BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1271

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Deferred Accounting Authorization for Expenses/Refunds Associated with SB 408	STAFF'S REPLY BRIEF

INTRODUCTION

In summary, Portland General Electric's (PGE) testimony argued that deferred accounting should be employed to neutralize the impacts of the implementation of SB 408 as applied to certain non-utility assets that were purchased before SB 408 became law. The Public Utility Commission of Oregon Staff (Staff), along with the Citizens' Utility Board (CUB) and the Industrial Customers of Northwest Utilities (ICNU), filed responsive testimony that noted that PGE's request was contrary to SB 408 and the rules implementing SB 408.

While PGE contends that its application for deferred accounting (Application) meets the statutory requirements, Staff has not taken a position on whether the Application meets the statutory requirements. Staff has noted that the Application is in violation of SB 408 and the rules implementing SB 408. Because the Application is in direct violation of SB 408, whether or not the Application meets the requirements for deferred accounting is extraneous to the crux of this dispute.

Rather than directly discussing SB 408 and the rules implementing SB 408, PGE contends that the issue must be viewed in the context of all applicable legal and rate-making principles. *See* PGE's Opening Brief at 11. Admittedly, PGE's statement appears to be superficially attractive. However, the import of PGE's statement is that the Commission will violate the law if it enforces SB 408 and the rules implementing SB 408. Consequently, PGE is

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requesting that the Commission selectively ignore some of its legal and rate-making principles, namely, SB 408 and the rules implementing SB 408.

On the one hand, PGE continues to reargue that SB 408 and its implementing rules depart from past Commission policy and precedent in that the new statute and rules do not always perfectly align "benefits and burdens." PGE continues to rehash these policy arguments despite the fact that these were the same arguments made to the Legislature and during Docket AR 499. In passing SB 408, the Legislature directed the Commission to establish tax expenses included in rates based upon a concept of taxes collected and taxes paid. At the direction of the Legislature, the Commission's past policy and precedent of calculating utility taxes has changed. As a result, PGE's assertions regarding past Commission policy and practices are misdirected under the new legislatively established policy contained in SB 408.

On the other hand, PGE contends that SB 408 and the Commission's implementing rules are unconstitutional. While PGE avers that granting its Application will "harmonize all applicable legal principles," there is no escaping the fact that PGE's request requires that the Commission ignore SB 408 and its implementing rules. *See* PGE Opening Brief at 11. PGE's argument boils down to the assertion that the implementation of SB 408 and its implementing rules will violate applicable Oregon statutes and state and federal constitutional principles. Indeed, the Commission's decision in this proceeding is whether it should enforce SB 408 and its implementing rules or whether it should allow the Application because it believes that SB 408 and its implementing rules violate Oregon statutes and state and federal constitutional principles.

In approximately five pages of PGE's Opening Brief, PGE throws the statutory and constitutional kitchen sink at SB 408 and the rules implementing SB 408. Staff is concerned that PGE has thrown out a litany of skeletal statutory and constitutional arguments on very complex constitutional issues and then await its reply brief to add more substance to its arguments when

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1 no party is currently allowed to respond to PGE's reply brief.[1] Staff, however, takes this

2 opportunity to respond in likewise fashion to PGE's skeleton statutory and constitutional claims.

3 **DISCUSSION**

4 1. If the Commission concludes that SB 408 and the rules implementing SB 408 do not violate statutory or federal and state constitutional principles, it need not consider

5 whether the Application meets the deferred accounting criteria.

6 Notably absent from PGE's Opening Brief are any arguments that its Application is

7 consistent with SB 408 and the rules implementing SB 408. Instead, PGE alleges that its

8 Application is consistent with past Commission policies and practice (i.e. policies and practices

9 that predate the enactment of SB 408) and that the application of SB 408 and its implementing

10 rules will result in statutory and constitutional violations. If the Commission concludes that

11 SB 408 and its implementing rules are lawful, PGE's Application must be denied. Furthermore,

12 if PGE's Application is denied based upon the Commission's conclusion that granting the

13 Application would disregard SB 408 and it implementing rules, it is unnecessary to consider

14 whether PGE's Application otherwise meets the deferred accounting criteria.

15 2. PGE fails to recognize the reality that SB 408 and the rules implementing SB 408 have changed the paradigm for calculating utility tax expenses.

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17 In several places in its Opening Brief, PGE argues that the Commission should follow its

18 past policy and practice of aligning benefits and burdens. In support of its argument, PGE cites

19 past Commission decisions, the OPUC Staff white paper prepared for the Oregon Legislative

20 Assembly, several Department of Justice memoranda, as well as Oregon statutes.[2]

21 PGE's arguments are flawed as they rely on policies, practices, and events that predate

22 the passage of SB 408. Seemingly, PGE is requesting that the Commission simply ignore

23 SB 408 and its implementing rules and, instead, continue to follow past policies and practices

24 [1] This concern was also raised at the prehearing conference. If Staff's concern was to come to fruition, Staff would request an opportunity to file an additional reply or conduct oral arguments, or both.

25 [2] PGE also cites Washington and Idaho court decisions. SB 408 and the rules implementing SB 408 are Oregon law. PGE does not contend that Washington or Iowa have the same statutory and administrative law as Oregon for

26 calculating a utility's tax expense. As a result, those cases are of little or no relevance to the requirements of Oregon law.

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1 that predate the passage of the new law. Obviously, events that predate the passage of SB 408
2 involve a different set of laws and factors that have been altered with the passage of SB 408.[3]
3 This proceeding is not the appropriate venue to repeat and reargue either the legislative policy
4 choices made in passing SB 408 or the Commission policy choices made in implementing
5 SB 408 rules in Docket AR 499.

6 Admittedly, the policies were different in 2001 when PGE acquired the unregulated asset
7 at issue. While Staff has testified that it is sympathetic that the policies were different at the time
8 the unregulated asset was acquired, granting the Application would violate plain meaning of the
9 effective date of SB 408 and its implementing rules. Quite simply, SB 408 does not grandfather
10 events that occurred before its effective date.

11 PGE may argue that this particular situation is inherently unfair and the Commission is
12 allowed to neutralize the effects in this one instance. Furthermore, PGE has alleged that granting
13 the Application would avoid statutory and constitutional issues.

14 In a sense, it appears that PGE is arguing that this situation is unfair while also raising a
15 host of skeletal statutory and constitutional arguments in the hope that the Commission will grant
16 the Application to avoid statutory and constitutional challenges. Because the effective date of
17 SB 408 is plain, the unfairness of this situation is not relevant to the Commission's application of
18 the law. PGE's lists of statutory and constitutional challenges are broad attacks on the
19 lawfulness of SB 408 and the rules implementing SB 408. Granting the Application would do
20 nothing to alleviate future statutory and constitutional challenges. Indeed, the Commission
21 would likely face legal challenges from other parties to this docket if they failed to apply SB 408
22 and its implementing rules according to their plain, ordinary, and natural meaning.
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24 [3] The Department of Justice memoranda cited by PGE were directed toward the question of whether the Commission could consider changing its method of calculating utility tax expenses based upon the existing
25 circumstances at that time and not aimed a specific proposal. In sum, those memoranda recommended that the most "legally prudent" approach, if the Commission choose to change its past policy, was to follow the benefits/burden approach outlined in *City of Charlottesville, Virginia v. FERC*, 249 U.S. App. D.C. 236, 774 F.2d 1205 (1985).
26 These memoranda predate the passage of SB 408 and do not contemplate the specific method of calculating utility tax expenses required by SB 408 and the rules implementing SB 408.

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3. The denial of PGE's Application neither establishes unjust and unreasonable rates nor does it constitute a regulatory taking by creating confiscatory rates.

a. Denial of PGE's Application does not result in unjust and unreasonable rates under ORS 756.040(1) and ORS 757.210(1).

Staff agrees with PGE that SB 408 adjustments must result in rates that are fair and reasonable under ORS 756.040(1) and ORS 757.210(1). Staff notes that PGE's statutory claims under ORS 756.040(1) and ORS 757.210(1) are premature. While the Commission must ensure that SB 408 adjustments result in rates that are fair and reasonable, this docket does not involve a SB 408 adjustment. PGE argues that if the Application is not granted, a future SB 408 adjustment will result in unjust and unreasonable rates. As a result, PGE cannot argue that the overall rates are unjust and unreasonable until the Commission adopts a future SB 408 adjustment that will have an overall rate impact. The effect of one isolated adjustment in relation to a future SB 408 adjustment for which the overall impact is not known is insufficient to demonstrate that the overall rates are unjust and unreasonable at this time.

Regardless of the premature nature of PGE's statutory claims, PGE's Application fails to demonstrate that unjust and unreasonable rates will result if its Application is denied. PGE claims that its actual rate of return for 2006 is *expected* to be less than PGE's authorized rate of return and that denying the Application will result in an even lower rate of return, which would be below a fair, just, and reasonable rate. *See* PGE Opening Brief at 11-12. The legal test for whether rates are just and reasonable is not whether a utility is expected to earn less than its authorized rate of return. *See FPC v. Hope Natural Gas Co*., 320 US 591, 602 (1944). Rather, the legal test is whether the end result establishes overall just and reasonable rates. *Id.* Quite clearly, a simple claim that a utility is expected to earn less than its authorized rate of return is inadequate to demonstrate that the overall rates are unjust and unreasonable.

b. Denial of PGE's Application does not create a regulatory taking by creating confiscatory rates

PGE asserts that the application of SB 408 and its implementing rules *in 2007*

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1 would seize PGE property without just compensation in violation of both the United States and
2 Oregon Constitutions. *See* PGE's Opening Brief at 12. PGE next contends that application of
3 SB 408 and its implementing rules *may* result in an unconstitutional taking in the form of
4 confiscatory rates. *See Id.* at 14. Again, Staff notes that PGE is alleging that future events may
5 result in a constitutional violation. As such, PGE's claims are premature.
6 PGE's first claim that implementation of SB 408 would result in seizure of PGE's
7 property without just compensation, is really the same claim as its second, that the future
8 implementation of SB 408 may result in confiscatory rates.[4] PGE's first claim appears to be an
9 attempt to "create" a taking where none exists. Certainly, the Commission is not seizing any
10 specific property. PGE seems to perceive this fundamental flaw when it cites to cases for the
11 proposition that a taking can occur from an identifiable fund of money. *See Id.* Additionally, the
12 Commission is not seizing an identifiable fund of money. Rather, the Commission is
13 establishing PGE's tax expense based upon a concept of taxes paid and taxes collected. In
14 establishing a tax expense for purposes of determining the amount that will be included in
15 customer rates, the Commission is not seizing specific property or a specific identifiable account
16 of money.
17 Notably, even PGE does not claim that the Commission's denial of its Application will
18 result in confiscatory rates. Instead, PGE vaguely claims that denial of its Application *may* result
19 in confiscatory rates. Similar to the discussion above regarding the statutory standards for just
20 and reasonable rates, the constitutional test is whether the overall rates are just and reasonable.[5]
21 *See FPC v. Hope Natural Gas Co.*, 320 US 591 (1994); *see also Duquesne Light Co. v. Barasch*,
22 488 US 299, 314 (1989) ("an otherwise reasonable rate is not subject to constitutional attack by
23 questioning the theoretical consistency of the method that produced it"). While Staff agrees that
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[4] Most of PGE's claims regarding seizure of PGE's property without just compensation discuss the alignment of benefits and burdens. The benefits and burdens test has nothing to do with whether a regulatory taking has taken place. Rather, the relevant question is whether the overall rates, not the methodology, results in just and reasonable rates.

[5] These issues may seem similar as ORS 757.210(1) is the statutory equivalent of the constitutional test established in *FPC v. Hope Natural Gas Co.,* 320 US 591, 602 (1994).

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1 the overall rates must be just and reasonable to meet constitutional muster, PGE has failed to
2 demonstrate that denial of this Application will lead to overall rates that are constitutionally
3 confiscatory.

4 4. Denial of PGE's Application would not be unconstitutionally arbitrary.

5 PGE suggests that if its deferred accounting Application is not granted, SB 408 will result
6 in an arbitrary and opportunistic change in regulation. *See* PGE's Opening Brief at 15. Again,
7 PGE's contention rests upon the future implementation of SB 408 and is premature. PGE's
8 position seems to be that the Commission must use deferred accounting to avoid the intended
9 results of SB 408. Accordingly, and in order to grant PGE's Application, the Commission would
10 have to consciously determine that it should avoid the intended consequences of SB 408. Staff
11 does not believe the Commission should employ deferred accounting in a manner that implicitly
12 ignores direct legislative direction.

13 For support of its claim that future Commission implementation of SB 408 will be
14 unconstitutional, PGE relies on one sentence from *Duquesne Light Co. v. Barash* ("a State's
15 decision to arbitrarily switch back and forth between methodologies in a way which require[s]
16 investors to bear the risk of bad investments at some times while denying them the benefit of
17 good investments at others would raise serious constitutional concerns.") *See* PGE's Opening
18 Brief *citing Duquesne Light Co. v. Barash*, 488 US at 315.

19 As every party involved with SB 408 is aware, the Commission's and legislative
20 processes leading to SB 408 and the rules implementing SB 408 was a long, deliberate process
21 and not a random or arbitrary process. Furthermore, there has not been switching back and forth.
22 There has been one switch from the Commission's past practice, that switch was based upon new
23 legislative direction and requirements.

24 A closer look at the issue in *Duquesne Light* offers further support for the
25 constitutionality of SB 408 and its implementing rules. In *Duquesne Light*, the underlying
26 decision of the Supreme Court of Pennsylvania had held that a new state law, which required the

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exclusion of utility property that was not "used and useful," applied to prohibit the inclusion of the costs in rate base or by amortizations, <u>even though the utility canceled the nuclear generating plants before passage of the new law.</u> *See Duquesne Light* at 302-04. The case was appealed to the United States Supreme Court, which reaffirmed the teachings of *FPC v. Hope Natural Gas Co*. *Id*. at 310. The Court stated that "an otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it." *Id.* at 314 *citing FPC v. Hope Natural Gas Co*, 320 U.S., at 602.

The future implementation of SB 408 and its implementing rules are similar to *Duquesne Light* in that they are both based upon changes to the law that require a change in Commission practice. Similar to *Duquesne Light*, the implementation of SB 408 will be constitutional as long as the overall rates "give a reasonable rate of return on equity given the risks under such a regime." *Id.* at 315. As described above, PGE's statement that it is expected to earn less than its authorized rate of return is insufficient to support a conclusion that the overall rates are confiscatory.

5. <u>PGE impairment of contract claim is diversionary and lacks merit.</u>

PGE argues that an old stipulation in the Enron-PGE merger, where PGE and Enron agreed to certain "ring fencing" conditions, created a "corollary" contractual obligation that PGE and Enron would retain the "rewards and benefits" of unregulated activities. *See* PGE's Opening Brief at 16. According to PGE, application of SB 408 without the requested deferral would substantially impair that contractual agreement. *Id.* Instead of attempting to make any type of detailed argument regarding how it meets the criteria for contract impairment, PGE summarily cites to two cases that discuss contract clause violations under the federal and state constitutions, respectively. *Id.*

PGE's contention is premature in the sense that it attempts to argue about future decisions regarding the implementation of SB 408. If there was a constitutional Contract Clause issue, it would be a result of the future implementation of SB 408 and not the denial of this Application.

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Regardless, PGE's contract clause claims fail. PGE relies on a merger stipulation, where Enron and PGE agreed to certain conditions, which no longer exits. In Docket No. UM 1206, the Commission approved the re-creation of PGE as an independent company. Since then, PGE's rates have been established based upon its operation as an independent company. *See* Docket UE 180.

In addition, there is no "corollary" contract obligation in which the Commission sacrifices its statutory duty to establish just and reasonable rates in exchange for certain, agreed-to, ring fencing conditions. Utility regulation does not constitute the unconstitutional impairment of contracts. According to PGE's logic, it could enter into a power purchase contract to buy 200 megawatts of power at $500 per megawatt. If the Commission disallowed the power purchase contract as imprudent, would that Commission decision result in an unconstitutional Contract Clause issue? Clearly, typical Commission regulation does not constitute violations of the contract clauses of the federal and state constitutions.

PGE's impairment of contract claim does not satisfy the three-step inquiry of whether a regulation violates the Contract Clause cited its own brief. *See* PGE's Opening Brief at 16. The first step is to determine whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.[6] Here, there is no contractual relationship. Assuming, *in arguendo,* that there was a contractual relationship, there is no substantial impairment. If we were to assume that the first step was met, the second step is to consider whether Oregon has a significant and legitimate public purpose behind the regulation.[7] Helpfully, ORS 757.267 describes the significant and legitimate public purposes behind the regulation. The third step would be to consider whether the contractual impairment is based upon reasonable conditions and if it is of a character appropriate to the public purpose.[8]

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[6] *See Rui One Corp. v. City of Berkeley*, 371 F3d 1137, 1147 (9th Cir 2004) *citing Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983) *quoting Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978).
[7] *Id*. at 411-12 (citations omitted).
[8] *Id*. at 412-13 *quoting United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

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1 6. The calculation of a utility tax expense for inclusion in rates is unrelated to federal tax law.
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3 PGE attempts to fashion a federal preemption issue by mischaracterizing the purpose and
4 future application of SB 408. *See* PGE's Opening Brief at 16-17. The future application of SB
5 408 and its implementing rules will establish a utility tax expense to be included in customer's
6 rates that is fair, just and reasonable. The application of SB 408 only deals with establishing a
7 level of utility tax expenses to be included in customer rates and not with the underlying federal
8 and state tax treatment of a utility's taxable income. Contextually, it is also important to
9 remember that any future SB 408 adjustments must result in overall rates that are just and
10 reasonable.

11 Staff again notes that this claim is premature. Specifically, PGE's claim is that the future
12 operation of SB 408 will result in a federal preemption issue. *Id.* at 17. Because that future
13 event has not occurred, there can be no federal preemption issue related solely to this current
14 Application. In addition, accepting PGE's federal preemption claim would demand that the
15 Commission accept the proposition that SB 408 and its implementing rules violate the United
16 States Constitution. Considering that federal preemption is a complex area of constitutional law
17 and that PGE's federal preemption claim is based upon a few general statements from a non-
18 binding federal appeals court,[9] it would seem rash for the Commission to rely on such
19 generalized assertions to conclude that the Oregon Legislature's policy choice is
20 unconstitutional.

21 Generally, courts will presume that Congress does not intend to displace state law,
22 especially where state law concerns areas that traditionally arise within the states' police powers
23 and unless the manifest and clear purpose of Congress is to supersede state police powers.[10]
24 Federal tax law allows PGE to use consolidated losses to offset consolidated income if it files a
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[9] The 5th Circuit Court of Appeals, which includes Louisiana, Mississippi and Texas.
[10] *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *City of Columbus v. Ours Garage and Wrecker Service Inc.*, 536 U.S. 424, 432-33 (2002) *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 1947).

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consolidated federal tax return. However, that general federal tax benefit does not demonstrate a clear intention on the part of Congress to preempt a state's specific ability to establish just and reasonable rates for a state's utility customers.

7. The Oregon Legislature acted rationally in defining a "public utility" or "utility" in ORS 757.268(13).

ORS 757.268(13) defines a "public utility" or "utility" as a "regulated investor-owned utility that provided electric or natural gas service to an average of 50,000 or more customers in Oregon in 2003." PGE summarily alleges that this definition violates the state and federal constitutions. *See* PGE's Opening Brief at 17.

PGE's final claim contains the same fundamental flaw as the rest of its claims in this proceeding. PGE's claim is aimed at a definition in SB 408. As a result, PGE's claims are based upon the future application of SB 408 and are not directed to the denial of its Application in this proceeding.

Generally, under the rational relationship test of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the courts will only ask only it is conceivable that the classification bears a rational relationship to a legislative purpose. Courts rarely grant significant review of legislative decisions to classify persons in terms of economic regulation because they have little institutional capability to assess the scope of legitimate governmental ends in any way that would be superior to the capability of the legislature. Likewise, a classification in Oregon must have a reasonable relationship to the legislative purpose.

While it is unnecessary to determine the constitutionality of SB 408 in this proceeding, the Legislature's definition in ORS 757.268(13) does bear a rational and reasonable relationship to the legislative purpose of SB 408, which is to calculate a utility's tax expense based upon taxes collected and taxes paid. Undoubtedly, including only utilities that most substantially impact the rates of Oregon utility customers, while also balancing the costs of compliance and cost of regulation, is rationally and reasonably related to the legislative purpose of SB 408.

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1 **CONCLUSION**

2 While the Commission has the authority to declare statutes and rules unconstitutional, it
3 should exercise its authority infrequently and with care. *See Nutbrown v. Munn*, 311 Or 328, 811
4 P2d 131 (1991). Especially considering the deliberate process that occurred before and during the
5 legislative debate on SB 408 and the deliberate and careful adoption of implementing rules in
6 AR 499, the Commission should hesitate to declare the Legislature's recent enactment of SB 408
7 unconstitutional.

8 Moreover, the statutory and constitutional arguments alleged in PGE's Opening Brief are
9 premature, as they relate to the future application of SB 408 and not the deferred application at
10 issue in this proceeding. Finally, PGE's litany of statutory and constitutional claims lack merit,
11 and it is apparent that PGE's Application must be denied.

12 For the foregoing reasons, Staff respectfully urges the Commission to deny PGE's
13 Application.

14 DATED this 18th day of May 2007.

15 Respectfully submitted,

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17 HARDY MYERS
Attorney General

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19 /s/Jason W. Jones ______________
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1 **CERTIFICATE OF SERVICE**

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3 I certify that on May 18, 2007, I served the foregoing upon all parties of record in this

4 proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid

5 first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

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