

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-180-000
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-154-000
Portland General Electric Company	Docket No. EL02-114-007
Enron Power Marketing, Inc.	Docket No. EL02-115-008
EL Paso Electric Company Enron Power Marketing, Inc. Enron Capital and Trade Resource Corp.	Docket No. EL02-113-000

**ORDER ON MOTION FOR EXTENSION OF TIME TO FILE TESTIMONY
AND CONFIRMING RULINGS**

(Issued June 27, 2005)

1. On June 10, 2005, Enron Power Marketing, Inc., Enron North America Corp. f/k/a Enron Capital and Trade Resources Corp., and Enron Energy Services, Inc. (collectively, “Enron”) filed¹ for relief related to Enron trader tapes in the custody of the Department of Justice (“DOJ”). According to Enron, the access provided to its trader tapes by DOJ is inferior to the access provided to Commission Trial Staff (“Staff”). As a result, Enron asserts violations of its Fifth Amendment due process rights and moved for a six month extension of time. Alternatively, it requested that all tape related testimony in this case be stricken.

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¹ *Motion for Extension of Time to File Testimony, or, In the Alternative, To Strike All Tape-Related Testimony, or, In the Alternative, For Order Granting Equal Access to Tapes.*

2. Answers were filed by The Western Intervenors² and Staff. The Western Intervenors and Staff argue that Enron's request is unduly broad since it did not distinguish between two separate sets of Tapes, the Snohomish Tapes and the Enron Tapes. Concerning the Snohomish Tapes, both Staff and Western Intervenors assert that Enron had access to these set of tapes since August 2004, and that these tapes are not involved in the motion. Additionally, The Western Intervenors argue that due process will not be violated if Enron is not granted another extension of the procedural schedule to rectify its tactical mistakes. Concerning the Enron Tapes, Enron had been aware of the evidence for over four years and the procedures it should follow to access the tapes. Additionally, these parties aver that in rebuttal testimony concerning the Snohomish Tapes Enron has not presented any exculpatory evidence. Concerning the Enron Tapes, Staff maintains that these tapes were processed at Commission expense beginning on August 2004. Enron had the same opportunities as Staff but chose to delay, and when it did seek access on March 2005, it sought a separate means of accessing the tapes. Staff asserts that it was allowed access to the Enron Tapes only through Aspen's internet-based system and could download audio files, one file at a time.

3. Oral argument was heard on June 23, 2005 concerning the cited motion and two other motions.³

DISCUSSION

4. The issue is really what process is due to Enron. On March 24, 2005, Enron was given an extension of time of the procedural schedule in this case in order for it to review the Enron Tapes.⁴ This was an equitable remedy in light of the fact that Enron was asserting due process rights to review the tapes for exculpatory evidence. The reason this was an equitable remedy back in March was due to the fact that throughout this proceeding which started in June 2003, Enron has had years to review all of its tapes and had declined to do so until now.⁵

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² The City of Santa Clara, California ("Santa Clara"); Public Utility District No. 1 of Snohomish County, Washington ("Snohomish"); Nevada Power Company and Sierra Pacific Power Company (the "Nevada Companies"); The Metropolitan Water District of Southern California ("MWD"); and Valley Electric Association, Inc. ("Valley") (collectively, "The Western Intervenors").

³ Motion to Compel Attendance of Enron's Witness Edward D. Baughman filed on June 20, 2005 by The Western Intervenors and an oral motion by Staff concerning the deposition of Kenneth J. Slater.

⁴ *Order Confirming Rulings*. It is clear that Enron has copies of the Snohomish Tapes and obtained the same by August 2004. Enron admits that the Snohomish Tapes are not at issue in their motion.

⁵ Enron disclosed the existence of the tapes in 2002. See Tr. at 584:5-8. In the

5. Enron cites to the Fifth Amendment of the Constitution (U.S. Const. amend. V) and *Brady v. Maryland*, 373 U.S. 83 (1963). However, *Brady* is inapposite since this is not a matter of the government denying Enron access to evidence.⁶ In this case, Enron has known all along about the tapes, especially in light of the fact that they were Enron tapes to begin with. Moreover, Enron has had more than ample notice of the fact that other Parties and Staff were preparing their cases based on these tapes. *See note 5, supra*. This is really a matter of Enron waiting until the last hour to defend itself. Thus, it's due diligence arguments are specious.

6. Moreover, and most importantly, Enron's due process rights are not being violated. Due process does not require that Enron be given access to the tapes within the protocols it demands.⁷ Due process does require that Enron be given access to the tapes. Enron has been given access to the tapes. The DOJ is allowing Enron to send three to five persons per day to the Federal Bureau of Investigations' ("FBI") Houston offices during ordinary business hours to listen to the tapes. Enron started going to the FBI's Houston office of the on June 17, 2005, from 9 a.m. to 5 p.m., five days per week using five individuals. It is using its software to search for pertinent tapes. Enron is currently able to listen to 500 clips per day per person which amounts to 2500 clips per day (500 clips per day x 5). Additionally, Enron was offered access to Aspen on similar grounds as Staff by March 2005. However, Enron declined this access. Staff could listen to the tapes from Aspen one file at a time (at any time), and needed DOJ approval to use the tapes in this proceeding. Additionally, Staff did not create its own searchable database of

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Order to Show Cause in the partnership proceeding, the Commission required parties to submit tapes with their responses. *Enron Power Marketing Inc.*, 103 FERC ¶ 61,346 at P 47 and n. 3 (2003); *Order Granting Interlocutory Appeal*, 105 FERC ¶ 61,362 at P14 (2003). In a Commission order in a case which has been consolidated with this proceeding the Commission stated that the Enron tapes would be considered. *El Paso Electric Co., et al*, 108 FERC ¶ 61,071 at PP 14-18 (2004). In this cited proceeding Staff sought access to the tapes from Enron in August-September 2002. Staff informed the parties that it had signed a protective order with DOJ regarding access to the Enron Tapes on August 20, 2004. Staff stated in September 22, 2004, that it was reviewing the Enron tapes. However, Enron waited until March 2005 to request access to the tapes.

⁶ It is noted that the holding in *Brady* is based on the Fourteenth Amendment to the U.S. Constitution (US Const. amend. XIV). In this case Enron is arguing due process violations based on the Fifth Amendment. It is found that Enron's Fifth Amendment and Fourteenth Amendment rights have not been violated in this case.

⁷ DOJ allowed Enron to access Aspen's web-based interface, downloading audio files one file at a time. However, this is not what Enron wants. Enron wishes to access the data in bulk through a portable hard drive or to extract the data electronically, in order to create a fully searchable data base. Appendix C to Staff's June 22 Answer at 2.

the Enron tapes. Staff could not remove copies and did not have remote access and has never had custody of the tapes at any time. Moreover, Staff was never afforded access to all of the files at once and did not seek to do so. It is found that due process does not mandate that Enron be given more or better access than Commission Staff.

7. Staff and other parties in this proceeding have stated that they have not reviewed all the Enron tapes. Staff reviewed a statistical sample of the Portland tapes. Enron will have six weeks of eight hour work days for five people to look for exculpatory evidence. This is more than ample time, based on the facts of this case, for Enron to be able to listen to a similar universe of tapes as used by Staff (the Portland tapes). Moreover, as was shown in the oral argument, Enron is not limiting its search to just the tapes used by Staff but is reviewing all Enron tapes in DOJ's possession. Thus theoretically, within the remaining time allotted Enron for review of the tapes, it may obtain exculpatory evidence from tapes not presently submitted for identification in this proceeding.⁸ This supports the finding that Enron's request for an additional postponement of the procedural schedule in this case is totally without merit. Furthermore, the additional delays since March 2005 have been the result of Enron's demand to access on its own terms.⁹ Accordingly, it is found that Enron's due process rights have not been violated in this case since it has been given adequate and fair opportunity to review the tapes. Balancing all the interests, it is found that it is not unfair for Enron to proceed to hearing as previously scheduled and that it has had ample time to prepare its case. Therefore, Enron's Motion **IS DENIED**.

8. Additionally, the following rulings were entered from the bench:

The Motion to Compel Attendance of Enron's Witness Edward D. Baughman filed on June 20, 2005 by The Western Intervenors was **GRANTED**.

Staff's Oral Motion requesting additional days to depose Kenneth J. Slater was **GRANTED**.

Carmen A. Cintron
Presiding Administrative Law Judge

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⁸ It is salient that Enron did not refute the Parties' assertion that in Enron's rebuttal testimony concerning the Snohomish Tapes it did not offer an iota of exculpatory evidence.

⁹ Enron cannot again prevail in its due process arguments since it has been the architect of its situation.