

LANE  
POWELL  
SPEARS  
LUBERSKY

LLP



Rochelle Lessner  
(503) 778-2176  
lessnerr@lanepowell.com

November 17, 2004

VIA FACSIMILE (503-378-6163)  
AND E-MAIL (puc.UM1121@state.or.us)  
ORIGINAL BY REGULAR MAIL

Ms. Annette Taylor  
Hearings Division  
Oregon Public Utility Commission  
PO Box 2148  
Salem, OR 97308-2148

Re: *In the Matter of Oregon Electric Utility Company, LLC, et al.*  
*Docket No. UM 1121*

Dear Ms. Taylor:

Enclosed for filing in the above-captioned proceeding is Strategic Energy LLC's Opening Brief. The original of this letter and five copies are being sent by regular U.S. mail.

Sincerely,

Rochelle Lessner

cc: Service List (via e-mail and regular mail)

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Suite 2100  
601 SW Second Avenue  
Portland, Oregon  
97204-3158

(503) 778-2100

Facsimile:  
(503) 778-2200

www.lanepowell.com

1 **BEFORE THE PUBLIC UTILITY COMMISSION**  
2 **OF OREGON**

3 Docket No. UM 1121

4 In the Matter of )  
5 OREGON ELECTRIC UTILITY COMPANY, ) **STRATEGIC ENERGY LLC'S**  
6 LLC, *et al.* ) **OPENING BRIEF**  
7 Application for Authorization to Acquire )  
8 Portland General Electric Company. )

9 Strategic Energy LLC (“Strategic Energy”) respectfully submits its Opening Brief in the  
10 above-captioned proceeding.

11 **INTRODUCTION AND SUMMARY**

12 The central issue before the Public Utility Commission of Oregon (Commission) in this  
13 proceeding is whether the application of Oregon Electric Utility Company, LLC, et al.  
14 (Applicant) for authorization to acquire Portland General Electric Company (PGE) satisfies the  
15 requirements for approval under ORS 757.511. Pursuant to that statute, the Commission cannot  
16 approve an application to acquire PGE unless “approval of the application will serve the public  
17 utility’s customers in the public interest.” ORS 757.511(3) (emphasis added). In so finding, the  
18 Commission is authorized to “condition an order authorizing the acquisition upon the applicant’s  
19 satisfactory performance or adherence to specific requirements.” *Id.*

20 If the Commission decides to approve the Applicant’s acquisition of PGE pursuant to  
21 ORS 757.511, Strategic Energy urges it to adopt a “direct access”<sup>1</sup> condition as a factor  
22 weighing in favor of the public interest.

23  
24 \_\_\_\_\_  
25 <sup>1</sup> Strategic Energy uses the term “direct access” broadly to describe eligible customers’ ability to choose  
26 and contract with an energy service provider of their choice to purchase electricity. Direct access is not  
an exclusive term; it is alternatively referred to as retail competition, customer choice, retail access and  
other similar terms.

1 The Industrial Customers of Northwest Utilities (ICNU) have proposed a direct access  
2 condition in the September 22, 2004, Surrebuttal Testimony of Donald W. Schoenbeck  
3 (Schoenbeck Surrebuttal). In that testimony, ICNU enumerates the “conditions that [the  
4 Commission should] adopt if the Commission intends to approve Oregon Electric Utility  
5 Company’s proposed acquisition of Portland General Electric.” Shoenebeck Surrebuttal at  
6 ICNU/300 Schoenbeck/1, lines 9-13. If it decides to approve Applicant’s request to acquire  
7 PGE, the Commission should adopt ICNU’s recommended Direct Access Conditions 27.a.-d,  
8 contained in Shoenebeck Surrebuttal at ICNU/301 Shoenebeck/6-7.<sup>2</sup>

9 **BACKGROUND**

10 **A. Strategic Energy LLC**

11 Strategic Energy LLC was founded in 1986 and is headquartered in Pittsburgh,  
12 Pennsylvania.<sup>3</sup> It has previously been certified by the OPUC and registered to do business as an  
13 Energy Service Supplier (ESS) in the service territory of PGE.

14 Strategic Energy is in the business of supplying electricity services to retail electricity  
15 consumers, operating in nine states that permit retail electricity choice. It is now one of the  
16 largest retail energy providers in the United States.

17 Strategic Energy has previously marketed energy services to customers within the PGE  
18 service territory. It attempted to enter the Oregon market during the late summer and early fall  
19 of 2002 to develop a customer base among eligible customers. Strategic’s target market was not  
20 only the very large loads, but focused on the smaller end of the load size spectrum, heavily  
21 emphasizing Oregon school districts.

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22 <sup>2</sup> Strategic Energy takes no position on whether the Commission should or should not approve the  
23 application, only that if it approves the application, the Commission should include a direct access term as  
24 a condition of approval.

25 <sup>3</sup> For information about Strategic Energy, see In Re Public Utility Commission of Oregon Staff’s  
26 Investigation Into Direct Access Issues for Industrial and Commercial Customers Under SB 1149, OPUC  
Docket No. UM 1081, Comments of Strategic Energy LLC (August 20, 2003); see also OPUC Docket  
No. 1121, Strategic Energy’s Petition to Intervene (March 19, 2004).

1 Through its experience in 2002, Strategic concluded that the Oregon market structure was  
2 not competitive or viable due to significant barriers to ESS's and customers. Strategic Energy  
3 may in the future market energy services to customers within the Portland General Electric  
4 service territory if those barriers are eliminated or significantly lowered.

5 **B. Direct Access is in the Public Interest**

6 The Oregon legislature concluded that direct access is in the public interest through its  
7 1999 enactment of Senate Bill 1149 (SB 1149), codified at ORS 757.600-.691. More  
8 specifically, in ORS 757.646(1), titled "Commission policies to eliminate barriers to competitive  
9 retail market structures and rules to establish code of conduct for electric companies," the  
10 Legislature provided that "[t]he duties, functions and powers of the Public Utility Commission  
11 shall include developing policies to eliminate barriers to the development of a competitive retail  
12 market structure."

13 Recently, the Commission itself has also emphasized that direct access is in the public  
14 interest:

15 The Commission has long held the view that competition and  
16 customer choice in the purchase of services is in the long-term  
public interest.

17 OPUC Docket No. AR 481, Order No. 04-483 at 4 (August 19, 2004) (emphasis added).

18 **C. Direct Access Conditions Have Been Included in both Prior Commission Orders**  
**Approving Applications to Acquire PGE**

19 Including a direct access condition in an order approving the acquisition of PGE is not  
20 new. In the two prior completed dockets in which the Commission considered such an  
21 application under ORS 757.511, the Commission incorporated a direct access condition in its  
22 approval.

23 In the 1997 proceeding in which Enron's application to acquire PGE was approved, the  
24 Commission noted that "Staff and other parties raised issues . . . including . . . PGE's  
25 willingness to engage in restructuring and allow its customers direct access." In re Application  
26

1 of Enron Corp for an Order Authorizing the Exercise of Influence Over Portland General Electric  
2 Company, OPUC Docket No. 814, Order No. 97-196 at 5 (June 4, 1997) (emphasis added). In  
3 its final order, the Commission described a stipulation containing agreed conditions to the  
4 acquisition, noting “Stipulation condition 22 states Enron’s and PGE’s commitment to file,  
5 within 60 days of the merger close, a proposal to initiate a process by which disaggregation and  
6 customer choice may occur for PGE.” *Id.* at 7 (emphasis added). That condition provided as  
7 follows:

8                   22. On or before 60 days after the closing of the merger,  
9 PGE shall file a plan with the Commission which includes the  
10 following components:

11                   a. proposed terms and conditions on which all  
12 customer classes will have the opportunity to choose their  
13 electricity provider;

14                   b. proposed separation of competitive from monopoly  
15 businesses of PGE; and . . .

16                   c. the proposed resolution and recovery of stranded  
17 costs.

18 *Id.* Stipulation, Appendix A at 9-10 (italics in original).

19 Similarly, in a subsequent proceeding on Sierra Pacific Resources’ application to acquire  
20 PGE, the Commission described a condition included in the Stipulation it approved as follows:  
21 “PGE will continue to support the major provisions of SB 1149, including direct access for non-  
22 residential customers . . . .” In Re Application of Sierra Pacific Resources to Acquire Portland  
23 General Electric Company, OPUC Docket No. UM 967, Order No. 00-702 at 7 (October 30,  
24 2000) (emphasis added). The pertinent conditions incorporated into the approval order in that  
25 case provided in part as follows:  
26

1 SETTLEMENT AGREEMENT

2 ...

3 1.0 PGE will file a general rate case to establish a new  
4 revenue requirement and satisfy the requirements of  
5 SB 1149 ... on or before October 1, 2000 ... .

6 ...

7 5.27 Sierra and PGE agree to support the timely  
8 implementation of S.B. 1149 and to support the 30kW  
9 definition for small non-residential customers.

10 ... .

11 *Id.* Settlement Agreement, Appendix B at 1, 14.

12 STIPULATION

13 ...

14 3. ... PGE will continue to support as sound public policy,  
15 and make proposals to achieve, the major provisions of  
16 SB 1149, including direct access for non-residential customers  
17 ... .

18 *Id.* Stipulation, Appendix C at 3.

19 In each proceeding in which it has considered and approved an application to acquire  
20 PGE, the Commission has included a direct access condition in its order.

21 **D. Direct Access Conditions Are an Issue in This Proceeding**

22 At the request of the Administrative Law Judges in this proceeding, the parties prepared a  
23 list of issues. *See* OPUC Docket No. 1121, Staff’s Consolidated Issues Lists 1 and 2 (August 2,  
24 2004) (“Issues List”). As identified in the filed transmittal letter of the Issues List, the following  
25 parties agreed to the list: Applicant, PGE, Bonneville Power, BOMA, AOI, Strategic Energy,  
26 EWEB, Multnomah County, Enron, RNP, CUB, ICNU, City of Portland and Staff. *Id.* Letter  
from Michael T. Weirich to Judges Kathryn Logan and Christina Smith of 8/02/04.

Among the 65 issues contained on the Issues List, List 2 identifies direct access as  
follows:

1           7. What conditions affecting direct access service should be  
2           required as a condition of the acquisition of PGE to facilitate  
3           the implementation of SB 1149 and to serve the public interest?

4           Issues List at 3. Conditions of approval related to the public interest in direct access are  
5           appropriately at issue in this proceeding, as they have been in prior proceedings under ORS  
6           757.511 to consider the acquisition of PGE.

7           **E. A Direct Access Condition has been Proposed by ICNU; Applicant did not Object in**  
8           **Subsequent Testimony.**

9           In its surrebuttal testimony of September 22, 2004, ICNU enumerated a list of acquisition  
10          conditions that are “designed to protect PGE customers and provide a ‘net benefit’ associated  
11          with ownership by Oregon Electric.” Schoenbeck Surrebuttal at ICNU/300, Schoenbeck/1, lines  
12          22-23. One such condition ICNU proposed is a direct access condition:

13               27. a. i. PGE shall offer customers with aggregate load larger  
14               than 1 aMW a three-year and a five-year option to opt  
15               out of the cost of service rate with a fixed transition  
16               amount under the same terms as current Schedule 483  
17               (effective September 1, 2004). The Schedule 483 offer  
18               shall be made each September for a 30-day period for  
19               so long as PGE is required to offer direct access.

20               ii. PGE shall develop and file, within six months of  
21               closing of the transaction, a plan to offer to all  
22               customers eligible for direct access who do not qualify  
23               for Schedule 483 a multi-year option to opt out of the  
24               cost of service rate with a fixed transition amount at  
25               least one time each year. The plan shall include a  
26               mechanism for determining the costs of administering  
              such program for various size loads and aggregated  
              loads and the appropriate allocation of costs. The plan  
              shall include the opportunity for aggregation.

              b. PGE shall offer all customers eligible for direct access an  
              opportunity to elect direct access for a period of seven  
              calendar days (similar to the current November offering) at  
              least once each month. PGE shall make a filing within 90  
              days of closing of the transaction to initiate a process for  
              developing and obtaining regulatory approval for the  
              proposal.

              c. PGE shall in consultation with customers eligible for direct  
              access and energy service suppliers develop a new

1 methodology for calculating energy imbalance penalties,  
2 which accounts for the benefits of the diversity of PGE's  
3 system. The goal of the methodology shall be to provide  
4 imbalance service to direct access customers on the same  
5 basis that PGE provides imbalance service to cost of  
6 service customers. PGE shall make a filing with the  
7 Federal Energy Regulatory Commission within 90 days of  
8 closing of the transaction requesting approval of such  
9 changes.

- 6 d. PGE in consultation with customers eligible for direct  
7 access and energy service suppliers shall develop an option  
8 that allows direct access customers to purchase flat blocks  
9 of energy from energy service suppliers, while having the  
10 option to purchase load shaping and other necessary  
11 services from PGE. PGE shall make a filing within 90 days  
12 of closing of the transaction to initiate a process for  
13 developing and obtaining regulatory approval for the  
14 proposal.

11 Schoenbeck Surrebuttal at ICNU/301, Schoenbeck/6-7.

12 In its October 11, 2004 sur-surrebutal testimony, Applicant did not object to ICNU's  
13 proposed direct access condition. See OPUC Docket No. 1121, Oregon Electric Utility  
14 Company, LLC's Sur-Surrebuttal Testimony as follows: Kelvin L. Davis (Oregon Electric/500-  
15 510/Davis); Carrie Wheeler (Oregon Electric/600/ Wheeler); Karl A. McDermott (Oregon  
16 Electric 700&701/McDermott); Daniel J. Bussel (Oregon Electric 800-802/Bussel); Richard  
17 Schifter (Oregon Electric 900/Schifter) ("Applicant's Testimony").

## 18 ARGUMENT

19 The Commission recently noted that it has "long held the view that competition and  
20 customer choice [direct access] in the purchase of services is in the long-term public interest."  
21 OPUC Docket No. AR 481, Order No. 04-483 at 4 (August 19, 2004). Consistent with this  
22 Commission doctrine, both times in the past that the Commission has approved applications to  
23 acquire PGE, it has expressly included a condition for direct access. In opening Docket  
24 UM 1081 in 2003, In the Matter of An Investigation into Direct Access Issues for Industrial and  
25 Commercial Customers under SB 1149, the Commission emphasized that it "wants interested  
26



1 persons to be involved in workshops/task groups to make recommendations to the Commission  
2 regarding direct access concerns.” In Re Public Utility Commission of Oregon Staff’s  
3 Investigation Into Direct Access Issues for Industrial and Commercial Customers Under  
4 SB 1149, OPUC Docket No. UM 1081, Order 03-260 at 1 (May 1, 2003). These statements  
5 affirming a public interest in direct access by the Commission are consistent with the legislative  
6 directive that the Commission develop policies “to eliminate barriers to the development of a  
7 competitive retail market structure.” ORS 757.646(1).

8 Establishing a process to resolve the core issues on direct access, a job not yet completed,  
9 is the subject of ICNU’s proposed direct access condition. In simple terms, what the ICNU  
10 direct access condition actually says is:

- 11 1. PGE will offer a three- and five-year opt-out program once a year for customers  
12 with aggregate loads larger than 1 aMW;
- 13 2. Within six months of closing, PGE will file a plan to offer a multi-year opt-out for  
14 smaller customers, including a determination of the costs;
- 15 3. Within 90 days of closing, PGE will file a proposal to allow a seven-day shopping  
16 window once a month for all customers eligible for direct access.
- 17 4. PGE shall consult with interested parties and develop a new method to calculate  
18 energy imbalance charges so that they are on the same basis for direct access  
19 customers as for cost of service customers.
- 20 5. PGE shall consult with interested parties to develop an option for purchasing flat  
21 blocks of energy from an energy service supplier and other necessary services  
22 from PGE and make a filing accordingly.

23 With the exception of the first point, essentially the current state, this proposed condition  
24 is nothing more than an agreement for PGE to develop and file certain proposals with the  
25 Commission. The proposed condition is entirely reasonable. Nothing in ICNU’s proposed direct  
26 access condition either requires approval or implementation or binds any party to any particular

1 position in the proceedings contemplated. ICNU’s proposed direct access condition does only  
2 what previous acquisition orders have done: establish PGE’s commitment to start proceedings  
3 aimed at implementing and improving direct access terms and conditions, as a condition of the  
4 acquisition.

5 Lively debate can be expected on the matters that will be fully at issue in the proceedings  
6 contemplated by ICNU’s direct access condition. However, those proceedings, not the present  
7 one, are the proper place for them. Arguments on the merits in those yet-to-be-filed proceedings  
8 are premature and irrelevant for purposes in this docket. The ICNU direct access condition is  
9 merely a requirement for initiating a subsequent process, the outcome of which will be  
10 determined at that time. Further, though hypothetically other potential mechanisms are  
11 available, it is proper and appropriate to secure commitments to initiate these later proceedings  
12 through a condition in this docket.<sup>4</sup>

13 If the Commission decides to approve the application to acquire PGE, it should condition  
14 it on a direct access condition for the following reasons:

- 15 1. As the Commission has itself stated, direct access is in the public interest;
- 16 2. Both completed prior PGE acquisition proceedings have included direct access  
17 conditions approved by the Commission. There is precedent for doing so, and  
18 there is no precedent for not doing so;
- 19 3. Direct access is on the list of issues in this proceeding;
- 20 4. ICNU has proposed a reasonable direct access condition in the proceeding,  
21 requiring that subsequent proceedings be initiated to consider the merits of  
22 various direct access proposals;

---

23 <sup>4</sup> Many, if not most conditions proposed by the Staff and other parties in this case have another  
24 regulatory mechanism by which consideration could be initiated, including rulemaking, contested case  
25 proceedings, complaints, declaratory judgments and others. It would be entirely inappropriate to dismiss  
26 them all as potential conditions of approval merely because there is an alternative that might be available  
under hypothetical circumstances. If one condition is rejected on this ground, then all to which it applies  
must be, thus rendering the Commission’s authority to condition its approval under ORS 757.511(3)  
meaningless.



CERTIFICATE OF SERVICE

UM 1121

I hereby certify that I served, on the date given below, a true and correct copy of the foregoing STRATEGIC ENERGY LLC'S OPENING BRIEF upon the parties shown below, from the official service list for Docket No. UM 1121, by causing the same to be served electronically and by U.S. Mail, postage prepaid:

JIM ABRAHAMSON -- CONFIDENTIAL COMMUNITY ACTION DIRECTORS OF OREGON 4035 12TH ST CUTOFF SE STE 110 SALEM OR 97302 jim@cado-oregon.org	SUSAN K ACKERMAN NIPPC PO BOX 10207 PORTLAND OR 97296-0207 susan.k.ackerman@comcast.net
GRIEG ANDERSON 5919 W MILES ST. PORTLAND OR 97219	JEANNE L ARANA OREGON HOUSING AND COMMUNITY SERVICES DEPT PO BOX 14508 SALEM OR 97301 jeanne.arana@hcs.state.or.us
KEN BEESON -- CONFIDENTIAL EUGENE WATER & ELECTRIC BOARD 500 EAST FOURTH AVENUE EUGENE OR 97440-2148 ken.beeson@eweb.eugene.or.us	JULIE BRANDIS -- CONFIDENTIAL ASSOCIATED OREGON INDUSTRIES 1149 COURT ST NE SALEM OR 97301-4030 jbrandis@aoi.org
KIM BURT WEST LINN PAPER COMPANY 4800 MILL ST WEST LINN OR 97068 kburt@wlinpco.com	J LAURENCE CABLE -- CONFIDENTIAL CABLE HUSTON BENEDICT ET AL 1001 SW 5TH AVE STE 2000 PORTLAND OR 97204-1136 lcable@chbh.com
D. KEVIN CARLSON DEPT OF JUSTICE - GENERAL COUNSEL DIVISION 1162 COURT ST NE SALEM OR 97301-4096 d.carlson@doj.state.or.us	MICHAEL CARUSO 176 SW HEMLOCK DUNDEE OR 97115 carusodad@hotmail.com

JENNIFER CHAMBERLIN -- CONFIDENTIAL STRATEGIC ENERGY LLC 2633 WELLINGTON COURT CLYDE CA 94520 jchamberlin@sel.com	WILLIAM H CHEN CONSTELLATION NEWENERGY INC 2175 N CALIFORNIA BLVD STE 300 WALNUT CREEK CA 94596 bill.chen@constellation.com
JOAN COTE -- CONFIDENTIAL OREGON ENERGY COORDINATORS ASSOCIATION 2585 STATE ST NE SALEM OR 97301 cotej@mwvcaa.org	CHRIS CREAN -- CONFIDENTIAL MULTNOMAH COUNTY 501 SE HAWTHORNE, SUITE 500 PORTLAND OR 97214 christopher.d.crean@co.multnomah.or.us
MELINDA J DAVISON -- CONFIDENTIAL DAVISON VAN CLEVE PC 1000 SW BROADWAY STE 2460 PORTLAND OR 97205 mail@dvclaw.com	JIM DEASON CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP 1001 SW FIFTH AVE STE 2000 PORTLAND OR 97204-1136 jdeason@chbh.com
JAMES DITTMER -- CONFIDENTIAL UTILITECH INC 740 NW BLUE PKWY STE 204 LEE'S SUMMIT MO 64086 jdittmer@utilitech.net	J JEFFREY DUDLEY -- CONFIDENTIAL PORTLAND GENERAL ELECTRIC 121 SW SALMON ST 1WTC1300 PORTLAND OR 97204 jay.dudley@pgn.com
GARY DUELL -- CONFIDENTIAL 11301 SE CHARVIEW COURT CLACKAMAS, OR OR 97015 gduell@bigplanet.com	JASON EISDORFER -- CONFIDENTIAL CITIZENS' UTILITY BOARD OF OREGON 610 SW BROADWAY STE 308 PORTLAND OR 97205 jason@oregoncub.org
JAMES F FELL -- CONFIDENTIAL STOEL RIVES LLP 900 SW 5TH AVE STE 2600 PORTLAND OR 97204-1268 jffell@stoel.com	ANN L FISHER -- CONFIDENTIAL AF LEGAL & CONSULTING SERVICES 1425 SW 20TH STE 202 PORTLAND OR 97201 energlaw@aol.com
ANDREA FOGUE LEAGUE OF OREGON CITIES PO BOX 928 1201 COURT ST NE STE 200 SALEM OR 97308 afogue@orcities.org	SCOTT FORRESTER FRIENDS OF THE CLACKAMAS RIVER 2030 NW 7TH PL GRESHAM OR 97030 clackamas9@aol.com


<p>KATHERINE FUTORNICK  14800 NE BLUEBIRD HILL LANE  DAYTON OR 97114  futork@onlinemac.com</p>	<p>LORA GARLAND L-7  BONNEVILLE POWER ADMINISTRATION  P.O. BOX 3621  PORTLAND OR 97208-3621  lmgarland@bpa.gov</p>
<p>LEONARD GIRARD  2169 SW KINGS COURT  PORTLAND OR 97205  lgirard@teleport.com</p>	<p>ANN ENGLISH GRAVATT -- CONFIDENTIAL  RENEWABLE NORTHWEST PROJECT  917 SW OAK - STE 303  PORTLAND OR 97205  ann@rnp.org</p>
<p>PATRICK G HAGER -- CONFIDENTIAL  PORTLAND GENERAL ELECTRIC  121 SW SALMON ST 1WTC0702  PORTLAND OR 97204  patrick.hager@pgn.com</p>	<p>ROY HENDERSON  PENSION ENHANCEMENT COMMITTEE  895 NW DALE AVENUE  PORTLAND OR 97229  royhensn@msn.com</p>
<p>MARY ANN HUTTON -- CONFIDENTIAL  CANON AND HUTTON  SOUTHERN OREGON OFFICE  1141 NW KRING ST  ROSEBURG OR 97470  mah@canonandhutton.com</p>	<p>JOE JANSSENS  PGE PENSION ENHANCEMENT COMMITTEE  24495 BUTTEVILLE RD NE  AURORA OR 97002  osprey64@juno.com</p>
<p>VALARIE KOSS  COLUMBIA RIVER PUD  PO BOX 1193  SAINT HELENS OR 97051  vkoss@crpud.org</p>	<p>GEOFFREY M KRONICK LC7 – CONFIDENTIAL  BONNEVILLE POWER ADMINISTRATION  PO BOX 3621  PORTLAND OR 97208-3621  gmkronick@bpa.gov</p>
<p>MICHAEL L KURTZ  BOEHM, KURTZ &amp; LOWRY  36 E 7TH ST STE 1510  CINCINNATI OH 45202-4454  mkurtzlaw@aol.com</p>	<p>ROCHELLE LESSNER -- CONFIDENTIAL  LANE, POWELL, SPEARS, LUBERSKY LLP  601 SW 2ND AVE. STE. 2100  PORTLAND OR 97204  lessnerr@lanepowell.com</p>
<p>KEN LEWIS -- CONFIDENTIAL  2880 NW ARIEL TERRACE  PORTLAND OR 97210  kl04@mailstation.com</p>	<p>STEVEN G LINS  GLENDALE, CITY OF  613 E BROADWAY STE 220  GLENDALE CA 91206-4394  slins@ci.glendale.ca.us</p>

JAMES MANION -- CONFIDENTIAL WARM SPRINGS POWER ENTERPRISES PO BOX 960 WARM SPRINGS OR 97761 j_manion@wspower.com	LLOYD K MARBET DON'T WASTE OREGON 19142 S BAKERS FERRY RD BORING OR 97009 marbet@mail.com
GORDON MCDONALD PACIFIC POWER & LIGHT 825 NE MULTNOMAH STE 800 PORTLAND OR 97232 gordon.mcdonald@pacificorp.com	DANIEL W MEEK -- CONFIDENTIAL DANIEL W MEEK ATTORNEY AT LAW 10949 SW 4TH AVE PORTLAND OR 97219 dan@meek.net
THAD MILLER -- CONFIDENTIAL OREGON ELECTRIC UTILITY COMPANY 222 SW COLUMBIA STREET, SUITE 1850 PORTLAND OR 97201-6618 tmiller6@optonline.com	WILLIAM MILLER IBEW 17200 NE SACRAMENTO PORTLAND OR 97230 bill@ibew125.com
CHRISTY MONSON LEAGUE OF OREGON CITIES 1201 COURT ST. NE STE. 200 SALEM OR 97301 cmonson@orcities.org	MICHAEL MORGAN -- CONFIDENTIAL TONKON TORP LLP 888 SW 5TH AVE STE 1600 PORTLAND OR 97204-2099 mike@tonkon.com
FRANK NELSON 543 WILLAMETTE CT MCMINNVILLE OR 97128 fnelson@viclink.com	NANCY NEWELL 3917 NE SKIDMORE PORTLAND OR 97211 ogec2@hotmail.com
JAMES NOTEBOOM -- CONFIDENTIAL KARNOPP PETERSEN NOTEBOOM ET AL 1201 NW WALL ST STE 300 BEND OR 97701 jdn@karnopp.com	LISA F RACKNER -- CONFIDENTIAL ATER WYNNE LLP 222 SW COLUMBIA ST STE 1800 PORTLAND OR 97201-6618 lfr@aterwynne.com
DONALD W SCHOENBECK -- CONFIDENTIAL REGULATORY & COGENERATION SERVICES INC 900 WASHINGTON ST STE 780 VANCOUVER WA 98660-3455 dws@r-c-s-inc.com	REBECCA SHERMAN -- CONFIDENTIAL HYDROPOWER REFORM COALITION 320 SW STARK STREET, SUITE 429 PORTLAND OR 97204 northwest@hydroreform.org
JOHN W STEPHENS -- CONFIDENTIAL ESLER STEPHENS & BUCKLEY 888 SW FIFTH AVE STE 700 PORTLAND OR 97204-2021 stephens@eslerstephens.com	BRETT SWIFT -- CONFIDENTIAL AMERICAN RIVERS 320 SW STARK ST, SUITE 418 PORTLAND OR 97204 bswift@amrivers.org

MITCHELL TAYLOR -- CONFIDENTIAL ENRON CORPORATION PO BOX 1188 1221 LAMAR - STE 1600 HOUSTON TX 77251-1188 mitchell.taylor@enron.com	LAURENCE TUTTLE CENTER FOR ENVIRONMENTAL EQUITY 610 SW ALDER #1021 PORTLAND OR 97205 nevermined@earthlink.net
S BRADLEY VAN CLEVE -- CONFIDENTIAL DAVISON VAN CLEVE PC 1000 SW BROADWAY STE 2460 PORTLAND OR 97205 mail@dvclaw.com	BENJAMIN WALTERS -- CONFIDENTIAL CITY OF PORTAND - OFFICE OF CITY ATTORNEY 1221 SW 4TH AVE - RM 430 PORTLAND OR 97204 bwalters@ci.portland.or.us
MICHAEL T WEIRICH -- CONFIDENTIAL DEPARTMENT OF JUSTICE 1162 COURT ST NE SALEM OR 97301-4096 michael.weirich@state.or.us	STEVEN WEISS NORTHWEST ENERGY COALITION 4422 OREGON TRAIL CT NE SALEM OR 97305 steve@nwenergy.org
ROBIN WHITE PORTLAND BOMA 1211 SW 5TH AVE STE 2722-MEZZANINE PORTLAND OR 97201 rwhite@bigplanet.com	LORNE WHITTLES EPCOR MERCHANT & CAPITAL (US) INC 1161 W RIVER ST STE 250 BOISE ID 83702 lwhittles@epcor.ca
LINDA K WILLIAMS -- CONFIDENTIAL KAFOURY & MCDUGAL 10266 SW LANCASTER RD PORTLAND OR 97219-6305 linda@lindawilliams.net	

DATED: November 17, 2004.

LANE POWELL SPEARS LUBERSY LLP

By   
Rochelle Lessner

Of Attorneys for Strategic Energy LLC

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