

107 FERC ¶ 61,108
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Fact-Finding Investigation of Potential	)	Docket No. PA02-2-016, <u>et al.</u>
Manipulation of Electric and Natural	)	
Gas Prices	)	
	)	
American Electric Power Service	)	Docket Nos. EL03-137-003, <u>et al.</u>
Corporation, <u>et al.</u>	)	(Consolidated)
	)	
Enron Power Marketing, Inc.	)	Docket Nos. EL03-180-002, <u>et al.</u>
and Enron Energy Services Inc., <u>et al.</u>	)	(Consolidated)
	)	
San Diego Gas & Electric Company,	)	
Complainant	)	
	)	
v.	)	Docket No. EL00-95-090, <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. EL00-98-077, <u>et al.</u>
Independent System Operator and the	)	
California Power Exchange	)	
	)	
Other Investigations	)	Undocketed

ORDER ON REHEARING

(Issued May 5, 2004)

1. This order addresses: (1) the request for rehearing 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) of the Commission's November 14, 2003 Order in this proceeding (November 14 Order); (2) the requests for rehearing filed by the California Parties, Enron Corporation (Enron), and jointly by Citrus Corporation (Citrus) and Northern Border Partners, L.P. (NBP) of the Commission's December 23, 2003 Order issued in Docket No. PA02-2-000 (December 23 Order); and (3) the requests for rehearing filed by the California Parties, Enron, and jointly by Citrus and NBP of the Commission's March 8, 2004 Order issued in Docket No. PA02-2-000 (March 8 Order). The November 14 Order, inter alia, denied the California Parties' motion requesting 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.¹ The December 23 Order is the Commission's second order on the re-release of documents in accord with the Commission's April 22, 2003 Order in this proceeding (April 22 Order), which dealt with the release of documents submitted in Docket No. PA02-2-000.² The December 23 Order identified 52,828 documents as appropriate for re-release and 15,806 documents as appropriate for permanent removal because they contain personal and other information not relating to the investigation.³ The March 8 Order identified 30,727 documents as appropriate for re-release and 8,151 documents as appropriate for permanent removal because they contain personal and other information not relating to the investigation.⁴

¹ Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, et al., 105 FERC ¶ 61,205 (2003).

² Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 103 FERC ¶ 61,077 (2003).

³ Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 105 FERC ¶ 61,361 (2003).

⁴ Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 106 FERC ¶ 61,239 (2004).

Background

Docket No. PA02-2-000

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. Enron, Citrus, and NBP were not among those respondents. 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. 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 could be excluded from the public release. One company provided such details. Thereafter, on March 26, 2003, the Commission released the remaining information. 102 FERC ¶ 61,311.

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. 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). 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 reviewed 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.

6. 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.

7. On September 15, 2003, the Commission issued its first order on the re-release of documents in accord with the April 22 Order (September 15 Order). 104 FERC ¶ 61,294 (2003). 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 personal and other information not relating to the investigation.

8. 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.

9. On November 14, 2003, the Commission issued an Order on Rehearing and on Motion on Disclosure of Information, and Notice of Intent to Release Documents. 105 FERC ¶ 61,205 (2003). This order addressed (1) the California Parties' September 30 motion, and (2) the requests for rehearing filed by Enron and jointly by Citrus and NBP of the Commission's September 15 Order. Specifically, this order: (1) denied the California Parties' motion; (2) granted Enron's rehearing request as to documents that contain personal information; (3) denied Enron's rehearing request as to documents that do not contain personal information; and (4) provided notice to Citrus and NBP of the Commission's intent to re-release documents involving them but related to staff's investigation in Docket No. PA02-2-000. Shortly thereafter, Commission staff returned to the agency's web site the documents appropriate for re-release. On January 14, 2004, the Commission issued an Order Granting Rehearing for Further Consideration of the November 14 Order.

10. On December 23, 2003, the Commission issued its second order on the re-release of documents in accord with the April 22 Order. 105 FERC ¶ 61,361 (2003). The

December 23 Order identified 52,828 documents as appropriate for re-release and 15,806 documents as appropriate for permanent removal because they contain personal and other information not relating to the investigation. Timely motions for clarification or, in the alternative, requests for rehearing of the December 23 Order were filed by Enron, the California Parties, and jointly by Citrus and NBP. Shortly thereafter, Commission staff returned to the agency's web site the documents appropriate for re-release. On February 17, 2004, the Commission issued an Order Granting Rehearing for Further Consideration of the December 23 Order.

11. The Commission issued its third order on the re-release of documents in accord with the April 22 Order on March 8, 2004 (March 8 Order). 106 FERC ¶ 61,239 (2004). The March 8 Order identified 30,727 documents as appropriate for re-release and 8,151 documents as appropriate for permanent removal because they contain personal and other information not relating to the investigation. Timely motions for clarification or, in the alternative, requests for rehearing of the March 8 Order were filed by Enron, the California Parties, and jointly by Citrus and NBP. Shortly thereafter, Commission staff returned to the agency's web site the documents appropriate for re-release. On April 28, 2004, the Commission issued an Order Granting Rehearing for Further Consideration of the March 8 Order.

Docket No. EL03-137-000, et al.

12. On June 25, 2003, the Commission issued an Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior. American Electric Power Service Corp., et al., 103 FERC ¶ 61,345 (2003) (Gaming Order). The Gaming Order found that all of "the entities listed in the caption (Identified Entities) appear to have participated in activities (Gaming Practices), that constitute gaming and/or anomalous market behavior in violation of the California Independent System Operator Corporation's (ISO) and California Power Exchange's (PX) tariffs during the period January 1, 2000 to June 20, 2001, that warrant a monetary remedy of disgorgement of unjust profits and that may warrant other additional, appropriate non-monetary remedies." Id. at P 1, 70-71. These findings were based on certain tariffs provisions, an ISO study, a report by Commission staff, and evidence and comments submitted by market participants. Id. at P 1, 71.

13. In light of these findings, the Gaming Order directed the Identified Entities, in a trial-type hearing to be held before an administrative law judge (ALJ), to show cause why their behavior during the January 1, 2000 to June 20, 2001 period does not constitute gaming and/or anomalous market behavior as defined in the ISO and PX tariffs. Id. at P 2, 71. The Gaming Order also instructed the ALJ to hear evidence and render findings and conclusions, quantifying the full extent to which the Identified Entities may have

been unjustly enriched as a result of their conduct. Id. at P 71. The Commission further instructed the ALJ to consider “any additional, appropriate non-monetary remedies, as may be appropriate, e.g. revocation of an Identified Entity’s market-based rate authority and revisions to an Identified Entity’s code of conduct.” Id.

14. The Gaming Order also directed the ISO to provide to the Identified Entities and the Commission, within twenty-one (21) days of the Order, “all of the specific transaction data for each of the Gaming Practices discussed in the ISO Report, including an explanation of the screen(s) that it used to identify the transactions in question.” Id. at P 72; see also id. at P 2 n.2. Within forty-five (45) days thereafter, the Identified Entities were required to file their show cause responses, unless an offer of settlement was filed in lieu thereof.

Docket No. EL03-180-000, et al.

15. Also, on June 25, 2003, the Commission issued an Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior Through the Use of Partnerships, Alliances Other Arrangements and Directing Submission of Information. Enron Power Marketing, Inc. and Enron Energy Servs. Inc., et al., 103 FERC ¶ 61,346 (2003) (Partnership Order). In the Partnership Order, the Commission found that there was evidence that named entities worked in concert through partnerships, alliances or other arrangements to engage in activities that constitute gaming and/or anomalous market behavior (Gaming Practices) in violation of the ISO’s and PX’s Tariffs during the period January 1, 2000 to June 20, 2001. The Commission held that such activities could warrant a monetary remedy of disgorgement of unjust profits and other additional, appropriate non-monetary remedies. Id. at P 2, 44. The Commission further found that named entities, “through partnership, alliances or other arrangements . . . appear to have jointly engaged in market manipulation schemes that had profound adverse impacts on market outcomes and that violated the ISO and PX tariffs” Id. at P 44. The Commission therefore directed the named entities to show cause, in a trial-type hearing to be held before an ALJ, why they should not be found to have engaged in Gaming Practices in violation of the ISO and PX Tariffs. Id. at P 46.

Docket Nos. EL00-95-000, et al. and EL00-98-000, et al.

16. On August 2, 2000, in response to significant increases in prices for energy and ancillary services in California, San Diego Gas & Electric Company (SDG&E) filed a complaint in Docket No. EL00-95-000. This complaint, filed against all sellers of energy and ancillary services into the ISO and PX markets subject to the Commission's jurisdiction, requested that the Commission impose a \$250 price cap for sales into those

markets. The Commission denied this request in an order issued August 23, 2000, on the grounds that SDG&E had not provided sufficient evidence to support an immediate seller's price cap. San Diego Gas & Electric Company, et al., 92 FERC ¶ 61,172, at p. 61,606 (2000); order on reh'g., 93 FERC ¶ 61,121 (2000). However, in that order, the Commission instituted consolidated formal hearing procedures under section 206 of the Federal Power Act (FPA), 16 U.S.C. §§ 792-823c, to investigate the justness and reasonableness of the rates of public utility sellers into the ISO and PX markets, and also to investigate whether the tariffs, contracts, institutional structures and bylaws of the ISO and PX were adversely affecting the wholesale power markets in California.⁵ The Commission's December 19, 2001 Order, 97 FERC ¶ 61,275 at 62,172-78, includes a detailed background section that summarizes the Commission's orders that relate to the mitigation of prices in the Western markets and other actions to correct dysfunctions and possible exercises of market power in those markets.

Requests for Rehearing of the November 14 Order

17. On December 15, 2003, the California Parties filed a request for rehearing of the November 14 Order. The California Parties contend that the Commission's November 14 Order erred by: (1) not addressing any of the specific data or working papers identified in their September 30 motion; (2) rejecting their request for an index of documents; and (3) not releasing relevant documents in undocketed proceedings. Regarding the assertion that the Commission did not address specific data identified in their September 30 motion, including deposition and interview transcripts and financial trading information, the California Parties specifically request that the Commission: (1) make the specific data available; or (2) if the data are available, explain where they can be accessed; or (3) if the data are being withheld, explain the reason for the withholding.

Requests for Rehearing of the December 23 Order

18. On January 15, 2004, Citrus and NBP jointly filed a motion for clarification or, in the alternative, a request for rehearing of the December 23 Order.⁶ Citrus and NBP

⁵ Because Docket Nos. EL00-95-000 and EL00-98-000 raised common issues of law and fact, the Commission consolidated them for purposes of hearing and decision. 92 FERC at 61,608.

⁶ Enron 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 (continued...)

contend that: (1) the documents that relate to them or their subsidiaries do not relate to the Commission's investigation into price manipulation in the West, and therefore should not 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; (3) the release of information will cause irreparable harm to them; and (4) the release of their documents would render an order by the United States District Court for the Southern District of Texas protecting these documents from disclosure partially ineffective. Citrus and NBP assert that 2,762 documents which relate to Citrus and NBP and were identified for re-release are unrelated to the Commission staff's investigation into the Western markets and should not be publicly re-released.⁷

19. In a January 15, 2004 letter to the Secretary of the Commission, Enron updated the Commission regarding its review efforts. Enron stated that it received an index of documents slated for re-released, which improved the efficiency of Enron's review of these documents. Soon after, on January 22, 2004, Enron filed a request for rehearing of the December 23 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 4,169 documents, which Enron claims contain personal information. On February 6, 2004, Enron filed a letter with the Secretary notifying the Commission that Enron had completed its internal review of the 4,169 documents identified in its January 22 request for rehearing. In its February 6 letter, Enron requests that 1,250 documents, rather than the 4,169 documents originally identified, be permanently withheld from public access.⁸

Pipeline Company, Midwestern Gas Transmission Company, and other interstate natural gas pipelines.

⁷ In their January 15, 2004 rehearing request, Citrus and NBP identified 1,701 documents as appropriate for permanent removal and incorporated by reference the 1,061 documents identified in their November 21, 2003 response to the Commission's November 14 Order.

⁸ The Commission considers Enron's February 6 letter as a motion for clarification. Although the filing was submitted out-of-time, the Commission acknowledges Enron's diligence in advising the Commission of the true number of documents for which Enron seeks permanent removal. Therefore, the Commission hereby accepts and grants Enron's February 6 letter as a motion for clarification.

20. Also on January 22, 2004, the California Parties filed a request for rehearing seeking to ensure that all documents that are relevant to the Commission's staff's investigation in Docket No. PA02-2-000, as well as related proceeding in Docket Nos. EL03-137-000, et al., EL03-180, et al., IN03-10-000, and EL00-95-000, et al., are publicly released. The California Parties also request that documents which contain both personal information and information related to the above docketed proceeding be released in redacted form.

Requests for Rehearing of the March 8 Order

21. On March 30, 2004, Citrus and NBP jointly filed jointly filed a motion for clarification or, in the alternative, a request for rehearing of the March 8 Order.⁹ Citrus and NBP contend that: (1) the documents that relate to them or their subsidiaries do not relate to the Commission's investigation into price manipulation in the West, and therefore should not be released; (2) many of the documents contain privileged, commercially sensitive, and personal information, (3) 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 (4) the release of their documents would render an order by the United States District Court for the Southern District of Texas protecting these documents from disclosure partially ineffective. Citrus and NBP assert that 661 documents which relate to Citrus and NBP and were identified for re-release are unrelated to the Commission staff's investigation into the Western markets and should not be publicly re-released.¹⁰

22. On March 30, 2004, Enron filed a request for rehearing of the March 8 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 275 documents, which Enron claims contain personal

⁹ Enron 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.

¹⁰ Citrus originally identified 828 documents. After taking into account duplicative entries the total number of documents is actually 661.

information. On April 6, 2004, Enron filed a letter with the Secretary notifying the Commission that Enron had completed its internal review of the 275 documents identified in its March 30 request for rehearing. In its April 6 letter, Enron requests that 131 documents, rather than the 275 documents originally identified, be permanently withheld from public access. The Commission hereby accepts and grants Enron's April 6 letter as a motion for clarification.

23. On April 7, 2004, the California Parties filed a request for rehearing seeking to ensure that all documents that are relevant to the Commission's staff's investigation in Docket No. PA02-2-000, as well as related proceeding in Docket Nos. EL03-137-000, et al., EL03-180, et al., IN03-10-000, and EL00-95-000, et al., are publicly released. The California Parties again request that documents which contain both personal information and information related to the above docketed proceeding be released in redacted form.

Answer to Enron Letter and Citrus and NBP Rehearing Request

24. On January 30, 2004, the California Parties filed an answer to Enron's January 15, 2004 letter and Citrus and NBP's request for rehearing of the December 23 Order. The California Parties contend that their request for an index of all documents related to various Commission investigations, including that conducted in PA02-2-000, should be granted for the same reason Enron received an index of the documents slated for re-release: that if an index is an essential tool for Enron's efforts, than an index would be an equally essential tool for parties actively litigating against Enron. At a minimum, the California Parties assert that the index provided to Enron should be publicly released. The California Parties also contend that Citrus' and NBP's documents should be re-released because (1) the Commission has already acknowledged that documents related to Enron affiliates are to be re-released, and (2) Citrus and NBP's argument that their documents are protected by a Federal court is unavailing.

25. On February 9, 2004, Enron filed a letter to the Secretary of the Commission stating that the "index" provided to it was a list of Enron documents that correlate to the specific Enron documents that the Commission identified for re-release in its December 23 Order. Enron asserts that this list should not be provided to the California Parties because such a release may result in the identification of documents not appropriate for public release.¹¹

¹¹ The Commission considers Enron's letter as an answer to the California Parties' answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, (continued...)

Discussion

Docket No. PA02-2-000

26. The Commission agrees with the California Parties' contention that any information that may not have been made public for reasons other than those stated in the March 21 Order should be public. As explained above, since March 2003, the Commission has endeavored to ensure that all relevant information collected during the PA02-2-000 investigation, with very limited exceptions related to ongoing criminal investigations, be accessible by members of the public. In fact, in response to a recent request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2003), Commission staff discovered some enforcement documents obtained in Docket No. PA02-2-000.¹² A detailed index of these documents was circulated to the appropriate Federal agencies to determine if the documents were appropriate for release. Then, those documents that were appropriate for release were promptly placed on the Commission's web site.¹³ All public information regarding Docket No. PA02-2-000 is accessible via the Commission's web site at: <http://www.ferc.gov/industries/electric/indus-act/wem/pa02-2/info-release.asp>.

27. The California Parties' argument that the "failure to fully release data in the Docket No. PA02-2-000 proceeding . . . makes it incurably premature to be moving to dismiss, or settling with, parties against whom there are contested claims, and it violates due process . . ." is unavailing. The California Parties have access to almost 2.2 terabytes of information, clearly enough to enable them to decide how to proceed in cases initiated

18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a rehearing or answer unless otherwise ordered by the decisional authority. The Commission accepts the answers filed by the California Parties and Enron because they have provided information that assisted the Commission in its decision-making process.

¹² The FOIA request sought, among other things, copies of all documents or files concerning or relating to the Commission's investigation of the natural gas markets submitted in reference to wash trading or false reporting of trade and volume information.

¹³ Certain documents were created by another Federal agency, to which the documents were returned. The FOIA requester was advised accordingly.

as a result of the PA02-2-000 investigation.¹⁴ The only data in that record, to which they do not have access, are the Enron employees' personal information, such as social security and home telephone numbers, and the information requested by the United States Attorney for the Southern District of Texas to be withheld to avoid impeding his criminal investigations.¹⁵ The Commission continues to find, for obvious reasons, that the release of personal information would serve no public interest. Likewise, the Commission continues to believe that it should honor the request of the U.S. Attorney, whose investigations are as important as the Commission's proceedings to the public generally and the California Parties specifically.¹⁶

28. The California Parties' request that certain documents be released in redacted form is denied as unfeasible. The Commission acquired the iConect software program to maintain a sizable portion of the information obtained in Docket No. PA02-2-000. This software program, which creates a secure in-house information repository, allows for the editing of documents in the sense of adding a note or some information regarding a specific document. The program does not allow for the redaction of information from a particular document. Thus, in order to redact a document, Commission staff would be faced with the time consuming task of printing the document, redacting it, and having the document rescanned into the database. Further, Commission staff acted in good faith when reviewing the documents. The burden of requiring Commission staff to re-review documents and the individuals' rights to privacy are disproportionate to the public interest in disclosure. See Whitehouse v. U.S. Dep't of Labor, 997 F. Supp. 172, 175 (D. Mass. 1998) (finding that the public interest in disclosure of medical records was outweighed by the claimants' right to privacy). As the time spent redacting any personal information is outweighed by the burden of re-reviewing documents and the practicality of redacting a limited number of documents, if any, the Commission denies the California Parties' request.

¹⁴ In its March 8 Order, the Commission announced the completion of the review of the 141,379 Enron e-mails that had temporarily been removed in response to Enron's motions and individuals' requests. Notwithstanding Enron's characterization of the removed e-mails, the Commission found that over 76% were in fact related to the investigation, and directed that they be re-released.

¹⁵ The Commission also has not released records of other Federal agencies. See supra note 13.

29. The California Parties' renewed request for an index of the documents obtained in Docket No. PA02-2-000 and related proceedings is also without merit. As explained in its November 14 Order, the vast majority of the documents – well over 99% – are available, and preparing an index of the documents would create an undue and unnecessary burden on Commission staff. Moreover, as the Commission is under no obligation pursuant to the FPA, 16 U.S.C. §§ 792-823c, or the Natural Gas Act, 15 U.S.C. §§ 717-717w, to create such an index, see 105 FERC ¶ 61,205 at P 20, the Commission believes that no purpose would be served to create an index of the withheld personal emails. The Commission also believes that an index of the documents withheld at the request of the U.S. Attorney could impede his investigations in the same way as the release of the documents themselves.

30. The California Parties correctly acknowledge that Aspen Systems Corporation, the Commission's contractor responsible for maintaining the information obtained in this proceeding, created an index to assist Enron in its review of documents slated for re-release. Commission staff approved the creation of this index because: (1) the index would improve the efficiency of Enron's review of the documents, thus allowing the Commission to re-release documents as quickly as possible; and (2) the documents were Enron documents, therefore the disclosure of any personal information would not be to a third party. To prevent the disclosure of personal information, the Commission denies the California Parties' request that the index provided to Enron be publicly released. The Commission reminds members of the public, including the California Parties, that they may use the iConect system to create their own spreadsheets to identify the publicly available documents by utilizing either a predefined table option or by clicking the "change table view display" button and identifying the field options preferred to create a customized table.

31. Citrus and NBP's argument that their documents do not relate to the Commission's investigation into price manipulation in the West and therefore should not be released is without merit. The Commission acknowledges that Citrus and NBP do not serve the Western markets. However, as the Commission explained in its March 21 Order, "to understand those [Western] markets . . . the Commission needed to explore market matters beyond those [Western] boundaries and times, and the public deserves access to that information as well." 102 FERC 61,311 at P 10. As the Commission further found, to limit the release of information based on geography would inappropriately depart from the purpose of the release, which is to allow the public an opportunity to understand the bases for the Commission's decisions. Id. Moreover the Commission clarified in its November 14 Order that information collected during its investigation and discussed in the Final Staff Report issued in Docket No. PA02-2-000 includes evidence that Enron and *its affiliates* may have acted inconsistently with their

market-based rate authority. 105 FERC ¶ 61,205 at P 19. For these reasons, the Commission denies Citrus and NBP's rehearing request that their documents not be re-released.

32. The Commission also finds no merit in Enron's and Citrus and NBP's claim that the Commission acted arbitrarily and capriciously when it directed the release of documents. 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. Further, as the Commission detailed in its September 15 Order:

Enron did not even ask for an extension of time to respond or make any other attempt prior to the release of information to apprise the Commission of its concerns. Rather, Enron waited until March 28, 2003, two days after the release of documents, in the first of seven motions, to request that the Commission remove certain documents from public access. Furthermore, Enron waited until April 3, 2003, over a week after the release of the information and almost a month after it was put on notice of the Commission's intent to release information, to file its request for rehearing and emergency stay. Enron waited even longer to petition the United States Court of Appeal for an emergency stay. Under these circumstances, Enron is obviously mistaken that the Commission acted arbitrarily and capriciously, or failed to balance the public interest with the interest of protecting confidential information by not providing a meaningful opportunity for parties to express concern regarding the release of information. The Commission acted pursuant to its regulations by providing notice and an opportunity to comment. See 18 C.F.R. § 388.112. Further, in its March 21 Order, the Commission addressed the disclosure of information as in the public interest. See 102 FERC ¶ 61,311 at P 6, 10, 13, 15. It is Enron who failed to provide a meaningful response to the Commission's March 5 Notice and March 21 Order, and is therefore attempting to cover up its own lack of diligence.

104 FERC ¶ 61,283 at P 14. Enron, Citrus and NBP have not presented any evidence to persuade the Commission that its former holding was in error. Accordingly, the Commission denies Enron's and Citrus and NBP's requests for rehearing.

33. Citrus and NBP's contention that the documents containing privileged communications or commercially sensitive information should be permanently withheld to prevent irreparable harm to them has also been addressed by the Commission in its previous orders in this proceeding. The Commission has repeatedly held that the public's interest in reviewing and understanding the information that formed the basis for the Commission's decisions and reasons in the affected dockets represents an extraordinary set of circumstances that outweighs (1) the admitted important attorney-client and attorney work product privileges and (2) any alleged concerns about withholding competitively sensitive information. See, e.g., 102 FERC ¶ 61,311 at P 10 and 15.

34. Citrus and NBP's argument that their documents are protected by a Federal court order is unavailing. First, the documents were in the Commission's possession prior to the Federal court order. Moreover, the Commission provided notice of the release of the documents almost a year before the issuance of the Federal court order. Finally, Citrus and NBP have not argued or provided any evidence that the Federal court order prevents the Commission from releasing the documents. For these reasons, the Commission finds that the Federal court order does not bar the Commission from releasing the documents, and denies Citrus and NBP's rehearing request on this issue.

35. Enron's and Citrus and NBP's contentions that a relatively small number of documents identified for re-release contain personal information are 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, Citrus and NBP's requests for rehearing as to those documents that contain personal information. However, some documents identified by Enron or Citrus and NBP 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. Several of these documents refer to energy trading, power outages, and other business transactions. Therefore, the Commission denies Enron's and Citrus and NBP's requests for rehearing as to these documents, which are identified in Appendix A to this order.

Docket Nos. EL03-137-000, et al., EL03-180-000, et al., EL00-95-000, et al., EL00-98-000, et al., IN03-10-000, and Undocketed Proceedings

36. The Commission is not persuaded by the California Parties' argument that information in docketed proceedings related to Docket No. PA02-2-000 should be

released. As the Commission found in its November 14 Order, it cannot allow the California Parties' September 30 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. 105 FERC ¶ 61,205 at P 22.¹⁷

37. The Commission also denies the California Parties' request that the Commission release documents and data in related undocketed investigations. By definition, such investigations would generally be conducted under Part 1b of the Commission's regulations, 18 C.F.R. Part 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.¹⁸ Furthermore, such investigations are not open to the 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, order on reh'g, 105 FERC ¶ 61,281 (2003); see also Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456 (D.C. Cir. 2001).¹⁹ Therefore, 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.

38. The California Parties are correct that the Commission found the release of documents in Docket No. PA02-2-000 to be in the public interest given the extraordinary set of circumstances in that proceeding. However, the Commission did not release any information during the course of the investigation, prior to the release of the Final Report

¹⁷ The California Parties recently contacted Commission staff with a procedural inquiry with respect to the so-called "Hundred Days" filings. Apparently, certain parts of the California Parties' Hundred Days' filing was inadvertently withheld notwithstanding the direction in the March 26 Order to release all information contained in the Hundred Days' filings except to the extent the information was implicated in the U.S. Attorney's investigations. Staff has now released any inadvertently withheld information in these filings.

¹⁸ For example, the Commission publicly discussed an undocketed investigation into the physical withholding of capacity at its March 26, 2003 meeting.

¹⁹ Docket No. IN-03-000, for example, is an investigation that has been conducted under Part 1b of the Commission's regulations.

on March 26, 2003. The Commission acknowledges that, among other things, keeping investigative information non-public protects the integrity of ongoing investigations. See, e.g., Foster v. United States Dep't of Justice, 933 F.Supp 687, 692 (E.D. Mich. 1996) (finding that the withholding documents is appropriate where disclosure "could impede ongoing government investigation"). The Commission is not conceding that records of related undocketed investigations actually exist, only that such records may exist. See Schwarz v. United States Dep't of Treasury, 131, 150 F. Supp. 2d 142 (D.D.C. 2000) (noting that the courts have upheld an agency not conceding to the existence of investigations "in connection with a request for law enforcement records of a third party"). As the Commission found in its November 14 Order, 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. See 105 FERC ¶ 61,205 at P 24. Therefore, the Commission denies the California Parties' request for the release of information in undocketed proceedings.

The Commission orders:

(A) The California Parties' requests for rehearing are denied as described above.

(B) Enron's requests for rehearing are granted in part and denied in part as described above.

(C) Citrus and NBP's requests for rehearing are granted in part and denied in part as described above.

(D) Staff is directed to return data identified in Attachment A to the agency's web site no sooner than five days from issuance of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.

Appendix A
Documents to be Re-Released

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