121 FERC ¶ 61,084
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Luzenac America, Inc. Docket No. EL06-8-000

ORDER DISMISSING PETITION

(Issued October 24, 2007)

1. On October 20, 2005, Luzenac America, Inc. (Luzenac) submitted a petition, pursuant to section 1290 of the Energy Policy Act of 2005 (EPAct 2005),[1] requesting that the Commission exercise exclusive jurisdiction over a claim for a termination payment sought by Enron Power Marketing, Inc. (Enron) in a bankruptcy complaint proceeding.[2] Luzenac requests that the Commission deny Enron's claim. For the reasons discussed below, we find that, regardless of the outcome of the *Luzenac Adversary Proceeding* and any appeals related thereto, Enron's termination payment claim arises under a retail contract over which the Commission lacks jurisdiction. Accordingly, we dismiss Luzenac's petition.

[1] Pub. L. No. 109-58, 119 Stat. 594, 983-984 (2005).

[2] *See* Enron Power Marketing Inc.'s Complaint for Declaratory Relief Pursuant to the Bankruptcy Code and Rules and for Damages, *Enron Power Marketing, Inc. v. Luzenac America, Inc.*, Case No. 01-16034 (AJG) (Bankr. S.D.N.Y. filed Feb. 10, 2003) (*Luzenac Adversary Proceeding*). In addition, Luzenac has appealed a district court ruling, in the *Luzenac Adversary Proceeding*, holding, among other things, that section 1290 is merely clarifying legislation that does not give the Commission exclusive jurisdiction over the parties' dispute. *See Enron Power Marketing, Inc. v. Luzenac America, Inc., et al.*, No. 05 Civ. 9244, 2006 WL 2548453 (S.D.N.Y. Aug. 31, 2006), *appeal docketed, Pub. Util Dist. No. 1 of Snohomish Co., et al. v. Enron Power Marketing, Inc. (In re Enron Corp.),* Case Nos. 07-1158, *et al.* (2d Cir. Mar. 22, 2007).

Background

2. Luzenac states that on August 31, 2000, Luzenac and Enron entered into a power sales agreement (Agreement) that required Enron to sell to Luzenac five megawatts of "West Firm Energy" (as such term is defined in the Agreement), per hour, for a term of ten years at a point of delivery located at the border of the Montana Power Company's transmission system.[3] Luzenac states that it required this long-term supply of energy as the operator of certain talc processing facilities located in Sappington and Three Forks, Montana.

3. Luzenac states, however, that in December 2001, Enron discontinued delivering power under the Agreement and declared bankruptcy, following the exposure of its misstated financial statements and financial fraud. Luzenac asserts that these occurrences represented an Event of Default under the Agreement, and, in response, on January 9, 2002, Luzenac exercised its right to terminate the Agreement.[4] Luzenac states that shortly thereafter, on February 12, 2003, Enron initiated the *Luzenac Adversary Proceeding*, in which it seeks a termination payment of approximately $6.8 million, plus interest, under sections 5.2 and 5.3 of the Agreement.[5]

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[3] The Agreement was modeled on a standard form purchase and sale agreement, Version 2.1, as prepared by the Edison Electric Institute. The Montana Power Company is now known as NorthWestern Energy.

[4] *See* Agreement at article 5, section 5.1(d) ("An 'Event of Default' shall mean, with respect to a Party (a 'Defaulting Party'), the occurrence of any of the following: . . . (d) such Party becomes Bankrupt") and section 5.2 (Declaration of an Early Termination Date and Calculation of Settlement Amounts).

[5] Section 5.2 of the Agreement states, among other things, that in the Event of Default, the Non-Defaulting Party shall have the right to designate an Early Termination Date "to accelerate all amounts owing between the Parties and to liquidate and terminate all, but not less than all, Transactions (each referred to as a 'Terminated Transaction') between the Parties." Section 5.2 further provides that the Non-Defaulting Party shall calculate a "Settlement Amount" for each such Terminated Transaction. The Settlement Amount, a defined term under the Agreement, means, "with respect to a Transaction and the Non-Defaulting Party, the Losses or Gains, and Costs, expressed in U.S. Dollars, which such party incurs as a result of the liquidation of a Terminated Transaction

(continued)

4. Luzenac asserts that the Commission has the exclusive jurisdiction to deny Enron's claim pursuant to EPAct 2005, section 1290, which provides as follows:

> (a) Application – This section applies to any contract entered into in the Western Interconnection prior to June 20, 2001, with a seller of wholesale electricity that the Commission has –
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> (1) found to have manipulated the electricity market resulting in unjust and unreasonable rates; and
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> (2) revoked the seller's authority to sell any electricity at market-based rates.
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> (b) Relief – Notwithstanding section 222 of the Federal Power Act (as added by section 1262 [sic]), any provision of title 11, United States Code, or any other provision of law, in the case of a contract described in subsection (a), the Commission shall have exclusive jurisdiction under the Federal Power Act (16 U.S.C. § 791a, *et seq*.) to determine whether a requirement to make termination payments for power not delivered by the seller, or any successor in interest of the seller, is not permitted under a rate schedule (or contract under such a schedule) or is otherwise unlawful on the grounds that the contract is unjust and unreasonable or contrary to the public interest.

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pursuant to section 5.2." Finally, section 5.3 requires that the Settlement Amounts be netted out to a single liquidated amount, payable by one Party to the other in the form a Termination Payment:

> The Non-Defaulting Party shall aggregate all Settlement Amounts into a single amount by: netting out (a) all Settlement Amounts that are due to the Defaulting Party, plus, at the option of the Non-Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party pursuant to Article Eight, plus any or all other amounts due to the Defaulting Party under this Agreement against (b) all Settlement Amounts that are due to the Non-Defaulting Party, plus any or all other amounts due to the Non-Defaulting Party under this Agreement, so that all such amounts shall be netted out to a single liquidated amount (the "Termination Payment") payable by one Party to the other. The Termination Payment shall be due to or due from the Non-Defaulting Party as appropriate.

(c) Applicability – This section applies to any proceeding pending on the date of enactment of this section involving a seller described in subsection (a) in which there is not a final, nonappealable order by the Commission or any other jurisdiction determining the respective rights of the seller.

5. Luzenac argues that it is entitled to seek relief under section 1290 (and in so doing defeat Enron's claim to a termination payment under the Agreement) because the Agreement is a contract eligible for relief under section 1290(a).[6] Luzenac also argues that the pendency of the *Luzenac Adversary Proceeding* does not bar the Commission from acting in this case, under section 1290(c), because as of the date that section 1290 became law (on August 8, 2005), and as of the date Luzenac filed its petition, no final, nonappealable order determining the respective rights of the parties had been issued. Luzenac asserts that, as such, the Commission has exclusive jurisdiction, under section 1290(b), to consider, in this proceeding, whether the requirement in the Agreement to make a termination payment for power not delivered by Enron is: (i) permitted under Enron's rate schedule; or (ii) permitted under the Agreement, or (iii) otherwise unlawful on the grounds that the Agreement is unjust and unreasonable or contrary to the public interest.

6. Luzenac argues that Enron is not entitled to collect a termination payment under the Agreement on all three grounds. First, Luzenac argues that Enron is not entitled to collect a termination payment under its "rate schedule," because at the time that Enron executed the Agreement, and throughout the period in which it sold electricity to Luzenac, Enron was acting in violation of its rate schedule, i.e., its Commission-approved market-based rate tariff. Specifically, Luzenac notes that in the *Enron Revocation Order* the Commission, in revoking Enron's market-based rate authority, found specific violations including acts of market manipulation and gaming schemes; exercises of market power; affiliate abuses; failure to disclose certain information to the Commission; control over other entities' generation assets and failures by Enron to file timely, accurate

[6] Specifically, Luzenac notes that the Agreement contemplates performance within the Western Interconnection, that it was executed prior to June 20, 2001, and that it was entered into with a seller (Enron) matching the requirements set forth at section 1290(a)(1) and (2), i.e., that Enron has been found by the Commission to have manipulated the western energy market and has had its market-based rate authority revoked. *See Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343 (2003) (*Enron Revocation Order*), *order denying reh'g*, 106 FERC ¶ 61,024 (2004).

and complete information with the Commission. As a result, the Commission concluded that Enron, throughout this period, had manipulated the relevant electricity market resulting in unjust and unreasonable rates.[7] Luzenac argues that, as such, Enron's demand for a termination payment constitutes an effort by Enron to collect market-based profits that would have been earned by Enron had it performed under the Agreement, complied with its tariff, and retained its market-based rate authority, under circumstances where Enron, in fact, failed to deliver electricity, lost its market-based rate authority and no longer has a tariff on file with the Commission allowing it to charge market-based rates or collect market-based profits.[8]

7. Luzenac adds that even prior to the Commission's revocation of Enron's market-based rate authority, in the *Enron Revocation Order*, Enron lacked a valid market-based rate tariff under which to assess any termination charge to Luzenac because Enron failed to fulfill the conditions that attached to that authority, including the reporting requirements necessary for the Commission to monitor Enron's activities.

8. As a second ground for relief, under section 1290(b), Luzenac asserts that Enron is not permitted to collect a termination payment under its "contract [entered into] under [its] rate schedule," because the Agreement was induced by fraud, i.e., by Enron's concealment of its financial condition. Luzenac states that Enron, in its bankruptcy proceeding, admitted that it was insolvent at least as early as 1999, and that from that point forward, up until its bankruptcy filing, its true financial condition was concealed. Luzenac states that but for this fraudulent conduct, the Agreement would not have been executed.

9. Luzenac adds that Enron is also not entitled to collect a termination payment under the Agreement because Enron waived its right to contest Luzenac's own calculation of the termination payment following its notice of termination. Luzenac explains that under section 5.5 of the Agreement, the defaulting party is precluded from raising a dispute with respect to the non-defaulting party's calculation of the termination payment, in whole or in part, unless "the Defaulting Party, shall, within two (2) Business Days of

[7] *See Enron Revocation Order*, 103 FERC ¶ 61,343 at P 56.

[8] Luzenac notes that the termination payment sought by Enron is the discounted present value of the "profits" which Enron would have earned had it not defaulted on the Agreement and had its market-based rate authority not been revoked by the Commission.

receipt of Non-Defaulting Party's calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. . . ." Luzenac states that as the Non-Defaulting party, it provided Enron with its calculation of the termination payment by letter dated August 16, 2002 (claiming in that letter, as a preliminary calculation, that it was Enron, not Luzenac, that was required to make a termination payment). Luzenac states that for more than two business days thereafter, Enron failed to provide Luzenac with any written explanation disputing its calculation.

10. As a third ground for relief under section 1290(b), Luzenac argues that the termination payment sought by Enron should be denied because the Agreement "is otherwise unlawful on the grounds that the contract is unjust and unreasonable or contrary to the public interest." Luzenac argues that where, as here, the seller fraudulently induced the buyer to execute the contract and then manipulated the market in a way that affected the prices payable under that contract, abrogation is warranted.

11. For all these reasons, Luzenac requests that the Commission take exclusive jurisdiction over the termination payment dispute at issue in this case, under EPAct 2005, section 1290, and enter an order denying Enron's claim to a termination payment.

Notice of Filing and Responsive Pleadings

12. Notice of Luzenac's petition was published in the *Federal Register* with interventions, answers, protests and comments due on or before November 10, 2005.[9] Motions to intervene were timely filed by Enron, the City of Santa Clara, California (Santa Clara), Valley Electric Association, Inc. (Valley Electric), Public Utility District No. 1 of Snohomish County, Washington (Snohomish), Nevada Power Company (Nevada Power), and Sierra Pacific Power Company (Sierra Pacific).[10] Comments in support of Luzenac's filing were filed by Snohomish and a protest was filed by Enron.

[9] 70 Fed. Reg. 61,272 (2005).

[10] The intervention requests submitted by Santa Clara, Valley Electric, Nevada Power, and Sierra Pacific were subsequently withdrawn by these entities, pursuant to settlement agreements reached with Enron. These settlements were approved by the Commission in *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 114 FERC ¶ 61,067 (2006), as to Nevada Power and Sierra Pacific, and *Enron Power Marketing, Inc.*, 115 FERC ¶ 61,376 (2006), as to Santa Clara and Valley Electric.

13. In its protest, Enron asserts that the Commission is barred from addressing its termination payment claim, as raised in the *Luzenac Adversary Proceeding*, because the Commission lacks jurisdiction to do so under EPAct 2005, section 1290. First, Enron argues that the requirements of section 1290(c) are not satisfied because Luzenac's petition, filed on October 20, 2005, was not "pending" at the Commission as of the date that section 1290 was enacted. In addition, Enron claims that the requirements of section 1290(b) have not been satisfied because the exercise of jurisdiction authorized by this provision is limited to the Commission's jurisdiction under the Federal Power Act (FPA) over wholesale transactions.[11] Enron points out that, by contrast, the sales made by Enron, under the Agreement, were retail transactions because Luzenac, under the Agreement, was an end-user of all supplies delivered by Enron.

14. Enron argues, in the alternative, that even assuming that the Commission has jurisdiction in this case, Luzenac misinterprets the bases for relief allowed under section 1290(b). Specifically, Enron disputes Luzenac's assertion that Enron's termination payment claim can be rejected if it is either: (i) not permitted under a rate schedule or the Agreement (*see* PP 6-9, above); or (ii) is unlawful on the grounds that it is unjust and unreasonable or contrary to the public interest (*see* P 10, above). Enron argues, instead, that the required showing under 1290(b) is a single, unified standard, i.e., that the "unjust and unreasonable or contrary to the public interest" language of section 1290(b) is meant to apply to both the clause "rate schedule (or a contract under a rate schedule)" *and* the clause "otherwise unlawful." Enron argues that absent this reading, a termination payment right could be denied on the basis of an unspecified standard without a showing that the provision is unjust, unreasonable, or contrary to the public interest.

15. Accordingly, Enron concludes that the Commission must review the Agreement, if at all, under either its just and reasonable standard or under the high bar established by *Mobile-Sierra* doctrine.[12] Enron further argues that any review made in this case under the Commission's just and reasonable standard can be undertaken only under section 206 of the FPA and that any relief granted under this authority can be prospective only.[13]

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[11] 16 U.S.C. § 824 (2000).

[12] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp,* 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.,* 350 U.S. 348 (1956) (*Sierra*).

[13] 16 U.S.C. § 824d (2000).

16. Enron also argues that under either of these two standards, Luzenac has failed to carry its burden of proof. In particular, Enron argues that Luzenac has failed to demonstrate any relationship between the market manipulation allegedly engaged in by Enron and either the price under the Agreement or the formation of the Agreement. In addition, Enron asserts that Luzenac's claims regarding Enron's loss of market-based rate authority are irrelevant because the contract right at issue in this case vested on the date the Agreement was entered into, i.e., at a time when Enron was still authorized by the Commission to make sales to Luzenac under Enron's market-based rate tariff. Enron also disputes whether its alleged failure to file timely, accurate and complete market power analyses, change in status reports, and quarterly transaction reports have any relevance regarding the continued justness and reasonableness of the Agreement.

17. Enron also responds to Luzenac's claim that Enron was fraudulently induced into executing the Agreement. Enron argues that Luzenac has not demonstrated that Enron's statements regarding its financial condition induced Luzenac to enter into the Agreement and that Luzenac was not harmed by any Enron acts. In addition, Enron claims that Luzenac ratified the Agreement when it failed to seek its termination following its knowledge of Enron's sinking financial fortunes as early as October 2001, and that with this ratification, Luzenac waived its right to argue fraudulent inducement. Enron also argues that the two-day response time under section 5.5 of the Agreement cannot be construed to deprive Enron of its property right under the Agreement, even assuming Luzenac's letter constituted a commercially reasonable calculation of the settlement amount. Finally, Enron argues that its right to recover a termination payment under the Agreement is a Constitutionally-protected right because a public utility seller is entitled to recover its costs.[14]

[14] Enron protest at 45-47, *citing Bluefield Water Works & Improvement Co., v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923). As noted below, Enron raises additional Constitutional arguments in its answer.

Answers and Motions

18. On November 23, 2005, Luzenac filed an answer responding to Enron's protest.[15] In its answer, Luzenac asserts that section 1290(a) unambiguously vests the Commission with exclusive jurisdiction in this case, as the bankruptcy court in Enron's bankruptcy proceeding initially determined.[16]

19. Luzenac also argues that section 1290(a) applies to "any contract" meeting its requirements, both wholesale and retail. Luzenac adds that, as such, the Agreement is a contract eligible for relief under section 1290, "notwithstanding section 222 of the [FPA[17]] . . . or any other provision of law."[18]

20. Luzenac argues that the Agreement expressly incorporates Enron's Commission-

[15] The answer, while denominated by Luzenac as a motion for summary judgment, will not be treated as such here given the fact that the relief sought by Luzenac simply re-states its request for relief as set forth in its petition.

[16] The ruling to which Luzenac refers (a November 2, 2005 ruling issued by Judge Gonzales), was subsequently reversed, on August 31, 2006, by the United States District Court for the Southern District of New York. *See* note 2, supra. The district court held that, under section 1290, the bankruptcy court retained jurisdiction to rule on state law contract claims related to Enron. The district court also held that section 1290 was merely clarifying legislation that reaffirms the traditional jurisdictional division between the courts and the Commission. Finally, the court identified two potential constitutional concerns, namely, the Bankruptcy Uniformity Clause and the separation of powers doctrine, that it reasoned weigh in favor of reading section 1290 as merely clarifying legislation. As noted above, the district court's ruling is now pending review before the United States Court of Appeals for the Second Circuit.

[17] *See* EPAct 2005, section 1283, adding new section 222 to the FPA. Section 222 prohibits the use or employment of manipulative or deceptive devices or contrivances in connection with the purchase or sale of electric energy, or transportation or transmission services subject to the jurisdiction of the Commission. In a Final Rule issued January 19, 2006, the Commission implemented its new statutory anti-manipulation provisions. *See Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047 (2006).

[18] Luzenac answer at 30, *citing* EPAct 2005, section 1290(b).

approved market-based rate tariff and that, as such, Enron agreed to abide by that tariff. Luzenac further argues that this tariff is the only authority on which the Agreement is based. Luzenac adds that "[w]hen a contract provides that its terms are subject to a regulatory body, all parties to that contract are bound by the actions of the regulatory body."[19]

21. Luzenac also argues that Enron's purported right to collect a termination payment, if granted, would violate the filed rate doctrine because Enron: (i) currently has no tariff on file with the Commission authorizing such recovery; (ii) was acting in violation of its tariff at the time it entered into the Agreement and therefore had no tariff authority to act under the Agreement; and (iii) was granted no "wind down" authority by the Commission at the time that its market-based rate authority was revoked. Luzenac adds that Enron's collection of a termination payment would also violate Luzenac's common law right to void the contract for fraud in the inducement and that a collection of a termination payment by Enron under these facts would be unjust, unreasonable and contrary to the public interest.

22. Luzenac also challenges Enron's argument regarding the reference made in section 1290(c) to "any proceeding pending on the date of enactment of this section." Luzenac asserts that the term "proceeding," as used in this clause, is not limited to Commission proceedings, as Enron suggests, because such a limitation is not supported by the plain language of 1290(c) itself, including the clause referring to "a final, nonappealable order by the Commission *or any other jurisdiction* determining the respective rights of the seller" (emphasis added). Luzenac claims that the intent of section 1290 is to transfer to the Commission any pending Enron claim for a termination payment, unless that pending claim is already subject to a final, nonappealable order.

23. On December 8, 2005, Snohomish filed an answer in support of Luzenac's answer and Enron filed an answer opposing Luzenac's answer. Enron's answer raises new Constitutional issues. Specifically, Enron claims that if the Commission interprets section 1290 as giving the Commission exclusive jurisdiction to determine all issues involving Enron's termination payment rights (including state law issues), section 1290

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[19] *Id.* at 31, *citing Alliant Energy, Inc. v. Nebraska Public Power Dist.*, 347 F.3d 1046, 1050 (8th Cir. 2003) (*Alliant*); *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988) (*Inter-City Gas*); *Holbein v. Austral Oil Co.*, 609 F.2d 206, 208 n.3 (5th Cir. 1980) (*Holbein*).

would violate several aspects of the Constitution, including the Bankruptcy Clause (article 1, section 8, clause 4), the separation of powers doctrine, the Fifth Amendment guarantees of due process and equal protection, and the Seventh Amendment's right to a jury trial.[20]

24. On December 23, 2005, answers to Enron's answer were filed by Luzenac and Snohomish. Luzenac reiterates its arguments that the Agreement is a wholesale sales contract but that, regardless, section 1290 gives the Commission jurisdiction over both wholesale and retail contracts that otherwise satisfy the requirements of section 1290(a). With respect to its claim that the Agreement is a wholesale contract, Luzenac argues that in addition to energy sales, the Agreement also contemplated jurisdictional wholesale exchange transactions (subject to Luzenac's receipt of a power marketing certificate from the Commission) and wholesale transmission and scheduling services as required under section 3.2 of the Agreement.[21]

25. Snohomish argues that the proper forum to apply and interpret section 1290 is the Commission and that any remaining Constitutional challenges must be decided in the court of appeals after the Commission has issued final orders on Luzenac's petition.

26. On January 9, 2006, Enron filed an answer responding to the answers filed by Luzenac and Snohomish. Enron argues that the answers submitted by Luzenac and

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[20] Enron notes that the Commission need not address these statutory interpretation and Constitutional issues here, given the pendency of these issues elsewhere. *See* note 16, *supra*.

[21] The Agreement, at section 3.2 (Transmission and Scheduling), provides as follows:

> Seller shall arrange and be responsible for transmission service to the Delivery Point and shall Schedule or arrange for Scheduling services with its Transmission Providers, as specified by the Parties in the Transaction, or in the absence thereof, in accordance with the practice of the Transmission Providers, to deliver the Product to the Delivery Point. Buyer shall arrange and be responsible for transmission service at and from the Delivery Point and shall Schedule or arrange for Scheduling services with its Transmission Providers to receive the Product at the Delivery Point.

Snohomish add nothing new to the record and should therefore be rejected. If these answers are not rejected, Enron argues that it should be given an opportunity to respond. On February 6, 2006, Luzenac filed an answer supporting its claim that it was fraudulently induced to enter into the Agreement and that its right of rescission was not waived based on the passage of time. On February 8, 2006, Enron filed an answer arguing that Luzenac's right of rescission was waived.

27. On October 22, 2007, Enron filed a motion for summary disposition, reasserting its position that, under section 1290, the Commission has no jurisdiction over Luzenac's petition.[22]

Discussion

A. Procedural Matters

28. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[23] the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a) of the Commission' Rules of Practice and Procedure[24] prohibits an answer to a protest, or an answer to an answer, unless otherwise permitted by the decisional authority. We will accept each of the above-noted answers, given the complex issues presented herein and because these answers have provided information that aided in clarifying the relevant facts, as discussed below.

B. Analysis

29. As noted above, the Constitutionality of section 1290 and other issues relating to the Commission's exclusive jurisdiction under this provision, are now pending on appeal before the United States Court of Appeals for the Second Circuit.[25] Regardless of the outcome of this litigation, however, we determine here that Luzenac's petition must be dismissed, based on our findings below that: (i) the Agreement is a retail contract; and

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[22] Based on our analysis and findings, below, Enron's motion is moot.

[23] 18 C.F.R. § 385.214 (2007).

[24] *Id.* at § 385.213(a)(2).

[25] *See* note 16, *supra*.

(ii) the Commission lacks jurisdiction, both under section 201 of the FPA[26] and EPAct 2005, section 1290, to consider whether and to what extent Enron may be entitled to collect a termination payment under a retail contract.

30. Luzenac, as noted above, disputes each of these findings. First, Luzenac asserts that the Agreement, from its inception, was a wholesale contract. Specifically, Luzenac notes that in the cover sheet to the Agreement, reference is made to the applicability of the "general terms and conditions" of Enron's Commission-approved market-based rates tariff and that the Agreement contemplated exchange transactions. Luzenac further argues that the Agreement required Enron to perform certain transmission and scheduling duties under section 3.2 of the Agreement.

31. We find no support for these arguments. First, Luzenac does not contest Enron's assertion that Luzenac was an end-user with respect to all supplies delivered by Enron under the Agreement.[27] The reference made in the Agreement to the applicability of a Commission-approved tariff, then, does not alter this fact. The market-based rate tariff to which the Agreement refers, moreover, addresses only wholesale transactions. Accordingly, while the Agreement may have contemplated the possibility that Luzenac could or would obtain authorization to re-sell some or all of the supplies delivered by Enron under the Agreement or to participate in exchanges with Enron (thus converting Enron's sales into wholesale transactions that *may* have become jurisdictional and thus subject to Enron's market-based rates tariff), there is no evidence presented here that any such sales occurred under the Agreement. As such, the reference in the Agreement to Enron's market-based rates tariff appears to have been an incidental placeholder to address a situation that never came to fruition in an Agreement that otherwise embodies all necessary terms and conditions, including a price term.

32. Under these circumstances, we cannot conclude that the Agreement's single reference to Enron's market-based rates tariff, a tariff on which the Agreement was not dependent for an essential term, converts a contract that otherwise contemplates retail sales, and which was used for that purpose alone, into a wholesale contract, subject to the

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[26] 16 U.S.C. § 824(b)(1) (2000). Section 201(b)(1) grants the Commission jurisdiction over "the transmission of electric energy in interstate commerce and [ ] the sale of electric energy at wholesale in interstate commerce…."

[27] *See* Enron protest at 11.

Commission's jurisdiction under the FPA. Contractual intent, as it relates to the Commission's jurisdiction under the FPA, cannot alone confer upon the Commission this grant of statutory authority.[28] In addition, in determining whether a contract contemplates wholesale transactions subject to our jurisdiction, the Commission is required to focus on the substance of these transactions, not simply the parties' contractual recitations.[29] Here, the substance of the transactions reveal retail sales only.

33. Moreover, the cases relied upon by Luzenac in its answer do not suggest otherwise. For example, in *Alliant*, the court addressed the effect of a Commission order requiring the jurisdictional parties to a multiparty agreement (but not a *non*-jurisdictional party, the Nebraska Public Power District (NPPD)), to issue certain refunds.[30] In

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[28] *See Weinberger v. Bentex Pharms., Inc*., 412 U.S. 645, 652 (1973) ("as a statutory entity, the Commission cannot acquire jurisdiction merely by agreement of the parties before it"); *Transmission Agency of Northern California v. FERC*, 2007 U.S. LEXIS 17303 (D.C. Cir. 2007); *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 924 (9th Cir. 2005) ("[t]he fact is that FERC's regulatory authority is bound by statute and utilities can neither waive that authority to opt in or out of FERC's jurisdiction"); *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 463 (D.C. Cir. 2005) (jurisdiction cannot arise from the absence of objection, or even from affirmative agreement).

[29] *See New York State Electric & Gas Corp.*, 83 FERC ¶ 61,203, 61,904 (1998) ("To rely solely, or even principally, on the parties' contractual recitations . . . is to elevate form over substance, which we have specifically rejected when analyzing whether transactions are 'buy-sell' arrangements [subject to our jurisdiction]"); *Potomac Edison Co.*, 79 FERC ¶ 61,185, 61,877 (1997); *see also Central Vermont Pub. Serv. Corp.*, 39 FERC ¶ 61,295, 61,960 (1987) ("This analysis (i.e., the Commission's finding that the substance of the transaction is a "disposition" of facilities subject to FPA section 203] is consistent with our prior determinations to focus on the substance rather than the form of corporate transactions and relationships when making jurisdictional determinations"); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 401 (1965) (in considering the economic facts underlying the lease-sale agreement over the form of the transaction, the Commission properly treated the sales at issue as jurisdictional sales under the Natural Gas Act).

[30] *Alliant*, 347 F.3d at 1050.

upholding the lower court's ruling against NPPD in a separate *civil* proceeding – concerning NPPD's obligations under the agreement to abide by the Commission's orders – the court held that NPPD had agreed to be bound by the Commission's actions as a matter of contract (and thus by its refund order), even though the Commission had no *direct* authority over NPPD itself. In so holding, the court did not suggest, or even imply, that NPPD was subject to the Commission's jurisdiction under the FPA.[31]

34. Nor can we accept Luzenac's argument that section 3.2 of the Agreement required Enron to provide a jurisdictional transmission service, or a jurisdictional scheduling service. Enron's responsibilities, under section 3.2, did not make it a jurisdictional transmission provider under the Agreement, i.e., an entity that either owned or operated transmission facilities subject to the Commission's jurisdiction. Rather, this section serves to establish the point at which title transfers and the parties' responsibilities prior to, or after, title is transferred.

35. We next consider whether section 1290 applies to a retail contract. We note, as a threshold matter, that the issues now pending on appeal, in the *Luzenac Adversary Proceeding*, do not address or otherwise raise the issue considered below. Specifically, while the parties to the *Luzenac Adversary Proceeding* have raised issues concerning the Constitutionality of section 1290 and the Commission's exclusive jurisdiction thereunder, they have not addressed whether section 1290 should be interpreted as applying to a retail contract, or whether the Agreement is such a contract.

36. Luzenac argues that even assuming that the Agreement is a retail contract, section 1290 still applies because section 1290(a) refers "to *any* contract" that meets the requirements of that provision, namely, to *any* contract that was (i) entered into in the Western Interconnection prior to June 20, 2001; (ii) with a seller of wholesale electricity;

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[31] Similarly, in *Inter-City Gas*, the court held, on review of a civil arbitration ruling, that *Boise Cascade Corporation*, an end-user, was required, under its retail contract with its supplier, to pay a retail rate as established by the Commission-approved wholesale rate. *See Inter-City Gas*, 845 F.2d at 189. The court did not find or suggest, however, that the retail contract at issue involved a wholesale transaction. Finally, in *Holbein*, the court found that the regulatory terms and conditions established by the Federal Power Commission (FPC) governed the lessees' royalty obligations under a non-jurisdictional lease agreement, but only because that lease agreement made reference to a price factor over which the FPC exercised jurisdiction. *See Holbein*, 609 F.2d at 208.

(iii) with a seller found to have manipulated the electricity market; and (iv) with a seller whose market-based rate authority has been revoked. We cannot agree, however, that section 1290(a) applies to *any* contracts, without reference to the other limitations set forth in section 1290.

37. First, we note that section 1290(b) grants "exclusive jurisdiction to the Commission *under the Federal Power Act* to determine whether a requirement to make termination payments for power not delivered by the seller, or any successor in interest of the seller, is not permitted under a rate schedule (or contract under such a rate schedule) or is otherwise unlawful on the grounds that the contract is unjust and unreasonable or contrary to the public interest."[32] We do not construe this language as a Congressional directive expanding the scope of the Commission's exclusive jurisdiction to cover retail transactions.

38. Moreover, section 1290, on its face, does not expressly provide that it applies to retail contracts and its application *is* expressly limited, in subsection (a), to contracts entered into by a seller of "wholesale electricity," in subsection (a)(2), to a seller whose authority to sell any electricity at market-based rates has been revoked by the Commission, and in subsection (c), to circumstances involving prior Commission proceedings which, given the Commission's jurisdiction over wholesale transactions,[33] assumes the proceeding involves a wholesale transaction. This finding is also consistent with the legislative history relating to section 1290.[34] It is reasonable, then, to construe section 1290 as not having changed the existing Federal-State balance already established by Congress under the FPA.[35] For all these reasons, we find that EPAct 2005, section

[32] EPAct 2005, section 1290(b) (emphasis added).

[33] *See* note 25, *supra.*

[34] *See, e.g.,* Statement of Sen. Cantwell, 151 Cong. Rec. S7269 (daily ed. June 23, 2005) ("This provision [section 1290] expresses Congress's belief that the issues surrounding the potential requirement to make termination payments associated with *wholesale* power contracts are inseparable and inextricably linked to the Commission's jurisdictional responsibilities") (emphasis added).

[35] *See Heublein, Inc. v. S.C. Tax Comm'n,* 409 U.S. 275, 281-82 (1972) ("[Unless] Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance").

1290 does not apply to retail contracts.

39. Given these findings, we need not decide, Luzenac's remaining claims regarding the scope and reach of section 1290. Nor are we required to rule on Enron's additional arguments, including its assertion that section 1290 is unconstitutional.

The Commission orders:

Luzenac's petition is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.