

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Investigation of Anomalous Bidding
Behavior and Practices in the Western
Markets

Docket No. IN03-10-012

ORDER DISMISSING PLEADING

(Issued March 28, 2005)

1. On December 10, 2004, the Attorney General of California, the California Electricity Oversight Board, the California Public Utilities Commission, Southern California Edison Company, and Pacific Gas and Electric Company (collectively, the California Parties) filed a request for rehearing seeking to challenge certain non-public, investigatory determinations made by the Commission's Office of Market Oversight and Investigations (OMOI). Specifically, the California Parties request rehearing of numerous, company-specific Termination-of-Investigation Notices issued by OMOI on May 12, 2004, concerning these entities' bidding behavior and practices in the western energy markets.¹ For the reasons discussed below, we will dismiss the California Parties' pleading.

Background

2. OMOI's investigations in this proceeding were undertaken pursuant to a Commission order issued June 25, 2003.² In that order, the Commission instructed OMOI to investigate anomalous market behavior and bidding patterns in the western markets and to report back to the Commission regarding its investigation.

¹ The notices at issue were obtained by the California Parties from the Commission, on November 10, 2004, pursuant to a Freedom of Information Act (FOIA) request.

² See *Investigation of Anomalous Bidding Behavior and Practices in the Western Market*, 103 FERC ¶ 61,347 (2003) (June 25 Order).

3. Subsequently, in an order issued October 16, 2003,³ the Commission explained that it viewed certain proceedings, including the investigations established in Docket No. IN03-10-000, as non-public investigations under Part 1b of the Commission's regulations.⁴ We also stated that all pending motions for intervention in these proceedings would be treated as motions to file comments and we rescinded all interventions which we had previously granted. Finally, we stated that, because the proceedings at issue were investigatory in nature, rather than adjudicatory, there could be no "parties" to those proceedings and we noted that only a party may request rehearing.⁵ Accordingly, rehearing requests concerning our prior findings were dismissed.

Request for Rehearing

4. The California Parties assert, in effect, that the Commission erred in the October 16 Order when it declined to permit interventions in this proceeding. The California Parties further claim that the Commission's refusal to allow the California Parties to participate in OMOI's non-public investigations violates the requirements of due process and is arbitrary, capricious, and contrary to reasoned decisionmaking. In particular, the California Parties argue that the Commission improperly resolved issues raised in its non-public investigations.

Discussion

5. We will dismiss the California Parties' pleading, essentially a request for rehearing, as a collateral attack of the October 16 Order and for the additional reasons set forth below.

6. As we explained in the October 16 Order and in related orders, the California Parties were not (and are not) parties to the non-public OMOI investigations conducted in this

³ See *Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices*, 105 FERC ¶ 61,063 (October 16 Order), *order on rehearing*, 105 FERC ¶ 61,281 (2003), *appeal pending*, *City of Palo Alto, et al. v. FERC*, Nos. 04-1036, *et al.* (D.C. Cir.).

⁴ 18 C.F.R. Part 1b (2004) (Rules Relating to Investigations).

⁵ 105 FERC ¶ 61,063 at P 7. The single exception to this rule, as recognized in the October 16 Order, would be a timely rehearing request filed by those entities that had or may be identified in a Commission order as subjects of an investigation. *Id.*

proceeding.⁶ Under the Commission's regulations, there is no right to intervene in non-public investigations.⁷ Nor did we grant the California Parties party status at any point earlier in this proceeding.

7. Moreover, because the California Parties lack party status, they also lack standing under the Federal Power Act⁸ to seek rehearing of the notices issued in this case by OMOI, as only a "party" may seek rehearing (and ultimately, judicial review.)⁹

The Commission orders:

The California Parties' pleading is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁶ See, e.g., 105 FERC ¶ 61,063 at P 7; accord *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 109 FERC ¶ 61,034 (2004). See also *Duke Energy North America, LLC, et al.*, 106 FERC ¶ 61,307 (2003), *rehearings dismissed*, 106 FERC ¶ 61,177 (2004).

⁷ 18 C.F.R. §§ 1b.11 and 385.101(b)(1) (2004).

⁸ 16 U.S.C. § 8251 (2000).

⁹ See generally *Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, 103 FERC ¶ 61,019 at P 14-17 (2003); *Duke Energy North America, LLC, et al.*, 106 FERC ¶ 61,177 at P 5 (2004).