1	BEFORE THE PUBLIC UTILITY COMMISSION			
2	OF OREGON			
3	UM 1224			
4	In the Matter of			
5	UTILITY REFORM PROJECT and KEN	STAFF'S REPLY BRIEF		
6	LEWIS,			
7	Application for Deferred Accounting.			
8	I. INTRODUCTION			
9	In Order No. 07-351 the Commission granted a deferred accounting application filed by			
10	Utility Reform Project and Ken Lewis (hereinafter URP) under ORS 757.259 and directed			
11	Portland General Electric Company (PGE or Company) to calculate the deferred amount using			
12	the SB 408 methodology. <i>Id.</i> at 7-8. The Commission, in approving the deferral, concluded that			
13	an earnings review is required by ORS 757.259(5) and directed PGE to conduct an earnings test			
14	that the Commission will review at the time it considers amortization of the deferral. <i>Id.</i> at 8.			
15	PGE filed testimony that used three methods to calculate the deferred amount. Two			
16	methods do not follow the SB 408 methodology that the Commission directed it to follow in			
17	Order 07-351. Id. at 7-8. PGE, Staff, and URP agree that under the SB 408 methodology the			
18	deferral amount is \$26.5 million. <sup>1</sup>			
19	This is deferred accounting case under ORS 757.290, not a rate case under ORS 757.210.			
20	Both PGE and Staff agree that the earnings review conducted by PGE shows that its earnings are			
21	far below its authorized rate of return that will not support the amortization of the deferred			
22	amount when the Commission considers that is	sue. URP does not dispute the results of the		
23	earnings test. Rather it argues that SB 408 appl	lies as of September 2, 2005, and that not		
24	requiring PGE to refund amounts for income ta	xes that were not actually paid to governments		
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	<sup>1</sup> See PGE Exhibit 200/Hager-Tamlyn-Tinker/2-3; Staff/	100, Owings/3; and URP's Opening Brief at 5		

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1	because of an earnings test violates SB 408 and would constitute retroactive ratemaking. URP's	
2	arguments are without merit.	
3	SB 408 does not apply here. The Commission's authority to even address utility	
4	expenses or revenues outside a general rate case – and outside the automatic adjustment clause	
5	provisions of SB 408 – is based on ORS 757.259, which includes an earnings test. The	
6	Commission is required by ORS 757.259(5) to apply an earnings test when it considers	
7	amortization. Nor would the Commission violate the rule against retroactive ratemaking by	
8	applying an earnings test. ORS 757.259 is an express legislative exception to the rule against	
9	retroactive ratemaking.	
10	II. DISCUSSION	
11	1. The calculation of the deferral amount using the SB 408 methodology	
12	PGE, Staff, and URP all agree the deferral amount is \$26.5 million using the SB 408	
13	methodology. <sup>2</sup>	
14	2. PGE's Alternative Calculations	
15	PGE offers two alternatives to the SB 408 methodology that consider the so-called	
16	"double whammy." See PGE Exhibit 100/Hager-Tamlyn-Tinker/10. Under PGE's alternative	
17	methodologies the deferral amount would be either zero or \$20.9 million. See PGE Exhibit	
18	200/Hager-Tamlyn-Tinker/3. The Commission exercised its discretion when it determined that	
19	PGE should calculate the deferral amount using the SB 408 methodology. See Order No. 07-351	
20	at 8. PGE neither argues nor shows that the Commission abused its discretion in directing the	
21	Company to calculate the deferral amount based on the SB 408 methodology.	
22	3. The Earnings Test	
23	In Order No. 07-351 the Commission granted a deferred accounting application filed by	
24	URP under ORS 757.259. The Commission, in approving the deferral concluded that an	
25	earnings review is required under ORS 757.259(5). <i>Id.</i> at 8. PGE's authorized rate of return for	
26		
	<sup>2</sup> See fn. 1.	

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1	the earnings period is 10.5%. Staff/100, Owings/6. Under Staff's calculation PGE's actual ROl	
2	is 6.92%, more than 350 basis points below PGE's authorized ROE. Staff/100, Owings/9-10.	
3	The Company's earnings are far below even the minimum reasonable level under the earnings	
4	test. See Staff/100, Owings/3; see also Order No. 93-257 (Dockets 82/UM 445).	
5	URP acknowledges, as it must, that this is a deferred accounting proceeding under ORS	
6	757.259. URP's Opening Brief at 1. URP does not dispute the earnings test results. Rather it	
7	argues that SB 408 applies as of September 2, 2005, and that not requiring the utility to refund	
8	amounts for income taxes that were not actually paid to governments because of the earnings test	
9	violates SB 408 and would constitute retroactive ratemaking. <i>Id.</i> at 9-10. URP's arguments are	
10	misplaced.	
11	This is a deferred accounting proceeding under ORS 757.259, not a proceeding under	
12	SB 408. It is significant that the legislature, in enacting SB 408, expressly limited the use of the	
13	automatic adjustment clause to taxes paid to units of government collected on or after January 1,	
14	2006. See Or Laws 2005, c. 845, section 4(2). Because the deferral period here is October 5,	
15	2005, to December 31, 2005, the automatic adjustment clause authorized by SB 408 does not	
16	apply. The Commission's authority to review the Company's revenues and expenses outside a	
17	general rate case is limited to a deferred accounting proceeding. See Order 07-351 at 7-8.	
18	A statutory rule of construction requires the Commission "not to insert what has been	
19	omitted or to omit what has been inserted" PGE v. Bureau of Labor and Industries, 317 Or	
20	606, 611, 859 P2d 1143 (1993); ORS 174.010. ORS 757.259(5) expressly requires the	
21	Commission to "review the utility's earnings at the time of application to amortize the deferral."	
22	Thus, the Commission was correct when it concluded that it must review PGE's earnings when it	
23	considers whether to amortize the deferral.	
24	Nor would the Commission's review of PGE's earnings in considering whether to	
25	amortize the deferral violate the rule against retroactive ratemaking. URP correctly quotes from	
26	a Department of Justice Letter of Advice to Charles Davis, Commissioner, Public Utility	

1	Commission, dated March 18, 1987, WL 278316 (OP-6076) regarding the rule against			
2	retroactive ratemaking. See URP's Opening Brief at 10-11. But URP's limited discussion of			
3	retroactive ratemaking does not fully describe that rule. Elsewhere, the opinion notes			
4	"the rule against retroactive ratemaking is derived from and rooted in the legislative nature of the ratemaking process. A legislature, however, can			
5				
6	Id. at 7. The opinion also states "[t]he general rule is that ratemaking is prospective unless the			
7	legislature expressly authorizes retroactive ratemaking," Id. at 16, citing Joseph v. Lowery, 26			
8	Or 545, 495 P2d 273 (1972) (emphasis in original).			
9	The Department of Justice, in a subsequent advice letter to the Public Utility			
10	Commission, described the rule against retroactive ratemaking as follows:			
11	"[i]n substance the prohibition against <u>retroactive ratemaking</u> precludes inclusion in rates of costs related to a past service, unless expressly authorized by			
12	the legislature. Letter of Advice dated March 18, 1987, to Charles Davis, Public Utility Commissioner (OP-6076). <b>ORS 757.140(2) and ORS 757.259 are</b>			
13	express legislative exceptions to that principle."			
14	Letter of Advice to Ron Eachus, Commission Chair, Public Utility Commission, dated June 8,			
15	1992, (OP-6454), 1992 Ore. AG LEXIS 9, 19, fn. 7 (underline in original, emphasis supplied).			
16	Commissioner Davis in his testimony regarding HB 2145, also recognized that the			
17	legislature, in enacting ORS 757.259, expressly authorized retroactive ratemaking:			
18	Under the filed rate doctrine and rule against retroactive ratemaking, the Commission's ratemaking function must be prospective unless the			
19	<b>Legislature authorizes that it be otherwise.</b> The Oregon Attorney General Opinion No. 6076, March 18, 1887, 1987 WL 278316, at 5, notes that where the			
20	rule against retroactive ratemaking does not implicate constitutional concerns, the Legislature may authorize the Commission to act retroactively. The Oregon			
21	Legislature has authorized retroactive ratemaking in two cases: ORS 757.215(4) and (5) (permitting refunds for interim and nonsuspended rates) and			
22	ORS 757.259 (permitting deferred accounting orders).			
23	See URP's Opening Brief at 11-12 (emphasis supplied). In sum, ORS 757.259 expressly			
24	authorizes the Commission to perform retroactive ratemaking.			
25				
26	///			

1	URP also argues that the language in ORS 757.259(5), "upon review of the utility's			
2	earnings at the time of application to amortize the deferral," refers to the company's earnings at			
3	the time of this current proceeding, and states (in the footnote on page 12) that OAR 860-027-			
4	0300(9), which requires a review of earnings for a period "during which the deferral took place			
5	or must be reasonably representative of the deferral period," is unlawful and beyond the			
6	Commission's authority.			
7	The Commission interprets the language cited by URP to require that the Commission			
8	review the utility's earnings at the time it makes a decision whether to amortize the deferred			
9	amount. The language means that the earnings test period applied must include the period of the			
10	2005 deferral or be otherwise representative of that period. See ORS 860-027-0300(9).			
11	In Order No. 93-257, in describing the earnings test period, the Commission stated:			
12	"The sole issue is whether a utility's earnings for the test period enable it to absorb a cost that has been approved for deferral. Therefore, the earnings			
13	calculation should approximate the <b>actual earnings realized by the utility during the test period</b> . URP's proposal does not help evaluate whether PGE has			
14	excess earnings to offset its deferred cost. Actual earnings and reasonable rate of return serve as the primary basis for addressing the requirements of ORS			
15	757.259(4)." <sup>3</sup>			
16	Id. at 7 (emphasis supplied). The Commission's discussion applies equally to refunds and			
17	deferred costs. The Commission has consistently applied OAR 860-027-0300(9) since it was			
18	adopted in 1988. Staff is not aware of any instance when the Commission has used an earnings			
19	review period that did not include the deferral period. The Commission's interpretation of ORS			
20	757.259(5) is reasonable and consistent with the statute. URP's argument should be rejected.			
21	III. CONCLUSION			
22	This is deferred accounting case under ORS 757.290. It is not a proceeding under SB			
23	408 or a rate case under ORS 757.210. All parties agree that the deferred amount is \$26.5			
24	million using the SB 408 methodology. The review of PGE's earnings indicates that the			
25	Company's earnings are far below even the minimum reasonable level under the earnings test.			
26	<sup>3</sup> Former ORS 757.259(4) was renumbered to ORS 757.259(5) as a result of unrelated amendments to ORS 757.259			

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1	The Commission should not amortize the deferred amount when it considers that issue in a rat	
2	proceeding under ORS 757.210.	
3	DATED this 28th day of April 2008.	
4		Respectfully submitted,
5		HARDY MYERS
6		Attorney General
7		s/David B. Hatton
8		David B. Hatton, #75151 Assistant Attorney General
9		Of Attorneys for Staff of the Public Utility Commission of Oregon
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1	CERTIFICATE OF SERVICE
2	
3	I certify that on April 28, 2008, I served the foregoing upon all parties of record in this
4	proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid
5	first class mail or by hand delivery/shuttle mail to the parties accepting paper service.
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