

115 FERC ¶ 61,377
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enron Power Marketing, Inc. and Docket Nos. EL03-180-024
Enron Energy Services Inc.

Enron Power Marketing, Inc. and Docket Nos. EL03-154-018
Enron Energy Services Inc.

Portland General Electric Company Docket Nos. EL02-114-019

Enron Power Marketing, Inc. Docket Nos. EL02-115-023

El Paso Electric Company, Docket Nos. EL02-113-021
Enron Power Marketing, Inc. and
Enron Capital and Trade Resources
Corp.

(Consolidated)

Fact Finding Investigation into Potential Docket No. PA02-2-000
Manipulation of Electric and Natural Gas
Prices

Investigation of Anomalous Bidding Docket No. IN03-10-000
Behavior and Practices in Western Markets

ORDER APPROVING SETTLEMENT

(Issued June 28, 2006)

1. In this order, the Commission approves a settlement filed on April 25, 2006 (the Settlement) between Enron¹ and the Metropolitan Water District of Southern California (Met Water). 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,² and Commission approval is requested by August 31, 2006.
2. The Settlement resolves all issues as to Enron for disgorgement of profits and other remedies sought by Met Water in these proceedings arising from transactions and events in western energy markets, including markets of the California Independent System Operator Corporation (CAISO) and the California Power Exchange (CalPX), during the period from January 16, 1997 through June 25, 2003³ (the Settlement Period) as they relate to Enron. The Settlement also resolves claims arising from the termination of certain forward power contracts between Enron and Met Water.
3. On May 31, 2006, Presiding Administrative Law Judge Carmen A. Cintron certified the Settlement to the Commission as a contested partial settlement, finding it to be “fair and reasonable.”⁴

¹ 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. (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, LLC.

² 18 C.F.R. § 385.602 (2005).

³ This period is the time set by the Commission in its order directing an administrative law judge to determine the total amount of disgorgement of unjust profits by Enron for its wholesale power sales in the Western Interconnect for violations of tariffs on file with the Commission. *See* Joint Explanatory Statement at 9.

⁴ *Enron Power Marketing, Inc.*, 115 FERC ¶ 63,065 (2006).

4. In addition to the Commission's approval, the Settlement requires the approval of United States Bankruptcy Court for the Southern District of New York (the Enron Bankruptcy Court).⁵ The Commission takes notice that on May 11, 2006, Judge Arthur J. Gonzalez, issued an order approving the Met Water Settlement without condition. Judge Gonzalez found that "the legal and factual bases set forth in the Motion [for approval of the Settlement] establish just cause for relief granted herein and that the Settlement Agreement is fair and reasonable. . . ."⁶

I. Procedural Background and Description of the Settlement

5. Met Water supplies water to over 18 million southern California residents. Because Met Water's pumping plant load averages 2400 gigawatt-hours annually with a full aqueduct, Met Water participates significantly in western energy markets. Commencing in November 2000 and extending through March 2002, Met Water and EPMI entered into a series of daily, monthly and quarterly contracts under the Western Systems Power Pool Agreement (WSPP Agreement).

6. Enron's contracts with Met Water either have expired on their own terms or have been terminated. As to certain of these contracts for the delivery of energy in the fourth quarter of 2001 and the first quarter of 2002, Enron initiated an adversary proceeding in the Enron Bankruptcy Court in April 2004, claiming it is entitled to a termination payment in the amount of \$1,282,719 plus interest.⁷

7. Separately, 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 practices under the CAISO and CalPX tariffs.⁸ To date, the Commission has either

⁵ Section 1.3 of the Met Water Settlement defines the "Bankruptcy Cases" collectively as cases commenced under Chapter 11 of the Bankruptcy Code, by the Enron Debtors and certain affiliates on or after December 2, 2001 in *In re Enron Corp. et al.*, Chapter 11 Case No. 01-16034 (AJG) Jointly Administered, pending before the Enron Bankruptcy Court

⁶ Enron Bankruptcy Court order approving the Met Water Settlement, at 2.

⁷ See Answering Testimony of Jon Lambeck, Exh. MWD-1, at 3-4.

⁸ *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (Gaming Order); *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,346 (2003) (Partnership Order). Collectively, these orders are referred to as the Partnership/Gaming Orders.

dismissed actions against or approved settlements involving each of the companies named in the show cause orders, except for Enron.⁹ Met Water is an intervenor in those Commission proceedings involving Enron, specifically those involving the potential disgorgement of unjust profits by Enron.

8. On January 26, 2004, Chief Administrative Law Judge Curtis Wagner issued an order consolidating the Gaming and Partnership Proceedings.¹⁰ On January 30, 2004, the Chief Judge issued an errata consolidating Enron-related issues from Docket Nos. EL02-114-000 and EL02-115-000 with the Gaming and Partnership Proceedings.¹¹

9. On July 22, 2004, the Commission issued an order affirming the Initial Decision in Docket No. EL02-113-000, pertaining to the adjudication of Enron's liability resulting from its relationship with El Paso Electric Company.¹² The July 22 Order also consolidated that docket and others with Docket Nos. EL03-180-000 and EL03-154-000, and directed further proceedings before the Presiding Administrative Law Judge in the consolidated dockets.

10. On March 11, 2005, the Commission ruled that certain disputed terminated contracts between Enron and several utilities, including Nevada Power Company (Nevada), Public Utility District No. 1 of Snohomish County, Washington (Snohomish), Metropolitan Water District of Southern California (Met Water), the City of Santa Clara, California and Valley Electric Association (collectively, the Western Intervenors), were within the scope of the consolidated proceedings and should be addressed in these instant proceedings.¹³ Previously, separate proceedings were initiated on contract termination payments sought by Enron.

⁹ See Gaming Order at P 73.

¹⁰ *Enron Power Marketing, Inc.*, "Order of the Chief Judge Consolidating Gaming and Partnership Proceedings for Hearing and Decision," Docket No. EL03-180-000, *et al.* (2004).

¹¹ *Enron Power Marketing, Inc.*, Errata, Docket No. EL03-180-000, *et al.* (2004).

¹² *El Paso Elec. Co.*, 108 FERC ¶ 61,071 at P 32 (2004); see *Enron Power Marketing, Inc.*, 104 FERC ¶ 63,010 (2003) (the July 22 Order).

¹³ *El Paso Elec. Co.*, 110 FERC ¶ 61,280 (2005).

11. On July 20, 2005, the Chief Judge issued an order suspending the procedural schedule and scheduling a settlement conference between Enron and the remaining non-settling parties in these proceedings. After the Commission's Trial Staff unsuccessfully engaged the parties in settlement discussions, the Chief Judge issued an order designating Administrative Law Judge Judith A. Dowd as a settlement judge and scheduling a settlement conference. As a result of numerous settlement discussions between Trial Staff, Enron, and the Western Intervenors, an offer of settlement between Enron and the Nevada Companies was filed with the Commission, and this settlement was approved on January 25, 2006.¹⁴

12. Against the backdrop of this pending litigation, the Settlement filed on April 25, 2006, will resolve, as between Enron and Met Water, all claims or rights to remedies that may arise with respect to the captioned Commission proceedings.¹⁵ The Settlement will also resolve certain non-Commission proceedings, including those pending at the Enron Bankruptcy Court as between Enron and Met Water. The monetary and non-monetary consideration involved in the Settlement is described below.

13. Met Water agrees to pay to Enron a termination payment of \$316,000 in satisfaction of all amounts arising under or in connection with any transactions entered into by Met Water and Enron under the WSPP Agreement.¹⁶ While Met Water did not file a Proof of Claim in the Enron Bankruptcy,¹⁷ Enron prepared and filed with the Bankruptcy Court schedules reflecting any liabilities that may have been owed to third parties, including Met Water. These liabilities would be settled in full as to Met Water and, upon the Settlement Effective Date, these liabilities would be disallowed in their entirety as to Met Water.¹⁸

¹⁴ *San Diego Gas & Elec. Co.*, 114 FERC ¶ 61,067 (2006).

¹⁵ The Settling Parties filed a Joint Motion to Continue Stay of Proceedings Pending Commission Consideration and Approval of Settlement on April 26, 2006, with the Chief Judge.

¹⁶ See section 4.1.1 of the Settlement.

¹⁷ See *supra* n.5 and Sections 1.3, 1.5, and 4.1.2 of the Settlement.

¹⁸ Section 4.1.2 of the Settlement.

14. Under section 5.2.1 of the Settlement, Met Water agrees to withdraw all pleadings, testimony, exhibits, discovery requests, and additional requests for relief filed with the Commission and will terminate its participation as to Enron in the “FERC Proceedings.”¹⁹ The Settlement provides that no issues between Enron and any non-settling party in the FERC Proceedings or the “Cantwell Amendment Proceeding”²⁰ will be affected by the Settlement.

15. Under sections 6.5 and 6.6 of the Settlement, Met Water and Enron mutually agree to release each other from past, existing and future claims arising at the Commission and/or under the Federal Power Act (FPA)²¹ and the Natural Gas Act (NGA),²² and/or under the Cantwell Amendment²³ and any amendments to the FPA or NGA pursuant to EPAct from any legal theory or cause of action during the Settlement Period that: (1) Enron or Met Water charged, collected or paid unlawful rates, terms or conditions for electric energy, ancillary services, transmission congestion or natural gas in the western

¹⁹ “FERC Proceedings” is defined in section 1.24 of the Settlement as: *Enron Power Mktg., Inc., et al.*, FERC Docket Nos. EL03-180, EL03-154, EL02-114-007, EL02-115-008, and EL02-113, and any subsequent proceeding to determine the distribution of funds in such proceedings (Partnership/Gaming Proceeding); Docket No. EL00-95, *et al.* (Refund Proceedings); Docket Nos. PA02-2 and IN03-10 (Investigation Proceedings); Docket No. EL02-71 (Quarterly Reports Proceeding); *Enron Power Mktg., Inc., et al.*, Docket No. EL03-77 and RP03-311 (Revocation Proceeding); *Public Util. Dist. No. 1 of Snohomish County, Washington v. Enron Power Mktg., Inc.*, Docket No. EL05-139-000; *City of Santa Clara, California v. Enron Power Mktg., Inc.*, Docket No. EL04-114-000; and *Luzenac America Inc. v. Enron Power Mktg., Inc.*, Docket No. EL06-8-000 (Termination Proceedings); and any related appeals and any proceedings on remand of the foregoing proceedings.

²⁰ Section 1.9 of the Settlement defines “Cantwell Amendment Proceeding” as the consolidated proceeding before the United States District Court for the Southern District of New York styled *Enron Power Mktg. v. Luzenac America, Inc., et al.*, 05 Civ. 9244, *et al.* (LAP).

²¹ 16 U.S.C. § 824 *et seq.* (2000).

²² 15 U.S.C. § 717 *et seq.* (2000).

²³ Section 1290 of the Energy Policy Act of 2005 (EPAct) is referred to as the “Cantwell Amendment.” *See* Pub. L. No. 109-58, § 1290, 119 Stat. 983-84 (2005).

energy markets; (2) Enron or Met Water manipulated the western energy markets in any fashion; (3) Enron or Met Water was unjustly enriched by the foregoing released claims or otherwise violated any applicable tariff or law relating to western energy markets; (4) Enron or Met Water has claimed, charged, collected or retained profits associated with transactions made while the seller was in violation of orders or directives of the Commission; (5) Enron or Met Water breached, defaulted or failed to perform any contractual obligation under any contract or guarantee of performance for the purchase or sale of electricity or natural gas, including any and all claims arising under or in connection with transactions entered into by Met Water and EPMI under the WSPP Agreement; and (6) Enron or Met Water guaranteed or issued any guarantee to the other of any obligation for the benefit of any counterparty to any transaction.

II. Initial and Reply Comments on the Settlement

16. Initial comments on the Settlement were filed on May 15, 2006 by the Commission's Trial Staff and by Snohomish and Luzenac America, Inc. (Luzenac) (collectively, the Western Consumers). Reply Comments were filed on May 25, 2006 by Trial Staff and by Enron and Met Water, jointly. The Western Consumers oppose specific portions of the Settlement.

Comments of the Western Consumers

17. Western Consumers raise two issues: (1) the impact of the Settlement on non-settling parties, particularly in the pending Cantwell Amendment Proceedings; and (2) the withdrawal by Met Water of pleadings in these proceedings. Western Consumers suggest that certain changes to the Settlement would "eliminate the major bases for Western Consumers' objection."²⁴ Without such changes, the Western Parties assert that the Settlement is contrary to the public interest.²⁵

18. Western Consumers object to the language of section 7.1.1 of the Settlement, which provides that a Commission order approving the Settlement

shall be deemed and construed, unless the FERC Settlement Order(s) makes an express, specific finding to the contrary, as an order finding that: the monetary consideration provided by [Met Water] ... shall be deemed to be found just and

²⁴ Western Consumers initial comments at 6.

²⁵ *Id.* at 5.

reasonable and consistent with the public interest in the Partnership/Gaming Proceedings and the Termination Proceedings ...²⁶

Western Consumers are concerned that the “deemed and construed” language could be construed as a finding in the Western Consumers’ pending Cantwell Amendment Proceedings.²⁷ They further assert that this language “constitutes a renewed effort to get this Commission to prejudge the very issues that Congress – by passage of the Cantwell Amendment – has told the Commission to investigate and resolve in a fashion that is consistent with its obligation to protect consumers.”²⁸ Western Consumers state that this language is “substantively unnecessary” to the Settlement and “procedurally defective” because Met Water is not a party to all of the Termination Proceedings.²⁹

19. Western Consumers also assail Met Water’s obligation to withdraw pleadings and resist subpoena of its witnesses. In doing so, Western Consumers state that they “preserve and incorporate by reference” their prior objections to other settlements that have similar obligations imposed on the settling parties. However, because “[Met Water] did not submit a significant quantity of evidence into the record, ... [Western Consumers’] objections are not as important in this situation as they are in the case of the Trial Staff and Santa Clara [Settlements].”³⁰

²⁶ Western Consumers also object to nearly identical language in section 2.2, which describes the conditions precedent to certain Settlement obligations, including the payment of monetary consideration, the release of claims or defenses and the withdrawal from Commission proceedings. *Id.* at 1, 3, 5-6. The “Termination Proceedings” are proceedings initiated pursuant to the Cantwell Amendment seeking a determination on claims for termination payments under certain contracts with EPMI. These proceedings are also referred to as “Cantwell Amendment proceedings.”

²⁷ *Id.* at 2, 3-5.

²⁸ *Id.* at 4.

²⁹ *Id.* at 2.

³⁰ *Id.* at 6. Western Consumers refer to the pending settlements between Enron and the Commission’s Trial Staff and Enron and Santa Clara, , which were filed for Commission approval on May 10, 2006.

20. Trial Staff's initial comments support the Met Water Settlement as a "fair and reasonable result which represents a reasonable compromise of competing interests."³¹ Pointing to sections 2.2 and 6.7.4, Trial Staff assert that the Settlement will not adversely affect the rights of non-settling parties to continue their litigation in these proceedings or in the Cantwell Amendment Proceedings.

21. Trial Staff's reply comments state that the Western Consumers' objections to sections 2.2 and 7.1.1 are without merit and should be denied. They point out that the Settlement by its express terms is between Enron and Met Water only. Moreover, Trial Staff avers that it is irrelevant that Met Water is not a party to all of the Termination Proceedings, in that Enron and Met Water do not represent that Met Water is a party to all of the Termination Proceedings.³² Trial Staff argue that any findings with respect to the reasonableness of Met Water's termination payment under the Settlement are limited to the terms of this Settlement and do not adversely affect Western Consumers' litigation in the Termination Proceedings.³³

22. Enron and Met Water's (Settling Parties) joint reply comments assert that the sections of the Settlement to which Western Consumers object do not have the effect of prejudging the Cantwell Amendment Proceedings nor are they intended to create any precedent that would impair the ability of non-settling parties to continue to litigate against Enron.³⁴ They aver that Western Consumers either misunderstand or have not given sufficient weight to other language included in section 2.2 that provides: "Nothing herein will affect the positions that any Non-Settling Participant or any of the Remaining Western Parties wishes to assert in any proceeding."³⁵ The Settling Parties also argue that the language found objectionable by Western Consumers was added to ensure that Enron would not be barred from receiving the payments Met Water has agreed to make "on the grounds that they are unjust, unreasonable, or contrary to the public interest."³⁶

³¹ Trial Staff initial comments at 11.

³² *Id.* at 4-5.

³³ *Id.* at 7.

³⁴ Settling Parties' reply comments at 4.

³⁵ Section 7.1.1 contains nearly identical language.

³⁶ Settling Parties' reply comments at 5.

23. With respect to the obligation to withdraw pleadings, the Settling Parties assert that such agreements are appropriate between parties settling their differences, and refusing to give effect to this provision would undercut the value of the Settlement to the parties. It would also be inconsistent with the Commission's goal of achieving settlements.³⁷ In this regard, Trial Staff's reply comments also point out that any litigant, such as Snohomish or Luzenac, will still be able to sponsor any document filed by Met Water deemed necessary to pursue its litigation. "Consequently, [Met Water] should not be required to make any witness available in order for Snohomish to develop the record to support its claim."³⁸

III. Commission Determination

24. The Commission is not persuaded by either of the Western Consumers' concerns with this Settlement and, accordingly, the Commission will approve it.

25. First, the Commission does not read the language in section 2.2 or 7.1.1 of the Settlement as having any effect on non-settling parties. On the contrary, language in these sections immediately following the language to which Western Consumers object states the Settling Parties' clear intention that the Settlement not adversely affect the interests of non-settling parties: "Nothing herein will affect the positions that any Non-Settling Participant or any of the Remaining Western Parties wishes to assert in any proceeding."³⁹ Moreover, section 6.7.4 also ensures against adverse impacts on Non-Settling Participants:

Moreover, except for the purpose of enforcing the terms and conditions of this Agreement as between and among the Parties, nothing herein shall establish any facts or precedents as between the Parties and any third parties as to any dispute.

Thus, it is clear to the Commission that the Settlement provides ample and sufficient protections against adverse effects on non-settling parties.

26. Additionally, the Settling Parties have provided satisfactory explanation as to why the "deemed and construed language" is necessary. The Settling Parties state that this

³⁷ *Id.* at 7, citing *Panhandle Eastern Pipe Line Company*, 69 FERC ¶ 61,313 at 62,200 (1994).

³⁸ Trial Staff reply comments at 3 n.7.

³⁹ *See* sections 2.2 and 7.1.1 of the Settlement.

language ensures that Enron will not be barred from receiving the payments Met Water has agreed to make under section 4.1.1 of the Settlement on the ground that they are unjust, unreasonable or contrary to the public interest.

27. The Commission also notes that virtually identical language was included in an earlier settlement between Enron and the Nevada Companies, which the Commission approved on January 5, 2006.⁴⁰ The Western Parties' comments (in which Snohomish participated) asked that the Commission confirm that provisions of the Nevada Companies' settlement would not affect the rights of non-settling parties. The settling parties in that matter provided this assurance in reply comments, and the Commission's order agreed that these provisions would have no adverse effect on non-settling parties. The provisions at issue in the instant Settlement between Enron and Met Water similarly state that the terms of this bilateral settlement between Enron and Met Water are just and reasonable as between the settling parties, who are trying to resolve their differences in these very complex proceedings. The Settlement contains no discussion, much less a finding, with respect to termination payments sought by Enron from non-settling parties. Therefore, the Commission will not require any modifications to sections 2.2 or 7.1.1 of the Settlement.

28. Second, with respect to the Western Consumers' concern that Met Water's withdrawal of pleadings will adversely affect non-settling parties, the Commission finds that this concern is without merit. The only effect of the Settlement on non-settling parties is that they will have to sponsor material withdrawn pursuant to the Settlement. In a similar case involving the effect of withdrawal of pleadings on non-settling parties, the Commission stated:

SPS's assertions that the withdrawal of pleadings and termination of proceedings will hamper its efforts to protect its rights are speculative, and, in any event, do not warrant our forcing parties that have no desire to litigate to continue to litigate.⁴¹

All of the evidence proffered by Met Water will remain available to the non-settling parties, should they choose to sponsor it, and thus there should be no disadvantage to

⁴⁰ See *San Diego Gas & Elec. Co.*, 114 FERC ¶ 61,067 (2006). Under that settlement, the Nevada Companies include Nevada Power Company, Sierra Pacific Power Company, and Sierra Pacific Resources.

⁴¹ *City of Las Cruces, New Mexico*, 91 FERC ¶ 61,277 at 61,939 (2000). See also *Axia Energy. LP*, 96 FERC ¶ 61,039 at 61,000-01 (2001).

those seeking to continue to litigate. Moreover, the Commission's policy throughout these proceedings has been to promote transparency and provide access to the evidence obtained in its investigation into market manipulation in Docket No. PA02-2-000, and as noted above, that evidence is still available for the Western Consumers themselves to sponsor. Western Consumers also acknowledge that Met Water did not introduce a significant quantity of evidence, and thus its objections "are not as important" as they were with respect to the Enron-Trial Staff Settlement.

The Commission orders:

The Commission hereby approves the Settlement between Enron and Met Water as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.