ORDER NO. 05-1250

ENTERED DEC 14 2005

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UF 4218/UM 1206

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Application for an Order Authorizing the Issuance of 62,500,000 Shares of New Common Stock Pursuant to ORS 757.410 et seq. (UF 4218) and In the Matter of STEPHEN FORBES COOPER, LLC, as Disbursing Agent, on behalf of the RESERVE FOR DISPUTED CLAIMS Application for an Order Allowing the Reserve for Disputed Claims to Acquire the Power to Exercise Substantial Influence over the Affairs and Policies of Portland General Electric Company Pursuant to ORS 757.511. (UM 1206)	ORDER

DISPOSITION: STIPULATION ADOPTED; APPLICATION GRANTED

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DISPOSITION: STIPULATION ADOPTED; APPLICATION GRANTED

DECISION SUMMARY

Portland General Electric (PGE) and Stephen Forbes Cooper, LLC, as Disbursing Agent on behalf of the Reserve for Disputed Claims, filed an application requesting Commission approval of two actions. One, under ORS 757.410 *et seq*., the applicants request Commission approval to allow PGE to issue 62,500,000 shares of new PGE common stock to replace existing stock owned by Enron. Two, under ORS 757.511, the applicants request approval to allow the Reserve to hold more than five percent of the new PGE common stock for eventual distribution to Enron creditors. The application was made pursuant to a plan approved by the Enron bankruptcy estate, Enron's creditors, and a federal Bankruptcy Court, to transfer 100 percent of PGE's common equity from the Enron bankruptcy estate to the creditors of Enron and other Debtors.

PGE, Stephen Forbes Cooper LLC, Enron, the Citizens' Utility Board of Oregon, Commission Staff, Industrial Customers of Northwest Utilities, Community Action Directors of Oregon and Oregon Energy Coordinators Association entered into a stipulation setting forth 17 conditions to the application and recommended Commission approval. The conditions are designed to mitigate any potential harms of the transaction and to provide benefits to PGE customers and Oregonians. The City of Portland and the Utility Reform Project opposed the stipulation and application.

The Commission may approve the issuance of securities in two different ways. Under ORS 757.410, the Commission must authorize the issuance of securities. ORS 757.415 requires applicants to show that the issuance satisfies one of the listed purposes, and that the issuance is compatible with the public interest and will not impair the utility's ability to provide service. Alternatively, under ORS 757.412, the Commission may approve an issuance of stock without an order expressly authorizing the issuance, "if the Commission finds that application of the law is not required by the public interest."

Under ORS 757.511, the applicants must also show the proposed transaction "will serve the public utility's customers in the public interest." The Commission applies a two-part test to determine whether the applicants met that public interest standard. One, the transaction must provide a net benefit to PGE customers. Two, the transaction must pose no harm to Oregonians as a whole. To evaluate this transaction, the Commission compares the operation of PGE as a stand-alone entity to the operation of PGE under continued Enron ownership.

In this order, the Commission finds that the application, as amended by the conditions in the Stipulation, meets the relevant statutory criteria and serves the public interest. The Commission finds that issuance of new stock will not harm ratepayers or shareholders and grants approval to PGE to issue new common stock under ORS 757.412. The Commission finds that the distribution of stock through the reserve account managed by the Disbursing Agent, as circumscribed by the stipulation, poses no risks or harms to PGE ratepayers or Oregonians. The Commission finds that the proposed transaction will yield net benefits to PGE ratepayers through the improved financial strength of a stand-alone PGE, free of Enron ownership, and the extension of service quality benchmarks.

CONTEXT OF PROCEEDING

1. Procedural History

On June 17, 2005, a two part application was filed jointly by Portland General Electric Company ("PGE") and Stephen Forbes Cooper, LLC, as Disbursing Agent on behalf of the Reserve for Disputed Claims ("SFC" or "the Reserve"). The first part, filed under ORS 757.410 *et seq*., would allow PGE to issue new stock. The second part, filed under ORS 757.511, would allow an account managed by SFC to acquire the majority share of stock to be distributed to creditors of Enron Corp. ("Enron"). The two

parts were given separate docket numbers, but were treated as one application in a consolidated docket.

On July 19, 2005, a prehearing conference was held in Salem, Oregon. Intervenors in the docket included the City of Portland;[1] Utility Reform Project ("URP"); Industrial Customers of Northwest Utilities ("ICNU"); Pacific Power & Light Company, dba PacifiCorp ("PacifiCorp"); PGE Mutual Utility, Inc.; Eugene Water and Electric Board ("EWEB"); Community Action Directors of Oregon and Oregon Energy Coordinators Association ("CADO/OECA"); Bonneville Power Administration ("BPA"); the City of West Linn; the City of Salem; and Portland Metropolitan Association of Building Owners and Managers ("BOMA"). Enron also filed a petition to intervene, which was granted; it joined briefs and testimony submitted by Applicants. The Citizens' Utility Board of Oregon ("CUB"), filed its Notice of Intervention pursuant to ORS 774.180.

On August 10, 2005, Applicants filed a motion for official notice of the 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 related schedules and exhibits ("Plan"), as confirmed by the United States Bankruptcy Court for the Southern District of New York on July 15, 2004. *See In re.* Enron Corp., *et al*., Order, Case No. 01-16034 (AJG) (Bankr SDNY July 15, 2004) ("Bankruptcy Order"). On September 21, 2005, Applicants filed a memorandum in support of its request to take notice of the documents. The motion to take official notice was granted in an October 13, 2005, ruling.

On August 31, 2005, PGE moved for issuance of a standard protective order. The order was issued the next day. *See* Order No. 05-971. Also on September 1, 2005, a Stipulation recommending approval of both applications, with agreed upon conditions was filed by PGE, SFC, Enron, CUB, Commission Staff ("Staff"), ICNU, and CADO/OECA. A motion to extend the time for filing testimony in support of the Stipulation accompanied the filing. The motion was conditionally granted on September 1, with testimony supporting the Stipulation to be submitted by September 7, and objections to the Stipulation to be submitted on September 16, to coincide with the modified procedural schedule already established.[2]

On September 16, 2005, the City of Portland filed testimony and objections to approval of the Stipulation. In addition, URP filed notice of its adoption of the testimony by the witness for the City of Portland. The City of Salem filed notice that it did not object to the Stipulation. On September 28, 2005, Staff filed rebuttal testimony, refuting points raised by the City of Portland. In addition, Applicants filed joint rebuttal testimony of two witnesses.

[1] Because the City of Portland submitted extensive filings in this case, we refer to it as "the City," unless otherwise indicated.

[2] The September 1 conditional ruling stated that any person could object within five days of the service of the motions, and if no objection was received, then the decisions in the ruling would be final. In the City of Portland's Objections to the Stipulation, filed September 16, 2005, it objected to the schedule. The objection is untimely.

No party requested cross-examination, and the hearing was canceled. To admit the testimony into evidence, witnesses submitted affidavits swearing to the truth of the testimony. *See* OAR 860-014-0060(4)(a). The testimony was received into evidence, and the record was closed. *See* ALJ ruling (Oct 13, 2005). No party requested oral arguments. On October 27, 2005, Staff submitted a brief; PGE, SFC, and Enron, submitted a joint brief; and the City of Portland submitted a brief that was joined by URP.

On November 15, 2005, PGE submitted updated Exhibits E, G, and H to Appendix A of the Application, which fulfilled the requirements of a filing for a stock issuance under OAR 860-027-0030 and moved that they be included in the record. PGE stated that it had provided copies of the exhibits to the City of Portland and URP prior to the close of the record and requested that the response time be shortened. The request for a shortened response time was denied. *See* ALJ ruling (Nov 16, 2005). No objections were received, and the evidence is admitted into the record.

2. Historical Background

On August 30, 1996, Enron filed an application under ORS 757.511 to purchase PGE. After months of comments and public proceedings, and participation by more than 30 parties, several parties and Staff reached a Stipulation with Enron ("Enron Stipulation"). *See* Order No. 97-196, 1-2. The Commission approved the Stipulation, which included several conditions which were not in the initial application. *See id.* at 5.

On December 2, 2001, Enron filed for bankruptcy in the Southern District of New York. Before and after Enron declared bankruptcy, several entities filed applications to purchase PGE with this Commission, but the transactions were not completed. Most recently, the Oregon Electric Utility Company, LLC, a holding company on behalf of the Texas Pacific Group, applied to purchase PGE from Enron on March 8, 2004. *See* UM 1121, Order No. 05-114. That was the first application to purchase a utility that was not resolved by a settlement. Ultimately, the Commission rejected the application. *See id.* The application was analyzed in light of Enron's status in bankruptcy and its continued ownership of PGE, which is not in bankruptcy. *See id.* at 10-11. In analyzing whether there were net benefits under that transaction, the Commission compared the outcome of that application against the outcome of a stock distribution. *See id.* at 11-12.

3. Bankruptcy Order

The Bankruptcy Order and adopted Plan allows for issuance of new PGE common stock and discusses the method for distribution of stock to Enron's creditors.[3] While the issuance of new PGE common stock is not expressly discussed, it is implicitly assumed by the Plan. *See* Plan § 32.1(c)(iii) (distribution of PGE common stock may occur after obtaining regulatory approval to issue the new stock); *id.* at § 32.16 (canceling existing PGE common stock upon issuance of new PGE common stock).

The Plan then allows for creation of a trust to hold PGE common stock to be liquidated. *See* Plan § 24.1. The creditors are defined and prioritized by the Plan. *See* Plan §§ 1.7-1.33. Holders of Allowed Claims or Allowed Equity Interests, as defined by the Plan, will receive PGE stock to satisfy debts. Initially, holders of Allowed Claims will receive no less than 30 percent of the shares, and SFC will receive not more than 70 percent of the shares. *See id.* at § 32.1(c)(iii). The initial release of stock is "to assure that a liquid market can exist for shares of" PGE common stock and to permit listing of the stock on a national securities exchange. *See* Application, 13. Over time, the Disbursing Agent will distribute shares held in the Reserve to creditors of Enron in satisfaction of their claims against Enron. *See* Plan §32.7(b). The Plan provides that, if a sale occurs before the conditions for distribution of stock have been met, the proceeds from that sale will be distributed to creditors in the same fashion that the stock would have been distributed. *See* Plan § 32.1(c). Finally, the Plan provides for termination of the trust to distribute PGE stock:

> The Operating Trusts shall terminate no later than the third (3rd) anniversary of the Confirmation Date; provided, however, that, on or prior to the date three (3) months prior to such termination, the Bankruptcy Court, upon motion by

[3] Applicants appear to assert that, under federal law, the Plan and Order adopting the Plan mandate the issuance of new PGE Common Stock and distribution to Holders of Allowed Claims, both of which otherwise must be approved by state law: "The only circumstance in which the Plan does not require issuance of New PGE Common Stock is if Enron has sold the existing PGE common stock," and Enron has said that "it will consider any credible offer * * * that meets Enron's economic and commercial terms, is for the purchase of PGE common stock only, can be financed and, in Enron's judgment, can be closed in a reasonable period of time." *See* Application, 3, *see also* 6:1-5. The City disputes the implication that the Commission must approve the Application to comply with federal law. *See* COP brief, 38-39.

In fact, the Plan expressly contemplates that regulatory approval is needed for the issuance of the stock. *See* Plan § 32.1(c)(iii) ("Distributions of PGE Common Stock * * * shall commence upon * * * (b) obtaining the requisite consents for the issuance of the PGE Common Stock"); *see also, e.g.*, Plan §§ 1.193, 1.196, 1.238 (referring to "the Existing PGE Common Stock or the [newly issued] PGE Common Stock, as the case may be"). The Plan also appears to consider that Commission approval is required to transfer control of PGE. *See* Plan § 24.1 (Enron is to transfer assets, including PGE, to Operating Trusts "subject to appropriate or required governmental, agency or other consents").

While the authors of the Plan clearly prefer regulatory approval of the instant Application, and made minimal alternatives available in the Plan, we can find no requirement that approval of this Application is mandated by the Plan, the Bankruptcy Court, or federal law. However, because we approve the Application on its merits, there is no need to determine whether approval of the Application is required by federal law.

> a party in interest, may extend the term of the Operating Trusts if it is necessary to the liquidation of the assets of Operating Trusts. Notwithstanding the foregoing, multiple extensions can be obtained so long as Bankruptcy Court approval is obtained at least three (3) months prior to the expiration of each extended term; provided, however, that the aggregate of all such extensions shall not exceed three (3) years from and after the third (3rd) anniversary of the Confirmation Date.

Plan § 24.11.

4. This Application

The instant Application consists of two parts. In the first part, PGE applies to issue 62,500,000 shares of new PGE common stock to "replace in full the existing PGE common stock, which will be canceled." *See* Application, 2. The new stock would be exempt from certain provisions of the Securities Exchange Act of 1934, because the stock was issued pursuant to a plan of reorganization in bankruptcy. *See id.* at 14 n 26. After the new stock is issued, PGE will enter into a Separation Agreement from Enron, in which Enron will indemnify PGE for tax and employee benefit liabilities and terminate the Master Services Agreement and tax allocation agreement between the two entities. *See id.* at 16-17.

In the second part, SFC applies to acquire control of PGE from Enron. Holders of Allowed Claims would receive no less than 30 percent of PGE stock, and SFC would receive not more than 70 percent of the stock. *See id.* Over time, the Disbursing Agent would distribute shares held in the Reserve to creditors of Enron in satisfaction of their claims against Enron. Within two years of the initial distribution date, April 2006, the Reserve would hold less than fifty percent of the stock; within three years, less than thirty percent. *See* PGE-SFC/500, Taylor/2-3.

The Application states that this transfer of control is different than that in other ORS 757.511 applications: the new "controller" does not acquire PGE for investment or strategic purposes, change the beneficial ownership of PGE, or create a holding company to use dividends elicited from PGE. *See id.* at 3. SFC would be the registered holder of the stock and distribute it in accordance with guidance provided by the Reserve's Overseers, who are appointed by the Bankruptcy Court. *See* Application, 2. The Application states, "Neither the Disbursing Agent nor the DCR Overseers have any economic interest in the assets in the Reserve, including the New PGE Common Stock." *See id.* at 5, 22. The Disbursing Agent may not sell or vote new PGE stock, except as instructed by the DCR Overseers. *See id.* at 21. "The DCR Overseers will exercise their business judgment to vote Plan securities, including the New PGE Common Stock, in a manner they believe will maximize the value of assets to be distributed to creditors." *See id.* at 22.

After acquisition by the Reserve, PGE would be managed by a new Board of Directors, selected in accordance with the requirements set forth by the stock exchange, Securities and Exchange Commission (SEC), and federal law under the Sarbanes/Oxley Act. *See* Application, 14. The directors would owe a fiduciary duty to all shareholders, including the Reserve, as well as those who had recently purchased PGE stock. *See id.* at 18.

The Application acknowledges that trading of the new PGE stock "will be subject to the laws and regulations applicable to investors in publicly traded securities." *See* Application, 16. That includes a federal provision that requires any purchaser of five percent or more stock of a publicly traded company to file notice of its intentions with the SEC. *See id.* "Such ownership could also trigger the Commission's jurisdiction under ORS 757.511." *See id.*

5. This Stipulation

On September 1, 2005, a Stipulation was submitted by PGE, SFC, Enron, CUB, Staff, ICNU, and CADO/OECA. The Stipulation, attached as Appendix A to this Order, recommends Commission adoption of the Application. It also recommends that the transaction be subject to certain conditions, some of which mirror the conditions in the Enron Stipulation, in UM 814. The signing parties agreed that the Application, as modified by the conditions, "will provide net benefits to PGE's customers and will serve PGE's customers in the public interest." *See* Stipulation, 2.

The supporting testimony identifies what the signing parties consider to be the unique nature of this transaction, and the testimony further points out that the Application is part of the Plan confirmed by the Bankruptcy Order. The primary benefit of the Application is that there will be no new debt, no acquisition premium, and PGE will no longer be in a holding company structure. *See* Joint/100, 5. According to the supporting testimony,

> The issuance of New PGE Common Stock will remove PGE from a holding company structure. Even though the Reserve will temporarily hold a significant percentage of the New PGE Common Stock, the Reserve is in the nature of a trust or escrow rather than a holding company and, unlike a typical holding company, will not use dividends from PGE to invest in diversified businesses or service acquisition debt. Nor will the Reserve have the control of a parent company; instead, its rights will be those of a shareholder that does not own 100 percent of PGE. This circumstance lessens or eliminates financial and other concerns raised by holding company structures.

Joint/100, 5-6. The signing parties contend that the conditions agreed to in the Stipulation, taken together, will provide net benefits to ratepayers and no harm to

Oregonians by indemnifying PGE from certain liabilities and ensuring that ratepayers will be held harmless from others, ring-fencing PGE's financial health, providing Commission access to books and records, and extending existing SQMs as well as creating new customer service benefits.

ANALYSIS

1. Application for Issuance of Securities

a. Legal Standard

i. Relevant Law

The Commission has the authority to regulate the issuance of stocks, bonds, notes, and other evidences of indebtedness issued by public utilities. *See* ORS 757.405. Any issuance of securities is void without an order of the Commission, except as provided by ORS 757.412 or 757.415(3). *See* ORS 757.410(1). ORS 757.415 (1) sets forth the purposes for which securities may be issued:

> (1) A public utility may issue stocks * * * for the following purposes and no others, except as otherwise permitted by subsection (4) of this section:
>
> (a) The acquisition of property, or the construction, completion, extension or improvement of its facilities.
>
> (b) The improvement or maintenance of its service.
>
> (c) The discharge or lawful refunding of its obligations.
>
> (d) 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 paragraphs (a) to (c) of this subsection except the maintenance of service and replacements, in cases where the applicant has kept its accounts and vouchers for such expenditures in such manner as to enable the Public Utility Commission of Oregon to ascertain the amount of money so expended and the purposes for which such expenditures were made.
>
> (e) The compliance with terms and conditions of 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.
>
> (f) The finance or refinance of bondable conservation investment as described in ORS 757.455. * * *

The general exception to these requirements is ORS 757.412, which provides as follows:

> Subject to such terms and conditions as the Public Utility Commission may prescribe, the commission, by rule or order, may exempt [stocks, bonds, notes, or other evidences of indebtedness otherwise subject to commission authorization, and any public utility or class of public utilities] from any or all of the provisions of ORS 757.400 to 757.480, if the commission finds that application of the law is not required by the public interest.

No specific definition is provided for "the public interest," as it is used in this context, but the administrative rules provide some guidance. OAR 860-027-0030(1)(n) sets out the filing requirements for a stock issuance application and states that the facts must show "that the issue:

> (A) Is for some lawful object within the corporate purposes of the applicant;
>
> (B) Is compatible with the public interest;
>
> (C) Is necessary or appropriate for or consistent with the proper performance by the applicant of service as a utility;
>
> (D) Will not impair its ability to perform that service; [and]
>
> (E) Is reasonably necessary or appropriate for such purposes."

In prior decisions, the Commission has stated that providing access to markets was in the public interest. *See* UF 4211, Order No. 04-672, Appx A (Staff Report); UF 4200, Order No. 03-454, Appx A (Staff Report); UF 4198, Order No. 03-347, Appx A (Staff Report).

ii. Parties' Arguments

The City argues that the Application does not comport with the legal standards set forth in statute for three reasons. First, the City argues that ORS 757.415 sets forth the only purposes for which securities can be issued and that there may be "no others." *See* City of Portland Objections (COP Obj), 4-5. In support, the City cites an

Attorney General letter of advice from 1988 and an Attorney General opinion from 1960 which used that statutory language to advise against Commission approval of certain applications to issue securities. *See* COP Obj, 5, 5 n 3. Second, the City argues that Commission precedent requires us to apply ORS 757.415, and to decline to apply ORS 757.412. To bolster that argument, the City cites a prior Commission order approving a line of credit for Northwest Natural, but declining to allow a carte blanche renewal under ORS 757.412. *See* COP brief, 12 (citing UF 4205, Order No. 04-231). The Staff Report in that case, adopted by the Commission, stated that the company should make a substantive application for the renewal under ORS 757.415. *See* Order No. 04-231, Appx A at 3. Finally, the City argues that the Commission cannot exercise its authority under ORS 757.412 without first establishing reasonable standards for using that authority. *See* COP brief, 11 (citing *Sun-Ray Dairy v. OLCC*, 16 Or App 63, 70, 517 P2d 289 (1973)). Because "the public interest" in ORS 757.412 has not been clearly defined, the City argues, the statute cannot be applied.

Staff asserts that ORS 757.415 applies only to the issuance of stock for new proceeds. *See* Staff/100, Conway/9. PGE makes a similar argument in testimony, *see* PGE-SFC(RDC)/400, Piro/15, but declines to pursue that argument in its brief, *see* Applicants' and Enron's brief, 16 ("App brief"). COP argues that the "net proceeds" required to trigger ORS 757.415 may be nominal. *See* COP brief, 8. Given that there will be more shares traded, PGE will be openly traded on the open market, and the "stock will be untainted by prior association with Enron and its dominion over PGE," the City argues that the Commission cannot conclude that there will be no new proceeds.

iii. Analysis and Conclusions

At the outset, we note the uniqueness of this Application and address the threshold question of whether PGE is required to obtain a Commission order authorizing its issuance of new stock under ORS 757.410. We find some merit in Staff's argument that ORS 757.415 only applies in instances where the stock issuance will produce new net proceeds. Indeed, ORS 757.415(1) catalogues a list of items for which the proceeds raised by a stock issuance may be used. Moreover, we note that an application under ORS 757.412 is for an *exemption* from the statutory requirement that the Commission issue an order authorizing an issuance of stock. Accordingly, we conclude that we need not authorize the issuance of stock, but simply approve exemption of the issuance from the applicable statutes, subject to any conditions we may apply.

As to the City's first argument, that stock may be issued for the purposes set forth in ORS 757.415 "and no others," we note that ORS 757.412 was later enacted to serve as a catch-all category for issuances. The 1988 Attorney General letter and 1960 opinion were written before the enactment of ORS 757.412. *See* Or Laws 1997, ch 261, § 3. Therefore, we conclude that ORS 757.412 may permit issuance of securities for purposes other than those specified in ORS 757.415.

As to the second argument, the City cites a case that was decided on the facts of that particular application, in which the Commission refused to give a company

carte blanche to issue further securities but stated it would consider each application on its merits. *See* Order No. 04-231. In this case, we apply ORS 757.412 for this one specific application for a stock issuance, and we will continue to analyze each application on its own merits.

As to the City's third argument, that ORS 757.412 has not been clearly defined well enough to be applied, we note that the Commission has adopted rules providing guidance for the application of the stock issuance statutes. OAR 860-027-0030(1)(n) provides that the issuance must be within the corporate purpose of the applicant, consistent with the applicant's service as a utility, and will not impair its ability to perform that service. In addition, the legislative history behind ORS 757.412 shows that the legislature contemplated that the guidelines would be written into the order. *See* Testimony, House Committee on General Government, HB 2646, Mar 10, 1997, (statement of William E. Peressini) ("The exact scope of an exemption will depend upon the terms and conditions included by the Commission as part of the exemptive order or rule."). Considering the catch-all nature of the statute and the guiding principles set forth in OAR 860-027-0030, we conclude that ORS 757.412 may be applied to the Application for authorization to issue stock.

In conclusion, we reserve judgment on whether an application must be made under ORS 757.410 if there are no new proceeds. Further, we conclude that ORS 757.412 may be applied to exempt applications for stock issuances from the requirements specified in ORS 757.415, "if the commission finds that application of the law is not required by the public interest." ORS 757.412. We now examine the circumstances surrounding the stock issuance to determine whether they serve the public interest so the issuance may be exempt from the statutory requirements.

b. Merits of Application

i. Parties' Arguments

The City argues that "Applicants have made no showing of how the public interest will be served by issuing" new common stock, especially in greater quantity than existing stock, which will dilute the value. In addition, the City notes that no explanation has been "provided as to why the existing PGE common stock cannot be used to effect the proposed stock distribution plan." COP Obj, 4. The City raises the concern that Enron seeks to "wash its existing PGE stock holding" of risk. *See* COP brief, 6. Also, the City seeks further reasoning from Applicants as to why more stock must be issued than currently exists. These explanations, the City contends, are required for Applicants to meet their "fundamental burden of production," as well as their burden of persuasion. *See* COP Obj, 4.

Staff asserts that by reissuing the stock, Enron creditors will receive the same total value that they currently hold, just in different values per share. Shares would then be traded at market value. In addition, Staff points out that customers will not be harmed by the transaction through enforcement of Stipulation Conditions 4 and 6. Enron will benefit by the transaction, Staff notes, because the new stock is exempt from Section

5 of the Securities Act of 1933[4] and will eliminate the requirement for extra filings with the SEC. *See* Staff/100, Conway/10.

PGE asserts that new stock is needed "to use the exemption from registration under the Securities Act of 1933 provided by Section 1145 of the Bankruptcy Code."[5] *See* PGE-SFC(RDC)/500, Taylor/7:19-20. A larger number of shares will be issued as a marketing strategy to yield a more "attractive per share market price" in public trading. *See id.* at Taylor/7:22-23. Finally, PGE argues that stock is not being diluted because shares are being issued for 100 percent of common equity. *See id.* at Taylor/8. In addition, PGE asserts that because "the existing common stock representing all of the common equity [will be] canceled and new common stock representing all of the common equity [will be] issued," there will be no change to PGE's capital structure, and PGE will have the common equity needed to support its credit ratings and provide working capital for utility functions. *See* PGE-SFC(RDC)/400, Piro/15.

ii. Analysis and Conclusions

We find that the Application to replace existing PGE common stock with new common stock meets the public interest test in ORS 757.412, allowing the Commission to approve the issuance of the stock exempt from the requirements of ORS 757.400 through 757.480. Based on the evidence in the record, we find that ratepayers will not be harmed by the issuance of new securities. Further, no current shareholder's value will be shortchanged by receiving new stock, so there is no harm to shareholders. Additionally, we agree with Applicants that the stock may be more marketable at a lower value, easing the transition to a publicly traded PGE. For these reasons, we find that application of the provisions of ORS 757.400 through 757.480 is not required by the public interest, and the part of the Application relating to issuance of new PGE stock should be approved under ORS 757.412 subject to the terms and conditions set forth in the Application and Stipulation.

[4] This provision requires that, before securities are offered through the mail, a registration statement must be in effect and the prospectus must comply with relevant statutes. *See* 15 USC § 77e.

[5] Section 1145 of the Bankruptcy Code provides in relevant part:

> * * * [S]ection 5 of the Securities Act of 1933 and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security do not apply to -
>
> (1) the offer or sale under a plan of a security of the debtor, of an affiliate participating in a joint plan with the debtor, or of a successor to the debtor under the plan -
>
> (A) in exchange for a claim against, an interest in, or a claim for an administrative expense in the case concerning, the debtor or such affiliate; or
>
> (B) principally in such exchange and partly for cash or property.

11 USC § 1145.

2. Application for Acquisition of Substantial Influence

a. Legal Standard

i. Relevant Statutory Provision

The legal standard for an application "to acquire the power to exercise substantial influence" over a public utility is set out in ORS 757.511(3), which provides:

> If the commission determines that approval of the application will serve the public utility's customers in the public interest, the commission shall issue an order granting the application. The commission may condition an order authorizing the acquisition upon the applicant's satisfactory performance or adherence to specific requirements. The commission otherwise shall issue an order denying the application. The applicant shall bear the burden of showing that granting the application is in the public interest.

In UM 1011, the Commission considered the meaning of "public interest" in this context and concluded that "in addition to finding a net benefit to the utility's customers, [the Commission] must also find that the proposed transaction will not impose a detriment on Oregon citizens as a whole." Order No. 01-778, 11.

This standard was applied in rejecting the application by Oregon Electric Utility Company, LLC, to acquire PGE in UM 1121. *See* Order No. 05-114, 33-34. That docket weighed the purported benefits of the application, which were found to provide "no value to PGE's ratepayers" or "minimal value," against potential harms posed by the transaction, which could have "result[ed] in the degradation of service, increased customer rates, a weakened financial structure for PGE, and diminution of utility assets." *See id.* at 33-34. Because the harms outweighed the benefits, the Commission rejected that application. *See id.*

The Commission has the discretion to issue a conditional order. However, as discussed in UM 1121, it is unclear how the legislature intended the Commission to exercise that discretion. One reading of the statute implies a step analysis, in which the Commission first determines that the application is in the public interest, then conditions the order of approval on the satisfaction of certain administerial requirements. Another possible reading allows the Commission "to broadly condition the application so that it could be found in the public interest." Order No. 05-114, 19. There is a danger in interpreting the statute to provide the Commission with wide latitude to impose conditions on an applicant:

> While the statute may provide the authority to add conditions to modify a transaction so that it 'serves the

> public utility's customers in the public interest,' we cannot offset the potential harms presented in piecemeal fashion. Many of these harms are intertwined and linked—directly and indirectly—with each other. An attempt to eliminate one source may do little to mitigate the overall risk. More importantly, a condition crafted to address one potential harm may require the modification of other conditions, or possibly create other risks not previously considered. Consequently, any attempt to remedy this application would lead to an extended exercise that would likely result in the Commission drafting a new application.

Order No. 05-114, 34. Such an exercise would run contrary to an applicant's statutory obligation of establishing that the application is in the public interest. *See* ORS 757.511(3). The statute gives the Commission the "authority to place some conditions on an order approving an application, [but] we do not believe we have the authority to add conditions for the sole purpose of adding benefits." Order No. 05-114, 35.

ii. Comparator

To determine whether there are net benefits to ratepayers and no harm to Oregonians, the Commission must compare the outcome of the proposed transaction against another entity, presumably the entity that would exist if the application was not approved. Here, if this Application is not approved, Enron would still own PGE and would still be trying to dispose of PGE to provide compensation to its creditors.

In UM 1121, we compared the proposed transaction to "PGE as a separate and distinct entity, which would function as PGE operates today," presumably after a stock distribution. *See* Order No. 05-114, 18. The Plan, approved by the Bankruptcy Court, allows for two options: stock distribution or acquisition by another entity. In UM 1121, we compared the outcome of the acquisition option, with the Texas Pacific Group as the purchaser, against the outcome of the stock distribution outcome, which had few variables. While we did not know what application for stock distribution would be made, for comparison purposes, we were able to establish the parameters of the outcome of the stock distribution to a satisfactory extent.

In this case, we consider the outcome of the stock distribution, but the outcome of an acquisition does not provide a suitable comparator.[6] Any potential sale involves too many variables for the Commission to evaluate this Application against such

[6] In testimony, the City argued that we could compare net benefits against an analysis of PGE under City ownership. *See* COP/100, Cuthbert/24-25. Enron rejected a sale of PGE to the City of Portland. *See* Staff/100, Conway/3. The City put evidence of its analysis in the record, but there is no evidence that such an acquisition could be completed. *See* COP/100, Cuthbert/24-25. In fact, the brief filed by Applicants and Enron states, "The correct comparison is not a City acquisition that never occurred and has no prospect of taking place in the future." *See* Applicants' and Enron's brief, 18 ("App brief"). We decline to compare the outcome of the transaction to the outcome of an acquisition by the City.

a hypothetical comparator. The Plan approved by the Bankruptcy Court provides for Enron's ability to sell PGE to another entity, but there is no evidence in the record that there is a plausible sale on the horizon. *See* Application, 3-4. For these reasons, we will not use a speculative acquisition as the comparator, but will compare this transaction to the outcome that will occur if we do not approve the Application: the continued ownership by Enron in search of an opportunity to dispose of PGE.

b. Potential Harms

i. Ongoing Liabilities

a. Parties' Arguments

The City argues that Enron's agreement to indemnify PGE for certain liabilities is not a benefit because it is a reiteration of a condition in the order approving Enron's acquisition of PGE in UM 814. *See* COP Brief, 36. Further, the City asserts that the proposed conditions in this Application and Stipulation are a harm because they fall short of the original promise of indemnification. *See* COP/100, Cuthbert/21. The City argues that there are liabilities not addressed by Enron, such as "matters related to unfair and deceptive trade practices in the western energy markets in 2000 and 2001 and unpaid Multnomah County taxes, among other things, that are still unresolved." *Id*. at Cuthbert/12:20-23. In the City's view, PGE should quantify those liabilities and establish a reserve, not available for dividend payments, to compensate for those liabilities. *See id.* at Cuthbert/12, 23. The City argues that these liabilities could burden PGE's finances and impact its credit strength. *See id.* at Cuthbert/21. In addition, the City expresses concern that the indemnification will last only thirty days after the effective date of the tariffs approved in the next PGE rate case under Stipulation Condition 6(d). *See* COP brief, 31.

In the Stipulation, Enron agrees to indemnify PGE for liabilities related to tax issues and employee benefits. *See* Stipulation, Condition 16. Enron also commits to leaving an additional $40 million, above the 48 percent equity level, "to assure PGE's capacity to absorb adjustments, if any to its revenue requirement resulting from the hold-harmless provisions." App brief, 9, *see also* Stipulation, Condition 6(c). As to the expiration of the indemnification, Applicants note that Condition 6(d) only terminates the extra $40 million for any increases in PGE's revenue requirement; the other indemnifications assumed by PGE are carried on indefinitely by Conditions 6(a)(i) and 6(b). *See* PGE-SFC(RDC)/400, Piro/4; App brief, 23. As to other liabilities, PGE agrees to assume "full legal and financial responsibility of Enron's obligations associated with Conditions 7 and 10 of the UM 814 Stipulation," which would have the effect of shielding ratepayers from those charges. *See* Stipulation, 3; *see also* Application, Appx A, Ex F (identifying additional potential liabilities). Additionally, Applicants argue that PGE's decision to assume other liabilities does not threaten its financial stability; "credit rating agencies review PGE's potential liabilities and its reserves. And PGE's ratings are growing stronger, not weaker." *See* App brief, 24 (citation omitted).

b. Analysis and Conclusions

The treatment of liabilities in the Stipulation poses no harm to customers, as asserted by the City. PGE has agreed to assume Enron's obligations under the UM 814 Enron Stipulation. In addition, in Condition 16 of this Stipulation, Enron agrees to indemnify PGE for two liabilities that have been identified at the present time, and further agrees to leave an extra $40 million with PGE for any increases in PGE's revenue requirement as a result of Enron ownership. As we have discussed in the past, it is difficult to assess "the magnitude of the risk PGE faces, and the uncertainty as to whether such obligations would be borne by customers," therefore, we have declined to declare indemnifications as a benefit. *See* Order No. 05-114, 31. However, the Conditions do provide some protection, so we find that there is no harm to ratepayers.

ii. Protracted Interim

a. Parties' Arguments

The City further argues that PGE will be harmed by being directed by a Board not acting in the utility's best interests and that the protracted interim could pose a harm to PGE and ratepayers. First, the City notes that the ring-fencing measures diminish as Reserve ownership of PGE shares diminishes: for instance, the 48 percent equity floor falls to 45 percent while SFC owns between 20 and 40 percent of PGE stock; below SFC ownership of 20 percent of the stock, there is no equity floor. *See* Stipulation, Condition 5. Similarly, when the Reserve's ownership of PGE stock falls below 25 percent, the conditions related to access to documents, the hold harmless provision, and the notice of dividend requirement expire. *See* Joint/100, 7-8. Additionally, the City expresses concern that the dividend policy, which has not yet been established, will be set in such a way that benefits shareholders at the expense of the financial health of PGE. *See* COP Obj, 12. It is not enough that the Commission receive notice of dividends at the same time they are issued in Condition 8, the City argues; by then, the Commission will not be able to reverse harm caused by an excessive dividend. *See id.* at 12-13.

Further, because Commission review is triggered when an entity seeks to own as little as five percent of stock, the City argues that the ring-fencing measures should remain in place much longer. *See* COP Obj, 11. The City contends that SFC's control over PGE will create conflicts between the short-term financial interest of Enron creditors, and the long-term interests of ratepayers. *See id.* Finally, the City argues that because the new PGE Board members have not yet been identified, the ORS 757.511 portion of the Application fails to fulfill the requirement that the parties seeking control of a utility be identified in the application. *See* COP brief, 19-20.

Staff counters the City's arguments. Staff argues that notification is required so that the Commission is aware of dividends in a timely manner; but customers are more protected by other conditions, such as the requirement that, after a dividend, PGE must, prior to the issuance of new stock, maintain a credit rating of BBB+ or, after

the issuance of stock, maintain a 48 percent equity floor, which will protect PGE from excessive dividends. *See* Staff/100, Conway/11-12.

Applicants and Enron argue that notice of dividends will be faster under the proposed Stipulation, and further support Staff's statements favoring the condition relating to PGE's credit rating. *See* App brief, 9. In addition, Applicants and Enron refute the City's argument that SFC is a "short-term financial player." *See id.* at 24. Applicants and Enron argue that SFC will be directed by a Board of Overseers directed to "exercise their best business judgment" and their control will be lessened over time as shares are distributed. *See id.* at 24-25. Contrary to other applications in which the purchasers were shareholders with an incentive to maximize short-term profit, in this case, the Applicants will have no economic interest in their actions. *See id., see also* Application, 5. In testimony, Applicants explain that PGE's Board of Directors will be independent of the Reserve. *See* PGE-SFC(RDC)/500, Taylor/3. Candidates for the PGE Board of Directors are nominated by PGE, and shareholders vote for directors. *See id.* Applicants note that the process for the Reserve to remove and replace Directors would be costly and "generally an undesirable alternative." *See id.* at Taylor/4. As to the diminished effect of the conditions, as the amount of stock held by SFC is reduced, Applicants and Enron argue that "reflect[s] the transitional nature of the Reserve's ownership," and that SFC's control over PGE will be tempered by the presence of other shareholders. *See* App brief, 23.

b. Analysis and Conclusions

First, we note one of the unique markers of this Application: the new PGE stock will not be held by a corporation as an investment, but as assets to be distributed pursuant to the Plan and governed by specific guidelines, both of which have been approved by the Bankruptcy Court. *See* Application, Ex 3. The Reserve was named as the Applicant, and a procedure to name the Overseers was established in the guidelines. *See id.* at § VII. Those individuals were subsequently selected and identified by the Bankruptcy Court, *see* Order ¶¶ 20, 27, 29, 30, 35, and biographies were included in an exhibit to the Application. *See* Application, Ex 8. The PGE Board of Directors will be selected in accordance with the procedures set forth in the Application. We are satisfied that this meets the statutory requirement that the Application specify the identity and financial ability of the applicant. *See* ORS 757.511(2)(a).

In addition, the ring-fencing conditions that protected PGE and its ratepayers throughout the Enron bankruptcy will continue to protect PGE and ratepayers while PGE makes the transition to a stand-alone company. The SFC Overseers do not have a financial stake in the governance of PGE and have been directed to exercise their best business judgment. Because there is no incentive for short-term profit taking, the risk to ratepayers is minimized. Moreover, the ring-fencing conditions, such as barring dividends which would harm PGE's credit rating or lower PGE's equity ratio below 48 percent, protect PGE from excessive dividends being issued. The gradual transition in this acquisition is unique, as well as the return to a stand-alone company from one owned by a single entity. These unique circumstances affect the ring-fencing conditions, which

will be phased out as PGE regains its status as an independent company, whose managers and directors are directly subject to Commission regulation under Oregon statutes. PGE has also agreed to other conditions to protect ratepayers, such as holding ratepayers harmless for increases in its revenue requirement due to Enron's ownership. *See* Stipulation, Condition 6(b). The conditions will be most stringent in the beginning, when the Reserve holds the most PGE stock and will have the most impact on the PGE Board of Directors, as asserted by the City. As SFC's control over PGE lessens, so too will the conditions. After considering the ring-fencing conditions that will govern during the gradual transition, we find that the risk to ratepayers during the interim is negligible.

c. Potential Benefits

i. PGE as an Independent Company

a. Parties' Arguments

The City asserts that there is no benefit to an independent, locally based PGE. The City points out that PGE's headquarters are already located in Portland and the company operates with "relative independence from Enron." COP/100, Cuthbert/5:12. In fact, the City assumes that PGE "is already a stand-alone regulated utility." COP brief, 21. In particular, the City expresses concern that the transition will actually lead to two possible harms: first, the Reserve will have extraordinary influence over selection of the PGE Board of Directors as a majority shareholder, and second, PGE will be vulnerable to takeover due to the recent repeal of the Public Utility Holding Company Act (PUHCA). *See* COP/100, Cuthbert/14-18.

Staff argues that ring-fencing conditions in the Stipulation will mitigate the risk of the Reserve acting in a way that is not in the long-term interest of PGE and its customers. *See* Staff/100, Conway/8. These conditions require access to information at PGE and the Reserve, initial strengthening of minimum equity requirements, and access for customer groups to address the PGE Board and senior management. *See id.*

Applicants deny that the Reserve will have inordinate control over the Board of Directors or that it will seek maximum profit in the short-term. They point out that "[t]he Reserve's role is not to control or operate PGE" but to hold and release assets to settle creditors' claims. *See* PGE-SFC(RDC)/500, Taylor/2:20-22. As discussed above, the Reserve Overseers will direct how the Disbursing Agent must vote the Reserve's shares in shareholder meetings, "[using] their business judgment to maximize the value of the New PGE Common Stock upon its release from the Reserve." *See* PGE-SFC(RDC)/500, Taylor/3:9-11; Taylor/5:12-17. In any event, PGE argues, the Reserve's control over PGE is not complete, and will actually diminish over time as it distributes stock. *See id.* at Taylor/4-6. The Reserve will not be able to impose policies on PGE, nor will it have any incentive to do so. *See id.*; *see also* Application, 22 ("Like the Disbursing Agent, the [Reserve] Overseers have no economic or beneficial interest in the assets held in the Reserve. Their sole compensation is the compensation they receive for acting as directors of Enron.") Further, Applicants assert that the Reserve will be

unlikely to affect the composition of the PGE Board of Directors. Therefore, Applicants argue, the Board will likely be selected by an independent PGE.

The stipulating parties cite an additional benefit to PGE being spun off as an independent company: "The issuance of New PGE Common Stock will remove PGE from a holding company structure. * * * This circumstance lessens or eliminates financial and other concerns raised by holding company structures." Joint/100, 5-6.

b. Analysis and Conclusions

As discussed above, we find that the transaction – with the ring-fencing conditions – poses a negligible, if any, risk to ratepayers. As to the City's second concern, that an independent PGE could possibly be purchased again, we acknowledge that possibility. Oregon law contemplates that utilities may be purchased; however, state statute also provides safeguards by barring any such acquisition unless it is authorized by this Commission.[7] *See* ORS 757.511. We cannot in this order bar a future transaction, and we will consider each future application on its own merits.

We also find that the transition of PGE to a publicly traded independent utility with no shareholder having a substantial stake provides a benefit. The costs of acquisition by a holding company, and the attendant burdens on PGE's financial structure and risks posed to ratepayers, was a key concern in UM 1121:

> The primary source [of harm] stems from Applicants' proposal to finance the purchase of PGE with an excessive amount of debt. As discussed above, the high debt percentage in the consolidated capital structure would likely result in lower credit ratings for PGE than it would in absence of this transaction. This large debt service requirement also presents the possibility that Oregon Electric's debt will be less than investment grade, which increases the likelihood that PGE may engage in imprudent cost cutting and reduced capital investments if earnings drop. Moreover, this debt increases the risks associated with the lack of final financing terms.

Order No. 05-114, 33-34. The outcome of this transaction – not just a practically independent PGE, but an *actually* independent PGE, free of financial burdens related to continued Enron ownership– provides a benefit to ratepayers.

[7] Applicants' testimony contemplates that the Reserve may choose to sell PGE, if presented with a suitable offer. *See* PGE-SFC(RDC)/500, Taylor/4. Applicants recognize that such a transaction would require approval of the Commission under ORS 757.511. *See* Application, 16.

ii. Customer Service Benefits

a. Parties' Arguments

The City argues that extension of the SQM agreement is not a benefit, because, if the measures are actually beneficial to ratepayers, they should be applied to all utilities. *See* COP brief, 34. In addition, the City argues that it is not a benefit because ratepayers will pay for the cost of implementing the measures. *See id.* The City also argues that benefits for selected groups of ratepayers do not constitute a benefit for all. *See id.* at 35. The City further asserts development of a billing SQM is inevitable and should not be counted as a benefit for ratepayers in this transaction. *See id.* at 36.

Applicants and Enron argue that customer service will continue as it has in the past. *See* App brief, 15. They note Condition 9 extends the current SQM agreement, which is currently set to expire in 2006, through 2016. In addition, they point to Condition 14, which relates to development of a billing accuracy SQM, and Condition 12, in which representatives from customer groups precertified for intervenor funding may address the PGE Board at least once a year for the next five years, as proof of their commitment to improved customer service benefits.

b. Analysis and Conclusions

The extension of the SQM agreement provides a slight benefit to customers that the Commission would not otherwise have the authority to impose. *See* UE 94 (Phase II), Order No. 98-191, 6, 8 (SQMs, adopted in the AFOR and patterned after those in Enron agreement, were beyond the Commission's authority). PGE's commitment to allow groups precertified for intervenor funding to address the PGE Board opens the door to access by groups that represent wide swaths of customers. *See* OAR 860-012-0100(3)(b)(B) (an eligible group "represents the interests of a broad group or class of customers and those interests are primarily directed at public utility rates and terms and conditions of service affecting that broad group or class of customers, and not narrow interests or issues that are ancillary to the representation of the interests of customers as consumers of utility services"). Further, we note that "[o]nce the SQM agreement expires, customers will no longer have the protections the SQM provides." Order No. 05-114, 31. PGE's commitment to extend the SQM agreement, taken together with access to the PGE Board for customer groups, provides a slight benefit to customers and no harm to Oregonians as a whole.

iii. Other Conditions

Other conditions, not disputed by the City, closely mirror those provided by the Enron Stipulation. As noted, Condition 7 provides Commission access to all written information provided to common stock and bond analysts and rating agencies. This is similar to Condition 8 in the Enron Stipulation, which only provided access to information provided to common stock and bond analysts, but did not specify rating agencies. Also, Condition 2 requires PGE and the Reserve provide access to all books

and documents related to PGE and its affiliates, identical to Condition 2 in the Enron Stipulation.

In addition, Condition 5 in this Stipulation bars PGE from paying a dividend, if it would cause the common equity capital to fall below 48 percent, without Commission approval. The Enron Stipulation contained very similar language in Condition 6. Further, Condition 8 provides that PGE will notify the Commission of any dividend declared by the Board at the same time that PGE discloses this information to the public. This echoes Enron Stipulation Condition 9(b), which required notice 30 days before PGE declares a special cash dividend, and Condition 9(c), which required notice 30 days after a quarterly cash dividend.

Against the similar conditions in the Enron Stipulation, we find that these Conditions in this Stipulation neither benefit nor harm ratepayers.

d. Additional Objections by the City of Portland

i. Enron Ratepayer Credit

a. Parties' Arguments

In Order No. 97-196, Enron agreed to pay $105 million to PGE that was to be credited to ratepayers. *See* Order No. 97-196, Appx A, Condition 20. The City states that Enron did not pay that entire amount and seeks enforcement of the condition before Enron is permitted to dispose of PGE. *See* COP/100, Cuthbert/12.

Applicants testify that PGE customers "received full credit, with interest, on the $105 million cash benefit promised by PGE and Enron, representing full payment for the items listed in Condition 20." PGE-SFC(RDC)/400, Piro/8. That testimony cited PGE's filing with the SEC, Form 10-K, in which PGE stated "the remaining liability to customers was reduced to zero under terms of a 2000 settlement agreement related to PGE's recovery of its investment in Trojan." COP/104, Cuthbert/3. Staff agrees with this assessment of the evidence, stating that ratepayers received the benefit in UM 989. *See* Staff/100, Conway/12-13. While the ratepayers were made whole, Enron continued to owe PGE $73 million, a debt that PGE forgave as part of the bankruptcy proceeding. *See id.* The City does not refute PGE's assertion that ratepayers received the full benefit of Enron Stipulation Condition 20.

As to the City's claim that Enron should pay PGE the outstanding amount, Staff, Applicants, and Enron note that Enron may exact a dividend from PGE as long as the equity ratio does not dip below 48 percent. *See* Order No. 97-196, Appx A at Condition 6; *see also* App brief, 25-26. PGE has maintained that 48 percent minimum equity level throughout the Enron bankruptcy. *See* PGE-SFC/400, Piro/8. Staff and Applicants argue that any required payment from Enron to PGE could be quickly reversed in a "wash transaction" through a dividend, returning the payment to Enron. *See id.*; *see also* Staff/100, Conway/12.

b. Analysis and Conclusions

Ratepayers have received the full benefit of the rate credit pledged by Enron in the order approving its acquisition of PGE. Some of those funds came from PGE, and PGE has chosen to forgive Enron's debt. Further, under the conditions of Enron's acquisition of PGE, Enron would have the right to reverse any payment ordered by the Commission. Because ratepayers have been made whole and any further conditions would have no practical impact on PGE, we decline to take further action regarding this provision. This aspect of the transaction neither benefits nor harms ratepayers or Oregonians as a whole.

ii. Rate Credit

a. Parties' Arguments

The City also suggests that a rate credit of approximately $175 million is necessary to establish "sufficient" net benefits to meet the ORS 757.511 standard. *See* COP Obj, 16. The $75 million reflects the portion of the Enron rate credit that was unpaid, which was disposed of above, and the $100 million figure apparently based on the City's projections of what it may have reduced rates by if it had acquired PGE. *See* COP/100, Cuthbert/24-25. The City appears to draw its conclusion of $100 million from its perception of PGE's ability to pay based on the company's financial projections. *See* COP Obj, 18; COP/112. The City also asserts that this $100 million rate reduction will impact the Commission's determination in future rate cases:

> [T]his would set a new baseline upon which PGE's future rate reviews could be based. PGE would need to independently demonstrate in its upcoming rate case the merits of rate increases to cover legitimate liabilities and higher costs. The burden of proof related to any rate increase would shift to PGE to show the Commission that future rate increases are necessary.

COP/100, Cuthbert/25:8-13. As support for its call to the Commission to impose a $100 million rate credit, the City also cites previous orders in which a rate credit was agreed to by stipulation. *See* COP Obj, 17.

Staff asserts that a $100 million rate credit, while appearing to provide a benefit for customers, is not necessary for the Commission to find this Application provides a net benefit. *See* Staff/100, Conway/6-7. Staff also counters the City's arguments that the rate credit will set a new baseline for future rates: Rates are set through rate cases, in which the utility bears the burden of proof when it files for a change in rates, and through which the Commission evaluates "rate levels based on known and expected costs of providing service," without consideration of prior rates. *See* Staff/100, Conway/5.

Applicants argue that rate credits are not necessary to establish a net benefit. First, they point to the consideration of the legal standard in UM 1011, in which the Commission determined that monetary benefits are not always necessary to determine a benefit. *See* App brief, 19 (citing Order No. 01-778, 11). Further, because the typical harms of an ORS 757.511 application are not present in this case – *e.g.*, there is no new ownership of PGE and no new debt associated with the purchase of PGE – there is no risk to be mitigated by financial benefits. *See id.*

b. Analysis and Conclusions

The ORS 757.511 standard only requires a net benefit, not a "sufficient amount" of benefits. *See* Order No. 05-114, 17-18 (rejecting a call for a "quantifiably" higher level of benefits). As we have noted before, parties may agree to a package of conditions, but the Commission will be circumspect in imposing additional conditions. *See* Order No. 05-114, 35. In light of our analysis above, we conclude that a rate credit is not necessary to establish net benefits in this case and will not impact subsequent rates in the manner argued by the City. Therefore, we decline to impose a rate credit.

iii. Franchise Agreement

The City also attempts to require Applicants to negotiate a modern franchise agreement as part of this transaction. *See* COP Obj, 19-20. PGE responded that it is in negotiations with the City and the Commission has formerly decided that it will not consider such a condition. *See* PGE-SFC(RDC)/400, Piro/14. As previously noted in UM 1121, "we do not have jurisdiction over that issue and it is not directly tied to this transaction." *See* Order No. 05-114, 35 n 20. For this reason, we decline to impose the City's proposal that PGE be required to negotiate a new franchise agreement with the City.

CONCLUSION

Based on the record, we conclude that we have jurisdiction under ORS 757.412 to approve the Application for issuance of stock and under ORS 757.511 to approve the Application for acquisition of power to exercise substantial influence over PGE. We further conclude that the proposed Application to issue new PGE stock and distribute that stock to the Reserve for the purpose of dispensing the stock, as modified by the Stipulation, is in the public interest and provides net benefits to ratepayers and no harm to Oregonians as a whole. The Stipulation should be adopted and the Application granted.

ORDER

IT IS ORDERED that:

1. The Application is granted.

2. The Stipulation is adopted, as attached as Appendix A.

Made, entered, and effective DEC 1 4 2005.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

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**	**STIPULATION**

This Stipulation ("Stipulation") is between Portland General Electric Company ("PGE"), Stephen Forbes Cooper, LLC, as Disbursing Agent ("Disbursing Agent"), on behalf of the Reserve for Disputed Claims ("Reserve") (collectively, the "Applicants"), and the parties to these proceedings that execute the original or a counterpart of this Stipulation (collectively, together with the Applicants, the "Settlement Parties" or "Parties"). The purpose of this Stipulation is to resolve all issues in these dockets among the Settlement Parties.

On June 16, 2005, the Applicants filed an application (the "Application") with the Oregon Public Utility Commission ("Commission"). The Application requests an order from the Commission pursuant to ORS 757.410, et seq., authorizing PGE to issue 62,500,000 shares of New PGE Common Stock with Holders of Allowed Claims receiving not less than 30% or 18,750,000 of such shares, and the Disbursing Agent as registered holder for the Reserve receiving not more than 70% or 43,750,000 of such shares. The issuance of the New PGE

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Common Stock would replace in full the existing PGE common stock, currently held 100% by Enron Corp. ("Enron"), which will be cancelled upon the issuance of the New PGE Common Stock.

The Reserve requested an order from the Commission pursuant to ORS 757.511 for the Reserve to hold more than 5% of the New PGE Common Stock and to vote not more than 70% of the New PGE Common Stock.

On August 10, 2005, PGE and the Reserve filed direct testimony in support of the Application. No other party has filed testimony in this proceeding. After PGE filed its direct testimony, the Settlement Parties held settlement discussions with respect to the Application on August 17 and August 23, 2005.

The Settlement Parties agree that, subject to the conditions ("Conditions") and the 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. The Settlement Parties agree that this is a unique Application under 757.511 and it should not be utilized by any party as precedent as to what generally constitutes a net benefit under 757.511.

The Settlement Parties agree that in the event the Commission approves the Application and this Stipulation, the Conditions shall be incorporated in the final Commission order approving the Application. The Settlement Parties also agree that in the event the Commission approves the Application and this Stipulation, the final order shall provide that: (1) the conditions adopted by Commission in Order 97-196, Docket UM 814, shall apply to PGE and

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Enron until the date of the issuance of the New PGE Common Stock, at which time they will terminate; provided that the obligations of PGE and Enron under conditions 7 and 10 of the Stipulation in UM 814 shall not be enforced against Enron but may be enforced, if at all, only against PGE; and (2) the Conditions set forth in this Stipulation shall apply from and after, but not before, the date of the issuance of the New PGE Common Stock, except that Condition 11 shall apply from and after the date the Commission approves the Application and Condition 6(c) of this Stipulation shall apply from and after the date the Commission approves the Application until such Condition is terminated in accordance with Condition 6(d) of this Stipulation. PGE agrees to assume full legal and financial responsibility of Enron's obligations associated with conditions 7 and 10 of the UM 814 Stipulation to the extent required by Conditions 6(a)(i) and 6(b) of this Stipulation.

Terms used in this Stipulation but not defined herein shall have the meanings given to them in the Application.

Conditions

1. There will be no direct charges or allocations to PGE from the Reserve.

2. PGE shall provide the Commission access to all books of account, as well as all documents, data and records of their affiliated interests, which pertain to transactions between PGE and all its affiliated interests. The Reserve shall provide the Commission access to all books of account, as well as all documents, data and records pertaining to PGE. Nothing in this Condition shall be deemed a waiver of PGE's or the Reserve's right to seek a protective order to maintain the confidentiality of the information described above.

3. All PGE financial books and records shall be kept in Portland, Oregon.

4. PGE shall exclude from PGE's utility accounts all non-recurring costs of PGE's

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transition from a privately held corporation to a publicly traded corporation, including but not limited to the costs of the 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. Beginning within 90 days following the date of issuance of the New PGE Common Stock, PGE will provide annual reports of these costs.

5. PGE shall not make any distribution to shareholders that would cause PGE's common equity capital to fall below 48% of the total PGE capital without Commission approval. This 48% minimum common equity capital percentage shall be reduced to a 45% minimum common equity capital percentage at such time that the Reserve holds 20% or more but less than 40% of the issued and outstanding common stock of PGE. There shall be no minimum common equity capital percentage during the time that the Reserve holds less than 20% of the issued and outstanding common stock of PGE. PGE may seek, through a filing and Commission order, adjustment of the minimum common equity capital percentage. The other Settlement Parties may take any position they deem appropriate if PGE seeks adjustment of the minimum common equity capital percentage.

6. (a) PGE agrees not to seek recovery of increases in the allowed return on common equity and other costs of capital (i) due to Enron's ownership of PGE or (ii) caused by the ownership by the Reserve of 25% or more of PGE's issued and outstanding common stock. These capital costs refer to the costs of capital used for purposes of rate setting, avoided cost calculations, affiliated interest transactions, least cost planning, and other regulatory purposes.

(b) PGE agrees not to seek recovery of increases in PGE's revenue requirement that result from Enron's ownership of PGE.

(c) In connection with Conditions 6(a)(i) and 6(b), PGE shall not make any

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distribution to shareholders that would cause PGE's common equity capital to fall below the level specified in Condition 5 plus $40 million. PGE has agreed to maintain this additional $40 million during the pendency of PGE's next general rate case to assure PGE's financial capacity to absorb adjustment(s), if any, in PGE's revenue requirement resulting from Conditions 6(a)(i) and/or 6(b).

(d) Condition 6(c) shall expire thirty (30) days after the PGE tariffs approved in PGE's next general rate case become effective, without regard to any appeal of the Commission's order approving such tariffs.

7. PGE and the Reserve shall provide the Commission unrestricted access to all written information provided to common stock and bond analysts, or rating agencies, which directly or indirectly pertains to PGE or any affiliate that exercises influence or control over PGE. Such information includes, but is not limited to, reports provided to, and presentations made to, common stock and bond analysts and rating agencies. For purposes of this Condition, 'written' information includes but is not limited to any written and printed material, audio and video tapes, computer disks and electronically-stored information. Nothing in this Condition shall be deemed to be a waiver of PGE's or the Reserve's right to seek a protective order to maintain the confidentiality of the information.

8. During the time that the Reserve holds 25% or more of the issued and outstanding common stock of PGE, PGE shall provide the Commission written notice of any dividend declared by the board of directors of PGE at the same time that PGE discloses this information to the public.

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9. PGE agrees to extend the Service Quality Measures Stipulation as adopted in UM 814 in OPUC Order 97-196, dated June 4, 1997, as recorded in the Stipulation made but not adopted in UM 1121 and included in Order 05-114, Appendix B, for a ten (10) year period including calendar years 2007 through 2016. In addition, PGE agrees to work with ICNU to evaluate and, if necessary, develop additional service quality standards related to service to industrial customers with a focus on high tech companies.

10. Conditions #2 and #7 shall no longer apply to the Reserve at such time as the Commission finds that the Reserve holds less than 25% of PGE's issued and outstanding common stock.

11. From the date the Commission approves the Application to the date of the issuance of the New PGE Common Stock, PGE shall not make any distribution to Enron unless PGE has a senior secured debt rating of not lower than BBB+ from Standard & Poor's and can reasonably expect to maintain that rating after the distribution.

12. (a) For five (5) years beginning with 2006, PGE commits that up to two (2) representatives from each customer group precertified to receive intervenor funding from electric companies pursuant to OAR 860-012-0100 will be invited to at least one meeting of the PGE Board of Directors per year to address the Board. During 2010, PGE will consult with these customer groups regarding whether this standing appearance is useful and should continue. For so long as this Condition is in place, PGE will consider making a similar opportunity available to non-profit interest groups representing interests relevant to energy policy and PGE's service to customers.

(b) For five (5) years beginning with 2006, PGE commits to provide a process by which representatives of organizations representing customer, environmental or low-income

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interests may meet with PGE officers on a periodic basis to discuss matters of policy and utility operations. PGE commits to the availability of management for the purposes of these meetings on a quarterly basis, contingent on the organizations requesting such meetings. During 2010, PGE will consult with the organizations with whom it has interacted under this Condition regarding the usefulness of the process and whether it should continue.

13. PGE agrees not to propose in its next general rate case a decoupling mechanism that would apply to Schedule 83. PGE further agrees to oppose a decoupling mechanism for Schedule 83 if any other party makes such a proposal in its next general rate case.

14. PGE agrees to work in good faith with Staff and other interested parties to develop and present to the Commission a billing accuracy service quality measure ("SQM"). Within 180 days of a Commission order approving the Application, PGE will file with the Commission a billing accuracy SQM. In general, the SQM would apply to systematic errors (such as programming and input errors, failure to follow tariff provisions and failure to implement rates correctly) and would be reasonably consistent with billing accuracy SQMs that apply to other energy utilities in Oregon. The SQM could exclude billing errors resulting from such sources as meter reads, customer meter reads, crossed meters, customer-caused errors, force majeure, estimates due to access issues, or inaccuracies that do not affect the calculation of the bill or prevent the bill from reaching the customer, but would not necessarily exclude Commission-required notices. In addition, PGE can also request exclusions or reductions in remedy amounts where there are mitigating circumstances. The SQM could include the ability for PGE to request a targeted and time-limited exclusion category for the introduction of a new metering or billing program or new tariff offering. Each bill affected by a systematic error would be considered an incident in the month the bill is issued, except that

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multiple bills to the same customer that contain the same type of error would count as one incident in that month. PGE would provide the Commission notice within 10 days after becoming aware of a specific billing error incident and after a certain level of errors per month. A written report would follow within a certain number of days. PGE would also prepare an annual report on billing for the Commission, to include such information as the number of estimated bills and bills excluded from this SQM under one of the approved categories. The SQM would include a per-incident remedy for errors beyond an agreed level, and a monthly or quarterly and annual maximum remedy. No bill counted as an error for purposes of this SQM would also be the basis of an At-Fault complaint for purposes of the C-1 SQM in PGE's Service Quality Program. The SQM would include a trial period before remedies applied. The parties also agree to review the costs of implementing and operating this SQM program prior to presenting it to the Commission. The Settlement Parties other than PGE may take any position they deem appropriate regarding the filings made under this Condition.

15. (a) PGE shall propose for OPUC approval to offer customers with aggregate load larger than 1 aMW (each point of delivery of at least 250 kW) a three-year and a five-year option to opt out of the cost of service rate with a fixed transition amount under similar terms as current Schedule 483 (effective September 1, 2004). Subject to OPUC approval, the Schedule 483 offer will be made each September for a 30-day period at least through 2010. For the 2005 and 2006 windows (for service beginning in 2006 and 2007 respectively), PGE will propose transition amounts that do not include long-term resources (5 years or longer) identified in its 2004 IRP Action Plan. Beginning with the 2007 window, transition amounts

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proposed will include long-term resources identified in its 2004 IRP Action Plan. ICNU agrees not to oppose and will consider supporting future proposals, if any, of PGE during the offering of Schedule 483 that would allow PGE to provide 3 to 5 year market-based pricing options to Schedule 483-eligible customers in a manner similar to its current one and three month market-based options under Schedule 83.

(b) PGE in consultation with customers eligible for direct access and electricity service suppliers shall develop the following proposals, which shall be included in its next general rate case filing:

(i) For customers with aggregate load larger than 1 aMW (each point of delivery of at least 250 kW) an opportunity to elect direct access for the remainder of the year with a two business day decision window (concluding at 5:00 pm of the next business day after posting) at least once each month. PGE may, at its option, propose an alternative that provides more frequent opportunities to elect direct access under which an eligible customer may request the calculation of a transition amount at any time.

(ii) For customers with aggregate load larger than 10 aMW (each point of delivery of at least 250 kW) the option to purchase flat blocks of energy from energy service suppliers not to exceed 50% of their load while purchasing the balance of the load and load shaping and other necessary services from PGE. In order to qualify for this option, the customer would have to exhibit an aggregated average monthly load factor of at least 60% over the most recent 12-month period.

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(c) ICNU agrees that the above conditions eliminate the need for a new resource opt-out as discussed in Commission Order No. 05-133 for PGE's 2004 IRP Action Plan and will support a PGE filing that requests a waiver of that requirement. ICNU may take any position it wishes on opt-out options applicable to new resources not identified in the 2004 IRP Action Plan.

(d) The Settlement Parties other than PGE and ICNU may take any position they deem appropriate regarding the filings made under this Condition.

16. Enron agrees to provide PGE the tax indemnification and employee benefits indemnification as described in Article III of the Separation Agreement (Application Exhibit 17), except that, as provided in footnotes 1 and 2 to that Article, the indemnifications may be modified or deleted if settlements are reached in the respective matters prior to the issuance of the New PGE Common Stock.

17. If the Commission believes that PGE and/or the Reserve have violated any of the Conditions set forth herein, or any conditions imposed by the Commission in its final order approving the Application (for purposes of this condition 17, collectively the "Conditions"), then the Commission shall give PGE and the Reserve written notice of the violation.

(a) If the violation is for failure to file any notice or report required by the Conditions, and if PGE and/or the Reserve provide the notice or report to the Commission within ten business days of the receipt of the written notice of violation, then the Commission shall take no action. PGE or the Reserve may request, for cause, permission for extension of the ten-day period. For any other violation of the Conditions, if such violation is corrected within five business days of the written notice of violation, then the Commission shall take no action. PGE or the Reserve may request, for cause, permission for extension of the five-day period.

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(b) If PGE and/or the Reserve fail to file a notice or written report within the time permitted in subparagraph (a) above, or if PGE and/or the Reserve fail to cure, within the time permitted above, a violation that does not relate to the filing of a notice or report, then the Commission may open an investigation, with an opportunity for PGE and/or the Reserve to request a hearing, to determine the number and seriousness of the violations. If the Commission determines after the investigation and hearing (if requested) that PGE and/or the Reserve violated one or more of the Conditions, then the Commission shall issue an order stating the penalty. PGE and/or the Reserve, as appropriate, may appeal such an order to the appropriate court. If no party appeals the order stating the penalty within the time allowed, or if the Commission's order is upheld on appeal, and the order imposes penalties under a statute that requires the Commission to file a complaint in court, then the Commission may file a complaint in the appropriate court seeking the penalty specified in the order, and PGE and/or the Reserve shall file a responsive pleading agreeing to such penalty. The Commission shall seek to impose a penalty on only one of PGE or the Reserve for the same violation.

(c) The Commission shall not be bound by subsection (a) in the event the Commission determines PGE and/or the Reserve has violated any of the material Conditions, contained herein, more than two times within a rolling 24-month period.

(d) PGE and/or the Reserve shall have the opportunity to demonstrate to the Commission that subsection (c) should not apply on a case-by-case basis.

General Terms and Conditions

1. The Settlement Parties agree that this Stipulation and its terms and Conditions are in the public interest.

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2. The Applicants shall file this Stipulation with the Commission. The Settlement Parties agree to support this Stipulation before the Commission and before any court in which this Stipulation may be considered. If the Commission rejects all or any material part of this Stipulation or adds any material condition to any final order which is not contemplated by this Stipulation, each of the Settlement Parties reserves the right to withdraw from this Stipulation upon written notice to the Commission and the other Settlement Parties within five (5) business days of service of the final order rejecting this Stipulation, or adding such material condition.

3. This Stipulation may be signed in any number of counterparts, each of which will be an original for all purposes, but all of which taken together will constitute one and the same agreement.

4. The Parties to any dispute concerning this Stipulation agree to confer and make a good-faith effort to resolve such dispute prior to bringing an action or complaint to the Commission or any court with respect to such dispute.

5. The Settlement Parties agree that this Stipulation represents a compromise in their positions. As such, conduct, statements, and documents disclosed in the negotiation of this Stipulation shall not be admissible as evidence in this or any other proceeding. The Settlement Parties agree that a Commission order adopting this Stipulation will not be cited as precedent in other proceedings for the matters resolved in this Stipulation.

6. This Stipulation will be offered into the record in this proceeding as evidence pursuant to OAR § 860-14-0085. The Settlement Parties agree to cooperate in drafting and submitting the explanatory brief or written testimony required by OAR § 860-14-0085(4).

7. By entering into this Stipulation, no Settlement Party shall be deemed to have approved, admitted or consented to the facts, principles, methods or theories employed by any

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other party in arriving at the terms of this Stipulation. Except as provided in this Stipulation, no Settlement Party shall be deemed to have agreed that any provision of this Stipulation is appropriate for resolving issues in any other proceeding.

EFFECTIVE THE 31st DAY OF AUGUST, 2005.

[SIGNATURE PAGE FOLLOWS]

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Portland General Electric Company

By: Barbara W. Halle

Stephen Forbes Cooper, LLC, as Disbursing Agent, on behalf of the Reserve for Disputed Claims

By:

Enron Corp.

By:

The Citizens' Utility Board of Oregon

By:

Staff of the Public Utility Commission of Oregon

By:

Industrial Customers of Northwest Utilities

By:

Community Action Directors of Oregon and Oregon Energy Coordinators Association

By:

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Portland General Electric Company

By:

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Enron Corp.

By:

The Citizens' Utility Board of Oregon

By:

Staff of the Public Utility Commission of Oregon

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Industrial Customers of Northwest Utilities

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Community Action Directors of Oregon and Oregon Energy Coordinators Association

By:

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Portland General Electric Company

By:

Stephen Forbes Cooper, LLC, as Disbursing Agent, on behalf of the Reserve for Disputed Claims

By:

Enron Corp.

Mitchell S. Taylor

By: Mitchell S. Taylor
Managing Director

The Citizens' Utility Board of Oregon

By:

Staff of the Public Utility Commission of Oregon

By:

Industrial Customers of Northwest Utilities

By:

Community Action Directors of Oregon and Oregon Energy Coordinators Association

By:

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Portland General Electric Company

By:

Stephen Forbes Cooper, LLC, as Disbursing Agent, on behalf of the Reserve for Disputed Claims

By:

Enron Corp.

By:

Citizens' Utility Board

By: Jason G. Eisdorfer

Staff of the Oregon Public Utilities Commission

By:

Industrial Customers of Northwest Utilities

By:

Community Action Directors of Oregon and Oregon Energy Coordinators Association

By:

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By:

Enron Corp.

By:

The Citizens' Utility Board of Oregon

By:

Staff of the Public Utility Commission of Oregon

By: Stephanie S. Andrus

Industrial Customers of Northwest Utilities

By:

Community Action Directors of Oregon and Oregon Energy Coordinators Association

By:

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