UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Avista Corporation
Avista Energy, Inc.
Enron Power Marketing, Inc.
Portland General Electric Company

Docket No. EL02-115-009

ORDER DENYING REHEARING

(Issued April 19, 2005)

1. In an order issued on April 19, 2004,[1] the Commission approved a contested settlement between Avista Corporation d/b/a Avista Utilities (Avista Utilities) and Avista Energy, Inc. (Avista Energy) (collectively, Avista) and the Commission's Trial Staff (Trial Staff), resolving the investigation instituted in this proceeding under section 206 of the Federal Power Act (FPA).[2] The City of Tacoma, Washington (Tacoma) and Bill Lockyer, California's Attorney General and the California Electricity Oversight Board (collectively, California Parties) request that the Commission grant rehearing of the Settlement Order, reject the settlement, set this matter for hearing, and order establishment of a revised procedural schedule that will reinstate a reasonable period for further discovery. In this order, we deny the requests of Tacoma and the California Parties. This order affirms our decision that this settlement represents a reasonable resolution of the complex matters at issue in this proceeding.

Background

2. On August 13, 2002, the Commission issued an order initiating the instant proceeding.[3] In the Hearing Order, the Commission stated that its investigatory staff had uncovered evidence warranting investigation of Avista and two affiliates of Enron

[1] *Avista Corp.*, 107 FERC ¶ 61,055 (2004) (Settlement Order).

[2] 16 U.S.C. § 824e (2000).

[3] *Avista Corp.*, 100 FERC ¶ 61,187 (2002) (Hearing Order).

Corporation: Enron Power Marketing, Inc. (EPMI) and Portland General Electric Corporation (PGE) (collectively, Enron).[4] It appeared that Avista may have: (1) engaged in trading strategies identified in the Enron memoranda[5] that were designed to manipulate the California energy markets in 2000 and 2001; (2) engaged in trading activities in violation of the Commission's rules on affiliate transactions; and (3) failed to cooperate with a Commission investigation in a show cause proceeding that concerned possible manipulation of electric and natural gas prices in the West.[6] In the Hearing Order, the Commission initiated an investigation and hearing concerning those matters pursuant to section 206 of the FPA.[7]

3. Subsequently, Avista and Trial Staff engaged in settlement negotiations, and, on January 30, 2003, Avista filed the settlement on behalf of itself and Trial Staff.[8] On February 19, 2003, the California Attorney General, the California Electricity Oversight Board, and the California Public Utilities Commission jointly and Tacoma each submitted initial comments opposing the settlement, and PGE submitted comments in support of the settlement. On March 3, 2003, Avista and Trial Staff each submitted reply comments in support of the settlement.

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[4] *Id.* at P 1, 6-14.

[5] The specific trading strategies were those identified in three Enron memoranda that were provided by Enron to the Commission on May 6, 2002 in response to a data request issued in Docket No. PA02-2-000. *See* Hearing Order, 100 FERC ¶ 61,187 at P 4; Data Request, Docket No. PA02-2-000 (May 6, 2002). Two of the memoranda were dated December 6, 2000 and December 8, 2000, respectively. Hearing Order, 100 FERC ¶ 61,187 at P 4 n.3. The third memorandum was undated. *Id.*

[6] *Id.* at P 11-12. In the earlier show cause order, issued on June 4, 2002, that preceded the Hearing Order, the Commission directed Avista Corporation and others to show cause why their market-based rate authority should not be revoked for their failure to comply with a Commission-ordered fact-finding investigation. *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 99 FERC ¶ 61,272 (2002).

[7] Hearing Order, 100 FERC ¶ 61,187 at P 13.

[8] The Chief Administrative Law Judge (Chief Judge), who was the presiding judge in this proceeding, severed non-Avista issues dealing with allegations against EPMI and PGE, to be addressed elsewhere. *E.g.*, *Portland General Elec. Co.*, 105 FERC ¶ 61,302 (2003).

4. On April 9, 2003, the Chief Judge ruled that the settlement could not be certified because it was in conflict with the Commission investigative staff's March 26, 2003 Final Report on Price Manipulation in Western Markets in Docket No. PA02-2-000 and the California Independent System Operator Corporation Report of October 4, 2002 (Analysis of Trading and Scheduling Strategies Described in Enron Memos). Thus, the Chief Judge directed Trial Staff to supplement its Investigation Report and describe the scope of its investigation.

5. On May 15, 2003, Trial Staff submitted a Supplemental Investigation Report, with affidavits which were admitted into evidence, and it presented a witness at a conference before the Chief Judge to summarize the supplement and answer clarifying questions. On May 27, 2003, the California Attorney General, the California Electricity Oversight Board, and the California Public Utilities Commission jointly and Tacoma each submitted supplemental initial comments on the Supplemental Investigation Report. On June 3, 2003, Avista and Trial Staff each submitted supplemental reply comments on the Supplemental Investigation Report.

6. On June 25, 2003, the Chief Judge denied the request to certify the settlement to the Commission because there appeared to be unresolved issues of material fact, which included: (1) the definitions of the trading practices known as "ricochet," "get shorty" and counter-flow revenues from cut schedules in real time; (2) a lack of evidence concerning affiliate transactions; and (3) a conflict between the Trial Staff's conclusions and the transcripts of the trader conversations referenced by Tacoma's witness.[9]

7. On July 10, 2003, the Trial Staff filed a motion asking the Chief Judge to reconsider his order denying certification, and Avista sought interlocutory appeal of the Chief Judge's order. On July 17, 2003, Avista filed an answer supporting the Trial Staff's motion for reconsideration. On July 25, 2003, the California Attorney General filed an answer in opposition to the Trial Staff's motion for reconsideration.

8. The Chief Judge subsequently issued two orders. On July 24, 2003, as amended on July 28, 2003, the Chief Judge certified the settlement as a contested settlement and recommended its approval.[10] In a separate order issued on the same date, upon further consideration and in light of the Commission's show cause orders in *American Electric*

[9] *Avista Corp.*, 103 FERC ¶ 63,058 at P 22 (2003) (Order Denying Certification).

[10] *See Avista Corp.*, 104 FERC ¶ 63,021 (2003) (Certification Order).

Power Service Corporation[11] and *Enron Power Marketing, Inc.*,[12] the Chief Judge found that there were no longer any pending unresolved issues of material fact and that the record in this proceeding was sufficient for the Commission to base a determination on the merits of the settlement.[13] Thus, the Chief Judge granted Trial Staff's motion for reconsideration, denied Avista's motion for leave to take an interlocutory appeal as moot, and canceled the procedural schedule.[14] And, as noted above, having reconsidered, he certified the settlement with a recommendation that it be approved.

9. On August 8, 2003, the California Parties submitted a motion for reconsideration asking the Chief Judge to reconsider the Certification Order and the Order Granting Reconsideration. They asked the Chief Judge to certify their motion to the Commission if he believed that he could no longer act on the motion. On August 22, 2003, Avista filed an answer to the California Parties' motion for reconsideration.[15]

10. On April 19, 2004, the Commission approved the contested settlement.[16] Tacoma and the California Parties filed requests for rehearing of the Settlement Order.

11. On September 28, 2004, the People of the State of Montana (Montana) filed a motion to intervene out-of-time. Montana states that it seeks to intervene now due to the Commission's release of information in Docket No. EL02-114-000 regarding the relationship between Avista and Enron. Montana states that this information indicates that Montana interests may have been substantially affected by Avista's actions. Montana agrees to accept the record in this proceeding as it currently exists. Avista filed an answer in opposition to Montana's motion. Montana filed an answer to Avista, in

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[11] *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003) (Gaming Practices Order), *reh'g denied*, 106 FERC ¶ 61,020 (2004).

[12] *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Order), *reh'g denied*, 106 FERC ¶ 61,020 (2004).

[13] *Avista Corp.*, 104 FERC ¶ 63,020 (2003) (Order Granting Reconsideration).

[14] *Id.*

[15] These pleadings, filed on August 8, 2003 and August 22, 2003, were considered by the Commission in reaching its conclusions in the Settlement Order. *See* Settlement Order, 107 FERC ¶ 61,055 at P 38 n.19.

[16] *Id.* at P 1, 45.

which it states that it does not seek rehearing of the Settlement Order nor does it seek to conduct any discovery. Montana states that it only seeks to gain access to confidential documents in this docket that are only available to intervenors so that it can complete its authorized state law investigation.

Discussion

A. Procedural Matters

12. We will deny Montana's request for late intervention. When late intervention is sought after the issuance of a dispositive order**,** the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.[17] Montana has not met its burden of justifying late intervention. Montana has other means available to obtain access to the data at issue rather than to burden this Commission's proceeding or prejudice the parties in this proceeding at this late date solely in order to obtain documents for a state investigation.

B. Requests for Rehearing

1. Trader Transcripts

13. On rehearing, Tacoma states that, in its comments in opposition to the settlement, it included the Affidavit of Philip J. Movish (Movish Affidavit) which provided 13 examples from trader transcripts which documented Avista's participation in improper transactions with Enron during the period under review in this proceeding. Tacoma states that, in the Order Denying Certification, the Chief Judge found that the Trial Staff's conclusions were directly contrary to the 13 examples set forth in the Movish Affidavit and thus presented a clear demonstration of unresolved genuine issues of material fact.[18]

14. Tacoma challenges the lack of discussion in the Order Granting Reconsideration as to how the Chief Judge' concerns, expressed in the Order Denying Certification, about the Movish Affidavit's 13 examples had been allayed when the record had not changed. Tacoma states that the discussion in the Settlement Order does not mention the concerns expressed regarding the trader transcripts or the Chief Judge's change of position on

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[17] *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

[18] *Citing* Order Denying Certification, 103 FERC ¶ 63,058 at P 22.

those concerns. Tacoma contends that the Commission's decision to accept the settlement was flawed.

15. We find that Tacoma's arguments are misplaced. In the Order Granting Reconsideration, the Chief Judge explained in detail how he became convinced that there was no longer any question of material fact concerning the transcripts of the tapes relied upon by Mr. Movish.[19] The Chief Judge explained as follows:

> With regard to the Chief Judge's concerns about contrary conclusions between Tacoma's Witness Movish in his affidavit and the Commission trial staff's conclusion reached in its investigation, both Avista in its motion for interlocutory appeal, and the trial staff in its motion for reconsideration point out that the transcripts cited by Mr. Movish are the same transcripts referenced by the Commission in its August 13, 2002 (100 FERC ¶ 61,187), order setting this case for hearing. The Commission trial staff and Avista point out that Avista's response to the August 13, 2003 [sic], Order offered extensive review of the transcripts and associated transactions. Further, the trial staff conducted an extensive review of the involved transactions, including a review of documents, correspondence, accounting records, internal reports, transaction logs, and a review of the actual tapes and found that no executive or employee of Avista engaged in or knowingly facilitated any of the Enron trading strategies. A description of the Commission trial staff's investigation was provided under oath by a trial staff witness at a prehearing conference held on May 20, 2003. Tacoma and the California parties were permitted to question the trial staff's witness. The Chief Judge is convinced that there is no longer any question of material fact concerning the transcripts of the tapes relied upon by Mr. Movish.[20]

16. In the Settlement Order, moreover, the Commission provided a summary of Trial Staff's review of the tape recordings of trader conversations[21] and noted Trial Staff's concern that trader tapes showed that energy traders for Avista Utilities suspected that transactions during the period in question may have been in violation of the Commission's Code of Conduct but that they did not inform upper management of their

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[19] Order Granting Reconsideration, 104 FERC ¶ 63,020 at P 6.

[20] *Id.*

[21] Settlement Order, 107 FERC ¶ 61,055 at P 24-25, 40-41, 45.

suspicions.[22] After reviewing the record and comments filed, the Commission found that the record in this proceeding both showed that Trial Staff conducted an extensive and thorough investigation and indicated that Avista Utilities and Avista Energy did not knowingly engage in or facilitate the improper trading strategies at issue here. Tacoma has failed to convince us otherwise; accordingly, we deny rehearing.

2. Scope of Proceeding

17. On rehearing, Tacoma states that, in the Hearing Order, the Commission defined the scope of investigation in this proceeding as "address[ing] the extent to which Avista engaged in or facilitated trading strategies identified in the Enron memoranda as well as the circumvention of prohibitions on affiliate sales, and the imposition of any appropriate remedies such as refunds and revocation of market-based rates."[23] Tacoma states that, in the Order Denying Certification, the Chief Judge identified as an unanswered issue of material fact the allegations that Avista engaged in the Enron practices of ricochet, get shorty and counter-flow revenues from cut schedules in real time.[24]

18. Tacoma argues that the Chief Judge incorrectly determined that the Gaming Practices Order and Partnership Order disposed of the dispute in this proceeding regarding the definition of ricochet transactions, get shorty, and deathstar[25] because the Commission had stated that those orders were inapplicable to the instant investigation.[26] Tacoma claims that, with only cursory mention, the Commission erroneously sanctioned the Chief Judge's retroactive application of the Gaming Practices Order definitions.[27]

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[22] *Id.* at P 14. In response, the settlement provides that Avista Utilities and Avista Energy commit to maintain a training program, to be conducted at least annually, on the applicable Commission Code of Conduct for all employees engaged in the trading of electric energy and capacity, and maintain records of successful completion of the training. *Id.*

[23] *Citing* Hearing Order, 100 FERC ¶ 61,187 at P 11.

[24] *Citing* Order Denying Certification, 103 FERC ¶ 63,058 at P 22.

[25] *Citing* Order Granting Reconsideration, 104 FERC ¶ 63,020 at P 3.

[26] *Citing* Gaming Practices Order, 103 FERC ¶ 61,345 at P 7 n.6; Partnership Order, 103 FERC ¶ 61,346 at P 7 n.9.

[27] *Citing* Settlement Order, 107 FERC ¶ 61,055 at P 43.

19. We disagree. The Commission did not state that the Gaming Practices Order and Partnership Order were inapplicable to the instant investigation. Rather, the Commission stated simply that those orders did not address Avista Corporation because there was a separate section 206 proceeding investigating Avista's conduct.[28] The Commission never indicated that the definitions of the improper practices disclosed in the Enron memoranda, set out in the Gaming Practices Order,[29] could not be used in the various section 206 proceedings investigating whether parties had engaged in those improper practices. Since the Enron memoranda underlie all of the various section 206 investigations, the definitions of the specific practices discussed in those memoranda can reasonably be used in all of the section 206 proceedings. Accordingly, we deny rehearing.

20. Tacoma also claims that the Chief Judge incorrectly adopted the narrow scope of the Gaming Practices Order, which was focused solely on violations of the California Independent System Operator Corporation (CAISO) and the California Power Exchange (PX) tariffs, rather than maintaining a broad scope for the instant investigation, *inter alia*, whether Avista engaged in or facilitated the trading strategies identified in the Enron memoranda.[30] Tacoma's argument is incorrect. There is no indication in the Order Granting Reconsideration that the Chief Judge redefined the scope of the proceeding to violations of the CAISO and PX tariffs. In the Order Granting Reconsideration, the Chief Judge did state that: "[t]here is no question concerning the fact that the issues in those cases are identical with the issues addressed in this proceeding and that the definitions [in the Enron memoranda] would directly cover the allegations concerning Avista here." However, a statement that the issues are the same does not equate with a narrowing of the scope of the investigation. Furthermore, the Order Granting Reconsideration was issued after Trial Staff finished its investigation in this proceeding; therefore, that order could not have had any impact on the scope of the investigation conducted by Trial Staff. In fact, the Chief Judge noted that Trial Staff had used the same definitions in conducting its investigation.[31] In the Settlement Order, as well, the Commission did not change the scope of the investigation; the Commission only noted that the definitions of the

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[28] *See* Gaming Practices Order, 103 FERC ¶ 61,345 at P 7 n.6; Partnership Order, 103 FERC ¶ 61,346 at P 7 n.9.

[29] Gaming Practices Order, 103 FERC ¶ 61,345 at P 37-38, 42-45, 49-50.

[30] *Citing id*. at P 1-2; Hearing Order, 100 FERC ¶ 61,187 at P 11.

[31] Order Granting Reconsideration, 104 FERC ¶ 63,020 at P 4. We note that the definitions were set forth in the Gaming Practices Order. *See supra* note 29.

misconduct that the Trial Staff based its investigation upon here were consistent with the practices addressed in the Gaming Practices Order and found that Trial Staff, in fact, had taken a "broad view."[32] For these reasons, we deny the request for rehearing.

3. Enron Tapes

21. On rehearing, Tacoma asserts that the Commission erroneously failed to address Tacoma's request to defer consideration of any settlement until after the release of the Enron tapes seized by the Department of Justice (DOJ) and analysis of the tapes by the Commission and intervenors. Tacoma argues that, considering the prominence of Enron in Avista's transactions, as evidenced in the trader transcripts, this settlement continues to be premature.

22. In the Settlement Order, the Commission noted Trial Staff's response that Tacoma mischaracterized the release of Enron tapes by DOJ; essentially, there was no wholesale public release expected imminently, but rather they were to be provided by DOJ on a limited basis in Docket No. EL02-114-000 and were subject to a protective order in that proceeding.[33] Furthermore, under the settlement, Avista Utilities and Avista Energy committed to supplement their responses filed in this docket should they discover new information material to the issues set for hearing, and the settlement does not preclude the Commission or its staff from pursuing any matters based upon new information. Since the DOJ tapes were not available in this docket at the time at issue (and were not expected to be released imminently) and since the Commission is free to pursue any matters based upon new information that might be available in the future (including from DOJ tapes that might be made public at some point in the future), the Commission finds that it was appropriate not to delay the settlement. Accordingly, we deny rehearing.

4. Data From Western Market Outside of California

23. On rehearing, Tacoma argues that the Commission erred by failing to review sufficient data from the Western market outside of California. Tacoma asserts that the Commission failed to address Tacoma's argument that the broadly-initiated investigation of Avista set forth in the Hearing Order required a review of Avista's activities with all participants in the Western market, not just in the California sub-market. Tacoma also asserts that, without this needed analysis, the Trial Staff's Investigation Report wrongly concluded that no evidence existed that Avista had knowingly engaged in or facilitated

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[32] Settlement Order, 107 FERC ¶ 61,055 at P 43.

[33] *Id.* at P 36.

any improper trading strategies or manipulation and the Commission's Trial Staff wrongly entered into the settlement on that basis. Tacoma adds that, given that the Hearing Order did not limit the instant investigation to the CAISO/PX markets, the Commission acted arbitrarily and capriciously by approving a settlement based on an investigation that did not adequately ascertain Avista's role in other transactions, and with market participants other than Enron and PGE, throughout the Western market.

24. We disagree with Tacoma. As the Commission noted in the Settlement Order, Trial Staff took a "broad view" of its investigative authority in this proceeding.[34] There is no indication that Trial Staff limited the instant investigation to the CAISO/PX markets. On the contrary, the record shows that Trial Staff conducted an extensive and thorough investigation,[35] which went beyond the CAISO/PX markets.[36]

5. Standard for Approval of Contested Settlements

25. On rehearing, the California Parties contend that the Commission impermissibly deviated from its policy for approving contested settlements, which they claim allows approval: (1) based on the merits of the contested issues; (2) if it determines that the settlement as a whole provides an overall just and reasonable result; (3) if the benefits of the settlement for the directly affected settling parties outweigh the nature of the objections and the interest of the contesting party is sufficiently attenuated so that the settlement can be analyzed under the fair and reasonable standard applicable to uncontested settlements; and (4) by severing the contesting parties or contested issues and approving the settlement as uncontested for all consenting parties.[37]

26. Despite the California Parties' suggestion to the contrary, the only issues of material fact (which were identified by the Chief Judge) were (1) the definitions of the trading practices known as "ricochet," "get shorty" and counter-flow revenues from cut schedules in real time; (2) a lack of evidence concerning affiliate transactions; and (3) a conflict between the Trial Staff's conclusions and the transcripts of the trader

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[34] *Id.* at P 43.

[35] *See id.* at P 40-41.

[36] *See, e.g.*, Settlement App. A/Trial Staff Investigation Report at pp. 22-24, 30-33, 37-39, 41-45.

[37] *Citing Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 at 62,342-45 (1998), *reh'g denied*, 87 FERC ¶ 61,110, *reh'g denied*, 88 FERC ¶ 61,168 (1999) (Trailblazer).

conversations referenced by Tacoma's witness.[38] In the Order Granting Reconsideration, the Chief Judge explained why, on reconsideration, each of those issues was no longer an issue of material fact and he determined that the settlement should be certified.[39] The Commission agreed and approved the settlement based on the merits of the contested issues.

27. The California Parties also argue that the Commission failed to articulate a reasoned basis for finding that the settlement provides a just and reasonable result. The California Parties state that the Commission is required to make a determination that the settlement provides a remedy sufficient to put those harmed by Avista's misconduct in the position that they would have been if Avista did not engage in misconduct.[40]

28. Contrary to the California Parties assertion, the investigation in this proceeding did not find misconduct by Avista.[41] However, Trial Staff did find areas of concern, which Avista agreed to address pursuant to the settlement. Based upon the lack of evidence of misconduct and the steps taken to address areas of concern, the Commission correctly determined that the settlement provided a reasonable resolution of the matters at issue.[42]

29. The California Parties claim that the Commission could not determine that the benefits of the settlement outweighed the objections and that the interests of the California Parties were sufficiently attenuated so that the settlement could be analyzed under the "fair and reasonable" standard applicable to uncontested settlements.

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[38] Order Denying Certification, 103 FERC ¶ 63,058 at P 22.

[39] Order Granting Reconsideration, 104 FERC ¶ 63,020 at P 3-4, 6-7.

[40] There is no requirement that a settlement must put the parties in the same positions that they would have been in had certain conduct or actions not occurred. Such an inflexible standard would make settlements impossible in all but the rarest of cases; settlements would essentially need to replicate the results of litigation. Rather, settlements can be and often are a flexible tool to resolve disputes fairly and reasonably – and often innovatively – and in an expeditious manner, thus saving parties the time, resources and uncertainty of litigation.

[41] Settlement Order, 107 FERC ¶ 61,055 at P 11, 39, 45.

[42] *Id*. at P 11-15, 39.

30. This argument is misplaced. The Commission did determine that the benefits of the settlement, which addressed the only areas of any real concern,[43] outweighed the objections. Additionally, here, the Commission did not apply the "fair and reasonable" standard that is applicable to uncontested settlements; it approved the settlement pursuant to the statutory "just and reasonable" standard that applies in the case of contested settlements.[44]

31. Finally, the California Parties assert that the Commission improperly failed to sever the contesting parties or the contested issues. The California Parties add that the Settlement Order does not respond to the genuine issues of material fact raised by the California Parties. We disagree. The Chief Judge had already severed issues regarding PGE and EPMI out of this proceeding,[45] and the Commission found no need to sever further parties or issues from this proceeding. Furthermore, the Commission agrees with the Chief Judge's determination that there were no genuine issues of material fact remaining in this proceeding that would have required an evidentiary hearing.[46]

6. Suspension of Hearing Procedures

32. The California Parties contend that the Commission impermissibly precluded the development of an evidentiary record. The California Parties argue that, given the issues of material fact that exist, the approval of the settlement prior to the development of an evidentiary record was premature.

33. We disagree. As the Chief Judge found, no genuine issues of material fact existed that would have required an evidentiary hearing;[47] therefore, it was not premature to suspend the hearing procedures and approve the settlement.

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[43] *Id*. The settlement, in fact, provides that, among other things, Avista will improve its system of taping energy trader conversations, improve its account settlement process and maintain an annual training program on the applicable Code of Conduct for all employees engaged in the trading of electric energy and capacity. *Id*. at P 1, 12-15.

[44] *Id*. at P 1, 39, 45. *Compare* 18 C.F.R. § 385.602(g)(3) (2004) *with* 18 C.F.R § 385.602(h)(1)(i) (2004) *and* 16 U.S.C. §§ 824d, 824e (2000).

[45] *See supra* note 8.

[46] Order Granting Reconsideration, 104 FERC ¶ 63,020 at P 7, 9.

[47] *Id*.

7. Type of Proceeding

34. The California Parties argue that the proceeding was improperly conducted in the manner of an internal Commission investigation under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2004), rather than as a section 206 investigation. The California Parties contend that their assertion is supported by the establishment of a class of discovery that was available only to Trial Staff and the suspension of the proceeding prior to the completion of discovery and the submittal of any testimony.

35. The California Parties are mistaken. This case was not a Part 1b investigation. The Settlement Order explicitly distinguished this case from a Part 1b investigation,[48] and this case was *not* one of the cases in which the Commission found that, because they were Part 1b investigations, there were no parties.[49] While there was a protective order that limited access to certain information,[50] that is not an unusual circumstance; protective orders are often a feature of Commission proceedings. That fact does not make the proceeding a Part 1b investigation.

36. Moreover, the California Parties did not timely challenge the protective order (for example, by asking the Chief Judge either to reconsider his adoption of a protective order or to modify the protective order) nor did they timely seek an interlocutory appeal. It is thus too late for them to claim now that they were inappropriately disadvantaged.

The Commission orders:

The requests for rehearing of Tacoma and the California Parties are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.

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[48] Settlement Order, 107 FERC ¶ 61,055 at P 42 & n.21.

[49] *Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices*, 105 FERC ¶ 61,063, *order on reh'g*, 105 FERC ¶ 61,281 (2003)

[50] *Compare* Settlement Order, 107 FERC ¶ 61,055 at P 17 *with id.* at P 27.