Davison Van Cleve PC
Attorneys at Law
TEL (503) 241-7242 ● FAX (503) 241-8160 ● mail@dvclaw.com
Suite 400
333 SW Taylor
Portland, OR 97204

May 15, 2007

Via Electronic Mail 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
Application for Deferred Accounting of Excess Power Costs Due to Plant Outage
Docket No. UM 1234

Dear Filing Center:

Enclosed please find the original and six copies of the Reply of the Industrial Customers of Northwest Utilities to Portland General Electric Company's Opposition to Petition for Reconsideration in the above-referenced docket number.

Please return one file-stamped copy of the document in the self-addressed, stamped 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 Reply of the Industrial Customers of Northwest Utilities to Portland General Electric Company's Opposition to Petition for Reconsideration, upon the parties on the official service list shown below, via electronic mail and by U.S. Mail, postage prepaid and postmarked with today's date.

Dated at Portland, Oregon, this 15th day of May, 2007.

/s/ Ruth A. Miller
Ruth A. Miller

CITIZENS' UTILITY BOARD OF OREGON
CONFIDENTIAL
LOWREY R BROWN
JASON EISDORFER
610 SW BROADWAY - STE 308
PORTLAND OR 97205
lowrey@oregoncub.org

DEPARTMENT OF JUSTICE
CONFIDENTIAL
STEPHANIE S ANDRUS
REGULATED UTILITY & BUSINESS SECTION
1162 COURT ST NE
SALEM OR 97301-4096
stephanie.andrus@state.or.us

PORTLAND GENERAL ELECTRIC
CONFIDENTIAL
RATES & REGULATORY AFFAIRS
121 SW SALMON ST 1WTC0702
PORTLAND OR 97204
pge.opuc.filings@pgn.com

PORTLAND GENERAL ELECTRIC
CONFIDENTIAL
DOUGLAS C TINGEY
121 SW SALMON 1WTC13
PORTLAND OR 97204
doug.tingey@pgn.com

RFI CONSULTING INC
CONFIDENTIAL
RANDALL J FALKENBERG
PMB 362
8343 ROSWELL RD
ATLANTA GA 30350
consultrfi@aol.com

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1234

In the Matter of	)	
PORTLAND GENERAL ELECTRIC COMPANY	)	REPLY OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES TO PORTLAND GENERAL ELECTRIC COMPANY'S OPPOSITION TO PETITION FOR RECONSIDERATION
Application for Deferred Accounting of Excess Power Costs Due to Plant Outage.	)	

INTRODUCTION

Portland General Electric Company ("PGE" or the "Company") unconvincingly argues in its opposition to the Industrial Customers of Northwest Utilities' ("ICNU") petition for reconsideration that the Public Utility Commission of Oregon ("OPUC" or the "Commission") should deny the petition because the OPUC previously "pledged" to consider the effects of SB 408 in future ratemaking proceedings. According to PGE, ICNU's petition is untimely because ICNU did not seek reconsideration or judicial review at the time the Commission made its pledge in AR 499. In addition, PGE maintains that, despite the legislature's specific requirement that the taxes included in rates reflect the taxes paid to the government, the Commission nevertheless has general authority to set rates to allocate the income tax impact of particular costs and revenues to the utility. SB 408 was an explicit legislative mandate to change how utility income taxes are treated in Oregon, and the adjustment in Order No. 07-049 undoes that mandate for the income tax impact of the Boardman deferral deadband. The decision is

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

contrary to Oregon law, and the Commission should grant reconsideration to correct this legal error.

ARGUMENT

A. ICNU Cannot Seek Reconsideration of or Appeal a "Pledge"

PGE maintains that ICNU missed its opportunity to challenge decisions such as the adjustment to the Boardman deferral deadband, because ICNU did not object to, seek reconsideration of, or appeal the orders in which the Commission "pledged" to consider SB 408's impacts in future ratemaking proceedings. PGE Opposition at 1-2. PGE specifically identifies the Commission's statements that it would "consider" the tax effects when evaluating issues in other dockets and that it "may address" concerns about the double whammy in future proceedings.

PGE's suggested strategy of seeking reconsideration of or appealing a "pledge" is fundamentally flawed. The Commission's statement lacks virtually every element necessary for a reviewable decision, including finality, ripeness, and a remedy for any identifiable harm or error. A party cannot seek review of a "pledge" or a statement that the Commission "may" do something in the future. Furthermore, despite PGE's claims, ICNU objected throughout AR 499 to proposals that the Commission account for utility earnings variations between rate cases by authorizing a deferred account to offset the amounts that flow through the automatic adjustment clause. Adjusting the deadband applied to the deferred account for the Boardman outage costs is no different than authorizing a deferred account to preserve the tax impact of the deadband for PGE. The Commission's adjustment to the deferral deadband in UM 1234 is based on legal

DAVISON VAN CLEVE, P.C.
333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

error and directly and identifiably impacts the electric rates that ICNU's members pay. The decision is appropriate for reconsideration and should be modified.

B. The Commission's Discretion to Fashion a Deferral Mechanism Is Limited to that Allowed by Oregon Law

PGE maintains that the "essential predicate" that ICNU must demonstrate to justify reconsideration is that the Commission was legally obligated to adopt a 100 basis point deadband for the Boardman deferral deadband. PGE Opposition at 2. PGE also argues that the adjustment to the Boardman deferral deadband was appropriate, because a previous OPUC order demonstrates that the Commission has discretion to adopt any deadband it wants or even no deadband at all. PGE's argument misunderstands ICNU's basis for requesting reconsideration and takes the Commission's prior orders dramatically out of context.

1. SB 408's General Policies Create Bounds on the Commission's Deferred Accounting Authority and Discretion

PGE is incorrect that ICNU must demonstrate that the Commission was legally obligated to adopt a 100 basis point deadband. ICNU is not challenging the Commission's authority to adopt the deferral mechanism in this case based on its judgment about what mechanism will equitably allocate the costs at issue between the Company and customers. ICNU is, however, challenging the Commission's adjustment of that mechanism in a manner that is inconsistent with Oregon law. The Commission may have discretion to decide how utilities and customers share deferred costs, but that discretion and authority is limited to that granted by, and consistent with, Oregon law. The Commission has plainly acknowledged these limitations in previous PGE deferred accounting cases:

> We note first that our discretion [to authorize deferred accounting] is constrained by the statutory scheme that creates and governs the

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333 S.W. Taylor, Suite 400
Portland, OR 97204
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> Commission. That is, the deferral statute must be read to grant us a sphere of discretion that does not conflict with regulatory practice. The deferral statute is a specific grant of authority to make rates retroactively. It must be read so as to avoid conflict with the other statutory provisions governing ratemaking.

Re PGE, Docket No. UM 1071, Order No. 04-108 at 8 (Mar. 2, 2004).

In this case, the "statutory provisions governing ratemaking" in ORS § 757.268 (SB 408) explicitly direct the Commission to treat utility income taxes in a particular manner in order to set fair, just and reasonable rates. The Commission acknowledged the general applicability of SB 408 when setting new rates for PacifiCorp immediately after the law passed: "The legislative intent behind SB 408 is clear – we are to depart from historic practice and consider taxes paid by a utility or its parent when setting rates. When we authorize rates for the utilities covered by the bill, those rates must reflect the taxes paid to units of government in order to be fair, just and reasonable." Re PacifiCorp, Docket No. UE 170, Order No. 05-1050 at 18 (Sept. 28, 2005).[1/] Following this order, the Attorney General confirmed the Commission's conclusion that amendments to ORS § 757.210 in SB 408 changed the Commission's obligations in addressing utility income taxes. Opinion Letter from Hardy Myers, Oregon Att'y Gen., to Lee Beyer, OPUC Chairman at 12 (Dec. 27, 2005) ("In other words, in setting utility rates, the Commission generally must strive to include amounts of taxes in rates only to the extent that those amounts reflect taxes that are received by units of government from the regulated utility or from the affiliated group . . .").

[1/] The Commission subsequently affirmed its conclusion that amendments to ORS § 757.210 unambiguously required the Commission to order an adjustment to the amount of income taxes in PacifiCorp's rates in UE 170, but the Commission limited its decision to the facts in that case. Re PacifiCorp, Docket No. UE 170, Order No. 06-379 at 6 (July 10, 2006). The Commission left open whether SB 408 generally requires the Commission to change its practice in all future ratemaking proceedings. Id. at 7.

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The UM 1071 and UE 170 orders, along with the Attorney General's opinion, demonstrate that: 1) the Commission's discretion to authorize a deferred account is limited to actions that are consistent with the general ratemaking provisions of Oregon law; and 2) SB 408 is a general ratemaking provision that the Commission must abide by when setting rates. PGE's claim that the Commission's deferred accounting authority could somehow "trump" SB 408's policies lacks merit under these circumstances. The Commission's adjustment to the Boardman deferral deadband ignores the explicit legislative direction in SB 408 and reverts back to policies that SB 408 was intended to change. Specifically, by making the adjustment for SB 408 in this case, the Commission is no longer including in rates only those income taxes that are paid to units of government. Instead, the OPUC is impermissibly giving a portion of those income taxes to PGE shareholders.

2. PGE Incorrectly Assumes that Legal Errors Stem Only from an Insufficient Evidentiary Record

PGE's reliance on the Commission's decision in UM 995 is similarly misguided. PGE cites the Commission's statement in Order No. 02-469 that "[b]ecause the record before us supports full recovery of PacifiCorp's excess net power costs . . . a fortiori it supports less than full recovery." PGE Opposition at 3 (quoting Re PacifiCorp, Docket Nos. UE 121/UM 995/UC 578, Order No. 02-469 at 75 (July 18, 2002)). PGE maintains that because the Commission could authorize deferral of $42.8 million of deferred costs, "it follows as a simple matter of logic that it cannot be legal error" to authorize deferral of less than that amount. Id. at 2. PGE is mixing apples and oranges.

The Commission's statement in UM 995 refers to the sufficiency of the evidentiary record to support a finding that a utility prudently incurred its deferred excess power

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Portland, OR 97204
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costs. First, this case is not a prudence review and the order does not authorize PGE to recover any costs. Second, in arguing that it is a "simple matter of logic" that no legal error exists because the Commission could authorize deferral of an amount greater than it did, PGE incorrectly assumes that the only basis for legal error is an insufficient evidentiary record. The sufficiency of the record and the statement that PGE cites from UM 995 have nothing to do with the legal error that ICNU asserts, which is that adjusting the Boardman deferral deadband is contrary to SB 408.

C. Adjusting the Amount that PGE Is Permitted to Defer to Offset SB 408 Achieves the Same Unlawful Result that the Commission Condemned in AR 499

PGE maintains that ICNU's objection to Order No. 07-049 is overly broad, because ICNU essentially argues that the Commission is legally barred from taking any regulatory action to address the double whammy. PGE Opposition at 3. ICNU's argument is not overly broad; PGE just improperly casts it as such. ICNU is not challenging "any regulatory action" that the Commission might take to address the so-called double whammy. ICNU's petition is narrowly focused on the legality of the Commission's adjustment of the deferral deadband in UM 1234 to offset SB 408.

PGE accuses ICNU of confusing SB 408 with the Commission's other ratemaking policies, arguing that the Commission is bound to the terms of ORS § 757.268 (SB 408) "when applying SB 408," but that the Commission can consider the impact of SB 408 and adopt adjustments such as the one at issue here when making ratemaking decisions in other contexts. Id. The Commission's order in UE 170 and the Attorney General's opinion discussed previously contradict PGE's claim. Order No. 05-1050 at 18; Opinion Letter from Hardy Myers, Oregon Att'y Gen., to Lee Beyer, OPUC Chairman at 12 (Dec. 27, 2005). The Commission is not

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333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

limited to considering SB 408's policies only when applying the law itself. In fact, the Commission is *required* to abide by SB 408's statutory mandates when setting utility rates, including when authorizing deferred accounting.

PGE also argues that the Commission's orders in AR 499 clearly distinguish the Commission's deferred accounting policies from SB 408 and that the distinction justifies the adjustment in this case. Id. If the Commission's AR 499 orders clarify any aspect of the relationship between SB 408 and deferred accounting, it is that authorizing a deferred account to offset the operation of SB 408 is unlawful and inappropriate. See Re Adoption of Permanent Rules to Implement SB 408 Relating to Utility Taxes, Docket No. AR 499, Order No. 06-400 at 9-11 (July 14, 2006); Re Adoption of Permanent Rules to Implement SB 408 Relating to Utility Taxes, Docket No. AR 499, Order No. 06-532 at 10-11 (Sept. 14, 2006).

The Commission unequivocally rejected the proposal in AR 499 to use a deferred account to prevent earnings variations or costs that were not included in forecast income taxes from affecting the calculation of "taxes paid" under SB 408. Docket No. AR 499, Order No. 06-532 at 10. The Commission explicitly stated that "it would be contrary to the intent of the legislature to effectively offset the automatic adjustment clause so that it did not 'adjust' rates, as it was designed to do." Furthermore, the Commission noted that an application for a deferred account to accomplish such an offset likely would not satisfy the Commission's discretionary deferred accounting criteria. Id.; Order No. 06-400 at 11. Finally, the Commission committed to view future applications for such deferred accounts with "a skeptical eye." Order No. 06-400 at 11. These statements do not, as PGE alleges, establish that the Commission's deferred accounting authority is separate and distinct from the operation of SB 408 and that the

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333 S.W. Taylor, Suite 400
Portland, OR 97204
Telephone: (503) 241-7242

Commission can exercise its deferred accounting discretion to "trump" SB 408. Instead, the Commission's statements confirm, as ICNU maintains, that SB 408 limits the Commission's authority to approve a deferred account counteracting SB 408.

D. The Plain Text of SB 408 Is the Best Guide of the Legislature's Intent and It Does Not Provide for an Adjustment to Account for Earnings Variations

PGE criticizes ICNU for requesting that the Commission leave open the adjustment to the Boardman deferral deadband pending action on HB 2479 by the legislature in the 2007 session. PGE argues that inferring legislative intent from legislative inaction is notoriously speculative, and opines that it "is doubtful whether the legislature understood, much less intended, the double whammy." PGE Opposition at 4.

PGE's suggestion that the legislature did not understand or intend the double whammy highlights the basis for ICNU's petition for reconsideration. The legislature included in SB 408 specific adjustments to account for the tax impact of particular costs or revenues (e.g., charitable contributions, investment in renewable energy), but did not include adjustments for a variety of other issues that it was informed about during the 2005 session, including earnings variations between rate cases. Basic principles of statutory construction counsel the Commission to not insert into the statute what is not included in the text. ORS § 174.010. ICNU urges the Commission to apply the adjustments included in the plain text of SB 408, rather than indirectly creating new adjustments based on beliefs such as PGE's that the legislature did not understand the so-called double whammy. ICNU's arguments regarding the 2007 legislative proposals demonstrate that SB 408 does not permit the recovery of the tax impact of earnings deficiencies. Otherwise, HB 2479 would be unnecessary.

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Portland, OR 97204
Telephone: (503) 241-7242

CONCLUSION

For the reasons stated above, the Commission should grant ICNU's request that the Commission reconsider its order in this Docket.

Dated this 15th day of May, 2007.

Respectfully submitted,

DAVISON VAN CLEVE, P.C.

/s/ Matthew W. Perkins

S. Bradley Van Cleve
Matthew W. Perkins
333 S.W. Taylor, Suite 400
Portland, OR 97204
(503) 241-7242 phone
(503) 241-8160 facsimile
mail@dvclaw.com
Of Attorneys for Industrial Customers
of Northwest Utilities