

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. EL00-95-000

v.

Sellers of Energy and Ancillary Services Docket No. EL00-98-000

Investigation of the Practices of the California  
Independent System Operator and the  
California Power Exchange Docket No. IN03-10-000

Investigation of Anomalous Bidding Behavior  
and Practices in the Western Markets Docket No. PA02-2-000

Fact-Finding Investigation into Possible  
Manipulation of Electric and Natural Gas Prices Docket No. EL03-180-000

Enron Power Marketing, Inc. and  
Enron Energy Services, Inc. Docket No. EL03-154-000

Enron Power Marketing, Inc. and  
Enron Energy Services, Inc. Docket No. EL02-114-007

Portland General Electric Company Docket No. EL02-115-008

Enron Power Marketing, Inc. Docket No. EL02-113-000

El Paso Electric Company,  
Enron Power Marketing, Inc., and  
Enron Capital and Trade Resources Corporation

ORDER ON SETTLEMENT AGREEMENT

(Issued November 30, 2005)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement and Release of Claims Agreement (collectively, the Settlement) filed on October 11, 2005 in the instant proceedings by Enron<sup>1</sup> and the SRP Parties<sup>2</sup> (collectively, the Parties). The October 11 Settlement consists of the “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and the “Settlement and Release of Claims Agreement,” filed pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.<sup>3</sup> The Settlement resolves 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.
2. Although the Parties requested that the Commission receive comment on and review the Settlement without prior certification by the Presiding Administrative Law Judge, the Settlement was certified as a partial contested settlement on November 22, 2005.<sup>4</sup> The Parties also have requested that the Commission approve the Settlement by December 31, 2005.<sup>5</sup> Today’s order approves the Settlement.

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<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> 18 C.F.R. § 385.602 (2005).

<sup>4</sup> *See* Certification of Partial Contested Settlement, 113 FERC ¶ 63,025 (2005).

<sup>5</sup> 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).

### **Background and Description of the Settlement**

3. The Settlement will resolve claims by the SRP Parties against the Enron Debtors for refunds, disgorgement of profits, and other monetary and non-monetary remedies in the following Commission proceedings: the Refund Proceeding in Commission Docket Nos. EL00-95-000<sup>6</sup> and EL00-98-000,<sup>7</sup> the Partnership/Gaming Proceeding in Docket Nos. EL03-180-000, EL03-154-000, EL02-114-007, EL02-115-008, and EL02-113-000, and the Refund Related Proceedings, including Docket Nos. PA02-2-000 and IN03-10-000 for the Settlement Period. The Parties also have agreed to mutual releases of past, existing and future claims arising at the Commission and/or under the Federal Power Act (FPA)<sup>8</sup> and the Natural Gas Act (NGA)<sup>9</sup> with respect to rates, prices, and terms or conditions for energy, ancillary services, or transmission congestion in the western electricity or western natural gas markets during the settlement period.

4. The Parties note that SRP is an intervenor in the Commission's proceedings involving refunds and the disgorgement of profits by Enron, and both it and New West have asserted claims in the Enron Bankruptcy Proceeding. SRP also has filed comments on the settlement pending before the Commission in the captioned dockets<sup>10</sup> between and

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<sup>6</sup> *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange.*

<sup>7</sup> *Investigation of Practices of the California Independent System Operator and the California Power Exchange.* This proceeding and the proceeding in Docket No. EL00-95-000, *et al.*, are collectively referred to as the California Refund Proceeding or the Refund Proceeding.

<sup>8</sup> 18 U.S.C. § 824 *et seq.* (2000).

<sup>9</sup> 15 U.S.C. § 717 *et seq.* (2000).

<sup>10</sup> The Parties refer to the global settlement involving claims against Enron as the "California Settlement." The Commission accepted the California Settlement by order issued on November 15, 2005. *See* 113 FERC ¶ 61,171 (2005).

among Enron, the California Parties,<sup>11</sup> the Commission's Office of Oversight and Investigations (OMOI) and the attorneys general of the states of Washington and Oregon (California Settling Parties).

5. The consideration outlined in the Settlement is based, in part, on a calculation of Enron's estimate of refund amounts associated with transactions in the CAISO and CalPX markets pursuant to the Commission's orders in the Refund Proceeding for the period October 2, 2000 through June 20, 2001. The Settlement also includes negotiated amounts for the Pre-October Period at issue in the Refund Proceeding (May 1, 2000 through October 1, 2000), as reflected in the Exhibit A allocation matrix in the California Settlement. Finally, the Settlement provides negotiated amounts for the more inclusive period associated with the Partnership/Gaming Proceeding (January 16 1997 through June 25, 2003). The Parties request that the Commission grant any necessary authority for the CalPX and the CAISO to implement the Settlement, and that the Commission waive any tariff provisions or regulations necessary to implement the Settlement.

6. The Settlement anticipates cash payments totaling \$884,065, which is the amount of SRP's allocated share of cash distributions to Opt-In Participants under the California Settlement.<sup>12</sup> The Settlement also provides refunds against Enron's charges related to its transactions in the CAISO and CalPX markets during the Western energy crisis of 2000 and 2001 and resolves broader claims for remedies, including claims for profit disgorgement related to Enron's conduct in Western energy markets during the Settlement Period.<sup>13</sup> Under the Settlement, Enron will allow, in favor of the SRP Parties,

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<sup>11</sup> 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).

<sup>12</sup> This amount is reflected in the California Settlement's Exhibit A Allocation Matrix.

<sup>13</sup> "Settlement Period" is defined in section 1.80 as meaning the period from January 16, 1997 through June 25, 2003, which is the period set by the Commission in its order on disgorgement of profits by Enron. *El Paso Electric Co.*, 108 FERC ¶ 61,071 (2004).

a Class 6 general unsecured claim of \$2,700,000 in the bankruptcy proceeding of EPMI,<sup>14</sup> without offset, defense, or reduction, in accordance with the Enron Debtors' Plan of Reorganization (the Plan).<sup>15</sup>

7. As a condition to the receipt of this consideration, SRP is required to opt-into the California Settlement. The Settlement requires SRP to notify the Commission in its initial comments on the California Settlement of its intention to opt-into the California Settlement if the instant Settlement is approved. SRP has so notified the Commission in initial comments filed in the California Settlement on September 13, 2005. Although the California Settlement provides that such opt-in notices are to be filed within five days of a Commission order approving the Settlement, SRP indicated in its initial comments on the California Settlement and in the instant Settlement that it will require waiver of this opt-in time limit, because the California Settlement was filed on August 24, more than six weeks prior to the filing of the instant Settlement. In joint reply comments on the California Settlement, the California Parties, OMOI and Enron agreed that SRP should be allowed to file an opt-in notice within five days of the effective date of the Enron-SRP Settlement.

8. The Settlement also provides for non-monetary consideration. Article 6 provides that, subject to certain specified limitations, the Enron Debtors and the SRP Parties will mutually release and discharge each other as of the Settlement Effective Date from all past, existing and future claims before the Commission and/or under the FPA and NGA. Subject to specified limitations, the Enron Non-Debtor Gas Entities and the SRP Parties will release each other from Commission, FPA and NGA claims and civil claims arising from any transaction or occurrence described in the Initial Staff Report,<sup>16</sup> the Final Staff Report, or in the Commission's June 25, 2003 Order in Docket No. EL03-77 with respect to the Enron-Non-Debtor Gas Entities.<sup>17</sup>

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<sup>14</sup> *In re Enron Corp., et al., Reorganized Debtors*, Case No. 01-16034 (ALG) (Bankr. S.D.N.Y.).

<sup>15</sup> According to section 1.42 of the 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.

<sup>16</sup> The Initial Staff Report was released by the Commission Staff on August 13, 2002, in connection with the Commission's investigation in Docket No. PA02-2.

<sup>17</sup> *Enron Power Marketing, Inc.*, Order Revoking Market-Based Rate Authorities and Terminating Blanket Market Certificates, 103 FERC ¶ 61,343 (2003). *See* section 6.6 of the Settlement.

9. On October 28, the Enron Parties and the SRP Parties filed a Motion to Lodge Order of Bankruptcy Court Approving Settlement by and Among the Enron Parties and the SRP Parties (Motion to Lodge). Appended to the Motion to Lodge is the October 27 Enron Bankruptcy Court<sup>18</sup> 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 (Bankruptcy Court Order). Judge Gonzalez approved the Settlement without condition, based on his determination that “the legal and factual bases set forth in the Motion [to lodge the Settlement Agreement] establish just cause for relief granted herein and that the Settlement Agreement is fair and reasonable ....”<sup>19</sup> The Commission will grant the Motion to Lodge the Bankruptcy Court Order.

### **Comments on the Settlement**

10. Initial comments on the Settlement were due on October 31, and reply comments were due on November 10. Timely initial comments were filed by Port of Seattle, Washington (Port), the Commission’s Trial Staff, and the Western Parties.<sup>20</sup> Timely reply comments were filed by the Enron Parties and SRP.

11. The Commission notes at the outset that none of the commenters’ initial or reply comments<sup>21</sup> comply with the Commission’s Final Rule in Docket No. RM05-33-000 (Order No. 663), which was issued on September 16, 2005.<sup>22</sup> Order No. 663 revises the Commission’s Rules of Practice and Procedure to require that pleadings set forth:

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<sup>18</sup> Judge Alfred J. Gonzalez, presiding.

<sup>19</sup> Bankruptcy Court Order at 2.

<sup>20</sup> The Western Parties consist of: the City of Santa Clara, California, d/b/a Silicon Valley Power (Santa Clara); the Public Utility District No. 1 of Snohomish County, Washington (Snohomish); Valley Electric Association, Inc. (Valley Electric); Nevada Power Company and Sierra Pacific Power Company (the Nevada Companies); and The Metropolitan Water District of Southern California (MWD).

<sup>21</sup> Although SRP’s reply comments did contain a “Statement of Issues” section articulating the four issues that are addressed in SRP’s reply comments, Order No. 663 requires that the commenter include the legal precedent upon which the commenter is relying. In addition, the comments filed by Trial Staff are not required to provide a “Statement of Issues,” because they do not raise any issues with respect to the Settlement.

<sup>22</sup> 112 FERC ¶ 61,297 (2005); 70 *Fed. Reg.* 55723 (2005).

[t]he position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position, including a separate section entitled “Statement of Issues,” listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying; any issue not so listed will be deemed waived.<sup>23</sup>

Although the Commission’s regulations already require that each pleading include the positions taken by participants and the basis in law and fact supporting the position, the Commission has found that participants sometimes fail to specify the issues they want the Commission to address or the case law supporting their position. For this reason, Order No. 663 requires that participants list their issues and supporting legal precedent in a separate section, entitled “Statement of the Issues,” or those issues will be deemed waived.

12. The Commission issued Order No. 663 on September 16, 2005, which was well in advance of the due dates for comments and reply comments on the Settlement. Thus, the parties were on notice of these requirements as of the effective date of the rule, *i.e.*, the date of its publication in the *Federal Register* (September 23, 2005). For this reason, the Commission deems as waived those issues raised by commenters whose pleadings are not in conformance with Order No. 663. Therefore, the issues raised in the initial comments of Port and Western Parties and the reply comments of the Enron Parties and SRP are deemed to be waived.<sup>24</sup> We note that Trial Staff does not object to the Settlement and raises no issues.

### **Discussion**

13. Although the Commission deems waived all of the issues that were raised by commenters in the non-compliant initial comments and reply comments, the Commission nevertheless must reach a determination as to whether the Settlement results in a fair resolution of the matters in controversy and is in the public interest. In view of the fact that all of the issues involved in this bilateral settlement between Enron and SRP have been considered and addressed by the Commission in its order accepting the California Settlement,<sup>25</sup> the Commission would have reached the same conclusion in the instant proceeding as it did in the order on the California Settlement had the commenters’ pleadings met the requirements of Order No. 663. The Commission’s policy strongly

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<sup>23</sup> 18 CFR § 385.203(a)(7) (2005).

<sup>24</sup> 18 CFR § 385.203(a)(7) (2005).

<sup>25</sup> 113 FERC ¶ 61,171 (2005). *See* n9, *supra*.

supports negotiated settlements, because they provide regulatory certainty, promote administrative efficiency for the Commission, and eliminate the need for additional financial and personnel resources by the parties on issues resolved through settlement.<sup>26</sup> Moreover, the Settlement contains specific provisions intended to protect the rights of non-settling parties to continue litigating their claims against Enron.

14. The Commission also finds that there are no material issues of genuine fact that remain in dispute. Clearly, the Settlement does not resolve anything as to non-settling parties, and these entities retain the ability to pursue their claims against Enron in the underlying proceedings. The Commission's precedent establishes that this is an uncontested settlement:

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.<sup>27</sup>

Moreover, the specific terms of the Settlement itself make it clear that the Settlement establishes no facts or precedents. Specifically, section 6.7.5 provides:

[E]xcept for the purpose of enforcing the terms and conditions of this Agreement as between and among the Parties, nothing herein shall establish any facts or precedents as between the Parties and any third parties as to the resolution of any dispute. Each party expressly denies any wrongdoing or culpability with respect to the claims against it released in this Agreement, or any other matter addressed in this Agreement, and does not, by execution of this Agreement, admit or concede any actual or potential fault, wrongdoing or liability in connection with any facts or claims that have been or could have been alleged against it with respect thereto.<sup>28</sup>

In addition, section 2.2 of the Settlement states that "Nothing herein will affect the positions that any non-settling party wishes to assert in the allocation proceeding." Thus,

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<sup>26</sup> See *San Diego Gas & Electric Co.*, 112 FERC ¶ 61,176 (2005) at P1 ("We strongly encourage parties who are considering settlement to reach and finalize any outstanding settlements within the next two months.")

<sup>27</sup> *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292 (1983) at 61,673.

<sup>28</sup> Section 6.7.5 of the Settlement (emphasis added).

it is clear to the Commission that the Settlement does not affect non-settling parties' ability to pursue litigation against Enron, and whatever rights they may have are unaffected by the Settlement.

15. The agreement between Enron and the SRP Parties is bilateral in nature and, as such, resolves only those matters in controversy between them. This is made clear in a number of sections in the Settlement. For example, section 6.7.3 makes it clear that none of the releases or waivers set forth in the Settlement affect Enron's ability to continue to litigate claims against non-settling parties. The logical corollary is that the releases and waivers in this bilateral agreement between Enron and the SRP Parties will not affect the ability of non-signatory parties to pursue their claims against Enron or to defend against any Enron claims against them. Moreover, the following language in sections 2.2 and 7.1.1 also make it clear that the Settlement will not prejudice the rights of non-settling parties:

any monetary remedy that FERC may determine to award, if any, to such [non-settling] party shall not exceed the share allocable to that party, as determined under the allocation mechanism adopted by FERC in litigation, of any profits, if any, Enron may be finally required and ordered to disgorge, including, for any party, any final order with respect to any contract termination payments that may be due Enron. Nothing herein will affect the positions that any non-settling party wishes to assert in the allocation proceeding.

Western Parties state that, if the effect of this language will not prejudice their rights in the Show Cause Proceedings, they do not object to approval of the Settlement. To this end, they ask that the Commission provide clarification that nothing in the Settlement will prejudice or affect their rights in continuing litigation with Enron.<sup>29</sup> Therefore, the Commission finds that the Settlement will not adversely affect the rights of Non-Settling Participants to pursue litigation separately.

16. Finally, the Commission finds 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*, *Mirant* and *Enron* settlements.<sup>30</sup>

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<sup>29</sup> *Id.* at 4.

<sup>30</sup> See 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); 111 FERC ¶ 61,186 (2005) (order accepting *Mirant* settlement); and 113 FERC ¶ 61,171 (2005) (order accepting *Enron* settlement).

The Commission orders:

(A) The Commission hereby approves the Offer of Settlement and Settlement Agreement, as discussed in the body of this order.

(B) The CalPX is authorized and directed to implement the Settlement, as discussed in the body of this order.

(C) The CAISO is authorized and directed to implement the Settlement, as discussed in the body of this order.

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

( S E A L )

Magalie R. Salas,  
Secretary.

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(Issued November 30, 2005)

KELLY, Commissioner, *dissenting in part*:

This order marks the first application of the Commission's recently issued Order No. 663, a procedural rule requiring movants to list issues they wish the Commission to address in a section entitled "Statement of Issues." The changes made by Order No. 663 "are essentially formatting

changes”<sup>1</sup> and the rule became effective immediately upon publication in the Federal Register because it related to a matter of agency procedure.<sup>2</sup>

Although I agree that the Commission must enforce its rules, I find this order’s waiver of all issues raised by commenters for failure to comply with Order No. 663 to be an overly stringent application of this procedural rule under the circumstances. Since this is the first time the Commission is applying Order No. 663, I believe it would have been more appropriate for the Commission to have either addressed the commenters’ issues, while advising the commenters that future pleadings would be waived if they did not comply with this rule; or issued a public notice to the commenters that they would need to resubmit their pleadings in the proper format. Moreover, to further assure that all participants to Commission proceedings meet these formatting requirements, I think the Commission should prominently post Order No. 663 on its website.

Therefore, I respectfully dissent in part from this order.

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Suedeem G. Kelly

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<sup>1</sup> Order No. 663 at P 8.

<sup>2</sup> *Id.* at P 17.