

112 FERC ¶61,256
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Electric Company, Docket No. EL02-113-012
Enron Power Marketing, Inc., and
Enron Capital and Trade Resources Corporation

Enron Power Marketing, Inc. and Docket No. EL03-180-013
Enron Energy Services, Inc.

Enron Power Marketing, Inc. and Docket No. EL03-154-009
Enron Energy Services, Inc.

Portland General Electric Company Docket No. EL02-114-010

Enron Power Marketing, Inc. Docket No. EL02-115-014

ORDER DENYING REHEARING

(Issued September 7, 2005)

1. On June 13, 2005, the California Parties¹ and Western Intervenors² filed requests for rehearing of the Commission's May 12, 2005 Order.³ For the reasons set forth below, the Commission denies the requests for rehearing.

Background

2. On August 13, 2002, under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000), the Commission ordered a hearing to investigate possible misconduct by Enron⁴ and El Paso Electric Company (El Paso Electric), particularly whether they should have made filings pursuant to sections 203 and/or 205 of the FPA, 16 U.S.C. §§ 824b, 824d (2000). This was based on an indication that these entities had entered into a contractual relationship which may have resulted in Enron acquiring control of El Paso Electric's assets without informing the Commission.⁵

3. Separately, on June 25, 2003, the Commission initiated the two Show Cause Proceedings,⁶ Docket Nos. EL03-180-000, *et al.* and EL03-154-000, *et al.*, 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 California Independent System Operator Corporation (ISO) and California Power Exchange (PX) tariffs during the period from January 1, 2000 to

¹ The California Parties include the People of the State of California, *ex rel.*, Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Southern California Edison Company, and Pacific Gas & Electric Company.

² The Western Intervenors include the City of Santa Clara, California, Valley Electric Association, Inc., Public Utility District No. 1 of Snohomish County, Washington (Snohomish), Nevada Power Company and Sierra Pacific Power Company (Nevada Companies).

³ *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation*, 111 FERC ¶ 61,221 (2005) (May 12 Order).

⁴ Enron Capital and Trade Resources Corporation (currently d/b/a Enron North America) and Enron Power Marketing, Inc. (collectively, Enron).

⁵ *El Paso Electric Co.*, 100 FERC ¶ 61,188 at P 6-10 (2002).

⁶ *See American Electric Power Service Corp.*, 103 FERC ¶ 61,345 (2003), and *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (collectively Show Cause Proceedings or Show Cause Orders).

June 20, 2001. In its Show Cause Orders, the Commission initiated trial-type evidentiary procedures and directed the administrative law judges (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, appropriate non-monetary remedies such as revocation of the identified sellers' market-based rate authority.

4. On July 22, 2004, the Commission issued an order in Docket No. EL02-113-000, affirming an 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.⁷ The Commission's July 22 Order 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 was a subset of other Enron relationships and practices currently pending in the Show Cause Proceedings, the Commission consolidated Docket No. EL02-113-000 with the Show Cause Proceedings and directed the ALJ 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.

5. On August 4, 2004, Western Parties⁸ requested clarification of the July 22 Order. The Commission responded that the hearing ordered in the July 22 Order involved an examination of Enron's profits and that, as the termination payments under certain of Enron's contracts "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

⁷ *El Paso Electric Co., Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 108 FERC ¶ 61,071 (2004) (July 22 Order).

⁸ Western Parties consist of: Nevada Companies, Snohomish, the City of Palo Alto, California, 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.

conditions of its market-based rate authority,” the termination payments, *i.e.*, those profits as well, were within the scope of the hearing.⁹

6. Subsequently, in response to an interlocutory appeal involving a discovery dispute, the Commission again explained that, with respect to the remedy applicable to Enron, the hearing should consider any unjust profits that Enron may have derived through its violation of the Commission’s directives, specifically, the conditions of the Commission’s order granting Enron market-based rate authority, and the disgorgement of such profits.¹⁰ It added that this remedy of disgorgement of unjust profits by Enron hinged on the violation of the Commission’s directives and *not* on whether there was quantifiable harm (or the amount of the harm) to any particular customer. On June 30, 2005, the Commission denied Enron’s request for rehearing of the Commission’s April 29 Order.¹¹

7. On May 12, 2005, the Commission issued an order denying Western Power Trading Forum’s (WPTF) motion to intervene out-of-time, and again clarifying the scope of this proceeding.¹² The Commission stated that in neither the Show Cause Orders nor the July 22 Order did the Commission reopen the matters addressed in the Long-Term Contract Proceedings.¹³ Moreover, the Commission stated that “[i]n sum, this hearing is limited to addressing whether Enron individually or jointly engaged in gaming and/or

⁹ *El Paso Electric Co., Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 110 FERC ¶ 61,280 at P 10-11 (2005) (March 11 Order).

¹⁰ *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation*, 111 FERC ¶ 61,129 (2005) (April 29 Order).

¹¹ *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation*, 111 FERC ¶ 61,504 (2005) (June 30 Order).

¹² May 12 Order, 111 FERC ¶ 61,221.

¹³ *Id.* at P 15. See also *Nevada Power Co. v. Duke Energy Trading & Marketing, L.L.C.*, 99 FERC ¶ 61,047 (2002); *Public Utilities Commission of California v. Sellers of Long Term Contracts to the California Department of Water Resources*, 99 FERC ¶ 61,087 (2002); *PacifiCorp v. Reliant Energy Servs., Inc.*, 99 FERC ¶ 61,381 (2002) (Long-Term Contract Cases). The Long-Term Contract Proceedings are currently pending before the United States Court of Appeals for the Ninth Circuit. *Public Utilities Commission of California, et al. v. FERC*, Nos. 03-74207, *et al.* (9th Cir. filed November 17, 2003 and later).

anomalous market behavior in violation of the ISO's and PX's tariffs (as explained in greater detail in the Show Cause Orders), and the unjust profits that Enron must disgorge due to such actions as well as due to its violation of its market-based rate authority."¹⁴ Such remedy, the Commission noted, "could include the profits that constitute the termination payments sought under contracts that Enron executed when it was in violation of its market-based rate authority (as explained in the March 11 and April 29 Orders)."¹⁵

8. On May 27, 2005, the Commission denied requests for rehearing of the earlier March 11 Order.¹⁶ The Commission stated that it was not interpreting the rights of the parties under, or the terms of, the terminated contracts, as Enron asserted, but rather, carrying out its statutory mandate, *i.e.*, determining whether Enron should disgorge profits (including the profits under the terminated contracts) as a remedy for any impermissible gaming and/or anomalous market behavior in violation of the ISO's and PX's tariffs and also for violating the conditions of the order granting Enron market-based rate authority.¹⁷ The Commission explained again that this remedy of disgorgement of unjust profits hinges on the violation and not on whether there was quantifiable harm (or the amount of the harm) to any particular customer.¹⁸ Accordingly, the Commission also denied Enron's alternative request that it be permitted to seek discovery on whether intervenors suffered any harm entitling them to a remedy.¹⁹

9. Most recently, on June 30, 2005, the Commission denied requests for rehearing of the April 29 Order.²⁰ The Commission noted that it had already addressed the scope of these proceedings in other orders, discussed above, and reaffirmed those findings.²¹ The

¹⁴ May 12 Order, 111 FERC ¶ 61,221 at P 16.

¹⁵ *Id.*

¹⁶ *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 111 FERC ¶ 61,269 (2005) (May 27 Order).

¹⁷ *Id.* at P 14.

¹⁸ *Id.* at P 14.

¹⁹ *Id.* at P 15.

²⁰ June 30 Order, 111 FERC ¶ 61,504.

²¹ *Id.* at P 14.

Commission went on to reiterate that a remedy of disgorgement of unjust profits hinges on the violation and not on whether there was quantifiable harm (or the amount of harm) to any particular customer.²²

Requests for Rehearing

10. As discussed more fully below, Western Intervenors and California Parties argue that the Commission should make clear that the May 12 Order does not limit in any fashion the Commission's prior articulation of the scope of this proceeding. Specifically, Western Intervenors state that the Commission should clarify that nothing in the May 12 Order is intended to limit its previous determinations to review all Enron violations of Commission tariffs and orders and consider all available remedies in this case. Similarly, California parties request clarification that it was not the Commission's intent in paragraph 16 of the May 12 Order to retreat from the July 22 Order's inclusion of evidence of Enron's violation of all tariffs and all Commission orders involving Enron's role in the Western Power crisis, and that paragraph 16 was not a retreat from the Commission's earlier inclusion of non-monetary remedies in this proceeding.

Discussion

11. California Parties assert that the Commission, in restating the scope of the hearing in the May 12 Order, appears to have narrowed the scope of evidence as to Enron's violations and the appropriate remedies for those violations. By referring in the May 12 Order only to Enron's violations of the ISO and PX tariffs and of Enron's own market-based rate tariff, and by limiting the universe of remedies to disgorgement related to those violations, California Parties argue that paragraph 16 of the May 12 Order is inconsistent with the Commission's earlier pronouncements, which state that the hearing in this case should take into account Enron's violations of any tariffs or violations of any Commission orders in all pending dockets involving Enron's role in the Western power crises, and provided for both monetary and non-monetary remedies.²³ California Parties assert that Enron's illicit activities violated tariffs other than the ISO and PX tariffs and

²² *Id.* at P 15-19.

²³ California Parties Request for Rehearing at 4 n.13-14 (citing July 22 Order, 108 FERC ¶ 61,071 at P 2, and Show Cause Order, 103 FERC ¶ 61,345 at P 2).

Enron's own market-based rate tariff, such as the Open Access Transmission Tariffs (OATTs) of a variety of public utilities and the Commission's Order Nos. 888 and 889 affiliate rules.²⁴

12. Western Intervenors state that, in reliance on the Commission's July 22 Order (that this case should take into account all evidence of violations by Enron), the participants in the hearing have devoted substantial resources to uncovering evidence of violations of Commission tariffs and orders by Enron. Western Intervenors assert that while most of these violations relate to Enron's market-based rate authority and the PX's and ISO's tariffs, as described in paragraph 16 of the May 12 Order, there is at least one type of fraud that violates not only Enron's market-based rate authority, but also the Western System Power Pool (WSPP) tariff.²⁵

13. As discussed more fully below, the Commission does not agree with the California Parties' or the Western Intervenors' characterization of the Commission's prior articulation of the scope of this proceeding.

14. The violations investigated in the Show Cause Proceedings involved 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 California ISO and PX tariffs during the period from January 1, 2000 to June 20, 2001. Moreover, the Show Cause Orders did not limit remedies solely to disgorgement. In addition to directing that "any and all such unjust profits for the period January 1, 2000 to June 20, 2001 be disgorged in their entirety," the Commission directed consideration of "any additional, appropriate non-monetary remedies, as may be appropriate, *e.g.*, revocation of an Identified Entity's market-based rate authority and revisions to an Identified Entity's code of conduct."²⁶

15. The subsequent July 22 Order, having found a violation of Enron's market-based rate authority, 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

²⁴ California Parties Request for Rehearing at 4-5.

²⁵ Western Intervenors Request for Rehearing at 14-15.

²⁶ Show Cause Order, 103 FERC ¶ 61,345 at P 71; *accord* Show Cause Rehearing Order, 106 FERC ¶ 61,020 at P 97 (stating that "we will not broaden the scope of these proceedings . . . Rather, we chose to pursue those activities that we identified in the Partnership Gaming Order, and to the degree we identified in that order.").

violations.”²⁷ The July 22 Order also stated 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.”²⁸ However, this order and this language must be understood in context; the Commission, in this order, went on to explain:

However, we do not believe it is appropriate to view this proceeding in isolation. We note that Enron’s relationship with El Paso Electric was a subset of other Enron relationships and practices in the West, including potential market manipulation in violation of the CAISO and Cal PX tariffs, which are currently pending before an ALJ in Docket Nos. EL03-180-000 and EL03-154-000 [*i.e.*, the Show Cause Proceedings]. Further, the approximately \$32 million in profits that the ALJ in this proceeding ordered to be disgorged for Enron’s transactions involving El Paso Electric represents only a fraction of Enron’s profits in the Western Interconnect for the period it violated its market-based rate authority. Accordingly, we will refer our findings in this docket to the ALJ in the other pending dockets, consolidate this docket with the other dockets, and direct the ALJ in the other dockets to determine, based on the totality of the evidence in all the dockets, the total amount of profits that Enron should be required to disgorge as supported by the consolidated records.²⁹

Accordingly, when the Commission stated that the hearing was to review “all evidence relevant to Enron conduct that violated or may have violated Commission tariffs or orders and the appropriate remedy for such violations,” the relevant conduct, the relevant evidence and the relevant tariffs that the Commission had in mind more precisely went to violations of the California PX and ISO tariffs, *i.e.*, the subject of the Show Cause Proceeding, as well as violations of Enron’s market-based rate authority, *i.e.*, the subject of the July 22 Order. Any alleged violations of other tariffs including the WSPP tariff and of the Commission’s Order Nos. 888 and 889 affiliate rules were beyond the scope of this proceeding. Moreover, the appropriate remedies pertaining to the Show Cause

²⁷ July 22 Order, 108 FERC ¶ 61,071 at P 3.

²⁸ *Id.* at P 2.

²⁹ July 22 Order, 108 FERC ¶ 61,071 at P 32 (cites omitted). In the March 11 Order, the Commission clarified that Enron’s profits under certain disputed contracts are within the scope of, and have common issues of fact or law with, the Show Cause Proceedings. March 11 Order, 110 FERC ¶ 61,280 at P 10-11.

Docket No. EL02-113-012, *et al.*

9

Proceedings (Docket Nos. EL03-180-000, *et al.* and EL03-154-000, *et al.*) may include not only disgorgement of unjust profits but non-monetary remedies for these gaming and/or anomalous market behavior violations, and the remedy for violations of Enron's market-based rate authority (in Docket No. EL02-113-000) is disgorgement of unjust profits from all Enron market-based rate sales in the Western Interconnect for the period January 16, 1997 to June 25, 2003, with the ALJ to determine the total amount of such disgorgement.³⁰

16. The Commission's brief summary of the scope of the proceeding, in the last paragraph, P 16, of the May 12 Order, which the California Parties and Western Intervenors express concern over, did not change the scope articulated in the Show Cause Orders, the July 22 Order, or later orders. In fact, the Commission qualified its summary of the scope of the proceeding in the last paragraph, P 16, by stating that the description was "as explained in greater detail in the Show Cause Orders" and "as explained in greater detail in the March 11 and April 29 Orders."

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³⁰ *Accord* May 12 Order, 111 FERC ¶ 61,221 at P 14.