

115 FERC ¶ 61,376
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Enron Power Marketing, Inc. and
Enron Energy Services Inc. Docket Nos. EL03-180-020; -021; -022

Enron Power Marketing, Inc. and
Enron Energy Services Inc. Docket Nos. EL03-154-015; -016; -017

Portland General Electric Company Docket Nos. EL02-114-016; -017; -018

Enron Power Marketing, Inc. Docket Nos. EL02-115-020; -021; -022

El Paso Electric Company,
Enron Power Marketing, Inc. and
Enron Capital and Trade Resources
Corp. Docket Nos. EL02-113-018; -019; -020

(Consolidated)

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

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

City of Santa Clara, California Docket No. EL04-114-000

v.

Enron Power Marketing, Inc.

ORDER APPROVING SETTLEMENT AGREEMENTS
WITH CONDITIONS

(Issued June 28, 2006)

1. In this order, the Commission approves, subject to conditions, three Settlements filed on March 10, 2006. These Settlements involve agreements between: Enron¹ and the Commission Trial Staff (the Trial Staff Settlement); Enron and Valley Electric Association (Valley) (the Valley Settlement); and Enron and the City of Santa Clara, California (Santa Clara) (the Santa Clara Settlement) (collectively, the Settling Parties). Each settlement consists of a “Joint Offer of Settlement,” a “Joint Explanatory Statement,” and a “Settlement and Release of Claims Agreement.” The settlements were filed pursuant to Rule 602 of the Commission’s Rules of Practice and Procedure.²

2. These three Settlements are the most recent in a series of settlements of proceedings arising from the crisis in California energy markets in 2000 and 2001. With the instant Settlements, the Commission to date has accepted 24 settlements in various dockets, with over \$6.3 billion in refunds or other compensation to market participants.³ The Commission continues to believe that fair and reasonable settlements, rather than costly, protracted Commission and court litigation, are the most effective and efficient way to bring closure to the numerous proceedings spawned by the California energy crisis. In approving the Settlements, however, the Commission recognizes the importance of ensuring that the due process rights of non-settling parties are not affected. For this reason, as discussed below, the Commission will direct that certain modifications be made to the Trial Staff Settlement to ensure that nothing in our order today precludes non-settling parties from access to or use of Enron trader tapes or other evidence in the record of these proceedings, subject to any protective orders required by the Department of Justice (DOJ) or the Commission. In short, approval of these Settlements, subject to

¹ As set forth in the Settlement, Enron means the Enron Debtors and the Enron Non-Debtor Gas Entities. The Enron Debtors are Enron Corp.; Enron Power Marketing, Inc. (EPMI); Enron North America Corp. (formerly known as Enron Capital and Trade Resources Corp.); Enron Energy Marketing Corp.; Enron Energy Services Inc.; Enron Energy Services North America, Inc.; Enron Capital & Trade Resources International Corp.; Enron Energy Services, LLC; Enron Energy Services Operations, Inc.; Enron Natural Gas Marketing Corp.; and ENA Upstream Company, LLC. The Enron Non-Debtor Gas Entities are Enron Canada Corp.; Enron Compression Services Company; and Enron MW, LLC.

² 18 C.F.R. § 385.602 (2005).

³ Federal Energy Regulatory Commission Report to Congress, *The Commission’s Response to the California Energy Crisis and Timeline for Distribution of Refunds*, at 13-19 (2005).

the modifications directed by the Commission to be made to the Trial Staff Settlement, will not adversely affect non-settling parties in prosecuting their cases fully before the Commission, including specifically their ability to receive full and fair consideration of their petitions under the Cantwell Amendment.⁴

3. The three Settlements resolve all issues as to Enron for disgorgement of profits and other remedies sought by Trial Staff, Valley and Santa Clara in these proceedings arising from transactions and events in western energy markets, including markets of the California Independent System Operator Corporation (CAISO) and the California Power Exchange (CalPX), during the period from January 16, 1997 through June 25, 2003 (the Settlement Period)⁵ as they relate to Enron. The Settlements also resolve claims arising from the termination of certain long-term forward power contracts between Enron and Valley and Enron and Santa Clara. The Settlements are dependent upon one another, and Commission approval of all three is required for any single settlement to take effect.

4. On May 31, 2006, Presiding Administrative Law Judge Carmen A. Cintron certified each settlement to the Commission as a contested partial settlement, finding each settlement to be “fair and reasonable.”⁶

⁴ Pub. L. No. 109-58; 119 Stat. 983-84 (2005) (EPAAct). Section 1290 of EPAAct is referred to as the “Cantwell Amendment.”

⁵ This period is the time set by the Commission in its order directing an administrative law judge to determine the total amount of disgorgement of unjust profits by Enron for its wholesale power sales in the Western Interconnect for violations of tariffs on file with the Commission. *See* section 1.45 of the Trial Staff Settlement, *citing El Paso Elec. Co.*, 108 FERC ¶ 61,071 (2004).

⁶ *Enron Power Marketing, Inc.*, 115 FERC ¶ 63,052 (2006) (Trial Staff Settlement Certification); *Enron Power Marketing, Inc.*, 115 FERC ¶ 63,051 (Valley Settlement Certification); and *Enron Power Marketing, Inc.*, 115 FERC ¶ 63,050 (2006) (Santa Clara Settlement Certification). On June 15, Public Utility District No. 1 of Snohomish County, Washington (Snohomish), Ash Grove Cement Company (Ash Grove), Port of Seattle, Washington (Port), and Public Utility District No. 1 of Grays Harbor County, Washington (Grays Harbor) filed a Motion to Permit an Interlocutory Appeal of the orders certifying the settlements to the Commission. The motion was filed under Rules 212 and 715(b) of the Commission’s Rules of Practice and Procedure. 18 C.F.R. §§ 385.212. 385.715(b) (2005). Answers opposing the motion were filed on June 20 by Trial Staff, Enron and the Settling Parties (Valley and Santa Clara). On June 22, 2006, the Presiding Administrative Law Judge issued an order denying the motion. *Enron*

(continued)

5. On June 20, 2006, the Concerned Customers⁷ filed a Motion to Hold Public Meeting, in Seattle, Washington, on Proposed Settlement Between Enron and FERC Trial Staff (Motion for Public Meeting). The Concerned Customers assert that “The Commission would benefit from hearing directly from local officials and Western consumers, whom the settlement allegedly protects, whether they share that view or whether they believe FERC’s Trial Staff should continue to aggressively prosecute this enforcement proceeding against Enron.”⁸ Given the hundreds of pages of comments and reply comments filed with respect to the Trial Staff Settlement (not to mention comments on the Valley and Santa Clara Settlements), the Commission will deny the Concerned Customers’ Motion for Public Meeting.

6. 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).⁹ On April 12, the Settling Parties filed three Motions to Lodge Order of Bankruptcy Court approving the Trial Staff, Valley and Santa Clara Settlements. In approving each settlement without condition, Judge Arthur J. Gonzalez found that “the legal and factual bases set forth in the Motion [for approval of the Settlement Agreement] establish just cause for relief herein and that the Settlement Agreement is fair and reasonable. . . .”¹⁰ The Commission will grant these motions to lodge.

Power Marketing, Inc., 115 FERC ¶ 63,073 (2006). On June 26, 2006, Snohomish, Ash Grove and Port filed an appeal of the Presiding Administrative Law Judge’s order with the Motions Commissioner, to which Santa Clara and Valley filed a response on June 27, 2006. The Motions Commissioner has not acted yet.

⁷ Snohomish, Ash Grove, Port and Grays Harbor comprise the Concerned Customers for purposes of the June 20, 2006 motion.

⁸ Concerned Customers’ motion at 3.

⁹ Section 1.2 of the Trial Staff 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. An identical definition is found in section 1.3 of the Valley and Santa Clara Settlements.

¹⁰ Enron Bankruptcy Court orders approving the Trial Staff Settlement, the Valley Settlement and the Santa Clara Settlement, at 2.

I. Procedural Background and Description of the Settlement

7. Valley and EPMI were parties to a Master Power Purchase and Sale Agreement (Valley Master Agreement) dated February 13, 2001 and certain long-term confirmation agreements executed under the Master Agreement. Santa Clara and EPMI were parties to a Master Energy Purchase and Sale Agreement (Santa Clara Master Agreement) dated September 10, 1999 and two long-term confirmation agreements executed under the Santa Clara Master Agreement. In addition, Santa Clara and EPMI also entered into several short-term transactions during the Settlement Period.

8. On June 25, 2003, the Commission issued two orders requiring a total of 53 entities to show cause why they had not engaged in activities that constitute Gaming Practices under the CAISO and CalPX tariffs.¹¹ To date, the Commission has either dismissed actions against or approved settlements involving each of the companies named in the show cause orders, except for Enron.¹² Valley and Santa Clara are intervenors in these Commission proceedings involving Enron, specifically those involving the potential disgorgement of unjust profits by Enron during the Settlement Period.

9. On January 26, 2004, Chief Administrative Law Judge Curtis Wagner issued an order consolidating the Gaming and Partnership Proceedings.¹³ On January 30, 2004, the Chief Judge issued an errata consolidating Enron-related issues from Docket Nos. EL02-114-000 and EL02-115-000 with the Gaming and Partnership Proceedings.¹⁴ On July 22, 2004, the Commission issued an order affirming the Initial Decision in Docket No. EL02-113-000,¹⁵ pertaining to the adjudication of Enron's liability resulting from its relationship with El Paso Electric Company, with the Gaming and Partnership

¹¹ *American Elec. Power Serv. Corp., et al.*, 103 FERC ¶ 61,345 (2003) (Gaming Order); *Enron Power Marketing, Inc., et al.*, 103 FERC ¶ 61,346 (2003) (Partnership Order). Collectively, these orders are referred to as the Partnership/Gaming Orders.

¹² See Gaming Order at P 73.

¹³ *Enron Power Marketing, Inc.*, "Order of the Chief Judge Consolidating Gaming and Partnership Proceedings for Hearing and Decision," Docket No. EL03-180-000, *et al.* (2004).

¹⁴ *Enron Power Marketing, Inc.*, Errata, Docket No. EL03-180-000, *et al.* (2004).

¹⁵ *Enron Power Marketing, Inc.*, 104 FERC ¶ 63,010 (2003) (the July 22 Order).

Proceedings.¹⁶ The July 22 Order also consolidated that docket and others with Docket Nos. EL03-180-000 and EL03-154-000, and directed proceedings before the Presiding Administrative Law Judge in the consolidated proceedings.

10. Santa Clara filed a complaint against Enron related to EPMI's termination of the Santa Clara Master Agreement (Docket No. EL04-114-000). Enron brought adversary proceedings against Valley and Santa Clara in the Enron Bankruptcy Court to enforce its claims to termination payments under forward power contracts terminated by EPMI in 2002. Valley and Santa Clara have vigorously contested these proceedings.

11. On March 11, 2005, the Commission ruled that certain disputed terminated contracts between Enron and several utilities, including Nevada Power Company (Nevada), Snohomish, Metropolitan Water District of Southern California (Met Water), Santa Clara, and Valley (collectively, the Western Intervenors), were within the scope of the consolidated proceedings and should be addressed in these instant proceedings.¹⁷ Previously, separate proceedings were initiated on contract termination payments sought by Enron.

12. On July 20, 2005, the Chief Judge issued an order suspending the procedural schedule and scheduling a settlement conference between Enron and the remaining non-settling parties in these proceedings. After the Commission's Trial Staff unsuccessfully engaged the parties in settlement discussions, the Chief Judge issued an order designating Administrative Law Judge Judith A. Dowd as a settlement judge and scheduling a settlement conference. As a result of numerous settlement discussions between Trial Staff, Enron, and the Western Intervenors, an offer of settlement between Enron and the Nevada Companies was filed with the Commission, and this settlement was approved on January 25, 2006.¹⁸

13. Against the backdrop of this pending litigation, the Settlements filed on March 10, 2006, will resolve, as between Enron, Trial Staff, Valley and Santa Clara, all claims or rights to remedies that may arise with respect to the captioned Commission proceedings, including: as to all three settlements, the Partnership/Gaming Proceeding in Docket Nos. EL03-180-000, EL03-154-000, EL02-114-007, EL02-115-008, and EL02-113-000; as to the Valley and Santa Clara Settlements, Docket No. PA02-2-000 and IN03-10-000, and

¹⁶ *El Paso Elec. Co.*, 108 FERC ¶ 61,071 at P 32 (2004).

¹⁷ *El Paso Elec. Co.*, 110 FERC ¶ 61,280 (2005).

¹⁸ *San Diego Gas & Elec. Co.*, 114 FERC ¶ 61,067 (2006).

as to the Santa Clara Settlement only, Docket No. EL04-114-000. The Settlements will also resolve certain non-Commission proceedings, including those pending at the Enron Bankruptcy Court as between Enron and each of Valley and Santa Clara. The monetary and non-monetary consideration involved in the three settlements is described below.

A. Settlements' Monetary Consideration

14. In the Trial Staff Settlement, Enron agrees to grant a Class 6 general unsecured claim of \$5 million in favor of Trial Staff in the EPMI bankruptcy proceeding, \$4 million of which will be allocated to Santa Clara by Trial Staff, and \$1 million of which will be allocated to Valley by Trial Staff.¹⁹ In addition, the Commission will have a subordinate Class 380 penalty claim of \$400 million.²⁰

15. Under section 4.1.1 of the Valley Settlement, Valley will have a Class 6 general unsecured claim of \$13 million in the Enron bankruptcy proceeding (in addition to the \$1 million allocated to Valley by Trial Staff). In exchange for the Class 6 general unsecured bankruptcy claim, Valley will pay to Enron a termination payment of \$8 million.²¹ Santa Clara will receive no additional bankruptcy allocation other than the \$4 million Class 6 general unsecured bankruptcy claim set out in the Trial Staff Settlement. Santa Clara will pay to Enron a termination payment of \$36.5 million.²²

16. Section 4.1.2 of the Trial Staff Settlement provides that EPMI will allocate up to \$10 million in disgorgement amounts to non-settling participants that have filed timely Proofs of Claim against EPMI in the Enron Bankruptcy Proceeding. Amounts so allocated will be recognized as Class 6 general unsecured claims in the Enron Bankruptcy Proceeding.

¹⁹ See section 4.1.1 of the Trial Staff Settlement and the Santa Clara Settlement, and section 4.1.2 of the Valley Settlement.

²⁰ See section 4.1.2 of the Trial Staff Settlement.

²¹ See section 4.1.3 of the Valley Settlement.

²² See section 4.1.2 of the Santa Clara Settlement.

B. Settlements' Non-Monetary Consideration

17. The Trial Staff Settlement requires Enron to tender a settlement offer to Snohomish and Met Water, with terms of settlement of “comparable” value to those in the Valley and Santa Clara Settlements.²³ Snohomish did not accept the settlement proposal within the 30 days allowed under the Trial Staff Settlement. Met Water and Enron filed a joint offer of settlement and settlement agreement with the Commission on April 25, 2006, which will be addressed in a separate Commission order.

18. Within ten days of the Settlement Effective Date,²⁴ Trial Staff, Valley, and Santa Clara have agreed to file to withdraw all pleadings, testimony, related exhibits, discovery requests, and additional requests for relief filed with the Commission and to terminate their participation in Commission proceedings specified in the Settlements.²⁵ Valley and Santa Clara also agree to withdraw pleadings from and terminate their participation in numerous federal and state proceedings against Enron, including withdrawing their appeals and further participation in *State of California ex rel. Bill Lockyer, Attorney General v. FERC*, pending before the U.S. Court of Appeals for the District of Columbia Circuit and before the U.S. Court of Appeals for the Ninth Circuit.²⁶

19. Under section 6.2 of the Trial Staff Settlement, Trial Staff agrees to release Enron from past, existing and future claims arising at the Commission and/or under the Federal Power Act (FPA)²⁷ and the Natural Gas Act (NGA),²⁸ and/or under the Cantwell

²³ See section 5.1 of the Trial Staff Settlement. The Trial Staff reply comments (at 8) state that the offer to Snohomish would reduce the termination payments claimed by Enron to 25 percent of Enron’s original termination payment claim, *i.e.*, a reduction from \$117 million to \$29.25 million, as well as eliminating the interest that has accumulated with respect to Enron’s original termination payment claim.

²⁴ The Settlement Effective Date will occur two business days following the Commission’s order approving the Settlements. See section 2.3 of each Settlement.

²⁵ See section 5.2 of each Settlement. The proceedings subject to these withdrawals of pleadings and future participation by the Settling Parties are listed in Article 6 of each Settlement.

²⁶ See sections 5.2.1 of the Valley and Santa Clara Settlements.

²⁷ 16 U.S.C. § 824 *et seq.* (2000).

²⁸ 15 U.S.C. § 717 *et seq.* (2000).

Amendment and any amendments to the FPA or NGA pursuant to EPAct from any legal theory or cause of action during the Settlement Period that: (1) Enron charged, collected or paid unlawful rates, terms or conditions for electric energy, ancillary services, or transmission congestion or natural gas in the western markets; (2) Enron manipulated the western energy or natural gas markets or otherwise violated any applicable tariff or law relating to western markets; (3) Enron was unjustly enriched by the foregoing released claims or otherwise violated any applicable tariff or law relating to western markets; or (4) Enron has claimed, charged, collected or retained profits associated with transactions 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. The other settlements contain similar releases.²⁹

II. Initial and Reply Comments on the Settlements

20. Timely initial comments were filed on March 30, 2006 by the Joint Parties (Snohomish, Port, City of Tacoma, Washington, Met Water), Port (individually), Ash Grove, and Luzenac America Inc. (Luzenac).³⁰ Grays Harbor and the Attorney General of the State of Montana (Montana AG) filed initial comments with motions to accept them out-of-time.³¹ Reply comments were filed by Snohomish (jointly with Luzenac, Ash Grove, Port, Tacoma, Grays Harbor, and the Montana AG), Trial Staff, Enron, Valley and Santa Clara. A number of comments opposing the Settlements were filed by

²⁹ *See, e.g.*, sections 6.1, 6.5 and 6.6 of the Valley and Santa Clara Settlements.

³⁰ Luzenac's initial comments were accompanied by a motion to intervene out-of-time, with the explanation that at this point it is an intervenor in only one proceeding involving Enron; *i.e.*, Docket No. EL06-8-000, the Luzenac complaint proceeding seeking a determination as to whether Luzenac has a termination payment obligation under certain contracts with Enron.

³¹ Montana AG served hard copies of its initial comments on the Secretary of the Commission, Trial Staff and the Presiding Administrative Law Judge on the comment deadline but inadvertently failed to file electronically. Montana AG's counsel discovered the oversight and filed electronically on April 6, 2006. The Presiding Administrative Law Judge accepted the filing. *See* Trial Staff Settlement Certification, 115 FERC ¶ 63,052 at P 27, n.27 (2006).

Members of Congress³² and the general public. Although unaccompanied by motions to intervene, the Commission has placed each of these comments in the record of these proceedings.

21. Replies to the reply comments of Trial Staff and Enron, accompanied by motions to accept the replies, were filed by Montana AG on April 18, 2006 and jointly by Snohomish, Luzenac, Ash Grove, Port, Tacoma, Grays Harbor, and Montana AG on April 21, 2006. Staff answered on May 2, 2006, and Enron answered on May 8, 2006. In addition, on May 12, 2006, Snohomish filed a motion to lodge a letter from the Attorney General of Washington that purports to rebut assertions made by Enron in its reply comments. The Presiding Administrative Law Judge rejected these unauthorized pleadings.³³

22. On June 20, 2006, the Concerned Customers filed a Motion to Hold Public Meeting, in Seattle, Washington, on Proposed Settlement Between Enron and FERC Trial Staff (Motion for Public Meeting). The Concerned Customers assert that “the Commission would benefit from hearing directly from local officials and Western consumers, whom the settlement allegedly protects, whether they share that view or whether they believe FERC’s Trial Staff should continue to aggressively prosecute this enforcement proceeding against Enron.”³⁴ Given the hundreds of pages of comments and reply comments filed with respect to the Trial Staff Settlement (not to mention comments on the Valley and Santa Clara Settlements), the Commission finds that a public meeting in Seattle will not aid our decision making. Therefore, the Commission will deny the Concerned Customers’ Motion for Public Meeting.

³² The following Members of Congress filed comments opposing the Settlements: Sen. Max Baucus; Sen. Barbara Boxer; Sen. Conrad Burns; Sen. Maria Cantwell; Sen. Larry Craig; Sen. Mike Crapo; Sen. Dianne Feinstein; Sen. Patty Murray; Sen. Gordon Smith; Sen. Ron Wyden; Rep. Jay Inslee; and Rep. Rick Larsen.

³³ *Id.* at P 60. (“Because the replies to the reply comments and the letter from the Washington Attorney General simply repeat the arguments made in the Initial Comments, they do not assist the Presiding Judge in deciding whether to certify the instant Settlement. Therefore, the motions to accept and the motion to lodge are denied.”)

³⁴ Concerned Customers’ motion at 3.

III. Discussion

A. Comments of Joint Parties³⁵

23. Joint Parties assert that the Trial Staff Settlement³⁶ is not in the public interest because the Trial Staff Settlement does not protect but in fact harms the rights of non-settling participants by removing evidence from public view and by removing Trial Staff from these proceedings, and because the amount of profits Enron earned during the Settlement Period far exceeds the monetary consideration it will pay. Within these broad objections, the Joint Parties make the following arguments:

- a) The Trial Staff Settlement would remove from public view evidence that is critical to the claims of remaining non-settling litigants, thereby threatening the due process rights of these parties.
- b) The Trial Staff Settlement provides for Trial Staff to waive claims and release Enron from liability in violation of its statutory duty to protect consumers.
- c) The Trial Staff Settlement allows Enron to retain virtually all of its unjust profits earned during the Settlement Period and, because the Settlement proceeds are so small compared to the amount of Enron's profits, the Trial Staff Settlement is inconsistent with Commission policies.

The Joint Parties conclude by urging the Commission to reject the Trial Staff Settlement and "clarify that approval of the Santa Clara Settlement and Valley Settlement will not impair the ability of Snohomish to continue its litigation against Enron in any FERC proceeding."³⁷

³⁵ For purposes of these initial comments, the following entities comprise the Joint Parties: Snohomish, Port, Tacoma and Met Water. In addition, Grays Harbor filed a motion to intervene out-of-time, which the Presiding Administrative Law Judge granted, aligning itself with the comments of the Joint Parties.

³⁶ The Joint Parties' initial comments oppose only the Trial Staff Settlement and do not express a position on the Valley and Santa Clara Settlements.

³⁷ Joint Parties initial comments at 65.

1. Future Availability of Evidence.

24. The Joint Parties oppose portions of the Settlements that call on the parties to withdraw their pleadings and other evidence from the record, stating that this would result in the removal of “critical evidence” from the record, including hundreds of hours of taped telephone conversations among Enron traders engaged in market manipulation, as well as critical evidence under seal to which Snohomish has not been given access. The Joint Parties assert that:

The [Trial Staff] Settlement is therefore contrary to the public interest because it effectively eliminates evidence from the record available for the Commission’s decision making in these proceedings, thus defeating the stated purpose of the proceedings, which is to provide “for the comprehensive review of all evidence relevant to Enron conduct that violated or may have violated Commission tariffs or orders and the appropriate remedy for such violations.”³⁸

In particular, the Joint Parties assert that the Trial Staff Settlement will require the Trial Staff to withdraw Enron trader tapes of enormous probative value and highly probative documentary evidence from the public record. Because this evidence is critical to the claims of the remaining litigants, the Joint Parties argue that the withdrawal of this evidence from public view is a denial of due process.³⁹ They also argue that it “violates the Commission’s established position that *all* evidence related to Enron’s misconduct in the Western power crisis should be available to the public.”⁴⁰

25. The Joint Parties cite a number of Commission precedents supporting the release of record evidence. In approving a settlement in the Trans-Alaska Pipeline rate cases, the Commission allowed litigants to request incorporation of the evidentiary record into future proceedings.⁴¹ The Joint Parties also cite a Ninth Circuit ruling in *Olympic*

³⁸ Joint Parties initial comments at 45, *citing El Paso Electric Co.*, 108 FERC ¶ 61,071 (2004) (emphasis added).

³⁹ *Id.* at 49-65. Luzenac (initial comments at 8-13, 21-22) and the Montana AG (initial comments at 5-6) also oppose the withdrawal of pleadings in their respective comments on the Settlements.

⁴⁰ *Id.* at 61 (emphasis in original).

⁴¹ *Id.* at 62, *citing Trans-Alaska Pipeline System*, 35 FERC ¶ 61,425 (1986).

Refining Co. v. Carter,⁴² in which the court rejected an attempt by a defendant in a settled antitrust action to prevent disclosure of documents under seal in a subsequent antitrust action against the same defendant. More recently, the Joint Parties point out that the Commission has ordered the release of hundreds of documents that were obtained in the course of the Commission's *Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*⁴³ in the face of challenges that much of this information was commercially sensitive.

26. In response, the Trial Staff asserts that the obligation under section 5.2 of the Trial Staff Settlement to withdraw pleadings and other evidence from the Partnership/Gaming Proceedings will not alter the information currently available to litigants on the Commission's website, nor does it mean that Trial Staff's testimony and exhibits will be removed from public view. On the contrary, argue Trial Staff, this evidence "will remain in the public record along side all the other thousands of documents, e-mails, etc., released to the public as part of the Docket No. PA02-2-000 investigation."⁴⁴ Trial Staff's withdrawal of pleadings merely means that it will not offer its prefiled testimony⁴⁵ into evidence in the course of the hearing. "Further, Snohomish, which is in possession of all testimony and exhibits filed in both public and protected form by Trial Staff in the Gaming and Partnership Proceeding, is free to sponsor in testimony any document filed by Trial Staff that it deems necessary to pursue its litigation."⁴⁶

27. With respect to trader tapes, Trial Staff asserts that the tapes were filed by Trial Staff as Protected Materials, and Snohomish was served that testimony under the terms of the Commission protective order in this proceeding.⁴⁷ While these tapes were not made public, Snohomish has access to them. With respect to testimony, tapes and other evidence that remains protected under the terms of the DOJ Protective Orders, Trial Staff

⁴² 332 F.2d. 260 (9th Cir. 1964) (*Olympic Refining*).

⁴³ 104 FERC ¶ 61,283 (2003).

⁴⁴ Trial Staff reply comments at 21-22.

⁴⁵ Testimony and exhibits are not "evidence" until offered by the sponsoring participant and admitted into evidence by the administrative law judge at a hearing. 18 C.F.R. § 385.504(b)(4) (2005).

⁴⁶ Trial Staff reply comments at 22.

⁴⁷ *Id.* at 24.

is not authorized to grant access to this material without the approval of the DOJ. Moreover, the tapes themselves are in the physical custody of the Federal Bureau of Investigation and not Trial Staff. Trial Staff points out that Snohomish was offered the opportunity to execute the DOJ Protective Order, which would have given it access to the material in question, but Snohomish chose not to do so.⁴⁸

28. Enron's reply comments echo those of Trial Staff with respect to the effect of the withdrawal of Trial Staff's evidence on the due process rights of the remaining litigants. Enron asserts that the Settlements will have no effect on Snohomish's access to protected or sealed materials, or on its ability to use these materials in litigation.⁴⁹ Enron argues that Snohomish had the opportunity to gain access to the DOJ-held trader tapes, but failed to execute the DOJ Protective Order. The Trial Staff Settlement does not affect the protected status of this latter material. Rather, according to Enron, "any restriction on Snohomish's access to and use of such materials is thus attributable solely to Snohomish's choice of litigation strategy and not to the terms of the Trial Staff Settlement."⁵⁰

Commission Determination

29. While it is not uncommon for parties to a settlement to agree to withdraw pleadings in the proceedings that are the subject of the settlement, the Commission finds that the public interest necessitates changes to the proposed settlement. The Commission's policy throughout these proceedings has been to provide transparency in access to all the evidence obtained in its investigation into market manipulation in Docket No. PA02-2-000, subject to confidentiality concerns and the DOJ Protective Orders. Withdrawal of evidence in this proceeding is not consistent with this transparency policy. For this reason, the Commission rejects the provisions of the Trial Staff Settlement that require Trial Staff to withdraw evidence from these proceedings.

30. With respect to concerns about access to evidence filed by Trial Staff, the Commission believes that it is important to understand the factors that will continue to govern access to this evidence. The Federal Bureau of Investigation (FBI), along with the DOJ, has collected over 200 tapes of trader conversations and other data. However,

⁴⁸ *Id.* at 24-25.

⁴⁹ Enron reply comments at 4.

⁵⁰ *Id.*

due to the continuing criminal prosecutions of former Enron employees, this information always has been and remains subject to a protective order entered by a Federal District Judge in the Northern District of California. Access can be obtained only by signing the DOJ Protective Order. Release of this information by Trial Staff or by any other party that has signed the DOJ Protective Order may result in sanctions by the Court. It is the Commission's understanding that Trial Staff signed the DOJ Protective Order and gained access to this information in 2004. To the Commission's knowledge, however, Snohomish has never signed the DOJ Protective Order, although it can still gain access today by signing the DOJ Protective Order.

31. In addition to information subject to the DOJ Protective Order, some of the testimony filed in 2005 by Trial Staff in Docket No. EL03-180 (the Partnership/Gaming Proceeding) was covered by one or more protective orders. To the Commission's knowledge, of the 146 exhibits submitted by Trial Staff, 13 exhibits, containing information pertaining to Enron, are subject to the protective order entered by the Presiding Judge, and all parties to Docket No. EL03-180 (including Snohomish) have copies of these exhibits. These exhibits consisted primarily of organizational and seating charts that were deemed protected because they contained names of individuals that the Presiding Judge did not want released. Another 8 exhibits (or about 5 percent of the total exhibits) contain material subject to the DOJ Protective Order. Trial Staff obtained permission from the DOJ and FBI to supply the parties with these exhibits, including Snohomish.

2. Releasing Enron from Liability and Withdrawal of Trial Staff Participation.

32. The Joint Parties claim that the releases and waivers provisions in section 6.2 of the Trial Staff Settlement amount to an abdication of the Trial Staff's statutory duty to protect consumers under the Cantwell Amendment.⁵¹ This section of the EPAct grants the Commission exclusive jurisdiction over litigation pertaining to certain termination payments. The Cantwell Amendment applies to any contract entered into in the Western Interconnection prior to June 20, 2001 with a seller of wholesale electricity that the Commission has (1) found to have manipulated the electricity market resulting in unjust and unreasonable rates; and (2) revoked the seller's authority to sell any electricity at market based rates. According to the Joint Parties, the implication of the Cantwell

⁵¹ In fact, it is not Trial Staff that is charged directly with statutory responsibility, but the Commission.

Amendment was “FERC, do your job of protecting consumers.”⁵² Because the Trial Staff Settlement requires Trial Staff to withdraw from participation in these proceedings, the Joint Parties allege that:

Despite this clear direction from Congress to protect consumers, the Trial Staff proposes to lay down their arms before any Cantwell Amendment case has even been assigned to them. The Trial Staff Settlement must therefore be rejected because Trial Staff’s abdication of its responsibility to enforce the Cantwell Amendment is both beyond its authority and in defiance of the plainly expressed will of Congress.⁵³

The Joint Parties state that Trial Staff’s withdrawal from participation is *ultra vires* and should be rejected.

33. The Joint Parties aver that, among commenters on the Settlements, only Snohomish, Luzenac and Ash Grove have filed petitions seeking relief from termination payments under the Cantwell Amendment. They assert that Valley and Santa Clara have not filed Cantwell Amendment petitions. For this reason, the Joint Parties assert that the Trial Staff Settlement “is unduly discriminatory and preferential because it releases all existing claims under the Cantwell Amendment in exchange for compensation provided to participants that have not even submitted claims under the Cantwell Amendment.”⁵⁴ Moreover, the Joint Parties assert that withdrawal from participation in the Cantwell Amendment proceedings is beyond the scope of the Partnership/Gaming Proceedings and therefore procedurally flawed. The Joint Parties identify other procedural shortcomings, including the failure to file the Trial Staff Settlement in the California Refund Proceeding,⁵⁵ despite the fact that section 5.3 of the Settlement addresses the release of Enron collateral being held by CalPX.⁵⁶ The Joint Parties argue that this provision should have been noticed and the participants in the California Refund Proceeding should have an opportunity to be heard.

⁵² Joint Parties initial comments at 36-37, *citing* 151 Cong. Rec. S7270 (daily ed. June 23, 2005) (statement of Sen. Cantwell).

⁵³ *Id.* at 38.

⁵⁴ *Id.* at 40.

⁵⁵ Docket No. EL00-95, *et al.*

⁵⁶ Joint Parties initial comments at 41.

34. In reply, Trial Staff disagrees with the Joint Parties' characterization that the releases and waivers in section 6.2 of the Trial Staff Settlement amount to an abdication of Trial Staff's obligation to protect consumers. Although Trial Staff would be precluded from raising issues in other proceedings arising out of the same transactions that are the subject of its Settlement, Trial Staff notes that provisions such as these are not unusual in settlements. In terms of the impact of Trail Staff's Settlement on pending Cantwell Amendment proceedings, Trial Staff points out that the Cantwell Amendment does not dictate an outcome in favor of those seeking to avoid termination payments. Rather, the Cantwell Amendment provides that the Commission, and not the Bankruptcy Court, has exclusive jurisdiction to determine whether a request for termination payment should be allowed.⁵⁷ Moreover, Trial Staff disagrees that its Settlement is *ultra vires*. Trial Staff is precluded from raising issues in Cantwell Amendment proceedings arising out of the issues in these proceedings, but it may still participate in addressing issues "such as an interpretation of contract between Enron and a party from whom it is requesting a termination payment."⁵⁸

35. In its reply comments, Enron takes issue with the Joint Parties' argument that the Trial Staff Settlement waives the Commission's jurisdiction under the Cantwell Amendment.⁵⁹ Enron asserts that neither Trial Staff nor Enron can alter the Commission's jurisdiction, and nothing in the Trial Staff Settlement purports to do so. Enron also challenges the Joint Parties' assertion that the Trial Staff Settlement is *ultra vires* because the Cantwell Amendment petitions have not even been set for evidentiary hearing. Enron adds that the Joint Parties have not cited any authority for this assertion. Moreover, Enron asserts that, because the complaining parties in the Cantwell Amendment proceedings have asked that the Commission summarily find in their favor without hearing, and thus without Trial Staff testimony,⁶⁰ there is no way that the Trial Staff Settlement can affect the outcome of the Cantwell Amendment proceedings.

⁵⁷ Trial Staff reply comments at 26-27.

⁵⁸ *Id.* at 27.

⁵⁹ Enron cites the Joint Parties' initial comments at 36: "The Commission cannot waive its jurisdiction under the Cantwell Amendment or abdicate its statutory duty to protect consumers." Similarly, at 39: "Once Congress has granted jurisdiction to the Commission, the Commission has 'no discretion to reject that jurisdiction.'"

⁶⁰ *See* Snohomish Cantwell Complaint at 10; Snohomish Amended Cantwell Complaint at 3; Snohomish Motion for Summary Judgment at 5-9; Luzenac Cantwell

Commission Determination

36. The Commission finds that the releases and waivers in section 6.2 of the Trial Staff Settlement are inappropriate insofar as they bar further participation in these proceedings by Trial Staff. The public interest is best served by Trial Staff's continued participation in these proceedings, including continuing to work with the remaining participants in pursuing settlements. For these reasons, the Commission rejects the provisions of the Trial Staff Settlement that preclude Trial Staff's further participation in the instant proceedings.

3. Fairness of the Settlements' Payments.

37. The Joint Parties allege that the Trial Staff Settlement is inadequate, because it calls for Enron to disgorge "a miniscule fraction" of the \$1.7 billion⁶¹ in profits the Joint Parties claim to have been earned by Enron, as shown in the Affidavit of Robert McCullough attached as Attachment A to the Joint Parties' comments (McCullough Affidavit).⁶² According to the Joint Parties, the \$15 million that Enron would disgorge under the Trial Staff Settlement (through payments of \$5 million to Valley and Santa Clara and \$10 million to non-settling participants) is miniscule when compared to Enron's profits. When viewed in the context of the Enron Bankruptcy, the disparity is even more pronounced, they assert, because Enron will pay Class 6 unsecured claims at the rate of only 22.9 percent.⁶³ Moreover, the Joint Parties assert that the \$400 million Class 380 subordinated claim provided to Trial Staff under the Trial Staff Settlement "is mere window dressing," as the current Enron Bankruptcy Plan calls for nothing to be paid to Class 380 claims.⁶⁴

Complaint at 2; Luzenac Motion for Summary Judgment at 35; Ash Grove Cantwell Complaint at 29-31.

⁶¹ Joint Parties initial comments state that this amount is either \$1.6 (at 24, 40) or \$1.7 billion (at 28 and McCullough Affidavit at 4).

⁶² Joint Parties initial comments at 24; McCullough Affidavit at 4.

⁶³ *Id.* at 26, *citing* Disclosure Statement for Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United Bankruptcy Code, *In re Enron*, No. 01-16034 at 33 (Bankr. S.D.N.Y. filed Jan. 9, 2001) (Enron Bankruptcy Plan).

⁶⁴ *Id.* at 27, *citing* Enron Bankruptcy Plan at 90.

38. The Joint Parties also fault the Trial Staff Settlement because it does not give sufficient recovery to consumers in the Pacific Northwest, even though the Pacific Northwest was Enron's largest profit center.⁶⁵ According to the McCullough Affidavit, Enron made nearly \$700 million in profits from the Pacific Northwest in 2000 and 2001, nearly twice what Enron made in California.⁶⁶ The Trial Staff Settlement provides only \$2.29 million in real dollars, while the settling parties in the California Settlement received \$250 million in real dollars (as opposed to nominal bankruptcy dollars).⁶⁷ Thus, the Joint Parties argue that "[t]he Trial Staff Settlement must therefore be rejected because it discriminates against Pacific Northwest Ratepayers."⁶⁸

39. The Joint Parties assert that the Trial Staff Settlement is not in the public interest in essence because the Settlement figure "is far *outside* the range of Enron's unjust profits demonstrated in the record."⁶⁹ In this regard, they point to precedent establishing that the Commission cannot approve a settlement based on "the mere fact that the settlement figure fell somewhere within the vast gulf" between the positions advanced by the parties.⁷⁰ If the Commission does not reject the Trial Staff Settlement, the Joint Parties assert that the Commission must clarify that approval of the settlement does not affect the rights of others to continue to litigate their claims in the underlying proceedings, which the Commission provided in its order approving the Enron-Nevada Companies

⁶⁵ Port also asserts that the Trial Staff Settlement discriminates against Pacific Northwest ratepayers. Port initial comments at 31.

⁶⁶ *Id.* at 30; McCullough Affidavit at 23-24.

⁶⁷ *Id.* at 33, and McCullough Affidavit at 8. The California Settlement was among Enron, the California Parties and the Commission's Office of Market Oversight and Investigations. The Commission's Trial Staff was not a signatory. The California Settlement was approved by the Commission on November 11, 2005. *See San Diego Gas & Elec. Co. v. Sellers of Ancillary Services*, 113 FERC ¶ 61,171 (2005), *order denying reh'g*, 115 FERC ¶ 61,032 (2006) (California Settlement).

⁶⁸ *Id.* at 38.

⁶⁹ Joint Parties initial comments at 23 (emphasis in original).

⁷⁰ *Id.*, citing *Laclede Gas Co. v. FERC*, 997 F.2d 936, 947 (D.C. Cir. 1993) (*Laclede*).

settlement.⁷¹ Finally, the Joint Parties assert that the Trial Staff Settlement is “flatly inconsistent” with the Commission’s Policy Statement on Enforcement, which states that the Commission will require violators “to disgorge any unjust profits resulting from the wrongdoing.”⁷²

40. In their reply comments, Trial Staff argue that the Attorneys General of Washington and Oregon were signatories to the California Settlement and each received \$22.5 million in claims in the Enron Bankruptcy as a result of that settlement. Trial Staff assert that because Snohomish did not oppose the payments to the Attorneys General of Washington and Oregon in the California Settlement, its criticism of the Trial Staff’s Settlement as discriminating against Pacific Northwest ratepayers constitutes a collateral attack on the California Settlement.⁷³

41. Trial Staff assert that the amount of profits Enron earned on its sale of some \$27-30 million in power to Snohomish during the Settlement Period was “substantially less than \$10 million, the figure preserved by Trial Staff in its Settlement for non-settling parties with Proof of Claim against Enron.”⁷⁴ Thus, Trial Staff assert that if the Trial Staff Settlement is approved, Snohomish will have an opportunity to prove what its proper allocation of Enron’s profits should be, but Snohomish “clearly does not have the right to obtain disgorgement monies from Enron beyond its share of the equitable market.”⁷⁵

42. Finally, Trial Staff argue that its decision to enter into a settlement agreement with Enron was based on its assessment of the risks of continuing its litigation with the possibility that it would not recover any disgorgement from Enron. Among the factors Trial Staff considered was the fact that, even if the Bankruptcy Court allowed it to submit a claim at this time, it is possible that it would be classified as a penalty and subordinated to other claims, rendering recovery of any amount unlikely. Because the Trial Staff Settlement provides a limited proof of claim, Trial Staff assert that the certainty of this

⁷¹ *Id.* at 24, citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 114 FERC ¶ 61,067 at P19 (2006).

⁷² *Id.* at 28, citing *Enforcement Policy Statement* at P 23.

⁷³ Trial Staff reply comments at 13 n.20.

⁷⁴ *Id.* citing Exhibit SNO-1 at 6.

⁷⁵ *Id.* at 11-12.

result outweighs the uncertainty that continued protracted litigation would have entailed.⁷⁶ Valley's reply comments echo this point, saying that the Joint Parties' criticisms of the Trial Staff Settlement "do nothing more than reflect their disagreement with Trial Staff's and the settling parties' views of the case and the associated risks, costs and benefits of litigation versus settlement."⁷⁷

43. Enron's reply comments also point out that the Trial Staff Settlement contains a significant benefit for Snohomish and other non-settling participants: the right to claim a portion of the \$10 million Enron recognizes as a Class 6 subordinate claim in the Enron Bankruptcy. Enron states that it relinquished two significant rights in agreeing to recognize this claim: (1) the right to fully litigate all of its FPA defenses, including protection against retroactive refunds of the \$10 million claim, and (2) its right to insist that the \$10 million claim be made subordinate in the Bankruptcy Proceeding, which would have made the claim worth nothing.⁷⁸

44. Enron's reply comments assert that it has entered into settlements "that recognize over \$1 billion in unsecured claims in favor of major utilities in California, the Attorneys General of California, Oregon and Washington, the major utilities in Nevada, and the Salt River Project."⁷⁹ Furthermore, asserts Enron, the Trial Staff Settlement does not preclude non-settling participants, such as Snohomish, from continuing "to seek precisely the sort of multi-billion dollar relief they claim to be entitled to in their comments and that they erroneously assert is abated by the Trial Staff Settlement."⁸⁰

Commission Determination

45. The Commission finds that the monetary consideration in these Settlements represents a fair resolution of the disputes as between the Settling Parties and is thus in the public interest. The Trial Staff, Valley and Santa Clara each assessed the risks and benefits of continuing their litigation with Enron and determined, on the basis of those assessments, that the monetary and other considerations in these settlements outweigh the

⁷⁶ *Id.* at 15-20.

⁷⁷ Valley reply comments at 4.

⁷⁸ Enron reply comments at 11-12.

⁷⁹ *Id.* at 2 and 15.

⁸⁰ *Id.* at 14.

uncertainty of continued litigation and the possibility of lesser relief. Enron likewise has determined that the certainty of the monetary consideration in the Trial Staff, Valley and Santa Clara Settlements outweighs the potential risk that the Commission might have determined that Enron should disgorge a greater amount, had it continued the litigation with these parties.

46. The Commission recognizes, however, that it is not sufficient that the parties to the settlement are satisfied with the deal they have struck. Indeed, the Joint Parties correctly point to Commission precedent to this effect. In *Laclede*, the court admonished the Commission for approving a settlement that was supported by all but one litigant, Laclede, and was based on a determination that the amount of the refunds paid under the settlement was less than what was claimed was owed and more than what the pipeline conceded it owed. The court reasoned that a “mere ‘headcount’” was an unreliable indicator of the reasonableness of the settlement.⁸¹ Instead, the court instructed the Commission to support its decision with attention to the issues regarding the amount of the settlement and the burden posed by further litigation to support a determination that the settlement is equitable.

47. In the instant case, Trial Staff, Valley and Santa Clara have each determined that the amounts they will receive in Class 6 unsecured claims in the Enron Bankruptcy provide them with a certain result at this time, balanced against the risk of recovering nothing. In fact, the amount of unjust profits earned by Enron in the Settlement Period has not been established. Whether the amount is the \$1.6 - \$1.7 billion asserted by the Joint Parties, or is far less, is an issue for a party contemplating settlement to take into account. And while the Joint Parties argue that Enron’s alleged profits far exceed the amounts provided under the current Settlements, most of these profits involved parties who already have settled with Enron. Moreover, the potential for a claim to be rendered worthless by a Bankruptcy Court determination to treat it as a subordinated claim is a reasonable part of the calculus going into a determination to enter into a settlement. Finally, the viability of one party’s defense to another’s claims is an important element in the decision to settle instead of litigate.

48. In this case, as to Valley and Santa Clara, Enron has filed claims for termination payments related to their respective Master Agreements. Under the Valley and Santa Clara Settlements, these termination payments have been reduced to one-fourth of the amount claimed to be owed to Enron. Similarly, as to all three of its settlement counterparties, Enron has agreed to forego any defense available to it under the FPA and

⁸¹ *Laclede*, 997 F.2d. at 947.

bankruptcy laws and instead to recognize claims in the Enron Bankruptcy on behalf of Trial Staff, Valley and Santa Clara. And Enron will provide Trial Staff with a limited Proof of Claim, a major concession given that Enron is in bankruptcy. While the Commission recognizes that it is not sufficient to approve a settlement just because the parties are satisfied, the instant settlements represent significant concessions by all of the parties to the settlement, based on individual determinations that the benefits of settlement outweigh the uncertainty of continuing the litigation of this very complex set of proceedings. Thus, given the Commission's evaluation of the rationale underlying the settlement amounts and the risk-benefit factors that were taken into account by the parties to the Settlements, the Commission finds that approval of the Settlements is consistent with the court's decision in *Laclede*. In approving the Settlements, the Commission has not limited its analysis of the Settlements to a "mere 'headcount.'" Approval of these Settlements, subject to conditions with respect to the Trial Staff Settlement discussed above, is in the public interest.

B. Comments of Luzenac⁸²

49. Luzenac asserts that the Settlements violate three principles of settlements: (1) that they serve the public interest; (2) that they do not affect the rights of non-settling parties; and (3) that they do not limit access to evidence. The crux of Luzenac's public interest argument is that, by approving the Valley and Santa Clara Settlements, specifically the provisions for termination payments by Valley and Santa Clara, the Commission will have pre-judged the merits of Luzenac's Cantwell Amendment petition.⁸³ Luzenac also castigates the Trial Staff for agreeing to withdraw materials from the proceedings, because this will adversely affect parties, such as Luzenac, that did not file testimony in the Partnership/Gaming proceedings. Luzenac asserts that the Trial Staff Settlement violates the principles established in *Avista Corporation*⁸⁴ in that it proposes to abort its investigation into and prosecution of Enron despite ample evidence that Enron engaged in schemes to manipulate western energy markets and in violation of the market-based rate authority granted by the Commission. Luzenac asserts that the

⁸² Luzenac filed a motion to intervene-out-of-time strictly for the purpose of commenting in opposition to the Settlements. In certifying the Settlements to the Commission, the Presiding Administrative Law Judge granted the motion. Ash Grove filed comments that attach Luzenac's comments *in toto*.

⁸³ Luzenac initial comments at 15-17.

⁸⁴ 107 FERC ¶ 61,055 (2004) (*Avista*).

Trial Staff Settlement will adversely affect the rights of non-settling parties by withdrawing critical evidence, by stopping its prosecution of Enron and violates the express will of Congress.⁸⁵

50. Trial Staff points out that neither Luzenac nor Ash Grove has participated in the instant proceedings. Each entity has filed a Cantwell Amendment petition seeking a Commission determination that termination payment claims against each company by Enron should not be permitted.⁸⁶ Trial Staff points to numerous errors in Luzenac's comments, including the assertion that Trial Staff has agreed to assist Enron in seeking to have evidence illegally withdrawn and sequestered beyond Luzenac's reach.⁸⁷

51. Enron also takes issue with Luzenac's assertion that the Valley and Santa Clara Settlements portend a generic determination by the Commission that the termination payments sought by Enron are just and reasonable.⁸⁸ Likewise, Enron asserts that the Settlements do not affect public access to testimony and other material withdrawn by the parties pursuant to the Settlements. Enron argues that Luzenac's only possible interest in this material is to use it in support of its Cantwell Amendment claim.⁸⁹

52. Enron points out that Luzenac is not a party to any of the dockets included in the Settlements, and that it would be inconsistent with the Commission's policy encouraging settlements to modify the Settlements in order to provide Luzenac access to evidence to which it has no right as a non-party.⁹⁰ Moreover, Luzenac has not demonstrated how the Settlements will cause it to incur any costs or otherwise adversely affect it.

⁸⁵ Luzenac initial comments at 23.

⁸⁶ According to Trial Staff, Enron has filed a claim for termination payments against Luzenac for \$6,796,067 plus interest and a claim against Ash Grove for \$4,146,362 plus interest. Trial Staff reply comments at 30.

⁸⁷ *Id.*.

⁸⁸ Enron reply comments at 20.

⁸⁹ *Id.* at 21.

⁹⁰ *Id.*, citing *Panhandle Eastern Pipe Line Co.*, 69 FERC ¶ 61,313 at 62,000 (1994).

Commission Determination

53. The Commission concludes that, with the modifications required in the Trial Staff Settlement, these Settlements will not affect Luzenac's rights and obligations.

C. Comments of the Montana AG

54. Montana AG makes three arguments: (1) the Settlements discriminate against parties that have not filed testimony in the Partnership/Gaming Proceedings; (2) the Settlements discriminate against parties that have not filed timely claims in the Enron Bankruptcy; and (3) the \$10 million reserved by Enron for non-settling parties is too low.⁹¹ Montana AG asserts that it did not file testimony because it misunderstood the status of the proceedings, and, by the time it realized that it should have filed testimony, it was too late.⁹² Because it did not file testimony, Montana AG claims that its ability to pursue disgorgement claims will be disadvantaged even further because of the withdrawal of evidence by the settling parties.

55. With respect to filing a Proof of Claim, the Montana AG filed a Proof of Claim after the claims bar date, and Enron opposed its late filing. The Bankruptcy Court refused to accept the Montana AG's late-filed Proof of Claim. Because the Settlements require that an entity have a Proof of Claim in the Enron Bankruptcy to obtain an allocation of the \$10 million in the Bankruptcy Proceeding for non-settling parties, Montana AG asserts that the Settlements unfairly penalize entities such as the Montana AG.⁹³

56. Trial Staff and Enron rebut Montana AG's contentions that the Settlements treat unfairly those parties that failed to file testimony in these proceedings or who do not have a Proof of Claim in the Enron Bankruptcy. Trial Staff notes that "[a]t bottom, having voluntarily chosen not to present its own case, Montana proceeds at its own peril and should not complain that it has been discriminated against since it voluntarily chose not

⁹¹ This latter issue has been addressed in the Commission's discussion of the Joint Parties' comments on the Settlements.

⁹² Montana AG initial comments at 3-4.

⁹³ *Id.* at 6-7.

to present a case in Phase I.”⁹⁴ With respect to its lack of a Proof of Claim in the Enron Bankruptcy, Enron replies succinctly “[n]on-Settling Participants that lack valid claims have a problem with the Bankruptcy Code, not with the Settlements.”⁹⁵

Commission Determination

57. The Commission concludes that, with the modifications ordered in the Trial Staff Settlement, Montana AG’s complaints about discriminatory treatment will be addressed. However, Montana AG’s failure to file a Proof of Claim in the Enron Bankruptcy in a timely fashion leaves it at a disadvantage of its own making. The Commission will not alter the provisions of these Settlements to address Montana AG’s failure to pursue its bankruptcy claims reasonably and timely.⁹⁶

D. Comments of Port

58. In addition to joining the comments filed by the Joint Parties, Port has filed individual comments on the Settlements. Port alleges that the record of these proceedings supports its contention that there are numerous issues of material fact with respect to the Settlement. Appended to its comments is the prepared direct testimony of Carl Pechman on behalf of Snohomish and dated February 24, 2004. Rule 602 of the Commission’s Rules of Practice and Procedure requires that any comment contesting an offer of settlement by alleging a dispute as to genuine issues of material fact be supported by an

⁹⁴ Trial Staff reply comments at 34.

⁹⁵ Enron reply comments at 25.

⁹⁶ The Commission notes that, in a June 27, 2006 letter to the Presiding Judge (with copies to the Commissioners), Enron and the Montana AG announced that they have agreed in principle on terms and conditions that will resolve all issues among themselves. The letter adds that the Commission Trial Staff joins in the settlement in principle, and that formal settlement documentation is being prepared. In addition, on June 26, 2006, Enron, the City of Tacoma, Washington and the Commission Trial Staff filed a Joint Offer of Settlement, Joint Explanatory Statement and a Settlement and Release of Claims Agreement with the Commission, asking for approval by September 27, 2006.

affidavit with specific references to portions of the record that support the allegation.⁹⁷ Presumably, Port views this testimony, prepared for Snohomish over two years ago, to satisfy the Rule 602 requirement.

59. Port first argues that the Settlements' allocation of the proceeds violates a series of orders by the Commission and the Chief Administrative Law Judge, including specifically the Commission's September 24, 2003 Order that bifurcated the Gaming Proceeding into a liability phase and a distribution phase.⁹⁸ In support of its position, Port cites numerous Commission orders and orders of the Chief Judge that purport to prevent the distribution of Settlement proceeds until the liability phase of the Gaming Proceeding has concluded.⁹⁹

60. Next, Port alleges the existence of four specific factual disputes: (1) whether Enron's gaming practices and partnerships harmed consumers; (2) the amount of Enron's profits; (3) the regional allocation of Enron's profits; and (4) whether the Settlements amounts and allocations comply with the FPA. Because of the existence of these factual disputes, Port asserts that the Commission cannot make any findings with respect to whether the Settlements comply with the FPA.

61. Port states that the Settlements are preferential and discriminatory in the manner in which the Settlement proceeds are distributed. The crux of Port's position is that the Settlements are unfair *vis-à-vis* participants in non-California western markets. Port points out that, for the years 1998 through 2001, 48.9 percent of EPMI's profits in the west are attributed to the Pacific Northwest.¹⁰⁰

62. Port also argues once again that the Commission has subdelegated its FPA responsibility to establish just and reasonable rates to the Enron Bankruptcy court, an Article III court.¹⁰¹ According to Port, "under the Constitutional doctrine of subdelegation, when Congress delegates responsibilities to a federal agency, the agency

⁹⁷ 18 C.F.R. § 385.602(f)(4) (2005).

⁹⁸ Port initial comments at 29-30.

⁹⁹ *Id.* at 29, n.135.

¹⁰⁰ *Citing* Exs. SNO-379 and 908.

¹⁰¹ *Citing Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935) (*Schechter*) and I. Richard J. Pierce, Jr. *Administrative Law Treatise* § 2.7 at 115-16 (4th ed. 2004).

cannot re-delegate or subdelegate those responsibilities to an outside public or private party.”¹⁰² Port asserts that, under the subdelegation doctrine, the Commission must make all the material and factual determinations without relying on any outside entity, including specifically a bankruptcy court. Port cites *City of Tacoma, Washington v. FERC*¹⁰³ to support its claim that the bankruptcy court’s approval of the Settlements is “just such a constitutional violation.”¹⁰⁴ In addition, Port cites other precedent to support its contention that the Commission has subdelegated its FPA authority to an outside party in violation of the doctrine of subdelegation.¹⁰⁵

63. Port asserts that Trial Staff lacks the authority to enter into the Settlement with Enron, asserting that it is “nowhere demonstrated – or even represented – in the proffered agreements that the Trial Staff has the legal authority to perform the function designated to it and assumed by it under the terms of the three settlements.”¹⁰⁶

64. Finally, Port alleges that the Settlements fail to protect the public interest by providing Enron with more than \$100 million in termination payments, by settling claims for approximately \$0.00136 on the dollar, by providing for the withdrawal of evidence by Trial Staff, and by waiving future claims against Enron.¹⁰⁷

65. Trial Staff, Enron, Valley and Santa Clara all point out that Port has made four of its arguments in comments on other settlements in these proceedings and the Refund Proceeding and the Commission has rejected these arguments on each occasion.¹⁰⁸ Santa

¹⁰² Citing I. Richard J. Pierce, Jr., *Administrative Law Treatise* § 2.7 at 115-16 (4th ed 2002).

¹⁰³ 331 F.3d. 106 (D.C. Cir. 2003).

¹⁰⁴ Port initial comments at 32.

¹⁰⁵ Port also cites *United States Telecomm. Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, *Nat’l Ass’n of Regulatory Util. Commr’s v. United States Telecom Ass’n*, 543 U.S. 925 (2004); and *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775 (D.C. Cir. 1998) (*Shook*).

¹⁰⁶ Port initial comments at 33.

¹⁰⁷ *Id.* at 34.

¹⁰⁸ Trial Staff reply comments at 38-39; Enron reply comments at 22-23; Valley reply comments at 7 and Santa Clara reply comments at 7-8.

Clara points out that, with respect to the argument that the Settlements allocate proceeds in a manner inconsistent with prior Commission orders, the Settlements do not make any determination as to how proceeds will be allocated among non-settling participants. In fact the Santa Clara Settlement expressly provides that non-settling parties can continue to seek remedies in Commission proceedings, and that any resulting disgorged profits will be allocated in accord with whatever mechanism the Commission ultimately adopts.¹⁰⁹ Valley points out that Port has ignored a number of other Commission-approved settlements in which unsecured claims in the Enron bankruptcy estate were granted to settling parties.¹¹⁰

66. As to Port's assertion that there are material facts in dispute that preclude approval of the Settlements, Trial Staff, Valley and Santa Clara cite prior orders of the Commission rejecting these arguments.¹¹¹ Both Valley and Santa Clara state that the issues identified by Port are not implicated or relevant to their Settlements.¹¹² Santa Clara points out that its Settlement expressly provides that it does not resolve any factual issues with respect to non-settling parties and that nothing in the Settlement affects the positions that any non-settling party seeks to assert in any proceeding.¹¹³

67. Port's argument that the settlements are an unconstitutional delegation by the Commission to the Enron Bankruptcy Court is also challenged in the replies of Trial Staff, Valley and Santa Clara.¹¹⁴ Santa Clara asserts that the Settlements allow for certain unsecured claims in the Enron Bankruptcy, and the Enron Bankruptcy Court has determined already that the value of those claims will be 22.9 percent. The cases cited by

¹⁰⁹ Santa Clara reply comments at 8, *citing* section 7.1.1 of its Settlement.

¹¹⁰ Valley reply comments at 8, *citing* the California Settlement at P42.

¹¹¹ Trial Staff reply comments at 39; Valley reply comments at 8; and Santa Clara reply comments at 9-10.

¹¹² Valley reply comments at 8; and Santa Clara reply comments at 9.

¹¹³ Santa Clara reply comments at 9, *citing* sections 6.7.4 and 7.1.1 of its Settlement. The Valley Settlement (6.7.4 and 7.1.1) and the Trial Staff Settlement (6.3.3 and 7.1.1) contain identical provisions.

¹¹⁴ Trial Staff reply comments at 40; Valley reply comments at 9; Santa Clara reply comments at 10-11.

Port involve whether costs to be charged to ratepayers can be determined by other agencies and therefore do not apply to the Settlements.¹¹⁵ Valley points out that the role of the Enron Bankruptcy Court in approving the Settlements does not infringe on the Commission's jurisdiction, nor does it establish just and reasonable rates.¹¹⁶

68. With respect to Port's contention that Trial Staff lacks the "legal standing" to enter into these Settlements, Trial Staff, Enron, Valley and Santa Clara strongly disagree and challenge Port's lack of legal authority for this contention.¹¹⁷ Santa Clara points out that Trial Staff settles cases as a regular part of its litigation function.¹¹⁸ Valley adds that, just because Port is "entirely confounded" by Trial Staff's legal authority, it is no basis for rejecting the Settlements.¹¹⁹

69. Finally, with respect to Port's allegations that the Settlements are not in the public interest in part because the proceeds are small compared to the injury caused by Enron, Trial Staff points out that Port made a conscious decision not to file testimony in Phase I of the Partnership/Gaming Proceeding and await Phase II, the distribution phase. Thus, "it is wholly disingenuous" for Port to argue that the active participants in Phase I are not bringing in enough money for Port's needs.¹²⁰ Enron states that it already has settled with major case participants for well over \$1 billion and that the Trial Staff Settlement "more than fairly represents the small value of the remaining claims."¹²¹ Santa Clara asserts that "[t]he amount of profits subject to disgorgement remains an issue in dispute

¹¹⁵ Santa Clara reply comments at 11.

¹¹⁶ Valley reply comments at 9.

¹¹⁷ Trial Staff reply comments at 41; Enron reply comments at 23; Valley reply comments at 9; Santa Clara reply comments at 11.

¹¹⁸ Santa Clara reply comments at 11.

¹¹⁹ Valley reply comments at 9, *citing* Port at 33.

¹²⁰ Trial Staff reply comments at 41.

¹²¹ Enron reply comments at 23-24.

between Enron and non-settling parties. [Port] has purposely avoided litigating this issue. The March 10 Settlements determine that at least some amounts will be paid by Enron, regardless of how the litigation ultimately unfolds.”¹²²

Commission Determination

70. Trial Staff, Enron, Valley and Santa Clara are correct that the Commission has dealt with the first four issues presented by Port in several orders. Nevertheless, the Commission will address these issues once again.

71. First, with respect to whether the Settlements violate prior Commission orders, the Commission agrees that these Settlements do not affect the ability of non-settling participants to litigate. Port can pursue its claims in the Partnership/Gaming Proceeding. Moreover, in Docket No. ER03-154-000, the Chief Judge issued an order on July 20, 2005, suspending the procedural schedule expressly to provide Enron, Trial Staff and other parties with opportunities to conclude settlement discussions. Approval of these Settlements is procedurally consistent with the ongoing settlement process taking place under the aegis of the Administrative Law Judge in these proceedings. Thus, the Commission finds that approval of this Settlement is consistent with prior orders of the Commission in the Partnership/Gaming Proceeding and other orders in these proceedings.

72. As to Port’s second issue, that there are material facts in dispute, Rule 602 of the Commission’s Rules of Practice and Procedure requires that any comment contesting an offer of settlement by alleging a dispute as to genuine issues of material fact be supported by an affidavit with specific references to portions of the record that support the allegation.¹²³ The Commission finds that Exhibit 1, which is the direct testimony of Carl Pechman on behalf of Snohomish, identified as Ex. SNO-11, and notarized on February 20, 2004, does not support Port’s assertions of material factual disputes. Nowhere in Port’s argument does Port even cite, let alone address the substance of this lengthy document, although Port does cite to several other documents that have been filed by others in these proceedings.¹²⁴ Therefore, because Port has failed to comply with the requirements of Rule 602, the Commission will reject Port’s contention that there remain genuine issues of material fact that warrant rejection of these Settlements.

¹²² Valley reply comments at 12.

¹²³ 18 C.F.R. § 385.602(f)(4) (2005).

¹²⁴ See, e.g. Port initial comments at 30, 31, n.136-140.

73. On Port's third issue, the Commission again rejects the view that these Settlements are unconstitutional. Port continues to misapply constitutional doctrine to the facts underlying the Settlements in these proceedings and the Commission's orders approving them. Port's recitation of the case law applicable to the subdelegation doctrine misreads an essential element of those cases; in each instance, the federal agency in question had subdelegated statutory responsibility to a third-party. The court in *City of Tacoma* found that the Commission had improperly delegated to other federal agencies the evaluation of cost reports provided by utilities and used to fix the level of FPA administrative fees payable by the utilities to the Commission. The court found it significant that the Commission itself did not review the cost reports upon which the fees were based, which was a clear violation of the section 10(e)(1) of the FPA.¹²⁵ Likewise, in *United States Telecomm.*, the Federal Communications Commission (FCC) directed state regulatory commissions to make certain determinations that the court found to be an unlawful subdelegation under the Telecommunications Act of 1996,¹²⁶ which did not specifically authorize the delegation to a third-party.¹²⁷

74. While correctly summarizing the case law upon which it relies, Port misapplies the precedents in those cases to the case at hand. Port's analysis of the role of the Enron Bankruptcy Court in the Commission's consideration of the Settlements is based upon the flawed assumption that the Commission delegated to that tribunal authority under the FPA to make a determination as to the Settlements' legal efficacy under the FPA. This is not the case, as was clearly stated in the orders approving the California Settlement and the Enron SRP Settlement:¹²⁸ "[T]here has been no delegation of legislative authority to another branch of the government. Rather, these Settlements were filed with the Commission and the Bankruptcy Court for approval, which is directly within the unique statutory and constitutional purviews of each entity."¹²⁹ Approval by the Enron

¹²⁵ *City of Tacoma* at 115.

¹²⁶ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151, *et seq.*).

¹²⁷ *See also Shook* at 783-84 and n.6.

¹²⁸ *San Diego Gas & Electric Co.*, 113 FERC ¶ 61,171 (the California Settlement); *San Diego Gas & Electric Co.*, 113 FERC ¶ 61,244 (2005) (the Enron-SRP Settlement); *order denying reh'g* 115 FERC ¶ 61,032 (2006).

¹²⁹ California Settlement at P 46; SRP Settlement at P 23.

Bankruptcy Court was under its own independent statutory authority and based upon its own statutory standards of review and not under or based upon the application of the FPA.¹³⁰

75. Moreover, Port overlooked an important distinction that was made by the court in *City of Tacoma*, which found that the Commission's failure was not in the subdelegation *per se* but in the fact that the Commission itself did not review the cost reports prepared by the other agencies:

Because section 10(e) plainly commands the Commission to assess annual charges under the FPA, including a review of OFA cost reports on which the charges are based, we conclude that the Commission, *by failing to conduct the review*, has acted contrary to the “unambiguously expressed intent of Congress” and therefore contrary to law.¹³¹

Similarly, in *The Coalition for the Fair and Equitable Regulation of Docks on the Lake of the Ozarks v. FERC*, the Court found that the assessment of user fees by a hydropower licensee was not an improper delegation of the Commission's authority, because the Commission retained the right under the FPA to require modifications to the licensee's actions.¹³²

76. Thus, it is unambiguous under the facts of these proceedings and the case law cited above that the Commission has neither delegated its FPA authority to the Enron Bankruptcy Court nor ceded its statutory responsibility to review, approve or reject the

¹³⁰ See *In Re Enron Corp., et al.*, Order Approving Settlement by and Among the Enron Parties, the Federal Energy Regulatory Commission's Office of Market Regulation and Investigation, the California Parties, and the Additional Claimants, Case No. 01-16034 (AJG) (October 20, 2005) (approving the Global Settlement); and Order Approving Settlement Agreement Among the Debtors, the Enron Non-Debtor Gas Entities, New West Energy Corporation and Salt River Project Agricultural Improvement and Power District, Case No. 01-16034 (AJG) (October 27, 2005) (approving the Enron-SRP Settlement). The judge in each case cites as his authority only sections of the Bankruptcy Code and regulations related thereto, such as Rule 9019 of the Federal Rules of Bankruptcy Procedure.

¹³¹ *City of Tacoma* at 115-16 (*emphasis added*).

¹³² 297 F.3d 771 (8th Cir. 2002).

settlements to the Enron Bankruptcy Court. The Commission's review of these Settlements is independent of, and not dependent upon, the Enron Bankruptcy Court's review. Therefore, the Commission rejects Port's constitutional argument.

77. On Port's fourth issue, the Commission addressed the adequacy of the Settlements and whether the Settlements discriminate against Pacific Northwest customers in the discussion of comments filed by the Joint Parties, in which pleading Port participated.

78. With respect to the Port's challenge to the authority of Trial Staff to enter into the Trial Staff Settlement, the Commission agrees with comments of Trial Staff, Enron, Valley and Santa Clara. Port has cited no authority supporting its position that the Trial Staff Settlement is *ultra vires*. There is ample precedent for parties to proceedings set for trial-type evidentiary hearings to work with Trial Staff to resolve disputes through settlements.¹³³

79. Finally, with respect to Port's public interest argument, the Commission has addressed this concern in its discussion, above, of issues raised by the Joint Parties, in which pleading Port participated.

The Commission orders:

(A) The Trial Staff Settlement is hereby approved, subject to the condition that it be modified to excise portions that require Trial Staff to withdraw evidence or withdraw from participation in these proceedings, as discussed in the body of this order.

(B) The Valley Settlement and the Santa Clara Settlement are hereby approved as discussed in the body of this order.

(C) The Motion for Public Meeting filed by the Concerned Customers is hereby denied as discussed in the body of this order.

By the Commission. Commissioner Brownell voted present; see attached statement.

(S E A L)

Magalie R. Salas,
Secretary.

¹³³ See, e.g., *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 at P73 (2003).

