

# BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1224

**UTILITY REFORM PROJECT  
and KEN LEWIS,**

**Application for Deferred  
Accounting,**

**(UM 1224)**

**REQUEST FOR OFFICIAL NOTICE  
OF PGE'S REPORT ENTITLED  
"OPUC REGULATORY REPORTING  
RESULTS OF OPERATIONS January  
2007 through December 2007"**

**OAR 860-014-0050**

The parties request the ALJ to take official notice and make part of the adjudicative facts of this proceeding PGE's "OPUC REGULATORY REPORTING RESULTS OF OPERATIONS January 2007 through December 2007," which PGE filed with the Commission on June 2 or 3, 2008. OAR 860-014-0050(1)(a), (1)(e) and (1)(f). The report is required by OAR 860-027-0070. The facts contained therein are presumed accurate and are completely within the definition of Rule OEC 201(b) of the Oregon Rules of Evidence and OAR 860-014-0050(1)(a).<sup>1</sup> The report has been filed "in the regular course of performing the Commission's duties" [OAR 860-014-0050 (1)(e)] and contains "[g]eneral, technical or scientific facts within the specialized knowledge of the agency." OAR 860-014-0050(1)(f).

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1. Rule 201(b) [ORS 40.065(2)]:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

- (1) Generally known within the territorial jurisdiction of the trial court; or
- (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

It would be an abuse of discretion, and contrary to statutory duty, for the Commission to *forbid* the inclusion of probative evidence of the highest authenticity and accuracy from the record of the proceeding. See generally, ***Arlington Educ. Ass'n v. Arlington School Dist. No. 3***, 177 OrApp 658, 663, 34 P3d 1197, 1200 (2001) (construing the similar language of ORS 183.450(4)). There can be no "rational relationship" between determining fair, just and reasonable rates and refusing to consider the best evidence available, particularly when the evidence is produced by the party (here, PGE) most likely to oppose its consideration.

A central issue in this case is whether the \$26.5 million in income tax overcollections by PGE during the period from October 5, 2005, through December 31, 2005, should not be returned to ratepayers, for the reason that PGE allegedly was not earning its full authorized rate of return on equity during an "earnings test" period. The Utility Reform Project and Ken Lewis [hereinafter URP] argued that the legally correct earnings test applies to "the utility's earnings at the time of application to amortize the deferral." ORS 757.259(5). The Opening Brief of URP (p. 12) stated:

The only earnings test that the statute allows is the "review of the utility's earnings at the time of application to amortize the deferral." The phrase "at the time of the application to amortize the deferral" clearly modifies the phrase "utility's earnings." Thus, the only allowable earnings review in this proceeding would be a review of PGE's earnings "at the time of the application to amortize the deferral." As noted earlier in this brief, that time was when URP requested a prehearing conference to complete this UM 1224 proceeding, which occurred on January 11, 2008.

The URP briefs also showed the Commission's prior practice of using the most recent 12 months for which data was available, allowing use of older data only when

"the updated figures to June 30 were not available as a practical matter for use in this case." OPUC Order No. 95-1216, p. 6 (Reply Brief of URP, p. 8).

At the April 2, 2008, hearing, it was established that PGE had not yet filed its 2007 PGE Results of Operations Report to the OPUC. It appears that this report was due to the OPUC on April 1, 2008, pursuant to OAR 860-027-0070.<sup>2</sup> The PGE witness at the hearing asserted that PGE could not know whether it had been earning more than its authorized rate of return in 2007 until the report was filed.

23 Q. Well, first of all, when will you be filing a  
24 report for 2007 that is similar to the report you did for  
25 2006 that we just designated URP 100?

1 A. (Mr. Hager) The Results of Operation report is  
2 due on May 1.

3 But before we go on. We have in the past, like,  
4 asked for 30-day extension. I don't know if we are going  
5 to do that this year or not. Potentially it's due May 1  
6 and is provided by June 1 at the latest.

7 Q. Now if we look at your 10-K report can you tell  
8 me whether it means that PGE did earn more than its  
9 authorized rate of return for calendar 2007?

10 MR. WHITE: Your Honor, I just want to  
11 state my objection to this line of questioning. And that  
12 it concerns time periods well outside the scope of the  
13 deferral period and the earnings test period. And it's  
14 not within the scope of these witnesses testimony.

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2. 860-027-0070. Annual Report Requirements for Electric, Large Telecommunications, Gas, and Steam Heat Utilities

(1) Annual Reports will be submitted by electric, gas, water, and steam heat utilities. The report shall be submitted on or before April 1, using the most current forms approved by the Commission.

15 ALJ KIRKPATRICK: I'm going to give  
16 Mr. Meek some allowance here under the -- I believe what  
17 he's questioning is whether the earnings test was the  
18 correct time period.

19 WITNESS HAGER: I can't say whether PGE  
20 overearned in 2007 yet or not. We haven't done any  
21 preliminary analysis on that yet.

TR 23-24. PGE filed this report on June 2 or 3, 2008, without providing it to URP  
counsel.

Now, as a practical matter, the figures from the 2007 PGE Results of Operations  
Report are available. They conclusively demonstrate that, "at the time of the  
application to amortize the deferral," PGE was earning profits at a level far higher than  
its authorized rate of return on equity.

During the April 2, 2008, hearing, URP counsel asked the PGE witnesses to  
identify which numbers on the Results of Operations summary table were the  
appropriate numbers to compare with PGE's authorized rate of return.

9 Q. Now in your testimony where you refer to the PGE  
10 earnings being less than -- the PGE earnings being  
11 realized during the earnings review period you're  
12 proposing as being less than was authorized -- less than  
13 your authorized rate of return, which of these numbers  
14 are you referring to? Are you referring to the actual  
15 financial statements, the regulated utility actuals, the  
16 pro forma results? Which of those numbers is the key  
17 number?

18 A. (Mr. Hager) Well, let's be clear. This is a  
19 report from the results of operations. So if I was going  
20 to compare this number to PGE's authorized ROE, it would  
21 be the one -- the column five, which says, "Regulated  
22 adjusted results."

TR 15. The "Regulated Adjusted Results" for 2007 produced a "Return on Equity" of 11.58%. PGE, OPUC Regulatory Reporting Results of Operations, January 2007 through December 2007, p. 1, col 5 (attached to this motion). This is higher than PGE's 10.1% authorized rate of return for 2007. The 2007 PGE Results of Operations Report uses the rate order in UE 180 (OPUC Order No. 07-015) as establishing the authorized rate of return applicable to 2007: 10.1%.

Another way of quantifying the 2007 overearning is that, under OPUC Order No. 07-015 (App F, p. 1, col 5, line 23) (attached to this motion), PGE was authorized to earn \$143,306,000 in net operating revenues for 2007. In reality (under Regulated Adjusted Results for 2007), PGE earned \$180,224,000. The difference is earnings of \$36,918,000 for 2007 in excess of the level authorized by OPUC Order No. 07-015.

This newly available data eliminates the factual basis for Staff's position that refunding the \$26.5 million overcollection to ratepayers is not necessary.

Regarding the earnings test applied to the method discussed above, the evidence shows that PGE's earnings are several hundred basis points below its authorized rate of return. Accordingly, Staff believes that the Commission should not require PGE to amortize the deferred amount due to the outcome of PGE's earnings test.

Staff Opening Brief, p. 2. Rather than being below the authorized rate of return, PGE's earnings during the most recent 12 months "at the time of application to amortize the deferral," ORS 757.259(5), were 148 basis points above the authorized rate of return.

Thus, even under the legal theory that underearnings can justify a refusal to amortize the deferred amount (which we contest), there is no factual basis for the

position of Staff and PGE and therefore no grounds for the Commission to fail to order PGE to return the \$26.5 million of income tax overcollections to ratepayers, with appropriate interest.

Because the information is centrally relevant to the major issue in this case, and because it fully qualifies for official notice pursuant to the Oregon Rules of Evidence and OAR 860-014-0050, we request official notice of the pages of PGE's report entitled "OPUC REGULATORY REPORTING RESULTS OF OPERATIONS January 2007 through December 2007" that are appended to this brief. We would not object to official notice of the entire contents of the document, which is available in the Commission's files.

Dated: June 16, 2008

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I filed served for foregoing REPLY BRIEF OF UTILITY REFORM PROJECT AND KEN LEWIS by email to the list below and by depositing a true copy in the U.S. Mail, first class postage prepaid, a true and correct copy upon the addresses below.

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Dated: June 16, 2008

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