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September 15, 2006

OREGON PUBLIC UTILITY COMMISSION
ATTN: FILING CENTER
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Re: UM 1262

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of the City of Portland's Response to Portland General Electric Company's Motion for Summary Judgment and the Declarations of David R. Jubb and Benjamin Walters in support. These documents are being filed electronically pursuant the Commission's eFiling policy to PUC.FilingCenter@state.or.us, with copies to all parties on the service list via the U.S. Postal Service.

Very truly yours,

Benjamin Walters

Benjamin Walters
Senior Deputy City Attorney

BW:CJ
c. Service List

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1262

CITY OF PORTLAND, Complainant, vs. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation, Defendant.	CITY OF PORTLAND'S RESPONSE TO PORTLAND GENERAL ELECTRIC'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

Portland General Electric has filed a motion for summary judgment against the City of Portland's third claim in this proceeding. The City of Portland opposes PGE's motion. The City's opposition is set forth below, as supported by the accompanying Declaration of David R. Jubb and the Declaration of Benjamin Walters.

PGE's motion for summary judgment should be denied. There are material facts at issue in this proceeding. The law does not favor the position advocated by PGE. Thus, PGE is not entitled to judgment as a matter of law. Separately, the City of Portland should be afforded an adequate opportunity to engage in discovery in this proceeding in regard to its remaining claim in order to develop a full factual record to inform the Commission's determination.

II. Summary Judgment Standard

The Oregon Public Utility Commission has adopted the Oregon Rules of Civil Procedure as generally governing its proceedings. OAR 860-011-0000(3).

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ORCP 47C. As noted by the Oregon Supreme Court, that standard is met only when "no objectively reasonable juror could return a

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verdict for the adverse party on the matter that is the subject of the motion for summary judgment." *Robinson v. Lamb's Wilsonville Thriftway*, 332 Or 453, 455 (Or. 2001) (citations omitted). In summary judgment, the record is viewed in the light most favorable to the party opposing the motion, "even as to those issues upon which the opposing party would have the trial burden." *Seeborg v. General Motors Corporation*, 284 Or 695, 699, 588 P2d 1100 (1978); *Metro One Telecommunications, Inc.*, IC 1, Order No. 02-126, 2002 Ore. PUC LEXIS 29, *3 - *4 (February 28, 2002).

III. Statement of Facts

A. Undisputed Material Facts

1. Enron Corp. ("Enron") acquired PGE on or about July 2, 1997. *PGE Motion for Summary Judgment*, p. 2.

2. PGE was a member of Enron's consolidated tax group from July 2, 1997, until May 7, 2001, and from December 24, 2002, until April 3, 2006, during which times Enron filed consolidated federal and state income tax returns for itself and its subsidiaries. *PGE Motion for Summary Judgment*, p. 2.

3. In December 2002, PGE and Enron entered into the Tax Allocation Agreement attached as Exhibit 1 to the Declaration of Pamela G. Lesh. *PGE Motion for Summary Judgment*, p. 2.

4. In part, the Tax Allocation Agreement served to formalize the parties' understandings regarding who was responsible for filing tax returns and how tax liabilities were internally allocated and tracked as to individual affiliates. *PGE Motion for Summary Judgment*, p. 2.

5. Under the Tax Allocation Agreement, Enron agreed, among other things, to prepare and file federal and state consolidated income tax returns on behalf of PGE, to make income tax elections on behalf of PGE, to adopt accounting methods on behalf of PGE, to file claims for refunds or credits on behalf of PGE, and to manage audits and other administrative

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proceedings conducted by the taxing authorities. Tax Allocation Agreement, § 2.1(c), Lesh Declaration, Ex. 1, p. 7.

6. Under the Tax Allocation Agreement, PGE agreed that it would compensate Enron for the use of "net operating losses and/or tax credits." Tax Allocation Agreement, § 3.2(a), Lesh Declaration, Ex. 1, p. 8.

7. Under generally accepted accounting principals, net operating losses are considered corporate assets and are entered into financial books and records as with other property. Declaration of David R. Jubb, ¶ 6.

8. The Tax Allocation Agreement terminated on April 3, 2006. *PGE Motion for Summary Judgment*, p. 2. However, as part of the "tail end" of PGE's participation in the Tax Allocation Agreement, PGE made a payment of $25 million to Enron on December 31, 2005, and then made another payment of $17 million in April 2006. Declaration of David R. Jubb, ¶ 15.

9. All in all, PGE made payments to Enron based on estimates of taxes owed during the time period from 1997 through April 2006 of roughly $697 million dollars. Declaration of David R. Jubb, ¶ 14-15.

10. During the period between July 1997 through December 2005, PGE issued dividends to Enron as its sole shareholder of approximately $416 million. Declaration of David R. Jubb, ¶17.

B. Disputed Material Facts And Inferences From Facts

1. The City of Portland disputes PGE's assertion that the Tax Allocation Agreement only involved inter-company accounting, and did not involve the transfer of property for compensation. As a practical matter, assets (net operating losses) of Enron's financially unsuccessful subsidiaries were transferred to PGE. In turn, PGE pledged to compensate the other firms for those NOLs. Tax Allocation Agreement, § 3.2(a), Lesh Declaration, Ex. 1, p. 8. See Declaration of David R. Jubb, ¶¶ 6-7.

2. The City would assert that the more proper inference from the *uncontested* facts is

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well described by City's declarant David Jubb, ¶¶ 7, 9:

> Under the Tax Allocation Agreement * * * the NOLs owned by Enron were assets * * * that PGE was allowed to use. In return, PGE agreed to pay Enron compensation for the use of its NOL. * * * PGE's "use" of the Enron NOL in this context was to consume it in the same way "goods" or "property" are consumed. * * * The Agreement allowed Enron to convert tax losses it manufactured through "paper transactions," otherwise only valuable for offsetting its unlikely future profits, into cash through sales of the NOLs to PGE. * * * In essence, the Agreement served to allow Enron as PGE's holding company to obtain PGE cash in excess of PGE regularly declared dividends.

The Commission should not dispose of the City's complaint unless and until it determines which characterization of the Agreement and its practical effects is proper: PGE's or the City's.

IV. Argument

A. ORS 757.495(2) Requires The Commission To Review The Tax Allocation Agreement Between PGE And Enron.

There are two distinct requirements under ORS 757.495 regarding the Commission's responsibilities for reviewing contracts between public utilities and affiliated interests.[1] The City here will focus on one of those requirements: ORS 757.495(2) requires that utilities provide the Commission with a copy of:

> any contract, oral or written, with any person or corporation having an affiliated interest relating to the construction, operation, maintenance, leasing or use of the property of such public utility in Oregon, or the purchase of property, materials, or supplies, which shall be recognized as the basis of an operating expense or capital expenditure in any rate valuation or other hearing or proceeding….

Once it receives a copy of such a contract, the PUC must evaluate the contract and may approve it as fair and reasonable or disapprove it as unfair. ORS 757.495(3). Even if the PUC takes no action within 90 days, the contract is not automatically "approved" for unquestioned use in rate hearings or any other proceedings in the future. While the PUC may not refuse to honor

[1]Enron was the owner of 100% of PGE's stock. Lesh Declaration, Ex. 1, p. 1. There is no dispute that Enron and its subsidiaries were "affiliated interests" of Portland General Electric as defined under ORS 757.015. PGE makes no contention of this in its motion for summary judgment.

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an un-reviewed contract simply because it was not "approved," the PUC retains the authority to consider the propriety of the contract during subsequent proceedings. ORS 757.495(4).

B. The Tax Allocation Agreement Involved The Purchase Or Use Of Property

Because the statute contains no definition of the terms "property" or "purchase," their standard meanings should be used.[2] The dictionary definition of property includes something that is or may be owned or possessed, a valuable right or interest or a source or element of wealth, something to which a person has legal title. *Webster's Third New Int'l Dictionary*, 1818 (unabridged ed 1993). "Purchase" means to get into one's possession; to obtain by paying money or its equivalent; to obtain by an outlay. *Webster's Third New Int'l Dictionary*, 1844 (unabridged ed 1993).

Under the Agreement, PGE agreed to compensate Enron for the use of "net operating losses and/or tax credits." Undisputed Fact No. 6; Tax Allocation Agreement, § 3.2(a), Lesh Declaration, Ex. 1, p. 8. Enron's NOLs constitute a form of intangible property, a right that is capable of transfer, that created present value for Enron. Jubb Declaration, ¶ 9. Under generally accepted accounting principals, followed by PGE, NOLs and tax credits are treated as assets. Undisputed Fact No. 7. Thus, the acquisition of the NOLs by PGE was a form of purchasing property by the public utility from an affiliated interest.

This conclusion is supported by cases interpreting the State's property tax statutes. "Property," as defined in ORS 308.510(1),[3] includes intangible rights for the use of property.

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[2] The plain, ordinary meaning of statutory terms is determined by reference to Webster's dictionary. *See, Mabon v. Myers*, 332 Or 633, 644, 33 P3d 988 (2001); *Generaux v. Dobyns*, 205 Or App 183, 134 P3d 983 (2006).

[3] ORS 308.510(1) defines property to "include[] all property, real and personal, tangible and intangible, used or held by a company as owner, occupant, lessee or otherwise, for or in use in the performance or maintenance of a business or service or in a sale of any commodity, . . . , whether or not such activity is pursuant to any franchise, and includes but is not limited to the lands and buildings, rights of way, roadbed, water powers, vehicles, cars, rolling stock, tracks, wagons, horses, office furniture, telegraph, telephone and transmission lines, poles, wires, conduits, switchboards, machinery, appliances, appurtenances, docks, watercraft irrespective of the place of registry or enrollment, merchandise, inventories, tools, equipment, machinery, franchises and special franchises, work in progress and all other goods or chattels. "Property" does not include items of intangible property that represent claims on other property including money at interest, bonds, notes, claims, demands and all other evidences of indebtedness, secured or unsecured, including notes, bonds or certificates secured by mortgages, and all shares of stock in corporations, joint stock companies or associations."

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Portland Gen. Elec. Co. v. State Tax Comm'n, 249 Or 239, 437 P2d 827 (1968) (use of tribal land); *Pacificorp Power Mktg., Inc. v. Dep't of Revenue*, 340 Or 204, 131 P3d 725 (2006) (contract rights). *See also, Pacific Northwest Bell Telephone Co. v. Katz*, 121 Or App 48, 53, 853 P2d 1346, rev den, 318 Or 25 (1993) (business and customer lists). In the *Pacific Northwest Bell* case, the telephone utility attacked the Commission's determination that telephone directories and business and customer lists were a form of property subject to the Commission's jurisdiction. The utility argued that the lists and directories were not a form of property, and that any use of the lists and directories by the utility was merely exploiting a business opportunity. The court rejected the utility's arguments because its use of the property had resulted in an increase in value, which the utility then sought to redirect to a non-regulated affiliated entity.

In the instant case, whether it is called a Tax Allocation Agreement or something else, PGE "obtained" the value of the NOLs by paying Enron for the beneficial use of those rights. Undisputed Facts Nos. 6-7. PGE "purchased" Enron's offsetting "property," creating "value" for the utility. In doing so, PGE avoided federal and state income tax obligations and Enron pocketed millions of dollars in cash. Jubb Declaration, ¶¶ 14-16.

Therefore, PGE's first argument against the City's complaint must fail. PGE says that there was no use or purchase of property under the Tax Allocation Agreement, so it did not have to be filed with the Commission. But the reality is to the contrary. Or, at a minimum, there is a dispute as to the reality under the facts thus far revealed. To say, as does PGE, that there was no transfer of property ignores the reality of the transaction. At a minimum, the City's complaint should not be dismissed and discovery should commence to inquire further into the Agreement.

In summary judgment, the record must be viewed in a light most favorable to the non-moving party. *Metro One Telecommunications*, *supra*. If there is any ambiguity in the meaning of the contract language, than there is a factual dispute and summary judgment would be

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inappropriate at this time.[4] *Interstate Fire v. Archdiocese of Portland*, 318 Or. 110, 118, 864 P.2d 346 (1993) (award of summary judgment inappropriate if ambiguity in meaning of insurance policy left factual issue). Interpretation of the contract language, and its potential meaning, must be made in a light most favorable to the City.

C. Only Further Investigation Can Show Whether The Tax Allocation Arrangements Should Have Been Recognized As The Basis Of An Operating Expense Or Capital Expenditure

PGE also argues the City's complaint should be dismissed because, *as PGE now interprets it,* the Tax Allocation Agreement does not meet a second aspect of the statutes. According to PGE, the Agreement does not fall within the statute as it is not a contract that "shall be recognized as the basis of an operating expense or capital expenditure in any rate valuation or any other hearing or proceeding …." Taxes, says PGE, are not operating or capital expenses.

PGE simply puts the cart before the horse. The Commission cannot tell if the Agreement should have been recognized as an expense or an expenditure until it reviews the contract. The Commission need not, indeed, must not, take PGE's characterization of the Agreement as final. What we now know of the Agreement is that PGE and Enron used or purchased assets in a way that allowed Enron to pocket millions of dollars otherwise intended to cover tax obligations. Jubb Declaration, ¶ 17. The fact that these transactions may not show up on PGE's balance sheets as the transfer of assets merely reinforces the need for Commission review. No one knew until the collapse of Enron's house of cards how money was moving in and out of Houston. It is time someone looked, and the Commission has the authority and the ability to do so now.

[4] The City has sought discovery in regard to the formation of the contract and intent of the language, but has not been provided any responses as of this juncture. See, Declaration of Benjamin Walters. The City submits this declaration in support of why further discovery is necessary. *See*, *Portland General Electric, v. Oregon Energy Company, L.L.C.*, UC 315, Order No. 98-238, 1998 Ore. PUC LEXIS 204, *9 (June 12, 1998).

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D. PGE's Argument That The Agreement Did Not Increase PGE's Rates Is Irrelevant

PGE says that only contracts that might or do increase rates must be disclosed to the PUC under ORS 757.295. PGE is wrong in at least two ways. First, the City admits that one consideration under the statute may be if a contract does or might affect rates. The statute refers, after all, to "rate valuation." But the statute is broader than that. It requires notice of a property contract that "shall be recognized as the *basis*" of an operating or capital expense in "any other hearing or proceeding." (Emphasis added.) Rate proceedings are not the exclusive arena justifying contract disclosure. Any means any as an intentional use of an expansive term. ORS 174.010 (construction of statute may not "omit what has been inserted.")

Second, had this contract been disclosed and reviewed by the PUC, it may well have affected rates. The PUC might have determined, for instance, that the management compensation portion of rates should be lowered to take into account that PGE's managers approved arrangements to pour cash, meant for tax collectors, into Enron's bank accounts.

E. The Context Of ORS 757.495 Supports The Application Of The Statute To The Tax Allocation Agreement.

As part of the first level of statutory interpretation, the Oregon courts look to the context of the statute, which includes related statutes and the case law interpreting those statutes. *Owens v. Maass*, 323 Or 430, 435, 918 P.2d 808 (1996). The context of ORS 757.495 supports the interpretation urged by the City.

As a regulatory agency, the primary responsibilities invested in the Commission by the Legislature are to protect utility customers "from unjust and unreasonable exactions and practices." ORS 756.040(1); Letter to Assistant Commissioner Mike Kane from Larry D. Thomson, Attorney General's Office, Or Atty Gen Op. No. 6269 (1988). In furtherance of this responsibility, the Legislature *extended* the Commission's authority over contracts between regulated utilities and affiliated interests so that it was not limited to merely considering those costs in the process of making rate determinations. *Pacific NW Bell v. Sabin*, 21 Or App 200,

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226, 534 P2d 984 (1975). As the Commission itself has previously noted, ORS 757.495 "was designed to protect ratepayers from abuses which may arise from less than arm's length transactions." *Pacificorp*, UE 134, UM 1047, Order No. 02-820, 2002 WL 32087858, 2002 Ore. PUC LEXIS 477 (November 20, 2002) (citing *CP National Corporation*, UF 3842, Order No. 82-593 at 2; *Portland General Electric Company*, UF 3739, Order No. 81-737 at 6).

In the current setting, the Tax Allocation Agreement arose from a less than arm's length relationship between Enron and its wholly owned subsidiary. The utility generated annual profits, including an adjustment of approximately 40% above its approved rate of return to account for potential tax obligations.[5] The holding company then paired off the utility profits with the empty losses generated by its other subsidiaries. Jubb Declaration, ¶¶ 9, 13. With all due deference to PGE and the Commission, and pending discovery and further factual investigation, it seems fair to say that there is at least some indication here that ratepayers and citizens were abused by these arrangements.

PGE also suggests that only "certain" contracts must be submitted to the Commission for review, implying that the Tax Allocation Agreement is not one of those special few requiring regulatory examination. *PGE Motion for Summary Judgment*, page 3. PGE cites one broad statement made in a Commission order reviewing an electric utility contract. However, other Commission orders do not use this narrowing construct:

> ORS 759.390 requires any telecommunications utility entering into a contract with an affiliated interest to file the agreement with the Commission. The statute requires the Commission to investigate to determine if the transaction is fair, reasonable, and not contrary to the public interest. The statute is designed to protect ratepayers from abuses which may arise from less than arm's length transactions.

GTE Northwest, Inc., UI 93(6), Order No. 95-1264, 1995 Ore. PUC LEXIS 27, *3 - *4 (November 30, 1995). *See*, *also*, *Malheur Home Telephone Company*, UI 146, Order No. 95-

[5] See, UE180/PGE/200/Timper-Tooman/13-14.

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1060, 1995 Ore. PUC LEXIS 6 (October 3, 1995).

Given the fact that ORS 747.495 and ORS 757.390 have otherwise identical constructs, the narrow phrasing used in electric utility orders should not result in more complete protection for telecommunications customers than for electricity ratepayers.

F. Did The Tax Allocation Agreement Constitute A Veiled Effort To Avoid The Application Of ORS 757.495, Or Otherwise Constitute An Evasion Of The Commission's Conditional Limitation Upon Distribution Of Dividends?

As a regulatory agency, the Commission must remain alert for subterfuge or attempted evasion of the letter or obligation of the law: "Any plan or scheme, whether by purported lease, agency, or other device disguising the true nature of the [arrangement] will be of no avail for that purpose." *State ex rel by Heltzel v. O. K. Transfer Co.*, 215 Or 8, 330 P.2d 510 (1958); Or Atty Gen Op 6462, 1992 Ore. AG LEXIS 33, October 15, 1992 (Concluding that regulated entity could not create affiliate for the purposes of evading regulation by the Public Utility Commission). It is a well established rule of law that no one may do indirectly what may not be done directly. 15 Op Atty Gen Or 344, 1931 Ore. AG LEXIS 276 (July 31, 1931). *See*, *also*, 71 Op Atty Gen Wis 147, 1982 Wisc. AG LEXIS 18 (Wisconsin utility commission had regulatory jurisdiction over holding company formed by public utility if the arrangement was a "device to enable the public utility corporation to evade regulatory jurisdiction.")

Was the Tax Allocation Agreement drafted to evade regulatory review under ORS 757.495? Moreover, was the Tax Allocation Agreement a vehicle for avoiding the conditions initially imposed by the Commission in approving Enron's acquisition of PGE in 1997? In approving Enron's ownership of PGE under the terms of ORS 757.511, the Commission imposed various regulatory requirements, including but not limited to, creating a "ring fence" between PGE and Enron and its other subsidiaries. *Enron Corp.*, Order No. 97-196, UM 814, 177 P.U.R.4th 587, 1997 WL 406191 (June 4, 1997). For example, under Stipulated Condition No. 9, Enron agreed to provide the Commission with: (a) at least 60 days prior notice of its intent to transfer more than 5 percent of PGE's retained earnings to Enron over a six-month period; (b)

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at least 30 days prior notice of its intent to declare a special cash dividend from PGE; and (c) Notice within 30 days of quarterly common stock cash dividend payments from PGE. After agreeing to these conditions, PGE made cash payments to Enron under the Tax Allocation Agreement that were more than 150% of the cash dividends reported to the Commission under the conditions of the approved merger.[6] Jubb Declaration, ¶ 17. Given the significant transfers of cash from PGE to Enron under the Tax Allocation Agreement, was this arrangement a means by which to work around the stipulation?

This situation brings to mind the conclusions drawn in the Congressional investigation of Enron:

> [FERC] was no match for a determined Enron …. On a number of occasions, FERC was provided with sufficient information to raise suspicions of improper activities – or had itself identified potential problems – in areas where it had regulatory responsibilities over Enron, but failed to understand the significance of the information or its implications. Over and over again, FERC displayed a striking lack of thoroughness and determination with respect to key aspects of Enron's activities – an approach seemingly embedded in its regulatory philosophy, regulations, and practices. In short, the record demonstrates a shocking absence of regulatory vigilance on FERC's part….

Majority Staff Report, Senate Committee on Governmental Affairs, Committee Staff Investigation of the Federal Energy Regulatory Commission's Oversight of Enron Corp., pp. 2-3 (November 12, 2002).[7]

In answering these questions, the Commission must look to the underlying intent, rather than how the arrangement may otherwise be characterized. These are ultimately questions of fact to be considered by the fact-finder. *Thomas v. Foglio*, 225 Or 540, 561, 358 P2d 1066 (1966). Issues of subjective intent and motivation are generally not susceptible to summary judgment. *See*,

[6] The City offers this as amendment to its pleadings, to conform to the evidence. As the Commission is liberal in its consideration of pleadings, the amendment should be approved. See ORS 756.500(4); UE 111, Order No. 00-091, 2.

[7] This document is for review available on the Senate's website: http://www.senate.gov/~govt-aff/111202fercmemo.pdf.

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e.g., *Zeigler v. Bostwick*, 106 Or App 666, 809 P2d 131, *rev den*, 311 Or 644 (1991); *Welch v. Bancorp Management Services*, 57 Or App 666, 673, 646 P.2d 57 (1982), *aff'd in part, rev. in part on other grounds*, 296 Or. 208, 675 P2d 172, mod., 296 Or. 713, 679 P.2d 866 (1984); *Wallulis v. Dymowski*, 134 Or App 219, 895 P2d 315 (1995), affirmed, 323 Or 337, 918 P2d 755 (1996).

The City objects to the consideration of summary judgment at this stage of this proceeding, where it has not been afforded any opportunity to engage in discovery. Declaration of Benjamin Walters, ¶¶ 2-6. The City has sought discovery of information from PGE in this proceeding, but has not received any responses from PGE to the data requests that are pending. Given the posture of this proceeding, the City has not had the opportunity to develop a full record in response to PGE's motion for summary judgment. Walters Declaration, ¶¶ 5-6.

G. The Commission Has A Range Of Regulatory Tools To Address PGE's Failure To Comply With ORS 757.495.

1. Silence Should Not Be Equated With Acquiescence

PGE's argument seems to be that the Tax Allocation Agreement was previously submitted to the Commission, and that no directive was ever issued to submit the Agreement for formal review. However, this informal inquiry was not tantamount to review by the Commission and a formal determination. PGE has acknowledged that it submitted the Tax Allocation Agreement to the Commission's staff to review. Lesh Declaration, ¶ 3. Staff's conclusions upon examination of the Agreement are unknown, as there is apparently no record of any response to PGE. *Id.*

Mere silence by agency staff cannot be used to justify a PGE's demand to "foreclose full inquiry into broad public interest questions, either patent or latent." *Retail Store Employees Local 880 v. FCC*, 436 F2d 248, 254 (DC Cir 1970) (citations omitted). It is not an act of grace for a regulatory agency to provide public, written explanations as to why it is interpreting a statute to exempt certain forms of contracts providing for the transfer of enormous sums of money out-of-state, which are issues of significant public import. *Weems v. American*

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International Adjustment Co., 319 Or. 140, 148, 874 P.2d 72 (1994) (Durham, J., concurring).

Nor is the Commission estopped at this juncture from undertaking to consider this matter.[8] PGE has admitted that it did not previously comply with the statute. Lesh Declaration, ¶ 3. It cannot argue now that the Commission is somehow banned from examining the Tax Allocation Agreement under the statute. As for the Commission, the failure to act then is no excuse for failing to act now.

2. A Public Investigation Of The Tax Allocation Agreement, And Of The Resulting Economic Effects For The Utility, May Have Resulted In Other Proceedings

Enron and PGE elected to file on a consolidated basis. This was a matter of choice, not of necessity. Once the companies choose to go down that path, the Commission had a duty and obligation to review this transaction between affiliated entities. By not determining the proper treatment of this transaction, the Commission turned a blind eye toward an additional, hidden return on capital to PGE's sole shareholder at the expense of the ratepayers. *Compare*, *City of Muncie v. Indiana PSC*, 177 Ind App 155, 378 NE 2d 896, 898-99 (1978). Following the filing of Enron's bankruptcy in 2002, the possibility of a potential tax liability for PGE was effectively eliminated. Jubb Declaration, ¶ 16. As of that moment in time, and thereafter, the utility's effective tax rate went to zero.

PGE criticized the City for referring to the Maine Public Utility Commission's decision on a tax allocation agreement. *PGE Motion for Summary Judgment*, p. 4, n. 4. The truth is, the underlying statutory scheme is not as radically different as PGE suggests. Maine's law has the same essential components as the Oregon affiliated interest statute, as it requires that the commission review contracts between utilities and affiliated interests to determine whether the agreement is adverse to the public interest.

[8] *Compare*, *Pacific N. W. Bell v. Sabin*, 21 Or App 200, 225-26, 534 P2d 984, rev denied (1975) (estoppel not applicable against Commission, as administrative understanding of "conditions may change, and the agency must be free to act") (citations omitted).

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Indeed, close regulatory examination of tax arrangements for public utilities, and the actual tax obligations of the utility, is a fairly common practice among utility regulators. Approximately 25% of the state regulatory agencies have considered and concluded that a utility's rates should reflect its actual tax liabilities, as noted by the Texas Public Utility Commission in a compilation in its decision in the case of *In re El Paso Elec. Co.*, 14 Tex. P.U.C. Bull. 2834, 1989 WL 625088, *183 n. 1 (May 5, 1989):

> *In Re New Jersey Power & Light Company*, 89 A. 2d 26 (N.J.S.C. 1952) ("The Utility is allowed a deduction from gross income for actual operating expenses only (or actual normalized operating expenses), and not for hypothetical expenses which did not and foreseeably will not occur. Thus, it is entitled to an allowance for actual taxes and not for higher taxes that it would pay if it filed on a different basis."); *City of Pittsburg v. Pennsylvania Public Utility Commission*, 128 A. 2d 372 (Pa. S.C. 1956) ("In computing the cost of operation and service, the Commission considers evidence of actual expenses, properly adjusted when the evidence warrants; there is no legal or equitable reason for a supplemental return in the guise of allowances for taxes or other expenses which are not incurred."); * * * ; *Hastings v. Village of Stowe, Electric Department*, 214 A. 2d 56 (Vermont S.C. 1965) ("To proliferate a utility's true operating expense by the introduction of illusory charges never actually experienced would impair the regulatory process... tax benefits accruing to an operating utility are not to be translated into costs of service to the detriment of the consumer in a public service enterprise."); * * * ; *Washington Gas Light Company v. Public Service Commission*, 450 A.2d 1187 (D.C. Ct. Ap. 1982); * * * ; *City of Muncie v. Public Service Commission*, 378 N.E.2d 896 (Indiana App. 1978) (Commission must "make some determination of the actual tax liability of Petitioner, rather than use a hypothetical figure"); * * * ; *Citizens Utilities Company of Illinois v. Illinois Commerce Commission*, 504 N.E.2d 1367 (Ill. App. 1987) ("Citizens' customers should not be required to bear in their rates an imaginary level of income tax expenses which citizens will never pay. ...the income tax expenses a utility charges in its rates should be no higher than the amount the utility actually owes."); * * * ; *Consolidated Edison Company v. New York State Public Service Commission*, 385 N.Y.S.2d 209 (N.Y.S.C. 1976, Motion for leave to appeal denied, 387 N.Y.S.2d 1030); *Long Island Water Corp. v. Public Service Commission*, 374 N.Y.S.2d 841 (N.Y.S.C. 1975); * * * ; *Hastings v. Village of Stowe*, 61 P.U.R.3rd at p. 419 (Vermont S.C.) ("To proliferate a utility's true operating expense by introduction of illusory charges never actually experienced would impair the regulatory process. ...tax benefits accruing to an operating utility are not to be translated into

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> costs of service to the detriment of the consumer in a public service enterprise."); * * * ; *Re Arkansas Louisiana Gas Company*, 4 P.U.R.4th 265 (Ark. P.S.C. 1974); *Re Mississippi Power Company*, 36 P.U.R.4th 342 (Miss. P.S.C. 1980) ("It is patently obvious that if the company's cost of service is not reduced by the tax savings resulting from the filing of a consolidated federal income tax return, the ratepayers are providing an outright gift to the company and to the company's parent and ultimately to the stockholders of the parent. ...this commission finds it is not fair nor reasonable to inflate the company's cost of service by an amount for which the company will absolutely never be liable.") * * * ; *Re Connecticut Natural Gas Corporation*, 37 P.U.R. 4th 287 (Conn. D.P.U.C. 1980) ("a utility cannot charge its customers more for taxes paid than the actual amount paid or more than its equitable share of the consolidate tax liability."); * * * ; *Northwestern Bell Telephone Company v. State*, 253 N.W.2d 815 (Minn. S.C. 1977); * * * ; *In Re Lambertville Water Company*, 378 A. 2d 1158 (N.J.S.C. 1977) ("It is only the real tax figure which should control rather than that which is purely hypothetical."); *Michaelson v. New England Telephone and Telegraph Company*, 404 A. 2d 799 (R.I.S.C. 1979); *Re West Virginia Water Company*, 91 P.U.R. 3rd 98 (W. Va. 1971); * * * ; *Re Continental Telephone Company of Maine*, 18 P.U.R. 4th 636 (Maine P.U.C. 1977) ("The Company is entitled to include in its operating expenses, to be recovered from the ratepayers in rates, its federal income tax liability that will be actually incurred, but is not entitled to additional profits (for payment to its parent organization) for hypothetical tax expense. Rates based on such a fictitious amount would not be just and reasonable."); *Re Bridgeport Hydraulic Company*, 90 P.U.R. 3rd 111 (Conn. P.U.C. 1971) ("A utility cannot charge its customers more for taxes than the actual amount paid or more than its equitable share of the consolidated tax liability."); *Re The Connecticut Natural Gas Corporation*, 11 P.U.R. 4th 66 (Conn. P.U.C. 1975) ("The company's proposal to reflect a pro forma tax liability on a separate return basis is in conflict with the established regulatory principle that since a utility's customer must reimburse it for all taxes paid, a utility cannot charge its customers more for taxes paid than the actual amount paid or more than its equitable share of the consolidated tax liability.") * * *

As demonstrated in the Texas Commission's extensive listing, other States have demonstrated that PGE's argument of "no harm, no foul" is fallacious. Oregon ratepayers have been harmed in the lost opportunity to engage in a public debate of whether the Tax Allocation Agreement was inappropriate as being against the public interest. Oregon ratepayers have been deprived of the opportunity to assert that PGE's actual tax liability was zero during Enron's ownership, as it unquestionably was during the years when consolidated tax filings occurred, to

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assert that a new rate case should have been opened or to assert that Enron was using the Tax Allocation Agreement as a vehicle to avoid limitations upon cash distributions to the holding company.

In 1986, the Attorney General's Office advised the Commission that if it denied an affiliated interest application or approved the application with certain conditions that necessitated a change in accounting treatment, it could order the utility to make adjusting entries on its books. Letter to Rick Elliott, Administrator, Financial Analysis Division, from Larry D. Thomson, Chief Counsel, General Counsel Division, Or. Op. Atty. Gen. OP-5975 (April 30, 1986). The Commission has not only the right, but the duty, to exercise its authority to set just and reasonable rates for protection of customers, even to the extent of modifying terms of contracts entered into by a regulated utility. *American Can Co. v. Davis*, 28 Or App 207, 224, 559 P.2d 898, *rev denied*, 278 Or 393 (1977).

The City of Portland respectfully asks that PGE's Motion for Summary Judgment be denied.

Dated this 15th day of September, 2006.

Respectfully submitted,

Benjamin Walters

Benjamin Walters, OSB #85354
Senior Deputy City Attorney
bwalters@ci.portland.or.us
Attorneys for Plaintiff City of Portland

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **CITY OF PORTLAND'S RESPONSE TO PORTLAND GENERAL ELECTRIC'S MOTION FOR SUMMARY JUDGMENT, DECLARATION OF DAVID R. JUBB, and DECLARATION OF BENJAMIN WALTERS** on:

JEANNE M. CHAMBERLAIN DAVID F. WHITE ROBYN E. RIDLER TONKON TORP LLP 888 SW FIFTH AVE STE 1600 PORTLAND OR 97204 jeanne@tonkon.com davidw@tonkon.com robyn@tonkon.com	MELINDA J. DAVISON MATTHEW PERKINS DAVISON VAN CLEVE PC 333 SW TAYLOR STE 400 PORTLAND OR 97204 mail@dvclaw.com
J. JEFFERY DUDLEY PORTLAND GENERAL ELECTRIC CO. 1WTC1300 121 SW SALMON PORTLAND OR 97204 jay.dudley@pgn.com	JAMES T SELECKY BRUBAKER & ASSOCIATES INC 1215 FERN RIDGE PKWAY STE 208 ST LOUIS MO 63141 jtselecky@consultbai.com
DAVID HATTON ASSISTANT ATTORNEY GENERAL REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST, NE SALEM OR 97301-4096 david.hatton@state.or.us	JASON EISDORFER ENERGY PROGRAM DIRECTOR 610 SW BROADWAY STE 308 PORTLAND OR 97205 jason@oregoncub.org

on September 15, 2006, by causing a full, true and correct copy thereof, addressed to the last-known address of said persons, to be sent by the following method(s):

☒ by mail in a sealed envelope, with postage paid, and deposited with the U.S. Postal Service in Portland, Oregon.

☐ by hand delivery.

☒ by email.

☐ by facsimile transmission.

Benjamin Walters

BENJAMIN WALTERS, OSB #85354
Telephone: (503) 823-4047
Of Attorneys for City of Portland

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1262

CITY OF PORTLAND, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation, Defendant.	**DECLARATION OF DAVID R. JUBB IN SUPPORT OF THE CITY OF PORTLAND'S OPPOSITION TO SUMMARY JUDGMENT**

I, DAVID R. JUBB, declare under penalty of perjury under the laws of the State of Oregon as follows:

1. I am professionally qualified as an attorney and a certified public accountant by the State of Oregon. I am in private practice as a tax lawyer and business consultant. My business address is Jubb & Company LLC, 14195 NW Harvest Lane, Portland, Oregon 97229. I am testifying as a witness at the request of the City of Portland. I am a 1971 graduate of Linfield College with Bachelors of Arts degrees in economics and accounting. After graduation, I was employed by the firm of Lybrand, Ross & Montgomery that subsequently became Coopers and Lybrand and is now known as PriceWaterhouseCoopers. I received my certified public accountant designation in 1973. I am also a 1976 graduate of the Northwestern School of Law of Lewis and Clark College with a Juris Doctor degree and became a member of the Oregon State Bar in 1976. I was with the now-named PriceWaterhouseCoopers firm from June 21, 1971 until October 1, 1996. I was a tax partner in the Portland office with Coopers and Lybrand from October 1, 1978 until October 1, 1996 doing generally transaction based corporate work. Since October 1, 1996, I have been a tax lawyer in private practice doing generally domestic and international corporate merger and acquisition transaction work. Over the course of my career as

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a tax professional, I have provided tax advice to a large number of public and private corporations. My clients covered various industries including, steel mills, aluminum smelters, passenger and freight airlines, helicopter companies, electric utility, coal, steel pipe manufacture, undersea cable, satellite operations, telephone, construction, banking, insurance, wholesaling, food manufacture, real estate development, national food and drug chain stores, leasing, time share and wood products.

2. Federal law allows for in certain circumstances, but generally does not mandate, consolidated corporate income tax filings. Internal Revenue Code (IRC) §§1501 and 1504(b). These federal statutes permit affiliated groups of corporations to file consolidated income tax returns on a consolidated basis rather than requiring each business to file a separate return. *Compare*, *In re Wakefield Water Co.*, 32 PUR 4th 476, 487 (RI PUC January 4, 1980) ("That [the public utility] chooses to do business in the form of a subsidiary is a matter of choice, not necessity.")

3. A consolidated tax return filing allows affiliated corporate entities to allocate and apportion income as if all the income had been earned by one corporation, as the return reflects the consolidated income of the whole group. For purposes of tax calculations, separate company profits and losses are eliminated as part of the consolidation of income process.

4. The benefits of filing consolidated returns include offsetting operating losses of one company against the profits of another affiliated corporation, offsetting the capital losses of one company against the capital gains of another or avoiding taxes on inter-company asset transfers.

5. The Financial Accounting Standards Board (FASB) is the designated private sector organization within the United States that establishes financial accounting and reporting standards. FASB's primary purpose is to develop Generally Accepted Accounting Principles (GAAP). The Securities and Exchange Commission ("SEC") has statutory authority for

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establishing financial accounting and reporting standards for publicly held companies under the Securities Exchange Act of 1934. The SEC's general policy has been to rely on the private sector for this function to the extent that the private sector demonstrates ability to fulfill the responsibility in the public interest. The SEC has designated the FASB as the organization responsible for setting accounting standards for public companies in the U.S. FASB 109 is the standard that governs accounting for income taxes.

6. Under GAAP accounting, as governed by FASB 109, the value of a corporation's "net operating loss" (NOL) is generally recorded as an asset on the balance sheet ("statement of financial position") similar to other corporate assets. Sometimes the recorded NOL asset is subjected to a valuation allowance. In accounting terms, a corporation's assets are its "property or "goods" " because they can be owned, distributed, devised, sold or transferred and accordingly must be reflected on the corporate balance sheet. Generally, among affiliated corporations filing a consolidated income tax return, any particular corporate member of the group is considered to own its NOLs. Generally, under most tax allocation agreements, an affiliated group member is paid if another member of the affiliated group uses its NOLs.

7. Under the Tax Allocation Agreement entered into between and among Enron and PGE, the NOLs owned by Enron were assets ("goods" or "property") that PGE was allowed to use. In return, PGE agreed to pay Enron compensation for the use of its NOL. Sec. 3.2(a). PGE's "use" of the Enron NOL in this context was to consume it in the same way "goods" or "property" are consumed.

8. There is support for the assertion that the NOLs used by PGE were assets owned by Enron, both in applications made by Enron to the Securities and Exchange Commission and in the resulting SEC determinations. For example, in July, 2005, the SEC stated:

> Enron will no longer charge companies with income the stand-alone tax that they would pay on their income but for the consolidated losses. Enron generally would no longer pay loss

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> companies for the benefit of their losses used to offset income on the consolidated return, except that it is expected that payments to Enron under the Portland General and CrossCountry tax allocation agreements would be shared with all loss companies consistent with past practice.

Filings Under the Public Utility Holding Company Act of 1935, as Amended 70 Fed Reg 40,075, (July 12, 2005). In a submission to the SEC seeking approval of the tax allocation agreement, Enron described the tax losses and credits as assets of the corporation. Enron Corp, Form U-1, *Application/ Declaration Under the Public Utility Holding Company Act of 1935 Securities and Exchange Commission*, p. 27 (filed May 26, 2005).[1]

9. Enron enjoyed significant financial benefits in the form of cash payments because of its Tax Allocation Agreement with PGE. The Agreement allowed Enron to convert tax losses it manufactured through "paper transactions," otherwise only valuable for offsetting its unlikely future profits, into cash through sales of the NOLs to PGE. After Enron's bankruptcy filing, this became a source of cash for distribution to Enron's creditors. In essence, the Agreement served to allow Enron as PGE's holding company to obtain PGE cash in excess of PGE regularly declared dividends.

10. Under Section 2 of the Tax Allocation Agreement, Enron agreed to perform on PGE's behalf a variety of tax-related services, including the preparation and filing of income tax returns for PGE, making elections and adopting accounting methods, filing claims for refunds or credits and managing audits and other administrative proceedings conducted by the taxing authorities.

11. As reported by Congressional investigators, "[o]ver time, [Enron's] tax department generated benefits for Enron that equaled, or eventually far outstripped, the budgeted cost of the tax department itself. The benefits generated by Enron's tax department included

[1] Enron's filing is available for public review at http://www.secinfo.com/drD1f.z7v.htm#1t6z.

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financial earnings as well as tax savings." Staff of the Senate Committee on Finance, Joint Committee on Taxation, *Report of Investigation of Enron Corporation and Related Entities Regarding Federal Tax and Compensation Issues, and Policy Recommendations*, S. Rep. JCS-3-03, Vol. I, p. 93, fn. 163, 108th Congress, 1st Session (February 2003).[2]

12. Prior to entering into the formal Tax Allocation Agreement in December, 2002, PGE paid funds to Enron as part of Enron's consolidated tax group. Beginning July 2, 1997, PGE was made a member of Enron's consolidated group for federal income tax purposes, after Enron's merger with PGE was closed. Portland General Electric Co., Securities and Exchange Commission Form 10-K 1997 Annual Report, p. 31 ; Portland General Electric Co., Securities and Exchange Commission Form 10-K 1998 Annual Report, p. 38; Portland General Electric Co., Securities and Exchange Commission Form 1999 10-K/A Annual Report, p. 12; Portland General Electric Co., Securities and Exchange Commission Form 10-K 2001 Annual Report, p. 23; Portland General Electric Co., Securities and Exchange Commission Form 10-K 2002 Annual Report, p. 42; Portland General Electric Co., Securities and Exchange Commission Form 10-K 2003 Annual Report, p. 52; Portland General Electric Co., Securities and Exchange Commission Form 10-K 2004 Annual Report, p. 42; Portland General Electric Co., Securities and Exchange Commission Form 10-K 2005 Annual Report, p. 89.

13. Enron had over 2,500 subsidiaries in the United States, South America, Asia, Europe and the Caribbean, operating electric generation, transmission, and distribution facilities; gas transmission pipelines and distribution companies; liquefied natural gas unloading, storage and vaporizing facilities; and companies engaged in providing water and wastewater services. Securities and Exchange Commission, In re Applications of Enron Corp., Administrative Proceeding File No. 3-10909, Initial Decisions Release No. 222, 2003 SEC LEXIS 316, *25-26

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[2] < http://www.gpo.gov/congress/joint/jcs-3-03/vol1/index.html > (site visited August 1, 2006). The report is alternately available at < http://www.house.gov/jct/s-3-03-vol1.pdf > (site visited August 1, 2006).

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(February 6, 2003).

14. During the period between July 1997 and December 2005, PGE's consolidated cash flow statements indicated that PGE made cash payments to Enron as part of the consolidated income tax arrangement, as follows (figures in millions):

6/97	($73)
1997	$96 (Net $23 post acquisition)
1998	$133
1999	$139
2000	$109
2001	$35
2002	$2
2003	$39
2004	$83
2005	$88
Sum	$651

15. In its 10-Q filed with the SEC on August 4, 2006 for the quarter ending June 30, 2006, PGE stated:

> As PGE was included in Enron's consolidated income tax return prior to April 3, 2006, the Company made payments to Enron for PGE's income tax liabilities. The $25 million income taxes payable to Enron at December 31, 2005 represents a net current income taxes payable for the fourth quarter of 2005 that was paid to Enron in January 2006. In April 2006, PGE paid Enron $17 million for net current income taxes payable for the first quarter of 2006.

Portland General Electric Company, Securities and Exchange Commission Form 10-Q, Quarterly Report for Period Ending 06/30/2006, p. 17 (filed August 4, 2006).

16. As reported by Congressional investigators:

> Enron reported net operating losses (before net operating loss carryovers) for each of its taxable years 1996 through 1999. Enron did not seek to carry back those net operating losses to receive a refund of income taxes paid in earlier years. Instead, Enron carried forward these net operating losses ($3.1 billion) into 2000. The net operating losses for 1996 through 1999 prevented Enron from

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> obtaining closure for Federal income tax audit purposes with respect to those years. As a result, Enron adopted a strategy to pay tax for 2000 to close out the audit for 1996 through 1999. Late in 2000, Enron entered into a number of transactions intended to generate taxable income in 2000 that would absorb the entire $3.1 billion net operating loss carryover to that year. In its 2000 Federal income tax return, Enron reported $3.1 billion of taxable income (before its net operating loss deduction), which Enron offset with its reported net operating loss carryover from 1999 to 2000 of approximately the same amount. The following year, 2001, Enron recognized losses from closing out the transactions that had generated taxable income in 2000. This resulted in a net operating loss of $4.6 billion on Enron's 2001 Federal income tax return.

Enron Report, supra, p. 98 (footnotes omitted). The net operating loss of $4.6 billion on Enron's 2001 Federal income tax return would have been carried forward under IRC 172(b) and deductible in subsequent years. Accordingly, Enron would have had more than sufficient carry-forward losses through 2006 "sell" to PGE under the Tax Allocation Agreement.

17. In response to an inquiry from the City of Portland, Portland General Electric provided a summary of dividends paid to Enron between July, 1997 and December, 2005. A copy of that document is attached to this Declaration as Exhibit 101. According to the information provided by Portland General Electric, during the time period between 1997 and 2005, Enron received dividend payments totaling $416,390,000 (rounding off to the nearest thousand). PGE's cash transfers to Enron under the Tax Allocation Agreement exceeded the dividend payments by more than 150%.

18. I hereby declare that the above statements are true to the best of my knowledge and belief. I understand these statements are made for use as evidence in a Public Utility Commission proceeding.

Dated this 15th day of September, 2006.

DAVID R. JUBB

Exhibits: Exhibit 101 – PGE Dividend Payments to Enron (COP 36337-002628).

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Portland General Electric
DR 022-A

	Dividends			
Year	*Q1*	*Q2*	*Q3*	*Q4*
1997	N/A	N/A	$ 16,675,962.03	$ -
1998	-	16,248,373.26	16,248,373.26	16,248,373.26
1999	20,096,672.19	20,096,672.19	20,096,672.19	20,096,672.19
2000	20,096,672.19	20,096,672.19	20,096,672.19	20,096,672.19
2001	20,096,672.19	20,096,672.19	-	-
2002	-	-	-	-
2003	-	-	-	-
2004	-	-	-	-
2005	-	-	150,000,000.00	

Note: Merger was effective July 1, 1997

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1262

CITY OF PORTLAND, Complainant, v. PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation, Defendant.	DECLARATION OF BENJAMIN WALTERS IN SUPPORT OF THE CITY OF PORTLAND'S OPPOSITION TO SUMMARY JUDGMENT

I, BENJAMIN WALTERS, declare under penalty of perjury under the laws of the State of Oregon as follows:

1. I am a Deputy City Attorney representing the City of Portland (the "City") in this proceeding.

2. On May 19, 2006, the City served PGE with data requests in this proceeding. On August 1, 2006, following the dismissal of the City's claims 1 and 2 by the Administrative Law Judge on July 31, 2006, the City served PGE with a revised data request narrowing the range of requested information to the remaining third claim. A copy of the City's August 1st data request is attached as Exhibit 102 to this Declaration.

3. The discovery requested by the City sought information regarding agreements for the treatment of taxes between PGE and Enron, general information regarding the intent and motivation underlying the tax compacts, and general information regarding the transfer of funds between PGE and Enron relating to taxes.

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4. In discovery, the City is seeking to determine whether the agreement was an arms length transaction, whether there were mutual benefits or if the flow of benefits was unidirectional, and more particularly, whether the agreement was ever intended as an attempt to inflate Enron's profits from PGE to evade limits.

5. PGE has refused to respond to the City's data request. The City has received no discovery from PGE in this proceeding.

6. The City's inability to obtain information from PGE has limited the City's ability to develop a factual record regarding PGE and Enron's motivations in entering into their various tax arrangements, the treatment of fund transfers between the two companies, and whether there was any motivation for evasion of Oregon laws or PUC requirements. The failure to obtain discovery has been prejudicial to the City's efforts in developing its case.

7. PGE has objected to the "intrusive" nature of the City's data requests and has asserted that it would be burdensome and costly for the company to assemble responses to the data requests. Some of this information has been previously assembled by PGE in various other proceedings, and the City is seeking only to have the materials produced in a single proceeding rather than having to assemble those materials and then have PGE authenticate again. For example, PGE produced materials related to the collection of taxes in discovery in the case of *Kafoury v. Portland General Electric Company*, Multnomah County Circuit Court Case No. 0501-00627. PGE has produced materials relating to communications with Enron in relation to the Federal Energy Regulatory Commission's investigation of the West Coast electricity market. Nearly 1.5 million e-mail messages were posted on the internet by FERC. Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Dockets No PA02-2-

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000, ELOO-95-0048, ELOO-98-042, and EL01-10-007, 68 Fed Reg 17,933 (April 14, 2003). There are online databases allowing for review of these emails on the internet. See, e.g., http://www.enronemail.com. For example, one e-mail from the FERC database indicates that 13 months prior to PGE and Enron entering into the Tax Allocation Agreement, the companies were discussing how PGE could transfer funds to Enron and avoid taxes on the distribution. Email from Rod Hayslett, Enron, to Jim Piro, PGE, "FW: PGE Dividend" (Wednesday, 21 Nov 2001 05:48:45). A copy of this email is attached as COP Exhibit 103. This email indicates that there were discussions occurring between the companies as to how to transfer capital from PGE to Enron at least a year prior to the Tax Allocation Agreement. The Commission should allow the opportunity for discovery to investigate where these discussions went, and what else the parties discussed.

8. I hereby declare that the above statements are true to the best of my knowledge and belief.

Dated this 15th day of September, 2006.

Benjamin Walters

BENJAMIN WALTERS, OSB No. 85354
Deputy City Attorney
Portland City Attorney's Office

Exhibits:

Exhibit 102 – City of Portland data request to PGE, dated August 1, 2006
Exhibit 103 – email dated Wednesday, 21 Nov 2001

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CITY OF
PORTLAND, OREGON
OFFICE OF CITY ATTORNEY

Linda Meng, City Attorney
1221 S.W. 4th Avenue, Suite 430
Portland, Oregon 97204
Telephone: (503) 823-4047
Fax No.: (503) 823-3089

August 1, 2006

RATES AND REGULATORY AFFAIRS
PORTLAND GENERAL ELECTRIC
121 SW SALMON ST 1WTC0702
PORTLAND OR 97204

RE:	Docket No.	City of Portland Request No.	Response Due By
	UM 1262	1 - 9	August 15, 2006

In light of the ruling by the administrative law judge on Portland General Electric's Motion to Dismiss, dated July 31, 2006, the City of Portland is revising its First Set of Data Requests to Portland General Electric as previously issued on May 19, 2006.

These data requests are submitted pursuant to OAR 860-014-0070. The City's revised First Set of Data Requests is set forth below. In revising its data requests, the City of Portland is not conceding the correctness of the ALJ's determinations, nor is the City of Portland waiving any rights to seek review of the ALJ's ruling.

Please provide responses to the following requests for information, and deliver copies of the response to the address below:

Benjamin Walters
Senior Deputy City Attorney
Office of City Attorney
Room 430
1221 SW 4th Avenue
Portland, OR 97204

Contact the undersigned before the due date noted if additional time is needed in order to provide a full and complete response.

DEFINITIONS

For the purpose of this Data Request, the following terms, phrases, and their derivations shall have the meanings given below unless specifically indicated otherwise. Whenever appropriate in order to bring within the scope of this Data Request any information or documents

which might otherwise be considered to be beyond the scope of any particular request, words used in the present tense shall include the future tense, words in the plural number shall include the singular, and words in the singular shall include the plural.

1. "Communication" means any document recording statements, dialogues, discussions, or conversations, and also means any transfer of thoughts, ideas or data between persons or locations by document.

2. "Documents" means any writing, graphic matter, computer stored matter, or other means of preserving thought or communication, and all tangible things from which information can be processed or transcribed, including the originals and all non-identical copies, whether different from the original by reason of any notation made on such copy or otherwise, including but not limited to correspondence, memoranda, notes, messages, letters, facsimile, e-mails, computer records, bulletins, minutes or other communications, interoffice and intra-office telephone calls, diaries, chronological data, minutes, books, reports, charts, ledgers, invoices, worksheets, receipts, returns, computer printouts, prospectuses, financial statements, schedules, affidavits, contracts, cancelled checks, transcripts, statistics, surveys, magazine or newspaper articles, releases, graphic records or representations of any kind, including without limitation photographs, charts, graphs, microfiche, microfilm, videotape, recordings, motion pictures and electronic, mechanical or electric recordings or representations of any kind, including without limitation tapes, cassettes, discs and recordings, and any and all drafts, alterations and modifications, changes and amendments of any of the foregoing.

"Documents" includes computer generated or stored documents, including computer files or data, electronic mail, and information on hard disk, which may have been erased but are retrievable through means of reasonable data recovery.

"Documents" also includes copies, where the original documents are not in PGE's possession, custody or control.

"Documents" also includes copies containing handwritten or other notations which is not otherwise contained or set forth in the original.

4 "Enron" means Enron Corp; Stephen Forbes Cooper, LLC, as disbursing agent on behalf of the Reserve for Disputed Claims in the Enron Bankruptcy Proceeding, as Plan Administrator; and as any other role authorized in the Enron Bankruptcy Proceeding; all affiliates, subsidiaries and related parties to Enron other than PGE; and any employees, agents, representatives, affiliates, or other persons or entities with authority to acting on behalf of Enron.

5. "Enron Bankruptcy Proceeding" means *In re: Enron Corp., et. al.,* Bankruptcy Court, S.D.N.Y., Case No. 01-16034, and related proceedings.

6. "Identification" and "identify" mean:

(a) when used with respect to a document, please state the nature of the document (e.g., letter, memorandum, corporate minutes); the date of the document, if any; the date, if known, on which the document was prepared; the title of the document; the general subject matter of the document; the number of pages comprising the document; the identity of each person who wrote, dictated or otherwise participated in the writing of the document; the identity of each person who signed or initialed the document, indicating authorship, acceptance or approval; the identity of each person to whom the document was addressed; the identity of each person who received the document or reviewed it; the present physical location of the document; and the identity of each person having possession, custody or control of the document; and,

(b) when used with respect to a person; please state their full name; their most recently known business address, telephone number and e-mail address; their present title and position; and their present and prior connections or associations with PGE or Enron or any of its subsidiaries or affiliates.

7. "Income tax return" means any federal income tax returns, any State of Oregon income tax returns, any Oregon local government income tax returns or any income tax informational filings or returns.

7. "Paid by PGE to Enron" means any form of transfer, payment, exchange or remittance of monies, funds, credits or other monetary benefits from PGE to Enron, including, but not limited to, cash, credit, wire transfer, money order, dividend, offset against receivable, book entry, in-kind payment, barter, transfer, waiver or release of claim, or voluntary or involuntary forgiveness of indebtedness.

8. "Person" means any natural person, individual, proprietorship, partnership, corporation, association, organization, joint venture, firm, other business enterprise, governmental body, group of natural persons or other entity.

9. "Relating to" means identifying, reporting, accounting for, pertaining to, referring to, containing, concerning, describing, embodying, mentioning, constituting, supporting, corroborating, demonstrating, proving, showing, evidencing, arising out of or in connection with, refuting, negating, disputing, rebutting, controverting, contradicting, or in any way legally, logically or factually connected in any way with the stated subject matter.

10. The terms "and" and "or" shall be construed either conjunctively or disjunctively whenever appropriate in order to bring with the scope of these Data Requests any information or documents which might otherwise be considered to beyond the scope of this request.

INSTRUCTIONS

1. These requests call for all information, including information contained in documents, which relating to the subject matter of these Data Requests and which is known or available to PGE.

2. Please furnish responses to each Data Request on a separate page. Where a Data Request has separate subdivisions or related parts or portions, please provide a complete response to each such subdivision, part or portion. Any objection to a Data Request should clearly indicate the subdivision, part, or portion of the Data Request to which it is directed.

3. The time period encompassed by these Data Requests is from July 1, 1997 through June 1, 2006, unless otherwise specified.

4. a. Whenever possible, please provide documents in Microsoft Office format or in searchable Adobe Acrobat format. Notwithstanding the foregoing, PGE should not change or modify the format or media in which the document now appears.

b. In addition to hard copies of documents, electronic versions of the documents, including studies and analyses, must also be furnished whenever available. Please also provide electronic copies of all workpapers that support the answers provided. If responses include spreadsheets, please provide with all formulas intact and all linked files.

5. If PGE cannot answer a Data Request in full, after exercising due diligence to secure the information necessary to do so, state the answer to the extent possible, state why the Data Request cannot be answered in full, and state what information or knowledge PGE has concerning the unanswered portions. If no document is responsive to a Data Request that calls for a document, then so state. If absolutely no information exists in response to a Data Request, then so state.

6. If, in answering any of these Data Requests, PGE reasonably believes that any Data Request or definition or instruction applicable thereto is ambiguous, please provide a response identifying the ambiguous language together with the interpretation used in responding to the Data Request.

7. If a document requested is unavailable, or is not in PGE's possession, custody or control, identify the person from whom the document may be otherwise obtained, and provide as complete an identification of the document as is reasonably possible.

8. If PGE asserts that any document that would otherwise be responsible to a Data Request has been lost, discarded, or destroyed, please identify the document so lost, discarded, or destroyed, when and why it was destroyed and identify the person who directed the destruction, the date of the destruction, and the person disposing of the documents. If the document was destroyed pursuant to PGE's document destruction program or otherwise, identify and produce a copy of the guideline, policy, or company manual describing such document destruction program.

9. If PGE refuses to respond to any Data Request by reason of a claim of privilege, confidentiality, or for any other reason, state in writing the type of privilege claimed and the facts and circumstances PGE is relying upon to support the claim of privilege or the reason for refusing to respond. With respect to requests for documents to which PGE refuses to respond, identify each such document, and specify the number of pages it contains. Please provide the following information for such documents:

(a) a brief description of the document and its subject matter;

(b) the date of document;

(c) identify the sender, author, preparer and/or originator;

(d) identify each person who received the document or to whom copies of the document were furnished;

(e) the specific basis for withholding it and a statement of facts constituting the justification and basis for withholding it; and

(f) The Data Request to which such document responds.

The City asks that this information be provided so that it may determine whether the claim of privilege is being reasonably asserted, and so that it may reasonably evaluate whether to challenge the assertion as to that particular document.

10. For each Data Request, identify the person from whom the information and documents supplied in response to that Data Request were obtained, the person who prepared each response, the person who reviewed each response, and the person who will bear ultimate responsibility for the truth of each response.

11. These requests for documents and responses are continuing in character so as to require PGE to file supplemental answers as soon as possible if PGE obtains further or different

information. Any supplemental answer should refer to the date and use the number of the original request or subpart thereof.

12. Whenever these Data Requests specifically request an answer rather than the identification of documents, the answer is required and the production of documents in lieu thereof will not substitute for an answer.

13. If the information sought under any of these Data Requests is otherwise publicly available from another source, please identify that source and describe how the information may be reasonably otherwise obtained outside of this proceeding.

DOCUMENTS

1. a. Please provide all oral or written inter-company tax compacts or agreements (created pursuant to Treasury Regulations or other federal or State of Oregon requirements or otherwise) involving Portland General Electric that existed during the relevant time period, and all communications relating to any such agreements or compacts.

b. Please provide any amendments or other oral or written modifications relating to such tax compacts or agreements, between or among PGE and Enron or between PGE and any member of the Enron controlled group of companies, and all communications relating to any such amendments or other modifications.

c. For the relevant time period, please provide all orders issued by any federal or state regulatory agency approving or reviewing any such tax compacts or agreements, including all communications to or from the federal or state agency.

d. For the period between July 1, 1997 through the present, please provide copies of all communications with, to or from any federal or state agency regarding such inter-company tax compacts or agreements.

d. For the relevant time period, please provide a list of all funds paid by PGE to Enron made pursuant to such tax compact or agreement, identifying the date of the payment, the amount of the payment and describing the basis for the payment.

e. For the relevant tie period, please provide a list of all funds received by PGE from Enron made pursuant to such tax compact or agreement, identifying the date of the payment, the amount of the payment and describing the basis for the payment.

f. Please provide all documents relating to any oral, informal or other form of agreements between Enron and PGE relating to the payment of funds for covering income tax obligations of PGE, as an affiliate of Enron or otherwise, for the relevant time period.

2. Please provide copies of all studies or analyses performed for PGE or Enron by outside consultants, auditors or advisors, including investment bankers, relating to the flow of funds between or among PGE and Enron under any inter-company tax compacts or agreements (created pursuant to Treasury Regulations or other federal or State of Oregon requirements or otherwise) during the relevant time period.

3. a. Please provide documents relating to the total funds paid by PGE to Enron during the relevant period, identifying as a percentage of such funds the amount of funds paid by PGE to Enron under any inter-company tax compacts or agreements (created pursuant to Treasury Regulations or other federal or State of Oregon requirements or otherwise) during the relevant time period.

b. Please provide documents relating to the total funds paid by PGE to Enron during the relevant period, and the percentage of such funds paid by PGE to Enron represented by the monies collected under the Multnomah County Business Income Tax.

4. If not otherwise produced under Data Requests No. 1 through No. 3 above, for the relevant time period, please provide each Multnomah County Business Income Tax return or tax information filing filed or prepared by PGE or its officers, employees, or agents, including all supporting work papers.

5. Please provide all documents relating to the deconsolidation of PGE from Enron for tax reporting purposes in 2001.

6. Please provide all documents available to PGE relating to PGE's re-consolidation with Enron for tax reporting purposes in 2002.

7. To the extent not otherwise provided in response to Data Request No. 1 through No. 14, please provide:

a. All documents relating to whether any of the $45.917 million in Income Taxes referenced under Account 236 in the second half 1998 Affiliated Interest Report submitted to the OPUC were paid by PGE to Enron.

b. All documents relating to whether any of the $72.545 million in Income Taxes referenced under Account 236 in the first half 1999 Affiliated Interest Report submitted by PGE to the OPUC were paid by PGE to Enron.

c. All documents relating to whether any of the $52.618 million in Income Taxes referenced under Account 236 in the second half 1999 Affiliated Interest Report submitted by PGE to the OPUC were paid by PGE to Enron.

d. All documents relating to whether any of the $109.399 million in Income Taxes referenced under Account 236 in the 2000 Affiliated Interest Report submitted by PGE to the OPUC were paid by PGE to Enron.

e. All documents relating to whether any of the $94.140 million in Income Taxes collected by PGE as referenced in PGE's OPUC Regulatory Reporting, Results of Operation, January 1, 2000 - December 31, 2000, Page 1, Actual Financial Statements column, were paid by PGE to Enron.

f. All documents relating to whether any of the $38.389 million in Income Taxes collected by PGE as referenced in PGE's OPUC Regulatory Reporting, Results of Operation, January 1, 2001 - December 31, 2001, Page 1, Actual Financial Statements column, were paid by PGE to Enron.

g. All documents relating to whether any of the $52.618 million in Income Taxes referenced under Account 236 in the second half 1999 Affiliated Interest Report submitted by PGE to the OPUC were paid by PGE to Enron.

h. All documents relating to the return to Accrual Adjustments of $11.300 million in Income Taxes referenced under Account 236 in the 2002 Affiliated Interest Report submitted by PGE to the OPUC.

i. All documents relating to whether any of the $68.025 million in Income Taxes referenced under Account 236 in the 2004 Affiliated Interest Report submitted by PGE to the OPUC were paid by PGE to Enron.

8. a. Please provide all documents relating to accounting entries by PGE in its books and records to reflect the distribution, disposition, adjustment, compromise, disbursement, settlement, resolution or satisfaction of PGE's Claims against Enron in the Enron Bankruptcy Proceeding.

b. The proof of claim submitted by PGE in the Enron Bankruptcy Proceeding stated: 'Pursuant to a tax sharing agreement that was entered into among PGE, its subsidiaries and former parent, and for which Enron is liable pursuant to the Merger ("Tax Sharing Agreement"), PGE is owed $4,972,314 plus additional interest, fees, charges, costs and expenses that may be owed". Please provide all documents relating to the "Tax Sharing Agreement", to the extent not otherwise provided in response to Data Request No. 5. Please provide all

documents relating to PGE's calculation and assessment of the amount identified by PGE in this statement.

c. The proof of claim submitted by PGE in the Enron Bankruptcy Proceeding stated: "Pursuant to the Tax Sharing Agreement, PGE may owe Enron $8,152,384 in 2001 RTA (return to accrual) taxes and $1,828,931 in taxes related to the Merger." Please provide all documents relating to the "Tax Sharing Agreement", to the extent not otherwise provided in response to Data Request No. 5 or No. 15(b). Please provide all documents relating to PGE's calculation and assessment of the amount identified by PGE in this statement.

9. For the period between January 1, 1997 through December 31, 1997, please provide all documents relating to:

a. The amount of PGE income allocated to the portion of the year when PGE was an affiliate of PGC and the amount allocated to the portion of the year when PGE was an affiliate of Enron;

b. The amount of PGE deferred taxes and income tax credit allocated to the portion of the year when PGE was an affiliate of PGC and the amount allocated to the portion of the year when PGE was an affiliate of Enron; and

c. The amount of PGE income tax expense allocated to the portion of the year when PGE was an affiliate of PGC and the amount allocated to the portion of the year when PGE was an affiliate of Enron.

Very truly yours,

Benjamin Walters

Benjamin Walters
Senior Deputy City Attorney

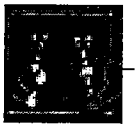
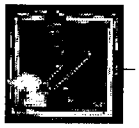
BW:pd

c. Judy Johnson, OPUC
Service List

Email Message

Scores:	Employment statistically:76	Dates:2	Internet domains:1	Email addresses:4	Telephone numbers:1
	Offensive statistically:1	Personal statistically:1	Spam/ UCE:0		
Categories:	Personal content review				
Actions:					
View:	text/plain headers				

Vote: **Click to vote in Enron Contest for message that are funny, would get you fired, or that you would regret sending.**

It's funny  Would get me fired  Sender's regret 

From: rod.hayslett@enron.com
To: jim.piro@enron.com
Subject: FW: PGE Dividend
Date: Wed, 21 Nov 2001 05:48:45 -0800 (PST)

Can you help us out here from what you know? I do not believe you can loan money to Enron. Have you filed to be able to make the special dividend?

-----Original Message-----
From: Goodrow, Alicia
Sent: Monday, November 19, 2001 2:27 PM
To: Adams, Gregory
Cc: Hayslett, Rod; Ginty, James; Maxey, Dave
Subject: RE: PGE Dividend

Greg:

I do not have any access to information regarding PGE retained earnings.

As we discussed this morning, distributions of cash in the form of dividends will be subject to a tax of approximately 7%. This tax can be avoided completely if the distributions of cash take the form of intercompany loans which are settled at the close of the sale of PGE. Significant tax research and intercompany briefings took place on this very topic in July and August of this year. The procedures for settlement of the loans are already baked into the PGE

purchase and sale agreement. It is my understanding that some loans of cash have already been made under this procedure, but I am the wrong person to talk to about PGE issues or that sort. Rod Hayslett would have more information.

Jim Ginty is the appropriate tax department contact for PGE Purchase and Sale Agreement issues.

Regards,

Alicia Goodrow

-----Original Message-----
From: Adams, Gregory
Sent: Monday, November 19, 2001 10:36 AM
To: Goodrow, Alicia
Subject: FW: PGE Dividend

Alicia,

Do we know / can we quantify the amount of undistributed/retained earnings as of Sepetmber 30th, and what the tax impact would be of distributing that amount.

Thanks again.

Greg Adams
713-853-3887

-----Original Message-----
From: Brown, Bill W.
Sent: Monday, November 19, 2001 10:25 AM
To: Adams, Gregory
Subject: Re: PGE Dividend

I had heard something similar. We should probably get alicia to quantify exactly how much the leakage would be {in dollars} and how the mechanics would work. Please tell alicia that we understand that this would be a whalley, mcmahon, causey decision. We are only trying to identify options and quantify breakage and leakage.

Thanks very much for the update keep me posted.
William W. Brown

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