110 FERC ¶61,280
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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| El Paso Electric Company,<br>Enron Power Marketing, Inc., and<br>Enron Capital and Trade Resources Corporation | Docket No. EL02-113-007 |
| Enron Power Marketing, Inc. and<br>Enron Energy Services, Inc. | Docket No. EL03-180-007 |
| Enron Power Marketing, Inc. and<br>Enron Energy Services, Inc. | Docket No. EL03-154-004 |

ORDER ON CLARIFICATION

(Issued March 11, 2005)

1. On July 22, 2004, the Commission issued an order[1] affirming the Initial Decision's[2] finding that Enron[3] violated a condition contained in the Commission's December 2, 1993 order authorizing Enron to charge market-based rates for wholesale power sales, by not informing the Commission of Enron's business relationship with El Paso Electric Company (El Paso Electric). The July 22 Order required that Enron disgorge $32.5 million in profits associated with sales involving El Paso Electric's facilities. The July 22 Order also consolidated Docket No. EL02-113-000 with Docket Nos. EL03-180-000 and EL03-154-000, and directed the Administrative Law Judge (ALJ) in Docket Nos. EL03-180-000 and EL03-154-000 to determine the

[1] *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation*, 108 FERC ¶ 61,071 (2004) (July 22 Order).

[2] *Enron Power Marketing, Inc.*, 104 FERC ¶ 63,010 (2003) (Initial Decision).

[3] Enron Capital and Trade Resources Corporation (currently d/b/a Enron North America) (ECT) and Enron Power Marketing, Inc. (EPMI) (collectively, Enron).

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total amount of money that Enron should be required to disgorge. On August 4, 2004, Western Parties[4] requested clarification of the July 22 Order. As discussed below, the Commission grants clarification on a discrete issue involving termination payments.

2. This order, like the July 22 Order, benefits customers by providing for the comprehensive review of all evidence that Enron may have violated Commission tariffs or orders and for a determination of the appropriate remedy for such violations.

## I. Background

3. A detailed history of this proceeding is provided in the Initial Decision.[5] This proceeding involves an examination of the business relationship between El Paso Electric and two Enron companies: ECT and its subsidiary EPMI.[6] In brief, during certain hours of the week, Enron operated El Paso Electric's power marketing desk, and, further, entered into contracts for El Paso Electric solely at Enron's discretion – and thus gained control of El Paso Electric's generation.

4. On August 13, 2002, under section 206 of the Federal Power Act (FPA),[7] the Commission ordered a hearing to investigate possible misconduct by Enron and El Paso Electric, particularly over whether they should have made filings pursuant to sections 203 and/or 205 of the FPA.[8] This was based on an indication that these entities had entered

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[4] Western Parties consist of: the Nevada Power Company and Sierra Pacific Power Company (collectively, Nevada Companies), Public Utility District No. 1 of Snohomish County, Washington (Snohomish), the City of Palo Alto, California (Palo Alto), the Office of the Nevada Attorney General's Bureau of Consumer Protection, the Attorney General of the State of Washington, and the Public Utilities Commission of Nevada.

[5] Initial Decision at P 2-6.

[6] El Paso Electric, the California Attorney General, the California Electricity Oversight Board, and the Commission Trial Staff reached a settlement as to El Paso Electric in this proceeding, which the Commission has approved. *See El Paso Electric Company, Enron Power Marketing, Inc., Enron Capital and Trade Resources Corporation*, 104 FERC ¶ 61,115 (2003).

[7] 16 U.S.C. § 824e (2000).

[8] 16 U.S.C. §§ 824b, 824d (2000).

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into a contractual relationship which may have resulted in Enron acquiring control of El Paso Electric's assets without informing the Commission.[9]

5. On July 15, 2003, the ALJ, after extensive hearings and briefing, issued an Initial Decision deciding the issues raised in this case. The ALJ concluded that the record in this case supported a finding that Enron entered into contracts for El Paso Electric solely at Enron's discretion (and even took title to El Paso Electric's power in some transactions), that Enron set or affected the price El Paso Electric obtained for its power, and that Enron and El Paso Electric shared profits on supplemental market sales and ancillary services sales to the California Independent System Operator Corporation (ISO). Accordingly, she found that Enron, by virtue of the Power Consulting Services Agreement, gained control of El Paso Electric's generators by controlling El Paso Electric's marketing division.

6. Separately, on June 25, 2003, the Commission initiated the two Show Cause Proceedings,[10] Docket Nos. EL03-180-000 and EL03-154-000, to investigate whether sellers, including Enron, either individually or jointly engaged in gaming and/or anomalous market behavior in violation of the Market Mitigation and Information Protocols of the ISO and California Power Exchange tariffs during the period from January 1, 2000, to June 20, 2001. In its Show Cause Orders, the Commission initiated trial-type evidentiary procedures and directed the ALJs in the Show Cause Proceedings to quantify the extent to which the various respondents had been engaged in and unjustly enriched by improper gaming and/or partnership activities during the period January 1, 2000 to June 20, 2001. The Commission explained that any and all such unjust profits during that period should be disgorged in their entirety and also directed the ALJs to consider any additional and appropriate non-monetary remedies such as revocation of the identified sellers' market-based rates.

7. In its July 22 Order, the Commission affirmed the Initial Decision's finding that Enron violated a condition contained in the Commission's order authorizing Enron to charge market-based rates for wholesale power sales, by not informing the Commission of Enron's business relationship with El Paso Electric. The Commission's July 22 Order

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[9] *El Paso Electric Co.*, 100 FERC ¶ 61,188 at P 6-10 (2002).

[10] *See American Electric Power Service Corp.*, 103 FERC ¶ 61,345 (2003) (Gaming Order), *and Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Gaming Order), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (collectively Show Cause Proceedings or Show Cause Orders).

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required Enron to disgorge $32.5 million in profits associated with sales involving El Paso Electric's facilities. However, holding that the Enron-El Paso Electric relationship is a subset of the broader Enron relationships and practices currently pending in the Show Cause Proceedings in Docket Nos. EL03-180-000 and EL03-154-000, the Commission consolidated Docket No. EL02-113-000 with the Show Cause Proceedings and directed the ALJ in Docket Nos. EL03-180-000 and EL03-154-000 to determine the total amount of money that Enron should be required to disgorge. In consolidating these proceedings, the Commission noted that, based on the evidence in the consolidated dockets, Enron could potentially be required to disgorge profits for all of its wholesale power sales in the Western Interconnect for the period January 16, 1997 to June 25, 2003, and that an appropriate remedy should take into account all evidence of violations of tariffs on file or orders of the Commission in all pending dockets involving Enron's role in the Western power crisis.

## II. Discussion

8. On August 4, 2004, Western Parties requested that the Commission confirm that terminated wholesale power contracts between Enron and various utilities (executed during the period January 16, 1997 to June 25, 2003) pursuant to which Enron continues to demand termination payments (as well as the retention of profits already collected) are within the scope of these proceedings, and that evidence may be presented on the level of profits Enron should be precluded from reaping under these contracts. Western Parties state that, under section 22 of the Western Systems Power Pool Agreement (WSPP Agreement), the "termination payment" is calculated by measuring the "gains" and "losses" incurred from the termination of the contract based upon a comparison of the contract price with current market prices, subtracting relevant transaction costs, and reducing to present value. Western Parties argue that the Commission did not intend to foreclose parties under these terminated contracts, executed during the period when Enron was in violation of filed tariffs and/or Commission orders, from seeking an appropriate remedy for such violations, such as Enron's forfeiture of its privilege to receive profits in excess of its costs.[11]

9. On August 19, 2004, Enron filed an answer to Western Parties' request for clarification. Enron argues that: (1) the Western Parties' interpretation of the July 22 Order is inconsistent with the scope of the Show Cause Proceedings; (2) the Western Parties show no common issues of fact or law warranting consolidation of

[11] *See* Request for Clarification of Western Parties at 2-5.

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bilateral contract termination claims with the Show Cause Proceedings; (3) the Western Parties' motion is inconsistent with the Commission's refusal to institute a generic proceeding on long-term contract termination claims; and (4) the Western Parties are not foreclosed from pursuing the appropriate remedy in an appropriate forum.

10. The Commission finds that Enron's profits under these disputed contracts are within the scope of, and have common issues of fact or law with, the Show Cause Proceedings.

11. The July 22 Order directed the "review of all evidence relevant to Enron conduct that violated or may have violated Commission tariffs or orders and the appropriate remedy for such violations."[12] Furthermore, the July 22 Order stated:

> We note that based on the evidence in this docket, as well as in Docket Nos. EL03-180-000 and EL03-154-000, Enron potentially could be required to disgorge profits for <u>all</u> of its wholesale power sales in the Western Interconnect for the period January 16, 1997 to June 25, 2003. However, an appropriate remedy should take into account all evidence of violations of tariffs on file or orders of the Commission in all pending dockets involving Enron's role in the Western power crisis.[13]

Upon consideration of Western Parties' argument, the Commission finds that Enron's profits under the terminated contracts fall within the scope of this proceeding. The termination payments are based on profits Enron projected to receive under its long-term, wholesale power contracts executed during the period when Enron was in violation of conditions of its market-based rate authority. The Commission finds that these matters would benefit from a full examination at hearing. Therefore, the Commission directs that these matters be examined in the ongoing consolidated hearing before the ALJ in Docket No. EL03-180, *et al.*, subject to any applicable bankruptcy restrictions.

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[12] July 22 Order, 108 FERC ¶ 61,071 at P 3.

[13] July 22 Order, 108 FERC ¶ 61,071 at P 2.

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The Commission orders:

The Commission clarifies that the disputed terminated contracts between Enron and various utilities (executed during the period January 16, 1997 to June 25, 2003) are within the scope of this proceeding, and shall be addressed in the ongoing hearing in Docket No. EL02-180, *et al.*, subject to any applicable bankruptcy restrictions, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,
Secretary.