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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

San Diego Gas & Electric Company, Complainant,	)	Docket Nos. EL00-95-000 EL00-95-048
v.	)	
Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange, Respondent.	)	
Investigation of Practices of the California Independent System Operator and the California Power Exchange	)	EL00-98-000 EL00-98-042

ORDER ON MOTION FOR DISCOVERY ORDER

( )

1. Pursuant to a court directive, in this order, we allow the parties in these proceedings to conduct discovery into market manipulation by various sellers during the western power crisis of 2000 and 2001, and specify procedures for adducing this information. In taking this action, our goal is to provide all parties an opportunity to ensure that all relevant evidence is adduced in this proceeding, but also to bring closure and certainty to these proceedings (to sellers and customers alike) fairly and quickly. We do not intend the adducement of additional evidence to delay in any way the issuance of the ALJ findings of fact in the ongoing refund calculation proceeding in the above dockets. We anticipate findings of fact on refund calculations in the near future and, as discussed below, we will consider those findings of fact at the same time we consider any additional evidence adduced by the parties.

I. Background

2. The current proceeding was initiated by a complaint filed by San Diego Gas & Electric Company (SDG&E) on August 2, 2000. Between August 23, 2000 and May 15, 2002, the Commission issued a series of orders in response to that complaint. Administrative Law Judge (ALJ) Birchman was directed to make findings of fact with respect to: (1) the mitigated price in each hour of the refund period between October 2, 2000 and June 20, 2001; (2) the amount of refunds owed by each supplier according to the methodology prescribed by the Commission; and (3) the amount currently owed to each supplier (with separate quantities due from each entity) by the California Independent System Operator Corporation (California ISO), the investor owned utilities, and the State of California.[1]

3. On May 24, 2002, the Commission filed the certified index to the record of Docket No. EL00-95, et al., with the United States Court of Appeals for the Ninth Circuit (Ninth Circuit). On June 5, 2002, pursuant to Section 313(b) of the Federal Power Act (FPA),[2] the People of the State of California, ex rel. Bill Lockyer, Attorney General (State of California); the California Electricity Oversight Board (California Oversight Board) and Southern California Edison Company (Edison) filed with the Ninth Circuit a motion for leave to adduce additional evidence before the Commission regarding sellers' market manipulation (motion for leave to adduce additional evidence).

4. On August 21, 2002, the Ninth Circuit held the consolidated petitions for review in abeyance and granted the motion for leave to adduce additional evidence (August 21st order).[3] The Ninth Circuit did not grant the request that it order the Commission to institute an evidentiary hearing with discovery to adduce new and material evidence into the record. The Ninth Circuit deferred to the discretion of the Commission to determine how the new evidence would be adduced. The Ninth Circuit stated as follows:

> The California parties' motion for leave to adduce additional evidence before FERC is granted. See 16 U.S.C. § 825l(b). The consolidated petitions for review are held in abeyance and the parties are granted leave to

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[1] See San Diego Gas & Electric Co. v. Seller of Energy and Ancillary Serv., et al., 96 FERC ¶ 61,120 at 61,520 (2001).

[2] 16 U.S.C. § 825l(b) (2000).

[3] Public Utilities Commission of the State of California, et al. v. FERC, Order of August 21, 2002 (9th Cir. Docket Nos. 01-71051, et al.).

> adduce additional evidence of market manipulation by various sellers before FERC. The court defers to the discretion of FERC to determine how this new evidence shall be adduced.

The Ninth Circuit also explained that

> [t]he court is asserting exclusive jurisdiction over matters in which rehearing was denied and a petition for review was filed from the order denying rehearing. The Commission may issue further orders in the underlying docket Nos. EL00-95, et al., which address matters not addressed in earlier rehearing orders, without leave of this court.

5. On September 6, 2002, the State of California, the California Oversight Board, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company (PG&E) and Edison (collectively, the California Parties) filed a motion for discovery to implement the August 21st order (motion for discovery).

II. California Parties' Motion for Discovery

6. The California Parties request an order allowing the California Parties to conduct discovery for a period of 100 days, including depositions, data requests and such other forms of discovery necessary to allow the California Parties to discover any matter relevant to the issue of sellers' market manipulation or reasonably calculated to lead to the discovery of relevant evidence.

7. The California Parties also request that the Commission appoint an ALJ to resolve any discovery disputes that may arise. Within two weeks after the discovery period ends, the California Parties propose to file with the Commission the new evidence that they have adduced, which they propose will become part of the record in Docket No. EL00-95, et al. The California Parties suggest that at that time, if necessary, they will identify any issues of fact that remain and that require an evidentiary hearing or other further procedures. Alternatively, they propose that to the extent that there are issues of fact that require an evidentiary hearing or further procedures, they will propose to the Commission new findings of fact and suggested modifications to the orders currently on appeal to the Ninth Circuit. The California Parties state that based upon the new evidence the Commission will be able to determine whether additional remedies are warranted, whether sellers should be subjected to penalties in addition to refund or whether additional procedures are necessary in order to conform to the Ninth Circuit's August 21st order.

8. The California Parties also request that the Commission order the California ISO and the California Power Exchange Corporation (California PX) or, as necessary, the reorganized California PX to make public all bid, sales and outage data from January 1, 2000 through June 20, 2001. Although they acknowledge that the Commission has held that such information should be treated as confidential because it may contain commercially sensitive information, the California Parties assert that this information is too stale to retain any commercial or competitive significance. They also argue that the release of this information will provide the most efficient means of discovery.

9. The California Parties also argue that the requested discovery should not be limited to the transactions within the refund period, October 2, 2000 to June 20, 2001. They assert that such a time limitation would be inappropriate and would not conform with the Ninth Circuit's ruling that the Commission allow the California Parties to adduce additional evidence of market manipulation.

10. The California Parties emphasize that they are not requesting a stay of the refund proceedings in Docket No. EL00-95, et al., or a delay of the procedures established by the Commission regarding the gas price proxy that should be used in the refund methodology or a delay in the Commission's investigation in Docket No. PA02-2-000.

III. Answers to the Motion for Discovery

A. Answers in Support

11. The California ISO and SDG&E support the California Parties discovery request. The California ISO argues that evidence continues to mount that energy suppliers manipulated the various factors that affect supply and demand in the California market. It asserts that only complete discovery of the facts surrounding this manipulation and the magnitude of the manipulation will fully inform the Commission and the people of California of the impact of this action on their energy markets. The California ISO argues, however, that there should be no stay or extension of time in the refund proceeding due to the additional discovery requested. It adds that the refund proceeding must take into account any evidence adduced during the requested discovery and any revised methodology for determining gas prices in calculating the mitigated market clearing price.

12. The California ISO notes that section 20.3.2 of its tariff requires it to keep confidential virtually all information relating to individual bids. It asserts, however, that the balance in this case weighs in favor of disclosure of this information because the passage of time has diminished the potential for anti-competitive uses of the information

and the information would be used to determine whether anti-competitive conduct occurred and, if so, an appropriate remedy. The California ISO notes that nonetheless it is bound to maintain the confidentiality of its participants' bid and availability information as mandated in its tariff until the Commission issues an appropriate order.

B. Answers in Opposition

13. The City of Anaheim, the City of Glendale, the City of Riverside, the City of Santa Clara, Imperial Irrigation District, Modesto Irrigation District, the Northern California Power Agency, Public Utility District No. 2 of Grant County, the Sacramento Municipal Utility District and Turlock Irrigation District (collectively, the Municipal Entities) oppose the methodology proposed by the California Parties as duplicative of other proceedings, overly burdensome and discriminatory because of its omission of major market participants. The Municipal Entities contend that the proposed methodology appears to set the California Parties themselves in the position of fact finder, usurping the Commission's authority and replacing the unbiased finder of fact with a litigant. They object to the proposed time frame extending beyond the refund period and unlimited discovery compressed into a short time frame. The Municipal Entities oppose the possibility that PG&E and Edison, two of the largest players and generation owners in the California markets and members of the California Parties, may be exempt from discovery if the California Parties themselves conduct all discovery.

14. The Arizona Electric Power Cooperative, Inc. (Arizona Cooperative) objects to the lack of detail provided about the discovery that the California Parties request and the lack of guidance or direction requested from the Commission before an ALJ is assigned. It argues that a threshold showing should be required of the alleged market manipulation the California Parties seek to pursue and the scope of the proposed discovery. Arizona Cooperative argues that the need for discernible standards in advance is especially acute for non-jurisdictional entities, particularly load-serving entities located outside of California like Arizona Cooperative, which had only a limited opportunity and ability to sell power to the California PX and the California ISO and no ability to manipulate California power prices. It also objects to the request to order the California ISO and California PX to make public all bid and sales data. It claims that although the information sought is now dated it remains highly sensitive, particularly in the current, heavily politicized environment. Finally, it disagrees that the requested discovery will not interfere with the refund hearing, as the California Parties claim, because it will duplicate the Commission's present inquiries.

15. Although TransCanada Energy Ltd. (TransCanada) opposes the discovery request, it suggests possible steps to ensure that if the request is granted the process is manageable

and constructive. TransCanada insists that rights comparable to those afforded the California Parties be afforded to other participants as well.

16. The City of Los Angeles Department of Water and Power (City of Los Angeles) asserts that the California Parties should present the additional evidence they now have. It argues that then the Commission should decide whether to allow further discovery related to such evidence; what standard of materiality and relevance govern any discovery allowed; what its time limitations will be (i.e., within or without the scope of the section 206(b) limitations established in this proceeding); and whether a separate sub-docket is warranted. Additionally, it contends that any discovery should be limited to prevent burdensome duplication of the discovery already conducted in these and all related dockets. If the Commission finds that the evidence sought to be adduced is insufficient for discovery and further proceedings, City of Los Angeles requests that the Commission promptly so rule and advise the Ninth Circuit.

17. The City of Los Angeles responds to the California Parties' request for some form of "unjust enrichment" outside of section 206 of the FPA by noting that since the Commission has no authority under the FPA to award non-statutory equitable remedies the California Parties' request must be linked to other statutory remedies, such as those provided under the filed rate requirements of section 205 of the FPA. However, the City of Los Angeles notes that pursuant to section 201(f) of the FPA it and other non-jurisdictional entities have no such rate schedules. It also argues that even if "manipulation" embraces violations of California PX and ISO rate schedules, the California Parties have not identified any provisions in such schedules that have been allegedly violated. Additionally, it asserts that the California Parties have not alleged any relationship between the prices charged and any alleged tariff violations.

18. Avista Energy, Inc., Avista Corporation, BP Energy Co., Coral Power, LLC, IDACORP Energy, L.P., Pinnacle West Companies, Tuscon Electric Power, Pinnacle West Capital Corporation and Arizona Public Service Company, Portland General Electric Company, Powerex Corp., PPL Montana, LLC, PPL EnergyPlus, LLC, Public Service Company of New Mexico, Puget Sound Energy, Sempra Energy Trading Corp., Tractebel Power, Inc., TransAlta Energy Marketing (US) Inc., TransAlta Energy Marketing (California) Inc. and Tuscon Electric Power Company (collectively, the Competitive Supplier Group or CSG) claims that the California Parties' request exceeds the Ninth Circuit's holding by seeking unlimited discovery in time periods prior to those now before the Commission. CSG argues that the California Parties' discovery request should be limited to the time period established by the Commission because the Ninth Circuit retained exclusive jurisdiction over the review of this time period. CSG argues that neither the Ninth Circuit order nor section 313(b) of the FPA address discovery of

additional evidence; therefore, to the extent that the California Parties have any evidence, they should be required to present it and all parties should have the opportunity to respond and fully explore additional evidence. If the Commission deems the new evidence material, according to CSG, then the Commission should initiate proceedings and permit discovery.

19. CSG asserts that the California Parties have not shown that the allegations of manipulation that they have borrowed from the Docket No. PA02-2 proceeding relate to all sellers and, therefore, that they lack the basis to complain about the procedures the Commission has already selected to consider that same evidence.

20. CSG argues that if the Commission allows discovery on the California Parties' claims of unjust enrichment then the discovery must also encompass the conduct of the investor-owned utilities as sellers and buyers, the California ISO as the "independent" operator of the California transmission system and seller, and the California state agencies as sellers. It believes that the Commission should require the California Parties and the California ISO to abide by the same standards of discovery required in the Docket No. PA02-2 submissions (i.e., the results of discovery investigation are due within a two week time frame and must be verified under oath by a senior officer).

21. CSG concludes that the California Parties have thus far not adduced sufficient evidence to warrant any further discovery, citing three defects in the California Parties' proposal. CSG asserts that rather than allowing the California Parties two weeks after the end of the proposed discovery period to present evidence, identify issues that merit a hearing or other procedures, or submit findings of fact, it would be more orderly and balanced for the parties on each side to first present a summary of any factual basis for their claims to the Commission for its determination of how to proceed.

22. CSG argues that the California Parties' request for the disclosure of the California ISO's and PX's bid data is not reconcilable with the use of a protective order. Further, it asserts that the blanket disclosure of data at this time, solely based on the claim that the data has lost its commercial value over time, is premature, lacks considered judgment and is calculated to do harm without the benefit of cause or any balancing of public and private interests.

23. Duke Energy, Dynegy, Mirant Americas, Reliant Energy and Williams Energy (collectively, the California Generators) assert that the proposed hearing and discovery procedures requested by the California Parties far exceed the scope of the Ninth Circuit order, unnecessarily duplicate and conflict with the Commission Staff's Fact-Finding Investigation of Western Markets and deny other participants procedural due process.

The California Generators argue that section 313(b) of the FPA and the Ninth Circuit order do not require or contemplate that the Commission convene a plenary evidentiary hearing or order discovery to adduce additional evidence and that the California Parties have failed to demonstrate that additional discovery in these proceedings is necessary or proper. The California Generators suggest that the Commission can fairly and expeditiously implement the Ninth Circuit order by introducing material evidence from the west-wide investigation into the EL00-95, et al. record, if appropriate, and providing all the parties with an opportunity to formally address the impact of the evidence on the Commission's earlier findings and final orders.

C. California Parties' Answer to Answers

24. California Parties filed an answer to answers and protests submitted in this proceeding. Answers to answers are generally not permitted pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), unless otherwise permitted by the decisional authority. We are not persuaded to allow California Parties' answer to answers and protests.

IV. Discussion

25. In their motion, the California Parties: (1) seek to conduct discovery for the purpose of obtaining evidence of market manipulation by various sellers, (2) request the Commission to appoint an ALJ as a Discovery Master to resolve any discovery disputes that may arise, and (3) propose to file with the Commission upon the completion of the discovery additional evidence along with recommendations concerning the need for additional procedures.

26. Pursuant to the Ninth Circuit Court's order, we will allow the California Parties and other parties in this proceeding to conduct discovery for the period January 1, 2000 to June 20, 2001. This may include depositions, data requests, and any other appropriate form of discovery. 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. We direct the Chief Administrative Law Judge to appoint an ALJ as a Discovery Master to resolve any discovery-related disputes

that may arise.[4] To prevent disclosure of confidential information, the presiding judge may adopt a protective order, as appropriate.[5]

27. All of the parties will have until February 28, 2003 to conduct discovery and review the material and submit directly to the Commission additional evidence and proposed new and/or modified findings of fact based upon proffered evidence that is either indicative or counter-indicative of market manipulation. Parties must provide relevant documents and citations to the record to support any proposed substantive recommendations.

28. We intend to finalize the issues in these dockets expeditiously. These discovery procedures will be sufficient to meet the concerns of the California Parties and we see no need for additional discovery procedures following the February 28, 2003 submission of evidence and substantive recommendations.

The Commission orders:

(A) The parties in these proceedings may propose adducing evidence into these proceedings as discussed in the body of this order.

(B) No later than February 28, 2003, the parties in these proceedings shall submit directly to the Commission additional evidence and proposed new and/or modified findings of fact with specific citations to the record to support any proposed substantive recommendations.

By the Commission.

Secretary

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[4] In order not to delay the ongoing refund proceeding, a separate ALJ should be appointed as a Discovery Master.

[5] The Commission and its Staff conducting investigation in Docket No. PA2-2-000 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. The Commission's Litigation Staff shall not conduct discovery or otherwise participate in this phase of this proceeding.