BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

UM 1121

In the Matter of **OREGON ELECTRIC UTILITY COMPANY, LLC, et al.** **Application for Authorization to Acquire Portland General Electric Co.**	**OPENING BRIEF OF UTILITY REFORM PROJECT, et al.** **November 17, 2004**

In 1997, the Utility Reform Project (URP), et al., testified and argued against Oregon Public Utility Commission (OPUC) approval of Enron's proposal to buy PGE. URP testified:

> The purchase would harm PGE ratepayers and impair the development of competitive markets in power supply and energy conservation. The conditions of the "Stipulation" (April 30, 1997) among some of the parties in this proceeding do not come close to adequately compensating PGE ratepayers for the harm this merger threatens.
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> Enron could redirect some of this type of revenue by manipulating the PGE assets it is acquiring, particularly PGE's 800+ megawatt share of the Pacific Intertie transmission system between the Northwest and California. * * *
>
> Protecting Oregon ratepayers from complicated shell games will be an entirely new and more difficult task for the PUC. Such transactions would simply become a subset of Enron's complex wholesale dealings throughout the West, requiring the Oregon PUC to keep detailed records on all Enron transactions throughout at least western North America. Enron now claims most company information is confidential.
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> The OPUC Staff itself has admitted its probably inability to effectively police Enron: "Staff is confident that it can effectively regulate PGE as a stand-alone company. It is not nearly as confident of its ability to regulate PGE as a part of Enron."
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> We question whether the mostly meaningless promises in the "Stipulation" are worth placing Oregon ratepayers in harm's way.

Comments of Lloyd K. Marbet, Don't Waste Oregon Council, and Utility Reform Project (May 2, 1997), OPUC Docket UM 814.[1]

It is fair to say that the Commission did not heed this testimony and instead approved the Enron purchase of PGE. URP appealed the Commission's approval of the Enron takeover to Marion County Circuit Court and to the Oregon Court of Appeals but did not prevail. The consequences of the takeover have included large electricity rate increases, financial instability, and since 1997 the charging to PGE ratepayers of over $650 million for "federal income taxes" and "state income taxes" that neither PGE nor Enron actually paid to either government.[2]

Here, URP concludes that the Commission should not approve the proposed transaction, without URP conditions proposed in the Testimony of Daniel W. Meek and those proposed by the Building Owners and Managers Association (BOMA), the Industrial Customers of Northwest Utilities (ICNU) and the Citizens Utility Board (CUB).

To the extent that a condition proposed by another party is operationally inconsistent with those proposed by URP, we recommend adoption of the condition proposed by URP.

We also support the position of BOMA that this proceeding should be suspending, pending the outcome of existing state and federal investigations into the financial dealings of TPG, Neil Goldschmidt, and the Oregon Investment Council (OIC). We also agree that, in light of the Enron experience, any conditions adopted by the Commission be enforceable by any and all interested parties, including representatives of ratepayers of any class.

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1. Documents in previous OPUC dockets are subject to official notice, which is hereby requested to the extent necessary. The excerpted statements from the 1997 testimony are offered not for the truth of the matters stated therein but merely to show that the statements were made, in writing, to the Commission.

2. Testimony of Daniel W. Meek (URP 100), p. 5.

I. LEGAL STANDARDS FOR APPROVAL.

A. THE COMMISSION SHOULD DETERMINE WHETHER THE APPLICANTS HAVE SHOWN THAT THE TRANSACTION WOULD "SERVE THE PUBLIC UTILITY'S CUSTOMERS IN THE PUBLIC INTEREST" BY COMPARING THE PROPOSED TRANSACTION TO THE ALTERNATIVES TO THE TRANSACTION, NOT TO THE STATUS QUO OF ENRON OWNERSHIP.

The major public interest benefit offered by Applicants appears to be providing ownership of PGE by an entity that is not Enron Corp. ORS 757.511(3) requires that the applicant prove that its proposal "will serve the public utility's customers in the public interest." Any such proof logically requires comparing the proposed transaction to what is likely to occur, but for the transaction.

It is true, of course, that Enron Corp. continues to own all of PGE. But the practical alternatives to the proposed transaction do not include Enron ownership of PGE for more than the limited period needed to either (1) distribute PGE stock to the Enron creditors or (2) sell PGE to another buyer. Applicants have not made a case that the proposed transaction results in public benefit, compared with either or those two alternatives.

1. COMPARISON WITH PURCHASE OF PGE BY CITY OF PORTLAND OR OTHER PUBLIC ENTITY.

As stated in the uncontested Testimony of Daniel Meek:

> While the City of Portland has been constrained by its confidentiality agreement with Enron from disclosing information about its offer to buy PGE, the press has reported that the City offered Enron $2.2 billion for PGE. PORTLAND TRIBUNE, July 11, 2003. This would appear to compare favorably to the amount that would be netted by Enron creditors from the proposed TPG transaction (although this comparison is complicated by the indemnity provisions among OEUC, TPG, and Enron). The purchase of all PGE assets by City of Portland for $2.2 billion would, presumably, have left Enron in possession of PGE's cash. If that cash (its expected level at closing) is subtracted from the purchase price of the proposed TPG transaction, it appears that Enron is receiving $2.06 billion.
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> The City of Portland has undertaken studies provided a letter to this Commission on June 23, 2004, indicating that a City purchase of PGE

> "would provide local businesses and residents with a 10% rate advantage," even if all operational costs stay the same. Even this comparison does not account for the advantage of status as a public entity entitled to preference customer status from the federal Bonneville Power Administration (BPA). Thus, compared with a City purchase of PGE, the proposed TPG transaction does not appear to "serve the public utility's customers in the public interest." In any event, the Applicants have not attempted to demonstrate that their proposed transaction would benefit customers, when compared with a City or other public entity purchase of PGE or its assets.

The Applicants have not refuted this testimony. Thus, it is clear that the Applicants have not proven that the TPG transaction "will serve the public utility's customers in the public interest," since the Applicants have disregarded the alternative of public ownership of PGE. The Commission cannot determine whether Plan A has a benefit over Plan B, when Plan B is disregarded.

2. COMPARISON WITH ENRON DISTRIBUTION OF PGE STOCK TO ENRON'S CREDITORS.

The other alternative noted in the Enron Plan of Reorganization, should the sale to TPG not occur, is the distribution of PGE stock to Enron's creditors. Enron's largest creditors are financial center banking corporations, such an Chase Manhattan and CitiBank. Such a distribution of PGE stock would likely cause PGE stock to resume trading on a major stock exchange, since Enron's creditors would no doubt wish to have a liquid market that would enable them to sell the PGE stock for what it is worth and not retain it indefinitely.

This outcome--a PGE independent of other corporations, capitalized by publicly-traded stock--appears to be the ultimate outcome favored even by those whom TPG has selected to serve on the Oregon Electric Utility Co. (OEUC) local board of directors. Transcript, Volume 2, p. 153 (examination of Tom Walsh). The straightforward way to achieve this ultimate outcome would be to reject the TPG proposal, which would allow Enron to implement its back-up plan to distribute the PGE stock to its creditors.

B. THE APPLICANTS HAVE NOT SATISFIED THE FINANCIAL DISCLOSURE REQUIREMENTS OF ORS 757.511(2)(c).

As stated in the Testimony of Daniel W. Meek:

> The Applicants have declined to identify the investors in the funds that would be used to buy the PGE stock. Those funds include TPG III, TPG IV, and apparently some fund or funds at Oaktree Capital Management. Applicants' testimony makes reference to the benefits of local control and ownership, yet Applicants refuse to disclose the actual equity owners of OEUC. Applicants have at least implied, in testimony and elsewhere, that the Oregon Public Employee Retirement System (PERS) is a significant investor in OEUC. Unless the owners of OEUC equity are disclosed, the accuracy of this statement cannot be determined. Further, this lack of disclosure would appear contrary to ORS 757.511(2)(c), which requires disclosure of "the source and amounts of funds or other consideration to be used in the acquisition."

Applicants continue to refuse to disclose "the source and amounts of funds or other consideration to be used in the acquisition" and thus do not qualify the proposal for approval.

II. ADDITIONAL CONDITIONS NECESSARY FOR SERVING THE UTILITY'S CUSTOMERS IN THE PUBLIC INTEREST.

The Testimony of Daniel W. Meek recommended several conditions as prerequisites for approval of the transaction. Each of these conditions included the stipulation that the Applicants agree to the condition and also agree not to contest its application in the future.

A. The Commission should recognize the "double leveraged" capital structure proposed by the Applicants for PGE.

The Testimony of Daniel W. Meek stated:

> The Applicants propose that OEUC buys PGE. OEUC would have a capital structure that includes at least $707 million of new debt. But the Applicants propose that most of this debt be considered "equity" on the PGE balance sheet. The Commission should pierce the double leverage and consider the OEUC debt to be PGE debt. This should result in lower rates for PGE ratepayers, compared with not piercing the double leverage, because rate of return would be determined on the basis of the embedded cost of debt instead of the higher rate typically associated with a return on equity.

If PGE ratepayers are to be subjected to the additional risk inevitably associated with the additional $707 million of debt, they should not be forced to pay for that capital at the significantly higher, hypothetical cost of utility equity.

B. The Commission should require PGE not to charge ratepayers for federal and/or state and/or local income taxes, and all other taxes, that PGE does not actually pay to government.

The Testimony of Daniel W. Meek stated:

> Since 1997, PGE has charged ratepayers over $650 million for "federal income taxes" and "state income taxes" that have not been paid (or remained paid) to those governments. It appears that continuing charges to PGE ratepayers for "federal income taxes" and "state income taxes" which will not actually be paid to government is an integral part of the Applicants' proposal, considering the disparate balance sheets proposed for PGE and OEUC. The Commission should not allow PGE to charge to ratepayers the alleged cost of any income taxes (or other taxes) that are not actually paid to government. This should constitute a cap on the cost of taxes to be charged to PGE ratepayers.

No party has refuted this testimony. The Commission needs to end its abusive practice of allowing utilities to charge to ratepayers the alleged cost of corporate income taxes that are in fact not paid to government. The Commission should commence this new policy by making it a condition here.

C. The Commission should require crediting to ratepayers all gains on subsequent sales of PGE or PGE Assets.

The Testimony of Daniel W. Meek stated:

> TPG has indicated its intent to sell PGE within a short period of time (sometimes expressed as 5-7 years, sometimes as a few more years). Since the proposed transaction involves selling PGE at a price of less than 1.1 times depreciated book value of PGE assets in service (considering that $239 million of the payment is expected to come from PGE cash), it is reasonable to expect that the subsequent sale of PGE will result in significant gains to the owners under the proposed TPG transaction. The Commission should adopt as a condition that all gains proceeds of the sale of PGE stock or PGE assets be credited to ratepayers. Without such a condition, the buyers under the proposed TPG transaction will stand to earn much more than the regulated reasonable rate of return on their investment. They will enjoy both the regulated return and the additional return realized upon the subsequent sale of PGE or PGE assets.

Again, no party has refuted this testimony. No party has stated that TPG will not be able to obtain a significant gain upon its resale of PGE or that such gain should not be considered when determining a reasonable rate of return for the owners of PGE. The only way to ensure that TPG does not run off the field with an overall return on equity far higher than the authorized level is to require TPG, upon selling all or part of PGE, to disgorge the gain back to ratepayers.

III. CONCLUSION.

If the Commission adopts and enforces the above conditions, and those proposed by BOMA, ICNU, and CUB, then the proposed transaction may qualify under ORS 757.511.

Dated: November 17, 2004

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing OPENING BRIEF OF UTILITY REFORM PROJECT, ET AL. by mailing a true and correct copy thereof, placed in a sealed envelope and deposited in the U.S. Postal Service at Portland, Oregon, on November 17, 2004, with the postage prepaid, to every person on the service list UM 1121 proceeding below for whom the list on the OPUC web site this day does not show an email address:

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I served the remainder of the service list by emailing this document in Wordperfect, Word, and PDF formats to every email address on the service list by using the Email Service List (comma delimited) link on the OPUC web site for this docket.

Dated: November 17, 2004

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Linda K. Williams