

the ISO identifies activities that purport to fall within the definitions of gaming and/or anomalous market behavior identified in the ISO tariff, and which occurred during the period January 1, 2000 to June 20, 2001.

9. In addition, on November 20, 2002, the Commission issued an order that allowed parties in Docket Nos. EL00–95–000, EL00–95–048, EL00–98–000 and EL00–98–042 to conduct additional discovery into market manipulation by various sellers during the western power crisis of 2000 and 2001, and specified procedures for adding this information.<sup>15</sup> The Discovery Order allowed the parties to conduct discovery, review the material and submit directly to the Commission additional evidence and proposed new and/or modified findings of fact based upon proffered evidence that is either indicative or counter-indicative of market manipulation, no later than February 28, 2003.<sup>16</sup> On February 10, 2003, the Commission issued an order affording parties an opportunity to respond to submissions made by adverse parties.<sup>17</sup> The Rehearing Order allowed parties to file reply comments directly with the Commission by March 17, 2003. The Commission in a later order extended the February 28, 2003 deadline to March 3, 2003, and allowed the reply comments to be filed by March

Described in Enron Memos, (October 4, 2002), publicly released on January 6, 2003, available at <<http://www.caiso.com/docs/2003/03/26/2003032613435514289.pdf>> (last viewed June 9, 2003); Addendum to October 4, 2002 Report on Analysis of Trading and Scheduling Strategies Described in Enron Memos: Revised Results for Analysis of Potential Circular Schedules (“Death Star” Scheduling Strategy), (January 17, 2003), available at <<http://www.caiso.com/docs/2003/03/26/2003032613593115924.pdf>> (last viewed June 9, 2003); and Supplemental Analysis of Trading and Scheduling Strategies Described in Enron Memos, (June 2003), available at <<http://www.caiso.com/docs/2003/06/18/2003061806053424839.pdf>> (last viewed June 18, 2003), (collectively, ISO Report). The ISO released its June 2003 Supplemental Analysis after the issuance of the Staff Final Report. The Commission has reviewed the ISO’s Supplemental Analysis.

<sup>15</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv., et al.*, 101 FERC ¶ 61,186 (2002) (Discovery Order).

<sup>16</sup> *Id.* at P 27.

<sup>17</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv., et al.*, 102 FERC ¶ 61,164 (2003), *reh’g pending* (Rehearing Order).

On the same day, the Commission expanded the coverage of these responses to include the proceeding in Docket No. EL01–10–007. See *Puget Sound Energy, Inc., et al. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement*; 102 FERC ¶ 61,163 (2003).

20, 2003.<sup>18</sup> These filings are referred to as the “100 Days Evidence.”

10. On March 5, 2003, the Commission issued a notice providing that the Commission intended to release: (1) All documents submitted in Docket No. PA02–2–000, except documents obtained from other Federal agencies in accord with the Federal Records Act, 44 U.S.C. § 3510(b), and (2) all documents submitted in response to the Discovery Order and Rehearing Order.<sup>19</sup> On March 21, 2003, the Commission issued an order directing the release of information no later than March 26, 2003 in accordance with the above notice.<sup>20</sup>

11. Finally, by order issued on April 2, 2003,<sup>21</sup> the Commission provided for the submission of briefs on Commission Staff’s interpretation of the MMIP provisions concerning gaming and anomalous market behavior as prohibiting certain practices by market participants. Thirty-three parties filed in response. Their comments are discussed below in the section on the MMIP provisions.

### III. Discussion

#### A. The Commission’s Authority in This Case

1. Commission Authority with Respect to the Period Prior to October 2, 2000

12. In our July 25, 2001 order<sup>22</sup> and the November 1, 2000 Order in the California Refund Proceeding, we established a refund effective date (October 2, 2000) concerning the market manipulation allegations at issue in that proceeding, based on the evidence available at that time and the refund limitations set forth in section 206 of the Federal Power Act (FPA).<sup>23</sup> As such, we did not include within the scope of that proceeding, conduct relating to a portion of the period at issue here, *i.e.*, for the period from January 1, 2000 to October 2, 2000. In doing so, however, we noted that the Commission could take action to address earlier periods if, during those earlier periods, a seller did not charge the filed rate or violated

<sup>18</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv., et al.*, 102 FERC ¶ 61,194 (2003) (February 24, 2003 Order).

<sup>19</sup> Notice of Intent to Release Information and Opportunity to Comment, 68 Fed. Reg. 11,821 (March 12, 2003).

<sup>20</sup> Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, *et al.*, 102 FERC ¶ 61,311 (2003).

<sup>21</sup> Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 103 FERC ¶ 61,016 (2003).

<sup>22</sup> *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., et al.*, 96 FERC ¶ 61,120 at 61,506–11 (July 25, 2001 Order), *order on clarification and reh’g*, 97 FERC ¶ 61,275 (2001).

<sup>23</sup> 16 U.S.C. § 824e (2000).

tariffs.<sup>24</sup> Thus, with respect to the period prior to the October 2, 2000 refund effective date, the Commission can order disgorgement of monies above the post October 2, 2000 refunds ordered in the California Refund Proceeding, if it finds violations of the ISO and PX tariffs and finds that a monetary remedy is appropriate for such violations. Further, while refund protection has been in effect for sales in the ISO and PX short-term energy markets since October 2, 2000, the Commission can additionally order additional disgorgement of unjust profits for tariff violations that occurred after October 2, 2000 (*i.e.*, to June 20, 2001).<sup>25</sup>

#### 2. Commission Authority With Respect to Governmental Entities

13. We note that several of the Partnership Entities are governmental entities, subject to the jurisdictional exemption set forth in section 201(f) of the FPA.<sup>26</sup> In the July 25, 2001 Order, as reiterated in the December 19, 2001 Order, the Commission found that refund liability should apply to energy sold in the ISO and PX short-term energy markets, including that sold by governmental entities. Here, as well, we find that the potential remedies specified in this order, including the disgorgement of unjust profits for the pre-October 2, 2000 period, should apply to sales made by governmental entities as well as to those sales by the other Partnership Entities.

14. In the July 25, 2001 Order, the Commission explained that its jurisdiction attached to “the subject matter of the affected transactions: wholesale sales of electric energy in interstate commerce through a Commission-regulated centralized clearinghouse that set a market clearing price for all wholesale seller participants, including [governmental entities]” and thus that jurisdiction may properly be asserted over sales by governmental entities.<sup>27</sup> The Commission continued:

<sup>24</sup> 96 FERC at 61,507–08, *citing* Washington Water Power Co., 83 FERC ¶ 61,282 (1998). See also Jack J. Gynsburg v. Rocky Mountain Natural Gas Co., 90 FERC ¶ 61,247 at 61,825–26, *reh’g denied*, 93 FERC ¶ 61,180 at 61,587 (2000); Public Service Co. of Colorado, 85 FERC ¶ 61,146 at 61,588 (1998).

<sup>25</sup> See December 19, 2001 Order, 97 FERC at 61,239 (the Commission can order equitable remedies, such as disgorgement, for unjust enrichment); *accord* AES Southland, Inc. and Williams Energy Marketing & Trading Corp., 95 FERC ¶ 61,167 at 61,538 (2001); *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313 (5th Cir. 1993).

<sup>26</sup> See 16 U.S.C. § 824(f) (2000).

<sup>27</sup> July 25, 2001 Order, 96 FERC at 61,512; *accord id.* at 61,511–13.