

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Electric Company, Docket No. EL02-113-011  
Enron Power Marketing, Inc., and  
Enron Capital and Trade Resources Corporation

Enron Power Marketing, Inc. and Docket No. EL03-180-012  
Enron Energy Services, Inc.

Enron Power Marketing, Inc. and Docket No. EL03-154-008  
Enron Energy Services, Inc.

Portland General Electric Company Docket No. EL02-114-009

Enron Power Marketing, Inc. Docket No. EL02-115-013

ORDER DENYING REHEARING

(Issued June 30, 2005)

1. On May 31, 2005, Enron Power Marketing, Inc. (EPMI), Enron Energy Services Inc. (EES) and Enron North America Corp. (ENA) f/k/a Enron Capital and Trade Resources Corporation (ECT) (all three referred to collectively as Enron) requested rehearing of the Commission's April 29, 2005 Order on Interlocutory Appeal. For the reasons set forth below, the Commission denies Enron's request for rehearing.

**Background**

2. On August 13, 2002, under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000), the Commission ordered a hearing to investigate possible misconduct by Enron and El Paso Electric Company (El Paso Electric), particularly over whether they should have made filings pursuant to sections 203 and/or 205 of the FPA, 16 U.S.C.

§§ 824b, 824d (2000). This was based on an indication that these entities had entered into a contractual relationship which may have resulted in Enron acquiring control of El Paso Electric's assets without informing the Commission.<sup>1</sup>

3. Separately, on June 25, 2003, the Commission initiated the two Show Cause Proceedings,<sup>2</sup> Docket Nos. EL03-180-000, *et al.*, and EL03-154-000, *et al.*, to investigate whether sellers, including Enron, either individually or jointly engaged in gaming and/or anomalous market behavior in violation of the Market Mitigation and Information Protocols of the California Independent System Operator Corporation (ISO) and California Power Exchange (PX) tariffs during the period from January 1, 2000 to June 20, 2001. In its Show Cause Orders, the Commission initiated trial-type evidentiary procedures and directed the administrative law judges (ALJs) in the Show Cause Proceedings to quantify the extent to which the various respondents had been engaged in and unjustly enriched by improper gaming and/or partnership activities during the period January 1, 2000 to June 20, 2001. The Commission explained that any and all such unjust profits during that period should be disgorged in their entirety and also directed the ALJs to consider any additional, appropriate non-monetary remedies such as revocation of the identified sellers' market-based rate authority.

4. On July 22, 2004, the Commission issued an order in Docket No. EL02-113-000, affirming an initial decision's finding that Enron violated a condition contained in the Commission's order authorizing Enron to charge market-based rates for wholesale power sales, by not informing the Commission of Enron's business relationship with El Paso Electric.<sup>3</sup> The Commission's July 22 Order required Enron to disgorge \$32.5 million in profits associated with sales involving El Paso Electric's facilities. However, holding that the Enron-El Paso Electric relationship was a subset of other Enron relationships and practices currently pending in the Show Cause Proceedings, the Commission consolidated Docket No. EL02-113-000 with the Show Cause Proceedings and directed the ALJ to determine the total amount of money that Enron should be required to disgorge. In consolidating these proceedings, the Commission noted that, based on the evidence in the consolidated dockets, Enron could potentially be required to disgorge profits for all of its wholesale power sales in the Western Interconnect for the period

---

<sup>1</sup> *El Paso Electric Co.*, 100 FERC ¶ 61,188 at P 6-10 (2002).

<sup>2</sup> *See American Electric Power Service Corp.*, 103 FERC ¶ 61,345 (2003), and *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (collectively Show Cause Proceedings or Show Cause Orders).

<sup>3</sup> *El Paso Electric Co., Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 108 FERC ¶ 61,071 (2004) (July 22 Order).

January 16, 1997 to June 25, 2003, and that an appropriate remedy should take into account all evidence of violations of tariffs on file or orders of the Commission in all pending dockets involving Enron's role in the Western power crisis.

5. On August 4, 2004, Western Parties<sup>4</sup> requested clarification of the July 22 Order. The Commission responded that the hearing ordered in the July 22 Order involved an examination of Enron's profits and that, as the termination payments under certain of Enron's contracts "are based on profits Enron projected to receive under its long-term, wholesale power contracts executed during the period when Enron was in violation of conditions of its market-based rate authority," the termination payments, *i.e.*, those profits as well, were within the scope of the hearing.<sup>5</sup>

6. In her March 24, 2005 Order Confirming Rulings, the ALJ, among other things, denied Enron's motions to compel, which sought discovery of "wholesale market activities" of certain parties.<sup>6</sup> The ALJ stated that "[t]he information requested by Enron concerning the remedies sought by these parties, their harm and whether the remedies sought in this proceeding, such as, contract rescission are similar to the remedies in the Bankruptcy proceeding, is deemed to be irrelevant to this proceeding."<sup>7</sup>

7. On April 8, 2005, Enron filed with the Chairman, as Motions Commissioner, an interlocutory appeal requesting that the Motions Commissioner reverse the ALJ's denial of permission to appeal to the Commission her March 24 Order. Enron argued that, if this ruling is allowed to stand, Enron will be denied due process, since it will lack the necessary information to demonstrate that the intervenors are not entitled to any remedy because they were not, in fact, injured.

---

<sup>4</sup> Western Parties consist of: Nevada Power Company and Sierra Pacific Power Company (collectively, Nevada Companies), Snohomish, the City of Palo Alto, California, the Office of the Nevada Attorney General's Bureau of Consumer Protection, the Attorney General of the State of Washington, and the Public Utilities Commission of Nevada.

<sup>5</sup> *El Paso Electric Co., Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 110 FERC ¶ 61,280 at P 10-11 (2005) (March 11 Order).

<sup>6</sup> Those parties are Valley Electric Association, Inc.; City of Santa Clara, California, d/b/a Silicon Valley Power; Metropolitan Water District of Southern California; and Snohomish (collectively, Intervenors).

<sup>7</sup> March 24 Order at P 2(b) (citations omitted).

8. On April 15, 2005, the Chairman, as Motions Commissioner, referred the matter to the Commission. On April 29, 2005, in the order that is on rehearing here, the Commission denied Enron's interlocutory appeal, again explaining that, with respect to the remedy applicable to Enron, the hearing should consider any unjust profits that Enron may have derived through its violation of the Commission's directives, specifically, the conditions of the Commission's order granting Enron market-based rate authority, and the disgorgement of such profits.<sup>8</sup> It added that this remedy of disgorgement of unjust profits by Enron hinged on the violation of the Commission's directives and *not* on whether there was quantifiable harm (or the amount of the harm) to any particular customer.<sup>9</sup>

9. Subsequently, on May 12, 2005, the Commission issued an order denying Western Power Trading Forum's (WPTF) motion to intervene out-of-time, and again clarifying the scope of this proceeding.<sup>10</sup> The Commission stated that, with respect to Enron, the proceeding should address whether Enron individually or jointly engaged in gaming and/or anomalous market behavior in violation of the ISO's and PX's tariffs, and the unjust profits that Enron must disgorge due to such actions as well as due to its violation of its market-based rate authority. Such remedy, the Commission noted, could include the profits that constitute the termination payments sought under contracts that Enron executed when it was in violation of its market-based rate authority.<sup>11</sup>

10. On May 27, 2005, the Commission denied requests for rehearing of the earlier March 11 Order.<sup>12</sup> The Commission stated that it was not interpreting the rights of the parties under, or the terms of, the terminated contracts, as Enron asserted, but rather, carrying out its statutory mandate, *i.e.*, determining whether Enron should disgorge profits (including the profits under the terminated contracts) as a remedy for any

---

<sup>8</sup> *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 111 FERC ¶ 61,129 (2005) (April 29 Order).

<sup>9</sup> *Id.* at P 11-12.

<sup>10</sup> *El Paso Electric Co., Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 111 FERC ¶ 61,221 (2005) (May 12 Order).

<sup>11</sup> *Id.* at P 16.

<sup>12</sup> *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 111 FERC ¶ 61,269 (2005) (May 27 Order) (denying rehearing of *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 110 FERC ¶ 61,280 (2005)).

impermissible gaming and/or anomalous market behavior in violation of the ISO's and PX's tariffs and also for violating the conditions of the order granting Enron market-based rate authority.<sup>13</sup> The Commission explained again that this remedy of disgorgement of unjust profits hinges on the violation and *not* on whether there was quantifiable harm (or the amount of the harm) to any particular customer.<sup>14</sup> Accordingly, the Commission also denied Enron's alternative request that it be permitted to seek discovery on whether intervenors suffered any harm entitling them to a remedy.<sup>15</sup>

### **Request for Rehearing**

11. In Enron's request for rehearing of the Commission's April 29 Order, Enron again argues that the harm suffered by the counterparties is relevant to the current phase of the proceeding, and asks for discovery on whether those parties suffered any harm entitling them to party-specific remedies.

12. Enron argues that the April 29 Order provides no reasoned basis for its inconsistency with prior Commission orders that, it claims, require a demonstration of harm in order to receive a remedy.<sup>16</sup> Enron objects that, if the counterparties prevail in the current liability phase of this case so that they need not make termination payments (without first having to demonstrate harm), Enron will not have additional opportunities to explore these matters at the later distribution phase.

13. Furthermore, Enron argues that the April 29 Order improperly denies Enron's due process right to make a full defense to the charges against it. Enron argues that not only must the counterparties demonstrate that they were harmed, but Enron also is entitled to demonstrate the opposite. Enron asserts that, by denying Enron's rights to discover evidence of harm (or lack thereof) to the counterparties, the Commission has

---

<sup>13</sup> *Id.* at P 14.

<sup>14</sup> *Id.* at P 14.

<sup>15</sup> *Id.* at P 15.

<sup>16</sup> Enron's Request for Rehearing at 8-11 (citing *United Gas Pipe Line Co.*, 64 FERC ¶ 61,014 at 61,101 (1993); *Massachusetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, 30 FERC ¶ 61,323 at 61,654 (1985) (citing *Power Authority of the State of New York v. FERC*, 743 F.2d 93, 108 (2<sup>nd</sup> Cir. 1984)); *Northeast Utilities Serv. Co.*, 50 FERC ¶ 61,266 at 61,843 (1990); *Columbia Gas Transmission Corp.*, 27 FERC ¶ 61,475 at 61,903 (1984); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951)).

substantially limited Enron's ability to present an affirmative defense, and this flaw threatens to invalidate the last two years of investigation and litigation, as well as the upcoming trial and subsequent decisions.<sup>17</sup>

### **Discussion**

14. Initially, we note that we have in numerous separate orders already addressed the scope of these proceedings.<sup>18</sup> Enron again raises the same arguments here that it has raised before; indeed, Enron's request for rehearing can be viewed largely as an impermissible collateral attack on those orders. We see no reason to change our earlier conclusions and will deny rehearing as explained below.

15. The Commission denies Enron's argument that the harm to counterparties is relevant and its request that it be permitted to seek discovery on whether counterparties suffered any harm entitling them to a remedy. This proceeding is focused on any unjust profits (including the profits under the terminated contracts) that Enron may have derived through its violations of Commission orders and tariffs, and their disgorgement. As we found in the April 29 Order, and confirmed in the May 27 Order, this remedy of disgorgement of unjust profits hinges on the violation and *not* on whether there was quantifiable harm (or the amount of the harm) to any particular customer.<sup>19</sup> Accordingly, the information sought by Enron (*i.e.*, which customers were harmed, and by how much) is irrelevant to this proceeding – given that this proceeding does not hinge on harm to any particular customer.

16. Enron cites cases which it claims support its argument that counterparties should be required to make a demonstration of harm in order to receive a remedy. Initially, though, we again note that this proceeding is focused on violations of Commission orders and tariffs, and the remedy for such violations. Whether individual counterparties were harmed and by how much is not relevant. Just as the Commission is charged with protecting competition, and not individual competitors,<sup>20</sup> so the Commission need not

---

<sup>17</sup> *Id.* at 11.

<sup>18</sup> *See* May 27 Order, 111 FERC ¶ 61,264 at P 14-15 (denying rehearing of 110 FERC ¶ 61,280 at P 10-11); April 29 Order, 111 FERC ¶ 61,129 at P 11-12; May 12 Order, 111 FERC ¶ 61,221 at P 13-16.

<sup>19</sup> April 29 Order, 111 FERC ¶ 61,129 at P 11-12; May 27 Order, 111 FERC ¶ 61,269 at P 15.

<sup>20</sup> *E.g.*, *Union Electric Co.*, Opinion No. 417, 81 FERC ¶ 61,011 at 61,058 (1997), *reh'g denied*, Opinion No. 417-A, 82 FERC ¶ 61,093 (1998).

find individual harm in this circumstance to order a remedy.<sup>21</sup> Turning to the cases Enron cites, these cases are inapposite. For instance, in *United Gas Pipe Line Co.*, 64 FERC ¶ 61,014 at 61,100-01 (1993), the Commission was attempting to return the parties to the *status quo ante* after an error by the Commission brought about the violation. This is not the case here. In *Columbia Gas Transmission Corp.*, 27 FERC ¶ 61,475 (1984), the cited language was not from an order of the Commission, but was a separate statement of a single Commissioner. In *Northeast Utilities Serv. Co.*, 50 FERC ¶ 61,266 at 61,843 (1990), the cited language again was not from a Commission order but from a separate statement of a single Commissioner.<sup>22</sup> And in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951), the proceeding was a suit in court for damages, and the focus was on “fraud.”

17. Enron argues that not only must the counterparties demonstrate that they were harmed, but due process entitles Enron to demonstrate the opposite.<sup>23</sup> As noted above, though, a demonstration of harm is not required. Thus, Enron is not entitled to demonstrate the opposite. That is, we do not agree that due process requires Enron to seek discovery on whether counterparties suffered any harm entitling them to a remedy. There is also no due process violation since Enron understands the violations for which it is being investigated, and is being afforded a full opportunity to justify its conduct, which is not related to the specific harm suffered by counterparties.

---

<sup>21</sup> In this sense, the circumstance present here is also akin to the circumstance presented when a public utility fails to timely file rates; a remedy is ordered for the violation even in instances in which the customer does not object to having paid the untimely filed rate. *E.g.*, *El Paso Electric Co.*, 105 FERC ¶ 61,131 at P 31-32 (2003).

<sup>22</sup> As to *Massachusetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, 30 FERC ¶ 61,323 at 61,654 (1985), which states that “the remedy cannot be fashioned in a vacuum; it must be designed with the injury in mind so that the least disruptive correction is ordered,” the remedy ordered there appears no more exact or precise, including customer-specific, than what is contemplated in our orders in this proceeding. *Compare Id.* at 61,654-56 with *supra* notes 8-15. We also note that we are not ordering a remedy in a vacuum, but rather any remedy ordered will reflect the particular violation – that is, a violation of Commission orders and tariffs. We have likewise been very clear that the remedy will center not on revenues collected in violation of Commission orders and tariffs but rather on the profits.

<sup>23</sup> Enron’s Request for Rehearing at 11.

18. The Commission is not limited in devising remedies for unlawful acts to just those acts that harm or injure customers. To the extent Enron violated Commission orders and tariffs (through, *e.g.*, impermissible gaming and/or anomalous market behavior in violation of ISO's and PX's tariffs and violating the conditions of the order granting Enron market-based rate authority), the imposition of a requirement that Enron disgorge any unjust profits on these tainted transactions redresses injury to the statute and filed tariffs and to the Commission's ability to carry out its statutory duties.

19. In this regard, finally, we emphasize that we have broad discretion when it comes to remedies; indeed, our discretion is at its zenith in determining an appropriate remedy.<sup>24</sup> In the circumstances of this case, to the extent that Enron has violated Commission orders and tariffs, a remedy of disgorgement of profits is well within the scope of that discretion.

The Commission orders:

Enron's request for rehearing of the Commission's April 29 Order is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Linda Mitry,  
Deputy Secretary.

---

<sup>24</sup> *See, e.g., Niagara Mohawk Power Corp. v. FERC*, 379 F.2d 153, 159 (D.C. Cir. 1967); *accord* 16 U.S.C. § 825h (2000); *Mesa Petroleum Co. v. FERC*, 441 F.2d 182, 187-88 (D.C. Cir. 1971); *Gulf Oil Corporation v. FPC*, 563 F.2d 588, 608 (3<sup>rd</sup> Cir. 1977), *cert. denied*, 434 U.S. 1062, *reh'g denied*, 435 U.S. 981 (1978); *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1549 (D.C. Cir. 1985).