

122 FERC ¶ 61,015
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, and Jon Wellinghoff.

Enron Power Marketing, Inc. Docket No. EL03-180-032
and Enron Energy Services Inc.

Enron Power Marketing, Inc. Docket No. EL03-154-026
and Enron Energy Services Inc.

El Paso Electric Company, Docket No. EL02-113-029
Enron Power Marketing, Inc., and
Enron Capital Trade Resources Corp.

Portland General Electric Company Docket No. EL02-114-027

Enron Power Marketing, Inc. Docket No. EL02-115-031

Public Utility District No. 1 of Snohomish Docket No. EL05-139-003
County, Washington

San Diego Gas & Electric Company Docket No. EL00-95-201

v.

Sellers of Energy and Ancillary Services

Investigation of Practices of the Docket No. EL00-98-186
California Independent System Operator
and the California Power Exchange

Puget Sound Energy, Inc. Docket No. EL01-10-028

v.

Sellers of Energy and/or Capacity

Fact-Finding Investigation Into Possible Docket No. PA02-2-045
Manipulation of Electric and Natural
Gas Prices

Investigation of Anomalous Bidding Docket No. IN03-10-031
Behavior and Practices in Western
Markets

State of California, *ex rel.* Bill Lockyer,
Attorney General of the State of
California

Docket No. EL02-71-008

v.

British Columbia Power Exchange Corp.,
et al.

Nevada Power Company, *et al.*

Docket No. EL02-28-007

v.

Enron Power Marketing, Inc.

City of Santa Clara, California

Docket No. EL04-114-003

v.

Enron Power Marketing, Inc.

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

Docket No. EL03-77-005

ORDER APPROVING UNCONTESTED SETTLEMENT

(Issued January 8, 2008)

1. In this order, the Commission¹ approves a Settlement filed on October 9, 2007. This Settlement involves agreements among: Enron,² Public Utility District No.1 of

¹ On December 21, 2007, Chairman Joseph T. Kelliher issued a memorandum to the file in Docket Nos. EL07-49, EL07-50, EL07-40, EL06-89, EL00-95, EL00-98, EL01-118, EL02-113, EL02-114, EL02-115, PA02-2, ER02-1656, EL03-137 and CP04-5 documenting his decision, based on a memorandum from General and Administrative Law dated November 13, 2007, not to recuse himself from considering matters in this docket.

² As set forth in the Settlement, Enron means the Enron Debtors and the Enron Non-Debtor Gas Entities. The Enron Debtors are Enron Corp.; Enron Power Marketing, Inc.; Enron North America Corp. (formerly known as Enron Capital and Trade Resources Corp.); Enron Energy Marketing Corp.; Enron Energy Services Inc.; Enron Energy Services North America, Inc.; Enron Capital & Trade Resources International Corp.; Enron Energy Services, LLC; Enron Energy Services Operations, Inc.; Enron Natural

(continued)

Snohomish County, Washington (Snohomish) and the Commission Trial Staff (Trial Staff) (collectively, Settling Parties). The Settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement.” The Settlement was filed pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.³

2. This Settlement is one of a number of recent settlements⁴ in a series of settlement proceedings arising from the crisis in western energy markets in 2000 and 2001. The Commission continues to believe that fair and reasonable settlements, rather than costly, protracted Commission and court litigation, are the most effective and efficient way to bring closure to the numerous proceedings spawned by dysfunctions in the California and western energy markets. According to Settling Parties, with this Settlement, the Grant Settlement and the allowance of the California Power Exchange (CalPX) claim,⁵ as discussed below, Enron will have resolved every timely proof of claim filed in the Enron Bankruptcy Court related to Enron's actions and transactions in the western energy markets during the period January 16, 1997 through June 25, 2003. In addition, as previously approved by the Commission, the Settling Parties assert that the Settlement provides additional monetary protection for non-settling parties, as discussed below.

3. The Commission approves this Settlement as being fair and reasonable and in the public interest, as discussed below. The instant Settlement (with prior Commission-approved settlements) resolves all issues as to Enron in the above-captioned proceedings,

Gas Marketing Corp.; and ENA Upstream Company, LLC. The Enron Non-Debtor Gas Entities are Enron Canada Corp.; Enron Compression Services Company; and Enron MW, LLC.

³ 18 C.F.R. § 385.602 (2007).

⁴ Among these settlements is a settlement with Public Utility District No. 1 of Grant County, Washington (Grant Settlement) filed on September 20, 2007 in Docket No. EL00-95, *et al.* The Grant Settlement will resolve Grant's proof of claim filed with the United States Bankruptcy Court for the Southern District of New York (Enron Bankruptcy Court). The grant Settlement was approved by the Commission on December 21, 2007. *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 121 FERC ¶ 61,291 (2007).

⁵ Enron has filed a stipulation in the Enron Bankruptcy Court to allow the CalPX Claim.

as discussed below. Accordingly, the Commission also dismisses Enron with prejudice from the above-captioned proceedings.

I. Background

4. In the Joint Explanatory Statement, Settling Parties state that Snohomish and Enron were parties to a Master Power Purchase and Sale Agreement (Master Agreement) dated January 26, 2001 and a long-term confirmation agreement executed under the Master Agreement, pursuant to which Enron would sell power to Snohomish under specified terms from April 1, 2001 until December 31, 2009.

5. According to Settling Parties, on November 28, 2001, Snohomish sent Enron a letter terminating the Master Agreement. On December 2, 2001, Enron filed a petition for bankruptcy in the Enron Bankruptcy Court. Subsequently, Snohomish refused to pay a termination fee provided under the Master Agreement. On January 31, 2003, Enron filed a complaint against Snohomish in the Enron Bankruptcy Court, seeking to recover a termination payment of approximately \$116 million plus interest.

6. Settling Parties further state that on August 5, 2005, Snohomish filed a petition under the Cantwell Amendment⁶ in Docket No. EL05-139, seeking a determination from the Commission that Enron was not entitled to collect the termination payment (Cantwell Amendment Proceeding). According to Settling Parties on June 28, 2006, the Commission granted the petition insofar as it sought to deny Enron's termination payment claim under state contract law.⁷ Both Enron and Snohomish sought rehearing, and Enron filed a direct appeal with the District Court for the Southern District of New York (District Court). Settling Parties also state that on August 31, 2006, the District Court ruled that the Cantwell Amendment did not deprive the Enron Bankruptcy Court of

⁶ See Energy Policy Act of 2005, Pub. L. No. 109-58; 119 Stat. 983-84 (2005) (EPAAct). Section 1290 of EPAAct is referred to as the "Cantwell Amendment." The Cantwell Amendment provides that "the Commission shall have exclusive jurisdiction under the Federal Power Act ... to determine whether a requirement to make termination payments for power, not delivered by the seller, or any successor in interest of the seller, is not permitted under a rate schedule (or contract under such a schedule), or is otherwise unlawful on the grounds that the contract is unjust and unreasonable or contrary to the public interest."

⁷ Settling Parties cite to *Pub. Util. Dist. No. 1 of Snohomish County, Wash.*, 115 FERC ¶ 61,375 (2006).

jurisdiction to decide the state contract law issues.⁸ Snohomish, Luzenac America, Inc. (Luzenac) and the United States appealed that decision to the United State Court of Appeals for the Second Circuit (Second Circuit). Settling Parties state that these appeals have been stayed pending approval of this settlement.

7. The instant Settlement was reached after the Enron Bankruptcy Court directed arbitration. According to Settling Parties, the Settlement will resolve not only the proceeding in Docket. No. EL05-139 but also remaining issues in the proceedings described below.

A. Gaming/Partnership Proceeding in Docket Nos. EL03-180, EL03-154, EL02-114, EL02-115, and EL02-113

8. On June 25, 2003, the Commission issued two orders requiring a total of 53 entities to show cause why they had not engaged in activities that constitute gaming and/or anomalous market behavior in violation of the California Independent System Operator Corporation (CAISO) and CalPX tariffs during the period January 1, 2000 to June 20, 2001 (Gaming Practices).⁹ According to Settling Parties, to date, the Commission has either dismissed actions against or approved settlements involving each of the companies named in the show cause orders,¹⁰ except for Enron.

⁸ Settling Parties cite to *Enron Power Mktg., Inc. v. Luzenac America, Inc.*, No. 05-9244, 2006 U.S. Dist. LEXIS 62922 (S.D.N.Y. 2006).

⁹ *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003) (*Gaming Order*); *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003) (*Partnership Order*). Collectively, these orders are referred to as the Gaming /Partnership Proceedings.

¹⁰ *El Paso Electric Co.*, 104 FERC 61,115 (2003); *Portland General Electric Co.*, 105 FERC 61,302 (2003); *City of Redding, Cal.*, 106 FERC ¶ 61,023 (2004); *American Electric Power Serv. Corp.*, 106 FERC ¶ 61,025 (2004); *Puget Sound Energy, Inc.*, 106 FERC ¶ 61,026 (2004); *Williams Energy Serv. Corp.*, 106 FERC ¶ 61,027 (2004); *San Diego Gas & Electric Co.*, 106 FERC ¶ 61,028 (2004); *Idaho Power Co.*, 106 FERC ¶ 61,208 (2004); *Aquila Merchant Serv., Inc.*, 106 FERC ¶ 61,234 (2004); *PacifiCorp*, 106 FERC ¶ 61,235 (2004); *Portland General Electric Co.*, 106 FERC ¶ 61,236 (2004); *Morgan Stanley Capital Group Inc.*, 106 FERC ¶ 61,237 (2004); *Powerex Corp.*, 106 FERC ¶ 61,304 (2004); *Avista Corp.*, 107 FERC 61,055 (2004); *Modesto Irrigation Dist.*, 107 FERC ¶ 61,116 (2004); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 108 FERC ¶ 61,002 (2004); *Northern Cal. Power Agency*, 108 FERC ¶ 61,112 (2004); *Coral Power, L.L.C.*, 108 FERC ¶ 61,115 (2004); *Dynegy Power Mrktg*,

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9. On January 26, 2004, Chief Administrative Law Judge (ALJ) Curtis Wagner issued an order consolidating the Gaming and Partnership Proceedings.¹¹ On January 30, 2004, the Chief ALJ issued an errata consolidating Enron-related issues from Docket Nos. EL02-114-000 and EL02-115-001 with the Gaming/Partnership Proceedings.¹² On July 22, 2004, the Commission issued an order affirming the Initial Decision in Docket No. EL02-113-000,¹³ pertaining to the adjudication of Enron's liability resulting from its relationship with El Paso Electric Company, with the Gaming/Partnership Proceedings.¹⁴ In *El Paso*, the Commission also consolidated that docket and others with Docket Nos. EL03-180-000 and EL03-154-000, and directed proceedings before the ALJ in the consolidated proceedings.

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

¹¹ *Order of the Chief Judge Consolidating Gaming and Partnership Proceedings for Hearing and Decision*, Docket No. EL03-180-000, *et al.* (Jan. 26, 2004).

¹² *Enron Power Mktg., Inc.*, Errata, Docket No. EL03-180-000, *et al.* (Jan. 30, 2004).

¹³ *Enron Power Mktg., Inc.*, 104 FERC ¶ 63,010 (2003).

¹⁴ *El Paso Elec. Co.*, 108 FERC ¶ 61,071 (2004) (*El Paso*).

10. Settling Parties explain that Enron has executed settlements with a number of participants in the Gaming/Partnership Proceedings, which were approved by the Commission.¹⁵ As a result, the issues that remained with respect to Enron were primarily those raised by Snohomish. Accordingly, in January and February 2007, a hearing was held before ALJ Carmen A. Cintron, in which, according to Settling Parties, Snohomish was the only private party to offer evidence against Enron. An initial decision was issued on June 21, 2007.¹⁶ The deadline to file briefs on exceptions is currently stayed pending submission and approval of this Settlement.¹⁷

B. The Refund Proceeding in Docket Nos. EL00-95 and EL00-98

11. On August 23, 2000, the Commission instituted formal hearing procedures¹⁸ under the Federal Power Act (FPA)¹⁹ to investigate, among other things, “the justness and reasonableness of the rates of public utility sellers into the CAISO and PX markets, and

¹⁵ Specifically, Enron executed settlement agreements with the California Parties (Pacific Gas and Electric Company; Southern California Edison Company; San Diego Gas & Electric Company; the People of the State of California, *ex rel.* Edmund G. Brown Jr., Attorney General; The California Electricity Oversight Board; and the California Public Utilities Commission); the Attorney General of the States of Washington, Oregon and Montana; the Commission’s Office of Market Oversight and Investigations (now the Office of Enforcement or OE); Salt River Agricultural Improvement and Water District and New West Energy Corporation; Nevada Power Company and Sierra Pacific Power Company (collectively, Nevada Companies); The City of Santa Clara, California (Santa Clara); Valley Electric Association, Inc.; Metropolitan Water District of Southern California; the City of Tacoma, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Grant, and the Commission’s Trial Staff.

¹⁶ *Enron Power Mktg., Inc.*, 119 FERC ¶ 63,013 (2007) (*Gaming/Partnership Initial Decision*).

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

¹⁸ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 92 FERC ¶ 61,172 (2000).

¹⁹ 16 U.S.C. §§ 796, *et seq.* (2004), *as amended by* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

also to investigate whether the tariffs, contracts, institutional structures and bylaws of the CAISO and PX were adversely affecting the wholesale power markets in California.”²⁰

12. Parties have litigated the refund-related issues before the Commission and the United States Court of Appeals for the Ninth Circuit (Ninth Circuit). Settling Parties allege that certain issues may still be subject to further proceedings before the Commission, the Ninth Circuit and the United States Supreme Court. Snohomish intervened in the refund proceeding out-of-time on March 7, 2003, but did not participate actively in the litigation.

C. The Pacific Northwest Proceeding in Docket No. EL01-10

13. Settling Parties state that on October 26, 2000, Puget Sound Energy, Inc. (Puget) filed a complaint asking the Commission to cap the prices at which sellers of energy or capacity under the Western Systems Power Pool (WSPP) Agreement may sell energy or capacity into the Pacific Northwest's wholesale power markets subject to the Commission's jurisdiction. On December 15, 2000, the Commission dismissed Puget's complaint²¹ but subsequently ordered a preliminary evidentiary hearing to develop a factual record on the issue of whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest for the period December 25, 2000 through June 20, 2001.²² According to Settling Parties, after conducting the preliminary evidentiary hearing, the ALJ found that no refunds were merited for sales in the Pacific Northwest during the period at issue.²³ On June 25, 2003, the Commission adopted the ALJ's recommendation that refunds be denied, and denied rehearing of the dismissal of the complaint.²⁴ The Ninth Circuit issued a decision remanding the case to the Commission on August 24, 2007.²⁵

²⁰ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 97 FERC ¶ 61,275, at 62,173 (2001).

²¹ *Puget Sound Energy, Inc.*, 93 FERC ¶ 61,294 (2000).

²² *San Diego Gas & Elec. Co. v. Seller of Energy and Ancillary Serv.*, 96 FERC ¶ 61,120 (2001).

²³ *Puget Sound Energy, Inc.*, 96 FERC ¶ 63,044 (2001).

²⁴ *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348 (2003).

²⁵ *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007).

D. The Investigation Proceedings in Docket Nos. PA02-2 and IN03-10

14. Settling Parties state that on March 26, 2003, following the Commission's directive,²⁶ Commission Staff issued a Final Report on Price Manipulation in Western Markets (Final Staff Report). According to Settling Parties, the Final Staff Report found that the Market Monitoring and Information Protocols (MMIP) contained in the CAISO and CalPX tariffs put participants on notice that misconduct that arose from abuses of market power, and that adversely affected the efficient operations of the CAISO and CalPX markets, were violations of the California ISO and PX tariffs. Settling Parties further explain that the Final Staff Report further stated that Commission Staff's preliminary analysis of spot-market clearing prices, as compared to generation input costs during May to October 2000, revealed what appeared to be instances of potential anomalous bidding behavior, as defined in the MMIP.

15. According to Settling Parties, on June 25, 2003, the Commission issued an order requiring demonstration that certain bids did not constitute anomalous market behavior in Docket No. IN03-10.²⁷ Settling Parties further state that Enron settled Docket No. IN03-10 with the OE as part of the California Settlement,²⁸ which included Enron's settlement with numerous entities, including OE and the Attorneys General of Oregon and Washington.

E. The Long-Term Contract Proceeding in Docket No. EL02-28 *et al.*

16. Nevada Companies filed complaints against Enron and other western power market participants alleging that the prices charged in long-term forward contracts were unjust and unreasonable or otherwise contrary to the public interest. Snohomish also filed a complaint against Morgan Stanley Capital Group, Inc. in Docket No. EL02-56. The Commission consolidated those proceedings and set them for hearing.²⁹ An initial

²⁶ *Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

²⁷ *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

²⁸ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,171 (2005) (*California Settlement Order*).

²⁹ *Nevada Power Co. v. Enron Power Mktg., Inc.*, 99 FERC ¶ 61,047 (2002).

decision was entered on December 19, 2002.³⁰ On June 26, 2003, the Commission affirmed that initial decision³¹ and on November 10, 2003, denied rehearing.³² The Nevada Companies, Snohomish, and others filed petitions for review with the Ninth Circuit. Enron entered into a settlement with the Nevada Companies, which the Commission approved on January 25, 2006.³³

17. The Ninth Circuit issued a decision remanding the case to the Commission on December 19, 2006.³⁴ Certain parties, not including Enron, petitioned the Supreme Court for *certiorari*. On September 25, 2007, the Supreme Court granted *certiorari*.³⁵

F. The Quarterly Reports Proceeding in Docket No. EL02-71

18. On March 20, 2002, the State of California, *ex rel.* Bill Lockyer, Attorney General, filed a complaint against generators and marketers selling into the CAISO and CalPX markets, alleging that their rates were not properly on file under section 205(d) of the FPA.³⁶ Enron was one of the respondents to the complaint. The complaint was dismissed in part, granted in part, and denied in part.³⁷ The Commission ordered certain respondents to refile their quarterly reports of wholesale power sales but declined to order refunds. The Commission denied rehearing,³⁸ and the State of California petitioned for

³⁰ *Nevada Power Co. v. Enron Power Mktg., Inc.*, 101 FERC ¶ 63,031 (2002).

³¹ *Nevada Power Co. v. Enron Power Mktg., Inc.*, 103 FERC ¶ 61,353 (2003).

³² *Nevada Power Co. v. Enron Power Mktg., Inc.*, 105 FERC ¶ 61,185 (2003).

³³ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 114 FERC ¶ 61,067 (2006).

³⁴ *Pub. Util. Dist No. 1 of Snohomish County, Wash. v. FERC*, 471 F.3d 1053 (9th Cir. 2006).

³⁵ *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County, Washington*, 2007 WL 1315838, 75 U.S.L.W. 3610, 76 U.S.L.W. 3019 (U.S. Sept. 25, 2007) (No. 06-1457).

³⁶ 16 U.S.C. § 824d (2004).

³⁷ *Lockyer v. British Columbia Power Exchange Corp.*, 99 FERC ¶ 61,247 (2002).

³⁸ *Lockyer v. British Columbia Power Exchange Corp.*, 100 FERC ¶ 61,295 (2002).

review in the Ninth Circuit. The Ninth Circuit remanded the matter to the Commission for further proceedings,³⁹ and the Supreme Court denied certiorari.⁴⁰ Enron has settled all disputes with the State of California and the other California Parties pursuant to the California Settlement, discussed below.⁴¹

G. City of Santa Clara, California v. Enron Power Marketing, Inc. in Docket No. EL04-114

19. On July 2, 2004, Santa Clara filed a complaint against Enron seeking a declaration that Enron was not entitled to collect a termination payment from Santa Clara under a bilateral contract between those parties. Alternatively, Santa Clara sought an order revoking Enron's market-based rate authority effective as of January 2000 and requiring Enron to calculate the termination payment on a cost of service basis. Snohomish intervened in that proceeding. On December 29, 2004, the Enron Bankruptcy Court determined that certain issues raised by Santa Clara before the Commission were properly before the Enron Bankruptcy Court and enjoined Santa Clara from pursuing those issues before the Commission. On January 10, 2005, Santa Clara filed a revised complaint. On March 11, 2005, the Commission issued an order denying the revised complaint in part and deferring consideration of certain issues until a final order on disgorgement of profits was issued in the Gaming/Partnership Proceeding.⁴² Santa Clara and Snohomish filed separate petitions for review with the Ninth Circuit. After Enron settled its disputes with Santa Clara,⁴³ Santa Clara filed a notice with the Commission withdrawing its complaint and withdrew its petition for review. Snohomish's petition remains on file with the Ninth Circuit, but has been stayed since 2005.

³⁹ *Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

⁴⁰ *Coral Power, L.L.C. v. California ex rel. Brown*, 127 S. Ct. 2972, 168 L. Ed. 2d 719, 75 U.S.L.W. 3678 (U.S. 2007).

⁴¹ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,171 (2005).

⁴² *City of Santa Clara, Cal. v. Enron Power Mktg., Inc.*, 110 FERC ¶ 61,281, *reh'g denied*, 112 FERC ¶ 61,280 (2005).

⁴³ *Enron Power Mktg., Inc.*, 115 FERC ¶ 61,376 (2006).

II. Overview of Settlement Terms

20. According to Settling Parties, the Settlement will resolve, as to Snohomish, all rights to participate or receive any monetary or non-monetary relief solely as to Enron in the above-captioned Commission proceedings. In addition, the Settlement will also resolve certain non-Commission proceedings, including those pending at the Enron Bankruptcy Court as between Enron and Snohomish. The monetary and non-monetary considerations involved in the Settlement are described below.

A. Settlement's Monetary Consideration

21. Under the Settlement, Snohomish will pay Enron a settlement payment of \$18,000,000 in full satisfaction of Enron's claim in litigation for an amount that today totals approximately \$180 million.⁴⁴ In addition, Trial Staff will allocate and assign all of its ownership, right, title and interest in the Trial Staff claim to Snohomish, which will, simultaneously with such transfer, irrevocably transfer and assign all of its ownership, right, title and interest in the Trial Staff claim to Enron.⁴⁵

B. Settlement's Non-Monetary Consideration

22. In return for the specified consideration, subject to the approvals, all rights, claims or remedies against Enron by Snohomish from time immemorial to the Settlement effective date, for refunds, disgorgement of profits, or other monetary or non-monetary remedies in the above-captioned Commission proceedings, as well as the proceeding in Docket Nos. EL03-77 and RP03-311, the proceedings before the Enron Bankruptcy Court, and the Cantwell Amendment Proceeding⁴⁶ will be resolved with prejudice and settled as of the Settlement effective date.⁴⁷

23. The Settlement will also resolve with prejudice and settle claims arising from the Snohomish-Enron Master Agreement, Snohomish's termination of the Master Agreement,

⁴⁴ Section 4.1.3 of the Settlement Agreement.

⁴⁵ Section 4.1.1 of the Settlement Agreement.

⁴⁶ The Cantwell Amendment Proceeding is the consolidated proceeding before the Second Circuit titled *Pub. Util. Dist. No. 1 of Snohomish County, Washington, et al. v. Enron Power Mktg, Inc.*, No. 07-1158-bk, *et al.*

⁴⁷ Section 6.1 of the Settlement Agreement.

or for delivered power thereunder, or under other contracts between Enron and Snohomish.⁴⁸

24. Subject to certain specified limitations, the Settlement Agreement provides also for mutual release and discharge from all past, existing and future claims, as specified in the Settlement Agreement, before the Commission and/or under the FPA, Natural Gas Act (NGA),⁴⁹ and/or including the Cantwell Amendment and any amendments to the FPA or NGA pursuant to EPAct, and/or any other state or federal law, that have been asserted or could or might have been asserted in any proceeding from time immemorial to the Settlement effective date.⁵⁰

C. Effective Date and Period Covered

25. The Settlement Agreement will become effective seven business days following the date that the Settlement Agreement has been approved by this Commission and the Enron Bankruptcy Court, without material change or condition unacceptable to any of the Settling Parties.⁵¹

D. Termination

26. The Settlement Agreement provides that the Settlement terminates if, prior to the Settlement effective date, the Commission or the Enron Bankruptcy Court acts to disapprove or materially alter the Settlement Agreement.⁵² The Settlement Agreement, unless otherwise agreed to by the Settling Parties, also terminates if the Commission and/or the Enron Bankruptcy Court fails to approve the Settlement Agreement, without material changes, on or prior to January 9, 2008.⁵³

⁴⁸ Section 6.2 of the Settlement Agreement.

⁴⁹ 15 U.S.C. §§ 717, *et seq.* (2004).

⁵⁰ Sections 6.4 and 2.2 of the Settlement Agreement.

⁵¹ Sections 1.49, 2.3, 7.1.1, 7.1.2, and 7.1.3.

⁵² Sections 2.4 and 7.1.3.

⁵³ Sections 2.3, 2.4, and 7.1.3.

E. Information Required by the Chief ALJ

27. Pursuant to the Notice to the Public issued by the Chief ALJ on October 15, 2003, errata issued October 23, 2003,⁵⁴ the Joint Explanatory Statement also provides the following information. The Settlement raises no policy implications because, in conjunction with the Grant Settlement and the allowance of the California PX Claim, and in light of the prior settlements as approved by the Commission in the prior settlement orders,⁵⁵ approval of the Settlement will resolve all timely proofs of claim related to Enron's actions and transactions in the western energy markets during the period January 16, 1997 through June 25, 2003. If the Settlement is approved and becomes effective, in addition to the withdrawals specifically specified in the Settlement, certain proceedings before other fora will be withdrawn. The Settlement does not involve issues of first impression or previous reversals on the issues involved.

F. Settling Parties' Request to Dismiss with Prejudice the Above-Captioned Proceedings as to Enron

28. In the Joint Explanatory Statement, the Settling Parties state that with this Settlement, the Grant Settlement and the allowance of the California PX Claim, Enron will have resolved every timely proof of claim filed in the Enron Bankruptcy Court related to Enron's actions and transactions in the western energy markets during the period January 16, 1997 through June 25, 2003. In addition, Settling Parties assert that, as approved by the Commission, Enron has provided additional monetary protection for non-settling parties.

⁵⁴ *Information to be Provided with Settlement Agreement*, Chief ALJ's Notice to the Public (Oct. 15, 2003).

⁵⁵ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,171 (2005); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,244 (2005); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 114 FERC ¶ 61,067 (2006); *Enron Power Mktg, Inc.*, 115 FERC ¶ 61,376 (2006); *Enron Power Mktg, Inc.*, 115 FERC ¶ 61,376 (2006); *Enron Power Mktg, Inc.*, 116 FERC ¶ 61,298 (2006); *Enron Power Mktg, Inc.*, 116 FERC ¶ 61,299 (2006); *Enron Power Mktg, Inc.*, 117 FERC ¶ 61,109 (2006); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 118 FERC ¶ 61,168 (2007); and *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 119 FERC ¶ 61,135 (2007).

29. According to Settling Parties, the California Settlement resolved all claims against Enron by the California Parties, the Attorneys General of Oregon and Washington and OE and also permitted parties to opt in to the agreement on the condition that their claims against Enron would also be resolved. Fourteen parties or groups of affiliated parties opted into the California Settlement.⁵⁶ In addition, Enron has opted into and/or elected to be bound by nine settlements between the California Parties and other entities.⁵⁷ Under the California Settlement, Enron assigned to the California Parties \$25 million in receivables claimed by Enron to be due it from the CAISO and CalPX, assigned and paid approximately \$22.4 million held by the CAISO as collateral related to certain meter reading claims, and allowed a claim of \$875 million in Enron's bankruptcy proceeding. Enron also allowed a \$600 million civil penalty claim under the California Settlement. Settling Parties assert that Enron provided additional consideration to the California Parties⁵⁸ and other specified parties, regardless of whether those other parties opted into

⁵⁶ Those fourteen parties and groups of affiliated parties are: (1) the City of Anaheim, California, (2) APX, Inc., (3) Aquila Merchant Services, (4) the City of Banning, California, (5) Constellation NewEnergy, Inc., (6) Dynegy Power Marketing, Inc., El Segundo Power LLC, Long Beach Generation LLC, Cabrillo Power I LLC and Cabrillo Power II LLC, (7) El Paso Marketing, LP, (8) IDACORP Energy L.P. and Idaho Power Company, (9) Illinova Energy Partners, (10) PacifiCorp, (11) Portland General Electric Company, (12) Pinnacle West Capital Corporation and Arizona Public Service Company, (13) the City of Riverside, California, and (14) Salt River Project Agricultural Improvement and Power District.

⁵⁷ Those nine settlements include the California Parties' settlements with: (1) Reliant Energy, Inc. and affiliates, (2) Public Service Company of Colorado, (3) Portland General Electric Company, (4) Eugene Water & Electric Board, (5) PacifiCorp, (6) Duke Energy Corporation and affiliates, (7) Dynegy, Inc. and affiliates, (8) El Paso Marketing, LP, and (9) Mirant Corporation and affiliates.

⁵⁸ Enron assigned to the California Parties any refunds or rights to refunds that Enron has in the Refund Proceeding, the Gaming/Partnership Proceeding and other proceedings. *California Settlement Order*, 113 FERC ¶ 61,171 at P 8.

the California Settlement.⁵⁹ As part of the California Settlement, Enron also settled its liability in Docket No. IN03-10.⁶⁰

30. According to Settling Parties, the California Settlement established monetary protections for non-settling parties by establishing the Enron Refund Escrow and an allowed administrative claim to pay Enron's share of CalPX wind-up charges. Settling Parties state that the funds set aside in the Enron Refund Escrow were to be allocated to non-settling parties, regardless of whether they had filed a proof of claim in the Enron Bankruptcy Court proceeding.⁶¹

31. Settling Parties further state that contemporaneously with this Settlement, Enron filed a notice with the Enron Bankruptcy Court that will allow the CalPX Claim as an unsecured claim at the full reserved value of \$17.5 million. According to Settling Parties, as a result, the assignees of the CalPX Claim will obtain financial protection over and above the cash amounts already set aside for them in the Enron Settlement Reserve.

32. On March 1, 2007, the Commission approved a multi-party settlement among Enron, APX Inc. (APX) and those parties that participated in the California ISO and PX through APX (APX Settlement).⁶² The APX Settlement resolved claims against Enron

⁵⁹ For example, pursuant to the California Settlement, the California ISO distributed the \$22.4 million in collateral related to certain meter reading claims against Enron without regard to whether the recipients of those funds opted into the California Settlement. *Id.* at P 7.

⁶⁰ Under the California Settlement, Enron was required to transfer \$537,814.01 of the receivable assigned to the California Parties to the escrow account from which distributions will be made in Phase II of the Partnership/Gaming Proceeding.

⁶¹ The Commission expressly found that "the rights of the Non-Settling Participants are amply protected by the Settlement." *California Settlement Order*, 113 FERC ¶ 61,171 at P 25.

⁶² *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 118 FERC ¶ 61,168 (2007).

by numerous parties and provided for further protection for those parties who had not yet settled with Enron by establishing an account specifically for non-settling parties.⁶³

33. Enron has also settled the claims against it raised by a number of other claimants, including the SRP Parties,⁶⁴ the Nevada Companies,⁶⁵ Santa Clara, Valley Electric Association,⁶⁶ Metropolitan Water District,⁶⁷ the Montana Attorney General,⁶⁸ the City of Tacoma, Washington,⁶⁹ and Public Utility District No. 1 of Grays Harbor County, Washington.⁷⁰

34. According to Settling Parties, as is the case with its settlement with Snohomish, many of Enron's prior settlements have resolved litigation brought by Enron to collect payments owed under terminated contracts.⁷¹

⁶³ The APX Settlement specified that unless the order approving the APX Settlement made an express, specific finding to the contrary, the order shall be deemed and construed as an order finding and concluding that the funds placed in the Enron Settlement Reserve are "sufficient and adequate to protect the interests of Enron Non-Settling Parties."

⁶⁴ SRP Parties are comprised of New West Energy Corporation and Salt River Project Agricultural Improvement and Power District. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 113 FERC ¶ 61,226, *corrected at* 113 FERC ¶ 61,244 (2005).

⁶⁵ *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 114 FERC ¶ 61,057 (2006).

⁶⁶ *Enron Power Mktg., Inc.*, 115 FERC ¶ 61,376 (2006).

⁶⁷ *Enron Power Mktg., Inc.*, 115 FERC ¶ 61,377 (2006).

⁶⁸ *Enron Power Mktg., Inc.*, 116 FERC ¶ 61,298 (2006).

⁶⁹ *Enron Power Mktg., Inc.*, 116 FERC ¶ 61,299 (2006).

⁷⁰ *Enron Power Mktg., Inc.*, 117 FERC ¶ 61,109 (2006).

⁷¹ *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv.*, 114 FERC ¶ 61,067 (2006); *Enron Power Mktg., Inc.*, 115 FERC ¶ 61,376 (2006); *Enron Power Mktg., Inc.*, 115 FERC ¶ 61,377 (2006); *Enron Power Mktg., Inc.*, 116 FERC ¶ 61,299 (2006).

35. Settling Parties argue that if this Settlement and the Grant Settlement are approved, and in light of Enron's allowance of the California PX Claim, every proof of claim that has been timely filed in Enron's bankruptcy seeking relief related to wholesale power transactions will be resolved. Settling Parties, therefore requests that the Commission dismiss with prejudice the above-captioned proceedings as to Enron.

G. Settlement is Conditioned upon Nullification of the Effect of Certain Commission Orders on Enron

36. The Settlement provides that it will not become effective unless, by approving the Settlement, the Commission accepts the Settlement as substitute and satisfaction for relief and remedies ordered in *El Paso* and *Gaming/Partnership Initial Decision* (collectively, Identified Orders) with respect to Enron. The Identified Orders were issued in the Gaming/Partnership Proceeding.⁷² Settling Parties explain that they do not request that the Identified Orders be vacated; rather, they request that Enron-specific remedies be nullified and therefore not "be given *res judicata* or *collateral estoppel* effect with respect to any claims against Enron before the Commission or in any other forum; the findings and conclusions stated therein may not be hereafter cited as precedent or decisional authority against Enron before the Commission or in other proceedings."⁷³

37. Settling Parties further argue that with this Settlement, every party that submitted evidence and testimony in the Gaming/Partnership Proceeding has obtained a remedy.⁷⁴ Settling Parties also state that Enron's long-term contract with Snohomish was the last in a series of such contracts to be resolved, and no other entity is a party to the Master Agreement at issue or, apart from the ratepayers represented by Snohomish's elected Board of Commissioners, has any pecuniary interest in the resolution of this dispute. Enron concludes that the only entities who may have had an interest in the resolution of analogous disputes have settled.

⁷² These are the same orders that are described in P 9-10 of this order and are more fully discussed below.

⁷³ See Joint Explanatory Statement at 29.

⁷⁴ Settling Parties cite to *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv.*, 115 FERC ¶ 61,032, at P 21 (2006) (recognizing that without a proof of claim on file with the Enron Bankruptcy Court, a party cannot be affected by a settlement).

38. Settling Parties further contend that the remedies provided or considered by the Identified Orders have been superseded by the remedies provided by this Settlement, the Grant Settlement, and all prior Enron settlements. Enron argues that because the remedies have become moot, "no immediate purpose would be served" by preserving them.⁷⁵

III. Responsive Pleadings

39. Timely initial comments were filed on October 29, 2007 by Californians for Renewable Energy (CARE), the City of Redding (Redding), and California Parties. Reply comments were filed on November 8, 2007 by the Port of Seattle, Washington (Port of Seattle), Enron, California Parties, CARE, and Trial Staff. Redding also filed a late motion to intervene for the limited purpose of commenting on the Settlement. Northern California Power Agency (NCPA), currently not a party to these proceedings, also petitioned the Commission for special appearance for the limited purpose of filing reply comments on the Settlement. In addition, Settling Parties filed a motion to lodge for informational purposes the Enron Bankruptcy Court's order approving the Settlement.⁷⁶

IV. Discussion

40. The Commission finds the Settlement to be fair and reasonable and in the public interest, and it is therefore approved. Commission approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in these proceedings. Commenters, except CARE, generally support the Settlement. However, CARE raises certain issues that are addressed below.

41. Settling Parties request that the Commission dismiss with prejudice the above-captioned proceedings as to Enron. This Settlement and Enron's prior settlements have resolved issues and claims brought in the above-captioned proceedings with respect to Enron. Moreover, Enron's prior settlements have provided adequate protection to non-settling parties.⁷⁷ Settling Parties also state that if this Settlement and the Grant

⁷⁵ Enron cites to *Florida Power and Light Co.*, 30 FERC ¶ 61,230, at 61,459 (1985).

⁷⁶ The Commission grants this motion to lodge as the Enron Bankruptcy Court's approval of the Settlement is directly relevant to the issues addressed in this order.

⁷⁷ See P 29-32 of this order.

Settlement are approved, and in light of Enron's allowance of the CalPX Claim, every proof of claim that has been timely filed in Enron's bankruptcy seeking relief related to wholesale power transactions will be resolved. No party contests these assertions. For these reasons, we approve the Settlement and dismiss with prejudice the above-captioned proceedings as to Enron.

A. Redding's Late Motion to Intervene

42. Redding submitted a late motion to intervene for the limited purpose of commenting on the Settlement. Redding explained that it was not a party to the Gaming/Partnership Proceeding when *Gaming/Partnership Initial Decision* was issued, because its case was severed from other consolidated dockets in 2003.⁷⁸ Redding states that it does not oppose the Settlement; rather its comments focus on footnote 69 of the *Gaming/Partnership Initial Decision*, which, according to Redding, contains a finding on Redding's transactions based on erroneous factual information provided in Snohomish's testimony.⁷⁹ Redding argues that because under the terms of the Settlement, Snohomish is to withdraw its pleadings, testimony and exhibits from the Gaming/Partnership Proceeding,⁸⁰ the finding in question should not remain in the *Gaming/Partnership Initial Decision*. Accordingly, Redding requests the Commission to clarify that the *Gaming/Partnership Initial Decision's* findings will not be applicable to Redding.

43. In support of its late intervention, Redding also cites to the ALJ's ruling that allowed a late intervention by Luzenac for the limited purpose of objecting to the

⁷⁸ *Order of Chief Judge Severing Parties and Holding Further Proceedings in Abeyance and Establishing New Lead Docket for Consolidated Proceedings*, Docket No. EL03-137, *et al.* (Nov. 4, 2003); *Order of Chief Judge Severing Parties and Holding Further Proceedings in Abeyance*, Docket No. EL03-180, *et al.* (Dec. 4, 2003).

⁷⁹ According to Redding, footnote 69 provides that: “[i]n 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.”

⁸⁰ Redding refers to section 5.2.1 of the Settlement Agreement.

settlement.⁸¹ Redding argues that late interventions for the limited purpose of objecting to the settlement have been previously permitted in the Gaming/Partnership Proceeding.⁸²

44. California Parties filed an answer opposing Redding's late intervention. California Parties argue that Redding's motion to intervene out-of-time should be denied because Redding has not demonstrated good cause for failing to intervene within the time prescribed. California Parties state that interventions in the Enron dockets in which the *Gaming/Partnership Initial Decision* was issued were routinely granted in the months and years following the Commission's order in *El Paso*. California Parties argue that while Redding claims to seek intervention in order to offer comments on the Settlement, its primary purpose is to call into question the validity of evidence submitted by Snohomish to the Commission on February 27, 2004 and incorporated into the findings of the *Gaming/Partnership Initial Decision*. California Parties conclude that comments on a settlement are not the proper procedural tool to raise objections to an initial decision.⁸³

Commission Determination

45. We agree with California Parties that Redding has failed to show good cause to intervene out-of-time. Snohomish's testimony that allegedly contains a factual error relevant to Redding's transactions with Enron was filed in February 2004. Since then, Redding has had ample opportunity to intervene in the Gaming/Partnership Proceeding and raise its concerns with the substance of Snohomish's testimony. During the course of the Gaming/Partnership Proceeding, the ALJ routinely has granted late motions to intervene. However, Redding did not seek to intervene in the Gaming/Partnership Proceeding until this Settlement was filed. Moreover, its comments do not address the Settlement *per se*, which it states it does not oppose. Instead, Redding seeks to use the Settlement as an opportunity to address the substance of the *Gaming/Partnership Initial Decision* as it pertains to Redding and not as it pertains to the Settlement

⁸¹ *Enron Power Mktg, Inc.*, 115 FERC ¶ 63,052, n.25 (2006) (*ALJ Issuance*).

⁸² Redding Comments at 5, *citing Enron Power Marketing Inc., et al.*, Certification of Contested Partial Settlement, Docket No. EL03-180-022 at P 27, n.25 (May 31, 2006).

⁸³ California Parties cite to 18 C.F.R. § 385.711 (2007) (explaining briefs on exceptions).

46. We also note that *ALJ Issuance* cited by Redding in support of its late intervention, allowed the late intervention by Luzenac for the limited purpose of *objecting to the settlement*,⁸⁴ not for the purpose of challenging the initial decision and testimony that was submitted several years prior to the settlement. Specifically, Luzenac was challenging one of the terms of the settlement under which the Trial Staff was to withdraw its evidence from that proceeding and cease its investigation.⁸⁵ Redding, however, does not challenge specific terms of the Settlement; rather, it seeks to challenge a factual finding made in the *Gaming/Partnership Initial Decision*. The instant proceeding is not the proper forum for Redding to challenge findings in the *Gaming/Partnership Initial Decision*. The issues raised by Redding should be addressed in the Gaming/Partnership Proceeding, not in the instant proceeding addressing the Settlement.⁸⁶

47. For these reasons, Redding's late motion to intervene is hereby denied.

B. Settling Parties' Request for Clarification Regarding the Effect of Identified Orders as to Enron

48. California Parties, while expressing general support for the Settlement, are concerned with the requested nullification of the Identified Orders with respect to Enron. California Parties argue that, given that the California Parties have not settled with all of the power sellers that overcharged California consumers during the 2000-2001 energy crisis, the Commission should clarify that nullification of relief sought or remedies imposed under the Identified Orders is not applicable to claims against or relief sought from entities other than Enron.

49. Port of Seattle echoes California Parties' concerns. It also requests clarification that the nullification of the Identified Orders does not limit the use of the Identified Orders' findings in pursuing claims against parties other than Enron.

⁸⁴ The Commission notes that the ALJ, in granting Luzenac's late intervention, specifically limited Luzenac's participation in the proceedings to presenting objections to the settlement only. *ALJ Issuance* n.72, *supra*. See also summary of Luzenac's comments on the settlement, *id.* at P 36.

⁸⁵ *Id.*

⁸⁶ On June 21, 2007, the *Gaming/Partnership Initial Decision* and record were certified to the Commission. *Certification of Initial Decision and Record*, Docket No. EL03-180-000, *et al.* (June 21, 2007).

50. NCPA,⁸⁷ argues that the nullification of the Identified Orders should also apply to non-parties to the Gaming/Partnership Proceeding. NCPA explains that, because non-parties did not participate in the Gaming/Partnership Proceeding, the findings made in the *Gaming/Partnership Initial Decision* should not be used against them. In NCPA's opinion, it would be unfair to allow parties to use the *Gaming/Partnership Initial Decision* against non-parties.

Commission Determination

51. In the Joint Explanatory Statement, Settling Parties request that the Commission accept this Settlement as substitute and satisfaction of the remedies ordered in the Identified Orders with respect to Enron. In *El Paso*, the Commission directed Enron to disgorge \$32.5 million in profits associated with sales involving the facilities of its affiliate, El Paso Electric Company's (El Paso). The Commission, however, also found that because Enron's relationship with El Paso was a subset of other Enron relationships and practices in the West, that proceeding should be consolidated with the Gaming/Partnership Proceeding and referred to the ALJ to determine the total amount of profits subject to disgorgement. Subsequently, the consolidated proceedings were resolved as to all parties involved, except Enron and Snohomish.

52. In the *Gaming/Partnership Initial Decision*, the ALJ concluded that Enron's market-based rate authority must be revoked as of January 16, 1997, and ordered Enron to disgorge \$1,617,454,868.50 of unjust profits for the period January 16, 1997 through June 25, 2003. Furthermore, the ALJ also concluded that the termination payment that Enron is seeking from Snohomish is also unjust profits.

53. This Settlement and prior settlements discussed in the Background section of this order satisfy the monetary remedies ordered in the Identified Orders, as described above, with respect to Enron. However, to the extent the Gaming/Partnership Proceeding has not been resolved with respect to parties other than Enron, Commission approval of this Settlement does not resolve any claim or any other issue with respect to parties other than Enron.

54. As for NCPA's concern that non-parties to the Gaming/Partnership Proceeding will be unjustly affected by the potential application of *Gaming/Partnership Initial Decision* findings against them, we find this contention premature and, consistent with

⁸⁷ The Commission will allow the special appearance by NCPA for the limited purpose of commenting on the Settlement because, unlike Redding's comments, NCPA's comments do in fact address the terms of the Settlement.

applicable rules of evidence, findings in the *Gaming/Partnership Initial Decision* can be applied against entities that were not parties to the Gaming/Partnership Proceeding to the extent permitted by law. The Commission will not at this time prejudge the issue of the applicability of the *Gaming/Partnership Initial Decision* findings to entities that did not participate in the Gaming/Partnership Proceeding.

C. CARE's Comments in Opposition

55. CARE opposes the Settlement. It argues that because Snohomish is a governmental entity, the Commission has no authority to order refunds in wholesale electric contracts negotiated by governmental entities or non-public utilities.⁸⁸ CARE further states that it opposes this Settlement because it gives ratepayers' money to Enron, an entity that contributed to the western energy crisis of 2000-01. According to CARE, the approval of this Settlement would be a failure on the Commission's part to carry out its duties under statute to protect the public interest of energy ratepayers. CARE contends that the \$18 million refund by Snohomish to Enron is unlawful because the contract in question was signed by Enron and Snohomish during the height of the western energy crisis and subsequently the Commission revoked Enron's market-based rate authority. CARE concludes that the Commission lacks the statutory authority to order Snohomish refund ratepayer funds to Enron. According to CARE, to issue refunds to Enron will reward Enron for its fraudulent actions taken against Snohomish customers in violation of law and in violation of CARE's members'⁸⁹ procedural due process rights. In addition, CARE suggests that all the money proposed in the Settlement should instead be returned to the ratepayers of Snohomish for Enron's unlawful market-based contract.

56. In its opposition to the Settlement, CARE also mentions that the Supreme Court granted the petitions for *certiorari* of the Ninth Circuit decisions addressing the applicable standard of review for long-term forward contracts entered into in the West during the 2000-2001 energy crisis.⁹⁰ According to CARE, the cases being appealed

⁸⁸ CARE cites to *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (*BPA Decision*).

⁸⁹ CARE has also submitted a written objection by one of its members, Sondra Archuleta, which also argues that the \$18 million payment by Snohomish to Enron under the Settlement constitutes an unlawful refund.

⁹⁰ CARE refers to *Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053 (9th Cir. 2006); and *Pub. Util. Com'n of the State of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006) (*CPUC*); *Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

concern federal regulators' power to take an energy crisis into account in reviewing electric power sales contracts.

57. In addition, CARE filed reply comments, supplementing its initial comments. Specifically, in its reply, CARE reiterates that the Settlement will deny its members' procedural due process rights to pursue refunds for overcharges to ratepayers of Snohomish resulting from this Settlement. CARE also contends that section 5.2.1 of the Settlement provides for withdrawal from the above-captioned Commission proceedings of "critical evidence" and is "an illegal attempt by Enron, Snohomish, and the FERC to obstruct justice for western energy ratepayers who were harmed by the 2000 and 2001."⁹¹

58. In their reply comments, Trial Staff and Enron state that CARE's contentions are baseless and that CARE has failed to raise a genuine issue of material fact as required by Rule 602(f)(4) of the Commission's rules and regulations in order to contest a settlement.⁹² Moreover, Trial Staff points out that CARE has provided no affidavit or any specific allegation of any genuine issue of material fact required by Rule 602 (f). Instead, Trial Staff argues, CARE's comments consist of less than three pages with no reference to any document or testimony relevant to this proceeding. Thus, Trial Staff and Enron argue that there is no genuine issue of material fact in dispute, and that CARE has not demonstrated that its interests are immediately and irreparably affected. Trial Staff and Enron thus conclude that CARE's opposition does not make this Settlement contested.⁹³

59. Trial Staff also contends that CARE's statement that the Commission has no authority to order refunds in wholesale electric contracts negotiated by governmental entities or non-public entities is not relevant because the Settlement payment is in fact consideration for the release of claims and is not a refund. Finally, Trial Staff argues that the fact that there are pending matters in other long-term contract case proceedings does not and should not affect the ability of Snohomish and Enron to settle their own contract issues.

⁹¹ See CARE's Reply Comments at 3.

⁹² 18 C.F.R. (2007) § 385. 602(f)(4) (2007).

⁹³ In support, Enron cites to *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983); *San Diego Gas & Electric Co. v. Sellers of Energy & Ancillary Serv.*, 113 FERC ¶ 61,171, at P 40 (2005).

Commission Determination

60. CARE's arguments in opposition to the Settlement are misplaced. By approving this Settlement, the Commission does not exercise its refund authority, because this Settlement does not involve payment of refunds. Rather, the \$18 million termination payment that Snohomish is to pay to Enron under the Settlement is consideration for the settlement of contractual claims made by Enron against Snohomish. The Settlement is a voluntary agreement entered into among the parties⁹⁴ as a means to settle several complicated, costly and long-running disputes. As such, the payment under the Settlement is not a refund, and, thus, the *BPA Decision* is not applicable to payments made pursuant to this Settlement. The Settlement resolves and settles the claims arising from the Snohomish-Enron Master Agreement, Snohomish's termination of the Master Agreement, or for delivered power thereunder, or under other contracts between Enron and Snohomish. We find that the terms of the Settlement are fair and reasonable and do not adversely affect the rights and interests of non-settling parties. As discussed above, the Commission continues to believe that fair and reasonable settlements, rather than costly, protracted Commission and court litigation, are the most effective and efficient way to bring closure to the numerous proceedings spawned by the western energy crisis.

61. CARE also argues that the Settlement violates its members' due process rights; however, it fails to explain how those rights have been violated. The United States Circuit Court for the District of Columbia held that:

It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsels' work, create the ossature for the argument, and put flesh on its bones.⁹⁵

Moreover, CARE has not explained what due process rights have been violated, how those rights have been violated and what the harm is. We, therefore, reject CARE's claim that the Settlement has violated its due process rights.

62. Furthermore, CARE fails to explain the relevancy of the Ninth Circuit decisions on the long-term forward contracts to the instant Settlement. The Commission therefore dismisses its statement as unsupported. Rule 602(f)(4) of the Commission's Rules and Regulations requires that:

⁹⁴ Section 9.4 of the Settlement Agreement.

⁹⁵ *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C.Cir. 2005).

any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issues of material fact by specific reference to documents, testimony, or other items...⁹⁶

63. For these reasons, the Commission rejects CARE's initial comments in opposition to the Settlement. Also, we find that CARE's opposition does not make this Settlement a contested settlement. CARE has made unsupported allegations that fail to raise any legitimate issue or demonstrate that its interests are immediately and irreparably affected by approval of this Settlement.⁹⁷

64. Furthermore, we also reject CARE's reply comments because they raise a completely new issue challenging the Settlement's requirement for the withdrawal of pleadings, testimony and other evidence submitted by Snohomish in the above-captioned proceedings. To allow supplemental comments in place of reply comments would be unfair to and violate due process rights of other parties to the proceeding because they will have no opportunity to respond to new issues raised in reply comments.⁹⁸

⁹⁶ 18 C.F.R. § 385.602(f)(4) (2007).

⁹⁷ In a prior order, the Commission stated: "[i]f a party's interests are not immediately and irreparably affected by approval of a settlement in a consolidated docket, that party's opposition does not create a genuine, material issue. In the absence of any genuine, material issue, we can dispose of the matter before us in a summary fashion. We shall, therefore, treat this as an uncontested offer of settlement." *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at 61,673 (1983).

⁹⁸ We note that the Commission routinely excludes issues raised for the first time in requests for rehearing. The Commission has made clear that "we look with disfavor on parties raising on rehearing issues that should have been raised earlier" because this is "disruptive to the administrative process." *Sierra Pacific Power Co.*, 96 FERC ¶ 61,050, at 61,124 (2001). The Commission rejects new issues raised in requests for rehearing because of the inherent unfairness in allowing parties to withhold substantive objections until making its request for rehearing (to which the Commission permits no replies). This principle applies here by analogy, because CARE raises a new issue – the withdrawal of pleadings and other evidence under the Settlement – in its reply comments. Therefore, the Commission will exclude CARE's argument concerning the Settlement's provisions for the withdrawal of pleadings and other evidence, because CARE should have raised the issue in its initial comments and not in its reply comments.

65. In addition, we note that under section 5.2.1 of this Settlement, Snohomish is to withdraw all of its pleadings, testimony and exhibits from the above-captioned proceedings.⁹⁹ However, this will not adversely affect other parties and non-parties because the pleadings, testimony and exhibits withdrawn by Snohomish will remain on the record as to all parties other than Enron and Snohomish.¹⁰⁰

The Commission orders:

- (A) The Settlement is hereby approved, as discussed in the body of this order.
- (B) The above-captioned proceedings are hereby dismissed as to Enron as discussed in the body of this order.
- (C) Clarification is hereby provided on the effect of the Settlement on the Identified Orders, as discussed in the body of this order.
- (D) Settling Parties' motion to lodge the Enron Bankruptcy Court order is hereby granted.
- (E) Redding's motion to intervene out-of-time is hereby rejected for the reasons discussed in the body of this order.
- (F) CARE's objections to the Settlement are hereby rejected for the reasons discussed in the body of this order.

By the Commission. Commissioners Spitzer and Moeller not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

⁹⁹ Section 5.2.1 of the Settlement Agreement.

¹⁰⁰ *Enron Power Mktg, Inc.*, 116 FERC ¶ 61,299, at P17 (2006).