

114 FERC ¶ 61,067
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

v.

Sellers of Energy and Ancillary Services

Docket No. EL00-98-000

Investigation of the Practices of the California
Independent System Operator and the
California Power Exchange

Docket No. PA02-2-000

Fact-Finding Investigation into Possible
Manipulation of Electric and Natural Gas Prices

Docket No. EL03-180-000

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

Docket No. EL03-154-000

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

Docket No. EL02-114-007

Portland General Electric Company

Docket No. EL02-115-008

Enron Power Marketing, Inc.

Docket No. EL02-113-000

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

Docket No. EL04-1-000

Enron Power Marketing, Inc.

ORDER ON SETTLEMENT AGREEMENT

(Issued January 25, 2006)

1. In this order, the Commission acts on a Joint Offer of Settlement and Settlement and Release of Claims Agreement (collectively, the Settlement) filed on November 16, 2005 in the instant proceedings by Enron¹ and the Nevada Companies² (collectively, the Parties). The Settlement consists of the “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and the “Settlement and Release of Claims Agreement,” filed pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.³ The Settlement resolves claims and matters raised in the captioned proceedings (FERC Proceedings) arising from transactions and events in western energy markets, including markets of the California Independent System Operator (CAISO) and the California Power Exchange (CalPX) during the period from January 16, 1997 through June 25, 2003 (the Settlement Period) as they relate to Enron. The Settlement also resolves claims arising from Enron’s termination of certain long-term forward power contracts with the Nevada Companies in May, 2002.

2. The Parties request that the Commission receive comment on and review the Settlement without prior certification by the Presiding Administrative Law Judge, and they have requested that the Commission approve the Settlement before January 31, 2006.⁴ Today’s order approves the Settlement without condition.

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

² For purposes of the Settlement, “Nevada Companies” means Nevada Power Company (NPC), Sierra Pacific Power Company (SPPC) and Sierra Pacific Resources (SPR).

³ 18 C.F.R. § 385.602 (2005).

⁴ In addition to the Commission’s approval, the Settlement requires the approval of United States Bankruptcy Court for the Southern District of New York (the Enron Bankruptcy Court). Section 1.4 of the Settlement defines the “Bankruptcy Cases” collectively as cases commenced under Chapter 11 of the Bankruptcy Code (Title 11 of the United States Code) by the Enron Debtors and certain affiliates on or after December 2, 2001 in *In re Enron Corp. et al.*, Chapter 11 Case No. 01-16034 (AJG) Jointly Administered, pending before the Enron Bankruptcy Court.

I. Background and Description of the Settlement

3. The Settlement will resolve myriad legal disputes between the Nevada Companies and Enron that are the outgrowth of commercial dealings between the companies during the Settlement Period. From 1997 to May 7, 2002, Enron sold power to the Nevada Companies in both spot and forward market transactions. The Nevada Companies are intervenors in certain Commission proceedings that are the subject of this Settlement, and they have asserted claims against Enron in the Enron Bankruptcy Court. In addition, the Nevada Companies have brought actions against Enron at the Commission related to the reasonableness of prices in certain of Enron's long-term power contracts, as well as Enron's termination of those contracts in May, 2002, in Docket Nos. EL02-28 and EL04-1. Finally, Enron brought an adversary proceeding against the Nevada Companies in the Enron Bankruptcy Court to enforce its claimed rights to termination payments under the forward power contracts terminated by Enron in 2002.⁵

4. Against the backdrop of this pending litigation, the Settlement will resolve, as between the Nevada Companies and Enron, all claims or rights to remedies that may arise with respect to the above described Commission proceedings: the Refund Proceeding in Commission Docket Nos. EL00-95-000⁶ and EL00-98-000,⁷ the Partnership/Gaming Proceeding in Docket Nos. EL03-180-000, EL03-154-000, EL02-114-007, EL02-115-008, and EL02-113-000, and the FERC Refund Related Proceeding in Docket No. PA02-2-000 for the Settlement Period. The Parties also have agreed to mutual releases of past, existing and future claims arising at the Commission and/or under the Federal Power Act (FPA)⁸ and the Natural Gas Act (NGA)⁹ with respect to rates, prices, and terms or conditions for energy, ancillary services, or transmission congestion in the western electricity or western natural gas markets during the settlement period.

⁵ *Enron Power Marketing, Inc. v. Nevada Power, et al.*, Chapter 11 Case No. 01-16034 (ALG), Adversary Proceeding No. 02-02520 (defined in section 1.1 of the Settlement as the Adversary Proceeding).

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

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

⁸ 18 U.S.C. § 824 *et seq.* (2000).

⁹ 15 U.S.C. § 717 *et seq.* (2000).

5. Under the Settlement, Enron will allow, in favor of the Nevada Companies, a Class 6 general unsecured claim under the Enron Debtors' Plan of Reorganization (the Plan)¹⁰ of \$126,500,000 in the bankruptcy proceeding of EPMI,¹¹ in the aggregate, without offset, defense, or reduction.¹² The Nevada Companies will pay Enron \$129,000,000 as termination payments arising from Enron's termination of certain forward power contracts with NPC and SPPC in May, 2002. The Settlement provides that NPC's payment allocation of this total will be \$89,784,000, and SPPC's payment allocation will be \$39,216,000.¹³

6. The Settlement also provides for non-monetary consideration. Article 6 provides that, subject to certain specified limitations,¹⁴ Enron and the Nevada Companies will mutually release and discharge each other as of the Settlement Effective Date from all past, existing and future claims before the Commission and/or under the FPA and NGA. The Settlement resolves all claims as to or against Enron for monetary and non-monetary remedies in the FERC Proceedings and the Adversary Proceeding. The Enron Debtors will release the Nevada Companies from any claims pending against them in the Enron Bankruptcy.¹⁵ Under section 6.4 of the Settlement, the Nevada Companies will not oppose any request by Enron for the release to Enron of the collateral that is being held by the CalPX (the Enron PX Collateral). The Nevada Companies will release Enron from its claims for certain meter reading errors and overcharges to the CAISO market participants under section 6.7 of the Settlement.

7. On December 16, 2005, the Enron Parties and the Nevada Companies filed a Motion to Lodge Order of Bankruptcy Court Approving Settlement by and Among the Enron Parties and the Nevada Companies (Motion to Lodge). Appended to the Motion to Lodge is the December 15, 2005 Enron Bankruptcy Court¹⁶ Order Approving Settlement Agreement Among the Enron Parties and the Nevada Companies and Reconsidering and Allowing the Nevada Companies' Claims (Bankruptcy Court Order). Judge Gonzalez approved the Settlement without condition, based on his determination that "the legal and

¹⁰ According to section 1.32 of the Settlement, the Plan is the Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code confirmed by the Enron Bankruptcy Court on or about July 15, 2004.

¹¹ *In re Enron Corp., et al., Reorganized Debtors*, Case No. 01-16034 (ALG) (Bankr. S.D.N.Y.).

¹² Sections 4.1.1.1 and 4.1.1.2 of the Settlement.

¹³ *Id.* at section 4.1.3.

¹⁴ *Id.* at section 6.8, "Reservations and Limitations on Releases."

¹⁵ *Id.* at section 6.3.

¹⁶ Judge Alfred J. Gonzalez, presiding.

factual bases set forth in the Motion [to lodge the Settlement Agreement] establish just cause for relief granted herein and that the settlement is fair and reasonable”¹⁷ The Commission will grant the Motion to Lodge the Bankruptcy Court Order.

II. Comments on the Settlement

8. Initial comments on the Settlement were due on November 30, and reply comments were due on December 7. Timely initial comments were filed by the City of Tacoma, Washington (Tacoma), the Office of the Nevada Attorney General, Bureau of Consumer Protection (Nevada BCP), the Public Utilities Commission of Nevada (PUCN), the Commission’s Trial Staff and the Western Parties.¹⁸ Timely reply comments were filed jointly by the Enron Parties and Nevada Companies. The Commission’s Trial Staff supports the Settlement without qualification as a “reasonable compromise of competing interests concerning the resolution of difficult, complex issues both before the Commission and the Enron Bankruptcy Court.”¹⁹ The Nevada BCP and PUCN both seek assurances that the Settlement does not affect their respective jurisdictional authority with regard to efforts by the Nevada Companies to pass through Settlement-related costs to retail Nevada ratepayers or the determination as to whether the termination payment by the Nevada Companies to Enron is prudent under state law. Neither entity opposes the Settlement as long as their state jurisdictional responsibilities are not affected. Tacoma and Western Parties each seeks certain clarifications in order to support the Settlement.

III. Discussion

- **Comments of Nevada BCP and PUCN**

9. Nevada BCP and PUCN generally support the Settlement, but each expresses concerns that the Settlement not interfere with their respective jurisdictional authority. Nevada BCP states that it does not oppose the Settlement so long as it does not interfere with its jurisdiction to review the prudence of the Nevada Companies in their execution and administration of certain long-term forward power contracts between Enron and the Nevada Companies, which were terminated in May, 2002 (the Nevada Contracts).²⁰

¹⁷ Bankruptcy Court Order at 2.

¹⁸ The Western Parties consist of: the City of Santa Clara, California, d/b/a Silicon Valley Power (Santa Clara); the Public Utility District No. 1 of Snohomish County, Washington (Snohomish); Valley Electric Association, Inc. (Valley Electric); and The Metropolitan Water District of Southern California (MWD).

¹⁹ Trial Staff comments at 11.

²⁰ Nevada BCP comments at 3–4.

10. In a similar vein, PUCN notes that, as a non-party to the Settlement, it reserves any rights it may have to address issues regarding the pass-through of Settlement-related costs to Nevada ratepayers. Moreover, PUCN states that section 2.6 of the Settlement specifically provides that the Settlement does not address or resolve any issues that may arise if the Nevada Companies attempt to pass-through Settlement-related costs. PUCN further avers that it will withdraw the testimony of C. Kirby Lampley in Docket Nos. EL03-180-000, EL03-154-000 and EL02-115-008 if the Settlement is approved.

11. In reply, the Enron and the Nevada Companies point to “multiple sections” where the Settlement states that it does not affect the rights of non-settling parties.²¹ The Parties also confirm their intention that nothing in the Settlement prejudice the prudence of any decisions related to the Nevada Companies’ contracts with Enron. The Parties do not object to the PUCN reserving its right to review the Settlement in appropriate regulatory proceedings.²²

Commission Determination

12. The Commission finds that the Settlement does not affect the jurisdiction of either the Nevada BCP or the PUCN to make determinations with respect to the Nevada Contracts or the pass-through of Settlement-related costs to Nevada ratepayers. In this regard, section 2.6 of the Settlement states that “the PUCN retains its jurisdictional authority to review the prudence of the Nevada Companies’ decisions regarding the execution and administration of purchased power contracts.” Moreover, neither the Nevada BCP nor the PUCN is a party to the Settlement. Thus, the Commission concludes that their rights are not affected by the Settlement.

• Comments of Tacoma

13. While Tacoma does not oppose the Settlement, it asserts that language in sections 2.2 and 7.1.1 could potentially limit the remedies that might be available to it in Docket No. EL01-10-000, *et al.* (the PacNW Proceeding).²³ Sections 2.2 and 7.1.1 provide that:

²¹ Settling Parties’ joint reply comments at 4, *citing* sections 2.2 and 2.6 of the Settlement.

²² *Id.* at 3.

²³ See *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy and/or Capacity Markets in the Pacific Northwest, Including Parties to the Western Systems Power Pool Agreement, Order Granting Rehearing, Denying Request to Withdraw Complaint and Terminating Proceeding*, 103 FERC ¶ 61,348 (2003); and *Puget, Order Denying Rehearing*, 105 FERC ¶ 61,183 (2003).

[A]ny party in the FERC Proceedings that is not a party to this Agreement may continue to seek remedies from Enron in the FERC Proceedings; *provided, however, that any monetary remedy that FERC may determine to award, if any, to such party shall not exceed the share allocable to that party, as determined under the allocation mechanism adopted by FERC in litigation of any profits, if any, Enron may be finally required and ordered to disgorge, including for any party, any final order with respect to any contract termination payments ...* (emphasis added).

Tacoma states that, unless clarified, the language might preclude recovery of refunds, which are the subject of the PacNW Proceeding, now pending in federal court.²⁴ “FERC Proceedings” are defined in section 1.23 as including the Partnership/Gaming Proceeding involving Enron, where the disgorgement of unjust profits, rather than refunds, is at issue. Tacoma is concerned that, should the court rule in favor of the pending petitions for review in the PacNW Proceeding and remand the proceedings to the Commission, Tacoma’s ability to receive refunds could be adversely affected by the “to disgorge” language in sections 2.2 and 7.1.1 of the Settlement. It seeks clarification from the Parties that the Settlement will not affect its potential recovery of refunds under the PacNW Proceeding; however, if that clarification is not forthcoming, Tacoma asks the Commission to disapprove the identified language in sections 2.2 and 7.1.1. If the Commission does not provide the requested clarification or reject this language, Tacoma will oppose the Settlement.

14. In their reply comments, the Parties state that the language in sections 2.2 and 7.1.1 is intended simply to provide that non-settling parties may continue to seek monetary relief, and that, with respect to the Partnership/Gaming Proceeding (but not the PacNW Proceeding), the Commission may only grant monetary relief to a non-settling party according to whatever allocation mechanism the Commission ultimately adopts. With respect to the PacNW Proceeding, the Parties state that the Settlement does not affect the ability of non-settling parties to seek whatever relief to which they demonstrate an entitlement.²⁵

²⁴ The Commission’s orders in these proceedings, which denied refunds sought by Tacoma and others, are subject to pending consolidated petitions for review before the United States Court of Appeals for the Ninth Circuit in *Port of Seattle, Washington, et al. v. FERC*, Case Nos. 03-74139, *et al.*, including, *inter alia*, *City of Tacoma, Washington v. FERC*, Case No. 03-74769.

²⁵ Enron and Nevada Companies joint reply comments at 5.

Commission Determination

15. Enron and the Nevada Companies have provided the clarification requested by Tacoma in their joint reply comments. Therefore, no further clarification by the Commission is necessary.

Comments of the Western Parties

16. Western Parties state that, while they do not seek to be an obstacle to this bilateral Settlement, they urge the Commission to ensure that the rights of non-settling parties are fully protected and preserved. In that regard, Western Parties urge the Commission to confirm that:

1. the Settlement does not provide a complete remedy for Enron's wrongful conduct and addresses remedies only as to Enron and the Nevada Companies. Thus, the Settlement does not prejudge the scope and proper allocation of remedies for Enron's wrongful conduct;
2. that the Commission will adopt a process by which Western Parties may sponsor important documents previously presented by the Nevada Companies; In particular, Western Parties assert that, because Section 5.3 of the Settlement requires the Nevada Companies to withdraw all pleadings, testimony and exhibits in the FERC Proceedings, Western Parties will be harmed to the extent that some of these materials "were submitted jointly with other non-settling Western Parties."²⁶ and,
3. that any stay of these proceedings issued at the request of Enron and the Nevada Companies will pertain only to Enron and the Nevada Companies.

If the Commission provides these assurances, Western Parties will not oppose the Settlement.²⁷

17. In their joint reply comments, Enron and the Nevada Companies point out that the Settlement is clear that the rights of non-settling parties to continue to litigate will not be affected. Moreover, the Settlement is similar to Enron's Settlements with the California

²⁶ Western Parties comments at 10.

²⁷ *Id.* at 4-6.

Parties²⁸ and the SRP Parties,²⁹ and the Commission's orders approving those settlements has ruled that the rights of non-settling parties to continue to litigate are not affected.³⁰

18. Enron and the Nevada Companies also urge the Commission to deny Western Parties' request to sponsor certain evidence previously filed by the Nevada Companies. In support, Enron and the Nevada Companies state that the Commission has considered and rejected an identical request by Western Parties in the order approving the California Parties' Settlement, pursuant to which the Nevada Companies are obligated to withdraw testimony previously filed in the Partnership/Gaming Proceeding. Likewise, the Parties point out that the Commission in the same order also rejected Western Parties' request to strike certain Enron evidence from the record. The Parties ask that the Commission reiterate its prior determination that such evidentiary issues should be resolved by the Administrative Law Judge, before whom the Partnership/Gaming Proceeding is currently stayed.³¹ In a similar vein, the Parties also assert that any ruling on the stay in the Partnership/Gaming Proceeding should be left to the Administrative Law Judge. "There is no reason for the Commission to pre-determine issues that will properly be delegated to the Administrative Law Judge if they ever arise."³²

Commission Determination

19. The Commission finds that the Settlement is a comprehensive and reasonable effort by Enron and the Nevada Parties to end their litigation and resolve their legal

²⁸ For purposes of the California Parties' Settlement, the "California Parties" means collectively: Pacific Gas & Electric Company (PG&E); Southern California Edison Company (SCE); San Diego Gas & Electric Company (SDG&E); the People of the State of California, *ex rel.* Bill Lockyer, Attorney General (the California Attorney General); the California Department of Water Resources acting solely under authority and powers created by California Assembly Bill 1 from the First Extraordinary Session of 2000 – 2001, codified in Sections 80000 through 80270 of the California Water Code (CERS); the California Electricity Oversight Board (CEOB); and the California Public Utilities Commission (CPUC).

²⁹ For purposes of the SRP Settlement, "SRP Parties" refers to New West Energy Corporation (New West) and Salt River Project Agricultural Improvement and Power District (SRP).

³⁰ Enron and Nevada Companies joint reply comments at 6, *citing San Diego Gas & Elec. Co., et al.*, 113 FERC ¶ 61,171 at ¶25 (2005) (California Parties Settlement); and *San Diego Gas & Elec. Co., et al.*, 113 FERC ¶ 61,226 at ¶13 (2005) (SRP Parties Settlement).

³¹ *Id.* at 7.

³² *Id.* at 8.

disputes in a way that does not affect the rights of others to continue to litigate their claims in the underlying proceedings. The Commission's determination should allay Western Parties' concerns that this bilateral settlement between Enron and the Nevada Companies will adversely affect their ability to continue litigating their disputes with Enron. In addition, the Commission finds Western Parties' request to sponsor withdrawn evidence to be inappropriate at this time. They have presented no compelling reason for the Commission to direct that the Administrative Law Judge allow the Western Parties to sponsor evidence that is withdrawn pursuant to the terms of the Settlement. Likewise, the Commission believes that any determination with respect to requests to extend the stay in the Partnership/Gaming Proceeding should also be left to the appropriate Administrative Law Judge and not prejudged by the Commission at this time.

The Commission orders:

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

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.