

106 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Arizona Public Service Company	Docket No. EL03-139-000
Automated Power Exchange, Inc.	Docket No. EL03-140-000
Bonneville Power Administration	Docket No. EL03-141-000
California Department of Water Resources	Docket No. EL03-142-000
California Power Exchange	Docket No. EL03-143-000
Cargill-Alliant, LLC	Docket No. EL03-144-000
City of Anaheim, California	Docket No. EL03-145-000
City of Azusa, California	Docket No. EL03-146-000
City of Pasadena, California	Docket No. EL03-148-000
City of Riverside, California	Docket No. EL03-150-000
FPL Energy	Docket No. EL03-155-000
Los Angeles Department of Water and Power	Docket No. EL03-157-000
Northern California Power Agency	Docket No. EL03-161-000
Pacific Gas and Electric Company	Docket No. EL03-162-000
PGE Energy Services	Docket No. EL03-164-000
Public Service Company of Colorado	Docket No. EL03-167-000
Public Service Company of New Mexico	Docket No. EL03-168-000

Salt River Project Agricultural Improvement and Power District	Docket No. EL03-171-000
Sierra Pacific Power Company	Docket No. EL03-174-000
Southern California Edison Company	Docket No. EL03-175-000
TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc.	Docket No. EL03-176-000
Tucson Electric Power Company	Docket No. EL03-177-000
Western Area Power Administration	Docket No. EL03-178-000

ORDER ON MOTIONS TO DISMISS SHOW CAUSE PROCEEDINGS

(Issued January 22, 2004)

Introduction

1. In this order, we grant motions to dismiss certain show cause proceedings instituted by the Commission in its Gaming Practices Order.¹

Background

Gaming Practices Order

2. The Commission's Gaming Practices Order among other things, found that 43 Identified Entities appeared to have participated in activities that constitute gaming²

¹ American Electric Power Service Corp., et al., 103 FERC ¶ 61,345, reh'g denied, 106 FERC ¶ 61,020 (2003) (Gaming Practices Order).

² Gaming is defined at Section 2.1.3 of the ISO's Market Monitoring and Information Protocol (MMIP) as follows:

[T]aking unfair advantage of the rules and procedures set forth in the PX or ISO Tariffs, Protocols or Activity Rules, or of transmission constraints in periods in which exist substantial Congestion, to the detriment of the efficiency of, and of consumers in, the ISO Markets. "Gaming" may also include taking undue advantage of other conditions that may affect the availability of transmission and

(continued...)

and/or anomalous market behavior³ (Gaming Practices) in violation of the California Independent System Operator Corporation's (ISO) and California Power Exchange's (PX) tariffs during the period January 1, 2000 to June 20, 2001.

3. Previously, Advisory Staff had conducted an investigation in Docket No. PA02-2-000; concurrently, the Commission had extended discovery in other dockets that were addressing alleged market manipulation by various sellers in 2000 and 2001.⁴ Advisory Staff's investigation encompassed both data gathering and data analysis of physical and financial transactions in and out of the California bulk power marketplace and related markets during 2000-2001. After sending data requests to over 130 sellers of wholesale electricity, Advisory Staff issued its Initial Report.⁵ Based on the Initial Report, in October 2002, the ISO developed market screens to review transaction data in order to determine the nature of the transactions identified in the Initial Report during the period January 1, 2000 to June 20, 2001. Advisory Staff noted in its Initial Report that its

generation capacity, such as loop flow, facility outages, level of hydropower output or seasonal limits on energy imports from out-of-state, or actions or behaviors that may otherwise render the system and the ISO Markets vulnerable to price manipulation to the detriment of their efficiency.

³ Anomalous market behavior (with examples not quoted below) is defined at Section 2.1.1 of the ISO's MMIP as:

[B]ehavior that departs significantly from the normal behavior in competitive markets that do not require continuing regulation or as behavior leading to unusual or unexplained market outcomes.

⁴ The Commission issued several orders in Docket Nos. EL00-95-000 and EL00-98-000, et al., that permitted the parties to: (1) conduct discovery, review the material and submit directly to the Commission additional evidence and proposed new and/or modified findings of fact based upon proffered evidence that is indicative or counter-indicative of market manipulation; (2) respond to these submissions; and (3) file reply comments. These filings are referred to as the "100 Days Evidence". See Gaming Practices Order, 103 FERC ¶ 61,345 at P 9.

⁵ Initial Report on Company-Specific Separate Proceeding and Generic Reevaluations; Published Natural Gas Price Data; and Enron Trading Strategies: Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000, issued August 2002.

investigation was ongoing and that areas of inquiry and recommendations not addressed in its Initial Report may be included in its Final Report.⁶

4. In June 2003, the ISO updated its analysis of the relevant transactions. The ISO's reports, Advisory Staff's Initial and Final Reports, and the several studies and testimonies submitted by witnesses in the "100 Days Evidence" served as the basis for the Commission's Gaming Practices Order.

5. The Gaming Practices Order set for hearing the issues of whether the Identified Entities had in fact, employed one or more of the Gaming Practices, and the appropriate remedy.⁷ The Commission directed the Administrative Law Judge (ALJ) to hear evidence and render findings and conclusions, including quantifying the full extent to which the Identified Entities were improperly enriched by their conduct. The Commission stated that the ALJ could recommend the monetary remedy of disgorgement of unjust profits and any other additional, appropriate non-monetary remedies.⁸

Motions to Dismiss and Terminate Dockets

6. Trial Staff conducted telephone conferences, reviewed Identified Entities' data responses, as well as the ISO's submissions. In light of this effort and Trial Staff's analysis of the information developed, Trial Staff filed motions in various dockets requesting termination of those dockets. Termination of each docket was requested because the Identified Entity: (1) had not engaged in prohibited activities; or (2) had engaged in the prohibited activities, but did not meet the minimum enrichment threshold set in the Gaming Practices Order;⁹ or (3) was merely an agent for other Identified Entities, who, if prohibited activities occurred, should be held solely accountable.

7. In addition, Automated Power Exchange, Inc. (APX) submitted a filing in Docket Nos. EL03-140-000, EL03-155-000, and EL03-176-000 and we will treat this filing as a motion to dismiss in Docket No. EL03-140-000. We will also treat this filing as a response in support of Trial Staff's motions to dismiss in the two other dockets.

⁶ Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000, issued March 26, 2003.

⁷ See Gaming Practices Order, 103 FERC ¶ 61,345 at P 71.

⁸ Id. at P 2, 71.

⁹ Id. at P 69.

Responses

8. Several parties filed responses to the motions to dismiss. The responses are discussed below. Some parties submitted answers to answers. The answers to answers are discussed below.

Discussion

Procedural Matter

9. Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2003), prohibits answers to answers unless specifically permitted by the decisional authority. We will permit the responses/answers because they provided information that assisted us in our decision-making process.

Motions to Dismiss and Answers/Responses

10. This order addresses motions to dismiss in the above captioned dockets that include the "Gaming Practices" identified in Attachments A, B, and C of the Gaming Practices Order.¹⁰

Docket No. EL03-139-000 – Arizona Public Service Company

Motion to Dismiss

11. Trial Staff filed a motion to dismiss the show cause order against the Arizona Public Service Company (APS) and to terminate Docket No. EL03-139-000. Trial Staff points out that the Gaming Practices Order determined that APS might have engaged in the gaming practices of False Import¹¹ and Paper Trading of Ancillary Services.¹² Trial

¹⁰ Attachment A lists market participants alleged to have engaged in the False Import Practice in violation of the MMIP. Attachment B lists market participants alleged to have engaged in the following congestion-related practices in violation of the MMIP: (1) Cutting Non-firm; (2) Circular Scheduling; (3) Scheduling Service on Out-of-Service Lines; and (4) Load Shift. Attachment C lists market participants alleged to have engaged in Paper Trading in violation of the MMIP.

¹¹ False Import, also known as Ricochet or Megawatt Laundering, is described in the Gaming Practices Order:

A market participant made arrangements to export power purchased in California in the day-ahead or day-of markets to an entity outside the state
(continued...)

Staff reviewed the record and concludes that the False Import allegations against APS should be dismissed because: (1) none of the transactions identified by the ISO as potential False Import transactions by APS involve a party outside of the ISO control area and (2) the transactions were initiated by the ISO before the hours identified as potential False Import, and only overlap with the latter hours due to the request of the ISO to extend the transaction.

12. With regard to the Paper Trading allegations, Trial Staff asserts that the record shows that APS had the resources available to provide the services offered to the ISO. Trial Staff further asserts that the record shows that APS did not provide those services when requested due to: (1) a misunderstanding by APS traders concerning how to complete the ISO bid templates, and (2) unforeseen outages on the APS system. Thus, Trial Staff argues that since APS had the resources available when offered and did not intend to provide the offered services through real-time market purchases, these transactions do not fit the definition of Paper Trading.¹³

13. In light of the record, Trial Staff requests that the Commission dismiss APS from the show cause proceeding and terminate the docket.

and to re-purchase the power from the out-of-state entity, for which the out-of-state entity received a fee. The “imported” power was then sold in the California real-time market at a price above the cap.

See Gaming Practices Order, 103 FERC ¶ 61,345 at P 37.

¹² Paper Trading is described in the Gaming Practices Order as a market participant selling ancillary services in the day-ahead market, even though it did not have adequate resources available to provide the ancillary services, and then buying back these services in the hour-ahead market at a lower price. See Gaming Practices Order, 103 FERC ¶ 61,345 at P 49.

¹³ Trial Staff also points out that the ISO report did not include APS on the lists of entities alleged to have participated in Paper Trading. Finally, Trial Staff notes that even if the transactions could be construed as Paper Trading, APS lost money on those transactions thus there are no profits to be disgorged or even revenues to be returned with respect to these transactions.

Response

14. The California Parties¹⁴ filed an answer opposing the motion to dismiss.¹⁵ The California Parties oppose the motion to dismiss because, they argue, it is impossible to appreciate the full extent of the harm to customers or provide a fair and complete remedy for sellers' abuse of market rules by examining any single seller in isolation.

15. The California Parties argue that Trial Staff's rationale for relieving APS of its involvement in False Import arises from an overly narrow reading of what constitutes False Import – and they have sought clarification from the Commission.¹⁶ They argue that, if a different definition of False Import is used, then there are factual disputes that support the denial of the motion to dismiss. The California Parties also argue that they have not been given adequate time for full and complete discovery and assert that, because additional discovery would help them to show additional harm and the need for non-monetary remedies as well as additional monetary remedies, the motion to dismiss should be denied.

16. The California Parties also object to the Commission's "piecemeal approach" of examining narrowly defined gaming behavior that "virtually guarantees that each seller's conduct will escape proper review, that the interaction of multiple sellers' conduct will not be fully explored, and that the full and complete harm visited on consumers as a result of the abuse of market rules will go unremedied."¹⁷ The California Parties further object to the dismissal because of the possibility that the Commission may enlarge the scope of this proceeding based upon pending rehearing requests. Alternatively, the California Parties request that the Commission leave open the possibility of applying newly imposed rules, standards, or remedies on APS, if the scope of the show cause proceeding is broadened due to decisions on appeal.

¹⁴ The California Parties are 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 & Electric Company and Southern California Edison Company.

¹⁵ The California Parties filed the essentially the same answer, with only minor differences, in other dockets discussed herein.

¹⁶ The California Parties' motion for clarification and their request for rehearing of the Gaming Practices Order is addressed and denied in the contemporaneous rehearing order.

¹⁷ This issue is also in their request for clarification and rehearing of the Gaming Practices Order, which is addressed in the contemporaneous rehearing order.

17. They also request that, if the Commission grants the motion to dismiss, that it do so with the caveat that this decision is not precedent for any other proceedings relating to the California markets, nor is the Commission precluded from ordering any appropriate remedy as to APS in any other proceeding. They further request that the docket be kept open so that APS can remain subject to further discovery as a party to the extent it possesses information relevant to Gaming Practices by others. They argue that APS will not be harmed by keeping the docket open and efficiency is best served by doing so.

Docket No. EL03-140-000 – Automated Power Exchange, Inc.

Motion to Dismiss

18. APX filed a response to motions to dismiss filed in Docket Nos. EL03-155-000 and EL03-176-000.¹⁸ Because of the substance of APX's response, we will treat APX's filing as a motion to dismiss in Docket No. EL03-140-000.

19. APX argues that it was named as a party in the Gaming Practices Order only because it served as the Scheduling Coordinator (SC) for FPL Energy, MSCG, and TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc. (collectively, TransAlta) in the ISO markets during the relevant period. According to APX, those sellers, and not APX, exercised control over and made all decisions with regard to the schedules that the Commission is now questioning under the MMIP. APX further argues that since the MMIP applies directly to sellers, and not just their SCs, to the extent that the Commission directs any party to show cause, the sellers that engaged APX as their SC should be required to show cause, not APX.¹⁹

20. APX, therefore requests that, in the same order the Commission issues granting the motions to dismiss in those dockets (or accepting the Stipulation with regards to MSCG's alleged circular schedule transactions), the Commission make clear that APX is likewise relieved of any further obligation with regard to those parties' alleged circular scheduling transactions attributed to APX.

¹⁸ APX also filed this document as comments on the Agreement and Stipulation of Morgan Stanley Capital Group (MSCG) in Docket No. EL03-160-000. That agreement is pending.

¹⁹ See APX Response at 2.

Docket No. EL03-141-000 – Bonneville Power Administration**Motion to Dismiss**

21. Trial Staff filed a motion to dismiss the show cause order against Bonneville Power Administration (BPA) and to terminate Docket No. EL03-141-000. Trial Staff points out that the Gaming Practices Order determined that BPA might have engaged in the gaming practices of False Import and Paper Trading of Ancillary Services. As a result of its review of the record, Trial Staff concludes that the False Import allegations against BPA include no transactions that meet the definition of False Import because none of the identified out-of-market transactions were in excess of the price cap and also did not involve a third party. Further, Trial Staff points out that the ISO data submitted on July 15, 2003 in response to the Commission's Gaming Practices Order no longer lists BPA as a participant in False Import transactions.

22. Trial Staff also requests dismissal of the show cause order with respect to the allegation that BPA engaged in Paper Trading. According to Trial Staff, the ISO data shows that BPA had a net loss with regard to these transactions. Trial Staff also points out that BPA had the required resources available to provide ancillary services at the time it sold such services in the day-ahead market.

Responses

23. The California Parties filed a response in opposition to the motion to dismiss that echoes their response filed in Docket No. EL03-139-000 and other dockets.

24. The ISO filed a response opposing the motion to dismiss in part, because of its pending request for rehearing of the Gaming Practices Order, which, if granted, would expand the definition of False Import transactions to include the types of transactions that BPA engaged in.²⁰ The ISO also objects to dismissal of the Paper Trading allegations because "availability of resources is in effect a defense, the facts relevant to which should be tested through discovery and a hearing."²¹ Finally, the ISO alternatively requests that the docket remain open so that BPA will continue to be subject to discovery as a party, even if the Commission dismisses the gaming practices allegations.

²⁰ As noted elsewhere in this order, in a contemporaneous rehearing order the Commission is denying rehearing of the Gaming Practices Order.

²¹ See ISO Response at 2.

Docket No. EL03-142-000 – California Department of Water Resources**Motion to Dismiss**

25. Trial Staff filed a motion to dismiss the show cause order against the California Department of Water Resources (CDWR) and to terminate Docket No. EL03-142-000. Trial Staff points out that the Gaming Practices Order determined that CDWR might have engaged in Paper Trading of Ancillary Services. Trial Staff requests dismissal of the Paper Trading allegations against CDWR because CDWR had no resources of its own and did not sell Ancillary Services to the ISO. Trial Staff further notes that CDWR operates the State Water Project (SWP) and SWP may self-provide or sell Ancillary Services to the ISO. Trial Staff points out that no party, including the ISO in its various reports, alleged that SWP engaged in Paper Trading or other gaming practices. Trial Staff asserts that the record shows no instances where SWP bid or sold in the Day-Ahead market any ancillary services for which it lacked the required reserves to perform. Thus, Trial Staff concludes that, since SWP did not engage in Paper Trading, the Commission should dismiss show cause order against CDWR, SWP's operator.

Responses

26. The ISO filed an answer to the motion to dismiss that did not object to relieving CDWR of any obligation to respond further concerning the practice of Paper Trading. However, the ISO requests that the docket remain open, with CDWR subject to future discovery requests of any information relevant to potential gaming practices by others. According to the ISO, CDWR would not be prejudiced if it remains a party for purposes of future discovery and the interests of efficiency would be served, especially in light of the short discovery periods in these proceedings and the fact that the cumbersome process of obtaining discovery from a non-party would be avoided.

27. CDWR filed an answer in support of the motion to dismiss and in opposition to the request that the docket remain open for future discovery, on other issues.

Docket No. EL03-143-000 – California Power Exchange Corporation**Motion to Dismiss**

28. Trial Staff filed a motion to dismiss the show cause order against the PX and to terminate Docket No. EL03-143-000. Trial Staff points out that the Gaming Practices Order determined that the PX might have engaged in Paper Trading of Ancillary Services. After reviewing the record, Trial Staff concludes that the Paper Trading allegations against the PX were the result of actions of seven identified entities for which the PX served as SC and against which separate show cause orders are pending. With respect to the PX serving as SC for Powerex Corporation (Powerex), Trial Staff points

out that of the seven Ancillary Services transactions identified by the ISO as possible Paper Trading, 3 of these transactions do not meet the definition of Paper Trading; Powerex lost money when it bought back at a higher price in the Hour-Ahead market the MWH it had sold in the Day-Ahead market. In 3 of the remaining transactions Trial Staff points out that the record indicates that Powerex bought back at the same price in the Hour-Ahead market the MWH it had sold in the Day-Ahead market, resulting in no gains or losses and thus again not meeting the Commission's definition of Paper Trading. Finally, Trial Staff states that the record contains evidence showing that in one instance, on December 5, 2000, Powerex engaged in Paper Trading for which it achieved a gain of \$34,608.00. Trial Staff states that it is addressing Powerex's gain as part of a settlement in a separate proceeding (Docket No. EL03-166-000); accordingly, Trial Staff asserts that there is no basis to seek relief from the PX for its role as Powerex's SC.

29. Trial Staff notes that it addressed Paper Trading allegations against Idaho Power Company, for which the PX also served as SC, in Docket No. EL03-156-000. In that docket, Trial Staff moved to dismiss these transactions as part of a settlement.

30. Trial Staff also points out that it filed a motion to dismiss, among other things, the Paper Trading allegations against Los Angeles Department of Water and Power (LADWP) in Docket No. EL03-157-000. Trial Staff concluded that the Paper Trading allegations against the PX in its role as SC for LADWP are the same transactions that Trial Staff sought to dismiss in Docket No. EL03-157-000.

31. Trial Staff states that the PX served as SC for Public Service Company of New Mexico (PSNM). However, the Commission in the Gaming Practices Order decided not to prosecute PSNM for Paper Trading because it earned less than \$1,000.00 in revenues from the transactions that may have met the definition of Paper Trading. Therefore, Trial Staff argues that there is no basis to continue to investigate the PX for its role as SC for PSNM.

32. Trial Staff states that the PX served as SC for San Diego Gas and Electric Company (SDG&E). However, according to Trial Staff, the charges in the Gaming Practices Order involving San Diego do not involve Paper Trading strategies, because each of the relevant transactions were backed by firm contracts for capacity and those contracts were qualified by the ISO to supply Ancillary Services, obviating the need to pursue SDG&E for Paper Trading. Trial Staff similarly concludes that there is no basis to pursue charges against the PX for its role as SC for SDG&E.

33. Trial Staff notes that the PX served as SC for Sierra Pacific Power Company (SPP) but the record shows that SPP entered into only two transactions in which it bought back Hour Ahead energy that it sold in the Day Ahead market. In both of the instances, SPP bought back the energy at higher prices, therefore it did not engage in Paper Trading

and, similarly Trial Staff concludes, there is no basis on which to pursue charges against the PX for its role as SC for SPP.

34. Finally, Trial Staff points out that while the Gaming Practices Order did not identify Tucson Electric Power Company (Tucson Electric) as an entity alleged to have engaged in Paper Trading, the California Parties have filed a motion that requests that this charge also apply to Tucson Electric. Trial Staff notes that this motion is pending.

35. Trial Staff also notes that the ISO, in Docket No. EL03-177-000 (where Trial Staff has filed a motion to dismiss the show cause proceeding against Tucson Electric based on other strategies) stated that Tucson Electric's ancillary service buy back transactions can be "attributed to congestion/transmission on the branch group where the import was located." Based on this statement, Trial Staff asserts that it is appropriate to dismiss the Paper Trading allegations against Tucson Electric. Accordingly, Trial Staff argues that there is no basis to pursue allegations against the PX for its role as SC for Tucson Electric.

Responses

36. The California Parties do not oppose Trial Staff's motion to dismiss the PX as a respondent in these proceedings. However, they argue that the Commission should keep the docket open for further discovery because, as the principal day-ahead market in California, the PX controls data crucial to these investigations. According to the California Parties, the PX (and the ISO) are crucial parties because the genesis of these proceedings is the finding by the Commission that the alleged conduct of the Identified Entities violated their tariffs. The California Parties also argue that the PX (and the ISO) possess data concerning any violation of the tariffs. The California Parties point out that the ISO is an intervener in these proceedings despite the fact that it is not a respondent. They argue that, as a condition of the dismissal, the PX should remain an intervener in the consolidated proceedings that are continuing to hearing in order to permit the Commission to develop a full and balanced record.

37. The ISO filed an answer that does not object to relieving the PX of any obligation to respond further concerning the practice of Paper Trading. However, the ISO requests that the Commission keep the docket open so that the PX can remain subject to discovery as a party if it has information relevant to potential gaming practices of others. According to the ISO, the PX would suffer no harm if the docket remains open. It further argues that keeping the docket open would promote efficiency, especially in light of the short discovery periods in these proceedings and the cumbersome process of obtaining discovery from a non-party.

38. The PX filed an answer in support of the motion to dismiss and in opposition to the requests that it continue to be subject to discovery in these proceedings as a party.

The PX points out that it is currently winding up its business affairs, subject to the Commission's supervision. It notes that it has and will continue to cooperate with all relevant Commission orders. The PX also states that, because it is no longer an operating utility, it has limited personnel and its personnel will be busy over the next several months complying with the Commission's order to complete the reruns of settlement statements in the refund proceeding by the middle of March 2004. See San Diego Gas & Electric Co., et al., 105 FERC ¶ 61,066 at Ordering Paragraph (2) (2003). The PX asserts that an order requiring it to remain in these proceedings would impose a substantial burden and defeat the purpose of the motion to dismiss and terminate the proceedings with regard to it. The PX argues that the California Parties' and the ISO's arguments concerning the onerous nature of requesting a subpoena of the PX's records are unsupported. The PX points out that it has already responded to subpoenas in three proceedings to which it is not a party, namely: Avista Corporation, et al., Docket No. EL02-115-000; El Paso Electric Co., et al., Docket No. EL03-113-000 and Portland General Electric Co., Docket No. EL02-114-000. According to the PX, there were no unusual or time-consuming problems with the issuance of the subpoenas, the service of the subpoenas, or its response to the subpoenas. Therefore, the PX argues that there is no reason that parties who require information in the unique possession of the PX cannot similarly request a subpoena in these show cause proceedings.

Docket No. EL03-144-000 – Cargill-Alliant, LLC

Motion to Dismiss

39. Trial Staff filed a motion to dismiss the show cause order against Cargill-Alliant, LLC, now know as Cargill Power Markets, LLC (Cargill) and to terminate Docket No. EL03-144-000. Trial Staff points out that the Gaming Practices Order determined that Cargill might have engaged in two congestion-related practices: (1) Cutting Non-Firm or

Non-Firm Export;²² and (2) Circular Scheduling or Death Star.²³ After reviewing the materials submitted by Cargill and the ISO's submission in direct response to the Gaming Practices Order (ISO Post-Gaming Practices Order Report),²⁴ Trial Staff concluded that Cargill "is not identified at all as having engaged in the Circular Schedules/Death Star strategy."²⁵ Regarding the Cutting strategy, Trial Staff points out that the only transactions identified by the ISO Post Gaming Practices Order Report where Cargill may

²² Cutting Non-Firm or Non-Firm Export is described in the Gaming Practices Order:

This practice involved the scheduling of non-firm power by a market participant that did not intend to deliver or cannot deliver the power. Upon receipt of the congestion payment for cutting the schedule, the market participant then canceled the non-firm power after the hour-ahead market closed but kept the congestion payment. . . . In some instances, the market participant may have submitted a schedule for non-firm power that it, in fact, had not acquired.

See Gaming Practices Order, 103 FERC ¶ 61,345 at P 42.

²³ Circular Scheduling or Death Star is described in the Gaming Practices Order:

The Circular Scheduling practice involved the market participant scheduling a counterflow in order to receive a congestion relief payment. In conjunction with the counterflow, the market participant scheduled a series of transactions that included both energy imports and exports into and out of the ISO control area and a transaction outside the ISO control area in the opposite direction of the counterflow back to the original place of origin. With the same amount of power scheduled back to the point of origin, however, power did not actually flow and congestion was not relieved.

See Gaming Practices Order, 103 FERC ¶ 61,345 at P 43.

²⁴ The Gaming Practices Order directed the ISO "to provide the Identified Entities with all of the specific transaction data for each of the Gaming Practices discussed in the ISO Report, including an explanation of the screen that it used to identify the transactions in question The ISO shall contemporaneously file such transaction data with the Commission." See Gaming Practices Order, 103 FERC ¶ 61,345 at Ordering Paragraph (C).

²⁵ See Trial Staff Motion at P 4.1.

have engaged in this strategy occurred in 2002, outside the period under investigation in the instant case.²⁶

Responses

40. The ISO filed an answer that does not oppose relieving Cargill of the obligation to respond to the Gaming Practices Order. However, the ISO requests that the docket remain open until the conclusion of the show cause proceedings, with Cargill remaining subject to discovery as a party if it has information relevant to potential gaming by others.²⁷

41. The California Parties filed an answer opposing the motion to dismiss, which largely mirrors their answers in other dockets described above. The California Parties also state that they do not object to the motion to dismiss the show cause proceeding as to Cargill, if it is limited to the narrow issues set for hearing in the Gaming Practices Order. The California Parties request that the docket remain open so that Cargill-Alliant is subject to discovery as a party to the extent that it possesses information relevant to gaming practices by others.

42. Cargill filed a reply to the California Parties' and the ISO's answers. Cargill notes that neither the California Parties nor the ISO challenge any of the evidence that serves as the basis for Trial Staff's motion to dismiss. Cargill objects to the docket remaining open in order to facilitate speculative future discovery. Cargill points out that to the extent that there is a bona fide need for discovery from it, Commission procedures would permit such discovery after the termination of this docket.²⁸ Cargill asserts that the Commission should not blur the distinction between party and non-party discovery under its rules²⁹ for the California Parties' and the ISO's convenience in light of the time, expense and inconvenience of complying with data requests in a proceeding in which it has no interest.

²⁶ See id. at P 4.2.

²⁷ See ISO Answer at 2-3.

²⁸ See Cargill Reply, citing 18 C.F.R. § 385.409 (2003).

²⁹ See Cargill Reply, citing 18 C.F.R. §§ 385.402, 385.403, 385.406 (2003) (limited to "participants").

Docket No. EL03-145-000 – City of Anaheim, California**Motion to Dismiss**

43. Trial Staff moves to dismiss the show cause order against the City of Anaheim, California (Anaheim) and to terminate Docket No. EL03-145-000. Trial Staff points out that the Gaming Practices Order determined that Anaheim appeared to have participated in the congestion-related practice of Scheduling Service on Out-of-Service Lines (or Wheel Out)³⁰ and Paper Trading of Ancillary Services. After reviewing the materials submitted during the “100 Days Evidence,” the ISO Post-Gaming Practices Order Report, and various affidavits from representatives of Anaheim, Trial Staff asserts that:

[N]o party in the 100 Days Evidence appears to have alleged that Anaheim engaged in this behavior nor does the ISO’s July 2003 data contain any indication that Anaheim Scheduled Service on Out-of-Service Lines.³¹

Trial Staff also notes that the ISO’s Post-Gaming Practices Order Report contains no indication that Anaheim engaged in Paper Trading.

Responses

44. The California Parties filed an answer to the motion to dismiss that echoes their answer filed in Docket No. EL03-144-000.

³⁰ Scheduling Service on Out-of-Service Lines or Wheel Out is described in the Gaming Practices Order:

This practice involved a market participant submitting a schedule across an intertie line at the ISO border that was known to be out of service and had been derated to zero capacity, thus creating artificial congestion. The market participant would then schedule a counterflow export, a “wheel out,” and be paid for congestion relief in the day-ahead or hour-ahead market. However, because the line was completely constrained, the initial schedule was certain to be cut by the ISO in real time and the market participant would receive a congestion payment for energy it did not actually supply.

See Gaming Practices Order, 103 FERC ¶ 61,345 at P 44.

³¹ See Trial Staff Motion at 5.

45. The ISO filed an answer that does not oppose the motion to dismiss regarding the allegations of Scheduling Service on Out-of-Service Lines, however it objects to the motion to dismiss with respect to the Paper Trading transactions. According to the ISO, material issues of fact exist as to whether Anaheim engaged in Paper Trading. The ISO asserts that the record contains evidence that Anaheim engaged in this practice in specific hours, and the ISO's market notice of July 3, 2002 indicates that payments to Anaheim for Ancillary Services were rescinded because the generating capacity that was to provide the Ancillary Services had not been available.³² The ISO argues that, in light of the record, Trial Staff's motion on this issue is more properly characterized as a request for a factual finding and, as such, should be denied as improperly short-circuiting the trial-type evidentiary hearing before the ALJ.³³ Finally, the ISO makes the alternative request that the Commission keep the docket open for future discovery even if it dismisses the show cause order against Anaheim on the merits.

46. Anaheim filed an answer supporting the motion to dismiss. Anaheim points out that the ISO, in a letter dated July 14, 2003 and included in the Motion to Dismiss, states that it does not have any evidence that Anaheim scheduled service on out-of-service lines.³⁴ Anaheim also asserts that the record contains sufficient evidence, which Trial Staff relies upon, showing that it did not engage in Paper Trading.³⁵

Docket No. EL03-146-000 – City of Azusa, California

Motion to Dismiss

47. Trial Staff moves to dismiss the show cause order against the City of Azusa, California (Azusa) and to terminate Docket No. EL03-146-000. Trial Staff points out that the Gaming Practices Order determined that Azusa appears to have participated in Paper Trading of Ancillary Services. Trial Staff asserts that after examining the entire record, including material filed as part of the 100 Days Evidence, each of the ISO's reports, and the data submitted by Azusa in response to the show cause order, it concluded that Azusa had sufficient capacity to cover its ancillary service bids and energy schedules for the hours in question. This conclusion, Trial Staff asserts, is

³² See ISO Answer at 2.

³³ See *id.* at 3.

³⁴ See Anaheim Answer at 5.

³⁵ Id.

sufficient to dismiss the show cause order against Azusa because the Commission explicitly recognized that an entity may legitimately take advantage of price differentials between the day-ahead and real-time markets, if the entity in fact had the resources available to provide the ancillary services it was selling.³⁶

Responses

48. The California Parties filed a response to the motion to dismiss that echoes their responses filed in Docket No. EL03-144-000 and other dockets.

49. Azusa filed an answer supporting the motion to dismiss. Azusa points out that there were resources to cover Azusa's ancillary services bids and energy schedules. Azusa further notes that no party disputes the evidence in the affidavit of Bob Tang, Azusa's Assistant Utilities Director, attached to the motion to dismiss, which described those resources.³⁷

Docket No. EL03-148-000 – City of Pasadena, California

Motion to Dismiss

50. Trial Staff filed a motion to dismiss the show cause order against the City of Pasadena, California (Pasadena) and to terminate Docket No. EL03-148-000. Trial Staff points out that the Gaming Practices Order determined that Pasadena might have engaged in the practice of Paper Trading. Trial Staff concludes that its analysis of the relevant data supports Pasadena's claim that the incidents at issue were largely due to the operating constraints of Pasadena's generating plants. Trial Staff further notes Dr. Fox-Penner's testimony against Pasadena does not support an allegation that Pasadena engaged in Paper Trading.³⁸

Responses

51. In addition to echoing its response filed in Docket No. EL03-144-000, the ISO asserts additional bases for its opposition to the motion to dismiss. According to the ISO, Trial Staff requests not a dismissal of the show cause order as to Pasadena, but instead a

³⁶ See Trial Staff Motion at P 3.2.

³⁷ See Azusa Answer at 4.

³⁸ See Trial Staff Motion at P 2.2, 3.2.

finding of fact, on the merits, in favor of Pasadena. The ISO makes this assertion because Trial Staff does not assert that there is no evidence of Pasadena engaging in Paper Trading, rather Trial Staff interprets, in Pasadena's favor, the record evidence that gave rise to the show cause order. The ISO not only asserts that the motion to dismiss should be denied but it insists that it be permitted the opportunity to undertake additional discovery in order to determine Pasadena's involvement in, and the amount that it profited from, manipulation of California's electric markets. The ISO points out that the Gaming Practices Order invited Identified Entities to settle with Trial Staff rather than go through the full proceeding but the order did not suggest that the entire process should be short circuited so long as an Identified Entity could convince Trial Staff that it was "clean".³⁹

52. The California Parties filed a response to the motion to dismiss that echoes their responses filed in Docket No. EL03-144-000, and other dockets.

53. Pasadena filed an answer in support of the motion to dismiss and in opposition to relief requested by the ISO and the California Parties in the event the Commission agrees with Trial Staff on the motion's merits. According to Pasadena, although styled as a motion to dismiss, the motion satisfies all the requirements for summary disposition under 18 C.F.R. § 385.217 (2003). According to Pasadena, it produced 28 pages of testimony explaining that it had not engaged in Paper Trading and neither the ISO or any other party questioned any of the facts in that testimony. Pasadena asserts that Trial Staff properly exercised prosecutorial discretion in moving to dismiss Pasadena in order to relieve the burden and costs to both the parties and the Commission. Finally, Pasadena argues that if the Commission adopts the ISO's position it would impermissibly shift the ultimate burden of proof to it. Pasadena argues that the show cause order merely puts the burden of going forward on Pasadena, and Pasadena has met that burden.⁴⁰

54. Pasadena also objects to the request that the docket remain open for further discovery even if the Commission grants the motion to dismiss. Pasadena relies on Southern California Edison Company, 16 FERC ¶ 61,185 (1981) (So Cal Edison) where the Commission determined that the customers had failed to make a prima facie case of price squeeze against the utility and refused to keep the docket open to permit Trial Staff to present a price squeeze case that it admitted it had not yet formulated. The Commission denied Trial Staff's request because the "proceeding had gone on long

³⁹ See ISO Answer at 3.

⁴⁰ See Pasadena Answer at 7 and cases cited therein.

enough.” 16 FERC at 61,426. Pasadena argues that due process requires that the motion to dismiss be granted and the docket terminated.⁴¹

Docket No. EL03-150-000 – City of Riverside, California

Motion to Dismiss

55. Trial Staff filed a motion to dismiss the show cause order against City of Riverside, California (Riverside) and to terminate Docket No. EL03-150-000. Trial Staff points out that the Gaming Practices Order determined that Riverside might have engaged in two congestion-related practices: (1) Cutting Non-Firm and (2) Circular Scheduling. After reviewing the materials submitted by Riverside, the 100 Days Evidence, and the ISO Post-Gaming Practices Order Report, Trial Staff concluded that Riverside is not identified in the ISO Post-Gaming Order Report as having engaged in Circular Schedules or in Cutting Non-Firm.

Responses

56. The ISO and the California Parties each filed responses that echo their responses filed in Docket No. EL03-144-000 and other dockets.

57. Riverside filed an answer supporting the motion to dismiss. Riverside argues that, since there is a complete lack of evidence showing that it engaged in market manipulation, “it is manifestly unfair to continue taxing the limited resources of a publicly owned and operated utility such as Riverside. . . .”⁴²

Docket No. EL03-155-000 – FPL Energy

Motion to Dismiss

58. Trial Staff filed a motion to dismiss FPL Energy and to terminate Docket No. EL03-155-000. Trial Staff points out that the Gaming Practices Order determined that FPL Energy might have engaged in the congestion-related practice of Circular Scheduling. After reviewing the materials submitted by FPL Energy, the 100 Days Evidence, and the ISO Post-Gaming Practices Order Report, Trial Staff concludes that FPL Energy received a one-time congestion relief payment of \$1,900.00 that could be evidence of Circular Scheduling.

⁴¹ See id. at 11.

⁴² See Riverside Answer at 5.

59. Trial Staff noted that the Commission stated that it would not prosecute Identified Entities where the ISO Report finds earned revenues of \$10,000.00 or less for a particular Gaming Practice and where the Commission has no other basis to prosecute them for that particular Gaming Practice.⁴³

Responses

60. The ISO and the California Parties each filed responses that echo their responses filed in Docket No. EL03-144-000 and other dockets.

61. APX filed a response to the motion to dismiss. APX supports the motion to dismiss. APX alleges that it serves as the SC for certain sellers named in the Gaming Practices Order. Consistent with its role as SC, APX states that, when it received those sellers' schedule and bid data it forwarded the information to the ISO. APX asserts that the ISO records attributed these transactions to it but the sellers, and not APX, exercised control over and made all decisions with regard to the schedules that the Commission is now questioning under the MMIP. Therefore, APX seeks Commission clarification that, if the Commission grants the motion to dismiss in this docket, it make clear that APX is relieved of all further obligations with regard to these alleged Circular Schedule transactions.⁴⁴

62. FPL Energy filed an answer supporting the motion to dismiss and objecting to the request to keep the docket open for possible future discovery. According to FPL Energy, neither the ISO nor the California Parties (nor any other party) submitted a single discovery request to it during the 100 Days Discovery. FPL Energy concludes that the docket should be closed since neither the ISO nor the California Parties have introduced evidence to contradict the conclusion that during the relevant period the FPL Energy transactions that are the subject of the unopposed motion to dismiss did not violate the MMIP.

⁴³ See Gaming Practices Order, 103 FERC ¶ 61,345 at P 69. Because the de minimus amount is sufficient for dismissal, Trial Staff did not address FPL Energy's witness Mr. Maisto's Affidavit that explained that the transactions do not constitute Circular Scheduling. See Trial Staff Motion at P 3.5.

⁴⁴ APX argues that letting a seller "off the hook" for its actions, but requiring the seller's agent (i.e., the SC) nonetheless to remain responsible for that seller's transactions, would eliminate any deterrent effect, a result that is not in the public interest. See APX Response at 4.

Docket No. EL03-157-000 – Los Angeles Department of Water and Power

Motion to Dismiss

63. Trial Staff filed a motion to dismiss the show cause order against LADWP and to terminate Docket No. EL03-157-000. Based on the ISO Post-Gaming Practices Order Report and studies by Dr. Fox-Penner, the Commission in the Gaming Practices Order determined that LADWP might have engaged in: (1) False Import, (2) Circular Scheduling, (3) Load Shift⁴⁵, and (4) Paper Trading.

64. After reviewing the record, Trial Staff filed a motion to dismiss the show cause order with regard to False Import allegations because the ISO data submitted in response to the show cause order:

showed that LADWP may have exported power purchased in the California day-ahead or day-of markets and then sold that power in the California real-time market at a price above the applicable price cap . . . (t)he July 15 ISO Data did not however, indicate whether . . . LADWP subsequently sold the energy it purchased from California to an entity outside California and re-purchased it from an entity for a fee. Trial Staff reviewed the LADWP database of power schedules, . . . which demonstrates that on September 19, 2000, LADWP did not sell and repurchase any energy it purchased from the PX with a third party outside of California for a fee.⁴⁶

⁴⁵ Load Shift is described in the Gaming Practices Order:

“Load Shift” involved a market participant underscheduling load in one zone in California and overscheduling load in another, thereby increasing congestion in the direction of the overscheduled zone. Congestion “relief” occurred when the market participant later adjusted the two schedules to reflect actual expected loads. This adjustment created a counterflow toward the unscheduled zone, earning the market participant a congestion relief payment from the ISO. The market participant had to own Firm Transmission Rights (FTRs) in the direction of the overscheduled zone to cover its exposure to ISO congestion charges, but any of the FTRs that it did not use may have earned artificially high FTR payments from the ISO.

See Gaming Practices Order, 103 FERC ¶ 61,345 at P 45.

⁴⁶ See Trial Staff Motion at P 4.3.

65. Trial Staff supports its motion to dismiss the show cause order with regard to Circular Scheduling by stating that its review of the ISO Data and Dr. Fox-Penner's studies do not indicate that LADWP collected any congestion revenues from counterflow schedules on the ISO's transmission system during the period from January 1, 2000 through June 19, 2001.⁴⁷

66. Trial Staff moves to dismiss the Load Shift allegation against LADWP because the only reference to Load Shift in the ISO Post-Gaming Practices Order Report is the description of Enron's load shift practices, and no LADWP load shift practices are mentioned.⁴⁸

67. Trial Staff moves to dismiss the Paper Trading allegation against LADWP because the ISO Post-Gaming Practices Report does not mention LADWP. Further, the Trial Staff states that after examining the record, it found that, based on that report, LADWP had sufficient reserve capacity to sell Ancillary Services to the ISO in each hour in which it may have re-purchased Ancillary Services in the hour-ahead market.⁴⁹

Responses

68. LADWP filed an answer in support of the motion to dismiss reiterating, in large part, the arguments made by Trial Staff.

69. The ISO opposes the motion to dismiss with regard to False Import allegations based upon its objection to the Gaming Practices Order's definition.⁵⁰ The ISO objects to dismissal of the Circular Scheduling allegations because of what the ISO characterizes as the central role that LADWP's transmission rights played in various Circular Scheduling schemes employed by Enron. The ISO argues that LADWP may have profited from these transactions in as-yet undiscovered ways. The ISO does not object to the dismissal of the show cause order with regard to the Load Shift and Paper Trading allegations. Finally, in the alternative, the ISO requests that the docket remain open for ease of discovery, even if the Commission dismisses all of the gaming practices allegations.

⁴⁷ Id. at P 4.4.

⁴⁸ Id. at P 4.5.

⁴⁹ Id. at P 4.7.

⁵⁰ The ISO notes that it has raised this objection in its request for clarification and/or rehearing of the Gaming Practices Order, which, we note, is being denied in a contemporaneous order.

70. The California Parties filed a response in opposition to the motion to dismiss. They object to the “unduly narrow definition of False Import”. They assert that the record is incomplete and therefore inadequate to determine LADWP’s role in Circular Scheduling. They also argue that LADWP’s acts of market manipulation were not restricted to activities detailed in the Gaming Practices Order and the acts are interrelated, mutually reinforcing, and result in cumulative damages.

71. LADWP filed a response to the parties’ answers to the motion to dismiss. LADWP points out that no party objects to the motion to dismiss regarding the Load Shift or Paper Trading allegations. Thus, LADWP argues, this portion of the motion to dismiss should be granted; it is supported by undisputed evidence. With regard to the False Import and Circular Scheduling allegations, LADWP points out that the parties’ opposition to dismissal are impermissible collateral attacks on the Gaming Practices Order. LADWP argues that there are no material issues of fact regarding these allegations, because the parties do not dispute the facts as they are applied to the definition of these gaming practices contained in the Gaming Practices Order. Finally, LADWP objects to keeping the docket open for discovery purposes because that would impose an unwarranted burden on it.

72. Trial Staff filed a response to the parties’ opposition to the motion to dismiss. It incorporates by reference the responses filed in several other dockets on the same day, which are described above. In addition, Trial Staff points out that the parties argue that LADWP may have benefited financially by selling its transmission rights to other parties who subsequently engaged in impermissible gaming strategies. Trial Staff argues that, aside from the parties not providing evidence for that assertion, a critical element of the offense is the receipt of “a congestion relief payment.” Trial Staff points out that LADWP did not collect congestion relief revenues, a fact not disputed by the parties; therefore, LADWP did not engage in this gaming strategy.

Docket No. EL03-161-000 – Northern California Power Agency

Motion to Dismiss

73. Trial Staff moves to dismiss the show cause order against the Northern California Power Agency (NCPA) and to terminate Docket No. EL03-161-000. Trial Staff points out that the Gaming Practices Order determined that NCPA appears to have participated in the congestion-related practice of Load Shift and the practice of Paper Trading. After a review of the record, including materials submitted during the 100 Days Evidence, the ISO Post-Gaming Practices Order Report, and NCPA’s response to the Gaming Practices Order, Trial Staff concludes that NCPA could not have engaged in Paper Trading. Trial Staff notes that the record showed that NCPA had generation resources available to meet its ancillary service commitments and that where NCPA’s ancillary service payments

were rescinded the reasons were legitimate and documented. Trial Staff also points out that the ISO Post-Gaming Practices Order Repot did not include NCPA as a party with potential Paper Trading transactions.

74. Regarding Load Shift, Trial Staff seeks dismissal not on the merits, but only because this issue (including any remedies) also arises in the context of NCPA's alleged partnership arrangements with Enron Power Marketing, Inc. and Enron Energy Services, Inc. (Enron) in Docket No. EL03-196-000. Trial Staff asserts that it is more efficient to pursue those issues in that docket. Trial Staff states that it understands that NCPA agrees with this procedure and will proceed in that docket with respect to Load Shift issues as if litigation of the issue of Load Shift had continued in Docket No. EL03-161-000.⁵¹

Responses

75. The ISO and the California Parties each filed responses that echo their responses filed in Docket No. EL03-144-000 and other dockets.⁵²

76. NCPA filed an answer supporting the motion to dismiss, as far as it goes. NCPA asserts that Trial Staff's proposed relief concerning the Load Shift allegations demonstrates that it has found no reasonable basis on which to contend that NCPA engaged in Load Shift strategies on its own. NCPA continues to assert that it has not engaged in improper gaming behavior, either alone or in concert with Enron. NCPA adds that its request for rehearing that challenges the Commission's assertion of jurisdiction over it in Docket No. EL03-161-000 is moot if the Commission grants the motion to dismiss.

77. NCPA also filed an answer to the ISO and the California Parties' responses. NCPA points out that these responses do not contradict the evidence that NCPA did not participate in Paper Trading. NCPA objects to the requests to keep the docket open for additional discovery and potentially newly imposed rules, standards, or remedies for the dismissed allegations. NCPA concedes that the Load Shift allegation will be litigated, if at all, in Docket No. EL03-196-000. However, NCPA points out that it also has a

⁵¹ See Trial Staff Motion at P 4.1.

⁵² In addition, the California Parties rely on *Consolidated Edison Company v. FERC*, No. 01-1503 (D. C. Cir. November 7, 2003), issued after Trial Staff's motion, to support their continued opposition to what they characterize as the Commission's "piecemeal approach in these proceedings."

pending rehearing request challenging the Commission's assertion of jurisdiction over NCPA in that proceeding.⁵³

Docket No. EL03-162-000 – Pacific Gas and Electric Company

Motion to Dismiss

78. Trial Staff moves to dismiss the show cause order against Pacific Gas and Electric Company (PG&E) and to terminate Docket No. EL03-162-000. Trial Staff points out that the Gaming Practices Order determined that PG&E appears to have participated in the congestion-related practice of Cutting Non-Firm and the practice of Paper Trading. Trial Staff reviewed the record, including materials submitted during the 100 Days Evidence, the ISO Post-Gaming Practices Order Report, and PG&E's response to the Gaming Practices Order; Trial Staff notes that the ISO Post-Gaming Practices Order Report did not list PG&E as one of the market participants that may have engaged in Paper Trading. Trial Staff also points out that the evidence shows that PG&E had sufficient reserve capacity to sell Ancillary Services to the ISO in each hour in which it may have re-purchased Ancillary Services in the hour-ahead market.⁵⁴ Regarding Cutting Non-Firm, Trial Staff asserts that the amount at stake is under \$10,000.00. Trial Staff also notes that PG&E is not identified in the ISO Post-Gaming Practices Order Report as one of the market participants engaged in Cutting Non-Firm transactions. Trial Staff also explains that, once typographical errors and transactions from outside the applicable period are eliminated from consideration, the only PG&E transactions that triggered the ISO's initial screens on Cutting Non-Firm were transactions for two hours on August 25, 2000 and PG&E did not receive any congestion relief payments from this schedule reduction.⁵⁵

Responses

79. The ISO filed a response that echoes its responses filed in Docket No. EL03-144-000 and other dockets.

⁵³ NCPA's rehearing request is dismissed in the contemporaneously issued rehearing order, referenced earlier in this order.

⁵⁴ In addition, Trial Staff notes that the no-pay instances where PG&E showed up in Attachment G of the Gaming Practices Order (Ancillary Services Payments Rescinded Due to Generator Unavailability) appear to be attributable to the operational realities of its hydro electric-based system. See Trial Staff Motion at P 3.5.

⁵⁵ See Trial Staff Motion at P 3.8.

80. PG&E filed an answer in support of the motion to dismiss.

Docket No. EL03-164-000 – PGE Energy Services

Motion to Dismiss

81. Trial Staff moves to dismiss the show cause order against PGE Energy Services (PGE) and to terminate Docket No. EL03-164-000. Trial Staff points out that the Gaming Practices Order determined that PGE appears to have participated in the congestion-related practice of Circular Scheduling and the practice of False Import. Trial Staff reviewed the record, including materials submitted during the 100 Days Evidence, the ISO Post-Gaming Practices Order Report, and PGE’s response to the Gaming Practices Order; Trial Staff notes that the ISO Post-Gaming Practices Order Report contains no data concerning PGE with respect to False Import or Circular Scheduling transactions, nor do Dr. Fox-Penner’s studies indicate that PGE engaged in these activities.

Response

82. The ISO filed a response to Trial Staff’s motion that does not oppose relieving PGE from further obligation with regard to the practices of False Import and Circular Scheduling, as defined in the Gaming Practices Order. However, the ISO requests that the docket remain open so that, in the name of efficiency, PGE remains subject to discovery as a party.

83. The California Parties filed a response opposing the motion to dismiss that repeats the arguments made in other dockets.

Docket No. EL03-167-000 – Public Service Company of Colorado

Motion to Dismiss

84. Trial Staff filed a motion to dismiss the show cause order against Public Service Company of Colorado (PSC Colorado) and to terminate Docket No. EL03-167-000. Trial Staff points out that the Gaming Practices Order determined that PSC Colorado might have engaged in the congestion-related practice of Circular Scheduling. Trial Staff reviewed the data submitted by PSC Colorado, the 100 Days Evidence, and the ISO Post-Gaming Practices Order Report, and concluded that the only record reference to PSC Colorado in conjunction with Circular Scheduling is contained in the testimony of Dr. Fox-Penner which “is actually a question and answer pertaining to whether or not Mirant

may have engaged in Circular Scheduling.”⁵⁶ Thus, Trial Staff concludes, “in view of the lack of any specific evidence to support that PSC Colorado may have engaged in Circular Scheduling . . . there is an insufficient basis upon which to include PSC Colorado as an Identified Entity (in Attachment B of the Show Cause Order) in this proceeding.”⁵⁷

Responses

85. The ISO filed a response that echoes its responses filed in Docket No. EL03-144-000 and other dockets.

86. In addition to echoing their responses filed in Docket No. EL03-144-000 and elsewhere, the California Parties also argue additional bases for their opposition to the motion to dismiss. The California Parties assert that additional evidence, not identified by Trial Staff in the motion to dismiss, that was available in Docket No. PA02-2-000 or that was adduced in the so-called California Refund Proceeding suggests a more active participation by PSC Colorado. The California Parties argue that the record in Docket No. PA02-2-000 shows that PSC Colorado provided various services for Mirant – services that may have helped Mirant engage in Circular Scheduling, or other gaming or anomalous market behavior. Furthermore, the California Parties point to record evidence that PSC Colorado shared profits with Mirant, thus directly benefiting from manipulation of California markets. The California Parties assert that the lack of references to PSC Colorado in the ISO Post-Gaming Practices Order Report is not dispositive. They argue that a circular schedule may include a number of transactions, not all of which were in California, and which may not necessarily show up in the ISO’s data. PSC Colorado’s facilities are located outside the ISO service area. The California Parties assert that, in order to engage in a circular scheduling scheme, PSC Colorado does not need to make sales directly to California to profit from those sales, so it is not surprising that the ISO Post-Gaming Practices Order Report does not contain specific references to PSC Colorado.⁵⁸ The California Parties not only assert that the motion to dismiss should be denied, but they insist that they should be permitted the opportunity to undertake additional discovery in order to determine PSC Colorado’s involvement in, and the amount that it profited from, manipulation of California’s electric markets.

⁵⁶ See Trial Staff Motion at P 3.3.

⁵⁷ Id.

⁵⁸ See California Parties Answer at 11.

Docket No. EL03-168-000 – Public Service Company of New Mexico**Motion to Dismiss**

87. Trial Staff moves to dismiss all issues related to PSNM set for hearing in the Gaming Practices Order. Trial Staff points out that this order alleged that PSNM, among others, appeared to have engaged in the gaming practice of False Imports in violation of the ISO's MMIP. Trial Staff argues that the motion to dismiss should be granted and Docket No. EL03-168-000 terminated because its examination of data submitted by the ISO in July 2003 shows that PSNM did not export power purchased in the California day-ahead or day-of-markets and then sell that power in the California real-time market at a price above the applicable price cap.

Responses

88. The California Parties respond in opposition to the motion to dismiss, mirroring the responses that they filed in Docket No. EL03-139-000 and other dockets.

89. The ISO submitted a response that mirrors its objections to dismissal of the False Import allegations in Docket No. EL03-141-000 and other dockets.

90. PSNM answered in support of the motion to dismiss. PSNM points out that the California Parties' designated witness, Dr. Fox-Penner, has provided a declaration that confirms that PSNM did not engage in False Import transactions during the applicable period, and that the ISO also does not dispute Trial Staff's similar conclusion. According to PSNM, everything else raised in both of the responses is irrelevant to the pending motion to dismiss⁵⁹ or represents a collateral attack upon the Gaming Practices Order. PSNM also objects to keeping the docket open for discovery purposes because the Commission's procedures would allow for such discovery to the extent any bona fide need exists, without unduly burdening PSNM merely for the other parties' convenience.

⁵⁹ According to PSNM, the California Parties' allegations concerning the significance of the parking service that it provides is the subject of Docket No. EL03-200-000 and will be addressed there. PSNM argues that the only evidence relevant in this docket is whether it engaged in False Import transactions during the relevant period on its own behalf. Since no such evidence exists, PSNM argues that the motion to dismiss in this docket should be granted. See PSNM Response at 11.

Docket No. EL03-171-000 – Salt River Project Agricultural Improvement and Power District

Motion to Dismiss

91. Trial Staff filed a motion to dismiss the show cause order against Salt River Project Agricultural Improvement and Power District (Salt River) and to terminate Docket No. EL03-171-000. Trial Staff points out that the Gaming Practices Order determined that Salt River might have engaged in the gaming practice of False Import. As a result of its review of the record, Trial Staff concludes that the False Import allegations are baseless since the relevant Salt River transactions did not meet the definition of False Import, because none of the identified out-of-market transactions were in excess of the price cap and they also did not involve a third party.

Responses

92. The ISO filed a response that repeats the arguments made in several other dockets.

93. The California Parties filed a response that repeats the arguments made in several other dockets.

94. Salt River filed a response that supports the motion to dismiss for the reasons stated by Trial Staff. Salt River argues that: (1) it made a very small number of Out Of Market (OOM) sales and the Commission recognized that the smaller the volume of transactions and revenues identified for individual market participants, the less the likelihood that the transactions represent intentional gaming practices; (2) as a net buyer in the ISO and PX markets, it had no incentive to increase prices through gaming practices; (3) the practice of False Import harmed Salt River because OOM costs were passed through to it, as a load-serving SC, in neutrality adjustment charges collected by the ISO; (4) its purchases and sales constitute independent and unrelated obligations; (5) Dr. Fox-Penner admitted that his analysis included legitimate purchase and sale transactions; (6) it has no profits to disgorge for its OOM transactions and, in fact, sustained losses; (7) it did not earn revenues in excess of \$10,000 for the relevant OOM transactions; and (8) it is not a public utility whose sale transactions are subject to the Commission's ratemaking jurisdiction under Sections 205 and 206 of the Federal Power Act.⁶⁰

⁶⁰ See 16 U.S.C. §§ 824d, 824e (2000).

Docket No. EL03-174-000 – Sierra Pacific Power Company**Motion to Dismiss**

95. Trial Staff filed a motion to dismiss the show cause order against SPP and to terminate Docket No. EL03-174-000. Trial Staff points out that the Gaming Practices Order determined that Sierra Pacific might have engaged in the congestion-related practice of Cutting Non-Firm. After reviewing the materials submitted by SPP, the 100 Days Evidence, and the ISO Post-Gaming Practices Order Report, Trial Staff notes that the transactions identified by the California Parties as evidence of Cutting Non-Firm were removed in the ISO's Post-Gaming Practices Order Report.⁶¹ Trial Staff argues that removal of SPP from the list of parties engaging in the practice of Cutting Non-Firm, indicates that, in fact, a legitimate transaction occurred. Moreover, Trial Staff points out that SPP received less than \$10,000.00, an amount below the threshold identified as a basis for exclusion from these proceedings.⁶²

Responses

96. The ISO and the California Parties each filed responses that echo their responses filed in Docket No. EL03-144-000 and other dockets.

97. SPP filed an answer in support of the motion to dismiss. It points out that no party objects to the motion to dismiss on the merits and that the request to keep the docket open for future potential discovery is prejudicial and contrary to law.

Docket No. EL03-175-000 – Southern California Edison Company**Motion to Dismiss**

98. Trial Staff filed a motion to dismiss the show cause order against Southern California Edison Company (So Cal Edison) and to terminate Docket No. EL03-175-000. Trial Staff points out that the Gaming Practices Order determined that So Cal Edison might have engaged in the congestion-related practices of Cutting Non-firm and Circular Scheduling and the ancillary services practice of Paper Trading. After reviewing the

⁶¹ Trial Staff noted that the California Parties' allegations preceded both SPP's April submission or the ISO's Post-Gaming Practices Order Report. See Trial Staff Motion at P 4.5.

⁶² See Gaming Practices Order, 103 FERC ¶ 61,345 at P 69.

materials submitted by So Cal Edison, the 100 Days Evidence, and the ISO Post-Gaming Practices Order Report, Trial Staff notes that the ISO no longer lists So Cal Edison as possibly having engaged in Cutting Non-Firm. Furthermore, even if the relevant transactions that gave rise to the show cause order were in fact Cutting Non-Firm, these practices yielded revenues below the \$10,000.00 threshold.

99. With regard to Circular Scheduling, Trial Staff asserts that these transactions were simply due to circumstances, unrelated to Circular Scheduling. Furthermore, Trial Staff points out that the total congestion payments associated with So Cal Edison importing power that it was contractually obligated to import from one party to an existing transmission contract (ETC) at the same time when it was exporting power to another, unrelated party to an unrelated ETC was \$1,380.00. Trial Staff notes that in another transaction, So Cal Edison received a congestion payment for \$10,200.00 as the result of an error in associating a contract reference number with an ETC between So Cal Edison and PacifiCorp. According to Trial Staff, So Cal Edison has agreed to return these congestion payments to the ISO within 15 days of the Commission's approval of the motion to dismiss.

100. Trial Staff asserts that So Cal Edison did not engage in Paper Trading because the record shows resources to provide the ancillary services that So Cal Edison sold in the Day-Ahead market were available to So Cal Edison.⁶³

Response

101. The ISO filed an answer that echoes the responses it filed in Docket No. EL03-144-000 and other dockets.

Docket No. EL03-176-000 -- TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc.

Motion to Dismiss

102. Trial Staff filed a motion to dismiss the show cause order against TransAlta and to terminate Docket No. EL03-176-000. Trial Staff points out that the Gaming Practices Order determined that TransAlta might have engaged in the congestion-related practices of Circular Scheduling, Counterflow (scheduling power in the opposite direction of

⁶³ See Trial Staff Motion at P 3.13.

congestion), and Wheel-Out.⁶⁴ Trial Staff argues that this docket should be terminated because, after reviewing the record, it found that TransAlta showed less than \$10,000 in revenues for each of the above-listed gaming practices.

Responses

103. The ISO filed a response that does not oppose relieving TransAlta of further obligation with respect to the issues of Circular Scheduling, Counterflow, and Wheel Out. However, the ISO requests that the docket be kept open for discovery purposes. The ISO argues that TransAlta might have information relevant to potential gaming by other parties.

104. The California Parties filed a response that repeated the arguments made in their responses to motions to dismiss in several other dockets.

105. APX filed the same response that it filed in Docket Nos. EL03-140-000 and EL03-155-000.

Docket No. EL03-177-000 – Tucson Electric Power Company

Motion to Dismiss

106. Trial Staff filed a motion to dismiss the show cause order against Tucson Electric Power Company (Tucson Power) and to terminate Docket No. EL03-177-000. Trial Staff points out that the Gaming Practices Order determined that Tucson Power might have engaged in the gaming practice of False Import. Trial Staff reviewed the record and concludes that the False Import allegations against Tucson Power do not involve transactions that meet the definition of False Import because none of the identified out-of-market transactions were in excess of the price cap and/or they did not occur during the relevant time period (between May 1, 2000 and October 1, 2000).

107. Trial Staff notes that the Commission has pending before it a motion by the California Parties to add Tucson Power to the list of entities engaging in Paper Trading. Trial Staff nevertheless examined evidence relating to the California Parties' allegations and concludes that Tucson Power did not engage in Paper Trading because it did not purchase in the ISO's Hour-Ahead Market.

⁶⁴ Trial Staff points out that the Commission found that TransAlta earned less than \$10,000 for Cutting Non-Firm and therefore declined to prosecute TransAlta for this gaming practice.

Responses

108. The ISO filed a response that supports Trial Staff's conclusion that Tucson Power did not engage in Paper Trading. However, the ISO objects to the motion to dismiss with regard to False Import in light of its arguments in its rehearing/clarification request of the Gaming Practices Order that assert that the definition needs to be broadened. The ISO also argues that, even if the Commission dismisses the show cause order as to Tucson Power on both issues, it should keep the docket open for discovery purposes.

109. The California Parties filed a response opposing the motion to dismiss, reiterating the issues raised in their responses filed in other dockets. Alternatively, the California Parties request that the docket be kept open for discovery purposes.

Docket No. EL03-178-000 – Western Area Power Administration

Motion to Dismiss

110. Trial Staff filed a motion to dismiss the show cause order against Western Area Power Administration (Western) and to terminate Docket No. EL03-178-000. Trial Staff points out that the Gaming Practices Order determined that Western might have engaged in Paper Trading. Trial Staff seeks dismissal because the record shows that Western does not trade directly in the ISO's ancillary services markets; that Western self-provides its ancillary services at all times; and that the ISO credits Western for providing those services. When the ISO cannot confirm self-provision, it bills Western after-the-fact for the entire cost of ancillary services it purchased on Western's behalf. Furthermore, Trial Staff points out that the evidence also shows that the ISO cannot always confirm self-provision due to technical reasons.⁶⁵

Responses

111. The ISO and the California Parties each filed responses that echo their responses filed in Docket No. EL03-144-000 and other dockets.

Trial Staff's General Reply to Responses Opposing the Motions to Dismiss

112. Trial Staff filed a general reply to the ISO and the California Parties' responses filed in opposition to the motions to dismiss that it filed in Docket Nos. EL03-141-000,

⁶⁵ See Trial Staff Motion at P 3.2.

EL03-144-000 through EL03-148-000, EL03-154-000, EL03-155-000, EL03-157-000, EL03-164-000, EL03-167-000, EL03-168-000, EL03-171-000, EL03-174-000, EL03-176-000 through EL03-178-000.⁶⁶

113. Trial Staff argues that the vast majority of the responses submitted by the ISO and the California Parties are devoted to repeating a series of generic, across-the-board arguments made to the Commission elsewhere. Trial Staff asserts that these arguments are little more than a series of individual requests for rehearing of various Commission orders, most notably the Gaming Practices and Partnership Gaming Orders. As such, Trial Staff asserts that these arguments should be addressed in an order on rehearing/clarification.⁶⁷ Trial Staff further argues that, inasmuch as these responses raise matters outside the scope of the issues set for hearing, they do not constitute an appropriate basis upon which to object to the motions to dismiss.⁶⁸

114. Trial Staff also disputes the parties' claims that they have not had sufficient time to pursue discovery as a basis to nevertheless keep open dockets even though the Identified Entity is relieved of any obligation with respect to the charges that it engaged in gaming practices. Trial Staff points out that the California Parties requested the "100 days of discovery" in their September 6, 2002 motion;⁶⁹ that the Commission granted the

⁶⁶ This response also addressed Docket No. EL03-202-000 which is the subject of another Commission order being issued simultaneously.

⁶⁷ Trial Staff asserts that the parties' objection to what they characterize as Trial Staff's overly narrow view of the definition of False Import is nothing more than a request for rehearing of the Gaming Practices Order and, in fact, raises the same arguments as their requests for rehearing/clarification. Trial Staff argues that, given the clear and unambiguous language of the Gaming Practices Order, "material issues of fact" sufficient to defeat a motion to dismiss would be present only if the Commission adopted the California Parties' revised definition of False Import.

⁶⁸ Trial Staff asserts that the California Parties' claims that the Gaming Practices Order failure to include all possible gaming and to charge certain Identified Entities with more gaming practices are "material issues of fact" are incorrect. Trial Staff argues that these claims are disguised requests for rehearing and should not be considered with the motions to dismiss or settlements.

⁶⁹ See Trial Staff Response at 16 n.19, citing Motion for Discovery Order to Implement the August 21st Order From The United States Court of Appeals For The Ninth Circuit Allowing The California Parties To Adduce Additional Evidence at 2.

motion despite heavy opposition; and that the California Parties later described the evidence as “ample evidence” of the allegations.⁷⁰

115. Trial Staff points out that the California Parties’ objection to what they characterize as the Commission’s “piecemeal approach” to handling claims of market manipulation is raised in their request for rehearing and in a motion filed in Docket EL00-95-000 on April 29, 2003. Trial Staff further points out that the California Parties’ request for one consolidated proceeding to address remedy and damage issues was specifically denied in San Diego Gas & Electric Company, 103 FERC ¶ 61,359 (2003).

Commission Determination

116. We will grant Trial Staff’s motions to dismiss. We agree with Trial Staff’s assessment of the record in each docket and find that the respondents did not engage in prohibited gaming practices, as defined in the Gaming Practices Order, during the relevant time period.⁷¹ Moreover, in almost every instance, the only opposition was in reality restatements of the requests for clarification/rehearing of the Gaming Practices Order and, as such, are not appropriately addressed here.⁷²

117. We also grant APX’s motion to dismiss. APX was included in this proceeding because of the activities that it performed as SC for FPL Energy and TransAlta and we conclude herein that the activities of FPL Energy and TransAlta do not warrant continuing show cause proceedings.

118. We will therefore dismiss the above show cause proceedings against the respondents, subject to parties’ commitments made in order to facilitate dismissal, and terminate the dockets.⁷³

⁷⁰ Id. at 16 nn. 20, 21.

⁷¹ We will dismiss the Load Shift issue in Docket No. EL03-161-000 on procedural grounds. The merits of this issue will be addressed, as NCPA and Trial Staff have agreed, in Docket No. EL03-196-000.

⁷² As noted above, an order denying these rehearing requests is being issued contemporaneously. See supra note 1.

⁷³ We deny the requests that the dockets be kept open so that the respondents remain subject to discovery as parties. Keeping the respondents “on the hook” for discovery after they no longer are parties and no longer have an interest in the proceeding is unfair and onerous. In any event, the Commission’s rules of discovery are sufficient to provide parties with a means to discover information from non-parties, should that prove necessary or appropriate. See 18 C.F.R. §§ 385.404, 385.409 (2003).

The Commission orders:

(A) Trial Staff's motions to dismiss are hereby granted.

(B) APX's motion to dismiss is hereby granted.

(C) Docket Nos. EL03-139-000, EL03-140-000, EL03-141-000, EL03-142-000, EL03-143-000, EL03-144-000, EL03-145-000, EL03-146-000, EL03-148-000, EL03-150-000, EL03-155-000, EL03-157-000, EL03-161-000, EL03-162-000, EL03-164-000, EL03-167-000, EL03-168-000, EL03-171-000, EL03-174-000, EL03-175-000, EL03-176-000, EL03-177-000, and EL03-178-000 are hereby terminated.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.