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VIA E-FILING & FIRST CLASS MAIL

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

Re: *UM 1234*

Attention Filing Center:

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

Very truly yours,

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

Leslie Hurd, Legal Assistant to
David F. White

/ldh

Enclosure

cc: Service List

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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1234**

In the Matter of

PORTLAND GENERAL ELECTRIC
COMPANY,

Application for Deferred Accounting of Excess
Power Costs Due to Plant Outage.

**OPPOSITION OF PORTLAND
GENERAL ELECTRIC COMPANY TO
PETITION FOR RECONSIDERATION
OF INDUSTRIAL CUSTOMERS OF
NORTHWEST UTILITIES**

I. INTRODUCTION

Portland General Electric Company ("PGE") submits this Opposition to the Petition for Reconsideration of the Industrial Customers of Northwest Utilities ("ICNU"). ICNU claims that the Commission's decision adjusting the "Boardman deferral deadband to account for SB 408 second guesses the wisdom of Oregon law" and "effectively achieved the result [the Commission] determined was prohibited in AR 499." Pet. at 1, 4. We disagree on both counts. The Commission's final order (the "Final Order") comports with Oregon law and correctly implements the Commission's framework set forth in AR 499. The Commission should deny ICNU's petition for reconsideration.

**II. ICNU'S OBJECTION TO THE COMMISSION'S POSITION IN AR 499 IS
UNTIMELY**

ICNU's argument is misplaced in this proceeding. ICNU objects to a single aspect of the Commission's Final Order; namely, that the Commission abided by its previous commitment and adjusted the Boardman deferral deadband based upon SB 408's impact: "Consistent with our pledge in Order No. 06-532, we further find that the ROE deadband should be adjusted from 100 to 80 basis points to account for the SB 408 effect on costs incurred on or after January 1, 2006 for the Boardman Outage." Final Order at 19. As the Commission's Final Order made clear, this was a straightforward application of its "pledge" in AR 499 that the Commission will "consider the tax effects when evaluating issues in other dockets" (Order

No. 06-400 at 9) and "may [address the consequences of the double whammy problem] in ORS 756.040 proceedings, general rate cases, and power cost adjustment mechanism dockets." Order No. 06-532 at 11.

ICNU never objected to the Commission's pledge in AR 499, when it had every opportunity to do so. Parties filed two rounds of comments in response to the Commission's interim order, in which the Commission committed to "consider the tax effects when evaluating issues in other dockets." ICNU elected not to object to the Commission's pledge. ICNU also declined to seek reconsideration or appeal the final order in AR 499.

ICNU's objection to the Commission's straightforward application of its AR 499 commitment is ill-founded in this docket.

III. THE COMMISSION DID NOT COMMIT LEGAL ERROR

ICNU does not dispute the Commission's central conclusions that (a) PGE's application satisfied the legal requirements of the statute, (b) PGE met the Commission's "deferral discretionary criteria," and (c) \$42.8 million of replacement power costs were approved as "eligible for deferral." Final Order at 9, 10, 13. ICNU's only complaint is that the Commission committed legal error when it set the deadband at 80 basis points instead of 100 basis points.

But ICNU has failed to establish the essential predicate of its argument; namely, that the Commission was legally required to adopt a 100 basis deadband in the first place. In fact, the Commission was not legally obligated to adopt a deadband at all. The Commission has approved a number of power cost deferrals in the past with no deadband. *See, e.g.*, UM 445, Order No. 91-1781 (Dec. 20, 1991) (permitting PGE to defer 90% of its replacement power costs due to plant outage); UM 480, Order No. 1130 (authorizing Idaho Power to defer excess power costs due to drought conditions). If the Commission could have lawfully authorized the deferral of \$42.8 million, it follows as a simple matter of logic that it cannot be legal error (at least from the customers' perspective) to authorize the deferral of less than that amount. UM 995, Order

No. 02-469 at 75 (July 18, 2002) ("Because the record before us supports full recovery of PacifiCorp's excess net power costs * * * a fortiori it supports less than full recovery").

IV. ICNU'S POSITION IS OVERLY BROAD AND MISUNDERSTANDS THE COMMISSION'S PLEDGE AND ITS APPLICATION IN THIS DOCKET

ICNU's position appears to be that the Commission is legally barred from taking any regulatory action that might potentially mitigate SB 408's double whammy impact. Pet. at 7. Such a construct would unduly restrict the Commission in discharging its statutory directives and policies. It would bar the Commission from altering the amount of revenue a utility is entitled to collect (in a general rate case or otherwise) because it would create "an adjustment to the amount that will flow through PGE's automatic adjustment clause that the Legislature chose not to include in SB 408." Pet. at 7. That position is untenable on its face.

At its core, ICNU's reconsideration request confuses SB 408 (including the double whammy effect) with the Commission's other policies, including its deferred accounting policy, a distinction the Commission clearly drew in AR 499 and applied in this docket. When applying SB 408, the Commission is bound by the terms of the statute. However, when the Commission applies other statutes and policies, it need not turn a blind eye to the impact of SB 408.

In this docket, the Commission applied its general deferral policy according to which the Commission considers the "financial impact" on the utility of variations in costs or revenues and the business risk to which the utility is exposed between rate cases. UM 1147, Order No. 05-1070 at 7 (Oct. 5, 2005). When considering such issues, the Commission must consider the specific facts and circumstances of the request, including changes in circumstances such as the SB 408 impact. *Id.* at 5. As the Commission noted in AR 499, SB 408 magnifies the financial impact on utilities of variations in costs between rate cases. Order No. 06-400 at 8. Because deferred accounting deals with both variations from rate case forecasts and their financial impact on the utility, consideration of the SB 408 impact is unavoidable and consistent with Commission's statutory obligations and its own policies. Nothing in SB 408 suggests the

Commission was wrong to consider the SB 408 impact in fine-tuning its deferral policy to fit the changed circumstances.

ICNU appears to rely on the same confusion between SB 408 and other Commission policies when it speculates about legislative intent. According to ICNU, the Legislature purposefully declined to mitigate the double whammy impact when structuring the SB 408 automatic adjustment clause. Pet. at 6. It is doubtful whether the Legislature understood, much less intended, the double whammy; however, implementation of the SB 408 automatic adjustment clause is not at issue. Even if ICNU is correct about the double whammy, there is absolutely no evidence the Legislature intended to prohibit the Commission from considering SB 408 impacts when applying other Commission policies. SB 408 contains no language or terms to that effect, and ICNU points to no legislative history to support such a broad claim.

Finally, there is no reason for the Commission to hold this docket in abeyance until the 2007 legislative session ends as ICNU suggests. Pet. at 8. What happens (or does not happen) in this legislative session is irrelevant to this docket, and certainly provides no basis for granting reconsideration. ICNU appears to suggest that if the Legislature fails to address the double whammy impact in this session, then it can be inferred that the Legislature (a) intended the double whammy impact and (b) meant to bar the Commission from considering SB 408 impacts when applying other Commission policies. Neither inference is sound.

Inferring legislative intent from inaction is notoriously speculative, but it is doubly speculative here given ICNU's tortured logic. Rather than confirming that the double whammy impact was intended, inaction in the 2007 legislative session may mean the Legislature would like the benefit of a few years' experience when the automatic adjustment clause is effective before amending the statute.¹ ICNU's speculation is all the more dubious here given

¹ The automatic adjustment clause under SB 408 applies to taxes paid and collected on or after January 1, 2006. SB 408, § 4.

that there is no proposed legislation on the real issue, which is not the doubly whammy impact, but whether the Commission may consider SB 408 when fashioning other regulatory policies. Indeed, if legislative inaction in 2007 suggests anything, it would indicate that the Legislature endorses the Commission's Final Order and its adjustment of the Boardman Outage deadband to account for SB 408. In any event, such speculation is legally insufficient under the reconsideration statute. It does not establish an error of law or fact, or good cause for further examination.

V. CONCLUSION

For the reasons stated above, the Commission should reject ICNU's petition for reconsideration.

DATED this 30th day of April, 2007.

PORTLAND GENERAL
ELECTRIC COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **OPPOSITION OF PORTLAND GENERAL ELECTRIC COMPANY TO PETITION FOR RECONSIDERATION OF INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES** by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to each party listed below, deposited in the U.S. Mail at Portland, Oregon.

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DATED this 30th day of April, 2007.

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