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	**OPENING BRIEF OF ENRON CORP.**

Introduction and Summary of Argument

When this proceeding started, we knew that Enron Corp. (Enron) owned all of the common stock of Portland General Electric Company (PGE) and that it wanted to sell this property to Oregon Electric Utility Company (Oregon Electric). We knew that Enron has the absolute right to dispose of this property to anyone it chooses in any manner it chooses free of any restrictions or conditions imposed by the Commission except those that: (1) are consistent with the Commission's statutory authority, (2) are consistent with the exercise of the police power of the State of Oregon to protect PGE's customers from harm, as limited by the State and Federal Constitutions, (3) relate directly to a demonstrable harm significant enough to warrant a restriction on alienation, and (4) are roughly proportional to such harms. We also knew that Oregon Electric wanted to purchase the PGE stock from Enron. These things are still true today.

We also knew that nothing about this transaction has any effect on the Commission's authority to fully regulate PGE or on PGE's obligation to provide adequate service. Without Commission approval, PGE's rates cannot change and its rates cannot include any cost. The terms and conditions of PGE's service to customers cannot change without Commission

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approval. The Commission has full authority to assure PGE's customers of adequate service under ORS 756.040, and PGE is obligated to provide such service. These things are still true today.

But now, after nine months of proceedings, thousands of pages of Oregon Electric, Enron and PGE responses to data requests, the disclosure of all of the Texas Pacific Group's (TPG) and Oregon Electric's due diligence and decision-making documents, hundreds of pages and five rounds of testimony, and extensive cross examination, we know more. Some of the things we know that are relevant to this proceeding are:

1. Nothing about PGE will change as a result of this transaction, except for positive changes. PGE's rates will not increase, and the terms and conditions of PGE's service will not decrease. Oregon Electric will conduct a management review of PGE's operations and report on a transitional plan within one year after it acquires PGE. This process may identify efficiencies that can ultimately lead to lower costs and better service for PGE's customers.

PGE's financial structure will be better than it would be with continued Enron ownership. The dividend that PGE will pay to Oregon Electric at the close of this transaction will be paid to Enron if this transaction does not close. Otherwise, PGE's existing financing and capital structure will remain in place. PGE will retain all of its utility assets. Oregon Electric will provide PGE with the benefit of $94 million in Enron indemnities against PGE's own potential liabilities. These indemnities would not be available but for this transaction. These indemnities improve PGE's financial structure.

Oregon Electric will substantially increase the number of local business leaders on PGE's board of directors. This will increase the board's contact with and knowledge of the communities and customers in PGE's service territory.

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2. No party has presented any evidence that Enron's sale of PGE to Oregon Electric will harm customers. "Harm" as used in this brief means an actual degradation of PGE's service, an increase in PGE's rates, a weakened financial structure for PGE or a diminution of PGE's utility assets. These are the harms identified in ORS 757.506(2) that are the subject of ORS 757.511. As noted in paragraph 1 above, none of these harms result from this transaction.

3. Because they cannot prove harm, parties instead focus on what they see as risks arising from this transaction. The uncertainties they identify as risks are largely the result of an unknown future rather than the result of this transaction. They assume that the risks they identify will result in negative outcomes for PGE and its customers. But they offer no evidence that this is the likely result, and in many cases the opposite conclusion – positive outcomes – is more logical or likely. In any case, this house of cards of assumed negative outcomes in an uncertain future is not a sufficient basis for the Commission to reject Oregon Electric's application or to restrict Enron's right to transfer its property.

4. Even assuming for the purposes of argument that the uncertainties identified as risks present a sufficient probability of actual harm that the Commission can remedy them with conditions or restrictions, the Commission must nevertheless approve the transaction on the terms offered by Oregon Electric. The reason is that Oregon Electric has offered an unprecedented set of conditions that prevent any reasonably assessed risks from resulting in actual harms to PGE or its customers.

5. We deal with the following risks in this brief, which we believe to be the primary risks identified by the parties that relate to this transaction:

(a) The Risk of Cost Cuts that Prove to be Detrimental Rather than Beneficial to Customers. Some parties claim that Oregon Electric will unreasonably cut costs

in a way that damages customer service in order to make payments on Oregon Electric's debt or increase short-term profits. The evidence shows that no such cuts are needed to service the debt. In addition, Oregon Electric has agreed to an extension and update of Service Quality Measures designed to improve, not degrade, service. It has also agreed to extensive public reporting of its capital expenditures and an audit at its expense to assure the Commission and the public that service will not deteriorate.

(b) The Risk that Oregon Electric Goes into Bankruptcy and that such Bankruptcy Proves Harmful to Customers. Some parties are concerned that Oregon Electric may go into bankruptcy and this may adversely affect PGE's customers. The evidence shows that this is highly unlikely and that less stringent ring-fencing conditions than those offered by Oregon Electric protected PGE during Enron's bankruptcy. Rates did not increase as a result of Enron's bankruptcy and service did not deteriorate. PGE had adequate access to capital. In any case, Oregon Electric has agreed that PGE's revenue requirement and cost of capital will not increase as a result of Oregon Electric's ownership, even if Oregon Electric goes into bankruptcy.

(c) The Risk of a Change to PGE's Cost of Capital as a Result of this Transaction with a Negative Effect on Customers. Some parties are concerned that PGE's cost of capital will increase as a result of this transaction. The evidence shows that this is unlikely. As described more fully in PGE's Opening Brief, even if PGE's cost of capital increases, it is highly unlikely that this would increase customer rates. In any case, Oregon Electric has agreed that customers will not pay any increased costs.

(d) The Risk that a Future Transfer of PGE's Stock Proves Harmful, Rather than Helpful, to Customers. Some parties are concerned about the future transfer of

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Oregon Electric's ownership in PGE. This is baseless speculation. We have no idea who might become a future owner and whether that owner might be helpful or harmful to customers.

Finally, there is a fundamental point that many of the parties to this proceeding have either rejected or disregarded. The role of conditions under ORS 757.511 is not to protect customers from all conceivable harms. Rather, the Commission may only impose conditions to remedy harms that result from this transaction and that would not exist in the absence of this transaction. As shown in Section III of this brief, in order to comply with constitutional principles, any harm the Commission seeks to remedy must not be remote and any remedy must be proportionate to the harm. There are no such harms. Even under the most expansive interpretation of harms (assuming that all unknowns ultimately will prove to be harms), Oregon Electric's conditions mitigate them.

The remainder of this brief has three sections. Section I sets forth the Oregon law applicable to this proceeding. Section II demonstrates that there are no harms caused by the transaction that would allow the Commission to impose any conditions or restrictions other than those offered by Oregon Electric. Section III sets forth the constitutional and statutory law that applies to the rate credits and other conditions demanded by the opposing parties and demonstrates that the rate credits and conditions must be rejected because they are not related to this transaction or are not proportionate to any harm created by this transaction.

Enron does not believe that the legislature has the authority under the Constitution of the United States to require that either Enron or a buyer of its property confer a "net benefit" on PGE's customers or the residents of Oregon as a whole. However, we do not focus on this argument because the Commission does not need to decide it. The conditions offered by Oregon Electric provide clear "net benefits" including: $43 million in guaranteed rate credits, new

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Service Quality Measures, a local board of directors, and indemnities of up to $94 million to PGE that would not be available but for this transaction.

I. Oregon Law

The Commission's review of this application should focus on one question: Does this transaction harm customers? Parties opposing the transaction have created a record that diverts attention from this fundamental regulatory test. Parties studiously ignore the primary question by speculating about potential future risks, many of which are admittedly unlikely and many of which exist whether or not this transaction occurs. Many spend most of their time identifying unrelated regulatory and business issues they would like resolved in their favor and then request Commission-imposed conditions to guarantee that outcome. Many demand "benefits" but present no evidence of harms and no rational connection between the speculative harms they allege and the conditions or "benefits" they demand.

But the words of ORS 757.511, which governs this proceeding, matter, and the statute's purpose cannot be ignored, particularly when they echo the Commission's basic regulatory test and the Commission's fundamental mission: to "protect customers" against real threats to "adequate service at fair and reasonable rates." ORS 756.040(1). Every source of authority dictates a return to the Commission's core function of identifying whether the transaction causes harm to customers and adopting conditions that prevent any such harms.

The Statute: The purpose of ORS 757.511 is beyond question: to prevent harm to customers. The statute was enacted to fill a gap in the regulatory statutes by giving the Commission jurisdiction to regulate acquisitions of certain public utilities by a person not

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engaged in the public utility business in Oregon.[1] Such transactions require review because they could "*result in harm to such utility's customers*, including but not limited to the degradation of utility service, higher rates, weekend financial structure and diminution of utility assets." ORS 757.506(1)(c) (emphasis added).[2] After establishing the preventive purpose of the legislation, the Legislature set forth the manner of regulation: "It is therefore the policy of the State of Oregon to regulate [such] acquisition . . . in the manner set forth in this section and ORS 757.511 in order *to prevent unnecessary and unwarranted harm to such utilities' customers.*" ORS 757.506(3) (emphasis added).

Legislative History: The legislative history confirms this focus on preventing harms to customers. Mr. David Hayhurst, an attorney representing Northwest Natural Gas Company, testified before the legislature and described the purpose of the statute:

> The unprecedented increase in the number of corporate take-overs is a well documented phenomenon. . . . This could have a serious effect on the ability of an acquired *utility to continue to provide adequate service to Oregon customers at reasonable rates. . . . We believe the bill represents an important step in authorizing the Commissioner to protect Oregon utility customers from the harmful effect of ill-advised acquisitions.*

Written Testimony Before the Senate Committee on Utility Rate Relief, April 23, 1985 (Exhibit I, at 2) (emphasis added).

The absence of any reference in the statute or its legislative history to "net benefits" or requiring benefits unrelated to the transaction is conspicuous and telling. The sole focus is ensuring that the transaction does not harm service quality or increase rates.

The Context – The Commission's Basic Regulatory Test: ORS 757.511 is one of several statutes in the Oregon regulatory scheme that require Commission approval. *See, e.g.*,

[1] Enacted before ORS 757.511, ORS 757.485 provides the Commission with the authority to review acquisitions of utility stock or assets by another Oregon public utility.
[2] This statute sets forth the findings and policy motivating the enactment of ORS 757.511.

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ORS 757.480 (requiring approval for the sale of utility assets); ORS 757.485 (requiring approval for acquisition of utility stock or property by another public utility); ORS 757.490 (requiring approval for certain utility contracts); ORS 758.460 (requiring preapproval for territorial allocations). Under each of these statutes, the Commission applies a no-harm standard:

- We believe that a no-harm test is appropriate in this case [applying ORS 757.480]. It provides protection to ratepayers while allowing utilities a reasonable opportunity to exercise their judgment regarding the sale of their assets.[3]

- [ORS 758.460(1)] does not require a showing that the position of the public will be improved, but only *that no public detriment will result.*[4]

Under this series of regulatory statutes which includes ORS 757.506 and ORS 757.511, the Commission has never permitted other business issues or unrelated regulatory matters to interfere with its focus on protecting customers from the harmful effects of proposed transactions.

Commission Decisions: The Commission reviewed an application under ORS 757.511 within a year of its enactment. In that first Commission order under ORS 757.511, the Commission specifically identified its role under the statute. Concluding that the legislature had directed the Commission to act under its general powers "to protect customers and the public from unjust and unreasonable exactions," the Commission described the focus of the statute and the Commission's review as "whether the change in the ownership of the public utility *will impair the ability of the utility to provide adequate service at just and reasonable rates.*" *In Re PGC*, UF 3972, Order No. 86-106, at 6 (Jan. 31, 1986) (emphasis added).

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[3] *In Re Application of PacifiCorp*, UP 168, Order No. 00-112, at 6 (Feb. 29, 2000).
[4] *In Re Application of CP National Corporation and Oregon Trail Electric Consumers Cooperative, Inc.*, UP 43, Order No. 88-1362, at 12 (Nov. 18, 1988) (emphasis added).

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Again, in UM 1011 – the docket opened to investigate the legal standards under ORS 757.511 – the Commission reaffirmed its merger and acquisition policy of preventing harms to customers:

> We believe that public policy for mergers and acquisitions should not require a "net benefit" for customers, so long as they are not affected adversely by the change of ownership of the utility. The role of a Public Utility Commission is to protect customers from unjust exactions resulting from the market control that utilities could exercise without state regulation. The form of business enterprise should be of no consequence to the Commission, as long as the utility obeys regulatory mandates and procedures, does not present conflicts with the interests of Oregon customers, does not expose customers to greater risks of higher costs or lower service quality, and is capable of economically and reliably providing the services offered to customers now and in the future.

In Re Legal Standards for Mergers, UM 1011, Order No. 01-778, at 11 (Sept. 4, 2001).

In UM 1011, the Commission reluctantly concluded that as *a legal matter* the statute required a "net benefit." But the order left no doubt that as a *regulatory policy matter* the Commission should focus on preventing harm to customers. That regulatory policy is beyond reproach. No party in UM 1011 or elsewhere has ever disputed it.

The legal conclusion reached in UM 1011 – that ORS 757.511 requires a "net benefit" – has been disputed in UM 1011 and elsewhere. No party had an acquisition at issue in UM 1011. No party appealed the Commission's legal interpretation in UM 1011 so it has not been tested in the courts. As noted above and explained further in Part III below, Enron believes that requiring such a "net benefit" exceeds the powers of the Oregon Legislature.

Fortunately, in this case, the Commission need not decide this issue. The applicants have offered substantial benefits to customers, which include an unprecedented set of conditions and the following:

(i) $43 million in customer credits;

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(ii) A guarantee that these cost savings will continue in rates;

(iii) Indemnities of up to $94 million that would not be in place but for this transaction; and

(iv) A definite and certain path for freeing PGE from the Enron bankruptcy proceeding.

With these offered benefits in hand, the Commission need not choose between its traditional regulatory role of preventing customer harms and a "net-benefit" standard. It can focus on its traditional regulatory role. If there are no harms or if all harms are prevented by agreed-to conditions, then the Commission's public policy for mergers and acquisition is satisfied *and* the legal standard is met. As shown below and in Oregon Electric's Opening Brief, the proposed transaction causes no harm to customers. The transaction therefore "serves the public utility's customers in the public interest" under either a net-benefit or no-harm test.

This is the blueprint the Commission used in approving the Enron/PGE, Sierra Pacific/PGE, and Scottish Power/PacifiCorp transactions. The stipulated conditions prevented any harm resulting from the transactions and the customer credits ensured benefits to customers. The transactions therefore satisfied both a net-benefit and a no-harm test. This approach is faithful to the statute's purpose of "preventing harm to customers," consistent with the Commission's stated regulatory policy for mergers and acquisitions, and consonant with the recognition that unrelated business and regulatory matters have no place in these proceedings.

II. Alleged Harms

While various parties identify potential risks that may result in potential harms that could occur during Oregon Electric's ownership of PGE, the parties' allegations of harm are flawed in several respects. First, the harms are speculative. Parties have theorized that it is possible that certain harms could occur, but they have not introduced evidence to show the likelihood that the

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harms actually would occur. Second, most of the alleged harms do not flow from Oregon Electric's acquisition of PGE. In other words, parties have not offered any evidence that the harms would not result (or would not be as likely to result) under the ownership of Enron and its successors.[5] Third, customers already are protected from certain of the alleged harms by the existing power of the Commission, because the alleged harm would affect customers only with the Commission's approval in future proceedings. In short, this transaction will not *cause* the alleged harm. Fourth, even if the asserted harms were valid, Oregon Electric has addressed them by agreeing to conditions that have been found sufficient by the Commission in every other major proceeding under ORS 757.511.

The following discussion will highlight several of the harms alleged by parties and explain how these allegations of harm are flawed. This brief does not address every harm alleged by every party, but the principles and arguments articulated here can be applied broadly.

A. There is No Evidence that Oregon Electric Will Cause PGE to Cut Costs in a Way that Will Harm Customers

Some parties argue that there is a risk that Oregon Electric, in a quest for short-term profits, will cause PGE to make cuts to essential services and infrastructure, harming customers. *See* CUB/100, Jenks-Brown/11-12; CUB/200, Dittmer/25-30; Staff/900, Morgan/16. This is a leap of logic that relies on several assumptions, none of which is supported by the evidence in this proceeding. First, it assumes that Oregon Electric is more motivated than other shareholders to earn a return on its investment from year to year. Do the parties believe that investors in the stock market do not want to see an annual return on their investment? Do the parties believe that

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[5] If the sale of PGE to Oregon Electric is not consummated, Enron's Chapter 11 Plan provides that PGE's stock will be distributed to those creditors of Enron that have allowed claims and to the Disputed Claims Reserve for later distribution as more creditors' claims are allowed (Enron/1, Bingham/4-6).

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if Enron distributed the stock of PGE to its creditors, the creditors would not want to receive yearly dividends? Even if some parties believe these assumptions to be true, they do not support them with any evidence.

Second, the parties' conclusory allegation regarding cost-cutting assumes that because Oregon Electric desires a return on its investment, PGE necessarily will cut costs more deeply than it would under the ownership of another entity or other investors. But the evidence is that Oregon Electric does not currently have a plan to cut costs at PGE. Rather, Oregon Electric has a plan to review PGE's management and operations. *See* Oregon Electric/22, Davis/4-8. Some parties make much of the fact that, as part of its due diligence process, Oregon Electric compared PGE's costs to those of other utilities and created financial models using different cost inputs. *See* CUB/200, Dittmer/29-30; *see also* ICNU/200, Antonuk-Vickroy/36. All this shows is that Oregon Electric prudently examined the financial structure of its investment, taking into account potential variables. Oregon Electric's witnesses testified that Oregon Electric has no plans to cut costs based upon these studies. *See* Oregon Electric/100, Davis/16. That testimony is undisputed.

Third, the parties assume that if PGE does cut costs under Oregon Electric's ownership, the cuts will harm customers. But Staff's testimony admits that not all cost cutting is bad for customers. *See* Staff/1000, Durrenberger/4. And there is no evidence that Oregon Electric will cause PGE to act imprudently and cut costs in ways that would harm customers. Prudent cost-cutting will benefit customers in the long-term, because lower costs result in lower rates. Oregon Electric's testimony regarding its consideration of the Port Westward Project is evidence that Oregon Electric will support prudent investment in infrastructure for the benefit of customers in the long term. *See* Oregon Electric/500; Davis/10.

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To summarize, there is no evidence that Oregon Electric is more motivated than another shareholder to profit from its investment, there is no evidence that Oregon Electric will cause PGE to imprudently cut costs, and there is no evidence that cost-cutting by PGE under Oregon Electric's ownership will be more likely to harm customers than benefit them.[6] The standard is not whether there is a possibility that cuts might be made which might harm customers – this possibility always exists. The standard is whether substantial evidence shows that such harm is more likely to occur under Oregon Electric's ownership than otherwise.[7] That standard has not been met.

Even if parties had proven a demonstrably increased risk of harm to customers from cost cutting, Oregon Electric and PGE have agreed to several conditions that adequately address any increased risk. PGE has agreed to extend its Service Quality Measures for ten years (Condition 5) and to work to develop a billing accuracy measure (Condition 29). Oregon Electric and PGE have committed to submit a final transition plan to the Commission, disclosing the actions PGE will take based on Oregon Electric's post-acquisition review of management and operations (Condition 22). PGE has committed to report its operation and maintenance expenses and its capital expenditures to the Commission annually, comparing them to budgeted amounts and past years' amounts and explaining major variances (Condition 23). PGE also has agreed to conduct an audit at the Commission's direction, and Oregon Electric has agreed to pay up to $400,000 for that audit (Condition 24). These conditions go far beyond what other investors have agreed to in

[6] There is also no evidence that Oregon Electric will be unable to meet its obligations and as a result will cause PGE to cut costs in order to pay higher dividends. *See* subpart II.B for a discussion of Oregon Electric's financial stability.

[7] The other equity investor to which Oregon Electric must be compared is Enron and Enron's successors. *See* footnote 5 above.

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ORS 757.511 proceedings, and they are more than sufficient to counterbalance perceived risks that Oregon Electric will cause PGE to cut costs unwisely.

B. There is No Evidence that Oregon Electric Will Go into Bankruptcy, or that Such Bankruptcy Would Adversely Affect PGE

Some parties argue that PGE must be insulated against the possibility that Oregon Electric might suffer financial failure and go into bankruptcy. *See* Staff/200, Morgan/29; Staff/900, Morgan/12; ICNU/200, Antonuk-Vickroy/24-26. This risk is entirely speculative. TPG's extensive financial modeling shows that there is no reason to expect that Oregon Electric will be unable to pay its obligations. *See* Oregon Electric/200, Wheeler/5-6. Staff agrees that it is likely that PGE will generate enough revenue to pay dividends to Oregon Electric sufficient for Oregon Electric to service its debt. *See* Staff/900, Morgan/9. Further, Mr. Piro testified that insufficient revenue could only result from a series of years of historically poor earnings, which in turn could only result from PGE not recovering its costs in rates. *See* PGE/100, Piro/4-5. This is a remote possibility at best and would reflect problems at PGE unrelated to this transaction. But even if there were a proven risk that Oregon Electric would become bankrupt, such a risk is not a harm of this transaction. PGE's current owner, Enron, is in bankruptcy. Oregon Electric's acquisition of PGE will remove PGE from Enron's ownership sooner than would otherwise happen.[8] Thus, the risk that PGE will be owned by a bankrupt company *decreases* when Oregon Electric acquires PGE.

Even if parties had proven that Oregon Electric is more likely to become bankrupt than Enron and its successors, the ring-fencing conditions agreed to by Oregon Electric and PGE are more than sufficient to protect customers from harms resulting from any such increased risk.

[8] Distribution of PGE's stock to creditors with allowed claims against Enron would not likely begin until the last half of 2005, and final distribution of PGE's stock would not be completed until all claims against Enron were resolved. *See* Enron/1, Bingham/4-5,8; Enron/2, Bingham/5.

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Not only did Oregon Electric adopt the ring-fencing conditions from prior merger approval proceedings, Oregon Electric also has agreed to strengthen and expand the ring-fencing conditions. *See* Oregon Electric/500, Davis/35 (Conditions 6, 16, 17, 18, 25, 27, 28, and 33). The evidence shows that the prior ring-fencing conditions adequately protected PGE and its customers from adverse effects of Enron's bankruptcy. Mr. Piro testified that PGE had adequate access to the capital markets and continued to invest in PGE's system throughout Enron's bankruptcy. *See* PGE/100, Piro/13-14. There is no reason to believe that the stronger ring-fencing conditions offered by Oregon Electric would not produce a similar or better result for PGE and customers in the unlikely event that Oregon Electric went into bankruptcy. *See* Oregon Electric/800, Bussel/4.

C. There is No Evidence that PGE's Cost of Capital Will Be Higher under Oregon Electric's Ownership than Under Enron's Ownership, or that any Such Increased Costs Will Be Borne by Customers

Some parties have expressed concern that PGE's costs of capital might increase due to its ownership by Oregon Electric. *See* Staff/100, Conway/24; Staff/200, Morgan/29, 50-51; Staff/900, Morgan/12, 14; ICNU/200, Antonuk-Vickroy/16-18; CUB/200, Dittmer/12-13. This concern is not supported by any evidence – it is only speculative. There has been no showing that PGE's cost of capital would be higher under Oregon Electric's ownership than it would be under the ownership of Enron and its successors.[9] As discussed in PGE's opening brief, Mr. Piro demonstrated that a theoretical increase in PGE's cost of capital is unlikely to result in actual increased costs for PGE, let alone an increase in PGE rates. *See* PGE/100, Piro/21-22.

[9] Staff argues that *Enron's* ownership of PGE has elevated PGE's debt costs but offers no evidence that PGE's debt costs will be higher under *Oregon Electric's* ownership. *See* Staff/900, Morgan/24.

Thus, it has not been established that any increase in PGE's cost of capital resulting from Oregon Electric's acquisition would harm customers. In addition, Oregon Electric has agreed to a condition explicitly stating that customers will be held harmless if PGE's cost of capital rises as a result of Oregon Electric's ownership (Condition 17).

D. There is No Evidence that Customers Will Be Harmed by TPG's Transfer of Its Equity Interest in PGE Some Time in the Future

Some parties argue that the fact that TPG will exit its investment in PGE within twelve years is a harm, because the identity of the next owner of PGE is unknown. *See, e.g.,* CUB/100, Jenks-Brown/16-20; CUB/300, Jenks-Brown/24-33. But unknowns are not by definition harms. The future is mostly unknown. To prove a harm for purposes of the ORS 757.511 standard, it is necessary to prove at least that the harm will be more likely to occur if Oregon Electric acquires PGE. The identity of the next owner of PGE, following Oregon Electric, is a matter of pure speculation, and there is no evidence that the next owner would benefit customers, harm customers, or be neutral with respect to customers. Even if unknowns were counted as harms, the unknown "endgame" is not a harm of this transaction because Oregon Electric's acquisition of PGE does not increase uncertainty about PGE's future ownership. If Oregon Electric does not acquire PGE, Enron will be the owner of PGE until the PGE shares are distributed to certain Enron creditors and the disputed claims reserve. We do not currently know the identities of the entities that will ultimately acquire PGE's stock from Enron. Oregon Electric's acquisition of PGE therefore will result in PGE staying with a presently-known owner for a longer period of time than would otherwise be the case.

Even if parties could prove a harm resulting from this transaction with respect to the "end game," the Commission has all the authority it needs with respect to any future disposition of PGE's stock or assets. First, ORS 757.511 requires Commission approval for any transaction by

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which a new entity acquires the power to exercise a substantial influence over PGE and becomes an affiliate by virtue of the acquisition. Second, ORS 757.480 requires Commission approval before the sale of utility assets can be completed. The Commission will be in a much better position to evaluate harms and consider curative conditions at the time of a future transaction, not now when all we know is that the future is unknown.

III. Rate Credits and Other Conditions

Because there is no evidence that Oregon Electric's acquisition of PGE will harm customers, there is no basis for imposing any conditions on approval of the acquisition other than those offered by Oregon Electric. Under ORS 757.511 and constitutional law, as further explained below, the Commission may only impose conditions that are reasonably designed to cure harms flowing from the transaction. It must be emphasized that "harm" in this context does not include any conceivable harm to customers that could occur during Oregon Electric's ownership of PGE. Rather, "harm" includes only harms that are not remote and that are demonstrably more likely to occur under Oregon Electric's ownership than under ownership by Enron and Enron's successors.

A. The Statute and the Constitution Only Allow Conditions to be Imposed that are Closely Related and Proportionate to Proven Harms Flowing from the Transaction

The Commission's authority to impose conditions under ORS 757.511 is tightly circumscribed. In fact, the initial draft of the statute did not permit the Commission to impose any conditions at all. Minutes of Senate Committee on Utility Rate Relief, April 23, 1985, at 11; Senate Committee on Utility Rate Relief, April 25, 1985, Exhibit B (Proposed Amendments to SB 433). Under the final enacted version, the Commission must approve an application that satisfies the statutory test: "If the commission determines that approval of the application will

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serve the public utility's customers in the public interest, the commission *shall* issue an order granting the application." ORS 757.511(3) (emphasis added). The term "shall" leaves the Commission without authority to impose additional conditions. The Commission's authority and discretion to impose conditions applies only to applications that would otherwise fail the statutory test: "The commission may condition an order authorizing the acquisition upon the applicant's satisfactory performance or adherence to specific requirements. The commission otherwise shall issue an order denying the application." *Id.* The Commission may impose conditions only if the transaction would harm customers, and, even then, it may only impose those conditions that are necessary to remedy such harm. The Commission lacks statutory authority to do anything more.

Any broader interpretation of ORS 757.511 would be unconstitutional. "The free alienation of property is an inherent right of the owner under our customs, law, and Constitution, subject only to restraint if against the public interest." *In Re Pacific Teleph. & Teleg. Co.*, UF 2286, Order No. 37883 (OPUC) (June 12, 1961); 39 PUR 3d 132, 139. Any restriction on Enron's right to transfer its ownership interest in PGE is subject to constitutional scrutiny under the Takings Clause of the U.S. Constitution, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Nollan v. California Coastal Commission*, 483 US 825, 827 (1987). When the government seeks to impose a condition on a property owner's exercise of fundamental property rights, the government must establish that (1) there is an "essential nexus" between a legitimate state interest and the condition imposed and (2) there is "rough proportionality" between the condition and the interest served. *Nollan,* 483 US at 837;

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Dolan v. City of Tigard, 512 US 374, 386, 391 (1994). If the government does not establish that these two criteria are satisfied, then the condition is an unconstitutional regulatory taking.[10]

The Commission's power to impose conditions on Enron's sale of PGE to Oregon Electric is also restricted by the Commerce Clause of the U.S. Constitution. The Commerce Clause "permits only incidental regulation of interstate commerce by the States; direct regulation is prohibited." *Edgar V. MITE Corp.*, 457 US 624, 640 (1982). Even if a regulation only has an incidental effect on interstate commerce, it violates the Commerce Clause if "the burden imposed on commerce is clearly excessive in relation to the putative local benefits." *Id.*; *see also Pike v. Bruce Church, Inc.*, 397 US 137, 142 (1970). In *Edgar*, the U.S. Supreme Court declared unconstitutional a law that gave the Illinois Secretary of State authority to approve or reject a tender offeror's bid to acquire an Illinois company. The Court held that the law was a direct regulation of interstate sales and it imposed a burden on interstate commerce that was excessive in light of the local interests served. *Edgar,* 457 US at 640.

The Oregon Legislature has delegated to the Commission a legitimate public interest: "to protect [utility] customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates." ORS 756.040. The specific purpose behind ORS 757.511 is to "prevent unnecessary and unwarranted harm to [Oregon public] utilities' customers."[11] In order to prevent actual harms to customers, the Commission may impose conditions to the extent necessary to alleviate such harms. Conditions

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[10] When the government restricts a property owner's rights through regulation, *without* imposing any conditions, then a different standard applies under the Takings Clause. *See, e.g., Ruckelshaus v. Monsanto Co.,* 467 US 986, 1003-05 (1984) (holding that takings clause applies to intangible personal property and identifying factors to consider in determining whether an unconstitutional taking has occurred: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations").
[11] ORS 757.506(2).

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that are reasonably related to proven harms to customers flowing from a transaction, and that are proportionate to such harms, will not violate the Constitution. But conditions on Enron's sale of its stock in PGE that are not so circumscribed would violate ORS 757.511 as well as the Takings Clause and the Commerce Clause of the U.S. Constitution.

B. Many of the Conditions Demanded by the Parties Are Not Related to or Proportionate to any Potential Harms

It is hard to generalize about the conditions or "benefits" demanded by many of the parties. It is fair to say, however, that many of them are so unrelated to this transaction or so speculative in nature or so disproportionate to any potential harm that the Commission could not lawfully impose them on Oregon Electric.

1. Many Proposed Conditions Do Not Address the Harms Alleged

None of the conditions proposed by various parties is necessary to alleviate a harm that will result from this transaction. Some parties do not even attempt to link their proposed conditions to alleged harms to customers. For example, several parties request conditions requiring Oregon Electric to make commitments with regard to SB 1149, but no one attempts to show that Oregon Electric's acquisition will harm customers in any way related to SB 1149. *See, e.g.*, Joint Public Interest Parties/100, Public Interest Witnesses/3-7. Interest groups for low-income customers demand that Oregon Electric commit to maintain and increase grants for assistance to low-income customers, but they do not even argue that Oregon Electric's acquisition will worsen low-income customers' bill payment problems. *See, e.g.*, CADO-OECA/100, Abrahamson/12-23. The Hydropower Reform Coalition and Renewable Northwest Project ask the Commission to impose conditions relating to hydropower and renewable energy, but they do not offer any evidence of how Oregon Electric's acquisition of PGE affects these matters. *See* HRC/100, Sherman & Swift/6-7; RNP/1, Gravatt/4-11. The City of Portland asks

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for a condition that Oregon Electric be required to negotiate a modern franchise agreement with the City, but nothing in the City's testimony explains how the status of the franchise is affected in any way by the transaction, or how the franchise relates in any way to customers' interests. *See* COP/100, Anderson/3-4. Eugene Water & Electric Board asks the Commission to require PGE to provide a bond or insurance to secure its payment obligations for Trojan decommissioning costs, but fails to prove how Oregon Electric's acquisition will harm PGE's customers in any way related to Trojan decommissioning.[12] ICNU proposes conditions related to direct access but does not explain why they are necessary in this proceeding. *See* ICNU/300, Schoenbeck/7; ICNU/301, Schoenbeck/6-7. In short, the parties ask the Commission to impose conditions that benefit them, without showing that their conditions directly alleviate proven harms and are necessary for Oregon Electric's application to meet the statutory test for approval. The proposed conditions must be rejected.

2. Other Proposed Conditions are Speculative and Lack Substantial Evidence

Some parties attempt to relate their proposed conditions to alleged harms to customers, but, as explained above in Part II, their allegations of harm are not supported by substantial evidence. Thus, CUB's proposal that the City of Portland be granted an option to purchase PGE (CUB/300, Jenks-Brown/33-34) must be rejected, because uncertainty regarding the future ownership of PGE exists regardless of whether this transaction takes place and, furthermore, is not a harm to customers. CUB also asks the Commission to impose a condition requiring

[12] EWEB asserts that PGE's cash accounts will be depleted by $240 million as a result of the transaction, impairing its ability to meet its obligations to co-owners of Trojan. *See* EWEB/100, Beeson/7-8. This assertion flatly contradicts the evidence. *See* Enron/2, Bingham/3. Even if there were evidence that PGE would have trouble paying its obligations during Oregon Electric's ownership (and there is no such evidence), ORS 757.511 does not give the Commission authority to impose conditions securing PGE's obligations to all parties with whom it has contracts.

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Oregon Electric and PGE to make any investments ordered by the Commission. CUB/300, Jenks-Brown/35. This condition must be rejected, first because there is no evidence that Oregon Electric will cut costs in a way that will hurt customers or will not adequately re-invest in PGE's system. Second, even if there were such evidence, there is *no* showing that the proposed condition, which would be an unprecedented invasion into PGE's management of its business, is proportionate to any harm alleged to flow from the transaction.

3. Still Other Proposed Conditions Are Not Necessary to Address any Harm Caused by this Transaction

Staff and ICNU both propose more restrictive ring fencing conditions, but they do not show that doing so is necessary to alleviate harms from this transaction. *See* Staff/801, Conway/9; ICNU/301, Schoenbeck/2-4. As explained earlier, there is no evidence that the financial structure of Oregon Electric will harm customers, either on the theory that Oregon Electric may one day become bankrupt or on the theory that PGE's costs of capital will rise. Even if such harms were proven, there is no showing that the more restrictive conditions proposed are necessary to alleviate those harms.

The Commission may not impose a condition on Enron's sale of PGE's stock simply because the condition will benefit customers or other interested parties. The Commission also may not impose a condition on the sale in order to protect customers from harms or risks that would exist regardless of whether the acquisition takes place. Under ORS 757.511 and constitutional law, the Commission may impose conditions on Enron's sale of PGE to Oregon Electric only if the conditions are necessary to alleviate harms to customers caused by Oregon Electric's acquisition of ownership.

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C. The Rate Credits Demanded by the Parties Have no Connection to this Transaction

Oregon Electric has offered a rate credit of $43 million. CUB and ICNU ask the Commission to impose a condition requiring Oregon Electric to pay a rate credit of $97 million, more than twice what Oregon Electric has offered, and Staff requests a condition imposing a rate credit of $75 million. *See* CUB/300, Jenks-Brown/36; ICNU/300, Schoenbeck/2; Staff/800, Conway/9. The Commission has no authority to impose a condition requiring Oregon Electric to pay a higher rate credit than it has offered unless the statutory and constitutional standards described above in Subpart III.A are satisfied. There would have to be substantial evidence in the record to support a conclusion that: (1) Oregon Electric's acquisition will harm customers, (2) the rate credit will alleviate the proven harm, and (3) the rate credit is proportionate to the proven harm; in other words, the rate credit must be no greater than necessary to allow Oregon Electric's application to meet the statutory test for approval. As explained above in Part III, the parties opposing approval of the transaction fail on the first step – they can prove no cognizable harms; therefore no conditions and no rate credit beyond what Oregon Electric has offered can be imposed. There is no evidence in the record on the second and third steps. No party has attempted to quantify the speculative harms alleged, much less matched such a quantification to the rate credits demanded. In fact, the rate credit demanded could actually be counterproductive and exacerbate the perceived risks. While parties claim to be concerned about PGE's financial well being and access to capital, the higher rate credits they demand would *diminish* PGE's available cash. The parties proposing increased rate credits do not even attempt to provide the Commission with an evidentiary basis for imposing increased rate credits as a condition of approval.

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The *only* rationale offered by the parties demanding rate credits is that in some prior merger approval proceedings, the applicants offered rate credits and the Commission entered orders approving the applications.

- "We think that this transaction creates more risk than the Sierra Pacific transaction." (CUB 300/Jenks-Brown 36).
- "ICNU's proposed rate credit is comparable to the credits adopted by the Commission in other ORS 757.511 proceedings." (ICNU 300/Schoenbeck at 2).
- "Q: Have rate credits been a prominent part of other recent acquisitions approved by the Commission?

  A: Yes. All three recent Commission orders contained rate credits." (Staff/800, Conway/10).

But in the three "precedents" cited (Enron/PGE, Sierra Pacific/PGE, and Scottish Power/PacifiCorp.), the Commission simply approved settlements with rate credits offered by the applicants. In these cases the Commission concluded that the settlements were *sufficient* to meet the standard. The Commission never concluded that rate credits of any kind were *necessary* for approval. In fact, in the three cases in which an application under ORS 757.511 has been submitted to the Commission without a settlement, the Commission has never imposed a customer credit condition. *In Re PGC*, UF 3972, Order No. 86-106, at 8 (January 31, 1986); *In Re Idaho Power*, UM 877, Order No. 98-056 (Feb. 17, 1998); and *In Re PacifiCorp*, UM 1021, Order No. 01-573 (July 10, 2001). What the parties demand in rate credits in this proceeding is without precedent. The Commission has never before imposed a customer rate credit as a condition in any proceeding under ORS 757.511.

Moreover, the Commission has explicitly rejected the use of past settlements as benchmarks for rate credits in a separate proceeding. In fact, Staff urged the Commission not to use other settlements as a measure for rate credits in the Scottish Power/PacifiCorp transaction.

ICNU had opposed the settlement and argued that the "proposed merger poses more risk than the PGE/Enron merger . . . and . . . the merger credit is less than that promised in the PGE/Enron merger." *In Re Scottish Power*, UM 918, Order No. 99-616 at 16 (Oct. 6, 1999). The Commission rejected the argument that other settlements are relevant to the amount of rate credits, adopting Staff's position in that docket: "as pointed out by Staff in its Staff Addendum to Post-Hearing Brief, applications brought under ORS 757.511 *must be decided on a case-by-case basis*." *Id.* (emphasis added). The Commission's admonition, adopting the case-by-case analysis of rate credits, precludes the type of argument offered here by CUB, ICNU, and Staff.

Even if the amount of rate credits in past settlements had any possible relevance in this proceeding, there is no evidence comparing the Oregon Electric acquisition and these other transactions. There is simply no evidence in this record regarding these other transactions. There is no evidence that the risks of this deal are greater, less, or the same as the risks of those other deals. They provide no useful points of comparison.

While there is no record evidence regarding these other transactions, we do know from the final Commission orders that the transactions were very different from Oregon Electric's proposed acquisition. The customer credit in the Enron acquisition of PGE was based in large part upon Enron's plans to use PGE know-how to enter California and other markets. No one has suggested anything remotely similar here. *In Re the Application of Enron,* UM 814, Order No. 97-196, Appendix A at 6 (June 4, 1997). The Sierra Pacific transaction and the Scottish Power acquisition both involved synergies and cost savings arising from the combination of two utilities. *Scottish Power*, UM 918, Order No. 99-616 at 13; *In Re The Application of Sierra Pacific*, UM 967, Order No. 00-702 at 3-4 (October 30, 2000). It is undisputed that this transaction does not involve similar cost savings or synergies. In short, there is no Commission

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precedent, no statutory authority, and no evidence to support the imposition of additional customer credits here.

IV. Conclusion

Multiple interest groups have come to the table in this proceeding, demanding that the Commission fulfill their wish-lists of "net benefits." They demand nearly $100 million in rate credits and a list of conditions that are much more restrictive than any the Commission ever has imposed before. Their justification for these rate credits and conditions? Speculation about possible future harms to customers, without any proof or quantification of risk attributable to Oregon Electric's proposed acquisition. The parties opposing Oregon Electric's application fail to show that the risks they identify will result from Oregon Electric's acquisition of PGE. They do not even try to demonstrate that the benefits they demand are proportionate to proven harms. Their testimony is a series of "what ifs" followed by a list of demands. They forget or ignore that the Commission must make a determination based on the statute and the evidentiary record.

The role of the Commission in this type of proceeding is not to give out favors and make everybody happy. Under ORS 757.511, the Commission must determine whether the acquisition will harm customers. The Commission must base its decision on substantial evidence. The Commission may not impose conditions unless there are proven harms to customers resulting from the acquisition, and any conditions imposed must be reasonably designed to remedy proven harms.

After Oregon Electric acquires PGE, the Commission will have the same authority it has now to regulate PGE's service and rates. It is not necessary now for the Commission to predetermine every issue that might arise during Oregon Electric's ownership of PGE, nor is it necessary for the Commission to protect against every conceivable risk that utilities face

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generally. All the Commission must decide now is whether Oregon Electric's acquisition will, in and of itself, harm customers.

The time for bargaining has ended, and Oregon Electric's application has been submitted to the Commission for decision on the evidentiary record. Oregon Electric's application offers substantial benefits to customers. No party has proven that any harms will result from the acquisition. Under ORS 757.511, the Commission must approve the application.

DATED this 17th day of November, 2004.

ENRON CORP.

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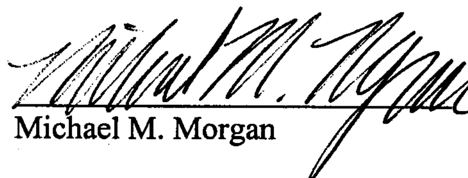
CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **OPENING 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: November 17, 2004.



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