

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

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In the Matter of	:	
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Applications of Enron Corp. for Exemptions	:	Administrative Proceeding
Under the Public Utility Holding Company Act	:	
of 1935, (Nos. 70-9661 and 70-10056).	:	File No. 3-10909

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**BRIEF IN SUPPORT OF PETITION FOR REVIEW OF ENRON CORP.**

Pursuant to Rule 450 of the Commission's Rules of Practice, 17 C.F.R. § 201.450 (2002), and the Commission's order issued on June 11, 2003,<sup>1</sup> Enron Corp. ("Enron") hereby submits its brief in support of its petition for review of the initial decision issued on February 6, 2003 in the above captioned proceeding.<sup>2</sup>

**I. INTRODUCTION AND SUMMARY OF THE ARGUMENT**

In its most basic sense, this proceeding is about the narrow question of how the Public Utility Holding Company Act of 1935 (the "Act" or "PUHCA") should be applied to Enron. Enron is entitled to exemption under the plain words of PUHCA and Commission precedent. However, even if Enron did not qualify under the plain wording of the statute, there are compelling reasons for forbearance on the Commission's part when it comes to regulating Enron as a holding company under PUHCA. In earlier phases in this proceeding, the Division of Investment Management ("Division") has advocated, and the Presiding Administrative Law Judge ("ALJ") has adopted, an interpretation of the Act that is rigid, literal and blind to the important principles of policy

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<sup>1</sup> *Order Granting Petitions for Review, Denying Motion for Leave to Intervene Out of Time, and Scheduling Briefs*, Holding Co. Act Release No. 27685 (June 11, 2003).

<sup>2</sup> *Enron Corp.*, Initial Decision Release No. 222 (Feb. 6, 2003)

embodied in the Act. It is now up to the Commission to review the initial decision with the fundamental policies of the Act in mind and apply those policies in a manner that makes sense in the context of this case.

In evaluating Enron's applications for exemption, the Commission must recognize that there are effectively two "Enrons:" the old Enron which has been the subject of so much discussion and many negative allegations over the past two years, and the Enron of today, which is an entirely different company. Enron today is a company which has been through a radical transformation and is currently working on five primary activities: selling assets, liquidating trading positions, resolving disputed claims, resolving pending litigation, and managing the liquidation and closure of debtor businesses. It is difficult to estimate how long it will take to resolve all outstanding issues, but Enron remains committed to maximizing value for its creditors and distributing it as quickly as possible.

The Commission's obligation in this proceeding is to interpret and apply PUHCA consistent with the public interest and the interest of investors and consumers as they relate to Enron today, not to the Enron of yesterday. The Commission's task today is to determine how best to administer PUHCA for the benefit of investors and consumers in the context of the Enron of today.

Viewed through the lens of the present, there is no benefit to be gained from regulating Enron as a holding company under PUHCA. Indeed, Enron has already committed to divest itself of its only public utility subsidiary at the earliest possible date, thereby ceasing to be subject to the jurisdiction of the Commission under PUHCA. Ironically, given the course that Enron is now on, any assertion by the Commission of jurisdiction over Enron as a holding company would only delay that process, while

actually working to the detriment of the constituencies the Commission is charged with protecting under PUHCA. To the extent that there are any residual issues that require Commission jurisdiction under PUHCA during the relatively short period before Enron ceases to be a holding company, the Commission has the authority to craft a narrowly tailored solution by imposing appropriate conditions in an order of exemption, thereby providing appropriate protections without imposing the heavy burden of registration in a context where nothing would be gained and much would be lost.

What Enron seeks in this proceeding is an application of the Commission's regulatory authority under PUHCA with a painter's brush, not a club. The Division favors using the Act as a blunt instrument to deny Enron's exemption applications, force Enron to register, and subject Enron to the full spectrum of regulation under the Act. However, PUHCA can and should be used with appropriate regard for the current status of Enron's reorganization under chapter 11 of the bankruptcy code to support that process, not to impede it.<sup>3</sup>

In particular, Enron seeks an exemption under the Act from registered holding company status conditioned, as necessary, to protect the public, investors and consumers.

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<sup>3</sup> On December 2, 2001, Enron and certain of its subsidiaries filed a voluntary petition for reorganization under chapter 11 of the bankruptcy code, 11 U.S.C. Ch. 11 (11 U.S.C. §§ 1101-74 (2000)), in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court"). Additional Enron subsidiaries have continued to file since that time. Enron's only utility subsidiary, Portland General Electric Company ("PGE"), is not in bankruptcy. Enron is a debtor in possession ("DIP") with respect to the estate in bankruptcy of Enron and many of its subsidiaries. As a DIP, Enron has been engaged, since the commencement of the chapter 11 proceedings, in the reorganization and disposition of its assets to satisfy the claims of its creditors. Test. of M. Metts ("Metts"), 3:49-66.

On July 11, 2003, Enron submitted a joint chapter 11 plan ("Plan") and a proposed disclosure statement to the Bankruptcy Court. See *Motion of Enron Corp. for leave to adduce additional evidence*, July 15, 2003 ("Motion to Adduce"). See also *In re Enron Corp., et al., Debtors, Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the U.S. Bankruptcy Code*, Case No. 01-16034 (AJG), 2003 Bankr. LEXIS 772 (Bankr. S.D.N.Y. July 11, 2003). The Plan, disclosure statement and related documents are available at <<http://www.enron.com/corp/por/>> last visited on July 18, 2003.

The chapter 11 reorganization process for Enron and its debtor subsidiaries (the "Debtors") is already well underway and a conditional exemption is the most rapid and efficient manner to bring about the dissolution of Enron and the divestiture of its only public utility subsidiary, PGE. Notably, the elimination of a holding company by forcing the divestiture of its public utility subsidiary companies is the ultimate remedy under PUHCA. This regulatory power, found in Section 11 of the Act, was referred to as the holding company "death sentence" at the time of the Act's passage.<sup>4</sup> To reject the solution of a conditional exemption and instead require Enron's registration under PUHCA would serve no useful purpose because Enron can do no more than it is already proposing under the Plan to divest its interest in PGE. Registration under the Act at this late date would do nothing to advance the protected interests under the Act. Perversely, registration under the Act would only delay the imposition of PUHCA's ultimate penalty.

Even leaving aside the aberrant policy that would be served by requiring Enron to register, it is clear that Enron is entitled to an exemption under the plain statutory language of Section 3 of PUHCA and Commission precedent. The initial decision erred in finding otherwise. But satisfying the requirements of PUHCA in a technical sense would be meaningless if the result made no practical sense. Enron will demonstrate below why the Commission should grant Enron's applications both as a technical matter under PUHCA and as an appropriate response to the need to apply PUHCA in the unique circumstances of a holding company that is far advanced in the process of dissolution under a reorganization plan.

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<sup>4</sup> See, James C. Bonbright, *Public Utilities and the National Power Policies* 36-37 (1940).

A. The Intrastate Exemption Under Section 3(a)(1)

PUHCA was intended to provide supplemental federal regulatory oversight where it was likely that state public utility commission regulation would not be adequate to control multi-state holding company systems. Thus, public utility holding companies with significant utility operations regulated by more than one state regulatory commission generally are subject to regulation as registered holding companies under PUHCA. There are twenty-eight holding companies registered under PUHCA today.<sup>5</sup> The typical registered holding company has significant public utility operations in several states. For example, Entergy Corp. has electric utility subsidiaries operating in four states, and American Electric Power Company Inc. has electric utility subsidiaries operating in nine states. Only one registered holding company today, Emera Inc., has United States public utility operations confined to only one state. This anomaly is due to Emera's status as a Nova Scotia corporation and the fact that it cannot re-incorporate in Maine, where its utility subsidiary Bangor Hydro-Electric Company is organized, to qualify for the intrastate exemption under Section 3(a)(1) of PUHCA. Enron, in contrast, is incorporated in Oregon, as is its only public utility subsidiary company, PGE.<sup>6</sup> Even more important, PGE's utility operations are subject to the jurisdiction of only one state regulatory commission, the Oregon Public Utility Commission ("OPUC"). The fundamental purpose of the Act was not directed at circumstances like this where there is no question as to the adequacy of state regulation. Indeed, there are many exempt

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<sup>5</sup> Not including subsidiary registered holding companies. *See*, Holding Companies Registered Under the Public Utility Holding Company Act of 1935, *available at* <<http://www.sec.gov/divisions/investment/regpucacompanies.htm>> (last modified Oct. 31, 2002) visited on July 18, 2003.

<sup>6</sup> *See*, Ex. Nos. PL-1, RB-1.

holding companies with utility subsidiaries that are subject to the jurisdiction of more than one state commission.

PGE is an electric utility company serving customers in a retail service territory located entirely within Oregon. Test. of P. Lesh ("Lesh"), 3:58-61. Enron qualifies for the intrastate holding company exemption under PUHCA because it and its only public utility subsidiary are organized in the same state, Oregon, and because PGE is "predominantly intrastate in character" under Section 3(a)(1) of PUHCA.

Commission precedent indicates that the determination of whether a company is predominantly intrastate in character depends on an evaluation of a number of factors that would tend to show the location of utility activities.<sup>7</sup> Enron has provided uncontroverted evidence that PGE is Oregon in character because: (a) PGE's entire customer base of 736,000 residential, commercial and industrial customers is located exclusively in Oregon, (b) substantially all of PGE's utility assets are located in Oregon, (c) PGE is a net purchaser of power in interstate commerce and, accordingly, it buys more power for use in Oregon than it exports, (d) all of PGE's offices are located in Oregon, (e) PGE has approximately 2,800 employees, all of whom work in Oregon, (f) substantially all of PGE's income, property and other taxes, and franchise fees in 2001 were paid to Oregon, (g) PGE's charitable contributions for 2001 have been made substantially to charities and civic organizations located in Oregon and its employees have contributed numerous hours of service to their communities in Oregon, and (h) PGE is subject to state utility regulation exclusively by the OPUC. The very substantial weight of the evidence proves that PGE is an Oregon utility, serving Oregon customers, with predominantly Oregon-

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<sup>7</sup> See, *C&T Enterprises, Inc.*, Holding Co. Act Release No. 27590 (Oct. 31, 2002) ("*C&T Enterprises*") at 11; *NIPSCO Indus., Inc.*, Holding Co. Act Release No. 26975 (Feb. 10, 1999) ("*NIPSCO*") at 28-29.

located assets, under Oregon regulatory control and supervision.<sup>8</sup> Lesh, 3-4:58-74, 5-6:112-17; Test. of J. Piro ("Piro"), 2:27-43, 10:209-15.

The Division pointed to only two relatively minor factors to rebut this overwhelming evidence of PGE's intrastate character. First, the Division argued that PGE accrued substantial revenues from selling electricity outside of Oregon in the wholesale power market.<sup>9</sup> Second, the Division argued that PGE had an interest in an electric generating plant located at the mouth of a coal mine in Montana that was a significant utility asset located outside Oregon.<sup>10</sup> Detailed testimony by PGE's executives, an uncontroverted part of the record in this matter, establishes that PGE's wholesale sales are an integral part of balancing its electric supply resources (*i.e.*, generating plant capacity and power purchase contracts) with its Oregon system load, and that in this context, it is necessary and desirable for PGE to sell some surplus power in the wholesale markets. Such sales reduce the cost of supplying electricity to PGE's Oregon customers.<sup>11</sup> Lesh, 9:185-201; Test. of M. Turina ("Turina"), 3-4:47-74. The OPUC has sanctioned this activity, characterizing it as a "prudent management practice" that is intrastate in nature.<sup>12</sup> The record also reflects that Colstrip Units 3 and 4 Coal Plant ("Colstrip"), the mine-mouth plant located in Montana, produces low-cost baseload electricity that is imported into Oregon to serve PGE's Oregon customers. Lesh, 4:76-85;

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<sup>8</sup> The OPUC has intervened in this proceeding and submitted a number of pleadings in which it expresses support for Enron's application for exemption under section 3(a)(1) of the Act on the basis that it has appropriate regulatory oversight over the activities of PGE. *See, Opening Brief of the OPUC* (Jan. 7, 2003) ("OPUC Brief"); *Reply Brief of the OPUC* (Jan. 14, 2003) ("OPUC Reply").

<sup>9</sup> *Statement of the Position of the Division* (Nov. 1, 2002) ("Division Statement of Position") at 5-6.

<sup>10</sup> *Post-Hearing Brief of the Division* (Jan. 7, 2003) ("Division Post-Hearing Brief") at 22-23.

<sup>11</sup> As explained further *infra*, PGE also engages in merchant trading in wholesale power. This activity serves PGE's retail operations indirectly, by providing critical market intelligence and improving PGE's access to the power markets and its ability to trade power effectively.

<sup>12</sup> OPUC Brief at 2.

Turina, 8-9:180-87. PGE's wholesale power sales transactions and its Colstrip interest, therefore, clearly have an intrastate (*i.e.*, Oregon) character. Unlike all the other registered holding companies, except Emera, Enron and PGE are not serving retail customers outside a single state.

The initial decision took a step beyond even the Division's strained arguments and found that PGE was a utility operating in interstate commerce. The ALJ found it to be inconsistent with PGE's intrastate status that PGE's high-voltage transmission grid was used to transport electricity in interstate commerce and that PGE purchased significant amounts of electricity from outside of Oregon.<sup>13</sup> Notably, neither the Division nor any other participant in this proceeding advanced such arguments for denying Enron's exemption application.

The initial decision's interpretation of Section 3(a)(1) is novel, unprecedented and misguided. The fact is that virtually all utilities in the United States today are engaged in interstate commerce.<sup>14</sup> They purchase energy and supplies from out-of-state, raise capital nationally, and have investors located throughout the country. Except with respect to those utilities located in Hawaii, Alaska and parts of Texas, all U.S. utilities are also connected to the interconnected North American high-voltage electric transmission grid.

The initial decision's analysis is misguided because it answers the wrong question.

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<sup>13</sup> Initial decision at 22.

<sup>14</sup> There are approximately 100 electric and gas utility holding companies that are exempt by order under Section 3(a)(1) or pursuant to Rule 2 under the Act, 17 C.F.R. § 250.2 (2002). *See Edison Electric Institute's Amicus Brief In Support Of Petitions For Review Of Initial Decision* (Mar. 25, 2003). Although it is not possible to discern, from publicly available information how many exempt holding companies would be adversely affected by the initial decision, it is possible that, given the current status of flux of the U.S. wholesale energy markets, many of such companies might determine to structure or restructure their trading operations in ways that they would not otherwise choose to, in order to avoid registration under the Act if the initial decision is permitted to stand.



By focusing broadly on all aspects of PGE's business in interstate commerce, the question the initial decision's Commerce Clause analysis answers is whether Enron and PGE could be subject to any federal legislation, not the more narrow question of whether a particular exemption under PUHCA is available to Enron. The simple question that the initial decision should have answered is, consistent with the long-recognized purpose of the exemption: "Are PGE's activities outside of Oregon so extensive that the utility cannot be adequately regulated at the state level?" If, as we believe, the answer is "no," then PGE should be deemed intrastate in character and Enron's entitlement to the exemption would be established under the objective criteria of Section 3(a)(1).

B. The Incidental and Predominantly Foreign Exemptions Under Sections 3(a)(3) and 3(a)(5)

The initial decision also failed to appropriately apply Sections 3(a)(3) and 3(a)(5) in the unique context presented by this case. Section 3(a)(3) is available to a holding company that is only incidentally a holding company because it is primarily engaged in a business other than being a public utility company and, in relevant part, where the holding company does not derive a material part of its income from any subsidiary public utility companies. Section 3(a)(5) is available to a holding company that derives no material part of its income from a public utility company operating in the United States, *i.e.*, a holding company that is engaged principally in foreign utility and non-utility businesses. Enron's exemption application under these sections of the Act was, admittedly, complicated by the accounting issues that led to its bankruptcy filing and Enron has acknowledged that, today, PGE represents a significant part of Enron's assets and income. Nevertheless, there is clear, recent Commission precedent holding that a holding company with a material public utility subsidiary that it has committed to divest

in a short period of time may still qualify for an exemption under Section 3(a)(5) of the Act.<sup>15</sup> In effect, a determination of "materiality" under Section 3(a)(5) of the Act depends, under the precedent, on not just a comparison of utility revenues to holding company revenues, but also on whether those revenues are likely to remain material in the immediate future. Because both exemptions use the same concept of materiality, the same logic applies, by extension, to an exemption under Section 3(a)(3) of the Act.<sup>16</sup>

Enron offered evidence that it was in bankruptcy reorganization under chapter 11 and that PGE was up for sale and, failing that, PGE could be included in a reorganized Enron or divested to creditors. Metts, 4-6:80-129. The ALJ rejected this evidence as speculative.<sup>17</sup> Now that the Plan has been filed and it describes the distribution of all the assets of the Debtors' estate, the fate of PGE is not speculative.<sup>18</sup> The Plan requires that Enron divest PGE. Divestiture will commence as soon as the Plan is confirmed by the Bankruptcy Court and becomes effective, and sufficient numbers of claims against the Debtors' combined estate are satisfied that a substantial portion of PGE stock can be distributed to creditors.<sup>19</sup> The temporary nature of Enron's continued ownership of PGE,

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<sup>15</sup> See, *AES Corp., Holding Co.* Act Release No. 27363 (Mar. 23, 2001) ("*AES II*").

<sup>16</sup> *Id.* at 22-23.

<sup>17</sup> Hearing Transcript ("Hrg. Tr.") at 26-29. At that time Enron was still in negotiations with the Creditors' Committee and other parties and consequently the elements of the Plan, including the fate of PGE, were not defined.

<sup>18</sup> See, Enron's Motion to Adduce. The Motion to Adduce was filed to supplement the record with respect to important developments in the bankruptcy proceeding including (a) the filing of the Plan, (b) the timing and process for implementation of the Plan, (c) the constituencies protected through the Plan, and (d) the effect of the Plan on Enron's status as a holding company. The Motion to Adduce also discusses the fact that Enron may qualify for an exemption under Section 3(a)(4) of the Act and that Enron is preparing an application for exemption.

<sup>19</sup> Section 28.1(c) of the Plan provides that commencing as soon as practicable after the Effective Date, the PGE common stock shall be distributed to holders of specified claims upon (a) allowance of General Unsecured Claims in an amount which would result in the distribution of 30% of the issued and outstanding shares of PGE common stock and (b) obtaining the requisite consents for the issuance of the PGE common stock. Section 1.72 of the Plan specifies that the Effective date shall occur on the first business day after the Plan is confirmed after which the conditions to the effectiveness of the Plan have been satisfied or

therefore, supports a finding that PGE is not a material utility subsidiary and that Enron is only incidentally a holding company within the meaning of Section 3(a)(3).

Contrary to the assertions in the initial decision, Enron is not seeking to avoid registration out of "a dislike for the provisions of PUHCA"<sup>20</sup> but it is seeking to protect the interests of its creditors and to avoid unnecessary adverse harm to its remaining non-utility operating businesses. Enron has no fundamental objections to PUHCA or its regulatory objectives, but it does object purely on economic grounds to the ill-timed imposition of registration under PUHCA when to do so would harm the interests that PUHCA was designed to protect. Registration would potentially delay the implementation of the Plan and reduce the value of the Debtors' estate generally through the added cost of compliance with duplicative or unnecessary PUHCA reporting and approval requirements. In addition, registration would trigger an adverse regulatory status change for Enron's wind-powered generating plants that have valuable power purchase contracts that depend on maintaining qualifying facility ("QF") status under the Public Utility Regulatory Policies Act of 1978 ("PURPA").<sup>21</sup> Loss of QF status if registration were ordered would reduce the sales value of these plants.<sup>22</sup> Registration under PUHCA also would make exempt holding company status for a potential acquirer of PGE less likely, thereby reducing the value of PGE to the Debtors' creditors. These

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waived, but in no event earlier than December 31, 2004, or such other date following the confirmation of the Plan that the Debtors and the Creditors' Committee, in their joint and absolute discretion, designate. The Plan is available at <<http://www.enron.com/corp/por/pdfs/por.pdf>> last visited on July 18, 2003.

<sup>20</sup> Initial decision at 24.

<sup>21</sup> 16 U.S.C. § 2601, *et. seq.* (2000).

<sup>22</sup> Enron has reached a settlement agreement with the Southern California Edison Company ("Edison"). See *Joint Motion To Partially Stay Proceeding And Suspend Procedural Schedule*, Jan. 23, 2003. The settlement agreement is currently under review by the Federal Energy Regulatory Commission ("FERC"). In addition, Enron has transferred its ownership interests in certain of these QFs to a trust. The FERC is also reviewing the trust structure. Final FERC approval, as defined in that settlement agreement, of either the settlement agreement or the trust structure would render the issue of the value of the QFs moot.

adverse effects will not harm Enron or its management, but they do reduce the value of the Debtors' estate and adversely affect creditors, contrary to the policies underlying PUHCA.

The Division has taken the position that the Commission should be concerned about Enron's shareholders, not only its creditors.<sup>23</sup> In the first instance, the harm to the Debtors' estate that would be caused by a denial of the exemption applications and a requirement that Enron register under the Act would lower the value of the estate for any group of investors, shareholders or creditors, that would seek to recover from the Debtors. The order of priority of claims under the Bankruptcy Code, however, determines which holders of claims against the Debtors are paid out of the Debtors' assets. It would be inconsistent with this orderly process, specifically implemented by Congress and followed in the case of any bankrupt company, for the Commission to seek to apply a different order of priority in the Debtors' chapter 11 case.

That Enron objects to the ill-effects registration under PUHCA would visit on the bankruptcy estate does not mean that the Commission must forego all regulation of Enron under the Act. A conditional exemption could include safeguards to assure that PGE is divested under the Plan within a reasonable period of time. It also could require Enron to obtain Commission approval before entering into any affiliate transaction with PGE that is not authorized by the OPUC. In addition, Enron could be required to report the status of its implementation of the Plan to the Commission periodically. A conditional exemption, therefore, would avoid the harmful effects of registration while keeping the Commission involved and informed, permitting effective and appropriate administration

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<sup>23</sup> Division Statement of Position at 2.

of the Act under these unique circumstances.

## II. ARGUMENT

### A. Section 3(a)(1)

The Commission may find that a holding company is exempt under Section 3(a)(1) of PUHCA if the:

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 predominantly 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;<sup>24</sup>

The Commission has found that Congress intended Section 3(a)(1) to be available to holding companies that, together with their utility subsidiaries, have their utility activities effectively regulated by a single state. In a 1989 rulemaking proposal, the Commission explained the purpose of the Section 3(a)(1) exemption as follows:

In adopting the Act, Congress determined to exempt from any provision or provisions of the Act a public-utility holding company that although engaged in interstate commerce, has an essentially intrastate character. Congress' decision is consistent with indications in the Act's legislative history that a major purpose of the Act was to create a system to control public-utility holding companies that escaped effective state regulation because of their interstate activities. While Congress' purpose in adopting the section 3(a)(1) exemption is not entirely explicit, it appears that Congress believed that a company that is "predominantly intrastate" could be effectively controlled by the state in which it is primarily located. This assessment is supported by the Senate and House Reports, which state that a predominantly intrastate company is "essentially not the kind of public-utility holding

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<sup>24</sup> Section 3(a)(1); 17 C.F.R. 250.2(a)(1) (2002).

compan[y] at which the purposes of the legislation are directed ...."<sup>25</sup>

The Commission established early on in the administration of the Act that the "predominantly intrastate" standard is applied only to utility activities and that non-utility activities of a holding company, wherever located, should not prevent a holding company from obtaining an exemption under Section 3(a)(1) to which it would otherwise be entitled.<sup>26</sup>

The ALJ ignores this precedent and, consequently, makes a critical error in applying Section 3(a)(1) in this matter. The ALJ's initial decision focuses on PGE's activities in interstate commerce as a basis for its finding that PGE is not intrastate, for example, by finding that PGE's purchases of electricity in interstate commerce and the use of its transmission grid in interstate commerce prevented Enron from qualifying for the exemption.<sup>27</sup> As discussed in more detail below, these factors have never been material to the exemption determination and no party suggested that they should be a factor in this decision. Traditionally, the Commission has instead focused on operational aspects of a utility's business that help to indicate where the utility provides utility service. The initial decision failed to recognize that the purpose of the analysis is to determine whether a public utility company, although it may be engaged in interstate commerce, has a sufficiently intrastate character that it is effectively subject to state regulation. The initial decision's focus on interstate commerce, generally, cannot be the

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<sup>25</sup> *Non-Utility Diversification by Intrastate Public-Utility Holding Cos.*, Holding Co. Act Release No. 24815 (Feb. 7, 1989) ("*Non-Utility Diversification*") at 5-6 (footnotes omitted).

<sup>26</sup> *Monarch Mills*, Holding Co. Act Release No. 426 (Nov. 5, 1936); *Int'l Pulp Co.*, Holding Co. Act Release No. 479 (Dec. 15, 1936), *Millville Mfg. Co.*, Holding Co. Act Release No. 489 (Dec. 17, 1936); *Southeastern Ind. Corp.*, Holding Co. Act Release No. 603 (Apr. 7, 1937); *Copper Range Co.*, Holding Co. Act Release No. 545 (Feb. 11, 1937).

<sup>27</sup> Initial decision at 22.

correct approach to the Section 3(a)(1) exemption determination. Since virtually all US utilities are engaged in interstate commerce, such an interpretation would prevent any utility holding company from qualifying for the exemption.<sup>28</sup> The discussion of the Commission's recent decision in *C&T Enterprises*, further illustrates that the Commission has not in other similar cases followed the ALJ's analysis in implementing the exemption under Section 3(a)(1).

The ALJ compounds the error in applying Section 3(a)(1) to this case by refusing to give sufficient weight to the overwhelming evidence in the record that the OPUC can adequately regulate PGE, and PGE's transactions with Enron. The Commission has found that a "major purpose of the Act was to create a system to control public-utility holding companies that escaped effective state regulation because of their interstate activities."<sup>29</sup> In this matter, the OPUC expressly stated that it could adequately regulate PGE, that it viewed PGE as an Oregon utility, and that PGE's sales of wholesale power outside of Oregon were related to PGE's provision of utility service to Oregon consumers.<sup>30</sup> The record also clearly demonstrates that PGE has no retail customers

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<sup>28</sup> The relevance of the policy issue raised by the initial decision is highlighted by the filings, in this proceeding, by the Edison Electric Institute and the National Association of Regulatory Utility Commissioners, two entities with a national scope.

<sup>29</sup> *Non-Utility Diversification* at 2.

<sup>30</sup> The reply brief submitted by the OPUC in this proceeding could not state the point more clearly:

"The OPUC continues to believe that it has adequate authority to regulate Portland General's utility activities regardless of whether Portland General transacts some out-of-state wholesale sales and owns a part interest in the Colstrip generating plants in Montana. The OPUC effectively regulates both of these activities by having access to the books and records of Portland General and regulating the retail rates charged to Portland General's Oregon customers."

OPUC Reply at 4-5. The OPUC also regulates PGE's energy purchases. In addition, in the context of approving Enron's acquisition of PGE, the OPUC imposed many conditions on PGE's activities as they relate to Enron that have substantial regulatory impact. *See*, Ex. No. JP-1 for the OPUC order authorizing Enron's acquisition of PGE and Enron's Brief in Support of its Applications for Exemption at 37-39 for a summary of the numerous ways in which PGE is operationally and legally separate from Enron.

located outside of Oregon and, therefore, there are no customers that are unprotected by adequate state regulation.<sup>31</sup> All of this evidence is uncontroverted and it bears directly on Enron's entitlement to the exemption. The ALJ failed, however, to connect her finding that "Nothing in the record disputes OPUC's claim that it adequately and effectively regulates Portland General's utility activities,"<sup>32</sup> to the determination of whether PGE is intrastate in character. The ALJ ignored the legislative history quoted above that clearly indicates that companies such as Enron, that own a single-state utility such as PGE that is effectively regulated by the state commission, are "essentially not the kind of public-utility holding compan[y] at which the purposes of the legislation are directed."<sup>33</sup> The ALJ simply dismissed this information, finding that "OPUC's position is significant, but not controlling."<sup>34</sup> A fundamental error in the application of Section 3(a)(1), in light of long-standing precedent and the Act's legislative history, cannot be so lightly dismissed. If the Commission is at this time to change its policy on the administration of Section 3(a)(1) and adopt the ALJ's reasoning, it should do so explicitly and with good reason for the change.<sup>35</sup>

The recent decision in *C&T Enterprises*, provides a good example of how the Commission has applied Section 3(a)(1) consistent with the Congressional purpose underlying that exemption. In *C&T Enterprises* the Commission, on delegated authority, found that a Pennsylvania holding company that proposed to acquire a material utility

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<sup>31</sup> OPUC Brief at 3.

<sup>32</sup> Initial decision at 21.

<sup>33</sup> *Non-Utility Diversification* at 2.

<sup>34</sup> Initial decision at 21.

<sup>35</sup> "An agency changing its course must supply a reasoned analysis..." *Motor Vehicle Mfrs. Ass'n, v. State Farm*, 463 U.S. 29, 57 (1983), citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnote omitted). The initial decision deserves review if for no other reason than to clarify the rationale for the Commission's change in its approach to the application of the Section 3(a)(1) exemption.



subsidiary, organized in Pennsylvania, but operating in both Pennsylvania and New York, qualified as an exempt holding company. The gas utility subsidiary, Valley Energy, Inc. ("Valley"), conducts a significant part of its utility business in New York where it had approximately 20% of its retail customers.<sup>36</sup> Based on an analysis of a variety of financial information, the Commission concluded that "[t]here appears to be little possibility in this case that the holding company structure will be used to evade state and local regulation, or that regulation under the Act is needed to supplement state regulation in order to prevent detriment to the interests protected by the Act."<sup>37</sup> Accordingly, the Commission found Valley to have a predominantly intrastate character (*i.e.*, predominantly a Pennsylvania utility) and C&T Enterprises was granted the exemption.

A review of the relevant facts in *C&T Enterprises* illustrates the Commission's analysis under Section 3(a)(1) and provides a useful reference point to the facts about PGE that are in this record. Valley is engaged in the business of selling and distributing gas in parts of one county in north-central Pennsylvania and in portions of two counties in south-central New York, and serves approximately 5,000 customers in Pennsylvania and 1,300 customers in New York. Unlike PGE, Valley is subject to regulation as a public utility company in two states, Pennsylvania and New York.<sup>38</sup> The Commission considered information about Valley's gross operating revenues, net operating revenues, utility operating income, net utility income and net utility plant for a five and one-half year period and compared the amounts derived in New York to Valley's total business to determine whether Valley was intrastate in character. The most recent financial period in

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<sup>36</sup> *C&T Enterprises* at 5.

<sup>37</sup> *Id.* at 20.

<sup>38</sup> *Id.* at 5, 8.

the record, the high and low points during the period, and the averages over the 5 1/2 year period are shown in the table below to summarize the financial measures reviewed by the Commission.

<b>Financial Measure</b>	<b>Valley Portion of Total Utility Activity Attributable to New York - Range of Data (%)<sup>39</sup></b>			
	<b>Most Recent Period</b>	<b>High</b>	<b>Low</b>	<b>Average 1997 - 2002 (through 6/30/02)</b>
Gross Operating Revenues	20.5	20.5	14.2	16.3
Net Operating Revenues	20.1	20.1	-6.6	11.7
Utility Operating Income	18.9	18.9	-66.1	-10.0
Net Utility Income	99.6	99.6	-111.3	-53.0
Net Utility Plant	13.5	13.5	12.4	13.2

It is clear that with reference to some financial measures, especially income, there was great variability over the five and one-half years. In another category, net utility plant, there was almost no change. Based on the most recent period presented in the decision, the New York portion of Valley's operations accounted for about 20% of Valley's total operations, which is consistent with the breakdown of customers between New York and Pennsylvania.

The Commission's decision noted, however, that although it has traditionally considered a wide range of numerical factors, in practice, it has given the greatest

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<sup>39</sup> Based on a summary of the tables reviewing financial information considered in *C&T Enterprises*. See, *Id.* at 12-16.

deference to revenues.<sup>40</sup> In this particular decision, in fact, the Commission made a point to consider net operating revenues more closely than the other data because it found this financial indicator to be more reliable. Net operating revenues (also known as operating margin) are the result of subtracting the cost of gas sold by a gas utility company, the cost of fuel used to generate electricity by an electric utility company, or the cost of purchased power, from the gross revenues of the utility company. Net operating revenues can be a more accurate measure of a utility's fundamental business because by subtracting the cost of the commodity that is delivered by the utility, one can see the revenues that are derived from providing the underlying utility delivery service. Since a public utility company sometimes sells its delivery service with the commodity gas or electricity and sometimes sells the delivery service alone, with the commodity sold by third party marketers, including the commodity cost in the comparison can distort the outcome of a comparison of utility service activity.<sup>41</sup>

C&T Enterprises urged the Commission to consider the differences between Valley's utility operations in Pennsylvania and New York, and urged the Commission to use a net operating revenues comparison to adjust for those differences. The Commission agreed, noting that Valley's Pennsylvania customers included more industrial consumers that purchased only gas transportation service, not the underlying commodity. In New York, by contrast, Valley's customers tended to purchase both gas and transportation service, thus exaggerating the revenues from New York. By subtracting the cost of gas from utility revenues in both states, a net operating revenues comparison allowed the underlying utility service (*i.e.*, the provision of gas delivery service through the pipes,

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<sup>40</sup> *Id.* at 11.

<sup>41</sup> *See, Id.* at 16-17.

compressors and meters owned by the utility) to be compared on an equal basis. Notably, by relying significantly on the net operating revenues comparison, the Commission was tacitly taking the position that the revenues derived from the sale of the gas commodity were not important for purposes of the Section 3(a)(1) predominantly intrastate analysis.<sup>42</sup> That position is indeed correct because the sale of gas as a commodity is not inherently a utility activity. Gas can be sold by any number of non-utility energy marketers competing in the marketplace, while the gas delivery function, performed with the hard assets owned and operated by Valley, could only be performed by a public utility company.

Lastly, the Commission noted C&T Enterprises' argument that the expected future growth in Valley's New York utility service area would be slow, while the growth in the Pennsylvania service territory would be comparatively greater. Based on these historic trends, the importance of Valley's New York operations was expected to decrease over time.<sup>43</sup>

The similarities between PGE and Valley are striking. Enron is confident that when the Commission carefully considers the fundamental nature of PGE's utility operations, as it did with respect to Valley, that the Commission will find that PGE is predominantly intrastate in character. In most respects, PGE is more intrastate in character than Valley. All of PGE's retail customers are located in Oregon, approximately the same percentage of its net utility plant is located in Montana (*i.e.*, the Colstrip plant) as was Valley's in New York, PGE's employees and offices are all located

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<sup>42</sup> *See, Id.* at 17-18.

<sup>43</sup> *Id.* at 18.

in Oregon, it serves only Oregon counties, its tax bills for income, property, franchise fees and other taxes are paid substantially to Oregon, and it is regulated on the state level by only the OPUC.

PGE's utility income also is predominantly from Oregon. The Division and the ALJ make much out of the fact that on a gross basis, PGE's wholesale sales outside of Oregon during the years 1999-2001 accounted for an average of 34% of PGE's gross revenues.<sup>44</sup> This analysis, however, suffers from the same distortion that the Commission made a point to avoid in *C&T Enterprises* between Valley's Pennsylvania and New York operations. PGE's activity in Washington state at the mid-Columbia wholesale power market trading hub is vastly different from PGE's electricity generation, transmission and distribution activity in Oregon in the service of over 700,000 retail customers.

In Oregon, PGE generates electricity in bricks and mortar plants that it owns, it transmits and distributes that electricity to customers over wires, poles and towers that it owns and it provides that power to end-use consumers under terms of service subject to the full regulation of the OPUC. In Washington, by contrast, PGE purchases power under long and short-term contracts both in bilateral transactions and at market hubs, and it sells surplus power at the established wholesale market hubs. PGE owns no bricks, mortar, wires, poles or towers in Washington or elsewhere out-of-state, with the exception of a portion of the Colstrip mine-mouth plant located in Montana. All of PGE's sales outside of Oregon are to wholesale purchasers.

Furthermore, PGE is a net purchaser because it buys more power to serve Oregon consumers than it sells at wholesale. PGE's out-of-state wholesale purchases of power

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<sup>44</sup> Division Post-Hearing Brief at 19-20; Initial decision at 19.

exceeded out-of-state wholesale sales in every year from 1998 to the present. On an intrastate basis, wholesale purchases also exceeded wholesale sales.<sup>45</sup> This distinction is important because it demonstrates that PGE's activities in the wholesale market are in support of its Oregon retail utility operations.

To avoid the distortion created by the volume of wholesale power sales transactions, as compared to the underlying retail utility business conducted by PGE, it is appropriate to use a net operating revenues financial measure. Netting PGE's purchased power costs from PGE's revenues from both in-state and out-of-state activities, as was done with the cost of gas for Valley, would allow the Commission to accurately compare PGE's underlying utility business both inside and outside Oregon. After the cost of purchased power is subtracted from gross revenues, the remainder is net operating revenues. This represents the value of electricity produced by PGE's owned generation and the value of the services that PGE provides to transmit and distribute electricity. These are the basic utility services that any integrated electric utility provides. As with Valley's sales of gas, the sale of electricity by PGE at wholesale is not inherently a utility function because it can, and often is, conducted in the competitive power trading market by non-utility power marketing companies. Since PGE's retail customers and distribution network are entirely within Oregon and its transmission system, with the exception of a

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<sup>45</sup> See, Ex. No. JP-5.

negligible portion associated with the Montana Colstrip plant, also is in Oregon, PGE's net operating revenues are exclusively from Oregon.<sup>46</sup>

Accordingly, if the Commission is to apply a consistent methodology to its exemption determinations under Section 3(a)(1), it must find under the *C&T Enterprises* precedent that PGE is predominantly intrastate in character and that Enron is entitled to an exemption under Section 3(a)(1).

In addition, the ALJ's initial decision incorrectly analyzes the question of whether PGE is predominantly intrastate in character by focusing on a number of factors that have not been traditionally relied upon by the Commission in making determinations under Section 3(a)(1), while discarding other compelling factors presented by Enron. Specifically, the initial decision finds that although "[PGE]'s strong ties to Oregon are not in dispute,"<sup>47</sup> PGE cannot be considered to be predominantly intrastate in character because: (a) PGE depends, to a significant or substantial degree, on power purchased out-of-state to serve its retail customers and, in 2001, 36% of the electricity needed to meet

<sup>46</sup> The table below demonstrates how PGE's purchased power costs exceeded gross revenue from wholesale sales in 2002.

**Gross Revenues and Purchased Power Costs - 2002**

<u>For Year Ended December 31, 2002</u>	<u>Mwh</u> <u>(Thousands)</u>	<u>Dollars</u> <u>(Millions)</u>	<u>10-K*</u>
<u>Gross Revenues</u>			
Retail	18,771	\$1,468	Page 5
Wholesale	12,645	\$391	Page 5
Other Operating Revenues - Trading Activities - net	(0)	(\$1)	Page 5
Total Gross Revenues	<u>31,416</u>	<u>\$1,858</u>	
Purchased Power Costs (Excludes Generation)	<u>24,930</u>	<u>\$979</u>	Page 25
Net Operating Revenues (Gross Revenues - Purchased Power Costs)	<u><u>6,485</u></u>	<u><u>\$879</u></u>	
Amount by Which Purchased Power Costs Exceed Gross Revenue from Wholesale Sales (Purchased Power Costs - (Gross Revenues - Retail - Trading Activities-net))	<u><u>12,286</u></u>	<u><u>\$588</u></u>	

\* Annual Report on Form 10-K filed by PGE on March 17, 2003, SEC File No. 1-5532-99.

<sup>47</sup> Initial decision at 22.

peak load came from short-term purchases; (b) PGE earned between 9% and 19% of its gross revenues from marketing power out-of-state, a business activity that the initial decision found has no relation to serving retail customers; and (c) PGE owns a substantial interest in the Pacific Northwest AC Intertie ("Intertie"), which is used primarily for interstate purchases and sales of electricity among Bonneville Power Administration ("BPA"), the Pacific Northwest utilities, including PGE, and California utilities.

Additionally, PGE's transmission system is part of the Western Electricity Coordinating Council ("WECC") (formerly known as the WSCC), which the decision characterizes as a "dynamic marketplace for the trading of electricity."<sup>48</sup>

Notably, none of these factors affects whether PGE is adequately regulated by the OPUC or whether PGE is not fundamentally an Oregon utility in character. As noted previously, virtually all U.S. utilities use their transmission grids in interstate commerce to buy and sell electricity. This is a basic utility practice intended to efficiently balance energy supplies and to maintain system reliability. These errors in the initial decision are addressed in more detail below.

1. Location of Utility Assets

PGE's out-of-state purchases of energy and its ownership interest in the Intertie are not relevant factors for analysis under Section 3(a)(1). The out-of-state purchases of energy cited in the initial decision (as contrasted with sales) have never before been a factor in the Section 3(a)(1) analysis because the location where energy purchases occur is unrelated to whether the state regulator with jurisdiction over the utility's service territory can adequately protect end-use customers.

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<sup>48</sup> *Id.*



In addition, PGE's portion of the Intertie, a high voltage transmission facility that supports the import and export of power, is located exclusively in Oregon.<sup>49</sup> The fact that such facility is used to transmit power in interstate commerce also is unrelated to whether the OPUC can adequately protect PGE's end-use customers. Both the costs and expenses associated with PGE's share of the Intertie are included in PGE's retail rates that are approved by the OPUC. In addition, the revenues received by PGE from providing transmission service to the public using its transmission facilities, including the Intertie, are credited to PGE's retail customers. Lesh, 14-15:318-24. There can be no doubt, therefore, that PGE's ownership interest in the Intertie has a predominantly intrastate character as evidenced by the manner in which such interest is managed by PGE, an exclusively Oregon utility, and treated by the OPUC, the Oregon utility regulator.

In addition, the initial decision improperly compares PGE's share of Colstrip to PGE's owned generation and finds that PGE's share of Colstrip is too large. As discussed above, PGE's out-of-state utility assets percentage is directly in line with the percentage of out-of-state assets owned by Valley, which was found to be predominantly intrastate in character.<sup>50</sup> Moreover, such comparison is misleading because PGE does not rely solely on owned generation to supply its load. Rather, as discussed below, PGE relies, to a great extent, on purchased power. As a percentage of total generating resources, PGE's share of the Montana plant represents 8% of the 3,365 MW combined generation and firm power purchases that PGE uses to serve its native load, on a MW basis. Therefore,

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<sup>49</sup> PGE owns an interest in the Intertie, a 4,800 MW transmission facility that runs between the John Day Substation in northern Oregon and the Malin Substation in southern Oregon by virtue of its ownership of certain facilities comprising the Intertie. Test. of M. Ryan ("Ryan"), 2-3:45-58. The Intertie provides important connections to the Pacific Northwest's transmission system that support the delivery of power from owned generation and purchased power to PGE's Oregon retail customers. Ryan, 3-4:65-70, 4:80-82.

<sup>50</sup> The Colstrip interest represents 13.1% of the undepreciated book value of PGE's total utility plant. Turina, 9:196-202. See, *C&T Enterprises* at 2-5.

PGE's portion of the Colstrip assets is a small part of PGE's total resources and utility plant. Even if the Colstrip interest were material, it would not be sufficient to render PGE not predominantly intrastate because the interest is dedicated to serving PGE customers in Oregon. Because of the low variable cost of Colstrip power, PGE dispatches this power more or less constantly, as base load power to meet native load requirements. PGE's customers are assigned the benefit of the low-cost Colstrip power in the ratemaking process. PGE's Colstrip interest, therefore, has Oregon character because it is used primarily to provide service to PGE's native load customers in Oregon. Turina, 9:185-90, 10:206-07, 10:223-25.

## 2. Wholesale Trading Revenues

The initial decision also finds that the level of PGE's gross revenues from wholesale trading activities prevents a finding that PGE's utility activities are intrastate in character.<sup>51</sup> PGE's wholesale electricity trading activity falls into two categories: power procurement activities and power trading activities (the "retail book" and "non-retail trading book", respectively). Turina, 3-4:47-74. The differences between these two categories are explained below.

Oregon law requires PGE to provide safe and adequate service to its customers at reasonable rates. In connection with that obligation, "[PGE] owns distribution, transmission, generation, and other assets and also contracts for various services, including power generation and natural gas transportation." Lesh, 3:65-67. PGE's owned generation is not sufficient to satisfy its native load requirements.<sup>52</sup> Turina, 2:43. To

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<sup>51</sup> Initial decision at 19-20.

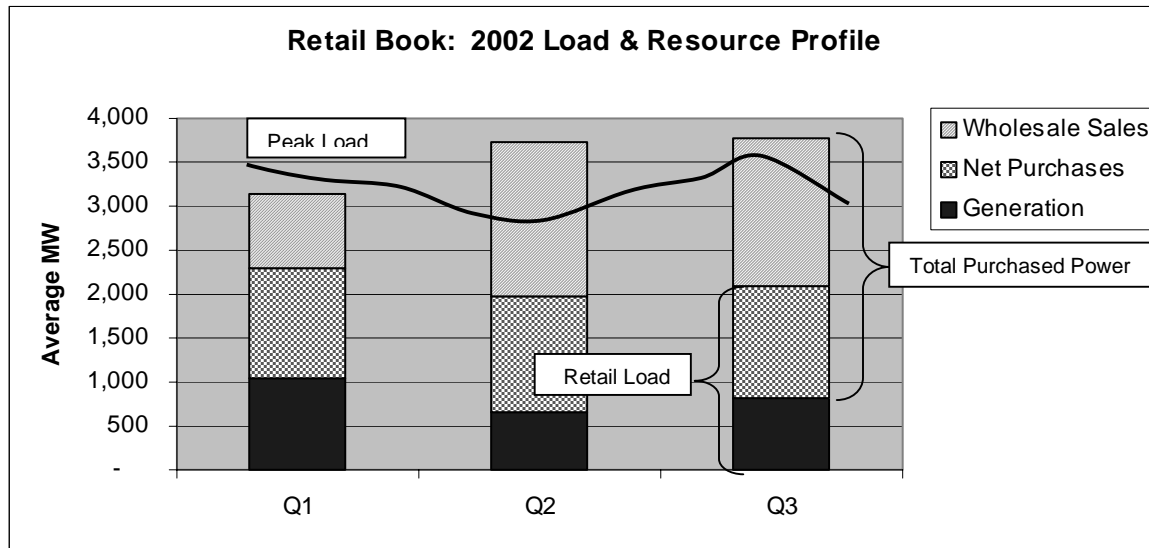
<sup>52</sup> PGE's strategy of relying significantly on the wholesale markets to procure power for its retail customers, rather than generating such power, was motivated by a desire to serve its customers more efficiently. PGE

meet the adequate service obligations imposed by Oregon's utility law, PGE must have enough owned and contracted resources to meet the maximum amount of power demanded by its retail customers and a reserve margin. Lesh, 5:96-99, 9:189-91. To meet its customers' demand and maintain the necessary reserve margin, PGE acquires power at wholesale in addition to relying on owned generating resources.<sup>53</sup> As a result of variations in consumption and availability of resources, PGE has the need to "shape" its power supply to the shape of the demand of its customers in Oregon by acquiring blocks of power sufficient to meet its peak load requirements and then selling excess power (in smaller blocks) when PGE can do so at prices at least equal to variable cost. The power sales are necessary to lower the overall cost of power to PGE's retail customers. Lesh, 9:185;191-201.

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adopted this strategy upon the decommissioning of its Trojan nuclear plant in 1993 "because the confluence of excess capacity in the WECC and [Federal Energy Regulatory Commission] ("FERC") actions to facilitate wholesale market activities allowed [PGE] to replace Trojan's contribution to [its] resource system with the lowest cost power at the time. In the late 1990s, [PGE] reaffirmed this strategy because it supported [Oregon's] movement toward competitive retail electric services" and reduced the potential for stranded costs. Power purchase contracts provide more flexibility to adjust the supply portfolio, thereby avoiding stranded costs that could be associated with fixed assets, should PGE's customers decide to purchase power from competing suppliers. Lesh, 11:232-41. Thus, the increase in wholesale sales revenues did not result from a shift in PGE's business focus, but rather resulted from a series of factors connected to the intrastate focus and character of PGE's utility activities.

<sup>53</sup> "[PGE] currently uses a mix of owned generation, including coal, gas, and hydro-electric resources, long-term power purchase agreements, and shorter-term power purchase contracts." Turina, 2:39-41. Among PGE's major sources of electric power are long-term contracts with four hydro-electric projects located in Washington, on the Columbia River. Lesh, 4:86-88; Turina 4:76-77.



The result of this approach is that PGE's customers enjoy significantly lower power supply costs than they would if PGE did not resell portions of the power that it purchases at wholesale. In sum, PGE's sales of excess power acquired for supply and reliability purposes are made to offset the costs of purchased power. Nevertheless, because of PGE's owned-capacity short position, PGE is a net purchaser of power in interstate commerce. Lesh, 9:189-95; Turina, 2:44-45. PGE purchases more power in the wholesale market for delivery to its Oregon customers than it sells in the wholesale market. Also, the cost of the power it purchases for the retail book is greater than the revenues it receives from the power it sells at wholesale.<sup>54</sup>

<sup>54</sup> For 1998, 1999, 2000, 2001 and the first nine months of 2002, the cost of PGE's wholesale purchases in its retail book exceeded the revenue from sales in that book by \$110,873,000, \$156,844,000, \$116,161,000, \$174,301,000, and \$443,130,000 respectively. The cost of the interstate portion of those purchases exceeded the revenues from the interstate portion of those sales by \$104,672,000, \$143,796,000, \$133,676,000, \$255,584,000 and \$395,957,000 respectively. Piro, 10:209-22; Ex. No. JP-5. In 2002, the cost of PGE's wholesale purchases in the retail book exceeded revenue from sales in that book by \$588,447,000. See, *Annual Report on Form 10K* filed by PGE on March 17, 2003 (SEC File No. 1-5532-99), pages 5 and 25.

Therefore, it would be a misapplication of the law to view PGE's wholesale sales activity out of the context of its effort to achieve the lowest possible cost of power supply for its retail load, all of which is in Oregon. Wholesale sales on the retail book as indicated above, are simply how PGE manages its inventory in support of its business as a retailer of electricity. PGE does not sell electricity at retail in any state other than Oregon and does not acquire power supply inventory for any purpose other than retail service.

The non-retail trading book purchase and sale activity, on the other hand, is essentially brokerage activity that does not involve inventory. It is not a significant business in its own right, it merely enables PGE to monitor wholesale markets so that PGE can better perform its power supply inventory management function on behalf of retail customers. Turina, 7-8:154-64. In addition, when considered on a net basis, as required by FASB to reflect the true impact of such activity, PGE's non-retail trading book revenues are not a significant part of its overall utility business. Indeed, the net revenues for the non-retail trading book were negative \$1 million for the first nine months of 2002 and negative \$11 million for 2001 in comparison to total operating revenues of \$1,361 million and \$2,420 million, respectively.<sup>55</sup> Stated simply, PGE's only business activity that is not directly related to providing service to Oregon utility customers (*i.e.*, the non-retail trading of power) contributed absolutely nothing to PGE's

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<sup>55</sup> Under recently issued guidance of the Financial Accounting Standards Board ("FASB"), "revenues from power trading activities [(*i.e.*, PGE's non-retail trading book) must] be reported net of the costs of purchased power commencing the third quarter of 2002," and "comparative financial statements for prior periods [must] be reclassified to conform to the new presentation.... [S]ince non-retail trading book purchases and sales are settled financially, netting" more accurately reflects the substance of PGE's non-retail trading book transactions and the impact on the company's bottom line. Piro, 11:229-36, 11:242-45. *See also* Ex. No. JP-4. As the table on footnote 46, *supra*, indicates, non-retail trading book revenues for the 12 months ended December 31, 2002 also were negative \$1 million.

revenues or income in the most recent financial periods and, accordingly, whether the business took place inside or outside Oregon, it has little to no relevance in determining what the actual character of PGE's business is today.

The initial decision incorrectly finds that revenues from PGE's non-retail power trading business should not be netted against purchases. However, as discussed above in connection with the *C&T Enterprises* case, to understand the character of a business the proper financial measures must be used to avoid distortions. The objective of the non-retail power trading business, like any energy trading business (or trading in stocks as a market-maker for that matter), is to maximize the margin that can be gained between one side of a trade and the other. Turina, 3-4:67-70. It is a typical market-making business where the objective is to buy low and sell high. The product in which the trader deals is not transformed by the trader's actions, it is not coupled with a service, and it is not possessed or delivered in any physical sense. Turina, 4:72. A financial measure that focuses on the total margin (*i.e.*, net revenues) earned on trading transactions provides substantially more information about the size and scope of such a business and its importance to PGE as a whole than does a focus on gross revenues.<sup>56</sup> In conclusion, the use of net revenues is consistent with the policy expressed in *C&T Enterprises, AES Corp.*, Holding Co. Act Release No. 27063 (Aug. 20, 1999) ("*AES I*") and *NIPSCO* of not relying on financial measures that distort the underlying business comparison and is

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<sup>56</sup> Compare the non-retail trading activity to the retail book activity. The latter involves trading for the purpose of supporting underlying operations. Power purchased for the retail book is transformed from a wholesale commodity by the application of transmission and distribution services into a retail product. Consequently, the retail book is effectively nothing more than a supply function for the retail customers in Oregon, with the wholesale sales of surplus power representing nothing more than cost minimization in the most elementary sense.

consistent with FASB treatment.<sup>57</sup>

When PGE's sales outside of Oregon in the context of managing the retail book are recognized as intrastate in character because of their purpose, PGE's legal obligation to provide reliable and economical service, and their regulatory treatment, and the non-retail trading book sales are properly netted with purchases, PGE's historical financial information shows a clear, undistorted picture. On average, from 1998 to September of 2002, 98% of PGE's total energy sales on a MWh basis and 97% of operating revenues were directly attributable to Oregon retail customers or to managing the supply and price of energy for PGE's retail customers.<sup>58</sup> This result is also consistent with the approach taken in *C&T Enterprises* where the cost of gas was subtracted from Valley's revenues from Pennsylvania and New York. The equivalent cost would be PGE's cost of purchased power. If these costs are subtracted from PGE's revenues all that would remain are revenues from PGE's activities in Oregon because PGE's wholesale power purchase costs exceed its wholesale power sales revenues.

### 3. Use of Trading Hubs

Not only must PGE sell power at wholesale (particularly in connection with its inventory function described above) but it must sell at the place where the conditions are

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<sup>57</sup> The FASB has identified several characteristics that distinguish more useful information from less useful information. Among other characteristics, useful information has the characteristic of "representational faithfulness" which is defined as correspondence or agreement between a measure or description and the phenomenon that it purports to represent. *Statement of Financial Accounting Concepts No. 2, Qualitative Characteristics of Accounting Information*, ¶ 63.

<sup>58</sup> See, Ex. No. JP-4.

most favorable. Consequently, a good portion of PGE's wholesale sales are deemed to take place in Washington state where the key Mid-C hub is located.<sup>59</sup>

In *NIPSCO*, the Commission acknowledges the important role interstate trading hubs play in efficiently managing utility supply portfolios. When PGE's wholesale sales outside of Oregon are viewed in the context of that precedent, it is clear that PGE's activities are prudent, modern utility industry practice that further its Oregon utility business, not a separate utility business located outside Oregon. The Commission's application of PUHCA to Enron and PGE should be flexible enough to accommodate the developments in the industry while still remaining faithful to the underlying policies and purposes of the exemption. It is unfair and inconsistent with Commission precedent and Congress' intent to ignore the current state of the art in the utility industry and to impose outmoded concepts of utility practice on Enron and PGE.

*NIPSCO* illustrates the Commission's modern view of the role of trading hubs. *NIPSCO* involved the combination of an Indiana electric and gas utility with two gas utility companies operating in Massachusetts, New Hampshire and Maine. One of the issues in the case was whether the Indiana and New England utilities could properly be considered to be an integrated utility system. The answer to this question depended, in

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<sup>59</sup> Trading hubs such as Mid-Columbia ("Mid-C"), the California-Oregon Border ("COB"), and Palo Verde have developed at areas of transmission interconnection where many utilities and marketers have rights to deliver or receive energy. Trading hubs have evolved into market centers where power is purchased and sold whether or not there is physical delivery. Seeking better price discovery and liquidity, buyers and sellers increasingly have concentrated their activities at a select group of major hubs where there is the greatest number of sellers and buyers. Major hubs have fewer transmission constraints, better assuring receipt and delivery of scheduled power. Consequently, purchasing and selling at a major hub allows the purchaser and seller to obtain a better and less volatile price and avoid risks associated with trading in less liquid markets. Turina, 4-5:78-109. Limiting PGE's purchases and sales so that they all take place at the Oregon border or within Oregon would impose a significant cost on PGE's retail customers because PGE would be able to buy and sell power with a much more limited group of counter-parties on what would most certainly be less favorable terms than can be obtained by trading at hubs. Turina, 7:140-45. In addition, the location of such trading hubs does not affect state regulatory oversight of PGE. OPUC Brief at 3.



part, on whether the companies' operations were confined to a single area or region defined by reference to the ability to derive gas from a common source of supply.<sup>60</sup>

In considering that question, the Commission noted that it had "taken notice of developments that have occurred in the gas industry, and . . . interpreted PUHCA and analyzed proposed transactions in light of these changed and changing circumstances."<sup>61</sup> The Commission's opinion describes how the utilities would coordinate the management of their gas supply portfolios through "several industry-recognized market and supply-area hubs."<sup>62</sup> It was noted that the combined utilities would be able to obtain gas from production basins by "flexible and efficient means, due to the development of market centers, hubs and pooling points that facilitate transactions between gas buyers and sellers."<sup>63</sup> It is notable that the hubs referred to were located in Ohio, Tennessee, Pennsylvania, Illinois and Louisiana - far away from the Indiana and New England areas where NIPSCO would provide utility services.

In *NIPSCO*, the Commission recognized the vital role of gas market hubs in transforming the gas utility industry and, in particular, aiding in the efficient management of gas pipeline capacity and gas supplies.<sup>64</sup> *NIPSCO* stands for the broad proposition that the use of industry-recognized market hubs to trade gas or energy for purposes of

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<sup>60</sup> See, the definition of an integrated gas utility system under Section 2(a)(29)(B) of PUHCA.

<sup>61</sup> *NIPSCO* at 20, citing a string of precedent for its flexible interpretation of PUHCA the Commission concluded with quotes from *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) ("An agency is not required to "establish rules of conduct to last forever," but rather "must be given ample latitude to adapt its rules and policies to the demands of changing circumstances.") and *Shawmut Ass'n. v. SEC*, 146 F.2d 791, 796-97 (1st Cir. 1945) (an agency "is expected to treat experience not as a jailer but as a teacher").

<sup>62</sup> *Id.* at 21.

<sup>63</sup> *Id.* at 30.

<sup>64</sup> *Id.* at 13, n. 19.

managing a utility's supply portfolio is consistent with modern, prudent utility operations.<sup>65</sup>

*NIPSCO* and *C&T Enterprises*, taken together, highlight an important principle of PUHCA, namely that the underlying nature of the utility activity is the proper focus of the "predominantly intrastate" determination.<sup>66</sup> *NIPSCO* involved wholesale gas portfolio management activities that clearly were not utility activities because a gas utility is defined under the Act as a company engaged in the distribution of gas at retail only.<sup>67</sup> The Commission in *C&T Enterprises* found that revenues from gas sold at retail by a gas utility company, clearly utility revenues under the Act, would not be considered in the predominantly and substantially intrastate analysis of Section 3(a)(1), because the differences in the manner in which the commodity was sold in Pennsylvania and New York would tend to distort the comparison of utility activities in the two states.<sup>68</sup> Enron is merely asking that the Commission treat PGE's electricity commodity sales revenues the same way. PGE's electricity sales activity is much different at the Mid-Columbia hub in Washington than it is in Oregon, so the cost of PGE's purchased power should be stripped from PGE's revenues to reveal the underlying utility business. The Division is correct that, as electric utilities are defined under the Act, wholesale electricity sales when conducted by a utility constitute the electric utility business. But they failed to take that position in *C&T Enterprises*, where retail gas sales when conducted by a utility also constitute the gas utility business. The Division's failure, one repeated by the ALJ, is its

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<sup>65</sup> See, *Id.* at 20-21.

<sup>66</sup> See, *Id.* at 34-35; *C&T Enterprises* at 11.

<sup>67</sup> Compare, Section 2(a)(3) (definition of electric utility company) to Section 2(a)(4) (definition of gas utility company); See, *NIPSCO* at 13-15.

<sup>68</sup> See, *C&T Enterprises* at 17-19.

failure to realize that these commodity revenues can obscure the true nature of the utility business when the objective is to determine whether a utility is predominantly intrastate in character.

Consider, for example, a utility with 500,000 retail customers in Oregon's principal metropolitan area and one wholesale customer just over the border in Washington state (for example, a municipality). The wholesale customer is served by a short transmission line extension from the main concentration of utility facilities located in Oregon. The wholesale customer consumes a large amount of power relative to that consumed by the Oregon retail customers. In this example, a focus on gross revenues would indicate a large percentage of sales derived from Washington, but it would certainly be misleading because the utility is predominantly engaged in servicing its Oregon customers, its assets are principally in Oregon, and the regulatory interest is to adequately protect the Oregon consumers. If *C&T Enterprises* was the applicant under this hypothetical, given evidence of adequate state regulation, the Division would probably advocate that power purchase costs (the equivalent of the cost of purchased gas) be netted from the utility's total revenues to expose the true nature of the utility's activities. Based on the *C&T Enterprises* precedent, we would expect the Division to support an intrastate exemption in such circumstances. If Enron was the applicant under this hypothetical, one need only to look at the Division's current pleadings to know that it would argue that Enron's hypothetical public utility subsidiary is interstate in character and that it is imperative that Enron be regulated as a registered holding company. The Commission's analysis was correct in *C&T Enterprises* and the Commission should follow that precedent in this matter in applying the objective criteria of the exemption

under Section 3(a)(1) consistent with Congress' intent.

Energy trading alone should not affect a company's utility character because it may be conducted by non-utility energy marketers and traders as well as utilities. In fact, subject to OPUC and FERC authorization, PGE could restructure its business operations in a manner that separates the wholesale power trading function into a separate subsidiary of Enron. This business would clearly be classified as a non-utility under PUHCA and none of its revenues would count for purposes of the Section 3(a)(1) predominantly and substantially standard.<sup>69</sup> That a simple structural change could dramatically change the applicability of the Section 3(a)(1) exemption demonstrates that trading activity is not indicative of a business's utility character in the way that distributing energy to retail customers indicates utility character. Accordingly, the Commission's no-action letter precedent provides an additional reason to disregard or at least minimize the weight accorded to PGE's wholesale sales for purposes of evaluating whether PGE is predominantly and substantially intrastate in character under Section 3(a)(1).

Another "solution" to the interstate sales problem would be for PGE to structure all its wholesale power trades contractually so that title to the energy passes from PGE, the seller, to the purchaser within Oregon or at the Oregon state border.<sup>70</sup> The reality of such an approach, however, would be to limit PGE's ability to reduce its power

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<sup>69</sup> See, *Enron Power Mktg., Inc.*, No-Action Letter dated Jan. 5, 1994 (Ref. No. 94-1-OPUR); *AIG Trading Corp.*, No-Action Letter dated Jan. 20, 1995 (Ref. No. 95-1-OPUR). See also, 17 C.F.R. 250.58(b)(1)(v) (2002). These letters take the position that wholesale power trading, absent ownership or control of the underlying utility assets, does not constitute utility activity and was not intended to be regulated as utility activity under the 1935 Act.

<sup>70</sup> See, Division's Statement of Position at 5, n. 9, citing Commission precedent that sales at the state line should be considered intrastate sales for purposes of the Section 3(a)(1) analysis. The *NIPSCO* decision's acknowledgement of the vital importance of interstate trading hubs in managing utility supply portfolios should be read to support the position that the use of trading hubs is consistent with the prudent utility operations of otherwise predominantly intrastate utilities.

procurement costs for its Oregon customers since PGE would have to attempt to sell its excess power in less liquid markets to a much more limited group of customers under non-standard contract terms. Turina, 7:140-45. The irony of both these “solutions” to a problem under PUHCA is that, under the first, the OPUC would have a lower level of jurisdiction than it does now over PGE’s power trading activities and, under the second, PGE’s retail customers would suffer higher costs of service than they do now.

It has been suggested that it is possible that due to certain market changes, wholesale sales became more profitable than retail sales and as such the nature of the activities of utilities may have changed from retail to wholesale.<sup>71</sup> This is not what happened to PGE. If it had, PGE's net revenues from its non-retail trading book would have been significantly positive rather than, as is the case, negative. Furthermore, such a theory ignores the fact that the economic benefits of wholesale purchases and sales in PGE's retail book, necessary to supply PGE's retail load requirements, flow through to PGE's retail customers.<sup>72</sup>

B. Section 3(a)(3) and Section 3(a)(5)

The initial decision fails to properly evaluate and consider the temporary nature of Enron's status as a holding company which is at the cusp of being reorganized in bankruptcy and that will divest its sole public utility subsidiary in connection with such reorganization. Instead, the initial decision finds that Enron's reasons in support of the

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<sup>71</sup> Hrg. Tr. at 105:11-15.

<sup>72</sup> By focusing on the location of power plants and the location of wholesale purchasers, the decision, if affirmed, also will add a geographic factor to decisions concerning the location of power plants and power procurement strategies that ought to be based on economic and environmental considerations. The result is a policy that creates a potential incentive for utilities to pursue behavior that may not be dictated by economic or environmental considerations and that may be adverse to its retail customers.

applications are based on speculation as to its future actions, a dislike for the provisions of PUHCA, and self-interest.<sup>73</sup>

The ALJ also speculates whether certain of the "concerns that PUHCA was designed to prevent" may have occurred with Enron or PGE.<sup>74</sup> The ALJ denied the exemptions in part because she found evidence of: (a) an uncollectible account receivable from Enron and affiliated companies that appears on [PGE's balance sheet, (b) a pledge agreement under which Enron has assigned and pledged certain collateral consisting of interests it holds in PGE, and (c) protections created by the OPUC in connection with Enron's acquisition and ownership of PGE. As discussed in the Petition of FPL Group, Inc. for Review of Initial Decision at 3-8, these matters are not instances of abuses of the type identified in Section 1 of PUHCA.

First, the origin and history of the uncollected receivable demonstrate that it is a sign of a healthy state regulatory system and not an abusive practice related to holding companies. As part of Enron's concessions in the 1997 proceeding evaluating Enron's application to acquire PGE, the OPUC and Enron agreed that in order to share the cost savings of the acquisition with PGE's ratepayers and compensate this group for use of PGE's goodwill and certain utility operations, Enron would pay PGE's customers \$105 million over time. Of this \$105 million, \$74 million was recorded on PGE's books as a merger receivable, and through payments, Enron had reduced the outstanding amount to \$48 million. When Enron declared bankruptcy, PGE classified the account as uncollectible. Thus the receivable is a result of the OPUC's strong regulatory oversight,

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<sup>73</sup> Initial decision at 24.

<sup>74</sup> *Id.*

and its uncollectible nature stems from Enron's inability to pay its creditors and not from an abusive practice targeted by the Act.<sup>75</sup>

Second, the pledging of PGE stock as collateral does not push PGE towards bankruptcy - PGE remains solvent.<sup>76</sup> Including PGE stock in the bankruptcy estate is a natural part of the bankruptcy process since Enron owns these assets. The stock is Enron's asset; PGE's assets remain outside of the estate.

Finally, the ALJ interpreted the OPUC's exercise of its regulatory authority to impose conditions on Enron's acquisition of PGE as evidence of a concern that Congress intended the Act to address. Just the opposite is true. Congress intended the Act to supply a layer of federal oversight when state utility commissions were unable to effectively regulate utilities owned by holding companies. The OPUC's imposition of conditions on Enron and PGE indicate that it has ample regulatory authority and the means to implement that authority.<sup>77</sup>

As noted above, Enron and certain of its affiliates are debtors in possession, in the process of being reorganized. Since the commencement of the chapter 11 cases, the Debtors have worked to formulate and negotiate the framework for a joint chapter 11 plan. The Debtors filed the Plan with the Bankruptcy Court on July 11, 2003. The Plan contemplates the distribution of all of Enron's assets to the creditors, including the

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<sup>75</sup> Petition of FPL Group, Inc. for Review of Initial Decision at 4-5.

<sup>76</sup> *Id.* at 6-7. In fact, despite Enron's bankruptcy, PGE has retained investment grade credit ratings. Piro, 6:124-25. *See also*, Current Report on Form 8-K filed on June 16, 2003 in SEC File No. 1-5532-99 by PGE (Informing that on June 4, 2003, Fitch Ratings (Fitch) upgraded its ratings of PGE senior secured, senior unsecured, and preferred stock to 'BBB-', 'BB', and 'B+' from 'BB+', 'BB-', and 'B', respectively. In addition, Fitch's Rating Outlook was revised from 'Rating Watch Positive' to 'Positive'. Fitch indicated that PGE's ratings reflect the ongoing challenges arising from the Company's status as a subsidiary of an insolvent parent, but that it recognizes a meaningfully improved near-to-intermediate term liquidity outlook and significant improvement in PGE's medium-term financial profile.)

<sup>77</sup> *Id.* at 4.

divestiture of PGE and the ultimate dissolution of Enron. Upon implementation of the Plan or sooner, Enron will cease to be a holding company under PUHCA.<sup>78</sup>

The Commission must consider the Plan and its implications for Enron's status as a holding company to fashion an appropriate resolution for this matter. The ALJ has improperly excluded evidence concerning the bankruptcy process, its goals and expected outcome as speculative<sup>79</sup> and concluded that Enron's claim that it would eventually cease to be a holding company was also speculative. Enron disputes such a characterization, and the Plan filed with the Bankruptcy Court should remove any doubt that may have existed at the time the initial decision was issued with respect to the divestiture of PGE. Once the Plan is implemented, Enron will cease to own PGE and the Commission's jurisdiction under the Act over this matter will terminate. Therefore, Enron is only incidentally a holding company because it is primarily engaged in being liquidated and reorganized and in the interim operating a portfolio of energy related businesses of which PGE is merely incidental.

The ALJ found that Enron's applications for exemption under Sections 3(a)(3) and 3(a)(5) must fail because PGE is material, both on a relative basis with respect to Enron and on an absolute basis with respect to other utilities.<sup>80</sup> Enron has acknowledged that in its current bankrupt state, that PGE most likely represents a substantial part of Enron's

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<sup>78</sup> See note 3, *supra*. See also Enron's Motion to Adduce. The Motion to Adduce was filed to supplement the record with respect to important developments in the bankruptcy proceeding including (a) the filing of the Plan, (b) the timing and process for implementation of the Plan, (c) the constituencies protected through the Plan, and (d) the effect of the Plan on Enron's status as a holding company. The Motion to Adduce also discusses the fact that Enron may qualify for an exemption under Section 3(a)(4) of the Act and that Enron is preparing an application for exemption. This evidence was clearly not available at the time of the hearing, when the Debtors were still negotiating the elements of the Plan with the Creditors' Committee and other parties.

<sup>79</sup> Hrg. Tr. at 26-29.

<sup>80</sup> Initial decision at 24.



revenues and income. But, it is not a foregone conclusion, therefore, that PGE is material to Enron as a matter of law under Sections 3(a)(3) and 3(a)(5). As the Commission's cases under Section 3 of the Act make clear, materiality is a term of art under the Act and what is material under the other securities laws administered by the Commission is not necessarily material under Section 3 of the Act. Indeed, materiality under Section 3(a)(1) may be significantly different from materiality under Sections 3(a)(3) and 3(a)(5).<sup>81</sup>

The *AES II* case is particularly instructive in this regard. In that matter the Commission clearly found that AES's combined utilities represented a greater part of AES's revenues than would have been acceptable under prior Commission precedent, yet the exemption under Section 3(a)(5) was maintained. Materiality as a matter of law under Section 3(a)(5), therefore, is malleable under appropriate circumstances where the objective is to effectuate the purposes of the Act and to bring companies into compliance.<sup>82</sup>

In addition, there is no compelling reason to regulate Enron as a registered holding company because Enron's holding of PGE shares is temporary and, pending divestiture, Enron's ability to exercise control over PGE is limited.<sup>83</sup> Therefore, Enron

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<sup>81</sup> *NIPSCO* at 27-28.

<sup>82</sup> *AES II* at 22-23.

<sup>83</sup> *See* Motion to Adduce. Under the Plan, Enron's custody of PGE shares (either directly or through a to-be-formed trust or other entity to which Enron would contribute PGE shares after the receipt of the necessary regulatory approvals (the "PGE Trust")) would be only temporary and such custody would be maintained solely for the benefit of Enron's creditors under the guidance of an administrator appointed with creditor and Bankruptcy Court consent. The administrator would be Stephen Forbes Cooper, LLC. The purpose of the PGE Trust would be to hold the PGE interest for the sole benefit of the Debtors' creditors until PGE could be sold or its shares distributed as required by the Plan. In addition, Enron's exercise of control over PGE pending implementation of the Plan would be significantly restricted. First, the management of PGE, comprised of persons that are not Enron officers or directors, would continue to manage the day-to-day operations of the utility. Second, the Debtors' operations, post-Plan confirmation, would be managed by an administrator, appointed by the Bankruptcy Court, that would be responsible for managing the assets of the estate as a fiduciary for the benefit of the Debtors' creditors. The Plan administrator's principal motivation with respect to PGE's management would be to prevent a decrease in

should be exempt from registration for what will likely be a short-lived period of holding company status for Enron following confirmation of the Plan.<sup>84</sup> An exemption, conditioned as necessary to assure that PGE is divested under the Plan and that Enron does not engage in unauthorized affiliate transactions with PGE before it is divested, would focus the Commission's jurisdiction over Enron appropriately on protecting the public, investors and consumers, without delaying the chapter 11 reorganization process and adversely affecting Enron's operating subsidiaries with the need to obtain additional regulatory approvals.

The negative implications of registration on the advancement of the bankruptcy process are significant. Enron's request that the Commission avoid needless adverse consequences for its existing businesses and a delay in implementing the Plan cannot properly be characterized as motivated by a "dislike for the provisions of PUHCA, and self-interest."<sup>85</sup> If Enron is required to register as a holding company under PUHCA there will be a seriously disruptive effect on the chapter 11 process that is already well advanced. Enron's registration process would be extremely complicated and can be expected to raise a number of novel issues that will have to be considered by the Commission. As just an example, Enron's registration could affect the ability of Enron's only public utility subsidiary, PGE, to borrow under its short-term credit facility and could limit the ability of Enron's profitable, non-debtor subsidiaries, such as its interstate gas pipeline companies to raise funds to finance pipeline acquisitions. The dissolution of

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the value of the PGE equity to the detriment of the Debtors' creditors. The Plan administrator would report to a new Enron board of directors. The new board of directors will be comprised of five members, appointed by the Debtor in consultation with the Creditors' Committee (with respect to four directors), and the Enron North America Examiner (with respect to one director).

<sup>84</sup> Registration may, in fact, prolong Enron's existence as a holding company by delaying the process that will culminate in the divestiture of PGE.

<sup>85</sup> Initial decision at 24.

many Enron subsidiaries, pursuant to Bankruptcy Court orders and otherwise, also could be put on hold, adversely affecting Enron's ability to simplify its corporate structure and to package assets for distribution to the Debtors' creditors.

Registration also would reduce both the marketability of PGE and the likelihood that it will be sold to a third party. If PGE cannot be sold because its purchaser will not qualify for an intrastate exemption, or it can be sold only to a very limited group of potential purchasers, the value of PGE in the Debtors' estate will decline. Therefore, Enron has argued that denying, not affirming, the exemption would be harmful to PGE's customers and investors and Enron's creditors. The ALJ erroneously refused to consider this proffered evidence even though it related directly to interests protected under PUHCA.<sup>86</sup>

Also of great concern is the possibility that the Commission may interpret PUHCA to require the Plan to be first submitted to and authorized by the Commission, after an opportunity for a hearing.<sup>87</sup> The addition of a second forum for the consideration of the Plan that is separate and apart from the Bankruptcy Court would unavoidably delay the implementation of the Plan.

Moreover, separate Commission review of the Plan is unnecessary because the Commission has filed a notice of appearance in the Debtors' bankruptcy cases under

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<sup>86</sup> The ALJ rejected the Prepared Direct Testimony of Michael Hoffman submitted by Enron in this proceeding. Mr. Hoffman, an experienced investment banker, described the negative effects on the value of PGE associated with the loss of the intrastate exemption.

<sup>87</sup> In its June 18, 2003 motion to expedite the procedural schedule, the Division takes the position that the Debtors' Plan and disclosure statement would require Commission authorization under Section 11(f) of PUHCA, after an opportunity for a hearing, prior to its submission to the Bankruptcy Court and the solicitation of creditor consents to the Plan. *See* Motion for Expedited Consideration of Enron's Appeal of the Initial Decision at 6. At this point, a full discussion of these issues is not required, but Enron wishes to note that it does not concede any aspect of Commission jurisdiction over the Plan if Enron is required to register under the Act and reserves the right to present its position on these issues to the Bankruptcy Court and the Commission at a future date.

Section 1109(a) of the Bankruptcy Code and, thus, is already able to participate in the development of the Plan in the Bankruptcy Court. The Plan and disclosure statement will be reviewed by the Bankruptcy Court, representatives of the creditors, and this Commission, and hearings will be held in the Bankruptcy Court prior to the solicitation of creditors and prior to Plan confirmation. Separate Commission hearings on the Plan and a separate Commission review of the Plan and disclosure statement are not only not required by PUHCA, but would be unnecessary, wasteful of the assets of the estate, and would delay confirmation and implementation of the Plan by months.

In addition, because the Plan, as proposed, requires the separation of PGE from Enron and the distribution of all the value in the Debtors' estates to creditors, the Plan is in all respects a vehicle for the liquidation and dissolution of Enron as a holding company. The elimination of Enron as a holding company is the ultimate remedy under PUHCA. Since this remedy is already being implemented, the Commission's focus should be on promoting the achievement of this end through an appropriately conditioned exemption.<sup>88</sup>

An exemption with conditions is not unprecedented. The Commission has a long history of fashioning flexible remedies that promote the orderly disposition of businesses, not fire sales, for the plain reason that orderly dispositions preserve value consistent with the intent of PUHCA to protect investors.<sup>89</sup> As recently as 2001, the Commission

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<sup>88</sup> The Division has taken the position that Enron simply *must* be registered. Division Statement of Position at 2-3; Division Post-Hearing Brief at 2. However, the Division has failed to demonstrate how registration under the present circumstances will advance the interests protected by the Act. Further, the Division has failed to rebut the arguments presented by Enron to demonstrate that registration would be counterproductive to such protected interests. As a matter of policy, the Commission must decide this case in a manner that protects the interest of investors and consumers, and not one that harms these interests.

<sup>89</sup> See e.g., the Commission's decision in *Lykes Bros.*, in which a Lykes, Florida holding company of a Florida gas utility, Peoples Gas System, Inc., was granted an exemption under section 3(a)(1) in all respects

fashioned a conditional exemption remedy for AES Corp. when it was faced with the potential loss of QF investment values if required to register, similar to Enron. AES sought to acquire a public utility subsidiary that would cause it to lose its exemption under Section 3(a)(5) and cause harm to its QF investments. The Commission permitted the acquisition and allowed AES to maintain its Section 3(a)(5) exemption for two years while AES divested utility holdings that precluded its qualifying for the exemption under the traditional exemption criteria.<sup>90</sup>

Enron seeks the same sensible application of regulation under the Act that the Commission made available to AES. The initial decision failed to appropriately apply the Commission's *AES II* precedent in this regard, and for that reason the ALJ made an error of law. If affirmed by the Commission, the initial decision would needlessly harm the value of Enron's QF and PGE interests, and consequently, would lower the value of the Debtors' estate that is available to satisfy creditors. For this reason the initial decision should be reversed. Enron's application under Sections 3(a)(3) and 3(a)(5) should be granted, consistent with the Commission's policy of interpreting and applying PUHCA to protect the interest of investors.

### III. CONCLUSION

The initial decision incorrectly denied the two applications for exemption at issue in this proceeding. With respect to Enron's application for exemption under Section 3(a)(1) of PUHCA, the initial decision failed to follow precedent and to apply the exemption in light of the legislative history of Section 3(a)(1), and the ALJ considered

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except to the extent of requiring under the "unless and except" clause that Lykes register under the Act for the purpose of filing a plan under section 11(e) of the Act to dispose of its ownership of Peoples. *Lykes Bros., Inc., Holding Co.* Act Release No. 20487 (Apr. 6, 1978).

<sup>90</sup> See, *AES II*.

irrelevant factors that are not traditionally relied upon in Section 3(a)(1) determinations. As demonstrated over the course of the proceeding, and discussed in this brief, PGE is predominantly intrastate in character and carries on its business substantially in Oregon. The OPUC supports an exemption for Enron under this section and the record is clear that PGE is effectively regulated by the OPUC. Accordingly, the Commission should find Enron exempt under Section 3(a)(1).

Enron's application for exemption under Section 3(a)(3), or, in the alternative, Section 3(a)(5) of PUHCA is based on Enron's incidental holding company status and the temporary need for the exemption. The initial decision fails to give appropriate weight to the negative implications of registration to the Enron bankruptcy process, the potential harm to the interest of Enron's creditors, and is inconsistent with the precedent in *AES II*. The filing of the Plan provides additional support for a temporary exemption for Enron which would allow the reorganization process to be concluded without undue delay and detriment to the Debtors' creditors.

For all the foregoing reasons, Enron is entitled to the exemptions that it has requested as a matter of correct statutory interpretation, Commission precedent and sound regulatory policy. Enron respectfully requests that the Commission reverse the initial decision and grant Enron's applications for exemption.

Respectfully submitted,

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William S. Lamb  
Charles A. Moore  
Sonia C. Mendonca  
LeBoeuf, Lamb, Greene & MacRae, L.L.P.  
125 West 55th Street  
New York, NY 10019-5389  
Attorneys for Enron Corp.

Dated: July 21, 2003

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been sent by U.S. Postal Service first class mail (or hand delivery, as noted) to the following persons on this 21st day of July, 2003.

(By hand)  
Securities and Exchange  
Commission  
Division of Investment  
Management  
450 Fifth Street, NW  
Mail Stop: 0503  
Washington, DC 20549  
Attn: Paul F. Roye  
David B. Smith  
Catherine A. Fisher  
Martha Cathey Baker  
David G. LaRoche  
Deborah D. Skeens  
Alberto H. Zapata  
Christopher W. Chow

Southern California Edison  
Company  
Attn.: Russel C. Swartz  
James B. Woodruff  
J. Eric Isken  
2244 Walnut Grove Ave.  
Suite 342  
Rosemead, CA 91770

Clifford M. Naeve  
Paul Silverman  
William C. Weeden  
Skadden Arps Slate Meagher &  
Flom  
1440 New York Avenue, NW  
Washington, DC 20005

David L. Schwartz  
Julie B. Greenisen  
Latham & Watkins  
555 Eleventh Street, NW  
Washington DC, 20004

(By hand)  
The Hon. Brenda P. Murray  
Chief Administrative Law Judge  
Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, DC 20549

(By hand)  
Arthur S. Lowry  
Securities and Exchange Commission  
450 Fifth Street, NW  
Mail Stop: 0911  
Washington, DC 20549

Electric Power Supply Association  
Attn.: Julie Simon  
Mark Bennet  
1401 New York Avenue, NW  
Eleventh Floor  
Washington, DC 20005

J.A. Bouknight, Jr.  
Cynthia L. Taub  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, NW  
Washington, DC 20036-1795

Jason W. Jones  
Assistant Attorney General  
Department of Justice  
1162 Court Street NE  
Salem, OR 97301-4096

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Sonia C. Mendonca



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

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In the Matter of

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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

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**BRIEF IN SUPPORT OF PETITION FOR REVIEW OF ENRON CORP.**

William S. Lamb  
Charles A. Moore  
Sonia C. Mendonca  
LeBoeuf, Lamb, Greene & MacRae, L.L.P.  
125 West 55th Street  
New York, NY 10019-5389  
Attorneys for Enron Corp.

July 21, 2003

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