



N A R U C
National Association of Regulatory Utility Commissioners

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Office the Secretary
Security Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

March 21, 2003

Re: *Applications of Enron Corp. for Exemptions Under the Public Utility Holding Company Act of 1935, (Nos. 70-9661 and 70-10056)*

Dear Secretary:

Attached is the National Association of Regulatory Utility Commissioners (NARUC) motion for leave to intervene out-of-time in support of the Oregon Public Utilities Commission's petition for review and three copies. If you have any questions or need additional information, please contact me at 202-898-1350 or at sbarklind@naruc.org.

Sincerely,

Sharla Barklind
NARUC Assistant Counsel

**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**

In the Matter of

*Applications of Enron Corp. for Exemptions
Under the Public Utility Holding Company
Act of 1935, (Nos. 70-9661 and 70-10056)*

Administrative Proceeding

File No. 3-10909

**NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS MOTION FOR
LEAVE TO INTERVENE OUT-OF-TIME
IN SUPPORT OF THE OREGON PUBLIC UTILITY COMMISSION'S
PETITION FOR REVIEW**

Pursuant to Rules 154 and 210 of the Commission's Rules of Practice, 17 C.F.R. § § 201.154 and 201.210, the National Association of Regulatory Utility Commissioners ("NARUC") hereby respectfully requests the Securities Exchange Commission's ("SEC") permission for leave to intervene out-of-time in the above-captioned proceeding.

NARUC supports the Oregon Public Utility Commission's ("OPUC") petition for review of the SEC Initial Decision issued on February 6, 2003 ("*Initial Decision*") in the above-captioned proceeding. Because of the significant national policy implications of the *Initial Decision*, NARUC respectfully requests any waivers needed to allow its participation in the creation of the record for review of that petition be granted.

In support of this request, NARUC states as follows:

INTERVENTION OUT-OF-TIME

During NARUC's 2003 Winter Meetings in Washington, D.C., (February 23-27, 2003) the OPUC brought the *Initial Decision* to the attention of NARUC's members. It was apparent that, on its face, that the *Initial Decision* has potentially negative implications for utilities and consumers across the country. Given the potential national

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impact of the decisions, the usual NARUC decision-making procedures were expedited to authorize the filing of this intervention and statement. NARUC submits that good cause exists to permit it to file an intervention at this time because:

1. No other party to this proceeding will be prejudiced or inconvenienced because (a) only three weeks have elapsed since the OPUC filed its petition, (b) NARUC will accept and abide by any procedural arrangements the SEC may have imposed thus far, and (c) any adversely affected party can and will certainly inform the SEC of the nature and extent of any prejudice; and

2. No other party can adequately represent the national scope of State interests provided through NARUC's participation in this proceeding. The SEC's action on the Oregon petition will directly affect NARUC's member commission's abilities to carry out their respective mandates to serve the public interest. NARUC is a quasi-governmental nonprofit organization founded in 1889. Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions.¹ NARUC's members include the governmental bodies of the fifty States engaged in the economic and safety regulation of carriers and utilities. NARUC's members are charged with the duty of regulating the retail rates and services of electric, gas, water and telephone utilities operating within their respective jurisdictions. These State officials have the obligation under State law to assure the establishment and maintenance of such energy utility services as may be

¹ See, e.g., 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. Cf., 47 U.S.C. § 254 (1996). See, also, *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff. 672 F.2d 469 (5th Cir. Unit "B" 1982); aff. en banc, 702 F.2d 532 (5th Cir. Unit "B" 1983, rev'd, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

required by the public convenience and necessity, and to ensure that such services are provided at rates and conditions that are just, reasonable and nondiscriminatory for all consumers. NARUC's members regulate many of the utilities that could potentially be affected by this decision. Given NARUC's members' statutory obligations, the public interest will be served by NARUC's involvement in this proceeding.

STATEMENT SUPPORTING THE OPUC REQUEST

The ALJ's *Initial Decision* constitutes an exercise of discretion on an important decision of law and public policy and should be reviewed. Rule 411 of the Commission's Rules of Practice, 17 C.F.R. § 201.411, provides that the Commission may grant a petition for review if the decision embodies law or policy that is important and that the Commission should review. Such is the case in the instant proceeding.

NARUC believes the *Initial Decision* is a departure from current Commission precedent and policy, which allowed a flexible case-specific approach to interpreting Section 3(a)(1) of the Public Utility Holding Company Act of 1935 ("PUHCA").² By deviating from Commission policy and adopting a bright-line standard of percentage of utility revenues generated through out-of-State sales, the *Initial Decision* could increase the potential for utility practices that are not in the public interest. Under this revised approach, utilities may no longer prudently manage their businesses to provide service at the least cost to retail customers located within a single State.

² "[I]n making Section 3(a) determinations the Commission has not established a set of hard and fast rules but has in a number of cases weighed individual factors in reaching a conclusion." *Initial Decision* at 13. See also, *Initial Decision* at 21-22, ("Commission precedent and Commission policy require a flexible approach to interpreting Section 3(a)(1) to each particular factual situation, and 'the determination of what is appropriate in the public interest necessarily turns on a consideration of the facts and circumstances of each situation,'" citing Division of Investment Management, Securities and Exchange Commission, The Regulation of Public Utility Holding Companies, 114-15 (1995)).

The decision finds that “[e]ven with the application of a most forgiving flexible approach, an electric utility with the business characteristics [as outlined in the case] cannot by any reasonable measure be considered ‘predominantly intrastate in character’ and carrying on ‘business substantially in a single State.’”³ This finding fails to recognize the predominately intrastate character of the operations of Portland General. All of its service territory and retail customers are located in Oregon. The OPUC fully regulates Portland General under several chapters of State law as an investor-owned utility providing service to and for retail customers within Oregon. Its participation in wholesale markets is done to benefit the retail customers of its service area, and as with many such companies, those customers are located within a single State. Most utilities, as a prudent management practice for providing service at the least cost to their retail customers, buy and sell power on the wholesale market. Most State commissions view this participation in the wholesale markets 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.

The *Initial Decision* also discounts the adequate regulation that State commissions have over these utilities. Like the OPUC, NARUC’s members have adequate regulatory authority over utilities operating in their States to protect customers.⁴ NARUC’s members typically have the authority to regulate all of the activities of the utilities, regardless if they occur solely within one State, because the State commissions are able to set the retail rates for customers based on the State commission’s approval of prudent costs of providing service to customers. By discounting this regulatory oversight and

³ *Initial Decision* at 22.

⁴ “Nothing in the record disputes OPUC’s claim that it adequately and effectively regulates Portland General’s utility activities.” *Initial Decision* at 21.

ignoring the principle intrastate focus of Portland General's operations, the *Initial Decision* may ultimately harm retail ratepayers because utilities would no longer have the incentives to arrange the most cost-effective power to serve native load. By subjecting the company to Commission jurisdiction, the decision provides disincentives for Portland General to sell excess power out-of-State. Portland General may decide not to purchase the less expensive hydroelectric power and, instead, serve its native load with its higher cost thermal resources – resources that could otherwise be sold out-of-State. Portland General is not the only utility that sells excess power into the wholesale market. Nearly all utilities sell excess power much of which ends up out of the originating State. If the *Initial Decision* is adopted, utilities would have an incentive to limit their sales of excess power to markets within the State, often times at lower prices, so as to avoid Commission jurisdiction. This would negatively affect both the customers who receive the benefit of the excess power sales netted against the utilities' power costs and those customers in areas that have a need for the excess power.

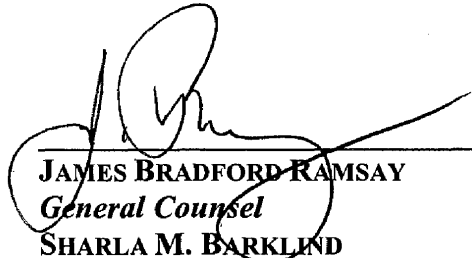
NARUC respectfully suggests that the SEC should not adopt a policy that creates incentives for Portland General and other utilities to pursue behavior adverse to its retail customers, especially when no party questions the OPUC's ability to adequately and effectively protect all of Portland General's retail customers.

Accordingly, we join the OPUC in urging the Commission to review the *Initial Decision* and reverse the finding that the Section 3(a)(1) exemption is not applicable. Alternatively, we request that the SEC set the matter for a rulemaking to allow wider participation and opportunity to comment on the implications of the implementation of such a non-flexible policy.

CONCLUSION

Portland General participates in the wholesale power business to benefit its intrastate customer base. OPUC-required prudent management of the company's native Oregon load requires that Portland General sell surplus power in the most cost effective markets. The fact that some of Portland General's wholesale trades occur in markets outside the Oregon border does not change the predominately intrastate character of Portland General's operations. Accordingly, NARUC respectfully requests that its motion to intervene in the instant case be granted and that the SEC grant the OPUC petition.

Respectfully Submitted,



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Assistant General Counsel

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Dated: March 21, 2003

CERTIFICATE OF SERVICE

I, Sharla M. Barklind, certify that on this 21st of March, 2003, I sent a copy of NARUC's "National Association Of Regulatory Utility Commissioners Motion For Leave To Intervene Out-Of-Time In Support Of The Oregon Public Utility Commission's Petition For Review" by 1st class mail, postage prepaid to those parties listed below.


Sharla M. Barklind

March 21, 2003

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