

UNITED STATES OF AMERICA 113 FERC ¶63,002
FEDERAL ENERGY REGULATORY COMMISSION

Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-180-014
Enron Power Marketing, Inc. and Enron Energy Services Inc.	Docket No. EL03-154-010
Portland General Electric Company	Docket No. EL02-114-011
Enron Power Marketing, Inc.	Docket No. EL02-115-015
El Paso Electric Company, Enron Power Marketing, Inc., and Enron Capital and Trade Resources Corp.	Docket No. EL02-113-013

CERTIFICATION OF PARTIAL CONTESTED SETTLEMENT

(Issued October 6, 2005)

TO THE COMMISSION:

I. INTRODUCTION

1. The August 24, 2005, Settlement and Release of Claims Agreement (Settlement) filed by Enron,¹ the California Parties,² the Additional Claimants,³ and the Federal

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.; Enron North America Corp. (fka 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. Settlement §§ 1.22, 1.25, and 1.27.

² As set forth in the Settlement, the California Parties means collectively, Pacific

Energy Regulatory Commission's Office of Market Oversight and Investigations (OMOI) (the Parties) is certified as a partial contested settlement. Approval of the Settlement is in the public interest as it will effectively resolve all issues concerning Enron and these Parties in the above cited dockets and others listed below.⁴ This Settlement resolves claims in various proceedings⁵ against Enron for refunds, disgorgement of profits, and other non-monetary remedies resulting from the events in the western energy markets⁶ during the California energy crisis and an extended period from January 16, 1997 through June 25, 2003 (the Settlement Period). The Parties request that the Commission approve the Settlement before December 31, 2005.

II. PROCEDURAL HISTORY

A. The FERC Refund Proceeding – Docket Nos. EL00-95-000 and EL00-98-000

2. On August 23, 2000, the Commission issued an order which directed hearing procedures under the Federal Power Act to investigate whether the rates of public utility sellers into the California Independent System Operator (ISO) and California Power

Gas and Electric Company (PG&E); Southern California Edison Company (SCE); San Diego Gas and Electric Company (SDG&E); the People of the State of California, *ex rel.* Bill Lockyer, Attorney General (California Attorney General); the California Department of Water Resources acting solely under authority and powers created by California Assembly Bill 1 from the First Extraordinary Session of 2000-2001, codified in Sections 80000 through 80270 of the California Water Code (CERS) (excluding the State Water Project); California Electricity Oversight Board (CEOB); and the California Public Utilities Commission (CPUC). Settlement §§ 1.14, 1.17 and 1.18.

³ As set forth in the Settlement, the Additional Claimants are the Attorneys General of Oregon and Washington.

⁴ The following Docket Nos. are also involved in this Settlement: Docket Nos. EL00-95-000, EL00-98-000, IN03-10-000 and PA02-2-000. However, these dockets were not before the Presiding Judge.

⁵ The proceedings include: the FERC Refund Proceeding in Docket Nos. EL00-95-000 and EL00-98-000; the Partnership/Gaming Proceeding in Docket Nos. EL03-180-000, EL03-154-000, EL02-114-007, EL02-115-008, and EL02-113-000; and two investigatory proceedings Docket Nos. PA02-2-000 and IN03-10-000.

⁶ The market includes the markets of the California Independent System Operator Corporation (ISO) and the California Power Exchange Corporation (PX).

Exchange Corporation (PX) markets were just and reasonable. In addition, the hearing would consider whether the tariffs, contracts, institutional structures and bylaws of the ISO and PX were adversely affecting the wholesale power markets in California (the FERC Refund Proceeding).⁷ “The scope of and methodology for calculating refunds related to transactions in the spot markets operated by the ISO and PX during the period October 2, 2000 through June 20, 2001” was set forth in the hearing order.⁸

3. Proposed findings of facts regarding refund liability were issued by the Presiding Judge on December 12, 2002. The Commission subsequently issued an Order on Proposed Findings on Refund Liability on March 26, 2003 and orders on rehearing on October 16, 2003 and May 12, 2004.⁹ Appeals are currently pending.

B. The Enforcement Proceeding – Docket Nos. PA02-2-000 and IN03-10-000

4. On February 13, 2002, the Commission directed its Staff to begin a fact-finding investigation in Docket-No. PA02-2.¹⁰ As part of this investigation, on May 6, 2002, FERC publicly released memoranda that described Enron trading strategies in the ISO and PX markets. The Final Report on Price Manipulation in Western Markets (the Final Staff Report) issued by Commission Staff (Staff) on March 26, 2003 concluded that the Market Monitoring and Information Protocols (MMIP) in the ISO and PX tariffs put participants on notice that the misconduct that arose from abuses of market power, and adversely affected the efficient operations of the ISO and PX markets, violated each of those tariffs. In addition, the report stated that Staff’s preliminary analysis also revealed what appeared to be anomalous bidding behavior, as defined in the MMIP.

5. On June 25, 2003, the Commission issued an order¹¹ in Docket No. IN03-10-000

⁷ *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 at 61,275 (2000); *San Diego Gas & Elec. Co.*, 97 FERC ¶ 61,275 at 62,173 (2001).

⁸ Joint Explanatory Statement at 6 (citing *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120 at 61,499 (2001) (the July 25 Order)).

⁹ *San Diego Gas & Elec. Co.*, 102 FERC ¶ 61,317 (2003); *San Diego Gas & Elec. Co.*, 105 FERC ¶ 61,066 (2003), *order on reh’g*; *San Diego Gas & Elec. Co.*, 107 FERC ¶ 61,165 (2004), *order on reh’g*.

¹⁰ *Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002).

¹¹ *Investigation of Anomalous Bidding Behavior and Practices in the Western*

directing the OMOI to investigate the bidding practices in the western markets at the individual participant level. Accordingly, OMOI investigated all parties who bid above \$250/MWh in the ISO and PX markets to determine whether violations of the MMIP occurred. The Commission also directed OMOI to determine whether there was any physical withholding of power by California generators between May 1, 2000 and June 20, 2001.¹²

C. The Partnership/Gaming Proceeding

Docket Nos. EL03-180-000, EL03-154-000, EL02-114-007, EL02-115-008, and EL02-113-000

6. On June 25, 2003, the Commission issued an order in Docket No. EL03-137-000, *et al.*¹³ directing 43 entities, including Enron to show cause why they had not engaged in gaming and/or anomalous market behavior (Gaming Practices) in violation of the ISO and PX Tariffs.¹⁴ The Commission also issued an order directing Enron and 23 other market participants to show cause why they had not engaged in Gaming Practices under the California ISO and PX Tariffs (Partnership Proceeding).¹⁵ The Chief Judge consolidated the Gaming and Partnership Proceedings on January 26, 2004.¹⁶ On January 30, 2004, the Chief Judge consolidated the Enron related issues in Docket Nos. EL02-114-007 and EL02-115-008 with the Partnership and Gaming Proceeding.¹⁷

Markets, 103 FERC ¶ 61,347 (2003).

¹² On August 1, 2003, OMOI issued its Initial Report on Physical Withholding by Generators Selling into the California Market and Notification to Companies.

¹³ *American Elec. Power Serv. Corp., et al.*, 103 FERC ¶ 61,345 (2003) (Gaming Order).

¹⁴ The lead docket number was subsequently changed to Docket No. EL03-152-000. *American Elec. Power Serv. Corp., et al.*, Order of Chief Judge Severing Parties and Holding Further Proceeding In Abeyance and Establishing New Lead Docket for Consolidated Proceedings, Docket Nos. EL03-137-000, *et al.* (Nov. 4, 2003).

¹⁵ *Enron Power Mktg., Inc. and Enron Energy Servs., Inc., et al.*, 103 FERC ¶ 61,346 (2003) (Partnership Order).

¹⁶ *Enron Power Mktg., Inc. and Enron Energy Servs., Inc., et al.*, Order of Chief Judge Consolidating Gaming and Partnership Proceedings for Hearing and Decision, Docket Nos. EL03-180-000, *et al.* (Jan. 26, 2004).

¹⁷ *Enron Power Mktg., Inc. and Enron Energy Servs., Inc., et al.*, Errata, Docket

7. On July 22, 2004, the Commission issued an order¹⁸ affirming the Initial Decision in Docket No. EL02-113-000 and consolidating that docket number and others with Docket Nos. EL03-180-000 and EL03-154-000.¹⁹ The July 22 Order directed the hearing to entail a comprehensive review of all evidence relevant to Enron conduct that violated or may have violated Commission tariffs or orders and an appropriate remedy for the violations. In addition, the Commission broadened the scope of the proceeding to allow the examination of all Enron's wholesale power sales in the Western Interconnection from January 16, 1997 to June 25, 2003. On March 11, 2005 the Commission issued an order which added the issue of profits dealing with certain terminated contracts with various utilities.²⁰

III. THE OFFER OF SETTLEMENT

Settlement and Release of Claims Agreement (Attachment B).

8. Recitals or various "whereas" clauses are listed on the first page of the Settlement. The clauses list various disputes and state that the Parties have agreed to settle the same based on the terms and conditions described in the Settlement. Section 1 is a list of definitions.

9. Section 2 contains conditions to effectiveness, the Settlement effective date and termination clause. As such, Section 2.1 provides that the Settlement is binding upon the execution date. Section 2.2 binds each Opt-In Participant. In Section 2.3, a number of conditions precedent to certain obligations are listed. First, the Settlement Effective Date has to occur before a Party makes payments, assigns receivables, assumes liabilities or releases claims. Second, there has to be a FERC Settlement Order finding that the

Nos. EL03-180-000, *et al.* (Jan. 30, 2004).

¹⁸ *El Paso Elec. Co., Enron Power Mktg., Inc., and Enron Capital and Trade Resources Corp.*, 108 FERC ¶ 61,071 (2004) (July 22 Order) (consolidating Docket No. EL02-113-000 and others with Docket Nos. EL03-180-000 and EL03-154-000).

¹⁹ Trial Staff filed motions to dismiss and negotiated settlements with most respondents. Additionally, the California Parties reached settlement with four other parties cited below which have been approved by the Commission. As a result, the only respondent remaining in the show cause proceedings is Enron.

²⁰ *El Paso Electric et al.*, 100 FERC ¶ 61,280 (2005).

monetary and other consideration provided by Enron shall be final satisfaction of all liabilities of the Enron Parties and deemed a disgorgement in favor of the Settling Claimants and all Opt-In Participants in the Partnership/Gaming Proceeding²¹ before the Settlement is effective. This FERC Settlement Order must also find that any monetary remedy awarded in the Partnership/Gaming Proceeding, to Non-Settling Participants shall not exceed the share allocable to that party, as determined under the allocation methodology adopted by FERC, of any profits, if any, Enron may be finally required and ordered to disgorge, including contract termination payments owed by the Western Parties. Section 2.3(b). *See also* Section 8.8. Finally, the Order must also find that all exhibits, testimony, and requests for relief of Settling Claimants shall be withdrawn with prejudice. Section 2.3 (c). The Settlement Effective Date is the date when all approvals have been obtained. Section 2.4. The Settlement shall terminate under a number of caveats listed in Section 2.5 one of which is if FERC disapproves the Settlement. According to Section 2.6, in the event of termination the Settlement shall be null and void (some clauses are excepted and listed in this section).

10. Section 3 specifies that the payments, other consideration and obligations settle and compromise the Settling Participants' claims in the releases set forth in the Settlement.

11. Section 4 provides the monetary consideration of the Enron Parties. Section 4.1 defines the Settlement amount as certain monetary settlement consideration provided by the Enron Parties. This is comprised of the following: cash up to \$25,000,000 (Cash Amount);²² an allowed Class 6 unsecured claim for a fixed, liquidated amount of \$875,000,000 against EPMI in favor of the Settling Claimants (the Aggregate Allowed Claim);²³ an allowed subordinated Class 380 penalty claim of \$600,000,000;²⁴ any

²¹ The exception relates to claims asserted by the Western Parties in connection with termination payments.

²² Enron shall assign to the California Parties its right, title, and interest up to \$25,000,000 from the PX Settlement Clearing Account. Section 4.1.1. Section 4.3 specifies the payment of this cash from this account. First a payment of \$15,000,000 shall be distributed and subsequent payments will be based on the amounts remaining in the Remaining Enron Receivables. Section 4.3.1. Section 4.3.2. If the amount is negative Enron shall have no further obligation to the California Parties for the Cash Amount. Section 4.3.2(i). If the amount is less than or equal to \$10,000,000 the California Parties will be paid the full amount of the Remaining Enron Receivables which will be deposited into the Enron Refund Escrow. Section 4.3.2.(ii).

²³ The Settling Claimants is defined as the Additional Claimants and the California

refunds or rights to refunds that Enron received or shall receive from other entities in the FERC Refund Proceeding or FERC Refund Related Proceedings (excluding CERS) plus interest (without a reduction for any Fuel Cost Allowance or Emissions Offset).²⁵ Additionally, Enron will assign to CERS all of Enron's right, title, and interest in any refunds resulting from any mitigation of sales by CERS of imbalance energy into the ISO real time market. Section 4.1.5. Finally, Market Participants will be distributed by the ISO the entirety of Enron's ISO Collateral (funds and interest related to certain meter reading claims against Enron, as of July 1, 2005 which was approximately \$22,400,000). Section 4.1.6.

12. Section 4.2 establishes that Enron's share of PX Wind-Up Charges as determined in any global settlement in the dockets listed in this section shall be an allowed administrative expense claim paid in cash under Sections 503(b) and 507 of the Bankruptcy Code. However, the amount Enron is required to pay for its share of the PX Wind-Up Charges shall not exceed \$1,000,000.

13. In Section 5 Enron's other non-monetary considerations are listed. For instance,

Parties. Section 1.81. Additional Claimants means the Oregon Attorney General and the Washington Attorney General. Section 1.1. This amount will not be offset or reduced on account of any claim or counterclaim the Enron Debtors have or may have against any of the Settling Claimants. Section 4.1.2. Section 4.4 contains provisions regarding the payment of the Aggregate Allowed Claim including responsibility for Fuel Cost Allowances and Emissions Offsets and true-ups of these cost allowances and offsets. Section 4.6. Section 4.7.

²⁴ This is to be done in accordance with the Enron Debtors' Plan of Reorganization (Plan). In favor of, collectively, the California Attorney General, California Public Utility Commission, the California Electricity Oversight Board, the Oregon Attorney General and the Washington Attorney General. The allocation of this civil penalty shall be as set forth in the Allocation Notice. Section 4.1.3.

²⁵ This shall be assigned to the California Parties. The amounts shall be paid by the PX, ISO, or the escrow accounts in the *Williams, Duke, Dynegy and Mirant* Settlements into the Enron Refund Escrow. However, amounts owed to Enron Parties by APX as refunds or transactions in which APX acts as scheduling coordinator for Enron are retained by Enron. This section provides that the FERC Settlement Order shall be deemed to find (unless negated in the order) that if Enron becomes an opt-in participant in the *Williams, Dynegy, Duke and Mirant* Settlements, it shall not be a deemed distribution participant as defined in those settlements. Section 4.1.4. *See also* Section 8.20.

Section 5.1 establishes a two year obligation for the Enron Parties to cooperate with the Settling Claimants in their pursuit of claims against others related to events in the western energy markets or third parties who participated with Enron during the Settlement Period (January 16, 1997 through June 25, 2003).

14. The disposition and allocation of the settlement proceeds and other monetary consideration is set forth in Section 6. “Enron Refund Escrow” and “California Litigation Escrow” accounts shall be established by the California Parties pursuant to Section 6.1. A cash transfer²⁶ from the PX Settlement Clearing Account to the Enron Refund Escrow shall be made within 10 business days after the Settlement Effective Date. Section 6.2.3. Additionally, a portion of the cash payments transferred under Section 6.2.2²⁷ shall be transferred to an account specified by OMOI. This consideration shall be allocated by FERC as part of its resolution of the anomalous bidding investigation in Docket No. IN03-10. Section 6.2.4. The FERC Refund Proceeding Allocation Matrix (Exhibit A) sets forth various allocation percentages applicable to each Settling Claimant. Allocations among Settling Claimants are pursuant to a separate agreement among them. Section 6.3. The Additional Claimants have an aggregate unsecured claim of \$45 million from the Aggregate Allowed Claim to be divided among them. Section 6.3.3. Refunds payable to each Opt-In Participant owed refunds in the Refund Proceeding Allocation Matrix shall be paid from the Enron Refund Escrow in cash. Section 6.4. Settling Claimants and Opt-In Participants who owe pre-refund amounts to the PX or ISO for transactions from January 1, 2000 through June 20, 2001 or refunds to the market as calculated in Exhibits CPX-51 and ISO-30 in the FERC Refund Proceeding are listed as Deemed Distribution Participants. Settlement Exh. C. Distribution of settlement proceeds, other than the share of the Aggregate Allowed Claim, to Deemed Distribution Participants will be a reduction against amounts owed. Section 6.5. Amounts payable to Market Participants (specified on the FERC Refund Proceeding Allocation Matrix) who are Non-Settling Participants will be retained in the Enron Refund Escrow until the issuance of the FERC Refund Determination. If the FERC determines Enron owes refunds or interest to any Non-Settling Participant, it shall be paid first from the amounts retained for Non-Settling Participants in the Enron Refund Escrow until the funds are exhausted, with any balance to be paid by Enron. Section 6.7.

²⁶ The amount of the cash transfer is \$15 million minus the total of all Deemed Distributions applicable to Deemed Distribution Participants in accordance with Section 6.5 who are Settling Participants.

²⁷ Equal to 20 percent of the total of all Non-Settling Participants’ allocable shares of the total amount in refunds for the Pre-October Period shown on the FERC Refund Proceeding Allocation Matrix.

15. As a result of this Settlement, the ISO and PX need to take a number of actions, particularly with respect to the calculation of refunds and the assignment of bankruptcy claims, which are set forth in Section 7. Additionally, the FERC Settlement Order shall grant waivers of the ISO and the PX tariffs as necessary for these entities to be able to disburse the funds as required by the Settlement. Section 7.9.

16. Section 8 contains clauses dealing with the scope of the Settlement, releases, withdrawals and waivers. Accordingly, Section 8.1 specifies that in return for the consideration described above all claims against Enron for the Settlement Period by the Settling Claimants for refunds, disgorgement of profits, or other monetary or non-monetary remedies in the FERC Proceedings shall be deemed settled and discharged. This will not apply to Non-Settling Participants referenced in Sections 9.1 and 8.8. All pleadings, testimony, exhibits, and additional requests for relief in the Partnership/Gaming Proceeding as related to Enron shall be withdrawn by the Settling Claimants. Section 8.2. In addition, the Settling Claimants shall withdraw any appeals of FERC orders in any dockets comprising the Revocation Proceedings solely related to Enron Parties. Section 8.2(iii). Moreover, the Settling Claimants shall not take a position in any forum arising out of *Puget Sound Energy Inc. v. All Jurisdictional Sellers of Energy and/or Capacity in the Pacific Northwest*, Docket No. EL01-10. Section 8.2(v). The Settling Claimants shall not take a position regarding requests for retroactive revocation of any Enron Parties' market-based rate authority. Section 8.2(vi). In Section 8.4, Enron and the Settling Claimants reserve all claims and defenses they may have against Non-Settling Participants. Additionally, Enron and the Settling Claimants reserve all claims and defenses they may have against the ISO and PX. Enron also reserves all claims it may have against any of the Western Parties related to termination payments or other forward contract amounts due Enron. Enron is responsible for amounts awarded to Non-Settling Participants in excess of the amounts that have been allocated to the Non-Settling Participants under this Settlement. Accordingly, Enron shall be entitled to receive amounts allocated to Non-Settling Participants for the Pre-January 18, 2001 Period and the Post-January 17, 2001 Period to the extent the amounts exceed the amounts ultimately awarded to the Non-Settling Participants. Section 8.5.

17. Section 8.6 contains terms related to the Bankruptcy Claims and Section 8.7 specifies releases by Enron under the Bankruptcy Code. Parties in the Partnership/Gaming Proceeding who do not opt into the Settlement may continue to seek remedies from Enron in the cited proceeding. However, any monetary remedy awarded by FERC, shall not exceed the share allocable to that party, as determined under the allocation methodology adopted by FERC, of any profits, if any, Enron may be required to disgorge, including, for the Western Parties, any final order with respect to contract termination payments owed by the Western Parties. Section 8.8. Upon the Settlement Effective Date, the California Parties shall withdraw from *Enron Power Marketing, Inc. v. California Power Exchange Corp, et al.*, Case No. 04-CV-08177 (RCC), U.S. Dist. Ct.

(S.D. NY). This section also provides that after receipt of the first \$15,000,000 of the Cash Amount, the California Parties shall support any request by Enron for the release to Enron of the Enron PX Collateral. Section 8.9. Enron and the California Attorney General shall seek to obtain a stay or dismissal of the complaint in *Official Committee of Unsecured Creditors of Enron Corp. et al. v. People of the State of California, ex rel. Bill Lockyer, Attorney General*, filed in Enron Bankruptcy Ct., Case No. 01-16034 (AJG), Adversary Proceeding No. 04-03386. Section 8.10. Section 8.16.5 specifies that Enron continues to be responsible for payment of the PX Wind-Up Charges up to \$1,000,000 and Enron's share shall be allowed as an administrative expense claim. To the extent that the PX previously obtained payment from Enron by setoff against the Enron Receivables, the FERC Settlement Order shall be deemed to direct the PX to reverse the setoff.

18. Section 9 contains provisions for Market Participants who chose to be bound by the Settlement and become Opt-In Participants using the form of notice. Section 9.1. Settlement Exh. F. Opting into the Settlement shall not be deemed to reduce or alter the amount of refunds such participant owes, if an Opt-In Participant is determined to owe refunds to the ISO or PX for transactions during 2000 and 2001. Section 9.2.

19. The Settlement must be approved by FERC, the Enron Bankruptcy Court and the CPUC. Section 10.1.1. Section 10.1.2. Section 10.1.3. Section 11 contains typical clauses regarding Parties' representations, warranties and covenants. In Section 11.2.3 the Parties agree that Enron will execute and deliver documents, agreements, instruments, etc. necessary to effectuate the Enron Parties' transfer of the Enron Receivables under Sections 4.3 and 4.5. Settling Claimants must transfer, assign and convey, to the Enron Parties, any and all rights to allocable shares of any profits Enron may be finally required and ordered to disgorge in the Partnership/Gaming Proceeding, except for the consideration provided for in the Settlement.

20. The Governing Law is California law as provided in Section 12.1. Other clauses dealing with interpretation are set forth in sections 12.2-12.6. Section 13 contains miscellaneous clauses.

21. The Settlement also contains the following exhibits: Exhibit A is the FERC Refund Proceeding Allocation Matrix; Exhibit B contains the Metering Error Allocation Matrix; Exhibit C is the Deemed Distribution Participants; Exhibit D is Proofs of Claim; Exhibit E is a list of Stayed Proceedings and Exhibit F is the Form of Notice of Election to Participate in Settlement.

IV. INITIAL COMMENTS

Commission Trial Staff

22. Staff filed comments²⁸ in support of the Settlement on September 13, 2005. Staff supports the Settlement as a reasonable compromise of competing interests and complex issues in the instant proceeding. In addition, Staff states that the Settlement resolves the claims of the California Parties and Additional Claimants and, with respect to the resolved issues, effectively eliminates the need for additional expenditures of financial and personnel resources. Staff emphasizes that the Settlement constitutes a considerable step towards the resolution of all issues in the Gaming and Partnership Proceeding while preserving the rights of all Non-Settling Participants and their claims against Enron. Staff views the terms of the Settlement as fair, reasonable, and in the public interest. Accordingly, Staff does not oppose approval of the Settlement by the Commission.

Nevada Attorney General, Bureau of Consumer Protection

23. The Office of the Attorney General for the State of Nevada, Bureau of Consumer Protection (Nevada BCP) filed Initial Comments²⁹ on September 13, 2005 requesting clarification of the terms of the Settlement. The Nevada BCP seeks to: (1) ensure that its rights are unaffected and (2) emphasize that the Nevada BCP's non-opposition is based upon its interpretation of the Settlement as effectuating the Parties' intention to preserve the rights of the parties electing not to join the Settlement. The comments point out that Section 8.1 is ambiguous³⁰ since it does not specify governmental entities such as the Nevada BCP, PUCN, FERC Trial Staff and others that are still active parties in the Gaming and Partnership Proceeding. Consequently, the Nevada BCP urges the Settling Parties to clarify and the Commission to modify, the Settlement to specifically provide that a Non-Settling Participant can include a governmental entity, particularly those mentioned above. Additionally, Nevada BCP states that it interprets Section 8.8³¹ as

²⁸ Initial Comments of the Commission Trial Staff on Joint Offer of Settlement.

²⁹ Initial Comments of the Office of the Nevada Attorney General, Bureau of Consumer Protection Addressing Offer of Settlement.

³⁰ The relevant portion of Section 8.1 provides, "the FERC proceedings shall not be deemed settled or discharged as to Non-Settling Participants, as defined in Section 9.1, or as to the termination payment claims or defenses as described in Section 8.8." Nevada BCP Initial Comments at 3-4. Settlement at 27.

merely effectuating the “Settling Parties’ agreement that non-settling parties should not be entitled to a larger allocation of any total monetary remedy than they could have obtained in the absence of the Settling Participant’s resolution of their claims.” Nevada BCP Initial Comments at 6. The Nevada BCP requests that the Commission order approving the Settlement specify that the approval does not prejudice or affect the existing rights of non-settling parties.

The Western Parties

24. The Western Parties³² filed Initial Comments on September 13, 2005 arguing that the Settlement is only a partial resolution and does not provide a comprehensive remedy for Enron’s unjust profits or wrong doing in the West. In fact, the Western Parties explain, they were excluded from settlement discussions and, per the terms of the Settlement, remain unaffected. The Settlement refers to the right to opt-in, but that right is really referring to the Refund Proceeding in Docket EL00-95 and does not give parties that choose to opt-into the Settlement any right to share in the monetary relief or any other remedy in the consolidated Docket No. EL03-180 proceeding. The purpose of the proceeding in Docket No. EL03-180, they argue, is to investigate and remedy all instances of improper conduct by Enron in the entire Western Interconnect from January 16, 1997 to June 25, 2003, effectively providing a forum for all parties in the West. The Western Interconnection is substantially greater than the ISO and PX spot markets, which were the focus of various complaints lodged by the California Parties, and which are principally addressed by the Settlement. According to the Western Parties, the Commission intended the hearing to be a forum for all parties in the West and not merely a forum to address the California Parties’ limited ISO and PX gaming theories.

³¹ The referenced portion of Section 8.8 states, “...provided, however, that any monetary remedy that FERC may determine to award, if any, to such Non-Settling Participant shall not exceed the share allocable to that party, as determined under the allocation methodology adopted by FERC, of any profits, if any, Enron may be finally required and ordered to disgorge, including, for any of the Western Parties, any final order with respect to contract termination payments owed by the Western Parties.” Nevada BCP Initial Comments at 6. Settlement at 30.

³² The Western Parties include: the City of Santa Clara, California d/b/a Silicon Valley Power; the Public Utility District No. 1 of Snohomish County, Washington; Valley Electric Association, Inc.; Nevada Power Company and Sierra Pacific Power Company; and The Metropolitan Water District of Southern California. Settlement §1.87.

25. The Western Parties argue that the Commission should confirm and require that the Western Parties not be harmed or prejudiced by the Settlement. According to The Western Parties, the cash value of payments to be made by Enron under the Settlement fails to provide a comprehensive regulatory remedy when compared to the extent of Enron's violations. Specifically, various parties estimate the past profits earned by Enron between January 16, 1997 and June 23, 2003 to be between \$1.8 and \$2.4 million, before adding \$550 to \$575 million to address disputed termination payments under forward contracts. *Id.* at 11. Thus, when compared to the \$200 to \$260 million to be paid by Enron under the Settlement and the meaningless civil penalties also assessed against Enron, the Western Parties argue, this falls short of being meaningful remedy. *Id.* at 11-12. The Western Parties note that the Commission's July 22 Order confirmed that the termination payments sought by Enron for power never delivered under contracts made when it was in violation of its market-based rate authority are also within the scope of the hearing. Accordingly, the Western Parties emphasize, the Commission should note that the Settlement does not begin to address the unjust termination profits and that their rights remain unaffected since the Settlement provides the Western Parties with no benefits and fails to address the termination profits.

26. They interpret the provisions of Section 8.8 and 2.3 of the Settlement as providing for the full and final resolution of the rights of the Settling Claimants with respect to Enron. This means the Settling Claimants cannot obtain any additional remedies from Enron, under future allocations of disgorged profits or other remedies that may later be imposed by the Commission. In addition, the Western Parties state that the sections make it clear that the Settlement does not involve termination payments or resolve any termination payment issues. The Western Parties object to any attempt to make the Settlement's allocations binding upon non-settling parties. To ensure the rights of the remaining parties are preserved, the Western Parties contend, the Commission's order on the Settlement should clearly state that the consideration provided in the Settlement is the only remedy the Parties are entitled to receive from Enron. They argue the Commission's Order should further state that nothing is prejudged or predetermined with regard to the proper scope of Enron's violations of tariffs and/or orders relating to market-based rate authority.

27. Finally, the Western Parties contend that the Commission should fulfill its promise to consider all evidence of violations of FERC tariffs and orders, by Enron, and establish a process for the Western Parties to sponsor important documents. They argue that it would be prejudicial to remove documents pre-filed by Settling Parties that are being relied upon by other participants. Neither the Settlement nor the Commission's rules prohibit making evidence submitted by withdrawing parties open to sponsorship by other participants, they assert. Accordingly, the Western Parties are requesting to have the opportunity to sponsor a few exhibits previously submitted by the California Parties. If, however, this request is denied, the Western Parties ask that the Enron testimony and exhibits that reply to the California Parties pleadings, testimony, and exhibits also be

removed from the record. This, they claim, will avoid prejudice to the Western Parties that may result from an imbalance in the record. The Western Parties specifically state that in not protesting the Settlement and, with the conditions and understandings set forth in their comments, they expressly reserve all rights, issues and remedies in all proceedings.

The Port of Seattle, Washington

28. The Port of Seattle, Washington (Port) filed Comments in Opposition to the Proposed Settlement Agreement³³ on September 13, 2005. Port argues that there are numerous issues of material fact.³⁴ Additionally, Port argues that the monetary remedy is speculative since a portion of the proceeds are to be recovered as allowed, unsecured pre-petition claims in the Enron bankruptcy proceeding. Therefore, the Commission cannot determine whether the Settlement complies with the FPA. Port contends that the Settlement distributes proceeds in a manner inconsistent with previous orders issued by the Commission and Chief Judge. Those orders provided that the allocation of settlements and amounts awarded in the liability phase of the proceedings would not be determined until that phase concluded. The Settlement proposes to distribute all of the cash available to the Enron Entities to California. This is unjust, unreasonable, unduly preferential, and unduly discriminatory, Port emphasizes, because it disregards the fact

³³ Comments of the Port of Seattle, Washington in Opposition to the Proposed Settlement Agreement Among Enron Entities, the Office of Market Oversight and Investigations, Certain Intervenors and the Attorneys General of the States of Washington and Oregon. The comments included an Affidavit of Robert F. McCullough in Support of Comments of Port of Seattle, Washington in Opposition to Joint Offer of Settlement (arguing that the Settlement should be rejected because it is insufficient and distinctly inequitable). Additionally, the following documents were included: Prepared Direct Testimony of Robert F. McCullough on Behalf of Public Utility District No. 1 of Snohomish County, Washington (Exhibit Nos. SNO-58 through SNO-159), Docket Nos. EL03-180-000, *et al.* (February 27, 2004); Prepared Supplemental Testimony of Robert F. McCullough on Behalf of Public Utility District No. 1 of Snohomish County, Washington (Exhibit Nos. SNO-710 through SNO-813), Docket Nos. EL03-180-000, *et al.* (January 27, 2005); Rebuttal Testimony of Robert F. McCullough on Behalf of Public Utility District No. 1 of Snohomish County, Washington (Exhibit Nos. SNO-822 through SNO-915), Docket Nos. EL03-180-000, *et al.* (May 13, 2005).

³⁴ Port Initial Comments at 26 (arguing that the following remain as issues of material fact: 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 settlement amount and allocation complies with the FPA).

that Enron's fraudulent activities perpetrated in Portland, Oregon mostly took place within the PNW and that a majority of the illegal profits were actually made outside of California. Last, Port claims the Settlement delegates the authority to determine the amount to be paid to the Parties to the judiciary which constitutes an unconstitutional delegation of legislative authority. Consequently, Port requests that the Settlement be rejected.

Salt River Project Agricultural Improvement and Power District

29. The Salt River Project Agricultural Improvement and Power District (SRP) submitted Initial Comments³⁵ on September 13, 2005. SRP states that the terms of the Settlement, standing alone, would compensate it for giving up claims in the FERC Refund Proceeding, but would not provide compensation for relinquishing claims against Enron in the Gaming and Partnership Proceedings. The Settlement, SRP avers, fails to adequately and sufficiently protect SRP's interests in the Gaming and Partnership Proceedings. If SRP were to opt-in to the Settlement (standing alone), it would essentially be trading a few thousand dollars in refunds in the FERC Refund Proceedings to forgo the receipt of a potential payment of millions of dollars in the Gaming and Partnership Proceedings. SRP notes that the California Parties do not share this concern as the Settlement provides compensation of approximately \$800 million for their release of claims in the Gaming and Partnership Proceedings.

30. Notably, due to on-going good faith negotiations, SRP and Enron have executed a Memorandum of Understanding as a settlement in principle that is expected to ripen into a final settlement agreement. SRP expects the agreement to be filed with FERC on or about September 30, 2005. If the Settlement is approved by the Commission, without material modifications or conditions, SRP states that, it will be able to, and it intends to, opt-in to the Settlement. For this reason, Enron and the California Parties agreed to extended the opt-in notification date for the instant Settlement. Accordingly, SRP requests that the Commission allow the deferral of the date for SRP's opt-in notice.

Public Utility District No. 2 of Grant County, Washington

31. On September 13, 2005, Public Utility District No. 2 of Grant County, Washington (Grant PUD) submitted Initial Comments³⁶ composed of three basic

³⁵ Initial Comments of Salt River Project Agricultural Improvement and Power District on Joint Offer of Settlement.

³⁶ Comments on Joint Offer of Settlement of Public Utility District No. 2 of Grant County, Washington.

arguments. First, Grant PUD claims the Settlement impairs the ability of Grant PUD and others similarly situated to obtain redress from Enron. Grant PUD asserts that OMOI's status as a party to the Settlement shows that the Commission is no longer going to investigate Enron's market manipulation as it relates to Grant PUD and other Non-Settling Parties. "This is made clear," Grant PUD states, "by Section 8.12 of the Settlement, which releases Enron from 'all existing and future claims before FERC' that Enron charged unjust and unreasonable rates or 'manipulated the western electricity or natural gas market in any fashion.'" Grant PUD Initial Comments at 4 (citing Settlement at 31). The Settling Claimants, which include OMOI, agree to take no position in any FERC proceeding or any other forum relating to *Puget Sound Energy Inc. v. All Jurisdictional Sellers* in Docket No. EL01-10. Thus, the Settlement limits monetary remedies and allowed bankruptcy claims for entities other than the California Parties and Additional Claimants with respect to refunds under the FERC Refund Proceeding. This, Grant PUD contends, shows that OMOI has washed its hands of pursuing any further investigation of Enron for non-California gaming activity and any remedies for entities that did not purchase from the ISO or PX, but were still affected by the gaming activity.

32. Grant PUD anticipates that the Settling Parties may argue that it and other parties could have intervened in the appropriate dockets if they wanted to obtain a remedy for Enron's behavior in the Western markets. In response, Grant PUD explains it reasonably believed that OMOI would investigate and seek remedies from Enron on behalf of all Market Participants. The entities that can opt into the Settlement because they made purchases from the ISO and PX, Grant PUD notes, may still benefit from the Settlement although many of them did not pursue market manipulation claims against Enron. In addition, Grant PUD maintains that the Commission has not allowed the parties to intervene or comment in many of its investigation dockets based on the theory that Commission investigations are not participatory forums.

33. Two courses of action are suggested to correct the failure of the Settlement to grant some form of relief to affected non-California Western participants. First, it suggests expanding the list of parties who may opt-in to include all Western purchasers of energy or, at a minimum, all entities that purchased energy directly from Enron during the Settlement Period. Second, Grant PUD recommends giving any party not entitled to opt into the Settlement thirty days from its approval to intervene out-of-time in any Enron investigation or show cause dockets in which the Commission has allowed parties to intervene.

34. Grant PUD's second argument claims the Settlement impairs the ability of Grant PUD to collect payment for its energy sales to (or through) the ISO. It states that the Settlement proposed distributions may guarantee Settling Claimants full recovery of their claims without ensuring the same for Non-Settling Parties and others. Settling Parties, Grant PUD notes, should not have a preferential claim to what may turn out to be limited funds. Grant PUD states that it is owed an estimated \$20 million in principle and interest

for energy it sold to the ISO. However, Grant PUD claims the ISO has advised it to seek payment through claims in the PX and PG&E bankruptcy proceedings. It is currently seeking payment in the PX and PG&E bankruptcy proceeding with the understanding that any resulting monetary remedy will be paid from the PX Settlement Clearing Account. Accordingly, Grant PUD states that to the extent the PX Settlement Clearing Account is reduced by the amounts paid to the Settling Claimants, there must be assurance that an entity will pay the other non-settling entities, such as Grant PUD, for the revenue shortfall.

35. The third argument is that Grant PUD's timely filed claim in the Enron bankruptcy proceeding should not, by virtue of this Settlement, be trumped by untimely claims filed by other parties. It argues that its claim to refunds from Enron should be safeguarded against payouts to the Settling Claimants under the Settlement. In conclusion, Grant PUD urges the Commission to require amendment of the Settlement. If the Commission does not require an amendment, Grant PUD requests that the Commission establish procedures allowing for further interventions to protect the rights of purchasers from Enron that would not be entitled to receive such protection under the Settlement.

The Attorney General of the State of Washington

36. The Attorney General of the State of Washington (Washington Attorney General) submitted Initial Comments in Support of Joint Offer of Settlement on September 13, 2005 in support of the Settlement. The comments note that the Settlement grants a \$600 million civil penalty and an unsecured claim of \$875 million to the Washington Attorney General, the Oregon Attorney General, the California Attorney General and other governmental bodies in California. The Settlement does not resolve or affect the rights of the Non-Settling Parties, therefore, the Washington Attorney General avers that once the Settlement is approved, FERC's job is not complete. FERC must still respond to the parties' claims against Enron and halt Enron's attempt to collect more unjust profits for contract termination payments from Public Utility District No. 1 of Snohomish County, Washington. Accordingly, the Washington Attorney General requests that the Commission approve the Settlement and act swiftly to fulfill FERC's remaining responsibilities to protect the Non-Settling Parties and the consumers they serve in Washington State.

California Independent System Operator Corporation

37. On September 13, 2005, the ISO submitted Comments in Support of the Settlement.³⁷ The ISO explains that it will bear the burden of implementing the financial

³⁷ Comments of the California Independent System Operator Corporation in

portion of the Settlement on its accounting books and in the financial clearing phase of the market re-runs that have been ordered by the Commission³⁸ in the Refund Proceeding. Therefore, ISO concludes, it has a direct and substantial interest in the Commission's treatment of the Settlement. Second, the ISO reveals that it supports the Settlement as it will benefit Market Participants by advancing certain refund payments and create a duty for the Settling Parties to assist the ISO as needed in order to implement the Settlement. The Parties cooperation is essential, the ISO explains, to ensure that financial adjustments are made to properly implement the Settlement.

38. Next, the ISO maintains that the Commission should state, in any order approving this Settlement, that the ISO (including its directors, officers, employees and consultants), will be held harmless with respect to the Settlement and accounting activities it performs to implement the Settlement. The ISO also notes that it has a requested hold harmless provision in previous settlements filed in this proceeding with respect to *Duke, Williams, and Mirant*.³⁹ The factors that justified holding the ISO and PX harmless in those settlements apply equally to this Settlement. Additionally, the ISO also requests that the order exempt it from being responsible for recovering any funds disbursed pursuant to the Settlement, if the funds are subsequently required to be repaid. The ISO further explains that a Market Participant may bring suit claiming the accounting adjustments were improper, resulting in incorrect refund amounts. According to the ISO, a claim could also arise because it is not certain that the Settling Parties' estimates of payables or receivables are accurate, and due to the complexity of the settlement, there may be additional, unanticipated impacts to the ISO Market Participants. As the volume of settlements increases, there is a corresponding increase in the complexity of implementing the settlements and the likelihood that a party will bring an action against the market operators.

39. It would also be appropriate for the Commission to include a hold harmless provision in the order because, the ISO avers, it is a non-profit public benefit corporation and it would be unreasonable to subject it officers, employees and consultants to suits for implementing the Settlement as authorized by the Commission. As its final argument in support of a hold harmless provision, the ISO notes that the Settlement does not prohibit,

Support of the Joint Offer of Settlement Involving Enron.

³⁸ *San Diego Gas & Elec. Co.*, 105 FERC ¶ 61,066 (2003).

³⁹ *San Diego Gas & Electric Co.*, 108 FERC ¶ 61,002 (2004) (Williams); *San Diego Gas & Electric Co.*, 109 FERC ¶ 61, 257 (2004) (Duke); *San Diego Gas & Electric Co.*, 111 FERC ¶ 61,017 (2005) (Mirant).

and the Setting Parties do not oppose, the protection guaranteed by a hold harmless provision.

40. Fourth, the ISO explains that it interprets Sections 7.1.3 and 7.1.4 of the Settlement to mean that the ISO would be required to calculate refunds relating to the Pre-October Period only if the Commission, by order, expands the scope for the Refund Period to include the Pre-October Period.⁴⁰ Thus, the ISO requests that this interpretation be explicitly adopted as part of any Commission order approving the Settlement.

California Power Exchange Corporation

41. On September 13, 2005, the PX filed Initial Comments.⁴¹ The PX begins by noting that it does not take a position on the merits of the Settlement, but only seeks to provide the Commission and PX market participants with a review of matters affected by the Settlement. First, the PX states that the Settlement provides for Enron, a bankrupt debtor, to be the sole backstop for the Non-Settling Participant's claims if there are any deficiencies in EMPI's accounts with the PX and/or ISO. The PX explains that there are several ways Enron could end up owing funds to these markets, and thus to Non-Settling Participants. According to the PX, the Settlement Clearing Account is structured to provide a \$10 million cushion for any downward adjustment of EPMI's receivables in the Final Financial Phase of the Refund Proceeding. The PX explains that if the balance of the Enron receivables is between zero and \$10 million, the California Parties will be paid the full amount of the remaining Enron receivables per Section 4.3.2(ii) of the Settlement. In contrast, if the amount of the remaining Enron receivables is negative, Enron alone will be responsible for reimbursing the PX and the ISO as provided in Section 4.3.2(i). The PX contends that it is likely that the \$10 million cushion will be insufficient to cover the EPMI balance in the PX markets, much less any balances owed by EPMI in the ISO markets.

42. Enron currently has a pre-mitigation credit balance with the PX in the amount of \$439,840, plus an additional \$20,233 as a result of the preparatory rerun. Based on the refund reruns, the PX has calculated that EPMI will receive \$44,906,567 in refunds with a final balance of \$26,476,960 due to a soft cap reversal of \$18,429,607. However, the PX notes, this estimated refund amount has not been adjusted to account for refund

⁴⁰ The Settlement defines the Pre-October Period as May 1, 2000 through October 1, 2000. It also states the Refund Period is from October 2, 2000 through June 20, 2001.

⁴¹ California Power Exchange Corporation's Initial Comments on the Enron Parties' Settlement.

reductions based on fuel allowances, emissions offsets, marketers' cost recovery amounts or interest shortfalls that will be applied in the final financial phase.

43. The recent remand decision of the Ninth Circuit "determined that the Commission does not have refund jurisdiction under Section 206 of the Federal Power Act with respect to governmental entities and non-public utilities."⁴² The removal of these entities from the pool of participant sellers providing refunds, in addition to the adjustments explained above, could reduce EPMI's expected refund amount substantially below the current estimate of \$26 million. In contrast, the PX mentions, the same factors above could also result in a substantial increase in the net amount owed by EPMI to the ISO. The PX draws a distinction between the effect that the removal of the governmental entities and non-public utilities from the pool of refund providers will have on EPMI. It notes that the refunds owed by EPMI will not be reduced by the removal, whereas, the amount of receivables owed to EPMI will be reduced, which could result in an increase in the estimated net amount that EPMI may owe the ISO.

44. Section 6.9 of the Settlement provides for \$22.4 million in Enron ISO collateral to be distributed to certain ISO Market Participants, as provided in the Metering Error Allocation Matrix in Exhibit B, to resolve certain Enron metering errors. According to the PX, if the ISO is left with unpaid liabilities from Enron with no collateral to secure the obligations, the ISO will seek to pass those debts to the PX to the extent that the PX acted as a ISO Scheduling Coordinator during the relevant time period. This would result in additional liabilities on EPMI's account balance with the PX. There will be little or no recourse against Enron, the PX asserts, if it releases the cash collateral.

45. The cash collateral it is holding is the only viable security for any EPMI obligations. The PX explains that although the Settlement does not require the PX to release the \$138 million in cash collateral at this time, the California Parties are required to support any request by Enron to release the Enron PX Collateral once the PX pays the first \$15 million to the Enron Refund Escrow Account. If the PX does not apply the collateral to EPMI's liabilities in the final clearing of the markets, the Non-Settling Participant's claims for any amounts due by EPMI to the PX clearinghouse would be treated as unsecured pre-petition claims in the bankruptcy proceedings. Without the Enron PX Collateral, the Non-Settling Participants will be required to collect their claims via the bankruptcy process where the value of their recovery would prove to be uncertain. The PX asserts that EPMI intends to minimize the financial consequences of the mitigation of prices in the Commission's Refund Proceeding by forcing the PX rate

⁴² PX Initial Comments at 8 (citing *Bonneville Power Admin. v. FERC*, No. 02-70272, 2005 U.S. App. LEXIS 19205 (9th Cir. Sept. 6, 2005) (Bonneville)).

reductions to be accounted for as bankruptcy claims that may be satisfied only as unsecured pre-petition claims. In bankruptcy proceedings, non-priority unsecured claims are paid only after secured claims and priority unsecured claims have been satisfied. Thus, the PX explains, the Non-Settling Participants should be aware of the significance of the position they are assuming in the bankruptcy under Section 7.7.1 of the Settlement (the PX will assign the Non-Settling Participants' claims in the bankruptcy proceeding). Specifically, to the extent EPMI is permitted to receive full refunds for the refunds it is owed, but pays any refunds it owes as a cents on the dollar bankruptcy claim, the Non-Settling Participant's recovery will be reduced. The PX claims that the release or reduction of the Enron PX collateral could compromise or eliminate their recovery.

46. The Commission should provide that the PX and its officers, directors, employees and professionals are held harmless from, and indemnified for third party complaints for implementing the Settlement. Notably, the California Parties, the Additional Claimants and Enron do not oppose Commission approval of the proposed hold harmless clause. The PX mentions previous occasions when the Commission approved a hold harmless provision for it and ISO in the Williams, Duke, Dynegey and Mirant settlements⁴³.

47. The potential for exposure, the PX claims, can arise from: "1) the substantial amount of funds to be transferred and credits to be applied (\$25 million) under the Enron settlement; 2) the 'black box' nature of the settlement, in which the payouts and credits were determined by the Settling Parties; 3) the fact that any final market obligations by EPMI have not been determined; and 4) the possible need to recover any ultimate deficiencies in EPMI's account from Enron, which is in a chapter 11 bankruptcy proceeding." PX Initial Comments at 13.

48. The PX also requests clarification that restrictions on expenses to continue to prosecute the Non-Settling Parties' claims do not foreclose expenses to effectuate the assignment of the Non-Settling Parties' claims. Section 7.7.2. creates some ambiguity, the PX asserts, because it states that the Non-Settling Participants are required to assume all costs "associated with prosecuting or litigating the claims on behalf of the Non-Settling Participants in the Bankruptcy Proceeding, or otherwise related to participation in the Bankruptcy Proceedings..." as of the issuance of the FERC Settlement Order. The PX voices its concern that expenses incurred solely to effectuate the assignment of claims could be construed as "others related to participation in the Bankruptcy Proceedings." *Id.* at 16. Consequently, the PX explains, it would then be required to incur expenses to meet its obligation under Section 7.7.1(ii) to assign the rights, but not be permitted to

⁴³ *Williams*, 108 FERC ¶ 61,002; *San Diego Gas & Electric Co.*, 109 FERC ¶ 61,071 (2004) (*Dynegey*); *Duke*, 109 FERC ¶ 61, 257; *Mirant*, 111 FERC ¶ 61,017.

incur those expenses under Section 7.7.2. unless it receives an express, written agreement to fund the assignment costs from a Non-Settling Participant. The PX argues that if it is unable to incur expenses to effectuate the assignments, without that written agreement, the assignment will not likely happen or will be subject to subsequent challenge. Thus, the PX avers, for the assignment to be properly effectuated and not subject to subsequent challenge, it is essential that there be a commonsense interpretation of Section 7.7.2. The PX notes that it should be permitted to incur reasonable expenses in order to assign the claims in accordance with the requirements of the Enron Bankruptcy Court, without first being required to secure the prior written agreement of, and payment from the Non-Settling Participants.

V. REPLY COMMENTS

The Port of Seattle, Washington

49. On September 23, 2005, Port filed reply comments.⁴⁴ Port notes that several of the commentators agreed with its assertions that the opt-in provisions of the Settlement meant nothing to parties, such as Port, who did not buy or sell electricity through the ISO or PX. In addition, Port notes that Grant PUD agreed with its comment that the Settlement provided certain California entities with a preferential claim to Enron's limited funds and does not fully preserve the rights of all Non-Settling Participants. Consequently, Port states, the Settlement does not meet the standards for the conditional approval of the Nevada Attorney General, is inconsistent with the assumptions upon which the Attorney General of the State of Washington based his approval, and may fail the qualifications set forth by the Western Parties.

50. Next, Port claims Staff's assertion that the Settlement represents "a reasonable compromise of competing interests" has no basis in fact. Port Reply Comments at 3 (citing Trial Staff Comments at 7). According to Port, this is because neither Staff nor anyone else can make any representation as to actual value of the portion of the Settlement that will become an allowed, but unsecured petition claim in the bankruptcy court.

51. Port also notes that the record should reflect that it and, to its knowledge, other Pacific Northwest entities were also excluded from the settlement discussions. Finally, Port fully adopts the Western Parties suggestion that upon approval of the Settlement, the

⁴⁴ Reply Comments of the Port of Seattle, Washington to the Proposed Settlement Agreement Among Enron Entities, the Office of Market Oversight and Investigations, Certain Intervenors and the Attorney General of the States of Washington and Oregon.

Commission should provide procedures for the remaining parties to sponsor exhibits submitted by Settling Parties.

The California Parties, Enron, and OMOI

52. On September 23, 2005, the California Parties,⁴⁵ Enron, and OMOI (collectively the Parties) submitted Joint Reply Comments. The Parties note that the comments failed to raise issues concerning the reasonableness of the Settlement because the non-settling parties' rights remain unaffected unless they opt into the Settlement.

53. In response to the Western Parties' suggestion that the Commission allow them to sponsor exhibits submitted by the Settling Parties in the Partnership/Gaming Proceeding, the Parties argue that it is inappropriate and unnecessary for the Commission to rule on this evidentiary issue because the proceeding is pending before an Administrative Law Judge. In addition, the Parties note that once the Settlement is approved and the proceeding resumes, any party continuing in the proceeding can argue for the inclusion or exclusion of evidence. The right for the remaining parties to pursue evidentiary matters in the hearing will not be affected by the Settlement. Therefore, the Parties contend, all documents submitted by the California Parties against Enron should be withdrawn pursuant to the Settlement, without prejudice, to allow filing by other parties. In the event the parties seek to have certain Enron evidence stricken prior to trial, the Parties explain, they may also request appropriate relief from the presiding judge. The Parties also mention that it is routine and appropriate for settling parties to withdraw their evidence from the proceeding and, notably, evidence presented by settling parties rarely remains in the record.

54. The Parties do not oppose a hold harmless provision in favor of PX. Additionally, the Parties state that Section 7.7.2 does not require clarification as the Section does not prohibit the incurrence of costs, but instead addresses how incurred costs will be recovered.

55. The Parties disagree with the characterization of Enron as the sole financial backstop under the Settlement as argued by the PX. The California Parties have assumed the risk that up to \$10 million of Enron receivables will not be available to the California Parties when the amount of the remaining Enron receivables are determined. The Parties also argue that the Settlement protects the interests of Non-Settling Participants by

⁴⁵ Joint Reply Comments of California Parties, Enron, and OMOI on Joint Offer of Settlement. For purposes of these reply comments CERS, and the Attorneys General of Oregon and Washington were not included.

retaining earmarked funds in the Enron Refund Escrow until payments are made to the Non-Settling Participants as provided in Section 6.7. In addition, the Parties mention that the Non-Settling Participants that have filed bankruptcy claims will also have funds earmarked in the Enron Refund Escrow that are at least commensurate, as a portion of their net purchases in the relevant time periods, with the amounts set aside for the California Parties and the Opt-In Participants.

56. According to the Parties, the PX's concern that the amount of receivables owed to EPMI may be much less than the current estimate of \$27 million is misplaced. The Parties explain that the Settlement resolves much of Enron's refund liability with almost all of the buyers in the ISO market. This means any implementation of *Bonneville*⁴⁶ will have only a limited effect on EPMI. The PX's concerns about the release of the \$138 million in cash collateral, which secures the EPMI obligations and claims, are premature. This is because there is no request for the release of the collateral currently pending, the release is not a condition of the Settlement, and the PX and Non-Settling Participants retain their rights to object to the release of the collateral when it is requested.

57. With respect to the Initial Comments submitted by the ISO, the Parties do not oppose the assurances requested from the Commission. The Parties also confirm the ISO's understanding that a calculation of refunds for the Pre-October Period as required by Sections 7.1.3 and 7.1.4 of the Settlement would be appropriate only if based on FERC orders that refunds must be paid for the Pre-October period, if any, in the FERC Refund Proceeding.

58. In reply to the Salt River Initial Comments, the California Parties and Enron agree that Salt River may defer its opt-in notice and service date until five business days after the later of the effective date of the Enron/Salt River settlement agreement or the Settlement Effective Date as defined in the instant Settlement.

59. According to the Parties, the Grant PUD request should be denied as the comments fail to provide any basis for amending or modifying the Settlement. The Parties counter Grant PUD's argument by explaining that Grant PUD did not receive an allocation of the settlement amounts for the alleged violations of the ISO and PX tariffs because Grant PUD was not a net buyer in those markets. However, the Parties explain, entities such as Grant PUD that do not opt-in, will have an additional opportunity to collect amounts allocated for the Pre-October Period which will be transferred to an escrow account. The Parties note that Grant PUD's rights to pursue claims against Enron

⁴⁶ *Bonneville Power Administration v. FERC*, No. 02-70272, 2005 U.S. App. LEXIS 19205 (9th Cir. Sept. 6, 2005).

will not be affected unless it opts into the Settlement. Finally, the Parties state that Grant PUD's assertion that its claim in the Enron Bankruptcy Proceeding should not trumped by untimely filed claims as a result of this Settlement should be addressed by the bankruptcy court and not the Commission.

60. The Parties claim that as a matter of law the Settlement is uncontested because Port's comments fail to raise any issues of material fact. According to the Parties, this is because the Settlement does not resolve any facts as to the underlying case with regard to Port unless it opts into the Settlement and, in addition, the express terms of the Settlement allow Port to continue to pursue any claim it may have. The Parties explain that the Settlement does not establish the facts that Port alleges are in dispute, namely: "whether Enron's gaming practices and partnerships harmed consumers," "the amount of Enron's profits," and "the regional allocation of Enron's profits." Parties Reply Comments at 15 (citing Port Comments at 26). Therefore, the Parties conclude, these factual issues are irrelevant with regard to approval of the Settlement.

61. The Parties also state that the issue of whether the settlement amount and allocation complies with the FPA, is a legal issue, and not a factual issue as Port claims. In addition, the Parties contend that addressing the allocation issue is premature as that issue will be addressed in the distribution phase of the Partnership/Gaming Proceeding. They also assert that Port has not presented sufficient details to support their allocation argument. Moreover, the Parties conclude, if the Commission does decide to consider Port's argument, the Settlement should still be approved.

62. According to the Parties, Port's statement that the Settlement should not be approved because it does not provide for proceeds to be allocated and distributed at a later date stems from a misunderstanding of the nature of the Settlement. The Settlement, they explain, is a partial settlement which does not decide the merits of the case against Enron. Moreover, Port has not cited a single case where the monetary consideration of a private settlement (such as this one) was paid into an account for later distribution to third parties who were not part of the settlement.

63. The Parties refute Port's claim that the allocation of Settlement proceeds is unjust, unreasonable, unduly preferential and unduly discriminatory, noting that Port's argument appears to be incorrectly based on the assertion that Enron cannot settle with the California Parties because all violations did not occur in California. According to the Parties, nothing in the Settlement precludes Port from submitting any evidence that Enron profited at Port's detriment.⁴⁷

⁴⁷ The Parties also argue that Port's reliance on Snohomish exhibits is misplaced since the exhibits do not support Port's claims. Parties' Reply Comments at 17 n.23.

64. The Parties state that the Settlement does not delegate authority to determine amounts to be distributed to the bankruptcy court. They explain that the Settling Claimants have agreed to accept allowed claims against EPMI in the bankruptcy proceeding. In addition, the Parties mention that the Settlement only provides for payments of allowed claims in bankruptcy to the Settling Claimants, not other Market Participants.

65. In response to the comments filed by the Nevada BCP, the Parties clarify by explaining that the rights of Non-Settling Parties which could include non-governmental entities, such as the Nevada BCP, the Public Utilities Commission of Nevada, and FERC Trial Staff are unaffected by the Settlement. This interpretation, they note, is consistent with the language in the Settlement.

Indicated Parties

66. On September 23, 2005, Indicated Parties⁴⁸ filed Reply Comments to the Joint Offer of Settlement generally supportive of the Settlement. Since the Settlement designates Enron, a bankrupt entity, as the financial backstop for potential shortfalls in the clearing accounts, the Indicated Parties suggest that the Commission approve the Settlement with two conditions. First, the Indicated Parties propose that the Settlement be accepted with the understanding that the Commission will not allow the PX to release Enron collateral it is holding until Enron's obligations to the PX and the ISO in this proceeding have been satisfied. Further, the Indicated Parties argue that the PX is holding collateral to provide crucial financial security in the event that there are insufficient funds to pay existing claims. Since the market has no way to recover any deficiency caused by the Settlement, the Indicated Parties assert, the remaining cash collateral must continue to be held by the PX until all downward adjustments have been made and all of Enron's obligations in this proceeding have been met. However, if the Commission permits the release of the Enron PX Collateral, the second condition the Indicated Parties suggest provides that any shortfalls in the PX or ISO markets caused by Enron's inability to pay should be shared by all market participants, including the California Parties. The Indicated Parties further argue that the California Parties should not be allowed to shift liabilities for unknown shortfalls to other PX and ISO Market Participants.

⁴⁸ The Indicated Parties include: Puget Sound Energy, Inc.; Avista Energy, Inc.; and IDACORP Energy, L.P.

VI. PENDING MOTION

67. On September 27, 2005, the California Parties,⁴⁹ Enron, and OMOI (collectively, for the purposes of this motion, the Moving Parties) filed a Motion to Strike Reply Comments of Indicated Parties (Motion to Strike). The Moving Parties argue that the Indicated Parties' Reply Comments are procedurally improper, seek a decision on a matter not before the Commission, and propose conditions that would disrupt the pending settlement. First, the Moving Parties stress that if the Indicated Parties wanted to propose a material change to the Settlement, their comments should have been filed by the September 13, 2005 due date. Commission Rule 602 (f) (3), 18 C.F.R. §385.602 (f)(3) (2005), is cited as support with the claim that the rule clearly distinguishes between comments and reply comments. The rule provides that a failure to file comments is a waiver of all objections to the settlement. Therefore, the Indicated Parties' comments should not be considered because they are submitted "under the guise of 'reply' comments," when they actually reply to nothing. Motion to Strike at 3. The Moving Parties bolster this argument by citing Commission precedent⁵⁰ to show that previous parties' attempts to file reply comments out of time have not been tolerated.

68. Next, the Moving Parties contend that the Indicated Parties Reply Comments propose conditions that are irrelevant to the Commission's consideration of the Settlement. The Moving Parties explain that there is no reason for the Commission to address the Enron PX Collateral issue raised by the Indicated Parties at this time as the release of collateral is not a condition of the Settlement and there is no request for release of the PX Collateral pending before the Commission. In addition, the Moving Parties argue that the Indicated Parties will retain their right to object to the release of the cash whether or not they opt-in to the Settlement. Based on the above reasons, the California Parties, Enron, and OMOI request that the Indicated Parties' Reply Comments be struck and that the August 24, 2004 Settlement be approved without condition.

69. On September 29, 2005, Indicated Parties filed an answer⁵¹ in response to the

⁴⁹ For purposes of this motion CERS is excluded.

⁵⁰ Motion to Strike at 4 (citing *Williams Natural Gas Co.*, 43 FERC ¶ 61,227 at 61,586 (1988) (rejecting reply comments to the extent they oppose the settlement because under the Commission's Rules those parties waived their objections by not filing comments); *El Paso Natural Gas Co.*, 35 FERC ¶ 61,440 at 62,073-74 (1986) (granting motion to strike reply comments)).

⁵¹ Answer of Indicated Parties to Joint Motion of the California Parties, Enron and

Motion to Strike requesting that the Commission deny the Motion. According to the Indicated Parties, their filing does not raise new issues. Instead, they assert that their filing responds to the issue identified in the PX's Initial Comments. The Indicated Parties note that the PX comments alerted the Commission that if Enron's Cash Collateral is released, there will likely be a shortfall in the PX and ISO accounts and Enron, a bankrupt entity, will be left as the backstop for the shortfall. In addition, the Indicated Parties state that the PX further cautioned that if the Enron PX Collateral were released to Enron there would be little or no recourse against Enron for the deficiencies. The Indicated Parties explain that their Reply Comments were submitted in response to these assertions.

70. The Indicated Parties aver that their Reply Comments simply noted that the shortfall can be remedied by ensuring that the Enron PX Collateral will not be released as provided in Section 8.9 of the Settlement unless and until all of Enron's obligations to the ISO and PX are met. Any deficiencies created in the PX or ISO markets should be borne by all Market Participants and not shifted to the sellers under the Settlement. This, they note, would be consistent with Commission precedent. Finally, the Indicated Parties emphasize that their Reply Comments do not raise any new issues, attempt to propose material changes to the Settlement, or respond to nothing as the Settling Parties argue in their Motion to Strike.

71. According to the Indicated Parties, this complex Settlement, which is comprised of voluminous documentation, was negotiated behind closed doors. In addition, the Indicated Parties argue that the California Parties, by filing the Motion to Strike, are asking the Commission to deny the parties affected by the Settlement the opportunity to participate in front end negotiations and address settlement issues affecting them. In conclusion, the Commission should deny the California Parties' Motion to Strike, and consider the Reply Comments of the Indicated Parties in its review of the Settlement.

VII. DISCUSSION

72. The General Overview of the Joint Offer of Settlement states that the nominal consideration is \$1.5 billion. The Settlement resolves the claims of the California Parties, the Oregon and Washington Attorneys General and Opt-In Participants⁵² against the

OMOI to Strike (September 29, 2005) (Indicated Parties' Answer).

⁵² An Opt-In Participant is a Market Participant who elects to join the Settlement. A Market Participant is any entity that was an ISO scheduling coordinator or PX participant or otherwise directly sold energy to or purchased energy from the ISO and/or PX during part or all of the Settlement Period. Section 1.52.

Enron Debtors for refunds, disgorgement of profits and other monetary and non-monetary remedies in the following proceedings: (1) the FERC Refund Proceeding,⁵³ (2) the Partnership/Gaming Proceeding⁵⁴ for January 16, 1997 through June 25, 2003⁵⁵ and other investigatory proceedings.⁵⁶ Enron will assign to the California Parties \$25 million in receivables (claimed by Enron from the ISO and PX). The amount is to be paid in installments with the first \$15 million due 10 business days after the Settlement Effective Date. The ISO will distribute to Market Participants, in accordance with an allocation matrix submitted with the Settlement (Exhibit B), \$22.4 million held by the ISO as collateral related to meter reading claims. A Class 6 unsecured claim of \$875 million in favor of the California Parties and Additional Claimants will be allowed by Enron. Additionally, Enron will pay a civil penalty of \$600 million as a subordinated Class 380 penalty claim in favor of the California Attorney General, the CPUC, the CEOB and the Additional Claimants. Enron will assign to the California Parties its interests in refunds or rights thereto from other suppliers in the FERC Proceedings.⁵⁷ Refunds associated with mitigation of certain sales by CERS into the ISO real time market will be assigned by Enron to CERS. A maximum of \$1 million in PX Wind-Up charges⁵⁸ or Enron's share, will be an allowed administrative expense. Enron also agreed to cooperate with the Settling Claimants in their claims against other entities by making available information, witnesses and other documents. Section 5.1.

⁵³ Docket Nos. EL00-95-000 and EL00-98-000, *San Diego Gas & Elec. Co. v. Sellers*, 92 FERC ¶ 61,176 (2005).

⁵⁴ Docket Nos. EL03-180-000, EL03-154-000, EL02-114-007, EL02-115-008 and EL02-113-000 *American Electric Power Service Corp, et al.*, 103 FERC ¶ 61,345 (2003) (Gaming Order) and *Enron Power Mktg, Inc. and Enron Energy Servs, Inc. et al.*, 103 FERC ¶ 61,346 (2003) (Partnership Order); Docket EL02-113-000 was subsequently consolidated with these two dockets. *El Paso Electric*, 108 FERC ¶ 61,071 (2004).

⁵⁵ See *EL Paso Electric*, 108 FERC ¶ 61,071 (2004).

⁵⁶ Docket Nos. PA02-2-000, *Fact-Finding Investigation of Potential Market Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002) and IN03-10-000, *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347 (2003).

⁵⁷ FERC Proceedings is defined in Section 1.38 namely as the proceedings described above and any related appeals.

⁵⁸ This is an issue in Docket Nos. ER02-2234, *et al.*

73. The CPUC approved the Settlement. However, Bankruptcy Court approval is also being sought contemporaneously with FERC approval.

74. Enron's total estimated refund amounts based on transactions in the ISO and PX markets for October 2, 2000 through June 20, 2001 were calculated in the Settlement. Additionally, there is a negotiated amount for the Pre-October Period (May 1, 2000-October 1, 2000) period at issue in the Refund Proceeding and for the period associated with the Partnership/Gaming Proceeding January 16, 1997 through June 25, 2003.

75. Market Participants who do not opt into the Settlement will not be guaranteed the benefits of the Settlement (except for the payment dealing with meter claims) and will be paid the refunds it is ultimately determined to be owed through litigation. Parties in the Partnership/Gaming Proceeding that do not opt into the Settlement can continue to seek remedies through litigation. The Settlement provides that "any monetary remedy that FERC may determine to award . . . to such Non-Settling Participant in the Partnership/Gaming Proceeding shall not exceed the share of any Enron profits allocable to that party, as determined under the allocation methodology adopted by FERC, of any profits, if any, that Enron may be finally required to disgorge, including, for any of the Western Parties, pursuant to any final order with respect to contract termination payments owed by the Western Parties." Section 8.8. This language could be interpreted to mean that the Settlement is imposing a monetary limit to the disgorgement recovery of the Non-Settling Participants. Such result may not be intended by the Settlement. As a matter of fact, in response to the Nevada BCP the Parties assert that the Settlement does not affect the rights of the Non-Settling Participants and that Section 8.8 should be interpreted as such.

76. The Western Parties argue that the Settlement is not a meaningful remedy to redress Enron's misconduct since the pre-filed testimony in the record in the Gaming/Partnership proceeding tends to show that Enron's profits amounted to \$1.8 to \$2.4 billion. The Settlement contemplates a nominal monetary amount of \$1.5 billion. Moreover, the Commission has approved other settlements which contemplated similar recovery provisions. *See Williams*, 108 FERC ¶ 61,002; *Dynegy*, 109 FERC ¶ 61, 071; *Duke*, 109 FERC ¶ 61, 257; *Mirant*, 111 FERC ¶ 61,017. Additionally, the settlement does not terminate the Partnership/Gaming proceeding where others can seek to continue to litigate these issues. The Settlement contemplates that the Settling Parties will withdraw exhibits and testimony that they have filed. Contrary to the assertions of the Western Parties, it is premature to make a determination as to the future use of withdrawn exhibits since this is something which can be addressed by the Presiding Judge in the Gaming/Partnership proceeding.

77. Contrary to Port's allegations, there are no material issues of fact preventing certification of the settlement. *See Rule 602(h)(2)(ii)*. The Settlement does not resolve any facts as against Enron in the pending proceedings and Port can continue to pursue

any claims it has against Enron. *See* Section 13.4. The fact that a portion of the monetary remedies go to the California Parties does not render the Settlement unjust and unreasonable. The Commission has previously allowed settlements which involved unsecured claims in bankruptcy proceedings as consistent with the public interest and allowed settlement money to go directly to the California Parties. *See Mirant*, 111 FERC ¶ 61,017. Furthermore, the Commission has previously rejected similar arguments in approving settlements involving the California Energy Crisis. *See Duke, Williams, Mirant, Dynegy, supra*. As the Commission found in *Dynegy* “the Settlement is not unduly discriminatory. The Settlement would provide significant benefits, including certainty and finality on major issues, to the Settling Parties. In addition, the Settlement will not adversely affect the interests of those parties that choose to continue to litigate their claims in the Refund Proceeding rather than opt into the Settlement.” *Dynegy*, 109 FERC 61,286 PP 19-21. In this case the Settlement allows parties to opt in. Additionally, there is a reserve for those parties who do not opt-in and the California Parties have assumed a \$10 million risk. Furthermore, the Settlement does not adversely affect the interests of the parties who choose to continue to litigate. Port’s allegations concerning allocation of funds are premature since there is a mechanism in place to distribute monetary awards in the Partnership/Gaming proceeding, a distribution phase after the liability phase. *See Duke Energy Trading and Mktg, L.L.C*, Order of the Chief Judge Consolidating Distribution Issue for Hearing (December 22, 2003).⁵⁹

78. Furthermore, contrary to the arguments advanced by Grant PUD, the Commission has previously allowed the settlement of its investigatory proceedings similarly to the Settlement in this proceeding. *See Mirant, Duke, Dynegy, supra*. The amounts paid for the “anomalous bidding” investigation are paid as part of the Exhibit A Allocation Matrix, to net buyers under the ISO and PX tariffs. Grant PUD was not a net buyer in these markets. Additionally, 20 percent of the total of all Non-Settling Participants allocable shares of the total amount in refunds for the Pre-October Period shall be transferred to an account specified by OMOI as part of the resolution of the anomalous bidding investigation in Docket IN03-10. The Settlement states that any Party may advocate any particular refund allocation or methodology for this amount. Section 6.2.4 In their reply comments the Parties argue that these funds will be allocated as part of the allocation phase of the Partnership/Gaming Proceeding. Accordingly, the Parties maintain that Grant PUD and others can seek an allocated share of such amounts.⁶⁰

⁵⁹ Port’s argument that the Settlement delegates legislative authority to the Bankruptcy Court is without merit. As the Parties pointed out, the Settling Claimants agreed to accept allowed claims against EPMI in the bankruptcy proceeding.

⁶⁰ Parties’ Reply Comments at 12.

Furthermore, the Parties are correct that Grant PUD's arguments concerning their bankruptcy proceeding claims are best addressed before that forum.

79. The Parties clarify that Enron is not the only financial backstop under the Settlement. Under the Settlement, the California Parties assume up to \$10 million in risk that the Enron Receivables will not be available to the California Parties when the amount of the Remaining Enron Receivables is finally determined. See Sections 4.1.1; 4.3.1 and 4.3.2. Furthermore, Non-Settling Participants are protected to the extent they are entitled to refunds,⁶¹ these funds have been earmarked and are retained in the Enron Refund Escrow account until the Commission issues the Enron Refund Determination, which will then be paid out in accordance with Section 6.7. This is a substantial benefit for Non-Settling Participants without claims in the bankruptcy proceeding. Non-Settling Participants with claims in the Bankruptcy Proceeding have amounts set aside for them in the Enron Refund Escrow, which are at least commensurate (as a portion of net purchases in the relevant period) with the amounts set aside for the California Parties and the Opt-In Participants. Therefore, there seems to be sufficient protections for Market Participants. See *Williams*, 108 FERC ¶ 61,002 at P 27.

80. Moreover, the Settlement does not preclude other parties from seeking remedies from Enron, including continuing to pursue their claims in the Bankruptcy proceeding.

81. The Settlement is in the public interest, it resolves the Order to Show Cause and other proceedings as to the California Parties, the Additional Settling Parties and Opt-In Participants. Costly additional litigation will be avoided while refunds and other relief are provided. The payment of refunds is accelerated by virtue of the Settlement. The California Parties estimate that PG&E, SDG&E and SCE and the State of California, paid about 95 percent of all overcharges (measured by the MMIP) in the ISO and PX markets. Consequently, the Joint Explanatory Statement sets forth that it is estimated that even if no other Market Participants opt into the Settlement, more than 95 percent of the Enron's Parties potential liability in the Refund Proceeding will be resolved by the Settlement. In other words, by virtue of the Settlement Enron is resolving its refund liability with nearly all of the buyers in the ISO market.⁶² If other Market Participants opt-in, all remaining

⁶¹ Amounts specified in the FERC Refund Proceeding Allocation Matrix as payable to market participants. See Section 6.7.

⁶² Consequently, the *Bonneville* decision will have only a limited effect on Enron according to the Parties. They explain that this is because the Settlement defines "Enron Receivables" as amounts payable to Enron before mitigation. Section 4.3. Therefore, these parties maintain that the changes in the level of refunds owed to or by Enron will not affect the approximately \$27 million currently estimated in Enron Receivables. The

Enron refund liability in the Refund Proceeding could be resolved by the Settlement. Furthermore, the Settlement resolves Enron's potential liability as to the Settling Participants in the Partnership/Gaming Proceeding.

82. Commission approval shall be deemed direction for the ISO and PX to conform their books and records to implement the various provisions of the Settlement as specified in Section 7. The California Parties, the Additional Claimants and Enron do not oppose a "hold harmless" provision for the ISO and PX. In prior Commission Orders both entities have been held harmless for steps taken to implement the settlement. *See Mirant*, 111 FERC ¶ 61,017 at P 28-30. The ISO requests that it not be held responsible for recovering any funds disbursed pursuant to the Settlement, which are subsequently required to be repaid. The comments did not object to this caveat. The Parties are correct that Section 7.7.2 is clear on its face and does not need clarification. It is noted that the Parties agreed to allow deferral of the opt-in notice for SRP.⁶³ Additionally, the Settlement provides a negotiated amount for the period May 1, 2000 through October 1, 2000 which is still at issue in the Refund Proceeding and calculations for the Pre-October period as required by Sections 7.1.3 and 7.1.4 will be undertaken only if so mandated by the Commission. The Motion to Strike should be denied since the Reply Comments filed by Indicated Parties address issues raised in the Initial Comments.

83. This Settlement involves numerous dockets related to Enron's dealings in the energy market. The Commission has previously accepted settlements involving other companies related to their dealings in the energy markets. Therefore, there are no policy implications related to the settlement. The Settlement can only be modified in writing signed by each of the parties affected by the proposed modification. Section 13.6.

VIII. CERTIFICATION

84. Pursuant to 18 C.F.R. § 385.602(h)(2)(i), I hereby certify for the Commission's

PX notes that the amount of receivables owed to Enron will be reduced when non-public utilities are removed from the pool or refund providers, potentially widening the estimated net amount that Enron may ultimately owe the ISO. These arguments seem to be more relevant in a proceeding to release the collateral amount held by the PX and not particularly pertinent for purposes of whether the Settlement can be approved or not.

⁶³ The Parties' Reply Comments at 10. Salt River may defer the date by which it provides notice and service that it is opting into the Settlement until five business days after the later of: (i) the effective date of Enron's settlement agreement with Salt River; or (ii) the Settlement Effective Date as defined in the Settlement.

consideration as a partial contested offer of settlement:

- (a) Joint Offer of Settlement, Joint Explanatory Statement, and Settlement and Release of Claims Agreement filed by Enron, the California Parties, the Additional Claimants, and the Federal Energy Regulatory Commission Office of Market Oversight and Investigations on August 24, 2005;
- (b) Initial Comments of the Commission Trial Staff on Joint Offer of Settlement filed on September 13, 2005;
- (c) Initial Comments of the Office of the Nevada Attorney General, Bureau of Consumer Protection Addressing Offer of Settlement filed on September 13, 2005;
- (d) Initial Comments of Western Parties on Joint Offer of Settlement filed on September 13, 2005;
- (e) Comments of the Port of Seattle, Washington in Opposition to the Proposed Settlement Agreement Among Enron Entities, The Office of Market Oversight and Investigations, Certain Intervenors and the Attorneys General of the States of Washington and Oregon filed on September 13, 2005 and Affidavit of Robert F. McCullough in Support of Comments of Port of Seattle, Washington in Opposition to Joint Offer of Settlement filed September 14, 2005;
- (f) Initial Comments of Salt River Project Agricultural Improvement and Power District on Joint Offer of Settlement filed on September 13, 2005;
- (g) Comments on Joint Offer of Settlement of Public Utility District No. 2 of Grant County, Washington filed on September 13, 2005;
- (h) Initial Comments of The Attorney General of the State of Washington in Support of Joint Offer of Settlement filed on September 13, 2005;
- (i) Comments of The California Independent System Operator Corporation in Support of the Joint Offer of Settlement Involving Enron filed on September 13, 2005 and an Errata to those comments filed on September 15, 2005;
- (j) California Power Exchange Corporation's Initial Comments on the Enron Parties' Settlement filed on September 13, 2005;
- (k) Reply Comments of the Port of Seattle, Washington to the Proposed

Settlement Agreement Among Enron Entities, the Office of Market Oversight and Investigations, Certain Intervenor and the Attorneys General of the States of Washington and Oregon filed on September 23, 2005;

- (l) Joint Reply Comments of California Parties, Enron, and OMOI on Joint Offer of Settlement filed on September 23, 2005;
- (m) Reply Comments of Indicated Parties to Joint Offer of Settlement filed on September 23, 2005;
- (n) Joint Motion of the California Parties, Enron, and OMOI to Strike Reply Comments of Indicated Parties filed on September 27, 2005;
- (o) Answer of Indicated Parties to Joint Motion of the California Parties, Enron, and OMOI to Strike filed on September 29, 2005; and
- (p) All pleadings, orders and other documents of record in this proceeding.

Carmen A. Cintron
Presiding Administrative Law Judge