UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

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

BRIEF IN SUPPORT OF PETITION OF FPL GROUP, INC. FOR REVIEW OF INITIAL DECISION

In response to the order of the Securities and Exchange Commission ("Commission") issued in this proceeding on June 11, 2003,[1] FPL Group, Inc. ("FPL") hereby submits this brief in support of its petition for review of the Initial Decision ("Initial Decision") issued by the Administrative Law Judge ("ALJ") in this proceeding on February 6, 2003. FPL has taken the position that the Public Utility Holding Company Act of 1935 ("Act") gives the Commission the power to craft a remedy in this proceeding that both protects the interests of investors and consumers and avoids adverse impacts on innocent parties such as FPL. FPL has explained its position in detail previously,[2] and it proposes here only to address whether the record contains evidence that Enron Corp.'s ("Enron") exempt status may have resulted in abuses that the Act was intended to prevent. Unless such evidence exists, there simply is no reason why the relief FPL seeks should be withheld. FPL also will respond to certain criticisms of its

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

2 See FPL's Motion to Intervene submitted on October 21, 2002; the testimony of Dean R. Gosselin on behalf FPL and James J. Hoecker on behalf of FPL and Sithe/Independence Power Partners, L.P. ("Sithe"), all submitted on November 15, 2002; the Brief Supporting Position of FPL and Sithe submitted on January 7,2003, and the Reply Brief submitted by FPL and Sithe on January 14, 2003.

petition for review of the Initial Decision advanced by the Commission's Division of Investment Management ("Division").

While the ALJ has pointed to certain facts in the record as evidence of such abuses, careful analysis shows that those facts in no way suggest that such abuses have occurred. For this reason, FPL continues to maintain that failure to continue Enron's exemptions under Section 3(a)(3) or 3(a)(5) of the Act for a reasonable period could cause considerable harm both to them and investors without any corresponding benefits to any of the parties the Act was intended to protect. In addition, FPL believes that the Division has completely mischaracterized its position in a way that has broad implications for a correct understanding of the purpose of this proceeding.

I. FPL's Position is Consistent with the Public Interest.

The Division has characterized FPL's position in this proceeding as one that seeks a "balancing of harms."[3] While that assessment is not incorrect, the Division's response to it demonstrates a severe misunderstanding of the fundamental point FPL has been attempting to make. Specifically, the Division goes on to claim that "ignoring the requirements of the Act in order to resolve a matter of economic detriment is not the role of the Commission."[4] However, FPL has never requested the Commission to ignore the Act's requirements. Indeed, FPL has stated that it takes no position on Enron's entitlement to an exemption and seeks only to ensure that whatever decision the Commission reaches does not harm the interests of innocent parties such as FPL. The Division maintains that this "is not the role of the Commission,"[5] but as FPL

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[3] Response of the Division of Investment Management in Opposition to Petitions for Review filed in this proceeding on March 23, 2003 ("Division Response") at n. 19.

[4] *Id.*

[5] Division Response at n. 19.

has previously demonstrated, that simply is not true. Indeed, the one thing that can be said with certainty about the Commission's role in administering the Act is that it has never been to proclaim *fiat justitia ruat caelum* (let justice be done though the heavens fall), a phrase which nicely summarizes the central theme of all the Division's pleadings.

Contrary to the Division's claims, the Commission consistently has attempted to limit the adverse effects of its decisions in all contexts, including revocations of Section 3(a) exemptions. In one case, the SEC commenced revocation proceedings when it found evidence of complexities in the holding company's financial structure that impaired its ability to raise capital and adversely affected its operating subsidiaries.[6] Nevertheless, the Commission permitted the holding company to retain its exemption pending completion of a restructuring. The Commission has adopted this approach in a number of proceedings, and FPL simply requests the Commission to do so in this case.[7]

The Division is also mistaken when it attempts to characterize FPL as the master of its own fate and therefore not in need of the relief it requests. Specifically, the Division has asserted that FPL has alternative remedies that lie "outside the purview of the administrative process."[8] Unfortunately this is not correct. FPL has made extensive efforts to protect itself from the harm it could suffer through loss by Enron of its Section 3(a)(3) and 3(a)(5) exemptions. However full implementation of the plans it has developed in this connection

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6 *Colonial Gas Energy System*, Holding Co. Act Release No. 22144 (July 30, 1981).

7 *See, e.g., Public Service Co. of Colorado,* SEC No-Action Letter, (Feb. 19, 1997) (deferring enforcement action until completion of formation of a new registered holding company); *United Utilities,* 20 SEC 496 (1945) (granting exemption subject to sale of out-of-state assets); *Lykes Bros., Inc.*, Holding Co. Act Release No. 20487 (April 6, 1978).

8 Division Response at n. 19.

depends on the receipt of regulatory approvals from the Federal Energy Regulatory Commission ("FERC"), and the decision to issue those approvals obviously lies with FERC.

Until February 27, 2003, FPL co-owned with a subsidiary of Enron a number of qualifying facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978. As FPL has previously explained, if Enron were to lose its exemptions under Sections 3(a)(3) and 3(a)(5) of the Act, the generation facilities in question would lose their QF status. To avoid this result, Enron's indirect interests in these facilities were transferred to a trust on February 27, 2003. FPL was actively involved in the negotiations that led up to this transfer and expended considerable resources to achieve this result. However, it remains uncertain whether the transfer will receive the necessary approvals from the FERC and thus achieve the desired result of protecting FPL's interests. Unless and until those approvals are issued, FPL remains exposed to harm unless it receives the relief it is seeking from the Commission. At this time, however, the outcome of the FERC proceedings remains uncertain.

First, a settlement concerning the QFs in question, as well as other QFs in Southern California in which Enron held an interest, is pending at the FERC. A presiding administrative law judge has urged the FERC to reject a consent agreement with FERC Staff, although FERC may decide not to accept this recommendation. Should the FERC accept the underlying settlement, FPL would no longer need the relief it seeks from the Commission. On the other hand, should FERC reject or otherwise modify the settlement in manner that is not acceptable to the parties, and if FERC also rejects the QF recertification application relating to the trust ownership structure for the generation faculties, then the QF status of those facilities would remain in jeopardy without a temporary extension of Enron's Section 3(a)(3) and 3(a)(5) exemptions. In that situation, FPL would, of course, continue its vigorous efforts to resolve its

difficulties. However, without the Commission's assistance, FPL remains exposed to significant harm.

II. The ALJ Has Recognized the Validity of the Flexible Approach to Interpreting the Act Supported by FPL.

The ALJ acknowledged in the Initial Decision that "the Commission has not established a set of hard and fast rules" for making determinations under Section 3(a) of the Act, but rather that it weighs a number of factors when making these determinations. The ALJ therefore chose to adopt the "flexible" approach to interpreting Section 3(a) supported by FPL.[9] The ALJ found, however, that even when applying a flexible approach, Enron could not qualify for any exemption. However, the ALJ's decision is incompatible with the flexible approach because it would create greater harms than available alternatives without producing any benefits. The ALJ appears to acknowledge that in applying the flexible approach she should weigh the potential harms that would result from alternative possible outcomes. To justify her denial of the request that Enron's exemptions under Sections 3(a)(3) and 3(a)(5) be continued temporarily as requested by FPL, she maintains that "the record contains evidence of some concerns that PUHCA was designed to prevent."[10] However, the specific facts the ALJ identifies have no connection whatsoever with such concerns and to some extent demonstrate that effective protections are in place to prevent them.

III. The Initial Decision Does Not Allege any Concerns that Represent Abuses the Act was Intended to Prevent.

The ALJ maintains that the record in this proceeding contains evidence of the following concerns the Act was intended to prevent: (a) an uncollectible account receivable from Enron and affiliated companies that appears on Portland General Electric Company's

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9 Initial Decision at 14.

10 *Id.* at 24.

("Portland General") balance sheet, (b) a pledge agreement under which Enron has assigned and pledged certain collateral consisting of interests it holds in Portland General, and (c) protections created by the Public Utility Commission of Oregon ("OPUC") in connection with Enron's acquisition and ownership of Portland General. While the ALJ notes that these matters have not been subject to cross examination, one must first ask whether they have any relevance at all to the issue presented, i.e., is it reasonable to presume that they might represent evidence of abuses the Act was intended to prevent. The Act addresses a discrete set of issues connected with the ownership of public utility companies by holding companies. Before one can proceed to test specific facts through cross examination, one must first determine whether they might be relevant to these issues. Even if the matters identified by the ALJ represent situations or occurrences that may be disadvantageous to Portland General, this does not mean that they necessarily represent abuses the Act was intended to prevent.

Careful analysis of the evidence in question shows that the ALJ has not identified anything in the record that suggests Enron's current exempt status has produced any of the abuses identified in Section 1 of the Act. For this reason, the concerns pointed to by the ALJ in no way contradict the position taken by FPL on the temporary continuation of Enron's current exemptions under Sections 3(a)(3) and 3(a)(5). FPL will analyze below the relevance to this proceeding of the evidence presented by the ALJ.

a. Account Receivable

The ALJ notes that Portland General's books show "a $48 million after-tax provision for uncollectible accounts receivable from Enron and affiliated companies due to uncertainties surrounding Enron's bankruptcies."[11] However this account did not arise through

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[11] *Id.*

an affiliate transaction regulated under the Act. Rather, it is related to conditions the OPUC placed on Enron's acquisition of Portland General. The account's current status as uncollectible does not result from a potentially abusive dealings among affiliates, which would be necessary to make it a concern under the Act. The receivable was created as follows.

On June 4, 1997 the OPUC issued an order authorizing Enron's acquisition of Portland General.[12] That order was preceded by extensive discussions that culminated in a stipulation among OPUC staff, Enron and other affected parties ("Stipulation").[13] Among the many requirements agreed to by Enron in the Stipulation as a condition of its acquisition of Portland General was an obligation to provide to Portland General's customers $105 million upon completion of the merger. This amount was deemed to represent full payment to these customers for any entitlement they may have had to the value relating to:

1. the use of Portland General's name, reputation, business relationships, expertise, goodwill or other intangibles;

2. the wholesale and non-franchise retail activities that Portland General has undertaken that would not take place within Portland General following the merger and wholesale and non-franchise retail activities that Portland General might have undertaken had the merger not occurred; and

3. the added value of the merged entity that is achievable because of the combination or because of the association of Enron with Portland General.[14]

Of this $105 million payment, $74 million was recorded on Portland General's books as a merger receivable. Following completion of the acquisition, Enron made regular cash payments to Portland General, which reduced the outstanding balance to $48 million at the time

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[12] This order is attached as Exhibit JP-1 attached to the Prepared Direct Testimony of James J. Piro filed in this proceeding on November 15, 2002.

[13] The Stipulation is attached to the OPUC's order attached as Exhibit JP-1 to the testimony of James J. Piro.

[14] See Section 20.A of the Stipulation.

that Enron filed for bankruptcy protection. The bankruptcy filing caused Portland General to classify the account as uncollectible.

It is impossible to characterize this sequence of events as evidencing concerns of the type the Act was intended to prevent. The account receivable was not the product of a abusive affiliate transaction of the type described in Section 1(b)(2) of the Act or of any other potentially improper practice mentioned in Section 1. It arose out of the common practice of state utility commissions requiring merger parties to give back to retail customers in the form of reduced rates some amount of the value a merger is projected to create. Moreover, the outstanding balance of $48 million did not become uncollectible because of some abuse relating to the control of public utility companies by holding companies. It became uncollectible because Enron declared bankruptcy due to events entirely unrelated to its dealings with Portland General. More importantly, regardless of the origin of this uncollectible account, its existence in no way suggests that granting the relief FPL seeks will in any way threaten the interests of investors or consumers. Enron currently operates under the supervision of the bankruptcy court, and Enron's immediate registration under the Act will provide no additional protections. On the other hand, it would have a substantial negative impact on the value of Enron's assets and would cause substantial harm to FPL. The result simply cannot be viewed as consistent with long-standing Commission policy on mitigating the effects of its administration of the Act.

b. Pledge Agreement

The ALJ notes in the Initial Decision that Portland General's Chief Financial Officer ("CFO") and Treasurer has stated that "Portland General is operationally and legally separate from Enron, and its assets and liabilities will not become part of the Enron estate" in

bankruptcy.[15] The ALJ suggests that this statement is contradicted by a Pledge Agreement dated December 3, 2001, and approved by the Bankruptcy Court on July 2, 2002, in which Enron assigned and pledged to certain financial institutions certain collateral, including "a security interest in the common stock of Portland General and all income, profits, distributions, proceeds or payments related thereto." However, this pledge agreement in no way suggests that Portland General's assets and liabilities will become part of the Enron bankruptcy estate.

Section 541 of the Bankruptcy Code defines the bankruptcy estate exclusively in terms of property interests of the debtor on bankruptcy.[16] For Portland General's assets and liabilities to become part of the Enron bankruptcy estate, it would have to be viewed as one with Enron. This, of course, is why Portland General's CFO emphasized Portland General's separate operational and legal existence. Enron and Portland General are separate entities. Enron is in bankruptcy and Portland General is not, and Enron's declaration of bankruptcy does not have the effect of putting Portland General into bankruptcy or pushing it in the direction of bankruptcy.

Enron's interests include, of course, its interests in Portland General, and those interests therefore are included in the Enron bankruptcy estate. The fact that Enron has pledged certain of those interests to financial institutions in no way suggests that Portland General's assets and liabilities have become or are likely to become part of the Enron bankruptcy estate. The assets Enron pledged in the pledge agreement are its own assets and are entirely distinct from Portland General's assets. The existence of the pledge agreement in no way suggests that Portland General's assets and liabilities may become part of the Enron bankruptcy estate.

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15 Initial Decision at 24.

16 11 U.S.C. § 541.

c. OPUC Actions

It is difficult to see how the actions of the OPUC cited by the ALJ in the Initial Decision can be characterized as evidence of the concerns the Act was designed to prevent. The ALJ notes that Portland General's CFO has represented that the OPUC has required that Portland General may not, without OPUC approval, make an equity distribution to Enron which would cause Portland General's common equity capital to fall below forty-eight percent of total capital and that Enron "generally" cannot unilaterally place Portland General in bankruptcy. The ALJ also notes that the OPUC issued an order on November 20, 2002 requiring Portland General to seek OPUC approval of a transfer in 1999 of approximately $20 million from a corporate-owned life insurance asset account to Portland General Holding and then to Enron.

The 48 percent common equity capital requirement is considerably more rigorous than the 30 percent common equity requirement that the Commission normally imposes on public utility company subsidiaries in registered holding company systems. That the OPUC imposed this requirement demonstrates that Enron's status as an exempt holding company in no way hampered the OPUC's ability to protect, as it saw fit, Portland General's capital structure from Enron's actions. On the contrary, commitments not to place Portland General in bankruptcy and assertions of OPUC jurisdiction over the transfer of assets from Portland General to Enron are, if anything, further evidence of the effectiveness of state regulation. The Act was intended to supplement state regulation in instances where holding companies were able to evade that regulation. The evidence cited by the ALJ suggests Enron's exempt status has in no way

diminished the OPUC's ability to regulate the relations between Enron and Portland General.[17] These facts provide support for, rather than arguments against, relief sought by FPL.

IV. Conclusion

For the foregoing reasons, FPL requests review of the Initial Decision and also request that the Commission grant Enron a reasonable extension of its current exemptions under Sections 3(a)(3) and 3(a)(5) of the Act for the purpose of mitigating the impact that denial of the exemptions could have on FPL.

Respectfully submitted,

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[17] The OPUC strongly affirmed this conclusion in its Petition for Review filed in this proceeding on February 27, 2003.