UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corporation	Docket No. EL02-113-000
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-180-000
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-154-000

ORDER ON INITIAL DECISION AND CONSOLIDATING DOCKETS

(Issued July 22, 2004)

1. This case is before the Commission on exceptions to an Initial Decision by an Administrative Law Judge (ALJ) in Docket No. EL02-113-000.[1] The Commission affirms the Initial Decision's finding that Enron[2] violated a condition contained in the Commission's December 2, 1993 Order authorizing Enron to charge market-based rates for wholesale power sales, by not informing the Commission of Enron's business relationship with El Paso Electric Company. The order also affirms the Initial Decision to the extent of requiring that Enron disgorge $32.5 million in profits associated with sales involving El Paso's facilities.

2. However, the Commission also concludes that in light of the fact that the Enron-El Paso relationship was a subset of broader Enron relationships and practices in the West which are currently pending before another ALJ in Docket Nos. EL03-180-000 and EL03-154-000, it is appropriate to consolidate this docket and our decision herein with Docket Nos. EL03-180-000 and EL03-154-000, and to direct the ALJ in Docket Nos. EL03-180-000 and EL03-154-000 to determine the total amount of money that Enron

[1] Enron Power Marketing, Inc., *et al.*, 104 FERC ¶ 63,010 (2003) (Initial Decision).

[2] Enron Capital and Trade Resources Corporation (currently d/b/a Enron North America) (ECT) and Enron Power Marketing, Inc. (EPMI) (collectively, Enron).

should be required to disgorge. We note that based on the evidence in this docket, as well as in Docket Nos. EL03-180-000 and EL03-154-000, Enron potentially could be required to disgorge profits for all of its wholesale power sales in the Western Interconnect for the period January 16, 1997 to June 25, 2003. However, an appropriate remedy should take into account all evidence of violations of tariffs on file or orders of the Commission in all pending dockets involving Enron's role in the Western power crisis.

3. This order benefits customers by providing for the comprehensive review of all evidence relevant to Enron conduct that violated or may have violated Commission tariffs or orders and the appropriate remedy for such violations.

I. Background

4. A detailed history of this proceeding is provided in the Initial Decision.[3] In brief, this proceeding involves an examination of the business relationship between El Paso Electric Company (El Paso Electric) and two Enron companies: ECT and its subsidiary EPMI.[4] In brief, during certain hours of the week, Enron operated El Paso Electric's power marketing desk, and, further, entered into contracts for El Paso Electric solely at Enron's discretion – and thus gained control of El Paso Electric's generation.

5. On August 13, 2002, under section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e (2000), the Commission ordered a hearing to investigate possible misconduct by Enron and El Paso Electric, particularly over whether they should have made filings pursuant to sections 203 and/or 205 of the FPA, 16 U.S.C. §§ 824b, 824d (2000). This was based on an indication that these entities had entered into a contractual relationship which may have resulted in Enron acquiring control of El Paso Electric's assets without informing the Commission.[5]

[3] Initial Decision at P 2-6.

[4] El Paso Electric, the California Attorney General, the California Electricity Oversight Board, and the Commission Trial Staff reached a settlement as to El Paso Electric in this proceeding, which the Commission has approved. *See* El Paso Electric Company, Enron Power Marketing, Inc., Enron Capital and Trade Resources Corporation, 104 FERC ¶ 61,115 (2003).

[5] El Paso Electric Co., 100 FERC ¶ 61,188 at P 6-10 (2002).

6. Testimony was filed by Trial Staff, Enron, El Paso Electric, the California State Parties, and Tacoma.[6] On July 15, 2003, the ALJ, after extensive hearings and briefing, issued an initial decision deciding the issues raised in this case.[7] Briefs on Exceptions were filed by Enron, the California Parties, and PG&E. Trial Staff and Enron filed Briefs Opposing Exceptions.

II. Discussion

7. We have reviewed the record, the Initial Decision and the briefs on and opposing exceptions to the Initial Decision. While Enron and other parties discuss numerous issues on exceptions to the Initial Decision, their arguments largely replicate those which were made to, and fully addressed by, the ALJ. Nothing in their briefs persuades us to overturn the ALJ with respect to her findings that: (1) Enron violated its market-based rate authority by failing to notify the Commission of its control of El Paso Electric's assets pursuant to the Power Consulting Services Agreement (PCSA);[8] (2) Enron should disgorge profits for this violation;[9] (3) Enron's market-based rate authority should be revoked (which, we note, the Commission has already done prospectively in a separate

[6] Several parties sought, and were granted, intervenor status in this proceeding: the City of Tacoma, Washington (Tacoma); the California Electricity Oversight Board and the People of the State of California, *ex. rel.* Bill Lockyer, Attorney General (collectively, California State Parties); the California Independent System Operator Corporation (CAISO); Pacific Gas and Electric Company (PG&E); Dynegy Power Marketing, Inc.; Californians for Renewable Energy, Inc.; Pioneer America LLC; the City of Burbank, California; and the Public Utility District No. 1 of Snohomish County, Washington (Snohomish).

[7] Enron Power Marketing, Inc., *et al.*, 104 FERC ¶ 63,010 (2003) (Initial Decision).

[8] Initial Decision at P 95-112; see Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,405 (1993), *order on clarification and reh'g*, 66 FERC ¶ 61,244 (1994) (granting market-based rate authority).

[9] Initial Decision at P 112-115.

proceeding);[10] and (4) it is not necessary to determine in this proceeding whether Enron's trading strategies constituted unlawful actions that adversely affected the California energy market since this issue is being addressed in a separate proceeding.[11] No useful purpose would be served by further discussion of those issues because the ALJ's findings are supported by the record and are consistent with existing case law and Commission policy. There are certain matters, however, which warrant further discussion, or on which we differ with the ALJ. Those matters are discussed below.

A. Submission of the PCSA between Enron and El Paso Electric

1. Initial Decision

8. The ALJ concluded that the record in this case supports a finding that Enron violated section 205(c) of the FPA, since it did not file the PCSA with the Commission. According to the ALJ, the PCSA was a contract which related to or affected the rates, charges, and classifications of jurisdictional services. The ALJ found that, under the PCSA, Enron marketed El Paso Electric's power; Enron operated El Paso Electric's power marketing desk, buying and selling wholesale electricity without filing the PCSA for Commission approval pursuant to section 205(c) of the FPA. The ALJ found that, contrary to Enron's claims, this was not just a consulting agreement; consequently, under section 205(c) of the FPA, it had to be approved by the Commission.[12]

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[10] *Id.* at P 115; Enron Power Marketing, Inc., 103 FERC ¶ 61,343 (2003), *reh'g denied*, 106 FERC ¶ 61,024 (2004) (EPMI). A revocation of market-based rates or a disgorgement of profits would not void contracts that parties may have signed; the rates may be changed prospectively, or disgorgement of profits may be ordered, but the contract remains. *See* Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61,980 (1993), *order on reh'g*, 65 FERC ¶ 61,081 (1993) (Prior Notice) (a failure to timely file for market-based rate authority may result in the rates being re-set as cost-based rates). Any disgorgement still must let sellers recover their costs. *See, e.g.*, Coastal Oil & Gas Corp. v. FERC, 782 F.2d 1249, 1253 & n.6 (D.C. Cir. 1986); *see generally* United Gas Pipe Line Company v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Company, 350 U.S. 348 (1956).

[11] Initial Decision at P 115, 116, 125-127; *see* American Electric Power Services Corp., 103 FERC ¶ 61,345 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004); *see also* Enron Power Marketing, Inc., 103 FERC ¶ 61,346 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004).

[12] *See* Initial Decision at P 33.

9. Furthermore, the ALJ found that Enron entered into contracts for El Paso Electric solely at Enron's discretion.[13] The ALJ noted that unrebutted record evidence demonstrates that in some transactions Enron even took title to El Paso Electric's power.[14] Due to the nature of the business relationship between both parties, the ALJ also noted that it is not possible to differentiate in which transactions this did in fact occur. Furthermore, the ALJ determined that by Enron's actions (with no input from El Paso Electric) Enron set or affected the price El Paso Electric obtained for its power. Moreover, the ALJ noted that Enron and El Paso Electric shared profits on supplemental market sales and ancillary services sales to the California Independent System Operator (CAISO). The ALJ concluded that this evidence proved that the relationship was not brokering.[15] The ALJ found that Enron, by virtue of the PCSA, gained control of El Paso Electric's generators by controlling the marketing division of El Paso Electric (a utility with a franchised service area).[16] Since Enron's previously approved tariff did not give it authority to perform these services contemplated in the PCSA, the ALJ concluded that Enron had to seek prior formal approval from the Commission under section 205(c) before providing this service.

2. Exceptions

10. In its Brief on Exceptions, Enron repeats many of the same arguments it made in its Initial Brief. Enron argues that EPMI and other power marketers were exempt from filing individual power sales contracts or related agreements under section 205, and the Commission cannot impose such a remedy retroactively. Although Enron admits that section 205 applies to it, Enron maintains that beginning in 1989 the Commission granted all power marketers without generation facilities a waiver of the requirement to file contracts or related agreements under section 35.1(a) of the Commission's regulations, 18 C.F.R. § 35.1(a). Under this waiver, Enron states that, instead of filing individual contracts or related agreements, power marketers were only required to file tariffs and

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[13] *See id.* at P 37 ("Enron could decide from whom, how and when Enron could buy or sell power on El Paso Electric's behalf").

[14] *See id.* at P 46 (citing Exs. S-40 at p. 44-45; S-39 at p. 3; S-9 at p. 6 ¶ 16; S-10 at p. 9; S-37 at p. 4).

[15] *See id.* at P 46-48 (citing Enron Power Marketing, Inc., 65 FERC ¶ 61,305 (1993) (citing Citizens Energy Corp., 35 FERC ¶ 61,198 (1986)).

[16] *See* Initial Decision at P 49.

quarterly reports of jurisdictional activities.[17] Enron states, if the Initial Decision is not reversed, the precedent set will have negative consequences, by requiring all power marketers to file agreements for brokering, advising, revenue sharing, and other services that have previously been exempt from filing.

11. Additionally, Enron repeats its argument that the Commission's order granting Enron market-based rate authority and accepting its power marketer tariff gave EPMI plenary authority to sell power and operate a trading desk, without limitation as to whether those sales were made on EPMI's own behalf or on behalf of others.[18]

12. Trial Staff argues that Enron failed to cite any Commission order that explicitly announced a waiver of 18 C.F.R. § 35.1(a) in its entirety for all power marketers in 1989, which it would have done unequivocally had a waiver of such magnitude occurred.[19] Trial Staff also counters that market-based rate authority does not allow a power marketer to do anything it wants. Trial Staff maintains that it merely provides a power marketer the authority to engage in those activities requested by the entity when it first filed for such authority with the Commission; if a power marketer wants to provide a new type of jurisdictional service not covered by a tariff or contract on file, Commission approval must first be obtained.

2. Commission Determination

13. While the Commission agrees with the ALJ's finding that Enron at times exercised control over El Paso Electric's facilities, and while as discussed *infra* we affirm the ALJ's conclusions that Enron violated its market-based rate authorization and should be required to disgorge profits, we reverse the ALJ's finding that Enron violated section 205(c) of the FPA by failing to file the PCSA under section 205(c) before its implementation.

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[17] *See* Enron's Brief on Exceptions at 6-9 (citing 18 C.F.R. § 35.1(g) (2003); Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,407 (1993); Citizens Power & Light Corp., 48 FERC ¶ 61,210 (1989); Southern Company Services, Inc., 87 FERC ¶ 61,214 (1999); D.E. Shaw Plasma Power, LLC, 104 FERC ¶ 61,150 (2003), and D.E. Shaw Plasma Power, LLC, *et al.*, Docket No. ER03-879-000, *et al.* (July 23, 2003) (letter order) (collectively, Plasma Power Orders)).

[18] *See* Enron's Brief on Exceptions at 10-13 (citing the Plasma Power Orders). While ECT signed the PCSA with El Paso Electric, in practice EPMI performed the services under the PCSA. *See* Initial Decision at P 31-32.

[19] *See* Trial Staff's Brief on Exceptions at 16-17.

14. Initially, the Commission agrees with the ALJ that Enron at times had a quantum of control and operated El Paso Electric's assets during certain off-peak periods.[20] Specifically, Enron, in its prescheduling and real-time functions, gained control of decision-making authority over sales of electric energy. Indeed, El Paso Electric admitted that it gave Enron discretion on how, when, and to whom it could sell power on El Paso Electric's behalf while Enron ran the El Paso Electric trading desk. Prompt notification to the Commission of this type of change of circumstances was specifically required of Enron.[21]

15. In the prescheduled (day-ahead) market, the quantities and acceptable prices (minimum, not ceiling) were given to Enron, who sold the power in the market. Enron had similar authority for El Paso Electric sales to CAISO's supplemental and ancillary services markets. Enron had authority to determine the timing and quantity of bids into the California Power Exchange (Cal PX) and CAISO, subject to reliability parameters. Finally, El Paso Electric allowed Enron to dispose of the output of certain generation assets.[22] In real-time, the same was essentially true.[23]

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[20] *See* Initial Decision at P 39-42.

[21] *See* Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,405 (1993), *order on clarification and reh'g*, 66 FERC ¶ 61,244 (1994) (directing "Enron to inform the Commission promptly of any change of status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing.").

[22] *See* Initial Decision at P 42 (citing Exs. S-5 at p. 25; S-9 at p. 3 ¶ 12(a); S-32 at p. 3; Ex. S-5 at p. 28; Ex. S-9 at p. 3 ¶ 12(a); Ex. S-9 at p. 3 ¶ 11(a)).

[23] Enron manned El Paso Electric's real-time trading desk 76 percent of the time; 16 hours per day during the work week and 24 hours per day on holidays and weekends. Enron thus was responsible for monitoring and performing real-time marketing on El Paso Electric's behalf 76 percent of the time. Enron set the price and, as long as operational and reliability criteria were met, El Paso Electric could not rescind the transaction. The ALJ found no instances of any transaction being rescinded. Initial Decision at P 41 (citing, *e.g.*, Ex. S-1 at p. 13).

16. In short, Enron at times had control over the quantity, availability and pricing of wholesale power sales by a competitor. The Commission's market-based rate findings are expressly premised upon a demonstration by the applicant that the applicant lacks market power.[24] If conditions changed, Enron was required to inform the Commission of those changes.[25]

17. Through Enron's control at times of El Paso Electric's sales of physical power, Enron had the ability to control this supply, and even withhold this supply from the market. These were not the circumstances that were represented to the Commission when Enron was granted its market-based rate authority, and, importantly, Enron's market-based authorization expressly required it to report departures from circumstances previously represented to the Commission. Specifically, the Commission directed: "Enron to inform the Commission promptly of any change of status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing."[26] The failure of Enron to follow this requirement warrants retroactive disgorgement of profits (discussed *infra*).

18. We note that Enron was fully aware of its obligation to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission relied upon in approving market-based pricing. For example, pursuant to this obligation, on January 21, 1997, Enron notified the Commission of a change in status when it and one of its subsidiaries acquired a majority interest in Zond Corporation.[27] On January 16, 1997, Enron executed the PCSA with El Paso Electric, and the same obligation to promptly report the change in status applied. Yet Enron did not notify the Commission of the execution of the PCSA.

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[24] *See* Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,404-05 (1993), *order on clarification and reh'g*, 66 FERC ¶ 61,244 (1994); *accord*, *e.g.*, Heartland Energy Services, Inc., 68 FERC ¶ 61,223 at 62,060-63 (1994).

[25] *See* Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,405 (1993), *order on clarification and reh'g*, 66 FERC ¶ 61,244 (1994); *accord EPMI*, 103 FERC ¶ 61,343 at P 55 & n.35 (revoking Enron's market-based rate authority prospectively and stating that "we find that Enron Power Marketers failed to inform the Commission in a timely manner of changes in their market shares that resulted from their gaining influence/control over others' facilities").

[26] *See* Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,405 (1993), *order on clarification and reh'g*, 66 FERC ¶ 61,244 (1994).

[27] *See* Enron's January 21, 1997 filing in Docket No. ER94-24-017.

19. Although on January 16, 1997, when it executed the PCSA, Enron was required to notify the Commission of changes in status under the Commission's requirements in effect at the time, the PCSA was not required to be separately filed under section 205(c) of the FPA. The Commission has discretion as to precisely what contracts need to be filed under section 205(c).[28] At the time Enron and El Paso Electric executed the PCSA, January 16, 1997, Enron had already been granted blanket market-based rate authority for wholesale sales and Commission precedent did not expressly require that agreements like the PCSA needed to be separately filed with the Commission under section 205(c) of the FPA; indeed, for sellers with market-based rate authority like Enron, the Commission had waived some of the Commission's requirements, including a number of the Commission's filing requirements.[29] Even today, the Commission has not expressly required agreements such as the PCSA to be separately filed with the Commission under section 205(c), and has, in Order No. 2001, waived the requirement to file power sales agreements for sellers with market-based rate authority.[30] Accordingly, in this regard, we will reverse the Initial Decision.

[28] *See, e.g.*, Northeast Utilities Service Company and Select Energy, Inc. v. ISO New England Inc. and New England Power Pool, 105 FERC ¶ 61,122 at P 21 (2003); Pacific Gas and Electric Company, San Diego Gas & Electric Company and Southern California Edison Company, 80 FERC ¶ 61,128 at 61,423 (1997).

[29] *See* Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,407 (1993), *order on clarification and reh'g*, 66 FERC ¶ 61,244 (1994) (holding that "Enron's request for waiver of the provisions of subparts B and C of Part 35 of the Commission's regulations, except as to sections 35.12(a), 35.13(b), 35.15, and 35.16 of the Commission's regulations, is hereby granted. As to sections 35.12(a), 35.13(b), 35.15, and 35.16, Enron's request is hereby denied").

[30] Revised Public Utility Filing Requirements, Order No. 2001, 67 Fed. Reg. 31,043, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074 (2002); *see* 18 C.F.R. § 35.10a (2004).

B. Remedies

1. Initial Decision

20. The ALJ found that Enron should refund identified profits of approximately $32.5 million that it earned in transactions involving Enron and El Paso Electric.[31]

21. The ALJ disagreed with Enron's arguments concerning remedies. First, the ALJ stated that the refund effective date established by the Commission does not prohibit refunds for earlier periods in cases where the utility did not file pursuant to section 205(c) of the FPA. Additionally, the ALJ determined that the filed rate doctrine does not bar refunds in this case, since the filed rate doctrine presupposes a filed rate, which is not the situation here. Second, the ALJ held that the Commission is authorized to order disgorgement of profits.[32]

22. In determining a remedy for Enron's violation of section 205(c) of the FPA, the ALJ cited Prior Notice,[33] where the Commission adopted a remedy for failing to comply with the prior notice and filing requirements of section 205 of the FPA. In Prior Notice, the ALJ explained, the Commission stated that this remedy sought to convey to the industry the seriousness with which it viewed failures to comply with these requirements, which mandated that rates or charges for jurisdictional service, or contracts affecting or

[31] Initial Decision at P 53, 115.

[32] *Id.* at P 55. While we agree with the ALJ that the Commission may order disgorgement of profits based on the facts presented, as discussed *infra*, we reverse the ALJ's findings that Enron had no rate on file.

[33] *See id.* at P 52 (citing Prior Notice, 64 FERC at 61,979-80). The situation presented here is distinguishable from that in Prior Notice. Prior Notice dealt with situations where the seller had no rate on file. As noted above, Enron had a rate on file, but failed to comply with the conditions of its market-based rate authorizations, *i.e.*, the conditions in the Commission's order granting it that authorization.

relating to such service, be filed. The Commission held that: "we will require the utility to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a of our regulations, for the entire period that the rate was collected without Commission authorization."[34] In addition, the Commission stated: "the late filing utility will receive the equivalent of a cost-based rate."[35]

23. In the instant case, the ALJ found, the record is devoid of direct evidence of Enron's costs. Enron asserted a number of reasons for not producing its costs, none of which the ALJ found persuasive. Trial Staff witness Barlow thus calculated an estimated range of profits and recommended a refund amount,[36] and the ALJ found Barlow's uncontradicted testimony reasonable and entitled to substantial weight. Barlow estimated EPMI earned approximately $19,303,468 using a so-called low profit number and $45,754,064 using a so-called high profit number, from its transactions as a result of its alliance with El Paso Electric under the PCSA.[37] Since Enron did not provide cost data, Barlow started with Enron's total reported revenues reported to the Western Systems Power Pool (WSPP) for the period in question (1997 to 2001), and multiplied this figure by assumed high and low profit percentages based on margins obtained for energy marketers/brokers that were derived from a larger set of U.S. utilities obtained from Dominion Bond Rating Service, Ltd. Barlow estimated that EPMI earned approximately $50,732,040 using a low profit number and $124,727,794 using a high profit number, from all of EPMI's transactions reported to the WSPP.[38] Barlow then took these profit numbers and multiplied them by the percentage of power supplied by El Paso

[34] Prior Notice, 64 FERC at 61,979; *accord id.* at 61,980.

[35] *Id.* at 61,980.

[36] *See* Initial Decision at P 53 n.21.

[37] *Id.* at P 53 (citing Ex. S-50 at p. 5-6, and Attachment A at p. 1).

[38] *See* Ex. S-50 at p. 5, and Attachment A at p. 1.

Electric to Enron to calculate high and low profit estimates for transactions involving El Paso Electric and Enron for the period in question.[39] The ALJ stated that it is reasonable to average these two figures, and, accordingly, the ALJ determined that Enron should disgorge $32,528,766.[40]

24. The ALJ also stated that, due to the relationship between Enron and El Paso Electric, which, because it was not brought to the Commission's attention, violated Enron's market-based rate authority, Enron should be ordered to disgorge $32,528,766 for transactions involving Enron and El Paso Electric.[41] This remedy was recommended in addition to the prospective revocation of Enron's market-based rate authority which had already been ordered by the Commission.[42] The ALJ stated that "[a]lthough Staff is correct that violation of market-based rate authority is a continuing violation which would permeate all transactions in the WSPP, the imposition of such a remedy seems outside of the jurisdictional parameters of this proceeding," especially in light of the fact that the Commission had ordered Enron to show cause in other proceedings why it should not be ordered to disgorge profits it made in violation of the CAISO and Cal PX tariffs.[43]

2. Exceptions

25. The California State Parties and PG&E argue that since Enron's misconduct involving El Paso Electric was only a small part of a pervasive pattern of market manipulation in California, the only workable remedy is a resetting of market prices for the entire period from May 1, 2000 through June 20, 2001, using the Commission's mitigated market clearing price (MMCP) methodology. If the Commission does not implement such a market-wide remedy against all sellers, including Enron, the California State Parties and PG&E argue that Enron should be ordered to disgorge all profits it earned under its market-based rate authorization from all sources during the entire time of

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[39] *See* Ex. S-50 at p. 2-5, and Attachment A at p. 1.

[40] While the ALJ stated that "consistent with Commission policy, as enunciated in Prior Notice, . . . [this figure] reflect[s] the equivalent of a cost-based rate," the Commission interprets this to mean that the refund of the $32,528,766 of unjust profits would leave Enron with the equivalent of a rate justified by Enron's costs. See Initial Decision at P 53.

[41] Initial Decision at P 115.

[42] *Id.* at P 115.

[43] *Id.* at P 115.

its relationship with El Paso Electric, 1997-2001, as quantified by California State Parties witness Merola, in the amount of $2.974 billion. In the alternative, the California State Parties and PG&E argue that, at a minimum, Enron should disgorge the profits that it earned from its activities in the WSPP, at the upper range identified by Staff witness Barlow, in the amount of $124.73 million.

26. Furthermore, PG&E argues that the Initial Decision erred in failing to set forth a methodology to allocate damages among the injured parties in California. PG&E recommends that the appropriate method of allocating damages is to distribute the damages to the purchasers of energy in the ISO market during the May 1 through October 1, 2000 period *pro rata* in proportion to their total purchases in this market.[44] Further, PG&E argues that the Initial Decision erred in failing to set forth a procedure for the damages to flow in order to provide the maximum benefit to the injured parties. Specifically, PG&E urges the Commission to direct that the amounts flow through the ISO settlement accounts, offsetting the awards against any amounts owed to Enron. Any collateral amounts that are held in the Cal PX, and that are related to Enron, should also be available to satisfy these damages in the event that the amounts to be paid by Enron exceed the amounts that are owed to it. If both the amounts owed to Enron and the Cal PX collateral amounts are exhausted, parties may then pursue the remaining amounts in court.

27. Enron argues that the ALJ erred in recommending that EPMI refund $32,528,766 in profits, all of which were earned from power sales, pursuant to EPMI's tariff on file with the Commission, made before the refund effective date of this case. Enron maintains that the proposed refund exceeds the Commission's statutory authority under section 206 of the FPA, and would violate the established prohibition against retroactive refunds. Enron argues that Part II of the FPA, which governs this proceeding, provides two monetary remedies for violations: prospective refunds and fines.[45] Enron argues that the disgorgement remedy is an unlawful retroactive refund in disguise, and is further prohibited by the filed rate doctrine. Enron distinguishes the Prior Notice case that the Initial Decision relied upon for disgorgement authority since that case involved the refund of rates that were never on file with the Commission.[46] Enron argues that the

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[44] *See* PG&E's Brief on Exceptions at 7 (citing the methodology in the Commission's recent settlement with Reliant in Docket Nos. PA02-2, *et al.*).

[45] *See* Enron's Brief on Exceptions at 30 (citing section 206, 16 U.S.C. § 824e (2000), and sections 315 and 316, 16 U.S.C. §§ 825n-825o (2000)).

[46] *See* Enron's Brief on Exceptions at 30 n.47, 39-40 (citing Initial Decision at P 52-53 (citing Prior Notice, 64 FERC at 61,979-80)).

revocation of EPMI's market-based rate tariff became effective on June 25, 2003 (the refund effective date), and at all times prior to that, including the time period during which all the relevant power sales were made, the tariff was in full force and effect, and any attempt to change those rates must comply with section 206, which provides for prospective relief upon finding an existing rate unjust, unreasonable, or unduly discriminatory or preferential.

28. In response to Enron, Trial Staff supports the Initial Decision's finding that the Commission has authority to order disgorgement of the profits Enron earned from the activities at issue here. According to Trial Staff, the record supports the Initial Decision's finding that Enron should disgorge the identified profits it earned both for violating the section 205(c) filing requirement and for violating EPMI's market-based rate tariff. Trial Staff argues that Enron failed to comply with its market-based rate tariff. Failing to comply with the filed rate, Enron's profits can be disgorged to the affected ratepayers. Moreover, Trial Staff argues that, assuming the identified sales complied with a valid tariff, the Commission can still order Enron to refund the identified profits because they were profits earned pursuant to an unfiled, and therefore unlawful, jurisdictional activity. The fact that the identified sales ultimately were executed pursuant to an otherwise (allegedly) valid tariff is immaterial.[47]

3. Commission Determination

29. Initially, while we agree with the ALJ that we have authority to order disgorgement of profits based on Enron's failure to comply with the Commission's market-based rate order which directed Enron to inform the Commission of any change in status reflecting a departure from the characteristics relied upon in the order, we reverse the ALJ's finding that there was no filed rate. This is not a situation in which Enron failed to obtain any rate approval prior to engaging in wholesale sales. Enron had a filed rate – its market-based rate tariff, which the Commission previously had accepted.[48] Rather, this is a situation in which Enron failed to abide by one of the conditions in the Commission's order authorizing the rates.

30. Turning to the issue of Enron's failure to separately file the PCSA pursuant to section 205(c), since the Commission finds that Enron was not required to file the PCSA and since Enron did give prior notice under section 205 by filing for and obtaining rate approval prior to engaging in market-based sales, the ALJ's reasoning that Enron is

[47] Trial Staff's Brief Opposing Exceptions at 51.

[48] *See* Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,403, 62,405 (1993), *order on clarification and reh'g*, 66 FERC ¶ 61,244 (1994).

required to make refunds pursuant to Prior Notice[49] does not apply to the circumstances in this case. Rather, as previously discussed, the Commission finds that EPMI violated its market-based rate authorization when it failed to comply with the requirement to inform the Commission of the change in the circumstances upon which its tariff had been accepted. The question before us, then, is the appropriate remedy for this type of violation.

31. While the Commission does not have civil penalty authority under the FPA for this type of violation, it does have generally broad discretion when it comes to remedies; indeed, its discretion is at its zenith in determining an appropriate remedy.[50] Here, Enron failed to comply with its obligation to inform us of its control of El Paso Electric's assets, thereby preventing us from determining whether that change in circumstance undermined the basis for our authorization of Enron's market-based rates. The obligation to inform the Commission was express and failure to comply with the obligation impeded the Commission's ability to ensure that utilities do not acquire market power and that rates remain just and reasonable. Under these circumstances, we find that disgorgement of the profits earned on transactions involving those assets, *i.e.*, transactions "identified to have involved El Paso [Electric] and Enron,"[51] is justified.

32. However, we do not believe it is appropriate to view this proceeding in isolation. We note that Enron's relationship with El Paso Electric was a subset of other Enron relationships and practices in the West, including potential market manipulation in violation of the CAISO and Cal PX tariffs, which are currently pending before an ALJ in

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[49] Prior Notice, 64 FERC at 61,980.

[50] *See* Niagara Mohawk Power Corp. v. FERC, 379 F.2d 153, 159 (D.C. Cir. 1967); *accord* 16 U.S.C. § 825h (2000); Mesa Petroleum Co. v. FERC, 441 F.2d 182, 187-88 (D.C. Cir. 1971); Gulf Oil Corporation v. FPC, 563 F.2d 588, 608 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1062, *reh'g denied*, 435 U.S. 981 (1978); Consolidated Gas Transmission Corp. v. FERC, 771 F.2d 1536, 1549 (D.C. Cir. 1985). The Commission's discretion, of course, is limited in some respects by the FPA, as construed by the courts. For example, section 206, the filed rate doctrine and the rule against retroactive ratemaking preclude certain remedial options. *See* PG&E Co. v. FERC, No. 03-1108, *et al.* (D.C. Cir. July 9, 2004). Courts have also ruled that disgorgements must still let a seller recover its costs. *See, e.g.*, Coastal Oil & Gas Corp. v. FERC, 782 F.2d 1249 at 1253 (1986).

[51] *See* Initial Decision at P 115.

Docket Nos. EL03-180-000 and EL03-154-000.[52] Further, the approximately $32 million in profits that the ALJ in this proceeding ordered to be disgorged for Enron's transactions involving El Paso Electric represents only a fraction of Enron's profits in the Western Interconnect for the period it violated its market-based rate authority. Accordingly, we will refer our findings in this docket to the ALJ in the other pending dockets, consolidate this docket with the other dockets, and direct the ALJ in the other dockets to determine, based on the totality of the evidence in all the dockets,[53] the total amount of profits that Enron should be required to disgorge as supported by the consolidated records.

33. With respect to the amount of disgorgement ordered in this proceeding, the ALJ noted that the record was devoid of direct evidence of Enron's costs, and that Enron had failed to produce relevant data, instead producing vague and incomplete responses.[54] Trial Staff witness Barlow calculated a range of profits (constituting Enron's profits from its transactions involving El Paso Electric) that had been made by Enron, since it "has not volunteered a number, has not settled the case, and to this day, there's no data that has been forthcoming from Enron."[55] The ALJ determined that the averaging of Barlow's high and low estimates of Enron's profits reflected an appropriate profit amount. In light of Enron's failure to provide information on its costs, the Commission finds that the

[52] There are pending "show cause" proceedings before an ALJ in Docket Nos. EL03-180-000 and EL03-154-000, involving gaming practices in violation of the CAISO and the Cal PX tariffs during the 2000-2001 period, as well as Enron's alliances/partnerships that may have gamed the market in violation of the CAISO and Cal PX tariffs. The Chief Administrative Law Judge consolidated the gaming and alliance/partnership proceedings for hearing and decision. Enron Power Marketing, Inc., and Enron Energy Servs. Inc., *et al.*, Order of Chief Judge Consolidating Gaming and Partnership Proceedings for Hearing and Decision, Docket Nos. EL03-180-000, *et al.* (Jan. 26, 2004). *See also* Enron Power Marketing, Inc., and Enron Energy Servs. Inc., *et al.*, Order of Chief Judge Extending Initial Decision Deadline and Suspending Procedural Schedule, Docket Nos. EL03-180-000, *et al.* (May 25, 2004); Enron Power Marketing, Inc., and Enron Energy Servs. Inc., *et al.*, Presiding Administrative Law Judge's Notice about Suspension of Procedural Schedule, Docket Nos. EL03-180-000, *et al.* (June 8, 2004).

[53] The ALJ is considering any and all evidence of potential market manipulation including the recently discovered "Enron trader tapes."

[54] *See* Initial Decision at P 53 n.21 (stating that the missing information would most likely raise Enron's profits or reduce its costs).

[55] *See* Ex. No. S-50 at p. 1-2 (quoting Tr. 358).

averaging of Barlow's high and low estimates produces a reasonable approximation of Enron's profits associated with its transactions with El Paso Electric, and agrees with the ALJ's recommendation that Enron disgorge $32,528,766.

34. The Commission will not, as requested by the California State Parties and PG&E, reset all market prices for the entire period from May 1, 2000 through June 20, 2001. There is no evidence in this proceeding to support findings of violations of tariffs or market rate authorizations by sellers other than Enron. The violation we find here was committed by Enron and thus our remedial authority in this proceeding is limited to Enron.

35. However, the Commission agrees with PG&E that a methodology and procedure should be set forth to distribute and allocate damages among the injured parties. Therefore, the Commission will direct Enron to deposit $32,528,766, subject to any applicable bankruptcy requirements, in the same dedicated fund that has already been established for the receipt of amounts in Docket Nos. EL03-137-000, *et al*. In those proceedings, the Commission will determine a mechanism to fairly distribute monies to customers harmed by the various practices at issue. Since those proceedings involve the same harm suffered by customers here, it is appropriate that the distribution of such amounts be addressed at the same time in one proceeding. Any additional disgorgement ordered in the consolidated proceeding will also be placed in the same fund.

36. Finally, the Commission rejects PG&E's request to use prior collateral posted by Enron and the amounts at issue here as an offset against amounts owed to Enron. As we have held, Commission-ordered refunds or disgorgement of profits should not be reduced by claimed possible offsets for unrelated amounts.[56]

The Commission orders:

(A) The Initial Decision issued on July 15, 2003 in this proceeding is hereby affirmed in part and reversed in part, as discussed in the body of this order.

(B) Enron is hereby directed to pay $32,528,766 to the dedicated fund discussed in the body of this order, within 30 days of the date of this order (subject to any applicable bankruptcy requirements), and to file a report for Commission approval within 30 days thereafter, consistent with the terms of this order.

[56] Entergy Services, Inc., 107 FERC ¶ 61,035 at P 18 & n.12 (2004); *accord* Dominion Transmission, Inc., 101 FERC ¶ 61,160 at P 11 (2002) (citing Interstate Natural Gas Association of America v. FERC, 756 F.2d 166 (D.C. Cir. 1985)).

(C) Docket No. EL01-113-000 is hereby consolidated with Docket Nos. EL03-180-000 and EL03-154-000 and the Commission's findings are hereby referred to the ALJ in Docket Nos. EL03-180-000 and EL03-154-000. The ALJ in the consolidated proceeding shall determine the total amount of disgorgement of profits by Enron for the violation found by the Commission in this order, as well as for any additional violations found by the ALJ.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.