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March 3, 2003

VIA ELECTRONIC FILING

Honorable Magalie Roman Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

RE: *San Diego Gas and Electric Company v. Sellers of Energy*
FERC Docket Nos. EL00-95 and EL00-98

Dear Secretary Salas:

Enclosed please find the California Parties' Motion to Publicly Disclose All Exhibits Filed in the 100 Day Proceeding.

Please call if you have any questions. Thank you for your attention to this matter.

Sincerely,

VICKIE P. WHITNEY

For BILL LOCKYER
Attorney General

VPW:ab
Enclosure
cc: ListServ and Service Lists
Compiled in these proceedings

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company, Complainant,	)	Docket Nos. EL00-95-000
	)	EL00-95-045
	)	EL00-95-075
v.	)	
	)	
Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange, Respondents.	)	
	)	EL00-98-000
Investigation of Practices of the California Independent System Operator and the California Power Exchange	)	EL00-98-042
	)	EL00-98-063

CALIFORNIA PARTIES' MOTION TO PUBLICLY DISCLOSE ALL EXHIBITS FILED IN THE 100 DAY PROCEEDING

In accordance with Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"), 18 C.F.R. § 385.212 (2002), the California Parties, collectively, the People of the State of California *ex rel.* Bill Lockyer, Attorney General ("Attorney General"), the California Electricity Oversight Board ("EOB"), the California Public Utilities Commission ("CPUC") and Southern California Edison Company ("Edison")[1], respectfully request that the Commission make public all exhibits filed in the 100 Day Proceeding on March 3, 2003 and those to be filed on March 20, 2003.

[1] Pacific Gas and Electric Company ("PG&E") takes no position on making the filing public at this time but understands that the Commission may make this information public after having time to review the evidence.

The public interest requires that all evidence in the 100 Day Proceeding concerning the manipulation of the California markets should be made available for public review. The importance of this proceeding to California's citizens cannot be overstated. Umbrella protective orders of the type in place here are designed to facilitate discovery, during the designated discovery period, by avoiding disputes over release of alleged commercially sensitive information. Now that the discovery period the Commission permitted is concluded, the evidence gleaned from discovery that is being filed with the Commission in the form of exhibits should be publicly available. The California Parties know of no legitimate claim that could credibly be advanced to justify refusal to disclose publicly the exhibits contained in the evidentiary submissions that are being made in this case. The information in question dates back to January 2000, over three years ago – if the concern is competitive harm, it is difficult to imagine that any of this information could cause it – it is very stale. Even if there were a basis for protecting the information that might be colorable under other circumstances, the balance here weighs in favor of disclosure. The public has a right to know the truth about what caused the California energy crisis. This information cannot be kept under wraps any longer.[2]

[2] Indeed, in *PEPCO Energy Co*., the Commission found that a system that fails to provide information to customers, even if such information is provided to the Commission, fails to comport with the requirements of open government. The Commission said, "providing the data only to the Commission, and to no others (including customers) would not be a satisfactory resolution. Commission evaluation of rates . . . based on data known only to the utility charging the rates . . . and the Commission . . . and **not** to the customer who is being charged the rates . . . would hardly comport with the core purposes of FOIA." 88 FERC ¶ 61,330 at 62,019 n.13 (1999) (emphasis in original.)

BACKGROUND

The filing of additional testimony and evidence of market manipulation by the California Parties ("100 Day Filing") marks an important milestone in a journey that has to date, lasted nearly three years. The complaint filed by San Diego Gas & Electric Company on August 2, 2000, seeking Commission action to abate the abnormally increasing prices in California's electricity market, triggered an "informal investigation" and a series of Commission orders,[3] the majority of which are now on appeal in the Ninth Circuit. Over the course of the Commission's orders up through the July 25 Order commencing the refund proceeding, the Commission concluded that it lacked the evidence necessary to file that any seller in the California markets manipulated the markets or violated tariffs. No discovery had ever been allowed to occur on these issues, however, and no evidentiary hearing was permitted – the Commission asserted that, "a trial-type hearing is not necessary to resolve the matters."[4]

The July 25th Order, as modified on December 19, 2001, instituted and governed a proceeding designed solely to arrive at refunds for the charging of unjust and unreasonable rates charged in California, pursuant to the Commission's preordained refund formula. While discovery was allowed to proceed in that narrow context and an evidentiary hearing permitted, the scope was strictly limited to the application of the methodology directed by the Commission, and nothing more.

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[3] These orders include, but are not limited to: *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000) (August 23rd Order); *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121 (2000) (November 1st Order); *San Diego Gas & Elec. Co*., 93 FERC ¶ 61,294 (2000) (December 15th Order); *San Diego Gas & Elec. Co.*, 94 FERC ¶ 61,245 (2001) (March 9th Order); *San Diego Gas & Elec. Co*., 95 FERC ¶ 61,115 (2001) (April 26th Order); *San Diego Gas & Elec. Co.*, 95 FERC ¶ 61,418 (2001) (June 19th Order*)*; *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 (2001) (July 25th Order); *San Diego Gas & Elec. Co.*, 97 FERC ¶ 61,275 (2001) (December 19th Order).

[4] November 1st Order, 93 FERC at 61,373.

It was not until February 13, 2002, in response to requests from Congress, that the Commission directed a Staff fact-finding investigation into whether any entity manipulated short-term prices in electric energy or natural gas markets in the West in a manner that impacted long-term contracts.[5] On May 6, 2002, the Commission posted the now-infamous Enron memoranda that describe in great detail the market manipulation games engaged in by Enron and other sellers, in a deliberate attempt to increase wholesale power prices in California for their own profit. Data requests by the Staff apparently yielded further evidence, all of which is not fully known due to the nonpublic nature of the Staff investigation, that other and further market games were being played during critical periods of California's energy crisis.

On the basis of the limited information that began to come to light, on June 5, 2002, the California Parties filed a motion with the Ninth Circuit under Section 313(b) of the Federal Power Act ("FPA") for leave to adduce additional evidence before the Commission regarding sellers' market manipulation. The Ninth Circuit was persuaded that indeed, as had been pointed out by the California Parties, the "investigation" by the Commission had fallen short and that the parties should be permitted to obtain further evidence of market manipulation.[6] In fact, in order to grant the California Parties' Section 313(b) motion, the Ninth Circuit had to find that the evidence that the California Parties sought to adduce was the sort of evidence that – had it been available at the time the Commission issued its orders – would clearly have persuaded or compelled the

[5] Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002) (February 13th Order), Docket No. PA02-2.

[6] California Public Utilities Commission v. Federal Energy Regulatory Commission, 9th Circuit Case No. 01-71051, et al. (consolidated cases), (9th Cir. August 21, 2002.)

Commission to reach different decisions concerning the scope of and methodology for establishing refunds.[7] The manner in which new evidence would be adduced was left to the Commission.

Consequently, on September 6, 2002, the California Parties filed a motion for discovery to implement the 9th Circuit's Order.[8] On November 20, 2002, the Commission issued an Order on Motion for Discovery Order, granting the California Parties 100 days in which to conduct discovery for a period covering back to January 1, 2000, and to file additional evidence and findings of fact procured.[9] The Honorable H. Peter Young was appointed the Discovery Master and, as in all cases, a protective order (the same one that governed the refund proceeding before Judge Birchman) was adopted for use in the 100 Day Proceeding.[10]

The California Parties request that the Commission set aside the protective order so that all of the exhibits filed by the California Parties and all other parties in the 100

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[7] In *Rocky Mountain Power Company v. FPC*, 409 F.2d 1122, 1128, n. 21 (D.C. Cir. 1969), the D.C. Circuit explained that in order to persuade a court, pursuant to section 313(b) of the FPA, to allow a party to adduce new evidence, the party must show that it "clearly appear[s] that the new evidence would compel or persuade to a contrary result." (citing, *Louisville Gas & Elec. Co. v. FPC*, 129 F.2d 126, 134 (6th Cir. 1942), cert. denied, 318 U.S. 761 (1942), reh'g denied, 318 U.S. 800 (1942).

[8] The California Parties asked for three things: (1) to conduct discovery to obtain evidence of market manipulation by sellers; (2) that the Commission appoint an ALJ as Discovery Master; and (3) that they file, after the 100 days of discovery, additional evidence found along with recommendations concerning the need for additional procedures.

[9] 101 FERC ¶ 61,186.

[10] *San Diego Gas & Electric Co., et al.*, Order of Chief Judge Adopting Protective Order, Docket Nos. EL00-95 & EL00-98 (August 7, 2001); *San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 63,035 (2001) (Order Modifying Protective Order (September 6, 2001); *San Diego Gas & Electric Co., et al.*, Order Regarding Protective Order in Discovery Master Proceedings, Docket Nos. EL00-95 & El00-98 (December 2, 2002) ("Protective Order").

Day Proceeding on March 3, 2003 and March 20, 2003, will be made public.[11] Given the extreme public importance of the information uncovered, the protective order should not shield those who have engaged in unlawful, manipulative, anticompetitive and injurious conduct. The truth should be laid bare for all to see, most especially given the health, safety, and welfare consequences endured by California's citizens as a result of such conduct.[12]

THE CONTENT OF THE EVIDENCE UPON WHICH THIS COMMISSION WILL ACT MUST BE MADE PUBLIC

There is indeed a great public interest in administrative proceedings such as the one now pending before this Commission, since it is the public who are most impacted. As the Supreme Court has stated, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[13] The Commission itself has long been attuned to the need for public access to its processes – the need for "sunshine" in decision making – and has been loath to keep important information secret absent a truly compelling need to deny public access. In

[11] The Protective Order prescribes a procedure for contesting a producing party's designation of materials as "protected materials," and generally contemplates a process under which the Presiding Judge will decide whether materials should remain protected. Protective Order, P 11. However, the Protective Order also provides that any party may ask the *Commission* to find that the Protective Order should not apply to *all or any materials* previously designated as Protected Materials pursuant to the Protective Order. *Id*. at P 14. The California Parties are invoking this latter provision of the Protective Order concerning materials produced in the 100 Days Proceeding and used in the Exhibits filed with the Commission because of the exigency and importance of this issue and because the discovery period has now ended so that the matter is now before the Commission, not Judge Birchman or Judge Young.

[12] The California Parties would also point the Commission to a letter sent to Chairman Pat Wood by California Senator Dianne Feinstein on February 6, 2003, also asking the Commission to lift the protective order.

[13] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

proceedings before this agency, it has been recognized that, "the public sector is not present; it is only tangentially represented by the interventions of State regulatory and environmental bodies, and, therefore, the public can only apprehend the nature and conduct of an agency's adjudicatory process through the information made available by the agency to the public." [14] Consequently, "*in camera* reviews and determinations at regulatory agencies such as this Commission are antithetical to the paramount desideratum of the public's right to know not merely what *was the judgment* of the ultimate decisional body, but more importantly, *what was the content of the evidence* upon which it reached that judgment."[15]

The principles outlined above are the very principles that should guide the Commission here in setting aside the protective order as to the 100 Day Proceeding. There can be no clearer case where the public has the right to know. California's citizens need to know the truth – they cannot find satisfaction simply in a final decision by the Commission – they should and must know the evidence upon which the Commission ultimately reaches its decision.

The Commission's guideline for lifting protective orders is found in *Transcontinental Gas Pipe Line Corporation*, 40 FERC ¶ 61,023 (1987). There, the Commission stated that it does not promote closed administrative proceedings.[16] Especially in the case of umbrella protective orders of the type at issue here – where there has never been a decision by the Commission or a Presiding Judge that particular

[14] *Southern California Edison and San Diego Gas and Electric Company*, 49 FERC ¶ 63,029 at 65,127 (1989)
[15] *Id*. (emphasis in original).
[16] *Id.* at 61,066.

materials subject to the protective order are worthy of secret treatment – it should not be presumed that all (or even any) materials designated by a producing party as protected will remain hidden from the public view once they become the focus of testimony, evidence, and Commission decision making. If documents do not qualify as confidential or commercially sensitive, then either the protective order should be dissolved or all of the documents that cannot qualify as deserving of protection should be removed from the scope of the order.[17] The California Parties believe, and ask the Commission to find, that none of the materials that are being filed as evidence in this proceeding merit protection from public disclosure.

In cases concerning the lifting of protective orders, the Commission has balanced competitive harm against the public interest.[18] Where the potential harm in disclosure is minimal (such as where it is stale through the passage of time), the information has been deemed to lose its commercial sensitivity and thus, the public's right to know has won out.[19]

First and foremost, while the California Parties recognize that there is validity in some situations to protecting one party from benefiting from the business secrets of another, the balance here weighs heavily in favor of disclosure. The right and need of the public to know is paramount. Those whose conduct is revealed in the 100 Day

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[17] *Id.*

[18] *Buckeye Pipe Line Company*, 44 FERC ¶ 61,066 (1988); *Panhandle Eastern Pipe Line Company*, 44 FERC ¶ 61,246 (1988); *Transcontinental Gas Pipe Line Corporation*, 40 FERC ¶ 61,023 (1987); *see also, Southern California Edison and San Diego Gas and Electric Company*, 49 FERC ¶ 63,029 (1989); and *Columbia Gas Transmission Corporation*, 20 FERC ¶ 61,047 (1982).

[19] *See, Panhandle Eastern Pipe Line Company*, 44 FERC ¶ 61,246 at 61,917 (1988).

Proceeding as unlawful, fraudulent and manipulative, should be forced to face the scrutiny of those they injured – the public.

Second, the information at issue here is *not* competitively sensitive. The time period covered by this 100 Day Proceeding is January 1, 2000 through June 20, 2001. Information that is 2 ½ to 3 years old is stale and no longer has any competitive value[20], particularly in an industry in which historical business practices already have changed dramatically during that same time period – in part because of the energy crisis and the admitted manipulative seller behavior that caused it. This is buttressed by the fact that similar data for the most recent portion of the time period (October 2, 2000 through June 20, 2001), has *already* been made subject to public disclosure because all evidence filed in the underlying Refund Proceeding went into the record without a protected designation, and thus is available for the public to see. There is no basis for treating similar information that is from a time period that is even more remote any differently.

Third, some of the information that is being presented (or information like it, in the case of the notorious Enron memoranda) is already in the public realm. Countless newspapers, radio, and television reports have provided accounts of unscrupulous tactics employed by Enron and others in manipulating California's electric and gas markets, all for profit. In addition, information such as heat rates of generating units, mitigated market clearing prices, and NOx emissions costs have already been publicized as a result

[20] *Id*.

of the lifting of the protective order in the Refund Proceeding. Clearly, information that is already in the public domain cannot be subject to a protective order.[21]

Fourth, umbrella-type protective orders such as the one here, serve as an administrative convenience, primarily designed to facilitate discovery. In *Southern California Edison and San Diego Gas and Electric Company*,[22] ALJ Lewnes discusses the Commission's utilization of the protective order process to expedite discovery and to avoid a cumbersome and time-consuming process of assessing each individual piece of information for isolated determinations on protection. Given the very limited amount of time afforded the California Parties here, it was imperative to expedite discovery – hence the protective order. Now, however, continuing to keep "secret" the types of information at issue, would not serve any purpose save permitting wrongdoers to shield themselves from public scrutiny and embarrassment. To prevent disclosure of commercially sensitive information is one thing – it is quite another to prevent disclosure of information that is not competitively sensitive merely because of a preference that the public not know the nature and extent of impermissible manipulation. There is no justification - either legally or morally - for preventing those affected by such conduct from knowing the truth.

[21] The California Parties note in this regard that, because most of the sellers in the 100 day Proceeding marked most of their data productions as "protected," and because those materials have been incorporated into exhibits that contain evidence that already is in the public domain or is otherwise undeserving of protected status, the California Parties have been forced to designate all of the Exhibits they are filing on March 3, 2003, and even the indices that summarize those exhibits, as "protected."

[22] 49 FERC ¶ 63,029 at 65,126.

CONCLUSION

Unquestionably, the citizens and businesses of California suffered great harm during 2000 and 2001 – we now know why. The reasons for rolling blackouts, massive increases in the prices of electricity, the financial collapse of two major utilities, and the substantial impact to California's budget must not be available to only a select few. The public's right to know outweighs any other considerations here and warrants that all Exhibits be made public.

Respectfully submitted,

Vickie P. Whitney

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Dated: March 3, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon each person designated on the official service list in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Harrisburg, Pennsylvania, this 3rd day of March, 2003.

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