

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

In the Matter of

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

Administrative Proceeding

File No. 3-10909

**NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS' AMICUS BRIEF
IN SUPPORT OF THE OREGON PUBLIC UTILITY COMMISSION'S
OPENING BRIEF IN SUPPORT OF PETITION FOR REVIEW**

Pursuant to Rule 210(d)(ii) of the Commission's Rules of Practice, 17 C.F.R. § 201.210(d)(ii)(2002), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits this amicus brief in support of the Public Utility Commission of Oregon's ("OPUC") Opening Brief in Support of Petition for Review ("Brief"). As per the SEC's rules, signed consent from all parties is attached to this pleading. Because of the significant national policy implications of the February 6, 2003 *Initial Decision's* adoption of a bright-line rule, NARUC respectfully urges the SEC to reverse that ruling.

INTRODUCTION

NARUC is a quasi-governmental nonprofit organization founded in 1889. Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of the State regulatory commissions.¹ NARUC's members include the governmental bodies of the fifty States engaged in the economic and safety regulation of utilities.

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

Specifically, NARUC's members are charged with the duty of regulating the retail rates and services of electric, gas, water and telephone utilities operating within their respective jurisdictions. These State officials have the obligation under State law to assure the establishment and maintenance of such energy utility services as may be required by the public convenience and necessity, and to ensure that such services are provided at rates and conditions that are just, reasonable and nondiscriminatory for all consumers.

NARUC's member commissions regulate other utilities in other States that could potentially be affected by the *Initial Decision*. The *Initial Decision* concludes Enron's application for a 3(a)(1) exemption should be denied because the activities of Portland General are not "predominantly intrastate in character" within the meaning of the Public Utility Holding Company Act of 1935.² As discussed, *infra*, this determination could set up perverse incentives for some utilities. In many instances, the SEC's determinations may well directly affect NARUC's member commission's abilities to carry out their respective mandates to serve the public interest. NARUC, therefore, urges the SEC to overturn the *Initial Decision* in order to avoid creating a policy that encourages adverse utility behavior and that could in turn negatively impact consumers across the country.

STATEMENT SUPPORTING THE OPUC'S ARGUMENT

The *Initial Decision* is a departure from current Commission precedent and policy and gives inadequate consideration to the regulatory authority of the OPUC to effectively oversee the activities of Portland General. Commission precedent and policy has allowed a flexible case-specific approach to interpreting Section 3(a)(1) of the Public Utility Holding Company Act of 1935 ("PUHCA"), especially when a State has adequate authority to regulate a utility's

² Like the OPUC's filing, NARUC's amicus is limited to Enron's application for an exemption under Section 3(a)(1) of the Public Utility Holding Company Act of 1935 ("PUHCA"). NARUC takes no position on Enron's filing for exemptions under Section 3(a)(3) or 3(a)(5).

activities.³ By deviating from Commission policy and adopting a bright-line standard of percentage of utility revenues generated through out-of-State sales, the *Initial Decision* could increase the potential for utility practices that are not in the public interest. Under this revised approach, utilities may no longer prudently manage their businesses to provide service at the least cost to retail customers located within a single State.

The decision finds that “[e]ven with the application of a most forgiving flexible approach, an electric utility with the business characteristics [as outlined in the case] cannot by any reasonable measure be considered predominantly intrastate in character and carrying on “business substantially in a single State.”⁴ NARUC disagrees. In this specific instance that finding fails to recognize the predominately intrastate character of the operations of Portland General. All of its service territory and retail customers are located in Oregon. The OPUC fully regulates Portland General under several chapters of State law as an investor-owned utility providing service to and for retail customers within Oregon. Its participation in wholesale markets is done to benefit the retail customers of its service area, and as with many such companies, those customers are located within a single State. Most utilities, as a prudent management practice for providing service at the least cost to their retail customers, buy and sell power on the wholesale market. Most State commissions view this participation in the wholesale markets as intrastate activity because the sole purpose of the activity is to provide service to the native intrastate load of the utility at the least cost.

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

⁴ *Initial Decision* at 22.

The *Initial Decision* also discounts the adequate regulation that State commissions have over these utilities in circumstances like those presented in this proceeding. Like the OPUC, in potentially many future cases, a bright line approach would be inappropriate because the commission in question would, as the OPUC has here, have adequate regulatory authority over the utility in question.⁵ For utilities like Portland General, State Commissions frequently have the authority to regulate all of the activities of the utilities, regardless of whether there are some out of State sales, because the State commissions are able to set the retail rates for customers based on the State commission's approval of prudent costs of providing service to customers.

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

⁵ “Nothing in the record disputes OPUC's claim that it adequately and effectively regulates Portland General's utility activities.” *Initial Decision* at 21.

NARUC respectfully suggests that the SEC should not adopt a policy that creates incentives for Portland General and other similarly situated utilities to pursue behavior adverse to its retail customers, especially where, as in this case, no party questions the State commission's ability to adequately and effectively protect all of Portland General's retail customers. Accordingly, we join the OPUC in urging the Commission to reverse the finding that the Section 3(a)(1) exemption is not applicable. Alternatively, we request that the SEC set the matter for a rulemaking to allow wider participation and opportunity to comment on the implications of the implementation of such a non-flexible policy.

CONCLUSION

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

Respectfully Submitted,

JAMES BRADFORD RAMSAY
General Counsel

SHARLA M. BARKLIND
Assistant General Counsel

**NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS
1101 VERMONT AVENUE, SUITE 200
WASHINGTON, DC 20005
(202) 898-1350**

CERTIFICATE OF SERVICE

I, Sharla M. Barklind, certify that on this 21st of July, 2003, I sent a copy of NARUC's "Amicus Brief in Support of The Oregon Public Utility Commission's Opening Brief in Support of Petition For Review" by 1st class mail, postage prepaid to those parties listed below.

Sharla M. Barklind

July 21, 2003

The Honorable Brenda P. Murray
Chief Administrative Law Judge
Securities & Exchange Commission
450 Fifth Street NW
Washington, DC 20549

David B. Smith, Jr.
Associate Director
Division of Investment Management
Securities & Exchange Commission
450 Fifth Street NW
Washington, DC 20549

William S. Lamb, Esq.
Sonia C. Mendonca, Esq.
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, NW
Washington, DC 20009

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

Clifford M. (Mike) Naeve
Paul Silverman
William C. Weeden
Skadden Arps Slate Meagher & Flom
1440 New York Avenue NW
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
Paul A. Graham, Assistant Attorney General
Oregon Department of Justice
Regulated Utility & Business Section
1162 Court Street, NE
Salem, OR 97301-4096

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

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

ENRON Corporation
Attn: David Koogler
Mark Metts
1400 Smith Street
Houston, TX 77002