

109 FERC ¶ 61,298
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-180-000
Enron Power Marketing Inc. and Enron Energy Services Inc.	Docket No. EL03-154-000
Enron Power Marketing, Inc.	Docket No. EL02-115-008

ORDER ON CERTIFIED QUESTION

(Issued December 20, 2004)

1. On November 18, 2004, the Presiding Administrative Law Judge (ALJ) certified a question to the Commission, pursuant to Rule 714 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.714 (2004). The question certified to the Commission was:

[W]hether monetary sanctions should be imposed on Enron Power Marketing, Inc. and Enron Energy Services Inc. (collectively "Enron") for willful failure to comply with an order of the Presiding Judge requiring Enron to provide certain documents to intervenor Public Utility District No. 1 of Snohomish County, Washington ("Snohomish") pursuant to the Commission's discovery rules.

2. For the reasons discussed below, we find that the ALJ may impose daily monetary sanctions upon Enron for willfully failing to comply with, in fact, ignoring, our discovery rules and, in particular, an ALJ's discovery order, and such sanctions may be imposed until Enron complies.

I. Background

3. On October 12, 2004, Snohomish filed a motion to compel Enron to produce certain documentary materials sought by data request under Rule 406 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.406 (2004). In addition, Snohomish sought sanctions against Enron for failure to produce the materials in a timely manner. The motion prompted a conference call during which counsel for both Enron and Snohomish were given the opportunity to argue their clients' positions on the discovery of these materials. According to the ALJ, during that conference call the issue of the appropriate length of time for going through those materials designated for disclosure was discussed at some length, and the ALJ indicated November 10, 2004 would be the deadline for Enron to produce documents designated by Snohomish. The ALJ stated that counsel for Enron did not suggest that Snohomish's designation of any particular volume of materials might be a problem.

4. The ALJ's October 14, 2004 Order provided that Enron must produce a redacted version of its directory of materials no later than October 23, 2004, and that Enron must produce and provide to counsel for Snohomish documents listed on the directory and designated by Snohomish no later than November 10, 2004. The November 10 deadline passed, however, and Enron provided nothing to Snohomish, nor did Enron seek from the ALJ either an extension of time in which to provide the documents or any other relief.

5. On November 17, 2004, Snohomish filed a motion seeking sanctions against Enron, claiming that Enron had failed to comply with the ALJ's October 14 Order, by not providing Snohomish with copies of certain specified documents on or before November 10. Enron filed a response to this motion, stating several reasons for its failure to meet the November 10 deadline: (1) the sheer size of the request made it impossible to deliver the documents to Snohomish by November 10;¹ (2) the delay was caused by Snohomish's insistence that the materials be converted into an electronic format specified by Snohomish; and (3) the delay was exacerbated by Snohomish's refusal to specify to Enron's contractor the precise format it desired, and make suitable arrangements for paying the contractor's bill for the conversion and for other processing tasks.

¹ Enron has conceded that some 90 percent of the documents requested by Snohomish had been segregated from other material kept in Enron's Houston warehouse and were in the hands of Enron's contractor, and thus ready to be copied and delivered by the November 10 deadline. *See* Enron's Response at 2, 4, 8 (Nov. 17, 2004). There is no clear indication that, even to date, any of these documents have been provided to Snohomish.

6. On November 18, 2004, the ALJ issued an order holding Enron in default for failure to comply with the discovery rules. The ALJ explained that a valid data request seeking documents was to be responded to by the production of copies of the documents in question. Moreover, the ALJ stated, generally the obligation to reproduce requested documents rests with the party from which discovery is sought, and that party must pay the costs of reproduction and shipping. The ALJ noted that, when Enron realized that it could not comply with the requirement to “produce and provide,” it could have, and should have (but did not), at that time seek relief under Rule 410(c) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.410(c) (2004), such as modifying the deadline, allowing it to produce and provide the documents in “hard copy” rather than the requested format, or seeking other relief. Enron did not do so. Thus, the ALJ granted Snohomish’s motion and imposed monetary sanctions on Enron for its willful failure to comply with its obligations under the Commission’s discovery rules and, in particular, with the ALJ’s October 14 Order.

7. The ALJ certified to the Commission the question of imposing an appropriate sanction upon Enron. The ALJ recommended that the Commission enter an order directing Enron to pay a monetary sanction of \$500.00 per day for each day of non-compliance with the October 14 Order – from November 10 to, and including, the date of the ALJ’s November 18 Order and \$1,000.00 per day for each day of non-compliance thereafter. The ALJ recommended that these amounts be paid to Snohomish to compensate it for the burdens it shouldered in attempting to extract from Enron materials which it was entitled to under the Commission’s discovery rules and the ALJ’s October 14, 2004 Order.

II. Discussion

8. Rule 411 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.411 (2004), provides for sanctions for “fail[ure] to obey an order compelling discovery.” It provides that a presiding judge may, after notice and an opportunity to be heard, take one or more of 5 actions (but may not dismiss/terminate the proceeding): (1) certify to the Commission a recommendation that it dismiss an application, terminate the participant’s right to participate in the proceeding, or institute a civil action; (2) deem matters at issue “established” for purposes of the proceeding; (3) preclude the participant from supporting or opposing a position or contesting a matter as to which discovery is sought; (4) strike all or part of a pleading, or stay a proceeding until discovery is completed; or (5) recommend that the Commission take action against the representative of the participant if the representative has engaged in “unethical or improper professional conduct.”

9. In adopting its current discovery rules, including its rule on sanctions, Rule 411, the Commission concluded that it “is of the opinion that the power to impose the sanctions set forth in [Rule 411] is inherent in the Commission’s authority to conduct hearings and maintain the integrity of its proceedings,” and that the Commission’s authority “would be completely undermined if participants . . . were free to choose whether to respond to discovery requests.”² The Commission went on to explain, however, that it “will impose sanctions only where they are clearly warranted.”³

10. None of the five sanctions specified in Rule 411 expressly address payment of monies. In *California Independent System Operator Corp.*,⁴ however, the Commission explained in a slightly different context that “it believes that it has the authority to award monetary sanctions,” but added that such sanctions are “an extraordinary remedy” and should be imposed “only in the ‘clearest cases.’” In *Connecticut Yankee Atomic Power Co.*,⁵ a presiding judge found the facts clear enough to warrant monetary (and other) sanctions for failure to produce certain discovery materials – the monetary penalties reimbursing attorneys fees that a party would not have incurred but for the failure to produce.

11. Pursuant to sections 206, 308 and 309 of the Federal Power Act (FPA),⁶ and consistent with the foregoing precedent, the Commission finds that it has the authority to assess sanctions, including monetary sanctions, for violations of its discovery rules and orders directing discovery. Moreover, the Commission finds that, in the present circumstances, Enron’s clear violation of the Commission’s discovery rules and, in particular, the ALJ’s October 14 Order – ignoring completely an obligation to produce discovery by a date certain – merit such an extraordinary remedy. As Enron’s conduct at

² *Rules of Discovery for Trial-Type Proceedings*, Order No. 466, FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,731 at 30,558-59, *order on reh’g*, Order No. 466-A, FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,766 (1987).

³ *Id.*

⁴ *California Independent System Operator Corp.*, 106 FERC ¶ 61,032 at P 65 & n.68 (2004) (CAISO); *accord Pennsylvania Power Co.*, Opinion No. 157, 21 FERC ¶ 61,313 at 61,821 (1983); *Central Illinois Public Service Co.*, 27 FERC ¶ 61,079 at 61,145 (1984).

⁵ *Connecticut Yankee Atomic Power Co.*, 81 FERC ¶ 63,006 at 65,039-40 (1997).

⁶ *See* 16 U.S.C. §§ 824e, 825g, 825h (2000).

issue in these consolidated proceedings has involved manipulative and obfuscatory conduct,⁷ the Commission agrees also that monetary sanctions are the most appropriate remedy available to provide incentives to Enron to comply with our rules and orders (and thus to provide the required discovery).⁸

12. Enron's behavior exhibits a clear violation of the discovery rules and, in particular, the ALJ's October 14 Order – a violation we expect this order to stop. Enron failed to produce the specified documentary materials sought by Snohomish's valid data request pursuant to Rule 406. Enron was then informed that November 10 would be the deadline for Enron to produce the documents specified by Snohomish. Furthermore, the ALJ's October 14 Order clearly and unambiguously directed Enron to provide the specified documents (from the documents listed on the directory, those that were specified by Snohomish) by November 10.⁹ Enron failed to provide even a single specified document by the November 10 deadline, and did not seek any extension of that date or any other relief. Rather, it engaged in "self-help" and ignored its obligations.

13. The Commission, like the ALJ, is not persuaded by Enron's arguments that it was entitled to ignore its obligations. The Commission's policy is that a valid data request seeking documents shall be responded to, absent separate arrangements, with the production of "hard copies" by the party from which discovery is sought, and, absent separate arrangements, that party must also pay the cost of reproduction and shipment. Enron's excuses that it did not have enough time to copy the requested documents, that it did not know in which computer format Snohomish wanted the reproductions, or that Snohomish refused to pay for the conversion and handling of the documents, do not provide valid excuses for its failure to timely comply – these claims, in short, do not justify ignoring an ALJ's directive. Enron had the options of reaching agreement with Snohomish to resolve these issues, or seeking relief under Rule 410(c), such as an extension of the deadline. It did neither. It did not have the option of self-help. It did

⁷ *E.g., El Paso Electric Co., Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 108 FERC ¶ 61,071 (2004).

⁸ This is not to say that the other sanctions identified in Rule 411, such as deeming matters established or precluding Enron from advocating a particular position or contesting a matter, may not also be appropriate.

⁹ The November 10 deadline was given to allow Enron time to redact privileged information from the directory, and then to provide Snohomish with the requested documents from this redacted directory.

not have the option of willfully ignoring the ALJ's October 14 order. Enron's willful failure to timely comply with the discovery process in these circumstances can not be excused.

14. The ALJ recommended that Enron pay \$500.00 per day for each day of non-compliance with the October 14 order, from November 10 to, and including, the date of the ALJ's November 18 Order and \$1,000.00 per day for each day of non-compliance thereafter.¹⁰ The ALJ recommended that this amount be paid to Snohomish to compensate it for the burdens it has shouldered in attempting to extract from Enron materials which it was entitled to.¹¹ The Commission finds such payments for non-compliance an appropriate sanction that balances equitable considerations relevant to the resolution of this proceeding (*e.g.*, encouraging Enron to comply as soon as possible so that this proceeding can, in fact, proceed).¹²

15. We find that the record before us does not demonstrate a direct relationship between, in particular, Snohomish's costs and the delay in discovery. Furthermore, we note that there is an existing proceeding, Docket No. EL03-137-000, *et al.*, in which a dedicated fund already exists for the receipt of amounts to customers harmed by Enron's various practices at issue here. We find that those same customers have also suffered harm from Enron's failure to abide by the Commission's discovery rules and the ALJ's October 14 Order. For these reasons, the Commission will direct Enron to deposit such monies, subject to any applicable bankruptcy requirements, in the dedicated fund in Docket No. EL03-137-000, *et al.*

¹⁰ *Cf.* 16 U.S.C. §§ 825n, 825o (2000) (describing monetary forfeitures and penalties available in other contexts).

¹¹ ALJ Certification at P 4.

¹² *See Gulf Power Co. v. FERC*, 983 F.2d 1095, 1101 (D.C. Cir. 1993). While we do not address here whether other additional sanctions may also be appropriate, *see supra* note 8, we agree with the ALJ that under the circumstances the monetary sanctions recommended by the ALJ provide a result more proportional to Enron's continuing violation of the Commission's regulations and the ALJ's October 14 Order than the alternative remedies set forth under Rule 411 (which would not necessarily provide an increasing incentive over time to provide discovery).

The Commission orders:

Pursuant to sections 206, 308, and 309 of the FPA, and for the reasons stated above, the Commission finds that Enron should be assessed the monetary sanctions recommended by the ALJ, but to be deposited in the dedicated fund established in Docket No. EL03-137-000, *et al.*

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.