

1 **UNITED STATES OF AMERICA**
2 **BEFORE THE**
3 **SECURITIES AND EXCHANGE COMMISSION**

4 In the Matter of

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

Administrative Proceeding

File No. 3-10909

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

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

13 **I. INTRODUCTION**

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

21 The OPUC's brief is limited to Enron's application for an exemption under Section
22 3(a)(1) of Public Utility Holding Company Act of 1935 (the "Act"). The OPUC takes no
23 position on Enron's filing for exemptions under Section 3(a)(3) or Section 3(a)(5) of the Act.

24 The Initial Decision concluded that Enron's application for a 3(a)(1) exemption should be
25 denied because the activities of Portland General are not "predominantly intrastate in character"

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1 under the meaning of the Act.¹ The Initial Decision does not adequately consider the historical
2 policy of the Act along with the undisputed fact that the OPUC adequately and effectively
3 regulates Portland General. In addition, the Initial Decision's conclusion that Portland General is
4 not predominately intrastate in character under the meaning of the Act is incorrect. In fact, all of
5 Portland General's service territory and retail customers are located within the State of Oregon²
6 and the OPUC is the only state utility commission that regulates Portland General.³ The
7 operation of Portland General in prudently managing its native load requirements to serve
8 Oregon consumers does not change the predominately intrastate character of Portland General.
9 Adoption of the Initial Decision would negatively affect Enron, and other exempt holding
10 companies, while also increasing the potential for adverse utility behavior. The Commission
11 should not adopt a policy that creates the potential for adverse utility behavior when the facts
12 demonstrate that Portland General is predominately intrastate in character and adequately and
13 effectively regulated by the OPUC.

14 II. DISCUSSION

15 A. The OPUC adequately and effectively regulates Portland General's utility 16 operation and activities.

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

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

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24 ¹ Initial Decision at 23.

25 ² Opening Brief of the Public Utility Commission of Oregon dated January 7, 2003 ("Opening Brief") at 2; Lesh,
3:59-61.

26 ³ Lesh, 5:112 -113.

⁴ ORS 756.040(1).

1 the regulatory scheme provided for in Oregon. Although Portland General enters into some
2 wholesale transactions outside of Oregon, the OPUC has access to the books and records of these
3 transactions. Whether or not wholesale power sales take place on the Oregon side of the border
4 or outside of Oregon does not affect the ability of the OPUC to protect Portland General's retail
5 customers.⁵

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

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24 ⁵ Opening Brief at 3

25 ⁶ Id.; Lesh 3:59-61.

26 ⁷ Opening Brief at 3.

⁸ Id.

⁹ Reply Brief of the Public Utility Commission of Oregon dated January 14, 2003 ("Reply Brief") at 4-5.

1 **1. The Initial Decision fails to adequately consider the historic policy of the Act in**
2 **concluding that the OPUC’s adequate and effective regulation of Portland**
3 **General’s utility activities does not support a finding that Portland General is**
4 **predominately intrastate in character.**

5 The Initial Decision correctly acknowledges that it is undisputed that the OPUC has
6 adequate and effective regulation of Portland General.¹⁰ The Initial Decision, however, fails to
7 consider the implications of adequate and effective regulation within the historic policy of the
8 Act and, instead, simply summarily dismisses the OPUC’s adequate and effective regulation of
9 Portland General as “significant, but not controlling.”¹¹

10 The Initial Decision ignores the historic policy of the Act, which is to make Section
11 3(a)(1) exemptions available when the utility activities of Portland General are effectively
12 regulated by the single State of Oregon. Specifically, the Commission has determined that
13 Congress intended Section 3(a)(1) exemptions to be available when utility activities are
14 effectively regulated by a single state. In 1989, the Commission explained the purpose of
15 Section 3(a)(1) exemptions. It stated that:

16 In adopting the Act, Congress determined to exempt from any provision or
17 provisions of the Act a public-utility holding company that although engaged in
18 interstate commerce, has an essentially intrastate character. Congress’ decision is
19 consistent with indications in the Act’s legislative history that a major purpose of
20 the Act was to create a system to control public-utility holding companies that
21 escaped effective state regulation because of their interstate activities. While
22 Congress’ purpose in adopting the section 3(a)(1) exemption is not entirely
23 explicit, it appears that Congress believed that a company that is “predominantly
24 intrastate” could be effectively regulated by the state in which it is primarily
25 located. * * *¹²

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

30 ¹⁰ Initial Decision at 21.

31 ¹¹ Id.

32 ¹² Non-Utility Diversification by Intrastate Public-Utility Holding Companies, Holding Co. Act Release No. 24815
33 (February 7, 1989)(footnotes omitted).

1 over public-utility holding companies that escaped effective state regulation because of their
2 interstate activities. In this case, it is undisputed that Portland General has not escaped effective
3 state regulation because of its interstate activities. Portland General is predominantly intrastate
4 within the meaning of the Act because it is effectively regulated by the OPUC in the State of
5 Oregon where Portland General is primarily located.

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

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

16 The fact that Portland General prudently manages its native Oregon load requirements by
17 selling excess wholesale power at the most cost effective trading hubs – which are sometimes
18 located outside of Oregon – does not change the predominantly intrastate character of Portland
19 General as demonstrated by the fact that Portland General continues to be a net purchaser of
20 power to serve its native Oregon load.¹³ The Initial Decision ignores the purpose of the trading
21 activity and, instead, largely relies on the percentage of utility revenues generated through out-
22 of-state sales for 1999-2001.¹⁴

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

25 ¹³ See Piro, 10: 209-215.

26 ¹⁴ Initial Decision at 22.

1 Division recommended that the Commission adopt a flexible standard that considers all the facts
2 and circumstances of each situation for exemptions under Section 3(a) of the Act instead of
3 applying bright-line tests.¹⁵ The OPUC agrees with the 1995 Division Study that all the facts
4 and circumstance of each situation should be considered instead of the application of a bright-
5 line test. The Initial Decision, however, has decided to ignore the facts and circumstances that
6 have led to Portland General’s out-of-state wholesale sales (i.e. Portland General is a net
7 purchaser of power to serve its native Oregon load and prudently manages that native Oregon
8 load by selling excess power into the most cost effective power markets)¹⁶ and, instead, adopted
9 the bright-line view that out-of-state sales that result in over 30% of Portland General’s utility
10 revenue for the years 1999-2001 demonstrates that Portland General is interstate in character.

11 The Initial Decision looks only at the last three year averages of Portland General’s utility
12 revenues and concludes that the application should be analyzed only on those three years.¹⁷
13 While the OPUC agrees that the Commission has generally used this measuring period, it does
14 not take into account the highly atypical western wholesale power market in the years 2000 and
15 2001.¹⁸ Again, the OPUC believes that all the facts and circumstances of the situation should be
16 considered. In this case, it is evident that the western wholesale market in 2000 and 2001 created
17 a situation where a utility with excess power (a long position) could sell that excess power into
18 the western wholesale market at extremely high and volatile prices compared to historical prices.
19 As a result, the utility revenues collected by Portland General during 2000 and 2001 were
20 substantially higher than would be expected if the utility revenues were adjusted to account for
21 the atypical prices that were being charged in the western wholesale market.¹⁹

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24 ¹⁵ See 1995 Division Study at 114-115.

25 ¹⁶ See Opening Brief at 2; Piro 10: 209-215.

26 ¹⁷ Initial Decision at 19-20.

¹⁸ Reply Brief at 2; Piro, 9:198-10:207.

¹⁹ Reply Brief at 2-3.

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2 **2. Portland General's ownership of a part interest in a Colstrip, Montana
generating plant does not change its predominately intrastate character.**

3 Portland General also owns an interest in the Colstrip #3 and #4 generating plants located
4 in Montana. The power that is generated from Portland General's interest in the Colstrip plants
5 is primarily used to provide power to Portland General's native Oregon load. Portland General's
6 ownership of its interest in the Colstrip generating plants have been included in Portland
7 General's Oregon retail rate base since the mid-1980s, during which time Portland General has
8 been deemed to be intrastate in character.²⁰ Portland General's ownership in an interest of the
9 Colstrip generating plants used primarily to provide retail service to its native Oregon load and
10 included in its Oregon rate underscores the predominately intrastate character of Portland
11 General.²¹

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

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

19 In determining whether Enron is entitled to a Section 3(a)(1) exemption under the Act,
20 the issue is whether Portland General is predominantly intrastate in character and whether it
21 carries on its business substantially in a single State. The Initial Decision correctly concluded
22 that Commission precedent and Commission policy require a flexible approach to interpreting
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24 ²⁰ Portland General has been deemed to be intrastate in character, and as such, eligible for an exemption under
25 Section 3(a)(1) of the Act for many years prior to any relationship with Enron. Portland General's former parent
26 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.

1 Section 3(a)(1) of the Act to each particular factual situation, and the “determination of what is
2 appropriate in the public interest necessarily turns on a consideration of the facts and
3 circumstances of each situation.”²²

4 Instead of actually taking a flexible approach to Portland General’s particular factual
5 situation and considering what is appropriate in the public interest the Initial Decision establishes
6 a type of bright-line test that relies mainly on the facts that Portland General garners an average
7 of 34.14 percent of its total operating revenues from interstate sales from 1999-2001 and
8 approximately fourteen percent of its owned generation is located out-of-state.²³

9 Adoption of the Initial Decision would establish a policy that would likely result in
10 adverse utility behavior. Portland General is not the only utility that sells excess power into the
11 wholesale market. In fact, nearly all utilities sell excess power which often ends up out of the
12 state. If the Initial Decision was adopted, utilities would have an incentive to sell their excess
13 power within the state, often times at lower prices.²⁴ The Commission should not adopt a policy
14 that creates an incentive for utilities to sell their excess power within the state, which may not be
15 the most effective location for the utility that needs power (or at prices most beneficial to
16 customers), especially in this situation where all the parties agree that the OPUC has adequate
17 regulatory oversight of Portland General to protect Oregon customers. Clearly, creating an
18 incentive for such behavior would negatively affect both the customers who receive the benefit
19 of the excess power sales netted against the utilities’ power costs and those customers in areas
20 that have a need for the excess power.

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

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25 ²² Initial Decision at 21-22 citing Division of Investment Management, Securities and Exchange Commission, The
Regulation of Public Utility Holding Companies, 114-14 (1995).

26 ²³ Initial Decision at 22.

²⁴ Reply Brief at 3.

1 it can then sell that excess thermal power into the wholesale market, resulting in a benefit to
2 Oregon retail customers.²⁵ However, if the Commission creates a policy with disincentives for
3 Portland General to sell excess power out-of-state by subjecting it to Commission regulation,
4 Portland General may decide not to purchase the less expensive hydroelectric power and,
5 instead, serve its native load with its higher cost thermal resources. The Commission should not
6 adopt a policy that creates incentives for Portland General and other utilities to pursue behavior
7 adverse to its retail customers, especially when no parties question the OPUC ability to
8 adequately and effectively protect all of Portland General’s retail customers.

9 **III. CONCLUSION**

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

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26 ²⁵ Id. at 2-3.

