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)

OPENING BRIEF IN SUPPORT OF PETITION FOR REVIEW OF THE
PUBLIC UTILITY COMMISSION OF OREGON

Pursuant to Rule 450 of the Commission’s Rules of Practice, 17 C.F.R. § 201.450, the Public Utility Commission of Oregon ("OPUC") hereby submits an opening brief in support of its petition for review ("Brief") of the Initial Decision issued on February, 6, 2003, in the above captioned proceeding ("Initial Decision").

I. INTRODUCTION

The OPUC is a state agency of Oregon that regulates the customer rates and services of Portland General Electric Company ("Portland General"), a subsidiary of Enron. In addition to Portland General, the OPUC also regulates the rates and services of other investor-owned electric utilities, natural gas companies, and certain telephone services and water utilities in Oregon. The OPUC’s primary responsibility is to ensure that Oregon customers receive adequate services at fair and reasonable rates, while also providing Oregon regulated companies an opportunity to earn a fair return on their investments. Oregon Revised Statutes ("ORS") 756.040(1).

The OPUC’s brief is limited to Enron’s application for an exemption under Section 3(a)(1) of Public Utility Holding Company Act of 1935 (the “Act”). The OPUC takes no position on Enron’s filing for exemptions under Section 3(a)(3) or Section 3(a)(5) of the Act.

The Initial Decision concluded that Enron’s application for a 3(a)(1) exemption should be denied because the activities of Portland General are not “predominantly intrastate in character”
under the meaning of the Act.¹ The Initial Decision does not adequately consider the historical
policy of the Act along with the undisputed fact that the OPUC adequately and effectively
regulates Portland General. In addition, the Initial Decision’s conclusion that Portland General is
not predominately intrastate in character under the meaning of the Act is incorrect. In fact, all of
Portland General’s service territory and retail customers are located within the State of Oregon²
and the OPUC is the only state utility commission that regulates Portland General.³ The
operation of Portland General in prudently managing its native load requirements to serve
Oregon consumers does not change the predominately intrastate character of Portland General.
Adoption of the Initial Decision would negatively affect Enron, and other exempt holding
companies, while also increasing the potential for adverse utility behavior. The Commission
should not adopt a policy that creates the potential for adverse utility behavior when the facts
demonstrate that Portland General is predominately intrastate in character and adequately and
effectively regulated by the OPUC.

II. DISCUSSION

A. The OPUC adequately and effectively regulates Portland General’s utility
operation and activities.

The OPUC has adequate authority to regulate Portland General’s utility activities. The
OPUC regulates the rates that Portland General charges in connection with its primary business
of providing retail electric services solely within the State of Oregon.⁴

The OPUC has adequate authority to regulate Portland General’s utility activities
regardless of whether Portland General trades at the Oregon border or elsewhere, such as the Mid
Columbia trading hub. The OPUC effectively regulates these Portland General activities through

¹ Initial Decision at 23.
² Opening Brief of the Public Utility Commission of Oregon dated January 7, 2003 ("Opening Brief") at 2; Lesh,
³ 3:59-61.
⁴ Lesh, 5:112 -113.
⁴ ORS 756.040(1).
the regulatory scheme provided for in Oregon. Although Portland General enters into some
wholesale transactions outside of Oregon, the OPUC has access to the books and records of these
transactions. Whether or not wholesale power sales take place on the Oregon side of the border
or outside of Oregon does not affect the ability of the OPUC to protect Portland General’s retail
customers.⁵

All of Portland General’s retail customers are located within Oregon⁶ and the OPUC
effectively regulates the effect of Portland General’s out-of-state wholesale sales on retail rates.⁷
Retail rates for customers of Portland General are based on the OPUC’s approved prudent costs
of providing service to customers, which includes the costs of wholesale power netted against
any margins received from the sale of wholesale power. As a result, it benefits Oregon
ratepayers that Portland General transacts purchases and sales of electricity at wholesale in the
most cost effective markets available in the Western Interconnection, regardless of where such
markets happen to be located.⁸ The OPUC has adequate authority to effectively regulate
Portland General’s utility activities, including regulation of Portland General’s out-of-state
wholesale sales (transacted to prudently manage its native Oregon load) and its part ownership
interest in the Colstrip generating plants in Montana, through access to the books and records of
Portland General and regulating the retail rates charged to Portland General’s Oregon
customers.⁹

⁵ Opening Brief at 3
⁶ Id.; Lesh 3:59-61.
⁷ Opening Brief at 3.
⁸ Id.
1. The Initial Decision fails to adequately consider the historic policy of the Act in concluding that the OPUC’s adequate and effective regulation of Portland General’s utility activities does not support a finding that Portland General is predominately intrastate in character.

The Initial Decision correctly acknowledges that it is undisputed that the OPUC has adequate and effective regulation of Portland General. The Initial Decision, however, fails to consider the implications of adequate and effective regulation within the historic policy of the Act and, instead, simply summarily dismisses the OPUC’s adequate and effective regulation of Portland General as “significant, but not controlling.”

The Initial Decision ignores the historic policy of the Act, which is to make Section 3(a)(1) exemptions available when the utility activities of Portland General are effectively regulated by the single State of Oregon. Specifically, the Commission has determined that Congress intended Section 3(a)(1) exemptions to be available when utility activities are effectively regulated by a single state. In 1989, the Commission explained the purpose of Section 3(a)(1) exemptions. It stated that:

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 regulated by the state in which it is primarily located.

This case presents a situation where it is undisputed that the OPUC adequately and effectively regulates the utility activities of Portland General making an overlay of Commission regulation unnecessary. As the Commission noted in the above quotation, the legislative history of the Act demonstrates that a major purpose of the Act was to create Commission regulation

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10 Initial Decision at 21.
11 Id.
over public-utility holding companies that escaped effective state regulation because of their interstate activities. In this case, it is undisputed that Portland General has not escaped effective state regulation because of its interstate activities. Portland General is predominantly intrastate within the meaning of the Act because it is effectively regulated by the OPUC in the State of Oregon where Portland General is primarily located.

While the undisputed fact that the OPUC adequately and effectively regulates Portland General does not necessarily control the outcome of this proceeding, it should be carefully considered in the context of the historic policy and purposes of the Act. A major aim of the Act is to provide for Commission regulation in situations where public-utility holding companies have escaped effective state regulation because of their participation in interstate activities. This case does not present such a situation and, instead, presents a situation where the effective regulation of Portland General by the OPUC is undisputed, making an overlay of Commission regulation unnecessary and inconsistent with the historic policy and purposes of the Act.

B. The operation of Portland General in prudently managing its native Oregon load requirements does not change its predominately intrastate character.

The fact that Portland General prudently manages its native Oregon load requirements by selling excess wholesale power at the most cost effective trading hubs – which are sometimes located outside of Oregon – does not change the predominantly intrastate character of Portland General as demonstrated by the fact that Portland General continues to be a net purchaser of power to serve its native Oregon load. The Initial Decision ignores the purpose of the trading activity and, instead, largely relies on the percentage of utility revenues generated through out-of-state sales for 1999-2001.

In a study published by the Division of Investment Management (“Division”) in 1995, titled “The Regulation of Public Utility Holding Companies” (“1995 Division Study”), the

\[13\] See Piro, 10: 209-215.
\[14\] Initial Decision at 22.
Division recommended that the Commission adopt a flexible standard that considers all the facts and circumstances of each situation for exemptions under Section 3(a) of the Act instead of applying bright-line tests. The OPUC agrees with the 1995 Division Study that all the facts and circumstance of each situation should be considered instead of the application of a bright-line test. The Initial Decision, however, has decided to ignore the facts and circumstances that have led to Portland General’s out-of-state wholesale sales (i.e. Portland General is a net purchaser of power to serve its native Oregon load and prudently manages that native Oregon load by selling excess power into the most cost effective power markets) and, instead, adopted the bright-line view that out-of-state sales that result in over 30% of Portland General’s utility revenue for the years 1999-2001 demonstrates that Portland General is interstate in character.

The Initial Decision looks only at the last three year averages of Portland General’s utility revenues and concludes that the application should be analyzed only on those three years. While the OPUC agrees that the Commission has generally used this measuring period, it does not take into account the highly atypical western wholesale power market in the years 2000 and 2001. Again, the OPUC believes that all the facts and circumstances of the situation should be considered. In this case, it is evident that the western wholesale market in 2000 and 2001 created a situation where a utility with excess power (a long position) could sell that excess power into the western wholesale market at extremely high and volatile prices compared to historical prices. As a result, the utility revenues collected by Portland General during 2000 and 2001 were substantially higher than would be expected if the utility revenues were adjusted to account for the atypical prices that were being charged in the western wholesale market.
2. Portland General’s ownership of a part interest in a Colstrip, Montana generating plant does not change its predominately intrastate character.

Portland General also owns an interest in the Colstrip #3 and #4 generating plants located in Montana. The power that is generated from Portland General’s interest in the Colstrip plants is primarily used to provide power to Portland General’s native Oregon load. Portland General’s ownership of its interest in the Colstrip generating plants have been included in Portland General’s Oregon retail rate base since the mid-1980s, during which time Portland General has been deemed to be intrastate in character. Portland General’s ownership in an interest of the Colstrip generating plants used primarily to provide retail service to its native Oregon load and included in its Oregon rate underscores the predominately intrastate character of Portland General.

The Commission should grant Enron’s application under Section 3(a)(1) of the Act because all of the facts and circumstances demonstrate that the main purpose of Portland General’s out-of-state sales are predominately intrastate in character – to manage Oregon native load and serve Oregon retail customers.

C. The Initial Decision unnecessarily and incorrectly adopts a policy that will negatively affect Enron, and other exempt holding companies, while increasing the potential for adverse utility behavior.

In determining whether Enron is entitled to a Section 3(a)(1) exemption under the Act, the issue is whether Portland General is predominantly intrastate in character and whether it carries on its business substantially in a single State. The Initial Decision correctly concluded that Commission precedent and Commission policy require a flexible approach to interpreting

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20 Portland General has been deemed to be intrastate in character, and as such, eligible for an exemption under Section 3(a)(1) of the Act for many years prior to any relationship with Enron. Portland General’s former parent company, Portland General Corporation, was an exempt holding company pursuant to Rule 2 prior to its merger with Enron in 1997. Reply Brief at 4.

21 Reply Brief at 4.
Section 3(a)(1) of the Act 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.”

Instead of actually taking a flexible approach to Portland General’s particular factual situation and considering what is appropriate in the public interest the Initial Decision establishes a type of bright-line test that relies mainly on the facts that Portland General garners an average of 34.14 percent of its total operating revenues from interstate sales from 1999-2001 and approximately fourteen percent of its owned generation is located out-of-state.

Adoption of the Initial Decision would establish a policy that would likely result in adverse utility behavior. Portland General is not the only utility that sells excess power into the wholesale market. In fact, nearly all utilities sell excess power which often ends up out of the state. If the Initial Decision was adopted, utilities would have an incentive to sell their excess power within the state, often times at lower prices. The Commission should not adopt a policy that creates an incentive for utilities to sell their excess power within the state, which may not be the most effective location for the utility that needs power (or at prices most beneficial to customers), especially in this situation where all the parties agree that the OPUC has adequate regulatory oversight of Portland General to protect Oregon customers. Clearly, creating an incentive for such behavior 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.

The Initial Decision creates a policy with additional negative implications in relation to Portland General’s situation. Portland General’s load contains power from thermal resources. When Portland General is given the opportunity to purchase less expensive hydroelectric power,

23 Initial Decision at 22.
24 Reply Brief at 3.
it can then sell that excess thermal power into the wholesale market, resulting in a benefit to Oregon retail customers. However, if the Commission creates a policy with disincentives for Portland General to sell excess power out-of-state by subjecting it to Commission regulation, Portland General may decide not to purchase the less expensive hydroelectric power and, instead, serve its native load with its higher cost thermal resources. The Commission should not adopt a policy that creates incentives for Portland General and other utilities to pursue behavior adverse to its retail customers, especially when no parties question the OPUC ability to adequately and effectively protect all of Portland General’s retail customers.

III. CONCLUSION

The Initial Decision fails to adequately consider the policy and purposes of the Act in conjunction with the undisputed fact that the OPUC adequately and effectively regulates Portland General. The Initial Decision incorrectly concludes that Portland General is an interstate utility. All of the facts and circumstances demonstrate that Portland General is predominately intrastate in character because all of its service territory and retail customers are located in Oregon and the OPUC is the only state utility commission that regulates Portland General. The interstate activities that Portland General does participate in do not change the predominately intrastate character of Portland General because the purposes of those activities is to prudently and efficiently serve it native Oregon load and the OPUC has adequate and effective regulation of those activities. The Initial Decision also unnecessarily and incorrectly creates a policy that negatively affects Portland General, and other exempt holding companies, while also creating the potential for adverse utility behavior. The Commission should carefully review establishing such a policy, especially when no party to this proceeding questioned that the OPUC adequately and effectively regulates Portland General’s activities.

25 Id. at 2-3.
Wherefore, for the foregoing reasons, the OPUC respectfully requests that the
Commission grant Enron’s application for a 3(a)(1) exemption.

DATED this _____ day of July 2003.

Respectfully submitted,

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