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103 FERC ¶ 61,343

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket No. EL03-77-000
Bridgeline Gas Marketing L.L.C. Citrus Trading Corporation, ENA Upstream Company, LLC, Enron Canada Corp., Enron Compression Services Company, Enron Energy Services, Inc., Enron MW, L.L.C., and Enron North America Corp.	Docket No. RP03-311-000

ORDER REVOKING MARKET-BASED RATE AUTHORITIES AND TERMINATING BLANKET MARKETING CERTIFICATES

(Issued June 25, 2003)

1. On March 26, 2003, the Commission issued an order that directed Enron Power Marketing, Inc. (EPMI) and Enron Energy Services, Inc.'s (EESI) (collectively, Enron Power Marketers) to show cause to the Commission in a paper hearing why their authority to sell power at market-based rates should not be revoked.[1] In addition, that order directed Bridgeline Gas Marketing L.L.C. (Bridgeline), Citrus Trading Corporation (CTC), EESI, ENA Upstream Company, LLC (EEUA), Enron Canada Corp. (ECC), Enron Compression Services Company (ECS), Enron MW, L.L.C. (EMW), and Enron

[1]Enron Power Marketing, Inc., et al., 102 FERC ¶ 61,316 (2003) (Show Cause Order).

North America Corp. (ENA) (collectively, Enron Gas Marketers)[2] to show cause to the Commission in a paper hearing why the Commission should not terminate their blanket marketing certificates. As discussed below, the Commission will revoke Enron Power Marketers' market-based rate authorities pursuant to Sections 206 and 309 of the Federal Power Act (FPA), 16 U.S.C. §§ 824e, 825h (2000), and terminate the natural gas blanket marketing certificates of, EESI, EEUA, ECC, ECS, EMW, and ENA pursuant to Sections 5, 7 and 16 of the Natural Gas Act (NGA), 15 U.S.C. §§ 717d, 717f, 717o (2000), to the extent discussed below. In addition, the Commission has determined not to take action against Bridgeline and CTC.

2. This order is necessary to fulfill the Commission's obligation, pursuant to Sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d, 824e (2000), to protect electricity customers from unjust and unreasonable rates, and Sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c, 717d (2000), to protect natural gas customers from unjust and unreasonable rates.

I. Background

3. On February 13, 2002, the Commission directed a Staff fact-finding investigation into whether any entity manipulated prices in electricity or natural gas markets in the West or otherwise exercised undue influence over wholesale electricity prices in the West, since January 1, 2000.[3]

4. On August 13, 2002, Staff released its Initial Report in Docket No. PA02-2-000.[4] In that Report, Staff recommended the initiation of various company-specific proceedings[5] to further investigate possible misconduct, and recommended several generic changes to market-based tariffs to prohibit the deliberate submission of false information or the deliberate omission of material information and to provide for the imposition of both refunds and penalties for violations.

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[2]The Enron-related entities involved in these dockets are referred to collectively as Enron, Enron subsidiaries, or Enron affiliates.

[3]Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 98 FERC ¶ 61,165 (2002) (February 13 Order).

[4]The Initial Report is available on the Commission's website at http://www.ferc.gov/electric/bulkpower/pa02-2/Initial-Report-PA02-2-000.pdf.

[5]These proceedings, which are currently pending before the Commission, are Docket Nos. EL02-113-000, EL02-114-000, and EL02-115-000.

5. On March 26, 2003, the Commission released the Final Staff Report on Price Manipulation in Western Markets.[6] The Commission found in the Show Cause Order, based on the evidence discussed in the Final Staff Report, that Enron Power Marketers apparently: (1) violated Section 205(a) of the FPA[7] by engaging in gaming; and (2) acted inconsistently with their market-based rate authority, not only by engaging in gaming, but also by failing to inform the Commission in a timely manner of changes in their market shares by gaining influence/control over others' facilities in violation of their market-based rate authority.

6. In view of those findings, the Commission directed Enron Power Marketers to show cause why their authority to sell power at market-based rates should not be revoked by the Commission.[8]

7. The Show Cause Order also discussed evidence developed in the Final Staff Report investigation indicating that certain Enron Gas Marketers apparently misused their authority under their blanket marketing certificates to make sales to and purchases from gas markets serving California at rates that were unjust and unreasonable from the summer of 2000 through the winter of 2000-2001. Based on that evidence, the Commission determined in the Show Cause Order that the Enron Gas Marketers apparently participated in practices that manipulate prices so as to charge unjust and unreasonable rates. For instance, that order stated that this evidence indicates that the Enron Gas Marketers, through their electronic trading platform, EnronOnline (EOL),[9] apparently manipulated the price of natural gas at the Henry Hub located in Louisiana, on

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[6]Final Staff Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000 (March 2003) (Final Staff Report). The Final Staff Report is available on the Commission's website at http://www.ferc.gov/calendar/commissionmeetings/discussion_papers/03-26-03/E-18.pdf .

[7]16 U.S.C. § 824d(a) (2000).

[8]Enron Power Marketers are authorized to sell power at market-based rates. See Enron Power Marketing, Inc., 65 FERC ¶ 61,305 (1993); Enron Energy Services Power, Inc., 81 FERC ¶ 61,267 (1997).

[9]The EnronOnline system is administered by Enron Networks, an Enron Corp. subsidiary. EnronOnline is a free, Internet-based, transaction system which allows the Enron Gas Marketers to buy from and sell gas to third parties.

at least one occasion to profit from positions taken in the over-the-counter (OTC) financial derivatives markets (OTC markets).

8. Given the evidence of Enron Gas Marketers' conduct and its adverse effects on gas prices, the Show Cause Order directed Enron Gas Marketers to show cause why the Commission should not terminate their blanket marketing certificates under Section 284.402 of the Commission's regulations[10] to make sales for resale at negotiated rates in interstate commerce of categories of natural gas subject to the Commission's NGA jurisdiction.[11]

II. Notice and Responsive Pleadings

9. The Show Cause Order was published in the Federal Register, 68 Fed. Reg. 15,712 (2003). The Show Cause Order provided that any interested person desiring to be heard in the proceedings should file notices of intervention or motions to intervene with the Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), within 21 days of the date of the order. Furthermore, the Show Cause Order stated that Enron's show cause submissions be filed within 21 days of the date of the order and the responses to the submissions be submitted within 15 days thereafter.

10. The following parties filed timely motions to intervene raising no substantive issues: the People of the State of California ex rel. Bill Lockyer, Attorney General (California Attorney General), California Electricity Oversight Board (EOB), Florida Power Corp (only in RP docket), Metropolitan Water District of Southern California (Metropolitan), Nevada Power Company and Sierra Pacific Company (Nevada Companies), Pacific Gas and Electric Company (PG&E), Public Utility District No. 1 of Snohomish County, Washington (Snohomish), the City of Seattle, Washington (Seattle), the City of Santa Clara, California (Santa Clara), and Southern California Edison Company (Edison).

11. On April 10, 2003, Bridgeline filed a motion for clarification and requested an extension of time to file their answer two weeks after the Commission acted on their motion. On April 14, 2003, Bridgeline's request for extension of time was granted.

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[10] 18 C.F.R. § 284.402 (2003).

[11] See 15 U.S.C. §§ 717 et seq. (2000).

12. On April 16, 2003, CTC and Enron Entities[12] each submitted show cause submissions. On May 1, 2003, Metropolitan, the City of Palo Alto, California (Palo Alto), Santa Clara and Snohomish filed responses to the Enron Entities' submission and California Parties[13] and Nevada Companies filed responses to both submissions.

13. On April 25, 2003, Bridgeline, Metropolitan, Palo Alto, Santa Clara, Snohomish, Bridgeline filed requests for rehearing of the Show Cause Order. On May 12, 2003, Enron Entities and CTC filed answers to the requests. On May 23, 2003 Palo Alto filed a motion in opposition to the Enron Entities' answer to the requests for rehearing. On June 9, 2003, Enron Entities filed an answer in opposition to the motion.

III. Discussion

14. As we ordered in the Show Cause Order, the Commission instituted investigations, pursuant to sections 206 of the FPA and sections 5 and 7 of the NGA, into the apparent misconduct that the Enron Power Marketers and Enron Gas Marketers were engaged in. Our investigation has led us to find that these Enron companies disrupted the energy industry.

15. As discussed below, the Final Staff Report documents that Enron management invented numerous market manipulation schemes (which are summarized in memoranda detailing the various strategies), and used various Enron companies to execute these schemes. In fact, several Enron managers and traders are under criminal investigations or have waived indictment and pleaded guilty to participating in such strategies. The Final Staff Report also documents examples of wash trading by Enron, examples of market manipulation of natural gas at Henry Hub, and affiliate abuse in the use of EOL.

16. Moreover, as is documented in the Final Staff Report, Enron routinely disregarded the corporate separation of the various Enron affiliates, and used one or another to facilitate misconduct. For example, traders nominally employed by EPMI frequently acted as employees of EOL and controlled the bid management software that produced the prices that users saw on their screens. Since EPMI routinely was one of the two parties to each EOL transaction, in essence, the same company that ran the trading platform was a party to transactions on that platform, a situation that would not be

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[12]Enron Entities include EPMI and EESI (jointly, the Enron Power Marketers), and EEUA, ECC, ECS, EESI, EMW, and ENA.

[13]California Attorney General, EOB, California Public Utilities Commission, PG&E and Edison.

tolerated in a regulated trading exchange and which afforded traders from the power marketer a significant informational advantage over counter-parties. As another example, senior officers of Enron Corporation and ENA invested in partnerships that owned other Enron companies (such as the wind farms) expressly for the purposes of avoiding ownership rules.

17. In short, Enron's management routinely failed to respect the corporate boundaries of its various subsidiaries and affiliates, but rather treated them essentially as shell corporations under a single corporate umbrella.[14] It is entirely proper to attribute misconduct of any one to the other wholly-owned and majority-owned Enron affiliates that are the subject of the show cause order, notwithstanding their claims of individual non-involvement, and to revoke all of their electric market-based rate authorizations and terminate their natural gas blanket marketing certificate.[15] (Moreover, any Enron company that emerges from reorganization must re-apply to the Commission for new authorizations. Otherwise, Enron would be free to continue the status quo ante through an individual gas or electric power marketer that has retained its authorization.) In other words, we believe that in order to ensure that the statutory purposes of the FPA and the NGA are not frustrated we are entirely justified in taking this step.[16] (Moreover, our doing so will guarantee that Enron does not participate in the future in wholesale markets absent new applications that the Commission can thoroughly scrutinize.) This will give reassurance to the industry at large as to the fairness of energy markets.

A. Procedural Matters

1. Interventions, Answers and Rehearings

[14]Notably, the various Enron companies (except for Citrus and Bridgeline), see supra note 12 and accompanying text, filed a joint answer to the show cause order, thereby again demonstrating the commonality of purpose among themselves, as well as their intent to mount a joint defense.

[15]Town of Highlands, N.C. v. Nantahala Power & Light Company, Opinion No. 225, 37 FERC ¶ 61,149 at 61,356, 61,360 nn.10-12 (1986), reh'g denied, Opinion No. 255-A, 38 FERC ¶ 61,052 at 61,153 (1987).

[16]See id.

18. Pursuant to Rule 214(c)(1) of the Commission's Rules of Practice and Procedure, the timely, unopposed motions to intervene filed by the entities seeking to intervene serve to make them parties to the proceedings in which they moved to intervene.[17]

19. Rule 713 of the Commission's Rules of Practice and Procedure provides that rehearing may be sought only with respect to a "final Commission decision or other final order."[18] Final agency orders "impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process."[19] The Show Cause Order is not a final order – it imposes no obligation, denies no right nor fixes a legal relationship; it merely establishes procedures. Thus, we dismiss the requests for rehearing, as well as the answers. Any arguments or issues pertinent to a revocation of market based rate authorities and blanket marketing certificates should be raised on rehearing of this order.

20. We address Bridgeline's motion for clarification in Section IV of this order.

2. Consolidation

21. In its answer and in a motion filed in numerous dockets, including the two at issue here, California Parties[20] ask that the Commission use the so-called California refund

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[17]18 C.F.R. § 385.214(c)(1) (2003). Our granting interventions in Docket Nos. EL03-77-000 and RP03-311-000 does not alter the fact that the Commission is conducting an investigation in Docket No. PA02-2-000, in which the Commission has enforcement discretion. Indeed, even though the Commission has, albeit rarely, allowed interventions in Part 1b investigations, 18 C.F.R. Part 1b (2003), those interventions did not transform the investigation into an adjudication. See Baltimore Gas & Electric v. FERC, 252 F.3d 456 (D.C. Cir. 2001) (holding that notwithstanding the participation of intervenors in a section 1b investigation, the Commission had exercised unreviewable discretion in approving a settlement with the company under investigation over the objections of those intervenors); see generally Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices, 103 FERC ¶ 61,019 at P 14-15 (2003), reh'g pending.

[18]18 C.F.R. § 385.713 (2003).

[19]Air California v. U.S. Dept. of Transp., 654 F.2d 616, 621 (9th Cir. 1981) citing Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 33 U.S. 103, 1112-13 (1948); Nevada Airlines, Inc. v. Bond, 622 F.2d 1017, 1020 n.5 (9th Cir. 1980).

[20]California Parties consists of the California Attorney General, CEOB, California

(continued...)

proceeding (Docket No. EL00-95, et al.), as a single consolidated proceeding to address remedy and damage issues and to provide for a common protective order for the numerous proceedings related to the manipulation of the California spot energy markets and other California Independent System Operator (ISO) and California Power Exchange (PX) tariff violations during 2000 and 2001.

22. Among the responses to the motion, Metropolitan conditionally opposes the consolidation of the proceeding in Docket Nos. EL03-77-000 and EL02-113 with Docket Nos. EL00-95-000, et al. and Docket No. EL00-98-000 to the extent consolidation would limit the relief or parties eligible for relief from Enron. The Enron Entities and CTC principally argue that the motion to consolidate should be denied because there is no commonality between the transactions at issue and those in the California refund proceeding. The Commission Trial Staff filed a response supporting the California Parties' motion in part and opposing it in part. We note that this motion is being considered separately, and we do not find it appropriate to delay our action here pending a decision on that motion.

B. Request for Trial-Type Hearing

1. Show Cause Submission

23. The Enron Entities and CTC argue that the Show Cause Order and the paper hearings it established violate due process. They assert that the Show Cause Order generally lacks specificity as to the facts and the law asserted and that the allegations raised in the Show Cause Order raise disputes of material fact. The Enron Entities and CTC assert that resolving these proceedings through a paper hearing will deprive them of conducting discovery and confronting and cross examining witnesses. They argue that without these opportunities they do not have adequate notice of the issues and cannot adequately defend themselves. The Enron Entities and CTC also argue that the paper hearing is essentially a summary disposition proceeding and that the Commission may not initiate such a proceeding based on the "vague and conclusory allegations"[21] in the Show Cause Order. They request that the issues raised in the Show Cause Order be addressed in a trial-type proceeding.

2. Answers

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[20](...continued)
Public Utility Commission, PG&E and So Cal Edison.

[21]Enron Entities at 7; CTC at 6.

24. California Parties note that there is ample evidence of extensive market manipulation (and also tariff violations) in the Western power markets during the period January 1, 2000 through June 20, 2001: (1) the Commission Staff's investigation in Docket No. PA02-2 that resulted in the Initial Staff Report and the Final Staff report; (2) filings in the refund proceeding that resulted from the 100-Day Discovery Period; (3) parallel proceedings directly related to the crisis in the Western power markets,[22] criminal allegations and guilty pleas involving market manipulation in California and further fact-finding processes on physical withholding of electric capacity in California during the crisis period; and (4) recently initiated show cause proceedings.

25. Snohomish contends that Enron's assertions that the Show Cause Order is legally defective and that Enron is entitled to greater due process already accorded to it in this proceeding are without foundation.

26. Metropolitan states that the Show Cause Order, the Final Staff Report and proceedings in Docket No. PA02-2 provide more than enough information as to the nature of the issues involved to provide adequate notice to Enron. Metropolitan adds that the Commission is not required to describe every single fraudulent transaction and every single instance of market manipulation and gaming.

27. Metropolitan asserts that the Commission provided Enron with proper notice of the claims and allegations against it, adequately specifying the nature of the facts and evidence on which the Commission proposes to take action. Metropolitan argues that adequate notice was provided because in this proceeding Enron has had a full opportunity to present evidence and arguments in the paper hearing here[23] why its market-based rate authority or blanket certificates should not be revoked.

28. Metropolitan adds that the allegations against Enron culminate from a year-long investigation by Commission Staff to determine whether and, if so, the extent to which California and Western energy markets were manipulated during 2000 and 2001. During this investigation and up to the Show Cause Order, Enron had more than sufficient notice of the allegations against it and specific acts of misconduct alleged. In issuing its Show Cause Order, the Commission granted Enron yet another opportunity to provide any evidence or reason why it should retain its market-based rate authority and blanket certificates. According to Metropolitan, in failing to provide any information or

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[22] See El Paso Elec. Co., 100 FERC ¶ 61,188 (2002); Portland Gen. Elec. Co., 100 FERC ¶ 61,186 (2002); Avista Corp., 100 FERC ¶ 61,187 (2002).

[23] See Hess & Clark, Inc. v. FDA, 495 F.2d 975, 985 (D.C. Cir. 1974).

evidentiary support countering the allegations against it, Enron failed to take advantage of this opportunity. Metropolitan concludes that Enron has failed to meet its burden and has also failed to justify the need for any further proceedings to determine the relevant facts.

29. Metropolitan, Palo Alto, Snohomish and Santa Clara argue that the Commission provided specific allegations in this proceeding which are sufficient to support the Show Cause Order against Enron. They point to Chapter VI of the Final Staff Report which discusses Enron's inappropriate trading strategies and the evidence indicating that Enron worked in concert with other entities to implement these strategies in ways that manipulated market outcomes; this chapter discusses the operations of the Cal-ISO and PX, the tariff provisions Enron violated and a detailed description of Load Shift, export strategies (such as megawatt laundering and ricochets), manipulation strategies based on false information (such as Fat Boy), transmission congestion strategies (such as Death Star), and ancillary services manipulation strategies (such as Get Shorty). They also point to Chapter VII's discussion of wash trading through the operation of EOL, and Enron's participation in or enabling of market manipulation by other entities. They further note that Chapter VII discusses Enron's failure to disclose to the Commission business arrangements through which they obtained effective control of other entities' assets and derived informational advantages facilitating their market manipulation.

30. Metropolitan also states that prior Commission orders regarding Enron provide Enron with more than ample notice of the allegations, facts, and reasons supporting and bringing about the Commission's Show Cause Order.[24]

31. While Palo Alto states that it is not opposed to a trial-type hearing to develop additional evidence of wrongdoing, it urges that the Commission take swift and effective remedial action once the facts are proven to the Commission's satisfaction.

32. Nevada Companies ask that the Commission complete its investigation in Docket No. PA02-2-000 as soon as practical, file the record of that proceeding in the current proceedings, and then designate an administrative law judge to address any remaining issues.

3. Commission's Response

[24] See supra note 22; see also supra note 3 (order directing staff investigation of whether any entity manipulated short term prices for electric energy or natural gas in the West).

33. We find that a trial-type hearing is unnecessary, as we are satisfied that the record before us provides a sufficient basis to take action and we are prepared today to act on that record and order appropriate remedies. In Exxon Company, U.S.A., v. FERC, et al., 182 F.3d 30, 45-46 (D.C. Cir. 1999), for example, the court explained that the Commission may resolve factual issues on a written record.[25] In this case, given the nature of the matters at issue and the quantity and type of evidence available, these matters are amenable to resolution on a written record.

34. In addition, in Louisiana Association of Independent Producers & Royalty Owners v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1992), the court held that a party may not complain that it was deprived of a fair hearing after receiving notice of expert testimony on which an opposing party relied, an opportunity to review it, a chance to submit briefs criticizing it and evidence opposing it, and the opportunity to argue before the Commission. In this case, Enron has had just such notice, an opportunity to submit evidence of its own and an opportunity to criticize the evidence presented against it, as well as opportunity to make its case to the Commission.

35. Accordingly, we deny Enron Entities' and CTC's request for a trial-type hearing. For the same reason, we deny Nevada Companies' request to initiate a proceeding before an administrative law judge.

C. Violation of Market-Based Rate Authority

1. Failure to Report

a. Show Cause Submissions

36. The Enron Entities acknowledge that the Commission may revoke market-based rate authority if a seller acquires an undue market share, measured by generation and/or transmission capacity, or undue control of inputs to electric production or other barriers to entry.[26] They argue, however, that failing to report business arrangements with third parties does not trigger revocation. The Enron Entities state that although the Final Staff Report alleges that business relationships which the Enron Power Marketers entered into

[25]While motive, intent or credibility of witnesses may weigh in favor of a trial-type hearing, these concerns are not present here.

[26]Enron Entities at 30.

with unaffiliated market participants caused changes in their market shares,[27] the Commission has failed to establish a prima facie case for revocation because neither the Final Staff Report nor the Show Cause Order quantifies the change in market share produced by these business relationships or provides evidence that the arrangements increased market share above acceptable levels.

37. In addition, the Enron Entities argue that the Show Cause Order fails to establish that the Enron Power Marketers violated the reporting requirements associated with their market-based rate orders. The Enron Entities state that, the mere existence of a business relationship does not invoke the Commission's reporting requirements and that the Show Cause Order did not identify any business relationship which they were required to report. They further state that: (1) many of the types of business relationships entered into by power marketers are neither jurisdictional nor required to be reported; (2) the Commission has specifically disclaimed jurisdiction over Enron in its capacity as a broker;[28] and (3) that the Show Cause Order did not identify any violation of the Enron Power Marketers' quarterly reporting obligations for failure to include a jurisdictional contract, purchase or sale transaction with a counterparty to any business relationship.

38. Finally, the Enron Entities assert that because EPMI is part of an ongoing proceeding in Docket No. EL02-113-000 where it has been accused of violating the FPA because of its relationship with El Paso Electric Company, this accusation provides no basis for adverse action in the instant proceeding.

b. Answers

39. Snohomish states that the Commission should conclude that deceptive and fraudulent activity, which involves the purposeful submission of false information to scheduling authorities and others, is a per se violation of Enron's market-based rate certificate justifying immediate revocation of that certificate. According to Snohomish, electric markets cannot function efficiently and the electric system cannot operate reliably where false information is disseminated by dishonest market participants like Enron. This is enough to justify revocation of market-based rate authority, even if the market manipulation schemes ultimately failed to achieve their goal of artificially inflating Enron's profits.

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[27] Final Staff Report at Chapter VI pp. 37-43.

[28] Citing Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,403 (1993).

40. Contrary to Enron's claim, Snohomish maintains that the testimony of the Commission Staff, in the Docket No. EL02-113-000 proceeding investigating the propriety of Enron's business arrangement with EPE, demonstrates that Enron not only violated its market-based rate authority, but Section 205 of the FPA as well, by failing to inform the Commission of material changes in its status as an entity authorized to charge market-based rates and by failing to file its power services agreement with EPE. Moreover, Enron's "practice" of gaining unduly preferential access to competitively sensitive market information through this type of business alliance, is a plain violation of FPA Section 205 and an abuse of its market-based rate authority.

2. Unjust and Unreasonable Rates

a. Show Cause Submissions

41. The Enron Entities argue that the Show Cause Order fails to establish a prima facie case under Section 206 that the conduct of the Enron Power Marketers charged or caused there to be charged any unjust or unreasonable rate. They state that the Commission's burden in a Section 206 proceeding is to show first that an existing rate is unjust or unreasonable and then that the proposed rate is just and reasonable.[29] With regard to gaming, the Enron Entities assert that the Commission must first establish the zone of reasonableness for a rate, with appropriate cost evidence, and then show what portion of the price outside the zone was the result of any "gaming" conduct on the part of the Enron Power Marketers. The Enron Entities assert that neither the Final Staff Report nor the Show Cause Order met this burden. They assert that the Commission failed to present evidence regarding: (1) the magnitude of the effect on market prices, if any, resulting from any actual transactions in which the Enron Power Marketers employed the Enron Trading Strategies; or (2) the effects on market prices of market fundamentals (e.g., increased demand for electricity, lack of addition to generating capacity) unrelated to Enron's trading strategies.

42. The Enron Entities conclude that even if: (1) "gaming" is illegal; (2) one or more of Enron's trading strategies constitutes such a violation; and (3) one or more of the Enron Power Marketers' gaming caused a power price increase in a relevant market, these facts alone do not establish proof of a violation under Section 206.

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[29] 16 U.S.C. § 824e(a) (2000).

b. Answers

43. Snohomish states that Enron's assertion that gaming did not harm energy markets is irrelevant and, in any event, is without merit. Snohomish asserts that the FPA requires only that the Commission articulate a rationale for its conclusion that any "practice" is unjust and unreasonable. It further asserts that there is no requirement that the Commission find that the Enron gaming strategies resulted in some definitive increase in rates before it can take action. Snohomish states that the Final Staff Report has sufficiently articulated a basis to conclude that gaming is unreasonable; it concluded that the submission of false schedules, and the use of false information intended to, for example, circumvent applicable requirements, is per se illegal because markets cannot function properly and the electric transmission system cannot be operated reliably where false information is routinely submitted to system operators. In any event, there is ample evidence that the Enron gaming strategies provided a substantial and artificial boost to Enron's profits.

44. Palo Alto rejects the arguments by Enron that its behavior was somehow consistent with its legal obligations, including the terms and conditions of the market-based authority. Palo Alto agrees with the Commission that certain terms and conditions were implicit in the grant of market-based rate authority, for example a presumption that a company's behavior will not involve fraud, deception or misrepresentation. Palo Alto also argues that another implicit condition in granting market-based rates (which Enron Entities either knew or should have known) is that recipients of market-based rate authority must not manipulate the markets the Commission was relying on to fulfill its statutory duty to ensure just and reasonable rates.

45. Palo Alto states that the Final Staff Report provides evidence that the Enron Entities manipulated both gas and electricity markets by various means, including the submission of false information to the Cal ISO, the exercise of market power in thinly traded markets, and abuse of its role as owner, operator, and market-maker in EOL.

46. Santa Clara argues that a contract that it entered into with EPMI provides another basis for the issuance of the Show Cause Order. Santa Clara explains that it entered into a contract with EPMI for a number of short term transactions under EPMI's market-based rate authority on September 10, 1999. Santa Clara explains that, to protect its customers against the volatility of the California markets, it modified this contract to enter into two long-term transactions with EPMI, a nine-year transaction and a five-year transaction. Santa Clara alleges that EPMI notified Santa Clara that it was unable to deliver power after less than one year of performance of the nine year term. Santa Clara

indicates that it suspended deliveries after EPMI's various defaults. Santa Clara contends that EPMI then subsequently claimed a right to an early termination payment from Santa Clara. Santa Clara provides that EPMI acts of default were not only illegal, but also in violation of the Commission's regulations under 18 C.F.R. § 35.15 (2003). Santa Clara argues that this reflects a misuse by EPMI of its market-based rate authority and requests that the Enron Entities' market-based rate authority be revoked.

47. Metropolitan also notes that Enron failed to respond substantively to the allegations in the Show Cause Order. Metropolitan maintains that Enron provides no factual or evidentiary materials or information which would in any way refute the evidence developed in Docket No. PA02-2-000 and discussed in the Final Staff Report.

48. Metropolitan asks the Commission to reject Enron's attempt to avoid responsibility for its own egregious actions by arguing that no violation of Section 206 of the Federal Power Act was shown. According to Metropolitan, the Commission has clearly established, and as discussed above, Enron has failed to refute, that Enron manipulated the market causing unjust and unreasonable rates. The Commission should order remedies for such actions, including revocation, both prospective and retroactive, of Enron’s market-based rate authority and disgorgement of profits.

49. Metropolitan, Palo Alto and Santa Clara assert that the Commission has ample remedial authority to revoke the Enron Entities' market-based rate authority retroactively and disgorge profits under these circumstances.

3. Commission Response

50. The Enron Entities contend that the Commission has not shown that their actions resulted in gaming or unjust and unreasonable rates. While the Show Cause Order properly made no findings of market manipulation and unjust and unreasonable rates, as the parties had not yet had an opportunity to respond, the Commission is now prepared to make such findings for the reasons discussed below.

51. The Enron Entities do not dispute the facts set forth in the Show Cause Order (and the Final Staff Report that was incorporated by reference) i.e., that they engaged in the conduct referenced and that they failed to report their influence/control over other entities' facilities. Rather, they argue that these "improper" actions did not constitute gaming or result in unjust and unreasonable rates. We disagree.

52. We have previously explained that companies failing to adhere to proper standards are subject to immediate revocation of their market-based rate authority.[30] The Show Cause Order elaborated that "implicit in Commission orders granting market-based rates is a presumption that a company's behavior will not involve fraud, deception or misrepresentation."[31]

53. First, we find that the Enron Power Marketers engaged in gaming in the form of inappropriate trading strategies: (1) False Import (i.e., Ricochet or Megawatt Laundering); (2) congestion-related practices such as Cutting Non-firm (i.e., Non-firm Export), Circular Scheduling (i.e., Death Star), Scheduling counter flows on out of service lines (i.e., Wheel Out), and Load Shift; (3) ancillary services-related strategies known as Paper Trading and Double Selling; and (4) Selling Non-firm Energy as Firm.[32]

54. With regard to the Enron Entities' "zone of reasonableness" argument, we note, for example, that Timothy N. Belden and Jeffrey S. Richter, former Enron executives, signed plea agreements in which they state that they engaged in fraudulent schemes in the California markets.[33] Among other things, they admit that they knowingly and intentionally filed energy schedules that misrepresented the nature of electricity to be supplied and the load they intended to serve. Belden and Richter state that the purpose of filing false schedules was to artificially increase congestion on California transmission lines, which in turn, increased the market price for congestion fees for transmission between zones. The result was, in part, manipulated prices in the California market and congestion fees in excess of what Enron would have received with accurate schedules and bids. It is clear that when Enron submitted false schedules, i.e., schedules that had no energy and that falsely claimed to relieve congestion, the rates that resulted were outside the zone of reasonableness.

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[30]Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, 99 FERC ¶ 61,272 at 62,154 (2002); San Diego Gas & Electric Company, 95 FERC ¶ 61,418 at 62,548, 62,565 (2001), order on reh'g, 97 FERC ¶ 61,275 (2001), order on reh'g, 99 FERC ¶ 61,160 (2002); accord Show Cause Order, 102 FERC ¶ 61,316 at P 8 & n.10, and cases cited therein.

[31]Show Cause Order, 102 FERC ¶ 61,316 at P 8.

[32]For a more detailed description of these trading strategies, see American Electric Power Service Corporation, et al., 103 FERC ¶ 61,345 (2003), which is being issued concurrently with this order.

[33]See U.S. v. Timothy N. Belden, (N.D. Cal. Case No. CR02-0313-MJJ); U.S. v. Jeffrey S. Richter, (N.D. Case No. CR-03-0026-MJJ).

55. Second, and in any event, we find that the 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. The Final Staff Report explains that Enron created a marketing program based on the use of other entities' assets, thus avoiding large capital expenditures and the risk of owning its own resources, to carry out its various trading strategies. Enron focused not only on partnerships and alliances with investor-owned utilities, but also on smaller utilities, such as public utility districts, municipalities, and qualifying facilities. Enron, using these partnerships and alliances, gained market share, acquired commercially sensitive data, acquired decisionmaking authority, and promoted reciprocal dealings and equity sharing of profits, among other things.[34] Critically for present purposes, Enron formed these business alliances or partnerships without notifying the Commission, as required under their market-based rate authorizations.[35]

56. In their conduct described above, the Enron Power Marketers engaged in behavior that undermines the functioning of the wholesale power market and our reliance on that market to ensure that rates are just and reasonable; for example, by Enron's failure to report to the Commission changes in status that affected the facilities under the Enron Power Marketers' control and/or influence, the Commission was denied the ability to assure that the Enron Power Marketers' market shares warranted their continued authorization to charge market-based rates. Such abuse of our market-based rate authority cannot be tolerated. Accordingly, we find, based on the record in this proceeding, that the behavior of the Enron Power Marketers constitutes precisely the kind of behavior that would fall within the language of the orders referred to above,[36] constitutes market manipulation and results in unjust and unreasonable rates. We also find that this same conduct violates the express requirements in our orders allowing the Enron Power Marketers to make sales at market-based rates that they report changes in their status.

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[34]These partnerships and alliances are described in more detail in Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,346 (2003), which is being issued concurrently with this order.

[35]See 16 U.S.C. § 824d (2000); Enron Power Marketing, Inc., 65 FERC ¶ 61,305 at 62,405 (1993); Enron Energy Services Power, Inc., 81 FERC ¶ 61,267 at 62,319 (1997). Moreover, to the extent that they were jurisdictional, they were not filed with the Commission.

[36]See supra notes 30-31 and accompanying text.

D. Violation of Blanket Marketing Certificates

1. Show Cause Submissions

57. The Enron Entities and CTC argue that the Commission does not have the authority to terminate the Enron Gas Marketers' blanket marketing certificates based on the circumstances in this proceeding. First, the Enron Entities and CTC argue that the Commission may terminate a blanket marketing certificate when: (1) there has been a fundamental shift of a long-term nature in the basic premise on which the certificate was issued,[37] or (2) the certificate holder has violated a term or condition of the certificate.[38] With regard to the former, they assert that the fundamental premise of the blanket marketing certificates is a significant amount of uncommitted gas supplies and open access transportation regime. The Enron Entities and CTC argue that there are no allegations in this proceeding that the fundamental premise of the blanket marketing certificates has fundamentally changed on a long-term basis and that even if it did, the change would apply to all holders of blanket marketing certificates and not just the Enron Gas Marketers. With regard to the latter, the Enron Entities and CTC state that the only condition attached to the blanket marketing certificates at the time of their issuance was that affiliated transportation-only pipelines must have been restructured pursuant to order No. 636 or their restructuring proceedings terminated and that all of their affiliated pipelines have satisfied this condition.

58. Second, the Enron Entities and CTC assert that the Commission's blanket marketing certificate authority intentionally does not include a condition that would make any negotiated price violative of the terms of the certificate. They argue that in issuing the blanket marketing certificate, the Commission did not rely upon the existence of sufficient uncommitted gas supplies to prevent the certificate holder from manipulating prices but rather to prevent market power[39] and that these are not the same. In addition, the Enron Entities and CTC point to Order No. 547 which states that "[a]ny sale effectuated pursuant to the marketing certificate issued by this rule is by definition a sale at a negotiated rate" and that "any negotiated rate received in a sale under Section

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[37]Citing Trunkline LNG Co., 22 FERC ¶ 63,028 (Trunkline I), decision and order dismissing complaints, 22 FERC ¶ 61,245 at 65,422 (1983) (Trunkline II).

[38]Also, the Enron Entities assert that Congress did not permit the Commission to attach conditions after the issuance of a certificate under section 7.

[39]Citing Regulations Governing Blanket Marketer Sales Certificates, Order No. 547, FERC Stats. & Regs., Reg. Preambles January 1991- June 1996 ¶ 30,957 at 30,726 (1992), order on reh'g, Order No. 547-A, 62 FERC ¶ 61,239 (1993).

284.402 falls within the ambit of this rule."[40] Further, they note that the Final Staff Report states that the "regulations contain no explicit guidelines or prohibitions for trading gas."[41]

59. Third, they argue that the Commission's reliance on Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967) and Section 16(a) of the NGA is misplaced. The Enron Entities assert that Section 16(a) does not grant the Commission any authority to terminate a blanket certificate and that the only authority must be found in Section 7, if at all.

60. Finally, the Enron Entities and CTC argue that the Show Cause order fails to establish a prima facie case under Section 5. In addition, they point out that Section 5 allows the Commission to disturb existing rates only when the existing rates are shown to be unjust or unreasonable, and the remedy proposed by the Commission is shown to be just and reasonable. They assert that rates are unjust and unreasonable only when there is a demonstration that the rates are outside the "zone of reasonableness," as discussed above. The Enron Entities and CTC argue that the Commission has failed to demonstrate this in the Show Cause Order because it made no specific allegations and presentation of a prima facie case concerning the Enron Gas Marketers' costs.

2. Commission Findings

61. We find that the Enron Gas Marketers engaged in wash trading on EOL that resulted in the manipulation of prices. A "wash trade" is generally defined as a prearranged pair of trades of the same good between the same parties, involving no economic risk and no net change in beneficial ownership. It exposes the parties to no monetary risk and serves no legitimate business purpose. A wash trade might be used to create the illusion that a market is liquid and active, or to increase reported trading revenue figures. A wash trade might be arranged at prices that diverge from the prevailing market in an attempt to send false signals to other market participants. Alternatively, the intent might be to affect the average or index price reported for a market, which in turn could benefit a derivatives position or affect the magnitude of payments on a contract linked to the index price.

62. The Final Staff Report explains that EOL market traders were traders assigned to always quote both a bid price and an offer price. The data indicates that they sometimes

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[40] Id.

[41] Final Staff Report at Chapter II p. 61.

elected to set the bid-offer spread to zero, which is referred to as "choice market." The Final Staff Report states that choice markets may, in effect, have been an invitation to EOL customers to engage in wash trading. In general, the data reveals a trend in which more wash trades occurred later in time. Only 5 percent of natural gas wash trades occurred during the first 4 months (January to April 2000), while 42 percent of gas wash trades occurred during the last 4 months (August to November 2001) examined. The information provided about EOL trading activity during choice market periods reveals that, in fact, 45 percent of all choice market trading in natural gas products occurred during the last three months (September to November 2001) of the 21-month sample. These 3 months coincide with the period of time leading up to Enron's filing for bankruptcy.[42]In general, the data reveals a trend in which more wash trades occurred later in time. Only 5 percent of natural gas wash trades occurred during the first 4 months (January to April 2000), while 42 percent of gas wash trades occurred during the last 4 months (August to November 2001) examined. In addition, the Final Staff Report reveals that Enron traders engaged in 378 wash trades with one EOL market maker executing 111 wash trades (29.4 percent of the total) and a second market maker executing 73 wash trades (19.3 percent of the total).

63. One of the most egregious examples of abuse through EOL resulted in the manipulation of natural gas prices at the Henry Hub located in Louisiana on at least one occasion to profit from positions taken in the over-the-counter (OTC) financial derivatives markets (OTC markets).[43] Although the price change in the physical markets was only about $.10/MMBtu, Enron Gas Marketers nevertheless profited due to the effect that this small change in the physical price had on its large financial position; Enron Gas Marketers earned approximately $3.2 million from this manipulation.

64. On July 19, 2001, a number of traders entered relatively large short positions in the financial markets through OTC swaps and Gas Daily financial swaps. These traders continued to increase the short positions throughout the initial phase of the manipulation, which was the period when the EOL market maker (who was, at times, the desk manager) quickly and steadily raised prices on EOL, resulting in the purchase of a very large amount of next-day physical gas. This purchasing caused prices in the financial markets to rise, but by a lesser amount.

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[42]The Final Staff Report notes that this increase in trading activity may have been an attempt to prop up Enron's presence in the market.

[43]For a more detailed account of wash trading on EOL, see generally Final Staff Report at Chapter 7.

65. The financial traders stopped increasing their short positions near the end of the EOL market maker's buying streak, at a point when the EOL market maker stopped raising prices and began to hold prices steady at the high levels. Once the EOL market maker leveled out prices, the OTC swap began to fall. The EOL market maker then began to lower the prices and sold a very large amount of gas at rapidly falling prices. The falling of the physical price then further pushed down the OTC swap price, generating significant profits for the financial traders. These profits greatly exceeded the losses that were generated from the buying and selling of the physical gas.

3. Commission Determination

66. The Commission finds that Enron's participation in the above-described practices involving the manipulation of the natural gas sales market justifies the revocation of the authority in 18 C.F.R. § 284.402 (2003) for any Enron entity to make jurisdictional sales for resale of natural gas.[44] This action is necessary to maintain the integrity and efficiency of the Commission's program of authorizing natural gas marketers to make jurisdictional sales at negotiated rates.[45]

67. The Commission adopted this provision granting blanket marketing certificates for natural gas marketers to make sales at negotiated rates in Order No. 547. The purpose of Order No. 547 was to "foster a truly competitive market for natural gas sales for resale in interstate commerce, giving purchasers of natural gas access to multiple sources of natural gas and the opportunity to make gas purchasing decisions in accord with market conditions."[46] Although the order was independent of Order Nos. 636 and 636-A, it was promulgated for the same reasons, including the promotion of an active and viable spot market for natural gas.[47] The Commission permitted affiliated gas marketers to sell gas at negotiated rates based on a finding that the sale of gas as a

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[44]As discussed further below, we will issue limited authorizations to certain Enron entities to permit them to liquidate existing assets.

[45]Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967) (The Commission's remedial discretion extends to denial of participation in a government program generally extended to business managers for the purpose of maintaining the fairness, equity, and efficiency of the program.)

[46]Order No. 547, FERC Stats & Regs., Reg. Preambles January 1991-June 1996 at 30,719.

[47]Id. at 30,721.

commodity would be sufficiently competitive to prevent affiliated gas marketers from exercising market power, that is, controlling prices or excluding competition. The Commission also stated in Order No. 547 that it would "monitor the operation of the market through the complaint process."[48]

68. The Commission believes that the underlying premise of Order No. 547 -- that the natural gas commodity market is competitive -- remains valid. However, even in competitive markets, it is possible for participants to engage in anti-competitive and deceptive practices. Through its extensive participation in wash trades for no legitimate business purpose and the other manipulations discussed in the Final Staff Report, Enron has done exactly that. Such wash trades can mislead the market in a number of ways, including by sending false price signals to other market participants and making the market at particular points appear more liquid than it really is. Misleading the market in this manner undercuts the most fundamental goal of Order No. 547. In Order No. 547, the Commission stated that it sought to foster a "natural gas sales market where merchants of natural gas are influenced by market forces."[49] The Commission also stated that "most importantly, the final rule will foster a truly competitive market for natural gas sales for resale in interstate commerce giving purchasers of natural gas . . . the opportunity to make gas purchasing decisions in accord with market conditions."[50] Clearly, the creation of false price signals through wash trades is contrary to the goal of allowing gas purchasers to make purchasing decisions "in accord with market conditions."

69. The Commission finds that it has the authority under the NGA to revoke a blanket marketing certificate authorization as it applies to particular persons who have engaged in misconduct contrary to the Commission's fundamental purpose in granting the blanket marketing certificate. Enron suggests that, because Order No. 547 authorizes certificate holders to make sales for resale at negotiated rates, no sale Enron entered into pursuant to its marketing certificate could violate any obligation it had under that certificate. However, Order No. 547 also expressly stated that the Commission would monitor the operation of the market through the complaint process. If the Commission had intended through the blanket marketing certificate to grant gas marketers carte blanche to engage

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[48] Id. at 30,727.

[49] Id. at 30,718.

[50] Id. at 30,719. This goal of Order No. 547 was consistent with Congress' urging, when it adopted the Wellhead Decontrol Act, that the Commission "retain and improve this competitive structure in order to maximize the benefits of decontrol." H.R. Rep. No. 101-29, at 6 (1989) (emphasis in original).

in any form of conduct in connection with their jurisdictional sales for resale no matter how deceptive, trusting solely in the market to cure any problems, there would have been no reason for the Commission to state that it would entertain complaints.

70. As the Supreme Court has held, the Natural Gas Act "was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."[51] Under NGA Section 7, in order for the Commission to issue a certificate, it must find that the certificated service "will be required by the present or future public convenience and necessity." In order for the Commission to carry out the NGA's purpose of providing consumers a complete, permanent and effective bond of protection, it must have the authority to terminate a certificate when the holder violates the certificate by deliberately engaging in misconduct that undermines the basic purpose for issuing the certificate in the first instance. [52]

71. There is nothing to the contrary in either the majority or concurring opinions in Trunkline II. In that case, the issue was whether the Commission had authority to revoke the certificate based on "changed economic circumstances which were admittedly beyond the control of" the pipeline.[53] In other words, the issue was whether the Commission had the authority to end certificated service when no violation of the terms of the certificate was present. This case does not turn on whether a certificate may be revoked without a violation, but rather on acts taken by the certificate holder in violation of its obligation under the certificate. Nothing in Trunkline I nor Trunkline II precludes revocation of a certificate as a remedy for a violation by the certificate holder. In fact, in Trunkline II the Commission stated that "there is no question that the Commission has the authority to revoke a certificate for violation of its terms."[54] Such action is necessary to maintain the integrity of the Commission's certificates.

E. Remedies

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[51]Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388 (1959).

[52]To rule otherwise would be to find that granting a certificate under NGA section 7 authorizes rates that are unjust and unreasonable under NGA Sections 4 and 5. Phrased differently, a certificate under NGA Section 7 does not entitle the certificate holder to charge rates that are unjust and unreasonable under NGA Sections 4 and 5.

[53]Trunkline II, 22 FERC at 61,445 (concurring opinion).

[54]Id. at 61,444. See also, Wyoming-California Pipeline Company, 70 FERC ¶ 61,041 at 61,130 (1995).

72. The Commission has discretion to implement remedies when it finds conduct that has violated its policies or regulations. The agency is at its zenith in fashioning such remedies.[55] Its discretion extends to denial of participation in a government program generally extended to business managers for the purpose of maintaining the fairness, equity, and efficiency of the program.[56] Given the Enron Gas Marketers' and Enron Power Marketers' conduct and the adverse effects on gas and electricity prices, and the Enron Power Marketers' failure to abide by reporting conditions in the Commission's orders authorizing them to sell electricity at market-based rates, the Enron Gas Marketers' blanket marketing certificates will be terminated and the Enron Power Marketers' market-based rate authorities will be revoked, to the extent discussed below.[57]

1. "Second Chance" & Bankruptcy

a. Show Cause Submissions

73. The Enron Entities and CTC state that the Administrative Procedure Act, 5 U.S.C. § 558(C) (2000), requires that before the Commission can revoke the Enron Power Marketers' market-based rate authority or the Enron Gas Marketers' blanket marketing certificates, which the Enron Entities and CTC consider licenses, the Commission must give them a "second chance" to comply with the requirements.

74. In addition, Enron states in a footnote that the Enron Power Marketers and three of the Enron Gas Marketers are debtors under Chapter 11 of Title 11 of the United States Code (Bankruptcy Code) and that because they are entitled to the protections of the automatic stay under Section 362 of the Bankruptcy Code any attempt by the Commission to revoke their licenses – without first obtaining relief from the automatic stay – violates the automatic stay and is void ab initio. Further they argue that the

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[55] E.g., Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967). See also Connecticut Valley Electric Company, Inc. v. FERC, 208 F.3d 1037, 1044 (D.C. Cir. 2000); Louisiana Public Service Commission v. FERC, 174 F.3d 218, 225 (D.C. Cir. 1999).

[56] Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967).

[57] There is no entitlement in the FPA to make sales at market-based rates; rather, the FPA provides simply that rates should be just and reasonable and not unduly discriminatory or preferential. See 16 U.S.C. §§ 824d, 824e (2000). In fact, traditionally, just and reasonable rates were defined by reference to utility costs, i.e., were cost-based rates.

forfeiture of estate assets that would result from any attempted revocation supports the issuance of an injunction under Section 105 of the Bankruptcy Code.

b. Answers

75. Snohomish states that Enron is not entitled to a second chance. To begin with, it is doubtful that market-based rate authority constitutes a "license" subject to the provisions of the APA cited by the Enron Entities and CTC. On the contrary, market-based rate authority is the product of Sections 205 and 206 of the FPA and, consistent with Farmers Union,[58] does not confer any authority on a regulated entity beyond what it already holds under the FPA: the right to charge "just and reasonable" rates for jurisdictional electric power sales and transmission. Furthermore, according to Snohomish, only the manner in which rates are determined changes with a grant of authority to charge market-based rates. In any event, Snohomish maintains that even assuming that the provision of the APA cited above applies in this situation, the plain language of that statute justifies the Commission's suspension of Enron's market-based rate authority in these circumstances. Snohomish notes that, as Enron concedes,[59] the statute does not require a second chance for a licensee to attain compliance where the licensee's actions involve willful misconduct or a threat to the public health, interest, or safety, and both exceptions are implicated here.

76. Santa Clara asserts that the Commission is not required to give the Enron Entities an opportunity to violate the market-based rate authority prior to permanently revoking that authority. Santa Clara argues that under the FPA, particularly Sections 205 and 206, the Commission has plenary authority to accept, reject or revise tariffs which are subject to the Commission's jurisdiction, such as EPMI's and other Enron Entities' market-based rates tariffs. Santa Clara provides that, while it consistently opposes the retroactive imposition of remedies, the unique circumstances presented here justify departure from this standard, e.g., EPMI's status as a bankrupt entity which effectively no longer transacts electric trading activities and which may be found to have manipulated energy markets and deceived the Commission with respect to the underlying facts upon which it was granted market-based rate authority.

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[58]Farmers Union Central Exchange, Inc. v. FERC, 734 F.2d 1486 (D.C. Cir. 1984) (Farmers Union).

[59]Enron Filing at 41 n.27.

77. Santa Clara also notes that Enron's answer concedes an exception to the "second chance" rule when the license holder's conduct is willful or when the public health, interest or safety require otherwise. Santa Clara argues that the behavior outlined in the Final Staff Report, as well as the statements by officers of Enron[60] contain repeated admissions of willful improper conduct. Santa Clara also believes that the history of rolling blackouts which occurred in California shows the impact of market manipulation on the public health, interest or safety.

78. Santa Clara submits that substantial judicial precedent exists which holds that, in the circumstance of market manipulation and failure to abide by reporting requirements, no second chance is afforded the transgressor.[61]

79. Santa Clara asserts that Enron Entities have failed to allege that the potential remedy, the disgorgement of market-based rate authority profits, is subject to second chance opportunities.

80. With regard to bankruptcy, Santa Clara argues that prior rulings permit the Commission to retroactively revoke the Enron Entities' market-based rate authority and to take other actions respecting the Enron Entities' improper actions, without violating the automatic stay provisions of the Bankruptcy Code. Santa Clara states that Enron's argument that since this proceeding could impact assets of the estate, it violates the automatic stay was rejected by the Supreme Court.[62] Santa Clara further provides that any remaining doubt that a governmental unit can – in exercising its police or regulatory powers – take action affecting the assets of a debtor was conclusively resolved when 362(b) of the Bankruptcy Code was amended in 1998. In the 1998 Amendment, an express reference to Bankruptcy Code Section 362(a)(3) was added to Section 362(b)(4). This change made it clear that the police and regulatory exception to the automatic stay applies to actions to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

c. Commission's Response

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[60]See U.S. v. Timothy N. Belden (N.D. Cal. Case No. CR02-0313).

[61]See, e.g., Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir.), cert. denied, 406 U.S. 932 (1971); Goodman v. Benson, 286 F.2d 896 (7th Cir. 1961); Great Western Food Distributors v. Brannan, 201 F.2d 476 (7th Cir. 1953).

[62]See Board of Governors of the Federal Reserve System v. MCorp. Financial, Inc., 502 U.S. 32 (1991).

81. Initially, we note that we agree with Snohomish that we are not revoking a license. Rather, we are exercising our undoubted police or regulatory authority under Sections 206 and 309 of the FPA, as well Sections 5, 7 and 16 of the NGA, to ensure that rates are just and reasonable – as the FPA and NGA require. Our actions below ensure that rates charged by Enron, including its affiliates and subsidiaries, are just and reasonable under both the FPA and the NGA.

82. With one exception (Enron Compression Services Company), Enron's wholly-owned affiliates are in Chapter 11 (reorganization) bankruptcy; Enron claims that damage to the orderly unwinding of contracts and/or harm to innocent third-party customers would be the result of the Commission's revoking their market-based rate authority or termination of their blanket certificates. To minimize further harm to third-parties from Enron's actions, we will allow Enron to unwind its current positions. However, we will limit its authority to market electricity and natural gas to only what is needed for such unwinding and we here revoke those authorizations entirely once unwinding ends. Furthermore, any companies that emerge from the bankruptcy are required to apply at that time for authorization to sell electricity and natural gas at wholesale.

83. We also do not believe that the automatic stay provision of the Bankruptcy Code bars us from ensuring that rates and charges under the FPA and the NGA are just and reasonable, especially given what has occurred to date, described above, and the Commission's actions here in response.[63] The Bankruptcy Code is not, as Enron would have it, a shield to protect market manipulation, unjust and unreasonable rates, and continued failure to comply with Commission orders.

84. While the Bankruptcy Code generally stays all proceedings against the debtor automatically upon the filing of the bankruptcy petition, 11 U.S.C. § 362 (2000), "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" is excepted from the automatic stay under 11 U.S.C. § 362(b)(4) (2000). Thus, an agency, such as the Commission, given the statutory mandate to ensure just and reasonable rates, retains its

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[63] See, e.g., Board of Governors of the Federal Reserve System v. MCorp. Financial, Inc., 502 U.S. 32, 37-42 (1991); In re FCC, 217 F.3d 125,138 (2d Cir. 2000) (FCC); National Labor Relations Board v. 15th Avenue Iron Works, Inc., 964 F.2d 1336, 1337 (2d Cir. 1992); National Labor Relations Board v. Continental Hagen Corp., 932 F.2d 828, 834-35 (9th Cir. 1991).

traditional control over rates throughout bankruptcy.[64] Also, as our action here is exempt from the automatic stay as a regulatory action under 11 U.S.C. § 362(b)(4) (2000), we do not have to seek relief from that stay under 11 U.S.C. § 362(d) (2000) before taking this action.[65]

2. Findings

85. The following are the specific remedies we adopt here:.

a. EMW

86. Prior to bankruptcy, EMW was jointly owned by Enron and a non-affiliated company (People's Gas & Light Company). It was formed to own Enovate LLC, which was a gas marketing company. Through Enovate LLC, EMW engaged in natural gas trading and market making in Chicago and the surrounding mid-continent producing regions. EMW sold its stake in Enovate and is no longer engaged in natural gas trading activity. EMW has no remaining open physical financial natural gas positions and is expected to be dissolved during reorganization.

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[64] See In re Cajun Electric Power Cooperative, Inc., 185 F.3d 446, 453 (5th Cir. 1999) (Cajun). See also Penn Terra Ltd. v. Dept. of Environ. Resources, 733 F.2d 267, 278 (3d Cir. 1984) ("In enacting the exceptions to Section 362, Congress recognized that in some circumstances, bankruptcy policy must yield to higher priorities.").

[65] See FCC, 217 F.3d at 138-39 (2d Cir. 2000); Eddelman v. U.S. DOL, 923 F.2d 782, 785 (10th Cir. 1991).

While the Bankruptcy Code gives a bankruptcy court power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. § 105(a) (2000), that power is not unlimited, but can be exercised only within the confines of the Bankruptcy Code. Cajun, 185 F.3d at 453 n.9, 458; Dept. of the Treasury for the Commonwealth of Puerto Rico v. Pagan, 279 B.R. 43, 46 (D.P.R. 2002). Section 105 of the Bankruptcy Code does not empower a bankruptcy court to create rights that do not exist under the Code. Id. (citing In re SPM Mfg. Corp., 984 F.2d 1305, 1311 (1st Cir. 1993); In re Morristown & Erie RR Co., 885 F.2d 98, 100 (3d Cir. 1989)). "In short, section 105 does not permit bankruptcy courts to become 'roving commission[s] to do equity.'" Id. (quoting In re Southmark Corp., 49 F.3d 1111, 1116 (5th Cir. 1995)).

87. We revoke EMW's authority to make sales under 18 C.F.R. § 284.402 (2003), given that it has fully unwound its contractual obligations and is expected to be dissolved. We direct EMW to notify the Commission of the date of dissolution.

b. ECC

88. Prior to bankruptcy, ECC was among the largest natural gas and electricity marketers in Canada. Commencing January 2002, ECC has been actively winding down its business operations. ECC now has only: (1) liquid assets, (2) a number of unsettled terminated trading contracts, (3) a small number of payables, some of which are presently in litigation, and (4) a number of contingent liabilities relating primarily to master netting agreements entered into along with all Enron Corp affiliates. ECC presently has no open physical gas positions.

89. We revoke ECC's authority to make sales under 18 C.F.R. § 284.402 (2003), given that it has no open physical gas positions. In the event that ECC emerges from reorganization with a gas marketing function, it must request and receive specific Commission authority to make such sales.

c. ENAU

90. Prior to bankruptcy, ENAU was primarily engaged in physical natural gas trading and market making for wellhead production. ENAU is no longer engaged in any natural gas market making activity or speculative natural gas trading activity. The dissolution of its gas trading book is expected to conclude by December 2003, and the remaining open physical and financial positions have a current market value of between $200,000 to $500,000. ENAU is prepared to terminate its gas marketing certificate upon completion of this process.

91. We revoke ENAU's authority to make sales under 18 C.F.R. § 284.402 (2003) and in place issue a limited authorization for the sole use of liquidating the existing assets, with a self-effectuating termination date of December 31, 2003 (see 18 C.F.R. § 284.402(d) (2003)). In the event that ENAU emerges from reorganization with a gas marketing function, it must request and receive specific Commission authorization to make such sales.

d. EESI

92. Prior to bankruptcy, EESI served retail gas and electric customers in a number of markets. EESI has approximately $8.6 million dollars worth of gas held in storage or imbalance by various pipelines and local distribution companies. EESI's ongoing electric

energy-related business includes: (1) the sale of its First Energy Market Support Generation and related customer contracts that will not completely transfer until June 2003, (2) refunds from PG&E, and (3) re-settlement with the Cal ISO due to incorrect meter readings from December 2, 2001 through December 23, 2002.

93. We revoke EESI's authorization to make sales under 18 C.F.R. § 284.402 (2003) and in place issue a limited authorization for the sole use of liquidating EESI's existing assets. EESI must report to the Commission in Docket No. RP03-311 every 30 days of the progress made in liquidating its assets. This authorization will expire once liquidation is completed (see 18 C.F.R. § 284.402(d) (2003)). We also immediately revoke EESI's market-based rate authority and terminate its electric market-based rate tariff because it has not identified any need for continued market-based rate authority. In the event that EESI emerges from reorganization with a gas marketing function, it must request and receive specific Commission authorization to make such sales. In the event that EESI emerges from reorganization with a wholesale power marketing function, it must reapply for market-based rate authority.

e. ECS

94. ECS is not currently in bankruptcy. ECS manages and operates four (unregulated) compressor stations under long-term contracts: three on Transwestern Pipeline (through 2010) and one on Florida Gas Transmission (through 2022). ECS also provides management services for the ENA Compression Service contract with Northern Natural Gas Pipeline (through 2017).[66] ECS buys retail electricity for an electric motor drive system for the pipeline compression station. As compensation, ECS receives an equivalent amount of gas that would have been consumed by a traditional gas compression station. ECS eventually sells this gas at either an index or fixed price at specified delivery points.

95. We revoke ECS's authority under 18 C.F.R. § 284.402 (2003) and in place issue a limited authorization for the sole use of marketing gas entitlements accrued under ECS's existing compressor station contracts.

f. ENA

96. ENA was formed to market natural gas products and for making markets in physical and financial natural gas. ENA sold its trading platform to UBS Warburg Energy in March 2002. ENA is no longer engaged in any natural gas market making

[66] All three pipelines are Enron affiliates.

activity or speculative natural gas trading activity. The dissolution of the ENA gas-trading book has been underway since December 2001 and is expected to conclude by December 2003. ENA has a number of park and loan balances, storage balances, and imbalance quantities with an estimated value of around $4 million that it is currently in the process of liquidating. ENA has two ongoing contractual obligations: (1) a compressor service agreement (through 2017) with Northern Natural Gas Company, and (2) a verbal commitment to provide fuel management support services to the Ponderosa Pines Generating project, in which ENA has a small ownership interest. ENA is attempting to sell its ownership interest which may take up to a year to complete.

97. We revoke ENA's authorization under 18 C.F.R. § 284.402 (2003) and in place issue a limited authorization that allows ENA to conduct only the activities listed above. ENA must report to the Commission in Docket No. RP03-311 every 30 days on the progress made in terminating those activities. This authorization will expire once these activities are completed (see 18 C.F.R. § 284.402(d) (2003)).

g. EPMI

98. There is no description of EPMI's current status in the pleading. Enron has not identified any ongoing activity or made any specific request to allow EPMI to continue any trading function. The pleading simply states: "Because the Commission has not given the Enron Power Marketers [including EPMI] a second chance to comply, the Commission cannot lawfully revoke their market-based rate authority and the Show Cause Order is a nullity."

99. We immediately revoke EPMI's market-based rate authority and immediately terminate its electric market-based rate tariff. Unlike the other entities that have a specified need for continued authorization, there is no request or demonstration that EPMI needs to retain its market-based rate authority for unwinding or otherwise. In the event that EPMI emerges from reorganization with a wholesale power marketing function, it must reapply for market-based rate authority.

IV. CTC and Bridgeline

A. CTC

100. Citrus Corp. is equally owned by Enron and Southern Natural Gas Company, a wholly-owned subsidiary of El Paso Corp (El Paso). Citrus Corp. in turn owns Florida Gas Transmission (Florida) and CTC, which was formed as an independent marketing affiliate.

101. CTC buys and sells natural gas for the markets located along the Florida pipeline system, primarily in the State of Florida. CTC has long-term gas sales commitments to Florida Power Corp. and Auburndale Power Partners, totaling approximately 50,000 MMBtu/day. To serve these obligations, CTC has three long-term supply contracts which total slightly more than its sales commitments. As a result, CTC markets its excess supply to different customers. CTC states that it does not engage in speculative natural gas trading or market making activities and has never traded on EOL. For these reasons, it states, there is no connection to the circumstances identified in the show cause order and revocation would cause injury and harm to CTC and third-parties including the Enron Creditors that are partial owners of Citrus Corp.

102. On the facts, we are not persuaded that CTC should be treated like the other Enron Gas Marketers, and we will dismiss CTC from Docket No. RP03-311-000.

B. Bridgeline

103. On April 10, 2003, Bridgeline filed a motion for clarification challenging the Show Cause Order's inclusion of Bridgeline in the Enron Gas Marketers and requiring Bridgeline to show cause why the Commission should terminate its blanket marketing certificate.[67]

104. Primarily, Bridgeline argues that neither the Show Cause Order nor the Final Staff Report identify any misconduct on the part of Bridgeline. It points out that, in fact, it is not mentioned in the Final Staff Report. In particular, Bridgeline argues that it is not an Enron Gas Marketer; it explains that it is a wholly owned subsidiary of Bridgeline Holdings, LP, whose ownership includes a 39.6 percent limited partner interest owned by various Enron entities and a 1 percent general partner interest that is 40 percent owned by Enron North America Corp.

105. Furthermore, Bridgeline provides that it has always functioned independently from Enron, and it has been a stand-alone company with independent officers and employees who bear a fiduciary duty to Bridgeline. Bridgeline does admit, however, that Enron appoints two of four managers (50 percent) to Bridgeline LLC, the general partner of Bridgeline Holdings, L.P. Bridgeline states that these managers function as a board

[67] A notice of extension of time granted Bridgeline an extension of time to file its response to and including fourteen days after the Commission acts on the motion for clarification.

of directors, but do not exercise control over Bridgeline's day-to-day operations, including its trading.

106. Bridgeline states that it has no affiliation with Transwestern Pipeline Company, Citrus Corp., and/or Northern Plains Natural Gas Company, other than the indirect relationship that stems from Enron' s 40 percent minority interest in Bridgeline.

107. The Commission's description of Enron's market manipulation, according to Bridgeline, is predicated upon the Enron Gas Marketers' use of EOL to trade with third parties. Bridgeline asserts that, because it transacted as an independent third party on EOL, it was not in a position to benefit from the market manipulation by the Enron Gas Marketers. It argues that, to the extent those entities engaged in market manipulation, Bridgeline would have been a victim, not a beneficiary, of such misconduct. Bridgeline also does not see how it possibly could have participated in any market manipulation in the gas markets serving California from the summer 2000 through the winter of 2000-2001, because it has never engaged in trading activity in the California gas market.[68] Bridgeline provides that to the best of its knowledge, neither Bridgeline nor any of its employees have received data requests or been interviewed by the Commission Staff. Bridgeline provides that it is unaware of any misconduct on its part, but is conducting a thorough internal investigation of its trades and positions during the period June and July 2001 to confirm that no wrongdoing took place.[69]

108. On the facts, we are not persuaded that Bridgeline should be treated like the other Enron Gas Marketers, and we will dismiss Bridgeline from Docket No. RP03-311-000.

The Commission orders:

(A) We hereby terminate EMW's authority to make sales under 18 C.F.R. § 284.402 and direct EMW to notify the Commission of the date of dissolution.

(B) We hereby terminate ECC's authority to make sales under 18 C.F.R. § 284.402 and direct ECC to request and receive specific Commission authority to make gas sales if it emerges from reorganization with a gas marketing function

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[68]Under Bridgeline Holdings, L.P.'s Amended and Restated Limited Partnership Agreement, executed March 1, 2000, Bridgeline cannot market natural gas outside the State of Louisiana.

[69]We note that no answers were filed in response to Bridgeline's motion for clarification.

(C) We hereby terminate ENAU's authority to make sales under 18 C.F.R. § 284.402 and issue a limited authorization for the sole use of liquidating the existing assets, with a self-effectuating termination date of December 31, 2003, pursuant to 18 C.F.R. § 284.402(d). In the event that ENAU emerges from reorganization with a gas marketing function, it must request and receive specific Commission authorization to make such sales.

(D) We hereby terminate EESI's authorization to make sales under 18 C.F.R. § 284.402 and in place issue a limited authorization for the sole use of liquidating EESI's existing assets. EESI must report to the Commission in Docket No. RP03-311 every 30 days of the progress made in liquidating its assets. This authorization will expire once liquidation is completed, pursuant to 18 C.F.R. § 284.402(d). In the event that EESI emerges from reorganization with a gas marketing function, it must request and receive specific Commission authorization to make such sales.

(E) We hereby revoke EESI's market-based rate authority and immediately terminate its electric market-based rate tariff. In the event that EESI emerges from reorganization with a wholesale power marketing function, it must reapply for market-based rate authority.

(F) We hereby terminate ECS's authority under 18 C.F.R. § 284.402 and in place issue a limited authorization for the sole use of marketing gas entitlements accrued under ECS's existing compressor station contracts.

(G) We hereby terminate ENA's authorization under 18 C.F.R. § 284.402 and in place issue a limited authorization that allows ENA to conduct only the activities discussed in the body of this order. ENA must report to the Commission every 30 days in Docket No. RP03-311 of the progress made in terminating those activities. This authorization will expire once these activities are completed, pursuant to 18 C.F.R. § 284.402(d).

(H) We hereby revoke EPMI's market-based rate authority and immediately terminate its electric market-based rate tariff. In the event that EPMI emerges from reorganization with a power marketing function, it must reapply for market-based rate authority.

(I) Bridgeline and CTC are hereby dismissed from Docket No. RP03-311-000, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.