UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation	Docket No. EL02-113-009
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-180-009
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-154-006

ORDER DENYING REHEARING

(Issued May 27, 2005)

1. On April 8, 2005, Enron Power Marketing, Inc. and Enron North America Corporation, f/k/a Enron Capital and Trade Resources Corporation (collectively, Enron) requested rehearing of the Commission's Order on Clarification issued on March 11, 2005.[1] On April 11, 2005, Public Utility District No. 1 of Snohomish County, Washington (Snohomish) requested rehearing of the March 11 Order.

2. In this order, the Commission denies the requests for rehearing of the March 11 Order. This order benefits customers because it assures the development of an evidentiary record on which the presiding judge and the Commission can reach decisions.

[1] *El Paso Electric Co., Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 110 FERC ¶ 61,280 (2005) (March 11 Order).

I. Background

3. 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.[2]

4. Separately, on June 25, 2003, the Commission initiated the two Show Cause Proceedings,[3] Docket Nos. EL03-180-000, *et al.*, and EL03-154-000, *et al.*, to investigate whether sellers, including Enron and its affiliates, 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.

5. 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.[4] 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

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[2] *El Paso Electric Co.*, 100 FERC ¶ 61,188 at P 6-10 (2002).

[3] *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).

[4] *El Paso Electric Co., Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 108 FERC ¶ 61,071 (2004) (July 22 Order).

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 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.

6. On August 4, 2004, Western Parties[5] 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.[6]

7. Subsequent to the request for rehearing at issue here and discussed below, on April 29, 2005, in response to an interlocutory appeal involving a discovery dispute, the Commission again explained 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.[7] 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.

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[5] 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.

[6] March 11 Order, 110 FERC ¶ 61,280 at P 10-11 (2005).

[7] *El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation*, 111 FERC ¶ 61,129 (2005) (April 29 Order).

8. Also subsequent to the requests for rehearing at issue here and discussed below, 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.[8] The Commission stated that with respect to Enron, the proceedings 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 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.[9]

II. Requests for Rehearing

9. On April 8, 2005, Enron requested rehearing of the Commission's March 11 Order. Enron argues that the Commission lacks the authority to grant the relief contemplated in the March 11 Order. Enron maintains that the March 11 Order provides no reasoned basis for including examination of the termination payments in this proceeding and is inconsistent with prior Commission orders. Enron requests that the Commission conclude that the party-specific remedies Enron alleges are being sought by intervenors are based on their contracts with Enron, and are therefore within the jurisdiction of the bankruptcy court. In the alternative, however, Enron requests that the Commission grant it discovery on whether intervenors suffered any harm entitling them to a remedy.[10]

10. On April 11, 2005, Snohomish requested rehearing, arguing that, to the extent the March 11 Order suggests that the bankruptcy court may in any way interfere with the Commission's regulatory determination on the question of whether Enron is entitled to retain profits, including profits arising from "termination payment" claims, during the period when it was in violation of Commission orders and tariffs, that suggestion is incorrect and the Commission should so state.

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[8] *El Paso Electric Co., Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.*, 111 FERC ¶ 61,221 (2005) (May 12 Order).

[9] *Id.* at P 16.

[10] Enron Rehearing at 22-23.

III. Discussion

11. Initially, we note that, since the parties originally filed their requests for rehearing, the Commission has in two separate orders addressed the scope of these proceedings.[11] Hence, the matters raised in the parties' requests for rehearing have been, to a degree, overtaken by subsequent events. Turning to the specifics of the parties' requests for rehearing, we see no reason to change our earlier conclusions and will deny rehearing as explained below.

12. Enron argues that issues related to enforcement of the disputed terminated payment obligations involve the property of Enron's Estate, are matters within the jurisdiction of the bankruptcy court, and, accordingly, are subject to the automatic stay provisions of the Bankruptcy Code.[12] The Commission disagrees, and accordingly, Enron's request for rehearing is denied.

13. While the Bankruptcy Code generally stays all proceedings against the debtor automatically upon the filing of the bankruptcy petition, 11 U.S.C. § 362 (2000), "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" is excepted from the automatic stay under 11 U.S.C. § 362(b)(4) (2000).[13] As our action here is exempt from the automatic stay as a regulatory action under 11 U.S.C. § 362(b)(4) (2000),[14] we do not have to seek relief from that stay under 11 U.S.C. § 362(d) (2000) before taking this action.[15]

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[11] *See supra* notes 7-8 and accompanying text.

[12] Enron's Request for Rehearing at 7-8.

[13] *See In re Cajun Electric Power Cooperative, Inc.*, 185 F.3d 446, 453 (5th Cir. 1999) (*Cajun*). *See also Penn Terra Ltd. v. Dept. of Environ. Resources*, 733 F.2d 267, 278 (3d Cir. 1984) ("In enacting the exceptions to section 362, Congress recognized that in some circumstances, bankruptcy policy must yield to higher priorities.").

[14] 16 U.S.C. §§ 824d, 824e (2000).

[15] *See In re FCC*, 217 F.3d 125, 138-39 (2d Cir. 2000); *Eddelman v. U.S. DOL*, 923 F.2d 782, 785 (10th Cir. 1991).

While the Bankruptcy Code gives a bankruptcy court power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this

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14. In this proceeding, the Commission is not interpreting the rights of the parties under, or the terms of, the terminated contracts, as Enron asserts, 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 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. Such action consists of an exercise of our police and regulatory power and, accordingly, does not conflict with the bankruptcy court proceeding.[16] Indeed, in the April 29 Order, we explained that disgorgement of unjust profits does *not* hinge on whether there was harm (or the amount of the harm) to any particular customer.[17]

15. The Commission also denies Enron's alternative request that it be permitted to seek discovery on whether intervenors suffered any harm entitling them to a remedy. This proceeding is focused on any unjust profits that Enron may have derived through such violations, and their disgorgement. As we found in the April 29 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.[18] 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.

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title," 11 U.S.C. § 105(a) (2000), that power is not unlimited, but can be exercised only within the confines of the Bankruptcy Code. *Cajun*, 185 F.3d at 453 n.9, 458; *Dept. of the Treasury for the Commonwealth of Puerto Rico v. Pagan*, 279 B.R. 43, 46 (D.P.R. 2002). Section 105 of the Bankruptcy Code does not empower a bankruptcy court to create rights that do not exist under the Code. *Id*. (citing *In re SPM Mfg. Corp.*, 984 F.2d 1305, 1311 (1st Cir. 1993); *In re Morristown & Erie RR Co.*, 885 F.2d 98, 100 (3d Cir. 1989)). "In short, section 105 does not permit bankruptcy courts to become 'roving commission[s] to do equity.'" *Id*. (quoting *In re Southmark Corp.*, 49 F.3d 1111, 1116 (5th Cir. 1995)).

[16] *See generally Mirant Corp. v. Potomac Electric Power Co.*, 378 F.3d 511, 518-519, 521-522, 523 (5th Cir. 2004) (discussing Commission authority, even in the context of bankruptcy, with respect to rates).

[17] April 29 Order at P 11-12.

[18] April 29 Order at P 11-12.

16. Snohomish argues that the proviso in the March 11 Order indicating that Commission relief in this proceeding is "subject to any applicable bankruptcy restrictions" should be removed or at least clarified to make clear that the bankruptcy court may not interfere with the Commission's ongoing exercise of its police and regulatory powers. Snohomish argues that where, as in this proceeding, the Commission exercises its exclusive jurisdiction over the rates, terms, and conditions of service under the Federal Power Act, the bankruptcy court lacks the jurisdiction to declare the Commission's action null and void on any ground, and therefore is without the power to interfere with such jurisdiction.

17. This proceeding on possible disgorgements by Enron for violations of the ISO's and PX's tariffs and the conditions of its market-based rate authority is a valid exercise of our police and regulatory powers. However, when the Commission stated in the March 11 Order that the profits from the disputed terminated contracts are within the scope of this proceeding, and shall be addressed in the ongoing hearing, "subject to any applicable bankruptcy restrictions," it merely intended to clarify that the Commission is not infringing on the bankruptcy court's valid exercise of any jurisdiction it may have with respect to these disputed contracts and the actual disbursement of funds from the bankruptcy estate, just as the Commission expects that the bankruptcy court will not infringe upon the Commission's valid exercise of its jurisdiction over the question of whether Enron is entitled to retain profits, including profits arising from "termination payment" claims relating to the disputed contracts, during the period when it was in violation of Commission orders and tariffs.

The Commission orders:

Requests for rehearing of the March 11 Order are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.