

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1224**

In the Matter of
UTILITY REFORM PROJECT and
KEN LEWIS

Application for Deferred Accounting

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

I. INTRODUCTION

This is the final phase of a deferred accounting proceeding related to the federal and state tax expenses included in Portland General Electric Company's ("PGE") rates from October 5, 2005, to December 31, 2005. The Commission ordered deferred accounting treatment on August 14, 2007. PGE has since calculated the deferred amount, as the Commission directed, and conducted an earnings test as required by ORS 757.259(5) and the Commission order granting deferred accounting. Because the earnings test shows that PGE's earnings during the deferral period are well below the minimum reasonable level of return on equity, the deferred amount should not be amortized.¹

II. FACTUAL BACKGROUND

On September 2, 2005, Senate Bill 408 ("SB 408") was signed into law. SB 408 is generally codified at ORS 757.267 and ORS 757.268. In essence, SB 408 requires utilities to "true up" the amount of income taxes collected from customers in rates with the actual amount of taxes paid to the government that are "properly attributed" to the utility's regulated operations. SB 408 became effective when signed on September 2, 2005. However, the legislature expressly

¹ PGE believes that the parties are following proper Commission procedures to address both the deferral application and possible amortization of the deferred amount. URP voiced some procedural uncertainty at the Commission hearing on April 2, 2008, but PGE is unaware of any problems with the procedure.

directed that the automatic adjustment clause (*i.e.* true-up mechanism) in SB 408 would only apply to taxes paid and collected "on or after January 1, 2006." Or Laws 2005, ch. 845, §4(2).

On October 5, 2005, the Utility Reform Project and Ken Lewis (collectively "URP") filed a deferred accounting application with the Commission pursuant to ORS 757.259. Deferred accounting is a discretionary power of the Commission that the Commission applies in extraordinary circumstances. ORS 757.259. URP requested that the Commission order PGE to set up a deferred account to capture the difference between federal and state taxes collected and federal and state taxes paid for the period beginning September 2, 2005. URP argued that PGE's rates could not be considered "fair, just and reasonable" without an SB 408-like adjustment, regardless of the effective date of the adjustment mechanism in SB 408 itself. PGE argued that its existing rates were lawful, that SB 408 did not require any adjustment for taxes paid or collected prior to January 1, 2006, and that deferred accounting was not appropriate, especially when PGE performed significantly below its authorized rate of return during the relevant time period.

On August 14, 2007, the Commission granted URP's deferral request but limited the deferred accounting period to October 5, 2005, to December 31, 2005. Order No. 07-351 at 7. The Commission ordered PGE to calculate the deferred amount by December 1, 2007, using the same methodology used for SB 408 adjustments. *Id.* The Commission expressly stated in its order that it did not consider PGE's earnings in the initial decision whether to grant the deferral, but that it would consider PGE's earnings when making its ultimate decision whether to amortize the deferred amount, as required by ORS 757.259(5). *Id.* at 8.

On November 30, 2007, PGE filed direct testimony and exhibits in this proceeding. PGE/100, Hager-Tamlyn-Tinker. PGE calculated the deferred amount under the SB 408 rules as \$26.6 million, but also proposed two alternative methodologies for calculating the deferred amount, which would result in a deferred amount of either zero or \$20.9 million, respectively. *Id.* at 10-14. Without the deferral, PGE calculates its actual ROE for the relevant earnings period as 5.11%, more than 500 basis points below its authorized ROE of 10.5%. *Id.*

at 16. Amortization of any deferred amount would reduce PGE's ROE even further. For example, amortizing \$26.6 million would reduce PGE's actual ROE for the relevant period to 3.54%, as compared to the authorized ROE of 10.5%, or almost 700 basis points below PGE's authorized ROE during the deferral period. *Id.*

On February 28, 2008, Staff filed reply testimony, including its own calculations of the deferred amount and PGE's earnings. Staff/100, Owings. Staff calculates the deferral amount as \$26.5 million using the SB 408 methodology, which is the only methodology it considered. *Id.* at 3-5. With regard to PGE's earnings test, Staff believes that one additional adjustment should be made (removing the SB 408 accrual that reflects PGE's 2006 expected SB 408 refund), although Staff recognizes that "reasonable minds could disagree" about whether such adjustment should be made and that making such adjustment is the "most conservative position." *Id.* at 8. Based on Staff's calculations, PGE's ROE without the deferral is 6.92% and its ROE with the deferral would be 5.28%. *Id.* at 7-8. Staff recognizes that both amounts are well below PGE's authorized ROE of 10.5% and that ORS 757.259 requires the Commission to consider PGE's earnings before amortizing the deferred amount. *Id.* at 9-10. Accordingly, based on its analysis, Staff has recommended to the Commission that the Commission find the deferred amount to be \$26.5 million, but that the Commission not require PGE to amortize the deferred amount in light of PGE's earnings. *Id.* at 10.

The schedule provided URP with an opportunity to file testimony, but URP did not file any testimony.

PGE filed rebuttal testimony on March 27, 2008. PGE agrees with Staff that, if the deferred amount is calculated pursuant to the SB 408 rules, then the amount should be \$26.5 million rather than \$26.6 million as PGE originally calculated.² PGE/200, Hager-Tamlyn-Tinker/2. However, PGE maintains that the alternative methods it has proposed for calculating the deferral amount, which result in a deferred amount of either zero or

² The \$0.1 million difference relates to the treatment of local taxes. URP's deferral application requests deferral related to federal and state taxes only, not local taxes, so PGE agrees with Staff's approach of removing all local taxes from the calculation.

\$20.9 million, are superior. *Id.* at 2-3. PGE also disagrees with Staff's proposed adjustment removing the SB 408 accrual for purposes of the earnings test and believes it would set a bad precedent if the Commission adopted such approach. *Id.* PGE agrees with Staff's ultimate conclusion, however, that, no matter how the Commission calculates the deferred amount or PGE's ROE, PGE's earnings are too low to warrant amortization of the deferred amount in this docket. *Id.* at 1.

III. THE COMMISSION SHOULD FIND THE DEFERRED AMOUNT TO BE ZERO OR \$20.9 MILLION

This is the amortization phase of a deferral proceeding under ORS 757.259. As such, the Commission has broad discretion in determining how to calculate the deferred amount that is eligible for amortization. In its last order, the Commission ordered PGE to calculate the deferred amount using the methodology the Commission set forth in OAR 860-022-0041 to implement SB 408. Order No. 07-351 at 7. PGE has done that calculation and agrees with Staff that it results in a deferred amount of \$26.5 million. Staff/100, Owings/3-5; PGE/200, Hager-Tamlyn-Tinker/2. However, PGE urges the Commission to consider alternative methods for calculating the deferred amount that would, for example, eliminate the unintended "double whammy" effect of SB 408.

If the purpose of the deferral is to capture over-collection of taxes in 2005, then the most appropriate way to calculate the deferred amount is to compare two different stand-alone cases: (a) that which was assumed in the ratemaking process, consistent with the presumed level of costs and the authorized ROE; and (b) PGE's actual income tax liability, which reflects actual utility revenues and costs. PGE/100, Hager-Tamlyn-Tinker/11. Applying this methodology, PGE was expected to collect \$75.0 million in taxes in 2005 but actually collected \$45.7 million in taxes. *Id.* at 11-12. PGE therefore under-collected taxes during the relevant period and the deferred amount should be zero. *Id.* at 12. This methodology is superior to the SB 408 methodology because it better aligns benefits and burdens, is more consistent with long-standing Commission policy, and avoids the "double whammy" problem. *Id.* at 11-12.

If the Commission declines to adopt the foregoing methodology for purposes of this deferral proceeding, it should at least adopt a methodology that eliminates the "double whammy" effect. The "double whammy" in SB 408 goes beyond fixing the so-called "Enron problem" that was the underlying purpose of the SB 408 legislation. *Id.* at 12-13. Moreover, the Commission previously indicated in Order 06-532 (AR 499) that it would consider the "double whammy" effect in other dockets. Calculating the deferral amount pursuant to the SB 408 methodology, but with an adjustment for the "double whammy," would result in a deferred amount of \$20.9 million.³ *Id.* at 13.

IV. GIVEN PGE'S EARNINGS, THE COMMISSION SHOULD NOT REQUIRE PGE TO AMORTIZE THE DEFERRED AMOUNT

If the Commission concludes that the deferred amount is anything other than zero, then it is required to consider PGE's earnings in deciding whether to amortize the deferred amount. Under ORS 757.259, the Commission may authorize deferral of certain amounts for later incorporation into rates but, when the time comes, must consider the utility's earnings in deciding whether to actually incorporate the deferred amounts into rates. The statute states, in relevant part:

(1) In addition to powers otherwise vested in the Public Utility Commission, and subject to the limitations contained in this section, under amortization schedules set by the commission, a rate or rate schedule:

(a) May reflect:

* * *

(B) Amounts deferred under subsection (2) of this section.

* * *

(2) Upon application of a utility or ratepayer or upon the commission's own motion and after public notice, opportunity for comment and a hearing if any party requests a hearing, the commission by order may authorize deferral of the following amounts for later incorporation in rates:

³ If the Commission agrees with Staff and PGE that the deferral amount under a strict SB 408 methodology would be \$26.5 million rather than \$26.6 million as PGE originally calculated, then the amount after adjusting for the "double whammy" would actually be \$20.8 million rather than \$20.9 million. The difference is so small as to be immaterial, *cf.* PGE/200, Hager-Tamlyn-Tinker/2, but \$20.8 million is the more accurate number if the Commission adopts this methodology.

* * *

(e) Identifiable utility expenses or revenues, the recovery or refund of which the commission finds should be deferred in order to minimize the frequency of rate changes or the fluctuation of rate levels or to match appropriately the costs borne by and benefits received by ratepayers.

* * *

(5) Unless subject to an automatic adjustment clause under ORS 757.210(1), amounts described in this section shall be allowed in rates only to the extent authorized by the commission in a proceeding under ORS 757.210 to change rates and upon review of the utility's earnings at the time of application to amortize the deferral. The commission may require that amortization of deferred amounts be subject to refund. The commission's final determination on the amount of deferrals allowable in the rates of the utility is subject to a finding by the commission that the amount was prudently incurred by the utility.

ORS 757.259 (emphasis added).

A. Historical Development and Application of the Earnings Test⁴

In 1987, the legislature adopted ORS 757.259 to give express statutory authority to the Commission to engage in deferred accounting in appropriate circumstances. The Commission had previously engaged in deferred accounting, but concern arose about the legality of engaging in such practice without express statutory authority after the Attorney General's Office advised the Commission that it was not permitted under then-current statutes due to a conflict with the rule against retroactive ratemaking. Testimony of PUC Commissioner Charles Davis before the House Committee on Environment and Energy, regarding HB 2145, March 11, 1987, at 1-4 ("Davis Testimony"). The purpose of the statute as a whole was therefore to authorize what the Commission was already doing with respect to deferred accounting. Minutes of Public Hearing on HB 2145, House Committee on Environment and Energy, March 11, 1987, at 3.

As for the purpose of the earnings test in ORS 757.259, there is almost no legislative history on that particular issue. There are no legislative comments on it. The only

⁴ This section responds to ALJ Kirkpatrick's request that the parties address the historical development and application of the earnings test under ORS 757.259. Hearing Memorandum of April 3, 2008.

relevant statement at all appears in the testimony of then-PUC Commissioner Charles Davis, who stated that the earnings review would "allow the Commission to determine whether amortization of a deferred income or expense amount is warranted based on the utility's earnings; if earnings are higher than authorized, expense amortization will not be appropriate." Davis Testimony at 5. The fact that then-Commissioner Davis only expressly addressed expense amortization when earnings were too high, and did not expressly address income amortization when earnings were too low, is likely due to the fact that the bill originally provided only for deferral applications by utilities. The bill was amended after Dan Meek testified to the House Committee on Environment and Energy that he was concerned about the one-sided nature of the bill, which, as originally drafted, did not allow third parties to apply for deferrals for unexpected cost reductions. Then-Assistant PUC Commissioner William G. Warren advised the Committee that Meek had a valid point on this issue and that the Commissioner supported amending the bill's language so that anyone could apply for deferred accounting. Letter from Assistant PUC Commissioner William G. Warren to Representative Ron Cease, Chair of the House Committee on Environment and Energy, dated March 30, 1987, at 2.

Since the passage of ORS 757.259, the Commission has followed the statutory procedure and guidelines whenever engaging in deferred accounting, including conducting an earnings test when deciding whether or not to amortize a deferred amount. Staff addressed how the Commission and parties should perform the earnings test in a March 1992 letter. Letter from T. Ray Lambeth to Anne Eakin, Pacific Power & Light Co., et al., dated March 25, 1992. In the letter, Staff acknowledged the fundamental predicate of the earnings test, namely that amortization of the deferred amount should not occur if amortization moves the utility's actual earnings away from a reasonable range of return on equity. "The purpose of this stage is to produce an earnings picture that can be used to perform earnings tests required by ORS 757.259. Such tests are necessary for evaluating potential amortization of deferred costs and revenues. Accordingly, the operating results at this stage of the report should reflect as closely as possible

the company's actual earnings for the reporting period and *its ability to absorb a deferred cost or its need to retain deferred revenues.*" *Id.* at 1-2 (emphasis added).

The Commission next addressed the earnings test in the context of deferred power costs related to a Trojan outage. *See In the Matter of the Revised Tariff Sheets filed by PGE to Implement the Provisions of Order No. 91-1781*, UE 82/UM 445, Order No. 93-257 (1993). In Order No. 93-257, the Commission reaffirmed that the fundamental purpose of the earnings test is to test the utility's earnings against a reasonable range of ROE. The Commission adopted an approach supported by Staff and PGE according to which amortization was tested against a reasonable range of ROE using a 100 basis point range, 50 basis points above and below an established mid-point. The primary issue in the docket was whether the Commission should apply a restrictive or non-restrictive approach to the earnings test. Notably, URP argued for the restrictive approach, "which allows amortization of deferred costs in rates unless recovery will cause earnings to rise above the minimum reasonable level, and allows amortization of deferred income amounts in rates unless refund will cause earnings to fall below a maximum reasonable level." *Id.* at 10. Staff and PGE urged a non-restrictive approach according to which amortization of deferred costs is allowed unless recovery will cause earnings to rise above a maximum reasonable level of earnings and amortization of a deferred revenue is allowed "unless refund will cause earnings to fall below a minimum reasonable level." *Id.* The Commission ultimately permitted amortization, finding that PGE's earnings were sufficiently low to warrant recovery of the deferred power costs.

The difference between the restrictive and non-restrictive approaches to the earnings test is not relevant here. The two approaches differ concerning the presumption for amortization of deferred amounts within the range of reasonable ROE. That difference is inapplicable given that PGE's earnings are well below the minimum reasonable ROE and amortization of the deferred amount moves PGE's earnings even further below the minimum reasonable level. Amortization of the deferred amount is inappropriate in those circumstances under both the restrictive and non-restrictive approaches.

The Commission reduced amortization of deferred amounts based on the earnings test in UM 594-UE 93 (Order No. 95-1216, Appendix B, page 3). The Commission approved a stipulation that permitted PGE to recover only \$9.1 million out of \$48.2 million in deferred power cost due to the application of the earnings test.

The Commission applied an earnings test that could have limited amortization of the deferred amount in the following dockets:

- UM 528/UE 85 (Order No. 94-096). The Commission applied an earnings test and found that PGE should be permitted to recover the full deferred amount due to insufficient earnings.
- UM 692/UE 93 (Order No. 95-1216). The Commission adopted a stipulation reflecting an earnings test for the period April 1, 1993 to February 21, 1995 and finding that PGE should recover the full amount due to insufficient earnings.

B. Application of the Earnings Test in This Proceeding

In this case, PGE's authorized ROE during the applicable deferral and earnings period is 10.5%. PGE/100, Hager-Tamlyn-Tinker/16; Staff/100, Owings/6. PGE's actual ROE for the relevant period, without the deferral, is either 5.11% or 6.92%, depending whether one uses PGE's calculation or Staff's calculation. PGE/100, Hager-Tamlyn-Tinker/16; Staff/100, Owings/9-10. Under either calculation, PGE's earnings are well below the authorized 10.5%. Staff/100, Owings/10. Using either approach, PGE's earnings are more than 350 basis points below PGE's authorized ROE. If PGE were required to amortize the deferred amount, its earnings would be even lower. For example, if the Commission finds the deferred amount to be \$26.5 million, as Staff recommends, then PGE's actual ROE with the deferral would be either 3.53% or 5.28%, again depending which earnings test calculation is used. PGE/100, Hager-Tamlyn-Tinker/16; Staff/100, Owings/6 fn.3 and 7-8.

PGE firmly maintains that its earnings test calculation is based on the correct methodology. PGE disagrees with Staff's methodology for calculating PGE's actual ROE and is

concerned that, if the Commission adopts it, it will set a poor precedent for future proceedings. PGE/200, Hager-Tamlyn-Tinker/2-3. Staff adjusted earnings to remove the SB 408 accrual of \$30.5 million during the earnings test period which reflects the anticipated SB 408 refund for the period. *Id.* at 2. Such an adjustment is inappropriate given that the SB 408 accrual accurately reflects the reduction in earnings the SB 408 refund will cause. Removal of the accrual assumes that revenues are available to PGE shareholders when they in fact will not be.

Staff admits that "reasonable minds could disagree" about which methodology is correct and that Staff is taking the "most conservative position." Staff/100, Owings/8. Fortunately, it is unnecessary for the Commission to formally adopt either methodology in this proceeding. For purposes of the present deferral, PGE's earnings are well below the authorized 10.5% regardless of which methodology is used. *Id.* at 10. Since there is no need for the Commission to decide the issue in this proceeding, PGE urges the Commission not to decide the issue in this proceeding.

In sum, this proceeding involves a discretionary deferral under ORS 757.259, not an automatic adjustment under SB 408. Order No. 07-351 at 7. An earnings test is mandatory under the deferral statute before amortization. Given that PGE's earnings for the relevant period are already substantially below its authorized ROE, the Commission should not require PGE to amortize the deferred amount and thereby reduce its earnings even further below the minimum reasonable level. This is precisely the type of situation contemplated by ORS 757.259(5). Moreover, it is a situation in which amortization is not permitted under either the restrictive or non-restrictive approach. Finally, Staff agrees that amortization of the deferred amount is inappropriate given PGE's actual earnings, and Staff expressly recommends that the Commission not order PGE to amortize the deferred amount. Staff/100, Owings/10.

V. CONCLUSION

For the foregoing reasons, the Commission should find the deferred amount to be zero. If the Commission finds the deferred amount to be any other amount (such as

\$20.9 million or \$26.5 million), then the Commission should not require PGE to amortize the deferred amount in light of its earnings during the deferral period.

DATED this 14th day of April, 2008.

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Of Attorneys for Portland General Electric
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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S OPENING BRIEF** by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to each party listed below, deposited in the U.S. Mail at Portland, Oregon.

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DATED this 14th day of April, 2008.

DAVID F. WHITE
ROBYN RIDLER AOYAGI

Of Attorneys for Portland General Electric
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If the Commission declines to adopt the foregoing methodology for purposes of this deferral proceeding, it should at least adopt a methodology that eliminates the "double whammy" effect. The "double whammy" in SB 408 goes beyond fixing the so-called "Enron problem" that was the underlying purpose of the SB 408 legislation. *Id.* at 12-13. Moreover, the Commission previously indicated in Order 06-532 (AR 499) that it would consider the "double whammy" effect in other dockets. Calculating the deferral amount pursuant to the SB 408 methodology, but with an adjustment for the "double whammy," would result in a deferred amount of \$20.9 million.³ *Id.* at 13.

IV. GIVEN PGE'S EARNINGS, THE COMMISSION SHOULD NOT REQUIRE PGE TO AMORTIZE THE DEFERRED AMOUNT

If the Commission concludes that the deferred amount is anything other than zero, then it is required to consider PGE's earnings in deciding whether to amortize the deferred amount. Under ORS 757.259, the Commission may authorize deferral of certain amounts for later incorporation into rates but, when the time comes, must consider the utility's earnings in deciding whether to actually incorporate the deferred amounts into rates. The statute states, in relevant part:

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(5) Unless subject to an automatic adjustment clause under ORS 757.210(1), amounts described in this section shall be allowed in rates only to the extent authorized by the commission in a proceeding under ORS 757.210 to change rates and upon review of the utility's earnings at the time of application to amortize the deferral. The commission may require that amortization of deferred amounts be subject to refund. The commission's final determination on the amount of deferrals allowable in the rates of the utility is subject to a finding by the commission that the amount was prudently incurred by the utility.

ORS 757.259 (emphasis added).

A. Historical Development and Application of the Earnings Test⁴

In 1987, the legislature adopted ORS 757.259 to give express statutory authority to the Commission to engage in deferred accounting in appropriate circumstances. The Commission had previously engaged in deferred accounting, but concern arose about the legality of engaging in such practice without express statutory authority after the Attorney General's Office advised the Commission that it was not permitted under then-current statutes due to a conflict with the rule against retroactive ratemaking. Testimony of PUC Commissioner Charles Davis before the House Committee on Environment and Energy, regarding HB 2145, March 11, 1987, at 1-4 ("Davis Testimony"). The purpose of the statute as a whole was therefore to authorize what the Commission was already doing with respect to deferred accounting. Minutes of Public Hearing on HB 2145, House Committee on Environment and Energy, March 11, 1987, at 3.

As for the purpose of the earnings test in ORS 757.259, there is almost no legislative history on that particular issue. There are no legislative comments on it. The only

⁴ This section responds to ALJ Kirkpatrick's request that the parties address the historical development and application of the earnings test under ORS 757.259. Hearing Memorandum of April 3, 2008.

relevant statement at all appears in the testimony of then-PUC Commissioner Charles Davis, who stated that the earnings review would "allow the Commission to determine whether amortization of a deferred income or expense amount is warranted based on the utility's earnings; if earnings are higher than authorized, expense amortization will not be appropriate." Davis Testimony at 5. The fact that then-Commissioner Davis only expressly addressed expense amortization when earnings were too high, and did not expressly address income amortization when earnings were too low, is likely due to the fact that the bill originally provided only for deferral applications by utilities. The bill was amended after Dan Meek testified to the House Committee on Environment and Energy that he was concerned about the one-sided nature of the bill, which, as originally drafted, did not allow third parties to apply for deferrals for unexpected cost reductions. Then-Assistant PUC Commissioner William G. Warren advised the Committee that Meek had a valid point on this issue and that the Commissioner supported amending the bill's language so that anyone could apply for deferred accounting. Letter from Assistant PUC Commissioner William G. Warren to Representative Ron Cease, Chair of the House Committee on Environment and Energy, dated March 30, 1987, at 2.

Since the passage of ORS 757.259, the Commission has followed the statutory procedure and guidelines whenever engaging in deferred accounting, including conducting an earnings test when deciding whether or not to amortize a deferred amount. Staff addressed how the Commission and parties should perform the earnings test in a March 1992 letter. Letter from T. Ray Lambeth to Anne Eakin, Pacific Power & Light Co., et al., dated March 25, 1992. In the letter, Staff acknowledged the fundamental predicate of the earnings test, namely that amortization of the deferred amount should not occur if amortization moves the utility's actual earnings away from a reasonable range of return on equity. "The purpose of this stage is to produce an earnings picture that can be used to perform earnings tests required by ORS 757.259. Such tests are necessary for evaluating potential amortization of deferred costs and revenues. Accordingly, the operating results at this stage of the report should reflect as closely as possible

the company's actual earnings for the reporting period and *its ability to absorb a deferred cost or its need to retain deferred revenues.*" *Id.* at 1-2 (emphasis added).

The Commission next addressed the earnings test in the context of deferred power costs related to a Trojan outage. *See In the Matter of the Revised Tariff Sheets filed by PGE to Implement the Provisions of Order No. 91-1781*, UE 82/UM 445, Order No. 93-257 (1993). In Order No. 93-257, the Commission reaffirmed that the fundamental purpose of the earnings test is to test the utility's earnings against a reasonable range of ROE. The Commission adopted an approach supported by Staff and PGE according to which amortization was tested against a reasonable range of ROE using a 100 basis point range, 50 basis points above and below an established mid-point. The primary issue in the docket was whether the Commission should apply a restrictive or non-restrictive approach to the earnings test. Notably, URP argued for the restrictive approach, "which allows amortization of deferred costs in rates unless recovery will cause earnings to rise above the minimum reasonable level, and allows amortization of deferred income amounts in rates unless refund will cause earnings to fall below a maximum reasonable level." *Id.* at 10. Staff and PGE urged a non-restrictive approach according to which amortization of deferred costs is allowed unless recovery will cause earnings to rise above a maximum reasonable level of earnings and amortization of a deferred revenue is allowed "unless refund will cause earnings to fall below a minimum reasonable level." *Id.* The Commission ultimately permitted amortization, finding that PGE's earnings were sufficiently low to warrant recovery of the deferred power costs.

The difference between the restrictive and non-restrictive approaches to the earnings test is not relevant here. The two approaches differ concerning the presumption for amortization of deferred amounts within the range of reasonable ROE. That difference is inapplicable given that PGE's earnings are well below the minimum reasonable ROE and amortization of the deferred amount moves PGE's earnings even further below the minimum reasonable level. Amortization of the deferred amount is inappropriate in those circumstances under both the restrictive and non-restrictive approaches.

The Commission reduced amortization of deferred amounts based on the earnings test in UM 594-UE 93 (Order No. 95-1216, Appendix B, page 3). The Commission approved a stipulation that permitted PGE to recover only \$9.1 million out of \$48.2 million in deferred power cost due to the application of the earnings test.

The Commission applied an earnings test that could have limited amortization of the deferred amount in the following dockets:

- UM 528/UE 85 (Order No. 94-096). The Commission applied an earnings test and found that PGE should be permitted to recover the full deferred amount due to insufficient earnings.
- UM 692/UE 93 (Order No. 95-1216). The Commission adopted a stipulation reflecting an earnings test for the period April 1, 1993 to February 21, 1995 and finding that PGE should recover the full amount due to insufficient earnings.

B. Application of the Earnings Test in This Proceeding

In this case, PGE's authorized ROE during the applicable deferral and earnings period is 10.5%. PGE/100, Hager-Tamlyn-Tinker/16; Staff/100, Owings/6. PGE's actual ROE for the relevant period, without the deferral, is either 5.11% or 6.92%, depending whether one uses PGE's calculation or Staff's calculation. PGE/100, Hager-Tamlyn-Tinker/16; Staff/100, Owings/9-10. Under either calculation, PGE's earnings are well below the authorized 10.5%. Staff/100, Owings/10. Using either approach, PGE's earnings are more than 350 basis points below PGE's authorized ROE. If PGE were required to amortize the deferred amount, its earnings would be even lower. For example, if the Commission finds the deferred amount to be \$26.5 million, as Staff recommends, then PGE's actual ROE with the deferral would be either 3.53% or 5.28%, again depending which earnings test calculation is used. PGE/100, Hager-Tamlyn-Tinker/16; Staff/100, Owings/6 fn.3 and 7-8.

PGE firmly maintains that its earnings test calculation is based on the correct methodology. PGE disagrees with Staff's methodology for calculating PGE's actual ROE and is

concerned that, if the Commission adopts it, it will set a poor precedent for future proceedings. PGE/200, Hager-Tamlyn-Tinker/2-3. Staff adjusted earnings to remove the SB 408 accrual of \$30.5 million during the earnings test period which reflects the anticipated SB 408 refund for the period. *Id.* at 2. Such an adjustment is inappropriate given that the SB 408 accrual accurately reflects the reduction in earnings the SB 408 refund will cause. Removal of the accrual assumes that revenues are available to PGE shareholders when they in fact will not be.

Staff admits that "reasonable minds could disagree" about which methodology is correct and that Staff is taking the "most conservative position." Staff/100, Owings/8. Fortunately, it is unnecessary for the Commission to formally adopt either methodology in this proceeding. For purposes of the present deferral, PGE's earnings are well below the authorized 10.5% regardless of which methodology is used. *Id.* at 10. Since there is no need for the Commission to decide the issue in this proceeding, PGE urges the Commission not to decide the issue in this proceeding.

In sum, this proceeding involves a discretionary deferral under ORS 757.259, not an automatic adjustment under SB 408. Order No. 07-351 at 7. An earnings test is mandatory under the deferral statute before amortization. Given that PGE's earnings for the relevant period are already substantially below its authorized ROE, the Commission should not require PGE to amortize the deferred amount and thereby reduce its earnings even further below the minimum reasonable level. This is precisely the type of situation contemplated by ORS 757.259(5). Moreover, it is a situation in which amortization is not permitted under either the restrictive or non-restrictive approach. Finally, Staff agrees that amortization of the deferred amount is inappropriate given PGE's actual earnings, and Staff expressly recommends that the Commission not order PGE to amortize the deferred amount. Staff/100, Owings/10.

V. CONCLUSION

For the foregoing reasons, the Commission should find the deferred amount to be zero. If the Commission finds the deferred amount to be any other amount (such as

\$20.9 million or \$26.5 million), then the Commission should not require PGE to amortize the deferred amount in light of its earnings during the deferral period.

DATED this 14th day of April, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S OPENING BRIEF** by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to each party listed below, deposited in the U.S. Mail at Portland, Oregon.

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