

123 FERC ¶ 61,247
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. Docket No. EL03-180-000
and Enron Energy Services, Inc.

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

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. Docket No. EL02-113-000
Enron Capital and Trade Resource Corp.

ORDER VACATING INITIAL DECISION AS MOOT

(Issued June 5, 2008)

1. In this order, we act on an Initial Decision issued and certified to the Commission on June 21, 2007.¹ The Initial Decision made certain findings in

¹ *Enron Power Mktg, Inc.*, 119 FERC ¶ 63,013 (2007) (Initial Decision).

regard to conduct by Enron² during the period January 16, 1997 through June 25, 2003. Because all the claims and issues addressed in the Initial Decision have been resolved in a subsequent settlement, we find the Initial Decision's findings moot and therefore vacate the Initial Decision.

Background

2. The Gaming and Partnership Proceedings commenced on June 25, 2003 with the Commission's issuance of two show cause orders, one directed to 43 entities (in the Gaming Proceeding)³ and the other directed to 24 entities (in the Partnership Proceeding)⁴. In those orders, the Commission required multiple identified entities to show cause why they should not be found to have engaged, either individually or in concert with other entities, in Gaming Practices in violation of the tariffs of either the California Independent System Operator Corporation or the California Power Exchange. By mid-2004, the Commission issued orders either dismissing proceedings against, or approving settlements involving, all of the named entities,⁵ except for Enron.

² Several Enron entities have been identified in the course of these proceedings. They include Enron Corp.; Enron Power Marketing, Inc.; 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, Enron Canada Corp.; Enron Compression Services Company; and Enron MW, LLC (collectively, Enron).

³ *Am. Electric Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003).

⁴ *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003).

⁵ *El Paso Electric Co.*, 104 FERC ¶ 61,115 (2003); *Portland General Electric Co.*, 105 FERC ¶ 61,302 (2003); *City of Redding, Cal.*, 106 FERC ¶ 61,023 (2004); *American Electric Power Serv. Corp.*, 106 FERC ¶ 61,025 (2004); *Puget Sound Energy, Inc.*, 106 FERC ¶ 61,026 (2004); *Williams Energy Serv. Corp.*, 106 FERC ¶ 61,027 (2004); *San Diego Gas & Electric Co.*, 106 FERC ¶ 61,028 (2004); *Idaho Power Co.*, 106 FERC ¶ 61,208 (2004); *Aquila Merchant Serv., Inc.*, 106 FERC ¶ 61,234 (2004); *PacifiCorp*, 106 FERC ¶ 61,235 (2004); *Portland General Electric Co.*, 106 FERC ¶ 61,236 (2004); *Morgan Stanley Capital Group Inc.*, 106 FERC ¶ 61,237 (2004); *Powerex Corp.*,

(continued)

3. The Initial Decision concludes that Enron violated its market-based rate authority starting on January 1, 1997 and engaged in gaming and anomalous market behavior by itself and in concert with others. As a result, the Initial Decision finds that Enron's market-based rate authority must be revoked as of January 16, 1997. The Initial Decision also requires that Enron disgorge \$1,617,454,868.50 of unjust profits for the period January 16, 1997 through June 25, 2003. Furthermore, the Initial Decision concludes that the termination payment that Enron was seeking from the Public Utility District No.1 of Snohomish County, Washington (Snohomish) should also be disgorged, as this payment constitutes unjust profits.⁶

4. Subsequent to the issuance of the Initial Decision, Enron entered into a settlement agreement with Snohomish and the Commission's Trial Staff (Trial Staff). Pending submission and approval of the settlement, the deadline to file

106 FERC ¶ 61,304 (2004); *Avista Corp.*, 107 FERC ¶ 61,055 (2004); *Modesto Irrigation Dist.*, 107 FERC ¶ 61,116 (2004); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 108 FERC ¶ 61,002 (2004); *Northern Cal. Power Agency*, 108 FERC ¶ 61,112 (2004); *Coral Power, L.L.C.*, 108 FERC ¶ 61,115 (2004); *Dynegy Power Mktg., Inc.*, 108 FERC ¶ 61,145 (2004); *Modesto Irrigation Dist.*, 108 FERC ¶ 61,260 (2004); *City of Glendale, Cal.*, 108 FERC ¶ 61,111 (2004); *Sempra Energy Trading Corp.*, 108 FERC ¶ 61,114 (2004); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 109 FERC ¶ 61,071 (2004); *Colorado River Com'n of Nevada*, 109 FERC ¶ 61,081 (2004); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 109 FERC ¶ 61,257 (2004); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 111 FERC ¶ 61,017 (2005); *Mirant Americas Energy Mktg., LP*, 111 FERC ¶ 61,488 (2005); *Pub. Serv. Co. of New Mexico*, 112 FERC ¶ 61,033 (2005); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,171 (2005); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,235 (2005); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,244 (2005); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 114 FERC ¶ 61,067 (2006); *Enron Power Mktg., Inc.*, 115 FERC ¶ 61,376 (2006); *Enron Power Mktg., Inc.*, 115 FERC ¶ 61,377 (2006); *Enron Power Mktg., Inc.*, 116 FERC ¶ 61,298 (2006); *Enron Power Mktg., Inc.*, 116 FERC ¶ 61,299 (2006); *Enron Power Mktg., Inc.*, 117 FERC ¶ 61,109 (2006); *Enron Power Mktg., Inc.*, 117 FERC ¶ 61,257 (2006).

⁶ Initial Decision at P 181.

briefs on exceptions was stayed.⁷ The settlement among Enron, Snohomish, and Trial Staff was approved by the Commission as uncontested on January 8, 2008.⁸

5. Thereafter, a briefing schedule for briefs on and opposing exceptions related to the Initial Decision was established. Only the City of Redding, California (Redding) filed a brief on exceptions. Because Redding is not a party to the instant proceeding, its brief was accompanied by a motion to intervene out-of-time for the limited purpose of submitting a brief on exceptions. The California Parties⁹ and Snohomish filed answers opposing Redding's late motion to intervene.¹⁰ Redding filed an answer to the California Parties' and Snohomish's answers to its late motion to intervene. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a), prohibits an answer to answers, unless otherwise permitted by the decisional authority. We will allow California Parties' and Snohomish's answers to Redding's late motion to intervene and Redding's answer to the California Parties' and Snohomish's responsive pleadings, as they have assisted the Commission in its decision-making.

Discussion

1. Redding's Late Motion to Intervene

6. As background to its late motion to intervene, Redding explains that it was

⁷ Notice of Extension of Time, Docket No. EL03-180-000, *et al.* (July 17, 2007).

⁸ *Enron Power Mktg., Inc.*, 122 FERC ¶ 61,015 (2008).

⁹ California Parties include the People of the State of California *ex rel.* Bill Lockyer, Attorney General, the California Electricity Oversight Board, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company, and Southern California Edison Company.

¹⁰ The California Parties' and Snohomish's answers addressed only Redding's motion to intervene. However, both requested an extension of time to file a brief opposing exceptions if the Commission grants Redding's motion to intervene out-of-time. The Commission's disposition of Redding's motion renders these requests moot.

severed from the Gaming and Partnership Proceedings on November 4, 2003,¹¹ and the Presiding Judge certified the Redding – Trial Staff settlement as a contested settlement on November 10, 2003.¹² The Commission approved the settlement on January 22, 2004.¹³ Redding explains that it is not a party to the instant proceeding because of the settlement.

7. Redding states that it wants to intervene in the proceeding for the limited purpose of submitting a brief on exceptions to challenge the allegedly erroneous finding in footnote 69 of the Initial Decision.¹⁴ Redding further states that it is concerned that, under the terms of the settlement among Enron, Snohomish and Trial Staff, the Initial Decision’s findings are no longer enforceable against Enron but will remain in effect as against other entities, including Redding.¹⁵

8. Redding contends that it was encouraged to enter into the settlement by the Commission and thus ceased its participation in the proceeding.¹⁶ Redding argues that the Commission must not leave parties who settled earlier in the proceeding exposed to erroneous findings on issues that were not fully litigated due to settlement.¹⁷

9. Redding further argues that intervening in the proceeding earlier for the sole purpose of challenging one exhibit would have exposed Redding to further litigation costs and risks.¹⁸ Redding also argues that its late intervention in the

¹¹ Order of Chief Judge Severing Parties and Holding Further Proceedings in Abeyance and Establishing New Lead Docket for Consolidated Proceedings, Docket No. EL03-137, *et al.*; Order of Chief Judge Severing Parties and Holding Further Proceedings in Abeyance, Docket No. EL03-180, *et al.* (unpublished orders, November 3, 2003).

¹² *City of Redding, Cal.*, 105 FERC ¶ 63,015 (2003).

¹³ *City of Redding, Cal.*, 106 FERC ¶ 61,023 (2004).

¹⁴ Redding’s Motion to Intervene Out-of-Time at 4.

¹⁵ *Id.* at 5, 6.

¹⁶ *Id.* at 5, 8.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 8.

proceeding will neither disrupt the proceeding nor prejudice parties to the proceeding because upon the Commission's approval of the settlement between Enron and Snohomish, there are no parties remaining in the proceeding.¹⁹

Answers to Redding's Late Motion to Intervene

10. California Parties and Snohomish argue that Redding's late motion to intervene should be denied because Redding chose not to intervene in the proceeding earlier with the full knowledge that its transactions with Enron were at issue in the proceeding.²⁰ Instead, according to Snohomish, Redding waited until the issuance of the Initial Decision to determine whether it agrees with the outcome or wishes to challenge it. Snohomish also states that Redding had actual knowledge of references in Snohomish's testimony to Redding-Enron transactions because Redding's counsel is on the service list for this proceeding on behalf of Redding.²¹

11. Snohomish asserts that, had Redding intervened in a timely fashion, it could have submitted testimony in reply to Snohomish with respect to the facts set out in footnote 69, and its testimony would have been subject to cross-examination. Snohomish asserts that the Presiding Judge would have been able to consider all of this testimony in preparing the Initial Decision.²² California Parties and Snohomish argue that permitting late intervention at this point would unfairly benefit Redding at the expense of the other parties to the proceeding. California Parties and Snohomish thus conclude that Redding failed to demonstrate good cause that its late intervention should be permitted.²³

Redding's Response to Answers to Its Late Motion to Intervene

12. In response, Redding argues that California Parties and Snohomish have failed to demonstrate that Redding's late intervention in the proceeding would

¹⁹ *Id.* at 9.

²⁰ California Parties' Answer at 5; Snohomish's Answer at 2, 3.

²¹ Snohomish's Answer at 6, 7

²² *Id.* at 7.

²³ California Parties' Answer at 7; Snohomish's Answer at 5.

prejudice and/or burden these two parties. Redding explains that both California Parties and Snohomish have already resolved all of their issues with Enron through settlements. Redding concludes that the correction to the Presiding Judge's finding in footnote 69 of the Initial Decision will have no impact on the California Parties and Snohomish.²⁴

13. Further, Redding states that although it was severed from the Gaming and Partnership Proceedings at the early stage, remaining parties continued to rely on its testimony. According to Redding, if parties believed that Redding's testimony was insufficient, there were adequate procedures available to these parties to continue discovery.²⁵ Redding also states that its witness whose testimony was used by parties in litigating their claims was once called for cross-examination by Enron, but the subpoena was later withdrawn. Subsequently, according to Redding, Enron and Snohomish stipulated that the exhibits, including Redding's affidavit, could be entered into the record without objection. For this reason, Redding continues to state, the Presiding Judge's finding in footnote 69 must fairly and accurately reflect that evidence, which it does not.²⁶

14. Redding also states that it does not seek to add evidence to the record but rather it seeks to ensure that the Initial Decision correctly reflects the weight of the record evidence.²⁷ Redding is also concerned that if the finding in footnote 69 is not corrected, it would undermine its settlement in Docket Nos. EL03-149-000 and EL02-182-000 and might result in further litigation.²⁸

Commission Determination

15. When late intervention is sought after the issuance of an order, the prejudice to other parties and burden upon the Commission of granting the late

²⁴ Redding's Answer at 3-4.

²⁵ *Id.* at 6.

²⁶ *Id.* at 7-8.

²⁷ *Id.* at 9-10.

²⁸ *Id.*

intervention may be substantial. Thus, a movant bears a higher burden to demonstrate good cause for the granting of such late intervention.²⁹

16. We agree with California Parties and Snohomish that Redding has failed to show good cause to intervene out-of-time. Snohomish's testimony that allegedly contains a factual error relevant to Redding's transactions with Enron was filed in February 2004. For more than four years, Redding has had ample opportunity to intervene in the proceeding and raise its concerns with the substance of Snohomish's testimony. During the course of the proceeding, the Presiding Judge routinely has granted late motions to intervene.³⁰ However, Redding did not seek to intervene in the proceeding until the Initial Decision was issued, over four years after the allegedly erroneous testimony was filed. Redding presents no good cause to justify its late intervention. Rather, it merely makes vague and unsupported allegations that the information in footnote 69 will somehow "cloud the public record"³¹ and "remain available to provide guidance."³² Neither is sufficient to justify granting its motion to intervene out-of-time.

17. The Commission, therefore, rejects Redding's motion to intervene out-of-time.³³ Redding filed its motion after issuance of the Initial Decision, but fails to present an adequate reason why, for over four years since the challenged

²⁹ See, e.g., *El Paso Elec. Co.*, 111 FERC ¶ 61,221, at P 10 (2005); *Nevada Power Co.*, 100 FERC ¶ 61,273, at P 5 (2002); *Florida Power & Light Co.*, 99 FERC ¶ 61,318, at P 9 (2002); *Int'l Paper Co.*, 99 FERC ¶ 61,066, at 61,303 (2002).

³⁰ See, e.g., *Order of Chief Judge Confirming Rulings Made at the Prehearing Conference*, Docket No. EL03-180-029 (Apr. 24 2007) (granting motions to intervene filed by eight different parties); *Order on Motion for Leave to Intervene*, Docket No. EL03-180-000 (Apr. 1, 2005) (granting a motion to intervene out-of-time filed by Public Utility District No. 1 of Grays Harbor County, Washington).

³¹ Redding's Motion to Intervene Out-of-Time at 2.

³² *Id.* at 6.

³³ E.g., *Connecticut Yankee Atomic Power Co.*, Opinion No. 449, 92 FERC ¶ 61,269, at 61,899 (2000) (denying motion to intervene filed after issuance of initial decision for failure to demonstrate good cause and to prevent undue burden on active participants).

testimony was filed, it remained silent and relied on others to defend its interests. Redding is not free now to change its mind and conclude that the participants in the case did not live up to its expectations.³⁴ Redding cannot remain inactive throughout and then enter the proceeding following the conclusion of a full evidentiary hearing and all that it entails.³⁵ As we have long held, the failure of one's interests to be adequately represented can be blamed on no one but oneself.³⁶ Redding made a conscious decision not to intervene earlier. It cannot be permitted to intervene at this late stage of the proceeding and delay the closure of the proceeding, which has no parties remaining, as they all have already resolved their issues through settlements.

18. In addition, as we find below, all the findings in the Initial Decision are rendered moot by the settlement among Enron, Snohomish and Trial Staff. Therefore, the finding in footnote 69 of the Initial Decision challenged by Redding is moot as well. For these reasons, we deny Redding's late motion to intervene.

2. Initial Decision is Moot and Vacated

19. We find the Initial Decision moot and vacate it. The Commission may terminate a proceeding and find an initial decision moot upon a finding that a settlement resolves all claims and issues addressed in the initial decision.³⁷ The Initial Decision addresses issues that were subsequently resolved by the Commission-approved comprehensive settlement among Enron, Snohomish and

³⁴ *Golden Spread Electric Coop., Inc.*, Opinion No. 501, 123 FERC ¶ 61,047, at P 208 (2008).

³⁵ *See, e.g., DiVito v. Fidelity & Deposit Co.*, 361 F.2d 936, 939 (7th Cir. 1966) (stating that "equity aids the vigilant").

³⁶ *See, e.g., Southwestern Pub. Serv. Com'n*, 22 FERC ¶ 61,341, at 61,593 (1983).

³⁷ *See, e.g., Cal. Indep. Sys. Operator Corp.*, 112 FERC ¶ 61,157, at P 16 (2005); *Trailblazer Pipeline Co.*, 107 FERC ¶ 61,008, at P 11 (2004).

Trial Staff.³⁸ We also note that, with the exception of a brief on exceptions filed by Redding, no briefs on exceptions have been submitted. Regardless of Redding's attempt to intervene out-of-time in this proceeding, its brief on exceptions raises no concern with any substantive issues addressed in the Initial Decisions. Therefore, the Initial Decision is moot, and it is appropriate to terminate the proceeding. The Commission has found that there are sound policy considerations for vacating an initial decision rendered moot by settlement.³⁹ Vacating the Initial Decision will not prejudice any party, and an order discussing the findings of the Initial Decision will serve no useful purpose.⁴⁰ Under these circumstances, we vacate the Initial Decision.

The Commission orders:

(A) Redding's late motion to intervene in the proceeding is hereby denied for the reasons stated in the body of this order.

³⁸ Moreover, during the hearing, Enron executed settlement agreements with the following parties: the California Parties; the Attorney General of the States of Washington, Oregon and Montana; the Commission's Office of Market Oversight and Investigations (now Office of Enforcement); Salt River Agricultural Improvement and Water District and New West Energy Corporation; Nevada Power Company and Sierra Pacific Power Company; The City of Santa Clara, California (d/b/a Silicon Valley Power); Valley Electric Association, Inc.; Metropolitan Water District of Southern California; the City of Tacoma, Washington; and Public Utility District No. 1 of Grays Harbor County, Washington. *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,171 (2005), *reh'g denied*, 115 FERC ¶ 61,032 (2006); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 114 FERC ¶ 61,067 (2006); *Enron Power Mktg., Inc.*, 115 FERC ¶ 61,376, *reh'g denied*, 117 FERC ¶ 61,257 (2006); *Enron Power Mktg., Inc.*, 115 FERC ¶ 61,377 (2006); *Enron Power Mktg., Inc.*, 116 FERC ¶ 61,298 (2006); *Enron Power Mktg., Inc.*, 116 FERC ¶ 61,299 (2006); *Enron Power Mktg., Inc.*, 117 FERC ¶ 61,109 (2006).

³⁹ See *KeySpan Energy Dev. Corp.*, 108 FERC ¶ 63,012, at P 45 (2004) (certifying an uncontested settlement to the Commission and recommending the Commission to vacate the initial decision as a result of the settlement).

⁴⁰ See *Fl. Power & Light Co.*, 30 FERC ¶ 61,230, at 61,459 (1985); and *United Gas Pipeline Co.*, 56 FERC ¶ 61,211, at 61,845 (1991).

(B) The Initial Decision is hereby vacated as moot for the reasons stated in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.