November 17, 2004

VIA TRANSERV AND E-MAIL

ANNETTE TAYLOR
LEGAL SECRETARY TO ADMINISTRATIVE
LAW JUDGE KATHRYN LOGAN
PUBLIC UTILITY COMMISSION OF OREGON
550 CAPITOL STREET, NE
SALEM OR 97310

Re: UM 1121 – Oregon Electric Utility Company, et al., to Acquire Portland General Electric Company: City of Portland's Opening Brief

Dear Ms. Taylor:

Enclosed for filing in the above-referenced matter are an original and five copies of the City of Portland's Opening Brief.

Please let me know if you have any questions regarding this filing.

Very truly yours,

/s/ Benjamin Walters
Benjamin Walters
Senior Deputy City Attorney

BEW:pd
Enclosures
cc: UM 1121 Service List

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1121

In the Matter of the Application of

OREGON ELECTRIC UTILITY COMPANY, LLC, *et al*.

Application for Authorization to Acquire Portland General Electric Company

---

OPENING BRIEF OF THE CITY OF PORTLAND, OREGON

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Attorneys for City of Portland

November 17, 2004

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I. Introduction

Texas Pacific Group's [1] proposal to acquire Portland General Electric (PGE) is not simple and straightforward, nor is it transparent. *Application*, p. 25, lines 3-4. If the acquisition is completed, PGE will become merely one of a vast group of assets controlled by a multinational corporation. CUB 300/Jenks-Brown 29-30. The proposed acquisition will not provide net benefits to PGE's ratepayers. There are significant aspects of the proposed acquisition that pose real risks to Oregonians in general. Even by imposing conditions as recommended by Staff or intervenors, the proposed acquisition is not in the public interest: any cumulative conditions simply cannot overcome the significant, accumulative risks. As a result the Commission should deny Texas Pacific Group's application.

The proposed acquisition "includes a financial structure and a business plan that are new to the Commission and which present genuine challenges under traditional regulation." CUB 300/Jenks-Brown, 2 lines 3-5. Texas Pacific Group acknowledges that the proposed acquisition "is unlike any this Commission has addressed in the past." *Application*, p. 4, line 1.

The structure of the new organization introduces layers of holding companies between PGE and its new ultimate corporate parent. PGE will be owned by Oregon Electric Company, LLC, a limited liability company created days before the proposed acquisition was announced in November 2003. *Application*, Ex. 1. Oregon Electric will, in turn, be controlled by Managing Member LLC, a separate limited liability company, together with various Texas Pacific Group funds and a small number of passive investors. *Application*, p. 6. Of these three entities, none

[1] Throughout the City's Opening Brief, "Texas Pacific Group" generally refers to the combined applicants consisting of TPG Partners III, L.P., TPG Partners IV, L.P., Managing Member LLC, Oregon Electric Utility Company, LLC, Dr. Peter Kohler, Gerald Grinstein and Tom Walsh.

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have prior experience in the intricacies of managing or operating an electric utility. *Application*, Ex. 3, Davis 10, line 6. The two newly formed limited liability companies merely serve to make Texas Pacific Group to avoid regulation under the Public Utility Holding Company Act of 1935 (PUHCA). *See*, *Transcript Record (TR)* Vol. 2, Schifter, cross-exam by Davison, p. 172, lines 16-18.

Texas Pacific Group's investment objective focuses on an anticipated capital gain from the re-sale of PGE, but it will also require a substantial stream of revenue from PGE to meet Oregon Electric's debt-service obligations. "Oregon Electric has no intent to own any business other than PGE." *Application*, Ex. 3, Davis, 14 line 3. "Oregon Electric's source for servicing its acquisition debt will be the dividends from PGE." *Id.*, p. 18, lines 3-4; *Application*, Ex. 3, Davis 18, line 5. Oregon Electric will borrow over $700 million from a combination of public and private financial institutions to finance this acquisition. *Id.*, Davis 16, lines 4-10. However, the final terms of the financing have yet to be determined. *Application*, p. 16, lines 23-26.

The structure of the proposed acquisition will result in a double-leveraged financial operation resulting in a consolidated equity level for PGE of 20 to 25 percent, roughly half of the Commission's previously expressed preferred equity level of 48 percent. Staff 200/Morgan 27, lines 11-12 ("the total debt is roughly 80 percent, leaving only 20 percent of 'true' equity invested in the combined business"); CUB 200/Dittmer 4. This highly-leveraged transaction will have a negative impact upon PGE's credit quality. Staff 200/Morgan 29, lines 18-22. Indeed, reaction among rating agencies has already been negative. ICNU 806/39 *Standard & Poor's Utilities & Perspectives*, (January 20, 2003).

PGE may be again up for sale in as little as five to seven years, given Texas Pacific Group's past practices in buying and selling companies and the general expectations of the

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investment community. COP 100, Exhibits A, B, C, and D. David Bonderman has publicly acknowledged that Texas Pacific Group's general holding period for investments is in the range of five to seven years. Staff 202/Morgan 19. It will not be longer than 12 years. Staff 200/Morgan 55, lines 7-9; *Application*, Ex. 3, Davis 4, lines 16-17; Davis 12, lines 6-7.

The Enron bankruptcy once seemed to present an opportunity for PGE to become a stable, reliable centerpiece for a recovering Oregon economy. However, the proposal submitted by Texas Pacific Group fails to achieve that objective. Instead, the proposed acquisition poses significant risks for PGE's customers. For example, the acquisition imposes a significant amount of new debt upon PGE, together with pressures to service that debt. PGE customers will be saddled with the costs and risks of this newly created debt. Staff 200/Morgan 28-30; ICNU 200/Antonuk-Vickroy 16-26; CUB 100/Jenks-Brown 13; CUB 200/Dittmer 12-12 and 23-38; CUB 400/Dittmer 5. As PGE may be put up again on the auction block in as little as five to seven years, this volatile combination will not result in stability for the utility or its customers.

In all of these aspects, Texas Pacific Group poses a new regulatory paradigm for the Commission, different from any of recent experience. The record in this proceeding clearly shows that Texas Pacific Group's proposal does not meet the statutory standard for approval of a utility merger. The merger will introduce substantial unprecedented risks while providing minimal demonstrable benefits. Texas Pacific Group proposes various conditions to mitigate risks or to provide benefits. However, no package of possible conditions can convert an inadequate Application into one meeting the ORS 757.511 test. Additionally, the recommended Staff conditions are inadequate to provide the necessary tools to avoid or mitigate the risks of the proposed acquisition, or to provide customers a net benefit. The Commission should deny the Application.

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II. The Commission must view the proposed acquisition through the lens of its administrative authority, focusing on the applicable statutory criteria.

A. The Applicant has the burden of proof.

"The applicant shall bear the burden of showing that granting the application is in the public interest." ORS 757.511(3). Texas Pacific Group does not dispute that it is responsible for carrying this burden. *Application*, Ex. 4, McDermott, p. 16.

Texas Pacific Group describes its proposal as providing "irrefutable" net benefits. OEUC 100/Davis 32, line 17. Texas Pacific Group's rhetoric is insufficient to meet the evidentiary burden: "the proponent of a fact or position bears the burden of presenting evidence to support the fact or position. ORS 183.450(2)." *Cole v. Driver and Motor Vehicle Services Branch*, 336 Or 565, 584, 87 P3d 1120 (2004). "The general rule is that the burden of proof is upon the proponent of the fact or position, the party who would be unsuccessful if no evidence were introduced on either side." *Harris v. SAIF*, 292 Or 683, 690, 642 P2d 1147 (1982). *See also*, *Salem Decorating Center, Inc. v. National Council on Compensation Ins.*, 116 Or App 166, 840 P2d 739 (1992) (the party seeking redress and whose claim would fail if neither party introduces any evidence has the burden of proof).

"The phrase 'burden of proof' has two meanings: one to refer to a party's burden of producing evidence; the other to a party's obligation to establish a given proposition in order to succeed." *In re Portland General Elec. Co.*, UE 115, Order No. 01-777, 212 PUR 4th 1, 2001 WL 1346291 (August 31, 2001), *reconsideration denied*, Order No. 01-988, 213 PUR 4th 376, 2001 WL 1708039 (November 20, 2001). To prevail in this proceeding, Texas Pacific Group must submit evidence and may not merely rely upon arguments to meet this burden. Texas Pacific Group must establish by a preponderance of the evidence that the proposed acquisition will provide net benefits to PGE ratepayers and will not cause harm to Oregonians.

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B. Texas Pacific Group's burden is to show that the proposed acquisition will benefit PGE's customers, and will not negatively affect Oregonians.

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

Northwest Natural, author of the legislation (SB 433) that became ORS 757.511, anticipated the current Application and its circumstances:

> The advent of innovative and highly speculative financing techniques, including use of so-called "junk bonds," has made it possible for very large corporations to be taken over with relatively small equity investments. In one way or another, the assets of the acquired company are used to service the acquisition debt. This could have a serious effect on the ability of an acquired utility to continue to provide adequate service to Oregon customers at reasonable rates.

Legal Standard for Approval of Mergers, *supra* (quoting testimony by an attorney for Northwest Natural Gas, the company that drafted the ORS 757.511 language). Northwest Natural's testimony foresaw with eerie precision the specific issues presented by Texas Pacific Group's proposed acquisition of PGE: the potential for harm to ratepayers of a leveraged buyout with the resulting cash demands for servicing the new debt.

The question of "what to compare" must also be considered. If the merger is not closed, Texas Pacific Group acknowledges that the most likely resulting scenario will be a stock distribution. OEUC 22/Davis 25. However, the option of sale to another party, perhaps under circumstances more favorable to PGE's ratepayers, is not foreclosed by the bankruptcy documents. Enron 1/Bingham 6. As the Portland City Council has publicly acknowledged,

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"[t]he City of Portland remains willing and able to pursue public ownership of PGE." COP 101/Anderson 12-14; COP 101, Exhibit 2.

The Oregon Legislature has directed the Commission to "prevent unnecessary and unwarranted harm to [the utility's] customers." ORS 757.506(2). Under ORS 757.511(3), the Commission may approve a merger application only after determining that it will serve the public interest. The Commission must otherwise deny the application. In the order approving the merger, the Commission may include conditions addressing the applicant's satisfactory performance or adherence to specific requirements. The Commission's first and foremost responsibility is to determine whether the statutory standards are met – only after that does the consideration of conditions enter into the equation. This statutory construct is clear and unmistakable. *Northwest Natural Gas Co. v. Oregon Public Utility Com'n*, 195 Or App 547, 99 P3d 292 (2004) (reversing a declaratory ruling that "ignored the meaning of the words that the legislature used").

C. Texas Pacific Group has not carried its burden of proof.

Texas Pacific Group has argued, but has not demonstrated, that its proposed acquisition of PGE will bring substantial benefits to PGE's customers and Oregonians in general. *Cf.*, *Application*, p. 4, lines 17-18. Texas Pacific Group has submitted testimony from witnesses in support of the transaction and in support of the idea that regulation will work perfectly with the structure of the proposed acquisition. However, these optimistic claims are primarily from witnesses with little or no utility regulation history, or by witnesses that forecast results upon unique and untried circumstances.[2]

[2] These projections are reminiscent of the sayings of the ultimate optimist embodied by Dr. Pangloss from Voltaire's *Candide*: "All is for the best in this best of all possible worlds."

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In contrast, the parties of record opposing Texas Pacific Group's application have identified numerous risks and harms presented by this transaction. Some of the evidence submitted by these parties is in the form of expert witness testimony based on years of experience before this Commission and objective analysis of the incentives flowing from the transaction. Some of the evidence is in the form of documentary evidence of what Texas Pacific Group is actually contemplating, not simply what it is saying in support of its proposal. Some of the evidence undertakes to dissect the underlying financial structure of the proposed acquisition. The record assembled by these parties stands in stark contrast to Texas Pacific Group's case which is constructed of vague assurances, flat denials or mere argumentation.

Texas Pacific Group's evidence simply fails to establish that PGE's ratepayers will enjoy a net benefit as a result of this transaction.[3] The record contains significant, compelling evidence contrary to that proposition. *Compare*, *In re Portland General Elec. Co.*, UE 139, Order No. 02-

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[3] The paucity of detailed information is reflected in other ways. For example, the record is bereft of any indication that Oregon Electric's general counsel has applied to appear *pro hac vice* in this proceeding. The general counsel's name is included on pleadings submitted to the Commission beginning with the Application. However, no application apparently has been submitted for admission before the Commission to serve in a representative capacity. OAR 860-012-0005(1). "[A] person who is not a duly licensed lawyer and active member of the Oregon State Bar may not appear in a representative capacity for another person or entity before an agency, board or commission of the State of Oregon in matters constituting the practice of law." 1987 Or Op Atty Gen 6045, 1987 WL 278301, *2 (February 6, 1987) (Concluding that statutes applied to contested case proceedings before administrative agencies). An attorney not authorized to practice law in Oregon may apply to appear *pro hac vice*. Uniform Trial Court Rule 3.170(1). "This rule applies to all judicial and administrative proceedings in [Oregon]." UTCR 3.170(2)(b).

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772, 222 PUR4th 139, 2002 WL 31618297 (October 30, 2002).[4] "The Commission's role is to weigh the evidence presented on each issue in the case and determine where the preponderance lies…. [The Commission makes] that decision on the record as a whole." *In re U.S. West Communications, Inc.*, UT 125, Order No. 97-171 at 8, 178 PUR4th 123, 1997 WL 464114 (May 19, 1997).

"In order to find net benefits, positive results must outweigh negative results so that … benefits outweigh the risks and costs." Staff 800/Conway 13,lines 14-18. After considering the risks presented by the Texas Pacific Group's application, it is clear that the proposed acquisition does not pass the statutory test.

Texas Pacific Group has asserted that its proposed acquisition of PGE will provide various "benefits." OEUC 500/Davis 36. These "benefits" fall roughly into three categories: 1) They are either so hedged by equivocal conditions as to be indeterminable (*e.g.*, commitment to renewable resources); 2) They are absolutely *de minimis* in terms of value (*e.g.*, commitment to funding low-income assistance); or, 3) They will otherwise occur even in the absence of Texas Pacific Group's acquisition of PGE (*e.g.*, PGE will make capital reinvestments and PGE will have a capable board of directors).

On the basis of the assembled record, Texas Pacific Group has not, and cannot, demonstrate that its proposed acquisition of PGE will provide net benefits to PGE's ratepayers and that it will not impose a negative impact upon Oregon. The Application should be denied.

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

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III. Texas Pacific Group's proposed acquisition introduces substantial risks for PGE and the public interest.

A. Texas Pacific Group's plans for short-term ownership will continue uncertainties regarding PGE's future.

Texas Pacific Group's financial goals and short-term investment horizon are fundamental flaws of the proposed acquisition. The double-leveraged financial structure proposed by Texas Pacific Group introduces significant risks for PGE and its customers which was exactly one of the potential issues anticipated in the Legislature's approval of ORS 757.511(2). The proposed financial structure is exactly the kind of risk that the Legislature was determined to fend off. The proposed transaction creates significant inconsistencies between the short-term interests of Texas Pacific Group and long-term interests of ratepayers and Oregonians. The overall time limits upon Texas Pacific Group's ownership of assets, and its typically shorter holding period, will drive Texas Pacific Group's goals for PGE: prepare the utility for re-sale while maximizing the investors' return. *Application*, Ex 3, p. 4; COP 100, Exhibits A, B, C, D.

The objectives of the proposed new owner are unlike any other the Commission has had reason to previously consider under ORS 757.511(3). The investment objectives and planning horizon for Texas Pacific Group differ not just in degree but in underlying character. Texas Pacific Group's goal is to get PGE in shape to sell in the relatively near term. *See, e.g.*, BOMA 2/White 5 (investors expect to turn the purchase and resell).

> Uncertainty about future ownership and strategic direction of the Company can require managers to focus more on short-term decision making than longer-term strategy and direction. This can create poor incentives for longer-term decision making resulting in the potential postponement or distortion of important business decisions …. In addition, uncertainty about the future can affect the customer's decisions about investing.

Application, Ex. 4, McDermott 11, lines 7-14. Texas Pacific Group asks us not to worry but the

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Application gives plenty of cause for worry.

Texas Pacific Group's fiduciary duty to increase return for its investors, including the Oregon Public Employees Retirement System, pits the investors against the ratepayers – Oregonian against Oregonian. *Application*, Ex. 3, Davis 5, lines 7-11 ("pensioners in Oregon and elsewhere are the people, among others, for whose ultimate benefit the investment in PGE will be made"). In this zero-sum equation, only Texas Pacific Group is certain to come out ahead.

Texas Pacific Group investment objectives will increase pressures upon PGE to reduce costs, which will potentially harm the utility in the long run. Incentives to engage in aggressive cost-cutting are always present in between utility rate cases. CUB 300/Jenks-Brown 15 lines 3-7. Texas Pacific Group has taken this to another level by including anticipated cost cuts in its financial models of how the proposed acquisition pencils out. COP 101/Anderson 10; CUB 100/Jenks-Brown 4-12.

Oregon Electric's obligation to service its debt payments increases pressure on PGE to deliver dividends. *See, e.g.*, CUB 300/Jenks-Brown 3-4; CUB 301. Oregon Electric's debt obligations will impose new financial pressures upon PGE that have simply not existed previously. Texas Pacific Group insists that PGE's dividends are typically comfortably above the levels required to meet debt service. As Staff explains, however, "it is not sufficient to say that there would be only a small risk of default for the reason that PGE's dividends are expected to be sufficient to fund debt service requirements." Staff 900/Morgan 9.

Texas Pacific Group has given numerous assurances to senior management that they will continue to serve after completion of the acquisition. *Application*, p. 20, lines 14-16 ("It is expected that Peggy Fowler, PGE's Chief Executive Officer, and other members of executive

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management will retain their positions after the closing of the Proposed Transaction."); *TPG PUHCA Filing*, p. 9 ("The current management team will continue to operate PGE after the closing of the Acquisition and Peggy Fowler and Jim Piro, CEO and CFO, respectively of PGE, [sic] will also serve as CEO and CFO, respectively, of OEUC.") However, the Application is simply silent as to Texas Pacific Group's intentions regarding PGE's workforce or the preservation of local jobs. The coded language used by Texas Pacific Group suggests that workforce reduction will certainly be considered after the transaction is closed: "The first job of the new PGE Board will be to take a fresh look at the company and its operations." OEUC 22/Davis 3, lines 23-24. This fresh look will assess "operational performance" including "cost and service level[s] across operations and service functions [and] practices and process assessments of PGE versus other utilities." OEUC 22/Davis 7, lines 16-19. Texas Pacific Group's practice of reducing workforce at other companies it has purchased is well documented. CUB 300/Jenks-Brown 3-4.

CUB has provided evidence of at least two utilities – US West and Commonwealth Edison - where aggressive cost cutting led to serious operational problems and degradation of service. CUB 300/Jenks-Brown 8-11. As CUB notes, a regulatory model based upon review of historic data will always lag behind the effects of such actions. CUB 300/Jenks-Brown 12. Receiving reports of historical data, whether annually or quarterly, necessarily entails looking backward. OEUC 100/Davis 19, lines 17-18. Quite a bit of harm can occur over the span of a year or even three months. Sometimes the extent of the harm is not apparent until the next catastrophic event, when the failure to maintain or cuts in maintenance staff suddenly are revealed as being too close to the bone.

There are other examples of how cost-cutting can occur at levels that are beyond any

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reasonable regulatory scrutiny, yet are of significant importance to PGE and its customers. Hydropower relicensing takes a significant commitment of resources, including money. HRC 100/Sherman-Swift 4. Cuts to PGE's acknowledged effective hydropower program, whether by "financial reduction or by dissolution of its initiatives"[5] can occur without notice or any opportunity for input. These incremental changes can accumulate resulting in tectonic shifts before the Commission is even aware that changes are afoot.

This regulatory deficiency is compounded by limited resources at the Commission to track, identify and respond to such problems. Texas Pacific Group insists that the risk of this is slight, but even if Texas Pacific Group's claim is accurate—and Texas Pacific Group offers nothing to substantiate it—Texas Pacific Group's incentives to reduce costs are so strong that this risk is real and cannot be disregarded.

B. Borrowing to finance the acquisition will increase credit risks for PGE's ratepayers.

Texas Pacific Group will add new layers of ownership and debt on top of the existing PGE structure. There is no dispute PGE's credit rating will be inextricably bound up in the debt servicing of Oregon Electric, its proposed parent. OEUC 100/Davis 3. PGE's credit rating has already been downgraded as a result of the financial structure of the proposed acquisition. OEUC 600/Wheeler 15; Staff/200 at p. 9. "PGE's unsecured ratings are now only one notch into the investment-grade category by Standard & Poor's and Moody's. Fitch rates PGE's unsecured securities as one notch into the non-investment grade ratings." Staff 900 at p. 14. *See also,* CUB/208; CUB/209. "PGE's cost of debt has already increased as a result of Enron's ownership . . . [PGE's unsecured ratings] will be hovering just above non-investment-grade. This rating

[5] HRC 100/Sherman-Swift 2, line 24.

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will affect the interest rate charged on PGE's revolving lines of credit, and power purchases, among other 'spillover effects' that Mr. Davis has not addressed." Staff 900/Morgan 12; CUB 400/Dittmer 3, lines 1-15 (various rating agencies have concerns regarding the double leveraged capital structure of PGE and Oregon Electric's debt). This slippage in credit ratings is an additional cost that will be borne by PGE's customers as a result of the proposed transaction.

C. Real time notification of the exercise of Texas Pacific Group's consent rights will be necessary for the Commission to possess adequate information regarding issues of PGE's administration and operation.

Once the acquisition is completed, PGE's ultimate fate as a corporation will be controlled by decisions made by Texas Pacific Group, not any "local" representatives. OEUC 22/Davis 15; *TR*, Vol. 2, Schifter cross-exam by Davison, pp. 176 – 177. Until shown otherwise, any exercise of consent rights by Texas Pacific Group must be interpreted as a divergence of interest between Oregon Electric's board and Texas Pacific Group's investment objectives. This divergence is a core concern with Texas Pacific Group ownership, but neither the Commission nor any other party will know a consent right has been exercised until Commission Staff submit a request to Oregon Electric. OEUC 501/Davis 3.

Texas Pacific Group has not offered to provide concurrent notification of any exercise of its negative consent rights. Because the exercise of these rights will be symptomatic of a disagreement between Texas Pacific Group and the local representatives, providing this information is of vital importance to the Commission and PGE's customers. For example, there is no reasonable basis for delaying notice of an internal dispute on a proposed rate filing to decrease rates. On balance, Texas Pacific Group's interests in hiding these internal disagreements, and of its exercise of control over PGE, should not outweigh the Commission's interest in receiving timely information. The Commission should not put itself, when protecting

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the public interest, in the position of having to come begging for information of this magnitude.

D. Local representatives will be legally bound to treat shareholder interests as paramount.

Texas Pacific Group's apparent premise is that by appointing board members who happen to have backgrounds as Oregonians, local issues will take precedence. However, this is simply a legal and practical fantasy. As an Oregon corporation, PGE's board of directors is legally obligated to place the interests of the shareholders and investors first above any "local" concerns. The directors are obligated to conduct the affairs of the corporation for the benefit of the stockholders and investors. Those in control of corporate affairs must discharge their duties toward shareholders by making business decisions that reflect legitimate business purposes rather than the controlling parties' private interests. *Zidell v. Zidell, Inc.*, 277 Or 413, 419, 560 P2d 1086 (1977); *Naito v. Naito*, 178 Or App 1, 35 P3d 1068 (2001) (concluding that majority shareholders had engaged in oppressive conduct against minority interests). Texas Pacific Group clearly expects that shareholders' interests will come first: The Board of Oregon Electric has "a fiduciary duty to manage money on behalf of the many investors in TPG Applicant funds." OEUC 22/Davis 17, lines 21-22.[6] Having local representatives provides no assurances that local interests will be given priority over investor expectations.

E. If PUHCA is repealed, Texas Pacific Group will have full voting control over PGE and any conditions regarding local representation will vanish.

As a private equity firm, Texas Pacific Group's ownership presents particular issues related to transparency and oversight. *See, e.g.*, BOMA 2/White 3. Texas Pacific Group is so fundamentally concerned with avoiding PUHCA registration, with its corresponding regulatory

[6] Division of local concerns and shareholder interests would not occur under local, public ownership where the identities of ownership and local issues would collapse into a singularity.

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filings, as to make this an explicit condition of closing. *TR*, Vol. 2, Schifter, cross-exam by Davison, pp. 186-187.

Texas Pacific Group is simply working around the purposes of PUHCA by setting up a holding company with no real control, emphasizing "local" representation while retaining real control for itself. In the meantime, Texas Pacific Group is "optimistic" that the Securities and Exchange Commission (SEC) will determine that the proposed structure will exempt Texas Pacific Group from compliance with PUHCA. OEUC 900/Schifter 3.

As of late October, the consent rights were still in a state of flux, being negotiated by representatives from Texas Pacific Group with staff at the SEC in closed-door discussions away from any public scrutiny.[7] *See*, *TR*, Vol. 2, Schifter, cross-exam by Walters, p. 185. On November 4, 2004, Texas Pacific Group and its affiliates filed applications with the SEC for exemptions from regulation under PUHCA.[8] Texas Pacific Group's filing describes what appears to be the final version of the consent rights. *TPG PUHCA Filing*, pp. 12-18. The moving target of the negative consent rights, as well as the non-final terms of the financial package, make it difficult to provide a definitive critique.

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[7] "[TPG has] been engaged in discussions with the SEC, we've provided drafts, received some feedback … [Staff has] essentially indicated what -- they would like to be in a position that when we file the Application that they would be recommending that the SEC grant the requested relief." *TR*, Vol. 2, Schifter cross-exam by Davison, pp. 179-180.

[8] Richard P. Schifter on behalf of TPG Partners IV, L.P., TPG III and Oregon Electric Investment Company, LLC, *Form U-1 Application/Declaration Under the Public Utility Holding Company Act of 1935* (November 4, 2004) http://www.sec.gov/Archives/edgar/data/1307646/000095012904008509/0000950129-04-008509.txt (site visited Nov. 8, 2004) (*TPG PUHCA Filing*). Richard P. Schifter on behalf of Managing Member LLC and Oregon Electric Utility Company, LLC, *Form U-1 Application/Declaration Under the Public Utility Holding Company Act of 1935* (November 4, 2004) . http://www.sec.gov/Archives/edgar/data/1307652/000095012904008508/h19624uv1.txt (site visited Nov. 8, 2004) (*OEUC PUHCA filing*).

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The only entity that will work out the details of the proposed acquisition in a transparent, open setting is the Public Utility Commission. Any reliance upon the federal regulator is misplaced. If the proposed acquisition is going to be placed under real scrutiny, it will have to occur here and now. The Commission cannot depend upon that occurring in Washington, D.C.

Texas Pacific Group's consent rights will give it veto authority over fundamental operating decisions of PGE. The consent rights are fundamental to "ensuring that its investment will be protected" by preventing the PGE board from making independent decisions. *TPG PUHCA Filing*, at p. 11. Texas Pacific Group is also reserving the right to remove members from the board of Managing Member LLC, consisting of Gerald Grinstein, Peter Kohler, Duane McDougall, Robert Miller and Tom Walsh, "in the event that its fundamental economic interest is endangered by the Managing Member's failure to manage OEUC effectively." *TPG PUHCA Filing*, at p. 18.

In the meantime, Texas Pacific Group continues to wait out the repeal of PUHCA: "The SEC itself … advocate[s] the repeal of PUHCA, and proposals to repeal the Act are pending in Congress …." *Application*, Ex. 5, Schifter 4; OEUC 900/Schifter 3 (Texas Pacific Group is "optimistic" that the SEC will determine that the proposed structure will exempt it from compliance with PUHCA). Either way, Texas Pacific Group will ultimately pull the strings at Oregon Electric, whether through exercise of "negative consent" or directly after PUHCA's repeal.

The holding company has been generally described as serving to do away with "the incompetence, somnambulance, naiveté, or even the unwarranted integrity of local managements." John Kenneth Galbraith, *The Great Crash*, 39 (Avon Books 1980). It is the specter of outsiders controlling the "unwarranted integrity" of local representatives that the

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Commission should focus upon.

In 1935, Congress eventually figured out what was by then painfully obvious to most ratepayers - the holding company model was good for investors but wreaked havoc upon the businesses and families served by the utility. As part of the overall efforts to address the excesses of the market, Congress adopted PUHCA in 1935. As George Santayana stated: "Progress, far from consisting in change, depends on retentiveness. Those who cannot remember the past are condemned to repeat it." Santayana, *The Life of Reason* (1905).

As noted in PGE's corporate biography, its corporate predecessor Portland Electric Power Company was once serially part of several holding companies, passed from one to another until PEPCO itself filed for bankruptcy reorganization in 1939. Craig Wollner, *Electrifying Eden, Portland General Electric 1889-1965*, Chapter 5 – The Perilous Years (Oregon Historical Society Press 1990). All of this occurred under the regulatory oversight of the Oregon Public Utility Commissioner, who lacked the resources to track the goings-on of a multi-state corporation situated some distant level of corporate intermediaries above the regulated utility. *Id.*, p. 149 (noting that the Public Service Commission successfully stopped utility from paying 3% management fee to parent, but had no regulatory ability to restrict the parent corporation from packing the board of directors). What possible conditions will serve to protect ratepayers and the region from repeating the past and suffering another cycle of wrenching economic dislocation?

"If PUHCA is repealed, Oregon Electric's economic ownership and voting control will be adjusted so that the TPG Applicants will have voting control consistent with their equity status." *Application*, Ex. 3 Davis 9, lines 17-19; *See, also*, *Application*, p. 7, fn. 9; *Application*, Appendix A, p. 3, ¶ 10.f ("repeal of [PUHCA] will change the voting structure of Oregon

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Electric"). Simply put, Texas Pacific Group has reserved all rights to reallocate the voting rights proportional to itself. *Application*, Ex. 10, pp. 5-6. Eighty percent of the economic interests will belong to Texas Pacific Group, while roughly two-thirds of one percent will belong to the local investors. *OEUC Application Amendment* (July 13, 2004), p. 4, lines 12-14 and Revised Exhibit 9. The other approximate 20% will belong to passive investors who will have no board representation and no attending voting rights. *Application*, Ex. 3, Davis 10, lines 1-2. As a result, the effective voting control that will belong to Texas Pacific Group will actually approach 100% after PUHCA repeal.

Perhaps most importantly, Texas Pacific Group has structured the proposed acquisition to include one further condition anticipating PUHCA's repeal: "**PUHCA-related restrictions (such as limits on board membership) will also cease to apply**." *Application*, Ex. 10, p. 6 (emphasis added). Despite Kelvin Davis's vague assurances that local representation will always be contemplated, (*Application*, Ex. 3/Davis 9),[9] the retention of this right reveals Texas Pacific Group's actual intentions. They want to retain this right because they may want to exercise it. Whether or not PUHCA is repealed, Texas Pacific Group will ultimately pull the strings at Oregon Electric either through exercise of "negative consent" or directly through voting control and board representation. The possibility of any real "local representation" as described by Texas Pacific Group is zero.

The Commission must recognize that it is probable that PUHCA will be repealed within the next Congressional session. Staff's recommended conditions focus on only the intermediary

[9] "[W]e expect that Neil Goldschmidt will continue to serve as chair and Messrs. Grinstein and Walsh will serve as board members even if at some point in the future PUHCA is repealed." *Application*, Ex. 3/Davis 9, lines 22-24.

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entities, and not on Texas Pacific Group. Given that these entities will functionally collapse after PUHCA's repeal, Staff has kept its eye on the wrong ball. "The potential problems regarding access to books and records, and affiliated interest and cost allocation issues, have [not] been adequately addressed in the merger conditions." *In re Scottish Power plc*, UM 918, Order No. 99-616, 196 PUR4th 349, 1999 WL 1080199 (Oct 6, 1999).

Staff's proposed condition regarding access to records is wholly inadequate because it stops at Oregon Electric. The Commission must be able to examine **all** records that are reasonably calculated to lead to information relating to PGE. The Commission must be able to determine the basis for all of PGE's decisions. Will these decisions be based upon analysis demonstrating least cost to customers, or in order to create profits for Texas Pacific Group upon directives from above? Both before and after PUHCA repeal, many of the critical decisions relating to PGE investment and operations will be made by Texas Pacific Group prior to board meetings at either Oregon Electric or PGE. Staff should have insisted upon access to relevant information all the way through to the ultimate corporate parent. After the transaction is closed, and PUHCA is repealed, it will be too late to seek such access.

F. Texas Pacific Group is unaccustomed to providing key information ordinarily required of public utilities.

Texas Pacific Group is accustomed to operating behind a veil of corporate secrecy, away from the prying eyes of regulators. "[G]iven TPG's status as a private equity investor, it is impractical for it to be treated as a 'holding company' for PUHCA purposes." *Application*, Ex. 3, Davis 9, lines 8-9. This corporate culture of secrecy can only come into eventual conflict with the need for open process and information in proceedings before the Commission. The proposed conditions do not address this. Instead, they provide a means by which information

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can be kept from ever becoming public through a side process involving only Texas Pacific Group and Staff.

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

Under the terms of the proposed acquisition, Texas Pacific Group's interests as investors will be foremost among any other considerations. While Texas Pacific Group principal Kelvin Davis stated, "the consent rights will not give TPG Applicants the ability to unilaterally initiate any actions with respect to PGE," (OEUC 22/Davis 15, lines 10-11), Texas Pacific Group reserves the "standard majority shareholder right in a private or public company to sell its shares and thereby transfer control of the company, subject to Commission regulatory oversight." OEUC 22/Davis 15, fn. 3. "The current draft of the LLC Agreement does provide that in essence TPG, subject to consultation with other board members of OEUC and PGE, can in fact cause either an IPO or another sale of PGE." *TR*, Vol. 2, Schifter cross-exam by Davison, pp. 176-177.[10]

If the local representatives do not control the corporation's ultimate disposition, other than the right to be possibly "consulted," local representation is little more than the right to speak your piece but have no role in the final decision. This is tantamount to corporate colonialism, not meaningful local representation. To address the uncertainty of short-term ownership, the Commission must consider how PGE will eventually be resold. CUB 300/Jenks-Brown 33-34. No condition offered by Texas Pacific Group or Staff addresses these concerns.

H. Important details of the proposed acquisition remain unclear.

Texas Pacific is "highly confident" that it will be able to obtain the requisite $700 million in financing that Oregon Electric will need to close the deal. *Application,* p. 17. However, the

[10] As this testimony reveals, the full extent of Texas Pacific Group's rights, as established in the limited liability corporation agreements, have not been finalized.

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actual, final terms of financing remain unfinalized. *Application*, p. 16. The only certainty is that the financing will be secured by a pledge of PGE's stock. *Application*, p. 17. This unresolved question of the final terms of financing creates huge uncertainties that simply cannot be resolved by the Commission.

I. Inserting a highly leveraged limited liability company between PGE and the proposed corporate parent poses additional risks to PGE customers and Oregonians in general.

The insertion of limited liability corporations between PGE and Texas Pacific Group, combined with the double leverage nature of the proposed acquisition, gives rise to a separate concern: the financial ability of PGE to adequately perform its decommissioning responsibilities at the Trojan Nuclear Plant.

> The debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations and liabilities of the limited liability company . . . . The failure of a limited liability company to observe the usual limited liability company formalities or requirements relating to the exercise of its limited liability company powers or management of its business is not a ground for imposing personal liability on the members or managers of the limited liability company.

ORS 63.165.

"PGE ratepayers, and all Oregonians, will be negatively impacted if PGE's future financial health is jeopardized by this acquisition and thus its ability to complete the task of safely decommissioning Trojan is harmed." EWEB 200/Beeson 2, lines 6-8. The use of limited liability corporations to shield Texas Pacific Group and its investors presents concerns regarding potential consumer liabilities. Separate ownership entities provide additional liability buffers between the decommissioned nuclear plant and its ultimate owners. The limited liability corporations provide a financial shield for the parent/owner if an accident, equipment failure, safety upgrade, or unanticipated maintenance need creates a large, unanticipated cost. The

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parent/owner can walk away by declaring bankruptcy for that separate entity without jeopardizing its other investments. The possibility of this occurring, and Texas Pacific Group being insulated from responsibility even though its control may have been a contributing factor, presents huge issues for PGE customers and Oregonians in general.

J. PGE customers and Oregonians in general will be harmed by the proposed transaction.

Texas Pacific Group's proposal is a classic rendition of the fog of rhetoric. Raising the twin threats of continuing Enron control and PGE being pulled into bankruptcy, the Application portrays Texas Pacific Group as a knight in shining armor riding to the rescue of all Oregonians. Ultimately, the Commission must cut through this fogbank and view the proposed acquisition on its actual merits. In the calm light of day, the proposed acquisition of PGE by Texas Pacific Group presents significant risks to PGE's ratepayers that cannot be overcome by any combination of proposed conditions. The alternative scenario of PGE stock distribution will much more likely provide clear benefits for consumers. All of the existing conditions imposed upon Enron in its acquisition of PGE would remain in place in the interim, and no additional debt would be incurred in regard to PGE. Staff 200/Morgan 55-56.[11]

IV. The Commission must weigh the risks of Texas Pacific Group's proposal against the putative benefits.

Texas Pacific Group takes an inappropriately narrow view of "net benefits." Staff's testimony reflects a similar gap. At first blush, it would not seem to be a new owner's responsibility to undertake to close the gap in the low-income energy assistance program, or to address the current lack of renewable resources, or to remedy the plight of wild fish runs.

[11] By comparison, even a potential sale to a public entity, with real local governance and real, long-term stability of ownership, would more likely provide net benefits to PGE's customers.

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However, it is a new owner's responsibility to run the utility in such a way as to address these public interest issues and to improve various existing shortcomings. Staff's testimony fails to acknowledge these aspects in determining the public interest aspects of the proposed acquisition. As with Texas Pacific Group's approach, Staff's view of the public interest is simply too narrow and leaves out significant, relevant public interest issues. The Commission has been vested with broad authority to represent the utility customer and the public interest in this type of setting. *See*, *e.g.*, ORS 756.040 ("the commission shall represent the customers of any public utility…in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction").

"Net benefits" must be viewed in the context of the entire proposal. Staff 800/Conway 13; COP 101/Anderson 11. As a total package, Texas Pacific Group's proposal creates a significant level of risks for PGE ratepayers and Oregonians as a whole. Texas Pacific Group attempts to balance this by offering a minimal rate credit, that may possibly disappear altogether, and a token amount of corporate loose change for low-income assistance. The balance of the other conditions is hemmed in by equivocation or will occur even in the absence of the transaction closing.

A. Rate credits are insufficient to address the significant risks presented by Texas Pacific Group's proposed acquisition.

Even under the lightest scrutiny, Texas Pacific Group's offer of a rate credit is clearly not an "irrefutable" benefit of "real economic value" worth $43 million. OEUC 500/Davis 2, lines 15-20. The value of Texas Pacific Group's proposed rate credit is reduced by two indisputable factors: timing and offsets.

By delaying the onset of the rate credit until 2007, the present value of Texas Pacific

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Group's proposal is only $29.4 million.[12] Even with no adjustments for current value, Texas Pacific Group's offering is less than one-third of the total rate benefit provided to customers in the Enron merger, and less than one-half of the total rate credit offered to customers in Sierra Pacific's proposed transaction. ICNU 300/Schoenbeck 3, lines 5-10.

As if telling the ratepayers that they must wait two years to begin receiving this "benefit" were not enough, Texas Pacific Group further proposes that the rate credit may be decreased by the amount of reductions in operational costs identified in the next rate case. If Texas Pacific Group achieves annual savings of more than $8.6 million, the rate credit will be effectively eliminated. Ratepayers will then simply receive the benefits of operational efficiencies to which they are entitled **regardless of whether the acquisition is ever completed**.

Generally, rates are intended to reflect the utility's costs. As those costs go down, rates should follow suit. In essence, Texas Pacific is betting that it will identify and pass on savings of $8.6 million per year to ratepayers. If it identifies less than $8.6 million in savings, it will make up the difference; if it identifies more than $8.6 million, the actual number flows through to ratepayers. In either case, the "benefit" offered by Texas Pacific Group will be wholly or partially funded by rate savings that should flow through to ratepayers anyway, regardless of whether a merger occurs. In short, Texas Pacific Group's version of a ratepayer-funded rate credit cannot be fairly characterized as providing any "benefit" to PGE's customers.

As discussed above in Section III, Texas Pacific Group's proposed acquisition poses considerably more risk than Sierra Pacific Resources, a transaction the Commission conditionally approved with rate credits of $97 million. *Sierra Pacific Resources*, UM 967,

[12] The present value calculation was performed using a standard spreadsheet formula, assuming a discount rate of 8 percent.

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Order No. 00-702, 205 PUR4th 119, 2000 WL 1727000 (October 30, 2000), Appendix B at 5-6; CUB 300/Jenks-Brown 23, lines 1-9. In the proposed acquisition by Sierra Pacific, the combination of two existing utilities presented probable synergies achievable through possible integration efficiencies. *Sierra Pacific Resources, supra*. In that case, the Commission agreed that rate credits would serve to help ensure that customers obtained net benefits from the transaction. Texas Pacific Group has insisted that there are no anticipatable benefits from the proposed acquisition as would be associated with a merger of utilities. OEUC 100/Davis 18, fn. 16, lines 24-25. *See also*, CUB 300/Jenks-Brown 31-32. Furthermore, Texas Pacific Group acknowledges that it will bring no prior experience in operating a utility – a business which is the exclusive provider of an essential service to thousands of Oregon residents and commercial customers. *Application*, Ex. 3, Davis 10, line 6.

Texas Pacific Group's initial rate credit offer was based upon a projection of excess profits. OEUC 100/Davis 32. However, Staff argues that rate credits must be determined in an amount necessary to offset potential harms. Staff 100/Conway 17, lines 5-8. The weakness in either case is that rate credits only address partially the potential harms that may be suffered by PGE customers and it does nothing to address the detrimental impacts of the proposed acquisition upon Oregonians in general.

The size of the proposed rate credits, whether as proposed by Texas Pacific Group or as recommended by Staff, does not adequately approach the size of the harms presented by the proposed acquisition. Texas Pacific Group expects to gain about $15 million annually in tax savings alone due to the interest deduction caused by the debt. Staff 1200/Johnson 4. As the record clearly shows, this new debt will have negative effects upon PGE. Customers will be burdened with at least some, if not all, of the risk associated with this debt. While the rate credit

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conditions represent the most identifiable benefit to be weighed against the other harms, these rate credits are insufficient in and of themselves to be considered a benefit.

Staff's rate credit is more significant and cannot be offset. However, Staff concedes the full benefit of the $15 million annual tax savings to Oregon Electric. As a result, customers will essentially take on additional risks **and** overpay on taxes to fund a rate credit of equal size over the same period of time. As is evident after examination of Texas Pacific Group's proposed rate credit, customers will be saddled with financing the proposed Staff rate credit. While Staff has identified many of the conditions necessary to address the risks of the double leverage financing, the Commission must ensure that the ratepayers are kept whole for all identifiable risks of the proposed acquisition. Any amount of rate credits associated with this transaction is like putting lipstick on a pig – they don't make the proposed acquisition any more attractive to PGE's customers. However, should the Commission determine that rate credits can begin to serve to partially balance the otherwise significant disadvantages posed by this transaction, the risks associated with this transaction necessitate a rate credit that is at the level established in Sierra Pacific and not down around the amount offered by Texas Pacific Group or as discussed by Staff. *See*, CUB 300/Jenks-Brown 36. The rate credit suggested by CUB and ICNU is neither overly onerous nor prescriptive. Should the Commission choose to approve the proposed acquisition with conditions, CUB and ICNU's proposed rate credit is, at a minimum, the appropriate level given the attendant risks of Texas Pacific Group's proposed transaction.

B. The proposed indemnification will provide benefit to Texas Pacific Group and Oregon Electric but not to PGE's customers.

Texas Pacific Group contends that an extension to PGE of the contractual indemnifications provided by Enron is a benefit of the proposed acquisition. There is significant

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uncertainty about the value of these indemnifications and there are also risks that the eventual liabilities could exceed the value of these indemnifications. Staff 900/Morgan 5-7.

As even Mr. Davis notes "PGE **is not certain** to be indemnified for any of these potential liabilities." OEUC 100/Davis 38 (emphasis added). In other words, PGE may or may not experience any actual benefits from these indemnifications. By extension, PGE's customers may not receive benefits from this condition.

Even if a liability for PGE does arise, ratepayers might or might not be compelled to share the financial burden. Certainly if the liability arose due to imprudent decisions or mismanagement, it would not be appropriate to impose these costs upon PGE's ratepayers. CUB 300/Jenks-Brown 23-24 (questioning whether ratepayers would be responsible for any of the variously identified liabilities).

The primary beneficiaries of indemnification will be Texas Pacific Group and Oregon Electric, not PGE's ratepayers. CUB 300/Jenks-Brown 24, lines 11-13. The proposed condition confuses Texas Pacific Group's self-interest with the public interest. However, a benefit flowing to Texas Pacific Group's bottom line is not a benefit for PGE's customers.

C. Texas Pacific Group will have actual control, overriding any benefits that local representation could possibly provide.

Local representation does not provide tangible benefits for PGE's ratepayers. Texas Pacific Group has emphasized "local representation" as being central to the "net benefits" associated with the proposed acquisition. *Application*, pp. 3, 6, 15, 19, and 23; OEUC 100/Davis 58; OEUC 22/Davis 13-14. However, local representation is the normal operating assumption of other regulated utilities in Oregon, including Northwest Natural Gas and PacifiCorp. ICNU 100/Schoenbeck 5. Providing to PGE's ratepayers what other Oregon utility customers already

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receive as a matter of ordinary course cannot be viewed as a benefit. Texas Pacific Group describes the benefits of local representation as follows: "Board members who live and work in the area served by PGE are in a unique position to understand the factors that drive the economy of the area, the needs of the local communities, areas of special concern, and opportunities for growth." OEUC 300/Jackson 9. In any event, "Oregon Electric's commitments to ensure local representation and leadership on the PGE Board does not give the local members the unilateral ability to control the PGE Board . . ." OEUC 22/Davis 16, lines 7-9. Any "benefit" associated with local representation is further undermined by the fact of the significant restrictions upon the local board members' decision-making authority due to Texas Pacific Group's negative consent rights. The local representatives acknowledge and recognize this limitation upon their autonomy. For example, Dr. Peter Kohler acknowledged that "the Consent Rights do provide a consideration that will be major." *TR* Vol. 2, Kohler cross-exam by Eisdorfer, pg. 128, lines 3-4. While local representation may provide some abstract, tangential benefits, the significant restrictions imposed by Texas Pacific Group negate these aspects altogether.

D. To be functional, any competent corporation will have a strong board of directors, so offering to provide this for PGE is not a benefit to the ratepayers.

Texas Pacific Group has provided extensive biographies of the prospective board members to tout their experience and community ties. They appear to have assembled a responsible set of individuals, as any prudent investor would under similar circumstances.

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Application Amendment, (July 12, 2004).[13] However, simply acting as any other prudent investor does not translate into a benefit for PGE's ratepayers. Texas Pacific Group's efforts to identify a strong set of directors for PGE and OEUC are welcome, but they do not represent a benefit above what is legitimately expected of any corporate board. ICNU 100/Schoenbeck 8-9; CUB 200/Dittmer 19. Texas Pacific Group is again confusing the public interest with its own self-interest.

Texas Pacific Group otherwise acknowledges that the Board of Oregon Electric "has every incentive to select highly qualified individuals as Board members" to protect their own "substantial personal investment" as well as the interests of outside investors. OEUC 22/Davis 17, lines 21-25. In examining whether the "public interest" is being served, the Commission must focus on the benefits accruing to PGE's ratepayers and Oregonians, not the benefits accruing to Texas Pacific Group. *Compare, Morrison v. School Dist. No. 48*, 53 Or App 148, 156, 631 P2d 784 (1981) (Under public interest test for public records, examination focuses upon the public at large, not the benefits to particular persons in particular circumstances).

E. The proposed ring fencing conditions are insufficient to address the fundamental flaws of the proposed acquisition.

All of the ring fencing that could ever be mustered cannot change the basic economics of the proposed transaction. Ring fencing may serve to protect the utility from having the corporate parent empty the vaults: It does nothing to address cost-cutting as a fundamental approach to

[13] Gerald Grinstein is identified as one of the primary "local" representatives. Application, p. 8 and Ex. 2; OEUC Ex. 23, p. 6; *TPG PUHCA filing*, p. 2. However, Mr. Grinstein currently works out of Atlanta, Georgia and before that was a resident of the Seattle, Washington area. *TR*, Volume 2, cross-exam by Davison, 102, lines 2-4; *Application*, Ex. 11, p. 3. Would anyone reasonably think that an Oregonian serving on the board of directors for a Seattle public utility would be viewed as "local" representation?

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business success. CUB 300/Jenks-Brown 16, lines 21-22. Indeed, it is apparent that Texas Pacific Group is already posturing to avoid some of the substantive aspects of the proposed ring fencing conditions. *See, e.g.*, CUB 400/Dittmer 6-7.

F. There is no evidence indicating that Texas Pacific Group would approach capital reinvestment strategies differently.

Texas Pacific Group has provided no evidence that it will reinvest in PGE differently than any other potential owner. Capital investment is a standard expectation of utilities, and there is no evidence to support Texas Pacific Group's claim that this pledge distinguishes its ownership from any baseline alternative. ICNU 400/Antonuk-Vickroy 10. In fact, Texas Pacific Group will have little incentive to engage in long-range planning and investing given the admitted short-term nature of its ownership.

G. Extension of service quality measures is of little value to ratepayers, given that the costs of such regulatory supervision will be passed through to PGE's customers.

While an extension of the existing service quality measurements (SQMs) may have beneficial aspects, the fact is that this is not a qualitative aspect inherent to the proposed acquisition. In other words, there is nothing unique about this transaction that renders SQMs beneficial. As ICNU observed, the ratepayers will fund the cost of delivering the services that enable PGE to meet the SQMs. ICNU 100/Schoenbeck 10. Imposing costs upon ratepayers to avoid problems presented by the proposed acquisition is not a "net" benefit to ratepayers. It is simply boot-strapping. Achieving more comprehensive, superior mechanisms for overseeing a utility's operations and performance should be something that the Commission attempts to achieve universally, not on an *ad hoc* basis depending upon the vagaries of a utility being offered for sale. If SQMs are indeed beneficial to ratepayers, the Commission should seek to adopt these as standards applicable to one and all.

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H. PGE will collect more money from ratepayers that Oregon Electric will pay in taxes, which hardly constitutes a benefit to ratepayers.

Oregon Electric and PGE will file taxes on a consolidated basis after the proposed acquisition. *Application*, p. 22. Oregon Electric's substantial corporate debt will generate income tax deductions far in excess of any "hypothetical Oregon state income taxes" collected by PGE and passed through to Oregon Electric. CUB 200/Dittmer 38, lines 1-6. By inserting new layers of ownership and significantly increasing debt load, the combined corporate structure will earn above the authorized rate of return by pocketing the money (or converting it to equity by paying down debt) rather than applying it to the payment of taxes as it was originally intended in the approved rate structure. CUB 100/Jenks-Brown 27; BOMA 2/White 5 (tax benefits will increase effective rate of return for investors). Describing Oregon Electric's potential for paying state income taxes is misleading because under most scenarios, PGE will collect more from ratepayers that Oregon Electric will turn over to the state coffers.

In reality, Oregon Electric's status as an Oregon taxpayer is not a benefit. Instead it should be considered a disadvantage of the proposed acquisition. Net income tax payments to the State of Oregon will be less than they would be if PGE were a stand-alone company, whether following stock distribution to Enron's creditors (where it would pay taxes as a stand-alone entity) or in the case of public ownership (which as a tax-exempt entity would not collect monies in rates to pay income taxes).

Should the Commission determine that the acquisition is in the public interest with conditions, the only way to provide benefits to ratepayers on this aspect would be to require Texas Pacific Group to adopt a mechanism to share the tax benefits that arise from the interest deductions at Oregon Electric. COP 100/Anderson 21; CUB 100/Jenks-Brown 13; ICNU

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200/Antonuk-Vickroy 41. Any such condition should attempt to have PGE's recovery of taxes approximate where those funds actually end up. *See*, CUB 300/Jenks-Brown 36, lines 1-7. Crediting Oregon Electric's interest deduction to allow for a net wash of this expense would begin to address the current inequitable situation of paying "phantom taxes." CUB 400/Dittmer 5; BOMA 2/White 7. Knowing of Oregon Electric's tax deduction strategy and not addressing this can only be viewed as harmful to PGE's ratepayers. Anything short of this would simply serve as providing blessing for the padding Oregon Electric's pockets.

I. Ending Enron's ownership is simply not enough when considered with the risks presented by the proposed acquisition.

PGE will have a new owner—and put Enron behind it—under any plausible scenario, not simply under Texas Pacific Group's acquisition proposal. For example, in the event of stock distribution to creditors, Enron ownership may continue somewhat longer than under Texas Pacific Group's proposal, but it is unclear that this introduces any new risk or problems for PGE's customers.

Equally importantly, Texas Pacific Group ownership will perpetuate the most disruptive characteristics of Enron's ownership. PGE will continue to be for sale, continue to experience uncertainty around its medium to long-term ownership, and continue to be subject to a corporate parent whose objectives do not necessarily align with PGE's.

J. Vague commitments to support renewable resources do not provide benefits for PGE ratepayers or Oregonians in general.

Texas Pacific Group's proposal includes only vague commitments, bordering on illusory, for increasing the utility's use of renewable energy resources. Any pledge to increase PGE's use of renewable energy resources is a welcome gesture, but not a real benefit providing verifiable deliverables. RNP 1/Gravatt 5; COP 100/Anderson 14-16. Texas Pacific Group indicates a

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willingness to "work vigorously" and to appoint a manager to address issues generally related to sustainability, but it can accomplish both of these pledges without adding a single kilowatt-hour of renewable energy to the grid. These commitments lack any substance.

A diverse portfolio of generating resources, reflecting reasonable and prudent choices, would incorporate renewable resources and avoid over-reliance upon hydropower and natural gas. RNP 1/Gravatt 2. "The risk benefits of renewable resources should be included in any determination of whether the resources are 'economic.'" RNP 1/Gravatt 2.

Texas Pacific Group has acknowledged in passing the critical policy issues embodied in SB 1149, the single most important piece of energy legislation in Oregon in recent decades. In the end, however, it has offered no specific commitment to uphold the underlying policy objectives. OEUC 100/Davis 46. This issue is of vital interest to a number of intervenors, including Portland. *See, e.g.,* COP 100/Anderson 13; COP 101/Anderson 5; LOC 1/Fogue 5-6; Joint Public Interest Parties 100/Bissonette-Weiss 3-4. Should the Commission determine to approve this proposal with conditions, these must include specific requirements addressing these issues: 1) A long-term enforceable commitment to support the intent and direction of SB 1149 and to work in good faith with the relevant stakeholders; and, 2) A long-term, firm commitment to meet 10% of PGE's total energy load with new, non-hydro renewable resources by a date certain within the time frame of Texas Pacific Group's ownership, evaluating such choices as using methodologies as identified by the Renewable Northwest Project. RNP 11/Gravatt 7-8.

K. The proposed increase in low income assistance is insufficient by any reasonable standards of measurement.

Texas Pacific Group acknowledges the significance of the need for low-income bill-paying assistance but offers only a superficial response, pledging to increase PGE's cash

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contribution to Oregon HEAT by only $50,000 per year. OEUC 100/Davis 49. Texas Pacific Group's proposal is simply negligible. CADO-OEUC 200/Abrahamson 1, line 27. Over 100,000 of PGE's customers, representing 16% of its total customers, are eligible for low-income assistance on utility bills. *Id.*, Anderson 3, lines 9-10. Yet only 15,627 actually received assistance. *Id.* Texas Pacific Group's proposal amounts to about four cents per month of rate relief for each low-income household in need of bill-paying assistance within PGE's service territory. COP 101/Anderson 6. Texas Pacific Group's commitment represents just 0.01% of PGE's retail revenue. ICNU 100/Schoenbeck 2.

Texas Pacific Group's offer may perhaps be viewed as a benefit, as even the slightest amount may be characterized as better than nothing. Even in the most charitable light however, Texas Pacific Group's offer must be seen as extraordinarily parsimonious. CADO-OEUC 100/Abrahamson 11. This is particularly true when examined in light of various possible assumptions regarding Texas Pacific Group's return on investment. CADO-OEUC 200/Abrahamson 7, lines 10-19. There are clear benefits that could be achieved by a dedicated effort to low income assistance, such as decreased arrearage balances. Multnomah County 2/Crean 2. The miserly sum offered by Texas Pacific Group stands in stark contrast to the beneficial aspects of the low-income assistance package as offered by Scottish Power in its merger with PacifiCorp:

> While the funding for low income initiatives is more likely to directly benefit low income customers of PacifiCorp, the funding may also provide indirect benefits to the Company's customers at large, since the initiatives may help reduce the amount of uncollectibles that the Company experiences, which are in turn passed on to customers through rates. This is especially true if Applicants are successful in implementing programs that provide 'sustained benefit' to low income customers.

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In re Scottish Power plc, UM 918, Order No. 99-616196, PUR4th 349, 1999 WL 1080199 (Oct 6, 1999). Texas Pacific Group's proposal fails to meet its obligation, as PGE's potential new owner, of taking an innovative approach to providing adequate service to those who cannot pay their energy bills. *Cf.*, OEUC 100/Davis 50, lines 6-8.

Texas Pacific Group also offers a vague commitment to "work on" programs for low-income bill-paying assistance. This gesture does not lead to any tangible, delivered benefits within any foreseeable timeline arriving at identifiable improvements for PGE's low income customers.

L. Texas Pacific Group was unwilling to commit to timely franchise negotiations with the City of Portland, a small but potentially meaningful benefit.

PGE is willing to engage in franchise negotiations "because it is good business to do so" but declines to make a commitment to concluding a franchise, "since the Commission need not and should not insert itself in the middle of these normal utility business affairs." PGE 100/Piro 30. OEUC 100/Davis 51. Texas Pacific Group has not committed to having PGE complete a modern franchise agreement with the City of Portland within a specified time period. *Compare*, *Sierra Pacific Resources*, UM 967, Order No. 00-702, 205 PUR4th 119, 2000 WL 1727000 (October 30, 2000).[14] That Texas Pacific Group is reluctant to commit to something like this, clarifying a long-standing legal uncertainty of PGE operating under franchises granted over a century ago, sheds light on how likely the company is to be engaged in taking on and resolving other important long-term issues.

[14] The Commission's order acknowledged that a condition regarding franchise negotiations was in the public interest. ("City of Portland, PGE and Sierra commit to make all reasonable efforts to develop and obtain approval of a modern utility franchise with the City of Portland within two years following the completion of the merger.")

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M. Other issues posed by the acquisition are not addressed by verifiable, meaningful conditions.

Texas Pacific Group's proposal is loaded with a host of other vague, unquantifiable pledges, such as continuing PGE's charitable leadership in the community and access to PGE's Board of Directors for various customer and environmental advocacy groups. These commitments do not prove meaningful benefits to PGE ratepayers in comparison with either the status quo or any anticipatable alternatives. In the case of PGE's "charitable leadership," Texas Pacific Group offers no standards by which to establish whether it has, or has not, met its pledge. In providing access to PGE's board, whether such access is being provided could be verified, but there is no certainty that this will result in any actual improvements in service, costs, or community relations. These commitments serve only to demonstrate Texas Pacific Group's awareness of several issues of particular importance to PGE's customers and communities. In the end, however, awareness of issues does not simply translate into benefits for ratepayers without firm commitments containing verifiable standards for compliance.

Only a few of Texas Pacific Group's offered benefits have any tangible, quantifiable aspects — the rate credit, the indemnification and the increase in PGE's donation for bill-paying assistance. Of these, only the value of increasing PGE's contribution to low-income bill-paying assistance is clearly ascertainable. The rate credit and indemnifications offer some value, but it is difficult to estimate the actual benefit. On any reasonable standard of measurement, the value of either is considerably less than Texas Pacific Group asserts.

Trusting Texas Pacific Group's intentions, based upon assurances from representatives from Texas Pacific Group and "personal satisfaction," is insufficient. *Compare, TR,* Vol. 2, Kohler, cross-exam by Eisdorfer, p. 133; OEUC 300/Jackson 9. Trusting Texas Pacific Group's

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business intentions to align with ratepayer interests is an unsupportable leap of faith.

V. CONCLUSION

To establish whether Texas Pacific Group's application provides net benefits, any positive features of its proposal must be weighed against all of its many negative impacts. Texas Pacific Group's proposal attempts to assure the Commission that Oregon citizens and PGE ratepayers will be protected from the identifiable risks posed by the proposed acquisition. Nonetheless, the risks for significant detrimental harms remain wholly unabated. Texas Pacific Group's proposal will not provide net benefits to PGE's ratepayers, but instead will leave ratepayers worse off than they are currently. To protect ratepayers and the public interest, the Commission must reject Texas Pacific Group's proposal.

Texas Pacific Group's business plan is built upon a foundation of a short-term ownership. ICNU 300/Schoenbeck 8 lines 8-10; Staff 202/Morgan 19. From the beginning, Texas Pacific Group's fundamental investment strategy will transform PGE into a short-term commodity. ICNU 300/Schoenbeck 5, lines 11-13. Texas Pacific Group's core business plan of owning assets for no longer than twelve years is inherently at conflict with the long-term interests of PGE customers, employees, and the community. The undeniable fact is that PGE will end up back on the auctioneer's block. While this is plainly inevitable, there is no answer for how this will be handled. This continuing uncertainty is detrimental to PGE's customers and ultimately to all Oregonians.

Under Texas Pacific's proposed acquisition, Oregon Electric will be saddled with a significant debt burden, creating a double-leveraged capital structure. Given its non-existent financial resources as an intermediate holding company, Oregon Electric will have no choice but to put significant pressures upon PGE to significantly reduce on-going costs, such as labor

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expenses and investments in system maintenance, in order to pay dividends to fund the debt load. ICNU 300/Schoenbeck 15, lines 4-11. The only alternatives would be for either OEUC or PGE to engage in short-term borrowing to pay the debt service. Either alternative has negative implications for PGE's ratepayers. Staff 200/Morgan 28-29.

Texas Pacific Group's final offer of a rate credit totaling $8.6 million per year, beginning in 2007, represents a reduction of only about 0.6% from PGE's current rates. This is simply meaningless in light of its possible returns.

Local representation embodied by the appointment of Oregonians to PGE's board of directors is significantly compromised by Texas Pacific Group's creation of a lengthy list of "consent rights" giving it veto authority over virtually all major business decisions of Oregon Electric as the sole, controlling owner of PGE. Any promise of "local control" will evaporate completely if PUHCA is repealed and Texas Pacific Group assumes direct control over PGE. At that point in time, Texas Pacific Group has expressly reserved the right to walk away from any commitments to local representation.

The City of Portland is one of PGE's larger customers, with over 600 accounts and a total combined annual PGE utility bill of approximately $8,500,000. The population of Portland comprises roughly one-third of the total population of 1.5 million encompassed within PGE's service territory. *TPG PUHCA Filing, p. 2.* The elected officials serving on the Portland City Council locally represent the interests of Portland residents. The Portland City Council has weighed the proposed acquisition and unanimously endorsed opposing Texas Pacific Group's

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proposal.[15] The City of Portland urges the Commission to determine that the proposed acquisition is not approvable under the standards of ORS 757.511(3), as interpreted by the Commission in *Legal Standards for Approval of Mergers, supra*.

DATED this 17th day of November, 2004.

Respectfully Submitted,

/s/ Benjamin Walters

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[15] These points reflect the unanimously adopted position of the five elected members of the Portland City Council, as embodied in their public vote to approve Resolution No. 36265, adopted on October 20, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing OPENING BRIEF OF THE CITY OF PORTLAND, OREGON, on behalf of the City of Portland, Oregon, upon the parties shown on the attached official service list for Docket No. UM 1121, by causing the same to be electronically served on all parties who have an e-mail address on the official service list, and by U.S. Mail, postage prepaid, to those parties who do not have an e-mail address on the official service list.

DATED this 17th day of November, 2004.

/s/ Benjamin Walters

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