

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 178

In the Matter of

OREGON PUBLIC UTILITY COMMISSION
STAFF

Requesting the Commission Direct
PORTLAND GENERAL ELECTRIC
COMPANY

To file tariffs establishing automatic
adjustment clauses under the terms of SB 408

**PORTLAND GENERAL ELECTRIC
COMPANY'S REPLY BRIEF**

I. THE REFUND FOR TAX YEAR 2006 SHOULD BE AMORTIZED OVER TWO YEARS

Portland General Electric Company ("PGE") has requested that its SB 408 refund for tax year 2006 be amortized over two years. Staff does not oppose this proposal. Staff Opening Brief/1. Staff agrees that two-year amortization "would result in better rate stability in the future" if tax year 2007 results in a surcharge as expected. *Id.*

The only party to submit a brief opposing two-year amortization is the Industrial Customers of Northwest Utilities ("ICNU"). As ICNU recognizes, OAR 860-022-0041(8)(c) expressly permits an SB 408 refund or surcharge to be amortized over any "period authorized by the Commission." ICNU Opening Brief/3. Nonetheless, ICNU argues that the amount being refunded was collected over a single year (January 1, 2006 – December 31, 2006) and should therefore be refunded over a single year (June 1, 2008 – May 31, 2009) in order to better match costs and benefits to customers. ICNU Opening Brief/4.

It is no doubt true that in some cases it will be best to amortize an SB 408 refund or surcharge over a single year. However, in other cases, amortizing the refund or surcharge over a different period will be better for customers, such as here where it will reduce overall rate volatility. The need for this type of flexibility is clearly recognized by OAR 860-022-0041(8)(c).

Moreover, regardless of the amortization period selected by the Commission, there will never be perfect temporal alignment because, by the nature of SB 408, there will always be a 2½ year gap between the beginning of the "over-collection" or "under-collection" period (*e.g.*, January 1, 2006) and the beginning of the refund or surcharge period (*e.g.*, June 1, 2008). ORS 757.268. Finally, ICNU's concern that two-year amortization will allow PGE to benefit from the time value of money (ICNU Opening Brief/4) is unfounded as interest will accrue on the refund balance until paid, as required by Commission rule. OAR 860-22-0041(8)(e); PGE Opening Brief/10.

The Commission has the authority to amortize PGE's SB 408 refund for tax year 2006 over two years pursuant to OAR 860-022-0041(8)(c), and it is appropriate to do so under the circumstances of this case. PGE respectfully requests that the Commission so order.

II. THE REFUND AMOUNT SHOULD BE \$32.3 MILLION

As discussed in PGE's opening brief, including a \$4.9 million tax benefit from an unregulated asset (the Turbine) in PGE's SB 408 refund for tax year 2006 would violate multiple federal and state constitutional principles. PGE Opening Brief/2-9. The parties previously briefed the same constitutional issues in UM 1271 (although the Commission did not rule on them), only ICNU has submitted a new brief on the constitutional issues in this docket,¹ and that brief is largely similar to ICNU's briefing in UM 1271. In the interests of efficiency, PGE included in its opening brief in this docket responses to all of the constitutional arguments made by Staff, CUB and ICNU in UM 1271. As such, rather than repeat its responses again, PGE refers the Commission to its opening brief, and will limit this reply to a few additional responses to ICNU's arguments.

¹ The Citizens Utility Board ("CUB") did not file an opening brief in this docket, and, regarding the constitutional issues, Staff simply resubmitted its UM 1271 briefing. *See* Staff Opening Brief/1.

First, ICNU recognizes that *Federal Power Commission v. United Gas Pipe Line Co.*, 386 U.S. 237 (1967) did not involve a constitutional challenge, but argues that the case nonetheless supports its position because it stands for the proposition that "while the non-regulated members of a consolidated group should not be required to pay the tax liability of the regulated utility, neither should the regulated utility pay the tax liability of the non-regulated members." ICNU Opening Brief/8. Such proposition is not in dispute here—there has never been any risk of PGE's customers paying tax liability in connection with the Turbine, a non-regulated asset. The issue is who should receive the \$4.9 million tax benefit associated with the Turbine. ICNU characterizes this tax benefit as "phantom taxes" that cannot give rise to a property interest. ICNU Opening Brief/8. *United Gas* does not use the term "phantom taxes," and it is unclear what ICNU means by it, except to suggest that the \$4.9 million tax benefit at issue is somehow less than real. To the extent the term "phantom taxes" is meant to suggest that the benefit does not exist absent consolidation, that is not the case. Absent consolidation, the tax benefit would roll forward to the next tax year if the unregulated member was unable to take advantage of it in the current tax year.

Second, ICNU argues that SB 408 does not violate the principle recognized in *Duquesne Light Co. v. Barash*, 488 U.S. 299, 315 (1989) that "a State's decision to arbitrarily switch back and forth between methodologies in a way which require[s] investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional concerns." ICNU asserts there is no serious constitutional concern here because SB 408 mandates "*only one method* of determining the amount of taxes included in rates going forward." ICNU Opening Brief/11 (emphasis in original). However, in reality, SB 408 itself creates two different methodologies, depending on whether the unregulated asset is sold for a loss or sold for a profit, such that tax effects that prove beneficial at a consolidated level go entirely to customers while tax effects that prove detrimental at a

consolidated level are borne entirely by PGE and its shareholders. SB 408, therefore, does result in arbitrary and opportunistic switching between methodologies.

Finally, third, ICNU argues that SB 408 is not a "tax law." ICNU Opening Brief/13-15. However, any law is subject to constitutional challenge, and it is a semantic debate at best whether SB 408 is a "tax law." SB 408 expressly addresses the allocation of tax liabilities and tax benefits in setting utility rates, has a very real practical effect on taxes, and, indeed, was specifically proposed and passed to address taxes.

All of ICNU's other arguments on the constitutional issues are addressed in PGE's opening brief, as are Staff's arguments on the constitutional issues. In sum, including the \$4.9 million tax benefit from the Turbine in PGE's SB 408 refund for tax year 2006 would violate multiple federal and state constitutional principles. PGE therefore urges the Commission to order PGE to refund \$32.3 million in connection with tax year 2006 (rather than \$37.2 million) and, for the reasons stated in the previous section, to amortize such refund over two years.

DATED this 13th day of March, 2008.

PORTLAND GENERAL ELECTRIC
COMPANY

Douglas C. Tingey FOR OCT

Douglas C. Tingey, OSB No. 04436
121 SW Salmon Street, 1 WTC1300
Portland, OR 97204
Telephone: 503-464-8926
Fax: 503-464-2200
E-Mail doug.tingey@pgn.com

TONKON TORP LLP

David F. White

David F. White, OSB No. 01138
888 SW Fifth Avenue, Suite 1600
Portland, OR 97204-2099
Direct Dial 503-802-2168
Direct Fax 503-972-3868
E-Mail david.white@tonkon.com

Robyn Ridler Aoyagi, OSB No. 00016
888 SW Fifth Avenue, Suite 1600
Portland, OR 97204-2099
Direct Dial 503-802-2158
Direct Fax 503-972-3858
E-Mail robyn.aoyagi@tonkon.com

Attorneys for Portland General Electric
Company

CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S REPLY BRIEF** by e-mail and/or mailing a copy thereof, to each party that has not waived paper service, in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the US mail at Portland, Oregon.

Douglas C. Tingey
Asst. General Counsel
Portland General Electric Company
121 SW Salmon, 1WTC 1300
Portland, OR 97204

Linda K. Williams
Kafoury & McDougal
10266 SW Lancaster Road
Portland, OR 97219-6305

Jason W. Jones
Assistant Attorney General
Oregon Department of Justice
Regulated Utility & Business Section
1162 Court St. NE
Salem, OR 97301-4096

Allen C. Chan
Davison Van Cleve PC
333 SW Taylor, Suite 400
Portland, OR 97204

Melinda J. Davison
Davison Van Cleve, P.C.
333 SW Taylor, Suite 400
Portland, OR 97204

Daniel W. Meek
Attorney at Law
10949 SW Fourth Avenue, Suite 1000
Portland, OR 97219

Waives Paper Service
Lowrey R. Brown
Utility Analyst
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205

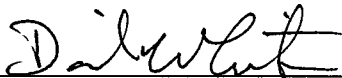
Waives Paper Service
Jason Eisdorfer
Energy Program Director
Citizen's Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205

Waives Paper Service
Robert Jenks, Executive Director
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205

Portland General Electric Company
Rates & Regulatory Affairs
121 SW Salmon Street, 1WTC0702
Portland, OR 97204

DATED this 13th day of March, 2008.

TONKON TORP LLP

By 
David F. White, OSB No. 01138
Robyn Ridler Aoyagi, OSB No. 00016
Attorneys for Portland General Electric Company

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