UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-180-008
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-154-005
Enron Power Marketing, Inc.	Docket No. EL02-115-011

ORDER DENYING REHEARING

(Issued May 27, 2005)

1. On January 19, 2005, the Public Utility District No. 1 of Snohomish County, Washington (Snohomish) filed a request for rehearing of the Commission's Order on Certified Question issued on December 20, 2004.[1] Also on January 19, 2005, Enron Power Marketing, Inc. (EPMI), Enron Energy Services, Inc. (EES), and Enron North America Corp. (ENA) f/k/a Enron Capital & Trade Resources Corp. (ECT) (all three referred to collectively as Enron) filed a request for rehearing of the Commission's December 20 Order. For the reasons set forth below, the Commission denies rehearing.

I. Background

2. Snohomish states that, as early as November 2003, it submitted a data request to Enron requesting "all indices . . . or other documents listing or otherwise describing . . . information maintained and/or stored" by Enron.[2] Snohomish states that a Consolidated

[1] *Enron Power Marketing, Inc.*, 109 FERC ¶ 61,298 (2004 (December 20 Order).

[2] Snohomish's Request for Rehearing at 5 n.12 (citing data request SNO-ENR-54, issued by Snohomish in Docket No. EL03-137, *et al.*, on November 14, 2003).

Data Management System (CDMS) index, which was not provided by Enron in response to this data request, *inter alia*, lists or describes information maintained and/or stored at Enron's Houston warehouse. Enron states that it did not maintain an "index" of materials maintained at the warehouse; rather, the CDMS was an "electronic database" consisting of over 800,000 entries which it used to search for and to identify documents maintained at that facility.[3] Further, Enron argues that, prior to the summer of 2004, discovery had been focused on Enron's prior testimony and on a much narrower scope of the case.

3. On September 27, 2004, Snohomish submitted a formal data request to Enron seeking a redacted copy of Enron's indices.[4] Enron objected to this data request on the grounds that it "would take thousands of man-hours for Enron to read, review for privilege, and then index every document in its possession," and instead proposed that Snohomish identify search terms for Enron to use in compiling redacted indices.[5]

4. Snohomish states that it offered to accept a redacted version of the CDMS index to accommodate concerns raised by Enron about revealing information that was privileged or clearly fell outside the scope of these proceedings.[6] Following several communications between the parties, Enron agreed to provide a copy of the CDMS index by Monday morning, October 11, 2004, when Snohomish's representatives were scheduled to arrive at Enron's Houston warehouse for their document review during the week of October 11-15, 2004.

5. Shortly after a team of reviewers from Snohomish arrived at the Enron warehouse, however, Enron personnel refused to produce the CDMS Directory, on the ground that they had not completed the task of redacting from it privileged material.[7] Snohomish

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[3] Enron's Request for Rehearing at 3.

[4] *See* data request SNO-ENR-203.

[5] *See* Emergency Motion to Compel and Request for Expedited Consideration of Snohomish at Attachment B (Docket No. EL03-180, *et al*., Oct. 12, 2004).

[6] Snohomish's Request for Rehearing at 6.

[7] *See* Enron's Request for Rehearing at 3; *see also* Presiding Administrative Law Judge's Order Granting In Part and Denying In Part Motion To Compel Production Of Documents at P 2 n.1 (October 14, 2004) (stating that "Enron explains that when it agreed to provide the database, it was under the impression that it contained a simple list of documents, without describing their contents. It later learned to its dismay that many of the entries contained full-paragraph descriptions of the contents of the documents. As

(continued)

states that Enron personnel informed Snohomish that it would have to file a motion to compel to obtain a copy of the CDMS Directory.[8]

6. On October 12, 2004, Snohomish filed an emergency motion to compel Enron to produce the CDMS Directory pursuant to Rule 406 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.406 (2004).[9] In addition, Snohomish sought sanctions against Enron for failure to produce the materials in a timely manner. Enron filed an answer and the ALJ convened a conference call during which counsel for both Enron and Snohomish were given the opportunity to argue their clients' positions on the discovery of these materials. According to the ALJ, during that October 13, 2004 conference call the issue of the appropriate length of time for going through those materials designated for disclosure was discussed at some length, and the ALJ indicated November 10, 2004 would be the deadline for Enron to produce documents designated by Snohomish. The ALJ stated that counsel for Enron did not suggest that Snohomish's designation of any particular volume of materials might be a problem.

7. The ALJ's October 14, 2004 Order provided that Enron must produce a redacted version of its directory of materials no later than October 23, 2004, and that Enron must produce and provide to counsel for Snohomish documents listed on the directory and designated by Snohomish[10] no later than November 10, 2004. The November 10

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counsel for Enron acknowledged, the commitment to produce the index without redaction turned out to be improvident"); *see also* Expedited Response of Enron to Portions of Emergency Motion to Compel of the Public Utility District No. 1 of Snohomish County at 2-3 n.2 (Oct. 13, 2004).

[8] Snohomish's Request for Rehearing at 7.

[9] Emergency Motion to Compel and Request for Expedited Consideration of Public Utility District No. 1 of Snohomish County, Washington (Docket No. EL03-180, *et al*. Oct. 12, 2004).

[10] The ALJ required Snohomish's designations of documents from the CDMS Directory be submitted in the form of a data request by no later than November 5, 2004. *See* Presiding Administrative Law Judge's Order Clarifying Ruling on Production of Documents (October 18, 2004). Enron asserts that the ALJ's bench order set forth different deadline dates, wherein in it lost nine days of response time. *See* Enron's Request for Rehearing at 4.

deadline passed, however, and Enron provided nothing to Snohomish, nor did Enron seek from the ALJ either an extension of time in which to provide the documents or any other relief.

8. On November 17, 2004, Snohomish filed a motion seeking sanctions against Enron, claiming that Enron had failed to comply with the ALJ's October 14 Order, by not providing Snohomish with copies of certain specified documents on or before November 10. Enron filed a response to this motion, stating several reasons for its failure to meet the November 10 deadline: (1) the sheer size of the request made it impossible to deliver the documents to Snohomish by November 10;[11] (2) the delay was caused by Snohomish's insistence that the materials be converted into an electronic format specified by Snohomish; and (3) the delay was exacerbated by Snohomish's refusal to specify to Enron's contractor the precise format it desired, and make suitable arrangements for paying the contractor's bill for the conversion and for other processing tasks.

9. On November 18, 2004, the ALJ issued an order holding Enron in default for failure to comply with the discovery rules. The ALJ explained that a valid data request seeking documents was to be responded to by the production of copies of the documents in question. Moreover, the ALJ stated, generally the obligation to reproduce requested documents rests with the party from which discovery is sought, and that party must pay the costs of reproduction and shipping. The ALJ noted that, when Enron realized that it could not comply with the requirement to "produce and provide," it could have, and should have (but did not), at that time seek relief under Rule 410(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.410(c) (2004), such as modifying the deadline, allowing it to produce and provide the documents in "hard copy" rather than the requested format, or seeking other relief. Enron did not do so. Thus, the ALJ granted Snohomish's motion and imposed monetary sanctions on Enron for its willful failure to comply with its obligations under the Commission's discovery rules and, in particular, with the ALJ's October 14 Order.

10. The ALJ certified to the Commission the question of imposing an appropriate sanction upon Enron. The ALJ recommended that the Commission enter an order directing Enron to pay a monetary sanction of $500.00 per day for each day of non-compliance with the October 14 Order – from November 10 to, and including, the date of the ALJ's November 18 Order and $1,000.00 per day for each day of non-compliance

[11] Enron conceded that some 90 percent of the documents requested by Snohomish had been segregated from other material kept in Enron's Houston warehouse and were in the hands of Enron's contractor, and thus ready to be copied and delivered by the November 10 deadline. *See* Enron's Response at 2, 4, 8 (Nov. 17, 2004).

thereafter. The ALJ recommended that these amounts be paid to Snohomish to compensate it for the burdens it shouldered in attempting to extract from Enron materials which it was entitled to under the Commission's discovery rules and the ALJ's October 14, 2004 Order.

11. On December 20, 2004, the Commission found that, pursuant to sections 206, 308, and 309 of the FPA, in light of Enron's violation of the discovery rules and, in particular, the ALJ's October 14 Order, by ignoring completely an obligation to produce discovery by a date certain, Enron should be assessed the monetary sanctions recommended by the ALJ, but such monies should be deposited in the dedicated fund established in Docket No. EL03-137-000, *et al.*

II. Requests for Rehearing

12. Enron first argues that the December 20 Order is based upon an inadequate record for two reasons. First, Enron states that the ALJ's imposition of an order compelling production of documents requested from the CDMS Index was arbitrary and capricious in that the ALJ allowed only five calendar days (including a weekend) without knowing that thousands of documents had to be reviewed for privilege and produced. Second, Enron states that given the time constraints and the lack of a transcript for the October 13 pre-hearing conference call, any attempt by Enron to file a Rule 410(c) motion would have been futile and counterproductive.

13. Enron next argues that the December 20 Order erroneously states that the circumstances justify the "extraordinary remedy" of sanctions, which are to be imposed "only in the clearest cases." On the contrary, Enron asserts that it undertook extraordinary efforts to comply with the October 14 Order.

14. Snohomish argues that, contrary to the December 20 Order's findings, the record in these proceedings establishes a direct nexus between Snohomish's costs and the sanctions imposed for Enron's failure to respond to Snohomish's data requests. Snohomish therefore requests rehearing of the December 20 Order to the extent it deviates from the ALJ's recommendation that the amount of the penalty shall be paid directly to Snohomish to compensate it for the burdens it has shouldered in attempting to extract from Enron material to which it was entitled under the Commission's Procedural Rules. In the alternative, Snohomish requests that the Commission should not foreclose Snohomish from later demonstrating, during the distribution phase of these proceedings, that sanction monies paid by Enron should be allocated to Snohomish.

III. Discussion

15. We will deny Enron's request for rehearing. What Enron tries to obscure is that we ordered the extraordinary remedy of sanctions for a failure to comply with (or alternatively seek relief from), in particular, the ALJ's order. In short, it was Enron's ignoring the Commission's discovery rules and the ALJ's order that warrants the sanctions ordered.

16. Turning to the specifics of Enron's request for rehearing, Enron does not persuade us that rehearing is warranted. Enron first asserts that it did not maintain an "index" of materials maintained at the Houston warehouse, but rather an "electronic database" (the CDMS) that it used to search for and to identify documents maintained at that facility. Whether the CDMS may be properly defined as an "index" or not is immaterial, since Snohomish's November 2003 data request sought "documents listing or otherwise describing . . . information maintained and/or stored" by Enron. The CDMS clearly was such a document.

17. Enron also notes that a discrepancy in the deadline dates for production of documents in the October 13 bench order and in the ALJ's written decisions of October 14 and October 18 caused it to lose nine days of response time.[12] Moreover, Enron objects that the ALJ's orders provided Enron only five calendar days to review thousands of documents for privilege and production. Even accepting Enron's claims for the sake of argument, they do not entitle Enron to exercise "self help."

18. Enron concedes that some 90 percent of the documents requested by Snohomish had been segregated from other material kept in Enron's warehouse and were in the hands of Enron's contractor, and ready to be copied and delivered by the November 10 deadline. This certainly suggests that Enron could have complied (or at least substantially complied) with the ALJ's order compelling the production of documents and that that order was not arbitrary or capricious, but rather was reasonable. In addition, Enron was on notice that such materials had been requested (in Snohomish's November 2003 data request), and Enron certainly was on notice that Snohomish sought information from the CDMS (in its September 27, 2004 data request and through the parties' subsequent informal communications on this issue). Yet, as of the ALJ's November 18

[12] While Enron makes much of this discrepancy now, it is not at all clear that Enron did so at the time; Enron, it seems, did not bother to seek additional time to comply.

Orders,[13] and even as of the Commission's December 20 Order, it was not clear that any of these documents had been provided to Snohomish, despite Enron's assertion that it would provide this material to Snohomish on a rolling basis.[14]

19. Enron states that the five days it had to produce the documents designated by Snohomish gave it the choice between trying to comply with the Order and trying to challenge it. We are hard pressed to believe that with the resources Enron has devoted to litigation before the Commission (including the filing of the instant request for rehearing) it could not, for example, spare a few hours' time of a single attorney to at least craft a motion to the ALJ seeking an extension of time to comply with the ALJ's order.[15] Such a motion would not have been mutually exclusive with Enron's efforts to comply.

20. Enron asserts that the ALJ's October 14 Order compelling production was improper since Snohomish could not have made an initial showing of relevance of the requested information at that time since Snohomish had not designated any materials for production, and Snohomish had not even had the opportunity to review the CDMS index to become acquainted with its contents. Enron's argument is disingenuous. Enron on the one hand refuses to provide even a redacted copy of the index, while Enron on the other hand objects that Snohomish could not show relevance since it is not acquainted with the details of its contents. And, in any event, it was not for Enron to decide what is relevant and what is irrelevant; that is for the ALJ, and Enron could have (but chose not to) argue relevance to the ALJ.

21. Employing similar reasoning, Enron argues that the ALJ's October 14 ruling was premature; since Snohomish failed to identify the requested documents, Enron was deprived of an opportunity to object to the production of particular documents. The Commission disagrees. Snohomish was not requesting actual copies of the 800,000

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[13] *See* Enron's Request for Rehearing at 5 (essentially conceding that in response to a Snohomish data request of November 1, no documents had been produced as of November 10).

[14] *See* Expedited Response of Enron to Portions of Emergency Motion to Compel of the Public Utility District No. 1 of Snohomish County at 2 (Oct. 13, 2004).

[15] In this regard, Enron was able to respond to Snohomish's request for sanctions on the same day. *See* Enron's Request for Rehearing at 14. Enron also notes that it was entitled to 15 days to respond, but the regulations do not dictate that an ALJ *must* wait 15 days especially when the response has already been filed. Having received both a motion and an answer, the ALJ was within his rights to rule.

documents in Enron's possession; rather, the ALJ merely ordered Enron to provide a redacted copy of an index that Enron had already created which described the documents in Enron's Houston warehouse.

22. Enron argues that to the extent that the December 20 Order and the ALJ's earlier November 18, October 18 and October 14 Orders are predicated upon the October 13 telephone conference, those orders should be vacated for lack of an adequate record. The Commission disagrees. The telephone conference was in response to Snohomish's written data requests and motion to compel, as well as Enron's written response to that motion – and were followed by the ALJ's written orders. Regardless of the alleged discrepancies with the deadline dates discussed at the telephone conference, the dates were very clear in the ALJ's written orders. Enron should have objected before the November 10 deadline came and went without producing the requested documents.[16] Moreover, the December 20 Order based its conclusion (that payments for Enron's non-compliance was an appropriate sanction that balanced the equitable considerations relevant to the resolution of this proceeding (*e.g.*, encouraging Enron to comply as soon as possible)) upon the entire and extensive written record on this matter in this proceeding, and not merely upon the recollections of what transpired in the telephone conference.

23. We likewise will deny Snohomish's request for rehearing. Snohomish argues that the record in these proceedings establishes a direct nexus between Snohomish's costs and the sanctions imposed for Enron's failure to respond to Snohomish's data requests. Thus, Snohomish requests that the amount of the penalty should be paid directly to Snohomish to compensate it for these burdens, or in the alternative, Snohomish requests clarification that the Commission find that Snohomish is not foreclosed from later demonstrating, during the distribution phase of these proceedings, that these sanction monies should be allocated to Snohomish. While the Commission does not believe the record to date demonstrates such a nexus, the Commission will not, at this juncture, foreclose Snohomish from later demonstrating, during the distribution phase of these proceedings, that these sanction monies should be allocated entirely or in part to Snohomish. That is a

[16] While Enron points to the fact that as of November 17 over 60 individuals had logged over 2,600 man-hours, that is not the critical fact. *See* Enron's Request for Rehearing at 17. Rather, the critical fact is that the ALJ had ordered production by a date certain (November 10), and as of that date no documents had been produced and alternatively no motion for relief had been filed. Likewise, that Enron subsequently produced some documents by a later date does not excuse its failure, either to timely comply or to timely seek relief from the obligation to timely comply. It is not Enron's prerogative to set deadlines. That is for the ALJ (and this Commission).

matter properly taken up at a later date, *i.e.*, in the distribution phase of these proceedings.

The Commission orders:

The requests for rehearing are 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.