

September 2, 2005

***Via Electronic Filing and U.S. Mail***

Oregon Public Utility Commission  
Attention: Filing Center  
PO Box 2148  
Salem OR 97308-2148

Re: In the Matter of an Investigation Relating to Electric Utility Purchases from  
Qualifying Facilities  
OPUC Docket No. UM 1129

Attention Filing Center:

Enclosed for filing in the above-captioned docket is Portland General Electric's Opening Brief Regarding Refund Availability Pursuant to ORS 757.215(4). This document is being filed by electronic mail with the Filing Center.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

/s/ J. RICHARD GEORGE

JRG:am

cc: UM 1129 Service List

Enclosure

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused to be served the foregoing OPENING BRIEF OF PORTLAND GENERAL ELECTRIC COMPANY REGARDING REFUND AVAILABILITY PURSUANT TO ORS 757.215(4) filed in OPUC Docket No. UM 1129 by depositing a true and accurate copy with the U.S. Postal Service, posted prepaid and properly addressed to the persons shown on the attached official service list in this proceeding.

Dated this 2<sup>nd</sup> day of September, 2005.

/s/ J. RICHARD GEORGE

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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1129**

In the Matter of	)	
	)	
PUBLIC UTILITY COMMISSION OF	)	<b>OPENING BRIEF OF PORTLAND</b>
OREGON	)	<b>GENERAL ELECTRIC COMPANY</b>
	)	<b>REGARDING REFUND</b>
Staff's Investigation Relating to Electric Utility	)	<b>AVAILABILITY PURSUANT TO</b>
Purchases From Qualifying Facilities	)	<b>ORS 757.215(4)</b>

Portland General Electric Company (“PGE” or the “Company”) hereby submits its Opening Brief Regarding Refund Availability Pursuant to ORS 757.215(4) in this proceeding.

**I. Introduction**

In this docket investigating electric utility purchases from Qualifying Facilities (“QFs”) under the federal Public Utility Regulatory Policies Act of 1978 (“PURPA”)<sup>1</sup>, the Public Utility Commission of Oregon (“Commission”) ordered PGE to make a compliance filing consistent with its Order No. 05-584, including submittal of avoided cost power purchase prices, revised tariffs related to purchases from QFs, and a standard power purchase agreement. Order No. 05-584 provided that: “The standard contract form shall become effective 30 days after the date of filing, unless otherwise suspended by the Commission. Prior to effectiveness, the standard contract forms shall be considered initial offers. A Qualifying Facility or electric utility which signs an initial offer may not modify such offer until the term of the resulting contract expires. Any modifications to a standard contract form will be prospective only and will not alter the terms of the initial offer.”

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<sup>1</sup> Pub. L. No 95-617, 92 Stat. 3117 (codified as amended in various sections of 16 U.S.C.).

PGE made its compliance filing (Advice No. 05-10, Compliance Filing) on July 12, 2005. Instead of suspending PGE's compliance filing, the Commission allowed PGE's compliance filing " . . . to go into effect on August 11, 2005, subject to investigation and possible refund pursuant to ORS 757.215(4)." Order No. 05-899 (entered August 9, 2005). The Commission also ordered that a clause be added to the utilities' pro forma standard contracts indicating that such investigation was ongoing and that the utilities may be required to pay to QFs a potential "refund" of the difference between the ultimate avoided cost price for the power and the initial price contained in the utilities' compliance filings. *Id.* The Commission also ordered in Order No. 05-899 that the question of whether a refund in this docket is available pursuant to ORS 757.215(4) be addressed at the outset of the investigation regarding the compliance filings. This brief addresses that specific question.

## **II. By its Plain Language, ORS 757.215(4) is Inapplicable in this Case.**

ORS 757.215(4), by its terms, is unambiguous and inapplicable in this case. The tenets of statutory interpretation are long established in Oregon law. Under the methodology prescribed by *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610-12, 859 P.2d 1143 (1993), the Commission must first examine the plain text and context of a statute. *Id.* at 610-11. In considering the text of a statute, the Commission must give words of common usage their plain and ordinary meanings, and words that have well-defined legal meanings must be given those meanings. *Norden v. Water Resources Dept.*, 329 Or. 641, 645, 996 P.2d 958 (2000).

Statutory context includes other provisions of the same statute and other related statutes, as well as the preexisting common law and the statutory framework within which the statute was enacted. *Denton and Denton*, 326 Or. 236, 241, 951 P.2d 693 (1998). At the first level of analysis, the Commission must also consider its prior interpretations of the same statute. *State v. Toevs*, 327 Or. 525, 532, 964 P.2d 1007 (1998). Only if such language is open to ambiguity is further analysis, including examination of legislative history, necessary.

ORS 757.215(4) provides:

If the commission is required to or determines to conduct a hearing on a rate or schedule of rates filed pursuant to ORS 757.210, but does not order a suspension thereof, any *increased revenue collected by the utility* as a result of such rate or rate schedule becoming effective *shall be received subject to being refunded*. If the rate or rate schedule thereafter approved by the commission is for a lesser increase or for no increase, the utility shall refund the amount of revenues received *that exceeds the amount approved* as nearly as possible to the customers from whom such *excess revenues were collected*, by a credit against future bills or otherwise, in such manner as the commission orders. [Emphasis added.]

In Order No. 05-899, which accepted the utilities' compliance filings subject to investigation and possible refund, the Commission wrote that the utilities' compliance filings were made pursuant to ORS 757.205.<sup>2</sup> ORS 715.215(4), though, only applies to "a rate or schedule of rates filed pursuant to ORS 757.210." Since the compliance filings were not made pursuant to ORS 757.210, a refund under ORS 757.215(4) is not available in this docket.

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<sup>2</sup> PGE notes that ORS 757.205 is likely inapplicable to the compliance filings made in this docket. The authority for the Commission to require such filings derives from federal PURPA, not state authority. *See, e.g.,* Order No. 05-584, at 1. The Oregon legislature has specifically exempted PGE from state PURPA. ORS 757.612 (4). Moreover, there may be some question as to whether federal PURPA preempts the Commission's ability to approve the utilities' compliance filings subject to rate modification and potential additional payments to QFs. *See, e.g., Oregon Trail Elec. Consumers Co-op, Inc. v. Co-Gen Co.*, 168 Or App 466, 482, 7 P.3d 594, 605 (2000); *Smith Cogeneration Mgt. v. Corp. Com'n*, 863 P.2d 1227, 1240 (Okla. 1993).

The term “refund,” as used in ORS 757.215(4), also cannot be stretched to apply in this docket. Staff suggests in its Staff Report (attached as Appendix A to Order No. 05-899 and incorporated therein by reference) that ORS 757.215(4) should be utilized by the Commission to require utilities to make additional payments to QFs in the event that pursuant to the investigation of the compliance filings, the Commission determines that the utilities should have paid more to QFs for their power.<sup>3</sup> Staff explains that it believes this to be the “fair outcome” and, presumably with respect to QFs, that “ORS 757.215(4) provides that customers should not be harmed by being forced to accept rates, terms and conditions that are later found to be unreasonable by the Commission.” *Order No. 05-899, Appendix A at 3*. Staff’s first error is that the term “customers” in ORS 757.215(4) does not include QFs in this context. “Customer,” as used in ORS Chapter 757, is defined by ORS 756.010 (3). It includes: “patrons, passengers, shippers, subscribers, users of the service and consumers of the product of a public utility or telecommunications utility.” *Id.* QFs under the standard contracts are suppliers; indeed, PGE is a customer of the QFs under such contracts and not vice versa.

Second, despite Staff’s policy considerations towards QFs, “agencies and courts are without authority to put policy considerations into the meaning of statutes in place of the words that the legislature has chosen to use.” *Northwest Natural Gas Company v. Oregon Public Utility Commission*, 195 Or App 547, 556, 99 P3d 292, 297 (2004). The plain meaning of “refund,” the word chosen by the legislature for ORS 757.215(4), does not include the concept of a buyer having to make additional payments to a seller. Refund means: “to repay or restore; to

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<sup>3</sup> Staff also acknowledges that “[q]uestions do exist regarding the application of ORS 757.215(4) to the standard contracts and tariffs.” *Order No. 05-899, Appendix A at 3*.



return money in restitution or repayment; e.g. to refund overpaid taxes; to refund purchase price of returned goods.” *Blacks Law Dictionary*, 1281 (Sixth ed. 1990).

There is no question that PGE will not receive any payment from a QF, nor come into possession of any money that can be returned to a QF as a result of this docket. Indeed, the only refund that could occur would be for a QF to return money overpaid to it by PGE or one of the other utilities. That is, if, as a result of the investigation, PGE’s avoided cost rate was found to be too great, a QF should repay such overage to PGE. However, although PGE’s customers would benefit from QFs refunding overpayments, such symmetry of relief was not provided for in the Commission’s Order. *See* Order No. 05-899.

Staff’s view of the statute is also inconsistent with the Commission’s own interpretation of “refund” under ORS 757.215(4). The Commission recently expressly stated in reference to ORS 757.215(4): “We understand the term ‘refund’ in ratemaking to mean a process whereby the Commission orders a utility to return to ratepayers amounts previously collected through rates. *See* ORS 757.215(4)-(6).” Order No 03-401 at 15 (issued July 9, 2003, in Docket No. UCB 13). Since UM 1129 only involves the relationship between utilities and power producers in the form of QFs, and not the privity between utilities and their ratepayers, a refund under the Commission’s view of ORS 757.215(4) is not available in this docket.

The Oregon Attorney General has interpreted ORS 757.215(4) thus: “[i]f the commissioner holds a hearing on the proposed rates and does not order a suspension of the rates, any increased revenue received by the utility is subject to refund if the commissioner approves rates that are less than the proposed rates.” Or. Op. Atty. Gen OP-6076 (March 18, 1987). In this docket, if the Commission approves rates that are *less than the proposed rates*, then the

utilities should have been *paying less* to QFs for the power produced, and, logically, the utilities should have been offered relief from potential overpayments.

Unmistakably, ORS 757.215(4) only refers to revenue or money that is actually obtained by a utility from its customers, not money that is paid by a utility to third-party power producers such as QFs. The statute states “increased revenue collected by the utility . . . shall be received subject to being refunded.” The key words here are “collected” and “received.” These terms are not defined in ORS chapter 757. In common usage, *Webster's Third New International Dictionary* at 444 (unabridged 2002)<sup>4</sup> defines “collect,” in part, to mean “to claim and receive in payment or fair recompense . . . to present as due and receive payment for.” “Receive” means “to take possession or delivery of; to knowingly accept.” *Id.* at 1894. As alluded to above, it is a fact, however, that no amount of money is or will be collected or received by utilities pursuant to the compliance filings made in UM 1129. Again, the compliance filings establish terms and conditions by which a utility must *pay money to* Qualifying Facilities for the power generated by such facilities. *See* Advice No. 05-10, PGE’s Compliance Filing and Order No. 05-584.

The statutory context of ORS 757.215(4) also supports its inapplicability to the compliance filings made by the utilities. While ORS 757.215 (1) through (3) and (6) do not contain language that discusses either ratepayers or third-party power suppliers, subsection (5) clearly involves the regulation of utilities and its ratepayers, not a utility’s suppliers. That subsection discusses suspending a schedule and implementing an interim rate as an alternative to

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<sup>4</sup> In addition to *Blacks Law Dictionary*, *Webster's Third New International Dictionary* is relied on by Oregon Courts to ascertain common meaning of terms. *See, e.g., Northwest Natural Gas Company* 195 Or App 547; *Osborne v. PSRB*, 325 Or 135, 146, 934 P2d 391 (1997).

accepting a rate subject to refund. It sets forth certain requirements with respect to the design of such interim rates — in particular, that they should be designed to avoid cost shifting between customer classes or between demand and energy charges. It also allows refunds of the portion of the interim rate increase that the Commission ultimately finds unjustified. The statute elaborates that: “[r]efunds shall be made as nearly as possible *to the customers*<sup>5</sup> against whom the interim rate were charged, by credits against future bills . . . .” ORS 757.215(5) (emphasis added).

### III. Conclusion

ORS 757.215(4) is clearly inapplicable in this docket based on a plain reading of the text and upon examination of the context of the statute. The Commission cannot in its subsequent investigation order a refund pursuant to that statute.

DATED this 2<sup>nd</sup> day of September, 2005.

Respectfully submitted,

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<sup>5</sup> See definition of “Customers” above.