

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
104 FERC ¶ 61,115

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

El Paso Electric Company, Enron Power
Marketing, Inc., Enron Capital and Trade

Docket No. EL02-113-000
and EL02-113-002

Resources Corporation

ORDER APPROVING CONTESTED SETTLEMENT

(Issued July 23, 2003)

1. In this order, we approve the contested settlement in this docket between El Paso Electric Company (El Paso Electric), the California Attorney General (Attorney General), the California Electricity Oversight Board (California Board) (collectively, the California State Parties) and the Commission Trial Staff (Trial Staff). The so-called Combined Offer represents a reasonable resolution of the complex matters at issue in this proceeding, and is in the public interest. This order also resolves the contested issue of whether certain parties were improperly excluded from the distribution of the \$15.5 million El Paso Electric has agreed to refund. This order benefits customers because it provides for refunds, and ensures the distribution of the refunds to California ratepayers who on the record before us are entitled to the refunds.

Background

2. On August 13, 2002, the Commission issued an order initiating the instant proceeding.¹ In its order, the Commission stated that its investigatory staff had uncovered evidence warranting investigation of El Paso Electric, Enron Power Marketing, Inc. (Enron Power), and Enron Capital and Trade Resources Corporation (Enron Capital) (collectively, Enron).² It appeared that El Paso Electric and Enron had engaged in actions adversely affecting prices and markets in the West; violated open

¹ El Paso Electric Company, *et al.*, 100 FERC ¶ 61,188 (2002).

² *Id.*

access transmission requirements; failed to file jurisdictional rate schedules or contracts; disposed of (through ceding control) jurisdictional assets without prior Commission approval; and failed to timely notify the Commission of material changes to the circumstances pursuant to which they were granted market-based rate authority. The Commission therefore initiated an investigation and hearing under Federal Power Act Section 206, 16 U.S.C. § 824e (2000).³

3. Subsequently, El Paso Electric and Trial Staff engaged in settlement negotiations, and, on December 5, 2002, as part of Trial Staff's Direct Testimony, Trial Staff filed a stipulation with El Paso Electric, titled "Stipulated Facts and Remedies Between Trial Staff and El Paso Electric Company" (Stipulation).⁴

4. El Paso Electric, the Attorney General, and the California Board entered into settlement negotiations and submitted a settlement agreement, titled "Settlement Between El Paso Electric Company and the California State Parties in Docket No. EL02-113" (Settlement). This was filed on March 4, 2003, as part of El Paso Electric's rebuttal case.⁵

5. On April 24, 2003, Trial Staff submitted comments in support of the so-called Combined Offer.⁶ On April 24, 2003, Tacoma and Snohomish submitted comments opposing the Combined Offer. El Paso Electric filed reply comments on May 5, 2003, as did Trial Staff, supporting the Combined Offer. The Attorney General and the California Board also filed reply comments on May 5, 2003, supporting the Combined Offer.

³ The following parties were allowed to intervene: the City of Tacoma, Washington (Tacoma); the California Board; the Attorney General; the California Independent System Operator Corporation (CAISO); Pacific Gas and Electric Company; Dynegy Power Marketing, Inc.; Californians for Renewable Energy, Inc.; Pioneer America LLC; the City of Burbank, California (Burbank); and Public Utility District No. 1 of Snohomish County, Washington (Snohomish).

⁴ Exhibit S-9.

⁵ Exhibit EPE-24.

⁶ The Stipulation was endorsed by the parties to be Exhibit A to the so-called Combined Offer, and the subsequent Settlement was endorsed by the parties to be Exhibit B to the so-called Combined Offer.

6. On May 28, 2003, the Presiding Judge certified the Combined Offer to the Commission as an uncontested settlement, and recommended its approval.⁷

Combined Offer of Settlement

7. The Combined Offer provides two main remedies: El Paso Electric agrees both to pay \$15.5 million in refunds and to a suspension of its market-based authority for over two years (December 1, 2002 through December 31, 2004). Additionally, El Paso Electric agrees to continue to cooperate in investigations of the California energy markets.

8. Regarding the refund, it is payable to the California Department of Water Resources' Electric Power Fund.⁸ The California Department of Water Resources (CDWR) administers this fund, and the refund is to be treated as compensation to CDWR⁹ to ensure that California ratepayers directly benefit from the Settlement.

9. The Settlement provides that the California State Parties release El Paso Electric, in this docket and in any state or federal court proceeding which may be filed, as well as before any state or federal agency, from all claims against El Paso Electric based on the issues and allegations included in Docket No. EL02-113.¹⁰ Also, El Paso Electric agrees to relinquish any claim it may have for money owed to it by the CAISO, the California

⁷ See *El Paso Electric Company, et al.*, 103 FERC ¶ 63,036 (2003) (Certification). An evidentiary hearing dealing with Enron was held before the Presiding Judge on April 1 and 2, 2003. A supplementary hearing for additional cross examination was scheduled for May 7, 2003. At this hearing it was deemed that further cross examination by Enron had been waived. On May 6, 2003, El Paso Electric filed a motion to sever El Paso Electric from this proceeding. This motion was granted.

⁸ Settlement at P 1.

⁹ This refund is considered by the parties to be compensation for paying above-market prices for electricity.

¹⁰ Settlement at P 2.

Power Exchange, or the California State Parties for power sale transactions on or prior to June 20, 2001.¹¹

Initial Comments on the Combined Offer

10. Tacoma along with Snohomish (hereinafter jointly referred to as Tacoma, except when expressly noted otherwise) filed comments supporting the propriety and amount of the refunds. However, Tacoma objects to the failure to provide for refunds to wholesale purchasers of electricity outside of California. According to Tacoma, the refunds must return monies to western power market participants who were financially and economically harmed by price manipulation in those markets in the 2000-2001 period, including those outside California.¹²

11. Since the Western Electric Coordinating Council operates as a single market, Tacoma asserts, and market prices in one region are reflected in another, the consequences of El Paso Electric's behavior were felt beyond California's borders, even if parties outside California did not purchase electricity from El Paso Electric.¹³ Furthermore, Tacoma alleges, as El Paso Electric and Enron can be jointly and severally liable for their behavior, it is inappropriate to limit the refunds to California, especially since parties such as Tacoma and Snohomish did purchase electricity from Enron.¹⁴

¹¹ Settlement at P 2. Thus, the Combined Offer is intended to resolve all issues set for hearing in this docket regarding El Paso Electric's liability. The Settlement provides additional releases relating to any claims against El Paso Electric for the alleged existence or exercise, prior to the completion of the Settlement, of market power, unfair business practices, or excessive or unlawful charges for electric power, including claims to receive any refunds of any kind from El Paso Electric in Docket No. EL00-95, et al. Settlement at P 3. However, the Settlement provides that the Attorney General does not waive any criminal claims or unknown claims of willful fraud. Settlement at P 8. El Paso Electric further agrees to cooperate with the Attorney General in its civil investigation of the California electric power and gas markets, and to cooperate with the discovery proceeding in Docket No. EL00-95, et al. Settlement at P 4-5.

¹² Comments of Tacoma and Snohomish at 3-4.

¹³ Id. at 5.

¹⁴ Id. at 6.

12. Tacoma also contends that it was denied the opportunity to present direct evidence on the allocation of the refunds to California because that portion of the Combined Offer came in with rebuttal testimony.¹⁵

13. Trial Staff states in its initial comments that the Combined Offer is reasonable and in the public interest. El Paso Electric and Trial Staff generally agree on the facts underlying the relationship between El Paso Electric and Enron from 1997 to 2001, Trial Staff argues. And the amount to be refunded, \$15.5 million, is the appropriate sum to be paid by El Paso Electric, Trial Staff asserts. This is due to the fact that El Paso Electric really “stood in the periphery of the misconduct that led to excess charges to power consumers in California”;¹⁶ there is no evidence in this proceeding demonstrating that El Paso Electric initiated any of the various “Fat Boy” and “Ricochet” Trading Strategies that Enron employed to manipulate the markets in California, and El Paso Electric has claimed it did not know whether Enron may have submitted false information to the California Power Exchange or CAISO regarding transactions involving El Paso Electric.¹⁷

14. Not only has El Paso Electric agreed to pay \$15.5 million, but, according to Trial Staff, it has agreed that it will not make any sales under its market-based rate authority from December 1, 2002, through December 31, 2004. In addition, El Paso Electric has agreed to cooperate in all additional investigations concerning Enron.

15. Trial Staff also argues that the refunds should go to California customers through the CDWR's Electric Power Fund.¹⁸ The evidence in the case supports this, Trial Staff avers, citing testimony submitted by El Paso Electric's witness Bassham; this witness testified that El Paso Electric's wholesale trading activity primarily revolved around California, since a substantial amount of El Paso Electric's available capacity was at Palo Verde, and El Paso Electric actively participated in the California Power Exchange auction market, a substantial majority of the power El Paso Electric sold at Palo Verde to third parties was sold into California, and the Enron trading strategies “Fat Boy” and

¹⁵ Id. at 7-8.

¹⁶ Trial Staff's Comments at 19.

¹⁷ Trial Staff's Comments at 20, Appendices A-G.

¹⁸ Trial Staff's Comments at 21-24.

“Ricochet” were focused on California.¹⁹ A Trial Staff witness, Deters, agreed with Bassham. Deters testified that the evidence shows that California has the strongest claim for receipt of refunds.²⁰ Additionally, California State Parties' witness Merola stated that the specific manipulative behaviors engaged in by Enron with respect to El Paso Electric assets and products were directed at California.²¹ Merola also testified that there is no evidence indicating that entities outside of California were harmed as a result of the relationship between El Paso Electric and Enron.

16. According to Trial Staff, claims that all western market participants harmed by price manipulation should receive a portion of the refunds at issue here are without merit.²² Tacoma, Trial Staff explains, did not purchase electricity from El Paso Electric nor did El Paso Electric cause power to be delivered to the Pacific Northwest in the 2000-2001 period.²³ Trial Staff maintains there is no sound basis to devise a mechanism to provide for sharing of these refunds by customers outside California, based on the evidence in this record.²⁴

17. Trial Staff points out that the refunds at issue here are being paid by El Paso Electric and not Enron. Trial Staff adds that Tacoma did not avail itself of the opportunities it had to develop a causal nexus and failed to establish any nexus between El Paso Electric's actions and the prices Tacoma paid for electricity. Therefore, Trial Staff avers, in the absence of a nexus, it is appropriate for these refunds to go to the California customers. Furthermore, Trial Staff maintains that these refunds should flow through the CDWR's Electric Power Fund which will benefit California ratepayers.²⁵

¹⁹ Exhibit EPE-18 at 16-17.

²⁰ Exhibit S-36 at 7.

²¹ Exhibit Cal-5 at 11.

²² Trial Staff's Comments at 22.

²³ Id.

²⁴ Id.

²⁵ Trial Staff's Comments at 23.

Reply Comments

18. Both El Paso Electric and Trial Staff filed Reply Comments. Tacoma's refund claims, El Paso Electric asserts, are baseless.²⁶ There is no evidence, El Paso Electric maintains, that Tacoma was injured by El Paso Electric.²⁷ El Paso Electric points out that Tacoma admits that it did not purchase electricity from El Paso Electric and notes that it did not provide any evidence quantifying the harm alleged to have been suffered.²⁸ Nor, El Paso Electric states, does Tacoma provide any refund methodology.²⁹ Additionally, El Paso Electric argues that Tacoma failed to provide any evidence demonstrating that any El Paso Electric transactions affected the price of electricity in western energy markets.³⁰ Finally, El Paso Electric argues that Tacoma had every opportunity to develop evidence during the hearing, substantiating the claim to refunds, but failed to do so.³¹

19. Trial Staff's reply comments echo the arguments made by El Paso Electric. Tacoma individually, Trial Staff explains, presented only a claimed estimate of alleged overpayments and one not offered to support a specific claim for refunds,³² while Snohomish failed to present any evidence of overpayments. Neither party contended they purchased power from El Paso Electric or that El Paso Electric directly contributed to their alleged overpayments. Failing to demonstrate any causal nexus between El Paso Electric and any alleged harm, Trial Staff maintains, deprives Tacoma of any portion of the refunds and the refunds should flow to California. Finally, Trial Staff maintains

²⁶ El Paso Electric's Reply Comments at 5.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id. at 7.

³¹ Id. at 11. El Paso Electric notes that Tacoma and Snohomish attempt to introduce and rely upon evidence excluded by the Presiding Judge at hearing, since it was evidence deemed not relevant to this proceeding. Id. at 8. The evidence consisted of testimony and exhibits from Puget Sound, Docket No. EL01-10-005.

³² Trial Staff's Reply Comments at 3-4.

Tacoma had ample opportunity to present evidence and even cross-examined witnesses in this case.

20. Reply comments were also filed by the Attorney General and the California Board. These parties argue that Tacoma cannot point to any evidence connecting El Paso Electric sales and activities (which were mainly focused on the California markets) with prices paid by Tacoma. Moreover, Tacoma and Snohomish both concede they did not purchase from El Paso Electric and did not purchase in California markets. Thus, even a market-wide remedy would not result in refunds by El Paso Electric to Tacoma or Snohomish.

Discussion

21. The Commission finds that the Combined Offer is reasonable and in the public interest.

22. All of the participants agree with the propriety and amounts of the refunds, but Tacoma contends that it is improperly not receiving any share of the \$15.5 million that El Paso Electric has agreed to refund. Concerning this matter, Tacoma's arguments are without merit.

23. The record developed in this case supports approval of the Settlement as proposed, with El Paso Electric agreeing to refund \$15.5 million and foregoing market-based sales for over two years.

24. Moreover, refunds in this case should go to the CDWR for the benefit of California customers. El Paso Electric's wholesale trading activity primarily revolved around California, since a substantial amount of El Paso Electric's available capacity was at Palo Verde. Additionally, the Enron trading strategies involved in this proceeding were targeted at California. Finally, the record shows that neither Tacoma nor Snohomish purchased any power from El Paso Electric.

25. Tacoma and Snohomish failed to establish any causal nexus with El Paso Electric. Despite numerous opportunities before and during the hearing, Tacoma and Snohomish failed to introduce any evidence supporting their allegations that they were harmed by El Paso Electric. As Trial Staff and El Paso Electric point out, there is no demonstrated connection between El Paso Electric and Tacoma or Snohomish. The benefits to the directly-affected settling parties, *i.e.*, to California, outweigh Tacoma's and Snohomish's attenuated claims to a portion of the refunds. Suggesting that any refunds agreed to here

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must be spread among all western power market participants allegedly financially injured by the activities at issue here is unsupported by the evidence developed in this case.

26. Consequently, for the foregoing reasons, Tacoma's and Snohomish's claims to a portion of the refunds are without merit and will be denied.³³

The Commission orders:

The Combined Offer is hereby approved, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

³³ Cf. Trailblazer Pipeline Company, 85 FERC ¶ 61,345 (1998), order on reh'g and contested settlement, 87 FERC ¶ 61,110 at 61,441 (1999).