

**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 REPLY BRIEF**

URP fundamentally ignores the nature of this proceeding. This is a deferred accounting and amortization proceeding under ORS 757.259. The Commission made a discretionary decision to allow a deferral related to taxes collected between October 5, 2005 and December 31, 2005. Order No. 07-351. The Commission is now required to decide, after conducting a mandatory earnings test pursuant to ORS 757.259, whether amortization of the deferred amount is appropriate in light of PGE's actual earnings during the deferral period. URP ignores this statutory requirement and urges the Commission to simply refund the full deferred amount regardless of the earnings test. Indeed, URP generally ignores ORS 757.259 and treats this proceeding as if it were a mandatory adjustment under SB 408 rather than a deferred accounting originated by URP under a discretionary statute.

The question before the Commission is whether amortization of the deferred amount is appropriate given the results of PGE's earnings test. The answer is clearly "no." Indeed, the answer is so clearly "no" that the Commission need not even decide various sub-questions such as what effect the SB 408 accrual should have on PGE's earnings calculation, what the exact deferred amount is, or whether to apply a restrictive or non-restrictive approach to the earnings test. Under any analysis, PGE's actual earnings are so far below its authorized rate of return, and the minimum reasonable rate of return, that amortization is inappropriate. PGE urges the Commission to adopt Staff's recommendation and deny amortization.

I. THE COMMISSION IS FOLLOWING PROPER PROCEDURE

URP expresses some concern in its Opening Brief about whether the Commission is following proper procedure for a deferred accounting. (URP Op. Brief at 2) PGE believes the Commission is following the same procedure it has always followed for deferred accountings and that such procedure is legally correct.

Under URP's interpretation of the statutes, the Commission could only decide whether to amortize a deferred amount in a rate proceeding initiated by the utility. *See* ORS 757.259(5) (allowing inclusion of deferred amounts in rates only in a proceeding under ORS 757.210); ORS 757.210 (describing proceeding where "public utility" files a new rate or schedule of rates with the Commission). This reading is inconsistent with the statutory scheme as a whole, and in particular the deferral statute. *See* ORS 757.259(2) (allowing utility or ratepayer to seek deferred accounting). The better reading of the statutes is that a utility or ratepayer may seek deferred accounting and amortization in a proceeding such as this one and, if the Commission ultimately orders amortization, then the utility must file a tariff consistent with the final order and ORS 757.210. PGE disagrees with URP that there is any procedural problem in this case.

II. THE EARNINGS TEST IS MANDATORY AND ESTABLISHES THAT AMORTIZATION IS INAPPROPRIATE IN THIS CASE

URP asserts that amortization of the deferred amount is required in this proceeding, regardless of PGE's actual earnings for the deferral period. (URP Op. Brief at 9) This assertion is incorrect and ignores the plain language of the deferral statute, as well as the Commission order allowing deferred accounting in the first place.

ORS 757.259(5) specifically states that, unless subject to an automatic adjustment clause, deferred amounts shall only be allowed in rates "upon review of the utility's earnings at the time of application to amortize the deferral." The Commission expressly recognized this statutory requirement in its order allowing deferred accounting in this case, stating that "we [the Commission] agree that PGE's earnings will be reviewed at the time we consider amortization of

the deferral. *See* ORS 757.259(5)." Order No. 07-351 at 8. Thus, the earnings test is mandatory, and URP has never explained, nor can it explain, how the Commission has authority to ignore this statutory requirement, let alone why it should do so when it expressly stated that it would conduct an earnings test as part of its order allowing deferred accounting in the first place.

Instead, URP tries to distract from the statutory requirement, and in the process mischaracterizes this proceeding by suggesting that PGE is trying to use the deferred accounting process to recoup past losses in violation of the rule against retroactive ratemaking. (URP Op. Brief at 9-12) This is nonsense. URP initiated this proceeding. It is URP that is seeking to defer PGE's revenues generated from the rates established by the Commission and already collected by PGE. ORS 757.259 allows such retroactive rate adjustments under extraordinary circumstances, but only upon consideration of the utility's overall earnings after conducting an earnings test. ORS 757.259(5). URP cannot seriously be arguing that the deferred accounting statute violates the rule against retroactive ratemaking when URP is the one who applied for deferred accounting in this case and now seeks amortization of the deferred amount. URP cannot just use the part of ORS 757.259 it likes and ignore the rest.

URP next argues that if an earnings test is to be applied, it should be based on PGE's earnings at the time of URP's application for amortization (January 11, 2008), rather than PGE's earnings during the time period encompassing the deferred amount. (URP Op. Brief at 12-13) This is a misreading of ORS 757.259, as well as an improper collateral attack on the Commission rule, OAR 860-027-0300(9). ORS 757.259(5) states that deferred amounts shall only be included in rates "upon review of the utility's earnings at the time of application to amortize the deferral." The Commission has reasonably interpreted this statutory language to mean that review should occur at the time of application to amortize the deferral. This interpretation is incorporated into OAR 860-027-0300(9), which specifically requires that the period selected for earnings review in connection with an amortization proceeding must "encompass all or part of the period during which the deferral took place or must be reasonably representative of the deferral period."

URP's arguments are clearly a collateral attack on OAR 860-027-0300(9) and thus improper in this proceeding. See *In the Matter of OPUC Staff Requesting the Commission Direct PacifiCorp, dba PACIFIC POWER, to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, UE 177, Order No. 08-201, at *4-5 (April 11, 2008) ("If ICNU wishes to challenge or change the existing rule, a petition to open a separate proceeding is the proper procedure for doing so. We disregard ICNU's arguments with respect to this issue."). The Commission should therefore disregard URP's argument that PGE's earnings should be tested as of the date URP filed its application rather than a time period encompassing the deferral period.¹ *Id.*

Finally, URP protests that if the deferred amount is not amortized now, it will never be amortized. (URP Op. Brief at 13) That is true, but that is the nature of deferred accounting under ORS 757.259, and it is equally true whether the deferred amount under consideration would result in a charge or a refund. If the earnings test does not support amortization, then amortization is not allowed, regardless of who financially benefits from such conclusion.

III. THE COMMISSION NEED NOT DECIDE THE EXACT DEFERRED AMOUNT OR HOW BEST TO CALCULATE PGE'S ROE

The parties disagree, or potentially disagree, regarding several sub-issues in this proceeding. Staff and PGE disagree as to the proper way to calculate PGE's earnings, with Staff proposing removal of the SB 408 accrual during the earnings test period and PGE opposing such an adjustment. (PGE Op. Brief at 9-10) PGE and URP may disagree as to the proper way to conduct an earnings test (restrictive or non-restrictive), although it is unclear since URP's position is that the Commission should simply not bother with an earnings test. (PGE Op. Brief at 8-9) Finally, although all the parties agree that the deferred amount would be \$26.5 million under a strict SB 408 calculation, PGE disagrees that the Commission should use that

¹ Even if the attack on OAR 860-027-0300(9) was procedurally appropriate (which it is not), URP's alternative interpretation of ORS 757.259(5) would be highly undesirable as a policy matter in that it would encourage gamesmanship in the deferred accounting process in a manner the legislature could not have intended.

methodology in this proceeding and suggests two alternative methodologies that would result in a deferred amount of either \$20.9 million or zero.²

The parties have briefed the foregoing sub-issues in case the Commission decides to amortize the deferred amount. In practice, however, PGE's actual earnings are so far below its authorized rate of return, and a minimum reasonable rate of return, that amortization is inappropriate regardless of the specific answers to the foregoing questions. The Commission should therefore defer ruling on such questions until some other proceeding in which it is necessary to do so.³


² The Commission has the authority under ORS 757.259 to consider other methodologies for calculating the deferred amount. In Order No. 07-351, the Commission ordered PGE to provide a calculation using the SB 408 methodology, which PGE has done, but it did not say it would not consider other alternatives if presented. Order No. 07-351 at 7-8. Of course, this is a moot point if the Commission denies amortization. (Staff Op. Brief at 2) As for URP's argument that PGE is "picking and choosing" methodologies depending on results (URP Op. Brief at 7-8), such argument is baseless. This is a deferred accounting proceeding, so the Commission has significant discretion in deciding how to calculate the deferred amount, and PGE has proposed two reasonable methods for doing so. The Commission has no such discretion with regard to applying the rules it adopted to implement the automatic adjustment clause under SB 408 to PGE's 2007 taxes.

³ As noted above, URP filed no testimony and instead elected to offer support for amortization through its opening brief after the record in this matter was closed. If the Commission elects to adopt URP's position in its opening brief to order amortization despite PGE's earnings, then PGE requests the opportunity to provide factual testimony necessary for the Commission to consider certain constitutional impediments to amortization. Those constitutional impediments are the same type PGE raised in UE 178. (See UE 178, Order No. 08-204 (April 11, 2008) (addressing PGE's constitutional arguments)) PGE has not previously raised those issues or provided supporting testimony in this docket because no party offered testimony supporting amortization. Of course, as with the aforementioned sub-issues, PGE need not provide further evidence and the Commission need not reach such constitutional issues if the Commission agrees with Staff and PGE that amortization is inappropriate given the earnings test, or if it agrees with PGE that the deferred amount should be zero.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny amortization of the deferred amount.

DATED this 28th 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 REPLY 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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