

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Investigation of Anomalous Bidding Behavior
and Practices in the Western Markets

Docket No. IN03-10-000

ORDER DISMISSING MOTION FOR CLARIFICATION,
REQUEST FOR ADDITIONAL PROCEDURES,
AND REQUEST FOR REHEARING

(Issued October 8, 2004)

1. On August 18, 2004, the California Parties¹ filed a motion for clarification and request for additional procedures, or in the alternative, a request for rehearing of the Commission's determinations in its anomalous bidding investigation. The California Parties' pleading appears to have been filed in response to the Commission's recent decision to deny its request for non-public documents pursuant to the Freedom of Information Act (FOIA).² In this order, the Commission dismisses the California Parties' pleading.

Background

2. On June 25, 2003, in Docket No. IN03-10-000, the Commission directed its Office of Market Oversight and Investigations to conduct an investigation of the bidding behavior and practices engaged in by participants in the short-term energy markets operated by the California Independent System Operator and the California Power

¹ The "California Parties" consist of the People of the State of California *ex rel.* Bill Lockyer, Attorney General; the California Electricity Oversight Board, the California Public Utilities Commission, Southern California Edison Company, and Pacific Gas and Electric Company.

² 5 U.S.C. § 552 (2002).

Exchange for the period May 1, 2000 to October 2, 2000.³ On October 16, 2003, the Commission subsequently clarified that Docket No. IN03-10-000 is a non-public investigation under 18 C.F.R. Part 1b of its regulations.⁴ The Commission explained that there are no parties to investigations pursuant to 18 C.F.R § 1b.11 (2003).⁵

3. On May 19, 2004, the City of Los Angeles Department of Water and Power (LADWP) issued a press release stating that it received a letter from the Commission explaining that the Commission had terminated its investigation of LADWP's anomalous bidding practices. The California Parties presume that the issues resolved in LADWP's investigation are the same issues that are pending in *San Diego Gas & Elec. Co., et al.* in Docket No. EL00-95-000, *et al.* (the "Refund Proceeding"). The Commission, however, did not notify the public or the California Parties of its decision to terminate its non-public investigation of LADWP's anomalous bidding practices.

4. In response to LADWP's public announcement, the California Parties, on June 25, 2004, requested, pursuant to the Freedom of Information Act (FOIA), "copies of all letters and notices issued by the Commission in Docket No. IN03-10-000 since the start of its Anomalous Bidding Investigation in that docket." The Commission, however, on July 21, 2004, issued a letter denying its FOIA request. In the letter, the Commission stated that a search of the Commission's non-public files identified one or more documents that may be responsive to the California Parties' request. Notwithstanding, the Commission explained that it was withholding the documents pursuant to FOIA Exemption 7, which exempts from disclosure, "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings."⁶

³ *Investigation of Anomalous Bidding Behavior and Practices in Western Markets*, 103 FERC ¶ 61,347 (2003).

⁴ *Fact-Finding Investigation of Potential Market Manipulations of Electric and Natural Gas Prices, et al.* 105 FERC ¶ 61,063, *order on reh'g*, 105 FERC ¶ 61,281 (2003).

⁵ *Id.* at P 6.

⁶ 5 U.S.C. § 552(b)(7).

5. On September 24, 2004, the California Parties filed another FOIA request for information similar to that sought under the instant motion. The Commission has not yet acted on that FOIA request.

Instant Filing

6. On August 18, 2004, the California Parties filed a “motion for clarification and request for additional procedures and, in the alternative, request for rehearing.” The California Parties seek clarification from the Commission regarding: (1) whether the Commission has made any final determinations regarding sellers’ anomalous bidding behavior and practices in the Western markets; and (2) if the Commission has made any such final determinations, whether the Commission addressed the California Parties’ evidence of anomalous bidding behavior submitted in the Refund Proceeding and made any determinations regarding the merits of that evidence.

7. The California Parties further request that the Commission make public all decisions, staff analyses, and underlying record information collected or developed in its investigation, and incorporate such information into the record of the Refund Proceeding. The California Parties state that the Commission should also establish procedures, consistent with the principles of due process and the requirements of the Ninth Circuit’s August 21, 2002 decision,⁷ to provide the California Parties an opportunity to challenge the Commission’s determinations in Docket No. IN03-10-000.

8. If the Commission does not grant its motion for clarification and the proposed procedures are not adopted, or if the Commission has already rejected the California Parties’ evidence on the issue of sellers’ anomalous bidding behavior, the California Parties seek rehearing of those determinations.⁸

⁷ See *Public Utilities Commission of the State of California, et al. v. FERC*, (Ninth Circuit Nos. 01-71051, *et al.*) (August 21, 2002) (Ordering the Commission to permit parties to seek, and introduce evidence concerning sellers’ market manipulation into the record of the Refund Proceeding.)

⁸ The California Parties contend that July 21, 2004 FOIA letter must be viewed as a dispositive order in Docket No. IN03-10-000.

Comments

9. On September 2, 2004, the Competitive Supplier Group (CSG) and Enron Power Marketing Inc. (EPMI) submitted answers in response to the California Parties' filing, and on September 10, 2004, the California Parties filed an answer in response to the answer filed by CSG.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits answers to protests and other answers. We are not persuaded to waive this prohibition, and the California Parties' unauthorized answer is rejected.

11. CSG states that the Commission has already ruled that the investigation in Docket No. IN03-10-000 would be conducted as an investigation pursuant to Part 1b of the Commission's regulations, thereby denying party status to would-be intervenors such as the California Parties.⁹ CSG states that the California Parties' claim that the Commission has violated their due process rights by establishing a non-public investigation to examine alleged anomalous bidding behavior is clearly incorrect, given the broad discretion the Commission has in conducting investigations. Furthermore, CSG states that there is no basis for the California Parties' claim that the Commission violated the Ninth Circuit's order (which permitted parties to adduce evidence of market manipulation) by deciding to conduct an independent investigation of alleged anomalous bidding behavior.

12. CSG states that the California Parties' filing is the latest in a series of apparently never-ending pleadings through which the California Parties seek to cross-pollinate the records in various dockets that the Commission has treated separately, both procedurally and substantively. CSG states that the California Parties' pleading seeks relief only in Docket No. IN03-10-000; however, consistent with their established practice, the California Parties also filed its motion in Docket Nos. EL00-95-000, *et al.* and EL00-98-000, *et al.*, which are separate and distinct from Docket No. IN03-10-000. CSG states that when confronted with the California Parties' practice in the past, the Commission has directed the Secretary to remove improperly filed pleadings from the Refund Proceeding.¹⁰ CSG suggests that such action would be appropriate in this case.

⁹ *Citing Fact-Finding Investigation of Potential Market Manipulations of Electric and Natural Gas Prices, et al.* 105 FERC ¶ 61,063 at P 7, *order on reh'g*, 105 FERC ¶ 61,281 (2003).

¹⁰ *Citing Duke Energy North America LLC, et al.*, 106 FERC ¶ 61,117 at n.2 (2004).

13. EPMI similarly objects to the California Parties' attempt to inject itself into the Commission's investigation and argues that nothing in the Ninth Circuit's order directs the Commission to permit the California Parties to participate as parties in its investigations.

Discussion

14. The Commission will dismiss the California Parties' motion for clarification, request for additional procedures, and alternative request for rehearing. As explained in prior decisions, the California Parties are not parties to this non-public investigation.¹¹ Under the Commission's regulations, *see* 18 C.F.R. § 1b.11 and 385.101(b)(1), there is no right to intervene in non-public investigations. Thus, the Commission's regulations prohibit the participation by parties in such investigations.¹²

15. Because the California Parties lack party status, they also lack standing under the Federal Power Act (16 U.S.C. § 8251) to seek rehearing of an order issued by this Commission, as only a "party" may seek agency rehearing (and ultimately, judicial review.)¹³ On September 7, 2004, the California Parties filed with the Commission's General Counsel an appeal of the Commission's decision to deny their June 25, 2004 FOIA request.

16. Finally, the Commission finds that the California Parties have improperly filed its pleading in multiple proceedings. Accordingly, consistent with precedent,¹⁴ the Commission directs the Secretary to remove the California Parties' filings (as well as the

¹¹ *Fact-Finding Investigation of Potential Market Manipulations of Electric and Natural Gas Prices, et al.* 105 FERC ¶ 61,063 at P 7, *order on reh'g*, 105 FERC ¶ 61,281 (2003). *See also Duke Energy North America, LLC, et al.*, 106 FERC ¶ 61,177 at P 5 (2004).

¹² *See* 18 C.F.R. § 1b.11 (2004) ("There are no parties, as that term is used in adjudicative proceedings, in an investigation under this part and no person may intervene or participate as a matter of right in any investigation under this part.")

¹³ *See generally, Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, 103 FERC ¶ 61,019 at P 14-17 (2003); and *Duke Energy North America, LLC, et al.*, 106 FERC ¶ 61,177 at P 5 (2004).

¹⁴ *Duke Energy North America LLC, et al.*, 106 FERC ¶ 61,117 at n.2 (2004).

answers filed by CSG and Enron) in Docket Nos. EL00-95-000, EL00-95-045, EL00-95-069, EL00-98-000, EL00-98-042, and EL00-98-058 as being improperly filed in those proceedings.

The Commission orders:

(A) The California Parties' motion for clarification, request for additional procedures, and request for rehearing are dismissed, as discussed in the body of this order.

(B) The Secretary is hereby directed to remove the California Parties' filings (as well as the answers filed by CSG and Enron) in Docket Nos. EL00-95-000, EL00-95-045, EL00-95-069, EL00-98-000, EL00-98-042, and EL00-98-058 as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.