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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-180-000
Enron Power Marketing Inc. and Enron Energy Services Inc.	Docket No. EL03-154-000
Enron Power Marketing, Inc.	Docket No.EL02-115-008

PRESIDING ADMINISTRATIVE LAW JUDGE'S ORDER HOLDING ENRON IN DEFAULT FOR FAILURE TO COMPLY WITH DISCOVERY RULES

(Issued November 18, 2004)

1. On November 17, 2004, Public Utility District No. 1 of Snohomish County, Washington ("Snohomish") filed a motion seeking the imposition of sanctions against Enron Power Marketing, Inc. and Enron Energy Services Inc. (collectively "Enron"). The motion recited a number of alleged grievances; however, its gravamen was the claim that Enron had failed to comply with my order of October 14, 2004, to the extent that the order required Enron to produce and provide Snohomish with copies of certain specified documents on or before November 10, 2004.

2. Enron filed an answer to the motion on November 18, 2004. Enron interposed several reasons for its failure to meet the November 10 deadline. In the first place, said Enron "the sheer size of the request made it impossible to deliver the documents to Snohomish by November 10, or even close to that date." (However, Enron did concede that some 90% of the documents requested by Snohomish had been segregated from other material kept in Enron's Houston warehouse and were in the hands of Enron's contractor, ready for delivery by the November 10 deadline.) In large measure, Enron continued, the delay was caused by Snohomish's insistence that the materials be converted into an electronic format specified by Snohomish. The delay was exacerbated, according to Enron, by Snohomish's refusal to (a) specify to Enron's contractor the precise format it desired; and (b) make suitable arrangements for paying the contractor's bill for the conversion and for other processing tasks. The contretemps about conversion has apparently been resolved by mutual agreement of the parties – for Enron now says that "Snohomish's refusal to pay for the process, including conversion from hard copy into the electronic format Snohomish desires, is the only remaining problem preventing shipment of documents on a rolling basis."

3. My order of October 14, 2004 was clear and unambiguous. It was entered after Snohomish had filed a motion to compel Enron to respond to a data request seeking an index, in Enron's possession and control, of documents kept in its Houston warehouse facility. The motion prompted a conference call during which counsel for both Enron and Snohomish were given the opportunity to state their clients' positions on the discovery of documents kept at that facility. During that conference call the issue of the appropriate length of time for going through materials designated for disclosure was discussed at some length, and I indicated that I would set November 10 as the deadline for Enron to produce documents designated by Snohomish. Counsel for Enron did not suggest that Snohomish's designation of any particular volume of materials might be a problem. So the order was issued on the following day. It provided that Enron must produce a redacted version of its Directory of materials sought by Snohomish not later than October 22, 2004 and that "Enron must produce and provide to counsel for Snohomish documents listed on the index or director and designated by Snohomish not later than November 10, 2004." November 10 came and went, but Enron provided nothing to Snohomish.

4. When Enron realized that it could not comply with the requirement to "produce and provide," it could have, and should have, sought a protective order under Rule 410(c), modifying the deadline, allowing it to produce and provide the documents in "hard copy" format or seeking other relief. Enron did not do so. Instead, according to its answer, its lawyers made telephone calls to counsel for Snohomish on or about November 10 to ascertain in what "electronic format" Snohomish wanted the materials and to make it clear that it expected Snohomish to pay the contractor's bill for the conversion process and for handling the documents. The failure of Snohomish's counsel to return the calls immediately is not a valid excuse for missing the deadline. Nor is disagreement over which party is responsible for the contractor's charges.

5. This process began with a data request for documentary materials under Rule 406. Under the processes that this Commission has historically followed, a valid data request seeking documents is responded to by the production and transfer of "hard copy" reproductions of the documents in question. Generally, the obligation to reproduce the documents rests with the party from which discovery is sought, and that party must pay the cost of reproducing and shipping the documents. If a different arrangement is desired by the party upon which the data request was made, it has two choices. It can either reach a voluntary mutual agreement with the party that interposed the data request or it can seek a protective order under Rule 410. What it cannot do is what Enron did here – allow the deadline for responding to the data request pass without doing anything.

6. Enron says that timely compliance with the data request and the October 14, 2004 order compelling such timely compliance would have been very expensive. Here again, the expense of compliance was something that could have been considered if Enron had raised it in a request for a protective order under Rule 410. But Enron did not do so. It

simply allowed the deadline to pass without complying with the data request or seeking relief from its obligation to do so. It should be borne in mind, moreover, that Enron is a regulated public utility. That is a status it voluntarily chose for itself. The obligation to respond to discovery requests in investigation proceedings initiated by the Commission or upon complaint is part and parcel of being a regulated public utility. See 16 U.S.C. § 825f(b). It comes with the territory. And in light of the nature and purposes of this particular investigation proceeding, one can have little sympathy with Enron's poor-mouthing about the high cost of compliance with the Commission's discovery rules.

7. Enron says that Snohomish's data request should be regarded as a request for production of documents in situ under Rule 406. It is traditional that when a request for examination of documents is made, the party making the request must bear the expense of reproducing the documents. There are several problems that arise in connections with Enron's suggestion. The first, of course, is that the party seeking discovery has the privilege of designating the discovery rule under which it elects to proceed, at least in the first instance. And Snohomish interposed data requests, not requests for production and examination of papers. It is possible, of course to convert one form of discovery to the other, and Enron could have chosen to essay this maneuver by timely filing of a motion under Rule 410. As noted above, however, this particular train left the station when the deadline for compliance with the data request expired. Enron's inventive suggestion simply comes too late.

8. For the foregoing reasons, I hold that Enron is, and has been, in willful default of my order requiring it to respond to Snohomish's data request for specified documents that are in Enron's possession and control.

9. This brings us to the question of who is responsible for payment of the cost of reproducing and handling the documents. As we have noted above, the general rule is that the party served with the data requests must bear the cost of reproducing the documents in "hard copy" format and delivering them to counsel for the party that made the data request. If Snohomish wishes to have the documents converted to a format other than "hard copies," it must pay the cost of conversion and will get no discount on the ground that it has thereby saved the cost of reproduction by an office copier. I also note that a copy of the contractor's bill attached to Snohomish's motion indicates that the contractor sought to collect a charge for stamping a Bates number on each page of the documents. Bates stamping is performed for the convenience of the party supplying the documents under a data request (Enron in this case). Therefore, the cost of Bates stamping may not be imposed upon Snohomish, the party making the data request. If Enron elects to use a contractor to perform the reproduction-and-delivery services, that is Enron's privilege; Enron may not, however, shift responsibility for compliance with the data requests to a contractor or to dealings between its contractor and the party making the data request. The responsibility for compliance rests on Enron and Enron alone. Enron cannot excuse its conduct by arguing that Snohomish is at fault for failing to reach

an agreement with its contractor over the amount and payment of the contractor's bill.

10. It is my conclusion, based on the pleadings and my familiarity with what has transpired in this proceeding, that the time and occasion has come to grant Snohomish's motion and impose sanctions on Enron for its willful failure to comply with its obligations under the Commission's discovery rules and, in particular, with my order of October 14, 2004. Upon considering the sanctions available to me, I have decided that the sanctions specifically mentioned in Rule 411(a) are not well calculated to remedy the situation at hand. This is not a case in which the guilty party is seeking some relief from the Commission; hence dismissal of one or claims or refusal to receive otherwise admissible evidence is inappropriate. Other remedies specifically discussed in subparagraphs (1)-(4) of Rule 411(a) have the disadvantage of distorting the record if they are applied. This is a case in which the Commission's inquiry would benefit from as full and complete a record as possible. In this case, I strongly believe that a per diem monetary penalty ought to be imposed on Enron for its past non-compliance with my discovery order and for any continuing non-compliance that may take place hereafter. For these reasons, I have decided to rely on the general authority of the Presiding Judge in Rule 714 to certify to the Commission the question of imposing an appropriate sanction upon Enron. In an appropriate case, the Commission has ruled, it may impose a monetary sanction upon a party that fails to comply with a discovery order. Pennsylvania Power Co., 21 FERC ¶ 61,313 (1982). See also, Connecticut Yankee Atomic Power Co., 81 FERC ¶ 63,006 (1997).

11. This is a clear case of disobedience to a discovery order by a party that should know better. I recommend that the Commission enter an order directing Enron to pay a monetary penalty of $500.00 per day for each day of non-compliance with the October 14 order from November 10 to, and including, the date of this order and $1,000.00 per day for each day of non-compliance thereafter. The amount of the penalty shall be paid directly to counsel for Snohomish for the account of Snohomish to compensate Snohomish for the burdens it has shouldered in attempting to extract from Enron material to which it was entitled under the Commission's Procedural Rules.

IT IS SO ORDERED.

Isaac D. Benkin
Presiding Administrative Law Judge