

119 FERC ¶ 63,009  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Enron Power Marketing, Inc. and Enron Energy Services, Inc.	Docket Nos. EL03-180-029
Enron Power Marketing, Inc. and Enron Energy Services, Inc.	EL03-154-023
Portland General Electric Company	EL02-114-024
Enron Power Marketing, Inc.	EL02-115-028
El Paso Electric Company Enron Power Marketing, Inc. Enron Capital and Trade Resource Corp.	EL02-113-026

INITIAL DECISION

(Issued June 1, 2007)

APPEARANCES

*Charles A. Moore, Esq. and Bruce Neely, Esq.* for Enron Power Marketing, Inc., Enron Energy Services, Inc., and all of the Enron affiliated corporate entities; and the law firm of LeBoeuf, Lamb, Greene & MacRae

*Lawrence Acker, Esq.* for Mr. Gary Fergus

*Michael Kuhn, Esq.* for Bracewell & Giuliani, formerly Bracewell & Patterson, and Jeffrey D. Watkiss, Esq.

*Raymond B. Wuslich, Esq., Donald Danker, Esq., and Gordon A. Coffee, Esq.* for Charles River Associates International

*Patrick J. McCormick III, Esq. and Ted J. Murphy, Esq.* for Dr. Jan Acton

*Philip Bruns, Esq.* for Mr. Robin Gibbs, Mr. Jean Frizzell, and Mr. Julian Fertitta

Docket No. EL03-180-029, *et al.*

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*Donna Attanasio, Esq. and Zori Ferkin, Esq.* for Dr. David Riker

*Channing D. Strother, Jr. Esq. and Philip Chabot, Esq.* for Port of Seattle

*J. Michael Carr, Jr. Esq. and Michael Kurman, Esq.* for the City of Tacoma, Washington

*Melanie Devoe, Esq.* for Public Utility District No. 1 of Snohomish County, Washington

*Deborah Bone, Esq., G. Philip Nowak, Esq., Jerry Rothrock, Esq., and Brian C. Drumm, Esq.* for City of Seattle

*Craig Burgraff, Esq.* for the California Attorney General

*Joel Cockrell, Esq., Edith Gilmore, Esq., and Linda Lee, Esq.* for the Trial Staff of the Federal Energy Regulatory Commission

CURTIS L. WAGNER, JR., Chief Administrative Law Judge

## I. INTRODUCTION

1. On March 13, 2007, Presiding Judge Carmen A. Cintron certified the following question to the Commission pursuant to Rule 714 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.714 (2006) (Certified Question):<sup>1</sup>

Whether a hearing should be initiated to determine if Dr. Jan Paul Acton (Dr. Acton), Charles River Associates (CRA), and Enron's attorneys should be suspended from appearing and practicing before the Commission?

Judge Cintron requested that the Commission determine whether a hearing should be initiated so that any potential decision as to suspension or disqualification of persons appearing before the Commission comports with Rule 2102 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2102(a) (2006). On April 11, 2007, the Commission issued an Order on Certified Question and Establishing Hearing Procedures

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<sup>1</sup> See March 13, 2007 Certification of Question Regarding Suspension of Witness and Attorneys Pursuant to Rule 2102, Docket No. EL03-180-000, *et al.* (Certification Order).

(Order on Certified Question).<sup>2</sup> The Commission directed that a hearing be conducted to determine whether Dr. Acton, Charles River Associates International (CRA), or the Enron attorneys (the Enron Parties) have engaged in unethical or improper conduct. The Commission referred the issues identified in its Order on Certified Question to the Chief Judge for further action in accordance with the guidelines set forth in its order.

## II. BACKGROUND

2. In 2001, Judge Cintron presided over litigation in Docket No. EL01-10, *et al.* surrounding transactions in the Pacific Northwest spot market.<sup>3</sup> That proceeding addressed whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest and the extent of potential refunds.<sup>4</sup> In August 2001, Judge Cintron issued orders requesting transaction data and directed parties to submit data on their spot market transactions in the Pacific Northwest to the Commission using a specific template.<sup>5</sup> Dr. Acton assisted counsel for Enron Power Marketing, Inc. and Enron Energy Services, Inc. (collectively, Enron) in preparing Enron's response to the 2001 Data Orders in Docket No. EL01-10, *et al.*

3. In 2007, Dr. Acton testified in Docket No. EL03-180-000, *et al.* over which Judge Cintron is also presiding. Under cross-examination by Snohomish's counsel, Dr. Acton, provided testimony concerning the completeness of the data submitted to the Commission in the 2001 Pacific Northwest proceeding.<sup>6</sup> As set forth in the Joint Statement of Issues filed by counsel for Enron and Public Utility District No. 1 of

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<sup>2</sup> 119 FERC ¶ 61,036 (2007)

<sup>3</sup> *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy*, Docket No. EL01-10-000.

<sup>4</sup> *San Diego Gas & Electric Co.*, 96 FERC ¶ 61,120, at 61,520 (2001).

<sup>5</sup> See Order on Data Submissions, August 3, 2001, Docket No. EL01-10-000 and Order on Format for Data Submissions, August 9, 2001, Docket No. EL01-10-000 (2001 Data Orders). In pertinent part, the August 3, 2001 data order states that "[t]he record should establish the volume of transactions, the identification of net sellers and net buyers, the price and terms and conditions of the sales contracts, and the extent of potential refunds," and that "[a] future order [(i.e., the August 9, 2001 data order)] will identify specific items to be included in the data submissions."

<sup>6</sup> Tr. at 3416-3445, Docket No. EL03-180-000, *et al.*

Snohomish County, Washington (Snohomish) on January 23, 2007, in Docket No. EL03-180-000, *et al.*, the issues being determined in that proceeding include: (1) whether Enron violated its market-based rate authority from January 16, 1997 to June 23, 2003; (2) whether Enron engaged in gaming or anomalous market behavior during that period; and (3) what are appropriate remedies, if any.<sup>7</sup>

4. The Commission considered the facts contained in Judge Cintron's Certified Question Order, and the attached certified record (including a partial transcript of Dr. Acton's testimony, exhibits referenced in that testimony, and the August 3, 2001 Data Order), in deciding how to act on the certified question. The certified record reveals that Dr. Acton, in assisting Enron counsel, did not release certain data regarding transactions internal to Enron.<sup>8</sup> Dr. Acton testified that the excluded data reflected internal Enron bookkeeping activities and was removed for the purpose of "fairly and accurately" representing Enron's trading with the outside world.<sup>9</sup> Dr. Acton explained that these internal "bookkeeping" transfers were not from one Enron affiliate to another Enron affiliate, but rather were transfers of responsibility for transactions (from one trade desk to another) within the same Enron affiliate.<sup>10</sup>

5. The Order on Certified Question found that the allegation that persons may have withheld materially significant data on Enron transactions in contravention of the 2001 Data Orders is a serious charge that warrants further consideration, but also found that there are issues of material fact that cannot be resolved based on the current record and directed that these issues be resolved through hearing procedures. Thus, the Commission

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<sup>7</sup> Dr. Acton appeared as a witness on behalf of Enron in this current proceeding.

<sup>8</sup> *See, e.g.*, Ex. SNO-1117, Email from Dr. Acton to Guillermo Petrei, David Riker, and gfergus@brobeck.com (August 15, 2001 at 7:25 PM) stating in part, "Guillermo—also note that I will be correcting the counterparty table sent earlier. Gary wants to drop a series of trades (and counterparty descriptions) for a set of counterparties internal to Enron, used for bookkeeping purposes (names like selling to Enron ...);" *see also* Ex. SNO-1118, Email from Dr. Acton to Guillermo Petrei, David Riker, and gfergus@brobeck.com (August 15, 2001 at 7:33 PM) stating in part, "There is a new column: Exclude. Use it to eliminate trades with these counterparties in all our reporting. These are internal trades in Enron for bookkeeping purposes."

<sup>9</sup> Tr. at 3440, Docket No. EL03-180-000, *et al.*

<sup>10</sup> *Id.* at 3438-40, Docket No. EL03-180-000, *et al.*

referred to the Chief Judge the matter of whether, pursuant to Rule 2102, the Enron Parties engaged in unethical or improper conduct sufficient to warrant disqualification.

6. The Commission provided guidance to the presiding judge in order to ensure that any persons accused of improper conduct receive due process of law and that a full and complete record is developed on these matters. The Commission stated in its Order on Certified Question that the “. . . purpose of the hearing shall be to determine whether any person engaged in unethical conduct in violation of Rule 2101, engaged in unethical or improper professional conduct in violation of Rule 2102, or otherwise violated any Commission order or regulation in submitting, or failing to submit, information in response to the 2001 Data Orders.” The Commission directed that the Commission Trial Staff (Trial Staff) participate at the hearing to ensure an adequate record. The Commission directed that the designated presiding judge consider the following questions in conducting the hearing and making a recommendation to the Commission in an initial decision:

(1) The presiding judge shall provide any person alleged to have engaged in such conduct due process of law, including notice and the right to appear and defend against such allegations through the submission of testimony, oral argument and briefs of counsel, or such other procedures as the presiding judge deems appropriate under the circumstances. If a dispute arises with respect to the procedures to be applied, and there is no controlling Commission precedent, the presiding judge should adopt the procedures applicable in the federal courts of the United States as to matters of a similar nature.

(2) In making a determination as to whether any person engaged in unethical conduct in violation of Rule 2101, engaged in unethical or improper professional conduct in violation of Rule 2102, or otherwise violated any Commission order or regulation in submitting, or failing to submit, information in response to the 2001 Data Orders, the presiding judge shall determine whether the 2001 Data Orders were clear and unambiguous with respect to the submission of the data in dispute or, alternatively, whether more than one interpretation of the orders could have been reasonable under the circumstances. The presiding judge shall also determine whether the data in dispute submitted to the Commission in the Pacific Northwest proceeding complied with the 2001 Data Orders.

(3) In making a determination as to whether Rules 2101 and 2102 were violated by a failure to conform to ethical standards, the presiding judge shall consider the ethical standards set forth in ABA Model Rules 3.3, Candor toward the Tribunal, and 3.4, Fairness to Opposing Party and Counsel, including whether any person violated such standards by:

- a. knowingly making a false statement of fact or law to a tribunal;
- b. knowingly failing to correct a false statement of material fact previously made to the tribunal;
- c. knowingly offering false evidence to the Commission;
- d. unlawfully obstructing another party's access to evidence;
- e. unlawfully altering, destroying or concealing a document or other material having potential evidentiary value;
- f. counseling or assisting another person to unlawfully obstruct another party's access to evidence;
- g. counseling or assisting another person to unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

(4) If the presiding judge finds that a person has violated a Commission rule, regulation or order in respect of the foregoing, the presiding judge shall consider:

- a. To what extent was there any actual or potential injury or harm caused by the misconduct?
- b. Are there any aggravating or mitigating circumstances the Commission should consider?
- c. Are there any other pertinent factual considerations, beyond what has been addressed here, that need explication?

(5) If the presiding judge finds that a person has violated a Commission rule, regulation or order in respect of the foregoing, the presiding judge shall identify, with specificity, the person(s) that committed the violation, set forth the factual and legal basis for concluding that such violation occurred, and determine whether a remedy is appropriate under the circumstances. If the presiding judge also finds that a business, partnership or corporation should be held responsible for any such violation, the presiding judge shall set forth, with specificity, the factual and legal basis for holding any such business, partnership or corporation responsible for such violation and determine whether a remedy is appropriate under the circumstances.

(6) If the presiding judge finds that no violations have occurred, or that no action by the Commission is necessary, the presiding judge shall make such recommendation.

7. On April 16, 2007, the Chief Judge issued an order scheduling a prehearing conference for April 20, 2007, for the purpose of discussing the issues involved, the procedures to be applied, the magnitude of evidentiary submissions, whether matters can

be stipulated, whether discovery will be necessary, and a timeframe for a procedural schedule. Docket Nos. EL03-180-029, EL03-154-023, EL02-114-024, EL02-115-028, and EL02-113-026 were established for this portion of the proceeding. At the April 20, 2007, conference the Chief Judge granted motions to intervene, set a date for filing motions to intervene, admitted documents into evidence as Items by Reference, and established a procedural schedule leading to a hearing on July 9, 2007. At that conference the Chief Judge also directed CRA to submit three data sets: one containing the original production by Enron to Judge Cintron's Order on Data Submissions issued on August 3, 2001 in Docket Nos. EL01-10-000 and EL01-01-001 (August 2001 production); the second containing the intra-Enron data that was excluded from the August 2001 production; and the third containing the August 2001 production modified to include the excluded data.

8. The established procedural schedule provided for a further hearing/conference on May 14, 2007, for the purpose of determining whether any persons identified in the April 24 and April 30, 2007 submissions may be eliminated from the proceeding. On April 24, 2007, the Chief Judge designated himself as the presiding Judge in these proceedings.

### III. DISCUSSION

9. As directed by the Chief Judge at the April 20, 2007 conference, Enron attorney Mr. Gary Fergus and Ms. Bonnie J. White of Enron, on April 24, 2007, submitted affidavits listing all persons who worked in any capacity in Docket No. EL01-10-000 proceeding on behalf of Enron (Identified Persons). The persons listed are: individuals employed by Enron: James Steffes, Alan Comnes, Richard Sanders, Esq., Robert Frank, Esq., Robert Williams Esq., Tim Belden, Jeff Richter, and Sean Crandall. Individuals from Bracewell & Patterson, L.L.P.: Jeffrey D. Watkiss, and to a very limited extent Shelby Kelly. Individuals from Gibbs & Bruns, L.L.P.: Robin Gibbs, and Jean Frizzell. In addition, Julian Fertitta worked as an independent contractor for Gibbs & Bruns in connection with this matter. Individuals from Brobeck, Phleger & Harrison, LLP: Gary Fergus. Individuals from Stoel Reeves, L.L.P.: Steve Hall. Individuals from CRA: Jan Acton, David Riker, Mr. Michael Hunter, and Guillermo Petrei

10. The following persons filed affidavits in these proceedings: Jean C. Frizzell (attorney, Gibbs & Bruns, L.L.P. (Enron Civil Litigation attorneys)), Robin C. Gibbs (partner of Gibbs & Bruns, L.L.P. (Enron Civil Litigation attorneys)), Julian J. Fertitta III (attorney, Grimes & Fertitta (assisted Gibbs & Bruns in 2001 as a contract attorney for a case involving Enron)), Michael C. Kuhn (attorney at Bracewell & Giuliani, formerly Bracewell & Patterson (represented Enron in the EL01-10 proceeding)), L.L.P, Jeffrey D. Watkiss (attorney at Bracewell & Giuliani, formerly Bracewell & Patterson, L.L.P. (represented Enron in the EL01-10 proceeding)), Shelby J. Kelley (attorney at Bracewell & Giuliani, formerly Bracewell & Patterson, L.L.P. (represented Enron in the EL01-10

proceeding)), Gary S. Fergus (partner at Brobeck, Phleger & Harrison, LLP (represented Enron in EL01-10)), Amanda Smith (an assistant to Gary Fergus), Richard Sanders (Assistant General Counsel for Enron Wholesale Services/Enron North America), Stephen Hall (partner at Stoel Rives LLP), David A. Riker (Vice President in the Energy and Environment Practice of CRA), Robert J. Larner (Head of CRA's competition practice), James M. Speyer (head of the Energy and Environment Practice of CRA). Affidavits were also filed by Enron employees Raymond J. Alvarez, G. Alan Comnes, and Robert C. Williams. In addition, written views of participants were submitted by Dr. Jan Paul Acton, a CRA Vice President and person in charge of the Enron Project in August, 2001; one of Enron's outside Counsel, Gary S. Fergus; and the Port of Seattle, all of which are part of the record herein.

11. At the conclusion of the prehearing conference, counsel for Trial Staff endeavored to make a significant number of data requests. In response, Trial Staff received several affidavits and thousands of pages of documentary evidence and held a technical conference.

12. Port of Seattle's exhibits POS-1 through POS-27 were described and marked for identification at the hearing/conference held on May 14-15, 2007, but not offered nor admitted into evidence because counsel did not have copies available. Rather than offering the documents as late-filed exhibits, counsel, with the Chief Judge's approval, elected to file the documents as supplemental exhibits to the April 30, 2007 written comments of the Port of Seattle. The supplemental exhibits were filed with the Secretary of the Commission on May 21, 2007, and are contained in e-Library. The Chief Judge does not find the exhibits to be relevant to the sole narrow issue in this proceeding concerning the matter of whether the Enron Parties engaged in unethical or improper conduct sufficient to warrant disqualification by withholding spot sales data of the seven counter-parties in their data submission to the ALJ in Docket No. EL01-10, *et al.*

13. At the hearing/conference held on May 14-15, 2007, the Chief Judge eliminated one-by-one Identified Persons from the proceedings after reviewing affidavits filed by them, taking testimony where necessary, and admitting exhibits in evidence, all Identified Persons were eliminated, *i.e.* no person was left in the proceedings. Under the circumstances, the Chief Judge canceled the July 9, 2007 hearing date. The Chief Judge gave the participants the right to file briefs, but since no one expressed any desire to file a brief, the Chief Judge waived the filing of briefs for all parties. The Chief Judge was convinced that none of the Identified Persons and entities was guilty of any misconduct or impropriety and that there was no motive or intent to in any way deceive or withhold any data or information from Judge Cintron or the Commission. No party objected to the elimination of these individuals from the proceedings. Specifically, the Chief Judge dismissed the following Identified Persons from the proceeding: David A. Riker, Jean Frizzell, Robin Gibbs, Julian Fertitta, Bonnie J. White, Gary S. Fergus, Michael C. Kuhn,

Jeffrey D. Watkiss, Shelby J. Kelley, Alan Connes, Amanda Smith, Richard Sanders, Robert C. Williams, Stephen Hall, Dr. Jan Acton, Guillermo Petrei, Michael Hunter, all employees of CRA included in the Chief Judge's Exhibit 1 (CJ-1), and all employees from the law firm of Bracewell & Giuliani (formerly Bracewell & Patterson).

14. In dismissing Enron attorneys Robin Gibbs, Jean Frizzell, and Julian Fertitta, the Chief Judge found that these individuals had no knowledge of the information provided by Enron in the earlier proceeding, and that they merely filed the information provided to them as exhibits or information responses with no knowledge of any data being left out.<sup>11</sup>

15. CRA's Motion for Dismissal, the declarations of Robert Lerner and James Speyer, the affidavit of David Riker, and the statements made by counsel on the record convinced the Chief Judge that the role of CRA and its employees who were involved in the preparation of the data submitted in ER01-10, *et al.*, was purely ministerial in nature. CRA merely complied with Enron's counsel direction to exclude certain categories of transactions from the data that CRA had compiled because they were internal trades in Enron for bookkeeping purposes. Dr. Riker, in his Affidavit, states that his role in compiling and submitting the data that was provided by Enron in response to Judge Cintron's August 2001 Data Orders was mainly to provide technical assistance in developing programming code for the software package. He was not an expert in energy matters and made no policy decisions whatsoever concerning the data to be furnished to the Commission. While Dr. Jan Acton was a Vice President of CRA, the record herein shows that the overall management of CRA is not vested within each Vice President. As Mr. Lerner of CRA states in his Declaration, under CRA's business structure in 2001, employees were organized into practices. The head of each practice had oversight authority over the activities of employees within his or her practice. The Executive Committee had firm-wide authority to resolve operational and strategic issues. Mr. Lerner further states that neither he nor the Executive Committee had any involvement in supervising or monitoring CRA's role in compiling the data in connection with any Enron data project submitted to the Commission in August 2001. This was solely within Dr. Acton's practice group. CRA's Mr. Speyer's declaration states that Dr. Acton was the Officer-in-Charge for the Enron project in August 2001. As the Officer-in-Charge, he was responsible for all aspects of the relationship with the client and directed his team in discharging the tasks given by his client. However, the extent of the assignments by Enron's attorneys to CRA was limited to formatting data that was responsive to instructions provided by Enron's counsel from a larger set of data that counsel and Enron had provided. The data formatting did not involve expert analysis or expert testimony.

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<sup>11</sup> *See*, Tr. p. 85.

Dr. Acton was a non-testifying consultant in that case, and he made no policy decisions in what data was to be included. Neither CRA nor Dr. Acton was asked by Enron's counsel to interpret the data request.<sup>12</sup>

16. Ms. Shelby Kelly's testimony and affidavit demonstrated that she was not involved with making any of the decisions on what data was to be included in the compilation.<sup>13</sup> Mr. Jeffrey Watkiss' on-the-record testimony and affidavit showed that while he was kept up to date with the status of the compilation, he was not aware at the time and was not told of the exclusion of the seven counter-parties. Mr. Watkiss testified that he only became aware of the exclusion when he was preparing his affidavit for this proceeding:<sup>14</sup>

PRESIDING JUDGE: Mr. Watkiss, were you aware that these seven [s]ells [sic] to, I'll call them "intracompany" Enron Company, were excluded from the material that you furnished the Commission?

THE WITNESS: As I was preparing this affidavit, I became aware of that. At the time of the submission, I have no independent recollection that I had anything to do with that, or had any awareness of it.

PRESIDING JUDGE: Did you have any part in preparing the data that was submitted to the Commission, or Judge Cintron?

THE WITNESS: As I indicated to my counsel, Your Honor, I am sure that as part of that bigger group that was the Virtual Law Firm, including the people who were working directly with Charles River in trying to sort through all of that data, that questions would have been asked of me based on my experience in the energy industry as to what was responsive and what wouldn't be responsive, and we had those discussions. As those were actually applied in the--as those discussions were actually applied in sorting through all of this and answering the template, I wasn't involved at that level.

PRESIDING JUDGE: So it was not your decision to exclude those seven entities?

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<sup>12</sup> See Exhibit A-1 and Tr. pp. 57 – 62.

<sup>13</sup> See Chief Judge's Exhibit 2.

<sup>14</sup> See Tr. pp. 102 – 103.

THE WITNESS: No, Your Honor.

17. After considering Mr. Watkiss' affidavit and testimony, the Chief Judge found that Mr. Watkiss had no part in eliminating the seven counter-parties from the data, and dismissed him from the proceeding.<sup>15</sup>

18. Mr. Gary Fergus' submission in his response to Trial Staff's Data Request No. 1<sup>16</sup> and his testimony on the record<sup>17</sup> indicates that there was some confusion regarding the Enron data response to Judge Cintron's orders of August 3, August 9, and August 13, 2001 in Docket No. EL01-10-000 which resulted in a telephone call to Enron's Tim Belden. However, the record demonstrates that Mr. Fergus and other Identified Persons named in his data response were not guilty of any impropriety or misconduct. In fact, the ultimate decision on what data to include in the data submission appears to have been made by Mr. Tim Belden. Mr. Fergus testified at length as follows:<sup>18</sup>

Q. Now you describe this in detail in paragraph 44 of your affidavit and I won't ask you to do that word-for-word again, but did it become clear to you in that conversation late at night on the 15th from somebody, and if so, who and how, that this needed to be checked with the client before we went any further?

A. Yes. When we got through going through that counter-party list with the contract information, my recollection is Mr. Frizzell, who had started working on this from the Gibbs, Bruns firm maybe six or seven days earlier, he said he was uncomfortable just relying on the results of the examination of contracts from the Houston office and using that for purposes of the data submission and he said we need sign off from the client. And my recollection is I was in Washington, D.C. They were in Houston and I believe Mr. Gibbs was there and I can't be certain of that, but I do recall Mr. Frizzell saying I'm not comfortable. We've got to call the client. At which point, I believe they added in Tim Belden. I say that for a couple of reason is that Tim Belden was the person, when we had questions about

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<sup>15</sup> See Tr. p. 155.

<sup>16</sup> Exhibit ENR-1.

<sup>17</sup> See Tr. pp. 169 – 256.

<sup>18</sup> Tr. pp. 182 – 185.

the data submission, we went to. He had the substantive answers. We went back through the counter-party list, the information --

Q. With Mr. Belden?

A. With Mr. Belden to confirm that it was correct, that what we were looking at --

Q. What did he say?

A. What I recall is that we were told, no, the information you're relying on, the Houston Contract office does not have all of the information. It's not current. This information that you've got is incorrect with respect to the contract information for some of these counter-parties. But in addition, you have listed as counter-parties on this entities for which there aren't transactions. These are, you know, internal Enron desks, I believe. And I cannot recall the reasons specifically as to what he said about Enron Canada. I just have no recollection of Enron Canada and EES. I did know from other work that I had done that EES was retailed in California and the load manager for EES had told me just a month before that the way they operated, for example, when they would make a deal with a broker for energy they would then call up EPMI, EPMI would be the counter-party and then actually acquire the energy for them. I'd been told earlier and believe it was by Jeff Richter they did that for a pass-through cost.

Q. So that was at transfer at cost?

A. Plus some fee. There was some fee.

Q. But at cost.

A. Correct. I can't swear that that's the reason that was given that night, but I know that was certainly something I knew at that point in time. When we got done, I started over. I created a new column that had "exclude" and we went through it and based on the factual information that was provided -- and I believe it was Mr. Belden, we put or I put marks, x's next to those seven entities. When that was done, I read through it and confirmed to I believe Mr. Frizzell and Mr. Gibbs that this is, in fact, what was to be done. And once that was confirmed and we were right on the critical path, this was now, you know, getting right before I think 10 o'clock on East Coast time and it was going to take Charles River all night to process that data just so we could make our deadline. And as soon as I'd confirmed that, I e-mailed the results to Dr. Acton and said, you know, this is what you should do.

Q. And you sent him the list that he then used?

A. Yes. And that list that I sent him listed seven counter-parties with x's.

Q. The next day did you communicate what had transpired to Mr. Watkiss?

A. Yes, I did. What I can't remember in detail is I am certain I told him that we had finally resolved, you know, the contract issue. I cannot say that, you know, that we discussed in detail what the actual mechanics were and which were the seven, but I know I reported to him on what had happened because I was worried we weren't going to make our deadline.

19. Again, as noted previously herein, Mr. Fergus made no policy considerations on the data to be excluded, but merely relied on Mr. Tim Belden in instructing Dr. Acton to exclude data concerning the seven counter-parties.

20. Pursuant to the Chief Judge's direction, CRA, on May 4, 2007, submitted the three sets of data. This document was marked as Exhibit CJ-5. The submission includes a statement of Mr. Ira Shavel, a CRA employee who supervised the preparation of the data sets and specifies the data files and programs utilized in the process. The submission also includes an overview of the method used by Mr. Shavel to locate the input files and programs used to produce the August 2001 production, and to use those data and programs to measure the implications of excluding the seven counter-parties. The charts identify the type of transactions that were omitted from Enron's August 2001 production, the quantities involved, in terms of MWh, value, and number of transactions.

21. The data and Mr. Fergus' testimony reveals that that the following seven counter-parties were screened out of the information submitted by Enron in the August 2001 production:

1. Energy Services, Inc.
2. Enron Canada Corp.
3. Enron Energy Services, Inc.
4. EPMI California Pool
5. EPMI Short Term Hourly
6. EPMI Short Term West Services

## 7. ST Alberta

22. The results of this exercise revealed that the total amount of additional sales that were previously excluded from the seven counter-parties is 13,960 MWh. This compares to the total reported amount of sales in the revised filing of 5,465,021 MWh—approximately 0.3 percent.<sup>19</sup> Attachment 2 of Exhibit CJ-5 shows the same information, but for Spot transactions. Of the 13,960 MWh, the total MWh for what would later be considered Spot is 1,560 MWh—out of a total of 2,682,249 MWh reported, or 0.1 percent.<sup>20</sup>

23. The total amount of additional Intervenor purchases that were previously excluded from the seven counter-parties is 6,400 MWh, compared to the total reported amount of Intervenor purchases in the revised filing of 2,274,957 MWh, or approximately 0.3 percent. Of the 6,400 MWh, none were for transactions that were subsequently included in Judge Cintron's determination of Spot transactions in the Pacific Northwest. The total amount of additional Non-Intervenor purchases that were previously excluded from the seven counter-parties is 13,913 MWh, compared to the total reported amount of Non-Intervenor purchases in the revised filing of 3,023,470 MWh, or approximately 0.5 percent. Of the 13,913 MWh transactions, 10,113 MWh were for transactions that were subsequently included in Judge Cintron's determination of Spot transactions in the Pacific Northwest out of a total of 1,690,595 MWh, or approximately 0.6 percent.

24. A similar pattern occurs for the Total Value and Records variables, as shown in Attachments 1 and 2 of Exhibit CJ-5. Attachment 3 provides the details for each of the excluded counter-parties.<sup>21</sup>

25. Despite the infinitesimal dollar impact that resulted from the elimination of the seven counter-parties from the data submission, Trial Staff witness Daniel Poffenberger testified on the record that the transactions outside of the Pacific Northwest, such as the involved Enron Canada Corporation transactions, were not contemplated by the template.

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<sup>19</sup> CJ Exhibit 5, Attachment 1.

<sup>20</sup> CJ Exhibit 5, Attachment 2.

<sup>21</sup> CJ Exhibit 5, Attachment 3.

In addition, Mr. Poffenberger testified that in his view the intra-company transactions are simply accounting entries not subject to the Federal Power Act:<sup>22</sup>

Q. Are all of the transactions on these 51 pages appear to be some kind of intracompany transactions within Enron?

A. I don't know if they're intracompany transactions. It's possible. But I guess there are certain counter-parties that I don't know would necessarily be reported as part of the template. For example, there are two listings for Enron Entergy Services, which my understanding is retail and I believe I've read some -- I don't know if it's in the affidavits or responses to staff data request in this proceeding where those are really pas[r]t [sic] of cost-based transactions and we did not request cost-based transactions to be reported as part of the template and at the bottom you've got purchases -- transactions where Enron is purchasing. Here again, you have Enron Canada, ST Alberta. I'm assuming those are transactions that could possibly fall outside of the scope of what was required in the reporting for the template. And I guess the other thing too is here you have Enron reporting purchases which I don't see -- that probably -- that would help Enron to perhaps deflect counter-claims of other parties in the 2001 proceeding where they might possibly be seeking refunds and here this would allow them to have data as to what they actually paid the buyer. So I don't know why they would, you know, want to exclude anything like that, but to the extent they did, I guess it would be to their detriment. Just off the top of my head, that's the way I would think of that. So really the only transactions here that perhaps I can't explain would be under the counter-party where Enron is the seller where you have EPMI, Short-Term West Services 190 megawatts of volume and \$32,775 and you compare that to the magnitude of what Enron submitted in the 2001 proceeding it doesn't even show up as a blimp. It's very small.

Q. Would it be your view as one of the template, albeit, modified by Judge Centron [sic] that other than that 32,000 odd dollars, that a reasonable person might have excluded these transactions from the template material that they submitted -- I think in Enron's case on August 20, 2000?

A. Right.

Q. Okay. Do intracompany transactions result in the physical delivery of electricity?

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<sup>22</sup> See, Tr. pp. 161 – 163.

A. I guess to the extent it's canceled out or something there would be no physical delivery. There would be no scheduling of that transaction is my understanding.

Q. I'm going to read you a quotation from Judge Centron. It's page 185 of Judge Centron's [sic] initial decision in EL01-10 and she states -- this is at 96 FERC, paragraph 63044 issued on September 24, 2001. Judge Centron states, "Since bookouts do not result in the physical delivery of electricity at any time, much less in the immediate spot market, such transactions cannot fall into the definition of spot market in the scope of this proceeding. The inclusion of bookout transactions also cannot be reconciled with clear precedents that bookout transactions are not subject to the Federal Power Act in the first instance." If you substitute these intracompany transactions for the word "bookout," assuming they don't result in the physical delivery, would it be your view that they might also fall outside the scope of the ELO-1-10 [sic] proceeding.

A. Right. Well, they wouldn't be a definition of the spot market transactions. It's just zeroed out. It's an accounting entry, I believe.

26. Trial Staff witness Poffenberger's testimony demonstrates that most, if not all, of the seven counter-parties' data that was omitted from the filing in the EL01-10, *et al.* proceeding was done so correctly since it was not contemplated that such data be included. The only exception was EPMI Short Term West Services, and as to this entity he simply did not know what was involved. Again, this shows that there was no intent to deceive or withhold information on the part of Dr. Acton, the CRA personnel working under him, nor the Enron attorneys.

27. Further, the record in this case is clear that neither Dr. Acton, the CRA personnel doing the actual number crunching, nor the Enron attorneys made any policy determinations concerning the deletion of the data applying to the seven counter-parties. As pointed out before herein, Dr. Acton was not employed to submit any expert testimony in the involved proceeding, nor was he to suggest policy considerations. He and his CRA assistants were employed merely to put the numbers together for the ordered filing since this was too big an undertaking for the Enron legal staff, especially with the involved short filing time frame.

28. Mr. Poffenberger designed the template for the EL01-10, *et al.* proceedings. He certainly should be given great deference as to what data should have been included in the filing. Under the circumstances, the interpretation placed on the 2001 Data Orders by the Enron Parties appears to be reasonable. Aside from the fact that most of the omitted transactions were merely a transfer from one trading desk to another within the same company, some of the counter-parties were retail sellers which were not in the involved

“spot market,” and at least two were Canadian companies. The Enron Parties’ submission in issue would appear to be in full compliance with the 2001 Data Orders.

#### IV. CONCLUSION

29. The investigation conducted by the Commission Trial Staff, the numerous affidavits submitted by the named involved persons, the arguments and statements of counsel, and the testimony given at the hearing/conference held on May 14-15, 2007, demonstrates an absolute void of any action by any person that was in any way a violation of Rules 2101 and 2102 of the Commission’s Rules of Practice and Procedure,<sup>23</sup> *i.e.*, there is absolutely no evidence in this case that any person engaged in any unethical or improper professional conduct in connection with the data on Enron transactions in contravention of the involved 2001 Data Orders. Further, even if the omitted transactions of the seven counter-parties should have been provided, which it appears there were not, the dollar amount involved was an infinitesimal less than 0.1 percent of the total Enron sales in the spot market.

30. Again, it is pointed out that no party or participant objected in any way to the Chief Judge’s findings on an individual basis at the May 14-15, 2007 hearing/conference that the individual should be eliminated from the proceedings. In other words, no party or participant indicated that it believed any named person was guilty of any unethical or improper professional conduct.

31. It is also emphasized that no party or participant desired to file a brief.

#### V. RECOMMENDATION

32. As pointed out in detail before herein, the Chief Judge finds that no violations of Rules 2101 and 2102 of the Commission’s Rules of Practice and Procedure have been committed by any person in connection with Enron’s submission in compliance with the 2001 Data Orders in Docket No. EL03-180, *et al.* The Chief Judge recommends that no

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<sup>23</sup> 18 C.F.R. § 385.2101 and 2102 (2006).

Docket No. EL03-180-029, *et al.*

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action by the Commission is necessary and that these proceedings on the Commission's March 13, 2007, Order on the Certified Question regarding suspension of witnesses and attorneys be terminated.

Curtis L. Wagner, Jr.  
Chief Administrative Law Judge