

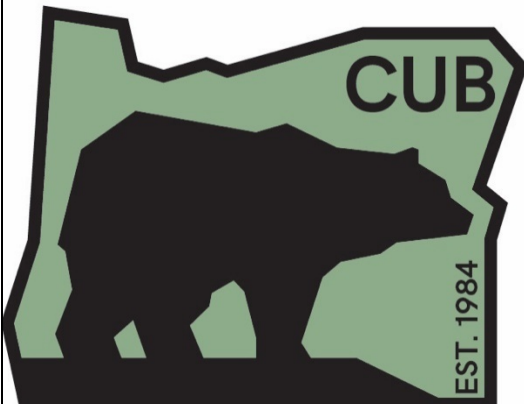
**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 394**

In the Matter of )  
 )  
PORTLAND GENERAL ELECTRIC )  
COMPANY, )  
 )  
Request for a General Rate Revision. )  
\_\_\_\_\_ )

REDACTED OPENING BRIEF  
OF THE  
OREGON CITIZENS' UTILITY BOARD

February 22, 2022



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**I. INTRODUCTION**

**A. Background**

Pursuant to Administrative Law Judge (ALJ) Lackey’s January 6, 2022 Ruling, the Oregon Citizens’ Utility Board (CUB) hereby submits its Opening Brief in the above-captioned proceeding. In this Brief, CUB responds to issues raised by Portland General Electric Company (PGE or the Company) throughout this proceeding. CUB also addresses issues and arguments raised by other parties, including the Staff of the Public Utility Commission of Oregon (Staff) and the Alliance of Western Energy Consumers (AWEC).

In its Prehearing Brief, PGE lauds itself for its dedication to keeping customer prices low despite a rise in inflation since its last general rate case (GRC).<sup>1</sup> While CUB appreciates the Company’s dedication to mitigating rate increases during a trying economic time for its captive customers, many of PGE’s proposals in this proceeding would unnecessarily shift risk and cost onto customers in order to benefit its shareholders. PGE continues to oppose AWEC and CUB’s

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<sup>1</sup> UE 394 – PGE’s Prehearing Brief at 1.

Boardman Deferral,<sup>2</sup> despite the compelling legal, policy, and equity reasons for the Public Utility Commission of Oregon (Commission) to grant it. The Company's proposals regarding its Faraday Repowering Project (Faraday) and Level III Outage Mechanism would represent an inappropriate shift of risk and cost. The Commission should reject PGE's proposals on these issues in order to follow legal mandates and further sound and equitable regulatory policy.

PGE proclaims that its positions against the Boardman Deferral and for its unprecedented Faraday cost recovery proposal will help the Company meet the challenges of climate change while maintaining reasonable rates for customers.<sup>3</sup> The Company's proposals will not achieve either. By taking a legally unsupportable position against the Boardman Deferral that differs from its peer utilities' approach to equitably transition from coal, PGE is intentionally standing in the way of Oregon's transition to clean energy.<sup>4</sup> In doing so, the Company proposes to illegally retain \$109,909,915<sup>5</sup> in Boardman costs that belong to its customers. Further, the Company's proposal to recover Faraday's costs in a "Phase II" of this GRC is entirely-one sided, completely devoid of any articulable Commission precedent, and would unnecessarily shift to customers the costs of a project whose commercial operation date is speculative at best. Further, PGE failed to meet its burden of proof to demonstrate that its proposed Faraday treatment and proposed changes to its Level III Outage Mechanism are reasonable.

In contrast, CUB's recommendations are grounded in equitable and legally supportable ratemaking principles. With a robust record for the Commission's consideration, CUB has met its burden of proof to demonstrate that the Boardman Deferral's costs should be amortized to customers over three years. This proceeding is an excellent opportunity for the Commission to

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<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> See UE 394 – CUB/400/Jenks – Gehrke/14.

<sup>5</sup> UE 394 – AWEC/301/Mullins/2.

reaffirm Oregon’s strong Oregon Revised Statutes (ORS) § 757.355 “used and useful” statute to protect customers and exercise its broad authority to set rates that are just and reasonable.<sup>6</sup>

CUB’s proposals discussed herein fairly balance the interests of the utility investor and consumer and will aid the Commission in setting just and reasonable rates.<sup>7</sup>

CUB respectfully requests the Commission:

1. Grant CUB and AWEC’s Boardman Deferral and amortize the balance over three years on a functionalized basis for return to customers;
2. Reject the Company’s proposal to conduct a GRC Phase II to bring Faraday into rates;
3. Adopt CUB’s proposed changes to the Company’s current Level III Outage Mechanism, or, in the alternative, adopt Staff’s proposed changes; and
4. Adopt Staff’s proposal to amortize some Wildfire and Ice Storm Deferral costs over a three-year period in this case while addressing remaining issues in their respective proceedings.

## **B. Burden of Proof**

In a utility dispute before the Commission, the burden of proof consists of two discrete components—the burden of persuasion and the burden of production.<sup>8</sup> In a utility proceeding, the burden of persuasion and the ultimate burden of producing sufficient evidence to support its

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<sup>6</sup> *In re Portland General Electric Company*, OPUC Docket Nos. UE 88/DR10, Order No.08-487 at 5 (“[t]he Commission sets rates under a comprehensive and flexible regulatory scheme. The legislature has expressed no specific process or method the Commission must use to determine the level of just and reasonable rates, and the Commission has great freedom to determine which of the many possible methods it will use.”) and *id.* at 4 (The legislature has provided the Commission with “the broadest authority—commensurate with that of the legislature itself—for the exercise of [this] regulatory function.”).

<sup>7</sup> ORS § 756.040.

<sup>8</sup> *In re Portland General Electric Company Application to Amortize the Boardman Deferral*, OPUC Docket No. UE 196, Order No. 09-046 at 7 (Feb. 5, 2009).

claims is always with the utility.<sup>9</sup> Other parties to the proceeding have the burden of producing evidence to support their argument in opposition to the utility's position.<sup>10</sup> In a case in which a utility is requesting a change in rates or a schedule of rates—such as a GRC—the utility bears the burden of showing that its proposed change will result in rates that are fair, just, and reasonable.<sup>11</sup> In regards to the Boardman Deferral, AWEC and CUB bear the burden of proof as the applicants that initiated Commission Docket No. UM 2119.

## II. ARGUMENT

### A. Boardman Deferral

CUB continues to respectfully urge the Commission to order the amortization of the entire balance of the Docket No. UM 2119 Boardman Deferral over three years for return to customers.<sup>12</sup> The Boardman Deferral represents the revenues customers have paid to support the plant's operation since the time it ceased operation. The Commission should act in this proceeding and approve the pending Boardman Deferral request and subsequent reauthorization as a preliminary matter before also authorizing amortization.<sup>13</sup> At a minimum, the Commission should approve the Boardman Deferral, which would set the stage for a dispute over the merits of amortization in Docket No. UM 2119 or a separate contested case. However, CUB believes the record is sufficient in this case for the Commission to order amortization of the entire

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 7-8.

<sup>11</sup> ORS § 757.210(1)(a).

<sup>12</sup> UE 394 – CUB/400/Jenks – Gehrke/5.

<sup>13</sup> UE 394 – Staff/2600/Moore – Dlouhy – Storm/4, lines 1-4.

Boardman Deferral balance. Should the Commission disagree with CUB’s primary proposal, CUB supports Staff’s Boardman Deferral amortization proposal as an alternative.<sup>14</sup>

The Commission can order the refund of the amounts in the deferral statute under the ORS § 757.355 “used and useful” statute. Additionally, the Boardman Deferral meets the criteria in ORS § 757.259 to be granted. Finally, compelling equity and policy rationale dictate that granting CUB’s request is in the public interest. The Commission should not be persuaded by PGE’s unavailing arguments to the contrary.

1. *ORS § 757.355 mandates return of the Boardman Deferral to customers.*

ORS § 757.355(1) states that “a public utility may not, directly or indirectly, by any device, charge, demand, collect or receive from any customer rates that include the costs of construction, building, installation or real or personal property not presently used for providing utility service to the customer.” Oregon’s “used and useful” statute is firm. There is not a lot of wiggle room in the words “directly or indirectly, by any device . . . .” From the date that Boardman ceased operating on October 15, 2020, the plant has not been used and useful. Customers have not been receiving a benefit from its operations. Therefore, under Oregon law, customers must not bear the costs. Staff agrees that ORS § 757.355 is the proper standard to apply to the amounts in the Boardman Deferral.<sup>15</sup> In determining whether a utility should be eligible to recover costs under the statute, the Commission has held that “[t]he critical issue is

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<sup>14</sup> UE 394 – Staff/2600/Moore – Dlouhy – Storm/5 (“Given that PGE has filed its Results of Operation (ROO) report for 2020, it is clear the Commission can resolve in this case the amortization of amounts deferred in 2020 and Staff recommends the Commission do so.”) and Staff/2600/Moore – Dlouhy – Storm 15 (“Staff recommends the Commission adopt an earnings test benchmark of 100 basis points below PGE’s authorized ROE. . . . PGE would [ ] not be able to amortize any portion of a credit that would cause PGE’s earnings to go below this benchmark.”) and Staff/2600/Moore – Dlouhy – Storm/13 (“Under Staff’s proposal, the earnings review would be conducted in three tranches, one for each calendar year of approved deferrals.”) and Staff/2600/Moore – Dlouhy – Storm/17 (Staff recommends no sharing for the Boardman Deferral because “allowing PGE to keep a percentage of the deferred amounts will not incent behavior that is beneficial for customers.”).

<sup>15</sup> UE 394 – Staff/2600/Moore – Dlouhy – Storm/21.

whether the . . . assets were being ‘used for providing utility service to the customer,’ as required by ORS § 757.355.”<sup>16</sup> Here, no utility service was rendered, so the utility should not receive any compensation.

For its part, PGE recognizes that it has continued to recover costs associated with Boardman after it closed.<sup>17</sup> However, the Company attempts to distinguish its direct contravention of ORS § 757.355 by citing *Gearhart* and arguing that rates may be legal even if the rates include depreciation expense and a return for a retired plant.<sup>18</sup>

In *Gearhart*, the Oregon Supreme Court relied on analysis from *Dreyer*, another case in the long history of PGE’s Trojan nuclear plant. In *Dreyer*, the Oregon Supreme Court held that amounts PGE collected after Trojan’s closure were “in violation of ORS § 757.355.”<sup>19</sup> The question that *Dreyer* wrestled with is whether ratepayers were injured by this ORS § 757.355 violation.<sup>20</sup> In *Dreyer*, the Court found that the Commission had been instructed, at the time, to “revise and reduce rates to offset the previous ‘improperly calculated and *unlawfully* collected rates.’”<sup>21</sup> Therefore, the Oregon Supreme Court was clear that collecting amounts in contravention of ORS § 757.355 was unlawful. The Court went on to say “[d]epending on how the PUC responds to that remand, some or all plaintiffs claimed injuries may cease to exist.”<sup>22</sup>

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<sup>16</sup> *In re Portland General Electric Company*, OPUC Docket Nos. DR10/UE88/UM989, Order No. 08-487 at 77 (Sep. 30, 2008).

<sup>17</sup> UE 394 – PGE’s Prehearing Brief at 43.

<sup>18</sup> UE 394 – PGE’s Prehearing Brief at 45 citing *In re the Application of Portland Gen. Elec. Co. for an Investigation into Least Cost Plan Plant Retirement*, Docket DR 10, et al., Order No. 08-487 at 21 (Sept. 30, 2008); see also *Gearhart v. Pub. Util. Comm’n of Or.*, 255 Or App 58, 94, 299 P3d 533 (2013) (affirming the Commission on this point); *Gearhart v. Pub. Util. Comm’n of Or.*, 356 Or 216, 237 n. 15, 339 P3d 904 (2014) (“the fact that rates include a component that is prohibited by statute does not necessarily mean that ratepayers have been injured.”).

<sup>19</sup> *Dreyer v. Portland Gen. Elec. Co.*, 341 Or. 262, 286, 142 P.3d 1010, 1023 (2006) (emphasis added).

<sup>20</sup> *Id.* at 285, 1022 (“[T]he central issue in these cases . . . [is] whether plaintiffs have been injured (and, if they have been, the extent of the injury).”).

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *Id.*

The Court was therefore clear that plaintiffs had incurred injuries as a result of the utility’s unlawful behavior. The Court in *Dreyer* concluded “that the PUC has primary jurisdiction to determine what, if any, remedy it can offer PGE ratepayers, through rate reductions or refunds, for the amounts PGE collected in violation of ORS 757.355.”<sup>23</sup> In this case, the revenues customers paid to support Boardman have been placed in a deferred account, allowing the Commission the remedy of refunding the amount that has been collected in violation of ORS § 757.355.

CUB requests that the Commission—as the holder of primary jurisdiction to determine whether a remedy should be applied—find that PGE’s ratepayers have been injured by PGE’s unlawful recovery of post-closure Boardman costs to the tune of \$109,909,915.<sup>24</sup> The remedy is clear—order the return of the entire Boardman Deferral balance for return to ratepayers over a three-year window. Just as the Oregon Supreme Court has held, PGE acted unlawfully when it retained Boardman costs in rates after the plant’s closure. PGE attempts to dismiss CUB’s legal theory on unavailing administrative grounds, saying that “[t]he interpretation for which CUB advocates would be unworkable in practice, because utilities would be required to change their rates every time they replace a transformer or pole.”<sup>25</sup>

PGE’s strawman argument holds no water. We’re not talking about transformers, poles, or any lesser plant subject to group depreciation. We’re talking about the retirement of Oregon’s only coal plant—PGE’s largest source of generation. We’re talking about a once-in-a-lifetime transition from fossil fuels to clean energy, and conducting that transition in a manner that is legally sound and fair to both ratepayers and PGE. We’re talking about aligning PGE with its

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<sup>23</sup> *Id.* at 286, 1023.

<sup>24</sup> UE 394 – AWEC/301/Mullins/2. This number represents an estimate at this time.

<sup>25</sup> UE 394 – PGE’s Prehearing Brief at 45.



peer utilities that are transitioning from coal.<sup>26</sup> The retirement of Boardman is a significant event<sup>27</sup> that carries with it significant amounts of money. According to the Oregon Supreme Court, it is unlawful for utilities to collect money for plant that is no longer serving customers under ORS § 757.355. The question for the Commission is whether the injury to ratepayers is of sufficient scale that it must be redressed. CUB urges the Commission to find that it is.

Due to ORS § 757.355's firm statutory prohibition and the Commission's broad authority to determine just and reasonable rates,<sup>28</sup> the Commission can end its inquiry here and order the return of the entire Boardman Deferral balance to customers.<sup>29</sup> Doing so would fairly balance the interests of investors and consumers and result in just and reasonable rates for a litany of reasons this Brief will address. The Boardman Deferral also meets the standard articulated in ORS § 757.259 and should be approved for additional policy and equity reasons.

2. *The Boardman Deferral meets the standard in ORS § 757.259.*

In its Prehearing Brief, CUB demonstrated why the Boardman Deferral meets the Commission's statutory and discretionary deferral criteria.<sup>30</sup> Rather than reiterating those arguments here, CUB incorporates them by reference and will focus on rebutting issues raised in PGE's Prehearing Brief. While PGE and CUB agree that Boardman's closure was a stochastic risk, the Company asserts that retaining Boardman's costs in rates did not result in substantial harm to customers sufficient to warrant deferred accounting.<sup>31</sup> In support of this contention, the

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<sup>26</sup> See, e.g., Case Number IPC-E-20-32 with the Idaho Public Utilities Commission and UE 394 – CUB/601/2.

<sup>27</sup> UE 394 – CUB/400/Jenks – Gehrke/10-11.

<sup>28</sup> OPUC Order No. 08-487 at 5 (“[t]he Commission sets rates under a comprehensive and flexible regulatory scheme. The legislature has expressed no specific process or method the Commission must use to determine the level of just and reasonable rates, and the Commission has great freedom to determine which of the many possible methods it will use.”) and *id.* at 4 (The legislature has provided the Commission with “the broadest authority—commensurate with that of the legislature itself—for the exercise of [this] regulatory function.”).

<sup>29</sup> UE 394 – CUB/601/3 – “[T]he removal of plant no longer in service is statutorily mandated.”).

<sup>30</sup> UE 394 – CUB's Prehearing Brief at 8-10.

<sup>31</sup> UE 394 – PGE's Prehearing Brief at 43.

Company argues that it has absorbed almost \$100 million in regulatory lag since its last rate case.<sup>32</sup> In terms of whether the amounts in the Boardman Deferral satisfy the magnitude threshold to justify deferred accounting, the Company's argument is meaningless. The test relevant to the deferral criteria is whether the magnitude of costs related the event is substantial or that there were extenuating circumstances.<sup>33</sup> Not whether the Company arguably experienced what it perceives to be offsetting costs. Here, both CUB and Staff agree that the amounts within the Boardman Deferral are substantial, and are therefore eligible for deferred accounting.<sup>34</sup> Further, PGE's practice of collecting revenue to pay for a plant that is no longer in service for over a year represents an extenuating circumstance that justifies exercise of the Commission's discretion to authorize amortization of the Boardman Deferral.

CUB continues to stress that the Commission retains broad discretion as to the contours of any potential earnings test.<sup>35</sup> Consistent with established Commission precedent, any earnings test should recognize the circumstances that gave rise to the deferral in the first place.<sup>36</sup> Here, the Commission should recognize PGE's systematic overcollection and recognize that PGE has avoided regulatory lag on nearly all of its generating assets.<sup>37</sup> Further, the Commission should consider that failing to return the amounts in the Boardman Deferral to customers would be unlawful under ORS § 757.355, as articulated by the Oregon Supreme Court. This is consistent with the Commission guidance indicating that "earnings test treatments should be designed to further public policy goals related to the specific deferral."<sup>38</sup> CUB continues to urge the

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<sup>32</sup> *Id.* at 44.

<sup>33</sup> UE 394 – Staff/2600/Moore – Dlouhy – Storm/6.

<sup>34</sup> UE 394 – Staff's Prehearing Brief at 11, line 1.

<sup>35</sup> UE 394 – CUB/400/Jenks – Gehrke/18, lines 7-9.

<sup>36</sup> UE 394 – CUB/400/Jenks – Gehrke/18, lines 9-11 and Staff/2600/Moore – Dlouhy – Storm/14.

<sup>37</sup> UE 394 – CUB/400/Jenks – Gehrke/19.

<sup>38</sup> *In re Portland General Electric Company*, OPUC Docket No. UE 82, Order No. 93-257 at 11-12.

Commission to order the return of the Boardman Deferral without consideration of an earnings test because it would be illegal for PGE to retain the amounts in the deferral. Additionally, as the next section will address, the Boardman Deferral furthers important public policy goals.<sup>39</sup>

CUB's earnings test request is not without precedent. In Docket No. UM 1920, PGE filed a deferral to track tax benefits associated with the U.S. Tax Reconciliation Act for later return to customers.<sup>40</sup> There, the Commission specifically considered the applicability of an earnings test for the tax benefits that were to be passed back to customers under ratemaking principles. The Order states, “[t]he Commission has wide discretion in the design of an earnings test, including discretion to apply or not to apply an earnings threshold.”<sup>41</sup> Ultimately, parties reviewed PGE's forecasted return on equity (ROE) and PGE agreed that “earnings inclusive of deferred amounts will result in earnings that are within an acceptable level of authorized rates.”<sup>42</sup>

Since the issue came before the Commission as part of a settlement, the Commission did not apply its own earnings test, but accepted the agreement that the earnings were “within an acceptable level.” However, the Commission did indicate that an earnings test at authorized ROE would have reduced the tax benefit being returned to customers, which would have been improper given the circumstances of the deferral.<sup>43</sup> Therefore, we know that the earnings review reflected in the settlement recognized earnings below authorized ROE but still within a range of reasonableness.

Similar to the Boardman Deferral, the deferral in UM 1920 was tracking revenues that customers were paying in excess of the cost. UM 1920 was focused on revenues that were

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<sup>39</sup> See, e.g. ORS § 757.518.

<sup>40</sup> *In re Portland General Electric Company, Application for Authorization to Defer Benefits Associated with the US Tax Reconciliation Act*, OPUC Docket No. UM 1920, Order No. 18-459 (Dec. 4, 2018).

<sup>41</sup> OPUC Order No. 18-459 at Appx. A, p. 5.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

collected to pay for taxes that were excessive after changes to federal tax rates. The Boardman Deferral is tracking revenues that customers paid in excess of Boardman's full cost after the plant was retired. In both cases, customers are paying to support a cost that no longer exists. The Commission approved a refund of the deferred amounts in UM 1920 and should follow suit here.

From a deferred accounting perspective, responding to a regulatory requirement is more akin to responding to a change in federal tax law or complying with a statutory mandate. When a change in costs is mandated—such as due to regulatory, legislative, or statutory direction—the Commission frequently does not require that traditional deferral criteria be met or an earnings test be applied. PGE itself has sought deferral of numerous statutorily or Commission mandated or authorized costs, and their approval has not been subject to the Commission's discretionary criteria.<sup>44</sup> Regardless, CUB has demonstrated that the Boardman Deferral does meet the Commission's statutory and discretionary deferral criteria. CUB continues to urge the Commission to return in the amounts in the Boardman Deferral without consideration of an earnings test. As an alternative, CUB finds Staff's recommended treatment as detailed in its testimony to be reasonable.<sup>45</sup>

3. *Granting the Boardman Deferral is supported by sound and equitable ratemaking policy and furthers important public policy goals.*

Returning the amounts in the Boardman Deferral to customers is supported by sound and equitable ratemaking policy and furthers Oregon's policy to decarbonize the electric system. Under ORS § 757.518, Oregon electric utilities are required to remove coal plant related costs from rates by January 1, 2030. In order to comply with this mandate, Oregon ratepayers have

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<sup>44</sup> UM 394 – CUB/601/3 citing OPUC Docket No. UM 2078 (Residential Battery Storage Pilot); OPUC Docket No. UM 1977 (Community Solar Start-Up Costs); OPUC Docket No. UM 1976 (Demand Response Test Bed).

<sup>45</sup> See *supra*, note 13.

been required to bear significant costs in connection with accelerating the closure of coal plants throughout the west.<sup>46</sup> Given that these costs are being passed to customers in an accelerated manner, it is imperative that the benefits be passed to customers as they are realized.<sup>47</sup> In addition, the costs of replacement resources such as Wheatridge are placed into customers' rates through the Renewable Adjustment Clause (RAC). Therefore, customers' rates reflect the accelerated depreciation of a legacy coal plant that is not providing power *and* the costs of the clean energy investments that replaced the retiring coal plant. Failure to address this unfair, imbalanced treatment creates a barrier to Oregon's transition to clean energy.<sup>48</sup>

PGE has been able to utilize trackers and accelerated depreciation to protect its shareholders from the impacts of the transition away from coal.<sup>49</sup> To enable PGE to continue to recover Boardman after it has ceased operation would be patently unfair to customers. If customers are treated unfairly, some intervenors may oppose the transition from coal. Oregon seeks to make a unified transition away from coal, and all parties must be treated fairly during the transition. PGE's shareholders have been able to recover their full Boardman investment, which was fully depreciated in 2020.<sup>50</sup> Under PGE's proposal, customers would be paying for more than the actual costs associated with retiring the plant. Apart from being illegal, this is unfair, poor ratemaking policy, and would fail to follow the matching principle.

CUB's proposal would also more equitably match the regulatory treatment PGE has enjoyed for years. PGE was able to accelerate Boardman's depreciation outside of a GRC via separate trackers between 2011 and 2013.<sup>51</sup> This resulted in increased short-term costs for

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<sup>46</sup> UE 394 – AWEC – CUB/100/Mullins – Gehrke/2, lines 8-9.

<sup>47</sup> *Id.* at lines 11-14.

<sup>48</sup> UE 394 – CUB/400/Jenks – Gehrke/14.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 14-15.

<sup>51</sup> UE 394 – CUB/400/Jenks – Gehrke/12.

PGE's captive customers. Further, PGE has historically avoided regulatory lag on a large number of recent generation investments,<sup>52</sup> and most of its future investments will be eligible for dollar-for-dollar cost recovery through the RAC without any consideration of an earnings test.<sup>53</sup> In terms of equity, if ratepayers must be responsible for the additional costs of new renewable resources acquired pursuant to state renewable policy through the RAC, it follows that ratepayers must also get the benefit of retiring coal resources pursuant to state policy at the time the resources are deferred.<sup>54</sup>

To counter these arguments, PGE asserts the lag it has incurred more than offsets the Boardman costs in rates after it closed.<sup>55</sup> PGE's arguments muddle the record and do not paint the entire picture. As CUB has demonstrated, PGE has historically gone to great lengths to avoid any regulatory lag on a wide number of generating plants it has brought online in recent years.<sup>56</sup> Mathematically, if no regulatory lag is allowed on the front end, and regulatory lag is allowed on the back end, customers will overpay a utility for a generation investment.<sup>57</sup> PGE's assertion that it had incurred lag that offsets Boardman costs does little to assuage CUB's legal and policy concerns about customers over-paying for an asset that has not served them for well over a year.

Finally, PGE has not rebutted evidence CUB put on the record demonstrating that PGE used Schedule 145 to recover costs associated with the retention and severance of PGE's employees at Boardman outside of a GRC process.<sup>58</sup> As of June 2020, PGE's customers have funded 14 million in severance and retention costs. By seeking to retain the amounts in the

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<sup>52</sup> UE 394 – CUB/400/Jenks – Gehrke/23.

<sup>53</sup> UE 394 – AWEC – CUB/100/Mullins – Gehrke/3, lines 13-15 and PGE's Prehearing Brief at 17 ("As with costs subject to the RAC, recovery of these costs would not be subject to an earnings review.").

<sup>54</sup> *Id.* at 15-18.

<sup>55</sup> UE 394 – PGE's Prehearing Brief at 46.

<sup>56</sup> UE 394 – CUB/400/Jenks – Gehrke/17, 23.

<sup>57</sup> *Id.* at 17.

<sup>58</sup> *Id.* at 15.

Boardman deferral, PGE is asking customers to fund retention and severance benefits for PGE's Boardman employees while the Company enjoys reduced labor costs.<sup>59</sup> These cost savings were funded by customers, not PGE, and represent another compelling reason in the long list of reasons why the Commission should approve amortization of the Boardman Deferral.

For the foregoing reasons, CUB respectfully requests that the Commission approve the Boardman Deferral and order amortization of the amounts therein over a three-year period for return to customers.

## **B. Faraday Repowering Project**

CUB continues to recommend that the Commission reject PGE's proposal to open a Phase II of this GRC to evaluate Faraday's prudence before the project is complete.<sup>60</sup> CUB, AWEC, and Staff are aligned in this position and no non-Company party believes PGE's proposal should be adopted.<sup>61</sup> Under the Company's proposal, the proceeding would initiate in the July-August 2022 timeframe and would focus solely on Faraday cost recovery.<sup>62</sup> According to PGE, Faraday is expected to be placed in service in the fourth quarter of 2022,<sup>63</sup> although, given project delays, this anticipated online date is speculative at best.<sup>64</sup> Regardless of Faraday's eventual online date, PGE's proposed Phase II would occur prior to Faraday being placed into service.<sup>65</sup> CUB agrees with Staff that it is inappropriate to review a project's costs for prudence before the project is complete and total costs and not reasonably known.<sup>66</sup> This would be true

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<sup>59</sup> *Id.* at 15-16.

<sup>60</sup> UE 394 – PGE's Prehearing Brief at 8.

<sup>61</sup> UE 394 – AWEC's Prehearing Brief at 19 and Staff's Prehearing Brief at 5.

<sup>62</sup> UE 394 – PGE/2600/Bekkedahl – Tinker/1, lines 20-22.

<sup>63</sup> UE 394 – AWEC's Prehearing Brief at 19 citing UE 394 – Bekkedahl – Tinker/10, lines 4-6.

<sup>64</sup> UE 394 – AWEC's Prehearing Brief at 20 (“There is no reason to believe that additional delays may not take place.”).

<sup>65</sup> *Id.* at 19.

<sup>66</sup> UE 394 – Staff's Prehearing Brief at 6.

for any project, but it is especially true for Faraday since it is already more than 100% over budget and has been substantially delayed, in part by circumstances beyond PGE's control.<sup>67</sup> Since circumstances outside the Company's control have contributed to project delays, PGE cannot be reasonably certain that it will meet its currently anticipated online date.<sup>68</sup>

Additionally, PGE's proposal represents a marked departure from traditional ratemaking. Under PGE's proposal, the scope of the second phase would be limited to reviewing the prudence of Faraday's costs.<sup>69</sup> This is problematic. Typically, in a GRC, rates are established based on an overall costs and revenues associated within a specific test year.<sup>70</sup> Any potential future Faraday cost recovery proceeding should also consider any changes to costs and revenues across PGE's system.<sup>71</sup> Put another way, parties should be able to bring forth any potentially countervailing issues that may be relevant. This is consistent with traditional generation plant cost recovery and prudence review in a GRC. An extension to this proceeding that would only examine Faraday's prudence would unfairly benefit the Company and prejudice other parties.

Further, the Company's proposal differs substantially from the Commission's limited practice to allow tariff riders for generating plants in some circumstances. In those circumstances, the Commission has required that the plant in question be online by the middle of the test year and has required review to ensure the test year forecast is still reasonably accurate.<sup>72</sup> In its Prehearing Brief, PGE notes that the Commission approved a tariff filing under which Port Westward *could* become operational up to eight and a half months after the GRC's rate effective

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<sup>67</sup> UE 394 – AWEC's Prehearing Brief at 19 and PGE's Prehearing Brief at 10, lines 6-10.

<sup>68</sup> UE 394 – CUB/607/1.

<sup>69</sup> *Id.* at 16, lines 5-8.

<sup>70</sup> UE 394 – CUB/400/Jenks – Gehrke/24, lines 7-8.

<sup>71</sup> *Id.* at 24.

<sup>72</sup> *Id.* at 25, lines 9-12.



date without automatically requiring a new case.<sup>73</sup> However, the plant came online June 11, 2007, midway through the test year.<sup>74</sup> If the plant would have come online later than September 1, 2007, PGE would have had to file “an entirely new rate case.”<sup>75</sup>

PGE’s citation to Port Westward does little to buoy its argument. Port Westward represented the longest tariff rider the Commission has approved,<sup>76</sup> and it still came online earlier than the 8.5 months that was anticipated. Here, Faraday is expected to come online in the fourth quarter, which means that 9 months into the test year is the *earliest* it may come online. However, it could also come online on the last day of the test year, or later, and it is still subject to ongoing unforeseeable delays. Further, PGE’s proposal would limit Faraday’s Phase II review solely to questions around its prudence, whereas prior Commission tariff riders enabled parties to raise any relevant countervailing issues and confirm the accuracy of test year forecasts.

Finally, PGE’s claims around Faraday’s benefits do not reflect the plant’s true costs and benefits to customers. PGE asserts that the 2022 AUT included the value of the Faraday repowering production tax credits (PTCs) and an energy benefit of approximately \$5 million.<sup>77</sup> PGE states that new PTCs generated at Faraday provide a benefit to customers.<sup>78</sup> PGE’s attempt to justify Faraday’s inclusion in this test year fails for two main reasons.

First, the AUT benefits PGE claims in its Brief are merely incremental energy benefits PGE’s system will experience for one month—December 2022. The reality is that Faraday’s

**[BEGIN CONFIDENTIAL]** [REDACTED]

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<sup>73</sup> UE 394 – PGE’s Prehearing Brief at 11, lines 15-17 (emphasis added).

<sup>74</sup> UE 394 – CUB/400/Jenks – Gehrke/25, lines 20-21.

<sup>75</sup> *Id.* at line 20.

<sup>76</sup> *Id.* at 26.

<sup>77</sup> UE 394 – PGE’s Prehearing Brief at 12, lines 17-19.

<sup>78</sup> *Id.* at 9, lines 11-12.

[REDACTED]

[REDACTED]

[REDACTED] [END CONFIDENTIAL] Hydroelectric energy is similar to wind and solar in that it has little to no marginal cost. When a generating unit with little to no marginal cost, like Faraday, is offline PGE must replace that energy with higher cost sources.<sup>82</sup> Therefore, the [BEGIN CONFIDENTIAL] [REDACTED] [REDACTED] [END CONFIDENTIAL] has increased customers' power costs. Customers have borne the cost of Faraday deration during a capacity shortage period in region, thereby exacerbating this issue.<sup>83</sup>

Additionally, Customers have been paying for the capital and operations and maintenance (O&M) associated with Faraday's operation while it has been under construction. The Company's purported benefits in support of its matching principle argument are selective, self-serving, and fail to tell the entire picture of Faraday's impact. Since [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] while customers are paying for the capital costs and O&M associated with the facility in base rates.

Second, PGE's reliance on Faraday's PTC benefits is misleading. Although Faraday does generate new PTCs, customers are not able to enjoy their full benefit. Dating back at least to 2016, PGE has been unable to utilize any PTCs in the year they are accrued because the

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<sup>79</sup> UE 394 – CUB/604/1.

<sup>80</sup> *Id.*

<sup>81</sup> UE 394 – CUB/605/1 and UE 394 – CUB 606/1

<sup>82</sup> UE 394 – CUB/603/10, lines 1-3 (“Wind generation has little to no marginal cost. When wind production is lower than expended [sic], PGE has to replace that energy with higher cost sources.”). The same theory is true for hydroelectric generation.

<sup>83</sup> UE 394 – PGE's Prehearing Brief at 9, lines 14-16.

<sup>84</sup> UE 394 – CUB/604/1.

Company lacks the requisite tax appetite to utilize the credit.<sup>85</sup> Although PGE relies on PTC benefits in Integrated Resource Plan (IRP) modeling and touts their benefits to customers in this case, the reality is that PGE's PTCs are sitting in an account that is accruing interest at its rate of return until PGE can use the credit.<sup>86</sup> This means that customers are essentially financing a rate reduction and PGE is able to profit off the growing PTC stockpile.<sup>87</sup> Customers will not receive the full benefit of PTCs when they receive them in the AUT, due to PTC financing costs at PGE's authorized rate of return.

The Company has failed to meet its burden of proof to demonstrate that its proposal for a Phase II of this GRC to examine Faraday's prudence is reasonable. CUB continues to urge the Commission to reject PGE's proposal and direct it to follow traditional ratemaking processes. In a GRC, parties will be able to look at any outstanding prudence issues and the test year will be updated to reflect the Company's actual costs and revenues.

### **C. Level III Storm Outage Mechanism**

PGE has failed to carry its burden to prove that its proposal to modify the existing Level III Storm Outage Mechanism is superior to the reasonable and balanced proposals brought forth by Staff<sup>88</sup> and CUB. CUB recommends that the Commission adopt its recommended changes that would enable the account to carry a negative balance, subject to a hard cap.<sup>89</sup> CUB's

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<sup>85</sup> CUB/602/32 ("First, Staff continues to have concerns about PGE's ability to utilize the acquired tax credits any time before 2030. Staff raised this concern in the 2016 IRP and it remains an issue. Currently, PGE is sitting on over [confidential] in unused PTCs, on which PGE is earning a rate of return paid for by ratepayers. Staff estimates the Wheatridge project add nearly \$8 million annually in new PTCs to the current stockpile.<sup>85</sup> From the perspective of IRP modeling, Staff is unclear as to how PGE's ability to utilize tax credits in "real world" is modeled and represented in the cost and risk metrics of portfolios that add PTC eligible wind resources and whether it may skew results toward near-term acquisitions.")

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See UE 394 – Staff's Prehearing Brief at 4.

<sup>89</sup> UE 394 – CUB/500/Gehrke/8, lines 8-11. Specifically, the negative balance of the account would not be allowed to exceed two times the annual accrual amount collected from customers, and any costs beyond the cap would be borne by PGE.

recommended changes adequately account for the dynamic nature of storms that affect the Company's system and fairly balances risk between PGE and its customers.<sup>90</sup> As an alternative, CUB supports Staff's proposal that would not allow negative accrual balances, but would annually recalculate the amount recovered in rates based on an updated ten-year average.<sup>91</sup> CUB proposes one change to Staff's proposal—that the annual rate change for the ten-year rolling average of costs occur on January 1<sup>st</sup> of each year.<sup>92</sup> This proposal would minimize the frequency of rate changes because the Company already updates several supplemental schedules on January 1.<sup>93</sup> Minimizing the frequency of rate changes would benefit PGE's customers by providing them greater certainty for paying their utility bills. It is good policy for the Commission to endeavor to reduce the frequency of rate changes imposed on customers.

Under PGE's proposal, the amount collected in base prices will continue to be based on the ten-year average of Level III restoration costs, which will accrue to a reserve account for use against future Level III events.<sup>94</sup> PGE's proposal would allow the reserve account to carry a negative balance, subject to certain criteria.<sup>95</sup> CUB's approach is preferred because it is subject to a hard cap, rather than the minimum amount of sharing the Company proposes. A hard cap provides much greater protection to customers than a small amount of sharing (i.e. a "soft cap").

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<sup>90</sup> *Id.*

<sup>91</sup> UE 394 – Staff/2700/St. Brown/6.

<sup>92</sup> UE 394 – CUB/500/Gehrke/11.

<sup>93</sup> *Id.*

<sup>94</sup> UE 394 – PGE/2400/Bekkedahl – Tooman/16, lines 14-16.

<sup>95</sup> *Id.* at 16-17 (“For every year that results in a negative balance, the actual Level III restoration costs that are applied to that negative balance will be shared 90% by customers and 10% by PGE (i.e., 90/10 sharing, where 90% of the costs will be applied to the 3 balancing account and 10% will be absorbed by PGE). If the balancing account exceeds a \$12 million positive or negative balance, PGE will amortize the excess amount by either collection from (negative balance) or refund to (positive balance) customers based on a 90/10 sharing of the excess amount.”).

As an alternative, PGE proposes to combine Staff and CUB’s proposals.<sup>96</sup> Neither Staff nor CUB support this proposal.

As Staff notes, PGE’s proposal does not does not satisfy the Commission’s criteria for a change to the mechanism as detailed in its order in Docket No. UE 335. There, the Commission stated that any future request for “an alternative Level III storm deferral mechanism based, in part, on claims of greater storm intensity due to climate change . . . should include some foundational analysis to justify this claim.”<sup>97</sup> The Commission expressly invited stakeholders to bring forward a revised proposal to address relative risks to the Company and its customers and address risk in a balanced manner.<sup>98</sup> The Commission similarly indicated an openness to reconsider how to appropriately allocate risks in its Docket No. UM 1817 Order.<sup>99</sup>

PGE has failed to offer sufficient evidence to justify that the substantial changes it proposes to the mechanism are warranted. The costs subject to the mechanism are not increasing, even though the frequency of storms may be.<sup>100</sup> The Company’s proposal fails to align with clear Commission direction and is accompanied by a dearth of evidence. Nothing in the record warrants the wholesale and imbalanced changes the Company seeks. If approved, PGE’s proposed changes would shift business risk to customers in an unbalanced manner, inconsistent with Commission direction. Conversely, CUB’s proposal furthers the Commission’s direction address risk in a balanced manner. It enables the Company to recover costs associated with dynamic storm patterns by enabling the account to go negative. CUB’s hard cap ensures that PGE has a robust incentive to minimize restoration costs where

appropriate and

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<sup>96</sup> UE 394 – PGE/2400/Bekkedahl – Tooman/17.

<sup>97</sup> *In re Portland General Electric Company*, OPUC Docket No. UE 335, Order No. 18-464 at 14 (Dec. 14, 2018)

<sup>98</sup> OPUC Order No. 18-464 at 16.

<sup>99</sup> *In re Portland General Electric Company, Application for the Deferral of Storm-Related Restoration Costs*, OPUC Docket No. UM 1817, Order No. 19-274 at 2 (Aug. 19, 2019).

<sup>100</sup> UE 394 – Staff’s Opening Brief at 4, lines 3-4.

fairly treats both the Company and its customers. PGE's asymmetric sharing proposal provides the Company little incentive to control costs, and the vast majority of risk associated with fluctuating costs are levied onto customers. PGE asserts that their proposal follows Commission direction, but fails to demonstrate that CUB or Staff's proposals do not.

PGE argues that its proposed changes will help support the Commission's policy of prioritizing safety and promoting emergency preparedness.<sup>101</sup> The implication of PGE's position is troubling. Under ORS § 757.020, the Company has an obligation to furnish adequate and safe service. PGE needs no extra incentive to ensure this core function is achieved. CUB and Staff's proposals in this case represent a reasoned evolution of a mechanism driven by, and responsive to, Commission direction. They are fair and balanced. PGE's proposal would unfairly shift risk and cost to customers. PGE also fails to articulate why their proposal would help promote the Commission policy of which it speaks any better than CUB's or Staff's.

Finally, CUB continues to stress that the mechanism should not be expanded to include wildfire-related costs. Wildfires and their attendant impact were not contemplated in the design of the mechanism when it was established.<sup>102</sup> The Company appears to be parsing the language in Docket No. UE 215 in a manner that would inappropriately expand the mechanism. There are no references to wildfires in Docket No. UE 215. Currently, PGE is able to recover costs for wildfire-related damage for events that are declared an emergency through the Commission's emergency deferral process. The Commission should deny the Company's proposal to expand the mechanism to include wildfire-related damage costs. The mechanism that CUB put forth was intended to recover Level III storm-related restoration costs—not wildfires. A change to the

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<sup>101</sup> UE 394 – PGE's Prehearing Brief at 31-32.

<sup>102</sup> UE 394 – CUB/500/Gehrke/14.

mechanism to include wildfires would necessitate a reexamination of appropriate risk-sharing levels.

CUB respectfully requests that the Commission adopt its proposal to make incremental changes to the Level III Outage Mechanism that fairly balance risks and align with Commission direction.

#### **D. Wildfire and Ice Storm Deferrals**

CUB supports Staff’s proposal to amortize the Wildfire and Ice Storm deferrals over a three-year period in this rate case.<sup>103</sup> As Staff notes, once the amounts are approved for amortization, ratepayers will benefit because the applicable interest rate for amortization would decrease from Authorized Rate of Return (AROR) to the Modified Blended Treasury (MBT) rate.<sup>104</sup> CUB supports Staff’s proposal to authorize amortization of some of the deferred amounts—the prudently incurred costs deferred in 2020—to enable these accounts to shift to accruing interest at MBT.<sup>105</sup> Under this proposal, Staff’s proposal for earnings tests and sharing can be addressed in this proceeding while ongoing prudence concerns about post-2020 costs in the deferred accounts can be addressed at a later time in the respective deferral dockets.

PGE seems to believe that the AROR interest rate that is currently accruing is “meant to compensate the utility for the time value of money.”<sup>106</sup> This statement is either intentionally misleading or represents a fundamental lack of understanding of deferred accounting practices. Just last year, PacifiCorp attempted to argue in reconsideration of a general rate case that the cost of long-term debt (4.77 percent) should be used to reflect the time value of money.<sup>107</sup> In that

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<sup>103</sup> UE 394 – Staff/2600/Moore – Dlouhy – Storm/3.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 13.

<sup>106</sup> UE 394 – PGE/2900/Tooman – Ferchland/25, lines 9-10.

<sup>107</sup> *In re PacifiCorp, dba Pacific Power’s Request for a General Rate Revision*, OPUC Docket No. UE 374, Order No. 21-090 at 6 (Mar. 29, 2021).

case, the Commission held that “a blended rate based on the company’s cost of debt and a recent issuance of debt reasonably reflects the time value of money.”<sup>108</sup> In other words, 4.77 percent was too high to reflect the time value of money. For PGE to argue that its AROR of 7.3 percent<sup>109</sup> is somehow reflective of the time value of money utterly ignores Commission precedent.

PGE itself notes in its briefing that “[t]he Commission applies a lower [interest] rate after amortization because ‘the amortized amount differs from an investment in terms of the risk associated with it.’”<sup>110</sup> PGE is indeed profiting off the balances in the Wildfire and Ice Storm deferrals. Additionally, as Staff notes, it is earning a return on capital costs that sit within these deferred accounts—essentially earning a return on its return on.<sup>111</sup>

In order to mitigate the unnecessary carrying charges that customers are currently subsidizing in the Wildfire and Ice Storm Deferrals, CUB urges the Commission to adopt Staff’s proposal regarding amortization and the application of an earnings test.<sup>112</sup>

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<sup>108</sup> *Id.* at 9.

<sup>109</sup> UE 394 – Staff/2600/Moore – Dlouhy – Storm/2, line 15.

<sup>110</sup> UE 394 – PGE’s Opening Brief at 47, lines 11-13 citing OPUC Order No. 06-507 at 6.

<sup>111</sup> *Id.* at 3.

<sup>112</sup> UE 394 – Staff’s Opening Brief at 11-16.



### III. CONCLUSION

For the foregoing reasons, CUB respectfully requests that the Commission adopt its recommendations in this proceeding.

Dated this 22<sup>nd</sup> day of February, 2022.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Michael P. Goetz".

Michael P. Goetz, OSB #141465  
General Counsel  
Oregon Citizens' Utility Board  
610 SW Broadway, Ste. 400  
Portland, OR 97205  
T. (503) 227-1984  
E. [mike@oregoncub.org](mailto:mike@oregoncub.org)

## UE 394– CERTIFICATE OF SERVICE

I hereby certify that, on this 22<sup>nd</sup> day of February, 2022, I served the **Confidential Opening Brief of the Oregon Citizens' Utility Board** in docket UE 394 upon the Commission and each party designated to receive confidential information pursuant to Order 21-206 through a secure, encrypted attachment to an e-mail.

WILLIAM STEELE (C) BILL STEELE AND ASSOCIATES, LLC	PO BOX 631151 HIGHLANDS RANCH CO 80164 w.steele1@icloud.com
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### AWEC

JESSE O GORSUCH (C) (HC) DAVISON VAN CLEVE	1750 SW HARBOR WAY STE 450 PORTLAND OR 97201 jog@dvclaw.com
---	---

CORRINE MILINOVICH (C) (HC) DAVISON VAN CLEVE, P.C.	1750 SW HARBOR WAY, STE. 450 PORTLAND OR 97201 com@dvclaw.com
--	---

TYLER C PEPPE (C) (HC) DAVISON VAN CLEVE, PC	1750 SW HARBOR WAY STE 450 PORTLAND OR 97201 tcp@dvclaw.com
---	---

### CALPINE SOLUTIONS

GREGORY M. ADAMS (C) (HC) RICHARDSON ADAMS, PLLC	PO BOX 7218 BOISE ID 83702 greg@richardsonadams.com
---	---

KEVIN HIGGINS (C) (HC) ENERGY STRATEGIES LLC	215 STATE ST - STE 200 SALT LAKE CITY UT 84111-2322 khiggins@energystrat.com
---	--

### FRED MEYER

JUSTIN BIEBER (C) FRED MEYER/ENERGY STRATEGIES LLC	215 SOUTH STATE STREET, STE 200 SALT LAKE CITY UT 84111 jbieber@energystrat.com
--	---

KURT J BOEHM (C) BOEHM KURTZ & LOWRY	36 E SEVENTH ST - STE 1510 CINCINNATI OH 45202 kboehm@bkllawfirm.com
---	--

JODY KYLER COHN (C) BOEHM, KURTZ & LOWRY	36 E SEVENTH ST STE 1510 CINCINNATI OH 45202 <a href="mailto:jkylerecohn@bkllawfirm.com">jkylerecohn@bkllawfirm.com</a>
---	---

**OREGON CITIZENS UTILITY BOARD**

WILLIAM GEHRKE (C)  
OREGON CITIZENS' UTILITY BOARD

610 SW BROADWAY STE 400  
PORTLAND OR 97206  
will@oregoncub.org

MICHAEL GOETZ (C)  
OREGON CITIZENS' UTILITY BOARD

610 SW BROADWAY STE 400  
PORTLAND OR 97205  
mike@oregoncub.org

**PGE**

LORETTA I MABINTON (C) (HC)  
PORTLAND GENERAL ELECTRIC

121 SW SALMON ST - 1WTC1711  
PORTLAND OR 97204  
loretta.mabinton@pgn.com

JAY TINKER (C)  
PORTLAND GENERAL ELECTRIC

121 SW SALMON ST 1WTC-0306  
PORTLAND OR 97204  
pge.opuc.filings@pgn.com

**SBUA**

DIANE HENKELS (C)  
SMALL BUSINESS UTILITY ADVOCATES

621 SW MORRISON ST. STE 1025  
PORTLAND OR 97205  
diane@utilityadvocates.org

**STAFF**

STEPHANIE S ANDRUS (C)  
PUC STAFF--DEPARTMENT OF JUSTICE

BUSINESS ACTIVITIES SECTION  
1162 COURT ST NE  
SALEM OR 97301-4096  
stephanie.andrus@state.or.us

JILL D GOATCHER (C)  
PUC STAFF--DEPARTMENT OF JUSTICE

BUSINESS ACTIVITIES SECTION  
1162 COURT ST NE  
SALEM OR 97301-4096  
jill.d.goatcher@doj.state.or.us

MATTHEW MULDOON (C)  
PUBLIC UTILITY COMMISSION OF OREGON

PO BOX 1088  
SALEM OR 97308-1088  
matt.muldoon@puc.oregon.gov

**WALMART**

VICKI M BALDWIN (C)  
PARSONS BEHLE & LATIMER

201 S MAIN ST STE 1800  
SALT LAKE CITY UT 84111  
vbaldwin@parsonsbhle.com

STEVE W CHRISS (C)  
WAL-MART STORES, INC.

2001 SE 10TH ST  
BENTONVILLE AR 72716-0550  
stephen.chriss@wal-mart.com

MADILILNE MALMQUIST (C)  
WALMART

madelinemalmquist@parsonsbehle.com



Thomas Jerin  
Operations Manager  
Oregon Citizens' Utility Board  
610 SW Broadway, Ste. 400  
Portland, OR 97205  
503.227.1984  
[dockets@oregoncub.org](mailto:dockets@oregoncub.org)