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July 10, 2006

VIA E-FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol St. NE, Suite 215
P. O. Box 2148
Salem, Oregon 97308-2148

Re: *UM 1256, UM 1257 and UM 1259*

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of Portland General Electric Company's Response to Staff's Analysis. This document is being filed electronically per the Commission's eFiling policy to the electronic address PUC.FilingCenter@state.or.us, with copies being served on all parties on the service list via U.S. Mail. A photocopy of the PUC tracking information will be forwarded with the hard copy filing.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Leslie Hurd', written in a cursive style.

Leslie Hurd, Legal Assistant to
David F. White

/ldh

Enclosures

cc: Service List

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1256, UM 1257 & UM 1259**

In the Matter of

PORTLAND GENERAL ELECTRIC
COMPANY, (UM 1256)

PACIFICORP, dba PACIFIC POWER &
LIGHT COMPANY, (UM 1257)

and

IDAHO POWER COMPANY (UM 1259)

Applications for Deferral of Certain Costs and
Revenues Associated with Grid West

**PORTLAND GENERAL ELECTRIC
COMPANY'S RESPONSE TO STAFF'S
ANALYSIS**

Pursuant to the Conference Memorandum dated May 25, 2006, Portland General Electric Company ("PGE") files these Response Comments to Commission Staff's Analysis. PGE agrees with Staff's analysis and its conclusions that (1) the Commission has the legal authority to grant PGE's Deferred Accounting Application (the "Application") and (2) its recommendation that the Commission grant the Application.

Just last year, in UM 1147, the Commission rejected attempts similar to those proposed in this docket to restrict its discretion and legal authority under the deferred accounting statute.¹ In particular, it declined to "adopt additional standards to determine whether an application meets the requirements of ORS 757.259 (2)(e)." UM 1147, Order No. 05-1070 at 5. The Commission should reaffirm that position in this docket.

We submit the following as further support for Staff's analysis and recommendation.

¹ UM 1147, Order No. 05-1070 at 1 ("We also affirm the use of a flexible, fact specific review approach that acknowledges the wide range of reasons why deferred accounting might be beneficial to customers and utilities").

ISSUE NO. 1: Does PGE's Application seek to defer expenses incurred prior to the date of the Application?

It is important to note what is not in dispute. PGE applied for a deferred accounting order under ORS 757.259(2)(e), which permits the Commission to authorize deferred accounts for "identifiable utility expenses or revenues, the recovery or refund of which the Commission finds should be deferred in order to minimize the frequency of rate changes or the fluctuation of rate levels or to match appropriately the costs borne by and benefits received by ratepayers." No party seriously questions that PGE's Application concerns an "identifiable utility expense."

What the Industrial Customers of Northwest Utilities ("ICNU") disputes is the timing of that expense. ICNU claims that PGE incurred an expense when it disbursed funds to Grid West under Funding Agreements entered into beginning in 2000.² ICNU argues that expenses incurred before the date of the Application are ineligible for deferred accounting based on subsection 4's authorization that the Commission may grant deferrals "beginning with the date of application."

ICNU's argument rests on the mistaken assumption that entering into a loan agreement and disbursing funds pursuant to that loan agreement is an expense. The plain meaning of the terms "loan" and "expense" highlights this position's implausibility. An "expense" is defined as:

- (1)(a)(1) the act or practice of expending money: spending; * * *
- (1)(b)(1) the act or process of using up: consumption; * * *
- (1)(b)(2) loss * * * (2)(a) something that is expended in order to secure a benefit or bring about a result * * * (b) the financial burden involved typically in a course of action or manner of living: cost; * * * (d) an item of outlay incurred in the operation of a business enterprise allocable to and chargeable against revenue for a specific period; (3) a cause or occasion of expenditure; * * *
- (4) loss, injury, or detriment as the necessary price of something gained or as the inevitable result or penalty of an action: sacrifice.

² ICNU Response in Opposition ("Response") at 6.

Webster's Third International Dictionary (unabridged 1971) ("*Webster's*") at 800. Inherent in the definition of an expense is the notion that a person or company disburses funds or cash for immediate consumption or usage, which is therefore chargeable to the company or person as a loss, cost or expense.

A loan is not an expense because the company or person that disburses the funds receives in exchange a promise to repay the loan. A "loan" is defined as "(1)(a) money lent at interest; * * * (b) something lent for the borrower's temporary use on condition that it or its equivalent be returned * * * (2)(a) the grant of temporary use made by a lender." *Webster's* at 1326.

The Funding Agreements state that the "funds provided by" PGE and other participating utilities "shall be loan amounts that shall be repaid with interest by" Grid West to the utilities no later than the commencement of transmission service by Grid West. Funding Agreements, § 1.1 (a sample Funding Agreement is attached as Exhibit 1); Commission Staff Report, May 3, 2006, at 2. Commission Staff, therefore, concluded that the funds were loans, not expenses, at the time PGE disbursed the funds to Grid West.

The applicable legal constructs lead to the same conclusion. In interpreting a statute, the goal is to determine the intent of the Legislature. *PGE v. Bureau of Labor and Industry*, 317 Or 606, 610, 859 P2d 1143 (1993); ORS 174.020. Under the *PGE v. BOLI* standard, the first level of review is the statutory text and context, with the text being the better evidence of legislative intent. *PGE v. BOLI*, 317 Or at 610. If the text and context unambiguously disclose the Legislature's intent, the inquiry ends there. *Id.* at 610–11. If the legislative intent is not clear from the text and context, the court will then consider legislative history to discern the Legislature's intent. *Id.* at 611–12.

In this instance, the first level of review is conclusive. The Grid West loans, if and when they are deemed no longer recoverable, will be an "identifiable utility expense" under the plain terms of the statute. The timing of the expense is also clear based on the text and

context of the statute. An expense is not incurred when the utility makes a loan. An expense requires a loss or usage of funds that is "chargeable against revenue." A loan has none of these attributes. Funds are not consumed in a loan transaction. They are transferred in exchange for a loan receivable, which is an asset. Only at such time that a loan is deemed unrecoverable does it become an expense.

Finally, the Commission has considerable discretion to define when an expense is incurred. ICNU's position seeks to handcuff the Commission. The deferred accounting statute is not so inflexible. The degree of discretion afforded the Commission depends upon the nature of the terms. *Springfield Education Assn. v. School Dist.*, 290 Or 217, 223, 621 P2d 547 (1980). "Exact terms" impart relatively precise meanings, and require agency fact finding and nothing else. *Id.* at 223-224. Examples of exact terms are "21 years of age, male, 30 days." *Id.* at 223. "Inexact terms" are less precise and embody "complete expressions of Legislative meaning, even though that meaning may not always be obvious." *Id.* at 224. "Delegative terms" are general terms through which the Legislature may delegate to an agency responsibility for developing policy within the discretion allowed by the statute.

"Identifiable utility expense" is not an exact term. Unlike terms such as "male" or "30 days," it does not impart a precise meaning. Staff's Analysis concluded that "expense" is an inexact term. Staff Analysis at 3. A strong argument can be made that the issue here—when an expense has been incurred—has been delegated to the Commission for the exercise of its discretion. Recall, the timing of an expense is neither a defined term nor one used in the statute at all. The issue arises not from subsection (2)(e) of the statute, but rather from subsection 4, which provides general terms of authorization: "The Commission may authorize deferrals under subsection 2 of this section beginning with the date of application." Furthermore, the general terms of the statute provide the Commission with considerable discretion to grant deferrals under appropriate circumstances. *See* UM 1147, Order No. 05-1070 at 3 (citing ORS 757.259(2) ("the Commission by order *may* authorize deferral of the following amounts for later incorporation in rates")).

In this case, whether the term is "inexact" or "delegative" is immaterial. In either case, the courts will permit the Commission to use its expertise and experience to define when a utility has incurred an expense.³ Staff has recommended the use of GAAP, which provides that an expense is not incurred until such time as the loans are deemed no longer recoverable. Staff Report at 2. The use of GAAP to resolve this issue is consistent with the Commission's practice and well within the Commission's discretion as the agency charged with administering the deferred accounting statute.

ICNU's other arguments on this first question are similarly unpersuasive. ICNU claims that granting the Application will create "a huge loophole." As a threshold matter, this is a policy argument that goes to the exercise of Commission discretion, not an argument that is relevant to ICNU's attempt to hamstring the Commission's legal authority. More important, this objection reflects a gross exaggeration. Utilities will not be able to avoid the terms of the deferred accounting statute "simply by calling costs loans." ICNU Letter at 2. In this case, PGE produced to Staff and ICNU six separate Funding Agreements executed since 2000, when PGE first disbursed funds to Grid West. Utility expenditures will have no such contemporaneous loan documentation. Moreover, the Commission has considerable discretion over whether to grant deferred accounting applications. The Commission can block any loophole by rejecting "creative methods" designed to avoid the statute or Commission policy.

³ Courts give an agency's interpretation of "inexact terms" an "appropriate degree of assumptive validity if the agency was involved in the legislative process" or if the agency "has expertise based upon the qualifications of its personnel or because of its experience in the application of the statute to varying facts." *Springfield Education Assn.*, 290 Or at 227-228. The Commission has all the necessary attributes to permit the exercise of discretion. The Commission was actively involved in the legislative process leading to the enactment of the deferred accounting statute. The Commission has expertise in the technical area of utility ratemaking. Finally, the Commission has extensive experience applying the statute to a variety of deferred accounting applications. The courts' deference to agency expertise and discretion reaches its highest point when the statutory terms are delegative in nature.

ISSUE NO. 2: Are the expenses appropriately subject to deferral under ORS 757.259(2)(e)?

Under ORS 757.259(2)(e), the Commission may grant a deferred accounting application if it finds that the Application will either (1) minimize the frequency of rate changes or (2) match appropriately the costs borne by and benefits received by ratepayers. This test is stated in the alternative. An application need only satisfy either standard. UM 995, Order No. 01-085 at 11.

The Staff Report concluded that PGE's Application satisfied the second prong: it would appropriately match the costs borne by and benefits received by ratepayers. Staff Report at 3. ICNU objects "since Grid West is dissolving, there is no possible way in which these costs can be matched to a time in which ratepayers will receive any benefit." ICNU Letter at 3. ICNU's argument is ill-founded both as a matter of law and regulatory policy.

As a matter of law, it seeks to impose requirements that have no basis in the statute. According to ICNU, the "appropriate matching" only occurs when the expense provides benefits to future customers and those same future customers are charged the expense. In other words, "appropriate matching" requires temporal matching. The Commission has never adopted such a limited interpretation of "appropriate matching." For example, many power cost deferrals would not satisfy ICNU's rigid temporal matching requirement, yet the Commission has repeatedly approved these deferrals because they appropriately match costs and benefits.⁴

Nor would such a "temporal matching" principle make any sense. By definition, deferred accounts require a separation in time between when the utility incurs an expense and amortization of the expense in rates. A "temporal matching" requirement is therefore virtually impossible to satisfy and fundamentally at odds with the practice of deferred accounting, which the statute authorizes.

⁴ UM 480, Order No. 92-1130 at 2 ("Deferrals should be authorized * * * to match appropriately the costs borne by and benefits received by ratepayers. Deferred accounting is reasonable because customers are enjoying the benefits of extraordinary purchases and other actions by Idaho Power which assure continued service."); UM 673, Order No. 94-1111 at 3.

The Grid West loans were provided pursuant to FERC's mandate to develop a regional transmission entity. The potential expenses were incurred for the benefit of customers. Deferred accounting, therefore, will appropriately match the costs and benefits associated with the Grid West loans.

Finally, ICNU's restrictive interpretation of "appropriate matching" reflects unwise regulatory policy. The Commission recently observed that it "has used deferrals for a variety of reasons, including to encourage utility or customer behavior consistent with regulatory policy." UM 1147, Order No. 05-1070 at 2. Deferred accounting, in particular ORS 757.259(2)(e), is a Commission tool used to recover utility costs incurred while engaging in activities that further Commission policy. Unduly restricting this tool, particularly when the proposed limitation has no statutory basis, serves only to frustrate Commission policy and unnecessarily restrict the Commission's discretion.

CONCLUSION

For the reasons stated above, the Commission should (1) conclude that it has the legal authority to approve PGE's Application and (2) grant the Application as recommended in Staff's Report.

DATED this 10th day of July, 2006.

PORTLAND GENERAL
ELECTRIC COMPANY

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FUNDING AGREEMENT

THIS AGREEMENT is entered into effective as of May 3, 2000 (the "Effective Date") by and among Avista Corporation, the Bonneville Power Administration ("BPA"), Idaho Power Company, Nevada Power Company, The Montana Power Company, PacifiCorp, Portland General Electric Company, Puget Sound Energy, Sierra Pacific Power Company (together referred to as the "Transmission Owners" or "TOs"), and RTO West.

RECITALS:

The TOs wish to work toward filing(s) on or before October 15, 2000 for the creation of a Regional Transmission Organization ("RTO") pursuant to FERC Order 2000 (as amended).

The parties recognize the need to include other interested stakeholders in a broad collaborative process for the creation of the RTO.

The TOs wish to finance the retention of experts and facilitators in order to further this work, and to assist in preparation of the regulatory filings required for the RTO.

RTO West is a nonprofit Washington corporation, with a purpose initially of retaining experts and facilitators to further the effort to create the RTO and to facilitate the related collaborative process, and a purpose later (after changes to the RTO West governing documents that among other matters conform RTO West's governance with the independence requirements of FERC's Order 2000) of operating as the RTO as filed with and approved by FERC.

The parties wish to set forth their agreement for the funding of the above work.

AGREEMENT:

- 1.0 **Funding.** Subject to the terms of this Agreement, the TOs agree to provide funding to RTO West for the purpose of enabling RTO West to retain the experts and facilitators referenced above and to pay certain other incidental expenses.
 - 1.1 **By Non-BPA TOs.** Funds provided by TOs other than BPA shall be loaned amounts that shall be repaid with interest by RTO West to the TOs promptly when sufficient third party financing is available to RTO West, but in any event, not later than the commencement of transmission services by RTO West as an RTO over the transmission assets of one or more TOs. RTO West agrees to pay interest on all outstanding loan balances at the same interest rates from time to time as established by FERC for refunds, pursuant to 18 CFR §35.19a.
 - 1.2 **By BPA.** Funds provided by BPA shall be credited with interest against rates payable by BPA transmission customers, in services to BPA

transmission customers in equivalent value, or in such other manner as BPA may direct, when sufficient third party financing is available to RTO West, but in any event, not later than the commencement of transmission services by RTO West as an RTO over the transmission assets of one or more TOs. RTO West agrees to provide an allowance for interest on all outstanding BPA amounts at the same interest rates and in the same manner as that provided to the other TOs in Section 1.1.

- 1.3 Amount of Funds Available. Each of the TO's agrees to provide its allocated share, as set forth in section 1.4, of all funding as requested by RTO West, up to a total TO funding amount of \$2.0 million. This funding level may be increased, but the obligation to fund such increases shall be binding only upon those TOs agreeing to such increases.
- 1.4 Allocation. 50 % of each funding request shall be allocated equally among the TOs, and the remaining 50% shall be allocated in proportion to each TO's net transmission plant investments. The methodology for the total funding amounts for each of the TOs is set forth in Attachment 1. The funding totals shall be as follows:
- | | |
|--------|---|
| 7.74% | Avista Corporation |
| 27.85% | BPA |
| 8.17% | Idaho Power Company |
| 8.72% | The Montana Power Company |
| 18.01% | PacifiCorp |
| 7.97% | Portland General Electric Company |
| 9.53% | Puget Sound Energy, Inc. |
| 12.01% | Sierra Pacific Power Company and Nevada Power Company |
- 1.5 Timing of Funding. Each of the TOs shall advance to RTO West its allocated share of an initial Funding amount of \$1.0 million, on or before May 15, 2000. RTO West may issue calls in writing for additional Funding, up to the limit set in section 1.3, in order to meet its payment obligations incurred pursuant to approvals by the TOs in accordance with Section 2.0. Each of the TOs shall advance its share of funding requests to RTO West within 10 business days of receiving RTO West's call. If a TO has contributed an amount in excess of the amount such TO was required to contribute pursuant to section 1.3, RTO West (1) first shall make refunds to such TO up to its excess contribution, plus interest

earned by RTO West thereon, and (2) thereafter with respect to any remaining RTO West funds, to each TO in proportion to the relative actual percentage contributions made by such RTO as specified in section 1.4.

- 2.0 Use of TO Funds. Funds available to RTO West under this Agreement shall be used only for the purposes described in Section 1.0 and as approved by a majority of the TOs current in their payment obligations under this Agreement. Each TO shall have one vote, except that Sierra Pacific Power Company and Nevada Power Company shall together have one vote. With respect to any funding increases not agreed to by all of the TOs, such funds shall be used only for the purposes described in Section 1.0 and as approved by a majority of the TOs who have agreed to such increased funding and who are current in their payment obligations under this Agreement. Such funds may be used to contract with consultants, experts, and for related services; to purchase equipment, supplies, office space, and public meeting expenses incidental to such services; and to pay related filing, incidental and administrative costs. Such funds shall not be used to reimburse internal costs of the TOs or costs of third parties hired individually by one or more of the TOs. Funds under this Agreement for the payment of RTO West legal counsel shall not be available without the unanimous consent of the TOs current in their payment obligations under this Agreement. The TOs each hereby consent to the retention by RTO West of the law firm of Krogh & Leonard to facilitate the public collaboration process and to provide other legal assistance as requested by RTO West from time to time. The TOs also agree that RTO West may retain Krogh & Leonard retroactively for a period commencing February 15, 2000.
- 3.0 Management of Activities Funded by the TOs and Indemnity. Activities funded by the TOs shall be managed by individuals selected by the RTO West Board of Directors; however, RTO West shall remove any managing individual if requested to do so by a majority of the TOs. Other than for willful misconduct, each of the TOs agrees to indemnify and hold each of their own employees only (i.e. not the employees of other TOs) who may be appointed to serve as RTO West directors, officers or managers, harmless from any claims, loss, damages, charges and costs connected with or arising out of such director's, officer's, or manager's actions or omissions in the management of activities during the term of this Agreement.
- 4.0 Term. This Agreement shall remain in effect through December 31, 2000; provided that RTO West's obligation to repay or provide interest or credits to TOs under Sections 1.1 and 1.2, RTO West's obligation to repay unused funds under Section 1.5, the restrictions on the use of funds under Section 2.0, and the obligation of the TOs to indemnify under Section 3.0 shall survive the termination of this Agreement. Within the limits set pursuant to Section 1.3, the obligation of each TO hereunder to pay its allocated share of each funding request of RTO West is unconditional, cannot be terminated or rescinded during the term of this Agreement, and is applicable whether or not such TO is continuing to participate in the effort to create the RTO. Each TO waives as a defense to its timely

payment of its allocated share of each such funding request any defense that one or more of the other TOs has failed to timely pay its allocated share of such funding request.

5.0 Other terms.

- 5.1 Interpretation. This Agreement shall not be interpreted or construed to create an association, joint venture, or partnership or to impose any partnership obligation or liability upon the parties. No party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of the other parties except as expressly provided herein. It is expressly understood that this Agreement is limited in scope to funding a collaborative RTO effort and is not intended to, and does not, constitute an agreement to consummate any transaction involving transmission facilities or to enter into a definitive agreement with respect thereto.
- 5.2 Notices. Any notice required under this Agreement shall be in writing and shall be delivered (a) in person, (b) by a nationally recognized delivery service, (c) by United States Certified Mail, or (d) by facsimile to the persons, addresses and facsimile numbers listed in Attachment 2 to this Agreement. Notices are effective when received. Any party may change its address for notices by giving notice of such change in accordance with this section.
- 5.3 Amendments. No amendment, rescission, waiver, modification or other change to this Agreement shall be of any force or effect, unless set forth in writing and signed by authorized representatives of each party.
- 5.4 Third Party Beneficiaries. The directors, officers and managers of RTO West, as well as any entity entering a contract with the RTO West permitted under this Agreement, are intended third party beneficiaries of this Agreement. Except as here stated, no other parties shall be third party beneficiaries hereunder.

This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together shall constitute one and the same instrument.

Avista Corporation

By: Randall O Cloward

Name Randall O. Cloward

Title: Director Transmission Ops

Bonneville Power Administration

By: Mark W. Matter

Name: MARK W. MATTER

Title: SR. Vice Pres. TRANSMISSION
BUSINESS LINE

Idaho Power Company

By: James M. Collingwood

Name: JAMES M. COLLINGWOOD

Title: GEN. MGR. OPERATIONS

The Montana Power Company

By: William A. Pasloc

Name: William A. Pasloc

Title: Vice President

PacificCorp

By: Donald N. Furman

Name DONALD N. FURMAN

Title: VICE PRESIDENT

Portland General Electric Company

By: _____

Name: _____

Title: _____

Puget Sound Energy, Inc.

By: Kimberly Harris

Name Kimberly Harris

Title: Assistant General Counsel

Sierra Pacific Power Company
Nevada Power Company

By: _____

Name: _____

Title: _____

RTO West

By: Robin MacLaren

Name: Robin MacLaren

Title: President

CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE TO STAFF'S ANALYSIS** by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to each party listed below, deposited in the U.S. Mail at Portland, Oregon.

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DATED this 10th day of July, 2006.

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