

August 12, 2005

PUBLIC UTILITY COMMISSION OF OREGON  
ATTN: FILING CENTER  
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PO BOX 2148  
SALEM OR 97308-2148

Re: In the Matter of Portland General Electric Company Petition for a  
Declaratory Ruling Regarding the Application of OAR 860-022-0045  
Docket No. DR 32

Enclosed for filing is the Reply Brief of the City of Portland, Oregon. The Brief has also  
been sent to you via electronic format today.

Very truly yours,

/s/ Benjamin Walters

Benjamin Walters  
Senior Deputy City Attorney

BEW:lw  
Enclosure  
cc: Service List

1 BEFORE THE PUBLIC UTILITY COMMISSION  
2 OF OREGON

3 DR 32

4  
5 In the Matter of PORTLAND GENERAL  
6 ELECTRIC COMPANY Petition for a  
7 Declaratory Ruling Regarding the Application  
8 of OAR 860-022-0045

REPLY BRIEF OF THE CITY OF  
PORTLAND, OREGON

8 **SUMMARY**

9 From 1997 through 2004, PGE routinely included itemized charges for county taxes on  
10 its billings to ratepayers within Multnomah County. During this time period, PGE collected  
11 almost \$1 million per year from Multnomah County ratepayers. However, PGE paid only an  
12 insignificant percentage of these funds as actual tax obligations to Multnomah County. PGE's  
13 collection of funds in excess of its actual tax obligations was not in compliance with the plain  
14 meaning of the Commission's administrative rule.

15 PGE's practice of collecting funds significantly in excess of its actual tax expenses  
16 within Multnomah County significantly tipped any balance of interest toward that of its investor,  
17 Enron, over ratepayers. "[T]he fixing of 'just and reasonable' rates, involves a balancing of the  
18 investor and the consumer interests." *Federal Power Commission v. Hope Natural Gas Co*, 320  
19 US 591, 603, 64 S Ct 281, 88 L Ed 333 (1944). *See also*, ORS 756.040. The Commission  
20 should not condone this flagrant exploitation of its administrative rules.

21 **ARGUMENT**

22 **1. The Commission may simply decline to exercise jurisdiction over this matter and**  
23 **dismiss PGE's petition.**

24 The City agrees with the Utility Reform Project that the doctrine of primary jurisdiction  
25 is not applicable in the context of a utility overcharging its customers. Utility Reform Project  
26 Opening Brief ("URP"), at pp. 9-11; City of Portland Opening Brief, at p. 7, n. 4. The terms of

1 ORS 756.450 clearly give the Commission unrestricted discretion to decline to exercise its  
2 authority to issue a declaratory ruling. An agency’s decision to refuse to give a declaratory  
3 ruling is not reviewable by the Oregon courts. *United Brokers, Inc. v. Department of*  
4 *Agriculture*, 68 Or App 44, 45, 680 P2d 702 (1984). Declining to exercise jurisdiction would not  
5 deny PGE of the opportunity to obtain a ruling on its questions, as the same issues have been  
6 presented to the Multnomah County Circuit Court.  
7

8 **2. The Commission must limit any declaratory rulings in this proceeding to the issues**  
9 **presented by PGE’s petition.**

10 The City agrees with ICNU that the scope of this proceeding is necessarily limited by the  
11 statutory framework. The Commission may only address **PGE’s compliance** with the  
12 Commission’s administrative rule in regard to **PGE’s billings** for amounts in excess of its  
13 Multnomah County business income tax obligations. Opening Brief of the Industrial Customers  
14 of Northwest Utilities, (“ICNU”), at p. 3. The statute narrowly circumscribes the Commission’s  
15 authority to issue declaratory rulings. The Commission may interpret existing policies; it may  
16 not exercise its declaratory ruling authority to develop new policies. Nor does the declaratory  
17 ruling authority encompass factfinding.  
18

19 The declaratory ruling process is not drafted to accommodate  
20 factfinding. If facts are at issue, they must be resolved through the  
21 contested case procedure. The uniform rules on declaratory  
22 rulings are designed to provide petitioners and agencies with an  
expeditious process for determining legal issues -- not factual  
issues.

23 *Forelaws on Bd. v. Energy Facility Siting Council*, 311 Or 350, 359, 811 P2d 636 (1991)  
24 (citation omitted, emphasis in original). If the Commission determines at any point in time that  
25 PGE’s petition involves disputed facts, the petition must be dismissed.  
26

1       **3. PGE’s arguments blur the substantive distinctions between itemizing county taxes**  
2       **and normalizing costs for ratemaking.**

3           PGE notes that the Commission’s administrative rule “create[d] a separate **procedure** for  
4 charges to customers based on a utility’s county tax expenses.” Portland General Electric  
5 Opening Brief (“PGE”), at p. 10 (emphasis in original). PGE admits that the rule requires a  
6 utility to “calculate its local income taxes on an annual basis and charge customers to recover  
7 those amounts.” *PGE*, at p. 10. PGE then incorrectly asserts that the Commission’s rule does  
8 not differ in substance from its ratemaking calculations for projected tax expenses. *Id.*  
9

10           As noted by CUB and ICNU, traditional ratemaking involves a normalization of  
11 projected costs, while the administrative rule allows the utility to itemized county taxes as a  
12 direct pass through to ratepayers. *CUB*, at pp. 3-4; *ICNU*, at p. 10. The ratemaking process is  
13 one of estimates and forecasting and making adjustments of a utility’s estimated future costs by  
14 an estimated tax percentage so that the utility may recover its full allowed rate of return.  
15

16           PGE has elsewhere described the process of calculating future taxes for ratemaking as  
17 follows:

18                   The taxes we pay are part of our ‘cost of service’ and are based on  
19 an allowable rate of return set by the OPUC. Through the  
20 regulatory process, PGE creates a ‘test year,’ or forecast, of its  
21 costs and revenues based on a variety of data points including  
22 historical trends, current economic indicators and forecasted  
23 weather conditions. The amount of PGE’s expected tax obligation  
24 is factored into the forecast. Our expected costs, plus an allowable  
25 rate of return are then added up and divided by the amount of  
26 electricity we assume our customers will use during this period.  
27 This calculation ultimately determines our customers’ rates.<sup>1</sup>

28           The ratemaking process of estimating future tax obligations is completely dissimilar from

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29 <sup>1</sup> PGE 2002 Taxes (April 2003);  
30 [http://www.portlandgeneral.com/about\\_pge/news/archives/tax\\_issues.asp?bhcp=1#opuc](http://www.portlandgeneral.com/about_pge/news/archives/tax_issues.asp?bhcp=1#opuc) (Website visited August 8,  
31 2005).

1 itemizing county taxes. PGE has acknowledged that has the capacity for continuously tracking  
2 its county tax obligations to throughout the year, not merely on a forecasted basis.<sup>2</sup>

3 Not only is the process dissimilar, the rationale is completely different. Itemized taxes  
4 are not an adjustment to the utility’s costs so that the utility earns only an allowed rate of return  
5 adjusted by its marginal tax rates. Instead, the Commission has required utilities to itemize  
6 revenue-raising taxes imposed by counties and cities so that these taxes “are charged only to  
7 customers in the counties and cities that benefit from such taxes.” Petition for Declaratory  
8 Ruling of PGE, at p. 2, n. 2. The rationale articulated by the Commission in promulgating and  
9 defending the itemization rule was widely understood and acknowledged: burdens should follow  
10 benefits. *See, Multnomah County v. Davis*, 35 Or App 521, 527, 581 P2d 968 (1978), *rev den*,  
11 295 Or 73 (1979) (concluding that Commission could rationally determine that county taxes  
12 were “revenue measures generally benefiting county residents and thus should be passed on to  
13 county residents only.”) The Commission has otherwise indicated that its administrative goal is  
14 “that the taxes that affect utilities and their customers should be explicit.” *In re Amendment of*  
15 *OAR 860-022-0040*, AR 329, Order No. 98-125, 1998 Or 107, \*10-\*11 (April 7, 1998).

16  
17  
18 The Commission cannot turn its back on this rationale and conclude that PGE could bill  
19 Multnomah County ratepayers for amounts significantly in excess of its actual tax obligations,  
20 without any connection to the “benefits” enjoyed by the county residents. This outcome was  
21 certainly not anticipated when this rule was first developed. Failure to adhere to this rationale  
22 would constitute the development of a new policy, rather than a clarification of the existing  
23 policy.  
24

25  
26 <sup>2</sup> Declaration of James Murray in Support of Portland General Electric’s Reply of Motions to Dismiss, ¶ 4,  
Multnomah County Circuit Court Case No. No. 0501-00627.

1 PGE’s labeling of the itemized amounts as “taxes” does not mean that these were PGE’s  
2 tax obligations. As noted by ICNU, the actual tax liability for the company is determined by the  
3 county’s tax code. *ICNU*, at pp. 7-8. The Commission itself “has no ability to tax”. *Multnomah*  
4 *County v. Davis*, 35 Or App at 528. Under the plain meaning of the administrative rule, PGE  
5 may not include itemized charges to ratepayers within Multnomah County in amounts that are in  
6 excess of its actual tax obligations.  
7

8 **4. Later adopted “standard” practices identified by PGE cannot alter the meaning of**  
9 **the earlier adopted administrative rule.**

10 PGE argues that the administrative rule should be construed in the light of later  
11 rulemakings and separate ratemaking proceedings. *PGE Memorandum*, at pp. 5-7. PGE argues  
12 that the Commission has accepted stand-alone treatment for income taxes in normalized  
13 ratemaking and that “uniformity” is desirable. *PGE Memorandum*, at p. 12.

14 Once the Commission adopted the administrative rule, it was “as binding on the agency  
15 as if the legislature itself had enacted [the rule]”. *Bronson v. Moonen*, 270 Or 469, 476, 528 P2d  
16 82 (1974). “An agency is not authorized to act contrary to its rules, and those who deal with it  
17 cannot benefit from its doing so.” *Harsh Inv. Corp. v. State*, 88 Or App 151, 157, 744 P2d 588  
18 (1987), *rev den*, 305 Or 273 (1988).

19  
20 It is clear from the language and history of this administrative rule that it was intended to  
21 allow utilities to recover their costs, not to allow utilities to bill county ratepayers for costs that  
22 were never actually incurred. In construction of an administrative rule, words of common use  
23 are to be given their natural, plain and obvious meaning, rather than any curious, narrow or  
24 hidden sense. *Portland Gen. Elec. Co. v. Dept. of Rev.*, 7 OTR 33, 47, 1977 Or 62 (1977).  
25  
26

1 Taxes are imposed when there is an obligation to actually pay them. *ICNU*, at pp. 6-7; *URP*, at  
2 pp. 23-24. In calculating income taxes, there are adjustments in income “above the line” – prior  
3 to the calculation of the income tax – and then “below the line” – after the amount of the tax is  
4 calculated. As *ICNU* points out, it is unreasonable for PGE to assert that the taxes “imposed”  
5 upon the utility were apparently the unadjusted amounts. *ICNU*, at pp. 7-8. If PGE were  
6 operating as a stand-alone company, it certainly could not assert that the county was “imposing”  
7 taxes upon it on the basis of its unadjusted tax calculation. Yet that is what PGE seems to be  
8 arguing in this proceeding.

10 PGE apparently choose to itemize these amounts as “taxes” without seeking a prior  
11 determination from the Commission that this was appropriate. PGE cannot now ask the  
12 Commission to retroactively revise the plain, ordinary meaning of the terms used in the  
13 administrative rule to allow the utility to recover “costs” that it was not otherwise incurring.

15 PGE expresses concern for the theoretical harm to its customers if the expenses of  
16 consolidated subsidiaries were reflected in utility rates. *PGE Memorandum*, at p. 11. PGE’s  
17 apprehensions are disingenuous given the actual financial harms imposed upon ratepayers within  
18 Multnomah County from 1997 through 2004.

20 If the Commission feels compelled to accept PGE’s invitation to indulge in a broader  
21 policy exploration of income taxes, it should acknowledge that other states require a form of  
22 “true-up” for tax benefits realized through consolidation. *See, e.g.*, Illinois Commerce  
23 Commission Section 285.3040, Schedule C-5.1<sup>3</sup>. When the out-of-pocket tax cost of the  
24

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25 <sup>3</sup> : “If the utility is part of an affiliated group of companies and its federal income tax return is filed as part of a  
consolidated federal income tax return, provide statements describing:

- 26 a) The procedure used to allocate the consolidated federal income tax liability;  
b) The benefits, if any, of the consolidated filing of the federal income tax return to the utility; and

1 regulated affiliate is reduced, there is an immediate confrontation with the rate-making principle  
2 that limits cost of service to expenses actually incurred. In setting the “just and reasonable rates”  
3 for PGE, the Commission is fully within its administrative authority to recognize the actual tax  
4 saving impact of a private election to file consolidated returns. *Federal Power Com. v. United*  
5 *Gas Pipe Line Co.*, 386 U.S. 237, 246-247, 18 LEd 2d 18, 87 S Ct 1003 (1967). Simply because  
6  
7 it has chosen not to do so elsewhere does not mean that the Commission is bound to do so in  
8 regard to this particular administrative rule.

9 **5. PGE has not complied with its filed tariffs in billing Multnomah County ratepayers**  
10 **for amounts significantly in excess of its actual tax obligations.**

11 PGE notes that its filed tariff provides that “A separately stated tax adjustment is billed in  
12 any community or area where a governmental authority imposes a tax or assessment in excess of  
13 the limit established by the Commission in OAR 860-022-0040 and 0045.” *PGE Memorandum*,  
14 at p. 3 (citing PUC Oregon No. E-17, Sheet No. E-2, Rule E(1)(D)). PGE fails to discuss the  
15 implications flowing from its tariff filing.  
16

17 Because tariffs are filed as drafted by the utility, they are strictly construed. *See, In re US*  
18 *West Communications, Inc. Rate Schedules for Telecommunications Service*, Order No. 96-128;  
19 UT 128, 1996 Or 108 (May 16, 1996). In that proceeding, the Commission was investigating  
20 complaints from Internet service providers about the utility’s practice of requiring payment of  
21 construction costs in advance of service installations. The Commission concluded that the  
22 utility’s practices were not rationally related to the purposes of the tariff for recovering costs for  
23 commercial construction. In reaching this determination, the Commission held that the utility’s  
24

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25 c) The impact of the benefits, if any, of filing the consolidated federal income tax return on the utility’s books.”  
26 *See also*, SB 408, signed by the Oregon Senate August 4, 2005.



1 tariff “should be interpreted narrowly”. *Id.*, at \*4.

2 In this matter, PGE is a “regulated monopoly imposing its policies on its captured  
3 customers.” *Id.* As in *US West*, PGE “drafted the tariff, which is a contract. Contracts,  
4 generally, are interpreted against the drafter. Strictly interpreting the tariff is important because  
5 [PGE’s] practice seriously disadvantages customers [by requiring payments in excess of PGE’s  
6 actual tax obligations]”. *Id.* As in the *US West* proceeding, the Commission should find that  
7 PGE’s practices were not rationally within the terms of its filed tariff.  
8

9 The rule regarding interpretation of ambiguities against the drafting party “applies with  
10 peculiar force in the case of a contract of adhesion [where] the party of superior bargaining  
11 power not only prescribes the words of the instrument but the party who subscribes to it lacks the  
12 economic strength to change such language.” *Graham v. Scissor-Tail, Inc.*, 28 Cal 3d 807, 820,  
13 623 P2d 165, 172 (Cal., 1981) (citation omitted). PGE’s tariff is a form of contract of adhesion  
14 because there is no negotiating terms of utility service: the terms of the tariff are part and parcel  
15 of the ratepayer taking services from PGE.  
16

17 Where one party chooses the terms of a contract, he is likely to  
18 provide more carefully for the protection of his own interests than  
19 for those of the other party. He is also more likely than the other  
20 party to have reason to know of uncertainties of meaning. Indeed,  
21 he may leave meaning deliberately obscure, intending to decide at  
a later date what meaning to assert. In cases of doubt, therefore, so  
long as other factors are not decisive, there is substantial reason for  
preferring the meaning of the other party.”

22 *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 US 52, 63. (1995) (quoting  
23 Restatement 2d of Contracts, § 206, Comment a).

24 ORS 757.225 requires utilities to collect for services in accordance with filed schedules.  
25 Utility tariffs and regulations “lie[] at the core of the [Commission’s] authority to set adequate  
26 service levels and establish reasonable rates therefor.” *Garrison v. Pacific NW Bell*, 45 Or App

1 523, 531, 608 P2d 1206 (1980) (Noting that OPUC rules limiting a public utility’s liability could  
2 not grant immunity or limit liability for conduct consciously indifferent to or in reckless  
3 disregard of the rights of others.)

4 **6. PGE should repay Multnomah County ratepayers for the millions of dollars it has**  
5 **overcollected as “taxes”.**

6 “[S]ince 1997 and through late 2004, PGE has collected over \$6.9 million from its  
7 customers in Multnomah County by means of [the] “Multnomah County tax” billing adder.  
8 During this same period of 1997-2004, PGE has admitted in discovery . . . that PGE actually paid  
9 in MCBIT a grand total of only \$3,631 (which it paid in 2003).” *URP*, at pp. 1-2. To the extent  
10 that PGE labeled the itemized amounts as county taxes, this amounts to a fraud upon the  
11 ratepayers. *CUB*, at p. 6.

12  
13 In Oregon, the common law elements for action on fraud and deceit were as follows:  
14 “(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity  
15 or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner  
16 reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) his reliance on its truth;  
17 (8) his right to rely thereon; (9) and his consequent and proximate injury.” *Musgrave v. Lucas*,  
18 193 Or 401, 410, 238 P2d 780 (1951) (citations omitted). PGE’s billings to Multnomah County  
19 ratepayers falsely described itemized amounts as county taxes. This characterization was  
20 material, because PGE collected funds from Multnomah County ratepayers in excess of its actual  
21 tax obligations. By describing these amounts to ratepayers as county taxes, PGE misled its  
22 customers to believe that these amounts were actually due to Multnomah County. If a ratepayer  
23 sought to withhold payment of the itemized amounts, PGE could respond by terminating the  
24 ratepayer’s service for failing to pay billed amounts.  
25  
26





1 CERTIFICATE OF SERVICE

2 I hereby certify that I sent the foregoing REPLY BRIEF OF THE CITY OF  
3 PORTLAND, OREGON to:

4 PUBLIC UTILITY COMMISSION OF OREGON  
5 ATTN: FILING CENTER  
6 550 CAPITOL STREET NE – SUITE 215  
7 PO BOX 2148  
8 SALEM OREGON 9708-2148  
9 E-mail: PUC.FilingCenter@state.or.us

10 on the 12<sup>th</sup> day of August, 2005, via e-mail as shown above and by mailing the original and five  
11 copies contained in a sealed envelope with postage paid, and deposited in the post office at  
12 Portland, Oregon on said day.

13 I further certify that on August 12, 2005, the foregoing document was electronically  
14 mailed to all Persons on the attached Service List which is maintained by the Public Utility  
15 Commission for the DR 32 proceeding who have an e-mail address posted.

16 /s/ Benjamin Walters

17 \_\_\_\_\_  
18 Benjamin Walters, OSB #85354  
19 Senior Deputy City Attorney  
20 Of Attorneys for City of Portland  
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**SERVICE LIST – DR 32**

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LOWREY R BROWN  
CITIZENS' UTILITY BOARD OF OREGON  
610 SW BROADWAY, SUITE 308  
PORTLAND OR 97205  
[lowrey@oregoncub.org](mailto:lowrey@oregoncub.org)

JASON EISDORFER  
CITIZENS' UTILITY BOARD OF OREGON  
610 SW BROADWAY STE 308  
PORTLAND OR 97205  
[jason@oregoncub.org](mailto:jason@oregoncub.org)

THOMAS LANNOM  
BUREAU OF LICENSES  
111 SW COLUMBIA, SUITE 600  
PORTLAND OR 97201  
[tlannom@ci.portland.or.us](mailto:tlannom@ci.portland.or.us)

DANIEL W MEEK  
DANIEL W MEEK ATTORNEY AT LAW  
10949 SW 4TH AVE  
PORTLAND OR 97219  
[dan@meek.net](mailto:dan@meek.net)

MATTHEW W PERKINS  
DAVISON VAN CLEVE PC  
333 SW TAYLOR, STE 400  
PORTLAND OR 97204  
[mwp@dvclaw.com](mailto:mwp@dvclaw.com)

DOUGLAS C TINGEY  
PORTLAND GENERAL ELECTRIC  
121 SW SALMON 1WTC13  
PORTLAND OR 97204  
[doug.tingey@pgn.com](mailto:doug.tingey@pgn.com)

KEN LEWIS  
PO BOX 29140  
PORTLAND, OR 97296  
[kl04@mailstation.com](mailto:kl04@mailstation.com)

S BRADLEY VAN CLEVE  
DAVISON VAN CLEVE PC  
333 SW TAYLOR, STE 400  
PORTLAND OR 97204  
[mail@dvclaw.com](mailto:mail@dvclaw.com)

STEPHANIE S. ANDRUS  
DEPARTMENT OF JUSTICE  
REGULATED UTILITY & BUSINESS SECTION  
1162 COURT ST NE  
SALEM OR 97301-4096  
[Stephanie.andrus@state.or.us](mailto:Stephanie.andrus@state.or.us)

LINDA K WILLIAMS  
KAFOURY & MCDUGAL  
10266 SW LANCASTER RD  
PORTLAND OR 97219-6305  
[linda@lindawilliams.net](mailto:linda@lindawilliams.net)

JAMES F. FELL  
STOEL RIVES LLP  
900 SW 5<sup>TH</sup> AVE, SUITE 2600  
PORTLAND OR 97204-1268  
[jffell@stoel.com](mailto:jffell@stoel.com)

GORDON MCDONALD  
PACIFIC POWER & LIGHT  
825 NE MULTNOMAH, SUITE 800  
PORTLAND, OR 97232  
[gordon.mcdonald@pacificcorp.com](mailto:gordon.mcdonald@pacificcorp.com)