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	OPENING COMMENTS OF PORTLAND GENERAL ELECTRIC REGARDING INTERPRETATION OF SB 408 SECTION 3(13)(e)

I. Introduction

The explicit intent of the Oregon State Legislature in passing Senate Bill 408 (SB 408) was to create a system for dealing with utility income taxes that is "fair." This guiding principle was so important to legislators they modified ORS 757.210 to include a requirement that, "[t]he commission may not authorize a rate or schedule of rates that is not fair, just, and reasonable." SB 408 Sec. 5; amending ORS 757.210(1)(a). Similarly, the findings of SB 408 include a statement that, "[u]tility rates that include amounts for taxes should reflect the taxes that are paid to units of government to be considered fair, just and reasonable." Section 2(f).

The fairness provisions of SB 408 cannot be read in isolation. These new and amended statutes are part of an established body of law and precedent, and must be interpreted consistently with that body of law. ORS 756.040 provides that rates are fair and reasonable if they provide adequate revenue for operating expenses and capital costs, with a return to the equity holder that is commensurate with the risks of the enterprise and sufficient to ensure confidence in the financial integrity of the utility. The Public Utility Commission of Oregon (Commission) must closely scrutinize all proposed interpretations of the term "taxes authorized to be collected in rates" to determine if they meet all of these statutory requirements. The Commission must reject proposed definitions for taxes authorized to be collected that are

patently unfair, inaccurate, or create a system that will not allow a utility to recover in rates amounts of taxes actually paid to units of government.

The major provisions of SB 408, including the tax report (section 3(1)) and automatic adjustment clause (section 3(6)), are based on a comparison between "taxes paid" (section 3(13)(f)) and "taxes authorized to be collected" (section 3(13)(e)). To follow the plain language of section 3(13)(e), achieve the intent of SB 408, and comport with the constitutional and statutory requirements for ratemaking, the Commission must make certain that this comparison uses consistent data, such that the determination of "taxes authorized to be collected" reflects the same revenues and expenses that resulted in the amount of "taxes paid." Therefore, Portland General Electric Company (PGE) answers the question posed for briefing with a simple, "No."

II. Does SB 408 require that the Commission, in determining the amounts identified in 3(13) (e) (B) and (C), use the numbers calculated from test year data that the Commission has previously authorized?

PGE believes the answer to this question is "no." The legislature did not intend, and neither SB 408, ORS 757.210, nor ORS 756.040 allow, for the amount of taxes collected in rates to be determined by reference to inaccurate test year data. The plain language of the statute directs that the Commission calculate taxes collected in rates using the same method the Commission uses in establishing rates. This method is not fixed to test year data – it is flexible and readily permits substitution of actual financial results for test year inputs. The context of the statute similarly compels the use of actual, up-to-date data so that an accurate comparison can be made between the taxes paid in a given year and the taxes collected in that year. The use of test year data would run counter to the text and context of SB 408 and would produce a result that is neither fair nor reasonable, in violation of SB 408, ORS 757.210, and ORS 756.040.

A. The Text and Context of SB 408 sec. 3(13)(e)(B) Refer to a Process, Not a Product

When we interpret SB 408, our overall task is to "discern the intent of the legislature." *PGE v. BOLI*, 317 Or 606, 610 (1993). In the first level of statutory construction we look to the text and context of the statute, including other provisions of the same statute and other related statutes. *Id.* at 611. As we interpret the text, we must be careful not to "insert what has been omitted, or omit what has been inserted," and follow plain, natural, and ordinary meanings of the words in the statute. *Id.* As we interpret the context, we must give meaning, wherever possible, to all of the provisions of the statute and related statutes. *Id.*

SB 408 section 3(13)(e) defines "taxes authorized to be collected" as the product determined by multiplying three values:

> (A) The revenues the utility collects from ratepayers in Oregon, adjusted for any rate adjustment imposed under this section;
>
> (B) The ratio of the net revenues from regulated operations of the utility to gross revenues from regulated operations of the utility, as determined by the commission in establishing rates; and
>
> (C) The effective tax rate used by the commission in establishing rates.

The best interpretation of the phrase "as determined by the commission in establishing rates" (Section 3(13)(e)(B)) is that it refers to a process used by the Commission when it establishes rates. Rules of statutory construction and requirements of law do not support an interpretation of this phrase as a product the Commission reached during the utility's last rate case.

General rules of construction require that we not insert words that are omitted, or omit words that are inserted. *PGE v. BOLI*, 317 Or at 611. Legislators wrote the phrase "in establishing rates" in the progressive tense—this language indicates on-going action, not a past result. We must presume that legislators did not use the words "in the utility's last general rate

case," and did not use the past tense ("when rates were established") for a reason. Both points support an interpretation of this language as a process, not a product.

The context of Section 3(13)(e) also supports this interpretation. Section 3(13)(e) determines, for purposes of SB 408, how much money the utility collected from ratepayers in a given year for taxes.[1] Utility expenses and revenues always vary from the amounts used for test year ratemaking. The parties appear to agree that Section 3(13)(e)(A) refers to the actual revenues collected from Oregon ratepayers in a given year. Basic logic instructs that using actual results for Section 3(13)(e)(A) and old test year amounts for 3(13)(e)(B) mismatches data and produces inaccurate information. The utilities and the Commission know with certainty that test year results will not occur precisely as predicted – even in the actual year of the test year, much less several years later. The net to gross ratio determined on a test year basis has meaning only within that test year.[2] A utility does not experience the same net to gross ratio outside of the test year any more than it experiences the same amount of revenues outside of the test year. The text and context of the statute simply do not support a methodology that allocates revenue and calculates taxes authorized to be collected by reference to hypothetical and inaccurate test year results.

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1 PGE does not believe it is possible to precisely determine what portion of utility revenues collected in a given year correspond to taxes, because such a calculation would require an arbitrary allocation of revenues. However, PGE believes the methodology described herein, which is required by the plain language of SB 408 sec. 3(13)(e), provides the most accurate method of estimating the amount of taxes authorized to be collected in rates for the intended purpose of SB 408.

2 The Commission does not explicitly set the utility's net to gross ratio when it establishes rates - the net to gross ratio results from other elements of the test year (*i.e.*, rate base, authorized return on equity, and the expenses, including income tax expense, that are authorized for recovery by the Commission). On a test year basis, the Commission determines an amount of net income the utility should earn based on the utility's rate base, the required return on equity and the share of financing provided by equity. The authorized level of net income is an "after-tax" figure which is grossed up for the utility's tax expense, resulting in the utility's projected pre-tax earnings (or "net"). Pre-Tax earnings are then added to the other expenses (A&G, O&M, etc.) that are allowed for recovery to determine the revenue requirement (or "gross"). The net to gross ratio is not an input into this ratemaking process; it is simply a ratio that can be derived from the results of that process.

B. Section 3(13)(e)(C) Should Be Interpreted Consistently with Section 3(13)(e)(B)

Section 3(13)(e)(C) uses slightly different language than Section 3(13)(e)(B): it refers to the effective tax rate "used by the commission in establishing rates," as opposed to the net to gross ratio "as determined by the commission in establishing rates." This difference does not change the interpretation because both sections use the progressive tense in the operative language, "in establishing rates." When it sets rates, the Commission "uses" an effective tax rate that is the product of forecast taxable income, forecast marginal tax rates, and forecast usage of tax credits. The Commission can easily apply the same formula to actual data, achieving the logical outcome implied by the text and context of the statute: an actual effective tax rate updated on an annual basis, generated using the same process the Commission uses when establishing rates.

Just as it would violate legislative intent to use a test year net to gross ratio, it would work against legislative goals of accuracy and fairness to use an effective tax rate based on old test year results. The purpose of Section 3(13)(e) is to account for, on an annual basis, actual amounts collected by the utility for taxes. Neither text nor context of this section support any interpretation that substitutes old test year results for actual results.

SB 408 requires that the Commission treat taxes differently from other costs by changing rates to account for differences between amounts of taxes actually collected and amounts of taxes actually paid in a given past year. The various sections of the bill work in context to achieve this goal. Inserting old test year results into this process violates the central purpose of the legislation.

C. SB 408, ORS 757.210, and ORS 756.040 Require that the Utility Be Permitted to Recover in Rates Amounts Paid to Units of Government for Taxes

Section 2(1)(f) states that "Utility rates that include amounts for taxes should reflect the taxes that are paid to units of government to be considered fair, just and reasonable." As previously noted, the legislature found the fairness principle to be so central to SB 408 it modified ORS 757.210 to state, "The Commission may not authorize a rate or schedule of rates that is not fair, just and reasonable." If the Commission interprets the language in sec 3(13)(e) as referring to actual utility financial results, the result will be a fair comparison between an amount of "taxes authorized to be collected" based on actual utility financial results and an amount of "taxes paid" based on actual amounts paid to units of government. Rate adjustments will track these actual financial results and ensure that the utility has collected in revenue no more and no less than the amount of taxes it actually pays to units of government. This is precisely the result the legislature intended.

Using old test year data to calculate the amount of taxes collected, on the other hand, will achieve precisely the opposite effect. Test year results will not reflect the utility's actual financial results, resulting in an automatic adjustment clause that forces the utility to under- or over-collect for taxes in rates. This result runs directly counter to the essence of SB 408. The legislature found that utility rates that include taxes should reflect the taxes that are paid to units of government. *See* Section 2(1). If the Commission implements rate adjustments based on old test year data, it will not achieve this goal.

III. Conclusion

The issue presented in this briefing is an issue of fairness and accuracy. Everyone – customers and utilities alike – loses if the Commission calculates rate adjustments under SB 408

based on faulty data that does not reflect actual utility results. Customers will pay rates with over- or under-charges and experience unnecessary rate volatility. Utilities either will not have an opportunity to recover in rates legitimate and authorized costs for taxes, or will receive a windfall for taxes paid but not collected. These results are neither required nor supported by SB 408. PGE respectfully requests that the Commission consider the text and context of SB 408, and reasonably interpret the bill in a manner that benefits all parties and achieves the legislature's goal in enacting this legislation.

DATED this 10th day of November, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing OPENING COMMENTS REGARDING INTERPRETATION OF SB 408 SECTION 3(13)(e) 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
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