

## DEPARTMENT OF ENERGY

Federal Energy Regulatory  
Commission

[Docket No. EL03-204-000]

AES Somerset, LLC, Complainant, v.  
Niagara Mohawk Power Corporation,  
Respondent; Notice of Complaint

June 26, 2003.

Take notice that on June 25, 2003, AES Somerset, LLC (Somerset) filed a complaint against Niagara Mohawk Power Corporation (Niagara Mohawk), requesting that the Federal Energy Regulatory Commission (Commission) issue an order prohibiting Niagara Mohawk from requiring Somerset's generating facility to pay retail tariff charges for self-supplied station power, including retail charges for transmission and distribution service and stranded cost recovery, and barring Niagara Mohawk from taking steps or actions to disconnect the generating facility from the New York State bulk power transmission system.

Any person desiring to be heard or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. The answer to the complaint and all comments, interventions or protests must be filed on or before the comment date below. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at <http://www.ferc.gov> using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or toll-free at (866)208-3676, or for TTY, contact (202)502-8659. The answer to the complaint, comments, protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Comment Date: July 15, 2003.

Magalie R. Salas,  
Secretary.

[FR Doc. 03-16745 Filed 7-2-03; 8:45 am]

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## DEPARTMENT OF ENERGY

Federal Energy Regulatory  
Commission

[Docket Nos. EI03-127-000 et al.]

American Electric Power Service  
Corporation et al.; Order To Show  
Cause Concerning Gaming and/or  
Anomalous Market Behavior

Issued June 25, 2003.

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

In the matter of: EL03-137-000, EL03-138-000, EL03-139-000, EL03-140-000, EL03-141-000, EL03-142-000, EL03-143-000, EL03-144-000, EL03-145-000, EL03-146-000, EL03-147-000, EL03-148-000, EL03-149-000, EL03-150-000, EL03-151-000, EL03-152-000, EL03-153-000, EL03-154-000, EL03-155-000, EL03-156-000, EL03-157-000, EL03-158-000, EL03-159-000, EL03-160-000, EL03-161-000, EL03-162-000, EL03-163-000, EL03-164-000, EL03-165-000, EL03-166-000, EL03-167-000, EL03-168-000, EL03-169-000, EL03-170-000, EL03-171-000, EL03-172-000, EL03-173-000, EL03-174-000, EL03-175-000, EL03-176-000, EL03-177-000, EL03-178-000, EL03-179-000: American Electric Power Service Corporation, Aquila, Inc., Arizona Public Service Company, Automated Power Exchange, Inc., Bonneville Power Administration, California Department of Water Resources, California Power Exchange, Cargill-Alliant, LLC, City of Anaheim, California, City of Azusa, California, City of Glendale, California, City of Pasadena, California, City of Redding, California, City of Riverside, California, Coral power, LLC, Duke Energy Trading and Marketing Company, Dynegy Power Marketing Inc., Dynegy Power Corp., El Segundo Power, LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC, Enron Power Marketing, Inc. and Enron Energy Services Inc., F P & L Energy, Idaho Power Company, Los Angeles Department of Water and Power, Mirant Americans Energy marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC, Modesto Irrigation District, Morgan Stanley Capital Group, Northern California Power Agency, Pacific Gas

and Electric Company, PacifiCorp, PGE Energy Services, Portland General Electric Company, Powerex Corporation, (f/k/a British Columbia Power Exchange Corp.), Public Service Company, of Colorado, Public Service Company of New Mexico, Puget Sound Energy, Inc., Reliant Resources, Inc., Reliant Energy Power Generation, and Reliant Energy Services, Inc., Salt River Project Agricultural Improvement and Power District, San Diego Gas & Electric Company, Sempra Energy Trading Corporation, Sierra Pacific Power Company, Southern California Edison Company, TransAlta Energy marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc., Tucson Electric Power Company, Western Area Power Administration, Williams Energy Services Corporation.

## I. Introduction

1. As discussed below, the entities listed in the caption (Identified Entities) appear to have participated in activities (Gaming Practices), that constitute gaming and/or anomalous market behavior 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, that warrant a monetary remedy of disgorgement of unjust profits and that may warrant other additional, appropriate non-monetary remedies. These determinations are based on certain of the tariffs' provisions, an ISO study, a report by Commission Staff, and evidence and comments submitted by market participants.

2. As the Identified Entities appear to have participated in activities that constitute gaming and/or anomalous market behavior in violation of the ISO and PX tariffs, this order directs the Identified Entities, in a trial-type evidentiary hearing to be held before an administrative law judge (ALJ), to show cause why their behavior, as set forth *infra*, during the period January 1, 2000 to June 20, 2001<sup>1</sup> does not constitute gaming and/or anomalous market behavior as defined in the ISO and PX

<sup>1</sup> June 20, 2001 has been selected as the end date of the relevant period in this proceeding when a prospective mitigation and market monitoring plan took effect. See *infra* note 56; see San Diego Gas & Electric Co., et al., 95 FERC ¶ 61,115 (April 26, 2001 Order), order on reh'g, 95 FERC ¶ 61,418 (2001) (June 19, 2001 Order) (In the April 26, 2001 Order, the Commission issued a prospective mitigation and market monitoring plan for wholesale sales through the organized real-time markets operated by the ISO; the Commission acted on requests for rehearing and clarification of the April 26, 2001 Order on June 19, 2001, modifying and expanding the mitigation plan, effective June 20, 2001.)

tariffs.<sup>2</sup> 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.<sup>3</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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

<sup>4</sup> 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).

<sup>5</sup> 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.<sup>6</sup> The Staff Final Report on its fact-finding investigation was publicly released on March 26, 2003.<sup>7</sup>

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.<sup>8</sup> 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

<sup>6</sup> 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.

<sup>7</sup> 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>.

<sup>8</sup> 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.

ISO Markets.”<sup>9</sup> 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.”<sup>10</sup> The Staff Final Report, among other things, cites to a study by the ISO,<sup>11</sup> in which 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 adducing this information.<sup>12</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>13</sup> On February 10, 2003, the Commission issued an order affording parties an opportunity to respond to submissions made by adverse parties.<sup>14</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 20, 2003.<sup>15</sup> These filings are referred to as the “100 Days Evidence.”<sup>16</sup>

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>17</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>18</sup>

11. Finally, by order issued on April 2, 2003,<sup>19</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.<sup>20</sup> 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>21</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>22</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 tariffs.<sup>23</sup> Thus, for 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 we find violations of the ISO and PX tariffs. 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 disgorgement of unjust profits for tariff violations that occurred after October 2, 2000 (*i.e.*, to June 20, 2001).<sup>24</sup>

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

13. We note that several of the Identified Entities are governmental entities, subject to the jurisdictional exemption set forth in section 201(f) of the FPA.<sup>25</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 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 Identified 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

<sup>9</sup> ISO’s MMIP 2.1.3. As explained below, the MMIP is part of the ISO tariff.

<sup>10</sup> MMIP 2.1.1.

<sup>11</sup> See Department of Market Analysis, California ISO, Analysis of Trading and Scheduling Strategies 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>12</sup> *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv., et al.*, 101 FERC ¶ 61,186 (2002) (Discovery Order).

<sup>13</sup> *Id.* at P 27.

<sup>14</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).

<sup>15</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>16</sup> Attachment E to this order lists the parties that submitted 100 Days Evidence. Much of the 100 Days Evidence consisted of sworn testimony and affidavits.

<sup>17</sup> Notice of Intent to Release Information and Opportunity to Comment, 68 Fed. Reg. 11,821 (March 12, 2003).

<sup>18</sup> Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, *et al.*, 102 FERC ¶ 61,311 (2003).

<sup>19</sup> Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 103 FERC ¶ 61,016 (2003).

<sup>20</sup> These commenters are listed in Attachment F.

<sup>21</sup> *San Diego Gas & Elec. 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>22</sup> 16 U.S.C. § 824e (2000).

<sup>23</sup> 96 FERC at 61,507–08, citing *Washington Water Power Co.*, 83 FERC ¶ 61,282 (1998). See also *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>24</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>25</sup> See 16 U.S.C. 824(f) (2000).

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>26</sup> The Commission continued:

Here, the central transactions, wholesale sales of energy in interstate commerce, were governed by FERC-approved rules and a FERC-jurisdictional ISO and PX \* \* \* [and] thus fell within FERC's jurisdiction regardless of the jurisdictional nature of the sellers or buyers. Further, the centralized wholesale spot electricity markets operated by the California ISO and PX were established (and have been modified) subject to FERC review and approval. Because the market did not exist prior to FERC authorization, all those who participated in the market had to recognize the controlling weight of FERC authority. Moreover, it is fair that all those who benefitted from this market also bear responsibility for remedying any potential unlawful transactions that might have occurred in the market.

\* \* \* \* \*

Consequently, if the price for a specific sale is found to be unjust and unreasonable, then all sellers who obtained that price received an unjust and unreasonable rate. To the extent the Commission determines refunds are an appropriate remedy for that sale, consumers can only be made whole by refunds from all sellers who received the excessive price. As [governmental entity] sellers of energy and ancillary services accounted for up to 30 percent of all sales in the California centralized ISO and PX spot markets, excluding them from a potential refund remedy could have a serious detrimental effect on consumers.<sup>27</sup>

15. This rationale applies equally in the context of violations of MMIP provisions that prohibit gaming and/or anomalous market behavior, as such provisions apply to all transactions in the California market.

#### *B. The MMIP's Provisions Concerning Gaming and/or Anomalous Market Behavior*

##### **1. Provisions Cited in the Staff Final Report**

16. Concerning the Commission's remedial authority with respect to the Identified Entities' alleged practices, the

Staff Final Report notes that the MMIP is one of several protocols that the Commission required the ISO and PX to include as part of their filed rate schedules.<sup>28</sup> The Staff Final Report also cites the underlying purposes of the MMIP,<sup>29</sup> discussed in MMIP 1.1 (Objectives) which provides in pertinent part:

This Protocol sets forth the workplan and, where applicable, the rules under which the ISO will monitor the ISO Markets to identify abuses of market power, to ensure to the extent possible the efficient working of the ISO Markets immediately upon commencement of their operation, and to provide for their protection from abuses of market power in both the short term and the long term, and from other abuses that have the potential to undermine their effective functioning or overall efficiency in accordance with section 16.3 of the ISO Tariff.<sup>30</sup>

17. The Staff Final Report also cites part 2 of the MMIP which specifies what are termed "Practices Subject to Scrutiny." Among those practices are two that the Staff Final Report identifies as being of particular concern to the Commission; the first is "gaming," and the second is "anomalous market behavior."<sup>31</sup> Gaming is defined at section 2.1.3 of the ISO's MMIP as follows:

[T]aking unfair advantage of the rules and procedures set forth in the PX or ISO Tariffs, Protocols or Activity Rules, or of transmission constraints in periods in which exist substantial Congestion, to the detriment of the efficiency of, and of consumers in, the ISO Markets. "Gaming" may also include taking undue advantage of other conditions that may affect the availability of transmission and generation capacity, such as loop flow, facility outages, level of hydropower output or seasonal limits on energy imports from out-of-state, or actions or behaviors that may otherwise render the system and the ISO Markets vulnerable to price manipulation to the detriment of their efficiency.<sup>32</sup>

18. Anomalous market behavior is defined at Section 2.1.1 of the ISO's MMIP:

"Anomalous market behavior" \* \* \* is \* \* \* 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. Evidence of such behavior may be derived from a number of circumstances, including: withholding of Generation capacity under circumstances in which it would normally be offered in a competitive market; unexplained or unusual redeclarations of availability by Generators; unusual trades or transactions; pricing and bidding patterns that are inconsistent with prevailing supply and demand conditions, e.g., prices and bids that appear consistently excessive for or otherwise inconsistent with such conditions; and unusual activity or circumstances relating to imports from or exports to other markets or exchanges.<sup>33</sup>

##### **2. The Staff Final Report's Interpretation of the MMIP<sup>34</sup>**

19. In brief, the Staff Final Report interprets the MMIP as "rules of the road" which the Commission may enforce, and as barring the kinds of practices at issue here. The Staff Final Report explains that the MMIP enumerates objectionable practices, the MMIP authorizes the ISO to impose "sanctions and penalties" or to refer matters to the Commission for appropriate sanctions or penalties,<sup>35</sup> and the MMIP was part of the ISO and PX tariffs on file with the Commission during the relevant period.<sup>36</sup> Accordingly, entities that transact through the ISO or PX and engage in such enumerated practices are in violation of filed tariffs. Further, the Staff Final Report concludes that various practices were violations of the MMIP and thus violations of the ISO's and PX's filed tariffs.

##### **3. Comments Regarding the Staff Final Report's Interpretation of the MMIP**

###### **a. Supporting Comments**

20. Several commenters supported the Commission Staff's interpretation of the

<sup>33</sup> MMIP 2.1.1.5 further provides that: The Market Surveillance Unit shall evaluate, on an ongoing basis, whether the continued or persistent presence of such circumstances indicates the presence of behavior that is designed to or has the potential to distort the operation and efficient functioning of a competitive market, e.g., the strategic withholding and redeclaring of capacity, and whether it indicates the presence and exercise of market power or of other unacceptable practices.

<sup>34</sup> See Staff Final Report, ch. VI at 8–10.

<sup>35</sup> MMIP 7.3.

<sup>36</sup> As the Staff Final Report notes, and as discussed in more detail below, the MMIP has been part of the ISO and PX tariffs on file with the Commission since 1998, which encompasses the relevant period of January 1, 2000 through June 20, 2001.

<sup>26</sup> July 25, 2001 Order, 96 FERC at 61,512; *accord id.* at 61,511–13.

<sup>27</sup> *Id.* at 61,513 (footnote omitted); *accord id.* at 61,511–13. On rehearing, the Commission reaffirmed its jurisdiction over these transactions. December 19, 2001 Order, 97 FERC at 62,180–87.

<sup>28</sup> As further explained below, the MMIP has been part of the ISO's and PX filed tariffs since 1998.

<sup>29</sup> Staff Final Report, ch. VI at 6–7.

<sup>30</sup> MMIP 1.1.

<sup>31</sup> Staff Final Report, ch. VI at 7–10.

<sup>32</sup> MMIP 2.1.3.

MMIP.<sup>37</sup> They argue that: (1) The MMIP is on file with the Commission as part of a filed tariff, and has been for some time, and thus can be enforced by the Commission; (2) the MMIP applies to all market participants, and is expressly intended to identify abuses and to provide for protection from such abuses; (3) the MMIP provides that the practices that are expressly subject to scrutiny are gaming and anomalous market behavior, and each is defined in some detail; (4) while the MMIP does not expressly prohibit such Gaming Practices as “ricochet” or “get shorty,” such a standard would require a level of detail that would be impossible to achieve, and it would require anticipating all of the myriad ways that could be dreamed up to “game” the markets, and to spell them all out in the MMIP; (5) it is hard to conceive that market participants as sophisticated as those here did not realize that the kind of trading practices at issue here were inappropriate; and (6) as part of a filed tariff, the MMIP ultimately is for the Commission to interpret and enforce, and the MMIP itself recognizes that the Commission is the ultimate enforcement authority.

#### b. Opposing Comments

21. Several parties filed comments opposing Commission Staff’s interpretation of the MMIP.<sup>38</sup> They argue that: (1) The MMIP was intended to provide direction to the ISO and not be a standard by which the Commission prosecuted market participants’ conduct; (2) the MMIP does not expressly bar any trading practices; and (3) the MMIP does not identify with precision the particular strategies that are subject to scrutiny, and thus, it is too vague to serve as a standard by which to judge market participants’ conduct. They argue that the Commission cannot hold market participants responsible in these circumstances, when they have not had fair notice that the trading practices at issue here are prohibited. Further, they contend that there is extrinsic evidence indicating that market participants, particularly including the ISO itself, did not view the MMIP as a bar to the kind of trading practices at issue here or as a basis for ordering disgorgement of unjust profits.

<sup>37</sup> E.g., the California Parties, which include the California Attorney General and the California Public Utilities Commission, among others.

<sup>38</sup> E.g., California Generators (Mirant, Dynegy, Williams), Competitive Supplier Group (Aquila, Aquila Merchant Services, Arizona Public Service Company, Avista Energy, Constellation Power Source, Coral Power, El Paso Merchant Energy, IDACORP Energy, Idaho Power Company, Pinnacle West Capital Corporation, Portland General Electric, Puget Sound Energy, and Semptra Energy Trading Corp.), Enron, and Reliant.

In this respect, the parties argue that the Commission to date has never indicated that it viewed the MMIP as a bar to such conduct; its orders, to the extent that they have touched on such matters at all, have, in fact, implied the contrary, according to the opposing commenters. They also suggest that if the Commission initiates an investigation, it would discourage new investment.

#### c. Other Comments

22. The California Parties also argue that other tariff provisions may have been violated, citing the following tariff provisions from the ISO Tariff: (1) Section 5.5.1 (Planned Maintenance); (2) Section 5.5.3 (Forced Outages); (3) Section 5.3 (Identification of Generating Units); (4) Section 5.4 (Western Systems Coordinating Council (WSCC) Requirements); (5) Section 2.2.7.2 (Submitting Balanced Schedules); (6) Section 2.5.22.11 (Failure to Conform to Dispatch Instructions); and (7) Section 20.3 (Confidential Information).

#### 3. Commission Determination

23. The MMIP puts market participants on notice regarding their rights and obligations in the marketplace. It serves as the rules of the road for market participants. It also contemplates that these rules will be enforced by the Market Surveillance Unit, in the form of monitoring and reporting, or by the appropriate body or bodies (including this Commission), in the form of corrective actions.<sup>39</sup> While the Commission’s role in this regard may be triggered by the referral procedures outlined in the MMIP, the Commission also possesses the authority to enforce a filed tariff even in the absence of a referral.<sup>40</sup> We agree with the Staff Final Report that one key function of the MMIP is to put market participants on notice as to the rules of the road for market participants, so that the markets operated by the ISO are free from abusive conduct and may function as efficiently and competitively as possible. The Staff Final Report finds, and again we agree, that market participants cannot reasonably argue that they were *not* on notice that conduct such as the Gaming Practices discussed below would be a violation of the ISO and PX tariffs. In short, the key function of the MMIP is to put market participants on notice of what practices would be subject to monitoring and, potentially, corrective or enforcement

<sup>39</sup> Sections 2.3, 3.3.4 and 7.3 of the MMIP outline the procedures to be followed by the ISO and the PX when a market participant is found to have engaged in any of the suspect practices delineated in the MMIP.

<sup>40</sup> 16 U.S.C. §§ 824d, 824e, 825h (2000).

action, by either the ISO in the first instance or by the Commission, whose role includes enforcing the terms and conditions of filed rate schedules. Accordingly, it is appropriate for us to institute this proceeding.

24. MMIP 2.3 and its several subparts address how the ISO, including the Market Surveillance Unit, is to respond to market participants engaging in any of the suspect practices delineated in the MMIP. While the MMIP outlines intermediate steps (such as arranging for alternative dispute resolution or proposing language changes to the tariff), ultimately the MMIP directs the Market Surveillance Unit to refer matters to this Commission for enforcement.<sup>41</sup> The MMIP contemplates that, while the ISO may try to correct misconduct on its own, the Commission is to be “the court of last resort” for misconduct committed by market participants, including the gaming and/or anomalous market behavior misconduct defined in the MMIP. While part 2 of the MMIP enumerates suspect practices, MMIP 7.3 authorizes the ISO to impose “sanctions and penalties” or, as particularly relevant here, to refer matters to the Commission for appropriate sanctions or penalties.

25. We agree with the Staff Final Report that if entities are found to have engaged in the identified misconduct, they will have violated the ISO’s and PX’s filed tariffs even if such formal procedures as referral outlined in the MMIP did not occur. The Commission can enforce a filed tariff even when there are processes in that tariff which, had they been used, would have assisted the Commission. Ultimately, the Commission can enforce a filed tariff with or without the assistance of a complaint or a referral.<sup>42</sup>

26. In this regard, we note that the ISO and PX each initially submitted its MMIP (along with other protocols), for informational purposes only, on October 31, 1997. The Commission, however, found that the protocols, including the MMIP, “govern a wide range of matters which traditionally and typically appear in agreements that should be filed with and approved by the Commission.”<sup>43</sup> The Commission accepted the protocols, including the MMIP, for filing, and directed the ISO and PX each to post the protocols on its Internet site and to file its complete protocols pursuant to Section 205 of the FPA within 60 days of the ISO’s and PX’s Operations Date (that date ultimately was April 1,

<sup>41</sup> MMIP 3.3.4.

<sup>42</sup> 16 U.S.C. 824d, 824e (2000).

<sup>43</sup> Pacific Gas and Electric Co., *et al.*, 81 FERC ¶ 61,320 at 62,471 (1997).

1998).<sup>44</sup> Accordingly, the MMIP has been part of the ISO's and PX's filed tariffs since 1998, which includes the period January 1, 2000 to June 20, 2001 at issue here.

27. With respect to tariff provisions besides the MMIP cited by the California Parties: (1) The WSCC requirements cited by the California Parties make no reference to gaming strategies or anomalous market behavior (as does the MMIP), and therefore, those provisions do not provide a basis for finding gaming and/or anomalous market behavior; and (2) conduct involving arbitrage, underscheduling and confidentiality of certain data is addressed below in the discussion of Gaming Practices and California Practices. We are also currently investigating alleged violations related to physical withholding.

### C. Overview of PX and ISO Operations

28. The Staff Final Report provides an overview of the ISO and PX operations and trading rules in order to put the alleged practices in the context of Western energy markets.<sup>45</sup> This overview is recited below.

29. The ISO operates much of the transmission grid in California and is responsible for real-time operations, such as continually balancing generation and load and managing congestion on the transmission system it controls. In California, a certified scheduling coordinator is the intermediary between the ISO and the ultimate customer. Under California's restructuring legislation, the PX was created primarily to operate two markets in which energy was traded on an hourly basis. These were the day-ahead and day-of markets. These markets established a single clearing price for each hour across the entire ISO control area, provided there were no transmission constraints. Where transmission congestion existed, a separate clearing price was established for each transmission constrained area or zone in California. Each zonal clearing price was based on adjustment bids submitted by sellers and buyers. The adjustment bids represented the value to an entity of increasing or decreasing (*i.e.*, adjusting) its use of the system. In essence, this is a redispatch of the system to deal with congestion.<sup>46</sup>

30. The ISO operates a variety of markets in order to procure the

resources necessary to reliably operate the transmission system, including a day-ahead market and an hour-ahead market for relieving transmission congestion and an energy market to continuously balance the system's energy needs in real time. The latter real-time market is the final energy market to clear chronologically, after all other markets in the region clear. Bilateral spot markets at trading hubs outside California generally operated in the time period between the close of the PX market and the ISO real-time market.<sup>47</sup>

31. As the Staff Final Report notes, understanding the interaction of the PX and ISO spot markets with all their complexities, together with the different market operations outside of California, is crucial to understanding and analyzing the impact of the various conduct discussed below. An example of these complexities is the transmission congestion management system. A transmission path is "congested" when total schedules exceed the available transmission capacity of the facilities. The ISO used, as suggested above, a zone-based approach to alleviate congestion. Sellers and buyers submitted adjustment bids identifying the prices they were willing to use to increase or decrease their generation on demand to relieve congestion in a particular zone. However, the software used by the ISO to evaluate adjustment bids did not accept prices that were higher than the ISO price cap. These and other complexities created an opportunity for the market participants to engage in the conduct described below.<sup>48</sup>

32. In addition, it is important to remember that California's restructuring plan required the three California public utilities (Southern California Edison Company (SoCal Edison), San Diego Gas & Electric Company (SDG&E), and Pacific Gas and Electric Company (PG&E)) to sell all of their generation resources into the PX and to buy all of their energy needs from the PX. This made the PX by far the largest scheduling coordinator in California, representing at times close to 90 percent of the load served by the ISO grid. This requirement that the three public utilities exclusively use the PX was critical in the restructuring program, since this was how the three public utilities were to calculate savings from using the new market structure and apply those savings to recover their stranded costs.<sup>49</sup>

33. Thus, under the California restructuring rules, the three California public utilities were both buyers and sellers in the PX. The prices paid for buying back their own resources through the PX served to value those resources for stranded cost purposes. As long as the three public utilities paid less than the frozen retail rates, they used the difference to write off stranded costs. This formula broke down, however, when the public utilities had to buy back their resources at more than the frozen retail rates.<sup>50</sup>

### D. Gaming Practices and California Practices

34. Since the inception of the Commission's investigation into whether any entity manipulated prices in the electricity and gas markets in the West and the release of the first Enron memorandum in May 2002 discussing its trading strategies, there have been a multitude of studies and reports written about the alleged inappropriate conduct in California by market participants during 2000 and 2001. In addition to the Staff Final Report that addresses these issues, we have reviewed the ISO Report and the several studies and testimony by witnesses submitted in the 100 Days Evidence. Most notable among the testimony submitted with respect to alleging gaming conduct by market participants are the testimony and studies conducted by Dr. Peter Fox-Penner.<sup>51</sup>

35. As a result of our review and analysis of this material, the Commission has determined that some of these alleged gaming practices violated the MMIP. As to those practices that violated the MMIP (hereafter collectively referred to as the Gaming Practices), we found two categories of violations: (1) Gaming Practices that violated the MMIP and for which we are seeking disgorgement of all unjust profits received as a result of those violations; and (2) Gaming Practices that violated the MMIP, but for which there were no unjust profits earned or other countervailing and mitigating circumstances existed that caused the market participants to engage in the

<sup>50</sup> *Id.* at 4–5. As noted in the Commission's December 15, 2000 Order, 93 FERC at 62,002 & n.54, stranded cost estimates showed that by then PG&E had collected \$8.3 billion, and SoCal Edison had collected \$9.3 billion; SDG&E had fully recovered its stranded costs earlier in 2000. Staff Final Report, ch. VI at 5.

<sup>51</sup> See Prepared Testimony of Dr. Peter Fox-Penner on Behalf of California Parties, Exhibit No. CA-1, and Appendices to Prepared Testimony of Dr. Peter Fox-Penner on Behalf of California Parties, Exhibit No. CA-2 attached to California Parties' Supplemental Evidence Filing in Docket No. EL00-95-075, *et al.* (filed March 3, 2003).

<sup>44</sup> *Id.* The ISO (in Docket No. EC96-19-029, *et al.*) and PX (in Docket No. EC96-19-28, *et al.*) each made that compliance filing on June 1, 1998.

<sup>45</sup> See Staff Final Report, ch. VI at 4–6.

<sup>46</sup> For a more detailed description of the day-ahead auction process, see the Staff Final Report, ch. VI at 5.

<sup>47</sup> *Id.* at 5–6.

<sup>48</sup> *Id.* at 6.

<sup>49</sup> *Id.* at 4.

Gaming Practices such that it would not be just for the Commission to seek the disgorgement of unjust profits.

36. We have determined that certain of the market participants' practices did not violate the MMIP, and we are not pursuing market participants for having engaged in such activities (hereafter collectively referred to as the California Practices). Rather, we find that the California Practices did not violate the ISO tariff or any rule, and were recognized and widely accepted as appropriate arbitrage activity.

#### 1. Gaming Practices

##### a. False Import

37. This practice, which is also known as "Ricochet" or "Megawatt Laundering," took advantage of the price differentials that existed between the day-ahead or day-of markets and out-of-market sales in the real-time market. A market participant made arrangements to export power purchased in the California day-ahead or day-of markets to an entity outside the state and to repurchase the power from the out-of-state entity, for which the out-of-state entity received a fee. The "imported" power was then sold in the California real-time market at a price above the cap.

38. The essence of the False Import practice was to "park" day-ahead or day-of California energy with a company outside of California, buy it back for a small fee and then sell it to the ISO as "imported" out-of-market power. When power was parked under this practice, no power actually left the state of California. The reason for creating this fictional import was to take advantage of the fact that the ISO was making out-of-market purchases that were not subject to the price cap during real time whenever there was insufficient supply bid into its market.<sup>52</sup> The ISO buyers responsible for obtaining the energy needed in the real-time market were willing to pay a price above the cap for energy imported from outside of California and accepted offers from sellers engaging in the False Import practice.

39. Those market participants who engaged in the False Import practice violated the MMIP by unfairly taking

advantage<sup>53</sup> of the rules permitting energy to be purchased at prices above the cap in out-of-market purchases during real time and the ISO's practice of permitting such uncapped purchases for imported power. More precisely, the market participants engaging in False Import deceived the ISO by falsely representing that their available power had been imported in order to receive a price above the cap. In fact, however, the generation was California generation, and no power had left the state in the fictional export-import parking transaction.

40. Based on the ISO Report and studies by Dr. Fox-Penner,<sup>54</sup> the following parties may have engaged in the False Import Practice in violation of the MMIP and unjustly received prices in excess of the cap for energy that was falsely represented as being imported energy: (1) Aquila, Inc.; (2) Arizona Public Service Company; (3) Bonneville Power Administration; etc., as set forth in Attachment A to this Order.<sup>55</sup>

##### b. Congestion-Related Practices.

41. According to the ISO rules, market participants received congestion relief payments for relieving flows in the direction of congestion or increasing counterflows in the opposite direction. There were four practices that market participants engaged in that involved false scheduling of load or counterflow energy that appeared to relieve congestion in real time so that they could receive congestion payments.<sup>56</sup>

<sup>53</sup> See MMIP 2.1.3.

<sup>54</sup> As discussed below in section E, because the ISO Report and Dr. Fox-Penner's studies were broadly inclusive, we recognize that some of the transactions identified in those reports may have been legitimate transactions and not Gaming Practices.

<sup>55</sup> The monetary remedy of disgorgement of unjust profits for this particular Gaming Practice would be imposed only until such time as the mitigated market clearing price was put in place for transactions, i.e., on June 21, 2001. Furthermore, during the period covered by the refund period (October 2, 2000–June 21, 2001), see *supra* note 3, all spot market sales through the PX in the day ahead market are mitigated as are all transactions with the ISO in the real time market. Therefore, both the energy price for the export and the import are mitigated during this period. Accordingly, disgorgement for this strategy will apply to only transactions between May 2000 and the start of the refund period on October 2, 2000.

<sup>56</sup> As noted above, *supra* notes 1 and 3, June 20, 2001 has been selected as the end date of the relevant period in this proceeding. While the mitigation plan, which became effective on that date, was primarily intended to control the real-time energy market, it also had a disciplining effect on congestion costs and eliminated the opportunity to profit from Gaming Practices. The ISO Market Analysis Report for June 2001 shows that the average price of real-time electricity in June decreased 62 percent to \$104/MWh from the May 2001 average of \$275/MWh and total congestion costs for June 2001 were \$0.5 million, down from

42. The first such Congestion-Related practice is referred to as Cutting Non-firm, also sometimes known as Non-firm Export. This practice involved the scheduling of non-firm power by a market participant that did not intend to deliver or cannot deliver the power. Upon receipt of the congestion payment for cutting the schedule, the market participant then canceled the non-firm power after the hour-ahead market closed but kept the congestion payment. No power was transmitted and no congestion was relieved, but the market participant was paid for congestion relief. In some instances, the market participant may have submitted a schedule for non-firm power that it, in fact, had not acquired.

43. The second Congestion-Related practice is Circular Scheduling, also sometimes referred to as "Death Star." The Circular Scheduling practice involved the market participant scheduling a counterflow in order to receive a congestion relief payment. In conjunction with the counterflow, the market participant scheduled a series of transactions that included both energy imports and exports into and out of the ISO control area and a transaction outside the ISO control area in the opposite direction of the counterflow back to the original place of origin. With the same amount of power scheduled back to the point of origin, however, power did not actually flow and congestion was not relieved. Circular Scheduling was profitable as long as the congestion relief payments were greater than the cost of scheduled transmission.

44. The third Congestion-Related practice was Scheduling Counterflows on Out-of-Service Lines, also sometimes referred to as "Wheel Out." This practice involved a market participant submitting a schedule across an intertie line at the ISO border that was known to be out of service and had been derated to zero capacity, thus creating artificial congestion. The market participant would then schedule a counterflow export, a "wheel out," and be paid for congestion relief in the day-ahead or hour-ahead market. However, because the line was completely constrained, the initial schedule was certain to be cut by the ISO in real time and the market participant would receive a congestion payment for energy it did not actually supply.

45. The fourth Congestion-Related practice, known as "Load Shift," involved a market participant

\$7 million in May 2001. A. Sheffrin, Market Analysis Report for June 2001, (July 20, 2001), available at <<http://www.caiso.com/docs/2001/07/20/200107201733319105.pdf>>.

<sup>52</sup> "Out-of-market purchases" refers to all generation purchased by the ISO that was not bid into the market or was bid at a price above the effective price cap. Out-of-market purchases were especially frequent prior to the implementation of the "must offer" requirement effective on May 29, 2001, which mandates that all generators with participating generator agreements with the ISO provide available generation to the ISO unless the ISO grants a waiver. See San Diego Gas & Electric Co., 95 FERC ¶ 61,115 (implementing the must offer requirement), *clarified*, 95 FERC ¶ 61,275 (2001).



underscheduling load in one zone in California and overscheduling load in another, thereby increasing congestion in the direction of the overscheduled zone. Congestion "relief" occurred when the market participant later adjusted the two schedules to reflect actual expected loads. This adjustment created a counterflow toward the underscheduled zone, earning the market participant a congestion relief payment from the ISO. The market participant had to own Firm Transmission Rights (FTRs) in the direction of the overscheduled zone to cover its exposure to ISO congestion charges, but any of the FTRs that it did not use may have earned artificially high FTR payments from the ISO.

46. Each of the four Congestion-Related practices violated the MMIP because the market participants submitted false schedules to the ISO. In the cases of Cutting Non-firm, Circular Scheduling, and Scheduling Counterflows on Out-of-Service Lines, the market participants fraudulently received congestion relief payments for energy that was never provided and did not relieve congestion. Similarly, market participants who engaged in the Load Shift practice received congestion payments for their FTRs as a result of the very congestion that they created. As a result of these false representations, the market participants that engaged in these Congestion-Related practices unfairly took advantage of the ISO rules regarding payment for congestion relief.

47. Based on the ISO Report and studies by Dr. Fox-Penner, the following parties may have engaged in one or more of these four Congestion-Related Practices in violation of MMIP and unjustly received congestion payments: (1) American Electric Power Service Corp.; (2) Aquila, Inc.; (3) Duke Energy Trading and Marketing Company; *etc.*, as set forth in Attachment B to this Order.

#### *c. Ancillary Services-Related Practices.*

48. There are three different practices that market participants engaged in that involved selling ancillary services, also sometimes collectively referred to as "Get Shorty." Two of these we consider to be Gaming Practices and violations of the MMIP and are discussed here. The third, we determine to be a form of legitimate arbitrage and is discussed below, in the section addressing the California Practices.

49. The first Ancillary Services-Related practice we refer to as Paper Trading. This practice involved selling ancillary services in the day-ahead market even though the market participant did not have the required

resources available to provide the ancillary services. The market participant then bought back these ancillary services in the hour-ahead market at a lower price.

50. The second Ancillary Services-Related practice we refer to as Double Selling. This practice involved selling ancillary services in the day-ahead market from resources that were initially available, but later selling those same resources as energy in the hour-ahead or real-time markets.

51. Market participants that engaged in Paper Trading and/or Double Selling violated the MMIP since they unfairly took advantage<sup>57</sup> of the market rules by using false representations and/or receiving payments for services that they did not provide. With respect to Paper Trading, the ISO's tariff requires that any bid for the provision of ancillary services specify the generating unit, system unit, load or system resource which will be used to provide the ancillary service. Additionally, a scheduling coordinator must identify the specific operating characteristics of that resource which would qualify it to provide ancillary services.<sup>58</sup> However, market participants engaged in Paper Trading falsely represented that the resources were available to provide ancillary services when they were not actually available. Similarly, with respect to Double Selling, the market participant misled the ISO by selling capacity that it had already committed to reserve as ancillary services, thus making that capacity no longer available in real time if the ISO were to call upon that resource to provide ancillary services. In addition to violating the MMIP, those market participants that engaged in Double Selling also violated Section 2.5.22.11 of ISO tariff.<sup>59</sup>

52. Although the ISO Report includes a list of market participants that may have engaged in Paper Trading, the ISO does not have the information necessary to determine the extent to which the capacity for ancillary services sold in the day-ahead market and then sold back in the hour-ahead was not actually available or could not have been provided. However, in a market notice, dated July 3, 2002, the ISO listed market participants that received payments for ancillary services that were called upon

but for which they could not deliver the services.<sup>60</sup> Based on the identification of market participants in the July 3, 2002 market notice as well as the ISO Report, the Commission believes that the following parties may have engaged in Paper Trading in violation of the MMIP and Section 2.5.22.11 of the ISO tariff and unjustly received payments for ancillary services: (1) Arizona Public Service Co.; (2) Automated Power Exchange, Inc.; (3) Bonneville Power Administration; *etc.*, set forth on Attachment C to this Order.

53. Based on the studies by Dr. Fox-Penner, the Commission believes that the following parties may have engaged in Double Selling in violation of MMIP and unjustly received payments for ancillary services: (1) Duke Energy Trading and Marketing Corp.; (2) Dynegy Power Marketing Inc., Dynegy Power Corp., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC; (3) Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC; and (4) Reliant Resources, Inc., Reliant Energy Power Generation, and Reliant Energy Services, Inc.; as set forth on Attachment D to this Order.

#### *d. Selling Non-Firm Energy as Firm*

54. The practice of Selling Non-Firm Energy as Firm involved Enron<sup>61</sup> buying non-firm energy from outside California and then selling it to the ISO as firm energy. Enron was able to derive an unjust profit from this practice because it avoided the cost of purchasing the operating reserves that are required for firm energy.

55. The practice of Selling Non-Firm Energy as Firm was a flagrant false representation by Enron to the ISO. Thus, it was a violation of the MMIP.

### **2. Gaming Practices for Which Disgorgement of Unjust Profits Is Not Sought**

#### *a. Underscheduling Load.*

56. This practice was an effort by the load-serving entities, primarily the three California utilities (PG&E, SoCal Edison, and SDG&E), to reduce the overall price paid for generation. For months they understated their load consistently in

<sup>57</sup> See MMIP 2.1.3.

<sup>58</sup> ISO Tariff § 2.5.6.1 (applicable to generation within California); and ISO Tariff §§ 2.5.7.4.2 and 2.5.7.4.3 (applicable to resources outside of California).

<sup>59</sup> Section 2.5.22.11 of the ISO Tariff (Failure To Conform To Dispatch Instructions) requires that resources that have been committed to provide ancillary services for a given period must be available and capable of providing the services for the full duration of the period.

<sup>60</sup> California ISO, Ancillary Services Payments Rescinded Due to Generator Unavailability, Market Notice (July 3, 2002). For the convenience of parties, the ISO's July 3, 2002 market notice is attached as Attachment G to this order.

<sup>61</sup> In the 100 Days Evidence, Seattle alleges that Avista, El Paso, Portland General, PowerEx, and Transalta engaged in all of the Gaming Practices. However, we have seen no evidence that any market participant engaged in Selling Non-Firm Energy as Firm other than Enron.



schedules submitted to the PX in an effort to reduce the amount of generation purchased in the day-ahead market, thereby lowering the price. The remainder of the utilities' generation needs would be purchased in the ISO's capped real-time market.

57. Under the then-existing market rules, the utilities were required to satisfy their need for energy with purchases from the PX and were to bid in their generation in the PX day-ahead market in an amount equal to their load.<sup>62</sup> However, during 2000, in an effort to minimize their energy costs, the three California public utilities began to routinely underschedule their load in the PX day-ahead market. Due to the large size of the three California public utilities, changes in their purchasing strategies had a significant impact on market outcomes, including the market-clearing prices in the PX day-ahead market. By moving a significant amount of their load out of the PX day-ahead market, less supply bids were needed to clear the market which, in turn, resulted in lower market clearing prices in the PX day-ahead market. As a direct result of the underscheduling by the three public utilities in the day-ahead market, however, the ISO had to meet a larger percentage of the load in real time, causing serious operational and reliability problems.

58. Because Underscheduling Load required the utilities to submit false schedules with regard to their loads to the PX, this conduct was certainly troublesome and is not condoned by the Commission.<sup>63</sup> Moreover, it violated the MMIP by unfairly taking advantage of the rules and caused a demonstrable detriment to the efficiency of the market.<sup>64</sup> Although we disapprove of the practice of Underscheduling Load and we have the authority to order disgorgement of unjust profits, there are no profits to disgorge since this was a price-reducing purchasing strategy.

#### b. Overscheduling Load.

59. The practice of Overscheduling Load involved a market participant with more generation than load falsely

overstating to the ISO its scheduled load to correspond with the amount of generation in its schedule. This practice, also sometimes referred to as "Inc-ing" or "Fat Boy," permitted the market participant to be dispatched by the ISO during real time to its full capacity and receive the real-time market clearing price even though it did not have scheduled load equal to its generation capacity when it bid into the day-ahead market. Thus, Overscheduling Load ensured that generation would not go unsold in the real-time market.

60. Overscheduling Load required the market participant to submit a false load schedule to the ISO since the ISO required that only balanced schedules of load and generation could be bid into the day-ahead market. Although the submission of such false schedules is a violation of the MMIP, there were countervailing circumstances that existed in the California market at the time that caused the market participants to engage in Overscheduling Load. The ISO rules required that all market participants submit schedules containing balanced levels of generation and load. However, as noted above, in an effort to minimize their procurement costs in the California market due to the interplay between the PX and ISO rules, the utilities routinely underscheduled their load. The market participants who engaged in Overscheduling Load did so as a direct response to the utilities' practice of Underscheduling Load.<sup>65</sup> Overscheduling Load actually helped reduce reliability problems in the real-time market. In fact, Overscheduling Load was often actively encouraged by the ISO because it reduced the need for real-time energy due to the utilities' underscheduling.<sup>66</sup> Finally, participants

<sup>65</sup> The phenomenon of market participants engaging in Overscheduling Load in response to the utilities' practice of Underscheduling Load was widely known and accepted. See Report on California Energy Markets Issues and Performance: May-June, 2000, Special Report, by Department of Market Analysis, California ISO, dated August 10, 2000, pages 2-3, 25-37, available at <<http://www.caiso.com/docs/09003a6080/07/40/09003a6080074029.pdf>>.

<sup>66</sup> Some of the generators in the 100 Days Evidence indicated that the ISO had encouraged the practice of Overscheduling Load to obtain needed supply. For example, Reliant stated that the ISO assisted it by creating an artificial load point, i.e., helped it provide additional generation to the market. See Reliant's Reply to the March 3, 2003 Submission of California Parties, Vol. I, Exhibit REL-27 at 33-34 (Docket No. EL00-95-089, et al., March 23, 2003). In addition, in explaining that Overscheduling Load did not cause or exacerbate the high price in May 2000, an ISO report states that the generation that was overscheduled was not hidden from the ISO but was directly factored into the ISO's decision about how much generation would be required to meet real time demand. E. Hildebrandt, ISO's Department of Market Analysis, Did Any of Enron's Trading and Scheduling

who engaged in Overscheduling Load did not set the market clearing price because, as uninstructed energy, they were price takers who were paid the ex-post price for imbalance energy which was set by the bid of the marginal unit dispatched.<sup>67</sup> Therefore, we are not seeking disgorgement of unjust profits from those market participants who engaged in Overscheduling Load.

#### 3. California Practices

61. As noted, the Commission has determined that some of the conduct discussed in the Staff Final Report and the 100 Days Evidence did not violate the MMIP or any other tariff violation. These California Practices were widely recognized and accepted as appropriate and legitimate practices, as discussed below. They did not involve any false representations or take unfair advantage of ISO rules. Accordingly, we are not seeking to recover the profits earned by market participants as the result of engaging in such conduct.

##### a. Export of California Power

62. This practice involved a purchase of power in the California day-ahead market at or below the price cap and then a resale of the power outside the state at a higher (uncapped) price. Unlike the False Import practice discussed above, energy is actually exported out of California.

63. This practice did not violate the tariffs or rules of the PX or ISO.<sup>68</sup> Market participants were engaging in arbitrage between the California market, which had price caps in effect, and markets outside of California that did not have price caps and where they could receive a higher price.<sup>69</sup> This type of export practice has never been prohibited and, to the extent it does not involve collusion with other market participants,<sup>70</sup> represents legitimate economically rational attempts by the

Practices Contribute to Outages in California? at 12-13 (November 15, 2002), available at <http://www.caiso.com/docs/2002/11/26/2002112610411219558.pdf>.

<sup>67</sup> See ISO Tariff section 2.5.23.

<sup>68</sup> We note, however, that the ISO does have the authority to alter scheduled deliveries of energy and ancillary services into or out of the ISO controlled grid to avert a system emergency. See ISO Tariff § 5.6.1.

<sup>69</sup> In fact, this is precisely what arbitrage is—i.e., the purchase of a commodity, such as electricity, in one market (day-ahead), for immediate resale in another market (real-time) in order to profit from the unequal prices. As more parties engage in arbitrage, prices between the markets converge and the opportunity for profits should disappear.

<sup>70</sup> There has been no evidence discovered to suggest that there was any collusion between market participants to export their energy outside of California in order to create scarcity within California.

<sup>62</sup> The Commission halted this practice created under California legislation (see AB 1890 (September 23, 1996)) and began allowing the utilities to procure resources under long-term contracts in December 2000. See *supra* note 3.

<sup>63</sup> The Commission previously noted in several orders that the widespread underscheduling of load was taking place in the California markets, and directed changes to the market rules and allowed penalties, in an attempt to address the problem. See December 19, 2001 Order, 97 FERC at 62,226-27; December 15, 2000 Order, 93 FERC at 62,002-03; November 1, 2000 Order, 93 FERC at 61,361-62; and August 23, 2000 Order, 92 FERC at 61,608.

<sup>64</sup> MMIP 2.1.3.

market participants to maximize their profits.

b. Ancillary Services-Related Practices—Arbitrage.

64. As noted above, market participants engaged in several different practices involving ancillary services. Two of those we discussed above (Paper Trading and Double Selling) and we consider those practices to be Gaming Practices in violation of the MMIP. However, to the extent a market participant was merely taking advantage of systematic differences in the day-ahead and hour-ahead market prices for ancillary services by selling ancillary services in the day-ahead market and buying them back at a lower price in the hour-ahead market, we find this practice to be consistent with legitimate arbitrage.<sup>71</sup> Thus, as long as the market participant had the generation available to provide the ancillary services or appropriately contracted for it, selling the energy at one price and buying it back at a lower price did not violate the ISO rules or tariff and was nothing more than a method for the market participant to reap a valid profit from the price differential in the day-ahead and real-time markets.

c. Access to IIR Outage Data.

65. For an annual fee, market participants could subscribe to a generation outage notification service provided by Industrial Information Resources (IIR). IIR provided information to subscribers via daily e-mails and upon request regarding plant outages in the West. The information sometimes included the cause of outages, prospective as well as current plant outages, and expected start and end dates. IIR obtained information directly from the generating plants.

66. In the 100 Days Evidence, the California Parties alleged that market participants who utilized IIR violated the ISO tariff regarding confidentiality of outage data and that subscriptions to the IIR service raised issues under the antitrust laws. We disagree. The ISO tariff prohibits the ISO from revealing market participants' confidential outage data; the tariff does not prohibit the market participants providing the information to third parties and then subscribing to third-parties' services.<sup>72</sup> Further, subscribing to a service that provides outage information does not mean that the subscribers used that

information to manipulate the market. There has been no evidence to suggest that the sharing of outage information was used to manipulate the market. Subscribing to IIR's service did not involve any false representations, rule violations, or violations of MMIP. Furthermore, no evidence was offered to suggest that any outage data was used in a collusive manner to raise prices.

*E. Further Clarification as to What Constitutes Gaming Practices*

67. The screens used by the ISO and Dr. Fox-Penner are broadly inclusive and some of the characteristics that were used to identify potential Gaming Practices may also be present in transactions that were not actually Gaming Practices. In fact, the 100 Days Evidence indicates that there may be legitimate explanations for many of the transactions that may initially appear to be Gaming Practices. As a result, the Identified Entities will have an opportunity to submit evidence to the ALJ that may demonstrate that any or all of the transactions identified in the ISO Report or Dr. Fox-Penner's studies were not Gaming Practices. For example, with respect to transactions identified as False Imports, evidence that may demonstrate that the transactions were legitimate transactions and not part of a False Import practice might include establishing that: (a) The "imported" power was actually imported from outside the state of California and not a fictitious import, *i.e.*, not an export and import that constitutes a False Import, as described above; (b) the transaction was designed to work around a transmission constraint (such as on Path 15) which limited the movement of power between two points within the ISO control area by using an uncongested transmission path (such as the Pacific DC intertie) to move the power to a point outside the ISO control area and back to its intended destination; (c) the export and import were actually two independent and unrelated obligations such as a pre-existing long-term bilateral contractual export obligation followed by a real-time import from the same party in an unrelated transaction; or (d) the market participant was importing power on behalf of the ISO or California Department of Water Resources (California DWR), because suppliers were unwilling to assume the credit risk of dealing directly with the ISO or California DWR.

68. Similarly, evidence that may establish that transactions were not part of a Cutting Non-firm practice might be that, with respect to any energy that was scheduled, but did not flow, the energy

did not flow due to circumstances beyond the control of the market participant and without prior knowledge by the market participant that the energy would not flow. Regarding Paper Trading and Double Selling, evidence that may establish that the transactions, identified by the ISO and Dr. Fox-Penner, were not in fact Gaming Practices, but were instead legitimate transactions might include showing that: (a) The resources to provide the ancillary services sold in the day-ahead market were actually available to the bidder; (b) ancillary services payments were not received for capacity that was not available to provide ancillary services, or (c) the ISO requested that the market participant provide energy in the real-time market even though it knew that such energy was being held for ancillary services previously sold to the ISO.

*F. Identified Entities With Revenues of \$10,000 or Less*

69. We are exercising our prosecutorial discretion and not prosecuting certain of the Identified Entities which the ISO Report states have earned revenues of \$10,000 or less for a particular Gaming Practice and where we have no other basis to prosecute them for that particular Gaming Practice.<sup>73</sup> In the ISO's latest report analyzing various practices, the ISO states that its analysis includes market participants with a relatively small number of transactions and revenues from particular practices. The ISO explains that the smaller the volume of transactions and the revenues identified for individual market participants, the less the likelihood that the transactions represent prohibited Gaming Practices. The ISO, in fact, recommends applying a minimum threshold in any further investigations of these practices.<sup>74</sup> We agree that the burden and costs to both the parties and

<sup>73</sup> We, thus, are exercising our prosecutorial discretion and not prosecuting Constellation Power Source, Inc. for False Import practice.

Further, we are exercising our prosecutorial discretion and not prosecuting, Calpine Corp., Idaho Power Company, Modesto Irrigation District, TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc., and Williams Energy Services Corp. for Cutting Non-firm.

We, likewise, are not prosecuting Arizona Public Service Company, Calpine Corp., Hafslund Energy Trading, LLC, Portland General Electric Company, and Puget Sound Energy, Inc. for Circular Scheduling.

We, similarly, are not prosecuting Calpine Corp., City of Vernon, Constellation Power Source, Inc., Public Service Company of New Mexico and Portland General Electric Company for Paper Trading.

<sup>74</sup> ISO Report at 3-4 (June 2003).

<sup>71</sup> See California Independent System Operator Corporation, 82 FERC ¶ 61,327 (1998) (Commission accepted ISO Tariff Amendment No. 4, which allowed scheduling coordinators to buy back and sell ancillary services in the hour-ahead market).

<sup>72</sup> ISO Tariff 20.3.1-20.3.3.

the Commission associated with litigating whether market participants whose revenues were less than \$10,000 for particular Gaming Practices engaged in those practices may exceed any unjust profits on the revenues that resulted from such transactions. Accordingly, we are exercising our prosecutorial discretion and not proceeding against certain Identified Entities for particular Gaming Practices.

*G. Show Cause Order and Institution of Trial-Type Evidentiary Proceeding*

70. As described above, and as the Staff Final Report concludes, the Gaming Practices identified above violate the ISO's and PX's filed tariffs, and the Identified Entities appear to have engaged in such practices, as identified above.

71. Accordingly, we require these entities to show cause, in a trial-type evidentiary proceeding to be held before an ALJ, why they should not be found to have engaged in Gaming Practices in violation of the ISO's and PX's tariffs.<sup>75</sup> In addition, we direct the ALJ to hear evidence and render findings and conclusions, quantifying the full extent to which the entities named herein may have been unjustly enriched by their engaging in Gaming Practices.<sup>76</sup> We require that any and all such unjust profits for the period January 1, 2000 to June 20, 2001 be disgorged in their entirety. We also direct the ALJ to consider any additional, appropriate non-monetary remedies, as may be appropriate, e.g., revocation of an Identified Entity's market-based rate authority and revisions to an Identified Entity's code of conduct.<sup>77</sup>

72. The ISO shall, within 21 days of the date of this order, provide the Identified Entities all of the specific transaction data for each of the Gaming Practices discussed in the ISO Report, including an explanation of the screen(s) that it used to identify the transactions in question. The ISO shall

contemporaneously file that transaction data, including the explanation of its screen(s), with the Commission. Unless the Identified Entity files an offer of settlement as discussed below, within 45 days thereafter, the Identified Entities shall file their show cause responses.

73. We recognize that, in some instances, the burdens and costs to both the parties and the Commission associated with litigating whether certain market participants engaged in particular Gaming Practices and violated the MMIP may exceed the revenues and unjust profits that resulted from such transactions. There are also many disputed issues of fact which, in litigation, would tend to prolong uncertainty for the Identified Entities and the marketplace as a whole. Therefore, we encourage the Identified Entities to resolve these proceedings by settlement with the Commission's Trial Staff. In this regard, should participants not settle on a mechanism to distribute monies, the ALJ should request comment and render a finding on a mechanism that will fairly distribute any monies to those customers harmed by the Gaming Practices.

74. Finally, given the commonality of issues of law and fact presented herein, Docket Nos. EL03-137-000, EL03-138-000, EL03-139-000, EL03-140-000, EL03-141-000, EL03-142-000, EL03-143-000, EL03-144-000, EL03-145-000, EL03-146-000, EL03-147-000, EL03-148-000, EL03-149-000, EL03-150-000, EL03-151-000, EL03-152-000, EL03-153-000, EL03-154-000, EL03-155-000, EL03-156-000, EL03-157-000, EL03-158-000, EL03-159-000, EL03-160-000, EL03-161-000, EL03-162-000, EL03-163-000, EL03-164-000, EL03-165-000, EL03-166-000, EL03-167-000, EL03-168-000, EL03-169-000, EL03-170-000, EL03-171-000, EL03-172-000, EL03-173-000, EL03-174-000, EL03-175-000, EL03-176-000, EL03-177-000, EL03-178-000 and EL03-179-000 will be consolidated for purposes of hearing and decision.

*The Commission orders:*

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 CFR Chapter I), a public hearing shall be held in Docket Nos. EL03-137-000, EL03-138-000, EL03-139-000, EL03-140-000, EL03-141-000, EL03-142-000, EL03-143-

000, EL03-144-000, EL03-145-000, EL03-146-000, EL03-147-000, EL03-148-000, EL03-149-000, EL03-150-000, EL03-151-000, EL03-152-000, EL03-153-000, EL03-154-000, EL03-155-000, EL03-156-000, EL03-157-000, EL03-158-000, EL03-159-000, EL03-160-000, EL03-161-000, EL03-162-000, EL03-163-000, EL03-164-000, EL03-165-000, EL03-166-000, EL03-167-000, EL03-168-000, EL03-169-000, EL03-170-000, EL03-171-000, EL03-172-000, EL03-173-000, EL03-174-000, EL03-175-000, EL03-176-000, EL03-177-000, EL03-178-000 and EL03-179-000: (1) where the Identified Entities shall show cause why they should not be found to have employed the above-described Gaming Practices in violation of the ISO's and PX's tariffs; and (2) where the appropriate remedies may be identified and quantified, as discussed in the body of this order.

(B) Any interested person desiring to be heard in these proceedings should file a notice of intervention or motion to intervene with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR § 385.214), within 21 days of the date of this order.

(C) The ISO is hereby directed to provide the Identified Entities with all of the specific transaction data for each of the Gaming Practices discussed in the ISO Report, including an explanation of the screen that it used to identify the transactions in question, within 21 days of the date of this order, as discussed in the body of this order. The ISO shall contemporaneously file such transaction data with the Commission.

(D) Within 45 days of the ISO's submittal made pursuant to Ordering Paragraph (C) above, the Identified Entities shall submit show cause responses, as discussed in the body of this order.

(E) An administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding to be held within approximately fifteen (15) days of the filing of the show cause submissions ordered in Ordering Paragraph (D) above, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the

<sup>75</sup> We will incorporate the Staff Final Report and the underlying record in Docket No. PA02-2-000 by reference into the record in this proceeding.

<sup>76</sup> We will permit the parties to introduce relevant evidence from the 100 Days Evidence proceeding. See *supra* P 9.

As discussed in the Staff Final Report and in the body of this order, there is evidence of gaming and/or anomalous market behavior sufficient to require the Identified Entities to show cause why they should not be found to have engaged in Gaming Practices in violation of the ISO's and PX's tariffs. As a result, the burden of going forward will be placed on the Identified Entities. However, the ultimate burden is upon the Commission. To that end, the Commission is aware that many parties in California and elsewhere in the West have sought a forum in which to address the issues raised in this proceeding. Those parties may participate in this proceeding upon attaining intervenor status.

<sup>77</sup> See *supra* P 2.

Commission's Rules of Practice and Procedure.

(F) Docket Nos. EL03-137-000, EL03-138-000, EL03-139-000, EL03-140-000, EL03-141-000, EL03-142-000, EL03-143-000, EL03-144-000, EL03-145-000, EL03-146-000, EL03-147-000, EL03-148-000, EL03-149-000, EL03-150-000, EL03-151-000, EL03-152-000, EL03-153-000, EL03-154-000, EL03-155-000, EL03-156-000, EL03-157-000, EL03-158-000, EL03-159-000, EL03-160-000, EL03-161-000, EL03-162-000, EL03-163-000, EL03-164-000, EL03-165-000, EL03-166-000, EL03-167-000, EL03-168-000, EL03-169-000, EL03-170-000, EL03-171-000, EL03-172-000, EL03-173-000, EL03-174-000, EL03-175-000, EL03-176-000, EL03-177-000, EL03-178-000 and EL03-179-000 are hereby consolidated for purposes of hearing and decision.

(G) The Secretary is hereby directed to publish a copy of this order in the **Federal Register**.

By the Commission. Commissioner Massey dissented in part with a separate statement attached.

**Magalie R. Salas,**  
*Secretary.*

**Attachment A.—Market Participants Alleged to Have Engaged in the False Import Practice in Violation of the MMIP**

1. Aquila, Inc.
2. Arizona Public Service Co.
3. Bonneville Power Administration
4. City of Glendale
5. Coral Power, LLC
6. Duke Energy Trading and Marketing Co.
7. Dynege Power Marketing Inc., Dynege Power Corp., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC
8. Enron Power Marketing, Inc. and Enron Energy Services Inc.
9. Idaho Power Co.
10. Los Angeles Department of Water and Power
11. Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC
12. PacifiCorp
13. PGE Energy Services
14. Portland General Electric Co.
15. Powerex Corp.
16. Public Service Co. of New Mexico
17. Puget Sound Energy
18. Reliant Resources, Inc., Reliant Energy Power Generation, and Reliant Energy Services, Inc.
19. Salt River Project Agricultural Improvement and Power District
20. Sempra Energy Trading Corp.
21. Tuscon Electric Power Co.
22. Williams Energy Services Corp.

**Attachment B—Market Participants Alleged to Have Engaged in Congestion-Related Practices in Violation of the MMIP**

*Cutting Non-firm*

1. American Electric Power Services Corp.
2. Aquila, Inc.
3. Cargill-Alliant, LLC
4. City of Glendale
5. City of Riverside
6. Coral Power, LLC
7. Duke Energy Trading & Marketing Company
8. Dynege Power Marketing Inc., Dynege Power Corp., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC
9. Enron Power Marketing, Inc. and Enron Energy Services Inc.
10. Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC
11. Morgan Stanley Capital Group
12. Pacific Gas and Electric Company
13. PacifiCorp.
14. Portland General Electric Company
15. Powerex Corp.
16. Puget Sound Energy, Inc.
17. San Diego Gas & Electric Company
18. Sempra Energy Trading
19. Sierra Pacific Power Company
20. Southern California Edison Company

*Circular Scheduling*

1. American Electric Power Service Corp.
2. Aquila, Inc.
3. Automated Power Exchange, Inc.
4. Cargill-Alliant, LLC
5. City of Glendale
6. City of Redding
7. City of Riverside
8. Coral Power, LLC
9. Duke Energy Trading and Marketing Company
10. Dynege Power Marketing Inc., Dynege Power Corp., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC
11. Enron Power Marketing, Inc. and Enron Energy Services Inc.
12. F P & L Energy
13. Idaho Power Company
14. Los Angeles Department of Water and Power
15. Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC
16. Modesto Irrigation District
17. Morgan Stanley Capital Group
18. PacifiCorp
19. PGE Energy Services
20. Powerex Corp.
21. Public Service Company of Colorado

22. Salt River Project Agricultural Improvement and Power District
23. San Diego Gas & Electric Company
24. Sempra Energy Trading Corp.
25. Southern California Edison Company
26. TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc.
27. Williams Energy Services Corp.

*Scheduling Service on Out-of-Service Lines*

1. City of Anaheim
2. Coral Power, LLC
3. Duke Energy Trading and Marketing Company
4. Dynege Power Marketing Inc., Dynege Power Corp., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC
5. Enron Power Marketing, Inc. and Enron Energy Services Inc.
6. Morgan Stanley Capital Group
7. Powerex Corp.
8. Sempra Energy Trading Corp.

*Load Shift*

1. City of Glendale
2. Coral Power, LLC
3. Duke Energy Trading and Marketing Company
4. Dynege Power Marketing Inc., Dynege Power Corp., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC
5. Enron Power Marketing, Inc. and Enron Energy Services Inc.
6. Los Angeles Department of Water and Power
7. Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC
8. Northern California Power Agency
9. Powerex Corp.
10. Williams Energy Services Corp.

*Attachment C.—Market Participants Alleged To Have Engaged in Paper Trading in Violation of the MMIP*

1. Arizona Public Service Co.
2. Automated Power Exchange, Inc.
3. Bonneville Power Administration
4. California Department of Water Resources
5. California Power Exchange
6. City of Anaheim
7. City of Azusa
8. City of Glendale
9. City of Pasadena
10. Coral Power, LLC
11. Duke Energy Trading & Marketing Co.
12. Dynege Power Marketing Inc., Dynege Power Corp., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC
13. Enron Power Marketing, Inc. and Enron Energy Services Inc.
14. Idaho Power Company
15. Los Angeles Department of Water and Power

16. Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC
17. Modesto Irrigation District
18. Northern California Power Agency
19. Pacific Gas and Electric Co.
20. Powerex Corp.
21. Puget Sound Energy, Inc.
22. Reliant Resources, Inc., Reliant Energy Power Generation, and Reliant Energy Services, Inc.
23. Sempra Energy Trading Corp.
24. Southern California Edison Co.
25. Western Area Power Administration
26. Williams Energy Services Corp.

**Attachment D.—Market Parties Alleged to Have Engaged in Double Selling in Violation of the MMIP**

1. Duke Energy Trading and Marketing Co.
2. Dynegy Power Marketing Inc., Dynegy Power Corp., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC
3. Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC
4. Reliant Resources, Inc., Reliant Energy Power Generation, and Reliant Energy Services, Inc.

**Attachment E.—Entities that Submitted 100 Day Evidence in California (Docket Nos. EL00–95, EL00–98, EL01–10, EL02–60 and EL02–62)<sup>80</sup>**

1. AES Alamitos, LLC, AES Huntington Beach, LLC, AES Redondo Beach, LLC, and AES Southland, LLC (AES)
2. Allegheny Energy Supply Co.
3. Arizona Electric Power Cooperative, Inc.
4. Automated Power Exchange, Inc.
5. Avista Energy, Inc.
6. Avista Corporation d/b/a Avista Utilities
7. Avista Energy, Inc., BP Energy Company, IDACORP Energy L.P., Puget Sound Energy, Inc., TransAlta Energy Marketing (U.S.) Inc., TransAlta Energy Marketing (California) Inc., and TransCanada Energy, Ltd.
8. Bonneville Power Administration
9. BIT (City of Burbank, California, the Imperial Irrigation District, Turlock Irrigation District) (Joint Reply Comments and Proposed Reply Findings)
10. California Electricity Oversight Board and California Public Utilities Commission
11. City of Burbank, California, City of Glendale, California, Turlock Irrigation District, and Imperial Irrigation District

12. California Independent System Operator Corporation
13. California Parties (People of the State of California ex rel. Bill Lockyer, Attorney General, the California Electricity Oversight Board, the California Public Utilities Commission, Pacific Gas and Electric Company, and Southern California Edison Company)
14. Californians for Renewable Energy (CARE)
15. Calpine Corporation
16. Cities of Anaheim, Azusa, Banning, Colton and Riverside, California
17. City of Glendale, California
18. City of Pasadena, California
19. City of Redding, California
20. City of Santa Clara
21. City of Seattle, Washington
22. City of Vernon, California
23. Competitive Supplier Group (El Paso Merchant Energy, LP, BP Energy Company, Coral Power, IDACORP Energy LP, Exelon Corporation on behalf of Exelon Generation Company, LLC, PECO Energy Company and Commonwealth Edison Company, Portland General Electric Company, Public Service Company of New Mexico, Sempra Energy Trading Corporation, TransAlta Energy Marketing (U.S.) Inc., TransAlta Energy Marketing (California), Inc., TransCanada Energy Ltd., Avista Energy, Inc., Puget Sound Energy, Inc., Constellation Power Source, Inc., Powerex Corp., and Public Service Company of Colorado)
24. Constellation Power Source, Inc. and NewEnergy, Inc.
25. Coral Power, LLC
26. Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC(Duke Energy)
27. Dynegy Power Marketing, Inc. *et al.*
28. Electric Power Supply Association
29. El Paso Merchant Energy, LP
30. Enron Power Marketing, Inc. and Enron Energy Services, Inc.
31. Eugene Water & Electric Board
32. Exelon (Exelon Corporation on behalf of Commonwealth Edison Company, Exelon Generation Company, LLC and PECO Energy Company)
33. Public Utility District No. 2 of Grant County
34. Hafslund Energy Trading, LLC
35. IDACORP Energy LP and Idaho Power Company
36. Imperial Irrigation District
37. Independent Energy Producers Association
38. Indicated Long-Term Sellers (Allegheny Energy Supply Company, LLC, Coral Power, L.L.C., Mirant Americas Energy Marketing, L.P., Morgan Stanley Capital Group Inc. and Sempra Energy Resources)
39. Los Angeles Department of Water and Power
40. Merrill Lynch Capital Services, Inc.
41. Mirant (Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC)
42. Mirant Americas Energy Marketing, LP
43. Morgan Stanley Capital Group, Inc.
44. Northern California Power Agency
45. PacifiCorp

46. PGET and PGEES
47. Pinnacle West Companies
48. Portland General Electric Company
49. Powerex Corp.
50. PPL Montana, LLC and PPL EnergyPlus, LLC (PPL Parties)
51. PPM Energy Inc. (fna Pacificorp Power Marketing Inc.)
52. Public Service Company of Colorado
53. Public Service Company of New Mexico
54. Puget Sound Energy, Inc.
55. Reliant Energy Power Generation, Inc. and Reliant Energy, Inc. (Reliant)
56. Sacramento Municipal Utility District
57. Enron
58. Salt River Project Agricultural Improvement and Power District
59. Sempra Energy Resources
60. Sempra Energy Trading Corp.
61. Public Utility District No. 1 of Snohomish County, Washington
62. TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc.
63. TransCanada Energy, Ltd.
64. Turlock Irrigation District
65. Tuscon Electric Power Company
66. Valley Electric Association, Inc.
67. Western Area Power Administration
68. Western Power Trading Forum
69. Williams Energy Marketing & Trading Company

**Attachment F.—Parties Filing Briefs on Commission Staff's Interpretation of the MMIP**

1. American Public Power Association
2. Arizona Electric Power Cooperative
3. Avista Energy
4. Bonneville Power Administration
5. California Generators (Mirant, Dynegy, Williams)
6. California Independent System Operator Corporation
7. California Parties (California Attorney General, California Electricity Oversight Board, California Public Utilities Commission, Pacific Gas & Electric Company, and Southern California Edison Company)
8. Calpine Corporation
9. CARE
10. City of Glendale, California
11. City of Redding, California
12. City of San Diego, California
13. Colorado River Commission of Nevada
14. Competitive Supplier Group (Aquila, Aquila Merchant Services, Arizona Public Service Company, Avista Energy, Constellation Power Source, Coral Power, El Paso Merchant Energy, IDACORP Energy, Idaho Power Company, Pinnacle West Capital Corporation, Portland General Electric, Puget Sound Energy, and Sempra Energy Trading Corp.)
15. Coral Power
16. Duke Energy North America and Duke Energy Trading and Marketing
17. Electric Power Supply Association
18. Electricity Consumers Resource Council
19. Enron Power Marketing, Inc.
20. Grays Harbor County, Washington Public Utility District
21. Los Angeles Department of Water and Power
22. MG Industries, Tamco, and Lehigh Southwest Cement Company

<sup>80</sup> The following entities filed comments in a related proceeding in *Puget Sound Energy, Inc., et al. v. All Jurisdictional Sellers*, Docket No. EL01–10–000: AES, Avista *et al.*, CARE, Public Utility District No. 1 of Chelan County, City of Santa Clara, City of Seattle, City of Tacoma and Port of Seattle, Coral Power, Duke Energy North America, IDACORP and Idaho Power, Kaiser Aluminum & Chemical, Modesto Irrigation District, Northern California Power Agency, Northwest PUDs (Public Utility District No. 2 of Grant County, WA *et al.*), PacifiCorp, Pinnacle West, Portland General Electric, PPL Montana and PPL Energy Plus, Public Service Company of New Mexico, Puget Sound Energy, Reliant Energy, Sacramento Municipal Utility District, Transaction Finality Group, TransAlta Energy Marketing, Williams Energy Marketing & Trading Company.

23. Modesto Irrigation District  
 24. Morgan Stanley Capital Group  
 25. Northern California Power Agency  
 26. PJM Industrial Customer Coalition  
 27. PacifiCorp  
 28. Powerex Corp.  
 29. Public Service Company of New Mexico  
 30. Public Utility District No. 2 of Grant County, Washington  
 31. Puget Sound Energy  
 32. Reliant  
 33. Sempra Energy Trading Corp.

**Attachment G.—ISO Market Notice, July 3, 2002**

*Ancillary Services Payments Rescinded Due to Generator Unavailability*

Market Participants and Scheduling Coordinators: As detailed in a Market Notice

posted on July 2, 2002, the ISO has received requests from various parties for information about Scheduling Coordinators (1) that initially received payments for providing to the ISO Ancillary Services that subsequently were rescinded because the scheduled generating units were unable to provide such services, and (2) that agreed to provide Ancillary Services for their own needs (*i.e.*, self-provision) but in fact did not do so. As described in the July 2, 2002 Market Notice, the ISO does not consider the names of such Scheduling Coordinators or the aggregated amounts of payments rescinded for non-performance or additional charges for failure to self-provide to be confidential or commercially sensitive under the ISO Tariff Section 20.3.2.

The ISO monitors the availability and performance of generating resources

scheduled to provide Ancillary Services. Beginning on June 14, 1999, the ISO began rescinding Ancillary Services capacity payments when such services were not delivered. Failure to deliver such services may be the result of a number of factors, including economic decisions, outages, or operational changes. The ISO charges the relevant market price to Scheduling Coordinators that indicated they would self-provide Ancillary Services but subsequently did not do so.

The Ancillary Services payments listed below represent all invoiced amounts through April 30, 2002 and are subject to potential change as a result of the dispute resolution process set forth in the ISO Tariff.

Scheduling coordinator name	Ancillary service capacity payments rescinded
Arizona Public Service Co .....	\$17,832.13
Automated Power Exchange .....	213,288.24
Avista Energy .....	53,466.57
Bonneville Power Administration .....	33,432.76
California Department of Water Resources .....	2,167,285.09
California Power Exchange .....	20,275,167.45
Calpine .....	2.65
City of Anaheim .....	93,042.14
City of Azusa .....	4,450.00
City of Glendale .....	1,971.41
City of Pasadena .....	609,196.38
City of Vernon .....	6,106.33
Constellation Power Source .....	1,456.53
Coral Power .....	56,459.65
Duke Energy Trading & Marketing .....	14,355,586.95
Dynegy Electric Clearinghouse .....	25,193,737.23
Enron Power Marketing Inc .....	991,443.30
Mirant .....	11,167,048.87
Modesto Irrigation District .....	51,176.11
Northern California Power Agency .....	146,592.71
PG&E—Utility .....	10,995,192.78
PG&E Transmission .....	19,411.23
PG&E Transmission—Non-Grid <sup>81</sup> .....	65,199.05
Portland General Electric Co .....	3,347.35
PowerEx .....	389,325.10
Puget Sound Energy .....	10,000.00
Reliant Energy Services .....	16,715,969.28
Sempra Energy Trading .....	22,215.60
Southern California Edison .....	286,310.15
Western Area Power Administration .....	21,304.02
Williams Energy Services .....	25,073,505.04
<b>Total .....</b>	<b>129,040,522.10</b>

The “PG&E Transmission—Non-Grid” charges are in dispute and have not yet been invoiced to PG&E Transmission. PG&E Transmission's responsibility for payment of these charges currently is under consideration by the Federal Energy Regulatory Commission.

If you have any questions, about this Market Notice, please contact your Client Account Representative.

Client Relations Communications.0715  
 CRCommunications@caiso.com

DEPARTMENT OF ENERGY, FEDERAL ENERGY REGULATORY COMMISSION

	Docket No.
American Electric Power Service Corporation .....	EL03–137–000
Aquila, Inc .....	EL03–138–000
Arizona Public Service Company .....	EL03–139–000
Automated Power Exchange, Inc .....	EL03–140–000
Bonneville Power Administration .....	EL03–141–000
California Department of Water Resources .....	EL03–142–000

## DEPARTMENT OF ENERGY, FEDERAL ENERGY REGULATORY COMMISSION—Continued

	Docket No.
California Power Exchange .....	EL03-143-000
Cargill-Alliant, LLC .....	EL03-144-000
City of Anaheim, California .....	EL03-145-000
City of Azusa, California .....	EL03-146-000
City of Glendale, California .....	EL03-147-000
City of Pasadena, California .....	EL03-148-000
City of Redding, California .....	EL03-149-000
City of Riverside, California .....	EL03-150-000
Coral Power, LLC .....	EL03-151-000
Duke Energy Trading and Marketing Company .....	EL03-152-000
Dynegy Power Marketing Inc., Dynegy Power Corp., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC, and Cabrillo Power II LLC .....	EL03-153-000
Enron Power Marketing, Inc. and Enron Energy Services Inc .....	EL03-154-000
Florida Power & Light .....	EL03-155-000
Idaho Power Company .....	EL03-156-000
Los Angeles Department of Water and Power .....	EL03-157-000
Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC .....	EL03-158-000
Modesto Irrigation District .....	EL03-159-000
Morgan Stanley Capital Group .....	EL03-160-000
Northern California Power Agency .....	EL03-161-000
Pacific Gas and Electric Company .....	EL03-162-000
PacifiCorp .....	EL03-163-000
PGE Energy Services .....	EL03-164-000
Portland General Electric Company .....	EL03-165-000
Powerex Corporation (f/k/a British Columbia Power Exchange Corp.) .....	EL03-166-000
Public Service Company of Colorado .....	EL03-167-000
Public Service Company of New Mexico .....	EL03-168-000
Puget Sound Energy, Inc .....	EL03-169-000
Reliant Resources, Inc., Reliant Energy Power Generation, and Reliant Energy Services, Inc .....	EL03-170-000
Salt River Project Agricultural Improvement and Power District .....	EL03-171-000
San Diego Gas & Electric Company .....	EL03-172-000
Sempra Energy Trading Corporation .....	EL03-173-000
Sierra Pacific Power Company .....	EL03-174-000
Southern California Edison Company .....	EL03-175-000
TransAlta Energy Marketing (U.S.) Inc. and TransAlta Energy Marketing (California), Inc .....	EL03-176-000
Tucson Electric Power Company .....	EL03-177-000
Western Area Power Administration .....	EL03-178-000
Williams Energy Services Corporation .....	EL03-179-000

(Issued June 25, 2003)

MASSEY, Commissioner, *dissenting in part*:

Today the Commissioner takes another step toward addressing the market manipulation that contributed to the extraordinary Western power crisis. I support this show cause order, and applaud the Commission for dealing with these issues. I write separately to express my disagreement with two aspects of the order.

First, I would not limit the monetary penalty for tariff violations to disgorgement of unjust profits. Market manipulation can raise the single market clearing price paid by all market participants and collected by all sellers. The Federal Power Act requires that all rates and charges be just and reasonable. Where the market has been manipulated so as to affect the market clearing price, that price is not just and reasonable and is therefore unlawful. Simply requiring that bad actors disgorge their individual profits does not make the market whole because all sellers received the unlawful price caused by the manipulation. The narrow remedy of profit disgorgement is not an adequate remedy for the adverse effect of the bad behavior on the market price, and may not be an adequate deterrent to future behavior. The appropriate remedy may be that the manipulating seller makes the market

whole.<sup>1</sup> Unfortunately, today's order appears to take this remedy off of the table. I would prefer to wait to see the extent of harm that specific behaviors caused before addressing the remedy issue.

Second, I would not apply the show cause order to non-public utilities that are otherwise not jurisdictional. Today's order uses the same rationale for doing so as was used to extend a refund obligation to non-public utilities in our July 25, 2001 Order.<sup>2</sup> I disagreed with the rationale at that time, and I still do not believe the Commission has this authority.

For these reasons, I dissent in part from today's order.

William L. Massey,  
Commissioner.

[FR Doc. 03-16821 Filed 7-2-03; 8:45 am]

BILLING CODE 6717-01-P

<sup>1</sup> The Commission has accepted the make the market whole remedy as part of a settlement for withholding generation from the California PX market. See 102 FERC ¶ 61,108 (2003).

<sup>2</sup> San Diego Gas & Electric Company *et al.*, 96 FERC ¶ 61,120 (2001).

## DEPARTMENT OF ENERGY

Federal Energy Regulatory  
Commission

[Docket Nos. EL03-134-000 and EL03-135-000]

**Richard Blumenthal, Attorney General  
of the State of Connecticut, and The  
Connecticut Department of Public  
Utility Control v. NRG Power  
Marketing, Inc., Connecticut Light and  
Power Company; Notice of Initiation of  
Proceedings and Refund Effective  
Dates**

June 27, 2003.

Take notice that on June 25, 2003, the Commission issued an order in the above-indicated docket nos. initiating proceedings in Docket Nos. EL03-134-000 and EL03-135-000 under section 206 of the Federal Power Act.

The refund effective date in Docket Nos. EL03-134-000 and EL03-135-000