

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Enron Power Marketing, Inc. and Docket No. EL03-180-025
Enron Energy Services Inc.

Enron Power Marketing, Inc. and Docket No. EL03-154-019
Enron Energy Services Inc.

Portland General Electric Company. Docket No. EL02-114-020

Enron Power Marketing, Inc. Docket No. EL02-115-024

El Paso Electric Company, Docket No. EL02-113-022
Enron Power Marketing, Inc. and
Enron Capital and Trade Resources
Corp.

ORDER APPROVING SETTLEMENT AGREEMENT

(Issued September 27, 2006)

1. In this order, the Commission approves a settlement filed on June 26, 2006 between Enron,¹ the City of Tacoma, Washington on behalf of its Department of Public

¹ As set forth in the Settlement, Enron 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.

Utilities, d/b/a Tacoma Power (Tacoma), and the Commission's Trial Staff (collectively, the Settling Parties). The settlement consists of a "Joint Offer of Settlement," a "Joint Explanatory Statement," and a "Settlement and Release of Claims Agreement" (collectively, the Settlement). The Settlement was filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,² and the Settling Parties have requested Commission approval by September 27, 2006.

2. The Settlement resolves, as between Enron and Tacoma, certain claims against Enron for disgorgement of profits and other remedies sought by Tacoma in these proceedings. These claims emanated from transactions and events in western energy markets, including markets of the California Independent System Operator Corporation (CAISO) and the California Power Exchange (CalPX), during the period from January 16, 1997 through June 25, 2003³ (the Settlement Period) as they relate to Enron.

3. In addition to the Commission's approval, the Settlement requires the approval of United States Bankruptcy Court for the Southern District of New York (the Enron Bankruptcy Court).⁴ On July 24, 2006, the Settling Parties filed a joint motion to lodge the July 13, 2006, Order of the Bankruptcy Court approving the Settlement without condition. Judge Arthur J. Gonzalez found that "the legal and factual bases set forth in the Motion [for approval of the Settlement] establish just cause for relief granted herein and that the Settlement Agreement is fair and reasonable. . . ."⁵

² 18 C.F.R. § 385.602 (2006).

³ The Settlement Period is derived from the Commission's July 22, 2004 Order directing proceedings before an ALJ to review all evidence relevant to Enron's conduct that violated or may have violated Commission tariffs and to determine the appropriate remedy for such violations, including an examination of Enron's wholesale power sales in the Western Interconnect. *See* Joint Explanatory Statement at 5-6, *citing El Paso Elec. Co., Enron Power Mktg., Inc., and Enron Capital and Trade Resources Corp.*, 108 FERC ¶ 61,071 (2004).

⁴ Section 1.3 of the Settlement defines the "Bankruptcy Cases" collectively as cases commenced under Chapter 11 of the Bankruptcy Code, by the Enron Debtors and certain affiliates on or after December 2, 2001 in *In re Enron Corp. et al.*, Chapter 11 Case No. 01-16034 (AJG) Jointly Administered, pending before the Enron Bankruptcy Court.

⁵ Enron Bankruptcy Court order approving the Settlement, at 2.

4. On September 13, 2006, the Presiding ALJ issued a Certification of Uncontested Partial Settlement, finding that “The Settlement is fair and reasonable and in the public interest and is hereby certified for the Commission’s consideration.”⁶ As discussed below, the Commission concurs and finds that the Settlement is a fair and reasonable resolution of the issues and its approval is in the public interest.

I. Procedural Background and Description of the Settlement

5. On June 25, 2003, the Commission issued two orders requiring a total of 53 entities, including Enron, to show cause if they had engaged in activities that constitute gaming practices under the CAISO and CalPX tariffs.⁷ To date, the Commission has either dismissed actions against or approved settlements involving each of the companies named in the show cause orders, except for Enron.⁸ Tacoma is an intervenor in those Commission proceedings involving Enron, specifically those involving the potential disgorgement of unjust profits by Enron.

6. On January 26, 2004, Chief Administrative Law Judge Curtis Wagner issued an order consolidating the Gaming and Partnership Proceedings.⁹ On January 30, 2004, the Chief Judge issued an errata consolidating Enron-related issues from Docket Nos. EL02-114-000 and EL02-115-000 with the Gaming and Partnership Proceedings.¹⁰

7. On July 22, 2004, the Commission issued an order affirming the Initial Decision in Docket No. EL02-113-000, pertaining to the adjudication of Enron’s liability resulting

⁶ *Enron Power Marketing, Inc., et al.*, 116 FERC ¶ 63,053 (2006).

⁷ *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003), *reh’g denied*, 106 FERC ¶ 61,020 (2004) (Gaming Order); *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Order). Collectively, these orders are referred to as the Partnership/Gaming Orders.

⁸ *See* Gaming Order at P 73.

⁹ *Enron Power Marketing, Inc.*, “Order of the Chief Judge Consolidating Gaming and Partnership Proceedings for Hearing and Decision,” Docket No. EL03-180-000, *et al.* (2004).

¹⁰ *Enron Power Marketing, Inc.*, Errata, Docket No. EL03-180-000, *et al.* (2004).

from its relationship with El Paso Electric Company.¹¹ The July 22 Order also consolidated that docket and others with Docket Nos. EL03-180-000 and EL03-154-000, and directed further proceedings before the Presiding Administrative Law Judge in the consolidated dockets.

8. On July 20, 2005, the Chief Judge issued an order suspending the procedural schedule and scheduling a settlement conference between Enron and the remaining non-settling parties in these proceedings. After the Commission's Trial Staff unsuccessfully engaged the parties in settlement discussions, the Chief Judge issued an order designating Administrative Law Judge Judith A. Dowd as a settlement judge and scheduling a settlement conference. As a result of numerous settlement discussions, an offer of settlement between Enron and the Nevada Companies was filed with the Commission, and this settlement was approved on January 25, 2006.¹² On June 28, 2006, the Commission issued two orders that approved four other settlements. One order approved related settlements between Enron, Trial Staff, City of Santa Clara and Valley Electric,¹³ and the other order approved a settlement between Enron and Metropolitan Water District of Southern California.¹⁴

9. Against the backdrop of this pending litigation, the Settlement filed with the Commission on June 26, 2006, will resolve, as between Enron and Tacoma, all claims or rights to remedies that may arise with respect to the captioned Commission proceedings.¹⁵ The Settlement will also resolve certain non-Commission proceedings, including those pending at the Enron Bankruptcy Court as between Enron and Tacoma. The monetary and non-monetary consideration involved in the Settlement is described below.

¹¹ *El Paso Elec. Co.*, 108 FERC ¶ 61,071 at P 32 (2004); *see Enron Power Marketing, Inc.*, 104 FERC ¶ 63,010 (2003) (the July 22 Order).

¹² *San Diego Gas & Elec. Co.*, 114 FERC ¶ 61,067 (2006).

¹³ *Enron Power Marketing, Inc., et al.*, 115 FERC ¶ 61,376 (2006).

¹⁴ *Enron Power Marketing, Inc., et al.*, 115 FERC ¶ 61,377 (2006).

¹⁵ The Settling Parties filed a Joint Motion to Continue Stay of Proceedings Pending Commission Consideration and Approval of Settlement on June 26, 2006, with the Chief Judge.

10. Under Section 4.1.1, Enron will allow Tacoma claims totaling \$3,288,519.71, without offset, defense or reduction, in the Enron Bankruptcy Proceedings. This amount represents the full amount of Tacoma's timely-filed proof of claim in the Enron Bankruptcy Proceedings (POC No. 24045). The Settlement provides the following allocation of this amount: (1) a Class 6 general unsecured claim against EPMI under the Bankruptcy Plan in the amount of \$2,288,519.71 with respect to POC No. 24045; and (2) a \$1 million portion of the Trial Staff Claim, in the form of a Class 6 general unsecured claim against EPMI in accordance with section 4.1.2 of the Trial Staff Settlement with respect to the Phase One Partnership/Gaming Proceeding.¹⁶

11. Under section 5.2.1 of the Settlement, Tacoma agrees to withdraw all pleadings, testimony, exhibits, discovery requests, and additional requests for relief filed with the Commission and will terminate its participation as to Enron in the "FERC Proceedings."¹⁷ This section also requires Tacoma to withdraw or refrain from further participation in specific proceedings pending in federal court.

12. Under sections 6.5 and 6.6 of the Settlement, Enron and Tacoma mutually agree to release each other from past, existing and future claims arising at the Commission and/or under the Federal Power Act (FPA)¹⁸ and the Natural Gas Act (NGA),¹⁹ and any amendments to the FPA or NGA pursuant to EPAct from any legal theory or cause of action during the Settlement Period that Enron or Tacoma: (1) charged, collected or paid

¹⁶ See n.12, *supra*, and Settlement section 1.34.

¹⁷ "FERC Proceedings" is defined in section 1.23 of the Settlement as: "*Enron Power Mktg., Inc., et al.*, FERC Docket Nos. EL03-180, EL03-154, EL02-114-007, EL02-115-008, and EL02-113, and any subsequent proceeding to determine the distribution of funds in such proceedings (Partnership/Gaming Proceeding); *San Diego Gas & Electric Co., et al.*, FERC Docket Nos. PA02-2 and IN03-10 (Investigation Proceedings); FERC Docket Nos. EL00-95, *et al.* (Refund Proceeding); FERC Docket No. EL02-71 (Quarterly Reports Proceeding); *Enron Power Mktg., Inc. et al.*, Docket No. EL03-77 and RP03-311 (Revocation Proceeding); *Puget Sound Energy, Inc.*, Docket No. EL01-10 (Pacific Northwest Proceeding); and, any related appeals and/or any petitions for review and any proceedings on remand relating to the foregoing proceedings."

¹⁸ 16 U.S.C. § 824 *et seq.* (2000).

¹⁹ 15 U.S.C. § 717 *et seq.* (2000).

unlawful rates, terms or conditions for electric energy, ancillary services, transmission congestion or natural gas in the western energy markets; or (2) manipulated the western electricity or natural gas markets in any fashion.

13. The Settlement also includes a number of civil claims releases to the effect that neither Enron nor Tacoma: (1) claimed, charged, collected or retained profits associated with transactions made while the seller was in violation of orders or directives of the Commission; (2) manipulated the western electricity or natural gas markets; (3) was unjustly enriched by the foregoing released claims or otherwise violated any applicable tariff or law relating to western energy markets; (4) claimed, charged, collected or retained profits associated with transactions made while either was in violation of FERC directives or orders; (5) breached, defaulted or failed to perform any contractual obligation under any contract or guarantee of performance for the purchase or sale of electricity or natural gas (physical or financial) or related transactions or engaged in fraud in connection therewith; or, (6) guaranteed or issued any guarantee to the other of any obligation for the benefit of any counterparty to any transaction.

II. Initial and Reply Comments on the Settlement

14. Initial comments on the Settlement were filed on July 17, 2006 by the Public Utility District No. 1 of Snohomish County, Washington (Snohomish). Reply Comments were filed by Enron and Tacoma (jointly) and by the Commission's Trial Staff. While Snohomish seeks certain clarifications discussed below, it does not oppose the Settlement.

15. Snohomish is concerned about Tacoma's agreement to withdraw its pleadings from the record of these proceedings as required by section 5.2.1 of the Settlement. Snohomish points out that Tacoma signed onto several pleadings filed by Snohomish and used expert witnesses retained by Snohomish. Snohomish asserts that Enron and Tacoma cannot agree to withdraw pleadings or requests for relief filed by Snohomish, even if Tacoma joined in the filings. Furthermore, Snohomish argues that Enron and Tacoma cannot agree not to make expert witnesses available to testify in the Gaming and Partnership proceedings on behalf of Snohomish to the extent that Snohomish and Tacoma retained the same expert witness. Snohomish cites expert witnesses Robert McCullough, Carl Pechman, and Timothy Mount as having submitted testimony not just for Tacoma but also for Snohomish.²⁰ Accordingly, Snohomish seeks clarification from the Settling Parties and confirmation by the Commission as to the effect of section 5.2.1

²⁰ Snohomish Initial Comments at 2-3 and n.4.

of the Settlement on the withdrawal of pleadings, as well as access to witnesses that served as experts for both Snohomish and Tacoma. Snohomish conditions its lack of opposition to the Settlement on this clarification.

16. On July 26, 2006, Enron and Tacoma filed joint reply comments addressing Snohomish's concerns and providing the requested clarification. According to the reply comments, under section 5.2.1 of the settlement:

...any joint pleadings and/or requests for relief made by Tacoma and Snohomish will be withdrawn solely to the extent of Tacoma's participation therein, but will remain on the record as to Snohomish. Further, Snohomish will remain free to seek relief and sponsor testimony, and the witnesses who have filed testimony for both Tacoma and Snohomish will remain free to offer testimony on behalf of Snohomish and will not be restricted thereby as a consequence of Tacoma's undertakings pursuant to the Settlement Agreement.²¹

On the same date, Trial Staff filed reply comments expressing no objection to the clarification and urging the Commission to find that the Settlement represents a fair and reasonable resolution of the issues and is in the public interest.²²

Commission Determination

17. The Commission agrees with Snohomish that section 5.2.1 requires clarification as to the effect on Snohomish of Tacoma's agreement to withdraw pleadings and to not make its witnesses available to others in these proceedings. In view of the clarification provided by Enron and Tacoma, the Commission finds that section 5.2.1 will not adversely affect Snohomish because the pleadings withdrawn by Tacoma will remain on the record as to Snohomish. Similarly, the witnesses who have filed testimony for both Tacoma and Snohomish will continue to be available to offer testimony on behalf of Snohomish. Therefore, the Commission finds that the Settlement, as clarified, is uncontested, is a fair and reasonable resolution of the issues, and in the public interest.

²¹ Enron and Tacoma Reply Comments at 2.

²² Trial Staff Reply Comments at 4. Trial Staff also request that the Presiding Judge certify the Settlement to the Commission for approval.

The Commission orders:

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

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.