

117 FERC ¶61,257  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Enron Power Marketing, Inc. and  
Enron Energy Services Inc. Docket No. EL03-180-027

Enron Power Marketing, Inc. and  
Enron Energy Services Inc. Docket No. EL03-154-021

Portland General Electric Company Docket No. EL02-114-022

Enron Power Marketing, Inc. Docket No. EL02-115-026

El Paso Electric Company,  
Enron Power Marketing, Inc. and  
Enron Capital and Trade Resources  
Corp. Docket No. EL02-113-024

(Consolidated)

Fact Finding Investigation into  
Potential Manipulation of Electric  
and Natural Gas Prices Docket No. PA02-2-034

Investigation of Anomalous Bidding  
Behavior and Practices in Western  
Markets Docket No. IN03-10-020

City of Santa Clara, California Docket No. EL04-114-002

v.

Enron Power Marketing, Inc.

ORDER DENYING REHEARING

(Issued November 30, 2006)

1. This order denies requests for rehearing of the Commission's June 28, 2006 Order<sup>1</sup> that approved, with conditions, settlements between Enron,<sup>2</sup> 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). Two timely requests for rehearing of the June 28 Order were filed: Public Utility District No. 1 of Snohomish County, Washington (Snohomish), Ash Grove Cement Company, and the Port of Seattle, Washington (Port) filed a joint request for rehearing (as the Concerned Customers), and Port filed a separate request for rehearing in its own behalf. The Commission will deny these requests for rehearing, as discussed *infra*.

### **I. Background of the Settlements and the June 28 Order**

2. The settlements provide \$5 million in Class 6 unsecured claims to Trial Staff, which in turn allocates them to Valley and Santa Clara in Enron's ongoing bankruptcy proceeding.<sup>3</sup> In exchange, Valley and Santa Clara are required to pay amounts to Enron in settlement of Enron's claims to termination payments from Valley (\$8 million) and

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<sup>1</sup> *Enron Power Marketing, Inc., et al.*, 115 FERC ¶ 61,376 (2006) (the June 28 Order).

<sup>2</sup> As set forth in the Settlements, 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. The three settlements are collectively referred to as the Settlements.

<sup>3</sup> 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.

Santa Clara (\$36.5 million). Enron also agreed to a \$400 million civil penalty in the form of a subordinated Class 380 penalty claim allowed against EPMI in favor of the Trial Staff. Finally, Enron agreed to recognize up to \$10 million in additional unsecured Class 6 claims to non-settling parties who have filed Proofs of Claim in the Bankruptcy Proceeding. On April 12, 2006, the Settling Parties filed three Motions to Lodge Order of Bankruptcy Court approving the Trial Staff, Valley and Santa Clara Settlements 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. . . .”<sup>4</sup>

3. Three issues featured prominently in the comments of opponents to the Settlements: the Trial Staff’s agreement to withdraw pleadings and other material in its prefiled case; Trial Staff’s withdrawal from the proceedings; and the adequacy of the monetary consideration. The June 28 Order required modification of the Trial Staff Settlement<sup>5</sup> to remove the provisions requiring Trial Staff to withdraw pleadings and other evidence and to withdraw from participation in these proceedings, and limiting Trial Staff’s involvement in the Cantwell Amendment proceedings.<sup>6</sup>

## **II. Issues Raised in the Requests for Rehearing**

4. As a preliminary matter, the Commission notes that Port’s request for rehearing does not fully comply with Order No. 663-A.<sup>7</sup> This order requires that requests for rehearing contain a separate section, “Statement of Issues,” which sets forth the issues that will be addressed and the Commission precedent and case law upon which the party will rely in discussing the issues in its request for rehearing.<sup>8</sup> In Port’s request for rehearing, the issues set out in the “Statement of Issues” do not correspond to the issues

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<sup>4</sup> Enron Bankruptcy Court orders approving the Trial Staff Settlement, the Valley Settlement and the Santa Clara Settlement, at 2.

<sup>5</sup> See June 28 Order at PP 29-31, 36 and Ordering Paragraph (A).

<sup>6</sup> See Pub. L. No. 109-58; 119 Stat. 983-84 (2005) (EPAct). Section 1290 of EPAct is referred to as the “Cantwell Amendment.”

<sup>7</sup> 18 C.F.R. § 385.713 (2006).

<sup>8</sup> See *Revision of Rules of Practice and Procedure Regarding Issue Identification*, 114 FERC ¶ 61,284 (2006), 71 *Fed. Reg.* 14640 (2006). The Commission has addressed  
(continued)

set out in the body of the pleadings, which makes it difficult to establish a correlation between these two portions of Port's pleading.<sup>9</sup> However, to the extent issues argued by Port in the body of its requests for rehearing are not also set out in the Statement of Issues, the Commission will deem these issues waived, as provided by Rule 713 (c)(2) of the Commission's Rules of Practice and Procedure.

**A. Concerned Customers Request for Rehearing**

5. The Concerned Customers discuss two issues: (1) whether the June 28 Order fails to satisfy the standards required for approval of the Trial Staff Settlement;<sup>10</sup> and (2) whether the June 28 Order violates the Commission's enforcement policy<sup>11</sup> and arbitrarily and capriciously departs from Commission precedent without reasoned explanation.

• **June 28 Order's Failure to Apply Applicable Standards**

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Port's apparent confusion concerning the requirements of Order No. 663-A in three recent orders on rehearing: (1) involving the settlement among Enron, the California Parties, Office of Market Oversight and Investigations (OMOI), and the Salt River Project (SRP) Parties; (2) involving the settlement among Reliant, the California Parties and OMOI; and (3) involving the settlement among IDACORP, the California Parties and OMOI.<sup>8</sup> See *San Diego Gas & Electric Co.*, 115 FERC ¶ 61,032 (2006) (the *Enron* Rehearing Order); *San Diego Gas & Electric Co.* 115 FERC ¶ 61,271 (2006) (the *Reliant* Rehearing Order); and *San Diego Gas & Electric Co.*, 117 FERC ¶ 61,020 (2006) (the *IDACORP* Rehearing Order). The *Enron* and *Reliant* Rehearing Orders were issued prior to and should have informed the requests for rehearing in the instant proceeding.

<sup>9</sup> The Concerned Customers identify four issues in its Statement of Issues but discuss two issues in the body of their request for rehearing. Port identifies four issues in its Statement of Issues but discusses six issues in the body of its request for rehearing.

<sup>10</sup> While recognizing the interrelated nature of all three settlements approved by the June 28 Order, the Concerned Customers specifically seek a Commission order granting rehearing and vacating approval only of those portions of the Enron-Trial Staff Settlement that remained following the June 28 Order.

<sup>11</sup> *Policy Statement on Enforcement*, 113 FERC ¶ 61,068 (2006).

6. Concerned Customers argue that the Commission's June 28 Order violates the Administrative Procedure Act (APA)<sup>12</sup> and the Federal Power Act (FPA),<sup>13</sup> because it is arbitrary and capricious, unsupported by substantial evidence, and not otherwise in accordance with law. The Concerned Customers also argue that the June 28 Order is unjust, unreasonable, unduly discriminatory and unduly preferential.<sup>14</sup> Within these broad statutory standards, the Concerned Customers argue more particularly that the June 28 Order is flawed because it incorrectly judged the Trial Staff Settlement under criteria that apply to uncontested settlements, based on the erroneous conclusion that the Trial Staff Settlement does not raise disputes of material facts. Even if the Trial Staff Settlement were properly regarded as uncontested, Concerned Customers allege that the Commission has failed to apply the standards for uncontested settlements correctly.<sup>15</sup> Instead, Concerned Customers argue that the Commission made "perfunctory conclusions that a settlement is a reasonable way to resolve litigation and provide certainty."<sup>16</sup>

7. In order to approve an uncontested settlement, the Commission's regulations require a Commission finding that the settlement at issue is "fair and reasonable and in the public interest."<sup>17</sup> Concerned Customers argue that the Commission did not make such a finding and thus failed to apply its own regulatory requirements for approval of an uncontested settlement. After citing several findings made by the Commission in the June 28 Order, Concerned Customers conclude that those findings do not "adequately

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<sup>12</sup> 5 U.S.C. § 706.

<sup>13</sup> 16 U.S.C. § 824d.

<sup>14</sup> *Citing Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 (2003), stating that the FPA and NGA were "so framed as to afford customers a complete, permanent and effective bond of protection from excessive rates and charges."

<sup>15</sup> Concerned Customers Request for Rehearing at 11-13, *citing Laclede Gas Co. v. FERC*, 997 F.2d 936 (D.C. Cir. 1990) (*Laclede*).

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.* at 10, *citing* 18 C.F.R. §385.602(g)(3).

support the Commission's approval of this particular settlement between Enron and the Commission's Trial Staff, including the unreasonably low monetary amount of that settlement."

8. Next, Concerned Customers argue that 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) does not provide adequate compensation for Enron's illegal acts. They allege that the June 28 Order does not even acknowledge that the Commission's Trial Staff testified that the amount of Enron's unjust profits were in excess of \$1.6 billion. Concerned Customers cite numerous references in the record of these proceedings as to the amount of Enron's illegal profits, and they conclude that the amount of the settlements "is so inadequate, it does not even cover the profits derived by Enron from its transactions with a single wholesale power customer in the Pacific Northwest, Snohomish." Moreover, the Trial Staff Settlement discriminates against ratepayers in the Pacific Northwest by providing unduly preferential treatment for California ratepayers, even though Enron's profits in California were less than half of Enron's profits in the Pacific Northwest.<sup>18</sup>

9. Concerned Customers also assert that the Commission did not address evidence proffered by Snohomish that the settlement amount is far less than the amount of profits Enron extracted from customers like Snohomish:

Hence, the Enron-Trial Staff settlement is, even on a nominal basis, less than half what would be necessary to compensate just Snohomish for profits extracted from it for power delivered during the limited period in 2000-2001 initially at issue in this case, even if Enron's profits from 1997 to 2000 are ignored and Enron collects no further profits through its termination payment claim.<sup>19</sup>

Thus, by ignoring Snohomish's evidence of the magnitude of Enron's profits, Concerned Customers allege that the June 28 Order approved a settlement amount "that does not come anywhere close to landing in the vast gulf between Enron's \$676 million profit estimate and the Trial Staff's own \$1.6 billion profit estimate."<sup>20</sup>

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<sup>18</sup> *Id.* at 14.

<sup>19</sup> *Id.* at 15.

<sup>20</sup> *Id.* at 12.

### **Commission Determination**

10. Concerned Customers raise a threshold issue as to the regulatory standards applicable for approval of the Trial Staff Settlement. The Commission's regulations provide that the Commission may decide the merits of a settlement as if it were uncontested, if the record contains substantial evidence upon which to base a reasoned decision or if the Commission determines that there remain no genuine issues of material fact in dispute as alleged by a contesting party.<sup>21</sup> In the June 28 Order, the Commission found that the record contains substantial evidence upon which to render a reasoned decision, and that there remain no genuine issues of material fact in dispute. On rehearing, the Concerned Customers allege that the Commission's determination on this issue was based on erroneous assumptions, but they provide no additional facts to support this allegation. Moreover, Concerned Customers are incorrect in arguing that the Commission would be required to act on the settlement differently if there were material issues of fact in dispute. By using the disjunctive "or" in setting out the criteria under which the Commission may proceed to evaluate a settlement as an uncontested settlement, Rule 602 clearly authorizes the Commission to act on the instant settlement based upon the substantial evidence in the record of this proceeding, even if material factual disputes exist. The Commission in the June 28 Order acted on the instant settlement under the standards that apply to uncontested settlements based on its finding that there were no material issues of genuine fact and there was substantial record evidence. For these reasons, the Commission finds that the Settlements at issue were properly adjudged to be uncontested settlements and were correctly evaluated under the Commission's standards governing uncontested settlements.

11. Next, the Concerned Customers allege that the June 28 Order does not comply with the standards required by the APA and the FPA. Contrary to the allegations concerning the APA, the June 28 Order is not arbitrary and capricious. Rather, in the June 28 Order, the Commission discussed the substantial evidence submitted by all of the litigants and articulated clearly the rationale underlying its determination to approve the settlements. Thus, the Commission finds the Concerned Customers' APA argument to be without merit.

12. Also without merit is the Concerned Customers' argument that the Trial Staff Settlement is unjust, unreasonable, unduly discriminatory and unduly preferential, and thus in violation of the FPA. The crux of this argument is based upon the assertion that Enron extracted far more in illegal profits from the Pacific Northwest than from

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<sup>21</sup> See 18 C.F.R. § 385.602

California, and that the Trial Staff Settlement “provides virtually nothing for ratepayers in the Pacific Northwest.”<sup>22</sup> The Settlement reserves \$10 million to fund settlements with Enron.<sup>23</sup> Furthermore, the Attorneys General of Washington and Oregon were signatories to the California Settlement, which resulted in payment of \$22.5 million in claims in the Enron Bankruptcy, which should redound to the benefit of consumers in the Pacific Northwest. The Commission denies rehearing on this issue.

13. With respect to the allegation that the June 28 Order does not comport with Rule 602 of the Commission’s Rules of Practice and Procedure, the Commission found that the monetary consideration in the Settlements represents “a fair resolution of the disputes as between the Settling Parties and is thus in the public interest.”<sup>24</sup> While Concerned Customers are correct that Rule 602 requires that the Commission, in approving an uncontested settlement, find that it is “fair and reasonable and in the public interest,” the Commission’s lengthy discussion of the comments on the settlements and the Presiding Judge’s certification of the Settlements should make it clear that the Commission also found the settlements to be “reasonable.” In explaining the Commission’s policy objectives in encouraging settlements such as these, the June 28 Order stated:

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.<sup>25</sup>

Clearly, the Commission implicitly found the instant settlements to be reasonable. The Commission does not agree that the June 28 Order failed to apply Rule 602 correctly merely for lack of the word “reasonable.” In fact, the Commission quoted the findings of the Presiding Judge’s orders certifying these three settlements as partial contested settlements:

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<sup>22</sup> Concerned Customers Request for Rehearing at 14.

<sup>23</sup> To the extent that Concerned Customers believe the Trial Staff Settlement is not adequate, we note that the Trial Staff Settlement does not preclude these parties from pursuing their claims through further litigation with Enron.

<sup>24</sup> June 28 Order at P 45.

<sup>25</sup> *Id.* at P 2.

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.”<sup>26</sup>

The June 28 Order cited these findings and did not question the Presiding Judge’s conclusions with respect to the settlements. In short, the June 28 Order, in approving the settlements subject to modification, was predicated on a determination under Rule 602 that they are “fair and reasonable and in the public interest.”

14. Likewise, the Commission disagrees with the Concerned Customers’ assertion that the June 28 Order ignored evidence as to the magnitude of Enron’s illegal profits in order to approve the settlements. In the June 28 Order, the Commission both discussed and made determinations with respect to claims by the Joint Parties,<sup>27</sup> Port, Trial Staff and other participants as to the extent of Enron’s profits as compared to the settlement amounts.<sup>28</sup> In fact, the Commission recognized that there was some disagreement about whether the amount was \$1.6 or \$1.7 billion.<sup>29</sup> Nor are Concerned Customers correct in asserting that the Commission ignored testimony by Trial Staff on the extent of Enron’s profits. The June 28 Order cited Trial Staff’s allegation that the amount of profits Enron

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<sup>26</sup> *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).

<sup>27</sup> For purposes of initial comments on the settlements, the Joint Parties comprise Snohomish, Port, City of Tacoma, Washington, and Metropolitan Water District of Southern California.

<sup>28</sup> June 28 Order at PP 37-48.

<sup>29</sup> *Id.* at 18 n.61, *citing* the McCullough Affidavit submitted in support of the Joint Parties’ initial comments on the settlements.

earned on its sale of some \$27 to 30 million in power to Snohomish during the Settlement Period<sup>30</sup> was “substantially less” than the \$10 million reserved by the Trial Staff Settlement for non-settling parties.<sup>31</sup>

15. In approving the Trial Staff Settlement (and the related Santa Clara and Valley Settlements), the Commission determined that, based on the record of these proceedings, the monetary and non-monetary consideration represented “a fair resolution of the disputes between the parties . . . .”<sup>32</sup> The Commission also addressed the requirements of *Laclede* that approval of a settlement must be more than a “mere ‘headcount,’”<sup>33</sup> and the June 28 Order supported the Commission’s determination that approval of the settlements was consistent with the requirements of *Laclede*:

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

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<sup>30</sup> The Settlement 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).

<sup>31</sup> June 28 Order at P 41.

<sup>32</sup> June 28 Order at P 45.

<sup>33</sup> *Laclede*, 997 F.2d at 947.

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.<sup>34</sup>

Thus, the Commission evaluated the evidence cited by Concerned Customers comparing the monetary compensation in these settlements to the amount of Enron's alleged illegal profits and found that the settlements were fair and in the public interest and represented a reasonable balance of risk versus reward. In short, the requirements of *Laclede* were satisfied by the June 28 Order.

- **June 28 Order's Violation of Commission's Enforcement Policy and Commission Precedent**

16. Concerned Customers' second issue is predicated on its assertion that the Commission's Enforcement Policy Statement requires Enron to disgorge all its unjust profits whenever they can be determined or reasonably estimated, and thus the \$15 million settlement amount in the Trial Staff Settlement is inadequate to compensate for the \$1.6 billion of Enron's unjust profits in Trial Staff's testimony.<sup>35</sup> Concerned Customers also assert that the Commission could impose remedies in addition to disgorgement of profits, including revocation or suspension of market-based rate authority and civil penalties of as much as \$1 million per day under the Energy Policy Act of 2005 (EPAAct).<sup>36</sup>

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<sup>34</sup> June 28 Order at P 47. The reference in this paragraph to "parties who already have settled with Enron" is to the settlement among Enron, the California Parties and the Commission's Office of Market Oversight and Investigations. The Commission's Trial Staff was not a signatory. This 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).

<sup>35</sup> *Id.* at 17-18.

<sup>36</sup> *Id.* at 17-18, *citing* EPAAct, which is codified at Pub. L. No. 109-58; 119 Stat. 983-84 (2005). Among other things, section 1284 of EPAAct contains an amendment to section 316A of the FPA, which increases the Commission's civil penalty authority from \$10,000 to \$1 million per day per violation. 16 U.S.C. § 825o-1.

17. Concerned Customers also allege that the amount of the Trial Staff Settlement is inconsistent with a number of other Trial Staff settlements where the settlement amounts exceed the amounts of profits the Trial Staff would have recommended to be disgorged in litigation in the gaming and partnership proceedings of other defendants.<sup>37</sup> According to Concerned Customers, the June 28 Order was arbitrary and capricious in taking a different position with respect to Enron's bankruptcy status by approving a settlement in which Trial Staff will receive a claim at a reduced value (approximately 22.9 percent for unsecured claims), when the Commission did not do so in a settlement involving Mirant.<sup>38</sup> Concerned Customers assert that the Commission's order approving the Mirant settlement, in which the settlement amount agreed to by "the Trial Staff ... was not reduced to reflect any penalty collection risks associated with Mirant's status as a bankrupt entity" is at odds with the instant settlement in which unsecured claims will be paid at the rate of approximately 22.9 percent.<sup>39</sup>

### **Commission Determination**

18. As a threshold matter, the Commission finds Concerned Customers' arguments concerning the relevance of other settlements to the Trial Staff Settlement to be inconsistent. On one hand, Concerned Customers castigate the Commission for citing prior settlements, asserting that "reliance upon prior settlements as evidence to support the Commission's decision here violates the Concerned Customers' due process rights and arbitrarily and capriciously departs from promises made in those settlements ... that the settlements will not have any precedential impact or affect non-settling parties in any way."<sup>40</sup> On the other hand, Concerned Customers cite numerous settlements, including *Mirant*, to support their position that the Commission's approval of the Trial Staff Settlement is arbitrary and capricious and inconsistent with other settlements involving Enron.<sup>41</sup>

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<sup>37</sup> Concerned Customers Request for Rehearing at 19.

<sup>38</sup> *Mirant America Energy Marketing, LP, et al.*, 111 FERC ¶ 61,488 (2005) (*Mirant*).

<sup>39</sup> Concerned Customers Request for Rehearing at 21.

<sup>40</sup> *Id.* at 15-16.

<sup>41</sup> *Id.* at 20-21.

19. The Commission's determinations in the June 28 Order were based on the facts in the instant proceedings and not predicated on prior orders approving settlements arising from the California energy crisis of 2000-2001. The Commission's citations to prior settlement orders were intended to put the Trial Staff, Santa Clara and Valley Settlements into the broader context of Commission efforts to resolve proceedings pertaining to the California energy crisis:

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.<sup>42</sup> 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 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.

The Commission's discussion of prior settlement orders clearly was intended to put the instant settlements into an overall context of Commission action and not to provide substantive support for any of the Commission's determinations on issues raised with respect to these settlements. Concerned Customers' criticism of the Commission's references to prior settlements orders is unfounded.

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<sup>42</sup> 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).

20. As to whether the Commission's June 28 Order erred by not requiring Enron to disgorge all of its illegal profits, the Commission reminds Concerned Customers that Enron has paid substantial amounts already. For example, with respect to the California Refund Proceeding and allegations of market manipulation, the California Settlement alone called for Enron to provide cash payments of \$47.4 million from accounts held by the California Power Exchange (CalPX) and the California Independent System Operator (CAISO), a Class 6 unsecured claim of \$875 million against EPMI in the Bankruptcy Proceeding, as well as a \$600 million civil penalty in the form of a subordinated Class 380 penalty claim in the Enron Bankruptcy in favor of the Attorneys General of California, Oregon and Washington, the California Energy Oversight Board (CEOB) and the California Public Utility Commission (CPUC).<sup>43</sup> With respect to the disgorgement proceedings, the Commission also approved a settlement under which Enron agreed to reduce the prices it charged Southern California Edison Company for power from a number of Enron-owned Qualifying Facilities, which provided an immediate benefit to California ratepayers of approximately \$11 million, with future rate reductions of from \$41 to \$47 million on a net present value basis.<sup>44</sup> Given that estimates of Enron's illegal profits are in the range of \$1.6 to \$1.7 billion, it is clear that Enron has repaid a substantial portion of that total, even though the Commission recognizes that claims in the Enron Bankruptcy are worth approximately 22.9 cents on the dollar. Concerned Customers therefore are incorrect in asserting that the June 28 Order violates the Enforcement Policy Statement.

### **B. Port's Request for Rehearing**

21. Port alleges that the Commission's June 28 Order erred by approving the settlements,<sup>45</sup> because: (1) distribution of the settlement proceeds violates prior orders of

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<sup>43</sup> See *San Diego Gas & Elec. Co. v. Sellers of Ancillary Services*, 113 FERC ¶ 61,171 (2005), *order denying reh*, 115 FERC ¶ 61,032 (2006). These specific monetary terms are set out in sections 4.1.1 – 4.1.6 of the California Settlement.

<sup>44</sup> *Investigation of Certain Enron-Affiliated Qualifying Facilities*, 104 FERC ¶ 61,126 (2003). The Commission's regulations provide in detail the technical and ownership criteria for Qualifying Facility status. See 18 C.F.R. §§ 292.203-206 (2006). See also 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).

<sup>45</sup> Port's Request for Rehearing challenges the Commission's approval of all three settlements approved by the June 28 Order.

the Commission and the Chief Administrative Law Judge; (2) there are material issues of fact in dispute; (3) distribution of the settlement proceeds is unjust, unreasonable, unduly preferential and unduly discriminatory; (4) approval of the settlements is an unconstitutional delegation of legislative authority to an Article III Court; (5) Trial Staff lacks legal standing to enter into its settlement with Enron; and, (6) the settlements fail to protect the public interest.<sup>46</sup>

22. Port first asserts that the Commission's order issued on September 24, 2003 in the Gaming and Partnership proceedings<sup>47</sup> provided that all parties to those proceedings would have an opportunity in Phase II of those proceedings to pursue their claims against Enron.<sup>48</sup> Port cites several orders of the Chief Administrative Law Judge to the same effect. Thus, Port asserts that the June 28 Order erred by approving the distribution of the settlement proceeds prior to Phase II in violation of these orders.

23. Port's second point of error is that the Commission's approval of these settlements violates Rule 602 of the Commission's Rules of Practice and Procedure,<sup>49</sup> which provides that contested settlements cannot be certified and approved if there are material issues of fact in dispute and if there is an inadequate record upon which to resolve such disputes. Port alleges the following 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;
- (4) whether the settlement amount and allocation comply with the FPA.

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<sup>46</sup> Port Request for Rehearing at 28-33.

<sup>47</sup> *American Electric Power Serv. Corp., et al.*, 104 FERC ¶ 61,323 (2003).

<sup>48</sup> Port Request for Rehearing at 28.

<sup>49</sup> 18 C.F.R. § 385.602 (2006).

Port alleges that “Because the Commission is obligated to protect the *public* interest, not merely the *private* interests of the settling parties, these issues do not evaporate simply because a settlement has been submitted for approval.”<sup>50</sup>

24. Port’s third assertion of error is that the June 28 Order approved the distribution of settlement proceeds that is “completely inconsistent” with the fact that Enron’s fraud was perpetrated from Portland, took place largely in the Pacific North West and the majority of illicit profits were made outside of California. Thus, the distribution and allocation of settlement proceeds are unjust, unreasonable, unduly preferential and unduly discriminatory.

25. The fourth error alleged by Port is that the June 28 Order, by “delegating to the bankruptcy court the authority to determine the amount to be paid to the settling parties ...” is an unconstitutional delegation to the judiciary of legislative authority. Port explains that, under the doctrine of subdelegation, the Commission cannot defer to the bankruptcy court but must instead make all material factual and legal determinations in acting on the settlement.<sup>51</sup>

26. Port next argues that the Trial Staff had no legal authority to negotiate the settlements on behalf of the Commission and that the Commission cannot cite any legal authority that vests Trial Staff with the authority to enter into these settlements. Consequently, the June 28 Order erred by approving settlements that bind the Trial Staff to settlement obligations that are *ultra vires*.

27. Finally, Port alleges that the June 28 Order erred in approving settlements that fail to protect the public interest by providing Enron with termination payments while settling

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<sup>50</sup> Port Request for Rehearing at 30. With respect to the Settlements at issue in the June 28 Order, Port was the only party to raise the issue of whether the Commission’s approval violated the regulations concerning uncontested settlements. The June 28 Order found Port’s pleading opposing the Settlements to be procedurally deficient on this issue. Therefore, even though Port raises this issue again on rehearing, the Commission will deny rehearing, as Port did not raise it properly in its initial comments.

<sup>51</sup> *Id.* at 31-32, citing *City of Tacoma v. FERC*, 331 F.3d 106 (D.C. Cir. 2003) (*City of Tacoma*).

the “approximately \$1.7 billion” in claims for what amounts to “approximately \$0.00136 on the dollar.” Port concludes by stating that the June 28 Order violates the Commission’s Policy Statement on Enforcement and is not in the public interest.<sup>52</sup>

### **Commission Determination**

28. Port’s request for rehearing repeats nearly verbatim its initial comments on the Trial Staff, Santa Clara and Valley Settlements. It has offered no new argument or additional legal authority to rebut the Commission’s determinations in the June 28 Order on five of the six issues raised by Port’s initial comments. Thus, the Commission will deny rehearing, based upon the discussion in paragraphs 71-77 and 79 of the June 28 Order.

29. The only issue about which Port has proffered any additional discussion pertains to its allegation that Trial Staff’s role in negotiating and executing the settlements is *ultra vires*. In addition to repeating its initial comments, Port asserts that, because the settlements provide the Trial Staff – and not the Commission or the United States – with a Class 6 general unsecured claim in the EPMI bankruptcy, the Trial Staff has assumed a role here that “is not simply to settle an adjudicative proceeding on behalf of the Commission or assist other parties in reaching settlement.”<sup>53</sup> Port asserts that the Commission has not delegated this authority to its Trial Staff and “the Commission has not – and cannot – provide any citation under which Trial Staff is vested with the legal authority ... ” to perform the obligations under the settlements.

30. Port’s concern about the Trial Staff’s role in these proceedings is based upon a fundamental misunderstanding as to what renders a settlement legally binding on the Commission. Port is correct that the Trial Staff cannot bind the Commission to a settlement negotiated and executed by Trial Staff. Section 6.1 of the Trial Staff Settlement clearly recognizes that Trial Staff’s obligations under the Settlement are subject to the approval of the Commission.<sup>54</sup> One need only read the June 28 Order to confirm that the Commission employed independent judgment in evaluating the Trial

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<sup>52</sup> *Id.* at 33-34.

<sup>53</sup> *Id.* at 32.

<sup>54</sup> Section 7 sets out the “Required Approvals” for the Trial Staff Settlement, and section 7.1.1 makes it clear that the settlement is not effective until the Commission approves it.

Staff Settlement.<sup>55</sup> The Commission rejected provisions that would have obligated Trial Staff to withdraw testimony and other pleadings from the record of these proceedings and that would have required Trial Staff to withdraw from further participation in these proceedings.<sup>56</sup> The Trial Staff Settlement became effective only after the Commission approved it, as modified, pursuant to Rule 602, at which point, the Trial Staff has the authority to fulfill its obligations under the settlements. Trial Staff's actions in negotiating and executing the settlement did not bind the Commission and thus were not *ultra vires*. The Commission will therefore deny rehearing on this issue.

The Commission orders:

The Commission denies the requests for rehearing of the Concerned Customers and Port, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>55</sup> In the California Refund proceedings, settlements also have been entered into by the Office of Market Oversight and Investigation.

<sup>56</sup> June 28 Order at PP 29-31 and 36.