

3. This order complements an order being issued concurrently, in which the Commission (1) determines that certain conduct by a number of market participants, during the period January 1, 2000 to June 20, 2001, constituted Gaming Practices that violated the ISO and PX tariffs, (2) directs those who engaged in those Gaming Practices, in a trial-type evidentiary proceeding to be held before an ALJ, to show cause why their behavior during the relevant period does not constitute gaming and/or anomalous market behavior as defined in the ISO and PX tariffs, (3) directs the ALJ to hear evidence and render findings and conclusions quantifying the full extent of their conduct, and (4) provides that the ALJ may recommend the monetary remedy of disgorgement of unjust profits and any other additional, appropriate non-monetary remedies.⁴ Gaming Practices for which the Gaming Practices Show Cause Order institutes a show cause proceeding involve: False Import; Congestion-Related Practices (Cutting Non-firm, Circular Scheduling, Scheduling Counterflows on Out-of-Service Lines, and Load Shift); Ancillary Services-Related Practices (Paper Trading and Double Selling); and Selling Non-Firm Energy as Firm.⁵ Whereas the Gaming Practices Show Cause Order concerns allegations that a number of market participants engaged in Gaming Practices, this order addresses allegations that certain market participants engaged in Gaming Practices in concert with other market participants.⁶

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, 2000.⁷

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.⁸ 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 strategies; 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 and recommendations not addressed in its Initial Report may be included in its Final Report.⁹ The Staff Final Report on

its fact-finding investigation was publicly released on March 26, 2003.¹⁰

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.¹¹ 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 ISO Markets."¹² The ISO tariff, through the MMIP, defines anomalous market behavior, in part, as "behavior that departs significantly from the normal behavior in competitive markets that do not require continuing regulation or as behavior leading to unusual or unexplained market outcomes."¹³ The Staff Final Report, among other things, cites to a study by the ISO,¹⁴ in which

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.

¹⁰ 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>>.

¹¹ 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.

¹² ISO's MMIP 2.1.3. As explained below, the MMIP is part of the ISO tariff.

¹³ MMIP 2.1.1.

¹⁴ See Department of Market Analysis, California ISO, Analysis of Trading and Scheduling Strategies

⁴ American Electric Power Service Corp., 103 FERC ¶ 61,345 (2003) (Gaming Practices Show Cause Order).

⁵ The Commission's analysis regarding what constitutes Gaming Practices is set forth in the Gaming Practices Show Cause Order and incorporated by reference here. See Gaming Practices Show Cause Order, 103 FERC ¶ 61,345 at P 35-67 (Section III-D, Gaming Practices and California Practices).

⁶ The potential remedies in this case, as with the potential remedies in the Gaming Practices Show Cause Order (*see id.* at P 2 & n.3), 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.

⁷ 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* San Diego Gas & Electric Co., *et al.*, 97 FERC ¶ 61,275 (2001) (December 19, 2001 Order).

⁸ 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.

⁹ 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