

UNITED STATES OF AMERICA 103 FERC * 61,359
FEDERAL ENERGY REGULATORY COMMISSION

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

San Diego Gas & Electric Company,	Docket Nos. EL00-95-000
Complainant	EL00-95-045
	EL00-95-069
v.	
Sellers of Energy and Ancillary Services	
Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange,	
Respondents	
Investigation of Practices of the California	EL00-98-000
Independent System Operator and the	EL00-98-042
California Power Exchange	EL00-98-058
Fact-Finding Investigation Into Possible	PA02-2-000
Manipulation of Electric and Natural Gas Prices	
Reliant Energy Services, Inc.	EL03-59-000
BP Energy Company	EL03-60-000
Enron Power Marketing, Inc. and Enron	EL03-77-000
Energy Services, Inc.	
Bridgeline Gas Marketing, L.L.C., Citrus	RP03-311-000
Trading Corporation, ENA Upstream Company, LLC, Enron Canada Corp., Enron Compression Services Company, Enron Energy Services, Inc., Enron MW, L.L.C., and Enron North America Corp.	
El Paso Electric Company, Enron Power	EL02-113-000
Marketing, Inc., Enron Capital and Trade	
Resources Corporation	
Portland General Electric Company	EL02-114-000
Enron Power Marketing, Inc.	EL02-115-001
Avista Corporation, Avista Energy, Inc.	EL02-115-000

(Issued June 27, 2003)

1. In this order, the Commission denies a motion to consolidate several proceedings and grants a common protective order in the above-captioned proceedings. This order benefits market participants by clarifying the procedures that will be used in several Commission proceedings.

Background

2. On April 29, 2003, the California Parties[1] filed a motion for institution of consolidated proceeding to address remedy and damage issues and for a common protective order in the above-captioned proceedings. Specifically, the California Parties request that the Commission institute a single consolidated proceeding to calculate damages and relief arising from market manipulation impacting the California spot markets during the period January 1, 2000 through June 20, 2001. The California Parties contend that damage calculations that will make parties whole for market manipulation inevitably involve overlapping and intertwined calculations and should be accommodated in a single damage/remedy proceeding. The California Parties state that the existing refund proceeding in Docket Nos. EL00-95 and EL00-98 is best suited to accomplish this goal.

3. In addition, the California Parties request that the Commission adopt a protective order common to all proceedings that address the issue of market manipulation impacting the California spot markets during the period January 1, 2000 through June 20, 2001. The California Parties argue that a common protective order is necessary to prevent drastically hindering the development of the record because the standard Commission protective order limits the use of materials on a proceeding-by-proceeding basis. Because of the existence of multiple proceedings, the California Parties contend that, without a common protective order, parties will have to waste valuable time and resources repeating discovery in one docket, when the same information is relevant to other dockets and has already been uncovered in other dockets.

Answers

4. The following parties filed timely answers to the California Parties' motion: Arizona Electric Power Cooperative, Inc.; Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California; Avista Corporation; Bridgeline Gas Marketing LLC; City of Burbank and Glendale, California and the Turlock Irrigation District; Californians for Renewable Energy (CARE); Citrus Trading Corporation; Commission Trial Staff; Competitive Supplier Group[2]; Duke Energy North America, LLC, and Duke Energy Trading and Marketing, LLC; Enron Entities[3]; Public Utility District No. 2 of Grant County, Washington; Indicated Generators[4]; Metropolitan Water District of Southern California; M-S-R Power Agency and the Cities of Palo Alto, Redding, and Santa Clara, California; Modesto Irrigation District; Northern California Power Agency; Powerex Corp; Sacramento Municipal Utility District; and the Western Area Power Administration. On May 27, 2003, the California Parties filed an answer to the above parties' answers. On June 11, 2003, the Pinnacle West Capital Corporation and Arizona Public Service Company, members of the Competitive Supplier Group, filed an

answer to the California Parties' answer.

5. With two exceptions, all of the commenters oppose the California Parties' motion for consolidation. Generally, the parties that oppose the motion to consolidate make the following arguments:

a. The California Parties' claim that a market-wide "make-whole" remedy is required to address manipulation is unfounded and premature because there has been no Commission finding of liability for market manipulation;

b. Consolidation will not ease regulatory burdens, but will lead to unnecessary complications and impose burdens on the Commission and other parties, including making it more difficult to maintain the confidential and proprietary nature of information that parties have been required to produce and present;

c. A multi-party proceeding would be highly inefficient for small entities that would be forced to participate in wide-ranging matters of limited interest;

d. Consolidation would delay resolution of proceedings that are currently in an advanced stage and would be prejudicial to parties involved in these proceedings;

e. Consolidation would combine cases involving unrelated issues of fact and law, different parties, different theories of liability, and different adjudicatory procedures; and

f. Consolidation is an attempt by the California Parties to circumvent the Commission's finding that the refund period began on October 2, 2000.

6. Commission Trial Staff generally supports the concept of consolidated hearings, but it objects to the consolidation of Docket Nos. EL00-95, EL02-113, EL02-114, and EL02-115 with any other proceedings because these proceedings have diverse issues and procedural paths and some of these proceedings have been ongoing for years, while others have not yet begun. Commission Trial Staff suggests that, with the exception of three proceedings (i.e. EL02-113, EL02-114, and EL02-115), the remaining proceedings could be consolidated into three proceedings, rather than one proceeding. The categories that Commission Trial Staff recommends for these proceedings are as follows: 1. Parties that are the subject of all new show cause orders that used "Enron strategies"; 2. Parties that were Enron business partners that allegedly acted in concert to improperly manipulate the market; and 3. Parties that are the subject of show cause orders for alleged violations of CAISO and California Power Exchange tariffs concerning economic withholding of generation and inflated bidding. CARE also supports the motion to consolidate because it would give the public a "comprehensive view" of the past, present and future of these proceedings.

7. In their answer, the California Parties agree with Commission Trial Staff that three proceedings should not be part of a consolidation because of the significant procedural developments that have already occurred (i.e. EL02-113, EL02-114, and EL02-115). Thus, in their answer, the California Parties withdraw their motion to consolidate three proceedings: El Paso Electric Co., 100 FERC * 61,188 (2002); Portland General Electric

Co., 100 FERC * 61,186 (2002); and Avista Corp., 100 FERC * 61,187 (2002). However, the California Parties oppose Commission Trial Staff's suggestion that the remaining proceedings could be consolidated into three proceedings, rather than one proceeding. The California Parties state that "[i]f the Commission were to break the proceeding into three parts . . . , they would inevitably overlap, confounding the segregation."

8. Generally, the parties that oppose the California Parties' request for a common protective order make the following arguments:

a. A single common protective order will make it more difficult to maintain the confidential and proprietary nature of information that parties have been required to produce and present;

b. Any need for material produced in other dockets can be met through a standard data request; and

c. The California Parties should not be permitted to "side-step" the procedural obligation to demonstrate that the materials they wish to rely on in more than one proceeding are both relevant to the issues to be decided in each proceeding and admissible.

9. Commission Trial Staff supports the California Parties' request for a common protective order applicable to all of the proceedings, as well as to any additional proceedings concerning market manipulation that may be instituted. Commission Trial Staff states that a common protective order would be an efficient means of allowing a free flow of information, unencumbered by costly procedural delays, between the various proceedings.

Discussion

10. As an initial matter, we note that Rule 213(a) of the Commission's Rules of Practice and Procedure prohibits an answer to an answer unless otherwise permitted by a decisional authority.[5] However, in this case, we find the California Parties' May 27 answer and the Pinnacle West Capital Corporation and Arizona Public Service Company jointly filed June 11 answer to be helpful in the development of the record in this proceeding, and accordingly, we accept them.

11. We find that consolidation of the multiple proceedings that the California Parties identify in their motion into one proceeding or three proceedings would not lead to increased efficiency in the resolution of factual or legal issues.[6] There remain distinct factual and legal issues in each proceeding that are in different stages of development. Consolidation would only act to delay more advanced proceedings and the resolution of discrete issues, while other proceedings are given the opportunity to catch-up. Furthermore, we find that a massive single proceeding on the scale that the California Parties propose would create more problems than it would solve and would create unnecessary administrative problems for Commission staff and resources. Finally, we find that consolidation would be highly inefficient and costly for small entities, such as various California municipalities, that would be forced to participate in a wide-ranging proceeding on issues in which they have little interest. Accordingly, we will deny the California Parties' motion to consolidate multiple proceedings into one proceeding.

12. We find that a common protective order for these proceedings would provide efficiencies and benefit many parties that outweigh any disadvantages. While there remain distinct factual and legal issues in different stages of development in each of the above-captioned proceedings, we find that there may be limited occasions when a party may believe that evidence discovered in one proceeding has relevance to issues in one of these other proceedings. We find that a common protective order for the above-captioned proceedings would allow for the unencumbered movement of such evidence to other proceedings. Furthermore, we find that a common protective order would not preclude any party from raising an objection to the introduction of evidence in another proceeding based on relevance or confidentiality. Accordingly, we will direct the presiding administrative law judge in the EL00-95 proceeding to issue a common protective order for the above-captioned proceedings.

The Commission orders:

(1) The Commission hereby denies the California Parties' motion to consolidate multiple proceedings into one proceeding, as discussed in the body of this order.

(2) The Commission hereby grants the California Parties' request for a common protective order in the above-captioned proceedings, as discussed in the body of this order.

(3) The presiding administrative law judge in the EL00-95 proceeding shall issue a common protective order in the above-captioned proceedings within fifteen (15) days of the date of this order.

By the Commission.

(SEAL)

Magalie R. Salas,
Secretary.

Footnotes

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

[2]The Competitive Supplier Group consists of the following parties: Avista Energy, Inc.; Constellation Power Source, Inc.; Coral Power, L.L.C.; Exelon Corporation, on behalf of Exelon Generation Company, LLC; PECO Energy Company and Commonwealth Edison Company; IDACORP Energy L.P.; Morgan Stanley Capital Group Inc.; PPL EnergyPlus, LLC and PPL Montana, LLC; Pinnacle West Capital Corporation and Arizona Public Service Company; Public Service Company of Colorado; Public Service Company of New Mexico; Puget Sound Energy, Inc.; TransCanada Energy Ltd., TransAlta Energy Marketing (CA) Inc. and TransAlta Energy Marketing (US) Inc.; and Tucson Electric Power Company.

[3]The Enron Entities consist of the following parties: Enron Power Marketing, Inc.; Enron Energy Services, Inc.; ENA Upstream

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Company, LLC; Enron Canada Corp; Enron Compression Services Company; Enron Energy Services, Inc.; Enron MW, LLC; and Enron North America Corporation.

[4]The Indicated Generators are Dynegy Power Marketing, Inc. et al.; Mirant Americas Energy Marketing, LP, et al.; Reliant Energy Power Generation, Inc., et al.; and Williams Energy Marketing & Trading Company.

[5]See 18 C.F.R. * 385.213(a)(2) (2002).

[6]See PP&L Resources, Inc., et al., 90 FERC * 61,203 at 61,653 (2000).