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October 27, 2005

VIA E-FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol St. NE, Suite 215
P. O. Box 2148
Salem, Oregon 97308-2148

Re: *UF 4218 /UM 1206*

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of Applicants' and Enron's Brief in the above-referenced matter. This document is being filed electronically per the Commission's eFiling policy to the electronic address PUC.FilingCenter@state.or.us, with copies being served on all parties on the service list via U.S. Mail. A photocopy of the PUC tracking information will be forwarded with the hard copy filing.

Very truly yours,

Leslie D. Hurd
Legal Assistant to David F. White

/ldh
Enclosures
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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UF 4218 / UM 1206

In the Matter of the Application of PORTLAND GENERAL ELECTRIC COMPANY for an Order Authorizing the Issuance of 62,500,000 Shares of New Common Stock Pursuant to ORS 757.410 et seq. **UF 4218** and In the Matter of the Application of STEPHEN FORBES COOPER, LLC, as Disbursing Agent, on behalf of the RESERVE FOR DISPUTED CLAIMS, 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 **UM 1206**	**APPLICANTS' AND ENRON'S BRIEF**

I. INTRODUCTION

This Brief is filed on behalf of Portland General Electric Company ("PGE"), Stephen Forbes Cooper, LLC ("SFC"), as Disbursing Agent, on behalf of the Reserve for Disputed Claims ("Reserve") (collectively, "Applicants") and Enron Corp. ("Enron") in support of the Application.[1]

The Application, as supplemented by the Stipulation dated August 31, 2005, has earned broad support. The Commission Staff, the Industrial Customers of Northwest Utilities ("ICNU"), the Citizens' Utility Board ("CUB"), the Applicants, Enron, and the Community Action Directors of Oregon and Oregon Energy Coordinators Association (collectively, "Settlement Parties"), all signed the Stipulation, agreeing that the Application

[1] The joint application filed on behalf of Portland General Company and Stephen Forbes Cooper, LLC, as Disbursing Agent, on behalf of the Reserve for Disputed Claims, on June 17, 2005.

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and Stipulation provide "net benefits to PGE's customers and will serve PGE's customers in the public interest." These parties support Commission approval of the Application and Stipulation.

The Commission should approve the Application for the reasons the Settlement Parties recommend. First, the transaction is unique. No acquisition debt is incurred; no traditional holding company is formed; and the eventual outcome of the Application will be a publicly-traded company that is widely held, the exact opposite of most ORS 757.511 applications. Second, the unique nature of the transaction, combined with the conditions in the Stipulation (the "Conditions"), ensure that customers are protected from any potential harm associated with the Application. Finally, the Application and Conditions provide a variety of important benefits to customers.

This Brief is organized as follows: the Application (section 2), Legal Standards (section 3), Status of the Docket (section 4), the Reserve's Application Under ORS 757.511 (section 5), PGE's Application to Issue New Securities (section 6), and Response to the City of Portland's Objections (section 7).

II. THE APPLICATION

The Application seeks Commission approval to implement the terms of the Plan[2] that the Bankruptcy Court confirmed on July 15, 2004 (the "Confirmation Order"). In particular, the Application requests authority to carry out the Plan's directive to transfer 100% of PGE's common equity from Enron to the creditors of Enron and other Debtors.[3]

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[2] Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated July 2, 2004, including the Plan Supplement and all schedules and exhibits thereto (the "Plan").

[3] The Debtors are Enron and the other entities identified in Plan Section 1.77, all of whose bankruptcy filings were consolidated with Enron. In this brief, the term "Debtors" excludes Portland General Holdings, Inc., and Portland Transition Company, Inc., whose bankruptcy plans were not confirmed by the Bankruptcy Court. Enron and the other Debtors whose plans were confirmed by the Confirmation Order became "Reorganized Debtors," which

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The Plan and Bankruptcy Court Confirmation Order accomplish this by canceling PGE's existing common stock held by Enron and issuing to Enron's creditors new PGE common stock ("New PGE Common Stock").

The Application contains two separate requests. First, PGE requests an order authorizing the issuance of 62,500,000 shares of New PGE Common Stock. After receiving all necessary regulatory approvals, PGE will issue the New PGE Common Stock when the Bankruptcy Court has allowed sufficient claims to permit the issuance of not less than 30% of the New PGE Common Stock to Holders of Allowed Claims.[4] The remainder of the New PGE Common Stock will be issued to the Reserve. Application, 12-13. The 30% condition is likely to be met early enough to permit the issuance to occur in April 2006. Application, 13. At the time of issuance, Holders of Allowed Claims will receive not less than 30%, or 18,750,000, of such shares and the Reserve will receive not more than 70%, or 43,750,000 of such shares. PGE seeks a Commission order authorizing the issuance under ORS 757.415 or a "public interest" exemption under ORS 757.412. Application at 2.

Second, the Disbursing Agent, on behalf of the Reserve, seeks an order under ORS 757.511 to hold more than 5% of the New PGE Common Stock and to vote not more than 70% of the New PGE Common Stock. The Disbursing Agent will be the registered

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means that they emerged from bankruptcy and are no longer debtors-in-possession under Chapter 11 of the United States Bankruptcy Code. For convenience, this brief continues to use the term "Debtors" to refer to the Reorganized Debtors. *See* Application at 2 n.3 and 9-10.

[4] An Allowed Claim is one scheduled by a Debtor as liquidated and not contingent or disputed or, if not so scheduled, filed against a Debtor and allowed by a Final Order of the Bankruptcy Court. The Bankruptcy Court fixed November 29, 2004, as the record date for determining which holders of Allowed Claims are entitled to receive distributions under the Plan, including distributions of New PGE Common Stock. As used herein, "Holder of Allowed Claim" means the holder, as of the record date, of an Allowed Claim.

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holder of New PGE Common Stock for the Reserve, and the DCR Overseers[5] will determine how the Disbursing Agent votes the New PGE Common Stock held in the Reserve. The amount of New PGE Common Stock the Disbursing Agent holds may not exceed 70%. The Reserve will release shares of New PGE Common Stock to Holders of Allowed Claims as disputed claims are resolved, resulting in regular and irreversible reductions in the percentage of New PGE Common Stock held in the Reserve. Application at 13. The Reserve will probably hold less than 50% of the New PGE Common Stock within one year after the issuance, and may hold less than 30% of the New PGE Common Stock within two years after the issuance. *Id.* Ultimately, the Reserve will release all of the New PGE Common Stock when Debtors resolve the last of the disputed claims.[6] *Id.* at 14.

III. LEGAL STANDARDS

A. THE RESERVE'S ORS 757.511 APPLICATION

The Commission reviews applications under ORS 757.511 to determine whether the proposed transaction "will serve the public utility's customers in the public interest." ORS 757.511(3). If the application meets this standard, then the Commission "shall issue an order granting the application." *Id.* For applications that fall short of this standard, the Commission may, in its discretion, impose additional conditions or simply deny them. *In Re Oregon Electric Utility Company*, UM 1121, Order No. 05-114 at 16 (March 10,

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[5] The DCR Overseers were appointed by the Bankruptcy Court in the Confirmation Order. DCR Overseers will exercise their business judgment to vote the Plan Securities, including the New PGE Common Stock, in a manner they believe will maximize the value of the assets to be distributed to creditors. The DCR Guidelines, adopted in connection with the Confirmation Order and Plan, require that the DCR Overseers take all actions that a board of directors of a public corporation chartered in the State of Delaware would be required to take to satisfy its fiduciary duty. *See* Application at 2, 21-23.

[6] Section 1.86 of the Plan defines disputed claims as any claim against a Debtor to the extent the allowance of such Claim or Equity Interest is the subject of a timely objection or a request for estimation in accordance with the Plan, the Bankruptcy Code, the Bankruptcy Rules or the Bankruptcy Court's Confirmation Order.

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2005). The Commission considers the "application" to include the initial application, any amendments, and agreed-to conditions. *Id.* In this docket, the Application has been supplemented by the Conditions contained in the Stipulation. The Commission has adopted a two-prong test to determine whether a proposed transaction "will serve the public utility's customers in the public interest." First, the application must provide a net benefit to customers. Second, the application must not "impose a detriment on Oregon citizens as a whole." UM 1121, Order No. 05-114 at 17; *In Re Legal Standard for Approval of Mergers*, UM 1011, Order No. 01-778 at 11 (Sept. 4, 2001).

Under ORS 757.511, the Legislature has delegated broad authority to the Commission. The Commission has carefully guarded its discretion: "the Legislature has given the Commission discretion in assessing whether to approve mergers. We do not propose to circumscribe that discretion." Order No. 01-778 at 11. The Commission reviews each application based on the particular facts: "We will assess each merger on a case-by-case basis." *Id.*; *see also, In Re ScottishPower*, UM 918, Order No. 99-616 at 16 (Oct. 16, 1999). The Application, with the Conditions agreed to in the Stipulation discussed below, meets the legal standard, and the Commission should approve the Application as supplemented by the Stipulation under ORS 757.511.

B. PGE'S STOCK ISSUANCE APPLICATION

The Commission may approve an application to issue securities under either ORS 757.415 or ORS 757.412. ORS 757.415 applies if the purpose of the issuance is identified in the statute.[7] For applications made under ORS 757.415, the Commission must

[7] The purposes listed under ORS 757.415 are as follows: (1) the acquisition of property or the construction, completion, extension or improvement of its facilities; (2) the improvement or maintenance of its service; (3) the discharge or lawful refunding of its obligations; (4) the reimbursement of money actually expended from income or from any other money in the treasury of the public utility not secured by or obtained from the issue of stocks or bonds, notes or other evidences of indebtedness, or securities of such public utility, for any of the purposes listed in (1) through (3) above; (5) the compliance with terms and conditions of

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find that the issuance is compatible with the public interest and will not impair the utility's ability to provide service. ORS 757.415(2)(B). Alternatively, the Commission may grant the application if it determines under ORS 757.412 that the issuance should be exempt because the application of ORS 757.410 et seq. is not required by the public interest. The Application, as supplemented by the Stipulation, and the issuance of the New PGE Common Stock, meet both of these tests.

IV. THE STATUS OF THE DOCKET

On June 17, 2005, PGE and the Reserve submitted the Application. The Applicants conducted a series of workshops and submitted opening testimony in support of the Application on August 10, 2005. Public settlement conferences were held on August 17 and 24, 2005. On August 31, 2005, Commission Staff, CUB, ICNU, PGE, the Disbursing Agent on behalf of the Reserve, Enron, and the Community Action Directors of Oregon and Oregon Energy Coordinators Association entered into a settlement resolving "all issues in these dockets among the Settlement Parties." Stipulation, 1. The intent of the Settlement Parties is that the Commission adopt the Conditions contained in the Stipulation as part of its final order approving the Application:

> The Settlement Parties agree that, subject to the Conditions and other commitments of the Settlement Parties set forth herein, the issuance of the New PGE Common Stock to Holders of Allowed Claims and the Reserve as requested in the Application will provide net benefits to PGE's customers and will serve PGE's customers in the public interest. The Settlement Parties agree that, subject to the Conditions and the other commitments of the Settlement Parties set forth herein, the Commission should approve the Application.

Stipulation, 2. Witnesses from CUB, Commission Staff and PGE submitted testimony on behalf of the Settlement Parties supporting the Stipulation and the Application. Settlement

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options granted to its employees to purchase its stock, if the Commission first finds that such terms and conditions are reasonable and in the public interest; and (6) the finance or refinance of bondable conservation investment as described in ORS 757.455.

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Parties/100, Conway–Jenks–Lesh/1-21. The City of Salem subsequently submitted testimony stating that it did not oppose the Stipulation.

A single party—the City of Portland—filed testimony and objections in opposition to the Application and Stipulation. On September 28, 2005, PGE, Enron and Commission Staff submitted testimony responding to the City of Portland's testimony and objections.

During the prehearing conference on September 29, 2005, no party asked for cross-examination or oral argument. Accordingly, the hearing and oral argument were cancelled. *See* ALJ Smith Ruling, October 13, 2005. "Because of the limited issues raised in testimony," prehearing submissions were removed from the schedule. ALJ Smith Memorandum, September 30, 2005. The only remaining procedural steps in this docket are a single round of briefs and the Commission's final order.

V. THE RESERVE'S APPLICATION UNDER ORS 757.511 SHOULD BE GRANTED

The evidence shows that the Application meets the legal standard of ORS 757.511. The Application, as supplemented by the Stipulation, provides net benefits to customers. The nature of the transaction and the Conditions set forth in the Stipulation protect customers and the public generally from any harm or potential harm related to the Application.

A. THE APPLICATION AND STIPULATION PROVIDE CUSTOMERS WITH A NET BENEFIT

As the parties to the Application and Stipulation recognize, the circumstances that give rise to this Application and the Application itself are unique. First, the Application implements a confirmed bankruptcy plan. Approval of the Application by the Commission will permit Enron and PGE to implement the terms of the Plan for the issuance of New PGE Common Stock to the Reserve and Holders of Allowed Claims. Application at 3. Second,

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the purpose of the Reserve is not to acquire PGE for investment purposes. The purpose of the Reserve is to preserve the value of PGE and other assets of Enron and to hold those assets only for as long as is necessary to transfer them to Holders of Allowed Claims. *Id.* Third, the Application does not seek to change beneficial ownership in PGE. *Id.* at 4-5. Now, creditors of Enron and the other Debtors currently hold beneficial ownership in all Enron's assets, including the PGE common stock. After issuance of New PGE Common Stock at least 30% of such shares will be issued to Holders of Allowed Claims. The remainder of New PGE Common Stock will be held by the Reserve in trust for the benefit of Holders of Disputed Claims and Allowed Claims. Fourth, the Application does not result in any new debt or liability for PGE. *Id.* at 27. Finally, the Application will serve to remove PGE from a traditional holding company structure. *Id.* at 5. The expected outcome of the Plan is for PGE shares to be publicly traded and widely held. *Id.* at 28; *see generally* Settlement Parties/100, Conway-Jenks-Lesh/4-6 (describing the unique nature of the Application).

Approval of the Application and the Stipulation will also have the salutary effect of removing uncertainty. PGE's future has been in flux since 1999. No less than three acquisitions have been proposed but failed to close. Enron filed for bankruptcy protection in 2001. Now the Plan requires the distribution of all Enron assets, including the common equity of PGE.

If the Application is denied, customers face the prospect that PGE's common equity could be distributed without the protections and benefits of the Conditions. As the Settlement Parties testified:

> Should the Commission deny this Application, it is not clear how PGE's common equity would be distributed as called for in the Plan. The distribution of PGE's common equity could occur without any of the Conditions in this Settlement that protect customers and PGE during the transition and provide benefits to customers even beyond the transition.

Settlement Parties/100, Conway-Jenks-Lesh/12.

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The benefits associated with the Conditions are substantial and impressive:

1. Improved Ring-Fencing Provisions

The Stipulation contains strengthened and updated ring-fencing provisions, enhancing the customer protections in the Enron/PGE merger order (the "UM 814 Order"). Condition 5 imposes the same minimum common equity ratio limit as Condition 6 of the UM 814 Order so long as the Reserve holds 40% or more of the outstanding common stock of PGE. This minimum equity ratio threshold for distributions is supplemented. Condition 6(c) prohibits PGE from making a distribution that would cause PGE's common equity to fall below the level specified in Condition 5 plus $40 million pending the outcome of PGE's next general rate case. This additional $40 million is to assure PGE's capacity to absorb adjustments, if any, to its revenue requirement resulting from the hold-harmless provisions. Conditions 6(a)(i) and/or 6(b).

Conditions 8 and 11 further enhance the ring-fencing protections for dividends from PGE. Condition 8 requires PGE to give the Commission timely written notice of any dividend declared by its Board of Directors at the same time PGE discloses it to the public. For most dividends, PGE will provide written notice to the Commission sooner than under the UM 814 Order counterpart. PGE-SFC(RDC)/400, Piro/12. The new Condition requires notice when the dividend is made public; for most dividends, the UM 814 Order condition required written notice within 30 days after the distribution.

Condition 11 strengthens the dividend protection by prohibiting any distributions from PGE to Enron prior to the issuance of the New PGE Common Stock unless PGE has, and can reasonably expect to maintain after the distribution, a senior secured debt rating of not lower than BBB+ from Standard & Poor's.

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2. Enhanced Hold-Harmless Protection

The Stipulation also updates and upgrades the hold-harmless provisions. Condition 6(a) prohibits PGE from seeking recovery for increases in the allowed cost of capital (a) due to Enron's ownership of PGE or (b) caused by the Reserve's ownership of 25% or more of PGE's common stock. This replaces Condition 7 of the UM 814 Order with respect to Enron's ownership. It also updates the protection to apply to the Reserve's ownership of PGE at the 25% threshold and above.

Condition 6(b) prohibits PGE from seeking recovery for increases in PGE's *revenue requirement* that result from Enron's ownership. This upgrades the UM 814 Order Condition 10, in which Enron guaranteed that customers would be held harmless from the effect of the "merger between Enron and PGC." PGE, not Enron, is responsible for this hold-harmless protection. This enhances the insulation provided to customers because, given that Enron filed for bankruptcy protection, it is unclear what value the Enron UM 814 guarantee has.

3. New Indemnifications from Enron

Condition 16 provides that Enron will indemnify PGE for potential control group income tax and employee benefits liabilities. The Commission concluded that a similar indemnity provision in the proposed Texas Pacific acquisition provided a benefit to customers, but discounted the level of that benefit because the indemnification would likely be provided in the event the Commission rejected Texas Pacific's application and the stock distribution occurred. UM 1121, Order No. 05-114 at 31. There is still reason to count this indemnification as a benefit. It acts as an insurance policy protecting the financial health of PGE, which is a benefit to customers.

Enron's indemnity obligation is a post-bankruptcy obligation. There is no reason to discount the benefit to PGE and its customers associated with the obligation as would be appropriate for a creditor claim in a bankruptcy proceeding. Enron's witness

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Mitchell Taylor testified that Enron would honor the indemnity obligations. PGE–SFC(RDC)/500, Taylor/8.

4. Extended SQMs for Customers' Benefit

The Conditions ensure continued focus on quality of service, safety and reliability. The Stipulation provides for the maintenance and improvement of customer service in two ways. First, Condition 9 extends the service quality measures ("SQM") that otherwise would terminate in 2006. Second, PGE agrees to work with ICNU on additional service quality standards for service to high tech companies. Condition 9. In addition, PGE agrees to work with Staff to present a billing accuracy service quality measure. The Stipulation obligates PGE to submit a billing accuracy SQM within 180 days of a Commission order approving the Application. Condition 14.

These Conditions reflect a continuation and deepening of PGE's commitment to customer service. These commitments provide benefits that otherwise would be unavailable.

5. Direct Access Options

The Stipulation also contains commitments to offer new direct access options, continue several direct access options, and increase election windows when customers may elect these portfolio options. Condition 15. PGE also commits to maintain a simplified rate structure for large non-residential customers. In particular, if PGE pursues a decoupling mechanism in its next rate case, it agrees that such a mechanism will not apply to Schedule 83 customers, who already pay demand and facilities charges.

B. THE APPLICATION, SUBJECT TO THE CONDITIONS IN THE STIPULATION, PREVENTS OR FULLY MITIGATES HARM ASSOCIATED WITH THE ISSUANCE OF NEW PGE COMMON STOCK TO THE RESERVE AND SHAREHOLDERS

This is a unique ORS 757.511 Application. Potential harms associated with traditional utility acquisitions have no relevance because this is not a traditional utility

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acquisition. Conditions address any potential harm associated with the Application. We address these two sources of customer protection in turn.

1. Traditional Concerns Have No Application

Many acquisitions are debt financed, which can create concerns for the financial strength of the utility and place undue pressure on the dividend policy of the utility. Order No. 05-114 at 33-34. This Application will impose no new debt or liability on PGE. Settlement Parties/100, Conway-Jenks-Lesh/5.

Utility mergers often involve holding companies, which may create concerns if the holding company places undue financial pressure on the utility. *Id.* This Application does not create a traditional holding company. *Id.*

Utility acquisitions have caused the Commission concern because of the complex affiliate relations created. UM 814, Order No. 97-197 at 7-8. This transaction creates no new affiliate other than the Reserve because there is no traditional holding company structure.

ORS 757.511 applications often involve a change in beneficial ownership with a new owner and a new business plan. *See, e.g., In Re Sierra Pacific*, UM 967, Order No. 00-702. This Application involves no change in beneficial ownership. Settlement Parties/100, Conway-Jenks-Lesh/5.

Acquisitions may transform a utility from a widely-held, publicly-traded company to a utility with a single owner. UM 814, Order No. 97-196 at 7. This may cause concern that the single owner could manipulate the utility and weaken its financial condition. *Id.* Not only is this not happening in this case, but the exact opposite is occurring. The purpose of the Application is to distribute 100% of PGE's common equity to creditors of Enron. After the issuance of New PGE Common Stock to the Reserve and Holders of

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Allowed Claims, and the ultimate distribution of all New PGE Common Stock to Enron creditors, PGE will be a widely held company that is traded on a public exchange.

2. The Conditions Provide Still Further Protections for Customers

To the extent there are particular risks associated with the Application, the Conditions insulate customers from experiencing harm:

a. Cost of Issuing New PGE Common Stock

Condition 4 ensures that customers will not pay for any non-recurring costs associated with the issuance of New PGE Common Stock to the Reserve and Holders of Allowed Claims:

> Condition 4. PGE shall exclude from PGE's utility accounts all non-recurring costs of PGE's transition from a privately held corporation to a publicly-traded corporation, including but not limited to the costs of issuance of the New PGE Common Stock, the initial listing of such stock on a national stock exchange, and the release of any such stock held by the Reserve to Holders of Allowed Claims.

b. Affiliate Relations

As mentioned earlier, the unique characteristics of the Application moot affiliate concerns traditionally associated with utility acquisitions. Unlike prior ORS 757.511 applications, the utility will not become part of a holding company with complex affiliate relations. Detailed affiliate relations conditions are inapposite.

> A number of the Enron Conditions were no longer necessary, because they related to PGE becoming part of a larger corporate family of energy companies. This includes Enron Conditions 1, 12, 13, 14, 15, and 16.

Settlement Parties/100, Conway-Jenks-Lesh/15.

Condition 1 bars allocations or charges from the Reserve to PGE, which is the only new affiliate relation. This fully protects customers from any potential harm from affiliate transactions between the Reserve and PGE.

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c. Access to Information

Conditions 2, 3 and 7 ensure that the Commission has access to all relevant and important information. Settlement Parties/100, Conway-Jenks-Lesh/15. Condition 2 provides the Commission with access to information pertaining to PGE's transactions, and the Reserve's books and records pertaining to PGE. These are the exact same conditions as UM 814 Order Conditions 3 and 8. But the Stipulation goes even further. It provides the Commission "unrestricted access" to all written information provided to common stock and bond analysts, or rating agencies, concerning PGE. Condition 7.

d. Hold Harmless

The Stipulation contains a hold-harmless provision similar to those adopted in other ORS 757.511 proceedings. It protects customers from paying for any increase in the cost of capital associated with the Reserve's ownership of 25% or more of PGE's issued and outstanding common stock. Condition 6(a). As described above, other provisions of the hold harmless Condition provide customers with enhanced and improved protections for potential harm that Enron's ownership may have caused.

e. Ring-Fencing

The Stipulation contains a number of provisions that prevent the weakening of PGE's financial condition. As mentioned earlier, the prospect of this Application weakening PGE's financial condition is speculative at best given that the conditions that give rise to this concern are not present. The Application will impose no new debt or liability on PGE, nor will PGE become part of a traditional holding company, and the Reserve will not require PGE dividends to finance new debt or other affiliate business. Nevertheless, the Stipulation continues limitations on dividends that would cause PGE's common equity capital to drop below 48% (or other specified level of total capital) (Condition 5), provides the Commission with written notice of declared dividends (Condition 8), and prohibits distributions to Enron

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prior to the issuance of the New PGE Common Stock unless PGE can be reasonably expected to maintain a BBB+ rating or better from Standard & Poor's (Condition 11).

The Stipulation also recognizes the transitional nature of the Reserve's ownership. The Reserve's ownership level will be regularly decreasing. The Stipulation acknowledges that as PGE's shares become more widely held, the investing public, minority shareholders, and a critical financial community will serve to protect and enhance PGE's financial strength. Ring-fencing conditions protect the utility from manipulation by a single shareholder. When a single shareholder no longer exists, the financial strength of the utility is protected by market forces, not ring-fencing provisions.

> The circumstances of the transitional structure differ from a traditional holding company for many reasons, including the presence of a significant percentage of stock held by non-affiliated entities or persons as of the issuance. The presence of minority shareholders, as well as coverage by the financial community, lessens the ability of creditors, through the Reserve, to influence PGE's Board to declare dividends that could weaken PGE's financial structure. By the time the Reserve's ownership drops below 40%, the minimum required equity can also drop. By the time the Reserve's ownership drops below 20%, a "ring fence" will no longer be necessary.

Settlement Parties/100, Conway-Jenks-Lesh/16.

f. Service Quality

The Application does nothing to put at risk PGE's excellent record for customer service. No new debt will require servicing. PGE will operate just as it did before the issuance of New PGE Common Stock to the Reserve and Holders of Allowed Claims, as the Commission surmised in the TPG docket. *See* UM 1121, Order No. 05-114 at 18 ("There is little to suggest that PGE would operate very differently after the stock distribution plan than it does now."). Nevertheless, the SQM Conditions (Conditions 9 and 14) demonstrate that PGE's commitment to service quality will not suffer because of the Application.

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VI. THE COMMISSION SHOULD APPROVE PGE'S STOCK ISSUANCE

A. ORS 757.415

ORS 757.415 authorizes a public utility to issue securities for the purposes identified in the statute.[8] The issuance of New PGE Common Stock will satisfy all these purposes. The Plan calls for the cancellation of existing PGE shares and the issuance of New PGE Common Stock to continue to provide PGE with the common equity it needs. PGE needs common equity to support its credit and provide working capital. In short, the issuance allows PGE to continue to have the common equity outstanding necessary for all of the purposes listed in ORS 757.415, namely, the safe, efficient, effective operation of an electric utility for the benefit of its customers. PGE/400, Piro/15.

The issuance of stock does not need to generate proceeds to meet the purposes identified in ORS 757.415. The statue does not require that the issuance of securities immediately result in proceeds. It simply requires that the issuance be for one of "the following purposes and no others" (ORS 757.415(1)). The purpose of issuing New PGE Common Stock is to provide common equity to enable PGE to acquire property, construct and improve its facilities, and improve and maintain its service, to name just a few of the purposes listed in ORS 757.415.

Moreover, the Commission has taken an expansive view of ORS 757.415, rejecting attempts to limit its authority to the approval of securities whose purpose is raising proceeds. In docket UF 4192, PGE applied to issue a single share for $1 of Junior Preferred Stock. The Share was designed to further insulate PGE from the effects of the Enron bankruptcy by limiting PGE's ability to file a voluntary petition for bankruptcy without the written consent of the owner of the Share. This helped stabilize both PGE's credit ratings and

[8] See footnote 7 above for a list of the purposes identified in the statute.

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its continued access to capital markets. The Commission approved the application under ORS 757.415(1) and (2), rejecting a narrow interpretation of its authority:

> Issuing the Share will enable PGE to protect and maintain its ability to access capital markets, and in so doing, secure sufficient generating, transmission, and distribution capacity to serve its customers reliably and at reasonable cost. The Application falls within the scope of ORS 757.415(1)(a) and (b) because PGE's ability to keep capital costs low directly affects its ability to acquire utility property and facilities and to improve and maintain its service.

UF 4128, Order No. 03-024 at 3.

The same is true for issuance of the New PGE Common Stock. It will provide common equity necessary for PGE to operate as a public utility. Given the substantial benefits of the Application, as supplemented by the Stipulation, the issuance satisfies the other requirements under ORS 757.415(2)(b): it is both "compatible with the public interest" and will not "impair" PGE's ability to offer reliable electric service to customers.

B. ORS 757.412

Alternatively, the Commission could authorize the issuance of New PGE Common Stock under ORS 757.412. That statute allows the Commission to find that an issuance of securities should be exempt from the requirements of ORS 757.415 and ORS 757.410 et seq. if the exemption is in the public interest. Here, the uniqueness of the Application and the benefits it will provide customers support a "public interest" exemption:

> The proposed transaction is so unique that the Commission's review of it should not be confined by a statute that governs use of stock issued in the ordinary course of utility business. In other words, the public interest requires the Commission to judge the stock re-issuance on its merits, not by determining whether it fits within one of the six specific purposes for the use of proceeds. The Legislature created ORS 757.412 to apply in these circumstances.

Staff/100, Conway/11. The benefits of the Application and Stipulation are well documented and supported with record evidence. The unique features of the Application, combined with

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the hold-harmless and other Conditions in the Stipulation, ensure that the issuance of New PGE Common Stock will cause customers no harm. The broad range of parties supporting the Application and Stipulation further evidence that this Application is in the public interest. The Commission should grant a "public interest" exemption for the Application.

VII. THE CITY OF PORTLAND'S OBJECTIONS ARE UNIFORMLY WITHOUT MERIT

The City of Portland (the "City") is the only party to submit testimony and objections against the Application and Stipulation. The City's objections fail, both as a matter of law and fact. As a matter of law, the City's objections reflect fundamental misconceptions about the Commission's authority under ORS 757.511. As a matter of fact, the City's objections are full of unfounded allegations and riddled with incorrect claims.

A. THE CITY'S OBJECTIONS ARE ILL-FOUNDED AS A MATTER OF LAW

1. City Uses the Wrong "But For" Case

The City maintains that the Commission should measure the Application against the "but for" case in which the City owns PGE. City of Portland/100, Cuthbert/25 ("I believe it would be appropriate for the Commission to use the municipal operation of PGE as a valid comparator in this proceeding"). The correct comparison is not a City acquisition that never occurred and has no prospect of taking place in the future. We do not know what would happen if the Application is not granted because there is only one Plan; there is no alternative or plan B. Application, 5-6. But we do know that there is no legal basis or evidence upon which to consider City ownership as an alternative.

In UM 1121, URP offered, and the Commission rejected, "public ownership" as an appropriate measure:

> URP adds a third alternative that would also consider the purchase of PGE by the City of Portland or another public entity. We reject URP's recommendation for two reasons. First, no such proposal was presented in this proceeding.

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> *Second, and more importantly, we reiterate that our review under ORS 757.511 does not provide for consideration of competing proposals.*

Order No. 05-114 at 18, n. 14 (emphasis added). There is no reason to reach a different legal conclusion in this docket.

Not only is the City alternative legally flawed, the facts don't support it. The City does not have a contract to purchase PGE. There is no purchase price, financing or operating plan. "The City cannot provide even the most basic information necessary to determine what it would cost the City and its citizens to purchase and run PGE." PGE-SFC(RDC)/400, Piro/13.

2. Rate Credits Are Not Required

The City also assumes that a rate credit is the only way to demonstrate a "net benefit" to customers. City of Portland/100, Cuthbert/ 24 ("For there to be a measurable public benefit from the stock distribution, a significant rate credit is needed"). This assumption is wrong. In UM 1011, the Commission rejected the City's position:

> This allows us to retain flexibility in our decision making, a desideratum in today's uncertain climate. Because potential harm from merger transactions is often difficult to verify, recent merger orders have required monetary terms as a way to demonstrate that customers will receive a net benefit. *This need not always be the case.*

Order No. 01-778 at 11 (emphasis added). This is not a case in which potential harm, or the lack thereof, is difficult to verify. The traditional risks associated with utility acquisitions are not present. In such circumstances, non-monetary benefits are more than sufficient to establish a net benefit, as the Commission has recognized.

3. ORS 757.511 Applications Must Be Analyzed On a Case-By-Case Basis

The City's approach ignores the unique facts of this Application. It assumes that the Application is just like Enron's acquisition of PGE, just like ScottishPower's

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acquisition of PacifiCorp, and just like Sierra Pacific's proposed, but abandoned, acquisition of PGE. Rate credits were part of the settlements in each of these dockets, so rate credits should be required here, according to the City's simplistic approach. City Objections, 17.

The Commission has expressly rejected this "one-size-fits-all" analysis. The Commission considers "the total set of concerns presented by each merger application in determining how to assess a net benefit." UM 1011, Order No. 01-778 at 11. Because the Commission focuses on the facts of each application, there is no single rule or test that applies: "We cannot say in advance what showing a given utility must make to gain approval; such a determination would restrict the discretion the Legislature has given us. We will assess each merger on a case-by-case basis." *Id.* The Commission has rejected the use of other utility merger orders as an appropriate measure for rate credits: "as pointed out by Staff in its Staff Addendum to Post-Hearing Brief, applications brought under ORS 757.511 must be decided on a case-by-case basis." *In Re ScottishPower*, UM 918, Order No. 99-616 at 16 (Oct. 6, 1999).

Indeed, the use of rate credits illustrates the fact-intensive nature of the Commission's review. In the three precedents the City cites, the Commission approved settlements which included the applicants' offer of rate credits. City Objections at 17 (citing Commission orders in Enron/PGE (Order No. 97-196); *ScottishPower/Pacific Corp* (Order No. 99-616) and *Sierra Pacific/PGE* (Order No. 00-702). The Commission never concluded that rate credits were necessary for approval. The Commission concluded that rate credits were sufficient, not that they were necessary, to satisfy the legal standard. Moreover, in the three cases in which the Commission reviewed an ORS 757.511 application without a settlement, the Commission did not impose a customer rate credit. *In Re PGC*, UF 3972, Order No. 86-106, at 8 (January 31, 1986); *In Re Idaho Power*, UM 877, Order No. 98-056 (Feb. 17, 1998); and *In Re PacifiCorp*, UM 1021, Order No. 01-573 (July 10, 2001).

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Virtually all the parties in this docket agree that this Application is unique and should not serve as precedent in future utility acquisition dockets:

> The Stipulation expresses the Settlement Parties' agreement that this is a unique Application under ORS 757.511 and that no Settlement Party will use the Condition found suitable in this case as precedent in any other docket, including UM 1209, regarding what generally constitutes a net benefit under ORS 757.511. The Application is unique in many ways.

Settlement Parties/100, Conway–Jenks–Lesh/4. The unique circumstances of this Application make the use of previous Commission orders inappropriate.

4. Irrelevant Issues for Which There Is No Statutory Authority

Finally, most of the concerns the City addresses have nothing to do with the Application. For example, the City complains about the lack of a new franchise agreement, collections from customers of the Multnomah County tax, and the adequacy of PGE's reserves for potential liabilities. City/100, Cuthbert/11-12; City Objections at 19. The City goes so far as to request that the Commission impose a condition requiring a new franchise agreement: "the Commission should include a condition that PGE enter into a modern franchise with the City of Portland, in place of the asserted claims operating under franchises granted in the 1800s." City Objections at 19.

Such claims and proposed conditions have no place in this proceeding. The Application has nothing to do with these issues. The Application does not create these issues. It does not make these issues more or less serious. It does not affect these issues at all.

The City's attempt to interject these irrelevant issues in this docket underscores the City's misunderstanding about the Commission's statutory authority. In UM 1121, the Commission concluded that there was no legal basis for the Commission to address such unrelated issues and conditions:

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> These conditions may have been part of stipulated agreements in the past, and may have been agreed to in part by Applicants in this case. However, Intervenors have failed to provide any statutory basis to authorize our adoption of those conditions under ORS 757.511. . . Once the applicant determines that it is not amending its application with the addition of such provisions, we question the parties' ability to pursue conditions unrelated to harms posed by the transaction. While we have the authority to place some conditions on an order approving an application, we do not believe we have the authority to add conditions for the sole purpose of adding benefits.

UM 1121, Order No. 05-114 at 35.

In particular, the Commission flatly rejected the City's attempt in that docket to interject unrelated issues like a new city franchise agreement: "The City of Portland also wants Texas Pacific to negotiate a modern franchise agreement. The City also appears to recognize that we do not have jurisdiction over that issue and that it is not directly tied to this transaction." *Id.* at 35, n. 20. The Commission was right in UM 1121 concerning this issue, and the City suggests no reason for the Commission to change its legal conclusion. [9]

B. THE CITY'S POSITION RESTS ON UNFOUNDED AND INACCURATE CLAIMS

1. The Application Does Not Reduce Customer Protections, As the City Alleges

In one form or another, the City's objections all reduce to the following allegation: "the Application and the Stipulation do not maintain the current level of protection afforded to PGE's customers by the existing conditions available under Enron's ownership." City of Portland/100, Cuthbert/ 4-5. The City's testimony provides no evidence whatsoever for this allegation. The City complains about alleged Enron-related liabilities, PGE's potential liabilities, Multnomah County taxes, franchise issues, and other unrelated topics, without any suggestion, let alone evidence, that customers will be worse off with

[9] In any event, such a condition is unnecessary in light of the ongoing negotiations between the City and PGE regarding a new franchise. PGE has been holding regular meetings with the City since June 2004. Mr. Piro reported that "substantial progress has been made." PGE-SFC(RDC)/400, Piro/14.

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respect to these issues if the Commission grants the Application and adopts the Stipulation. All the evidence is to the contrary. The ring-fencing conditions are stronger; written notice of dividends will be faster; the hold harmless provision is upgraded and updated; Enron is prohibited from receiving distributions that might jeopardize PGE's credit ratings; Enron provides indemnification for control group tax and benefit liability; and service quality measures are extended.

Where the City is specific, it gets the facts wrong. The City suggests that the hold-harmless provision is weaker because it allegedly will expire after PGE's next rate case. City/100, Cuthbert/20. This is wrong. The hold-harmless provision for both Enron ownership and the Reserve's ownership of 25% or more has no time limit. PGE-SFC(RDC)/400, Piro/4. The only time limit applies to the additional $40 million on top of the 48% or other minimum common equity percentage. This $40 million addition goes away after the next rate case because the $40 million supplement is designed to absorb adjustments, if any, in PGE's next rate case related to Enron's ownership. The end of the $40 million addition cannot possibly be viewed as a reduction in customer protection. The UM 814 Order had no additional equity requirement. The protection afforded by the additional $40 million in equity cushion reflects a strengthening, not a weakening, of the hold-harmless condition.

Perhaps the City is referring to the reduction and ultimate elimination of the minimum common equity ratio for distributions when the Reserve's ownership drops below 20%. If this is the City's position, they have missed the primary point of the Application. The reduction and elimination of the minimum equity requirement reflect the transitional nature of the Reserve's ownership. When there is a large majority shareholder, the minimum common equity ratio condition serves to protect customers and the utility from manipulation. The ultimate elimination of the minimum equity threshold does not reflect the loss of a

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customer protection. On the contrary, the elimination of this condition reflects a different ownership structure that no longer poses the threat that this condition addresses. *See* Settlement Parties/100, Conway-Jenks-Lesh/16.

2. PGE Potential Liabilities

The City also alleges, without any support, that PGE has not adequately reserved for potential liabilities. City /100, Cuthbert/19. Aside from offering no evidence on point, the City's claim is incorrect. PGE's CFO, Jim Piro, testified that "PGE has adequately reserved for its liabilities, based on all available information, to the extent required and has disclosed adequately its liabilities to the public under generally accepted accounting principles and the reporting requirements of the Securities and Exchange Commission." PGE-SFC(RDC)/400, Piro/5. There are other independent points of confirmation. PGE discloses potential liabilities on its Form 10-K and Form 10-Q. Deloitte and Touche, LLP, an independent registered public accounting firm, audits PGE's Form 10-Ks and reviews its Form 10-Qs. Finally, credit rating agencies review PGE's potential liabilities and its reserves. PGE-SFC(RDC)/400, Piro/6. And PGE's ratings are growing stronger, not weaker. *Id.*

3. The Reserve Is Not a "Short-Term Financial Player"

The City also provides no support of its allegation that the Reserve is a "short-term financial player" with its sole duty to maximize short-term value to creditors. City Objections, 11-12. As mentioned earlier, the Reserve's Overseers will direct the voting of the New PGE Common Stock held in the Reserve. The Guidelines for the DCR Overseers require that the Overseers exercise their best business judgment and take all actions that a board of directors of a public corporation would be required to take to satisfy its fiduciary duties in making a decision requiring the voting by such corporation of a comparable

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proportion of securities it holds. Nowhere do the Guidelines suggest that the DCR Overseers should focus on maximizing short-term profits. PGD-SFC(RDC)/500, Taylor/5-6.

The differences between the Reserve's ownership and what the Commission reviewed in UM 1121 are stark. The Reserve is not acquiring New PGE Common Stock with the intent to resell the company and make a profit. The Reserve will hold PGE shares because the Plan requires it, and it will regularly reduce its ownership of PGE's shares. Moreover, the opportunity for the Reserve to engage in gaming, or short-term profit maximizing that might harm the utility, is significantly reduced, not increased, by issuance of the New PGE Common Stock: "PGE will have many shareholders, not just one dominant owner." PGE-SFC(RDC)/500, Taylor/6. And the PGE board will owe a fiduciary duty to all shareholders. *Id.* In addition, neither the Disbursing Agent nor the DCR Overseers have any economic interest in the Reserve. Application at 21-22.

4. Other Inaccurate Allegations

Finally, the City's testimony is full of demonstrably incorrect claims. For example, the City claims that PGE has a potential $60 million liability in the California refund proceeding and that its $40 million reserve is insufficient. The City has confused potential refunds, liabilities and reserves. The $60 million figure is the amount the California ISO and the PX owe PGE, not what PGE owes them. PGE/400, Piro/9. PGE has a $40 million reserve against this receivable because FERC may make certain adjustments to the receivable. It now appears that the $40 million reserve was conservative. PGE currently estimates that the FERC adjustment will reduce the $60 million receivable from the California ISO and PX by $27 million, or $13 million less than the $40 million reserve. *Id.*

The City also claims the $73 million receivable Enron owed to PGE in connection with the Enron/PGE merger credit had a "negative impact" on PGE's customers. This is misleading and untrue. First, PGE has passed through to customers the full amount of

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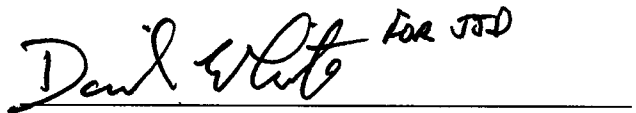
the Enron/PGE merger credit. PGE-SFC(RDC)/400, Piro/8. Customers have received the entire benefit to which they were entitled. Second, given PGE's current capital structure, PGE could have transferred the receivable back to Enron as a dividend (rather than writing off the receivable) without falling below the minimum equity threshold of 48%. Staff/100, Conway/14. As PGE's CFO testified: "This receivable—whether it was written off or collected in full – has no impact on PGE's customers." PGE/400, Piro/8.

VIII. CONCLUSION

For the reasons stated above, the Commission should approve the Application subject to the Conditions in the Stipulation.

Respectfully submitted this 27th day of October, 2005.

PORTLAND GENERAL ELECTRIC COMPANY



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DATED this 27th day of October, 2005.

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UF 4218 / UM 1206

In the Matter of the Application of PORTLAND GENERAL ELECTRIC COMPANY for an Order Authorizing the Issuance of 62,500,000 Shares of New Common Stock Pursuant to ORS 757.410 et seq. **UF 4218** and In the Matter of the Application of STEPHEN FORBES COOPER, LLC, as Disbursing Agent, on behalf of the RESERVE FOR DISPUTED CLAIMS, 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 **UM 1206**	**APPLICANTS' AND ENRON'S BRIEF**

I. INTRODUCTION

This Brief is filed on behalf of Portland General Electric Company ("PGE"), Stephen Forbes Cooper, LLC ("SFC"), as Disbursing Agent, on behalf of the Reserve for Disputed Claims ("Reserve") (collectively, "Applicants") and Enron Corp. ("Enron") in support of the Application.[1]

The Application, as supplemented by the Stipulation dated August 31, 2005, has earned broad support. The Commission Staff, the Industrial Customers of Northwest Utilities ("ICNU"), the Citizens' Utility Board ("CUB"), the Applicants, Enron, and the Community Action Directors of Oregon and Oregon Energy Coordinators Association (collectively, "Settlement Parties"), all signed the Stipulation, agreeing that the Application

[1] The joint application filed on behalf of Portland General Company and Stephen Forbes Cooper, LLC, as Disbursing Agent, on behalf of the Reserve for Disputed Claims, on June 17, 2005.

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and Stipulation provide "net benefits to PGE's customers and will serve PGE's customers in the public interest." These parties support Commission approval of the Application and Stipulation.

The Commission should approve the Application for the reasons the Settlement Parties recommend. First, the transaction is unique. No acquisition debt is incurred; no traditional holding company is formed; and the eventual outcome of the Application will be a publicly-traded company that is widely held, the exact opposite of most ORS 757.511 applications. Second, the unique nature of the transaction, combined with the conditions in the Stipulation (the "Conditions"), ensure that customers are protected from any potential harm associated with the Application. Finally, the Application and Conditions provide a variety of important benefits to customers.

This Brief is organized as follows: the Application (section 2), Legal Standards (section 3), Status of the Docket (section 4), the Reserve's Application Under ORS 757.511 (section 5), PGE's Application to Issue New Securities (section 6), and Response to the City of Portland's Objections (section 7).

II. THE APPLICATION

The Application seeks Commission approval to implement the terms of the Plan[2] that the Bankruptcy Court confirmed on July 15, 2004 (the "Confirmation Order"). In particular, the Application requests authority to carry out the Plan's directive to transfer 100% of PGE's common equity from Enron to the creditors of Enron and other Debtors.[3]

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[2] Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the United States Bankruptcy Code, dated July 2, 2004, including the Plan Supplement and all schedules and exhibits thereto (the "Plan").

[3] The Debtors are Enron and the other entities identified in Plan Section 1.77, all of whose bankruptcy filings were consolidated with Enron. In this brief, the term "Debtors" excludes Portland General Holdings, Inc., and Portland Transition Company, Inc., whose bankruptcy plans were not confirmed by the Bankruptcy Court. Enron and the other Debtors whose plans were confirmed by the Confirmation Order became "Reorganized Debtors," which

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The Plan and Bankruptcy Court Confirmation Order accomplish this by canceling PGE's existing common stock held by Enron and issuing to Enron's creditors new PGE common stock ("New PGE Common Stock").

The Application contains two separate requests. First, PGE requests an order authorizing the issuance of 62,500,000 shares of New PGE Common Stock. After receiving all necessary regulatory approvals, PGE will issue the New PGE Common Stock when the Bankruptcy Court has allowed sufficient claims to permit the issuance of not less than 30% of the New PGE Common Stock to Holders of Allowed Claims.[4] The remainder of the New PGE Common Stock will be issued to the Reserve. Application, 12-13. The 30% condition is likely to be met early enough to permit the issuance to occur in April 2006. Application, 13. At the time of issuance, Holders of Allowed Claims will receive not less than 30%, or 18,750,000, of such shares and the Reserve will receive not more than 70%, or 43,750,000 of such shares. PGE seeks a Commission order authorizing the issuance under ORS 757.415 or a "public interest" exemption under ORS 757.412. Application at 2.

Second, the Disbursing Agent, on behalf of the Reserve, seeks an order under ORS 757.511 to hold more than 5% of the New PGE Common Stock and to vote not more than 70% of the New PGE Common Stock. The Disbursing Agent will be the registered

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means that they emerged from bankruptcy and are no longer debtors-in-possession under Chapter 11 of the United States Bankruptcy Code. For convenience, this brief continues to use the term "Debtors" to refer to the Reorganized Debtors. *See* Application at 2 n.3 and 9-10.

[4] An Allowed Claim is one scheduled by a Debtor as liquidated and not contingent or disputed or, if not so scheduled, filed against a Debtor and allowed by a Final Order of the Bankruptcy Court. The Bankruptcy Court fixed November 29, 2004, as the record date for determining which holders of Allowed Claims are entitled to receive distributions under the Plan, including distributions of New PGE Common Stock. As used herein, "Holder of Allowed Claim" means the holder, as of the record date, of an Allowed Claim.

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holder of New PGE Common Stock for the Reserve, and the DCR Overseers[5] will determine how the Disbursing Agent votes the New PGE Common Stock held in the Reserve. The amount of New PGE Common Stock the Disbursing Agent holds may not exceed 70%. The Reserve will release shares of New PGE Common Stock to Holders of Allowed Claims as disputed claims are resolved, resulting in regular and irreversible reductions in the percentage of New PGE Common Stock held in the Reserve. Application at 13. The Reserve will probably hold less than 50% of the New PGE Common Stock within one year after the issuance, and may hold less than 30% of the New PGE Common Stock within two years after the issuance. *Id.* Ultimately, the Reserve will release all of the New PGE Common Stock when Debtors resolve the last of the disputed claims.[6] *Id.* at 14.

III. LEGAL STANDARDS

A. THE RESERVE'S ORS 757.511 APPLICATION

The Commission reviews applications under ORS 757.511 to determine whether the proposed transaction "will serve the public utility's customers in the public interest." ORS 757.511(3). If the application meets this standard, then the Commission "shall issue an order granting the application." *Id.* For applications that fall short of this standard, the Commission may, in its discretion, impose additional conditions or simply deny them. *In Re Oregon Electric Utility Company*, UM 1121, Order No. 05-114 at 16 (March 10,

[5] The DCR Overseers were appointed by the Bankruptcy Court in the Confirmation Order. DCR Overseers will exercise their business judgment to vote the Plan Securities, including the New PGE Common Stock, in a manner they believe will maximize the value of the assets to be distributed to creditors. The DCR Guidelines, adopted in connection with the Confirmation Order and Plan, require that the DCR Overseers take all actions that a board of directors of a public corporation chartered in the State of Delaware would be required to take to satisfy its fiduciary duty. *See* Application at 2, 21-23.

[6] Section 1.86 of the Plan defines disputed claims as any claim against a Debtor to the extent the allowance of such Claim or Equity Interest is the subject of a timely objection or a request for estimation in accordance with the Plan, the Bankruptcy Code, the Bankruptcy Rules or the Bankruptcy Court's Confirmation Order.

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2005). The Commission considers the "application" to include the initial application, any amendments, and agreed-to conditions. *Id.* In this docket, the Application has been supplemented by the Conditions contained in the Stipulation. The Commission has adopted a two-prong test to determine whether a proposed transaction "will serve the public utility's customers in the public interest." First, the application must provide a net benefit to customers. Second, the application must not "impose a detriment on Oregon citizens as a whole." UM 1121, Order No. 05-114 at 17; *In Re Legal Standard for Approval of Mergers*, UM 1011, Order No. 01-778 at 11 (Sept. 4, 2001).

Under ORS 757.511, the Legislature has delegated broad authority to the Commission. The Commission has carefully guarded its discretion: "the Legislature has given the Commission discretion in assessing whether to approve mergers. We do not propose to circumscribe that discretion." Order No. 01-778 at 11. The Commission reviews each application based on the particular facts: "We will assess each merger on a case-by-case basis." *Id.*; *see also, In Re ScottishPower*, UM 918, Order No. 99-616 at 16 (Oct. 16, 1999). The Application, with the Conditions agreed to in the Stipulation discussed below, meets the legal standard, and the Commission should approve the Application as supplemented by the Stipulation under ORS 757.511.

B. PGE'S STOCK ISSUANCE APPLICATION

The Commission may approve an application to issue securities under either ORS 757.415 or ORS 757.412. ORS 757.415 applies if the purpose of the issuance is identified in the statute.[7] For applications made under ORS 757.415, the Commission must

[7] The purposes listed under ORS 757.415 are as follows: (1) the acquisition of property or the construction, completion, extension or improvement of its facilities; (2) the improvement or maintenance of its service; (3) the discharge or lawful refunding of its obligations; (4) the reimbursement of money actually expended from income or from any other money in the treasury of the public utility not secured by or obtained from the issue of stocks or bonds, notes or other evidences of indebtedness, or securities of such public utility, for any of the purposes listed in (1) through (3) above; (5) the compliance with terms and conditions of

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find that the issuance is compatible with the public interest and will not impair the utility's ability to provide service. ORS 757.415(2)(B). Alternatively, the Commission may grant the application if it determines under ORS 757.412 that the issuance should be exempt because the application of ORS 757.410 et seq. is not required by the public interest. The Application, as supplemented by the Stipulation, and the issuance of the New PGE Common Stock, meet both of these tests.

IV. THE STATUS OF THE DOCKET

On June 17, 2005, PGE and the Reserve submitted the Application. The Applicants conducted a series of workshops and submitted opening testimony in support of the Application on August 10, 2005. Public settlement conferences were held on August 17 and 24, 2005. On August 31, 2005, Commission Staff, CUB, ICNU, PGE, the Disbursing Agent on behalf of the Reserve, Enron, and the Community Action Directors of Oregon and Oregon Energy Coordinators Association entered into a settlement resolving "all issues in these dockets among the Settlement Parties." Stipulation, 1. The intent of the Settlement Parties is that the Commission adopt the Conditions contained in the Stipulation as part of its final order approving the Application:

> The Settlement Parties agree that, subject to the Conditions and other commitments of the Settlement Parties set forth herein, the issuance of the New PGE Common Stock to Holders of Allowed Claims and the Reserve as requested in the Application will provide net benefits to PGE's customers and will serve PGE's customers in the public interest. The Settlement Parties agree that, subject to the Conditions and the other commitments of the Settlement Parties set forth herein, the Commission should approve the Application.

Stipulation, 2. Witnesses from CUB, Commission Staff and PGE submitted testimony on behalf of the Settlement Parties supporting the Stipulation and the Application. Settlement

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options granted to its employees to purchase its stock, if the Commission first finds that such terms and conditions are reasonable and in the public interest; and (6) the finance or refinance of bondable conservation investment as described in ORS 757.455.

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Parties/100, Conway–Jenks–Lesh/1-21. The City of Salem subsequently submitted testimony stating that it did not oppose the Stipulation.

A single party—the City of Portland—filed testimony and objections in opposition to the Application and Stipulation. On September 28, 2005, PGE, Enron and Commission Staff submitted testimony responding to the City of Portland's testimony and objections.

During the prehearing conference on September 29, 2005, no party asked for cross-examination or oral argument. Accordingly, the hearing and oral argument were cancelled. *See* ALJ Smith Ruling, October 13, 2005. "Because of the limited issues raised in testimony," prehearing submissions were removed from the schedule. ALJ Smith Memorandum, September 30, 2005. The only remaining procedural steps in this docket are a single round of briefs and the Commission's final order.

V. THE RESERVE'S APPLICATION UNDER ORS 757.511 SHOULD BE GRANTED

The evidence shows that the Application meets the legal standard of ORS 757.511. The Application, as supplemented by the Stipulation, provides net benefits to customers. The nature of the transaction and the Conditions set forth in the Stipulation protect customers and the public generally from any harm or potential harm related to the Application.

A. THE APPLICATION AND STIPULATION PROVIDE CUSTOMERS WITH A NET BENEFIT

As the parties to the Application and Stipulation recognize, the circumstances that give rise to this Application and the Application itself are unique. First, the Application implements a confirmed bankruptcy plan. Approval of the Application by the Commission will permit Enron and PGE to implement the terms of the Plan for the issuance of New PGE Common Stock to the Reserve and Holders of Allowed Claims. Application at 3. Second,

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the purpose of the Reserve is not to acquire PGE for investment purposes. The purpose of the Reserve is to preserve the value of PGE and other assets of Enron and to hold those assets only for as long as is necessary to transfer them to Holders of Allowed Claims. *Id.* Third, the Application does not seek to change beneficial ownership in PGE. *Id.* at 4-5. Now, creditors of Enron and the other Debtors currently hold beneficial ownership in all Enron's assets, including the PGE common stock. After issuance of New PGE Common Stock at least 30% of such shares will be issued to Holders of Allowed Claims. The remainder of New PGE Common Stock will be held by the Reserve in trust for the benefit of Holders of Disputed Claims and Allowed Claims. Fourth, the Application does not result in any new debt or liability for PGE. *Id.* at 27. Finally, the Application will serve to remove PGE from a traditional holding company structure. *Id.* at 5. The expected outcome of the Plan is for PGE shares to be publicly traded and widely held. *Id.* at 28; *see generally* Settlement Parties/100, Conway-Jenks-Lesh/4-6 (describing the unique nature of the Application).

Approval of the Application and the Stipulation will also have the salutary effect of removing uncertainty. PGE's future has been in flux since 1999. No less than three acquisitions have been proposed but failed to close. Enron filed for bankruptcy protection in 2001. Now the Plan requires the distribution of all Enron assets, including the common equity of PGE.

If the Application is denied, customers face the prospect that PGE's common equity could be distributed without the protections and benefits of the Conditions. As the Settlement Parties testified:

> Should the Commission deny this Application, it is not clear how PGE's common equity would be distributed as called for in the Plan. The distribution of PGE's common equity could occur without any of the Conditions in this Settlement that protect customers and PGE during the transition and provide benefits to customers even beyond the transition.

Settlement Parties/100, Conway-Jenks-Lesh/12.

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The benefits associated with the Conditions are substantial and impressive:

1. Improved Ring-Fencing Provisions

The Stipulation contains strengthened and updated ring-fencing provisions, enhancing the customer protections in the Enron/PGE merger order (the "UM 814 Order"). Condition 5 imposes the same minimum common equity ratio limit as Condition 6 of the UM 814 Order so long as the Reserve holds 40% or more of the outstanding common stock of PGE. This minimum equity ratio threshold for distributions is supplemented. Condition 6(c) prohibits PGE from making a distribution that would cause PGE's common equity to fall below the level specified in Condition 5 plus $40 million pending the outcome of PGE's next general rate case. This additional $40 million is to assure PGE's capacity to absorb adjustments, if any, to its revenue requirement resulting from the hold-harmless provisions. Conditions 6(a)(i) and/or 6(b).

Conditions 8 and 11 further enhance the ring-fencing protections for dividends from PGE. Condition 8 requires PGE to give the Commission timely written notice of any dividend declared by its Board of Directors at the same time PGE discloses it to the public. For most dividends, PGE will provide written notice to the Commission sooner than under the UM 814 Order counterpart. PGE-SFC(RDC)/400, Piro/12. The new Condition requires notice when the dividend is made public; for most dividends, the UM 814 Order condition required written notice within 30 days after the distribution.

Condition 11 strengthens the dividend protection by prohibiting any distributions from PGE to Enron prior to the issuance of the New PGE Common Stock unless PGE has, and can reasonably expect to maintain after the distribution, a senior secured debt rating of not lower than BBB+ from Standard & Poor's.

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2. Enhanced Hold-Harmless Protection

The Stipulation also updates and upgrades the hold-harmless provisions. Condition 6(a) prohibits PGE from seeking recovery for increases in the allowed cost of capital (a) due to Enron's ownership of PGE or (b) caused by the Reserve's ownership of 25% or more of PGE's common stock. This replaces Condition 7 of the UM 814 Order with respect to Enron's ownership. It also updates the protection to apply to the Reserve's ownership of PGE at the 25% threshold and above.

Condition 6(b) prohibits PGE from seeking recovery for increases in PGE's *revenue requirement* that result from Enron's ownership. This upgrades the UM 814 Order Condition 10, in which Enron guaranteed that customers would be held harmless from the effect of the "merger between Enron and PGC." PGE, not Enron, is responsible for this hold-harmless protection. This enhances the insulation provided to customers because, given that Enron filed for bankruptcy protection, it is unclear what value the Enron UM 814 guarantee has.

3. New Indemnifications from Enron

Condition 16 provides that Enron will indemnify PGE for potential control group income tax and employee benefits liabilities. The Commission concluded that a similar indemnity provision in the proposed Texas Pacific acquisition provided a benefit to customers, but discounted the level of that benefit because the indemnification would likely be provided in the event the Commission rejected Texas Pacific's application and the stock distribution occurred. UM 1121, Order No. 05-114 at 31. There is still reason to count this indemnification as a benefit. It acts as an insurance policy protecting the financial health of PGE, which is a benefit to customers.

Enron's indemnity obligation is a post-bankruptcy obligation. There is no reason to discount the benefit to PGE and its customers associated with the obligation as would be appropriate for a creditor claim in a bankruptcy proceeding. Enron's witness

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Mitchell Taylor testified that Enron would honor the indemnity obligations. PGE–SFC(RDC)/500, Taylor/8.

4. Extended SQMs for Customers' Benefit

The Conditions ensure continued focus on quality of service, safety and reliability. The Stipulation provides for the maintenance and improvement of customer service in two ways. First, Condition 9 extends the service quality measures ("SQM") that otherwise would terminate in 2006. Second, PGE agrees to work with ICNU on additional service quality standards for service to high tech companies. Condition 9. In addition, PGE agrees to work with Staff to present a billing accuracy service quality measure. The Stipulation obligates PGE to submit a billing accuracy SQM within 180 days of a Commission order approving the Application. Condition 14.

These Conditions reflect a continuation and deepening of PGE's commitment to customer service. These commitments provide benefits that otherwise would be unavailable.

5. Direct Access Options

The Stipulation also contains commitments to offer new direct access options, continue several direct access options, and increase election windows when customers may elect these portfolio options. Condition 15. PGE also commits to maintain a simplified rate structure for large non-residential customers. In particular, if PGE pursues a decoupling mechanism in its next rate case, it agrees that such a mechanism will not apply to Schedule 83 customers, who already pay demand and facilities charges.

B. THE APPLICATION, SUBJECT TO THE CONDITIONS IN THE STIPULATION, PREVENTS OR FULLY MITIGATES HARM ASSOCIATED WITH THE ISSUANCE OF NEW PGE COMMON STOCK TO THE RESERVE AND SHAREHOLDERS

This is a unique ORS 757.511 Application. Potential harms associated with traditional utility acquisitions have no relevance because this is not a traditional utility

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acquisition. Conditions address any potential harm associated with the Application. We address these two sources of customer protection in turn.

1. Traditional Concerns Have No Application

Many acquisitions are debt financed, which can create concerns for the financial strength of the utility and place undue pressure on the dividend policy of the utility. Order No. 05-114 at 33-34. This Application will impose no new debt or liability on PGE. Settlement Parties/100, Conway-Jenks-Lesh/5.

Utility mergers often involve holding companies, which may create concerns if the holding company places undue financial pressure on the utility. *Id.* This Application does not create a traditional holding company. *Id*.

Utility acquisitions have caused the Commission concern because of the complex affiliate relations created. UM 814, Order No. 97-197 at 7-8. This transaction creates no new affiliate other than the Reserve because there is no traditional holding company structure.

ORS 757.511 applications often involve a change in beneficial ownership with a new owner and a new business plan. *See, e.g., In Re Sierra Pacific*, UM 967, Order No. 00-702. This Application involves no change in beneficial ownership. Settlement Parties/100, Conway-Jenks-Lesh/5.

Acquisitions may transform a utility from a widely-held, publicly-traded company to a utility with a single owner. UM 814, Order No. 97-196 at 7. This may cause concern that the single owner could manipulate the utility and weaken its financial condition. *Id.* Not only is this not happening in this case, but the exact opposite is occurring. The purpose of the Application is to distribute 100% of PGE's common equity to creditors of Enron. After the issuance of New PGE Common Stock to the Reserve and Holders of

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Allowed Claims, and the ultimate distribution of all New PGE Common Stock to Enron creditors, PGE will be a widely held company that is traded on a public exchange.

2. The Conditions Provide Still Further Protections for Customers

To the extent there are particular risks associated with the Application, the Conditions insulate customers from experiencing harm:

a. Cost of Issuing New PGE Common Stock

Condition 4 ensures that customers will not pay for any non-recurring costs associated with the issuance of New PGE Common Stock to the Reserve and Holders of Allowed Claims:

> Condition 4. PGE shall exclude from PGE's utility accounts all non-recurring costs of PGE's transition from a privately held corporation to a publicly-traded corporation, including but not limited to the costs of issuance of the New PGE Common Stock, the initial listing of such stock on a national stock exchange, and the release of any such stock held by the Reserve to Holders of Allowed Claims.

b. Affiliate Relations

As mentioned earlier, the unique characteristics of the Application moot affiliate concerns traditionally associated with utility acquisitions. Unlike prior ORS 757.511 applications, the utility will not become part of a holding company with complex affiliate relations. Detailed affiliate relations conditions are inapposite.

> A number of the Enron Conditions were no longer necessary, because they related to PGE becoming part of a larger corporate family of energy companies. This includes Enron Conditions 1, 12, 13, 14, 15, and 16.

Settlement Parties/100, Conway-Jenks-Lesh/15.

Condition 1 bars allocations or charges from the Reserve to PGE, which is the only new affiliate relation. This fully protects customers from any potential harm from affiliate transactions between the Reserve and PGE.

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c. Access to Information

Conditions 2, 3 and 7 ensure that the Commission has access to all relevant and important information. Settlement Parties/100, Conway-Jenks-Lesh/15. Condition 2 provides the Commission with access to information pertaining to PGE's transactions, and the Reserve's books and records pertaining to PGE. These are the exact same conditions as UM 814 Order Conditions 3 and 8. But the Stipulation goes even further. It provides the Commission "unrestricted access" to all written information provided to common stock and bond analysts, or rating agencies, concerning PGE. Condition 7.

d. Hold Harmless

The Stipulation contains a hold-harmless provision similar to those adopted in other ORS 757.511 proceedings. It protects customers from paying for any increase in the cost of capital associated with the Reserve's ownership of 25% or more of PGE's issued and outstanding common stock. Condition 6(a). As described above, other provisions of the hold harmless Condition provide customers with enhanced and improved protections for potential harm that Enron's ownership may have caused.

e. Ring-Fencing

The Stipulation contains a number of provisions that prevent the weakening of PGE's financial condition. As mentioned earlier, the prospect of this Application weakening PGE's financial condition is speculative at best given that the conditions that give rise to this concern are not present. The Application will impose no new debt or liability on PGE, nor will PGE become part of a traditional holding company, and the Reserve will not require PGE dividends to finance new debt or other affiliate business. Nevertheless, the Stipulation continues limitations on dividends that would cause PGE's common equity capital to drop below 48% (or other specified level of total capital) (Condition 5), provides the Commission with written notice of declared dividends (Condition 8), and prohibits distributions to Enron

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prior to the issuance of the New PGE Common Stock unless PGE can be reasonably expected to maintain a BBB+ rating or better from Standard & Poor's (Condition 11).

The Stipulation also recognizes the transitional nature of the Reserve's ownership. The Reserve's ownership level will be regularly decreasing. The Stipulation acknowledges that as PGE's shares become more widely held, the investing public, minority shareholders, and a critical financial community will serve to protect and enhance PGE's financial strength. Ring-fencing conditions protect the utility from manipulation by a single shareholder. When a single shareholder no longer exists, the financial strength of the utility is protected by market forces, not ring-fencing provisions.

> The circumstances of the transitional structure differ from a traditional holding company for many reasons, including the presence of a significant percentage of stock held by non-affiliated entities or persons as of the issuance. The presence of minority shareholders, as well as coverage by the financial community, lessens the ability of creditors, through the Reserve, to influence PGE's Board to declare dividends that could weaken PGE's financial structure. By the time the Reserve's ownership drops below 40%, the minimum required equity can also drop. By the time the Reserve's ownership drops below 20%, a "ring fence" will no longer be necessary.

Settlement Parties/100, Conway-Jenks-Lesh/16.

f. Service Quality

The Application does nothing to put at risk PGE's excellent record for customer service. No new debt will require servicing. PGE will operate just as it did before the issuance of New PGE Common Stock to the Reserve and Holders of Allowed Claims, as the Commission surmised in the TPG docket. *See* UM 1121, Order No. 05-114 at 18 ("There is little to suggest that PGE would operate very differently after the stock distribution plan than it does now."). Nevertheless, the SQM Conditions (Conditions 9 and 14) demonstrate that PGE's commitment to service quality will not suffer because of the Application.

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VI. THE COMMISSION SHOULD APPROVE PGE'S STOCK ISSUANCE

A. ORS 757.415

ORS 757.415 authorizes a public utility to issue securities for the purposes identified in the statute.[8] The issuance of New PGE Common Stock will satisfy all these purposes. The Plan calls for the cancellation of existing PGE shares and the issuance of New PGE Common Stock to continue to provide PGE with the common equity it needs. PGE needs common equity to support its credit and provide working capital. In short, the issuance allows PGE to continue to have the common equity outstanding necessary for all of the purposes listed in ORS 757.415, namely, the safe, efficient, effective operation of an electric utility for the benefit of its customers. PGE/400, Piro/15.

The issuance of stock does not need to generate proceeds to meet the purposes identified in ORS 757.415. The statue does not require that the issuance of securities immediately result in proceeds. It simply requires that the issuance be for one of "the following purposes and no others" (ORS 757.415(1)). The purpose of issuing New PGE Common Stock is to provide common equity to enable PGE to acquire property, construct and improve its facilities, and improve and maintain its service, to name just a few of the purposes listed in ORS 757.415.

Moreover, the Commission has taken an expansive view of ORS 757.415, rejecting attempts to limit its authority to the approval of securities whose purpose is raising proceeds. In docket UF 4192, PGE applied to issue a single share for $1 of Junior Preferred Stock. The Share was designed to further insulate PGE from the effects of the Enron bankruptcy by limiting PGE's ability to file a voluntary petition for bankruptcy without the written consent of the owner of the Share. This helped stabilize both PGE's credit ratings and

[8] See footnote 7 above for a list of the purposes identified in the statute.

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its continued access to capital markets. The Commission approved the application under ORS 757.415(1) and (2), rejecting a narrow interpretation of its authority:

> Issuing the Share will enable PGE to protect and maintain its ability to access capital markets, and in so doing, secure sufficient generating, transmission, and distribution capacity to serve its customers reliably and at reasonable cost. The Application falls within the scope of ORS 757.415(1)(a) and (b) because PGE's ability to keep capital costs low directly affects its ability to acquire utility property and facilities and to improve and maintain its service.

UF 4128, Order No. 03-024 at 3.

The same is true for issuance of the New PGE Common Stock. It will provide common equity necessary for PGE to operate as a public utility. Given the substantial benefits of the Application, as supplemented by the Stipulation, the issuance satisfies the other requirements under ORS 757.415(2)(b): it is both "compatible with the public interest" and will not "impair" PGE's ability to offer reliable electric service to customers.

B. ORS 757.412

Alternatively, the Commission could authorize the issuance of New PGE Common Stock under ORS 757.412. That statute allows the Commission to find that an issuance of securities should be exempt from the requirements of ORS 757.415 and ORS 757.410 et seq. if the exemption is in the public interest. Here, the uniqueness of the Application and the benefits it will provide customers support a "public interest" exemption:

> The proposed transaction is so unique that the Commission's review of it should not be confined by a statute that governs use of stock issued in the ordinary course of utility business. In other words, the public interest requires the Commission to judge the stock re-issuance on its merits, not by determining whether it fits within one of the six specific purposes for the use of proceeds. The Legislature created ORS 757.412 to apply in these circumstances.

Staff/100, Conway/11. The benefits of the Application and Stipulation are well documented and supported with record evidence. The unique features of the Application, combined with

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the hold-harmless and other Conditions in the Stipulation, ensure that the issuance of New PGE Common Stock will cause customers no harm. The broad range of parties supporting the Application and Stipulation further evidence that this Application is in the public interest. The Commission should grant a "public interest" exemption for the Application.

VII. THE CITY OF PORTLAND'S OBJECTIONS ARE UNIFORMLY WITHOUT MERIT

The City of Portland (the "City") is the only party to submit testimony and objections against the Application and Stipulation. The City's objections fail, both as a matter of law and fact. As a matter of law, the City's objections reflect fundamental misconceptions about the Commission's authority under ORS 757.511. As a matter of fact, the City's objections are full of unfounded allegations and riddled with incorrect claims.

A. THE CITY'S OBJECTIONS ARE ILL-FOUNDED AS A MATTER OF LAW

1. City Uses the Wrong "But For" Case

The City maintains that the Commission should measure the Application against the "but for" case in which the City owns PGE. City of Portland/100, Cuthbert/25 ("I believe it would be appropriate for the Commission to use the municipal operation of PGE as a valid comparator in this proceeding"). The correct comparison is not a City acquisition that never occurred and has no prospect of taking place in the future. We do not know what would happen if the Application is not granted because there is only one Plan; there is no alternative or plan B. Application, 5-6. But we do know that there is no legal basis or evidence upon which to consider City ownership as an alternative.

In UM 1121, URP offered, and the Commission rejected, "public ownership" as an appropriate measure:

> URP adds a third alternative that would also consider the purchase of PGE by the City of Portland or another public entity. We reject URP's recommendation for two reasons. First, no such proposal was presented in this proceeding.

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> *Second, and more importantly, we reiterate that our review under ORS 757.511 does not provide for consideration of competing proposals.*

Order No. 05-114 at 18, n. 14 (emphasis added). There is no reason to reach a different legal conclusion in this docket.

Not only is the City alternative legally flawed, the facts don't support it. The City does not have a contract to purchase PGE. There is no purchase price, financing or operating plan. "The City cannot provide even the most basic information necessary to determine what it would cost the City and its citizens to purchase and run PGE." PGE-SFC(RDC)/400, Piro/13.

2. Rate Credits Are Not Required

The City also assumes that a rate credit is the only way to demonstrate a "net benefit" to customers. City of Portland/100, Cuthbert/ 24 ("For there to be a measurable public benefit from the stock distribution, a significant rate credit is needed"). This assumption is wrong. In UM 1011, the Commission rejected the City's position:

> This allows us to retain flexibility in our decision making, a desideratum in today's uncertain climate. Because potential harm from merger transactions is often difficult to verify, recent merger orders have required monetary terms as a way to demonstrate that customers will receive a net benefit. *This need not always be the case.*

Order No. 01-778 at 11 (emphasis added). This is not a case in which potential harm, or the lack thereof, is difficult to verify. The traditional risks associated with utility acquisitions are not present. In such circumstances, non-monetary benefits are more than sufficient to establish a net benefit, as the Commission has recognized.

3. ORS 757.511 Applications Must Be Analyzed On a Case-By-Case Basis

The City's approach ignores the unique facts of this Application. It assumes that the Application is just like Enron's acquisition of PGE, just like ScottishPower's

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acquisition of PacifiCorp, and just like Sierra Pacific's proposed, but abandoned, acquisition of PGE. Rate credits were part of the settlements in each of these dockets, so rate credits should be required here, according to the City's simplistic approach. City Objections, 17.

The Commission has expressly rejected this "one-size-fits-all" analysis. The Commission considers "the total set of concerns presented by each merger application in determining how to assess a net benefit." UM 1011, Order No. 01-778 at 11. Because the Commission focuses on the facts of each application, there is no single rule or test that applies: "We cannot say in advance what showing a given utility must make to gain approval; such a determination would restrict the discretion the Legislature has given us. We will assess each merger on a case-by-case basis." *Id.* The Commission has rejected the use of other utility merger orders as an appropriate measure for rate credits: "as pointed out by Staff in its Staff Addendum to Post-Hearing Brief, applications brought under ORS 757.511 must be decided on a case-by-case basis." *In Re ScottishPower*, UM 918, Order No. 99-616 at 16 (Oct. 6, 1999).

Indeed, the use of rate credits illustrates the fact-intensive nature of the Commission's review. In the three precedents the City cites, the Commission approved settlements which included the applicants' offer of rate credits. City Objections at 17 (citing Commission orders in Enron/PGE (Order No. 97-196); *ScottishPower/Pacific Corp* (Order No. 99-616) and *Sierra Pacific/PGE* (Order No. 00-702). The Commission never concluded that rate credits were necessary for approval. The Commission concluded that rate credits were sufficient, not that they were necessary, to satisfy the legal standard. Moreover, in the three cases in which the Commission reviewed an ORS 757.511 application without a settlement, the Commission did not impose a customer rate credit. *In Re PGC*, UF 3972, Order No. 86-106, at 8 (January 31, 1986); *In Re Idaho Power*, UM 877, Order No. 98-056 (Feb. 17, 1998); and *In Re PacifiCorp*, UM 1021, Order No. 01-573 (July 10, 2001).

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Virtually all the parties in this docket agree that this Application is unique and should not serve as precedent in future utility acquisition dockets:

> The Stipulation expresses the Settlement Parties' agreement that this is a unique Application under ORS 757.511 and that no Settlement Party will use the Condition found suitable in this case as precedent in any other docket, including UM 1209, regarding what generally constitutes a net benefit under ORS 757.511. The Application is unique in many ways.

Settlement Parties/100, Conway–Jenks–Lesh/4. The unique circumstances of this Application make the use of previous Commission orders inappropriate.

4. Irrelevant Issues for Which There Is No Statutory Authority

Finally, most of the concerns the City addresses have nothing to do with the Application. For example, the City complains about the lack of a new franchise agreement, collections from customers of the Multnomah County tax, and the adequacy of PGE's reserves for potential liabilities. City/100, Cuthbert/11-12; City Objections at 19. The City goes so far as to request that the Commission impose a condition requiring a new franchise agreement: "the Commission should include a condition that PGE enter into a modern franchise with the City of Portland, in place of the asserted claims operating under franchises granted in the 1800s." City Objections at 19.

Such claims and proposed conditions have no place in this proceeding. The Application has nothing to do with these issues. The Application does not create these issues. It does not make these issues more or less serious. It does not affect these issues at all.

The City's attempt to interject these irrelevant issues in this docket underscores the City's misunderstanding about the Commission's statutory authority. In UM 1121, the Commission concluded that there was no legal basis for the Commission to address such unrelated issues and conditions:

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> These conditions may have been part of stipulated agreements in the past, and may have been agreed to in part by Applicants in this case. However, Intervenors have failed to provide any statutory basis to authorize our adoption of those conditions under ORS 757.511. . . Once the applicant determines that it is not amending its application with the addition of such provisions, we question the parties' ability to pursue conditions unrelated to harms posed by the transaction. While we have the authority to place some conditions on an order approving an application, we do not believe we have the authority to add conditions for the sole purpose of adding benefits.

UM 1121, Order No. 05-114 at 35.

In particular, the Commission flatly rejected the City's attempt in that docket to interject unrelated issues like a new city franchise agreement: "The City of Portland also wants Texas Pacific to negotiate a modern franchise agreement. The City also appears to recognize that we do not have jurisdiction over that issue and that it is not directly tied to this transaction." *Id.* at 35, n. 20. The Commission was right in UM 1121 concerning this issue, and the City suggests no reason for the Commission to change its legal conclusion. [9]

B. THE CITY'S POSITION RESTS ON UNFOUNDED AND INACCURATE CLAIMS

1. The Application Does Not Reduce Customer Protections, As the City Alleges

In one form or another, the City's objections all reduce to the following allegation: "the Application and the Stipulation do not maintain the current level of protection afforded to PGE's customers by the existing conditions available under Enron's ownership." City of Portland/100, Cuthbert/ 4-5. The City's testimony provides no evidence whatsoever for this allegation. The City complains about alleged Enron-related liabilities, PGE's potential liabilities, Multnomah County taxes, franchise issues, and other unrelated topics, without any suggestion, let alone evidence, that customers will be worse off with

[9] In any event, such a condition is unnecessary in light of the ongoing negotiations between the City and PGE regarding a new franchise. PGE has been holding regular meetings with the City since June 2004. Mr. Piro reported that "substantial progress has been made." PGE-SFC(RDC)/400, Piro/14.

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respect to these issues if the Commission grants the Application and adopts the Stipulation. All the evidence is to the contrary. The ring-fencing conditions are stronger; written notice of dividends will be faster; the hold harmless provision is upgraded and updated; Enron is prohibited from receiving distributions that might jeopardize PGE's credit ratings; Enron provides indemnification for control group tax and benefit liability; and service quality measures are extended.

Where the City is specific, it gets the facts wrong. The City suggests that the hold-harmless provision is weaker because it allegedly will expire after PGE's next rate case. City/100, Cuthbert/20. This is wrong. The hold-harmless provision for both Enron ownership and the Reserve's ownership of 25% or more has no time limit. PGE-SFC(RDC)/400, Piro/4. The only time limit applies to the additional $40 million on top of the 48% or other minimum common equity percentage. This $40 million addition goes away after the next rate case because the $40 million supplement is designed to absorb adjustments, if any, in PGE's next rate case related to Enron's ownership. The end of the $40 million addition cannot possibly be viewed as a reduction in customer protection. The UM 814 Order had no additional equity requirement. The protection afforded by the additional $40 million in equity cushion reflects a strengthening, not a weakening, of the hold-harmless condition.

Perhaps the City is referring to the reduction and ultimate elimination of the minimum common equity ratio for distributions when the Reserve's ownership drops below 20%. If this is the City's position, they have missed the primary point of the Application. The reduction and elimination of the minimum equity requirement reflect the transitional nature of the Reserve's ownership. When there is a large majority shareholder, the minimum common equity ratio condition serves to protect customers and the utility from manipulation. The ultimate elimination of the minimum equity threshold does not reflect the loss of a

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customer protection. On the contrary, the elimination of this condition reflects a different ownership structure that no longer poses the threat that this condition addresses. *See* Settlement Parties/100, Conway-Jenks-Lesh/16.

2. PGE Potential Liabilities

The City also alleges, without any support, that PGE has not adequately reserved for potential liabilities. City /100, Cuthbert/19. Aside from offering no evidence on point, the City's claim is incorrect. PGE's CFO, Jim Piro, testified that "PGE has adequately reserved for its liabilities, based on all available information, to the extent required and has disclosed adequately its liabilities to the public under generally accepted accounting principles and the reporting requirements of the Securities and Exchange Commission." PGE-SFC(RDC)/400, Piro/5. There are other independent points of confirmation. PGE discloses potential liabilities on its Form 10-K and Form 10-Q. Deloitte and Touche, LLP, an independent registered public accounting firm, audits PGE's Form 10-Ks and reviews its Form 10-Qs. Finally, credit rating agencies review PGE's potential liabilities and its reserves. PGE-SFC(RDC)/400, Piro/6. And PGE's ratings are growing stronger, not weaker. *Id.*

3. The Reserve Is Not a "Short-Term Financial Player"

The City also provides no support of its allegation that the Reserve is a "short-term financial player" with its sole duty to maximize short-term value to creditors. City Objections, 11-12. As mentioned earlier, the Reserve's Overseers will direct the voting of the New PGE Common Stock held in the Reserve. The Guidelines for the DCR Overseers require that the Overseers exercise their best business judgment and take all actions that a board of directors of a public corporation would be required to take to satisfy its fiduciary duties in making a decision requiring the voting by such corporation of a comparable

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proportion of securities it holds. Nowhere do the Guidelines suggest that the DCR Overseers should focus on maximizing short-term profits. PGD-SFC(RDC)/500, Taylor/5-6.

The differences between the Reserve's ownership and what the Commission reviewed in UM 1121 are stark. The Reserve is not acquiring New PGE Common Stock with the intent to resell the company and make a profit. The Reserve will hold PGE shares because the Plan requires it, and it will regularly reduce its ownership of PGE's shares. Moreover, the opportunity for the Reserve to engage in gaming, or short-term profit maximizing that might harm the utility, is significantly reduced, not increased, by issuance of the New PGE Common Stock: "PGE will have many shareholders, not just one dominant owner." PGE-SFC(RDC)/500, Taylor/6. And the PGE board will owe a fiduciary duty to all shareholders. *Id.* In addition, neither the Disbursing Agent nor the DCR Overseers have any economic interest in the Reserve. Application at 21-22.

4. Other Inaccurate Allegations

Finally, the City's testimony is full of demonstrably incorrect claims. For example, the City claims that PGE has a potential $60 million liability in the California refund proceeding and that its $40 million reserve is insufficient. The City has confused potential refunds, liabilities and reserves. The $60 million figure is the amount the California ISO and the PX owe PGE, not what PGE owes them. PGE/400, Piro/9. PGE has a $40 million reserve against this receivable because FERC may make certain adjustments to the receivable. It now appears that the $40 million reserve was conservative. PGE currently estimates that the FERC adjustment will reduce the $60 million receivable from the California ISO and PX by $27 million, or $13 million less than the $40 million reserve. *Id.*

The City also claims the $73 million receivable Enron owed to PGE in connection with the Enron/PGE merger credit had a "negative impact" on PGE's customers. This is misleading and untrue. First, PGE has passed through to customers the full amount of

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the Enron/PGE merger credit. PGE-SFC(RDC)/400, Piro/8. Customers have received the entire benefit to which they were entitled. Second, given PGE's current capital structure, PGE could have transferred the receivable back to Enron as a dividend (rather than writing off the receivable) without falling below the minimum equity threshold of 48%. Staff/100, Conway/14. As PGE's CFO testified: "This receivable—whether it was written off or collected in full – has no impact on PGE's customers." PGE/400, Piro/8.

VIII. CONCLUSION

For the reasons stated above, the Commission should approve the Application subject to the Conditions in the Stipulation.

Respectfully submitted this 27th day of October, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **APPLICANTS' AND ENRON'S BRIEF** by electronic mail where available to each party listed below, and by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to each party listed below, deposited in the U.S. Mail at Portland, Oregon.:

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