

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Santa Clara, California

Docket No. EL04-114-000

v.

Enron Power Marketing, Inc.

ORDER ON COMPLAINT

(Issued March 11, 2005)

1. In this order, the Commission denies in part and defers in part the City of Santa Clara, California's (Santa Clara) complaint against Enron Power Marketing, Inc. (EPMI) regarding a Master Energy Purchase and Sale Agreement (Agreement) entered into by the parties and thus takes a further step towards resolving all outstanding California-related matters.

Background

2. On September 10, 1999, EPMI and Santa Clara executed the Agreement. It provides the terms and conditions that govern sales of energy that may thereafter be entered into by the parties. EPMI notified the Commission of the execution of the Agreement in a quarterly report filing,¹ but did not file the Agreement itself for

¹ See Santa Clara Exh. 7.

Commission approval. In response to a request for proposals for long-term power, on August 29, 2000 and April 17, 2001, EPMI and Santa Clara executed confirmation letters for two long-term firm power sales transactions pursuant to the Agreement.²

3. On December 28, 2001, EPMI allegedly notified Santa Clara that it was canceling the Agreement effective January 2, 2002. EPMI claimed that the cancellation resulted from an event of default under the Agreement, due to Santa Clara's: (1) failure to pay amounts owed to EPMI after Santa Clara received written notice of Santa Clara's failure to make payments, and (2) its failure to cure such nonpayment. Correspondence then ensued over EPMI's allegations, the counter allegations and any amounts owed by each party to the other.

4. On July 22, 2002, EPMI commenced an adversary proceeding against Santa Clara in the United States Bankruptcy Court for the Southern District of New York, seeking to collect an early termination payment EPMI alleged it was owed based upon the terms of the Agreement. Santa Clara responded that there was no default or basis for a termination payment under the terms of the Agreement and that EPMI's claimed entitlement to the termination payment violated the Federal Power Act (FPA).

5. On July 2, 2004, Santa Clara filed the instant complaint seeking a Commission ruling that it does not have to pay a termination payment. Santa Clara argued that: (1) EPMI violated the Agreement and long-term confirmations by purporting to exercise termination rights based on a pending good faith dispute; (2) EPMI's arguments for cancellation (*i.e.*, EPMI's margin call and Santa Clara's suspension of deliveries) were invalid and based on unreasonable practices; (3) EPMI's purported cancellation was void for failure to provide notice in compliance with section 205(d) of the FPA; and (4) EPMI should be prohibited from applying market-based rates to calculate an early termination payment.

6. In response, EPMI filed a motion before the Bankruptcy Court arguing that this complaint (1) violated the automatic stay issued by the Bankruptcy Court because it attempted to obtain control over property of EPMI's estate, and (2) violated a mediation order issued by the Bankruptcy Court. EPMI requested an injunction enjoining Santa Clara from further prosecution of this complaint and sought sanctions.

² Neither party has provided evidence of the filing of these two confirmation letters with the Commission.

7. On December 29, 2004, the Bankruptcy Court determined that all but two issues in the complaint concerned contract interpretation issues that were properly before the Bankruptcy Court and could not be pursued before the Commission. Therefore, the Bankruptcy Court enjoined Santa Clara from proceeding with the complaint, except with respect to specific issues related to notice and market-based rate authority.

8. On January 10, 2005, in response to the Bankruptcy Court's December 29 Order, Santa Clara filed an amended complaint with the Commission, arguing that EPMI's purported cancellation was void for failure to provide notice in compliance with section 205(d) of the FPA and EPMI should be prohibited from applying market-based rates to calculate an early termination payment. On January 31, 2005, EPMI filed an answer and a motion to strike portions of the amended complaint.

Notice of Filing and Pleadings

9. Notice of Santa Clara's complaint was published in the *Federal Register*, 69 Fed. Reg. 41,800 (2004), with interventions and protests due on July 22, 2004. This date was subsequently extended to September 23, 2004. The California Electricity Oversight Board (CEOB) filed a timely motion to intervene and comments in support of the complaint. The Public Utility District No. 1 of Snohomish County, Washington (Snohomish); the City of Palo Alto, California; and Nevada Power Company and Sierra Pacific Power Company (Nevada Power/Sierra Pacific) also filed timely motions to intervene. Santa Clara filed an answer to the motion to strike and an answer to EPMI's answer. Snohomish and Nevada Power/Sierra Pacific, jointly, filed an answer to EPMI's answer. EPMI filed an answer to Santa Clara's answer.

Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers of Santa Clara, Snohomish and Nevada Power/Sierra Pacific, or EPMI and will, therefore, reject them.

B. Bankruptcy Court's December 29 Order

12. The Bankruptcy Court found that the majority of the issues raised in the original complaint concerned state-law contract interpretation issues that were within the Bankruptcy Court's jurisdiction and enjoined Santa Clara from pursuing those issues before the Commission.³

13. However, the Bankruptcy Court identified two issues raised by Santa Clara in its complaint that did fall within the Commission's exclusive jurisdiction and, therefore, could be pursued before the Commission: (1) whether EPMI's cancellation of the Agreement was void for failure to provide notice in compliance with section 205(d) of the FPA (Notice Issues); and (2) the fairness of the market-based rates charged and the retroactive revocation of EPMI's market-based rate authority (Market-Based Rate Authority Issues). The Bankruptcy Court also found that it was for the Commission to determine whether the Market-Based Rate Authority Issues are redundant with the issues raised in the so-called "gaming and partnership" proceeding⁴ and whether it should consolidate those issues with that proceeding.

³ Those issues include: (1) failure to make a margin call; (2) suspension of performance; (3) failure to pay for power; (4) whether default occurred under the Agreement; (5) whether a basis for a termination payment existed; (6) whether a good faith dispute concerning entitlement to the termination payment existed; and (7) whether performance assurance was required by the terms of the Agreement.

⁴ *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004); *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004).

C. Motion to Strike

14. EPMI filed a motion to strike portions of the amended complaint that do not directly relate to the Notice Issues and Market-Based Rate Authority Issues and thus, according to EPMI, violate the Bankruptcy Court's December 29 Order. EPMI argues that paragraphs 24, 25, 25(a), 25(b), 25(c), 25(e) and 25(f)⁵ of the amended complaint

⁵ These portions of Santa Clara's amended complaint state:

24. This section is included to provide the Commission with background exemplifying the need for the [FPA's] requirement of Commission review and approval before long-term jurisdictional contracts are terminated. This section also demonstrates how EPMI was misusing the authority granted by the Commission, the rescission of which [Santa Clara] requests as relief for EPMI's violations. [Santa Clara] does not seek herein relief based on its belief that EPMI violated its jurisdictional contracts by purporting to cancel its contracts with [Santa Clara] despite [Santa Clara's] contemporaneous dispute of the grounds for the purported cancellation.

25. In the fall of 2001, Enron Corp.'s financial house of cards began to crumble, causing a chaotic sequence of events and disputes under the agreements briefly summarized as follows:

a. In October 2001, Enron Corp. took a \$1 billion charge due to write-downs of investments, disclosed its equity shrank by \$1.2 billion, and became the subject of an SEC investigation.

b. On November 8, 2001, Enron Corp. restated its earnings for 1997 through 2000, and stated that 'the financial statements for these periods and the audit reports relating to the year-end financial statements for 1997 through 2000 should not be relied upon.

c. Enron Corp. tried to resolve its liquidity problems by extending its debt payments, obtaining additional lines of credit, and agreeing to merge with Dynegy.

* * *

(continued)

relate to Santa Clara's allegations of alleged contractual violations by EPMI and are beyond the scope of what the Commission may consider. EPMI also contends that the last sentence in paragraph 31 of the amended complaint⁶ and exhibits 19-25 relate to Santa Clara's arguments addressing EPMI's motivations for terminating the transactions with Santa Clara and thus whether EPMI terminated the transactions in accordance with their terms, and likewise are beyond the scope of what the Commission may consider.

15. In its answer, Santa Clara argues that the Commission should deny EPMI's motion to strike because this proceeding has not been set for hearing and, therefore, the motion is not authorized under Rule 215 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.215 (2004). In the alternative, Santa Clara contends that the motion was not timely filed under either Rule 215(b) or Rule 215(c). Santa Clara adds that the paragraphs at issue, although providing facts that relate to its state contract law defenses, also relate to the issues before the Commission: (1) showing the need for notice to the Commission prior to termination; and (2) demonstrating the totality of the circumstances, including the cause and effect relationship among the termination, EPMI's FPA violations and the relief Santa Clara seeks from EPMI's termination charges. Santa Clara contends that eliminating the requested portions of paragraph 25 while retaining paragraph 25(d) will result in a one-sided discussion of EPMI's margin call demand.

e. On November 28, 2001, the credit rating of Enron Corp. and EPMI was downgraded to 'junk' status (specifically, B-) by Standard and Poor's, and Enron's merger with Dynegy fell apart.

f. On November 29, 2001, EPMI approached [Santa Clara] regarding an assignment of the agreements by EPMI, and [Santa Clara] consented to an assignment to PG&E Energy Trading. This assignment was on the verge of being consummated when Enron and EPMI filed for bankruptcy protection on December 2, 2001. EPMI refused to consummate the assignment following Enron's bankruptcy filing and left [Santa Clara] with no assurance of performance. [Footnotes omitted.]

⁶ Paragraph 31 states: "By letter dated December 28, 2001, EPMI claimed a right to terminate the contracts as of January 2, 2002, based on EPMI's assertion that [Santa Clara] failed to make a payment when due. It is now apparent that, during the turmoil of EPMI's collapse, EPMI was contemplating ways to terminate its power sales agreements with numerous counterparties."

16. While the identified portions of the amended complaint relate to issues that Santa Clara is enjoined from pursuing before the Commission, they also relate to the matters properly before the Commission. Accordingly, we will deny EPMI's request to disregard those portions of the amended complaint.

D. Notice Issues

17. Section 205(c) of the FPA⁷ states that:

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

18. Section 205(d) of the FPA⁸ states that:

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public.

19. Section 35.15(a) of the Commission's regulations,⁹ in turn, states that:

When a rate schedule or part thereof required to be on file with the Commission is proposed to be cancelled . . . and no new rate schedule or part thereof is to be filed in its place, each party required to file the schedule shall notify the Commission of the proposed cancellation . . . at least sixty days . . . prior to the date such cancellation . . . is proposed to take effect.

⁷ 16 U.S.C. § 824d(c) (2000).

⁸ 16 U.S.C. § 824d(d) (2000).

⁹ 18 C.F.R. § 35.15(a) (2004).

1. Santa Clara's Complaint

20. Santa Clara claims that, because the power sales transactions at issue were long-term,¹⁰ market-based rate power sales, EPMI was obligated under section 205(d) of the FPA to file notice with the Commission at least sixty days before any cancellation could be effective. Santa Clara argues that, in the *Southern Co.* decisions,¹¹ the Commission created only a limited exception from the requirement to file a notice of cancellation of a power sales agreement: for short-term¹² transactions, which could be as short as one hour, because sixty days' notice was impractical, if not impossible.¹³ Santa Clara adds that, because the *Southern Co.* decisions create an exception to a remedial statute, the ruling must be construed narrowly and thus should not be applied to excuse EPMI's failure to file a notice of cancellation of the long-term firm power sales at issue here.

21. Santa Clara also states that the Commission deems market-based rate contracts to be filed in accordance with the requirements of section 205(c) of the FPA when a utility files transaction reports with the Commission.¹⁴ Santa Clara argues that, because market-based rate contracts (like the ones at issue here) are considered filed under section 205(c),

¹⁰ Such contracts have a term of longer than one year.

¹¹ Citing *Southern Co.*, 84 FERC ¶ 61,199 (1998) (*Southern I*), *reh'g denied*, 86 FERC ¶ 61,131 (1999) (*Southern II*), *order on appeal*, *Power Co. of America v. FERC*, 245 F.3d 839 (D.C. Cir. 2001) (*PCA*) (collectively, *Southern Co.* decisions); *Southern Co.*, 87 FERC ¶ 61,214 at 61,848 (1999).

¹² Such contracts have a term of less than one year.

¹³ Citing *Blumenthal v. NRG Power Mktg, Inc.*, 103 FERC ¶ 61,344 at 61,318 (*Blumenthal I*), *reh'g denied*, 104 FERC ¶ 61,211 (2003) (*Blumenthal II*); *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 321 (2002); *Southern Co.*, 99 FERC ¶ 61,103 at 61,424 (2002); *PCA*, 245 F.3d at 844-45; *Southern Co.*, 87 FERC ¶ 61,214 at 61,848.

¹⁴ Citing *San Diego Gas & Elec. Co. v. Sellers of Ancillary Services*, 96 FERC ¶ 61,120 at 61,505-06 (2001); *State of California v. British Columbia Power Exchange Corp.*, 99 FERC ¶ 61,247 at 62,061-65 (2002), *aff'd in part and rev'd in part sub nom. State of California v. FERC*, 383 F.3d 1006 (9th Cir. 2004); *Blumenthal I*, 103 FERC ¶ 61,344 at P 58.

a filing is also required under section 205(d) before those contracts can be cancelled. Santa Clara contends that the fact that the contracts are not physically filed with the Commission and that the Commission only deems the contracts to be filed through summary reports, rather than through physical filing with the Commission, does not exempt them from a section 205(d) filing when they are cancelled. Santa Clara adds that the Commission has applied this requirement to power sales at market-based rates and has routinely rejected requests for waivers of the notice of cancellation requirement by parties, including EPMI, seeking market-based rate authority.¹⁵ Santa Clara also argues that the Agreement should be deemed to be a physically filed contract because EPMI controlled generation.¹⁶

22. Santa Clara concludes that EPMI's failure to provide the required notice of cancellation to the Commission voids any cancellation. Santa Clara requests that the Commission declare that EPMI's cancellation is void *ab initio* and does not become effective until at least sixty days from the date on which EPMI complies with section 205(d) of the FPA.

2. EPMI's Answer

23. EPMI states that the plain language of section 35.15 of the Commission's regulations does not require notice to be filed for the cancellation of a contract that is not on file with the Commission when the cancellation is in accord with the terms of the contract. EPMI contends that, to decide the applicability of section 35.15 here, the

¹⁵ Citing *Enron Power Mktg., Inc.*, 65 FERC ¶ 61,305 at 62,406 (1993); *Blumenthal I*, 103 FERC at 61,320; *Blumenthal II*, 104 FERC ¶ 61,211 at 61,740; *Portland General Elec. Co.*, 75 FERC ¶ 61,310 at 62,002-03 (1996); *Trigen-Syracuse Energy Corp.*, 95 FERC ¶ 61,326 (2001); *PPL Montana LLC*, 96 FERC ¶ 61,313 (2001); *Cheyenne Light, Fuel and Power Co. v. PacifiCorp*, 94 FERC ¶ 61,103 (2001).

¹⁶ Citing *Southern Co.*, 87 FERC ¶ 61,214 at 61,847 n.3.

Commission must decide whether the prerequisite for exemption from the notice requirement (*i.e.*, whether the termination occurred pursuant to the terms of the contract) has been satisfied. EPMI argues that the Commission cannot reach that issue without violating the Bankruptcy Court's injunction.¹⁷

24. EPMI argues that, even if it were appropriate to consider the termination issue in this proceeding, EPMI was not required to file a notice of cancellation. EPMI asserts that, according to Commission and court precedent,¹⁸ it was not required to file a notice of cancellation under section 35.15(a) because EPMI was not required to physically file the Agreement and the subsequent two long-term firm power sales transactions with the Commission in the first place. EPMI states that the Commission did not limit its rulings in *Southern I* and *Southern II* to short-term transactions, as Santa Clara argues. EPMI states that, while the transactions involved in those proceedings were short-term transactions, the Commission made clear that its policy applied to any discretionary power sales transactions -- which were not required to be filed with the Commission, regardless of the length of the contract term.¹⁹

25. EPMI also argues that Santa Clara confuses the physical filing requirement, which is the predicate for prior notice of termination under section 35.15(a), with the legal status of contracts and transactions reported in quarterly reports as "filed rates" for purposes of the filed rate doctrine and the *Mobile-Sierra* doctrine.²⁰ EPMI states that, in spite of the

¹⁷ We do not believe that the Bankruptcy Court's determination should be read as both allowing the Commission to consider the Notice Issues and yet not, according to EPMI, allowing the Commission to address what EPMI views as the necessary predicate to deciding the Notice Issues. Such an internally inconsistent argument makes no sense, and we reject it.

¹⁸ *Citing Southern I*, 84 FERC ¶ 61,199; *Southern II*, 86 FERC ¶ 61,131; *PCA*, 245 F.3d at 844-45; *Citizens Power & Light Co.*, 48 FERC ¶ 61,210 at 61,778 (1989); Order No. 2001 at P 223.

¹⁹ *Citing Southern I*, 84 FERC ¶ 61,199 at 61,986-87; *PCA*, 245 F.3d at 844; *Vermont Public Power Supply Auth. v. PG&E Energy Trading Power, L.P.*, 104 FERC ¶ 61,185 at P 19 (2003).

²⁰ *PacifiCorp. v. Reliant Energy Servs., Inc.*, 105 FERC ¶ 61,184 at 61,972 (2003).

fact that the transactions in *Southern I* and *Southern II* were reported in quarterly reports, the Commission and court did not consider the agreements to be “on file” with the Commission for purposes of section 35.15(a).

26. EPMI also claims that any suggestion that the Agreement should be deemed a physically filed contract because EPMI controlled generation is refuted by the Commission’s recent decision in *El Paso Electric Company*,²¹ which states that, although EPMI controlled El Paso’s generation, EPMI did not have to file the contract at issue there. EPMI asserts, therefore, that merely having control of power plants does not make a company subject to a requirement to file long-term contracts; rather, the test is whether the seller “owns” generation. EPMI states that, since it did not own generation but was a power marketer, it was not required to file the Agreement or the subsequent two long-term firm power sales transactions with the Commission.²²

27. EPMI also contends that the reason for Commission review under section 35.15 (*i.e.*, determining whether the proposed termination threatens the ability to render reliable service because of the absence of alternative sources) is not present here.²³

3. Commission Determination

28. Pursuant to section 35.15(a) of the Commission’s regulations, when a rate schedule or part thereof “is required to be on file with the Commission,” notice of cancellation is required (absent waiver) at least sixty days prior to the date the cancellation is proposed to take effect. The issue here is whether EPMI was required in

²¹ Citing *El Paso Elec. Co.*, 108 FERC ¶ 61,071 at P 19 (2004) (*El Paso*).

²² Citing *PCA*, 245 F.3d at 844-45; *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 at 61,778 (1989); Order No. 2001 at P 223.

²³ Citing *Electric Rates; Construction Work in Progress; Anticompetitive Implication*, Order No. 474, FERC Stats. & Regs., Regs. Preambles 1986-1990 ¶ 30,719 (1987).

the first instance to file the Agreement and the two long-term power sales transactions with the Commission. We find that EPMI was not required to do so, and did not do so. As a consequence, EPMI did not need to file a notice of cancellation.²⁴

29. At the time of execution of the Agreement and the two long-term power sales transactions at issue here, power marketers were only required to file their umbrella tariff (*i.e.*, market-based rate tariff) with the Commission and then summarily report individual transactions after-the-fact on a quarterly basis.²⁵ Therefore, because EPMI had filed a

²⁴ To reach the opposite conclusion, we would have to find that, while a contract did not have to be physically filed with the Commission in the first instance, a notice of its cancellation would. Such a policy would make little sense, and the Commission has not followed such a policy in implementing section 35.15 of the Commission's regulations. *See Southern II*, 86 FERC ¶ 61,131 at 61,458.

²⁵ *Southern I*, 84 FERC ¶ 61,199 at 61,986; *Southern II*, 86 FERC ¶ 61,131 at 61,459 & n.36; *PCA*, 245 F.3d at 845; *see also Heartland Energy Servs.*, 68 FERC ¶ 61,223 at 62,065-66 (1994). We note that, in an order issued on May 27, 1999, the Commission proposed to change power marketers' filing requirements to require power marketers engaged in long-term transactions to file the actual long-term agreements with the Commission rather than merely report the transactions in quarterly summaries. *Southern Co.*, 87 FERC ¶ 61,214 at 61,848-49. However, in that same order, the Commission stayed the effect of the proposed revised filing requirements pending Commission action on the requests for rehearing of the order and the issuance of a final order in the proceeding. *Id.* at 61,849. Subsequently, in an order issued on April 25, 2002, the Commission rescinded the requirement. *Southern Co.*, 99 FERC ¶ 61,103.

We find that *Cheyenne Light, Fuel and Power Co. v. PacifiCorp*, 94 FERC ¶ 61,103 at 61,420 (2001), is inapplicable here because it involved very different facts, a filed pre-July 9, 1996 power sales contract, and *Portland General Elec. Co.*, 75 FERC ¶ 61310 (1996), was overruled in relevant part by *Southern II*, 86 FERC at 61,457, and therefore cannot be relied upon here. *Trigen-Syracuse Energy Corp.*, 95 FERC ¶ 61,326 (2001), and *PPL Montana LLC*, 96 FERC ¶ 61,313 (2001), have no relevance here since the Commission declined to reach the merits in those proceedings.

market-based rate tariff with the Commission and received market-based rate authority, EPMI did not have to file with the Commission its subsequent agreements or confirmation letters for individual transactions executed pursuant to such agreements.²⁶

30. Because the Agreement and the resulting long-term power sales transaction confirmations were not required to be “on file” with the Commission for purposes of section 35.15 of the Commission’s regulations, notice of their cancellation also was not required. While Santa Clara asserts that a seller’s quarterly report, in and of itself, means that the underlying agreements are filed, we disagree. They are not “on file” for purposes of section 35.15 of the Commission’s regulations.²⁷ The Commission has determined that a finding (in a ruling on an application for market-based rate authority) that a seller lacks market power or has taken sufficient steps to mitigate market power, combined with the post-approval quarterly reporting requirements, satisfies the requirements of section 205(c) of the FPA. But that does not mean that they are “on file” for purposes of section 35.15 of the Commission’s regulations (*i.e.*, a notice of cancellation is not necessary). Finally, the Commission has also found that, even though EPMI controlled generation as a power marketer, EPMI was not required to separately file service agreements under section 205(c) of the FPA.²⁸ Accordingly, we find that EPMI’s cancellation of the Agreement is not void for failure to provide notice in compliance with section 205(d) of the FPA.

E. Market-Based Rates Authority Issues

1. Santa Clara’s Complaint

31. Santa Clara argues that, if EPMI’s cancellation was proper, EPMI should not be permitted to compute the termination payment based on its now-revoked market-based rates. Santa Clara seeks an order: (1) requiring EPMI to calculate, on a cost-of-service basis, any termination payment for undelivered energy contracts with terms extending

²⁶ Contrary to Santa Clara’s assertion, in *Blumenthal I*, the Commission agreed that the wholesale power sales agreement at issue did not have to be filed with the Commission. *Blumenthal I*, 103 FERC ¶ 61,344 at P 58 (“the relevant contract information is provided pursuant to quarterly reports but the contract itself is not filed with the Commission”); *Blumenthal II*, 104 FERC ¶ 61,211 at P 39.

²⁷ *Southern II*, 86 FERC ¶ 61,131 at 61,459-60 & n.40.

²⁸ *El Paso Elec. Co.*, 108 FERC ¶ 61,071 at P 19.

beyond the Commission's order revoking EPMI's market-based rate authority (issued on June 25, 2003);²⁹ or (2) revoking EPMI's market-based rates effective on or before January 2000, the effective date of Santa Clara's requested alternative relief. Santa Clara contends that either of the two forms of alternative relief would ensure that EPMI would only recover cost-based charges and not profit from its violation of its market-based rate authority. Santa Clara asserts that EPMI's continued efforts to seek profits from its market-based rate contracts with Santa Clara through unlawful claims for termination payments computed according to EPMI's tainted market-based rates demonstrates that the relief granted thus far by the Commission for EPMI's violations of its market-based rate authority is inadequate and incomplete. Santa Clara argues that EPMI's failure to reveal numerous changed circumstances, including a change in control of generation, in EPMI's triennial market analysis justifies a Commission finding revoking, suspending or prohibiting EPMI's continued use of its market-based rate authority after January 2000.

2. EPMI's Answer

32. EPMI states that, under the Agreement and resulting two long-term power sales transactions, the *Mobile-Sierra* public interest standard of review applies here. EPMI argues that Santa Clara has not shown that the public interest requires the modification of these agreements to require the calculation of the termination payment on a cost-of-service basis. EPMI adds that Santa Clara has not offered any legal justification for instead applying the just and reasonable standard of review to its request for contract modification.

33. EPMI also argues that section 206 does not authorize the Commission to retroactively modify these agreements or retroactively revoke EPMI's market-based rate authority because the Commission's remedial powers under section 206 can only be applied prospectively. In response to the request to revoke EPMI's market-based rate authority prior to the date of execution of the Agreement, EPMI states that the Commission's order instituting the show cause proceeding recognized the Commission's statutory obligation to establish a refund effective date no earlier than 60 days after the publication of the order.³⁰ EPMI adds that the limited circumstances under which the

²⁹ Citing *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,343 at 62,297 (2003), *reh'g denied*, 106 FERC ¶ 61,024 at P 24-32 (2004). In its comments, CEOB recommends that any required termination payment be mitigated using either: (1) a cost-based price, as Santa Clara recommends; or (2) an appropriate mitigation proxy price consistent with the treatment of the market as a whole in Docket No. EL00-95, *et al.*

³⁰ Citing *Enron Power Mktg., Inc.*, 102 FERC ¶ 61,316 at P 10 (2003).

Commission can order refunds for charges collected prior to the refund effective date (*i.e.*, where the Commission has accepted for filing a formula rate subject to retroactive refund regarding costs impermissibly charged through the formula, or where rates charged are contrary to the filed rate³¹) do not apply here. EPMI also contends that section 309 of the FPA does not confer independent authority upon the Commission to avoid the prohibition against retroactive remedies in section 206.³² EPMI states that it has not violated the FPA, or the regulations thereunder, with regard to its cancellation of its agreements with Santa Clara.

3. Commission Determination

34. Our resolution of the Market-Based Rate Issues raised by Santa Clara depends on the outcome of the proceeding in Docket No. EL03-180-000, *et al.* A hearing is presently ongoing in that proceeding. Since the potential disgorgement of profits could extend back to the date of execution of the Agreement and the two long-term power sales transactions,³³ we will defer resolution of these issues until a final order on disgorgement of profits is issued in Docket No. EL03-180-000, *et al.*

The Commission orders:

(A) Santa Clara's amended complaint is hereby denied with regard to the Notice Issues, as discussed in the body of this order.

³¹ Citing *San Diego Gas & Elec. Co. v. Seller of Energy and Ancillary Serv.*, 93 FERC ¶ 61,121 at 61,381 (2000).

³² Citing *New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974); *Southern Union Gas Co. v. FERC*, 725 F.2d 99, 102 (10th Cir. 1984); *FPC v. Texaco Inc.*, 417 U.S. 380, 394-95 (1974); *Public Serv. Comm'n of New York v. FERC*, 866 F.2d 487, 490 (D.C. Cir. 1989); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 96 FERC ¶ 61,120 at 61,509-10 (2001); *Consolidated Edison Co. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003).

³³ See *El Paso*, 108 FERC ¶ 61,071 at P 2.

(B) Resolution of Santa Clara's amended complaint is hereby deferred with regard to the Market-Based Rate Issues, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas
Secretary