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November 17, 2004
Oregon Public Utility Commission
Administrative Hearings Division
550 Capitol Street, NE, Suite 215
PO Box 2148
Salem, Oregon 97308-2148

Re: UM 1121

Dear Administrative Hearings Clerk:

Enclosed please find an original and five copies of BOMA's Initial Brief The parties were served by electronic distribution where electronic addresses were available, otherwise by mail.

Thank you for your courtesy.

Sincerely,

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of OREGON ELECTRIC UTILITY COMPANY, LLC, et al. Application for Authorization to Acquire Portland General Electric Company.	)))))	Case UM 1121 BOMA's Opening Brief ORAL ARGUMENT REQUESTED

Building Owners and Managers – Portland (BOMA) represents the interests of most, if not all, significant buildings in the Portland core. BOMA members hold the majority of the industrial space in the Metro area. BOMA has the backing and support of other major Commercial Real Estate Associations in the state: Institute of Real Estate Management (IREM), Commercial Association of Realtors (CAR), and National Association of Industrial and Office Properties (NAIOP). In total, BOMA represents the interests of well over 500 million square feet of rental space and the tenants and businesses that occupy the space. In these comments, BOMA speaks for the owners it serves as well as every tenant, business, and production facilities within the rental space it represents.

In this Brief, BOMA asserts the following:

1. These proceedings should be suspended until the completion of certain investigations and actions being taken by others.
2. Current consideration of the application should be conditioned upon Texas Pacific Group's (TPG) agreement to be under the jurisdiction of the Commission.
3. This transaction should not be approved at all.

4. If approval is granted, specific conditions must attach to the approval to insure the transaction protects the public interest of the ratepayers and Oregonians.

TPG has not met, and has not offered to meet the minimum requirements for Commission approval of the application. Therefore, the Commission must deny the application for approval on the basis that the applicant does not meet the minimum requirements for approval. If the Commission is, nevertheless, inclined to approve the transaction, it must, at a minimum, condition any approval upon 1) acceptance by TPG, the upstream parent, of Commission jurisdiction against TPG either by TPG's explicit agreement or by requiring TPG to resubmit the application showing TPG as both the applicant and the buyer; 2) acknowledgement by TPG that Commission approval will be required before TPG may exercise its "negative consent" rights respecting actions taken by the Portland General Electric (PGE) and OEUC ; 3) placement of significant limitations upon transfers of assets from PGE to OEUC or any of the TPG entities; 4) receipt and Commission acceptance of a report of no wrongdoing by TPG, its members, agents, or representatives with respect to the Oregon Investment Council; and 5) receipt of a ruling by the Securities and Exchange Commission (SEC) respecting an exemption from PUHCA requirements for either TPG or Oregon Electric Utility Company (OEUC).Each and every one of the enumerated conditions are necessary to ensure that the transaction meets the statutory tests to meet the public interest test. Failing to adequately protect ratepayers and the Public in this highly unusual transaction would be unlawful and unacceptable.

LEGAL CONSIDERATIONS:

The term "net benefits" generally is used to describe the standard by which the Commission is to review the proposed purchase of PGE by OEUC. However, the standard articulated in ORS 757.511 is "public interest", i.e. that the purchase would serve the public interest of the utility's customers. The burden is on the applicant (here TPG) to show that the proposal is in the utility's customers' public interest. This is a higher a standard than simply net benefits. It requires that the proposed acquisition quantifiably improve the services provided and the strength of the utility - by better service, stronger financial structure, and an increase in utility assets. ORS 757.506(c). The application does not even purport to meet this.

Among the issues to be considered in the Commission's review is the applicant's financial ability and identity; and the source and amounts of funds used to in the acquisition; and the experience in running a utility. ORS 757.511(2)(a); (2)(c) and (2) (d.) In addition, the Commission is free to look at additional information, as it chooses, to be able to make the

necessary determination. If the Commission is to adequately follow the statutory mandate, it must be particularly careful to consider the long-term issues, not just the near terms results. In the future the Commission's authority will be limited to exercising its regulatory power over only the regulated utility and the applicant. While there are some provisions (ORS 757.015) that might appear to require an upstream parent of the acquiring entity to be held responsible, they are not be applicable to this transaction or able to enforce any conditions imposed due to the unique multi-tiered structure proposed by OEUC.

Because Commission enforcement powers are limited, it must exercise its power now to condition approval of the transaction to ensure that the terms and conditions are met. While the Commission has authority to enforce violations of any statute or regulation administered by the Commission pursuant to ORS 756.180, that authority is limited to those who are public utilities or other persons subject to the jurisdiction of the Commission. The Commission may adjust the allowed returns to the shareholders but this authority applies only to the regulated utility. It can seek penalties under ORS 756.500 but generally these provisions deal with specific issues and proceedings not applicable here. Holding TPG accountable requires that the Commission specifically require TPG to submit to Commission jurisdiction as a condition of approval (assuming that it approves the transaction at all). Without TPG continuing accountability, ratepayers, PGE, the Public, and Oregonians are left unprotected.

PUHCA

TPG has asserted that it wants an exemption from PUHCA. The Commission has not yet stated its position on this but did not oppose an exemption for Enron. The issues with an exemption are many. Most significant of these is that an exemption means that the TPG will avoid the regulatory provisions designed to protect consumers. Here is how one consumer group describes PUHCA:

> PUHCA (the Public Utility Holding Company Act of 1935) is a federal law that regulates the parent or "holding" companies (that hold the stock of) electric and natural gas utilities, so that such owners can't raise rates by charging high fees to utilities for services from their affiliates, and can't speculate in riskier businesses with the ratepayer's money, since such speculation harms utilities' credit and raises their cost of borrowing money, thereby raising customers' utility bills. PUHCA requires utility parent companies to incorporate in the same state where the utility operates, so that the state can regulate them, or to be regulated by the Securities and Exchange Commission (SEC) if they operate in several states. PUHCA does not allow non-utilities, such as oil companies or investment banks, to own utilities. It also requires the SEC to approve any merger or utility acquisition by a holding company, to prevent the reappearance of the huge electric and natural gas cartels of the 1920s that abused their customers and went bankrupt in large numbers because of Enron-like speculation and accounting scams. The utility industry and

> would-be owners of utilities have lobbied Congress heavily to repeal PUHCA, claiming it's outdated. The pending energy bill would repeal PUHCA, despite consumer, environmental, union and credit rating agency objections.
>
> (http://www.citizen.org/cmep/energy_enviro_nuclear/electricity/deregulation/puhca/index.cfm

TPG would like the Commission to rule the sale before the Securities and Exchange Commission (SEC) rules on an exemption. If the Commission allows the sale without this issue first being addressed by the SEC, the SEC will likely grant the exemption and the consumer protections will be lost. The SEC is likely to reason that if this state is not concerned about ensuring consumer protections, why should the SEC worry? However, if the SEC denies the request for an exemption, TPG will either register or pull out of the transaction. (Shifter, cross examination October 21,2004, transcript page 186, lines 16-22.) The Commission should delay making any decision until the SEC has ruled. If TPG does take the position (as Mr. Shifter did) that denial of the exemption is a deal breaker, the Commission should be particularly careful before it grants approval because it discloses the real intent of TPG - to avoid the oversight and protections that PUHCA brings.

SHELL APPLICANT VS UNREGULATED BUYER

The multitude of articles respecting the "TPG" acquisition of PGE creates the false impression that TPG is the buyer and the entity asking for PUC approval. All of the articles discuss TPG's abilities, background, investments, and ability to perform "turn-around" actions in terms of why this is or isn't good for customers. Many of the articles also discuss TPG's reputation for making drastic cost cuts and to resell or "flip" the investment after a brief tenure as owner and to recovery handsomely for its efforts.

All of those articles are in error. TPG is not the applicant. It is not in this docket per se but rather through a second tier shell corporation separated enough by sufficient corporate structuring to protect TPG from any a claim of jurisdiction by the Commission while simultaneously allowing TPG to control PGE. There is nothing in the documents that makes TPG the applicant – it is all hyperbole and hype carefully designed to confuse the reader/hearer into believing that in the final analysis TPG is the buyer. The application seeks approval of an acquisition of PGE by OEUC. The structure being advanced gives negative covenants or veto rights over the actions of the Boards of PGE and OEUC by TPG, the upstream parent, even though TPG and its investment subsidiaries and its investment entities will not be subject to Commission jurisdiction. If approval is granted, the Commission will be powerless to prevent

TPG from using its negative covenants to directly and impermissively impact the welfare of the utility customers.

FINANCIAL STRENGTH OF APPLICANT

OEUC is the applicant over whom the Commission has jurisdiction, not TPG. Either the actual applicant should be evaluated on a stand-alone basis – or the de facto buyer should be required to accept to Commission authority and submit the application directly. OEUC has no assets itself. The assets it will have are either transferred from PGE or gifted from TPG and its investment entities. The *de facto* buyer is TPG and it is TPG who should be evaluated and who should be accept or reject the conditions of sale that are now being proposed. TPG should be required to submit an application directly and acknowledge that the Commission has jurisdiction over it to the extent that its actions relate to PGE. TPG should then be evaluated directly on a stand-alone basis to determine what assets are available to fund PGE activities if necessary. No knowledgeable businessperson – in fact no one at TPG itself – would ever enter into a transaction without requiring all of the significant parties to be bound. There should be no consideration of the acquisition without the same obligation to be bound that investors and finance people see routinely. No transaction of this size would ever occur without significant guaranties and guarantors. They are lacking here and their absence screams loudly about TPG's lack of commitment to PGE and to its ratepayers.

The reason TPG is at the table but not on the documents is simple. By using the multi-tiered approach and pushing hard for as few restrictions as possible, TPG is able to maximize its flexibility and minimize its risk. It is behaving like an equity investor should, good for the investors, but <u>not</u> good for the utility customers. A laudable approach in the non-regulated world becomes a liability to the customers in the regulated utility world. Like it or not, the value of a utility is not just what the return on investment is – it is also the value to utility customers and indirectly Oregon. It is this balancing that makes this acquisition not like others that TPG has tried. What is imperative in this acquisition is that TPG be held accountable for its actions, now and in the future.

FINANCIAL CONDITONS UNENFORCEABLE

Each of the Proposed Conditions, whether suggested by OEUC or another party, acknowledges that the conditions are only enforceable against OEUC and PGE. Testimony submitted by OEUC makes these issues even clearer. To illustrate, Davis testifies to OEUC's willingness to give additional indemnification in response to an issue raised by Staff (David, pg

21, lines 6-21). He does not say that TPG will provide indemnification nor does he state anywhere that TPG will assure that OEUC has the necessary financial strength to actually provide this remedy without using PGE funds. It is a circular argument. Since OEUC is essentially an asset-less entity, the indemnification is virtually worthless.

If BOMA or CUB or INCU came to the Commission and said it wanted to buy PGE, had no real assets, but "Gosh, our members, friends or relatives will step up if necessary", the Commission would dismiss the application out of hand. It would say that at the very least these members, friends, and relatives would have to sign on and accept the legal obligation entailed in buying a utility. Similarly, unless TPG is required to stand behind the conditions, they become meaningless and only provide further burdens upon PGE.

TRANSPARENCY

Transparency has been an issue since TPG would prefer to disclose only the minimal amount of information, thus preventing Intervenors and the Commission from making reasoned decisions about whether actions meet the customers' public interest. While OEUC appears to agree to provide information to the Commission, it is just an agreement to provide information. (Davis, page 25, lines 6-25.) However transparency without enforcement power is meaningless. The conditions acknowledge that the Commission has authority over OEUC, here to have access to records (…"to provide unrestricted access to…") – they do not say that that the Commission has any ability to do anything about it if the records show behavior that is against the public interests of the utility customers or if OEUC doesn't live up to the minimal promises made. Consider for instance what happens when OEUC allows Commission staff access to information relating to when, how, and why TPG exercised its negative covenants. The Commission can't make TPG withdraw the veto, can't make OEUC not accept it, and cannot aid the utility customers – at least not under the proposed conditions. But the Commission can require it as a condition of the acquisition.

STAFF CONDITONS

BOMA supports the conditions suggested by Staff PROVIDING that TPG stands behind them. BOMA also believes that for the most part the proposed conditions do not go far enough. Unless If the Commission is willing to allow the transaction to go forward without requiring TPG to stand behind the conditions, it will have failed in its obligations to the public, PGE, and to Oregon.

TPG has no obligation under any proposed condition. TPG promises that it will not make bad decisions that it will not use the negative covenants unwisely and has actually stated that it wants a strong PGE to make PGE a more valuable asset. But a promise without more has no meaning and no enforceable value. A great rapport with today's investors cannot bind future owners. Having TPG clearly agree to the kind of conditions necessary to make this transaction work requires a hammer to assure that it keeps its promises. Not only is the promise without a hammer, it is meaningless. The idea that TPG will use the negative covenants in a way that the Commission and public expect is irrational. TPG wants investments with good returns. TPG, with no regulatory obligations, would have a legal obligation to maximize returns to its shareholders, not to "volunteer" to maintain assets that mitigate against such returns. The balancing between investor interests and public interest is the Commission's job. That job cannot be done if the Commission gives away its power to do that job. I the application am approved as submitted, and not properly conditioned as part of this proceeding, next year or four years from now this state will likely discover that it was "enroned" again.

The conditions in place with Enron didn't work. They did not give the Commission enough of a handle to prevent the tragic loss to PGE employees and pensioners. They did not prevent Enron from manipulating the market manipulation that has caused rates in the Northwest to skyrocket. The world has continued to change and the Commission must be vigilant to properly protect the customers and the Public.

It cannot be said often enough, there has been insufficient consideration of how the conditions imposed upon OEUC or PGE would actually work. There is no guarantee by TPG to fund them or to comply with them. The Commission must condition any approval upon TPG under its jurisdiction to modify, enforce, or condition actions of PGE and OEUC. Moreover, any use of the negative consent rights must carry with it the risk that if used improperly, i.e. against the public interests of the utility customers, they can be trumped by Commission decision.

TRANSFERRING ASSETS

Something that has not been addressed in any detail is the arrangement between OEUC and PGE assets. One way that OEUC will gain assets is by a transfer of resources and cash from PGE to OEUC. There must be limitations upon transfers of generation resources, cash assets, transmission and infrastructure. Port Westward is at risk. It would not be difficult to move Port Westward away from PGE and lose the value of the resource to the utility customers. PGE will be required to borrow money to build the plant and it is likely that any bank or finance

entity (perhaps a TPG affiliate) will ask for a guarantee from OEUC for all or part of the construction. The plant itself cannot be put into rates until it is used and useful. OEUC could easily require PGE to enter into a power sale agreement (PSA) with PGE as a condition of the guarantee or as a way to avoid accounting issues. While that could be explained in a way that sounds positive for the customers, what really occurs is to give a significant asset to OEUC at little cost, supported to a PSA. In today's market, a resource with a utility PSA has tremendous value. By having Port Westward as asset of OEUC, it allows OEUC to use it as a market resource. Having Port Westward as asset of OEUC increases the value of OEUC to investors, enabling TPG to "flip" its investment more quickly. When you combine the ability to transfer assets with the equity issues and ring financing issues that Staff has focused upon, it is clear that there are significant monetary issues that prevent approval of the sale.

NEGATIVE CONSENT RIGHTS

Negative consent rights, negative covenants, veto power – they are all the same thing. The Commission cannot allow TPG to exercise these rights if it is not in the best interest of PGE customers. The Commission must require that if any veto rights are exercised, TPG first request permission to use the negative consent rights by making a showing that the decision that TPG seeks to reverse is unreasonable, imprudent, or not in the interests or shareholders and customers. The consent rights are many and cover virtually every action taken by PGE including the filing of a rate case. While oversight by OEUC is appropriate, there is no basis to assume that oversight by TPG, an unregulated parent is either reasonable or in the customers' public interest.

TAXES AND LIABLITIES

BOMA opposes any condition that would allow TPG, its investment entities, or OEUC to take taxes collected as a part of PGE rates and apply them against losses from other entities (i.e. file combined returns.) There has been a perception permeating the settlement discussions that PGE must be treated as a stand-alone company, or else creditors of TPG, TPG investment entity, and OEUC can attach PGE assets. The structure does not prevent creditors of TPG from seizing the utility asset.

A creditor of a parent can go against any asset of the entity, including all of its wholly owned subsidiaries, or against the percentage ownership of the subsidiary owned by the parent. XYZ Bank, with a loan to TPG, can declare it in default and then file suit to foreclose on any assets held by the debtor, including TPG and OEUC. Requiring PGE to collect taxes as a

stand-alone entity does not change this. The only thing this approach does is to allow TPG to pocket taxes that otherwise would not be collected in rates or would be paid to governmental taxing authorities. It is that valuable benefit that makes this deal a great investment for TPG even before it is sold. The Commission must not support what is clearly against the public interest of the customers. To the extent the taxes are collected, the rates are higher. To the extent they are not paid to the taxing authorities, the public suffers. To the extent that TPG pockets the money, it's another Enron situation.

EXIT STRATEGIES

TPG has stated that it is not interested in defined exit strategies. The Intervenors want to know what happens when OEUC decides to sell PGE. To some measure this debate is a red herring. Unfortunately under the proposed structure, TPG has no limitations upon selling its investment entities (TPG IV for instance) nor do TPG or the investment entities have any restriction upon selling OEUC. The Commission authority would only comes into play if OEUC decides to sell PGE as an operating utility, when presumably the Commission would conduct another review. What is not recognized is that the structure of TPG entities allows TPG to sell shares in the investment fund without regulatory oversight (private, with minimal if any reporting requirements.) It allows TPG to sell by replacing members of the investment entities, with no disclosure requirements and no limitations on transfer. The TPG investment entities can sell OEUC or it the memberships. In four or five years, it is far more likely that OEUC will have different investors and that TPG investment entities will have different investors -- none of them bound by the Commission, none of them known, and no real way to make them accountable for decisions made that impact the public interests of the customers.

PGE

PGE was historically a strong company and can be a strong company again if it does not become the pawn of another investment company looking to maximize profits at the expense of customers and employees. There is nothing in this deal that benefits the utility - in fact it is TPG who is using PGE's strength to make a better return. There is nothing in this deal that benefits the public interests of the utility customers. There is little rate reduction, the money for taxes will go into TPG's pockets, and there is a very real likelihood that assets will migrate from PGE to OEUC without limitation. A distribution to creditors (described By Bingham) is one alternative. It would make PGE again a publicly traded company without any entity having a major ownership share and it would be subject to Commission authority. City ownership is another

alternative, assuming that the City is interested in going forward with another offer. As more and more people have realized the downside of this transaction, more people are interested in finding another way that would work. But these are only some of the alternatives – there could be other buyers, some old suitors could join with others to find a way to accomplish this and to give a positive benefit to the Public. The point to keep in mind is simple – this is not the only game in town and approving the sale as if it is would be unreasonable, arbitrary, and capricious.

MOTION TO SUSPEND

BOMA has previously moved the Commission to Suspend these Proceedings or in the alternative to condition the approval upon TPG agreeing to Commission jurisdiction. ALJ Logan determined that there was no real reason to delay oral argument and the briefing. She allowed BOMA to reassert the motion in this portion of the proceeding. She stated in her order that the Commission would address the motion in making any decision related to approval of the OEUC application. As indicated herein, there are several issues that need to be addressed including the PUHCA exemption and the need to have the investigations concluded.

CONCLUSION

BOMA urges the Commission to reject the sale. The structure and terms are insufficient to meet the public interest test. It is a bad transaction fraught with risk for the ratepayers and PGE, while allowing an entirely unregulated TPG to make a significant return on its investment, at the expense of the utility customers. If the Commission is inclined to approve the transaction, it must be conditioned upon TPG being bound and further that it be prohibited from transferring any assets from PGE to OEUC, from exercising the negative covenants without

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PUC approval, be required to forego tax collection on a stand alone basis, and to be required to seek approval if it sells or transfers any membership interest in OEUC, any TPG investment entity involved with PGE or OEUC, and TPG to the extent such transfer in anyway affects PGE customers.

Dated this 16th day of November, 2004

X

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served BOMA's Reply to TPG's Response to BOMA's Initial Brief, on the official service list for Docket No. UM 1121, by causing the same to be electronically served on November 17,2004, upon all parties who have an email address on the official service list, and by U.S. Mail on November 17, 2004, postage-prepaid, to those parties who do not have an email address on the official service list.

Dated at Portland, Oregon, this 17th day of November 2004.

By: _____

Ann L. Fisher

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