

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

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

City of Santa Clara, California

Docket No. EL04-114-001

v.

Enron Power Marketing, Inc.

ORDER DENYING REHEARING

(Issued September 15, 2005)

1. In this order, we deny the requests for rehearing of the Commission's order issued on March 11, 2005 concerning City of Santa Clara, California's (Santa Clara) complaint against Enron Power Marketing, Inc. (EPMI) regarding a Master Energy Purchase and Sale Agreement (Agreement) entered into by the parties.<sup>1</sup>

**Background**

2. On September 10, 1999, EPMI and Santa Clara executed the Agreement. It provides the terms and conditions that govern sales of energy that may thereafter be entered into by the parties. EPMI notified the Commission of the execution of the Agreement in a quarterly report filing, but did not file the Agreement itself for Commission approval. In response to a request for proposals for long-term power, on August 29, 2000 and April 17, 2001, EPMI and Santa Clara executed confirmation letters for two long-term firm power sales transactions pursuant to the Agreement.

3. On December 28, 2001, EPMI allegedly notified Santa Clara that it was canceling the Agreement effective January 2, 2002. EPMI claimed that the cancellation resulted from an event of default under the Agreement. Correspondence then ensued over EPMI's allegations, the counter allegations and any amounts owed by each party to the other.

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<sup>1</sup> *City of Santa Clara v. Enron Power Mktg., Inc.*, 110 FERC ¶ 61,281 (2005) (March 11 Order).

4. On July 22, 2002, EPMI commenced an adversary proceeding against Santa Clara in the United States Bankruptcy Court for the Southern District of New York, seeking to collect an early termination payment EPMI alleged it was owed based upon the terms of the Agreement. Santa Clara responded that there was no default or basis for a termination payment under the terms of the Agreement and that EPMI's claimed entitlement to the termination payment violated the Federal Power Act (FPA).

5. On July 2, 2004, Santa Clara filed the instant complaint seeking a Commission ruling that it does not have to pay a termination payment. In response, EPMI filed a motion before the Bankruptcy Court arguing that this complaint (1) violated the automatic stay issued by the Bankruptcy Court because it attempted to obtain control over property of EPMI's estate, and (2) violated a mediation order issued by the Bankruptcy Court. EPMI requested an injunction enjoining Santa Clara from further prosecution of this complaint and sought sanctions.

6. On December 29, 2004, the Bankruptcy Court determined that all but two issues in the complaint concerned contract interpretation issues<sup>2</sup> that were properly before the Bankruptcy Court. According to the Bankruptcy Court, only the following two issues fall within the Commission's exclusive jurisdiction and, therefore, can be pursued before the Commission: (1) whether EPMI's cancellation of the Agreement was void for failure to provide notice in compliance with section 205(d) of the FPA (Notice Issues); and (2) the fairness of the market-based rates charged and the retroactive revocation of EPMI's market-based rate authority (Market-Based Rate Authority Issues). The Bankruptcy Court also found that it was for the Commission to determine whether the Market-Based Rate Authority Issues are redundant with the issues raised in the so-called "gaming and partnership" proceeding<sup>3</sup> and whether it should consolidate those issues with that proceeding. The Bankruptcy Court enjoined Santa Clara from proceeding with the complaint before the Commission, except with respect to those two issues.

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<sup>2</sup> Those issues include: (1) failure to make a margin call; (2) suspension of performance; (3) failure to pay for power; (4) whether default occurred under the Agreement; (5) whether a basis for a termination payment existed; (6) whether a good faith dispute concerning entitlement to the termination payment existed; and (7) whether performance assurance was required by the terms of the Agreement.

<sup>3</sup> *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004); *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004).

7. On January 10, 2005, in response to the Bankruptcy Court's December 29 Order, Santa Clara filed an amended complaint with the Commission, arguing that (1) EPMI's purported cancellation was void for failure to provide notice in compliance with section 205(d) of the FPA and (2) EPMI should be prohibited from applying market-based rates to calculate an early termination payment. On January 31, 2005, EPMI filed an answer and a motion to strike portions of the amended complaint.

8. In the March 11 Order, the Commission denied, in part (on the Notice Issues), and deferred, in part (on the Market-Based Rate Authority Issues), Santa Clara's amended complaint. Santa Clara, EPMI and Public Utility District No. 1 of Snohomish County, Washington (Snohomish) have requested rehearing.<sup>4</sup> Snohomish requests that the Commission initiate an expedited hearing on the issues it raises. On May 6, 2005, the City of Palo Alto, California filed a notice of withdrawal of its intervention in this proceeding.<sup>5</sup>

## **Discussion**

### **A. Notice Issues**

9. In its amended complaint, Santa Clara argued that EPMI's purported cancellation was void for failure to provide notice of the cancellation with the Commission in compliance with section 205(d) of the FPA.

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<sup>4</sup> We note that Snohomish seeks to incorporate by reference arguments raised in prior pleadings. *See* Snohomish Rehearing Request at 7 & n.21. The incorporation of arguments from prior pleadings in a rehearing request is inconsistent with section 313 of the FPA, 16 U.S.C. § 8251 (2000), which states that "[t]he application for rehearing shall set forth specifically the ground or grounds upon which such application is based." *See Standardization of Generator Interconnection Agreements and Procedures*, 109 FERC ¶ 61,287 at P 47 n.17 (2004). Furthermore, such an incorporation of arguments by reference in a rehearing request places the Commission in the untenable position of determining which arguments are still relevant following the issuance of a Commission order on the issues. For these reasons, we will not consider the arguments Snohomish seeks to incorporate by reference here.

<sup>5</sup> No one filed a motion in opposition to the withdrawal, and the Commission took no action to disallow it. Accordingly, pursuant to Rule 216 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.216 (2005), the withdrawal of the City of Palo Alto, California's intervention became effective fifteen days after it was filed.

10. In the March 11 Order, the Commission found that EPMI was not required to file the Agreement and the two long-term power sales transactions with the Commission (and did not do so).<sup>6</sup> As a consequence, the Commission concluded that EPMI did not need to file a notice of cancellation.<sup>7</sup> The Commission explained as follows:

At the time of execution of the Agreement and the two long-term power sales transactions at issue here, power marketers were only required to file their umbrella tariff (*i.e.*, market-based rate tariff) with the Commission and then summarily report individual transactions after-the-fact on a quarterly basis. Therefore, because EPMI had filed a market-based rate tariff with the Commission and received market-based rate authority, EPMI did not have to file with the Commission its subsequent agreements or confirmation letters for individual transactions executed pursuant to such agreements.

Because the Agreement and the resulting long-term power sales transaction confirmations were not required to be “on file” with the Commission for purposes of section 35.15 of the Commission’s regulations, notice of their cancellation also was not required. While Santa Clara asserts that a seller’s quarterly report, in and of itself, means that the underlying agreements are filed, we disagree. They are not “on file” for purposes of section 35.15 of the Commission’s regulations. The Commission has determined that a finding (in a ruling on an application for market-based rate authority) that a seller lacks market power or has taken sufficient steps to mitigate market power, combined with the post-approval quarterly reporting requirements, satisfies the requirements of section 205(c) of the FPA. But that does not mean that they are “on file” for purposes of section 35.15 of the Commission’s regulations (*i.e.*, a notice of cancellation is not necessary). Finally, the Commission has also found that, even though EPMI controlled generation as a power marketer, EPMI was not required to separately file service agreements under section 205(c) of the FPA.<sup>8</sup>

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<sup>6</sup> March 11 Order, 110 FERC ¶ 61,281 at P 28.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at P 29-30 (footnotes omitted).

The Commission found that EPMI's cancellation of the Agreement was not void for failure to provide notice in compliance with section 205(d) of the FPA.<sup>9</sup>

11. On rehearing, Santa Clara argues that the Commission erred by finding that EPMI was not required to file its long-term contracts with the Commission pursuant to section 205(c) of the FPA. Santa Clara and Snohomish claim that EPMI was a traditional public utility, not a power marketer, because EPMI was found by the Commission to control generation.<sup>10</sup> Santa Clara and Snohomish both argue that, as a traditional public utility, EPMI was required to physically file its long-term jurisdictional power sales agreements prior to July 1, 2002.<sup>11</sup> Santa Clara concludes that, because the contracts at issue were required to be on file, EPMI was obligated to file a notice of termination before canceling any such contracts.

12. Santa Clara adds that the Commission erred by relying on the holding in *El Paso* that EPMI was not required to file its El Paso power consulting services agreement when the Commission reached its determination that EPMI was not required to file (and to file a notice to terminate) its jurisdictional power sales agreements. Santa Clara concludes that the holding in *El Paso* is not applicable here. Santa Clara asserts that the power consulting services agreement with El Paso is distinguishable from the power sales contracts between EPMI and Santa Clara. Santa Clara argues that the Commission has never required consulting agreements or brokerage agreements, which do not require the

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<sup>9</sup> *Id.* at P 30.

<sup>10</sup> Citing *Enron Power Mktg., Inc.*, 104 FERC ¶ 63,010 at P 98-100 (2003), *aff'd in part, El Paso Elec. Co.*, 108 FERC ¶ 61,071 (2004) (*El Paso*). Snohomish argues that EPMI should not be excused from complying with the requirement to file long-term service agreements because it failed to comply previously with the Commission's requirement to accurately report ownership, operation or control of generation.

<sup>11</sup> Snohomish argues that, as a matter of law, EPMI was required to file wholesale power sales contracts with the Commission because section 205(c) requires every public utility to file with the Commission "all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with *all contracts* which in any manner affect or relate to such rates, charges, classification, and services." (emphasis added).

taking of title to energy, to be filed.<sup>12</sup> Santa Clara claims that, by contrast, wholesale power sales agreements are one of three types of agreements that are subject to section 205's filing requirements.<sup>13</sup>

13. EPMI was authorized to sell at market-based rates and was not required to file its wholesale power sales agreements. Rather, its market-based rate tariff was on file, and EPMI was required only to file quarterly reports. Because its wholesale power sales agreements did not need to be filed, EPMI did not need to file a notice to terminate them.<sup>14</sup>

14. We disagree with the argument that EPMI should be treated now as if it had been a traditional public utility when it executed the Agreement and the two long-term power sales transactions at issue. The fact that EPMI failed to follow its market-based rate authorization's express requirement to report departures from circumstances previously represented to the Commission, such as the control of generation, goes to the issue of whether it violated its market-based rate authority and must disgorge profits.<sup>15</sup> However, it does not change the filing requirements applicable to entities like EPMI that made their power sales pursuant to their market-based rate authority.<sup>16</sup>

15. We also disagree with Santa Clara's characterization of the holding in *El Paso*. Santa Clara relies on EPMI's characterization of the contract at issue in *El Paso* as a consulting or brokerage agreement.<sup>17</sup> However, the Administrative Law Judge (ALJ) found that, contrary to Enron's claims, the power consulting services agreement was a contract that related to or affected the rates, charges, and classifications of jurisdictional

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<sup>12</sup> Citing *Enron Power Mktg., Inc.*, 104 FERC ¶ 63,010 at P 22-23; *Southern Co. Serv., Inc.*, 72 FERC ¶ 61,324 at 62,407, n.38 (1995); *Enron Power Mktg., Inc.*, 65 FERC ¶ 61,305 at 62,404 (1993).

<sup>13</sup> Citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993).

<sup>14</sup> March 11 Order, 110 FERC ¶ 61,281 at P 29-30.

<sup>15</sup> *El Paso*, 108 FERC ¶ 61,071 at P 13, 17.

<sup>16</sup> *Id.* at P 13, 19.

<sup>17</sup> See *supra* note 12 (citing *Enron Power Mktg., Inc.*, 104 FERC ¶ 63,010 at P 22-23).

services, rather than just a consulting agreement or an agreement for brokerage services.<sup>18</sup> In *El Paso*, the Commission did not overturn that finding; however, the Commission did reverse the ALJ's determination that the agreement had to be filed with the Commission under section 205 of the FPA before its implementation.<sup>19</sup> The Commission explained as follows:

Although on January 16, 1997, when it executed the [power consulting services agreement], Enron<sup>20</sup> was required to notify the Commission of changes in status under the Commission's requirements in effect at the time, the [power consulting services agreement] was not required to be separately filed under section 205(c) of the FPA. The Commission has discretion as to precisely what contracts need to be filed under section 205(c). At the time Enron and El Paso Electric executed the [power consulting services agreement], January 16, 1997, Enron had already been granted blanket market-based rate authority for wholesale sales and Commission precedent did not expressly require that agreements like the [power consulting services agreement] needed to be separately filed with the Commission under section 205(c) of the FPA; indeed, for sellers with market-based rate authority like Enron, the Commission had waived some of the Commission's requirements, including a number of the Commission's filing requirements. Even today, the Commission has not expressly required agreements such as the [power consulting services agreement] to be separately filed with the Commission under section 205(c), and has, in Order No. 2001, waived the requirement to file power sales agreements for sellers with market-based rate authority.<sup>21</sup>

16. Similarly, here, at the time that EPMI executed the Agreement and the two long-term power sales transactions at issue, EPMI was not required to file those power sales

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<sup>18</sup> *Enron Power Mktg., Inc.*, 104 FERC ¶ 63,010 at P 33.

<sup>19</sup> *See El Paso*, 108 FERC ¶ 61,071 at P 8, 13.

<sup>20</sup> In *El Paso*, the Commission referred to Enron Capital and Trade Resources Corporation and EPMI collectively as "Enron." *See id.* at P 1 n.2.

<sup>21</sup> *Id.* at P 19 (footnotes omitted).

documents separately under section 205(c) of the FPA.<sup>22</sup> Accordingly, we deny the requests for rehearing on this issue.

17. Santa Clara also contends that, even disregarding EPMI's control over generation, notice of cancellation was required because the Commission deems market-based rate contracts to be filed in accordance with the requirements of section 205(c) of the FPA when utilities file transaction reports with the Commission.<sup>23</sup> Santa Clara claims that, because those contracts must be filed under section 205(c), notice is required before those contracts can be cancelled. Santa Clara argues that the fact that the contracts are not physically filed or that the Commission deems the contracts to be filed through summary reports rather than through physical filings with the Commission does not (1) exempt the contracts from the section 205(c) filing requirement, nor (2) excuse the contract from the corresponding section 205(d) requirement that changes in the filed rates, terms or conditions, including termination, can only occur after notice to, and review and acceptance, by the Commission.<sup>24</sup> Santa Clara adds that, in *PCA*,<sup>25</sup> which the Commission relied upon, the court did not reach the merits of the argument and thus did not disagree that notice of termination must be provided for contracts whose prices were referenced in quarterly reports.<sup>26</sup> Santa Clara also contends that *Southern Company*

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<sup>22</sup> See March 11 Order, 110 FERC ¶ 61,281 at P 29.

<sup>23</sup> Citing *San Diego Gas & Elec. Co. v. Sellers of Ancillary Serv.*, 96 FERC ¶ 61,120 at 61,505-506 (2001); *State of California v. British Columbia Power Exchange Corp.*, 99 FERC ¶ 61,247 at 62,061-65 (2002); *Blumenthal v. NRG Power Mktg., Inc.*, 103 FERC ¶ 61,344 at P 58 (2003).

<sup>24</sup> Santa Clara contends that cancellation is a change in rate that is subject to the prior notice requirement of section 205(d) of the FPA.

<sup>25</sup> Citing *Power Co. of America v. FERC*, 245 F.3d 839 (D.C. Cir. 2001) (*PCA*).

<sup>26</sup> Santa Clara is correct that, in *PCA*, the court "decline[d] to address *PCA*'s argument in its reply brief that the umbrella agreements were required to be on file because they were contained in quarterly reports that are required to be on file." *PCA*, 245 F.3d at 845. However, the Commission cited to *PCA* for the separate and different holding earlier on that page that "[p]ower marketers are not required to file umbrella agreements, so the notice-of-termination regulation in 18 C.F.R. § 35.15(a) does not apply to umbrella agreements they terminate. Power marketers instead filed umbrella tariffs and quarterly reports summarizing past transactions." *Id.*

*Services, Inc.*<sup>27</sup> only created an exception from the notice of cancellation requirement for short-term transactions, which this is not, and, therefore, the general rule that notice is required before cancellation of jurisdictional contracts remains applicable to the contracts at issue. These arguments were raised in the amended complaint and fully addressed in the March 11 Order. For the reasons set forth in that order, we deny rehearing.<sup>28</sup>

18. Santa Clara also argues that, pursuant to section 35.15(b)(2) of the Commission's regulations, EPMI was obligated to file a notice of termination because the contracts at issue did not terminate by their own terms (*i.e.*, upon their expiration).<sup>29</sup> Santa Clara misreads the regulations. Since the Agreement and the resulting long-term power sales transaction confirmations were not required to be "on file" with the Commission, EPMI did not have to file a notice to terminate them. Accordingly, we deny rehearing.

### **B. Contract Interpretation Issue**

19. In its answer to Santa Clara's amended complaint, EPMI stated that section 35.15 of the Commission's regulations did not require notice to be filed for the cancellation of a contract that was not on file with the Commission when the cancellation was in accord with the terms of the contract. EPMI contended that, to decide the applicability of section 35.15 here, the Commission had to determine whether the prerequisite for exemption from the notice requirement (*i.e.*, whether the termination occurred pursuant to the terms of the contract) had been satisfied. EPMI argued that the Commission could not reach that issue without violating the Bankruptcy Court's injunction.

20. In the March 11 Order, the Commission responded that:

[w]e do not believe that the Bankruptcy Court's determination should be read as both allowing the Commission to consider the Notice Issues and yet

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<sup>27</sup> 87 FERC ¶ 61,214 (1999), *reh'g dismissed*, 99 FERC ¶ 61,103 (2002).

<sup>28</sup> March 11 Order, 110 FERC ¶ 61,281 at P 28-30.

<sup>29</sup> *Citing Portland General*, 75 FERC ¶ 61,310 at 62,002 (1996); *Vermont Pub. Power Supply Auth. v. PG&E Energy Trading Power, L.P.*, 104 FERC ¶ 61,185 (2003). Santa Clara contends that, although Order No. 2001 was not applicable at the time of Enron's purported termination, the rule is instructive because it retains the requirement that notice must be provided before cancellation if a customer contests the grounds for cancellation. *Citing Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 321 (2002).

not, according to EPMI, allowing the Commission to address what EPMI views as the necessary predicate to deciding the Notice Issues. Such an internally inconsistent argument makes no sense, and we reject it.<sup>30</sup>

21. On rehearing, Santa Clara states that EPMI's argument failed to reflect Commission precedent that "by its terms" refers to expiration at the end of the term and incorrectly implied that Santa Clara was seeking a determination as to whether EPMI's purported termination was allowed under the contracts and the facts. Santa Clara requests clarification that the Commission did not decide any issues of contract interpretation in the March 11 Order. In particular, Santa Clara requests that the Commission clarify that it did not make any decision on the question of whether there was or was not an event of default or a good faith dispute as to the existence of an event of default. Santa Clara states that such clarification is needed to avoid any argument by EPMI that the Commission, in contravention of the Bankruptcy Court Order, decided that there was no bona fide dispute as to whether Santa Clara was in default under the contracts by reason of non-payment. Santa Clara adds that, if the Commission believes it is free to consider and resolve within its regulatory jurisdiction the issue of default, the Commission first investigate the facts concerning the dispute before making any ruling with respect to its existence or bona fides.

22. It was not necessary for the Commission to address whether the Agreement and transaction confirmations were exempt pursuant to section 35.15(b) from the requirement to file a notice of termination under section 35.15(a); thus, we did not reach the issue of whether the Agreement and confirmations terminated "by [their] own terms," as provided in section 35.15(b). Rather, we ruled simply that, notwithstanding section 35.15(b), these contracts could be terminated without filing a notice of termination because these contracts were not "required to be on file" pursuant to section 35.15(a).

### **C. Market-Based Rates Authority Issues**

23. In its amended complaint, Santa Clara argued that, if EPMI's cancellation was proper, EPMI should not be permitted to compute the termination payment based on its now-revoked market-based rates. Santa Clara sought an order: (1) requiring EPMI to calculate, on a cost-of-service basis, any termination payment for undelivered energy contracts with terms extending beyond the Commission's order revoking EPMI's market-based rate authority (issued on June 25, 2003);<sup>31</sup> or (2) revoking EPMI's market-based

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<sup>30</sup> March 11 Order, 110 FERC ¶ 61,281 at P 23 n.17.

<sup>31</sup> *Citing Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343 at 62,297 (2003), *reh'g denied*, 106 FERC ¶ 61,024 at P 24-32 (2004). In its comments, CEOB recommends that

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rates effective on or before January 2000, the effective date of Santa Clara's requested alternative relief. Santa Clara contended that either of the two forms of alternative relief would ensure that EPMI would only recover cost-based charges and not profit from its violation of its market-based rate authority.

24. In the March 11 Order, the Commission determined that the resolution of the Market-Based Rate Issues raised by Santa Clara depends on the outcome of the proceeding in Docket No. EL03-180-000, *et al.*, in which a hearing is presently ongoing.<sup>32</sup> Since the potential disgorgement of profits could extend back to the date of execution of the Agreement and of the two long-term power sales transactions, the Commission deferred resolution of these issues until a final order on disgorgement of profits is issued in Docket No. EL03-180-000, *et al.*<sup>33</sup>

25. On rehearing, EPMI argues that the Commission erred in deferring resolution of Santa Clara's claims because the Commission does not have the authority under the FPA to order the relief requested by Santa Clara. EPMI asserts that neither of the two monetary remedies allowed under the FPA - prospective refunds under section 206 and fines under sections 315 and 316 - allow the Commission to order repayment to customers. It also contends that section 206 prohibits the "importation" of retroactive refunds and that the disgorgement of profits is not permissible under a forward-looking statutory provision like section 206. EPMI adds that the Commission cannot grant itself disgorgement authority under section 309 because that section is a ministerial provision.

26. EPMI also argues that that any action by the Commission to prevent the disbursement of the termination payments conflicts with the automatic stay under section 362(a)(3) of the Bankruptcy Code and the Bankruptcy Court's "Order Governing Mediation of Trading Cases."<sup>34</sup> It contends that the fate of these monies is properly before the Bankruptcy Court and that the Commission does not have authority to revise the provisions of the long-term contracts or otherwise adjudicate the termination payment claims.

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any required termination payment be mitigated using either: (1) a cost-based price, as Santa Clara recommends; or (2) an appropriate mitigation proxy price consistent with the treatment of the market as a whole in Docket No. EL00-95, *et al.*

<sup>32</sup> March 11 Order, 110 FERC ¶ 61,281 at P 34.

<sup>33</sup> *Id.* (citing *El Paso*, 108 FERC ¶ 61,071 at P 2).

<sup>34</sup> Citing *In Re Enron Corp.*, Case No. 01-16034 (AJG) (Mar. 4, 2003).

27. Pursuant to section 1290 of the Energy Policy Act of 2005, the Commission has exclusive jurisdiction “to determine whether a requirement to make termination payments for power not delivered by [EPMI] . . . is not permitted . . . or is otherwise unlawful.”<sup>35</sup> Moreover, the Bankruptcy Court found that it was for the Commission to determine whether the Market-Based Rate Authority Issues are redundant with the issues raised in the “gaming and partnership” proceeding and whether it should consolidate those issues with that proceeding. The Commission has found that the resolution of the Market-Based Rate Authority Issues depends on the outcome of the proceeding in Docket No. EL03-180-000, *et al.* Since the issues related to the disgorgement of profits are still being addressed in an on-going proceeding in Docket No. EL03-180-000, *et al.*, we will continue to defer action on the Market-Base Rate Authority Issues until a final order on disgorgement of profits is issued in Docket No. EL03-180-000, *et al.* At that time, we will consider the arguments that have been raised. Accordingly, we deny this request for rehearing.

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.

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<sup>35</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, § 1290, 119 Stat. 594, \_\_\_\_ (2005).