

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

April 13, 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 two copies of the Petition for Reconsideration of the Industrial Customers of Northwest Utilities 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 Petition for Reconsideration of the Industrial Customers of Northwest Utilities, upon the parties on the official service list shown below, via electronic mail and by U.S. Mail, postage prepaid and post-marked with today's date.

Dated at Portland, Oregon, this 13th day of April, 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

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

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

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

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1234

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

INTRODUCTION

The Industrial Customers of Northwest Utilities (“ICNU”) requests that the Public Utility Commission of Oregon (“OPUC” or the “Commission”) grant reconsideration of Order No. 07-049, in which the Commission authorized a deferred account for Portland General Electric Company’s (“PGE” or the “Company”) replacement power costs associated with the 2005 Boardman outage. The Commission should reconsider its adjustment to the deferral mechanism’s return on equity (“ROE”) “deadband” to account for the alleged effects of Senate Bill 408 (“SB 408”), because this adjustment is contrary to the legislature’s specific direction to the OPUC in SB 408. The Commission determined in Docket No. AR 499 that it was inconsistent with SB 408 to approve a deferred account in order to offset the operation of the automatic adjustment clause and that SB 408 provided no authority for it to do so. By adjusting the Boardman deferral mechanism to account for SB 408, the Commission effectively achieved the result that it determined was prohibited in AR 499. ICNU requests that the Commission

modify its decision in Order No. 07-049 by eliminating the reduction in the deadband to account for SB 408.

BACKGROUND

PGE filed its application for a deferred account in November 2005, requesting to defer approximately \$45 million in replacement power costs associated with the Boardman outage that lasted from November 18, 2005, to February 5, 2006. A prehearing conference was held in March 2006, and the parties agreed to address three issues in the first phase of the case: 1) whether PGE's application met the deferral requirements; 2) what deferral mechanism should be used; and 3) the rate implications of the deferral. The parties filed testimony and briefs and participated in oral argument regarding these issues in proceedings lasting through October 2006.

On February 12, 2007, the Commission issued Order No. 07-049, granting PGE's application, in part. The Commission found that the application satisfied both the standards in ORS § 757.259 and the OPUC's discretionary criteria because the outage was a "scenario" event that fell outside the range of foreseen risk when the Commission set rates. Order No. 07-049 at 19. The Commission determined that \$42.8 million was eligible for deferral, subject to an appropriate deferral mechanism and prudence review. Id. at 13.

The Commission found that the appropriate deferral mechanism should result in no deferral of costs associated with outages that fell within a range of foreseeable risk. The Commission acknowledged that the record lacked evidence to calculate that level of costs but found "it appropriate to approximate the financial impact of this range of risk." Id. at 19. The Commission estimated that 100 basis points of ROE reflected the financial impact of this range and adopted a 100 basis point deadband for the deferral mechanism. Id.

The Commission next reduced the size of the deadband from 100 basis points to 80 basis points “to account for the SB 408 effect on costs incurred on or after January 1, 2006 for the Boardman outage.” Id. The Commission stated that this reduction was consistent with its “pledge” in AR 499 to account for the alleged SB 408 impact of variations in utility earnings—often referred to as the “double whammy”—when making decisions in ratemaking dockets.

ICNU requests reconsideration of the Commission’s reduction to the Boardman deferral deadband by 20 basis points to account for SB 408. As explained below, modifying the size of the deadband is contrary to the legislature’s intent in SB 408 and undermines the operation of Oregon law.

LEGAL STANDARD

Any party may file for reconsideration of a Commission order within sixty days of the date of service of the order. OAR § 860-014-0095(1); ORS § 756.561(1). The Commission may grant an application for reconsideration “if sufficient reason therefor is made to appear.” ORS § 756.561(1). The Commission’s rules provide that reconsideration may be appropriate if the applicant shows that there is: 1) new evidence which was unavailable and not reasonably discoverable before issuance of the order; 2) a change in the law or agency policy since the date the order was issued; 3) an error of law or fact in the order that is essential to the decision; or 4) good cause for further examination. OAR § 860-014-0095(3).

ARGUMENT

The Commission should reconsider its adjustment to the Boardman deferral deadband to correct an error of law that was essential to the decision and because the decision otherwise creates good cause for reconsideration. Certain parties raised the alleged double

whammy issue during the legislative debate regarding SB 408, and the legislature adopted SB 408's specific statutory scheme with the benefit of input regarding that issue. Reducing the size of the Boardman deferral deadband to account for SB 408 second guesses the wisdom of Oregon law rather than implementing that law as enacted. To be consistent with Oregon law, the Commission should grant reconsideration of Order No. 07-049 and eliminate the reduction to the Boardman deferral deadband to account for SB 408.

The legislature currently is considering an IOU-sponsored bill (HB 2479) that would amend Oregon law to address the earnings variation issue. As a result, even if the Commission disagrees with eliminating the reduction to the Boardman deferral deadband at this time, it should grant reconsideration in order to await the outcome of HB 2479.

A. The Commission, Staff, and Utilities Raised Concerns about Earnings Variations Throughout the SB 408 Debate

1. The Legislature Was Aware of the OPUC's Position Regarding the Earnings Variation Issue and Adopted a Different Approach

Parties raised the issue of the tax impact of utility earnings variations early in the legislative debate about correcting the mismatch between "taxes collected" and "taxes paid." In February 2005, the Commission provided a White Paper to the legislature that discussed various options for addressing the mismatch that the stand-alone policy had created. "Treatment of Utility Income Taxes in Utility Ratemaking" ("White Paper") at 1-3 (Feb. 2005). Among these options, the White Paper discussed requiring a "full" true-up of taxes collected and taxes paid, which would make no adjustments to either value. *Id.* at 8-10. The White Paper also discussed a "partial" true-up, which would make adjustments to taxes collected and taxes paid in order to comply with IRS normalization principles or promote particular policies. *Id.* at 10. The White

Paper specifically noted that a true-up could raise or lower rates in the “perverse” manner that the IOUs have described as the “double whammy”: “When the utility is experiencing high earnings because its costs are lower or its revenues higher than expected, customers would end up paying even more. When the utility is experiencing poor earnings and not adequately recovering its costs, customers would get a refund.” Id. at 9-10.

The Commission followed up on the White Paper by submitting a memorandum to Senators Ryan Deckert and Rick Metsger in March 2005. Memorandum from OPUC Commissioners to Senators Ryan Deckert and Rick Metsger regarding “Recommendation on treatment of utility income taxes,” Mar. 22, 2005. The Commission again discussed the true-up proposals, noting that a “full” true-up would violate IRS normalization principles. Id. at 3. The Commission did “not recommend that the Legislature require a full true up” for this reason and concluded by stating that it was “ready to assist in crafting any legislation you conclude is needed on these matters.” Id. at 3, 4 (emphasis in original).

The version of SB 408 that became law plainly reflects that the legislature followed the Commission’s suggestions on certain issues such as the full true-up, but it did not account for the concerns about the alleged double whammy. Indeed, SB 408 establishes a partial true-up, as the OPUC suggested, and includes an adjustment in the definition of “taxes paid” to satisfy IRS normalization requirements. The legislature also adopted adjustments to “taxes paid” to promote charitable contributions and other policies, and it also explicitly defined “taxes authorized to be collected in rates”^{1/} in response to concerns that specific definitions were needed to allow the OPUC to implement the law. ORS § 757.268(12)(e), (f); see, e.g., Senate

^{1/} “Taxes authorized to be collected in rates” is sometimes referred to by the shorthand phrase, “taxes collected.”

Chamber Vote on SB 408, 73d Leg., Regular Sess., 1 (Aug. 1, 2005) (statement of Senator Richard Metsger). The legislature did not, however, include any adjustment in the definition of “taxes collected” or “taxes paid” to address the concerns about the effect of utility earnings variations. The fact that the legislature adopted specific definitions and adjustments to certain issues that the Commission raised but did not adopt an adjustment or definition to address the alleged double whammy provides the best evidence that the legislature did not intend for adjustments to be made to account for that issue. See ORS § 174.010 (containing the directive “not to insert what has been omitted” when construing a statute).

2. The IOUs Suggested “Fixes” to the Earnings Variation Issue in AR 499 and the Commission Found That They Were Contrary to the Legislature’s Intent

After SB 408 took effect, the IOUs tried to address the so-called double whammy issue by proposing adjustments in the AR 499 rulemaking. The Commission, however, declined to adopt the proposed adjustments because they were contrary to SB 408. PGE specifically requested that the Commission authorize a deferred account for costs that would affect utility earnings. Order No. 06-400 at 10. In addition, PGE and Northwest Natural Gas Company asked the Commission in AR 499 to require an earnings test to mitigate the double whammy effect by modifying the results of SB 408’s automatic adjustment clause. Id. at 8. The Commission rejected these proposals, noting in the interim order that adjustments to offset amounts flowing through the automatic adjustment clause “would strike at the heart of the intent behind SB 408 to adjust rates for the difference between taxes collected and taxes paid.” Id. at 9. The Commission reiterated its conclusion in its final order, stating 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.” Order No. 06-532 at 10.

B. Adjusting the Boardman Deferral Deadband to Account for SB 408 Undermines the Legislature's Intent

By reducing the size of the Boardman deferral deadband to account for SB 408, the Commission effectively created an adjustment to the amount that will flow through PGE's automatic adjustment clause that the legislature chose not to include in SB 408. The Commission's pledge to "be responsive to concerns related to the consequences of the 'double whammy' problem" reflects its judgment about how the legislature *should* have addressed the mismatch that SB 408 is intended to correct rather than implementing the law that the legislature actually passed. Id. at 11. The Commission should not do in an adjudicative proceeding what it concluded was impermissible to include in a rulemaking proceeding.

Prior to SB 408, the Commission took the position that addressing the mismatch between "taxes collected" and "taxes paid" was inconsistent with the OPUC's longstanding stand-alone policy and likely required explicit legislative authorization. See Utility Reform Project v. PGE, OPUC Docket No. UCB 13, Order No. 03-401 at 6-7 (July 9, 2003). The legislature changed that policy and adopted the specific statutory scheme in SB 408, notwithstanding the Commission's concerns about the impact of utility earnings variations. The adjustment to the Boardman deferral deadband in Order No. 07-049 is contrary to Oregon law, and moves back toward the stand-alone policy that the legislature repudiated. The Commission should grant reconsideration to eliminate this adjustment and give effect to the law that the legislature enacted.

C. The Commission Should Grant Reconsideration Pending the Legislature's Action on House Bill 2479

Even if the Commission disagrees that adjusting the Boardman deferral deadband to account for SB 408 was contrary to the legislature's intent, good cause for reconsideration exists because the IOUs have proposed that the legislature address the double whammy issue and others in HB 2479. A copy of HB 2479 is attached as Attachment A. HB 2479 modifies the definition of "taxes authorized to be collected in rates" in a manner that would, among other things, remove the impact of utility earnings variations from the amounts that flow through the automatic adjustment clause. If HB 2479 fails, it would significantly clarify any perceived ambiguity in SB 408 with respect to the earnings variation issue.

CONCLUSION

For the reasons stated above, the Commission should reconsider its decision to make a 20 basis point reduction to the Boardman deferral mechanism deadband.

Dated this 13th day of April, 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

Attachment A

House Bill 2479

Sponsored by COMMITTEE ON REVENUE

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Prohibits Public Utility Commission from including tax savings realized by public utility affiliates that result from tax credits associated with investment in or operation of facilities by affiliate, if affiliate is regulated as public utility in other state and tax savings have been included in regulated operations of affiliate in other state. Modifies definition of taxes authorized to be collected in public utility rates for purposes of application of automatic adjustment clause to rates, in order to base calculation of taxes authorized to be collected in rates on actual audited results of utility regulated operations.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to operation of an automatic adjustment clause for taxes in public utility rates; amending
3 ORS 757.268; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 757.268 is amended to read:

6 757.268. (1) Every public utility shall file a tax report with the Public Utility Commission an-
7 nually, on or before October 15 following the year for which the report is being made. The tax re-
8 port shall contain the information required by the commission, including:

9 (a) The amount of taxes that was paid by the utility in the three preceding years, or that was
10 paid by the affiliated group and that is properly attributed to the regulated operations of the utility,
11 determined without regard to the tax year for which the taxes were paid; and

12 (b) The amount of taxes authorized to be collected in rates for the three preceding years.

13 (2) Every public utility shall be required to obtain and provide to the commission any other in-
14 formation that the commission requires to review the tax report and to implement and administer
15 this section and ORS 757.210.

16 (3) The commission may disclose, or any intervenor may obtain and disclose, the amount by
17 which the amount of taxes that units of government received from the public utility or from the af-
18 filiated group differs from the amount of costs for taxes collected, directly or indirectly, as part of
19 rates paid by customers, including whether the difference is positive or negative.

20 (4) The commission shall review the tax report and any other information the commission has
21 obtained and make the determinations described in this section within 90 days following the filing
22 of the report, or within a further period of time that the commission may by rule establish for
23 making determinations under this section that does not exceed 180 days following the filing of the
24 report. If the commission determines that the amount of taxes assumed in rates or otherwise col-
25 lected from ratepayers for any of the three preceding years differed by \$100,000 or more from the
26 amount of taxes paid to units of government by the public utility, or by the affiliated group and
27 properly attributed to the regulated operations of the utility, the commission shall require the utility
28 to establish an automatic adjustment clause, as defined in ORS 757.210, within 30 days following the

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 date of the commission's determinations under this section, or by a later date that the commission
2 may by rule prescribe for establishing an automatic adjustment clause that does not exceed 60 days
3 following the date of the commission's determinations under this section.

4 (5) If an adjustment to rates is made under an automatic adjustment clause established under
5 this section, the automatic adjustment clause shall remain in effect for each successive year after
6 an adjustment is made and until an order terminating the automatic adjustment clause is made un-
7 der subsection (9) of this section.

8 (6) The automatic adjustment clause shall account for all taxes paid to units of government by
9 the public utility that are properly attributed to the regulated operations of the utility, or by the
10 affiliated group that are properly attributed to the regulated operations of the utility, and all taxes
11 that are authorized to be collected through rates, so that ratepayers are not charged for more tax
12 than:

13 (a) The utility pays to units of government and that is properly attributed to the regulated op-
14 erations of the utility; or

15 (b) In the case of an affiliated group, the affiliated group pays to units of government and that
16 is properly attributed to the regulated operations of the utility.

17 (7) An automatic adjustment clause established under this section may not be used to make ad-
18 justments to rates for taxes paid that are properly attributed to any unregulated affiliate of the
19 public utility or to the parent of the utility.

20 (8) Notwithstanding subsections (1) to (7) of this section[, *the commission may authorize a public*
21 *utility to include in rates*]:

22 (a) **The commission may authorize a public utility to include in rates** deferred taxes re-
23 sulting from accelerated depreciation or other tax treatment of utility investment; [*and*]

24 (b) **The commission may authorize a public utility to include in rates** tax requirements and
25 benefits that are required to be included in order to ensure compliance with the normalization re-
26 quirements of federal tax law[.]; **and**

27 (c) **The commission may not adjust the calculation of taxes paid to include any tax**
28 **savings realized by an affiliate of the utility as a result of tax credits associated with in-**
29 **vestment in or operation of a facility by the affiliate if the affiliate is regulated in another**
30 **state and the savings from those tax credits have been included in the regulated operations**
31 **of that affiliate in the other state.**

32 (9) If the commission determines that establishing an automatic adjustment clause under this
33 section would have a material adverse effect on customers of the public utility, the commission shall
34 issue an order terminating the automatic adjustment clause. The order shall set forth the reasons
35 for the commission's determination under this subsection.

36 (10) The commission shall conduct a hearing under ORS 757.210 prior to making a determination
37 under subsection (9) of this section that an automatic adjustment clause would have a material ad-
38 verse effect on customers of the public utility.

39 (11) The commission may not use the tax information obtained by the commission under this
40 section for any purpose other than those described in subsections (1) to (10) of this section. An
41 intervenor in a commission proceeding to review the tax report or make rate adjustments described
42 in this section may, upon signing a protective order prepared by the commission, obtain and use the
43 information obtained by the commission that is not otherwise required to be made publicly available
44 under this section, according to the terms of the protective order.

45 (12) For purposes of this section, taxes paid that are properly attributed to the regulated oper-

1 ations of the public utility may not exceed the lesser of:

2 (a) That portion of the total taxes paid that is incurred as a result of income generated by the
3 regulated operations of the utility; or

4 (b) The total amount of taxes paid to units of government by the utility or by the affiliated
5 group, whichever applies.

6 (13) As used in this section:

7 (a) "Affiliated group" means an affiliated group of corporations of which the public utility is a
8 member and that files a consolidated federal income tax return.

9 (b) "Public utility" or "utility" means:

10 (A) A regulated investor-owned utility that provided electric or natural gas service to an aver-
11 age of 50,000 or more customers in Oregon in 2003; or

12 (B) A successor in interest to an entity described in subparagraph (A) of this paragraph that
13 continues to be a regulated investor-owned utility.

14 (c) "Regulated operations of the utility" means those activities of a public utility that are sub-
15 ject to rate regulation by the commission.

16 (d) "Tax":

17 (A) Means a federal, state or local tax or fee that is imposed on or measured by income and that
18 is paid to units of government.

19 (B) Does not include any amount that is refunded by a unit of government as a tax refund.

20 (C) Does not include franchise fees or privilege taxes.

21 (e) "Taxes authorized to be collected in rates" means the [*product determined by multiplying the*
22 *following three values:*]

23 [(A) *The revenues the utility collects from ratepayers in Oregon, adjusted for any rate adjustment*
24 *imposed under this section;*]

25 [(B) *The ratio of the net revenues from regulated operations of the utility to gross revenues from*
26 *regulated operations of the utility, as determined by the commission in establishing rates; and]*

27 [(C) *The effective tax rate used by the commission in establishing rates.*] **amount of taxes actu-**
28 **ally collected through the regulated operations of the utility:**

29 (A) **Calculated for the same 12-month period as the calculation of the amount of taxes**
30 **paid; and**

31 (B) **Determined by the commission based upon the actual taxable income as shown in the**
32 **audit results of the regulated operations of the utility, as audited by the commission or by**
33 **an independent auditor.**

34 (f) "Taxes paid" means amounts received by units of government from the utility or from the
35 affiliated group of which the utility is a member, whichever is applicable, adjusted as follows:

36 (A) Increased by the amount of tax savings realized as a result of charitable contribution de-
37 ductions allowed because of charitable contributions made by the utility;

38 (B) Increased by the amount of tax savings realized as a result of tax credits associated with
39 investment by the utility in the regulated operations of the utility, to the extent the expenditures
40 giving rise to the tax credits and tax savings resulting from the tax credits have not been taken into
41 account by the commission in the utility's last general ratemaking proceeding; and

42 (C) Adjusted by deferred taxes related to the regulated operations of the utility.

43 (g) "Three preceding years" means the three most recent consecutive fiscal years preceding the
44 date the tax report is required to be filed.

45 **SECTION 2. This 2007 Act being necessary for the immediate preservation of the public**

1 **peace, health and safety, an emergency is declared to exist, and this 2007 Act takes effect**
2 **on its passage.**

3
