

December 3, 2004

VIA HAND DELIVERY

Ms. Annette Taylor  
Legal Secretary  
Oregon Public Utility Commission  
550 Capitol Street NE, Suite 215  
PO Box 2148  
Salem, OR 97308-2148

Re: UM 1121 - Oregon Electric's Reply Brief

Dear Ms. Taylor:

Enclosed for filing in the above-referenced docket please find the original and five copies of Oregon Electric's Reply Brief.

Please contact me with any questions.

Sincerely,



Lisa F. Rackner

Enclosure

cc: UM 1121 Service List

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON  
UM 1121**

In the Matter of

OREGON ELECTRIC UTILITY COMPANY, LLC,  
et al.,

Application for Authorization to Acquire Portland  
General Electric Company

**OREGON ELECTRIC'S  
REPLY BRIEF**

**December 3, 2004**

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## I. INTRODUCTION

Oregon Electric has presented the Commission with a strong proposal for ownership of PGE—one which promises real benefits for PGE’s customers, while protecting them from all material risks. Oregon Electric, PGE, and Enron have provided compelling evidence in support of this proposal, including testimony from Oregon Electric’s investors, PGE’s Chief Financial Officer, local leaders who will be on the Oregon Electric and PGE Boards of Directors, a former member of the Illinois Public Service Commission, a former Arkansas Public Service Commissioner, and an expert in bankruptcy matters. This evidence clearly establishes that the Proposed Transaction provides a net benefit to PGE’s customers and will not impose a detriment on Oregon citizens as a whole.

In contrast, the arguments against the Proposed Transaction consist largely of unsubstantiated fears and anxieties about the proposed ownership structure, uninformed speculation regarding Oregon Electric’s motives and incentives, and an ill-founded assumption that every uncertainty posed by the transaction will result in a harm to PGE’s customers. Although Staff and intervenors have raised important questions about the proposal, each of these questions has been met with evidence or conditions that should dispel any reasonable concern.

After consideration of the evidence and the conditions of approval agreed to by Oregon Electric, the record clearly supports approval of the Proposed Transaction.

## II. LEGAL STANDARD

### A. The Commission’s Authority is Limited to the Application of ORS 757.511

The Commission’s authority in this matter is expressly limited to the determination of whether the Proposed Transaction meets the standard set forth in ORS 757.511. The statute requires that “if the Commission determines that approval of the application will serve the public utility’s customers in the public interest, the Commission *shall* issue an order granting the application.”<sup>1</sup>

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<sup>1</sup> ORS 757.511(3) (emphasis added).

1 CUB contends that, in the context of this case, the Commission “can do anything the  
2 legislature can do with regard to the regulation of public utilities” and has “broad latitude when  
3 determining general customer benefits.”<sup>2</sup> This interpretation is erroneous. Oregon courts have  
4 been clear that the Commission’s power “arises from and cannot go beyond that expressly  
5 conferred upon it.”<sup>3</sup> Thus, while the Commission may condition approval upon adherence to  
6 certain requirements, those requirements are limited by the Commission’s statutory charge.<sup>4</sup>  
7 Accordingly, any conditions imposed by the Commission must address a material risk presented  
8 by the Proposed Transaction and must be supported by substantial evidence.<sup>5</sup> Conditions that are  
9 not necessary to remedy a specific risk presented by the Proposed Transaction fail on both  
10 statutory and constitutional grounds.<sup>6</sup>

11 **B. Comparator**

12 The Parties differ on whether a net benefit must be assessed by reference to a  
13 “comparator” and, if so, what that comparator should be.<sup>7</sup> Oregon Electric believes that a  
14 comparator is not necessary and that the Proposed Transaction should be evaluated on its own  
15 merits.<sup>8</sup> However, to the extent the Commission determines that a comparator *is* necessary, the  
16 only “alternatives” about which there is evidence in the record are (a) the status quo, and (b) the  
17 distribution of PGE shares to Enron creditors (the “Distribution”).<sup>9</sup>

18 Whatever the comparator, if any, the analysis must consider both the benefits and the  
19 risks of the alternatives. For instance, if the Commission decides to compare the Proposed  
20 Transaction with the status quo, as recommended by ICNU,<sup>10</sup> that analysis must account for the

21 \_\_\_\_\_  
22 <sup>2</sup> CUB Opening Brief at 7-8.

23 <sup>3</sup> See *Pacific Northwest Bell Telephone Co. v. Sabin*, 21 Or.App. 200, 213 (1975).

24 <sup>4</sup> See *Pacific Northwest Bell Telephone Co. v. Eachus*, 135 Or.App. 41, 56 (1995).

25 <sup>5</sup> See PacificCorp’s Opening Brief at 2; Enron Reply Brief at \*.

26 <sup>6</sup> Enron Opening Brief at 17-20.

<sup>7</sup> Staff offers no specific comparator, but argues that “losses” to customers based on the change in ownership should be considered. Staff Opening Brief at 18, 21. CUB suggests that all of the alternatives for PGE result in uncertainty and must be analyzed accordingly. CUB Opening Brief at 9-10. ICNU argues the Proposed Transaction cannot be viewed in a vacuum and should be compared to the status quo. ICNU Opening Brief at 13.

<sup>8</sup> Oregon Electric/22, Davis/21.

<sup>9</sup> See Enron/2, Bingham/5; Enron Reply Brief at \*.

<sup>10</sup> ICNU Opening Brief at 13.

1 fact that PGE is currently an asset in Enron's bankruptcy and is therefore facing an uncertain  
2 future. Similarly, a comparison to the Distribution must consider that the end result of the  
3 Distribution is completely uncertain and by no means ensures that PGE will result in a widely-  
4 held, publicly-traded company, as some have suggested.<sup>11</sup> In addition, any analysis must include  
5 the fact that when Enron no longer owns PGE, its obligations under the current conditions will  
6 no longer be binding. Finally, any comparison with alternative outcomes for PGE must take into  
7 account that the substantial and concrete benefits offered by Oregon Electric are only guaranteed  
8 if the Proposed Transaction is approved.

9 **C. Proper Evidentiary Standard**

10 Oregon Electric carries the burden of showing the Proposed Transaction meets the  
11 standard set by ORS 757.511.<sup>12</sup> Initially, Oregon Electric carries both the burden of persuasion  
12 (the burden of establishing a given proposition) and the burden of production (the burden of  
13 providing evidence).<sup>13</sup> Once Oregon Electric has produced its evidence, the burden of  
14 production shifts to Staff and intervenors to present evidence in opposition.<sup>14</sup> If those parties fail  
15 to produce such evidence, or if their evidence is not compelling or sufficient to overcome the  
16 evidence provided by Oregon Electric, then Oregon Electric must prevail.<sup>15</sup>

17 The Commission must weigh only the evidence. Argument and speculation by parties or  
18 their witnesses do not constitute evidence.<sup>16</sup> Similarly, expert witnesses must present some basis  
19 for their conclusions for the Commission to accord any weight to their opinions.<sup>17</sup> Upon careful  
20

21 <sup>11</sup> Enron Reply Brief at \*; Enron/1, Bingham/6-7 (creditors may agree to sell shares to third party).

22 <sup>12</sup> ORS 757.511(3).

23 <sup>13</sup> See *In the Matter of Portland General Electric Company's Proposal to Restructure and Reprice its Services in Accordance with the Provisions of SB 1149*, OPUC Docket No. UE 115, Order No. 01-777 at 4 (describing "burden of proof" in ratemaking proceeding).

24 <sup>14</sup> *Id.* at 6.

25 <sup>15</sup> *Id.*

26 <sup>16</sup> See *Status Report*, OPUC Docket No. UM 1121 (Sept. 30, 2004), with correction as noted (Oct. 4, 2004). Speculation, or "the art or practice of theorizing about matters over which there is no certain knowledge," *Black's Law Dictionary* 1435 (8th ed. 2004), is by its nature inadmissible. See, e.g., *State v. Jacobs*, 109 Or. App. 444, 446 (1991) (rejecting expert testimony that amounted to "no more than speculation").

<sup>17</sup> See *Re US West Communications, Inc.*, UT 138/UT 139, Order No. 98-444 (Nov. 13, 1998) (finding studies based on the "judgment" of experts "unacceptable" due to lack of sufficient documentation).

1 review of the record, it is clear that Oregon Electric has carried its burden and produced  
2 substantial evidence that the Proposed Transaction provides a net benefit to PGE's customers  
3 and should be approved.

4 **III. THE ALLEGED RISKS OF THE PROPOSED TRANSACTION ARE**  
5 **IMMATERIAL OR ADEQUATELY MITIGATED BY PROPOSED CONDITIONS**

6 **A. The Alleged Risks of the Proposed Capital Structure are Not Material or are**  
7 **Adequately Mitigated by Conditions of Approval**

8 A consistent theme throughout Staff's and intervenors' opening briefs is the argument  
9 that Oregon Electric's proposed capital structure will impose risks that cannot be adequately  
10 mitigated.<sup>18</sup> As demonstrated in Oregon Electric's Opening Brief, any risks posed by the  
11 proposed capital structure are either immaterial or adequately mitigated by the proposed  
12 conditions of approval.<sup>19</sup>

13 **1. Oregon Electric's Debt Service Requirements Will Not Result in Undue**  
14 **Pressure to Fund Dividends or Increased Pressure to Imprudently Cut**  
15 **Costs**

16 Oregon Electric provided substantial evidence that its proposed capital structure will  
17 allow it to meet its operating expenses and debt service obligations without creating undue  
18 pressure on PGE to fund dividends.<sup>20</sup> *No party has rebutted this evidence.* Staff and intervenors  
19 simply repeat contrary assertions without contradicting the evidence provided by Oregon  
20 Electric.<sup>21</sup>

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21 <sup>18</sup> See, e.g., Staff's Opening Brief at 19-23; CUB Opening Brief at 33-40. Staff and intervenors have also identified  
22 as a "risk" of the Proposed Transaction the lack of final financing terms. Staff Opening Brief at 20; Staff/200,  
23 Morgan/46-51; Staff/900, Morgan/27; ICNU Opening Brief at 23-24; City of Portland Opening Brief at 20-21. As is  
24 the case in so many other areas, intervenors and Staff have failed to identify how this "risk" – which is admittedly  
25 based purely on uncertainty – could adversely affect customers. The fundamental terms of the financing  
26 arrangements have been outlined in the Highly Confidential Letter. See Exhibit 19 to the Application. Oregon Electric  
has testified to the likelihood that the financing package will be based on those terms. Oregon Electric/3, Davis/16-  
17. Oregon Electric/200, Wheeler/18. In contrast, no other party has offered any evidence that the final terms and  
conditions are likely to change, or that any changed terms will adversely affect customers.

<sup>19</sup> Oregon Electric Opening Brief at 21-39.

<sup>20</sup> See Oregon Electric Opening Brief at 21-25.

<sup>21</sup> See, e.g., Staff's Opening Brief at 20; AOI Opening Brief at 17-18.

1 Staff asserts that the amount of debt at Oregon Electric may place pressure on PGE to  
2 perform at a “high level of efficiency.”<sup>22</sup> It is unclear how an incentive to perform at a high level  
3 of efficiency is a risk or how it could adversely affect customers. Given the fact that rates are  
4 cost-based, operating efficiently and achieving responsible cost savings will benefit customers  
5 over time through lower rates.<sup>23</sup> On the other hand, if it is *imprudent* cost cutting that Staff fears,  
6 Staff provides no evidence showing that such cost cutting is likely. Staff cites to Staff witness  
7 Morgan’s testimony, but that testimony simply repeats Staff’s assertion without any evidentiary  
8 or analytical support.<sup>24</sup>

9 Staff expresses concern that PGE might be forced to draw on its revolver to fund  
10 dividends to Oregon Electric.<sup>25</sup> As PGE discusses in its Reply Brief, however, PGE’s use of its  
11 revolvers presents no risks to customers. Rather, it provides PGE with the most efficient means  
12 to fund its working capital needs.<sup>26</sup> Regardless of whether the Proposed Transaction closes, PGE  
13 intends to pay the catch-up dividend, reduce its cash on hand to more efficient levels, and use  
14 revolvers as it has historically done to finance its working capital needs, including the funding of  
15 dividends.<sup>27</sup> Staff has provided no convincing evidence that PGE’s use of revolvers in this  
16 manner presents a risk to customers.

17 Oregon Electric has also explained that PGE will be required to fund dividends to its  
18 shareholders even in the absence of the Proposed Transaction.<sup>28</sup> The parties have failed to show  
19 that the alleged pressure to fund dividends to Oregon Electric is qualitatively or quantitatively  
20 different than the pressure on PGE to fund dividends to Enron’s creditors or to any other  
21 shareholder.<sup>29</sup>

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22 <sup>22</sup> Staff Opening Brief at 20.

23 <sup>23</sup> See Staff/1000, Durrenberger/4.

24 <sup>24</sup> See Staff Opening Brief at 20 (citing Staff/900, Morgan/9-10).

25 <sup>25</sup> Staff Opening Brief at 20.

26 <sup>26</sup> PGE Reply Brief at \*; See also Hearing Tr. at 24.

27 <sup>27</sup> See Hearing Tr. at 18-24.

28 <sup>28</sup> See Oregon Electric Opening Brief at 22; PGE/400, Piro/14-15.

29 <sup>29</sup> In addition, the Oregon Electric revolver provides an additional source of liquidity to allow Oregon Electric to service its debt obligations even in the highly unlikely even that it becomes imprudent for PGE to fund dividends to Oregon Electric. Oregon Electric Opening Brief at 25; Oregon Electric/200, Wheeler/6.



1                   **2.     *PGE’s Customers Will Not Bear the Risk of An Increase, if any, in***  
2                   ***PGE’s Cost of Capital Resulting From Oregon Electric’s Ownership***

3                   Oregon Electric has acknowledged that PGE’s unsecured debt rating might be  
4                   downgraded as a result of the Proposed Transaction.<sup>30</sup> The issue then becomes whether a  
5                   downgrade would harm PGE’s customers. Oregon Electric has provided significant evidence  
6                   demonstrating that it would not.

7                   Staff states that customers could face over \$1 million in additional interest costs for Port  
8                   Westward due to an increase in PGE’s cost of debt resulting from the downgrade.<sup>31</sup> However,  
9                   this argument seems to be based upon the mistaken belief that PGE will finance Port Westward  
10                  with \$150 million in new *unsecured* debt.<sup>32</sup> On the contrary, PGE plans to finance Port  
11                  Westward with secured debt.<sup>33</sup> Because PGE’s secured debt ratings are not anticipated to  
12                  change, the Proposed Transaction will not increase the cost of financing Port Westward.<sup>34</sup>

13                  Second and more importantly, PGE’s customers are protected from any adverse financial  
14                  impact by Oregon Electric’s proposed hold harmless conditions, which protect customers from  
15                  bearing any costs associated with downgrades in PGE’s credit rating and related increases in  
16                  costs of capital that result from Oregon Electric’s ownership. These conditions entirely mitigate  
17                  the risks alleged by Staff and intervenors on this subject.<sup>35</sup>

18                   **3.     *There is No Material Risk of Bankruptcy at Oregon Electric***

19                  ICNU claims that the “potentially catastrophic” effects of bankruptcy at Oregon Electric  
20                  require additional conditions of approval.<sup>36</sup> This claim is curious given that ICNU urges the  
21                  Commission to view PGE as a “fundamentally sound” and “financially healthy” utility with “a

22                  <sup>30</sup> Oregon Electric Opening Brief at 25. PGE’s other credit ratings are anticipated to remain the same. *See* Oregon  
23                  Electric/200, Wheeler/15; Confidential Oregon Electric/203, Wheeler/11; PGE/100, Piro/19-20.

24                  <sup>31</sup> Staff Opening Brief at 20.

25                  <sup>32</sup> *Id.*

26                  <sup>33</sup> Hearing Tr. at 26.

<sup>34</sup> PGE/400, Piro/10-12. *See also* PGE Opening Brief at 26; PGE Reply Brief at \*. Even if Mr. Morgan were  
correct that the cost of financing Port Westward would be affected by a credit rating downgrade, the evidence  
demonstrates that the potential financial impact, if any, of such a downgrade would be minimal. Oregon Electric  
Opening Brief at 25-27; Hearing Tr. at 27-32. *See* PGE Reply Brief at \*.

<sup>35</sup> In fact, Staff has indicated that these conditions would mitigate the risks associated with an increase in PGE’s cost  
of capital. *See* Staff/900, Morgan/25.

<sup>36</sup> ICNU Opening Brief at 39-40.

1 strong financial profile,” *despite the fact that it is an asset in the Enron bankruptcy.*<sup>37</sup> In any  
2 event, ICNU provides no support for its assertion regarding bankruptcy. In contrast, Oregon  
3 Electric has presented substantial evidence that the risk of bankruptcy at Oregon Electric is  
4 remote and that there is virtually no risk that PGE would be consolidated into any such  
5 bankruptcy.<sup>38</sup> ICNU has not rebutted this evidence, but rather asserts that the risk must be  
6 addressed even if remote.<sup>39</sup> As discussed above, there is no basis in law for the imposition of  
7 conditions to address remote and speculative risks.<sup>40</sup>

8 In addition, ICNU has provided no evidence that Oregon Electric’s proposed ring-fencing  
9 conditions would prove insufficient to protect PGE in the event of a bankruptcy at Oregon  
10 Electric. These conditions are even more stringent than the ring-fencing conditions to which  
11 Enron agreed. Although Staff and intervenors assert that the Enron conditions did not  
12 adequately protect PGE during Enron’s bankruptcy, the only evidence cited to support their  
13 claims is Staff witness Morgan’s testimony.<sup>41</sup> However, Mr. Morgan’s testimony was rebutted  
14 by PGE’s Chief Financial Officer, Jim Piro, who stated that the existing minimum equity  
15 condition was “more than adequate to protect PGE’s finances during the Enron bankruptcy.”<sup>42</sup>  
16 Mr. Piro was responsible for PGE’s finances at the time of Enron’s bankruptcy and is uniquely  
17 qualified to testify regarding the financial impact of the bankruptcy on PGE and the effectiveness  
18 of the ring-fencing conditions in insulating PGE from any ill effects. Finally, the parties’  
19 arguments on this point are undercut by their own admissions that PGE is financially secure  
20 despite Enron’s bankruptcy.<sup>43</sup>

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22  
23  
24 <sup>37</sup> ICNU Opening Brief at 11.

25 <sup>38</sup> See Oregon Electric/800, Bussel/4; Oregon Electric Opening Brief at 27-28.

26 <sup>39</sup> See, e.g., ICNU Opening Brief at 39-40.

<sup>40</sup> See Section II, *supra*.

<sup>41</sup> See, e.g., CUB Opening Brief at 28; ICNU Opening Brief at 40.

<sup>42</sup> PGE/400, Piro/6. See also PGE/100, Piro/13-14.

<sup>43</sup> ICNU Opening Brief at 11-12; AOI Opening Brief at 20.

1                   4.       ***Oregon Electric’s Proposed Conditions of Approval Adequately Mitigate***  
2                   ***Any Alleged Risks of the Proposed Capital Structure***

3                   As discussed in detail in its Opening Brief, Oregon Electric proposes ring-fencing and  
4 other financial conditions that adequately mitigate any alleged risks of the proposed capital  
5 structure.<sup>44</sup> Staff and Oregon Electric agree on the language for all but three of these proposed  
6 conditions—the minimum equity condition, the cash flow sweep condition, and the restriction on  
7 re-leveraging.<sup>45</sup>

8                   (a)       ***Minimum Equity Condition***

9                   Staff claims that Oregon Electric’s proposed minimum equity condition is weaker than  
10 the corresponding Enron condition of approval. On the contrary, the minimum equity condition  
11 proposed by Oregon Electric is significantly stronger than the Enron condition as described in  
12 Oregon Electric’s Opening Brief.<sup>46</sup> Staff’s interpretation of the Enron condition as “prohibiting  
13 PGE’s equity ratio from falling below 48% *for any reason*”<sup>47</sup> is patently inconsistent with the  
14 plain language of the condition, which states that “PGE *shall not make any distribution* to Enron  
15 that would cause PGE’s equity capital to fall below 48%. . . .”<sup>48</sup> The language from the order  
16 approving the Enron merger cited by Staff simply does not support an interpretation of the  
17 condition that is so blatantly contrary to its unambiguous terms.

18  
19 <sup>44</sup> See Oregon Electric Opening Brief at 28-39 for a discussion of these conditions. The ring-fencing and financial  
20 conditions are limited to Conditions 6 (maintenance of separate debt ratings), 16 (minimum equity condition), 17  
21 and 18 (hold harmless conditions), 25 (cash flow sweep), 27 (restriction on re-leveraging), and 28 (allocation of  
22 costs/direct billing).

23 <sup>45</sup> See Oregon Electric Opening Brief at 28-39 and Staff Opening Brief at 11-16, 26-28, 29-30. Oregon Electric will  
24 agree to Staff’s proposed revised language for Condition 28 (*see* Staff Opening Brief at 29-30). Staff’s revised  
25 language for Conditions 17 and 18 is identical to Oregon Electric’s proposed conditions (*see id.* at 16). Staff also  
26 proposes an additional condition that provides that “No company, entity or person, other than PGE, shall use PGE’s  
regulated assets as collateral for any loan, guarantee or other such use without prior expressed Commission  
approval.” Staff Opening Brief at 28. Oregon Electric asserts that this condition is unnecessary because  
Commission approval for such actions would already be required under ORS Section 757.480. Staff states that the  
condition is different from Section 757.480 because it includes “guarantee or other such use” in addition to “loan”,  
but does not explain how this language is qualitatively different than the language of the statute, which states that a  
utility’s property may not be mortgages or “otherwise encumber[ed].” Staff Opening Brief at 28.

<sup>46</sup> Oregon Electric Opening Brief at 28-29.

<sup>47</sup> Staff Opening Brief at 12 (emphasis in original).

<sup>48</sup> Enron Condition No. 6, Order 97-196, Appendix A at 2.

1 In addition, Staff asserts that its proposed “or reasonably could be expected to” language  
2 is preferable to Oregon Electric’s proposed “in accordance with GAAP” language because  
3 Staff’s proposal gives the Commission the “authority and discretion to review all factors that  
4 result in the 48% equity floor being breached.”<sup>49</sup> However, Oregon Electric’s proposal also  
5 gives the Commission such authority and discretion. The difference between the two proposals  
6 is not whether the Commission will be able to look at all of the relevant facts and circumstances  
7 in determining whether a distribution violated the condition. The difference is the standard that  
8 the Commission will apply in making the determination. Staff’s proposed condition creates a  
9 standard that is entirely subjective and does not give PGE sufficient guidance to conduct its  
10 important financial affairs with any certainty.<sup>50</sup> On the other hand, the GAAP standard will  
11 provide PGE, Oregon Electric, and this Commission with a body of recognized and accepted  
12 rules and precedent to apply in order to determine whether a distribution will violate the  
13 minimum equity condition.<sup>51</sup> Given the fact that PGE and Oregon Electric can be subjected to  
14 penalties for violating a condition of approval, it is essential that PGE and Oregon Electric, not  
15 just Staff and the Commission, understand the terms of the conditions.

16 Finally, Staff asserts that the definition of long-term debt within the minimum equity  
17 condition should include amounts drawn on unsecured revolvers (over \$150 million) and all  
18 amounts drawn on secured revolvers. Oregon Electric addressed Staff’s arguments in detail in  
19 its Opening Brief.<sup>52</sup> Staff’s only explanation for requiring a threshold of \$150 million (rather  
20 than Oregon Electric’s proposed \$250 million) is that it is extremely unlikely that PGE would  
21 ever exceed the \$250 million rolling average threshold.<sup>53</sup> Although Staff asserts that this is  
22 problematic, it does not explain why.<sup>54</sup> PGE historically has maintained an unsecured revolver  
23 in the \$250 million range, including during the time that the Enron ring-fencing condition has

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24 <sup>49</sup> Staff Opening Brief at 14.

25 <sup>50</sup> Oregon Electric Opening Brief at 30.

26 <sup>51</sup> Oregon Electric Opening Brief at 30; Oregon Electric/600, Wheeler/11; PGE/400, Piro/7-8.

<sup>52</sup> Oregon Electric Opening Brief at 30-33. *See also* Oregon Electric/600, Wheeler/10-11.

<sup>53</sup> Staff Opening Brief at 15.

<sup>54</sup> *Id.*

1 been in place.<sup>55</sup> PGE plans to increase its revolver to \$250 million whether or not the Proposed  
2 Transaction closes.<sup>56</sup> Staff has cited no evidence demonstrating that this revolver amount  
3 negatively impacted PGE’s financial health or PGE’s customers.<sup>57</sup>

4 (b) *Cash Flow Sweep Condition*

5 Staff raises only one issue regarding the proposed cash flow sweep condition that was not  
6 addressed in Oregon Electric’s Opening Brief.<sup>58</sup> According to Staff, Oregon Electric argues that  
7 its proposal to exclude secured revolvers from the definition of long-term debt is preferable for  
8 one reason—to “take advantage of least-cost financing opportunities and use its revolvers to pay  
9 for necessary services.”<sup>59</sup> Staff states that this reasoning is insufficient. Staff argues that the  
10 Commission’s concern is for customers’ welfare, not PGE’s and Oregon Electric’s financial  
11 flexibility.<sup>60</sup> That may be. However, before it can legitimately impose this condition restricting  
12 PGE’s and Oregon Electric’s financial flexibility, the Commission must have evidence that the  
13 failure to include secured revolvers in the cash flow sweep provision negatively impacts  
14 customers’ welfare. Staff failed to provide such evidence.

15 (c) *Restriction on Re-leveraging*

16 The primary difference between Staff’s proposed condition and Oregon Electric’s is the  
17 equity threshold for re-leveraging debt (Staff proposes 40%, Oregon Electric proposes 30%).<sup>61</sup>

18 \_\_\_\_\_  
19 <sup>55</sup> PGE/400, Piro/4. *See also* Oregon Electric/600, Wheeler/10.

20 <sup>56</sup> *Id.*

21 <sup>57</sup> Staff Opening Brief at 15. In addition, Staff’s proposal unduly restricts PGE’s flexibility. Oregon Electric  
22 Opening Brief at 32; Oregon Electric/600, Wheeler/10.

23 <sup>58</sup> *See* Oregon Electric Opening Brief at 35-37 for a detailed rebuttal of Staff’s other arguments regarding the cash  
24 flow sweep condition. *See also* Oregon Electric/600, Wheeler/12-16.

25 <sup>59</sup> Staff incorrectly asserts that there is only one substantive difference between Staff’s proposed condition and  
26 Oregon Electric’s. Staff’s Opening Brief at 27. Oregon Electric actually raises four substantive concerns about  
27 Staff’s proposed condition. Oregon Electric Opening Brief at 36-37. Staff has addressed two of these concerns by  
28 deleting the definition of “direct operating expenses” and by adding the language “after closing.” Staff Opening  
29 Brief at 26-27. However, Staff did not address the fact that Staff’s proposal requires Oregon Electric to use  
30 dividends exclusively to pay operating expenses and debt service requirements *for five years* or until the other  
31 conditions are met. Oregon Electric’s proposal does not include the five-year requirement. *See* Oregon Electric  
32 Opening Brief at 37 for a discussion of this point.

33 <sup>60</sup> Staff Opening Brief at 28.

34 <sup>61</sup> Oregon Electric Opening Brief at 37-38; Staff Opening Brief at 29. There is also disagreement regarding Staff’s  
35 “reasonably could be expected to” language, which is discussed in the context of the minimum equity condition.  
36 *See* Section III (A)(4)(a), *supra*, and Oregon Electric Opening Brief at 30.

1 Staff criticizes Oregon Electric for providing only unsupported claims and vague justifications  
2 for its proposal.<sup>62</sup> However, it is not Oregon Electric’s burden to prove that its proposal is  
3 preferable—it is Staff’s burden to prove that its proposed condition is necessary to mitigate a risk  
4 presented by the Proposed Transaction. A restriction on re-leveraging was not one of the  
5 original Enron ring-fencing conditions and Oregon Electric does not believe that such a  
6 condition is necessary to protect PGE’s customers.<sup>63</sup> Indeed, because the ring-fencing and other  
7 financial conditions are adequate to address any risks associated with the amount of debt at the  
8 time of closing, there is no justification for this further limitation on Oregon Electric’s financial  
9 flexibility. Staff has failed to provide *any* evidence that this condition is necessary to protect  
10 PGE’s customers.

11 **B. Intervenor** **Intervenors Have Failed to Provide Any Evidence to Support the Assertion**  
12 **that the Incentives of a “Short-Term” Owner Present a Risk to PGE’s**  
13 **Customers**

14 CUB and several other intervenors assert that the “short” timeframe of Oregon Electric’s  
15 investment in PGE creates incentives that are incompatible with the interests of customers,  
16 including the incentive to imprudently cut costs and to fail to make long-term capital  
17 investments.<sup>64</sup> CUB goes so far as to state that the “set of incentives implicated by this short-  
18 term ownership are an absolute harm.”<sup>65</sup> At the outset, Oregon Electric disagrees with the  
19 intervenors’ assertion that TPG is a “short-term investor.” The evidence shows that TPG may  
20

21 \_\_\_\_\_  
22 <sup>62</sup> Staff Opening Brief at 29.

23 <sup>63</sup> Oregon Electric/600, Wheeler/16-18. The ring-fencing and other financial conditions that Oregon Electric  
24 proposed are designed to protect PGE and its customers at a considerably lower consolidated equity ratio than 40%  
25 (the initial consolidated equity ratio after closing will be approximately 22%) and are more than adequate to protect  
26 PGE and its customers at a consolidated equity ratio of 30%. *See* Oregon Electric Opening Brief at 38.

<sup>64</sup> CUB Opening Brief at 19-27; ICNU Opening Brief at 28-31; City of Portland Opening Brief at 10-12; AOI  
Opening Brief at 14-16. These intervenors do not present any new arguments regarding the risks of “short-term”  
ownership. Oregon Electric has previously rebutted these arguments in its Opening Brief, as well as its previous  
testimony in this docket, and will not repeat those arguments here. *See* Oregon Electric’s Opening Brief at 39-48;  
Oregon Electric/100, Davis/6-23; Oregon Electric/500, Davis/5-19; Oregon Electric/700, McDermott/13-18; Oregon  
Electric/400, McDermott/16-20; Oregon Electric/300, Jackson/3-6; PGE/100, Piro/6-9.

<sup>65</sup> CUB Opening Brief at 20.

1 hold its interest in Oregon Electric for up to 12 years and expects to hold PGE longer than most  
2 of the companies in which it invests.<sup>66</sup>

3 Moreover, the fundamental problem with the intervenors' arguments regarding the  
4 incentives of alleged "short-term" owners is that there is no evidence in the record to support  
5 them. Instead, the record contains substantial evidence that contradicts the intervenors'  
6 arguments.<sup>67</sup> The intervenors rely primarily on the testimony of CUB witnesses Jenks and  
7 Brown to support their theories.<sup>68</sup> However, Jenks and Brown have no experience with the  
8 incentives of "short-term" owners or private equity investors. Ms. Brown has a background in  
9 engineering and appears to have little or no experience with regulated utilities, economics, or  
10 business.<sup>69</sup> Mr. Jenks has experience with regulated utilities, but no experience that would  
11 qualify him as an expert regarding the incentives of "short-term" owners or private equity  
12 investors.<sup>70</sup> In fact, Mr. Jenks makes it clear that Oregon Electric is unlike any owner that he  
13 has seen.<sup>71</sup> Oregon Electric's incentives are clearly outside the scope of Jenks' and Browns'  
14 expertise.

15 The only witnesses uniquely qualified to testify regarding the incentives of private equity  
16 investors are Kelvin Davis and Carrie Wheeler. Mr. Davis testified at length that Oregon  
17 Electric is committed to providing PGE the tools it needs to be a successful company and will  
18 support prudent short- and long-term investments.<sup>72</sup>

19 CUB and the other intervenors also rely on the testimony of James Dittmer and Don  
20 Schoenbeck, CUB and ICNU's expert witnesses, to support their theories regarding the  
21 incentives of a "short-term" owner.<sup>73</sup> Although Mr. Dittmer states that the allegedly "short  
22

23 <sup>66</sup> Oregon Electric/3, Davis/12; Oregon Electric/108, Davis/18, 31-34.

24 <sup>67</sup> See note 70, *supra*.

25 <sup>68</sup> CUB Opening Brief at 19-27; ICNU Opening Brief at 28-31; City of Portland Opening Brief at 10-12; AOI  
26 Opening Brief at 14-16.

<sup>69</sup> CUB/102, Jenks-Brown/1.

<sup>70</sup> CUB/101, Jenks-Brown/1.

<sup>71</sup> CUB Opening Brief at 10; CUB/300, Jenks-Brown/2, 26.

<sup>72</sup> Oregon Electric/100, Davis/6-23; Oregon Electric/500, Davis/5-19.

<sup>73</sup> CUB Opening Brief at 20; ICNU Opening Brief at 28; AOI Opening Brief at 13-14.

1 timeframe” of the investment “arguably” gives Oregon Electric a “greater incentive to cut costs  
2 in the short run,” Mr. Dittmer never reaches CUB’s ultimate conclusion—that the incentives of a  
3 “short-term” owner are to imprudently cut costs and under-invest to the detriment of the  
4 company and its customers.<sup>74</sup> Mr. Schoenbeck’s testimony discusses the impact of savings in  
5 Operations and Maintenance (O&M) on Oregon Electric’s investment return, but does not give  
6 an opinion regarding the impact of any savings on PGE’s customers (saying only that ratepayers  
7 should reap the benefit of any savings achieved).<sup>75</sup> In fact, CUB admits that “Mr. Schoenbeck  
8 did not specifically comment on the incentives of a short-term owner.”<sup>76</sup>

9 Tellingly, despite CUB’s assertions that TPG’s “management style” is to imprudently cut  
10 costs and under-invest, no party has submitted *any* evidence that TPG has *ever* engaged in cost  
11 cutting that was either imprudent or had a negative impact on companies or their customers.<sup>77</sup>  
12 Nor has CUB provided *any* evidence demonstrating that TPG has failed to make adequate capital  
13 investments at any of the companies in which it has invested.<sup>78</sup> In contrast, Oregon Electric has  
14 submitted extensive testimony regarding TPG’s long history of responsible corporate  
15 stewardship and its commitment to ensuring that any cost efficiencies do not come at the expense  
16 of service or product quality.<sup>79</sup>

17 CUB cites to Jenks and Brown’s testimony regarding TPG’s “management style” at  
18 several other companies in which it has invested to support its position that TPG imprudently  
19 cuts costs.<sup>80</sup> As thoroughly discussed in the sur-surrebuttal testimony of Kelvin Davis, CUB’s  
20 testimony regarding these companies is misleading.<sup>81</sup> CUB characterizes the testimony  
21 regarding these companies as “an awkward dialogue” because “neither side seemed very well  
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23 <sup>74</sup> CUB/200, Dittmer/29.

24 <sup>75</sup> ICNU/100, Schoenbeck/12-21.

25 <sup>76</sup> CUB Opening Brief at 21.

26 <sup>77</sup> CUB Opening Brief at 19-27; ICNU Opening Brief at 28-31; City of Portland Opening Brief at 10-12; AOI  
Opening Brief at 14-16.

<sup>78</sup> CUB Opening Brief at 19-27.

<sup>79</sup> Oregon Electric/100, Davis/10-14, 18-23; Oregon Electric/500, Davis/8-19.

<sup>80</sup> CUB Opening Brief at 22-24.

<sup>81</sup> Oregon Electric/500, Davis/10-17.



1 informed about TPG's investment history."<sup>82</sup> The basis for this statement is unclear. What is  
2 clear is that Jenks and Brown made assertions about employee reductions at these companies  
3 without researching the accuracy of their claims. This is true despite the fact that all of the data  
4 used to respond to CUB's testimony was found in the same documents that were provided to  
5 CUB in response to a data request.<sup>83</sup> The only "awkward" aspect of the dialogue between CUB  
6 and TPG was CUB's utter disregard for the facts.<sup>84</sup> TPG is fully informed about its investment  
7 history and provided a detailed rebuttal to CUB's assertions.<sup>85</sup>

8 **C. The Corporate Structure of Oregon Electric Does Not Present a Risk to**  
9 **PGE's Customers**

10 In determining whether to approve a merger or acquisition of a public utility, the  
11 Commission has found that, as a matter of policy, "[t]he form of business enterprise [acquiring  
12 the utility] should be of *no consequence*" as long as customers are not harmed.<sup>86</sup> No evidence  
13 has been submitted in this case to suggest that Oregon Electric's corporate structure will harm  
14 PGE's customers in any way.<sup>87</sup>

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15  
16 <sup>82</sup> CUB Opening Brief at 22-23.

17 <sup>83</sup> The information was provided to CUB in response to a data request on September 14, 2004. See Oregon  
18 Electric/500, Davis/17, n. 28.

19 <sup>84</sup> For example, Jenks and Brown asserted that they did not have publicly available information with which to  
20 analyze any employee reductions at PETCO. CUB/300, Jenks-Brown/4. This is simply not true. TPG invested in  
21 PETCO in 2001. Oregon Electric provided Jenks and Brown with 10-Ks for PETCO for 2000, 2002, 2003, and  
22 2004. PETCO did not file a 10-K for 2001. These documents show that employment at PETCO has steadily  
23 increased during TPG's ownership (from 10,200 in 2000 to 15,300 in 2004).

24 <sup>85</sup> Oregon Electric/500, Davis/10-18. For example, CUB used J.Crew in support of its argument, stating that TPG  
25 did not dispute CUB's "finding" that J.Crew's number of full-time employees dropped by 38% since TPG invested  
26 in the company. CUB Opening Brief at 23. CUB then jumps to several illogical conclusions from this single  
27 statistic (*Id.*), but takes the statistic out of context. As explained by Mr. Davis in response to Jenks and Brown  
28 testimony on this topic, J.Crew sold two subsidiaries shortly after TPG invested in the company, which was the  
29 primary reason for the reduction in employees cited by CUB. Oregon Electric/500, Davis/14-15. In fact, the core  
30 employee base at J.Crew has grown by over 2,000 employees during the course of TPG's investment. *Id.*

31 <sup>86</sup> *In the Matter of a Legal Standard for Approval of Mergers*, UM 1011, Order No. 01-778, at 11 (Sep. 4, 2001)  
32 (emphasis added).

33 <sup>87</sup> ICNU claims that the SEC has never regulated a "PUHCA pretzel" structure like this before. ICNU Opening  
34 Brief at 14. But this is simply not true. The structure of the Proposed Transaction was based on a recognized  
35 structure that others have used to invest in regulated utility operations. See, e.g., *Berkshire Hathaway, Inc.*, SEC  
36 No-Action Letter (March 10, 2000); *SW Acquisition, L.P.*, SEC No-Action Letter (April 12, 2000); *General Electric  
Capital Corp.*, SEC No-Action Letter (April 26, 2002); *k1 Ventures*, SEC No-Action Letter (July 28, 2003); and  
*Evercore MTC Investment, Inc.*, SEC No-Action Letter (Nov. 25, 2003).

1 Intervenor contend, however, that Oregon Electric’s corporate structure presents risks  
2 relating to corporate governance, most significantly, TPG Applicants’ ability to exercise negative  
3 consent rights regarding certain actions of PGE’s and Oregon Electric’s Boards of Directors.<sup>88</sup>  
4 Intervenor also speculate that Congress will repeal PUHCA soon, at which time the TPG  
5 Applicants will assume voting control of Oregon Electric commensurate with their equity  
6 investment, and any benefit of “local control” will prove illusory.<sup>89</sup> These so-called risks are  
7 unsupported by any evidence.

8 ***1. Negative Consent Rights And PUHCA Exemptions Are Not a Risk***

9 Oregon Electric never has made a secret of the fact that its corporate structure is designed  
10 to meet SEC precedent for a finding that TPG Applicants and other investors are not “holding  
11 companies” under PUHCA, that TPG Applicants will have certain negative consent rights, or  
12 that, if PUHCA is repealed, the TPG Applicants will exercise voting control commensurate with  
13 their equity investment.<sup>90</sup> Indeed, it is for *precisely* these reasons that the TPG Applicants are  
14 each named as applicants in this proceeding, even though they individually do not hold (and may  
15 never hold) enough voting interest to require the Commission’s approval under ORS 757.511.

16 Intervenor’s characterization of the TPG Applicants as an “outside entity,” whose  
17 potential influence over PGE presents a risk, is therefore inexplicable.<sup>91</sup> They are not shadowy  
18 figures pulling levers from behind a curtain. They are *applicants*. In response to hundreds of  
19 data requests, they provided detailed information regarding their structure, financing, and  
20 investment history. In all of this voluminous discovery, there has been no evidence to suggest  
21 that the participation of the TPG Applicants – either through negative consent rights or upon  
22 PUHCA’s repeal – will harm PGE’s customers.

23  
24  
25 <sup>88</sup> See CUB Opening Brief at 16-18; ICNU Opening Brief at 13-21.

26 <sup>89</sup> See CUB Opening Brief at 13.

<sup>90</sup> See Application at 7 n. 9; Oregon Electric/3, Davis/9; Oregon Electric/5, Schifter/3.

<sup>91</sup> See ICNU Opening Brief at 17. BOMA goes so far as to assert that no TPG entity is an applicant in this proceeding. BOMA Opening Brief at 4. This is incorrect.

1 CUB insists, however, that the influence of TPG Applicants is harmful because “TPG has  
2 no experience running an electric utility.”<sup>92</sup> It is not clear why CUB believes lack of utility  
3 experience at the shareholder level is even relevant. CUB views a public offering of PGE stock  
4 as a beneficial “endgame,”<sup>93</sup> despite the fact that public shareholders would not have “experience  
5 running an electric utility.” In any event, CUB cites no evidence that TPG’s utility inexperience  
6 presents a risk. In fact, if the Commission approves the Proposed Transaction, TPG has made  
7 clear that it expects PGE’s experienced management to remain in place<sup>94</sup> and that TPG will  
8 apply its unique skills, not to meddle in PGE’s day-to-day operations, but to help ensure that  
9 PGE has the support it needs to succeed, including the guidance of a first-class Board of  
10 Directors.<sup>95</sup> TPG had no experience flying airplanes or operating an airline when it invested in  
11 Continental Airlines, or any experience manufacturing silicon wafers or knitting “yellow  
12 cardigan sweaters” when it invested in MEMC Electronic Materials and J.Crew, respectively.<sup>96</sup>  
13 Nevertheless, these companies flourished with substantial TPG investment and guidance.<sup>97</sup>  
14 There is no reason to believe that PGE will not.

15 In addition, it is important to note that the consent rights give TPG Applicants  
16 substantially fewer rights than controlling shareholders (*e.g.*, ScottishPower, Enron) typically  
17 have. Controlling shareholders have the full authority and ability to take affirmative actions  
18 regarding all important business decisions affecting a company.<sup>98</sup> Conversely, TPG Applicants  
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22 <sup>92</sup> CUB Opening Brief at 17.

23 <sup>93</sup> See CUB/300, Jenks-Brown/33; CUB Condition 1, CUB/325/Jenks-Brown/1.

24 <sup>94</sup> See Application at 20.

25 <sup>95</sup> See Application at 20-21; Oregon Electric/3, Davis/7-8. Three members of the proposed PGE Board of Directors  
26 have substantial utility experience—Jerry Jackson, Robert Miller, and Peggy Fowler. In addition, TPG Applicants  
have considerable experience investing in other regulated industries. See Oregon Electric/100, Davis/20-23.

<sup>96</sup> CUB Opening Brief at 2 (“TPG is a private equity investment firm that is no more interested in owning and  
operating an electric utility than it is in making hamburgers or yellow cardigan sweaters.”)

<sup>97</sup> See Oregon Electric/100, Davis/13; Oregon Electric/500, Davis/14-16.

<sup>98</sup> See ORS 60.227 (voting entitlement of shares in corporation); ORS 63.130 (management rights of LLC  
members).

1 will be limited to only a select number of negative controls and will not have the ability to  
2 unilaterally initiate any actions with respect to PGE, so long as PUHCA remains in effect.<sup>99</sup>

3 ICNU argues that, if the SEC concludes that TPG Applicants need not register as holding  
4 companies under PUHCA, this will remove “a layer of regulation intended to protect  
5 customers.”<sup>100</sup> ICNU never provides evidence of the particular protection that PUHCA provides,  
6 how PGE’s customers would be harmed without it, or whether a future buyer is more or less  
7 likely to be regulated under PUHCA.<sup>101</sup> In addition, ICNU’s position is inconsistent with this  
8 Commission’s position. In SEC Docket No. 3-10909, this Commission supported Enron’s  
9 application for an exemption under Section (3)(a)(1), arguing that PGE is predominately  
10 intrastate and that this Commission “has adequate regulation over Portland General to protect its  
11 customers.”<sup>102</sup> Whether the TPG Applicants properly should be regulated under PUHCA is a  
12 question that the SEC will decide based on all of the facts and circumstances, including the  
13 protections provided to PGE’s its customers by state regulation and this Commission.<sup>103</sup>

14 ICNU also argues that there are risks presented by Oregon Electric’s plan to seek an  
15 exemption from PUHCA by transferring PGE’s wholesale power trading operations to a newly-  
16 formed Oregon subsidiary.<sup>104</sup> This transfer is not a condition of closing and is not at issue in this  
17 docket. The Commission will review important aspects of the proposed restructuring in docket  
18 UI 235.<sup>105</sup>

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21  
22 <sup>99</sup> Oregon Electric/22, Davis/15. The TPG Applicants will have a standard majority shareholder right in a private or  
23 public company to sell its shares and thereby transfer control of the company, subject to Commission regulatory  
24 oversight. *Id.* at n. 3.

25 <sup>100</sup> ICNU Opening Brief at 13, 20.

26 <sup>101</sup> *Id.*

<sup>102</sup> *In the Matter of Applications of Enron Corp. for Exemptions Under the Public Utility Holding Company Act of  
1935* (Nos. 70-9661 and 70-10056), SEC Docket No. 3-10909.

<sup>103</sup> The SEC will consider the decisions of this Commission in determining whether it is appropriate to regulate  
Oregon Electric or the TPG Applicants under PUHCA. *See Madison Gas and Electric Co. v. SEC*, 168 F.3d 1337,  
1341 (D.C. Cir. 1999).

<sup>104</sup> ICNU Opening Brief at 18-21.

<sup>105</sup> *See also* FERC Docket No. ER04-1206.

1                   **2. Oregon Electric's Corporate Structure Provides Benefit of Local**  
2                   **Representation.**

3                   Some parties have suggested that the Distribution to Enron's creditors is a desirable  
4 outcome because it may yield a widely-held, publicly-traded company with dispersed  
5 ownership.<sup>106</sup> However, Oregon Electric's corporate structure offers benefits that are impossible  
6 to ensure if the utility or its parent is a publicly-traded company. Unified private ownership at  
7 Oregon Electric relieves PGE from the quarterly earnings focus and other demands of Wall  
8 Street and the diverse interests of multiple shareholders.<sup>107</sup> It also makes it feasible for Oregon  
9 Electric to commit that PGE always will have at least five Oregonians on its Board of Directors,  
10 with an Oregonian always serving as Chairman.<sup>108</sup> Even if PUHCA is repealed, Oregon Electric  
11 will remain bound by this commitment, and, contrary to intervenors' assumptions, local  
12 representation will not be diluted.<sup>109</sup>

13                   Oregon Electric's corporate structure also makes it feasible for the Commission and  
14 special interest groups such as CUB and ICNU to bring concerns directly to the attention of  
15 identifiable private owners, which is impossible to do with a publicly-traded corporation owned  
16  
17

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18 <sup>106</sup> Oregon Electric disagrees that a publicly-traded company is the likely outcome of a distribution to Enron's  
19 creditors. It is only one of several possible outcomes. See Enron/1, Bingham/6; Enron/2, Bingham/5; Oregon  
20 Electric/100, Davis/55-57.

21 <sup>107</sup> See Oregon Electric/700, McDermott/14-15 ("Whereas a private investor like TPG is concerned with the utility's  
22 ability to perform and increase in value over time, and TPG's investors do not expect to see returns for years, Wall  
23 Street and public investors ensure a constant and unrelenting pressure to drive up stock prices for publicly traded  
24 companies.").

25 <sup>108</sup> ICNU argues that such local representation is common among Northwest utilities, relying on the testimony of  
26 Don Schoenbeck. ICNU Opening Brief at 35-36. Contrary to ICNU's assertions, PacifiCorp's board is not  
27 comprised of primarily local citizens. As Mr. Schoenbeck testified, PacifiCorp's board includes "five individuals  
28 from within its large service territory," without specifying whether these individuals are from Utah, California,  
29 Oregon, Idaho, Washington, or Wyoming. ICNU/100, Schoenbeck/5. Mr. Schoenbeck's testimony does not support  
30 the assertion that there is "overwhelming local representation" on the PacifiCorp board. Oregon Electric has  
31 committed to having five *Oregonians* on the PGE Board at all times. No other Northwest utility has guaranteed this  
32 level of local representation.

33 <sup>109</sup> See Oregon Electric/3, Davis/9. Certain intervenors charge that TPG Applicants' negative consent rights make a  
34 promise of "local control" illusory. See CUB Opening Brief at 11-14; ICNU Opening Brief at 36. In fact, Oregon  
35 Electric has made a commitment to local *representation*, not local *control*, and that commitment is a tangible benefit  
36 that will persist throughout Oregon Electric's ownership. Oregon Electric/22, Davis/13-14.

1 by thousands of faceless shareholders dispersed across the country.<sup>110</sup> This enhanced  
2 accountability and accessibility is a benefit to PGE's customers.

3 **IV. OREGON ELECTRIC HAS PROPOSED CONCRETE BENEFITS**  
4 **FOR PGE'S CUSTOMERS**

5 Oregon Electric's proposed benefits – including a guaranteed \$43 million rate credit for  
6 customers, significant indemnifications against potential liabilities, local leadership on PGE's  
7 Board of Directors, and an extension of service quality measures – are pure benefits for PGE's  
8 customers. They are not provided to offset risks. Oregon Electric has demonstrated that any  
9 risks posed by the Proposed Transaction are more than adequately mitigated by Oregon Electric's  
10 proposed conditions. The benefits are simply benefits.

11 Staff and intervenors generally dismiss Oregon Electric's proposed benefits, arguing that  
12 they are insufficient.<sup>111</sup> In their rush to create justifications for even larger rate credits, they  
13 focus only on the *risks* of the Proposed Transaction, while pointing out only the *benefits* of  
14 alternative scenarios. They fail to recognize the substantial risks and tremendous uncertainty  
15 inherent in alternative scenarios. And they fail to recognize the very substantial losses to PGE's  
16 customers and the public at large if the Proposed Transaction is not approved. This game of  
17 "heads I win, tails you lose" is no substitute for reasoned analysis and must be rejected.

18 **A. Rate Credit**

19 **1. Oregon Electric's Proposed Rate Credit is a Pure Benefit to Customers**

20 Oregon Electric's proposed rate credit is simply a guaranteed \$43 million benefit to  
21 customers. It is not provided to offset risks. Intervenors offer a variety of arguments to support  
22 their assertion that this financial benefit is somehow illusory or insufficient to provide net  
23 benefits. These arguments are illogical, unsupported by the record, and without merit.

24  
25 <sup>110</sup> See Oregon Electric/22, Davis/10-11 See also Oregon Electric/700, McDermott/15 ("I find it curious that a  
26 publicly traded utility is a preferred outcome for so many intervenors when publicly traded stock can be bought and  
sold with no Commission oversight and public investors may lack the long-range business incentive to build value in  
the utility that we find in a consolidated investor like Oregon Electric.").

<sup>111</sup> See ICNU Opening Brief at 13; CUB Opening Brief at 45; Staff Opening Brief at 17-23.

1 ICNU argues that the rate credit is illusory because PGE will likely be adding Port  
2 Westward to rate base in a future rate case.<sup>112</sup> This suggestion is absurd. Costs for Port  
3 Westward will be included in PGE's revenue requirement if the Commission finds that they are  
4 prudently incurred, whether or not Oregon Electric owns PGE. Such a finding has no impact on  
5 the \$43 million in rate credits realized by PGE's customers if this transaction is approved.

6 Intervenors also argue that the rate credit is speculative because Oregon Electric will be  
7 able to apply actual cost savings that it achieves to offset future rate credits.<sup>113</sup> This argument is  
8 also without merit.<sup>114</sup> If Oregon Electric's ownership results in cost savings that are passed onto  
9 customers through PGE's base rates, customers are benefiting from that ownership. The  
10 ratemaking process ensures that such cost savings will be passed on to PGE's customers through  
11 adjustments to PGE's revenue requirement. However, to claim that customers do not benefit  
12 from those cost savings is illogical at best. In fact, Staff witness Conway previously testified that  
13 cost-cutting plans should offset rate credits necessary to demonstrate net benefits.<sup>115</sup>

14 CUB suggests that the rate credit is illusory because Oregon Electric will somehow use  
15 the rate credit to "pay for new costs due to TPG's ownership."<sup>116</sup> It is not entirely clear how  
16 CUB envisions this would happen. However, the following is clear: The hold harmless and rate  
17 credit conditions operate separately; there is no provision that would allow Oregon Electric to  
18 offset increased costs due to its ownership by the guaranteed rate credit.

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21  
22 <sup>112</sup> ICNU Opening Brief at 32.

23 <sup>113</sup> CUB Opening Brief at 36; ICNU Opening Brief at 33; AOI Opening Brief at 32.

24 <sup>114</sup> All three prior utility acquisitions provided guaranteed levels of "cost savings" or merger credits while allowing  
25 the acquiror to offset some or all of these guaranteed levels with actual cost savings achieved. *See* UM 814, Order  
26 97-196, Appendix A at 5-6 (providing offset for entirety of rate credit in Enron/PGE acquisition); UM 918, Order  
99-616, Appendix-Stipulation at 9 (providing offset for actual cost savings achieved in specific years following  
ScottishPower/PacifiCorp acquisition); UM 967, Order 00-702 at 3 (providing temporary rate freeze and test year  
freeze for future rate case in order to allow Sierra Pacific to exclude actual cost savings from revenue requirement in  
rate case following acquisition).

<sup>115</sup> Staff/100, Conway/18.

<sup>116</sup> CUB Opening Brief at 36-37.

1                   **2.     Intervenors' and Staff's Rate Credit Proposals are Arbitrary and**  
2                   **Capricious**

3                   As Enron discussed in its Opening Brief, the Commission can order Oregon Electric to  
4 provide rate credits only if the record contains substantial evidence of risks to customers that a  
5 financial settlement can redress, and the amount of the rate credit must be based upon a  
6 reasonable quantification of those risks.<sup>117</sup> That is, if the Commission is to order a rate credit, it  
7 must be as compensation for identifiable and quantifiable risks not otherwise adequately  
8 addressed through specific conditions of approval. As the opening briefs of Staff and intervenors  
9 demonstrate, the parties demanding rate credits have made no attempt to meet this standard.  
10 Instead, their rate credit proposals are based on improper and unsupported comparisons with  
11 previous rate credits, admittedly remote and unproven risks, and unfounded “judgment.”<sup>118</sup>

12                   Staff and intervenors' primary justification for their proposed rate credits is the rate  
13 credits agreed to by applicants in other merger dockets.<sup>119</sup> Without analysis or evidentiary  
14 support, intervenors conclude that this acquisition is “riskier” than prior mergers, therefore  
15 requiring a “high-side” credit.<sup>120</sup> Staff does not make any specific comparison with other  
16 dockets, but rather simply references other rate credits to support its “judgment” that \$75 million  
17 is required in this case to prove net benefits.<sup>121</sup>

18  
19 <sup>117</sup> Enron Opening Brief at 23.

20 <sup>118</sup> See, e.g., Staff Opening Brief at 18. Note that ICNU argues rate credits are “necessary,” an assertion specifically  
21 rejected by the Commission in Order 01-776. ICNU Opening Brief at 9.

22 <sup>119</sup> Staff Opening Brief at 18; ICNU Opening Brief at 34; CUB Opening Brief at 40; City of Portland Opening Brief  
23 at 23-24, 26. ICNU provides a misleading table identifying the rate credit in Enron as the sum of the \$36 million in  
24 rate credits and \$105 million in compensation (for the loss of certain trading floor activities) paid by Enron. ICNU  
25 Opening Brief at 34. In fact, as Staff notes in its testimony, the proper comparison is simply to the \$36 million rate  
26 credit. Staff Opening Brief at 18.

27 <sup>120</sup> ICNU Opening Brief at 34; CUB Opening Brief at 40; COP Opening Brief at 24; AOI Opening Brief at 32  
28 (“[T]here are higher levels of risks and uncertainties present in this transaction that would favor high-side  
29 comparisons to the past cases.”).

30 <sup>121</sup> Note that the record does not support the assertion that Staff made a “careful review” of these prior dockets.  
31 Staff/800, Conway/10-11 only describes the rate credit amounts from those dockets; it makes no mention of a  
32 “careful review” of those dockets. Staff and intervenors also fail to recognize that, in prior merger dockets, the  
33 proposed buyers were other energy companies, which meant there would be merger “synergies” resulting in cost  
34 savings. These synergies formed the basis for settlements that included rate credits. By comparison, this is an  
35 acquisition by a non-energy related company. Oregon Electric has no other holdings and there will be no synergies  
36 available to share with customers. Oregon Electric/22, Davis/9-10.



1           These arguments conflict with prior Commission guidance and clear evidentiary  
2 standards. In the ScottishPower case, the Commission flatly rejected the argument that rate  
3 credits in one case should be determined by reference to another case, finding instead that  
4 acquisition applications must be judged on a case-by-case basis.<sup>122</sup> Moreover, Staff and  
5 intervenors have failed to introduce sufficient evidence to allow the Commission to make a  
6 comparison of the relative “risks” inherent in Oregon Electric’s proposal versus past merger  
7 dockets.<sup>123</sup> Finally, contrary to Staff’s claim, the Commission never found that the rate credits  
8 agreed to in prior cases were “required” to meet a net benefit standard.<sup>124</sup> While the Commission  
9 found in each case that the settlement package *as a whole* provided a net benefit to customers, it  
10 did *not* make findings that any particular level of rate credit was necessary.<sup>125</sup>

11           Staff and intervenors also claim that their rate credit proposals are necessary to offset  
12 unmitigated risks. However, the parties make no attempt whatsoever to quantify those risks or to  
13 explain how a rate credit can offset the risks posed to customers. Neither Staff nor intervenors  
14 provide any explanation as to what level of “benefit” they judge necessary to meet the statutory  
15 standard or what percentage of their proposed rate credits should be considered “compensation”  
16 for “harms” to PGE’s customers.<sup>126</sup>

17           Two further arguments in favor of larger rate credits have been offered. CUB suggests  
18 that the rate credit may be linked to anticipated tax savings.<sup>127</sup> ICNU justifies its proposal based  
19  
20

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21 <sup>122</sup> OPUC Order No. 99-616 (Oct. 6, 1999) (hereinafter “Scottish Power Order”) at 16; Enron Opening Brief at 25.

22 <sup>123</sup> The only evidence offered by CUB in support of this point is a citation to the testimony of Witnesses Jenks and  
23 Brown, who in turn provide no support for their conclusion that the present case “carries with it more problems”  
24 than the Sierra Pacific case. See CUB Opening Brief at 40 (citing CUB/300, Jenks-Brown/36). ICNU provides no  
25 support whatsoever for its conclusion that Oregon Electric’s ownership “poses a more significant risk” than Sierra  
26 Pacific. ICNU Opening Brief at 34.

<sup>124</sup> Staff Opening Brief at 18.

<sup>125</sup> Moreover, in the ScottishPower case, the Commission explicitly noted that the potential risks of the proposed  
transaction were “adequately mitigated by the merger conditions.” It made no finding that the rate credit offset any  
supposed harms. Scottish Power Order at 15.

<sup>126</sup> Staff admits that the Proposed Transaction provides a variety of benefits, but apparently considers those benefits  
to be outweighed by the nebulous and remote risks it asserts accompany the Proposed Transaction. See Staff  
Opening Brief at 21, 22; Staff/100, Conway/25; Staff 1600, Murry-Sipler/2.

<sup>127</sup> CUB Opening Brief at 36.

1 on anticipated returns to Oregon Electric's investors.<sup>128</sup> Neither Oregon Electric's adherence to  
2 existing tax laws nor potential returns to investors presents a risk to customers from this  
3 transaction, and neither should be considered when assessing financial compensation to  
4 customers.

5 Staff and intervenors provide no sound justifications for their rate credit demands because  
6 none exist. Their rate credit proposals are arbitrary and capricious and must be rejected.

7 **B. The Indemnification Provisions of the Stock Purchase Agreement are a**  
8 **Significant and Concrete Benefit of the Proposed Transaction**

9 The indemnification provisions of the Stock Purchase Agreement protect PGE from:  
10 (1) up to \$94 million in losses incurred as a result of certain liabilities currently facing PGE that  
11 are unrelated to Enron's ownership; and (2) up to \$1.25 billion in losses incurred as a result of  
12 liabilities related to Enron's ownership (the "control group" liabilities).<sup>129</sup> To the extent that  
13 PGE incurs a loss subject to indemnification under the Stock Purchase Agreement, Oregon  
14 Electric has agreed to direct Enron to pay the benefit of these indemnifications directly to  
15 PGE.<sup>130</sup>

16 Staff and several intervenors argue that the indemnification provisions provide little to no  
17 benefit to PGE's customers.<sup>131</sup> The parties' arguments are based primarily on two premises:  
18 (1) that the liabilities facing PGE may not be recoverable in rates anyway, and the

19 \_\_\_\_\_  
20 <sup>128</sup> ICNU Opening Brief at 33.

21 <sup>129</sup> The indemnification provisions of the Stock Purchase Agreement are described in more detail in Oregon  
22 Electric's Opening Brief at 16-17. *See also* Oregon Electric/100, Davis/33-39; Oregon Electric/500, Davis/19-22.

23 <sup>130</sup> Condition 21, Oregon Electric/501, Davis/6. AOI and the City of Portland assert that Oregon Electric has not  
24 agreed to ensure that PGE will receive the benefit of the indemnification provisions. AOI Opening Brief at 26-27;  
25 City of Portland Opening Brief at 27. This is simply untrue. Condition 21 ensures that, to the extent PGE incurs a  
26 loss subject to indemnification under the Stock Purchase Agreement, Oregon Electric will direct Enron to pay the  
benefit of the indemnification directly to PGE. The City of Portland took Mr. Davis' quote out of context when it  
asserted that Mr. Davis stated that "PGE is not certain to be indemnified for any of these potential liabilities." The  
full quote is "*If the proposed transaction does not close*, PGE is not certain to be indemnified for any of these  
potential liabilities." Oregon Electric/100, Davis/38 (emphasis added).

<sup>131</sup> *See* Staff Opening Brief at 22 (Staff recognizes that the indemnifications are a benefit of the transaction, but  
states that "the benefit is not as great as it may appear."); AOI Opening Brief at 26-27; City of Portland Opening  
Brief at 26-27; BOMA Opening Brief at 5-6. BOMA misunderstands the indemnification provisions. Contrary to  
BOMA's assertions, it is Enron, not Oregon Electric, who has agreed to indemnify PGE under the Stock Purchase  
Agreement.

1 indemnifications therefore do not provide a benefit to PGE's customers; and (2) that PGE's  
2 actual liability for the indemnified claims may exceed the amount of the indemnification.<sup>132</sup>

3 The fundamental fact ignored by Staff and intervenors is that PGE is currently facing  
4 potentially significant liabilities for the indemnified claims. These claims are unrelated to and do  
5 not result from the Proposed Transaction. In the absence of the Proposed Transaction, PGE *will*  
6 *not* receive the \$94 million in indemnifications for claims unrelated to Enron's ownership and  
7 may not receive the \$1.25 billion in indemnifications for the Enron-related liabilities.<sup>133</sup>

8 The argument that the indemnifications do not benefit PGE's customers because the  
9 potential liability for the indemnified claims may not be recovered from customers in rates is  
10 premised upon an unjustifiably narrow view of what constitutes a benefit to customers.  
11 Regardless of whether PGE would be able to recover any losses incurred as a result of these  
12 potential liabilities in rates, the indemnifications provide a substantial benefit to PGE. Even if  
13 one only considers the \$94 million in indemnification, *it is a \$94 million contribution to PGE's*  
14 *financial health that does not exist if this transaction does not close.* Given the fact that Staff  
15 and the intervenors repeatedly argue that any potential negative impacts on PGE's financial  
16 health allegedly resulting from the Proposed Transaction are a detriment to PGE's customers, it  
17 is disingenuous for those parties to argue that a direct benefit to PGE's financial health is of no  
18 benefit to customers.<sup>134</sup>

19 In addition, the fact that valuation data for the potential liabilities is not available is  
20 irrelevant to the determination of whether the indemnifications are a benefit. PGE is potentially

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21 <sup>132</sup> See City of Portland Opening Brief at 27; AOI Opening Brief at 26. In addition, Staff makes the unsupported  
22 assertion that a stand-alone PGE would be able to withstand a \$100 million liability and "still be viewed as a low-  
23 risk investment." Staff Opening Brief at 22-23. First, it is unclear who would be viewing PGE as a low-risk  
24 investment. Second, it is unknown whether Staff is relying upon the \$240 million in retained earnings that is  
25 currently available to PGE in making this determination. Enron and PGE have indicated that the \$240 million will  
26 be paid to Enron even if the Proposed Transaction does not close. Enron/2, Bingham/3; PGE/100, Piro/11-12;  
PGE/400, Piro/5. Therefore, these retained earnings should not be considered in judging whether PGE could  
withstand a substantial liability without adverse impacts.

<sup>133</sup> Enron has indicated that it may indemnify PGE for the control group liabilities if the Proposed Transaction does  
not close. Enron/2, Bingham/3. Enron has also stated that it does not plan to indemnify PGE for any of the non-  
Enron-related liabilities. *Id.* at 4. See also Enron/3, Bingham/2.

<sup>134</sup> See, e.g., Staff Opening Brief at 19-20; AOI Opening Brief at 17-19; City of Portland Opening Brief at 12-13.

1 liable for the indemnified claims, with or without the Proposed Transaction and regardless of  
2 their potential scope. The indemnifications provide nothing but protection for PGE against a  
3 significant portion (if not the entirety) of these claims. Contrary to Staff's and intervenors'  
4 assertions, the fact that actual losses might exceed the indemnification is *not* a risk of this  
5 transaction. In the absence of the Proposed Transaction, PGE bears responsibility for 100% of  
6 potential losses. With the Proposed Transaction, PGE will face \$94 million less in potential  
7 losses.

## 8 V. CONCLUSION

9 Applicants have presented irrefutable evidence that the Proposed Transaction would  
10 result in a net benefit to PGE's customers and would not harm the public. In the course of this  
11 docket, Staff and intervenors have raised valid concerns about the proposal. However, all  
12 reasonable concerns are more than adequately dispelled by Oregon Electric's evidence and  
13 proposed conditions of approval. While the parties continue to assert that risks remain, these  
14 assertions are lacking any foundation in evidence. For the foregoing reasons, as well as those  
15 presented in Oregon Electric's Opening Brief and the briefs of Enron and PGE, Oregon Electric  
16 respectfully requests that the Commission issue an order granting its application to acquire PGE.

17 Respectfully submitted this 3<sup>rd</sup> day of December, 2004.

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