

tariffs.² In addition, we also direct the ALJ to hear evidence and render findings and conclusions quantifying the full extent to which the Identified Entities may have been unjustly enriched as a result of their conduct. The ALJ may recommend the monetary remedy of disgorgement of unjust profits and any other additional, appropriate non-monetary remedies.³ For example, the ALJ may identify non-monetary remedies such as revocation of an Identified Entity's market-based rate authority and revisions to an Identified Entity's code of conduct if the ALJ finds such remedies appropriate.

3. Further, this order finds that certain activities allegedly engaged in by the Identified Entities constituted Gaming Practices, but the circumstances in which they engaged in such activities do not warrant disgorgement of unjust profits. This order also finds that certain activities identified below (California Practices) allegedly engaged in by the Identified Entities do not constitute tariff violations; instead, many were legitimate transactions, which, while they have the superficial appearance of gaming, were not manipulative. This order also recognizes that some of the characteristics that were used to identify potential Gaming Practices may also be present in certain transactions that were not actually Gaming Practices. As a result, the Identified Entities will have an opportunity to submit evidence to the ALJ that the transactions were not Gaming Practices.

² As discussed below, we will also direct the ISO to provide the Identified Entities with certain transaction data that it relied upon in its study which is discussed below, and contemporaneously file that data with the Commission.

³ This potential disgorgement would apply to the period January 1, 2000 to June 20, 2001 and would be in addition to any refunds owed for the period after October 2, 2000 in the California Refund Proceeding. By order issued on August 23, 2000, the Commission, among other things, established a refund effective date of October 29, 2000, 60 days after the date of publication in the **Federal Register** of the Commission's intent to institute an investigation. *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 92 FERC ¶ 61,172 (2000) (August 23, 2000 Order). By order issued on November 1, 2000 in the same proceeding, the Commission granted rehearing in part of the August 23, 2000 Order by changing the refund effective date from 60 days after publication of notice in the **Federal Register** (October 29, 2000) to 60 days after the date of SDG&E's complaint (October 2, 2000). *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,121 at 61,370 (2000) (November 1, 2000 Order), *order on reh'g*, 97 FERC ¶ 61,275 (2001) (December 19, 2001 Order) (denying rehearing of the November 1, 2000 Order with respect to the October 2, 2000 refund effective date). In a December 15, 2000 order, the Commission found that the spot markets operated by the ISO and PX were dysfunctional. *San Diego Gas & Electric Co., et al.*, 93 FERC ¶ 61,294 (2000) (December 15, 2000 Order).

4. This order benefits customers by establishing procedures to address activities inconsistent with the ISO and PX tariffs during the period January 1, 2000 to June 20, 2001, consistent with due process.

II. Background

5. By order issued on February 13, 2002, in Docket No. PA02-2-000, the Commission directed a Staff investigation into whether any entity manipulated prices in electricity or natural gas markets in the West or otherwise exercised undue influence over wholesale electricity prices in the West since January 1, 2000.⁴

6. Pursuant to the directive of the February 13, 2002 Order, Staff undertook a comprehensive fact-finding investigation, encompassing both data gathering and data analysis of physical and financial transactions in and out of the California bulk power marketplace and related markets during 2000-2001. Staff's investigation has included a review of a wide variety of factors and behaviors that may have influenced electric and natural gas prices in the West over this period.

7. In August 2002, Staff released its Initial Report on potential manipulation of electric and natural gas prices in these markets, in which it concluded certain conduct was gaming while other practices were legitimate practices.⁵ The Initial Report noted that data requests were sent to over 130 sellers of wholesale electricity; entities from all sectors of the industry may have engaged in such trading practices. (Based on the analysis in the Initial Report, the ISO subsequently designed market screens in an effort to review its transaction data and identify potential transactions with characteristics indicative of these trading practices, including the practices that were identified by Staff as legitimate practices; the ISO's results are discussed below.) Staff expressly noted in this Initial Report, however, that its investigation into certain matters was ongoing and that other areas of inquiry

⁴ Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002) (February 13, 2002 Order). The February 13, 2002 Order, of course, was not the beginning point of our investigation into the justness and reasonableness of the rates of public utility sellers into the ISO and PX markets. For a general recitation of this procedural history, including the series of events and circumstances giving rise to the California energy crisis, see December 19, 2001 Order, 97 FERC ¶ 61,275 (2001).

⁵ Initial Report on Company-Specific Separate Proceeding and Generic Revaluations; Published Natural Gas Price Data; and Enron Trading Strategies: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000, issued in August 2002.

and recommendations not addressed in its Initial Report may be included in its Final Report.⁶ The Staff Final Report on its fact-finding investigation was publicly released on March 26, 2003.⁷

8. Since 1998, the ISO and PX tariffs have contained provisions that identify and prohibit "gaming" and "anomalous market behavior" in the sale of electric power.⁸ As explained in more detail below, the ISO tariff, through the ISO's Market Monitoring and Information Protocol (MMIP), defines gaming, in part, as "taking unfair advantage of the rules and procedures set forth in the PX or ISO tariffs, Protocols or Activity Rules * * * to the detriment of the efficiency of, and of consumers in, the

⁶ In the Initial Report, Staff also recommended that the Commission initiate FPA section 206 proceedings against Enron and three of its trading partners. See *El Paso Electric Co., et al.*, 100 FERC ¶ 61,188 (2002) (*El Paso Electric*); *Portland General Electric Co. and Enron Power Marketing, Inc.*, 100 FERC ¶ 61,186 (2002) (*Portland*); *Avista Corporation, et al.*, 100 FERC ¶ 61,187 (2002) (*Avista Corp.*). Those cases are in various stages of progress, with full or partial settlements having been proposed in some.

A settlement agreement between Trial Staff and Avista Corporation was filed on January 30, 2003 in Avista Corp. Comments in opposition to the agreement were filed on February 19, 2003, by the City of Tacoma, Washington and the California Attorney General. On May 15, 2003, Trial Staff amended its study in support of the settlement agreement and requested that the agreement be certified to the Commission. Additional comments were filed by Tacoma and California on May 27, 2003, with reply comments filed by Trial Staff and Avista Corporation. The settlement agreement is awaiting a determination by the Chief Judge on whether it should be certified. Moreover, on April 9, 2003, the Chief Judge issued an order in Avista Corp. in which he determined that the settlement or hearing in that proceeding will cover all issues raised by the Staff Final Report. Avista Corp. and Avista Energy Inc., Order of the Chief Judge Confirming Rulings Made at Prehearing Conference and Establishing Further Procedures, Docket No. EL02-115-000 (issued April 9, 2003). Therefore, this order does not address Avista Corp.

In the El Paso Electric proceeding, on May 28, 2003, the judge certified an uncontested settlement to the Commission with a recommendation that it be accepted. *El Paso Electric Company, et al.*, 103 FERC ¶ 63,036 (2003). Accordingly, this order does not address El Paso Electric.

Further, this order only addresses issues that are not being litigated in the on-going Portland proceeding.

⁷ Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000 (March 26, 2003) (Staff Final Report). The Staff Final Report is available on the Commission's Web site at <http://www.ferc.gov/western>.

⁸ See California Independent System Operator Corp., 82 FERC ¶ 61,327 at 62,291 (1998); California Power Exchange Corp., 82 FERC ¶ 61,328 at 62,296 (1998); cf. *AES Southland, Inc., et al.*, 94 FERC ¶ 61,248 at 61,873 & nn. 25-27, *order approving stipulation and consent agreement*, 95 FERC ¶ 61,167 (2001).

In relevant part, the terms of the two tariffs, the ISO's tariff and the PX's tariff, are substantially identical. Thus, for convenience, we often refer below only to the ISO's tariff.