



## Department of Energy

Bonneville Power Administration  
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Portland, Oregon 97208-3621

GENERAL COUNSEL

November 10, 2004

In reply refer to: LC-7

### VIA FACSIMILE AND FEDERAL EXPRESS

Ms. Annette Taylor  
Public Utility Commission of Oregon  
550 Capitol Street NE, Suite 215  
Salem, Oregon 97301-2551

Re: In the Matter of Oregon Electric Company, LLC, et al, Application for Authorization to Acquire Portland General Electric Company – Docket UM-1121  
Joint Request of the Bonneville Power Administration and the Eugene Water & Electric Board for Reconsideration Of the Presiding Administrative Law Judge's Order Denying Request for Official Notice, Or in the Alternative, Request for Certification to the Commission

### **Expedited Consideration Requested**

Dear Ms. Taylor:

Enclosed for filing with the Commission in the above-referenced docket are an original and five copies of the "Joint Request of the Bonneville Power Administration and the Eugene Water & Electric Board for Reconsideration Of the Presiding Administrative Law Judge's Order Denying Request for Official Notice, Or in the Alternative, Request for Certification to the Commission." ("Request for Reconsideration.")

In addition, there is enclosed with the original and five "hard" copies of this instant "Request for Reconsideration" being routed contemporaneously to the Commission via Federal Express delivery an extra copy of the "Request for Reconsideration," together with a stamped return envelope addressed to me. If you could please date stamp the "extra" copy of the Request upon receiving the "hard copies" being routed via Federal Express, returning it to me in the enclosed envelope, it would be most appreciated.

It is my understanding that the Commission's Offices will be closed on Thursday, November 11, 2004. Consequently, the "hard copies" and return envelope being submitted via Federal Express will not be received by you until Friday, November 12, 2004.

Thank you for your assistance with this matter.

Sincerely,

Geoffrey M. Kronick  
Of Attorneys for the Bonneville Power Administration

Enclosures

cc: via Electronic Mail and First Class Mail w/Reconsideration Request (1 copy)  
Official Service List in Docket UM-1121

1 **BEFORE THE PUBLIC UTILITY COMMISSION**

2  
3 **OF OREGON**

4  
5 **UM 1121**

6		
7	In the Matter of	)
8		)
9	OREGON ELECTRIC UTILITY COMPANY,	)
10	LLC, et al.	)
11		)
12	Application for Authorization to Acquire Portland	)
13	General Electric Company.	)
14		)
15	_____	)

Joint Request of the Bonneville Power Administration and the Eugene Water & Electric Board for Reconsideration of the Presiding Administrative Law Judge’s Order Denying Request for Official Notice, Or in the Alternative, Request for Certification to the Commission

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17	Hon. Kathryn Logan, ALJ	<u>Expedited Ruling Requested</u>
18	Hon. Christina M. Smith, ALJ	

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20 I.

21 The Bonneville Power Administration (“BPA”) and the Eugene Water & Electric Board  
22 (“EWEB”), parties to the instant proceeding, respectfully request the presiding Administrative  
23 Law Judge reconsider her November 8, 2004, Order denying BPA and EWEB’s November 3,  
24 2004, Joint Request for Official Notice. In the alternative, BPA and EWEB request that the  
25 Presiding Administrative Law Judge (“ALJ”) certify her decision to the full Commission, so that  
26 the Commission may exercise its discretion to consider whether to take Official Notice under  
27 OAR 860-014-0050 of the documents submitted with BPA and EWEB’s November 3, 2004,  
28 Joint Request for Official Notice.

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II.

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In relevant part, the presiding ALJ’s November 8, 2004, order states:

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“On November 4, 2004, Bonneville Power Administration (BPA) and the Eugene Water & Electric Board (EWEB) filed a joint request asking for official notice to be taken of four documents: a complaint filed on January 6, 2004 with the United States Court of Federal Claims, a General Accounting Office report entitled *Nuclear Regulation* dated December 2001, a U.S. Department of Energy Acceptance Priority Ranking & Annual Capacity Report dated July 2004, and PGE’s Decommissioning Plan of the Trojan Nuclear Plant dated, January 26, 1995.

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On November 5, 2004, the City of Portland filed a request asking for official notice to be taken of Portland City Council Resolution No. 36265, which was adopted on October 20, 2004.

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While the parties in both requests assert that the ALJs have the authority to take official notice of the various documents, the parties do not explain why these documents are relevant evidence that should be included in the record. We further note that all of these documents were available prior to the closing of the record. We deny both requests for official notice.”

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Order at 3.

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III.

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As indicated in the Presiding ALJ’s order cited above, there appear to be two bases upon

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which BPA and EWEB’s November 3, 2004, Joint Request for Official Notice (“Request”) was

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denied. First, the Presiding ALJ notes that no explanation of the relevance of the four documents

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tendered with the Request was offered. Second, the Presiding ALJ notes that all documents were

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available prior to the closing of the record. Each of these two issues will be responded to in turn.

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As a preliminary matter, however, it should be noted that the November 3, 2004, “Request”

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submitted by BPA and EWEB was unopposed, and moreover, the facts contained in the

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documents for which Official Notice is sought are not in dispute.

1 IV.

2 Relevance of Documents

3 In its Joint Issues List filed in this proceeding on July 29, 2004, BPA and EWEB listed  
4 only two issues that it wished considered in this proceeding. EWEB/BPA Issue 1: Do the  
5 proposed terms of the acquisition of Portland General Electric (“PGE”) by Oregon Electric  
6 Utility Co., LLC increase the probability that PGE will be unable to pay its share of all  
7 anticipated and unanticipated future costs related to the Trojan Nuclear Project?  
8 EWEB/BPA Issue 2: Should the Public Utility Commission of Oregon require PGE to post a  
9 surety bond, letter of credit, or provide insurance for a reasonable period of time and in a  
10 reasonable amount to ensure that the public and other Trojan owners are protected in the event  
11 that PGE is unable to pay some anticipated or unanticipated Trojan-related expense? If so, what  
12 type, term (length of time), and amount of financial protection would be reasonable?

13 All of the four documents tendered with and described in the November 3, 2004,  
14 “Request” for Official Notice are immediately and uniquely relevant to the two foregoing issues  
15 concerning Trojan-decommissioning costs raised by BPA and EWEB in this instant proceeding:

16 1. Attachment A – Complaint Filed by Portland General Electric before the United States  
17 Court of Federal Claims (Docket 04-009C), January 6, 2004 in Portland General Electric et al v.  
18 United States of America. This 14-page document is a legal pleading that is subject to Official  
19 Notice under OAR 860-014-0050 (a) as a matter of which the courts of the State of Oregon take  
20 judicial notice. See Schmitz v. Yant, 409 P.2d 346, 242 Or. 308 (1965).

21 This document is a copy of a complaint tendered by Portland General Electric (“PGE”) (the  
22 67.5% share owner of the Trojan Nuclear Plant) and the two other owners of the Trojan Nuclear

1 Plant in the United States Court of Federal Claims. It seeks damages based upon the failure of  
2 the U.S. Department of Energy (“DOE”) to timely honor its contract to accept Spent Nuclear  
3 Fuel and/or High Level Radioactive Waste (“SNF/HLW”) from the Trojan Nuclear Plant,  
4 notwithstanding payments of some \$104.9 million made by plaintiffs to DOE. Attachment A  
5 at 3.<sup>1</sup> Moreover, the pleading indicates that because of the failure of DOE to accept such  
6 SNF/HLW as promised, beginning in 1998, it was necessary for PGE and the other plaintiffs to  
7 construct an Independent Spent Fuel Storage Installation (“ISFSI”) in order to mitigate damages  
8 and reduce what otherwise would have been higher “wet storage” costs. Attachment A at 6-8.  
9 The pleading continues on to describe that in addition to a capital cost of \$88 million to construct  
10 the ISFSI, that plaintiffs continue to incur costs beginning in 2004 of \$4 million per year in  
11 operation and maintenance costs for the ISFSI, adjusted as appropriate for inflation, and that  
12 such costs will continue “until DOE accepts the last of Trojan’s SNF/HLW,” a date that is  
13 indicated in the pleading as not taking place until 2039. Attachment A at 11. [Extrapolating this  
14 figure of \$4 million per year alone, multiplied by the period of years indicated in the pleading  
15 between 2004 and 2039 (34 years), yet reduced to reflect only PGE’s pro-rata share of this  
16 amount – 67%, yields a rough figure of \$91.8 million.] As also indicated on page 11, the date  
17 upon which PGE expected all SNF/HLW would be removed from the Trojan site was during  
18 CY 2002.

19 BPA and EWEB assert that in combination with Attachments B-D subsequently  
20 described below, for which Official Notice was also requested, this 14 page document is relevant

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<sup>1</sup> BPA and EWEB hereby incorporate by reference Attachments A through D, previously supplied to the Commission and to all parties of record with BPA and EWEB’s earlier November 3, 2004, “Joint Request” for Official Notice.

1 to the issue of whether the proposed terms of the acquisition of PGE in this case increase the  
2 probability that, without more, PGE will be unable to pay its share of all anticipated and  
3 unanticipated future costs related to the Trojan Nuclear Project.

4 2. Attachment B – United States General Accounting Office Report to the Hon. Edward J.  
5 Markey, U.S. House of Representatives – “Nuclear Regulation” “NRC’s Assurances of  
6 Decommissioning Funding During Utility Restructuring Could Be Improved” December 2001 –  
7 Report Number GAO-02-48. This document is a 65-page report of a governmental agency, the  
8 United States General Accounting Office (recently renamed the United States General  
9 Accountability Office), and thus may be officially noticed by the presiding Administrative Law  
10 Judge or the Commission under OAR 860-014-0050(b).

11 As indicated in the title of the document, this is a report of a Federal agency specifically  
12 addressing the issue of the assurance of funding for nuclear decommissioning by electric utilities.  
13 Based upon the same issues of whether adequate funds are being made available for the Trojan  
14 ISFSI funding described in Attachment A above in this instant proceeding, BPA and EWEB  
15 again assert that this second document is relevant to the Commission’s consideration of the issue  
16 previously identified in this docket; whether the proposed terms of the acquisition of PGE in this  
17 case increase the probability that PGE will be unable to pay its share of all anticipated and  
18 unanticipated future costs related to the Trojan Nuclear Project. None of the facts contained  
19 within this GAO report are in controversy.

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21 3. Attachment C – Acceptance and Priority Ranking & Annual Capacity Report – U.S.  
22 Department of Energy – Office of Civilian Radioactive Waste Management – July 2004.

1 This is a 74-page report of a governmental agency; the U.S. Department of Energy,  
2 which indicates the scheduling of acceptance of Spent Nuclear Fuel and/or High Level  
3 Radioactive Waste by the Department of Energy and includes such a schedule for Spent Nuclear  
4 Fuel from the Trojan Nuclear Plant. It may be officially noticed by the Administrative Law Judge  
5 or the Commission under OAR 860-014-0050(b).

6 This July 2004, document provides an updated and more current schedule of “acceptance”  
7 of the SNF/HLW from the Trojan Nuclear Plant from that contained in Attachment A, PGE’s  
8 January 6, 2004, pleading. Again, this document, or rather the portion of the document upon which  
9 the Trojan SNF/HLW “schedule” is set forth, is relevant to the issue of whether the proposed terms  
10 of the acquisition of PGE in this case increase the probability that PGE will be unable to pay its  
11 share of all anticipated and unanticipated future costs related to the Trojan Nuclear Project.

12 4. Attachment D – Trojan Nuclear Plant – Decommissioning Plan – PGE/1061 –  
13 (January 26, 1995) This is a document in excess of 200 pages and is the Decommissioning Plan  
14 submitted by Portland General Electric to this Commission, such that it is a document in the files  
15 of the Commission which have been made part of the file in Docket UE-88 during the regular  
16 course of performance of the Commission’s duties and as part of the review such that it may be  
17 officially noticed by the Administrative Law Judge or the Commission pursuant to OAR 860-  
18 014-0050(e).

19 As noted in footnote 1, located on page 3 of BPA and EWEB’s earlier November 4,  
20 2004, “Request” (for Official Notice), BPA and EWEB requested Official Notice only of  
21 Section 5 of this document, approximately 20 pages of textual material and tables in the Chapter  
22 designated “Decommissioning Cost Estimate and Funding Plan.” The relevance of this  
23 document (or rather portion of this document) is to illustrate the great disparity between those



1 amounts that were originally considered adequate for disposal of SNF/HLW at Trojan by this  
2 Commission in 1995 ( at the time the “Decommissioning Plan” was submitted to the  
3 Commission and recovery of such costs permitted), and those amounts now required for such  
4 decommissioning and related spent fuel storage. This “great disparity” is also indicated in the  
5 other documents (Attachments A – C) for which Official Notice was earlier requested. Again,  
6 this document (or rather portion of a document) is relevant to the issue of whether the proposed  
7 terms of the acquisition of PGE in this case increase the probability that PGE will be unable to  
8 pay its share of all anticipated and unanticipated future costs related to the Trojan Nuclear  
9 Project.

10 V.

11 Official Notice

12 BPA and EWEB respectfully submit that the Presiding ALJ has misapprehended the  
13 nature and purpose of Official Notice by denying BPA and EWEB’s “Request” for Official  
14 Notice. The ALJ stated in her Ruling that Official Notice was denied in part on the basis “that  
15 all of these documents were available prior to the closing of the record.” There is no basis for  
16 the ALJ ruling that BPA and EWEB’s request for Official Notice was untimely. As  
17 distinguished from a request to introduce new testimony or exhibits after the close of the hearing,  
18 the Commission can take Official Notice of material at any time during the proceeding.

19 As recognized in Oregon Administrative Rule (OAR) 860-014-0050, “(1) the  
20 Commission or Administrative Law Judge (ALJ) may take Official Notice of the following  
21 matters: (a) all matters of which the courts of the State of Oregon take judicial notice; (b) rules,  
22 regulations, administrative rulings and reports of the Commission and other governmental  
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1 agencies; (c) orders of the Commission; (d) permits, certificates, and licenses issued by the  
2 Commission; (e) documents and records in the files of the Commission which have been made  
3 part of the file in the regular course of performing the Commission's duties; (f) general, technical  
4 or scientific facts within the specialized knowledge of the agency; (g) the results of the  
5 Commission's or ALJ's own inspection of the physical conditions involved after notice to the  
6 parties; (2) the Commission or the ALJ shall notify the parties when official notice is taken. The  
7 notice may be given on the record during the hearing or in findings of fact in a proposed or final  
8 order. A party may object to the fact noticed within 15 days of that notification. The objecting  
9 party may explain or rebut the noticed fact.”

10           The Commission, however, distinguishes between record evidence filed or received at  
11 a hearing and evidence based on Official Notice which may be taken at any time during a  
12 proceeding. (“With a limited exception for evidence based upon official notice, the  
13 Commission’s final decision must be based on the evidence in the administrative record  
14 received at the hearing.”) 2001 WL 522181 (Or. P.U.C.) at \*3, Re: Internal Operating  
15 Guidelines UM-1016, Order No. 01-253, March 26, 2001 (footnote omitted). Moreover, as  
16 indicated in the explicit language of OAR 860-014-0050 above, “(1) the Commission or  
17 Administrative Law Judge (ALJ) may take official notice of the following matters . . . .”  
18 Clearly if the Commission itself may take “Official Notice,” as well as the Presiding ALJ,  
19 why would such “Official Notice” be limited to the time prior to when the evidentiary record  
20 is closed by the Presiding ALJ? The explicit language of the rule itself does not impose such  
21 a temporal limitation.

1 Official Notice is also distinguishable from “testimonial evidence or exhibits” based  
2 upon the inherent reliability of such documents, or as is more specifically described in  
3 ORS 40.065 (2) [(Oregon Rule of Evidence 201(b)] – as being “[c]apable of accurate and  
4 ready determination by resort to sources whose accuracy cannot reasonably be questioned.”  
5 In the case of Attachment A, for which Official Notice was requested in BPA and EWEB’s  
6 November 3, 2004 “Request,” it is a pleading, a matter of which the Courts of Oregon take  
7 Official Notice. See Schmitz v. Yant, 409 P.2d 346, 242 Or. 308 (1965).

8 In the case of Attachment B (for which Official Notice was requested in BPA and  
9 EWEB’s November 3, 2004, “Request,”) the document is a “report of a governmental  
10 agency,” (the Federal General Accountability Office), and as such, is considered a document  
11 “capable of accurate and ready determination by resort to sources whose accuracy cannot  
12 reasonably be questioned,” and thus specifically contemplated as being subject to Official  
13 Notice under (OAR) 860-014-0050(b). Attachment C, a report of the U.S. Department of  
14 Energy, is also a “report of governmental agency” under OAR 860-014-0050(b), that also  
15 fulfills the same criteria of reliability. Attachment D’s reliability is evaluated under  
16 OAR 860-14-0050 (e), as a document in the files of the Commission that has been made part  
17 of the file in Docket UE-88 during the regular course of performance of the Commission’s  
18 duties and as part of the review. Notably, these Attachments are not “pre-filed written  
19 testimony” of an interested party the reliability of which need be tested by cross-examination.

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VI.

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2 Although the explicit language of OAR 860-14-0500 suggests that the taking of Official  
3 Notice is “discretionary” on the part of the Commission and the ALJ (“the Commission or  
4 Administrative Law Judge (ALJ) *may* take official notice . . . .”) (Emphasis added); the better  
5 rule is indicated in ORS 40.070 (2) [(Oregon Rule of Evidence 201(d)], which provides that  
6 “[a] court shall take judicial notice if requested by a party and supplied with the necessary  
7 information.” This rule finds its parallel in OAR 860-14-0500 (1)(a) which states that “the  
8 Commission or Administrative Law Judge (ALJ) may take official notice of the following  
9 matters: . . . all matters of which the courts of the State of Oregon take judicial notice.”

10 ORS 40.075 [(Oregon Rule of Evidence 201(e)] provides an explicit safeguard for all other  
11 parties when an Oregon Court takes Official Notice, permitting them “an opportunity to be heard  
12 as to the propriety of taking judicial notice and the tenor of the matter noticed.” Similarly,  
13 OAR 860-14-0500 (2) affords parties to the instant proceeding the same protection, permitting  
14 them an opportunity to raise an objection within 15 days of receiving notice that “Official  
15 Notice” has been taken, and permitting the objecting party to explain or rebut the proposed fact.  
16 (Or in this case, to rebut the publications and pleadings for which BPA and EWEB seek Official  
17 Notice in this instant docket.) Notably, no party to this proceeding had to date filed any  
18 objection as to the propriety of the ALJ taking Official Notice of the documents for which BPA  
19 and EWEB requested Official Notice at the time of the ALJ’s Order of November 8, 2004.

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VII

Should the Presiding ALJ determine not to grant BPA and EWEB’s instant Request for Reconsideration of the Presiding Administrative Law Judge’s November 8, 2004, Order Denying Request for Official Notice; granting Official Notice of the above-referenced attachments previously supplied with BPA and EWEB’s November 3, 2004, “Request,” BPA and EWEB hereby incorporate by reference the proceeding request and argument set forth above in Paragraphs I through VI, and in the alternative respectfully request that the Presiding ALJ, pursuant to OAR 860-014-0091, certify this issue to the Commission pursuant to OAR 860-012-0035(1)(i).

VIII.

Counsel for BPA and EWEB respectfully submit that absent Official Notice of these documents, that the fullest and most complete record will be denied the Commission with regard to the Trojan Decommissioning issues. Counsel also submit that absent such record, that the plethora of other issues in this instant docket may serve to obscure a monetarily significant issue of whether PGE will retain its ability, upon approval of the proposed acquisition by Oregon Electric Utility Company, LLC, to meet both anticipated and unanticipated costs relating to the Trojan Plant. Absent such financial assurance, and PGE’s ability to meet its Trojan and/or other financial commitments, a substantial detriment to the public interest may result.

WHEREFORE, BPA and EWEB respectfully request that the Presiding Administrative Law Judge issue an order granting reconsideration and grant Official Notice of the foregoing documents indicated as Attachment A through Attachment D, or, in the alternative, pursuant to



**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1121**

In the Matter of	)	
	)	
OREGON ELECTRIC UTILITY COMPANY,	)	Joint Request of the Bonneville Power
LLC, et al.	)	Administration and the Eugene Water
	)	& Electric Board for Reconsideration of
	)	the Presiding Administrative Law Judge's
Application for Authorization to Acquire Portland	)	Order Denying Request for Official
General Electric Company.	)	Notice, Or in the Alternative,
	)	Request for Certification to the Commission
_____	)	

CERTIFICATE OF SERVICE

I, Geoffrey M. Kronick, caused the foregoing “Joint Request of the Bonneville Power Administration and the Eugene Water & Electric Board for Reconsideration of the Presiding Administrative Law Judge’s Order Denying Request for Official Notice, Or in the Alternative, Request for Certification to the Commission” to be filed with the Commission in this instant proceeding by causing an original and five true copies to be routed via facsimile to the Commission’s offices, c/o Ms. Annette Taylor, at 550 Capitol Street, N.E. Suite 215, Salem, Oregon 97301-2551; (503) 378-6163 and an original and five true copies to thereafter be routed via Federal Express delivery to the Commission’s Offices, c/o Ms. Annette Taylor, at 550 Capitol Street, NE., Suite 215, Salem, Oregon 97301-25515; and a single true copy to be served upon the representatives of all parties indicated on the Official Service List compiled in this proceeding by causing such copies to be deposited, postage prepaid, in a receptacle maintained by the United States Postal Service for the receipt of mail, addressed to the following

named individuals taken from the Commission’s most recent service list indicated on the electronic web page for this docket, and also to be routed via electronic mail to all parties on the same service list who have maintained electronic mail addresses.

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