

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UE 178

In the Matter of the

OREGON PUBLIC UTILITY STAFF  
Requesting the Commission direct

PORTLAND GENERAL ELECTRIC  
COMPANY to file tariffs establishing  
automatic adjustment clauses under the terms  
of SB 408.

STAFF OPENING BRIEF

**INTRODUCTION**

While the Oregon Public Utility Commission Staff (Staff) has signed a stipulation in this docket, two unresolved issues remain. *See generally* UE 178/Joint Stipulating Parties/200; Owings-Ball-Tinker-Blumenthal-Jenks/4. Specifically, those two issues are the appropriate amortization period of the refund amount and Portland General Electric Company's (PGE) constitutional concerns regarding the treatment of the tax benefits from the sale of a non-utility asset (an LM 6000 turbine).

**DISCUSSION**

Staff is not opposed to PGE's proposed two-year amortization period. PGE currently predicts that its 2007 tax filing will be a surcharge. As a result, and if PGE's prediction is correct, a two-year amortization period would result in better rate stability in the future. Therefore, Staff does not oppose the two-year amortization period.

PGE's constitutional concerns were raised in UM 1271. In UM 1271, the Oregon Public Utility Commission denied PGE's Application for Deferred Accounting on the same turbine that is at issue in this proceeding. Staff believes PGE's arguments will be the same as they were in UM 1271. Therefore, Staff requests that its opening and reply briefs be incorporated into this opening brief. For the convenience of the parties, Staff is attaching both UM 1271 briefs to the opening brief.

1 CONCLUSION

2 For the foregoing reasons, Staff respectfully requests that its UM 1271 opening and reply  
3 brief be incorporated into this brief. Staff further states that it does not oppose PGE's proposed  
4 two-year amortization period.

5  
6 DATED this 3<sup>rd</sup> day of March 2008.

7 Respectfully submitted,

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14 Commission.  
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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 OPENING BRIEF

PROCEDURAL HISTORY

On July 14, 2006, Portland General Electric Company ("PGE" or "Company") filed an application for deferred accounting treatment of certain expenses/revenue refunds associated with Senate Bill 408. ("Application")<sup>1</sup> Specifically, PGE's application requests authorization to defer for later rate-making treatment expenses and revenues associated with the sale of non-utility assets, namely a LM6000 turbine and associated transformer (turbine) in 2001.

On August 1, 2006, Chief Administrative Law Judge ("ALJ"), Michael Grant issued a ruling suspending the docket until final rules were issued in Docket AR 499 (the rules implementing SB 408). On October 23, 2006, a joint prehearing conference was held.<sup>2</sup> On October 24, 2006, ALJ Christina Hayes issued a ruling holding each of the dockets, with the exception of UM 1271, in abeyance. In regards to UM 1271, ALJ Hayes' ruling adopted a schedule that allowed for testimony and a hearing.

On December 6, 2006, PGE filed direct testimony in support of its Application. Due to the application of SB 408, PGE testified that the tax loss generated by the sale of non-utility assets would lower PGE's retail electric prices by approximately \$4.8 dollars. See PGE/100, Dahlgren-Tinker/4, lines 15-17. Generally, PGE's direct testimony describes the factual events

<sup>1</sup> Senate Bill 408 has been codified and is now found in ORS 757.267 and ORS 757.268. <sup>2</sup> The joint prehearing conference involved UM 1238; UM 1240; UM 1244; UM 1266; and UM 1271.

1 related to the purchase and accounting treatment of the non-utility assets. Additionally, PGE  
2 offered policy rationales (benefits and burdens alignment and related policy against cross-  
3 subsidization) along with testimony on why it believed deferred accounting was appropriate in  
4 this instance. Overall, PGE's direct testimony argues that deferred accounting should be  
5 employed to neutralize the impacts of the implementation of SB 408 as applied to certain non-  
6 utility assets that were purchased before SB 408 become law.

7 In response to PGE's direct testimony, the Public Utility Commission of Oregon Staff  
8 ("Staff"), Industrial Customers of Northwest Utilities ("ICNU"), and Citizens' Utility Board of  
9 Oregon ("CUB") filed responsive testimony. Each and every party that filed responsive  
10 testimony pointed out that PGE's request was contrary to SB 408 and the Commission's rules  
11 implementing SB 408. In PGE's rebuttal testimony, it mainly reasserts why it believes the  
12 deferral would be "good policy," while recognizing that the contested issue – whether the  
13 deferral is consistent with the application and intent of SB 408 and the rules implementing SB  
14 408 – is legal in nature and, therefore, appropriate for legal briefs, not testimony.

15 On March 8, 2007, ALJ Christina Hayes issued a prehearing conference report for the  
16 remainder of this docket. That report provides for opening briefs on April 27, 2007; reply briefs  
17 by Staff and intervenors on May 18, 2007; and reply briefs by PGE on June, 8, 2007. While  
18 Staff and the intervenors have not yet seen PGE's opening brief on the legal issues, all of the  
19 parties were given the option of filing opening briefs. As a result, Staff takes the opportunity to  
20 file this opening brief. Obviously, Staff will also file a reply to PGE's legal assertions once they  
21 are submitted.

## 22 DISCUSSION

23 This case is legally straightforward. SB 408 and the rules implementing it have changed  
24 the paradigm for analyzing tax treatment for certain electric and gas utilities, including PGE. In  
25 response to this paradigm shift, PGE has requested deferred accounting as a mechanism for  
26 returning to the old paradigm for the purpose of the sale of certain non-utility assets. Regardless

1 of past Public Utility Commission of Oregon (“Commission”) policies and treatment, PGE’s  
2 Application utterly ignores and attempts to subvert the plain, natural, and ordinary meaning of  
3 SB 408 and the rules implementing SB 408.

4 Specifically, SB 408 and the rules implementing SB 408, detail authorized adjustments to  
5 the amount of taxes paid. *See* ORS 757.268(13)(f)(A)-(C); OAR 860-022-0041(3). As stated in  
6 its testimony, the Legislature did adopt exemptions for losses by affiliates or other entities  
7 related to the consolidated group, such as removing the tax effects of charitable contributions and  
8 accelerated depreciation. *See* Staff/100, Owings/5, lines 13-20. Absent from the exemptions,  
9 however, is any mention of an exemption for non-utility losses. Indeed, truing up the actual  
10 taxes collected in rates with the actual taxes paid to units of government, which are properly  
11 attributed to the regulated operations of the utility, were the main impetus for the legislation. *See*  
12 *Id.*, line 20 through Owings/6, line 2. In order to grant PGE’s Application, the Commission  
13 would have to ignore the plain, natural and ordinary meaning of SB 408 in violation of the rules  
14 of statutory construction. *See Portland General Electric v. Bureau of Labor and Industries*, 317  
15 Or 606, 859 P2d 1143 (1993); *see also* ORS 174.010 (the courts will not insert what has been  
16 omitted or omit what has been inserted).

17 Presumably, and because SB 408 is clear on this issue, PGE will argue that the  
18 Commission should use its general authority under ORS 757.040 to grant its Application. If  
19 PGE were to make this assertion, the obvious and apparent flaw is that it would simply be asking  
20 the Commission to do indirectly what it cannot do directly. Simply stated, the Commission  
21 should not exercise its general powers in a way that is inconsistent with the specific requirements  
22 and objectives of SB 408. *See also* Staff/100, Owings/6, lines 3-14.

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BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON

UM 1271

In the Matter of

PORTLAND GENERAL ELECTRIC  
COMPANY

STAFF'S REPLY BRIEF

Deferred Accounting Authorization for  
Expenses/Refunds Associated with SB 408

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

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

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

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

21 In approximately five pages of PGE’s Opening Brief, PGE throws the statutory and  
22 constitutional kitchen sink at SB 408 and the rules implementing SB 408. Staff is concerned that  
23 PGE has thrown out a litany of skeletal statutory and constitutional arguments on very complex  
24 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.<sup>1</sup> 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  
5 violate statutory or federal and state constitutional principles, it need not consider  
6 whether the Application meets the deferred accounting criteria.

7 Notably absent from PGE's Opening Brief are any arguments that its Application is  
8 consistent with SB 408 and the rules implementing SB 408. Instead, PGE alleges that its  
9 Application is consistent with past Commission policies and practice (i.e. policies and practices  
10 that predate the enactment of SB 408) and that the application of SB 408 and its implementing  
11 rules will result in statutory and constitutional violations. If the Commission concludes that  
12 SB 408 and its implementing rules are lawful, PGE's Application must be denied. Furthermore,  
13 if PGE's Application is denied based upon the Commission's conclusion that granting the  
14 Application would disregard SB 408 and its implementing rules, it is unnecessary to consider  
15 whether PGE's Application otherwise meets the deferred accounting criteria.

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

18 In several places in its Opening Brief, PGE argues that the Commission should follow its  
19 past policy and practice of aligning benefits and burdens. In support of its argument, PGE cites  
20 past Commission decisions, the OPUC Staff white paper prepared for the Oregon Legislative  
21 Assembly, several Department of Justice memoranda, as well as Oregon statutes.<sup>2</sup>

22 PGE's arguments are flawed as they rely on policies, practices, and events that predate  
23 the passage of SB 408. Seemingly, PGE is requesting that the Commission simply ignore  
24 SB 408 and its implementing rules and, instead, continue to follow past policies and practices

25 <sup>1</sup> This concern was also raised at the prehearing conference. If Staff's concern was to come to fruition, Staff would  
26 request an opportunity to file an additional reply or conduct oral arguments, or both.

<sup>2</sup> 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  
calculating a utility's tax expense. As a result, those cases are of little or no relevance to the requirements of Oregon  
law.

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.<sup>3</sup>  
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 <sup>3</sup> The Department of Justice memoranda cited by PGE were directed toward the question of whether the  
25 Commission could consider changing its method of calculating utility tax expenses based upon the existing  
26 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).  
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.

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

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

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

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

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

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

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.<sup>4</sup> 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.<sup>5</sup>  
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

24 <sup>4</sup> Most of PGE's claims regarding seizure of PGE's property without just compensation discuss the alignment of  
25 benefits and burdens. The benefits and burdens test has nothing to do with whether a regulatory taking has taken  
26 place. Rather, the relevant question is whether the overall rates, not the methodology, results in just and reasonable  
rates.

<sup>5</sup> 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).

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

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

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

15 5. PGE impairment of contract claim is diversionary and lacks merit.

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

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

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

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

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

24 \_\_\_\_\_  
25 <sup>6</sup> See *Rui One Corp. v. City of Berkeley*, 371 F3d 1137, 1147 (9<sup>th</sup> 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).

26 <sup>7</sup> *Id.* at 411-12 (citations omitted).

<sup>8</sup> *Id.* at 412-13 quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

1       6. The calculation of a utility tax expense for inclusion in rates is unrelated to federal tax  
2       law.

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,<sup>9</sup> 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.<sup>10</sup>  
24 Federal tax law allows PGE to use consolidated losses to offset consolidated income if it files a

25 \_\_\_\_\_  
<sup>9</sup> The 5<sup>th</sup> Circuit Court of Appeals, which includes Louisiana, Mississippi and Texas.

26 <sup>10</sup> *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).

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

4 7. The Oregon Legislature acted rationally in defining a "public utility" or "utility" in ORS  
5 757.268(13).

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

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

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

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

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.

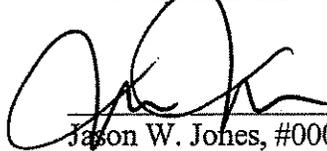
8 Moreover, the statutory and constitutional arguments alleged in PGE's Opening Brief are  
9 premature, as they relate to the future application of SB 408 and not the deferred application at  
10 issue in this proceeding. Finally, PGE's litany of statutory and constitutional claims lack merit,  
11 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 18<sup>th</sup> day of May 2007.

15 Respectfully submitted,

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17 Attorney General

18 

19 Jason W. Jones, #00059  
20 Assistant Attorney General  
21 Of Attorneys for the Public Utility Commission  
22 of Oregon  
23  
24  
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26

1 **CERTIFICATE OF SERVICE**

2  
3 I certify that on March 3, 2008, 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 not waiving paper service.

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