BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1121

In the Matter of the Application of OREGON ELECTRIC UTILITY COMPANY, LLC, et al., For Authorization to Acquire Portland General Electric Company	**REPLY BRIEF OF ENRON CORP.**

Oregon Electric has presented the Commission with an application, testimony and conditions demonstrating that Enron's sale of PGE's common stock to Oregon Electric will not harm customers, and will in fact provide concrete benefits. Among the benefits are guaranteed rate credits of $43 million and $94 million of indemnities against potential PGE liabilities that will not be available if the Commission rejects Oregon Electric's application. Staff and other parties[1] oppose Oregon Electric's application, demanding more benefits based on their unsupported assertions that Oregon Electric's ownership poses risks of harms. They fail to prove, however, that Enron's sale of PGE's common stock to Oregon Electric will actually harm customers. Instead, they cite uncertainties and concerns, speculating that some disastrous event might occur or that Oregon Electric might act in some imprudent way.

There are two major problems with these arguments. First, an unknown is not evidence of harm. If the evidence proves the proposed transaction will not harm or create a material risk of harm to customers, then the Commission has no basis for denying Oregon Electric's application or imposing additional or revised conditions beyond those offered by Oregon

[1] Throughout this brief, "Intervenors" will refer to those intervenors opposing Oregon Electric's application.

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888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440

Electric. The second major problem with Staff and Intervenors' arguments is that they contradict themselves on major issues, forecasting different scenarios of harm that directly oppose each other. These contradictions serve to show the speculative nature of the alleged harms.

Enron's Reply Brief has two sections. Section I reviews the legal standards governing the Commission's decision, explains why the unknowns in this case are not evidence of harms, and shows how Staff's and Intervenors' proposed rate credits and other conditions are not supported by evidence satisfying the legal standards. We also point out that uncertainties and unknowns accompany all of the alternatives for PGE that could result if the Commission rejects Oregon Electric's application.

Section II describes the major contradictions in Staff's and Intervenors' arguments: 1) Oregon Electric will cause PGE to excessively cut costs, and Oregon Electric will cause PGE to raise rates; 2) customers are well served by PGE even though Enron is in bankruptcy, and it would be disastrous for customers if Oregon Electric went into bankruptcy; and 3) the Commission should reserve discretion to deal with future issues as they arise, and the Commission should impose a host of restrictive conditions on PGE and Oregon Electric now to protect against hypothetical future harms.

We conclude that there is no basis in fact for the alleged harms, there are real benefits, and it would be arbitrary, capricious and unconstitutional for the Commission to deny Oregon Electric's application or impose more restrictive conditions than what Oregon Electric has offered.

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888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440

I. The Parties Opposing Oregon Electric's Application Do Not Satisfy the Legal Requirements for the Commission's Decision

A. Review of the Legal Standards

General principles of administrative law, incorporated into the statutes governing the Public Utility Commission, prohibit the Commission from making decisions that are arbitrary and capricious. First, the Commission must have a rational basis in law and fact for its decision. *Chase Gardens, Inc. v. Oregon Public Utility Commission*, 131 Or App 602, 605 (1994). Second, the Commission's findings of fact must be based on substantial evidence in the record. *Market Transport, Ltd. v. Lobdell*, 74 Or App 375, 377 (1985). Finally, the Commission's order must articulate the basis for its decision, explaining with specificity how the evidence in the record supports its decision so that it is clear to a reviewing court that the Commission observed these legal standards. *Reforestation Gen'l Contractors, Inc. v. Nat'l Council on Compensation Ins*, 127 Or App 153, 163 (1994); *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or App 302, 305 (1992); *Publishers Paper Co. v. Davis*, 28 Or App 189, 194 (1977). *See also* PacifiCorp's Opening Brief at 2 (citing additional authorities relating to the rational basis and substantial evidence standards).

In addition, as discussed in Enron's Opening Brief, the Constitution limits the Commission's power to restrict Enron's sale of its PGE stock. *See* Enron's Opening Brief at 17-20. Under the Commerce Clause, states may not directly regulate interstate commerce, and any indirect burden on interstate commerce must not be excessive in relation to the local interest served. *Edgar v. MITE Corp.*, 457 US 624, 640 (1982); *Pike v. Bruce Church, Inc.*, 397 US 137, 142 (1970). Under the Takings Clause, the state may not impose a condition on a property owner's exercise of fundamental property rights unless the state establishes that there is an "essential nexus" between a legitimate state interest and the condition imposed and there is

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888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
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"rough proportionality" between the condition and the interest served. *Nollan v. California Coastal Commission*, 483 US 825, 837 (1987); *Dolan v. City of Tigard,* 512 US 374, 386, 391 (1994). The legitimate state interests served by the utility laws and the Public Utility Commission are protecting customers from unreasonable rates and obtaining for them adequate service. ORS 756.040, ORS 757.020.

As explained in Enron's Opening Brief, we believe that a "net benefit" standard would be unconstitutional, and ORS 757.511 should be interpreted to impose a "no harm" standard consistent with sound regulatory policy, the statute's legislative history, and the purpose of the statute as expressed in ORS 757.506. *See* Enron's Opening Brief at 6-10. As in prior cases, however, the Commission need not resolve this issue because the proposed transaction and conditions do, in fact, satisfy a net benefit test. What the Commission cannot avoid is resolving the issues surrounding Staff's and Intervenors' attempts to obtain conditions on this transaction—including rate credits—for which they provide little, if any, evidence and none that meets the constitutional standards.

Staff rightly recognizes that the Commission is in danger of violating the Constitution if it restrains the sale of PGE or limits the market for resale of PGE. Staff's Opening Brief at 38 n.10. Staff acknowledges this constitutional concern with regard to CUB's proposed "end game" condition. What Staff and Intervenors have failed to recognize is that the sale of PGE's common stock to Oregon Electric is *Enron's* end game. Enron has the right to sell its stock in PGE at a fair market price to a willing buyer, provided that the transaction will not harm PGE's customers, and Enron has decided to sell PGE's common stock to Oregon Electric. In Staff's words, "there is nothing in ORS 757.511 that currently gives the Commission the authority to discriminate

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888 SW Fifth Avenue, Suite 1600
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against potential qualified buyers . . . ." Staff suggests that such discrimination might be a regulatory taking. Staff's Opening Brief at 37-38.

Under the same principles acknowledged by Staff, the Commission cannot reject Enron's selection of Oregon Electric as the purchaser of PGE's stock simply because the Commission or an Intervenor is satisfied with or even "prefers" the status quo. The Commission can reject Oregon Electric only if its application, evidence, and conditions fail to meet the statutory test of ORS 757.511. Any other result would promote unsound regulatory policies and practices. Any other result would mean that an "irresponsible" owner of a utility would find it easier to sell a utility than a "responsible" owner. This cannot be what the legislature intended in enacting ORS 757.506 and 757.511.

B. Uncertainty About the Future is Not "Substantial Evidence"

Staff and Intervenors provide the Commission no evidence that would enable the Commission to deny the proposed transaction or add to or modify Oregon Electric's proposed conditions under ORS 757.511 consistent with evidentiary and constitutional standards. Over and over, they cite "uncertainties" and "concerns" to justify their positions. *See, e.g.,* Staff's Opening Brief at 2 ("difficulty in foreseeing and addressing the risks and harms"), 3 ("inherent difficulty of verifying the potential harm"), 15 ("Staff is concerned . . ."), 19 ("worrisome concerns"), 21 ("additional general concerns"), 21 ("Staff is also concerned . . ."). But uncertainties and concerns are not satisfactory evidence, because future harms cannot be proven through speculation. *See Douglas Constr. Corp. v. Mazama Timber Products, Inc.*, 256 Or 107, 111, 114 (1970) (denying claim for lost profits because it was "uncertain and speculative" and quoting the rule that "proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion

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regarding the cause and the amount of the loss can be logically and rationally drawn") *cf. State v. Bailey*, 212 Or 261, 306-07 (1957) (in condemnation proceeding, court may not consider speculative benefits or speculative damages).

The law requires that future harms be proven to a reasonable certainty. *See Tadsen v. Praegitzer Indus., Inc.*, 324 Or 465, 471-73 (1996) (holding that a claim for damages for future harm must be proven to a "reasonable certainty," which means that the future harm must be probable). The series of what ifs posed by various parties do not pass legal muster as evidence. *See State v. Bivins*, 191 Or App 460, 468 (2004) ("[E]vidence is insufficient if it requires the stacking of inferences to the point of speculation.").

Oregon Electric has met its burden of producing substantial evidence that customers will not be harmed by the acquisition, and therefore the burden shifts to Staff and Intervenors to produce substantial evidence that customers will in fact be harmed by the acquisition. *See In Re Portland General Electric Company's Proposal to Restructure and Reprice Its Services in Accordance with the Provisions of SB 1149*, No. UE 115, Order No. 01-777, at 4 (Aug. 31, 2001). Notwithstanding that Oregon Electric, PGE, and Enron have responded to extensive discovery requests in this proceeding, Staff and Intervenors have identified no evidence that any particular harms will occur with the conditions offered by Oregon Electric in place. Of course some unknowns will remain, even after all presently available information has been examined, because the future cannot be known with certainty. An uncertain future is a simple fact of life, not a result of Oregon Electric's acquisition.

C. The Conditions Proposed by Staff and Other Parties Have No Basis in Substantial Evidence

There is no basis for imposing any conditions upon approval of the transaction other than those offered by Oregon Electric. Even if Staff and Intervenors had provided evidence of

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888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440

specific harms or material risks of harms to customers caused by the proposed transaction and not addressed or redressed by Oregon Electric's proposed conditions, the Commission could not impose any additional or revised conditions without substantial evidence that they would remedy those specific harms and be roughly proportional to (or not excessive in relation to) those harms. The proponents of additional or revised conditions provide the Commission no substantial evidence satisfying this legal standard.

Staff supports its proposed conditions with statements that they are "preferable" for customers, and, instead of pointing to evidence that its proposed conditions are necessary, merely concludes that Staff is not "convinced" or "persuaded" by Oregon Electric's explanations regarding why Staff's additional or revised conditions are unworkable or unnecessary. *See, e.g.,* Staff's Opening Brief at 28, 29, 33. The standard is not what customers would prefer (for example, customers would always prefer lower rates but that is no justification for imposing a rate credit condition), nor is the standard whether Staff is "convinced" or "persuaded." Rather, the standard is substantial evidence showing that the revised or additional conditions are necessary (and no more than necessary) to prevent or alleviate proven harms resulting from the transaction.

While Oregon Electric has the burden of proof on whether the transaction will likely harm customers, Oregon Electric does not have the burden of proving that every condition proposed by every party is unnecessary. Rather, if a party wants the Commission to impose a particular condition, that party must provide the Commission with evidence showing that the condition is necessary to remedy a harm, that Oregon Electric's conditions do not adequately address the harm, and that the particular condition is not excessive in relation to the harm. *See* Section I.A, above.

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888 SW Fifth Avenue, Suite 1600
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1. A Higher Rate Credit Is Not Supported by Substantial Evidence

Staff recommends that the Commission impose a condition that Oregon Electric pay $75 million in rate credits, citing its list of alleged harms, but virtually admits that there is no evidence showing that rate credits *in the amount of $75 million* are necessary. *See* Staff's Opening Brief at 17-18 (admitting that "the process of setting the rate credit amount frankly involves judgment"). Indeed, it appears that Staff did not even attempt to quantify supposed known harms to customers when developing its rate credit. Hearing Transcript at 76 (cross-examination of Staff witness Morgan) ("I think the rate credits were determined on a more macro view of the, of all the risks that were identified in this transaction. I'm not certain that a specific figure was included specifically to offset the additional interest rate that PGE – that I believe PGE is paying due to Enron's position.").

Staff's only legal argument in support of its position is a quote from the Commission's order in UM 1011 that: "Because potential harm from merger transactions is often difficult to verify, recent orders have required monetary terms as a way to demonstrate that customers will receive a net benefit." *In Re Legal Standards for Mergers*, UM 1011, Order No. 01-778, at 11 (Sept. 4, 2001). Staff 's Opening Brief at 3-4, 18. ICNU makes a similar argument. ICNU's Opening Brief at 9. With due respect to the Commission, the quoted statement is simply wrong. As explained in Enron's Opening Brief, there was no finding by the Commission in those other proceedings that any given amount of rate credits was necessary, and the amounts of rate credits agreed to by the applicants in those proceedings are irrelevant here. *See* Enron's Opening Brief at 24. What Staff's brief fails to note, however, is that the sentence in the order immediately following the quoted language is "This need not always be the case." Order No. 01-778 at 11.

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888 SW Fifth Avenue, Suite 1600
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Contrary to Staff's view, this demonstrates that prior orders related to rate credits are not precedent for this transaction.

The Commission has never had an opportunity to determine whether to impose a mandatory rate credit, and if so, in what amount. Enron believes that there is no constitutionally acceptable way to impose a set amount of rate credits in compensation for an unquantifiable potential harm.

The $97 million in rate credits proposed by CUB and ICNU similarly lack any evidentiary basis. They rely solely on the amounts agreed to by applicants in prior transactions, which the Commission acknowledged as irrelevant in the Scottish Power proceeding. *See* Enron's Opening Brief at 25.

2. Other Proposed Conditions Are Not Supported by Substantial Evidence

Staff and Intervenors propose that the Commission impose multiple conditions in addition to those offered by Oregon Electric, but they cite no evidence in the record that would support a Commission order imposing their conditions. For example, Staff asserts that its proposed conditions 16 (minimum equity for distributions), 25 (cash-flow sweep), and 27 (re-leveraging) are critically important (Staff's Opening Brief at 5), but provides no evidence supporting a finding that these conditions are *necessary* to remedy harms resulting from the transfer of ownership.[2] With respect to its proposed 40% minimum equity requirement in Condition 27, Staff simply offers its condition as a given, concluding without discussion that it is not "convinced" that Oregon Electric's condition is preferable. Staff's Opening Brief at 29.

[2] Staff also characterizes its proposed condition 20 (the rate credit) as important. Staff's rate credit proposal is discussed in the previous section of this brief.

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What Staff fails to recognize is that the Commission can adopt Oregon Electric's conditions simply because Oregon Electric agreed to them. The Commission cannot impose additional or revised conditions to which Oregon Electric objects unless the evidentiary record demonstrates that such additions and revisions are necessary. ICNU, CUB, and other parties also propose additional conditions and assert that they are "necessary," but provide no evidentiary basis for this assertion. *See, e.g.*, ICNU's Opening Brief at 37-41; CUB's Opening Brief at 40-44; AOI's Opening Brief at 28-29.[3]

One justification Staff offers is that its conditions are *more restrictive* than the conditions that Oregon Electric has offered. For example, with respect to Condition 16, Staff postulates that it might be possible for PGE to issue a dividend in a manner allowed by Oregon Electric's condition but prohibited by Staff's condition. Staff's Opening Brief at 13-14. All that this proves is that Staff's proposed condition is more restrictive. It does not prove that Staff's condition is necessary to cure harms, nor that Staff's proposed remedy is roughly proportional to such harms.

The trouble with Staff's and Intervenors' proposed conditions is that they overreach. Some examples of appropriately tailored condition are Condition 2 (excluding goodwill resulting from this acquisition from PGE's utility accounts), Condition 3 (excluding all costs and fees of the acquisition), and Condition 17 (holding customers harmless from increased costs of capital resulting from Oregon Electric's ownership).[4] These conditions prevent the acquisition from harming customers and do not restrict PGE's activities unrelated to the acquisition. By contrast, the additional conditions proposed by Staff and Intervenors cast a wide net, not only preventing

[3] ICNU does cite some testimony in its discussion of the ring-fencing conditions, but the testimony mentions no harm to *customers*. ICNU's Opening Brief at 40.

[4] "Resulting from Oregon Electric's acquisition" would be more in keeping with the language and purpose of ORS 757.511. The statute requires a determination of whether the acquisition will harm customers. If at any later time a harm arises that is attributable to the parent company rather than the utility, the Commission can exercise its jurisdiction to determine how to prevent customers from being burdened with the harm.

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some speculative effects of Oregon Electric's ownership but also restricting ordinary business activities of PGE. Without evidence that meets the constitutional and other applicable legal standards, the Commission cannot adopt these additional conditions and revisions to Oregon Electric's proposed conditions.

D. Oregon Electric Does Not Have the Burden to Prove that the World Will Be Perfect If It Acquires PGE

It appears that Staff and some Intervenors are attempting, through their conditions, to protect customers from or compensate customers for all conceivable harms that could occur during the period of Oregon Electric's ownership. *See, e.g.,* Staff's Opening Brief at 2 (justifying rate credit on basis that proposed conditions are "imperfect" and do not "provid[e] complete protection"); *see also* AOI's Opening Brief at 5 (noting that "conditions can mitigate risk, but they can't eliminate it"). While well-intentioned, this is not good regulatory practice and goes beyond the bounds of ORS 757.511, which is concerned only with harms resulting from the acquisition itself. Some risks always exist, regardless of who owns PGE. For example, there is always some risk that PGE's owner, or PGE itself, will become bankrupt. And there is always some risk that PGE will cut costs in a way that is later determined to be imprudent. These and other risks will exist regardless of who acquires or receives PGE's stock from Enron, and there is no basis for requiring Oregon Electric as a condition of approval to guarantee absolutely that no harm to customers will result from such risks under its ownership of PGE. Nor is there any basis for requiring Oregon Electric to pay money to customers now, as a part of this proceeding, for risks that have not yet and may never become harms, let alone been quantified. The Commission need not decide upon a remedy now for a speculative risk, when it can exercise its jurisdiction to protect customers if the risk ever materializes into an actual, quantifiable harm.

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888 SW Fifth Avenue, Suite 1600
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E. Continued Enron Ownership Has Uncertainties That Staff and Intervenors Do Not Acknowledge

Staff and the Intervenors devote their energies to argument about the "uncertainties" related to Oregon Electric's potential ownership of PGE. However, when it comes to any "uncertainties" related to Enron's continued ownership of PGE they say almost nothing. Worse, they appear to assume an end state for PGE ownership that may not happen and is not supported by the record. For instance, Staff states: "Ultimately, should Enron not seek another buyer for the company, the most likely scenario is Enron would distribute PGE's stock to Enron's creditors and PGE would once again become a publicly traded, stand-alone company." Staff's Opening Brief at 34-35. AOI states: "Once through the transitional phase to distribute all the stock, PGE would become a stand-alone company with publicly-traded stock in the hands of multiple shareholders." AOI's Opening Brief at 24. *See also* BOMA's Opening Brief at 9. Neither Staff nor AOI cite any evidence to support these statements, nor can they. It is possible that these statements may prove to describe a future state of PGE ownership, but it is also possible that they may not. We simply do not know.

As discussed above, Enron believes that the Commission must decide this case based on whether Oregon Electric's application meets the legal standards, not how Oregon Electric ownership compares to continued Enron ownership, and not whether one alternative is more or less "certain" or "preferable" than another. Despite this, we will address the issue of certainty and the issue of what is known about continued Enron ownership so that the record on these issues is as accurate as possible.

Enron's confirmed Bankruptcy Plan provides for a structure and a process by which all of the claims of Enron's creditors are resolved and all of Enron's assets are distributed to the holders of allowed claims. The Plan does not provide for an end state of ownership for PGE. It provides

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a process to resolve that ownership. The testimony of Robert S. Bingham describes the structure and process of the Plan. Enron/1, Bingham/4-8; Enron/2, Bingham/5. If Oregon Electric does not purchase PGE, then Enron will have the ability to sell PGE to another potential buyer. If PGE is not sold by Enron, then, when the bankruptcy court has allowed claims sufficient for 30% of PGE's common stock to be distributed to holders of allowed claims, Enron will cease to own PGE. Instead, PGE shares will be owned 30% by the holders of allowed claims and 70% by the Disputed Claims Reserve. We do not know how long it will take for the allowed claims to reach the 30% threshold. After distribution to the holders of allowed claims and the Disputed Claims Reserve, the holders of allowed claims and the Overseers of the Disputed Claims Reserve will have the right to sell PGE. Assuming they do not, the PGE shares remaining in the Disputed Claims Reserve will be distributed over time to additional holders of claims as their claims are allowed. We do not know have long this process will take. The Disputed Claims Reserve will hold some of PGE's shares until the process is complete.

Thus, while the process for distribution is spelled out, many uncertainties still remain. First, we do not know whether PGE's common stock will be sold to another buyer. Enron can sell PGE's shares. The Oversees of the Disputed Claims Reserve can sell PGE's shares while they are in voting control of PGE. The Overseers of the Disputed Claims Reserve and the other holders of PGE's stock from time to time can sell PGE their stock, even after the Overseers no longer are in voting control of PGE. And, of course, the owners of PGE's stock can sell their stock to a single buyer even after a final distribution from the Disputed Claims Reserve.

Second, we do not know how long the process will take. As noted above, the record does not show how long it will take before there are sufficient allowed claims to release the PGE stock to the holders of allowed claims and the Disputed Claims Reserve. The record also does

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not show how long it will take before all of the claims of Enron's creditors are resolved so there could be a final distribution of PGE stock from the Disputed Claims Reserve, assuming PGE is not sold in the interim. This process may take years.

Finally, we do not know who will own PGE stock as a result of distribution. Distributions are made to the holders of allowed claims. The claims are marketable and creditors can and do sell them. Enron and the Disputed Claims Reserve may not know the final holder of an allowed claim until the time to distribute in whole or partial satisfaction of that claim.

Because of these uncertainties, today it is impossible to describe as the "status quo" any end state for the ownership of PGE stock if it is not sold to Oregon Electric. The best that could be said is that the "status quo" is the structure and process with the uncertainties described above.

II. Staff and Intervenors' Arguments are Replete with Contradictions

Staff and the Intervenors opposing Oregon Electric's application work hard to create a long list of harms and dismiss all benefits resulting from Oregon Electric's acquisition and its proposed conditions. The arguments resulting from this exercise are contorted and contradictory. Exposing the contradictions demonstrates the weaknesses in their positions and shows that the harms alleged by Staff and Intervenors are nothing more than speculation.

A. Oregon Electric Will Cause PGE to Cut Costs, Without Passing the Benefits to Customers, AND Oregon Electric Will Cause PGE to Raise Rates

The opponents attempt to persuade the Commission both that Oregon Electric will cause PGE to cut costs and that Oregon Electric will cause PGE to raise rates. ICNU's brief provides the best example. First, ICNU claims that Oregon Electric will cause PGE to cut costs. ICNU's Opening Brief at 2, 28. Second, it claims that Oregon Electric will prevent these decreased costs from being reflected in lower rates, presumably by delaying a major rate case. *Id.* at 28. Last, ICNU argues that Oregon Electric will cause PGE to initiate a rate case in the near future in

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888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440

order to recover *increased* costs by raising rates. *Id.* at 2, 9, 32. ICNU's contradictory scenarios of harm demonstrate both their implausibility and their speculative nature.

Moreover, in posing these contradictory arguments, ICNU ignores altogether the Commission's authority with respect to rates. The Commission has the ability to initiate a rate case at any time if it thinks there is a basis for decreasing rates. The Commission has the power to deny any unreasonable increases requested by PGE. It has this authority both by statute and by virtue of the hold harmless condition proposed by Oregon Electric. *See* ICNU's Opening Brief at 2 (arguing that Oregon Electric's debt requirements will "undoubtedly lead to rate increases") (emphasis added). Staff's witness Thomas D. Morgan admitted during his cross-examination testimony that, in order for PGE's customers to bear the costs of increased debt expense, the Commission would have to allow those costs into PGE's rates. Hearing Transcript at 73.

What ICNU and other parties are essentially asking the Commission to do is require Oregon Electric to compensate customers for the possibility that the *Commission* will allow PGE's rates to include inappropriate amounts in the future. Yet, after customers receive their rate credit, are Intervenors likely to support, and is the Commission likely to allow, PGE raising its rates to recover improper costs? Of course not. This is well illustrated by the cross-examination testimony of Staff witness Thomas D. Morgan. Enron's attorney asked Mr. Morgan what would happen if the Commission imposed a $75 million rate credit to compensate, in part, for an alleged harm of $6 million in increased costs:

> Q . . . OEUC could pay customers over the next five years 75 million dollars to cover a myriad of harms including this harm. And in a future rate case when they came in to ask for the assumed six million dollars in costs, Staff might oppose it, and the Commission might agree with Staff and deny that cost recovery. Is that a fair characterization?

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A I think that's fair.

Hearing Transcript at 76. And if the speculative harms never materialize into actual harms, will Oregon Electric be able to recover any of the rate credits it paid? Of course not. *See* Hearing Transcript at 76-77 (cross-examination of Staff witness Morgan) (responding that he was uncertain whether Staff would support a refund). Imposing a rate credit in these circumstances would not meet the applicable legal and constitutional standards.

B. Customers Are Well Served by PGE Even Though Enron Is in Bankruptcy, AND It Would Be Disastrous for Customers if Oregon Electric Went into Bankruptcy

Some intervenors argue that PGE and its customers suffered no harm because of Enron's bankruptcy, and yet they warn that Oregon Electric's debt may force it into bankruptcy, causing disastrous harm for customers. *See, e.g.,* ICNU's Opening Brief at 11-12 (noting that PGE is financially healthy, has maintained access to capital during the Enron bankruptcy, and has continued with its normal operations throughout the bankruptcy process); *id.* at 40 (positing "potentially catastrophic effects" of an Oregon Electric bankruptcy); AOI's Opening Brief at 21-22 (observing that PGE has functioned well during Enron bankruptcy, continuing to invest for the long-term and to achieve good customer service); *id.* at 17 (citing risk of Oregon Electric bankruptcy if Oregon Electric fails to meet its obligations). The truth that should be evident from PGE's experience with Enron is that the parent company's financial troubles do not harm the utility when conditions such as Oregon Electric has proposed are in place.

The source of this misplaced fear of parent company bankruptcy appears to be a misunderstanding of who is responsible for the parent company's debt. The City of Portland states: "For example, the acquisition imposes a significant amount of new debt upon PGE, together with pressures to service that debt. PGE customers will be saddled with the costs and

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risks of this newly created debt." City of Portland's Opening Brief at 3. The City cites testimony of Staff, CUB and ICNU for this proposition. ICNU states: "In addition, Oregon Electric will assume $1.1 billion in PGE debt." ICNU's Opening Brief at 22. ICNU further states: "The double leveraged structure of the transaction substantially increases debt as a percentage of consolidated capitalization." ICNU's Opening Brief at 39. At best, these statements are confusing and at worst misleading.

Contrary to the City's statement, PGE and its customers will not be "saddled" with Oregon Electric's debt. PGE will not agree, and without the Commission's approval could not agree, to pay any of Oregon Electric's debt, whether incurred for this acquisition or for any other purpose. As a result, Oregon Electric's creditors will have no claim of any form under any theory to collect from PGE what they are owed by Oregon Electric. It follows that these debts cannot be charged to or paid by PGE's customers for any reason. *See*, PGE/400, Piro/15; *see also* ORS 757.440.

The "consolidated capitalization" and "double leverage" to which Staff and ICNU refer are the result of accounting conventions and not legal reality. So is Oregon Electric's "assumption" of $1.1 billion in PGE debt that ICNU cites. Consolidated financial reporting will require that Oregon Electric include PGE as a part of a combined financial statement. However, Oregon Electric will not "assume" or agree to pay PGE's debt. PGE's creditors will not be able to sue Oregon Electric to collect PGE's debts. "Double leverage" will exist only on financial reports. The legal reality is that each of PGE and Oregon Electric will have only "single leverage." PGE will have its existing and future debts as its "leverage." Oregon Electric will have its acquisition debt as its "leverage." But neither company is or will be responsible for the debts or "leverage" of the other company.

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888 SW Fifth Avenue, Suite 1600
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Perhaps this confusion between accounting and legal realities caused ICNU and others to reach inaccurate conclusions about the effects of a potential Oregon Electric bankruptcy on either PGE or its customers. ICNU notes that Oregon Electric's creditors will have a pledge and priority lien on the stock of PGE. ICNU concludes from this fact, without any evidence or analysis, that the right of Oregon Electric's creditors to foreclose on the security interest in PGE stock in the event of an Oregon Electric bankruptcy "puts PGE at additional risk." ICNU's Opening Brief at 40. The record in this case demonstrates that ICNU is wrong.

First, an Oregon Electric bankruptcy would not be "catastrophic" except perhaps for Oregon Electric's investors and Oregon Electric's creditors. Enron's bankruptcy, the largest and most complicated in history at the time it was filed, may fairly be characterized as "catastrophic," but the record shows that it had no effect on PGE's customers. The ring-fencing conditions adopted in the Enron merger order worked. PGE maintained its independent financial structure, had access to capital and continued to invest in needed utility infrastructure throughout the Enron bankruptcy proceedings. Rates did not increase because of Enron's bankruptcy and service did not deteriorate. *See* PGE/100, Piro/13-14. ICNU, AOI, and Staff concede that PGE is in good financial condition. ICNU's Opening Brief at 11-12; AOI's Opening Brief at 21-22; Staff's Opening Brief at 22. Staff witness Morgan testified that none of the alleged costs of the Enron bankruptcy are in PGE's rates. Hearing Transcript at 73 (cross-examination of Staff witness Morgan). PGE was not consolidated in Enron's bankruptcy and Mr. Bussel testified that the possibility that PGE could be consolidated in an Oregon Electric bankruptcy is remote. Oregon Electric/800, Bussel/4. The record is clear that the stronger ring-fencing conditions proposed by Oregon Electric would be more than adequate to protect PGE and its customers in the unlikely event that Oregon Electric were to go into bankruptcy.

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Moreover, an Oregon Electric bankruptcy would be simple and short. Oregon Electric will have no businesses other than PGE. Oregon Electric/3, Davis/3. Therefore, the only issues in an Oregon Electric bankruptcy would be how much of their equity Oregon Electric investors would have to give up to satisfy creditors and the bankruptcy court and how the creditors would restructure Oregon Electric's debt so that the expected dividends from PGE would ultimately satisfy the debt. In deciding these issues, Oregon Electric would have to abide by the strong ring-fencing measures that it has proposed. This process will not adversely affect PGE or its customers.

These conclusions hold true even though Oregon Electric's creditors may hold a security interest in PGE's stock. The security interest is actually irrelevant to PGE and its customers. All the security interest would give the creditors would be a priority interest in the proceeds of a sale of PGE stock and the ability to either hold or sell the stock to satisfy the debt. This has no effect on PGE and its customers. The creditors cannot sell PGE's stock to anyone that would have "substantial influence" over PGE without Commission approval under ORS 757.511. All that the security interest guarantees to the creditors of Oregon Electric is that they are first in line.

Oregon Electric's debt is not a harm for PGE's customers. It may be a burden on Oregon Electric, and it may be a risk for Oregon Electric's creditors. Oregon Electric and its creditors – not PGE and its customers – are the ones who stand to lose if Oregon Electric is unable to pay its debts. Likewise, Oregon Electric and its creditors – not PGE and its customers – may be harmed if Oregon Electric ever becomes bankrupt.

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888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440

C. The Commission Should Reserve Discretion to Deal with Future Issues as They Arise, AND the Commission Should Impose a Host of Restrictive Conditions on PGE and Oregon Electric Now to Protect Against Hypothetical Future Harms

None of the risks alleged by various parties is certain to cause harm, and if any of them ever does, the Commission can address the problem at that later time. There is no good reason to predetermine issues now, based on speculation, when the Commission can deal with issues as they arise and make decisions based on real facts. Staff and CUB both acknowledge that the Commission has broad authority to protect customers from inappropriate burdens. *See* Staff's Opening Brief at 22 ("The Commission always retains the right to deny PGE recovery in rates of the costs incurred from any of the liabilities. The Commission may decide to disallow, or allow, such costs depending upon the circumstances giving rise to any particular debt PGE incurs."); CUB's Opening Brief at 7 ("The utility statutes in general reflect a legislative scheme in which the PUC exercises 'broad powers to protect consumer interests.'"); *see also* AOI's Opening Brief at 27. In addition, Staff and CUB both acknowledge that the Commission must reserve discretion to deal with future events as they arise and that it would be unwise for the Commission to bind its hands prematurely. *See* Staff's Opening Brief at 37, 38 n. 10; *In Re Portland General Electric Co.*, DR 10/UM 535, Order No. 93-1117 (Aug. 9, 1993) (articulating CUB's position that the Commission must not "prejudge an issue with consequences to ratepayers" and "must know the dollar consequences of its actions."). But then Staff and Intervenors request conditions and compensation now to deal with contingencies that the Commission will have full authority to address later.

CUB's proposed end-game condition is the best example of this sort of contradiction. CUB proposes a condition that gives the City of Portland (or another public entity designated by the City) the option to buy all of PGE's assets at a purchase price set by an arbitrator if Oregon

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888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440

Electric does not create a publicly-traded corporation through a public stock offering (CUB/300, Jenks-Brown/33; CUB/325, Jenks-Brown/1); CUB provides no evidence, however, that would allow the Commission to meaningfully evaluate the consequences of public ownership. Thus, CUB contradicts its own position, quoted above, that the Commission should not prejudge an issue before it has all relevant information about the issue and can determine the precise consequences of its decision. Staff acknowledges that CUB's proposal that "the Commission make a decision today about what will be best for PGE's customers and the public generally at some unknown future time" is bad policy and may be illegal. Staff's Opening Brief at 37, 38 n. 10.

While Staff recognizes with respect to CUB's end-game condition that the Commission should not prematurely decide issues based on speculation and assumptions, Staff nevertheless proposes its own conditions that do the same thing. As a prime example, Staff's principal justification for its proposed rate credit is that Staff has been unable to "verify the potential harm" of Oregon Electric's acquisition. Staff's Opening Brief at 4-5. As another example, Staff argues in support of its proposed Condition 25 that, "In staff's opinion, PGE would only need to open a secured revolver account (as contrasted with an unsecured revolver) if PGE's financial performance was weak." *Id.* at 27. It is unknown what market conditions might develop that would lead PGE to consider using a secure revolver. *See* PGE/400, Piro/7. If PGE ever does determine that it should have a secured revolver, it will have to make an application to the Commission at that time (ORS 757.480). It is not necessary, wise, or legal for the Commission to impose conditions now based on mere speculation about what the future may bring.

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888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440

D. Underlying these Contradictions is the Reality that the Change in PGE's Ownership is Not Likely to Affect PGE's Service or Rates

The reality is that the Commission will continue to regulate PGE's rates and service, as it has always done. PGE will continue to be a separate company from its owner. If PGE's board of directors instructs PGE to take any action affecting PGE's rates or service, it will be subject to Commission oversight. *See generally* ORS 756.040, 756.515, 757.020. The Commission's authority to ensure that PGE delivers adequate service is provided for in these statutes. And as far as rates are concerned, neither PGE nor its owner can raise rates without Commission approval. The statutes provide the Commission ample authority to determine whether any proposed rate increase is reasonable, and the Commission can prevent any costs attributable to Oregon Electric's ownership from being included in rates. ORS 757.210. If the statutes did not make this authority clear, Oregon Electric's hold harmless condition does. Because the Commission will continue to have authority to assure that PGE's service is adequate and its rates are appropriate and reasonable, Staff and Intervenors are hard pressed to demonstrate that Oregon Electric's acquisition will harm service quality or raise rates. *See In Re Legal Standards for Mergers*, UM 1011, Order No. 01-778, at 11 (Sept. 4, 2001) ("The form of business enterprise should be of no consequence to the Commission . . . ."). The contradictions in their arguments reveal that the alleged harms are speculative and do not support Commission action now.

III. Conclusion

Staff and Intervenors are right that in many ways the future is unknown if Oregon Electric acquires PGE, but the future is also unknown if Enron retains ownership of PGE for the short term and then disposes of PGE's stock in accordance with its Bankruptcy Plan. Parties opposing the proposed transaction and conditions offer no evidence that the change in PGE's

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888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440

ownership will affect PGE's rates or service. Therefore, the Commission must approve Oregon Electric's application to acquire PGE. As the future reveals itself, the Commission will continue to have authority to deal with any events affecting PGE's service or rates. Because there is no evidence in the record of any harm to customers resulting from Enron's sale of PGE to Oregon Electric, and because there is evidence of concrete benefits offered by Oregon Electric, it would be arbitrary and capricious and it would be unconstitutional for the Commission to deny Oregon Electric's application or impose any conditions beyond those agreed to by Oregon Electric.

DATED this 3rd day of December, 2004.

ENRON CORP.

By _____

Michael M. Morgan, OSB No. 72173
David F. White, OSB No. 01138
Caroline Harris Crowne, OSB No. 02131
Tonkon Torp LLP
888 SW Fifth Avenue, Suite 1600
Portland, OR 97204
Telephone: 503-802-2007
Fax: 503-972-3707
E-Mail: mike@tonkon.com

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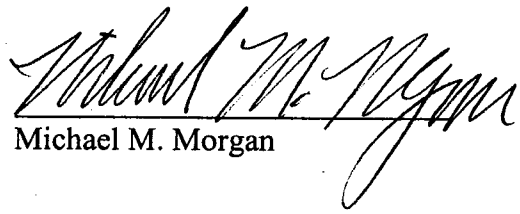
CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **REPLY BRIEF OF ENRON CORP.** 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.

DATED: December 3, 2004.



Michael M. Morgan

JIM ABRAHAMSON -- **CONFIDENTIAL**
CADO
4035 12TH ST CUTOFF SE STE 110
SALEM OR 97302
jim@cado-oregon.org

SUSAN K ACKERMAN
NIPPC
PO BOX 10207
PORTLAND OR 97296-0207
susan.k.ackerman@comcast.net

GRIEG ANDERSON
5919 W MILES ST.
PORTLAND OR 97219

JEANNE L ARANA
OREGON HOUSING AND COMMUNITY SVS DEPT
PO BOX 14508
SALEM OR 97301
jeanne.arana@hcs.state.or.us

KEN BEESON -- **CONFIDENTIAL**
EUGENE WATER & ELECTRIC BOARD
500 EAST FOURTH AVENUE
EUGENE OR 97440-2148
ken.beeson@eweb.eugene.or.us

JULIE BRANDIS -- **CONFIDENTIAL**
ASSOCIATED OREGON INDUSTRIES
1149 COURT ST NE
SALEM OR 97301-4030
jbrandis@aoi.org

KIM BURT
WEST LINN PAPER COMPANY
4800 MILL ST
WEST LINN OR 97068
kburt@wlinpco.com

J LAURENCE CABLE -- **CONFIDENTIAL**
CABLE HUSTON BENEDICT ET AL
1001 SW 5TH AVE STE 2000
PORTLAND OR 97204-1136
lcable@chbh.com

D KEVIN CARLSON
DEPT OF JUSTICE - GENERAL COUNSEL DIV
1162 COURT ST NE
SALEM OR 97301-4096
d.carlson@doj.state.or.us

MICHAEL CARUSO
176 SW HEMLOCK
DUNDEE OR 97115
carusodad@hotmail.com

JENNIFER CHAMBERLIN -- **CONFIDENTIAL**
STRATEGIC ENERGY LLC
2633 WELLINGTON COURT
CLYDE CA 94520
jchamberlin@sel.com

WILLIAM H CHEN
CONSTELLATION NEWENERGY INC
2175 N CALIFORNIA BLVD STE 300
WALNUT CREEK CA 94596
bill.chen@constellation.com

Tonkon Torp LLP
888 SW Fifth Avenue, Suite 1600
Portland, Oregon 97204
503-221-1440

JOAN COTE -- **CONFIDENTIAL**
OREGON ENERGY COORDINATORS ASSOCIATION
2585 STATE ST NE
SALEM OR 97301
cotej@mwvcaa.org

CHRIS CREAN -- **CONFIDENTIAL**
MULTNOMAH COUNTY
501 SE HAWTHORNE, SUITE 500
PORTLAND OR 97214
christopher.d.crean@co.multnomah.or.us

MELINDA J DAVISON -- **CONFIDENTIAL**
DAVISON VAN CLEVE PC
1000 SW BROADWAY STE 2460
PORTLAND OR 97205
mail@dvclaw.com

JIM DEASON
CABLE HUSTON BENEDICT EL AL
1001 SW FIFTH AVE STE 2000
PORTLAND OR 97204-1136
jdeason@chbh.com

JAMES DITTMER -- **CONFIDENTIAL**
UTILITECH INC
740 NW BLUE PKWY STE 204
LEE'S SUMMIT MO 64086
jdittmer@utilitech.net

J JEFFREY DUDLEY -- **CONFIDENTIAL**
PORTLAND GENERAL ELECTRIC
121 SW SALMON ST 1WTC1301
PORTLAND OR 97204
jay.dudley@pgn.com

GARY DUELL -- **CONFIDENTIAL**
11301 SE CHARVIEW COURT
CLACKAMAS, OR OR 97015
gduell@bigplanet.com

JASON EISDORFER -- **CONFIDENTIAL**
CITIZENS' UTILITY BOARD OF OREGON
610 SW BROADWAY STE 308
PORTLAND OR 97205
jason@oregoncub.org

JAMES F FELL -- **CONFIDENTIAL**
STOEL RIVES LLP
900 SW 5TH AVE STE 2600
PORTLAND OR 97204-1268
jffell@stoel.com

ANN L FISHER -- **CONFIDENTIAL**
AF LEGAL & CONSULTING SERVICES
1425 SW 20TH STE 202
PORTLAND OR 97201
energlaw@aol.com

ANDREA FOGUE
LEAGUE OF OREGON CITIES
PO BOX 928
1201 COURT ST NE STE 200
SALEM OR 97308
afogue@orcities.org

SCOTT FORRESTER
FRIENDS OF THE CLACKAMAS RIVER
2030 NW 7TH PL
GRESHAM OR 97030
clackamas9@aol.com

KATHERINE FUTORNICK
14800 NE BLUEBIRD HILL LANE
DAYTON OR 97114
futork@onlinemac.com

LORA GARLAND L-7
BONNEVILLE POWER ADMINISTRATION
P.O. BOX 3621
PORTLAND OR 97208-3621
lmgarland@bpa.gov

LEONARD GIRARD
2169 SW KINGS COURT
PORTLAND OR 97205
lgirard@teleport.com

ANN ENGLISH GRAVATT -- **CONFIDENTIAL**
RENEWABLE NORTHWEST PROJECT
917 SW OAK - STE 303
PORTLAND OR 97205
ann@rnp.org

PATRICK G HAGER -- **CONFIDENTIAL**
PORTLAND GENERAL ELECTRIC
121 SW SALMON ST 1WTC0702
PORTLAND OR 97204
patrick.hager@pgn.com

ROY HENDERSON
PENSION ENHANCEMENT COMMITTEE
895 NW DALE AVENUE
PORTLAND OR 97229
royhensn@msn.com

MARY ANN HUTTON -- **CONFIDENTIAL**
CANON AND HUTTON
Southern Oregon Office
1141 NW Kring Street
Roseburg, OR 97470
mah@canonandhutton.com

VALARIE KOSS
COLUMBIA RIVER PUD
PO BOX 1193
SAINT HELENS OR 97051
vkoss@crpud.org

MICHAEL L KURTZ
BOEHM, KURTZ & LOWRY
36 E 7TH ST STE 2110
CINCINNATI OH 45202
mkurtzlaw@aol.com

KEN LEWIS -- **CONFIDENTIAL**
2880 NW ARIEL TERRACE
PORTLAND OR 97210
kl04@mailstation.com

JAMES MANION -- **CONFIDENTIAL**
WARM SPRINGS POWER ENTERPRISES
PO BOX 960
WARM SPRINGS OR 97761
j_manion@wspower.com

GORDON MCDONALD
PACIFIC POWER & LIGHT
825 NE MULTNOMAH STE 800
PORTLAND OR 97232
gordon.mcdonald@pacificorp.com

THAD MILLER -- **CONFIDENTIAL**
OREGON ELECTRIC UTILITY COMPANY
222 SW COLUMBIA STREET, SUITE 1850
PORTLAND OR 97201-6618
tmiller6@optonline.com

CHRISTY MONSON
LEAGUE OF OREGON CITIES
1201 COURT ST. NE STE. 200
SALEM OR 97301
cmonson@orcities.org

NANCY NEWELL
3917 NE SKIDMORE
PORTLAND OR 97211
ogec2@hotmail.com

JOE JANSSENS
PGE PENSION ENHANCEMENT COMMITTEE
24495 BUTTEVILLE RD NE
AURORA OR 97002
osprey64@juno.com

GEOFFREY M KRONICK LC7 -- **CONFIDENTIAL**
BONNEVILLE POWER ADMINISTRATION
PO BOX 3621
PORTLAND OR 97208-3621
gmkronick@bpa.gov

ROCHELLE LESSNER -- **CONFIDENTIAL**
LANE, POWELL, SPEARS, LUBERSKY LLP
601 SW 2ND AVE. STE. 2100
PORTLAND OR 97204
lessnerr@lanepowell.com

STEVEN G LINS
GLENDALE, CITY OF
613 E BROADWAY STE 220
GLENDALE CA 91206-4394
slins@ci.glendale.ca.us

LLOYD K MARBET
DON'T WASTE OREGON
19142 S BAKERS FERRY RD
BORING OR 97009
marbet@mail.com

DANIEL W MEEK -- **CONFIDENTIAL**
DANIEL W MEEK ATTORNEY AT LAW
10949 SW 4TH AVE
PORTLAND OR 97219
dan@meek.net

WILLIAM MILLER
IBEW
17200 NE SACRAMENTO
PORTLAND OR 97230
bill@ibew125.com

FRANK NELSON
543 WILLAMETTE CT
MCMINNVILLE OR 97128
fnelson@viclink.com

JAMES NOTEBOOM -- **CONFIDENTIAL**
KARNOPP PETERSEN NOTEBOOM ET AL
1201 NW WALL ST STE 300
BEND OR 97701
jdn@karnopp.com

LISA F RACKNER -- **CONFIDENTIAL**
ATER WYNNE LLP
222 SW COLUMBIA ST STE 1800
PORTLAND OR 97201-6618
lfr@aterwynne.com

REBECCA SHERMAN
HYDROPOWER REFORM COALITION
320 SW STARK STREET, SUITE 429
PORTLAND OR 97204
northwest@hydroreform.org

BRETT SWIFT
AMERICAN RIVERS
320 SW STARK ST, SUITE 418
PORTLAND OR 97204
bswift@amrivers.org

S BRADLEY VAN CLEVE -- **CONFIDENTIAL**
DAVISON VAN CLEVE PC
1000 SW BROADWAY STE 2460
PORTLAND OR 97205
mail@dvclaw.com

MICHAEL T WEIRICH -- **CONFIDENTIAL**
DEPARTMENT OF JUSTICE
1162 COURT ST NE
SALEM OR 97301-4096
michael.weirich@state.or.us

ROBIN WHITE
PORTLAND BOMA
1211 SW 5TH AVE STE 2722-MEZZANINE
PORTLAND OR 97201
rwhite@bigplanet.com

LINDA K WILLIAMS -- **CONFIDENTIAL**
KAFOURY & MCDOUGAL
10266 SW LANCASTER RD
PORTLAND OR 97219-6305
linda@lindawilliams.net

009697\00012\561417 V001

DONALD W SCHOENBECK -- **CONFIDENTIAL**
REGULATORY & COGENERATION SVS INC
900 WASHINGTON ST STE 780
VANCOUVER WA 98660-3455
dws@r-c-s-inc.com

JOHN W STEPHENS -- **CONFIDENTIAL**
ESLER STEPHENS & BUCKLEY
888 SW FIFTH AVE STE 700
PORTLAND OR 97204-2021
stephens@eslerstephens.com

LAURENCE TUTTLE
CENTER FOR ENVIRONMENTAL EQUITY
610 SW ALDER #1021
PORTLAND OR 97205
nevermined@earthlink.net

BENJAMIN WALTERS -- **CONFIDENTIAL**
CITY OF PORTAND - OFFICE OF CITY ATTORNEY
1221 SW 4TH AVE - RM 430
PORTLAND OR 97204
bwalters@ci.portland.or.us

STEVEN WEISS
NORTHWEST ENERGY COALITION
4422 OREGON TRAIL CT NE
SALEM OR 97305
steve@nwenergy.org

LORNE WHITTLES
EPCOR MERCHANT & CAPITAL (US) INC
1161 W RIVER ST STE 250
BOISE ID 83702
lwhittles@epcor.ca