

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
103 FERC ¶ 63,059

San Diego Gas & Electric Company,
Complainant

Docket Nos. EL00-95-000
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
Independent System Operator and the
California Power Exchange

EL00-98-000
EL00-98-042
EL00-98-058

Fact-Finding Investigation Into Possible
Manipulation of Electric and Natural Gas
Prices

PA-02-2-000

Reliant Energy Services, Inc.

EL03-59-000

BP Energy Company

EL03-60-000

Enron Power Marketing, Inc. and Enron
Energy Services, Inc.

EL03-77-000

Bridgeline Gas Marketing, L.L.C., Citrus
Trading Corporation, ENA Upstream
Company, L.L.C., Enron Canada Corp., Enron
Compression Services Company, Enron
Energy Services, Inc., Enron MW, L.L.C.,
and Enron North America Corp.

RP03-311-000

El Paso Electric Company, Enron Power
Marketing, Inc., Enron Capital and Trade
Resources Corporation

EL02-113-000

Portland General Electric Company

EL02-114-000

Enron Power Marketing, Inc.

EL02-115-001

Avista Corporation, Avista Energy, Inc.

EL02-115-000

ORDER ADOPTING COMMON PROTECTIVE ORDER

(June 30, 2003)

1. By its Order Denying Consolidation and Granting Protective Order, issued on June 27, 2003, FERC ¶ , (June 27 Order) the Commission denied the motion filed by the California Parties to consolidate multiple proceedings into one proceeding to address remedy and damage issues, Ordering ¶ 1, granted the California Parties request for a common protective order in the above-captioned proceedings, Ordering ¶ 2, and directed me, in my capacity, since concluded, as the Presiding Judge in the EL00-95 California refund liability proceeding to issue a common protective order for the above-captioned proceedings, Ordering ¶ 3. As to this direction, the Commission recognized, *inter alia*, that there may be limited occasions when a party may believe that matter bearing on remedies and damages that is discovered in one proceeding may result in relevant evidence on issues in the other above-captioned proceedings and that a common protective order would allow for the unencumbered movement and use of such discovered matter to and in other of the above-captioned proceedings. Consistent with this direction, the common protective order provisions adopted below essentially reflect the provisions of the Protective Order adopted in the EL00-95-045 proceeding and EL00-98-042 proceeding by the Chief Administrative Law Judge on August 7, 2001, as amended by the Appendix to my order issued on September 6, 2001, 96 FERC ¶ 63,035 (2001), i.e, a tried, true, and workable Protective Order, which my prior order of December 2, 2002 in Dockets Nos. EL0095-069, and EL00-98-042 and EL00-98-058 directed be applied to certain Discovery Master proceedings. Accordingly, the following provisions shall apply in and to the above-captioned proceedings and serve as a Common Protective Order in the above-captioned proceedings relative to discovery concerning remedies and damages. *To the maximum extent practical, the participants shall endeavor to ensure that the record in the above-captioned proceedings is open to the public and that extraordinary procedures required by this Common Protective Order, ultimately, will by stipulation be waived as concerns any necessary adjudication before a Presiding Judge in any/all of these proceedings and/or before the Commission.* (The adjudicatory record in the California Refund liability proceeding before me was fully open as a result of agreed-upon waivers of application of the Protective Order.) This Common Protective Order shall govern the use of all Protected Materials produced by, or on behalf of, any Participant and

shall remain in effect until specifically modified or terminated by the undersigned or the Commission, as the case may be. Because of the need for a common protective order, all concerned are put on notice that modifications or changes will be the **extraordinary exception** to the rule.

2. This Common Protective Order applies to the following two categories of materials: (A) A Participant may designate as protected those materials which customarily are treated by that Participant as sensitive or proprietary, which are not available to the public, and which, if disclosed freely, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; and (B) A Participant shall designate as protected those materials which contain critical energy infrastructure information, as defined in 18 CFR ' 388.113(c)(1) ("Critical Energy Infrastructure Information").

3. Definitions -- For purposes of this Order:

(a) The term "Participant" shall mean a Participant as defined in 18 CFR ' 385.102(b).

(b) (1) The term "Protected Materials" means:

(A) materials (including depositions) provided by a Participant in response to discovery requests and designated by such Participant as protected;

(B) any information contained in or obtained from such designated materials;

(C) any other materials which are made subject to this Protective Order by the Presiding Judge, by the Commission, by any court or other body having appropriate authority, or by agreement of the Participants;

(D) notes of Protected Materials; and,

(E) copies of Protected Materials.

The Participant producing the Protected Materials shall physically mark them on each page as "PROTECTED MATERIALS" or with words of similar import as long as the term "Protected Materials" is included in that designation to indicate that they are Protected Materials. If the Protected Materials contain Critical Energy Infrastructure Information, the Participant producing such information

shall additionally mark on each page containing such information the words "Contains Critical Energy Infrastructure Information B Do Not Release".

(2) term "Notes of Protected Materials" means memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses materials described in Paragraph 5. Notes of Protected Materials are subject to the same restrictions provided in this order for Protected Materials except as specifically provided in this order.

(3) Protected Materials shall not include:

(A) any information or document contained in the files of the Commission, or any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court;

(B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order; or,

(C) any information or document labeled as "Non-Internet Public" by a Participant, in accordance with Paragraph 30 of FERC Order No. 630, FERC Stat. & Reg. & 31,140. Protected Materials do include any information or document contained in the files of the Commission that has been designated as Critical Energy Infrastructure Information.

(c) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto by which Participants who have been granted access to Protected Materials shall certify their understanding that such access to Protected Materials is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be served on all parties on the official service list maintained by the Secretary in this proceeding and the Judge designated in the above-captioned proceedings.

(d) The term "Reviewing Representative" shall mean a person who has signed a Non-Disclosure Certificate and who is:

(1) Commission Litigation Staff;

(2) an attorney who has made an appearance in this proceeding for a Participant;

- (3) attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in (2) above;
- (4) an expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding;
- (5) a person designated as a Reviewing Representative by order of the Presiding Judge or the Commission; or
- (6) employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.

4. Protected Materials shall be made available under the terms of this Protective Order only to Participants and only through their Reviewing Representatives as provided below.

5. Protected Materials shall remain available to Participants until the later of the date that an order terminating these proceedings becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Protected Material is concluded and is no longer subject to judicial review. If requested to do so in writing after that date, the Participants shall, within fifteen days of such request, return the Protected Materials (excluding Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraph 6. Within such time period each Participant, if requested to do so, shall also submit to the producing Participant an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 6. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order. *Again, it is expected that the participants will make every effort to ensure the above-captioned proceedings are on the record and open to the public without the ongoing resort to extraordinary application of this Common Protective Order.*

6. All Protected Materials shall be maintained by the Participant in a secure place. Access to those materials shall be limited to those Reviewing Representatives specifically authorized under the provisions herein. The Secretary shall place any Protected Materials filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination of any claim of privilege. The Commission and/or the Presiding

Judge in the above-captioned proceedings, as the case may be, retain the right to make determinations regarding any claim of privilege and the discretion to release information necessary to carry out its jurisdictional responsibilities. For documents submitted to Commission Litigation Staff ("Staff"), Staff shall follow the notification procedures of 18 CFR ' 388.112 before making public any Protected Materials.

7. Protected Materials shall be treated as confidential by each Participant and by the Reviewing Representative in accordance with the certificate executed in accordance with the provisions below. Protected Materials shall not be used except as necessary for the conduct of these proceedings, nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in these proceedings. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials.

8. (a) If a Reviewing Representative's scope of employment includes the marketing of energy, the direct supervision of any employee or employees whose duties include the marketing of energy, the provision of consulting services to any person whose duties include the marketing of energy, or the direct supervision of any employee or employees whose duties include the marketing of energy, such Reviewing Representative may not use information contained in any Protected Materials obtained through these proceedings to give any Participant or any competitor of any Participant a commercial advantage.

(b) In the event that a Participant wishes to designate as a Reviewing Representative a person not described in Paragraph 3(d) above, the Participant shall seek agreement from the Participant providing the Protected Materials. If an agreement is reached that person shall be a Reviewing Representative pursuant to Paragraphs 3(d) above with respect to those materials. If no agreement is reached, the Participant shall submit the disputed designation to the Judge in the above-captioned proceedings or the Commission, as the case may be, for resolution.

9. (a) A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Materials pursuant to this Protective Order unless that Reviewing Representative has first executed the Non-Disclosure Certificate annexed hereto, provided that if an attorney qualified as a Reviewing Representative has executed such a certificate, the paralegals, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. A copy of each Non-Disclosure

Certificate shall be provided to counsel for the Participant asserting confidentiality prior to disclosure of any Protected Material to that Reviewing Representative and to the Presiding Judge in the above-captioned proceeding or the Commission, as the case may be.

(b) Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this order.

10. Any Reviewing Representative may disclose Protected Materials to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative both have executed a Non-Disclosure Certificate. In the event that any Reviewing Representative to whom the Protected Materials are disclosed ceases to be engaged in these proceedings, or is employed or retained for a position whose occupant is not qualified to be a Reviewing Representative under Paragraph 3(d), access to Protected Materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the certification.

11. Subject to Paragraph 17, the designated Judge *presiding in the above-captioned proceedings and/or for the express purpose of resolving discovery disputes in a given proceeding(s)*, or the Commission, as the case may be, shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Judge, the parties to the dispute shall use their best efforts to resolve it. Any participant that contests the designation of materials as protected shall notify the party that provided the protected materials by specifying in writing the materials whose designation is contested. This Protective Order shall automatically cease to apply to such materials five (5) business days after the notification is made unless the designator, within said 5-day period, files a motion with the Judge, and/or the Commission, as the case may be, with supporting affidavits¹ and a Master Index of the Protected Materials with respect to each of the identified protected materials which demonstrates the reasons for maintaining the confidentiality of the Protected Materials and a Master Index of the Protected Materials. In any challenge to the designation of materials as protected, the burden of proof shall be on the participant seeking protection. If the Judge finds that the materials at issue are not entitled to protection, the procedures of Paragraph 17 shall apply. The procedures described above shall not

¹ The affidavits shall comply with International Paper Company v. Fibreboard Corporation, 63 F.R.D. 88, 93-4, and Parsons v. General Motors Corp., 85 F.R.D. 724, 726 (N.D. Ga. 1980), and if claims of work-product immunity are concerned, the affidavits shall comport with the requirements of 43 FERC ¶ 63,012 at 65,129 (1988).

apply to protected materials designated by a Participant as Critical Energy Infrastructure Information. Materials so designated shall remain protected and subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's Critical Energy Infrastructure Information Coordinator that such materials need not remain protected.

12. All copies of all documents reflecting Protected Materials, including the portion of the hearing testimony, exhibits, transcripts, briefs and other documents which refer to Protected Materials shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROTECTED MATERIALS" and shall be filed under seal and served under seal upon the Presiding Judge and all Reviewing Representatives who are on the service list. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information B Do Not Release". For anything filed under seal, redacted versions or, where an entire document is protected, a letter indicating such *and listing those portions of the redacted or protected exhibits*, also will be filed with the Commission and served on all parties on the service list and the Judge. Counsel for the producing Participant shall provide to all Participants who request the same, a list of Reviewing Representatives who are entitled to receive such material. Counsel shall take all reasonable precautions necessary to assure that Protected Materials are not distributed to unauthorized persons.

13. If any Participant desires to include, utilize or refer to any Protected Materials or information derived therefrom in testimony or exhibits during the hearing in these proceedings in such a manner that might require disclosure of such material to persons other than reviewing representatives, such participant shall first notify both counsel for the disclosing participant and the Judge for that proceeding(s) of such desire, identifying with particularity each of the Protected Materials. Thereafter, use of such Protected Material will be governed by procedures determined by the Judge for that proceeding(s).

14. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the use of Protected Materials on any legal grounds.

15. Nothing in this Protective Order shall preclude any Participant from requesting the Judge for any proceeding(s), and, where appropriate, the Commission, or any other body having appropriate authority, as the case may be, to find that this Protective Order should not apply to all or any materials previously designated as Protected Materials pursuant to this Protective Order.

16. All Protected Materials filed in the above-captioned proceedings or with any other judicial or administrative body, in support of, or as a part of, a motion, other pleading, brief, or other document, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials subject to this Protective Order. Such documents containing Critical Energy Infrastructure Information shall be additionally marked "Contains Critical Energy Infrastructure Information – Do Not Release."

17. If it is found at any time in the course of any of these the above-captioned proceedings that all or part of the Protected Materials need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for three (3) business days from the date of issuance of that decision, and if the Participant seeking protection files an interlocutory appeal or requests that the issue be certified to the Commission, for an additional seven (7) business days. None of the Participants waives its rights to seek additional administrative or judicial remedies after said decision respecting Protected Materials or Reviewing Representatives, or the Commission's denial of any appeal thereof. The provisions of 18 CFR ' ' 388.112 and 388.113 shall apply to any requests for Protected Materials in the files of the Commission under the Freedom of Information Act. (5 U.S.C. ' 552).

18. The contents of Protected Materials or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this (these) proceeding(s). Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

19. The disclosing Participant shall physically mark those Protected Materials that the disclosing Participant believes in good faith contains market sensitive information, public disclosure of which would competitively harm the Participant, with the words "Not Available to Competitive Duty Personnel." However, solely with regard to the California Independent System Operator and, if appropriate, the California Power Exchange, Protected Materials shall only be marked with the words "Not Available to Competitive Duty Personnel" if any Participant asserts in good faith that the disclosure of requested data might be inappropriate for review by Competitive Duty Personnel, as defined in Paragraph 22. Participants must make such assertions within two (2) business days after receiving a data request from another Participant. Any challenge to such designations may be made as provided in this protective order for challenges to designations of materials.

20. Solely with respect to Protected Materials that have been marked “Not Available to Competitive Duty Personnel” (and information derived therefrom), a Reviewing Representative may not include any person whose duties include (i) the marketing or sale of electric power at wholesale, (ii) the purchase or sale of electric power at wholesale, (iii) the direct supervision of any employee with such responsibilities, or (iv) the provision of electricity marketing consulting services to entities engaged in the sale or purchase of electric power at wholesale (collectively, “Competitive Duties”). If any person who has been a Reviewing Representative subsequently is assigned to perform any Competitive Duties, of if previously available Protected Materials are changed to “Not Available to Competitive Duty Personnel,” with the exception of the Reviewing Representative’s own data, such person shall have no such access to materials marked “Not Available to Competitive Duty Personnel” (and information derived therefrom) and shall dispose of such Materials, and shall continue to comply with the requirements set forth in the Non-Disclosure Certificate and this Protective Order with respect to any Protected Materials to which such person previously had access. Notwithstanding the foregoing, persons who otherwise would be disqualified as Competitive Duty Personnel may serve as a Reviewing Representative, subject to the following conditions: (i) the Participant who employs or has retained that person certifies in writing to the affected Producing Party that its ability to effectively participate in this proceeding would be prejudiced if it was unable to rely on the assistance of the particular Reviewing Representative; (ii) the party claiming such prejudice must identify by name and job title the particular Reviewing Representative required; (iii) the party claiming such prejudice must acknowledge in writing to the affected Producing Party that access to the Protected Materials which are Not Available to Competitive Duty Personnel shall be restricted only to purposes of the litigation of this proceeding, absent prior written consent of the Producing Party or authorization of a decisional body (the Commission or the Presiding Administrative Law Judge with opportunity for the Producing Party to seek review of such decision as provided in this order); (iv) such party acknowledges that any other use shall constitute a violation of an order of the Federal Energy Regulatory Commission; and (v) the Competitive Duty Personnel acting as a Reviewing Representative has provided a declaration or affidavit acknowledging his or her familiarity with the contents of this order and the particular restrictions set forth in this paragraph. Once materials are clearly and correctly labeled, compliance shall be the responsibility of the Reviewing Party. Materials marked as “Not Available to Competitive Duty Personnel” shall be returned or destroyed at the conclusion of proceedings as otherwise provided for herein.

21. If a Participant believes that Protected Materials previously distributed to Reviewing Representatives contain market sensitive information, public disclosure of which would competitively harm the Participant, and should be treated as if it

had been labeled “Not Available to Competitive Duty Personnel”, the Participant must e-mail Participants on the restricted service list and any ListServe established for email addresses in these proceedings, specifically state which documents contain such data, make an informal showing as to why such data should be subject to the restrictions applicable to documents labeled “Not Available to Competitive Duty Personnel”, and seek their consent to such treatment, and such consent shall not be unreasonably withheld. If no agreement is reached concerning the designation of previously distributed material as “Not Available to Competitive Duty Personnel, distributed material is subsequently designated as “Not Available to Competitive Duty Personnel”, it will be the responsibility of the Reviewing Party to ensure compliance with this order thereafter – the Producing Party will not be responsible for redistributing or re-labeling the documents or data.

Bruce L. Birchman
Presiding Administrative Law Judge

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company,
Complainant

Docket No. EL00-95-000, et al.

NON-DISCLOSURE CERTIFICATION OF COMPETITIVE DUTY PERSONNEL

I hereby certify my understanding that access to Protected Materials identified as "Not Available to Competitive Duty Personnel" is provided to me pursuant to the terms and restrictions of the amended Model Protective Order in this proceeding, that I have been given a copy of and have read the amended Model Protective Order, and that I agree to be bound by it. I understand that the contents of such Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that amended Model Protective Order. I further understand that access to Protected Materials identified as Not Available to Competitive Duty Personnel shall be restricted only to purposes of the litigation of this proceeding. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____
Title: _____
Representing: _____
Date: _____