ORDER NO. 06-156

ENTERED 04/10/06

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UF 4218/ UM 1206

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Application for an Order Authorizing the Issuance of 62,500,000 Shares of New Common Stock Pursuant to ORS 757.410 et seq. (UF 4218) and In the Matter of STEPHEN FORBES COOPER, LLC, as Disbursing Agent, on behalf of the RESERVE FOR DISPUTED CLAIMS Application for an Order Allowing the Reserve for Disputed Claims to Acquire the Power to Exercise Substantial Influence over the Affairs and Policies of Portland General Electric Company Pursuant to ORS 757.511 (UM 1206)	ORDER

DISPOSITION: APPLICATIONS FOR RECONSIDERATION DENIED

On February 13, 2006, the Utility Reform Project (URP) filed an application for reconsideration of Order No. 05-1250.[1] That order granted an application by Portland General Electric Company (PGE) to issue new stock and granted an application by Stephen Forbes Cooper, LLC (SFC), on behalf of the Reserve for Disputed Claims (Reserve) to acquire all of the stock of PGE for the purpose of distributing it to creditors of the bankrupt Enron Corporation (Enron).[2] On February 28, 2006, replies were submitted by several parties, including the City of Portland (City).[3]

[1] URP's Application cited Order No. 04-597. However, the docket number and arguments made therein appear to refer to Order No. 05-1250.

[2] The two applications were inextricably linked, *see* Order No. 05-1250, so reconsideration of one necessarily would require reconsideration of the other. Although URP's arguments appear aimed at SFC's application for acquisition of control of PGE under ORS 757.511, they also draw in PGE's application for issuance of stock.

[3] The City previously appealed the decision of the Public Utility Commission of Oregon (Commission) in Marion County Circuit Court, *see* docket 06C11248, and the Oregon Court of Appeals, *see* docket CA A131268.

In its reply, the City raised several additional grounds on which reconsideration should be granted. Because the City's filing was essentially an additional application for reconsideration, parties were provided an opportunity to reply to that filing by March 13, 2006. In addition, the Commission held public meetings on March 2, and 13, 2006, relating to the investigation of the Commission Staff (Staff) into the City's assertions of unlawful tax and trading practices by PGE.[4] At those meetings, the City raised additional issues for reconsideration. Parties were provided notice and an opportunity to rebut those comments. *See* OAR 860-012-0015.

There is only one timely filed application for reconsideration, which was filed by URP. That application is denied on its merits, as discussed below. In addition, the City raised additional issues in a filing and at two public meetings, while URP sought to raise one more issue in written comments at a public meeting. These additional issues raised by the City and URP are not properly before us and are rejected as they do not meet the requirements of OAR 860-014-0095. Even if we were to consider the arguments made by the parties, we would reject them for the reasons discussed below. The issues raised in each application, as well as in comments made by the City at public meetings, are discussed in turn.

URP's Application for Reconsideration

An application for reconsideration may be made within 60 days of the service of an order. *See* ORS 756.561. The Commission may grant an application for reconsideration under the following circumstances:

> (a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
>
> (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
>
> (c) An error of law or fact in the order which is essential to the decision; or
>
> (d) Good cause for further examination of a matter essential to the decision.

OAR 860-014-0095(3).

[4] While the matters discussed in the Staff report are not a part of this docket, the City made other assertions, discussed below, and requested that this docket be stayed so that the Commission could consider those other assertions.

URP filed a timely application for reconsideration, in which it claimed that the Commission made an error of fact and law in concluding that ratepayers would not be harmed by the stock issuance and that the public interest would be served by the stock distribution. This claim is premised on the recent passage of Senate Bill 408 (SB 408), codified as ORS 757.267 and 757.268, which provides for an automatic adjustment clause that would align the amount of taxes collected from ratepayers with the amount of taxes that are paid by, and properly attributed to, the regulated operations of the utility. URP argues that, while PGE is owned by a parent company with large losses that ensure the parent will pay no taxes, PGE will be required to refund to customers any income taxes it collects in rates for its operations. Conversely, if control of PGE is transferred for the purpose of distribution to creditors and removal from Enron's consolidated tax return, then PGE will be liable for taxes and will collect those taxes from ratepayers. Because this transfer of control will result in PGE charging ratepayers more for taxes than it otherwise would under a parent that paid no taxes, URP argues that the transfer of control violates the public interest standard under ORS 757.511. For this reason, URP argues that the Commission should resume deliberations and reject the two applications by PGE and SFC on behalf of the Reserve.

Staff, the Citizens' Utility Board (CUB), and Applicants and Enron filed a response opposing URP's application. First, Staff argues that URP could have raised the issue of the two methods of tax treatment under SB 408 prior to the close of the record. SB 408 was enacted on September 2, 2005; the Commission promulgated temporary rules regarding the new law on September 15, 2005. In light of this timing, Staff argues that the application fails to meet the requirements of the applicable administrative rule because there is no new evidence, under OAR 860-014-0095(3)(a), and no new law or policy since the date the order was issued, under OAR 860-014-0095(3)(b). In addition, Staff points out that URP's argument is predicated on the assumption that Enron will continue to own PGE, contrary to evidence in the record that Enron is seeking the first available opportunity to dispose of the utility. Moreover, there is no evidence in the record regarding the tax issue.

Applicants and Enron argue that URP failed to actively participate in this docket, and therefore should not be permitted to come in at this late stage and make arguments based on evidence that it did not introduce into the record. Additionally, they note that URP supported the City's brief, which conceded that tax deconsolidation is 'wholly unrelated' to the proposed stock distribution. Applicants and Enron echo Staff's response regarding the timing of the enactment of SB 408; they note URP's active involvement in the passage of that legislation and argue that, because it was passed prior to the close of the record, passage of SB 408 does not present a change in fact or law that would merit reconsideration of the initial order. On the merits, Applicants and Enron argue that SB 408 operates differently than asserted by URP, and that URP made a series of erroneous factual and legal assumptions to bolster its application. Further, they assert that ORS 757.511 does not permit the Commission to impose conditions in order to add benefits to a proposed transaction.

CUB cautions that, if the Commission were to delay severance of PGE and Enron, the United States Bankruptcy Court of the Southern District of New York could lose patience with the Commission's treatment of Enron's attempts to dispose of PGE and override the Commission. CUB also repeats the arguments made by other parties: URP could have introduced evidence about the impact of SB 408 while the record was open, but declined to do so. For this reason, CUB urges the Commission to reject URP's application for reconsideration. Further, CUB argues that any short-term impact of SB 408 in ratepayers' favor is outweighed by the negative consequences of prolonging Enron's ownership of PGE.

We begin by noting that SB 408 was passed while this record was still open. URP had sufficient time to raise its argument in a timely fashion, but chose not to do so. The record contains no evidence on the merits of allowing a bankrupt parent to retain ownership of PGE and the attendant benefits for ratepayers. Further, URP cannot fairly claim to not have known about the SB 408 argument prior to the close of the record. *See* UE 88, ALJ Ruling (July 1, 2005) (noting URP counsel's testimony before a legislative subcommittee meeting on SB 408). For these reasons, we deny URP's application for reconsideration.

City of Portland's Application

On February 28, 2006, the City submitted a filing in support of URP's application. The City stated "there is new evidence indicating that the Commission has failed to properly exercise its statutory responsibilities for overseeing persons exercising substantial influence over [PGE]." *See* City of Portland's Response, 1-2 (Feb 28, 2006). First, the City argues that the Commission committed legal error in its interpretation of "public interest" under ORS 757.412. Second, the City asserts that the Commission failed to properly investigate the City's request for a condition requiring PGE to negotiate a franchise agreement with the City. Third, the proposed disbursing agent for PGE stock has changed since the issuance of the order, from SFC to BDHLR, LLC. The City notes that no notice was provided to parties in this docket of the change and argues that the Commission has an obligation to investigate the new entity.

In response, Applicants and Enron argue that the City's filing should be stricken as untimely. Further, they assert that the Commission correctly interpreted and applied ORS 757.412, that the City has not properly invoked ORS 756.160 through petition or complaint, and that the Reserve, not SFC, was the applicant and does not change with the shift to BDHLR, LLC.

Staff also responded that the City's filing should be rejected as untimely. On the merits, Staff argues that the Commission was not required to promulgate rules to apply ORS 757.412, and that the Commission correctly concluded, based on the record, that the issuance met the standard set forth in ORS 757.412. Next, Staff argues that the Commission was not required to impose a condition mandating PGE to negotiate a new franchise agreement, because that matter is not affected by the transaction at issue in these dockets. Finally, Staff asserts that the change in disbursing agent from SFC to

BDHLR, LLC, is not new evidence justifying reconsideration because the Reserve was the true applicant, and the DCR Overseers will maintain control. *See* Order No. 05-1250, 6 (discussing roles and responsibilities of Disbursing Agent and DCR Overseers).

In essence, the City's arguments constitute a late-filed application for reconsideration. Parties have 60 days from the time the order is served to file an application for reconsideration. *See* ORS 756.561. Once the application is filed, we must enter an order within 60 days, or else the application is deemed denied. *See* ORS 183.482(1). Because of the time constraints, we only allow one round of responses and do not permit the applicant to rebut those arguments. *See* UM 1083, Order No. 04-598, 1-2. In this case, the City did not file a proper response to URP's application; instead, it made new arguments for the first time in the response round, which had the potential to prejudice the parties that filed the Applications under ORS 757.412 and ORS 757.511. *See* UF 4218/ UM 1206, ALJ Ruling (Feb 28, 2006). We agree with Applicants, Enron, and Staff that the City's filing is an untimely application for reconsideration.

Even if we considered the City's arguments to be timely, we reject them on their merits. The City's first argument is that the Commission erred in applying the legal standard under the stock issuance statutes. Under ORS 757.415, the legislature set out the purposes for which a stock issuance could be approved by the Commission. Under ORS 757.412, the legislature added a catch-all provision, in which it stated that the Commission could exempt an issuance of stock from statutes, including the statute requiring Commission approval, if the Commission found the issuance to be "in the public interest." Contrary to the City's arguments that our review is arbitrary and capricious, and without bounds, we were guided by the standards set forth in OAR 860-027-0030(1)(n). Our task was to determine whether the issuance satisfied the public interest test. We understand that PGE filed the Application due to certain regulations related to the Enron bankruptcy filing. *See* Order No. 05-1250, 11-12. However, we also found that neither shareholders nor ratepayers would be harmed, and "the stock may be more marketable at a lower value, easing the transition to a publicly traded PGE." *See id.* at 12. A determination of whether an application, of any kind, is in the public interest always necessitates a judgment on the part of the agency, and determinations must be made on a case by case basis. *See, e.g., Schoch v. Leupold & Stevens*, 325 Or 112, 117-18 (1997); *McCann v. OLCC*, 27 Or App 487, 492-93 (1976), *rev den* 277 Or 99 (1977); UM 1011, Order No. 01-778, 11 (discussion regarding discretion given by Legislature to Commission under ORS 757.511). We conclude that we made neither a legal nor a factual error in our determinations under ORS 757.415 and ORS 757.412.

Next, the City argues that the Commission committed legal error by not requiring PGE to negotiate a new franchise agreement as a condition of the transaction, and by not investigating PGE's failure to negotiate as a possible violation under ORS 756.160. First, we note that the City failed to raise ORS 756.160 in its filings during the evidentiary phase of this proceeding. Second, ORS 756.160 is not a new law that would qualify for reconsideration under OAR 860-014-0095(3)(b). Third, we do not have the jurisdiction to add conditions to an application that we have found to be in the public interest for the

purpose of adding benefits. *See* UM 1121, Order No. 05-114, 35. Fourth, if PGE were in violation of state law for failing to negotiate a modern franchise agreement, that fact has no impact on the transaction at issue in this docket. After approval of the instant Applications, PGE will remain a utility under Commission jurisdiction. We conclude that we did not err.

Finally, under the City's February 28, 2006, filing, we consider the change in disbursing agent for the Reserve and its impact on whether reconsideration of this Application should be granted. In our initial order, we made our decision based on representations made about the Reserve as the Applicant, and the commitments made on behalf of the Reserve. *See* Order No. 05-1250, 17 ("The Reserve was named as the Applicant."); *see id.* at 23 (concluding that distribution of the "stock to the Reserve for the purpose of dispensing the stock" is in the public interest). The disbursing agent serves a primarily ministerial function and does not exert substantial control over PGE. *See id.* at 13-14. We note that the new agent is comprised of the same individuals who serve as the DCR Overseers, who we reviewed as part of our initial order. *See id.* at 17. This new evidence does not affect an issue "essential to the decision," and does not constitute an issue for reconsideration.

March 2 and March 13 Public Meetings

As noted above, the Commission held two public meetings in March to discuss matters that had been raised by the City in an ongoing investigation of PGE's tax payments and trading practices. At those meetings, the City provided both oral and written comments, which raised additional issues that impact this docket. We address each issue in turn.

City of Portland's LLC Proposal

First, the City argues for an alternative to the approved stock redistribution plan. The City proposes to have PGE convert to an LLC prior to its distribution to Enron's creditors, allowing the PGE LLC to receive a "step up" in the basis of its assets to the fair market value of the assets. The City asserts that 40 percent of the "step up" would flow to ratepayers in the form of reduced future income taxes, due to the tax benefit of depreciation on the stepped up basis. According to the City, that would reduce rates between 7 and 10 percent. *See* City of Portland, notice of ex parte communication, 5 (Mar 2, 2006); Jubb comments, audio file, 10:00-11:00 (Mar 2, 2006).[5] At the public meeting, Commissioner Leonard stated that the City would provide written analysis of the LLC proposal. *See* Jubb comments, audio file, 11:00 (Mar 2, 2006).

Staff did not file a formal response to the LLC proposal, but made comments during the March 13, 2006, public meeting. Lee Sparling, Director of the Commission's Utility Program, stated that preliminary research indicated that the "step up" in basis for assets under the LLC proposal would eliminate the accumulated deferred

[5] Audio files of the two public meetings are located on the Commission website: http://www.puc.state.or.us/PUC/pgereport.shtml.

income tax offset to rate base, thereby reducing the benefits to ratepayers by an estimated $24 million. *See* Sparling comments, Sparling audio file, 7:40-9:20 (Mar 13, 2006). Staff also cautioned that the full ratemaking effects of the LLC proposal are highly speculative at this time. *See id.*

PGE responded to the City's LLC proposal by submitting a memorandum prepared by Skadden, Arps, Slate, Meagher & Flom LLP, a New York law firm specializing in tax law (Skadden Arps memo). The Skadden Arps memo argues that the City's proposal will not have the desired effects for several reasons. The memo argues that there may be difficulty in applying the LLC laws to PGE: to be effective, PGE must only have one owner, and it is currently owned by Enron as well as PGE's preferred stockholders. Further, if PGE is traded on the New York Stock Exchange, it will be automatically treated as a corporation for federal income tax purposes. Importantly, the memo notes that the Internal Revenue Service scrutinizes transactions in which the principal purpose is tax avoidance. In fact, the memo cites a case in which a similar transaction was rejected on that basis. *See id.* at 2 (*citing Commissioner v. Court Holding Co.*, 324 US 331, 334 (1945)).

On behalf of the City, Ms. Ann Fisher[6] recommended that the Commission either request briefing or schedule workshops to investigate the issues raised by the City. In addition, the City requested "a delay in the implementation of the stock redistribution plan or an outright reversal of the Commission's previous decision on the plan, until these various issues are fully resolved." The City noted that "execution of the proposed stock distribution plan would render the proposed LLC conversion approach moot." The City acknowledges that only PGE can elect to form an LLC, and that if it does not, the benefits of the LLC proposal should be considered in future SB 408 calculations. *See* Jubb comments, Jubb 4 audio file, 12:00 (Mar 13, 2006). The result would be that ratepayers would reap the benefits of the LLC proposal outcome, even if PGE did not pursue that course of action. This would provide incentives to PGE to either become an LLC, or make PGE explain why it did not take the action that would result in benefits to ratepayers. *See id.*

To begin, we again note that these issues constitute an untimely application for reconsideration, which we reject for lateness. Assuming, *arguendo*, that we were to consider these issues as an application for reconsideration, we would deny the application on its merits. First, we note that this issue is based on information that has long been available and could have been raised before the close of the record. Second, alternate proposals to the application are not properly considered when evaluating an application for acquisition of control under ORS 757.511. *See* UM 1121, Order No. 05-114, 18 n 14. Third, we do not have the authority to add conditions to bolster an application once we have found that it is in the public interest. *See id.* at 35. While it is not appropriate to take

[6] Ms. Fisher represented the Portland Building Managers and Owners Association in the UF 4218/ UM 1206 dockets, but stated that she represented the City of Portland in the March 13, 2006, public meeting.

the City's LLC proposal into account in this docket, we may consider a fully developed proposal, substantiated by credible evidence, in a future proceeding.

Tax Issues and Severance from Enron

The City next argues that the stock redistribution should be delayed so that it can investigate tax payments made by PGE to Enron and other matters. The City asserts that, as long as Enron remains the owner of PGE, there may be an opportunity to recover unlawful or improper payments. *See* Sten comments, audio file (Mar 2, 2006). If the Application is approved, and control over PGE is transferred to the Reserve from Enron, the City argues that it will no longer be able to recoup those unlawful payments. The City also questions whether Enron may have improperly filed a consolidated tax return with PGE, because PGE and Enron's finances were not "unitary" for purposes of the Oregon tax code, and whether PGE may have unlawfully included local taxes in rates, as well as a surcharge on bills for ratepayers residing in that local jurisdiction. *See* Jubb comments, Jubb 1, audio file, 3:00-20:00 (Mar 13, 2006); Jubb comments, Jubb 3 audio file, 3:30-10:00 (Mar 13, 2006); Leonard comments, Jubb 3 audio file, 10:00-11:20 (Mar 13, 2006).

We reject these arguments as being untimely raised. Even if we were to consider them, these issues do not provide a sufficient basis for us to reconsider Order No. 05-1250. There is no new material raised here that could not have been introduced into the record when it was open. The City admits that it participated in the initial docket, but is attempting to force a second proceeding to evaluate the Applications because it disagreed with the order issued by the Commission and so "decided to take a look." *See* Sten comments, Jubb 2 audio file, 6:20-7:30 (Mar 13, 2006).

The City does not even argue that PGE's actions related to taxes were necessarily unlawful; the City instead argues that they were "inappropriate." *See* Sten comments, audio file, 3:40-4:20 (Mar 2, 2006). To the extent that PGE's actions were unlawful, the City argues that we should refer the matter to the Department of Justice. *See* Jubb comments, Jubb 2 audio file, 2:45-6:05 (Mar 13, 2006); Leonard comments, Jubb 2 audio file, 11:00-12:45 (Mar 13, 2006). Whether or not PGE's actions related to taxes were unlawful was a subject of the Staff Report, and may be considered in another proceeding. As Applicants and Enron argue above, an investigation under ORS 756.160 could be considered under a complaint or petition but is not appropriately raised in this docket. The request for a delay in the case is denied.

Enron Merger Credit

In a written response to comments made at the public meetings, URP appears to assert a new error of law in Order No. 05-1250 relating to the Enron merger credit. *See* Dan Meek, Utility Reform Project, "Comments on OPUC Staff Review of PGE Taxes and Trading," 2-3 (Mar 13, 2006). In the initial proceeding, the City argued that Enron did not pay PGE the full amount of the ratepayer credit and should do so before ties were severed between the two entities. *See* Order No. 05-1250, 21.

Applicants and Enron noted that ratepayers had received the full benefit of the credit, and PGE had forgiven Enron's debt. *See id.* We concluded that ratepayers had received the benefit of the credit in docket UM 989 and noted that, even if we ordered Enron to pay PGE, the payment could be reversed under the terms of Enron's ownership. *See id.* at 22. On reconsideration, PGE responded that this issue has been fully briefed by the parties in the current remand dockets, and that the record has been closed. *See* PGE's Response to Ex Parte Communications, 2 (Mar 23, 2006). URP contends that, in making that decision, we did not properly construe the effect of the court decisions in docket UM 989 that addressed the merger credit.

We first note that this issue is raised after the time for an application for reconsideration. Were we to consider this issue, it would not affect the outcome of Order No. 05-1250. The court decisions to which URP refers have resulted in an appeal, currently under consideration at the Oregon Court of Appeals, *see* CA No. A123750, and a remand, currently under consideration at the Commission, *see* DR 10/UE 88/UM 989. We are already considering these issues in the remand docket; there is no reason to consider them here.

ORDER

IT IS ORDERED that the application and additional requests for reconsideration are denied.

Made, entered, and effective APR 1 0 2006.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.