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October 27, 2005

BY E-MAIL AND FIRST CLASS MAIL

Oregon Public Utility Commission
Attention: Filing Center
550 Capitol Street, NE #215
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 are an original and five copies of the Opening Brief of the City of Portland, Oregon. Copies have been served to all parties on the UM 1206 Service List.

Very truly yours,

Benjamin Walters

Benjamin Walters
Senior Deputy City Attorney

BEW:lw
Enclosures
cc: Service List for Docket UF 4218/UM 1206

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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, as Disbursing Agent, on behalf of the RESERVE FOR DISPUTED CLAIMS Application for an Order Allowing the Reserve for Disputed Claims to Acquire the Power to Exercise Substantial Influence over the Affairs and Policies of Portland General Electric Company Pursuant to ORS 757.511	UF 4218/UM 1206

OPENING BRIEF OF THE CITY OF PORTLAND, OREGON

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October 27, 2005

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I. INTRODUCTION

The Oregon Public Utility Commission is considering the Joint Application of Portland General Electric, (PGE), Enron and Stephen Forbes Cooper, LLC, (together, the "Applicants"), to create 62,500,000 million shares of new PGE common stock, replacing the existing PGE stock now held by Enron. The Applicants propose to issue roughly two-thirds of those new shares immediately, with one-third of this amount to be released to Enron's creditors holding allowed bankruptcy claims. The remaining two-thirds are to be deposited into a trust fund to be eventually released to Enron's creditors as the remaining claims are evaluated. This evaluation period will last for an indeterminable time period. During this time, the Enron board of directors will also oversee the trust fund.

Until 2007, when the shareholder elections are held on a slate of candidates yet to be identified, the same roster will also serve as PGE's board of directors, an interlocking triptych of corporate boards. *See*, COP/100/Cuthbert/7 ("[The Reserve] will be overseen by Steven Forbes Cooper LLC and other members of the Enron Board of Directors"); Portland General Electric Application to Nuclear Regulatory Commission for Indirect Transfer of Materials License p. 11 (July 12, 2005) NRC Accession Number ML051990308 (describing the process being employed for identifying new, additional members of PGE's board). A new board of directors will not possibly be put into place until at least 2007, and during that time, the existing board will remain in place:

> Since the Company's fiscal year ends on December 31, the Company will generally schedule its annual meeting of shareholders for the election of directors between March and June of each year. The annual meeting is generally held between 30-45 days after a proxy statement is filed with the SEC and mailed to shareholders. If the distribution of PGE's new common shares

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> occurs in 2006 as is currently anticipated, PGE would not be required to hold its first annual meeting of shareholders until 2007.

PGE-SFC (RDC)/300/Rogan-Palmer/9.

Steven Forbes Cooper LLC will exercise more than merely "substantial influence" over PGE. By having persons in common on both PGE's Board of Directors and on the board overseeing the predominate shareholder, there will be an absolute alignment of control.

A. The proposed transaction must be tested by application of the controlling statutory criteria.

1. The Applicant has the burden of proof.

The application pending before the Commission consists of two distinct parts. In UF 4218, Portland General Electric is applying to the Commission under ORS 757.410 *et seq.* to obtain the Commission's permission to issue new common stock. In UM 1206, Steven Forbes Cooper, LLC is seeking the Commission's approval to exercise influence under ORS 757.511.

"The phrase 'burden of proof' has two meanings: one to refer to a party's burden of producing evidence; the other to a party's obligation to establish a given proposition in order to succeed." *In re Portland General Elec. Co.*, UE 115, Order No. 01-777, 212 PUR 4th 1, 2001 WL 1346291 (August 31, 2001), *reconsideration denied*, Order No. 01-988, 213 PUR 4th 376, 2001 WL 1708039 (November 20, 2001). *See also, Harris v. SAIF*, 292 Or 683, 690, 642 P2d 1147 (1982) ("The general rule is that the burden of proof is upon the proponent of the fact or position, the party who would be unsuccessful if no evidence were introduced on either side."); *Salem Decorating Center, Inc. v. National Council on Compensation Ins.*, 116 Or App 166, 840 P2d 739 (1992) (the party seeking redress and whose claim would fail if neither party introduces any evidence has the burden of proof).

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"The Commission's role is to weigh the evidence presented on each issue in the case and determine where the preponderance lies…. [The Commission makes] that decision on the record as a whole." *In re U.S. West Communications, Inc.*, UT 125, Order No. 97-171 at 8, 178 PUR4th 123, 1997 WL 464114 (May 19, 1997).

The Applicants have the burden of production and persuasion on how these various statutory requirements have been met. *In re Oregon Electric Utility Co., LLC*, Order No. 05-114, UM 1121, 240 P.U.R.4th 141, 2005 Ore. PUC LEXIS 99, *37, n 12 (March 10, 2005). Portland General Electric and Steven Forbes Cooper LLC must establish by a preponderance of the evidence that issuance of new common stock meets the applicable statutory criteria, and that it will provide net benefits to PGE ratepayers and not cause harm to Oregonians. The Commission can not approve the Application without PGE and Steven Forbes Cooper meeting their burden of production and burden of persuasion. These statutory and evidentiary requirements can't just be stipulated away.[1]

B. The record assembled in this proceeding does not demonstrate that the Applicant's have met their statutory burden.

The assembled record does not demonstrate that the proposed transaction will provide net benefits to PGE's ratepayers and that it will not impose a negative impact upon Oregon.[2] The private benefits that will be enjoyed as a result of the proposed transaction can not be confused

[1][1]"[T]he burden of [proof] is borne by the utility throughout the proceeding. Thus, if PGE makes a proposed change that is disputed by another party, PGE still has the burden to show, by a preponderance of evidence, that the change is just and reasonable. If it fails to meet that burden, either because the opposing party presented compelling evidence in opposition to the proposal, or because PGE failed to present compelling information in the first place, then PGE does not prevail."

In re Portland General Elec. Co., UE 139, Order No. 02-772, 222 PUR4th 139, 2002 WL 31618297 (October 30, 2002).

[2] The City of Portland has previously filed a brief in opposition to the Stipulation. The City again asserts the arguments laid out in its brief, and incorporates them by reference.

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with public benefits, as required under ORS 757.511. The statute contemplates public benefits such as reasonable rates, reasonable return for the utility, long-term stability in ownership, protection of local jobs, superior customer services, and management focused on local priorities, local families and local businesses – tangible and substantial benefits for Oregon citizens and PGE's customers.

The benefits identified by the Applicants are inadequate. The proposed transaction, together with the various accompanying conditions, provides "benefits" that fall into roughly three categories: 1) They are speculative as to potential future effects for ratepayers; 2) They are *de minimis* in terms of value to ratepayers, or potentially transitory (*e.g.*, a stand-alone utility paying taxes); or, 3) They will otherwise occur even in the absence of the proposed transaction.

The Oregon Legislature has directed the Commission to "prevent unnecessary and unwarranted harm to [the utility's] customers." ORS 757.506(2). Under ORS 757.511(3), the Commission may approve a merger application only after determining that it will serve the public interest. The Commission must otherwise deny the application. In the order approving the merger, the Commission may include conditions addressing the applicant's satisfactory performance or adherence to specific requirements.

The Commission's first and foremost responsibility is to determine whether the statutory standards are met – only after that does the consideration of conditions enter into the equation. This statutory construct is clear and unmistakable. *Northwest Natural Gas Co. v. Oregon Public Utility Com'n*, 195 Or App 547, 99 P3d 292 (2004) (agency may not 'ignore[] the meaning of the words that the legislature used").

C. In considering whether to approve the Application, the Commission may weigh other conditions.

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The City has identified other conditions that will provide real, immediate benefits to PGE's customers, not potential benefits that may possibly be enjoyed at some future time. In its testimony, PGE offers the legal conclusion that "[t]he statute does not provide for consideration of counter-offers or competing proposals". PGE-SFC (RDC)/400/Piro/13, *citing* Order No. 05-114, page 16. However, as the Commission's staff has noted, the Commission actually reserved judgment on this question:

> [In UM 1121], the Commission reviewed its statutory authority to impose conditions under ORS 757.511(3). The Commission noted there was a possible ambiguity in the statute. Under one reading, the Commission must first approve the application as presented, and only then impose conditions. Under a second reading, the statute grants the Commission authority to place conditions on the application so that it meets the public interest test. The Commission decided not to resolve this possible ambiguity but declared it would not in any event issue a conditional order for the case at hand.

In re Midamerican Energy Holdings Company, Staff's Opening Comments, p. 2 (October 14, 2005).

The City of Portland has offered several conditions that it believes will serve to address the harms presented by the proposed transaction. If the Commission decides to proceed with consideration of approval of the Application, the City urges the Commission to consider adoption of its conditions.

II. UF 4218: CANCELING EXISTING PGE COMMON STOCK AND ISSUING NEW PGE COMMON STOCK DOES NOT MEET THE STATUTORY CRITERIA, NOR DOES IT SERVE THE PUBLIC INTEREST.

A. Why does Enron want to wash its PGE stock?

PGE's Application asks the Commission "for authorization to issue new common stock under ORS 757.410 et seq. and OAR 860-027-0030." Application, at p. 2. In order to proceed with the issuance of securities, PGE must show that the transaction either meets the statutory

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criteria under ORS 757.415 or that "the application of the law is not required by the public interest". ORS 757.412. PGE asserts that the transaction qualifies under ORS 757.415(1) "because it replaces common stock lawfully issued." Application, at p. 39. While PGE does not specify which of the six subsection of ORS 757.415(1) upon which it is relying, its argument uses the terminology under ORS 757.415(1)(c). PGE alternately suggests that the Commission "could find that the issuance is exempt from the requirements of ORS 757.410 to 757.480 under ORS 757.412 if the Commission finds that the application of those statutes is not required by the public interest." Application, p. 2, n. 5.

The Commission should ask the question, "Why has Enron filed an application to wash its existing PGE Stock holdings?" Why doesn't Enron simply distribute its existing PGE stock holdings to the Enron controlled Reserve and ultimately to Enron's creditors? What liability or perceived risk does Enron seek to evade by canceling its existing PGE stock? Why should the Commission be made a party to Enron's scheme and potentially put the public and PGE's customers at risk?

1. <u>It would be arbitrary and capricious to conclude that the issuance of 45 million shares of new common stock, with a potential market value in excess of $1 billion, would not result in "proceeds".</u>

The reason for denying Enron's application is simple and straightforward. Enron cannot have its PGE stock cancelled and new PGE stock issued to it because the Application fails to meet the requirements of ORS 757.415. Enron's one "small" problem is that ORS 757.415 does not contemplate cancellation of a public utility's stock and the reissuance of new stock to the same shareholders. The Application admits this, (Application, p. 2), and Staff concurs. Staff/100/Conway/11. The Applicants seek to avoid this conundrum by arguing that the statute

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does not require the Commission to approve this transaction.

The argument that is offered is that the Commission is not required to make any inquiry under ORS 757.415 because there will be no proceeds from this transaction: "[T]here are no "new" proceeds from the stock issuance because it is simply replacing the existing stock. See PGE's Application at 2." Staff/100/Conway/11. *See*, *also*, PGE-SFC (RDC)/400/Piro/15 ("[T]he Application requests is that the existing common stock representing all of the common equity be canceled and new common stock representing all of the common equity be issued.")

Despite these conclusory statements, there can be no real, substantive debate that the issuance of new common stock will generate "proceeds". Enron will be replacing the equity that it now holds with "new" common stock. Enron will enhance the volume of securities that it presently holds by almost forty-five percent. The new common stock will be released to the marketplace with a potential market value in excess of $1 billion. There is a value to the new shareholders of the stock being "washed' of potential, associated liabilities. For example, this would allow the owners of the new stock to argue that liabilities associated with the old stock (and the former owner) can not be visited upon the new owners, who are "disassociated" from the old liabilities. The conclusions in Staff's testimony are also at odds with statements made in the Application:

> The issuance of the New PGE Common Stock will replace in full the existing, "lawfully issued" PGE common stock, which will be canceled. In essence, PGE is refunding current obligations by "calling" the old equity and replacing it with new equity . . . As a publicly traded company, PGE will have access to the public equity market, something it does not have now.

Application, at p. 2 and p. 27

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Commission precedent indicates that net "proceeds" sufficient to trigger ORS 757.415 may be nominal. *In re Portland General Electric Application seeking authority to issue one share of $1 par Junior Preferred Stock*, UF 4192, Order 02-674, p. 2 (September 30, 2002) (requiring the company to file "the usual Report of Securities Issued and Disposition of Net Proceeds").[3]

The Commission can only reach the conclusion that there are no "proceeds" if it disregards the fact that there will be a net increase of approximately forty-five percent in the number of PGE shares trading in the market, that PGE will change from being a closely held company to one traded in the open market, that the creditors of Enron will be given new common stock as consideration for their claims, and that this stock will be untainted by prior association with Enron and its dominion over PGE.

Unlike in recent OPUC proceedings that considered the issuance of PGE securities, there is no evidence here that PGE's credit rating will suffer as a result of the Commission denying the request to issue new, additional common stock. *Compare*, UF 4192, Order 03-024. As the supporting testimony indicates, PGE has existing equity capital and it will "continue to have the common equity outstanding necessary to support its credit ratings and to provide working capital." PGE-SFC (RDC)/400/Piro/15. Hence, there is no evidence upon which to draw the inference that denying PGE's request to issue replacement stock may have subsequent cascading impacts upon PGE by reduced access to capital markets, increased borrowing costs or, ultimately, higher rates for customers.

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[3] *See also*, *In re Pacificorp*, Order No. 05-729; UF 4193(1), 2005 Ore. PUC LEXIS 286, *1 (June 7, 2005): "[T]he issuance of shares will provide both the flexibility to maintain proper capitalization ratios and access to capital on reasonable terms. The purposes for which the equity will be incurred are for the acquisition of utility property and the construction, extension, and improvement or maintenance of facilities and service, as permitted under ORS 757.415."

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The Commission may refer to the plain meaning of the statute to resolve this question. *Portland General Electric Co. v. Bureau of Labor & Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). (if the plain language of a statute is clear, further inquiry as to its meaning is unnecessary.) "Proceeds" may include "what is produced by or derived from . . . the total amount brought in". *Webster's Third New Int'l Dictionary*, 1807 (unabridged ed 1993). There will clearly be "proceeds" from the proposed transaction.

2. PGE has not identified how the public interest will be served by wholly exempting the proposed issuance of 45 million shares of new common stock.

The fallback position offered by the Applicants is that the proposed transaction is so unique "the public interest **requires** that the Commission judge the stock re-issuance on its merits, not by determining whether it fits within one of six specific purposes for the use of proceeds." Staff/100/Conway/11 (emphasis added). *See also*, PGE-SFC (RDC)/400/Piro/15 (arguing that no public interest would be served by applying ORS 757.415).

This is a remarkable suggestion. In other words, since the Legislature didn't see fit to authorize the Commission to consider, much less grant, the issuance of common stock under these circumstances, the Commission should find that the public interest requires approval in order to enable the Commission to grant it.

The Application does not cite facts showing that the public interest test identified by statute and administrative rule has been met. Instead, Enron asks the Commission to trust them. Does this sound familiar? Trust them by exempting their requested stock cancellation and reissuance scheme from statutory scrutiny. Shouldn't the Commission consider and worry about the public interest or even the Legislature's admonishment in ORS 757.405 that, "[t]he power of

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public utilities to issue stocks . . . is a special privilege . . ." As set forth in ORS 757.415(2)(b) issuance of stock must be narrowly limited to enumerated purposes. None of these purposes allow for washing Enron's PGE stock nor making the Commission a party to such scheme. Enron suggests that this is no big deal. Has Enron done anything since it acquired PGE to earn the Commission's trust or the public's? Look at Enron's history. Doesn't the public deserve to have Enron held to the specific standards set by the Legislature to protect the public?

There is no question that if Enron is held to the standards in ORS 757.400 *et seq.*, the Application must be denied. Only by exempting Enron's application from statutory compliance can Enron's stock scheme go forward. Of course, since the Legislature did not include a statutory provision that would allow the Commission to consider such an exemption, Enron requires the Commission to create its own exemption and then apply it to Enron's application. Enron does not explain why the Commission should accede to such a request; why it should ignore Legislative directives and the public interest; or why it should step outside its scope of authority granted by the Legislature to accommodate Enron's scheme.

Both Enron and Staff also try to stretch another statutory section to apply to this transaction, ORS 757.412. The two specific exemptions listed in ORS 757.412 no more fit Enron's stock scheme than does ORS 757.415. Subpart (1) of ORS 757.412 applies only if, "commission authorization would otherwise be required prior to the issuance, incurrence or assumption thereof." That does not work for Enron because there are no other statutory provisions authorizing the grant of Enron's application, other than ORS 757.415, which is the provision for which Enron wants to be exempted. Subpart (2) of ORS 757.412 applies only to exempt from securities regulation, "[a]ny public utility or class of public utilities." That does not work either (unless the Commission decides to exempt PGE from all future Commission

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securities regulation, which indeed neither Enron nor Staff go so far as to request).

The suggestion that the Commission now make up new requirements, wholly exempting this situation, is at odds with the directives given by the Oregon courts to administrative agencies. The Oregon courts have previously rejected legislative delegations that provided administrative agencies with "sky is the limit" authority.

> It is well established that the legislature cannot grant an administrative agency the power to regulate unless some standard or yardstick is provided as a guide to the administrative agency; in other words, the authority to regulate may not be left wholly to the whim and caprice of such agency.

Demers v. Peterson, 197 Or 466, 469-70, 254 P2d 213 (1953).

Under this case law, the Legislature may not turn over to the agency carte blanche authority to determine whether to regulate or not to regulate. There is only one means by which that authority may be preserved from constitutional infirmity: the agency must act to draw boundaries around the scope of its discretion. A broad delegation of legislative authority places upon the administrative agency the responsibility to establish reasonable standards for applying the law. *Sun-Ray Dairy v. OLCC*, 16 Or App 63, 70, 517 P2d 289 (1973). The court held that a legislative delegation of power in broad statutory language such as the phrase "demanded by public interest or convenience" placed upon an administrative agency a responsibility to establish standards by which that law was to be applied.

Staff's testimony highlights the fact that ORS 757.412 provides a possible exemption from the regulatory statutes. Perhaps the scope of this exemption is broad; perhaps it is narrow. The problem is that the Commission has been given an undefined level of discretion by the Legislature, and the Commission has failed to set parameters around that discretion.

ORS 757.412 has not apparently been actually applied in any other proceedings before

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the Commission. Northwest Natural previously asked that the Commission exempt a line of credit of $75,000,000. *In re Northwest Natural*, Order No. 04-231; UF 4205, 2004 Ore. PUC LEXIS 191 (April 29, 2004). Adopting staff's recommendation in that proceeding, the Commission declined the company's invitation. Given that the Application seeks approval for the issuance of new PGE common stock with a potential market value in excess of one billion dollars, the order of magnitude is significantly greater in the current circumstances.[4] The suggestion to exercise extra-jurisdictional authority to accommodate a stock washing scheme which is admittedly "so unique" makes no sense, particularly in the context of the Commission's charge to otherwise protect the public's interest.

B. The issuance of new PGE Common Stock serves private interests, not the public's interest.

Enron seeks a "Get out of Jail Free" jurisdictional card from the Community Chest. What is the purpose identified for issuing new common stock in PGE? The record is mostly silent in this regard, with only one cryptic explanation, provided in Enron's Rebuttal Testimony from Mitchell S. Taylor:

> I am informed by counsel that the issuance of the New PGE Common Stock was structured to use the exemption from registration under the Securities Act of 1933 provided by Section 1145 of the Bankruptcy Code. See footnote 26 of the Application. 62.5 million shares of New PGE Common Stock was selected as the appropriate number of shares to issue because that is the number of shares that the financial advisor for the Debtors believed would yield an attractive per share market price at the time the New PGE Common Stock began public trading.

[4] Research of public databases reveals only one other apparent instance in which the Commission has been asked to apply the wholesale exemption. *In re Cascade Natural Gas request for exemption from any and all provisions of ORS 757.400 to 757.480, pursuant to ORS 757.412*, UF 4212. While filed in November, 2004, the status of the application is unclear. There is no reported disposition of the application, nor any pending schedule indicated for this filing.

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PGE-SFC (RDC)/400/Taylor/7-8.

Not only is this statement hearsay, based upon some conclusions drawn by some unnamed financial advisor, this testimony fails to show how the public interest is being served by the issuance of new Common Stock.

The Applicants otherwise suggest that the issuance of the new Common Stock is compelled by Enron's reorganization plan, as approved by the bankruptcy court: "These dockets implement **the Plan's** arrangements for Holders of Allowed Claims to receive equity ownership in PGE as part of the distribution of Enron's estate in satisfaction of their claims against Enron." Joint/100/2 (emphasis added); "The issuance of the New PGE Common Stock and the Reserve's temporary ownership of a significant percentage of that stock are **the** process by which PGE will become a stand-alone public utility" Joint/100/2 (emphasis added); "[I]ssuance of the New PGE Common Stock . . . is **the only remaining path** in the Plan for Holders of Allowed Claims to receive the value represented by the PGE common equity that Enron now holds." Joint/100/5 (emphasis added).

The City disagrees.

First, Section 1145 of the Bankruptcy Code does not require cancellation of Enron's PGE stock and reissuance to Enron in order to obtain an exemption from registration under the Securities Act of 1933. The exemption to the Bankruptcy Code cited by Mr. Taylor would apply to the existing common stock, as well as to the new common stock. *See* 11 U.S.C. § 1145(a)(1)(A). The exemption simply provides for an exemption from registration for a debtor's stock so it can be distributed to creditors of the bankrupt estate without having to be registered. The only real justification provided in Mr. Taylor's statement is the conclusion drawn by an unnamed, unidentified "financial advisor for the Debtors" that the reissuance of new common

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stock "would yield an attractive per share market price at the time the New PGE Common Stock began public trading". That is the only real reason provided by the Applicants. This statutory argument is a red herring, providing no substantive justification for approving Enron's application.

Second, if Mr. Taylor's testimony is taken on face value, this proceeding and the enormous investment of time, energy and money by the Commission, Staff, and each of the public and private intervenors in responding to this application were apparently to satisfy a financial adviser's guess that bumping up Enron's PGE stock by a few million more shares would yield an attractive market price for the creditors. This stated purpose is frankly outrageous and an insult to the citizens of Oregon. Enron abuses the Commission's regulatory process on the advice of a financial adviser that doing so will hypothetically add a few cents a share to the creditor's potential stock holdings - an adviser not for PGE, but for Enron. The public interest of Oregon citizens and PGE customers was the farthest thing from the adviser's mind. This demonstrates anew that the application in Docket UF 4218 and the application in Docket UM 1206 (addressed below) have one purpose and one purpose only - to benefit Enron. In essence, the Enron proposes to have PGE issue new common stock, but gives no reason why the issuance of new stock is really necessary, gives no explanation why the specific number of new shares is required, and asks the Commission to find that the proposed issuance of new stock is in the public interest.

Third, the Commission has been given the impression from the Application and supporting testimony that the Bankruptcy Court ordered Enron to cancel its PGE common stock and issue new PGE common stock to its Debtors. *See*, *e.g.*, Application, p. 3 (suggesting that the Plan requires the issuance of New PGE Common Stock.) Again, this is not true.

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The Commission must first deal with the false impression that it is mandated by the Plan to approve the reissuance of stock. The Plan specifically anticipates the Commission's role, and acknowledges the possibility of regulatory disapproval. *See*, § 32.1(c)(iii) (Distribution of new, reissued PGE common stock is contingent upon "obtaining the requisite consents for the issuance of the [new] PGE Common Stock."); § 32.16(stating that existing shares will not be canceled until new stock is issued.) These aspects of the Plan are neglected by the Applicants in their descriptions to the Commission.

Enron's bankruptcy reorganization plan actually contemplates several alternatives, including the transfer of existing stock **or** the sale of PGE as an on-going integrated entity. *See*, *e.g.*, Enron's Reorganization Plan, § 1.238 ("PGE shall be sold only as a going-concern and a vertically integrated electric utility, and not on a piecemeal basis.) The Plan provides for the transfer of **either** the existing PGE common stock or the newly issued replacement securities. *See*, *e.g.*, § 1.192 (defining assets of the PGE Trust as including either existing or replacement common stock "**in lieu thereof**"); § 1.1.93 (providing that the "Trustee shall manage, administer, operate and liquidate the assets in the PGE Trust, either the existing PGE Common Stock or the PGE Common Stock, **as the case may be**") (emphasis added); § 1.196 (defining PGE Trust Interests as including both); § 1.238 (defining Sale Transaction as including existing stock or new replacement shares); § 1.270 (defining Value to include either existing stock or new replacement shares). The conclusion is clear, the Plan does not insist that only replacement stock will suffice. The Plan permits Enron to distribute its existing PGE common stock to its Debtors (or to a PGE Trust for the benefit of the Debtors). *See*, Application, Exhibit 13, Exhibit 12, and Exhibit 6. The stock cancellation scheme was just one of a number of options Enron could choose under the various Court orders. Enron chose not to distribute its existing PGE common

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stock (or sell PGE, another option permitted under the Court's orders), and instead filed this flawed Application.

The Commission should refuse to be a party to this stock washing scheme. The Commission must deny Enron's application in Docket UF 4218.

III. UM 1206 – The Exercise of Substantial Influence over PGE by Stevens Forbes Cooper, LLC will not Provide Benefits to the Utility's Customers

A. Steven Forbes Cooper, LLC must show that the proposed transaction will benefit PGE's customers, and will not negatively affect Oregonians.

Under ORS 757.511(3) "[t]he applicant shall bear the burden of showing that granting the application is in the public interest." The Commission recently confirmed the standards it applies for consideration and approval of an application under ORS 757.511:

> The meaning of "serve the public utility's customers in the public 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 two-pronged legal standard under ORS 757.511(3). After reviewing the text and context of the statute, the Commission "read the verb 'serve' to indicate a net benefit standard for merger approval." See Order No. 01-778 at 10. The Commission went on to state that providing net benefits is a specific way to cure the general concern enunciated in ORS 757.506 that a transaction could harm customers. The order then set out a second requirement: "in addition to finding a net benefit to the utility's customers, we must also find that the proposed transaction will not impose a detriment on Oregon citizens as a whole." . . . [W]e adhere to the "net benefits" standard established in Order No. 01-778.

In re Oregon Electric Utility Co., LLC, Order No. 05-114, UM 1121, 240 P.U.R.4th 141, 2005 Ore. PUC LEXIS 99, * 39 to *41 (March 10, 2005).

"[I]n addition to finding a net benefit to the utility's customers, [the Oregon Public Utility Commission] must also find that the proposed transaction will not impose a detriment on Oregon citizens as a whole." *Legal Standard for Approval of Mergers*, Order No. 01-778, 212 PUR 4th 449, 2001 WL 1285993 (2001). The Commission "will consider the total set of concerns

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presented by each merger application in determining how to assess a net benefit." *Id*.

B. The comparator to apply to the proposed transaction is the present-day PGE, with ratepayers enjoying the current benefits of the Enron merger conditions.

The Commission must decide the question of "what to compare". In UM 1121, the Commission decided "to take into account the current transitional nature of PGE's ownership, [by comparing] Applicants' proposal to PGE as a separate and distinct entity, which would function as PGE operates today." *Oregon Electric*, *supra*, 2005 Ore. PUC LEXIS 99, at * 43 to *44. In considering PGE as it functions today, the Commission must consider the beneficial aspects of the protections afforded to the ratepayers under the stipulated conditions approved by the Commission in Enron's acquisition of PGE in 1997. *In re Enron Corp.*, Order No. 97-196, UM 814, 177 P.U.R.4th 587, 1997 WL 406191 (June 4, 1997); COP/100/Cuthbert/4-5. The proponents agree that the comparator should be "to how PGE operates today with the protections for customers of the conditions included in Order No. 97-106." Joint/100/12.

A significant portion of the Application is spent arguing that the loss of the Enron merger conditions will not impose a significant burden upon ratepayers. Application, at pp. 23-27. The Stipulation and the supporting testimony are mostly devoted to replicating, in some fashion, the current conditions. In combination, these aspects reveal that the ratepayers do enjoy beneficial aspects from the Enron merger conditions, benefits which the ratepayers will lose as a result of the proposed transaction. This comparator is appropriate given the benefits and protections that are currently afforded to ratepayers that will go away if the proposed transaction is approved.

C. The Applicants have not adequately addressed the structural shortcomings nor the overhanging risks to ratepayers that remain from Enron's ownership.

In the Application, Enron and PGE have asserted that the proposed transaction will pose

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no risks to PGE's customers because the company "will not be subject[ed] to any new debt or liability." Application, at p. 27. Because this characterization is forward-looking, it fails to acknowledge the existing liabilities that have been imposed upon PGE. However, these "sunk costs" cannot be ignored. The Application also fails to acknowledge the shortcomings of the proposed transaction. The Commission may not indulge this myopia. Among the Commission's other responsibilities, the Oregon Legislature has directed the Commission to "prevent unnecessary and unwarranted harm to [the utility's] customers". ORS 757.506(2). "[U]sing the evidence in the record, [the Commission is] permitted to draw rational inferences of possible or actual harms that could affect PGE and its customers." UM 1121, Order 05-114, 2005 Ore. PUC LEXIS 99, *48.

The proposed transaction creates organizational structures that present risks to ratepayers. In the short-term, extending out to sometime in 2007 or later, the makeup of PGE's board will have significant overlap, if not complete identity, with the board overseeing the trust fund in which the PGE stock will be deposited. The trust fund board will have fiduciary obligations owing to Enron's creditors. Application, p.22, lines 13-15. This presents the significant probability of a misalignment between the short-term interests of creditors and potential "debtor vultures", and the long-term interests of utility customers. COP/100/Cuthbert/16. It is a fantasy that the board members will not succumb in their multiple roles to the pressures upon them from creditors and shareholders to wring short-term value out of the corporation through cash dividends or other forms of transfers. The Commission need not, and must not indulge this fantasy. The Commission should not assume that the same people, acting in dual roles, will maintain strict and absolute barriers between these roles.

Not everyone is assured that the liabilities faced by PGE as a result of Enron's ownership

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have been satisfactorily addressed. "PGE continues to face litigation risks from the Enron bankruptcy, including income taxes, retiree health benefits, and pension plans . . . As a member of Enron's control group, PGE may be at risk of having to meet some of these liabilities if Enron's estate fails to do so". PGE-SFC (RDC)/403/Piro/1 (evaluation by Standard & Poor's September 20, 2005). This also does not cover other potential liabilities, such as PGE's exposure to potential refunds in the California electricity market manipulations. COP/100/Cuthbert/11-13; COP/104/Cuthbert/7; COP/112/Cuthbert/2. "[Ultimately,] liability exposure to PGE could be large enough to drain PGE's financial capacity." COP/100/Cuthbert/21 (quoting Staff witness Thomas Morgan from the UM 1121 proceeding.)

> [T]he issue of risk is particularly significant and complex in a case involving an essential service provided to differing groups of customers. We represent, on the one hand, the interests of highly sophisticated industrial and commercial customers. Their size and experience may give them a strong negotiating position. On the other hand, we also represent residential customers who may be vulnerable because they have little knowledge of the utility business and little power to negotiate. The Commission must protect the welfare of all classes of customers.

In the Matter of the Application of Portland General Electric Company for Approval of the Customer Choice Plan, ORDER NO. 99-033; UE 102, 1999 Ore. PUC LEXIS 389, *23 - *24 (January 28, 1999)

D. As proposed, the distribution of new PGE common stock to the Reserve For Disputed Claims will not provide any public benefits, but merely private gains.

1. Who will own the company, and who will be in charge?

Who is taking over PGE? Enron does not know. Application, p. 14, lines 13-15 ("A search for new board members has already begun, with criteria including utility, business (customer service, information technology, etc.), and financial expertise, and a preference for Northwest residents.") Enron believes that by April 2006, it will know the names of the some of

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the creditors to whom it will distribute PGE's stock. PGE-SFC (RDC)/300/Rogan-Palmer/9. If Enron does not have any idea of who the potential owners may be, then how can the Commission make a determination under ORS 757.511 that it is permissible or appropriate to distribute PGE stock to unknown parties? It cannot. The Legislature requires the identity of the transferees as an essential pre-condition of an ORS 757.511 proceeding. When Enron can identify who is taking over PGE, it can come back and ask the Commission for approval. Until that time, the Application fails for lack of compliance with the statutory requirements.

2. What will be the net benefits to PGE's customers, and how will Oregon consumers be protected from harm?

The Commission must ask: where is the net customer benefit and public interest flowing from the proposed transaction? There is none. To avoid this conclusion, Enron proposes three new standards for the Commission to apply: the lack of risk test, the status quo test, and the stop keeping customer tax payments test. Application, p. 29, lines 5-18. *See*, *also*, COP/100/Cuthbert/9-10 (describing the "Three Reasons" offered by the Application.)

The Commission has never before been presented with as empty a statement of public interest and public benefit as presented in Section VII of the Application. The standard in Oregon used to be that an applicant bore the burden to affirmatively demonstrate how the public will not only be served by approving the transaction, but will actually receive a positive benefit. Enron apparently understands that if that standard were applied to them, their Application would fail. Hence, Enron proposes new standards.

Setting aside the lack of statutory authority (and the abrupt departure from the Commission's precedent), even a cursory examination of Enron's three new tests reveals their hollowness.

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Test One: There may be no risks for PGE's investors, but the proposed transaction presents risks for ratepayers.

The Applicant's first assert that "there are no risks to PGE or its customers as a result of the Plan for the New PGE Common Stock." Application, page 29, line 6. The underlying premise for this assertion seems to be that, merely by ending Enron's reign of manipulation, PGE's customers and the general public will be as at least as well off under new ownership. The Applicants' first test eliminates the net benefit standard altogether by assuming that the customers are already worse off, so any change is an improvement.

Test Two: Local may be better, but it is not a benefit to utility customers.

> Second, PGE will become a publicly traded stand-alone electric utility headquartered in Portland. The policy, direction and management decisions for PGE will be made by PGE's board of directors and management with full knowledge that PGE has no other business or purpose but to operate as a regulated public utility within the State of Oregon. As a publicly traded company, PGE will have access to the public equity market, something it does not have now.

Application, page 29, line 10.[5]

Since PGE is already headquartered in Portland, is already a stand-alone regulated utility, already has local management and its own corporate identity and board of directors, Enron in essence argues that keeping the status quo should substitute for public interest and net public benefit. However, the Commission just rejected the notion that obtaining the status quo through a local focus provides any benefits to ratepayers. Order No. 05-114, 2005 Ore. PUC LEXIS 99,

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5 In an apparent effort at easing its regulatory burden of proceeding, the Application seeks to conflate the statutory tests under ORS 757.412 and 757.511 by identifying the same rationales as to why the proposed transaction serves the public interest and how it will provide benefits to PGE's customers.

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*77.[6]

Enron also claims that PGE does not have access to the public equity market. Of course, PGE already has outstanding preferred stockholders independent from Enron, and accordingly already complies with public equity market reporting requirements imposed by the Securities Exchange Commission. Further, ORS 757.400, *et seq.*, currently provides PGE an open avenue to the public equity market. PGE may already apply to the Commission for authority to issue and register securities for sale, as long as it meets one of the purposes of ORS 757.415.

Merely having a single shareholder is not a barrier to a utility seeking to issue additional shares. *Compare*, *In re Pacificorp*, Order No. 05-729; UF 4193(1), 2005 Ore. PUC LEXIS 286, *1 (June 7, 2005) (approving the issuance of additional stock by PacifiCorp to its single equity holder). The Application falls short because it does not meet the qualifying criteria under ORS 757.415, not because PGE lacks access to equity. PGE does not need to distribute stock to Enron's Creditors to obtain access to public equity markets, when it already has that right. Again, Enron is attempting to champion the status quo in lieu of public interest and net benefit to customers.

Test three: Whether PGE will again pay state and local taxes is a moot question.

"[PGE] will not be consolidated for tax purposes with any other entity (other than with its wholly-owned subsidiaries) and will file and pay its taxes with and directly to all taxing authorities." Application, p. 29. In other words, Enron will stop taking the tax monies collected from PGE's customers and putting it in Enron's pocket (instead of paying the tax monies to the taxing authorities). Of course, paying taxes is an admirable act, and without question in the

6 After the City pointed out this flaw in its testimony, Enron later disavowed any intention of offering local focus as a beneficial aspect of the Application. PGE-SFC (RDC/500/Taylor. The words of the Applications speak for themselves.

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public interest. Yet, Enron did not and does not have to consolidate PGE with Enron for tax purposes. The Internal Revenue Code allows for an election, it does not mandate consolidation. In fact, for a short period of time during Enron's reign, Enron chose to de-consolidate PGE, and PGE filed and paid some taxes directly to taxing authorities (a small percentage of the tax monies collected from its customers). The concepts of consolidation and actually paying taxes are choices that can and have been manipulated by Enron for its benefit. These elections are wholly unrelated to its desire to distribute stock to its creditors. In the absence of the present Application, Enron could choose to de-consolidate and allow PGE to start paying taxes as a stand-alone entity, without filing this Application. A pledge to pay taxes starting some time in the future is an empty gesture.

The Application (as well as any of the supporting, supplemental filings) also failed to note the Legislature's passage of SB 408 which effectively eliminates the consolidated taxes scheme. Due to the adoption of a legislative remedy addressing Enron's past tax practices, test three is moot.

In addition, the Application fails to mention that PGE could still be consolidated for tax purposes with the Disputed Claims Reserve which will be PGE's majority stockholder for quite some time. If the Reserve has tax losses or inherits Enron's tax losses, it too can act like Enron and take PGE's tax monies and give it to the Creditors. *See*, IRS Field Service Memorandum, 1999-736, Vaughn (May 1, 1992). Likewise, if PGE's wholly-owned subsidiaries have tax losses, then the Reserve and the Creditors can again take PGE's tax monies and give it to the Creditors. *Id.*

Summing all three of Enron's new tests equals a big zero on the public interest and net benefit to customer requirement. Enron's arguments fail the test actually developed and applied

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by the Commission under ORS 757.511.

E. The conditions that PGE has agreed to in the Stipulation are insufficient to provide net benefits to PGE's customers.

The Stipulation is offered for the purposes of providing additional benefits sufficient to bring the Application up to the standards of ORS 757.511. Joint/100/4. Analysis of the stipulated conditions reveals the inaccuracy of this characterization.

1. <u>Promising that a "mere" shareholder will not impose direct charges upon PGE provides no benefits to ratepayers.</u>

Condition 1 provides that the Reserve will not impose any direct charges or allocations on PGE. *Stipulation*, at p. 3; Joint/100/6. However, the Reserve will merely be a shareholder in the company: "[the Reserve's] rights will be those of a shareholder that does not own 100% of PGE." Joint/100/6. If this statement is to be believed, the Reserve will have **no** rights to make any charges or allocations to the company. This is a hollow gesture with no substance, and provides absolutely no benefits to PGE's customers.

2. <u>Promising access to the company's books and records, authority already possessed by the Commission, provides no benefits to ratepayers.</u>

Under Condition 2, the Commission will have access to PGE's books and records, and to those of PGE's affiliates. *Stipulation*, at p. 3; Joint/100/6. "[T]he only affiliates PGE is likely to have will be subsidiaries." Joint/100/14; PGE-SFC (RDC)/400/Piro/2. The Commission already possesses authority to access the utility's books and records, and to oversee affiliate transactions. *See*, ORS 756.070 through 756.105; OAR 860-027 through 860-027-044. Merely recapitulating existing commission authority, already provided by the Legislature, provides no benefits to ratepayers.

Additionally, extending this type of condition is of questionable value unless the Commission is provided contemporaneous notice of intercompany transactions. If the company

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unilaterally determines that it is not required to report a transaction, then the Commission is presented with a *fait accompli*. *See, e.g.*, *In re Portland General Electric Company*, UI 211, Order No. 03-211 (April 10, 2003) (regarding intercompany receivable from Portland General Distribution Company).[7] Elsewhere, utility activities in intercompany transfers have been more significant, and the resulting financial difficulties for the utility have been of larger magnitude.[8] The Commission should not wait to be presented with such a situation before acting to prevent it. In order for this condition to be of any real value to utility customers, there must be a corresponding commitment by the regulatory agency to provide sufficient staffing and resources to be able to monitor the company's activities so that problems are identified before they become significant:

> [E]ffective oversight cannot be taken for granted. Regulatory agencies must be diligent not only in enforcing their rules and statutory authorities, but in looking for new instances of questionable accounting or manipulative behavior. Potential problems are not limited to the financial interactions between the utility and its holding company, but also concern how costs are apportioned between affiliates. The increased presence of companies in other energy fields (gas or oil, for

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[7] Gail Kinsey Hill, "Debt owed to PGE because of links with Enron unit unsettles regulators", *The Oregonian* (April 2, 2003) < http://www.oppc.net/press/2003-04-03_debt_unsettles_regulators.html > ("'This is one of several episodes in which the company did not adhere to accounting rules, and played a little fast and loose with what was going on,' said Joan Smith, one of three Oregon public utility commissioners.")

[8] "Consider the case of Westar Energy of Topeka, Kan. Last month, the Kansas Corporation Commission, the state's utility regulator, took the unusual step of ordering the company not to cause harm to its two Kansas utilities, Kansas Gas & Electric and Kansas Power & Light. The directive came after regulators found that Westar had quietly shifted more than $1.95 billion of debt onto the utility side of the business, by arranging intercompany loans and other means. The commission says it wants complete legal and financial separation of Westar's utilities from the rest of its enterprises, and especially from Protection One Inc. That Westar unit, a home-security firm, contributed $1.03 billion in losses and charges to Westar's bottom line from 1997 through this year's third quarter. Commission Chairman John Wine says utility holding companies "can go pretty far down the road of commingling utility assets before it gets detected." He says he is worried about the eventual impact on utility service and rates."
Rebecca Smith, "Beleaguered Energy Firms Try To Share Pain With Utility Units", *The Wall Street Journal* (December 26, 2002), quoted in American Public Power Association, "The Public Utility Holding Company Act: Its Protections Are Needed Today More Than Ever", 25 (February, 2003)
< http://energycommerce.house.gov/108/Hearings/03132003hearing818/twitty.pdf >

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example) or in completely unrelated fields will provide new opportunities for affiliate interactions.[9]

For example, the Commission could adopt formal schedules for examining the utility's books and records together with those of the affiliates, or criteria for triggering more in-depth examinations of the records.

3. Keeping books and records at the company's headquarters does not benefit ratepayers.

In Condition 3, PGE commits to keep its books and records in Portland, Oregon. *Stipulation*, at p. 3; Joint/100/6. PGE's Executive Vice President Finance, Chief Financial Officer and Treasurer otherwise testified that PGE will remain headquartered in Portland, Oregon. PGE-SFC (RDC)/400/Piro/1. To the extent that PGE's headquarters will be in one place, keeping its books and records in the same location, convenient to its management, is simply acting as a "prudent, well-managed utility would already be providing to its customers." UM 1121, Order No. 05-114, 2005 Ore. PUC LEXIS 99, *77.

4. A promise that PGE will not seek what the Commission would certainly disallow as a recoverable rate expense does not benefit ratepayers.

Condition 4 precludes PGE from including in its utility accounts any of the non-recurring costs of transitioning from a privately held company to a publicly traded corporation. *Stipulation*, at p. 4-5; Joint/100/6. These are shareholder-related costs that would not be recoverable from the ratepayers in any event.

5. Promising to maintain an equity ratio that is less than what PGE's Board has approved provides no benefits to customers.

Condition 5 continues the existing minimum equity level in PGE's capital structure at 48%. *Stipulation*, at p. 4; Joint/100/7. "Condition 5 of the Stipulation prohibits dividends that

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[9] American Public Power Association, "The Electric Utility Industry After PUHCA Repeal: What Happens Next?",

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would reduce PGE's percentage of common equity capital below target percentages." PGE-SFC (RDC)/400/Piro/11. The proponents argue that the "presence of minority shareholders, as well as coverage by the financial community" will reduce the ability of the Reserve or the creditors to influence PGE's board. Joint/100/15-16. Recent corporate misdealing at companies such as Qwest, Enron and Worldcom, seems to prove otherwise. These recent, spectacular examples serve to demonstrate how such "oversight" falls far short of the mark. Whether, and if, this condition will actually serve to benefit ratepayers is a matter of speculation. Given the indeterminate nature of this potential benefit, it should not be given significant weight as a benefit for ratepayers.

PGE's Board of Directors (essentially the same folks now applying to exercise "substantial influence" over PGE) have approved a corporate policy of targeting equity at 50%:

> PGE's financial objectives have been established by the Company's management and approved by its Board of Directors. Such objectives include the balancing of debt and equity to maintain a low weighted average cost of capital while retaining sufficient flexibility to meet the Company's financial obligations. PGE's objective is to maintain a common equity ratio (common equity to total consolidated capitalization, including current debt maturities) of approximately 50%. Achievement of this objective while sustaining sufficient cash flow is necessary to maintain acceptable credit ratings and allow access to long-term capital at attractive interest rates. PGE's common equity ratios were 59.4% and 58.2% at June 30, 2005 and December 31, 2004, respectively.
>
> * * *
>
> On July 19, 2005, PGE declared and paid a cash dividend of $150 million to Enron, the sole shareholder of the Company's common stock. PGE's equity ratio (as calculated under OPUC requirements) remains above the 48% level required by the Commission under terms of PGE's 1997 merger with Enron. PGE's common equity

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17 (October, 2005) < http://www.appanet.org/files/PDFs/APPAreportAfterPUHCARepeal.pdf >

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ratio also remains above the Company's 50% objective, as described above.[10]

The policy approved by PGE's board is at a level greater than the stipulated percentage of 48%. The Stipulation provides no real benefit when Board policy means threshold will never be approached. This also begs the question of why PGE didn't agree to setting the stipulated threshold at levels equal to that approved by the Board. This would seem to be consistent with acting as a "prudent, well-managed utility." UM 1121, Order No. 05-114, 2005 Ore. PUC LEXIS 99, *77.

The minimum equity level of 48% is reduced in steps until the Reserve holds less than 20% of PGE's stock. Limitation upon dividend distributions Condition 5 would be lifted once "the Reserve holds less than 20% of the New PGE Common Stock." Joint Testimony/100/7. The proponents assert, with no support, that "ring fencing" will no longer be necessary below 20%. Joint/100/16. "[A]s the Reserve's ownership diminishes, its potential influence on PGE's operations and dividend policy should decrease". Joint/100/3. The testimony acknowledges that even the proponents cannot, or will not, state with certainty that the Reserve's influence as a majority shareholder in PGE will not wane as the ownership diminishes incrementally. The question that the Stipulation presents, but the supporting testimony fails to answer, is where the tipping point occurs. The Stipulation settles on two different numbers –twenty percent for some,

[10] Portland General Electric Company, Second Quarter Report Form 10-Q (June 30, 2005) (certified as true and accurate by PGE's Chief Financial Officer on August 5, 2005). < http://www.portlandgeneral.com/about_pge/corporate_info/pdfs/financial/fm10q6_30_05.pdf >; < http://www.sec.gov/Archives/edgar/data/784977/000078497705000016/frm10q2q.htm > See also, Portland General Electric Company, 2004 Annual Report Form 10-K, pp. 40-41 (December 31, 2005) (also discussing the board approved equity goal of 50%) http://www.portlandgeneral.com/about_pge/corporate_info/pdfs/financial/form_10k_2004.pdf (certified as true and accurate by PGE's Chief Financial Officer on March 11, 2005). The information contained in this reference is relevant to the Commission's consideration of whether these conditions provide real benefits to ratepayers. There

twenty-five percent for others.[11] “Condition 10 eliminates the obligations of Conditions 2 and 7 with respect to the Reserve when its ownership interest in PGE drops below 25%.” Joint Testimony/100/8.

Oregon law defines a person or corporation holding, whether directly or indirectly, five percent or more of the voting securities as an affiliated interest. ORS 757.015(1). Any person or corporation exercising “substantial influence” over a public utility is also defined as having an affiliated interest. ORS 757.015(7). These tests are independently stated in the statute – they are not joined. The threshold test for whether the Oregon utility merger statute applies is whether a person holds a percentage of the voting securities. In re Portland General Electric Application seeking authority to issue and sell one share of $1.00 par value junior preferred stock. Order No. 03-024; UF 4192, 2003 Ore. PUC LEXIS 11, * 6 - * 7 (January 13, 2003) (Concluding that issuance of one share of preferred stock did not trigger the qualifying requirement of a percentage of stock).

Oregon’s five percent threshold is consistent with other requirements of federal law: “the Williams Act requires that any purchaser acquiring 5 percent or more of the common stock of a publicly traded company must file a Form 13-D with the SEC informing the SEC of that fact and of the investment intentions of the purchaser.” Portland General Electric Application to Nuclear Regulatory Commission for Indirect Transfer of Materials License p. 11 (July 12, 2005) NRC Accession Number ML051990308.

As PGE has noted elsewhere, the regulatory threshold for “material” control is lower than the amount identified in the Stipulation of 20 percent. For example, PGE’s application to the

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can be no question that it is “of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.” OAR 860-014-0045(1).

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Nuclear Regulatory Commission for an indirect transfer of its storage license for nuclear materials at Trojan stated:

> This means that, in the future, the Reserve will transfer amounts of the New PGE Common Stock to a large number of Holders of Allowed Claims, each of whom will receive only a small fraction of the total shares. In terms of their impact on the licensee, these subsequent distributions are much like the ordinary sale of stock on the open market, which has never required Commission approval unless such sale reaches the relatively high threshold that creates control. Under applicable precedent, no single Holder of Allowed Claims will ever gain control of PGE unless that holder acquires at least 10 percent of the voting stock of PGE. See, e.g., 15 U.S.C § 79b (a)(7) (when a party owns less than 10 percent of an entity's stock, burden shifts to the SEC to prove that there is a controlling influence). For that reason, as long as no party holds 10 percent or more of the voting stock of PGE, the future doling out of a small portion of stock to an individual Holder of Allowed Claims should not constitute a transfer of control. PGE is not aware of any Holder of Allowed Claims that will own or control 10 percent or more of the New PGE Common Stock as a result of the initial issuance of New PGE Common Stock or the release of New PGE Common Stock from the Reserve.

Portland General Electric Application to Nuclear Regulatory Commission for Indirect Transfer of Materials License, p. 10, fn 17 (July 12, 2005) NRC Accession Number ML051990308. *See also*, Nuclear Regulatory Commission, "Portland General Electric Company, Trojan Nuclear Plant, Independent Spent Fuel Storage Installation; Notice of Consideration of Approval of Proposed Corporate Restructuring And Opportunity For A Hearing", 70 Fed Reg 43,461 (Wednesday, July 27, 2005).

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[11] The lack of any logical basis for the selection of this ratio is revealed when comparing the percentage specified in this condition and the figure of twenty-five percent used in Conditions 2, 6, 7, 8 and 10.

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The Commission should reject the percentages established in the Stipulation as inconsistent with its statutory mandates. The Commission should not accept the range of numbers presented in the Stipulation.

6. Justice delayed is justice denied.

Condition 6 commits PGE to not seeking recovery in its rates of increases of costs of capital or revenue requirements that are due to Enron's ownership, or seek recovery in rates due to higher costs caused by ownership of 25% or more of PGE's stock by the Reserve. *Stipulation*, at p. 4-5; Joint/100/7. The condition expires after PGE's next rate case. Condition 6(d).

This condition purports to extend the indemnification required by the Commission from Enron against increased costs for PGE due to Enron's ownership. However, it is of limited duration.

The looming uncertainty raised by this Condition is whether it will ever be employed to the ratepayers' benefit. What if the utility later asks the Commission to revisit or revise the condition because it is not in a financial position to perform, because the economic burden is too high?

> [A] request to bind a future Commission, . . ., is contrary to the Commission's authority under ORS 756.568, which allows the Commission to rescind, suspend or amend an order at any time. The only potential way that this Commission could bind a future commission would be if the Commission entered into a contract with a utility or customer group. There is nothing in ORS 757.511 that suggests the conditions the Commission may impose on an application rise to the level of a contract that a future Commission may not alter.

UM 1121, Opening Brief of Staff, p. 38, n. 10 (Filed November 17, 2004).

ORS 756.568 authorizes the Commission to "rescind, suspend or amend any order made by the commission." The Commission has previously found "good cause" encompassed by

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changed circumstances, failure of a Commission order to be clear as to intent, and correction of a prior erroneous conclusion.[12] Under such circumstances, there are effectively no assurances that this condition, or any others, not subject to reconsideration. Every one of the proposed conditions is potentially vulnerable. Only a current, comprehensive evaluation of the hangover liabilities of Enron's ownership, coupled with a rate credit, can serve to provide guaranteed benefits. COP/100/Cuthbert/23-24.

7. Allowing the Commission to access information that it has statutory authority to otherwise obtain does not provide benefits to PGE's ratepayers.

Under Condition 7, the Commission is given access to written information provided to stock or bond analysts or rating agencies by PGE. *Stipulation*, at p. 5; Joint/100/7; PGE-SFC (RDC)/400/Piro/2. The Commission would have access to this information anyway. *See*, *e.g.*, Order No. 05-114, slip opinion at 29 (discussing the Commission's authority to review the books and records of regulated utilities and their affiliates); Order No. 05-114, slip opinion at 21 (discussing testimony from Staff and Intervenors analyzing Standard & Poor's, Moody's and Fitch reports). The Commission already possesses authority to access the utility's books and records, and to oversee affiliate transactions. *See*, ORS 756.070 through 756.105.

8. PGE providing notice of stock dividends to the Commission provides the same rights as already given to the general public.

In Condition 8, PGE has agreed to provide the Commission with written notice of dividend declarations by its Board of Directors. *Stipulation*, at p. 7; Joint/100/7. "Condition 8 requires PGE to notify the Commission of any declaration of a dividend at the same time it declares that information to the public." PGE-SFC (RDC)/400/Piro/12. As with other

[12] *See*, *e.g.*, Order No. 98-279 (significant change in posture of case warranted modification); Order No. 00-003 (Commission exercised authority to protect ratepayers); Order No. 92-557 (revising order as not complete or

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conditions, this commitment disappears when the Reserve's holdings go below 25%. *Stipulation*, at p. 5; Joint/100/8. "Condition 8 requir[ing] PGE to give the Commission written notice of any dividends declared by its Board of Directors at the same time as PGE discloses this information to the public[,] expires when the Reserve holds less than 25% of the New PGE Common Stock." Joint Testimony/100/7.

Generally, declaration of dividends by a publicly listed corporation triggers public notice requirements.[13] COP/100/Cuthbert/22. The Commission's rights to this type of information will be the same before, during and after the condition. This condition provides no real benefit to ratepayers, without some corresponding ability of the Commission to act upon this information.

The lack of benefits provided by this condition is further highlighted by the fact that no dividend policy has been submitted to the Commission as part of this Application, and no dividend policy has been included in the Stipulation. Instead, the Application states, "PGE will need to establish a dividend policy . . . sufficiently prior to the issuance of the New PGE Common Stock so that analysts are prepared once the stock began to trade." Application, p. 15.

The Application is missing more than simply a dividend policy for PGE. The Application is deficient by lacking final documentation in a number of areas. As such, it is not clear that it complies with the Commission's OAR 860-027-0030(2). *See*, *e.g.*, PGE-SFC(RDC)/Appendix A/8-9 (noting unavailability of documents required by OAR 860-027-

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accurate); Order No. 87-803 (reconsidering order after appeal filed) *See also*, OAR 860-014-0095(3) (Identifying circumstances under which Commission will consider reconsideration.)

[13] The notice requirements for dividend declarations are generally set as requirements for listing on a particular stock exchange, subject to federal oversight of these standards. See, e.g., Securities and Exchange Commission, *Self-Regulatory Organizations; Order Approving Proposed Rule Change by the American Stock Exchange LLC Amending Certain Listing Standards*, 65 Fed Reg 15672, 15673 (Thursday, March 23, 2000)

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0030(2)(c), (g), (i) and (k)). *See*, *also*, Application, p. 9, n. 17 and n. 18 (referring to draft Articles of Incorporation and Bylaws, respectively) and Application, p. 16, n. 28 (draft Separation Agreement). Approval of the incomplete application would require the Commission to waive the requirements of its rules, something Staff and the Commission have otherwise expressed reluctance to do.

> The Commission generally does not favor exempting an entity from compliance with any administrative rule. Nonetheless, entities are currently allowed to seek a waiver from the application of certain rules, and [the Commission has], on occasion, found it to be in the public interest to grant such a request.

Order No. 02-135, p. 4.

Because the Commission is being asked to act in an information vacuum, its ability to actually evaluate the beneficial aspects of this condition is reduced considerably.

9. <u>Given that the burden of regulatory compliance will be borne by the ratepayers, extending Service Quality Measures provides no benefits for PGE's ratepayers.</u>

PGE has agreed to extend the Service Quality Measures for another ten years for the benefit of PGE's customers. Condition 9, *Stipulation*, at p. 6; Joint/100/7-8; PGE-SFC (RDC)/400/Piro/2. Developing more comprehensive, superior mechanisms for overseeing public utility operations and performance should be something to achieve universally, not on an *ad hoc* basis. If service quality measures are indeed beneficial to ratepayers, then these measures should be applicable to all public utilities. Furthermore, given that the costs of such regulatory supervision will be passed through to PGE's customers, extension of service quality measures presents dubious boot-strapping qualities. "Extending these [measures] does not have great value . . . [T]hese types of service quality assurances are activities that a 'prudent, well-managed

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utility would already be providing to its customers.'" UM 1121, Order No. 05-114, 2005 Ore. PUC LEXIS 99, *77.

10. A commitment to maintain the company's status quo bond rating provides no real benefits for PGE's ratepayers.

Under Condition 11, PGE will not make distributions to Enron unless PGE has a Standard & Poor's rating of not lower than BBB+. *Stipulation*, at p. 6; Joint/100/8; Joint/100/16. "Maintenance of PGE's existing bond rating is essentially another meaningless protection". COP/100/Cuthbert/22. Rating agencies have recently "affirmed" PGE's BBB+ rating, standing pat does not seem to be of much benefit to the ratepayers. PGE-SFC (RDC)/403/Piro/1 (evaluation by Standard & Poor's September 20, 2005). A commitment to maintain the status quo cannot be viewed as a benefit to ratepayers. The Commission must be presented with more than what a "prudent, well-managed utility would already be providing to its customers". UM 1121, Order No. 05-114, *77.

11. Various side deals with specific ratepayer groups provide questionable value to PGE's ratepayers as a whole.

Condition 12 allows a limited number of consumer groups to meet once a year with PGE's Board of Directors, and occasionally with management. *Stipulation*, at p. 6-7; Joint/100/8. In Condition 13, PGE has cut a rate deal with one customer group regarding decoupling, agreeing not to propose any such changes in its next rate case and opposing any such offerings from other parties. *Stipulation*, at p. 7; Joint/100/8. Condition 15 is similar, in that PGE is agreeing to develop changes to its tariffs and rate schedules regarding direct access to benefit a certain portion of its ratepayers. *Stipulation*, at p. 8-10; PGE-SFC (RDC)/400/Piro/2.

It is difficult, if not impossible, to suggest how PGE's cutting side deals provides overall benefits to ratepayers at large. There is no evidence in the record that attempts to quantify for

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the Commission the potential extent of these conditions, nor the range of who may be included within their scope. This may simply be limited to a particular small group of customers and encompass a relatively small amount of revenue. *Compare*, UM 1121, Order No. 05-114, *79 (discussing potential benefit of stipulation benefiting low-income customers). If anything, these conditions may serve to potentially bind the Commission in its consideration of future rate proceedings. Without supporting evidence in the record, the value of these conditions is too speculative to be given much weight.

12. Improving billing accuracy is similar to extending Service Quality Measures – any value to PGE's customers is offset by the costs being borne by ratepayers.

In Condition 14, PGE has agreed to work on developing improved billing accuracy measures. *Stipulation*, at p. 7-8; Joint/100/8. Similar discussions are already occurring between ratepayer groups and other utilities, so PGE's agreeing to begin walking down this seemingly inevitable road hardly provides benefits to ratepayers. *Compare*, Order No. 05-1055, UM 1218 (September 29, 2005) (approving Northwest Natural Gas' petition to adopt new billing accuracy service quality measure). These are the types of undertakings that would a "prudent, well-managed utility would already be providing to its customers". UM 1121, Order No. 05-114, *77.

13. The proposed indemnifications will not provide any benefits to PGE's customers.

In Condition 16, Enron has agreed to indemnify PGE for certain liabilities. *Stipulation*, at p. 10; Joint/100/9. As the Stipulation indicates, Enron is promising no more than what was already addressed in the Separation Agreement included as Exhibit 17 to the Application. Application, at pp. 16-17; Joint/100/16. The liabilities that Enron is agreeing to indemnify PGE for arise from Enron's ownership of PGE. Enron's promise merely repeats what it already committed to in Order No. 97-106. Other testimony in this proceeding reveals the hollow aspects of this condition. Enron has identified that it is close to settling these claims: "[C]ontrol

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group liabilities related to Enron ownership are either being resolved or will not be applicable once the PGE stock issuance occurs." PGE-SFC (RDC)/400/Piro/3. Mr. Piro further testified that contingent liabilities related to Enron's pension plan have been resolved by court approved settlements, and that liabilities associated with Enron's income taxes have been settled with the IRS. PGE-SFC (RDC)/400/Piro/7. This is reminiscent of the indemnification commitments considered by the Commission in the Oregon Electric Utility application:

> The value to PGE customers of this indemnification depends on three issues: (1) the likelihood that a loss is assigned to PGE; (2) whether the loss would be charged directly to customers; and (3) whether there would be an indirect effect on customers if the loss instead is borne by PGE's shareholder, Oregon Electric. The record is silent on the first. Applicants did not provide any data on the value of the liabilities. *See* Staff/900, Morgan/6. As to the second, PGE states that it would seek to recover losses from customers, such as those losses arising from its provision of customer service. *See* PGE/100, Piro/27-29. CUB, however, disagrees with this assertion because the loss might be the result of PGE's failure to comply with the law. *See* CUB/300, Jenks-Brown/23-24. Applicants respond that even if the loss is not charged to customers, they would benefit to the extent the indemnification protects PGE's financial health, as suggested by the third issue above. *See* OE reply brief at 24. But CUB notes that the effect of any harm to the company, such as a higher cost of capital, should not be passed through to customers. *See* CUB/300, Jenks-Brown/24.
>
> We find that indemnification for the Shared and Non-Shared Indemnity Matters is a benefit for PGE's customers, akin to an insurance policy which may never be used. However, given the lack of evidence about the magnitude of the risk PGE faces, and the uncertainty as to whether such obligations would be borne by customers, we cannot, and do not, assign much value to those potential benefits.

Order No. 05-114, UM 1121, 240 P.U.R.4th 141, 2005 Ore. PUC LEXIS 99, *73 - 76.

The benefits of the "hold harmless" agreements are no more real in this proceeding than they were in the prior proceeding.

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F. Threats of bankruptcy court override are not real.

Underlying Enron's Application is the veiled threat that the Commission has no choice but to approve the Application or else the Bankruptcy Court will wrest jurisdiction away from the Commission and effect the transfer of PGE stock without Commission approval: The Commission had better bow to the Bankruptcy Court or else. *See*, Joint/100/12 (raising the specter of bankruptcy uncertainty). Perhaps this veiled threat explains why Enron has presented the Commission with an Application so lacking in substance, and why Staff and many of the other intervenors signed the Stipulation. The attitude of Enron and the perception among the intervenors appear to be that the Commission has no choice at this juncture.[14] The only protection left for ratepayers is to cross our fingers and hope for the best when the next rate case gets filed.

This threat of the bankruptcy trump card is not real and should not intimidate the Commission. It is an illusion intentionally cast to divert the Commission from its mission – to protect the public interest, the interests of the customers, and the interests of the utility. That diversion is necessary, for as seen above, without the diversion, the hollow Application is ineffective and must be denied.

The Bankruptcy Court has given no indication that the Commission cannot do its job, that the Commission cannot freely exercise its regulatory discretion, or that Commission's proper public health, safety and welfare determination will not be fully respected by the Court. Quite to the contrary, the Bankruptcy Court's orders consistently acknowledge that each action of Enron respecting PGE must secure Commission approval, as well as the approval of the federal

[14] PGE's testimony in support of the Stipulation paints a picture of further inevitability: "Standard & Poor's [have] stated the return of PGE to a stand-alone utility is 'a near certainty'." PGE-SFC (RDC)/400/Piro/6/ Ex. 403.

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regulatory agencies that also have discretionary approval requirements. Further, the Court's orders and the various approved Bankruptcy Plans and amendments provide built-in flexibility to deal with the possibility that the necessary regulatory approvals would not be granted.

We have not uncovered a single instance where a Bankruptcy Court has sought to intervene in or overturn a decision of a state or federal regulatory agency in the instance where that agency had public interest discretion in a decision like the Application before the Commission. Now, were the Commission to try to order Enron to pay PGE on one of PGE's claims before the Bankruptcy Court, then the Bankruptcy Court would not hesitate to overturn such a decision. But the Court will not interfere in the Application process before the Commission, nor in the same application process that Enron has or will file with the FERC, the NRC, the SEC, and the FCC.

Even if Enron and the Creditors were to try to convince the Bankruptcy Court that this Application should be the national test case to challenge the constitutional boundaries between bankruptcy authority and state regulatory authority, that decision by the Bankruptcy Court should not cause the Commission to abdicate the solemn responsibility conferred on it by the Oregon Legislature to protect the public interest and the customers of a state-granted monopolistic utility company.

G. The probability that PGE will be sold again within the next decade continues uncertainty for ratepayers and Oregonians in general.

"When the repeal of the Public Utility Holding Company Act of 1935, or PUHCA, becomes effective six months from now, Congress will have unleashed upon public utilities the deregulated market forces that have remade the airline, telecommunications and banking industries." COP/109/Cuthbert/1. PUHCA's repeal makes it more likely that PGE will be a

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takeover target. COP/100/Cuthbert/5. “By repealing [PUHCA], Congress opened the way for a wave of utility takeovers. And despite its Enron taint, PGE is a solid, profit-generating entity that could attract a takeover bid.” COP/108/Cuthbert/1. PGE will inevitably end up back on the sales block, whether voluntarily or as the subject of a hostile takeover.[15]

> John McConomy, who leads the power and utilities practice of PricewaterhouseCoopers' Transaction Services group, said, "2004 witnessed a reawakening of M&A activity in the North American power market, with deal values tripling to $57.9 billion. The North American market remains fragmented, leaving significant room for consolidation, and the unraveling of previously announced deals means that there are immediate targets for power deal making in 2005."
>
> Uncertainty regarding legislative and regulatory reforms, most notably the Public Utility Holding Company Act (PUHCA), remains the biggest barriers to full-scale consolidation of the regulated parts of the U.S. market. However, last year's healthy deal volume clearly indicates investors are interested in non-regulated businesses and regulated activities, such as pipelines and certain power generation assets, with comfortable levels of regulatory risk.[16]

Merger analysts have identified market pressures as driving merger activity in the utility sector: “Since organic growth averages only about 2 percent a year, while Wall Street expects 5 to 6 percent, companies are looking to buy additional synergies and customers; cost cutting and rate increases will get them only so far.”[17]

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[15] Todd Murphy, “Energy bill ripples in Oregon: One provision could have a big effect on Portland’s utilities”, *Portland Tribune* (Tuesday August 2, 2005) < http://www.portlandtribune.com/archview.cgi?id=31092 >

[16] “M&A Activity Likely to Increase in Power Industry as Leaders Seek Strong Regional Footprints in 2005” (March 10, 2005) < http://www.pricewaterhousecoopers.com.ua/extweb/ncpressrelease.nsf/docid/4EA5B0F794B3027C85256FC0006EFD00 >; *See*, *also*, < http://www.energyjournalist.com/display_story.php?story=765 >; < http://www.eei.org/magazine/editorial_content/nonav_stories/2005-05-01-NT.pdf >. *See*, *also*, Forbes Market Scan, “Four Picks In Electric Utilities” (August 1, 2005) http://www.forbes.com/markets/2005/08/01/electricity-utilities-earnings-0801markets07.html

[17] Joy Gramolini, “M&A Market Heats Up as Companies Seek Growth in Consolidating Sectors,

> Others expecting strong merger activity include the CEO of Constellation Energy, who predicts that the number of major electric utilities will drop from 100 to 50 within a few years, a Lazard investment banker, who believes the electric utility sector will be "white-hot" for the next few years, and the CEO of Exelon, who anticipates four or five large utility mergers 'fairly quickly.'[18]

Recent acquisition activities support these forecasts:

> May 26 [2005]: MidAmerican Energy, controlled by billionaire Warren Buffett, announced plans to buy Portland, Ore.-based PacifiCorp from ScottishPower PLC for $5.1 billion in cash. Under the deal, MidAmerican will assume $4.3 billion in PacifiCorp debt and preferred stock.
>
> May 9 [2005]: Duke Energy of Charlotte, N.C., announces plans to buy Cincinnati-based Cinergy Corp. for $9 billion in stock.
>
> December 2004: Chicago-based Exelon Corp. announces plans to buy Public Service Enterprise Group Inc. of Newark, N.J., for $12 billion in stock.[19]

Just over one week after President Bush signed the Dominici-Barton Energy Act of 2005, MidAmerican filed an amendment to its Application, together with supplementing testimony, restructuring its proposed acquisition of PacifiCorp in anticipation of the effective repeal of PUHCA on February 8, 2006. The amendments did away with the structural aspects of the deal that would have established barriers between PacifiCorp and the ultimate parent corporation.

Volatile Debt Market Could Bring Problems Later in the Year" (PricewaterhouseCoopers LLP July 5, 2005) < http://www.pwc.com/extweb/ncpressrelease.nsf/84f5f51d361fe04e8525665f00506220/ 566c514744 c184db8525703b004d0793/$FILE/PWC.FilekMidyearForecast.7.5.05.pdf >

[18] *Utilities After PUHCA*, *infra at n. 9,* 2 (October, 2005) (citations omitted).

[19] tcontent@journalsentinel.com, "Law is a barrier to utility mergers: State companies feel pressure to consolidate, but regulations keep it from happening — for now" (Milwaukee Journal Sentinel Posted: May 29, 2005) < http://www.jsonline.com/bym/news/may05/329778.asp > MidAmerican's shopping spree may have only begun. Gail Kinsey Hill, "On horizon: mega-utility trend?", The Oregonian (Friday, June 24, 2005) < http://www.oregonlive.com/business/oregonian/index.ssf?/base/business/ 1119607005304840.xml&coll=7 >

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PUHCA's repeal does not just have implications for consolidation within the utility sector. As legal analysts have noted, it will also open up utilities to acquisition by unrelated businesses:

> [PUHCA repeal will] open the market for ownership of electric and gas distribution companies. For example, a construction company could acquire one or more of these companies anywhere in the U.S. The same would be true for telecommunications and internet companies, financial services companies and other industrial players, such as oil companies and infrastructure developers. Foreign companies (both utilities and non-utilities alike) could more freely acquire electric and gas companies without the fear of extensive additional regulation which has largely kept them on the sidelines up to now[20]

Since congressional approval of PUHCA fifty years ago, utilities have been viewed as local institutions, "locally controlled and locally owned." Seligman, *The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance*, 129 (Northeastern University Press, Boston, Revised Edition 1995).[21]

> Before the 1935 PUHCA law, large companies were using utilities as piggy banks. Utility customers gave the companies a steady, predictable stream of revenue that the companies used for speculative investments, and the companies jacked up electricity bills when their risky ventures failed. Eventually, the utilities faced collapse because of their bad investments.[22]

Post-PUHCA, electricity and electric utilities are being transformed into a deregulated, speculative market, controlled and largely overseen by out of state financiers. This will be a

[20] Thelen Reid Report, "PUHCA Repeal on the Horizon" (August 5, 2003) < http://www.thelenreid.com/articles/report/ rep86_idx.htm >

[21] *Cited in*, Comments of Lynn Hargis on Behalf of the Citizen's Utility Board in UM 1209, p. 18 (October 14, 2005). The Commission may take official notice of this document, which is on file with the Commission. OAR 860-014-0050(1)(e); *See*, *e.g.*, In re Portland General Electric, UM 989, Order No. 02-227, 2002 Ore. PUC LEXIS 114 (March 25, 2002) (official notice taken of staff exhibit filed in a separate, prior proceeding.)

[22] Joe Hanel, "Bill could spur utility mergers: Measure would repeal Depression-era law" *The Daily Times-Call* (July 25, 2005) < http://www.longmontfyi.com/Local-Story.asp?id=2821 >

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system that rewards investors at the expense of local consumers, whether large or small, residential or commercial. In essence, local electricity markets are being transformed into extractive colonies subject to new forms of potential economic exploitation.

One of the potentially most significant implications of PUHCA's repeal is the revisiting of history. PGE's history had a role in the PUHCA's passage in the 1930's. As noted in PGE's corporate biography, its corporate predecessors were part of Samuel Insull's utility holding company empire, until the local utility filed for bankruptcy reorganization in 1939. Craig Wollner, *Electrifying Eden, Portland General Electric 1889-1965*, Chapter 5 – The Perilous Years (Oregon Historical Society Press 1990). All of this occurred under the regulatory oversight of the Oregon Public Utility Commissioner, who lacked the resources to track the goings-on of a multi-state corporation situated some distant level of corporate intermediaries above the regulated utility. *Id.*, at p. 149 (noting that the Public Service Commission successfully stopped utility from paying 3% management fee to parent, but had no regulatory ability to restrict the parent corporation from packing the board of directors). What possible conditions will serve to protect ratepayers and the region from repeating the past and suffering another cycle of wrenching economic dislocation?[23]

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[23]"In theory, a highly leveraged holding company pyramid with a major constituent of fixed-return securities can service its obligations to bond and preferred stock holders and still return a comfortable profit to common stock holders. This occurs if the return on the fixed assets adequately exceeds the requirement for interest and dividend payments and operating revenues continue to grow. However, debt and equity investors near the top of the pyramid and far removed from the operating assets bear the bulk of the risk that is typically associated with leverage - in good times, rapidly burgeoning profits; in bad times, the danger of losses." Cudahy and Henderson, *From Insull to Enron: Corporate (Re) Regulation after the Rise and Fall of Two Energy Icons*, 26 Energy L. J. 35, 58 (2005).

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H. The Commission should adopt other conditions, including rate credits, to address the significant risks presented by the proposed transaction.

In reviewing the Application, the Commission will hopefully conduct an in-depth review to obtain a complete accounting of the risks to ratepayers posed by the transaction and require compelling evidence of the purported benefits. The Commission must require the Applicants to provide a clear, unambiguous ratification of indemnification of ratepayers, together with a comprehensive review of all Enron-related ownership costs suffered by PGE. COP/100/Cuthbert/23-24. Furthermore, to avoid future uncertainty regarding whether PGE's ratepayers will suffer the burdens of these liabilities, the ratepayers should be given rate credits now, rather than the mere hope of relief in some future rate proceeding. COP/100/Cuthber/24-26. Staff disagrees, arguing that other transactions have been approved either without rate credits, or employing rate credits to capture merger benefits. Staff/100/Conway/6.

Applications brought under ORS 757.511 must be decided on a case-by-case basis. The resolution of each application must accordingly be on the merits of that particular application. Because rate credits were included in prior applications on the basis of identified merger proceedings, this does not preclude a determination in this proceeding that rate credits should be imposed in order to avoid potential harms to customers. This is a sufficient and adequate rationale for explaining the different outcomes. Portland does not ask that the Commission change its policy (if indeed this can be described as a policy): the City asks for a change in focus. Rate credits are necessary in this case to avoid potential harms to customers, not to capture benefits otherwise created by the proposed transaction.[24]

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[24] The City again incorporates by reference the requirements made in its opposition brief regarding the need for additional conditions that should attach to the proposed transaction in order to ameliorate potential harms to ratepayers.

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IV. CONCLUSION

To establish whether the Application provides net benefits, positive features of the proposal must be weighed against all of its many negative impacts. The Application attempts to assure the Commission that Oregon citizens and PGE ratepayers will be protected from the identifiable risks posed by the proposed transaction. The risks for significant detrimental harms are wholly unaddressed. The promise of future protection, to replace of the existing commitments protecting ratepayers, is insufficient. The Application, even as modified by the Stipulation, will not provide net benefits to PGE's ratepayers, but instead will leave ratepayers worse off than they are currently. To protect ratepayers and the public interest, the Commission must reject the proposal, or impose additional conditions to arrive at net benefits.

DATED this 27th day of October, 2005.

Respectfully Submitted,

/s/ Benjamin Walters

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing OPENING BRIEF OF THE CITY OF PORTLAND, OREGON, on behalf of the City of Portland, Oregon, upon the parties shown on the attached official service list for Dockets No. UF 4218 and UM 1206, by causing the same to be electronically served on all parties who have an e-mail address on the official service list, and by U.S. Mail, postage prepaid, to those parties who do not have an e-mail address on the official service list.

DATED this 27th day of October, 2005.

/s/ Benjamin Walters

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