

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
101 FERC ¶ 61,304

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

Puget Sound Energy, Inc., <u>et al.</u>)	Docket Nos. EL01-10-000
Complainant,)	EL01-10-001
)	
v.)	
)	
All Jurisdictional Sellers of Energy and/or)	
Capacity at Wholesale Into Electric Energy)	
and/or Capacity Markets in the Pacific)	
Northwest, Including Parties to the Western)	
Systems Power Pool Agreement,)	
Respondents.)	

ORDER ON MOTIONS TO REOPEN EVIDENTIARY RECORD

(Issued December 19, 2002)

1. In this order, we grant in part and deny in part motions seeking to reopen the evidentiary record in the EL01-10, et al. docket for the purpose of allowing parties to submit additional evidence concerning potential refunds for spot market bilateral sales transactions in the Pacific Northwest for the period January 1, 2000 through June 20, 2001. 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 this proceeding (to sellers and customers alike) fairly and quickly.

I. Background

2. On October 26, 2000, Puget Sound Energy, Inc. (Puget Sound) filed a complaint alleging that spot market prices in the Pacific Northwest were unjust and unreasonable. In a December 15, 2000 order (December 15 Order),¹ the Commission declined to

¹San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services,
(continued...)

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implement a region-wide price cap, as Puget Sound had requested. Puget Sound and others timely sought rehearing of the December 15 Order's determination not to impose a regional price cap or other mitigation. However, on June 22, 2001, Puget Sound filed a motion to dismiss its complaint and its subsequent rehearing request. Instead, in a July 25, 2001 order (July 25 Order)², the Commission established a preliminary evidentiary hearing pertaining to the Northwest for the period beginning December 25, 2000 through June 20, 2001 to help facilitate development of a factual record on whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest. In the July 25 Order, the Commission also stated that it would decide at a later time whether to allow Puget Sound to withdraw the complaint. On September 24, 2001, the Presiding Administrative Law Judge (ALJ) issued recommendations and proposed findings of fact in the case, finding no basis to order refunds.³

Motions

3. On May 13, 2002, the City of Tacoma, Washington (Tacoma) filed a motion in which it requests that the Commission reopen the evidentiary record in the EL01-10, et al. docket to allow a "hearing on all issues related to refunds for wholesale energy transactions in excess of the market clearing price in the Pacific Northwest" and permit further investigation and discovery into the actions of specific participants in the Pacific Northwest power market. Tacoma states that since the issuance of Puget Sound, material evidence has become available that demonstrates that the Presiding Judge's conclusions in that decision are "clearly erroneous." On September 9, 2002 and October 2, 2002, Tacoma filed supplements to its motion in which it identifies the existence of additional evidence it alleges is material and relevant to this proceeding.

4. In its motion, Tacoma identifies multiple grounds for reopening the evidentiary record in Docket No. EL01-10, et al. Among those are: (1) the release of documents obtained as part of the Staff investigation in Docket No. PA02-2-000; (2) the issuance of

¹(...continued)
et al., 93 FERC ¶ 61,294 (2000), reh'g denied, 97 FERC ¶ 61,275 (2001).

² San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services, et al., 96 FERC ¶ 61,120 (2001).

³ See Puget Sound Energy Company v. Sellers of Energy and Ancillary Services, 96 FERC ¶ 63,044 (2001) (Puget Sound).

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the Commission Staff's initial report in that docket, (3) the initiation of separate proceedings to investigate instances of possible misconduct of the companies named in those proceedings, which are also respondents in the EL01-10, et al docket; and (4) the Commission solicitation of comments on whether the Commission should change the method for determining refunds in the California refund proceedings. Tacoma also argues that the expedited nature of the proceedings that the Commission ordered contributed to material evidence being unavailable to the Presiding Judge in the EL01-10, et al. docket hearing. Tacoma also adds that the recommendations of the Presiding Judge in this proceeding are inconsistent with the determination the Commission made in Docket No. EL02-28, et al.,⁴ setting for hearing the issue of whether the dysfunctional California spot markets adversely affected the long-term bilateral markets. Tacoma concludes that its motion and supplements thereto provide sufficient evidence to warrant further investigation and discovery into the actions of Pacific Northwest market participants.

5. On May 24, 2002, the City of Seattle, Washington (Seattle) filed a motion requesting that it be allowed to supplement the record or, alternatively, that the Commission reopen the evidentiary record to allow for a hearing before the Presiding Judge. On June 24, 2002, Public Utility District No. 1 of Grays Harbor County, Washington (Grays Harbor) also filed a motion in this proceeding, requesting that the Commission reopen the evidentiary record. In particular, Seattle and Grays Harbor seek to supplement the evidentiary record with evidence developed in the PA02-2-000 Staff investigation and related proceedings.

Answers In Support

6. California Parties⁵ and Attorney General of Washington (Washington AG) support Tacoma's motion. In their opinion, the reasons offered by Tacoma for reopening the evidentiary record are compelling. In particular, Washington AG argues that the Presiding Judge's recommendations are undermined by evidence obtained in Docket PA02-2-000 and that Pacific Northwest utilities should be treated equally with the utilities that have claimed refunds in the EL00-95, et al. docket proceeding. Washington

⁴ Nevada Power Co. and Sierra Pacific Power Co. v. Duke Energy Trading and Mktg, L.P., et al., 99 FERC ¶ 61,047, order on reh'g 100 FERC ¶ 61,273 (2002), reh'g pending.

⁵California Parties include the People of the State of California, ex rel. Bill Lockyer, Attorney General, and the California Electricity Oversight Board.

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Utilities and Transportation Commission, the Oregon Office of Energy, and the Oregon Public Utilities Commission (jointly, Washington Commission) do not oppose Tacoma's motion but urge the Commission to reopen the evidentiary record only for the purpose of investigating the facts and consequences of market manipulation and to focus its remedies, if any, only on wrongdoers. The Washington Commission would oppose imposition of refunds based on spot market transactions.

Answers in Opposition

7. Puget Sound argues that the evidentiary record should not be reopened because the overwhelming majority of market participants, including public power entities, opposed initiation of a wholesale refund proceeding in these dockets in the first place. The Indicated Marketers,⁶ Transaction Finality Group (TFG),⁷ and Mirant argue that the movants have failed to demonstrate the extraordinary circumstances necessary to reopen the evidentiary record in this proceeding, as required by Commission precedent.⁸ Similarly, TransCanada Energy Ltd. (TransCanada) asserts that Tacoma's motion fails to

⁶The Indicated Marketers include Mirant Americas Energy Marketing, L.P. (Mirant); TransAlta Energy Marketing (U.S.) Inc.; and Morgan Stanley Capital Group Inc.

⁷The TFG is composed of Alcoa, Inc.; Avista Energy, Inc.; Columbia Falls Aluminum Company, LLC; Coral Power, LLC; Duke Energy Trading and Marketing, L.L.C.; Edison Mission Marketing & Trading, Inc.; Exelon Corporation on behalf of Exelon Generation Company, LLC; PECO Energy Company and Commonwealth Edison Company; IDACORP Energy, L.P.; Pinnacle West Capital Corporation/Arizona Public Service Company; Portland General Electric Company; PPL Montana, LLC and PPL Energy Plus, LLC; Public Service Company of Colorado; Public Service Company of New Mexico; Puget Sound Energy, Inc.; Trans Canada Energy Ltd.; BP Energy Company; Powerex Corp.; and Sempra Energy Trading Corp. Powerex Corp supports and supplements the comments filed by the TFG.

⁸ The Indicated Marketers cite to Systems Energy Resources, Inc., 96 FERC ¶ 61,165, at 61, 736 (2001) (holding that the Commission's "general rule is that 'the record once closed will not be reopened' absent a demonstration that extraordinary circumstances outweigh the need for administrative finality."); CMS Midland, Inc., *et al.*, 56 FERC ¶ 61,361, 61,736 (1991) (stating that the requesting "party must demonstrate a change in circumstances that is more than just material - it must be a change that goes to the very heart of the case.").

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provide appropriate justification for its request. In TFG's and Indicated Marketers' opinion, the movants should also have established a logical or factual nexus between alleged market manipulation in the California Independent System Operator and California Power Exchange markets and alleged dysfunctions in the Pacific Northwest markets. Eugene Water and Electric Board, Coral Power (Coral), and TFG argue that there is no purpose to reopening the Puget Sound docket prior to the completion of the Staff investigation in the PA02-2-000 docket. TFG believes that a different approach would create uncertainty.

Procedural Matters

8. On June 3, 2002, the Bonneville Power Administration (BPA) filed an untimely answer to Tacoma's May 13, 2002 motion. On June 7, 2002, Tacoma filed a motion to strike BPA's untimely answer. We will disallow BPA's answer pursuant to Rule 213(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(d) (2002).

9. On August 7, 2002, Grays Harbor filed an answer to the Indicated Marketers' answer. 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) (2002), unless otherwise permitted by the decisional authority. We are not persuaded to allow Grays Harbor's answer to the Indicated Marketers' answer.

Discussion

10. In their motions, Tacoma, Seattle, and Grays Harbor seek to reopen or, in the alternative, supplement, the evidentiary record in Docket No. EL01-10, et al. In particular, Tacoma requests permission to introduce evidence developed in the PA02-2-000 docket and related proceedings and to conduct further investigation and discovery into the actions of Pacific Northwest market participants.

11. We will allow the movants and other parties in this proceeding to conduct additional 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. To prevent disclosure of

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confidential information, the presiding judge may adopt a protective order, as appropriate.⁹

12. All of the parties will have until February 28, 2003 to submit directly to the Commission additional evidence concerning potential refunds for spot market bilateral sales transactions in the Pacific Northwest for the period January 1, 2000 through June 20, 2001 and proposed new and/or modified findings of fact. Parties must provide relevant documents and citations to the record to support any proposed substantive recommendations.

13. We intend to finalize the issues in this docket expeditiously. For this reason, we are not remanding this case to the Presiding Judge and will review additional evidence along with the Presiding Judge's recommendations in Puget Sound. Therefore, Tacoma's, Seattle's and Grays Harbor's motions are hereby granted in part and denied in part.

The Commission orders:

(A) Tacoma's, Seattle's and Grays Harbor's motions are hereby granted in part and denied in part, as discussed in the body of this order.

(B) No later than February 28, 2003, the parties in this proceeding 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.

⁹The Commission and its Staff conducting the 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.

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(C) The Chief Administrative Law Judge is hereby directed and authorized to appoint an Administrative Law Judge as a Discovery Master within ten days (10) of the date of issuance of this order. The Discovery Master shall administer discovery and resolve any potential discovery disputes.

By the Commission. Commissioner Brownell dissenting with a separate statement attached.

(S E A L)

Linwood A. Watson, Jr.,
Deputy Secretary.

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Pacific Northwest, Including Parties to the
Western Systems Power Pool Agreement

(Issued December 19, 2002)

BROWNELL, Commissioner, dissenting

In today's order the majority re-opens the record in a case in which a Presiding Administrative Law Judge has already completed a hearing and issued Recommendations and Proposed Findings of Fact; and in which the complainant has moved to withdraw its complaint. Neither equity nor efficiency is served by re-opening the record in this proceeding.

Nora Mead Brownell
Commissioner