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September 16, 2005

BY E-MAIL AND FIRST CLASS MAIL

Oregon Public Utility Commission
Filing Center
PO Box 2148
Salem OR 97308-2148

Re: **UF 4218/UM 1206** -- In the Matter of Portland General Electric Company
Application for an Order Authorizing the Issuance of 62,500,000 Shares of New
Common Stock Pursuant to ORS 757.410 *et seq.* and In the Matter of Stephen Forbes
Cooper, LLC

Dear Filing Center:

Enclosed for filing is an original and five copies of the following documents:

1. Testimony of Richard W. Cuthbert on behalf of the City of Portland; and
2. City of Portland's Objections to Approval of Application with Stipulated Conditions.

The parties in this matter have been served electronically and/or by first class mail.
Please let me know if you have any questions regarding this matter.

Very truly yours,

Benjamin Walters
Senior Deputy City Attorney

BEW:lw

Enclosures

cc: Service List for Docket UF 4218/UM 1206



1 BEFORE THE PUBLIC UTILITY COMMISSION
2 OF OREGON
3

4 In the Matter of PORTLAND GENERAL
5 ELECTRIC COMPANY Application for an
6 Order Authorizing the Issuance of 62,500,000
7 Shares of New Common Stock Pursuant to
8 ORS 757.410 *et seq.*

and

9 In the Matter of STEPHEN FORBES
10 COOPER, LLC, as Disbursing Agent, on
11 behalf of the RESERVE FOR DISPUTED
12 CLAIMS Application for an Order Allowing
13 the Reserve for Disputed Claims to Acquire
14 the Power to Exercise Substantial Influence
15 over the Affairs and Policies of Portland
16 General Electric Company Pursuant to ORS
17 757.511

Case Nos. UF 4218/UM 1206

CITY OF PORTLAND'S
OBJECTIONS TO APPROVAL OF
APPLICATION WITH
STIPULATED CONDITIONS

15 **I. INTRODUCTION**

16 The City of Portland objects to the Commission's approval of the Application in this
17 proceeding, as modified by the stipulated conditions. Preliminarily, the Applicants have not
18 demonstrated how the issuance of New Common Stock for PGE is within the public interest as
19 provided under ORS 757.400 through 757.460. Nor have they proven how the proposed
20 transaction fits within the limited criteria specified in ORS 757.415, or how the transaction will
21 serve PGE's utility purposes. The City disagrees with the proponents' contention that the
22 Application, together with the Stipulated Conditions, provides net benefits to ratepayers and
23 protects Oregon citizens as a whole. To provide assistance to the Commission in its
24 consideration of the proposed transaction, the City includes recommendations of several
25 additional conditions that would help to provide net benefits to ratepayers.
26

1 **A. The apparent rush to judgment threatens a lack of due consideration, if not**
2 **due process.**

3 The Application of PGE, Enron and Steven Forbes Cooper, LLC, states that the condition
4 precedent to PGE's stock distribution plan is "likely to occur in time to permit the issuance of the
5 New PGE Common Stock in April 2006." Application, Pg 14. As April 2006 is more than six
6 months away, no immediately pending deadlines exist to justify the precipitous departure from
7 the previously approved Docket schedule which protects the due process rights of Intervenors
8 and customers of PGE, and assures that the Commission will not be rushed to judgment without
9 a full and fair examination of the issues associated with the Application.

10 Notwithstanding the approved schedule, which resulted from negotiations among the
11 parties, on September 1, 2005, Applicants, Commission Staff and the Industrial Customer of the
12 Northwest Utilities filed a motion asking the Commission to approve the Application filed by
13 PGE and materially shorten the response time frame for objectors to respond. *Motion to Reduce*
14 *the Number of Days in Which Objections to the Stipulation May be Filed*, p. 2 (September 1,
15 2005). Less than two hours after the motion was filed electronically with the Commission, the
16 deadline for filing objections to approval of the Application with the stipulated conditions was
17 reduced by five days, taking 25% off the already foreshortened administrative process for
18 reviewing stipulations. *Ruling* (September 1, 2005).

19 The ruling was distributed electronically to parties scant minutes before the close of
20 business. Hard copies of the ruling were not mailed until the following day, September 2, 2005.
21 The ruling also allowed Joint Testimony in support of the motion to be filed six days later, on
22 September 7, 2005. This delay effectively reduced the time for researching and drafting reasoned
23 objections in response to the Motion to very little more than one week. The ruling also
24 effectively doubled up the filing deadline for submitting testimony in this proceeding, presenting
25 a Hobson's choice: prepare limited testimony responding to the Stipulation and its supporting
26 Joint Testimony, or file general testimony responding to the Application and its supporting

1 testimony from the Applicants.

2 Despite today's availability of computers and nearly instantaneous electronic delivery of
3 pleadings, there is still a need for a reasoned pace in deliberative proceedings. Protection of the
4 rate payer is a "primary responsibility" of the Commission. *Oregon Tel. Corp. v. Public Utility*
5 *Comm'r*, 5 Or App 231, 236, 483 P2d 822 (1971). Rushing to judgment raises the question of
6 how well the interests of ratepayers are being served.¹

7 **II. LEGAL STANDARDS APPLICABLE TO THE APPLICATION**

8
9 **A. Approval of an application to issue securities under ORS 757.410 et seq.**
10 **requires a determination that the public interest will be served. The**
11 **Applicants have not attempted to show how the statutory standards have been**
12 **met.**

13 ORS 757.410 et seq. requires that utilities issuing securities must either demonstrate that
14 the public interest will be served, or that specific purposes delineated in the statutes have been
15 met. The Applicants have the affirmative burden of proof on showing how the requested
16 issuance of stock meets the public interest test. However, they have made no effort to
17 demonstrate how the issuance of new PGE common stock will serve the public interest. The
18 Applicants have also not made any attempt at showing how the specific statutory criteria have
19 been satisfied.

20 **1. The Applicants have not shown how the issuance of 62.5 million shares of**
21 **new PGE common stock will serve the public interest.**

22 The Applicants have made no showing of how the public interest will be served by
23 issuing 62.5 million shares of new PGE common stock, replacing and diluting the outstanding
24 42.75 million shares of existing PGE common stock.² Aside from conclusory statements in the
25 Joint Testimony stipulating to public interest, neither the Stipulation nor the Joint Testimony

26 ¹ Due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 US 319, 333, 96 S Ct 893, 47 L Ed 2d 18 (1976) (internal quotations omitted).

² Portland General Electric Company, Form 10-Q June 30, 2005. <
http://www.portlandgeneral.com/about_pge/corporate_info/pdfs/financial/fm10q6_30_05.pdf. > The additional shares will represent an increase in PGE's issued common stock of over 45%.

1 provide the Commission with any facts upon which to base a finding that the issuance of the
2 stock would be compatible with the public interest. ORS 757.415(2)(b).

3 The Application spends a great deal of time describing the mechanics of how the
4 bankruptcy reorganization plan will divide and distribute Enron’s ownership interest in PGE to
5 Enron’s creditors. However, nothing in the Application, nothing in the Joint Testimony, and
6 nothing in the bankruptcy reorganization plan addresses or explains why PGE must cancel the
7 existing PGE common stock currently held by Enron and issue new Common Stock to Enron.
8 No explanation is provided as to why there must be an increase of over 45% in the amount of
9 shares of PGE common stock. Nor is any explanation provided as to why the existing PGE
10 common stock cannot be used to effect the proposed stock distribution plan. Applicant bears the
11 burden to both demonstrate what purpose would be served by cancellation of the PGE common
12 stock currently held by Enron, and how this might serve the public interest. The Commission’s
13 responsibility is to weigh the advantages and disadvantages of the proposed stock issuance and to
14 determine if this will be in the public interest, not how it may serve the private interests of Enron
15 and its creditors. *Compare, Tierney v. Duris*, 21 Or App 613, 626-27, 536 P2d 435, *rev den*
16 (1975). Failing to provide this essential information means that the Applicants have failed to
17 meet their fundamental burden of production, let alone their burden of persuasion. See, *In re*
18 *Oregon Electric Utility Co., LLC*, Order No. 05-114, UM 1121, 240 P.U.R.4th 141, 2005 Ore.
19 PUC LEXIS 99, *37, n 12 (March 10, 2005). The Applicants have not demonstrated by any
20 measure how the issuance on new PGE common stock serves the public interest under ORS
21 757.410 *et seq.*

22 **2. The Applicants have not shown how issuing 62.5 million shares of new**
23 **PGE common stock serves the statutory criteria set forth in ORS 471.415.**

24 The Applicants assert that “The New PGE Common Stock meets the requirements of
25 ORS 757.415(1) because it replaces common stock lawfully issued.” Application, at 2 (footnote
26 omitted.) However, the Applicants make no effort to demonstrate how the issuance of the new

1 PGE common stock complies with any of the statutory criteria. Under ORS 471.415, the
2 Commission may only approve the issuance of stock by a regulated utility upon making a
3 determination that the proposed issuance meets the specified elements. The statute states that
4 public utilities may issue stock “for the following purposes and *no others*”. (emphasis added).
5 *See, e.g.*, Letter from Chief Counsel Larry D. Thomson to Phil Nyegaard, No. OP-6210, 1988
6 Ore. AG LEXIS 12 (Ore. AG 1988) (February 3, 1988) (Concluding that the Commission lacked
7 regulatory authority to approve issuance of long-term debt by Avion Water Company to retire a
8 short-term loan for repurchase of some of its stock, as being outside the limited purposes
9 identified in ORS 757.415).³

10 Again, the Applicants have not shown how the proposed transaction complies with the
11 statutes. The issuance of new PGE common stock, and the simultaneous cancellation of PGE’s
12 existing common stock is not within any of the six stated purposes identified in ORS 757.415(1)
13 for which a public utility may issue stock. Assuming, *arguendo*, that the issuance of the stock is
14 for the replacement of lawfully issued stock, the Applicants have still not shown how this serves
15 PGE’s facilities, or its service, or its obligations, or that it will reimburse its expenditures, or
16 comply with its employee stock option plans. Rather, the issuance of the stock is purely for the
17 benefit of Enron and its creditors. Absent a demonstration by the Applicants of any of the
18 specified statutory purposes, the Commission has no authority to approve the Application.
19 Absent such approval, ORS 757.415(1) prohibits the issuance of the new common stock.

20 In addition, the Applicants have not demonstrated, nor have they even addressed, whether

21 _____
22 ³ *See also*, Office of the Oregon Attorney General, No. 5126, 1960 Ore. AG LEXIS 154; 30 Op. Atty Gen. Ore. 107
23 (December 20, 1960) (Concluding Commission lacked authority under *former* ORS 757.415 to approve issuance of
stock to public utility employees as additional compensation). *Compare, In re Idaho Power Company*, Order No.
03-766; UF 4201, 2003 Ore. PUC LEXIS 583, (December 29, 2003):

24 “Idaho represents that the proceeds will only be used for purposes allowed by
25 law. Such purposes include the acquisition of utility property, the construction,
26 extension or improvement of utility facilities, the improvement or maintenance
of service, the discharge or lawful refunding of obligations that were incurred for
utility purposes (such as higher cost debt or preferred stock) or the
reimbursement of Idaho’s treasury for funds used for the foregoing purposes.”

1 the issuance of new PGE common stock is “necessary or appropriate for or consistent with the
2 proper performance by the applicant of service as a public utility”. ORS 757.415(2)(b); OAR
3 860-027-0030(1). The Applicants have identified how benefits will flow to Enron and its
4 creditors, but not once is the stock issuance plan linked to the proper performance of PGE’s
5 rendition of service as a public utility. Again, the Applicants have the burden of production and
6 persuasion on how these various statutory requirements have been met. *Oregon Electric Utility*
7 *Co., supra*, 2005 Ore. PUC LEXIS 99 at *37, n 12. The Applicants cannot simply settle away
8 these statutory and evidentiary requirements. The Application cannot go forward absent meeting
9 these burdens.

10 The Commission is a creature of the legislature and “its power arises from and cannot go
11 beyond that expressly conferred upon it” by the legislature. *Pacific NW Bell v. Sabin*, 21 Or App
12 200, 213, 534 P2d 984 (1975). If the Applicants do not demonstrate that the proposed issuance
13 of new PGE common stock complies with the statutory requirements, than the Application must
14 be denied.

15 **B. The Applicants have failed to show that PGE’s ratepayers will receive net**
16 **benefits and that Oregon citizens will not suffer any detriment, as required for**
the Commission’s approval under ORS 757.511.

17 The City has argued as a preliminary matter that the Applicants have failed to establish
18 that the issuance of new PGE common stock complies with the various statutory requirements of
19 ORS 757.410 *et seq.* Should the Commission determine otherwise, the Application, as modified
20 by the stipulated conditions, fails to meet the statutory test set forth in ORS 757.511. The City
21 suggests additional necessary conditions to address the harms presented to PGE’s ratepayers and
22 to assure that PGE’s ratepayers will receive actual net benefits. COP/100/Cuthbert/23-26.

23 The Commission recently reaffirmed the controlling standards for consideration and
24 approval of an application under ORS 757.511:

25 The meaning of “serve the public utility’s customers in the public
26 interest” was the subject of a Commission investigation in docket
UM 1011. Utilities, consumer groups, and Staff provided input on
the applicable standard under the statute. The Commission
resolved the docket by issuing Order No. 01-778, which adopted a

1 two-pronged legal standard under ORS 757.511(3). After
2 reviewing the text and context of the statute, the Commission “read
3 the verb ‘serve’ to indicate a net benefit standard for merger
4 approval.” See Order No. 01-778 at 10. The Commission went on
5 to state that providing net benefits is a specific way to cure the
6 general concern enunciated in ORS 757.506 that a transaction
7 could harm customers. The order then set out a second
8 requirement: ‘in addition to finding a net benefit to the utility’s
9 customers, we must also find that the proposed transaction will not
10 impose a detriment on Oregon citizens as a whole.’ See Order No.
11 01-778 at 11.

12 *Oregon Electric Utility Co., supra*, 2005 Ore. PUC LEXIS 99 at * 39. The City concurs that this
13 legal standard applies to the Commission’s review of the Application under ORS 757.511. The
14 City disagrees that the Applicants have met their burden to demonstrate their Application meets
15 this standard. Conclusory statements and stipulations agreeing with conclusory statements do not
16 meet the statutory jurisdictional threshold requirements.

17 Enron has broadly suggested that any failure by the Commission to approve the
18 Application will violate bankruptcy laws and result in the bankruptcy court removing jurisdiction
19 of the Commission over the proposed transaction. Application, p. 3.⁴ However, the Applicants
20 have failed to inform the Commission that bankruptcy court jurisdiction and the preemptive
21 effect of bankruptcy laws have limited effect on a State’s sovereign exercise of regulatory
22 authority over non-bankrupt utilities and protection of utility rate payers. *Compare, Pac. Gas &*
23 *Elec. Co. v. California ex rel. California Dept. of Toxic Substances Control*, 350 F3d 932, 948
24 (9th Cir. 2003), *cert den*, --- US ----, 160 L Ed 2d 318, 125 S Ct 454 (2004) (holding that
25 preemptive effect of federal bankruptcy law was limited to otherwise applicable nonbankruptcy
26 laws “relating to financial condition”, and state laws regarding utility license transfers involving
the exercise of discretion were not necessarily preempted.)

The fact is that the bankruptcy reorganization plan does not mandate Commission

⁴ This suggestion is repeated in the Joint Testimony: “we must also take into account whether, if the Commission denies the Application, state or federal law will prevail in the implementation of the court-confirmed Plan. This adds uncertainty regarding how and when PGE emerges from Enron’s ownership, removing the current focus from implementing the Plan to jurisdictional issues.” Joint Testimony, p. 12, lines 8-12.

1 approval of the issuance of new PGE common stock and its subsequent distribution by Enron to
2 its creditors, just as it did not mandate the Commission approval of Texas Pacific Group's
3 purchase of Enron's PGE common stock. The bankruptcy reorganization plan recognized the
4 Commission's jurisdiction over all such proceedings, noting that the Texas Pacific Group
5 purchase and the alternative stock distribution plan were subject to Commission approval.
6 Furthermore, the bankruptcy reorganization plan authorizes stock distribution as only one of the
7 options available for effecting a transfer of the value of PGE to Enron's creditors. The plan also
8 authorizes the sale of PGE. *See, Memorandum Opinion and Order Approving Plan of*
9 *Reorganization Under Section 11(f) and Issuing Report Under Section 11 (March 9, 2004).*
10 Significantly, the bankruptcy reorganization plan does not purport to address the sovereign
11 jurisdictional right of the Commission to impose conditions on an approval of an application or
12 to deny approval of an application if the Applicants will not accept such conditions.

13 This red herring issue aside, the Commission need not deny the Application but may
14 consider including conditions sufficient to provide net benefits to ratepayers and to prevent any
15 injury to Oregon citizens.⁵ COP/100/Cuthbert/6-7. Neither the Application nor the Stipulation
16 contains conditions sufficient to meet the established legal standard for approval by the
17 Commission under ORS 757.511. In order to provide net benefits to ratepayers, the Commission
18 should impose the following conditions:

19 1. The Commission should require PGE to provide a current estimate of potential costs
20 and liabilities related to Enron's ownership of the utility, and require PGE to establish sufficient
21 reserves to address those liabilities. COP/100/Cuthbert/23;

22 2. The Commission should explicitly affirm that the ratepayers will be held harmless for
23 all costs and liabilities associated with Enron's ownership of the utility.

24 COP/100/Cuthbert/23-24;

25

26 ⁵ Indeed, the Application itself anticipates that there are other potential outcomes for PGE, different from the
issuance of securities. "Because Enron has a fiduciary duty to its creditors, it has stated publicly that it will consider
any credible offer to purchase the existing PGE common stock." Application, page 3.

1 3. Until the amount of stock held in the Disputed Claims Reserve falls below a threshold
2 amount of 20% of the issued shares, any declaration of PGE dividends should be subject to prior
3 Commission review and approval, to protect ratepayer interests against the short-term focus of
4 the Reserve trustees and the Allowed Creditors. COP/100/Cuthbert/24; and,

5 4. The Commission should require rate credits in the range of \$175 million to assure that
6 PGE's ratepayers are given the "benefit of the bargain" struck in Order No. 97-196 and to
7 otherwise provide PGE's ratepayers with a net benefit in the proposed transaction.
8 COP/100/Cuthbert/12; COP/104; COP/100/Cuthbert/24-26.

9 **C. The appropriate comparator in considering the Application is to the**
10 **protections and benefits currently enjoyed by PGE's ratepayers, not to some**
11 **end state after completion of the proposed transaction.**

12 In the recent Oregon Electric Utility proceeding, the Commission also examined the use
13 of a comparison case in determining whether an ORS 757.511 application meets the "net
14 benefits" test:

15 ORS 757.506(1)(c) delineates some harms against which
16 customers should be protected, including degradation of utility
17 service, higher rates, weakened financial structure and diminution
18 of utility assets. The wording of the statute presumes a review of
19 the utility's current status to see if a proposed transaction would
20 cause harm. ORS 757.506(2) further provides that regulation is to
21 prevent "unnecessary and unwarranted harm to such utilities'
22 customers." Reading this statute in concert with ORS 757.511, we
23 reject Applicants' approach and conclude that we must compare
24 the potential benefits and harms of the transaction against the
25 [transaction] as it is currently configured. However, this
26 transaction is unique, because PGE is in a transitional state. It is
owned by Enron, which is in bankruptcy and is being liquidated.
There is little to suggest that PGE would operate very differently
after the stock distribution plan than it does now. With Enron's
current hands-off approach, PGE is, essentially, currently acting as
a stand-alone utility. Therefore, to take into account the current
transitional nature of PGE's ownership, we will compare
Applicants' proposal to PGE as a separate and distinct entity,
which would function as PGE operates today." Order No. 05-114
at 18

26 Oregon Electric Utility Co, supra, 2005 Or 99 at *42-43.

1 This standard of comparison is equally applicable to the Application presently before the
2 Commission. The Commission should employ a comparator standard that considers the utility
3 “function[ing] as PGE operates today” under the protections afforded to PGE ratepayers as set
4 forth in the Stipulated Conditions included in the Commission’s approval of Enron’s acquisition
5 of PGE in 1997. *In re Enron Corp.*, Order No. 97-196, UM 814, 177 P.U.R.4th 587, 1997 WL
6 406191 (June 4, 1997). These conditions included a guarantee by Enron “that the customers of
7 PGE shall be held harmless if the merger between Enron and PGC results in a higher revenue
8 requirement for PGE than if the merger had not occurred.” The conditions also require a
9 payment of \$105 million by Enron to PGE, for the benefit of the ratepayers. The time for
10 requiring the performance of the Enron-related conditions is now, not in some possible future
11 rate proceeding. COP/100/Cuthbert/18-21.

12 **D. The Application, together with the conditions offered under the Stipulation,**
13 **does not provide benefits to PGE ratepayers equal to the status quo, much less**
14 **net benefits.**

15 **1. The focus of short term interests for Steven Forbes Cooper and Enron’s**
16 **creditors threaten PGE’s financial strength.**

17 In the Joint Testimony, the proponents recognize the transaction’s potential threat to
18 PGE’s financial structure. However, the Joint Testimony asserts that the stipulated conditions
19 adequately address these potential threats. Joint Testimony, p. 14. The City of Portland
20 respectfully disagrees with this assertion. The mere recognition of potential threats caused by the
21 transaction should raise a large red flag to the Commission as to the prudence of the transaction
22 at all. The stipulated conditions do not bring the transaction back to status quo, do not protect
23 against the acknowledged potential threats, and do not come close to providing a net benefit to
24 the customers.

25 According to the Application, Steven Forbes Cooper will initially control as much as 70%
26 of the New Common Stock of PGE, thus having effective voting control over the company.
Application, p. 13, lines 14-17; COP/100/Cuthbert/7. Under the most optimistic scenario

1 envisioned in the Application, Enron’s current expectation is that control over PGE will continue
2 for at least two years. Application, p. 13. Beyond the initial distribution of stock, it is uncertain
3 how long a controlling amount of stock will be held in the Disputed Claims Reserve.
4 COP/100/Cuthbert/17. During this time frame, a slate for electing proposed directors to an
5 independent PGE Board of Directors will not be presented to shareholders until at least 2007.
6 PGE-SFC/300/Rogan-Palmer/9.

7 Notably, in the public company stock exchange traded world that PGE proposes to
8 re-enter, control over a corporation can be retained with as little as 20% to 25% stock ownership.
9 By Oregon law, a person or corporation holding, directly or indirectly, five percent or more of the
10 voting securities of a public utility is defined as having an affiliated interest. ORS 757.015(1).
11 Furthermore, any person or corporation exercises “substantial influence” over a public utility is
12 also defined as having an affiliated interest. ORS 757.015(7). These tests are independently
13 stated in the statute – they are not joined. The threshold test for whether the Oregon utility
14 merger statute applies is whether a person holds a percentage of the voting securities. *See, e.g.,*
15 *In re* Portland General Electric Application seeking authority to issue and sell one share of \$ 1.00
16 par value junior preferred stock, Order No. 03-024, UF 4192, 2003 Ore. PUC LEXIS 11, *
17 6 - * 7 (January 13, 2003) (Concluding that issuance of one share of preferred stock did not
18 trigger the qualifying requirement of a percentage of stock). The Commission should tread
19 carefully so that it does not establish potential precedent which may pre-determine what qualifies
20 as “substantial influence” without a full and complete opportunity for deliberation.

21 The result of Steven Forbes Cooper’s plenary control over PGE is likely to create
22 conflicts between the short term financial interests of the Enron creditors and the longer term
23 interests of ratepayers. COP/100/Cuthbert/16-18. In fact, the Application makes clear that
24 Steven Forbes Cooper’s sole duty under the bankruptcy reorganization plan is focusing upon the
25 short term maximization of value for the Creditors. Application, p. 22, lines 13-15. The dangers
26 of short-term focus upon returns were recognized and acknowledged by the Commission in its

1 order denying approval of the Texas Pacific Group’s proposed acquisition of PGE from Enron.
2 “[S]hort-term ownership makes it somewhat more likely that [ratepayers] will be exposed to the
3 effects of poor spending and investment decisions. Such risks could cause the degradation of
4 utility service and the diminution of utility assets.” *Oregon Electric Utility Co., supra*, 2005 Ore.
5 PUC LEXIS 99 at *66. These risks are greater under the current application, but these potential
6 harms are not addressed in any fashion by the proposed stipulated conditions.

7 Instead, the Commission is asked to trust that Steven Forbes Cooper will act
8 appropriately to benefit the ratepayers even though its marching orders are to “maximiz[e] the
9 value of assets to be distributed to creditors.” Application, p. 22. The ratepayers are left to hope
10 that, “The presence of minority shareholders, as well as coverage by the financial community,
11 lessens the ability of creditors, through the Reserve, to influence PGE’s Board to declare
12 dividends that could weaken PGE’s financial structure.” Joint Testimony, pp. 15-16.
13 Meanwhile, no dividend policy has been submitted to the Commission as part of this
14 Application, and no dividend policy has been included in the Stipulation. Instead, the
15 Application states, “PGE will need to establish a dividend policy . . . sufficiently prior to the
16 issuance of the New PGE Common Stock so that analysts are prepared once the stock began to
17 trade.” Application, p. 15.

18 As the Commission recognized in Order No. 05-114, short term financial players have
19 both the incentive and the means to influence and control company expenditures and investments
20 to maximize generation of short term net revenues. Such decisions can negatively impact
21 necessary maintenance, repair and replacement of equipment, can result in reduced work force
22 and lower quality of service, and can result in agreements that saddle ratepayers with long-term
23 rate increases. *Oregon Electric Utility Co., supra*, 2005 Ore. PUC LEXIS 99 at *58 through *66.

24 The Joint Testimony does not address these concerns, but instead focuses on potential
25 future dividend policy protection. The Joint Testimony states that “Condition 8 ensures the
26 Commission has written notice of dividend declarations by PGE’s Board.” Joint Testimony, p.

1 16. This is the emptiest of conditions in terms of providing protection to the ratepayers from
2 short term financial gaming. COP/100/Cuthbert/22. By the time a notice of dividend comes out,
3 the damage to ratepayers will have already occurred. Further, the Commission will only get the
4 otherwise standard public notice that will be issued by PGE. PGE will be obligated to provide
5 public notice regardless of whether it commits to this as a condition. The notice could just as
6 easily be obtained by checking any business or financial news service. The important missing
7 component is any corresponding regulatory rights for the Commission to protect against short
8 term financial gaming which artificially creates increased net revenues, which may then be
9 reaped by the declaration of stock dividends. The City addresses this deficiency in its testimony,
10 as discussed in further detail below. COP/100/Cuthbert/23-24.

11 The Application suggests that other unquantifiable benefits that ratepayers will enjoy as a
12 result of the proposed stock swap will be an independent, locally headquartered, publicly traded
13 company, paying state and local taxes. Application pp. 27-28.⁶ PGE is already locally
14 headquartered, so provides no benefit to PGE's ratepayers. COP/100/Cuthbert/5; 14-15. To the
15 contrary, in today's market and with the repeal of PUHCA, PGE is and will continue to be an
16 attractive takeover target. COP/100/Cuthbert/5; 15-16; COP/107; COP/108; COP/109. Its
17 independence will, at best, be short lived, as will the likelihood that it remains headquartered in
18 Portland after its acquisition by a holding company. And then ratepayers will be doomed to
19 repeat history. As noted in PGE's corporate biography, its corporate predecessor Portland
20 Electric Power Company (PEPCO) was once serially part of several holding companies, passed
21 from one to another until PEPCO itself filed for bankruptcy reorganization in 1939. Craig
22 Wollner, Electrifying Eden, Portland General Electric 1889-1965, Chapter 5 – The Perilous

23

24

25 ⁶ PGE's Chief Financial Officer, Jim Piro, was recently quoted publicly as citing these attributes as beneficial
26 components of the proposal resulting in "more stable conditions". Gail Kinsey Hill, "Sten demands PGE rate cut",
The Oregonian, (September 12, 2005)
<http://www.oregonlive.com/business/oregonian/index.ssf?/base/business/1126349702113670.xml&coll=7> (site
visited September 12, 2005).

1 Years (Oregon Historical Society Press 1990).⁷ All of this occurred under the regulatory
2 oversight of the Oregon Public Utility Commissioner, who lacked resources to track the goings-
3 on of a multi-state corporation situated some distant level of corporate intermediaries above the
4 regulated utility. *Id.*, p. 149. What possible conditions can serve to protect ratepayers and the
5 region from repeating the past and suffering another cycle of wrenching economic dislocation?
6 Imposing a rate credit is one means by which to address the uncertainties of such potential harms.

7 **2. Removal of the protections required under prior Commission orders,**
8 **without corresponding and adequate protections, will impose significant**
9 **harms upon PGE ratepayers.**

9 The Joint Testimony asserts that the stipulated conditions provide adequate replacements
10 for prior protections given to ratepayers in prior transactions. However, viewed in their best
11 potential light, the stipulated conditions merely bring an otherwise deficient Application back to
12 the status quo protections currently in place for PGE's ratepayers.

13 Condition 6 replaces Enron Conditions 7 and 10, transferring from
14 Enron to PGE the obligation not to seek recovery for increases in
15 the cost of capital or revenue requirement due to Enron's
16 ownership. In addition, Condition 6 updates the "hold harmless"
17 for increases in the cost of capital to cover any found by the
18 Commission to be caused by the Reserve's ownership of PGE of
19 more than 25%. To assure that enforcement of the hold harmless
20 protections against PGE does not, itself, financially weaken PGE,
21 condition 6(c) increases the minimum equity required by Condition
22 5 by \$40 million for the period . . . discussed above. The \$40
23 million, as represented by the additional equity at PGE, may be
24 used by PGE if the Commission should order certain disallowances
25 in PGE's next general rate case due to Enron's ownership of PGE.

20 Joint Testimony, pp. 16-17.

21 The City of Portland disagrees that the proposed conditions achieve even the status quo,
22 much less deliver net benefits to PGE's ratepayers. COP/100/Cuthbert/9-11; 13. The stipulated
23 conditions propose the adoption of placeholders postponing consideration of the very serious
24 concerns of the harmful impacts of Enron's ownership on PGE to some potential future
25

26 ⁷ See additionally, Cudahy and Henderson, *From Insull to Enron: Corporate (Re) Regulation after the Rise and Fall of Two Energy Icons*, 26 *Energy L.* 35 (2005), for an overview of the potential forces that led to PUHCA's original adoption.

1 proceeding. Deferral does not protect the ratepayers today. Deferral does not meet the legal
2 standard of net benefit and public interest. “To delay justice, is injustice.” William Penn, *Fruits*
3 *of Solitude*, 69 (11th ed. 1906) (1693).

4 The ratepayers deserve protection in the form of conditions that come into force today.
5 For example, despite the Commission’s requirement of payments from Enron to PGE under
6 Order No. 97-196, in the end, Enron has failed to pay PGE at least \$73 million.
7 COP/100/Cuthbert/12.⁸ At a minimum, the Commission should require that PGE be made whole
8 now, to maintain the status quo from the Commission’s previous order for the protection of the
9 ratepayers. After approval of this Application, Enron will be gone. The only meaningful
10 opportunities for dealing with the harmful impacts related to Enron’s ownership of PGE are as
11 conditions in this proceeding.

12 **3. The Commission should impose additional conditions upon the proposed**
13 **transaction in order to protect the public interest and to assure that**
14 **ratepayers will be provided net benefits.**

15 **a. The Applicants should be required to provide current estimates of**
16 **“hangover” liabilities for PGE associated with Enron’s ownership.**

17 As noted in the City’s testimony, PGE should be required to estimate the potential
18 financial costs and liabilities arising from Enron’s ownership of PGE and that this information
19 should be provided to the Commission for its review and considerations. COP/100/Cuthbert/12;
20 23-24. PGE should also be required to establish adequate reserves to meet these costs and
21 liabilities. COP/100/Cuthbert/21; 24.

22 **b. The ratepayers should be given explicit assurances now that they will**
23 **be protected from all liabilities associated with Enron’s ownership of**
24 **PGE.**

25 As an explicit condition of approval this Application, the Commission should ratify and
26 reincorporate its prior requirement that PGE ratepayers will be protected from any costs or

⁸ Portland General Electric Company, Form 10-K, pages 117-120 (March 11, 2005).
http://www.portlandgeneral.com/about_pge/corporate_info/pdfs/financial/form_10k_2004.pdf >

1 liabilities associated with Enron's ownership of PGE. COP/100/Cuthbert/11-12; 23. In addition,
2 the Commission should explicitly inform PGE's new stock holders that they can anticipate being
3 held financially responsible for these costs and liabilities as the successor in interest to control of
4 PGE's common stock.

5 The Applicants have suggested that the stipulated condition of adding \$40 million to the
6 debt/equity percentage limitation on the timing of payment of dividends pending filing of PGE's
7 next rate case addresses this concern. Joint Testimony/100/16-17. However, without
8 quantification of the amount of potential PGE liabilities associated with Enron's ownership, it is
9 pure speculation as to whether this amount is sufficient. The range of liabilities facing PGE as a
10 result of its association with Enron could potentially dwarf this amount.

11 COP/100/Cuthbert/11-13.

12 **c. The Commission should assert its authority to protect the ratepayers**
13 **by requiring as a condition of approval that PGE should not only**
14 **provide notice of proposed dividends but also prior regulatory**
15 **approval.**

16 The Commission should strengthen Conditions 5 and 8 of the Stipulation by requiring
17 prior Commission approval of any cash payments or dividends from PGE to its new stock
18 holders while the Reserve holding is greater than 20 percent of total new common stock and
19 adequate financial reserves are established to cover all Enron related costs and liabilities.

20 COP/100/Cuthbert/23. Without this corresponding right, the right to receive notice of proposed
21 dividends is simply meaningless. COP/100/Cuthbert/22.

22 **d. In order to assure that the ratepayers enjoy net benefits as a result of**
23 **the proposed transaction, the Commission should require the**
24 **Applicants to provide rate credits.**

25 In addition to the actions listed above that address potential harms to PGE customers
26 associated with the Application, the Commission should require an immediate rate credit in the
range of \$175 million. A rate credit would provide the benefits to PGE ratepayers sufficient to
meet the Commission's net benefit standard. Potential delays in the timing of dividend payments

1 does not equate with actual, quantifiable benefits for ratepayers.

2 Under prior applications of the legal standard of ratepayer net benefit, the Commission
3 has previously ordered rate credits:

4 Enron purchase of PGE (1997)
Order 97-196

- 5 • \$36 million in rate credits spread out over four years
- 6 • \$105 million to purchase PGE's trading floor

7 Scottish Power purchase of PP&L (1999)
Order 99-616 22

- 8 • \$52 million in rate credits spread out over four years

9 Sierra Pacific proposed purchase of PGE (2000) 4
Order 00-702 5

- 10 • \$95 million in rate credits spread out over seven years

11 UM 1121 Staff/800Conway/10-11.

12 The Application, as modified by the stipulated conditions, provides no rate relief
13 whatsoever for PGE's customers. There is precedent in the Commission's prior orders of
14 requiring rate credits to establish net benefit for PGE's ratepayers. *Compare, In re Enron Corp.*,
15 *supra*, (Commission determining "ratepayer benefit" provided by \$105 million in payments to
16 Oregon ratepayers); *In re Scottish Power plc*, Order No. 99-616; UM 918, 1999 Ore. PUC LEXIS
17 15, *32- *33 (October 6, 1999) (Commission found "benefits" to ratepayer in present delivery of
18 a \$51 million rate credit over four years.) The Commission should order rate relief in the amount
19 of at least \$73 million to preserve the status quo benefits promised to ratepayers as part of
20 Condition 20 under Order 97-196. COP/100/Cuthbert/12. Additional rate relief in the range of
21 \$100 million is necessary to provide a net benefit to PGE's ratepayers sufficient to meet the legal
22 standard of ORS 757.511. COP/100/Cuthbert/24-26; COP/110/Cuthbert/2.

23 Enron and PGE suggest that rate credits are not appropriate because the issuance of new
24 PGE common stock will not create any "administrative cost savings or synergies". Application,
25 p. 26. This aspect of requiring rate credits was discussed in the Commission's recent
26 consideration of Texas Pacific Group's effort to acquire PGE. *Oregon Electric Utility Co.*,

1 *supra*, 2005 Ore. PUC LEXIS 99 at *71 - *73. However, the City's proposal is not based upon
2 measuring rate credits on that basis, and that one aspect is not dispositive of the statutory
3 requirement that the proposed transaction provide a net benefit to ratepayers. Rather, a rate
4 credit is needed to protect against the harmful impacts of Enron ownership and the loss of
5 protections for ratepayers under Enron ownership, and to meet the net benefit standard. A rate
6 credit would provide real, verifiable, quantifiable benefits to PGE ratepayers at the onset of the
7 transaction, not some potential benefits sometime in the unidentifiable future. PGE's ability to
8 fund rate credits at the levels suggested by the City is demonstrated by its recent statements to
9 bankers regarding its projected cash position. COP/110/Cuthbert/2. Furthermore, PGE's actions
10 demonstrate this ability as well, such as its recent \$150 million stock dividend payment to Enron.
11 COP/100/Cuthbert/12.

12 **e. The stipulated conditions do not address the assertion in the**
13 **Application that PGE owns all attributes of corporate goodwill, past,**
14 **present and future.**

15 The Application asserts that all goodwill in PGE belongs to the company, suggesting that
16 any increases in the value of goodwill occurring since the Enron merger belong to Enron and
17 none belongs to the ratepayers. Application, p. 27, fn. 36 (citing Condition 20 of Order No.
18 97-196.) "Goodwill" is merely another means by which to claim that the company may
19 recognize a higher rate base or value than can be justified by the actual, depreciated value of
20 physical investment. PGE appears to be staking out a position for future proceedings such as a
21 future corporate acquisition.

22 The Application does not note, and the Joint Testimony does not clarify, that the \$105
23 million was not fully paid. There is no corresponding condition in the Stipulation that
24 contradicts and corrects this erroneous assertion. However, PGE has otherwise noted that at least
25 \$73 million of that amount was never paid by Enron to PGE. COP/100/Cuthbert/12;
26 COP/104/Cuthbert/3.⁹

⁹ Portland General Electric Company, Form 10-K, page 188 (March 11, 2005). Portland General Electric Company,
Form 10-K, page 188 (March 11, 2005).

1 In addition, PGE operates as a regulated utility. It has no independent competitive market
2 place based goodwill. Any goodwill attributable to PGE is a result of Commission regulation
3 and the comparative balancing of shareholder and ratepayer interests. The ratepayers share
4 equally with Enron in any goodwill that attaches to PGE as a regulated company.

5 Left unanswered, PGE will likely assert in possible future merger reviews that the
6 Commission has “accepted” this bald assertion by “approving” the Application. Without a
7 corrective condition clarifying the shared goodwill between the ratepayers and the shareholders,
8 this aspect of the Application harms the ratepayers and fails the public interest and net benefit
9 standards. The Commission should reject the notion that PGE is entitled to all aspects of
10 corporate goodwill. The ratepayers have not received the funds that they were promised in
11 exchange, and therefore consideration for the acquisition has failed. If the Commission
12 determines that PGE has completed performance of its side of this “bargain”, the Commission
13 should allocate any increases in the goodwill since PGE’s “acquisition” to the ratepayers.

14 **f. The Commission should include a condition that PGE enter into a**
15 **modern franchise with the City of Portland, in place of the asserted**
16 **claims of operating under franchises granted in the 1800’s.**

17 The City of Portland has responsibilities under its home rule charter to oversee the
18 activities of utilities within its boundaries through the establishment of franchises and the
19 issuance of permits, and is also responsible for the orderly management of public rights of way
20 within its boundaries. The Portland City Council has exercised these responsibilities in adopting
21 Portland City Code (“PCC”) 17.24.010(A), which requires that permits be obtained from the City
22 Engineer before any public utility may work in the public right-of-way. PCC 17.24.010(B)
23 restricts the issuance of street construction permits to persons holding current franchises or other
24 grant of authority from the City. The Commission has regulatory oversight authority and
25 enforcement responsibilities under ORS 756.160 regarding utility compliance with municipal
26 ordinances.

PGE claims to operate in the Portland streets under color of five franchises issued during

1 the nineteenth century, including: Ordinance No. 107 issued by the City of Albina to the Albina
2 Light & Water Co. on or about March 5, 1890; Ordinance No. 595 issued by the City of East
3 Portland to H.A. & C.P. Hogue & D.H. Jones on or about June 29, 1887; Ordinance No. 984
4 issued by the City of East Portland to Geo. W. Brown on or about June 25, 1891; Ordinance No.
5 3538 issued by the City of Portland to Geo. Weidler on or about September 8, 1882; and,
6 Ordinance No. 4932 issued by the City of Portland to P. F. Morey on or about October 7, 1886.
7 These ordinances do not identify specific terms or duration. Oregon courts have determined that
8 local grants of perpetual franchises are against public policy and void. *Newsom v. City of Rainier*,
9 94 Or 199, 201-202, 185 P 296 (1919) (grant of right to build and maintain water mains “so long
10 as this contract shall remain inviolate” was invalid as a perpetual franchise).

11 To address this issue, the Commission should include as a condition of approving the
12 proposed transaction that PGE conclude franchise negotiations with the City of Portland on a
13 modern franchise in place of its claims of authority under franchises granted back in the days of
14 coke gas and DC electric street lights.

15 **III. CONCLUSION**

16 In examining the Application as modified by the stipulated conditions, the Commission
17 must find it wanting in several aspects. The Applicants have not demonstrated how the issuance
18 of new PGE common stock will serve the public interest. They have only shown how it will
19 serve the private interests of Enron and its creditors. Furthermore, the Applicants have not
20 proven how the proposed issuance of new PGE common stock serves any of the purposes
21 identified in ORS 471.415. Nor have the Applicants shown how the proposed transaction serves
22 any of PGE’s purposes as a public utility.

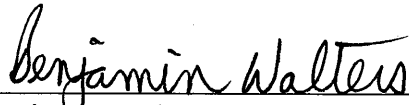
23 Should the Commission answer these threshold questions in PGE’s favor, the
24 Commission must then examine whether the Application, together with the stipulated conditions,
25 provides net benefits to ratepayers and protects Oregon citizens as a whole. The City of Portland
26 believes that, as submitted to the Commission, that the Application will not provide net benefits

1 to PGE ratepayers. In order to address the deficiencies, the City has recommended several
2 additional conditions that would serve to assure that ratepayers would be provided net benefits.

3 Dated this 16th day of September, 2005.

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Respectfully submitted,



Benjamin Walters, OSB #85354
Senior Deputy City Attorney
Of Attorneys for City of Portland

CERTIFICATE OF SERVICE

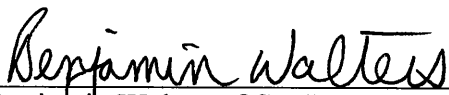
I hereby certify that I served an original and five copies of the foregoing City of
Portland's Objections to Approval of Application with Stipulated Conditions to:

Oregon Public Utility Commission
Filing Center
PO Box 2148
Salem OR 97308-2148

on the 16th day of September, 2005, by electronic copy to the PUC Filing Center, e-mail address:
puc.filingcenter@state.or.us and by mailing the original and five copies of said document,
contained in a sealed envelope with postage paid, and deposited in the post office at Portland,
Oregon on said day.

I further certify that I served a copy of the foregoing City of Portland's Objections to
Approval of Application with Stipulated Conditions on the following Persons by electronically
mailing copies to the individuals on the attached Service List.

DATED this 16th day of September, 2005.


Benjamin Walters, OSB #85354
Deputy City Attorney
Of Attorneys for City of Portland

SERVICE LIST (UF 4218/UM 1206)

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