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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 1224*

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of Portland General Electric Company's Amended Comments on Application for Deferred Accounting. 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,

A handwritten signature in cursive script, appearing to read "Leslie Hurd".

Leslie Hurd, Legal Assistant to
David F. White

/ldh

Enclosure

cc (w/enc.): Service List

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**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 AMENDED COMMENTS
ON APPLICATION FOR DEFERRED
ACCOUNTING**

I. INTRODUCTION

Pursuant to the Revised Scheduling Memorandum, dated August 15, 2006, Portland General Electric Company ("PGE") hereby files these Amended Comments. PGE filed its initial comments on November 10, 2005. The Administrative Law Judge held the docket in abeyance pending the outcome in the reconsideration phase of UE 170. After the Commission ruling in UE 170 ("Reconsideration Order"), PGE moved to brief the impact of the Reconsideration Order on this docket. At the August 7, 2006, prehearing conference, URP proposed, and the parties agreed, that PGE should file these Amended Comments. *See Revised Scheduling Memorandum.*

Much has changed since PGE filed its initial comments—the SB 408 automatic adjustment is operative, the Commission will soon issue permanent rules in AR 499 implementing SB 408, and the Commission has ruled in the reconsideration phase of UE 170. PGE has substantially amended its comments to reflect these changed circumstances. These Amended Comments replace and supersede PGE's initial comments.

The Utility Reform Project's and Ken Lewis's (collectively "URP") Application for Deferred Accounting ("URP's Application") and complaint ("Complaint") suggest that this

proceeding should be about Senate Bill 408 (“SB 408”).¹ URP is wrong. URP has filed for deferred accounting under the general deferral statute—ORS 757.259—not SB 408. URP’s Application fails under ORS 757.259 for at least three reasons: (1) the deferred accounting statute does not authorize URP’s combination of a deferred accounting application and general rate complaint (*see* Section III below); (2) SB 408 addresses URP’s central complaint, the matching of taxes collected and taxes paid, and provides for a backward-looking mechanism effective January 1, 2006, and no sooner (*see* Section IV below); and (3) the financial impact of the proposed deferral for 2005 would push PGE’s earnings to more than 500 basis points below the authorized level, a circumstance that neither warrants the Commission’s exercise of discretion to grant deferred accounting treatment nor permits amortization of any deferred amounts under the law (*see* Section V below).

The Commission should reject URP’s Application at this stage in the proceeding. In the event the Commission declines to deny URP’s Application without further proceedings, PGE requests a hearing under ORS 757.259(2) and asks that the Commission conduct a contested case proceeding on URP’s Application.

II. URP’S FILINGS

Although URP has filed two separate papers—the Complaint and Application—the basis for both submissions is the same. URP complains and seeks deferred accounting because PGE’s current rates allegedly include a tax expense that is not paid to any governmental entity. Thus, the Complaint alleges that:

PGE’s rates, since September 2, 2005 [the effective date of SB 408], and continuing to the present, are not just and reasonable

¹ These Comments concern URP’s Application. PGE’s Amended Motion to Dismiss filed today in the companion docket UM 1226 responds to the Complaint.

and are in violation of SB 408 (2005) because they contain approximately \$92.6 million in annual charges for state and federal income taxes that are not being paid to any government.

Complaint at 1.

The reason URP offers for deferred accounting is the same:

Deferred accounting is requested, because PGE is charging ratepayers approximately \$92.6 million annually for ‘federal income taxes’ and ‘state income taxes’ that is not being paid to either government. The Commission has concluded that, as of the effective date of SB 408, such charges are not fair, just and reasonable.

Application, ¶ 5(b).

The Complaint and Application fit together. The Complaint appears to seek a prospective change in PGE’s rates. Complaint, ¶ 6. The Deferred Accounting Application seeks to lock in that rate change as of the date of the filing. Application, ¶ 5.

III. URP’S APPLICATION IMPROPERLY SEEKS TO USE DEFERRED ACCOUNTING WITH A GENERAL RATE COMPLAINT

The Legislature did not intend for the Commission or parties to use deferred accounting to render current rates interim or to refund revenues without any lawful basis. URP has tried this strategy before, and the Commission has rejected it.

In UE 76, URP combined a complaint under ORS 756.500 with an application for deferred accounting based upon alleged unlawful late fee charges. Order No. 92-1128 at 1-2. The complaint and deferral application were consolidated because the “issues relating to the deferral are largely the same as the issues in the complaint case.” *Id.* at 2. The Commission found that a prospective rate adjustment was appropriate to recognize the additional late fee revenues. *Id.* at 7-8. Because the amount of the adjustment was small (about \$300,000 per year), the Commission established, on a prospective basis from the date of the Commission order, a deferral for the adjustment amount to minimize the frequency of rate changes. *Id.*

However, the Commission rejected a retroactive rate adjustment effective upon the filing of the complaint and application for deferred accounting:

We now turn to URP's Application for deferred accounting filed in 1989. The deferral URP requests is very different from the deferral we ordered above of excess revenues which Pacific will receive subsequent to this order. That deferral is clearly within the scope of ORS 757.259, as we noted. URP's Application asks for deferral of excess revenues back to the time of application in 1989. We conclude that URP's Application must be denied because the deferral is not permitted by that statute and is not otherwise sanctioned by law.

Id. at 8.

Deferred accounting is a mechanism to address variations in costs or revenues between rate cases. It allows the utility to defer the recovery from, or credit to, customers of unexpected variations in costs or revenues, respectively, until a later time. This may assist in reducing the frequency of rate fluctuations or serve to match costs borne by customers and benefits received by customers. The main point here is that this rate-making tool is designed for use between rate proceedings:

For permanent, long term increases in utility rates, the procedures of ORS 757.210, including interim rate increases, are appropriate. For the most part, deferrals under ORS 757.259(2)(c) were to be for discrete items which might substantially affect a utility's earnings on a short term basis. Accounts must be authorized every 12 months and amortized to rates after an earnings review. And, except in limited circumstances not applicable here, *it was never contemplated that this statute would serve any function, once a rate proceeding was under way.*

Id. at 8-9 (emphasis added).

Oregon's regulatory scheme enables any party to file a rate complaint under ORS 756.500 or the Commission to bring its "own motion" proceeding to examine a utility's rates (ORS 756.515). The Oregon statutes also provide that the utility may demand a contested case proceeding before entry of a final rate order changing rates. ORS 756.515(5) and (6). If

parties justify a rate change in that contested case proceeding, the Commission may set new rates on a prospective basis.

The utility statutes do not permit the Commission to declare existing rates interim subject to refund based on the outcome of a general rate case proceeding. The Commission reached this conclusion in docket UT 85 and the Court of Appeals agreed:

The effect of an order declaring those existing rates to be interim would have been to allow a rate reduction before the reduced rate had been approved; it would, in essence, have been a retroactive adjustment . . . We hold that it was not error for the PUC to refuse to declare PNB's existing rates to be interim and subject to refund.

Pacific Northwest Bell v. Eachus, 135 Or App 41, 49-50, 898 P2d 774 (1995).

In UE 76, the Commission rejected URP's deferral application for just this same reason:

In substance URP is requesting that the Commission order deferral of excessive earnings of the utility measured by the revenue requirement found in this proceeding to be appropriate on an ongoing basis for permanent rates. The Commission does not believe that such a request should be a matter for deferred accounting or would be authorized by the deferred accounting statute. While the Commission once had power to capture excessive earnings of a utility, a form of retroactive rate-making, that power was repealed by the legislature in 1971.

Order No. 92-1128 at 9 (internal citations omitted).

URP's current deferred accounting application suffers from the same defect.

URP's allegations center on PGE's current rates, alleging they are unjust and unreasonable. But that is the basis of a general rate complaint or general rate-making proceeding with prospective-only outcomes, not deferred accounting. The deferral statute does not authorize deferred accounting for general claims of "unjust and unreasonable" rates. Permitting a deferral to accompany a general rate complaint violates fundamental principles of Oregon ratemaking by seeking to exact a retroactive adjustment based on the outcome of a general rate case proceeding.

IV. SB 408 NEITHER AUTHORIZES NOR IS CONSISTENT WITH URP'S APPLICATION

URP's Application concerns two very distinct time periods. The first time period runs from the filing of the Application (October 5, 2005) through to December 31, 2006; the second begins on January 1, 2006 and continues through the end of the deferral period. The Commission should reject URP's Application with respect to *both* time periods, but the reasoning differs depending on the time period because the SB 408 automatic adjustment clause is effective January 1, 2006. *See* SB 408, § 4(2).

A. TIME PERIOD BEFORE APPLICATION OF THE SB 408 AUTOMATIC ADJUSTMENT CLAUSE

The unstated yet clear assumption underlying URP's application is that SB 408 authorizes the proposed deferral. URP is wrong. It filed the Application under the general deferral statute. Application, ¶ 5(b). The SB 408 Legislature amended a number of Commission-administered statutes, including ORS 757.210, but declined to amend or alter the deferred accounting statute. SB 408 provides no basis for a deferred accounting order under ORS 757.259.

The legislative choices surrounding SB 408 are inconsistent with URP's Application. The Legislature could have authorized deferred accounting as the tool for implementing the true-up between the tax expense in rates and taxes paid. Instead, it elected to amend ORS 757.210 and authorize an automatic adjustment clause that operates independently from the deferred accounting statute. *See* ORS 757.268(6). The Legislature could have made the automatic adjustment clause effective immediately upon passage. Instead, the Legislature decided that the "backward looking" component of SB 408 would take effect on January 1, 2006,

and no sooner. SB 408, § 4(2). Through these choices, the Legislature rejected exactly what URP's Application proposes: a true-up of taxes collected and taxes paid before January 1, 2006.

The Commission's final order in UE 170 (the "Reconsideration Order") offers no support for URP's Application. The Reconsideration Order had a narrow focus: the application of SB 408's amendments to a general rate case proceeding in which the Commission sets rates prospectively under its general rate-making statute. The Commission concluded that SB 408's amendments to ORS 757.210 evidenced an intent to alter the way the Commission addresses tax expenses when setting rates prospectively under that statute:

We affirm our earlier decision, however, that the application of SB 408 to this proceeding required a *prospective adjustment* to PacifiCorp's base rates.

Order No. 06-379 at 6 (emphasis added).

The Commission's extremely narrow ruling in UE 170 offers no authority for URP's deferred accounting application under ORS 757.259. In UE 170, the Commission applied a statute (ORS 757.210) that the SB 408 Legislature specifically amended, and linked those amendments to its primary objective of aligning the tax expense in rates with the taxes paid to taxing authorities. Here, URP seeks a deferred accounting order under a statute the Legislature neither amended nor utilized in implementing SB 408.

B. AFTER JANUARY 1, 2006, THE SB 408 AUTOMATIC ADJUSTMENT CLAUSE PROVIDES THE EXCLUSIVE BACKWARD-LOOKING RATEMAKING ADJUSTMENT

In exercising its discretion under ORS 757.259, the Commission considers “whether there are other, more appropriate regulatory tools to address recovery of the identified costs or revenues.” UM 1147, Order No. 05-1070 at 10. The SB 408 automatic adjustment clause, which is effective as of January 1, 2006, will address the exact same issue URP's

Application seeks to resolve—namely, a true-up of tax expenses paid in rates with actual taxes paid to taxing authorities. After January 1, 2006, URP's Application is moot or unnecessary.

The permanent rules implementing SB 408 and its automatic adjustment clause are the superior vehicles to address these issues. The AR 499 docket in which the Commission will adopt permanent rules has already been opened, the Commission issued an interim order, Staff published multiple versions of draft rules, the parties commented on the interim order and draft rules, and the Commission held a public meeting. Permanent rules are expected in September. All the affected utilities and customer groups have intervened and are participants in AR 499, ensuring that the Commission will have the benefit of hearing from all affected parties, not just one intervenor and one utility. The participation of all utilities also ensures a consistent outcome for all affected utilities and customers. SB 408 directly authorized the automatic adjustment clause and the implementing rules that the Commission will promulgate in AR 499. In contrast, URP's Application lacks any statutory authority. All factors point to AR 499 and the Commission rules implementing SB 408 as the appropriate and exclusive mechanism to address and resolve these issues.²

V. THE FINANCIAL IMPACT OF THE PROPOSED DEFERRAL DOES NOT JUSTIFY DEFERRED ACCOUNTING TREATMENT

One of the important factors the Commission considers in exercising its discretion under ORS 757.259 is the financial impact of the proposed deferred accounting order. UM 1147,

² Granting URP's Application could jeopardize the availability of accelerated depreciation deductions under the federal tax code. Utilities that do not observe normalization rules risk losing the ability to take advantage of accelerated depreciation deductions available under the federal tax code. In this regard, URP's Application lacks the safeguards SB 408 establishes. SB 408 has a specific provision that permits deferred taxes to be included in rates and any other "tax requirements and benefits that are required to be included in order to ensure compliance with the normalization requirements of federal tax law." ORS 757.268(8)(b). The draft permanent SB 408 rules also address this issue.

Order No. 05-1070 at 7. Moreover, the financial impact on the utility is relevant at the amortization phase where the Commission applies an earnings test before authorizing the recovery or refunding of deferred amounts. ORS 757.259(4). Since PGE filed its initial comments, more information has become available regarding the financial impact of the proposed deferral. According to PGE's Regulated Results of Operation filed on June 1, 2006, PGE's earnings test adjusted return on equity for 2005 was 6.64%.³ In its application, URP proposes to defer approximately \$23 million for the final quarter of 2005, which reflects more than 135 basis points of earnings for PGE. *See* Application, § 5(d) (estimating deferred amount at \$92.6 million per year).

Under these circumstances, the Commission should exercise its discretion to deny the Application. For 2005, PGE's earnings were almost 400 basis points below the authorized level the Commission established in PGE's last general rate case without the proposed deferral. URP's proposed deferral would push PGE's return on equity to more than 500 basis points below the authorized level. Amortization of the amounts URP proposes to defer for 2005 will never survive an earnings test, which is required by law. ORS 757.259(4). An exercise of the Commission's discretion is unwarranted when there is no chance for recovery or refunding of the deferred amounts.

³ Pursuant to OAR 860-014-0050(1)(e), the Commission may take official notice of PGE's 2005 Regulated Results of Operation, a document "in the files of the Commission which have been made a part of the file in the regular course of performing the Commission's duties."

VI. CONCLUSION

For the reasons stated above, the Commission should deny URP's Application.

DATED this 11th day of September, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S AMENDED COMMENTS ON UTILITY REFORM PROJECT'S APPLICATION FOR DEFERRED ACCOUNTING** 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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