

148 FERC ¶ 61,006  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;  
Philip D. Moeller, John R. Norris,  
and Tony Clark.

San Diego Gas & Electric Company  
v.

Docket No. EL00-95-112

Sellers of Energy and Ancillary Services

Investigation of Practices of the California Independent  
System Operator and the California Power Exchange

Docket No. EL00-98-099

ORDER DENYING REQUEST FOR REHEARING

(Issued July 2, 2014)

1. This order addresses the California Parties'<sup>1</sup> request for rehearing of an August 31, 2004 order,<sup>2</sup> which denied the California Parties' Motion to Lodge Additional Evidence of Market Manipulation (Motion to Lodge) in this proceeding (Refund Proceeding). This order denies the California Parties' request for rehearing, as discussed below.

**I. Background**

2. The Refund Proceeding was initiated by a complaint filed by San Diego Gas & Electric Company on August 2, 2000. In November 2000, the Commission determined the refund effective date to be October 2, 2000 (Refund Effective Date).<sup>3</sup> In July 2001 the Commission established an evidentiary, trial-type hearing to calculate appropriate mitigated market clearing prices for each hour during the period October 2, 2000 to

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<sup>1</sup> The California Parties that filed the request for rehearing were, collectively, 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.

<sup>2</sup> *San Diego Gas & Elec. Co.*, 108 FERC ¶ 61,214 (2004) (August 2004 Order).

<sup>3</sup> *San Diego Gas & Electric Co.*, 93 FERC ¶ 61,121, at 61,370 (2000).

June 20, 2001 (Refund Period) and the amounts of refunds owed.<sup>4</sup> The Commission declined to order refund relief for sales that occurred prior to the Refund Effective Date.<sup>5</sup>

3. On June 5, 2002, the California Parties filed a motion before the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) for leave to adduce additional evidence before this Commission.<sup>6</sup> On August 21, 2002, the Ninth Circuit granted the motion. The Ninth Circuit deferred to the discretion of the Commission to determine how the new evidence would be adduced.<sup>7</sup>

4. Pursuant to the Ninth Circuit's order, on November 20, 2002, the Commission issued an order allowing parties to conduct discovery into market manipulation for the period January 1, 2000 to June 20, 2001,<sup>8</sup> and on March 3, 2003, the California Parties filed discovery material with the Commission. In a March 26, 2003 order, the Commission stated that "[a]ny future Commission findings of energy market manipulation . . . would not result in a resetting of the refund effective date in this proceeding . . . and would have no impact on the just and reasonable clearing prices developed for the Refund Period."<sup>9</sup>

5. On July 8, 2004, the California Parties filed their Motion to Lodge in the Refund Proceeding. The California Parties stated that the additional material consists of Enron materials, including financial and accounting data, and audio tape recordings and transcripts of Enron phone conversations (collectively, additional evidence), and explained that the additional evidence is relevant to determining the full extent of market manipulation by sellers in California during May 1, 2000 to June 20, 2001 and thus relevant to the Refund Proceeding.

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<sup>4</sup> *San Diego Gas & Electric Co.*, 96 FERC ¶ 61,120, at 61,499 (2001).

<sup>5</sup> *Id.* at 61,508-10.

<sup>6</sup> Public Utilities Commission of the State of California, *et al.* June 5, 2002 Motion for Leave to Adduce Additional Evidence.

<sup>7</sup> *Pub. Utilities Comm'n of Cal. v. FERC*, Order of August 21, 2002 (9th Cir. Docket No. 01-71051, *et al.*).

<sup>8</sup> *San Diego Gas & Elec. Co.*, 101 FERC ¶ 61,186, at P 26 (2002), *order on reh'g*, 102 FERC ¶ 61,164 (2003).

<sup>9</sup> *San Diego Gas & Elec. Co.*, 102 FERC ¶ 61,317, at P 149 (March 2003 Order), *order on reh'g*, 105 FERC ¶ 61,066, *modified*, 105 FERC ¶ 61,252 (2003), *petition granted in part, denied in part on other grounds sub nom. Pub. Utils. Comm'n Cal. v. FERC*, 456 F.3d 1025, *amending and superseding*, 462 F.3d 1027 (9th Cir. 2006).

6. In the August 2004 Order, the Commission denied the Motion to Lodge but referred the evidence to the Presiding Judge in the Enron-specific Gaming and Partnership Proceeding in Docket No. EL03-180-000, *et al.*, with instruction to allow any relevant evidence that had not already been admitted. The Commission reiterated its explanation from the March 2003 Order:

[F]indings of energy market manipulation will not affect the determination of the just and reasonable clearing prices (or the resetting of the clearing prices) developed for the [R]efund [P]eriod, which is the issue in the Refund Proceeding, nor will it change the refund effective date permitted by the FPA. Rather, such evidence goes to whether there were potential violations of tariffs or orders, and those issues are properly being addressed in the on-going Enron-specific Gaming and Partnership Proceeding.<sup>10</sup>

Additionally, the Commission noted that the Ninth Circuit had denied motions of the California Parties seeking to upset the Commission's decision to pursue enforcement/investigative issues in individual company-specific dockets, separate and distinct from the Refund Proceeding.<sup>11</sup>

7. On September 30, 2004, the California Parties filed their request for rehearing, arguing that the Commission rejected the evidence of market manipulation presented in the Motion to Lodge because it incorrectly characterized its remedial statutory authority.<sup>12</sup> They assert that the setting of just and reasonable prices cannot be divorced from the manipulative seller actions that made such prices unlawful in the first place. They argue that addressing evidence of seller misconduct exclusively in other proceedings is arbitrary and capricious, violates their due process rights, and violates the Ninth Circuit's August 21, 2002 order. They assert that the Commission must address seller misconduct during the California energy crisis in the Refund Proceeding and that the evidence should be lodged here.<sup>13</sup> They aver that *California ex rel. Lockyer v. FERC*<sup>14</sup> invalidated the Commission's interpretation of its remedial authority and that it demonstrates that the Commission is not limited to Refund Period relief.<sup>15</sup> The

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<sup>10</sup> August 2004 Order, 108 FERC ¶ 61,214 at P 18 (internal citation omitted).

<sup>11</sup> *Id.* (citing *Pub. Utilities Comm'n of Cal. v. FERC*, Order of July 27, 2004 (9th Cir. Docket No. 01-71051, *et al.*) (July 27, 2004 Order)).

<sup>12</sup> Rehearing Request at 6-7.

<sup>13</sup> *Id.* at 7-9.

<sup>14</sup> 383 F.3d 1006 (9<sup>th</sup> Cir. 2004) (*Lockyer*).

<sup>15</sup> Rehearing Request at 9-10.

California Parties argue that the Commission's interpretation of the Ninth Circuit's July 27, 2004 Order is incorrect. The California Parties state that the July 27, 2004 Order makes no substantive ruling on the appropriateness of the Commissions' decision to address allegations of market manipulation exclusively in individual company-specific dockets rather than in the Refund Proceeding.<sup>16</sup>

8. On November 15, 2005, the Commission issued an Order on Settlement Agreement among Enron,<sup>17</sup> the California Parties, and the Commission.<sup>18</sup> The Settlement Order resolved, in relevant part, all claims by the California Parties against Enron for refund, disgorgement of profits, and other monetary and non-monetary remedies in a list of pending matters, but the instant docket was not on the list.<sup>19</sup>

9. On August 2, 2006, the Ninth Circuit issued a decision expanding the scope of the Refund Proceeding to include transactions entered into prior to October 2, 2000.<sup>20</sup> On November 19, 2009, the Commission issued an order on remand,<sup>21</sup> establishing an evidentiary, trial-type hearing before an Administrative Law Judge to address the issue of whether any individual public utility seller engaged in tariff violation prior to October 2, 2000, and whether any such violation affected the market clearing price (Remand Proceeding). Enron was not included among respondents and participants in that proceeding.

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<sup>16</sup> *Id.* at 11-12.

<sup>17</sup> For purposes of the Settlement Agreement, "Enron" means the Enron Debtors and the Enron Non-Debtor Gas Entities. The "Enron Debtors" are Enron Corp.; Enron Power Marketing, Inc. (EPMI); Enron North America Corp. (formerly known as Enron Capital and Trade Resources Corp.); Enron Energy Marketing Corp.; Enron Energy Services Inc.; Enron Energy Services North America, Inc.; Enron Capital & Trade Resources International Corp.; Enron Energy Services, LLC; Enron Energy Services Operations, Inc.; Enron Natural Gas Marketing Corp.; and ENA Upstream Company, LLC. The "Enron Non-Debtor Gas Entities" are Enron Canada Corp.; Enron Compression Services Company; and Enron MW, L.L.C.

<sup>18</sup> *San Diego Gas & Elec. Co.*, 113 FERC ¶ 61,171 (2005) (Settlement Order).

<sup>19</sup> The pending matters were listed as Dockets Nos. EL00-95-000, EL00-98-000, IN03-10-000, PA02-2-000, EL03-180-000, EL03-154-000, EL02-114-007, EL02-115-008, EL02-113-000. *See Settlement Order*, 113 FERC ¶ 61,171 at P 1.

<sup>20</sup> *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (2006).

<sup>21</sup> *San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,147 (2009) (Remand Order).

10. Subsequently, on May 26, 2011, on rehearing of the Remand Order, the Commission clarified that that in the hearing, the California Parties are not precluded from offering evidence involving the non-parties' market behavior, provided such evidence is relevant to the scope of the hearing.<sup>22</sup> On November 2, 2012, the Commission reiterated that non-parties' conduct may be examined for the purpose of demonstrating specific unlawful practices by the remaining respondents in the proceeding.<sup>23</sup> The California Parties did not submit any evidence pertaining to Enron's alleged misconduct into the record of the Remand Proceeding.

## II. Discussion

11. Regarding evidence of market manipulation occurring during the Refund Period, we reiterate here that "findings of energy market manipulation will not affect the determination of the just and reasonable clearing prices (or the resetting of the clearing prices) developed for the [R]efund [P]eriod, which is the issue in the Refund Proceeding, nor will it change the refund effective date permitted by the FPA."<sup>24</sup> In the Refund Proceeding we have reset the market clearing prices for all hours of the Refund Period, and further evidence of market manipulation during the Refund Period is therefore irrelevant.

12. Regarding evidence of market manipulation prior to the Refund Effective Date of October 2, 2000, the Commission explicitly stated that the California Parties could offer evidence involving settled parties' market behavior in the Remand Proceeding if it was relevant to show that any of the remaining respondents engaged in a tariff violation impacting the market clearing price.<sup>25</sup> To the extent that the California Parties' Motion to Lodge concerned evidence of market manipulation occurring prior to the Refund Period, the California Parties had ample opportunity to bring such evidence in the Remand Proceeding. Despite these allowances, the California Parties have not sought to introduce the evidence presented in the Motion to Lodge in the intervening years.

13. Furthermore, the California Parties' assertion that *Lockyer* invalidated the Commission's interpretation of its remedial authority is incorrect. *Lockyer* held that the Commission had the authority to order retroactive refund relief in the specific

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<sup>22</sup> *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,183, at P 11 (2011), *reh'g denied*, 141 FERC ¶ 61,087 (2012).

<sup>23</sup> *San Diego Gas & Elec. Co.*, 141 FERC ¶ 61,087, at P 13 (2012).

<sup>24</sup> August 2004 Order, 108 FERC ¶ 61,214 at P 18 (internal citation omitted).

<sup>25</sup> *San Diego Gas & Elec. Co.*, 135 FERC ¶ 61,183 at P 11, *reh'g denied*, 141 FERC ¶ 61,087 at P 13.

circumstance where its reporting requirements were not followed.<sup>26</sup> There is no parallel to the current proceeding. Finally, the Commission relied on its statutory authority in issuing its August 2004 Order. The Commission merely noted, but did not rely on the Ninth Circuit's July 27, 2004 Order.

14. For the aforementioned reasons, we deny the California Parties' request for rehearing.

The Commission orders:

The California Parties' request for rehearing is hereby denied for the reasons discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>26</sup> *Lockyer*, 383 F.3d at 1015-16.