

124 FERC ¶ 61,206
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enron Power Marketing, Inc.,
and Enron Energy Services, Inc.

Docket No. EL03-77-007

Bridgeline Gas Marketing L.L.C.,
Citrus Trading Corporation,
ENA Upstream Company, LLC,
Enron Canada Corp.,
Enron Compression Services Company,
Enron Energy Services, Inc.,
Enron MW, L.L.C., and
Enron North America Corp.

Docket No. RP03-311-005

ORDER CONDITIONALLY APPROVING UNCONTESTED SETTLEMENT

(Issued August 29, 2008)

1. In this order, the Commission conditionally approves an uncontested Stipulation and Agreement (Settlement) filed on July 21, 2008 in the above-captioned proceedings (Revocation Proceedings) by the Enron Parties¹ and the City of Seattle, Washington (City of Seattle) (together, the Parties). The Settlement resolves all issues in the Revocation Proceedings, including certain petitions for review separately filed by the Parties that are currently before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The Parties request that the Commission expeditiously approve the Settlement as fair and reasonable and in the public interest.

¹ The Enron Parties include the Enron Power Marketers, which consist of Enron Power Marketing, Inc. and Enron Energy Services, Inc. (EESI), and the Enron Gas Marketers, which consist of ENA Upstream Company, LLC, Enron Canada Corp., Enron Compression Services Company, EESI, Enron MW, L.L.C., and Enron North America Corp. We note that two entities included in the caption – Bridgeline Gas Marketing, L.L.C. and Citrus Trading Corp. – were dismissed from this proceeding by the Commission on June 25, 2003.

2. The Settlement was filed by the Parties pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.² The Parties have requested expedited action and a Commission order approving the Settlement by no later than September 1, 2008.

3. As discussed below, the Commission conditionally approves the Settlement, finding it to be fair and reasonable and in the public interest.

Background

A. The Revocation Proceedings

4. On February 13, 2002, the Commission directed Commission Staff (Staff) to engage in a fact-finding investigation into whether any entity manipulated prices in electricity or natural gas markets in the western United States, or otherwise exercised undue influence over wholesale electricity prices in that region, since January 1, 2000.³ After Staff completed its fact-finding investigation, it released an Initial Report in Docket No. PA02-2-000 on August 13, 2002.⁴ Among other things, the Initial Report recommended that the Commission initiate company-specific proceedings to further investigate possible misconduct. On March 26, 2003, Staff issued a Final Report⁵ that provided evidence indicating that the Enron Power Marketers had engaged in gaming and misrepresentation, and had failed to report significant changes in their market shares to the Commission. The Final Report also found evidence that the Enron Gas Marketers had engaged in price manipulation.

5. Also on March 26, 2003,⁶ the Commission directed the Enron Power Marketers to show cause why their previously granted market-based rate

² 18 C.F.R. § 385.602 (2008).

³ *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

⁴ The Initial Report is available on the Commission's website at <http://www.ferc.gov/electric/bulkpower/pa02-2/Initial-Report-PA02-2-000.pdf>.

⁵ Final Report on Price Manipulation in Western Markets, Docket No. PA02-2-000 (March 3, 2003).

⁶ *Enron Power Marketing, Inc., et al.*, 102 FERC ¶ 61,316 (2003) (Show Cause Order).

authorities should not be revoked.⁷ In addition, the Commission directed the Enron Gas Marketers to show cause why their previously granted blanket marketing certificates should not be revoked.⁸ Based on findings from Staff's investigation, the Show Cause Order concluded that there was evidence that the Enron Power Marketers engaged in gaming and had acted inconsistently with the terms of their market-based rate authorities by failing to report significant changes in their market shares. The Show Cause Order also found evidence indicating that the Enron Gas Marketers had misused their authority under their blanket marketing certificates to make sales to and purchases from the gas markets serving California at rates that were unjust and unreasonable from the summer of 2000 through the winter of 2000-2001.⁹

6. The Enron Parties filed their response to the Show Cause Order on April 16, 2003, asserting that the Commission failed to establish that their market-based rate authorities or blanket marketing certificates, as applicable, should be revoked.

7. On June 25, 2003, the Commission issued an order revoking each of the Enron Power Marketers' market-based rate authorities and terminating each of the Enron Gas Marketers' blanket marketing certificates.¹⁰ The June 25 Order found that the Enron Power Marketers engaged in gaming by using inappropriate trading strategies, and failed to report significant changes in their market shares, which was a condition of their market-based rate authority. With respect to the Enron Gas Marketers, the June 25 Order found that they engaged in the manipulation of prices by sending false price signals to market participants. The June 25 Order

⁷ Market-based rate authorizations are granted pursuant to section 205 of the Federal Power Act (FPA) and Part 35 of the Commission's regulations.

⁸ Blanket marketing certificates are issued pursuant to the Natural Gas Act (NGA) and Part 284 of the Commission's regulations.

⁹ The Show Cause Order provided specific examples of the Enron Gas Marketers engaging in apparent market manipulation, including the manipulation of natural gas prices at the Henry Hub in Louisiana by using the EnronOnline electronic trading platform. *See* Show Cause Order at P 13.

¹⁰ *Enron Power Marketing, Inc., et al.*, 103 FERC ¶ 61,343 (2003) (June 25 Order), *order denying reh'g*, 106 FERC ¶ 61,024 (2004) (January 22 Order) (collectively, the Revocation Orders).

cited several additional examples of the Enron Gas Marketers using the electronic trading platform to manipulate prices. The Commission also directed certain of the Enron Gas Marketers to file a monthly report of their liquidation activities.¹¹

8. The Commission denied the Enron Parties' subsequent request for rehearing in the January 22 Order. The January 22 Order stated that the Enron Power Marketers exercised "unmitigated market power in the form of gaming through multiple inappropriate trading strategies," erected barriers to entry by employing such strategies and by filing false schedules in the California markets designed to artificially increase congestion, and engaged in affiliate abuse.¹² The January 22 Order also stated that the Commission has full authority to enforce the conditions of the Enron Gas Marketers' blanket marketing certificates, and that the "cornerstone of our decision was the misconduct of the Enron Gas Marketers, i.e., engagement in wash trades and price manipulation, rather than the outcome of the conduct."¹³ Finally, the January 22 Order rejected rehearing requests filed by other parties regarding the imposition of retroactive remedies, finding that such remedies were beyond the scope of the Revocation Proceedings and were more appropriately addressed in other proceedings.

9. The Enron Parties petitioned the D.C. Circuit for review of the Revocation Orders. The petition is currently pending in Case No. 04-1040 before the D.C. Circuit.

B. Intervention Orders

10. On October 16, 2003, the Commission issued an order clarifying the nature of several proceedings involving the western energy markets, including the

¹¹ See June 25 Order at Ordering Paragraphs (D) and (G). In compliance with this direction, EESI and Enron North America Corp. filed in Docket No. RP03-311 a monthly report on the liquidation of their natural gas books. EESI's final report was filed in August 2003, where it was reported that EESI no longer needed its blanket marketing certificate. Enron North America Corp.'s last report was filed in December 2006, where it was reported that all of its natural gas inventories had been liquidated.

¹² January 22 Order at P 26.

¹³ *Id.* P 38.

Revocation Proceedings.¹⁴ In this order, the Commission stated that the proceedings would be treated as investigations, subject to Part 1b of its regulations.¹⁵ Because the proceedings were investigations, the Commission explained that there would be no “parties” and it therefore rescinded the interventions it had previously granted, including City of Seattle’s intervention in the Revocation Proceedings. City of Seattle sought rehearing of the October 16 Order, arguing that the order failed to articulate a rationale for rescinding party status to City of Seattle in the Revocation Proceedings and that it violated the Commission’s own rules and procedures. The Commission denied rehearing in the December 12 Order.

11. City of Seattle petitioned for review of the Intervention Orders. That petition is currently pending before the D.C. Circuit in Case No. 04-1358.¹⁶ Case No. 04-1358 and Case No. 04-1040 were consolidated.

Description of the Settlement

12. On July 21, 2008, the Enron Parties and City of Seattle filed the instant Settlement. The Parties requested, and the Commission granted, an initial comment date of August 11, 2008, with reply comments due on or before August 20, 2008.¹⁷ No comments were filed.

13. The Settlement will resolve the Parties’ claims in the Revocation Proceedings and also resolves a dispute between the Parties as to whether the Commission should vacate the Revocation Orders as being moot as a result of the Enron Parties’ declaration of bankruptcy. The core components of the Settlement are described below.

¹⁴ *Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices, et al.*, 105 FERC ¶ 61,063 (October 16 Order), *order on reh’g*, 105 FERC ¶ 61,281 (2003) (December 12 Order) (collectively, the Intervention Orders).

¹⁵ *See* 18 C.F.R. § 1b (2008).

¹⁶ City of Seattle had initially filed its petition for review with the Ninth Circuit Court of Appeals. That petition was subsequently transferred to the D.C. Circuit.

¹⁷ *Notice of Filing*, 73 Fed. Reg. 44,247 (July 23, 2008).

14. The Parties agree to withdraw their separate petitions for review of the Revocation Orders and the Intervention Orders within seven business days of a Commission order approving the Settlement. Each Party will state that the other Party and the Commission support the motion.¹⁸ In addition, section 3.2 of the Settlement states that the Parties agree that the Revocation Orders will become final and no longer subject to the judicial review, and that the Revocation Proceedings will terminate upon specified terms, including: (1) the market-based rate authorities of the Enron Power Marketers are revoked and their market-based rate schedules are terminated as of June 25, 2003; (2) the authorizations of the Enron Gas Marketers to make sales under 18 C.F.R. § 284.402 are terminated as of June 25, 2003; and (3) “from and after June 25, 2003, sales of natural gas by the Enron Parties to liquidate their businesses are authorized under limited certificates as specified in” the June 25 Order.¹⁹

15. In addition to the foregoing, section 3.2.4 of the Settlement states that a Commission order approving the Settlement must conclude that: (1) “no further interim or final action, order or remedy, shall be taken, pursued or imposed with respect to the Enron Parties pursuant to the Revocation Orders;”²⁰ (2) the Revocation Orders shall not be given *res judicata* or collateral estoppel effect “with respect to any claims against the Enron Parties before FERC or in before any other agency, court or other forum;”²¹ (3) the findings and conclusions in those orders cannot be “cited as precedent or decisional authority against the Enron Parties” before the Commission or before other agencies, courts, or other forum;²² and (4) “nothing in the foregoing shall preclude or prejudice the City of Seattle from participating in existing or future proceedings against, from initiating proceedings against, from asserting any claims or defenses against, and from citing and relying on the Revocation Orders” against other parties (i.e., other than the Enron Parties).²³

¹⁸ The Parties included as Attachment A to the Settlement a form of motion to be filed with the D.C. Circuit Court of Appeals to dismiss the petitions for review.

¹⁹ Settlement at § 3.2 (citing June 25 Order at Ordering Paragraphs (C), (D), (F), and (G)).

²⁰ Settlement at § 3.2.4.

²¹ *Id.*

²² *Id.*

²³ *Id.*

16. The Settlement states that it is subject to a Commission order approving it without material change or condition unacceptable to any Party. Specifically, any changes to the requirements set forth in section 3.2.4 of the Settlement would constitute such a material change.²⁴

17. The Settlement would deem resolved with prejudice and settled as of the Settlement effective date any claims by the City of Seattle against the Enron Parties under the FPA or NGA “from time immemorial” to the Settlement effective date, with the exception of the non-monetary remedies required by the Revocation Orders.²⁵

18. With respect to modifications to the Settlement, section 6.5 provides in pertinent part:

Modifications/Severability: This Agreement may be modified only if in writing and signed by each of the Parties affected by the proposed modification No modification will be effective unless any approval that may be required with respect to such modification, if any, had been received. Absent consent and agreement of all Parties to the proposed change, the standard of review for any changes to this Agreement proposed by a Party, a non-party or FERC acting *sua sponte* shall be the ‘public interest’ standard of review set forth in *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) (the ‘Mobile-Sierra’ doctrine), and that in connection with, and as to any modification of, or to, this Agreement under that adopted and enforced standard of review shall take into account the here expressed understanding and intent of the Parties that the terms of this Agreement regarding the consideration exchanged for the mutual releases herein

²⁴ See P 15, *supra*.

²⁵ Settlement at section 3.3. The Parties also agree, at section 3.4.1, that the Settlement does not modify or impair their settlement agreement that was approved by the United States Bankruptcy Court for the Southern District of New York in Case No. 01-16034 on June 3, 2005.

provided are and shall be severable, and as such maintained intact, from the remaining modified and/or invalidated terms hereof.²⁶

19. The Parties request that the Commission approve the Settlement by September 1, 2008 “in order for the parties to reap the full benefits negotiated for in the Settlement Agreement, to eliminate additional litigation expense and to effectuate judicial economy.”²⁷ The Settlement Explanatory Statement states that the Settlement will terminate “if the Commission fails to approve” it without material changes “on or prior to September 1, 2008”²⁸

20. Finally, the Settlement states that the Parties disagree as to whether the Revocation Orders have become moot by reason of the Enron Parties’ declaration of bankruptcy. The Enron Parties contend that the Revocation Orders have been mooted and thus should be vacated by the Commission in accordance with United States Supreme Court precedent.²⁹ City of Seattle, however, contends that the orders should not be vacated, and that vacatur could harm it in litigation against other persons. The Parties state that the Settlement resolves this dispute.³⁰

Discussion

21. The Commission conditionally approves the uncontested Settlement, finding that it is fair and reasonable and in the public interest. The Settlement will resolve all disputes between the Enron Parties and City of Seattle in the Revocation Proceedings, and it will terminate litigation in connection with the Revocation Proceedings that is currently pending before the D.C. Circuit. As noted above, no comments were filed contesting the Settlement.

²⁶ Settlement at § 6.5.

²⁷ Settlement Explanatory Statement at 5.

²⁸ *Id.* at 6.

²⁹ The Enron Parties cite to *United States v. Munsingwear*, 340 U.S. 36 (1950) (*Munsingwear*) and *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961) in support of their contention that the Revocation Orders should be vacated.

³⁰ See Settlement Transmittal Letter at 2.

22. To avoid any doubt, the Commission approves the Settlement without modification to section 3.2.4. The Parties have indicated that it is necessary that this provision be accepted by the Commission without material modification.³¹ The Commission's acceptance of this provision means that the Revocation Orders cannot be cited as precedent or decisional authority against the Enron Parties by City of Seattle or others. However, as discussed below, the Revocation Orders will not be vacated and they may be cited against persons other than the Enron Parties.³²

23. Under the terms of the Settlement, the Revocation Orders will not be vacated as a result of the Commission's approval of the Settlement. However, these orders may not be cited in proceedings against the Enron Parties. They may still be cited as precedent in actions by City of Seattle or others against persons other than the Enron Parties. Because the Revocation Orders will still be binding precedent, although their use has been limited as described above, the Commission finds that they have not been vacated under *Munsingwear* and related precedent governing vacatur.

24. In light of *Maine Pub. Util. Comm'n v. FERC*, 520 F.3d 464, 477-78 (D.C. Cir. 2008), *reh'g pending*, the Commission may not accept the standard of review in section 6.5 of the Settlement as currently written. As such, the Settlement is approved conditioned on the Parties revising the standard of review applicable to non-settling third parties. An acceptable substitute provision applicable to non-settling third parties would be the "most stringent standard permissible under applicable law." Accordingly, the Parties must file a revised standard of review provision consistent with this precedent within 30 days of the date of this order.

25. The Commission's conditional approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

The Commission orders:

(A) The Settlement filed on July 21, 2008 is hereby conditionally approved, as discussed in the body of this order.

³¹ See P 16, *supra*.

³² See P 23, *supra*.

(B) The Parties must submit a compliance filing within 30 days of the date of the issuance of this order modifying the standard of review applicable to non-settling third parties.

By the Commission. Commissioners Wellinghoff and Kelly dissent in part with a separate joint statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Enron Power Marketing, Inc.,
and Enron Energy Services, Inc.

Docket No. EL03-77-007

Bridgeline Gas Marketing L.L.C.,
Citrus Trading Corporation,
ENA Upstream Company, LLC,
Enron Canada Corp.,
Enron Compression Services Company,
Enron Energy Services, Inc.,
Enron MW, L.L.C., and
Enron North America Corp.

Docket No. RP03-311-005

(Issued August 29, 2008)

WELLINGHOFF and KELLY, Commissioners, dissenting in part:

The instant settlement states that the “public interest” standard of review will apply to any modification to the settlement not agreed to by all parties whether proposed by a party, non-party, or the Commission acting *sua sponte*.

The majority finds that, in light of the U.S. Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit) decision in *Maine Public Utilities Commission v. FERC*,¹ the Commission may not accept the standard of review set forth in the instant settlement. Therefore, the majority approves the settlement conditioned on the settling parties revising the standard of review applicable to non-settling third parties. The majority also states that language applying the “most stringent standard permissible under applicable law” to non-settling third parties would be “[a]n acceptable substitute provision.”

We continue to disagree with the majority’s characterization of the D.C. Circuit’s holding in *Maine PUC* as to the applicability of the “public interest” standard. For the reasons set forth in our dissents in *Duke Energy Carolinas, LLC*² and *Westar Energy, Inc.*,³ we respectfully dissent in part.

Jon Wellinghoff
Commissioner

Suede G. Kelly
Commissioner

¹ 520 F.3d 464 (D.C. Cir. 2008) (*Maine PUC*).

² 123 FERC ¶ 61,201 (2008).

³ 123 FERC ¶ 61,252 (2008).