

**UNITED STATES OF AMERICA 105 FERC ¶ 63, 016
FEDERAL ENERGY REGULATORY COMMISSION**

**Portland General Electric Company
Enron Power Marketing, Inc.**

**Docket No. EL02-114-006
Docket No. EL02-115-007**

**PRESIDING JUDGE'S CERTIFICATION OF UNCONTESTED
PARTIAL SETTLEMENT AND COMMENTS
CONCERNING COMMISSION CONSIDERATION**

(Issued November 10, 2003)

TO THE COMMISSION:

1. On September 26, 2003, Portland General Electric Company (Portland), Federal Energy Regulatory Commission Trial Staff (Staff), the People of the State of California, *ex rel.* Bill Lockyer, Attorney General (California AG), the California Public Utilities Commission (CPUC), the City of Tacoma Washington (Tacoma), the Oregon Public Utility Commission (Oregon PUC), Enron Power Marketing, Inc. (Enron or EPMI), Industrial Customers of Northwest Utilities (ICNU), and Blue Heron Paper Company (Blue Heron) (collectively "the Parties") all filed an Offer of Settlement ("Settlement Offer" herein) in the above captioned case. If approved, the proposed settlement would fully resolve all issues which were set for hearing in these proceedings as to Portland.

CASE SUMMARY

2. On February 13, 2002, the Commission established in Docket No. PA02-2-000 a "Staff Investigation of Potential Manipulation or Other Exercises of Undue Influence Over Wholesale Electric and Natural Gas Prices in the West" for the period January 1, 2000 forward (herein referred to as the "PA02 Proceeding."). *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC & 61,165 (2002). During the course of the Commission's fact-finding investigation, Portland conducted an internal investigation that disclosed certain posting errors regarding its trades with its affiliate EPMI. Portland requested a meeting with Commission Enforcement Staff to report these errors, which was held on April 15, 2002. At that meeting, Portland provided spreadsheets to Enforcement Staff detailing what Portland had found.

3. A few weeks later, as part of its investigation in the PA02 Proceeding, the Commission became aware of Enron memoranda that described trading strategies allegedly employed by Enron's electricity traders in the West. After receiving the memoranda on May 6, 2002, on May 8, 2002 the Commission issued data requests to

Docket No. EL02-114-006

2

Docket No. EL02-115-007

identified sellers of wholesale electricity and/or ancillary services in the West seeking information about their knowledge and use of the Enron trading strategies. Portland responded to this data request on May 22, 2002 (even though Portland was not served with the data request), essentially stating that it had not been aware of these strategies. Portland also responded to two more sets of industry-wide data requests issued by the Commission (dated May 21 and May 22, 2002) regarding electric and gas trading strategies.

4. Based on Portland's May 22, 2002 response, the Commission issued an order on June 4, 2002 in that proceeding finding that Portland and others had failed to cooperate with the Commission investigation and ordering those companies to show cause why their authority to charge market-based rates should not be revoked as a result of their failure to comply with the investigation. *Order to Show Cause Why Market-Based Rate Authority Should Not Be Revoked*, 99 FERC & 61,272 (2002). In response, Portland provided data regarding its purchases and sales during 2000-2001 and related trading and transmission transcripts. On August 1, 2002, Portland provided further information to Enforcement Staff in the PA02 Proceeding regarding the posting errors it previously had disclosed. Using Enforcement Staff's definition of what constituted a posting error, Portland performed a comprehensive analysis of its affiliate trades over the period 1999-2001 and provided Enforcement Staff with a complete list of transactions for which posting had not been made in accordance with the Enforcement Staff's criteria.

5. On August 13, 2002, the Staff issued an Initial Report in the PA02 Proceeding finding, among other things, that preliminary evidence indicated that Portland and EPMI may have violated their codes of conduct and the Commission's standards of conduct which govern a power marketer's relationship with its traditional public utility affiliates. The Commission established a separate proceeding under section 206 of the Federal Power Act (FPA) in Docket No. EL02-114-000, and set for hearing the issues of whether Portland violated its code of conduct, its market-based rate tariff, or the Commission's standards of conduct in its transactions with EPMI. *Portland General Electric Company and Enron Power Marketing, Inc., Order Initiating Investigation, and Establishing Hearing Procedures and Refund Effective Date*, 100 FERC & 61,186 ("August 13, 2002 Order" herein).¹ The hearing's purposes were also to address the issues of appropriate

¹ On December 23, 2002, the Chief Judge severed the Non-Avista third-party transaction issues in Docket No. EL02-115-000 and consolidated these issues into the ongoing proceeding in Docket No. EL02-114-000 for hearing and decision, to be heard under Docket No. EL02-115-001. *See, Avista Corp., Avista Energy, Inc., Enron Power Marketing, Inc., Portland General Electric Corporation, and Portland General Electric Company, Inc., Order of Chief Judge Suspending Procedural Schedule, Severing, Consolidating Issues, and Denying Motion for In-Camera Review*, issued December 23, 2002.

Docket No. EL02-114-006

3

Docket No. EL02-115-007

remedies and whether Portland did in fact provide all relevant information during the investigation.

6. Staff and Intervenors conducted their investigation over a several month period. The investigation included, among other things, a field audit in Portland, numerous meetings in Washington, DC, numerous discovery requests and depositions. Although the Commission's Order decreed that the investigation was to span the period January 1, 2000 forward², the testimony and exhibits filed in this proceeding indicate that Staff only examined a few of those months in detail on a transaction basis. The Parties assert that, due to time limitations, as well as Portland's vigorously maintaining that it could not possibly transcribe all the tapes for the 2000 – 2001 period, Staff was only able to examine transcripts for the 17 days of transactions which Portland reported and for select days in May, June, August, and December 2000 for which Staff transcribed conversations from 'wav' files that Portland provided.

7. Pursuant to the procedural schedule in this proceeding, Staff filed its Statement of Asserted Violations on November 14, 2002. Staff filed its Direct Testimony and Revised Asserted Violations on December 10, 2002. The Revised Asserted Violations generally alleged that Portland violated Sections 205 and 206 of the Federal Power Act, its code of conduct, its market-based rate tariff, and Portland's Energy Trading Policy and Procedures by (1) engaging in transactions with EPMI during April - June 2000 that are believed to have circulated power out of and back into California (the "17-day transactions"), and using a marketing sleeve as part of those transactions, (2) failing to report concerns regarding these transactions to ethics or legal officials, and (3) failing to properly post certain affiliate transactions. The California AG and the CPUC (jointly) and Tacoma filed their Direct Testimony on December 17, 2002. Portland and EPMI filed their Answering Testimony on February 24, 2003. The California AG and the CPUC (jointly), Staff, and Tacoma filed Supplemental Direct and Rebuttal Testimony on May 12, 2003. Staff filed a Second Revised Statement of Asserted Violations on May 12, 2003.³

² See, August 13, 2002 Order, at paragraph 3.

³ The full text of Staff's Second Revised Assertions can be accessed at <http://ferris.ferc.gov/idmws/nvcommon/NVViewer.asp?Doc=9694914:0>

THE PARTIAL OFFER OF SETTLEMENT

8. On September 26, 2003, the Parties filed an Offer of Settlement. Concurrently, the parties also filed a Joint Motion to Suspend Procedural Schedule in the above-captioned dockets and a Joint Motion to Transfer Allegations Related to EPMI, Inc. The parties sought to obtain suspension of the procedural schedule in the above-captioned dockets until approval of the Settlement Offer, a severance of the allegations against EPMI, and consolidation of those allegations with related proceedings pending in docket EL03-154-000. Because the Procedural Schedule in this proceeding had been specifically limited by Chief Judge Curtis L. Wagner, Jr., it was up to Judge Wagner to rule on the requests affecting the Procedural Schedule in the case. He granted both of the requests on October 1, 2003 in an *Order of Chief Judge Suspending Procedural Schedule, Severing, and Consolidating Proceedings*.

9. Article I contains a general description of the events that led to the institution of this proceeding, the investigation that followed, the testimony that has been filed, the assertions made against Portland and its responses, and the current procedural posture of the case. This Article explains that the Signatories make no determination regarding any of the alleged violations except for a limited number of posting violations, to which Portland admits⁴. Rather, the Settlement Offer includes an Agreement and Stipulation ("Agreement") that sets forth the Signatories' stipulation as to undisputed facts and agreement on certain remedies and conditions as a means to resolve this proceeding. The stipulated facts include (1) a description of how Portland discovered and reported to the Commission affiliate posting errors and the actions Portland took as a result of these errors; (2) a description of the so-called "17-days" transactions that were investigated in this proceeding; and (3) a description of Portland's efforts to cooperate with the Commission's investigation in the PA02 proceeding, the June 4, 2000 show cause order, and the Staff's investigation in this Docket. Article I also explains that the Offer of Settlement is conditioned on the Commission making no adverse findings as to Portland (other than the simple finding that there were posting errors, and nothing more) in an order that approves the Offer of Settlement in its entirety, without modification or condition.

10. Article II explains that the Signatories have been advised that the Settlement Offer is uncontested. It further explains that the Agreement addresses the issues regarding Portland in this proceeding without the need for full litigation and a decision on the merits by the Commission. Article II also addresses the remedies that the Agreement contains. Portland will pay a settlement amount of \$8.5 million to California parties, Oregon, Tacoma, ICNU, and Blue Heron in accordance with the allocations contained in Exhibit A to the Settlement. Portland also agrees to a twelve-month suspension of its market-based rate authority as to new transactions, in accordance with the tariff

⁴ See, Appendix A, Paragraph 4(a) at page 2.

Docket No. EL02-114-006
Docket No. EL02-115-007

5

amendment set forth in Exhibit B to the Settlement. In addition, Portland agrees to implement certain procedures in the future. These procedures include increasing training and related document retention on code of conduct and affiliate issues and maintaining recordings of affiliate trading transactions, affiliate postings, and related accounting records for five years. Portland also agrees to cooperate with California investigations. The Parties point out that the Settlement Offer resolves proceedings pending before administrative agencies other than the Commission, as well as certain court proceedings, and commits Portland's cooperation in other ongoing investigations.

11. Finally, Article II contains language that constitutes the core arguments of the Parties as to why the Commission should approve the Settlement Offer. The Parties assert as follows:

The information produced during the last year of discovery and submitted in pre-filed testimony demonstrates that the Offer of Settlement is fair and reasonable, and should therefore be approved as consistent with the public interest.

* * *

The Agreement further serves the public interest by increasing Portland's training and related document retention for code of conduct and affiliate issues, and by ensuring the maintenance, for five years from the date of final Commission approval of the Agreement, of Portland's recordings of affiliate trading transactions, affiliate postings and related accounting records. This will facilitate Commission review of Portland's ongoing compliance with its code of conduct and the Commission's affiliate rules.

Finally, as noted in Paragraph 14 of the Agreement, the Agreement resolves other pending administrative and court proceedings, and commits Portland to cooperate in other ongoing investigations. This benefit should not be overlooked, given the vast amount of litigation spawned by the Western energy crisis of 2000-2001, most of which is not completed.⁵

12. Article III of the Settlement Offer references the Settlement Amount, Exhibit A of the Agreement and Exhibits A-1, A-2, A-3, A-4 and A-5. Exhibit A sets forth the

⁵ See, Settlement Offer at pages 7 & 8.

Docket No. EL02-114-006

6

Docket No. EL02-115-007

allocation of the settlement amount to specified entities, and Exhibits A-1, A-2, A-3, A-4, and A-5 describe how the funds will benefit retail customers.

13. Article IV explains that the Settlement Offer resolves only issues related to Portland, and is expressly conditioned on the transfer of allegations relating to EPMI to the pending proceeding in Docket No. EL03-154, consolidated with Docket Nos. EL03-137, et al., where alleged gaming practices are already the subject of a pending proceeding. (As noted previously, this transfer/consolidation has already taken place.) It also explains that the subject matter of Docket Nos. EL03-137, et al. includes alleged circular schedule transactions, the same gaming practice in dispute in this proceeding, and that the parties prefer to pursue the EPMI allegations in that docket, both to avoid duplication and to maximize global settlement possibilities.

14. Article IV expresses EPMI's support for the transfer, provided that the substantive and procedural issues set out in the Hearing Order, including the burden of proof, do not change. Article IV then summarizes the conditions of the transfer, which are more fully and expressly set forth in the Agreement. Finally, Article IV recognizes that the Commission has jurisdiction over the requested transfer, and relates that the Signatories are concurrently filing with the Commission a separate, conditional Joint Motion to Transfer.

15. Article V represents that the Settlement Offer is either joined or unopposed by all of the participants in the proceeding (the "settling parties"), and that it is signed by all of the participants that have filed testimony. The Signatories are unaware of any party that intends to contest the Settlement Offer. If, however, any party does contest the Settlement Offer, Article V requests that it be certified to the Commission as uncontested as to the settling parties. To the extent that any party contests the Settlement Offer, Article V requests that those parties be severed for purposes of hearing and decision. Commission case law supporting this procedure is cited. In this event, Article V provides that the hearing process that remains as of the date of the filing of the Settlement Offer be rescheduled as to the contesting parties.

16. Article VI explains that the Settlement Offer not only resolves an extended and complex set of issues, but also, it includes procedural provisions, the timing of which affects all parties. It cites the transfer of the EPMI issues to Docket No. EL03-154, and the procedural schedule that has been established for the consolidated Docket No. EL03-137, et al. cases, and it also refers to the possible need to sever the instant proceeding as to contesting parties, if any. For these reasons, the Signatories request expeditious treatment of the Settlement Offer.

17. Article VII asserts that the Settlement Offer represents a delicate balance of interests, negotiated over a period of several months. The Parties reiterate their request that it be certified to by the undersigned and approved by the Commission as a full and

Docket No. EL02-114-006

7

Docket No. EL02-115-007

final resolution of the issues set for hearing as to Portland, without condition or modification.

COMMENTS ON THE PROPOSED SETTLEMENT

18. On October 16, 2003, Staff and Tacoma filed initial comments supporting the settlement. Staff believes that it fairly and appropriately addresses all of the issues set for hearing as to Portland in this proceeding. Staff also states that the extensive investigation over the last year, the discovery responses and the pre-filed testimony, all support this Settlement as fair and reasonable. Staff further claims that the Settlement Offer is clearly in the public interest and should be approved, as it provides an immediate and final resolution of difficult issues in this proceeding as to Portland, while it avoids the delay and expense inherent in a full litigation. Significantly, this Settlement Offer also resolves numerous other proceedings pending at other agencies and in the courts. Furthermore, Portland has agreed to cooperate in other ongoing investigations. Tacoma also strongly supports the settlement and believes that the settlement "reflects a delicate balance of interests and compromises in a carefully crafted agreement between and among a wide range of interests and divergent parties" (Settlement Offer at 13). Tacoma urges that the undersigned certify the settlement to the Commission – without modification or approval – expeditiously. No reply comments were filed.

DISCUSSION

19. This Settlement Offer constitutes a complete settlement of the issues designated for investigation by the Commission, so far as Portland General Electric Company is concerned. Because the Settlement Offer leaves for litigation elsewhere the issues designated for investigation by the Commission, so far as Enron Power Marketing, Inc. is concerned, this can only be deemed a "partial" settlement in this proceeding. No party or participant has stepped forward to contest the terms of the Settlement Offer. Accordingly, I have before me an uncontested partial offer of settlement. I am therefore compelled to certify the Settlement Offer to the Commission, pursuant to 18 C.F.R. §385.602

20 The Parties to the Settlement have all stated that they believe the Settlement Offer is "fair and reasonable and in the public interest." If the Commission agrees, it may approve the Settlement. See 18 C.F.R. 385.602(g)(3).

21. Under Rule 602, I am not *required* to state that I find the Settlement Offer to be just, reasonable, and in the public interest. Rest assured, if I believed that to be the case, I would so state. However, in this particular proceeding, after much consideration, I have decided to withhold such an endorsement. Having worked with the parties in this proceeding for over a year, and having read thousands of pages of testimony and supporting documents, I believe that the only appropriate thing for me to do is comment

Docket No. EL02-114-006

8

Docket No. EL02-115-007

on the Settlement Offer in light of the Commission's August 13, 2002 Order which initiated the investigation in this case, an relevant events that have occurred at FERC since August 2002.

22. Without having to cite to extensive authority (which exists), it is clear that Section 206 investigations are tools for the Commission to use to act to protect the public interest. In this particular proceeding, the Commission was prompted by

Preliminary evidence, taken from transcripts of recorded telephone conversations, indicat[ing] that Portland and [EPMI] knowingly engaged in transactions that may constitute violations of the standards of conduct and/or the companies' codes of conduct and/or market-based rate tariffs.⁶

23. The Commission was additionally concerned that Portland had not provided "all relevant information in the investigation." Lastly, the Commission wanted a record developed on appropriate remedies in the event it was shown that there had been a failure to cooperate. Specifically, the Commission mentioned the revocation of market-based rate authority as a remedy.⁷

24. Within the confines of this proceeding, a tremendous amount of data and information has passed between the participants. A portion of that universe of information has been filed as testimony and exhibits. From the beginning, the proceeding was administered with the understanding that the burden of proof was on the FERC trial Staff and/or Intervenors, so far as providing convincing evidence of violations or other wrongdoing.⁸ Portland vigorously defended the legality of its actions and the manner in which it had responded to the various stages of FERC's investigation of its activities.

25. I do not believe it would be appropriate for me to comment on the persuasive or non-persuasive nature of any of the evidentiary documents filed in the course of this proceeding. I firmly believe that this would not assist the Commission in its assessment of the Settlement Offer as to reasonableness, justness, and whether it is in the public interest. If the terms of the Settlement Offer are approved by the Commission, all pre-filed testimony in this proceeding will become part of the record in another proceeding where adjudication of issues will occur, resulting in an Initial Decision by another Administrative Law Judge.

⁶ See, August 13, 2002 Order at Paragraph 8.

⁷ *Id.*, at Paragraph 12.

⁸ A brief but fair discussion of how the burden of proof was administered in this proceeding can be found at Footnote 5 of the Settlement Offer.

Docket No. EL02-114-006

9

Docket No. EL02-115-007

26. In the Settlement Offer, (and as cited *supra*) the Parties seek to quantify the justness, reasonableness, and virtues of public interest of their Offer by citing to “the information produced during the last year of discovery and submitted in pre-filed testimony.” In the opinion of the undersigned, the Commission would not be well-advised to anchor its approval of the Settlement Offer in either one of these bodies of documents. First, the information exchanged during discovery is not before the Commission, nor a part of the record in this proceeding. Second, the pre-filed testimony in this proceeding is subject to objections and cross-examination in a yet-to-be-held adjudicatory proceeding.

27. During the fifteen months since the Commission instituted this proceeding, an immeasurable amount of information has been reviewed by the Commission, a portion of which directly touches on some of the issues raised in this proceeding. If the Commission finds that the Settlement Offer in this proceeding is just, reasonable, and in the public interest, it will likely do so based on the entire universe of information made available to it since the PA02 investigation was instituted, almost two years ago, rather than the information generated in this proceeding.

28. My only other comment to the Commission is more of an observation: the Settlement Agreement reached between the Parties is *not* the result of an exhaustive investigation of every month in the years 2000 and 2001. I am not criticizing or excusing the actions of any Parties in this proceeding by making this statement—I am simply observing a fact. Because I believe the Commission expected an exhaustive examination of transactional data for the period January 2000 forward, I believe this observation is a relevant fact for the Commission to be aware of when considering the merits of the Settlement Offer.

29. Should the Commission be inclined to approve the Settlement Offer in this proceeding, the events of the last fifteen months have certainly placed the Commission in a position to reach an informed decision as to what is just, reasonable, and in the public interest with respect to Portland General Electric Company.

CERTIFICATION

30. In accordance with 18 C.F.R. §385.602(g), the following documents are certified to the Commission:

- (1) The “Offer of Settlement as to Portland General Electric Company”, together with all attachments thereto, as submitted to the Secretary on September 26, 2003.

Docket No. EL02-114-006

10

Docket No. EL02-115-007

(2) Initial Comments filed by the Commission Trial Staff and the City of Tacoma, Washington, both on October 16, 2003.

(3) The Official Stenographer's Reports of Pre-Hearing Conferences, Motion Hearings, and *In Camera* Sessions (subsequently made public), consisting of nine (9) volumes and totaling three hundred and seventeen (317) pages.

Jeffie J. Massey
Presiding Administrative Law Judge

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

DRAFT

In Reply Refer To:
Docket No. EL02-114-006
and EL02-115-007

Richard L. Brusca
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005

Dear Mr. Brusca:

1. On September 26, 2003, you filed, on behalf of Portland General Electric Company (Portland), Federal Energy Regulatory Commission Trial Staff (Staff), the People of the State of California, *ex rel.* Bill Lockyer, Attorney General (California AG), the California Public Utilities Commission (CPUC), the City of Tacoma Washington (Tacoma), the Oregon Public Utility Commission (Oregon PUC), Enron Power Marketing, Inc. (Enron or EPMI), Industrial Customers of Northwest Utilities (ICNU), and Blue Heron Paper Company (Blue Heron) (collectively the parties) a settlement agreement resolving all issues in this docket pertaining to Portland. On October 16, 2003, both Staff and Tacoma filed comments. No reply comments were filed. On November 5, 2003, the Chief Judge certified the settlement as uncontested to the Commission.
2. The subject settlement is in the public interest and is hereby approved. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. The Commission retains the right to investigate the rates, terms, and conditions under the just and reasonable and not unduly discriminatory or preferential standard of Section 206 of the Federal Power Act, 16 U.S.C. § 824e (2000).
3. Accordingly, the Signatories shall act on the remedies that the Offer of Settlement discusses. The day after the date of this letter, Portland's market-based rate authority will be capped at cost-based rates for a period of twelve months. Portland will also pay a settlement amount of \$8.5 million, to be allocated in the amount of \$6.1 million to electricity customers in California, \$800,000 to be allocated to Portland's retail customers in Oregon, \$1.1 million to Tacoma to reduce the revenue requirements for which its municipal electric customers are responsible, \$250,000 to ICNU to offset the cost of electric service from Portland and \$250,000 to Blue Heron, also to offset the cost of

Docket No. EL02-114-006

2

Docket No. EL02-115-007

electric service from Portland. In addition, Portland agrees to increase training and related document retention on code of conduct and affiliate matters and will maintain recordings of affiliate trading transactions, affiliate postings, and related accounting records for five years from the date of final Commission approval of the Offer of Settlement. In return, the California AG and the Oregon PUC agree that the Offer of Settlement resolves other administrative and judicial proceedings, as specified in the Agreement and Stipulation, including, as to the California AG, Portland's proposed settlement in Docket No. EL03-165.

4. This letter terminates all issue in the above dockets with respect to Portland.

By direction of the Commission.

Secretary

cc: All parties

Public Utility Commission of Oregon
550 Capitol St NE #215
PO Box 2148
Salem OR 97308-2148