

UNITED STATES OF AMERICA 105 FERC ¶ 61, 063
FEDERAL ENERGY REGULATORY COMMISSION

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

Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices	Docket No. PA02-2-000
American Electric Power Company	Docket No. PA03-1-000
Aquila Marketing Service	Docket No. PA03-2-000
Coral Energy Resources, LP	Docket No. PA03-3-000
CMS Marketing Services & Trading	Docket No. PA03-4-000
Dynegy, Inc.	Docket No. PA03-5-000
Duke Energy Trading and Marketing, LLC	Docket No. PA03-6-000
El Paso Merchant Energy, LP	Docket No. PA03-7-000
Mirant Americas Energy Marketing, LP	Docket No. PA03-8-000
Reliant Resources, Inc.	Docket No. PA03-9-000
Sempra Energy Trading Corporation	Docket No. PA03-10-000
Williams Energy Marketing & Trading Company	Docket No. PA03-11-000
Natural Gas Price Formation	Docket No. AD03-7-000
Price Discovery in Natural Gas and Electric Markets	Docket No. PL03-3-000
Investigation of Anomalous Bidding Behavior and Practices in the Western Markets	Docket No. IN03-10-000
BP Energy Company	Docket No. EL03-60-000
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-77-000
Bridgeline Gas Marketing, LLC, Citrus Trading Corporation, ENA Upstream Company, LLC, Enron Canada Corporation Enron Compression Services Company, Enron Energy Services, Inc., Enron MW, LLC, and Enron North America Corporation	Docket No. RP03-311-000

(Not Consolidated)

ORDER CLARIFYING NATURE OF PROCEEDINGS

(Issued October 16, 2003)

1. The Commission is issuing this order as an exercise of its discretion to fashion procedural rules as required to enable it to discharge its statutory responsibilities. See

Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 543-44 (1978). The Commission clarifies the status of the various proceedings that arose out of its investigation into possible market manipulation in the western electric and natural gas markets, conducted in Docket No. PA02-2-000. See Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002). That effort spawned a number of proceedings of different types and purposes, including the above-captioned proceedings. This order clarifies the fundamental nature of the above-captioned proceedings for purposes of considerations such as party status, settlement, rehearing, and the Commission's ex parte rules.

BACKGROUND

2. In its order initiating Docket No. PA02-2-000, the Commission directed its Staff:

to undertake a fact-finding investigation into whether any entity, including Enron Corporation (through its affiliates or subsidiaries), manipulated short-term prices in electric energy or natural gas markets in the West or otherwise exercised undue influence over wholesale prices in the West, for the period January 1, 2000, forward. Staff will also look into other factors that may have influenced contract terms. In conducting this broad investigation, Commission staff may obtain information on any and all matters relevant to potential market manipulation in the West, including comparative information from other markets in the country.

98 FERC ¶ 61,165, at p. 61,614. The order added:

Among other things, the Commission may use the information developed by this fact-finding investigation to determine how to proceed on any existing or future FPA Section 206 complaints involving long-term power sales contracts relevant to the matters investigated, or any formal FPA Section 206 or NGA Section 5 proceedings initiated on our own motion.

Id.

3. The Commission has initiated a number of different proceedings to address issues uncovered by the PA02-2-000 investigation. These proceedings have taken different forms, depending on the nature of the actions required. In Docket Nos. PA03-1-000 through PA03-11-000, the Commission ordered named companies to submit written demonstrations that they had corrected certain trading practices. American Electric Power Co., et al., 103 FERC ¶ 61,089 (2003). In Docket No. AD03-7-000, the Commission initiated a technical conference to address issues related to the adequacy of natural gas price information. Notice of Staff Technical Conference, Docket No. AD03-7-000 (March 14, 2003). In Docket PL03-3-000, the Commission issued a policy

statement to explain its expectations with respect to natural gas and electricity price indices. Policy Statement on Natural Gas and Electric Price Indices, 104 FERC ¶ 61,121 (2003). In Docket No. IN03-10-000, the Commission directed its Office of Market Oversight and Investigations to conduct an investigation into anomalous bidding behavior and practices in western markets. Order Requiring Demonstration that Certain Bids Did Not Constitute Anomalous Market Behavior, 103 FERC ¶ 61,347 (2003). In Docket Nos. EL03-60-000, EL03-77-000, and RP03-311-000, the Commission directed specified companies to show cause in paper hearings why their market-based rate authority should not be revoked and their blanket marketing certificates terminated. Enron Power Marketing, Inc., et al., 102 FERC ¶ 61,316 (2003). In addition to the captioned dockets, the Commission assigned a number of matters to Administrative Law Judges (ALJs) for trial-type hearings. This order does not apply to any of the proceedings assigned to ALJs.

4. The Commission has received the following requests for rehearing in those proceedings:

- Californians for Renewable Energy, filed July 26, 2003, in Docket Nos. PA02-2-000 and IN03-10-001.
- California Parties (People of the State of California, California Public Utilities Commission, California Electricity Oversight Board, Pacific Gas & Electric Company, and Southern California Edison Company), three separate requests filed July 25, 2003, in Docket No. PA02-2-000.
- California Parties, filed July 31, 2003, in Docket No. PA02-2-000.
- Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC, filed July 25, 2003, in Docket No. IN03-10-001.
- Indicated Sellers (Arizona Public Service Company; Avista Energy, Inc.; Constellation Power Source, Inc.; Coral Power LLC; El Paso Merchant Energy, L.P.; Idaho Power Company; Portland General Electric Company; Powerex Corp.; Public Service Company of New Mexico; Puget Sound Energy, Inc.; Sempra Energy Trading Corp.; TransAlta Energy Marketing (CA) Inc.; TransAlta Energy Marketing (US) Inc.; and Tucson Electric Power Company), filed July 25, 2003, in Docket No. IN03-10-001.
- Northern California Power Agency, filed July 25, 2003, in Docket No. IN-03-10-001.
- Reliant Energy Power Generation, Inc. and Reliant Energy Services, Inc., filed July 25, 2003, in Docket No. IN03-10-001.

- Los Angeles Department of Water and Power, filed July 25, 2003, in Docket No. IN03-10-001.
- Modesto Irrigation District, filed July 25, 2003, in Docket No. IN03-10-001.
- California Parties, filed July 31, 2003, in Docket Nos. PA02-2-012, EL03-60-002, EL03-77-003, and RP03-311-003.
- Enron Entities (Enron Power Marketing, Inc.; Enron Energy Services, Inc.; ENA Upstream Company, LLC; Enron Canada Corp.; Enron Compression Services Company; Enron MW, LLC; and Enron North America Corp.), filed July 25, 2003, in Docket Nos. EL03-77-002 and RP03-311-002.
- City of Palo Alto, California, filed July 25, 2003, in Docket Nos. EL03-77-002 and RP03-311-002.
- Nevada Power Co. and Sierra Pacific Co., filed July 25, 2003, in Docket Nos. EL03-77-002 and RP03-311-002.
- Metropolitan Water District of Southern California, filed July 25, 2003, in Docket Nos. EL03-77-002 and RP03-311-002.
- Snohomish County PUD No. 1, filed July 25, 2003, in Docket Nos. EL03-77-002 and RP03-311-002.
- City of Santa Clara, California, filed July 25, 2003, in Docket Nos. EL03-77-002 and RP03-311-002.
- California Parties, filed July 25, 2003, in Docket Nos. EL03-77-002 and RP03-311-002.

(Many of these rehearing requests also listed dockets other than those shown in the caption of this order.)

DISCUSSION

5. The Commission intends the proceedings listed in the caption of this order to proceed as investigative and, where appropriate, enforcement proceedings. Their purpose is to examine instances of potential wrongdoing and take remedial action where needed. The Commission is thus acting in a prosecutorial manner in these matters, rather than strictly as an adjudicator. This view is consistent with the Commission's authority under the Federal Power Act (FPA) and Natural Gas Act (NGA). In Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456 (D.C. Cir. 2001), the court held that the Commission's investigative and enforcement decisions were actions committed to agency discretion by law. Id. at 458; see 5 U.S.C. § 701(a)(2) (2000). Specifically, the court found that the NGA "lack[ed] guidelines against which to measure FERC's decision how, or whether, to enforce that statute." 252 F.3d at 460. Although BG&E involved only the NGA, the sections of that act conferring investigative and enforcement authority on the Commission, 15 U.S.C. §§ 717m(a), 717s(a) (2000), are virtually identical to the investigative and enforcement provisions of the FPA, 16 U.S.C. §§ 825f, 825m (2000). Consequently, BG&E's reasoning applies equally to the FPA. See Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981) (where NGA and FPA provisions "are in all material respects substantially identical" cases under them may be cited interchangeably). On this basis, and in order to facilitate the timely resolution of the captioned proceedings, the Commission clarifies that it is treating the captioned proceedings as investigations under Part 1b of its regulations.

6. The nature of the captioned proceedings, specifically that they are investigatory rather than adjudicatory proceedings, has important implications, particularly with respect to potential intervenors. There are no parties to an investigative proceeding. 18 C.F.R. § 1b.11 (2003). Moreover, only a party can contest a settlement, 18 C.F.R. § 385.602(h) (2003), or request rehearing, 18 C.F.R. § 385.713(b) (2003). Under Rule 713, "party" includes only an applicant in a proceeding, a respondent to a proceeding, or an intervenor. 18 C.F.R. § 385.102(c) (2003). Another implication is the application of the Commission's rules governing off-the-record communications. These rules apply only to contested, on-the-record proceedings; they do not apply to Part 1b investigations unless the Commission specifically makes an exception to allow formal interventions and party status. 18 C.F.R. § 385.2201(c) (2003).

7. Given the Commission's conclusion that these proceedings should be treated as investigations, it necessarily follows that, under Part 1b, there can be no "parties" and thus no intervenors. Consequently, the Commission is treating all pending motions for intervention as motions to file comments and, to the extent the Commission to date may have erroneously allowed intervention, rescinding those interventions that have heretofore been granted. It further follows that the rehearing requests listed above must be dismissed with respect to the dockets listed in the caption of this order, with one exception: the Commission will entertain timely rehearing requests filed by those entities

identified, or may in the future be identified, in Commission orders as subjects of investigation.¹ Decisions with respect to participation in other respects will be made in individual proceedings. This order does not apply in any part to proceedings assigned to ALJs for trial-type hearings.²

The Commission orders:

(A) In view of the foregoing, and regardless of any contrary implication in previous orders, the Commission clarifies that it is treating the proceedings listed in the caption of this order as investigative proceedings under 18 C.F.R. Part 1b (2003).

(B) All motions to intervene pending in the proceedings listed in the caption of this order will be treated as motions to file comments.

(C) All interventions previously granted in the proceedings listed in the caption of this order are hereby rescinded. Those motions will instead be treated as motions to file comments.

¹ This assumes, of course, that there are no other impediments to the Commission considering a rehearing requests. In this regard, the filing entity must, for example, be challenging a final decision. 18 C.F.R. § 385.713 (2003).

² The Commission in some cases has assigned investigative matters to ALJs for trial-type proceedings. Although these proceedings could properly be treated as subject to the limitations of a Part 1b investigation, as described in this order, the Commission determined that the specific circumstances required different treatment for proper resolution. Specifically, the Commission found that, in some instances, there were factual issues that required proceedings more similar to a traditional, adversarial trial. Consequently, none of the matters assigned to ALJs is affected by this order.

Docket No. PA02-2-000,et al.

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(D) The requests for rehearing listed in paragraph 4 above are hereby dismissed with respect to the proceedings listed in the caption of this order, with the exception of the rehearing request filed by the Enron Entities on July 25, 2003, in Docket Nos. EL03-77-002 and RP03-311-002.

By the Commission. Commissioner Massey dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

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(Issued October 16, 2003)

MASSEY, Commissioner, dissenting in part:

I do not agree that the Investigation of Anomalous Bidding Behavior and Practices in the Western Markets should be treated exclusively as an investigation under Part 1b and that there should be no parties to the proceeding. Much of the evidence supporting

the investigation was adduced by parties pursuant to a court order in the California refund proceeding. The California parties are integral to the assessment of and weight to be given the evidence. The Commission should not decide, in isolated enforcement proceedings, issues upon which the court-ordered adduced evidence has a bearing where those that adduced the evidence are not parties and have no appeal rights.

For these reasons, I dissent in part from today's order.

William L. Massey
Commissioner