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December 3, 2004

Via Facsimile, Electronically, and US Mail

Ms. Annette Taylor
Oregon Public Utility Commission
P.O. Box 2148
Salem OR 97308-2148

Re: In the Matter of Oregon Electric Utility Company, LLC, et al., Application for Authorization to Acquire Portland General Electric Company
Docket No. UM 1121

Dear Ms. Taylor:

Enclosed please find an original and six copies of the Reply Brief of the Industrial Customers of Northwest Utilities in the above-captioned Docket.

Please return one file-stamped copy of the Reply Brief in the self addressed, stamped envelope provided. Thank you for your assistance.

Sincerely yours,

/s/ Ruth A. Miller
Ruth A. Miller

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Reply Brief of the Industrial Customers of Northwest Utilities upon the parties, shown below, on the official service list for Docket No. UM 1121, by causing the same to be electronically served on all parties who have an email address on the official service list, and by U.S. Mail, postage-prepaid, to those parties who do not have an email address on the official service list.

Dated at Portland, Oregon, this 3rd day of December, 2004.

/s/ Ruth A. Miller
Ruth A. Miller

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1121

In the Matter of	)
	)
OREGON ELECTRIC UTILITY	)
COMPANY, LLC, *et al*,	)
	)
Application for Authorization to Acquire	)
Portland General Electric Company.	)
	)

REPLY BRIEF OF

THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

December 3, 2004

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INTRODUCTION

While the opening briefs submitted in this proceeding by Oregon Electric Utility Company, LLC ("Oregon Electric" or the "Applicants"), Portland General Electric Company ("PGE" or the "Company"), and Enron Corporation ("Enron") provide no new information to demonstrate to the Public Utility Commission of Oregon ("OPUC" or the "Commission") that Oregon Electric's Application (the "Application") in this Docket serves PGE's customers or is in the public interest, they provide insight with respect to the attitudes about ownership of PGE and the accompanying OPUC regulation. Both Oregon Electric's and Enron's opening briefs are notable for the claims about the alleged lack of Commission or legislative authority to apply certain standards for approval or to "interfere" in PGE's operations by adopting certain conditions. This attempt at minimization of the Commission's and legislature's authority by Oregon Electric and Enron demonstrates a mindset of unwillingness to fully comply with OPUC oversight and regulation. Enron's actions during its ownership of PGE have created a new legacy of increased scrutiny of utility owners in Oregon. Oregon Electric must buy into this legacy if it seeks to acquire PGE from Enron. Oregon Electric's arguments that the Commission should not interfere in PGE's operations prior to even having secured approval of the proposed transaction can only be an indicator of things to come, if the proposed transaction is approved. The Industrial Customers of Northwest Utilities ("ICNU") urges the Commission to deny Oregon Electric's Application to avoid putting customers at risk of a new owner that does not fully comply with the OPUC's regulatory authority.

The opening briefs submitted by Oregon Electric, Enron, PGE, and PacifiCorp all attempt to limit, if not eliminate, the Commission's discretion in applying the net benefits

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standard in this proceeding. The Commission determined that ORS § 757.511 embodied a net benefits standard in a lawfully issued order in Docket No. UM 1011. As noted by Enron, no one challenged that decision. Enron's Opening Brief at 9. This is not the proper forum to challenge the merger standard. ICNU would remind the utilities and the Applicants that the Commission made a deliberate decision to establish the merger standard in a generic docket rather than in the context of a specific ORS § 757.511 proceeding.[1/]

The Commission has broad discretion in implementing the net benefit merger standard, which includes the discretion to deny Oregon Electric's Application, which ICNU recommends, or alternatively to adopt ICNU's proposed conditions. The net benefits standard does not, however, permit the Commission to make findings that customers will benefit from proposals of Oregon Electric that lack certainty and are unsupported by evidence in the record. ICNU urges the Commission to review the evidence in the record and find, just as Staff and all customer groups have concluded, that the proposed transaction does not serve PGE's customers in the public interest.

ARGUMENT

The opening briefs submitted by Oregon Electric, Enron, PGE, and PacifiCorp unsuccessfully attempt to place the Commission in a box in which it has little choice but to approve the Application on the terms and conditions proposed by Oregon Electric. First, Oregon Electric and Enron essentially argue that the Commission cannot lawfully apply the net benefits standard in this proceeding. Second, Oregon Electric and Enron argue that Staff's and

[1/] Although ICNU disagrees with Oregon Electric's and Enron's arguments, if the Commission wishes to reopen its interpretation of the merger standard in ORS § 757.511, then it should order separate briefing on this important issue or open a Commission investigation into this issue. Otherwise, ICNU would assume that the Commission would apply the standard set forth in Order No. 01-778.

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customer's claims about the harms and risks of the proposed transaction are mere speculation and that the only risks that the Commission should act to address in this proceeding are those demonstrated by concrete evidence. Third, Oregon Electric and Enron assert that the Commission's authority in this proceeding is so constrained that it likely will violate Oregon Electric's and Enron's statutory and constitutional rights if the Commission denies the proposed transaction or adopts any conditions other than those proposed by Oregon Electric.

The implication of all these arguments is that the Commission has little authority or discretion to take any action other than approve the Application on the terms suggested by Oregon Electric. The Commission should reject this attempt to limit its discretion. Oregon Electric's and Enron's complaints about the net benefits standard ignore the Commission's order in UM 1011. The claims that the Commission can recognize only actual harms demonstrated by concrete evidence in the record ignore the practical reality of a forward looking proceeding such as this. Furthermore, Oregon Electric's demand for certainty with respect to the harms of the proposed transaction only highlights the fact that the alleged benefits proposed by Oregon Electric in this proceeding are inherently speculative. Finally, the Commission has broad discretion to take the action necessary to protect customers in this proceeding. Oregon Electric and Enron question the Commission's authority to adopt certain conditions on the basis that they could result in a taking of Enron's property or "interfere" with PGE's operations. ICNU urges the Commission to deny the proposed transaction outright to avoid such concerns. Staff and customer groups all oppose the transaction as proposed—it is not in the public interest.

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A. The Commission Should Give No Weight to Oregon Electric's and Enron's Diversionary Assault on the Net Benefits Standard

Oregon Electric and Enron question all aspects of the net benefits standard in their opening briefs, including the legislature's authority to adopt a statute embodying such a standard, the Commission's authority to interpret the statute as it did, and the Commission's authority to apply that standard in this proceeding. Oregon Electric's Opening Brief at 1, n.4; Enron's Opening Brief at 5. Enron asserts all of these arguments directly. Oregon Electric adopts Enron's misguided arguments by reference.[2/] The Commission should give no weight to these arguments, which generally ignore the fact that the Commission adopted that standard after stating a reasonable statutory analysis in a lawfully issued order.[3/] Re A Legal Standard for Approval of Mergers, OPUC Docket No. UM 1011, Order No. 01-778 (Sept. 4, 2001) ("Order No. 01-778"). The net benefits standard is the standard that applies. See Re A Legal Standard for Approval of Mergers, OPUC Docket No. UM 1011, PGE's Reply Brief at 3 (June 22, 2001) ("Regardless of how the Commission decides the statutory interpretation of the public interest language, the Commission must apply that standard when the next acquisition application is filed.")

The main thrust of Oregon Electric and Enron's argument is that the Commission should apply a "no harm" standard in this proceeding. According to Enron, "[t]he Commission's review of this application should focus on one question: Does this transaction harm customers?"

[2/] Oregon Electric cites Enron's argument that ORS § 757.511 does not contemplate a net benefits standard. Oregon Electric's Opening Brief at 1, n.4. Most of Enron's opening brief consists of attacks on the lack of legislative and OPUC authority to adopt and implement this standard and analysis of the proposed transaction under a "no harm" standard. Oregon Electric apparently adopts all of Enron's misguided arguments.

[3/] Oregon Electric and Enron argue that the legal interpretation in Order No. 01-778 "has not been tested in the courts," implying that the Commission's decision is somehow invalid. Enron's Opening Brief at 9. OPUC orders are "prima facie lawful and reasonable, until found otherwise in a proceeding brought for that purpose[.]" ORS § 756.565.

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Enron's Opening Brief at 6. Enron also argues that "[t]he purpose of [ORS § 757.511] is beyond question: to prevent harm to customers" but points to ORS § 757.506(3) to support this contention. Id. at 6, 19. Oregon Electric and Enron indicate that the policy in ORS § 757.506(3) should override the standard in ORS § 757.511 and that "[i]f there are no harms or if all harms are prevented by agreed-to conditions, then the Commission's public policy for mergers and acquisition is satisfied *and* the legal standard is met." Enron's Opening Brief at 10 (emphasis in original).

The Commission should give no weight to Oregon Electric's and Enron's arguments, which merely attempt to shift focus from the fact that PGE's customers do not benefit under Oregon Electric's proposals. The regulatory test at issue in this proceeding is whether the proposed transaction results in a net benefit to customers. It makes little sense that Oregon Electric and Enron would so ardently attack the net benefits standard in this proceeding unless the proposed transaction did not meet that standard. If Oregon Electric's proposals actually met the net benefits standard, it would be unnecessary for Oregon Electric to join in the unfounded criticism of the net benefit test.

Furthermore, Oregon Electric's and Enron's argument that the "no harm" policy in ORS § 757.506 overrides the standard in ORS § 757.511 contradicts a basic principle of statutory construction. Oregon Electric's and Enron's interpretation of ORS §§ 757.506 and 757.511 essentially would render the legal standard in ORS § 757.511 superfluous. State ex rel. Juvenile Dep't of Multnomah County v. Alderson, 146 Or. App. 185, 189 (1997). When the courts construe multiple statutes together, the courts give meaning to all statutes. Id. In any event, Oregon Electric has not demonstrated with evidence in the record that customers will not

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be harmed as a result of the proposed transaction. Thus, the Application also fails according to the standard that Oregon Electric and Enron urge the Commission to apply.

B. Oregon Electric's and Enron's Demands for Certainty in Evidence Highlights Oregon Electric's Failure to Meet its Burden of Proof

Oregon Electric and Enron have ignored significant evidence provided by Staff and intervenors in reaching its conclusion that all potential harms from Oregon Electric ownership of PGE are speculative. Oregon Electric's and Enron's arguments should not distract the Commission from a basic precept of this proceeding: Oregon Electric bears the burden of proof. To meet this burden, Oregon Electric must demonstrate that the proposed transaction will: 1) provide net benefits to PGE's utility customers; and 2) not harm Oregon citizens as a whole. Order No. 01-778 at 11; ORS § 757.511(3). With respect to both of these points, Oregon Electric must: 1) present compelling evidence to demonstrate its claims; and 2) rebut the evidence presented by other parties to demonstrate, by a preponderance of the evidence, that the proposed transaction meets the standards in ORS § 757.511. See Re PGE, OPUC Docket No. UE 115, Order No. 01-777 at 4-6 (Aug. 31, 2001).[4/]

Rather than providing compelling evidence to demonstrate net benefits of the proposed transaction and to rebut Staff's and intervenors' evidence, Oregon Electric and Enron attempt to demonstrate that Oregon Electric has met its burden by criticizing Staff's and intervenors' extensive list of potential harms as unsupported or speculative. We can all agree that no one can accurately predict the future, but the very nature of an ORS § 757.511 proceeding requires all parties, and especially the Commission, to do their best to identify

[4/] The Commission has characterized the burden of proof in this manner in ratemaking proceedings but has not specifically commented on the burden in a proceeding under ORS § 757.511.

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potential harms and seek to remedy them. We must all learn from the Enron debacle. Oregon Electric has sought at its own peril to discount or ignore legitimate concerns raised by a broad group of parties. As a result, Oregon Electric has failed to carry its burden of proof in this proceeding.

1. The Commission Must Address Potential Harms in Terms of Risk in a Forward-looking Proceeding

Oregon Electric and Enron fail to recognize the practical realties of this proceeding by suggesting an unrealistic definition of harm. Enron defines "harm" as "an actual degradation of PGE's service, an increase in PGE's rates, a weakened financial structure for PGE or a diminution of PGE's utility assets." Enron's Opening Brief at 3.

In a forward-looking proceeding such as this, the Commission must address the potential effects on PGE's customers in terms of risk rather than actual, demonstrated harm. Although the Commission should endeavor to define the potential harms of Oregon Electric's unique ownership structure with as much certainty as possible, the nature of the issues in this proceeding limits its ability to do so. The Commission recognized this fact in describing the importance of rate credits in its previous decisions under the net benefits standard. Order No. 01-778 at 11 ("Because potential harm from merger transactions is often difficult to verify, recent orders have required monetary terms as a way to demonstrate that customers will receive a benefit.") No party presented evidence in the Enron merger proceeding to demonstrate with certainty the fraud and criminal activity that permeated Enron after it acquired PGE in 1997; nevertheless, the Commission adopted conditions that helped to protect the Company from Enron's conduct.

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Despite its complaints about the speculative nature of the harms at issue here, Oregon Electric is responsible for any uncertainty surrounding the proposed transaction. For example, the Commission and the parties still do not know the cost of financing for the proposed transaction because Oregon Electric has not provided the financing details. Oregon Electric is the only party that has the ability to resolve at least some of this uncertainty by providing definitive information or answers, but it chooses not to do so. Oregon Electric has not provided any indication of its plans for PGE or even how long it intends to own the Company. Although Oregon Electric commits to conducting an internal process review if the proposed transaction is approved, it provides little detail of what such a review would entail. Furthermore, Oregon Electric asserts that its financial model runs justify the amount of Oregon Electric's debt and demonstrate the thoroughness of Texas Pacific Group's ("TPG") due diligence, but then argues that Staff and intervenors cannot rely on the TPG Investment Review Committee's presentations or other due diligence information as evidence of Oregon Electric's intentions. Oregon Electric has the burden to demonstrate that customers benefit from the proposed transaction, and it cannot do so with generalizations about future review processes and contradictory characterizations of the information provided to Staff and intervenors.

2. Oregon Electric Must Demonstrate its Proposed Benefits with Definitive Evidence

Oregon Electric's inability to adequately rebut the evidence of potential harm presented by Staff and intervenors makes it all the more important for Oregon Electric to definitively demonstrate that PGE's customers actually will be better off as a result of Oregon Electric's proposals. Oregon Electric has not provided sufficient evidence to meet this element of its burden. Although the Commission must accept some uncertainty with respect to

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evaluating the potential harms identified by Staff and intervenors, it is unnecessary to do so with respect to the proposed benefits. Oregon Electric has access to all of the evidence that is necessary to demonstrate whether customers will actually benefit from its proposals and can submit that evidence into the record. Indeed, the Commission can evaluate the evidence supporting Oregon Electric's proposed benefits against the evidence provided to demonstrate PGE's current situation. The record reveals that Oregon Electric's proposed benefits are speculative, unproven, or already exist.

A recent proposed order in an Arizona Corporation Commission proceeding involving the acquisition of Tucson Electric Power Company by, among other entities, a private equity investment firm named Kohlberg Kravis Roberts & Co. ("KKR") is instructive with respect to what is necessary to demonstrate, in a proceeding such as this, that customers will benefit from certain proposals. In that docket, the ALJ found that she could not accept as a benefit to customers KKR's proposals to maintain a local headquarters, continue charitable contributions, and retain management because KKR had not demonstrated that these things would change without KKR's ownership. Re The Reorganization of Unisource Energy Corp., Arizona Corporation Commission Docket No. E-04230A-03-0933, Recommended Opinion and Order at 32-33 (Nov. 8, 2004). In essence, there was no evidence to establish a baseline against which to evaluate whether KKR's proposed acquisition actually benefited Tucson Electric customers. The same is true with Oregon Electric. One of the most glaring flaws in Oregon Electric's evidence is that it has not provided evidence to demonstrate the baseline against which

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to evaluate its proposals.[5/] As a result, there is nothing against which to compare PGE's situation under Oregon Electric's proposals. Similarly, there is no basis to determine that customers receive a net benefit from the proposed transaction. The reasons why the speculative and uncertain benefits identified by Oregon Electric in its opening brief do not meet the net benefits standard are discussed below.

Rate Credit. Despite Oregon Electric's claims, its proposed rate credit is not "guaranteed," which makes it of little benefit to customers. ICNU's proposed rate credit is guaranteed; it unconditionally provides that customers will receive $97 million as a credit to rates over five years beginning in 2006. Staff's rate credit is guaranteed; it unconditionally provides that customers will receive $75 million.

Oregon Electric's proposed "rate credit" is fundamentally different. Oregon Electric offers $43 million to customers over five years beginning in 2007. However, Oregon Electric proposes that it may offset this amount by any cost savings that PGE demonstrates in a future rate case. Oregon Electric indicates that the $43 million is guaranteed because Oregon Electric has committed to provide this credit to customers even if PGE does not demonstrate savings in the next rate case. If Oregon Electric's proposed rate credit were truly guaranteed, however, it would not be tied to the savings in PGE's next rate case or any other condition. The total amount of Oregon Electric's rate credit, however, includes costs savings that PGE demonstrates in the next rate case, but Oregon Electric ignores that PGE could achieve these cost savings regardless of Oregon Electric's ownership. If PGE demonstrates cost savings in a rate

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[5/] The baseline against which the Commission should evaluate Oregon Electric's ownership is PGE's current situation today. Oregon Electric urges the OPUC to consider the proposed transaction without reference to a particular baseline. Oregon Electric/22, Davis/21.

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case, those savings should be reflected in customer's rates regardless of whether Oregon Electric owns PGE. Such savings should not be used to offset a rate credit that Oregon Electric alleges in this proceeding is a benefit to customers. Finally, even if the entire $43 million were a guaranteed rate credit, this amount is insufficient to constitute a legitimate benefit to customers.

In addition, Oregon Electric points out that the Commission in Order No. 01-778 noted that monetary terms are not necessary to show net benefits in every merger transaction. Oregon Electric's Opening Brief at 15. The implication of this argument is that Oregon Electric has gone above and beyond what is required under the net benefits standard. The Commission should reject this reasoning. Oregon Electric has offered a rate credit and claimed that credit as a customer benefit. As a result, Oregon Electric's argument about whether the net benefits standard *requires* a rate credit is irrelevant. The issue before the Commission is not whether a rate credit is necessary in this proceeding; the issue is whether the rate credit offered by Oregon Electric is sufficient to constitute a benefit to PGE's customers. The $43 million that Oregon Electric has offered customers amounts to $8.6 million per year, which would reduce PGE's current rates by approximately 0.6%. Because of the offset proposal, however, the actual amount of the rate reduction depends on PGE's arguments in its next rate case that it has achieved savings to offset the rate credit. There is no evidence that PGE could not achieve such cost savings regardless of Oregon Electric's ownership. Oregon Electric's proposed rate credit does not provide a net benefit to customers.

Indemnification. Oregon Electric also claims that TPG secured indemnifications for PGE and Oregon Electric that will benefit customers. The Commission should make no mistake that TPG secured the indemnifications to protect its investment, not to benefit

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customers. Any potential purchaser of PGE likely would have demanded the indemnifications in the stock purchase agreement related to Enron's and other liabilities. In addition, Oregon Electric has not provided evidence to demonstrate that the potential liabilities that are subject to indemnification will harm PGE's customers. Assuming that PGE actually incurs a loss that is subject to indemnification under the stock purchase agreement,[6/] the Commission would decide if PGE would recover the cost of that loss from customers through rates. Finally, as Staff noted in its opening brief, Oregon Electric failed to provide the valuation data underlying the potential liabilities for which the Applicants are offering the indemnifications. Staff's Opening Brief at 23. In other words, despite the fact that the potential risk of liability is quantifiable and the information is available, Oregon Electric has chosen not to provide detail about the value of this benefit, if any.

Local Focus and First-Class Board of Directors. Oregon Electric also has provided no evidence to demonstrate that customers will be better off as a result of the "local" Board of Directors that will be put in place. The evidence in the record from PGE's President and Chief Executive Officer indicates that PGE currently is a "local" company. The unrefuted testimony of Donald Schoenbeck demonstrates that virtually all investor-owned utilities in the Northwest have "local" boards. ICNU/100, Schoenbeck/4-5.

Finally, Oregon Electric has also stated that keeping PGE's headquarters in Oregon is a benefit and that Oregon will benefit from PGE's continued charitable contributions. There is no evidence of a threat to move PGE's headquarters or that such contributions will end without Oregon Electric. In other words, what Oregon Electric argues is a benefit in this

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6/ Oregon Electric acknowledges in its opening brief that the circumstances surrounding whether PGE would incur a loss that is subject to indemnification is inherently uncertain. Oregon Electric's Opening Brief at 18.

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proceeding is actually just maintaining the status quo. There is no basis upon which to conclude that Oregon Electric has met its burden to demonstrate that customers benefit from these proposals.

Extension of Service Quality Measures. Oregon Electric also states that the extension of the current service quality measures ("SQM") is a benefit to PGE's customers; however, there is no evidence that the measures would not continue to exist in the absence of Oregon Electric. Indeed, it is more likely than not that PGE will continue its current SQM with or without Oregon Electric. This is another instance of maintaining the status quo, not offering something that makes PGE's customers better off. Without some evidence that the SQM would change in the absence of Oregon Electric's ownership, the Commission cannot accept this as a benefit.

Commitment to Address Issues Faced by PGE's Low Income Customers. Oregon Electric's commitment to address issues faced by low income customers may benefit certain PGE customers. As with many of the proposed commitments, however, there is little certainty surrounding Oregon Electric's proposals, and there is little basis to determine whether this truly is a benefit.

Stability and Known Ownership. Oregon Electric also claims that it is offering certainty and known ownership to PGE's customers; however, all the evidence in this proceeding indicates that the known ownership will probably last for five to seven years. It could be shorter particularly if the Public Utility Holding Company Act of 1935 ("PUHCA") is repealed. Oregon Electric has provided no evidence to demonstrate that customers are better off under this scenario. Again, there is no evidence of the alleged "distractions" of Enron ownership.

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C. The Commission Has the Discretion to Deny the Application or Adopt Conditions to Help Protect Customers

Oregon Electric and Enron state that the Commission does not have the authority to impose certain conditions and that other conditions would allow the Commission to impermissibly "interfere" in PGE's operations. Oregon Electric's Opening Brief at 1 n.4, 33; Enron's Opening Brief at 18. Enron goes so far as to state that adoption of certain conditions or actions by the Commission would violate Enron's constitutional rights.[7/] Enron's Opening Brief at 18. The not so subtle implication of these arguments is that if the Commission denies the proposed transaction or adopts any conditions other than those proposed by Oregon Electric, the Commission's order will be overturned on appeal. The Commission should not be swayed by these arguments.

An administrative agency has broad discretion to implement statutes governing its delegated functions. Pac. Northwest Bell Tel. Co. v. Katz, 116 Or. App. 302, 309 (1992). The OPUC, in particular, has been delegated discretion to implement statutes such as ORS § 757.511. See Springfield Educ. Ass'n v. Springfield School Dist., 290 Or. 217, 228-231 (1980). One court described the OPUC's discretion as appearing to be "commensurate with that of the legislature itself" when the Commission acts pursuant to the authority delegated to it by the legislature. See Pac. Northwest Bell Tel. Co. v. Sabin, 21 Or. App. 200, 213-214 (1975). The standard under which the Commission must evaluate the proposed transaction is whether it will

[7/] The Commission should give no weight to Oregon Electric's threat that certain proposed conditions would impermissibly "interfere" in PGE's operations and Enron's claim that adoption of certain conditions would amount to a "taking" of Enron's property. The Commission has broad discretion under a public interest standard to adopt conditions necessary to protect customers. Furthermore, the fraudulent actions of Enron and its management account for the increased scrutiny that demands more stringent conditions in this proceeding. As such, these conditions are reasonably related to the potential harms identified by Staff and intervenors.

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serve PGE's customers in the public interest. ORS § 757.511. Oregon Electric, Enron, PGE, and PacifiCorp all attempt in opening briefs to constrain the Commission's authority under this standard. In truth, however, the Commission's discretion to determine the public interest could be no broader. ORS § 757.511(3) provides the Commission the discretion to: 1) deny the Application if it does not serve PGE's customers in the public interest; and 2) condition authorization of the proposed transaction upon adherence to certain requirements. ICNU recommends that the Commission deny the Application—Oregon Electric and Enron do not question that aspect of the Commission's discretion. If, however, the Commission determines, based on it discretion, to approve the proposed transaction, that discretion also includes the authority to adopt the conditions proposed by ICNU.

D. The Conditions Proposed by Staff and Oregon Electric Are Insufficient to Ensure that the Proposed Transaction Is in the Public Interest

ICNU has recommended throughout this proceeding that the Commission deny the proposed transaction. Nevertheless, ICNU also proposed a package of conditions to help protect customers in the event that the Commission disagrees with Commission Staff and all customer groups that the proposed transaction is not in the public interest. ICNU included its proposed conditions as Attachment A to ICNU's opening brief. Some of these conditions are the same as those proposed by Staff; however, certain of ICNU's conditions provide additional protection and transparency or relate to issues that are not addressed by other parties. Although Staff's proposed conditions help to provide protection in some areas, they do not do enough as a whole. Furthermore, ICNU acknowledges that its proposed conditions do not protect customers from all potential harms.

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Certain of ICNU's proposed conditions are identical to those proposed by Staff. In addition, Staff proposed certain revised conditions in its opening brief to which ICNU agrees. The Staff conditions that ICNU agrees with include numbers 1-10, 12, 16-19, 22-23, 26-27, 29, and 31-37.[8/] In addition, ICNU does not oppose condition 38 proposed by Staff and the City of Portland.

ICNU discussed in its opening brief certain conditions related to bankruptcy (conditions 35-38), access to the PGE Board (condition 42), the "endgame" (conditions 44-45), direct access (condition 46), and enforceability (condition 47) that are of particular importance to ICNU. Below is a discussion of other ICNU conditions that differ from Staff's and relate to issues that are particularly problematic in this proceeding.

1. Condition 11

Condition 11 governs access to the records of TPG's exercise of its consent rights. Staff proposes two conditions related to this issue. Staff condition 11 provides the Commission access to a record of the exercise of a consent right by TPG. Oregon Electric agrees with this condition. Staff condition 30 provides that Oregon Electric will provide a semi-annual report to the Commission that details the date a consent right was exercised and identifies the consent right triggered. Oregon Electric does not agree to provide such a report to the Commission.

The complexity and lack of transparency associated with the holding company and consent right structure concocted by TPG to avoid regulation under PUHCA poses a serious risk to customers and a detriment to the OPUC's regulation of PGE. These concerns cannot be effectively dealt with through conditions. ICNU condition 11 attempts to address one obvious

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8/ ICNU's conditions 41 and 42 are the same as Staff's conditions 36 and 37, respectively.

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detriment of TPG's consent rights, but does not by any means deal with all of the risks posed by Oregon Electric's unique holding company structure. ICNU proposes that Oregon Electric maintain a record of each time the TPG Applicants withhold their consent to an action of the PGE Board and that Oregon Electric provide this record to the Commission upon request and on a quarterly basis. Furthermore, ICNU's proposed condition provides that information concerning the date, subject matter, and consent right exercised shall not be subject to confidential protection. This differs from Staff's and Oregon Electric's proposals in two important respects: 1) Oregon Electric would merely make a record available to the Commission but would not be required to provide reports; and 2) Staff would require Oregon Electric to provide a limited report to the Commission, but the information in that report would be subject to protections that include having the report disclosed to Commission Staff only.

In addition, in further reviewing condition 11, ICNU has determined that additional revisions are necessary to make it consistent with Oregon Electric's most recent proposals and to encompass actions of the Boards of both PGE and Oregon Electric. ICNU's revisions to condition 11 as it appeared in Attachment A to ICNU's opening brief appear in redline below:

> 11. Oregon Electric shall maintain and provide the Commission unrestricted access to a record of each instance in which TPG Applicants withhold their consent to a decision of the PGE ***<u>or Oregon Electric</u>*** Board of Directors. The record shall detail the basis for the decision, including any governing report or document that memorializes the exercising of the consent rights and shall identify the persons involved in making the TPG Applicant Consent Rights decision. Oregon Electric shall provide the records to the Commission on a quarterly basis and at any additional times upon request of the Commission. Nothing in this condition shall be deemed to be a waiver of Oregon Electric's or PGE's right to seek protection of information in such records. However, for each

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> exercise of a consent right described in a record that has been provided to the Commission, the following information shall not be subject to protection and shall be made available to the public from the Commission: the date of the action; the subject matter; and the enumerated consent right authority ***(from Oregon Electric/901, Schifter/1-2)*** ~~7 to Oregon Electric's March 8, 2004 Application)~~ under which the action was taken.[9/]

ICNU identified in its initial testimony in this Docket the problems associated with the TPG consent rights. If the Commission does not deny Oregon Electric's Application, it is important that information regarding the exercise of those consent rights be provided to the Commission, Staff, and PGE's customers.

2. Condition 13

Condition 13 highlights the affiliate issues created by drawing PGE into TPG's network of companies. Staff and Oregon Electric propose conditions that require PGE and Oregon Electric to notify the Commission within 30 days of the formation of any "subsidiary." ICNU's proposed condition would extend the notification requirement to "formation of any subsidiary, affiliate, or partnership." ICNU's condition would extend the notification requirement to formation of PGE affiliates in the form of TPG companies rather than just PGE or Oregon Electric subsidiaries. The rationale for the more limited condition put forth by Staff and Oregon Electric apparently is that it is too burdensome for Oregon Electric and PGE to keep track of the worldwide network of TPG's companies. It is exactly such an expansive and diverse network of companies, however, that creates the risk of affiliate abuses. Again, this is a regulatory problem created by the uniqueness of TPG and for which there is no definitive

[9/] This condition is identical to the condition 11 supported by the Associated Oregon Industries.

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solution. Limiting the Commission's ability to understand affiliate issues surrounding PGE is not a compromise that should be made here.

3. Conditions 42 and 46

ICNU's conditions 42 and 46 reflect the uncertainty of Oregon Electric's commitments in this proceeding. Condition 42 provides that customer groups will have periodic access to the PGE Board of Directors. Oregon Electric has asserted throughout this proceeding that it is "willing to commit that PGE will provide periodic access to the PGE Board for the appropriate advocacy groups." Oregon Electric/22, Davis/11. This willingness is restated in Oregon Electric's opening brief. Oregon Electric's Opening Brief at 18-19. The problem is that Oregon Electric never proposed or embraced a condition to implement this commitment.

Condition 46 is a direct access condition proposed by ICNU. Oregon Electric stated in testimony supporting the Application that it supports direct access and restructuring under Senate Bill 1149. This also turned out to be a commitment that was unsupported by any action.

Oregon Electric's failure to follow through on the promises made in testimony calls into question many of the "commitments" made in this proceeding. The Commission should not permit companies to come to Oregon and seek to acquire utilities with empty promises.

4. Condition 47

ICNU's condition 47 authorizes the Commission, Staff, and customer groups to enforce certain of Oregon Electric's obligations in the event that the proposed transaction is approved. Given the unique structure proposed by Oregon Electric, the uncertainty surrounding

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fundamental aspects of the proposed transaction, and the questionable nature of certain of Oregon Electric's commitments in this proceeding, it is important to have an enforceability condition to tie together the obligations imposed in any Commission order approving the proposed transaction. The Commission, Staff, and customers should be assured that Oregon Electric's obligations are enforceable should the Commission decide to approve the proposed transaction.

CONCLUSION

Ownership of PGE by Oregon Electric is not in the public interest. The Commission should deny the Application. At this late stage in this proceeding, many fundamental questions about the proposed transaction remain unanswered. What are the terms of the financing? By how much will Oregon Electric cut costs at PGE? How long will Oregon Electric own PGE? Can PGE finance Port Westward and still meet its obligation to provide dividends to support Oregon Electric's debt? All of these unanswered questions pose serious risks to PGE and its customers. Furthermore, Oregon Electric's and Enron's opening briefs question the Commission's authority, question the standards that govern this proceeding, and warn the Commission to not "interfere" in PGE's operations. This approach undoubtedly is a sign of things to come under Oregon Electric's ownership. Neither Staff nor any customer group supports the proposed transaction on the terms proposed by Oregon Electric. ICNU urges the Commission to protect PGE's customers by denying Oregon Electric's Application. If the Commission disagrees with Staff and all customer groups that the proposed transaction does not serve PGE's customers in the public interest, then the package of conditions proposed by ICNU will help to protect PGE's customers from the risks of Oregon Electric's ownership.

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Respectfully submitted,

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