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BY E-MAIL AND FIRST CLASS MAIL

PUBLIC UTILITY COMMISSION
ATTN: FILING CENTER
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Re: **Docket UE 180/UE 181/UE 184:** In the Matter of PGE's Request for a General Rate Revision

Dear Filing Center:

Enclosed for filing in the above-referenced matter is an original and five copies of the Reply Brief of the City of Portland, Oregon.

Very truly yours,

Benjamin Walters

Benjamin Walters
Senior Deputy City Attorney

BW:lw
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c: Service List (by e-mail)

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 180/ UE 181/ UE 184

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Request for a General Rate Revision (UE 180), In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Annual Adjustments to Schedule 125 (2007 RVM Filing) (UE 181), In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Request for a General Rate Revision relating to the Port Westward Plant (UE 184).	REPLY BRIEF OF THE CITY OF PORTLAND, OREGON

I. INTRODUCTION

PGE's Opening Brief has mischaracterized the process for weighing evidence submitted into the record in this proceeding. Going last does not lead ineluctably to PGE's prevailing. The Commission must weigh the evidence and decide the more persuasive case. Being final does not make PGE's witnesses right, it just makes them last.

The evidentiary record in this proceeding contains substantial evidence to support the Commission's adoption of a capital cost structure for PGE consisting of 50% common equity, 0.29% preferred stock, and 49.71% long-term. The Commission may adopt capital cost structures where its conclusions are supported by evidence in the administrative record. There is ample evidence in the record supporting the capital cost structure jointly proposed by the Industrial Customers of Northwest Utilities and the Citizens' Utility Board.

The Commission should adopt the three conditions suggested by CUB regarding PGE's recovery of costs associated with Port Westward.

The Commission should ignore PGE's objections and adopt the City's proposals that PGE provide annual reports on practical and prudent tax planning. The Commission should adjust PGE's rate base to account for reasonable and prudent business decisions that PGE and Enron could have taken to provide tax benefits to ratepayers. The City has submitted reliable, probative evidence on issues such as the proposed LLC conversion which PGE has not convincingly controverted. Furthermore, the City asks that deferred income taxes be refunded to ratepayers over the reversal period of the specific temporary differences that created the deferred taxes.

II. ARGUMENT

1. PGE incorrectly identifies who bears the burden of persuasion in a rate case where the utility must show that its proposed rates are "fair, just and reasonable."

In its opening brief, PGE argues that the "City of Portland did not respond to or otherwise attempt to rebut PGE's testimony." Portland General Electric Company's Opening Brief, at 50 (November 17, 2006) ("PGE Opening"). On those narrowest of grounds, PGE asks that the Commission "reject the City of Portland's claims for the unrebutted reasons contained in PGE's testimony." Id. PGE's opening argument is thus limited to asserting that because the utility's

witnesses went last, the Commission must summarily dismiss the City's various proposals. PGE's response confuses having the final word with having met its burden of persuasion.

> In Order No. 01-777, [the Commission] reaffirmed that a utility bears the burden to establish that a proposed rate change is just and reasonable, and stated, 'If [PGE] fails to meet that burden, either because the opposing party presented compelling evidence in opposition to the proposal, or because PGE failed to present compelling information in the first place, then PGE does not prevail.' . . . That use of the word "compelling" was intended to clarify that a utility cannot meet its burden with respect to any proposed rate change merely by presenting unrebutted evidence. Rather, that evidence must be compelling, that is, persuasive. We did not adopt a new standard of proof and reject any implied assertion to the contrary.

In re Oregon Electric Utility Company, LLC, UM 1121, Order No. 05-114, at 17 n. 12, 2005 Ore PUC LEXIS 99, * 39 n. 12, 240 PUR 4th 141 (March 10, 2005) (citations omitted).

PGE's implicit invitation is for the Commission to merely tally up the number of witnesses, instead of weighing the evidence. This would be plainly erroneous. Compare, Martin v. Psychiatric Sec. Review Board, 312 Or 157, 167, 818 P2d 1264 (1991) (agency "does not count the witnesses; it weighs the evidence."). It is within the Commission's sound discretion to weigh the reliability of the testimony, to "[pass] upon the credibility of the witness, the soundness of his judgment, and the existence of the facts upon which his opinion was predicated." Ritter v. Beals, 225 Or 504, 524, 358 P2d 1080 (1961). See, also, Beard v. Montgomery Ward & Co., 215 Kan 343, 348, 524 P2d 1159 (1974) (Evidence which is unreliable need not be weighed, "even if such evidence be uncontradicted."). The Commission is not required to blindly accept PGE's witness conclusions or opinions. Cf., Miller v. Board of Nursing, 115 Or App 84, 87, 836 P2d 749, rev den, 314 Or 727 (1992).

The order in which the evidence is submitted is not determinative in the evaluation of persuasiveness. Even where evidence is wholly uncontroverted a utility can fail to meet is burden of persuasion:

> The only evidence . . . was presented by Cascade. The evidence was not controverted and the witness was not cross-examined. Because of this, Cascade asserts a *prima facie* case for normalized accounting was presented, and there was not evidence to support denial of Cascade's request. The simple answer is the Commissioner, being the fact finder with the task of analyzing the evidence, is free to not regard it as probative. Cascade has the burden of persuasion which the Commissioner determined it had not met.

Cascade Natural Gas Corp. v. Davis, 28 Or App 621, 634, 560 P2d 301, rev den, 279 Or 1 (1977).

The "burden of persuasion" has a very specific meaning:

> '[B]urden of persuasion' means the obligation of a party to produce a particular conviction in the mind of the [Commission] as to the existence or nonexistence of a fact. If the requisite degree of conviction is not achieved, the [Commission] must assume that the fact does not exist. Morgan, Basic Problems of Evidence, 19 (1957); 9 Wigmore, Evidence, §2485 (2d ed 1940); Kirkpatrick, Oregon Evidence, §305.02 (4th Ed 2002). If a trier of fact cannot say in whose favor the evidence weighs more heavily, 'then the factfinder must resolve the evidence question against the party upon whom the burden of evidence rests.'

State v. James, 339 Or 476, 487, 123 P3d 251 (2005).

It is appropriate to consider who should carry the burden of persuasion on basis of access to proof and probabilities. See, e.g., Secretary of State v. Hanover Ins. Co., 242 Or 541, 549, 411 P2d 89 (1966) (surety had burden to show expenditure of funds was in fact for a legitimate purpose within scope of statutory authority). The City should not be required to a search for "a needle in a haystack that is controlled by [PGE]." Id.. See, also, Anderson v. Palmer, 111 Or 137, 144, 224 P 629 (1924) (stating the general rule that "[t]he duty of producing evidence rests upon the party having control of it."); Sorenson v. Kribs, 82 Or 130, 138, 161 P 405 (1916) (It is

"elementary that, when a fact is peculiarly within the knowledge of a party, he must, if necessary, furnish the evidence thereof.")

In this proceeding, PGE controlled the high ground with an insider's knowledge and possession of information. The lead witness in PGE's testimony has been with Portland General Electric since 1980, and has been one of PGE's top management since at least November, 2000. PGE/100/Piro-Lesh/31, lines 6-13 (stating James P. Piro's qualifications). It would be a reasonable conclusion to draw from the evidence that PGE's long-term employees, who held significant positions of responsibility during the period of Enron's ownership, could have offered more probative evidence of management's attempts to undertake reasonable tax planning in favor of ratepayers. PGE failed to provide compelling evidence on these points and others.

In responding to the City's testimony on corporate reorganization to provide favorable tax benefits for ratepayers, PGE's rebuttal did not identify any specifics about what was considered, weighed, evaluated and discarded in terms of options. PGE/1700/Piro-Tamlyn/7-13. Instead, PGE testimony offered speculative conclusions about why Enron and PGE failed to undertake any type of management planning of this kind. PGE did not offer any concrete responses to essential questions posed by City – should the Commission weigh utility tax planning efforts that may provide benefits to ratepayers? Should tax planning merely be undertaken for the benefit of shareholders? Discussion of that point was notably absent from PGE's testimony and briefing. On many of the points raised by the City, PGE offered no compelling or even indicative evidence. Compare, In re Avista Corp., UG 176/UM 1279, Order No. 06-610, App. A at 18, 2006 Ore

PUC LEXIS 494, *35-*36 (October 30, 2006) (ordering investigation to determine if gas company's "aggressive" hedging strategies were contributing to higher supply costs.)[1]

There was no reason for the City to file a response to PGE's rebuttal testimony when PGE's testimony was internally contradictory, or PGE's testimony was not "compelling". For example, PGE argued that the City's proposed LLC conversion would have increased the rate base by approximately $200 million by eliminating deferred income taxes. PGE/1700/Piro-Tamlyn/10, lines 9-13. PGE's rebuttal failed to address the City's proposed adjustment to the tax basis book value. COP/100/Jubb/6-7. Furthermore, "[i]t is clear that if the actual taxes paid on the federal tax returns filed are reduced by increased tax depreciation (lines 1, 2 and 3 of the summary sheet) then the amount refunded to ratepayers (line 13) is increased by the amount exactly. For FAS 109 purposes, the increased tax depreciation is not a temporary difference but a permanent one, so it would flow through to ratepayers." Staff/1900/4. The issue of the burden of the LLC conversion is addressed in greater detail below.

The City's testimony on PGE undertaking tax planning to benefit ratepayers was prompted by the Commission's prior invitation: "While it is not appropriate to take the City's LLC proposal into account in this docket, we may consider a fully developed proposal, substantiated by credible evidence, in a future proceeding." In re Portland General Electric Company, UF 4218/UM 1206, Order No. 06-156, at 8, 2006 Ore PUC LEXIS 140 (April 10, 2006). In this proceeding, the City re-submitted its proposal to provide tax benefits to ratepayers through reasonable business decisions. In response to the Commission's invitation, the City has

[1] See, In re Public Utility Commission of Oregon, UM 1282 (filed October 25, 2006) (initiating investigation to examine Avista Utilities' gas purchasing strategy.)

provided a more detailed proposal in what is otherwise an appropriate proceeding. If this is not the appropriate forum, what would be? If not now, when should it be offered?

The City is not inviting the Commission to engage in 20/20 hindsight. Rather, the City has presented evidence on the record that indicates that PGE is not taking reasonable steps to avoid tax costs otherwise passed through to customers. In determining what portion of a cost should be borne by the customer and what portion should be borne by shareholders, it is appropriate for the Commission to weigh what reasonable steps the utility might have taken to avoid those costs. This is the kind of information that should be considered when the Commission is undertaking to balance the interests of the utility and the ratepayers in determining what are fair and reasonable rates. ORS 756.040(1).

2. The evidence submitted by ICNU and CUB regarding PGE's Cost of Capital provides substantial support for a Commission determination.

a. The Commission may impute a capital cost structure for the utility where its conclusions are supported within the evidentiary record.

The City of Portland joins with ICNU and CUB in urging the Commission to use the weighted cost of capital identified in their testimony and evidence. ICNU-CUB/200/Gorman/9. The City of Portland adopts the arguments presented by ICNU in its opening brief and CUB's opening arguments. Opening Brief of the Industrial Customers of Northwest Utilities, at 34-57 (November 17, 2006) (Redacted Version) ("ICNU Opening"); Opening Brief of the Citizens' Utility Board, at 30-32 (November 17, 2006) ("CUB Opening").

PGE relies upon New England Telephone and Telegraph Company v. Public Utilities Commission, 390 A2d 8, 39 (Maine June 28, 1978) for the proposition that ratepayers must show that PGE's actual capital cost structure is "clearly unreasonable" or that it is "inefficient and unreasonable." PGE Opening, at 16-17. Despite PGE's characterizations, that is not what the

Maine Supreme Court decision stands for. PGE fails to note that the Maine Supreme Court actually decided the unremarkable proposition that an administrative agency must base its determination upon the evidence in the record. The Maine Supreme Court rejected the agency's adjustment to the utility's debt costs on the grounds that the Commission had not properly identified its factual predicate in factoring in double leveraged debt controlled by a minority shareholder interest in an otherwise publicly traded company. New England Telephone, 390 A2d at 42-45.

In remand in that case, the Maine Commission subsequently "reviewed the record and [found] the New England actual capital structure is unreasonable and inefficient for determination of a fair rate of return for the company." New England Telephone & Telegraph Co., 26 PUR 4th 352 (Maine PUC July 28, 1978). In doing so, the Maine Commission rejected the utility's 45 per cent debt and 55 per cent equity in favor of a hypothetical capital structure for the company of 55 per cent debt and 45 per cent equity. The Commission determined that the hypothetical capital structure was supported in the record by evidence provided by a "well-qualified expert witness, who at the time of this case had testified on fair rate of return in nearly 200 cases . . . [This witness provided a] lengthy discussion of the importance of a capital structure that is safe for investors and economical for ratepayers." Id.. See also, Pine Tree Tel. & Tel. Co. v. Public Utilities Commission, 631 A2d 57, 69 (Maine 1993) (affirming Commission order adopting a "hypothetical capital structure" where there was sufficient evidence in the record to support the determination.)

In this case, Mr. Gorman, testifying as a witness on behalf of CUB and ICNU, has provided persuasive testimony regarding CUB and ICNU's proposed capital cost structure. ICNU-CUB/300/Gorman/7-14; ICNU-CUB/319/Gorman/1-5. Mr. Gorman is exceptionally

qualified as a witness on this issue. ICNU-CUB/301/Gorman. Taken as a whole, Mr. Gorman's testimony provides ample support for determining that ICNU and CUB's joint proposal would achieve a balanced capital structure fair and reasonable for both investors and ratepayers.

b. Regulatory Commissions have frequently adopted imputed capital structures in setting utility rates.

The adoption of a hypothetical capital structure has been approved in numerous other utility rate proceedings. In the case of Central Maine Power Co. v. Public Utilities Commission, 405 A2d 153 (Maine 1979), the Maine Supreme Court affirmed the agency's adoption of a capital structure containing 35% common equity, over the utility's "actual" equity ratio of 36.6% as "unreasonable and inefficient" as it "provide[d] an excessive and unnecessary margin of safety which is being financed by ratepayers." Id., 405 A2d at 179.

In Carnegie Natural Gas Co. v. Pennsylvania Public Utility Commission, 61 Pa Cmwlth 436, 440-41, 433 A2d 938, 940-41 (1981), the appellate court affirmed the agency's use of a hypothetical capital structure. The court held that "[w]here a utility's actual capital structure is too heavily weighted on either the debt or equity side, the commission, which is responsible for determining a capital structure which allocates the cost of debt and equity in their proper proportions, must make adjustments to the utility's capital structure." Id., 433 A2d at 439 (citation omitted.) The court also rejected the utility's contention that the agency "must show actual harm before it may impose a hypothetical capital structure." Id., 433 A2d at 440-41. See, also, T.W. Phillips Gas and Oil Co. v. Pennsylvania Public Utility Com'n, 81 Pa Cmwlth 205, 211-12, 474 A2d 355, 359 (1984) (affirming adoption of hypothetical capital structure composed of 55% debt and 45% common equity over utility's actual capital structure of 39.9% debt and 60.1% common equity, as supported by evidence in record); In re West Service Corp., 1998 WL

698372, *17 (Connecticut DPUC July 23, 1998) (slip opinion) ("It is the Department's practice to encourage companies to target an optimal capital structure that employs debt and equity such that the overall weighted average cost of capital is minimized.")

In C&P Telephone Co. of Maryland v. PSC, 230 Md 395, 187 A2d 475 (1962), the utility challenged the authority of the Commission to approve a tax adjustment in a rate case, which effectively imputed a different capital structure than the utility's actual cost structure. The utility challenged the agency's determination, arguing that it had invaded the prerogatives of "sound, honest and competent management", and that the Commission could only make such an adjustment on a finding of "abuse of discretion, bad faith or wastefulness." Id., 230 Md. at 412, 187 A2d at 484. The court upheld the agency, rejecting the utility argument in stating, "[t]he owners and managers of the Company have the right to determine what its debt-equity ratio should be, but they may not always make the ratepayers foot the bill resulting from the choice." Id., 230 Md. at 413, 187 A2d at 484. See, also, In re Chesapeake and Potomac Telephone Co. of Maryland, 76 Md PSC 238 (May 29, 1985) ("The legality of using a hypothetical capital structure for revenue requirement purposes is so well established that we need not address it further."); State ex rel. Utilities Commission v. General Tel. Co. of Southeast, 281 NC 318, 341, 189 SE2d 705 720 (1972) ("The choice of the appropriate debt-equity ratio is a management decision, but the board of directors may not thereby tie the hands of the Commission and compel it to approve rates for service higher than would be appropriate for a reasonably balanced capital structure.")

The Oregon Public Utility Commission has itself approved capital cost structures that are not "actual", where the evidentiary record supported the determination:

> Continental Telephone Company of the Northwest, Inc., raises necessary capital by sale of equity securities and by debt issues; i.e., borrowing. At the end of the test year, the company's capital structure consisted of 53.28 per cent long-term debt,

> 4.29 per cent preferred stock, and 42.43 per cent common equity. The company urged adoption of an optimum capital structure of 55 per cent debt, composed of 5 per cent preferred stock and 40 per cent common equity. The staff concurred and the company's optimum capital structure is adopted.

Continental Telephone Co. of the Northwest, Inc., No. UF-3162, Order No. 76-061, 12 PUR 4th 535 (January 24, 1976).

c. There is ample evidence in the record of this proceeding that supports the capital cost structure proposed by the ratepayer groups.

ICNU and CUB have submitted evidence in the record that the Commission may rely upon as reliable and probative in support of their proposed capital cost structure: "The Company's projected capital structure is overweighted with common equity and therefore is too expensive and unreasonable for rate setting purposes." ICNU-CUB 300/Gorman/1, lines 21-23. In counter-argument, PGE makes vague references to concerns over increased volatility in earnings necessitating higher equity return. In support of these vague concerns, PGE cites to legislative mandates and judicial decisions. PGE 2700/Hager – Valach/6, lines 9-11. The City agrees with the points noted in

> The one Oregon-specific issue that PGE identifies is SB 408. Even assuming that PGE can legitimately consider complying with Oregon law a 'risk,' PGE has not quantified that risk or demonstrated how it impacts required returns. ICNU-CUB/319 Gorman/3, lines 15-19. In fact, PGE has stated publicly that SB 408 will not have as significant an impact now that Enron no longer owns the Company. Ted Sickinger, "Tax filings show refund potential," The Oregonian, Oct. 17, 2006.

ICNU's Opening, at 55.

The only other electric utility that must comply with SB 408 is PacifiCorp, and PacifiCorp's authorized capital structure does not resemble PGE's requests. ICNU-CUB/300/Gorman/11. As the only cost of capital decisions for an Oregon electric utility

since SB 408 was passed, these decisions do not indicate that a higher ROE or equity ratio is necessary to compensate for the "risk" of complying with the law."

PGE has separately indicated to ratings analysts that it will respond to SB 408 by taking action in the 2007 legislative session. Staff/1925/Morgan/25. The Commission should not make decisions in anticipation of the Oregon Legislature acting to perhaps adjust the "legislative mandate" that PGE is complaining about.

PGE also mentions a recent Oregon Supreme Court case, indicating that the court's holding had increased "financial risks" for the company. PGE's materials do not identify the specific court decision that is the source of these recent concerns. Again, PGE has not provided any quantification associated with the company's "fears". The failure to both identify the specific case, so that other parties may begin to analyze the basis for PGE's concerns, and to provide a specific quantification of the associated risks, is sufficient basis for the Commission to reject PGE's arguments.

PGE's reference may be to the Oregon Supreme Court's recent decision in Dreyer v. Portland General Electric, 341 Or 262, 142 P3d 1010 (2006), handed down in August of this year. If that is the case, there are other reasons for rejecting PGE's arguments. As the Oregon Supreme Court noted, the underlying dispute that was addressed in that mandamus case can be traced back to 1993. In the end, the court determined that the dispute needed to be returned to the Commission for determinations as to:

> what, if any, remedy it can offer to PGE ratepayers, through rate reductions or refunds, for the amounts that PGE collected in violation of ORS 757.355 (1993) between April 1995 and October 2000. If the PUC determines that it can provide a remedy to ratepayers, then the present actions may become moot in whole or in part. If, on the other hand, the PUC determines that it cannot provide a remedy, and that decision becomes final, then the court system may have a role to play. Certainly, after the PUC has made its ruling, plaintiffs will retain the right to return

> to the circuit court for disposition of whatever issues remain unresolved, including the question of a fee award.

Dreyer, 341 Or at 286.

If past events are any indication, the eventual outcome of this dispute could be a decade away. This is significantly remote to the test year. Even if the final determination is arrived sooner, what that outcome may be is mere speculation at best. To the extent that there is regulatory risk associated with this dispute, there is no evidence in the record as to what the specific risks are, and how the risks should be shouldered between shareholders and ratepayers. PGE offers no explanation at this time as to why ratepayers should now pick up the costs associated with this "additional" risk, if indeed there really is any risk at all.

The City of Portland agrees with ICNU and CUB that PGE's proposed debt-equity ratio contains too much equity and insufficient debt, resulting in an inflated rate of return. ICNU-CUB/200/Gorman/9-14. PGE itself sponsored evidence suggesting that its proposed mix of debt and equity is "too rich": "PGE's own witnesses relied on proxy groups with capital structures with common equity ratios in the range of 45% to 52% or lower." ICNU-CUB 300/Gorman/12, lines 5-6.

3. The Commission should adopt CUB's proposed conditions for PGE's recovery of costs associated with Port Westward.

The City of Portland supports CUB's recommendations that OPUC impose three conditions on PGE's recovery of Port Westward costs. CUB Opening, at 26-27. The Commission's consideration of individual resource proposals can not, and should not, occur in a vacuum. The City of Portland agrees with CUB's argument that renewable energy resources must be brought on-line in a balanced fashion, commensurate with the priorities otherwise seemingly given to fossil fuel plants. Otherwise, the Commission's consideration and approval of

utility integrated resource plans will have little meaning, amounting to a hollow gesture. CUB Opening, at 21-24. A balance between non-renewable resource generation and renewable resources can only be achieved if the Commission acts in accordance with the plans that it has previously considered and approved. To act otherwise borders on arbitrary and capricious abandonment of previously adopted positions. As the Commission has previously acknowledged, PGE should be held to obtaining a result in which "the mix of options [] yields, for society over the long run, the best combination of expected costs and variance of costs." In re Portland General Electric Company, LC 33, Order No. 04-375, p. 12, quoting OPUC Order No. 89-507, p. 2. For now, the piecemeal approach that PGE is proposed is not resulting in a "mix of options" that will yield anything other than incremental, piecemeal development of non-renewable resources. The conditions proposed by CUB should be adopted to assure that a reasonable balance of resource development occurs.

4. PGE's objections to Portland's various proposals are unsubstantiated under Oregon law, or are contradictory to the facts.

a. Oregon law allows for the seamless conversion by a corporation to a limited liability company, and could have been no more complex than the various other attempts to sell PGE or issue "new" common stock.

In its rebuttal testimony, PGE argued that it would have incurred "substantial legal costs" in having legal counsel review PGE's existing, outstanding contracts and debt instruments to determine if they would allow liquidation and reincorporation of the company. PGE/1700/Piro-Tamlyn/7, lines 10-12, and at 14, lines 18-23. However, PGE fails to note that the Oregon Limited Liability Company Act allows a private corporation to be converted into a limited liability company, while continuing the existence of the business entity without alteration. The statute provides that title to all real estate and other property is vested in the converted business entity

without reversion or impairment, and all obligations of the converting business entity, whether contractual, statutory, or administrative, are automatically obligations of the converted business entity. ORS 63.479(1)(a)–(c).

In Darnet Realty Associates, LLC v. 136 East 56th Street Owners, Inc., 153 F3d 21 (2d Cir 1998), the court held that an LLC was the same entity as the converted partnership. In C & J Builders and Remodelers, LLC v. Geisenheimer, 249 Conn 415, 733 A2d 193 (1999), the court noted that the conversion statute's purpose was to facilitate a seamless transition between the prior business partnership and the successor limited liability company. See, also, Purina Mills, L.L.C. v. Less, 295 F Supp 2d 1017 (ND Iowa 2003) (LLC that converted from corporation while contract was in effect was proper party to bring litigation on contract); Shoreline Care Ltd. Partnership v. Jansen & Rogan Consulting Engineers, P.C., 2002 WL 180886 (Conn Super Ct 2002) (LLC had standing to institute litigation in converted limited partnership's name).

PGE's testimony also fails to describe how the LLC conversion analysis would have been different than the multiple transactional reviews undertaken for the utility during the short times span from 2000 through 2005. There was the proposed sale of PGE to Sierra Pacific in 2000. Application of Sierra Pacific Resources to Acquire Portland General Electric Company, UM 967 in 2000 (filed January 18, 2000.) Does PGE assert that its lawyers did not undertake to examine the effect of this transaction on existing contracts, debt instruments and bonds? After approval of the application by the Commission, the transaction was terminated by the buyer and seller on April 26, 2001. In 2001, Northwest Natural Gas filed an application to acquire PGE. Application of Northwest Natural Holdco and Northwest Natural Gas Company to Exercise Substantial Influence Over Portland General Electric Company, UM 1045 (filed November 11, 2001 and dismissed without prejudice May 31, 2002). There is no basis for assuming that legal counsel

would did not undertaken a review of existing contracts, debt instruments and bonds in that transaction. In 2004, Oregon Electric Utility Company, LLC sought to acquire PGE. Application of Oregon Electric Utility Company, LLC to Acquire Portland General Electric Company, UM 1121 (filed March 8, 2004 and denied March 10, 2005). Once more, it would strain credulity to believe that legal counsel did not thoroughly review the impact of the proposed transaction upon existing contracts, debt instruments and bonds. PGE can not reasonably suggest that the conversion to an LLC is somehow more complex, or qualitatively different, than the serial marketing efforts undertaken by Enron. Given the Oregon statute on succession to assets and liabilities, a conversion would have otherwise been seamless.

PGE also implied that somehow the conversion to an LLC would have been subject to some heightened level of scrutiny by other regulatory agencies. PGE/1700/Piro-Tamlyn/7, lines 14-18. These concerns did not seem to serve as a distraction in Enron's placing PGE on the sales block multiple times. For example, these multiple reviews did not seem to have presented any difficulties in the recent joint application from PGE and Stephen Forbes Cooper, LLC for the issuance and distribution of 65,000,000 new shares of common stock in PGE. In re Application of Portland General Electric Company for an Order Authorizing the Issuance of 62,500,000 Shares of New Common Stock, UF 4218/UM 1206 (filed June 17, 2005) (noting that the utility, the LLC and Enron would file any necessary applications with the Securities and Exchange Commission, the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, the Federal Communications Commission and the Oregon Energy Facilities Siting Council.) These applications apparently met with little more than regulatory indifference. There is no basis for concluding that distribution of LLC membership interests would have presented any more significant administrative hurdles.

PGE argued that the City's proposed transaction would have presented a "time-consuming" distraction. PGE/1700/Piro-Tamlyn/14, lines 12. In December 2001, Enron, along with several of its corporate subsidiaries, filed for bankruptcy reorganization under Chapter 11 of the federal Bankruptcy Code. In re Enron Corp., Case No. 01-16034 (AJG), US Bankruptcy Court (SD NY). Following that filing, Enron went through two failed attempts to sell PGE and then developed a unprecedented scheme to issue 65,000,000 shares of "new" common stock in PGE. Given resources devoted to these efforts, it again strains credulity to assert that the City's proposal would have been any more "unusual and risky". PGE/1700/Piro-Tamlyn/14, lines 20-23.

There is perhaps a more plausible reason for PGE to exhibit such reluctance to pursue the reorganization proposal offered by the City. "A regular corporation can be preferable to an LLC when a public offering of equity interests or a tax-free merger or similar reorganization with another corporation is likely. "[Venture] capital firms have shown reluctance to invest in LLCs and have historically preferred businesses organized as regular corporations." David Culpepper, "Limited Liability Companies", ADVISING OREGON BUSINESSES, § 7.3, p. 7-6 (Oregon State Bar 2001 Edition). Thus, it seems that PGE may have been more motivated with preserving the opportunity for resale than in providing tax benefits to ratepayers.

b. PGE's indifference to the flow of "taxes" – whether to the government or refunded to the ratepayers if overcollected – is the basis of the City's request for prudent tax planning.

The City's point in suggesting that PGE engage in prudent tax planning was not based upon concerns that PGE will have "an incentive to pay more money to the government to avoid paying money to customers." 1700/Piro-Tamlyn/4, lines 21-22. Rather, the City's proposal is based upon economic realism: that PGE will be indifferent to which direction revenues flow

because either way the money will not go to PGE. Before PGE had the incentive to serve the interests of its sole corporate owner by maximizing revenues returned to Enron. Under SB 408, PGE will either have to pay money back to the ratepayers or pay it to the government. It is the fact of this likely indifference that is the focus of Mr. Jubb's concerns.

PGE asserts that the City has not provided any evidence that PGE has "failed in the past to engage in prudent and practical tax planning." PGE/1700/Piro-Tamlyn/6. PGE's failure to engage in tax planning that might benefit ratepayers can be quantified at a specific amount: $717 million. COP/100/Jubb/12, lines 4-13. From 1997 through 2006, PGE demonstrated superior capabilities in developing strategies for sending tax revenues to Enron as the utility's corporate owner. PGE's Surrebuttal testimony did not respond at all to this point.

PGE referred to UM 1186, in which it sought to defer Oregon state income tax credits relating to the fuel storage installation at the Trojan Nuclear Plant. On closer examination this does not serve as an example of PGE's selfless acts to benefit ratepayers. As noted in the Order No. 06-117 (February 17, 2006), PGE's customers paid for the fuel storage installation facility through annual payments of over $14 million. PGE's "sole purpose" was not to return value to its customers. Instead, the income tax credits were deposited into a sinking fund to repay the ratepayers for their capital contributions to the construction of the installation facilities. Order No. 06-117, App. A, page 2. This evidence does not compel any conclusion that PGE is undertaking to engage in prudent tax planning for the benefit of customers.

PGE argued that it would not be appropriate not appropriate to include any adjustment to PGE's revenue requirement as a result of SB 408/AR 499. PGE/200/Tooman-Tinker/12. However, income taxes are not an inconsiderable expense for the utility: PGE's evidence indicated that income taxes comprise 9% of its 2007 Test Year revenue requirements. PGE

200/Tooman-Tinker /4. PGE's rebuttal testimony argued that "SB 408 did not change PGE's basic incentive with regard to tax planning." PGE/1700/Piro-Tamlyn/4, line 3. PGE's otherwise argued that things had changed significantly as a result of SB 408: "Decreases from forecasted test year cost to actual cost trigger surcharges to customers; increases trigger refunds." PGE/2400/Lesh/23, lines 14-17 (asking that the Commission address the "double whammy" effect of SB 408).

In the end, it is unclear what PGE is advocating for. On the one hand, PGE has argued that the City's concerns about SB 408 reducing the utility's incentives to engage in tax planning were "not logical". PGE/1700/Piro-Tamlyn/4. On the other hand, PGE has noted that it will seek recovery of any tax costs above those allowed in this rate proceeding through surcharges for ratepayers. PGE/2400/Lesh/23. It is in the hopes of avoiding such ratepayer surcharges that the City has asked that PGE engage in prudent tax planning. Given the strength of PGE's rejection of the City's reasonable request for prudent tax planning, it seems that surcharges are all but inevitable.

CONCLUSION

For the reasons stated above, the City of Portland recommends that the Commission:

- Adopt ICNU and CUB's joint proposal for a capital cost structure of 50% common equity, 0.29% preferred stock, and 49.71% long-term.
- Impose CUB's three proposed conditions upon PGE's recovery of costs associated with Port Westward.
- Require PGE to provide annual reports of efforts that it has undertaken for practical and prudent tax planning undertaken to minimize its payable income tax burden.

- Consider as a comparator in determining PGE's rate base an adjustment for reasonable and prudent business decisions that PGE and Enron could have taken to provide tax benefits to PGE's ratepayers.
- Income taxes previously reflected in PGE's rates as deferred taxes on the PGE balance sheet as of January 1, 2006 should be refunded as billing credits to ratepayers in order to avoid double charging ratepayers for those taxes when the temporary differences that created the deferred tax liabilities reverse and become currently payable income tax liabilities.

DATED this 1st day of December, 2006.

/s/ Benjamin Walters

Benjamin Walters, OSB #85354
Senior Deputy City Attorney
Of Attorneys for City of Portland

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2006, I mailed an original and five copies of the foregoing REPLY BRIEF OF THE CITY OF PORTLAND, OREGON to:

PUBLIC UTILITY COMMISSION OF OREGON
ATTENTION: FILING CENTER
550 CAPITOL ST., NE., SUITE 215
PO BOX 2148
SALEM, OR 97308-2148

and on December 1, 2006, I hereby certify that the foregoing document was electronically mailed to all Persons on the Service List maintained by the Public Utility Commission for the related UE 180, UE 181 and UE 184 proceedings who had an e-mail address posted. I further certify that for those persons on the Service List who were not identified as having an e-mail address, a copy was sent by first class mail, contained in a sealed envelope, with postage paid, and deposited in the post office at Portland, Oregon on said day.

/s/ Benjamin Walters
Benjamin Walters, OSB #85354
Senior Deputy City Attorney
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