

**PUBLIC OWNERSHIP OF PGE - ISSUES WORKSHOP
October 29, 2002**

**COMMENTS OF DAN MEEK AND LINDA WILLIAMS
for
Oregon Public Power Coalition (OPPC)
and Utility Reform Project (URP)**

Thank you for the invitation to co-host this meeting.

We are the only co-hosts who (1) endorsed the City's August 28 resolution before it was adopted and (2) opposed the competing proposal called Willamette Valley Power (WVP). In May 2002, we started our formal efforts encourage the City to acquire the assets of Portland General Electric Co. (PGE) and to oppose WVP, about 17 months after the Oregon courts rejected our challenge to the order of the Oregon Public Utility Commission (OPUC) allowing Enron to buy PGE in the first place.

ACQUIRING THE PGE ASSETS

The City's central task is to acquire the assets of PGE at a reasonable price.

We assume that the City is proceeding with all possible diligence to accomplish this purpose, although the City is precluded from revealing its progress by the confidentiality agreement it signed with Enron.

We note that Enron last week told the OPUC that Enron would not engage in negotiations with the City outside of the bidding process that is part of the bankruptcy proceeding. This implies that Enron does not yet grasp that the City is materially different from any other entity expressing interest in buying the PGE assets.

The difference is that the City has power of eminent domain to acquire most of those assets from any private company that owns them. This power can be exercised now and does not require approval of the Bankruptcy Court.¹

We recommend that the City commence the eminent domain acquisition process without delay.² The first step is to conduct a City proceeding to determine what amount of payment would constitute "just compensation" under the Oregon and U.S. Constitutions.³ That determination will allow the city to use ORS Chapter 35

1. We have a separate memorandum on this subject, available to the City.

2. ORS 35.235 and other relevant statutes are attached to this testimony.

3. **Oregon Constitution, Article I, Section 18. Private property or services taken for public use.**

(continued...)

to acquire the assets, without delay, by depositing into court either the determined amount of compensation or perhaps just a warrant for such amount. Enron can then ask the jury to increase the amount of compensation for the assets, but that litigation does not delay the transfer of the assets into the ownership of the City.

Oregon law requires a potential condemner to make a written offer of purchase of the property at least 20 days before filing a condemnation action in circuit court. ORS 35.346. The law assumes that the condemner will have made a good faith effort to evaluate the property in making the offer.

It seems particularly important for the City to begin an open public process to evaluate the PGE assets which might be acquired through condemnation. Enron has apparently insisted upon confidentiality regarding most aspects of its sale of PGE through the bankruptcy process. While Enron sees fit to try to "spin" the information about potential buyers and the progress (if any) of the bidding in the bankruptcy, the City seems constrained to say nothing about its role. This asymmetrical balance of power and information is misleading and unnecessary.

In contrast, the City's hearing on the specific assets which the City of Portland might acquire through condemnation would be a public process, based on property records and other information widely available in the public record, as well as engineering and other on-the-ground information. The City need not rely upon any confidential information it may have seen in order to value specific assets it seeks to acquire.

Beginning hearings as soon as possible on the condemnation price to offer Enron would demonstrate the City's resolve. The hearings would help educate the public about the valuable assets and how much the ratepayers have already paid for those assets (including depreciation and return). It would provide a baseline of factual information about the assets located in Oregon. There is no mystery about the book value of the hydroelectric dams, the major transmission lines, the poles and wires, buildings, and other facilities which the company owns and which are all clearly subject to condemnation upon deposit of a just sum with the Circuit Court, if the offer of purchase does not lead to successful negotiations.

This step will both speed up the actual acquisition of the assets by the City and will also put other parties on notice that the City is quite serious about completing this acquisition. Thus, it will significantly reduce the amount of money that any company is likely to offer Enron for the PGE assets. Enron has not revealed how many companies submitted indicative bids by the mid-October deadline. With this step, the number of interested companies should decline. And the lower the

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Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.

price paid for PGE, the less Oregon ratepayers will have to pay for electric service.

Filing this action should also allow the City to return the confidential information to Enron and instead obtain any information relevant to valuation either through the court-supervised discovery process, assisted by Enron's strong incentive to provide such information to the City as part of the City's proceeding to determine estimated just compensation.

The City also needs to be making arrangements with Grant County PUD and the other Mid-Columbia PUDs for the transfer of the contracts for 327 average megawatts of power from the Mid-Columbia dams. These contracts are personal property of PGE subject to eminent domain.

Acquiring Power Plants

The Citizens Utility Board (CUB) continues to criticize our effort to create PUDs on the grounds that the public needs to buy all of PGE's thermal power plants. We do not agree that all those plants need to be acquired by means of eminent domain, because their value in the market is not much higher than their depreciated book value (with the exception of the Boardman coal-fired power plant). Left without a distribution system, Enron would very likely sell off those thermal power plants at well.⁴ If acquiring all of PGE thermal power plants is deemed crucial, however, then the City probably has even less eminent domain power to achieve this than does a PUD.

A PUD has authority under the Oregon Constitution, Article XI, Section 12, to condemn any property necessary to carry out its functions. The statute enacted by the Legislature in 1967, purporting to ban PUDs from exercising eminent domain over thermal power plants, is in conflict with the Oregon Constitution and therefore invalid.

Upon its creation in 1859, the State of Oregon was granted by its citizens the sovereign right of eminent domain powers. Through legislative action the State has delegated some of its sovereign power to various political subdivisions of the state under a variety of statutes. By initiative in 1932, voters amended the Constitution to grant the full power of eminent domain to PUDs. The voters gave to the legislature only the right to implement this Constitutional amendment (providing for the creation and operation of PUDs) but not to limit or curtail the Constitutional amendment.

4. In addition, the City or a PUD could build or buy its own gas-fired power plants. Many such plants are already under construction or in the licensing phase in Oregon and Washington. New gas-fired plants consist essentially of a large jet engine stood on end. It takes less than 1 year to build one.

In addition, BPA currently has surplus power to sell, because regional loads are below what BPA had expected. BPA's existing firm power contracts expire on October 1, 2006. BPA now intends to sign new contracts to provide firm power to publicly-owned utilities starting October 1, 2006, which is another reason that creation of a public power system for the PGE service area is crucial now, in order to avoid being shut out of federal hydropower for many years, commencing in 2006.

The Legislature has sought to restrict the exercise of eminent domain powers to condemn thermal power plants by two separate statutory restrictions, one applying to PUDs⁵ and the other to municipal utilities.⁶ Since there is no constitutional mandate upon the State to delegate all of the state's inherent eminent domain powers to every potential political subdivision of the state, the legislative limitation upon the use of such power by municipalities to condemn thermal plants is probably lawful.

So, if acquiring thermal power plants by eminent domain is crucial, then the City can join with an existing PUD to create an intergovernmental authority under ORS Chapter 190, which can then exercise the PUD's power under the Constitution to acquire any sort of generating plant by eminent domain. In Multnomah County, there already exist 2 PUDs with this power.

Role of NWNG

Some have speculated that the City may be acting as a stalking horse for Northwest Natural Gas Co. (NWNG), discouraging other potential purchasers now but later stepping aside for NWNG to purchase the assets. We hope this is not the case, although if this occurs the City should impose a tax on NWNG equal to the reduction from the \$2.96 billion price that NWNG had earlier agreed to pay (with upward adjustments for the facts that the earlier deal did not give existing NWNG stockholders full ownership of PGE and actually diluted their ownership in NWNG itself).

GOVERNANCE OF THE NEW PUBLICLY-OWNED UTILITY (POU)

Much has already been said about the need for the City to share governance of the new POU with residents of the PGE service area outside the City's borders.

Achieving this does not require reinventing the wheel or creating new forms of government. If the 5 proposed PUDs (covering the entire PGE service area) are formed by the voters next year, they can join together in an ORS Chapter 190 entity and agree to operate the new system and pay debt service on the bonds that the City would issue in acquiring the PGE assets. The 5 PUDs could also, with voter approval, consolidate themselves into a single PUD, or the Legislature could by statute create a PUD encompassing the entire existing PGE service area.

The advantage of the PUD structure is that it is a known entity; already 8 of them operate in Oregon, including two in Multnomah County. A PUD is democratically

5. ORS 261.250(2): A district shall not exercise its power of eminent domain to acquire a then existing thermal power plant or any part thereof.

6. ORS 225.480(2): A city shall not exercise its power of eminent domain to acquire a then existing thermal power plant or any part thereof.

governed through direct election of commissioners by the electorate within its boundaries.

Another advantage is that the PUD (or group of PUDs) could then issue its own revenue bond and cash out the City's investment, should the City desire to reclaim its money, although this would entail appreciable additional transaction costs.

Alternatively, the City could ask the Legislature to authorize it to include voters residing outside of the City limits in elections for members of a "Portland Electric Board" (PEB) similar in function to the Eugene Water & Electric Board (EWEB). This would eliminate the need for agreements with other government bodies about governance of the new POU. We would not expect any opposition to such a bill. If desired, in the meantime the City could pledge to appoint a PEB board on the basis of a vote-by-mail election conducted through the utility billing envelopes, with each customer entitled to an equal vote, regardless of residence inside or outside of the City.

We most certainly do not agree with any suggestion that there exist a new governance mechanism that includes board members chosen in any way other than direct election by the voters (or, temporarily, by the customers). We recommend against the approach taken by WVP of placing on a board representatives of certain groups, such as CUB and ICNU, however well intentioned those groups may be.

PUBLIC PURPOSES

We believe the City should focus on acquiring the PGE assets and establishing an initial system of governance.

The new POU's commitment to energy conservation, renewable resources, and low-income customer assistance should be determined by the democratically-elected governing board of the new POU, although the City could set guidelines designed to ensure repayment of the City's investment in the assets.

Those guidelines could include requirements for:

1. resource diversity (including renewable resources);
2. significant investment in energy efficiency (due to its reliability, its cost-effectiveness, and its stimulating effect on the local economy); and
3. substantial assistance for low-income customers, including comprehensive whole-house energy efficiency improvements (a field where PGE has an excellent record to date).

COMPENDIUM OF STATUTES

ORS 35.235 Agreement for compensation; status of resolution or ordinance of public condemner; status of action of private condemner; agreement effort not prerequisite.

(1) Subject to ORS 758.015 and 836.050, whenever in the judgment of the condemner it is necessary to acquire property for a purpose for which the condemner is authorized by law to acquire property, the condemner shall, after first declaring by resolution or ordinance such necessity and the purpose for which it is required, attempt to agree with the owner with respect to the compensation to be paid therefor, and the damages, if any, for the taking thereof.

(2) The resolution or ordinance of a public condemner is presumptive evidence of the public necessity of the proposed use, that the property is necessary therefor and that the proposed use, improvement or project is planned or located in a manner which will be most compatible with the greatest public good and the least private injury.

(3) The commencement of an action to condemn property by a private condemner creates a disputable presumption of the necessity of the proposed use, that the property is necessary therefor and that the proposed use, improvement or project is planned or located in a manner which will be most compatible with the greatest public good and the least private injury.

(4) The question of the validity of the disputable presumptions created in subsection (3) of this section, if raised, shall be determined by the court in a summary proceeding prior to trial.

ORS 35.265 Advance deposit by public condemner requiring immediate possession; effect on interest otherwise allowable.

(1) When a public condemner commences an action for the condemnation of property and immediate possession of the property is considered necessary by the public condemner, a fund shall be created in the amount estimated to be the just compensation for the property and placed in the hands of the treasurer of the public condemner for deposit with the clerk of the court wherein the action was commenced, for the use of the defendants in the action.

(2) When the public condemner is a state agency and immediate possession of property is considered necessary by the agency, the agency shall certify to such facts and authorize an advancement out of funds available to the agency of the amount estimated by the agency to be just compensation for the property. Upon such certification and authorization, a warrant shall be drawn in favor of the clerk of the court in the amount authorized.

(3) Upon the deposit in court by the public condemner of the estimated amount of just compensation as provided by subsections (1) and (2) of this section, no interest shall be allowed thereon in any final judgment. [1971 c.741 §10]

ORS 35.275 Advance occupancy by private condemner; hearing; deposit or bond; effect of size of bond or deposit on amount of just compensation.

(1) At any time after an action is commenced to acquire any property, a private condemner may apply to the court for an order to occupy the property to be condemned and to make use of the property for the purposes for which it is being appropriated.

(2) At the hearing on the motion, the court shall determine the reasons for requiring a speedy occupation. The court shall grant the motion if, giving consideration to the public interest involved, it finds that the interests of the owners will be adequately protected. The court may make such provisions or orders as necessary, so that the advance taking or an advance payment, as provided by subsection (3) of this section, will not be prejudicial to either party.

(3)(a) If an order to occupy the property is granted, it may also require the private condemner to deposit with the court either such sum as the court finds reasonable on account of just compensation to be awarded or to deposit a surety bond in an amount and with such surety as the court may approve. The surety bond shall be conditioned to the effect that the private condemner shall pay to the owners of the property just compensation for the property taken or restitution, if any, and costs, disbursements and reasonable attorney fees as finally determined.

(b) After an order to occupy is entered, if it appears necessary in order to protect the interests of the owners of the property, the court at any time may require the private condemner to deposit with the court an additional bond or sum on account of just compensation to be awarded.

(c) Evidence as to the finding of the court regarding the amount of such bond or deposit shall not be admissible at the trial of just compensation. [1971 c.741 §11]

ORS 35.346. Offer to purchase required prior to filing action for condemnation; appraisal; arbitration; when costs and disbursements allowed.

(1) At least 20 days prior to the filing of any action for condemnation of property or any interest therein, the condemner shall make a written offer to the owner or party having an interest to purchase the property or interest, and to pay just compensation therefor and for any compensable damages to remaining property.

(2) The offer shall be accompanied by any written appraisal upon which the condemner relied in establishing the amount of compensation offered. * * *