

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Fact-Finding Investigation of Potential)	Docket No. PA02-2-000, <u>et al.</u>
Manipulation of Electric and Natural)	
Gas Prices)	
)	
American Electric Power Service Corp., <u>et al.</u>)	Docket Nos. EL03-137-000, <u>et al.</u>
)	(Consolidated)
)	
Enron Power Marketing, Inc.)	Docket Nos. EL03-180-000, <u>et al.</u>
and Enron Energy Services Inc., <u>et al.</u>)	(Consolidated)
)	
San Diego Gas & Electric Company,)	
Complainant)	
)	
v.)	Docket No. EL00-95-000, <u>et al.</u>
)	
Sellers of Energy and Ancillary Services Into)	
Markets Operated by the California)	
Independent Systems Operator and the)	
California Power Exchange,)	
Respondents)	
)	
Investigation of Practices of the California)	Docket No. EL00-98-000, <u>et al.</u>
Independent System Operator and the)	
California Power Exchange)	
)	
Other Investigations)	Undocketed

ORDER ON REHEARING AND
ON MOTION ON DISCLOSURE OF INFORMATION,
AND NOTICE OF INTENT TO RELEASE DOCUMENTS

(Issued November 14, 2003)

1. This order addresses the requests for rehearing filed by Enron Corporation (Enron) and jointly by Citrus Corporation (Citrus) and Northern Border Partners, L.P. (NBP) of the Commission's September 15, 2003 order in Docket No. PA02-2-000 (September 15 Order), which directed the re-release of documents submitted in Docket No. PA02-2-000.¹ No other parties filed requests for rehearing of the September 15 Order.² This order also addresses the motion filed by the California Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Southern California Edison Company, and Pacific Gas and Electric Company (collectively, the California Parties), which requested that the Commission identify the universe of documents in the above captioned proceedings, and to explain what documents have not been made public and why.

Background

2. On March 5, 2003, the Commission issued a notice that it intended to release to the public information collected in its investigation into manipulation of energy prices in the West, and sought, by March 12, 2003, comments from those companies and individuals who submitted information during the course of the investigation. Eighteen companies or organizations, as well as the United States Attorney for the Southern District of Texas, filed comments or otherwise responded. On March 21, 2003, the Commission issued an order addressing the comments and responses to its March 5, 2003 notice, and further announced that it would release the information, except as noted in the order, in no less than five days after issuance of the order. 102 FERC ¶ 61,311 (March 21 Order). One exception to the release was personal personnel information that was raised by three of the commenters. In this regard, the Commission asked that companies or individuals provide specifics by March 24, 2003, so that such information

¹Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 104 FERC ¶ 61,294 (2003).

²HGP, Inc. (HGP) filed comments on the September 15 Order, but did not seek rehearing. HGP's concerns were adequately addressed in prior Commission orders issued in this proceeding. See, e.g., 104 FERC ¶ 61,294 at P 10.

could be excluded from the public release. One company provided such details. Thereafter, on March 26, 2003, the Commission released the remaining information.

3. Subsequent to the release of the information, on March 28, 2003, the Commission received the first of seven motions from Enron asking that certain parts of the released information be removed from public access. These motions in particular attempted to identify Enron employees' personal information. The Commission also received calls on its Enforcement Hotline from Enron employees who were concerned about their personal information being available on the internet. As quickly as possible, the Commission staff accommodated these requests in keeping with the Commission's stated concerns in the March 21 Order about releasing certain personal data.

4. Further, on April 7, 2003, the Secretary of the Commission issued a notice (April 7 Notice) that the Commission would remove temporarily, until April 24, 2003, Enron e-mails that had been placed on the agency's web site pursuant to the March 21 Order. The notice indicated that during that time the Commission would consider any requests that certain personal and other information be permanently removed from public accessibility.

5. In the meantime, on April 4, 2003, Enron filed a petition for writ of mandamus and an emergency motion to stay the March 21 Order in the United States Court of Appeals for the Fifth Circuit, Enron Corp. v. FERC, No. 03-60295, requesting that all Enron e-mails posted on the Commission's web site be removed. No other party filed a motion in court requesting a stay of the March 21 Order. On April 7, 2003, the court denied Enron's petition for writ of mandamus, and granted the stay request, but only to the extent that it directed the Commission to remove all Enron e-mails from its web site until further order of the court. The court also directed the Commission to file a response in this proceeding by close of business April 11, 2003. Subsequently, in light of the Commission's removal of the Enron e-mails from its web site on April 7, the court granted Enron's motion to hold the case in abeyance and to defer the need for the Commission to file a response by April 11, 2003, until April 24, 2003. Accordingly, the Commission's April 7 action removing the Enron e-mails from its web site coincided exactly with the Fifth Circuit's stay of the March 21 Order to the extent the stay action implicated the withdrawal of Enron e-mails from the agency's web site.

6. On April 22, 2003, the Commission issued an Order on Re-Release of Data Removed from Public Accessibility on April 7, 2003. 103 FERC ¶ 61,077 (2003) (April 22 Order). In the April 22 Order, the Commission stated that it would not re-release any of the documents that respondents sought to be withheld with specificity until the Commission had reviewed those documents and given the respondents and the

public notice of its intent to re-release specific documents. Id. at P 7-8. As the Commission directed in its April 22 Order, its staff is currently reviewing the data proffered for removal to ascertain whether indeed it should be in the public domain. No one sought rehearing of the April 22 Order.

7. With respect to the data that was removed from the Commission's web site pursuant to the April 7 Notice but that was not identified by any company or individual for permanent removal, as directed by the Commission, Commission staff returned that data to the agency's web site. See 103 FERC ¶ 61,077 at P 9.

8. On September 15, 2003, the Commission issued its first order on the re-release of documents in accord with the April 22 Order. 104 FERC ¶ 61,294. The September 15 Order identified 12,057 documents as appropriate for re-release and 5,128 documents as appropriate for permanent removal because they contain information not relating to the investigation including social security numbers, home telephone numbers, employee performance evaluations, personal photographs, and spam.

Requests for Rehearing

9. On October 15, 2003, Enron filed a request for rehearing of the September 15 Order, contending that the Commission acted arbitrarily and capriciously when it directed the release of information that is exempt from disclosure by law and unrelated to the investigation in this proceeding. Enron further asserts that the release of such information will cause irreparable harm to Enron and others. Enron specifically seeks rehearing of the decision to release 255 documents, which Enron claims contain personal information.

10. Also, on October 15, 2003, Citrus and NBP jointly filed a request for rehearing of the September 15 Order.³ Citrus and NBP contend that: (1) they may not be deemed to have had notice that its documents would be released; (2) the Commission acted arbitrarily and capriciously when it directed the release of information that is protected by law or unrelated to the investigation in this proceeding; and (3) the release of information will cause irreparable harm to them. Citrus and NBP assert that 1,061 documents which relate to Citrus and NBP and were identified for re-release are unrelated to the

³Enron is a joint venture partner in Citrus and NBP. Citrus owns, inter alia, Florida Gas Transmission Company. NBP owns, inter alia, interests in Northern Border Pipeline Company, Midwestern Gas Transmission Company, and other interstate natural gas pipelines.

Commission staff's investigation into the Western markets and should not be publicly re-released.

Motion and Answers Regarding the Release of Information

11. On September 30, 2003, the California Parties filed a motion that the Commission: (1) ensure a full and fair disclosure of all documents and data received by the Commission in Docket No. PA02-2-000, et al., as well as the full disclosure of all responses to data requests; (2) direct sellers to submit working papers for the March 20, 2003 filings and the May 12, 2003 gas cost allowance filings; and (3) provide an index of all documents provided to the Commission in Docket No. PA02-2-000, and related proceedings.

12. Timely answers to the California Parties' motion were filed by: Enron; Citrus and NBP; the City of Burbank, California (Burbank), the City of Glendale, California (Glendale), and Turlock Irrigation District (Turlock); Reliant Energy Power Generation, Inc., Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC., Dynege Power Marketing, Inc., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC and Cabrillo Power II LLC, and Williams Power Company, Inc., formerly known as Williams Energy Marketing & Trading Company (collectively, the California Generators); Duke Energy North America, L.L.C. and Duke Energy Trading and Marketing, L.L.C. (collectively, Duke Energy); and El Paso Merchant Energy, L.P. (El Paso Merchant).

13. In their answers, two of the respondents contend that the Commission is appropriately ensuring a full and fair disclosure of all documents obtained in Docket No. PA02-2-000 through its current review process. Enron, at p. 5; Citrus and NBP at pp. 2-5. Several respondents express concern that the release of the information at issue could jeopardize ongoing investigations, and have a chilling effect on companies complying with future investigations. California Generators, at pp. 4-6; El Paso Merchant, at pp. 5-6. Respondents also remark that the release of documents that were submitted to the Commission staff in confidence in connection with on-going investigations would be inappropriate because it could interfere with the Commission staff's ability to complete its investigations adequately and may discourage parties from entering into settlement negotiations. El Paso Merchant, at pp. 7-9; Duke Energy, at p. 2; California Generators, at pp. 6-8.

14. Respondents also contend that the California Parties failed to take advantage of the appropriate discovery period to obtain the working papers at issue. Duke Energy, at pp. 2-3; California Generators, at p. 9. One respondent in particular asserts that the request

for working papers was untimely as it related to both the March 20, 2003 and May 12, 2003 filings. Duke, at pp. 2-3. Noting that the California Parties did not provide to all other parties the work papers of its March 20, 2003 filing, another respondent objects to the California Parties' demand that parties claiming fuel cost offsets provide working papers for those filings, and argues that all parties had the opportunity to obtain the information through discovery. California Generators, at pp. 9-10.

15. Three respondents express concerns with the California Parties' request that Commission staff compile an index of all PA02-2-000 documents, as well as other relevant materials received by the Commission in proceedings that grew out of that docket. Burbank, Glendale, and Turlock, at pp. 5-6; Citrus and NBP, at pp. 5-6; Enron, at p. 7. Enron does not object to such an index if it does not publicly divulge sensitive personal and commercial information. Enron, at p. 7. However, Citrus and NBP, and Burbank, Glendale, and Turlock contend that the creation of such an index in itself would be unreasonable and unduly burdensome under the circumstances. Citrus and NBP, at p. 6; Burbank, Glendale, and Turlock, at pp. 5-6. Citrus and NBP, in particular, express concern that compiling such an index could detract from Commission staff's current effort to review the remaining non-public documents in Docket No. PA02-2-000. Citrus and NBP, at p. 6.

Discussion

16. Enron's contention that a relatively small number of documents identified for re-release contain personal information is correct. In its review of the massive number of documents identified for permanent removal, Commission staff inadvertently identified some documents containing personal information for re-release. As the Commission has previously ordered that such documents not be returned to public access, see 103 FERC ¶ 61,077 P 7, the Commission grants Enron's request for rehearing as to those documents that contain personal information. However, some documents identified by Enron as containing personal information actually contain information that is appropriate for re-release because they do not contain the personal information alleged, and they do not fall within the categories identified by the Commission as appropriate for permanent removal. See id. at P 7-8. Therefore, the Commission denies Enron's request for rehearing as to these documents, which are identified in Appendix A to this order.

17. On March 5, 2003, at the latest, Enron and others were put on notice of the Commission's intent to release documents obtained during the investigation conducted in this proceeding. Eighteen companies and individuals responded to the March 5 Notice. Enron, Citrus, and NBP did not respond to that notice or to the March 21 Order that provided further opportunity to bring personal information to the Commission's attention.

As described supra note 3, Enron is a parent corporation of Citrus and NBP. Although there is no argument that Enron was put on notice of the Commission's intent to release documents, Citrus and NBP make a colorable argument that they did not receive such notice. Therefore, the Commission grants *for now* their request not to re-release the documents identified in their request for rehearing. Within seven days from the date of this order, Citrus and NBP must identify for the Commission the 1,061 documents, as well as any others that are not currently publicly available, alleged to be their documents.

18. Under these circumstances, the Commission hereby gives notice that it intends to release to the public any of Citrus' and NBP's documents that relate to the Commission's investigation into manipulation of energy prices in the West, including information that led to any of the show cause orders issued in related proceedings or that illustrate the corporate relationship of Enron with its affiliates.⁴ Written comments are due within seven days from the date of this notice, and should clearly explain any opposition to or support of the release of these documents, or portions thereof, and the rationale for that position. All comments filed in response to this notice must be detailed and specific. The Commission will not be persuaded by conclusory statements as to why the information deserves protection.

19. Once Commission staff receives the identity of the documents, review will be undertaken to determine which of the identified e-mails, if any, contain personal information that has nothing to do with the Commission's investigation. None of those e-mails will be re-released. Nevertheless, as the Commission has previously stated, the Commission intended to release as much information as possible to enable the public to understand better the bases for its determinations in the report on the Enron investigation issued the same day as the information was released and other decisions that might flow from that report. See, e.g., 103 FERC ¶ 61,077 at P 7. The Commission clarifies here that such information includes evidence discussed in the Final Staff Report issued in Docket No. PA02-2-000 that Enron and *its affiliates* may have acted inconsistently with their market-based rate authority, not only by engaging in gaming, but also by failing to inform the Commission in a timely manner of changes in their market shares by gaining influence or control over others' facilities in violation of their market-based rate authority.

⁴As the Commission finds that Citrus and NBP may not have adequately received notice that the Commission would release documents obtained in Docket No. PA02-2-000, and is giving such notice here, Citrus and NBP's remaining arguments on rehearing are dismissed as untimely.

20. The Commission denies the California Parties' motion as administratively unnecessary and burdensome. First, as detailed above, the Commission currently has a process in place to review the remaining non-public documents obtained in Docket No. PA02-2-000.⁵ See 104 FERC ¶ 61,294 at P 8.

21. Second, preparing an index of the documents obtained in PA02-2-000 and related proceedings would create an undue burden on Commission staff which is currently in the process of determining which of the 141,379 documents are appropriate for re-release, *i.e.*, all documents containing information related to the Commission's completed investigation in Docket No. PA02-2-000. Preparing such an index would also slow the re-release of the documents. Moreover, the Commission is under no obligation pursuant to the Federal Power Act, 16 U.S.C. §§ 792-823c, or the Natural Gas Act, 15 U.S.C. §§ 717-717w, to create such an index.

22. Third, the Commission cannot allow the California Parties' motion to circumvent the procedures already established by the Commission or the Administrative Law Judges in the relevant proceedings that grew out of Docket No. PA02-2-000 or involve Western market issues.

23. Finally, the California Parties have included in the coverage of their motion documents in "other undocketed investigations." By definition, such investigations would generally be conducted under Section 1b of the Commission's regulations, 18 C.F.R. § 1b, and be non-public investigations in two senses of the word "non-public." Unless announced or publicly discussed by the Commission, such investigations are not known to the general public.⁶ Furthermore, such investigations are not open to the

⁵ As detailed in the March 21 Order, the record in Docket No. PA02-2-000 intended for release amounted to over 2 terabytes of information, which would fill 1.5 million floppy diskettes or 3,341 compact diskettes. 102 FERC ¶ 61,311 at n.1. Ultimately, after the steps taken in response to the reaction of Enron, its current and former employees, and others to the actual release of information on March 26, *see supra* P 3-6, the Commission withdrew 141,379 emails, which are now the subject of review by Commission staff. As the Commission previously described the matter, these documents, which amount to approximately eight percent of the Enron e-mails removed from public access on April 7, 2003, fill no more than one compact diskette out of 3,341 compact diskettes of information released on March 26, 2003. 103 FERC ¶ 61,077 at n.3.

⁶ For example, the Commission publicly discussed an undocketed investigation into the physical withholding of capacity at its March 26, 2003 meeting.

public; participation is limited to the Commission's investigative staff and the companies or individuals contacted by staff. See Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, et al., 105 FERC ¶ 61,063; see also Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456 (D.C. Cir. 2001).

24. Against this backdrop, the Commission denies the California Parties' request for non-public information in "other undocketed proceeding," as inconsistent with the purposes of the non-public treatment of investigatory records. First, non-public treatment of investigative information minimizes the potential destruction of evidence, loss of information and witness collusion that might occur if such information became public before the investigation were to end. Non-public treatment of investigative information also protects persons or companies that provide information from unfair, adverse publicity or financial repercussions that could follow public disclosure of information during an investigation. Next, public disclosure of investigative information could make companies less likely to cooperate in future investigations. This cooperation is an important component in performing investigations on a reasonable timeline and in negotiating settlements. Finally, keeping investigative information non-public protects the integrity of ongoing investigations into related matters. The Commission is not conceding that such records actually exist, only that such records may exist. In the event such records exist, their release or identification is not appropriate at this time as such release or identification could jeopardize the Commission's ability to complete any investigations.

The Commission orders:

- (A) Enron's request for rehearing is granted in part and denied in part as described above.
- (B) Citrus and NBP's request for rehearing is granted as described above.
- (C) California Parties' motion is denied.
- (D) Staff is directed to return data not identified by any respondent, as discussed in this order, to the agency's web site.
- (E) Notice is hereby given that pursuant to the Commission's regulations, 18 C.F.R. ' 388.112(d) (2003), the Commission intends to release Citrus' and NBP's documents submitted in Docket No. PA02-2-000 that relate to the Commission's investigation in that proceeding. Any submitter of information with a confidentiality interest in these documents may submit comments on the release of these documents.

Written comments are due within seven days from the date of this notice, and should clearly explain any opposition to the release of these documents, or portions thereof, and the rationale for that position. The Commission will not be persuaded by conclusory statements as to why the information deserves protection.

(F) Any person desiring to be heard in response to the notice directed by Paragraph (E) should file comments with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. Comments will be considered by the Commission in determining the appropriate action to be taken. This notice is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's web site at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll-free at (866) 208-3676, or TTY, contact (202) 502-8659. The Commission strongly encourages electronic filings. See 18 C.F.R. ' 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "e-Filing" link.

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

(S E A L)

Magalie R. Salas,
Secretary

Appendix A
Documents to be Re-Released

Firstbates	Lastbates
ECD-000003534	ECd-000003535
ECD-000308384	ECd-000308384
ECD-000308411	ECd-000308434
ECD-000308435	ECd-000308444
ECD-000308551	ECd-000308574
ECD-000308576	ECd-000308596
ECD-000308601	ECd-000308621
ECD-001055222	ECd-001055222
ECD-000308448	ECd-000308471
ECD-000308504	ECd-000308524
ECD-000308526	ECd-000308549
ECD-000088875	ECd-000088885
ECD-000308151	ECd-000308165
ECD-000308289	ECd-000308328
ECD-000308344	ECd-000308383
ECD-000658059	ECd-000658059

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MASSEY, Commissioner, dissenting in part:

To the extent any evidence or other investigative information compiled by the Commission or its staff in the course of a non-public investigation is informed by the evidence adduced in the 100-Days discovery process, I dissent in part for the reasons set out in my dissent to an order issued on October 16, 2003.¹

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

William L. Massey
Commissioner

¹ Fact Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices, 105 FERC ¶61,063 (2003).