

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

San Diego Gas & Electric Co. Docket No. EL00-95-000

v.

Sellers of Energy and Ancillary Services Docket No. EL00-98-000

Investigation of the Practices of the California
Independent System Operator and the
California Power Exchange Docket No. IN03-10-000

Investigation of Anomalous Bidding Behavior
and Practices in the Western Markets Docket No. PA02-2-000

Fact-Finding Investigation into Possible
Manipulation of Electric and Natural Gas Prices Docket No. EL03-180-000

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

Enron Power Marketing, Inc. and
Enron Energy Services, Inc. Docket No. EL02-114-007

Portland General Electric Company Docket No. EL02-115-008

Enron Power Marketing, Inc. Docket No. EL02-113-000

El Paso Electric Company,
Enron Power Marketing, Inc., and
Enron Capital and Trade Resources Corporation

ORDER ON SETTLEMENT AGREEMENT

(Issued November 15, 2005)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement and Release of Claims Agreement (collectively, the Settlement) filed on August 24, 2005 in the instant proceedings by Enron,¹ the California Parties,² and the Federal Energy Regulatory Commission's Office of Market Oversight and Investigations (OMOI) (collectively, the Parties). The August 24 filing consists of the "Joint Offer of Settlement," a "Joint Explanatory Statement," the "Settlement and Release of Claims Agreement," and other supporting documentation, filed pursuant to Rule 602 of the Commission's Rules of Practice and Procedure.³ The Settlement resolves claims and matters raised in the captioned proceedings (FERC Proceedings) arising from transactions and events in Western energy markets, including markets of the California Independent System Operator (CAISO) and the California Power Exchange (CalPX) during the period from January 16, 1997 through June 25, 2003 (the Settlement Period) as they relate to Enron.

¹ For purposes of the Settlement, "Enron" or the "Enron Parties" means the Enron Debtors and the Enron Non-Debtor Gas Entities. The "Enron Debtors" are Enron Corp.; Enron Power Marketing, Inc. (EPMI); Enron North America Corp. (formerly known as Enron Capital and Trade Resources Corp.); Enron Energy Marketing Corp.; Enron Energy Services Inc.; Enron Energy Services North America, Inc.; Enron Capital & Trade Resources International Corp.; Enron Energy Services, LLC; Enron Energy Services Operations, Inc.; Enron Natural Gas Marketing Corp.; and ENA Upstream Company, LLC. The "Enron Non-Debtor Gas Entities" are Enron Canada Corp.; Enron Compression Services Company; and Enron MW, L.L.C.

² For purposes of the Settlement, the "California Parties" means collectively: Pacific Gas & Electric Company (PG&E); Southern California Edison Company (SCE); San Diego Gas & Electric Company (SDG&E); the People of the State of California, *ex rel.* Bill Lockyer, Attorney General (the California Attorney General); the California Department of Water Resources acting solely under authority and powers created by California Assembly Bill 1 from the First Extraordinary Session of 2000 – 2001, codified in sections 80000 through 80270 of the California Water Code (CERS); the California Electricity Oversight Board (CEOB); and the California Public Utilities Commission (CPUC).

³ 18 C.F.R. § 385.602 (2005).

2. Although the Parties requested that the Commission receive comment on and review the Settlement without prior certification by the Presiding Administrative Law Judge, the Settlement was certified as a partial contested settlement on October 6, 2005.⁴ The Parties request that the Commission approve the Settlement before December 31, 2005.⁵ Today's order approves the Settlement with conditions, discussed *infra*.

I. Background and Description of the Settlement

3. The Settlement will resolve claims by the California Parties and other Settling Participants against the Enron Debtors for refunds, disgorgement of profits, and other monetary and non-monetary remedies in the following Commission proceedings: the Refund Proceeding in Commission Docket Nos. EL00-95-000⁶ and EL00-98-000,⁷ the Partnership/Gaming Proceeding in Docket Nos. EL03-180-000, EL03-154-000, EL02-114-007, EL02-115-008, and EL02-113-000, and the Refund Related Proceedings, including Docket Nos. PA02-2-000 and IN03-10-000 for the Settlement Period. The Parties also have agreed to mutual releases of past, existing and future claims arising at the Commission and/or under the Federal Power Act⁸ with respect to rates, prices, and terms or conditions for energy, ancillary services, or transmission congestion in the western electricity or western natural gas markets during the settlement period.

⁴ See Certification of Partial Contested Settlement, 113 FERC ¶ 62,002 (2005).

⁵ In addition to the Commission's approval, the Settlement requires the approval of the CPUC and the United States Bankruptcy Court for the Southern District of New York (the Enron Bankruptcy Court). Both the CPUC and the Enron Bankruptcy Court have approved the Settlement.

⁶ *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange*.

⁷ *Investigation of Practices of the California Independent System Operator and the California Power Exchange*. This proceeding and the proceeding in Docket No. EL00-95-000, *et al.*, are collectively referred to as the California Refund Proceeding or the Refund Proceeding.

⁸ 18 U.S.C. § 824 *et seq.* (2000).

4. The consideration outlined in the Settlement is based, in part, on a calculation of Enron's total estimated refund amounts associated with transactions in the CAISO and CalPX markets pursuant to the Commission's orders in the Refund Proceeding for the period October 2, 2000 through June 20, 2001. The Settlement also includes negotiated amounts for the Pre-October Period at issue in the Refund Proceeding (May 1, 2000 through October 1, 2000). Finally, the Settlement provides negotiated amounts for the more inclusive period associated with the Partnership/Gaming Proceeding (January 16 1997 through June 25, 2003).

5. The Settlement provides an opportunity for all other parties to these proceedings to join the Settlement as Settling Participants,⁹ and it provides a period of five days following a Commission order approving the Settlement for parties to indicate or elect to join the Settlement. The Parties state that the rights of those electing not to join the Settlement will not be affected by the Settlement, but they also point out that, with one exception discussed *infra*, Non-Settling Participants will not share in the benefits of the Settlement.

6. Exhibit A of the Settlement and Release of Claims Agreement is an Allocation Matrix that sets out the allocation of refunds and payments to parties to the Refund Proceeding. This Allocation Matrix lists the allocation of refunds from Enron to market participants and is listed according to two time periods: the period from October 2, 2000 through January 17, 2001 (the Refund Period) and the period from May 1, 2000 through October 1, 2000 (Pre-October Period). Each of the Parties and Opt-in Participants will receive refunds to which the Settlement determines each is entitled pursuant to the Exhibit A Allocation Matrix. Exhibit C lists the "Deemed Distribution Participants," who will receive their allocable refunds in the form of an offset against their outstanding market obligations to the CAISO or the CalPX.

7. In addition to setting forth allocations of refunds applicable to the Refund Proceeding, the Settlement resolves certain meter reading claims against Enron. Over \$22 million is being held by the CAISO as collateral related to those claims. The Settlement provides that the CAISO will distribute this amount to Market Participants (who may or may not be Opt-in Participants) pursuant to the Allocation Matrix set out in Exhibit B. In this one respect, participants listed in Exhibit B that do not opt into the Settlement will obtain the benefit of a release of collateral related to their meter reading claims against Enron.

⁹ "Settling Participants" is defined in section 1.82 as the Parties (the California Parties and the Additional Claimants) and the Opt-in Participants.

8. The Settlement provides for cash payments totaling up to \$47.4 million from accounts that are currently held by the CAISO and the CalPX. The Settlement provides a Class 6 unsecured claim of \$875 million against EPMI in Enron's bankruptcy proceeding¹⁰ in accordance with the Enron Debtors' Plan of Reorganization (Plan).¹¹ Enron has also agreed to a \$600 million civil penalty in the form of a subordinated Class 380 penalty claim allowed against EPMI in accordance with the Plan in favor of the Attorneys General of California, Oregon and Washington, the CPUC and the CEOB.¹² According to the Settlement, the actual value and timing of the distributions on the allowed unsecured claim are uncertain due to EPMI's bankruptcy status. Enron has also agreed to assign to the California Parties any interests it has in refunds or rights to refunds from other suppliers in the Commission's Refund Proceeding, the Partnership/Gaming Proceeding, and the proceedings in Docket Nos. PA02-2 and IN03-10. It has also agreed to assign to CERS any refunds associated with mitigation of certain sales by CERS into the CAISO real time market.¹³ The Settlement also provides that Enron's share of CalPX Wind-up charges, which are at issue in Docket Nos. ER02-2234-000, *et al.*, will be an allowed administrative expense claim, up to a maximum of \$1 million.

9. The Settlement also provides certain non-monetary consideration. Section 5.1 requires the Enron Parties to cooperate with the Parties in the Parties' pursuit of claims against other entities relating to events in the western energy markets or relating to third-party participation in alleged Enron misconduct during the Settlement Period.¹⁴

¹⁰ *In re Enron Corp., et al., Reorganized Debtors*, Case No. 01-16034 (ALG) (Bankr. S.D.N.Y.).

¹¹ According to section 1.62 of the Settlement, the Plan is the Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code confirmed by the Enron Bankruptcy Court on or about July 15, 2004.

¹² See sections 4.1.1, 4.1.2, 4.1.3 and 4.1.6 of the Settlement.

¹³ See sections 4.1.4 and 4.1.5 of the Settlement.

¹⁴ "Settlement Period" is defined in section 1.80 as meaning the period from January 16, 1997 through June 25, 2003, which is the period set by the Commission in its order directing the administrative law judge to determine the total amount of disgorgement of profits by Enron for its wholesale power sales in the western

(continued)

II. Comments on the Settlement

10. Initial comments on the Settlement were due on September 13, and reply comments were due on September 24. Initial comments were filed by: CAISO; CalPX; Public Utility District No. 2 of Grant PUD, Washington (Grant PUD); the Office of the Nevada Attorney General, Bureau of Consumer Protection (Nevada BCP); the Port of Seattle, Washington (Port); Salt River Project Agricultural Improvement and Power District (SRP); the Commission's Trial Staff (Trial Staff); the Attorney General of the State of Washington (Washington AG); and, the Western Parties.¹⁵ Only the Washington AG and Trial Staff supported the Settlement without modification. Most commenters either requested clarifications or minor modifications (CAISO, CalPX, Grant PUD, Indicated Parties, Nevada BCP, SRP, and Western Parties). Reply Comments were filed by the California Parties, Enron, and OMOI (jointly); the Indicated Parties;¹⁶ and Port. Only Port opposed the settlement outright.

11. Although the Commission's rules governing settlements only provide for initial comments and reply comments,¹⁷ two other sets of pleadings warrant discussion at the outset. First, the California Parties, Enron and OMOI filed a joint motion to strike the reply comments of the Indicated Parties, arguing that these reply comments were "procedurally improper" in that they "reply to nothing, seek a decision on a matter not before the Commission, and propose conditions that would disrupt" the Settlement.¹⁸ The Indicated Parties filed an answer to the motion to strike, asserting that their reply comments were an appropriate response to an issue identified in the initial comments of the CalPX. As a preliminary matter, the Commission agrees with the Indicated Parties

interconnect for violations of tariffs on file or orders of the Commission. *El Paso Electric Co.*, 108 FERC ¶ 61,071 (2004).

¹⁵ The Western Parties consist of: the City of Santa Clara, California, d/b/a Silicon Valley Power (Santa Clara); the Public Utility District No. 1. of Snohomish County, Washington (Snohomish); Valley Electric Association, Inc. (Valley Electric); Nevada Power Company and Sierra Pacific Power Company (the Nevada Companies); and the Metropolitan Water District of Southern California (MWD).

¹⁶ Puget Sound Energy, Inc., Avista Energy, Inc., and IDACORP Energy LP.

¹⁷ 18 C.F.R. § 385.602(f) (2005).

¹⁸ Joint Motion at 2.

that their reply comments appropriately respond to an issue raised in the CalPX initial comments and will deny the joint motion. The Commission will discuss the merits of Indicated Parties' reply comments *infra*.

12. Second, SRP's initial comments alluded to ongoing settlement discussions with Enron, and on October 11, SRP and Enron filed a Joint Offer of Settlement and Settlement Agreement (SRP Settlement). Initial Comments are due on October 31, and reply comments are due on November 10. SRP's initial comments expressed concern that its separate negotiations with Enron might present a timing issue with respect to the Settlement's five-day opt-in time limit. That is, SRP would not be able to meet that five day requirement if its separate settlement with Enron had not also been approved. SRP's initial comments indicate that Enron and the California Parties have agreed to defer the date by which SRP must provide notification of its intention to opt-into the Settlement until five business days after effective date of the SRP Settlement.¹⁹ Inasmuch as no commenters object to the deferral of the five-day opt-in requirement as to SRP, the Commission will grant SRP's request for deferral of the opt-in requirement until five days after the SRP Settlement effective date. The Commission will address the merits of the SRP Settlement in a separate order.

13. Third, on October 21, the California Parties and the Enron Parties filed a Motion to Lodge Order of Bankruptcy Court Approving Settlement by and Among the Enron Parties, the Office of Oversight and Investigation, the California Parties, and the Additional Claimants (Motion to Lodge). Appended to the Motion to Lodge is the October 20 Order of the Enron Bankruptcy Court²⁰ Approving Settlement by and Among the Enron Parties, the Federal Energy Regulatory Commission's Office of Market Regulation (sic) and Investigation, the California Parties, and the Additional Claimants (Bankruptcy Court Order). Judge Gonzalez approved the Settlement without condition, based on his determination that "the legal and factual bases set forth in the Motion [to lodge the Settlement] establish just cause for relief . . . and that the settlement is fair and equitable . . ." ²¹ The Commission will grant the Motion to Lodge the Bankruptcy Court Order.

¹⁹ Sections 2.3 and 7.1 of the SRP Settlement provide that it will become effective upon approval by the Enron Bankruptcy Court and by the Commission.

²⁰ Judge Alfred J. Gonzalez, presiding.

²¹ Bankruptcy Court Order at 2.

A. CAISO Initial Comments**• The need for “hold harmless” protection**

14. The CAISO’s comments indicate support for the Settlement and reiterate arguments made in the settlements involving *Williams*, *Duke*, and *Mirant*.²² According to the CAISO, the Settlement will require the CAISO to disburse substantial sums pursuant to an unprecedented level of accounting adjustments by the CAISO pursuant to this Settlement, the terms of which have been determined by a subset of parties to the California Refund Proceeding. Accordingly, CAISO asserts that implementing the Settlement will expose it, along with its officers, directors, employees and consultants, to potential claims of disgruntled market participants. Finally, CAISO points out that, as the Commission approves more settlements in the Refund Proceeding, the task of implementing those settlements will become more complex, thereby increasing litigation exposure for CAISO as it attempts to implement the settlements.²³ The CalPX also asserts the need for “hold harmless” protection.²⁴ In their reply comments, the Parties state that they do not oppose Commission assurances to the CAISO and CalPX that are similar to the “hold harmless” assurances provided in the other settlements.²⁵

Commission Determination

15. The Commission finds that the CAISO and CalPX have provided the Commission with compelling justification as to why they should be held harmless, along with their officers, directors, employees and contractors, for the steps taken to implement the Settlement. Particularly persuasive is the fact that, although both CalPX and CAISO will be disbursing substantial sums of cash under the terms of the Settlement, they are not protected by the same waivers of liability that Article 8 of the Settlement Agreement provides for the Parties. Their own tariffs provide hold harmless protection for meeting

²² The Commission granted CAISO’s request for hold harmless protection in the proceedings involving settlements for *Williams*, *Duke* and *Mirant*. See 109 FERC ¶ 61,107 (2004) (order accepting *Duke* settlement); 111 FERC ¶ 61,186 (2005) (order accepting *Mirant* settlement); and 111 FERC ¶ 61,186 (2005) (order on rehearing of the order approving the *Williams* settlement).

²³ CAISO comments at 5, 6.

²⁴ CalPX initial comments at 12-14.

²⁵ Parties’ Joint Reply Comments at 9.

their obligations under their respective tariffs, so the Commission finds that “hold harmless” protection is warranted for CAISO and CalPX for steps taken to implement the Settlement.

- **Implications of sections 7.1.3 and 7.1.4 of the Settlement for refund calculations for the Pre-October Period**

16. The CAISO states its understanding of the obligations imposed on it and the CalPX under sections 7.1.3 and 7.1.4 of the Settlement. According to CAISO, the import of these sections is that the CAISO and the CalPX will calculate the amounts of refunds, if any, that Enron would owe, or would be owed, if the Commission’s refund methodology were to be applied to . . .” the Pre-October Period (May 1, 2000 through October 1, 2000).²⁶ The CAISO states that, in correspondence with the Parties, it has been assured that these two sections of the Settlement mean that the CAISO will be required to calculate refunds for the Pre-October period only if the Commission expands the scope of the Refund Period by issuing an order stating that refunds should be made for the Pre-October Period.

Commission Determination

17. The Parties have provided the requested clarification of the CAISO (and CalPX) obligations under sections 7.1.3 and 7.1.4. Therefore, further Commission action is not required.

B. CalPX Initial Comments

- **Clarification of sections 7.7.1 and 7.7.2**

18. The CalPX takes no position on the Settlement. However, as stated above, CalPX asks that the Commission provide it with the same “hold harmless” protection as has been provided in prior settlement orders. In addition, CalPX seeks clarification that its implementation of the obligations under two sections of the Settlement will not leave it in the untenable position of being required to incur expenses under section 7.7.1 to effectuate the assignment of a Non-Settling Participant’s claim in the Enron Bankruptcy Proceedings but being barred from being compensated for such expenses by section 7.7.2, which requires that the Non-Settling Participant must affirmatively agree in writing to fund the cost of the assignment. According to CalPX, if it were unable to incur

²⁶ CAISO comments at 8.

expenses to effectuate the assignment of a Non-Settling Participant's claim absent prior written consent, "the assignment likely would not happen, or it would be subject to subsequent challenge."²⁷

19. In response, the Parties assert that no clarification is required, because section 7.7.2 does not prohibit the incurrence of costs, but instead addresses how incurred costs will be recovered.²⁸

Commission Determination

20. The Commission understands the CalPX's concern that it not be required to perform obligations and incur additional expenses under the Settlement for which it is not compensated. Nevertheless, the Commission finds that the language of these sections is clear in setting out the CalPX's obligations to assign the claims of the Non-Settling Participants and in drawing a clear temporal line after which only the Non-Settling Participants will be liable for costs incurred by the CalPX associated with prosecuting or litigating claims on behalf of the Non-Settling Participants.

21. Section 7.7.1 sets out CalPX's obligation to effectuate the assignment of Non-Settling Participants' claims in the Enron Bankruptcy, and it requires CalPX to do so "effective as of the Settlement Effective Date." Section 7.7.2 provides that:

After the entry of the FERC Settlement Order no Market Participants (including any Enron Party) other than the Non-Settling Participants shall be liable for any costs or expenses (including attorneys' fees) of the [Cal]PX incurred thereafter that are associated with prosecuting or litigating claims on behalf of the Non-Settling Participants in the Bankruptcy Proceedings, or otherwise related to participation in the Bankruptcy Proceedings, and among Non-Settling Participants, the only Non-Settling Participants that shall be liable for such [Cal]PX costs and expenses (including attorneys' fees) are those Non-Settling Participants that notify the [Cal]PX in writing of their agreement to pay such [Cal]PX costs and expenses (including attorneys' fees) associated with such activities and actions by the [Cal]PX.

²⁷ CalPX initial comments at 16.

²⁸ Parties' reply comments at 6.

This provision addresses the consequences for recovery of costs should the CalPX not effectuate the assignment of Non-Settling Participants' claims required by section 7.7.1. In short, neither the Enron Parties nor any Market Participant will bear these costs. Certainly, the onus is on the CalPX to ensure that it effectuates the assignment of claims expeditiously after the Settlement is approved.

- **Adequacy of financial backstop for Non-Settling Participants**

22. CalPX is concerned that the Settlement places Non-Settling Participants at a disadvantage if they elect not to opt into the Settlement. CalPX maintains that Enron will be the "sole financial backstop" for Non-Settling Participants' claims if Enron's accounts with the CAISO or the CalPX are not adequate to meet the obligations of the Settlement.²⁹ Grant PUD and the Indicated Parties express the same general concern that the Settlement does not provide adequate protection for Non-Settling Participants from the likelihood of shortfalls, which would diminish their potential recovery of refunds in the Refund Proceeding.³⁰

23. CalPX first asserts that several factors could result in Enron serving as the sole backstop for Non-Settling Participants. The CalPX states that the Settlement Clearing Account provides what amounts to a \$10 million "cushion" to provide for any downward adjustment of Enron's receivables in the final financial phase of the Refund Proceeding.³¹ However, CalPX asserts that, "[b]ased on several factors, it appears that the \$10 million cushion likely will be insufficient to cover the ultimate EPMI balance in the CalPX markets, much less any balances owed by EPMI in the CAISO markets."³² Among the factors outlined is the fact that the estimated refunds in the Settlement do not take into account refund reductions due to fuel cost allowances, emissions offsets, marketers' cost recovery amounts or interest shortfalls. Moreover, CalPX avers that the recent opinion by the Ninth Circuit Court of Appeals in *Bonneville Power Administration, et al. v. FERC*³³ (*Bonneville*) will remove governmental entities and non-public utilities from the pool of participant sellers providing refunds, which will further limit the refunds expected

²⁹ *Id.* at 2.

³⁰ Grant PUD at 7, and Indicated Parties at 5.

³¹ CalPX at 7.

³² *Id.*

³³ 422 F.3d 908 (2005).

to be due to Enron below the \$28 million on which the Settlement is based. Although the refunds *owed by* Enron will not be reduced by the removal of the governmental and non-public utilities from the pool of refund providers, the amount of receivables *owed to* Enron will be reduced, “thus widening the estimated net amount that EPMI may ultimately owe the CAISO.”³⁴ As a result, the \$10 million cushion will be insufficient, resulting in Enron/EPMI being responsible to the CalPX for the shortfall under section 4.3.2(i) of the Settlement.³⁵ A final concern of the CalPX pertains to the \$138 million in cash collateral it holds as security for Enron’s obligations. Its concern centers around section 8.9 of the Settlement, which obligates the California Parties to support any request by Enron that the CalPX release to Enron this cash collateral. Enron may request the release of this collateral upon payment of the first \$15 million of the Cash Amount to the Enron Refund Escrow. CalPX is concerned that if the Enron collateral held by the CalPX is inadequate, Non-Settling Participants will have to rely on their claims in the Enron Bankruptcy proceeding to recover amounts allegedly owed to them by Enron. According to CalPX, the Non-Settling Participants face an uncertain recovery in the Enron Bankruptcy, because “if the Enron [Cal]PX Collateral is released or reduced the [Non-Settling Participants’] potential for recovery from EPMI will be substantially compromised, if not virtually eliminated.”³⁶

24. The Parties state that the CalPX wrongly characterizes Enron as the only financial backstop in the Settlement. Rather, they state that the California Parties have assumed the risk that up to \$10 million of Enron Receivables, which the CalPX has estimated to exceed \$27 million, will not be available to the California Parties when the amount of the Remaining Enron Receivables is finally determined.³⁷ However, the Settlement protects the interests of the Non-Settling Participants through amounts earmarked for them in the Enron Refund Escrow as shown on the Allocation Matrix in Exhibit A. At the issuance of the Enron Refund Determination, these amounts will be paid to the Non-Settling

³⁴ CalPX at 9.

³⁵ Section 4.3.2(i) provides: If the amount of the Remaining Enron Receivables is negative, the reimbursement to the [Cal]PX or [CA]ISO shall be the responsibility of Enron and Enron shall have no further obligation to the California Parties for the Cash Amount.

³⁶ CalPX comments at 11.

³⁷ *Citing* sections 4.1.1, 4.3.1 and 4.3.2 of the Settlement.

Participants.³⁸ As to the impact of the *Bonneville* decision, the Parties point out that the Settlement resolves its refund liability “with nearly all of the buyers in the [CA]ISO market. Therefore, regardless of how the *Bonneville* decision is implemented, it will have only a very limited effect on EPMI. ... No change in the level of refunds owed to or by Enron can affect the approximately \$27 million currently estimated in Enron Receivables.”³⁹ With respect to the CalPX concerns about the release of Enron’s collateral, the Parties point out that this concern is premature, given that Enron has not yet requested the release of this collateral. Moreover, the CalPX and the Non-Settling Participants have the right to object to any such request.⁴⁰

Commission Determination

25. The Commission agrees with the Parties that the concerns raised by CalPX are misplaced. The Settlement provides adequate protection for Non-Settling Participants, in that funds will be earmarked and held in the Enron Refund Escrow pending the Commission’s Enron Receivables Determination. Under the Settlement, the final determination of the amount of Enron Receivables will be made by the Commission in its ongoing Refund Proceeding. Section 6.7 provides that Non-Settling Participants will be paid the funds shown on the Exhibit A Allocation Matrix that are set aside in the Enron Refund Escrow once the Commission makes this final determination. According to the Parties, this aspect of the Settlement substantially reduces the risk of non-recovery for the Non-Settling Participants that have no claims in the Enron Bankruptcy proceeding. For Non-Settling Participants that have filed claims in the Enron Bankruptcy, the funds set aside for them in the Enron Refund Escrow “are at least commensurate, as a portion of their net purchases in the relevant time periods, with the amounts set aside for the California Parties and the Opt-In Participants.”⁴¹ Thus, it appears to the Commission that the rights of the Non-Settling Participants are amply protected by the Settlement.

26. With respect to the *Bonneville* opinion, the Commission agrees with the Parties’ assessment that the impact of removing governmental and non-public utilities from the Settlement refund pool will have little effect on the Settlement, because the Settlement itself resolves all of Enron’s refund liability with respect to nearly all of the buyers in the

³⁸ See sections 1.39, 1.40, and 1.42.

³⁹ Parties reply comments at 9.

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 7.

CAISO and CalPX markets. Moreover, the CalPX has not cited any evidence nor provided any data to suggest that the Settlement's backstop and escrow arrangements for the Non-Settling Participants will be inadequate. The Commission is acceding to the CalPX request for "hold harmless" protection, which addresses its concerns about potential liability in implementing the Settlement.

27. Finally, in response to CalPX's concern about the release of the Enron Collateral, the Settlement commits the California Parties to support a request by Enron for the release to Enron of the Enron Collateral, but there has been no such request at this point. Accordingly, the Commission will address any such request when it is filed, and CalPX and Non-Settling Participants will have the right to file their objections with the Commission at the appropriate time.

28. CalPX raises a number of issues despite its protestation that it takes no position on the Settlement. Nevertheless, CalPX asked that the Commission grant only two requests if it approves the Settlement: "hold harmless" protection and clarification that the Settlement does not foreclose the CalPX from incurring reasonable expenses to effectuate the assignment of the Non-Settling Participants' claims. Therefore, while the Commission finds the concerns expressed by the CalPX unavailing, it will grant CalPX "hold harmless protection" as previously discussed, and it will grant the requested clarification.

C. Grant PUD Comments

29. Although Grant PUD asserts that it does not object to the Settlement, it states that the Settlement impairs its ability to obtain redress from Enron for its manipulation of Western energy markets. Section 8.12 of the Settlement releases Enron from "all existing and future claims before FERC," arising from claims that Enron charged unjust and unreasonable rates or "manipulated the western electricity or natural gas market in any way." Grant PUD claims that the Settlement will leave it and others that did not purchase energy from the CAISO or the CalPX but instead bought energy directly from Enron at inflated prices without effective recourse. Grant PUD expresses consternation that, by entering into this Settlement, the Commission's investigative arm, OMOI, "will no longer pursue its investigation of Enron's market manipulation with respect to parties who are not covered by the settlement, such as Grant PUD."⁴² Grant PUD points out that the

⁴² Grant PUD comments at 3.

Commission has not allowed intervention in the IN03-10 anomalous bidding investigation, as it is a non-public proceeding under section 1b of the Commission's regulations.⁴³

30. To remedy these deficiencies in the Settlement, Grant PUD requests that the Commission impose two conditions on the Settlement if it does approve it: 1) the Commission should require the Parties to expand the list of parties who may opt into the Settlement to include all Western purchasers of energy, or at least those who purchased energy directly from Enron during the Settlement Period; and, 2), the Commission should allow parties that are not entitled to opt into the Settlement thirty days from the date of the approval of the Settlement to intervene out-of-time in any Enron investigation or show cause dockets in which the Commission has allowed parties to intervene.⁴⁴

31. The Parties dispute Grant PUD's alleged deficiencies in the Settlement and urge the Commission not to adopt either of Grant PUD's proposed conditions. They point out that the OMOI investigation in the Docket No. IN03-10 proceeding concerns alleged violations of provisions of the CAISO and CalPX tariffs. The amounts paid to settle these allegations will be paid to net purchasers under those tariffs, as shown on the Exhibit A allocation matrix. Grant PUD is not allocated any settlement amount on the allocation matrix, because it was not a net purchaser in the CAISO and CalPX markets.⁴⁵ The Parties also point out that "the fact that Grant PUD chose not to intervene in the Partnership/Gaming Proceeding is neither caused nor affected by the Settlement." The Parties assert that Grant PUD does not meet the criteria warranting a grant of late intervenor status under the Commission's regulations.⁴⁶ Finally, the Parties disagree that the Settlement will diminish Grant PUD's claim in the Enron Bankruptcy Proceeding. They assert that the merits of Grant PUD's bankruptcy claim should be decided by the Bankruptcy Court "in due course."⁴⁷

⁴³ 18 C.F.R. § 1b.11 (2005).

⁴⁴ *Id.* at 5.

⁴⁵ Parties' reply comments at 11, 12.

⁴⁶ *Id.*, citing 18 C.F.R. § 214.(b)(1) through (3).

⁴⁷ *Id.* at 13.

Commission Determination

32. The Commission finds Grant PUD's arguments unconvincing. The fact that it is not listed on the Exhibit A Allocation Matrix is due to the nature of Grant PUD's participation in the CalPX and CAISO markets as a net seller and not a purchaser.⁴⁸ Grant PUD has provided insufficient justification for altering the Settlement in order to change the allocation matrix to address its situation as a net seller. Rather, its rights in these proceedings are not affected by the Settlement and it is free to pursue its claims against Enron. Nor will the Commission allow Grant PUD to intervene late in other ongoing proceedings based on the concern expressed in its comments on the Settlement that OMOI's participation in the Settlement leaves the interests of entities such as Grant PUD without representation, because it is settling its litigation with Enron. Rule 214 of the Commission's Rules of Practice and Procedure requires that a party seeking to intervene out-of-time must show good cause why the time limit for intervention should be waived.⁴⁹ These proceedings have been ongoing for several years, and to the extent Grant PUD has not intervened in those proceedings in which the Commission has allowed participation,⁵⁰ it is too late at this stage of the proceedings to accommodate such an untimely request, and it would be unfair to litigants who intervened in a timely fashion and have participated actively in these proceedings. Finally, with respect to Grant PUD's concern about the impact of the Settlement on its claims in the Enron Bankruptcy Proceeding, the Commission notes again that the Bankruptcy Court has issued an opinion approving the Settlement.

D. Reply Comments of the Indicated Parties

33. Indicated Parties' reply comments amplify concerns that were raised by the CalPX concerning the effect on Non-Settling Participants of a release of the CalPX Enron Collateral.⁵¹ Indicated Parties oppose any release of this collateral, and they assert that

⁴⁸ Grant PUD comments at 6, n3.

⁴⁹ 18 C.F.R. § 214(b)(3) (2005).

⁵⁰ The IN03-10 investigation was initiated by the Commission as a non-public proceeding under section 1b of its regulations, and the Commission subsequently has held that no party is entitled to intervene, nor does any party have standing to challenge the Commission's resolution of such an investigation. *See, e.g. Reliant Energy Services, Inc.*, 105 FERC ¶ 61,253 (2003).

⁵¹ Indicated Parties reply comments at 5 *citing* CalPX initial comments at 9.

the Commission should not approve the Settlement unless it: 1) requires that Enron's obligations to the CAISO and the CalPX be satisfied before directing or authorizing the release by the CalPX of the Enron Collateral; and 2) requires that any shortfalls resulting from the release of the Enron Collateral be borne by all market participants, including the California Parties, on a *pro rata* basis.

Commission Determination

34. As stated above, the Commission will address requests to release the Enron Collateral held by the CalPX when such request is made. With respect to potential shortfalls, the Commission has found already that the Settlement provides adequate backstops to protect the interests of Non-Settling Participants.

E. Nevada BCP Initial Comments

35. The Nevada BCP states that it does not oppose the Settlement so long as the Commission clarifies that the rights of governmental entities, such as Nevada BCP, are unaffected by the Settlement. This clarification is necessary, according to Nevada BCP, because of a "latent ambiguity" in various sections of the Settlement, in particular because Non-Settling Participants is defined in such a way as not to include governmental entities.⁵² In their joint reply comments, Enron, the California Parties and OMOI clarify that "the rights of non-settling parties which could include governmental entities such as the Nevada BCP, the Public Utilities Commission of Nevada, and the FERC Trial Staff – like the rights of Non-Settling Participants – are unaffected by the Settlement Agreement."⁵³

Commission Determination

36. The Parties have provided sufficient clarification as to the impact of the Settlement on governmental entities. No further clarification by this Commission is necessary.

⁵² Nevada BCP at 4.

⁵³ Parties reply comments at 18, 19.

F. Comments of Port

- **Whether there are genuine issues of material fact that would require the Commission to consider the Settlement as contested**

37. Port opposes the Settlement on a number of grounds, but the crux of its position is that the Settlement is unfair *vis-à-vis* participants in non-California Western markets and that it inequitably distributes the proceeds of the Settlement.⁵⁴ Port alleges that the record of these proceedings supports its contention that there are numerous issues of material fact with respect to the Settlement. Appended to its comments is an Affidavit of Robert F. McCullough (McCullough Affidavit) referring to numerous portions of the record and asserting the existence of genuine issues of material fact. Rule 602 of the Commission's Rules of Practice and Procedure requires that any comment contesting an offer of settlement by alleging a dispute as to genuine issues of material fact be supported by an affidavit with specific references to portions of the record that support the allegation.⁵⁵

38. Port alleges four specific factual disputes: 1) whether Enron's gaming practices and partnerships harmed consumers; 2) the amount of Enron's profits; 3) the regional allocation of Enron's profits; and, 4) whether the Settlement amount and allocation complies with the FPA. Because of the existence of these factual disputes, Port asserts that the Commission cannot make any findings with respect to whether the Settlement complies with the FPA. Port complains that the Settlement would distribute Settlement proceeds in a manner that is unjust, unreasonable, unduly preferential and unduly discriminatory. Port alleges that the Settlement is unconstitutional in that it would delegate legislative authority to an Article III court.⁵⁶

39. The Parties rebut Port's contention that there remain any genuine issues of material fact, stating that three of the issues identified by Port are not factual disputes to be resolved by the Settlement, and the fourth issue is a legal issue and not a factual issue. According to the Parties, the Settlement does not establish the facts that Port alleges are in dispute. It does not establish whether Enron's gaming practices harmed consumers, the amount of Enron's profits or the regional allocation of Enron's profits. These factual issues are not relevant to nor are they addressed by the Settlement, and they are not pertinent to the issue of whether the Settlement should be approved, according to the

⁵⁴ Affidavit of Robert F. McCullough at 3-8.

⁵⁵ 18 C.F.R. § 602(f)(4) (2005).

⁵⁶ *Citing Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935).

Parties.⁵⁷ The fourth issue identified as a factual dispute, *i.e.*, whether the Settlement and its allocation comply with the FPA, is a legal question. The Parties allege that this question is premature, in that it will be addressed by the Commission in the distribution phase of the Partnership/Gaming Proceeding.⁵⁸ The Parties conclude that the Settlement is uncontested, despite Port's purported opposition, and that the Commission should approve the Settlement notwithstanding Port's arguments.

Commission Determination

40. The Commission agrees with the Parties that there are no material issues of genuine fact that remain in dispute, despite Port's opposition to the Settlement. Clearly, the Settlement does not resolve anything as to Port if it does not opt into the Settlement, and Port retains the ability to pursue its claims against Enron in the underlying proceedings. The Parties correctly cite Commission precedent that establishes this as an uncontested settlement:

If 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.⁵⁹

Moreover, the specific terms of the Settlement itself make it clear that the Settlement establishes no facts or precedents. Specifically, section 13.4 provides:

[E]xcept for the purpose of enforcing the terms and conditions of this Agreement as between and among the Parties and the Settling Participants, *nothing herein shall establish any facts or precedents as between the Parties, the Settling Participants, and any third parties as to the resolution of any dispute.* Each party expressly denies any wrongdoing or culpability with respect to the claims against it released in this Agreement, or any other matter addressed in this Agreement, and does not, by execution of this

⁵⁷ Parties' reply comments at 15.

⁵⁸ *Id.*, citing *Enron Power Marketing, Inc., et al.*, 111 FERC ¶ 63,001 (2005) at P5.

⁵⁹ *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292 (1983) at 61,673.

Agreement, admit or concede any actual or potential fault, wrongdoing or liability in connection with any facts or claims that have been or could have been alleged against it with respect thereto.⁶⁰

The Settlement does not affect Port's ability to pursue litigation against Enron, and whatever rights it may have are unaffected by the Settlement. Section 8.8 states that "Nothing herein will affect the positions that any Non-Settling Participant wishes to assert in the FERC proceeding to determine the allocation methodology."

- **Whether Settlement proceeds can be distributed prior to the "Distribution Phase" of the Gaming/Partnership proceeding**

41. Port asserts that the Settlement should be rejected because it provides for the allocation and distribution of proceeds prematurely. Port cites numerous Commission orders and orders of the Chief Judge that purport to prevent the distribution of Settlement proceeds until the liability phase of the Gaming/Partnership proceeding has concluded.⁶¹ The Parties disagree, stating that "If the Partnership/Gaming Proceeding goes to decision and Enron is required to disgorge profits, those profits will be distributed later to Non-Settling Participants, based on their ability to demonstrate an entitlement to the money."⁶²

Commission Determination

42. The Commission finds that the distribution and allocation of Settlement proceeds as provided by the Settlement is consistent with Commission precedent, specifically the Commission's orders approving the *Williams*, *Dynegy*, *Duke*, and *Mirant* settlements.⁶³

⁶⁰ Section 13.4 of the Settlement (emphasis added).

⁶¹ Port comments at 27, n119.

⁶² Parties' reply comments at 16.

⁶³ See 108 FERC ¶ 61,002 (2004) (order accepting *Williams* settlement); 109 FERC ¶ 61,071 (2004) (order approving *Dynegy* settlement); 109 FERC ¶ 61,107 (2004) (order accepting *Duke* settlement); and, 111 FERC ¶ 61,186 (2005) (order accepting *Mirant* settlement).

- **Whether the Settlement is unjust, unreasonable, unduly preferential and unduly discriminatory**

43. Port alleges that the vast bulk of unsecured bankruptcy claims and all of the cash available to the Enron Entities “is (sic) destined for California.”⁶⁴ Port avers that “Enron’s fraudulent activities were perpetuated from Portland, Oregon, largely took place within the [Pacific Northwest], and that a majority of the illicit profits were made *outside* of California. ... The allocations reflected in the Joint Offer [of Settlement] reflect nothing more than an arbitrary and capricious power grab by the California Parties.”⁶⁵ The Parties counter that Port misperceives the basic nature of the Settlement in that Port apparently believes “that Enron cannot settle with the California Parties because not all of Enron’s allegedly illegal activities occurred in California.”⁶⁶

Commission Determination

44. The Commission disagrees with Port’s characterization of the Settlement as a “power grab.” Rather, the Settlement is a complex, comprehensive and reasonable effort by the Parties to end their litigation and resolve their legal disputes. Port does not have to join the Settlement, and its right to continue to litigate is unaffected by the Settlement.

- **Whether the Settlement is unconstitutional**

45. Port argues that the Settlement is an unconstitutional delegation to the Bankruptcy Court of a legislative function.⁶⁷ Parties aver that this argument is unexplained and without merit.⁶⁸

⁶⁴ Port comments at 28.

⁶⁵ Port comments at 28-30.

⁶⁶ Parties’ reply comments at 17.

⁶⁷ Port comments at 30.

⁶⁸ Parties reply comments at 18.

Commission Determination

46. Regarding Port's argument in the most favorable terms, it is unexplained and unsupported. Consisting of two sentences, this argument appears to equate the allocation and distribution of Settlement funds to a legislative activity that, when delegated to the Bankruptcy Court (an Article III tribunal), amounts to an unconstitutional delegation. Port cites as precedent for this argument *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (*Schechter*), a landmark Supreme Court decision invalidating the Live Poultry Code as an unconstitutional delegation of legislative power to the Executive Branch. *Schechter* is inapposite for two reasons. First, there simply is no legislative function involved. The Settlement provides an allocation that will be used in the distribution of the Settlement proceeds to the Parties and the Opt-in Participants. Second, there is no delegation of legislative authority to another branch of government. Rather, a Settlement has been filed with the Commission and the Bankruptcy Court for approval, which is directly within the unique statutory and constitutional purviews of each entity. Thus, the Commission finds that Port's constitutional argument is not articulated clearly enough to persuade the Commission, and Port's reliance on *Schechter* appears to be misplaced.

G. Western Parties' Initial Comments

47. The Western Parties assert that they are not opposed to the Settlement, so long as the Commission recognizes that it is only a "partial resolution" of issues before the Commission. The Commission should make sure that approval does not in any way prejudice the rights of non-settling participants in pursuing litigation in the underlying proceedings.⁶⁹ The thrust of Western Parties' initial comments is that, because there is nothing in it for them, they will continue with the underlying litigation. As long as it is clear that the Settlement does not affect their ability to do so, the Western Parties do not oppose the Settlement.

48. However, Western Parties assert that they will be adversely affected by the covenants in the Settlement pursuant to which the Parties will withdraw pleadings. Western Parties allege that they should be allowed to take over the sponsorship of certain exhibits, and that procedures be established before the Presiding Administrative Law

⁶⁹ Western Parties Initial Comments at 1-3.

Judge to make certain record material available to the Western Parties to sponsor.⁷⁰ Western Parties assert that, if the Commission does not accede to its request to sponsor some of the exhibits withdrawn by the California Parties, it should require that, “at a minimum, Enron’s testimony and exhibits referenced in Appendix IV should be removed from the record.”⁷¹

49. The Parties respond that it would be inappropriate for the Commission to rule on the evidentiary issues raised by Western Parties. “The right of remaining parties to the litigation to pursue such evidentiary matters is not affected by the Settlement, and there is no reason whatsoever for the Commission to take upon itself now the task of sorting out such evidentiary matters as to parties who intend to continue to litigate in front of the Presiding Judge.”⁷² Thus, the Parties urge the Commission to reject Western Parties’ request.

Commission Determination

50. As stated above, the Commission finds that the Settlement will not adversely affect the rights of Non-Settling Participants to pursue litigation separately. On the issue of withdrawal of testimony required by the Settlement, the Commission finds Western Parties’ request to sponsor withdrawn evidence to be inappropriate at this time. They have presented no compelling reason for the Commission to substitute its judgment for that of the Presiding Judge in determining whether to allow the Western Parties to sponsor evidence that is withdrawn pursuant to the terms of the Settlement.

The Commission orders:

(A) The Commission hereby approves the Offer of Settlement and Settlement Agreement, as discussed in the body of this order.

(B) The CalPX is authorized and directed to implement the Settlement, as discussed in the body of this order.

⁷⁰ *Id.* at 20.

⁷¹ *Id.* at 21.

⁷² Parties reply comments at 4.

(C) The CAISO is authorized and directed to implement the Settlement, as discussed in the body of this order.

(D) The Commission directs that the CalPX and the CAISO will be held harmless from their actions to implement the Settlement, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.