

111 FERC ¶ 61, 129
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. EL02-113-000
Enron Power Marketing, Inc., and
Enron Capital and Trade Resources Corporation

Enron Power Marketing, Inc. and Docket No. EL03-180-000
Enron Energy Services, Inc.

Enron Power Marketing, Inc. and Docket No. EL03-154-000
Enron Energy Services, Inc.

Portland General Electric Company Docket No. EL02-114-007

Enron Power Marketing, Inc. Docket No. EL02-115-008

ORDER ON INTERLOCUTORY APPEAL

(Issued April 29, 2005)

1. On April 8, 2005, Enron Power Marketing, Inc., Enron Energy Services Inc. and Enron North America Corp., f/k/a Enron Capital and Trade Resources Corporation (collectively, Enron) filed with the Chairman, as Motions Commissioner, an interlocutory appeal. The interlocutory appeal requests that the Motions Commissioner reverse the Presiding Administrative Law Judge's (ALJ) denial of permission to appeal to the Commission her March 24, 2005 Order Confirming Rulings (March 24 Order). On April 15, 2005, the Chairman, as Motions Commissioner, referred the matter to the Commission.

2. For the reasons set forth below, this order denies Enron's request for interlocutory appeal.

I. Background

3. This proceeding involves an examination of the business relationship between El Paso Electric and two Enron companies: Enron Capital and Trade Resources Corporation (currently d/b/a Enron North America) (ECT) and Enron Power Marketing, Inc. (EPMI) (collectively, Enron).¹ In brief, during certain hours of the week, Enron operated El Paso Electric's power marketing desk, and, further, entered into contracts for El Paso Electric solely at Enron's discretion – and thus gained control of El Paso Electric's generation.

4. On August 13, 2002, under section 206 of the Federal Power Act (FPA),² the Commission ordered a hearing to investigate possible misconduct by Enron and El Paso Electric, particularly over whether they should have made filings pursuant to sections 203 and/or 205 of the FPA.³ This was based on an indication that these entities had entered into a contractual relationship which may have resulted in Enron acquiring control of El Paso Electric's assets without informing the Commission.⁴

5. On July 15, 2003, the ALJ, after extensive hearings and briefing, issued an Initial Decision deciding the issues raised in this case. The ALJ concluded that the record in this case supported a finding that Enron entered into contracts for El Paso Electric solely at Enron's discretion (and even took title to El Paso Electric's power in some transactions), that Enron set or affected the price El Paso Electric obtained for its power, and that Enron and El Paso Electric shared profits on supplemental market sales and ancillary services sales to the California Independent System Operator Corporation (ISO). Accordingly, she found that Enron, by virtue of the Power Consulting Services Agreement, gained control of El Paso Electric's generators by controlling El Paso Electric's marketing division.

¹ *Enron Power Marketing, Inc.*, 104 FERC ¶ 63,010 at P 2-6 (2003) (Initial Decision). El Paso Electric, the California Attorney General, the California Electricity Oversight Board, and the Commission Trial Staff reached a settlement as to El Paso Electric in this proceeding, which the Commission has approved. *See El Paso Electric Company, Enron Power Marketing, Inc., Enron Capital and Trade Resources Corporation*, 104 FERC ¶ 61,115 (2003).

² 16 U.S.C. § 824e (2000).

³ 16 U.S.C. §§ 824b, 824d (2000).

⁴ *El Paso Electric Co.*, 100 FERC ¶ 61,188 at P 6-10 (2002).

6. Separately, on June 25, 2003, the Commission initiated the two Show Cause Proceedings,⁵ Docket Nos. EL03-180-000 and EL03-154-000, to investigate whether sellers, including Enron, either individually or jointly engaged in gaming and/or anomalous market behavior in violation of the Market Mitigation and Information Protocols of the ISO and California Power Exchange 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 ALJs in the Show Cause Proceedings 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 and appropriate non-monetary remedies such as revocation of the identified sellers' market-based rates.

7. On July 22, 2004, the Commission issued an order⁶ affirming the 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. 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 is a subset of the broader Enron relationships and practices currently pending in the Show Cause Proceedings in Docket Nos. EL03-180-000 and EL03-154-000, the Commission consolidated Docket No. EL02-113-000 with the Show Cause Proceedings and directed the ALJ in Docket Nos. EL03-180-000 and EL03-154-000 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.

⁵ See *American Electric Power Service Corp.*, 103 FERC ¶ 61,345 (2003) (Gaming Order), and *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Gaming Order), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (collectively Show Cause Proceedings or Show Cause Orders).

⁶ *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation*, 108 FERC ¶ 61,071 (2004) (July 22 Order).

8. On August 4, 2004, Western Parties⁷ requested clarification of the July 22 Order. In its March 11, 2005 Order, the Commission explained 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 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.⁸

9. In her March 24, 2005 Order Confirming Rulings, the ALJ, among other things, denied Enron's motions to compel, which sought discovery of "wholesale market activities" of certain parties.⁹ The ALJ stated that "[t]he information requested by Enron concerning the remedies sought by these parties, their harm and whether the remedies sought in this proceeding, such as, contract rescission are similar to the remedies in the Bankruptcy proceeding, is deemed to be irrelevant to this proceeding."¹⁰

10. On April 8, 2005, Enron filed with the Chairman, as Motions Commissioner, an interlocutory appeal requesting that the Motions Commissioner reverse the ALJ's denial of permission to appeal to the Commission her March 24 Order. Enron argued that, if this ruling is allowed to stand, Enron will be denied due process, since it will lack the necessary information to demonstrate that the intervenors are not entitled to any remedy because they were not, in fact, injured.

⁷ 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.

⁸ *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).

⁹ Those parties are Valley Electric Association, Inc.; City of Santa Clara, California, d/b/a Silicon Valley Power; Metropolitan Water District of Southern California; and Snohomish (collectively, Intervenors).

¹⁰ March 24 Order at P 2(b) (citations omitted).

11. On April 15, 2005, the Chairman, as Motions Commissioner, referred the matter to the Commission.

II. Discussion

In the July 22 Order, the Commission found that Enron violated the Commission's directives, specifically, the conditions of the Commission's order granting Enron market-based rate authority. Moreover, the March 11 Order confirmed that the hearing involved an examination of Enron's profits and merely clarified that, as the contract termination payments are based on profits Enron projected to receive from contracts executed during the period when Enron was in violation of the Commission's directives, the termination payments, *i.e.*, those profits, as well, are within the scope of the hearing. The hearing is focused on any unjust profits that Enron may have derived through such violations, and their disgorgement. This remedy of disgorgement of unjust profits hinges on the violation and *not* on whether there was quantifiable harm (or the amount of the harm) to any particular customer.

12. On this basis, the Commission agrees with the ALJ that the information sought by Enron (*i.e.*, which customers were harmed, and by how much) is irrelevant to this proceeding – given that this proceeding is based on a violation of Commission directives and not on any harm to any particular customer. Accordingly, the Commission denies Enron's motion for interlocutory appeal.

The Commission orders:

Enron's interlocutory appeal is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.