TONKON TORP LLP
ATTORNEYS

1600 Pioneer Tower
888 SW Fifth Avenue
Portland, Oregon 97204
503.221.1440

DAVID F. WHITE

503.802.2168
FAX 503.972.3868
davidw@tonkon.com

September 7, 2006

VIA E-FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol St. NE, Suite 215
P. O. Box 2148
Salem, OR 97308-2148

Re: *UM 1234*

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of the Opening Brief of Portland General Electric Company. This document is being filed electronically per the Commission's eFiling policy to the electronic address PUC.FilingCenter@state.or.us, with copies being served on all parties on the service list via U.S. Mail. A photocopy of the PUC tracking information will be forwarded with the hard copy filing.

Very truly yours,

Leslie Hurd

Leslie Hurd, Legal Assistant to
David F. White

/ldh
Enclosures
cc (w/enc.): Service List
001991\00260\713301 V001

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1234

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, Application for Deferred Accounting of Excess Power Costs Due to Plant Outage.	**OPENING BRIEF OF PORTLAND GENERAL ELECTRIC COMPANY**

I. INTRODUCTION

Portland General Electric Company's ("PGE") Application concerns the extraordinary 105-day outage at PGE's Boardman plant, exactly the type of event that the Commission has traditionally treated using deferred accounting. Such an extended outage is so rare the Commission has not included it in the test-year assumptions used to establish rates. The size of the financial impact—approximately $59 million since PGE shut down the plant in October 2005 through February 5, 2006, the end of the deferral period—exceeds the normal variation in costs and revenues the Commission expects the utility to absorb. Deferred accounting treatment of these types of events:

- allows the Commission to limit the test-year assumptions used in ratemaking to reasonably predictable factors rather than all conceivable contingencies,
- charges customers for at least most of the costs of energy they consume, and
- enables the Commission to manage price changes over time.

These are the typical attributes of events for which the Commission used accounting orders prior to ORS 757.259 and for which the Legislature passed that statute to permit this regulatory practice to continue.

Extended plant outages, like this one, are such standard candidates for deferred accounting that it is no wonder the parties opposing the Application seek to create a variety of distractions. They suggest this case is simply about rates. It is not; it is about an extraordinary plant outage, PGE's efforts to secure replacement power in order to meet its obligation to serve customers, and customers paying for the power they use. They suggest this docket is about whether the utility should absorb normal variations. It is not. No one disputes that PGE should absorb normal variations related to Boardman's availability, such as the difference between the forced outage rate for Boardman and the rate actually experienced prior to the deferral period, and the operations and maintenance expenses associated with the plant. But there is nothing normal about the Boardman outage that is the subject of this deferral. In fact, Staff characterized it as a once-in-100 years event.

In UM 1147, the Commission articulated its deferred accounting policy, elaborating on how it exercises its discretion under ORS 757.259. The circumstances here are exactly the type for which the Commission stated it would exercise its discretion to grant deferred accounting treatment. PGE has met its burden of showing each required legal element and each factor the Commission recognized in UM 1147 as favoring the use of deferred accounting. Parties opposing PGE's Application have failed to offer evidence to rebut that case. The Commission should approve PGE's Application.

II. PGE'S APPLICATION AND THE BOARDMAN OUTAGE

In July 2005, Boardman plant engineers observed vibrations in one of the two bearings for the low-pressure turbine 1 ("LPT1") at the Boardman facility. PGE/200, Quennoz-Mayer/3. Siemens Westinghouse Power Corporation ("SWPC") designed the LPT1 turbine and, in June 2000, installed it. *Id.*/2. The turbine increased efficiency (output) by 7%, incorporating the latest in analytical techniques, metallurgy and manufacturing techniques. *Id.* The LPT1 turbine was not yet due for a routine major maintenance. *Id.*/3. It was only halfway through its first 10-year interval for major maintenance established by SWPC. *Id.*

After July 2005, the upward trend in vibrations continued, although vibrations remained below safety and operational limits. In October 2005, the vibrations became so severe that the operators shut down the Boardman facility. PGE's independent vibration consultant, Robert Kowlczk ("RK Ltd."), and SWPC reviewed the vibration data and performed their own analysis. *Id.*/4. Both concluded that the data suggested a "turbine rub" due to a bowed shaft. After a partial disassembly, RK Ltd. discovered and corrected the rub. *Id.* After reassembly, the operator attempted to restart the turbine with no success, leading RK Ltd. to conclude that the turbine rub could not alone explain the vibrations. A full disassembly of the turbine revealed a crack in the rotor. On November 18, 2005, when the full extent of the problem and the extended time needed for repair were clear, PGE filed its Application for Deferred Accounting (the "Application"). PGE/300, Drennan-Tinker-Hager/2.

Repairing the cracked rotor required shipping the rotor to a repair shop. PGE paid a premium to fly the rotor to the east coast for repairs because returning the Boardman plant to service was a top priority. PGE/200, Quennoz-Mayer/4. The repaired rotor arrived back at the Boardman plant on January 25, 2006, and SWPC's personnel reinstalled it. On February 6, 2006, the rotor was being placed into service when a second outage occurred due to a generator rotor failure. *Id.*/5. PGE is not seeking deferred accounting treatment with respect to the second outage. Accordingly, the deferred accounting period is November 18, 2005 (the date of the Application), through February 5, 2006 (the date PGE deemed the outage concluded). PGE/100, Lesh/1.

The Application seeks deferral of only Boardman replacement power costs. When the extent and likely duration of the outage became apparent in November 2005, PGE's power operations searched for the lowest cost alternatives available to fill the energy deficit created by the Boardman outage. PGE/200, Quennoz-Mayer/6. They compared the cost of market purchases with the cost of PGE's other available resource, PGE's Beaver plant. Market purchases were cheaper. They then had to decide when to make market purchases. *Id.* Power prices tend to spike in winter months, making a large open position risky. PGE's power operations determined that the most prudent course was to purchase replacement power on a forward basis to replace the Boardman energy. At the time the wholesale power transactions were executed, PGE flagged the replacement power transactions as Boardman replacement purchases. *Id.*

PGE estimated that the excess power costs incurred to replace the base-load energy Boardman normally provides was about $59.4 million. PGE/300, Drennan-Tinker-Hager/4. These excess power costs equate to 355 basis points of the earnings opportunity PGE has under the UE 115 rate order, not including the tax impact of the excess costs. *Id.* PGE estimated that the replacement power costs for the deferral period were approximately $45.4 million based on replacement of 100% of the base-load energy the Boardman plant usually provides. *Id.* Staff made a variety of technical corrections, which PGE accepted. Accepting these changes resulted in a slight change in PGE's estimate from $45.4 million to $45.7 million. PGE/400, Lesh-Tinker/3.

These figures assumed that the deferred amount covered PGE's replacement of 100% of its share of Boardman's full output during the deferral period, along with an agreement that in any future four-year rolling average calculation of the plant's availability, PGE would assume that Boardman was 100% available during the deferral period. PGE/400, Lesh-Tinker/4. Staff also proposed to reduce the amount of replacement power to reflect Boardman's average forced outage rate of 6.5%. Staff/100, Owings-Galbraith/5. In other words, the deferred amount would be calculated to replace 93.5% of PGE's share of Boardman's full capacity. Such an adjustment did not match Staff's proposal to treat the plant as 100% available in future forecasts of the plant's availability using the four-year rolling average. PGE/400, Lesh-Tinker/4. PGE is willing to support either a 100% or 93.5% availability factor for determining the amount of replacement power so long as the Commission uses the same percentage in future calculations of Boardman's plant availability and in determining the amount of replacement Boardman power. If the Commission uses a 93.5% availability factor, the deferred replacement costs would be $42.8 million. *Id.*

III. PGE'S APPLICATION SATISFIES STATUTORY AND COMMISSION REQUIREMENTS AND SHOULD BE GRANTED

The Commission considers deferred accounting applications in two phases. One phase requires the Commission to determine whether the deferred accounting statute authorizes the proposed deferral. The second phase requires the Commission to exercise its discretion to determine whether it should grant the application. UM 1147, Order No. 05-1070 at 5-7 (Oct. 5, 2005).

PGE has met the applicant's burden of persuasion and production in support of both phases of the Commission's review. Under these circumstances, "the burden of production shifts to other parties to present evidence that rebuts what an applicant presented." *Id.* at 5. In this docket, the other parties have failed to offer any evidence to rebut the evidence in favor of PGE's Application.

A. THE APPLICATION IS AUTHORIZED BY STATUTE

PGE filed the Application under subsection 2(e) of ORS 757.259, which permits the deferral of "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." The replacement power costs are an identifiable expense.[1] Subsection 2(e) applies an alternative test to "identifiable expenses or revenues." An application passes the test if it *either* minimizes the frequency of rate changes *or* matches those that benefit with those that bear the costs, but it need not meet both prongs of the test. UM 1147, Order No. 05-1070 at 5; UM 995, Order No. 01-085 at 12 (Jan. 9, 2001). In this case, both prongs are satisfied.

The Application serves to minimize rate changes. If deferred accounting had not been available, PGE would have filed for immediate rate relief. PGE/100, Lesh/3. Because the cause of the Boardman outage was a repairable problem, a temporary rate increase would have

---

[1] *See* PGE/100, Lesh/2 ("These are the expenses PGE records in FERC accounts 555 and 501 of Purchased Power and Fuel Expenses").

increased—not minimized—the frequency of rate changes. Deferred accounting prevents a temporary rate increase and then a rate decrease, allowing the Commission to tailor an amortization schedule that increases rate stability. As the Commission found in UM 1147, "a utility might meet this standard by showing that the deferral would prevent an interim rate filing." Order No. 05-1070 at 5.

PGE could have justified an interim rate filing. The financial impact of the Boardman outage is substantial ($59 million, not including the tax impact). Moreover, PGE did not have countervailing cost decreases to offset the excess power costs. In 2005, PGE earned just $64 million of net income, the equivalent of 6.3% return on equity, well below the return on equity the Commission last authorized in UE 115 (10.5%). PGE/100, Lesh/3. PGE expects its 2006 earnings also will be lower than this last authorized return on equity. *Id.*

PGE's Application will also enable the Commission to better match costs and benefits. PGE used the replacement power to serve its customers and satisfy its obligation to provide safe and reliable power when its customers demand and in the quantities that customers need. PGE/100, Lesh/4 ("Absent this deferral, customers will have used power at a cost significantly less than PGE incurred to provide it."). Customers used the energy. They should pay for at least most of the cost of that energy.[2]

B. THE COMMISSION SHOULD GRANT THE APPLICATION AS AN EXERCISE OF ITS DISCRETION

In exercising its discretion under the deferred accounting statute, the Commission considers the type of event and the magnitude of the harm. Order No. 05-1070 at 7. As to the "type of event," the Commission considers two important factors: whether the event was (1) included in test-year assumptions used to set rates, and (2) reasonably foreseeable as happening in the ordinary course of events:

---

[2] *See, e.g.,* UM 480, Order No. 92-1130 at 2 (Aug. 5, 1992) ("Deferrals should be authorized pursuant to ORS 757.259(2)(c) [now ORS 757.259(2)(e)] to match appropriately the costs borne by and benefits received by ratepayers. Deferred accounting is reasonable because customers are enjoying the benefits of extraordinary purchases and the other actions by Idaho Power which assure continued service.").

> The Commission will look to whether the event was modeled in rates, and, if so, whether extenuating circumstances were involved that were not foreseeable during the rate case or whether the event fell within a foreseen range of risk when rates were last set. If the event was not modeled, we will consider whether it was foreseeable as happening in the normal course of events, or not likely to have been capable of forecast.

UM 1147, Order No. 05-1070 at 7. If the event was neither modeled in rates nor reasonably foreseeable in the ordinary course of events, then "the magnitude of harm that would justify deferral likely would be lower." *Id.* The Commission has characterized the degree of financial harm required for events that were modeled or foreseen as "substantial." Events that were neither modeled in rates nor foreseen need only have a "material impact" to justify deferred accounting. *Id.* Each of the factors that indicates that an event warrants deferred accounting treatment—not modeled, unforeseen and material financial impact—are present here.

1. THE BOARDMAN OUTAGE WAS NOT MODELED IN THE TEST-YEAR FORECAST USED TO SET 2005 AND 2006 RATES

In setting rates, the Commission forecasts PGE's power costs using a rolling four-year average to estimate thermal plant availability. The rolling four-year average covers the four years prior to the year forecasted. The four-year historic data used to forecast test-year net variable power costs do not, nor could they, reflect the full range of possible operating outcomes. PGE/100, Lesh/5. The annual Boardman forced outages composing the current outage rate are as follows:

Year	Modified EFOR
2004	11.51%
2003	4.21%
2002	8.12%
2001	2.89%

PGE/400, Lesh-Tinker/6.

The Commission's methodology provides no basis for adjusting plant availability factors to include outages that are not reflected in the four-year rolling average. In short, the assumptions used to forecast Boardman's availability for 2005 rates did not include this outage.

PGE/400, Lesh-Tinker/14 ("It should be clear that neither PGE's current prices nor those in effect in 2005 include the potential of this outage.").

Over the last several years, parties before this Commission have hotly contested the Commission's deferred accounting practice in UM 995, UM 1071 and UM 1147, but there was one position upon which there was universal agreement: deferred accounting is appropriate for extraordinary plant outages not modeled in rates. Even parties opposing deferred accounting applications held out extended plant outages as the one clear standard against which all other deferred accounting applications must be measured:

> Staff believes it is inappropriate to use deferred accounting to mitigate stochastic risks that are reflected in base rates. Deferred accounting should be used only to address scenario or paradigm risks, which are not quantifiable and often represent abrupt changes in business factors or practices (the unexpected shutdown of the Trojan nuclear plant is an example).

UM 1071, Order No. 04-108 at 4 (March 2, 2004). The Commission agreed.

> In the Trojan deferral cases, UM 445 and UM 529, we were dealing with a paradigm or scenario risk. While rates are typically set using four-year average forced outage rates to forecast NVPC, the duration and cost of the Trojan shutdown was not a normal forced outage, and the risk of premature decommissioning was not reflected in base energy rates.

Id.

In apparent recognition that the Boardman outage is so rare the Commission did not include it in the assumptions used to forecast power costs for 2005 and 2006 rates, Staff argues that the Commission should consider the Boardman outage as meeting the UM 1147 criteria for the heightened financial impact test because it **could have been** modeled in rates. Staff/100, Owings-Galbraith/16-17. The final order in UM 1147 does not say this. In fact, that order makes clear that the threshold test is whether or not the Commission uses this type of event in the test-year assumptions to set rates. If not, which is the case here, the Commission considers whether the event's occurrence was reasonably foreseeable in the ordinary course of events. Finally, the Commission then considers whether the event causes substantial harm (if the event is modeled or foreseeable in the ordinary course of events) or material harm (if the event is neither modeled nor reasonably foreseeable). Nowhere does the Commission consider whether the event "could have been modeled in rates."

Moreover, in UM 1071, Staff argued that it was how the Commission actually set rates that mattered, not how they could have been set:

> As we stated in opening comments, we would classify the unexpected shutdown of the Trojan facility as an outcome of scenario risk. It is a long-standing Commission policy to use 4-year average forced outage rates to forecast net variable power cost. *In other words, the variability of plant operation is quantified and reflected in base energy rates. Staff would not support deferral of replacement power costs for a temporary plant outage if the duration and cost of the outage were within the range considered when the Commission set base energy rates.* However, the unexpected shutdown of the Trojan facility was not a normal forced outage. The risk of the premature decomisssioning of Trojan was *not reflected in base rates.*

UM 1071, Staff Reply Comments/3 (emphasis added).[3] It is undisputed that PGE's rates have never included the possibility of such an extraordinary outage. PGE/400, Lesh-Tinker/14.[4]

Finally, Staff offers no evidence for its claim that PGE could have included such events in the assumptions used to forecast test-year net variable power costs. Including extremely rare events in rates is inconsistent with the Commission's test-year rate-making policies. Attempting to capture such events would require quantifying assumptions that cover all potential disruptive events, such as an earthquake or terrorist attack. PGE/400, Lesh-Tinker/14. Neither Staff nor any party has ever sponsored such an approach for test-year forecasting. Even if PGE were to sponsor such an approach, there is no guarantee Staff or others would support it. Even if all parties supported such an approach to test-year forecasting, the Commission could, and probably should, reject it.

---

[3] The Commission may take official notice of Staff's comments in UM 1071 under OAR 860-014-0050(1)(e) as a record in the Commission's files.

[4] "[I]t should be clear that neither PGE's current prices nor those in effect in 2005 included the potential of this outage. There is no 'forced outage adder to account for outages that are more extreme than those reflected in a normal four-year rolling average.'" (quoting from Staff/100, Owings-Galbraith/23).

2. THE BOARDMAN OUTAGE WAS NOT REASONABLY FORESEEABLE AS OCCURRING IN THE ORDINARY COURSE OF EVENTS

The Boardman outage was extraordinary in nature and duration. The length of the forced outage was 105 days, which is very rare for Boardman and for the industry. The Boardman plant had a strong record for reliability. In fact, the turbine affected (the LPT1) had just been installed in 2000 and was only midway through its 10-year major maintenance cycle. Industry data from the North American Reliability Council ("NERC") demonstrate that the 105-day outage is extremely rare. PGE/300, Drennan-Tinker-Hager/4. Over the last 20 years, NERC had data on approximately 21,415 outages for generating units of similar capacity. *Id.* Only 51 of these outages lasted 105 days or longer, or approximately .238% of the outages. *Id.*

It is not just that this type of event was not reasonably foreseeable for 2005 or 2006. This was the type of event that is <u>not</u> expected to occur over the next 10 years, 20 years or even 30 years. One would not have predicted it to occur in Boardman's expected lifetime (40 years) at all. An outage event like this one occurs once every 100 years, or once every 2½ Boardman lifetimes. PGE/400, Lesh-Tinker/12 (citing deposition of Staff witness, PGE Ex. 404/4). By all accounts, this was an extraordinary outage.

The Commission has expressed a greater willingness to grant deferrals for events that will not balance out over time. UM 1071, Order No. 04-108 at 9.[5] The financial impact of the Boardman outage will not "average out" over time. There are no events captured using the four-year rolling average that compensate or offset for extraordinary forced outages like the subject of this deferral application. Although some have argued that hydro variability will balance out over time,[6] extraordinary plant outages will not, for the simple reason that a thermal

---

[5] "The financial threshold for deferred accounting is lower for the scenario or paradigm risk because the effect of that type of risk is not likely to fluctuate as the stochastic risks do. Hydro variability, for example, causes costs to swing above and below the average included in rates, so the effect should average out."

[6] PGE does not agree with this view. Although the Commission uses 69 years of data to forecast hydro generation, no one has produced a valid study demonstrating that the past distribution of results will repeat in the future and in what order.

plant cannot produce more than 100% availability. There are no "negative" forced outages to compensate the utility.[7] Moreover, the parties opposing this Application have all taken the position in this docket, and in PGE's concurrent general rate case, that future assumptions used to forecast power costs for ratesetting purposes should exclude this outage, precluding any possibility of better performance in the future balancing of this outage. Staff/100, Owings-Galbraith/21-22; UE 180 CUB/100, Jenks-Brown/7; UE 180 ICNU/103, Falkenberg/12.

3. THE FINANCIAL IMPACT FAR EXCEEDS MATERIALITY THRESHOLD

The Commission should exercise its discretion to grant the Application because the financial impact of the Boardman outage is large enough to warrant deferred accounting, no matter the characterization of the event. The total excess power cost associated with the Boardman outage is $59 million (or 355 basis points) and the deferred amount is $45.7 million (or 273 basis points), both well above the 250 basis points some parties cite as the threshold for "substantial" financial harm, let alone the lower threshold required to show "materiality."[8] Moreover, these figures do not even include the real financial harm to the Company, which includes the negative tax consequences of these excess power costs.[9]

The Commission has not yet said what is "material" in this context or how it would evaluate the question for a deferral that spans less than a year and occurs in a post-SB 408 world. Staff has suggested that the test for materiality may be $1. PGE/400, Lesh-Tinker/19; PGE Ex. 404/8-9. Certainly, the Commission has granted a host of deferred accounting orders

---

[7] PGE/400, Lesh-Tinker/13 ("Even if Oregon adopted an entirely different methodology for determining availability of thermal plants to forecast NVPC, it is still unlikely that a forced outage of this duration would 'balance out over time,' simply because a thermal plant cannot be more than 100% available. Thermal plants differ significantly from hydro generation in this regard: Thermal plants cannot produce more than 100% of 'average' which hydro can, depending on water conditions").

[8] As explained in Section IV(B), this Application is not similar to UM 995, in which the Commission chose 250 basis points as a fair amount for PacifiCorp to absorb given all the circumstances present.

[9] *See* Section VI below for the tax consequences of the Boardman outage.

for events not modeled in rates with no sharing or deadbands, supporting Staff's suggestion.[10] Moreover, the thresholds some parties suggest are based upon deferred accounting orders that covered an entire 12-month period. PGE's Application covers just under three months. PGE/400, Lesh-Tinker/18. An annual "materiality" threshold should be pro-rated, and therefore reduced, in this case to reflect the short-term nature of the deferral period.

4. PGE HAS MET ITS BURDEN OF PROOF

As discussed above, PGE has provided persuasive evidence that its Application meets the statutory requirements and all the factors the Commission has identified that warrant the exercise of the Commission's discretion to grant the Application. It has met its burden of "identifying the event," "showing its significance," and proving that all legal requirements have been satisfied. UM 1147, Order No. 05-1070 at 6-7. Other parties now have the burden of producing evidence that rebuts this case. *Id.* As addressed below, the other parties have failed to offer reliable or substantial evidence to support their claims.

IV. OTHER PARTIES' OBJECTIONS ARE EITHER RESULT-DRIVEN OR CONFLICT WITH COMMISSION PRECEDENT AND STANDARDS

A. THIS WAS NOT A NORMAL PLANT OUTAGE

Parties rest their case on Commission orders in UM 1071 and UM 995, and conclusory statements that the Boardman outage was a "normal plant outage." Staff/100, Owings-Galbraith/19; ICNU/100, Falkenberg/17; CUB/100, Jenks/9. They claim that utilities should absorb such "normal plant outages" without deferred accounting or demand the imposition of a 250-basis-point deadband notwithstanding that the deferral spanned less than three months. *Id.* These positions are functionally equivalent to denying this Application. A 250 basis point deadband would permit PGE to recover about 1% of its excess power costs incurred since the Application. Staff/100, Owings-Galbraith/20.

---

[10] *See, e.g.,* UM 1252, Order No. 06-183 (deferring tax kicker refund estimated to be $4 million); UM 1256, Order No. 06-483 (deferring expenses associated with loans to Grid West); UM 1131, Order No. 04-169 (deferring savings in information technology resulting in a $4.2 million rate credit).

There is no substantial evidence in this record to support these claims. In fact, the undisputed facts in this case contradict these conclusory statements. No one questions that outages of 105 days in duration, like the Boardman outage, account for less than .238% of all outages in the comprehensive 20-year NERC study.[11] Parties have testified that the outage was:

- "extraordinary" (CUB/100, Jenks/1, Staff/100, Owings-Galbraith/16);
- "not normal" (Staff Depo., PGE Ex. 404/3);
- a "rare plant outage" (*Id.*);
- "had an extreme duration associated with it" (*Id.*/2); and
- occurs "once every 100 years" (Staff/100, Owings-Galbraith/16).

Staff offered no evidence that this is a normal plant outage. In deposition testimony, Staff's witness claimed that normal plant outages are those "that are expected to occur," which Staff defined as "on the order of once every hundred years." PGE Ex. 404/4. Staff offered no support for this conclusion. Since UM 1071 and UM 1147, when the Commission adopted a standard for exercising its discretion to allow deferrals based on what was "modeled" in the rate-setting process, no one has offered any measure for what is "normal" other than the assumptions actually used to create test-year forecasts of various costs for purposes of setting rates. No party rebutted PGE's evidence that the assumptions used to set PGE's 2005 and 2006 rates did not include the outage that is the subject of this Application. PGE/400, Lesh-Tinker/14.

The parties' conclusory testimony is simply not credible on this point. Expert opinions can be based on facts or data. *See State v. Whitman*, 132 Or App 596, 599, 889 P2d 372 (1995) (finding that expert conclusions must be supported by facts; mere conclusions are inadequate). Implicit in this notion is the fact that an expert opinion must be based on something. Here, Staff's witness has put forth no evidence or support—no "something"—for its

---

[11] PGE/300, Drennan–Tinker–Hager/4-5 ("Data provided by the North American Electric Reliability Council (NERC) demonstrates that the 105-day length of the initial Boardman outage is extremely rare.").

opinion. *See In Re U.S. West Communications, Inc.*, Order No. 98-444, 1998 WL 992036 (Or PUC Nov. 13, 1998) (finding expert judgments unacceptable because they were not based on adequate documentation or details).

B. THIS IS NOT UM 995

The support the parties opposing this Application most commonly cite for the positions they take and arguments they advance is the Commission's order in UM 995. Staff/100, Owings-Galbraith/19; ICNU/100, Falkenberg/17; CUB/100, Jenks/9. They claim the deadband and sharing percentages from UM 995 should apply in this case. We disagree.

First, the Commission's exercise of its discretion in this context is a highly fact-specific endeavor, which the Order in UM 995 demonstrates and UM 1147 confirms. In UM 995, the Commission specifically observed that the facts in that case were extraordinary and unprecedented:

> PacifiCorp's case presented a new constellation of events: Poor hydro conditions, a plant outage, and volatile power markets. In deciding on PacifiCorp's application, we did not depart from precedent because *there were no factual situations close enough to PacifiCorp's to constitute precedent in our deferred accounting cases.*

UM 995, Order No. 01-753 at 6 (Aug. 28, 2001) (emphasis added). The Commission has rejected the use of such rigid, bright line rules that would handcuff the Commission based on prior fact-specific rulings. Rather, the Commission adopts a "flexible, fact specific review" that enables the Commission to distinguish and reject methodologies employed under different circumstances. UM 1147, Order No. 05-1070 at 1.

Second, it does not appear that the Commission intended the UM 995 Order to serve as precedent, let alone in the nature of the "rule" the parties imply it is. The UM 995 Order offers little reasoning in support of the deadband and sharing mechanism adopted. The entirety of the analysis from the final order is as follows: "We prefer Staff's mechanism to PacifiCorp's, however. PacifiCorp's model is structurally similar to Staff's but is more generous to the company. Staff's is more generous to ratepayers. We find that Staff's model balances the interests of the company and ratepayers in a more appropriate way." UM 995, Order No. 01-420 at 29 (May 11, 2001). The Commission described the events surrounding UM 995—California energy crisis, near record drought, cold weather and a catastrophic plant outage—as a "perfect storm," which it handled as best it could. UM 1071, Order No. 04-108 at 8.

Third, the UM 995 deferral period lasted almost 12 months. The Boardman deferral period lasted less than three months. The UM 995 deferral was global in nature, capturing any and all variations in power costs without regard for the cause of the variation. PGE/400, Lesh-Tinker/18. PGE's Application specifically tracks Boardman replacement power costs, excluding variations in power costs that arise from others sources.

Fourth, adopting a 250-basis-point deadband has a very different outcome in this docket than it did in UM 995. In UM 995, the global power cost deferral for one calendar year, after application of the 250-basis-point deadband, enabled PacifiCorp to defer over 60% of its excess power costs. UM 995, Order No. 02-467 at 1, Appendix B (July 18, 2002). In this docket, such a deadband would have a dramatically different impact. PGE would be allowed to defer about 1% of its excess power costs. There is no evidentiary, policy or legal basis for such a disparate and discriminatory treatment in this docket even if UM 995 were an appropriate precedent, which it is not.

The Commission should not exercise its discretion in this manner and, in other cases, it clearly has not. In UM 445, the Commission considered PGE's application for deferred accounting associated with the first Trojan outage. The Commission Staff recommended, and the Commission approved, the deferral, which permitted recovery of 90% of the excess power costs. After a thorough analysis and review, the Commission approved the deferral because "the assignment of 10% of costs to PGE investors will create a financial incentive for PGE to minimize costs during the Trojan outage * * * and:

> PGE would not customarily be compensated for "normal" variation in Trojan performance as they would effect power costs. Therefore, we suggest that assignment of 10% of power costs to PGE investors will generally reflect normal variation in plant operation. That is, PGE investors would assume the customary risk of "normal" variations in Trojan operations, which ratemaking

> actions would reflect the "extraordinary" variation occasioned by the steam generator problems."

UM 445, Order No. 91-1781, Appendix A at 6 (Dec. 20, 1991).

V. WHAT OTHER PARTIES PROPOSE IS BEYOND THE LEGAL LIMITS AVAILABLE TO THE COMMISSION

Under the deferred accounting statute, the Commission undeniably has broad discretion. Nevertheless, the Commission's statutory and constitutional requirements impose real limits on the exercise of that discretion.

> We note first that our discretion is constrained by the statutory scheme that creates and governs the Commission. That is, the deferral statute must be read to grant us a sphere of discretion that does not conflict with regulatory practice. The deferral statute is a specific grant of authority to make rates retroactively. It must be read to avoid conflict with the other statutory provisions governing ratemaking.

Order No. 04-108 at 8.

The position of the parties opposing this Application is extreme, punitive, and, if adopted, unlawful. It departs substantially from the positions taken in prior dockets. In PGE's hydro deferral, parties opposed PGE's hydro shortfall deferral on the grounds that hydro variability reflects known variability that the test-year forecast models by using average hydro conditions to forecast annual production. Staff and others believed that deferred accounting could permit the utility to recover twice: once through the use of this averaging methodology, and a second time through deferred accounting. UM 1071, Order No. 04-108 at 3-4.

In this docket, the parties have taken the opposite extreme position. Their position is that PGE should never be able to recover its power costs associated with extraordinary outages like this one. Thus, the parties propose a 250-basis-point point deadband for the Boardman outage, which virtually eliminates the entire deferred balance. Staff/100, Owings-Galbraith/19; ICNU/100, Falkenberg/17; CUB/100, Jenks/9. Then these parties exclude the Boardman outage in calculating Boardman's future plant availability. Staff/100, Owings-Galbraith/21-22; UE 180 CUB/100, Jenks-Brown/7; UE 180 ICNU/103, Falkenberg/12. In other words, PGE cannot recover these costs through rates set on a test year and PGE cannot recover these costs through deferred accounting. The parties are, therefore, suggesting that PGE should not be allowed to recover $41.9 million (250 basis points) of its operating costs, not because of imprudence and not because of an accident PGE should have prevented or known about. PGE should not be able to recover these costs simply because of the pernicious combination of the test-year forecasting method and a faulty deferred accounting policy advanced in this docket.

Such an extreme position violates statutory norms. The Commission's statutes do not guarantee that utilities will recover their operating costs. Cost and revenue variability will affect recovery of operating costs in any given year. The law <u>does</u> guarantee that the utility be given an <u>opportunity</u> to recover its reasonable operating costs, and the proposals in this docket would deprive the utility of that opportunity.[12] The parties' position is that utilities may not recover operating costs associated with extraordinary plant outages. Rates set adopting this position would be unfair, unreasonable and unlawful under ORS 756.040.[13]

ORS 756.040 imposes on the Commission an obligation to "balance the interests of the utility investor and the consumer in establishing fair and reasonable rates" and ensure that rates are just and reasonable. The Commission's obligations in this regard are not limited to rate case proceedings. Nothing in Chapters 756 or 757 limits the Commission's need to pursue its responsibilities under ORS 756.040 beyond test-years based rate cases. Rather, that statute establishes the Commission's general powers and obligations which govern all Commission proceedings that affect rates and services. Deferred accounting is a specific Commission tool that complements its test-year ratemaking policies. The Commission uses deferred accounting to

---

[12] "The Commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates. Rates are fair and reasonable for purposes of this subsection if the rates provide adequate revenue both for operating expenses of the public utility" and "for capital costs of the utility" a reasonable rate of return on equity. ORS 756.040(1).

[13] In SB 1149, the Legislature underscored the notion that Oregon electric companies' rates must provide for a cost-of-service option. ORS 757.603(1). PGE's Application concerns variations in its power cost assumptions used to set cost-of-service rates. While a "cost-of-service" rate may not guarantee recovery of a utility's operating costs, nothing in ORS 757.603, or any other Commission-administered statute, suggests that a cost-of-service rate may systematically prohibit recovery of reasonably incurred operating expenses.

handle situations where forecasting a necessary assumption does not work in the traditional test-year framework. In particular, when the test-year assumptions encompass only a certain degree of variation, deferred accounting is appropriate to capture such events which are too rare for inclusion in the test-year forecast to establish base rates. When the Commission acts in this capacity, it is constrained and guided by its general powers conferred under ORS 756.040.

The proposals in this docket are also constitutionally suspect. Rates that deny the utility the opportunity to recover operating costs are confiscatory and violate a utility's constitutional rights. *See, e.g., A-1 Ambulance Service v. County of Monterrey*, 90 F.3d 333, 337 (9th Cir. 1996) (finding confiscatory rates where such rates were insufficient to cover "operating expenses, much less a reasonable rate of return"); *Aetna Casualty & Surety Company v. Commissioner of Insurance*, 358 Mass. 272, 263 N.E. 2d 698 (1970) (rates were confiscatory that were insufficient to cover operating expenses or any profit); *Medical Malpractice Joint Underwriting Ass'n v. Paradis*, 756 F. Supp. 669, 675 (D.R.I. 1991) (rates were confiscatory because they required insurer to operate at a loss). This is particularly apt in this case given that the return on equity the Commission sets does not compensate utilities for such a systematic failure to permit recovery of reasonable operating costs.

VI. THE IMPACT OF SB 408 MUST BE CONSIDERED

The other parties in this docket have ignored the impact of SB 408. PGE Ex. 404/16-17; PGE Ex. 405/1. The Commission should not, and has said it will not. AR 499, Order No. 06-400 at 9 (July 14, 2006) ("In response, we will consider the tax effects when evaluating issues in other dockets, such as power cost adjustment mechanisms").

The Commission's recent direction on deferred accounting not only considers the financial effect on the utility but makes that a determinative factor. UM 1147, Order No. 05-1070 at 3. The financial impact on PGE of the Boardman outage will include not only excess power costs but also the income tax impact of those expenses. For each dollar of excess power costs, SB 408 imposes a "double whammy" on the utility by providing customers with a tax benefit of 40% of the excess power costs. This is because the fixed ratio approach to calculating "taxes collected" under SB 408 excludes all actual variances from test-year forecasting assumption figures, but SB 408 captures the tax consequences of the variances through the calculation of taxes paid. *See* AR 499, Order No. 06-400 at 8-9.

The financial thresholds and deadbands some have suggested in this docket are ill-conceived and unduly restrictive, as we argue above. Nevertheless, if the Commission elects to adopt such thresholds, or any thresholds, it should consider the SB 408 impact. SB 408 was not in effect when the Commission issued its orders in UM 995, UM 1071 and UM 1147, on which some parties rely for threshold and sharing percentages. The thresholds suggested by those parties, therefore, do not reflect the actual financial impact on the utility of cost and revenue variances. Those thresholds should be adjusted to reflect the SB 408 impact of variances, or the SB 408 impacts should be expressly added to the deferred amount calculation, increasing the deferred amount by PGE's effective tax rate. For example, a 250-basis-point annual deadband for PGE is approximately $41.9 million. Staff/100, Owings-Galbraith/20. This amount should be reduced to $25.1 million to reflect the SB 408 impact. In other words, $25.1 million of excess costs today causes the same financial harm to the utility as 250 basis points of earnings before the enactment of SB 408 ($41.9 million * 60%) because, in the pre-SB 408 world, the utility would have absorbed the tax benefit and would have incurred $25.1 million of after-tax earnings impact from a $41.9 million pre-tax deadband. In addition, sharing percentages outside the deadband should be adjusted to reflect SB 408's impact.

VII. CONCLUSION

For the reasons stated above, the Commission should approve PGE's Application.

DATED this 7th day of September, 2006.

PORTLAND GENERAL
ELECTRIC COMPANY

By Dal White FOR DCT

Douglas C. Tingey OSB No. 04436
121 SW Salmon Street, 1WTC1301
Portland, OR 97204
503-464-8926 (Telephone)
503-464-2200 (Facsimile)
doug_tingey@pgn.com

TONKON TORP LLP

By Dal White

David F. White, OSB No. 01138
888 SW Fifth Avenue, Suite 1600
Portland, OR 97204
503-802-2168 (Telephone)
503-972-3868 (Facsimile)
davidw@tonkon.com

Attorneys for Portland General Electric
Company

001991\00260\708374 V005

CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **OPENING BRIEF OF PORTLAND GENERAL ELECTRIC COMPANY** 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.

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

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

S. Bradley Van Cleve
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

Stephanie S. Andrus
Assistant Attorney General
Department of Justice
Regulated Utility and Business Section
1162 Court Street NE
Salem, OR 97301-4096

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

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

Randall J. Falkenberg
RFI Consulting, Inc.
PMB 362
8351 Roswell Road, PMB 362
Atlanta, GA 30350

DATED this 7th day of September, 2006.

TONKON TORP LLP

Dal Whit

David F. White, OSB No. 01138
888 SW Fifth Avenue, Suite 1600
Portland, OR 97204
503-802-2168 (Telephone)
503-972-3868 (Facsimile)
davidw@tonkon.com

001991\00260\708374 V004