

98 FERC ¶ 61, 134  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, Linda Breathitt,  
and Nora Mead Brownell.

Northwest Natural Gas Company  
Portland General Electric Company

Docket No. EC02-30-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued February 13, 2002)

On November 30, 2001, as supplemented on December 20, 2001, Northwest Natural Gas Company (NW Natural) and Portland General Electric Company (PGE) (collectively, Applicants) filed an application under Section 203 of the Federal Power Act (FPA)<sup>1</sup> and Part 33 of the Commission's regulations<sup>2</sup> requesting Commission authorization for the disposition of PGE to by NW Natural through a newly-formed public utility holding company created by NW Natural currently identified as Northwest Natural Holding Company (NW Natural Holdco). As discussed below, we will authorize the disposition of facilities as consistent with the public interest.

I. Background

A. Description of the Parties

NW Natural is a local natural gas distribution (LDC) utility that is principally engaged in the sale and distribution of natural gas in portions of western Oregon and southwestern Washington. NW Natural serves the Portland metropolitan area, the northern Oregon coast, the Columbia River Gorge, the Vancouver, Washington metropolitan area and adjacent areas of southwest Washington. It owns, operates and maintains 15,000 miles of gas transmission and distribution pipelines, in addition to

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<sup>1</sup>16 U.S.C. § 824b (1994).

<sup>2</sup>18 C.F.R. § 33.1 - .10 (2001).

underground natural gas storage reservoirs located near Mist, Oregon, and two liquefied natural gas plants with a total storage capacity of 12.2 million Mcf.

PGE is a public utility engaged in the generation, purchase, transmission, distribution and sale of electricity to retail customers in the State of Oregon and to wholesale customers throughout the area of the Western Systems Coordinating Council. PGE's electric distribution system in Oregon serves an area of 3,150 square miles, including 51 incorporated cities with a population of 1.5 million. PGE is currently a wholly-owned subsidiary of Enron NW Assets, LLC (Enron NW Assets), which in turn is a wholly-owned subsidiary Enron Corporation (Enron),<sup>3</sup> an exempt holding company under the Public Utility Holding Company Act of 1935 (PUHCA).<sup>4</sup> As part of the transaction, NW Natural Holdco will also purchase, from Enron, PGH II, Inc., a holding company that owns non-utility businesses.

On December 2, 2001, Enron and several of its subsidiaries filed petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York.<sup>5</sup> Despite this development, Applicants plan to proceed with the transaction, as discussed below.

#### B. The Proposed Transaction

The proposed transaction involves the sale of PGE by Enron and the disposition of PGE to Northwest Natural Holdco, a newly-formed subsidiary of NW Natural, for a combination of cash, common stock, and preferred stock, with a total value of approximately \$1.8 billion. The transaction will be accomplished in accordance with the Stock Purchase Agreement dated October 5, 2001 among Enron, Enron NW Assets, NW Natural, and NW Natural Holdco. To effect the transaction, NW Natural Holdco has been formed as a subsidiary of NW Natural, and a new company known as Northwest Natural Holdco Sub Corp. (Merger Sub) has been formed as a subsidiary of NW Natural Holdco.

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<sup>3</sup> The Commission authorized Enron to acquire PGE in Enron Corporation, et al., 78 FERC ¶ 61,179 (1997).

<sup>4</sup>15 U.S.C. § 79z-5a (2001).

<sup>5</sup> In re Enron Corp., Case No 01-16034 (AJG) and related cases subject to administrative consolidation.

As a result of the transaction, Merger Sub will be merged with and into NW Natural, with NW Natural being the surviving corporation. Each share of NW Natural common stock outstanding immediately prior to the merger will be converted into an equal number of new shares of common stock of NW Natural Holdco. The shares of NW Natural Holdco common stock held by NW Natural immediately before the merger will be canceled. Upon consummation of the transaction, NW Natural Holdco will become a public utility holding company that will apply for an exemption from registration pursuant to Section 3(a)(1) of PUHCA, and NW Natural, PGE and PGH II, Inc. will be wholly-owned subsidiaries of NW Natural Holdco.<sup>6</sup>

NW Natural and PGE state in their supplement of December 20, 2001, that despite the bankruptcy filing, Enron intends to complete the transaction, and that Enron is proceeding to satisfy all conditions necessary to permit the sale of PGE to NW Natural. While Applicants recognize that the transaction is subject to the approval of the Bankruptcy Court, they state that Enron anticipates that the approval of the Stock Purchase Agreement will be considered separately from the Court's disposition of other issues in the Enron bankruptcy proceeding. Applicants do not expect the Bankruptcy Court's consideration to delay the closing of the transaction.

## II. Notice of Filing and Interventions

Notice of the application was published in the Federal Register, 66 Fed. Reg. 64,965 (2001), with interventions and protests due on or before December 21, 2001. B-R Pipeline Company and Industrial Customers of Northwest Utilities filed timely motions to intervene raising no substantive issues, and the Washington Utilities and Transportation Commission filed a notice of intervention raising no substantive issues.

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<sup>6</sup>Applicants also indicate that, in conjunction with and in order to facilitate the financing of the transaction, Enron will be receiving equity securities of NW Natural Holdco as a portion of the purchase price. Enron also will be permitted to designate up to two representatives on the NW Natural Holdco Board of Directors (the Enron designees will not replace any existing Board members). Enron representation on the Board will decrease if its ownership of NW Natural Holdco stock decreases below specified levels, but in any event, will terminate in no more than five years. Application at p.3, 14.

The Northwest Industrial Gas Users (NWIGU)<sup>7</sup> filed a Motion to Intervene and Protest. On January 7, 2002, NW Natural and PGE filed an answer to NWIGU's protest.

### III. Discussion

#### A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>8</sup> the notice of intervention and timely, unopposed motions to intervene make those who filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2001), prohibits the filing of an answer to a protest unless otherwise permitted by the decisional authority. We find that good cause exists in this proceeding to allow Applicants' answer because it aids us in our understanding of the issues raised in this proceeding.

#### B. Standard of Review

Section 203(a) of the FPA provides that the Commission must approve a proposed disposition if it finds that the disposition "will be consistent with the public interest."<sup>9</sup> The Commission generally takes account of three factors in analyzing proposed disposition of facilities: (a) the effect of competition; (b) the effect on rates; and (c) the effect on regulation.<sup>10</sup> For the reasons discussed below, we find that the proposed merger is consistent with the public interest. Accordingly, we will approve the proposed disposition of jurisdictional facilities.

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<sup>7</sup>NWIGU is a nonprofit association comprised of thirty-two end users of natural gas with major facilities in Oregon, Washington, and Idaho.

<sup>8</sup>18 C.F.R. § 385.214 (2001).

<sup>9</sup>16 U.S.C. § 824b(a)(1994).

<sup>10</sup>See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, FERC Stats. and Regs. ¶ 31,044 (1996), order on reconsideration, Order No. 592-A, 62 Fed. Reg. 33,341 (June 19, 1997), 79 FERC ¶ 61,321 (1997); see also Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Stats. and Regs. ¶ 31,111 (2000), order on reh'g, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

C. Effect on Competition

1. Horizontal Effects

Applicants assert that the transaction will not harm competition in any relevant electricity market through consolidation of generation assets because NW Natural does not control any electric generation facilities. Applicants do not submit a horizontal Competitive Analysis Screen. Instead, they argue that the transaction satisfies the conditions stated in Section 33.3(a)(2) of the Commission's regulation, hereby a full horizontal screen analysis is not necessary.

a. Applicants' Analysis

Applicants claim that because there is no increase in concentration of control over generation assets in any relevant market, the transaction will not affect horizontal market power.

Applicants state that NW Natural's generation assets are comprised of minority financial interests in a number of Qualifying Facilities (QFs) located in California. They argue that since the output of these facilities is committed to long-term contracts, NW Natural has no control over the output of the facilities. Given that NW Natural does not control any generation, Applicants conclude that the transaction could not harm competition because it does not increase generation concentration levels in any relevant market.<sup>11</sup>

b. Protest

NWIGU claims that the application is inadequate without complete vertical and horizontal competitive analyses, and requires additional information from the Applicants before a proper analysis of potential customer impacts can be completed. In addition, NWIGU argues that the merger between NW Natural and PGE would result in the consolidation of two regionally dominant energy providers, which would result in an increase in market power in newly evolving energy markets. NWIGU cites Section 33.3(a)(2) of the Commission's filing requirements, which states that a horizontal Competitive Analysis Screen is not necessary only if the applicant:

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<sup>11</sup>Applicants further argue that even if NW Natural did control the output of those facilities, the amount of generation in question is small enough to meet the Commission's de minimis standard for exemption from the need to submit a Competitive Analysis Screen.

(i) affirmatively demonstrates that the merging entities do not currently conduct business in the same geographic markets or that the extent of the business transactions in the same geographic markets is de minimis; and

(ii) No intervenor has alleged that one of the merging entities is a perceived potential competitor in the same geographic market as the other.

First, NWIGU argues that PGE and NW Natural do conduct business in the same geographic market, the Pacific Northwest, and that they are both energy service providers in that market.<sup>12</sup> It concludes that under Section 33.3 (a)(2)(i), Applicants must perform a full Competitive Analysis Screen.

NWIGU also argues that it perceives NW Natural and PGE to be potential competitors in the Pacific Northwest energy markets. It concludes that even if Applicants do not currently compete in the same relevant geographic market, under Section 33.3 (a)(2)(ii), Applicants must perform a full horizontal Competitive Analysis Screen.

c. Applicants' Response to Protest

Applicants respond to NWIGU's claim that they compete or are perceived to potentially compete with each other in the Pacific Northwest energy market by stating that any such competition or perceived competition would take place at the retail level. They conclude that a full horizontal Competitive Screen Analysis is not necessary.

d. Commission Determination

Applicants have shown that the combination of PGE's and NW Natural's electric generation facilities will not harm competition. As noted by Applicants in their Application and Answer, NW Natural and PGE are not competitors in any relevant wholesale electricity market. Therefore, the transaction does not eliminate a competitor and will not harm competition. Applicants are correct in their assertion that they do not need to conduct a horizontal Competitive Analysis Screen. As required in Section 33.3(a)(2) of the Revised Filing Requirements, Applicants have demonstrated that the merging parties do not currently compete at wholesale in any relevant geographic market. While NWIGU has asserted that it perceives PGE and NW Natural Gas to be potential competitors, that competition would be at the retail level. We note that the Oregon and Washington Commissions have jurisdiction over the transaction and have not requested our assistance. Consequently, consistent with our policy to not evaluate retail issues

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<sup>12</sup>NWIGU Protest at 8.

unless state commissions lack authority to review such issues and ask us to review them, we find that NWIGU's concerns are more appropriately raised before the Oregon and Washington Commissions.<sup>13</sup>

2. Vertical Effects

a. Applicants' Analysis

Applicants state that there is no opportunity to exercise vertical market power in wholesale electricity markets because the relative share of generation within the Western Systems Coordinating Council that is supplied with fuel by NW Natural and its affiliates is de minimis, and because potential entrants into wholesale electricity markets in the region have many alternative sites that would not rely on delivery of natural gas by NW Natural or its affiliates. Applicants claim that a showing that either the upstream or downstream market is not susceptible to the exercise of market power necessarily demonstrates that the transaction will not unduly increase Applicants' ability to exercise vertical market power.

Applicants note that the Commission's primary areas of concern regarding the combination of gas and electric generation assets are: (1) the incentive for the merged firm to use its influence in gas-related upstream markets to foreclose or raise downstream rivals' costs; (2) the enhanced ability to facilitate coordinated behavior; and (3) the enhanced ability to evade regulation. Applicants address these three concerns.

First, they argue that combining NW Natural and PGE's gas transportation resources with PGE's electric generation facilities will not harm competition because the pipelines on which NW Natural holds firm transportation rights do not currently serve any electric generation facilities. Moreover, as a holder of firm transportation rights, NW Natural is not the operator of the pipeline and cannot withhold natural gas in order to increase electricity prices, nor does it possess sensitive information regarding rival generators that it could pass on to PGE. Applicants do not submit a full Vertical Competitive Analysis because NW Natural does not provide gas transportation to rival generators and the transaction thus satisfies the conditions stated in 33.4(a)(2) of the Commission's requirements for when a vertical competitive analysis is not necessary.

Applicants argue that the combination of PGE's downstream generation and NW Natural's upstream natural gas pipeline capacity will not enable the merged firm to evade regulation. They note that a merger between a natural gas supplier and an electric

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<sup>13</sup>See, e.g., San Diego Gas & Electric Company and Enova Energy, Inc., et al., 79 FERC ¶ 61,372 (1997), order denying reh'g, 85 FERC ¶ 61,037 (1998) (Enova).

generator can create the ability and incentive to pass above-market costs on to customers. However, they cite Long Island Lighting Company, 80 FERC ¶ 61,035 (1997), where the Commission concluded that the relevant state commissions could address any issues regarding attempts to subsidize affiliates or pass through above-market costs to customers.<sup>14</sup> Applicants note that the Oregon Public Utility Commission and the Washington Utilities and Transportation Commission have regulatory jurisdiction over Northwest Natural and that the Oregon PUC has jurisdiction over PGE.

b. Protest

NWIGU argues that the Application is incomplete without a full vertical competitive analysis. It says that since the merged firm would own 43% of the pipeline capacity on the Northwest Pipeline Corporation (NPC), the merger increases the possibility that the Applicants could favor their own electric generation facilities, thus harming competition. Next, NWIGU argues that Applicants themselves acknowledge the potential for coordination between their natural gas and electricity operations and that they do not analyze the effect of that coordination on competition in electricity and natural gas transportation markets in the Northwest. NWIGU asserts that such coordination may give the merged company an unfair advantage over independent power producers.<sup>15</sup>

In addition, NWIGU cites Section 33.4 (a)(2) of the Commission's requirements, which states that a full vertical Competitive Analysis is not necessary only if "no intervenor has alleged that one of the merging entities is a perceived potential competitor in the same geographic market as the other." As it did in its protest regarding the combination of Applicants' generation facilities, NWIGU argues that it perceives PGE and NWIGU to be potential competitors in the overall Pacific Northwest energy market. NWIGU concludes that Applicants must, therefore, include a full vertical competitive analysis to make their application complete.

c. Applicants' Response to Protest

Applicants note that NW Natural currently does not provide natural gas services to any significant competitor, so there is no downstream competitor of PGE's that could be harmed by the transaction. Second, they argue that as an LDC, NW Natural cannot raise

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<sup>14</sup>Application at p. 9.

<sup>15</sup>NWIGU Protest at 12.

prices in any relevant electricity market.<sup>16</sup> Third, they argue that despite the 43% share of the capacity of NPC that they will possess post-merger, they merely hold firm transportation rights; they do not operate the pipeline and could not, therefore, withhold throughput on the pipeline in order to raise rival generators' costs. Fourth, Applicants note that NPC is just one of the pipelines serving the Pacific Northwest and that post-merger they would hold transportation rights to less than 18% of the aggregate pipeline capacity into the region.<sup>17</sup> Finally, Applicants respond to NWIGU's claim that they compete or are perceived to potentially compete with each other in the Pacific Northwest energy market. They argue that any such competition or perceived competition would take place at the retail level, not in any relevant wholesale electricity market. Thus, they conclude that a full vertical Competitive Analysis is not necessary.

d. Commission Determination

We find that Applicants have shown that the combination of NW Natural's natural gas assets and PGE electric generation facilities will not harm competition. Applicants have shown that the amount of electric generation served by gas transportation services controlled by the merged firm is de minimis. In addition, we agree with Applicants' argument that, as a holder of firm transmission rights, they do not possess the operational control necessary to withhold natural gas in order to raise the input price to rival gas-fired generators, nor do they have operational information about the generators that they could pass on to their electric generation affiliate.<sup>18</sup>

D. Effect on Rates

1. Applicants' Analysis

Applicants state that the transaction will not adversely affect wholesale generation or transmission rates because they have agreed to hold their customers harmless from any adverse effect of the merger. Specifically, Applicants commit to the following:

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<sup>16</sup>Applicants cite Long Island Lighting Company, 80 FERC ¶ 61,035 (1997), where the Commission found that LDCs generally do not have the ability to exercise vertical market power because (i) generators can usually bypass the LDC; (ii) LDCs only control gas services within their defined service territories; and (iii) LDCs are subject to state regulation of service and rates.

<sup>17</sup>Answer at 9.

<sup>18</sup>If Applicants did withhold the capacity on the pipeline (by not scheduling their firm transmission rights), then the pipeline could offer the capacity as non-firm service.

- (1) The cost of completing the disposition (i.e., transaction costs) will be excluded from PGE's regulated accounts.
- (2) Rates and results of operations of PGE will exclude all transaction costs associated with the purchase of PGE and all goodwill resulting from the transaction.
- (3) In future Commission proceedings, PGE will hold PGE wholesale power sales customers and transmission customers harmless if the disposition of PGE results in a higher revenue requirement for PGE than if the disposition had not occurred.
- (4) If, contrary to expectations, the transaction causes an increase in any cost item included in PGE's transmission cost of service, such increase will not be included in any future transmission rate proceeding at the Commission for five years after the transaction closes except to the extent it is offset by merger-related savings.

NWIGU asks the Commission to require more specific information regarding Applicants' hold harmless commitment.

## 2. Commission Determination

We disagree with NWIGU's contention that the information provided by Applicants regarding their hold harmless commitment is inadequate. The Applicants' hold harmless commitment will be sufficient to protect against any adverse effect on rates for wholesale generation and transmission customers by protecting customers from being charged for any merger-related costs not offset by merger-related savings. Therefore, we will not require Applicants to provide more specific information. We note that Applicants will bear the burden of proof in future rate filings to show that any merger-related costs included in the cost of service are offset by merger-related savings.

### E. Effect on Regulation

As explained in the Merger Policy Statement and in the Commission's regulations, the Commission's primary concern with a merger's effect on regulation involves possible changes in the Commission's jurisdiction, specifically with regard to intra-company sales of non-power goods and services, when a registered holding company is formed, thus invoking the jurisdiction of the Securities and Exchange Commission (SEC). The Commission is also concerned with the effect on state regulation where a state does not

have the authority to act on a merger and has raised concerns about the effect on state regulation of the merged entity.<sup>19</sup>

As a result of the proposed transaction, Northwest Natural Holdco will become a holding company under PUHCA. However, Applicants state that the new holding company will file for exemption from registration with the SEC pursuant to Section 3(a)(1) of PUHCA. Therefore, Applicants believe that there will be no change in the Commission's jurisdiction.

As for state regulation, Applicants state that the proposed merger will not result in the loss of jurisdiction of any state regulatory commission.

We note that Applicants have not yet filed an application with the SEC requesting exempt holding company status. Also, while the filing of such an application in good faith exempts the applicant from SEC regulation under PUHCA until the SEC acts upon the application, the SEC may grant or, after notice and an opportunity for hearing, deny or otherwise dispose of the application.<sup>20</sup> If the SEC determines that Northwest Natural Holdco does not qualify for exempt holding company status, it will instead become a registered holding company, and this Commission, in view of the Ohio Power decision,<sup>21</sup> would be deprived of authority over certain intra-company transactions.

Thus, because Northwest Natural Holdco's status as a holding company under PUHCA is unclear, and because the Commission may not be able to adequately protect ratepayers from affiliate abuse should Northwest Natural Holdco become a registered holding company, we will condition approval of the proposed merger on the Applicants' agreeing to abide by our policies with respect to intra-corporate transactions. The Applicants shall inform the Commission within 15 days of the date of this order whether this condition is acceptable.

Accordingly, we find that the proposed disposition, as conditioned, will not have an adverse effect on state or Federal regulation.

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<sup>19</sup>Merger Policy Statement at 30,124-1125.

<sup>20</sup>15 U.S.C. §§ 79b, 79c (1994).

<sup>21</sup>Ohio Power Co., 39 FERC ¶ 61,098 (1987), reh'g denied, 43 FERC ¶ 61,046 (1988) vacated sub nom. Ohio Power v. FERC, 880 F.2d 1400 (D.C. Cir. 1989), reh'g denied, 897 F.2d 540 (D.C. Cir. 1989), remanded sub nom. Arcadia v. Ohio Power Co., 498 U.S. 73 (1990), on remand sub nom. Ohio Power Co. v. FERC, 954 F.2d 779, 782-786 (D.C. Cir. 1992), cert. denied sub nom. Arcadia v. Ohio Power Co., 506 U.S. 981 (1992).

F. Accounting

Applicants propose to use the purchase method of accounting for recording the disposition of PGE and PGH II, Inc. to NW Natural Holdco. Under the terms of the stock purchase agreement, NW Holdco will pay approximately \$1.8 billion. Applicants state that the use of the purchase method of account results in goodwill that will be recorded and amortized by NW Natural Holdco. Since the merger will be recorded at the non-jurisdictional holding company level, we have no objection to the use of the purchase method of accounting.

Since we do not expect the proposed merger accounting to have any effect on the book and records of PGE, we will not require the Applicants to submit their proposed merger accounting. However, if the merger (including merger-related costs) affects the books and records of PGE, Applicants must promptly inform the Commission and provide a full explanation for any proposed adjustments.

The Commission orders:

(A) The proposed transfer of PGE to NH Natural Holdco is hereby approved, subject to the commitments and conditions discussed in the body of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter now pending or which may come before the Commission.

(C) PGE and NW Natural are hereby directed to notify the Commission within 10 days of the date the transfer of jurisdictional facilities is completed.

(D) NW Holdco shall submit its proposed final accounting within six months after the transaction is consummated. The accounting submission shall provide all merger-related accounting entries made to the books and records of NH Holdco, along with appropriate narrative explanations describing the basis for the entries.

(E) PGE and NW Natural must promptly inform the Commission of any change in the circumstances that would reflect a departure from the facts that the Commission has relied upon in reviewing the merger accounting.

(F) The Commission retains authority under sections 203(b) and 309 of the FPA to issue further orders as appropriate.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.