natural Gas] Act"); *Elizabethtown Gas Company v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (the Commission could rely on market-based pricing where the Commission made clear that it would exercise its Natural Gas Act section 5 authority to assure that market-based rates were just and reasonable); accord *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 369-71 (D.C. Cir. 1998) (upholding Commission's authorizing market-based rates in light of showing of no market power at the time market-based rate authority is granted and an "escape hatch" or "safeguard" of further Commission review should actual market conduct not match the Commission's predictions).

<sup>30</sup> See 16 U.S.C. §§ 824d, 824e (2000); accord infra note 32.

<sup>31</sup> *Gaming Practices Order*, 103 FERC ¶ 61,345 at P 26, quoting *Pacific Gas and Electric Co.*, 81 FERC ¶ 61,320 at 62,471 (1997) (October 1997 Order).

<sup>32</sup> See 16 U.S.C. § 824d (2000); *Maine Public Service Co. v. FPC*, 579 F.2d 659, 666 (1st Cir. 1978) (rate schedule filed with the Commission has "the force of law"); accord *Electrical District No. 1 v. FERC*, 774 F.2d 490, 492 (D.C. Cir. 1985) (a customer cannot refuse to pay a rate currently in effect).

manuals containing day-to-day operating practices that may not have to be filed,<sup>33</sup> it would not have ordered the ISO and PX to file the MMIP as part of their filed tariffs.

37. Enron cites to the 100 Days testimony of the PX market monitor, who opines that market participants may not have had “a clear understanding” of what may have been “taking unfair advantage of the market.” Dynegy argues the same point, citing testimony by the Chairman of the California Market Surveillance Committee. In essence, Dynegy would allow alleged misconduct by market participants to be justified by the lack of enforcement actions of the ISO and PX. The failure of the ISO and the PX to enforce the MMIP does not mean the Commission can or should walk away from these proceedings, however. Moreover, in light of the failure of the ISO and PX to enforce their tariffs, this Commission has a special duty to independently enforce those tariffs. That is precisely what the Show Cause Orders do. Under the FPA, especially when those private entities that were to enforce the MMIP in the first instance have not done so, the Commission can and must function as the ultimate safeguard against customers’ payment of unjust and unreasonable rates.<sup>34</sup>

38. Dynegy argues that the fact that the Commission requested that the ISO revise its earlier Market Monitoring Plan (which resembles the MMIP) means that the MMIP itself is not enforceable.<sup>35</sup> Dynegy argues that the Commission’s request for revisions to the Market Monitoring Plan means that “[e]veryone (including the Commission) thus clearly understood that the MMIP did *not* set forth the criteria and standards by which market behavior would be measured.” (Emphasis in original.) As we explain below, we disagree.

39. First, these parties misstate the reasons why the Commission directed the ISO and PX to revise their tariffs. While we did “acknowledge the concerns of commenters who claim that there is not enough detail in the monitoring criteria and standards,” we did not, in fact, find that the monitoring plans were inadequate. Rather, we explained that the “issues and criteria outlined by the ISO and PX cover the range of market power issues

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<sup>33</sup> See, e.g., Pennsylvania-New Jersey-Maryland Interconnection, 81 FERC ¶ 61,257 at 62,241-42, 62,267 (1998), order on reh'g, 92 FERC ¶ 61,282 (2000); accord New England Power Pool, 100 FERC ¶ 61,287 at P 147 (2002), order on reh'g, 101 FERC ¶ 61,344 (200-), Atlantic City Electric Co., 89 FERC ¶ 61,225 at 61,666 (1999).

<sup>34</sup> See supra note 31.

<sup>35</sup> Enron makes a similar argument.

we [were] concerned about.”<sup>36</sup> What we were principally concerned about was not the adequacy of notice to market participants, but rather whether we had sufficient information about how the ISO and PX would enforce their tariffs, an enforcement procedure that departs from traditional regulatory practice. We stated:

While we approve of the concept of having the ISO and PX being authorized to impose sanctions, we have not yet approved any specific sanctions and are directing the ISO and PX to have our approval under section 205 before they impose any sanctions. If and when we approve any specific sanctions, we will require notification, via a brief summary, of any sanctions imposed by the ISO or PX, along with the analysis underlying the action promptly after the sanction is imposed.

October 1997 Order, 81 FERC at 61,553.

40. It was with these concerns in mind that the Commission directed the ISO and PX to revise their tariffs under Section 205 to describe sanctions that they (not the Commission) would impose and to describe the behavior that would trigger each sanction. Nowhere in the October 1997 Order did the Commission find that market participants would not have adequate notice of what was expected of them and what behavior was prohibited, nor did we direct any revisions to the definitions of “gaming” or “anomalous market behavior”. On the contrary, a key concern was whether the ISO or PX had adequately detailed the sanctions authority that we were authorizing them to exercise.<sup>37</sup> While we noted that we would give the ISO and PX “the flexibility to modify” its monitoring criteria as they grew in monitoring experience and as market conditions changed, this flexibility cannot be read as a finding that the definitions of “gaming” or “anomalous market behavior” were inadequate.<sup>38</sup>

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<sup>36</sup> October 1997 Order, 81 FERC at 61,552.

<sup>37</sup> That the ISO and PX did not subsequently make a filing to clarify their authority does not affect the Commission’s exercise of its statutory obligation to ensure that rates, terms and conditions on file with it are just, reasonable, and not unduly discriminatory or preferential. Our statutory responsibility to enforce a filed tariff is separate from any contractually-based sanction authority of the PX and ISO; indeed, we are not directing the payment of penalties at all, only the disgorgement of unjust profits.

<sup>38</sup> October 1997 Order, 81 FERC at 61,552.

41. Second, in a later order, issued on December 17, 1997,<sup>39</sup> we directed the ISO and PX to file the MMIP as part of their filed rate schedules and rejected their attempts to have the MMIP filed for informational purposes only. Any possible uncertainty as to the legal status of the MMIP as a filed rate schedule was therefore resolved at that time. In the December 1997 Order, we did not reject the MMIP as lacking the requisite clarity and specificity that we demand of all rate schedules on file with the Commission, nor did we agree with the PX and ISO that the MMIP should be treated as informational filings. On the contrary, we explained that the MMIP “govern[s] a wide range of matters which traditionally and typically appear in agreements that should be filed with and approved by the Commission,”<sup>40</sup> and directed that the MMIP be formally filed with the Commission as part of the ISO’s and PX’s tariffs.

42. Thus, we reject the position that the MMIP is not enforceable. It is within the Commission’s authority and discretion to accept tariff provisions for filing, while simultaneously directing further revision to those provisions. This means only that the current tariff provisions can and should be improved, not that they are unenforceable and *not* part of a filed rate schedule. If we had determined that the MMIP lacked the clarity and specificity required of a filed rate schedule under Section 35.1 of our regulations,<sup>41</sup> we could have issued a deficiency letter or we could have rejected the MMIP. On the contrary, we affirmatively ordered it to be made part of the filed rate schedule, pending clarification as to the ISO and PX’s sanction authority (which is not at issue in this proceeding). And, as we noted before, regardless of whether the ISO enforced the MMIP, we have an independent statutory obligation to provide customers with the protection they are statutorily entitled to under the FPA.

43. Indicated Generators and NCPA claim that the MMIP’s inclusion in the ISO’s June 1, 1998 compliance filing, which lists the so-called unresolved issues, means that it cannot now be enforced against the market participants. We reject this theory. The fact that some market participants did not agree with the precise language of the MMIP or believed that the ISO’s authority under the MMIP was overly broad does not obviate that it is a filed rate schedule, and that market participants cannot claim lack of notice that it is a filed rate schedule. That some parties object to a particular provision in a filed rate

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<sup>39</sup> Pacific Gas & Electric Co., et al., 81 FERC ¶ 61,320 (1997) (December 1997 Order).

<sup>40</sup> Id. at 62,470-71.

<sup>41</sup> 18 C.F.R. § 35.1 (2003).

schedule, and that the Commission has not yet resolved those objections, does not mean that the Commission cannot ascribe it a reasonable interpretation and enforce it as a filed rate schedule.<sup>42</sup> As noted above, the Commission never rejected the MMIP, but rather specifically directed it to be filed as part of the ISO's tariff. We never found that the MMIP was patently deficient, even as we allowed the ISO and PX to modify their monitoring criteria as their experience grew. We would do an injustice to innocent customers to allow those market participants who have consistently objected to being subject to the MMIP's standards to now claim that their objections undermine the enforceability of the MMIP as a filed rate schedule.

44. Parties argue that the MMIP is vague and ambiguous, and therefore unenforceable. They also argue that it did not specify penalties. Dynegy claims that the MMIP does not set forth what specific types of practices are to be considered anti-competitive and what the penalties are. We reject these arguments, as explained below.

45. While the MMIP does not list every single specific act that would constitute prohibited behavior, that is not the proper standard to apply. The Enron memoranda cited in the Staff Final Report illustrate the creativity of the various trading strategies it employed to the economic detriment of the market, other market participants and, ultimately, customers. Enron (and others) would demand that a regulatory agency have the prescience to include in a rate schedule *all* specific misconduct in which a particular market participant could conceivably engage.<sup>43</sup> That standard is unrealistic and would render regulatory agencies impotent to address newly conceived misconduct and allow them only to pursue, to phrase it simply, last year's misconduct – essentially, to continually fight the last war and deny the capability to fight the present or next one.

46. The MMIP's language is, in this regard, considerably more precise than the language of the FPA itself (which, in Sections 205 and 206, uses phrases such as just,

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<sup>42</sup> Indeed, by these parties' logic, a proposed rate that under FPA Section 205 had been accepted, suspended, and made effective subject to refund could not be charged until after the end of the ordered hearing and after the Commission issued its final opinion. And that is certainly not, and has never been, the case.

<sup>43</sup> See, e.g., *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (the standard is whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform . . . , " quoting *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995)).

reasonable, and not unduly discriminatory or preferential), and, indeed, of other statutes that empower regulatory agencies to monitor competitive markets, such as the Sherman Act.<sup>44</sup> Its definition of “gaming” describes misconduct that causes reductions in efficiency and/or harm to customers and which takes unfair advantage of market rules and conditions. The MMIP provisions specify that such rules and conditions include those that “may affect the availability of transmission or generation capacity, such as loop flow, facility outages, level of hydropower output or seasonal limits on energy imports from out-of-state.” The MMIP provide that gaming may also include other types of behavior that “render the system and the ISO [and PX] Markets vulnerable to price manipulation to the detriment of their efficiency.”

47. The definition of “anomalous market behavior” is even more specific, defining this type of misconduct as “depart[ing] significantly from the normal behavior in competitive markets that do not require continuing regulation or as behavior leading to unusual and unexplained market outcomes.” The MMIP then goes on to give specific examples of anomalous market behavior, such as withholding of generation capacity when such capacity would normally be offered in a competitive market; unexplained or unusual redeclarations of availability of capacity; unusual trades or transactions; pricing or bidding patterns that are inconsistent with prevailing supply and demand conditions, for example, prices and bids that appear consistently excessive for such conditions; and unusual activity or circumstances relating to imports from or exports to other markets or exchanges. In short, there is, in fact, sufficient specificity and clarity in the MMIP to be enforceable. We also note that no market participant (or the ISO) complained to the Commission, prior to the invitation of comments in Docket No. PA02-2-000, that the MMIP lacks specificity and clarity and that their due process rights were being compromised by the inclusion of such a provision in the tariffs.

48. Thus, the MMIP provided adequate notice to market participants of what conduct was prohibited. The mere fact that the MMIP does not expressly prohibit in so many words specific trading strategies such as “Fat Boy” simply means that the Commission did not (as, indeed, it could not) foresee all the myriad means that certain market

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<sup>44</sup> E.g., 15 U.S.C. § 2 (2000) (Section 2 of the Sherman Act prohibits “conspiracy in restraint of trade”). In *Nash v. United States*, 229 U.S. 373, 376-77 (1913), the Supreme Court upheld the constitutionality of the Sherman Act, which is less precise than the MMIP, against claims that the statute was void for vagueness. The Court held that “apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.” Id. at 377.

participants could employ to the detriment of competition; it does not mean that market participants determined to have engaged in Gaming Practices and Partnership Gaming may escape disgorgement of the unjust profits that they gained by their conduct. Indeed, in the Enron memoranda,<sup>45</sup> which outline various trading strategies, the authors of the memoranda also state that these trading strategies could violate the MMIP provisions concerning gaming and anomalous market behavior.<sup>46</sup> The Enron Memoranda also explain in detail what sanctions could be taken against Enron for engaging in these trading strategies. It is thus clear that Enron, the author of these trading strategies, recognized that its trading strategies could have been prohibited by the MMIP and that Enron could be severely sanctioned for the trading strategies, if it were caught. Given this, Enron's (and others') current position that the language of the MMIP does not allow market participants to know what conduct is prohibited is not credible.

49. Parties also maintain that the Commission's interpretation of the MMIP is contrary to earlier views expressed by the Commission and its Staff. For example, Dynegy argues that the Commission held in December 2000 that no tariff violation had been identified.<sup>47</sup> Since that time, of course, Commission Staff concluded its Western Markets investigation in Docket No. PA02-2-000, and we have the benefit of its reports. In short, our understanding of how California's energy markets operated (or failed to operate) has significantly advanced since 2000. Dynegy also cites a dialogue between the Deputy General Counsel and a Commissioner in the July 25, 2001 public meeting, in which, Dynegy asserts, the Deputy General Counsel stated that the withholding did not violate any tariff provisions. Even if such conversation could bind the Commission, which it cannot,<sup>48</sup> as the conversation quoted by Dynegy makes clear, the Commissioner and the

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<sup>45</sup> See Enron Memoranda of December 6, 2000 and December 8, 2000 ("Trading Strategies in the California Wholesale Power Markets/ISO Sanctions"). They are available on the Commission's website at <<<http://www.ferc.gov/industries/electric/indus-act/wem/pa02-2.asp>>>.

<sup>46</sup> December 6, 2000 Enron Memorandum at 8.

<sup>47</sup> Dynegy cites to the December 15, 2000 Order in the California Refund Proceeding, *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,294 (2000) (December 2000 Order).

<sup>48</sup> See, e.g., 18 C.F.R. § 388.104(a) (2003); Annual Charges under the Omnibus Budget Reconciliation Act of 1986, 88 FERC ¶ 61,068 at 61,159 n.20 (1999), order on reh'g, 95 FERC ¶ 61,234 (2001); *Pennsylvania Power & Light Co.*, 23 FERC ¶ 61,325 at 61,717 n.1 (1983).

Deputy General Counsel were not discussing the MMIP or any other ISO or PX tariff provision. Rather, they were discussing only the market-based rate tariffs and codes of conduct of power marketers. The MMIP is, of course, neither.

50. Dynegy claims that the Staff Final Report conflicts with what Dynegy calls “the Commission’s new view” that it can order the disgorgement of unjust profits. We disagree. Dynegy is confusing the authority that the Commission can exercise under its enabling statute to enforce tariffs on file with the contractual authority of the ISO. The Commission’s obligation to ensure that market participants abide by the language of the filed tariffs cannot be limited by the parameters placed on the ISO, which, of course, is a private party with no similar statutory obligations. Nor are we swayed by Dynegy’s suggestion that no other ISO has rules in effect that are similar to the MMIP. Even if this is true (we do not concede that it is), we cannot ignore tariff provisions agreed to by the market participants in one ISO -- and filed with and accepted by the Commission -- simply because other ISOs have not adopted such provisions.

### C. Gaming Practices and California Practices

51. Based on its review and analysis of the Staff Final Report, the ISO Report, and the several studies and testimony by witnesses submitted in the 100 Days Evidence, most notably the testimony and studies conducted by California Parties' witness Dr. Fox-Penner, the Commission determined that certain practices violated the MMIP. As to those practices that violated the MMIP (i.e., the Gaming Practices), the Commission identified two categories of violations: (1) Gaming Practices that violated the MMIP and for which the Commission sought disgorgement of unjust profits received as a result of those violations; and (2) Gaming Practices that violated the MMIP, but for which there were no unjust profits earned or other countervailing and mitigating circumstances existed that caused the market participants to engage in the Gaming Practices such that the Commission would not seek the disgorgement of unjust profits.<sup>49</sup> The Commission further determined that certain of the market participants' activities did not violate the MMIP, and so it did not pursue market participants for having engaged in such activities (i.e., the California Practices). Rather, the Commission found that the California Practices did not violate the ISO tariff or any rule, and were recognized and widely accepted as appropriate arbitrage activity.<sup>50</sup>

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<sup>49</sup> 103 FERC ¶ 61,345 at P 34.

<sup>50</sup> Id. at P 36.

52. We are not persuaded to change our approach, and so we will deny rehearing.

**1. Gaming Practices**

**a. False Import**

**The Gaming Practices Order**

53. False Import, which is also known as "Ricochet" or "Megawatt Laundering," took advantage of the price differentials that existed between the day-ahead or day-of markets and out-of-market sales in the real-time market. A market participant made arrangements to "park" power, *i.e.*, to export power purchased in the California day-ahead or day-of markets to an entity outside the state and to repurchase the power from the out-of-state entity, for which the out-of-state entity received a fee. The "imported" power was then sold in the California real-time market at a price above the price cap. In reality, however, when power was "parked" under this practice, no power actually left the state of California. The reason for creating this fictional import was to take advantage of the fact that the ISO was making out-of-market (OOM) purchases that were not subject to the price cap during real time whenever there was insufficient supply bid into its market.

54. The Commission determined that those market participants who engaged in False Import violated the MMIP by unfairly taking advantage of the rules permitting energy to be purchased at prices above the cap in OOM purchases during real time and the ISO's practice of permitting such uncapped purchases for imported power. More precisely, the market participants engaging in False Import deceived the ISO by falsely representing that their available power had been imported, in order to receive a price above the cap. In fact, however, the generation was California generation, and no power had left the state in the fictional export-import parking transaction.<sup>51</sup>

**Requests for Rehearing**

55. California Parties argue that the Commission defined False Imports too narrowly. They contend that potential False Imports should include all transactions where power was exported or claimed to be exported from California via any market other than real-time and was simultaneously re-imported in real-time. For example, they claim that a generator within the ISO may have sold power bilaterally to an out-of-state entity, as a prelude to repurchasing the power to sell into the ISO real-time market. They do not

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<sup>51</sup> Id. at P 37-40.

believe that the export leg of a False Import must involve a purchase from the PX day-ahead or day-of markets, rather than a direct bilateral sale or export by an in-state generator.

56. In addition, they contend that entities with load outside the state could purchase within California and "export" it to themselves in the day-ahead and hour-ahead markets while simultaneously selling it back to the ISO in real-time. Thus, a parking arrangement with another entity out-of-state was not a necessary component of a False Import, according to California Parties.

57. California Parties further assert that the return leg or import of a False Import may have involved a sale to the ISO real-time market through a mechanism other than an out-of-market (OOM) sale. They state that the Commission, in Docket No. IN03-110, recognized that many high priced sales into the ISO markets may be indicative of gaming and an exercise of market power; thus, it makes sense to inquire into any pre-scheduled export from California that is associated with any simultaneous sale back to the real-time market. They further contend that False Imports that are limited to the definition in the Gaming Practices Order would eliminate almost all of the potential False Import transactions identified in the ISO's and Dr. Fox-Penner's screens. They argue that the fact that the Commission used the ISO and Fox-Penner screens as a starting point for the show cause order suggests that the Commission did not intend such a narrow reading.

58. California Parties also argue that False Imports should not be limited to imported power that was sold in the California real-time market "at a price above the cap," but instead should include transactions that were sold into the real-time market at the market clearing price.<sup>52</sup>

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<sup>52</sup> In support, California Parties (Motion for Clarification at 11) argue:

As reflected in the Commission's Investigation of Anomalous Bidding Behavior and Practices in the Western Markets, the Commission directed an investigation of all parties who bid in the ISO and PX markets above the prima facie level of \$250 per MW to determine whether these parties may have violated the prohibitions in the MMIPs against anomalous market behavior, in violation of the tariffs. Thus, it would be inconsistent to limit [False Imports] during hours in which the importer submitted Real-Time bids above \$250, since such bids must be reviewed to determine if they are indicative of anomalous market behavior in violation of the MMIP, in the first instance.

59. California Parties seek clarification concerning the period covered by the potential disgorgement for False Import. They say it is unclear whether the Commission ordered potential disgorgement to cover the period ending October 2, 2000 or the period ending June 21, 2001.<sup>53</sup> In any event, they argue that False Import adversely affected the real-time market during the period October 2, 2000 to June 21, 2001, claiming that refunds do not mitigate all transactions, e.g., bilateral transactions and transactions over 24 hours. They contend that the refund period mitigation may allow some sellers to collect a significant profit, even after refunds, which is inconsistent with requiring manipulators and tariff violators to disgorge their profits.

60. California ISO argues that potential disgorgement for False Import should also apply to transactions between January 1, 2000 and May 1, 2000 and that the Commission did not explain why it did not include this period.<sup>54</sup> It also suggests that market participants engaged in False Import could have made profits during intervals or hours in which the price paid to them was not being mitigated in the California Refund Proceeding, due to the exclusion of a variety of categories of out-of-market sales from mitigation in that proceeding.

61. California ISO also requests clarification that False Import is not limited to the situations identified in the Gaming Practices Order, but instead applies to any transaction in which an entity falsely represented that power had been imported. For example, a generator within the ISO could have sold power to an out-of-state entity through a direct bilateral arrangement, rather than purchasing the energy through the day-ahead or day-of-PX markets, prior to repurchasing and selling that power in the ISO's real-time market. Further, entities with load outside the state could purchase within California and "export"

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<sup>53</sup> As we indicated in the Gaming Practices Order, 103 FERC ¶ 61,345 at P 40 n.55, the monetary remedy of disgorgement of profits for this particular Gaming Practice would be only to October 2, 2000. While this remedy was to be applied from January 1, 2000 to June 21, 2001 for the other Gaming Practices, see id. at P 2 n.3, 71, False Import was different. For False Import, given that spot market sales through the PX in the day-ahead market and transactions with the ISO in the real time market (i.e., exports and imports) were mitigated, it was appropriate to provide that the remedy for False Import would apply to a more limited period.

<sup>54</sup> The May 2000 reference, see id. at P 40 n.55, reflects that the price differentials that made False Import profitable became significant beginning in May 2000. See Staff Final Report at I-12 (citing San Diego Gas & Electric Co., et al., 93 FERC ¶ 61,121 at 61,353 (2000)); see generally id. at VI-45 – 47; VI-48 – 51; VI-52 – 53.

it to themselves in the day-ahead and hour-ahead markets, then sell it back to the ISO in real-time, rather than using a second party to accomplish the False Import. Or, the "re-import" stage of a False Import transaction may have involved a sale other than an OOM sale to the ISO.

**b. Congestion-Related Practices**

**The Gaming Practices Order**

62. The order initiated show cause proceedings concerning congestion-related practices, including Circular Scheduling and Load Shift, in which market participants engaged in false scheduling of load or counterflow energy that appeared to relieve congestion in real time so that they could receive congestion payments. The Commission found that these practices violated the MMIP because the market participants submitted false schedules to the ISO. Market participants who engaged in Circular Scheduling fraudulently received congestion relief payments for energy that did not flow and which did not relieve congestion. Market participants who engaged in Load Shift underscheduled load in one zone in California and overscheduled load in another, thereby creating congestion in the direction of the overscheduled zone.<sup>55</sup>

**Requests for Rehearing**

63. California Parties seek to broaden the scope of the show cause proceeding to include allegations of Circular Scheduling against NCPA and Turlock, based on Dr. Fox-Penner's new testimony and exhibits included in their request for rehearing. They also argue that the Staff Final Report identified NCPA.

64. California Parties seek to add PS Colorado as a show cause respondent concerning Load Shift based on the Fox-Penner testimony and exhibits. PSColorado responds that the allegation is unsubstantiated.

**c. Ancillary Services-Related Practices: Paper Trading and Double Selling**

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<sup>55</sup> 103 FERC ¶ 61,345 at P 41, 43, 45.

### **The Gaming Practices Order**

65. The Ancillary Services-Related practice of Paper Trading involved selling ancillary services in the day-ahead market even though the market participant did not have the required resources available to provide the ancillary services. The market participant then bought back these ancillary services in the hour-ahead market at a lower price. Double Selling involved selling ancillary services in the day-ahead market from resources that were initially available, but later selling those same resources as energy in the hour-ahead or real-time markets.

66. The Commission determined that market participants that engaged in Paper Trading and/or Double Selling violated the MMIP since they unfairly took advantage of the market rules by using false representations and/or receiving payments for services that they did not provide. Market participants engaged in Paper Trading falsely represented that the resources were available to provide ancillary services when they were not actually available. Similarly, with respect to Double Selling, the Commission determined that the market participant misled the ISO by selling capacity that it had already committed to reserve as ancillary services, thus making that capacity no longer available in real time if the ISO were to call upon that resource to provide ancillary services.<sup>56</sup>

### **Requests for Rehearing**

67. California Parties note that the Commission identified parties that may have engaged in Paper Trading based on a list in the ISO's July 3, 2002 Market Notice of participants that received payments for ancillary services that were called upon, but for which they could not deliver the services. Noting that, beginning on June 14, 1999, the ISO began rescinding ancillary services capacity payments when such services were not delivered, California Parties assert that it is unclear what transactions are related to the ancillary services Gaming Practices and/or what disgorgement or other remedies would be applicable to these ancillary services payments that have been withheld. California Parties specifically seek to add Grant PUD and Tucson as show cause respondents concerning Paper Trading, based on the ISO Report.

68. California Parties also assert that it is unclear whether the Commission intended to restrict Double Selling practices to the day-ahead market or whether it intended to

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<sup>56</sup> Id. at P 48-53.

include sales of ancillary services in the hour-ahead market. They argue that Double Selling is gaming, regardless of whether the seller committed to sell day-ahead or hour-ahead. They further request clarification that Double Selling includes a situation in which a seller commits to provide ancillary services, and then engages in sales in real-time of uninstructed generation such that the committed capacity is not there, contending that gaming is just as problematic if the energy sale occurs through intentional uninstructed real-time generation rather than pre-scheduled sales of energy.

69. Indicated Generators contend that there was no ISO Tariff provision prohibiting Double Selling prior to September of 2000 when ISO Tariff Amendment No. 13 became effective.<sup>57</sup>

**d. Selling Non-Firm Energy as Firm**

**The Gaming Practices Order**

70. The practice of Selling Non-Firm Energy as Firm involved Enron buying non-firm energy from outside California and then selling it to the ISO as firm energy. Enron thus avoided the cost of purchasing the operating reserves that are required for firm energy. The Commission determined that this practice was a false representation by Enron to the ISO. Thus, it was a violation by Enron of the MMIP. (The Commission did not find evidence that any market participant engaged in this practice other than Enron.)<sup>58</sup>

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<sup>57</sup> By order issued on February 9, 1999, the Commission accepted the ISO's tariff Amendment No. 13 for filing, to become effective on the later of February 10, 1999 or seven days after the ISO posted on its website a notice that the software necessary to implement Amendment No. 13 was in place. See California Independent System Operator Corp., 86 FERC ¶ 61,122 at 61,417-19 (1999) (February 1999 Order) (accepting for filing a proposal to withhold certain payments to generators that commit to provide ancillary service and then fail to honor that commitment), reh'g denied, 101 FERC ¶ 61,021 (2002). On September 14, 2000, the ISO posted a notice that Amendment No. 13 had become effective.

<sup>58</sup> 103 FERC ¶ 61,345 at P 54 & n.61.

### **Request for Rehearing**

71. California Parties seek to include Idaho Power as a show cause respondent concerning this practice.

2. **Gaming Practices for Which the Commission Did Not Seek Disgorgement**

a. **Underscheduling Load**

#### **The Gaming Practices Order**

72. That Commission found the following:<sup>59</sup>

This practice [Underscheduling Load] was an effort by the load-serving entities or LSEs, primarily the three California utilities (PG&E, SoCal Edison, and SDG&E), to reduce the overall price paid for generation. For months, they understated their load consistently in schedules submitted to the PX in an effort to reduce the amount of generation purchased in the day-ahead market, thereby lowering the price. The remainder of the utilities' generation needs would be purchased in the ISO's capped real-time market.

73. The Commission further found:<sup>60</sup>

Under the then-existing market rules, the utilities were required to satisfy their need for energy with purchases from the PX and were to bid in their generation in the PX day-ahead market in an amount equal to their load. However, during 2000, in an effort to minimize their energy costs, the three California public utilities began to routinely underschedule their load in the PX day-ahead market. Due to the large size of the three California public utilities, changes in their purchasing strategies had a significant impact on market outcomes, including the market-clearing prices in the PX day-ahead

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<sup>59</sup> Id. at P 56.

<sup>60</sup> Id. at P 57 (footnotes omitted). The Gaming Practices Order also noted that the Commission had since directed changes to the market rules and allowed penalties in an attempt to address the problem of Underscheduling Load. Id. at P 58 n.63.

market. By moving a significant amount of their load out of the PX day-ahead market, less supply bids were needed to clear the market which, in turn, resulted in lower market clearing prices in the PX day-ahead market. As a direct result of the underscheduling by the three public utilities in the day-ahead market, however, the ISO had to meet a larger percentage of the load in real time, causing serious operational and reliability problems.

74. The Commission found that this practice required the utilities to submit false schedules with regard to their loads to the PX. Moreover, it violated the MMIP by unfairly taking advantage of the rules and caused a demonstrable detriment to the efficiency of the market. The Commission disapproved of this practice, and it found that this practice violated the MMIP by unfairly taking advantage of the rules and caused a demonstrable detriment to the efficiency of the market. However, while the Commission determined that it had the authority to order disgorgement of profits, it found that there were no profits to disgorge since this was a price-reducing purchasing strategy.<sup>61</sup> Therefore, the Commission did not order disgorgement of profits for Underscheduling Load.

### **Requests for Rehearing**

75. According to California Parties, “underscheduling” by the three California load serving entities is not gaming. Rather, it is price-responsive demand bidding. Further, no tariff provisions require buyers to buy 100 percent of their projected loads in the PX markets. They contend that the Commission ignored the testimony of their witness Dr. Stern<sup>62</sup> that bidding a price-sensitive demand curve – i.e., offering to buy more as the price goes down and less as the price increases – was rational, consistent with efficient markets, and even encouraged by the PX Market Monitoring Committee. Consequently, there was no detriment to consumers or the markets. Because there was no detriment, the practice cannot be gaming. Further, because this type of behavior was normal behavior in competitive markets, it cannot be classified as anomalous, according to California Parties. They also dispute the Commission’s findings that the LSEs submitted false schedules with regard to their loads and that the practice was widely known and accepted, citing Dr. Stern’s testimony. Finally, they contend that the LSEs’ submission of price-sensitive demand bids was a response to undersupply and high supplier bidding by suppliers in the PX markets.

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<sup>61</sup> Id. at P 56-58.

<sup>62</sup> See 100 Days Exh. CA-3 (testimony of Dr. Stern).

**b. Overscheduling Load****The Gaming Practices Order**

76. Overscheduling Load involved a market participant with more generation than load falsely overstating to the ISO its scheduled load, to correspond with the amount of generation in its schedule. The Commission found that: market participants who engaged in Overscheduling Load did so as a direct response to the utilities' practice of Underscheduling Load; Overscheduling Load actually helped reduce reliability problems in the real-time market; Overscheduling Load was often actively encouraged by the ISO because it reduced the need for real-time energy due to the utilities' underscheduling; and participants who engaged in Overscheduling Load did not set the market clearing price because, as uninstructed energy, they were price takers who were paid the ex-post price for imbalance energy which was set by the bid of the marginal unit dispatched. Therefore, the Commission did not seek disgorgement of unjust profits for this practice.<sup>63</sup>

**Requests for Rehearing**

77. California Parties dispute the Commission's finding that Overscheduling Load had a beneficial or neutral effect on the market. In support, California Parties cite the new testimony filed with their request for rehearing, stating that Dr. Fox-Penner "has taken a closer look at the use of Fat Boy strategies." According to Dr. Fox-Penner's new testimony, the market impact of Overscheduling Load varies, depending on the source of the power that represented the supposedly balanced (but false) load schedule and did not always improve reliability.

78. California Parties further argue that the Commission wrongly attributed the cause of Overscheduling Load to the LSEs' practice of Underscheduling Load, suggesting that the Commission "set the . . . cart before the horse." They contend that Overscheduling Load is intended only to manipulate the market, exacerbates underscheduling in some instances, does nothing to improve reliability, and does not correct for underscheduling. They also argue that the order ignored the testimony of their witness, Dr. Stern, on this point. They state that Dr. Stern testified that the increase of volumes traded in the real-time market was not due to LSE buying strategies, but was the result of a variety of strategies by sellers to withhold power from the day-ahead market and increase market prices.

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<sup>63</sup> 103 FERC ¶ 61,345 at P 59-60.

79. California ISO disputes the "countervailing circumstances" cited by the Commission. They contend that the August 2000 Report by the ISO's Department of Market Analysis (August 2000 DMA Report) actually concluded that underscheduling of load by buyers was the result of underscheduling of supply by sellers and the exercise of market power in the day-ahead market. Further, California ISO asserts that the August 2000 DMA Report did not mention overscheduling of load by suppliers. It requests that, if the Commission declines to impose penalties for overscheduling, the Commission will clarify that these practices suggest a pattern of physical withholding in the forward PX markets, and were a means of profiting from both physical and economic withholding in the real-time market, and thus it will be subject to Staff's investigation of anomalous bidding practices in Docket No. IN03-10-000.

### **3. California Practices**

#### **a. Ancillary Services-Related Practices - Arbitrage**

##### **The Gaming Practices Order**

80. The Commission determined that, to the extent a market participant was merely taking advantage of systematic differences in the day-ahead and hour-ahead market prices for ancillary services by selling ancillary services in the day-ahead market and buying them back at a lower price in the hour-ahead market, this practice was consistent with legitimate arbitrage<sup>64</sup> (so long as the market participant had the generation available to provide the ancillary services or appropriately contracted for them).<sup>65</sup>

##### **Request for Rehearing**

81. California ISO urges the Commission to find that ancillary services buyback constitutes a Gaming Practice rather than legitimate arbitrage. It disputes the Commission's determination that the ISO's day-ahead and hour-ahead ancillary service markets are simply financial markets for a single fungible commodity rather than separate markets for two distinct physical products; ancillary service commitments procured by

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<sup>64</sup> It cited California Independent System Operator Corp., 82 FERC & 61,327 (1998) (March 1998 Order), in which the Commission accepted ISO Tariff Amendment No. 4, which allowed scheduling coordinators to buy back and sell ancillary services in the hour-ahead market.

<sup>65</sup> 103 FERC ¶ 61,345 at P 64.

the ISO on a day-ahead basis are not directly fungible with commitments procured by the ISO on an hour-ahead basis. The ISO explains that it purchases the bulk of its ancillary service requirements in the day-ahead market to better ensure system reliability.

82. According to the ISO, when participants seek to profit from price differences between the day-ahead and hour-ahead markets by canceling commitments made in the day-ahead market, the direct impact of this arbitrage is to require the ISO to procure a higher portion of its reliability requirements in the hour-ahead market. The ISO maintains that the net result of this practice is to reduce its ability to manage system reliability and costs through its ancillary service procurement decisions. The ISO thus argues that ancillary services buyback is a Gaming Practice, unless sellers can demonstrate that capacity they had sold in the day-ahead market was repurchased in the hour-ahead market due to unforeseeable or uncontrollable factors which made sellers unable to honor firm capacity commitments made in the day-ahead market.

**b. Access to IIR Outage Data**

**The Gaming Practices Order**

83. Industrial Information Resources (IIR) provided information to subscribers via daily e-mails and upon request regarding plant outages in the West. The Commission determined that, although the ISO tariff prohibits the ISO from revealing market participants' confidential outage data, the tariff does not prohibit the market participants providing the information to third parties and then subscribing to third-parties' services.<sup>66</sup>

**Requests for Rehearing**

84. California Parties argue that Section 20.3 of the ISO Tariff (regarding confidentiality of outage data) prohibits market participants from sharing outage data, whether directly or indirectly. They claim that sellers used the shared outage information to manipulate the market and raise rates. They argue that the Commission should set the matter for hearing.

**4. Commission Determination**

85. We deny California Parties' repeated requests that we broaden the scope of the show cause proceedings to include other transactions and other entities, by, for example, defining the various Gaming Practices as Dr. Fox-Penner defined them and including in

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<sup>66</sup> Id. at P 65-66.

the show cause proceedings all of the entities and transactions that are identified in his proposed market screens. We decline to do so. The fact that the Commission did not adopt every aspect of Dr. Fox-Penner's proposed market screens was not an inadvertent error. As explained above, the Gaming Practices Order expressly found that his proposed market screens were overly broad and would include legitimate activity. The determination of which practices to investigate in these show cause proceedings falls within the Commission's prosecutorial discretion, which is recognized by the courts.<sup>67</sup> That is, decisions whether to prosecute and decisions whether to settle fall within this discretion. Here, we exercised our discretion not to prosecute certain practices, which we found, in this instance, did not lead to unjust profits.<sup>68</sup>

86. We did not, and we do not, adopt Dr. Fox-Penner's proposed market screens in their entirety as he proposed them. Rather, we chose to pursue those activities that we identified in the Gaming Practices Order, and to the degree we identified in that order.<sup>69</sup> We are not persuaded to adopt a different approach here.

87. Besides our prosecutorial discretion, discussed above, there are additional bases for denying the requests for rehearing. We reject California Parties' argument that our investigation of False Import should be expanded to include transactions other than through the PX. These show cause proceedings are based on alleged violations of the MMIP provisions of the ISO and PX tariffs. We do not intend to pursue this broader

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<sup>67</sup> See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Baltimore Gas & Electric Co. v. FERC*, 252 F.3d 456, 461 (D.C. Cir. 2001).

<sup>68</sup> We also exercised our prosecutorial discretion not to pursue entities that earned revenues of \$10,000 or less for a particular Gaming Practice.

<sup>69</sup> As we stated in that order, 103 FERC ¶ 61,345 at P 67:

The screens used by the ISO and Dr. Fox-Penner are broadly inclusive and some of the characteristics that were used to identify potential Gaming Practices may also be present in transactions that were not actually Gaming Practices. In fact, the 100 Days Evidence indicates that there may be legitimate explanations for many of the transactions that may initially appear to be Gaming Practices. As a result, the Identified Entities will have an opportunity to submit evidence to the ALJ that may demonstrate that any or all of the transactions identified in the ISO Report or Dr. Fox-Penner's studies were not Gaming Practices.

range of activities in this proceeding; we believe that we should only pursue the range of trading strategies identified previously as violating the MMIP. The Gaming Practices and Partnership Gaming show cause proceedings were not intended to be catch-all proceedings concerning every conceivable California-related matter that fell outside of the scope of the California Refund Proceeding, but are proceedings to enforce compliance with Commission-accepted tariffs.

88. We reject California Parties' argument that we should expand False Import beyond OOM transactions. We also reject their argument that we should investigate transactions that did not exceed the price cap, but which were at prices that the California Parties believe were excessive. As discussed in the Gaming Practices Order, the essence of the false representation in False Import is that the seller falsely represented the energy as an import in order to make an OOM transaction and receive a price above the cap.<sup>70</sup> Further, "we recognize[d] that some of the transactions identified [by the ISO and Dr. Fox-Penner] may have been legitimate transactions and not Gaming Practices."<sup>71</sup> We also provided some examples of justifications for transactions that might, at first, appear to be Gaming Practices, but were instead legitimate transactions (id. at P 67):

For example, with respect to transactions identified as False Imports, evidence that may demonstrate that the transactions were legitimate transactions and not part of a False Import practice might include establishing that: (a) the "imported" power was actually imported from outside the state of California and not a fictitious import, i.e., not an export and import that constitutes a False Import, as described above; (b) the transaction was designed to work around a transmission constraint (such as on Path 15) which limited the movement of power between two points within the ISO control area by using an uncongested transmission path (such as the Pacific DC intertie) to move the power to a point outside the ISO control area and back to its intended destination; (c) the export and import were actually two independent and unrelated obligations such as a pre-existing long-term bilateral contractual export obligation followed by a real-time import from the same party in an unrelated transaction; or (d) the market participant was importing power on behalf of the ISO or California Department of Water Resources (California DWR), because suppliers were

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<sup>70</sup> 103 FERC ¶ 61,345 at P 39.

<sup>71</sup> Id. at P 40 & n.54.

unwilling to assume the credit risk of dealing directly with the ISO or California DWR.

89. We reject Indicated Generators' argument that Double Selling was not prohibited prior to ISO Tariff Amendment No. 13 becoming effective in September of 2000. The purpose of Amendment No. 13 was not to adopt a new prohibition. Rather, it was to ensure compliance with the existing prohibition by adopting a new remedy (withholding of payments) for non-compliance.<sup>72</sup>

90. We reject California Parties' argument that Underscheduling Load by the LSEs' did not constitute a Gaming Practice. As we concluded in the Gaming Practices Order, discussed above, such conduct constituted a Gaming Practice, and thus violated the MMIP, by unfairly taking advantage of the then-existing market rules. While there was economic gain in the form of foregone losses, there were no profits to disgorge since that conduct was a price-reducing strategy. Since our legal authority in this instance is limited to disgorging profits, we did not pursue that conduct in these proceedings.<sup>73</sup> In the end, therefore, there is little practical difference between California Parties' arguments and our decision – in either case, the LSEs would not and will not be required to disgorge any monies. Accordingly, we will deny rehearing as to this issue.

91. With respect to Overscheduling Load, we will grant the motions to strike the new testimony of Dr. Fox-Penner submitted with California Parties' requests for rehearing of the Gaming Practices and Partnership Gaming Orders.<sup>74</sup> Since the California Parties' new

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<sup>72</sup> February 1999 Order, 86 FERC at 61,418 (the amendment ensures that ancillary service providers would have no economic incentive to violate their obligation to maintain reserves, and instead would generate energy).

<sup>73</sup> See Gaming Practices Order, 103 FERC ¶ 61,345 at P 56-58.

<sup>74</sup> See, e.g., Southern California Edison Co., 102 FERC ¶ 61,256 at P 17 & n.5 (2003) ("[t]he Commission generally will not consider new evidence on rehearing, because we cannot resolve issues with any efficiency or finality if parties are permitted to submit new evidence and thus to have us chase a moving target"), and cases cited therein; accord Cities and Villages of Albany and Hanover, Illinois v. Interstate Power Co., 61 FERC ¶ 61,362 at 62,451 & n.4 (1992); Northern States Power Co. (Minnesota), 54 FERC ¶ 61,242 at 61,171 & n.9 (1991). Further, California Parties had the opportunity to address these issues prior to the issuance of the Gaming Practices Order. The issues of whether "Fat Boy"-type strategies were a response to Underscheduling by the LSEs and that such strategies improved reliability were raised in the 100 Days

(continued)

arguments are based on the stricken testimony, we reject those new arguments as well. As to physical and economic withholding, such activities are the subject of other proceedings (including Docket No. IN03-10) and are not at issue in these proceedings.

92. We also reaffirm our determination in the Gaming Practices Order that ancillary services buyback constitutes legitimate arbitrage rather than a Gaming Practice for the reasons stated therein. Moreover, the ISO added the ancillary services buyback provision to the ISO Tariff when it proposed, and the Commission conditionally accepted for filing, Amendment No. 4 in which the ISO adopted "a mechanism, developed with the input and support of the market Participants, to allow Scheduling Coordinators to buy back and sell back Ancillary Services in the Hour-Ahead Market."<sup>75</sup> The amendment provided for arbitrage, provided that the market participant could provide the ancillary services. The ISO's argument on rehearing here suggests that its Amendment No. 4 had an unanticipated negative impact on its ability to procure ancillary services. While that may be grounds to seek to amend the tariff going forward, it is not a basis for a determination of a tariff violation. Further, we note that in a subsequent order in the proceeding concerning California's Comprehensive Market Redesign Proposal, we approved in principle the ISO's conceptual proposal to give it the flexibility to procure a portion of its ancillary services requirement in the hour-ahead market in order to take advantage of potential lower hour-ahead prices, subject to monitoring by the ISO's Department of Market Analysis for price and reliability concerns.<sup>76</sup>

93. We reject California Parties' argument that the MMIP prohibits Market Participants from sharing IIR outage data. They argue that MMIP Section 20.3 (Confidentiality) prohibits Market Participants from sharing outage data, whether directly or indirectly. However, as the Gaming Practices Order noted, Section 20.3 concerns

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Proceeding, and the California Parties filed testimony disputing those arguments. See 100 Days Exh. CA-1 at 173 (March 3, 2003 Testimony of Dr. Fox-Penner); 100 Days Exh. CA-351 passim (March 20, 2003 Rebuttal Testimony of Dr. Stern).

<sup>75</sup> March 1998 Order, 82 FERC at 62,290.

<sup>76</sup> California Independent System Operator Corp., 105 FERC ¶ 61,140 at P 83-84, reh'g dismissed, 105 FERC ¶ 61,278 (2003). The Commission also determined that interested parties would have an opportunity to comment on the proposal when the ISO made a filing to amend its tariff to reflect the proposal.

confidentiality requirements applicable to the ISO.<sup>77</sup> Neither Section 20.3.1 nor Section 20.3.2 prohibits Market Participants from sharing outage data. Further, Section 20.3.3 (Other Parties) provides that no Market Participant shall have the right thereunder to receive from the ISO or to review outage data of another Market Participant. Section 20.3.3 is limitation on market participants' right to demand outage from the ISO, but it does not limit their right to provide such information to a third party, such as IIR, and to subscribe to the service where other parties offer their information to IIR. And, the Gaming Practices Order found that there was no evidence that the sharing of outage data was used to manipulate the market and that no evidence was offered to suggest that any outage data was used in a collusive manner to raise prices.<sup>78</sup> California Parties have not persuaded us otherwise.

#### **D. Partnership Gaming**

##### **Requests for Rehearing**

94. California Parties seek to broaden the scope of the show cause proceeding by expanding the definitions of some Gaming Practices, pursuing some practices that the show cause order opted not to pursue, and requiring that all of the partnership arrangements identified by Dr. Fox-Penner be included in the show cause proceeding.

95. NCPA argues that the Commission should not have excluded the California Practices from the show cause proceeding. It further argues that the Commission erred by not initiating a show cause proceeding against PG&E for what NCPA characterizes as a version of a load shift or load swap concerning transactions across transmission Path 15 in an effort to manipulate congestion prices. According to NCPA, this alleged practice was not one of the Enron strategies, but the 100 Days Evidence shows that it involved the submission of inaccurate schedules, hampered reliability, and was intended to manipulate the market and capitalize on design flaws in the market.

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<sup>77</sup> See MMIP Section 20.3.1 (requirements for the ISO to maintain confidentiality of documents, data and information provided to it by any Market Participant that are treated as confidential or commercially sensitive under Section 20.3.2); MMIP Section 20.3.2 (information provided to the ISO by scheduling coordinators that "shall be treated by the ISO as confidential" includes individual generator outage data).

<sup>78</sup> 105 FERC ¶ 61,345 at P 66.

96. Port of Seattle argues that the Partnership Gaming proceeding should have included a review of potential gaming practices that manipulated all of the Western Electricity Coordinating Council (WECC) electricity market, including the Pacific Northwest region. Port of Seattle further contends that the Commission should not have limited the potential monetary remedy to unjust profits at the outset of the proceeding. It believes that the record may show that, if Partnership Entities were unjustly enriched through the Western markets, it was at the expense of other participants in those markets. According to Port of Seattle, the Commission should have provided for the assessment of monetary penalties predicated upon the higher of unjust profits or damages incurred as a result of the Partnership Gaming.

### **Commission Determination**

97. We will deny rehearing; we will not broaden the scope of these proceedings. As we held above concerning Gaming Practices, we did not, and we do not, adopt Dr. Fox-Penner's proposed market screens for Partnership Gaming in their entirety as he proposed them. Rather, we chose to pursue those activities that we identified in the Partnership Gaming Order, and to the degree we identified in that order.<sup>79</sup> We are not persuaded to adopt a different approach here.

98. Port of Seattle cites no authority for the Commission to assess "damages" incurred as a result of the Partnership Gaming. We deny that argument for the same reasons we stated in the California Refund Proceeding, discussed above.<sup>80</sup>

99. We reject NCPA's argument that it was error not to pursue PG&E for the matters alleged by NCPA. In addition to our prosecutorial discretion concerning the scope of the show cause proceedings, described above, NCPA does not claim that PG&E engaged in the alleged activities concerning Path 15 in partnership with other entities. Thus, its allegations are beyond the scope of the Partnership Gaming proceeding. Moreover, Trial Staff's motion to dismiss NCPA from the Gaming Practices proceeding is being granted in an order being issued concurrently, and its request for rehearing is thus moot with respect to that proceeding as well.<sup>81</sup>

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<sup>79</sup> See 103 FERC ¶ 61,346 at P 30-44.

<sup>80</sup> See supra P 16 & n.13.

<sup>81</sup> See supra note 10.

100. Further, the Partnership Gaming Order noted that the Staff Final Report listed a number of entities that may have had a partnership, alliance or other arrangement with Enron and that not all of those entities were addressed in the order. The order stated that Commission Staff was conducting further analysis to determine if any further action was appropriate for those other entities.<sup>82</sup> Upon further analysis, Commission Staff determined that no further action was appropriate for those entities.

**E. The Show Cause Directives and Institution of Trial-Type Evidentiary Proceedings in the Gaming Practices and Partnership Gaming Orders**  
**Requests for Rehearing**

101. Several parties contend that the Show Cause Orders improperly shifted the burden to the show cause respondents.<sup>83</sup> They argue that the Commission cannot shift the burden without first establishing a prima facie case. They contend that no prima facie case was established, because the evidence from Docket No. PA02-2, including the Staff Final Report, had not been subjected to procedures, particularly discovery and cross-examination, that are required by the Administrative Procedure Act and due process. They maintain that the Commission must allow respondents a full trial-type evidentiary hearing.

**Commission Determination**

102. What the Commission did in the Show Cause Orders was to establish trial-type evidentiary hearings to pursue the matters identified in those orders. The Commission did not find that the Identified Entities had, in fact, engaged in conduct that warranted remedies; that will be determined in the course of these proceedings. That being said, the record before the Commission, and identified in the Show Cause Orders, did warrant the Commission instituting such procedures.

**F. Addressing the Gaming Practices Individually**  
**Requests for Rehearing**

103. California Parties and California ISO reiterate their argument that the Commission improperly adopted a piecemeal approach, treating each Gaming Practice as a separate

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<sup>82</sup> 103 FERC ¶ 61,345 at P 1 n.2.

<sup>83</sup> Indicated Partnership, Indicated Respondents, Modesto.

and individual violation of the ISO tariff. They contend that all of the allegations should be considered as reflective of a pattern of behavior. California Parties further maintain that all issues should be considered in the California Refund Proceeding. California Parties also argue that an order by the United States Court of Appeals for the Ninth Circuit<sup>84</sup> required that the 100 Days Evidence be adduced in the California Refund Proceeding rather than in a separate new proceeding.

### **Commission Determination**

104. As noted above, the Commission exercised its discretion with respect to how it would administer these cases. We have not previously seen fit to combine all investigations into one sprawling, unwieldy mega-proceeding, nor are we persuaded to do so now. We will continue that approach. Moreover, in the Ninth Circuit order cited by California Parties and California ISO, the court expressly granted the Commission discretion as to how to adduce additional evidence, and placed no limitation on how the Commission might choose to use this additional evidence.<sup>85</sup>

### **G. Conclusion**

105. As discussed above, we will deny the requests for rehearing of the Gaming Practices Order and the Partnership Gaming Order, except the requests for rehearing concerning which we will defer consideration in light of pending motions to dismiss and settlements.<sup>86</sup>

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<sup>84</sup> Public Utilities Commission of the State of California, et al. v. FERC, et al., No. 01-71051, et al. (9th Cir. Aug. 21, 2002).

<sup>85</sup> Id., slip op. at 7-8.

<sup>86</sup> See supra P 15.

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The Commission orders:

The requests for rehearing of the Gaming Practices Order and the Partnership Gaming Order are hereby denied, except those for which we defer consideration, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Linda Mitry,  
Acting Secretary.

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**Appendix A**

Entities that Filed Responses to California Parties' Motion  
for Clarification of the Gaming Practices Order

Idaho Power Company (Idaho Power)

Indicated Entities (consisting of Sempra Energy Trading Corp., Idaho Power Company, Portland General Electric Company, Arizona Public Service Company, and Puget Sound Energy, Inc.)

Los Angeles Department of Water and Power (LADWP)

Northern California Power Agency (NCPA)

PacifiCorp

Powerex Corporation (Powerex)

Public Service Company of Colorado (PS Colorado)

Public Utility District No. 2 of Grant County, Washington (Grant PUD)

Tucson Electric Power Company (Tucson)

**Appendix B**

Entities that Filed Responses to California Parties' Motion for  
Clarification of the Partnership Gaming Order

Arizona Public Service Company (APS)

Constellation Power Source, Inc. (Constellation)

Indicated Generators (consisting of: Dynegy Power Marketing, Inc., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC (Dynegy); Mirant Americas Energy Marketing, L.P., Mirant California, LLC, Mirant Delta, LLC, Mirant Potrero, LLC (Mirant); and Williams Energy Marketing & Trading Company (Williams)).

LADWP

NCPA

PacifiCorp

Powerex

PS Colorado

Public Service Company of New Mexico (PSNM)

City of Redding, California (Redding)

Reliant Resources, Inc., Reliant Energy Power Generation, Inc. and Reliant Energy Services, Inc. (collectively, Reliant)

Salt River Project Agricultural Improvement and Power District (Salt River)

Southern Cities (consists of Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California)

Tucson

Turlock Irrigation District (Turlock)

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## **Appendix C**

### Entities that Filed Requests for Rehearing of the Gaming Practices Order

Automated Power Exchange, Inc. (APX)

Bonneville Power Administration (BPA)

California Parties

California Power Exchange Corporation (PX or California PX)

Coral Power (Coral)

California Department of Water Resources State Water Project (DWR-SWP)

California Independent System Operator Corporation (ISO or California ISO)

Duke Energy North America, LLC (Duke)

Enron Power Marketing, Inc. and Enron Energy Services, Inc. (collectively, Enron)

Indicated Generators

Indicated Respondents (consisting of Aquila, Inc. and Aquila Merchant Services, Constellation Power Source, Inc., Coral Power, L.L.C., Exelon Corporation (on behalf of Exelon Generation Company, LLC and PECO Energy Company), Idaho Power Company, Morgan Stanley Capital Group, Inc., Powerex Corp., Public Service Company of New Mexico, Sempra Energy Trading Corp., TransAlta Energy Marketing (California) Inc. and TransAlta Energy Marketing (U.S.) Inc., and El Paso Merchant Energy, L.P.)

LADWP

Modesto Irrigation District (Modesto)

Redding

Reliant Resources, Inc. (Reliant)

Salt River

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**(Appendix C, continued)**

City of San Diego, California (City of San Diego)

Sempra Energy Trading Corporation (Sempra)

Sierra Pacific Power Company (Sierra Pacific)

Southern Cities

Western Area Power Administration (Western)

**Appendix D**

Entities that Filed Requests for Rehearing of the Partnership Gaming Order

California Parties

Colorado River Commission of Nevada (CRCN)

Coral

Enron

Eugene Water & Electric Board (Eugene Electric)

Indicated Partnership Entities (consisting of Aquila, Inc. and Aquila Merchant Services, Constellation Power Source, Inc., Coral Power, L.L.C., Exelon Corporation (on behalf of Exelon Generation Company, LLC and PECO Energy Company), Idaho Power Company, Morgan Stanley Capital Group, Inc., Powerex Corp., Public Service Company of New Mexico, Sempra Energy Trading Corp., TransAlta Energy Marketing (California) Inc. and TransAlta Energy Marketing (U.S.) Inc., and El Paso Merchant Energy, L.P.)

Modesto

NCPA

Port of Seattle, Washington (Port of Seattle)

Redding

Sempra

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**Appendix E**

Entities that Filed Answers to California Parties' October 21, 2003  
Motion for Expedited Determination of Scope of Proceedings  
and Temporary Suspension of Procedural Schedules

City of Burbank, California; Glendale; and Turlock

Duke

Dynegy Power Marketing, Inc.

Indicated Respondents

Modesto

NCPA

Public Utility District No. 1 of Snohomish County, Washington; City of Tacoma, Washington; and Port of Seattle (collectively, Pacific Northwest Parties)<sup>87</sup>

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<sup>87</sup> Pacific Northwest Parties filed a motion for leave to file an answer out-of-time and an answer.