UNITED STATES OF AMERICA 119 FERC ¶ 63,013
FEDERAL ENERGY REGULATORY COMMISSION

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

INITIAL DECISION

(Issued June 21, 2007)

Michael J. Kurman, Esq. and J. Michael Carr, Jr. Esq. on behalf of City of Tacoma, Washington.

Charles A. Moore, Esq., Gary S. Fergus, Esq., Samuel Behrends IV, Esq., Bruce W. Neely, Esq., H. Liza Moses, Esq., Samuel G. Backfield, Esq., and Gregory S. Wagner, Esq. on behalf of Enron Power Marketing, Inc., Enron Energy Services Inc., and Enron North America Corp.

Philip L. Chabot, Jr. Esq. on behalf of the Port of Seattle, Washington.

Eric L. Christensen, Esq., Deborah A. Swanstrom, Esq., Michael A. Goldfarb, Esq., Edward D. Gehres III Esq., and Melanie T. Devoe, Esq., on behalf of Public Utility District No. 1 of Snohomish County, Washington.

Hollis J. Alpert, Esq., Joel M. Cockrell, Esq., Edith A. Gilmore, Esq., and Renee Terry, Esq. on behalf of the Commission Trial Staff.

CARMEN ANA CINTRON, Presiding Administrative Law Judge

I. INTRODUCTION

1. This 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 concludes that Enron's market based rate authority must be revoked as of January 16, 1997 and Enron is ordered to disgorge $1,617,454,868.50 of unjust profits for the period January 16, 1997 through June 25, 2003 (the Relevant Period). Furthermore, in this decision it is concluded that termination payments (Enron is seeking from Snohomish) are also unjust profits.

II. PROCEDURAL HISTORY

2. This case commenced June 25, 2003 with the Commission's issuance of two show cause orders.[1] In these 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 (Cal ISO or ISO) or the California Power Exchange (Cal PX). In the latter half of 2003 and early 2004, Trial Staff negotiated settlements or filed motions to dismiss based on substantial evidence with respect to all of the entities named on both show cause orders, except for Enron.[2]

3. On January 26, 2004, the Chief Judge issued an order consolidating the Gaming and Partnership Proceedings.[3] On January 30, 2004, the Chief Judge issued an errata order consolidating Enron-related issues from Docket Nos. EL02-114-000 and EL02-115-001 with the Gaming and Partnership Proceeding.[4]

---

[1] *American Electric Power Service Corp.,* 103 FERC ¶ 61,345 (2003) (Gaming Order); *Enron Power Marketing,* 103 FERC ¶ 61,346 (2003) (Partnership Order); *reh'g denied,* 106 FERC ¶ 61,020 (2004) (Gaming and Partnership Rehearing Order).

[2] Gaming Order, 103 FERC ¶ 61,345 at P 73. Several Enron entities have been identified in the course of these proceedings. They include Enron Power Marketing, Inc. (EPMI), Enron Energy Services, Inc. (EES) and Enron Capital and Trade Resources Corporation (ECT) (collectively, Enron).

[3] *Enron Power Marketing, Inc.,* "Order of Chief Judge Consolidating Gaming and Partnership Proceedings for Hearing and Decision," Docket No. EL03-180-000, *et al.* (2004).

[4] *Enron Power Marketing, Inc.,* Errata, Docket No. EL03-180-000, *et al.* (2004). Enron-related issues in Docket Nos. EL02-114-000 and EL02-115-001 were previously consolidated into the Gaming Proceeding on October 1, 2003. *Portland General Electric Co.,* "Order of Chief Judge Suspending Procedural Schedule, Severing, and Consolidating Proceedings," Docket No. EL02-114-000, *et al.* (2003).

4. Subsequently, on July 22, 2004, in reviewing an Initial Decision with respect to Enron's five-year relationship with El Paso Electric Co. (El Paso or EPE) in Docket No. EL02-113-000, the Commission determined that Enron's relationship with EPE "was a subset of other Enron relationships and practices in the West, including potential market manipulation in violation of the Cal ISO and Cal PX tariffs."[5] Accordingly, the Commission consolidated that proceeding with the ongoing Gaming and Partnership Proceeding and directed "the ALJ in the other dockets to determine, based on the totality of the evidence in all the dockets, the total amount of profits that Enron should be required to disgorge as supported by the consolidated records."[6] In that same order, the Commission affirmed that it had the authority to disgorge "profits based on Enron's failure to comply with the Commission's market-based rate order"[7] and that the Commission could require Enron to "disgorge profits for all of its wholesale power sales in the Western Interconnect for the period January 16, 1997 to June 25, 2003."[8]

5. Thereafter, on March 11, 2005, the Commission ruled that Enron's profits associated with certain disputed terminated contracts between Enron and several utilities such as Nevada Power Company (Nevada), Public Utility District No. 1 of Snohomish County, Washington (Snohomish), the Metropolitan Water District of Southern California (Met Water), the City of Santa Clara, California (Santa Clara) and Valley Electric Association, Inc. (Valley) should also be addressed in the instant consolidated proceeding.[9] Enron had filed separate proceedings against these parties in bankruptcy court seeking contract termination payments.

6. On April 29, 2005, the Commission issued an order denying an interlocutory appeal filed by Enron of an order denying discovery. In so doing, the Commission held that, "this proceeding is based on a violation of Commission directives and not on any harm to any particular customer."[10]

7. On May 12, 2005, the Commission clarified the scope of this proceeding as "limited to addressing whether Enron individually or jointly engaged in gaming and/or anomalous market behavior in violation of the ISO's and PX's tariffs (as explained in

---

[5] *El Paso*, 108 FERC ¶ 61,071 at P 32 (2004) (*El Paso).*

[6] *Id.* (footnote omitted).

[7] *Id.* at P 29.

[8] *Id.* at P 2.

[9] *El Paso Electric Co., et al.*, 110 FERC ¶ 61,280 (2005) (Order on Clarification), *reh'g denied,* 111 FERC ¶ 61,269 (2005) (March 11 Clarification Order).

[10] *El Paso Elect. Co., et al.*, 111 FERC ¶ 61,129 at P 12 (2005) (Order on Interlocutory Appeal), *reh'g denied*, 111 FERC ¶ 61,504 (2005).

greater detail in the Show Cause Orders), and the unjust profits that Enron must disgorge due to such actions as well as due to its violation of its market-based rate authority."[11] On rehearing, the Commission further clarified that "when the Commission stated that the hearing was to review 'all evidence relevant to Enron conduct that violated or may have violated Commission tariffs or orders and the appropriate remedy for such violations,' the relevant conduct, the relevant evidence and the relevant tariffs that the Commission had in mind more precisely went to violations of the California PX and ISO tariffs, *i.e.*, the subject of the Show Cause Proceeding, as well as violations of Enron's market-based rate authority, *i.e.*, the subject of the July 22 Order. Any alleged violations of other tariffs including the WSPP tariff and of the Commission's Order Nos. 888 and 889 affiliate rules were beyond the scope of this proceeding." *Id.* at P 15.

8. Between October 2003 and July 2005, various rounds of testimony (including direct, answering, supplemental, rebuttal, and supplemental rebuttal testimony) were filed by Enron,[12] Snohomish,[13] and Trial Staff,[14] as well as other parties that have settled and subsequently withdrawn their testimony. In addition, two rounds of testimony related to the Enron tapes were filed by Trial Staff on March 1, 2005 and on April 14, 2005 (collectively, Tape Testimony).

9. In July 2005, the procedural schedule was suspended for the parties to conduct settlement discussions. This suspension continued for over fifteen months, during which time Enron executed settlements with a number of participants, which settlements were approved by the Commission.[15] The procedural time lines were reestablished by the

---

[11] *El Paso Elec. Co.*, 111 FERC ¶ 61,221 at P 16 (2005) (Order on Motion to Intervene Out-of-Time and Request for Clarification), *reh'g denied*, 112 FERC ¶ 61,256 (2005).

[12] Enron filed direct testimony on October 3, 2003; rebuttal testimony on May 13, 2005; supplemental rebuttal testimony on June 17, 2005; and joint supplemental rebuttal on July 14, 2005. Also, during this time, Enron filed for redesignation of certain exhibits.

[13] Snohomish filed direct testimony on February 27, 2004; supplemental testimony on May 17, 2004 and January 31, 2005; and revised public versions of formerly protected materials on February 9, 2007.

[14] Trial Staff filed direct testimony on February 27, 2004 (also included certain exhibits previously filed in Docket No. EL02-114-000, *et al.*) and direct and answering testimony on January 31, 2005.

[15] Specifically, Enron executed settlement agreements with the California Parties; the Attorney General of the States of Washington, Oregon and Montana; the Commission's Office of Market Oversight and Investigations; 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

Chief Judge on November 21, 2006, and amended on December 1, 2006.[16] Thereafter, the final round of testimony provided for in the procedural schedule, Enron's rebuttal to Trial Staff's Tape Testimony, was filed on December 6, 2006. In addition, revised testimony was filed on December 12, 2006 by Enron to remove portions of testimony related to parties that had settled and, thus, were no longer in the case.

10. The hearing commenced on January 29, 2007 and concluded on February 28, 2007.[17] Enron, Snohomish, and Staff submitted initial and reply briefs on April 4, 2007 and April 23, 2007, respectively. The Port of Seattle, Washington (Seattle) filed an initial brief on April 4, 2007.

III. ISSUES

ISSUE I: DURING THE PERIOD JANUARY 16, 1997 TO JUNE 25, 2003, DID ENRON VIOLATE ITS MARKET BASED RATE AUTHORITY? IF SO, HOW AND IN WHAT MANNER AND WHEN?

Enron

11. Enron states that its reporting requirements, which included the obligation to report a departure from the characteristics the Commission relied upon in granting the Market Based Rate Authority (MBRA) only refers to previously unreported ownership of generation, transmission, barriers to entry, and self dealing. Enron asserts that in 1995, the Commission eliminated the obligation to report business and financial arrangements in *Morgan Stanley Capital Group*, 72 FERC ¶ 61,082 at 61,436 (1995). Enron states that from 1994 through 2005, EMPI and other sellers with MBRA were allowed to report changes in market power with triennial reports instead of when each change occurred. Enron asserts that it complied with these requirements and filed triennial repots in 1996 and on January 14, 2000 (the 2000 Triennial Report). Enron states that it also filed notice of changed status for some facilities. Enron claims that although Snohomish asserts that EPMI should have filed a report in March of 2003, EPMI was bankrupt at that time and owned fewer facilities than it owned in 1997. In addition, Enron contends that there is no evidence that EPMI had market power more than a year after its bankruptcy and, at any

---

Southern California ; the City of Tacoma, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; and the Commission's Trial Staff.

[16] *Enron Power Marketing, Inc.*, "Order of Chief Judge Reestablishing Procedural Time Lines," Docket No. EL03-180-000 *et al.* (2006); *Enron Power Marketing, Inc.*, "Order of Chief Judge Confirming Modification of Procedural Time Lines," Docket No. EL03-180-000, *et al*. (2006).

[17] By order dated March 11, 2007, the Chief Judge granted a motion to modify the procedural schedule. As a result, the parties had an additional week to submit their brief.

rate, a filing would have been futile. Enron also argues that if it were required to make a filing, the remedy is a reminder to file within 60 days and the initiation of a section 206 proceeding.

12. Enron argues that when reviewing market power, the Commission measures a seller's ability to affect market price by its share of excess generating capacity in the relevant market. The Commission would grant MBRA if an applicant controlled less than 20 percent of the capacity that could reach a particular market. According to Enron, EPMI and its affiliates never owned more than 6.6 percent of the generating capacity in any relevant market and even if EMPI had control over generation such control would be less than 20 percent. Thus, under that measure, EPMI contends, it never had market power. Enron also argues that EPMI reported all ownership of generation to the full extent required in EPMI's 1993 market-based rate application, EPMI's 2000 Triennial Report, or in market-based rate applications by the generation owners. Enron claims that for other facilities, commercial operation did not begin until after EPMI filed its 2000 Triennial Report and that other facilities were never built and never operated while owned by EPMI or its affiliates, or never owned by Enron at all. Enron further asserts that it had no obligation to report development projects that were not built or operating while EMPI and its affiliates held an ownership interest under *Heartland Energy Services, Inc*., 68 FERC ¶ 61,223 at 62,063 n.12 (1994). In addition, Enron claims that the output of some facilities was committed under long-term contract to third-party purchasers and was thus not material to Enron's market share.

13. EMPI's contractual relationships with generators did not convey control equivalent to ownership of their resources, Enron contends. Enron claims that EPMI had contracts to purchase power from several small generators and to act as their Scheduling Coordinator (SC) in the Cal ISO markets. Although some of the agreements provided for revenue splitting and EPMI provided services to customers, Enron asserts that this does not constitute reportable control. Enron also argues that its contracts with the small generators are not similar to the relationship it had with El Paso because the generators were not EPMI competitors and they did not give EPMI the amount or type of information provided by El Paso. Thus, Enron concludes, EPMI's relationships did not have to be reported. Specifically, Enron claims that its relationships with Delano Energy Company, Atlantic Richfield Company (ARCO), Willamette Industries, Inc. (Willamette), Harbor Cogeneration Company (Harbor) did not give Enron control. Enron asserts that although Tosco Refining Co. (Tosco) gave Enron certain cost information, and even if it were commercially sensitive information, the amount of generation was minimal and EPMI could not have derived any unfair competitive advantage.

14. Enron claims that EPMI's purchase and resale of ancillary services did not require reporting, did not give EPMI control over the generation customer or provide EPMI with commercially sensitive information although EPMI received a small fee for purchase and resell of the product and paid the generator a share of the revenue. Such transactions, Enron asserts, include its services to Glendale and the Colorado River Commission

(CRC). Enron contends that Staff witness Mr. Deters agreed that a SC's contract by itself does not need to be reported to the Commission. In addition, Enron states that for other customers, Enron placed bids at their request in the Supplemental, Day-Ahead or Real-Time markets which does not give EPMI decision-making control over the availability of generation and is not a reportable event.

15. Enron asserts that EPMI did not obtain control over the ten entities named in the Show Cause Order as allegedly being involved in partnership gaming with Enron. Enron states that Glendale and CRC were mostly ancillary service customers. Powerex and Montana Power were flat fee customers and Trial Staff does not claim that Enron controlled those two entitles, Enron contends. In discussing the remaining six entities, Enron forwards various arguments. Specifically, there is no proof that Enron was involved in Las Vegas Cogeneration (LV Cogen) shutting down for a day or that this caused an emergency in California, Enron claims. Enron also asserts that its relationships with Modesto Irrigation District (Modesto), Northern California Power Agency (NCPA), and the Public Service Company of New Mexico, did not result in EPMI obtaining control of the facilities that required reporting. Enron asserts that its relationship with the City of Redding, California (Redding) involved Red Congo transactions that never came to fruition and thus caused no harm to the market. Enron also claims that it did not control the Valley facility and that the information it received from Valley did not constitute improper sharing between competitors.

Snohomish

16. Snohomish claims that Enron violated its MBRA during the Relevant Period. Snohomish argues that Enron's violations are established as a matter of law and this proceeding is only intended to determine the appropriate remedy for those violations. According to Snohomish, this proceeding is intended to establish remedies for all Enron violations of its MBRA and all Enron violations of the ISO/PX tariffs in the 1997 through 2003 period. Snohomish states that the Commission's order affirming the *El Paso* initial decision also found that Enron's relationship with El Paso was a subset of broader Enron practices in the West. Snohomish claims that the Commission's orders make clear that the purpose of this proceeding is to: (1) develop a remedy taking into account all evidence of Enron's violations; (2) consider whether Enron violated its MBRA; (3) determine whether Enron should be required to disgorge profits made under its MBRA from 1997-2003 based on the evidence in all dockets; (4) prohibit Enron from collecting termination payments; and (5) determine the amount that Enron should refund to Snohomish for amounts charged above the just and reasonable level before Snohomish terminated its contract on November 28, 2001.

17. Snohomish argues that the undisputed evidence in this proceeding demonstrates that Enron violated its MBRA throughout the period at issue by engaging in fraud, deception, misrepresentation, and market manipulation. Snohomish claims that the Commission has already found that Enron's market manipulation schemes constitute the

exercise of market power and that Enron was on notice that such misconduct could result in revocation of its MBRA. Snohomish also asserts that the plea agreements made by Enron managers Timothy Belden, Jeffrey Richter, and John Forney establish that Enron was manipulating the markets at least as early as 1998. The evidence also shows that Enron engaged in thousands of wash trades in the electricity markets (mostly with its affiliates) during the relevant period, Snohomish argues. Snohomish also asserts that Enron used the EnronOnline Electronic Trading Platform (EOL) to manipulate prices, exercise market power, and deceive customers. According to Snohomish, Enron never reported the existence of EOL to the Commission in violation of its MBRA. Snohomish also contends that Enron committed financial fraud by misreporting its financial statements to hide its insolvency and also committed fraud, concealment, and misrepresentation by failing to reveal its insolvency when entering into power contracts which often required a supplier to certify that it has investment grade credit. Snohomish states that this includes contracts with Snohomish which required suppliers responding to its requests for power to have investment grade credit ratings.

18. Enron also withheld power from the western market by using its control over generation to take plants down for unscheduled maintenance in violation of its MBRA and the ISO/PX tariffs, Snohomish claims. Snohomish also asserts that Enron withheld power by having a premeditated plan to decline to dispatch generation when the Cal ISO issued electronic instructions to generate incremental energy needed by the Cal ISO. In addition, Snohomish argues that Enron failed to comply with its obligations to provide the Commission with quarterly reports of its activity under its MBRA by failing to report its long-term contracts and its acquisition of enormous market shares over transmission rights on key paths by purchasing Firm Transmission Rights (FTRs). Snohomish also claims that Enron improperly filed Quarterly Transactional Reports with aggregated data after the Commission required Enron to file the report with disaggregated data.

19. In addition, Snohomish claims that Enron violated its MBRA throughout the relevant period by failing to disclose its affiliations and control of generation throughout the West. Snohomish claims that when Enron applied for MBRA in 1993 it claimed that it did not own or control any electric transmission or distribution facilities and therefore could not exercise market power. However, Enron acquired Portland General Electric Company (PGE) an electric utility as well as other ownership interests in generation facilities across the country as shown in Enron's triennial market reports and others that Enron failed to report. Snohomish claims that the evidence shows that Enron formed affiliations and obtained control of and economic interests in generation resources across the western interconnection. According to Snohomish, Enron gained market share, acquired commercially sensitive data and decision making authority, and promoted reciprocal dealings and equity profit sharing. Snohomish also states that since the Commission already concluded that Enron violated its MBRA by failing to inform the Commission of these partnerships and alliances the only issues that need to be determined for purposes of designing a remedy is how prevalent Enron's violations were and how long they lasted. With regard to Enron's reporting requirement argument,

Snohomish states that Enron's witnesses were not certain how much generation Enron really owned or controlled. In addition, Snohomish claims that generation market share is not the only basis for granting MBRA and that the Commission has stated that market power may be gained without ownership.

20. Snohomish asserts that Enron also violated its MBRA by failing to report its affiliation with entities that owned inputs to electric power production and the record shows that Enron had affiliations with companies that likely had control over sites for new generation or that engineered and constructed new generation facilities. This allowed Enron to obtain competitively sensitive information about other companies' generation projects that Enron could use for its competitive advantage, Snohomish claims. Snohomish also asserts that Enron's arguments that its gaming schemes did not violate the ISO/PX tariff, the schemes did not result in unjust and unreasonable rates, and that it was not required to report its affiliate relationships must be rejected as collateral attacks on prior Commission orders.

Staff

21. Staff states that in granting Enron MBRA, the Commission required Enron to report any changes in status that departed from the characteristics that the Commission relied upon in granting Enron MBRA. First, Staff asserts that the Commission has already found that Enron violated its MBRA in the order terminating Enron's MBRA on a prospective basis and found that Enron invented numerous market manipulation schemes, Enron used affiliates and partnerships with other entities to facilitate misconduct, and that Enron failed to inform the Commission of changes in its market shares. Second, in the order affirming the *El Paso* initial decision, the Commission found that Enron's relationship with El Paso violated its MBRA because Enron, at times, had control over El Paso's assets and failed to report this change to the Commission, Staff claims.

22. Staff contends that Mr. Deters relied on Mr. Ballard's testimony and considered several factors including the degree of control that Enron had over El Paso, the value Enron obtained from having access to sensitive commercial information, Enron's network of profit sharing alliances and control over numerous generation in the Western Interconnect, and the fact that none of these relationships were ever reported to the Commission. Staff states that Mr. Deters also looked at the wire fraud guilty plea agreements of three Enron trading managers and noted that in their plea agreements the former managers admitted to engaging in gaming strategies to maximize Enron's profits and being able to manipulate prices in certain markets, arbitrage price differences between markets, obtain congestion payments in excess of what they would have received with accurate schedules and received prices for electricity above price caps set by the Cal ISO and the Commission. Staff also claims that Mr. Deters testified that the direct transactional evidence of Enron's gaming practices show that Enron violated its MBRA many times and showed Enron's willingness to manipulate its MBRA. Mr.

Deters also stated that Enron's behavior was in violation of its MBRA and concluded that Enron should be required to disgorge all of its market-based rate profits in the Western Interconnect for the relevant period, Staff claims. Staff states that Mr. Deters' recommendation is based on Enron's unreported relationship with El Paso which provided Enron with informational advantages, the unreported profit sharing alliances with western utilities and instances of control, and Enron's gaming conduct in the western markets.

23. Staff claims that it is not necessary to show that all or even most of Enron's sales were fraudulent, but only that Enron willfully, intentionally and purposefully created multiple schemes to defraud the market. Staff also argues that Enron witnesses Acton's, Kee's and Slater's challenges to Mr. Deter's conclusions have no sound basis. Staff claims that Enron failed to promptly report changes in its status to the Commission and therefore did not comply with the MBRA reporting requirements. Staff asserts that Enron incorrectly adopts a narrow interpretation of the commission's market-based reporting requirements.

Discussion/Findings

24. To put this decision in context, it is noted that the Commission has previously found that Enron violated its market-based rate authority. The evidence in this case also establishes that Enron violated its MBRA. The record evidence, and in particular, the transactional evidence, in this case clearly show that Enron entered multiple relationships that allowed it to control generation and transmission and that Enron failed to notify the Commission of these changes in violation of its MBRA. In addition, the record demonstrates that Enron engaged in gaming and market manipulation schemes in the western markets also in violation of its MBRA and the Market Monitoring and Information protocol (MMIP). These violations took place during the period January 16, 1997, the date that Enron's relationship with El Paso began, and June 25, 2003, the date the Commission terminated Enron's MBRA.

The Commission has Already Found that Enron Violated its Market-Based Rate Authority

25. Enron's MBRA was revoked on June 25, 2003, based on the Commission's finding that the:

> Enron Power Marketers engaged in gaming in the form of inappropriate trading strategies: (1) False Import (i.e., Ricochet or Megawatt Laundering); (2) congestion-related practices such as Cutting Non-firm (i.e., Non-firm Export), Circular Scheduling (i.e., Death Star), Scheduling counter flows on out of service lines (i.e., Wheel Out), and Load Shift; (3) ancillary services-related strategies known as Paper Trading and Double Selling; and (4) Selling Non-firm Energy as Firm.

Enron Power Marketing Inc., 103 FERC ¶ 61,343 at P 53 (Revocation Order). The Commission also found that Enron executives Timothy Belden and Jeffrey Richter signed plea agreements admitting that they "engaged in fraudulent schemes in the California markets" and "knowingly and intentionally filed energy schedules that misrepresented the nature of electricity to be supplied and load they intended to serve." *Id.* at P 54. Thus, the Commission found, these actions resulted in "manipulated prices in the California market and congestion fees in excess of what Enron would have received with accurate schedules and bids" and resulted in rates that were outside the zone of reasonableness. *Id.* at P 54. The Commission also found that Enron failed to inform the Commission in a timely manner of changes in its market shares that resulted from alliances that allowed Enron to gain influence/control over others' facilities. *Id.* at P 55. "The Enron Power Marketers engaged in behavior that undermines the functioning of the wholesale power market and our reliance on that market to ensure that rates are just and reasonable," the Commission noted. *Id.* at P 56. The Commission found that the Enron Power Marketers' behavior constitutes market manipulation and results in unjust and unreasonable rates. *Id.* Finally, the Commission found that Enron's conduct also violates the "express requirements" in the Commission's orders granting Enron MBRA and requiring Enron to report changes in its status to the Commission. *Id.*

26. The Commission also ordered an investigation on August 13, 2002, into Enron's relationship with El Paso. The initial decision found that Enron violated its MBRA by failing to inform the Commission of the nature of the relationship and required Enron to disgorge $32.5 million in profits associated with sales involving El Paso's facilities. *El Paso Elect. Co.*, 104 FERC ¶ 63,010 (2003). The Commission affirmed those findings holding that Enron violated its MBRA by its failure to inform the Commission of any change in status reflecting a departure from the characteristics relied upon by the Commission in granting its MBRA. *El Paso*, 108 FERC ¶ 61,071 at P 32. In addition, the Commission also concluded that the "Enron-El Paso relationship was a subset of broader Enron relationships and practices in the West"[18] and noted that includes "potential market manipulation in violation of the Cal ISO and Cal PX Tariffs." *Id.* The Commission stated that Enron could be required to disgorge profits for all of its wholesale power sales in the Western interconnect for the period January 16, 1997 to June 25, 2003.

27. Commission precedent in these consolidated proceedings clearly establishes that Enron violated its MBRA by: (1) failing to report its relationship with El Paso; (2) engaging in various market manipulation schemes and gaming strategies, Revocation Order, 103 FERC ¶ 61,343 at P 53; (3) disregarding the express requirements of its MBRA requiring Enron to timely inform the Commission of change in its market shares that resulted from alliances. *Id.* at P 55.

---

[18] *El Paso*, 108 FERC 61,071 at P 2.

The Evidence in this Proceeding Demonstrates that Enron Violated its Market-Based Rate Authority

28. There is a plethora of evidence in this proceeding supporting the conclusion that Enron violated its MBRA starting on January 16, 1997. The evidence in this record not only appears to be exhaustive, but overwhelmingly demonstrates that Enron violated its MBRA in several ways. The Show Cause Order stated that "implicit in Commission orders granting market-based rates is a presumption that a company's behavior will not involve fraud, deception or misrepresentation" and that abuse of market-based rate authority "cannot be tolerated." Revocation Order, 103 FERC ¶ 61,343 at P 52, 56 (2003). As discussed more below, Enron violated its MBRA by failing to report, as mandated by the Commission, the numerous affiliate relationships that allowed Enron to control assets and gain sensitive commercial information and that it owned inputs to electric power production. Additionally, Enron engaged in Gaming and market manipulation schemes.

29. The Commission granted Enron MBRA and imposed several requirements in conjunction with this grant of MBRA. *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 at 61,598 (1993), *order on reh'g and clarification*, 66 FERC ¶ 61,244 (1994). Specifically, the Commission directed Enron to:

> [I]nform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing. These include but are not limited to: (1) ownership of generation or transmission facilities or inputs to electric power production other than fuel supplies; (2) affiliation with any entity that owns generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area; or (3) business and financial arrangements involving Enron or any entity affiliated with Enron and the entities that buy from or sell power to Enron.

Id. at 62,405. The Commission further directed Enron to "inform the Commission of all other generating projects it or its affiliates undertake so that the Commission can consider whether these projects affect Enron's competitive position in the generation market." *Id.* at 62,405 n.6. Enron was directed to file the report every three years. *Id.* at 62,405 n.6; Ex. SNO-24 at 1. Quarterly reporting requirements provide the Commission with the ability to monitor the market and are an integral part of an effective market-based tariff. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015-16 (9th Cir. 2004) (*Lockyer*). Finally, the Commission also stated that informational filings are necessary "to provide for ongoing monitoring of the marketer's ability to exercise market power." *Id.* at 62,406; *Enron Power Marketing, Inc.*, 66 FERC at 61,244.

30. In addition, the Commission made several observations concerning Enron's status in granting Enron MBRA. Specifically, the Commission noted that "there is no evidence that Enron or any of its affiliates owns or controls any other resources which could be used to create any barriers to entry to other suppliers" and that "there is no evidence that Enron will engage in any self or reciprocal dealing." *Id.* at 62,405. The Commission also relied on Enron's statements that it "does not own or control any electric power transmission or distribution facilities," was not "affiliated with any entity which owns or controls such facilities," did not own any electric generation assets, and that "neither it nor any of its affiliates holds a franchise service territory for the transmission, distribution or sale of electric power." *Id.* at 62,403. Importantly, the Commission expressly directed "Enron to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing." *Id.* at 62,405

31. Evidence of Enron's market manipulation can be found in the trader tapes and in the guilty pleas of Enron's managers. It is clear from the Enron trader tapes that the traders were aware that their conduct was prohibited.[19] In addition, the four corners of the guilty pleas entered into the by Enron managers clearly establish that Enron was involved in market manipulation schemes as early as 1998 and continued until 2001. *See* Revocation Order, 103 FERC 61,343; SNO-13 at 3; SNO-58 at 34-35. The plea agreement executed by Timothy Belden, the head of Enron's power trading operations in the West, states that "[b]eginning in approximately 1998 and ending in approximately 2001," he and others "devise[d] and implement[ed] a series of fraudulent schemes." Ex. SNO-13 at 3; Ex. SNO-247 at 4; SNO-11 at 23-24. Specifically, the plea agreement confirms that in carrying out such schemes, they "submit[ed] false information to the PX and ISO in the electricity and ancillary services markets…. knowingly and intentionally filed energy schedules that misrepresented the nature of electricity we proposed to supply…intentionally filed schedules designed to artificially increase congestion on California transmission lines… [were] paid to 'relieve' congestion, when, in fact, we did not relieve it… scheduled energy we did not have, or did not intend to supply." SNO-13 at 3. As a result, Enron was "able to manipulate prices in certain markets." *Id.*

32. Jeffrey Richter, manager of Enron's California Short Term trading desk, also admitted to working with others at Enron in the year 2000 to "devise and implement fraudulent schemes" which enabled them to "manipulate prices in certain markets." Ex. SNO-14, *see* Ex. SNO-11 at 25. John Forney was an Enron power trader who reported to Tim Belden from 1997 to 2000 and managed the West Power Real Time Training Desk from June 1999 to December 2000. Ex. SNO-983 at 2; Ex. SNO-593 at 2. Mr. Forney's plea agreement states that he and others engaged in various trading strategies to

---

[19] Exs. SNO-536 at 4:25-5:6; SNO-421 at 2:19-30; SNO-221 at 3:3-12; SNO-220 at 2:22-3:9; SNO-185 at 4:15-16; SNO-213 at 7:22-25; SNO-237 at 2:16-18; SNO-247 at 33:24-36:16; SNO-20 at 8, 16.

maximize Enron's profits in the California energy market and engaged in schemes such as selling non-firm as firm energy, non-firm export, Get Shorty, Death Star, Ricochet, and Off-Line Hub. Ex. SNO-983 at 3-5. Thus, it is found that the evidence in the trader tapes and plea agreements, taken together, clearly demonstrate that Enron's employees knowingly engaged in the market manipulation schemes non-firm export, Get Shorty, Death Star, and Ricochet in violation of Enron's MBRA and the ISO/PX tariffs during the period beginning in 1997 through 2001.

33. Enron also violated its MBRA and the ISO/PX tariffs by plotting and engaging in schemes to withhold power from the markets. Enron intentionally shut plants down for unplanned maintenance which Enron executive Tim Belden knew was the easiest way to withhold power thereby raising prices. Ex. SNO-1131 at 1:3-8. The trader tapes reveal that Enron used its affiliations to order plants to shutdown and on at least one occasion in 2001 to request that an operator "get a little creative" and "come up with a reason to go down." Ex. SNO-525 at 1:22-24, 3:3-13; Ex. SNO-247 at 5, 55; Ex. SNO-1080 (chart summarizing Enron directions to El Paso to shut down generators). Tape transcripts also show that Enron required other generators to shut down. Ex. SNO-1066 at 5:12-22; Ex. SNO-1065 at 1:11. Enron used its ability to control and withhold large amounts of generation to manipulate the market. Tr. 4324:12-22; Ex. SNO-247 at 111:12-14, 113:28-117:8; Tr. 3015 (Dr. Hidlebrandt); Ex. ISO-2 at 5 n.6; ISO-4 at 25. Enron also sought to avoid complying with an order which required Enron to provide all available power. Ex. SNO-1061 (Dept. of Energy Dec. 14, 2000 Emergency Order Pursuant to Section 202(c) of the Federal Power Act). Enron directed the LV Cogen generator to shut down in January 17, 2001, in direct violation of the Secretary of Energy's order and during a time when the Cal ISO was in a Stage 3 emergency.[20] Enron also manipulated the market by withholding generation requested by the Cal ISO. Ex. SNO-1080; *see also* Tr. at 3031:7-18. It is found that Enron's purposeful and fraudulent withholding of generation from the market constitutes gaming and anomalous market behavior in violation of Enron's MBRA and PX and ISO Tariffs beginning as early as January 17, 2001. Ex. SNO-63 at 7 (MMIP §§ 2.1.1.1, 2.1.3); *see* Revocation Order, 103 FERC ¶ 61,343 at P 52.

34. Enron did not report[21] its affiliation with entities that owned inputs to electric power production which includes companies that owned sites on which new generation

---

[20] Ex. SNO-1061 at 34; Ex. SNO-130. Enron's argument that it has not been established in the record that LV Cogen actually failed to operate that day and that it is highly unlikely that such an outage would have caused that type of emergency in California is rejected. Enron's attempt to withhold energy from the market alone is an indication of its proclivity to game the market regardless of whether it caused a system emergency.

[21] *See* Tr. at 2418:11-2424:9; Ex. SNO-1059.

could be built, companies that engineer and construct new generation facilities[22] and turbines.[23] The Commission required Enron to report any change in status related to Enron's or its affiliates' ownership or control which could be used to create any barriers to entry to the other suppliers and changes in ownership in "inputs to electric power production other than fuel supplies." *Enron Power Marketing, Inc*., 65 FERC at 62,405. A company may be able to erect barriers to competition if it controls inputs to electric power production, thus, when the Commission evaluates barriers to entry it considers affiliations with companies that own sites on which new generation can be built or engineer and construct new generation facilities. *See Heartland Energy Services, Inc., et al*., 68 FERC ¶ 61,223 at 62,062 (1994); *DTE River Rouge No. 1, LLC, et al* ., 91 FERC ¶ 61,139 at 61,538 (2000); *Merrill Lynch Capital Services, Inc.*, 111 FERC ¶ 61,036 at 61,098 (2005); *Southern Company Energy Marketing, Inc., et al*., 109 FERC ¶ 61,275 at 62,304 (2004). Thus, it is found that the record supports a finding that Enron's failure to report its affiliation with companies that owned sites on which new generation could be built or companies that engineer and construct new generation facilities was a violation of Enron's MBRA.

35. Enron also failed to comply with the Commission's quarterly reporting requirements by filing the reports using improper data, failing to report long-term contracts, and Firm Transmission Rights (FTRs) it acquired. The Commission rejected Enron's request to file aggregated data; however, Enron's reports during the period at issue were improperly filed with aggregated data instead of the requisite disaggregated data.[24] Notwithstanding the Commission's express statement that disaggregated data is necessary to "evaluate the reasonableness of the charges, and to provide for on going monitoring of the marketer's ability to exercise market power," Enron still failed to comply. *Enron Power Marketing, Inc*. 65 FERC at 62,406; *see also California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015-16. Without this data, the Commission was unable to track Enron's abuse and bring it to a halt. Ex: SNO-247 at 88:10-21, 89:7-93:17. Enron also failed to report[25] the large quantities of FTRs it purchased and the fact that it controlled: (1) 75.8% of the market share between California and the Pacific Northwest; (2) 63.9% of the transmission connecting California and the Southwest; and (3) 61.7% of California's critical path. Ex. SNO-247 at 71:8-72:15; Ex. SNO-632 at 3; Ex. SNO-247 at 72:1. The Commission has recognized that market power can be exercised via control of transmission facilities since entities with such control can

---

[22] *See* Ex. SNO-247 at 51:18-53:10; *See also* Ex. SNO-619 (public version); Ex. SNO-620; Ex. SNO-21; Ex. SNO-622. Ex. SNO-1059; SNO-IB at 41.

[23] Ex. ENR-278 at 46: 14-46. *See also* Ex. SNO-247 at 52:20-25-53:1-10; Ex. SNO-622.

[24] Ex. SNO-247 at 86:22-88:10 (analyzing aggregation of data); Ex: SNO-1109 (Enron's 2000 Quarterly Reports); Ex. SNO-1110 (Enron's 2001 Quarterly Reports).

[25] Ex. SNO-247 at 72:2-15.

withhold supply and charge "monopoly" prices.[26] Enron also claims that the plea agreements do not demonstrate unreported market power in violation of the MMIP or of Enron's MBRA. *Id.* The Commission has already found that Enron engaged in gaming and that the actions described in the plea agreements "resulted in manipulated prices in the California market." Revocation Order, 103 FERC at 62,301. Gaming and market manipulation are violations of both the MMIP and Enron's MBRA.[27]

36. Enron's argument that it did not have the ability to erect barriers to entry, misses the point.[28] The gist of Snohomish's argument is that Enron's failure to report such relationships violates Enron's MBRA, not whether Enron could actually erect barriers to entry. The Commission's order granting Enron MBRA specifically required Enron to report *any* change in status that would change the circumstances the Commission relied upon in granting Enron the approval. *Enron Power Marketing, Inc.*, 65 FERC at 62,405. Enron's claims are rejected as it is Enron's failure to report such relationship alone that constitutes a violation of Enron's MBRA, without the need for a separate finding that the unreported relationships allowed Enron to erect barriers to entry.

37. The evidence in the record also demonstrates that Enron formed alliances with generation and electric utilities and gained control over their generation. Enron's failure to disclose its affiliations and its control of generation also constitutes a violation of its MBRA. After Enron was granted MBRA in 1993, Enron began acquiring ownership interests in generating facilities. Although Enron did report certain ownership interests it later acquired, the accuracy of the reports is questionable.[29] Enron also made decisions

---

[26] *Citizens Power & Light Corp.*, 48 FERC 61,210 at 61,777 (1989) (*Citizens Power*). This order was incorporated into the Commission's order granting Enron MBRA. *Enron Power Marketing, Inc.*, 65 FERC at 62,403.

[27] Ex. SNO-63 at 7 (§MMIP 2.1.3 Gaming); Revocation Order, 103 FERC at 62,301 (the Commission stated that Enron's behavior constitutes market manipulation and violates the express requirements of Enron's MBRA). *Id.* at 61,302 (implicit in the Commission's orders granting MBRA is the presumption that the entity will not engage in fraud, deception or misrepresentation).

[28] Enron cites *Louisville Gas & Elec. Co.*, 62 FERC ¶ 61,016 at 61,147 (1993); *Doswell*, 50 FERC ¶ 61,251 at 61,758 (1990); *Wallkill Generating Co.*, 56 FERC ¶ 61,067 (1991); *Pac. Gas & Elec.*, 53 FERC ¶ 61,505-06 (1990) (*Wallkill*) to support its contentions that it did not have the ability to erect barriers to entry. Enron RB at 8. Sno. IB at 40-43.

[29] Tr. at 2326:2 (Dr. Hieronymus was not certain Enron disclosed all relevant facts for preparation of the 2000 triennial market power study). Enron's documents and SEC reports show that Enron owned significantly more generation than reported to the Commission. *See* Ex. SNO-247 at 44:2-46:4. *See also* Exs. SNO-596; SNO-597 at 173; SNO-695; SNO-639.

for and sold these entities generation and capacity as part of profit sharing agreements.[30] Enron also took title to the power in market transactions performed for generators. Ex. SNO-1075. In addition, Enron directed generation plant production levels telling operators when to run their units.[31]

38. Enron was able to perform many of these functions under the guise of a consulting arrangement which enabled Enron to gradually expand its services to control the entity. The trader tapes reveal that Enron had alliances not only with El Paso, but also generators such as Montana Power, Valley Electric, Tosco, Willamette, and Delano which allowed Enron to do business on their behalf including selling excess power or buying power on the entity's behalf. Ex. SNO-218 at 10, 16-17, 18:27-19:9. Many of these relationships were similar to that forged with El Paso.[32] A document dated July 6, 2000, also shows that Enron had several generation profit sharing arrangements with Saguaro, LV Cogen, Harbor Cogen, and Williamette as early as 2000. SNO-820 at 87. These arrangements also enabled Enron to access sensitive generation data for several entities in the West during the period 2000-2001.[33] The generation plans for these entities also show that Enron real time personnel could change the amount of energy available for sale for each of those generators. *Id.*

39. Enron also controlled Valley Electric Association (Valley), a utility that controls hydroelectric resources. Enron managed that load in an arrangement that was "structured so Enron benefits financially when Valley minimizes its energy costs." Ex. SNO-20 at 75. Specifically, Enron read its meters and sold excess load into the marketplace or purchased load for shortfalls "to keep Valley in balance." *Id.* The duration of Enron's arrangement with Valley was from approximately late 1999 through about March 1, 2002. Ex. SNO-961 at 9:6-13; 19:20-20:1. Enron's witness Dr. Acton admitted that Enron used its own discretion in managing bids on behalf of Valley and that it is likely

---

[30] Ex. SNO-612 at 8; Ex. SNO-1073 (email stating that Enron used their discretion in making bids as part of their service and as part of profit sharing); Ex. SNO-207 at 1:12-23, 2:207; Ex. SNO-820 at 87.

[31] *See* Exs. SNO-495, SNO-1066, SNO-1065, SNO-525, SNO-165, SNO-169, SNO-170, SNO-171, SNO-172, SNO-173, SNO-174, SNO-176, SNO-179, SNO-184, SNO-186, SNO-187, SNO-189, SNO-197, SNO-199, SNO-260, SNO-263, SNO-270, SNO-271, SNO-275, SNO-280, SNO-281, SNO-283, SNO-286, SNO-298, SNO-372, SNO-460.

[32] Ex. SNO-218 at 10, 16-17,18:27-19:9; SNO-623 (data request response stating that Enron performed consulting services similar to those performed for El Paso Electric for Valley Electric Association, Inc. and the Modesto Irrigation District).

[33] Ex. SNO-1086 (generation data reports Harbor Cogeneration Company, Delano Energy Company, Wheelabrator Martell Inc., Las Vegas Cogeneration, Eugene water & Electric Board, Arco, Tosco, Saguaro, Williamette, and Gray's Harbor); Ex. SNO-821.

that Enron had access to Valley's commercially sensitive information.[34] This arrangement was also similar to El Paso and the other profit sharing agreements. *See* Ex. SNO-612 at 8; Ex. SNO-820 at 75; Ex: SNO-818 at 6-7; SNO-962 at 9:11-14, 12:14-15.

40. The same is true of the arrangement between Enron and Northern California Power Agency (NCPA). ENR-170 at 18, § 9. Similar to Enron's arrangement with El Paso, Enron was to control NCPA's generation, obtain sensitive data concerning NCPA's load and generation, and Enron also had a profit sharing agreement with NCPA.[35] Enron utilized its relationship with NCPA for some of its market manipulation schemes during the Western Power Crisis.[36] Enron also had the ability to control the assets of the City of Glendale, California (Glendale) through an agreement that also provided for the parties' exchange of sensitive information and profit sharing.[37] The evidence also strongly suggests that Enron used Glendale's assets for its market manipulation schemes. SNO-1108 (quizzes given to Glendale's employees concerning knowledge of Enron's schemes). Enron also controlled real-time scheduling for Colorado Springs Utilities (CSU)[38] and Colorado River Commission's (CRC) energy resources.[39]

41. The evidence supplied by Snohomish includes numerous and various documents (contracts, emails, generation reports, internal documents and presentations) all showing that Enron controlled facilities. Snohomish's documentation is credible and accorded substantial weight. Enron's arguments that it exerted no control over these facilities are unpersuasive in light of the, substantial evidence to the contrary and, in addition, the evidence that demonstrates that Enron's witnesses did not have access to all Enron's information as discussed below. Enron argues that splitting revenues from market transactions and the various services EPMI provided to customers do not constitute

---

[34] Tr. at 2924:10-25; 2843:4-12. The evidence refutes Enron's argument that under the arrangements the "owners retained control over how much, if any, of the product to make available and at what price." Enron IB at 13.

[35] Ex. SNO-1085; Ex. S-68 at 4-5; Ex. ENR-170 at 7-8; *see* Tr. at 2977-2978; SNO-1077; *See e.g.*, Ex. SNO-1091; Ex. SNO-732. *See* Ex. SNO-822 at 76-77.

[36] Ex. SNO-710 at 116:1-3; Ex. SNO-1090.

[37] Ex. ENR-163 at 2, §2.7; Ex. ENR-163 at 5, §7.2; Exs. SNO-840; 842; 843; Ex. SNO-76; 133; 827; 828; 134; 840; 841; 842; 843; 822 at 66-67.

[38] Ex.SNO-1089 at 2,11. *See also* Ex. SNO-818 at 6-8 (listing covering CSU as an accomplishment).

[39] Ex. SNO-820 at 87 (showing that Enron had intermittent management of CRC); SNO-114 at 4; *see* Exs. SNO-858 - SNO-861.

reportable control.[40] These arguments are disingenuous since the record shows that in practice and through its affiliations, Enron was able to exert control over these entities. In addition, the evidence in the trader tapes, emails and the other numerous documents in the record are more than sufficient to rebut Enron's claims to the contrary. Enron claims that Staff and Snohomish rely almost exclusively on analogies to *El Paso*. Both Staff and Snohomish support their arguments with ample record evidence in addition to their comparisons to the El Paso-Enron relationship. Thus, the evidence in the record shows that Enron used its relationships to gain control of transmission and generation and to gain sensitive information which Enron used to its advantage. The evidence also demonstrates that Enron failed to report these relationships as required by the Commission and, thus, it is found that based on the evidence in this record, Enron clearly violated its MBRA.

42. Enron witness Dr. Hieronymus admitted that in performing his triennial market power study, he did not perform an independent investigation of Enron's files to see what control they may have had under contracts and admitted that he could not be absolutely confident that Enron's representations were correct. Tr. 2324-2329. In addition, for this hearing, Mr. Hieronymus relied primarily on contracts and confirmations in performing his analysis which would not have uncovered relationships with entities such as Valley which was based on an oral profit sharing agreement. Tr. 2437-2438. In addition, as noted by Staff, contrary to Mr. Hieronymus' assertions, the point is not whether Enron would have qualified for MBRA if it would have been forthright with the Commission, but instead, the point is actually that Enron was not.

43. Enron argues that the Commission's order granting it MBRA only applies to "previously unreported ownership of generation, transmission, barriers to entry and self-dealings." Enron IB at 6-7. As Staff aptly notes, Enron's interpretation of the MBRA reporting requirements is narrow. The Commission's direction required Enron to report *any* change in its status that would reflect a departure from the characteristics the Commission relied upon. *Enron Power Marketing Inc.*, 65 FERC at 62,405; Staff RB at 5-6, 9-11. Enron argues that EPMI and its affiliates never owned more than 6.6 percent of the generating capacity of any market and even if EPMI would have acquired what can be considered the equivalent of ownership through the contracts, EPMI's share would still be less than 20 percent.[41] First, this argument fails because Enron did not have

---

[40] Enron even cites Staff witness Mr. Deters for this proposition (that SC services alone do not create "control"). Enron IB at 12-13. This evidence in this case overwhelmingly shows that Enron was more than just a scheduling coordinator.

[41] Enron argues that the Commission would grant market-based rate authority without further inquiry if the applicant controlled less than 20 percent of the capacity that could reach a particular market. Enron IB at 8. For this proposition, Enron cites *Pub. Serv. Co. of Ind. Inc.*, Opinion No. 349, 51 FERC ¶ 61,367 at 62,205, *order on reh'g*, Opinion No. 349-A, 52 FERC ¶ 61,260 (1990); *Entergy*, 58 FERC ¶ 61,234 at 61,758

discretion to report based on the amount of generation or transmission involved. The Commission wanted to be informed of *any* relevant change. The record shows that Enron had numerous relationships which affected its status. Furthermore, as Staff points out, although the Commission listed specific types of changes, in the order, it prefaced the short listing by stating that the reporting requirements were "not limited to" the three listed.[42] Moreover, Enron engaged in numerous different contracts and arrangements that taken together may have given the Commission cause for concern.

44. As Snohomish recognizes, Enron's own witnesses are not sure how much generation Enron actually owned or controlled. Tr. 1338:4-21 (Dr. Bohi); Tr. 2326:2-10. Specifically, Dr. Hieronymus was not sure whether Enron disclosed all of the relevant facts when he prepared the 2000 triennial market power study. Tr. 2326:2-10. Documents from Enron's files indicate that the MWs Enron owned were greater than that reported in Enron's triennial reports. SNO-247 at 44-45; Ex. SNO-596; Ex. SNO-597 at 173. Enron's argument that it duly reported its affiliate's ownership interests in EPMI's 1993 MBRA application, EMPI's 2000 Triennial Report, or in market-based rate applications[43] is also questionable since it is dubious whether the amounts reported were even correct. *See* Tr. 1338:4-21 (Dr. Bohi); Tr. 2326:2-10; Tr. 2326:2-10. Thus, Enron's arguments that it duly reported its affiliate relationships or was not required to report to the Commission for various reasons are rejected. Enron was clearly required to promptly and accurately report any change in status as a condition of its MBRA. Enron cites *3E Technologies Inc.*, 111 FERC ¶ 61,295 (2005), for the proposition that the remedy for failing to file the report is a reminder from the Commission to file within 60 days and the initiation of a section 206 proceeding. This case is distinguishable since it was not issued until 2005 long after Enron's 2003 triennial report would have been due and it did not establish limitations on remedies for violations of the filing requirement.

45. Enron also claims that *Morgan Stanley Capital Group, Inc*., 69 FERC ¶ 61,175 at 61,695 (1994) (*Morgan Stanley*), *order on reh'g*, 72 FERC ¶ 61,082 (1995) stands for the proposition that the Commission allowed "EPMI and other sellers with MBRA to report changes in market power status through triennial reports rather than promptly as each change occurred" and eliminated the obligation to report business and financial arrangements. Enron IB at 6-7. Staff states that Enron's reliance on this case fails to address the fact that *Morgan Stanley* preceded the formation of the Cal ISO and the California energy crisis in 2000 and 2001 which is significant since the nature of the

---

n.79, *order on reh'g*, 60 FERC ¶ 61,168 (1992); *Heartland Energy Servs., Inc.*, 68 FERC ¶ 61,223 at 62,063 n.12 (1994). These cases are inapposite. This case does not involve an application for MBRA. On the contrary, this case involves sanctions for violations of the privilege.

[42] *El Paso*, 65 FERC at 62,405; Staff RB at 9-10.

[43] Enr. IB at 8.

market-place changed after *Morgan Stanley* was issued. Although Staff makes an important observation, Staff's argument that Enron was aware of its duty to report promptly to the Commission is supported by *El Paso*, 108 FERC ¶ 61,071 at P 18. In *El Paso*, which was issued after *Morgan Stanley*, the Commission noted that "Enron was fully aware of its obligation to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission relied upon in approving market-based pricing." *Id.* The Commission gave an example where Enron complied with its duty to notify the Commission by reporting a change in status five days after the transaction. *Id.* Thus, Enron's arguments here that prompt notification was not required by the Commission, and that a report was only due every three years even in light of its substantial activity, is disingenuous and is therefore rejected.

46. Staff witness Mr. Deters offers persuasive testimony. Mr. Deter's examined and summarized the testimony of Staff witnesses Dr. Linda Hearne Boner, Edward Gross, Barry Sullivan, and Natalie Tingle-Stewart all of whom investigated Enron's gaming activities and also found that Enron engaged in gaming strategies. Mr. Deters found that Enron should be required to disgorge "all of their wholesale market-based rate profits in the Western Interconnect for the period January 16, 1997 through June 25, 2003. Ex. S-67 at 3. Mr. Deters based this on (1) Enron's relationship with El Paso and how it was advantageous to Enron as outlined by Staff witness Ballard; (2) Enron's other relationships with other utilities and generators in the West in violation of its MBRA; and (3) the admissions of Enron's executives to "submitting false and fraudulent schedules, bids and other information in order to maximize Enron's trading profits." Ex. S-67 at 7-8.

47. Mr. Deters evaluated the level of control that Enron had over El Paso's resources and the advantages Enron derived from this control such as the acquisition of sensitive information concerning El Paso's assets. *Id.* at 9-10. Mr. Deters also relied on Mr. Ballard's testimony who examined Enron's profit sharing alliances which gave Enron influence/control over several generation owners in the Western interconnect. *Id.* at 11-13. Specifically, Mr. Deters noted that these relationships constituted a change in status from what the Commission relied upon in granting Enron MBRA and that Enron's failure to report these relationships violated Enron's MBRA. *Id.* at 11. Mr. Deters also notes that Enron gained control over and did not report the generation assets of Valley. Ex. S-67 at 11-13. In addition, Enron had "continuing purchase understandings" with Tosco, Delano Energy Company, and ARCO that should have been reported to the Commission. *Id.* With respect to gaming, Mr. Deters also noted that the guilty pleas serve as evidence of Enron's gaming and manipulating the market. In addition, the direct transactional evidence presented by Ms. Tingle-Stewart, Mr. Sullivan, and Mr. Gross serve as evidence that Enron used "coherent strategies" and "violated the terms and spirit of its market-based rate authority time and time again." *Id.* at 21-22.

48. Mr. Deters also states that January 16, 1997, is the appropriate disgorgement starting point because that is the date that Enron executed its PCSA with El Paso. *Id.* at 8. He also asserts that the termination date should be the date that the Commission

revoked Enron's MBRA, June 25, 2003. *Id.*; Revocation Order, 103 FERC ¶ 61,343. The dates selected by Mr. Deters are appropriate since the Commission already found that Enron's relationship with El Paso violated its MBRA and "this interval reflects the period from which Enron was first found to have violated its market rate authority until the Commission revoked its authority." Ex. S-67 at 8-9. Mr. Deters' testimony that Enron should be required to disgorge all of its market-based profits in the Western Interconnect for the period January 16, 1997 through June 25, 2003 is supported by substantial evidence and supported by the Staff witnesses mentioned above and is thus, persuasive. It is found that Mr. Deters' testimony serves as credible evidence of Enron's gaming and fraudulent activity. Accordingly, it is found that Enron violated its MBRA by failing to report control over and relationships with other entities.

49. Snohomish cites numerous examples of Enron's experts Mr. Slater's, Dr. Acton's and Mr. Riker's complacency in determining the accuracy and completeness of their data. Tr. 2539:24-2540 (Slater did not search Enron hard drives or request access to them); Tr. 2937:3-4 (Acton admits he knew files were incomplete); Tr. 2979:3-17 (Acton never investigated or gathered data related to certain Enron affiliations); Tr. 3808:25-3810:16, 3843:19-22 (Riker conducted no investigations on certain suspicious audio files nor did he analyze transcripts for accuracy); *See* SNO RB at 5-6 for more instances. Moreover, Enron witness Slater's admission that he conducted no further investigation although he noticed, Mr. Richter, Mr. Forney's, or Mr. Belden's names mentioned in contracts is disturbing in light of the admissions in their guilty pleas. Tr. 2537:7-2538:17. Mr. Hieronymus' failure to examine Enron's files and look at contracts in conducting his triennial market power study to determine whether Enron had control over generation is suspect as it shows that Dr. Hieronymus did not perform a thorough investigation. *See* Tr. 2325. Enron's experts also neglected to review critical materials such as the Yoder/Hall memoranda.[44] Tr. 3660:8-3663:15. An expert interested in performing a thorough analysis would have performed a reasonable inquiry to insure the information was complete, especially in light of Enron's activity and the nature of this proceeding. Thus, Enron's expert's apparent satisfaction with incomplete information and comfort with relying simply on documents involving individuals from Enron who plead guilty to fraudulent activity renders their testimony suspect. *See* Tr. at 2537:7-2538:17; Tr. 2927:12-13; Tr. 2937:3-4. Thus, the testimony of Enron's witnesses will not be accorded any weight.

50. Although not specifically identified in the Gaming Show Cause Order as a violation, the record also indicates that Enron used EOL to manipulate the market. EOL was the largest electronic trading platform and it allowed Enron's power traders to

[44] The "Yoder-Hall memoranda" are three memoranda written by attorneys that discuss Enron trading strategies.

conduct a majority of their business transactions.[45] EOL enhanced Enron's ability to manipulate the market by giving Enron proprietary knowledge of market conditions not available to other market participants. EOL was "wholly controlled by Enron," so there were "no fixed rules" and thus, EOL gave Enron the ability to manipulate posted prices and post any price it wanted and deceive EOL users. Ex. SNO-247 at 76:28-80:4. In addition, Enron used EOL to facilitate its market manipulation schemes and manipulation of prices in the forward markets as well as markets in the west. Ex. SNO-58 at 151:19-153:4; Ex. SNO-247 at 76:28-80:4, 144:28-145:2. Through its market manipulation schemes on EOL, Enron earned "speculative profits" from EOL in excess of $500 million between 2001 and 2000. *Id.* at ES-2. Thus, it is found that Enron violated its MBRA with respect to EOL by using the platform (in 2000-2001) to manipulate the markets by, among other things, deceiving users.

51. Enron also engaged in numerous wash trades which were not specifically identified in the Gaming Show Cause Order. A wash trade is "generally defined as a prearranged pair of trades of the same good between the same parties, involving no economic risk and no net change in beneficial ownership…. and serve no legitimate business purpose." Revocation Order, 103 FERC ¶ 61,343 at P 61. Wash trades can be used to "create the illusion that a market is liquid and active,… to increase trading revenue figures,…might be arranged at prices that diverge from the prevailing market in an attempt to send false signals to other market participants" or "to affect the average or index price reported for a market." *Id.* The Commission stated that "participation in wash trades for no legitimate business purpose is anti-competitive and deceptive" and can mislead the market in a number of ways.[46] Moreover, the Commission stated, "wash trades by themselves are enough to allow the Commission to terminate a gas market's blanket marketing certificate, regardless of intent and regardless of the number of trades." *Enron Power Marketing, Inc. et al.*, 106 FERC ¶ 61,024 at P 41 (2004) (Revocation Rehearing Order). The evidence in this proceeding establishes that Enron engaged in at least 51,020 wash trades in the western markets.[47] The value of the wash trades is approximately $479,766,486 including $367,495,070 with its own affiliates. Ex. SNO-710 at 87-88. Enron had wash trades at the beginning of 2000 through 2001 and also used EOL to perpetrate such trades. Ex. SNO-710 at 91, 93. Accordingly, it is found that

---

[45] Ex. SNO-247 at 74:1-17, 75:1-8; Ex. SNO-642; Ex. SNO-643; Ex. SNO-644; Ex. SNO-696; Ex. SNO-597 at 231; Ex. SNO-609 at 98-99; Tr. 1564-14.

[46] Revocation Rehearing Order, 106 FERC ¶ 61,024 at P 41; Revocation Order, 106 FERC ¶ 61,343 at P 61-62, 66-71; *see also* Ex. SNO-247 at 75; Ex. SNO-710 at 89:3-94:1 (describing other effects of wash trades on the market); Final Staff Report VII-1.

[47] SNO-710 at 86:20-21 (FERC short term database shows 51,020 wash trades in the western markets); Ex. SNO-710 at 87-89:3-94:1. *See* Ex. S-84 at 52:10-11 (68 wash trades found in the trader tape review process).

the evidence in the record supports a finding that Enron engaged in various manipulative wash trades in 2000 and 2001 in violation of its MBRA. Enron's use of wash trades undermined the presumption that Enron would not use its MBRA to commit fraud, deception or misrepresentation. Revocation Order, 103 FERC ¶61,343 at P 52, 56.

52. The record also indicates that Enron engaged in ploys to mask its insolvency. Ex. SNO-247 at 127; Ex. SNO-47. Enron admitted that it was insolvent as of 1999, but the record indicates that Enron likely began financial fraud as early as 1997.[48] Enron is bound by what it has previously stated in its pleadings. *See Soo Line R.R. Co. v. Louis Southwestern Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997); *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995). Several of Enron's corporate officers and executives have pled guilty to financial fraud. Ex. SNO-1009; Ex. SNO-656; Ex. SNO-247 at 123-124; Ex SNO-1007; Ex. SO-687, Ex. SNO-688; Ex. SNO-47. Credit worthiness was of material concern to Enron and its counterparties and it was industry practice to ensure suppliers had sufficient financial standing. SNO-4 at 12, 29-30; Ex. SNO-591 at 52; Tr. at 1593; Ex. SNO-247 at 127, 130; SNO-11 at 74; Ex. SNO-680. Thus, Enron fraudulently lead its contractual counterparts to believe that they had investment grade credit, when in fact they were insolvent. Ex. SNO-497 at 1:28-29; Tr. at 1591-1593; Ex. SNO-247 at 128. Without such fraudulent misrepresentations, Enron knew that it would not be able to continue trading. Ex. SNO-247 at 127, 137; Ex. SNO-680 at 14. Specifically, Snohomish required its suppliers to have investment-grade credit ratings and Enron led Snohomish to believe that it had a credit rating above investment grade. Ex. SNO-658 at 6; Ex. SNO-6; Ex. SNO-247 at 130:7-16; SNO-1009. Enron's contract with Snohomish incorporated Enron's Market Based Rate tariff. Ex. SNO-4 at 5. Since creditworthiness was essential to Enron's livelihood, Enron was motivated to, and in fact did, deceive its contractual counterparties in order to continue to do business. Thus, it is found that Enron misrepresented the true nature of its creditworthiness to counterparties such as Snohomish.

---

[48] Ex. SNO-1009, Enron Fourth Amended Bank Complaint at ¶ 703; Ex. SNO-1009, Enron-Pinnacle West Complaint ¶¶ 12,17; Ex. SNO-1009, Enron-OCM Administrative Services, LLC Complaint at ¶¶ 12,18; Ex. SNO-247 at 126-127; Ex. SNO-656 at 4-5.

ISSUE II: DURING THE PERIOD JANUARY 16, 1997 TO JUNE 25, 2003, DID ENRON ENGAGE IN GAMING OR ANOMALOUS MARKET BEHAVIOR AS DEFINED IN THE PX OR ISO TARIFFS, EITHER INDIVIDUALLY OR IN CONCERT WITH PARTNERS? IF SO, HOW AND IN WHAT TRANSACTIONS?

Enron

53. Enron argues that the Cal ISO and Cal PX Tariff MMIP's define gaming to include detriment to the markets and consumers and, accordingly, under the MMIP for a practice to constitute gaming, the practice must be detrimental to both the efficiency of the Cal ISO and PX markets and to consumers in those markets. Enron states that the Commission identified eight gaming practices and did not analyze whether any of the practices were detrimental to both the efficiency of the market and consumers. In addition, Enron asserts that its witnesses testified that certain Gaming Practices were not detrimental to the market or consumers and thus did not violate the MMIP's. Enron also contends that the record shows that its market transactions did not adversely affect prices in the Cal ISO and PX markets. Accordingly, Enron claims, the practices did not violate the MMIP.

54. Enron claims that the record shows that EPMI's trading activities had no material effect on the Cal ISO or PX market prices and therefore could not have had any detrimental effects on the market or consumers. Enron asserts that its witness Mr. Kee concluded that EPMI's trading strategies were not a material factor in causing high prices in the short-term electricity markets in California. In addition, Enron claims, Mr. Kee determined that the prices in the California spot market during the relevant period resulted from a combination of supply and demand market drivers and from generator bidding behavior facilitated by the California market design and the short supply situation. Enron claims that Mr. Kee's testimony is consistent with the Final Staff Report which stated that fundamental factors were responsible for high prices in California during 2000 through 2001. Enron asserts that market forces and decisions by owners of large fleets of generation were responsible for setting prices in the Cal ISO markets and that claims that EPMI, which was only able to influence a small portion of the market, was able to significantly affect market prices, are exaggerated. Enron's share of the California market was 5.6 percent in 2000, Enron claims. Enron states that, in sum, Mr. Kee's testimony concluded that EPMI's alleged Gaming practices had little or no impact on California spot markets and had minimal effects on forward markets.

55. Snohomish and Staff have not quantified the dollar amount attributable to the adverse market impact of Enron's alleged Gaming Practices although Staff and Snohomish witnesses stated that there are methods that could be developed to quantify such amounts. Enron also claims that Staff witness Barry Sullivan testified that Circular Scheduling, which Staff found had the highest dollar volume of the Gaming Practices

subject to disgorgement, had a minor impact on the market. Thus, Enron concludes, neither Staff nor Snohomish has met their burden to show that EPMI's trading practices adversely affected the market or prices to consumers.

56. Enron contends that its alleged Gaming Practices earned insignificant revenue from January 1, 2000 through June 20, 2001. With regard to the practice of False Import, Enron claims that as long as the practice does not involve evasion of the price cap, the transactions benefit the market and consumer prices through arbitrage of power from the lower priced market to the higher priced real-time market. Enron also claims that the Cal ISO found no out-of-market transactions in which EPMI was paid a price above the applicable price cap during the Relevant Period. Next, Enron argues that Paper Trading has no adverse effect on reliability because it involves paying for the Cal ISO to procure supplies from a substitute supplier. Enron also asserts that ancillary services buybacks when generation is available at the time ancillary services are sold is considered legitimate arbitrage and benefits the market. Enron claims that the Cal ISO reported that EPMI complied with dispatch orders in 97 percent of the hours when EPMI sold ancillary services into the market and did not pay for the obligation to be transferred to another supplier.

57. With regard to Circular Scheduling, the Cal ISO congestion management system perceived a counterflow which permitted the Cal ISO to schedule additional load centers for non-Enron transactions from the lower priced generation in northern to southern California and Enron avers this resulted in a net economic benefit to the Cal ISO. Enron also claims that Staff witness Mr. Sullivan stated that Circular Scheduling was so small in volume that it had no adverse effect on the grid. Overscheduling Load or Fat Boy, Enron claims, made energy available in, and improved reliability in the real-time market and did not affect the market clearing price.

58. Enron claims that neither the Cal ISO, Staff, nor Snohomish allege that Enron engaged in Double Selling. Enron also asserts that Dr. Riker demonstrated that neither Staff nor Snohomish presented evidence to show that Enron engaged in Double Selling or Selling Non-Firm as Firm and thus this should not be deemed a violation of the MMIP. Next, Enron contends that the record does not support a finding that EPMI engaged in Gaming with the ten named entities identified in the Gaming Order and, accordingly, there are no associated revenues to be disgorged. Enron claims that Staff and the Cal ISO agree that EPMI earned only about $6 million in revenues from Gaming Practices identified by the Commission as violating the MMIP. Enron also argues that Snohomish and Staff have not shown that EPMI's Gaming Practices justify their proposed remedies. Snohomish requests remedies for transactions specifically excluded from this proceeding such as Ricochet transactions within the Cal ISO price cap and Overscheduling Load, Enron contends.

Snohomish

59. Snohomish argues that the Commission's order revoking Enron's MBRA has already determined that Enron's gaming schemes violate FPA Section 205(a), Enron's MBRA and the MMIP of the Cal ISO/PX tariffs. Snohomish claims that since the Commission has already determined that Enron engaged in gaming and anomalous market behaviors, that are prohibited by the MMIP, Enron cannot collaterally attack the Commission's orders by relitigating these legal conclusions. Snohomish states that the gaming schemes involved providing fraudulent information to the ISO and others, and therefore violated the MBRA prohibition against false, misleading, and deceptive behavior.

60. Additionally, Snohomish claims that Enron engaged in a massive criminal conspiracy to manipulate the Western power markets. Snohomish states that Enron followed an explicit strategy of advocating a flawed market design and exploiting the weaknesses of the flawed design. According to Snohomish, Enron advocated a market that was inefficient and vulnerable to manipulation and probed for weaknesses early in the ISO's formation and then set out to exploit these weaknesses. Snohomish also asserts that Enron's internal documents demonstrate that Enron intentionally manipulated the Western electricity markets beginning in 1998. The record demonstrates that Enron actively gamed the markets starting in May 1998 and Enron continued until it filed bankruptcy in December 2001, Snohomish asserts.

61. Snohomish contends that Enron's own records demonstrate that Enron engaged in thousands of schemes to game the Western markets that the Commission has determined violated the ISO and PX tariffs. Snohomish argues that Enron engaged in thousands of Death Stars by itself and with other entities by creating schedules where the same amount of power is scheduled to flow simultaneously in opposite directions, so that no power actually flows, but Enron still collects congestion management fees from the ISO although no congestion is actually relieved. Snohomish claims that its witness identified 48,995 such transactions.

62. According to Snohomish, Enron engaged in more than 1,000 Get Shorty transactions individually and by exploiting the assets of other entities. According to Snohomish, the record demonstrates that Enron engaged in 1,127 Get Shorty transactions, but notes that this is likely an underestimate. Snohomish also claims that when executing Get Shorty Enron deliberately submitted false information to the ISO claiming that it had ancillary services on standby when it did not.

63. In addition, Snohomish states that Enron also fraudulently sold Non-Firm energy as Firm on more than 1,000 occasions. Snohomish claims that Enron's internal data bases identify approximately 1,034 transactions in which Enron sold power as "Firm" although the non-firm transmission was used to deliver the power. Enron often used

power purchased from generators outside California and imported into California on constrained lines, rendering the power non-firm, Snohomish contends. This resulted in the Cal ISO paying EPMI, Snohomish asserts, for ancillary services that Enron did not provide. Thus, Snohomish states, selling non-firm as firm involves submitting false and fraudulent schedules, bids, and other information to the ISO in violation of industry standards.

64. Enron also engaged in Load Shifts on nearly everyday of 2000 to 2001, Snohomish claims. Snohomish asserts that Enron's documents show that Enron executed Load Shifts on approximately 332 days beginning as early as 1998, but Enron mostly engaged in Load shifts during the period 2000 through 2001. Snohomish also states that the fact the Enron routinely executed Load shifts is confirmed by internal Enron evidence such as the trader tapes and emails. Snohomish asserts that Enron executed Load Shifts by filing false schedules with the ISO intentionally overstating its projected load in one congestion zone and intentionally understating its projected load in a neighboring zone.

65. Snohomish also claims that Enron engaged in fraudulent False Import (Ricochet) transactions to make it look as if power had left California. Snohomish contends that Ricochets depended on a false representation that power had left California when it had not. Snohomish asserts that Enron engaged in Ricochets nearly every day during the 2000-2001 crisis and Enron's emails show that Enron engaged in Ricochets as early as January 1999. Snohomish also contends that Enron used Ricochets partly to evade price caps in California and sold power to the Cal ISO at or above price caps. In addition, Snohomish argues that Enron used Ricochet to create the appearance of a shortage so that the ISO would be forced to increase its reliance on real time purchases and artificially increase prices. Snohomish claims that Ricochets involve multiple entities and that the record shows that Enron used the assets of other entities to carry out Ricochets.

66. Further, Snohomish argues that Enron engaged in approximately 80 Non-Firm Export (also, Cutting Non-Firm) Transactions which allowed Enron to receive congestion payments without relieving congestion or placing power on the system. Snohomish claims that Enron concedes that it engaged in 11 fraudulent Wheel-Out transactions beginning at least as early as the year 2000. Enron collected fraudulent congestion relief payments by taking advantage of a market design flaw, Snohomish contends. Snohomish claims Enron engaged in Double-Selling as shown in the trader tape evidence. Snohomish argues that Enron executed Fat Boy schemes frequently in order to manipulate the market on its own and using the assets of other entities such as Valley Electric, Glendale, Redding and CRC.

67. Snohomish also notes that although the Commission is not imposing refunds for Fat Boy schemes they were violations of Enron's MBRA and provide further justification for denying Enron's right to profits. Snohomish also argues that the record shows that Enron engaged in a variety of schemes previously undetected by the Commission such as "Donkey Punch," "Ping Pong," Russian Roulette," "Spread Play," "Big Tuna," "Little

Tuna," and "Sidewinder" which are all variations on Load shift, Ricochet, and Death Star. Snohomish asserts that these are all violations of Enron's MBRA.

68. According to Snohomish, Enron's trading operation was an organized enterprise whereby Enron's schemes were a carefully orchestrated criminal conspiracy. Snohomish claims that the majority of Enron's western power trading staff were involved in the gaming schemes which the traders knew were illegal. Next, Snohomish claims that Enron's claims produced significant economic distortions in electricity markets across the West and threatened electric system reliability. Snohomish asserts that the record demonstrates that Enron and its affiliates engaged in a variety of schemes that had adverse impacts on market outcomes by increasing market clearing prices, increasing price volatility, and reducing economic efficiency.

Staff

69. Staff argues that Enron created and implemented numerous gaming schemes (Gaming Practices) in the Western Interconnect. These practices, Staff asserts, resulted in substantial manipulation of the California energy markets. Staff discusses each of the practices Enron engaged in: Load Shift, Selling Non-Firm as Firm, Circular Scheduling, and Paper Trading. Staff witness Ms. Tingle-Stewart concluded that Enron had no transactions related to False Import, so that practice is not discussed. Enron's defenses have no merit, Staff contends.

70. Contrary to Enron's assertions, Staff contends that the MMIP does not require a showing of both detriment to the efficiency of the market and harm to consumers and that such an interpretation is restrictive. Staff also asserts that there is no requirement to quantify the extent to which Enron's actions raised market prices since the MMIP requires market participants to follow the MMIP regardless of whether the failure to do so can be associated with adverse effects on market prices. Staff claims that the total calculation of Enron's revenues for Gaming Practices is greater than the $7,158,365 specifically identified by Staff witnesses since Staff was unable to quantify the amounts associated with Enron's Selling Non-Firm as Firm.

71. Enron used its control over counter parties in the western interconnect to advance its gaming schemes, Staff contends. Staff states that Mr. Ballard addresses the partnership issues in this proceeding and in *El Paso*, Mr. Ballard testified that Enron directly controlled the operation of El Paso's generation assets during non business hours. Staff asserts that in *El Paso*, the Commission found that Enron gained control over the decision-making authority over the sales of electric energy. Staff also states that in El Paso it discovered that Enron actively courted and developed relationships with several entities that owned their own generation seeking the ability to control and market their generation in the PX and Cal ISO markets.

Discussion/Findings

72. The Commission found that Enron is among the entities that may have engaged in gaming and anomalous market behavior in violation of FPA Section 205 (a), the Cal ISO /PX tariffs' MMIP.[49] In the Gaming Order, the Commission directed the identified entities "to show cause why their behavior during the period January 1, 2000 to June 20, 2001 does not constitute gaming or anomalous market behavior as defined in the ISO and PX tariffs." Gaming Order, 103 FERC ¶ 61,345 at P 2. The Partnership Order, issued concurrently with the Gaming Order, found that Enron and other entities "worked in concert through partnerships, alliances or other arrangements… to engage in activities that constitute gaming and/or anomalous market behavior (Gaming Practices) in violation of the [Cal ISO] and [PX] tariffs during the period January 1, 2000 to June 20, 2001." Partnership Order, 103 FERC ¶ 61,346 at P 1 (2003). The Partnership Order directed the identified partnership entities to "show cause why their behavior during January 1, 2000 to June 20, 2001 does not constitute gaming and/or anomalous market behavior as defined in the ISO and PX tariffs." *Id.* at P 2.

73. In both the Gaming Order and the Partnership Orders, the Commission stated that the Administrative Law Judge (ALJ) was directed to "render findings and conclusions quantifying the full extent to which the Partnership Entities may have been unjustly enriched as a result of their conduct, and the ALJ may recommend the monetary remedy of disgorgement of unjust profits and any other additional appropriate non-monetary remedies." *Id.;* Gaming Order, 103 FERC ¶ 61,345 at P 2. In its order affirming the El Paso initial decision, the Commission directed the ALJ to determine the total amount of money that Enron should be required to disgorge for the period January 16, 1997 to June 25, 2003 taking into account "all evidence of violations of tariffs on file or orders of the Commission in all pending dockets involving Enron's role in the Western power crisis. *El Paso,* 108 FERC ¶ 61,071 at P 2.[50] In addition, the Commission stated that "Enron potentially could be required to disgorge profits for all of its wholesale power sales in the Western Interconnect" for the Relevant Period. *Id.*

74. A review of the record evidence in this proceeding shows that Enron engaged in gaming and anomalous market behavior as defined in the PX's and Cal ISO's MMIP both individually and in concert with partners. First, as discussed above, the Commission's June 25, 2003, Revocation Order found that Enron Power Marketers engaged in gaming in the form of inappropriate trading strategies including: "(1) False Import (i.e., Ricochet

---

[49] Gaming Order, 103 FERC ¶ 61,345 at P 3, 8, 16-18, 54-55; Partnership Order, 103 FERC ¶ 61,346 at P 1-3, 8.

[50] The Commission consolidated Docket Nos. EL03-180-000 and EL03-154-000 with Docket No. EL02-113-000.

or Megawatt Laundering); (2) congestion-related practices such as Cutting Non-firm (i.e., Non-firm Export), Circular Scheduling (i.e., Death Star), Scheduling counter flows on out of service lines (i.e., Wheel Out), and Load Shift; (3) ancillary services-related strategies known as Paper Trading and Double Selling; and (4) Selling Non-firm Energy as Firm." Revocation Order, 103 FERC at ¶ 61,343 at P 53, 56.

75. The Commission has stated that "[s]ince 1998, the ISO and PX tariffs have contained provisions that identify and prohibit 'gaming' and 'anomalous market behavior' in the sale of electric power." The ISO tariff, through the ISO's [MMIP] defines gaming, in part, as taking unfair advantage of the rules and procedures set forth in the PX or ISO tariffs, Protocols or Activity Rules…to the detriment of the efficiency of, and of consumers in, the ISO Markets." Gaming Order, 103 FERC ¶ 61,345 at P 8, 16-18 (citation omitted). "The ISO tariff, through the MMIP, defines anomalous market behavior, in part, as 'behavior that departs significantly from the normal behavior in competitive markets that do not require continuing regulation or as behavior leading to unusual or unexplained market outcomes.'" *Id.* at P 8, 18. (citing ISO's MMIP § 2.1.3). "The MMIP puts market participants on notice regarding their rights and obligations in the marketplace…. it serves as the rules of the road for market participants." *Id.* at P 23. The Commission previously stated that "the MMIP 'governs a wide range of matters which traditionally and typically appear in agreements that should be filed with and approved by the Commission,' and directed that the MMIP be formally filed with the Commission as part of the ISO's and PX's tariffs." Gaming Rehearing Order, 106 FERC ¶ 61,020 at P 41.

76. As discussed below, Enron deliberately engaged in a number of schemes to game the market and increase its revenues in violation of the MMIP, and thus, the PX and Cal ISO tariffs. Enron advocated a market that was inefficient and vulnerable to manipulation and then sought out to detect weaknesses in the system that it could exploit.[51] Specifically, Enron met with PerotSystems which had inside information and utilized the information it obtained to locate vulnerabilities in the system that it could use to its advantage.[52] As a result, Enron began manipulating the western electricity markets

---

[51] Ex. SNO-58 at 48:18-49 (McCullough stating that Enron was interested in schemes from the beginning and that PerotSystems marketed inside knowledge and gaming services to industry participants); Ex. SNO-80 (note from Jonathan Jacobs Manager of Pacific Gas & Electric Market Evaluation stating that "we know how to take advantage of those events over the full spectrum of subtle to extreme gaming tactics" and that [i]f required, we can keep gaming below regulatory thresholds"); Ex. SNO-710 at 13:12-16:4; Ex. SNO-713; Ex: SNO-37; Ex. IBR-8 at VI-3; Ex. SNO-11 at 62:1-68:8 (Enron advocated inefficient models vulnerable to manipulation).

[52] Ex. SNO-58 at 50:10-51:19; Exs. SNO-83-87; Ex. SNO-710 at 16:20-18:16.; Ex. SNO-58 at 50:13-14; Ex. SNO-674 at 3; Ex. SNO-795; Ex. SNO-812; Ex. SNO-719; Ex. SNO-247 at 26:24; Ex. SNO-588 at 40-42.

in 1998. Ex. SNO-717 at 3; Ex. SNO-716. In 1999, as further demonstrated by internal documents, Enron continued experimenting with various schemes to game the ISO/PX system using the information Enron obtained from PerotSystems.[53] In an effort to drive up market prices, Enron experimented with overscheduling the Silver Peak line to use weaknesses in the California ISO and PX computer systems in 1999.[54] In sum, record evidence reveals that Enron gamed the market at least 597 days between May 1998 and December 2001.[55] The discussion below continues with evidence that Enron engaged in Circular Scheduling/Death Star Transactions, "Get Shorty" Transactions, Selling Non-Firm Energy as Firm, Load Shifts, Ricochet Transactions/False Import, Non-Firm Export Transactions and Wheel-Out Transactions in the California electricity markets.

Circular Scheduling - Death Star Transactions

77. Death Stars are congestion related schemes that involve circular scheduling.[56] The Commission has found that Circular Scheduling is a prohibited Gaming strategy. Gaming Order, 103 FERC ¶ 61,345 at P 43. Death Star Transactions were perpetrated by Enron scheduling power to flow at the same time in opposite directions, but no power would actually flow.[57] The purpose of scheduling such counter flows was to create the illusion that Enron was relieving congestion so that Enron could receive congestion management payments from the ISO.[58] However, congestion is not actually relieved if

---

[53] Ex. SNO-58 at 126:20-77, 56:5-6; Ex. SNO-141 at 5-7; Ex. SNO-797; Ex. SNO-666 at 27; Ex. SNO-113; Ex. SNO-58 at 113:10-114:1: Ex. SNO-917.

[54] Ex. SNO-710 at 33:20-34:19, 12:22-13:2, 20:17-32:4; 26:17-19, 28:11-31:2; Ex. SNO-84; Ex. SNO-87; IBR-8 at VI-26; Exs. SNO-718-723; Ex. SNO-725; Ex. SNO-728 at 88; Ex. SNO-729. The record also demonstrates that Enron traders were involved in a bidding strategy called "Project Stanley," which they knew to be prohibited, in the Western Interconnection that drove up prices in the Alberta, Canada power pool. Ex. 710 at 149:7-154:8; Ex. SNO-756; Ex. SNO-914 at 10, 13, 17, 21, 26.

[55] *See* Ex. SNO-710 at 4; Tr. 4056:9-22 (additional days were discovered after testimony was filed).

[56] Gaming Order, 103 FERC ¶ 61,345 at P 43; Ex. SNO-710 at 54, 68 Ex. S-20 at

[57] Gaming Order, 103 FERC ¶ 61,345 at P 43; Ex. SNO-58 at 67:14-68:3; Ex. SNO-593 at 4 (Mr. Forney's guilty plea stating that "Enron misrepresented that the export from California and import into California were two unique transactions"); Ex. SNO-64. *See also* IBR-8 at VI-27; Ex. SNO-744 at ¶ 37.

[58] Gaming Order, 103 FERC ¶ 61,345 at P 43; Ex. SNO-58 at 77:1-79:1, 102:21-103-2 (ISO data shows the Enron was responsible for $2.1 million of Death Star revenues identified by the ISO out of $6.1 million); Ex. SNO-742; Ex. SNO-593 at 4; Ex. SNO-58 at 102:21; Ex. S-21 at 8.

power does not flow.[59] Death Star transactions were created by John Forney to take advantage of congestion payment revenues[60] and originally called the "Forney Loop" and later renamed "Death Star." Ex. S-21 at 1; Ex. S-21; Ex. S-44; S-44 at 1. There were several different types of Death Star transactions such as "Small Death Star" transactions, "Black Widow," "Big Tuna," and "the LOOP" which all had the fundamental purpose of creating simultaneous offsetting schedules where no energy would actually enter or be taken off the system.[61]

78. Enron began using Death Star transactions as early as January 2, 2000, as shown in the EnPower database and the record also shows that Death Star was successfully implemented on May 5, 2000.[62] Snohomish's witness states that Enron engaged in as many as 48,995 Death Stars and scheduled 9,538 hours of Death Star transactions in 2000 through 2001.[63] The Cal ISO produced, in response to the Commission's Gaming Order, a report that details the frequency and revenues created by the Circular Scheduling.[64] Based on the Cal ISO report, Enron engaged in Death Stars on at least 585 occasions between January 1, 2000 and June 21, 2001, and received congestion revenues in the amount of $2,162,485 from the Cal ISO. Ex. SNO-1093. Although the Cal ISO states that the reports have likely underestimated the number of Circular Schedules undertaken by Enron, Staff notes that it agrees with its estimated revenue calculation. Ex. S-48 at 16; Staff IB at 46-47. Enron's witness Dr. Acton agrees that this is the amount of net revenues earned by Circular Scheduling transactions[65] and Mr. Kee and Mr. Riker, other Enron witnesses agree that there were 585 Death Star transactions during the period January 1, 2000 through June 21, 2001. Ex. SNO-1093.

---

[59] Gaming Order, 103 FERC ¶ 61,345 at P 43. *See* Ex. S-39 at 13:1-13:11; Tr. 2870:14-2871:24; Ex. S-54 at 18:15-21:6; S-21 at 1.

[60] *See* Ex. S-5, Sch. 1 at 1-3; Ex. S-129 at 12-15.

[61] Ex. SNO-740 (Death Star templates); Ex. SNO-710 at 78:5-84:11 (explains Death Star Templates). Ex. SNO-58 at 96:12-98:6 (Small Death Star). The types of Death Stars. Ex. SNO-710 at 55-57; Ex. SNO-744 at ¶¶ 27-38.

[62] Ex. SNO-58 at 6:12-13; Ex. S-21 at 3.

[63] Ex. SNO- 58 at 86:10-92:3, 103:30-107:1. Data from Enron's internal databases, Enpower, CAPS and Enpower-to-CAPS reconciliations sheets detailing Death Star schedules. *See* Ex. SNO- 710 at 77:17-84:8; Ex. SNO-58 at 96:1-11, 159:12-16; Ex. SNO-710 at 36:15-44:7; 72:3-17.

[64] Gaming Order, 103 FERC ¶ 61,345 at P 72. The Cal ISO report is comprised of three documents dated October 4, 2002, January 17, 2003, and June 2003 and evaluates the financial effects and frequency of Circular Scheduling schemes. Ex. ENR-531 at 5-6; Ex. ENR-532 at 9; Ex. ENR-533 at 2-4; Ex. ENR-534 at 15-19.

[65] Ex. SNO-1093 (response to data request SNO-ENR-1580 prepared by Mr. Riker citing Dr. Acton).

79. Enron also perpetrated Death Stars in collusion with other entities. Enron's traders were told to use Portland General Electric Company's (Portland) transmission to carry out Death Stars and to hide the transaction.[66] Enron's traders also educated other entities on how to successfully perform this scheme. Ex. S-135 at 5-6. In addition, there were 17 days in 2000 in which Enron used Portland to perpetrate Death Star transactions, "sleeved" by Washington Water Power (WWP) to hide the nature of the transaction and "circumvent affiliate posting requirements." Ex. SNO-247 at 101-102. These transactions took place between the period May 6, 2000 and June 6, 2000. The 17 Days' Transactions were carried out by initiating: (1) "an import into the Cal ISO from Mead to Palo Verde", Ex. S-25; Ex. S-43; (2) "a simultaneous export to the Northwest at the California-Oregon Border (COB)", *id.*; (3) "a schedule from COB to the PGE system and back to COB," Ex. S-15 at 12; and (4)" a return leg from COB through the state of California on transmission controlled by LADWP, and out to Mead or Palo Verde, Ex. S-42 (Sch.1).[67] These transactions were complex and involved carefully planned scheduling and delivery points to enable Portland and Enron to avoid regulatory "impediments."[68] In addition, Enron scheduled a portion of the transaction on facilities outside the Cal ISO's control area which resulted in the Cal ISO being unaware of the Circular Schedules. Ex. S-19 at 15. Enron engaged in other Death Star transactions between May and August 2000. Ex. S-50.[69]

---

[66] Ex. SNO-99; Ex. SNO-107-108. *See* Ex. SNO-58 at 84:31-85:8. Ex. SNO-58 at 84:31-85:2, 85:10-25, 92:6-11, 93:1-95:1; Ex. SNO-109; Ex. SNO-105; Ex. SNO-106. *See also* Ex. SNO-58 at 83:9-84:31. PGE's contribution to this scheme is no longer an issue by virtue of a settlement between PGE and Enron and another settlement between PGE and Trial Staff approved by the Commission. *Portland Gen. Elec. Co.*, 105 FERC ¶ 61,302 at n.1 (2003) (Enron and PGE); *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,236 (2004) (Staff and PGE). Staff IB at 43.

[67] Staff IB at 42-43.

[68] *See* Ex. S-31 at 15, 16, 23-24; Ex. S-32 at 48; Ex. S-79 at 8; Ex. S-39 at 11; Ex, S-18; Ex. S-15 at 12, 15; Ex. S-36 at 13; Ex. S-5 (Sch.2 at 22); Ex. S-79 at 13; Ex. S-17. *See* Staff IB at 44-45.

[69] In addition, Enron used the City of Redding, California to carry out approximately 194 "Red Congo" schemes by using the city's transmission rights as part of its circular schedule and then split the associated profits with the city.[69] The "Cong Catcher" scheme is similar to "Red Congo," but instead, involves NCPA. Ex. SNO-710 at 56:21-62:4; Ex. SNO-58 at 81-82:2. Enron's internal documentation reveals that "Cong Catcher," Death Star and Non-Firm Export occurred on 86 of 330 days of the total days shown in the records.[69] Modesto Irrigation District was also used for Death Star schemes.[69]

80. Enron's Circular Scheduling Transactions violated the Cal ISO Tariff and the MMIP. Section 2.1.3 of the MMIP prohibits gaming. In addition, the Commission has already found that the Circular Scheduling constitutes a prohibited gaming practice and violates the MMIP because "the market participants submit[] false schedules to the ISO… fraudulently received congestion relief payments for energy that was never provided and did not relieve congestion" and "unfairly took advantage of the ISO rules regarding payment for congestion relief." Gaming Order, 103 FERC ¶ 61,345 at P 41-46. The record in this proceeding shows that Enron submitted false schedules to engage in Circular Scheduling,[70] that did not relieve congestion or produce any counterflows of power. Ex. S-39 at 7; Ex. S-79 at 19; Ex. S-80 at 11-12. Circular Schedules also violated section 2.2.7.2 of the Cal ISO tariff via the use of false schedules because scheduling coordinators did not submit a balanced schedule of generation and load as required by the tariff. Ex. S-39 at 11-12. Enron also violated the MMIP by taking unfair advantage of the rules and procedures established in the ISO and PX tariffs. Enron's conduct resulted in reliability risks to the detriment of the Cal ISO market as prohibited under MMIP section 2.1.3.[71]

81. Enron witnesses Acton's, and Mr.Kee's arguments that Circular Scheduling actually resulted in power flow and, thus Circular Schedules relieve congestion[72] are rejected. As aptly noted by Staff, the Commission has already found that Circular Scheduling did not result in power flow and that congestion was not relieved. Gaming Order, 103 FERC ¶ 61,345 at P 43; Staff IB at 50-51. For this reason, Enron witness Mr. Kee's arguments that Circular Schedules are normal market activity[73] and have beneficial effects[74] are also rejected. In addition the evidence in this record refutes their arguments.[75] The Cal ISO Report explains that Circular Schedules do not relieve congestion, and in fact, make congestion worse. Ex. ENR-532 at 9; Ex. SNO-822 at 33:4-16; Tr. 3019:3-14 (Dr. Hildebrandt). Thus, it is found that Enron violated the

---

[70] Ex. S-23 at 3; Ex. S-40 at 3; Ex. S-19 at 36.

[71] The Cal ISO was unaware that there were false schedules and thus, no counter flow for the congested line. Ex. S-39 at 19; Ex. S-54 at 22; ENR-532 at 9 (the Cal ISO report discusses concerns with Circular Scheduling).

[72] Enr. RB at 34.

[73] Ex. ENR-109 at 84, 100.

[74] Enr. RB at 34.

[75] Ex. S-21 at 1 (Enron traders described death Star scheme as "No MWs flow"); Ex. S-20 at 4-5, 12-13 (Yoder-Hall memoranda states that no energy flows); Ex. ENR-109 at 79-80; Ex. S-54 at 20-21 (Staff witness Mr. Gross stating that no energy flows in a Counter Schedule/Counter Flow); Ex. S-54 at 24; Ex. SNO-983 at 4 (Forney admitting that in Death Stars no power would flow); Ex. SNO-744 at 37; Tr. 3102:20-3103:7 (Death Stars do not benefit the system); Tr. 3020:22-3021:15.

MMIP's prohibitions against gaming, by submitting false schedules. It is also found that Enron engaged in Circular Scheduling on at least 585 occasions during the period January 1, 2000 and June 21, 2001, with an estimated total revenue value of $2,162,485. Finally, it is also found that Enron engaged in Circular Scheduling/Death Star activities with Portland, the City of Redding, California, the NCPA, and the Modesto Irrigation District.

"Get Shorty" Transactions

82. "Get Shorty" or Paper Trading transactions, as defined in the Commission's Gaming Order, involves "selling ancillary services in the day-ahead market even though the market participant [does] not have the required resources available to provide the ancillary services. The market participant then [buys] back these ancillary services in the hour-ahead market at a lower price." Gaming Order, 103 FERC ¶ 61,345 at P 49. The Commission found that Paper Trading violated the Cal ISO's MMIP. *Id.* at P 51. Enron sold ancillary services that it did not intend to provide, and even more troubling lacked the actual capacity to provide, and then Enron would repurchase such ancillary services commitments in the hour-ahead market.[76] Staff witness Dr. Boner testified that Enron intentionally submitted false information to the Cal ISO stating that Enron had ancillary services available, knowing that it in fact, did not. Ex. S-57 at 23; IBR-8 at VI-31. Dr. Boner further stated that this caused the "Cal ISO to overestimate the reliability of the ancillary services it purchased from Enron" and "if the ancillary services were called upon and not delivered, the Cal ISO might not be able to provide the level of transmission service it was obligated to provide under its tariff." Ex. S-57 at 23. "Enron's provision of inferior quality ancillary services to Cal ISO was economically harmful because it tended to reduce economic efficiency in the California market" and "it must be the case that consumers were harmed." *Id.* Thus, Dr, Boner concluded, these effects satisfy the Commission's definitions of gaming and anomalous behavior as defined in the Gaming Order. *Id.* These Get Shorty transactions posed a threat to system reliability and efficiency since there was a possibility that the ISO could rely on Enron to provide ancillary services if Enron failed to buy-back such services.[77] Dr. Boner's testimony on this point is persuasive and given significant weight.

---

[76] Ex. SNO-710 at 141:21-22; Ex. SNO-62 at 1 (the strategy can be characterized as "paper trading" since the seller does not actually have ancillary services to sell). *See* Ex. SNO-802-803.

[77] Ex. S-44 at 4; Ex. S-57; Ex. SNO-710 at 139:23-140:3; Ex. SNO-58 at 116:1-12; Tr. 3027:4-7 (Dr. Hidebrandt stating that Get Shorty "endangers system reliability" and "harms market efficiency"); S-20 at 6 (once an Enron trader failed to cover and the ISO called on the ancillary services).

83. Dr. Acton asserts that Paper Trading did not cause reliability problems since the services were bought-back in the hour ahead market. Ex. ENR-139 at 92-94. Dr. Acton states that selling ancillary services and then buying them back at a lower price is "legitimate arbitrage" as long as the market participant "had the generation available to provide the ancillary services or appropriately contracted for it." Ex. ENR-139 at 83. Dr. Acton's argument is flawed in that it completely ignores the fact that Enron did not have the ancillary services available and thus falsely represented to the Cal ISO that it had the services available when they were sold. ENR-139 at 96 (Acton noting that in Paper Trading ancillary services are sold although the participant does not have the resources). Dr. Acton assumes that in each and every scenario Enron bought back all the ancillary services it sold and thus, zeroed out the transactions. This was not the case and Enron failed to have ancillary services available when called upon by the Cal ISO. Ex. S-131 at 4-5. Dr. Acton's analysis simply turns a blind eye to Enron's fraudulent actions. *See* Ex. ENR-139 at 84; Tr. 2797. Dr. Acton's testimony is not credible and shall be accorded little weight.

84. Staff witness Mr. Gross testified that ancillary services support reliability and that system reliability can be threatened if there are no physical ancillary services to back up the bids. Ex. S-54 at 5-6, 13-14; Ex. S-54 at 10-11. [78] Mr. Gross also testified that system operators need actual physical assets backing up capacity commitments to address system failures, otherwise, the system operator has fewer resources to turn to in order to avoid system failure. *Id.*; Ex. S-54 at 10. Enron was fully aware that its Paper Trading schemes caused reliability concerns. Ex. S-131 at 3-5. As stated in the Yoder/Hall memorandum, reliability is a concern because blackouts could occur if ancillary services are not available. Ex. S-20. Enron attempted to ensure that the sell and buy-back transactions "zeroed out," not because of system reliability concerns, but because Enron was concerned that it could be caught gaming the market.[79] Enron's non-compliance rate for the Cal ISO's ancillary service instructions was 75 percent for August 2001.[80] In addition, Enron used WWP, Glendale, Valley, El Paso, and Redding to engage in Get Shorty transactions. IBR-8 at VI-32 at VI-33. Specifically, Enron used Glendale to sell "Phantom Ancillary Services." Ex. SNO-1102; Ex. SNO-1103.

---

[78] *See* Ex. SNO-62 at 1; Ex. ENR-532 at 21; Tr. 3027:4-7 (Dr. Hildebrandt). See Ex. SNO-131 at 3-5; Ex. SNO-822 at 48:15-16; IBR-8 at VI-31.

[79] Ex. SNO-121 Tim Belden stopped Get Shorty because the transactions had not zeroed out); Ex. SNO-122 (Tim Belden email stating that mistakes keep happening and that "the California Attorney General is in search of a smoking gun and is looking to find someone who is 'gaming' the market. I don't want to provide them with any fuel for their fire).

[80] Ex. ISO-2 at 23, Table 8 (Dr. Hidebrandt explains the table at Tr. 3028:4-3030:21).

85. The Cal ISO Report analyzed the financial gains by calculating the difference in the Day-ahead Hour prices for each MW sold back by each SC in the Hour Ahead Market with certain adjustments.[81] The Cal ISO Report only quantifies the total amount of ancillary services sold back to the Cal ISO by Enron in the Hour Ahead market. Ex. ENR-532 at 21; Ex. ENR-534 at 21. According to the Cal ISO Report, during the period January 1, 2000 through June 21, 2001, the approximate net revenue that inured to Enron as a result of its Paper Trading schemes totals $4,131,926. Ex. ENR-534 at 23; Ex. S-54 at 17. However, Enron claims, and Staff notes that $228,481 of these revenues are attributable to Enron's role as SC for other entities.[82] Staff does take issue with a proposed adjustment to address the $228,481 and states that subtracting the $228,481 for Enron's SC transactions from the net revenue amount identified by the Cal ISO of $4,131,926 yields a total amount of $3,903,445 that Enron should be required to disgorge.[83] Enron has not demonstrated that the transactions identified by the Cal ISO are not Paper Trades. Ex. S-54 at 15-16. In fact, Dr. Acton has stated that Enron engaged in 949 Paper Trades for a net gain in the amount of $3,903,445 during the period April 13, 2000 and August 25, 2000. Ex. SNO-1093.

86. Enron claims that EMPI complied with the Cal ISO dispatch orders 97 percent of the time.[84] This argument is rejected, however, because this compliance percentage does not apply to Get Shorty transactions since the services were bought back and the delivery obligation was relieved. Tr. at 3028:4-3029:3 (Dr. Hildebrandt); Ex. IBR-8 at VI-31.

87. Thus, it is found that Enron engaged in Get Shorty/ Paper Trading transactions in violation of the Cal ISO tariff and the MMIP. Enron took unfair advantage of the Cal ISO tariff protocols and activity rules by submitting fraudulent schedules to the Cal ISO for ancillary services Enron did not have available and had no intention of providing. *See* Gaming Order, 103 FERC ¶ 61,345 at P 51. It is further found that Enron's Paper Trading harmed the electricity system and adversely affected the Cal ISO's ability to maintain reliability on the system by creating the false impression that ancillary services were available. There is ample support in the record for these findings. The Cal ISO Report identified an estimated 1,297 transactions in which Enron may have engaged in

---

[81] The Commission directed the Cal ISO to prepare a report containing transaction data for each of the Gaming practices. Gaming Order, 103 FERC ¶ 61,345 at P 72. The report consists of three documents from the Cal ISO dated October 4, 2002, January 17, 2003 and June 2003. Ex. ENR-531 at 5-6.

[82] The other entities include: Glendale, Seattle City Light, Plains Generation & Transmission & Cooperative, Colorado River Commission, El Paso Electric, Valley Electric Association, EWEB, and Saguro. Ex. S-54; ENR-1 at 44.

[83] Staff IB at 61-62.

[84] Enr. RB at 33-34.

Get Shorty transactions[85] and Enron admits to 949 of these transactions. Ex. SNO-1093 at 41. However, Enron's CAPS and Settlement databases show that Enron engaged in an estimated 178 additional Get Shorty transactions not identified by the Cal ISO during the relevant period. Ex. SNO-822 at 48:21-51:2. Snohomish states that this results in an approximate total of 1,127 Get Shorty transactions that are supported in this record, which is likely an underestimate.[86] It is also found that the total amount of profits that Enron shall disgorge for engaging in Paper Trading during the period January 1, 2000 through June 21, 2001 is $3,903,445. In addition, it is found that Enron engaged in Paper Trading in concert with the entities identified in this section.

Selling Non-Firm Energy as Firm

88. The Commission has stated that Selling Non-Firm Energy is the practice of "buying non-firm energy from outside California and then selling it to the ISO as firm energy." Gaming Order, 103 FERC ¶ 61,345 at P 54. "Enron was able to derive an unjust profit from this practice because it avoided the cost of purchasing the operating reserves that are required for firm energy." *Id.* The Commission further found that this practice violated the MMIP because it required "a flagrant false representation by Enron to the [Cal ISO]" that it had the operating reserves required for firm energy. *Id.* at n.61, P 55. Enron was the only market participant that the Commission found engaged in Selling Non-Firm energy as Firm. *Id.* at n.61; Ex. S-45 at 21. Evidence shows that Enron told the Cal ISO that power was firm and continued the deception by hiding the source of the power. Ex. SNO-710 at 130:11-132:22, 132:23-133:19: Ex. SNO-58 at 118:8-119:3; Ex. SNO-357.

89. Staff witness Ms. Tingle-Stewart concluded that Enron collected unjust profits related to Selling Non-Firm Energy as Firm. Ex. S-45 at 24. To support her conclusions Ms. Tingle-Stewart reviewed the Yoder-Hall memoranda which states that Enron traders often sell Non-Firm Energy to the PX as Firm. Ex. S-45 at 23; S-20 at 7. To engage in selling Non-Firm Energy as Firm, Enron submitted false and fraudulent bids and other information to the ISO. Ex. SNO-539 at 3 (John Forney's wire fraud guilty plea). This practice also posed a threat to system reliability and distorted the market. Ex. SNO-710 at 134:6-8; Ex. S-57; IBR-8 at VI-34. Staff identified conversations that related to the

---

[85] Ex. SNO-757 at 20-21. Snohomish notes that the ISO did not have data to identify actual Get Shorty transactions, so to provide an estimate, the Cal ISO identified transactions where sellers had repurchased their own promises to provide ancillary services in the Day Ahead market. *Id.* at 20.

[86] Snohomish claims that Enron's traders maintained a shared folder on their computer server entitled Get Shorty that was never provided to Snohomish despite several requests. Ex. SNO-142; *See* Ex. SNO-758 (Craig Dean identifying a Get Shorty folder); Ex. SNO-759 (data request); Tr. 3027:8-3028:3 (Dr. Hildebrandt).

practice of Selling Non-Firm Energy as Firm which also support the finding that Enron engaged in Selling Non-Firm Energy as Firm. Ex. S-125 at 12; Ex. S-125 at 12-13. Ms. Tingle-Steward also noted additional conversations that uncovered the fact that Enron energy traders in the Portland office also engaged in strategies that violated the Cal ISO rules. S-144 at 5-6. Enron also combined this practice with other schemes, including Death Star. Ex. SNO-710 at 126:15-128:5.

90. Staff notes that Dr. Acton admitted that the practice of Selling Non-Firm Energy as Firm is a Gaming Practice.[87] Ms. Tingle-Stewart's testimony is credible as she reviewed the available documentation. Ex. S-S61R at 16. Thus, based on Ms. Tingle-Stewart's testimony and the evidence in this record, it is found that the record in this proceeding demonstrates that Enron engaged in the Gaming Practice of Selling Non-Firm Energy as Firm in violation of the MMIP, and thus, the Cal ISO and PX tariffs by "flagrantly" representing to the Cal ISO that it had available the operating reserves that are required for Firm Energy. Although Enron admits that Selling Non-Firm as Firm is one of the Gaming Practices that may have been detrimental to the efficiency of markets and consumers, Enron claims that Dr. Riker demonstrated that neither Trial Staff nor Snohomish have presented sufficient evidence to conclude that Enron engaged in Selling Non-Firm as Firm as defined by the Commission. Enr. IB at 35-36. As discussed above, Staff witness Tingle-Stewart demonstrated that Enron engaged in this practice, and in addition, witness Mr. McCullough also made a similar demonstration relying on Enron's own records. Ex. SNO-710 at 127:8-135:8, 131:1. Accordingly, Enron's arguments are rejected.

91. After review of the relevant documents, Ms. Tingle-Stewart was unable to determine the amount of revenues that should be disgorged for this practice. *See* Staff IB at 38-39. Although Ms. Tingle-Stewart's proposal to require Enron to make a compliance filing supporting the firmness of all its firm transmission in the Cal ISO and PX is reasonable, such a filing is rendered unnecessary by virtue of the findings in this initial decision. It is found, that this decision subsumes in total profits, the amounts for this practice.

Load Shift

92. Load Shift is one of four Congestion-Related practices identified by the Commission. Gaming Order, 103 FERC ¶ 61,345 at P 41-46. Pursuant to the Cal ISO's procedures, "market participants received congestion relief payments for relieving flows in the direction of congestion or increasing counter flows in the opposite direction." *Id.* at P 41. The Commission described the practice of Load Shift as follows:

> 'Load Shift,' involved a market participant underscheduling load in one

---

[87] Ex. ENR-139 at 7.

> zone in California and overscheduling load in another, thereby increasing congestion in the direction of the overscheduled zone. Congestion 'relief' occurred when the market participant later adjusted the two schedules to reflect actual expected loads. This adjustment created a counterflow toward the underscheduled zone, earning the market participant a congestion relief payment from the ISO. The market participant had to own Firm Transmission Rights (FTRs) in the direction of the overscheduled zone to cover its exposure to ISO congestion charges, but any of the FTRs that it did not use may have earned artificially high FTR payments from the ISO.

Id. at P 45; S-45 at 15-16; Ex. S-61 at 4. The Commission held that Congestion-Related practices "violated the MMIP because the market participants submitted false schedules to the ISO." *Id.* at P 46. In addition, the Commission stated that market participants "received congestion payments for their FTRs as a result of the very congestion that they created" and "took advantage of the ISO rules regarding payments for congestion relief." *Id.*

93. Staff witness Ms. Tingle-Stewart reviewed various documents that discuss the practice of Load Shift including the Yoder-Hall memoranda, the plea agreement of Jeffrey Richter (former manager of Enron's West Power Trading division), and the Cal ISO data including the October 2002 Report. The Cal ISO data report shows that Enron owned 1000 MW of FTRs on Path 26 (running north to south) in 2000. S-45 at 18-20. Enron maintained EnPower and CAPS Reconciliation Sheets (Reconciliation Sheets)[88] which traders used to note differences between the EnPower and CAPS databases to balance their schedules at the end of their shifts. Ex. S-61R at 7; Ex. S-62. Such variances were noted on the Reconciliation Sheets by the reviewer. Based on those notes, Ms. Tingle-Stewart concluded that "Enron shifted load between North of Path 15 (NP 15) and South of Path 15 (SP 15) and also between NP 15 and ZP 26." Ex. S-61 at 7. Ms. Tingle-Stewart also noted that Enron's knowledge of the Load Shift practice is evidenced by the Enron desk traders' review and sign off on the Reconciliation Sheets which showed that Enron had been shifting load. *Id.* Incremental Sheets (Inc Sheets)[89] also provide evidence of Enron's Load Shift activities. *Id.*

94. Load Shift, as defined by the Commission, also requires market participants to own FTRs "in the direction of the overscheduled zone to cover its exposure to ISO congestion charges." Gaming Order, 103 FERC ¶ 61,345 at P 45-46. The record shows

---

[88] Reconciliation Sheets reconcile transactions entered into the EnPower database with the CAPS database. Ex. S-61R at 7; S-62, Attachment E.

[89] Inc Sheets are spreadsheets that traders completed to track profits on a daily basis.

that, according to Enron's own analysis, Enron owned FTRs in 2000 and 2001.[90] Ms. Tingle-Stewart also states that Enron may have purchased additional NP 15 and SP 15 FTRs in 2000 and 2001. Ex. S-61 at 8; *see* Ex. 62, Attachment G. There are also tape conversations from the Snohomish tapes and the Enron tapes that were identified by Ms. Tingle-Stewart as discussing Load Shift and that match the dates on which the Inc Sheets or Reconciliation Sheets show that Enron engaged in Load Shift. Ex. S-125 at 8; Ex. S-125 at 8-11. Specifically, Ms. Tingle-Stewart identified a conversation where an Enron trader requested, and the NCPA trader confirmed, that the NCPA trader engage in a Load Shift from ZP26 to NP15, for 21 MW for hours ending 23, 24 and 1 through 8 the next day. *Id.* at 8-9. The hours discussed in the tape coincided with the hours shown in the Inc Sheets for Enron engaging in a NCPA Load Shift. Ex. S-125 at 9; Ex. S-127, Attachment B. Ms. Tingle-Stewart's testimony is unopposed as aptly pointed out by Staff, since Dr. Acton subsequently changed his position and agreed that Load shift is a Gaming Practice under the Commission's definitions. ENR-139 at 7. Ms. Tingle-Stewart's testimony on this issue is credible and will be given substantial weight, as even Dr. Acton admitted he "did not give it the depth of analysis that subsequently has been given to it,…by…witness Tingle-Stewart, as well as others." Tr. 2746:8-11.

95. The record demonstrates that Enron engaged in Load Shift frequently. In fact, out of 330 days analyzed, the Enpower-to-CAPS Reconciliation Report shows that Enron engaged in Load Shift on 273 of those days.[91] With the addition of other transactional evidence, the total days on which Enron executed Load Shifts and other gaming strategies is somewhere in the realm of 332 days.[92]

96. Enron admits that Load Shift is one of the Gaming Practices that may have been detrimental to the efficiency of the market as well as consumers. Enr. IB at 35. The record also shows that Enron began engaging in Load Shifts as early as 1998 and this practice was more prevalent during the 2000 to 2001 period. Ex. SNO-710 at 5. Load Shift results in price manipulation which increases costs to market participants. Ex. SNO-64 at 5; Ex. SNO-752; Ex. SNO-710 at 121:3-7; IBR-8 at VI-12. Tr. 3025:3-9. This practice also created reliability problems on the system. Ex. SNO-17 at 18. The

---

[90] Ex. S-62 at Attachment F.

[91] Ex. SNO-710 at 115:6-116:5. *See id*. at 114:8-115:5; Ex. SNO-58 at 110:8-112:1; Ex. SNO-736 (Enpower-to-CAPS Reconciliation Reports). *See also* Ex. SNO-732.

[92] Ex. SNO-916 (Mallory Load Shift workbook which documents additional Load Shifts on 23 days in 2001 which includes 15 not previously identified in the Enpower-to-CAPS Reconciliation Reports); Ex. SNO-822 at 43:9-10, 44:13-45:4. The record also indicates that there could be more undetected Load Shifts since Enron has not produced ISO settlement data which is used to identify Load Shift transactions. Ex. SNO-710 at 102:28-29.

trader tapes also indicate that Enron frequently engaged in Load Shifts and intentionally sought to cause congestion knowing it would result in greater profits. Ex. SNO-204 at 9; Ex. SNO-710 at 118:8-119:4; Ex. SNO-318. The intentional congestion allowed Enron to maximize the value of its FTRs. Ex. SNO-754 at 22; Ex. SNO-710 at 105:1-10. Enron received payments for relieving its "imaginary" load to relieve the supposed congestion it created. Ex. SNO-710 at 112:10-113:7. Load shift effectively generated substantial profits for Enron.[93] Enron achieved this by filing false schedules with the Cal ISO and intentionally overstating its projected load in one zone and then understating the projection in another zone. Ex. SNO-710 at 100:9-102:26; Ex. SNO-58 at 21:3-12, 109:17-22. Enron traders had to "fake extra load"[94] and planned excuses for its Load Shift scheme noting that "[n]o one can prove [it] give[n] the complexity of our portfolio." Ex. SNO-763 at 16-19. In addition, Enron submitted false schedules that often contained "hundreds and sometimes even thousands of megawatts of non-existent load." Tr. 3025:17-3026:20. Enron was also the only party that knew the schedules were wrong, which gave Enron an advantage. Ex. SNO-247 at 122:7-8.

97. This practice was taught by giving specific examples of how to implement the Load Shift strategy. To wit, by increasing "the likelihood of congestion on the…path and increase[ing] FTR value," by causing an "increase in electrons to cause[] congestion and increase[ing] FTR value, and by noting that "HA congestion revenue …can only be collected by FTRs if there is both HA congestion AND an increase in schedules from DA to HA." Ex. SNO-798; Ex. SNO-751 at 1. In addition, Enron engaged in Load Shift with other entities.[95] Enron also developed a computer model to determine how much load they would have to schedule to create artificial congestion.[96] All of this evidence demonstrates that Load Shift was encouraged and resulted in intentional congestion on the electric system. Accordingly it is found, that Enron engaged in Load Shift, both individually and in concert with others.

98. Ms. Tingle-Stewart has recommended that Enron be required to disgorge all unjust profits associated with Load Shift. Ex. S-61 at 5. Staff's review of the Inc sheets show

---

[93] Ex. SNO-64 at 5 (Yoder-Hall memo stating $30 million in profits from Load Shifts in 2000); Ex. SNO-710:5-6, 915, 916 (Load shift workbook stating $690,027 in profits in early 2000); Ex. SNO-35 at 187-79 (attorney Mary Hain's notes stating Enron netted approximately $30 million in profits); Ex. SNO-58 at 113:7-114:1 ($1.5 million in profits per day for Load Shifts).

[94] Ex. SNO-731 at 65 (handwritten notes stating that "[l]oad needs more…money congestion" and "can't have reg load in NP but can have fake extra load in SP"); Ex. SNO-710 at 118:1-7.

[95] Ex. SNO-798; Ex. SNO-1091 (used NCPA assets for Load Shift).

[96] Ex. SNO-204 at 7 (traders discuss Load Shift model); Ex. SNO-805; Ex. SNO-710 at 110:3-112:4.

profits of $812,936 related to 37 days on which Enron engaged in Load Shifts during the period from April 2000 to August 2000. Ex. S-61R at 10; S-62, Attachment A. However, an exact amount attributable to Load Shift is rendered moot by virtue of the adoption of a total unjust profit calculation.

False Import (Ricochet)

99. The Commission described this practice as follows:

> [taking] advantage of the price differentials that existed between the day-ahead or day-of markets and out-of-market sales in the real-time market. A market participant made arrangements to export power purchased in the California day-ahead or day-of markets to an entity outside the state and to repurchase the power from the out-of-state entity, for which the out-of-state entity received a fee. The 'imported' power was then sold in the California real-time market at a price above the cap.

Gaming Order, 103 FERC ¶ 61,245 at P 37. As a result, the day-ahead or day-of California energy was "parked" with an entity outside California; however, no power actually left California. *Id.* at P 38. This "fictional import" was created to take advantage of Cal ISO's "out-of-market purchases that were not subject to the price cap during real time whenever there was insufficient supply bid into the market" and the Cal ISO buyers were willing to pay a price above the cap for energy imported from outside of California. *Id.* The energy was then "bought back for a small fee and then sold to the Cal ISO as 'imported' out-of-market-power" for a price above the cap. *Id.*

100. The Commission stated that market participants that engaged in False Import "violated the MMIP by taking advantage of the rules permitting energy to be purchased at prices above the cap in out-of-market purchases during real time and the ISO's practice of permitting such uncapped purchases for imported power." *Id.* at P 39. In addition, the Commission stated that engaging in False Import "deceived the ISO by falsely representing that their available power had been imported in order to receive a price above the cap" when the California generation had never left the state." *Id.* Enron was identified among the entities the Commission stated may have engaged in False Import. *Id.* at Attachment A.

101. Although Staff states that it found no evidence of False Import,[97] Snohomish points to evidence in the record that reveals that Enron engaged in the practice during the relevant time period. First, the June 2003 Cal ISO report uncovered evidence of Enron's Ricochet activities for the period January 1, 2000 to June 21, 2001. Ex. SNO-757 at 26-27. The report shows Enron's Ricochet transactions for this period to be 48,620 MWs.

---

[97] Staff RB at 21; Ex. S-45 at 15.

Id. In addition, Snohomish witness McCullough stated that 1,753 buy/resells were found where Enron paid for the service at Malin and the majority of the power went back to California. Ex. SNO-58 at 122-125. There are also comments in the EnPower data base and on the Inc Sheets that contain references to Ricochet transactions on May 22, 2000. Ex. SNO-822 at 27:8-15. Enron emails also demonstrate that Enron engaged in Ricochet transactions as early as 1999.[98] Enron's traders attempted to hide their Ricochet practice from the Cal ISO.[99] Moreover, the Enron trader tapes also demonstrate that Enron engaged in Ricochet.[100] Enron also used Ricochets to evade price caps in California. Ex. SNO-710 at 95:1-2; Ex. SNO-593 at 4-5 (plea agreement of John Forney admitting to participating in Ricochets); Ex. SNO-13 at 3 (Belden guilty plea stating that Enron received payments above price caps from the ISO). A Ricochet transaction Enron engaged in on December 12, 2000, resulted in Enron selling energy into the California market for $800 /MW when the price cap in California was $250/MW.[101]

102. Ricochet also created the appearance of a power shortage in the market[102] and artificially increased prices.[103] Importantly, Ricochets threatened reliability of the electric system. Ex. SNO-710 at 99:16-101:2. Enron claims that the Cal ISO found no out-of-market transactions where the Cal ISO paid it a price above the price cap during the Relevant Period. In addition, Enron asserts that this is legitimate arbitrage and benefits the market and consumers as long as the practice does not involve evasion of the price cap. As discussed above, it has been demonstrated that Enron engaged in Ricochets in which Enron was paid prices above the cap. The record also demonstrates that Enron's use of Ricochets to receive payments in excess of the price cap allowance, and to create the appearance of a power shortage in order to raise prices was clearly detrimental to the

---

[98] Ex. SNO-141 at 5 of 7 (email dated January 7, 1999, stating "here are the ricochets related to Williams").

[99] Ex. SNO-143 (email dated May 13, 2002 stating "[t]he ISO is savvy to LA's attempt to circumvent ricochets by showing an export and import of equal megawatts on the California side of the tie in order to hide the ricochet nature of the transaction"); Ex. SNO-58 at 125:24-126:1.

[100] Ex. SNO-167 (trader describing a ricochet at Four Corners); Ex. SNO-180; EX. SNO-232.

[101] Ex. SNO at 95: *see also Id.* at 96-97 (Enron sold power to the ISO at a price of $750 MW and earned a profit of $222,678); *see also* IBR-8 at VI-18 to VI-19 (Enron and other entities generated approximately $10 million in profits by engaging in Ricochet).

[102] Ex. SNO-710 at 95:2-4; Ex. SNO-822 at 22:2-23:3, 24:5-15: Ex. SNO-247 at 112:7-12.

[103] Ex. SNO-710 at 210:3-5, 143:13-14; Ex. SNO-64 at 7 (Yoder-Hall memo stating that Ricochet may increase the Market Clearing Price by increasing energy demand).

market and the system. Ex. ENR-532 at 5; Ex. ENR-534 at 25; Ex. SNO-1079 at 15-17; IBR-8 at VI-18.

103. Thus, Enron's arguments are rejected and it is found the Enron engaged in Ricochet transactions in which it took advantage of the Cal ISO practices and received a price above the cap in violation of the MMIP, and thus the Cal ISO tariffs. The record also indicates that Enron used the assets of other entities, including Portland and NCPA, to carry out Ricochets. Ex. SNO-126; Ex. SNO-58 at 126:2-5; Ex. SNO-140, Ex. SNO-142; Ex. SNO-46; Ex. IBR-8 at VI-17; Ex. SNO-46; Ex. SNO-58 at 149:6-150:15. As a result, it is found that the emails, plea agreement, and Cal ISO reports demonstrate that Enron participated in Ricochet as early as January 1999 in concert with other entities.

Non-Firm Export, Wheel-Out, Double-Selling, and Fat Boy

104. Non-Firm Export, also known as Cutting Non-Firm, is one of the four Congestion-Related practices identified by the Commission. Gaming Order, 103 FERC ¶ 61,345 at P 45. This practice involves the "scheduling of non-firm power by a market participant that did not intend to deliver or cannot deliver the power." *Id.* Once the market participant received the congestion payment for cutting the schedule, the market participant would cancel the non-firm power after the hour-ahead market closed, but would retain the congestion payment. *Id.* However, no power was transmitted and no congestion was relieved. *Id.* The Commission listed Enron as a market participant alleged to have engaged in the practice of Cutting Non-Firm. *Id.* at Attachment A. The record shows that Dr. Hildebrandt, the Director of Market Analysis for the Cal ISO determined that Enron cut Non-Firm schedules in 23 instances and no power was transmitted and no congestion was actually relieved. Ex. SNO-710 at 134:20-136:11; SNO-757 at 28. In addition, the record demonstrates that Enron engaged in Non-Firm Export and fraudulently received congestion payments when no congestion was actually relieved.[104] Enron concedes that it engaged in this practice at a profit of $54,414. Thus, it is found that Enron engaged in the practice of Non-Firm Export in violation of the MMIP.

105. The record demonstrates that Enron engaged in Wheel-Out transactions. The Commission identified Wheel-Out as the third Congestion-Related practice. Gaming Order, 103 FERC ¶ 61,345 at P 44. Under this practice, the market participant would "submit a schedule across an intertie line at the ISO border that was known to be out of service and had been derated to zero capacity, thus creating artificial congestion. The market participant would then schedule a counterflow export, a 'wheel out' and be paid for congestion relief in the day-ahead or hour-ahead market." *Id.* Since the line was completely constrained, the initial schedule would be cut by the ISO in real time and the market participant would receive a congestion payment for energy it never supplied. *Id.*

---

[104] Ex. SNO-710 at 137:14-138:8; Ex. SNO-754 at 1-2 (notes describing Non-Firm Export).

The Commission listed Enron as one of the entities that may have scheduled service on out-of-service-lines. *Id.* at Attachment A. Enron engaged in Wheel-Out as early as February 4, 2000, by intentionally scheduling power to flow on out-of-service lines.[105] Enron has admitted to engaging in Wheel-Out at least 11 times valued at $225,075. Ex. SNO-1093 at 41. Accordingly, it is found that the record demonstrates that Enron engaged in Wheel Out transactions.

106. Snohomish argues that Enron engaged in the ancillary service related practice of Double-Selling. Double Selling involves "selling ancillary services in the day-ahead market from resources that were initially available, but later selling those same resources as energy in the hour-ahead or real-time markets." Gaming Order, 103 FERC ¶ 61,345 at P 50. As Snohomish points out, Enron was not named as an entity that may have engaged in Double-Selling.[106] Staff does not allege that Enron engaged in Double-Selling and Enron denies engaging in the Gaming Practice. However, an April 11, 2000, trader tape conversation does seemingly indicate that Enron engaged in Double-Selling. The traders discuss a "double dip for LV Cogen" for selling the same output from the LV Cogen generator for $749/MWh in the Day Ahead market, and reselling it in the Real Time market for $109/MWh.[107] It is found that Enron engaged in Double-Selling on at least one occasion.

107. Snohomish argues that Enron engaged in Fat Boy schemes by falsely overscheduling load to manipulate the market. Snohomish, Staff and Enron aptly point out that Fat Boy is a Gaming Practice as defined by the Commission, but is outside the scope of this proceeding since the Commission did not order disgorgement for this practice. It is, however, duly noted that the record indicates that Enron engaged in this practice using both its own assets and the assets of other entities such as Valley Electric, Glendale, Redding, and CRC.[108] It is also noted that the record demonstrates that Enron engaged in other gaming schemes not identified by the Commission such as "Big Tuna," "Donkey Punch," "Little Tuna," "Ping Pong," "Russian Roulette," "Sidewinder," and "Spread Play." Ex. SNO-710 at 44:8-51:17, 50:18-52:3; Ex. SNO-738 at 8.

108. Enron argues that the MMIP requires that in order for a practice to constitute gaming, "the effects of such practice must be detrimental to both the efficiency of the Cal

---

[105] Ex. SNO-98 (email from John Forney instructing Enron traders to schedule over out-of-service lines and stating "we would look to wheel out at FC); Ex. SNO-58 at 61:14-64:10; Ex. SNO-710 at 138:9-139:28; IBR-8 at VI-28 at VI-29

[106] Gaming Order, 103 FERC at 61,345 at Attachment D; SNO IB at 62.

[107] Ex. SNO-1025; Ex. S-145 at 65-70 (full transcript).

[108] Tr. 4098:23-4099:11 (McCullough). Ex. SNO-46; Ex. SNO-11 at 71:2-72:2; Ex.SNO-58 at 59:1-60:4, 163:14-168:5; Ex. SNO-20 at 1-3' Ex. SNO-62 at 2-3; Ex. SNO-75; Ex. SNO-8000; Ex. SNO-863 at 2; IBR-8 at VI-20 n. 26.

ISO and Cal PX markets and to consumers in those markets." Enr. IB at 27-28. Staff and Snohomish are correct that this argument must be rejected on two main points. First, the Commission has already found that these Gaming Practices violate the MMIP primarily on the ground that market participants that engaged in such conduct "submitted false schedules," received fraudulent congestion relief payments, and "unfairly took advantage of the ISO rules regarding payment for congestion relief." Gaming Order, 103 FERC ¶ 61,345 at P 39, 46, 51; Gaming and Partnership Rehearing Order, 106 FERC ¶ 61,020 at P 51, 54, 62, 66. Based primarily on the fraud and misrepresentations involved in these practices, the Commission determined that these practices are prohibited and, accordingly in this proceeding, the issue that remains is whether Enron engaged in these Gaming Practices.[109] It is simply too late at this juncture for Enron to argue otherwise. Thus, any argument that Enron makes with respect to practices already found by the Commission to constitute Gaming Practices are rejected as improper collateral attacks on prior Commission orders. Second, Enron's attempt to whittle down the MMIP's definition of Gaming in section 2.1.3 when the definition is more expansive and does, indeed include Enron's conduct, is disingenuous. Enron omits the second sentence of the MMIP's definition of Gaming which, in part, provides that "'Gaming' may also include taking undue advantage of other conditions that may affect the availability of transmission and generation capacity,…or actions or behaviors that may otherwise render the system and the ISO Markets vulnerable to price manipulation to the detriment of their efficiency." Gaming Order, 103 FERC ¶ 61,345 at P 17, SNO-63 at 7 (MMIP § 2.1.3). As discussed above, contrary to Enron's assertions, Enron's practices of, among other things, Paper Trading and Circular Scheduling threatened the reliability of the electric system. Ex. SNO-1098 at 2; Tr. 2639-40; Tr. 2531.

109. Third, Enron claims that Snohomish and Staff failed to quantify the market impact of its Gaming Practices, and therefore did not meet their burden of showing that EPMI's trading practices adversely affected the market. Enron IB at 28-33. There is no requirement that such impacts on the market be quantified or even that the impact be of a specific magnitude. Staff and Snohomish have shown that Enron's Gaming Practices had a detrimental effect on the efficiency of the market by among other things, submitting false schedules to the ISO and deceiving the ISO to receive payments in excess of what would otherwise be received. Similarly, Enron's claims that the impact of its Gaming Practices on the market are insignificant are without merit. Enron's Gaming Practices violated the MMIP and quantifying the value of the harm in each instance is not necessary. As stated by the Commission:

> The integrity of the Cal ISO market, in part, depends upon market participants adhering to market rules. We require market participants to follow the rules regardless of whether a failure to do so can be associated directly with adverse

---

[109] *See* Gaming and Partnership Rehearing Order, 106 FERC ¶ 61,020 at P 102.

> affects on market prices. The integrity of the marketplace and the reliability of service rendered are tied to confidence that the rules are being followed.

California Indep. Sys. Operator Corp., 106 FERC 61,179 at P 33 (2004).

110. Enron also claims that Mr. Kee's analysis demonstrates that prices in California spot markets during the Relevant Period were the result of fundamental supply and demand factors and generator bidding behavior. Enr. IB at 29. This argument is rejected as the record clearly demonstrates that Enron was able to manipulate the market. IBR-8 at VI-35, VI-43, VI-47-48, ES-1; Tr. 3012-3014; Ex. S-10. *See e.g*. Ex. SNO-1079 at 6-8; Tr. 3012:19-3013:10; Ex. SNO-13 at 3. Moreover, the Commission has already stated that the "fraudulent schemes in California markets" resulted in manipulated prices in California. Revocation Order, 103 FERC ¶ 61,343 at P 54, 56. In sum, Enron's claims that its practices did not violate the MMIP are rejected primarily as a collateral attack on the Commission's orders which have already found that certain Gaming Practices violate the MMIP, and thus the PX and Cal ISO tariffs.

Gaming in Concert with Partners

111. There is also record evidence in addition to the instances discussed above in which Enron exerted control over or had influential partnerships with other entities and used such relationships to engage in Gaming Practices. In *El Paso*, the Commission found that "Enron at times had a quantum of control and operated El Paso Electric's assets during certain off-peak periods….in its prescheduling and real-time functions, gained control of decision-making authority over sales of electric energy. Indeed, El Paso Electric admitted that it gave Enron discretion on how, when, and to whom it could sell power on El Paso Electric's behalf while Enron ran the El Paso electricity trading desk." *El Paso*, 108 FERC 61,071 at P 14. Thus, the Commission's determination in this regard leaves no doubt that Enron exerted control over the assets of El Paso. The El Paso relationship enabled Enron to gain access to commercially sensitive information and "provided Enron with flexibility regarding receipt and delivery points and thus enabled Enron to avoid curtailment of energy sales in the direction of congested power flow." S- 64 at 8, 12. Enron used this relationship to facilitate its gaming schemes and adversely affect the market in the west.[110]

112. In addition, Enron used its relationships with other partners to its advantage and adversely impacted the western market. Ex. S-64 at 10-11; Ex. S-65, Sch. 1. Enron entered into a parking and lending agreement with the Public Service Company of New

---

[110] *Id.* at 9-10; Ex. S-65, Sch. 1 at 10-11, 19; Ex. S-70 (listing the El Paso agreement among John Forney's accomplishments as providing for "constant monitoring of major generating assets in the SW, including the Palo Verde nuclear plant"); Ex. S-66, Sch. 2 at 2.

Mexico to facilitate its gaming practices "to arbitrage the spread between the PX and the ISO." S-64 at 11; *See* Ex. ENR-1 at 34-36. The record also indicates that Enron sought to develop relationships and gain control and market the generation in the Cal ISO and PX markets. Ex. S-64 at 14. Enron's aim was to forge business relationships and gain control over the various entities and thus their resources without having to incur capital expenditures. Ex. S-65, Sch 3 at 1-3; Ex. S-64 at 13-14. Such relationships were developed with more than 30 customers.[111]

113. Mr. Ballard states that the relationship between Enron and Glendale, Enron and LV Cogen, and Enron and Modesto Irrigation district were not normal power purchases or sales agreements and "appear to enable Enron to exercise some degree of control over the assets of the counterparty" or, at least obtain access to commercially sensitive information. Ex. S-64 at 18-19. In addition, Mr. Ballard states that the large number of profit sharing agreements between Enron and other entities under "non-power purchase and sales agreements" enabled Enron to obtain some element of control over the entities and obtain commercially sensitive information to operate the agreements. S-64 at 19-22; Ex. S-66, Sch 1 at 7-18, Sch. 4. Even Dr. Acton admitted that Enron was able to make independent decisions concerning the remarketing of Valley Electric's excess power at times. Ex. S-64 at 20; Ex. ENR-1 at 38. Through these relationships, Enron earned $2,839,224 in revenues in 1999, Ex. S-66, Sch. 3 at 3, $16,961,474 during the period January 1, 2000 through November 30, 2000, Ex. S-66, Sch. 3 at 3, and $9,098,189 during the first half of 2001, Ex. S-150.

114. Although Enron's arguments that it did not obtain control over other entities and was not required to report such relationships are contained in Issue I, such arguments concerning control must still be addressed to some extent herein. Staff correctly notes that Enron attempts to apply an overly narrow standard to its relationships is incorrect. The Commission did not impose a requirement that Enron's relationships had to mirror that with El Paso in order for Enron to be deemed as having gained control or influence. *See* Partnership Order, 103 FERC ¶ 61,346 at P 31-41. In addition, Staff points out that Enron's witness Mr. Slater only examined a limited number of documents, and thus overlooked the numerous emails and other evidence that show that although the contracts had provisions stating that the entities would retain control, that was not the case in actual practice. Ex. S-68 at 1, S-74 at 7; Staff IB at 82, RB at 24. Staff also points out that Mr. Slater failed to review additional documentation in an effort to determine whether the Northern California Power Agency allowed Enron to control its assets. Tr. 2500-06, 2596 (Slater); Ex. ENR-295 at 19; Staff RB at 25.

115. The record in this proceeding demonstrates that a thorough review of the evidence is critical since in many instances evidence of Enron's activities is revealed in the trader

---

[111] Mr. Ballard stated that Enron had relationships with several entities. Ex. S-64 at 17-18.

tapes, emails, and other documents. Mr. Slater's failure to inquire into other aspects of the Northern California Power Agency's relationship and the relationships between Enron and other entities raises concerns as to the credibility of his analysis. Tr. 2600-2603, 2605-2606, 2612.

116. The conflicting testimony presented by Enron's witnesses Acton and Slater is also an issue. Acton admitted that Enron exerted some decision making control over Valley[112] while Mr. Slater stated otherwise.[113] In addition, Dr. Acton's testimony with respect to Valley is inconsistent since he stated that it could not be concluded that Enron had a partnership with Valley in the context of this proceeding and then later testified that Enron did have limited decision-making control over Valley's generation resources. Ex. ENR-139 at 183, 228. Dr. Acton similarly relied significantly on the four corners of the contracts, such as the NCPA contract, to determine whether the agreements gave Enron control although as was evident in *El Paso*, the actual practice was different from the terms contained in the agreement. *See* Ex. ENR-1 at 27; S-67 at 17-18. The circumstances in *El Paso*, should have prompted Dr. Acton and Mr. Slater to seek more evidence of Enron's relationships with other entities to form the basis of their analysis, since it was clear in *El Paso* that the contract did not accurately reflect what took place in practice. Thus, the testimony of Dr. Acton and Mr. Slater is accorded little weight.

117. This initial decision is only considering disgorgement, with respect to Gaming activities, that were identified in the Gaming Order as Gaming Practices violating the MMIP or Cal ISO and PX protocols. Enron is correct that Overscheduling Load, and Underscheduling Load are not subject to disgorgement under the Gaming Order and, accordingly, its arguments concerning this subject are moot.[114] Enron's arguments that its violations cannot result in retroactive revocation of its MBRA are addressed in the following section.

118. In conclusion, it is found that the expansive record in this proceeding demonstrates that Enron engaged in Gaming and anomalous market behavior. Specifically, it is found that Enron engaged in Circular Scheduling/Death Star, Paper Trading/Get Shorty, Selling Non-Firm Energy as Firm, Load Shift, False Import/Ricochet, Non-Firm Export, and Wheel-Out in violation of the Cal ISO and PX tariffs. It is found that Enron engaged in Gaming Practices in concert with other entities. Additionally, it is found that these practices threatened reliability and harmed the efficiency of the system.

---

[112] Ex. ENR-139 at 183.

[113] Ex. ENR-295 at 2.

[114] Enr. RB at 13-14 (citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965); *Burinskas v. NLRB*, 357 F.2d 822 (D.C. Cir. 1966); *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 710 (2005)).

ISSUE III: BASED ON THE TOTALITY OF THE EVIDENCE IN ALL OF THE CONSOLIDATED DOCKETS, WHAT IS THE AMOUNT OF THE UNJUST PROFITS FROM TRANSACTIONS DURING THE PERIOD JANUARY 16, 1997 TO JUNE 25, 2003 THAT ENRON MUST DISGORGE?

Enron

119. Enron argues that disgorgement of profits is limited to the amount necessary to mitigate charges in excess of the filed rate. Enron states that the Commission can order refunds under sections 205, 206, and 309 of the FPA. Under section 309, Enron states, the Commission can order refunds if it finds violations of the filed tariff without any time limitations. Enron claims that the Ninth Circuit's decision in *Public Utilities Commission of the State of California v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006) (*CPUC*), restricts the Commissions section 309 disgorgement authority. Enron asserts that although section 309 has been interpreted to have no temporal restrictions, it is a provision that implements, and is limited by, the substantive portions of section 205 and 206 and is not an independent grant of "untrammeled authority." Nothing under section 309 permits the Commission to order refunds for transactions that were validly performed pursuant to filed rates or to replace the terms of contracts retroactively, Enron claims. Accordingly, Enron asserts that the Commission must first find a violation of the filed rate then determine the revenues in excess of the filed rate.

120. Enron claims that the record does not support a finding that all Enron transactions in the Western Interconnection during the Relevant Period should be subject to disgorgement. Staff and Snohomish, Enron asserts, have not carried their burden to show that all of Enron's transactions resulted in charges higher than the filed rate or violated a tariff. Enron also argues that it should be allowed to recover its costs for transactions found to violate the filed rate. According to Enron, it has demonstrated those costs. Enron identifies five different types of costs that it claims it incurred in the Western Interconnection during the Relevant Period. Among the costs that should be allowed, Enron contends, are EPMI's portion of federal income taxes and capital costs. Enron claims that if the Commission finds that every Enron transaction was a violation then the maximum disgorgement amount is the total profit figure of $675.4 million. Enron claims that Mr. McCullough's calculations incorrectly include mark-to-market accounting which overstates revenues. Mr. Barlow's calculations improperly include mark-to-market positions, used EBIT margins from companies that were not comparable to EMPI, and contain a mathematical error in the estimate of EPMI's interest and taxes. Enron asserts that both Snohomish's and Staff's calculations should be rejected.

Snohomish

121. Snohomish claims the record demonstrates that Enron violated its MBRA and Cal ISO/PX tariffs during the Relevant Period. Snohomish also contends that Enron's abuse

of market power and market rules created price distortions and volatility that permeated all transactions in the Western Interconnection. These abuses justify the most severe remedy available and Enron should be required to disgorge all profits at issue in this proceeding, Snohomish asserts. Snohomish claims that the total wholesale profits to be disgorged are $1,677,283,367.08 as calculated by its witness Mr. McCullough. Snohomish argues that Enron witness Dr. Bohi has incorrectly calculated Enron's profits. Snohomish also claims that there is good reason to believe that Enron's profits are higher than its accounting records show since the veracity of Enron's accounting records is questionable. Enron's cost filings fail to meet Commission standards which require detailed support to show that such costs are legitimate. Enron is attempting to claim costs that have been paid by its parent company and that the Commission disallows in rates. Snohomish argues that such costs should not be allowed to reduce Enron's profits in this proceeding. Snohomish also claims that Enron's attempts to minimize the impact of its manipulation schemes are factually incorrect.

Staff

122. Staff argues that there is no sound basis for Enron's contention that the "unjust profits" subject to disgorgement in this proceeding should be limited to only those profits received from particular transactions in the Western Interconnect found to violate Enron's market-based rate authority. Staff states that it did not evaluate Enron's profits associated with individual transactions that may have violated a rule, regulation, or tariff since Mr. Barlow determined Enron's profits from wholesale electricity trading in the Western Interconnection for the period January 16, 1997 through June 25, 2003. To calculate the amount of profits to be disgorged, Staff asserts, Mr. Barlow selected the most reliable reports for each period and calculated the Earnings Before Income and Taxes (EBIT) margin. Staff also asserts that Mr. Barlow determined Enron's total profits were $1,750,141,989 and subtracted the amount of $32,528,766 which the Commission already ordered to be disgorged in the *El Paso* proceeding. Next, Staff contends, Mr. Barlow then estimated Enron's Net Profits and determined that Enron's net profit margin was $1,557,626,370. Staff argues that the calculations of Enron witnesses Bohi and Day should be rejected. Staff claims that its witness Mr. Deters demonstrated that Enron violated its market based rate authority and perpetrated multiple gaming schemes during a period of several years and that for those reasons, Enron should be required to disgorge all of its profits earned during that time frame.

Discussion/Findings

123. As discussed above, Enron used numerous schemes and manipulative tactics in an effort to circumvent the rules of the Cal ISO and PX systems in violation of its MBRA and each tariff. Witnesses in this proceeding have described Enron's actions as violating "the terms and spirit of its market-based rate authority time and time again" and as showing "a willingness and a desire to be at the forefront in developing methods of manipulating, hiding and misrepresenting the facts to its own advantage." *Enron Power*

Marketing Inc., 104 FERC ¶ 63,010 at P 115 n.43 (2003); Ex. S-67 at 22; Tr. 4074-4075 (McCullough). The Commission found "that these Enron companies disrupted the energy industry." Revocation Order, 103 FERC ¶ 61,343 at P 14. In crafting a remedy in this proceeding, the Commission directed that all evidence of Enron's violations of tariffs on file or orders of the Commission be taken into account and noted that "Enron potentially could be required to disgorge profits for all of its wholesale power sales in the Western Interconnect for the period January 16, 1997 to June 25, 2003."[115]

124. This remedy is clearly supported by the record in these consolidated proceedings which demonstrates that Enron made a practice of devising schemes to game the market in violation of the PX and Cal ISO tariffs and its MBRA. Ex. S-67 at 22. Furthermore, Enron's actions caused injury to the Western Market as a whole by playing a role in negatively impacting system reliability and market prices. IBR-8 at VI-3. Enron claims that since the vast majority of its transactions were legitimate and its violations had no appreciable impact on prices, a Commission order to disgorge profits from all transactions would be a remedy "vastly disproportionate to the violations."[116] Enron's attempt to minimize the significance of its fraudulent transactions is rejected.[117] The breadth of evidentiary support in this record and the findings in this initial decision effectively refute such arguments. It is found that the only remedy that addresses the pervasiveness of Enron's manipulative and fraudulent conduct in the Western Interconnect throughout the Relevant Period is disgorgement of all profits for that entire

---

[115] *El Paso*, 108 FERC ¶ 61,071 at P 2. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at P 39, 149 (2003) (Market-Based Rate Investigation) ("in determining the appropriate remedy for violations of [Market Behavior Rule 2], we will take into account factors such as how self evident the violation is and whether such violation is part of a pattern of manipulative behavior"); *Id.* at P 149 (the Commission will "consider the full range of options available to the Commission to promote competition and to ensure that rates remain just and reasonable"). Staff bears the burden of proof concerning unjust profits for the Relevant Period under section 309. Gaming Order, 103 FERC ¶ 61,345 at P 71 n.76; Partnership Order, 103 FERC 61,346 at P 48 n.55; 5 U.S.C. § 556(d) (2007).

[116] Enr. IB at 47.

[117] Enr. IB at 41-47. Specifically, Enron's arguments that the profits received from these schemes is not significant based on the Cal ISO data is rejected. The Cal ISO did not conduct a comprehensive investigation to determine all of Enron's profits. Tr. 2993:12-25, 2998:20-3000:2, 3000:11-18 (Dr. Hildebrandt); Ex. SNO-757 at 5; 2997:16-22, 3040:4-12 (The Cal ISO only reviewed part of the data). The amount of money Enron made from these transactions is not insignificant. *See* Ex. SNO-222 at 2:12-3:15; Ex. SNO-240 at 2:38-41; Ex. SNO-383 at 1:18-19, 2:16-3:12; Ex. SNO-409 at 3:23; Ex. SNO-476 at 2:3-4; Ex. SNO-324 at 5:7-6:13; Ex. SNO-293 at 2:25-18; Ex. SNO-366 at 6:21-20-28.

time frame.[118] This is further supported by the fact that Enron violated its MBRA starting in January 16, 2007. Therefore, since that date, any profits Enron made were unjust and unreasonable since it was operating in the market in contravention of its authority. This conduct continued until its license was revoked on June 25, 2003. *See* Revocation Order, 103 FERC ¶ 61,313.

125. The authority to impose such a remedy is found in section 309 of the Federal Power Act, 16 U.S.C. § 825h (2007) which, in part, provides that the "Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this Act." *See CPUC*, 462 F.3d at 1048. To wit, section 309 gives the Commission "remedial authority to require that entities violating the Federal Power Act pay restitution for profits gained as a result of a statutory or tariff violation." *Id.*; *See Lockyer*, 383 F.3d 1006, 1017. Furthermore, the Commission has, under section 309, the authority to order refunds where the Commission "finds violations of the filed tariff and [section 309] imposes no temporal limitations."[119] Enron acknowledges that section 309 has no temporal limitations with respect to refunds for tariff violations, but claims that section 309 is limited by section 205 and 206 of the FPA, 16 U.S.C § § 824d, 824e, to enforcing the filed rate or the rate that should have been on file had the violation not occurred.[120] Thus, Enron claims, the Commission's section 309 authority does not allow the Commission to order refunds for transactions that were validly performed under the filed rate. *Id.* This, however, is not the correct interpretation of section 309 or the supporting case law.

126. As Staff points out, Enron's attempts to limit the span of section 309 using *Boston Edison*[121] fails because nothing in *Boston Edison's* terse section 309 discussion constrains *CPUC's* use of the term restitution or limits section 309 by sections 205 and 206. *Consolidated Edison,* 347 F.3d 964 at 967. Moreover, *Boston Edison* is distinguished on the facts. *Boston Edison* did not involve tariff violations such as the ones in this case. It involved contract interpretation and, specifically, one particular clause in the contract.

---

[118] *San Diego Gas & Elec.*, 95 FERC ¶ 61,418 at n.44 (2001); *see The Washington Water Power Co.*, 83 FERC ¶ 61,097 at 61,464 (1998) (*Washington Water Power*); Ex. SNO-1081 at 2; Tr. 3033:18-3035:6 (Hildebrandt); *Market-Based Rate Investigation,* 105 FERC ¶ 61,218 at P 149 (the Commission requires sellers to be fully accountable for any unjust gains attributable to their violations of the Market-Based Rules); Tr. 4074-4075 (McCullough).

[119] *CPUC,* 462 F.3d at 1045. *See* Revocation Rehearing Order, 106 FERC ¶ 61,024 at P 37 (the Commission has the fullest ability to enforce the conditions of the blanket marketing certificate).

[120] Enr. IB at 37-39.

[121] 856 F.2d at 369-70.

CPUC holds that the Commission has remedial authority to order entities that violate the FPA to pay restitution of profits related to a statutory or tariff violation without time constraints. *CPUC*, 462 F.3d at 1048. It is clear that section 309 is not limited by sections 205[122] and 206. *CPUC*, 462 F.3d at 1045-1050.[123]

127. Contrary to Enron's contentions, neither Staff nor Snohomish is seeking to change the filed rate. Enr. IB at n.67. Staff and Snohomish are only seeking to have Enron disgorge profits associated with the Relevant Period, which this record has shown was fraught with Enron's manipulative and fraudulent practices. Unlike the Commission's decision in *Coastal*, Enron is disgorging profits and is still allowed to retain its estimated costs.[124] Similarly, Enron's citation of *Coastal* for the proposition that the Commission lacks authority to order the disgorgement of profits from transactions that did not violate a tariff or otherwise deviate from the filed rate, is also rejected. The remedy in the case at bar is not confiscatory or a penalty as Enron asserts, since the disgorgement here allows Enron to recover its costs. Enr. IB at 47-50. The Commission has stated in this proceeding that "Enron could potentially be required to disgorge profits for all of its wholesale power sales in the Western Interconnect for the period January 16, 1997 to June 25, 2003." *El Paso*, 108 FERC ¶ 61,071 P 2. This a statement acknowledges that Enron's abuse was so widespread that, if the Commission's preliminary findings are supported by the totality of the evidence in these consolidated dockets, the remedy could be at the upper bounds of the Commission's authority. The Ninth Circuit has recognized that "[a]n agency's discretion is at its zenith when it is 'fashioning [] policies, remedies, and sanctions,… in order to arrive at maximum effectuation of Congressional objectives.'" *CPUC*, 462 F.3d at 1053 (quoting *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 126 U.S. App. D.C. 376, 379 F.2d 153, 159 (D.C. Cir. 1967)). "Customer refunds are a form of equitable relief, akin to restitution… agencies should order restitution only when 'money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.'" *Towns of Concord, et al. v. FERC*, 955 F.2d 67 at 75-76 (D.C. Cir 1992). In this case, Enron's conduct tainted all of its transactions during the relevant period on the Western

---

[122] *Lockyer*, 383 F.3d 1006 at 1014-15, held that the Commission can impose retroactive refunds under section 205.

[123] Thus, section 309 is not limited by section 206 and Enron's contention that section 206 does not allow a filed rate to be changed retroactively to a period prior to the refund effective date is rejected. Enr. IB at 41.

[124] "Coastal not only forfeits all of its profits, but it is also denied any payment whatsoever for the gas, including recoupment of costs." *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986) (*Coastal*). This was the remedy imposed by the Commission and on appeal, the Court did not allow this. Enron's arguments citing *Coastal* are disingenuous since this decision is not ordering it to disgorge all revenue.

Interconnection. Accordingly, ordering disgorgement of all its profits is equitable and in good conscience.[125]

128. Enron, Snohomish, and Staff each submitted calculations of Enron's unjust profits earned during the Relevant Period. Staff witness Mr. Barlow determined Enron's profits from wholesale electricity in the Western Interconnect for the Relevant Period, using the most reliable evidence available. Ex. S-76 at 6; Tr. 4407. Mr. Barlow acknowledged that calculating Enron's profits is not a simple task since Enron's financial information is stored in several different accounting systems or books. Ex. S-76 at 5; Tr. at 4407. Mr. Barlow noted that for each year he chose the most reliable documents available for his calculations and Enron's internal documents were more accurate than any calculation made using only Enron's public financial documents. *Id.* at 5-6. For the period January 16, 1997 through December 31, 1997, Mr. Barlow relied on the Western Systems Power Pool (WSPP) Quarterly Report.[126] Mr. Barlow then multiplied Enron's total estimated revenues as shown in the WSPP Quarterly Reports by an assumed Earnings Before Interest and Taxes (EBIT) margin[127] to determine Enron's total profits for 1997. Ex. S-76 at 6-8. For the period 1998 through 2001, Mr. Barlow used Enron's Annual Reports, Enron's SEC 10-K Forms, and Enron's Team Reporting documents from December of each year to determine Enron's pre-tax income. *Id.* at 8-12.[128] Mr. Barlow also reviewed Enron's Daily Position Reports (DPR) for the West Trading Desk for the years 2000 and 2001. *Id.* at 10-11.

129. Mr. Barlow also adjusted his profit calculations for 2000 and 2001. *Id.* at 10-12. Since Mr. Barlow found no basis for the subtraction in the Team Reporting documents of certain line items, the adjustments included adding back two line items entitled "Net

---

[125] Under the theory that Enron's MBRA is revoked since January 16, 1997, Enron should have been operating under cost-based rates since that date. Therefore, disgorgement of profits obtained illegally under a tainted MBRA is equitable.

[126] Mr. Barlow reviewed Enron's Annual Report, its Securities and Exchange (SEC) Form 10-K, and the Western Systems Power Pool (WSPP) Quarterly Report since internal financial documents for the West Trading Desk were not available for 1997. However, Mr. Barlow chose to rely on the WSPP Quarterly Report because the other documents did not break down earnings or costs associated with Western Electric Power Trading. S-76 at 5-6.

[127] Mr. Barlow developed the EBIT margin using the same method used in *El Paso*. *Id.* at 7-8. This entails using the EBIT Margin from Energy Marketers/Brokers Margins Mr. Barlow obtained from Dominion Bond Rating Service (Dominion). *Id.*; Tr. 4411. Dominion did not have margins for 1997, so Mr. Barlow used the margin of 23.1% for 1998 as a proxy for 1997. *Id.* at 7-8.

[128] Pre-tax income is slightly different from EBIT, but still reflects profits before taxes. Tr. 4414.

Other Revenue" previously subtracted in 2000 and 2001. *Id.* Next, Mr. Barlow states that since Enron's Chapter 11 Bankruptcy filing financial documents related to the West Power Trading operation have been difficult to find. As a result, Mr. Barlow used the Power Marketers Quarterly Report (now called the Electronic Quarterly Reports) for the years 2002-2003. *Id.* at 12-14. Mr. Barlow also applied EBIT Margins to those revenues to determine Enron's estimated profit margin. *Id.* at 15. Finally, Mr. Barlow's calculation of Enron's total profits is $1,750,141,989. *Id.* at 14-15 (chart summarizing total profit estimate for January 16, 1996 to June 25, 2003). Mr. Barlow subtracted the $32,528,766 the Commission ordered Enron to disgorge in *El Paso*, 108 FERC ¶ 61,071 at P 1, 33. Mr. Barlow then estimated Enron's net profit margin to be approximately 10.84 percent[129] and determined that Enron's net profit margin was $1,557,626,370. Ex. S-76 at 16-17. In addition, Mr. Barlow noted that he used mark-to-market accounting principles for the period 2000-2001 and further stated that Enron also used those principles for that period. Tr. 4420-21, 4493.[130] Mr. Barlow also allowed Enron a deduction of approximately $200 million for taxes and cost of capital although Enron failed to provide the necessary information for such a deduction. Tr. 4500. Mr. Barlow's approach is credible as he consulted several sources and used the most reliable information available to estimate revenues for certain periods.

130. Snohomish witness Mr. McCullough estimated Enron's wholesale power profits for the period to be $1,677,283,367.08. Ex. SNO-710 at 154:9-160:19. To estimate the amount of profits, Mr. McCullough used the Daily Position Reports and Trader Performance Reports[131] to fill in gaps in the missing Daily Performance Reports. *Id.* at 156-157. Mr. McCullough stated he also summed Enron's profits for each day, as shown in the Daily Position Reports, where evidence of Enron's gaming or market manipulation was found. *Id.* at 157: 10-11; Ex. SNO-58 at 214. Mr. McCullough, acknowledged that "Enron's books were 'cooked' on any number of levels" as was evident from the indictment of Jeffrey Skilling. Ex. SNO-58 at 205. Mr. McCullough states that he added the amount of $220,787,000 in Schedule C which contained amounts Enron set aside and hid in a reserve account. Ex. SNO-710 at 157-159; Ex. SNO-58 at 209-12. Mr.

---

[129] Enron's net profit margin was estimated by: (1) averaging Dominion's Net Profit Martin for 1998-2000 which results in a Net Profit Margin of 7.14%; (2) averaging the EBIT Profit Margin for 1998-2002 which results in an average EBIT Profit margin of 17.98%; (3) subtracting the average Net Profit Margin of 7.14% from the average EBIT Profit margin of 17.98% which results in an estimated net profit margin of 10.84%.

[130] Since Enron also used mark-to market accounting for the same period, its argument that mark-to-market values overstate and should be eliminated from EPMI's profit calculation is rejected. Ex. ENR-56 at 11; Enr. IB at 70.

[131] Trader Performance Reports are spreadsheets that summarize the profit and loss situation by trader and desk. Ex. SNO-710 at 156:18-19.

Barlow's and Mr. McCullough's calculations are very close and thus entitled to significant weight.

131. The profit calculations submitted by witnesses Dr. Bohi and Mr. Day are flawed and cannot be relied upon to approximate Enron's profits for the Relevant Period. Staff and Snohomish pointed out numerous flaws with respect to Dr. Bohi's and Mr. Day's calculations. The most striking of those flaws are discussed below. First, these witnesses calculated capital costs using industry averages instead of Enron's capital costs because they did not have access to Enron's internal records. Ex. ENR-351 at 9, Tr. 1360. Mr. Day and Dr. Bohi failed to use the Commission's traditional methodology to calculate EPMI's cost of capital. ENR-351 at 9. Mr. Bohi incorrectly applied the EBIT to market-based unregulated revenues, instead of cost justified revenues, in determining a proxy for EPMI's capital costs. Tr. 4494-95. This method resulted in a flawed hypothetical cost of capital. Tr. 4493-94. Further, Beth Apollo, an Enron employee stated that EPMI never paid its parent a cost of capital which makes Mr. Bohi's and Mr. Day's calculations suspect.. Ex. SNO-1084 at 156. *See* Tr. at 1364:13-1365:1.

132. Second, Mr. Bohi's tax calculations are fatally flawed as he based his estimate of taxes attributable to EPMI on an incorrect amount of $422 million for taxes paid (from the SEC filings) when the correct amount, as shown in the Internal Revenue Service returns, is $63 million in 2000 and 2001. Ex. ENR-56 at 19; Ex. SNO-1003; Tr. 1417. Enron paid no taxes from 1997 to 1999. Ex. SNO-1003. *See also* Tr. 1382:8-1387:17. As a result of this erroneous information, Dr. Bohi imputes taxes to EPMI related to trading in the Western Interconnection of $236 million. Ex. ENR-56 at 19; Tr. at 1554:23-1554:24. Dr. Bohi's incorrect calculation of $236 million in taxes which he asserts is attributable to EMPI is greater than the amount of taxes actually paid by Enron as a whole and more than the cost of capital that Enron paid which Mr. Barlow states makes no sense.[132] As Snohomish points out, when Dr. Bohi's erroneous deductions for tax and capital expenses are added back in to his calculation, Dr. Bohi's total profits equal $1,677,283,367.08.[133]

133. Third, Dr. Bohi erroneously overlooked and omitted $322 million in revenues from sales by EPMI to the Cal ISO. Tr. 1281. In addition, Dr. Bohi used Enron's income statements to determine expenses and estimates where those documents were not available. Ex. ENR-56 at 20-42. Dr. Bohi's reliance on Enron's financial documents

---

[132] Ex. ENR-56 at 19; Tr. 4500-01 (Barlow); Sno. IB at 71 n.428; Staff IB at 98.

[133] This calculation also includes the addition of the amount Dr. Bohi admittedly omitted of $322,107,739 related to revenue from the ISO. Ex. ENR-351 at 15:10-15:13; Tr. at 128:11-16. Sno. IB at 71.

renders his calculations suspect, especially in light of Enron's financial fraud.[134] These flaws make Enron's profit calculations less credible than the submissions of Staff and Snohomish.

134. The task of deciding the total amount to be disgorged is onerous since the record does not have complete evidence of Enron's costs or revenues. Thus, the calculations submitted by the parties are largely based on estimates. The estimated profits calculated by Staff witness Mr. Barlow and Snohomish witness Mr. McCullough are close which lends significantly to the credibility of their estimated profit amounts.[135] There is only a $120 million difference in their calculated amounts. In addition, Staff and Snohomish did not rely primarily on Enron's financial records for their calculations which lends to the credibility of the underlying data.[136] No party disputes that Enron should be allowed to recover certain costs. Although the cases cited by Enron and Snohomish[137] do not

---

[134] Ex. SNO-1029 at 5185:4-5207:12; Ex. SNO-685 and SNO-1007; Ex. SNO-58 at 205. Enron's claim that "[w]hen the records were created, Enron had no motivation to overstate expenses," is not given any weight. Enr. RB at 23 n.49.

[135] Seattle agrees that the calculations submitted by Snohomish and Staff are close and represent the amount of profits Enron should be required to disgorge.

[136] *See* Ex. SNO-1029 at 5185:4-5207:12; Ex. SNO-685 and SNO-1007; Ex. SNO-58 at 205.

[137] Enron cites the following cases for the proposition that it should be allowed to recover its costs: *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir.), *cert denied*, 469 U.S. 1034 (1984); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923); *Wash. Gas Light Co. v. Baker*, 188 F.2d 11, 14 (D.C. Cir 1950), *cert denied*, 340 U.S. 952 (1951); *Jersey Cent. Power & Light v. FERC*, 810 F.2d 1168, 1177-78 (D.C. Cir 1987); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Columbia Gulf Transmission Co.*, 23 FERC ¶ 61,396 at 61,853, *reh'g denied*, 24 FERC ¶ 61,258 (1983), *review denied sub nom, City of Charlottesville, Va. v. FERC*, 774 F.2d 1205 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986) (*Columbia Gulf*) (entities should be allowed to deduct their portion of the contribution to the consolidated tax return). Enr. IB at 48, Enr. RB at 22. Snohomish cites the following cases for the proposition that Enron must provide sufficient detail to support its costs: *Southern Company Services, Inc.*, 101 FERC ¶ 61,309 at 62,235 (2002); *Entergy Services, Inc.*, 91 FERC ¶ 61,149 at 61,562 (2000), *order on reh'g*, 94 FERC ¶ 61,257 (2000); *American Elec. Power Service Corp.*, 97 FERC ¶ 61,200 at 61,872 (2001); *Cambridge Elec. Light Co.*, 95 FERC ¶ 61,339 at 62,277 (2001), *reh'g granted in part*, 96 FERC 61,205 (2001). Sno. IB at 73-74 n.443. The other two cases cited by Snohomish were issued after Enron filed its supplemental rebuttal testimony on June 17, 2005 and July 14, 2005. *San Diego Gas & Elec. Co.*, 112

involve disgorgement and, and are thus not dispositive here, it is acknowledged that under general principles, entities are entitled to recover reasonable costs even in the face of disgorgement.

135. The Commission's order in this proceeding states that "[a]ny disgorgement still must let sellers recover their costs."[138] Staff's and Snohomish's calculations provide for cost allowances. Mr. Barlow's calculation used the EBIT margin to estimate Enron's profits and Mr. McCullough used the Trader Performance reports to summarize profits by trader desk.[139] *See* Tr. 2905:19-20; Ex. S-76 at 7-8; Ex. SNO-710 at 211. As in *El Paso*, the record here is "devoid" of direct evidence of Enron's costs, notwithstanding the fact that the Commission ordered Enron to provide cost data. *El Paso*, 108 FERC ¶ 61,071 at P 33; *San Diego Gas & Elect. Co.*, 112 FERC ¶ 61,176 at P 63-72. Thus, it is found that the estimated profits calculated by Mr. Barlow and Mr. McCullough based on other documents are the most credible based on the evidence in this record. The Commission allowed the averaging the high and low estimates of Enron's profits and determined this produces a reasonable approximation of Enron's profits. *Id.* Accordingly, that reasoning is adopted here and it is found that the average of Mr. Barlow's and Mr. McCullough's calculations, $1,617,454,868.50[140] is a reasonable estimate of Enron's unjust profits during the Relevant Period. Therefore, Enron is ordered to disgorge this amount into the fund created in the EL03-180 docket.

FERC ¶ 61,176 at P 103 (2005); *San Diego Gas & Elec. Co.*, 114 FERC ¶ 61,070 at P 141-146 (2006). Sno. IB at 74.

[138] *El Paso*, 108 FERC ¶ 61,071 at P 9 n.10 (citing *Costal*, 782 F.2d 1249, 1253 & n.6.; *see generally United Gas Pipeline Company v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Company*, 350 U.S. 348 (1956).

[139] This is deemed appropriate since Enron's financial statements are suspect. *See* Ex. SNO-1029 at 5185:4-5207:12; Ex. SNO-685; Ex. SNO-1007; Ex. SNO-58 at 205.

[140] $1,557,626,370 (Staff/Barlow) plus $1,677,283,367.00 (Snohomish/McCullough) equals $3,234,909,737 divided by 2 equals $1,617,454,868.50.

ISSUE IV: BASED ON THE TOTALITY OF THE EVIDENCE IN ALL OF THE CONSOLIDATED DOCKETS, WHAT IS THE AMOUNT OF THE UNJUST PROFITS, IF ANY, INCLUDED IN TERMINATION PAYMENTS THAT ENRON IS STILL SEEKING TO COLLECT UNDER CONTRACTS EXECUTED DURING THE PERIOD JANUARY 16, 1997 TO JUNE 25, 2003? IF THERE ARE ANY SUCH UNJUST PROFITS WHAT IS THE APPROPRIATE REMEDY THEREFOR?

Enron

136. The Commission does not have jurisdiction to determine Enron's right to collect the termination payment because this is a state matter and the scope of this proceeding does not include judgment on whether Snohomish owes the termination payment, or the appropriate amount of the payment.

137. Enron presented testimony on the liquidation of its forward contracts portfolio. The forward contracts were resolved by termination payments to or from EPMI, by bookouts or by purchase and sale of physical power. Termination payments made by and to EPMI are the starting point for the gross margin calculation and EPMI has a net payment obligation from resolving terminated contracts. Enron argues that its gross margin[141] on its portfolio may be allocated among all counterparties on a nondiscriminatory per MWh basis. The margin for unpaid termination payments is the same as the profit margin for all terminated contracts resolved by the Bankruptcy Court. Snohomish's contract is one of many in Enron's portfolio of forward sales contracts in the Western Interconnect. The Snohomish MWhs in the EPMI portfolio are indistinguishable from the other MWhs in the portfolio. Thus, the Snohomish Contract is as responsible as the other contracts for causing the costs EPMI incurred to maintain the portfolio and also contributed to EPMI's gross margin. Enron maintains, the termination payment is not pure profit and although there is not a specific contract to supply power to the Snohomish contract that does not indicate that there are no costs incurred related to Snohomish. EPMI has provided evidence of its costs and gross margin from the resolution of forward Western contracts in its portfolio at the Petition Date and Snohomish has not shown that any portion of the termination payment is unjust profits to be disgorged. Therefore, no remedy is justified.

138. The gross margin on the portfolio would be negative but for the post-petition sales to customers who did not terminate their contracts. EPMI's gross margin is $63 million

---

[141] Gross margin is the margin after netting direct costs of purchasing power against direct revenues from the sale of power before deducting non-power direct and indirect costs. Enr. IB at n.99. According to Enron, gross margin is a conservative measure of overall profits. *Id.*

or $0.15 per MWh ($293 million from EPMI to counterparties and net receipts of $356 million from post petition sales). If the termination payments are paid, the gross margin would be $0.45 per MWh for the portfolio.

139. Enron argues Snohomish terminated its obligation to take delivery of around 1.5 million MWh for its final 8 years. These 1.5 million MWh multiplied by $0.45 per MWh equals a gross margin of $675,000 in termination payments. The remainder of the termination payment recovers Snohomish's share of EPMI's forward portfolio costs. Enron argues it is entitled to recover these costs. Snohomish incorrectly claims that the contract excludes costs from the calculation of the Termination Payment when it does not exclude power costs, but excludes transaction costs and other non-power costs incurred in procuring replacement power. Since the gross margin on the portfolio power transactions excludes direct and indirect non-power costs, the gross margin overstates EPMI's portfolio profits.

140. The termination payment cannot be disallowed as imprudent because Snohomish has failed to show that the regulatory concept of prudence for traditional public utilities applies to bilateral power contracts.

141. Further, it is argued that if the Commission were to determine that the termination payment includes unjust profits then the same should be paid into the distribution fund set up in the *El Paso* proceeding.

Snohomish

142. Enron claims $117 million in termination payments plus more than $40 million in interest against Snohomish. The Commission concluded that Enron's profits under the terminated contracts are within the scope of this proceeding because the contracts were executed when Enron was in violation of its MBRA. The termination payments could also be eliminated in this proceeding because the potential disgorgement of profits can extend back to the execution of long-term power sales. Enron should not be able to collect the termination payment because it would be pure profit. The Commission only requires current ratepayers to bear legitimate costs of providing service to them. Additionally, Enron's claim should be denied since its cost arguments fail the prudency test. Enron should not be able to claim costs related to its illegal activity and Enron's termination payment claim would not exist if Enron had not concealed its insolvency from Snohomish. In addition, Enron had no reasonable expectation of continued service and since no further service was provided, no costs should be allowed.

143. Enron's claim for a termination payment would result in unjust profit to Enron since Enron has already recovered its costs for its Western Power portfolio. In addition, Enron did not have to make purchases in the wholesale market to serve the Snohomish contract. Also, the Commission has placed the issue of refunds for overpayments made

to Enron in this proceeding. Thus, Enron must refund $22.8 million in unjust rates that have already been charged.

Staff

144. Staff takes no position on this issue. Staff points out that Snohomish submitted a petition pursuant to section 1290 of the Energy Policy Act of 2005 requesting that Enron be precluded from collecting payments from Snohomish under the contract. The Commission granted Snohomish's request and denied Enron's termination payment claim. The order is currently pending rehearing before the Commission. With respect to Snohomish's request for refunds, in this proceeding, such a request is premature. The allocation of Enron's disgorged profits will be determined in the Phase II proceeding.

Discussion/Findings

145. The EPMI/Snohomish contract was executed on January 26, 2001 (the Agreement) for the sale and purchase of 25 MW for every hour between April 1, 2001 and December 31, 2009.[142] Enron is seeking a termination payment in the amount of approximately $117 million from Snohomish pursuant to a clause in the Agreement.[143] The Commission's March 11 Order clarified that "Enron's profits under the terminated contracts fall within the scope of this proceeding. The termination payments are based on profits Enron projected to receive under its long-term, wholesale power contracts executed during the period when Enron was in violation of conditions of its market-based rate authority." March 11 Order, 110 FERC ¶ 61,280 at P 10-11 (2005).

146. Enron argues that contract interpretation and enforcement is a state matter and the Commission cannot order EPMI to disgorge funds it has not yet collected. Enr. IB at 34 (quoting *El Paso Elec. Co., et al.*, 111 FERC ¶ 61,269 at P 17 (2005) (May 27 Order). This is a collateral attack of a prior Commission order and, as such, is rejected. In the May 27 Order, 111 FERC ¶ 61,269 at P 14, the Commission stated that it was not interpreting the rights of the parties under the contracts but carrying out its statutory mandate of determining whether Enron should disgorge profits (including the profits under the terminated contracts) as a remedy for impermissible gaming and anomalous market behavior in violation of the ISO and PX tariffs and Enron's MBRA.

147. This decision finds that Enron violated its MBRA starting in January 16, 1997 and that Enron violated the ISO and PX tariffs by engaging in anomalous market behavior and gaming by itself and in concert with others. As a result of these violations, Enron is being ordered to disgorge profits. The Commission determined that Enron fraudulently

---

[142] Ex. SNO- 4 at 4; Enr. IB at 74.

[143] Ex. SNO-4 at 19-22 (Article V); Enr. IB at 87.

induced Snohomish to enter the contract and denied Enron's termination payment claims, including interest.[144] Rehearing of this decision is pending.[145] Due to the fact that rehearing of the cited order is pending, and because the issue of the disgorgement of profits based on termination payments is an issue in this case, this decision will address the issue since it is deemed the issue is not moot. Especially, in light of the fact that resolution of this issue is on different grounds than those previously addressed by the Commission. Consequently, an analysis of the record in this proceeding concerning the termination payments is discussed below.

148. As Enron itself admits, termination payments are a standard feature of long-term contracts to quantify the market value of continued performance by delivery and payment versus the value of terminating the contract obligations at any time. Enron itself avers that its contemporaneous business records show EPMI's book value for all terminated contracts with each counterparty. This was a market calculation of the profits or losses "book value" of the terminated deal on the termination date. Ex. ENR-56 at 9:21-10:1.

149. The Agreement or MPPSA at Article V provides that upon termination, a settlement amount will be calculated based on the difference between the contract price and the market price for power based on a forward curve. Ex. SNO-4 at 19-20. Specifically, the contract provides that upon termination a "Settlement Amount" shall be calculated in a commercially reasonable manner for each transaction. The Settlement Amount for each transaction shall be netted out to a single liquidated amount or the Termination Payment. Ex. SNO-4 at 21 (Article V §§5.2-5.3). The contract defines the Settlement Amount as "the Losses or Gains and Costs, . . . which such party incurs as a result of the liquidation of a Terminated Transaction pursuant to Section 5.2" *Id.* at § 1.56. "Gains" are defined as an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of a Terminated Transaction, determined in a commercially reasonable manner. "Losses" means an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from the termination of a Terminated Transaction, determined in a commercially reasonable manner. *Id.* at § 1.28. Costs are defined as brokerage fees, commissions, and other similar third party transaction costs and expenses reasonably incurred by such Party either in terminating any arrangement pursuant to which it has

---

[144] *Public Utility District No. 1 of Snohomish County, Washington*, 115 FERC ¶ 61,375 (2006).

[145] It is noted that a federal court decided that Snohomish had not obtained relief from the automatic stay provisions in bankruptcy and the stay had not been lifted therefore, the FERC proceeding on state law termination payments was *void ab initio*. *Enron Power Mktg v. Luzenac Am;* 2006 US Dist Lexis 62922. *See also In re Enron Corp v. Pub. Util. Dist. No. 1 of Snohomish County,* 2007 Lexis 1808 (Bankr. S.D.N.Y. March 9, 2007).

hedged its obligations or entering into new arrangements which replace a Terminated Transaction; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the termination of a Transaction." Id at § 1.11.

150. Enron espouses a "gross profit margin" analysis to support its claim that it is entitled to the termination payments. Enron argues that its costs to supply the sales contracts (including Snohomish's) were determined by the forward purchase contracts in its Western portfolio. Resolution of the portfolio of terminated contracts resulted in a $293 million net liability to counterparties. These payments represent the net costs of the portfolio and a portion of these costs are attributable to Snohomish. Enron asserts that the costs of resolving the terminated power transactions in its portfolio are implicit in the calculation of the portfolio's gross margin. However, this new rationalization of the termination payment is contrary to the evidence in this record and as such is rejected.[146] The reality of portfolio management does not shed any light on this issue since the contract defines the essence of the termination payment. The contract did not provide that the termination payment would be estimated based on the gross margins of the portfolio or implicit costs. Furthermore, Enron's arguments are not credible. Snohomish's contract was 1 percent of the total Western portfolio.[147] However, Enron now claims that Snohomish should pay $116 million in portfolio costs when Enron's net liability to its counterparties as resolution of the terminated contracts was $293 million. The amount Enron is asserting as Snohomish's costs far exceeds its percentage share of the portfolio.[148]

151. In fact, the gross margin analysis which examines the "volume of purchases and sales" in Enron's portfolio does not bear any relationship to Enron's profits. As a matter of fact, Tim Belden testified at the Lay-Skilling trial that Enron's profits depended on price changes and price volatility, not volume of sales. The gross profit analysis proffered in this case does not examine either factor.[149]

152. Mr. Forouzan, in calculating gross margins, did not look at Enron's actual power supply costs on a dollars-per-MWh basis. Tr. at 2241:7-12. Mr. Forouzan also stated that he cannot draw any cost inferences from settlements, he never examined the extent to

---

[146] Enron's "gross margin" analysis is unprecedented. It is based almost entirely on adding up dollars Enron netted from settlements with its contract counterparties.

[147] Tr. 1580:4-11.

[148] Forouzan admitted his gross margin analysis vastly overstates Snohomish's share of Enron's costs since Snohomish accounted for only 0.44 percent of the portfolio, and therefore, its share of Enron's total termination payments, net of receipts from non-terminated contracts should be $6.7 million and not $116 million. Tr. 1913:24-1914:14.; Tr. 2049-2053:5.

[149] Ex. SNO-1029 at 5056:8-5061:11; Ex. SNO-1030 at 5501:14-24.

which Enron discounted costs associated with settled termination payment claims, and that his calculation of the termination payments did not consider Enron's hedging or other costs incurred by Enron. Tr. 1960:22-1961:5; 1996:18-22; 1974:17-1975:4. This witness conceded that the gross margin calculation would change significantly if Enron's contracts had not contained termination payments, but the underlying costs of supply would not change. Tr. 2164: 24-2165:5. Mr. Forouzan's analysis shown in Exhibit ENR-538 is not credible for the reasons discussed, and additionally, because Mr. Forouzan is not an accountant, he did not consult Commission case law before forming his conclusions, he is not familiar with the just and reasonable standard, he failed to consult FERC rules in defining pure profit, he is unfamiliar with a cost of service study.[150] In addition, Mr. Forouzan has no knowledge of the settlements that underlie his analysis. Tr. at 1800:24-1801:4; 1846:3-12; 1847:1-14; 2021:2-11.

153. Enron's gross margin arguments rely on the assumption that it operated a balanced supply portfolio. The record does not support this assumption. However, the record does support the conclusion that Enron did not operate a balanced portfolio, but engaged in speculative practices. The Enron traders accumulated a very substantial "long" position in the forward power portfolio prior to the California energy crisis in 2000. The record shows that this long position was liquidated at a significant profit during the energy crisis. The inference to be drawn is that Enron knew the market and knew it would profit significantly by taking a long position in the forward markets.[151] Additionally, the testimony of Enron officials Timothy Belden and David Delainey at the Lay-Skilling criminal trial shows that Enron did not operate a balanced trading book, but held very long and short positions in both the gas and power markets in North America.[152]

154. Additionally, the record evidence in this case establishes that Enron was extremely short after bankruptcy and the Snohomish contract termination, in fact, reduced Enron's costs by eliminating the need to fill this contract with new power purchases. Even Enron's own witnesses conceded that Enron saved $46 million due to the fact that it did not have to purchase power to serve Snohomish after the contract terminated in

---

[150] Tr. 1817:22-25; 1809:24-1810:5; 1810:6-10; 1818:17-20; 1807:25-1809, 1986:8-13; 1987:19-24; 2212:6-10. In addition, Mr. Forouzan admits to a $173 million error in one of his exhibits. Tr. 2212:6-10.

[151] Ex. SNO-1141; Tr. 4128:10-21; Tr. 4134:17-4137:9. This is documented by notes from Enron's attorney Mary Hain: "Bought power cheap a long time ago based on our fwd analysis. Sold expensive. We made so much money." Ex. SNO-79 at 26. Likewise, "We were long pwr on a forward basis. We are selling that, including Calif. Have sold out of long position." Ex. SNO-1143 at 000223-24, 000229. The trader tapes also document this. Exs. SNO-518 at 10, SNO-501, SNO-1029 at 5127:16-18.

[152] Exs. SNO-1029 at 5127:19-5130:17; SNO-1029 at 5073; SNO-1029 at 5112:15-5115:6.

November 18, 2001. As of January 2002, Enron had an open net short position of 28 million MWh across most major trading hubs and secondary trading points in the West with a mark-to-market value of approximately $1.2 billion. Consequently, Enron would have had to buy a net 28 million MWh to supply counterparties in the West through the remaining term of its portfolio.[153] Enron was a "net purchaser" to cover its positions after bankruptcy.[154]

155. The fact that Snohomish did not settle with Enron is irrelevant to the determination of whether the termination payments constitute profits. Furthermore, parties who settled with Enron did so voluntarily based on their own set of facts. Therefore, Enron cannot argue that ordering disgorgement of the termination payments is discriminatory *vis-a-vis* all the other counterparties in the portfolio.

156. Moreover, Enron also asserts that on a stand alone basis the entire termination payment is real costs to Enron for early termination and must be paid by Snohomish to restore both parties to their respective positions with respect to the contract. For the reasons stated in the preceding sentences this argument is specious. Furthermore, a literal reading of the contract supports the opposite view since the termination payment is defined as profits and costs or stated another way, defined as profits and costs or stated another way, the gain or losses are exclusive of costs. See definitions cited, *supra*. Enron's argument, in fact, is an erroneous interpretation of the contract since it is keeping out of the contract the statement "and costs" as stated in the Settlement Amount definition. On the other hand, most compelling is the argument that Enron's own numbers show that on a gross margin basis, the liquidation of its portfolio is favorable to Enron without Snohomish's termination payments. Enron's own evidence shows that it has already recovered its entire costs plus profits. Thus, additional payments from Snohomish, indeed, would result in additional profits to Enron (approximately $200 million in profits: $63 million and $116 from the termination payments or close to $400 million if Enron's bankruptcy discharged payments are considered at less than 100 percent).[155] Enron admits that the contract termination deprived EPMI of an ongoing revenue stream. This provides support for the proposition that the termination payments are profits. As discussed below, under the circumstances of this case, any profits made by Enron are unjust and unreasonable.

---

[153] Ex. SNO-1011 at 3.

[154] Tr. 1567:12-20.

[155] In its brief Enron avers that payouts from the bankruptcy estate should be valued at 100 percent and not the payout rate of approximately 45 percent. Snohomish is correct that in reality the Enron debts will be discharged at a reduced rate. The record in this case shows that the current market price for the pay out claims is 45 percent. Tr. 2040:19-23.

157. The basic principle of cost causation mandates that customers pay only those costs that are attributable to them.[156] An analysis of Enron's portfolio costs, on a cost-per-MWh basis, as calculated by Snohomish, shows that Enron's portfolio costs were less than $30/MWh for the post termination period. Ex. SNO-710 at 188:6-192:10; Tr. 4123:8-4123:16 (McCullough). Enron's gross profit margin analysis was not done on an actual power supply costs on a dollars-per-MWh basis and is unrelated to any power supply costs Enron incurred.[157]

158. Enron does not know the amount of profits or direct costs incurred, if any, to serve Snohomish after termination of the contract in November 2001. Ex. SNO-710 at 185:9-186:4; Ex. SNO-784; Ex. SNO-785; Ex. SNO-960. Enron cannot identify any costs incurred to service the Snohomish contract. Tr. 1837:13-18; 2057:8; 2059:8-10 (Forouzan). Enron did not deliver power to Snohomish after the termination, Enron did not have sufficient power in its portfolio to service Snohomish, and Enron admitted that no purchases were made to serve Snohomish after the termination of the contract.[158] Enron has not shown that it purchased power and incurred costs related to the Snohomish contract. As a matter of fact, Enron cannot identify any costs incurred specifically to satisfy the contract and as such fails to comport with cost causation principles.[159]

159. Enron cites several cases for the proposition that it should be entitled to recover its costs. *Nev. Power Co. v. Enron, Power Mktg., Inc.*, 101 FERC ¶ 63,031 n.435; *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 at 603 (1944); *Wash. Gas Light Co. v. Baker*, 188 F.2d 11 at 14 (D.C. Cir 1950), *cert denied*, 340 U.S. 952 (1951); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168 at 1178-79 (D.C. Cir. 1987). The Commission allows the recovery of costs even when disgorgement has been ordered; however, such costs must still be supported. The Commission has established standards to determine whether power marketers are entitled to cost-justified recoveries for sales made during the California energy crisis.[160] Enron did not follow these standards. First the Commission

---

[156] *See, e.g., KN Energy v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) (it has been traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them).

[157] ENR-107:9; Tr. 2241:7-2241:12 (Forouzan stated the cost was not a per MWh analysis).

[158] Tr. 1785:10-12; 1787:11-14 (Forouzan); Ex. SNO-710 at 193:8-10 ("Enron planned to be short in 2002 by approximately the size of the Snohomish contract); *Id.* at 194:5-11; Ex. SNO-1011 at 3; Tr. at 1567:12-20 (Baughman) (EPMI was a net purchaser after bankruptcy).

[159] Tr. 1987:19-24; 2044:21-2045:5.

[160] *San Diego Gas & Elec. Co.*, 112 FERC ¶ 61,176 at P 36, 38 (2005) (August 8 Order).

required that the portfolio be segregated by contract tenor and delivery point. Enron's gross margin analysis includes all contracts in Enron's Western portfolio at every hub and for every contract tenor.[161] Additionally, Enron included non-firm purchases even though it could not use non-firm power to meet its obligations. Mr. Forouzan's calculations also included offsetting transactions between identical parties and transactions with Enron's subsidiaries. Tr. 2189:1-12 to 2211:9-19. The Commission has concluded that transactions between Enron affiliates were part of the abuses during the energy crisis.

160. The Commission stated that it would not allow "cherry-picking among transactions."[162] However, Mr. Forouzan's analysis is based on a "snapshot" as of October 31, 2001, which contemplated the liquidation of all the contracts in the portfolio as of that date. Tr. 1916:6-13 (Forouzan). This "snapshot" analysis did not enable Mr. Forouzan to detect changes in the portfolio balance over time and did not reflect the significant change the portfolio underwent after Enron filed bankruptcy. Tr. 1797:3; 1677:20-1678:14; 1701:1-15; 2062:-2063:18. Furthermore, to the extent that Enron has incurred portfolio wide costs as of the snapshot date in Enron's analysis, Enron's recoveries exceed such costs. Tr. 1923:2-1925:5; 1926:-1927:16; 2270:4-2271:8 (Forouzan); Ex. ENR-538. As Snohomish aptly points out, Enron's claim that all its long portfolio positions would have been needed to serve all of its customers, hinges on the assumption that Enron operated with a balanced supply portfolio. Enr. IB at 77; Sno. RB at 41. However, the record demonstrates that Enron did not keep a balanced portfolio and engaged in speculation and accumulated a large "long" position in its forward power supply portfolio before the 2000 crisis.[163] In fact, Enron's strategy was to buy and create large long and short positions in its portfolio. Ex. SNO-518 at 10; Ex. SNO-501 at 4:24-27; Ex. SNO-1029 at 5127:12-14, 16-18, 5127:19-5130:17. Thus, it is unlikely that Enron purchased power for and incurred costs specifically to serve Snohomish. Enron

---

[161] August 8 Order,112 FERC ¶ 61,176 at P 36, 38; Tr. 2064:19-2065:3; Tr. 2191:20-2193:9 (non-firm power purchases were also included in the portfolio although non-firm power could not be used for Enron's firm deliveries); Enr. IB at 76-77. It is noted that the August 8 Order was issued after Enron filed its testimony in this proceeding. However, this order was issued before the hearing commenced. During the hearing Enron appended supplemental information to its gross margin calculation in Exhibit No. ENR-538.

[162] August 8 Order, 112 FERC ¶ 61,176 at P 37.

[163] Ex. SNO-1141; Ex. SNO-1029 at 5127:12-14 (David Delainey stating that Enron North America did not have a balanced trading book), Ex. SNO-1029 at 5073:10-13 (Belden); 5112-5115:6 (Delainey); Tr. 2233:23-2234:19 (Mr. Forouzan stating that Enron engaged in some degree of speculation). *See* Tr. 4128:10-21 (McCullough); Ex, SNO-79 at 26; Ex. SNO-1143 at 000223-000224, 000229.

conceded that its supply portfolio was more than 350 million MWh prior to bankruptcy, but only about 2 million MWh afterwards.[164]

161. The Commission also requires power marketers to include, among other requirements, "detailed work papers supporting the costs for each transaction."[165] Enron has not provided such detail. Enron did not account for transactions by duration or date and did not provide its risk management plan for the relevant time frame. It bears mentioning that the Commission rejected a similar filing by Enron in the California refund proceeding. Thus, it is found that Enron's profit margin analysis is not entitled to any weight. Further, it is additionally found that Enron has not demonstrated any costs associated with the termination payment.

162. Snohomish argues that Enron's costs are imprudent and should be disallowed on several grounds. In determining "the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility management (or that of another jurisdictional entity) would have made, in good faith, under the same circumstances, and at the relevant point in time." *Iroquios Gas Transmission Sys., L.P.*, 87 FERC ¶ 61,295 at 62,170 (1999) (quoting *Williams Natural Gas Company,* 80 FERC ¶ 61,408 at 62,343 (1997)). Assuming for the sake of argument that Enron had demonstrated that a portion of its termination payment are costs, in this case it can be concluded that Enron's alleged "costs" are based on its illegal activities and are the fruits of its criminal conduct. Thus, it should not be allowed to retain such costs. Further, the record evidence shows that Enron had no reasonable expectation of continuing to serve Snohomish under the contract. 18 C.F.R. § 35.26 (2006); *see, e.g., Montana Power Co.*, 106 FERC ¶ 61,063 at 61,203 (citing Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,048 at 30-421(1997)). Tr. 4204:3-4204:9; Ex. SNO-710 at 193:11-194:4; Ex. SNO-247. Enron knew that once its financial condition became known it was in eminent danger of financial collapse. Exs. SNO-680 at 12; SNO-710 at 180:20-191:3. However, the record in this case establishes that Enron had no costs after the contract was terminated. Enron cites *Town of Norwood*[166] for the proposition that a former customer must still pay a contractually-prescribed termination payment after service ends. However, *Towns of Norwood* is distinguishable from the present case. As the court in *Towns of Norwood* noted, the termination payment "cover[s] certain projected losses…caused by *not* supplying electricity after preparing to do so." 202 F.3d at 401.

---

[164] Tr. 1677:20-1678:24, 1701:1-15, Tr. 1797:2.

[165] August 8 Order, 112 FERC ¶ 61,176 at P 103; *San Diego Gas & Elec*., 114 FERC ¶ 61,070 at P 142 ("We will reject Enron's cost filing for failure to provide supporting documents to verify claimed costs…. a seller must include in its cost filing a complete tagging or line-by-line accounting for each transaction, backed by the power purchase contract and/or agreement.").

[166] 202 F.3d 392, 400 (1st Cir. 2000) (*Town of Norwood*).

In the case at bar, no losses are projected and as a matter of fact, profits are projected and more to the point Enron failed to prove any costs associated with the Agreement or that it had incurred costs associated with its preparing to supply electricity.

163. The Commission has declined to "honor those contract prices that were based on rates… already found to be unjust and unreasonable." *San Diego Gas & Elec. Co., et al.*, 114 FERC ¶ 61,070 at P 94 (2006); 16 U.S.C. 824(d) (1975) (FPA section 205). EPMI's MBRA was revoked by the Commission on June 25, 2003, and its market-based rate tariff was terminated. Revocation Order, 103 FERC ¶ 61,343 at P 1, 56, 99,108. Enron is correct that the Revocation Order did not prohibit the collection of the Termination Payment. *See id.*; Enr. RB at 39. However, as discussed above the disgorgement remedy in this initial decision starts on January 16, 1997, the beginning of the Revocation Period, and orders the disgorgement of all profits during that period.[167] This order also finds that Enron violated its MBRA starting on January 16, 1997. Therefore, Enron's market-based rates during the period at issue in this proceeding (January 16, 1997 through June 25, 2003) were unjust and unreasonable.[168] *See Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 P 56 (2003) *rehearing* 106 FERC ¶ 61, 024 at ¶¶ 24 and 30. Consequently, at the time Enron entered into the Snohomish contract it did not have a valid MBRA.

164. It is found that Enron has not demonstrated that there are any costs associated with the termination payment. Additionally, it is found that the entire termination payment is profits. Accordingly, it is also concluded based on Enron's repeated and continued violations, that the entire amount must be disgorged as unjust profits.

165. Snohomish's request for a refund is denied ($14.3 million in unjust profits collected for power purchased from Enron during the relevant period and $8.5 million in

---

[167] Enron also points to *El Paso* where the Commission stated that "[a] revocation of market-based rates or a disgorgement of profits would not void contracts that parties may have signed; the rates may be changed prospectively, or disgorgement of profits may be ordered, but the contract remains. *El Paso*, 108 FERC ¶ 61,071 at P 7 n.9.

[168] Snohomish is correct that if the contract price is reduced to $30 (arguably portfolio marginal costs) the termination payment would be eliminated since termination payments can only be recovered pursuant to the contract if the contract price is more than the market price. Ex. SNO-4, Art. 5 at 19-20. However, this case is about disgorgement of profits and the issue of contract reformation is outside the scope of this proceeding. Further, since it is being found that the termination payment is unjust profits and has to be disgorged, this is a sufficient remedy for this proceeding. It is noted, however, that contract formation issues were recently reviewed by the U. S. Ct. of Appeals for the Ninth Circuit in *Public Utility Dist v. FERC*, 471 F. 3d 1053 (9th Cir. 2006) (remanded to FERC to apply the proper statutory standard of review to challenged contracts).

unjust profits collected from Snohomish's major supplier, Bonneville Power Administration). The Commission has repeatedly stated that this case concerns the disgorgement of unjust profits by Enron. Contrary to Snohomish's assertions this proceeding does not involve refunds. As Staff points out, Snohomish's request is subsumed in Phase II of the proceeding where all disgorged profits will be distributed.[169] Thus, Snohomish's claim is premature at this juncture.

ISSUE V: WHAT OTHER NON-MONETARY REMEDIES, IF ANY, CAN AND SHOULD BE ADOPTED IN THESE PROCEEDINGS, INCLUDING THE REVOCATION OF ENRON'S MARKET-BASED RATE AUTHORITY DURING THE PERIOD JANUARY 16, 1997 TO JUNE 25, 2003?

Enron

166. Enron claims that retroactive revocation of its MBRA is not to be considered here and is an unlawful remedy. Enron also asserts the Commission lacks legal authority to retroactively revoke EPMI's market-based rate authority since the Commission is only allowed to impose a rate prospectively. According to Enron, retroactive revocation is also not an available remedy in this proceeding because it was not specifically mentioned in the Gaming and Partnership Orders. Enron also claims that in revoking Enron's MBRA, the Commission has to act pursuant to the requirements and limitations in section 206. The Commission's actions under section 206, Enron argues, are limited to prospective actions and the Commission cannot use section 309 to do otherwise. Enron asserts that the Commission cannot retroactively revoke a filed rate because revocation is a rate change that can only be implemented prospectively.

Snohomish

167. Snohomish states that the evidence in this proceeding supports revocation of Enron's MBRA beginning January 16, 1997 or, alternatively, at least March 7, 2000, when Enron's MBRA was renewed fraudulently. Snohomish claims that Enron wrongfully obtained a renewal of its market-based rate authority when Enron fraudulently induced the Commission to issue the order. Section 309 of the FPA, Snohomish claims, authorizes the Commission to rescind the order. Snohomish states that the Commission could also retroactively revoke Enron's MBRA because Enron had notice that its MBRA could be revoked if it violated the conditions of that authority.

---

[169] *Duke Energy Trading and Marketing L.L.C.*, "Order of Chief Judge Granting Clarification, Consolidating Distribution Issue for Hearing and Decision, and Designating Presiding Administrative Law Judge," Docket Nos. EL03-152-000, *et al.* (November 13, 2003) (Chief Judge consolidated the distribution issue in the related dockets for separate hearing and decision); Tr. 4172.

Staff

168. Staff advocates the revocation of Enron's MBRA as of January 16, 1997.

Discussion/Findings

169. In the Partnership and Gaming Orders, the Commission directed that any other appropriate non-monetary remedies, such as revocation of market-based rate authority and revisions to Enron's code of conduct, be considered. Partnership Order, 103 FERC ¶ 61,346 at P 2; Gaming Order, 103 FERC 61,345 at P 2. This Initial Decision has already found that Enron violated its MBRA as of January 16, 1997 and engaged in gaming and manipulative practices throughout the Relevant Period in violation of its MBRA. It was also found that the pervasiveness of these activities warrants disgorgement of all profits during that time frame.[170] Additionally, it was determined that section 309 of the FPA is not limited by the prospective parameters of 206. As discussed more below, the same logic applies here and Enron's MBRA is revoked, pursuant to section 309 for the duration of the Relevant Period. In addition, it is noted that this remedy logically follows from the findings, in Issue I above, that Enron violated its MBRA repeatedly throughout the Relevant Period.

170. As a threshold matter, it is noted that the authorization to sell power at market-based rates is a privilege and it is within the Commission's discretion to revoke this authority if violations are found.[171] The Commission has within its purview, the authority to impose retroactive remedies for violations of its MBRA.[172] Moreover, the

---

[170] In addition, Snohomish's witness Dr. Pechman recommends retroactive revocation of Enron's MBRA for the Relevant Period. Ex. SNO-247 at 160:15-17, 161:16-18; 163:26-29.

[171] Gaming and Partnership Rehearing Order, 106 FERC ¶ 61,024 at P 13 (citations omitted).

[172] *Lockyer*, 383 F.3d at 1015-1016; *see, e.g., Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984); *El Paso Elec. Co., et al.*, 108 FERC ¶ 61,071 at P 17, 27, 31 (Commission ordered retroactive refunds for MBRA violations); *American Elec. Power Serv. Corp., et al.*, 103 FERC ¶ 61,345 at P 12 (the Commission can take action to address earlier periods if the seller did not charge the filed rate or violated tariffs and can order retroactive disgorgement); Partnership Order, 103 FERC ¶ 61,346 at P 12; *San Diego Gas & Elec. Co., et al.*, 96 FERC ¶ 61,120 at 61,507-08 (2001), *order on clarification and reh'g*, 97 FERC ¶ 61,275 (2001), *order on reh'g*, 99 FERC ¶ 61,160 (2002), *petition for review sub nom* ("We agree that the Commission may take retroactive action to address circumstances where a seller did not charge the filed rate or violated statutory or regulatory requirements or rules in applicable rate tariffs" or, if demonstrated, violations of sellers' market-based rate tariffs.)

Commission contemplated that remedies in this proceeding could, in fact, be retroactive in nature.[173] With respect to the Commission's authority for prior periods, the Commission stated that it "could take action to address earlier periods if during those periods, a seller did not charge the filed rate or violated tariffs." Gaming Order, 103 FERC ¶ 61,345 at P 12. Moreover, the Commission has also stated that the "argument that we have authority to set just and reasonable rates, terms and conditions, but not enforce the tariffs is unpersuasive. Indeed, the FPA and the Commission's authority under Sections 205 and 206 (and 309) of the FPA would be virtually meaningless if we had no authority to enforce the tariffs that the statute requires must be filed with and reviewed by us." Gaming and Partnership Rehearing Order, 106 FERC ¶ 61,020 at P 21; *see also El Paso Elect. Co., et al.*, 108 FERC 61,071 at P 21; *Enron Power Mktg. Inc.*, 105 FERC ¶ 63,010 at P 55. As discussed above in Issue III, the Commission is granted broad authority under section 309 which is not limited by the constructs of sections 205 and 206.[174]

171. Enron's argument that retroactive revocation is not an option in this proceeding because it was not specifically mentioned among suggested non-monetary remedies by the Commission in the Partnership and Gaming Orders is rejected. Nothing in the Commission's order suggests that this list is exhaustive. In fact, as noted above, *El Paso* contemplates retroactive remedies. *See* 108 FERC ¶ 61,071 at P 2. Enron's argument that the Commission lacks legal authority to retroactively revoke Enron's MBRA by changing its filed rate schedule, and can only impose rates prospectively pursuant to section 206 is also rejected. Enron further argues that in revoking its MBRA, the Commission must act pursuant to section 206 since it is terminating a rate schedule on its own motion as it did when the Commission revoked Enron's MBRA. The Commission revoked Enron's MBRA pursuant to section 206 and 309 of the FPA. Revocation Order, 103 FERC ¶ 61,343 at P 1; 16 U.S.C. §§ 824(e), 825(h). Enron attempts to use the fact that the Commission did not use its section 309 to retroactively revoke Enron's MBRA to imply that the Commission recognized that section 206 limited the Commission to prospective actions. This argument is without merit. In consolidating these dockets, the Commission contemplated a comprehensive remedy and did not preclude the broad remedial authority in section 309. *See El Paso Elec. Co.*, 108 FERC ¶ 61,071. The first

---

[173] *El Paso*, 108 FERC 61,071 at P 2 (Enron could potentially be required to disgorge all wholesale power sales in the Western Interconnect for the period January 16, 1997 to June 25, 2003). In response to arguments that the Commission should retroactively revoke Enron's MBRA, the Commission stated that retroactive remedies are appropriately addressed in this proceeding. Revocation Rehearing Order, 106 FERC ¶ 61,024 at P 45, 47, 9 n.13.

[174] *See County of Halifax Va. v. Lever et al.*, 718 F.2d 649, 652 (4th Cir. 1983)

set of cases cited by Enron on this subject, do not discuss section 309 of the FPA or its counterpart section 16 of the Natural Gas Act and, thus have no bearing here.[175]

172. The other two cases cited by Enron also fail to support this proposition. *Consolidated Gas Transmission Corp. v. FERC*, does not limit section 309 remedial authority. 771 F.2d at 1536, 1551 (1985) (*Consolidated Gas*). In fact, *Consolidated Gas* states that, with regard to section 16 of the Natural Gas Act, which is analogous to section 309 of the Federal Power Act, "[w]hile the proper interpretation of the breadth of FERC's remedial powers under § 16 has been disputed, all of the cases are in agreement that the section, at a minimum, gives the Commission authority to remedy violations of other substantive sections of the Natural Gas Act." *Id.* at 1550; *see Mesa Petroleum Co. v. FPA*, 441 F.2d 182, 187 (1971) (section 16 of the NGA and section 309 of the FPA are counterparts). [176] The other case cited by Enron *Pub. Serv. Comm'n of N.Y. v. FERC*, 866 F.2d 487, 492 (D.C. Cir. 1990), discusses the Commission's use of section 309 to require refilings under section 4 of the NGA. The D.C. Circuit was concerned that the refilling requirement would have procedural consequences and blur the distinctions between sections 4 and 5 of the NGA (205 and 206 of the FPA), thereby "shift[ing] the burden of proof from the Commission to the company." 866 F.2d at 490-491. This case did not limit or prohibit the application of section 309 at issue here. Enron's claim that *Lockyer* provides no support for Snohomish's request since it does not address retroactive relief for tariff charges is rejected. . The Ninth Circuit, in *Lockyer* stated the "power to order retroactive refunds when a company's non-compliance has been so egregious that it eviscerates the tariff is inherent in FERC's authority to approve a market-based tariff." *Lockyer*, 383 F.3d at 1015-1016. The cited portion supports Snohomish's claim that the Commission has broad authority to address "egregious" acts by ordering a retroactive remedy, such as in that case, refunds. *Id.*

---

[175] *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C. Cir. 1979).

[176] Enron cites *Consolidated Gas* stating that under section 309, the Commission "cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined." Enr IB at 94 (quoting *Consolidated Gas*, 771 F.2d at 1551). However, the D.C. Circuit also states that section 16 "authorize[s] an agency to use means of regulation not spelled out in detail," provided that the action conforms with the purposes and policies of Congress and does not contravene any terms of the Act." *Id.* at 1550-1551 (citations omitted). Retroactively revoking Enron's MBRA simply enhances the Commission's power under the FPA to ensure just and reasonable rates by correcting Enron's abuse of that authority. Additionally, Enron is correct that *Elec. Dist, No. 1 v. FERC*, 774 F.2d 490, 493-94 (D.C. Cir 1985) states that a rate change can only be made prospectively under section 206. However, this case is not relevant since section 309 is being used as the vehicle for revocation.

173. As an additional point, the D.C. Circuit has stated that where notice has been given that rates are subject to change, what would have been considered a retroactive remedy changes to a prospective remedy.[177] The tone of the Commission's order granting Enron MBRA was clear that any exercise of market power or failure to comply with the requirements established by the Commission would result in revocation of its MBRA. *Enron Power Marketing, Inc*., 65 FERC ¶ 61,305; *see El Paso Elec. Co., et al.*, 108 FERC ¶ 61,071 at P 18; *see also* Ex. SNO-247 at 23-27. Enron was required to report any changes in the conditions the Commission relied upon in granting Enron's MBRA. *Id.* at 62,406. Enron also had notice that abuse under its MBRA could result in revocation of its MBRA.[178] Additionally, Enron's attorneys informed Enron that its actions could result in revocation of its MBRA. Ex. SNO-58; Ex. SNO-589; Ex. SNO-898. *See also* Ex. SNO-247 at 25-29. Thus, Enron was aware that its MBRA was provisional in nature and subject to later revision, i.e. revocation.

174. Snohomish alternatively argues that if Enron's MBRA is not revoked as of January16, 1997, then the Commission's March 7, 2000, order renewing Enron's MBRA should be rescinded because the order was issued based on Enron's fraudulent misrepresentations. This argument is rendered moot by the findings in this Initial Decision which find that Enron's MBRA is revoked for the entire Relevant Period. With regard to other remedies, Enron is correct that there is no need for monitoring or modifying Enron's codes of conduct since Enron has no ongoing business and had stopped selling electricity.[179]

---

[177] *See, e.g., Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990), *cert denied, Panhandle Pipe Line v. Columbia Gas Transmission*, 498 U.S. 907 (1990) (*Columbia Gas*) ("Notice does *not* relieve the Commission from the prohibition against retroactive ratemaking. Instead, it changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision."). *Columbia Gas* does not stand for the proposition that notice changes a retroactive remedy into a prospective remedy, as Enron claims Snohomish argues. The cited portion of the case does, however, support the assertion that Enron was aware that its MBRA was provisional in nature and subject to revision. *See Columbia Gas*, 895 F.2d 791, 797.

[178] *See Citizens Power*, 48 FERC ¶ 61,210 at 61,779 (any abuse found under the market-based rate schedule could result in appropriate action by the Commission including removing price flexibility and removing waivers granted); *Enron Power Marketing, Inc., et al.*, 65 FERC ¶ 61,305 at 62,403 (incorporated the requirements developed in *Citizens Power* into Enron's MBRA).

[179] Enr IB at 91.

175. In conclusion, the circumstances in this proceeding warrant revocation of Enron's MBRA starting on January 16, 1997 to June 25, 2003. The Commission and the courts have recognized the need for retroactive remedies to correct egregious tariff or MBRA violations. Enron's violations undoubtedly fit that profile. This remedy serves the public interest by providing a remedy for Enron's deceptive acts and by discouraging parties from engaging in similar activities. *See* Revocation Order, 103 FERC ¶ 61,343 at P 2.

176. As in *El Paso*, the disgorgement amount shall be placed in the dedicated fund. *El Paso*, 108 FERC ¶ 61,071 at P 36, Ordering Paragraph (B).

IV. ADDITIONAL MATTERS

Motion for Removal of Protected Status

177. On May 25, 2007, Enron, Snohomish, and Staff (collectively, Joint Movants) filed a Joint Motion for Removal of Protected Materials Status of Certain Exhibits. The Joint Movants submit that Exhibit Nos. SNO-1120 and SNO-1121 were previously Protected because they were subject to a Protective Order issued by the United States District Court for the Northern District of California. The Protective Order was lifted on April 6, 2007. *In re Search Warrants Regarding Enron Corporation*, No. CR 209 MISC MJJ (N.D. Cal., Apr. 6, 2007). In addition, Enron no longer seeks protection for Exhibit Nos. ENR-585; ENR-585-A; ENR-585-B; and ENR-585-C. Good cause has been shown for granting this motion as public access to exhibits serves the public interest. Accordingly, the motion is hereby GRANTED and following exhibits are made public: ENR-585; ENR-585-A; ENR-585-B; ENR-585-C; SNO-1120; and SNO-1121.

Motion to Strike

178. On May 14, 2007, Snohomish filed a motion to strike and Enron filed an answer thereto on May 29, 2007. Snohomish requests that limited portions of Enron's reply brief be stricken because it cites an off-the-record letter sent to FERC Commissioners on April 9, 2007, by two members of the LECG consulting firm (LECG letter). According to Snohomish, the LECG letter criticizes the conclusions in the SFR. Snohomish states that the LECG letter should be stricken because it was never entered into evidence, is not part of the record, addresses an issue that is not within the scope of this proceeding, and is a prohibited Rule 2201, 18 C.F.R. § 385.2201 (2006), off-the-record communication. In response, Enron states that it has not violated the *ex parte* rules and has only cited a publicly-available document and served the document on the Commission as required by the Commission's rules. Enron asserts that it is unaware of any authority that prohibits a party from referring to a public document in its brief. Moreover, Enron states that if its citation were a violation of Rule 2201, 18 C.F.R. § 385.2201, there would be no basis for granting the motion because Snohomish has not been prejudiced. Enron also claims that the Commission disfavors motions to strike. Finally, Enron states that the LECG letter was posted on the Commission's website on April 11, 2007.

179. It is correct that Enron is citing extraneous materials which have not been made a part of the record in this proceeding. Enron's arguments that it was denied an opportunity to discover the facts and sources underlying the SFR's conclusions, are rejected. Enron Response at 4 (citing Revocation Rehearing Order, 106 FERC ¶ 61,024 at P 13-16; *Order Declining to Issue Subpoenas for Depositions*, Docket No. EL03-180-000, et al. (July 10, 2003) (July 10 Order). The July 10 Order denied Enron's request, without prejudice, and Enron never endeavored to raise the issue or dispute the SFR in this proceeding. It was incumbent upon Enron to dispute the SFR and it is too late to do so at this juncture. The SFR is an item by reference and will be given weight accordingly. Similarly, the LECG letter is a public document and will receive weight commensurate with such documents. Snohomish's motion to strike is hereby denied.

Request to Draw a Negative Inference

180. During the hearing Mr. Belden asserted his Fifth Amendment privilege and refused to testify that the contents of his, Mr. Forney's, Mr. Richter's, and Mr. Despain's guilty pleas were true. Snohomish states that a negative inference should be drawn from Mr. Belden's refusal to testify and his assertion of his Fifth Amendment privilege. Snohomish's request is denied. The four corners of the guilty pleas, the exhibits in the record, including those containing admissions of Mr. Belden and other Enron employees, have proven sufficient to support Snohomish's claims.

V. CONCLUSION

181. Enron violated its MBRA and the PX and Cal ISO tariffs throughout the Relevant Period by engaging in various gaming and market manipulation schemes throughout the Western interconnect. As a result, this Initial Decision orders Enron to disgorge $1,617,454,868.50 in unjust profits earned during the Relevant Period. Enron's MBRA is also revoked beginning January 16, 1997. Finally, it is found that Enron must disgorge the Termination Payment from Snohomish as such a payment is unjust profits.

VI. ORDERING PARAGRAPH

182. IT IS ORDERED, subject to review by the Commission on exceptions or on its own motion, as provided by the Commission's Rules of Practice and Procedure, that:

Within thirty days from the issuance of the final order of the Commission in this proceeding, Enron shall disgorge $1,617,454,868.50. This money shall be deposited into the fund created in Docket No. EL03-137-000 and Enron shall file a report for Commission approval at the time the money is deposited.

IT IS SO ORDERED.

Carmen A. Cintron
Presiding Administrative Law Judge