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June 13, 2005

**VIA ELECTRONIC MAIL & FIRST CLASS MAIL**

Ms. Carol Hulse  
Administrative Hearings  
Oregon Public Utility Commission  
550 Capitol St. NE, Suite 215  
P. O. Box 2148  
Salem, Oregon 97308-2148

Re: *UE 88/DR 10/UM 989*

Dear Ms. Hulse:

Enclosed for filing in the above-referenced docket are the original and five copies of Portland General Electric Company's Motion to Strike.

Very truly yours,

  
Jeanne M. Chamberlain

JMC/ceb  
Enclosure  
cc (w/enc.): Service List

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

**DR 10, UE 88, UM 989**

In the Matters of

The Application of Portland General Electric  
Company for an Investigation into least Cost  
Plan Plant Retirement, (DR 10)

Revised Tariffs Schedules for Electric Service  
in Oregon Filed by Portland General Electric  
Company, (UE 88)

Portland General Electric Company's  
Application for an Accounting Order and for  
Order Approving Tariff Sheets  
Implementing Rate Reduction. (UM 989)

**PORTLAND GENERAL ELECTRIC  
COMPANY'S MOTION TO STRIKE**

Pursuant to OAR 860-013-0031 and 860-014-0045, Portland General Electric Company ("PGE") moves to strike portions of Dan Meek's testimony<sup>1</sup> and Exhibit 206 attached to Mr. Meek's testimony. The extrinsic documents to which Mr. Meek refers are unreliable hearsay and therefore inadmissible.

**I. The Commission Rules Define Admissible Evidence.**

OAR 860-014-0045(1) governs the admissibility of evidence in Commission proceedings. The Commission rule provides that relevant evidence must both (i) tend to make the existence of any fact at issue in the proceeding more or less probable than it would be without the evidence, and (ii) be of the type "commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." *Id.* (emphasis added). Commission Order No.

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<sup>1</sup> URP 204/10, lines 5 – 32.

04-597 defines the "facts at issue" as the ratemaking question "What rates would have been approved in UE 88 if ORS 757.35 had been interpreted to prohibit a return on Trojan." Commission Order 04-597 at 6. The Commission may also exclude evidence "if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or by undue delay." OAR 860-014-0045(1)(c).

## **II. The Willamette Week Article and TPG Documents are Inadmissible Hearsay.**

Mr. Meek's testimony quotes a Willamette Week article<sup>2</sup> and refers to a document created by the Texas Pacific Group (the "TPG Document") to argue that PGE "over-earned" during the period following the Commission's UE 88 final order. URP 204/10. This testimony (URP 204/10) and the associated exhibit should be stricken.

As a threshold matter this material is irrelevant to the facts at issue. The relevant question for this phase is what rates would the Commission have authorized in UE 88 if it had known that rates could not include a return on Trojan. Commission Order No. 04-597 at 6. PGE's actual earnings after UE 88 could not possibly bear on that ratemaking question. Such after-the-fact information could not have been known by the Commission and could not have affected the Commission's ratemaking decision. It should be stricken from the record for this reason alone. OAR 860-014-0045(1).

In addition, the testimony and documents should be excluded because they are "not of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." OAR 860-014-0045(1). Mr. Meek's earnings claims involve multiple levels of hearsay. Mr. Meek quotes from the Willamette Week article which quotes the TPG Document. TPG and Willamette Week are not parties in this docket and neither is subject to discovery or cross examination. While some types of hearsay may be admissible in administrative proceedings, Oregon courts have concluded that *unreliable* hearsay should be excluded. *Reguero v. Teacher*

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<sup>2</sup> URP 206, attached as Exhibit 1.

*Standards and Practices*, 312 Or 402, 418, 822 P2d 1171 (1991); *Cole/Dinsore v. DMV*, 336 Or 565, 585, 87 P3d 1120 (2004).<sup>3</sup>

To determine whether hearsay is reliable enough for admission in an administrative proceeding, the Oregon Supreme Court has identified a number of factors, all of which point to excluding the evidence in this case:

- the importance of the facts sought to be proved by the hearsay statement;
- the consequences of exclusion;
- the alternative to relying on the hearsay evidence;
- the state of supporting evidence; and
- the degree of lack of efficacy of cross-examination with respect to the hearsay statement.

*Reguero*, 312 Or at 418.

The fact URP seeks to prove – alleged "over-earning" – is irrelevant to this proceeding so the fact to be proven is unimportant and exclusion of the hearsay will cause no prejudice. In addition, more reliable information on the topic is readily available. Mr. Meek concedes that alternatives for the Willamette Week article are available but Mr. Meek elected not to submit this more reliable evidence. With respect to the fourth factor, Mr. Meek offers no other supporting evidence.

The most important factor demonstrating the unreliability of the Willamette Week article and the TPG document is the unavailability of cross examination to determine the assumptions used in the TPG analysis. Given that TPG is not a party, there is no way to know whether the

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<sup>3</sup> The *Reguero* and *Cole/Dinsore* decisions involved administrative proceedings governed by the Oregon APA provision ORS 183.450. While the Commission is exempt from ORS 183.450 generally (ORS 183.315(6)), the substantive standard is the same: is the evidence of the type "commonly relied upon by reasonably prudent persons in conduct of their serious affairs." Compare ORS 183.450(1) with OAR 860-014-0045(1).

article accurately reflects the content of TPG's analysis nor how the analysis was constructed.

The article cannot be cross-examined.

Finally, Mr. Meek's testimony is inadequate for other reasons. Mr. Meek's submission of Exhibit 206 fails to comply with OAR 860-014-0060 which requires the identification and segregation of relevant from irrelevant information. The Willamette Week article contains numerous claims that have no place in this proceeding. For example, the article contains quotations from Mr. Meek and State Senator Rick Metsger questioning the Commission's ability to regulate utilities. Such irrelevant material will encumber and confuse the factual record in this proceeding. It should not be admitted into evidence.

#### IV. Conclusion

For the reasons stated above, the ALJ should strike the applicable part of Mr. Meek's testimony and Exhibit URP 206.

DATED this 13<sup>th</sup> day of June, 2005.

PORTLAND GENERAL ELECTRIC  
COMPANY



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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I served the foregoing PORTLAND GENERAL ELECTRIC COMPANY'S MOTION TO STRIKE by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to each party listed below, deposited in the U.S. mail at Portland, Oregon.

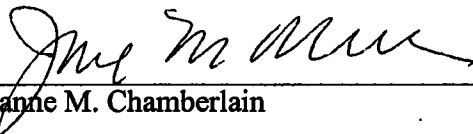
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DATED this 13<sup>th</sup> day of June, 2005.

  
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