

111 FERC ¶ 61,221  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Electric Company, Docket No. EL02-113-010  
Enron Power Marketing, Inc., and  
Enron Capital and Trade Resources Corporation

Enron Power Marketing, Inc. and Docket No. EL03-180-010  
Enron Energy Services, Inc.

Enron Power Marketing, Inc. and Docket No. EL03-154-007  
Enron Energy Services, Inc.

Portland General Electric Company Docket No. EL02-114-008

Enron Power Marketing, Inc. Docket No. EL02-115-012

ORDER ON MOTION TO INTERVENE OUT-OF-TIME  
AND REQUEST FOR CLARIFICATION

(Issued May 12, 2005)

1. On April 11, 2005, Western Power Trading Forum (WPTF) submitted a motion to intervene out-of-time and requested clarification of the scope of the hearing in the above-captioned dockets. For reasons set forth below, we dismiss WPTF's motion. However, the Commission, *sua sponte*, provides clarification on the scope of the hearing as discussed below.

**I. Background**

2. On June 25, 2003, the Commission initiated the two Show Cause Proceedings,<sup>1</sup> Docket Nos. EL03-180-000, *et al.*, and EL03-154-000, *et al.*, to investigate whether sellers, including Enron Power Marketing, Inc. and its affiliates (jointly, Enron), either individually or jointly engaged in gaming and/or anomalous market behavior in violation

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<sup>1</sup> See *American Electric Power Service Corp.*, 103 FERC ¶ 61,345 (2003), and *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (collectively Show Cause Proceedings or Show Cause Orders).

of the Market Mitigation and Information Protocols of the California Independent System Operator Corporation (ISO) and California Power Exchange (PX) tariffs during the period from January 1, 2000 to June 20, 2001. In its Show Cause Orders, the Commission initiated trial-type evidentiary procedures and directed the administrative law judges (ALJs) to quantify the extent to which the various respondents had been engaged in and unjustly enriched by improper gaming and/or partnership activities during the period January 1, 2000 to June 20, 2001. The Commission explained that any and all such unjust profits during that period should be disgorged in their entirety and also directed the ALJs to consider any additional, appropriate non-monetary remedies such as revocation of the identified sellers' market-based rate authority.

3. On July 22, 2004, the Commission issued an order in Docket No. EL02-113-000, affirming an initial decision's finding that Enron violated a condition contained in the Commission's order authorizing Enron to charge market-based rates for wholesale power sales, by not informing the Commission of Enron's business relationship with El Paso Electric Company (El Paso Electric).<sup>2</sup> The Commission's July 22 Order required Enron to disgorge \$32.5 million in profits associated with sales involving El Paso Electric's facilities. However, holding that the Enron-El Paso Electric relationship was a subset of other Enron relationships and practices currently at issue in the Show Cause Proceedings, the Commission consolidated Docket No. EL02-113-000 with the Show Cause Proceedings and directed the ALJ to determine the total amount of money that Enron should be required to disgorge. In consolidating these proceedings, the Commission noted that, based on the evidence in the consolidated dockets, Enron could potentially be required to disgorge profits for all of its wholesale power sales in the Western Interconnect for the period January 16, 1997 to June 25, 2003, and that an appropriate remedy should take into account all evidence of violations of tariffs on file or orders of the Commission in all pending dockets involving Enron's role in the Western power crisis.

4. Western Parties<sup>3</sup> requested clarification of the July 22 Order. The Commission responded that the hearing ordered in the July 22 Order involved an examination of Enron's profits and that, as the termination payments under certain of Enron's contracts "are based on profits Enron projected to receive under its long-term, wholesale power

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<sup>2</sup> *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation*, 108 FERC ¶ 61,071 (2004) (July 22 Order).

<sup>3</sup> Western Parties consist of: the Nevada Power Company and Sierra Pacific Power Company (collectively, Nevada Companies), Public Utility District No. 1 of Snohomish County, Washington (Snohomish), the City of Palo Alto, California, the Office of the Nevada Attorney General's Bureau of Consumer Protection, the Attorney General of the State of Washington, and the Public Utilities Commission of Nevada.

contracts executed during the period when Enron was in violation of conditions of its market-based rate authority,” the termination payments, *i.e.*, those profits as well, were within the scope of the hearing.<sup>4</sup>

5. Subsequently, in response to an interlocutory appeal involving a discovery dispute, the Commission again explained that, with respect to the remedy applicable to Enron, the hearing should consider any unjust profits that Enron may have derived through its violation of the Commission’s directives, specifically, the conditions of the Commission’s order granting Enron market-based rate authority, and the disgorgement of such profits.<sup>5</sup> It added that this remedy of disgorgement of unjust profits by Enron hinged on the violation of the Commission’s directives and *not* on whether there was quantifiable harm (or the amount of the harm) to any particular customer.

6. On April 11, 2005, Western Power Trading Forum (WPTF) submitted a motion to intervene out-of-time and requested clarification that the scope of the hearing in the above-captioned dockets should be limited to violations by Enron of the terms of the orders granting Enron market-based rate authorization and of the tariffs of the ISO and PX, and on the calculation of profits that should be disgorged by Enron as a result of these violations. According to WPTF, such a clarification is necessary to prevent this hearing from becoming an opportunity to litigate, and re-litigate, issues related to the alleged relationship between ISO and PX spot markets and bilateral forward markets in the West. WPTF argues that, if the Commission denies the requested clarification, other parties including WPTF, may be forced to intervene and submit testimony on May 13, 2005, to avoid adverse effects on WPTF and its members.

7. On April 14, 2005, as supplemented on April 22, 2005, the Public Utility District No. 1 of Snohomish County, Washington, the City of Santa Clara, California d/b/a Silicon Valley Power, and Nevada Power Company and Sierra Pacific Power Company (collectively, Western Intervenors) submitted an answer. On April 26, 2005, 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 (collectively, California Parties) submitted an answer.

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<sup>4</sup> *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation*, 110 FERC ¶ 61,280 at P 10-11 (2005) (March 11 Order).

<sup>5</sup> *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation*, 111 FERC ¶ 61,129 (2005) (April 29 Order).

8. The California Parties and Western Intervenors oppose WPTF's late intervention arguing that WPTF fails to meet the requirements for intervention. They also maintain that WPTF's request for clarification must be dismissed because it lacks the standing to file the request and that WPTF should have sought timely intervention as well as timely rehearing of the July 22 and March 11 Orders. In addition, they argue that the requested clarification conflicts with the Commission's prior orders and would deprive the existing parties of a full and fair opportunity to present evidence on all violations committed by Enron of the Commission orders and tariffs, all remedies that are appropriate for those violations, and the total amount of Enron's unjust profits relating to wholesale power contracts executed by Enron in bilateral forward markets. The Western Intervenors do not believe that WPTF should be allowed to foreclose the parties in this proceeding from submitting evidence on the nexus between Enron's misconduct and Enron's transactions in bilateral forward markets.

9. On April 27, 2005, WPTF filed an answer to the answers of California Parties and Western Intervenors. In further response, on April 28, 2005, the Western Intervenors also filed an answer. Both answers reiterate arguments made by these entities in their earlier submittals.

## **II. Discussion**

10. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.<sup>6</sup> WPTF has not met this higher burden of justifying its late intervention, and therefore, its motion to intervene out-of-time is denied.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept WPTF's April 27 and the Western Intervenors' April 28 answers, and will therefore reject them.

12. However, given that there appears to be confusion with regard to the scope of this proceeding, the Commission, *sua sponte*, takes this opportunity to clarify the scope.

13. In 2001 and 2002, various parties filed complaints with the Commission seeking abrogation or modification of long-term bilateral forward contracts entered into during 2000 and 2001 and alleging that these contracts were unjust and unreasonable because

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<sup>6</sup> See, e.g., *AES Warrior Run, Inc. v. Potomac Edison Co.*, 105 FERC ¶ 61,357 at P 12 (2003); *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

they were negotiated and executed in a forward market environment that was tainted by dysfunctions that the Commission had previously determined to have existed in the ISO and PX spot markets. The Commission consolidated the complaints into three separate proceedings (Long-Term Contract Proceedings)<sup>7</sup> and set for hearing: (i) whether the “public interest” standard of review of the *Mobile-Sierra* doctrine or the lesser “just and reasonable” standard of review applies to the challenged long-term bilateral forward contracts; (ii) whether the dysfunctional ISO and PX spot markets adversely affected long-term bilateral forward contracts; and (iii) if there was such an adverse effect, whether the impact on long-term bilateral forward contracts was sufficient to warrant modification of those contracts.<sup>8</sup> These Long-Term Contract Proceedings are currently pending before the United States Court of Appeals for the Ninth Circuit.<sup>9</sup>

14. In the Show Cause Orders, the Commission set for investigation whether Enron, among others, had individually or jointly engaged in gaming and/or anomalous market behavior in violation of the ISO’s and PX’s tariffs, and also noted that any unjust profits, (*i.e.*, the unjust enrichment gained from such actions) should be disgorged.<sup>10</sup> In the July 22 Order, the Commission separately found that Enron had violated a condition of the Commission’s order granting Enron market-based rate authority, by not informing the Commission of Enron’s business relationship with El Paso Electric, and ordered Enron to disgorge \$32.5 million in profits.<sup>11</sup> Given, however, that “the Enron-El Paso relationship was a subset of broader Enron relationships and practices in the West” that are at issue in the pending Show Cause Proceedings and also given that the \$32.5 million “represent[ed] only a fraction of Enron’s profits in the Western Interconnect for the period it violated its market-based rate authority,” the Commission determined that the best course of action was to consolidate Docket No. EL02-113-000 with the Show Cause Proceedings to

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<sup>7</sup> See *Nevada Power Co. v. Duke Energy Trading & Marketing, L.L.C.*, 99 FERC ¶ 61,047 (2002); *Public Utilities Commission of California v. Sellers of Long Term Contracts to the California Department of Water Resources*, 99 FERC ¶ 61,087 (2002); *PacifiCorp v. Reliant Energy Servs., Inc.*, 99 FERC ¶ 61,381 (2002) (Long-Term Contract Cases).

<sup>8</sup> See *Nevada Power Co. v. Duke Energy Trading & Marketing, L.L.C.*, 99 FERC at 61,190-91; *Public Utilities Commission of California v. Sellers of Long Term Contracts to the California Department of Water Resources*, 99 FERC at 61,383; *PacifiCorp v. Reliant Energy Servs., Inc.*, 99 FERC at PP 26-28.

<sup>9</sup> *Public Utilities Commission of California, et al. v. FERC*, Nos. 03-74207, *et al.* (9th Cir. filed November 17, 2003 and later).

<sup>10</sup> See *supra* note 1.

<sup>11</sup> July 22 Order, 108 FERC ¶ 61,071 at P 1.

determine “the total amount of profits that Enron should disgorge.” It added that Enron “potentially could be required to disgorge profits for all of its wholesale power sales in the Western Interconnect for the period January 16, 1997 to June 25, 2003.” In this regard, the Commission emphasized that, in determining an appropriate remedy, the ALJ should “take into account all evidence of violations of tariffs on file or orders of the Commission in all pending dockets involving Enron’s role in the Western power crisis.”<sup>12</sup>

15. In neither the Show Cause Orders nor the July 22 Order did the Commission reopen the matters addressed in the Long-Term Contract Proceedings. Therefore, the issue of the relationship between the ISO and PX spot markets and the bilateral forward markets in the West is beyond the scope of this hearing. In so clarifying, we are not narrowing the scope of profits that Enron may be required to disgorge, since disgorgement of profits under Enron’s long-term contracts may be justified by violations of Enron’s market-based rate authority, without evidence linking spot and forward markets. Furthermore, the Commission did not intend to allow parties to seek remedies from any entities other than Enron. In this regard, in the July 22 Order, the Commission stated that “[t]here [was] no evidence in this proceeding to support findings of violations of tariffs or market rate authorizations by sellers other than Enron. The violation we find here was committed by Enron and thus our remedial authority in this proceeding is limited to Enron.”<sup>13</sup> The March 11 and April 29 Orders likewise confirmed that with respect to the remedy the hearing involved an examination of “Enron’s profits,” explaining that “the contract termination payments [were] based on profits Enron projected to receive” during the period when Enron was in violation of its market-based rate authority and that the hearing should consider “any unjust profits that Enron may have derived” from violations of its market-based rate authority and “their disgorgement.”<sup>14</sup>

16. In sum, this hearing is limited to addressing whether Enron individually or jointly engaged in gaming and/or anomalous market behavior in violation of the ISO’s and PX’s tariffs (as explained in greater detail in the Show Cause Orders), and the unjust profits that Enron must disgorge due to such actions as well as due to its violation of its market-based rate authority. Such remedy could include the profits that constitute the termination payments sought under contracts that Enron executed when it was in violation of its market-based rate authority (as explained in the March 11 and April 29 Orders).

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<sup>12</sup> *Id.* at P 2.

<sup>13</sup> *Id.* at P 34.

<sup>14</sup> See March 11 Order, 110 FERC ¶ 61,280 at P 10-11; April 29 Order, 111 FERC ¶ 61,129 at P 11-12.

The Commission orders:

(A) WPTF's motion to intervene out-of-time is hereby denied, as discussed in the body of this order.

(B) The scope of this proceeding is hereby clarified, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Linda Mitry,  
Deputy Secretary.