

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 32

In the Matter of)

PORTLAND GENERAL ELECTRIC,)

Petition for a Declaratory Ruling Regarding)
the Application of OAR 860-022-0045.)

OPENING BRIEF

OF THE

CITIZENS' UTILITY BOARD OF OREGON

July 14, 2005



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I. Introduction

PGE requests that the Commission issue a “declaratory ruling that OAR 860-022-0045 requires a utility to collect from customers the local income tax that the utility would pay for its stand-alone, regulated operations.” PGE Petition, p.1. In other words, PGE would like the Commission to rule that there is an implicit requirement in OAR 860-022-0045 to calculate local taxes on a stand-alone basis, despite the fact that the rule itself never mentions such a requirement. In addition, the Company asks that “if the Commission decides that OAR 860-022-0045 requires calculation and collection of local income taxes on a different basis than state and federal income taxes, then PGE requests a declaratory ruling whether the provisions of OAR 860-021-0135” apply. PGE Petition, p.1.

We believe that OAR 860-022-0045 contains no requirement to calculate local taxes on a stand-alone basis for ratemaking purposes. Our reading of the rule leads us to the conclusion that the specific language of OAR 860-022-0045 means that only local taxes actually paid to government shall be collected from customers, regardless of the treatment of other taxes in the ratemaking process. However, for the purposes of the declaratory question raised by PGE, we need only find that the rule does not require the specific, implicit stand-alone requirement that PGE seeks.

With regard to the provisions of OAR 860-021-0135, applying the billing error rule to limit PGE's exposure in the event the Commission does not find an implicit directive in OAR 860-022-0045 to calculate local taxes on a stand-alone basis, we think the billing error rule does not apply when the utility action is a matter of course or choice, not an actual error.

II. Declaratory Ruling On OAR 860-022-0045

We simply cannot read any stand-alone requirement into OAR 860-022-0045, no matter how it is stretched. The rule states:

(1) If any county in Oregon, other than a city-county, imposes upon an energy or large telecommunications utility any new taxes or license, franchise, or operating permit 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.

Oregon Administrative Rules 860-022-0045(1) and (2). [Emphasis added.]

The Company argues that, because the Commission has historically used stand-alone tax calculations as the basis for forecasting state and federal income taxes in a utility test year for ratemaking purposes, this rule must require the same use of stand-alone taxes for county-based income taxes. This is quite a leap of faith, however, because the rule at issue clearly does not concern the traditional rate case process where taxes are forecast for a test year revenue requirement upon which rates are ultimately based.

The purpose of this rule is to allow a utility to collect from ratepayers in a specific county, or portion thereof, the “amount of the taxes or fees” imposed, and to require that the fee be “separately stated and defined in all customer billings.” A utility calculates its local taxes on an annual basis, and charges customers of that local jurisdiction to recover the specific cost of that local tax.

Even PGE recognizes that the purpose of the rule was to create an exception to traditional ratemaking:

Both OAR 860-22-040 and OAR 860-022-045 serve to ensure that revenue-raising taxes imposed by counties and cities are not included in general rates, which are paid by customers statewide, but rather are charged only to customers in the counties and cities that benefit from such taxes.

PGE Petition for Declaratory Ruling, page 2, footnote 1.

The goal of ratemaking is to forecast costs and set a revenue requirement that, under normal conditions, allows a utility to recover its costs and a reasonable rate of return. OAR 860-022-0045 has nothing to do with the traditional forecasting of

normalized costs in a contested-case proceeding before the Commission. It is a special cost-recovery mechanism that, by design, is separate from general statewide ratemaking.

PGE argues that OAR 860-022-0045 is different from traditional ratemaking in form only, and is completely consistent with the stand-alone tax treatment one sees in a rate case; therefore, the rule implicitly requires stand-alone treatment. There are two problems with this argument. First, the rule doesn't say this, and second, stand-alone tax treatment is not the only possible Commission policy on taxes.

We cannot read the language of OAR 860-022-0045 to require any particular treatment of local taxes. The rule says that: 1) the utility "required to pay such taxes or fees" shall collect from customers in the county, or portion thereof "the amount of the taxes or fees, or the amount of increase in such taxes or fees"; and 2) the tax or fee "shall be separately stated and identified in all customer billings." We see no other explicit or implicit requirement, much less one dictating that those taxes must be calculated on a stand-alone basis.

In addition, in order for OAR 860-022-0045 to implicitly require a particular tax treatment, there can be only one way to treat taxes, because the rule itself provides no detail on tax treatment. If there were more than one way to treat taxes, how would we know which alternative way is implied by the rule? Yet we know there are multiple ways to treat taxes. In his memorandum to the Commission on tax treatment policy, Assistant Attorney General Jason Jones wrote, "the Commission has the discretion to choose a policy of calculating tax expenses so long as its policy is rational." Department of Justice Memorandum to the Public Utility Commission, February 18, 2005, page 1.

In fact, customer groups have proposed several alternative approaches to tax calculation and tax forecasting. If the Commission can allow other approaches to forecasting federal and state income taxes in a general rate case, then it stands to reason that OAR 860-022-0045 does not require, and certainly not implicitly, a specific approach to county income taxes. We could stop here in order to answer PGE's proposed question for the declaratory ruling. No, there is no requirement in the rule for local taxes collected from customers to be calculated on a stand-alone basis.

However, we go on to point out that we believe the rule means that only local taxes actually paid to government shall be collected from customers, regardless of the treatment of other taxes in revenue requirement.

III. Declaratory Ruling On OAR 860-021-0135

PGE also asks the PUC to apply OAR 860-021-0135, the billing error rule, in the event the Commission finds that the local tax rule does not require or imply stand-alone treatment. Applying OAR 860-021-0135 would limit PGE's liability if PGE has been collecting local taxes but not paying those taxes to the governmental authority.

OAR 860-021-0135 concerns Measuring and Billing for Utility Service.

According to the rule:

When an underbilling or overbilling occurs, the energy or large telecommunications utility shall provide written notice to the customer detailing the circumstances, period of time, and amount of adjustment. If it can be shown that the error was due to some cause and the date can be fixed, the overcharge or undercharge shall be computed back to such date. If no date can be fixed, the energy or large telecommunications utility shall refund the overcharge or rebill the undercharge for no more than six months usage. In no event shall an overbilling or underbilling be for more than three years' usage.

Oregon Administrative Rules 860-021-0135 (1).

This rule concerns billing errors, but the issue here is not a billing error. PGE did not accidentally bill customers for a 3% tax, when the tax was actually only 2.9%. PGE billed customers correctly. They intended to bill for stand-alone taxes, and they did bill for stand-alone taxes.

The issue at question here is closer to one of consumer fraud. By listing a line item on the bill for a Multnomah County tax, explicitly charging and informing customers of the amounts they are paying toward the county tax, but then not paying it to the government, PGE was increasing its shareholders' profit at the expense of customers under false pretenses.

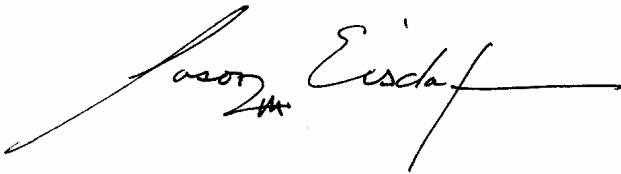
If OAR 860-022-0045 requires a utility to charge customers the amount of taxes that is actually imposed on that utility, as we believe it does, and PGE did not do so, then the Commission must consider the reason. If this were due to a billing error, then OAR 860-021-0135 would apply. PGE, however, does not argue that this was due to a billing error. Instead, PGE charged customers for taxes calculated on a stand-alone basis as a matter of course. OAR 860-0210-0135 was not intended to protect utilities from having to refund overcharges that were the result of a utility ignoring a rule and overcharging customers as a matter of choice.

Local taxes are not a part of a tariff reviewed by the Commission in a rate case, and so the Commission has not officially reviewed PGE's treatment of local taxes. We do not think it is appropriate to apply the billing error rule to this situation.

IV. Conclusion

In conclusion, we reiterate that we believe OAR 860-022-0045 neither explicitly nor implicitly requires a utility to calculate local taxes on a stand-alone basis, and also that the application of OAR 860-0210-0135 to this situation is not appropriate.

Respectfully Submitted,
July 14, 2005

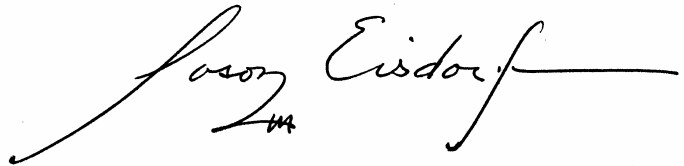
A handwritten signature in black ink, reading "Jason Eisdorfer". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Jason Eisdorfer #92292
Attorney for the Citizens' Utility Board of Oregon

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2005, I served the foregoing Opening Brief of the Citizens' Utility Board of Oregon in docket DR 32 upon each party listed below, by email and U.S. mail, postage prepaid, and upon the Commission by email and by sending 6 copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

Respectfully submitted,



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