November 10, 2005

Via Electronic Filing and U.S. Mail

Oregon Public Utility Commission
Attention: Filing Center
PO Box 2148
Salem OR 97308-2148

Re: In the Matter of the Adoption of Permanent Rules to Implement SB 408,
Relating to Matching Utility Taxes Paid with Taxes Collected
OPUC Docket No. AR 499

Attention Filing Center:

Enclosed for filing in the above-captioned docket are the following documents of Portland General Electric:

- Reply Comments; and
- Opening Comments Regarding Interpretation of SB 408 Section 3(13)(e).

These documents are being filed by electronic mail with the Filing Center.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

/s/ INARA K. SCOTT

Inara K. Scott

IKS:am

cc: AR 499 Service List

Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 499

In the Matter of the Adoption of Permanent Rules Implementing SB 408 Relating to Utility Taxes	REPLY COMMENTS OF PORTLAND GENERAL ELECTRIC

I. Introduction

Portland General Electric Company (PGE) continues to believe that the Commission should consider the issues presented in this briefing in light of constitutional and statutory standards, intended and unintended consequences, and the Commission's overall goal of achieving adequate service at fair and reasonable rates. PGE respectfully suggests that its sensible and straightforward interpretation of the questions posed for briefing follows the rules of statutory interpretation, ensures that the legislative intent behind Senate Bill 408 (SB 408) is carried out, and still yields a fair, just and reasonable result.

II. How Should The Commission Apply the "Properly Attributed" Standard As It Appears In the Individual Sections of the Bill?

PGE argued in its Opening Comments that the Commission should interpret "properly attributed" within the context of the sections in which it appears. *See generally* Portland General Electric Company's Opening Comments, AR 499 (Oct. 28, 2005) (PGE's Opening Comments). PGE demonstrated how a straightforward reading of SB 408 provides a simple answer to the question posed for briefing: Section 3(12) requires a comparison between the stand alone tax liability of the regulated operations of the utility and the total amount of taxes paid, and attributes the lesser of those amounts to the utility as "taxes paid and properly attributed"; section 3(7) prevents the Commission from making a rate adjustment based on any amount other than that calculated in section 3(12).

PGE also demonstrated how an out-of-context interpretation of the term requires modification of the plain language of SB 408 and invalidates entire sections of the bill, including section 3(12). In their opening comments, several parties advocate for the interpretation of "properly attributed" advanced by Staff in its temporary rule, but none of those parties justified the modifications of the bill this interpretation requires, or the manner in which this interpretation nullifies major provisions of the bill. *See* Northwest Industrial Gas Users' Opening Comments, AR 499 at 2 (Oct. 28, 2005) (NWIGU's Opening Comments); Citizen's Utility Board's Opening Comments, AR 499 at 2 (Oct. 28, 2005) (CUB's Opening Comments); Industrial Customers of Northwest Utilities' Opening Comments, AR 499 (Oct. 28, 2005) (ICNU's Opening Comments). (CUB, ICNU, and NWIGU are collectively referred to herein as Non-Utility Parties.) PGE continues to believe that properly attributed must be read in context and interpreted with reference to the overall intent and meaning of the sections in which it appears.

A. PGE's Approach Tracks the Language and Intent of SB 408

PGE argued in its Opening Comments that the plain language of section 3(12) directs the Commission to compare the taxes incurred as a result of the regulated operations of the utility (section 3(12)(a)) with the total amount of taxes paid (section 3(12)(b)), as that term is defined in section 3(13)(f), and attribute the lesser of these amounts to the regulated operations of the utility. *See* PGE's Opening Comment at 7-13. This straightforward reading of the text and context of this section is entirely compatible with the language of section 3(7), which directs the Commission not to make a rate adjustment under section 3(6) based on amounts properly attributed to unregulated affiliates (*i.e.*, any amounts other than those determined in section 3(12) to be properly attributed to the regulated operations). It is not necessary to calculate the tax

liability of individual affiliates, or to apportion the tax losses of those affiliates, to implement this important provision. The Commission effectuates Section 3(7) by limiting the automatic adjustment clause to a difference between the amount calculated in section 3(12) and the amount of taxes authorized to be collected under section 3(13)(e).

ICNU notes that one of the rules of statutory construction is that the use of the same term throughout a statute indicates that the term has the same meaning throughout that statute. ICNU's Opening Comment at 7, *citing PGE v. BOLI*, 317 Or 606, 611 (1993). However, this general rule of construction is one among many, and does not override the more basic principle that a statute must be viewed in light of both plain language and context, with the overall intent of discerning the intent of the legislature. *Id.* at 610. "Properly attributed" appears in multiple sections of SB 408, and the plain language and context of those sections indicate that legislators did not intend a formulaic meaning. Most notably, in section 3(12), "taxes paid that are properly attributed to the regulated operations of the public utility" is subject to a "lesser of" test that compares total taxes paid to a portion of taxes paid incurred as a result of income generated by the regulated operations of the utility. Section 3(7), on the other hand, provides for no such test. We must assume that legislators intended this significant difference in statutory language to have some meaning, and that they expected the amount of taxes paid that are properly attributed to unregulated affiliates (section 3(7)) to be different from the amount of taxes paid that are properly attributed to the regulated operations of the public utility (section 3(12)). *See PGE v. BOLI*, 317 Or at 611.

ICNU argues that interpreting section 3(12) to place a "cap" on the amount of taxes paid that is properly attributed to the utility's regulated operations based on the total amount of taxes paid to units of government renders the "may not exceed the lesser of" language superfluous.

ICNU's Opening Comments at 12-13. This is simply not the case. For each year in question, the Commission will engage in a comparison between the amount calculated under section 3(12)(a) and 3(12)(b), and then attribute the lesser of those amounts to the utility. This process ensures that the amount attributed to the utility does not exceed the lesser of the two amounts. ICNU further argues that this interpretation would "eliminate the concept of attributing." *Id.* at 12. ICNU perhaps confuses the term "apportion" (to divide and assign according to a plan)[1] with the term "attribute" (to relate to a particular cause or source; ascribe).[2] One need not apportion, or divide the total amount of "taxes paid" according to a ratio, in order to attribute those taxes under the terms of the statute.

The temporary rule definition of properly attributed, in fact, eliminates the operation of section 3(12) all together. Because "taxes paid" is calculated by reference to an attribution ratio, no comparison ever takes place under section 3(12): taxes paid is always equal to 3(12)(b), and the amount described in section 3(12)(a) is never calculated. Moreover, this purportedly "consistent" application of properly attributed is entirely inconsistent in one crucial aspect: it only attributes "taxes paid" among affiliates that have a positive tax liability, ignoring the affiliates whose tax losses offset the total consolidated tax liability. In the long run, this scheme punishes those affiliates by attributing their tax losses to other entities but not giving them credit in future years for the effects of those losses, which they might have otherwise been able to carry to a prior or subsequent year.

---

1 The American Heritage Dictionary of the English Language, Fourth Edition (2000).
2 *Id.*

B. The Utility Is Responsible for the Tax Liability Incurred as a Result of Income Generated by its Regulated Operations

CUB likens utility customers to prisoners within holding companies, included in the holding company "to bring in tax dollars that cover a greater proportion of the consolidated taxes than unregulated affiliates must pay." CUB's Opening Comments at 2-3. CUB argues that it is unfair for utility to "bear a disproportionately large share of the consolidated tax burden" CUB's Opening Comments at 10; *see also* ICNU's Opening Comments at 5. This argument ignores fundamental legal and economic principles. The utility generates its own tax liability based on the net income that results from the difference between the revenues customers pay and the costs the utility incurs to serve them. The holding company does not impose that liability on the utility, and absent a holding company structure, the utility would pay the entirety of that tax liability by itself. The utility's tax liability is incurred based on the regulated operations of the utility – not the revenues, expenses, or risks of affiliated entities within the consolidated entity.

Moreover, as long as the consolidated entity has sufficient positive tax liabilities to fully utilize its tax losses, it does not benefit from including a utility with a positive tax liability in the group. *See* Example 1, below. The only instance in which the consolidated entity arguably benefits from the utility's positive tax liability is a situation in which the consolidated entity has tax losses it cannot use in the current year. Putting aside that the consolidated entity may be able to carry those taxes losses into a prior or subsequent tax year, in such a situation, the positive tax liability of the utility allows the consolidated entity to use those tax losses. *See* Example 2, below. PGE believes it is for this very reason that SB 408 only attributes the consolidated entity's total taxes paid to the utility when the consolidated tax liability is <u>less</u> than the utility's stand alone tax liability, *i.e.*, in a case like Example 2.

Example 1:

Affiliate X Tax Liability	**$ 130**
Affiliate Y Tax Liability	**$ -60**
Utility A Tax Liability	**$ 130**
Total Consolidated Tax Liability (with utility)	**$ 200**
Total Consolidated Tax Liability (without utility)	**$ 70**

In this scenario, the consolidated entity's tax liability without the utility is 70; with the utility, it is 200 (70 + 130). As long as the utility contributes the full amount of its stand alone tax liability (130) to the group, the group is unaffected by the utility. In no way does the group benefit from the utility's positive tax liability.

Example 2:

Affiliate X Tax Liability	**$ 130**
Affiliate Y Tax Liability	**$ -200**
Utility A Tax Liability	**$ 130**
Total Consolidated Tax Liability (with utility)	**$ 60**
Total Consolidated Tax Liability (without utility)	**0 ($ -70)**

In this scenario, the consolidated entity has a 70 in tax losses it cannot take if the utility is not part of the consolidated group. It can fully utilize those losses if the utility is part of the group.

The structure that the Non-Utility Parties propose would actually take a portion of tax losses generated by other affiliates and apportion those to the utility even when the consolidated group receives no benefit from the utility's tax liability, as in Example 1, and despite the fact that utility customers share none of the risks of the other affiliates and pay none of their costs. This interpretation would result in a windfall for utility customers. PGE does not believe the

legislature intended this result. It is only in the case of Example 2, where the consolidated entity arguably benefits from the utility's positive tax liability, that the legislature intended for the utility's customers to share in that benefit.

III. May the Commission Terminate the Automatic Adjustment Clause Upon Showing By a Utility That the Automatic Adjustment Clause Has a Material Adverse Effect On the Utility?

The Non-Utility Parties interpreted this question to refer solely to section 3(9) of SB 408. *See* CUB's Opening Comments at 18; ICNU's Opening Comments at 14; NWIGU's Opening Comments at 4-5. PGE discussed this term in reference to ORS 756.040, ORS 757.210, and SB 408. *See* PGE's Opening Comments at 18. If the other parties view this question in a broader context, PGE hopes that they will reach different conclusions than those expressed in their Opening Comments.

VI. Conclusion

PGE proposes a straightforward and sensible approach to interpreting SB 408 that leads to a fair and reasonable result. PGE respectfully requests that the Commission reject attempts by other parties to modify or ignore the plain language of the bill and its clear legislative intent to create a fair, just and reasonable method for treating both consolidated taxpaying entities and stand alone utilities.

DATED this 10th day of November, 2005.

Respectfully submitted,

/s/ INARA K. SCOTT_____

Inara K. Scott, OSB # 01013
Portland General Electric Company
121 SW Salmon Street, 1WTC1301
Portland, OR 97204
(503) 464-7831 (telephone)
(503) 464-2200 (telecopier)
inara.scott@pgn.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing REPLY COMMENTS OF PORTLAND GENERAL ELECTRIC COMPANY to be served by First Class US Mail, postage prepaid and properly addressed, and by electronic mail, upon each party on the attached service list.

Dated at Portland, Oregon, this 10th day of November, 2005.

/s/ INARA K. SCOTT_____
Inara K. Scott

AR 499
Official Service List

SAMMIE B ADAMS 1141 WYLIE LANE GRANTS PASS OR 97527	GARY BAUER NORTHWEST NATURAL 220 NW 2ND AVE PORTLAND OR 97209 gary.bauer@nwnatural.com
LAURA BEANE PACIFICORP 825 MULTNOMAH STE 800 PORTLAND OR 97232-2153 laura.beane@pacificorp.com	SCOTT BOLTON PACIFICORP 825 NE MULTNOMAH PACIFICORP OR 97232 scott.bolton@pacificorp.com
JULIE BRANDIS ASSOCIATED OREGON INDUSTRIES 1149 COURT ST NE SALEM OR 97301-4030 jbrandis@aoi.org	LOWREY R BROWN CITIZENS' UTILITY BOARD OF OREGON 610 SW BROADWAY, SUITE 308 PORTLAND OR 97205 lowrey@oregoncub.org
ED BUSCH PUBLIC UTILITY COMMISSION OF OREGON PO BOX 2148 SALEM OR 97308-2148 ed.busch@state.or.us	R. TOM BUTLER tom@butlert.com
REP TOM BUTLER H-289 STATE CAPITOL SALEM OR 97310 cpatom@fmtc.com	KEN LEWIS P.O. BOX 29140 PORTLAND OR 97296 kl04@mailstation.com
MELINDA J DAVISON DAVISON VAN CLEVE PC 333 SW TAYLOR, STE. 400 PORTLAND OR 97204 mail@dvclaw.com	JIM DEASON ATTORNEY AT LAW 521 SW CLAY ST STE 107 PORTLAND OR 97201-5407 jimdeason@comcast.net
MICHAEL EARLY INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES 333 SW TAYLOR STE 400 PORTLAND OR 97204 mearly@icnu.org	JASON EISDORFER CITIZENS' UTILITY BOARD OF OREGON 610 SW BROADWAY STE 308 PORTLAND OR 97205 jason@oregoncub.org

STEVE EVANS MIDAMERICAN ENGERY HOLDINGS COMPANY 666 GRAND AVE DES MOINES IA 50303 srevans@midamerican.com	DON M FALKNER AVISTA UTILITIES PO BOX 3727 SPOKANE WA 99220-3727 don.falkner@avistacorp.com
EDWARD A FINKLEA CABLE HUSTON BENEDICT HAAGENSEN & LLOYD LLP 1001 SW 5TH, SUITE 2000 PORTLAND OR 97204 efinklea@chbh.com	ANN L FISHER AF LEGAL & CONSULTING SERVICES 2005 SW 71ST AVE PORTLAND OR 97225-3705 energlaw@aol.com
ANDREA FOGUE LEAGUE OF OREGON CITIES PO BOX 928 1201 COURT ST NE STE 200 SALEM OR 97308 afogue@orcities.org	KELLY FRANCONE ENERGY STRATEGIES 215 SOUTH STATE ST STE 200 SALT LAKE CITY UT 84111 kfrancone@energystrat.com
PAUL GRAHAM DEPARTMENT OF JUSTICE REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 paul.graham@state.or.us	ROBERT JENKS CITIZENS' UTILITY BOARD OF OREGON 610 SW BROADWAY STE 308 PORTLAND OR 97205 bob@oregoncub.org
JUDY JOHNSON PUBLIC UTILITY COMMISSION PO BOX 2148 SALEM OR 97308-2148 judy.johnson@state.or.us	JASON W JONES DEPARTMENT OF JUSTICE REGULATED UTILITY & BUSINESS SECTION 1162 COURT ST NE SALEM OR 97301-4096 jason.w.jones@state.or.us
GREGG KANTOR NORTHWEST NATURAL 220 NW SECOND PORTLAND OR 97209 gsk@nwnatural.com	MARGARET D KIRKPATRICK NORTHWEST NATURAL 220 NW 2ND AVE PORTLAND OR 97209 margaret.kirkpatrick@nwnatural.com
BLAIR LOFTIS PACIFICORP 825 NE MULTNOMAH PORTLAND OR 97232 blair.loftis@pacificcorp.com	LARRY O MARTIN PACIFIC POWER & LIGHT 825 NE MULTNOMAH STE 800 PORTLAND OR 97232 larry.martin@pacificorp.com

KATHERINE A MCDOWELL STOEL RIVES LLP 900 SW FIFTH AVE STE 1600 PORTLAND OR 97204-1268 kamcdowell@stoel.com	RON MCKENZIE AVISTA UTILITIES PO BOX 3727 SPOKANE WA 99220-3727 ron.mckenzie@avistacorp.com
DANIEL W MEEK DANIEL W MEEK ATTORNEY AT LAW 10949 SW 4TH AVE PORTLAND OR 97219 dan@meek.net	SENATOR RICK METSGER STATE CAPITOL 900 COURT ST NE S-307 SALEM OR 97301 sen.rickmetsger@state.or.us
DAVID J MEYER AVISTA CORPORATION PO BOX 3727 SPOKANE WA 99220-3727 david.meyer@avistacorp.com	LISA F RACKNER ATER WYNNE LLP 222 SW COLUMBIA ST STE 1800 PORTLAND OR 97201-6618 lfr@aterwynne.com
JAN MITCHELL PACIFIC POWER & LIGHT 825 NE MULTNOMAH STE 2000 PORTLAND OR 97232 jan.mitchell@pacificorp.com	CHRISTY OMOHUNDRO PACIFICORP 825 NE MULTNOMAH BLVD STE 800 PORTLAND OR 97232 christy.omohundro@pacificorp.com
THOMAS R PAINE AVISTA CORPORATION 1411 EAST MISSION SPOKANE WA 99202 tom.paine@avistacorp.com	RICHARD PEACH PACIFICORP 825 NE MULTNOMAH PORTLAND OR 97232 richard.peach@pacificorp.com
MATTHEW W PERKINS DAVISON VAN CLEVE PC 333 SW TAYLOR, STE 400 PORTLAND OR 97204 mwp@dvclaw.com	PAULA E PYRON NORTHWEST INDUSTRIAL GAS USERS 4113 WOLF BERRY COURT LAKE OSWEGO OR 97035-1827 ppyron@nwigu.org
PAUL M WRIGLEY PACIFIC POWER & LIGHT 825 NE MULTNOMAH STE 800 PORTLAND OR 97232 paul.wrigley@pacificorp.com	RICK TUNNING MIDAMERICAN ENERGY HOLDINGS COMPANY 666 GRAND AVENUE DES MOINES IA 50303 rrtunning@midamerican.com
SENATOR VICKI L WALKER STATE CAPITOL PO BOX 10314 EUGENE OR 97440 sen.vickiwalker@state.or.us	BENJAMIN WALTERS CITY OF PORTAND - OFFICE OF CITY ATTORNEY 1221 SW 4TH AVE - RM 430 PORTLAND OR 97204 bwalters@ci.portland.or.us

LINDA K WILLIAMS KAFOURY & MCDOUGAL 10266 SW LANCASTER RD PORTLAND OR 97219-6305 linda@lindawilliams.net	MARCUS A WOOD STOEL RIVES LLP 900 SW FIFTH AVENUE, SUITE 2600 PORTLAND OR 97204 mwood@stoel.com
AUSEY H. ROBNETT III PAINTE, HAMBLEN, COFFIN, BROOKE & MILLER LLP PO BOX E COEUR D' ALENE ID 83816-0328	