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VIA ELECTRONIC FILING

Public Utility Commission of Oregon
Attn: Filing Center
P.O. Box 2148
Salem, OR 97308-2148

Re: Docket DR 32

Enclosed for filing is the original and 5 copies of the Reply Brief of PacifiCorp in the above proceeding. Copies of this document was served on all parties listed as indicated on the attached certificate of service.

Very truly yours,

Lynda Ruiz
Secretary to James F. Fell

JFF:ljr
Enclosure
cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 32

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Petition for a Declaratory Ruling Regarding the Application of OAR 860-022-0045.	REPLY BRIEF OF PACIFICORP

This Reply Brief is filed by PacifiCorp, d/b/a Pacific Power & Light Company ("PacifiCorp" or "The Company"), in support of the declaratory ruling requested by Portland General Electric Company ("PGE").

ARGUMENT

1. PGE's Practice of Collecting the MCBIT is Consistent with Rules of Statutory Construction Regarding the Commission's Administrative Rules.

The City of Portland ("City") and the Industrial Customers of Northwest Utilities ("ICNU") argue that recognized rules of statutory construction support their view that OAR 860-022-0045 requires that the amount of county taxes collected by the utility must equal the amount of taxes received by the county. The City's and ICNU's argument is faulty because it requests an improper addition to the statutory language and fails to reconcile the reading of OAR 860-022-0045 with the stand-alone calculation requirement in OAR 860-027-0048(4)(h). The City and ICNU fail to incorporate all of the rules of statutory construction set forth in the case they cite, *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). (City Brief at 4.)

First, the City and ICNU fail to apply the rule of "statutory enjoinder 'not to insert what has been omitted, or to omit what has been inserted.'" *Id.* at 611, citing ORS 174.010. OAR 860-022-0045 reads, ". . . the utility required to pay such taxes or fees shall collect

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from its customers within the county imposing such taxes or fees the amount of the taxes or fees." The City then adds its interpretation that this means taxes *actually received by the county*. Just as the Court in *PGE* refused to read a qualifying limitation into a statute, recognizing that "[t]he legislature knows how to include qualifying language in a statute when it wants to do so," the Commission should similarly refuse to add the qualifying limitation suggested by the City. *Id.* at 614. To do otherwise would be contrary to the requirement of ORS 174.010 "not to insert what has been omitted."

The second principle of statutory construction supporting PGE's calculation of the MCBIT on a stand-alone basis is that in its "first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute *and other related statutes*." *PGE* at 611 (emphasis added). OAR 860-027-0048(4)(h), requiring that "[i]ncome taxes shall be calculated for the energy utility on a stand-alone basis for both ratemaking purposes and regulatory reporting,"[1] is certainly related to OAR 860-022-0045, which provides a ratemaking mechanism for the collection of locally imposed income taxes.[2] Being related, the Commission must consider OAR 860-027-0048(4)(h) in construing OAR 860-022-0045. This consideration leads to the conclusion that the line item collections provided for in OAR 860-022-045 are to be collected on a utility stand-alone basis, as specified in OAR 860-027-0048(4)(h).

[1] OAR 860-027-0048(3)(g) is an identical rule relating to transfers between the regulated and nonregulated activities of a utility. For convenience, this Reply Brief will only refer to OAR 860-027-0048(4)(h) regarding the transfer of assets or services with affiliates.

[2] The City argues that "PGE confuses the process of recovering a county imposed tax through a separately itemized charge with the process of ratemaking." City Brief at 5. In making such an argument, the City proposes an unreasonably narrow and unsupported view of what is ratemaking. Under the City's view, allowing recovery of fuel or net power costs through a pass-through mechanism, or more to the point, allowing a pass-through mechanism for income taxes, would not be ratemaking. Ratemaking can, and does, include more than general rate cases.

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The Citizens' Utility Board ("CUB") cites the Department of Justice Memorandum to the Public Utility Commission, dated February 18, 2005, for the proposition that the Commission has the discretion to choose a policy of calculating tax expense so long as its policy is rational. CUB Brief at 4. This may be true in certain contexts, but it does not address either the Commission's existing policy on tax expense expressed in OAR 860-027-0048(4)(h) or the procedures for modifying a Commission rule under the Oregon Administrative Procedures Act, discussed below. Each of these considerations supports the declaratory ruling PGE has requested.

2. OAR 860-022-0045 and OAR 860-027-0048(4)(h) are Ratemaking Rules.

As noted in PacifiCorp's Opening Brief at 2-3, OAR 860-022-0045 is a ratemaking rule that has the same force as a tariff. This same observation applies to OAR 860-027-0048, which is entitled "Allocation of Costs by an Energy Utility," and to subsection (4)(h) which addresses the calculation of income taxes "for ratemaking purposes and regulatory reporting." Arguments to the contrary would violate the holding in *Multnomah County v. Davis*, 35 Or App at 527-528, 581 P2d 968 (1978), that ratemaking rules are equivalent to tariffs.

3. Staff's Opening Brief Confirms the Long-Standing Commission Policy of Considering only Revenues and Expenses Related to Regulated Service in Computing a Utility's Rates.

The Staff's Brief confirms the long-standing Commission policy of treating income taxes on a stand-alone basis. Referring to the Commission's decisions in Dockets UCB 13 and UM 1074, the Staff stated:

> The Commission declined URP's request to open an investigation, based on the Commission's long-standing policy to determine utilities' income taxes on a stand-alone basis for ratemaking and regulatory purposes. Again, although the Commission did not expressly state that its long-standing policy applied equally to state, federal and local income taxes, this conclusion is implicit because the allegations underlying

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> URP's request to open an investigation concerned federal, state and local income taxes.

The Staff goes on to note that following the Commission's decisions in UCB 13 and UM 1074, the Commission incorporated its stand-alone tax policy into OAR 860-027-0048(4)(h). (Staff Brief at 5.)

4. The Administrative Procedures Act Requires that the Commission Comply with its Own Administrative Rules.

It is the policy of the State of Oregon that, whenever possible, the public be involved in the development of public policy and in the drafting of rules. ORS 183.333. Accordingly, ORS 183.335 lays out extensive requirements for the adoption, amendment or repeal of an administrative rule. These procedures would apply to any change to OAR 860-022-0045 or OAR 860-027-0048. Until such a rulemaking is done, the Commission must comply with its stand-alone tax rules.

As set forth in PacifiCorp's Opening Brief, OAR 860-022-0045 is a rule that requires a particular mechanism for ratemaking—a line item on the customer's bill—making the ratemaking requirements of OAR 860-027-0048(4)(h) applicable. The Commission does not have discretion to deviate from OAR 860-027-0048(4)(h) in making its determination in this case. In *Harsh Inv. Corp. v. State*, 88 Or App 151, 157, 744 P2d 588 (1987), the Court of Appeals stated: "An agency is not authorized to act contrary to its rules * * * If it were otherwise, the rules would become meaningless." This decision was reinforced in *Peek v. Thompson*, 160 Or App 260, 264-65, 980 P2d 178 (1999) (citations omitted), where the Court stated: "It is, of course, axiomatic that an agency must follow its own rules. Even if an agency is not required to adopt a rule, once it has done so it must follow what it adopted."

The Commission cannot waive a rule absent a specific reservation to that effect in the rules, such as the express waiver provision in OAR 860-038-0001(4) applicable to the direct

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access rules. *See Harsh Inv.*, 88 Or App at 158 ("Neither could [a state agency] waive a legal prerequisite to its actions; to permit it to do so would render meaningless the statutory procedures for suspending a rule"). *Cf.* OAR 860-011-0000(6) (Commission may waive rules contained in chapter 860, divisions 11 through 14 for good cause shown). The Commission has not reserved its ability to waive OAR 860-027-0048(4)(h).

Thus, OAR 860-027-0048(4)(h) has the force of law "as binding as if the legislature itself had acted." *Harsh Inv.*, 88 Or App at 157.

> "The rule may limit what an agency would otherwise be able to do. 'An agency which is vested with discretion by statute may limit its own discretion in its regulations.' Thus, the question is not * * * what the statute requires; rather, the question is what the rule requires."

Peek, 160 Or App at 265 (citations omitted).

A ruling in this case against the use of stand-alone taxes as the basis for determining and collecting taxes under OAR 860-022-0045 would constitute a change in the Commission's tax policy which has been implemented in OAR 860-025-0048(4)(h). If the Commission decides to change its tax policy, it must do so in an orderly, deliberate and forward-looking manner by opening a rulemaking to consider changes to its current stand-alone utility taxation rule. ORS 183.335. In advance of a change in the Commission's rule, adopted in accordance with the procedure required under the Administrative Procedures Act, it may not issue a ruling that on its face would have the effect of waiving or amending the rule.

The City cites subsection (4) of OAR 860-022-0045 for the proposition that the Commission has reserved the right to waive the line item rule where its application would be unjust or unreasonable. A waiver of this rule would only have prospective effect. It would not affect PGE's petition for a declaratory ruling.

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5. The Commission's Rule Governing Billing Adjustments Should Apply to Any Refund of MCBIT.

Staff asserts that "[a]s a general matter OAR 860-021-0135 applies when lawful rates have been billed incorrectly, not simply when the rates themselves are unlawful," without citing anything for that view. Staff Brief at 7. *See also,* CUB Brief at 6 and ICNU Brief at 13-15. This position that the rule on adjustment of utility bills does not apply when the billed rates are "unlawful" or a matter of "choice"[3] simply does not hold up: a computational error which results in a charge "greater or less" than what is specified in a utility's tariff is unlawful (ORS 757.225), as is a discriminatory charge (ORS 757.310(1)(a), which would be considered a matter of "choice." The Commission applied OAR 860-021-0135 to discriminatory charges in *Re PGE*, OPUC Docket DR 28, Order No. 02-121 at 8 (Feb. 25, 2002). In that case, the Commission was dealing with a charge under a tariff schedule, but as noted above, Commission rules have the same effect as tariff schedules.

ICNU purports to follow the statutory construction rules enunciated by the Court in *PGE,* requiring that the text of the rule be the starting point for interpretation. Rather than discussing the term "overbilling," however, ICNU focuses on the term "usage" and asserts that if the term "usage" is given its ordinary meaning, "any refund or collection under this section is to be calculated according to the 'usage' of the customer." ICNU Brief at 13. ICNU adds that OAR 860-021-0135 was intended to provide a remedy "when an error has occurred in calculating or billing the amount of electricity service *actually used by the customer."* (Emphasis added.) ICNU infers that the refund rule includes the same "actually used" language that the City infers in its argument regarding the MCBIT. As in that case, the rules of statutory construction do not permit ICNU to insert into the rule what the administrative agency has omitted.

[3] *See* CUB Brief at 6: "OAR 860-0021-0135 was not intended to protect utilities from having to refund overcharges that were the result of a utility ignoring a rule or overcharging customers as a matter of choice."

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Staff, CUB and ICNU would have the Commission write exceptions into OAR 860-021-0135 to the effect that it does not apply when the overbilling is "improper" (Staff), or when the overbilling results from what is later determined to be an error in the utility's understanding about the operation of a rule affecting billing (CUB), or when the overbilling is anything other than a billing error caused by a metering error (ICNU). For the reasons stated in section 4 above, the Commission cannot make a determination in this case that would have the effect of amending the rule on adjustment of utility bills. The Commission should give the text of the rule, and the term "overbilling" in particular, its ordinary meaning. Certainly, if the circumstances were reversed and a customer owed the utility (as occurred in Docket DR 28, Order No. 02-121), it would be difficult not to apply OAR 860-021-0135 as a statute of limitations. That is the plain meaning of OAR 860-021-0135.

If the Commission determines that PGE billed customers more than it should have under OAR 860-022-0045, it should consider that error to be an overbilling governed by OAR 860-013-0135.

CONCLUSION

WHEREFORE, PacifiCorp respectfully requests that the Commission grant PGE's Petition for Declaratory Ruling regarding the application of OAR 860-022-0045 to the MCBIT or, alternatively, approve the application of OAR 860-021-0135 to any refund obligation.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **REPLY BRIEF OF PACIFICORP** in DR 32 on the following named person(s) on the date indicated below by:

☒ mailing with postage prepaid

☒ electronic transmission (Email)

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at his or her last-known address(es) indicated below.

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