

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

Enron Power Marketing, Inc.	)	Docket No. EL03-180-000
and Enron Energy Services Inc.	)	
Aquila, Inc.	)	Docket No. EL03-181-000
City of Glendale, California	)	Docket No. EL03-182-000
City of Redding, California	)	Docket No. EL03-183-000
Colorado River Commission	)	Docket No. EL03-184-000
Constellation Power Source, Inc.	)	Docket No. EL03-185-000
Coral Power, L.L.C.	)	Docket No. EL03-186-000
El Paso Merchant Energy, L.P.	)	Docket No. EL03-187-000
Eugene Water and Electricity Board	)	Docket No. EL03-188-000
Idaho Power Company	)	Docket No. EL03-189-000
Koch Energy Trading, Inc.	)	Docket No. EL03-190-000
Las Vegas Cogeneration, L.P.	)	Docket No. EL03-191-000
MIECO	)	Docket No. EL03-192-000
Modesto Irrigation District	)	Docket No. EL03-193-000
Montana Power Company	)	Docket No. EL03-194-000
Morgan Stanley Capital Group	)	Docket No. EL03-195-000
Northern California Power Agency	)	Docket No. EL03-196-000
PacifiCorp	)	Docket No. EL03-197-000
PECO	)	Docket No. EL03-198-000
Powerex Corporation	)	Docket No. EL03-199-000
(f/k/a British Columbia Power Exchange Corporation)	)	
Public Service Company of New Mexico	)	Docket No. EL03-200-000
Sempra Energy Trading Corporation	)	Docket No. EL03-201-000
TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California) Inc.	)	Docket No. EL03-202-000
Valley Electric Association, Inc.	)	Docket No. EL03-203-000
	)	(Consolidated)

**MOTION OF THE CALIFORNIA PARTIES  
FOR LEAVE TO FILE INTERLOCUTORY APPEAL OF ORDER  
DENYING MOTIONS TO COMPEL PRODUCTION OF  
CERTAIN AUDIO TAPES AND OTHER MATERIALS**

**To: The Honorable Isaac D. Benkin  
Presiding Administrative Law Judge**

Pursuant to Rule 715(b) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission), 18 C.F.R. § 385.715(b) (2003), the California Parties<sup>1</sup> hereby respectfully request that the Presiding Judge permit an interlocutory appeal of his December 3, 2003 Order Denying Motions to Compel Production of Certain Audio Tapes and Other Materials, as amended on December 4, 2003<sup>2</sup> (the December 3 Order).<sup>3</sup>

The Commission Trial Staff (Trial Staff) and the California Parties are required to submit their case-in-chief testimony regarding the Respondents' collusive market manipulation schemes on December 19, 2003, without having access to all of the materials the Commission ordered the Respondents to produce. As described by the Presiding Judge, Respondents have resorted to a variety of arguments and assertions to avoid full compliance with the Commission's Partnership Entities Order.<sup>4</sup> Although

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<sup>1</sup> The California Parties are the People of the State of California, *ex rel.* Bill Lockyer, Attorney General (Attorney General), the California Electricity Oversight Board (EOB), the California Public Utilities Commission (CPUC), Pacific Gas and Electric Company (PG&E), and Southern California Edison Company (Edison).

<sup>2</sup> Presiding Administrative Law Judge's Order Amending Order Denying Motions to Compel Production of Audio Tapes and Other Materials, Docket Nos. EL03-180-000 *et al.* (Dec. 4, 2003) (amending Paragraph (P) 19).

<sup>3</sup> In response to the Presiding Judge's statement that the issues raised herein could be presented to the Commission, December 3 Order at P 23, *see also* P 15, the California Parties are filing a motion with the Commission today. This Motion for Leave to File Interlocutory Appeal also is being filed so there is no question as to full compliance with the requirements of Rule 715.

<sup>4</sup> *Enron Power Mktg., Inc., et al.*, 103 FERC ¶ 61,346 (2003) (Partnership Entities Order).

he finds blatant violations of the Commission’s Order, including finding in his December 3 Order that the “close reading” of the Commission’s order to avoid compliance is “utter nonsense,” the Presiding Judge holds that he is powerless to enforce it.

As a result, extraordinary circumstances exist that make prompt Commission review of the contested order necessary to prevent detriment to the public interest. As grounds for this motion the California Parties state the following:

#### **I. Background**

The Commission’s June 25 Partnership Entities Order finds that “based on a report by Commission Staff (Staff Final Report), and evidence and comments submitted by market participants, there is evidence that Enron Power Marketing, Inc. and Enron Energy Services Inc. (Enron) and a number of entities . . . (collectively, Partnership Entities) worked in concert through partnerships, alliances or other arrangements (jointly, Partnerships) to engage in activities that constitute gaming and/or anomalous market behavior (Gaming Practices) in violation of the California Independent System Operator Corporation’s (ISO) and California Power Exchange’s (PX) Tariffs during the period January 1, 2000 to June 20, 2001.”<sup>5</sup> The Order also finds “that there is evidence that a number of Partnership Entities . . . appear to have

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<sup>5</sup> *Id.* at P 1.

had similar Partnerships, which could be attempts to engage in similar activities as the Enron partnerships.”<sup>6</sup>

The June 25 Partnership Entities Order directs the Partnership Entities to show cause, in a trial-type evidentiary proceeding to be held before an Administrative Law Judge, why they should not be found to have engaged in the Gaming Practices (identified in the Gaming Practices Show Cause Order<sup>7</sup>) in violation of the ISO’s and PX’s tariffs.<sup>8</sup> The Partnership Entities were directed to file show cause responses. In addition, the Commission required the filing of “all related” materials with the Commission:

47. We also require the Partnership Entities to (1) inventory all revenues from their partnerships, alliances or other arrangements discussed above and (2) file these revenue figures as well as file all related correspondence, e-mail, memoranda, tapes, phone logs, transaction data, billing statements and agreements as part of their show cause responses. This requirement applies to both sides of an agreement regardless of whether the entity is supplying or receiving service. If a Partnership Entity does not provide this information and it is later discovered that such agreements exist, that may be grounds for other possible remedies.

Partnership Entities Order, 103 FERC at P 47 (Paragraph 47).

On October 29, 2003 (as corrected on October 30, 2003) the California Parties filed with the Presiding Judge a Motion to Compel certain Respondents to produce

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<sup>6</sup> *Id.*

<sup>7</sup> *American Elec. Power Serv. Corp., et al.*, 103 FERC ¶ 61,345 (2003) (Gaming Order).

<sup>8</sup> Partnership Entities Order, 103 FERC at PP 2 and 46.

audio tapes in response to Paragraph 47.<sup>9</sup> On November 7, 2003, the California Parties filed a Second Motion asking the Presiding Judge to issue an order requiring certain Respondents to produce other materials required by Paragraph 47.<sup>10</sup> Trial Staff filed an Answer Supporting the Motion to Compel.<sup>11</sup> Answers were filed by Respondents to both the Motion to Compel and the Second Motion.

## II. Presiding Judge's Ruling

In his December 3 Order the Presiding Judge, among other things, finds that he is not authorized to administer Paragraph 47 of the Commission's Partnership Entities Order and that Paragraph 47 has nothing to do with the conduct of the hearing in these proceedings:

On its face, Paragraph 47 is a blunt instrument, not a surgeon's scalpel. I do not think I am authorized to administer it; nor do I think it has anything to do with the conduct of the hearing with which I am charged.

December 3 Order at P 23.

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<sup>9</sup> Motion of the California Parties to Compel Production By Respondents of Audio Tapes and Related Materials Associated With Respondents' Partnerships, Alliances and Similar Arrangements, Docket Nos. EL03-180-000, *et al.* (Oct. 29, 2003, as corrected Oct. 30, 2003) (Motion to Compel).

<sup>10</sup> Second Motion of the California Parties to Compel Production By Respondents of Materials Associated With Respondents' Partnerships, Alliances and Similar Arrangements, Docket Nos. EL03-180-000, *et al.* (Nov. 7, 2003) (Second Motion to Compel).

<sup>11</sup> Answer of the Commission Trial Staff in Support of California Parties Motion to Compel Production of Audio Tapes and Related Materials (Nov. 6, 2003).

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