

102 FERC ¶ 61,023
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

San Diego Gas & Electric Company,
Complainant,

Docket No. EL00-95-069

v.

Sellers of Energy and Ancillary Services
Into Markets Operated by the California
Independent System Operator and the
California Power Exchange,
Respondents.

Investigation of Practices of the California
Independent System Operator and the
California Power Exchange

Docket No. EL00-98-058

ORDER GRANTING IN PART AND DENYING IN PART
INTERLOCUTORY APPEAL

(Issued January 10, 2003)

1. On December 19, 2002, California Parties¹ filed with the Chairman, as the Motions Commissioner, an interlocutory appeal. The interlocutory appeal pertains to a ruling by the Discovery Master that requests for documents produced in response to the Commission Staff's investigation in Docket No. PA02-2-000 were discoverable only through a Freedom of Information Act (FOIA) request to the Commission.
2. In this order, the Commission grants in part and denies in part California Parties' request for an interlocutory appeal. In particular, the Commission will permit California

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

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Parties to seek through data requests served on the sellers certain documents provided to the Commission and its Staff in Docket No. PA02-2-000.

Background

3. On November 20, 2002, the Commission issued an order allowing the parties in the instant proceeding to conduct discovery into market manipulation by various sellers during the Western power crises of 2000 and 2001.² In response to the November 20 Order, the California Parties served data requests on November 27, 2002 seeking, in relevant part, a complete, unredacted copy of certain documents provided to the Commission, the Commission Staff, or anyone acting on behalf of the Commission Staff related to the Commission Staff's investigation in Docket No. PA02-2-000 (November 27 Requests).

4. Specifically, the California Parties requested the following information from essentially all parties:

1.1 Your response to the FERC Staff's information request dated March 5, 2002.

1.2 Your response to the FERC Staff's Data Request on Trading Strategies Addressed to Sellers of Wholesale Electricity and/or Ancillary Services to the California Independent System Operator and/or California Power Exchange During the Years 2002-2001, issued May 8, 2002.

1.3 Your response to the FERC Staff's additional request for data regarding "wash trades" issued May 21, 2002.

1.4 Your response to the FERC Staff's Request of All Sellers of Natural Gas in the U.S. Portion of the Western Systems Coordinating Council and/or Texas During the Years 2000-2001 on "wash" transactions, issued May 22, 2002.

²San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator Corp. and the California Power Exchange, 101 FERC ¶ 61,186 (2002)(November 20 Order).

- 1.5 Any other documents you provided to FERC Staff related to, or in connection with, the investigation in Docket No. PA02-2-000.
 - 1.6 The transcripts of any depositions taken of you by the FERC Staff related to, or in connection with, the investigation in Docket No. PA02-2-000.
5. Some of the recipients of those requests objected to the request for production of those documents. At oral argument held on December 17, 2002 to address, among other things, whether requests for documents provided in response to the Commission Staff's investigation in Docket No. PA02-2-000 were discoverable in this proceeding, the Discovery Master ruled that requests for documents produced in response to the Commission Staff's investigation in Docket No. PA02-2-000 were discoverable only through a FOIA request to the Commission. The Discovery Master also denied the California Parties' oral motion for leave to file an interlocutory appeal.
6. On December 19, 2002, California Parties filed the instant Interlocutory Appeal. California Parties argue that the Discovery Master's ruling contradicts the Commission's ruling in other proceedings allowing the discovery of documents produced in response to the Commission Staff's investigation in Docket No. PA02-2-000. Specifically, California Parties contend that the Discovery Master's ruling that documents and materials produced in response to the investigation in Docket No. PA02-2-000 are not discoverable is inconsistent with the ruling in Nevada Power Co. And Sierra Pacific Power Co. v. Duke Energy Trading and Marketing, LLC, et al. (Nevada Power).³ California Parties further submit that the Discovery Master's order contradicts the Commission's specific directive that "parties should not duplicate the discovery conducted in other Commission proceedings, but may submit evidence from those proceedings in their filings in this proceeding, to the extent relevant."
7. California Parties contend that failure to grant prompt review by the Commission will result in detriment to the public interest. The California Parties argue that they need the requested information in order to adequately prepare their evidentiary submission by the Commission's February 28, 2003 deadline.

³100 FERC ¶ 61,195 (2002).

8. On December 30, 2002, the Competitive Supplier Group (CSG)⁴ filed an answer to California Parties' interlocutory appeal. CSG argues that the Discovery Master's ruling was correct and should not be disturbed on appeal. CSG contends that California Parties have failed to demonstrate that they will suffer irreparable injury absent Commission action. Finally, CSG asserts that reversal of the Discovery Master's ruling may undermine the Commission's ability to conduct investigations and the protections afforded materials submitted in confidence to an investigation.

Discussion

9. In the November 20 Order, the Commission stated that "[t]he Commission and its Staff conducting investigation in Docket No. PA02-2-000 will not be subject to discovery and the parties may not conduct depositions of and/or request information from the Commission or its Staff, as it would interfere with the Staff investigation in Docket No. PA02-2-000."⁵ The Discovery Master's ruling that the documents produced in response to the Commission Staff's investigation in Docket No. PA02-2-000 would be more appropriately obtained through a FOIA request is thus inconsistent with the Commission's directive in the November 20 Order that the Commission and its Staff conducting the investigation in Docket No. PA02-2-000 will not be subject to discovery. Furthermore, the Commission does not wish to encourage FOIA requests of information obtained through enforcement investigations and generally will not grant such requests except to the extent required under FOIA. Accordingly, the Discovery Master erred in ruling that California Parties must obtain the requested documents through a FOIA request.

10. California Parties' November 27 Requests 1.1 through 1.4 will be allowed. While such requests properly should be stated as requests for, *e.g.*, information on sales, purchases and market circumstances, instead of as requests for whatever information was previously requested by FERC's Staff, the Commission will not elevate form over substance by requiring the requests to be posited again in a proper form. Any claims as to privilege, confidentiality, and/or non-discoverability on any other grounds should be

⁴For purposes of this response, the following companies are members of the CSG: BP Energy Company, El Paso Merchant Energy, L.P.; Exelon Corporation, on behalf of Exelon Generation Company, LLC, PECO Energy Company and Commonwealth Edison Company; Public Service Company of New Mexico; Puget Sound Energy, Inc.; Trachtabel; TransAlta Energy Marketing (California), Inc. And TransAlta Energy Marketing (U.S.), Inc.

⁵November 20 Order, 101 FERC at 61,737, fn. 5.

addressed by the Discovery Master. To obtain the information sought by November 27 Request 1.6, California Parties can conduct their own depositions.⁶ November 27 Request 1.5, however, is not permissible. It requires the premature disclosure of information created for, and provided to, the Commission as a result of the Commission's investigatory process before the Commission has concluded its investigation. This would have a chilling effect on complete cooperation with the Commission's investigations in the future and would discourage parties from providing additional assistance to the Commission in its investigations.

11. California Parties are mistaken in their argument that not providing the documents produced in response to Commission Staff's investigation in Docket No. PA02-2-000 contradicts and is inconsistent with the ruling in Nevada Power. In Nevada Power, the City of Tacoma (Tacoma) moved to compel certain respondents to produce all information and documents that they produced in various Commission investigations and proceedings, including the investigation in Docket No. PA02-2-000. The Presiding Judge concluded that the documents sought would not be unduly burdensome and granted the motion. On interlocutory appeal of that ruling, the Commission made no ruling on whether any documents provided by the respondents in the investigation in Docket No. PA02-2-000 were discoverable. The Presiding Judge's decision on that issue therefore was allowed to stand by operation of law.⁷

12. California Parties argue that Nevada Power supports their request in the instant matter that the documents in Docket No. PA02-2-000 be provided. However, the fact that the Presiding Judge's decision to allow the production of the documents pertaining to Docket No. PA02-2-000 stood by operation of law does not have any precedential effect

⁶Many of the depositions were conducted jointly with the United States Department of Justice and/or the Commodity Futures Trading Commission. The information obtained at these depositions may be beyond the scope of the instant proceeding. Also, to protect the integrity of the ongoing civil and criminal investigations of various federal agencies, and in light of information sharing agreements and restrictions among federal agencies, the discovery may not include discovery on any depositions conducted jointly by the Commission and the CFTC or other federal agencies or any information that was provided to the Commission by other federal agencies.

⁷In a dissent filed by Commissioner Brownell, it was noted that the Commission had been evenly divided on the question of whether to allow Tacoma to obtain discovery of documents provided by respondents in the investigation in Docket No. PA02-2-000, resulting in the inability of the Commission to reach a decision and allowing the Presiding Judge's ruling on the subject to stand by operation of law.

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on the matter at hand. The Commission in Nevada Power never reached a decision as to whether the Presiding Judge's ruling on that subject was appropriate. As such, it cannot now be used by California Parties to support their request for the same documents in this proceeding. Moreover, the Presiding Judge's decision in Nevada Power is similarly of no effect as the decisions of a Presiding Judge in one hearing have no precedential effect in other proceedings before other ALJs.

The Commission orders:

California Parties interlocutory appeal is hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.