SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935
Rel. No. 27782 / December 29, 2003

Admin. Proc. File No. 3-10909

In the Matter of the Applications of

ENRON CORPORATION

OPINION OF THE COMMISSION

PUBLIC UTILITY HOLDING COMPANY ACT PROCEEDING

Electric utility is not predominantly intrastate in character and does not carry on business substantially in a single state and holding company is unable to establish that it is only incidentally a holding company and that it derives no material part of its income from an electric utility subsidiary. Held, application by public utility holding company for exemption from provisions of the Holding Company Act denied.

APPEARANCES:

William S. Lamb, Charles A. Moore, and Sonia C. Mendonca, of LeBoeuf, Lamb, Greene & MacRae, L.L.P., for Enron Corporation.

Paul F. Roye, David B. Smith, Jr., Catherine A. Fisher, M. Cathey Baker, David G. LaRoche, Deborah D. Skeens, Alberto H. Zapata, Christopher W. Chow, and Arthur S. Lowry, for the Division of Investment Management.

Hardy Myers and Jason W. Jones, for the Public Utility Commission of Oregon.

James Bradford Ramsay and Sharla M. Barklind, for the National Association of Regulatory Utility Commissioners.

Edward H. Comer, for the Edison Electric Institute.

Clifford M. Naeve and Paul Silverman, of Skadden Arps Slate Meagher & Flom L.L.P., for FPL Group, Inc.

Appeal filed: February 27, 2003
Last brief filed: September 3, 2003
Oral argument: December 4, 2003

I.

Enron Corporation ("Enron"), an Oregon corporation with headquarters in Houston, Texas, appeals from the decision of an administrative law judge denying Enron's applications for exemption from the provisions of the Public Utility Holding Company Act of 1935 ("Act"). Enron is a public utility holding company and the sole owner of Portland General Electric Company ("Portland General"), a public electric utility company. Enron filed two applications for exemption from the Act's provisions. In the first application, filed April 12, 2000, Enron requested an exemption pursuant to Sections 3(a)(3) and 3(a)(5) [1] of the Act. The law judge found that Enron failed to make the showing required under these provisions that Enron is only incidentally a public utility holding company and that it does not derive a material part of its income from its public utility subsidiary, Portland General. In its second application, filed on February 28, 2002, and amended on May 31, 2002, Enron sought an exemption pursuant to Section 3(a)(1) [2] of the Act. The law judge also denied that application, finding that Enron failed to show that Portland General is predominantly intrastate in character and that it carries on business substantially in a single state.

Enron contends that the law judge erred when she found that Enron was not entitled to an exemption pursuant to the "plain words" of the Act and Commission precedent. Enron argues further that, even if it does not qualify for an exemption pursuant to the "plain wording" of the Act, the Commission should review the initial decision "with the fundamental policies of the Act in mind." The Public Utility Commission of Oregon ("OPUC"), which regulates public utilities in Oregon and which was granted party status by the law judge, supports Enron's application for an

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1/ 15 U.S.C. § 79c(a)(3) and 15 U.S.C. § 79c(a)(5). The Act requires that all public utility holding companies must either register under Section 5 of the Act or seek an exemption from the Act's provisions. See 15 U.S.C. §§ 79c and 79e.

2/ 15 U.S.C. § 79c(a)(1).

exemption pursuant to Section 3(a)(1). [3] The Division of Investment Management opposes Enron's applications and contends that Enron failed to establish that it qualifies for any of the statutory exemptions for which it applied. We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal.

II.

On July 2, 1997, Enron acquired Portland General by merging with Portland General's holding company, Portland General Corporation. Enron acquired all of the outstanding common stock of Portland General and became a holding company within the meaning of Section 2(a)(7) of the Act. [4] After acquiring Portland General and until March 1, 2001, Enron claimed an exemption from registration under the Act by filing annually Form U-3A-2 with financial statements claiming it was entitled to an exemption under Section 3(a)(1). [5]

Procedural History

3/ OPUC takes no position with regard to Enron's application pursuant to Sections 3(a)(3) and 3(a)(5) of the Act. The National Association of Regulatory Utility Commissioners ("NARUC") submitted an amicus brief in support of OPUC's petition for review of the initial decision with respect to Section 3(a)(1). The Edison Electric Institute ("EEI") also filed an amicus brief limited to issues related to Enron's application for an exemption pursuant to Section 3(a)(1). FPL Group, Inc. ("FPL"), which was denied party status but allowed to participate in the hearing on a limited basis, seeks review of the law judge's decision with respect to Enron's application pursuant to Sections 3(a)(3) and 3(a)(5).

4/ 15 U.S.C. § 79b(a)(7). The Act defines a holding company, in relevant part, as any company that directly or indirectly owns or controls ten percent or more of the outstanding voting securities of a public utility company.

5/ Rule 2(a) under the Act provides that the filing of Form U-3A-2 by a holding company shall exempt the applicant from all the provisions of the Act subject to an annual filing on or before March 1 of each year of a statement showing the holding company's entitlement to the exemption. 17 C.F.R. § 250.2(a).

On April 12, 2000, Enron filed an application requesting an exemption from registration under the Act pursuant to Section 3(a)(3) or, in the alternative, Section 3(a)(5) of the Act. [6] Enron's exemption under these provisions would preserve the status as qualifying facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978 ("PURPA") of certain electric generation facilities in which Enron has an ownership interest. [7] An electrical generation facility designated under PURPA as a QF can sell power at advantageous rates under long-term contracts. The Federal Energy Regulatory Commission's ("FERC") regulations under PURPA specify that public utility holding companies cannot own more than a 50% equity interest in a QF. [8] These ownership restrictions do not apply, however, to holding companies that are exempt under Sections 3(a)(3) or 3(a)(5) of the Act. [9]

On November 8, 2001, Enron informed the Commission in a Form 8-K filing that Enron's consolidated financial statements for the fiscal years ending December 31, 1997 through 2000, and for the first and second quarters of 2001, should not be relied upon. On December 2, 2001, Enron filed a voluntary petition for reorganization under Chapter 11 of the bankruptcy code in the United States Bankruptcy Court for the Southern District of New York. [10] Enron represented at the hearing that it did not have an independent auditor, did not intend to provide audited restated financial statements for the period prior to the bankruptcy filing, and did not intend to provide audited or unaudited financial statements for periods subsequent to the bankruptcy filing.

6/ Pursuant to Section 3(c) of the Act, the filing of an application in good faith under Sections 3(a)(3) or 3(a)(5) exempts the applicant until the Commission has acted on the application. 15 U.S.C. § 79c(c).

7/ See, e.g., 16 U.S.C. §§ 796(17) and (18) (defining qualifying small power producers and qualifying cogenerators).

8/ See 18 C.F.R. § 292.206(b).

9/ Such holding companies are specifically exempted from the QF ownership limitation set forth in FERC's regulations. See 18 C.F.R. §§ 292.206(c) and 292.202(n).

10/ See Enron Corp., United States Bankruptcy Court, Case No. 01-16034 (S.D.N.Y. Dec. 2, 2001).

On February 28, 2002, Enron filed an application for exemption from registration pursuant to Section 3(a)(1). [11] Enron explained that it could no longer claim an exemption pursuant to Section 3(a)(1) by operation of Rule 2 "[a]s a consequence of the bankruptcy, the loss of a substantial portion of its staff, and the dismissal of its auditor." Enron stated that it was unable to collect and produce the information needed for a Rule 2 filing including the consolidated financial statements of Enron and its subsidiaries for the fiscal year ended December 31, 2001.

On October 7, 2002, the Commission issued an Order Scheduling Hearing Pursuant to Section 19 of the Act ("October 7 Order") with respect to Enron's two applications for exemption. [12] Our order stated that there would be a two-phase hearing on Enron's application. The first phase would be for the limited purpose of determining whether Enron satisfies any of the particular criteria for the exemptions it seeks. Only if a more fully developed record showed that Enron satisfies the criteria for any one of the three exemptions for which it applied would we consider whether such an exemption would be "detrimental to the public interest or the interest of investors or consumers." [13]

11/ Enron amended this application on May 31, 2002.

12/ Order Scheduling Hearing Pursuant to Section 19 of the Public Utility Holding Company Act of 1935, Holding Company Act Rel. No. 27574 (Oct. 7, 2002), 78 SEC Docket 2092.

13/ Order Scheduling Hearing Pursuant to Section 19 of the Public Utility Holding Company Act of 1935, 78 SEC Docket at 2093, citing 15 U.S.C. § 79c(a).

Our October 7, Order directed any person seeking either to intervene as a party pursuant to Commission Rule of Practice 210(b), 17 C.F.R. § 201.210(b), or to participate in the hearing on a limited basis pursuant to Rule 210(c), 17 C.F.R. § 201.210(c), to file a motion describing the nature and intent of the movant's interest with respect to each phase of the hearing. Order Scheduling Hearing Pursuant to Section 19 of the Public Utility Holding Company Act of 1935, 78 SEC Docket at 2092. Pursuant to a series of pre-hearing orders, Electric Power Supply Association, FPL Group, Inc. ("FPL"), Sithe/Independence Power Partner, L.P. ("Sithe"), and Southern California Edison ("Edison") were

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On December 5, 2002, the law judge held a hearing on the first phase of Enron's applications. On February 6, 2003, the law judge issued an initial decision in which she found that Enron had failed to establish that it met any of the relevant statutory criteria applicable to the exemptions it sought.

On July 11, 2003, Enron filed a Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code ("Plan") in the bankruptcy court. On July 15, 2003, Enron filed a motion with the Commission seeking leave to adduce additional evidence concerning the Plan.

Enron has sought Commission review of the initial decision denying its applications for exemptions pursuant to Sections 3(a)(1), 3(a)(3), and 3(a)(5). OPUC, which intervened as a party below, seeks review of the initial decision with respect to Section 3(a)(1). FPL filed a petition for review of the law judge's decision with respect to Sections 3(a)(3) and 3(a)(5). [14] The National Association of Regulatory Utility Commissioners ("NARUC") [15] and the Edison Electric Institute

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13/ (...continued)
denied party status but were allowed to participate on a limited basis. FPL and Sithe argued before the law judge that the Commission should grant at least temporarily the application for exemptions pursuant to Sections 3(a)(3) and 3(a)(5) of the Act. Sithe did not file a petition for review of the initial decision. Edison opposed Enron's application under Sections 3(a)(3) and 3(a)(5).

14/ Edison, which had filed a petition for review of the initial decision with respect to Sections 3(a)(3) and 3(a)(5), subsequently withdrew its petition for review.

15/ NARUC states that it is a quasi-governmental nonprofit organization whose members include the governmental bodies of the fifty states engaged in the economic and safety regulation of utilities. According to NARUC, its members are charged with regulating the retail rates and services of electric, gas, water, and telephone utilities operating within their respective jurisdictions.

("EEI") [16] have filed amicus briefs urging the Commission to grant Enron's application with respect to Section 3(a)(1).

Portland General

Portland General is an electric public utility company, incorporated and doing business in Oregon, under the regulation of OPUC. Portland General is engaged in generation, purchase, transmission, distribution, and retail and wholesale sales of electricity.

Portland General's offices, its 2,800 employees, and its approximately 736,000 residential, commercial, and industrial customers, all work, or are located, in Oregon. Portland General wholly owns six hydroelectric generating plants and two natural gas or oil-fired generating plants located in Oregon. Portland General also has an approximately 67% ownership interest in two other hydroelectric generating plants located in Oregon and an approximately 65% ownership interest in a coal-fired plant located in Oregon.

Outside of Oregon, Portland General owns a 20% interest in Units 3 and 4 of the Colstrip coal-fired generating plant in Colstrip, Montana, together with associated transmission lines. The Colstrip plant and associated transmission lines constitute approximately fourteen percent of all electric generating capacity owned by Portland General. These out-of-state assets represent 13.1% of the undepreciated book value of Portland General's total physical plant of $3.5 billion.

Portland General also owns approximately twenty percent of the Pacific Northwest AC Intertie. [17] The Intertie is part of a major north-south transmission line that links the Pacific Northwest and the Southwest. Portland General uses the Intertie to transmit power it purchases and sells, inside and outside of Oregon. Portland General represented at the hearing that the Intertie allows it access to California power producers.

16/ EEI states that it is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates worldwide. According to EEI, its members include most of the electric utility holding companies that are registered under the Act, as well as many holding companies that are exempt under Section 3(a)(1).

17/ Bonneville Power Administration and PacifiCorp are the other Intertie owners.

All of Portland General's retail sales are to customers located in Oregon. Portland General provides its retail electric service by using facilities it owns and by buying electricity at wholesale from other suppliers, some of whom are located outside of Oregon. Portland General's wholesale sales occur both inside and outside of Oregon. [18]

Portland General's wholesale electricity sales activity falls into two categories: power procurement related activities (which Enron refers to as its "retail book") and power trading activities (which it refers to as its "non-retail trading book"). Portland General engages in the wholesale activities reflected in its retail book because its owned generation is not sufficient to satisfy the load requirements imposed by Oregon law. To meet these load requirements, Portland General acquires power in wholesale transactions in addition to relying on its owned generating sources. Portland General purchases blocks of power and sells excess power at wholesale in order to manage the cost and volume of the power it purchases to serve retail customers. Wholesale sales generate gross revenue, and net revenue from these sales is sometimes positive and sometimes negative.

For its non-retail trading book, Portland General trades or brokers electric power in the wholesale market. This activity, which attempts to take advantage of price differentials in back-to-back purchases and sales, is essentially brokerage activity. Trades are settled financially and seldom result in the transfer of power.

III.

A. Exemption Under Section 3(a)(1) of the Act

18/ The state in which the sale of electricity takes place determines the source of utility revenues. We have determined that, if a sale occurs within the state in question or along that state's borders, it is an intrastate transaction for purposes of Section 3(a)(1). See NIPSCO Indus., Inc., 53 S.E.C. 1296, 1324 (1999) (stating that wholesale sales that take place in a state or at the state border constitute operations within that state); Consolidated Edison, Holding Company Act Rel. No. 27021 (May 13, 1999), 69 SEC Docket 2321, 2333 (same). The parties do not dispute the location where title passes with respect to Enron's electricity sales.

An exemption under Section 3(a)(1) of the Act is available to a public utility holding company if:

> such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominately intrastate in character and carry on their business substantially in a single state in which such holding company and every such subsidiary company thereof are organized. [19]

To qualify for an exemption under Section 3(a)(1), then, Enron must establish that Portland General is "predominately intrastate in character" and operates "substantially in a single State." [20]

To determine whether a utility is predominately intrastate in character and operates substantially in a single state, the Commission evaluates a variety of quantifiable factors in order to compare a company's out-of-state presence with its in-state presence. [21] Some of the most common indicia we have considered

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19/ 15 U.S.C § 79c(a)(1).

20/ Enron does not dispute that it derives a material part of its income from Portland General for purposes of Section 3(a)(1). Portland General is Enron's only public utility subsidiary. Enron derives all of its public utility income from Portland General and these amounts are "significant" or "substantial" portions of Enron's total income and revenues.

21/ NIPSCO, 53 S.E.C. at 1323. For example, we have found the predominantly/substantially requirement to be satisfied in cases where: (1) less than three percent of a system's service population, number of customers, generating capacity, sales, book value of net plant, and operating income were attributable to out-of-state activities, Wisconsin Energy Corp., Holding Company Act Rel. No. 24267 (Dec. 18, 1986), 37 SEC Docket 387, 399; (2) 3.3% of a subsidiary's gross operating revenues were derived from out-of-state operations, Penn Fuel Gas, Inc., Holding Company Act Rel. No. 26050 (May 9, 1994), 56 SEC Docket 2109, 2110 n.2; (3) a utility's out-of-state operations accounted for 6.8% of an applicant's consolidated operating revenues, 1.3% of consolidated net income, 4.4% of consolidated net utility plant and 4% of consolidated total assets, KU Energy Corp., (continued...)

include gross operating revenues, net operating revenues, utility operating income, net utility income, and net utility plant. [22] Among these indicia, we have "generally assigned the most weight to a comparison of gross utility operating revenues as a measure of the relative size of in-state and out-of-state utility operations." [23] We traditionally have looked at the most recent three-year average when evaluating the percent of revenue generated from interstate sales. [24]

By its terms, Section 3(a)(1) contains no specific numerical tests to guide a finding that a public utility subsidiary is predominantly intrastate in character and carries on its business substantially in a single state. Nor have we, in evaluating the quantifiable factors listed above, recognized any bright-line test as to the amount or percentage of out-of-state business permitted for a utility to meet the requirements of Section 3(a)(1). [25] Moreover, in its 1995 study entitled "The Regulation of Public-Utility Holding Companies" ("1995 Report"), the Division recommended that we adopt a more flexible standard for

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21/ (...continued)
50 S.E.C. 789, 793 (1991); and (4) two of 28 counties served and approximately four percent of an electric utility system's 69 KV transmission lines were located, and less than two percent of its energy sales took place, out of state, N.W. Electric Power Cooperative, Inc., Holding Company Act Rel. No. 24497 (Nov. 10, 1987), 39 SEC Docket 1026, 1026-27.

22/ See, e.g., C&T Enterprises, Inc., Holding Company Act Rel. No. 27590 (Oct. 31, 2002), 78 SEC Docket 2582, 2592; NIPSCO, 53 S.E.C at 1323-26 (and cases cited therein).

23/ C&T Enterprises, 78 SEC Docket at 2597.

24/ See, e.g., NIPSCO, 53 S.E.C. at 1325; but see C&T Enterprises, 78 SEC Docket at 2592 n.7 (noting that, while the Commission has traditionally used the most recent three year period in evaluating out-of-state revenues, a 3.5 year average was used in order to demonstrate that the loss in operating margin -- sometimes referred to as net operating revenue and defined as gross operating revenues less the cost of gas and cost of fuel for electric generation -- that occurred in the last full year for which records were available had not continued).

25/ See NIPSCO 53 S.E.C. at 1323 n.58.

exemptions under Section 3(a) that would consider the facts and circumstances of each situation and take into account the ability of state regulators to protect adequately the interests of utility customers. [26] As discussed infra, our consideration of applications for exemptions pursuant to Section 3(a) made subsequent to the 1995 Report reflects such an approach.

Thus, our evaluation of the traditional factors and our use of a flexible approach that considers the facts and circumstances of each case are not two separate, mutually-exclusive tests, but are complementary tools to assist us in evaluating whether a public utility is predominantly intrastate in character and carries on its business substantially in a single state. We first examine the traditional quantifiable factors. We then look to see if there is a reason that these factors do not provide an accurate comparison of the utility's in-state and out-of-state presence and whether state regulators are able to protect effectively the interests of utility customers and investors given the utility's out-of-state power sales.

1. Application of Traditional Quantifiable Factors Used to Compare a Utility's Out-Of-State Presence with Its In-State Presence

Portland General's wholesale interstate sales of electricity consistently have produced a large portion of its gross operating revenues. In 1998, Portland General's interstate sales of electricity constituted approximately 12.25% of its total gross operating revenue. In 1999, Portland General's interstate sales of electricity represented approximately 11.26% of its total gross operating revenues. In 2000, the percentage of gross operating revenues that Portland General received from interstate sales increased to 32.17%, and it increased further to 45.55% in 2001. In the first nine months of 2002, Portland General's interstate sales of electricity accounted for 29.10% of the utility's gross operating revenue. In the most recent three-year period as of the date of the hearing -- 1999 through 2001 -- Portland General earned an average of approximately 34% of its gross utility operating revenue from interstate sales.

The highest three-year average of interstate revenues that we previously found consistent with the granting of an exemption

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26/ Division of Investment Management, United States Securities and Exchange Commission, The Regulation of Public-Utility Holding Companies (1995) (hereinafter "1995 Report").

pursuant to Section 3(a)(1) was 13.2%. [27] When we granted that exemption, we noted specifically that the grant "should not be read as suggesting that section 3(a)(1)'s 'predominantly/ substantially' standard will be satisfied by percentages of out-of-state utility operations that are higher than presented in this matter." [28] Portland General's three-year average of 34% of its gross operating revenue from out-of-state sales is far greater than any amount the Commission has found consistent with the predominantly/substantially test.

Other factors also lead us to conclude that Portland General is not predominantly intrastate in character and carrying on business substantially in a single state. For example, Portland General's out-of-state assets located in Colstrip, Montana and the associated transmission lines are evidence of Portland General's interstate character. The out-of-state Colstrip plant and associated transmission lines represent 13.1% of the undepreciated book value of Portland General's total physical plant of $3.5 billion. These out-of-state assets constitute approximately 14% of Portland General's owned generating capacity. The amount of these utility assets located outside of Oregon is further evidence that Enron has failed to qualify for an exemption under Section 3(a)(1) of the Act. Consideration of these quantifiable factors leads us to conclude that Portland General is not a utility company that is predominantly intrastate in character and which carries on its business substantially in a single state. [29]

27/ NIPSCO, 53 S.E.C. at 1325-26. In NIPSCO, the 13.2% represented interstate sales as a percentage of net operating revenue. We found it necessary to use net operating revenue in that case because the intrastate utility operation was primarily electric and the out-of-state utility operation was gas. As discussed *infra* in the text accompanying note 30, differences between electric and gas utilities' pass through costs would have produced a distortion in the gross revenues that would have made comparisons of these numbers not meaningful. It is not necessary to use net operating revenue here because Portland General is purely an electric power utility and sells only electrical power inside and outside of Oregon.

28/ NIPSCO, 53 S.E.C. at 1326 n.61.

29/ In its petition for review, Enron argued that the law judge erred when she applied a general Commerce Clause analysis to

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2. Application of "Flexible" Standard

Enron argues that placing so much emphasis on gross operating revenues to determine whether Portland General is predominantly intrastate ignores other factors articulated in prior cases and, therefore, does not reflect sufficiently the flexible approach we have been employing. Instead, Enron argues that we should give greater emphasis to (1) a comparison of its in-state and out-of-state net revenue, (2) the purpose of its out-of-state wholesale electricity sales, and (3) the effectiveness of OPUC's regulation of Portland General.

a. Use of a "Flexible" Standard To Ameliorate Distortions When Comparing The Relative Size of a Utility's In-State and Out-Of-State Operations

Enron argues that a comparison of net operating revenues provides a more accurate picture of Portland General's operations and supports a finding that Portland General meets the predominantly/substantially test. In support of this argument, Enron points to cases in which we relied more heavily on net operating revenues than on gross operating revenues as part of our comparison of a utility's out-of-state and in-state activities.

i. Use of Flexible Standard in NIPSCO and C&T Enterprises

In NIPSCO, we relied more heavily on net revenues than gross revenues to determine whether a public utility met the predominantly/substantially test. That case concerned an application by NIPSCO Industries, Inc. ("NIPSCO"), an Indiana public utility holding company that was exempt under Section 3(a)(1). NIPSCO owned three public utility subsidiary companies

29/ (...continued)
determine whether Portland General was predominantly intrastate in character and carried on its business substantially within a single state. Although the law judge characterized her analysis using the terms "interstate commerce" and "intrastate commerce," she nevertheless focused on the appropriate factors applicable under the Act -- most significantly Portland General's large volume of out-of-state sales -- in her determination as to whether Portland General was predominantly intrastate or interstate in character.

that provided electric and retail natural gas service exclusively in Indiana. It was seeking to acquire, through a proposed merger, two gas utilities operating in Massachusetts, New Hampshire, and Maine. Prior to completing the proposed merger transaction, NIPSCO requested an exemption pursuant to Section 3(a)(1) for the new holding company to be created by the merger.

NIPSCO involved the acquisition of a gas utility by a predominantly electric utility. We recognized that the components of gross revenues are different for electric and gas utilities, so that gross operating revenues could overstate the comparative size of the gas utility component. The difference in the revenue components results from the fact that retail rates often contain an automatic adjustment clause that provides for the relatively current pass-through to customers of the actual costs of the purchased gas for a gas utility and of the fuel for electric generation for an electric utility. [30] These pass-through costs, however, constitute a larger portion of gross revenues for a gas utility than for an electric utility. [31] Thus, in a case where a combination gas and electric utility is being considered, reliance on a comparison of gross revenue can distort the gas utility's relative size in comparison to the electric utility. If the gas and electric utilities are located in different states, use of gross revenues can give a distorted picture of the amount of business conducted in each state.

In NIPSCO, the percentages of gross operating revenues attributable to out-of-state sales for each year of the most recent three-year period, 1995 through 1997, were 19.2%, 18.3%, and 19.8%, respectively. These percentages were somewhat greater than the amount we previously had allowed in granting an exemption pursuant to Section 3(a)(1). We recognized in that case, however, that -- consistent with a flexible standard that considered the facts and circumstances of each case -- reliance on gross revenues alone would be inappropriate because this measurement could overstate the size of the gas utility. We determined, therefore, that NIPSCO's utility operations after the merger still would be predominantly intrastate in character because its out-of-state sales accounted for an average of 13.2% of NIPSCO's total net operating revenue for this period. [32]

30/ See NIPSCO, 53 S.E.C. at 1320-21.

31/ See NIPSCO, 53 S.E.C. at 1321.

32/ In AES Corp., Holding Company Act Rel. No. 27063 (Aug. 20,
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In C&T Enterprises, a Pennsylvania public utility holding company, C&T Enterprises, and the two entities that each owned 50% of the issued shares of C&T Enterprises (collectively "C&T Enterprises"), sought Commission approval to acquire all of the common stock of a Pennsylvania public utility company, Valley Energy, Inc. ("Valley"). Valley was engaged in the business of selling and distributing natural gas in parts of one county in Pennsylvania and in portions of two counties in New York. C&T Enterprises sought an exemption pursuant to Section 3(a)(1).

The applicants in C&T Enterprises asserted that considerations similar to those raised in NIPSCO were present with respect to the distortion created by giving the greatest weight to gross revenues rather than net revenues. Specifically, revenue from Valley's Pennsylvania operations depended to a much greater extent than their New York operations on customers who received gas transportation services only. [33] Transportation-only customers arrange their own gas supply and there is no cost of pass-through gas associated with that revenue. [34] Thus, a comparison of Valley's Pennsylvania and New York operations based on gross revenues would have exaggerated the size of the New York operations.

In C&T Enterprises, the percentage of gross operating revenues attributable to out-of-state sales for the most recent

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32/ (...continued)
1999), 70 SEC Docket 1279 (AES I), we employed a flexible approach in determining that a public utility subsidiary did not contribute a material part of its parent's income for purposes of an application for exemption pursuant to Section 3(a)(5). Citing NIPSCO, we relied more heavily on net revenues than gross revenues in making our materiality determination because of the distortion that resulted from comparing gross revenues of an electric utility with those of a combination gas and electric utility. AES I, 70 SEC Docket at 1308. We also found significant a downward progression in the amount of net revenue contributed each year by the utility subsidiary to the parent suggesting that the utility subsidiary would not contribute a material part of its parent's income in the future. Id. at 1310.

33/ C&T Enterprises, 78 SEC Docket at 2598.

34/ Id.

three and one-half year period was 17.6%. [35] As with NIPSCO, this percentage was somewhat greater than the amount we previously had allowed in granting an exemption pursuant to Section 3(a)(1). Consistent with a flexible standard that considers the facts and circumstances of each case, we determined that relying on gross rather than net revenue in this instance would create a distortion. Thus, we gave the greatest weight to the measure of out-of-state operating margin, which consisted of the gross operating revenue less the cost of gas and the cost of fuel generation. The three and one-half year average out-of-state operating margin was 9.8%, which we determined was consistent with a finding that a utility satisfied the predominantly/substantially test. [36]

Net revenues were not the only factor we considered as part of our flexible analysis in C&T Enterprises. We also noted that the applicants expected the future growth of the Valley utility to take place in Pennsylvania rather than in New York. [37] Thus, it was unlikely that Valley's out-of-state gross operating revenues or operating margin would increase as a percentage of total Valley revenues. Indeed, we concluded that, given the applicant's representations about the future growth of the Valley utility, we expected the percentage of gross operating revenues and operating margin associated with Valley's New York operation to trend downwards. [38]

ii. Application of Flexible Standard Does Not Warrant Use of Net Revenue Instead of Gross Revenue Here

Enron relies heavily on C&T Enterprises and NIPSCO in support of its argument that the Commission should use net operating revenue rather than gross operating revenue as the

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35/ We incorporated the most recent six months of data in C&T Enterprises resulting in a calculation of a 3.5 year average, rather than the three-year average we have used traditionally. We did so in order to demonstrate that an operating margin loss occurring at the end of the three-year period did not represent a trend but rather was an aberration in the utility's revenues.

36/ C&T Enterprises, 78 SEC Docket at 2600.

37/ Id. at 2599.

38/ Id.

primary factor to determine whether Portland General is predominantly intrastate in character. Enron claims that Portland General's wholesale power sales and market trading are vastly different from its retail generation, transmission and distribution activity in Oregon. Enron states that Portland General generates electricity in "bricks and mortar" plants and transmits and distributes that electricity over poles, wires, and towers in Oregon to its retail customers in Oregon. Portland General's wholesale power market trading occurs at in-state and out-of-state market trading hubs where trades typically are settled financially and rarely result in the transfer of power.

Enron argues that it is appropriate to use a comparison of net revenues here in order to avoid what it claims is the "distortion created by the volume of [Portland General's] wholesale power sales transactions, as compared to the underlying retail utility business." Enron asserts that in C&T Enterprises we "tacitly [took] the position that the revenues derived from the sale of the gas commodity were not important for purposes of the Section 3(a)(1) analysis" because the "sale of gas is not inherently a utility activity." According to Enron, the only sales that we should consider in our analysis under Section 3(a)(1) are retail sales to customers, what Enron describes as "inherently a utility function." Enron argues that, as with Valley's sales of gas, Portland General's wholesale sales of electricity are not "inherently a utility function." To avoid the alleged distortion created by Portland General's wholesale power sales transactions, Enron urges the Commission to give more weight to net revenues than to other data, as we did in NIPSCO and C&T Enterprises.

Enron misreads the thrust of our analysis in those cases. Our comparison of net revenues in NIPSCO and C&T Enterprises did not involve a determination that retail sales to customers are more "inherently a utility function" than are wholesale sales, as Enron asserts. Rather, our use of net revenues in those cases was based on a determination that components of the gross revenues generated in the course of the applicable utility's out-of-state sales had the effect of exaggerating the size of the utility's interstate activity relative to the extent of its intrastate activity. [39] Indeed, NIPSCO and C&T Enterprises

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39/ In NIPSCO, this distortion resulted from a comparison of the operation of gas and electric utilities. In C&T Enterprises, the distortion resulted from the fact that Valley's New York gross revenues included predominantly the (continued...)

illustrate that the relevant comparison in a Section 3(a)(1) analysis is between a utility's in-state and out-of-state sales and not between a utility's retail and wholesale sales, as Enron asserts.

Here, Enron has failed to demonstrate, and the record does not support a finding, that there are differences in the components of Portland General's in-state and out-of-state gross revenues that will distort the size of its interstate sales (which are wholesale) in comparison with its intrastate sales (which are both retail and wholesale). [40] We find no basis for concluding that our use of gross revenues to compare Portland General's in-state power sales and its out-of-state power sales will exaggerate the extent of Portland General's out-of-state operations.

The Act does not provide a basis for excluding Portland General's wholesale sales of electricity. The definition of an electric utility contained in the Act makes no distinction between wholesale electricity sales and retail ones. [41] In contrast, the definition of a gas utility is limited to a company

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39/ (...continued)
price of the commodity and its transportation, while Valley's Pennsylvania gross revenue included predominantly transportation costs but not the cost of the commodity.

40/ Enron's argument that the flexible approach employed in NIPSCO and C&T Enterprises requires that we give the greatest weight to Portland General's net revenues is without merit for another reason. Unlike the applicants in NIPSCO and C&T Enterprises, whose out-of-state gross revenues were only somewhat greater than we had previously allowed for an exemption, Portland General generates 34% of its gross revenue from out-of-state sales, a significantly greater amount of out-of-state revenue than we previously have allowed to justify an exemption.

41/ The Act defines an electric utility company as:

> any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale, other than sale to tenants or employees of the company operating such facilities for their own use and not for resale.

15 U.S.C. § 79b(a)(3).

that distributes gas at retail. [42] The policy distinction made by Congress between these two types of utilities highlights the importance of considering Portland General's retail and wholesale utility operations in determining whether it is intrastate or interstate in character. [43]

In fact, a comparison of net revenues here would create a distortion instead of remedying one, giving the appearance that Portland General's out-of-state activities during the period under review have been de minimis, when in fact they constitute a significant portion of Portland General's overall activities. For example, in 2001 Portland General generated $578 million in gross revenue from out-of-state wholesale power trading sales but, when those sales were netted against out-of-state wholesale power trading purchases, the result was an $11 million loss. For the first nine months of 2002, gross revenue from wholesale power trading sales was $289 million, but the net was a $1 million

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42/ The Act defines a gas utility company as:

> any company which owns or operates facilities used for the distribution at retail . . . of natural or manufactured gas for heat, light, or power.

15 U.S.C. §79b(a)(4) (emphasis added).

43/ Enron also points to a laundry list of factors that it contends the law judge failed to consider and that it contends establish that Portland General is predominantly intrastate in character. Enron states that (1) all of Portland General's retail customers are located in Oregon, (2) substantially all of Portland General's utility assets are located in Oregon, (3) Portland General is a net purchaser of power, (4) all of Portland General's offices are located in Oregon, (5) all of Portland General's employees work in Oregon, (6) substantially all of Portland General's taxes and franchise fees were paid to Oregon, and (7) Portland General's charitable contributions have been made substantially to organizations located in Oregon. We do not dispute that Portland General has a substantial presence in Oregon but, for the reasons discussed above, we find that these factors do not establish that Portland General is predominantly intrastate in character and carries on business substantially in a single state.

loss. [44] Thus, in periods such as the one under review, where Portland General's out-of-state wholesale power trading returned little or no profit, using net revenues would conceal the true extent of Portland General's substantial out-of-state power sales activity. [45]

Factors in addition to a comparison of revenues also lead us to conclude that Portland General is not predominantly intrastate. For example, the fact that 13.1% of Portland General's utility assets are located out of state is evidence of its interstate character. [46] In addition, as we noted in C&T

44/ Nor are we persuaded by Enron's claim that the use of net revenues is consistent with the Financial Accounting Standards Board's accounting standards. Accounting standards are meant to provide a company's current and potential investors with an accurate picture of the company's financial condition. Our focus in an analysis under Section 3(a)(1) is directed at where a utility company conducts its business. Although using net revenue from power trading activities may present a more accurate picture of the financial condition of the company, it is not necessarily relevant to a determination of where the company conducts its business.

45/ As Enron concedes, the goal of the non-retail power trading business "is to maximize the margin that can be gained between one side of a trade and the other." In other words, Portland General's objective is to maximize profits from its wholesale trading, which, if achieved, would result in an upward trend in the net revenues of this out-of-state activity. Cf. C&T Enterprises, 78 SEC Docket at 2599, where we noted that, where size of out-of-state revenues were acceptable although somewhat high for purposes of Section 3(a)(1), an expected downward trend in those numbers supported the grant of an application.

46/ Enron takes exception to the law judge's finding, in support of her conclusion that Portland General does not meet the predominantly/substantially test, that Portland General depends to a "significant" or "substantial" degree on power purchased out of state to serve its retail customers. EEI makes a similar objection. Enron and EEI are correct that our cases generally do not consider out-of-state purchases of electricity in a Section 3(a)(1) analysis because the Act defines a statutory utility company as a company which owns or operates facilities "used for generation, transmission,
(continued...)

Enterprises, an indication that out-of-state revenues will decrease in the future can support the grant of an exemption. Such is not the case here. Given that the percentage of Portland General's total revenue attributable to interstate power brokerage activity has increased each year since 1999, there is nothing in the record to suggest that its out-of-state gross operating revenue will trend downwards. [47]

Enron argues that Portland General's energy trading should not matter in determining Portland General's character because this type of trading may be conducted by non-utility energy marketers and traders, as well as by utilities. According to Enron, Portland General could restructure its business in a manner that separates the wholesale power trading function into a separate subsidiary of Enron. Enron maintains that the lack of this formality should not prevent it from obtaining an exemption.

Enron's argument, however, ignores the way in which the Act operates. Generally, when activities take place in separate subsidiaries, it is easier to insulate the utility from financial risks created by the subsidiary engaged in non-utility activities. [48] The Act recognizes the significance of the

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46/ (...continued)
or distribution of electric energy for sale." 15 U.S.C. §79b(a)(3). Exclusion of Portland General's purchases of electricity from consideration, however, does not alter our determination that Enron fails to meet the qualifications for an exemption under Section 3(a)(1) as a result of the large amount of power it sells outside of Oregon.

47/ Although the record contains some discrepancies in this regard, it shows that, at a minimum, Portland General received 0% of its gross revenue from interstate power brokerage sales in 1999, 9% in 2000, 19% in 2001, and 17% in the first nine months of 2002.

48/ See, e.g., Pacific Lighting Corp., 45 S.E.C. 152, 161 (1973) (noting, in a case in which the four commissioners participating were evenly divided on the ultimate issue of the extent to which holding companies may engage in non-utility activities without violating the "unless and except" clause, that "in order to insulate the utility business to the extent possible from being adversely affected by losses in non-utility operations and to prevent the diversion of utility resources for non-utility purposes, all non-utility
(continued...)

structure of a holding company and its subsidiaries and mandates that the Commission regulate the structure of holding companies to protect the public interest. [49] Were Enron to restructure its wholesale trading into a separate subsidiary, Portland General could be protected from the risks of power marketing activity in a way that it currently is not protected. [50] Such separation is not a mere formality.

b. The Purpose of Out-of-State Wholesale Electricity Sales

Enron argues that it would be inconsistent with the intent of the Act and the flexible approach employed in NIPSCO and C&T Enterprises to fail to consider the purpose of Portland General's

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48/ (...continued) activities should be segregated from utility activities through separate corporate subsidiaries").

49/ For example, Section 11(b)(1) directs the Commission to take action to limit the operations of each registered holding company system to a single integrated public-utility system. 15 U.S.C. § 79k(b)(1). Section 11(b)(2) requires the Commission to eliminate needless complications from the corporate structures of registered holding companies and to ensure the equitable distribution of voting power among security holders. 15 U.S.C. § 79k(b)(2).

50/ Enron relies on two no-action letters to support its argument that its wholesale trading activity should not be considered as interstate. See Enron Power Mktg., Inc., SEC No-Action Letter (Jan. 4, 1994); AIG Trading Corp., SEC No Action Letter (Jan. 20, 1995). No-action letters are staff determinations not to recommend enforcement action. They do not necessarily reflect the views of the Commission nor do they have the force of law. See Chicago Board of Trade v. SEC, 883 F.2d 525, 530-31 (7th Cir. 1989); Lowell H. Listrom, 50 S.E.C. 883, 886 n.3 (1992). Moreover, these letters recognize that, because the Act defines an electric utility in terms of whether it uses generating, transmission or distribution facilities that it owns or operates for the sale of electricity, a power marketer who uses others' facilities to trade power at wholesale is not a utility for purposes of the Act. It does not follow that, when a utility engages in wholesale power trading, we should ignore that trading for purposes of Section 3(a)(1).

wholesale sales.[51] According to Enron, Portland General's retail-book wholesale sales are how Portland General manages its inventory in order to achieve the lowest possible cost power supply for its retail customers in Oregon. Enron contends that because these sales are intended to benefit Oregon customers, they should be recognized as intrastate sales even though they occur outside of Oregon.

Enron admits that Portland General's wholesale brokerage trading is not directly related to providing low-cost service to Oregon utility customers. Nevertheless, Enron maintains that Portland General's wholesale trading activity enables Portland General to monitor wholesale markets so that it can "better perform its power supply inventory management function on behalf of its retail customers."

Nothing in Section 3(a)(1), however, indicates that Congress intended the test in that section to be evaluated solely on the basis of where a company's retail customers are located or on whether out-of-state sales assertedly benefit in-state customers. Nor has the Commission in prior cases, including NIPSCO and C&T Enterprises, based its analysis solely on where a company's retail customers are located or whether out-of-state wholesale sales were meant to benefit in-state retail customers.

Enron further claims that Portland General must sell power at wholesale at the place where the conditions are most favorable. Enron asserts that, consequently, a good portion of Portland General's wholesale sales are deemed to take place in Washington state where the Mid-Columbia hub is located. According to Enron, NIPSCO stands for the "broad proposition that the use of industry-regulated market hubs to trade gas or energy for purposes of managing a utility's supply portfolio is consistent with modern, prudent utility operations."

Our discussion of trading hubs in NIPSCO was in support of a conclusion that the gas utility operations of NIPSCO satisfied

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51/ NARUC and EEI make similar arguments. NARUC claims that most state commissions view participation in the wholesale market as intrastate activity because "the sole purpose of the activity is to provide service to the native intrastate load of the utility at the least cost." EEI argues that revenue from Portland General's retail book should not be considered as evidence of out-of-state operations because this revenue results from the sale of power that Portland General purchased to serve its Oregon retail customers.

the statutory integration requirements of the Act. [52] In that case, we examined whether trading hubs constituted a common source of supply. The analysis of how hubs relate to integration with respect to a gas utility proves nothing about whether the transactions that occur at hubs are intrastate or interstate in character. Indeed, despite our recognition of the impact of trading hubs in the context of an integration analysis, NIPSCO did not consider transactions conducted at those hubs to be inherently intrastate in character in connection with NIPSCO's application for an exemption under Section 3(a)(1).

c. State Regulation of a Public Utility

Enron, OPUC, and NARUC argue that we should find that Portland General is predominantly intrastate within the meaning of the Act because it is regulated effectively by OPUC, making Commission regulation unnecessary. OPUC regulates Portland General's retail rates and conditions of service, its issuance of securities, and its systems of accounts.

At the time that Congress adopted the Act, the multistate character of holding companies prevented effective control by state regulators. [53] The effectiveness of state regulation of utility holding companies has improved markedly since that time. [54] We have factored this into our determinations of whether to grant an exemption pursuant to Section 3(a)(1). [55]

However, when a public utility engages in a large amount of out-of-state activity, there is the potential for the utility to escape effective regulation even if a state regulator controls the utility's in-state activity. Therefore, the fact that "[m]ost State commissions view . . . participation in the

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52/ For example, Section 11(b)(1) of the Act generally confines the utility properties of a registered holding company to a "single integrated public-utility system." 15 U.S.C. § 79k(b)(1). Section 10(c)(2) of the Act requires the Commission to find that a proposed utility acquisition "will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system." 15 U.S.C. § 79j(c)(2).

53/ See 1995 Report at 2.

54/ See 1995 Report at 115.

55/ See, e.g., C&T Enterprises, 78 SEC Docket at 2601.

wholesale market as intrastate activity" is not necessarily determinative of whether a utility is intrastate under the Act. The focus of state regulators is to ensure that the state's utility customers are served properly by regulating retail rates and conditions of service. Commission regulation under the Act focuses on the structure of public utility holding companies, for example ensuring that a holding company's corporate structure is not used to impair adequate disclosure of financial information to the investing public. [56] It is significant in this regard that neither OPUC nor NARUC assert that OPUC can adequately regulate the holding company. Thus we find that, given the extent of Portland General's out-of-state activities, OPUC's ability to regulate Portland General's in-state activity is not sufficient in this case to justify an exemption pursuant to Section 3(a)(1). [57]

We conclude that, on the facts presented here, granting Enron an exemption, even employing the most flexible approach, would risk robbing the statute of its meaning.

3. OPUC's and NARUC's Other Arguments

OPUC objects to using Portland General's utility revenues for the years 1999 through 2001 in determining whether Portland General meets the predominantly/substantially test. OPUC asserts that Portland General's energy trading revenues for this period are distorted because of what OPUC describes as the "highly atypical western wholesale power market in years 2000 and 2001" in which utilities with excess power "could sell that excess power into the western wholesale market at extremely high and volatile prices compared to historical prices." [58] OPUC does not

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56/ 15 U.S.C. § 79(a).

57/ We also reject Enron's claim that FERC regulation of Portland General's activities makes Commission regulation unnecessary. FERC's regulation is not duplicative of Commission regulation because FERC has been directed by Congress to administer different statutes, such as PURPA, with different goals than those embodied in the Act.

58/ The FERC determined that Enron's market manipulation was one of the causes of this atypical market. See Order Revoking Market-Based Rate Authorities and Terminating Blanket Marketing Certificates, 103 FERC ¶ 61,343 (June 25, 2003) (revoking the electric market-based rate authority of two

(continued...)

assert, and the record evidence does not support an inference, that this atypical electricity trading continued into 2002. Yet Portland General's gross interstate revenue for the first nine months of 2002, the most current data that Enron entered into evidence, show that Portland General's out-of-state sales of electricity accounted for 29% of its gross revenues, a percentage that far exceeds the percentage allowed in NIPSCO. Thus, the record evidence indicates that the three-year period from 1999 until 2001 is not atypical.

OPUC and NARUC also claim that failure to grant an exemption to Enron because of Portland General's large amount of out-of-state power sales may create an incentive for utilities to purchase and sell their power within the state, which may not be at prices most beneficial to customers. The policy issues raised by OPUC and NARUC may deserve consideration in another forum, but in this case they do not override the fact that Enron's application fails to satisfy the terms of the Act.

4. EEI's Arguments Do Not Justify An Exemption

EEI argues that the initial decision conflicts with important FERC policy initiatives. According to EEI, the failure to grant Enron an exemption under Section 3(a)(1) will discourage certain holding companies from participating in large regional transmission organizations ("RTOs"). EEI asserts that FERC has encouraged utilities to transfer operational control over their transmission facilities to large RTOs that are independent of any market participants. EEI asserts that this policy discourages utilities from relying on their own generation and increases their dependence on wholesale power purchases. [59]

EEI objects specifically to what it views as the law judge's conclusion that Portland General's use of intrastate transmission facilities to transmit energy in interstate commerce is evidence

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58/ (...continued)
Enron subsidiaries and finding that "Enron management invented numerous market manipulation schemes . . . and used various Enron companies to execute these schemes" and that "Enron routinely disregarded the corporate separation of the various Enron affiliates, and used one or another to facilitate misconduct").

59/ We need not reach whether EEI's characterization of FERC's actions with respect to RTOs is accurate for purposes of our consideration of Enron's application.

of Portland General's interstate character. EEI maintains that the FERC's policy of encouraging RTOs would be harmed to the extent that voluntary membership in an RTO jeopardized a public utility holding company's intrastate exemption under the Act.

EEI's concern is unfounded. [60] Our analysis is limited to the facts and circumstances of this case. Portland General's interstate transmission network is but one of the pieces of evidence, in addition to Portland General's large amount of out-of-state sales and its out-of-state utility assets and generation, that show that Portland General is not predominantly intrastate in character. Moreover, to the extent that a utility purchases power from a multi-state RTO, such out-of-state purchases (as opposed to sales) would not impact on a holding company's intrastate exemption. Our decision in this case cannot fairly be interpreted as holding that an interest in an interstate transmission network, without more, makes a utility interstate in character.

EEI also argues that the law judge erred when, in addition to considering the percentage of Portland General's utility plant located out of state, she considered the percentage of owned generation capacity located out of state. While we typically have evaluated the percentage of an applicant's utility plant that is located out-of-state, we have in the past also evaluated ownership of out-of-state generation capacity as one of the quantifiable factors we use in order to compare a company's out-of state presence with its in-state presence. [61]

60/ Moreover, EEI's claims are not supported by the record evidence in this case. While EEI claims that Portland General is not unique and that other utilities participate in the joint ownership of generating facilities and the use of in-state transmission facilities to transmit energy in interstate commerce, the record is lacking in any evidence to support this assertion. Even assuming that the assertion is correct, it does not follow that these utilities are affiliated with any public utility holding company currently exempt from registration under Section 3(a)(1) of the Act or that their exemptions would be revoked after consideration of all of the factors.

61/ See, e.g., Wisconsin Energy Corp., Holding Company Act Rel. No. 24267 (Dec. 18, 1986), 37 SEC Docket 387, 399 (granting exemption where, among other factors, Wisconsin Electric Power Company's out-of-state operations accounted for less than three percent of its generating capacity).

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We conclude that Enron has failed to establish that it meets the statutory criteria for an exemption under Section 3(a)(1) of the Act and, therefore, we deny Enron's application for an exemption pursuant to that section of the Act.

B. Exemption Under Sections 3(a)(3) and 3(a)(5) of the Act

An exemption under Section 3(a)(3) of the Act is available to a public utility holding company if:

> such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company.

An exemption pursuant to Section 3(a)(3), therefore, is limited to a holding company that is only incidentally a holding company. To meet this requirement, we traditionally have limited an exemption pursuant to Section 3(a)(3) to situations in which the utility operations of an applicant are necessary for, or are a natural, unavoidable by-product of, the applicant's non-utility activities. [62]

To establish that a holding company is not deriving a material part of its income from a public utility company, an applicant seeking an exemption under Section 3(a)(3) must demonstrate that its utility operations are small, both in a relative sense -- measured in terms of the materiality of the public utility's income to the holding company's income -- and in an absolute sense. [63]

62/ Electric Bond and Share Co., 33 S.E.C. 21, 42 (1952). In Electric Bond we stated that:

> We have in the past granted exemptions under Section 3(a)(3) where the holding company status was no more than an incidental derivation of the company's principal activities, as where, for example, a company owns utility interests required to assure it a source of power supply, or an oil company sells gas derived from its oil operations.

63/ AES I, 70 SEC Docket at 1286. Consideration of absolute size is intended primarily to ensure that the exemption is (continued...)

An exemption under section 3(a)(5) of Act is available to a public utility holding company if:

> such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

Our early decisions suggested that the exemption was designed for public utility holding companies that have essentially foreign utility interests, but also have a small, non-material United States utility subsidiary. [64] Recently, we stated that we did not believe it was necessary to limit the Section 3(a)(5) exemption to United States holding companies whose operations are essentially foreign. [65] An applicant seeking an exemption from Section 3(a)(5), like an applicant seeking an exemption from

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63/ (...continued)
not available to a company with a large utility business and a total business that is predominantly non utility in nature only because the non utility holdings dwarf the utility operations. Id. at 1295 (citing Electric Bond, 33 S.E.C. at 52 n.45).

64/ AES I, 70 SEC Docket at 1286 (citing Electric Bond, 33 S.E.C. at 46-52; Cities Service Co., 8 S.E.C. 318 (1940)).

65/ AES I, 70 SEC Docket at 1301-02. In AES I, we granted an exemption to a United States holding company whose operations consisted of (1) substantial foreign utility operations, (2) significant domestic utility operations that consisted of exempt wholesale generators under Section 32 of the Act and QFs under PURPA, and (3) a small United States utility. As much as seventeen percent of the holding company's total gross revenues were domestic. We concluded that, just as Congress determined that the public interest does not require regulation of public utility holding companies whose utility operations, except for a small domestic utility, are exclusively foreign the public interest does not require the regulation of a U.S. holding company whose domestic utility operations, apart from ownership of a small domestic utility, are exempt from the Act. Id. at 1301.

Section 3(a)(3), must demonstrate that its utility operations are small, both in a relative sense and in an absolute sense. [66]

66/ AES I, 70 SEC Docket at 1286.

1. Factual Showings Required To Obtain An Exemption Pursuant to Sections 3(a)(3) and 3(a)(5)

Enron admits that it cannot meet the requirements of either Section 3(a)(3) or Section 3(a)(5).[67] Although Enron claims that it is "incidentally a holding company," Enron has failed to present any evidence from which the Commission could draw that conclusion. It has no reliable financial statements for fiscal years 1997 through 2000, or for the first three quarters of 2001. It is unable, therefore, to make the showing required by Section 3(a)(3) that it is only incidentally a holding company in that it is engaged primarily in a business other than as a public utility. In addition, Enron failed to submit any data that demonstrates, as required by Sections 3(a)(3) and 3(a)(5), that it does not derive a material portion of its income from Portland General. Accordingly, Enron is unable to show that Portland General is small in a relative or an absolute sense.

Indeed, the record evidence tends to show that Portland General is a material utility subsidiary and that it is not small in either a relative or an absolute sense. Enron concedes that Portland General accounts for a "significant" and "substantial" part of Enron's revenues and income. Portland General, then, is not small in a relative sense.

To establish that a utility operation is small in absolute size, the Commission has required an applicant to show that its subsidiary's utility operations are small in comparison to other utility companies on a state, regional and national basis.[68] Portland General is the largest investor-owned utility in Oregon. Enron has failed to put forth evidence that would allow a comparison to be made between Portland General and other utilities in the northwest United States or the nation since it filed its request for an exemption on April 14, 2000. Enron has failed to establish that Portland General is small in absolute size. Accordingly, Enron has failed to establish that it is entitled to an exemption pursuant to Section 3(a)(3) or 3(a)(5).

2. "Conditional" Exemption Pursuant to Sections 3(a)(3) and 3(a)(5)

67/ Enron's own expert witness admitted that Enron does not qualify for an exemption under either Section 3(a)(3) or 3(a)(5).

68/ See AES I, 70 SEC Docket at 1295; GAZ Metropolitain, Inc., 52 S.E.C. 56, 62 (1994).

Despite its inability to make the showing required by Sections 3(a)(3) and 3(a)(5), Enron contends that the law judge erred by failing to consider the "temporary nature" of Enron's status as a holding company. [69] Enron maintains that, because it has filed a reorganization plan with the Bankruptcy Court, Enron's claims that it will cease eventually to be a holding company are no longer speculative. [70]

According to Enron, the Plan details the commitment by Enron to divest itself of Portland General. Enron asserts that, in the event the Plan is confirmed and becomes effective, Enron will either sell Portland General or distribute its shares to creditors. Enron notes that it may transfer Portland General shares to a trust as an intermediate step prior to selling Portland General or to distributing its shares to creditors.

At the same time that it filed the Plan, Enron filed a draft disclosure statement. The bankruptcy court must approve the adequacy of the information contained in that statement. Once approved, the Plan, the disclosure statement, and related solicitation materials would be served upon creditors for their acceptance or rejection of the Plan. The bankruptcy court then must hold a confirmation hearing on the Plan. Like all bankruptcy plans, the Plan can be modified or rejected outright. [71]

69/ Despite its occasional reference to a "temporary" exemption, Enron is seeking a conditional exemption pursuant to Sections 3(a)(3) and 3(a)(5) of the Act. Enron has not filed an application pursuant to Section 3(a)(4), which requires the applicant to establish that it is only "temporarily a holding company."

70/ In this regard, Enron has filed a motion with the Commission pursuant to Rule 452 of the Rules of Practice (17 C.F.R. § 201.452) seeking leave to adduce additional evidence concerning the joint Chapter 11 bankruptcy plan ("the Plan") filed by Enron on July 11, 2003. Because of the uncertain outcome of the Plan, Enron has failed to establish that the evidence its seeks to introduce is material to its applications as required by Rule 452. Nonetheless, we have determined, as a discretionary matter, to admit the evidence.

71/ Enron also claims that evidence about the bankruptcy plan is material to whether Enron, or a trust it may form, qualifies (continued...)

Enron argues that the Commission should grant it an exemption "conditioned as necessary to assure that [Portland General] is divested under the Plan and that Enron does not engage in unauthorized affiliate transactions with [Portland General] before it is divested." An exemption from registration will be for a "short-lived period," according to Enron, because once the Plan is implemented, Enron will cease to own Portland General and will no longer be a public utility holding company.

Enron's argument fails to account for the uncertain outcome of the bankruptcy proceedings. For example, despite the existence of a bankruptcy plan, no purchaser for Portland General or a date for its sale has been identified with any certainty. [72] The Plan does not make clear whether Enron or a trust will hold Portland General in the period prior to Enron's divestiture of the utility. Given that the Plan may be modified or rejected, it is not certain that Portland General will be sold or otherwise disposed of by Enron. The Plan does not and cannot provide a date for the transfer of Portland General to new owners -- the operative event under the Act that, if it occurs, will result in Enron ceasing to be a holding company. Thus, the disposition of Portland General outlined in the Plan is

71/ (...continued) for an exemption as a temporary holding company under Section 3(a)(4) of the Act. Neither Enron, nor any entity associated with Enron, has sought an exemption under Section 3(a)(4) of the Act. Thus, we refrain from addressing the alleged impact of the Plan on any application that Enron may file pursuant to Section 3(a)(4) unless and until such application is properly before us for review.

72/ At oral argument, counsel for Enron stated that Enron had signed an agreement to sell Portland General to a group sponsored by a company called Texas Pacific Group. This transaction, however, requires the approval of the bankruptcy court. Prior to approving the transaction, the bankruptcy court will conduct an "overbid" process to allow other potential buyers an opportunity to submit superior bids. Should no other potential buyers submit superior bids and should the bankruptcy court approve the transaction, the parties will need to obtain approval from state and federal regulators. The outcome of this process is still uncertain.

speculative and Enron's reliance on it in seeking an exemption is misplaced. [73]

Enron relies on our order in AES Corp. II, granting a conditional exemption under Section 3(a)(5) of the Act, [74] to support its argument that, even if it cannot meet the statutory requirements of Sections 3(a)(3) and 3(a)(5), this does not require a finding that Portland General is material to Enron as a matter of law or a denial of its application for an exemption. Enron's reliance on AES II is inapposite. [75] The exemption we granted in that case was conditioned upon AES's divestiture of an Illinois utility company that was a subsidiary of a company that AES proposed to acquire. We determined that the revenues of the Illinois utility company when combined with the revenues of AES's other small domestic utility would represent a material portion of AES's revenues, but that, once AES divested its ownership of the Illinois utility company, its remaining domestic utility's revenues would permit granting an exemption based on Commission precedent. [76]

A number of factors, not present here, contributed to our decision to grant AES a conditional exemption. We had determined

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73/ Enron argues that, given the status and terms of the Plan, the supervision of the Plan by the bankruptcy court, and the interests the bankruptcy process is designed to protect, there is no legitimate interest to be served by Commission regulation under the Act. The mere pendency of a bankruptcy proceeding and the associated supervision of the debtor by the bankruptcy court are not sufficient to render regulation under the Act unnecessary or to provide a basis for granting a conditional exemption. Indeed, the Act prescribes additional Commission oversight when holding companies required to register file for bankruptcy. See Sections 11(f) and 11(g) of the Act, 15 U.S.C. §§ 79k(f) and (g).

74/ AES Corp., Holding Company Act Rel. No. 27363 (Mar. 23, 2001), 74 SEC Docket 1728 (AES II).

75/ The Commission has, on other occasions, granted a temporary or conditional exemption from the registration provisions of the Act. See Kansas Power and Light Co., 50 S.E.C. 852 (1992); Kansas Power and Light Co., 32 S.E.C. 749 (1951). The justifications for those exemptions, which were granted pursuant to Section 3(a)(2), are not applicable here.

76/ AES II, 74 SEC Docket at 1744.

in an earlier decision, AES I, that AES was engaged in unregulated utility businesses and, therefore, met the requirements of the Act.[77] We also determined that, at the time AES was seeking the conditional exemption, it was still primarily engaged in these "exempt utility" businesses.[78] In addition, AES indicated in its application that it had held preliminary discussions with potential acquirers of the Illinois utility company and provided a date certain by which time the divestiture would be completed. Enron, in contrast, has not provided evidence that it meets, or has ever met, any of the requirements of Sections 3(a)(3) or 3(a)(5). Unlike AES, Enron has failed to show that it is, or ever has been, primarily engaged in the "exempt-utility" business.

Moreover, AES was sufficiently far along in its divestiture of the utility that it already had identified and had discussions with potential buyers. Enron, on the other hand, states only that it (1) may sell Portland General, or (2) may distribute Portland General shares to its creditors. Enron also indicates that it may transfer Portland General shares to a trust as an intermediate step.

AES also was able to commit to divesting the utility in question within two years of the acquisition transaction. This assurance was persuasive because AES, as a financially solvent company, had control over its own destiny. Unlike AES, Enron's ability to sell Portland General, and the timing of any sale, are dependent on the outcome of the bankruptcy proceeding, which is largely out of its control. Given these facts, Enron can provide no assurance concerning the length of time it will be a public utility holding company. Accordingly, Enron has failed to establish that the conditional exemption it seeks is warranted.

In sum, the Act provides that all holding companies, except those qualifying for an exemption, must register with the Commission. In the event that a registered holding company ceases to be a holding company, it may file an application to de-register with the Commission pursuant to Section 5(d) of the

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77/ AES II, 74 SEC Docket at 1742 (citing AES I, 70 SEC Docket at 1301).

78/ Id. at 1742.

Act. [79] If Enron registers under the Act and then subsequently sells Portland General, it can avail itself of this relief.

3. The Alleged Impact of Registration On The Bankruptcy Proceedings

Enron claims that a requirement that it register as a holding company under the Act will have a seriously disruptive effect on the bankruptcy process. For example, Enron claims that the registration process would be "extremely complicated and can be expected to raise a number of novel issues." In addition, according to Enron, failure to grant an exemption will needlessly harm the value of its QFs and its interest in Portland General and, therefore, would lower the value of the debtor's estate that is available to satisfy creditors in the bankruptcy proceeding. Enron also claims that registration would reduce the marketability of Portland General and the likelihood that it will be sold to a third party.

The costs that registration might impose and the benefits that might accrue as a result of an exemption from registration are not sufficient reasons to justify the grant of an exemption under the Act. Congress has determined that the costs associated with registration are necessary to protect the interests of investors and of public utility customers. [80] Congress made exemptions from registration available in situations where holding companies are susceptible to effective state regulation or are otherwise not the type of holding company to which the Act is directed. [81] Congress did not, however, provide for an exemption on the basis of a finding that the perceived costs of registration outweigh the benefits of registration. That there is some cost associated with the registration process or some

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79/ See National Grid Transco plc, Holding Company Act Rel. No. 27704 (Aug. 1, 2003), 80 SEC Docket 2974 (ordering the de-registration of four holding companies).

80/ See Section 1(b) of the Act, 15 U.S.C. §79a(b) (declaring that the national public interest, the interest of investors in the securities of holding companies and their subsidiaries and affiliates, and the interest of consumers of electric energy and natural and manufactured gas are or may be adversely affected when investors cannot obtain information necessary to appraise the financial position or earning power of the issuers).

81/ See 15 U.S.C. § 79c; see also 1995 Report at 105.

benefit from an exemption from registration, then, is not sufficient to justify Enron's request for an exemption.

4. FPL's Economic Interests

FPL, which was granted limited participant status in this case, seeks review of that part of the initial decision denying Enron an exemption pursuant to Sections 3(a)(3) and 3(a)(5) of the Act. FPL co-owns a number of generation facilities that are QFs pursuant to the FERC's regulations under PURPA. Until February 2003, it co-owned these facilities with a subsidiary of Enron. In February 2003, Enron's indirect interests in these facilities were transferred to a trust. FPL has filed with the FERC a recertification application that requests that the FERC accord QF status to the generation facilities in the trust ownership structure. However, FPL is uncertain as to whether the FERC will approve this application. [82]

FPL asserts that the generation facilities would lose their status as QFs if we were to deny Enron the exemptions it seeks under Section 3(a)(3) and 3(a)(5) of the Act. FPL requests that we grant Enron a "reasonable" extension of its current exemptions under Sections 3(a)(3) and 3(a)(5) for the purpose of mitigating the impact that denial of Enron's application could have on FPL.

FPL does not argue that Enron meets the statutory requirements for an exemption under Sections 3(a)(3) or 3(a)(5)--indeed, it states that it "takes no position on Enron's entitlement to an exemption." Rather, FPL argues that the Commission should craft a remedy that "protects the interests of investors and consumers and avoids adverse impacts on innocent third parties such as FPL." FPL's request, then, does not relate to advancing the policies underlying the Act. It is an attempt to mitigate the potential consequences of another federal statute, PURPA, and the implementation of that statute by the FERC. The question of whether the restructuring of Enron's interest in the QFs at issue satisfies the requirements of PURPA must be resolved on its own merits by the FERC, the agency with which Congress has placed responsibility for administering that statute.

82/ FPL also asserts that "a settlement concerning the QFs in question . . . is pending at the FERC." FPL represents that an administrative law judge "has urged the FERC to reject a consent agreement with FERC staff," but that were the FERC to approve the consent agreement, "FPL would no longer need the relief it seeks from the Commission."

FPL argues that the record does not contain evidence of the types of abuses by Enron that the Act was designed to prevent. Evidence of holding company abuses, however, is not a prerequisite to registration under the Act. The Act is prophylactic in nature and designed to prevent potential holding company abuses in those contexts where Congress determined they were most likely to occur. [83]

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We conclude that Enron has failed to establish that it meets the statutory criteria for an exemption under Section 3(a)(3) and 3(a)(5) of the Act and, therefore, we deny Enron's application for an exemption pursuant to those sections of the Act.

IV.

Based on this record, we find that Enron fails to meet the statutory requirements for an exemption pursuant to Sections 3(a)(1), 3(a)(3), or 3(a)(5) of the Act. [84] Accordingly, we

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83/ Standard Oil Co., 10 S.E.C. 1122, 1129 n.12 (1942), citing Detroit Edison Co. v. SEC, 119 F.2d 730, 739 (1941) ("The statute contemplates action prospectively. It is a preventative measure intended to regulate action before the interests of those concerned are adversely affected.").

84/ Therefore, we need not reach the question of whether granting Enron any of the exemptions it seeks would be "detrimental to the public interest or the interest of investors or consumers."

deny Enron's application filed on April 12, 2000, for an exemption under Sections 3(a)(3) and 3(a)(5) of the Act, and we deny its application filed on February 28, 2002, amended on May 31, 2002, seeking an exemption under Section 3(a)(1) of the Act.

An appropriate order will issue. [85]

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID and ATKINS); Commissioner CAMPOS not participating.

Jonathan G. Katz
Secretary

85/ We have considered all of the parties' contentions. We have rejected or sustained these contentions to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935
Rel. No. 27782 / December 29, 2003

Admin. Proc. File No. 3-10909

In the Matter of the Applications of

ENRON CORPORATION

ORDER DENYING APPLICATIONS FOR EXEMPTION

On the basis of the Commission's opinion issued this day, it is

ORDERED that Enron's application, filed on April 12, 2000, for an exemption under Sections 3(a)(3) and 3(a)(5) of the Public Utility Holding Company Act of 1935 and its application, filed on February 28, 2002, amended on May 31, 2002, seeking an exemption under Section 3(a)(1) of the Public Utility Holding Company Act of 1935 be, and they hereby are, denied.

By the Commission.

Jonathan G. Katz
Secretary