122 FERC ¶ 61,002
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Jon Wellinghoff.

Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-180-000
Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-154-000
Portland General Electric Company	Docket No. EL02-114-007
Enron Power Marketing, Inc.	Docket No. EL02-115-008
El Paso Electric Company, Enron Power Marketing, Inc. and Enron Capital and Trade Resources Corp.	Docket No. EL02-113-000
Fact-Finding Investigation Into Potential Manipulation of Electric and Natural Gas Prices	Docket No. PA02-2-000
Investigation of Anomalous Bidding Behavior and Practices in Western Markets	Docket No. IN03-10-000

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued January 3, 2008)

1. On October 26, 2007, Enron[1] and the Port of Seattle, Washington (Port of Seattle) (collectively, the Settling Parties) filed 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 request Commission approval by January 9, 2008.

2. The Settlement resolves, as between Enron and Port of Seattle, all claims against Enron for disgorgement of profits and other remedies sought by Port of Seattle in these proceedings. These claims emanated from transactions and events in the 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, Port of Seattle will be given a $500,000 Class 6 general unsecured claim against EPMI, in accordance with the Enron Debtors' Plan of

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[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 (2007).

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

Reorganization, without offset, defense or reduction.[4] The Settlement also contains a number of mutual releases of claims by the Settling Parties against each other as well as other non-monetary consideration.[5]

4. The Settlement also requires the approval of United States Bankruptcy Court for the Southern District of New York (Enron Bankruptcy Court),[6] which was granted on November 15, 2007.[7]

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*[8] public interest standard of review.[9]

6. On November 15, 2007, Commission Trial Staff submitted comments in support of the Settlement. Also on November 15, 2007, the Settling Parties filed a joint motion to lodge, for informational purposes, the Enron Bankruptcy Court Order, approving the

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[4] *See* section 4.1.1 of the Settlement.

[5] *See* article 5 of the Settlement.

[6] Section 1.2 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 Among the Enron Parties and the Port of Seattle, Washington* (Enron Bankruptcy Court Order), 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 at 2.

[8] *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).

[9] 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 F.3d 278, 286-87 (D.C. Cir. 2006). In this case, we find that the public interest standard should apply.

Settlement. On November 21, 2007, Port of Seattle filed reply comments clarifying its position with respect to the applicable standard or review, as set forth in section 10.6 of the Settlement.[10]

The Commission orders:

7. 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.

By the Commission. Commissioner Kelly concurring with a separate statement attached.
Commissioner Wellinghoff dissenting in part with a separate statement attached.
Commissioner Moeller not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[10] In its reply comments, Port of Seattle reiterates that while section 10.6 of the Settlement provides for the public interest standard of review, section 10.6 further provides that:

> Although Enron does not agree, Port contends in accord with the recent conclusion of the Ninth Circuit that there is no "public interest" standard distinct from the statutory "just and reasonable" standard, and that Mobile and Sierra represent only particularized applications of the just and reasonable standard. *Public Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053, 1060 n.7 (9th Cir. 2006), *pets. for cert. granted sub nom., Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County, et al.*, ___ U.S.L.W. ___ (U.S. Sept. 25, 2007) (No. 06-1457, *et al*.). Port agrees that the Settlement Agreement is just and reasonable and is consistent with the public interest, and, accordingly, Port agrees that the Commission should approve the Settlement Agreement and that the Settlement Agreement should be altered in the future only upon a showing meeting the strictest standard of review allowed by law.

See Port of Seattle Reply Comments at 2.

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KELLY, Commissioner, *concurring*:

The settling parties request that the Commission apply the *Mobile-Sierra* "public interest" standard of review with respect to any modifications to the settlement, whether proposed by a party, a non-party or the Commission acting *sua sponte*. This settlement resolves, as between Enron and Port of Seattle, all claims or rights to remedies emanating from transactions and events in the western energy markets during the period from January 16, 1997 through June 25, 2003. It is uncontested, does not affect non-settling parties, and resolves issues related to monetary and non-monetary consideration between the parties that arose during the relevant prior period. The settlement does not contemplate ongoing performance under the settlement into the future, which would raise the issue of what standard the Commission should apply to review any possible future modifications sought by non-parties or the Commission. Indeed, in a sense, the standard of review is irrelevant here. Therefore, while I do not agree with the order's statements

regarding the applicability of the *Mobile-Sierra* "public interest" standard of review (*see* footnote 9), I concur with the order's approval of this settlement agreement.

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Suedeen G. Kelly

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WELLINGHOFF, Commissioner, dissenting in part:

To the extent that the *Mobile-Sierra* doctrine creates a standard of review distinct from the "just and reasonable" standard of review, 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

[1] 117 FERC ¶ 61,055 (2006).

settlement sought by a non-party or the Commission acting *sua sponte*. In addition, for the reasons that I identified in *Southwestern Public Service Co*.,[2] I disagree with the Commission's characterization in this order of case law on the applicability of the "public interest" standard.

For these reasons, I respectfully dissent in part.

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Jon Wellinghoff
Commissioner

[2] 117 FERC ¶ 61,149 (2006).