UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re ENRON CREDITORS RECOVERY CORP., et al., Reorganized Debtors.	Chapter 11 Case No. 01-16034 (AJG) Jointly Administered
ENRON POWER MARKETING, INC., Plaintiff, -against- LUZENAC AMERICA, INC., Defendant.	Adversary Proceeding No. 03-2096

ORDER APPROVING ENRON POWER MARKETING INC.'S MOTION FOR AN ORDER DISMISSING ADVERSARY PROCEEDING AND ORDERING PARTIES TO ARBITRATION

Upon consideration of debtor Enron Power Marketing, Inc.'s Motion for an Order Dismissing Adversary Proceeding and Ordering Parties to Arbitration (the "Motion"); and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334, and pursuant to section 38.1 of the Supplemental Modified Fifth Amended Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated as of July 2, 2004; and it appearing that due and proper notice of the Motion and the relief requested therein has been given in accordance with this Court's Second Amended Case Management Order Establishing, Among Other Things, Noticing Electronic Procedures, Hearing Dates, Independent Website and Alternative Methods of Participation at Hearings, dated

December 17, 2002, and no other or further notice need be given; and the relief requested in the Motion being in the best interests of Enron Power Marketing, Inc. (the "Debtor") and its estate and creditors; and the Court having reviewed the Motion; and the Court having determined, as set forth on Exhibit "A" attached hereto, that the legal and factual bases in the Motion establish just cause for relief granted herein, and after due deliberation and sufficient cause appearing therefor, it is

ORDERED that the Motion is granted in all respects, and it is further

ORDERED that Adversary Proceeding No. 03-2096 is dismissed, without prejudice, and the parties are ordered to arbitration in accordance with the terms of the Master Power Purchase and Sale Agreement entered into between the parties on or about August 31, 2000 (as amended by that First Amendment to Master Power Purchase and Sale Agreement, dated August 31, 2000, the "MPPSA"), and it is further

ORDERED that the Court shall retain exclusive jurisdiction (i) to confirm any arbitration award, (ii) over any judicial remedies in connection with the arbitration, and (iii) to resolve any disputes arising under or in connection with the arbitration. Furthermore, the Court shall retain exclusive jurisdiction to interpret, implement, and enforce the provisions of this Order, and it is further

ORDERED that all objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are overruled on the merits. Those parties who did not object, or who withdrew their objections, to the Motion are deemed to have consented to the Motion, and it is further

ORDERED that Luzenac's Motion to Compel Arbitration and Stay the Adversary Proceeding is granted to the extent that it seeks to compel arbitration and denied, as moot, to the extent it seeks to stay the Adversary Proceeding.

Dated: New York, New York
October 4, 2007

s/Arthur J. Gonzalez
HONORABLE ARTHUR J. GONZALEZ
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT "A"

Before the Court is the Motion by Enron Power Marketing Inc. ("EPMI") for Order Dismissing Adversary Proceeding and Ordering Parties to Arbitration.

On February 10, 2003, EPMI commenced this adversary proceeding (the "Adversary Proceeding), asserting claims based upon, among other things, breach of contract and unjust enrichment. EPMI sought payment of a certain Termination Payment, in the amount of approximately $6.8 million, plus interest, allegedly owed by Luzenac America, Inc. ("Luzenac") under the terms of a Master Power Purchase and Sale Agreement (the "Master Agreement") entered into by the parties on August 31, 2000. The Master Agreement concerned the purchase and sale of power and provided the terms pursuant to which the parties could enter into such transactions. The Master Agreement further provided that upon the event of a default, the non-defaulting party could designate an Early Termination Date upon which all transactions between the parties would terminate. The non-defaulting party would then calculate a Termination Payment, which was based on the movements in the forward price curve for power. Further, the Master Agreement provided - in what is known as a "full two-way payment provision" - that the Termination Payment would be made to whomever it was owed, regardless of which party was the defaulting party.

Luzenac advised EPMI that, as a consequence of EPMI's filing for bankruptcy protection, it was in default under the Master Agreement and that Luzenac was terminating the Master Agreement and all transactions made thereunder, as of January 9, 2002. Luzenac did not pay EPMI the Termination Payment alleging that it was fraudulently induced to enter into the Master Agreement, which it claimed was void and unenforceable. Rather, Luzenac sought,

among other things, a Termination Payment from EPMI based upon what it alleged that the market price for power would have been had EPMI not engaged in what it described as certain gaming and trading strategies.

After EPMI's request for payment and Luzenac's refusal to pay, EPMI commenced the Adversary Proceeding. After the commencement of the Adversary Proceeding, Luzenac filed a motion seeking to compel arbitration of EPMI's claims against Luzenac and to stay the Adversary Proceeding. The proceeding concerning the motion to compel arbitration itself was stayed when this Court entered an order, dated March 4, 2003 (as subsequently amended, the "Mediation Order"), directing the mediation of this and various other similar Enron Trading Cases, including one involving Public Utility District No. 1 of Snohomish County ("Snohomish"). The parties proceeded to mediation but did not reach a resolution. Although Luzenac originally filed a motion to stay the adversary proceeding and compel arbitration, it has refused to consent to EPMI's request for arbitration at this time, arguing that it is premature as a result of a pending matter before the Second Circuit.

Previously, in the summer of 2005, section 1290 of the Energy Policy Act of 2005 was enacted. As a result, on October 20, 2005, Luzenac filed a complaint with the Federal Energy Regulatory Commission ("FERC") requesting that FERC exercise exclusive jurisdiction under section 1290 to review the issues concerning the Termination Payment provisions that were then before this Court. The parties disputed whether section 1290 divested this Court of jurisdiction to hear the issues concerning the Termination Payment and various motions were filed before this Court and before FERC concerning that dispute.

Subsequently, on August 31, 2006, the district court, which was hearing certain appeals

and withdrawals of the reference related to this matter, determined that section 1290 was clarifying legislation and that this Court retained jurisdiction over state law contract disputes such as those related to the Termination Payment. Upon the request of certain parties, the district court certified the August 31st Order for interlocutory appeal. Thereafter, the Second Circuit granted permission for the parties to file the interlocutory appeal. Subsequently, as a result of a settlement reached with Snohomish, and upon the request of the parties, the Second Circuit issued an order staying further briefing in the interlocutory appeal pending approval of the Snohomish settlement. In the case involving Snohomish, this Court had previously granted Snohomish's request to enforce a similar arbitration provision in its relevant contract.

Here, EPMI requests that the Court similarly enforce the arbitration provision of the Master Agreement and dismiss the adversary proceeding. The Court heard oral argument on this issue at a hearing (the "Hearing") held on September 27, 2007.

Initially, Luzenac argued that this Court lacked jurisdiction to hear this request to compel arbitration because of the interlocutory appeal before the Second Circuit concerning certain issues related to section 1290. However, it appears that at the Hearing Luzenac conceded that the Court has jurisdiction to hear the motion to enforce the arbitration provision of the Master Agreement and acknowledged that a determination on the request to proceed to arbitration is a matter within this Court's discretion.

Luzenac, however, argues that the Motion to Compel arbitration is premature and should be addressed only after the Second Circuit issues its ruling on whether this Court or FERC has jurisdiction to resolve the contract issues related to the Termination Payment. Luzenac indicates that it will seek to proceed with arbitration if this Court is found to have jurisdiction over the

state law contract issues, however, it asserts that the request is premature now, as previously stated. Luzenac argues that allowing arbitration to proceed would potentially be a waste of time, energy, and money if the Second Circuit were to rule that FERC has exclusive jurisdiction to resolve the state law contract dispute concerning the Termination Payment. Luzenac asserts that if this Court is found not to have jurisdiction of the contract issues, those issues would be addressed by FERC and not an arbitrator

EPMI argues that it wants to administer the bankruptcy estate expeditiously. EPMI further asserts that the Court directed the parties in the Snohomish matter to arbitration under similar circumstances, albeit while the request for the interlocutory appeal was pending and not as yet granted. EPMI further argues that Luzenac's request for a stay pending appeal is procedurally defective as it should have filed a motion to that effect. EPMI further argues that, in any case, Luzenac has not met the standard for a stay pending appeal.

Luzenac argues that it did not move for a stay because of the existence of the stay that was implemented to facilitate mediation. Nevertheless, Luzenac argues that there are grounds for a stay pending resolution of the interlocutory appeal, which proceeding itself is stayed pending resolution of the Snohomish settlement.

Although the mediation stay is in effect, as a practical matter, the parties have not participated in the mediation process for the past two years. In addition, the parties do not believe that mediation would be fruitful. The Court recognizes that, in the past, the parties to the various Enron trading-case disputes have been directed to seek a report from the mediator as to his opinion on the benefit to be attained from continuing the mediation process. However, in those instances, at least one party to the mediation saw benefit to continuing the process. Here,

neither party believes that continued participation in the mediation process would be beneficial at this time. Therefore, because no purpose is served by continuing the stay pending the mediation process, the Court concludes that the stay related to the mediation process should be terminated.

With respect to the stay pending appeal sought by Luzenac, it argues that the Court should defer ruling on the request to proceed with arbitration pending the resolution of the interlocutory appeal before the Second Circuit. That appeal concerns the district court's determination that section 1290 was clarifying legislation and did not deprive the bankruptcy court of jurisdiction over state law contract issues concerning the Termination Payment. The Court notes that, at the time that the Second Circuit granted the request for the interlocutory appeal, certain of the Enron trading cases at issue were in proceedings before FERC. The Snohomash matter involved a wholesale contract, while other cases, including Luzenac, involved retail contracts. However, FERC only made a determination concerning the Snohomish wholesale contract, which it determined to be eligible for review under section 1290. FERC also indicated that it would issue orders concerning the other trading cases but has yet to enter any such orders. Enron argues that the import of FERC's ruling, and its statement that it would issue orders in other cases, was that FERC viewed section 1290 as being applicable only to wholesale contracts and not to the type of retail contract involved in Luzenac.

The factors considered in determining whether to grant a stay pending appeal are (1) the likelihood of success on the merits; (2) irreparable injury suffered if a stay is denied; (3) substantial injury suffered by the party opposing the imposition of the stay; and (4) any public interest implicated. *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002). Satisfactory evidence

of all four criteria must be shown by the movant, otherwise, the motion will be denied. *Bijan-Sara Corp. V. FDIC (In re Bijan-Sara Corp.*, 203 B.R. 358, 360 (B.A.P. 2d Cir. 1996). In *Mohammed v. Reno*, the Second Circuit revised its formulation of the factors to embrace a more variable approach concluding that "[t]he necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors." *Mohammed v. Reno* 309 F.3d at 101 (citing *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir. 1977)). Phrased alternatively, the probability of success that must be shown "is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay." *Mohammed v. Reno* 309 F.3d at 101. As such, "more of one excuses less of the other." *Id.* (citing *Michigan Coaltion of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)).

Luzenac has not shown how it would be irreparably harmed. It argues that allowing the matter to proceed to arbitration could potentially be a waste of time, energy, and money if the Second Circuit were to rule that FERC has exclusive jurisdiction to resolve the state law contract dispute concerning the Termination Payment. This is not irreparable injury.

Rather, here, further delay would cause substantial harm to the EPMI bankruptcy estate and its creditors who have waited more than five years for the estate to collect any amounts due on the Termination Payment. To benefit creditors, a prompt resolution of claims concerning property of the estate is necessary. The estate needs to complete its affairs and distribute assets as quickly as possible. Since the mediation process included more than 75 pending trading cases, it was beneficial to implement a stay to allow the parties an opportunity to attempt to resolve the cases. However, Luzenac is the last trading case left to be resolved and the parties

acknowledge that a stay will not foster resolution. A further delay in proceeding with the merits of the underlying claims is not warranted. Moreover, the appeal before the Second Circuit is not proceeding as expeditiously as Luzenac asserts. Rather, after the report of the proposed Snohomish settlement, briefing before the Circuit was stayed until the conclusion of the approval process of the settlement. To date, the settlement papers have not been presented for approval to the Court or to FERC. In addition, EPMI has stated that if that settlement is approved, it intends to seek a dismissal of the interlocutory appeal on the grounds that section 1290 does not apply to a retail contract and, therefore, the basis of the interlocutory appeal would be rendered moot by the Snohomish settlement concerning a wholesale contract.

The Court concludes that the importance of the expeditious administration of the estate outweighs the concern that the arbitration process may ultimately be disregarded. First the Court has not been stayed by the Circuit in this matter. Second the state of affairs that were present when the Circuit granted the interlocutory appeal have changed and arguably could result in a change in their granting of the relief at issue.

Luzenac has also not shown a likelihood of success on the merits that would divest this Court of jurisdiction on the state law contract claims. First, even if Luzenac were correct that the Second Circuit would conclude that section 1290 was enacted to give FERC exclusive jurisdiction over the state law contract claims, Luzenac would have to further show that there was a likelihood that such an interpretation could be sustained as constitutional, as discussed but not reached by the district court. In this regard, the constitutional issue could be addressed by the Second Circuit or could be remanded to the district court. Further, even if success on the merits were likely, there is the additional obstacle of showing that such exclusive jurisdiction

under section 1290 was applicable to retail transactions.

The Court concludes that Luzenac has not satisfied the elements for a stay pending appeal. Therefore, Luzenac's prior motion seeking to compel arbitration and stay the adversary proceeding is granted to the extent of ordering the parties to proceed with arbitration pursuant to the terms of the Master Agreement, however it is denied to the extent it seeks a stay of the adversary proceeding. Further, the Court grants EPMI's motion seeking to dismiss the adversary proceeding, without prejudice, and to order the parties to arbitration in accordance with the terms of the Master Agreement, with the Court retaining jurisdiction over any judicial remedies in connection with the arbitration and to confirm any arbitration award.