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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Fax Cover Sheet	[Fax Cover Sheet] - To: Alberto Gonzales - From: Tom Phillips	1	03/18/2002	P5;

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Owen, Priscilla

FRC ID:

9797

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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- b(1) National security classified information [(b)(1) of the FOIA]
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- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

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Withdrawal Marker

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Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Owen, Priscilla

FRC ID:

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OA Num.:

2177

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2088

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2018-0016-P

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We undertook to search the records to determine the cases in which Enron entities had appeared before the Supreme Court of Texas since 1990.

We began with Enron's 2000 SEC Form 10-K, which lists its subsidiaries and affiliates in Exhibit 21. The list spans 61 pages and includes hundreds of entities. Given this large number of subsidiaries and affiliates, we have not gone back to earlier 10-K's. So, there is the possibility that there are entities who were in the past affiliated with Enron, but were not during 2000, that were involved in a matter before the Court. With this caveat, here is a list, beginning with cases filed in 1990, in which Enron or an affiliated company was a party or took a position in the Supreme Court of Texas.

There were five cases in which Enron or an affiliated company was a party or real party in interest. These are:

1) ***Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931 (Tex. 1996) (Owen, J., for a unanimous court)**

This was a tax case concerning a statute, TEX. TAX CODE § 23.12(f), that allowed an owner of inventory to elect to have the market value of the inventory determined either as of September 1 or January 1. The statute covers "inventory" in general and is not limited to natural gas. The Court decided another case in tandem with this one in which a grocery store's inventory was at issue, *H.E. Butt Grocery Co. v. Jefferson County Appraisal Dist.*, 922 S.W.2d 941 (Tex. 1996) (per curiam).

Spring Independent School District challenged the valuation of natural gas owned by several Enron entities that was stored in salt domes, asserting that the statute was unconstitutional. The Harris County Appraisal District denied relief, and after exhausting administrative remedies, SISD sued the Enron entities in district court.

The trial court upheld the constitutionality of the statute, but the court of appeals reversed, finding the statute infirm on several constitutional grounds. The Supreme Court of Texas reversed the CA. The only issues before the Supreme Court concerned the Texas Constitution, but the Court relied on two United States Supreme Court decisions that were analogous in concluding that the statute did not violate the Texas Constitution.

Justice Owen mistakenly said in the opinion that \$15 million in tax revenues was at stake. In actuality, the amount of tax at issue was \$224,988.65, as reflected in the CA's opinion, 889 S.W.2d 562 at 564.

2) ***Tenneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640 (Tex. 1996) (Abbott, J., for a unanimous court) (Owen, J., not sitting)**

This case primarily concerned the effect of a stock sale on a right of first refusal in an operating agreement for a natural gas liquids fractionation plant. Enron entities were petitioners, along with Tenneco entities. Texaco and others were respondents along with Enterprise Products. The trial court held in favor of the Enron and Tenneco entities, but the court of appeals reversed and remanded. The Supreme Court of Texas reversed and rendered, effectively reinstating the trial court's judgment.

The Court first held that a breach of contract claim had been waived by the Enterprise Products parties. The Court then addressed the right of first refusal issue and concluded that the evidence established as a matter of law that a sale by Tenneco of all the stock of its affiliate to an Enron entity was a stock sale, not a transfer of assets. The Court held that a transfer of stock did not trigger the operating agreement's right of first refusal, which arose when an owner of the plant "desire[d] to sell, transfer or assign all or any part of its Ownership Interest" in the plant. The Court relied on cases from four other jurisdictions and on commentators. The Court observed that the operating agreement could have but did not include a change of control provision. Finally, the Court held that the trial court did not err in denying additional discovery before ruling on the motions for summary judgment that resolved the case.

- 3) ***Northern Natural Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603 (Tex. 1998) (Enoch, J., for a unanimous court) (Hankinson, J., not sitting) (Hankinson, O'Neill, and Gonzales, JJ., not sitting on rehearing)**

Northern Natural is a subsidiary or affiliate of Enron. This case concerned an alleged breach of a gas transportation and processing agreement. The trial court entered judgment in favor of Conoco, awarding damages of more than \$20 million. The court of appeals reversed and remanded, holding that as a matter of law, Northern Natural had not breached its contract but that there was a fact question of whether it had breached a duty of good faith. The Supreme Court of Texas affirmed the court of appeals.

The Court agreed with the court of appeals that the contract at issue required Northern Natural to deliver to Conoco for processing any gas that Northern Natural purchased under contracts it had with producers that were specifically dedicated to the Conoco processing agreement, but that the processing agreement did not require Northern Natural to purchase any gas. The remaining question was whether Northern Natural may have breached a duty of good faith by cancelling all of the producer contracts dedicated to the Conoco processing agreement. The Court held that the UCC's good faith provision governing a sale of goods did not apply because this was a service contract. The Court then held that the processing agreement did not lack mutuality since it obligated Northern Natural to tender any and all gas that it purchased. But the Court also held that a party cannot avoid performance of an output or requirements contract by, in bad faith, having no output or requirements. The Court concluded that the case was properly remanded to the trial court to determine whether Northern Natural canceled its producer contracts without a valid business reason and in bad faith.

On rehearing, Northern Natural asked the Court to render judgment in its favor on the basis that there was no evidence 1) that it ceased to have processing requirements without a valid business reason and in bad faith, or 2) that Conoco sustained any damages. Justice Enoch wrote a short opinion for the Court on rehearing that expressed no opinion on the bad faith issue since it was first raised on rehearing and therefore was not timely raised. The Court then held there was some evidence of damages and overruled the motion for rehearing.

- 4) ***Intratex Gas Co. v. Beeson*, 22 S.W.3d 398 (Tex. 2000) (Hankinson, J., for a unanimous court) (O'Neill, J., not sitting)**

Intratex is a subsidiary or affiliate of Enron. This was an interlocutory appeal of an order certifying a class action. The trial court certified a class of: "All persons who were producers of natural gas sold to the defendant [Northern Natural] between January 1, 1978 and December 31, 1998 whose natural gas was taken by the defendant in quantities less than their ratable proportions." The court of appeals held that although the class definition might be problematic and might require modification, that would not defeat certification. The Supreme Court of Texas reversed and remanded for further proceedings, holding that the trial court had abused its discretion when it certified the class based on an improper class definition.

The Court held that a class definition must be precise, which means that class members must be presently ascertainable by reference to objective criteria. A corollary to that conclusion was that a class definition cannot require determination of the merits to ascertain who is in the class. The trial court's definition was fatally defective because the members of the class could not be determined until the merits of the case had been decided, that is, whether Northern Natural had taken gas non-ratably in violation of the Texas Natural Resources Code and if so, from whom it had taken non-ratably. The Court further held that appellate courts should not redefine a defectively defined class. Defining a class and whether to certify is a matter within a trial court's discretion. The Court accordingly remanded the case to the trial court for further proceedings.

- 5) *In re TXU*, 2001 WL 1668188 (Tex. 2001) (per curiam) (Phillips, C.J., concurring joined by Enoch and Godbey, JJ.) (Baker, J., concurring joined by Rodriguez, J.) (Brister, J., concurring) (Hecht, J., dissenting joined by Owen, J.) (Hankinson and O'Neill, JJ., not sitting)

This was a mandamus proceeding brought by TXU against the members of the Public Utility Commission in connection with the deregulation of the retail electric industry in Texas. Enron Energy Services, Inc. was a party in the PUC proceedings and filed a brief on the merits in the Supreme Court of Texas as a real party in interest. Enron Energy supported the Commission's order and urged the Court to deny the mandamus.

There was no consensus on the Court as to why the mandamus petition should be denied, but seven members of the Court, for differing reasons, concluded that the petition should be denied. TXU had requested the Court to direct the members of the PUC to vacate the portions of its order that 1) halted recovery by TXU of millions of dollars in so-called stranded costs, and 2) required depreciation of certain assets to be reversed. A majority of the Court did not reach the merits, which was whether the Commission had the authority under the PURA to do what it did. The dissent, joined by Justice Owen, would have held that the Commission had no authority under the PURA to interfere with the Legislature's scheme of deregulation.

Two of the Justices (Hankinson and O'Neill) did not sit on this case, and Governor Perry appointed Chief Justice Brister from a court of appeals in Houston and Judge David Godbey, a district judge in Dallas, to sit on this case.

Other Matters Before the Court

There seem to have been nineteen other matters before the Court since 1990 in which

Enron or an affiliate or subsidiary was a party or requested relief. In seventeen of those cases, the Court declined to exercise its discretionary jurisdiction or dismissed the case for want of jurisdiction and did not reach the merits. The other two were dismissed by agreement of the parties. The cases are:

- 1) *Mewborne Oil Co. v. Blackburn*, No. D-0232
Mandamus filed 8/22/1990
Overruled 10/10/1990

Transwestern Pipeline Company, an Enron affiliate or subsidiary, was a respondent.

- 2) *Enron Oil Trading & Transportation Co. v. Boles*, No. D-0374
Application for Writ of Error filed 10/9/1990
Denied 12/12/90

- 3) *Transwestern Pipeline Co. v. Wood*, D-0855
Mandamus filed 3/15/1991
Dismissed by Agreement of the parties 3/27/1991

Transwestern, an affiliate or subsidiary of Enron, was the petitioner.

- 4) *Enron Oil & Gas Co. v. Flores*, No. D-1097
Mandamus filed 5/31/1991
Overruled 9/18/1991

- 5) *Horizon Oil & Gas Co. v. Transwestern Pipeline Co.*, No. D-1274
Application for writ of error filed 7/10/1991
Dismissed for want of jurisdiction 9/18/1991

Transwestern Pipeline Company, and Enron affiliate or subsidiary, was a respondent.

- 6) *The Perry Cook Special Trust v. Sullivan*, D-2411
Application for writ of error filed 5/18/1992
Dismissed for want of jurisdiction 6/17/1992

Houston Pipe Line Company, an affiliate or subsidiary of Enron, was a respondent.

- 7) *Mewborne Oil Co. v. Seventh Court of Appeals*, D-2643
Mandamus filed 7/13/1992
Overruled 9/9/1992

Transwestern Pipeline Company, an affiliate or subsidiary of Enron, was a

respondent (a real party in interest)

- 8) *Metropolitan Life Ins. Co. v. Carpenter (Texas) Realty Corp.*, D-4441
Application for writ of error filed 11/17/1993
Denied 3/30/1994

Enron Corp. and Enron Property Company, Inc. were among the petitioners.

- 9) *Transamerican Natural Gas Corp. v. Mancias*, 94-0600 (Enoch, J., not sitting)
Mandamus filed 6/20/1994
Overruled 7/28/1994

Enron Corp. and Enron Oil & Gas Company were the respondents (real parties in interest)

- 10) *Houston Pipe Line Co. v. Tennant*, 94-1101
Mandamus filed 10/31/1994
Overruled 10/31/1994

Houston Pipe Line Company is an Enron affiliate or subsidiary.

- 11) *Utility Fuels, Inc. v. Destec Properties Limited Partnership* (94-1263)
Application for writ of error filed 12/08/1994
Denied 2/02/1995

Destec Properties Limited Partnership is an affiliate or subsidiary of Enron.

- 12) *Florida Gas Transmission Co. v. Nicor Exploration Co.* (96-0090)
Application for writ of error filed 1/29/1996
Denied 8/1/1996

Florida Gas Transmission Company is an affiliate or subsidiary of Enron.

- 13) *Miller v. Meridian Oil, Inc.* (98-1081)
Petition for Review filed 11/3/1998
Denied 1/7/1999

Enron Corp. was among the respondents.

- 14) *United Oil & Minerals, Inc. v. Costilla Energy, Inc.* (99-1034)
Motion for extension of time to file petition for review filed 10/14/1999
Dismissed by agreement of the parties 1/17/2002

Cotilla Energy, Inc. is an affiliate or subsidiary of Enron.

- 15) *Destec Properties Limited Partnership v. Freestone Central Appraisal Dist.* (99-1272)
Petition for review filed 12/20/1999
Denied 8/24/2000

Destec Properties Limited Partnership is an affiliate or subsidiary of Enron.

- 16) *Mercier v. Midtexas Pipeline Co.* 00-1164
Mercier v. Midtexas Pipeline Co. 00-1165
Petitions for review filed 11/9/2000
Denied 1/11/2001

Midtexas Pipeline Co. was listed as a "pending" affiliate or subsidiary of Enron in the 2000 10-K.

- 17) *Birnbaum v. SWEPI f/k/a Shell Western E&P, Inc.* (01-0449) (O'Neill, J., not sitting)
Petition for review filed 5/25/2001
Denied 8/30/2001

Enron Oil and Gas Company was among the respondents.

- 18) *In re EOG Resources, Inc.* (01-0687) (O'Neill, J., not sitting)
Mandamus filed 7/30/2001
Denied 1/10/2002

EOG Resources, Inc. is an affiliate or subsidiary of Enron.

- 19) *In re Reliant Energy, Inc.* (01-1168) (Hankinson, O'Neil, JJ., not sitting)
Mandamus filed 11/28/2001
Denied 12/31/2001

Enron Energy Systems, Inc. filed a response urging denial of the mandamus.

Other Cases

The names of Enron companies appear in other cases in the Court's records, but we determined from the briefs on file that the Enron entities did not appear before the Court, but were merely listed as parties in the lower courts or an administrative proceeding.