

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

San Diego Gas & Electric Co. Docket No. EL00-95-167
Docket No. EL00-95-169

v.

Sellers of Energy and Ancillary Services

Investigation of the Practices of the California
Independent System Operator and the
California Power Exchange Docket No. EL00-98-153
Docket No. EL00-98-155

Investigation of Anomalous Bidding
Behavior and Practices in the Western
Markets Docket No. IN03-10-015
Docket No. IN03-10-017

Fact-Finding Investigation into Possible
Manipulation of Electric and Natural Gas
Prices Docket No. PA02-2-029
Docket No. PA02-2-031

Enron Power Marketing, Inc. and Enron
Energy Services, Inc. Docket No. EL03-180-016
Docket No. EL03-180-018

Enron Power Marketing, Inc. and Enron
Energy Services, Inc. Docket No. EL03-154-012
Docket No. EL03-154-014

Portland General Electric Company Docket No. EL02-114-013
Docket No. EL02-114-015

Enron Power Marketing, Inc. Docket No. EL02-115-017
Docket No. EL02-115-019

El Paso Electric Company, Enron Power
Marketing, Inc., and Enron Capital and Trade
Resources Corporation Docket No. EL02-113-015
Docket No. EL02-113-017

ORDER DENYING REHEARING

(Issued April 10, 2006)

1. This order addresses the requests for rehearing of two Commission orders approving settlements in the captioned dockets. The settlements were filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.¹ The first settlement was filed on August 24, 2005 and involves Enron,² the California Parties,³ and the Federal Energy Regulatory Commission's Office of Market Oversight and Investigations (OMOI) (the Global Settlement). The Commission issued an order approving this settlement on November 15, 2005.⁴

¹ 18 C.F.R. § 385.602 (2005).

² For purposes of the Settlement, "Enron" or the "Enron Parties" means the Enron Debtors and the Enron Non-Debtor Gas Entities. The "Enron Debtors" are Enron Corp.; Enron Power Marketing, Inc. (EPMI); Enron North America Corp. (formerly known as Enron Capital and Trade Resources Corp.); Enron Energy Marketing Corp.; Enron Energy Services Inc.; Enron Energy Services North America, Inc.; Enron Capital & Trade Resources International Corp.; Enron Energy Services, LLC; Enron Energy Services Operations, Inc.; Enron Natural Gas Marketing Corp.; and ENA Upstream Company, LLC. The "Enron Non-Debtor Gas Entities" are Enron Canada Corp.; Enron Compression Services Company; and Enron MW, L.L.C.

³ For purposes of the Settlement, the "California Parties" means collectively: Pacific Gas & Electric Company (PG&E); Southern California Edison Company (SCE); San Diego Gas & Electric Company (SDG&E); the People of the State of California, *ex rel.* Bill Lockyer, Attorney General (the California Attorney General); the California Department of Water Resources acting solely under authority and powers created by California Assembly Bill 1 from the First Extraordinary Session of 2000 – 2001, codified in sections 80000 through 80270 of the California Water Code (CERS); the California Electricity Oversight Board (CEOB); and the California Public Utilities Commission (CPUC).

⁴ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 113 FERC ¶ 61,171 (2005) (November 15 Order).

2. The second settlement was filed on October 11, 2005 in the captioned dockets by Enron and the SRP Parties⁵ (the Enron-SRP Settlement). The Commission issued orders approving this settlement on November 30 and December 5, 2005.⁶

3. The Global Settlement and the Enron-SRP Settlement are nearly identical in most essential terms. Only The Port of Seattle, Washington (Port) filed timely requests for rehearing of the settlement orders, raising five identical issues with respect to each settlement. Its rehearing requests were coupled with requests for expedited consideration and motions for a stay of the November 15 and December 15 orders. Because only Port has requested rehearing of the November 15 and the December 5 orders, and because it raises identical concerns on rehearing with respect to each order, the Commission determined that, for the sake of administrative efficiency, it would address the requests for rehearing of these orders in the instant order.

4. The Enron Entities, the California Parties and OMOI filed joint answers to Port's requests for rehearing, addressing only the motion for stay of the November 15 Order. A similar pleading addressing the motion for stay of the December 5 Order was filed by the Enron Entities and SRP. In both pleadings, the parties acknowledge the fact that the Commission's rules do not permit answers to requests for rehearing, but they assert that, because Port's requests for expedited consideration and motion for stay rely on the arguments in its requests for rehearing, their answers must address, at least in part, certain of the issues raised in Port's request for rehearing.⁷ Because these answers are directed at responding to Port's request for expedited consideration and motion for stay rather than directed at responding to the issues addressed in Port's requests for rehearing, the

⁵ For purposes of the Settlement, "SRP Parties" refers to New West Energy Corporation (New West) and Salt River Project Agricultural Improvement and Power District (SRP).

⁶ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 113 FERC ¶ 61,226 (2005) (November 30 Order); 113 FERC ¶ 61,171 (2005) (December 5 Order). The December 5 Order corrected an error in the November 30 Order misinterpreting the applicability of the Commission's Order No. 663 (112 FERC ¶ 61,297; 70 *Fed. Reg.* 55723 (2005)) to settlements, thereby superseding the November 30 Order. Thus, with respect to the Enron-SRP Settlement in these proceedings, the instant order addresses only the request for rehearing of the December 5 Order.

⁷ Answer of Enron Entities, California Parties and OMOI to Port's Request for Rehearing at 4, n.7 and Answer of Enron-SRP at 4, n.7.

Commission will waive its general prohibition on answers to requests for rehearing and deem them to be responses to Port's motion for a stay, which are permitted under Rule 213 (a) (3).⁸

5. Subsequently, Port filed a supplemental request for rehearing of both settlement orders, identifying two additional issues to be added to Port's Statement of Issues in its requests for rehearing. Port's supplemental requests raise a new issue previously not addressed: Port cites to various sections of the Global Settlement and the Enron-SRP Settlement and now asserts that Port is affirmatively precluded from participating in the settlements, because it does not qualify as a "market participant" or a "non-settling participant" under the terms of the settlements. As a result, Port is not protected by the provisions of the settlements intended to set aside funds for those who choose to pursue their litigation against Enron rather than join the settlements. Port characterizes this issue as "within the ambit" of its previous Statement of Issues. However, it states that "it has become clear that the Commission's Solicitor does not" agree that the issues identified in its supplemental request for rehearing are within the ambit of its previous Statement of Issues.⁹

6. The Commission finds that the first issue in Port's supplemental rehearing request is not within the ambit of Port's rehearing requests but is, in fact, a new issue that has not been articulated previously by Port. The Commission looks with disfavor on parties raising new issues on rehearing. It is disruptive to the administrative process, because it has the effect of moving the target for parties seeking a final administrative decision.¹⁰ Moreover, because Rule 713 (d) (1) prohibits answers to requests for rehearing, the parties to the Global Settlement and the Enron-SRP Settlement are not entitled to file an answer in which they could offer alternative interpretations for the sections of the settlements now cited by Port or provide further justification for a conclusion that Port's interests will be adequately protected despite its not being a party to the settlements.

⁸ 18 C.F.R. § 213 (a) (3) (2005).

⁹ Supplemental Rehearing Requests at 2, *citing* Response of Federal Energy Regulatory Commission in Opposition to Petition for Writ of Mandamus at 5, 6 and 10, *Port of Seattle v. FERC*, Case No. 05-76837 (9th Cir.).

¹⁰ *See, e.g., Calpine Oneta Power v. American Electric Power Service Corp.*, 114 FERC ¶ 61,030 at P.7 (2006); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211 at P.34 (2005), *citing Baltimore Gas & Electric Company*, 91 FERC ¶ 61,270 at 61,922 (2000) and *Baltimore Gas & Electric Company*, 92 FERC ¶ 61,043 at 61,114 (2000).

Moreover, in their answer to the request for expedited consideration and motion for stay, the parties to the settlements limited their discussion to the issue of whether Port's motion meets the legal requirements warranting a stay and did not address other issues raised by Port's rehearing requests. Accordingly, the Commission will not address this issue, as would be patently unfair to the parties to the settlement.

7. The Commission denies Port's requests for rehearing and its motion for stay, as discussed below.

I. Background on the Settlements

8. The Settlements resolve claims and matters raised in the captioned proceedings (FERC Proceedings) arising from transactions and events in Western energy markets, including markets of the California Independent System Operator (CAISO) and the California Power Exchange (CalPX) during the period from January 16, 1997 through June 25, 2003 (the Settlement Period) as they relate to Enron.

9. The Global Settlement provided for cash payments of up to \$47.4 million from accounts held by the CAISO and the CalPX. In addition, the Settlement provided a Class 6 unsecured claim of \$875 million against Enron Power Marketing Inc. (EPMI) in Enron's ongoing bankruptcy proceeding. Enron also agreed to a \$600 million civil penalty in the form of a subordinated Class 380 penalty claim allowed against EPMI in favor of the California Attorney General, the CPUC, the CEOB, and the Attorneys General of Washington and Oregon. The Global Settlement provided that other market participants (generally those who participated in the CalPX and CASIO markets) could join the Settlement as Opt-in Participants.¹¹ With one exception, the Global Settlement did not affect those who did not opt-in. The exception pertains to approximately \$22.4 million held by the CAISO as collateral related to certain meter reading claims. The Global Settlement provided that these funds would be distributed to all Market

¹¹ The following entities notified the Commission of their intention to opt-into the Global Settlement: City of Anaheim, California; APX, Inc.; Aquila Merchant Services; City of Banning, California; Constellation NewEnergy, Inc.; Dynegy; IDACORP Energy L.P. and Idaho Power Company (jointly); Illinova Energy Partners; Pinnacle West Capital Corporation and Arizona Public Service Company (jointly); Portland General Electric Company; City of Riverside, California; and SRP.

Participants,¹² regardless of whether they opt-in. In addition to the Commission's approval, the Global Settlement required the approval of the CPUC and the Enron Bankruptcy Court,¹³ both of whom approved the Global Settlement prior to issuance of the November 15 Order.

10. The Enron-SRP Settlement provided that the SRP Parties would be paid \$884,065 in cash from the Enron Refund Escrow established as part of the Global Settlement.¹⁴ In addition, Enron allowed a Class 6 general unsecured claim of \$2,700,000 in favor of the SRP Parties in the Enron Bankruptcy proceedings. The Enron Bankruptcy Court approved the Enron-SRP prior to the issuance of the December 5 Order. Because the Enron-SRP Settlement is a bilateral agreement, it did not provide an opportunity for third parties to opt-into the settlement.

II. Port's Requests for Rehearing

11. In both the Global Settlement and the Enron-SRP Settlement proceedings, Port filed identical requests for rehearing, and each rehearing request was coupled with a request for expedited consideration and a motion for stay. In addition, Port filed a supplemental request for rehearing in each proceeding purporting to identify two issues that it asserts are within the ambit of issues identified in the Statement of Issues in its requests for rehearing. The Commission finds that the first issue in Port's supplemental rehearing request is not within the ambit of Port's rehearing requests but is, in fact, a new issue that has not been articulated previously by Port. The Commission looks with disfavor on parties raising new issues on rehearing. It is disruptive to the administrative process, because it has the effect of moving the target for parties seeking a final

¹² Section 1.52 of the Settlement defines Market Participants as "other than the [CA]ISO and [Cal]PX themselves, those entities that were [CA]ISO scheduling coordinators or [Cal]PX participants or otherwise directly sold energy to or purchased energy from the [CA]ISO and/or [Cal]PX during part or all of the Settlement Period."

¹³ *In re Enron Corp., et al., Reorganized Debtors*, Case No. 01-16034 (ALG) (Bankr. S.D.N.Y.).

¹⁴ The cash consideration to be paid SRP is exactly the dollar amount specified in the Global Settlement (*see* Exhibit A Allocation Matrix) as being owed to SRP.

administrative decision.¹⁵ Because Rule 713 (d) (1) prohibits answers to requests for rehearing, the parties to the Global Settlement and the Enron-SRP Settlement are not entitled to file an answer in which they could offer alternative interpretations for the sections of the settlements now cited by Port or provide further justification for a conclusion that Port's interests will be adequately protected despite its not being a party to the settlements. Moreover, in their answer to the request for expedited consideration and motion for stay, the parties to the settlements limited their discussion to the issue of whether Port's motion meets the legal requirements warranting a stay and did not address other issues raised by Port's rehearing requests. Accordingly, the Commission will not address this issue, as would be patently unfair to the parties to the settlement. The second issue identified in the supplemental requests for rehearing is within the ambit of Port's Statement of Issues, specifically issue (d) discussed below.¹⁶

12. Port identified the following issues in its rehearing requests and supplemental rehearing requests:

- a.) Whether the Commission erred in approving the settlements as uncontested, employing the Rule 602 "fair and reasonable and in the public interest" standard, when there are genuine issues of material fact in dispute;

¹⁵ See, e.g., *Calpine Oneta Power v. American Electric Power Service Corp.*, 114 FERC ¶ 61,030 at P.7 (2006); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211 at P.34 (2005), citing *Baltimore Gas & Electric Company*, 91 FERC ¶ 61,270 at 61,922 (2000) and *Baltimore Gas & Electric Company*, 92 FERC ¶ 61,043 at 61,114 (2000).

¹⁶ The Commission observes that Port's "Statement of Issues" in its rehearing requests do not accurately describe the issues that are actually presented for discussion in Port's "Specification of Errors," a portion of the pleadings that purports to expand upon the issues outlined in the "Statement of Issues." The wording of the issues identified in Port's "Statement of Issues" is inconsistent with the manner in which Port describes and discusses the issues later in the body of each rehearing request. Moreover, Port fails to discuss a number of the citations and Commission precedents identified in the "Statement of Issues" as supporting its arguments in the body of its pleadings. The result is that Port's requests for rehearing are a disorganized explication of issues and incomplete discussion of legal precedent upon which Port claims to rely. Finally, because Port's "Statement of Issues" is more in the nature of a series of rhetorical questions, the Commission is restating them as issues for purposes of addressing Port's rehearing requests.

- b.) Whether Port's interests as a non-settling party are adversely affected by the settlements in view of Enron's bankruptcy, and whether the Commission's determination that Port's interests are adequately protected by the settlements is supported by the record in these proceedings;
 - c.) Whether the Commission's approval of the distribution of settlement proceeds is an unreasonable departure from prior orders in these proceedings or unduly preferential;
 - d.) Whether the settlements constitute an unconstitutional delegation by the Commission of its legislative authority to an Article III court; and,
 - e.) Whether Port is entitled to expedited consideration of its rehearing requests and a stay of the proceedings pending a Commission order on rehearing;
- A. **Whether the Commission erred in approving the settlements as uncontested, employing the Rule 602 "fair and reasonable and in the public interest" standard, when there are genuine issues of material fact in dispute.**

13. Port argues that the settlements are contested, because it has demonstrated that there are genuine issues of material fact that remain in dispute. Therefore, Port asserts that the Commission cannot approve the settlements under the "fair and reasonable and in the public interest standard" set out in Rule 602 of the Commission's regulations.¹⁷ Port asserts that the parties supporting the settlements "have not shown what the actual dollar figures in the settlement will be or can even be expected to be."¹⁸

14. Port characterizes the Commission's orders approving the Global Settlement and the Enron SRP Settlement as not being fact-based, but instead the Commission based its orders on a holding that each "settlement is complex and that whatever the settling parties

¹⁷ Port Global Settlement rehearing request at 30, Port Enron-SRP rehearing request at 29, *citing* 18 C.F.R. § 385.602(g)(3). Under Rule 602(g)(3) of the Commission's Rules of Practice and Procedure, the Commission may approve an uncontested offer of settlement if it finds that the settlement "is fair and reasonable and in the public interest."

¹⁸ Port Global Settlement rehearing request at 30, Port Enron-SRP Settlement rehearing request at 29.

are agreeable to is necessarily in the public interest.”¹⁹ Port castigates the Commission for not fulfilling its duty “to understand, explain and address the public interest respect (sic) to a settlement of this significance”²⁰

15. Port continues to allege that the Commission is precluded from approving the settlements because of “numerous issues of material fact.” In support of this assertion, Port alleges that “the record demonstrates that those proffering the settlement, including the Commission’s OMOI,²¹ have not shown what the actual dollar figures in the settlement will be or can even be expected to be. . . . Nowhere does the record provide an undisputed calculation of the damages caused by Enron’s conduct and nowhere can the record identify the value of the settlement”²² In addition to the issue of the dollar impact of the settlements, Port identifies other “material factual disputes,” including the following: 1) whether Enron’s gaming practices and partnerships harmed consumers; 2) the amount of Enron’s profits; 3) the regional allocation of Enron’s profits; and, 4) whether the Settlement amount and allocation complies with the FPA.²³

16. Port challenges the Commission’s reliance on *El Paso Natural Gas Co.*,²⁴ which it characterizes as “a 22 year old precedent that stands for the utterly mundane principle that the Commission’s approval of a settlement as to one matter, cannot be cited by parties to a separate matter as a Commission ruling on merits establishing a citable legal or policy precedent.”²⁵ Port asserts that the Commission incorrectly relies on *El Paso* as its “sole legal support for its ruling that it need not undertake that type of public interest

¹⁹ *Id.* at 31 (Global Settlement rehearing request), and 31 (Enron-SRP Settlement rehearing request).

²⁰ *Id.*

²¹ OMOI is an acronym for the Commission’s Office of Market Oversight and Investigation, a signatory to the Enron Global Settlement.

²² Port Global Settlement rehearing request at 30, Port Enron-SRP Settlement rehearing request at 30.

²³ *Id.* at 38 (Global Settlement rehearing request) and 38 (Enron-SRP Settlement rehearing request).

²⁴ 25 FERC ¶ 61,292 (1983).

²⁵ Port’s Global Settlement rehearing request at 33 and Enron-SRP Settlement rehearing request at 32.

review.”²⁶ Port asserts that the Commission’s determination that the settlements are uncontested is in error and not in accord with other Commission precedent, including *Trunkline Gas Co.*²⁷ Port asserts that *Trunkline* holds that “any dispute as to the basic underlying facts related to the allocation of costs” would constitute a genuine issue of material fact “barring the Commission from passing on the merits.”²⁸

Commission Determination

- **Port’s Errors of Fact**

17. Port’s assertions that there remain material issues still in dispute are incorrect as a matter of both fact and law. As to errors of fact, Port is flatly wrong in asserting that the records of these settlements do not identify the value of the settlements. Each settlement provides specific dollar amounts that will flow between the parties to the settlements. As was stated in the November 15 Order,²⁹ the Enron Global Settlement provides for cash payments totaling up to \$47.4 million from accounts that are currently held by the CAISO and the CalPX. The Global Settlement also provides a Class 6 unsecured claim of \$875 million against EPMI in Enron’s bankruptcy proceeding³⁰ in accordance with the Enron Debtors’ Plan of Reorganization (Plan).³¹ Enron also agreed to a \$600 million

²⁶ *Id.* at 35 (Global Settlement rehearing request) and 35 (Enron-SRP Settlement rehearing request).

²⁷ 22 FERC ¶ 61,114 (1983).

²⁸ Port’s Global Settlement rehearing request at 38 and Enron-SRP Settlement rehearing request at 38, n.130, *citing Trunkline* at 65,398.

²⁹ *See* November 15 Order at PP. 4 – 9 for a discussion of how the Global Settlement amounts were determined. Some amounts were calculated and others were negotiated. The Allocation Matrix attached as Exhibit A to the Global Settlement sets out the allocation of refunds and payments to market participants in the Refund Proceeding, and it is divided into two time periods, the Refund Period (October 2, 2000 through January 17, 2001) and the Pre-October Period (May 1, 2000 through October 1, 2000).

³⁰ *In re Enron Corp., et al., Reorganized Debtors*, Case No. 01-16034 (ALG) (Bankr. S.D.N.Y.).

³¹ According to section 1.62 of the Global Settlement, the Plan is the Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code confirmed by the Enron Bankruptcy Court on or about July 15, 2004.

civil penalty in the form of a subordinated Class 380 penalty claim allowed against EPMI in accordance with the Plan in favor of the Attorneys General of California, Oregon and Washington, the CPUC and the CEOB.³² With respect to the Enron-SRP Settlement, part of the consideration provides SRP with a Class 6 general unsecured claim of \$2,700,000 against EPMI in the Enron bankruptcy,³³ as well as cash payments totaling \$884,065, which is the amount of SRP's allocated share of cash distributions to Opt-In Participants under the Global Settlement.³⁴

18. Both settlements recognized that “the actual value and timing of the distributions on the allowed unsecured claim will depend on a number of factors pertinent to the bankruptcy estate.”³⁵ However, the fact that this portion of settlements depends on factors that are uncertain at this point means that the dollar amounts tied to the Enron bankruptcy may vary from the amounts identified in the settlement. It does not mean that these sums are without factual basis in the record.

19. Port is also mistaken when it asserts that the settlements do not provide protections for parties that choose to continue litigating their claims against Enron. As the Commission found in both the November 15 Order and the December 5 Order, both settlements specifically provide that they do not decide any issues on the merits with respect to Non-Settling Participants.³⁶ Moreover, the Global Settlement provides that funds will be earmarked and held in the Enron Refund Escrow pending the Commission's Enron Receivables Determination. Under the Global Settlement, the final determination of the amount of Enron Receivables will be made by the Commission in its ongoing Refund Proceeding. Section 6.7 provides that Non-Settling Participants will be paid the funds shown on the Exhibit A Allocation Matrix that are set aside in the Enron Refund Escrow once the Commission makes this final determination. According to the Settling Parties, this aspect of the Settlement substantially reduces the risk of non-recovery for the

³² See sections 4.1.1, 4.1.2, 4.1.3 and 4.1.6 of the Global Settlement.

³³ December 5 Order at P. 6. See PP. 6-9 for a discussion of the consideration exchanged in the Enron-SRP Settlement.

³⁴ This amount is reflected in the California Settlement's Exhibit A Allocation Matrix.

³⁵ Joint Explanatory Statement at 3 (in both the Global Settlement and the Enron-SRP Settlement)

³⁶ November 15 Order at P. 40, *citing* sections 13.4 and 8.8 of the Global Settlement, and December 5 Order at P. 17, *citing* sections 6.7.5 and 2.2 of the Enron-SRP Settlement.

Non-Settling Participants that have no claims in the Enron Bankruptcy proceeding.³⁷

20. As it alleged in its comments on both settlements, Port again alleges a series of material factual disputes that it claims bars the Commission's approval of the settlements.³⁸ As the Commission held in both the November 15 Order and in the December 5 Order, Port is mistaken. The settlements do not address, much less establish, whether Enron's gaming practices harmed consumers, the amount of Enron's profits or the regional allocation of Enron's profits. Despite the fact that the November 15 Order and in the December 5 Order found that these factual issues are neither relevant to, nor addressed by, the settlements, Port continues to assert that these "material factual issues" are in dispute and bar approval of the settlements.³⁹ However, in its requests for rehearing, Port has made no attempt to demonstrate the relevance of these issues, or why they would constitute genuine issues of material fact. Instead, Port asserts that, "By approving the settlement, the Commission, instead of reaching the merits of matters at issue, simply allows the parties to take the money and run, without the Commission's having any basis upon which to conclude that this is in the public interest."⁴⁰

21. Port continues to assert that it will be adversely affected by the settlements, but nowhere in its comments on the settlements or in its requests for rehearing has it made any effort to provide factual support for, or to quantify, the alleged adverse effects. Instead, Port makes vague and unsupported assertions that the settlements directly affect

³⁷ Port did not file a claim in the Enron Bankruptcy proceeding.

³⁸ Specifically, Port alleges these "material factual issues" are still in dispute: (1) whether Enron's gaming practices and partnerships harmed consumers; (2) the amount of Enron's profits; (3) the regional allocation of Enron's profits; and (4) whether the settlement amount and allocation comply with the FPA. Port's requests for rehearing repeat the mistaken assertions presented originally in its comments on both settlements: "[T]here are material factual disputes with respect to . . . (4) for present purposes, of crucial important (sic), whether the settlement amount and allocation – *e.g.*, zero allocation to entities such as Port – complies (sic) with the FPA." This latter issue is a legal issue and not a factual issue. *See* Port's Global Settlement rehearing request at 38 and Enron-SRP Settlement rehearing request at 38.

³⁹ November 15 Order at P. 39, *citing* the Settling Parties' joint reply comments, and December 15 Order at P. 15, *citing* the Enron-SRP Joint Reply Comments.

⁴⁰ Port's Global Settlement rehearing request at 37, and Port's Enron-SRP rehearing request at 37.

“Port by diminishing the pool of funds available for distribution to parties in the allocation phase of these proceedings,”⁴¹ and that the Commission, by approving the settlements “simply ignores the direct injury the settlement terms directly do to Port.”⁴² Moreover, Port has not filed any testimony in these proceedings and, indeed, was not a participant in the CalPX or CAISO markets.⁴³ Instead, on February 27, 2004, Port filed notice before the presiding administrative law judge, stating that “it will not, in the ‘liability phase’ of this proceeding, seek to offer into evidence testimony and/or exhibits that had previously been designated for use in the ‘Gaming Proceeding,’ Docket Nos. EL03-137-000, *et al.* The Port specifically reserves the right to use such materials in the ‘distribution proceeding’ and to otherwise fully participate in this consolidated proceeding.”⁴⁴ Having presented no testimony in these proceedings nor filed a claim in the Enron bankruptcy proceeding, Port has not demonstrated that these settlements have *any* effect on it, much less an adverse effect. Thus, Port’s characterization of the Commission’s finding that there are no remaining genuine issues of material fact as being “unsupported”⁴⁵ rings hollow.

- **Port’s Errors of Law**

22. In addition to failing to support its allegation that there are genuine issues of material fact that have not been addressed, Port also fails to establish that the Commission has misapplied its own precedent in approving the settlements. Port’s position appears to be that as long as a litigant continues to press its issues, even if supported by only vague allegations of adverse impacts, genuine issues of material fact

⁴¹ *Id.* at 37 (in both the Global Settlement rehearing request and Enron-SRP rehearing request).

⁴² *Id.*

⁴³ *See* Motion to Intervene Out-of-Time by Port of Seattle, Washington, Docket Nos. EL00-95-031, *et al.* (July 2, 2001). In its motion, Port did not claim to be a participant in either CalPX or CAISO markets; rather, Port asserted that it purchased power on the “open market” from power producers that also serve California Utilities. Port’s motion averred that the prices it had to pay on the “open market” were 8,000 times what the prices were on the “wholesale market” one year before.

⁴⁴ *Enron Power Marketing Inc.*, Docket Nos. EL03-180-000, *et al.*, “Notice of Port of Seattle, Washington Regarding Designated Testimony and Exhibits,” February 27, 2004.

⁴⁵ Port’s Global Settlement rehearing request at 37, and Port’s Enron-SRP rehearing request at 37.

remain and a settlement cannot be approved under the “fair and reasonable and in the public interest” standard in Rule 602. Port’s argument is legally flawed.

23. The Commission’s November 15 and December 5 Orders rejected Port’s argument that the settlements could not be approved as uncontested under Rule 602. Quoting from well-established Commission precedent, *El Paso Natural Gas*,⁴⁶ the Commission stated that:

If a party’s interests are not immediately and irreparably affected by approval of a settlement in a consolidated docket, that party’s opposition does not create a genuine, material issue. In the absence of any genuine, material issue, we can dispose of the matter before us in a summary fashion. We shall, therefore, treat this as an uncontested offer of settlement.⁴⁷

As stated above, Port has failed to provide the Commission with any evidence to support a finding that its interests are “immediately and irreparably affected by approval” of these settlements. The settlements do not settle Port’s claims, and they specifically provide that “Nothing herein will affect the positions that any Non-Settling Participant wishes to assert in the FERC proceeding to determine the allocation methodology.”⁴⁸ Having established that there are no remaining genuine issues of material fact, the Commission correctly applied its precedent in approving these settlements as fair and reasonable and in the public interest.

24. Port cites *Trunkline Gas Co.*⁴⁹ for the proposition that disputes as to facts underlying allocation of costs constitute genuine issues of material fact barring a Commission order on the merits.⁵⁰ Although Port did not articulate the relevance of *Trunkline* to the case at hand, apparently, Port sees an analogy between the allocation of costs in a natural gas proceeding and the allocation of settlement proceeds in the Global Settlement and the Enron-SRP Settlement. However, if Port is concerned that it will suffer immediate and irreparable harm because of the allocation of settlement proceeds, it

⁴⁶ 25 FERC ¶ 61,292 (1983).

⁴⁷ *Id.* at 61,673.

⁴⁸ See section 8.8 of the Global Settlement. Section 2.2 of the Enron-SRP Settlement is nearly identical.

⁴⁹ 22 FERC ¶ 63,114 (1983). Port cites other cases in its explication of this issue, but only refers to *Trunkline* and Rule 602 in its “Statement of Issues.”

⁵⁰ Port’s Global Settlement rehearing request at 38 and Enron-SRP Settlement rehearing request at 38, n.130, *citing Trunkline* at 65,398.

has done nothing to demonstrate in the record of these proceedings the extent of harm it will suffer. Rather, Port states that the settlements provide “zero allocation to entities such as Port.”⁵¹ Left unanswered by Port is any indication of how much the allocation should have been and reference to any evidence that would support its claim. In short, Port has had numerous opportunities to provide the Commission with evidence of its claims against Enron in these proceedings, but it has failed to do so, leaving the Commission with no means of evaluating the nature or extent of any purported claim of harm to Port as a result of these settlements. Accordingly, the Commission finds that there remain no genuine issues of material fact, and that it was correct in approving these settlements as fair and reasonable and in the public interest under Rule 602.⁵²

25. Moreover, even if the settlement were a contested settlement as Port believes, the Commission could nevertheless approve it under its own precedent in *Trailblazer Pipeline Company*,⁵³ as well as Supreme Court precedent. In order to approve a contested settlement, the Commission must be able to make an independent determination based on substantial record evidence that the settlement will result in just and reasonable rates, or in the context of these proceedings, will produce a reasonable resolution of the proceedings.⁵⁴ *Trailblazer* outlined four circumstances under which the Commission may approve a contested settlement:

⁵¹ *Id.* at 38 (in both the Global Settlement rehearing request and Enron-SRP rehearing request).

⁵² *See also* Certification of Partial Uncontested Settlement, 113 FERC ¶ 63,002 (2005) at P. 77, where the presiding administrative law judge addressed Port’s contentions, concluding that “Contrary to Port’s allegations, there are no material issues of fact preventing certification of the settlement. *See* Rule 602(h)(2)(ii). The Settlement does not resolve any facts as against Enron in the pending proceedings and Port can continue to pursue any claims it has against Enron.” The presiding administrative law judge drew the same conclusion in addressing the Enron-SRP Settlement: “Accordingly, it is found that there are no genuine issues of material fact and the Settlement is certified under Rule 602 (h)(2)(i)-(ii).” Certification of Partial Contested Settlement, 113 FERC ¶ 63,025 (2005).

⁵³ 85 FERC ¶ 61,345 (1999) (*Trailblazer*).

⁵⁴ *See Mobil Oil Corp. v. FERC*, 417 U.S. 283, 314 (1974).

- 1) the Commission may make a merits determination on each contested issue;
- 2) even if some aspects of a settlement are problematic, the Commission nevertheless may approve a contested settlement as a package upon determining that the overall result of the settlement is just and reasonable;
- 3) the Commission may determine that the benefits of the settlement outweigh the nature of the objections and the contesting parties' interest is too attenuated; or,
- 4) the Commission may sever the contesting parties, approving it as uncontested as to the settling parties only and leaving the contesting parties free to pursue their claims through continued litigation.

In addition to the *Trailblazer* criteria, Rule 602 of the Commission's Rules of Practice and Procedure provides that the Commission may decide the merits of contested settlement issues if the record contains substantial evidence upon which to base a reasoned decision, or if the Commission determines that there is no genuine issue of material fact.⁵⁵

26. The Commission's November 15 Order and the December 5 Order satisfy the applicable precedent and the requirements of Rule 602 for approval of contested settlements. The orders addressed the merits of each contested issue raised in comments on the settlements. The orders found that the settlements constitute a comprehensive and reasonable effort by the settling parties to end their litigation and resolve their legal disputes, while preserving the rights of non-settling parties to pursue their claims against Enron separately.⁵⁶ The orders were based upon substantial record evidence, involving a thorough evaluation of the comprehensive settlement documents and comments of the parties and non-settling participants weighed against the Commission's precedent regarding settlements. Finally, the orders were based upon the Commission's determination that there are no genuine issues of material fact. Therefore, the November 15 Order and the December 5 Order comply with the requirements for approval of a contested settlement, even though the Commission has determined that the settlements are uncontested under the standards of *El Paso Natural Gas*. For these reasons, the Commission will deny rehearing on this issue.

⁵⁵ 18 C.F.R. section 385.602(h)(1)(i).

⁵⁶ November 15 Order at P. 44; December 5 Order at PP. 17 and 22.

B. Whether Port's interests as a non-settling party are adversely affected by the settlements in view of Enron's bankruptcy, and whether the Commission's determination that Port's interests are adequately protected by the settlements is supported by the record in these proceedings.

27. Port claims that its interests as a non-settling party are adversely affected by the settlement, and that the Commission's determinations to the contrary in the November 15 Order and the December 5 Orders are not supported by the record. Port avers that the settlements violate a series of orders of the Commission and the Chief Administrative Law Judge providing that the allocation of settlements and amounts awarded in the liability phase of the proceedings would not be determined until that phase concluded.⁵⁷ In addition, Port asserts that its interests are adversely affected by the distribution of settlement proceeds, because the settlements do not contain provisions to protect non-settling parties, and as a result "Enron, an entity in bankruptcy, remains solely responsible to Port."⁵⁸ Port claims that the November 15 Order and the December 5 Order do not refute these concerns and that the Commission's statement in those orders that the "allocation and distribution here is consistent with the precedent established by the orders approving the *Williams*, *Dynegy*, *Duke*, and *Mirant* settlements⁵⁹ is utterly baseless and unsupported."⁶⁰

⁵⁷ Port's Global Settlement rehearing request at 39 and Enron-SRP Settlement rehearing request at 39.

⁵⁸ *Id.* at 44 (both rehearing requests).

⁵⁹ 108 FERC ¶ 61,002 (2004) (order accepting *Williams* settlement); 109 FERC ¶ 61,071 (2004) (order approving *Dynegy* settlement); 109 FERC ¶ 61,107 (2004) (order accepting *Duke* settlement); *reh'g.* 111 FERC ¶ 61,186 (order on rehearing of the *Williams*, *Dynegy* and *Duke* settlements); and, 111 FERC ¶ 61,017 (2005) (order accepting *Mirant* settlement), *reh'g.* 111 FERC ¶ 61,354 (2005).

⁶⁰ Port's Global Settlement rehearing request at 45 and Enron-SRP Settlement rehearing request at 45.

Commission Determination

28. Port's contentions were evaluated and answered in full in the November 15 Order and the December 5 Order.⁶¹ With respect to the concern that the settlements violate prior orders of the Commission and the Chief Administrative Law Judge, the Commission addressed this concern as to each settlement in its November 15 Order and the December 5 Order. With respect to prior Commission orders, the Commission found that "the distribution and allocation of Settlement proceeds as provided by the Settlement is consistent with Commission precedent, specifically the Commission's orders approving the *Williams, Dynegy, Duke, and Mirant* settlements." The November 15 Order and the December 5 Order found that the prior settlements contained provisions to protect the interests of non-settling parties, as do the Global Settlement and the Enron-SRP Settlement.⁶² For example, the Global Settlement protects the interests of the non-settling participants through amounts earmarked for them in the Enron Refund Escrow as shown on the Allocation Matrix, attached as Exhibit A to the Global Settlement. At the issuance of the Enron Refund Determination, these amounts will be paid to the Non-Settling Participants.⁶³ As stated above, section 8.8 of the Global Settlement and section 2.2 of the Enron-SRP Settlement provide that nothing in the settlement will affect the ability of non-settling parties to continue to litigate their claims to refunds in the ongoing Refund Proceeding.

29. With respect to whether either settlement violates the prior orders of the Chief Administrative Law Judge, the Presiding Administrative Law Judge dismissed concerns about the settlements, stating that "Port's allegations concerning allocation of funds are premature since there is a mechanism in place to distribute monetary awards in the Partnership/Gaming proceeding, a distribution phase after the liability phase. *See Duke Energy Trading and Mktg, L.L.C*, Order of the Chief Judge Consolidating Distribution

⁶¹ In addition, Port's allegations with respect to both settlements were addressed by the presiding administrative law judge. *See* Certification of Partial Contested Settlement, 113 FERC ¶ 62,002 (2005) (Global Settlement) and 113 FERC ¶ 62,025 (2005) ((Enron-SRP Settlement).

⁶² *See* Global Settlement Order at P. 42, and Enron-SRP Settlement Order at P. 19.

⁶³ *See* sections 1.39, 1.40, 1.42, 4. 1 and 6.7 of the Global Settlement.

Issue for Hearing (December 22, 2003).”⁶⁴ For these reasons, the Commission will deny rehearing on this issue.

C. Whether the Commission’s approval of the distribution of settlement proceeds is an unreasonable departure from prior orders in these proceedings or unduly preferential.

30. Port does not explain what it means by “the law of the case,”⁶⁵ but from its “Statement of Issues,” it appears that Port believes that the Commission’s November 15 Order and December 5 Orders violate “the law of the case” by allowing the distribution of settlement proceeds to be distributed “prior to and outside of the allocation phase of this proceeding,” and that, by so doing, the Commission’s orders are unduly preferential and/or unduly preferential toward the parties to the settlements. As in its comments on the settlements, on rehearing Port alleges that the vast bulk of unsecured bankruptcy claims and all of the cash available to the Enron Entities “is (sic) destined for California.”⁶⁶ Once again, Port avers that “Enron’s fraudulent activities were perpetuated from Portland, Oregon, largely took place within the [Pacific Northwest], and that a majority of the illicit profits were made *outside* of California. ... Accordingly, the

⁶⁴ See Certification of Partial Contested Settlement, 113 FERC ¶ 63,002, at P.77 (2005) (Global Settlement). With respect to the Enron-SRP Settlement, the presiding administrative law judge’s Certification of Partial Contested Settlement makes a similar finding under Rule 602 (h)(i)-(ii). See 113 FERC ¶ 62,025 at P.24 (2005).

⁶⁵ As stated above, Port cites five Commission precedents upon which it purports to rely in its discussion of this issue, but none of these cases are cited, much less discussed in Port’s discussion of this issue. Instead, Port cites 44 state court proceedings in California, Nevada and Washington without any explanation as to the relevance of these proceedings to the instant proceedings. Certainly, these state court proceedings cannot constitute “the law of the case” with respect to matters pending before the Commission under the Federal Power Act.

⁶⁶ Port’s Global Settlement rehearing request at 45-47. Port does not make this argument in its request for rehearing of the Enron-SRP Settlement, instead limiting its discussion of the third issue to repeating its concern that the settlement diverts money away from non-settling parties to parties that join in the settlement. Port does describe the Enron-SRP Settlement as a “power grab” on the part of those who settle with Enron. See Port request for rehearing of the Enron-SRP Settlement at 45.

allocations reflected in the Joint Offer [of Settlement] reflect nothing more than an arbitrary and capricious power grab by the California Parties.”⁶⁷

Commission Determination

31. Port has not presented either new legal authority or new arguments as to why the Commission’s November 15 Order and December 5 Order are either unduly preferential or unduly discriminatory. With respect to the November 15 Order, Port cites the same 44 state proceedings as it did in its comments on the Global Settlement to complain about the portion of the settlement that settles claims by the Oregon and Washington Attorneys General, but it does not explain the relevance of those proceedings to its argument that the settlement is unduly preferential or unduly discriminatory. Moreover, the Commission continues to disagree with Port’s characterization of the settlements as a “power grab.” As the Commission stated previously, each of these settlements is a complex, comprehensive and reasonable effort by the parties to end their litigation and resolve their legal disputes. Port does not have to join the Settlement, and its right to continue to litigate is unaffected by the Settlement. For these reasons, the Commission will deny rehearing on this issue.

D. Whether the settlements constitute an unconstitutional delegation by the Commission of its legislative authority to an Article III court.

32. Port continues to argue that the Commission has subdelegated its Federal Power Act responsibility to establish just and reasonable rates to the Enron Bankruptcy court, an Article III court. According to Port, “under the Constitutional doctrine of subdelegation, when Congress delegates responsibilities to a federal agency, the agency cannot re-delegate or subdelegate those responsibilities to an outside public or private party.”⁶⁸ Port asserts that, under the subdelegation doctrine, the Commission must make all the material and factual determinations without relying on any outside entity, including specifically a bankruptcy court.⁶⁹ Port cites *City of Tacoma, Washington v. FERC*⁷⁰ to

⁶⁷ *Id.*

⁶⁸ Port’s Global Settlement rehearing request at 49 and Enron-SRP Settlement rehearing request at 46, *citing* I. Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.7 at 115-16 (4th ed 2002).

⁶⁹ Port has not raised any objection, constitutional or otherwise, to the requirement that the Enron Global Settlement be approved by the CPUC. *See* sections 1.79, 2.4, 10.1 and 10.1.3 of the Enron Global Settlement.

support its claim that the bankruptcy court's approval of the settlements is "just such a constitutional violation."⁷¹ In addition, Port relies on two other cases to support its contention that the Commission has subdelegated its FPA authority to an outside party in violation of the doctrine of subdelegation.⁷²

Commission Determination

33. Port continues to misapply constitutional doctrine to the facts underlying the settlements at issue in these proceedings and the Commission's orders approving them. Port's recitation of the case law applicable to the subdelegation doctrine misreads an essential element of those cases: in each instance, the federal agency in question had subdelegated statutory responsibility to a third-party. The court in *City of Tacoma* found that the Commission had improperly delegated to other federal agencies the evaluation of cost reports provided by utilities used to fix the level of FPA administrative fees payable by the utilities to the Commission. The court found it significant that the Commission did not even review the cost reports upon which the fees were based, which was a clear violation of the section 10(e)(1) of the FPA.⁷³ Likewise, in *United States Telecomm.*, the Federal Communications Commission (FCC) directed state regulatory commissions to make certain determinations that the court found to be an unlawful subdelegation under the Telecommunications Act of 1996,⁷⁴ which did not specifically authorize the delegation to a third-party.⁷⁵

34. While correctly summarizing the case law upon which it relies, Port misapplies the precedents in those cases to the case at hand. Port's analysis of the role of the Enron Bankruptcy court in the Commission's consideration of the settlements is based upon the flawed assumption that the Commission delegated to that tribunal authority under the

⁷⁰ 331 F.3d 106 (D.C.Cir. 2003).

⁷¹ Port's Global Settlement rehearing request at 50 and Enron-SRP Settlement rehearing request at 47.

⁷² Port cites two other cases in addition to *City of Tacoma*: *United States Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, *Nat'l Ass'n of Regulatory Util. Commr's v. United States Telecom Ass'n*, 543 U.S. 925 (2004); and *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775 (D.C. Cir. 1998) (*Shook*).

⁷³ *City of Tacoma* at 115.

⁷⁴ Pub. L. 104-104; 110 Stat. 56, codified at 47 U.S.C. § 151, *et seq.*

⁷⁵ *See also Shook* at 783-84 and n.6.

Federal Power Act to make a determination as to the settlements' legal efficacy under the Federal Power Act. This is not the case, as was clearly stated in the November 15 Order and the December 5 Order: "[T]here has been no delegation of legislative authority to another branch of the government. Rather, a Settlement has been filed with the Commission and the Bankruptcy Court for approval, which is directly within the unique statutory and constitutional purviews of each entity."⁷⁶ Approval by the Bankruptcy Court was based upon its own statutory standards of review and not upon the application of the FPA.⁷⁷

35. Moreover, Port overlooked an important distinction that was made by the court in *City of Tacoma*, which found that the Commission's failure was not in the subdelegation *per se* but in the fact that the Commission did not even review the cost reports prepared by the other agencies:

Because section 10(e) plainly commands the Commission to assess annual charges under the FPA, including a review of OFA cost reports on which the charges are based, we conclude that the Commission, *by failing to conduct the review*, has acted contrary to the "unambiguously expressed intent of Congress" and therefore contrary to law.⁷⁸

Similarly, in *The Coalition for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks v. FERC*, the Court found that the assessment of user fees by a hydropower licensee was not an improper delegation of the Commission's authority, because the Commission retained the right under the FPA to require modifications to the licensee's actions.⁷⁹

⁷⁶ November 15 Order at P. 56 and December 5 Order at P.24.

⁷⁷ See *In Re Enron Corp., et al.*, Order Approving Settlement by and Among the Enron Parties, the Federal Energy Regulatory Commission's Office of Market Regulation and Investigation, the California Parties, and the Additional Claimants, Case No. 01-16034 (AJG) (October 20, 2005) (approving the Global Settlement), and Order Approving Settlement Agreement Among the Debtors, the Enron Non-Debtor Gas Entities New West Energy Corporation and Salt River Project Agricultural Improvement and Power District, Case No. 01-16034 (AJG) (October 27, 2005) (approving the Enron-SRP Settlement). The judge in each case cites as his authority only sections of the Bankruptcy Code and regulations related thereto, such as Rule 9019 of the Federal Rules of Bankruptcy Procedure.

⁷⁸ *City of Tacoma* at 115 - 116 (*emphasis added*).

⁷⁹ 297 F.3d 771 (8th Cir. 2002).

36. Thus, it is unambiguous under the facts of these proceedings and the case law cited above that the Commission was correct in finding that it neither delegated its FPA authority to the Bankruptcy Court nor ceded its statutory responsibility to review, accept or reject the settlements to the Bankruptcy Court. The Commission's review of these settlements was independent of, and not dependent upon, the Bankruptcy Court's review. Therefore, the Commission will deny rehearing on this issue.

E. Whether Port is entitled to expedited consideration of its rehearing requests and a stay of the proceedings pending a Commission order on rehearing.

37. Port's requests for rehearing also include requests for expedited consideration and motions for stay, based on its concern that each settlement "provides that the funds at issue may be distributed to the settling parties within ten days of the order approving the settlement." Thus, Port avers that expedited consideration and a stay of each order are necessary to preserve the *status quo*.⁸⁰ In support of its position, Port cites *Wisconsin Gas Company v. FERC*,⁸¹ asserting that, because its requests for rehearing demonstrate that the Commission's orders erred and Port will prevail on the merits on rehearing, "Port easily meets the requirements for a stay"⁸²

Commission Determination

38. In reviewing a request for stay, the Commission applies the standard set forth in Section 705 of the Administrative Procedure Act (APA).⁸³ Under section 705, the Commission will grant a stay "if justice so requires." This standard is different from the criteria set out in *Wisconsin Gas* and used by courts to assess whether to stay a Commission order. *Wisconsin Gas* is cited by Port in support of its motion for stay and by the Enron Entities, the California Parties and OMOI in their joint answer opposing Port's motion for stay. The issuance of a stay is an equitable remedy, and the general

⁸⁰ Port's Global Settlement rehearing request at 50 and Enron-SRP Settlement rehearing request at 47.

⁸¹ 758 F.2d 669 (D.C. Cir. 1985) (*Wisconsin Gas*).

⁸² Port's Global Settlement rehearing request at 50, 51, and Enron-SRP Settlement rehearing request at 47, 48, *citing Wisconsin Gas*.

⁸³ 5 U.S.C. § 705 (2000).

principles of equity, such as fairness and justice, inform the Commission's decision on whether to issue a stay.⁸⁴

39. In applying the APA standard, the Commission considers: (1) whether the movant will suffer irreparable harm without the stay; (2) whether issuing the stay will substantially harm other parties; and, (3) whether a stay is in the public interest. If a party cannot demonstrate that it will suffer irreparable harm absent a stay, the Commission need not examine the other factors.⁸⁵

40. The standard for showing irreparable harm is strict, as the D.C. Circuit has explained:

The injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time.' It is well established that economic loss does not necessarily constitute irreparable harm Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.⁸⁶

Where the movant cannot meet the requirements of section 705, the Commission follows a general policy of denying motions for stays of its orders, based upon the need for definitiveness and finality in administrative proceedings.⁸⁷

41. It is well settled precedent that a stay is not warranted where the harm alleged by the movant is purely economic.⁸⁸ As stated above, Port has failed to provide the Commission with evidence quantifying its claims against Enron in these proceedings, despite numerous opportunities to do so. It concedes that it was not a participant in either the CalPX or the CAISO markets. For this reason, Port is not shown as being owed anything under the Allocation Matrix attached as Exhibit A to the Global Settlement. It did not file a claim in the Enron Bankruptcy proceeding and thus stands to receive no distribution in that proceeding. Port's allegation of harm is purely economic and based solely on its vague assertion that payments to settling parties will render the remaining

⁸⁴ See, e.g., *Olympic Pipe Line Company*, 102 FERC ¶ 61,055, at P. 8 (2003).

⁸⁵ See, e.g., *CMS Midland, Inc.*, 56 FERC ¶ 61,630, at 61,631 (1991); *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993).

⁸⁶ *Wisconsin Gas*, 758 F.2d 669 at 674 (1984).

⁸⁷ *Id.*

⁸⁸ See, e.g., *Boston Edison Company*, 81 FERC ¶ 61,102 (1997).

pool of funds smaller for non-settling participants. Even assuming that Port ultimately presents evidence of harm, which it has thus far failed to produce, such harm does not rise to the level of irreparable harm required to warrant a stay of a Commission order.⁸⁹ In addition, Port's rights to continue litigating its claims are preserved in each settlement, as discussed above. Thus, the Commission finds that Port has not shown any actual harm that will suffer as a result of the distribution of funds pursuant to settlements, much less the type of irreparable harm that would warrant a stay. For this reason, the Commission denies Port's motion for stay, as it has not shown that "justice so requires" that the Commission stay its orders approving the Global Settlement and the Enron-SRP Settlement.

The Commission orders:

(A) Port's requests for rehearing and supplemental requests for rehearing of the November 15 Order and the December 5 Order are denied as discussed in the body of this order.

(B) Port's Requests for Expedited Consideration and Motion for Stay with respect to the November 15 Order and the December 5 Order are denied as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁸⁹ *See Wisconsin Gas* at 674.