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April 27, 2007

Via Electronic and U.S. Mail

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

Re: In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Deferred Accounting Authorization for certain Expenses/Revenue Refunds Associated with SB 408 and the Sale of Certain Non-utility Assets
Docket No. UM 1271

Dear Filing Center:

Enclosed please find the original and six copies of the Opening Brief of the Industrial Customers of Northwest Utilities in the above-referenced matter.

Please return one file-stamped copy of the document in the postage-prepaid envelope provided. Thank you for your assistance.

Sincerely yours,

/s/ Ruth A. Miller
Ruth A. Miller

Enclosures
cc: Service List

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Opening Brief of the Industrial Customers of Northwest Utilities upon the parties on the service list, shown below, by causing the same to be deposited in the U.S. Mail, postage-prepaid, to those parties which have not waived paper service, and by electronic mail to all parties.

Dated at Portland, Oregon, this 27th day of April, 2007.

/s/ Ruth A. Miller
Ruth A. Miller

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1271

In the Matter of	)	
	)	
PORTLAND GENERAL ELECTRIC COMPANY	)	OPENING BRIEF OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES
	)	
Application for Deferred Accounting of Certain Revenue Refunds Associated with Senate Bill 408.	)	

I. INTRODUCTION

The Industrial Customers of Northwest Utilities ("ICNU") submits this opening brief to the Public Utility Commission of Oregon ("Commission") opposing Portland General Electric Company's ("PGE") application for an order to defer amounts associated with the sale of a combustion turbine and transformer by a PGE affiliate and the resulting impact on PGE's consolidated income tax liability. PGE's application is contrary to the legislature's intent in passing Senate Bill 408 ("SB 408") and the Commission's deferred accounting standards. Furthermore, the Commission rule implementing SB 408 already establishes the appropriate method for resolving the issue that PGE raises in its application. The Commission stated in AR 499 that it would view deferred accounting applications that seek to counteract SB 408 with a "skeptical eye." Accordingly, PGE's application should be denied.

II. BACKGROUND

SB 408 was signed into law on September 2, 2005, and codified at ORS § 757.268. SB 408 generally requires a true-up between "taxes collected" from customers

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and the "taxes paid" to the government and "properly attributed" to regulated utility operations. ORS § 757.268(4). If the difference between these amounts is more than $100,000, a utility must adjust rates accordingly through an automatic adjustment clause. Id.

In April 2006, the Commission opened a rulemaking proceeding, AR 499, to determine how to implement SB 408. The Commission addressed issues regarding the calculation of both "taxes collected" and "taxes paid" as well as the proper interpretation of "properly attributed to regulated operations of the utility." The Commission issued an interim order with preliminary findings on the SB 408 issues in July 2006, and it issued a final order adopting permanent rules the following September. Both ICNU and PGE were active participants in AR 499.

PGE filed its application for a deferred account in July 2006. The application states that Portland General Resource Development ("PGRD"), a PGE subsidiary, acquired a simple cycle turbine and transformer for $16.8 million in 2001, and sold them at a loss of approximately $12 million in 2006. Application at 3-4, 7-8. According to PGE, the loss on the turbine sale reduced PGE's net income tax liability because the Company files its income taxes on a consolidated basis with PGRD and other affiliates and the loss offset taxable income of other group members. Specifically, PGE states that the loss reduced its 2006 quarterly estimated federal and state tax payment by approximately $4.8 million. PGE/200, Piro-Tamlyn/4.

PGE maintains that customers will benefit from this reduction under SB 408, because the turbine sale ultimately reduces the amount of "taxes paid" that is "properly attributed" to PGE's regulated operations as compared to the Company's "taxes collected." ORS § 757.268(4). In AR 499, the Commission adopted the "apportionment method" to

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determine what amount of taxes paid is properly attributed to the regulated operations of a utility. Re Adoption of Permanent Rules to Implement SB 408 Relating to Utility Taxes, Docket No. AR 499, Order No. 06-532 at 3 (Sep. 14, 2006); OAR § 860-022-0041(3). By doing so, the Commission resolved the issues surrounding the proper allocation of affiliate losses. PGE does not address in either its application or testimony the apportionment method or the manner in which the OPUC rules deal with the affiliate loss at issue in this case.

PGE's application proposes two alternative methods for deferral. First, PGE proposes to defer the revenue refund resulting from the automatic adjustment clause. Second, PGE proposes to defer the tax effect of the tax loss. PGE/200, Piro-Tamlyn/5. In support of its application, PGE raises numerous policy issues related to SB 408 and deferred accounting, but does not address the legal impact that SB 408 has on PGE's application. PGE agrees that its application raises legal issues that must be addressed. PGE/300, Dahlgren-Tinker/2.

III. ARGUMENT

PGE's application is simply contrary to SB 408, codified at ORS § 757.268, because the Company effectively requests the Commission to bypass the SB 408 automatic adjustment by preventing the tax effect of the turbine sale from being considered in determining the amount of "taxes paid" that are "properly attributed" to the utility. Even setting aside that flaw, however, PGE's application fails to meet the Commission's deferred accounting standards. The Commission already rejected in AR 499 PGE's proposal to use deferred accounting to "neutralize" SB 408. PGE presents no new arguments to justify authorizing a result that the Commission previously deemed unlawful. The Commission must deny PGE's application and allow SB 408 to operate as intended.

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A. PGE's Application Is Contrary to the Legislature's Intent in Enacting SB 408

PGE argues that the Commission should grant its application because the tax loss relates to a turbine for which "neither the initial cost nor any of the expenses related to [it] were reflected in PGE's rates." PGE/100, Dahlgren-Tinker/4. PGE's witnesses testified extensively about the policies in place when PGRD purchased the turbine in 2001, and the Company asks the Commission to restore these policies. Id. PGE misses the point—the costs in rates and the policies in place in 2001 are completely irrelevant for purposes of calculating taxes paid under SB 408. As PGE is well aware, Enron paid no income taxes for many years in part by using affiliate losses on transactions that were not in rates to offset the utility's steady stream of income. PGE's application asks the Commission to do the very thing the legislature sought to stop.

1. Deferral of the Rate Refund Resulting from the Tax Loss Would Offset the Operation of SB 408

PGE's first proposed deferral method would defer the rate refund that will result from the tax effect of the turbine sale, effectively offsetting the rate adjustment that SB 408 requires. SB 408 unambiguously requires an adjustment to rates to account for the difference between "taxes paid" and "taxes collected" and does not allow for the relief that PGE requests.

In AR 499, PGE proposed that the Commission adopt a deferral mechanism to account for non-utility expenses and other costs that were not in rates. PGE argued that SB 408 would result in customers benefiting from expenses that were not included in rates. PGE supported its proposal by posing the same factual scenario this case presents—the sale at a loss of a turbine not included in rates. Re Adoption of Permanent Rules to Implement SB 408

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Relating to Utility Taxes, Docket No. AR 499, Order No. 06-400 at 10 (July 14, 2006). The Commission rejected PGE's proposal:

> [W]e believe that adoption of a deferral mechanism would be in opposition to the intent of the legislature, because it would effectively offset the automatic adjustment clause so that it did not "adjust" rates, as it was designed to do. Just as with the utilities' proposed earnings test, this deferral mechanism could net out the automatic adjustment clause. Because this would be contrary to the intent behind SB 408 to adjust rates for the difference between taxes collected and taxes paid, we decline to adopt a deferral mechanism as proposed by PGE.

Id. at 12. PGE's application specifically requests that the Commission authorize the result that it deemed contrary to the intent of SB 408 in AR 499. PGE expressly states that it seeks to "neutralize" the effect of the tax loss. PGE/100, Dahlgren-Tinker/4. The Commission lacks any legal or policy basis to authorize a deferred account that "neutralizes" the operation of SB 408. The Commission and parties have addressed and resolved this issue previously, and PGE's arguments are no more compelling now than they were in AR 499.

2. Deferral of the Tax Effect Would Constitute an Impermissible Adjustment to "Taxes Paid"

PGE's second proposed deferral method seeks to defer the tax effect of the loss on the turbine sale. PGE/200, Piro-Tamlyn/5. This proposal essentially asks the Commission to prevent the tax loss from being considered by performing an adjustment excluding the loss from the calculation of "taxes paid." This proposal is just as contrary to SB 408's plain language and the Commission's rules as PGE's other methodology.

SB 408 requires "taxes paid" to reflect "amounts received by units of government from the utility or from the affiliated group of which the utility is a member, whichever is applicable . . . ." ORS § 757.268(13)(f). PGE does not contend, however, that authorizing the

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proposed deferred account will prevent the tax loss from the income tax that PGE actually pays to the taxing authorities. To be sure, PGE's estimated quarterly tax payments for 2006 accounted for the $4.8 million reduction in PGE's tax liability. PGE/200, Piro-Tamlyn/4. Therefore, PGE's second proposed deferral methodology violates the unambiguous definition of taxes paid in SB 408 and the Commission's rules. ORS § 757.268(13)(f).

SB 408 does provide for certain adjustments to "taxes paid," but an adjustment for affiliate losses is not among them. SB 408 identifies three permissible adjustments: 1) charitable contribution deductions; 2) tax credits associated with investments in regulated operations of the utility not considered in the last rate case; and 3) deferred taxes related to the regulated operations of the utility. Id. The sale at a loss of affiliate property does not fit within any of these adjustments. Adjusting "taxes paid" to account for the impact of the turbine sale would violate the most basic rules of statutory construction, because it would require the Commission to unlawfully "insert what has been omitted" by the legislature. ORS § 174.010.

B. The OPUC's Rules Implementing SB 408 Address the Issue That PGE's Application Seeks to Resolve

PGE's application raises one of the most fundamental issues that parties debated in AR 499: how to allocate affiliate losses in determining the amount of "taxes paid" that is "properly attributed" to regulated utility operations. The Commission resolved the "properly attributed" issues, including the proper allocation of affiliate losses, by adopting the "apportionment method" and including that allocation method in its rules. Order No. 06-400 at 4-7. The apportionment method relies on ratios for property, payroll, and sales for each affiliate in a consolidated group to determine the amount of taxes paid that is properly attributed to the regulated utility. Id. at 6-7. According to the Commission, applying the apportionment method

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to the "taxes paid" by an affiliated group will "isolate the amount of taxes related to a utility's regulated operations from other entities and activities in an affiliated group." Id. at 7.

PGE's application essentially requests that the Commission ignore the apportionment method in favor of a "stand-alone" allocation that the legislature abandoned in SB 408 and that the Commission explicitly rejected in AR 499. PGE effectively seeks to isolate the tax impact of the turbine sale and exclude it from the amount of taxes paid that is properly attributed to regulated utility operations. The apportionment method already addresses the allocation of the tax impact of the turbine sale, along with all other tax events that affect the overall income tax liability for PGE's consolidated group. PGE may disagree with the apportionment method or SB 408 itself, but that disagreement does not justify authorizing a deferred account that PGE knows full well is contrary to the law.

C. PGE's Application Does Not Meet the Standards for a Deferred Account

Even if PGE's application was not directly contrary to Oregon law, it still would not pass muster because it fails to satisfy the Commission's deferred accounting standards. PGE argues that authorizing a deferred account would appropriately match the costs and benefits of the turbine sale under ORS § 757.259(2)(e), and that the Commission should exercise its discretion to allow a deferred account, because the enactment of SB 408 was unforeseeable. PGE/100, Dahlgren-Tinker/5-6. As with PGE's request to revert to the stand-alone policies in place in 2001, both the legislature and the Commission have already rejected the Company's arguments.

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1. SB 408 Establishes the Proper Matching of Costs and Benefits for Utility Income Taxes

ORS § 757.259(2)(e) allows the Commission to authorize a deferred account for "[i]dentifiable utility expenses or revenues [that] the commission finds should be deferred in order to . . . match appropriately the costs borne by and benefits received by ratepayers." PGE carries the burden of proof and persuasion to support its request for a deferred account. Re Staff Request to Open an Investigation Related to Deferred Accounting, Docket No. UM 1147, Order No. 05-1070 at 5-6 (Oct. 5, 2005). PGE has not done so in this case.

PGE argues that a deferred account "will allow the Commission to set rates that better match the costs of the turbine with the SB 408 effect of including tax benefits in retail electric rates." PGE/100, Dahlgren-Tinker/5. PGE once again urges the Commission to revert to the matching of costs and benefits on a stand-alone basis, which was one of the specific problems that SB 408 was intended to correct. The legislature decided that the proper matching of costs and benefits in the context of utility income taxes occurs when customers' rates reflect the income taxes that are actually paid to taxing authorities. In fact, the legislature explicitly determined that rates that do not reflect actual "taxes paid" are not "considered fair, just, and reasonable." ORS § 757.267(1)(f). PGE cannot rely on ORS § 757.259 to thwart the legislature's specific policies regarding utility income taxes.

2. The Magnitude of the Tax Impact of the Turbine Sale Does Not Warrant the Commission Exercising Its Discretion to Authorize a Deferred Account

The Commission already determined in AR 499 that rate adjustments under SB 408 are foreseeable events that do not justify an exercise of Commission discretion to authorize a deferred account. The Commission considers two primary factors in deciding

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whether to exercise its discretion to allow a deferred account: the foreseeability of the event and the magnitude of harm underlying the request. Order No. 05-1070 at 7. PGE asserts that the effect of SB 408 was unforeseeable because it changes "well-settled regulatory principles" and "was not modeled in rates." PGE/100, Dahlgren-Tinker/6. To the contrary, SB 408 *is the law*, and the effects of SB 408 are entirely foreseeable.

In evaluating the forseeability of an event:

> The Commission will look to whether the event was modeled in rates, and, if so, whether extenuating circumstances were involved that were not foreseeable during the rate case, or whether the event fell within a foreseen range of risk when rates were last set. If the event was not modeled, we will consider whether it was foreseeable as happening in the normal course of events, or not likely to have been capable of forecast. The Commission will examine whether or not the "risks are reasonably predictable and quantifiable."

Order No. 05-1070 at 7. When PGE proposed in AR 499 that the Commission adopt a deferred account to exclude non-utility expenses from the automatic adjustment clause, the Commission explicitly stated that the tax effects of SB 408 are entirely foreseeable, as those effects are "set in statute." Order No 06-400 at 11. The Commission also stated that "variances as a result of items not included in rates . . . are foreseeable," suggesting that those events generally are inappropriate for deferred accounting. Id. For these reasons, the Commission specifically stated that it would "consider applications for deferral with *a skeptical eye*" if those applications were intended to counteract SB 408. Id. (emphasis added). PGE has persisted with its arguments in this case despite the Commission's unambiguous conclusion in AR 499.

There is no question PGE could foresee the tax effect that SB 408 would have on the sale of the non-utility property involved in this case. Oregon law calls for the result that PGE

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seeks to avoid, and having to comply with SB 408 is no different than complying with any other law to which PGE is subject. PGE or PGRD did not sell the turbine and transformer until 2006—after SB 408 took effect.

Absent from PGE's application and testimony is the discussion that the harm in this case warrants an exercise of the Commission's discretion. In fact, the magnitude of harm in this case does not come close to constituting a "substantial" harm. PGE calculates the appropriate amount to defer at $4.8 million. Even accepting PGE's figure as accurate, this pales in comparison to amounts that the Commission has previously determined where not substantial enough to justify a deferred account. In UM 1071, the Commission rejected PGE's application to defer $31.6 million in excess power costs because those costs were "not significant enough . . . to warrant a deferral." Re PGE, Docket No. UM 1071, Order No. 04-108 at 9 (Mar. 2, 2004). The magnitude of harm in this case does not come close to matching this amount. As such, PGE has not met its burden to justify a deferral account.

IV. CONCLUSION

The Commission should deny PGE's application for the reasons stated in this opening brief.

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Dated this 27th day of April, 2007.

Respectfully submitted,

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