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February 28, 2006

VIA E-FILING & FIRST CLASS MAIL

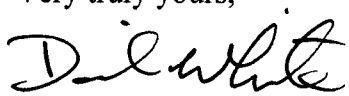
Oregon Public Utility Commission
Attn: Filing Center
550 Capitol St. NE, Suite 215
P. O. Box 2148
Salem, Oregon 97308-2148

Re: *UF 4218 / UM 1206*

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of Applicants' and Enron's Opposition to URP's Application for Reconsideration. This document is being filed electronically per the Commission's eFiling policy to the electronic address PUC.FilingCenter@state.or.us, with copies being served on all parties on the service list via U.S. Mail. A photocopy of the PUC tracking information will be forwarded with the hard copy filing.

Very truly yours,



David F. White

DFW/ldh
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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UF 4218 / UM 1206

In the Matter of the Application of PORTLAND GENERAL ELECTRIC COMPANY for an Order Authorizing the Issuance of 62,500,000 Shares of New Common Stock Pursuant to ORS 757.410 et seq. **UF 4218** and In the Matter of the Application of STEPHEN FORBES COOPER, LLC, as Disbursing Agent, on behalf of the RESERVE FOR DISPUTED CLAIMS, for an Order Allowing the Reserve for Disputed Claims to Acquire the Power to Exercise Substantial Influence over the Affairs and Policies of Portland General Electric Company Pursuant to ORS 757.511 **UM 1206**	**APPLICANTS' AND ENRON'S OPPOSITION TO URP'S APPLICATION FOR RECONSIDERATION**

I. INTRODUCTION

This Opposition to the Utility Reform Project's ("URP") Application for Reconsideration ("Reconsideration Request") is filed on behalf of Portland General Electric Company ("PGE"), Stephen Forbes Cooper, LLC ("SFC"), as Disbursing Agent, on behalf of the Reserve for Disputed Claims ("Reserve") (collectively, "Applicants") and Enron Corp. ("Enron").

URP declined to participate as an active party in this proceeding. It submitted no testimony, waived its right to cross-examine witnesses, and failed to submit its own substantive brief. URP now asks the Commission to conclude that it committed an "error of law or fact" when, in issuing Order No. 05-1250, the Commission confined itself to the record and did not consider tax deconsolidation concerns which no party, including URP, raised in these proceedings and for which there is no evidence in the record. URP cannot blame the Commission for failing to create a record. Moreover, URP joined the City of

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Portland's brief in this docket, which admitted that tax deconsolidation is "wholly unrelated" to the proposed stock distribution, a concession that is fatal to URP's reconsideration argument. URP's Reconsideration Request is deficient under the governing statute and Commission rules.

II. URP'S RECONSIDERATION REQUEST OFFERS NO NEW EVIDENCE AND FAILS TO SHOW THAT THE COMMISSION COMMITTED AN ERROR OF LAW OR FACT

URP claims that the Commission erred in concluding that the Joint Application[1] would "serve customers in the public interest." URP alleges that the Commission should have considered SB 408 and the potential tax and rate-making implications of the issuance of New PGE Common Stock to the Reserve and creditors of Enron (the "Stock Distribution"). Rec. Req. at 4-5.

Under the Commission's rules, an applicant for reconsideration bears the burden of showing either that there is a change in fact or law, or that the Commission has committed an error of "law or fact." OAR 860-014-0095(3)(a)-(c). URP's Reconsideration Request does neither. URP makes no claim that there is new evidence or a change in law. Nor could it. The statute upon which URP relies, SB 408, became effective on September 2, 2005. Testimony opposing the Joint Application and Joint Stipulation[2] was due on September 16, 2005, two weeks after SB 408 became law. The record in this docket remained open until October 17, 2005, six weeks after enactment of the law. ALJ Ruling at 1 (Oct. 13, 2005).

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[1] The Joint Application filed on behalf of Portland General Company and Stephen Forbes Cooper, LLC, as Disbursing Agent, on behalf of the Reserve for Disputed Claims, on June 17, 2005.

[2] The Joint Stipulation, effective as of August 31, 2005, by and among PGE, Enron, the Disputed Claims Reserve, Commission Staff, Citizens' Utility Board, Industrial Customers of Northwest Utilities, and Community Action Directors of Oregon and Oregon Energy Coordinators Association.

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URP cannot claim it was unaware of SB 408's passage. In June 2005, counsel for URP testified at a legislative subcommittee meeting on SB 408. UE 88, ALJ Ruling, July 1, 2005. And URP filed a complaint and application for deferred accounting based on SB 408 on October 5, 2005, well before the record was closed in this docket. *See* Commission Dockets UM 1224 and UM 1226.

URP similarly identifies no new evidence that was not available during the course of this proceeding. URP points to PGE's Form 10-K Report for 2004. Rec. Req. at 3-4. PGE filed its 2004 10-K on March 11, 2005, a full three months before PGE and the Reserve submitted the Joint Application to the Commission. URP also cites PGE's last general rate case order, but the Commission issued that order over four years ago. *Id.* at 4. The material URP relies on is not "new evidence * * * which was unavailable and not reasonably discoverable before issuance of the order," as the Commission's reconsideration rule requires. OAR 860-014-0095(3)(a).

Nor does URP meet its burden of showing that the Commission committed "an error of law or fact which is essential to the decision." OAR 860-014-0095(3)(c). In fact, URP does not allege that the Commission erred *on the record before it.* URP makes no objection to the legal standard the Commission applied under ORS 757.410 *et. seq.* and ORS 757.511. URP asserts no factual error on the record before the Commission. Instead, URP claims that the Commission should have considered the alleged harm to customers because it alleges that Enron losses (if any) will be unavailable for offsetting against PGE's net income after the Stock Distribution. Rec. Req. at 4-5.

But no party in this docket presented evidence of the alleged harm to customers from tax deconsolidation. Indeed, the record contains no specific PGE tax information, no tax information concerning Enron, no information regarding the amount of the tax expense included in rates, and no information regarding whether Enron will have net

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taxable income or net operating losses in the future. Neither the City of Portland nor URP presented this concern in briefs.

In fact, the Commission would commit reversible error if it did what URP asks: consider factual claims outside the record. Like any other tribunal, the Commission must support its orders with substantial evidence in the record.[3] It may not reach factual conclusions, like the ones URP offers, without evidence in the record.[4]

III. URP'S REQUEST MISUNDERSTANDS SB 408 AND THE NATURE OF THIS PROCEEDING

URP's Reconsideration Request offers no basis for the Commission to conclude that there is "good cause for further examination." URP's failure to timely raise its concerns during the proceeding is one indication that "good cause" is lacking. Equally important, URP's entire argument rests on the faulty assumption that SB 408 changed the Commission's review of applications under ORS 757.511. In fact, SB 408 is wholly unrelated to ORS 757.511 and this proceeding. SB 408 is a rate-making statute that changes none of the Commission standards under the applicable statutes.

URP assumes that SB 408 authorized the Commission to require utility parents to file consolidated tax returns. "SB 408 was enacted so that the benefit of this

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[3] *URP v. OPUC*, 171 Or App 349, 353 (2000); ORS 756.558 ("After the completion of the taking of evidence, and within a reasonable time, the commission shall prepare and enter findings of fact and conclusions of law upon the evidence received in the matter and shall make and enter the order of the commission thereon.); UM 1016, Order No. 01-253, Commission Internal Operating Guidelines at 5 ("contested cases are decided exclusively on a record developed in a trial-like proceeding").

[4] The order of proof for applications under ORS 757.511 confirms this conclusion. When an applicant comes forward with evidence in the application, the burden of production then turns to parties opposing the application to put forward evidence showing that the application does not serve the utility's customers in the public interest. UM 1121, Order No. 05-114 at 17, n12 ("Applicants are initially responsible for both the burden of persuasion and the burden of production. The burden of production shifts to other parties to evidence that rebuts what the Applicants presented."). URP failed to meet its burden of production.

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opportunity [to use net operating losses at the parent company] is captured by ratepayers, not by PGE's shareholders. But OPUC Order No. 05-1250 then nullifies the application of SB 408 to PGE by removing PGE's consolidation with Enron for income tax purposes." Rec. Req. at 4.

But SB 408 does not require what URP claims. It does not require consolidation, nor does it require that a parent company's tax losses be attributed to the utility. As stated in legislative findings, SB 408 seeks to align "utility rates that include amounts for taxes" and "taxes that are paid to units of government." SB 408, § 2(1). The statute requires the Commission to account for the amount of taxes "authorized to be collected in rates" and either (i) taxes paid by a stand-alone utility or (ii) in the case of utilities that are part of a consolidated tax group, the taxes paid by the consolidated group that is properly attributable to the regulated operations of the utility. SB 408, § 3(6). Nowhere does SB 408 require consolidation or permit attribution of a parent company's losses to the utility unless the utility is part of a consolidated tax group.

Aside from misconstruing SB 408, URP also misunderstands the nature of proceedings under ORS 757.511. The Commission considers whether the application "serves the public utility customers in the public interest." Once that standard has been met, the Commission may not impose conditions that are unrelated to the transaction or "to add conditions for the sole purpose of adding benefits." UM 1121, Order No. 05-114 at 35.

URP has already conceded that tax deconsolidation is irrelevant to this proceeding. City of Portland Opening Brief (joined by URP) at 23 ("These elections [whether to file as consolidated or deconsolidated] are wholly unrelated to its desire to distribute stock to its creditors"). URP's deconsolidation concern has no place in this proceeding given that it is "wholly unrelated" to the Stock Distribution.

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IV. URP'S FACTUAL CLAIMS ARE SPECULATIVE AT BEST

Even if URP had timely raised these arguments, and even if they were not wrong as a matter law, URP's claims lacks a sufficient foundation in fact. URP suggests that without Commission Order No. 05-1250, PGE's customers are guaranteed at least $92.6 million in refunds because of the alleged consolidated tax benefits and the operation of SB 408. According to URP's simplistic claim: PGE and Enron will remain consolidated if the Stock Distribution does not occur, Enron will have enough net operating losses to offset PGE's net income, and SB 408 will give all of these consolidated tax benefits to customers. Rec. Req. at 5. In addition to lacking any evidentiary support in the record, each step of this argument is either untrue or based on pure speculation.

First, Enron could distribute existing PGE shares to Enron's creditors directly instead of through the issuance of New PGE Common Stock. This would effectively deconsolidate PGE and Enron for tax reporting purposes once Enron held less than 80% of PGE's shares. 26 USC § 1504.

Second, the Enron Chapter 11 Plan[5] provides for the transfer of PGE shares to a trust under certain circumstances. Plan, Article 24. Such a transfer would cause the deconsolidation of Enron and PGE for tax reporting purposes.

Third, the workings of SB 408 are still unclear. The Commission applied SB 408 in one docket (UE 170), but the Commission granted reconsideration in that proceeding and has reached no final decision. The Commission has opened, but not concluded, an investigation to issue permanent rules interpreting SB 408. Commission Docket AR 499. That proceeding will result in rules that define the crucial terms of SB 408, including the definition of "taxes paid," "properly attributed," and "taxes authorized to be

[5] Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated July 2, 2004 (the "Plan").

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collected in rates," and the manner in which an automatic adjustment clause will be implemented. Until these terms are defined and an automatic adjustment clause is established, the rate-making impact of SB 408 cannot be known.

Fourth, an essential assumption of URP's argument is that "Enron expects never to pay income taxes" and will have sufficient losses to offset income from PGE for "the foreseeable future" Rec. Req. at 3, 5. This is unfounded. The sole basis for URP's assumption is the statement in PGE's 2004 10-K that Enron expects "to have sufficient NOLs to offset its regular income tax liability for all subsequent periods through the date of *consummation of its Chapter 11 Plan.*" Rec. Req. at 3 (emphasis added).[6] But "substantial consummation" is a technical term, defined in the Bankruptcy Code. 11 USC § 1101(2). The Bankruptcy Court has already concluded that the Enron Chapter 11 Plan "has been substantially consummated," in a ruling and order dated June 23, 2005. Ex. 1 at 10. At best, the statement in PGE's 2004 10-K suggests that Enron will have sufficient NOLs to offset PGE's net income through 2005. It in no way supports URP's speculation that, absent deconsolidation, Enron would have enough NOLs to offset PGE's net income "for the foreseeable future."

In fact, Enron has and will continue to reduce its carry-forward net operating losses as a result of gains attributable to the recognition of cancellation of indebtedness, gains on asset dispositions, and other transactions occurring in the normal course of liquidation. Enron currently expects that the consolidated return net operating losses will be either minimal or eliminated by the end of 2006.

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[6] URP's request that the Commission take official notice of PGE's Form 10-K Report of 2004 is improper. Rec. Req. at 4, n1. URP's request meets none of the requirements of OAR 860-014-0050. Moreover, URP seeks to use PGE's 10-K for the truth of its content (rather than for the existence of the record), which the Oregon courts and the Commission have ruled is an improper use of official or judicial notice. *See Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3*, 177 Or App 658, 665 (2001).

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We offer the above not as facts proven in the record. There is no record evidence because URP did not raise these issues until after the record was closed. We offer them to underscore the speculative and unverifiable nature of URP's alleged harm. Weighing these unsubstantiated harms against the significant customer benefits of the Joint Application and Joint Stipulation—benefits which the Commission recognized and URP does not contest—simply reaffirms the Commission's conclusion in Order No. 05-1250: the Stock Distribution will "serve customers in the public interest."

V. CONCLUSION

For the reasons stated above, the Commission should reject the Reconsideration Request.

Respectfully submitted this 28th day of February, 2006.

PORTLAND GENERAL ELECTRIC COMPANY

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re ENRON CORP., et al., Reorganized Debtors.	
UPSTREAM ENERGY SERVICES, as Agent for Certain Texas Gas Producers, Appellant, v. ENRON CORP., et al., THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ENRON CORP., et al., Appellees.	04 Civ. 8883 (VM) **DECISION AND ORDER**

VICTOR MARRERO, United States District Judge.

On November 9, 2004, Upstream Energy Services ("Upstream"), appearing as an agent for certain Texas gas producers ("Texas Producers"), appealed the Order of the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") entered on July 15, 2004 (the "Confirmation Order") as a part of the Chapter 11 bankruptcy proceedings of appellees Enron Corp. and certain of its affiliated reorganized debtor entities (collectively, "Enron") confirming the Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, and Related Relief (the "Plan"). Enron filed a Motion to Dismiss Upstream's appeal as

moot on January 19, 2005, which was joined by appellees The Official Committee of Unsecured Creditors of Enron Corp., et al. (collectively, the "Creditors' Committee") on January 20, 2005.

On May 20, 2005, the parties informed the Court that they agreed that the majority of issues raised by Upstream in its appeal were moot, and that the sole issue remaining in this action was the enforceability of the exculpation provision contained in Section 42.7 of the Plan (the "Exculpation Provision"). (Joint Letter from Weil, Gotshal & Manges LLP to the Court, dated May 20, 2005 ("May 20 Letter"), at 2.) Because the Court finds that Upstream's appeal as to this provision is also moot, the Court dismisses Upstream's appeal in its entirety.

I. BACKGROUND

The Chapter 11 bankruptcy of Enron was one of the largest in history, and most of the facts of those proceedings are irrelevant to the appeal at hand. Therefore, only facts necessary for the resolution of the present dispute are recited herein.

A. UPSTREAM'S CLAIM AGAINST ENRON[1]

[1] The details of Upstream's relationship with Enron are more fully described in the opinions rendered on the issue of whether Upstream's claim is secured or unsecured. See In re Enron N. Am. Corp., 312 B.R. 27 (S.D.N.Y. 2004) ("Upstream Security II"); In re Enron Corp., et al., 302 B.R. 455 (Bankr. S.D.N.Y. 2003) ("Upstream Security I"). Familiarity with these opinions is assumed.

In October 2001, Upstream entered into a series of agreements with Enron North America Corp. ("ENA") for the delivery of natural gas to ENA in November 2001. Upstream Security I, 302 B.R. at 457. In entering these agreements, Upstream acted as an agent for the undisclosed and heretofore unidentified Texas Producers.[2] Id. at 461. ENA received the gas, but, by reason of its having filed for bankruptcy in December 2001, was unable to pay for the shipments when the obligations became due. Upstream filed a Proof of Claim in the ENA bankruptcy in July 2002 as an agent for the Texas Producers,[3] which Upstream claims were undisclosed principals that held title to the gas delivered under the October agreements. Upstream Security II, 312 B.R. at 29.

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[2] Nowhere in the record presented to the Court on this appeal does Upstream list the Texas Producers for which it is acting as the agent. As noted in the Appellees' Reply Memorandum, Upstream has not revealed this information to the Bankruptcy Court either, as is required under Bankruptcy Rule 2019. (See Appellees' Reply Mem. of Law in Response to Upstream's Opp'n to Motion to Dismiss Appeal, dated March 9, 2005 ("Appellees' Reply Mem."), at 14 n.10.)

[3] Upstream's failure to submit the required disclosures under Bankruptcy Rule 2019 raises the question of whether these unidentified Texas Gas Producers in fact have consented to this agency relationship in relation to the bankruptcy. As stated in In re Ionosphere Clubs, Inc.,

> [t]o be an authorized agent of a multiple grouping, Bankruptcy Rule 2019 requires that every person purporting to represent more than one creditor in a Chapter 11 reorganization case file a verified statement setting forth the names and addresses of the creditors, the nature and amount of the claims and the relevant facts and circumstances surrounding the employment of the "agent." . . . Only when an agent has express authorization may he file a claim on behalf of another.

101 B.R. 844, 851-52 (Bankr. S.D.N.Y. 1989) (internal quotation marks and citations omitted).

B. ENRON'S CHAPTER 11 PROCEEDINGS

The Enron debtors, which at the time comprised approximately 180 affiliated debtor entities, each filed for Chapter 11 bankruptcy beginning on December 2, 2001 in the United States Bankruptcy Court for the Southern District of New York.[4] All of the affiliated debtor entities' Chapter 11 cases were consolidated for administrative purposes before Judge Arthur J. Gonzalez. (Findings of Fact and Conclusions of Law Confirming the Plan, dated July 15, 2004 (the "Findings Opinion" or "Findings Op.") at 7, included as Appendix Item 11 to Appellees' Mem.)

After approximately two years of negotiations between Enron, the Creditors' Committee and the ENA Examiner,[5] the

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[4] Not all of the Enron entities filed for bankruptcy on December 2, 2001. The individual filing dates for the various debtor entities are listed in the Notice of Occurrence of Effective Date and Deadline for the Filing of Claims for Administrative Expenses, which is included as Appendix Item 14 to Appellees' Memorandum of Law in Support of Motion to Dismiss Upstream's Appeal, dated January 19, 2005 ("Appellees' Mem.").

[5] The Bankruptcy Court, sua sponte, ordered the appointment of the ENA Examiner on February 21, 2002 (see Order Directing Appointment of an Examiner in Enron North America Corp., dated February 21, 2002, included as Appendix Item 1 to Appellees' Mem.) after about ten different creditors moved in January and February 2002 for the appointment of a trustee or examiner for ENA, appointment of a separate creditors' committee for ENA, or appointment of separate counsel for ENA. (See Disclosure Statement for Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code at 212, included as Appendix Item 4 to Appellees' Mem.) The ENA Examiner's role was expanded over the life of the bankruptcy proceedings and included, among other things, the duty to serve as a "'facilitator of a chapter 11 plan in the ENA chapter 11 case,'" and as a "fiduciary protecting the interests of the ENA estate and as a plan facilitator for ENA, working with the Debtors and the Creditors' Committee to facilitate the chapter 11 plan process for ENA and its subsidiaries. (Findings Op. at 10.) The ENA Examiner had a fiduciary duty solely to the ENA creditors. (Id. at 8.)

negotiating parties agreed upon the Plan. (Id. at 39.) A total of ninety-nine objections to the Plan were filed by creditors. (Id. at 2-3.) Upstream filed several objections to the Plan, including an objection specifically concerning the Exculpation Provision. (See id. at 155-61.) The Bankruptcy Court permitted the objecting parties to collect discovery concerning the Plan, a process in which Upstream did not participate.[6] (Id. at 16-19; Decl. of Brian S. Rosen in Support of Appellees' Motion to Dismiss Upstream's Appeal ("Rosen Decl.") ¶ 8, attached as Ex. B to Appellees' Mem.)

The Plan was presented to the creditors for a vote, and all of the non-insider, impaired classes entitled to vote on the Plan voted in favor of accepting the Plan. (Findings Op. at 30.) The Bankruptcy Court subsequently held a nine-day confirmation hearing (the "Confirmation Hearing"), including the presentation of exhibits and witnesses for direct and cross-examination. The parties that had objected to the Plan failed to present any witnesses at the Hearing. (Id. at 2-5.) Upstream participated in the cross-examination of the debtors' proffered witnesses, including questioning on the subject of the Exculpation Provision. (See, e.g., June 3, 2004 Confirmation Hearing Tr. ("Hearing Tr.") at 167-72, included

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[6] Because Upstream failed to file its objections to the Plan before March 3, 2004, Upstream did not have access to the electronic document depository established by the debtors. (Rosen Decl. ¶ 8.)

as Appendix Item 17 to Appellees' Mem.)

On July 15, 2004, the Bankruptcy Court entered the Confirmation Order confirming the Plan, finding that it was fair and equitable and within the range of reasonable litigation outcomes, and disposed of all outstanding objections to the Plan, including those of Upstream. (See Confirmation Order at 2-3, included as Appendix Item 12 to Appellees' Mem.; Findings Op. at 109, 152-62.) The Plan became effective on November 17, 2004, and Enron emerged from Chapter 11 bankruptcy. (Rosen Decl. ¶ 11.) Since the issuance of this Order, both Upstream and Enron agree that the Plan has been substantially consummated. (See May 20 Letter at 1-2.) Upstream nonetheless argues that the Exculpation Provision should be struck from the Plan.

C. THE EXCULPATION PROVISION

Section 42.7 of the Plan states, in pertinent part, that

> [n]one of the Debtors, the Reorganized Debtors, the Creditors' Committee, the Employee Committee, the ENA Examiner . . ., the Indenture Trustees, and any of their respective directors, officers, employees, members, attorneys, consultants, advisors and agents (acting in such capacity), shall have or incur any liability to any Entity for any act taken or omitted to be taken in connection with and subsequent to the commencement of the Chapter 11 Cases, the formulation, preparation, dissemination, implementation, confirmation or approval of the Plan or any compromises or settlements contained therein . . .; provided, however, that the foregoing provisions of this Section 42.7 shall not affect the liability of . . . any Entity that otherwise would result from any such act or omission to the extent that such act or omission is determined in a Final Order to

> have constituted gross negligence or willful misconduct, including, without limitation, fraud and criminal misconduct . . . .

(Plan at 113-14, attached as Ex. A to the Confirmation Order, included as Appendix Item 12 to Appellees' Mem.)

Upstream did not participate in the discovery process preceding the Confirmation Hearing to ferret out potential claims that might be affected by the Exculpation Provision. (Rosen Decl. ¶ 8; see Findings Op. at 17 (noting that "[n]one of the Creditors that filed objections to confirmation of the Plan after March 3, 2004 sought discovery or requested reconsideration of the Confirmation Discovery Procedures Order.").) Although Upstream questioned at least one witness about the Provision, the examination consisted of a brief series of questions concerning the witness's knowledge of any causes of action that might lie against any of the exculpated Plan professionals. (See Hearing Tr. at 167-172.)

In the Bankruptcy Court's Findings Opinion, Judge Gonzalez addressed the Exculpation Provision. (See Findings Op. at 99-101, 145-46, 156.) The Court noted that Enron was unaware of any valid cause of action that would be waived as a result of this provision and that no party offered evidence of any claim, but also acknowledged that Enron never investigated whether there existed any causes of action that were released by this provision. (See id. at 99.) The Court

stated that the

> exculpation provision in the Plan [was] appropriately limited to a qualified immunity for acts of negligence and [did] not relieve any party of liability for gross negligence or willful misconduct. As a part of their key employee retention program, the [Bankruptcy] Court authorized . . . the Debtors to provide indemnification to their officers and directors for their postpetition acts, as provided for under the Articles of Incorporation of the Debtors, the Oregon Business Corporation Act and other applicable law and consistent with the scope of the exculpation provision in Section 42.7 of the Plan.

(Id. at 100.) The Bankruptcy Court additionally found that the Exculpation Provision was "reasonable and customary and in the best interests of the estates," and that "without such exculpation, negotiation of a Plan in these Chapter 11 Cases would not have been possible." (Id. at 145-46; see also id. at 156 (overruling the objections of Upstream and others to the Exculpation Provision, stating that "the release and exculpation provisions contained in the Plan are in the best interests of the Debtors' estates and do not violate applicable bankruptcy and nonbankruptcy law").)

II. DISCUSSION

Although Upstream was not required to obtain a stay of the Confirmation Order prior to appealing that order, its failure to obtain the stay exposed Upstream to the risk that "the appeal in question [would] be rendered moot by constitutional or related equitable/jurisprudential considerations." In re Texaco, Inc., 92 B.R. 38, 45 (S.D.N.Y.

1988). Upstream's failure to obtain a stay of the confirmation of the Plan has rendered the majority of its claims moot, as the parties stipulated to the Court in the May 20 Letter, and so the Court considers here only whether to dismiss as moot Upstream's appeal as to the Exculpation Provision.

Mootness doctrine has two aspects in the context of a bankruptcy appeal. First, there exists the Article III concern that the court consider only actual cases and controversies. See U.S. Const. art. III, § 2. As the Supreme Court stated in Mills v. Green,

> when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for [the appellate court], if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

159 U.S. 651, 653 (1895); see In re Texaco, 92 B.R. at 45. Second, the court must consider whether, "even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." In re Best Prods. Co., Inc., 68 F.3d 26, 30 (2d Cir. 1995) (quoting In re Chateaugay Corp., 988 F.2d 322, 325 (2d Cir. 1993) ("Chateaugay I"). Where such inequity exists in the implementation of the remedy sought, the appeal is rendered moot. Id.

In the context of a bankruptcy order that has been substantially consummated, "there fairly exists a 'strong presumption' that appellants' challenges have been rendered moot due to their inability or unwillingness to seek a stay. . . . [I]t is inherently improbable, once there has been 'substantial consummation,' that an appellate court will be able to fashion effective relief." In re Texaco, 92 B.R. at 46. "Substantial confirmation" is defined in the Bankruptcy Code as: "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2).

The Plan in this case has been substantially consummated, as defined in the Bankruptcy Code. All property proposed by the Plan to be transferred has been transferred and all equity interests in Enron proposed to be cancelled have been cancelled. (See Aff. of Robert S. Bingham in Support of Appellees' Motion to Dismiss Upstream's Appeal ("Bingham Aff.") ¶¶ 9(a), (d); Appellees' Mem. at 17.) The reorganized debtor entities have assumed control of substantially all of the property covered by the Plan. (Bingham Aff. ¶¶ 9(b), (d);

Appellees' Mem. at 17.) Finally, distributions have been made in accordance with the plan, including a $16.1 million distribution to creditors in November 2004 and total distributions of approximately $570 million in February and April of 2005. (See Supplemental Aff. of Robert S. Bingham in Support of Appellees' Motion to Dismiss Upstream's Appeal ("Bingham Supp. Aff.") ¶ 4(a), included as an enclosure with Letter from Weil, Gotshal & Manges LLP to the Court, dated May 18, 2005.) In addition to these steps, myriad other complicated and interrelated transactions have gone forward, including the settlement and dismissal of litigation. (See Bingham Aff. ¶¶ 8(a)-(g), 9(e)-(j); Bingham Supp. Aff. ¶¶ 4(a)-(c).) Upstream does not contest that substantial consummation of the Plan has occurred. (See May 20 Letter at 1-2.) As a result of this substantial consummation, Upstream faces a "strong presumption" that its appeal in its entirety has been rendered moot. See In re Texaco, 92 B.R. at 46.

Notwithstanding this presumption of mootness, "[c]onstitutional and equitable considerations dictate that substantial consummation will not moot an appeal if all of the following circumstances exist:

(a) the court can still order some effective relief...;

(b) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity, ...;

(c) such relief will not unravel intricate transactions

so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court, ...;

(d) the parties who would be adversely effected by the modification have notice of the appeal and an opportunity to participate in the proceedings ...; and

(e) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order ... if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

In re Chateaugay Corp., 10 F.3d 944, 952-53 (2d Cir. 1993) ("Chateaugay II") (internal citations and quotation marks omitted, format altered, emphasis added). Because Upstream cannot establish all of these factors, its appeal must be dismissed as moot. See In re Sunbeam Corp., Nos. 01-40291, 03 Civ. 536, 03 Civ. 924, 2004 WL 136941, at *2-*3 (S.D.N.Y. Jan. 27, 2004).

While it might be possible for the Court to order some effective relief by removing the Exculpation Provision from the Plan, thus establishing the first Chateaugay factor, none of the other factors weigh in favor of granting Upstream such relief. The Exculpation Provision was negotiated by all parties, including the representatives of the creditors, the Creditors' Committee and the ENA Examiner, and was found by the Bankruptcy Court to have been necessary for the negotiation of the Plan and appropriate under the

circumstances. (See Findings Op. at 100-101, 145-46.) Parties participated in the creation of the Plan under the guarantee that they would receive some limited protection for participating in one of the largest and most complex bankruptcy filings in history. (See id. at 145.) Key employees remained with Enron as a result of being promised some indemnification for their postpetition acts, an offer made by Enron with the Bankruptcy Court's approval. (See id. at 100.) To pull away this string would thus tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition.

Without such protection from liability, key personnel might abandon efforts to help the reorganized debtor entities follow through on the Plan and wind up its affairs. Without the participation of these individuals, the implementation of the Plan might falter, leading to an "unmanageable, uncontrollable situation for the Bankruptcy Court." Chateaugay II, 10 F.3d at 953. Additionally, all parties who would be adversely affected by the removal of the Exculpation Provision have not had an opportunity to be heard as to the effect such relief might have on them, thus the fourth Chateaugay factor has not been met.

Finally, Upstream failed to diligently pursue a stay of

the Confirmation Order, nor did it seek expedited review of its appeal from this Court. Upstream claims that it did not seek a stay of the Confirmation Order because its receipt of the stay might have been conditioned upon its putting up a bond for a large amount of money. (Upstream's Reply in Opp'n to Appellees' Motion to Dismiss, dated February 9, 2005 ("Upstream's Reply Mem."), at 3.) Upstream's meager assertion that it "may" have had to post a bond and that it was "doubtful" that it could have obtained a satisfactory bond does not change the weight of the equities. As the Fourth Circuit stated in Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.,

> We can understand a reluctance to put up a supersedeas bond of $ 7 million, but if the Pension Fund seriously sought an outright reversal of the order of confirmation, as it contends, it should have posted the bond or sought a substantial reduction in its amount; it should not have sat idly by while this case drifted along a routine, unexpedited course.

841 F.2d 92, 95 (4th Cir. 1988).

Upstream's reliance on the Third Circuit's opinion in In re Continental Airlines, 203 F.3d 203 (3d Cir. 2000), is misplaced. (See Upstream's Reply Mem. at 13-14.) In that case, the appellants were shareholders who had brought several securities fraud class actions against the directors and officers of Continental Airlines Holdings, Inc. Their class actions had been stayed pending Continental's bankruptcy, but

were subsequently permanently enjoined as a part of the reorganization plan, which effectively released the debtors' directors and officers, the debtors, and others from all claims accruing at any time through until the confirmation date. Id. at 205-07. The shareholders received no consideration for the forcible forfeiture of their claims. Id. at 211.

This situation is distinguishable from that presented by Upstream to this Court. First, the scope of the Exculpation Provision is far more limited, exculpating only negligent conduct and only such conduct occurring after the filing of Enron's bankruptcy petition and relating to the creation of the Plan. Second, Upstream does not have a pending action against the exculpated parties for negligence in the creation of the Plan that has been dismissed by the Exculpation Provision, nor does Upstream present this Court with any evidence that it will ever have such a claim. It does not appear likely that any such claim exists given the Bankruptcy Court's finding that the exculpated Plan professionals acting in their capacity as such "provided valuable services to the Debtors' estates in satisfaction of their . . . fiduciary duties." (Findings Op. at 101.) Additionally, the Bankruptcy Court considered the objections of Upstream and others concerning the Exculpation Provision and dismissed those

objections, finding that the Provision was "reasonable and customary and in the best interests of the estates," in conformity with applicable law and necessary for the negotiation of the Plan. (Id. at 100-01, 145-46, 156.) Finally, Upstream received some indirect consideration for the Exculpation Provision in that the Bankruptcy Court found that the negotiated Plan would not have been possible without it, and that without a negotiated Plan, "the value of these chapter 11 estates would be immeasurably depleted by costly and lengthy litigation, thereby injuring all creditors." (Id. at 145.) Judge Gonzalez, who oversaw every aspect of Enron's reorganization and who was integrally involved in the bankruptcy for approximately three years, was certainly in the best position to rule on the necessity and efficacy of such a provision.

Upstream cannot sustain its appeal in light of the substantial consummation of the Plan as it has not met all of the factors articulated in Chateaugay II. Moreover, the Court finds that it would be manifestly inequitable at this late stage to modify even this one provision of the Plan that so many parties have relied upon in making various, potentially irrevocable, decisions. The Court finds that the entirety of Upstream's appeal has been rendered equitably moot by the substantial confirmation of the Plan.

III. ORDER

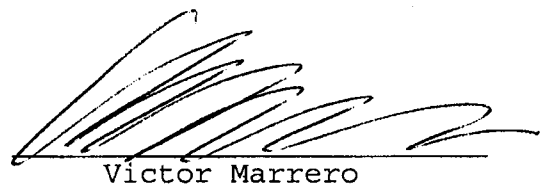
For the foregoing reasons, its is hereby

ORDERED that Upstream Energy Services's appeal of the Bankruptcy Court's Order Confirming Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, and Related Relief, entered on July 15, 2004, is dismissed.

The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: New York, New York
23 June 2005



Victor Marrero
U.S.D.J.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **OPPOSITION TO APPLICATION FOR RECONSIDERATION** by electronic mail where available to each party listed below, and by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to each party listed below, deposited in the U.S. Mail at Portland, Oregon.:

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DATED this 28th day of February, 2006.

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