

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Fact Finding Investigation of Potential Manipulation  
of Electric and Natural Gas Prices

Docket No. PA02-2-004

ORDER ON REHEARING

(Issued September 15, 2003)

1. This order addresses the requests for rehearing filed by El Paso Electric Company (EPE) and Enron Corporation (Enron) of the Commission's March 21, 2003 order in this proceeding (March 21 Order), which directed the release of documents submitted in Docket No. PA02-2-000.<sup>1</sup>

**Background**

2. On March 5, 2003, the Commission issued a notice that it intended to release to the public information collected in its investigation into manipulation of energy prices in the West, and sought, by March 12, 2003, comments from those companies and individuals who submitted information during the course of the investigation. Eighteen companies or organizations, as well as the United States Attorney for the Southern District of Texas, filed comments or otherwise responded. Enron was not among those respondents. On March 21, 2003, the Commission issued an order addressing the comments and responses to its March 5, 2003 notice, and further announced that it would release the information, except as noted in the order, in no less than five days after issuance of the order. One exception to the release was personal personnel information that was raised by three of the commenters. In this regard, the Commission asked that companies or individuals provide specifics by March 24, 2003, so that such information could be excluded from the public release. One company provided such details; Enron

---

<sup>1</sup>Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 102 FERC ¶ 61,311 (2003).

did not. Thereafter, on March 26, 2003, the Commission released the remaining information. 102 FERC ¶ 61,311.

3. Subsequent to the release of the information, on March 28, 2003, the Commission received the first of seven motions from Enron asking that certain parts of the released information be removed from public access. These motions in particular attempted to identify Enron employees' personal information. The Commission also received calls on its Enforcement Hotline from Enron employees who were concerned about their personal information being available on the internet. As quickly as possible, the Commission staff accommodated these requests in keeping with the Commission's stated concerns in the March 21 Order about releasing certain personal data.

4. Further, on April 7, 2003, the Secretary of the Commission issued a notice (April 7 Notice) that the Commission would remove temporarily, until April 24, 2003, Enron e-mails that had been placed on the agency's web site pursuant to the March 21 Order. The notice indicated that during that time the Commission would consider any requests that certain personal and other information be permanently removed from public accessibility.

5. In the meantime, on April 4, 2003, Enron filed a petition for writ of mandamus and an emergency motion to stay the March 21 Order in the United States Court of Appeals for the Fifth Circuit, Enron Corp. v. FERC, No. 03-60295, requesting that all Enron e-mails posted on the Commission's web site be removed. No other party, including EPE, filed a motion in court requesting a stay of the March 21 Order. On April 7, 2003, the court denied Enron's petition for writ of mandamus, and granted the stay request, but only to the extent that it directed the Commission to remove all Enron e-mails from its web site until further order of the court. The court also directed the Commission to file a response in this proceeding by close of business April 11, 2003. Subsequently, in light of the Commission's removal of the Enron e-mails from its web site on April 7, the court granted Enron's motion to hold the case in abeyance and to defer the need for the Commission to file a response by April 11, 2003, until April 24, 2003. Accordingly, the Commission's April 7 action removing the Enron e-mails from its web site coincided exactly with the Fifth Circuit's stay of the March 21 order to the extent the stay action implicated the withdrawal of Enron e-mails from the agency's web site.

6. On April 22, 2003, the Commission issued an Order on Re-Release of Data Removed from Public Accessibility on April 7, 2003 (April 22 Order). 103 FERC ¶ 61,077 (2003). In the April 22 Order, the Commission stated that it would not re-release any of the documents that respondents sought to be withheld with specificity until the Commission had reviewed those documents and given the respondents and the public

notice of its intent to re-release specific documents. Id. at P 7-8. As the Commission directed in its April 22 Order, its staff is currently reviewing the data proffered for removal to ascertain whether indeed it should be in the public domain. No one sought rehearing of the April 22 Order.

7. With respect to the data that was removed from the Commission's web site pursuant to the April 7 Notice but that was not identified by any company or individual for permanent removal, as directed by the Commission, Commission staff returned that data to the agency's web site. See 103 FERC ¶ 61,077 at P 9.

### **Requests for Rehearing**

8. On March 24, 2003, EPE filed a request for expedited rehearing and emergency stay of the March 21 Order, and claimed that the release of 25 allegedly privileged documents was contrary to the attorney-client and attorney work product privileges. EPE also alleged that, pursuant to the Commission's own rules and precedent, it was entitled to a document-by-document review. Finally, EPE contended that, at a minimum, the Commission should stay the March 21 Order to allow parties to seek judicial review.

9. On April 3, 2003, Enron also filed a request for rehearing and motion for emergency stay of the March 21 Order. Enron contended that: (1) the Commission's March 21 Order erred in directing the release of certain types of information that are exempt from disclosure or unrelated to the investigation in this proceeding; (2) the Commission acted arbitrarily and capriciously when it directed the release of information that is protected by law or unrelated to the investigation in this proceeding; and (3) by failing to provide a meaningful opportunity for parties to exclude certain potentially harmful information, the Commission failed to balance the public interest with the interest of protecting the confidential information of the parties involved in this proceeding.

### **Discussion**

10. The Commission addressed the issue of the attorney-client privilege in its March 21 Order:

While the attorney-client privilege is designed to encourage frank discussion between attorneys and their clients, it is lost when a communication made between an attorney and his client is made known to a third party, as is the case in the instant proceedings. See Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981)("Any voluntary

disclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege." (internal citation omitted). Moreover, the Commission's regulations expressly provide that the Commission "retains the right to make determinations with regard to any claim of privilege, and the discretion to release information as necessary to carry out its jurisdictional responsibilities." 18 C.F.R. § 388.112(c); see also 18 C.F.R. § 1.b.20.

102 FERC ¶ 61,311 at P 15. Further, the Commission found that the public's need to have access to the data underlying Commission inquiries outweighs the admittedly important privileges that attach to the relationship between an attorney and his client. *Id.* While the Commission is reluctant to release information that may normally be protected by the attorney-client and attorney work product privileges, the public's interest in reviewing and understanding the information that formed the basis for the Commission's decisions and reasons in the affected dockets represents an extraordinary set of circumstances that outweighs these privileges. EPE's has not persuaded the Commission that its March 21 determination regarding EPE's 25 documents, as well as other allegedly privileged documents, is in error. Moreover, EPE did not seek removal of these documents pursuant to the April 7 Notice.

11. EPE is mistaken that the Commission's rules and precedent entitle EPE to a document-by-document review. Pursuant to 18 C.F.R. § 388.112, any person submitting documents to the Commission may request privileged treatment of some or all of the information found in the documents. Paragraph (e) of this section provides the standards for notification prior to release of documents for which privileged treatment was requested, and states:

Notice of a decision by the Director, Office of External Affairs, the Chairman of the Commission, the General Counsel or General Counsel's designee, a presiding officer in a proceeding under part 385 of this chapter, or any other appropriate official to deny a claim of privilege in whole or in part, will be given to any person claiming that information is privileged no less than five days before public disclosure. The notice will briefly explain why the person's objections to disclosure are not sustained by the Commission.

Thus, when the submitter of information requests confidential treatment of information, the Commission must, by regulation, notify the submitter at least five days prior to disclosure. This allows the submitter an opportunity to respond, as well as to pursue an injunction against the Commission in district court (which EPE did not attempt to do).

Contrary to EPE's assertion, the regulation does not entitle the submitter to a document-by-document review by the Commission. The Commission abided by its rules when, as explained above, it gave the required notice prior to release of the documents.

12. Further, the cases on which EPE relies are inapposite. Independent Oil & Gas Ass'n of West Virginia, 20 FERC ¶ 63,094 (1982) is a Commission Administrative Law Judge's (ALJ) order on a motion to compel discovery where the ALJ found that the party asserting a claim of privilege must provide an affidavit as to each document providing a factual basis for each claim of privilege. No party requested that the ALJ review the documents in camera or that he rule on the validity of the asserted claims of privilege. This is unrelated to a request that the Commission review a submitter's own documents, as is the case here. Schreiber v. Society for Savings Bancorp, Inc. 11 F.3d 217, 221 (D.C. Cir. 1993)(Schreiber), and U.S. Coal Cos. v. Powell Construction Co. et al., 839 F.2d 958, 966-67 (3d Cir. 1988)(U.S. Coal), are similarly off the mark. There, the lower courts were taken to task for not examining documents to determine whether certain privileges applied. In Schreiber, the lower court assumed the privileges applied and excluded the documents as evidence, while in U.S. Coal, the lower court assumed that the privileges did not apply and admitted the documents accordingly. In the instant case, by contrast, while the Commission assumed that the privileges apply, it decided to override those privileges to further the public's right to review the record, which outweighs the admittedly important attorney-client and attorney work product privileges.

13. EPE's request for an emergency stay of the March 21 Order was mooted by the release of the documents on March 26, 2003. Also, as related above, EPE took no other action such as seeking a stay or injunction to protect these documents.

14. The Commission also finds no merit in Enron's rehearing request. On March 5, 2003, at the latest, Enron and others were put on notice of the Commission's intent to release documents obtained during the investigation conducted in this proceeding. Eighteen companies and individuals responded to the March 5 Notice. Enron did not respond to that notice or the March 21 Order that provided further opportunity to bring personal information to the Commission's attention. Also, Enron did not even ask for an extension of time to respond or make any other attempt prior to the release of information to apprise the Commission of its concerns. Rather, Enron waited until March 28, 2003, two days after the release of documents, in the first of seven motions, to request that the Commission remove certain documents from public access. Furthermore, Enron waited until April 3, 2003, over a week after the release of the information and almost a month after it was put on notice of the Commission's intent to release information, to file its request for rehearing and emergency stay. Enron waited even longer to petition the United States Court of Appeal for an emergency stay. Under these circumstances, Enron

is obviously mistaken that the Commission acted arbitrarily and capriciously, or failed to balance the public interest with the interest of protecting confidential information by not providing a meaningful opportunity for parties to express concern regarding the release of information. The Commission acted pursuant to its regulations by providing notice and an opportunity to comment. See 18 C.F.R. § 388.112. Further, in its March 21 Order, the Commission addressed the disclosure of information as in the public interest. See 102 FERC ¶ 61,311 at P 6, 10, 13, 15. It is Enron who failed to provide a meaningful response to the Commission's March 5 Notice and March 21 Order, and is therefore attempting to cover up its own lack of diligence. Accordingly, the Commission denies Enron's request for rehearing.

15. Enron's request for an emergency stay was mooted when the Commission, sua sponte, partially stayed its March 21 Order by removing all Enron e-mails from public accessibility on April 7, 2003, and giving interested persons an opportunity to identify documents that should not be disclosed.

The Commission orders:

The requests for rehearing and emergency stay are denied as described above.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.