

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
DR 32**

In the Matter of the Petition of Portland
General Electric Company for a Declaratory
Ruling Regarding the Application of OAR
860-022-0045.

STAFF REPLY BRIEF

1 **I. Motion to Strike.**

2 As a preliminary matter, staff of the Public Utility Commission (“staff”) moves to strike
3 all the attachments to the City of Portland’s opening brief, as well as lines 2- 26 of page 2 and
4 lines 1-3 of page 3 of the brief. In her June 10, 2005 Prehearing Conference Report, the
5 hearings officer specified that the parties’ briefs in this docket are “to address legal issues
6 applicable to the facts asserted in PGE’s petition for a declaratory ruling.” (June 10, 2005
7 Prehearing Conference Report at 2.) In its opening brief, the City of Portland makes several
8 assertions of fact that are not included in PGE’s Petition for Declaratory Ruling and also attaches
9 several media reports. These assertions and the attachments are not pertinent to the
10 Commission’s consideration of the legal questions presented by PGE’s petition and are
11 prohibited under the hearings officer’s June 10, 2005 Prehearing Conference Report.

12 Staff also requests that the hearing office strike several portions of the opening brief filed
13 by Ken Lewis and the Utility Reform Project (hereinafter both parties will be referred to as
14 “URP”). In its brief, URP refers to alleged admissions PGE made in discovery in Docket No.
15 UCB 13 (p 2) and quotes from a response to a discovery request issued in Docket No. UCB 13
16 (pp 7-8). These references to facts outside PGE’s Petition for a Declaratory Ruling should be
17 stricken.

18 **II. Response to motion to dismiss.**

19 URP asks the Commission to dismiss Portland General Electric Company’s (“PGE”)
20 Petition for Declaratory Ruling as improvidently granted on the ground the Commission lacks
21 the jurisdiction and authority to grant the relief requested by PGE. More specifically, URP
22 argues that the Commission does not enforce OAR 860-022-0045, and thus there is no
23 “justiciable controversy” presented by PGE’s petition. URP argues that in absence of a
24 justiciable controversy, the Commission does not have jurisdiction over PGE’s petition for
25 declaratory ruling. URP’s arguments are without merit.

1 First, URP's assertion that ORS 756.450 is a delegation of the "judicial power" from
2 Article VII, § 1, of the Oregon Constitution, and is thus limited by that provision of Oregon's
3 constitution is incorrect. The Commission is a part of Oregon's executive branch of government
4 and its exercise of authority is not controlled by Article VII of Oregon's constitution, which
5 concerns the judicial department. Accordingly, this Commission should not turn to case law or
6 statutes that govern the jurisdiction of Oregon's courts, but to the statutes that govern the
7 Commission itself. In this case, whether the Commission has jurisdiction to consider PGE's
8 request for declaratory ruling is resolved by a reading of ORS 756.450. That statute provides:

9 On petition of any interested person, the Public Utility Commission may
10 issue a declaratory ruling with respect to the applicability to any person, property,
11 or state of facts of any rule or statute enforceable by the commission. A declaratory
12 ruling is binding between the commission and the petitioner on the state of facts
13 alleged, unless it is modified, vacated or set aside by a court. However, the
14 commission may review the ruling and modify, vacate, or set it aside if requested
15 by the petitioner or other party to the proceeding. Binding rulings provided by this
16 section are subject to review in the circuit court in the manner provided in ORS
17 756.500.

18 The Commission's authority to act on PGE's request for declaratory ruling is defined in
19 the first sentence of ORS 756.450. Under the statute, the PUC may issue a declaratory ruling
20 with respect to the applicability of any rule or statute to any person, property or state of facts if 1)
21 requested to do so by an interested person; and 2) the rule or statute is enforceable by the
22 Commission. Both criteria are satisfied here.

23 URP argues that the rule at issue in this declaratory ruling is not "enforceable" because
24 the Commission will not require PGE to issue refunds to Multnomah County residents if it finds
25 that PGE incorrectly charged residents for local income taxes. Contrary to URP's assertion,
26 whether the Commission would allow refunds for charges collected under OAR 860-022-0045 is
not the litmus test as to whether the rule is "enforceable" by the Commission.

1 Contrary to URP's assertion, OAR 860-022-0045 is enforced by the Commission. The
2 Commission requires utilities to charge only the customers within a particular county for taxes,
3 etc., imposed by that county, which is required by the rule. Further, the Commission requires
4 utilities to collect such charges through a separately stated charge on customers' bills, rather than
5 through general rates, as required by the rule. While in the past the Commission typically has
6 not required the utilities make filings related to local government assessments, the requirements
7 of the rule still apply.

8 URP also argues that the Commission is without authority to enforce OAR 860-022-0045
9 because the Multnomah County Circuit Court "obtained jurisdiction on January 22, 2005, when
10 the complaint of the class action plaintiffs was filed." (URP Motion to Dismiss). URP
11 apparently misunderstands the nature of relief sought by PGE in this matter. PGE asks the
12 Commission to issue a ruling that will be binding between the Commission and PGE on the state
13 of facts alleged as to whether 1) utilities are required to determine their local income taxes on a
14 regulated stand-alone basis and collect such amounts from customers when applying OAR 860-
15 022-0045; 2) PGE acted in conformity with OAR 860-022-0045 when it charged customers
16 county income taxes imposed on PGE as a stand-alone regulated operation and when PGE paid
17 those sums to Enron during the period when Enron filed a consolidated tax return; and 3) the
18 provisions of OAR 860-021-0135 apply if the Commission determines that PGE has improperly
19 billed Multnomah County residents for local income taxes. By issuing such a ruling, the
20 Commission will not divest the Multnomah County Circuit Court of its jurisdiction over a
21 separate matter filed by other plaintiffs.

22 As noted in the staff report, a Commission ruling clarifying its interpretation of OAR
23 860-022-0045 could assist the Multnomah County Circuit Court. According to URP, the circuit
24 court has stayed the circuit court proceeding to allow the Commission opportunity to issue this
25 declaratory ruling. The Commission decided to issue a declaratory ruling in similar
26 circumstances presented in Docket No. DR 28.

1 Docket No. DR 28 stemmed from a lawsuit filed by a PGE customer against PGE in
2 Clackamas County Circuit Court. During the suit, the court stayed the proceeding to allow the
3 Commission to rule on a petition for declaratory ruling filed by PGE as to how the Commission
4 interpreted certain statutes and rules applied by the Commission. (OPUC Order No. 02-121 at 3-
5 4.) The Commission decided to consider the petition for declaratory ruling, in part, because its
6 ruling explaining the Commission’s views of the laws it enforces might assist the Clackamas
7 County Circuit Court. (*Id.*, at 4.)

8 No party, other than URP, has suggested that a Commission ruling in this case will usurp
9 the authority of the Multnomah County Circuit Court to decide the complaint currently pending
10 before it. In fact, such a suggestion is incorrect and URP’s argument that the Commission
11 should dismiss PGE’s petition for declaratory ruling on this ground is meritless.

12

13 **III. Argument re: resolution of questions posed in petition for declaratory ruling.**

14 The City of Portland, URP, the Industrial Customers of Northwest Utilities (“ICNU”) and
15 the Citizens’ Utility Board (“CUB”) argue that OAR 860-022-0045 does not require PGE to
16 determine its local income taxes on a regulated, stand-alone basis and collect these amounts from
17 customers. These parties misunderstand the questions posed in PGE’s Petition for Declaratory
18 Ruling. The questions do not ask whether the rule itself required PGE to calculate and collect
19 taxes on a stand-alone basis, etc., but whether the Commission required PGE to do so when PGE
20 applied the rule.

21 As noted by staff in its opening brief, resolution of the first two questions presented in
22 PGE’s petition are not resolved by parsing OAR 860-022-0045, but by examining the
23 Commission’s policy regarding estimation and collection of costs for income taxes.¹ The
24

25 ¹ The first and second questions presented in PGE’s Petition for Declaratory Ruling are as
26 follows:

1 Commission reiterated that policy in Docket Nos. UM 1074 and UCB 13, which concerned
2 PGE's collection of federal, state and local income taxes. In Docket No. UCB 13, the
3 Commission stated:

4
5 URP misapprehends how we set rates for a utility that is held by a holding
6 company. To protect the customers' interests, we view utility operations
7 separately from the financial operations of the parent company. That means that
8 the expenses used to calculate the rates are based solely on those of the utility.
9 For taxes, we look at the utility as a stand-alone enterprise. We do not explore the
10 holding company's tax liability, only the regulated utility's liability as though it
11 were operating without the holding company. (Order No. 03-401 at 6.)

12 Although the Commission did not expressly state that its ruling applied to local income
13 taxes as well as state and federal income taxes, this conclusion is implicit. The allegations at
14 issue in Docket No. UCB 13, as well as in Docket No. UM 1074, concerned PGE's collection of
15 federal, state *and local* income taxes, and thus, so did the Commission's orders.

16 Because resolution of the first two questions presented in PGE's Petition for Declaratory
17 Ruling are not resolved by searching the text of OAR 860-022-0045 for a requirement that
18 utilities determine their local tax liability on a stand-alone basis and collect such amounts from
19 customers, the statutory construction analyses of the rule offered by the City of Portland, ICNU
20 and URP is of little value. Further, even assuming a statutory construction analysis could be
21 helpful in resolving the questions presented in this docket, the analyses presented by the City of
22 Portland, ICNU and URP are deficient because they fail to take into account the context of the
23 rule, which includes the Commission's decisions in Docket Nos. UCB 13 and UM 1074,
24 statements the Commission has made regarding the history and purpose of the rule (*See* Order

25 Question No. 1: Whether utilities are required to determine their local income taxes on a
26 regulated, stand-alone basis and collect such amounts from customers when applying OAR 860-
022-0045?

27 Question No. 2: Whether PGE acted in conformity with OAR 860-022-0045 when it
28 charged customers for county income taxes imposed on PGE as a stand-alone regulated
29 operation and when PGE paid those sums to Enron during the period when Enron filed a
30 consolidated tax return?

1 No. 01-728, *In Re Triennial Review of Chapter 860*, AR 395) and general Commission policies
2 regarding ratemaking.

3 For example, ICNU argues that “the primary issue in interpreting the text of OAR §860-
4 022-0045 is whether MCBIT was ‘imposed’ on PGE for purposes of the rule.” ICNU argues that
5 based on the plain meaning of that word, “[i]t follows that the MCBIT was ‘imposed’ on PGE
6 only if the tax was applied to the Company’s income and amounts for the tax were actually due
7 and owed to PGE.” (Opening Brief of ICNU at 6.) Based on its understanding of the text of the
8 rule, ICNU concludes that:

9 [OAR 960-022-0045] requires the utility to specifically itemize and collect
10 from customers the specific amount of county income tax that the utility is
11 required to pay with respect to such customers. This requires an after-the-fact
12 examination of what amount of tax is actually imposed on the utility. In contrast,
13 when a utility collects amounts from customers for federal and state income taxes,
14 the Commission determines a normalized amount of those taxes to be included in
15 rates established in a ratemaking proceeding. (Opening Brief of ICNU at 5.)

16 ICNU’s analysis of what is meant by the word “imposed” in OAR 860-022-0045, which
17 leads to its ultimate conclusion regarding the proper interpretation of the rule (stated above),
18 ignores the context of OAR 860-022-0045, which includes fundamental policies of ratemaking
19 that are employed by the Commission. The Commission sets rates based on estimates of future
20 costs. It does not determine rates by employing an “after-the-fact examination” of what costs are
21 actually imposed on a utility. In light of this policy, which is part of the context of OAR 860-
22 022-0045, the term “imposed” cannot be interpreted in the manner suggested by ICNU.

23 A similar flaw is found in the City of Portland’s arguments. The City of Portland argues
24 that OAR 860-022-0045 is “not an exercise in prospective ratemaking based on future
25 assumptions, where the anticipated costs of the utility’s taxes are estimated and then included in
26 prospectively into general rates. * * * The administrative rule is a special cost recovery
mechanism.” (City of Portland Opening Brief at 9.) The City of Portland offers no support for
its interpretation of OAR 860-022-0045, other than its own interpretation of its text. In fact, the
City is correct only so far as it asserts that the local income taxes are not included into general

1 rates. To the extent that the City asserts that the charge for local income taxes should not be
2 based on future assumption regarding the utility's estimated taxes, the City is incorrect. This in
3 fact has been the Commission's policy regarding collection of taxes from ratepayers; the
4 Commission has made no distinction between taxes collected through general rates or a
5 separately-stated charge.

6 PGE's description of the distinction between collection of local income taxes under OAR
7 860-022-0045 and collection of federal and state taxes through general rates is accurate and
8 provides helpful context for the proper interpretation of OAR 860-022-0045. In its opening
9 brief, PGE explains the distinction between taxes collected under OAR 860-022-0045 and in
10 general rates as follows:

11
12 OAR 860-022-0045 is a ratemaking rule promulgated with the
13 Commission's broad authority to set fair and reasonable rates. The rule creates a
14 separate **procedure** for charges to customers based on a utility's county tax
15 expenses. Under the rule, a utility must calculate its local income taxes on an
16 annual basis and charge customers to recover those amounts. By contrast, in a
17 typical ratemaking proceeding, the Commission sets rates to include the utility's
18 projected tax expenses. The only difference in **substance**, however, between
19 charges made to recover local taxes under OAR 860-022-0045 and rates set under
20 ORS 757.205 to 757.225 to recover federal and state taxes is that charges made
21 under OAR 860-022-0045 apply to customers within particular counties, while
22 rates set under ORS 757.205 to 757.225 apply to customers statewide. (PGE's
23 Memorandum in Support of Petition for Declaratory Ruling at 10)(emphasis in
24 original).

19 In other words, the rule is designed to require that local income taxes are collected
20 through a separately-stated charge to ensure that costs imposed by local jurisdictions are not
21 spread to residents of other local jurisdictions. In short, it is a rate spread rule. *See* Order No.
22 01-728 (*In Re Triennial Review of Chapter 860*, AR 395) (Discussing history and purpose of
23 rule). As noted by PGE, the procedural difference in collecting local taxes only from the utility's
24 ratepayers within the jurisdiction imposing the taxes and collecting state and income taxes from
25 all the utilities ratepayers within the state does not logically give rise to substantive differences in
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1 how the utility’s tax liability is determined or how the utility acts if consolidated with a parent
2 corporation for tax purposes.

3 An agency’s plausible interpretation of its own rule will be given deference by reviewing
4 courts unless it conflicts with the rule’s text, context or another source of law, including case
5 law. *See Don’t Waste Or. Comm. v. Energy Facility Siting Council*, 320 Or 132, 142, 881 P2d
6 119 (1994). For the reasons explained above, the interpretation of OAR 860-022-0045 that is
7 provided by ICNU, CUB, URP and the City of Portland does in fact conflict with the rule’s
8 context and other sources of law, and would not be entitled to judicial deference. First, these
9 parties’ interpretation of the rule conflicts with the Commission’s orders in Docket Nos. UCB 13
10 and UM 1074. Second, their interpretation conflicts with Commission ratemaking policies,
11 which require that rates be set on estimated future costs, not an “after-the-fact” examination of
12 costs. Furthermore, these parties’ interpretation of OAR 860-022-0045 is not even plausible.

13 As explained by PGE, OAR 860-022-0045 creates a particular procedure for collecting
14 local income taxes to ensure that charges imposed by one jurisdiction are not spread to
15 ratepayers in other jurisdictions. There is no logical reason to conclude that the procedural
16 distinction between the collection of local taxes and state and federal taxes gives rise to
17 completely different policies regarding ratemaking (e.g., setting rates on a backward-looking

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1 basis, rather than prospectively) and consumer protection (e.g., the Commission's policy that
2 utilities determine their costs on a stand-alone basis to protect ratepayers from financial impacts
3 of the parent corporation).

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DATED this 12th day of August 2005.

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Respectfully submitted,

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HARDY MYERS
Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August 2005, I served the foregoing DR 32

STAFF REPLY BRIEF upon the parties, hereto by the method/s indicated below:

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