

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 32

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

This Opening 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”).

INTRODUCTION

The Multnomah County Business Income Tax (“MCBIT”) is imposed on each corporation doing business in Multnomah County. Pursuant to OAR 860-022-0045, PGE collects this tax from its customers through a separate line item on the customer’s bill. Pursuant to OAR 860-027-0048, PGE determines the amount of this line item on a standalone basis, without regard to revenues, deductions or credits of its affiliated companies. In paying the MCBIT to Multnomah County, however, PGE’s parent company, Enron Corp. (“Enron”), has calculated its payment based on the consolidated tax return of the affiliated group of companies that includes PGE. PGE has asked for a declaration that this practice is consistent with the Commission’s rules.

If the Commission determines that PGE’s practice of calculating the MCBIT on a standalone basis but paying the tax on a consolidated basis is not consistent with the

Commission's rules, PGE requests a declaratory ruling that the provisions of OAR 860-021-0135 regarding adjustment of utility bills apply to any required refund.

PacifiCorp supports PGE in both of these requests.

ARGUMENT

1. OAR 860-022-0045 Requires Utilities to Collect Taxes Imposed by Counties as a Separate Line Item on Customer Bills.

OAR 860-022-0045 specifically addresses the method for an energy or telecommunications utility's collection of fees imposed by any county in Oregon. It states:

(1) If any county in Oregon, other than a city-county, imposes upon an energy or large telecommunications utility any new taxes or . . . fees, or increases any such taxes or fees, the utility required to pay such taxes or fees shall collect from its customers within the county imposing such taxes or fees the amount of the taxes or fees, or the amount of increase in such taxes or fees. However, if the taxes or fees cover the operations of an energy or large telecommunications utility in only a portion of a county, then the affected utility shall recover the amount of the taxes or fees or increase in the amount thereof from customers in the portion of the county which is subject to the taxes or fees. 'Taxes,' as used in this rule, means sales, use, net income, gross receipts, payroll, business or occupation taxes, levies, fees, or charges other than ad valorem taxes.

(2) The amount collected from each utility customer pursuant to section (1) of this rule shall be separately stated and identified in all customer billings.

This rule was challenged by Multnomah County and upheld by the Oregon Court of Appeals in *Multnomah County v. Davis*, 35 Or App 521, 581 P2d 968 (1978). The Court decided that OAR 860-022-0045 was a ratemaking rule and was within the Commission's broad discretion to set rates. The Court stated:

Confronted with such a broad delegation, courts either have encouraged or compelled administrative agencies to adopt rules of the kind at issue here establishing the standards for the exercise of

such authority. Furthermore, in adopting policies of general application such as those at issue here, rulemaking procedures assure broader public input into the agency policy-making decisions than are afforded by the contested-case-type procedures where usually only those parties that are directly affected are given notice and participate in the deliberative process. The rulemaking procedures followed by the Commissioner were wholly proper. (Citations omitted.) 35 Or App at 527-528.

Thus, OAR 860-022-0045 is equivalent or even preferable to a tariff. The only distinction from tariff rates is that the Commission has determined that county taxes should be collected directly from customers within the county imposing the tax, rather than through the utility's energy charge.

In adopting OAR 860-022-0045, the Commission recognized that county taxes are revenue measures generally benefiting county residents. Tax revenues for one county do not typically provide benefits to the utility system and thus should be passed on to county residents only. 35 Or App at 527. Franchise fees imposed by cities, on the other hand, grant the utility the right to extend service throughout the city and in that way support the rest of the system. Even franchise fees, however, are limited to 3 percent of a gas utility's gross revenues within the city and 3.5 percent of an electric utility's gross revenues. City franchise fees greater than these percentages must be separately stated on the customer's bill. OAR 860-022-0040. This, too, is based on a determination by the Commission that franchise fees in excess of these percentages are likely to be revenue measures rather than cost recovery measures. *See*, Docket UF 2620, Order No. 43223 (Dec. 30, 1966), pp. 3-4; Docket AR 329, Order No. 98-125 (April 7, 1998), p. 4.

2. The Multnomah County Business Income Tax Law Requires Apportionment of the MCBIT Based on the Filer's Consolidated Tax Return.

The Multnomah County Business Income Tax law specifically requires apportionment of the MCBIT. It states:

(B) Any taxfiler having income from business activity both within and without the county shall in computing the tax, determine the income apportioned to the county by multiplying the total net income from the taxfiler's business by a fraction, the numerator of which is the total gross income of the taxfiler from business activity in the county during the tax year, and the denominator of which is the total gross income of the taxfiler from business activity everywhere during the tax year.

Multnomah County Code §12.610(B). In the case of PGE, Enron is the tax filer. Enron is therefore required to apportion its total net income based on the ratio of Enron's total gross income from business income in the county to Enron's total gross income from all business activity. The term "business activity" is defined to include any of the elements of doing business within or outside the county. *Multnomah County Code §12.610(A)*. This section requires filing the MCBIT tax on the basis of Enron's consolidated tax return.

3. It is Long-Standing Commission Policy to Consider Only Revenues and Expenses Relating to Regulated Service in Computing a Utility's Rates.

The Commission follows standard ratemaking practices in calculating a utility's rates on a standalone basis. This practice was recently confirmed in Docket UM 1074, Order No. 03-214 (April 10, 2003), p. 2, where the Commission adopted a Staff Report that stated:

For ratemaking purposes, the Commission sets PGE's rates to reflect the costs of the company's regulated operations. That is, in a rate proceeding, PGE's rates are set based on its own revenues, costs and rate base for a given test year. Income taxes are calculated using PGE's net operating income. The tax effect of Enron's other operations are ignored for purposes of setting rates. This is consistent with standard ratemaking principles. [Citing

Hahn & Aliff, *Accounting for Public Utilities*, Release 19, Nov. 2002, Sections 7.08[3] and 17.04[3].]

This practice has also been codified in the Commission's administrative rules. OAR 860-027-0048, entitled "Allocation of Costs by an Energy Utility," states:

(4) The energy utility shall use the following cost allocation methods when transferring assets or supplies or providing or receiving services involving its affiliates:

* * *

(h) Income taxes shall be calculated for the energy utility on a standalone basis for both ratemaking purposes and regulatory reporting. When income taxes are determined on a consolidated basis, the energy utility shall record income tax expense as if it were determined for the energy utility separately for all time periods.

This rule applies to "both ratemaking and regulatory reporting." As noted in Section 1 above, OAR 860-022-0045 (requiring that the utility separately state county taxes on customers' bills) is a ratemaking rule of the Commission and has the same force as a tariff. For regulatory reporting purposes, OAR 860-027-0048 requires that the utility record income tax expense "as if it were determined for the energy utility separately for all time periods." This clause can only mean that income tax expense must be recorded on a standalone basis for both future ratemaking and reporting historical costs. PGE had no choice but to charge and report the MCBIT on a standalone basis—or be in violation of this rule.

4. The Commission Has Not Established Any Mechanism to Allow PGE to Deconsolidate Its MCBIT.

Because of the Commission's long-standing practice to treat utility revenues and expenses on a standalone basis and rules such as OAR 860-027-0048, the Commission has not established any mechanisms for deconsolidating local income taxes such as the MCBIT. This

would not be an easy task and would probably require the use of some form of regulatory

mechanism to true-up collections. It would also require PGE to treat its county income taxes differently than all its other income tax expenses, even though they are governed by the same Commission rules and tariffs. Without a rational basis for the distinction, which is not apparent in this case, it would be arbitrary to deny PGE the protection of the Commission's rules. It would be particularly arbitrary to require PGE to make refunds of amounts previously collected.

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

OAR 860-021-0135 limits refunds for overbilling, stating "[i]n no event shall an overbilling or underbilling be for more than three years' usage." If any refund is required in this case, it should be subject to this rule. This rule is clearly designed to limit the time period over which refunds may be claimed. There is no other purpose for the rule.

WHEREFORE, PacifiCorp respectfully request that the Commission grant PGE's Petition for a 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.

DATED: July 14, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **OPENING 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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