



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

January 20, 2006

VIA EMAIL AND U.S. MAIL

Attention: Filing Center
Public Utility Commission of Oregon
550 Capitol Street NE, #215
P.O. Box 2148
Salem, OR 97308-2148
Puc.filingcenter@state.or.us

Re: *In the Matter of Public Utility Commission of Oregon Staff's Investigation Relating to Electric Utility Purchases from Qualifying Facilities*
OPUC Docket No. UM 1129
DOJ File No. 330-020-GN0041-04

Enclosed for filing are an original and five copies of the rebuttal testimony of Carel DeWinkel and Jeff Keto with attachments, offered by the Oregon Department of Energy in the above-captioned matter for filing with the Public Utility Commission today.

Sincerely,

/s/ Virginia L. Gustafson for

Janet L. Prewitt
Assistant Attorney General
Natural Resources Section

Enclosures

c: Phil Carver, ODOE
Carel DeWinkel, ODOE
Jeff Keto, ODOE
UM 1129 Service List

JLP:jrs/GENP0108.DOC

1 **PHASE 1 COMPLIANCE FILING REBUTTAL TESTIMONY OF CAREL**
2 **DEWINKEL**

3 **Q: PLEASE, STATE YOUR NAME, OCCUPATION AND BUSINESS**
4 **ADDRESS.**

5 A: My name is Carel DeWinkel. I am a Senior Policy Analyst with the
6 Oregon Department of Energy. My business address is 625 Marion Street
7 NE, Salem, Oregon 97301. My educational and professional background
8 is described in ODOE Exhibit No. 5, submitted in this matter.

9 **Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

10 A: In my prior testimony, I proposed criteria and definitions for determining
11 whether multiple energy projects are in fact a single QF that will have to
12 meet the nameplate criterion of 10 MW or less to be eligible for standard
13 rates and a standard contract. The purpose of this testimony is to present
14 revisions to the criteria and definitions based on settlement discussions
15 with parties to this proceeding.

16 **Q: WHAT IS BASIC ISSUE THAT IS BEING ADDRESSED?**

17 A: Issue Number 4 states:

18 Should the Commission adopt criteria for determining whether
19 multiple energy projects are in fact a single Qualifying Facility to
20 protect the intent of Order No. 05-584, which directs that only
21 projects 10 MW and smaller are eligible for standard avoided cost
22 rates and a standard contract? For example, if a 60 MW wind farm
23 is divided into six 10 MW installments in close proximity to one
24 another, all built in the same calendar year, and with underlying
25 ownership structures containing similar persons or entities, should
26 each installment be eligible for standard rates and standard
 contracts? What criteria determine when a Qualifying Facility is
 10 MW or less and eligible for the standard contract when the
 project/site has multiple generating units?

 Because ODOE is very concerned about the possibility that disagreements
 about project size will slow down the growth in QFs with standard rates
 and contracts, ODOE proposed criteria and definitions to address the

1 issue. The original language was drafted in close cooperation with
2 representatives of Idaho Power and Sherman County and was attached to
3 my opening testimony as Attachment 1.

4 **Q: HAVE YOU MADE CHANGES TO THE LANGUAGE IN**
5 **ATTACHMENT 1?**

6 A: Yes, the parties discussed this proposed text during the settlement
7 workshop on December 13, 2005 and agreed to several modifications
8 and/or additions, which are set out below. The parties had further
9 discussions during the following weeks and have agreed upon the text as
10 shown in Attachment A. ODOE's final proposed language was circulated
11 to the parties on January 13, 2006 as UM 1129 OF Definition REDLINE
12 1-13-06_IP_CD.doc.

13 **Q: WHICH PARTIES HAVE CONTACTED YOU TO STATE THEIR**
14 **AGREEMENT WITH THIS PROPOSED LANGUAGE AS SHOWN**
15 **IN ATTACHMENT A?**

16 A: I sent the proposed language to the complete UM 1129 mailing list and the
17 following parties have expressed their agreement: Idaho Power,
18 PacifiCorp, PGE, the Commission's Staff, and Sherman County/Simplot.
19 The Fair Rate Coalition informed me that it does not have any comments
20 on the proposed definition because "as it understands that in practical
21 terms, it would be unlikely to apply to small hydro resources."

22 **Q: WHAT CHANGES HAVE YOU MADE TO THE ORIGINAL**
23 **LANGUAGE?**

24 A: The parties agreed to language that clarified that the definition of a Small
25 Cogeneration Facility applies to facilities that are eligible for standard
26 contracts as well as standard rates. This was done by adding "and
standard contract" in the heading and in the definition.
In addition, the parties agreed to language to clarify the role of the

1 developer, to identify equipment to be included when generating projects
2 will be considered to be located at the same site, to make clear that certain
3 infrastructure in addition to interconnection equipment may be shared, to
4 add a standard contract provision, and to protect the confidentiality of
5 information given to the buyer by the seller.

6 **Q: WHAT CHANGE DO YOU PROPOSE IN THE DEFINITION OF**
7 **PERSON(S) OR AFFILIATED PERSONS(S)?**

8 A: We included the following language in the Definition of Person(s) or
9 Affiliated Persons:

10 “However, two facilities will not be held to be owned or controlled
11 by the same person(s) or affiliated person(s) solely because they
12 are developed by a single entity.”

13 This language was added because several intervenors believed that the
14 first sentence in this paragraph is not clear about the role of a developer.
15 This addition makes it clear that a developer can develop two adjacent
16 projects as long as two different persons or entities will own the projects.
17 It also allows a developer to have part-ownership in one of the two or
18 more projects (s)he is developing.

19 **Q: WHAT CHANGE DO YOU PROPOSE REGARDING THE**
20 **DEFINITION OF SAME SITE?**

21 A. We changed the Definition of Same Site to read as follows:

22 For purposes of the foregoing, generating facilities are considered
23 to be located at the same site as the QF for which qualification for
24 standard rates is sought if they are located within a five-mile radius
25 of any generating facilities or equipment providing fuel or motive
26 force associated with the QF for which qualification for published
rates is sought.

27 This added language focuses on the equipment that is specifically
28 associated with the generation of electricity and the equipment providing
29 fuel or motive force. For example, a large well that provides the hot water

1 for a geothermal electricity generating plant is considered “equipment
2 providing fuel or motive force”, but the geothermal reservoir is not.

3 **Q: WHAT CHANGE DO YOU PROPOSE REGARDING THE**
4 **SECTION OF SHARED INTERCONNECTION?**

5 A: This definition now also includes the words “and infrastructure” to make it
6 clear that infrastructure such as service roads can be shared among
7 separate project owners, without the facilities being considered a single
8 QF. But we also made it clear that this infrastructure may not include
9 infrastructure that provides motive force or fuel.

10 **Q: DID YOU ADD ANY NEW PROVISIONS TO THE DEFINITION?**

11 A: Yes. During the settlement workshop on December 13, it was proposed to
12 include a Standard Contract Provision. This reads as follows:

13 “To insure continued compliance with the requirements
14 stated above, the standard form power purchase agreements shall
15 contain a representation in substantially the following form:
16 “Seller will not make any changes in its ownership, control or
17 management during the term of this Agreement that would cause it
18 to not be in compliance with the Definition of a Small
19 Cogeneration Facility or Small Power Production Facility Eligible
20 to Receive the Standard Rates and Standard Contract approved by
21 the Commission at the time this Agreement is executed. Seller will
22 provide, upon request by Buyer not more frequently than every 36
23 months, such documentation and information as may be reasonably
24 required to establish Seller’s continued compliance with such
25 Definition. Buyer agrees to take reasonable steps to maintain the
26 confidentiality of any portion of the above-described
documentation and information that the Seller identifies as
“confidential,” except Buyer will provide all such confidential
information to the Public Utility Commission of Oregon upon the
Commission’s request.”

22 **Q: WHAT CHANGE DO YOU PROPOSE REGARDING**
23 **CONFIDENTIAL INFORMATION?**

24 A: We have included in the above quoted standard contract provision to
25 include the following language:

26 Buyer agrees to take reasonable steps to maintain the
confidentiality of any portion of the above-described

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documentation and information that the Seller identifies as “confidential,” except Buyer will provide all such confidential information to the Public Utility Commission of Oregon upon the Commission’s request.

Several developers expressed a concern about confidential information given to the utility and this language is added to clarify that the purchasing utility will protect confidential information related to the project. This language also preserves the Commission’s right to review confidential information related to a QF.

Q: WHAT SHOULD THE COMMISSION DO ON THIS ISSUE?

A: The Commission should adopt the QF definitions in Attachment A.

Q: DOES THIS CONCLUDE YOUR TESTIMONY?

A: Yes, it does.

1 **PHASE 1 COMPLIANCE FILING REBUTTAL TESTIMONY OF JEFF**
2 **KETO**

3 **Q: PLEASE, STATE YOUR NAME, OCCUPATION AND BUSINESS**
4 **ADDRESS.**

5 A: My name is Jeff Keto. I am the Loan Manager of the Small Scale Energy
6 Loan Program (Loan Program), Oregon Department of Energy. My
7 business address is 625 Marion St. N.E. Salem, Oregon. My educational
8 background and professional background is described in ODOE Exhibit
9 No. 6, submitted in this matter.

10 **Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

11 A: The subjects of my testimony are a cap on default damages, minimum
12 contracted power delivery, damages in the event of a delay in commercial
13 operations and contract termination (issues 5 and 36).

14 **Q: WHAT IS THE BASIS FOR YOUR RECOMMENDATION OF A**
15 **CAP ON DEFAULT DAMAGES?**

16 A: In testimony ODOE recommended the contract cap on default damages be
17 set at the value of the contracted minimum power delivery during the
18 default period. (ODOE/Exhibit 6/Keto/Page 16, Lines 19-21). In response
19 to Staff's data request #20 ODOE responded "I would not recommend
20 financing if projected maximum damages under the power purchase
21 agreement could not be paid from a reduction in future revenue within a
22 reasonable time while keeping expenses and debt service current."
23 Additionally, in testimony ODOE stated "To avoid potential negotiations
24 ODOE recommends the standard contracts state a minimum amount of
25 delivered power based on the type of resource. ODOE recommends
26 setting annual minimum power delivery based on the following capacity
 factors of nameplate ratings: 5 percent for solar, 10 percent for hydro and
 wind, 20 percent for geothermal, biomass or natural gas fired

1 cogeneration. The percentage should be adjusted by the percentage of
2 power a QF intends to use on site.” (ODOE/Exhibit 6/Keto/Page 7, Lines
3 17-23).

4 The recommended cap on default damages is based on the recommended
5 minimum power delivery requirements. As an example, a biomass
6 generation project that has a long-term projected capacity factor of 85%
7 and establishes the contract minimum delivery at a capacity of 20% would
8 have a cap on damages of about 23% of its anticipated generation (20/85).
9 This 23% would be close to the maximum amount the QF could be
10 expected to repay the utility in a reasonable amount of time and still have
11 funds for plant operations and debt service. Our recommendation for a
12 default damages cap was complementary with our recommendation for the
13 minimum delivery requirements.

14 **Q: DOES ODOE AGREE WITH STAFF’S RECOMMENDATION**
15 **THAT THE CAP ON DEFAULT DAMAGES BE BASED ON 110%**
16 **OF THE UTILITY’S FORWARD MARKET PRICES AT THE**
TIME OF CONTRACT EXECUTION? (Staff 1000/Schwartz 1, Page
53)

17 A: Yes. If the Commission does not accept ODOE’s minimum delivery
18 requirements by project type, ODOE concurs with Staff that the cap based
19 on 110% of the utility’s forward market prices at the time of contract
20 execution should be used. This provides what is needed for financing: a
21 quantifiable cap at the time of loan underwriting and a maximum amount
22 that could be repaid in a reasonable time and still maintain project
23 viability.

24 **Q: DOES ODOE AGREE WITH STAFF RECOMMENDATION TO**
25 **MODIFY THE CONTRACTS “TO EXCLUDE DELAY OF**
26 **COMMERCIAL OPERATIONS AS AN EVENT OF DEFAULT**
THAT ALLOWS TERMINATION IF THE UTILITY
DETERMINES AT THE TIME OF CONTRACT EXECUTION
THAT IT WILL BE RESOURCE-SUFFICIENT AS OF THE QF

ON-LINE DATE SPECIFIED IN THE CONTRACT”? (EMPHASIS ADDED) (STAFF 1000/SCHWARTZ 1, PAGE 35).

A: Not entirely. While ODOE agrees with not allowing termination as recommended by Staff, ODOE is concerned that utilities will include in their contract a provision allowing termination if the utility is not resource-sufficient. The PacifiCorp contract (11.2.2) allows an opportunity to cure for a delay in commercial operations—a provision critical to obtaining financing. The PGE contract does not include such an opportunity to cure. The Idaho Power contract provides ten months cure provision in (section 5.4) if the scheduled operation date is not met. Because a reasonable opportunity to cure will increase ODOE’s ability to finance projects, ODOE recommends that the Commission require PGE to include opportunity to cure language similar to PacifiCorp or language similar to Idaho Power that extends the time of default as stated above. ODOE further recommends that the Commission retain the PacifiCorp and Idaho Power contract language cited above.

Q: STAFF/1000 SCHWARTZ/1, PAGE 37 LINES 14-19 STATES “IDAHO POWER STATES THAT IT WOULD NOT TERMINATE A QF CONTRACT DUE TO REDUCED RESOURCE AVAILABILITY RESULTING FROM ADVERSE NATURAL MOTIVE FORCE CONDITIONS OR PRODUCTION CURTAILMENTS AT THE HOST INDUSTRIAL FACILITY, UNLESS THE PROJECT APPEARS TO HAVE PERMANENTLY CURTAILED ITS GENERATION TO VERY LOW LEVELS AND THE DEVELOPER IS NOT MAKING REASONABLE EFFORTS TO CURE THE PROBLEM.” DOES ODOE SUPPORT THE COMMISSION REQUIRING THIS LANGUAGE IN ALL STANDARD CONTRACTS?

A: Yes. We support such standard language. In response to ODOE’s data request #9, Staff stated:

“Staff has testified throughout this proceeding that weather should not be a cause for default or termination. Staff supports the use of a Mechanical Availability Guarantee (MAG) as the basis for determining default for under-delivery. Weather-related under-deliveries would not trigger default or termination under such a mechanism.

1 Without a MAG, utilities must rely on the QF to account for
2 adverse natural motive force conditions in designating
3 minimum annual generation, with supporting documentation.
4 Similarly, a cogeneration QF should account for production
5 curtailments in designating minimum generation. Avoided
6 cost rates are based on a firm proxy resource. In order for a
7 utility to avoid such a resource, the QF must provide
8 reasonable estimates of anticipated generation.

9 Under PGE's standard contract, the Company will not
10 terminate for under-delivery unless the QF has under-
11 delivered for two consecutive years. Therefore, Staff does
12 not believe it is necessary for the Commission to require PGE
13 to add language consistent with Staff's testimony, cited
14 above.

15 Under Idaho Power's standard contract, the Company will
16 not terminate a QF unless it fails to deliver at least 10% of its
17 minimum obligation in any contract year. If, for example, a
18 hydroelectric project does not produce energy for a year due
19 to temporary lack of water, the contract would allow for
20 termination, even though the Company states it would not
21 terminate the contract under such a circumstance. In the
22 absence of a MAG, Staff would not object to a party
23 recommending the Commission require Idaho Power's
24 standard contract to include language consistent with Staff's
25 testimony, cited above, for intermittent renewable resources.

26 PacifiCorp's contract provides no exceptions for termination
due to under-delivery other than events excused by force
majeure, which do not include lack of wind or water. In the
absence of a MAG, Staff would not object to a party
recommending the Commission require PacifiCorp's
standard contract to include language consistent with Staff's
testimony, cited above, for intermittent renewable resources."

ODOE has testified in ODOE/Exhibit 6/Keto/Page 9 that termination for
under delivery should not be allowed because a lender needs time to help
correct generation project problems and possibly foreclose and sell a
project. ODOE recommends that the Commission require that QF
contracts include language either similar to the Idaho Power statement in
Staff's testimony above (regarding non-termination for under-delivery
because of lack of motive force or production curtailment at the host
industrial facility if the developer is making a reasonable attempt to

1 increase the generation) or language as in PGE's contract (that PGE will
2 not terminate for under-delivery unless the QF has under-delivered for two
3 consecutive years).

4 **Q: IS ODOE CONCERNED WITH TERMINATION DAMAGES IN**
5 **THE UTILITY CONTRACTS?**

6 A: Yes. ODOE is concerned that if a power sales contract is terminated and
7 it must take over the project as a result of a loan default, ODOE may need
8 to pay any termination damages out of any sale proceeds of the project or
9 before obtaining a new power sales contract for the project. These
10 damages may make restarting a project uneconomic. To reduce this risk,
11 ODOE has stated above that termination should not be allowed except in
12 cases of an extended period of under-delivery or after an opportunity to
13 cure for a delay in commercial operations. This extra time allows a lender
14 to help cure any default or sell the project and avoid termination and
15 payment of damages.

16 **Q: DOES THIS CONCLUDE YOUR TESTIMONY.**

17 A: Yes.
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SETTLEMENT PROPOSAL – 1/13/06

Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Rates and Standard Contract:

A Qualifying Facility (either a small power production facility or a cogeneration facility) (“QF”) will be eligible to receive the standard rates and standard contract if the nameplate capacity of the QF, together with any other electric generating facility using the same motive force, owned or controlled by the same person(s) or affiliated person(s), and located at the same site, does not exceed 10 MW.

Definition of Person(s) or Affiliated Person(s):

As used above, the term “same person(s)” or “affiliated person(s)” means a natural person or persons or any legal entity or entities sharing common ownership, management or acting jointly or in concert with or exercising influence over the policies or actions of another person or entity. However, two facilities will not be held to be owned or controlled by the same person(s) or affiliated person(s) solely because they are developed by a single entity. Furthermore, two facilities will not be held to be owned or controlled by the same person(s) or affiliated person(s) if such common person or persons is a “passive investor” whose ownership interest in the QF is primarily related to utilizing production tax credits, green tag values and MACRS depreciation as the primary ownership benefit. A unit of Oregon local government may also be a “passive investor” if the local governmental unit demonstrates that it will not have an equity ownership interest in or exercise any control over the management of the QF and that its only interest is a share of the cash flow from the QF, which share will not exceed 20%. The 20% cash flow share limit may only be exceeded for good cause shown and only with the prior approval of the Commission.

Definition of Same Site:

For purposes of the foregoing, generating facilities are considered to be located at the same site as the QF for which qualification for the standard rates and standard contract is sought if they are located within a five-mile radius of any generating facilities or equipment providing fuel or motive force associated with the QF for which qualification for the standard rates and standard contract is sought.

Shared Interconnection and infrastructure:

QFs otherwise meeting the above-described separate ownership test and thereby qualified for entitlement to the standard rates and standard contract will not be disqualified by utilizing an interconnection or other infrastructure not providing motive force or fuel that is shared with other QFs qualifying for the standard rates and standard

SETTLEMENT PROPOSAL – 1/13/06

contract so long as the use of the shared interconnection complies with the interconnecting utility's safety and reliability standards, interconnection contract requirements and Prudent Electrical Practices as that term is defined in the interconnecting utility's approved standard contract.

Dispute Resolution

Upon request, the QF will provide the purchasing utility with documentation verifying the ownership, management and financial structure of the QF in reasonably sufficient detail to allow the utility to make an initial determination of whether or not the QF meets the above-described criteria for entitlement to the standard rates and standard contract. Any dispute concerning a QF's entitlement to the standard rates and standard contract shall be presented to the Commission for resolution.

Standard Contract Provision

To insure continued compliance with the requirements stated above, the standard contract shall contain a representation in substantially the following form: "Seller will not make any changes in its ownership, control or management during the term of this Agreement that would cause it to not be in compliance with the **Definition of a Small Cogeneration Facility or Small Power Production Facility Eligible to Receive the Standard Rates and Standard Contract** approved by the Commission at the time this Agreement is executed. Seller will provide, upon request by Buyer not more frequently than every 36 months, such documentation and information as may be reasonably required to establish Seller's continued compliance with such Definition". Buyer agrees to take reasonable steps to maintain the confidentiality of any portion of the above-described documentation and information that the Seller identifies as "confidential" except Buyer will provide all such confidential information to the Public Utility Commission of Oregon upon the Commission's request.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2006, I served the foregoing Rebuttal Testimonys of Carel DeWinkel and Jeff Keto with attachment upon the persons named on the attached UM 1129 service list by electronic mail and by mailing a full, true and correct copy thereof addressed to the persons at the addresses on the UM 1129 service list.

Dated: January 20, 2006

/s/ Virginia L. Gustafson for

Janet L. Prewitt, #85307
Assistant Attorney General

UM 1129 SERVICE LIST

<p>SARAH J ADAMS LIEN STOEL RIVES LLP 900 SW FIFTH AVE - STE 2600 PORTLAND OR 97204-1268 sjadamslien@stoel.com</p>	<p>MARK ALBERT VULCAN POWER COMPANY 1183 NW WALL ST STE G BEND OR 97701 malbert@vulcanpower.com</p>
<p>RANDY ALLPHIN IDAHO POWER COMPANY PO BOX 70 BOISE ID 83707-0070 rallphin@idahopower.com</p>	<p>MICK BARANKO DOUGLAS COUNTY FOREST PRODUCTS PO BOX 848 WINCHESTER OR 97495 mick@dcpf.com</p>
<p>R THOMAS BEACH -- CONFIDENTIAL CROSSBORDER ENERGY 2560 NINTH ST - STE 316 BERKELEY CA 94710 tomb@crossborderenergy.com</p>	<p>LAURA BEANE PACIFICORP 825 MULTNOMAH STE 800 PORTLAND OR 97232-2153 laura.beane@pacificorp.com</p>
<p>KARL BOKENKAMP IDAHO POWER COMPANY PO BOX 70 BOISE ID 83707-0070 kbokenkamp@idahopower.com</p>	<p>LOWREY R BROWN CITIZENS' UTILITY BOARD OF OREGON 610 SW BROADWAY - STE 308 PORTLAND OR 97205 lowrey@oregoncub.org</p>
<p>JOANNE M BUTLER IDAHO POWER COMPANY PO BOX 70 BOISE ID 83707-0070 jbutler@idahopower.com</p>	<p>BRIAN COLE SYMBIOTICS, LLC PO BOX 1088 BAKER CITY OR 97814 bc@orbisgroup.org</p>
<p>BRUCE CRAIG ASCENTERGY CORP 440 BENMAR DR STE 2230 HOUSTON TX 77060 bcraig@asc-co.com</p>	<p>RANDY CROCKET D R JOHNSON LUMBER COMPANY PO BOX 66 RIDDLE OR 97469 randyc@drjlumber.com</p>
<p>CHRIS CROWLEY COLUMBIA ENERGY PARTNERS 100 E 19TH STE 400 VANCOUVER WA 98663 ccrowley@columbiaep.com</p>	<p>DATA REQUEST RESPONSE CENTER PACIFICORP 825 NE MULTNOMAH - STE 800 PORTLAND OR 97232 datarequest@pacificorp.com</p>
<p>CAREL DE WINKEL OREGON DEPARTMENT OF ENERGY 625 MARION STREET NE SALEM OR 97301 carel.dewinkel@state.or.us</p>	<p>CRAIG DEHART MIDDLEFORK IRRIGATION DISTRICT PO BOX 291 PARKDALE OR 97041 mfidcraig@hoodriverelectric.net</p>

<p>ELIZABETH DICKSON HURLEY, LYNCH & RE, PC 825 NE MULTNOMAH - STE 800 BEND OR 97702 eadickson@hhr-law.com</p>	<p>JASON EISDORFER CITIZENS' UTILITY BOARD OF OREGON 610 SW BROADWAY STE 308 PORTLAND OR 97205 jason@oregoncub.org</p>
<p>JOHN M ERIKSSON STOEL RIVES LLP 900 SW FIFTH AVE - STE 2600 PORTLAND OR 97204-1268 jmeriksson@stoel.com</p>	<p>RANDALL J FALKENBERG -- CONFIDENTIAL RFI CONSULTING INC PMB 362 8351 ROSWELL RD ATLANTA GA 30350 consultrfi@aol.com</p>
<p>JOHN R GALE IDAHO POWER COMPANY PO BOX 70 BOISE ID 83707-0070 rgale@idahopower.com</p>	<p>J RICHARD GEORGE -- CONFIDENTIAL PORTLAND GENERAL ELECTRIC COMPANY 121 SW SALMON ST PORTLAND OR 97204 richard.george@pgn.com</p>
<p>THOMAS M GRIM CABLE HUSTON BENEDICT ET AL 1001 SW FIFTH AVE STE 2000 PORTLAND OR 97204-1136 tgrim@chbh.com</p>	<p>DAVID HAWK J R SIMPLOT COMPANY PO BOX 27 BOISE ID 83707 david.hawk@simplot.com</p>
<p>STEVEN C JOHNSON CENTRAL OREGON IRRIGATION DISTRICT 2598 NORTH HIGHWAY 97 REDMOND OR 97756 stevej@coid.org</p>	<p>BARTON L KLINE IDAHO POWER COMPANY PO BOX 70 BOISE ID 83707-0070 bkline@idahopower.com</p>
<p>ALAN MEYER -- CONFIDENTIAL WEYERHAEUSER COMPANY 698 12TH ST - STE 220 SALEM OR 97301-4010 alan.meyer@weyerhaeuser.com</p>	<p>MONICA B MOEN IDAHO POWER COMPANY PO BOX 70 BOISE ID 83707-0070 mmoen@idahopower.com</p>
<p>THOMAS H NELSON THOMAS H NELSON & ASSOCIATES 825 NE MULTNOMAH STE 925 PORTLAND OR 97232 nelson@thnelson.com</p>	<p>LISA F RACKNER ATER WYNNE LLP 222 SW COLUMBIA ST STE 1800 PORTLAND OR 97201-6618 lfr@aterwynne.com</p>
<p>PGE-OPUC FILINGS RATES & REGULATORY AFFAIRS PORTLAND GENERAL ELECTRIC COMPANY 121 SW SALMON ST 1WTC0702 PORTLAND OR 97204 pge.opuc.filings@pgn.com</p>	<p>DON READING -- CONFIDENTIAL BEN JOHNSON ASSOCIATES 6070 HILL ROAD BOISE ID 83703 dreading@mindspring.com</p>

<p>PETER J RICHARDSON -- CONFIDENTIAL RICHARDSON & O'LEARY PO BOX 7218 BOISE ID 83707 peter@richardsonandoleary.com</p>	<p>IRION SANGER -- CONFIDENTIAL DAVISON VAN CLEVE 333 SW TAYLOR - STE 400 PORTLAND OR 97204 ias@dvclaw.com</p>
<p>LISA C SCHWARTZ -- CONFIDENTIAL PUBLIC UTILITY COMMISSION OF OREGON PO BOX 2148 SALEM OR 97308-2148 lisa.c.schwartz@state.or.us</p>	<p>MARK TALLMAN PACIFICORP 825 MULTNOMAH STE 800 PORTLAND OR 97232-2153 mark.tallman@pacificorp.com</p>
<p>S BRADLEY VAN CLEVE -- CONFIDENTIAL DAVISON VAN CLEVE PC 333 SW TAYLOR - STE 400 PORTLAND OR 97204 mail@dvclaw.com</p>	<p>MICHAEL T WEIRICH -- CONFIDENTIAL DEPARTMENT OF JUSTICE REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 michael.weirich@state.or.us</p>
<p>LINDA K WILLIAMS KAFOURY & MCDUGAL 10266 SW LANCASTER RD PORTLAND OR 97219-6305 linda@lindawilliams.net</p>	<p>BRUCE A WITTMANN WEYERHAEUSER MAILSTOP: CH 1K32 PO BOX 9777 FEDERAL WAY WA 98063-9777 bruce.wittmann@weyerhaeuser.com</p>
<p>PAUL WOODIN WESTERN WIND POWER 282 LARGENT LN GOLDENDALE WA 98620-3519 pwoodin@gorge.net</p>	<p>MICHAEL YOUNGBLOOD IDAHO POWER COMPANY PO BOX 70 BOISE ID 83707 myoungblood@idahopower.com</p>