701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696
Telephone 202-508-5615
Fax 202-508-5673

EDWARD H. COMER
Vice President & General Counsel

July 21, 2003

BY HAND DELIVERY

Jonathan G. Katz, Esq.
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

RE: Enron Corp., Administrative Proceeding File No. 3-10909

Dear Secretary Katz:

Together with this transmittal letter, I am enclosing the original and three (3) copies of the Amicus Brief of Edison Electric Institute on Review of Initial Decision for filing in the above-referenced proceeding. Please call me at 202-508-5615, or Henri Bartholomot in my office at 202-508-5622, if you have any questions in connection with this filing.

Sincerely,

- signature -

Edward H. Comer

cc: Service List

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

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

AMICUS BRIEF OF EDISON ELECTRIC INSTITUTE ON REVIEW OF INITIAL DECISION

July 21, 2003

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AMICUS BRIEF OF EDISON ELECTRIC INSTITUTE
ON REVIEW OF INITIAL DECISION

Pursuant to Rule 210(d) of the Rules of Practice of the Securities and Exchange Commission ("Commission"), 17 C.F.R. § 201.210(d) (2002), Edison Electric Institute ("EEI") hereby files its Amicus Brief on Review of Initial Decision in the above-captioned proceeding. In the initial decision in this proceeding, dated February 6, 2003 ("Initial Decision"), the administrative law judge ("ALJ") denied separate applications of Enron Corp. ("Enron") for exemption under Sections 3(a)(1), 3(a)(3) and 3(a)(5) of the Public Utility Holding Company Act of 1935, as amended ("PUHCA" or the "Act"). On June 11, 2003, the Commission issued an Order Granting Petitions for Review, Denying Motion for Leave to Intervene Out of Time, and Scheduling Briefs. For the reasons set forth below, EEI urges the Commission to set aside or modify the Initial Decision specifically as it relates to the Section 3(a)(1) aspects of Enron's application. The written consents of the parties to EEI's participation in this proceeding accompany this Amicus Brief.

EEI is the association of U.S. shareholder-owned electric companies, international affiliates, and industry associates worldwide. In 2001, EEI members served more than 90

percent of the ultimate customers in the investor-owned segment of the electric utility industry, and nearly 70 percent of all electric utility ultimate customers in the nation. EEI's members include most of the electric utility holding companies that are registered under the Act, as well as many holding companies that are currently exempt under Section 3(a)(1).[1] EEI has previously appeared before the Commission to advocate positions on behalf of its members in rulemakings and other proceedings under the Act.

EEI's interest in this proceeding is limited to those portions of the Initial Decision that address the standards relevant to an application for exemption under Section 3(a)(1). The ALJ, relying on a variety of quantifiable factors, held that Enron is not entitled to the 3(a)(1) exemption because the utility operations of its sole public utility subsidiary, Portland General Electric Company ("Portland General"), are not "predominantly intrastate in character" and carried on "substantially in a single State," namely, Oregon.

EEI's concern is that the Initial Decision, if allowed to stand, will have significant consequences for other exempt intrastate electric utility holding companies. As set forth in greater detail below, EEI believes that the ALJ has adopted several new legal standards for determining whether the operations of a public utility are "predominantly intrastate in character" and carried on "substantially in a single State," and has not adequately dealt with Commission precedents and with other federal policies in coming to her conclusions.

Specifically, EEI is concerned that, in denying Enron's application for exemption, the ALJ found:

[1] EEI understands that there are approximately 100 electric and gas utility holding companies that are exempt by order under Section 3(a)(1) or pursuant to Rule 2 under the Act, 17 C.F.R § 250.2.

1. The use of Portland General's transmission system, which is located almost entirely in Oregon, to transmit electricity in interstate commerce is indicative of interstate operations. (Initial Decision at 12 – 13)

2. Portland General's purchase of electricity, at wholesale, from sources outside of Oregon in order to serve its Oregon retail load is indicative of interstate operations. (Initial Decision at 11 – 12)

3. The percentage of Portland General's generating assets, measured in terms of megawatts (MW), located out-of-state is indicative of an interstate business. (Initial Decision at 12)

4. The portion of Portland General's retail book trading[2] transactions taking place at hubs outside of Oregon is part of its out-of-state business even though entered into solely for the benefit of its Oregon retail customers.[3] (Initial Decision at 16 – 17)

I. INTRODUCTION.

Enron, an Oregon corporation, owns all of the issued and outstanding common stock of Portland General, also an Oregon corporation. Portland General operates as a regulated electric utility company in Oregon. All of its retail utility customers are located in Oregon, and, with the exception of certain generating assets located in Montana and associated transmission lines, all of Portland General's generation, transmission, and distribution assets are located in Oregon. Portland General is subject to regulation by the Oregon Public Utility Commission ("OPUC")

[2] Enron describes its retail book trading as the purchase and sale of power to manage supplies and load for the benefit of its retail customers, all of whom are located in Oregon.

[3] The ALJ took into account other factors as well, including, among others, Portland General's operating revenues from non-retail book (or merchant) trading activities outside Oregon.

with respect to retail electric rates and service in Oregon and by the Federal Energy Regulatory Commission ("FERC") with respect to wholesale electric rates and transmission service.

On February 28, 2002, Enron filed with the Commission under the Act an application requesting an order under Section 3(a)(1) exempting it and its subsidiary companies as such from all provisions of PUHCA, except Section 9(a)(2) (the "Section 3(a)(1) Application"). On October 7, 2002, the Commission issued an order scheduling a hearing on the Section 3(a)(1) Application, as well as on a separate application filed by Enron under Sections 3(a)(3) and/or 3(a)(5) of the Act. Under its scheduling order, the Commission divided the hearing into two phases. The "Phase I" portion was limited to determining whether Enron satisfies the statutory criteria for exemption under Section 3(a). "Phase II," which would be necessary only if it were found that Enron satisfies the statutory criteria for one of the exemptions, would be held for the purpose of determining whether granting Enron an exemption would be "detrimental to the public interest or the interest of investors or consumers" under the "unless and except" clause of Section 3(a).[4]

On February 6, 2003, the ALJ issued the Initial Decision denying both of Enron's exemption applications. With regard to the Section 3(a)(1) Application, the ALJ determined, using various numerical criteria, that Portland General's public utility operations are not "predominantly intrastate in character" and carried on "substantially in a single State," namely, Oregon. On February 27, 2003, Enron and the OPUC filed separate Petitions for Review of the Initial Decision ("Petitions"). On March 25, 2003, EEI, on behalf of its member utilities, filed an Amicus Brief In Support of Petitions for Review insofar as the Petitions related to the standards applied by the ALJ in denying Enron's Section 3(a)(1) Application. On June 11, 2003, the

[4] Order Scheduling Hearing Pursuant to Section 19 of the Public Utility Holding Company Act of 1935, Holding Co. Act Release No. 27574 (Oct. 7, 2002).

Commission issued an Order Granting Petitions for Review, Denying Motion for Leave to Intervene Out of Time, and Scheduling Briefs.

For the reasons set forth below, EEI urges the Commission to set aside or modify that portion of the Initial Decision denying Enron's application for exemption under Section 3(a)(1) of the Act.[5] More particularly, in determining whether Enron is entitled to an exemption under Section 3(a)(1) of the Act, EEI urges the Commission to ignore certain new and unprecedented numerical standards or tests applied by the ALJ in measuring the magnitude of Portland General's non-Oregon utility operations.

II. ARGUMENT.

Section 3(a)(1) of the Act provides that "unless and except insofar as it finds the exemption detrimental to the public interest or the interests of investors or consumers" the Commission shall exempt from registration any holding company and every subsidiary thereof, if:

> 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.

The Commission has considered – under the "unless and except clause" of Section 3 – a holding company system's interstate activities that give rise to the kinds of abuse enumerated in Section 1 of the Act to be grounds for denying or revoking exemptions, as "detrimental to the public interest and the interest of investors and consumers." But it has not viewed the totality of

[5] EEI has no position on the portion of the Initial Decision denying Enron's application for exemption under Section 3(a)(3) and/or 3(a)(5) of the Act.

a holding company's activities in interstate commerce as relevant to the question whether its utility operations are "predominantly intrastate in character."[6]

Thus, even though a holding company meets the requirements of Section 3(a)(1), the Commission may find its registration to be in the public interest.[7] The Commission in its October 7, 2002 order for a hearing specifically left to a Phase II hearing in this proceeding the issue of whether granting Enron an exemption would be "detrimental to the public interest or the interest of investors or consumers."

In determining whether a company is "predominantly intrastate in character" and operates "substantially in a single State," the Commission has historically considered various numerical factors, including gross operating revenues, net operating revenues, net income, number of customers served, location of utility assets, and net utility plant, in order to quantify the relative size of a company's out-of-state utility operations, or "presence."[8] As the ALJ noted, the Commission observed in a recent case that, in practice, it has given the greatest deference to revenues.[9]

In finding that Portland General's public utility operations are not "predominantly intrastate in character" and carried on "substantially in a single State," namely, Oregon, the ALJ has given substantial weight to certain numerical and non-numerical factors that the Commission has not previously considered relevant to the "predominantly/substantially" test under Section

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6 See e.g., Texas Utilities Co., 31 S.E.C. 367, 371 (1950) (granting exemption under Section 3(a)(1) to intrastate holding company "despite its magnitude and the extensive interstate aspects of its subsidiaries' operations").

7 See Niagara Hudson Power Corp., 16 S.E.C. 139, 171 (1944); Long Island Lighting Co., 18 S.E.C. 717, 721 (1945).

8 See NIPSCO Indust., Inc., 53 S.E.C. 1296, 1323 (1999) ("NIPSCO").

9 See C&T Enter., Inc., Holding Co. Act Rel. No. 27590 (Oct. 31, 2002).

3(a)(1). These include (a) the extensive use of certain high voltage transmission lines owned by Portland General and located in Oregon in connection with interstate transmission of power, (b) Portland General's wholesale purchases of electricity from non-Oregon sources in order to meet the requirements of its Oregon retail load, and (c) the percentage of Portland General's owned generation capacity (measured by MW) that is located outside Oregon.

Furthermore, in applying the traditional revenues test to Portland General, the ALJ included gross revenues from Portland General's "retail trading book sales," which, as indicated, are entered into by Portland General in support of its obligation to serve its Oregon retail customers.

The ALJ's new tests for exemption under Section 3(a)(1) are likely to conflict with important FERC policy initiatives to encourage the economic and efficient use of transmission facilities on a regional basis, and to increase the reliance of retail electric service providers on power purchased from non-affiliated generators, whether located within or without their service territories. Specifically, in Order No. 2000, the FERC has encouraged jurisdictional utilities to transfer operational control over their transmission facilities to large regional transmission organizations ("RTOs") that are independent of any market participants in order to "(1) improve efficiencies in transmission grid management; (2) improve grid reliability; (3) remove remaining opportunities for discriminatory transmission practices; (4) improve market performance; and (5) facilitate lighter handed regulation."[10] Such RTOs are expected to expand the efficiency and

[10] Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs., Regulations Preambles ¶31,089 at 30,993 (2000). In the FERC's view, there ideally would be four Regional Transmission Organizations serving markets throughout the United States—one in the Northeast, one in the Southeast, one in the Midwest, and one comprised of all utilities within the Western Interconnection, including Portland General. Regional Transmission Organizations, 96 FERC ¶61,065 (2001); Regional Transmission Organizations, 96 FERC ¶61,066 (2001); Avista Corp., 96 FERC ¶61,058 (2001).

geographic scope of electricity markets by providing transmission service throughout the region in which a participating utility's transmission facilities are located.[11]

More recently, the FERC has issued its proposed Standard Market Design rules that, if adopted, would require all jurisdictional utilities to transfer operational control over their transmission facilities to an RTO or other Independent Transmission Provider.[12] As envisioned by the FERC, each Independent Transmission Provider would be responsible for operation of region-wide day-ahead and real-time energy markets.[13] Such markets would encourage liquid regional trading hubs and would provide additional supply options that would enable load-serving entities to balance loads and resources in an economical manner on short notice. Each Independent Transmission Provider would also be responsible for developing and implementing a market-monitoring program designed to assure the efficiency of the market place.[14]

Conversely, the FERC has actively sought to mitigate the potential for any single supplier to exercise generation market power by owning or controlling an excessive share of generation in a relevant geographic market.[15] The effect of this policy is to discourage utilities from relying solely on their own generation for the purpose of providing retail electric service. Because many utilities have divested their own generating resources as part of state restructuring programs and now purchase all of their electricity in the wholesale market from marketers, independent power producers, and other utilities, they are necessarily dependent on wholesale power purchases from

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11 Order No. 2000 at 31,173 - 31,174.

12 Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, FERC Stats. & Regs., Proposed Regulations ¶32,563 (2002) at ¶¶125-131.

13 *Id.* at ¶¶269-327.

14 *Id.* at ¶¶474-508.

15 See, e.g., American Elec. Power Co. and Central and South West Corp., 90 FERC ¶61,242 at 61,790 - 61,792 (2000); AEP Power Marketing, Inc., et al., 97 FERC ¶61,219 (2001).

suppliers either within or outside of their service territories in order to provide retail electric service.

A. The ALJ erred in applying a traditional Commerce Clause analysis in measuring the extent of Portland General's out-of-state public-utility operations.

In finding that Portland General's utility operations are not "predominantly intrastate in character" and carried on "substantially in a single State," the ALJ considered numerous factors that distinguish "intrastate commerce" from "interstate commerce." (Initial Decision at 11 – 16) It is clear that the operations of even the most insular electric utility affect interstate commerce in many ways, including purchasing power, fuel, equipment and supplies from out-of-state sources as well as the transmission of electricity and selling securities. But operating in interstate commerce is not synonymous with out-of-state utility operations for purposes of Section 3(a)(1). Even the Division of Investment Management, in its Response in Opposition to the Petitions for Review, concedes that the Commission has not typically used the terms "interstate commerce" and "intrastate commerce" in looking at the location of a utility's operations. (Response in Opposition at 5 – 6)

1. The use of in-state transmission facilities to transmit energy in interstate commerce.

Although virtually all transmission of electricity in the lower 48 States (except portions of Texas) is considered to be the transmission of electricity in interstate commerce,[16] the Commission has never considered the use of in-state transmission facilities to transmit electricity in interstate commerce to be a relevant factor under the "predominantly/substantially" test of Section 3(a)(1). Moreover, as RTOs evolve in furtherance of FERC's Order 2000, the

[16] FPC v. Florida Power & Light Co., 404 U.S. 453 (1972).

transmission assets owned by a participating utility, even though located entirely within a single state, will become part of a much larger multi-state transmission network under the control of an independent third party. To the extent that voluntary membership in an RTO could jeopardize a utility holding company's intrastate exemption under PUHCA – an inference one could reasonably draw from the Initial Decision – such a sea change in the standards for exemption under Section 3(a)(1) would be inconsistent with FERC policy to encourage regional transmission organizations.

2. Purchases of energy out-of-state for in-state use.

The Commission also has not treated the purchase of power from out-of-state sources for resale to in-state retail customers as an indicium of out-of-state utility operations, any more than it has so treated out-of-state purchases of fuel, turbines, transmission cables and towers, and supplies. If the source of purchases were relevant to the character of intrastate utility operations, Section 3(a)(1) would have little if any applicability. Indeed, if the source of supply were determinative for purposes of Section 3(a)(1), few gas holding companies would qualify for exemption.

3. Ownership of out-of-state generation.

The ALJ also erred in concluding that the percentage of generation owned by Portland General, expressed in terms of MW, outside of Oregon is indicative of out-of-state operations. To be sure, in applying the "predominantly/substantially" test, the Commission has typically considered the percentage of an applicant's utility plant that is located out-of-state, usually in terms of net utility plant.[17] Although the ALJ did take into account the percentage of Portland General's total utility plant located outside Oregon, she also applied an additional numerical test:

[17] See, e.g., NIPSCO Indust., Inc., supra (granting exemption to holding company where out-of-state utility plant was about 13.5% of total net utility plant).

the percentage of owned generation located out-of-state (expressed in megawatts). The ALJ does not explain her singling out this type of utility plant for special treatment. Her holding, therefore, raises questions about the exemptions of other intrastate holding companies, many of whom own all or portions of generating plants located in other states.

Portland General's situation is not unique. In order to achieve economies of scale associated with the construction and operation of relatively large electric generating units, many utilities participate with others in the joint ownership and operation of generating facilities used to serve their respective retail customers.[18] Typically in such circumstances, each joint owner is entitled to a specified share of the total capacity available in the unit. The standard adopted by the ALJ raises an obstacle to participation by an exempt utility in a joint ownership arrangement involving development of generation in neighboring states, a decision not necessarily in the best interest of investors or consumers.

Although the percentage of Portland General's total utility assets located outside Oregon (13.1% based on undepreciated book value) and the percentage of its owned generating plant located outside Oregon (about 14.5% based on megawatts) are roughly the same, for other companies out-of-state generation as a percentage of total owned generation may be significantly higher than the percentage of out-of-state utility plant (i.e., generation, transmission and distribution) to all utility plant. The test for exemption under Section 3(a)(1) is whether the operations of a utility are carried on "substantially" in a single state. Neither the words of the statute nor the Commission's own decisions under Section 3(a)(1) provide any basis for isolating the generation function of a utility from its transmission and distribution functions.

[18] For example, the Colstrip plant is owned jointly by PPL Montana, LLC, and by several utilities located outside of Montana, including Portland General, Puget Sound Energy, Inc., PacifiCorp, and Avista Corp.

B. Portland General's revenues derived from its "retail book" wholesale sales should not be considered an indicium of out-of-state utility operation.

Portland General sells the excess power it purchases under contracts to serve its Oregon retail load in wholesale transactions that take place both in Oregon and at trading hubs located outside Oregon. Portland General refers to the revenues earned from these sales as its "retail book." (Initial Decision at 14) The record shows that Portland General is a net importer of power into Oregon because its wholesale purchases in its retail book have exceeded revenues from sales in the retail book annually since 1998. (Initial Decision, fn. 22) The ALJ concluded, however, that revenues derived from "retail book" transactions that take place outside of Oregon are part of Portland General's out-of-state operations for purposes of Section 3(a)(1).

While the ALJ is correct in noting that the Commission has historically looked at where title to electricity is transferred in determining whether a sale is in-state or out-of-state (Initial Decision at 16), we do not believe that the words of Section 3(a)(1) preclude the Commission from giving weight to the purposes of a wholesale sale particularly where, as in the case of Portland General, the utility's obligations to serve customers are clearly confined to one state, the transaction involves a sale of surplus power that it purchased in order to serve its in-state retail load, and the utility does not even own the out-of-state infrastructure necessary to complete the sale. Under such circumstances, the place where title is transferred is irrelevant. Further, as a matter of policy, it would make sense to interpret Section 3(a)(1) in a manner that is consistent with trends in the electric utility industry, including, as previously described, the development of regional trading hubs to foster competition and price transparency in wholesale electricity markets.

III. CONCLUSION.

Any case involving Enron may be sui generis. Certainly public interest and passion with respect to matters affecting that company are higher than they are with most exempt holding companies. Nevertheless, the Initial Decision, if left to stand, is likely to have widespread, though unintended, consequences to other exempt holding companies.

For these reasons, EEI respectfully requests that the Commission set aside or modify the Initial Decision and either grant or deny Enron's Section 3(a)(1) exemption application based solely on the quantifiable factors that the Commission has applied in other Section 3(a)(1) cases. Further, with specific regard to Portland General's wholesale revenues from its "retail book," EEI strongly urges the Commission to take into account recent changes in the evolution of wholesale electricity markets in the United States and not construe Section 3(a)(1) in a manner that would impede such developments.

Respectfully submitted,

- signature -

Edward H. Comer
Vice President and General Counsel
Edison Electric Institute

Dated: July 21, 2003

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
	:	
Application of Enron Corp. for Exemptions	:	Administrative Proceeding
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of 1935 (File Nos. 70-9661 and 70-10056)	:	File No. 3-10909
	:	

WRITTEN CONSENT OF PARTIES TO FILING OF AMICUS BRIEF ON REVIEW OF INITIAL DECISION

Pursuant to Rule 210(d)(ii) of the Commission's Rules of Practice, 17 C.F.R. § 201.210(d)(ii) (2002), the undersigned parties and participants in the above-captioned proceeding hereby consent to the filing by Edison Electric Institute ("EEI") of an Amicus Brief on Review of Initial Decision in this proceeding. The undersigned understand that (i) EEI's interest in this proceeding is limited to those portions of the Initial Decision that address the standards to be applied to exemption applications under Section 3(a)(1) of the Public Utility Holding Company Act of 1935, as amended, and (ii) the Division of Investment Management (the "Division") reserves the right to respond to arguments raised by EEI in its Amicus Brief, and the parties signing this consent also hereby consent to the filing of any such response to EEI's Amicus Brief by the Division. In giving their written consent, the undersigned in no way endorse the views of or positions taken by EEI in its Amicus Brief.

/s/ David B. Smith, Jr.

David B. Smith, Jr.
Associate Director
Division of Investment Management
Securities and Exchange Commission

/s/ William S. Lamb/ SM

William S. Lamb, Esq.
Sonia C. Mendonca
LeBoeuf, Lamb, Greene & MacRae L.L.P.

Counsel for Enron Corp.

/s/ Mike Naeve

Clifford M. (Mike) Naeve, Esq.
Paul Silverman, Esq
Skadden Arps Slate Meagher & Flom

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

/s/ J. A. Bouknight

J. A. Bouknight, Jr., Esq.
Steptoe & Johnson, LLP

Counsel for Southern California Edison Company

/s/ Julie Simon

Julie Simon, Esq.
Mark Bennett, Esq.
Electric Power Supply Association

/s/ Jason W. Jones

Jason W. Jones
Stephanie S. Andrus
Assistant Attorneys General
Oregon Department of Justice

Attorneys for Oregon Public Utility Commission

Dated: July 15, 2003

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July 2003, I served the foregoing Amicus Brief of Edison Electric Institute on Review of Initial Decision upon the parties hereto by the method indicated below:

Securities and Exchange Commission Division of Investment Management 450 Fifth Street, N.W. Washington, DC 20549 Attn: Paul F. Roye David B. Smith Catherine A. Fisher	___X__ HAND DELIVER _____U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
The Honorable Brenda P. Murray Chief Administrative Law Judge Securities & Exchange Commission 450 Fifth Street, N.W. Washington, DC 20549	__X___ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
Arthur S. Lowry Securities and Exchange Commission Division of Enforcement 450 Fifth Street, N.W. Washington, DC 20549	___X__ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
Southern California Edison Company Attn: Russel C. Swartz James B. Woodruff J. Eric Isken 2244 Walnut Grove Avenue, Suite 342 Rosemead, CA 91770	_____ HAND DELIVER ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
Electric Power Supply Association Attn: Julie Simon Mark Bennet 1401 New York Avenue, N.W. Eleventh Floor Washington, DC 20005	_____ HAND DELIVER ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
Clifford M. (Mike) Naeve Paul Silverman William C. Weeden Skadden Arps Slate Meagher & Flom 1440 New York Avenue, N.W. Washington, DC 20005	_____ HAND DELIVER ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL

J.A. Bouknight, Jr. Cynthia L. Taub Steptoe & Johnson LLP 1330 Connecticut Avenue, N.W. Washington, DC 20036-1795	_____ HAND DELIVER ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
David L. Schwartz Julie B. Greenisen Latham & Watkins 555 Eleventh Street, N.W. Washington, DC 20004	_____ HAND DELIVER ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
ENRON Corporation Attn: David Koogler Mark Metts 1400 Smith Street Houston, TX 77002	_____ HAND DELIVER ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
William S. Lamb Michael W. E. Didrikson LeBoeuf, Lamb, Greene, & McRae, L.L.P. 125 West 55th Street New York, NY 10019-5389	_____ HAND DELIVER ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
Charles A. Moore LeBoeuf, Lamb, Greene & MacRae, L.L.P. 1875 Connecticut Avenue, N.W. Washington, DC 20009	_____ HAND DELIVER ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
Sonia C. Mendonca LeBoeuf, Lamb, Greene & MacRae, L.L.P. 1875 Connecticut Avenue, N.W. Washington, DC 20009	_____ HAND DELIVER ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL
Jason W. Jones Assistant Attorney General Department of Justice 1162 Court Street, N.E. Salem, OR 97301-4096	_____ HAND DELIVER ___X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX) _____ ELECTRONIC MAIL

- signature -

Henri D. Bartholomot
Director, Regulatory Legal Issues
Edison Electric Institute