

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**DR 32**

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

Pursuant to the Prehearing Conference Report issued in Docket No. DR 32 on June 10, 2005, the Industrial Customers of Northwest Utilities submits this Opening Brief regarding Portland General Electric Company’s (“PGE” or the “Company”) Petition for Declaratory Ruling (the “Petition”) regarding the Company’s collection of the Multnomah County Business Income Tax (“MCBIT”) during the period 1997-2004. PGE has requested that the Public Utility Commission of Oregon (“OPUC” or the “Commission”) make the following declarations:

- 1) Utilities are required to determine their local income taxes on a regulated, stand-alone basis and collect such amounts from customers when applying OAR § 860-022-0045;
- 2) PGE acted in conformity with OAR § 860-022-0045 when, during the period PGE was included in Enron’s consolidated tax returns, it charged customers for Multnomah County Business Income Tax (“MCBIT”) amounts that PGE calculated according to its stand-alone regulated operations and paid those sums to Enron; and
- 3) If the Commission determines that PGE has improperly billed for local income taxes, the provisions of OAR § 860-021-0135, which relates to adjustment of utility bills when underbilling or overbilling occurs, apply.

Petition at 10.

ICNU requests that the Commission decline to issue the rulings sought by PGE

for the following reasons:

- 1) The declaratory ruling requested by PGE is overly broad. PGE requests a ruling that “utilities” are required to collect “local income taxes” based on the utility’s stand-alone operations, but the Petition demonstrates that the dispute at issue relates to *PGE’s* collection of the *MCBIT*. Any Commission ruling should be limited to PGE’s collection of the *MCBIT* only;
- 2) OAR § 860-022-0045 distinguishes the calculation and collection of the *MCBIT* from the calculation and collection of federal and state income taxes. The rule provides that when the *MCBIT* is “imposed” upon a utility, the utility “required to pay” the *MCBIT* shall collect “the amount of the taxes or fees” through a line item on customers’ bills. This is significantly different than the normalized amount of federal and state income taxes that PGE collects in rates established by the Commission in a general rate case. PGE’s interpretation that OAR § 860-022-0045 *requires* calculation and collection of the *MCBIT* in the same manner used for federal and state income taxes is inconsistent with the rule’s plain language;
- 3) Under the Multnomah County Code provisions governing the *MCBIT*, PGE’s stand-alone tax liability was irrelevant for purposes of the *MCBIT* when Enron included PGE in its consolidated tax group. As PGE acknowledges, the “starting point” for determining the *MCBIT* for a consolidated tax group is the net income of the consolidated group. It is unreasonable to conclude for purposes of OAR § 860-022-0045 that the *MCBIT* was “imposed” or that PGE was “required to pay” the tax based on the Company’s stand-alone net income, because the *MCBIT* did not even consider that amount;
- 4) PGE has not been authorized by the Commission to collect the *MCBIT*. Even if the Commission determines that such authorization was not required in the past, the disagreement regarding the manner in which the *MCBIT* is to be collected demonstrates that the Commission should require approval in the future; and
- 5) OAR § 860-021-0135 applies to billing or metering errors in the context of service under a utility tariff. The issues raised by PGE in this Docket do not relate to a billing error or metering error, or to tariffed service. If the Commission determines that PGE improperly billed customers for the *MCBIT*, the provisions of OAR § 860-021-0135 do not apply.

Customers, utilities, and the Commission all have an interest in ensuring that PGE collects the MCBIT in a manner that is consistent with the MCBIT itself and with the OPUC's statutory and policy directives.

## DISCUSSION

### 1. **If the Commission Issues A Declaratory Ruling In This Proceeding, That Ruling Should Be Narrowly Tailored to Focus on PGE's Collection of the MCBIT**

Any declaratory ruling issued by the Commission in this proceeding should focus specifically on the facts and issues as stated by PGE and should not be expanded to issues regarding "utilities" or "local income taxes" in general. The authority to issue a declaratory ruling is not intended to allow advisory rulings or to create a vehicle by which the Commission may make broad statements of general policy. Johnson v. Miller, 113 Or. App. 98, 100-01 (1992). Declaratory rulings are limited to the facts presented to the decision maker and, in general, require a controversy to exist for a decision to be made. Id. Under these circumstances, PGE's request for a determination that "[u]tilities are required to determine their *local income taxes* on a regulated, stand-alone basis and collect such amounts from customers when applying OAR § 860-022-0045" is overly broad. Petition at 10. The Petition relates to PGE's collection and payment of the MCBIT. The Commission should limit any declaratory ruling to PGE and the MCBIT, and should not expand any decision to generally apply to all Oregon utilities or local income taxes.<sup>1/</sup>

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<sup>1/</sup> ICNU's analysis in this Opening Brief is focused on PGE and the MCBIT specifically. The same principles would, however, apply to a more general ruling.

**2. OAR § 860-022-0045 Distinguishes the MCBIT From State and Federal Income Taxes**

OAR § 860-022-0045 addresses the collection of local government fees, taxes, and other assessments imposed upon Oregon utilities after December 16, 1971. The relevant provisions of the rule state:

- (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.

OAR § 860-022-0045(1)-(2). These provisions distinguish the manner in which a utility collects county income taxes such as the MCBIT from the manner in which a utility collects other types of income taxes. First, county income taxes are collected from only ratepayers located within the county that assessed the tax. This county-specific collection method differs from collection of state and federal income taxes, which are included in the rates of all of the utility’s ratepayers.

Second, county income taxes are not included in “rates” as a normalized expense that is established and approved by the Commission in a ratemaking proceeding. Rather, county

income taxes are collected through a line item that is “separately stated and identified in all customer billings.” OAR § 860-022-0045(2). This is known as a billing adder.

Finally, the rule dictates that “the utility required to pay such taxes or fees shall collect from its customers . . . *the amount* of the taxes or fees, or *the amount* of increase in such taxes or fees.” OAR § 860-022-0045(1) (emphasis added). In other words, the rule requires the utility to specifically itemize and collect from customers the specific amount of county income tax that the utility is required to pay with respect to such customers. This requires an after-the-fact examination of what amount of tax is actually imposed on the utility. In contrast, when a utility collects amounts from customers for federal and state income taxes, the Commission determines a normalized amount of those taxes to be included in rates established in a ratemaking proceeding.

**3. OAR § 860-022-0045 Does Not Require PGE to Bill Customers for MCBIT Unless the MCBIT Is “Imposed” on PGE and PGE Is “Required to Pay” Some “Amount” of the Tax**

PGE asks the Commission to declare that during the time PGE was consolidated with Enron for income tax purposes, under OAR § 860-022-0045 PGE was *required* to: 1) determine its MCBIT on a regulated, stand-alone basis; and 2) collect from Multnomah County customers the amount that PGE determined it would have paid as a stand-alone utility. PGE Petition at 1, 10. The plain language of OAR § 860-022-0045 does not support the determination requested by PGE. As described above, OAR § 860-022-0045(1) states that when a county tax or fee is “imposed upon” a utility, “the utility required to pay” the tax must collect “the amount of the taxes” from customers within the relevant county. It follows that three things must occur for PGE to properly collect amounts from customers for MCBIT: 1) Multnomah County must

have “imposed” some amount of MCBIT on PGE; 2) PGE must be “required to pay” that tax; and 3) PGE must collect from customers only “the amount” of the tax for which PGE is responsible.

**a. The Commission Must Interpret OAR § 860-022-0045 in Accordance with Established Rules of Statutory Construction**

To determine whether OAR § 860-022-0045 required PGE to collect MCBIT from customers based on the utility’s stand-alone operations during the time that PGE was consolidated with Enron, the Commission’s first step is to determine the meaning of OAR § 860-022-0045. The Commission must first look to the text and context of the rule. PGE v. Bureau of Labor and Industries, 317 Or. 606, 610-11 (1993). When examining the text of the rule, the Commission must give “words of common usage . . . their plain, natural, and ordinary meaning.” PGE, 317 Or. at 611. If the Commission’s intent in promulgating the rule is clear after this inquiry, the Commission need not proceed further. Abu-Adas v. Employment Dep’t, 325 Or. 480, 485 (1997).

**i. The Plain Language of OAR § 860-022-0045 Requires PGE to Bill Customers for MCBIT Only If MCBIT Is Imposed on PGE**

The primary issue in interpreting the text of OAR § 860-022-0045 is whether MCBIT was “imposed” on PGE for purposes of the rule. The plain meaning of “impose” is “to make, frame, or apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforceable.” Webster’s Third New International Dictionary 1136 (1993). It follows that the MCBIT was “imposed” on PGE only if the tax was applied to the Company’s income and amounts for the tax were actually due and owed by PGE.

In addition, it also is necessary to examine OAR § 860-022-0045 in the context of the Multnomah County Code (“MCC”) provisions governing the MCBIT to determine whether the tax was “imposed” on PGE. The MCBIT is “imposed” as follows: “Except as otherwise provided in this chapter, a tax is imposed upon each person<sup>2/</sup> doing business within the county equal to 1.45% of the net income from the business within the county effective with tax years beginning on or after January 1, 1993.” MCC § 12.500(A). “Income,” for purposes of the MCBIT, is defined as “[t]he net income arising from any business, as reportable to the State of Oregon for personal income, corporation excise, or income tax purposes . . . .” MCC § 12.110. The income upon which the MCBIT is imposed differs, however, for corporations that elect to file consolidated tax returns. For those entities, the income upon which the MCBIT is imposed is deemed to be the net income of the consolidated tax group:

If one or more persons are required or elect to report their income to the state for corporation excise or income tax purposes or personal income tax purposes in a consolidated, combined or joint return, a single return shall be filed by the person filling [*sic*] such return. In such cases, **INCOME** means the net income of the consolidated, combined or joint group of taxfilers before any allocation or appointment for operation out of the state, or deduction for a net operating loss carrying-forward or carry-back.

MCC § 12.110(B). In other words, this definition demonstrates that PGE’s stand-alone income was not even considered for purposes of calculating the MCBIT when PGE was included in Enron’s consolidated tax group. As PGE points out, “[f]or corporations that file a consolidated Oregon tax return, the *starting point* is the group’s consolidated net income as reported on its

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<sup>2/</sup> “Person” is defined as “[a] natural person, proprietorship, partnership, limited partnership, family limited partnership, joint venture, association, cooperative, trust, estate, corporation, personal holding company, limited liability company, limited liability partnership or any other form of organization for doing business.” MCC § 12.100.

consolidated state tax return.” Petition at 3 (emphasis added). Under these circumstances, it is unreasonable to conclude that the MCBIT was “imposed” on PGE for purposes of OAR § 860-022-0045, because the plain language of the MCBIT did not apply the tax rate to PGE’s net income to determine the amount of tax to be paid. The MCBIT only considered the net income of the consolidated group.<sup>3/</sup> As a result, OAR § 860-022-0045 did not “require” PGE to calculate and collect amounts for MCBIT based on the utility’s stand-alone operations when PGE was included in Enron’s consolidated tax group.

**ii. PGE Must Collect from Customers the Amount of MCBIT that PGE was Responsible for Paying**

OAR § 860-022-0045 also specifies that PGE shall collect from customers “the amount of the tax.” A reasonable reading of this language is that “the amount of the tax” that the utility shall collect is the specific amount “imposed” on the utility or that the utility is “required to pay.” As described above, the plain language of the MCBIT demonstrates that the tax was not imposed based upon PGE’s stand-alone net income when the Company was included in Enron’s consolidated tax group. Thus, it is unreasonable to conclude that “the amount” for PGE to collect from customers is required to be calculated according to the Company’s stand-alone MCBIT liability. Even assuming for the sake of argument that PGE was responsible for some portion of any amount of MCBIT that Multnomah County actually “imposed” on Enron based on PGE’s operations, a reasonable interpretation is that “the amount” of the tax for PGE to collect

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<sup>3/</sup> Given that the plain language of the MCBIT did not impose the tax upon PGE when the Company was included in Enron’s consolidated group, it follows that PGE was not a “utility required to pay” the MCBIT for purposes of OAR § 860-022-0045.



from customers is the portion of the total amount paid by Enron that is attributable to PGE's operations.<sup>4/</sup>

**b. PGE's Interpretation of the OPUC's Policy Regarding State and Federal Income Taxes Renders the Specific Provisions of OAR § 860-022-0045 Meaningless**

PGE ignores the specific provisions of OAR § 860-022-0045 in arguing that the OPUC policy of calculating utility income taxes on a stand-alone basis for ratemaking purposes also requires PGE to calculate its MCBIT on a stand-alone basis. *See* Petition at 5. As a matter of statutory construction, the plain language of OAR § 860-022-0045 contains no requirement that utilities calculate local income taxes on a stand-alone basis. The rule unequivocally obligates "the utility required to pay" the taxes to collect "the amount of the taxes." PGE's interpretation violates the principle that courts do not "insert what has been omitted" when interpreting a statute or rule. ORS § 174.010.

In addition, it is unreasonable to conclude, as PGE suggests, that the Commission's policy regarding the calculation of normalized federal and state income taxes in a general rate case should "trump" the specific provisions regarding county income taxes in OAR § 860-022-0045. PGE argues that the Commission's accounting rule, OAR § 860-027-0048, which directs utilities to calculate income taxes on a stand-alone basis for ratemaking and reporting purposes, should determine the manner in which the MCBIT is calculated and collected. If the Commission were to adopt this interpretation, however, it essentially would

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<sup>4/</sup> PGE did not allege in its Petition that the Company was responsible for any portion of the MCBIT imposed on Enron when the Company was included in Enron's consolidated tax group. PGE only alleged, and requested that the Commission determine, that the Company was required to calculate and collect amounts for MCBIT based on the utility's stand-alone operations. It is unclear under the facts alleged by PGE whether the Company believes that there is some amount of MCBIT that may have been imposed upon Enron that it may have been appropriate for the Company to collect from customers.

render meaningless OAR § 860-022-0045, which was adopted specifically to govern collection of county income taxes such as the MCBIT. Rules of statutory construction mandate the opposite result from the one PGE urges—according to ORS § 174.020(2), “[w]hen a general and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.” Accordingly, the specific provisions relating to collection of county income taxes in OAR § 860-022-0045 are paramount to the general accounting provisions of OAR § 860-027-0048.

PGE also argues that all utility income taxes should be calculated based on the utility’s stand-alone operations for ratemaking purposes because “if rates were set in a manner that captured the parent’s tax losses, the expenses that created those tax savings would also need to be reflected in rates and would harm PGE’s customers.” Petition at 5. Regardless of whether this argument is valid in the context of federal and state income taxes, it is meaningless in the context of the MCBIT. The MCBIT is not calculated or collected in the same way as federal and state income taxes. Federal and state income taxes are treated as normalized expenses in setting rates. In contrast, the MCBIT is treated as an expense that is directly passed through to customers. It would require an absurd interpretation of OAR § 860-022-0045 to achieve this result. The justification that PGE claims applies to state and federal income taxes does not apply in the context of the MCBIT.

#### **4. PGE Should Be Required to Receive Commission Approval to Collect the MCBIT**

A fundamental issue relating to whether PGE correctly determined and collected the MCBIT is whether OAR § 860-022-0045 *requires* PGE to collect the amount of tax from customers without first receiving Commission approval. PGE has not alleged in its Petition that

it sought Commission approval to collect the MCBIT from ratepayers, nor has the Company presented evidence that such approval was ever granted. ICNU maintains that because the MCBIT is an amount that PGE seeks to recover from customers, PGE is required to obtain Commission authorization prior to billing customers for those amounts. The OPUC has exclusive regulatory oversight over the amounts that PGE collects from customers, and it is unreasonable to assume that the Commission would delegate to PGE the task of ensuring that the amount of MCBIT are properly calculated and collected.

In addition, regardless of whether PGE was required to obtain OPUC approval to collect MCBIT in the past, the current dispute over the collection of that tax from customers demonstrates that the Commission should require PGE to obtain approval in the future. As described above, ICNU disagrees with PGE's interpretation of OAR § 860-022-0045 as it relates to the MCBIT, and ICNU's interpretation leads to a different conclusion regarding whether MCBIT was "imposed" on PGE and properly collected from customers. The existence of such genuine disagreement indicates that it should not be left to the Company to ensure that the MCBIT is properly calculated and collected—the legislature has delegated the duty to establish and authorize rates to the Commission. The amount of taxes that PGE collects from customers has been the subject of much debate and scrutiny in recent years, and the Commission should carefully review PGE's collection of these amounts to ensure that they have been properly collected and calculated. The Commission has pervasive oversight over the costs that PGE charges to customers, and there is no basis to conclude that the Commission should relax that authority for this specific subset of costs.

**5. OAR § 860-021-0135 Applies to Billing or Metering Errors Related to Customers Usage Rather Than a Uniformly Collected Tax Such as the MCBIT**

PGE also requests that the Commission determine that, if the Company improperly calculated and collected amounts for MCBIT, OAR § 860-021-0135 limits the amounts that PGE should return to customers. Petition at 8. OAR § 860-021-0135(1) provides:

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.

PGE acknowledges that the Company "has been billing and collecting local income taxes on a stand-alone basis for longer than three years." Petition at 8. As a result, PGE requests that the Commission apply OAR § 860-021-0135(1) to limit any amount that the Company would have to refund for improperly collected MCBIT to three years' usage.

The provisions of OAR § 860-021-0135 limiting adjustments to three years' usage do not apply to PGE's billing adder for the MCBIT. On its face, OAR § 860-021-0135 applies to billing errors for utility service, the most typical scenario being a meter error. The intentional and ongoing collection of the MCBIT from ratepayers is not the type of overcharge contemplated by the rule.

In interpreting OAR § 860-021-0135, the Commission should follow the statutory analysis from PGE v. Bureau of Labor and Industries that is described above. Under the first level of this analysis, the text of OAR § 860-021-0135 reveals that the rule primarily relates to

metering and billing errors under a utility tariff rather than errors in collection of costs for taxes such as the MCBIT. Indeed, the text does not mention overcharge for taxes or billing that is not related to usage. Furthermore, the provision stating that, “No billing adjustment shall be required if an electric or gas meter registers less than 2 percent error under conditions of normal operation” indicates that the preceding provisions regarding billing adjustments pertain to overbilling and underbilling resulting from significant meter error.

In addition, any refund or collection under this section is to be calculated according to the “usage” of the customer. If the term “usage” is given its ordinary meaning, it is apparent that the billing adjustment provision 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. PGE, 317 Or. at 611. The term “usage” does not encompass collection of a tax that is separate from and unrelated to charges incurred due to the customer’s use of a specific amount of the service provided by the utility. Indeed, it is unclear how this provision would apply in the context of refunding amounts for the MCBIT because PGE has not alleged that it collects amounts for the tax according to customers’ “usage.”

When OAR § 860-021-0135 is read in the context of other related provisions, its place in the statutory scheme also reveals that it was intended to apply to errors in utility bills caused by metering errors. The rule is located in Division 21 of Utility Regulation, under the heading “MEASURING AND BILLING SERVICE.” The previous rule sets forth a procedure for customers to request meter testing to ensure that their meter is measuring their usage accurately. OAR § 860-021-0130. In contrast, the rule regarding the collection of local taxes, OAR § 860-022-0045, is located in Division 22, which is titled “RATES.” When read in

context, the bill adjustment rule is applicable to overbilling and underbilling resulting from meter or calculation errors,<sup>5/</sup> and should not be construed so as to apply to limit any amount that PGE is required the refund due to improper collection of the MCBIT.

The manner in which PGE has incorporated the provisions of OAR § 860-021-0135 into the Company's tariff confirms that the rule is intended to apply to metering and billing errors under a utility tariff. PGE's tariff includes a provision regarding billing adjustments under the heading "Metering and Meter Reading," and this provision mirrors OAR § 860-021-0135 in that it refers to errors in metering or billing service, not the inclusion of a separate tax adjustment on a customer's bill. *See* Petition, Exh. F at 2-4. In other words, the plain language of PGE's tariff also appears to apply the billing adjustment provision of OAR § 860-021-0135 when the Company has charged a customer for electricity service that was "unmetered or incorrectly metered or billed." *Id.* at 4.

Finally, the Commission has previously determined that this rule applies to billing and metering errors related to utility service provided pursuant to a utility tariff. *Re PGE*, OPUC Docket No. DR 28, Order No. 02-121 at 8 (Feb. 25, 2002). As described above, however, PGE does not collect amounts for the MCBIT through its general tariffs. Instead, OAR § 860-022-0045 specifies that the amount of the MCBIT imposed upon PGE should be collected through a separate line on customers' bills. Under these circumstances, if the Commission determines that

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<sup>5/</sup> PGE's reliance on cases in which the Commission applied the rule to billing errors when customers were billed according to an incorrect rate schedule is misplaced. *See* Petition at 9. The use of an incorrect rate is a calculation error related to billing for that customer's usage, as opposed to the addition of a uniform tax which is unrelated to the customer's usage and cannot be properly characterized as a billing error.

PGE improperly calculated and collected amounts for MCBIT, the Commission should not interpret OAR § 860-021-0135 to limit the refund that PGE must provide to customers.

### **CONCLUSION**

ICNU requests that the Commission deny PGE's request for the declaratory ruling sought in the Petition. PGE's request is overly broad, and the Company's claims that OAR § 860-022-0045 required it to collect amount for the MCBIT based on the utility's stand-alone tax liability conflicts with the plain language of the rule and the provisions of the Multnomah County Code governing the MCBIT. If the Commission determines that PGE has improperly collected amounts for MCBIT, then OAR § 860-021-0135 does not apply to limit the amount that the Company must refund to customers.

Dated this 14th day of July, 2005.

Respectfully submitted,

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