

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices	Docket No. PA02-2-000
American Electric Power Co.	Docket No. PA03-1-000
Aquila Marketing Service	Docket No. PA03-2-000
Coral Energy Resources, LP	Docket No. PA03-3-000
CMS Marketing Services & Trading	Docket No. PA03-4-000
Dynegy, Inc.	Docket No. PA03-5-000
Duke Energy Trading and Marketing, LLC	Docket No. PA03-6-000
El Paso Merchant Energy, LP	Docket No. PA03-7-000
Mirant Americas Energy Marketing, LP	Docket No. PA03-8-000
Reliant Resources, Inc.	Docket No. PA03-9-000
Sempra Energy Trading Corp.	Docket No. PA03-10-000
Williams Energy Marketing & Trading Company	Docket No. PA03-11-000
Natural Gas Price Formation	Docket No. AD03-7-000
Price Discovery in Natural Gas and Electric Markets	Docket No. PL03-3-000
Investigation of Anomalous Bidding Behavior and Practices in the Western Markets	Docket No. IN03-10-000
BP Energy Company	Docket No. EL03-60-000
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-77-000
Bridgeline Gas Marketing, LLC, Citrus Trading Corporation, ENA Upstream Company, LLC, Enron Canada Corp., Enron Compression Services Company, Enron Energy Services, Inc., Enron MW, LLC, and Enron North America Corp.	Docket No. RP03-311-000

(Not Consolidated)

ORDER ON REHEARING

(Issued December 12, 2003)

1. On October 16, 2003, the Commission issued an order clarifying the status of the various proceedings that arose out of its investigation into possible market manipulation in the western electric and natural gas markets, conducted in Docket No. PA02-2-000. See Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002). The October 16 Order specified that the above-captioned proceedings are investigative proceedings under 18 C.F.R. Part 1b (2003). “Order Clarifying Nature of Proceedings,” 105 FERC ¶ 61,063 (2003) (Order Clarifying Proceedings). The Commission has received four rehearing requests challenging that order. As discussed below, the Commission denies these requests.

BACKGROUND

2. As noted, a variety of different proceedings have arisen out of the Commission’s investigation into possible market manipulation instituted by the Commission in February 2002 in PA02-2-000.¹ In some cases, the Commission concluded that the issues required further factual development through adversarial-type proceedings. It assigned those matters to Administrative Law Judges (ALJs). The above-captioned proceedings, however, were not assigned for trial-type hearings. During the course of the proceedings not assigned to ALJs, it became apparent that further clarification was necessary as to the nature of the proceedings. The Commission originally conceived those proceedings as investigative in nature, with Commission Staff acting in a prosecutorial role. The Commission did not initially specify, however, that interventions would not be permitted. Some interventions were received and, eventually, some orders issued in those proceedings were challenged through requests for rehearing. Interventions and rehearing requests, however, are not proper in investigative proceedings because there are no parties to investigations. 18 C.F.R. §§ 1b.11, 385.713(b) (2003). In addition, investigatory Staff could not properly conduct settlement discussions with the named companies if the proceedings were contested, on-the-record proceedings, as opposed to investigations. 18 C.F.R. § 385.2201(c) (2003). Consequently, in the Order Clarifying Proceedings the Commission specified that the above-captioned proceedings would proceed as Part 1b investigations. The Commission rescinded all interventions previously granted and specified instead that motions to intervene would be treated as motions to file comments. It further specified that pending requests for rehearing would be dismissed, with one specified exception.²

¹ Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002).

² The Commission specified that companies named in the proceedings could seek rehearing.

REQUESTS FOR REHEARING

3. The Commission has received four requests for rehearing:
- City of Palo Alto, California (Palo Alto), filed in EL03-77-000 and RP03-311-000.
 - Nevada Power Company and Sierra Pacific Power Company (Nevada Companies), filed in EL03-77-000 and RP03-311-000.
 - City of Santa Clara, California (Santa Clara), filed in EL03-77-000.
 - City of Seattle, Washington (Seattle), filed in EL03-77-000 and RP03-311-000.

Seattle and Nevada Companies

4. Seattle and the Nevada Companies make identical arguments in their rehearing requests. All three, prior to the Order Clarifying Proceedings, were intervenors in the Enron Show Cause Proceeding, Docket Nos. EL03-77-000 and RP03-311-000. They assert that the Commission's action lacks a rational basis. Seattle Request at pp. 7-8; Nevada Companies Request at p. 9. By way of explanation, they maintain that the Commission has already investigated Enron in PA02-2-000 and that it makes no sense for it to conduct another investigation. Seattle Request at p. 11; Nevada Companies Request at p. 13. They also assert, citing SEC v. Chenery Corp., 332 U.S. 194, 203 (1947), that the order is unfairly retroactive because it deprives them of the right to participate without any offsetting benefit. Seattle Request at pp. 11-12; Nevada Companies Request at pp. 13-14. These companies further claim that the order is unfairly discriminatory because it was not applied to the proceedings assigned to ALJs. Seattle Request at p. 13; Nevada Companies Request at p. 15.

5. Seattle and the Nevada Companies characterize the Order Clarifying Proceedings as purporting erroneously to make only a procedural change. They contend that the cases cited by the Commission do not support its decision to alter the proceeding retroactively. They assert that Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) (Vermont Yankee), merely allows agencies to develop procedural rules through rulemakings, while Baltimore Gas & Electric Co. v. FERC, 252 F.3d 456 (D.C. Cir. 2001) (BG&E), merely holds that a non-party may not challenge a settlement. Seattle Request at pp. 8-9; Nevada Companies at pp. 9-11.

6. Finally, these requesters claim that the order violates the Commission's own procedures and the Federal Power Act (FPA). They claim that it conflicts with the Commission's rules allowing aggrieved parties to request rehearing. Seattle Request at pp. 9-10; Nevada Companies Request at 11-12. They further maintain, without citing any authority, that the Commission's rules require that show cause proceedings be conducted under 18 C.F.R. Part 385 rather than under Part 1b. Seattle Request at pp. 10-11; Nevada Companies Request at p. 12.

Santa Clara

7. Santa Clara, an intervenor in EL03-77-000, contends that the Commission erroneously concluded that the proceeding was an investigative rather than an adjudicatory one. It maintains that the latter is necessary to address issues relating to the harm caused by Enron's actions that were left open by the Commission's order revoking Enron's market-based rate authority. Santa Clara Request at pp. 2-4; *see Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 (2003).

Palo Alto

8. Palo Alto, which intervened in EL03-77-000 and RP03-311-000, maintains that the Order Clarifying Proceedings could not properly designate those dockets as investigative proceedings. According to Palo Alto, Part 1b only applies prior to the fact-gathering stage of proceedings. It asserts that the proceedings involving the revocation of Enron's market-based rate authority had moved beyond that stage, as the Commission had already found that Enron had engaged in various wrongful activities. The only appropriate way of proceeding, it contends, is adjudication through a paper-type hearing. Palo Alto maintains that *BG&E* is distinguishable because the Commission there merely approved a settlement and the proceeding never reached the adjudicatory stage. Palo Alto states that these proceedings cannot be investigative, noting that the Commission's show cause order cited Rule 214, 18 C.F.R. § 385.214, and pointing out that Part 385 does not apply to investigations. Palo Alto Request at pp. 2-9.

9. Palo Alto further argues that the Commission erred because discretion in determining remedies and in ratemaking is subject to judicial review. It asserts that the Commission's order revoking Enron's market-based rate authority was undertaken as part of its role in market monitoring, which in turn is critical to its ability to establish market-based rates in the first place. Therefore, the argument continues, the customers who were paying the rates have the right to raise judicial challenges to the Commission's actions in determining remedies for the violations that caused it to revoke Enron's authority. Palo Alto Request at pp. 9-15. Palo Alto further contends that, because the market-based rate tariff that the Commission has terminated was incorporated into its contract with Enron, the proceedings involving Enron impact the filed rate under which Enron provides service to Palo Alto. It thus maintains that the Order Clarifying Proceedings denies Palo Alto due process by preventing it from remaining a party to the Enron proceedings. Palo Alto Request at pp. 15-17. Finally, Palo Alto echoes the argument made by Seattle and the Nevada Companies that the Order Clarifying Proceedings is unfairly discriminatory. Palo Alto Request at pp. 17-18.

DISCUSSION

10. As an initial matter, we note that, since the Order Clarifying Proceedings rescinded all previously granted interventions, rehearing ordinarily would not be proper. As that order explained, at P. 6, only parties can request rehearing. In this case, the Commission could

consider the requests as motions to reconsider. It is, however, open to question whether that order was issued under Part 1b. Rather than resolve the question whether these filings should be considered as requests for rehearing or motions to reconsider, the Commission will give them full consideration, on rehearing or, in the alternative, on reconsideration.

11. Many of the arguments raised in these requests stem from a misunderstanding of the underlying focus of these proceedings. Palo Alto, for example, expressly states that the Enron proceedings is “a paper-hearing adjudication under FPA § 206 and NGA [Natural Gas Act] § 5 and Part 385.” Palo Alto Request at p. 2. It is not. The Commission in these proceedings is not acting pursuant to its authority to order refunds. Instead, these proceedings are an exercise of the Commission’s authority to enforce the provisions of those acts, and rules and orders issued thereunder. The Commission is not, in these proceedings, adjudicating a dispute between parties. Instead, it is addressing market behavior that violated, or may have violated, the FPA or the NGA, or rules or orders issued under those Acts. Any remedies imposed will be intended to correct these violations rather than to make whole entities that may have been victimized by wrongdoing. Such remedies may take the form of disgorgement of profits. See Coastal Oil & Gas Corp. v. FERC, 782 F.2d 1249 (5th Cir. 1986). They will not take the form of refunds to specific companies.

12. This is consistent with the Commission’s authority as enunciated in BG&E. That case involved an unlawful abandonment of service by a natural gas pipeline. See 5 U.S.C. § 717f(b). The Commission conducted an investigation and determined to reach a settlement with the pipeline that included remedies for the possible violation. Those remedies did not include money damages to customers claiming they had incurred higher costs than they otherwise would have. 252 F.3d at 457. One of those customers, BG&E, moved to intervene so that it could challenge the settlement. It then sought judicial review when the Commission denied intervention. Id. at 457-58.

13. The D.C. Circuit dismissed the petition for review. Following Heckler v. Chaney, 470 U.S. 821 (1985), the Court held that the Commission’s action fell within its prosecutorial discretion and, thus, was unreviewable under the Administrative Procedures Act, which exempts from judicial review actions that are committed to agency discretion by law. See 5 U.S.C. § 701(a)(2). The Court reasoned that both decisions whether to prosecute and decisions to settle fall within this discretion. It further found that the Commission has broad discretion in enforcing the NGA. BG&E, 252 F.3d at 461. This discretion logically exists under the FPA as well. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 n.7 (1981) (decisions under NGA and FPA may be cited interchangeably).

14. The efforts in these rehearing requests to distinguish BG&E on the ground that it involved a settlement and this case involves an adjudication are without merit. The settlement in BG&E resolved the underlying substantive issues and removed the need for a decision on them by the Commission. In other words, the settlement served as an alternative to the resolution of the issues. The Commission thus sees no meaningful distinction, in this context, between a

settlement and a resolution of the issues by the Commission. Even more fundamentally, the requesters are premature in contending that these proceedings do not involve settlements. It remains possible that the issues may be resolved through settlement. These proceedings thus have not even reached the stage that BG&E had reached when it was reviewed by the circuit court.

15. For these reasons, the Commission rejects the contentions of all the requesters that the Order Clarifying Proceedings deprives them of their rights to pursue their claims. Their position does not differ in this regard from that of the petitioner in BG&E. BG&E, like the companies here, claimed it was damaged monetarily by the actions of the pipeline under investigation. The Court nevertheless ruled that it was not a party to the proceeding because the Commission was acting pursuant to its investigative authority.³ This is the case here as well. For the same reason, the Commission also rejects the contentions that it is contravening the FPA, as well as Palo Alto's contention that it is acting pursuant to its ratemaking authority and is contravening the filed rate doctrine. The Commission further rejects the contention that the Order Clarifying Proceedings lacks a rational basis. That order was necessary to conform the procedural posture of the proceedings to their underlying purpose, as explained above.

16. Seattle's and the Nevada Companies' contention that the Order Clarifying Proceedings made a substantive rather than a procedural change is beside the point. Part 1b plainly contemplates that a proceeding's procedural posture will have substantive import by providing that an investigative proceeding does not have parties. 18 C.F.R. § 1b.11. The decision in BG&E had the same effect. BG&E claimed it suffered monetary losses from an abandonment of service, but was unable to pursue that claim. These requesters' contention that Vermont Yankee is distinguishable because it only allows an agency to establish procedural rules through rulemakings also is immaterial. The Commission here is following its previously established rule, i.e., Part 1b.⁴

³ The Commission also rejects Seattle's and the Nevada Companies' assertion that its order contravenes the regulations that provide that an aggrieved party may file for rehearing. The issue presented here is whether the Commission has incorrectly determined that the requesters are not parties. If they are not, the regulations provide that they may not request rehearing. 18 C.F.R. § 385.713(b).

⁴ In any event, Seattle's and the Nevada Companies' reading of Vermont Yankee is incorrect. The Court plainly intended its reasoning to extend to an agency's application of its procedural rules as well as its exercise of its rulemaking authority:

[W]hile a court may have occasion to remand an agency decision because of the inadequacy of the record, the agency should normally be allowed to "exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its

(continued...)

17. Many of the requesters' complaints center on the proposition that the Commission cannot change the procedural format of these proceedings after they have begun. Obviously, as Palo Alto points out, Palo Alto Request at pp. 7-8, the Commission has granted interventions and referred to sections of Part 385. Nevertheless, the Commission's intention from the beginning of these proceedings has been to pursue these matters as an exercise of its enforcement authority, not its ratemaking authority. As is apparent from its title, the Order Clarifying Proceedings was necessary because the Commission had not clearly designated the proceedings as taking place under Part 1b.⁵ The Commission rejects the notion that it cannot do now what it could have done at the outset of the proceedings. Furthermore, requesters in these proceedings were made aware of the proceedings' nature at an earlier stage than was the case in BG&E, where BG&E did not become aware of its inability to oppose a settlement until after the settlement had been reached. 252 F.3d at 457-58.

18. The contentions of Seattle, the Nevada Companies and Palo Alto that the Commission may not, under its rules, designate these proceedings as investigative reflects too narrow a view of the Commission's authority. Palo Alto, for example, attempts to characterize the Commission's investigative authority as being limited to fact-gathering. Palo Alto Request at pp. 3-5. Part 1b contains no such limitation. Section 1b.7, quoted by Palo Alto, provides that, having found evidence of a violation, "the Commission may institute administrative proceedings . . . or take other appropriate action." (Emphasis added.) Furthermore, BG&E makes it clear that the Commission's authority is not so limited. In that case the Commission reached a settlement agreement in the course of its investigation. As explained above, this agreement resolved the substantive issues in the case to the same degree that an adjudication would have done. The Commission's actions in *BG&E* went beyond mere fact-gathering.⁶

(...continued)

prior decision should be modified in light of such evidence as develops."

Vermont Yankee, 435 U.S. at 544 (quoting FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976)).

⁵ The absence of such a clear designation had undesired consequences that played a role in the Commission's issuance of the Order Clarifying Proceedings. In particular, the Commission intended advisory staff to attempt to negotiate settlements in the proceedings that were not assigned to ALJs. Due to the operation of the Commission's ex parte rules, however, they could not do so in non-investigative proceedings. Order Clarifying Proceedings, at P. 6; see 18 C.F.R. § 385.2201(c).

⁶ Indeed, the underlying investigation grew out of the restructuring proceedings of Columbia Gas Transmission Corporation and Columbia Gulf Transmission Corporation under Order No. 636. If the court found that this investigation was beyond its jurisdiction as an exercise of the Commission's prosecutorial discretion, a fortiori the investigations at issue here qualify as actions committed to the agency's discretion.

19. Finally, the Commission did not discriminate unfairly when it chose not to apply the Order Clarifying Proceedings to those proceedings assigned to ALJs. It designated those matters for trial-type proceedings because it found them to involve issues that required more extensive factual development than in the proceedings included in the Order Clarifying Proceedings. The Commission believed, and continues to believe, that the involvement of intervenors in the trial-type proceedings is necessary to an adequate development of the record. Furthermore, the Commission continues to prefer that issues be resolved through settlements where possible. In the ALJ proceedings, trial staff may negotiate settlements without being limited by the ex parte rules. See 18 C.F.R. § 385.2201(c)(3) (excluding trial staff from coverage of ex parte rule). Therefore, the Commission had valid reasons for distinguishing between those matters that have been assigned to ALJs and those that have not.

The Commission orders:

(A) The requests for rehearing are construed as requests for rehearing or, in the alternative, for reconsideration.

(B) The requests are denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.