

# OREGON PUBLIC POWER COALITION

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## FEDERAL COURT SAYS BANKRUPTCY ALLOWS SALE OF UTILITY ASSETS OUT FROM UNDER STATE REGULATION

### RESULT WILL BE HIGHER PRICE FOR PGE ASSETS IN ENRON'S BANKRUPTCY AUCTION

### SETBACK FOR "WILLAMETTE VALLEY POWER" SCHEME

In a decision with direct impact on the ratepayers of Portland General Electric Co. (PGE), the U.S. District Court in San Francisco issued a decision that electric utility assets owned by a bankrupt corporation can be sold or transferred without approval of state utility regulators, regardless of any state law requiring such approval.

The full decision is available at <http://www.oppc.net/documents/usdcstatereg.pdf>. The Willamette Week article on this subject is at: <http://www.wweek.com>.

"This is what I warned about last November, before Enron declared bankruptcy," said Dan Meek, the public interest attorney who represents the Oregon Public Power Coalition (OPPC) and Utility Reform Project (URP). URP issued a press release on November 30, 2001, stating:

Contrary to the public statements of the chair of the Oregon Public Utility Commission (OPUC), the imminent bankruptcy of Enron, the owner of Portland General Electric Co. (PGE), does threaten the wallets of Oregon electric ratepayers. . . .

"To the contrary, the federal bankruptcy court will have broad power to determine how assets owned by Enron are sold, including PGE," said public interest attorney Dan Meek. "If the court orders the assets sold in a way to maximize the money available to creditors, the result could be significant additional rate increases for PGE ratepayers in Oregon."

The full November 2001 press release is available at <http://www.oppc.net/press/011130pr.htm>.

The U.S. District Court in San Francisco overruled the February 2002 decision of Bankruptcy Judge Dennis Montali, who had rejected the claim of PG&E that it could use the federal bankruptcy process to transfer its generation and transmission assets out from under rate regulation by California. The U.S. District Court held that "Congress intended expressly to preempt nonbankruptcy laws that would otherwise apply to bar, among other things, transactions necessary to implement the reorganization plan." The Court noted that Congress changed the Bankruptcy Code in 1978 to remove "the ability of state regulators to veto reorganization of public utilities in federal bankruptcy proceedings."

"If this decision is upheld, it has grave consequences for PGE ratepayers," said Meek. "It means that the Enron bankruptcy reorganization can include breaking up PGE assets and selling the extremely valuable hydroelectric facilities and Pacific Intertie transmission lines out from under Oregon rate regulation. The results will be:

1. A very high price for the PGE assets in any bankruptcy auction, because assets that carry no rate regulation are worth far more to potential corporate buyers.

2. Significantly higher rates for PGE ratepayers, because they will:
  - > lose the use of very low-cost hydropower dams (which the PGE ratepayers have largely already paid for), and
  - > lose the credits to ratepayers from profits on use of the Pacific Intertie transmission lines.

Northwest Natural Gas Co. in 2001 had agreed to pay \$2.96 billion for all of PGE's assets, even while they remained fully under state regulation. Under the new U.S. District Court decision, the federal bankruptcy process can strip off state rate regulation from PGE's hydropower and transmission assets. If these assets were sold to companies that are not regulated utilities in Oregon, the price for the aggregate of PGE's assets at auction could easily reach \$4.0 billion.

"This is a big problem for the Willamette Valley Power (WVP) scheme to outbid the entire world for PGE's assets," said Meek. "Now they will have to bid even higher than before. In essence, we will end up paying for the utility assets twice."

"This makes it even more crucial that Oregon governments prepare to protect ratepayers and the entire Oregon economy by exercising the power of eminent domain to acquire the PGE assets," said Judy Barnes, one of the organizers of the Oregon Public Power Coalition (OPPC). With the power of eminent domain, however, Oregon state or local governments could acquire these assets by paying "just compensation" determined by an Oregon court, not paying whatever Enron or its creditors demand. "We ratepayers have already invested over \$1.6 billion dollars in those assets, which is reflected in the depreciated book value of the PGE assets (\$1.9 billion). A payment of \$1.9 billion would be more than enough just compensation to Enron or to its creditors for the whole of the PGE system and all of its assets, even though we would not want all of them," Meek said.

"There is no justification for having PGE ratepayers pay Enron's creditors more than depreciated book value. To do otherwise means PGE ratepayers are footing the bill for Enron's crimes," added Barnes.

State or local governments can exercise eminent domain over PGE's assets, without approval of the federal bankruptcy court. Legal research shows that Bankruptcy Court approval is not required for exercise of eminent domain over the property of a viable, non-bankrupt, wholly-owned subsidiary of a bankrupt corporation. See 2 Collier on Bankruptcy (15th ed.) 362.04. "We have a more detailed memorandum on this subject," Meek said.

"This should be the end of the Willamette Valley Power plan," he said. The organizers of WVP are the Goldman, Sachs investment bank and two local attorneys who previously have had no apparent involvement in local energy issues. Their plan is to have up to 6 county governments form an ORS Chapter 190 intergovernmental agreement and issue revenue bonds to buy the PGE assets in whatever process is arranged by the U.S. Bankruptcy Court and the creditors. "With state rate regulation stripped off the assets, WVP would need to pay over \$4 billion for PGE," said Meek.

"Some people are queasy about using eminent domain to acquire utility assets, because it does not seem fair," Barnes noted. "But the federal bankruptcy process is certainly not fair at all, and it is going to be used to steal from PGE ratepayers the \$1.6 billion in depreciation we have already paid on the PGE assets, unless we take action by creating PUDs to acquire the assets by eminent domain."

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