ISSUED: December 27, 2005

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1224 and UM 1226

In the Matters of	)	
	)	
UTILITY REFORM PROJECT and KEN LEWIS	)	
	)	
Application for Deferred Account, (UM 1224)	)	
	)	
And	)	
	)	JOINT RULING
UTILITY REFORM PROJECT and KEN LEWIS,	)	
	)	
Complainants,	)	
	)	
v.	)	
	)	
PORTLAND GENERAL ELECTRIC COMPANY,	)	
	)	
Defendant. (UM 1226)	)	

DISPOSITION: DOCKETS HELD IN ABEYANCE

On October 5, 2005, the Utility Reform Project and Ken Lewis (collectively referred to as URP) filed a Complaint, pursuant to ORS 756.500 and OAR 860-013-015, which was docketed as UM 1226. The same day, URP also filed a Notice of Application for Deferred Account (Application for Deferred Account), pursuant to OAR 860-027-0300, which was docketed as UM 1224. Although the two dockets are not consolidated, they will be addressed together for the purposes of this ruling.

The Complaint and the Application for Deferred Account

The Complaint alleges that rates charged by Portland General Electric Company (PGE), since September 2, 2005, until the present, are unjust and unreasonable and in violation of Senate Bill (SB) 408 because they contain approximately $92.6 million in annual charges for state and federal income taxes that are not paid to any government entity. The Complaint claims that PGE has charged ratepayers for alleged costs, in the approximate amount of $92.6 million, for state and federal income taxes since at least 1997, despite never

paying such costs. The Complaint states that SB 408, which took effect on September 2, 2005, provides that "[u]tility rates that include amounts for taxes should reflect the taxes that are paid to units of government to be considered fair, just and reasonable." The Complaint further states that SB 408 applies to PGE rates as of now, as the Commission has already concluded that a portion of SB 408 is already in effect. As rates that are charged after the effective date of SB 408 "must reflect the taxes paid to units of government in order to be fair, just and reasonable,"[1] URP asks the Commission to investigate PGE's rates in a contested case proceeding and to create a deferred account for all amounts charged to ratepayers since September 2, 2005, for federal income taxes and state incomes, less amounts actually paid by, or on behalf of, PGE to the federal and state governments for income taxes.

The Application for Deferred Account further describes the revenues that would be subject to deferred accounting as, "the amounts charged to ratepayers, under current rate schedules, due to the estimated PGE liabilities for 'federal income taxes' and 'state income taxes,' which are not paid to those governments." The Application for Deferred Account requests that the Commission issue an order setting up a deferred account for the described revenues.

PGE's Comments and Motion

PGE filed response Comments to URP's Application, as well as a Motion to Dismiss, Abate, or Make More Definite and Certain (Motion) the Complaint of URP. PGE's Motion asserts that URP's Complaint fails to adequately state a claim. PGE also criticizes the Complaint as being untimely and unnecessary.

PGE faults URP's Complaint for failing to adequately elucidate the allegation that PGE's rates are unjust and unreasonable on a going forward basis. PGE observes that this allegation is contained in the introductory paragraph of the Complaint, but is never further developed. To the extent that the Complaint requests relief for *past* rates, PGE argues the Complaint is "ill-founded," as ORS 756.500 does not authorize retroactive ratemaking and because Docket No. UCB 13, which is now closed, addressed PGE's historic tax collections.

PGE construes the intent of the Complaint to be prospective in nature, however, and argues that a prospective complaint cannot be solely based on allegations concerning PGE's soon-to-be-past status as a subsidy of a holding company that files a consolidated tax return. PGE further explains that the Complaint ignores the Company's application for approval of the distribution of PGE common stock to Enron creditors. Should the application be approved, PGE states, PGE will operate as a stand-alone entity that pays taxes directly to the taxing authorities.

PGE comments that implementation of SB 408, via administrative rules that are currently being developed, will render the Complaint superfluous. PGE asserts that SB 408 does not provide for prospective income tax adjustment. Rather, PGE states, SB 408 establishes an automatic adjustment clause, based upon prior year collections and tax payments, which PGE is likely to trigger due to the low threshold. Consequently, PGE

[1] *Id*. at 3, citing Order No. 05-1050, p. 18.

argues that "[t]o the extent Complainants rely on SB 408 as the source of their claim, this Complaint exceeds statutory authority." Moreover, PGE posits that the Commission will likely conclude the rulemaking to implement SB 408 and an automatic adjustment clause will be in effect before it can complete a contested case proceeding undertaken pursuant to URP's Complaint.

Finally, PGE declares its intent to file a general rate case in early 2006 that will address tax-related issues, together with a review of other PGE costs and revenues. PGE contends that URP's Complaint seeks to establish new rates and that ratemaking requires the Commission to consider all utility costs and revenues. PGE further argues that consideration of PGE's taxes, in isolation of all of PGE's costs, revenues and other ratemaking components, in a contested case opened pursuant to URP's Complaint would constitute improper single issue ratemaking. Consequently, PGE urges the Commission to wait to address tax-related issues until PGE files a general rate case.

PGE also challenges URP's request that a deferred account be opened. Observing that a deferred accounting order is the "only specific relief requested in the Complaint," PGE asserts that requests for deferred accounting must be made under ORS 757.259, as opposed to ORS 756.500 under which the Complaint is made. In any case, as Complainants simultaneously filed the Complaint with an Application for Deferred Account under ORS 757.259, PGE asserts that the Complaint is superfluous. PGE admits, however, that the Complaint and Application "fit together," as the Complaint "appears to seek a prospective change in PGE's rates," while the Application "seeks to lock in that rate change as of the date of the filing." Yet, PGE also challenges the sufficiency and substance of URP's Application for Deferred Account, arguing that it fails to meet the legal requirements of ORS 757.259 and does not merit an exercise of discretion by the Commission to grant it.

PGE objects, in the first place, to URP's dual approach, arguing that the Legislature did not intend, and the Commission has already rejected, the use of deferred accounting in conjunction with a ratemaking proceeding. PGE claims that the effect of URP's simultaneous filings is to declare existing rates interim, subject to refund based on the outcome of a rate case, in violation of pertinent statutes, the rule against retroactive ratemaking and the filed rate doctrine.[2] Under Oregon's regulatory scheme, PGE argues that allegations about existing rates, as URP sets forth in its Complaint and Application for Deferred Account, should call for prospective rate adjustment only. Yet, as PGE observes, URP seeks deferred accounting for the apparent purpose of applying any prospective adjustment to PGE's existing rates on a retroactive basis. In UE 76, another case addressing an Application for Deferred Account filed by URP in conjunction with a complaint about rates, PGE notes the Commission rebuffed this approach, ruling that, "except in limited circumstances . . . it was never contemplated that this statute [ORS 757.259(2)(c)] would serve any function, once a rate proceeding was under way."[3]

[2] Portland General Electric Company's Comments on Application for Deferred Accounting, p. 4. Although PGE does not fully name the filed rate doctrine, PGE references the doctrine by citation to ORS 757.225 and Order No. 03-401 at 8.

[3] *Id*., citing Order No. 92-1128 at 9.

PGE also argues that on its own, URP's Application fails. PGE observes that URP's Application appears to be founded on subsections 1(a) and 2(e) of ORS 757.259, but argues that neither authorizes the Application. PGE notes that subsection 1(a) authorizes *amortization* of deferred amounts, but not deferral itself, and is, therefore, inapplicable to the Application. PGE argues that subsection 2(e) of ORS 757.259 also does not authorize URP's Application because the Application fails to satisfy either prong of the two-prong test that the Commission has interpreted the statute to lay out and because the Application fails to specifically identify the utility expenses that should be deferred, as the statute requires. PGE argues that granting URP's Application will neither minimize the frequency of rate changes, nor serve "to match appropriately the costs borne by and benefits received by ratepayers."

Regardless of the legal qualifications of URP's Application, PGE urges the Commission to first consider whether the Application merits the Commission exercising its discretion to open the requested deferred account. PGE argues that the Commission should reject the Application as a discretionary matter because URP's Application "creates significant risk for customers, provides no benefits that SB 408 will not provide, and will not impose unduly burdensome regulatory demands on the Commission." PGE explains that URP's Application, if granted, could jeopardize the availability of accelerated depreciation deductions under the federal tax code. PGE also observes that there are more appropriate regulatory tools than deferred accounting to be used to address the concerns underlying PGE's Application and points, specifically, to AR 499, an ongoing docket that is undertaking development of permanent rules to implement SB 408 and the automatic adjustment clause authorized by the statute. Moreover, PGE argues that the regulatory and administrative burdens that would be associated with undertaking URP's Application in parallel with AR 499, such as the risk of inconsistent outcomes, far outweighs the merits.

Finally, PGE asserts, to the extent URP's Application relies on SB 408, it does so inappropriately. As SB 408 does not affect ORS 757.259, the sole legal authority for deferred accounting requests, PGE argues that the statute is irrelevant to URP's Application. In any case, PGE opines, SB 408 only applies to taxes paid and collected from ratepayers on or after January 1, 2006.

URP's Response

On December 5, 2005, URP filed a Motion for Extension of Time to File "Response to PGE Motion to Dismiss, Abate, or Make More Definite and Certain" (Motion for Extension of Time). As URP also filed a Response to PGE Motion to Dismiss, Abate, or Make More Definite and Certain on the same day, URP's Motion requested an extension until December 5, 2005. In the Motion, URP represents that PGE does not object to the extension of time and, indeed, PGE did not object within the allowed period of time to do so.

In its Response, URP asserts that the Complaint is clear, alleging "that PGE is charging ratepayers more for income taxes that it is actually paying to units of government and that this practice makes PGE's rates unjust and unreasonable, as of September 5, 2005, the effective date of SB 408, and continuing until the Commission orders PGE to halt this practice, if and when that occurs." URP contends, therefore, that the future status of PGE's ownership is irrelevant to its Complaint, which asserts that PGE's rates "are right now unjust

and unreasonable and have been since the effective date of SB 408." URP also asserts that the current effort in AR 499 to develop administrative rules to implement SB 408 is irrelevant, "because the Commission has already determined that a different part of SB 408 took effect on September 5, 2005." URP points to language in Order No. 05-1050 indicating that "rates must reflect the taxes paid to units of government in order to be fair, just and reasonable" and observes that this section is separate from SB 408 provisions regarding the automatic adjustment clause. URP comments that PGE's position "completely contradicts the conclusion of the Commission in OPUC Order No. 05-1050."

As URP's Complaint focuses on the reasonableness of *current* rates, URP assesses PGE's reference to an upcoming general rate case to be irrelevant. URP also challenges PGE's contention that undertaking the Complaint would constitute single-issue ratemaking, arguing that the Commission can constrict the scope of a ratemaking process as it deems appropriate. URP indicates, however, that it would not object to abatement of its Complaint in order to conduct the case parallel with PGE's next general rate case, provided the Commission establishes the deferred revenue account sought by the Complaint and the Application.

Ruling

As no party objected to URP's Response, URP's Motion for Extension of Time is granted and URP's Response is accepted into the record, and this Ruling is based on all of the filings submitted to date by the parties.

URP's Response illuminates the primary focus of the Complaint. As URP makes very clear in its Response, pointing to specific language that "rates must reflect the taxes paid to units of government in order to be fair, just and reasonable," the Complaint is primarily founded upon the Commission's application of SB 408 in Order No. 05-150 reducing the amount of income taxes included in PacifiCorp's rates.

After URP filed its Complaint and Application for Deferred Account, however, Pacific Power & Light Company (dba PacifiCorp) filed, in Docket No. UE 170, an application for reconsideration or rehearing of Order No. 05-150. The application for reconsideration directly challenges the Commission's treatment of SB 408 in Order No. 05-150 that URP's Complaint and Application for Deferred Account relies on. On December 19, 2005, the Commission granted PacifiCorp's application for reconsideration in Order No. 05-1254.

It would be inappropriate to proceed with a Complaint and Application for Deferred Account that is founded upon an order that is currently under reconsideration. Thus, both the Complaint and Application for Deferral should be held in abeyance until Order No. 05-150 is deemed final by the Commission. The substantive

and procedural merits of URP's Complaint and Application for Deferral can be taken up at that point. URP's Application for Deferral will date back to its filing at any point in the future that it is acted upon.

Dated at Salem, Oregon, this 27th day of December, 2005.

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Traci A. G. Kirkpatrick
Administrative Law Judge