UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In The Matter of	)	Administrative Proceeding
	)	
Applications of Enron Corp. for Exemptions	)	File No. 3-11373
Under the Public Utility Holding Company	)	
Act of 1935 (No. 70 -10190)	)	

MOTION OF PUBLIC CITIZEN, INC. FOR SUMMARY DISPOSITION OF ENRON CORP'S LATEST PUHCA EXEMPTION REQUEST, AND REQUEST FOR FINDING THAT APPLICATION WAS NOT MADE IN "GOOD FAITH"

Motion of Public Citizen, Inc. for summary disposition on Enron Corp's Latest PUHCA Exemption Request, and Request for Finding that Application was not made in "good faith."

Pursuant to Rules 154 and 250 of the Rules of Practice, 17 C.F.R. §§ 201.154 and 201.250**,** Public Citizen, Inc.[1], ("Public Citizen") hereby respectfully moves the Securities and Exchange Commission ("the Commission") for summary disposition of the most recent (January 4, 2004) application of Enron Corporation ("Enron") for exemption from the Public Utility Holding Company Act of 1935 ("PUHCA," "the Holding Company Act" or "the Act"). This latest Enron exemption request was filed in this proceeding under section 3(a)(4) of PUHCA. Public Citizen believes that, under the plain terms of the statute, Enron

[1] Public Citizen filed a motion requesting the right to participate on a limited basis on January , 2004.

does not and cannot qualify for this exemption, which is intended for banks or others that become holding companies only because they obtain utility securities through foreclosure or for purposes of distribution. Public Citizen also believes that there are no questions of fact that would require a hearing, and therefore requests summary disposition of the application. Moreover, Public Citizen believes that the Commission should not allow Enron to use its PUHCA exemption application as a "bargaining chip," as indicated in the Joint Motion for an extension of time, to pressure the Commission to first approve Enron's Plan of Reorganization as it involves its wholly-owned utility, Portland General Electric.

Public Citizen also requests a finding by the Commission that Applicants have not made a "good faith" application under section 3(a)(4).

MOTION FOR SUMMARY DISPOSITION

Public Citizen hereby moves the Commission to summarily dispose of Enron's pending application for a section 3(a)(4) exemption on the ground that Enron has failed to make a *prima facie* case that it qualifies for such exemption under what the Commission has called the "objective standards" of the Act. *See* "Fidelity Management & Research Company, et al.," 61 S.E.C. Docket 78 (January 5, 1996). These requirements are statutory pre-requisites for an exemption, that is, they are the minimal facts that must be shown before an applicant can be entitled to

a temporary exemption pending Commission action or entitled to an opportunity for hearing on its application.

Section 3(a)(4) of PUHCA requires in plain and clear language that to qualify for this exemption, the applicant must be a statutory holding company only "*temporarily*," and

> "*solely by reason of* the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities…."

(15 U.S.C. § 79c(a)(4), emphasis supplied).

As the Commission is well aware, Enron did *not* become a statutory holding company "solely" because it acquired securities as a result of a bankruptcy or debt, nor has its holding company status been "temporary." Enron became a "holding company" under PUHCA because it acquired the voting securities of a statutory "public utility company," Portland General Electric, on July 2, 1997. The fact that Enron then ran its holding company into bankruptcy does not now qualify it for a section 3(a)(4) exemption, which applies when a company is a statutory holding company "solely" because it has acquired ownership of utility securities through foreclosure or for purposes of liquidation. Enron's argument that it qualifies for such an exemption because it has declared bankruptcy years after it became a holding company is tantamount to the classic plea of the man who killed his parents and now claims that he deserves mercy because he is an orphan.

Section 3(a)(4) does not provide the Commission authority to permit such a regulatory travesty.

Enron's application belies its own argument that it qualifies for a section 3(a)(4) exemption. Enron quotes (at pp. 9 and 10 of its application) from the Commission staff's 1995 report to Congress regarding the legislative history of the section 3(a)(4):

> "[I]t appears that the exemption was intended to address a narrow set of circumstances in which holding company status was *temporary*, *inadvertent*, and *unaccompanied by the intent to exercise control*…."

Accepting these criteria, there was nothing either temporary or inadvertent about Enron's acquisition of Portland General Electric. Enron reincorporated in Oregon in 1997 for the sole purpose of acquiring control over Portland General Electric without having to register as a holding company under section 5 of PUHCA. Enron thereafter filed for an exemption under PUHCA section 3(a)(1), which is available only to a holding company that is incorporated in the same state in which its public utility operates. Enron in fact enjoyed a section 3(a)(1) exemption, by filing under Rule 2, from 1997 until its recent collapse.

And Enron has certainly had, and continues to have, "control" over the voting stock of Portland General Electric. Indeed, in its application in this proceeding, the closest Enron can come to its own cited criteria for a section

3(a)(4) exemption is to state that Enron won't hold or control the Portland General common stock "for investment purposes" or "for the purpose of exercising control over Portland General contrary to the protected interests under the Act." (Application at p. 9). If such a profession of good intentions were all it took to demonstrate that a holding company lacked "control" under PUHCA, there wouldn't be any companies that were required to register under the Holding Company Act. (Indeed, there would be no statutory "holding companies" at all.) In short, under its own stated criteria for a section 3(a)(4) exemption, Enron has failed to make a prima facie case for this exemption.

Enron grasps at straws to argue that, as a debtor-in-possession, it is a different legal entity under the bankruptcy laws that has somehow "acquired" the utility securities that Enron already owned. Whether or not it is a different legal entity for bankruptcy purposes, it is not one for the purposes of the Act, which are those that are relevant to a section 3(a)(4) application. Enron certainly cites no Commission precedent under the Act for treating bankrupt holding companies as "new" entities. If it did, acquisitions of utility securities by such new entities would have to be approved under section 9(a)(2) of PUHCA, for which action there is also no precedent.

Indeed, if Enron as debtor-in-possession had in fact newly "acquired" the securities as a separate entity, it would have done so illegally, since Enron

would have failed to obtain the required approvals for such an acquisition of utility securities under federal and state utility laws.

The Holding Company Act does not give the Commission authority to exempt a holding company from regulation under the Act simply because its current status is expected to be "temporary." Rather, as Enron itself concedes, the exemption is for "a narrow set of circumstances" that is specified in the plain terms of the statute; section 3(a)(4) applies to temporary holding companies that have acquired such holding company status "solely by reason of the acquisition of securities" for the purposes set forth in the exemption. Enron clearly does not meet this "solely by reason of" standard, and so does not qualify for this exemption. It is unclear whether Stephen Cooper or PGE Trust qualifies either.

Enron finally "analogizes" to Rule 10, merely throwing the entire rule up to the Commission in the apparent hope that some unspecified part of it will stick. (App. p. 20.) Public Citizen suggests that if Enron actually thought that any part of Rule 10 exempted Enron (which it does not), Enron would have sought a Rule 10 exemption instead.

The statutory requirements are clear, and Enron does not meet them. Having failed to make even a *prima facie* claim under the "objective standards" of section 3(a)(4), Enron is not entitled even to an opportunity for hearing. Moreover, there are no material disputed facts that could be resolved by a hearing, so even if

there were a requirement for an "opportunity" for hearing, none would be required in this case. The question is one of law which the Commission can and should decide. (*See Citizens for Allegan County, Inc. v. Federal Power Commission,* 414 F.2d 1125 (1969); Rule 250, 17 C.F.R. § 201.250.)

Public Citizen therefore respectfully moves the Commission to grant summary disposition and deny the exemption of Enron and such other of the applicants that fail to satisfy even the minimal objective standards of the section 3(a)(4) exemption.

Public Citizen believes that it is important for the Commission to act on Enron's application *prior* to acting on Enron's proposed plan of reorganization involving the disposition of Portland General Electric. The Joint Motion filed by Enron and the Commission's staff on February 6, 2004, (and granted on the same day) contains the following language at p. 4:

> "Under the Settlement offer, Enron would register as a holding company under the Act *upon the issuance of orders granting the Plan Application and Omnibus Application in substantially the form filed…."*(emphasis supplied)

Public Citizen cannot read this language in any way but to suggest that Enron wants to use its "agreement" to register under section 5 of PUHCA as a bargaining chip to pressure the Commission to approve its plan of reorganization *in advance* of Enron's registration under the Act. Since Enron has failed to make even a *prima facie* case for a section 3(a)(4) exemption from PUHCA, Public Citizen

believes that the Commission should keep the proverbial horse *before* the cart and assert jurisdiction over Enron before it acts on its reorganization plan, to eliminate any such bargaining chip.

It is especially important that the Commission assert its jurisdiction over Enron before approving Enron's plan of reorganization, since the ratepayers of Portland General Electric will not be apprised of their rights and obligations under the Holding Company Act until such jurisdiction is asserted. At a minimum, the Commission must not act to foreclose future participation by Oregonians in the disposition of their local public utility by approving Enron's plan of reorganization before they are even aware that the Commission has asserted jurisdiction over such plan.

THE APPLICANTS HAVE NOT MADE A "GOOD FAITH" APPLICATION

The Commission's order setting this matter for hearing properly included for hearing the question of whether the Applicants had made a "good faith" filing, since only such a filing would exempt Applicants from compliance with the Act while the application is pending. As discussed above, the Applicants have failed to state that they meet even the basic statutory "objective standards" of the exemption, *viz.*, that Enron acquired the securities that resulted in its "holding company" status under the Act "solely by reason of" the circumstances set forth in section 3(a)(4).

While the application displays faith in the legal creativity of Enron's attorneys, it fails to meet the statutory requirements of a "good faith" filing. Enron has already exhausted most of the other possible PUHCA exemptions, including those under sections 3(a)(1), 3(a)(3) and 3(a)(5), all denied by the Commission by opinion issued December 29, 2004. Apparently, even Enron was unwilling to try to pass itself off as a "public utility company" for purposes of a section 3(a)(2) exemption application, so a section 3(a)(4) exemption is all that was left.

Enron's attorneys have managed to come up with the novel claim that a debtor-in-possession is a new entity under bankruptcy law that somehow "acquires" the securities that it already owns, but as noted above, such a claim is not relevant under the Holding Company Act, and would have required compliance under other federal and state utility statutes had there been any such "acquisition" of utility stock.

Public Citizen recognizes that it is a serious matter to allege that an application under the Holding Company Act was not made in "good faith," since section 4 of the Act makes most activities in interstate commerce illegal for a holding company that is required to register under PUHCA but fails to do so.

However, Public Citizen also recognizes that Enron Corp has been operating under "pending" exemption applications from the Commission under the Act for a long time, and believes that it is no longer tolerable for the Commission

to permit such exempt operations, given the great harm that Enron has already inflicted on its investors, employees and consumers. There are those who argue that Portland General Electric has come out relatively unscathed from the Enron bankruptcy, given Enron's reincorporation in Oregon in order to obtain PUHCA exemptions for many years by filing under Rule 2. However, the Commission should be aware that the fact that the Oregon utility is being put on the auction block and sold to a Texas investment company is not a happy outcome as far as many of the ratepayers and citizens of Oregon are concerned. (*See* Attachment A, "Protect Oregon Economy by Defeating PGE Sale," February 15, 2004, The Oregonian, 2004 WL 58856201, by a former president of the Port of Portland and of Lasco Shipping Co., and a former Oregon U.S. Attorney for more than 20 years.)

ENRON TO SEC: "TRUST US"

Perhaps the most extraordinary portion of the Enron application is Enron's argument that the Commission need not worry about any control that Enron might have over PGE because: "It would be contrary to Enron's fiduciary duty to take actions that would be adverse to Portland General and decrease the value of that company to the estate." (App. at p. 21). As if Enron had not previously had such a fiduciary duty to the thousands of employees and investors

who lost their life savings in the second biggest bankruptcy in United States history!

Enron also argues that it is too far advanced into its bankruptcy proceedings to now be required to register under PUHCA. As Public Citizen has already shown in our Motion to Intervene, this state of affairs is Enron's doing. Enron chose to file three PUHCA exemption applications after its bankruptcy, despite the fact that it was aware that the Commission might deny them all, which the Commission did on December 29, 2003. (See Opinion of the Commission in Admin. Proc. File No. 3-10909.) In any event, Enron has been well aware since the Initial Decision denying all its exemption applications was issued in that proceeding on February 6, 2003, that there was a strong possibility that its requested PUHCA exemptions would be denied by the Commission as well.

As the Commission correctly found in its very recent Enron opinion, the statute does not permit the Securities and Exchange Commission to abdicate its jurisdiction under PUHCA simply because the parties may prefer a different forum in a bankruptcy proceeding. As the Commission observed (opinion at note 73): "[PUHCA] prescribes additional Commission oversight when holding companies required to register file for bankruptcy," citing sections 11(f) and (g) of PUHCA, 15 U.S.C. §§ 79k(f) and (g)). These provisions are important and necessary to

protect the interests of utility investors, consumers and the public interest, not merely the interests of creditors, which are the focus of federal bankruptcy law.

Public Citizen noted in its Motion to Intervene recent examples of the differing concerns of a bankruptcy court and a public utility commission when a utility declares bankruptcy. We noted that in California, Montana and South Dakota, public utility commissioners have had to intervene in the bankruptcy proceedings to try to protect local ratepayers. We concluded that recent experience makes it clear that PUHCA's enactors were correct in anticipating that the bankruptcy of utility holding companies would require special protections for utility consumers, investors and the public interest, not just for the interests of creditors. Enron's arguments regarding the advanced status of its reorganization in the bankruptcy proceeding, therefore, demonstrate that Enron's section 3(a)(4) application was not made in "good faith," but simply as a ploy to gain time in getting the bankruptcy court's approvals and to gain bargaining power in its negotiations with the Commission staff, as indicated by the Joint Motion.

THE COMMISSION'S ROLE IN THE ENRON FINANCIAL DEBACLE

Finally, in evaluating Enron's "good faith," it must be observed that much of the harm that Enron has done was made possible at least in part by the many exemptions from PUHCA regulation or "no-action" treatment that Enron has received over the years from this Commission or its staff, including numerous

"good faith" exemptions. First, there was the section 3(a)(1) exemption that Enron enjoyed by rule for many years, and, later, the "good faith" sections 3(a)(1), 3(a)(3) and 3(a)(5) exemptions that Enron achieved by simply filing an application, up until the time the Commission acted on them. In addition, Enron was the first company, as early as 1994, to receive a staff "no-action" letter to become a "power marketer" unregulated by PUHCA because it owned contracts for the sale of electricity. ("Enron Power Marketing, Inc.", January 5, 1994, 1994 WL 6730.) As the Commission correctly points out in its recent opinion denying Enron's section 3(a)(1), 3(a)(3) and 3(a)(5) exemption requests, a "no-action" letter does not necessarily represent the views of the Commission, does not have the force of law, and indeed is only a staff determination not to recommend enforcement action. (Enron Opinion at note 50.) Nonetheless, Enron was able to run its vast power marketer operations without coming under PUHCA because of the 1994 staff no-action letter.

Enron also obtained no-action letters from the Commission's staff for various other utility businesses, including one to provide utility services to a military facility without coming under the Holding Company Act ("Enron Federal Solutions, Inc.," April 8, 1999, 1999 WL 194687), and another to provide retail utility-type services, yet operate outside of PUHCA regulation. ("Enron Capital & Trade Resources Corp.," February 13, 1997, 1997 WL 58873.)

In short, Enron's ability to engage in utility-type behavior, while avoiding the investor and consumer safeguards and constraints of PUHCA, has played a not inconsiderable role in allowing Enron to engage in the activities that caused its very name to become an international by-word for corporate corruption. (Parmalat is already being dubbed "Enron parmigiana.") Public Citizen believes that much of the Enron financial debacle could not have occurred had Enron been required to comply with PUHCA, rather than operating under "automatic" exemptions by rule or under pending "good faith" PUHCA exemption applications, which exempt the holding company until the Commission acts upon them. Commission staff "no-action" letters also allowed Enron to continually avoid the consumer and investor protections of the statute.

Public Citizen's belief that stronger PUHCA enforcement would have limited the damage done by Enron is supported by the February 19, 2004, analysis of Standard & Poor's credit rating agency which evaluates the credit standings of utilities that are regulated by the Commission under PUHCA. (*See*, Attachment B**.)** Although finding that: "[T]he SEC's *relaxation* of these [PUHCA restrictions on investments in non-utility businesses] has *not* helped utility investors," (emphasis supplied), S&P nevertheless concludes that, if PUHCA had not been in place, the average rating deterioration from investments in non-utility businesses might have been greater. (Report at p. 1.) S&P's concludes that: "[E]xisting

utility credit would be best served from enforcement of PUHCA's provisions and restriction of utility investment in outside businesses." (Report at p. 5.)

Thus, Wall Street agrees with Main Street that strong enforcement of PUHCA by this Commission is necessary for the financial health of our public utilities (whose securities are now, as they were in the 1930s, widely held). Strong enforcement of PUHCA is also necessary to protect utility consumers, who ultimately pay, in their electricity and natural gas bills, for the higher costs of utility credit that have resulted from the Commission's relaxation of PUHCA's investment restrictions.

Conclusion

While it may be too late to undo the harm caused by Enron's prior PUHCA exemptions and no-action letters, the Commission should at the least promptly and summarily dispose of Enron's latest and obviously unwarranted application, under section 3(a)(4), for exemption from PUHCA regulation, require Enron to promptly register under section 5 of PUHCA, retain jurisdiction over Enron's reorganization plan as it relates to its wholly-owned public utility company, Portland General Electric, and find that Enron's application for exemption under PUHCA section 3(a)(4) was not made in "good faith."

Respectfully submitted,

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Attachments
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