

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Service Company of New Mexico

Docket No. EL03-200-000

ORDER ON MOTION TO DISMISS SHOW CAUSE PROCEEDING

(Issued July 6, 2005)

1. In this order, we grant a motion to dismiss Docket No. EL03-200-000 instituted in the show cause proceeding established by the Partnership Gaming Order.¹

Background

Partnership Gaming Order

2. In the Partnership Gaming Order, the Commission explained that, based on the Final Report submitted by Commission Advisory Staff, and evidence and comments submitted by market participants, it appeared that Enron Power Marketing, Inc. and Enron Energy Services Inc. (collectively, Enron) and a number of entities identified in the order, including Public Service Company of New Mexico (PNM) (collectively, Partnership Entities), worked in concert through partnerships, alliances or other arrangements (jointly, Partnerships) to engage in activities that constitute gaming and/or anomalous market behavior (Gaming Practices) in violation of the California Independent System Operator Corporation's (CAISO) and the California Power Exchange's (PX) tariffs during the period January 1, 2000 to June 20, 2001.² The order also found that there was evidence that a number of Partnership Entities appear to have had similar Partnerships, which could be attempts to engage in similar activities.

¹ *Enron Power Marketing Inc.*, 103 FERC ¶ 61,346 (2003), *reh'g denied*, 106 FERC ¶ 61,024 (2003) (Partnership Gaming Order).

² The Partnership Gaming Order adopted the definitions of Gaming Practices stated in *American Electric Power Service Corp.*, 103 FERC ¶ 61,345 (Gaming Order), *reh'g denied*, 106 FERC ¶ 61,020 (2003), which was issued contemporaneously.

3. In the Partnership Gaming Order, the Commission directed the identified entities, in a trial-type evidentiary hearing to be held before an administrative law judge (presiding judge), to show cause why their behavior, as set forth in the order, during the period January 1, 2000 to June 20, 2001 does not constitute gaming and/or anomalous market behavior as defined in the CAISO and PX tariffs. Further, the Commission directed the presiding judge 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, and to recommend a monetary remedy of disgorgement of unjust profits and any other additional, appropriate non-monetary remedies.

Discussion

4. As the result of Commission Trial Staff's investigation, which included examining data responses, conducting conferences, and examining the CAISO's submissions, Trial Staff filed a motion to dismiss and request to terminate Docket No. EL03-200-000.

5. On October 4, 2004, the California Parties³ filed a response to the motion to dismiss. On October 18, 2004 Trial Staff and PNM each separately filed an answer to the California Parties' response. On October 25, 2004, Edison filed an answer to Trial Staff's answer.

Procedural Matter

6. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), prohibits answers to answers unless specifically permitted by the decisional authority. We will permit the answers because they provided information that has assisted us in our decision-making process.

Motion to Dismiss

7. In the Partnership Gaming Order, the Commission determined that PNM appeared to have engaged in a partnership, alliance, or other arrangement with the following entities: Aquila Merchant Services, Inc.; Constellation Power Source, Inc.; E1 Paso Merchant Energy, L.P.; Enron Power Marketing, Inc.; Idaho Power Company; Koch Energy Trading, Inc.; MIECO, Inc.; Morgan Stanley Capital Group Inc.; PECO Energy Company; PPM Energy, Inc. (f/k/a PacifiCorp Power Marketing, Inc.); Powerex Corp.

³ The California Parties are the People of the State of California ex rel. Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Pacific Gas and Electric Company, and Southern California Edison Company (Edison).

(f/k/a British Columbia Power Exchange Corp.); Sempra Energy Trading Corporation; and TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc. to engage in Gaming Practices and established Docket No. EL03-202-000.

8. Based on its review of the record, Trial Staff filed a motion to dismiss the Partnership Gaming Practices allegations against PNM. According to Trial Staff, there is no evidence that PNM either (1) engaged in a Gaming Practice that violated the CAISO or PX tariffs by directly transacting through the CAISO or PX markets pursuant to their tariffs, or (2) shared any unjust profits earned by PNM's counterparties that may have conducted Gaming Practices. Moreover, Trial Staff has either moved to dismiss or entered into settlements with twelve of the entities paired with PNM in the Partnership Gaming Order, in each instance stating Trial Staff's determination that there was no evidence indicating that any of these counterparties had used their parking and lending arrangements with PNM to complete a transaction constituting a Gaming Practice. Trial Staff therefore requests that the Commission dismiss this show cause proceeding against PNM and terminate this docket.

9. In addition, the motion states that to achieve regulatory certainty and closure in this proceedings and to avoid the burdens, costs, and uncertainty associated with the litigation process, PNM has agreed, within thirty (30) days of the approval without modification of a related agreement between Trial Staff and PNM, by final order of the Commission no longer subject to judicial review, to pay a lump sum amount of \$1 million into a Deposit Fund Account established by the U.S. Treasury on behalf of the Commission for this purpose. Furthermore, article 5.5 of the motion to dismiss states that this payment "constitutes a complete and total satisfaction of all issues related to any potential liability for the performance of parking and lending services by PNM."⁴

10. PNM earned \$5 million in fees for providing a parking and lending service, which Trial Staff states, alone, is not tantamount to engaging in any Gaming Practice that violated the CAISO or PX tariffs or entering into a partnership, alliance, or other arrangement that violated the CAISO or PX tariffs as set for hearing, so as to warrant disgorgement of profits. Trial Staff states that, regarding PNM's \$5 million in parking fees, PNM earned only \$356,167 from Enron - the only entity paired with PNM in the Partnership Gaming Order that is still at issue in this proceeding. Therefore, PNM's agreement to pay \$1 million is more than enough to constitute a full disgorgement of the fees.⁵

⁴ Motion at 15.

⁵ Motion at 11.

Responses

11. The California Parties filed a response in opposition to the motion to dismiss. They argue that the motion is mislabeled and that, although it is characterized as a motion to dismiss, it is an offer of settlement.⁶ They contend that the motion to dismiss is an inappropriate procedural vehicle where the motion concerns a negotiated resolution of issues set for hearing. The California Parties assert that when a matter has been set for hearing, the presiding judge has the responsibility to review and certify, or not certify, settlements.

12. The California Parties also state that the motion is procedurally inappropriate because it seeks to settle issues that fall outside the scope of this proceeding, which the California Parties contend are not specifically identified. They also argue that the motion does not meet the legal standard for approval of settlements.

13. They assert that there are material issues of fact and that, therefore, the Commission cannot conclude that the relevant filings are inadequate to make out a *prima facie* case with respect to the allegations at issue if those filings have been afforded every reasonable favorable inference.⁷

14. Alternatively, the California Parties request that, if the motion to dismiss is granted, the Commission should condition its approval on the removal of section 5.5. Section 5.5 provides as follows:

The payment of the Settlement Amount constitutes a complete and total satisfaction of all issues related to any potential liability for the performance of parking and lending services by PNM. The effectiveness of this agreement is conditioned on the Commission assuring that at no time and under no circumstances shall PNM be subject to further scrutiny, investigation or proceedings by the Commission or any of its staff specifically regarding its provision of parking and lending services prior to July 19, 2004 (the date PNM represents that it ceased providing parking and lending services), except as provided in section 7.4.

The California Parties state that section 7.4 does not provide an adequate exception to this broad release. The California Parties argue that section 7.4 provides that the PNM motion does not shield PNM from further scrutiny, investigation or proceedings involving issues not set for hearing in the Partnership Gaming Order and that might

⁶ California Parties Response at 7.

⁷ See *Id.* at 11-12 and cases cited therein.

“incidentally relate to or involve PNM’s parking and lending services.”⁸ They assert that PNM and Staff seek to release PNM for all liability related to its parking and lending services for a period of seven or eight years, even though, it claims, there is no record on which to support such a release.

15. The California Parties further request that in the event the Commission approves the motion and agreement, the docket not be closed and that PNM’s obligations to participate in this proceeding not be fully relieved until all of the Show Cause proceedings have been concluded. PNM should remain subject to discovery as a party (rather than forcing parties to have to pursue discovery as though PNM was a third party) to the extent it possesses information relevant to Gaming Practices by others.

16. In PNM’s answer to the California Parties’ response, PNM contends that the California Parties do not offer any valid rationale for the Commission to reject the motion or to impose the conditions requested by the California Parties in connection with the approval of the motion. PNM states that the motion was filed directly with the Commission because the Commission plainly reserved for itself the authority to rule on motions to dismiss, and the agreement concerning PNM’s authority to provide parking and lending services addresses matters that are beyond the scope of the matters set for hearing.

17. In addition, both Trial Staff and PNM state that no material issues of fact exist to warrant denial of the motion to dismiss or rejection of the agreement. Trial staff states that the California Parties fail to identify a genuine factual dispute about whether PNM either violated the CAISO or PX tariffs by engaging in a Gaming Practice, or shared unjust profits with an identified Partnership Entity that did so.

18. Trial Staff states that the issues raised by the California Parties do not warrant rejection of PNM’s request to resolve its potential liability for providing parking and lending services. It claims that the only issue being resolved is the legality of PNM’s parking and lending practices. PNM contends that, even if the California Parties are deemed to be a contesting party, the Commission may still approve the agreement because the record is sufficient to permit the Commission to decide any contested issues because the issues raised are legal issues, not factual issues. In this regard, PNM argues that the agreement provides a result that is just and reasonable, and the interest of the California Parties is attenuated.

⁸ *See Id.* at 33.

19. In addition, Trial Staff states that this is not the first proceeding in which Trial Staff has reflected an agreement in a motion to dismiss, and, in fact, did so as to one of the California Parties, Edison.⁹ In Edison's response, it contends that Trial Staff's characterization of the motion to dismiss Edison from the Gaming Order proceeding as containing a settlement was in error. Edison states that Trial Staff moved to dismiss Edison from the Gaming Order proceeding because there was no basis to continue the investigation and that the money which was to change hands was not revenue from questionable trading practices, but from payments made in error by the CAISO to Edison discovered in the course of the investigation.

20. As to the release provision provided in the agreement, Trial Staff contends that this release is tailored appropriately to cover the narrow issue PNM chose to settle: the questionable lawfulness of its parking and lending practices. Thus, PNM should be assured that, in consideration of the monetary and non-monetary remedies included in the Motion and Agreement, it will not have to re-litigate the very same issue resolved herein.

Commission Determination

21. We will grant Trial Staff's motion to dismiss (and in doing so, approve the agreement). We agree with Trial Staff's assessment of the record in this docket and find that PNM did not engage in prohibited gaming practices, as defined in the Partnership Gaming Order, during the relevant time period. Moreover, in almost every instance, the only opposition was in substance a restatement of the requests for clarification/rehearing of the Partnership Gaming Order (and the Gaming Order) and, as such, not appropriately addressed here.

22. In this regard, the Commission also approves PNM's agreement to pay \$1 million to resolve its potential liability for providing parking and lending services. We disagree with the California Parties' contention that this is a settlement required by Rule 206 of the Commission's regulations¹⁰ to be certified by the presiding judge. PNM's parking and lending services were beyond the scope of the matters set for hearing in this proceeding. In addition, we agree with Trial Staff that there are no material issues of fact that would warrant rejection of this agreement, but rather we can approve the settlement on the record before us.

⁹ Trial Staff Answer at 5, citing Trial Staff Motion to Dismiss Show Cause Proceeding, Docket No. EL03-175-000 (Nov. 3, 2003).

¹⁰ 18 C.F.R. § 385.602 (2004).

23. We will therefore dismiss the above show cause proceeding against PNM, subject to parties' commitments made in order to facilitate dismissal, and terminate this docket.¹¹

The Commission orders:

(A) Trial Staff's motion to dismiss is hereby granted, as discussed herein.

(B) Docket No. EL03-200-000 is hereby terminated.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

¹¹ We deny the requests that the docket be kept open so that the respondents remain subject to discovery as parties. Keeping PNM "on the hook" for discovery after it no longer is a party and no longer has an interest in the proceeding is unfair and onerous. In any event, the Commission's rules of discovery are sufficient to provide parties with a means to discover information from non-parties, should that prove necessary or appropriate. *See* 18 C.F.R. §§ 385.404, 385.409 (2004).