UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| IN RE ENRON CORPORATION SECURITIES LITIGATION | Consolidated Civil Action No. H-01-3624 |
| This Document Relates To:<br><br>MARK NEWBY, et al., individually and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>ENRON CORPORATION, et al.,<br><br>Defendants. | |
| THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., individually and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>KENNETH L. LAY, et al.,<br><br>Defendants. | |

United States Courts
Southern District of Texas
FILED
JUL 16 2004
Michael N. Milby, Clerk

**MERRILL LYNCH'S NOTICE OF SUPPLEMENTAL AUTHORITY IN OPPOSITION TO LEAD PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION**

Defendants Merrill Lynch & Co., Inc. and Merrill Lynch, Pierce, Fenner & Smith Incorporated (together, "Merrill Lynch") respectfully submit this notice of supplemental authority briefly to address the Fifth Circuit's recent decision, the petition for rehearing *en banc*, and the denial of that petition in *Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657 (5th Cir. 2004),[1] as well as two recent decisions outside the Fifth Circuit. As discussed below, *Greenberg* precludes class treatment of the claims against Merrill Lynch by eliminating the fraud-on-the-market presumption of reliance for precisely these types of claims. Under well-established law, in the absence of the fraud-on-the-market presumption, common issues do not predominate and a class cannot be certified.

**The Fifth Circuit's Holding that the Fraud-on-the-Market Presumption of Reliance Does Not Apply to Confirmatory Statements**

In most securities fraud cases, individual issues of reliance do not predominate because reliance is "rebuttably presumed with respect to publicly disseminated materially misleading statements concerning companies whose shares are traded on a well-developed, efficient market." *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 413 (5th Cir. 2001). On the other hand, where proof of individualized reliance is required, plaintiffs are precluded "from proceeding with a class action, since individual issues then would have overwhelmed common ones." *Basic, Inc. v. Levinson*, 485 U.S. 224, 242 (1988).[2]

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[1] A copy of *Greenberg* is attached as Exhibit A. The Fifth Circuit denied a petition for rehearing on May 12, 2004.

[2] *See Bell v. Ascendant Solutions, Inc.*, No. 01-0166, 2004 U.S. Dist. LEXIS 12321, at *5 (N.D. Tex. July 1, 2004) (finding that plaintiffs "may not resort to the 'fraud on the market' theory of reliance, and [would] have to establish individual reliance for each individual plaintiff – thus foreclosing class certification"); *Krogman v. Sterritt*, 202 F.R.D. 467, 478 (N.D. Tex. 2001) (denying class certification where the fraud-on-the-market-theory was

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In *Greenberg*, the Fifth Circuit held that the presumption of reliance does not apply to "confirmatory statements" – *i.e.*, statements that are consistent with information already digested by the market. 364 F.3d at 665. The Fifth Circuit stated that for the presumption of reliance to apply:

> it is necessary that the earlier positive misrepresentation not be confirmatory. As we noted in our example in *Nathenson*, 267 F.3d at 419, confirmatory information has already been digested by the market and will not cause a change in stock price. Because the presumption of reliance is based upon *actual movement* of the stock price, confirmatory information cannot be the basis for a fraud-on-the-market claim.

*Id.* at 666-67. The Fifth Circuit specifically rejected the argument that information confirming that earnings were in line with market expectations would give rise to a presumption of reliance even if the information was false and delayed the price of a security from falling. *Id.* at 663.

Moreover, the Fifth Circuit went beyond eliminating the presumption of reliance for confirmatory statements. It stated that even for non-confirmatory statements, plaintiffs are not entitled to a presumption of reliance if the price of the company's stock "did not decline upon revelation that the earlier positive statements were misleading," 364 F.3d at 665 (citing *Nathenson*, 267 F.3d at 417-19), and if they cannot show that "the negative 'truthful' information

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inapplicable, noting "proof of individual reliance would be required, and Plaintiffs [did] not satisfy the predominance element of Rule 23(b)(3)"); *Griffin v. GK Intelligent Sys., Inc.*, 196 F.R.D. 298, 304 (S.D. Tex. 2000) ("Plaintiffs are not entitled to the fraud-on-the-market presumption and must each prove individual reliance. The reliance issue predominates over the class issue of whether the statements were materially misleading, and Plaintiffs cannot satisfy the predominance element of the Rule 23(b)(3) requirement."); *Young v. Nationwide Life Ins. Co.*, 183 F.R.D. 502, 508 (S.D. Tex. 1998) (finding no presumption of reliance and denying class certification because individual reliance was an issue, thus undermining predominance); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (decertifying a class and noting "a fraud class action cannot be certified when individual reliance will be an issue").

causing the decrease in price is related to an allegedly false, non-confirmatory positive statement made earlier." *Id.* at 666. Further, the court emphasized that where there are multiple items of negative information, "plaintiffs must demonstrate that there is a reasonable likelihood that the cause of the decline in price is due to the revelation of the truth and not the release of unrelated negative information." *Id.* at 665.[3]

On April 28, 2004, the same counsel who represents the plaintiffs in this action filed a Petition for Panel Rehearing in *Greenberg*.[4] Counsel sought rehearing because the decision "appears to have crafted three bright-line rules" (Pet. at 1), including the rule that "confirmatory information is never actionable." (Pet. at 2). In fact, the Fifth Circuit did not hold that such information is never actionable; it instead held that it does not give rise to a *presumption* of reliance. As discussed above, this precludes class treatment. The Fifth Circuit denied rehearing on May 12, 2004.

**The Fraudulent Conduct Alleged Against Merrill Lynch**
**Is Confirmatory; Therefore, Class Treatment Is Precluded**

The fraudulent conduct alleged against Merrill Lynch is classically "confirmatory" under the plaintiffs' own characterization. The essence of plaintiffs' claims against Merrill Lynch is that Merrill Lynch participated in certain transactions in the fourth quarter of 1999 to enable Enron to "meet Wall Street's estimates." First Amended Consolidated Complaint ("Am. Compl.") ¶ 742.5; *see also id.* ¶¶ 742.16, 742.18 & 742.22 (alleging that power swaps, Nigerian

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[3] Moreover, just as *Greenberg* requires that plaintiffs demonstrate a price decline from revelation of the truth about the particular conduct of each defendant, in order to recover damages at the end of the day, plaintiffs will need to demonstrate that such damages were "*solely* caused by the defendant's conduct." *Miller v. Asensio & Co.*, 364 F.3d 223, 232 (4th Cir. 2004).

[4] A copy of the Petition is attached as Exhibit B.

barge, and LJM2 transactions "falsely inflated Enron's profits to meet Wall Street's and Enron's internal targets," and that "in response to Enron meeting analysts' estimates," its stock price increased). On January 18, 2000, Enron in fact announced earnings for the fourth quarter of 1999 of $0.31 per share ($1.18 per share for the year), precisely in line with the consensus estimate, and its stock price fell rather than rose. *See* Enron Press Release, January 18, 2000 (attached as Exhibit C); *Houston Chronicle*, January 19, 2000 ("The company matched analysts' expectations for the quarter to the penny, according to the average of earnings estimates compiled by First Call/Thomson Financial.") (attached as Exhibit D); Stock Price Chart (attached as Exhibit E). *Greenberg* explicitly states that an announcement of earnings "in line with analysts' estimates" is "the classic example of confirmatory information." 364 F.3d at 668 n.16.[5] Thus, these claims cannot be subject to class treatment because reliance cannot be presumed.

The same is true with respect to plaintiffs' allegation that Merrill Lynch issued misleading analyst reports. Each of the Merrill Lynch analyst reports cited in the Amended Complaint was based on information that was previously announced by Enron.[6] These reports are, therefore, confirmatory, and thus non-actionable under the fraud-on-the-market theory.

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[5] Accordingly, in *Greenberg*, the court affirmed summary judgment for the defendant insofar as plaintiffs' claims were based on such confirmatory earnings announcements.

[6] *See* Am. Compl. ¶¶ 130 (report commenting on Enron's earnings announcement of January 19, 1999), 142 (report summarizing "information presented at [an Enron] conference" held the prior month), 147 & 149 (reports commenting on Enron's earnings announcement of April 13, 1999), 162 (report commenting on Enron's earnings announcement of July 13, 1999), 181 (report commenting on Enron's earnings announcement of October 12, 1999), 201 (report commenting on Enron's earnings announcement of January 18, 2000), 208-09 (reports commenting on Enron's "all-day analyst meeting" of January 20, 2000 and announcement concerning broadband business), 226 (report commenting on Enron's earnings announcement of April 12, 2000), 250 (reports commenting on Enron's earnings announcement of July 24, 2000), 266 (report commenting on Enron's earnings announcement of October 17, 2000), 321

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In addition, recent decisions have raised questions regarding whether the fraud-on-the-market theory can *ever* be invoked at the class certification stage involving analyst reports, and confirm that, at a minimum, plaintiffs would have to establish far more facts than they have established here to permit the Court to make the findings necessary to support class ceritification. In *Hevesi v. Citigroup Inc.*, 366 F.3d 70 (2d Cir. 2004), the Second Circuit granted a petition under Fed. R. Civ. P. 23(f) for permission to file an interlocutory appeal from an order granting class certification, recognizing that a "substantial legal argument" had been made that there is "a crucial distinction between, on the one hand, the uniquely authoritative statements of issuers and, on the other hand, expressions of opinion by analysts." 366 F.3d at 79.

Acknowledging the import of the Second Circuit's decision, Judge Jed Rakoff of the Southern District of New York found that distinction to be dispositive, holding that the fraud-on-the-market presumption of reliance could not be invoked – and, therefore, the class could not be certified – where plaintiffs' expert had failed to demonstrate prior to class certification that "the analyst's statements materially impacted the market price in a reasonably quantifiable respect." *Demarco v. Lehman Brothers Inc.*, 03 Civ. 3470 (JSR), 2004 WL 1506242, at *3 (S.D.N.Y. July 6, 2004). In *Demarco*, the court held that the plaintiffs had not "remotely satisf[ied]" that standard, *id.* at *4, notwithstanding an expert report purporting to opine that such an impact existed. Here, of course, plaintiffs have offered no evidence whatsoever suggesting that any alleged false statements in Merrill Lynch's analyst reports "materially impacted the market price

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(report commenting on Enron's earnings announcements of April 17 & 18, 2001), 362 (report commenting on Enron's asset sales announced during prior two weeks). Copies of each of these reports were attached to the Declaration of Taylor M. Hicks in Support of Merrill Lynch & Co., Inc.'s Motion to Dismiss, dated May 7, 2002 (Docket No. 669).

in a reasonably quantifiable respect." Accordingly, for this reason as well, no class can be certified as to Merrill Lynch.

**Apart from the Fact that Merrill Lynch's Conduct Was Confirmatory, the Greenberg Standards for Presuming Reliance Are Not Satisfied**

Even apart from the confirmatory nature of Merrill Lynch's alleged conduct, the *Greenberg* standards for presuming reliance are not satisfied. As noted above, the only fraudulent conduct alleged against Merrill Lynch (aside from the analyst reports, which are confirmatory and have not been shown to impact Enron's market price) is its participation in certain transactions in the fourth quarter of 1999 that were allegedly designed to manipulate Enron's earnings. But when Enron announced its earnings for that quarter on January 18, 2000, Enron's closing stock price *declined* from $56 3/8 on January 14, to $55 1/2 on January 18, to $53 1/2 on January 19.[7] *See* Ex. E. Thus, the information did not result in an increase to Enron's stock price.

Plaintiffs also have not shown that the revelation of the "truth" about Merrill Lynch's conduct resulted in a material decrease in the stock price. Merrill Lynch's role in the Nigerian barge transaction and the power swaps transaction was not revealed until newspaper articles on April 9, 2002 and August 8, 2002, respectively (attached as Exhibit F). Enron had already filed for bankruptcy protection months earlier, and its stock had fallen to mere pennies, based more on speculation about potential recoveries in bankruptcy than on any current news or revelations about Enron. On the day that the power swaps transaction became publicly known, Enron stock actually climbed three cents to close at $0.17 per share, and it remained at $0.16 or above for

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[7] This represents the "two-day window" applied in *Greenberg*. On January 20, 2000, Enron made a significant positive announcement concerning its broadband business, and the market reacted immediately, climbing to $67 3/8.

more than a month. *See* Ex. E. Plaintiffs have not demonstrated any meaningful decline upon revelation of the transactions, much less that any such decline was attributable to such revelations, as opposed to other factors or other news about Enron. Accordingly, the allegations against Merrill Lynch do not even meet the standards for extending the presumption of reliance to non-confirmatory statements under *Greenberg*.

For each of the above reasons, there is no basis for certifying a class with respect to any of the claims against Merrill Lynch.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served upon all known counsel of record by e-mail, facsimile or certified mail, return receipt requested, pursuant to the Court's Order dated April 10, 2002 (Docket No. 449), on this the **16th** day of **July, 2004**.

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# EXHIBIT A

H

United States Court of Appeals,
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situated, Plaintiffs-Appellants,
v.
CROSSROADS SYSTEMS, INC.; Brian R. Smith; Reagan Y. Sakai; John R.
Middleton, Defendants-Appellees.

**No. 03-50311.**
April 14, 2004.

**Background:** Investors brought securities fraud class action against corporation and individual officers, alleging artificial inflation of stock price via false and misleading statements concerning corporation's products. The United States District Court for the Western District of Texas, 2002 WL 32005236, James R. Nowlin, J., granted summary judgment for defendants, ruling that investors were not entitled to presumption of reliance under fraud-on-the-market theory. Investors appealed.

**Holdings:** The Court of Appeals, W. Eugene Davis, Circuit Judge, held that:
(1) drop of 63% in stock price following company's revelation of news that contradicted earlier alleged misrepresentations constituted statistically significant decrease, supporting fraud-on-the-market presumption of reliance;
(2) negative news contradicting earlier alleged misrepresentations did not raise presumption of reliance where it was accompanied by much more severe negative news unrelated to misrepresentations; and
(3) news that quarterly financial results would be up to 66% below estimates, contradicting earlier alleged misrepresentations, raised presumption of reliance.

Affirmed in part, vacated in part, and remanded.

West Headnotes

**[1] Securities Regulation ⚷60.18**
349Bk60.18 Most Cited Cases

To state private securities fraud claim under § 10(b) and Rule 10b-5, plaintiff must allege, in connection with purchase or sale of securities: (1) misstatement or omission; (2) of material fact; (3) made with scienter; (4) on which plaintiff relied; (5) that proximately caused plaintiff's injury. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

**[2] Securities Regulation ⚷60.48(3)**
349Bk60.48(3) Most Cited Cases

Under fraud-on-the-market theory of proving reliance element of § 10(b) securities fraud action, reliance is rebuttably presumed if plaintiffs can show that: (1) defendant made public material misrepresentations; (2) defendant's shares were traded in an efficient market; and (3) plaintiffs traded shares between time misrepresentations were made and time truth was revealed. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

**[3] Securities Regulation ⚷60.62**
349Bk60.62 Most Cited Cases

In § 10(b) action, presumption of reliance raised by fraud-on-the-market showing may be rebutted by any showing that severs link between alleged misrepresentation and either price received or paid by plaintiff, or his decision to trade at fair market price. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

**[4] Securities Regulation ⚷60.48(3)**
349Bk60.48(3) Most Cited Cases

In § 10(b) cases employing fraud-on-the-market theory, complained-of misrepresentation or omission must have actually affected market price of stock in order to raise

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presumption of reliance. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

**[5] Securities Regulation ⚷60.48(3)**
349Bk60.48(3) Most Cited Cases

Drop of 63% in stock's price following company's revelation of product and financial problems that contradicted earlier alleged misrepresentations constituted statistically significant decrease, regardless of fact that even greater drop in stock price had occurred over preceding six-month period, and thus post-revelation drop supported fraud-on-the-market presumption of reliance in investors' securities fraud action against company and its officers. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

**[6] Securities Regulation ⚷60.48(3)**
349Bk60.48(3) Most Cited Cases

In § 10(b) action employing fraud-on-the-market theory, in order for plaintiff to show that stock's price was actually affected through evidence of significant price decrease following revelation of alleged "truth" of earlier false statements, plaintiff must demonstrate that: (1) negative "truthful" information causing decrease in price is related to allegedly false, non-confirmatory positive statement made earlier, and (2) it is more probable than not that it was this negative statement, not other unrelated negative statements, that caused significant amount of decline. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

**[7] Securities Regulation ⚷60.48(3)**
349Bk60.48(3) Most Cited Cases

Company's positive statements concerning interoperability of its products, which were contradicted by later announcement of temporary stop-ship of products due to interoperability problems, could not form basis for fraud-on-the-market presumption of reliance in investors' § 10(b) action against company and its officers, since stop-ship announcement was only one of several negative announcements included in same release, and was least significant one; other negative news included word that one of company's biggest customers would no longer be a customer and quarterly earnings two-thirds below estimates. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

**[8] Securities Regulation ⚷60.48(3)**
349Bk60.48(3) Most Cited Cases

Company's negative news that third-quarter financial results would be up to 66% below estimates raised fraud-on-the-market presumption of reliance in investors' § 10(b) action against company and its officers, since it directly contradicted earlier, allegedly misleading, positive statements concerning expected third-quarter results; amount of shortfall was large enough to overcome fact that information release contained other negative items unrelated to third-quarter results. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

**[9] Federal Courts ⚷611**
170Bk611 Most Cited Cases

Arguments not raised in district court cannot be asserted for first time on appeal, especially where assertion first raised on appeal is factual.

**[10] Securities Regulation ⚷60.27(4)**
349Bk60.27(4) Most Cited Cases

Company's officer's allegedly misleading statement of belief that recent stock price declines might be due to fears that large-stake investors might start selling their shares could not form basis for investors' securities fraud action, even if officer did not actually believe his own statement, where public did not learn of information that constituted alleged real reason for decline, i.e. interoperability problems with company's products, until two weeks after statement. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5.

**[11] Securities Regulation ⚷60.27(4)**
349Bk60.27(4) Most Cited Cases

Statement of belief is only open to objection under Securities Exchange Act where evidence shows that speaker did not in fact hold that belief and statement made asserted something false or misleading about subject matter. Securities Exchange Act of 1934, 15 U.S.C.A. § 78a et seq.
***659** Sanford Svetcov (argued), Dennis Jeremy Herman, Milberg, Weiss, Bershad, Hynes & Lerach, Laurence D. King, Kaplan, Fox & Kilsheimer, San Francisco, CA, William S. Lerach, Milberg, Weiss, Bershad, Hynes & Lerach, San Diego, CA, Frederic S. Fox, Kaplan, Kilsheimer & Fox, New York City, James D. Baskin, III, The Baskin Law Firm, Austin, TX, Katherine Blanck Radsan, Washington, DC, for Plaintiffs-Appellants.

Paul R. Bessette (argued), Michael John Biles, Jennifer R. Brannen, Akin, Gump, Strauss, Hauer & Feld, Austin, TX, for Defendants-Appellees.

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Appeal from the United States District Court for the Western District of Texas.

Before DAVIS, WIENER, and STEWART, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Purchasers of Crossroads Systems, Inc. stock between January 25, 2000, and August 24, 2000, filed this putative class action against Crossroads and three of its officers seeking recovery for securities fraud under Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5. The action is based on several statements made by defendants relating to the capabilities of Crossroads's products and financial results for the first three quarters of Fiscal Year 2000. The defendants moved for partial summary judgment on the ground that the plaintiffs cannot establish reliance on any of Crossroads's alleged ***660** false statements under the theory of fraud-on-the-market. We agree with the district court's analysis as to most of the alleged false statements but disagree with respect to the allegedly false statements made on 24 May 2000, 6 June 2000, 12 June 2000, and 5 July 2000. We therefore vacate the summary judgment as to these latter statements and remand for further proceedings.

I.

Crossroads is a public company based in Austin, Texas, that designs, manufactures, and sells storage routers. [FN1] On January 25, 2000, Crossroads announced that production was beginning on its "Third Generation" of storage routers, comprised of models 4150, 4250, and 4450. The release included details on several features of the new line of routers, such as interoperability, increased speed, and server-free backup. Over the next several months, Crossroads made additional statements concerning the capabilities of its Third Generation line of routers. On July 27, 2000, Crossroads released multiple items of unfavorable news, including the news that Crossroads had issued a temporary stop-ship of its products because of interoperability problems. After the July 27 release, the price of Crossroads stock fell by about one-half.

FN1. Storage routers are devices that relieve congestion within computer networks and reduce the time to back-up electronic information.

In February, 2001, the plaintiffs filed this private securities fraud class action on behalf of purchasers of Systems, Inc. (Crossroads) common stock between January 25, 2000, and August 24, 2000 (the "Class Period"), alleging violations by Crossroads and its principal executives of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. The Plaintiffs alleged that during the Class Period Crossroads made several material public misrepresentations overstating the interoperability and other capabilities of its router products that tended to inflate the price of the company's stock. In addition, the plaintiffs alleged that Crossroads overstated the company's financial results during the class period. [FN2] Plaintiffs also alleged that the "truth" about these statements was revealed on 27 July 2000 and 24 August 2000, causing the price of Crossroads stock to decline sharply.

FN2. Plaintiffs alleged that Crossroads made these misrepresentations on 25 January 2000, 7 February 2000, 22 February 2000, 23 February 2000, 27 March 2000, 19 April 2000, 23 May 2000, 24 May 2000, 6 June 2000, 12 June 2000, 14 June 2000, 20 June 2000, 27 June 2000, 5 July 2000, 13 July 2000.

The Defendants filed a motion to dismiss under Rule 12(b)(6). The district court denied this motion on August 15, 2001. In September of 2001, this court issued its opinion in *Nathenson v. Zonagen, Inc.*, 267 F.3d 400 (5th Cir.2001), which clarified, *inter alia*, the rule in this circuit concerning the proof required to establish reliance in a securities fraud case based on fraud-on-the-market. After completing discovery and deposing the lead plaintiff, Crossroads filed a motion for partial summary judgment arguing that under *Nathenson* the plaintiffs were not entitled to a presumption of reliance under the fraud-on-the-market theory of their case. The district court held that under *Nathenson*, plaintiffs asserting a fraud-on-the-market theory are not entitled to the presumption of reliance where the alleged misrepresentations do not affect the market price of the stock. The district court concluded that an efficient market will digest unexpected new information within two days of its release. The district court used this two-day window to determine whether the alleged misrepresentations sufficiently affected the price of Crossroads stock so ***661** that the plaintiffs would be entitled to the fraud-on-the-market presumption of reliance. [FN3] For various reasons discussed below, the district court concluded that the plaintiffs were not entitled to the presumption of reliance for any of the alleged misrepresentations. The district court then designated this partial summary judgment a final judgment and dismissed the plaintiffs case.

FN3. The plaintiffs do not challenge the use of this two-day window.

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II.

We review the district court's grant of summary judgment de novo, considering all evidence in a light most favorable to the non-movant. *Campos v. City of Houston*, 113 F.3d 544, 545 (5th Cir.1997). Summary judgment will be affirmed where, after independent review, there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. *Walker v. Thompson*, 214 F.3d 615, 624 (5th Cir.2000). Summary judgment may be affirmed on any basis supported by the record. *Conkling v. Turner*, 138 F.3d 577 (5th Cir.1998).

III.

[1][2][3] To state a private securities fraud claim under § 10(b) [FN4] and Rule 10b-5, [FN5] "a plaintiff must allege, in connection with the purchase or sale of securities, (1) a misstatement or an omission (2) of material fact, (3) made with scienter (4) *on which plaintiff relied* (5) that proximately caused [the plaintiffs'] injury." *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 406-07 (5th Cir.2001) (quotation omitted) (emphasis added). The Supreme Court recognized that requiring proof of "actual reliance" in class actions was unduly burdensome because of the obvious difficulty of showing that every class member individually relied on the alleged misstatement. To ease this burden the Supreme Court, in *Basic v. Levinson*, recognized the securities fraud theory of fraud-on-the-market. 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988). Under this theory, reliance on the statement is rebuttably presumed if the plaintiffs can show that (1) the defendant made public material misrepresentations, (2) the defendant's shares were traded in an efficient market, and (3) the plaintiffs traded shares between the time the misrepresentations were made and the time the truth was revealed. *Id.* at 247 n. 27, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194. [FN6] The Defendants may rebut this presumption by "[a]ny showing that severs the link between ***662** the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at fair market price [.]" *Id.* at 247, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194.

FN4. Section 10(b) provides, in pertinent part:
It shall be unlawful for any person, directly or indirectly ...
(b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe a necessary or appropriate in the public interest or for the protection of investors.
15 U.S.C. § 78j(b).

FN5. Rule 10b-5 provides, in pertinent part:
It shall be unlawful for any person, directly or indirectly ...
(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances, not misleading ... in connection with the purchase or sale of any security.
17 C.F.R. § 240.10b-5.

FN6. Under this theory, where securities are traded in an efficient market, it is assumed that all public information concerning a company is known to the market and reflected in the market price of the company's stock. Therefore, when someone purchases a company's stock in an efficient market, we can presume that he relied "on the supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price[.]" *Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir.1975).

[4] During the discovery phase of the instant case, this court issued its opinion in *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 406-07 (5th Cir.2001), where we stated,

> *Basic* plainly states that the presumption of reliance may be rebutted by "[a]ny showing that severs the link between the alleged misrepresentation and ... the price received (or paid) by the plaintiff." This would include a showing that "the market price would not have been affected by" the alleged "misrepresentations," as in such a case "the basis for finding that the fraud had been transmitted through market price would be gone."

*Nathenson*, 267 F.3d at 414 (citations omitted). Accordingly, *Nathenson* held that "in cases depending on fraud-on-the-market theory, [ ] the complained of misrepresentation or omission [must] have actually affected the market price of the stock[.]" Id. at 415. The *Nathenson* plaintiffs could not show that the price of Zonagen's stock was actually affected by the allegedly false statements, either by showing an increase in price following the allegedly false positive statements or a corresponding decrease in price following the revelation of the misleading nature of these statements. As such, the plaintiffs were not entitled to the fraud-on-the-market presumption of reliance.

Crossroads moved for partial summary judgment on the issue of presumption of reliance based on *Nathenson* 's requirement of an actual effect on stock price. The district court noted that the price of Crossroads stock either declined or did not increase in a statistically significant manner in the two days following the alleged misrepresentations made on 25 January 2000, 22 February

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2000, 23 February 2000, 24 March 2000, 27 March 2000, 19 April 2000, 23 May 2000, 24 May 2000, 6 June 2000, 12 June 2000, 14 June 2000, 20 June 2000, 27 June 2000, 5 July 2000, and 13 July 2000. The lack of stock price movement led the district court to conclude that under Nathenson the plaintiffs were not entitled to the presumption of reliance for the statements made on these days. The district court further found that the release of the "truth" of these allegedly false statements on 27 July 2000 and 24 August 2000 was not evidence that the stock price had actually been affected by those statements because the decline in price following both of these dates was statistically insignificant. In reaching this conclusion the district court compared the overall decline in stock price between the first day of the Class Period and the day before the July 27 release. [FN7] Because decline in stock price during the Class Period was, respectively, almost 800% and 1900% greater than that following the release of the "truthful" information, the district court concluded that the decline in price following 27 July 2000 and 24 August 2000 was not statistically significant.

> FN7. The district court found that the price dropped from $13.44 to $5.00 after the July 27 announcement and from $12.62 to $9.00 after the August 24 announcement. On the other hand, the price of the stock fell from $80.75 on January 25 to $13.44 on July 26. The court pointed out that the $67.31 drop between the first day of the class and the day before the July 27 announcement was 798% greater than the drop in the two days after the July 27 announcement, and it was 1962% greater than the drop in the two days after the August 24 announcement.

IV.

The plaintiffs argue that the district court erred in finding that they were not ***663** entitled to the fraud-on-the-market presumption of reliance for each of the allegedly false statements made by Crossroads during the Class Period. The plaintiffs concede that by looking only to the two-day change following these dates they cannot show that the price of Crossroads stock increased in a statistically significant manner. However, the plaintiffs argue that Nathenson allows them to benefit from the presumption of reliance if it can be shown that "special circumstances" prevented the price from otherwise rising.

The plaintiffs argument centers around the following statement from Nathenson:

> *We also realize that in certain special circumstances public statements falsely stating information which is important to the value of a company's stock traded on an efficient market may affect the price of the stock even though the stock's market price does not soon thereafter change.* For example, if the market believes the company will earn $1.00 a share and this belief is reflected in the share price, then the share price may well not change when the company reports that it has indeed earned $1.00 a share even though the report is false in that the company has actually lost money (presumably when that loss is disclosed the share price will fall).
> 267 F.3d at 419 (emphasis added).

The plaintiffs argue that this statement somehow relieves them of their burden in a fraud-on-the-market case to show that a stock's price was actually affected by an allegedly false statement. We do not agree. This example merely recognizes a market reality that a stock's price will not change upon the release of confirmatory information, i.e., information already known to the market. This reality, however, is immaterial to the question of reliance in 10b-5 fraud claims. Reliance is an indispensable element of any fraud claim because it provides the "causal connection between a defendant's misrepresentation and a plaintiff's injury." *Basic*, 485 U.S. at 243, 108 S.Ct. 978. The fact that a market will not double-count the same information does not establish a nexus between misrepresentation and injury, especially in the context of fraud-on-the-market where we allow this relationship to be proved indirectly. A causal relationship between the statement and actual movement of the stock price is still required. Indeed, the example itself notes that when the "truth" is revealed "the share price will fall." Nathenson, 267 F.3d at 419. It is this *actual movement* of stock price which must be shown by fraud-on-the-market plaintiffs, and a plaintiff cannot relieve himself of this obligation by referring to "special circumstances" in an attempt to explain non-movement of the stock price. *Id.* For these reasons, we reject the plaintiffs argument that a showing of "special circumstances" will entitle them to the presumption of reliance.

V.

On 27 July 2000, Crossroads released several items of very negative news. The release stated, in pertinent part:

> The company believes that revenues for the [third] quarter may be as much as two-thirds below revenues for the prior quarter.
>
> * * *
>
> One of the Company's largest customers will not be ordering at the end of this quarter due to an imbalance in its inventory as it transitions to new products. To address this, Crossroads and the customer have agreed to a one-time rebalancing of inventory and movement to Crossroads newer products.

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During the fiscal third quarter Crossroads' products experienced interoperability issues in certain SAN configurations *664 and in mid-July the Company issued a stop ship as a precaution. A correction is in the final stages of testing and is scheduled to be released shortly.

* * *

Finally, Compaq informed the Company late in July of its plan to transition out of the Crossroads' 4100/4200 router solutions by the end of this calendar year and replace them with Compaq's own solution.

Following this statement, the price of Crossroads stock declined almost 63%, from $13.44 to $5.00. The plaintiffs argue that the district court erred in concluding that the decline in price following this statement was not statistically significant. Furthermore, the plaintiffs argue that this statement revealed the falsity of Crossroads's previous statements and that the ensuing decline sufficiently demonstrates that the price of Crossroad stock was artificially inflated, or propped up, by those previous statements.

1.

[5] We first consider whether the district court erred in concluding that the drop in stock price following the statement on 27 July 2000 was not statistically significant. In reaching this conclusion, the district court compared the dollar difference between the drop in price following the 27 July 2000 announcement and the overall decline in price during the Class Period. The district court found it significant that following the 27 July 2000 release Crossroads stock price dropped from $13.44 to $5.00, a decline of $8.44, while the price of the stock fell from $80.75 to $13.44, a decline of $67.31, during the total Class Period prior to the 27 July 2000 release. The district court compared these two declines and concluded that the decline following the 27 July 2000 statement was not statistically significant because the overall decline in stock price during the Class Period was 798% greater than the decline following 27 July 2000. The district court relied on *Ieradi v. Mylan Laboratories, Inc.*, 230 F.3d 594, 600 (3d Cir.2000), where the Third Circuit came to a similar conclusion when the overall drop in share price immediately prior to the alleged revelation of the "truth" was only 300% greater than the drop in share price in the two days after the "truth" was revealed.

The plaintiffs argue that the district court erred in determining the significance of the decline by comparing the decline following 27 July 2000 to the total decline in stock price during the Class Period. [FN8] The plaintiffs argue that the proper method for determining whether a drop in price is statistically significant is to consider the percentage of value lost following the revelation of the "truthful" information. The plaintiffs point out that under the district court's reasoning, even if the price of the stock dropped 100%, from $13.44 to zero, it would still not be statistically significant.

FN8. The plaintiffs make the same claims regarding Crossroads's release of its final third quarter numbers on 24 August 2000. However, because the 24 August 2000 release is confirmatory, the fate of the plaintiffs claims based on this statement are tied to that of the 27 July 2000 release.

We find the district court's reliance on *Ieradi* to be misplaced. First, the portion of *Ieradi* relied upon by the district court concerns the question of materiality. 230 F.3d at 599-600. The fraud-on-the-market presumption addresses reliance, not materiality, and the two elements are fundamentally different. *Nathenson*, 267 F.3d at 418. Second, as the plaintiffs point out, under the district court's method even if Crossroads's stock had lost all its value following the 27 July 2000 statement, that loss of $13.44 would still not be considered *665 statistically significant because of the much larger decline of $67.31 during the overall Class Period. Indeed, in that situation the overall decline would still be 500% greater than that following 27 July 2000. But the question is one of causation, and we believe the focus should be on the change in price following the release of the "truthful" information. In this case, where the price of the stock fell 63% within two days after the information was released, we find the district court erred in concluding that this was not a statistically significant drop in price. [FN9]

FN9. We realize that whether a drop in a stock's price is statistically significant will vary depending on the average trading range for that particular stock. A drop of 10% for a volatile stock may not be statistically significant whereas the same drop for a stock with little average movement may be significant. However, we have no difficulty saying that a 63% drop in this stock following the release of this information was statistically significant.

2.

We next consider the plaintiffs argument that the significant decline in stock price following the 27 July 2000 statement is evidence that the price had been inflated by Crossroads's earlier statements. As we have noted, the main concern when determining whether a plaintiff is entitled to the

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presumption of reliance is the causal connection between the allegedly false statement and its effect on a company's stock price. Nathenson makes it clear that to establish this nexus the plaintiffs must be able to show that the stock price was actually affected. 267 F.3d at 418-419. This is ordinarily shown by an increase in stock price immediately following the release of positive information. We read Nathenson to also allow plaintiffs to make this showing by reference to actual negative movement in stock price following the release of the alleged "truth" of the earlier misrepresentation. Id. at 417-419. Nathenson repeatedly emphasizes that the plaintiffs were not entitled to the presumption of reliance because the price of the defendants' stock did not decline upon revelation that the earlier positive statements were misleading. Id. at 417-419. Because in Nathenson there was no decline in price following the release of the alleged "truth," Nathenson had no reason to explain the requirements for succeeding on a claim where such a decline occurred.

We are satisfied that plaintiffs cannot trigger the presumption of reliance by simply offering evidence of any decrease in price following the release of negative information. Such evidence does not raise an inference that the stock's price was actually affected by an earlier release of positive information. To raise an inference through a decline in stock price that an earlier false, positive statement actually affected a stock's price, the plaintiffs must show that the false statement causing the increase was related to the statement causing the decrease. Without such a showing there is no basis for presuming reliance by the plaintiffs. A similar problem arises where multiple items of negative information are released on the same day. For example, a company may make a false statement and later reveal the falsity of that statement and at the same time release other unrelated negative information. In this situation, to trigger the presumption plaintiffs must demonstrate that there is a reasonable likelihood that the cause of the decline in price is due to the revelation of the truth and not the release of the unrelated negative information. In the absence of such a showing the invocation of the presumption of reliance would be based solely on speculation.

Finally, it is necessary that the earlier positive misrepresentation not be confirmatory. As we noted in our example in Nathenson, 267 F.3d at 419, confirmatory ***666** information has already been digested by the market and will not cause a change in stock price. Because the presumption of reliance is based upon *actual movement* of the stock price, confirmatory information cannot be the basis for a fraud-on-the-market claim.

[6] In sum, in order for plaintiffs to show that a stock's price was actually affected through evidence of a significant price decrease following the revelation of the alleged "truth" of earlier false statements, plaintiffs must demonstrate: (1) that the negative "truthful" information causing the decrease in price is related to an allegedly false, non-confirmatory positive statement made earlier and (2) that it is more probable than not that it was this negative statement, and not other unrelated negative statements, that caused a significant amount of the decline.

A.

Turning to the summary judgment evidence in this case, we first consider whether evidence of the drop in price following the 27 July 2000 statement raises an inference that the price of Crossroad stock was actually affected by Crossroads's earlier statements regarding the features of its products. Of the alleged misrepresentations made by Crossroads regarding the features of its products, only those made on 25 January 2000, 23 February 2000, 20 June 2000, 14 June 2000, and 27 June 2000 are non-confirmatory and therefore actionable. [FN10]

> FN10. On 22 February 2000, Crossroads issued a press release which stated, "As planned, Crossroads began production shipments of its 4x50 line of high-performance, Fibre-Channel storage routers." This statement is confirmatory, it merely notes that Crossroads was doing what it had said it would in the 25 January 2000 announcement. As discussed earlier, confirmatory statements do not affect the price of a company's stock and cannot be the basis for a fraud-on-the-market claim.

[7] On 25 January 2000, [FN11] 14 June 2000, [FN12] and 27 June 2000 [FN13] Crossroads made non-confirmatory, positive statements (that were allegedly false) concerning the interoperability of its new line of routers. The 27 July 2000 statement specifically revealed the interoperability problems Crossroads was having with its routers. The plaintiffs have therefore shown that the "positive" statements and the 27 July 2000 "negative, truthful" statement are related. But the plaintiffs are faced with the additional problem that the 27 July 2000 announcement included other unrelated negative information in addition to information relating to interoperability problems. Specifically, the statement informed ***667** the market that one of Crossroads's biggest customers, Compaq, would no longer be a customer because it was developing its own line of routers, that another large customer, StorageTek, would not be ordering any new routers because of an overstock in inventory of Crossroads's older routers, and that Crossroads's third quarter earnings would be almost

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two-thirds below analysts estimates. Comparing the relative seriousness of all the information released in the 27 July 2000 statement, the news that Crossroads had ordered a *temporary* stop-ship of its products is by far the least negative information released that day. Temporary glitches in technology products are by no means a rare or devastating occurrence. Thus, in order for the plaintiffs to trigger the reliance presumption they must demonstrate the likelihood that the 27 July 2000 interoperability statements played a significant role in the decline in stock price. The plaintiffs have not done so, either in their Complaint or through their expert, Dr. Hakala. In the face of the more serious negative statements unrelated to interoperability and without any explanation by the plaintiffs, we conclude that a fact finder could not find that the news regarding temporary interoperability problems played a significant role in the decline in price following the 27 July 2000 statement. For these reasons, the statements regarding the interoperability of Crossroads's routers cannot form the basis for a fraud-on-the-market claim.

FN11. On this date Crossroads released the news that it was beginning production of its Third Generation of storage routers. The release stated, in pertinent part, "Crossroads Systems Inc .... today announced the availability of the entire 4x50 line of Fibre-Channel-SCSI storage routers, which includes the 4150, 4250 and 4450 models.... Each Crossroads router has an Ethernet port which enables the router to interoperate with enterprise level management software."

FN12. On this date, Crossroads announced its participation in an interoperability certification program for storage router vendors run by Sun Microsystems. The press release stated, in pertinent part, that "Crossroads is working with the certified partners to provide pervasive SAN interoperability.... Since 1998, our SAN interoperability lab has tested and verified more than 3,500 solutions. Our commitment to this certification process is another way Crossroads demonstrates its role as a leader in providing interoperable SAN solutions."

FN13. On this date, Crossroads announced that it had entered into an agreement whereby Crossroads 4x50 routers would be integrated into a larger library storage system manufactured by JVC. The release stated, in pertinent part, that this new relationship "demonstrate[s] Crossroads' ability to interconnect a wide variety of storage devices in the SAN."

The plaintiffs allege that Crossroads's 23 February 2000 statement falsely reported on the speed of its new routers. [FN14] The plaintiffs allege that this statement was false and misleading because at the time it was made performance tests had not yet been run to verify its accuracy. The negative information released on 27 July 2000, however, makes no reference to increased router speed. Without a showing that the allegedly false, positive information was related to the negative information released on 27 July 2000, the plaintiffs cannot demonstrate that this statement artificially inflated the price of Crossroads stock. This statement cannot form the basis of a fraud-on-the-market claim.

FN14. On this day S.G. Cowen issued a report in which Crossroads stated that the new line of 4x50 routers "provides twice the through put compared to the 4200 [line]."

The plaintiffs allege that Crossroads's 20 June 2000 statement falsely reported that "server-free backup" was now available on its 4x50 line of routers. [FN15] The plaintiffs allege this statement was misleading because server-free backup was not available on the 4x50 line of routers when this release was issued. Again, however, the negative information released on 27 July 2000 makes no mention of server-free backup or the lack of its availability on the new routers. Without a showing that the allegedly false positive information was related to the negative information released on 27 July 2000, the plaintiffs cannot demonstrate that this statement artificially inflated the price of Crossroad stock. This statement cannot form the basis for a fraud-on-the-market claim.

FN15. On this day a Crossroads press release stated, in pertinent part:
Server-Free Backup is the next "killer-app" for SANs that further leverages our customers' current SAN investments.... This technology is an integral facet of our 4250 and 4450 storage routers as it allows our customers to free their server resources, run mission-critical applications and virtually eliminate the backup window.

B.

We next consider whether the drop in price following the 27 July 2000 statement may be used to show that Crossroads's ***668** stock price was actually affected by the financial statements made by Crossroads directly and to analysts. Of the allegedly false financial statements made by Crossroads, only those made on 22 February 2000, 23 February 2000, 24 May 2000, 12 June 2000, and 5 July 2000 are

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non-confirmatory and therefore actionable. [FN16]

FN16. On 27 March 2000, Crossroads's CEO was quoted in Dow Jones Newswires as stating that he was "comfortable with analysts' estimates that the company's revenue will rise 20%, quarter to quarter, in Fiscal 2000." This statement merely confirms the estimates made by analysts at S.G. Cowen Securities Inc. and Needham & Co. on 23 February 2000.
On 19 April 2000, S.G. Cowen Securities Inc. issued another report reaffirming its estimates of 20% growth from quarter to quarter. This too confirms the analysts' statements made on 23 February 2000.
On 23 May 2000, Crossroads issued its financial results for the second fiscal quarter, ended 30 April 2000. Crossroads's earnings were in line with analysts' estimates made on 23 February 2000. This is the classic example of confirmatory information. The market expected Crossroads to report a certain level of earnings, and those estimates proved to be accurate.

The statements made on 22 February 2000 [FN17] and 23 February 2000 [FN18] reported Crossroads's financial results for the first quarter of Fiscal Year 2000 and detailed analysts earnings estimates for the fiscal second quarter. The 27 July 2000 statement states only that "revenues for the [third] quarter may be as much as two-thirds below revenues for the prior quarter." The release does not report any concern that Crossroads's first and second quarter earnings may be incorrect. Moreover, the 27 July 2000 release makes no reference at all to Crossroads's first and second fiscal quarters. Because there is no relationship between the statement made on 27 July 2000 and those made on 22 February 2000 and 23 February 2000, Crossroads's statements on these days cannot form the basis for a fraud-on-the-market claim.

FN17. On this day Crossroads reported its financial results for the first quarter of Fiscal Year 2000, ended 31 January 2000. The results were positive, with total revenues 12% higher than analysts estimates. In addition, Crossroads posted a loss of only $0.01 per share versus analysts estimates of a $0.07 per share loss.

FN18. On this day, Needham & Co. and S.G. Cowen Securities Inc. reported Crossroads first quarter earnings. These analysts also revised upward their earnings estimates for Crossroads in the second fiscal quarter.

[8] The allegedly false statements made on 24 May 2000, [FN19] 6 June 2000, [FN20] 12 June 2000, [FN21] and 5 July 2000 [FN22] all concerned Crossroads's earnings for the third quarter of Fiscal Year 2000. Because the ***669** 27 July 2000 release clearly concerned a significant revenue shortfall for Crossroads's third fiscal quarter, the plaintiffs have shown the requisite link between the 27 July 2000 negative information and the earlier statements. The plaintiffs, however, are again faced with the additional problem that the 27 July 2000 announcement included negative information that was unrelated to the earnings shortfall. The plaintiffs offer no evidence or analysis tending to show that the drop in price following the 27 July 2000 release was likely caused by the negative financial news. However, unlike the news of temporary interoperability problems, we are persuaded the news that a company's revenue will be 66% below estimates satisfies the plaintiffs burden. News that a company's earnings will be two-thirds short of analysts estimates is the type of negative information most likely to cause a sharp decline in stock price. For these reasons, we find that Crossroads's statements on 24 May 2000, 6 June 2000, 12 June 2000, and 5 July 2000 may form the basis for the plaintiffs fraud-on-the-market claim.

FN19. On this day S.G. Cowen Securities Inc. released a report on Crossroads in which they revised upward their previous earnings estimates for the fiscal third quarter.

FN20. On this day analysts from Needham & Co. participated in a series of meetings with Crossroads's management. In these meetings Crossroads's management stated that it was confident that the company would meet and possibly exceed the estimated third quarter revenues.

FN21. On this day Needham & Co. released a report on Crossroads. In this report, Needham & Co. adjusted upward their estimates for Crossroads's expected revenue in the third quarter of 2000. In addition, the report stated that after talking with Crossroads's management, Needham & Co. thought "that Crossroads should at least maintain, and could potentially achieve a reacceleration of sequential quarterly revenue growth[.]"

FN22. On this day Dain Rauscher Wessels released a report on Crossroads based upon information learned at a recent meeting with Crossroads's management. During that meeting, Crossroads's

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management told Dain Rauscher Wessels analysts that it had 45%-50% of its business left to close for the third quarter ending 31 July 2000.

VI.

We next consider the only purportedly false statement alleged in the plaintiffs Complaint which was followed by a significant increase in stock price. On 7 February 2000 Crossroads announced a worldwide agreement with Hitachi Data Systems to resell Crossroads's older 4x00 model router. The release stated, in pertinent part:

> Crossroads welcomes the opportunity to work with Hitachi Data Systems to provide Hitachi customers the ability to quickly and easily reap the benefits a SAN can offer ... The unique interoperability feature of Crossroads' storage routers coupled with the strength of each members product will bring smooth installation and optimal performance within an organization's infrastructure.

In the two days following this statement, the price of Crossroads stock rose from $109.75 to $163.25, and the district court found that this was a statistically significant rise in price. However, as the district court pointed out, the plaintiffs Complaint alleges that this statement was misleading because the 4x50 routers--not the 4x00 routers--were not interoperable. The district court observed that this information, that the 4x50 routers were "interoperable," had been released to the market on 25 January 2000 and was therefore confirmatory. As such, the district court concluded that the increase in price could not have been due to the allegedly false claim of "interoperability."

The plaintiffs do not dispute that their Complaint alleges that the 7 February 2000 statement was misleading because the 4x50 routers were not interoperable. The plaintiffs argue, however, that evidence offered by Crossroads on summary judgment proves that the statement really concerned the older 4x00 routers. Therefore, the plaintiffs argue that their mistake in pleading should be excused because "the evidence controls" over the complaint. The plaintiffs further argue that they sufficiently alleged the interoperability problems of the 4x00 routers in their Complaint.

[9] This argument made by the plaintiffs was not presented to the district court in opposition to the defendants motion for partial summary judgment. Arguments not raised in the district court cannot be asserted for the first time on appeal. *FDIC v. Mijalis*, 15 F.3d 1314, 1326-27 (5th Cir.1994); *Stokes v. Emerson Electric Co.*, 217 F.3d 353, 358 n. 19 (5th Cir.2000). This is especially true where the assertion first raised on appeal is factual. *DeBardeleben v. Cummings*, 453 F.2d 320, 324 (5th Cir.1972) ("Where the moving papers do not reveal the presence of a factual controversy*670 on a material issue, the adversary cannot simply assent by silence to the factual theory presented in the motion-and on which the parties stand in the Trial Court-and then assert thereafter on appeal as grounds for reversal a purported factual disagreement never before revealed.").

Accepting the facts as they were presented to the district court, we find the district court did not err in concluding that the allegedly false claim of interoperability on 7 February 2000 was confirmatory. This information had previously been released to the market in Crossroads's statement on 25 January 2000. As we have noted, confirmatory information does not actually affect the stock price. Accordingly, the 7 February 2000 statement cannot form the basis of the plaintiffs fraud-on-the-market claim.

VII.

[10] We next consider the allegedly false statements made by Brian Smith, CEO of Crossroads, on 13 July 2000. The price of Crossroads stock had declined at a steady pace in the weeks prior to this statement. On 13 July 2000 the Dow Jones Newswire reported that Smith, when asked about the recent stock decline, stated "that the company ... had made no announcements and had planned none that might explain the pattern." Smith also "speculated that the recent stock declines ... could be the result of fears that early investors with large stakes may start selling their shares." The plaintiffs claim this comment was false and misleading because Smith knew that the real reason for the decline was the interoperability problems Crossroads was having with its routers and the pending return of $1.1 million in outdated inventory by StorageTek.

[11] A statement of belief is only open to objection where the evidence shows that the speaker did not in fact hold that belief and the statement made asserted something false or misleading about the subject matter. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083,1095-1096, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991). Assuming, without deciding, the plaintiffs have sufficiently shown that Smith did not actually believe his statement, the plaintiffs still cannot survive summary judgment on this claim because the plaintiffs have not shown the statement was false. In order for the plaintiffs allegation to be true (and for Smith's statement to be false) it is necessary that the decline in stock price prior to Smith's 13 July 2000 statement have actually been caused by the negative interoperability and inventory information. The plaintiffs, however, have offered no evidence that the market learned of this information at any time prior to its release on 27 July 2000, two weeks after Smith's statement.

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The plaintiffs claim is supported by nothing more than an unsubstantiated conclusory statement. Such statements are not competent summary judgment evidence. *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir.1993) ("Unsubstantiated assertions are not competent summary judgment evidence"); *Hugh Symons Group, plc v. Motorola, Inc.*, 292 F.3d 466, 470 (5th Cir.2002) (conclusory statements are not sufficient to successfully oppose a motion for summary judgment). For these reasons, the district court correctly granted summary judgment as to the statement made on 13 July 2000.

VIII.

For the reasons stated above, we find the statements made by Crossroads on 25 January 2000, 22 February 2000, 23 February 2000, 27 March 2000, 19 April 2000, 23 May 200, 14 June 2000, 20 June 2000, 27 June 2000, and 13 July 2000 may not form the basis of a fraud-on-the-market claim. Accordingly, for these statements the district court's grant of summary judgment ***671** is affirmed. We find that the plaintiffs may maintain a fraud-on-the-market claim with respect to the statements made by Crossroads on 24 May 2000, 6 June 2000, 12 June 2000, and 5 July 2000. Accordingly, for these statements the district court's grant of summary judgement is vacated, and this case is remanded to the district court for further proceedings.

AFFIRMED in part, VACATED in part, and REMANDED.

364 F.3d 657, Fed. Sec. L. Rep. P 92,738

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# EXHIBIT B

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U.S. COURT OF APPEALS
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No. 03-50311

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STEPHEN GREENBERG, AVIEL MARRACHE, CHARLES BINKS, RYAN BRISTOL, RYAN W. CONNORS, PETER MARGONELLI, RANDALL SIMON, ROGER D. LYNCH, MYRNA ALZAGA, SAM RHOADES, STEVEN WALLERSTIEN, ERIC SCHUESSLER, IAN GOTLIB,

*Plaintiffs/Appellants,*

vs.

CROSSROADS SYSTEMS, INC., BRIAN R. SMITH, REAGAN Y. SAKAI and JOHN R. MIDDLETON,

*Defendants/Appellees.*

Appeal from the United States District Court
for the Western District of Texas (Austin Division)
Case No. A-00-CA-457-JN; The Honorable James Nowlin

# PETITION FOR PANEL REHEARING

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[Additional counsel appear on signature page.]

U.S. COURT OF APPEALS
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*Stephen Greenberg, et al. v. Crossroads Systems, Inc., et al.*
Fifth Circuit No. 03-50311

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Investors who purchased the common stock of Crossroads Systems, Inc. between January 25, 2000 and August 24, 2000, including, without limitation, lead plaintiff Aviel Marrache, and named plaintiffs John S. Miller, Peter Margonelli, Eric Schuessler, Stephen Greenberg, Charles Binks, Ryan Bristol, Ryan Simon, Roger D. Lynch, Myrna Alzaga, Sam Rhoades, Steven Wallerstien, and Ian Gotlib;

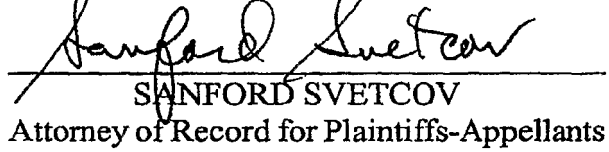
2. Milberg Weiss Bershad Hynes & Lerach LLP, Kaplan Fox & Kilsheimer LLP, and Baskin Law Firm, counsel for plaintiffs;

3. Defendant Crossroads Systems, Inc.;

4. Defendant Brian R. Smith;

5. Defendant Reagan Y. Sakai; and

6. Akin Gump Strauss Hauer & Feld LLP, counsel for defendants.



SANFORD SVETCOV
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## PETITION FOR PANEL REHEARING

Appellants respectfully petition for panel rehearing because the panel's decision filed April 14, 2004 (copy attached), appears to have crafted three bright-line rules that, unless clarified, would conflict with *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

In *Basic*, the Court rejected bright-line rules as inconsistent with the purposes of the securities laws: "Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." *Id.* at 236. *Basic* endorsed a similar fact-specific inquiry with respect to reliance and causation: "There is, however, ***more than one way*** to demonstrate the causal connection" between "a defendant's misrepresentation and a plaintiff's injury." *Id.* at 243 (emphasis added).

Portions of the panel opinion could be construed to be at odds with *Basic.* The panel's discussion relating to "confirmatory" statements and product defects appear to create hard and fast rules that may not allow for the many variables and factual realities operating in our well-developed securities markets. Appellants urge the panel to clarify its opinion to take account of such market realities and avoid an interpretation that would conflict with *Basic.* The panel's discussion of "special circumstances" may also conflict with *Basic*, and also overlooks explicit language in *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 419 (5th Cir. 2001).

## I. REASONS FOR REHEARING

### A. In Conformity with *Basic*, the Panel Should Modify Its Opinion to Make Clear that Not All "Repeated" (False) Statements Are Confirmatory, and Often Repetition Does Affect the Stock Price

The panel appears to announce a bright-line rule that false but "confirmatory" information is never actionable because the information "has already been digested by the market and ***will not*** cause a change in stock price." (Slip op. at 16 (emphasis added). The panel seems to define "confirmatory" to mean repeating the same false information. (Slip op. at 10, 16, 18, 21, 24, 25)

The panel's bright-line test does not draw a clear distinction between purely confirmatory misrepresentations that do not affect stock price and repeated misrepresentations that do affect the price and are actionable. As a result, unless clarified, the panel's rule will be interpreted by defendants in future cases as holding that all repeated misrepresentations are confirmatory and non-actionable, a consequence at odds with the face-specific inquiry required by *Basic*.

The panel's bright-line rule appears to arise from the particular facts of Crossroads where the stock price "***did not***" increase after many of defendants' false statements. The panel explained that the lack of price movement in some instances was because the statement was "confirmatory," *i.e.*, a repeat of an earlier statement previously digested by the market.

But, a false statement repeated at a later time that appears to be confirmatory on first analysis, may in fact ***affect*** the stock price more than the initial misrepresentation. For example, a false statement repeating that a product is selling like hotcakes 90 days after its release for sale, while partly confirmatory of an earlier similar statement made 30 days after the product first appeared on the market, also conveys new misinformation that adds to the perceived value of a company's stock price. Repetition assures investors that the product is not a flash in the pan, but one sustaining strong continuing sales that will make the company more profitable in the long term. Such a repeat statement may well increase the stock price or at least maintain the inflated price despite its ostensible confirmatory nature by offsetting certain negative market forces that maybe occurring at the same time.

The panel's flat statement that "confirmatory" statements repeating previous (false) positive information "will not" – *i.e.*, never – affect the stock price will likely cause confusion in future cases in determining whether or not a ***repeated*** false statement is "confirmatory" and actionable or inactionable.

Another example arises in this case. In footnote 16 of its opinion, the panel holds that a March 27, 2000 statement by the CEO of Crossroads, that he was "comfortable with analysts' estimates" of 20% revenue growth "quarter to quarter, in Fiscal 2000," published a month before was merely confirmatory of the analysts'

forecasts and did not increase the stock price. As such, the panel held the statement was not actionable. (Slip op. 21 n.16)

With respect, the panel overlooked that in many cases an expression of "comfort" by a corporate executive of an analyst forecast may indeed serve to distort the stock price. Although expressing comfort with the analyst forecast may in part be confirmatory, its repetition and adoption by an insider adds significant positive misinformation to the stock price. As the Supreme Court has recognized, a corporate official is perceived to have qualitatively greater knowledge, significant to investors:

> Shareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources, and the directors' perceived superiority is magnified even further by the common knowledge that state law customarily obliges them to exercise their judgment in the shareholders' interest.

*Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1091 (1991).

Applying *Virginia Bankshares*, the Third Circuit has explicitly held that a corporate executive's expression that he was "comfortable" with analyst projections is actionable. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1428-29 (3d Cir. 1997) (holding that expression that officer is "comfortable" with analyst's forecast "endorses it as reasonable"). An expression of comfort, though "confirmatory" in a literal sense, can nonetheless, as a matter of market reality, serve to add value to the stock price, or maintain its inflated value, precisely because it

carries a corporate executive's imprimatur and all the inside knowledge the "comfort" statement implies.

In fact, this Court has previously so held in an opinion authored by Judge Wiener. *Rubenstein v. Collins*, 20 F.3d 160, 168-69 (5th Cir. 1994) (held actionable a defendant's (confirmatory) statement endorsing a previous analyst's estimate as "realistic" that had a "dramatic affect" on the stock price).

The panel's apparent bright-line test on "confirmatory" statements overlooks two market realities. First, a repeated misrepresentation may serve to ***maintain*** an already fraud-inflated price by active concealment. As plaintiffs' expert explained: "had the true level of earnings been disclosed, the stock price would have been substantially reduced." (RE 91:R 2668¶23) Second, the stock price may not move on a repeat misrepresentation because it is "offset" by other "negative ... market events" occurring at the same time. (RE 89:R 2418¶25) In both circumstances, when the truth is later revealed, a significant drop in stock price is strong evidence the price was inflated or maintained by the repeated misrepresentation – as the panel elsewhere acknowledged. (Slip op. at 12-14)

Accordingly, repetition may not be, and often isn't, "double-counting" but provides incrementally positive (but false) news whose repetition provides a further boost to the stock price. The impact of a repeated, even confirmatory statement will

thus vary from case to case. As *Basic* emphasized: "[w]e do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price." 485 U.S. at 247 n.28.

Absent clarification by the panel, securities defendants would be free to confirm analysts' forecasts, despite knowing they are wrong, and can successfully mislead the market without fear of incurring liability. Surely the panel did not mean to insulate from liability repeated false statements – *e.g.*, the company will have 20% growth in quarter-to-quarter earnings – which actually increase, maintain or distort the stock price each time, simply because the statement appears to be "confirmatory" without further analysis. That would be contrary to *Basic*, and a license to lie.

In this case, on July 27, 2000, when Crossroads admitted it would miss analyst and company forecasts for the third quarter 2000 by 66%, the stock price dropped 50%. (RE 16:R 295) The panel found this drop significant. (Slip op. 12-14) Indeed, it was evidence that the stock price was inflated, at least in part by the company's March 27 expression of "comfort" with revenue forecasts. The panel opinion should therefore be modified to make clear that repeated misrepresentations like the CEO's March 27, 2000, expression of comfort that are partly confirmatory, but also affect or maintain a fraud-inflated price, are actionable, or at least should remain in the case until a full factual record is developed.

### B. In Conformity with *Basic*, the Panel Should Make Clear that Revelation of a Sales Revenue Decline Is Related to False Product Performance Claims

Under the fraud-on-the-market presumption, plaintiffs' initial burden is simply to show that defendants made material misrepresentations and that plaintiffs bought stock in an efficient market. *Basic*, 485 U.S. at 248. The burden then falls on defendants to rebut the presumption by showing that the stock price did not increase or become "distorted" by the misrepresentation. *Id.* The panel opinion recognizes that defendants bear this burden of rebuttal. (Slip op. at 6)

Therefore, under *Basic*, only after defendants rebut the presumption could the burden shift back to plaintiffs to show the causal links demanded by the panel. Once the burden shifts, the panel requires plaintiffs to prove that revelation of negative "truthful" information not only caused a price decline, but also that the reason for the decline is related to the false positive statements made earlier. (Slip op. at 16)

In explaining its rule, however, the panel strayed from *Basic* by limiting plaintiffs' showing to a single fact. The panel concluded that a one-to-one causal relation exists between false statements concerning the interoperability and performance of Crossroads' new routers, and the revelation on July 27, 2000 that the router was not interoperable and that shipment had stopped. (Slip op. at 17-19) The panel held that "a fact finder could not find" the interoperability and performance

problems caused a significant decline in the stock price, and held that all of the alleged statements relating to product defects "cannot form the basis of a fraud-on-the market claim." (Slip op. at 19, 20)

In limiting plaintiffs' proof of the causal relationship for product defects to a single fact, the panel overlooked a critical market reality: product problems affect sales and revenues. Thus, when Crossroads bragged about the virtues of its product, investors understood that this meant the product would sell and make money. That implication in turn also helped to give credence to the company's contemporaneous 20% revenue growth forecasts. In short, when on July 27 the company revealed the product problems ***and*** a 66% decline in revenues, both revelations were related to the false product performance claims.

Indeed, the panel elsewhere acknowledged, consistent with *Basic*, 485 U.S. at 246-47, that well developed markets digest ***all*** available information, ***positive*** or ***negative***, to arrive at a price. (Slip op. at 4) Thus, when multiple truthful revelations are made, more than one may reasonably be related to the earlier false statements.

As noted at the outset, the Supreme Court rejected as "underinclusive" any bright-line "approach that designates a single fact" as always determinative, and instead requires favor of a fact-specific inquiry. *Basic*, 485 U.S. at 236, 240. With respect to the issue of reliance in particular, the Supreme Court emphatically stated:

"There is, however, more than one way to demonstrate the causal connection" between "a defendant's misrepresentation and a plaintiff's injury." *Id.* at 243.

By concluding there was a strict one-to-one linkage between product performance and product defects, the panel overlooked the connection between product problems and declining revenues and the reality that one misrepresentation may convey multiple messages. A revelation that the router doesn't work also tells the market that the company will not be making as much money from selling it. As plaintiffs' expert said, both messages are important to investors. (RE 91:R 2654¶4)

Unless clarified, the panel's rule puts too much power in the hands of wrongdoers. It allows them to evade liability by controlling the timing and scope of revelations of truthful information to the detriment of investors. *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1422 (9th Cir. 1994) (companies "could immunize" themselves from liability simply by refusing disclosure of accounting errors).

Under *Basic's* fact-specific approach, a reasonable jury could find that the revelation of defects ***and*** lost revenues combined to impact Crossroads' stock price. Summary judgment is inappropriate in such circumstances. The panel should therefore modify its opinion accordingly. As so modified, the product performance statements uttered on January 25, February 23, and June 14, 20 and 27, 2000 (Slip op. at 17-20), should remain in the case until a full factual record is developed.

### C. The Panel Should Clarify Its "Special Circumstances" Discussion Which Appears to Be Contrary to *Basic* and Overlooks Express Language in *Nathenson*

The panel also rejected plaintiffs' argument that under *Nathenson*, 267 F.3d at 419, they may rely on the fraud-on-the-market presumption if they plead and prove that "special circumstances" prevented the stock price from increasing on a misrepresentation. The panel assumed that *Nathenson* requires "actual movement" of the price and not explanations for non-movement. (Slip op. at 9-11)

The panel's discussion appears to run afoul of *Basic* which rejected any bright-line rule on stock price movement: "We do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in the stock price." *Basic*, 485 U.S. at 247 n.2. Other circuits leave the issue to a fact-specific inquiry, including "expert testimony." *Gebhardt v. ConAgra Foods, Inc.*, 335 F.3d 824, 831-32 (5th Cir. 2003); *Blackie v. Barrack*, 524 F.2d 891, 908-09 n.25 (9th Cir. 1975).

Further, although the panel quotes the "special circumstances" section from *Nathenson* – it overlooks and omits the critical explicit language in the last sentence in which Judge Garwood, consistent with *Basic*, acknowledged that non-movement of price could be explained by market forces, when he said: "However, no such special circumstances is alleged or even hinted at here." *Nathenson*, 267 F.3d at 419.

That sentence must be read together with the earlier sentence in *Nathenson* recognizing that "in certain special circumstances," a misrepresentation "may ***affect the price*** of the stock even though the stock's market ***price does not*** soon thereafter ***change***." *Id.* (Emphasis added) Thus, *Nathenson* recognizes that explanations of the ***non-movement*** of stock price are permitted.

In this case, plaintiffs' expert provided explanations, identifying offsetting negative market-industry and company-specific events that served to explain non-movement of the price after misrepresentations. (RE 89, 91) The expert explained that had the truth been known, the price would have been different. (RE 91:R 2668¶23) Had investors known, they "would not have acted" to buy the stock. *Nathenson*, 267 F.3d at 413.

Indeed, under the panel's confirmatory statements rule, the very example of a special circumstance endorsed by *Nathenson* would not survive as an actionable misrepresentation solely because that statement is confirmatory – despite the fact that the price declined when the truth was later revealed.

The panel should therefore clarify its discussion of "special circumstances" to ensure consistency with *Basic* and *Nathenson*.

## II. CONCLUSION

For the foregoing reasons, the panel should modify its opinion as discussed above.

DATED: April 27, 2004

MILBERG WEISS BERSHAD
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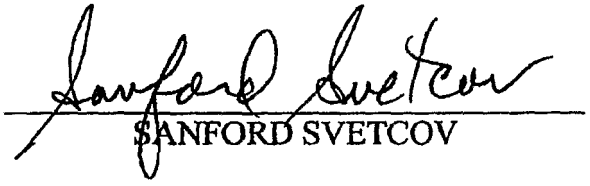
DENNIS J. HERMAN



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## Press Release

# ENRON CONTINUES STRONG EARNINGS GROWTH; REPORTS FOURTH QUARTER 1999 EARNINGS OF $0.31 PER DILUTED SHARE

FOR IMMEDIATE RELEASE: Tuesday, January 18, 2000

**HOUSTON** - Enron Corp. announced today very strong financial and operating results for the full year 1999, including:

- a 28 percent increase in revenues to $40 billion;
- a 37 percent increase in net income to $957 million;
- an 18 percent increase in earnings per diluted share to $1.18;
- a 19 percent increase in marketed volumes to 32 trillion British thermal unit equivalents per day (TBtue/d); and
- a more than doubling of new retail energy services contracts to $8.5 billion.

The above financial results exclude nonrecurring items.

"Our strong results in both the fourth quarter and the full year 1999 reflect excellent performance in all of our operating businesses. Our wholesale business again registered strong profitability and growth in the rapidly expanding, deregulating energy industry worldwide. Our retail business is now profitable. This business has reached critical mass in contracting activity and service capabilities, and profitability is expected to accelerate rapidly," said Kenneth L. Lay, Enron chairman and chief executive officer. "In addition, Enron continues to develop innovative, high-growth new businesses that capitalize on our core skills, as demonstrated by the early success of our new broadband services business. Overall, a great year – one in which our shareholders received a total return of 58 percent."

Enron also announced a very successful fourth quarter of 1999, generating earnings of $0.31 per diluted share, an increase of 29 percent from $0.24 a year ago.

**FULL YEAR RESULTS**

Enron's businesses include Wholesale Energy Operations and Services (including broadband services), Retail Energy Services, and Transportation and Distribution.

Wholesale Energy Operations and Services: Enron's wholesale group consists of two primary lines of business: Commodity Sales and Services (marketing energy commodities and services and managing the associated contract portfolios) and Energy Assets and Investments (investing in, developing, constructing and operating energy and other assets.)

The wholesale group increased income before interest, minority interests and taxes (IBIT) 36 percent in 1999 to $1.3 billion.

Strong earnings in Commodity Sales and Services were reflected in a 53 percent increase in IBIT to $628 million for 1999. Total deliveries of energy commodities increased 19 percent to 32 TBtue/d, including significant increases in both North America and Europe. Volume growth reflects expanding, comprehensive supply management contracts for large regional gas and power utilities. Natural gas volumes increased 22 percent, largely driven by the North American operations. Total power volumes worldwide declined slightly to 392 million megawatt hours due to a single period of unusual activity in the U.S. during the third quarter of 1998. Enron's strong early lead in large, newly deregulated power markets and the successful launch during 1999 of EnronOnline, Enron's innovative global Internet-based transaction system, are expected to contribute significantly to continuing growth in Commodity Sales and Services.

Energy Assets and Investments reported a 20 percent increase in IBIT to $850 million. The earnings reflect a balanced contribution from Enron's growing energy networks worldwide, diverse energy and communications investments, and sales of power plants developed and constructed to meet energy demands worldwide.

In 1999, Enron began commercial operations of eleven wholesale power plants totaling over 4,300 megawatts of capacity. Certain of these new facilities complement Enron's power marketing capabilities and provide customers in North America and Europe with valuable power in periods of high demand. Enron's plants also deliver new sources of electricity to developing markets, such as South America and India.

**Retail Energy Services:** Enron Energy Services offers comprehensive products to reduce energy costs for business customers throughout the U.S. and Europe. Enron Energy Services has built strong sales and implementation teams to capture the lead position in the energy outsource market and now manages over 16,500 facilities worldwide.

During 1999, Enron Energy Services entered into contracts representing $8.5 billion of customers' future expenditures for natural gas, power and energy services, more than

double the $3.8 billion contracted in 1998. The loss before interest and taxes of $68 million for 1999 represents a significant improvement over the $119 million loss for the prior year and reflects the results of the increased delivery of energy commodity services under outsource contracts. Enron Energy Services was profitable in the fourth quarter of 1999, reporting IBIT of $7 million, and is expected to generate significantly increased profits in 2000 and beyond.

**Transportation and Distribution:** This group includes Enron's Gas Pipeline Group and Portland General Electric. During 1999, Transportation and Distribution generated $685 million of IBIT versus $637 million last year.

The Gas Pipeline Group reported IBIT of $380 million for the full year 1999, compared to

$351 million in 1998. Total volumes transported increased by 4 percent to over 9 billion cubic feet per day. During the year, Northern Natural Gas settled a major rate case, which extends firm contracts with a majority of its customers. Florida Gas Transmission Company experienced record deliveries on its system and is processing two large expansions, which will add new capacity of approximately

600 million cubic feet per day and bring total capacity to 2.1 billion cubic feet per day.

During the fourth quarter of 1999, Enron entered into an agreement to sell Portland General Electric. The transaction is expected to close in late 2000.

**FOURTH QUARTER RESULTS**

Enron earned $0.31 per diluted share in the fourth quarter of 1999, an increase of 29 percent from $0.24 last year. Revenues increased over 40 percent to $11 billion. Earnings for the fourth quarter of 1999 were led by:

- a 31 percent increase in wholesale IBIT as marketed volumes increased 21 percent to 34 TBtue/d; and
- $7 million IBIT from Enron Energy Services, compared to a loss of $26 million in the fourth quarter a year ago. In addition, Enron Energy Services originated new contracts of $2.6 billion in the most recent quarter, including its first European outsource contract.

**OTHER INFORMATION**

For the full year 1999, Enron reported $1.10 of earnings per diluted share compared to $1.01 in 1998, after nonrecurring items.

The results for 1999 include nonrecurring charges totaling $0.08 per diluted share. The net result included after-tax income of $345 million, or $0.45 per diluted share,

reflecting Enron's sale of its ownership in Enron Oil & Gas Company. After-tax charges included $278 million and $131 million, or $0.36 and $0.17 per diluted share, related to Enron's MTBE asset and the cumulative effect of accounting changes, respectively.

*Please see attached tables for additional financial information.*

This press release includes forward looking statements within the meaning of Section 27A of the Securities Act of 1933 and Section 21E of the Securities Exchange Act of 1934. Although Enron believes that its expectations are based on reasonable assumptions, it can give no assurance that its goals will be achieved. Important factors that could cause actual results to differ materially from those in the forward looking statements herein include political developments in foreign countries, the ability to penetrate new retail natural gas and electricity markets, including the energy outsource market, in the United States and Europe, the timing and extent of changes in prices for crude oil, natural gas, electricity and interest rates, the timing and success of Enron's efforts to develop international power, pipeline and other infrastructure projects, and conditions of the capital markets and equity markets during the periods covered by the forward looking statements.

Click here to download this press release in Microsoft Word format.

Please see attached tables for additional financial information.

*For additional information please contact:*

**Mark Palmer**

**713-853-4738**

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# ENRON CORP.
## Table 1 - Earnings Summary
(Unaudited: in millions except per share data)

| | Quarter Ended December 31, | | Year Ended December 31, | |
|---|---|---|---|---|
| | 1999 | 1998 | 1999 | 1998 |
| **Revenues** | | | | |
| Transportation and Distribution: | | | | |
| Gas Pipeline Group | $ 181 | $ 170 | $ 653 | $ 653 |
| Portland General | 377 | 327 | 1,379 | 1,196 |
| Wholesale Energy Operations and Services | 9,936 | 6,618 | 36,287 | 27,725 |
| Retail Energy Services | 555 | 322 | 1,807 | 1,072 |
| Exploration and Production (a) | - | 230 | 526 | 884 |
| Corporate and Other (including intercompany eliminations) | (76) | 35 | (540) | (270) |
| **Total Revenues** | **$ 10,973** | **$ 7,702** | **$ 40,112** | **$ 31,260** |
| **After tax results** | | | | |
| **Net income excluding nonrecurring items** | $ 259 | $ 171 | $ 957 | $ 698 |
| Nonrecurring Items: | | | | |
| Gain on sale of EOG stock | - | 45 | 345 | 45 |
| Charges related to MTBE asset | - | (40) | (278) | (40) |
| Cumulative effect of accounting changes | - | - | (131) | - |
| **Net income** | **$ 259** | **$ 176** | **$ 893** | **$ 703** |
| **Earnings (loss) per share (diluted) (b)** | | | | |
| **EPS (diluted) excluding nonrecurring items** | $ 0.31 | $ 0.24 | $ 1.18 | $ 1.00 |
| Nonrecurring items: | | | | |
| Gain on sale of EOG stock | - | 0.07 | 0.45 | 0.07 |
| Charges related to MTBE asset | - | (0.06) | (0.36) | (0.06) |
| Cumulative effect of accounting changes | - | - | (0.17) | - |
| **EPS (diluted)** | **$ 0.31** | **$ 0.25** | **$ 1.10** | **$ 1.01** |
| **Average shares outstanding (diluted) (b)** | **779.1** | **716.4** | **769.0** | **695.3** |

(a) Reflects results of Enron Oil & Gas through August 16, 1999, date of share exchange transaction.
(b) Shares outstanding and EPS amounts have been restated to reflect the two-for-one common stock split that was effective August 13, 1999.

Fourth Quarter 1999

# ENRON CORP.
## Table 2a - Results by Segment
(Unaudited: in millions, except per share amounts)

| | Recurring | Non-Recurring | Total |
|---|---|---|---|
| **IBIT:** | | | |
| Transportation and Distribution: | | | |
| Gas Pipeline Group | $ 97 | $ - | $ 97 |
| Portland General | 105 | - | 105 |
| Wholesale Energy Operations and Services | 263 | - | 263 |
| Retail Energy Services | 7 | - | 7 |
| Exploration and Production (a) | - | - | - |
| Corporate and Other | 1 | - | 1 |
| **IBIT** | **473** | **-** | **473** |
| Interest and Related Charges, net | 119 | - | 119 |
| Dividends on Preferred Securities of Subsidiaries | 19 | - | 19 |
| Minority Interests | 41 | - | 41 |
| Income Tax Provision | 35 | - | 35 |
| **Net Income** | **259** | **-** | **259** |
| Preferred Dividends: | | | |
| Second preferred stock | 4 | - | 4 |
| Series A and Series B Preferred Stock (b) | 20 | - | 20 |
| **Earnings on Common Stock** | **$ 235** | **$ -** | **$ 235** |
| Average Number of Shares Used: (c) | | | |
| Basic | | | 715.3 |
| Diluted | 779.1 | 779.1 | 779.1 |
| **Earnings per Common Share: (c)** | | | |
| **Basic** | | | **$ 0.33** |
| **Diluted** | **$ 0.31** | **$ -** | **$ 0.31** |

(a) Reflects results of Enron Oil & Gas through August 16, 1999, date of share exchange transaction.
(b) The Series A and Series B Preferred Stock are antidilutive and therefore have been excluded from the calculation of diluted earnings per share.
(c) Shares outstanding and EPS amounts have been restated to reflect the two-for-one common stock split that was effective August 13, 1999.

Fourth Quarter 1998

# ENRON CORP.
## Table 2b - Results by Segment
(Unaudited: in millions, except per share amounts)

| | Recurring | Non-Recurring | Total |
|---|---|---|---|
| **IBIT:** | | | |
| Transportation and Distribution: | | | |
| Gas Pipeline Group | $ 84 | $ - | $ 84 |
| Portland General | 84 | - | 84 |
| Wholesale Energy Operations and Service | 201 | - | 201 |
| Retail Energy Services | (26) | - | (26) |
| Exploration and Production | 31 | - | 31 |
| Corporate and Other | 26 | (39) | (13) |
| **IBIT** | **400** | **(39)** | **361** |
| Interest and Related Charges, net | 152 | - | 152 |
| Dividends on Preferred Securities of Subsidiaries | 19 | - | 19 |
| Minority Interests | 17 | - | 17 |
| Income Tax Provision (Benefit) | 41 | (44) | (3) |
| **Net Income** | **171** | **5** | **176** |
| Preferred Dividends: | | | |
| Second preferred stock | 4 | - | 4 |
| **Earnings on Common Stock** | **$ 167** | **$ 5** | **$ 172** |
| Average Number of Shares Used: | | | |
| Basic | | | 661.8 |
| Diluted | 716.4 | 716.4 | 716.4 |
| **Earnings per Common Share:** | | | |
| **Basic** | | | **$ 0.26** |
| **Diluted** | **$ 0.24** | **$ 0.01** | **$ 0.25** |

Note: Shares outstanding and EPS amounts have been restated to reflect the two-for-one common stock split that was effective August 13, 1999.

1999 Year

# ENRON CORP.
## Table 2c - Results by Segment
(Unaudited: in millions, except per share amounts)

| | Recurring | Non-Recurring | Total |
|---|---|---|---|
| **IBIT:** | | | |
| Transportation and Distribution: | | | |
| Gas Pipeline Group | $ 380 | $ - | $ 380 |
| Portland General | 305 | - | 305 |
| Wholesale Energy Operations and Services | 1,317 | - | 1,317 |
| Retail Energy Services | (68) | - | (68) |
| Exploration and Production (a) | 65 | - | 65 |
| Corporate and Other | (17) | 13 | (4) |
| **IBIT** | **1,982** | **13** | **1,995** |
| Interest and Related Charges, net | 656 | - | 656 |
| Dividends on Preferred Securities of Subsidiaries | 76 | - | 76 |
| Minority Interests | 135 | - | 135 |
| Income Tax Provision (Benefit) | 158 | (54) | 104 |
| Income before Cumulative Accounting Changes | **957** | **67** | **1,024** |
| Cumulative Effect of Accounting Changes, net of tax | - | (131) | (131) |
| **Net Income (Loss)** | **957** | **(64)** | **893** |
| Preferred Dividends: | | | |
| Second preferred stock | 17 | - | 17 |
| Series A and Series B Preferred Stock (b) | 49 | - | 49 |
| **Earnings (Loss) on Common Stock** | **$ 891** | **$ (64)** | **$ 827** |
| Average Number of Shares Used: (c) | | | |
| Basic | | | 705.3 |
| Diluted | 769.0 | 769.0 | 769.0 |
| **Earnings (Loss) per Common Share: (c)** | | | |
| **Basic** | | | **$ 1.17** |
| **Diluted** | **$ 1.18** | **$ (0.08)** | **$ 1.10** |

(a) Reflects results of Enron Oil & Gas through August 16, 1999, date of share exchange transaction.
(b) The Series A and Series B Preferred Stock are antidilutive and therefore have been excluded from the calculation of diluted earnings per share.
(c) Shares outstanding and EPS amounts have been restated to reflect the two-for-one common stock split that was effective August 13, 1999.

1998 Year

# ENRON CORP.
## Table 2d - Results by Segment
(Unaudited: in millions, except per share amounts)

| | Recurring | Non-Recurring | Total |
|---|---|---|---|
| **IBIT:** | | | |
| Transportation and Distribution: | | | |
| Gas Pipeline Group | $ 351 | $ - | $ 351 |
| Portland General | 286 | - | 286 |
| Wholesale Energy Operations and Services | 968 | - | 968 |
| Retail Energy Services | (119) | - | (119) |
| Exploration and Production | 128 | - | 128 |
| Corporate and Other | 7 | (39) | (32) |
| **IBIT** | **1,621** | **(39)** | **1,582** |
| Interest and Related Charges, net | 550 | - | 550 |
| Dividends on Preferred Securities of Subsidiaries | 77 | - | 77 |
| Minority Interests | 77 | - | 77 |
| Income Tax Provision (Benefit) | 219 | (44) | 175 |
| **Net Income** | **698** | **5** | **703** |
| Preferred Dividends: | | | |
| Second preferred stock | 17 | - | 17 |
| **Earnings on Common Stock** | **$ 681** | **$ 5** | **$ 686** |
| Average Number of Shares Used: | | | |
| Basic | | | 642.3 |
| Diluted | 695.3 | 695.3 | 695.3 |
| **Earnings per Common Share:** | | | |
| **Basic** | | | **$ 1.07** |
| **Diluted** | **$ 1.00** | **$ 0.01** | **$ 1.01** |

Note: Shares outstanding and EPS amounts have been restated to reflect the two-for-one common stock split that was effective August 13, 1999.

Transportation and Distribution

# ENRON CORP.
## Table 3a - Core Business Highlights
(Unaudited)

| | Quarter Ended December 31, | | Year Ended December 31, | |
|---|---|---|---|---|
| | 1999 | 1998 | 1999 | 1998 |
| **Gas Pipeline Group** | | | | |
| (In Millions) | | | | |
| Net Revenues | $ 176 | $ 167 | $ 626 | $ 640 |
| Operating Expenses | 74 | 71 | 264 | 276 |
| Depreciation & Amortization | 14 | 20 | 66 | 70 |
| Equity in Earnings | 8 | 4 | 38 | 32 |
| Other Income, net | 1 | 4 | 46 | 25 |
| **IBIT** | **$ 97** | **$ 84** | **$ 380** | **$ 351** |
| Total Volumes Transported (BBtu/d) (a) | | | | |
| Northern Natural Gas | 3,738 | 4,252 | 3,820 | 4,098 |
| Transwestern Pipeline | 1,460 | 1,492 | 1,462 | 1,608 |
| Florida Gas Transmission | 1,538 | 1,310 | 1,495 | 1,324 |
| Northern Border Pipeline | 2,406 | 1,781 | 2,405 | 1,770 |
| **Portland General** | | | | |
| (In Millions) | | | | |
| Revenues | $ 377 | $ 327 | $ 1,379 | $ 1,196 |
| Purchased Power & Fuel | 179 | 129 | 639 | 451 |
| Operating Expenses | 81 | 65 | 304 | 295 |
| Depreciation & Amortization | 44 | 47 | 181 | 183 |
| Other Income, net | 32 | (2) | 50 | 19 |
| **IBIT** | **$ 105** | **$ 84** | **$ 305** | **$ 286** |
| Retail Customers (end of period, thousands) | 719 | 704 | 719 | 704 |
| Electricity Sales (Thousand MWh) | | | | |
| Residential | 2,004 | 2,052 | 7,404 | 7,101 |
| Commercial | 1,879 | 1,725 | 7,392 | 6,781 |
| Industrial | 1,198 | 921 | 4,463 | 3,562 |
| Total Retail | 5,081 | 4,698 | 19,259 | 17,444 |
| Wholesale | 3,300 | 2,237 | 12,612 | 10,869 |
| Total Sales | 8,381 | 6,935 | 31,871 | 28,313 |

(a) Reflects 100% of each entity's throughput volumes.

Wholesale Energy Operations and Services

# ENRON CORP.
## Table 3b - Core Business Highlights
(Unaudited)

| | Quarter Ended December 31, | | Year Ended December 31, | |
|---|---|---|---|---|
| | 1999 | 1998 | 1999 | 1998 |
| **Wholesale Energy Operations and Services** | | | | |
| (In Millions) | | | | |
| Commodity Sales and Services | $ 151 | $ 107 | $ 628 | $ 411 |
| Energy Assets and Investments | 149 | 140 | 850 | 709 |
| Unallocated Expenses | (37) | (46) | (161) | (152) |
| **IBIT** | **$ 263** | **$ 201** | **$ 1,317** | **$ 968** |
| | | | | |
| **Commodity Sales and Services** | | | | |
| Physical Volumes (BBtue/d) (a) | | | | |
| Gas: | | | | |
| United States | 10,219 | 7,941 | 8,982 | 7,418 |
| Canada | 4,406 | 4,101 | 4,398 | 3,486 |
| Europe | 1,604 | 1,605 | 1,549 | 1,243 |
| Other | 26 | 4 | 23 | 8 |
| | 16,255 | 13,651 | 14,952 | 12,155 |
| Transport Volumes | 693 | 510 | 575 | 559 |
| Total Gas Volumes | 16,948 | 14,161 | 15,527 | 12,714 |
| Oil | 5,877 | 4,923 | 5,407 | 2,960 |
| Liquids | 947 | 586 | 753 | 610 |
| Electricity (b) | 10,306 | 8,609 | 10,742 | 11,024 |
| Total Physical Volumes (BBtue/d) (a) | 34,078 | 28,279 | 32,429 | 27,308 |
| | | | | |
| Electricity Volumes Marketed (Thousand MWh) | | | | |
| United States | 88,254 | 78,969 | 380,518 | 401,843 |
| Europe | 6,443 | 196 | 11,143 | 483 |
| Other | 121 | 46 | 433 | 46 |
| Total | 94,818 | 79,211 | 392,094 | 402,372 |
| | | | | |
| Financial Settlements (Notional)(BBtue/d) | 109,872 | 79,879 | 99,337 | 75,266 |

(a) Includes third-party transactions of Enron Energy Services.
(b) Represents electricity transaction volumes marketed, converted to BBtue/d.

##

# EXHIBIT D

# Earnings at Energy Firm *Enron* Increase 29 Percent in Fourth Quarter

**Contents**

Houston Chronicle ~~~~~~~~~

## Houston Chronicle

By Michael Davis, Houston Chronicle

Jan. 19--***Enron*** Corp. reported a 29 percent jump in fourth-quarter earnings Tuesday as its retail services business recorded its first profit right on schedule.

The Houston company's retail services division handles retail sales of electricity and natural gas as well as energy management services. The group sells directly to major buyers, including such companies as Polaroid.

The retail services division made its first splash with television ads during the Super Bowl in 1998, at the time an unusual move for a company such as ***Enron***. Since then, the fast-growing division has lost $187 million, even though it signed $8.5 billionin contracts during 1999 alone.

The company fulfilled its prediction that the retail services division would be in the black in the fourth quarter. It earned $7 million.

"This business has reached critical mass in contracting activity and service capabilities, and profitability is expected to accelerate rapidly," ***Enron*** Chairman Ken Lay said in a written statement.

Overall, the company had fourth-quarter net income of $259 million, or 31 cents per share, on revenues of nearly $11 billion. That compared with net of $176 million, or 25 cents per share, on revenues of $7.7 billion in the fourth quarter of 1998. The 1998 quarter's net income included a one-time gain of $45 million and a one-time loss of $40 million.

The company matched analysts' expectations for the quarter to the penny, according to the average of earnings estimates compiled by First Call/Thomson Financial.

***Enron's*** fourth-quarter results held no surprises for investors. The company will be making a presentation to analysts on Thursday, at which it is expected to lay out its long-term strategy for its growing telecommunications business.

"The numbers looked good," said Carl Kirst, energy analyst with Jefferies & Co. in Houston. "They delivered a profit in the retail division, and that was important."

The modest profit does not mean the retail group is finished with start-up costs. As the company expands its retail services operations into international markets, ***Enron*** is likely to have more up-front expenses, Kirst said.

For all of 1999, ***Enron*** reported net earnings of $957 million, or $1.10 per share, compared with $698 million, or $1.01 per share, in 1998, after removing onetime items. Revenues grew from $31.3 billion to $40.1 billion.

***Enron's*** stock closed Tuesday at 55 1/2, down 7/8.

The star performer at ***Enron*** for the quarter -- as has been the case every quarter of 1999 -- was the wholesale energy operations and services division, which includes natural gas and power sales as well as energy finance.

The wholesale group had fourth-quarter operating earnings of $263 million, compared with $201 million in the fourth quarter of 1998. For all of 1999, the wholesale group increased its operating income 36 percent to $1.3 billion from 1998's

$968 million.

The company's transportation and distribution group, which includes ***Enron's*** natural gas pipelines as well as its electric utility Portland General Electric, had fourth-quarter operating earnings of $202 million, compared with $168 million during the fourth quarter of 1998.

During the fourth quarter of last year, ***Enron*** struck a deal to sell Portland General Electric to Sierra Pacific Resources, a holding company that operates electric utilities in the Lake Tahoe area, for $2.1 billion. That deal is expected to close this year, the company said Tuesday.

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# EXHIBIT E

**Quote, Chart, News**
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**Enron Corp**

| Date | High | Low | Close | Volume |
|---|---|---|---|---|
| 10/31/2002 | 0.10000 | 0.10000 | 0.10000 | 1,312,400 |
| 10/30/2002 | 0.10000 | 0.09000 | 0.10000 | 1,540,300 |
| 10/29/2002 | 0.10000 | 0.10000 | 0.10000 | 2,872,800 |
| 10/28/2002 | 0.10000 | 0.10000 | 0.10000 | 1,762,600 |
| 10/25/2002 | 0.10000 | 0.10000 | 0.10000 | 975,500 |
| 10/24/2002 | 0.11000 | 0.10000 | 0.10000 | 1,355,600 |
| 10/23/2002 | 0.11000 | 0.10000 | 0.11000 | 1,607,600 |
| 10/22/2002 | 0.11000 | 0.09000 | 0.11000 | 1,058,000 |
| 10/21/2002 | 0.11000 | 0.11000 | 0.11000 | 1,082,800 |
| 10/18/2002 | 0.12000 | 0.01000 | 0.11000 | 1,377,100 |
| 10/17/2002 | 0.12000 | 0.11000 | 0.11000 | 1,971,800 |
| 10/16/2002 | 0.12000 | 0.12000 | 0.12000 | 1,434,300 |
| 10/15/2002 | 0.13000 | 0.12000 | 0.12000 | 1,628,600 |
| 10/14/2002 | 0.13000 | 0.12000 | 0.12000 | 1,493,600 |
| 10/11/2002 | 0.13000 | 0.10000 | 0.13000 | 2,479,200 |
| 10/10/2002 | 0.11000 | 0.10000 | 0.11000 | 2,544,100 |
| 10/9/2002 | 0.10000 | 0.09000 | 0.10000 | 2,205,800 |
| 10/8/2002 | 0.10000 | 0.10000 | 0.10000 | 1,413,400 |
| 10/7/2002 | 0.11000 | 0.10000 | 0.10000 | 1,765,600 |
| 10/4/2002 | 0.11000 | 0.11000 | 0.11000 | 1,037,300 |
| 10/3/2002 | 0.12000 | 0.10000 | 0.11000 | 1,124,100 |
| 10/2/2002 | 0.12000 | 0.10000 | 0.11000 | 856,400 |

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|---|---|---|---|---|
| 10/1/2002 | 0.12000 | 0.11000 | 0.11000 | 715,100 |
| 9/30/2002 | 0.13000 | 0.10000 | 0.11000 | 1,408,800 |
| 9/27/2002 | 0.14000 | 0.01000 | 0.13000 | 960,100 |
| 9/26/2002 | 0.15000 | 0.12000 | 0.13000 | 2,363,300 |
| 9/25/2002 | 0.13000 | 0.12000 | 0.12000 | 1,558,800 |
| 9/24/2002 | 0.13000 | 0.11000 | 0.12000 | 2,208,800 |
| 9/23/2002 | 0.13000 | 0.13000 | 0.13000 | 1,351,900 |
| 9/20/2002 | 0.14000 | 0.13000 | 0.13000 | 1,465,300 |
| 9/19/2002 | 0.14000 | 0.13000 | 0.13000 | 1,395,600 |
| 9/18/2002 | 0.15000 | 0.14000 | 0.14000 | 1,850,800 |
| 9/17/2002 | 0.15000 | 0.15000 | 0.15000 | 2,036,600 |
| 9/16/2002 | 0.16000 | 0.15000 | 0.15000 | 1,964,700 |
| 9/13/2002 | 0.17000 | 0.15000 | 0.16000 | 2,580,300 |
| 9/12/2002 | 0.18000 | 0.17000 | 0.17000 | 1,646,400 |
| 9/11/2002 | 0.18000 | 0.17000 | 0.18000 | 1,079,400 |
| 9/10/2002 | 0.18000 | 0.16000 | 0.18000 | 1,959,000 |
| 9/9/2002 | 0.18000 | 0.17000 | 0.17000 | 1,715,900 |
| 9/6/2002 | 0.19000 | 0.18000 | 0.18000 | 1,611,100 |
| 9/5/2002 | 0.19000 | 0.18000 | 0.19000 | 2,555,500 |
| 9/4/2002 | 0.26000 | 0.19000 | 0.20000 | 3,637,700 |
| 9/3/2002 | 0.24000 | 0.20000 | 0.20000 | 3,557,900 |
| 8/30/2002 | 0.26000 | 0.20000 | 0.22000 | 2,934,500 |
| 8/29/2002 | 0.20000 | 0.18000 | 0.20000 | 1,909,500 |
| 8/28/2002 | 0.19000 | 0.02000 | 0.18000 | 8,717,600 |
| 8/27/2002 | 0.28000 | 0.19000 | 0.19000 | 9,407,900 |
| 8/26/2002 | 0.28000 | 0.22000 | 0.28000 | 9,020,600 |
| 8/23/2002 | 0.22000 | 0.19000 | 0.22000 | 5,494,500 |
| 8/22/2002 | 0.20000 | 0.17000 | 0.19000 | 3,356,100 |
| 8/21/2002 | 0.17000 | 0.16000 | 0.17000 | 2,689,200 |
| 8/20/2002 | 0.17000 | 0.16000 | 0.16000 | 1,895,100 |

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|---|---|---|---|---|
| 8/19/2002 | 0.17000 | 0.17000 | 0.17000 | 2,104,200 |
| 8/16/2002 | 0.17000 | 0.12000 | 0.17000 | 2,096,300 |
| 8/15/2002 | 0.16000 | 0.16000 | 0.16000 | 1,330,200 |
| 8/14/2002 | 0.17000 | 0.16000 | 0.16000 | 1,300,500 |
| 8/13/2002 | 0.17000 | 0.15000 | 0.16000 | 1,814,100 |
| 8/12/2002 | 0.16000 | 0.15000 | 0.16000 | 1,226,500 |
| 8/9/2002 | 0.17000 | 0.15000 | 0.16000 | 2,272,400 |
| 8/8/2002 | 0.17000 | 0.14000 | 0.17000 | 1,565,100 |
| 8/7/2002 | 0.15000 | 0.14000 | 0.14000 | 1,725,600 |
| 8/6/2002 | 0.17000 | 0.06000 | 0.15000 | 4,379,400 |
| 8/5/2002 | 0.22000 | 0.17000 | 0.17000 | 5,895,000 |
| 8/2/2002 | 0.20000 | 0.15000 | 0.19000 | 5,896,500 |
| 8/1/2002 | 0.16000 | 0.05000 | 0.15000 | 5,590,900 |
| 7/31/2002 | 0.14000 | 0.10000 | 0.11000 | 1,759,700 |
| 7/30/2002 | 0.11000 | 0.09000 | 0.11000 | 1,590,900 |
| 7/29/2002 | 0.11000 | 0.10000 | 0.10000 | 2,665,400 |
| 7/26/2002 | 0.11000 | 0.10000 | 0.10000 | 2,492,900 |
| 7/25/2002 | 0.10000 | 0.09000 | 0.10000 | 4,088,800 |
| 7/24/2002 | 0.09000 | 0.09000 | 0.09000 | 2,379,500 |
| 7/23/2002 | 0.10000 | 0.09000 | 0.09000 | 2,496,700 |
| 7/22/2002 | 0.09000 | 0.09000 | 0.09000 | 2,244,200 |
| 7/19/2002 | 0.10000 | 0.01000 | 0.09000 | 2,164,400 |
| 7/18/2002 | 0.10000 | 0.09000 | 0.09000 | 1,615,400 |
| 7/17/2002 | 0.10000 | 0.09000 | 0.09000 | 2,384,200 |
| 7/16/2002 | 0.10000 | 0.09000 | 0.10000 | 1,819,800 |
| 7/15/2002 | 0.10000 | 0.09000 | 0.09000 | 2,348,700 |
| 7/12/2002 | 0.09000 | 0.08000 | 0.09000 | 2,019,500 |
| 7/11/2002 | 0.10000 | 0.09000 | 0.09000 | 3,401,700 |
| 7/10/2002 | 0.09000 | 0.09000 | 0.09000 | 1,383,900 |
| 7/9/2002 | 0.09000 | 0.09000 | 0.09000 | 2,244,300 |

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|---|---|---|---|---|
| 7/8/2002 | 0.09000 | 0.09000 | 0.09000 | 2,327,200 |
| 7/5/2002 | 0.11000 | 0.08000 | 0.09000 | 2,392,500 |
| 7/3/2002 | 0.83000 | 0.01000 | 0.08000 | 3,188,300 |
| 7/2/2002 | 0.10000 | 0.01000 | 0.09000 | 8,223,500 |
| 7/1/2002 | 0.11000 | 0.10000 | 0.10000 | 2,832,200 |
| 6/28/2002 | 0.12000 | 0.09000 | 0.11000 | 4,973,800 |
| 6/27/2002 | 0.12000 | 0.11000 | 0.11000 | 4,765,600 |
| 6/26/2002 | 0.11000 | 0.10000 | 0.11000 | 8,167,800 |
| 6/25/2002 | 0.12000 | 0.11000 | 0.11000 | 2,620,500 |
| 6/24/2002 | 0.12000 | 0.11000 | 0.11000 | 4,084,900 |
| 6/21/2002 | 0.12000 | 0.10000 | 0.11000 | 2,328,400 |
| 6/20/2002 | 0.12000 | 0.10000 | 0.11000 | 2,688,200 |
| 6/19/2002 | 0.12000 | 0.10000 | 0.12000 | 3,780,200 |
| 6/18/2002 | 0.11000 | 0.09000 | 0.11000 | 5,888,900 |
| 6/17/2002 | 0.11000 | 0.10000 | 0.10000 | 2,769,900 |
| 6/14/2002 | 0.12000 | 0.11000 | 0.11000 | 3,068,600 |
| 6/13/2002 | 0.13000 | 0.12000 | 0.12000 | 3,371,900 |
| 6/12/2002 | 0.14000 | 0.13000 | 0.13000 | 3,646,600 |
| 6/11/2002 | 0.16000 | 0.14000 | 0.14000 | 1,931,700 |
| 6/10/2002 | 0.15000 | 0.14000 | 0.15000 | 2,930,500 |
| 6/7/2002 | 0.16000 | 0.15000 | 0.15000 | 2,717,100 |
| 6/6/2002 | 0.16000 | 0.01000 | 0.16000 | 2,303,500 |
| 6/5/2002 | 0.17000 | 0.16000 | 0.16000 | 2,189,300 |
| 6/4/2002 | 0.18000 | 0.17000 | 0.17000 | 3,789,500 |
| 6/3/2002 | 0.17000 | 0.17000 | 0.17000 | 1,775,000 |
| 5/31/2002 | 0.17000 | 0.16000 | 0.17000 | 1,128,500 |
| 5/30/2002 | 0.17000 | 0.16000 | 0.17000 | 1,453,800 |
| 5/29/2002 | 0.17000 | 0.16000 | 0.17000 | 1,845,600 |
| 5/28/2002 | 0.18000 | 0.02000 | 0.17000 | 2,213,800 |
| 5/24/2002 | 0.17000 | 0.17000 | 0.17000 | 1,056,100 |

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|---|---|---|---|---|
| 5/23/2002 | 0.17000 | 0.17000 | 0.17000 | 1,609,300 |
| 5/22/2002 | 0.19000 | 0.15000 | 0.17000 | 3,966,800 |
| 5/21/2002 | 0.54000 | 0.15000 | 0.16000 | 3,401,500 |
| 5/20/2002 | 0.19000 | 0.15000 | 0.16000 | 4,405,100 |
| 5/17/2002 | 0.18000 | 0.17000 | 0.17000 | 2,371,400 |
| 5/16/2002 | 0.21000 | 0.18000 | 0.18000 | 3,174,200 |
| 5/15/2002 | 0.19000 | 0.07000 | 0.19000 | 3,126,100 |
| 5/14/2002 | 0.21000 | 0.18000 | 0.19000 | 1,902,600 |
| 5/13/2002 | 0.20000 | 0.18000 | 0.19000 | 2,112,300 |
| 5/10/2002 | 0.21000 | 0.19000 | 0.20000 | 2,943,700 |
| 5/9/2002 | 0.20000 | 0.18000 | 0.20000 | 2,260,200 |
| 5/8/2002 | 0.22000 | 0.15000 | 0.19000 | 6,670,600 |
| 5/7/2002 | 0.22000 | 0.20000 | 0.20000 | 5,191,500 |
| 5/6/2002 | 0.23000 | 0.22000 | 0.22000 | 4,101,900 |
| 5/3/2002 | 0.23000 | 0.21000 | 0.22000 | 6,306,400 |
| 5/2/2002 | 0.23000 | 0.20000 | 0.22000 | 5,391,500 |
| 5/1/2002 | 0.21000 | 0.20000 | 0.20000 | 2,510,900 |
| 4/30/2002 | 0.20000 | 0.04000 | 0.20000 | 3,913,100 |
| 4/29/2002 | 0.22000 | 0.19000 | 0.20000 | 2,302,900 |
| 4/26/2002 | 0.22000 | 0.20000 | 0.21000 | 4,058,900 |
| 4/25/2002 | 0.25000 | 0.20000 | 0.21000 | 2,469,800 |
| 4/24/2002 | 0.24000 | 0.20000 | 0.22000 | 2,843,500 |
| 4/23/2002 | 0.25000 | 0.22000 | 0.22000 | 4,631,600 |
| 4/22/2002 | 0.26000 | 0.22000 | 0.24000 | 2,744,300 |
| 4/19/2002 | 0.25000 | 0.23000 | 0.23000 | 1,338,700 |
| 4/18/2002 | 0.28000 | 0.23000 | 0.24000 | 2,634,200 |
| 4/17/2002 | 0.25000 | 0.23000 | 0.25000 | 1,823,700 |
| 4/16/2002 | 0.25000 | 0.22000 | 0.25000 | 2,960,400 |
| 4/15/2002 | 0.30000 | 0.21000 | 0.22000 | 3,228,800 |
| 4/12/2002 | 0.26000 | 0.23000 | 0.24000 | 5,531,000 |

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|---|---|---|---|---|
| 4/11/2002 | 0.28000 | 0.25000 | 0.25000 | 3,177,400 |
| 4/10/2002 | 0.34000 | 0.26000 | 0.27000 | 3,581,700 |
| 4/9/2002 | 0.33000 | 0.28000 | 0.29000 | 5,275,100 |
| 4/8/2002 | 0.34000 | 0.31000 | 0.32000 | 6,638,100 |
| 4/5/2002 | 0.34000 | 0.28000 | 0.33000 | 8,399,100 |
| 4/4/2002 | 0.29000 | 0.25000 | 0.28000 | 4,575,700 |
| 4/3/2002 | 0.28000 | 0.25000 | 0.28000 | 5,295,900 |
| 4/2/2002 | 0.25000 | 0.22000 | 0.25000 | 5,652,300 |
| 4/1/2002 | 0.24000 | 0.19000 | 0.23000 | 4,199,700 |
| 3/28/2002 | 0.19000 | 0.18000 | 0.19000 | 4,738,400 |
| 3/27/2002 | 0.20000 | 0.18000 | 0.19000 | 3,438,100 |
| 3/26/2002 | 0.21000 | 0.20000 | 0.20000 | 3,204,800 |
| 3/25/2002 | 0.30000 | 0.19000 | 0.21000 | 2,191,000 |
| 3/22/2002 | 0.22000 | 0.20000 | 0.21000 | 4,550,100 |
| 3/21/2002 | 0.28000 | 0.20000 | 0.21000 | 3,659,900 |
| 3/20/2002 | 0.23000 | 0.21000 | 0.21000 | 5,640,800 |
| 3/19/2002 | 0.25000 | 0.24000 | 0.24000 | 3,389,100 |
| 3/18/2002 | 0.25000 | 0.23000 | 0.25000 | 6,274,000 |
| 3/15/2002 | 0.25000 | 0.23000 | 0.25000 | 3,102,500 |
| 3/14/2002 | 0.25000 | 0.20000 | 0.25000 | 2,747,500 |
| 3/13/2002 | 0.26000 | 0.24000 | 0.25000 | 3,053,600 |
| 3/12/2002 | 0.26000 | 0.23000 | 0.25000 | 3,356,700 |
| 3/11/2002 | 0.25000 | 0.23000 | 0.25000 | 6,317,000 |
| 3/8/2002 | 0.41000 | 0.23000 | 0.24000 | 4,666,900 |
| 3/7/2002 | 0.25000 | 0.24000 | 0.25000 | 5,411,700 |
| 3/6/2002 | 0.25000 | 0.21000 | 0.25000 | 3,303,700 |
| 3/5/2002 | 0.26000 | 0.23000 | 0.25000 | 6,376,400 |
| 3/4/2002 | 0.28000 | 0.22000 | 0.26000 | 4,953,400 |
| 3/1/2002 | 0.28000 | 0.25000 | 0.28000 | 3,100,700 |
| 2/28/2002 | 0.28000 | 0.25000 | 0.28000 | 5,062,200 |

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|---|---|---|---|---|
| 2/27/2002 | 0.28000 | 0.25000 | 0.28000 | 7,740,500 |
| 2/26/2002 | 0.28000 | 0.25000 | 0.28000 | 7,723,700 |
| 2/25/2002 | 0.25000 | 0.17000 | 0.25000 | 16,053,400 |
| 2/22/2002 | 0.21000 | 0.01000 | 0.18000 | 13,913,700 |
| 2/21/2002 | 0.22000 | 0.20000 | 0.20000 | 13,238,600 |
| 2/20/2002 | 0.25000 | 0.22000 | 0.22000 | 11,811,400 |
| 2/19/2002 | 0.26000 | 0.22000 | 0.25000 | 11,761,800 |
| 2/15/2002 | 0.26000 | 0.23000 | 0.26000 | 7,471,800 |
| 2/14/2002 | 0.28000 | 0.23000 | 0.25000 | 12,922,400 |
| 2/13/2002 | 0.31000 | 0.24000 | 0.28000 | 34,988,500 |
| 2/12/2002 | 0.37000 | 0.31000 | 0.34000 | 5,100,300 |
| 2/11/2002 | 0.38000 | 0.31000 | 0.34000 | 6,858,900 |
| 2/8/2002 | 0.40000 | 0.36000 | 0.38000 | 7,380,900 |
| 2/7/2002 | 0.47000 | 0.28000 | 0.35000 | 10,024,400 |
| 2/6/2002 | 0.34000 | 0.26000 | 0.29000 | 13,051,300 |
| 2/5/2002 | 0.56000 | 0.31000 | 0.32000 | 13,473,700 |
| 2/4/2002 | 0.39000 | 0.32000 | 0.35000 | 10,819,100 |
| 2/1/2002 | 0.41000 | 0.38000 | 0.40000 | 7,852,400 |
| 1/31/2002 | 0.44000 | 0.32000 | 0.41000 | 11,980,200 |
| 1/30/2002 | 0.46000 | 0.40000 | 0.41000 | 14,402,100 |
| 1/29/2002 | 0.44000 | 0.41000 | 0.43000 | 17,322,900 |
| 1/28/2002 | 0.49000 | 0.42000 | 0.44000 | 15,408,700 |
| 1/25/2002 | 0.50000 | 0.42000 | 0.49000 | 21,692,700 |
| 1/24/2002 | 0.50000 | 0.33000 | 0.45000 | 19,133,200 |
| 1/23/2002 | 0.41000 | 0.33000 | 0.34000 | 19,865,600 |
| 1/22/2002 | 0.54000 | 0.39000 | 0.44000 | 24,017,200 |
| 1/18/2002 | 0.57000 | 0.35000 | 0.51000 | 40,183,300 |
| 1/17/2002 | 0.38000 | 0.28000 | 0.38000 | 29,315,300 |
| 1/16/2002 | 0.32000 | 0.25000 | 0.30000 | 53,341,600 |
| 1/15/2002 | 0.67000 | 0.67000 | 0.67000 | 0 |

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| 1/14/2002 | 0.67000 | 0.67000 | 0.67000 | 0 |
| 1/11/2002 | 0.67000 | 0.67000 | 0.67000 | 0 |
| 1/10/2002 | 0.78000 | 0.61000 | 0.67000 | 38,792,300 |
| 1/9/2002 | 0.81000 | 0.76000 | 0.79000 | 28,976,700 |
| 1/8/2002 | 0.74000 | 0.70000 | 0.73000 | 24,707,700 |
| 1/7/2002 | 0.70000 | 0.67000 | 0.68000 | 16,500,100 |
| 1/4/2002 | 0.69000 | 0.65000 | 0.66000 | 17,332,200 |
| 1/3/2002 | 0.69000 | 0.63000 | 0.64000 | 19,917,300 |
| 1/2/2002 | 0.64000 | 0.58000 | 0.63000 | 20,443,200 |
| 12/31/2001 | 0.60000 | 0.55000 | 0.60000 | 20,242,300 |
| 12/28/2001 | 0.61000 | 0.56000 | 0.60000 | 18,209,200 |
| 12/27/2001 | 0.68000 | 0.56000 | 0.60000 | 26,302,500 |
| 12/26/2001 | 0.74000 | 0.65000 | 0.65000 | 31,983,800 |
| 12/24/2001 | 0.65000 | 0.57000 | 0.65000 | 18,801,600 |
| 12/21/2001 | 0.59000 | 0.45000 | 0.53000 | 36,123,900 |
| 12/20/2001 | 0.44000 | 0.40000 | 0.42000 | 21,423,100 |
| 12/19/2001 | 0.51000 | 0.41000 | 0.44000 | 39,205,900 |
| 12/18/2001 | 0.59000 | 0.50000 | 0.50000 | 33,201,400 |
| 12/17/2001 | 0.64000 | 0.55000 | 0.57000 | 30,896,700 |
| 12/14/2001 | 0.67000 | 0.59000 | 0.63000 | 18,397,300 |
| 12/13/2001 | 0.69000 | 0.60000 | 0.66000 | 30,563,400 |
| 12/12/2001 | 0.78000 | 0.51000 | 0.66000 | 84,319,400 |
| 12/11/2001 | 0.86000 | 0.71000 | 0.72000 | 45,438,500 |
| 12/10/2001 | 0.90000 | 0.79000 | 0.81000 | 58,502,800 |
| 12/7/2001 | 0.84000 | 0.67000 | 0.75000 | 59,327,200 |
| 12/6/2001 | 0.90000 | 0.60000 | 0.66000 | 130,436,700 |
| 12/5/2001 | 1.26000 | 0.94000 | 1.01000 | 239,309,900 |
| 12/4/2001 | 0.95000 | 0.58000 | 0.87000 | 85,126,000 |
| 12/3/2001 | 0.45000 | 0.26000 | 0.40000 | 61,477,400 |
| 11/30/2001 | 0.38000 | 0.25000 | 0.26000 | 68,638,700 |

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| 11/29/2001 | 0.52000 | 0.30000 | 0.36000 | 55,444,300 |
| 11/28/2001 | 3.90000 | 0.60000 | 1.10000 | 342,482,300 |
| 11/27/2001 | 4.50000 | 3.83000 | 4.11000 | 68,934,300 |
| 11/26/2001 | 4.85000 | 3.76000 | 4.01000 | 66,871,200 |
| 11/23/2001 | 5.15000 | 4.55000 | 4.71000 | 40,691,500 |
| 11/21/2001 | 7.00000 | 4.55000 | 5.01000 | 10,782,400 |
| 11/20/2001 | 8.30000 | 6.55000 | 6.99000 | 89,914,300 |
| 11/19/2001 | 9.07000 | 8.50000 | 9.06000 | 17,856,800 |
| 11/16/2001 | 9.38000 | 8.93000 | 9.00000 | 16,591,500 |
| 11/15/2001 | 9.87000 | 9.25000 | 9.48000 | 20,625,500 |
| 11/14/2001 | 10.28000 | 9.60000 | 10.00000 | 30,234,000 |
| 11/13/2001 | 9.99000 | 9.05000 | 9.98000 | 33,241,800 |
| 11/12/2001 | 9.85000 | 8.93000 | 9.24000 | 42,327,800 |
| 11/9/2001 | 9.28000 | 7.21000 | 8.63000 | 75,482,500 |
| 11/8/2001 | 10.00000 | 8.19000 | 8.41000 | 60,944,900 |
| 11/7/2001 | 9.55000 | 7.00000 | 9.05000 | 111,815,800 |
| 11/6/2001 | 11.15000 | 9.38000 | 9.67000 | 44,936,500 |
| 11/5/2001 | 12.20000 | 11.02000 | 11.17000 | 23,345,400 |
| 11/2/2001 | 11.85000 | 10.91000 | 11.30000 | 28,509,100 |
| 11/1/2001 | 13.16000 | 11.70000 | 11.99000 | 30,728,100 |
| 10/31/2001 | 14.20000 | 11.75000 | 13.90000 | 43,752,900 |
| 10/30/2001 | 13.80000 | 10.90000 | 11.16000 | 56,564,000 |
| 10/29/2001 | 15.55000 | 13.55000 | 13.81000 | 36,423,700 |
| 10/26/2001 | 16.35000 | 15.04000 | 15.40000 | 28,328,300 |
| 10/25/2001 | 17.95000 | 16.00000 | 16.35000 | 39,206,500 |
| 10/24/2001 | 19.74000 | 15.51000 | 16.41000 | 75,745,600 |
| 10/23/2001 | 23.25000 | 19.62000 | 19.79000 | 27,844,900 |
| 10/22/2001 | 24.40000 | 19.67000 | 20.65000 | 36,389,000 |
| 10/19/2001 | 28.22000 | 25.15000 | 26.05000 | 15,702,500 |
| 10/18/2001 | 31.96000 | 28.78000 | 29.00000 | 9,300,500 |

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|---|---|---|---|---|
| 10/17/2001 | 34.08000 | 32.05000 | 32.20000 | 5,086,200 |
| 10/16/2001 | 34.90000 | 32.63000 | 33.84000 | 8,324,400 |
| 10/15/2001 | 35.21000 | 32.94000 | 33.17000 | 6,266,900 |
| 10/12/2001 | 36.99000 | 34.70000 | 35.81000 | 3,695,600 |
| 10/11/2001 | 37.50000 | 35.50000 | 36.79000 | 6,644,900 |
| 10/10/2001 | 35.48000 | 33.65000 | 35.20000 | 3,226,700 |
| 10/9/2001 | 34.50000 | 33.38000 | 33.39000 | 3,562,300 |
| 10/8/2001 | 33.65000 | 31.88000 | 33.45000 | 3,102,900 |
| 10/5/2001 | 34.49000 | 31.58000 | 31.73000 | 6,715,900 |
| 10/4/2001 | 34.74000 | 32.75000 | 33.10000 | 4,583,100 |
| 10/3/2001 | 34.44000 | 31.20000 | 33.49000 | 7,813,700 |
| 10/2/2001 | 30.77000 | 28.70000 | 30.61000 | 5,732,500 |
| 10/1/2001 | 29.45000 | 27.05000 | 29.15000 | 6,458,600 |
| 9/28/2001 | 27.60000 | 25.29000 | 27.23000 | 6,794,900 |
| 9/27/2001 | 25.40000 | 24.46000 | 25.25000 | 7,251,400 |
| 9/26/2001 | 26.82000 | 24.66000 | 25.15000 | 10,033,700 |
| 9/25/2001 | 27.73000 | 26.99000 | 27.00000 | 5,385,400 |
| 9/24/2001 | 29.83000 | 27.00000 | 27.00000 | 5,060,600 |
| 9/21/2001 | 30.12000 | 27.05000 | 28.30000 | 8,460,100 |
| 9/20/2001 | 29.25000 | 25.90000 | 28.39000 | 6,978,800 |
| 9/19/2001 | 28.85000 | 25.50000 | 26.41000 | 11,533,300 |
| 9/18/2001 | 31.00000 | 28.08000 | 28.08000 | 7,634,900 |
| 9/17/2001 | 33.00000 | 30.51000 | 30.67000 | 6,833,900 |
| 9/10/2001 | 32.92000 | 30.62000 | 32.76000 | 5,492,700 |
| 9/7/2001 | 32.15000 | 30.00000 | 31.57000 | 6,786,000 |
| 9/6/2001 | 32.52000 | 30.20000 | 30.49000 | 9,242,200 |
| 9/5/2001 | 35.00000 | 32.18000 | 32.36000 | 9,215,500 |
| 9/4/2001 | 35.72000 | 34.81000 | 35.00000 | 3,201,900 |
| 8/31/2001 | 35.80000 | 34.58000 | 34.99000 | 4,940,200 |
| 8/30/2001 | 37.99000 | 35.24000 | 35.50000 | 6,161,800 |

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|---|---|---|---|---|
| 8/29/2001 | 38.34000 | 37.26000 | 37.30000 | 3,419,200 |
| 8/28/2001 | 38.62000 | 38.00000 | 38.16000 | 5,427,400 |
| 8/27/2001 | 37.90000 | 36.35000 | 37.76000 | 4,957,000 |
| 8/24/2001 | 37.00000 | 36.15000 | 36.35000 | 3,932,400 |
| 8/23/2001 | 37.44000 | 36.95000 | 36.96000 | 3,357,300 |
| 8/22/2001 | 37.60000 | 36.30000 | 37.26000 | 6,472,300 |
| 8/21/2001 | 37.20000 | 36.45000 | 36.88000 | 6,494,800 |
| 8/20/2001 | 37.25000 | 36.00000 | 36.25000 | 4,894,700 |
| 8/17/2001 | 37.60000 | 36.30000 | 36.67000 | 9,422,400 |
| 8/16/2001 | 39.60000 | 36.70000 | 36.85000 | 13,429,000 |
| 8/15/2001 | 40.25000 | 36.87000 | 40.25000 | 29,748,300 |
| 8/14/2001 | 43.20000 | 42.02000 | 42.93000 | 2,016,400 |
| 8/13/2001 | 43.03000 | 42.15000 | 42.15000 | 1,468,800 |
| 8/10/2001 | 43.55000 | 42.31000 | 42.81000 | 1,400,700 |
| 8/9/2001 | 43.00000 | 42.00000 | 42.78000 | 2,301,500 |
| 8/8/2001 | 43.50000 | 42.55000 | 42.85000 | 3,664,500 |
| 8/7/2001 | 44.68000 | 43.40000 | 43.60000 | 2,559,100 |
| 8/6/2001 | 45.47000 | 44.15000 | 44.50000 | 2,369,500 |
| 8/3/2001 | 46.10000 | 44.86000 | 45.36000 | 2,002,000 |
| 8/2/2001 | 46.10000 | 45.05000 | 45.58000 | 1,829,200 |
| 8/1/2001 | 46.60000 | 45.41000 | 45.61000 | 1,982,700 |
| 7/31/2001 | 46.86000 | 45.28000 | 45.35000 | 2,146,800 |
| 7/30/2001 | 47.04000 | 45.40000 | 45.73000 | 2,962,000 |
| 7/27/2001 | 46.55000 | 45.00000 | 46.10000 | 3,138,400 |
| 7/26/2001 | 47.40000 | 44.25000 | 46.84000 | 3,854,500 |
| 7/25/2001 | 45.15000 | 42.25000 | 44.96000 | 6,862,900 |
| 7/24/2001 | 46.67000 | 42.00000 | 43.24000 | 8,066,300 |
| 7/23/2001 | 48.18000 | 46.28000 | 46.66000 | 5,144,900 |
| 7/20/2001 | 49.25000 | 47.98000 | 48.16000 | 3,876,000 |
| 7/19/2001 | 49.55000 | 48.79000 | 49.08000 | 2,560,500 |

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|---|---|---|---|---|
| 7/18/2001 | 49.85000 | 47.60000 | 48.97000 | 3,535,200 |
| 7/17/2001 | 49.90000 | 49.16000 | 49.85000 | 2,382,300 |
| 7/16/2001 | 50.10000 | 48.94000 | 49.12000 | 2,284,100 |
| 7/13/2001 | 49.83000 | 47.71000 | 48.78000 | 3,726,100 |
| 7/12/2001 | 50.80000 | 48.55000 | 49.55000 | 4,276,200 |
| 7/11/2001 | 49.80000 | 48.23000 | 49.10000 | 2,784,500 |
| 7/10/2001 | 49.87000 | 49.00000 | 49.22000 | 3,211,400 |
| 7/9/2001 | 49.98000 | 49.06000 | 49.06000 | 3,441,500 |
| 7/6/2001 | 51.50000 | 48.59000 | 49.06000 | 3,654,300 |
| 7/5/2001 | 50.50000 | 48.98000 | 49.94000 | 3,528,800 |
| 7/3/2001 | 49.10000 | 48.41000 | 48.69000 | 1,475,400 |
| 7/2/2001 | 49.70000 | 47.50000 | 48.30000 | 3,678,400 |
| 6/29/2001 | 49.84000 | 47.80000 | 49.10000 | 4,760,400 |
| 6/28/2001 | 49.10000 | 46.25000 | 48.34000 | 5,115,600 |
| 6/27/2001 | 47.60000 | 44.31000 | 46.72000 | 6,644,600 |
| 6/26/2001 | 44.70000 | 43.25000 | 44.19000 | 3,719,400 |
| 6/25/2001 | 45.16000 | 44.04000 | 44.07000 | 3,686,400 |
| 6/22/2001 | 45.25000 | 43.76000 | 44.88000 | 5,618,600 |
| 6/21/2001 | 46.25000 | 43.60000 | 44.05000 | 7,349,200 |
| 6/20/2001 | 46.50000 | 45.01000 | 45.80000 | 6,370,800 |
| 6/19/2001 | 46.50000 | 42.35000 | 46.18000 | 8,026,300 |
| 6/18/2001 | 48.00000 | 44.19000 | 44.70000 | 7,497,300 |
| 6/15/2001 | 48.65000 | 46.87000 | 47.26000 | 4,227,400 |
| 6/14/2001 | 49.60000 | 47.35000 | 47.91000 | 3,576,700 |
| 6/13/2001 | 51.35000 | 49.77000 | 49.92000 | 2,893,300 |
| 6/12/2001 | 51.37000 | 50.09000 | 50.37000 | 3,262,000 |
| 6/11/2001 | 51.65000 | 50.09000 | 51.00000 | 4,363,900 |
| 6/8/2001 | 51.31000 | 49.52000 | 51.13000 | 4,776,700 |
| 6/7/2001 | 52.06000 | 48.80000 | 50.52000 | 8,978,400 |
| 6/6/2001 | 53.58000 | 51.97000 | 52.33000 | 3,843,000 |

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|---|---|---|---|---|
| 6/5/2001 | 54.54000 | 52.87000 | 53.75000 | 4,117,200 |
| 6/4/2001 | 54.95000 | 52.74000 | 54.54000 | 3,696,600 |
| 6/1/2001 | 53.25000 | 52.35000 | 53.04000 | 2,576,700 |
| 5/31/2001 | 53.59000 | 52.66000 | 52.91000 | 2,822,300 |
| 5/30/2001 | 53.38000 | 52.52000 | 53.23000 | 3,578,200 |
| 5/29/2001 | 54.00000 | 52.60000 | 53.05000 | 3,667,600 |
| 5/25/2001 | 54.11000 | 52.70000 | 53.00000 | 3,468,800 |
| 5/24/2001 | 56.01000 | 53.50000 | 54.16000 | 4,352,200 |
| 5/23/2001 | 56.19000 | 55.07000 | 55.35000 | 4,816,600 |
| 5/22/2001 | 55.65000 | 54.32000 | 54.95000 | 3,879,500 |
| 5/21/2001 | 55.32000 | 54.07000 | 54.99000 | 5,487,400 |
| 5/18/2001 | 55.09000 | 52.60000 | 54.90000 | 10,047,100 |
| 5/17/2001 | 56.30000 | 52.00000 | 52.20000 | 12,398,000 |
| 5/16/2001 | 58.10000 | 54.99000 | 55.01000 | 7,271,200 |
| 5/15/2001 | 59.20000 | 56.90000 | 56.99000 | 2,901,000 |
| 5/14/2001 | 59.60000 | 57.99000 | 58.75000 | 2,100,700 |
| 5/11/2001 | 58.50000 | 56.90000 | 58.20000 | 2,077,500 |
| 5/10/2001 | 58.96000 | 57.15000 | 57.60000 | 2,436,500 |
| 5/9/2001 | 59.52000 | 56.11000 | 59.20000 | 3,919,000 |
| 5/8/2001 | 57.82000 | 55.80000 | 56.11000 | 4,879,400 |
| 5/7/2001 | 59.76000 | 57.49000 | 58.04000 | 3,432,900 |
| 5/4/2001 | 59.70000 | 58.46000 | 59.48000 | 2,741,500 |
| 5/3/2001 | 60.20000 | 57.05000 | 58.35000 | 3,971,400 |
| 5/2/2001 | 63.40000 | 59.50000 | 60.50000 | 4,178,000 |
| 5/1/2001 | 63.60000 | 61.80000 | 62.41000 | 1,746,400 |
| 4/30/2001 | 64.75000 | 62.26000 | 62.72000 | 2,263,000 |
| 4/27/2001 | 63.61000 | 62.18000 | 63.50000 | 1,979,100 |
| 4/26/2001 | 63.99000 | 63.01000 | 63.66000 | 3,774,200 |
| 4/25/2001 | 62.99000 | 61.18000 | 62.88000 | 2,614,900 |
| 4/24/2001 | 62.95000 | 61.60000 | 61.87000 | 2,778,900 |

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|---|---|---|---|---|
| 4/23/2001 | 61.70000 | 60.32000 | 61.65000 | 3,042,500 |
| 4/20/2001 | 61.95000 | 59.68000 | 59.99000 | 3,109,400 |
| 4/19/2001 | 61.75000 | 60.10000 | 61.16000 | 3,697,800 |
| 4/18/2001 | 62.90000 | 60.15000 | 61.62000 | 6,189,000 |
| 4/17/2001 | 61.37000 | 59.90000 | 60.00000 | 4,697,500 |
| 4/16/2001 | 59.44000 | 56.68000 | 59.44000 | 3,631,000 |
| 4/12/2001 | 58.35000 | 57.01000 | 57.30000 | 2,094,900 |
| 4/11/2001 | 59.96000 | 58.51000 | 58.51000 | 3,265,100 |
| 4/10/2001 | 59.70000 | 56.34000 | 58.82000 | 3,675,000 |
| 4/9/2001 | 56.50000 | 53.60000 | 55.96000 | 2,478,200 |
| 4/6/2001 | 57.00000 | 53.20000 | 53.50000 | 4,910,900 |
| 4/5/2001 | 56.08000 | 53.60000 | 55.70000 | 3,894,700 |
| 4/4/2001 | 55.30000 | 53.30000 | 53.72000 | 2,883,000 |
| 4/3/2001 | 57.25000 | 53.70000 | 54.06000 | 3,189,500 |
| 4/2/2001 | 59.19000 | 55.70000 | 56.57000 | 3,600 |
| 3/30/2001 | 59.00000 | 55.31000 | 58.10000 | 3,664,600 |
| 3/29/2001 | 58.24000 | 54.30000 | 55.31000 | 5,689,000 |
| 3/28/2001 | 59.80000 | 57.03000 | 58.10000 | 3,486,500 |
| 3/27/2001 | 61.38000 | 59.00000 | 60.46000 | 3,716,000 |
| 3/26/2001 | 62.05000 | 60.31000 | 61.48000 | 4,112,900 |
| 3/23/2001 | 61.50000 | 56.10000 | 59.40000 | 7,704,800 |
| 3/22/2001 | 55.50000 | 51.51000 | 55.02000 | 10,145,300 |
| 3/21/2001 | 60.27000 | 55.00000 | 55.89000 | 9,763,700 |
| 3/20/2001 | 62.50000 | 60.94000 | 60.95000 | 4,211,000 |
| 3/19/2001 | 62.80000 | 61.15000 | 61.80000 | 3,426,400 |
| 3/16/2001 | 66.54000 | 62.00000 | 62.24000 | 4,301,700 |
| 3/15/2001 | 67.54000 | 63.70000 | 66.53000 | 8,062,900 |
| 3/14/2001 | 63.72000 | 59.99000 | 62.75000 | 6,110,300 |
| 3/13/2001 | 62.90000 | 60.53000 | 62.05000 | 5,864,000 |
| 3/12/2001 | 68.63000 | 61.00000 | 61.27000 | 6,018,100 |

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|---|---|---|---|---|
| 3/9/2001 | 71.75000 | 68.70000 | 68.84000 | 2,610,700 |
| 3/8/2001 | 71.36000 | 70.00000 | 70.59000 | 2,927,900 |
| 3/7/2001 | 70.59000 | 68.85000 | 70.00000 | 3,723,800 |
| 3/6/2001 | 70.96000 | 68.30000 | 68.87000 | 3,442,200 |
| 3/5/2001 | 71.26000 | 69.80000 | 70.11000 | 2,643,100 |
| 3/2/2001 | 70.57000 | 68.24000 | 70.19000 | 2,245,300 |
| 3/1/2001 | 69.30000 | 67.40000 | 68.68000 | 4,127,200 |
| 2/28/2001 | 70.00000 | 68.17000 | 68.50000 | 4,050,400 |
| 2/27/2001 | 71.20000 | 69.40000 | 70.04000 | 2,914,500 |
| 2/26/2001 | 71.98000 | 69.35000 | 70.56000 | 3,040,300 |
| 2/23/2001 | 72.08000 | 69.50000 | 71.00000 | 3,083,500 |
| 2/22/2001 | 73.89000 | 71.31000 | 72.15000 | 3,220,800 |
| 2/21/2001 | 75.65000 | 73.00000 | 73.09000 | 3,012,600 |
| 2/20/2001 | 77.07000 | 75.02000 | 75.09000 | 2,300,300 |
| 2/16/2001 | 78.25000 | 75.02000 | 76.65000 | 3,289,800 |
| 2/15/2001 | 79.41000 | 75.40000 | 77.90000 | 4,462,900 |
| 2/14/2001 | 81.49000 | 79.91000 | 80.00000 | 2,006,600 |
| 2/13/2001 | 81.78000 | 79.02000 | 81.15000 | 2,524,300 |
| 2/12/2001 | 80.70000 | 79.26000 | 79.80000 | 1,936,400 |
| 2/9/2001 | 81.45000 | 79.90000 | 80.20000 | 1,864,300 |
| 2/8/2001 | 81.50000 | 79.60000 | 80.00000 | 3,390,500 |
| 2/7/2001 | 81.18000 | 79.60000 | 80.35000 | 2,345,700 |
| 2/6/2001 | 81.65000 | 80.02000 | 80.15000 | 3,430,000 |
| 2/5/2001 | 82.10000 | 79.80000 | 81.81000 | 3,440,400 |
| 2/2/2001 | 80.39000 | 78.30000 | 79.98000 | 3,271,700 |
| 2/1/2001 | 79.75000 | 77.50000 | 78.79000 | 4,266,500 |
| 1/31/2001 | 80.60000 | 78.75000 | 80.00000 | 8,744,600 |
| 1/30/2001 | 80.49000 | 78.50000 | 78.50000 | 7,948,200 |
| 1/29/2001 | 81.32000 | 80.10000 | 80.77000 | 3,047,600 |
| 1/26/2001 | 82.56250 | 81.12500 | 82.00000 | 5,742,400 |

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|---|---|---|---|---|
| 1/25/2001 | 82.37500 | 79.31250 | 82.00000 | 6,877,200 |
| 1/24/2001 | 83.00000 | 79.12500 | 79.75000 | 7,743,300 |
| 1/23/2001 | 78.87500 | 76.50000 | 78.56250 | 4,950,300 |
| 1/22/2001 | 75.62500 | 73.00000 | 75.06250 | 5,003,700 |
| 1/19/2001 | 72.75000 | 70.06250 | 70.87500 | 3,090,500 |
| 1/18/2001 | 72.50000 | 70.37500 | 72.06250 | 3,440,400 |
| 1/17/2001 | 71.62500 | 66.06250 | 71.12500 | 5,334,700 |
| 1/16/2001 | 70.50000 | 67.56250 | 68.43750 | 4,281,000 |
| 1/12/2001 | 71.18750 | 68.81250 | 70.43750 | 2,455,900 |
| 1/11/2001 | 71.00000 | 68.68750 | 69.43750 | 2,612,700 |
| 1/10/2001 | 71.18750 | 68.06250 | 68.93750 | 3,530,300 |
| 1/9/2001 | 72.37500 | 68.00000 | 68.62500 | 3,864,500 |
| 1/8/2001 | 72.50000 | 70.37500 | 71.25000 | 2,457,800 |
| 1/5/2001 | 73.50000 | 71.00000 | 71.37500 | 5,072,700 |
| 1/4/2001 | 73.81250 | 70.18750 | 72.00000 | 9,174,200 |
| 1/3/2001 | 80.25000 | 75.00000 | 75.06250 | 4,236,100 |
| 1/2/2001 | 84.06250 | 79.06250 | 79.87500 | 3,229,800 |
| 12/29/2000 | 84.87500 | 82.12500 | 83.12500 | 1,813,900 |
| 12/28/2000 | 84.87500 | 82.18750 | 84.62500 | 2,067,900 |
| 12/27/2000 | 84.75000 | 80.12500 | 82.81250 | 3,179,600 |
| 12/26/2000 | 84.75000 | 81.43750 | 83.50000 | 3,058,200 |
| 12/22/2000 | 81.43750 | 78.68750 | 81.18750 | 1,953,300 |
| 12/21/2000 | 79.81250 | 78.12500 | 79.31250 | 2,731,300 |
| 12/20/2000 | 80.00000 | 78.06250 | 79.75000 | 3,092,300 |
| 12/19/2000 | 80.81250 | 79.25000 | 79.75000 | 2,657,100 |
| 12/18/2000 | 79.75000 | 77.00000 | 79.56250 | 2,105,700 |
| 12/15/2000 | 79.25000 | 75.75000 | 77.56250 | 5,248,300 |
| 12/14/2000 | 76.87500 | 73.43750 | 76.50000 | 3,667,200 |
| 12/13/2000 | 79.75000 | 73.93750 | 74.50000 | 2,986,600 |
| 12/12/2000 | 77.75000 | 75.18750 | 77.18750 | 1,892,100 |

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| 12/11/2000 | 77.37500 | 73.37500 | 76.50000 | 2,813,400 |
| 12/8/2000 | 73.56250 | 69.75000 | 73.06250 | 3,764,500 |
| 12/7/2000 | 73.93750 | 72.00000 | 72.87500 | 2,827,700 |
| 12/6/2000 | 72.87500 | 67.87500 | 71.93750 | 3,736,500 |
| 12/5/2000 | 69.12500 | 66.68750 | 68.25000 | 3,609,600 |
| 12/4/2000 | 68.75000 | 65.25000 | 65.93750 | 2,309,700 |
| 12/1/2000 | 68.56250 | 64.43750 | 65.50000 | 5,624,500 |
| 11/30/2000 | 71.62500 | 63.50000 | 64.75000 | 10,850,900 |
| 11/29/2000 | 79.00000 | 70.25000 | 70.25000 | 6,429,200 |
| 11/28/2000 | 79.68750 | 78.43750 | 78.43750 | 1,405,100 |
| 11/27/2000 | 79.56250 | 78.37500 | 78.87500 | 1,503,100 |
| 11/24/2000 | 79.25000 | 77.25000 | 77.75000 | 1,128,200 |
| 11/22/2000 | 80.37500 | 75.56250 | 75.56250 | 3,976,500 |
| 11/21/2000 | 81.43750 | 79.25000 | 80.37500 | 1,535,400 |
| 11/20/2000 | 81.93750 | 80.00000 | 80.25000 | 1,869,300 |
| 11/17/2000 | 82.06250 | 79.87500 | 81.50000 | 1,972,800 |
| 11/16/2000 | 82.31250 | 80.68750 | 81.25000 | 1,310,400 |
| 11/15/2000 | 80.56250 | 79.31250 | 80.37500 | 1,899,900 |
| 11/14/2000 | 80.37500 | 79.31250 | 79.56250 | 2,335,600 |
| 11/13/2000 | 82.31250 | 78.12500 | 79.43750 | 2,239,800 |
| 11/10/2000 | 83.12500 | 82.43750 | 82.93750 | 2,235,800 |
| 11/9/2000 | 83.18750 | 82.25000 | 82.93750 | 2,076,700 |
| 11/8/2000 | 83.06250 | 82.06250 | 82.12500 | 1,791,200 |
| 11/7/2000 | 83.18750 | 80.50000 | 81.81250 | 1,959,200 |
| 11/6/2000 | 82.25000 | 77.75000 | 81.56250 | 3,126,200 |
| 11/3/2000 | 81.50000 | 76.75000 | 77.37500 | 3,309,200 |
| 11/2/2000 | 83.81250 | 81.50000 | 81.75000 | 2,687,600 |
| 11/1/2000 | 83.62500 | 82.06250 | 83.25000 | 2,513,600 |
| 10/31/2000 | 82.43750 | 78.75000 | 82.06250 | 2,145,900 |
| 10/30/2000 | 81.50000 | 79.25000 | 80.68750 | 1,831,100 |

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| 10/27/2000 | 78.87500 | 77.25000 | 78.87500 | 1,583,200 |
| 10/26/2000 | 78.31250 | 75.56250 | 77.50000 | 2,188,300 |
| 10/25/2000 | 80.87500 | 75.50000 | 76.12500 | 2,147,900 |
| 10/24/2000 | 82.87500 | 79.62500 | 80.18750 | 1,467,800 |
| 10/23/2000 | 83.62500 | 80.50000 | 82.00000 | 2,255,700 |
| 10/20/2000 | 81.87500 | 79.50000 | 80.50000 | 1,803,100 |
| 10/19/2000 | 80.37500 | 79.00000 | 79.00000 | 1,932,600 |
| 10/18/2000 | 80.50000 | 77.62500 | 78.75000 | 2,547,400 |
| 10/17/2000 | 82.50000 | 78.87500 | 79.18750 | 2,340,400 |
| 10/16/2000 | 81.37500 | 79.31250 | 80.00000 | 1,632,500 |
| 10/13/2000 | 81.25000 | 79.12500 | 79.50000 | 2,045,700 |
| 10/12/2000 | 83.06250 | 79.50000 | 79.87500 | 2,288,700 |
| 10/11/2000 | 84.25000 | 81.50000 | 82.81250 | 1,634,800 |
| 10/10/2000 | 83.75000 | 81.31250 | 81.68750 | 2,019,000 |
| 10/9/2000 | 83.06250 | 81.00000 | 83.00000 | 1,609,400 |
| 10/6/2000 | 84.00000 | 81.31250 | 81.62500 | 1,993,400 |
| 10/5/2000 | 84.06250 | 82.37500 | 83.00000 | 2,253,700 |
| 10/4/2000 | 85.62500 | 82.50000 | 83.06250 | 2,777,100 |
| 10/3/2000 | 86.87500 | 85.31250 | 85.56250 | 2,240,000 |
| 10/2/2000 | 88.68750 | 85.00000 | 86.43750 | 2,244,200 |
| 9/29/2000 | 89.93750 | 86.00000 | 87.64063 | 2,358,100 |
| 9/28/2000 | 89.25000 | 87.37500 | 89.25000 | 2,010,800 |
| 9/27/2000 | 87.75000 | 85.12500 | 87.45313 | 1,899,400 |
| 9/26/2000 | 86.06250 | 84.18750 | 85.50000 | 3,081,400 |
| 9/25/2000 | 85.00000 | 82.81250 | 84.43750 | 2,594,400 |
| 9/22/2000 | 83.06250 | 79.25000 | 83.00000 | 2,817,400 |
| 9/21/2000 | 81.25000 | 77.00000 | 80.75000 | 3,127,000 |
| 9/20/2000 | 86.31250 | 80.56250 | 82.17188 | 4,447,500 |
| 9/19/2000 | 89.93750 | 84.37500 | 84.87500 | 3,207,200 |
| 9/18/2000 | 90.37500 | 88.50000 | 89.62500 | 2,690,900 |

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| 9/15/2000 | 89.50000 | 86.93750 | 89.43750 | 4,091,800 |
| 9/14/2000 | 87.25000 | 85.50000 | 86.70313 | 2,687,200 |
| 9/13/2000 | 86.93750 | 85.12500 | 86.68750 | 1,616,100 |
| 9/12/2000 | 86.25000 | 84.56250 | 86.12500 | 4,214,000 |
| 9/11/2000 | 86.31250 | 83.93750 | 86.01563 | 2,640,800 |
| 9/8/2000 | 84.93750 | 82.68750 | 84.21875 | 1,432,400 |
| 9/7/2000 | 85.37500 | 82.81250 | 83.87500 | 2,623,500 |
| 9/6/2000 | 86.43750 | 83.50000 | 84.37500 | 4,158,600 |
| 9/5/2000 | 86.93750 | 85.00000 | 85.00000 | 1,717,500 |
| 9/1/2000 | 87.43750 | 85.12500 | 85.32813 | 1,754,700 |
| 8/31/2000 | 85.93750 | 84.81250 | 84.87500 | 2,256,900 |
| 8/30/2000 | 86.25000 | 84.75000 | 84.87500 | 1,484,100 |
| 8/29/2000 | 87.93750 | 86.06250 | 86.25000 | 1,379,700 |
| 8/28/2000 | 87.00000 | 84.81250 | 86.62500 | 1,885,000 |
| 8/25/2000 | 86.50000 | 83.87500 | 84.87500 | 1,978,500 |
| 8/24/2000 | 89.93750 | 85.00000 | 86.00000 | 2,941,000 |
| 8/23/2000 | 90.75000 | 87.31250 | 90.00000 | 2,663,100 |
| 8/22/2000 | 88.68750 | 86.81250 | 87.50000 | 1,556,900 |
| 8/21/2000 | 88.62500 | 87.12500 | 87.87500 | 1,502,600 |
| 8/18/2000 | 88.00000 | 86.75000 | 86.93750 | 2,057,300 |
| 8/17/2000 | 90.00000 | 84.37500 | 90.00000 | 2,953,500 |
| 8/16/2000 | 84.50000 | 82.37500 | 84.01563 | 1,796,900 |
| 8/15/2000 | 83.93750 | 82.12500 | 82.12500 | 2,052,100 |
| 8/14/2000 | 84.31250 | 79.25000 | 84.25000 | 2,595,100 |
| 8/11/2000 | 81.00000 | 79.12500 | 80.25000 | 1,666,400 |
| 8/10/2000 | 82.50000 | 79.50000 | 80.76563 | 1,682,400 |
| 8/9/2000 | 83.43750 | 81.00000 | 82.29688 | 1,945,100 |
| 8/8/2000 | 83.37500 | 80.00000 | 82.43750 | 3,085,500 |
| 8/7/2000 | 81.06250 | 78.68750 | 80.26563 | 4,236,600 |
| 8/4/2000 | 79.12500 | 77.06250 | 78.00000 | 1,986,600 |

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| 8/3/2000 | 78.25000 | 75.12500 | 78.01563 | 2,806,600 |
| 8/2/2000 | 78.25000 | 75.06250 | 77.62500 | 2,738,800 |
| 8/1/2000 | 76.00000 | 73.56250 | 76.00000 | 2,220,000 |
| 7/31/2000 | 75.87500 | 72.75000 | 73.75000 | 2,555,600 |
| 7/28/2000 | 77.50000 | 74.31250 | 75.18750 | 2,838,000 |
| 7/27/2000 | 77.06250 | 73.25000 | 77.00000 | 4,380,900 |
| 7/26/2000 | 72.62500 | 70.93750 | 72.34375 | 3,060,900 |
| 7/25/2000 | 73.62500 | 71.06250 | 71.68750 | 2,250,600 |
| 7/24/2000 | 74.93750 | 72.62500 | 73.00000 | 2,867,200 |
| 7/21/2000 | 73.00000 | 71.50000 | 73.00000 | 1,856,000 |
| 7/20/2000 | 73.37500 | 71.25000 | 71.25000 | 1,675,000 |
| 7/19/2000 | 73.81250 | 72.06250 | 72.56250 | 1,967,400 |
| 7/18/2000 | 73.43750 | 71.62500 | 72.50000 | 1,550,300 |
| 7/17/2000 | 72.62500 | 71.43750 | 72.40625 | 1,494,500 |
| 7/14/2000 | 73.18750 | 70.68750 | 71.87500 | 1,599,300 |
| 7/13/2000 | 73.00000 | 71.00000 | 71.50000 | 1,640,800 |
| 7/12/2000 | 73.31250 | 71.12500 | 71.31250 | 2,023,900 |
| 7/11/2000 | 71.62500 | 68.87500 | 70.75000 | 2,410,200 |
| 7/10/2000 | 69.43750 | 67.81250 | 68.87500 | 1,587,500 |
| 7/7/2000 | 69.00000 | 67.25000 | 67.62500 | 1,654,100 |
| 7/6/2000 | 68.62500 | 66.62500 | 67.06250 | 1,766,100 |
| 7/5/2000 | 70.12500 | 65.56250 | 66.43750 | 2,652,800 |
| 7/3/2000 | 68.81250 | 66.00000 | 68.00000 | 1,884,000 |
| 6/30/2000 | 69.62500 | 64.48438 | 64.50000 | 4,082,700 |
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| 6/26/2000 | 72.68750 | 68.93750 | 69.62500 | 3,116,600 |
| 6/23/2000 | 74.37500 | 72.56250 | 73.18750 | 1,015,300 |
| 6/22/2000 | 74.93750 | 72.31250 | 73.43750 | 1,689,300 |

| | | | | |
|---|---|---|---|---|
| 6/21/2000 | 74.68750 | 71.18750 | 74.18750 | 2,436,400 |
| 6/20/2000 | 73.00000 | 69.50000 | 72.68750 | 2,798,200 |
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| 6/16/2000 | 71.93750 | 70.06250 | 71.62500 | 2,363,300 |
| 6/15/2000 | 72.18750 | 70.06250 | 71.25000 | 2,283,600 |
| 6/14/2000 | 74.00000 | 70.18750 | 72.00000 | 2,389,200 |
| 6/13/2000 | 74.93750 | 73.31250 | 74.00000 | 1,803,800 |
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| 6/7/2000 | 72.00000 | 69.50000 | 71.37500 | 1,801,300 |
| 6/6/2000 | 71.81250 | 68.06250 | 70.18750 | 3,861,300 |
| 6/5/2000 | 71.00000 | 65.93750 | 66.00000 | 2,923,000 |
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| 6/1/2000 | 73.75000 | 69.75000 | 71.12500 | 1,672,700 |
| 5/31/2000 | 73.93750 | 70.25000 | 72.87500 | 2,193,400 |
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| 5/25/2000 | 70.50000 | 68.00000 | 69.00000 | 2,462,300 |
| 5/24/2000 | 69.87500 | 66.12500 | 67.43750 | 4,552,600 |
| 5/23/2000 | 74.18750 | 69.50000 | 69.87500 | 2,188,700 |
| 5/22/2000 | 77.31250 | 72.56250 | 73.25000 | 2,356,300 |
| 5/19/2000 | 77.25000 | 75.06250 | 76.62500 | 1,802,600 |
| 5/18/2000 | 78.68750 | 76.18750 | 77.12500 | 2,070,300 |
| 5/17/2000 | 78.87500 | 75.50000 | 77.50000 | 2,507,400 |
| 5/16/2000 | 78.75000 | 76.50000 | 77.87500 | 2,962,200 |
| 5/15/2000 | 78.50000 | 76.00000 | 76.93750 | 3,145,200 |
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| 5/10/2000 | 75.81250 | 72.62500 | 74.75000 | 3,335,600 |

| | | | | |
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| 5/4/2000 | 75.25000 | 73.37500 | 74.37500 | 1,828,900 |
| 5/3/2000 | 77.00000 | 72.93750 | 74.62500 | 2,349,100 |
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| 4/28/2000 | 73.00000 | 69.50000 | 69.68750 | 1,621,300 |
| 4/27/2000 | 72.62500 | 70.75000 | 71.93750 | 1,777,500 |
| 4/26/2000 | 74.68750 | 72.06250 | 72.93750 | 1,977,100 |
| 4/25/2000 | 74.12500 | 71.18750 | 73.75000 | 2,703,700 |
| 4/24/2000 | 71.00000 | 69.12500 | 70.50000 | 1,376,700 |
| 4/20/2000 | 72.12500 | 70.37500 | 71.00000 | 2,563,800 |
| 4/19/2000 | 71.50000 | 67.00000 | 70.50000 | 3,342,000 |
| 4/18/2000 | 68.75000 | 65.06250 | 68.00000 | 2,656,100 |
| 4/17/2000 | 68.25000 | 63.00000 | 66.75000 | 3,990,400 |
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| 4/12/2000 | 74.25000 | 70.50000 | 71.12500 | 4,339,200 |
| 4/11/2000 | 70.50000 | 67.25000 | 69.12500 | 2,366,900 |
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| 4/7/2000 | 70.93750 | 69.25000 | 69.93750 | 2,162,600 |
| 4/6/2000 | 68.56250 | 65.00000 | 67.93750 | 2,909,100 |
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| 4/4/2000 | 74.43750 | 62.50000 | 65.43750 | 7,280,000 |
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| 3/29/2000 | 77.81250 | 73.50000 | 76.50000 | 2,494,500 |
| 3/28/2000 | 76.43750 | 72.81250 | 72.81250 | 2,287,700 |

| | | | | |
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| 3/24/2000 | 74.25000 | 70.43750 | 72.00000 | 1,725,600 |
| 3/23/2000 | 75.31250 | 72.68750 | 73.00000 | 2,638,400 |
| 3/22/2000 | 76.50000 | 71.50000 | 75.06250 | 5,024,200 |
| 3/21/2000 | 72.00000 | 68.00000 | 71.75000 | 2,502,600 |
| 3/20/2000 | 71.43750 | 68.31250 | 68.56250 | 1,863,600 |
| 3/17/2000 | 70.50000 | 67.75000 | 69.25000 | 2,560,000 |
| 3/16/2000 | 69.68750 | 67.18750 | 69.43750 | 2,401,400 |
| 3/15/2000 | 69.00000 | 65.87500 | 68.43750 | 3,100 |
| 3/14/2000 | 66.00000 | 64.18750 | 65.18750 | 2,073,000 |
| 3/13/2000 | 66.87500 | 63.87500 | 66.00000 | 2,231,300 |
| 3/10/2000 | 69.93750 | 67.00000 | 68.12500 | 3,055,300 |
| 3/9/2000 | 67.81250 | 63.25000 | 65.93750 | 2,391,600 |
| 3/8/2000 | 69.62500 | 66.00000 | 67.18750 | 3,023,300 |
| 3/7/2000 | 72.43750 | 68.93750 | 71.31250 | 3,494,800 |
| 3/6/2000 | 70.68750 | 67.62500 | 68.75000 | 2,193,600 |
| 3/3/2000 | 68.93750 | 67.00000 | 68.50000 | 1,483,600 |
| 3/2/2000 | 69.37500 | 67.81250 | 68.37500 | 2,018,900 |
| 3/1/2000 | 69.50000 | 67.06250 | 69.00000 | 1,895,800 |
| 2/29/2000 | 69.50000 | 64.81250 | 68.75000 | 2,158,600 |
| 2/28/2000 | 65.93750 | 62.25000 | 64.81250 | 2,051,500 |
| 2/25/2000 | 67.68750 | 62.00000 | 65.62500 | 2,054,900 |
| 2/24/2000 | 67.93750 | 63.68750 | 65.56250 | 2,576,600 |
| 2/23/2000 | 66.18750 | 64.50000 | 65.43750 | 2,969,100 |
| 2/22/2000 | 70.87500 | 66.00000 | 66.00000 | 2,806,900 |
| 2/18/2000 | 70.50000 | 68.56250 | 69.18750 | 3,079,400 |
| 2/17/2000 | 72.00000 | 70.00000 | 70.31250 | 2,303,200 |
| 2/16/2000 | 70.75000 | 68.93750 | 69.87500 | 2,694,400 |
| 2/15/2000 | 69.43750 | 67.37500 | 68.93750 | 2,033,100 |
| 2/14/2000 | 68.43750 | 66.18750 | 67.81250 | 1,690,100 |

| | | | | |
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| 2/3/2000 | 64.50000 | 61.18750 | 63.68750 | 3,014,200 |
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| 2/1/2000 | 67.50000 | 64.00000 | 64.50000 | 3,445,900 |
| 1/31/2000 | 67.87500 | 59.43750 | 67.87500 | 4,275,400 |
| 1/28/2000 | 62.75000 | 59.75000 | 60.18750 | 2,827,400 |
| 1/27/2000 | 62.62500 | 60.00000 | 61.00000 | 2,621,200 |
| 1/26/2000 | 63.87500 | 61.00000 | 61.12500 | 5,194,300 |
| 1/25/2000 | 65.31250 | 59.00000 | 61.25000 | 4,438,400 |
| 1/24/2000 | 71.68750 | 63.81250 | 65.00000 | 7,484,400 |
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| 1/20/2000 | 67.50000 | 54.37500 | 67.37500 | 10,951,300 |
| 1/19/2000 | 55.75000 | 52.62500 | 53.50000 | 2,828,200 |
| 1/18/2000 | 56.56250 | 54.25000 | 55.50000 | 3,736,400 |
| 1/14/2000 | 57.18750 | 53.43750 | 56.37500 | 3,247,700 |
| 1/13/2000 | 54.37500 | 51.00000 | 53.37500 | 2,960,100 |
| 1/12/2000 | 52.50000 | 47.12500 | 51.50000 | 4,450,600 |
| 1/11/2000 | 48.50000 | 46.93750 | 47.62500 | 2,560,200 |
| 1/10/2000 | 49.31250 | 46.87500 | 47.31250 | 1,913,700 |
| 1/7/2000 | 50.25000 | 47.18750 | 49.06250 | 3,567,200 |
| 1/6/2000 | 49.62500 | 43.75000 | 47.93750 | 4,350,500 |
| 1/5/2000 | 44.00000 | 41.56250 | 44.00000 | 2,231,000 |
| 1/4/2000 | 43.12500 | 41.37500 | 42.50000 | 2,253,700 |
| 1/3/2000 | 44.56250 | 42.00000 | 43.43750 | 1,769,600 |

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Tuesday, April 9, 2002

# Enron's McMahon: Hero or Collaborator?

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## Current Company President Took Part in a Sale That Helped Give Profits an Artificial Boost

By Anita Raghavan

In recent congressional hearings, Enron Corp. President Jeffrey McMahon was touted as an executive-suite hero who early on questioned the propriety of the firm's controversial partnership arrangements. In one exchange on Capitol Hill in February, Sen. Olympia Snowe (R., Maine) said she wished there had been more Sherron Watkinses and Jeffrey McMahons at Enron "because it might have well prevented this catastrophic demise of one of the largest companies in America."

But there are a few things lawmakers didn't ask Mr. McMahon about -- and he didn't offer up.

Two years before Enron imploded, Mr. McMahon was involved in a sale of several Nigerian barges to brokerage firm Merrill Lynch & Co. that helped Enron artificially boost its profits and contributed to the company's misleading financial picture. And in the summer of 2000, Mr. McMahon attempted, unsuccessfully, to set up a separate partnership to package some slow-growing businesses off Enron's books.

No one is suggesting that Mr. McMahon enriched himself through these activities, the way some Enron executives did. Yet other Enron executives involved in controversial activities have left the energy firm. Mr. McMahon, 41 years old, not only remains at Enron; in January, he was named president and has been commended for questioning the conflicts of interest raised by the partnerships set up by former Enron Chief Financial Officer Andrew Fastow, in which Mr. Fastow had an ownership interest.

But, like other senior executives at Enron, Mr. McMahon, who was Enron's treasurer between 1998 and late March 2000, painted a much-rosier picture of the company's finances than turned out to be true. Last month, an official at a major Wall Street credit-rating concern testified that Mr. McMahon was among the Enron officials who purposely misled the firm. During a January 2000 presentation to Standard & Poor's, Mr. McMahon offered the "kitchen sink" -- but failed to mention controversial partnerships that hid millions of dollars of off-balance-sheet assets from investors, Ronald Barone, an S&P managing director, told Congress. Included in Mr. McMahon's David Letterman-style list of "top 10 reasons" to upgrade Enron's credit rating was: "Communication with analysts, investors and credit officers is direct and candid -- No Secrets Policy," according to documents submitted as part of S&P's testimony.

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Mr. McMahon also attempted to refute "common misperceptions" about Enron. Among them, the documents show, was this: "Myth: There are massive amounts of debt that is not included in Enron's credit profile. Fact: The inclusion of all obligations (without adjustment for non-recourse) does not materially change the financial profile of Enron."

Mr. McMahon declined to comment for this article. Mark Palmer, an Enron spokesman, says "it is fantastic to believe that S&P's understanding of the company hinged on one presentation." He says Mr. McMahon's description of the company's debt load was an accurate representation of its obligations at the time and he notes that the "kitchen sink" analysis referred to an explanation, which S&P requested, of a footnote in the company's annual report: "They asked for this information and we put it together in a presentation and 2 1/2 years later they are claiming we didn't answer a question they didn't ask."

What could put the spotlight on Mr. McMahon even more is the Merrill transaction, and Mr. McMahon's role in it. The deal wasn't just another example of Enron hiding assets off the books. It also involved a verbal pledge by Enron, and Mr. McMahon, to arrange for the investment to be bought back, say people familiar with the situation. That raises the question of whether the deal was, in effect, a "sham" transaction simply to allow Enron to book an earnings gain.

"This looks like manufactured earnings," says John Coffee, a Columbia University law school professor. He says that the principal violation of securities laws, if any, would be by Enron, which is "fabricating a structure where they can call it a sale" and thereby book an earnings gain.

It all began in mid-December 1999, when Mr. McMahon approached Merrill with a curious request, say people familiar with the situation. Would Merrill invest in the three electricity-producing barges, to be anchored off the coast of Nigeria? Mr. McMahon asked.

It was Enron's plan, these people say Mr. McMahon said, to arrange for Merrill's $7 million investment to be bought back in the coming months. But Mr. McMahon said Merrill had to move quickly: Enron wanted to close the deal by year end so it could book an anticipated $12 million earnings gain from the deal, the people say. In December 1999, Enron created a special-purpose vehicle for the barges, contributing $21 million of debt to it and $7 million of equity from Merrill. The exact gain Enron booked from the deal is not known.

Merrill says it made the investment to please a major client. And, sure enough, an Enron partnership bought back the investment seven months later. Now the Securities and Exchange Commission and congressional investigators probing the Enron matter are examining the Nigerian barge deal to see if it was done simply to temporarily, and artificially, bulk up Enron's earnings, ultimately helping to conceal the Houston energy company's changing financial picture from investors.

Mr. McMahon's call to Merrill came after the Enron executive had pitched bankers at other securities firms without success. In one conversation with a Wall Street investment banker, Mr. McMahon stressed the urgency and assured the banker that "we'll make sure you'll get taken out" in the first half of 2000, suggesting Enron would buy back the investment, if necessary, according to a person who heard the pitch.

Mr. Palmer says Mr. McMahon's "involvement in the transaction was entirely legitimate. Jeff didn't promise nor does the documentation support that anybody

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would be guaranteed a rate of return." Mr. McMahon wouldn't comment.

The Nigerian deal, albeit small, came at a time when Enron appeared to be padding its profits with sales of assets to LJM1 and LJM2, two partnerships central to the company's downfall. "Near the end of the third and fourth quarters of 1999, Enron sold interests in seven assets to LJM1 and LJM2," according to a report by a special committee of Enron's board. The asset sales to LJM1 and LJM2 "were done quickly and permitted Enron to remove assets from its balance sheet and record a gain in some cases." The report quoted Mr. Fastow as saying in a presentation to the board's finance committee that the LJM transactions generated, directly, or indirectly, "earnings" to Enron of $229 million in the second half of 1999.

Mr. McMahon indicated to Merrill that Enron had been negotiating to sell the revenue streams thrown off by the barges to a third party. But a sale had been delayed because the buyer wouldn't sign on until Enron had reached a power-purchase accord with the Nigerian government, with which it was simultaneously negotiating, say people close to the matter.

Merrill now says it believed the deal was "appropriate" given what it knew about Enron at the time. It says it viewed the deal as providing bridge financing to accommodate a client with which it wanted to cultivate a relationship. The transaction was "carefully reviewed" and, in the end, a Merrill spokesman says: "We concluded that it was appropriate given what we knew about Enron at the time. We felt it was a real transaction with real risk consistent with Enron's core business." The Merrill spokesman says the deal was fully vetted by the firm's banking, credit and legal departments and was a small transaction immaterial to Merrill and Enron. Merrill also confirms that Mr. McMahon "made the formal request on this and was involved in it."

Mr. McMahon's overture to Merrill is documented in transaction notes Merrill recently handed over to the SEC. The notes say that "Jeff McMahon, EVP [executive vice president] and treasurer, has asked Merrill Lynch to purchase $7 million of equity in a special-purpose vehicle that will allow Enron to book $12 million of earnings." The notes also indicate that the proposed transaction has a maturity date of six months. By selling the barges to a special-purpose vehicle, Enron could book a gain on the asset, reflecting the difference between the value at which it was carried on its own books and the price at which it was sold to the special purpose vehicle, accountants explain. For arranging the deal, Merrill earned $250,000; when the investment was sold seven months later, Merrill received an additional $525,000.

In June 2000, after Mr. McMahon had left the treasurer's job, Enron executive Dan Boyle told Merrill it had found a buyer for its equity stake in the Nigerian barges -- Enron's own LJM2 partnership, say people familiar with the situation. On June 29, 2000, LJM2 bought the investment for $7.5 million, and, in September, LJM2 sold the investment for $8.2 million to power company AES Corp. and pocketed a $700,000 profit, LJM partnership documents show. Mr. Boyle declined to comment.

To be sure, other Enron officials were involved in the Nigerian deal. In another conversation with Merrill -- cited in interview transcripts done for an internal investigation conducted by a special committee of Enron's board -- a senior director of transaction support at Enron said he was told by Mr. Boyle that during the 1999 talks with Merrill, Mr. Boyle "particicpated in a phone call in which Andy Fastow gave Merrill Lynch a verbal assurance that he would make sure Merrill Lynch was relieved of its interest in Nigeria Barge by June 2000." Mr. Fastow, through a spokesman, declined to comment.

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The Nigerian transaction also underscores the degree to which Wall Street firms helped Enron create its complex and misleading financial structure -- a topic that is likely to draw congressional scrutiny in months ahead. The House Energy and Commerce Committee sent letters last month to more than a dozen securities and credit-rating firms seeking records about Enron and its partnerships, and a Senate panel grilled Wall Street analysts who recommended Enron's stock last fall as the company headed toward a bankruptcy-court filing.

Since Enron's troubles have surfaced, Mr. McMahon has tried to distance himself from its problems, even though he was publicly bullish on the stock just months before the firm's collapse. For instance, Mr. McMahon painted a glowing picture of Enron on Sept. 20 and Oct. 18, 2001, during two visits to his alma mater, the University of Richmond. So bullish was Mr. McMahon that managers of a university student fund say they sank nearly $13,000 in Enron.

"He was going on and on about how undervalued the stock was that you would have never thought there was something wrong at the company," says Devin Weisleder, one of the 11 student managers of the $90,000 Student Managed Investment Fund, or Spiderfund, "value" portfolio. The fund lost nearly all its investment when Enron filed for bankruptcy-court protection in December. The fund sold the stock at 83 cents after buying 1100 shares at about $11.61 a share.)

When Mr. McMahon was asked about his rosy portrait of Enron by the student newspaper, the Collegian, he said in an interview on Jan. 30, 2002, that he was "running an operating division at the time [of his first visit], responsible for paper and steel." Enron's Mr. Palmer said Mr. McMahon was responding to a question that assumed he was the finance chief at the time of the presentations. Mr. McMahon delivered a company-prepared and approved presentation, the accuracy of which he had no reason to doubt, Mr. Palmer said.

Still, Joe Ben Hoyle, Mr. McMahon's former accounting professor at the university, remains puzzled by his pupil's comments. "You'd think with a guy who is that high up in the company, if he tells you to buy the stock, the company won't go bankrupt," he says, adding that Mr. McMahon's bullish comments came "very late in the game."

Meantime, Mr. McMahon also had a hand in other Enron practices that now are being questioned. In the summer of 2000, he attempted to set up a partnership to move Enron's slow-growing pulp and paper business, among other things, off the books and develop them without reflecting the costs on Enron's consolidated income statement. The planned $1 billion partnership, Enron Net Works Partners, would pursue acquisitions in base metals, pulp and paper, lumber and steel industries, according to a confidential private-placement document from underwriter Chase H&Q, now a unit of J.P. Morgan Chase & Co. Mr. McMahon was slated to be president and chief operating officer of Net Works. (Net Works never got off the ground because Chase H&Q couldn't raise the money from investors for the partnership.)

Mr. Palmer says the company's strategy was to develop these businesses with outside capital. "You can question that corporate strategy but I don't see how you can question Jeff McMahon for carrying it out," says Mr. Palmer.

Still, "there is no legitimate reason" that the assets in Enron Net Works should be housed off balance sheet, says Edward Ketz, an accounting professor at Pennsylvania State University.

Responds Enron's Mr. Palmer: "If there is third party equity involved, and there is a true transfer of risk, it's entirely legitimate."

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Robert Block and Michael Schroeder contributed to this article.

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In Defense of Enron

Above are the top reasons that Enron's then-treasurer, Jeffrey McMahon, gave to Standard & Poor's two years ago when, in a David Letterman-style top 10 list, he enumerated why the credit-rating agency had underrated Enron.

His Top Five Reasons Why Enron Is Underrated

5 Over the past 10 years, Enron's performance has demonstrated a low risk business strategy in a highly volatile commodity/energy market.

4 Enron's financial ratios vs. peer companies are favorable,especially considering Enron's competitive advantage with respect to market shares and control systems.

3 Bond spreads/bank spreads indicate A- risk weighting.

2 Communication with analysts, investors, and credit officers is direct and candid -- No Secrets Policy.

1 Enron's credit rating is critical to the maintenance and growth of its existing dominant market share position.

Enron Corp. Credit Conference
Credit Profile
January 29, 2000
Jeffrey McMahon
Executive Vice President, Finance and Treasurer

---- INDEX REFERENCES ----

COMPANY (TICKER): Enron Corp.; ENRNQ; Merrill Lynch & Co. (ENE ENRNQ MER)

NEWS SUBJECT: Energy Markets; Bankruptcy; Bankruptcy; Corporate Actions; Corporate/Industrial News; Divestitures or Asset Sales; Divestitures/Asset Sales; Newspapers' Section Fronts; High-Yield Issuers; Natural Gas; Management Issues; Management Issues; Dow Jones Total Market Index; Wall Street Journal; English language content; Domestic Politics; Political/General News; Politics; Commodity Markets; Market News; Ownership Changes (M143 BCY C16 CAC CCAT DVT C182 FRT HIY LNG MNT C41 WEI WSJ ENGL GPOL GCAT PLT M14 MCAT C18)

MARKET SECTOR: Financial; Utilities; Newswire More Code; Newswire End Code (FIN UTI MMR NND)

INDUSTRY: Electric Utilities; Gas Utilities; Securities; Dow Jones Sector Titans Index - Financial (ELC GAS SCR XSTF)

REGION: North American Power; United States; North American Electric Reliability Council; North America; New York; United States - New York; Texas; United States - Texas; United States; Northeast U.S.; Southern U.S.; North American Countries (NAPW USA NERC NME NY USNY TX USTX US USE USS NAMZ)

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HEADLINE: Ex-Executives Say Sham Deal Helped Enron

BYLINE: By DAVID BARBOZA

DATELINE: HOUSTON, Aug. 7

BODY:

Desperate to meet a year-end profit target, the Enron Corporation struck a sham energy deal with Merrill Lynch that let Enron book a $60 million profit in the final days of December 1999, according to former Enron executives involved in the transaction.

The executives said that the energy deal, a complex set of gas and power trades, was intended to inflate Enron's profits and drive up its stock price. Enron and Merrill Lynch, they said, agreed that the deal would be canceled after Enron booked the profits; it later was.

By allowing the company to meet its internal profit targets, the power deal unleashed the payment of millions of dollars in bonuses and restricted stock to high-ranking executives, including Kenneth L. Lay, then the chief executive, and Jeffrey K. Skilling, then Enron's president, former executives said.

"This was absolutely a sham transaction, and it was an 11th hour deal," said one former Enron executive who was briefed on the deal. "We did this deal to get 1999 earnings." This account was confirmed by five other former executives who either worked on the deal or were briefed on it. All the executives insisted on anonymity, concerned either about losing their current jobs or being drawn into the litigation over Enron's collapse.

Merrill Lynch officials said there was nothing improper about the power deal and no prearrangement to cancel it, and one former Enron executive involved in the deal agreed.

"The trades we conducted with Enron were legitimate transactions involving real risk," Merrill said in a statement today. "At no time did Merrill Lynch knowingly assist Enron in misstating revenues."

Yet Merrill executives were so concerned about Enron's accounting for the deal that they obtained a letter signed by Richard A. Causey, Enron's chief accounting officer, stating that Enron did not rely on Merrill Lynch for accounting advice, former executives said. Securities law experts said that such a letter could help Merrill defend itself against any fraud charges that might arise from the transaction.

The deal was five times as big as Enron's sale of a Nigerian power barge to Merrill Lynch the same month, a transaction that a Senate panel denounced last week as evidence that the Wall Street bank helped Enron inflate its profits and cook its books.

Both of the December 1999 deals came as Enron struggled to meet Wall Street's year-end profit expectations. With the profits from the deals, Enron on Jan. 18, 2000, reported a fourth-quarter profit of $259 million, or 31 cents a share,

matching analysts' expectations. Without the $60 million profit, the company would have reported earnings of about 24 cents a share, according to Charles Hill, director of research at Thomson First Call, which tracks corporate profits.

"There are times when missing by a penny is huge," Mr. Hill said. "This would have creamed the stock." Instead, by the end of that week, Enron's share price had climbed 27 percent.

For its role in the deal, Merrill Lynch received about $8 million from Enron, people close to the transaction said.

Securities law experts said the transaction, which involved a series of complex gas and power trades, may have violated securities laws by allowing Enron to manipulate its year-end profit statement.

"Not only could this be securities fraud, but you could have a looting of the stock plan," said John C. Coffee Jr., a professor of law at Columbia University. "This could have been a way of fabricating earnings to permit the executives to reap stock bonuses. That's rigging the scoring system."

At the time, moreover, Merrill Lynch's sales force was promoting Enron's stock and the bank's private equity group -- touting Enron's stellar performance -- was asking investors to contribute over $250 million to one of Enron's off-balance-sheet partnerships.

Lawmakers have criticized Merrill Lynch and other banks that did business with Enron for having been blind to conflicts between the interests of their banking clients and those of investors. Merrill said today that the "Chinese walls" between its various businesses kept information about the power deal away from its sales force.

A spokesman for Enron, now in Chapter 11 bankruptcy protection, declined comment. Arthur Andersen, which as Enron's auditor at the time approved the accounting for the power deal, also had no comment. A spokeswomen for Mr. Lay declined comment and a spokeswoman for Mr. Skilling could not be reached..

The deal originated in Enron North America, the company's trading unit, where executives conceived a plan to take advantage of a group of power plants under construction in the Midwest. Their notion, the former executives said, was that if Enron could sell contracts tied to the output of some of the plant's well in the future, the company could book the long-term profits immediately, even if it did not receive a dime up front.

But when no energy company could be found to participate in such a deal, former executives said, Enron turned to its banker, Merrill Lynch, which operated its own energy trading unit.

The Enron effort was headed up by J. Clifford Baxter, the chairman and chief executive of Enron North America. One of his contacts on the deal at Merrill was Schuyler M. Tilney, the investment banker who last week invoked his Fifth Amendment right against self-incrimination and refused to testify before the Senate Permanent Subcommittee on Investigations. A lawyer for Mr. Tilney declined comment.

The initial plan for the power deal, the executives said, was to create a kind of mirror swap in which Enron would purchase energy contracts from Merrill and Merrill would simultaneously purchase energy contracts from Enron. But Arthur Andersen and Merrill Lynch were troubled by the structure of that deal, former executives said, worried that it amounted to a wash transaction from which no profits could be claimed.

With time winding down on the fourth quarter, Enron put pressure on Merrill and the Andersen accountants to help it complete some kind of deal.

"People were working 14-hour days, and Andersen was working around the clock to get this deal done," said one former Enron executive who was briefed on the transaction. "This deal got done in 10 days."

Enron and Merrill restructured the power deal as a complex series of gas and power contracts over four years. The executives' recollections differ on some accounts. But three executives briefed on the deal said that Enron and Merrill executives discussed canceling it in the first quarter of 2000, months before Merrill's first scheduled payment that September.

To further insulate Merrill, Enron agreed to embed a fee of about $14 million in the power contracts, former executives said.

The former executives said that Andersen accountants opposed elements of the final deal and warned Enron that if no gas was delivered in 2000, they might force the company to restate its 1999 earnings. Andersen officials who asked not to be named said this week that the firm told Enron only that auditors might have to consider the possibility of a restatement.

Tempers flared, some of the former executives said, as end-of-the-quarter pressure mounted on high-level executives including Mr. Baxter. Mr. Causey's letter to Merrill formally sealed the deal on Dec. 30, 1999.

Mr. Baxter committed suicide early this year. A lawyer for Mr. Causey declined to comment.

One Enron executive involved in the transaction disputed that the deal was a sham. Agreeing with Merrill Lynch, he said that there was a real transfer of risk to the investment bank, and he noted that there was no formal sale-buyback agreement.

"You will not see that in the contract," the executive said.

But in April 2000, Enron agreed to pay Merrill $8 million to cancel the deal, months before Merrill was scheduled to make a cash payment to Enron for the physical delivery of gas. Andersen did not press for a restatement of 1999 earnings, the former Enron executives said.

Enron executives benefited tremendously from the deal. Because Enron met its profit targets, dozens of top executives -- including Mr. Lay, Mr. Skilling and Mr. Baxter -- collected millions in stock and bonuses. Moreover, in the two weeks after the Jan. 18 earnings announcement, 20 Enron executives and directors sold $82.6 million in stock.

The deal was also a boon to Merrill Lynch's energy trading operation, which Merrill sold in January 2001 to Allegheny Energy Inc. for about $500 million.

Two weeks ago, Allegheny said it would shrink the operation because of the turmoil in the energy trading business. For its part, Merrill said in its statement today that it rued its dealings with Enron.

"We relied on representations made by Enron that it and its outside auditors had approved its transactions," Merrill said. "Like many others, we were deceived by Enron, and had we known what we know today, we would not have done business with them."

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GRAPHIC: Chart: "Five Days in January"Former Enron executives say that a sham deal with Merrill Lynch allowed Enron to meet Wall Street's earnings expectations for the fourth quarter of 1999. In the days after the quarterly profit was reported on Jan. 18, 2000, Enron's stock rose sharply and top officials sold or redeemed $82.6 million in company shares. Graph tracks the daily closing price of Enron shares, highlighting when the earnings report was released and days shown below, from October to March. EXECUTIVES STOCK ACTIVITY JAN. 20, 2000 EXECUTIVE: Mark A. FrevertPOSITION: OfficerSHARES SOLD FOR CASH: 60,000SHARES EXCHANGED TO COMPANY*: --TOTAL AMOUNT: $3,930,000 EXECUTIVE: Joseph W. SuttonPOSITION: DirectorSHARES SOLD FOR CASH: --SHARES EXCHANGED TO COMPANY*: 12,164TOTAL AMOUNT: 697,970 EXECUTIVE: Robert A. BelferPOSITION: DirectorSHARES SOLD FOR CASH: 8,000SHARES EXCHANGED TO COMPANY*: --TOTAL AMOUNT: 454,080 JAN. 21 EXECUTIVE: Lou L. PaiPOSITION: OfficerSHARES SOLD FOR CASH: 300,000SHARES EXCHANGED TO COMPANY*: --TOTAL AMOUNT: $21,620,091 EXECUTIVE: Richard A. CauseyPOSITION: Vice presidentSHARES SOLD FOR CASH: 45,000SHARES EXCHANGED TO COMPANY*: 484TOTAL AMOUNT: 13,392,365 EXECUTIVE: Mark A. FrevertPOSITION: OfficerSHARES SOLD FOR CASH: 30,000SHARES EXCHANGED TO COMPANY*: --TOTAL AMOUNT: 2,175,000 EXECUTIVE: Joseph W. SuttonPOSITION: DirectorSHARES SOLD FOR CASH: --SHARES EXCHANGED TO COMPANY*: 12,167TOTAL AMOUNT: 871,522 EXECUTIVE: Joe H. FoyPOSITION: DirectorSHARES SOLD FOR CASH: 9,120SHARES EXCHANGED TO COMPANY*: --TOTAL AMOUNT: 652,080 EXECUTIVE: J. Clifford BaxterPOSITION: OfficerSHARES SOLD FOR CASH: --SHARES EXCHANGED TO COMPANY*: 1,129TOTAL AMOUNT: 80,870 EXECUTIVE: Michael S. McConnellPOSITION: Vice presidentSHARES SOLD FOR CASH: --SHARES EXCHANGED TO COMPANY*: 674TOTAL AMOUNT: 48,279 EXECUTIVE: Richard B. BuyPOSITION: Vice presidentSHARES SOLD FOR CASH: --SHARES EXCHANGED TO COMPANY*: 507TOTAL AMOUNT: 36,316 EXECUTIVE: Steven J. KeanPOSITION: Vice presidentSHARES SOLD FOR CASH: --SHARES EXCHANGED TO COMPANY*: 444TOTAL AMOUNT: 31,804 EXECUTIVE: Jeffrey McMahonPOSITION: Vice presidentSHARES SOLD FOR CASH: --SHARES EXCHANGED TO COMPANY*: 411TOTAL AMOUNT: 29,440 JAN. 24 EXECUTIVE: Kenneth L. LayPOSITION: ChairmanSHARES SOLD FOR CASH: --SHARES EXCHANGED TO COMPANY*: 143,704TOTAL AMOUNT: $9,340,760 EXECUTIVE: Stanley C. HortonPOSITION: OfficerSHARES SOLD FOR CASH: 70,000SHARES EXCHANGED TO COMPANY*: --TOTAL AMOUNT: 4,690,700 EXECUTIVE: James V. Derrick Jr.POSITION: Vice presidentSHARES SOLD FOR CASH: 10,710SHARES