

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enron Power Marketing, Inc. and
Enron Energy Services Inc. Docket No. EL03-180-028

Enron Power Marketing, Inc. and
Enron Energy Services Inc. Docket No. EL03-154-022

Portland General Electric Company. Docket No. EL02-114-023

Enron Power Marketing, Inc. Docket No. EL02-115-027

El Paso Electric Company,
Enron Power Marketing, Inc. and
Enron Capital and Trade Resources
Corp. Docket No. EL02-113-025

Fact-Finding Investigation Into Potential
Manipulation of Electric and Natural Gas
Prices Docket No. PA02-02-037

Investigation of Anomalous Bidding
Behavior and Practices in Western Markets Docket No. IN03-10-023

ORDER APPROVING PARTIAL UNCONTESTED SETTLEMENT

(Issued October 26, 2006)

1. On August 14, 2006, Enron,¹ the Public Utility District No. 1 of Grays Harbor County, Washington (Grays Harbor), and the Commission's Trial Staff (collectively, the Settling Parties) filed a Joint Offer of Settlement, an 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 October 26, 2006.
2. The Settlement resolves, as between Enron and Grays Harbor, claims against Enron for refunds, disgorgement of profits and other remedies sought by Grays Harbor 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, 2003 (the Settlement Period)³ as they relate to Enron.
3. Under the Settlement, Grays Harbor will be given a \$300,000 Class 6 general unsecured claim against EPMI under the Enron Bankruptcy Plan, without offset, defense or reduction, with respect to Grays Harbors Proof of Claim No. 16301. In addition,

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.

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 6-7, *citing El Paso Elec. Co., Enron Power Mktg., Inc., and Enron Capital and Trade Resources Corp.*, 108 FERC ¶ 61,071 (2004).

Grays Harbor will receive a \$300,000 portion of the Trial Staff's Claim in the Enron Bankruptcy, which will take the form of a Class 6 general unsecured claim (the Grays Harbor Allocation of Trial Staff Claim).⁴ The Settlement also contains a number of mutual releases and other non-monetary consideration.⁵

4. The Settlement also requires the approval of United States Bankruptcy Court for the Southern District of New York (the Enron Bankruptcy Court),⁶ which was granted on September 14, 2006.⁷ On October 19, 2006, the Presiding ALJ issued a Certification of Uncontested Partial Settlement, finding that the Settlement is "fair and reasonable and in the public interest"⁸ No initial comments or reply comments were filed with respect to this Settlement.

5. Section 10.6 of the Settlement provides that the standard for review for any modifications to the Settlement proposed by a Settling Party, a non-party or the Commission *sua sponte* shall be the *Mobile-Sierra*⁹ public interest standard of review.¹⁰

⁴ See section 4.1 of the Settlement.

⁵ See article 5 of the Settlement.

⁶ 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

⁷ In the *Order Approving Settlement Agreement by and Among the Enron Parties, Public Utility District No. 1 of Grays County, Washington*, 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. . . ." Enron Bankruptcy Court order approving the Settlement, at 2.

⁸ *Enron Power Marketing, Inc., et al.*, 117 FERC ¶ 63,014 (2006).

⁹ See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

6. The Commission finds the Settlement to be fair and reasonable and in the public interest, and it is therefore approved. Commission approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings.

7. This order terminates Docket Nos. EL03-180-028; EL03-154-022; EL02-114-023; EL02-115-027; EL02-113-025; PA02-02-037; and IN03-10-023.

By the Commission. Commissioner Kelly concurring with a separate statement attached. Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁰ As a general matter, parties may bind the Commission to a public interest standard. *See Northeast Utilities Co. v. FERC*, 933 F.2d 937, 960-62 (1st Cir. 1993). Under limited circumstances, such as when the agreement has broad applicability, the Commission has the discretion to decline to be so bound. *See Maine Public Utilities Commission v. FERC*, 454 F3d. 278, 286-87 (D.C. Cir. 2006). In this case, we find that the public interest standard should apply.

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(Issued October 26, 2006)

KELLY, Commissioner, *concurring*:

The settling parties request that the Commission apply the *Mobile-Sierra* “public interest” standard of review for any future modifications to the settlement proposed by a party, a non-party, or the Commission acting *sua sponte*. The settlement resolves all rights or claims between the parties related to Enron’s actions in the Western energy markets during the specified settlement period of January 16, 1997 through June 25, 2003. It involves the exchange of monetary and non-monetary consideration for the settling parties and leaves non-settling participants in the relevant Commission proceedings unaffected. This settlement is uncontested, resolves issues between the parties for a prior period, and does not contemplate ongoing performance under the settlement into the future, which would raise the issue of what standard the Commission should apply in reviewing any possible future modifications. Indeed, in a sense, the standard of review is irrelevant here. Therefore, while I do not agree with

the reasoning of the majority regarding the applicability of the *Mobile-Sierra* “public interest” standard of review (*see* footnote 10), I concur with the order’s approval of this settlement agreement.

Suedeem G. Kelly

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WELLINGHOFF, Commissioner, dissenting in part:

The parties in this case have asked the Commission to apply the “public interest” standard of review when it considers future changes to the instant Settlement that may be sought by any of the parties, a non-party, or the Commission acting *sua sponte*. Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,¹ I believe that it is inappropriate for the Commission to grant the parties’ request and agree to apply the “public interest” standard to future changes to the Settlement sought by a non-party or the Commission acting *sua sponte*. Therefore, I dissent with respect to the Commission’s decision on that issue in this case.

¹ 117 FERC ¶ 61,055 (2006) (*Entergy*).

In addition, I write separately to express my concern about the Commission's characterization – in Footnote 10 of this order – of case law on the applicability of the “public interest” standard. First, the Commission's passing reference to that case law, including *Northeast Utilities Service Co. v. FERC*,² implies great clarity where none exists. As I noted in *Entergy*, case law on the applicability of the “public interest” standard is not entirely clear and is, in fact, inconsistent. Indeed, courts have recognized that cases in this area “do not form a completely consistent pattern,” and have invited the Commission to establish a clear policy to resolve the issue on a prospective basis.³

Second, I disagree with the statement in this order that the Commission has discretion only “under limited circumstances” as to the applicability of the “public interest” standard. In contrast to that characterization, courts have stated that the Commission “has reasonably broad powers to regulate the substantive terms of filings that it accepts and allows to become effective” and have suggested that the Commission may not need to tolerate the “public interest” standard at all.⁴ The recent court decision in *Maine Public Utilities Commission v. FERC*,⁵ cited in this order, reinforces that discretion, particularly with regard to the Commission's initial review of an agreement. To the extent that the *Maine PUC* decision also suggests that the breadth of an agreement's applicability may be relevant to the exercise of the Commission's discretion, I believe that the Commission should account for that issue by considering whether the agreement was negotiated through a stakeholder process reflecting a wide range of interests. My statement in *Entergy* places this consideration in context as to the appropriate applicability of the “public interest” standard.

For these reasons, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

² 993 F.2d 937 (1st Cir. 1993).

³ See *Boston Edison Co. v. FERC*, 233 F.3d 60, 67-68 (1st Cir. 2000).

⁴ *Id.* at 68.

⁵ 454 F.3d 278 (D.C. Cir. 2006) (*Maine PUC*).