INITIAL DECISION RELEASE NO. 222
ADMINISTRATIVE PROCEEDING
FILE NO. 3-10909

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

In the Matter of APPLICATIONS OF ENRON CORP.	INITIAL DECISION February 6, 2003

APPEARANCES: PARTIES PUBLIC REFERENCE COPY

William S. Lamb, Charles A. Moore, Sonia C. Mendonca, David Koogler, and Michael W.E. Didriksen for Enron Corp.

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

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

LIMITED PARTICIPANTS

Julie Simon and Mark Bennett for Electric Power Supply Association

Clifford M. Naeve, Paul Silverman, William C. Weeden, David L. Schwartz, and Julie B. Greenisen for FPL Group, Inc. and Sithe/Independence Power Partners, L.P.

J.A. Bouknight, Jr., Cynthia L. Taub, James B. Woodruff, J. Eric Isken, and Russel C. Schwartz for Southern California Edison Company

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

Public Reference Copy

I. BACKGROUND

On October 7, 2002, the Securities and Exchange Commission ("Commission") issued an Order Scheduling Hearing Pursuant to Section 19 of the Public Utility Holding Company Act of 1935 ("Order"), in response to two filings by the Enron Corp. ("Enron").

On April 12, 2000, Enron filed for an exemption under Sections 3(a)(3) and 3(a)(5) of the Public Utility Holding Company Act of 1935 ("PUHCA"). The purpose of the filing is to provide Enron relief from the Federal Energy Regulatory Commission's ("FERC") ownership restrictions for qualifying facilities ("QFs"), nonutility generating facilities, under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). (Order at n.2.) QFs sell power at advantageous rates under long-term contracts. (Enron's Summary at 25; Edison Reply Brief at 7.) Public utility holding companies cannot own more than a fifty percent equity interest in a QF project, but this disqualification does not apply to electric holding companies that are exempt pursuant to Section 3(a)(3) or 3(a)(5). (Enron Summary at 21-22.) The filing of an application in good faith under Sections 3(a)(3) or 3(a)(5) exempts the applicant until the Commission has acted on the application. See PUHCA Section 3(c). Enron facilities may lose their QF designation, if the Commission denied Enron's request for an exemption under 3(a)(3) or 3(a)(5).

Enron filed a second application on February 28, 2002, amended on May 31, 2002, under Section 3(a)(1) of PUHCA for an exemption from all PUHCA provisions except Section 9(a)(2). Enron is not a registered holding company because it filed annually Form U-3A-2 with financial statements claiming it was entitled to an exemption under Section 3(a)(1).[1] Enron can no longer produce the data called for by Form U-3A-2. (Order at n.1.) Enron would have to register as a holding company, if the Commission denied the applications.

A public hearing was held on December 5, 2002, to determine whether Enron satisfied the relevant statutory criteria for an exemption. (Order.) Enron submitted written direct testimony from ten witnesses, including one expert, and introduced several exhibits. Enron objected and made an offer of proof pursuant to 17 C.F.R. § 201.350(a) of the materials I did not allow into evidence.[2] (Tr. 15-16, 36.) The Commission's

---

[1] Rule 2(a) pursuant to PUHCA provides that the filing of Form U-3A-2 by a holding company shall exempt the applicant from all the provisions of PUHCA subject to an annual filing on or before March 1 of a statement showing its entitlement to the exemption.

[2] "Tr. __" refers to the transcript of the hearing. I will refer to the direct testimony by the witness's last name. For example, "Lesh at __." I will refer to Enron's exhibits by the initials of the sponsoring witness and a number. For example, "Exhibit PL-__." I will refer to the exhibits of the Division of Investment Management by "Exhibit IM-__." I will refer to the Summary of Enron's Case Supporting its Applications ("Enron

Division of Investment Management ("Division") did not cross-examine or present any witnesses, but it did submit five exhibits. Material received into evidence at the hearing and the several filings that Enron and the Division were required to make pursuant to the Commission's Rules of Practice are included in the record.

Electric Power Supply Association, FPL Group, Inc. ("FPL"), Sithe/Independence Power Partners, L.P. ("Sithe"), and Southern California Edison ("Edison") were denied party status but were allowed to participate on a limited basis.[3] See 78 SEC Docket 2933 (Nov. 5, 2002); 78 SEC Docket 2938 (Nov. 5, 2002). FPL, Sithe, and Edison made offers of proof at the hearing pursuant to 17 C.F.R. § 201.321(b).[4] (Tr. 49-51, 70-71.)

On January 8, 2003, I granted the Public Utility Commission of Oregon's ("OPUC") Motion to Intervene Out of Time, filed on January 7, 2003.

On or about January 7, 2003, the parties made the following filings, which I will refer to as follows: Enron's Proposed Findings of Fact and Conclusions of Law, Enron's Brief in Support of its Applications for Exemptions ("Enron Opening Brief"), the Division's Proposed Findings of Fact and Conclusions of Law, the Division's Post-Hearing Brief ("Division Opening Brief"), and OPUC Opening Brief. Persons granted limited participation made the following filings: Edison's Statement of Opposition and Summary of Case Supporting Opposition ("Edison Opening Brief"); Brief Supporting Position of FPL Group, Inc. and Sithe/Independence Power Partners, L.P. ("FPL, Sithe Opening Brief").

On or about January 15, 2003, Enron, the Division, OPUC, FPL and Sithe, and Edison filed Reply Briefs. I will refer to these filings by name, for example, "Enron Reply Brief."

II. PENDING MOTIONS

On January 23, 2003, Enron, Edison, FPL, and Sithe ("Movants") filed a joint motion ("Motion") requesting that I postpone issuing a decision on Enron's applications under Section 3(a)(3) and Section 3(a)(5) for at least six months because they have reached a settlement that could result in withdrawal of these applications. The Division opposed the Motion contending that the requested six-month stay would be an improper

---

Summary") and Statement of Position of the Division of Investment Management ("Division Position").

[3] Thelen Reid & Priest LLP was denied limited participation status. See 78 SEC Docket 2936 (Nov. 5, 2002).

[4] As limited participants, they were not allowed to introduce evidence. See 78 SEC Docket 2933 (Nov. 5, 2002); 78 SEC Docket 2938 (Nov. 5, 2002); 78 SEC Docket 3383 (Nov. 19, 2002); 78 SEC Docket 3385 (Nov. 19, 2002).

extension of the interim exemption provided by Section 3(c) from PUHCA's registration requirements.

Enron will seek to withdraw these applications upon receipt of approvals from FERC, the California Public Utilities Commission, and the United States Bankruptcy Court for the Southern District of New York. (Motion at 2.) There is no assurance that these three forums will approve the agreements within 180 days, or by July 23, 2003. In the meantime, the applications would remain pending and continue Enron's Sections 3(a)(3) and 3(a)(5) exemptions indefinitely.

I DENY the Motion because the result would be contrary to the public interest. It is important to decide whether Enron is entitled to an exemption in a timely manner. The purpose of PUHCA is to protect investors and customers of non-exempt utility holding companies.[5]

III. ARGUMENTS

A. Enron

For its Section 3(a)(1) application, Enron cites the following to prove Portland General Electric Company ("Portland General") is predominantly intrastate in character: (1) almost three quarters of a million customers are in Oregon under OPUC regulation; (2) no retail customers or state regulation is outside Oregon; (3) a substantial majority of utility assets are located in Oregon; (4) Portland General is a net importer of power into Oregon; (5) a substantial majority of taxes and franchise fees are paid to Oregon; (6) all Portland General offices are in Oregon; (7) charitable contributions are made substantially to Oregon groups; (8) retail revenues are exclusively from Oregon; (9) substantial majority of wholesale revenues and wholesale megawatt hour ("MWh") sales are related to providing power to Oregon retail consumers. (Enron Opening Brief at 16.)

Enron contends that a finding that Portland General is not predominantly intrastate in character will make Section 3(a)(1) unusable to the electric utility industry. Enron claims that NIPSCO Indus., Inc., 69 SEC Docket 303 (Feb. 10, 1999) ("NIPSCO"), demonstrates that the Commission has adopted a modern view that activities at trading hubs are consistent with utility operations. (Enron Opening Brief at 27-28.) Portland General records its wholesale purchases and sales in FERC accounts for non-utility activities.[6] (Lesh at 11-12.) Enron claims that "the substantial majority of

---

[5] Movants' reliance on Rule 161 of the Commission's Rules of Practice is misplaced. That rule deals with postponements of prescribed time limits. See 17 C.F.R § 201.161. I know of no rule that allows parties to request that the Commission not act to resolve a pending mater.

[6] Portland General claims that it does so to shield its retail customers from risk, but that they benefit from the activity. (Lesh at 11-12.)

[Portland General's] wholesale sales of electricity are part of normal utility power supply management conducted to further the Oregon utility business." (Turina at 7.)

Enron also argues that it is entitled to the Section 3(a)(1) exemption because the singular focus of Portland General's utility business is serving customers in Oregon and this is the appropriate test of whether a utility is intrastate in character. (Lesh at 9-10, 12, 14-15; Turina at 2-4, 7-8; Piro at 12; Enron Opening Brief at 2, 47; Enron Reply Brief at 6-11.) The essence of its arguments is that:

> Because they are made to benefit native load, interstate wholesale sales are not indications of utility activities outside of Oregon. It would be a mistake to view Portland General's interstate wholesale sales out of the context of its efforts to achieve the lowest possible cost of power supply for its native load. In essence, wholesale sales are simply how Portland General manages its inventory in support of its business as a retailer of electricity. We do not sell electricity at retail in any state other than Oregon and do not acquire inventory for any other purpose other than retail service. As I noted earlier, our non-retail trading book purchase and sale activity is essentially brokerage activity that does not involve inventory. It makes a minor contribution to earnings and enables us to stay on top of wholesale markets so that we can better perform our inventory management functions on behalf of retail customers.

(Turina at 7-8.)

Enron argues that it qualifies for an exemption under Section 3(a)(3) because it is incidentally a holding company because it is operating a portfolio of energy related businesses to which Portland General is incidental while it is being liquidated and reorganized. (Enron Opening Brief at 39; Enron Reply Brief at 18.)

Enron claims that the holdings in AES Corp., 70 SEC Docket 1279 (August 20, 1999) ("AES I") and AES Corp., 74 SEC Docket 1728 (March 23, 2001) ("AES II") justify the granting of its application for an exemption under Section 3(a)(5) because (1) Enron, except for Portland General, is engaged in non-utility businesses that Congress has determined should not be subject to PUHCA, (2) Portland General is similar in size to Indianapolis Power & Light, which the Commission found consistent with a Section 3(a)(5) exemption, and is small in terms of its regional impact when compared to the Bonneville Power Administration ("BPA"), and (3) like AES, Enron seeks an exemption to permit it "to own QFs without restriction under PURPA." (Enron Proposed Findings of Fact and Conclusions of Law at 9.) Enron believes it is entitled to an exemption under Section 3(a)(5) because it "is principally engaged in holding energy-related businesses of the type Congress determined should not be regulated under the Act." (Enron Opening Brief at 2.)

Enron views its ownership of Portland General as immaterial under both Sections 3(a)(3) and 3(a)(5) under the precedent of AES II, because there is a "reasonable

likelihood that Enron's ownership of [Portland General] will be only temporary." (Enron Opening Brief at 2-3.) Enron acknowledges that it cannot provide sufficient evidence that Portland General does not provide a material part of Enron's income, but it argues that the Commission should make an affirmative finding as a matter of law under the holding of AES II. (Enron Opening Brief at 42.) Enron does not specify the extent of the temporary exemption it seeks but makes reference to divestiture taking two to three years. (Enron Opening Brief at 45.)

Finally, Enron argues that granting an exemption under Section 3(a) would not permit the evils that PUHCA was intended to prevent; that registration would impose an unnecessary burden on Enron; and that OPUC, the bankruptcy court, and the creditors' committee are protecting the interests of creditors and investors. (Hawes at 18-19; Enron Opening Brief at 10-13; Enron Reply Brief at 16-18.) Enron contends that denial of the (1) Section 3(a)(1) exemption would reduce the potential buyers for Portland General, and (2) Section 3(a)(3) and 3(a)(5) exemptions would lower the value of its QF assets because Enron will likely face legal challenges for refunds and indemnification claims from co-owners.[7] (Lamb at 3-4; Enron Opening Brief at 12-13, Enron Reply Brief at 16.)

B. OPUC

OPUC takes no position on the application under Section 3(a)(3) and Section 3(a)(5), but it urges that the Commission grant Enron's application for an exemption under Section 3(a)(1). OPUC has access to Portland General's books and records of interstate wholesale transactions. (OPUC Opening Brief at 3.) OPUC views "Portland General's participation in the wholesale markets as intrastate activity because the purpose of the activity (demonstrated by the fact that Portland General is a net importer of power) is to provide service" to its retail load. (OPUC Opening Brief at 2.) OPUC does not address Portland General's market trading activities but refers only to sales of excess power into the wholesale market. OPUC maintains that it "effectively regulates the effect of Portland General's out of state wholesale sales on retail rates." (OPUC Opening Brief at 3; Reply Brief at 4-5.)

> 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.

---

[7] Power purchase contracts where Enron is a co-owner require that the seller maintain QF status so that if the applications are denied the sellers could face claims for refunds. (Lamb at 3-4.) Going forward, Edison would "pay significantly less for power purchased under contracts that it has entered into with the Enron Wind QFs." (Lamb at 3.)

(OPUC Opening Brief at 3.)

C. Division

The Division opposes a grant of each application. It maintains that Enron has not met its affirmative burden of providing the necessary factual evidence that the statute requires, and that each Commission opinion that Enron relies on for support is inapplicable to this situation. (Tr. 78, 83, 87-96.) The Division believes that Portland General is not predominantly intrastate in character as required by Section 3(a)(1). (Division Opening Brief at 2.) It notes that gross operating revenues is one of the factors that the Commission has used to compare out-of-state presence with in-state presence, and that the proportion of Portland General's revenues resulting from interstate sales of electricity far exceeds the proportion that the Commission has ever permitted under Section 3(a)(1). See NIPSCO, 69 SEC Docket at 0341. (Tr. 80-81.) The Division argues that Enron's position that the Commission look only to the location of its retail customers to determine whether Portland General is intrastate in character is contrary to both the language of the statute and Commission case law.

The Division argues that Enron does not qualify for an exemption under either Section 3(a)(3) or 3(a)(5). (Division Opening Brief at 2.) The Division contends that Enron has failed to show that it does not receive a material part of its income from Portland General and that it is only incidentally a holding company as required for an exemption under Section 3(a)(3). The Division charges that Enron has not shown that Portland General's utility activities are only incidental or accessory to the nonutility business of an affiliate, and, in fact, admitted selling its nonutility business with which Portland General might have had or could have established an accessory or incidental relationship. (Division Opening Brief at 11.) The Division argues that Enron has also failed to show that Portland General is small, in relative and absolute terms, compared with the holding company. See Electric Bond and Share Co., 33 S.E.C. 21 (1952). (Division Opening Brief at 28-29.)

The Division believes that the Commission's case law has limited Section 3(a)(5) exemptions to holding companies that have essentially foreign operations or a small, non-material domestic subsidiary, and that neither scenario is present here. The Division distinguishes the situation in AES II, because there AES had an exemption under Section 3(a)(5) and sought a short period in which it could act to preserve its exempt status. (Tr. 87-88.) In this situation, however, Enron does not have an exemption and it seeks a temporary exemption to sell Portland General so that it will not be covered by PUHCA. The Division argues that the fact that Enron finds it inconvenient to be regulated by PUHCA is no basis for granting an exemption. (Division Opening Brief at 33.)

The Division urges that the applications be decided based on the language of the statute and the interests protected by PUHCA, "and not on the basis of unproven economic impacts that a denial of exemption may have under different laws and regulatory schemes." (Division Position at 16.) In the Division's view, to grant these

exemptions would indicate that an exemption could be granted for any reason.[8] (Division Opening Brief at 2.)

D. FPL Group, Inc. and Sithe/Independence Power Partners, L.P.

FPL and Sithe argue that the Commission should grant at least temporarily the Section 3(a)(3) and 3(a)(5) applications because of the adverse impact summary denial will have on them and the public interest.[9] These limited participants argue that if the Commission denies the applications, it should "make the revocation of the exemptions effective only after a limited time period to allow Enron and its co-investors . . . to restructure the [QFs] they jointly own in a way that permits those facilities to retain their QF status." (FPL, Sithe Opening Brief at 2.) Enron represents that:

> Enron's interest in Independence was acquired in reliance on a good faith exemption obtained in connection with the filing of its April 2000 Application and the FERC's PURPA regulations that provide that if a person is exempt by rule or order adopted or issued under Section 3(a)(3) or 3(a)(5) of the 1935 Act, such person will not be considered as being primarily engaged in the generation or sale of electric power for the purposes of the QF ownership restrictions under 18 C.F.R. Section 292.206.

(Exhibit IM-3 at 17 n.14.)

These limited participants argue that to continue the exemptions temporarily is consistent with the Commission's administration of PUHCA so as to avoid the imposition of unjust burdens and unnecessary losses on innocent parties. They contend that temporary continuance of the exemptions is justified since there is no threat that the evils referenced in Section 1(b) of PUHCA would occur.[10] (FPL, Sithe Opening Brief at 8.)

---

[8] The Division is not attempting to force Portland General to abandon its wholesale marketing activities. Its position is simply that when a utility's wholesale activities have a substantial interstate component, PUHCA assumes an overlay of Commission regulation to protect the interests of utility investors and consumers. (Division Opening Brief at 24-25.)

[9] After Enron filed for the Section 3(a)(3) and 3(a)(5) exemptions, it acquired interests in power producing projects designated as QFs in which FPL and Sithe were owners, and in June 2001, Enron acquired a forty percent equity ownership in Independence Power Partners, L.P. (FPL, Sithe Opening Brief at 4; Exhibit IM-3 at 17 n.14.)

[10] The limited participants recognize the evils described in Section 1(b) as follows:

> (i) the issuance of securities by public utility subsidiaries upon the basis of fictitious or unsound asset values or earnings; (ii) the use of highly leveraged capital structures by public utility subsidiaries; (iii) the control

These limited participants view the Division's rejection of a temporary exemption as patently at odds with past Commission practice. See Kansas Power and Light Co., 50 SEC Docket 1603 (Feb. 5, 1992); see also Kansas Power and Light Co., 32 S.E.C. 749 (1951).

FPL and Sithe challenge the Division's position that Enron's situation is distinguishable from the situation in AES II because there AES had already qualified for a Section 3(a)(5) exemption while Enron does not qualify for an exemption. FPL and Sithe believe that the Division has overlooked Section 3(c), which gives Enron an exemption until the Commission acts on the application. (FPL, Sithe Opening Brief at 12.) These limited participants rely on the language of Section 3(c) to argue that temporary continuance of the exemption would not be creating a new exemption. (FPL, Sithe Opening Brief at 12.)

FPL and Sithe take no position on the Section 3(a)(1) application.

E. Southern California Edison

Edison opposes Enron's application under Sections 3(a)(3) and 3(a)(5). Edison opines that Enron never qualified for Sections 3(a)(3) and 3(a)(5) exemptions. (Edison Opening Brief at 16, Edison Reply Brief at 2.) Edison characterizes Enron's application as one for "additional, extended" relief from PUHCA since it has already exempt for two and one-half years because of Section 3(c). (Edison Reply Brief at 1.)

Edison sees a vast difference between AES II, 74 SEC Docket at 1728, where the Commission acted to achieve compliance, and Enron's situation where granting a temporary exemption would allow continued non-compliance with PUHCA. In Edison's opinion, Enron "filed for an exemption that it was not qualified to receive, and took advantage of the de facto exemption under Section 3(a) for over two years while retaining its too large utility subsidiary." (Edison Opening Brief at 14.) Edison claims that Enron's sole purpose in seeking the exemption under Sections 3(a)(3) and 3(a)(5) is not to avoid registration under the PUHCA, but to avoid the ownership restrictions of PURPA, and that this "Commission has never granted such an exception *solely* for the purpose of permitting an applicant to avoid regulation by a sister agency, FERC, as

---

> of public utility subsidiaries through disproportionately small investments and the use of questionable accounting, rate and dividend practices; (iv) the lack of economies and efficiencies in raising capital; (v) the subjection of public utility subsidiaries to excessive charges by affiliates for services, construction work, equipment and materials; and (vi) the growth and extension of holding company systems with no relation to economy of management and operation or integration and coordination of operating properties.

(FPL, Sithe Opening Brief at 6.)

requested here by Enron." (Edison Opening Brief 14-15.) Edison argues that PUHCA is intended to protect consumers, and ensure effective regulation, yet its customers have overpaid more than $150 million because Enron has circumvented the QF regulations and thus avoided FERC regulation. (Edison Reply Brief, at 2-5, 6-8.)

Edison also contends that Enron has not satisfied Section 3(a)(3) or 3(a)(5) because Portland General contributes a material part of Enron's income, and it is the largest investor-owned utility in Oregon. (Edison Opening Brief at 21-23.) Edison maintains that the fact that Enron is bankrupt does not entitle it to special treatment under PUHCA. (Edison Opening Brief at 16.) Edison views Enron's arguments that it is being adequately supervised by FERC and others, as contradictory with its admission that "the sole reason for seeking the exemption is to avoid regulatory scrutiny by FERC until the QFs are sold." (Edison Opening Brief 16 n.22; Edison Reply Brief at 6.) Edison is critical of Enron's narrow view that the applications are necessary to protect its creditors and Portland General's investors and thus the public interest will be served. (Edison Opening Brief at 15; Edison Reply Brief at 6-8.) Edison views the public interest as including Edison's rate paying customers who bear the above-market cost associated with Edison contracts with Enron's winds facilities.[11]

Edison also repeats its request that the Commission

> make a specific finding that the Application was not submitted in good faith. In the alternative, Edison requests that the Commission determine that the April 2000 application ceased to comply with the good faith standard subsequent to its filing given Enron's repeated failures to timely advise the Commission of required revisions to the material representations upon which the application was originally premised.

(Edison Opening Brief at 2.) Edison has made the same argument to a different presiding officer who denied its request, holding that the request was premature and deferring presentation of evidence before a ruling on whether the exemption should be granted. See 78 SEC Docket 3383, 3384 (Nov. 19, 2002). Edison's arguments are the same arguments presented to the prior presiding officer, I therefore affirm the prior ruling and DENY Edison's request.

Edison takes no position on Enron's application for an exemption pursuant to Section 3(a)(1).

[11] According to Edison, Enron acquired Zond Corp., a leading developer of wind energy that owned small power production facilities that sold power to Edison, before it acquired Portland General. Enron's wind facilities would not be QFs after the merger unless Enron divested itself of ownership so as to come within the fifty percent ownership limit. (Edison Opening Brief at 6.)

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW[12]

Enron, headquartered in Houston, Texas, but incorporated in Oregon describes itself as "an Oregon holding company with many energy-related businesses, but only one public utility company subsidiary." (Bowen at 1, 5.) Enron filed a voluntary petition for reorganization under Chapter 11 of the bankruptcy code in the United States Bankruptcy Court for the Southern District of New York, on December 2, 2001. See Enron Corp., United States Bankruptcy Court, Case No. 01-16034 (AJG) (S.D.N.Y. Dec. 2, 2001); (Bowen at 2.) As a debtor in possession, Enron is managing the reorganization or disposition of assets to satisfy creditor claims. (Metts at 3; Enron Summary at 3.) Enron believes that its existing equity has and will have "no value and that any Chapter 11 plan confirmed by the Court will not provide Enron's existing equity holders with any recovery." (Bowen at 8.)

Prior to bankruptcy, Enron represented itself as one of the world's leading electricity, natural gas, and communications companies with approximately $34 billion in energy and communications assets. (Exhibit IM-4 at 3.) Enron estimates it had over 2,500 subsidiaries prior to bankruptcy.[13] (Bowen at 2.) Enron and its affiliated businesses continue to operate in the United States, South America, Asia, Europe, and the Caribbean. (Bowen at 2.) Enron owns, directly or indirectly, assets such as electric generation, transmission, and distribution facilities; gas transmission pipelines and distribution companies; liquefied natural gas unloading, storage and vaporizing facilities; and companies engaged in providing water and wastewater services. (Bowen at 2.) Enron affiliates own oil and gas prospects in the United States and abroad, and engage in oil and gas exploration and production onshore and in the Gulf of Mexico. (Bowen at 2.) As of November 15, 2002, Enron engaged in the buying and selling of commodities such as electricity, gas, oil, and natural gas liquids "as necessary to maintain the value of certain energy contracts and assets that were retained by Enron after the sale of its former gas and power market making business." (Bowen at 2.)

---

[12] The facts presented herein have not been tested by cross-examination. Enron has the burden of showing that the applications meet the requirements of the statute. (Order.) The burden of proof is preponderance of the evidence. See Steadman v. SEC, 450 U.S. 91, 102 (1981). I have considered all the posthearing findings, conclusions, and arguments raised by the parties and accept those consistent with this decision.

[13] Exhibit RB-2 is an eight-page list of Enron's "Equity Investments in Certain Energy Companies." The list does not include non-utility companies such as power marketers and companies providing only operations and maintenance services. (Bowen at 4.) In the non-energy arena, Enron has an interest in a newsprint mill, associated timberlands and a sawmill in Canada, broadband communications, and other small investments. (Bowen at 5.)

Enron Wind, LLC, ("Enron Wind") is an "indirect wholly owned subsidiary" of Enron.[14] (Lamb at 2.) Enron's QFs include Enron Wind's interests in wind powered generating facilities in California, and a co-generating plant in New York State that Enron owns jointly with Sithe/Independence Power Partners, L.P. (Lamb at 3.) Enron Wind represented that it has sold its manufacturing, commercial, and operation and maintenance businesses to General Electric Company, and that Enron was seeking a temporary exemption under Sections 3(a)(3) and 3(a)(5) of PUHCA for time to sell its QF assets. (Lamb at 1-2.)

A. Does Enron Meet the Requirements of Section 3(a)(1) of PUHCA?

Section 3(a) provides:

> The Commission, . . . shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if
>
> > (1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are 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.

Portland General, a vertically integrated electric utility organized in the State of Oregon on July 25, 1930, is the largest investor-owned electric utility in the state and a wholly owned Enron subsidiary.[15] (Bowen at 2; Lesh at 2: Exhibit PL-1; Edison Opening Brief at 12.) Enron derives all of its public utility income from Portland General and those amounts are "significant" or "substantial" portions of Enron's total income and revenues.[16] (Tr. 54-55; Enron Summary at 22, 40-41.) The focus of the intrastate inquiry for the purpose of Section 3(a)(1) is only on Enron's public utility activities and since

---

[14] Enron Wind's principal QFs are Sky River Partnership, Victory Garden Phase IV Partnership, ZWHC LLC, and Cabazon Power Partners LLC. (Lamb at 3.) FERC initiated an investigation into Enron's ownership of three of these wind facilities. See Investigation of Certain Enron-Affiliated QFs, Docket Nos. EL-17-000 (Oct. 24, 2002), Order Initiating Investigation and Hearing.

[15] Enron claims to have been trying to sell Portland General since 1999. (Metts at 5.)

[16] Portland General paid Enron $81 million in common stock dividends and $2 million in preferred dividends in 2000, and $40 million in common stock dividends and $2 million in preferred dividends in 2001. (Exhibit JP-2 at 34.)

Portland General is its only public utility, the issue is whether Portland General is predominantly intrastate in character and whether it carries on its business substantially in a single State." (Stipulation at 2.)

1. Intrastate versus interstate commerce

According to testimony the Commission presented to Congress on February 13, 2002, "during the past decade, while the SEC has continued to support repeal of [PUHCA], we have also recognized that we need to administer it faithfully, while streamlining and adding flexibility to the regulatory structure where permitted by the Act." Testimony Concerning the Enron Bankruptcy, the Functioning of Energy Markets and Repeal of the Public Utility Holding Company Act of 1935, Statement of Securities and Exchange Commissioner Isaac C. Hunt, Jr., United States House of Representatives, Subcommittee on Energy and Air Quality, Committee on Energy and Commerce, 2 (Feb. 13, 2002). Correspondingly, in 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.

In a very early case, the Commission found that an applicant did not carry on its business substantially in a single state based on factors of location of generation, characteristics of physical plant, customers served, and operating revenues. See Washington Ry. and Elec. Co., 4 S.E.C. 191 (1938). Since 1938, the Commission has come to evaluate a number of quantifiable factors to compare a utility's out-of-state and in-state presence for purposes of Section 3(a).[17] See NIPSCO, 69 SEC Docket 303, 338-39 (Feb. 10, 1999). In NIPSCO, the Commission looked at gross operating revenues, net operating revenues, utility operating income, net utility income, and net utility plant for a recent three-year period. See id. at 340. The Commission recently stated that while it has traditionally considered a wide range of numerical factors, it has given the greatest

[17] The Commission has found the predominantly/substantially requirement satisfied in cases where (1) two out of twenty-eight counties served and approximately 4% of an electric utility system's 69 kV transmission lines were located, and less than 2% of its energy sales took place, out of state. N.W. Elec. Power Coop., Inc., 39 SEC Docket 1026 (Nov. 10, 1987); (2) less than 3% of a system's service population, number of customers, generating capacity, sales, book value of net plant, and operating income were attributable to out-of-state activities. Wisconsin Energy Corp., 37 SEC Docket 387 (Dec. 18, 1986); (3) 3.3% of a subsidiary's gross operating revenues were derived from out-of-state operations. Penn Fuel Gas, Inc., 56 SEC Docket 2109 (May 9, 1994); and (4) a utility's out-of-state operations accounted for 6.8% of an applicant's consolidated operating revenues. KU Energy Corp., 50 SEC Docket 349 (Nov. 13, 1991). The Commission has also held that the predominantly/substantially requirement was satisfied where the out-of-state utility operations of one electric utility represented 9.9% of that company's utility revenues. Sierra Pac. Res., 40 SEC Docket 161 (Jan. 28, 1988). See also NIPSCO, 69 SEC Docket at 0339 n.58.

deference to revenues. See C&T Enters., Inc., 78 SEC Docket 2582, 2592 (Oct. 31, 2002).

I will apply the "flexible" approach that the Commission has used in reference to PUHCA in considering the factors mentioned in prior cases that are present here.

2. Factors distinguishing intrastate commerce from interstate commerce

Scholarly discussions of the federal government's ability to regulate interstate commerce under Article I, Section 8, of the United States Constitution identify three broad categories of activity that are subject to federal regulation: (1) use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) activities having a substantial relationship to interstate commerce. See Joshua A. Klein, Commerce Clause Questions After Morrison: Some Observations on the New Formalism and the New Realism, 55 Stan. L. Rev. 571 (2002) (citing United States v. Morrison, 529 U.S. 598, 608-09 (2000); United States v. Lopez, 514 U.S. 549, 558-59 (1995)); see also Perez v. United States, 402 U.S. 146, 150 (1971).

a. Customer location and power supplies

Portland General's offices, its 2,800 employees, and its approximately 736,000 residential, commercial, and industrial customers, all work, or are located, in Oregon. (Lesh at 3; Piro at 2.) Portland General meets the electric power needs of its retail customers through a combination of owned generation, long-term fixed contracts, and short-term power purchases. (Turina at 2.) Portland General's owned and firm power purchases total 3,365 MW. (Turina at 9.) As of December 31, 2001, it owned generation of 2,046 MW. Most of this owned generation originated in Oregon, but 296 MW was from a mine-mouth plant at Colstrip, Montana. (Exhibit JP-2 at 16.) Portland General dispatches Colstrip power virtually all the time because of its low variable cost. (Turina at 9.) Portland General's other major power source is a long-term firm purchase contract for out-of-state power, approximately 645 MW from four hydroelectric projects on the Columbia River in Washington State. (Lesh at 4-5; Turina at 4; Exhibit JP-2 at 10, 16.) In 2001, Portland General also used the following out of state power sources:

> [F]irm contracts, ranging in term from one to thirty years, to purchase 674 MW of power, primarily hydro-generated, from BPA and other Pacific Northwest utilities. In addition, [Portland General] has a long-term exchange contract with a summer-peaking Southwest utility to help meet its winter-peaking requirements. These resources, along with short-term contracts, provide [Portland General] with sufficient firm capacity to serve its peak loads.

(Exhibit JP-2 at 10.)

Portland General acquires "significant" short-term resources to serve its retail market from the Western wholesale market, located largely outside Oregon. (Lesh at 11.) "As [Portland General's] generation and long-term power purchase contracts provide only a portion of its customers' load, the Company has relied upon short-term wholesale power purchase contracts and spot market purchases." (Exhibit JP-2 at 40.) In 2001, Portland General's peak load was 3,512 MW, of which thirty-six percent was met by short-term purchases. (Exhibit IM-3 at 9.)

On a daily basis, Portland General uses the most economical power sources it has assembled to meet the potential peak power demand of its retail customers. Portland General implements the principle of "economic dispatch" using a computer model, Monet, that simulates the operation of Portland General's power sources "within the broader context of the Western Electricity Coordinating Council ('WECC') to ensure that, for any given hour, Portland General is using the lowest cost resources to meet [its] retail customers' loads." (Lesh at 7.) Under this policy, Portland General may find it cheaper to buy short-term power interstate to serve its retail customers, and, at the same time, generate power to sell to third parties in the wholesale market at rates above its variable or fuel cost. (Lesh at 7-11; Turina at 3-4.) Portland General's power purchase contracts are take or pay contracts and generally the variable cost is zero. (Lesh at 9 Turina at 7.)

b. Out-of-state utility plant

Generation at Colstrip, Montana, accounted for approximately eight percent of Portland General's combined generation and firm power purchases used to service its Oregon customers. (Enron Summary at 6-7; Turina at 9.) It is impossible to demonstrate that retail customers receive low-cost energy generated at Colstrip or any particular source, but Portland General assigns "the benefit of such power which was used to energize the WECC" to its retail customers. (Turina at 9.) Colstrip and associated transmission lines are approximately fourteen percent of Portland General's owned generating capacity. (Enron Summary at 6-7; Turina at 9.) These out-of-state assets represented 13.1 percent of the undepreciated book value of Portland General's total physical plant of $3.5 billion. (Turina at 9.) Colstrip has been included in Portland General's retail rate base used to set retail rates approved by OPUC since the mid-1980s. (OPUC Reply Brief at 4.)

c. Facilities used in interstate transmission

Portland General's owned transmission system is located in and around its retail service territory with the exception of the lines associated with the Colstrip plant and the [Pacific Northwest] AC Intertie ("Intertie") located in central Oregon. (Ryan at 2.) Portland General makes extensive use of the Intertie and the Western Interconnection in connection with the interstate transmission of power.

Portland General owns twenty percent of the Intertie, a 4,800 MW transmission facility that runs between the John Day substation in northern Oregon and the substation

at Malin in southern Oregon, near the California border. (Exhibit IM-4 at 5.) BPA and PacifiCorp are the other Intertie owners. (Ryan at 3.) BPA operates the Intertie in accordance with FERC's open access requirements set out in Orders 888 and 889. (Ryan at 4.) "The AC Intertie provides important interconnections to the Pacific Northwest's transmission system that support . . . critical electrical power deliveries to Portland General's electrical system." (Ryan at 3.) The Intertie is a part of a major north-south transmission line that links the Pacific Northwest and Southwest that FERC considers highly important. Power Pooling In The United States, FERC, Office of Electric Power Regulation, 137, 139 (Dec. 1981). Portland General's costs and expenses associated with the Intertie are included in its retail rates approved by OPUC, and the revenues received from providing transmission services over its segment of the Intertie are credited to Portland General's retail customers. (Lesh at 14-15.) Portland General uses the Intertie to transmit power it purchases and sells inside and outside Oregon, and it allows Portland General "important" access to California power producers. (Ryan at 3-4.) As of April 1, 2002, Portland General had "accounts receivable totaling approximately $87 million that may be affected by the financial condition of two major California utilities." (Exhibit JP-2 at 41.)

In addition, Portland General owns 815 miles or 1.3 percent of some 62,000 miles of interconnected transmission lines in the Pacific Northwest that are operated cooperatively to achieve reliability in the power grid.[18] (Ryan at 1.) These lines are part of the Western Interconnection, 115,000 miles of transmission lines rated at 115 kV or higher owned by several interconnected systems and operated cooperatively in the states of Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, and the Canadian provinces of Alberta and British Columbia. (Ryan at 1-2.)

Portland General's transmission system is interconnected with the systems of other WECC owners.[19] (Lesh at 7-8, 11; Turina at 2, 6.) The WECC was formed on April 18, 2002, by a merger of the WSCC, the Southwest Regional Transmission Association, and the Western Regional Transmission Association. In 2001, Portland General relied "on wholesale market purchases within the [Western Systems Coordinating Council] in conjunction with its base of generating resources to supply its resource needs and maintain system reliability." (Exhibit JP-2 at 11.)

---

[18] Other Pacific Northwest owners are the BPA with 14,500 miles of line or 23%; PacifiCorp with 9,400 miles of line or 15%; British Columbia Hydro Authority with 7,200 miles of line or 11.6%; and Northwest Energy with 6,000 miles or 9.6%. (Ryan at 2.)

[19] Enron's Form 10-K for 2001 refers to the Western Systems Coordinating Council ("WSCC"), organized in 1967 and now the largest and most diverse of the ten regional electricity councils. (Exhibit JP-2 at 11.) The WSCC "provides coordination for operating and planning a reliable and adequate electric power system for the western continental United States, Canada, and Mexico." (Exhibit JP-2 at 11.)

Many of Portland General wholesale purchases and sales take place out of state because that is where major hubs in the WECC are located. (Turina at 4-5.) In 2000 and 2001, Portland General purchased power primarily from major trading hubs outside Oregon such as Mid-Columbia (Mid-C) in Washington State, Palo Verde in California, Garrison in Montana, the Idaho Power System in Idaho, and purchases from BPA. (Lesh at 3-4; Exhibit PL-3; Exhibit IM-5.) A trading or market hub is the designation given to a place of transmission interconnections at which many utilities and marketers have rights to deliver or receive energy. (Turina at 4.) "Trading hubs have evolved into market centers where power is purchased and sold whether or not there is physical delivery." (Turina at 5.) "Hubs create a common point for commercial purchase and sale contracts to settle with or without going to physical delivery." (Turina at 5.) Title transfers for electricity take place at the hub rather than at state borders irrespective of physical power flows. (Turina at 6.) Power trades do not indicate the physical delivery of electrons, but rather the allocation of "some or all of the costs of generating capacity, variable costs of energy generation and the costs of the power grid among parties benefiting from the electrical system." (Turina at 6.)

> Portland General sells electric energy at wholesale in interstate commerce to electric utilities located in other states, primarily California. Portland General purchases electric energy from public utility districts located in Washington and from nonassociated utilities in Oregon, Washington, Montana, Idaho, Arizona, New Mexico, California, and Canada. Portland General purchases surplus electric energy from the BPA, a federal agency that markets electric energy generated by federal hydroelectric dams located on the Columbia River in Oregon and Washington.

(Exhibit IM-4 at 4.)

Portland General purchases and sells power outside Oregon "because [its] position between Washington State and Canada on the north and California on the south make it a natural participant in the north-south powerflow between winter peaking utilities in the north and summer peaking utilities in the south." (Turina at 4-5.) In its Form 10-K for 2001, Portland General reported:

> The Company's transmission system connects winter-peaking utilities in the Northwest and Canada, which have access to low-cost hydroelectric generation, with summer-peaking wholesale customers in California and the Southwest, which have higher-cost fossil fuel generation. PGE has used this system to purchase and sell in both markets depending upon the relative price and availability of power, water conditions, and seasonal demand from each market.

(Exhibit JP-2 at 8.) Interstate wholesale sales represented approximately 28% percent of Portland General's total MWh sold in 2001, 29% in 2000, and 18% in 1999.[20] (Exhibit IM-3 at 12, Exhibit IM-5; Exhibit JP-4.)

d. Revenue

All Portland General's retail sales are intrastate. (Piro at 8.) Its wholesale sales occur inside and outside Oregon. (Exhibit JP-4.) Portland General's total operating revenues were approximately $1.2 billion in 1998, $1.4 billion in 1999, $2.3 billion in 2000, and $3 billion in 2001.[21] (Exhibit JP-4, Exhibit IM-3 at 11-12.) Portland General's retail sales revenues declined precipitously from 73% of total operating revenues in 1999, to 47% in 2000, and 36% in 2001. (Exhibit JP-4; Exhibit IM-5.) In 2001, Portland General's sold 72% of the total MWh sold to intrastate customers. Of this total amount, 58% was sold retail and 14% was sold wholesale. In the same period intrastate customers accounted for 55% of intrastate revenues, 36% from retail customers and 18% wholesale from wholesale customers. (Exhibit IM-5.)

Portland General makes interstate sales of two wholesale types primarily at trading hubs. Portland General could limit itself to making wholesale sales in Oregon, but to do so would limit the number of counter parties and favorable contract terms available at the major trading hubs. (Turina at 7.) Portland General manages its "resource portfolio for retail customers" by selling the wholesale power that it has under contract but that it does not need. (Lesh at 9; Turina at 3; Piro at 8, 10.) It refers to revenue earned from these sales as "retail book."[22]

Portland General also trades or brokers electric power in the wholesale market by taking advantage of price differentials in back-to-back purchases and sales. It refers to this activity as its "non-retail trading book purchases and sales." (Lesh at 11-12; Turina at summary, 3-4; Piro at 8-9.) Trades are settled financially and seldom result in a transfer of power. (Piro at 8; Turina at 6-8.) In February 2001, OPUC authorized Portland General to engage in wholesale purchases and sales beyond those necessary to balance its retail load to its resources. (Lesh at 11.) Portland General admits that its

---

[20] Enron's amendment to its application states that the percentage in 2001 was twenty-eight percent, however, Mr. Piro's exhibit puts the percentage in 2001 as twenty percent. Compare Exhibit IM-3 at 11 with Exhibit JP-4.

[21] Enron's figures for 2001 are lower than the Division's because they used a netting approach for Portland General's power marketing activities which it claims "results in a more accurate reflection of those transactions, showing the net gain or loss in revenue and eliminating from MWh sold those financially settled transactions." (Piro at 9.)

[22] Portland General is a net importer of power into Oregon since its "wholesale purchases in its retail book exceed the revenue from sales in that book" by over $110 million annually since 1998. (Piro at 10.)

interstate sales have increased in the last two years due to the evolution and dynamics of the wholesale electricity markets, changed federal policies, and its increasing focus on its wholesale marketing efforts. (Exhibit IM-3 at 12-13.)

Portland General received 11.26% of its gross operating revenues from interstate sales in 1999, 32.17% in 2000, 45.55% in 2001, and 29% in the first nine months of 2002. (Tr. 80-81; Exhibit JP-4; Exhibit IM-5.) Portland General earned an average of 34.14% of its total revenue from interstate sales in the period 1999 through 2001.[23] (Tr. 80; Exhibit IM-5; Exhibit JP-4.)[24] The highest three-year average of interstate revenues that the Commission has ever found consistent with section 3(a)(1)'s predominantly/substantially intrastate requirement is 13.2%.[25] See NIPSCO, 69 SEC Docket at 341 ("This percentage is consistent with a determination that after the Merger, NIPSCO will continue to carry on its utility operations primarily and substantially in Indiana."). A further breakdown of operating revenues from sales of surplus power and power marketing reveals that:

	1999 (%)	2000 (%)	2001 (%)	2002 (9 mos.) (%)
Interstate Sales of Surplus Power (Retail Book) as a % of Total Revenue	11	23	26	12
Interstate Power Brokerage (Non-Retail Trading Book) as a % of Total Revenue	0	9	19	17

[23] Enron asserts that Portland General's high revenue levels from wholesale purchases and sales in 2000 and 2001 were atypical, and that typically less than 15 percent of its operating revenue is derived from wholesale interstate sales of energy. (Turina at 8; Piro at 9.) Based on the evidence in this record, the electric utility has been changing for some time and it would be impossible to find a typical year.

[24] Division Exhibit IM-5 is from Enron's Amendment filed May 31, 2002, page 8, which is Division Exhibit IM-1. The Division calculated percentages in Exhibit IM-5, which Enron did not show on page 8 of Exhibit IM-1.

[25] In NIPSCO, the 13.2 percent is interstate sales as a percentage of net operating revenue. Portland General's three-year average of 34.14 percent was interstate revenues as a percentage of gross operating revenues. In NIPSCO the Commission found it necessary to use the net operating revenue data because it was comparing electric and gas utilities. See NIPSCO, 69 SEC Docket at 0334-35; see also C&T Enters., Inc., 78 SEC Docket at 2598 n.8. No party contends that the different measurements (i.e. the use of net revenues in NIPSCO) make the comparison here inappropriate.

Total Interstate Revenue as a % of Total Revenue	11	32	45	29

(Calculations done by using Exhibit JP-4 and Exhibit IM-4.)

Interstate Power Brokerage (Non-Retail Trading Book) as a % of Total Revenue		9	24	21

(Piro at 8-9.)

Enron does not dispute these percentages, rather Enron would net Portland General's power trading revenues using Financial Accounting Standards Board ("FASB") guidelines so that for 2001 and the first nine months of 2002, revenue from interstate wholesale sales as a percent of total revenue is 33% (not 45%) and 14% (not 29%), respectively.[26] (Piro at 9; Exhibit JP-4.)

I reject Enron's contentions that FASB requirements that utilities net their power trading activities for accounting govern how revenues should be viewed when determining whether an activity is predominantly intrastate in character. Moreover, of all the relevant factors, the Commission has generally assigned the most weight to a comparison of gross utility operating revenues as a measure of the relative size of in-state and out-of-state utility operations. See C&T Enters., Inc., 78 SEC Docket at 2597. I also reject Enron's claim that Portland General's interstate power trading activities are irrelevant to whether Portland General is predominantly intrastate in character because it suffered a net loss from its power brokerage trading in 2001 and the first nine months of 2002. The fact that Portland General's power brokerage resulted in a net loss in an accounting sense is irrelevant to the extent of Portland General's actual interstate trading activities.

In addition to a netting approach, Enron prefers using 1998 through the third quarter of 2002, which shows that an average of twenty-three percent of Portland General's total revenue were from interstate sales. (Enron Reply Brief at 11.) I find that this longer period does not produce a meaningful average because Portland General did not begin its power brokerage activities until 2000. Enron's proposed time frame would include two years of no power trading, an activity that Portland General intends to increase. In addition, the Commission traditionally uses a three-year average. See C&T Enters., Inc., 78 SEC Docket at 2592 n.7.

---

[26] FASB required that revenues from power trading activities be reported net of the cost of purchased power beginning with the third quarter of 2002. (Piro at 11.) See FASB Emerging Issues Task Force Issue No. 02-03.

e. Government Oversight

OPUC, which regulates Portland General's retail rates and conditions of service, its issuance of securities, and its system of accounts believes that the Commission should grant Enron's application for an exemption under Section 3(a)(1). (Lesh at 5; OPUC Opening Brief at 1-2.) Nothing in the record disputes OPUC's claim that it adequately and effectively regulates Portland General's utility activities. (OPUC Reply Brief at 3-4.) OPUC's position is significant, but not controlling.

3. All Activities Benefit Intrastate Customers

Enron concedes that Portland General has a material interstate connection and that most of its wholesale sales occur outside Oregon, but it maintains that Portland General's substantial interstate activities should be considered predominantly intrastate because their purpose is to benefit intrastate customers. Specifically, Enron argues that Portland General's wholesale interstate sales are intrastate in character because the substantial majority of wholesale sales are related to its obligation to service its intrastate customers. (Turina at 2, 7-8, Piro at 8-9, 12; Enron Opening Brief at 17-34; Enron Reply Brief at 6-14.)

I reject this argument for the following reasons: First, Enron, has not challenged the Division's position that the Commission has "always concerned itself with where the sales of electricity take place – where title passes" in examining wholesale sales.[27] (Division Opening Brief at 24.) In this situation, title to electricity in most of Portland General's wholesale contracts occurs at locations outside of Oregon. Second, Enron did not cite any case where the Commission has recognized the approach Enron advocates, and according to the Division there are none. (Division's Opening Brief at 23-24.) Finally, Enron's claim that retail customers benefit from Portland General's energy marketing activities because Portland General receives critical market intelligence, which it needs because "short-term resources acquired from the Western wholesale market currently make up such a significant portion of [its] retail resource system," is totally unpersuasive. (Lesh at11; Turina at 4, 10; Piro at 8-12; Enron Opening Brief at 33.) Customers would have to receive something more tangible than educating the company to receive a benefit. There is no evidence in this record that retail customers receive any economic benefit from Portland General's marketing in electricity.

4. Summary

Commission precedent and Commission policy require a flexible approach to interpreting Section 3(a)(1) to each particular factual situation, and "the determination of

---

[27] In NIPSCO for example, the Commission found that "Although Northern Indiana sells electricity at wholesale to non-Indiana customers, almost all of those sales take place in Indiana or at the Indiana border, and therefore do not constitute utility operations outside Indiana." NIPSCO, 69 SEC Docket at 0339.

what is appropriate in the public interest necessarily turns on a consideration of the facts and circumstances of each situation." See Division of Investment Management, Securities and Exchange Commission, The Regulation of Public Utility Holding Companies, 114-15 (1995).

Portland General's strong ties to Oregon are not in dispute. However, Portland General earned an average of 34.14 percent of its total operating revenues from interstate sales from 1999 through 2001; approximately fourteen percent of its owned generation is located out of state; Portland General depends to a "significant" or "substantial" degree on power purchased out of state to serve its retail customers and in 2001, thirty-six percent of the electricity needed to meet peak load came from short-term purchases; from 2000 through the first nine months of 2002, Portland General earned between nine and nineteen percent of its gross revenues from marketing power out of state,[28] a business activity that has no relation to serving its retail customers; and Portland General owns a substantial interest in the Intertie, which is used primarily for interstate purchases and sales of electricity among BPA, the Pacific Northwest utilities, including Portland General, and the California utilities.[29] (Exhibit JP-2 at 17; IM-4 at 5.) In addition, Portland General's transmission system is part of the WSCC, and, according to Portland General, during the last few years, the area covered by the WSCC has become a dynamic marketplace for the trading of electricity. (Exhibit JP-2 at 11.)

Even with the application of a most forgiving flexible approach, an electric utility with these business characteristics cannot by any reasonable measure be considered "predominantly intrastate in character" and carrying on "business substantially in a single state." To grant this application, the Commission would have to ignore the language of the statute and stretch the precedents established by over sixty years of case law beyond reasonable limits.

Finally, Enron questions whether a finding that Portland General is not predominantly intrastate in character and does not carry on business substantially in a single state will make Section 3(a)(1) irrelevant in the context of the electricity industry today. (Enron Opening Brief at 2.) It believes there would be no question as to its intrastate character if it simply restructured and put its wholesale trading operations into an affiliate. (Enron Reply Brief at 10-11.) Enron's expert questions whether the Commission intends to examine other utilities that have followed government policies and disposed of owned generation and increased their activities in trading electricity in interstate markets. (Hawes at 17.) These concerns raise policy issues that deserve consideration in another forum, but they are not relevant to a determination of whether this application meets the terms of the statute.

---

[28] Enron would put the percentage between nine and twenty-four percent.

[29] The use of the Intertie is no different from the use of other high voltage lines within the Pacific Northwest and the Western Interconnection. (Ryan at 4.)

For all the reasons stated, I deny Enron's application for an exemption pursuant to Section 3(a)(1). Enron has failed to show by a preponderance of the evidence that Portland General's public utility business is predominantly intrastate in character and that Portland General carries on business substantially in a single state.

B. Does Enron Meet the Requirements of Sections 3(a)(3) and (a)(5) of PUHCA?

1. Introduction

Sections 3 (a)(3) and (a)(5) state:

> (3) such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company;
>
> (5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

Enron's position changed at some point and it now seeks a temporary exemption to allow time to sell the QFs or Portland General without a diminution in their asset value. (Enron Opening Brief 46-48.) In Enron's words, given "Enron's transient need for the exemption, in light of the fact that it intends to sell the QFs and may sell Portland General, it is appropriate to view Portland General as an immaterial utility subsidiary under the Act." (Enron Summary at 22-23.)

2. Requirements of the statute

Enron admittedly cannot meet the requirements of Section 3(a)(3) or Section 3(a)(5). (Tr. 52.) Enron has no reliable financials for fiscal years 1997 through 2000, and the first three quarters of 2001, so it is unable to make the required showing that it is only incidentally a holding company in that it is engaged primarily in a business other than as a public utility or that it does not derive a material part of its revenue from

Portland General.[30] (Bowen at 5-8.) Enron's evidence is not persuasive that Portland General, the largest investor owned public utility in Oregon, is small in a relative or absolute sense, or that Enron's utility holdings are essentially foreign. See Electric Bond and Share Co., 33 S.E.C. at 43; AES I, 70 SEC Docket at 1295-97. Moreover, Enron's expert admits that, "Enron does not qualify for exemption under either Section 3(a)(3) or 3(a)(5), in the first instance because its revenues and income are too small after its catastrophic fall from grace." (Hawes at 19-20.)

I disagree with Enron's expert that a refusal to grant Enron an exemption under Sections 3(a)(3) and 3(a)(5) on condition that it divest either Portland General or the QFs within two years reverses a Commission policy of accommodating industry changes in applying PUHCA. (Hawes at 20.) Some of the cases cited in support of relaxing the strict requirements of PUHCA occurred where the "overall consequence . . . is to make nearer the ultimate goal of compliance." See Kansas Power and Light Co., 50 SEC Docket at 1612 n.20. That is not true here. The reasons Enron offers in support of the applications are based on speculation as to its future actions, a dislike for the provisions of PUHCA, and self-interest.

Commission precedent has limited the Section 3(a)(5) exemption to holding companies with non-material domestic utility operations, which meet the definition of a utility but do not merit regulation because their operations are outside the United States or Congress has made them exempt. (Division Reply Brief at 13, citing AES II, 74 SEC Docket at 1740-52.) Those conditions are not present with Enron.

Enron emphasizes that a grant of the applications will not result in any of the conditions that PUHCA was intended to address. However, the record contains evidence of some concerns that PUHCA was designed to prevent. For example, in 2001, Portland General's results of operations show "a $48 million after tax provision for uncollectible accounts receivable from Enron and affiliated companies due to uncertainties surrounding Enron's bankruptcies." (Exhibit JP-2 at 29.) According to Portland General's Chief Financial Officer (CFO) and treasurer, Portland General is operationally and legally separate from Enron, and its assets and liabilities will not become part of the Enron estate. (Piro at 3.) However, in a Pledge Agreement dated December 3, 2001, and approved by the Bankruptcy Court on July 2, 2002, Enron assigned and pledged certain collateral, including "a security interest in the common stock of Portland General and all income, profits, distributions, proceeds or payments related thereto" to certain financial institutions for loans and letters of credit. (Bowen at 8.) Portland General's CFO also represented that a number of protections were put in place when Enron acquired Portland General. (Piro at 4.) For example, Portland General may not make an equity distribution to Enron, which would cause its equity capital to fall below forty-eight percent of total

[30] Enron does not intend to produce audited restated financial statements for those periods. (Bowen at 5-6, 8.) Enron has no financial statements for periods since it filed for bankruptcy on December 2, 2001. Enron's reports to the Bankruptcy Court contain cash flow statements. (Bowen at 5.) Enron discharged Arthur Anderson as its independent auditor on January 17, 2002. (Bowen at 6.)

capital without OPUC approval, and Enron "generally" cannot unilaterally place Portland General in bankruptcy. (Piro at 4-5.) Those representations and the significance, if any, of a November 20, 2002, OPUC order that Portland General file for approval of a transfer in 1999 of some $20 million from a Corporate-Owned Life Insurance Asset account to Portland General Holding and then to Enron as a dividend are untested by cross-examination. (Before the Public Utility Commission of Oregon, Portland General Electric, Order No. 02-824 (Nov. 20, 2002).)

For all the reasons stated, I deny Enron's application for an exemption pursuant to Section 3(a)(3) and Section 3(a)(5).

V. RECORD CERTIFICATION

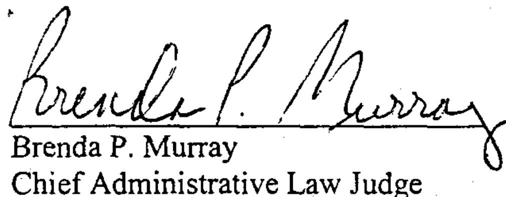
Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items described in the record index issued by the Secretary of the Commission on January 3, 2003.

VI. ORDER

Based on the findings and conclusions set forth above:

I ORDER, that Enron's applications filed on February 28, 2002, amended on May 31, 2002, and April 12, 2000, seeking exemptions pursuant to Section 3(a)(1) and Sections 3(a)(3) and 3(a)(5) of the Public Utility Holding Company Act of 1935 are DENIED.

This order shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that rule, a petition for review of this Initial Decision may be filed within twenty-one days after service of the decision. It shall become the final decision of the Commission as to each party who has not filed a petition for review pursuant to Rule 360(d)(1) within twenty-one days after service of the Initial Decision upon such party, unless the Commission, pursuant to Rule 360(b)(1), determines on its own initiative to review this Initial Decision as to any party. If a party timely files a petition for review, or the Commission acts to review as to a party, the Initial Decision shall not become final as to that party.



Brenda P. Murray
Chief Administrative Law Judge