

106 FERC ¶ 61,182  
 UNITED STATES OF AMERICA  
 FEDERAL ENERGY REGULATORY COMMISSION

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

Enron Power Marketing, Inc.	Docket No. EL03-180-004
Aquila Merchant Services, Inc. (f/k/a Aquila, Inc.)	Docket No. EL03-181-004
City of Redding, California	Docket No. EL03-182-003
City of Glendale, California	Docket No. EL03-183-003
Colorado River Commission of Nevada	Docket No. EL03-184-003
Constellation Power Source, Inc.	Docket No. EL03-185-003
Coral Power, LLC	Docket No. EL03-186-003
El Paso Merchant Energy, L.P.	Docket No. EL03-187-003
Eugene Water & Electric Board	Docket No. EL03-188-004
Idaho Power Company	Docket No. EL03-189-003
Koch Energy Trading, Inc.	Docket No. EL03-190-003
Las Vegas Cogeneration, L.P.	Docket No. EL03-191-003
MIECO Inc.	Docket No. EL03-192-003
Modesto Irrigation District	Docket No. EL03-193-003
Montana Power Company (now d/b/a NorthWestern Energy, LLC)	Docket No. EL03-194-003
Morgan Stanley Capital Group	Docket No. EL03-195-003
Northern California Power Agency	Docket No. EL03-196-003
PPM Energy, Inc. (f/k/a PacifiCorp Power Marketing, Inc.)	Docket No. EL03-197-004
PECO Energy Company	Docket No. EL03-198-003
Powerex Corporation (f/k/a British Columbia Power Exchange Corporation)	Docket No. EL03-199-003
Public Service Company of New Mexico	Docket No. EL03-200-003
Sempra Energy Trading Corporation	Docket No. EL03-201-003
TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc.	Docket No. EL03-202-003
Valley Electric Association, Inc.	Docket No. EL03-203-003 (Consolidated)

## ORDER DENYING REHEARING

(Issued February 23, 2004)

**I. Introduction**

1. In this order, we deny a request for rehearing of our December 23, 2003 Order granting an interlocutory appeal.<sup>1</sup> In the course of doing so, this order further explains the intent of the December 23 Order and of the Commission's Partnership Gaming Order in this proceeding.<sup>2</sup>

**II. Background**

2. On June 25, 2003, the Commission issued the Partnership Gaming Order, in which it instituted a show cause proceeding concerning alleged partnerships, alliances or other arrangements through which certain entities identified in the order appeared to have engaged in gaming and/or other anomalous market behavior in violation of the tariffs of the California Power Exchange Corporation and the California Independent System Operator Corporation, during the period from January 1, 2000 to June 20, 2001.

3. In the show cause proceeding, a dispute arose concerning Paragraph 47 of the Partnership Gaming Order.<sup>3</sup> The presiding judge in the Partnership Gaming proceeding

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<sup>1</sup> Enron Power Marketing, Inc., et al., 105 FERC ¶ 61,362 (2003) (December 23 Order).

<sup>2</sup> Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,346 (2003), reh'g denied, 106 FERC ¶ 61,020 (2003) (Partnership Gaming Order).

<sup>3</sup> Paragraph 47 of the Partnership Gaming Order states as follows:

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

permitted an interlocutory appeal, and the presiding judge requested clarification, concerning whether the presiding judge had the authority to enforce Paragraph 47 or whether only the Commission had authority to do so. The interlocutory appeal also sought clarification of the scope of the discovery envisioned by the Commission in Paragraph 47 and of the role of the intervenors in the proceeding.

4. In the December 23 Order, the Commission explained that its intent in Paragraph 47 was:

to facilitate the discovery process and thus the hearing by making relevant materials available at the outset to Trial Staff and the intervenors. In that regard, it was not our intent to limit the presiding judge's role regarding discovery of such materials. Thus, the presiding judge in these dockets shall have the same authority that presiding judges typically have over discovery in typical trial-type evidentiary hearings. Such authority includes, for example, the authority to vary the mode and extent of compliance with Paragraph 47, such as with a protective order Rule 410(c) of the Commission's Procedural Rules.<sup>[4]</sup>

5. The December 23 Order further determined that: (1) Paragraph 47 had a broad reach and was not limited to revenue-related materials; (2) intervenors in this proceeding should be afforded the same opportunity to participate in the discovery process and the hearing as any other intervenor in any other proceeding; and (3) it would be inappropriate to require respondents that are the subject of pending settlements or Trial Staff motions to dismiss to comply with Paragraph 47 while such filings were pending.

6. On January 22, 2004, the California Parties<sup>5</sup> filed a motion for clarification or, in the alternative, a request for rehearing of the December 23 Order's determination not to require respondents that are the subject of pending settlements or Trial Staff motions to dismiss to comply with Paragraph 47 of the Partnership Gaming Order while such filings were pending.

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<sup>4</sup> 105 FERC ¶ 61,362 at P 13.

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

### III. Discussion

#### A. Rehearing Arguments

7. According to the California Parties, several show cause respondents to the Partnership Gaming Order and the Commission's Trial Staff have contended in this proceeding that the December 23 Order is a merits determination that the show cause respondents need not comply with Paragraph 47 of the Partnership Gaming Order. The California Parties argue that the Commission most likely intended to leave for later determinations, perhaps on a case-by-case basis, whether the show cause respondents' alleged non-compliance with Paragraph 47 is sufficient to merit rejection of pending settlements or Commission Trial Staff-sponsored motions to dismiss.<sup>6</sup> They request that we make that clarification. Further, the California Parties request that the Commission reject all of the pending settlements and motions to dismiss.

8. If the Commission's intent was to excuse the show cause respondents that are the subjects of pending settlements or Commission Trial Staff-sponsored motions to dismiss from providing evidentiary materials to the Commission's Trial Staff and the other parties pursuant to Paragraph 47 of the Partnership Gaming Order, then the California Parties request rehearing. They argue that all show cause respondents should be required to comply with Paragraph 47.

9. They also argue that the Commission did not explain its decision, except that it agreed with what they characterize as the presiding judge's "off-hand reference."<sup>7</sup>

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<sup>6</sup> They further argue that the scope and impact of the show cause respondents' collusive behavior can only be assessed when considered together, not on an individual, case-by-case basis. We note that, in our January 22, 2004 order denying rehearing of the Partnership Gaming Order and the Gaming Practices Order (American Electric Power Service Corp., et al., 103 FERC ¶ 61,045 (2003)), we rejected the California Parties' argument that the Commission should have combined all of its ongoing California market-related proceedings and investigations into one sprawling mega-proceeding. 106 FERC ¶ 61,020 at P 103-04.

<sup>7</sup> See Enron Power Marketing, Inc., et al., Docket No. EL03-180-000, et al. at P 8, 15 (December 3, 2003) (Presiding Administrative Law Judge's Order Denying Motions to Compel Production of Certain Audio Tapes and Other Materials) (unpublished) (December 3 Order). In fact, the presiding judge's discussion of this matter was hardly off-hand:

(continued)

Further, they contend that the Commission could not rely on the presiding judge's determination, because the presiding judge was operating under several misconceptions when he excused any compliance by the show cause respondents with Paragraph 47; that is, they contend that: (1) the presiding judge was mistaken about the roles of Commission Trial Staff and the parties in the proceeding, which gave too much weight to Commission Trial Staff's determination to settle or dismiss; (2) the presiding judge was under the mistaken impression that the Commission's Trial Staff and the California Parties had failed to exercise their rights to seek Paragraph 47 materials under the Commission's discovery rules, and that misconception may have provided a justification for his determination to excuse the show cause respondents with pending settlements or motions to dismiss from further compliance with Paragraph 47;<sup>8</sup> and (3) without full and complete show cause responses consistent with the clarifications in the December 23 Order, the Commission lacks substantial evidence on which to approve the pending settlements and grant the motions to dismiss.

**B. Commission Determination**

10. We will deny rehearing. In agreeing with the presiding judge that it was inappropriate to require the show cause respondents with pending settlements or motions to dismiss to comply with Paragraph 47 while such filings are pending, the December 23

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In its order in Docket Nos. EL03-137-000 et al., a parallel enforcement proceeding issued the same day as the June 25 Partnership Order in this case, the Commission expressly said that it encouraged the disposition of the enforcement cases by negotiated agreement and indicated that parties agreeing to such settlements would thereby save the costs of litigation. American Electric Power Service Corp., 103 FERC ¶ 61,345 at P 73 (2003). One of the primary causes of litigation expense is the cost of complying with discovery rules. Hence, a Respondent who has successfully negotiated with Staff for settlement of its potential liability should be regarded as exempt from the mandate of Paragraph 47, at least as long as its settlement or the Staff-sponsored motion to dismiss remains pending.

Id. at P 8. The presiding judge's later reference, id. at P 15, was simply a shorthand means of describing this earlier and longer discussion.

<sup>8</sup> The California Parties contend that the show cause respondents' failure to comply with Paragraph 47 only came to light after the discovery period had closed.

Order cited the presiding judge's December 3, 2003 Order.<sup>9</sup> The presiding judge cited the Gaming Practices Order, in which the Commission encouraged the parties to settle, which, in turn, would save the costs of litigation. He stated that the same reasoning applied to the Partnership Gaming proceeding, because one of the primary causes of litigation expense is compliance with discovery. He thus determined that show cause respondents with pending settlements or motions to dismiss should be exempt from compliance with Paragraph 47, at least while such filings were pending.<sup>10</sup> In the December 23 Order, we agreed with the presiding judge's December 3 Order for the reasons stated therein, and we continue to do so. The show cause respondents were and are excused from compliance with Paragraph 47 while their settlements or motions to dismiss are pending.<sup>11</sup> However, as the presiding judge also determined, where pending settlements or motions to dismiss provide that the show cause respondents would still participate in the discovery process after approval of such settlements or the granting of such dismissals, that commitment is unaffected by the December 23 Order.<sup>12</sup>

11. Further, the California Parties cite nothing in the presiding judge's orders in support of their supposition that he gave inordinate weight to the Commission Trial Staff's recommendation or that he misconstrued the parties' respective roles in the proceeding.

12. We also reject the California Parties' argument that the Commission must remand the settlements and motions to dismiss and require all of the show cause respondents to fully comply with Paragraph 47 before it may even consider the settlements or motions to dismiss. In fact, the Commission has already acted on many of the settlements and motions to dismiss; the record before the Commission in each instance was sufficient to

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<sup>9</sup> Compare December 23 Order, 105 FERC ¶ 61,362 at P 16 & n.12 with supra note 7.

<sup>10</sup> See supra note 7.

<sup>11</sup> Most of the settlements and motions to dismiss that were pending at the time this matter first arose have since been approved/granted. Others are still pending, though, and will be considered in due course.

<sup>12</sup> See supra note 7 (December 3 Order at P 8 n.3); see also Arizona Public Service Co., 106 FERC ¶ 61,021 at P 118 & n.73 (2004); Colorado River Commission of Nevada, 106 FERC ¶ 61,022 at P 52 & n.26 (2004); cf. 18 C.F.R. §§ 385.404(a)(2), 385.409 (2003).

allow the Commission to consider and approve/grant them, and the California Parties' various arguments urging their rejection were found unpersuasive.<sup>13</sup> Moreover, the Commission has broad discretion as to whether and how to conduct its proceedings.<sup>14</sup> It has equally broad discretion to determine when and whether to approve settlements of or to dismiss show cause proceedings like this.<sup>15</sup> In considering and acting on the settlements and motions to dismiss, the Commission reasonably exercised that discretion.<sup>16</sup> Indeed, the California Parties' arguments on rehearing here amount, essentially, to a claim that the Commission cannot consider a settlement at all, or entertain a motion to dismiss in any proceeding, until all possible discovery has been completed. Such a claim is unpersuasive, and has never been a policy of this Commission and for good reason as it would undercut the ability of parties to settle – an important tool in managing cases and issues the Commission faces.<sup>17</sup>

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<sup>13</sup> E.g., City of Redding, California, 106 FERC ¶ 61,023 (2004); Williams Energy Services Corp., 106 FERC ¶ 61,027 (2004); Puget Sound Energy, Inc., 106 FERC ¶ 61,026 (2004); Arizona Public Service Co., 106 FERC ¶ 61,021 (2004); Colorado River Commission of Nevada, 106 FERC ¶ 61,022 (2004); see also American Electric Power Service Corp., 106 FERC ¶ 61,020 (2004).

<sup>14</sup> E.g., Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519, 524-25 (1978); Michigan Public Power Agency v. FERC, 963 F.2d 1574, 1578-79 (D.C. Cir. 1992).

<sup>15</sup> 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>16</sup> See supra note 13.

<sup>17</sup> E.g., Alabama Power Co., 75 FERC ¶ 61,233 at 61,769 (1996).

Docket No. EL03-180-004, et al.

- 8 -

The Commission orders:

California Parties' request for rehearing of the December 23 Order is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.