

FEDERAL ENERGY REGULATORY COMMISSION

- - - - -X
IN THE MATTER OF: : Docket No.
ENRON POWER MARKETING, INC. : EL03-180-000
AND ENRON ENERGY SERVICES, INC. :
AQUILA, INC. : EL03-181-000
CITY OF GLENDALE, CALIFORNIA : EL03-182-000
CITY OF REDDING, CALIFORNIA : EL03-183-000
COLORADO RIVER COMMISSION : EL03-184-000
CONSTELLATION POWER SOURCE, INC. : EL03-185-000
CORAL POWER, LLC : EL03-186-000
EL PASO MERCHANT ENERGY, L.P. : EL03-187-000
EUGENE WATER AND ELECTRICITY BOARD : EL03-188-000
IDAHO POWER COMPANY : EL03-189-000
KOCH ENERGY TRADING, INC. : EL03-190-000
LAS VEGAS COGENERATION, L.P. : EL03-191-000
MIECO : EL03-192-000
MODESTO IRRIGATION DISTRICT : EL03-193-000
MONTANA POWER COMPANY : EL03-194-000
MORGAN STANLEY CAPITAL GROUP : EL03-195-000
NORTHERN CALIFORNIA POWER AGENCY : EL03-196-000
PACIFICORP : EL03-197-000
PECO : EL03-198-000
POWEREX CORPORATION : EL03-199-000
(f/k/a British Columbia Power :
Exchange Corporation) :
PUBLIC SERVICE COMPANY OF NEW MEXICO : EL03-200-000
SEMPRA ENERGY TRADING CORPORATION : EL03-201-000
TRANSALTA ENERGY MARKETING(U.S.) INC.: EL03-202-000
AND TRANSALTA ENERGY MARKETING :
(CALIFORNIA), INC. :
VALLEY ELECTRIC ASSOCIATION, INC. : EL03-203-000
- - - - -x(Consolidated)

Hearing Room 5
Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C.
Monday, February 26, 2007

The above-entitled matter came on for hearing, pursuant to notice, at 9:38 a.m.

BEFORE:

HONORABLE CARMEN A. CINTRON
ADMINISTRATIVE LAW JUDGE

APPEARANCES: (AS HERETOFORE NOTED.)

P R O C E E D I N G S

PRESIDING JUDGE: Let's proceed.

MR. COCKRELL: I have one procedural matter, sort of a housekeeping question.

PRESIDING JUDGE: Okay.

MR. COCKRELL: We filed Mr. Barlow's testimony S-76 and S-77 before your ruling regarding the traders. We filed a corrected version this past month. He will be the last witness in the case. In preparing, we found five pages on Exhibit S-77, there is the mention of the names of energy traders. If I could approach, could I show you

that?

PRESIDING JUDGE: Yes.

MR. COCKRELL: It's pages 12, 17, 19, 22, and 23. If you would, before he testifies, give us your advice on how we should handle it. We can put it in without the names on it, we can cross them out, or we can just do it as is. No personal information about the traders appears to be in there.

PRESIDING JUDGE: It does have a number of -- a significant number of names. Can you just white out those names?

MR. COCKRELL: I think we can do that. I'll have them do that.

PRESIDING JUDGE: All right. Very good.

Whereupon,

ROBERT MC CULLOUGH

resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

THE WITNESS: Your Honor, could I make a very short request? In reviewing my testimony in response to your question on Friday, I wanted to make a very short amplification.

PRESIDING JUDGE: Okay. Hang on. We'll get started on that.

Any other housekeeping matters? No? Okay.

Mr. Moore, you were on.

Can you do that, Mr. Cockrell?

MR. COCKRELL: Yes. We'll do it before Mr. Barlow testifies.

PRESIDING JUDGE: Proceed.

THE WITNESS: It's very short, your Honor. Thank you very much.

In reviewing the record on Friday, I noticed I used the word "penalty" in a colloquial way, and it occurred to me "penalty" is a term of art in the bankruptcy case. What I meant to say, when I used "penalty," was simply that the Federal Energy Regulatory Commission should remove the market-based rate privilege and return them to the previous state, that there was no fine involved.

Thank you very much, your Honor.

PRESIDING JUDGE: And the 1.6 billion, where did you get that figure from, sir?

THE WITNESS: That's simply the total of profits from various sources from the daily position reports.

PRESIDING JUDGE: You have the floor, Mr. Moore.

MR. MOORE: We'll get to both, Judge. We'll get to where the 1.6 billion came from, and we'll get back to penalty, too, before we done here.

PRESIDING JUDGE: All right.

CROSS-EXAMINATION (Continued)

BY MR. MOORE:

Q Let's start out and see if we can be more agreeable this morning on Monday than we were on Friday afternoon and start with an easy one, I hope. And that is, that as a fundamental -- as one of the fundamental regulatory principles at this agency, you will agree with

me that the starting point for determination of just-and-reasonable rates is, in fact, cost; correct?

A Well, we couldn't quite agree on that on Friday, and it still has a problem here. Obviously, that's a component, that's a perfectly reasonable component, but equally obviously, I sat through EL00-95 where the Commission has adopted a marginal cost approach, which is different than the traditional embedded cost approach. So

I aim to keep that in mind in my answer.

Q And there's different ways and different methodologies to determine just-and-reasonable rates using cost as a starting point, but cost is always a starting point; right?

A Let me agree halfway. Cost is always a component. The reason I'm pausing is because it's my understanding that the EL00-95 solution was an analog to what a market price would have been, and it was their way of getting it.

Q Even in the MMCP, you start with some costs of representative generators that participated in that particular market; right?

A You start with a natural gas price series derived from the basins, and then you make adjustments for specific resources selected by the ISO.

Q Right. But you start with costs?

A Accepted.

Q Okay. And then maybe you'll go even a little bit further with me, then, that one of the standard regulatory tools used at this agency in determining the just-and-reasonable rates, using costs as a starting point, is a cost and revenue study; correct?

A That's a more difficult path to follow you on. If, by cost and revenue study, a phrase you've used for

many years in this case and which I interpret each time as a cost-of-service analysis and the traditional regulatory format, that really was not the direction we received from the Commission in either the first order or the follow-up orders. They did not say -- and they could have -- please analyze Enron as if it were a traditional utility. They said "return the profits", and that gives a slightly different answer.

So I can't agree with you that we've been in any sense directed in this proceeding to conduct a cost-of-service analysis, nor, frankly, do we have the data. I can remember on at least one occasion, we asked you -- pardon me. Normally identifying the lawyer with their client is not an issue; in this case it is an issue. We asked your client for cost-of-service information, and they responded that they only had what they provided to FERC, which, of course, meant that it was not available.

PRESIDING JUDGE: In which case was that? In this one or in the preceding one?

THE WITNESS: That data request was in this case.

PRESIDING JUDGE: In this case? I'm sorry, Mr. McCullough, I have to disagree with you. What the

Commission said was "disgorge."
THE WITNESS: Yes, ma'am.

BY MR. MOORE:

Q You would also agree with me, Mr. McCullough, that you have not done a cost and revenue study, as you have just described it, for Enron's West Coast operations; correct?

A I have not done a cost-of-service analysis, but I have, in fact, reviewed the net profits that are identified by Enron.

Q We're going to get to the net profits, and I want to examine you carefully about that.

A Yes, sir.

Q I'm not leaving that out, and I'm not intending by my questions to suggest that you didn't calculate profits. But I just want to state for the record, you did no cost and revenue study on Enron's West Coast operation; correct?

A Correct. And as I've responded, there simply is not the data to do a traditional regulatory analysis. I believe your experts have said something similar, and certainly, we received that information directly from Enron.

Q Okay. And other than what's in your testimony in the three pieces you filed, SNO-58, SNO-710, SNO-822, other than what's in there, you've done no study or analysis of what the just-and-reasonable level of rates in

California or the Pacific Northwest would be or should have been; correct?

A No. As you know, I have done such studies. I would simply state that they were not presented in this proceeding because they were not an issue in this proceeding.

Q Okay. I want to be precise with you. You have not, in your testimony in this proceeding, in SNO-58, SNO-710, or SNO-822, presented any study or analysis of what the just-and-reasonable rate levels in California or the Pacific Northwest should have been during the relevant time period; correct?

A No, I have not, and I don't believe that is a part of this proceeding.

Q Okay. Now, you also agree with me, don't you, that in order for you to find an Enron violation of the ISO or PX MMIPs requires a detriment to ISO or PX customers, including a negative economic impact?

A Anomalous behavior, obviously, has a negative impact on the entire market. We've been directed by the Commission not only to review the original show cause, but a much wider set of standards, including the conditions of the market-based rate privilege and the MMIPs. When the MMIP includes 2.1.1.5, obviously, we have a situation where we are looking at anomalous behavior in neighboring

markets.

So in that sense, it's a much broader standard. Now, I could argue certainly that violating Bonneville's rules at COB has a negative impact on anyone connected to COB, certainly the ISO and PX. But I would actually go further and say that the broad set of rules would have us approach impact throughout the West Coast.

PRESIDING JUDGE: Would have what?

THE WITNESS: Would have us address issues throughout West Coast.

PRESIDING JUDGE: I didn't understand one word you said. Speak up.

BY MR. MOORE:

Q Let me speak up and be sure you understand my question. My question relates to violations of the MMIP, either the ISO or PX MMIPs. They're pretty much identical, you agree with that, don't you?

A Yes, sir.

Q And my question is focused on that. Do you agree with me that a violation of the MMIP requires a detriment to ISO or PX customers, including a negative economic impact?

A I think you've asked me for a legal conclusion, but I'm not sure I would agree. I believe that the MMIPs are a guide to the rules, as published by those agencies

and accepted by FERC in the tariff and that it's the violation of the rules, not the subsequent proof of damage that counts.

Q Do you still have your deposition from April 14th, 2004, in front of you?

A I do.

Q Turn to page 96, please. Are you on page 96?

A I am, sir.

Q I want to you focus on the question I ask you there on line 13 and your answer on line 16. If you want to get the context of it, you may go back up and see where the preceding page on page 95, we're talking about MMIPs. And I have asked you, earlier on page 96 -- I left out the PX, and you told me to put it back in, not just the ISO but the PX as well. And I said, "I'm sorry, I didn't mean to leave them out. Other than that modification, it requires a detriment, does it not?" Your answer, "a detriment to customers in the ISO and PX markets, yes."

Then down there on line 13, my question to you, "we'll start with this one, then. Do you agree that a showing of a detriment requires a negative economic impact or not?"

And your answer on line 16 was what?

A "I agree."

Q Is that your testimony today?

A Yes.

Q Okay.

A Pardon me. You're such a skilled counsel, that each time you add a condition, I have to puzzle through a

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.