BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

DR 32

In the Matters of:
PORTLAND GENERAL ELECTRIC COMPANY Petition for a Declaratory Ruling Regarding the Application of OAR 860-022-0045

MOTION TO DISMISS

AND

OPENING BRIEF

OF

KEN LEWIS AND UTILITY REFORM PROJECT

July 14, 2005

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I. INTRODUCTION.

PGE has requested a declaratory ruling that:

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 it charged customers for county income taxes imposed on PGE as a stand-alone regulated operation and when PGE paid those sums to Enron during the period when Enron filed a consolidated tax return; and,

3. If the Commission determines that PGE has improperly billed for local income taxes, the provisions of OAR 860-021-0135 apply.

The request for a declaratory ruling was made after and in response to a lawsuit (with class action certification requested) filed by Multnomah County ratepayers, including intervenor Ken Lewis and others, seeking to recover at least $6.9 million (exclusive of interest) in charges they paid to PGE "for the benefit" of Multnomah County to allegedly cover PGE's payments for the Multnomah County Business Income Tax ("MCBIT") during the years since 1996. Apart from a sum of less than $4,000, the remainder of the $6.9 million in such "taxes" were never imposed upon PGE by the County, and PGE was not required to pay the amount collected to any government, except for a payment of $3,631 in 2003.

Since 1997, if not earlier, PGE has printed upon the electricity bills of its over 200,000 customers in Multnomah County a "billing adder" for "Multnomah County Tax." It is not disputed by PGE that, since 1997 and through late 2004, PGE has collected over $6.9 million from its customers in Multnomah County by means of this "Multnomah County tax" billing adder. During the same period of 1997-2004, PGE has admitted in discovery in the UCB 13 proceeding that PGE actually paid in MCBIT

a grand total of only $3,631 (which it paid in 2003). Lewis has alleged in Multnomah County Circuit Court, and PGE has not denied, that its parent, the consolidated tax filer Enron, paid nothing in MCBIT, ever. Thus, during 1997-2004, PGE charged Multnomah County ratepayers over $6.9 million for MCBIT, and the county actually received less than $4,000 in MCBIT from PGE and/or Enron.

The bills sent customers ambiguously identified the charges as for "Multnomah County tax" and "collected on behalf of local government * * *." These statements on the bills were (and continue to be) false in several respects:

1. They create a false inference that the customer owes the tax as a taxpayer;

2. They present ratepayers with an indicia and implication of regulatory approval and veracity by appearing on a bill of a regulated utility;

3. They omit relevant information--that neither PGE nor the customer owed the tax and that amounts collected from ratepayers were never paid to local government;

4. The charge was not collected "on behalf" the County, as the County had not designated PGE to be a collection agent on its behalf; and

5. The charge was not collected "on behalf" the County, as the County never received 99.95% of the tax collected from PGE ratepayers in the County.

II. MOTION TO DISMISS.

The Commission should dismiss the petition for declaratory ruling as improvidently granted. The Commission lacks both authority and jurisdiction to issue an advisory opinion on this matter.

The statute which authorizes this proceeding, ORS 756.450, provides:

> On petition of any interested person, the Public Utility Commission may issue a declaratory ruling with respect to the applicability to any person,

property, or state of facts of any rule or statute *enforceable by the commission.*[1] (emphasis supplied)

Here the rule at issue is not "enforceable" by the Commission for three distinct reasons:

1. The Commission has taken the position repeatedly that the "filed rate doctrine" prohibits it from ordering refunds for past overcharges, including overcharges which were unlawful;

2. The Commission does not in fact enforce the rule, and Commission Staff disavow any role in its enforcement or administration; and

3. The matter is within the jurisdiction of the Multnomah County Circuit Court, and the Commission cannot divest that court of jurisdiction.

Thus, the rule is neither enforced nor enforceable by the Commission, and the petition fails to present a justiciable controversy.

In fact, the staff memorandum of May 17, 2005, recommended that the Commission undertake this matter to "assist the court." Circuit Court Judge Wittmayer has stayed the judicial proceedings until October 15, 2005, upon representations made in open court by PGE's attorney, David Markowitz, that the Commission's ruling would not be "binding" but instead would be helpful in the same manner as an Attorney General's Opinion. However, an offer of assistance through an advisory opinion does not present a justiciable controversy, as required by the statute which contemplates a "binding" enforceable order.

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1. The full text continues:

> A declaratory ruling is binding between the commission and the petitioner on the state of facts alleged, unless it is modified, vacated or set aside by a court. However, the commission may review the ruling and modify, vacate or set it aside if requested by the petitioner or other party to the proceeding. Binding rulings provided by this section are subject to review in the circuit court in the manner provided in ORS 756.580 for the review of orders.

The Commission's statutory quasi-judicial authority under ORS 756.450 is a delegation of the "judicial power" of Article VII, § 1, of the Oregon Constitution. That power does include the power to issue mere advisory opinions. **All** exercises of judicial power in Oregon require a justiciable controversy. Any proceeding "must be more than a request for an advisory opinion; as an exercise of the 'judicial power' under Article VII (amended), section 1, it requires a justiciable controversy between the parties. ***La Grande/Astoria v. PERB****,* 281 Or 137, 139 n 1, 576 P2d 1204 (1978)." ***Oregon State Shooting Society v. Multnomah County***, 122 OrApp 540, 543, 858 P2d 1315, 1318 (1993).

A. THE COMMISSION HAS TAKEN THE POSITION REPEATEDLY THAT THE "FILED RATE DOCTRINE" PROHIBITS IT FROM ORDERING REFUNDS FOR PAST OVERCHARGES, INCLUDING OVERCHARGES WHICH WERE UNLAWFUL.

The Commission currently takes the position that it has no power to order rate refunds, whether or not past charges have been determined to be unlawful by the courts. So the Commission's opinion about a rule cannot solve a justiciable controversy. The Commission is fully aware that it has consistently and repeatedly argued that, because of the alleged existence of a "filed rate doctrine" in Oregon, it lacks any power to order enforceable rate refunds. If the local tax adder is truly a "rate" for which the OPUC has jurisdiction, then the "filed rate doctrine" prevents the OPUC from supplying any remedy (in the repeatedly declared current view of the OPUC).

The simple fact is that only the court has jurisdiction and can award damages or provide relief in equity. PGE apparently agrees with this interpretation, as it so argues to the Oregon Court of Appeals that the Commission is limited by the filed rate doctrine and can never order refunds of previously charged rates. At this precise time, PGE and the OPUC itself (as well as other utilities as *amicii*) are on record in the Court of Appeals that the OPUC lacks any authority whatever to recalculate those rates retroactively, even under court order, and has no authority to require PGE to refund any unlawful charges to ratepayers or even to reduce future rates to offset the unlawful charges. However, in this proceeding PGE claims that the OPUC has both authority to "enforce" the rule (creating the justiciable controversy) and the authority to award refunds, although PGE seeks to severely limit the time period for such refunds. At the same time, to the Court of Appeals, PGE argues that the OPUC has no legal authority to provide any remedy whatever for past overcharges or past unlawful charges. Both legal positions advanced by PGE cannot be right, nor can both be advanced at the same time in good faith.

The extent of the inconsistency is obvious by reviewing the PGE brief (filed September 27, 2004) before the Court of Appeals in ***Utility Reform Project v. OPUC***, CA No. A123750. That case arose when URP and undersigned counsel appealed a rate order, which we contended contained unlawful charges by PGE for profit on the long-abandoned Trojan Nuclear Plant. The trial court agreed with URP and remanded to OPUC with instructions to correct the overcharges for illegal profits, either through refunds or through rate reductions. The court expressly rejected the "filed rate doctrine," as asserted by both OPUC and PGE. OPUC and Intervenor PGE appealed,

and the issue is whether, upon court order to do so, OPUC can provide any refunds to ratepayers who paid the unlawful charges for Trojan profits.

Both PGE and the Commission continue to deny that there exists any statutory authority or administrative mechanism for refunding unlawful charges to ratepayers. In ***URP v. OPUC***, CA No. A123750, PGE seeks to vitiate any possible "relief" it now claims OPUC can afford under its "primary jurisdiction." In the Court of Appeals, PGE argues the OPUC has no power whatsoever to afford any relief to any ratepayers:

> But the PUC cannot change past rates. The legislature did not give it the power to readjust retroactively the sales and purchases of electricity that have already happened. The PUC cannot make customers pay extra for the electricity they have already bought and used. Neither can it order refunds to them. Because the system that the legislature established is not retroactive, the rates in effect for any sale are always known, definite, and simple. The price of electricity is therefore free of the uncertainty and ambiguity that would attend a decision by the PUC or a court to retroactively readjust the price in millions of transactions long afterwards.
>
> According to the Supreme Court, the PUC cannot order a refund without explicit statutory authority to do so, for its implied authority under its general powers is not enough. Although the legislature *has* granted authority to the PUC to calculate refunds in certain narrow and technical circumstances, it has not done so in the circumstances of this case. * * *
>
> * * * A court has no authority to improve on the statutes by creating a new remedy that the legislature did not provide.

PGE Intervenor-Appellant's Brief (September 24, 2004), CA No. A123750, pp. 6-7.

At the Court of Appeals, the OPUC itself agrees, arguing the "filed rate doctrine." OPUC Appellant's Brief (September 9, 2004), CA No. A123750, p. 17: "There is no statutory authority by which the PUC could have awarded a refund of rates already paid by customers." Surely, the Commission will not engage in the same inconsistency as does PGE. It therefore should either withdraw its argument on

appeal in ***Utility Reform Project v. OPUC***, CA No. A123750, or acknowledge that it cannot "retroactively" enforce OAR 860-022-0045 in order to provide any relief to ratepayers for the $6.9 million already charged to them for the non-imposed "Multnomah County Tax." Hence, the current matter before the OPUC is merely advisory, and this proceeding was improvidently commenced.

B. THE COMMISSION DOES NOT IN FACT ENFORCE THE RULE, AND COMMISSION STAFF DISAVOW ANY ROLE IN ITS ENFORCEMENT OR ADMINISTRATION.

Second, even if the Commission were to claim it can "retroactively" enforce OAR 860-022-0045 in order to provide relief to ratepayers, the OPUC Staff itself disavows any role in the question of the propriety of collections and disbursements of money collected under OAR 860-022-0045. Referring to the precise issue of OPUC enforcement of OAR 860-022-0045, Ed Busch, Administrator of the Electric & Natural Gas Division, OPUC, told the *Willamette Week*, January 19, 2005, that "Since the utility [PGE] itself is profitable, he explains, regulators allow it to collect the county tax. What happens after that, Busch says, is out of the PUC's hands." Thus, the OPUC Staff publicly claims that this matter is not within the OPUC's jurisdiction (or "hands"). Further, in discovery responses in UCB 13, OPUC Staff in February 2005 stated (emphasis added):

> **Request**
> 9. Please answer Question 1(c), which you omitted from your answers to Set 1.[2]

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2. That original Request No. 1 was this:

(continued...)

Response

Staff's response to Request 1 was based on the amount of taxes included in PGE's revenue requirement through its general rate cases UE 100 and UE 115. Per OAR 860-022-0045, local income taxes (new or increased after December 16, 1971) must be collected separately from customers of the jurisdiction imposing the tax. PGE collects these taxes under its Commission-approved schedules, PUC Oregon No. E-17, Sheet No. E-2, Rule E(1)(D). Staff understands that PGE uses a balancing account for these local income tax collections, and re-sets the billing rates as needed. **The Commission has not required PGE to file requests to modify the rates and has not tracked amounts collected.**

Request

10. Regarding each local income tax charged to ratepayers by PGE, please state:
    A. How PGE obtained approval from the OPUC to impose the charges.
    B. How the OPUC scrutinizes PGE to determine whether the charges are legitimate.
    C. How the OPUC audits the amounts collected pursuant to the charges and determines whether those amounts were remitted to local governments.

Response

See response to Request 9, above. **Staff has not audited the collections or payments to local governments.**

. . .

Request

12. Does PGE seek and receive OPUC approval for the imposition of charges for local income taxes on customer bills?
    A. If so, please indicate the process for obtaining such approval.

2.(...continued)

In each of the years 1997, 1998, 1999, 2000, 2001, 2002, 2003, and 2004, stated separately, how much money has PGE collected from Oregon jurisdiction retail ratepayers for the alleged cost of:

A. federal income taxes?

B. state income taxes?

C. local income taxes (with each type of tax quantified separately)?

B. If so, please state whether PGE obtained such approval for each and every local income tax listed in PGE's response to Request 1.

Response
Please see response to Request 9.

Thus, according to OPUC Staff, the OPUC has not required PGE to file any request for imposing the "Multnomah County tax" on ratepayers, PGE has obtained no approval from the Commission for doing so, and Staff has never audited or even tracked the amounts collected.

C. THE MATTER IS WITHIN THE JURISDICTION OF THE MULTNOMAH COUNTY CIRCUIT COURT, AND THE COMMISSION CANNOT DIVEST THAT COURT OF JURISDICTION.

The Commission is without authority to "enforce" the rule, because the Multnomah County Circuit Court obtained jurisdiction on January 22, 2005, when the complaint of the class action plaintiffs (appended to the petition of PGE) was filed.

There is no requirement that the plaintiffs undergo some "exhaustion or remedies" requirement before the Commission prior to asserting rights in a civil suit. In ***Oregon-Washington R. & Nav. Co. v. McColloch***, 153 Or 32, 49, 55 P2d 1133, 1141 (1936), the Oregon Supreme Court held: "If the only complaint which the shipper had was that he had been overcharged, there would be no issue before the commissioner as to the reasonableness of rates, and no necessity of determining just and reasonable rates to be applied in the future." 153 Or at 47. The same is true here. The issue is not the "reasonableness" of the rule, but whether PGE had any authority to use the billing adder when it was not recovering past MCBIT which had been imposed by the County or had been paid by PGE.

The Court further explained in ***Oregon-Washington R. & Nav. Co. v. McColloch***: "There is no necessity of resorting first to the commission in those instances in which the only question involved is an overcharge * * *." In ***Isom v. PGE***, 67 Or App 97, 104, 677 P2d 59 (1983), *pet rev denied*, 297 Or 272 (1984), the trial court had dismissed plaintiffs' Oregon Unlawful Debt Collection Practices Act claim for failure to "exhaust administrative remedies." The Oregon Court of Appeals reversed in unambiguous language:

> Finally, plaintiffs argue that their causes of action under the Unlawful Debt Collection Practices Act, ORS 646.639 *et seq*, should not have been dismissed for failure to exhaust administrative remedies, because the Commissioner has no power to enforce the act. We agree. The legislature, through the Unlawful Debt Collection Practices Act, has provided a private right of action for certain debt collection practices not subject to the commissioner's authority. Plaintiffs are entitled to pursue this cause of action. See ORS 756.200(1).

67 Or at 104.

> Circuit courts have subject matter jurisdiction over all actions unless a statute or rule of law divests them of jurisdiction. Or Const, Art VII, § 9; Or Const, Art VII (amended), § 2.

Greeninger v. Cromwell, 127 OrApp 435, 438, 873 P2d 377 (1994), cited recently for the same proposition in ***Mount Hood Community College v. Federal Insurance Co.***, 119 OrApp, 146, 152, 111 P3d 752, 755 (2005), holding that conduct of the Construction Contractors Board was irrelevant to jurisdiction of the court to hear plaintiff's claims against a contractor based on breach of contract.

There is absolutely no legislative intent demonstrated to oust a circuit court of jurisdiction it has already obtained merely because OPUC commences an advisory proceeding involving the same utility which is a defendant in court. If the Court is not

divested of jurisdiction, then this proceeding is merely advisory, and hence not authorized by statute and contrary to the fundamental source of the quasi-judicial power the Commission may have.

Ultimately, the courts will decide the lawfulness of PGE's conduct. Nothing OPUC is authorized to do divests the courts of jurisdiction. The equitable remedies and damages sought in the suit arise under the original jurisdiction of the court. Plaintiffs' claims do not seek or require any ratesetting by the court or by the OPUC, nor any special expertise within the purview of the agency. The court is uniquely situated to hear the claims of classes of injured customers, decide the legality of PGE's conduct in billing the adder when it did not owe or pay MCBIT, and is in the best position to oversee fairness to the injured class members, whether current of former customers.

Therefore, the Petition should be dismissed and the proceeding discontinued as improvidently commenced.

III. MERITS OF THE DECLARATORY RULING REQUEST.

As to the first requested ruling, that:

> 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

The Commission should reject this "interpretation," which goes far afield of the text to discuss tax treatment. Instead, the Commission should follow the plain meaning of its own rule, that:

> Utilities are required to recoup amounts for local (county-imposed) income taxes which they have actually been required to pay from ratepayers within that taxing district.

The relevant rule says nothing about "determining" amounts which are never imposed as taxes and says nothing about "keeping" money collected from ratepayers for taxes that the utility was never required to pay (and did not pay) and which no taxpayer was ever required to pay for tax liabilities (except ratepayers in good faith paid money for "taxes" to keep their lights on, thanks to the adder on the bills). The requested ruling would require an "interpretation" involving such substantive changes that it would amount to rulemaking--an invalid one undertaken without statutory notice.

A. THE TEXT AND CONTEXT OF OAR-022-0045 PROHIBIT PGE FROM KEEPING MONEY COLLECTED FOR COUNTY TAX LIABILITIES NEVER IMPOSED.

1. TEXT AND CONTEXT.

The first request requires construction of OAR-022-0045. What does this rule mean? PGE tries to frame this as a numbingly complicated problem about how to "determine" the amount of tax it "hypothetically" owes county government as a "stand-

alone," which requires resort to covert meaning for ordinary words such as "tax" and "utility" and ignores the past tense usage of the verbs "impos*ed*" and "requir*ed*."

But, plainly this is not a rule about "how" to determine tax liability. Instead, it is a rule about "when" a utility is authorized to use a billing adder to recoup taxes it has paid to the government. State tax law and the local Multnomah County ordinances answer the question of "how" to determine tax liability. The lawsuit which spurred PGE's request for declaratory rulings does not claim that PGE or Enron violated the law in calculating or paying its income taxes.

Apparently, Enron filed (in some years, at least) as a consolidated state and federal tax filer and pursuant to Multnomah County Ordinance § 12.110[3] was apparently not required to pay MCBIT. In those same years, PGE the "utility" referenced in OAR 860-022-0045, was not "required to pay" MCBIT and MCBIT was not "imposed" upon it (or upon Enron). PGE was never "required" to pay amounts collected for MCBIT to Enron, and any such payments were mere inter-affiliate transfers and not the payment of **taxes**.[4]

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3. § 12.110 Income Defined.

   * * *

   (B) If one or more persons are required or elect to report their income to the state for corporation excise or income tax purposes * * * in a consolidated, combined or joint return, a single return shall be filed by the person filling 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.

84. In our system of taxation, **taxpayers owe taxes to a government**. See definitions at page 23, 26 of this brief.

In other years, PGE was not consolidated with Enron, and was a taxpayer, but still was never required to pay MCBIT in excess of the above-mentioned $3,631. At the same time, PGE continued to charge ratepayers on the order of $1.5 million per year for "Multnomah County tax." So, this is a rule about "when" a utility can impose an adder to its bills and "when" it can keep the money it collects. The rule plainly states the conditions precedent to charging and keeping the adder--only *after* (1) a tax has been imposed and (2) the utility has been required to pay the tax. PGE met neither condition here for 99.95% of the "Multnomah County tax" it has charged to ratepayers since 1996.

It does not matter why a utility had no MCBIT tax liability in any given year. Maybe the utility had large pollution control tax credits, or maybe it carried forward losses. Maybe it filed a consolidated tax return with a parent that lost a lot of money or with a corrupt parent invented losses in the Cayman Islands or equally attractive business locations and then paid no taxes to any government. The outcome for Multnomah County ratepayers is the same: If MCBIT was not imposed on the regulated utility (PGE in this example), then the utility cannot collect and keep amounts for MCBIT from Multnomah County ratepayers. Similarly, if the utility was not required to pay the MCBIT, it cannot charge to Multnomah County ratepayers the amounts of MCBIT it was not required to pay (and did not pay).

This result is easily determined by reading the text. The binding standard for construction of the Commission's rules is well-established. It is found in ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 859 P2d 1143 (1993) (hereinafter

"***PGE v. BOLI***"), and is applicable to interpretation of administrative rules. ***PGE v. BOLI***, 317 Or 606, 612 n 4; ***Thomas Creek Lumber v. Board of Forestry***, 188 Or App 10, 22, 69 P3d 1238 (2003). At the first stage of analysis, the Commission must look at the text and context of the long-promulgated rule as the best evidence of what it means [***PGE v. BOLI***, 317 Or at 610-11]. The current version of ORS 174.020(3) also states that a "court shall give the weight to the legislative history that the court considers to be appropriate." The Commission need not decide what weight to give any history, as there is no extrinsic history to consider in this case. Nor is there any ambiguity in the words which would require a resort to such history as testimony, public comments or OPUC news releases.[5] "Legislative history" is precisely that--historical record--and not a pathway for the decision-maker to end up with what it would like to adopt as policy today, if this were a new rulemaking.

Thus, the role of the Commission in construing its own promulgated rule is to state the plain meaning of the rule that has been unchanged for over 30 years. Therefore, in this declaratory ruling the agency must "declare what [it] has done, not what it should have done." ***Portland General Elec. Co. v. Department of Revenue***, 1977 WL 1596. This Commission is "not at liberty to ignore distinctions" it has previously made. ***State v. Rietveld,*** 948 P2d 758, 151 OrApp 318 (1997). This case does not present the agency with a clean slate to interpret a term delegated to it by

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5. Undersigned has requested and reviewed the extant record of the 1974 rulemaking. It has no comments or memoranda discussing the rules adopted therein, nor statements from public hearings.

statute or apply law. Instead, it must announce the plain meaning of its own rule under the same standards that a court will apply upon review of this declaration.[6]

> [R]ules are characteristically of general applicability, and are prospectively effective. Rulemaking action by an agency generally does not apply previously set standards or policies to past facts or situations, but establishes a new standard or policy to apply to future facts. Rulemakings impose obligations on or affect groups, not only isolated persons. Agency rules implement or prescribe law or policy.

National Ass'n of Psychiatric Treatment Centers for Children v. Weinberger, 658 FSupp 48, 53 (D Co 1987).[7] ***Burke v. Children's Services Division***, 26 OrApp 145, 552 P2d 592 (1976) (hereinafter "***Burke v. CSD I***"). A "rule" means any agency directive, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. *Id.*; see ORS 183.310(7)(a). The rule PGE asks the Commission to construe was first adopted in 1974. The task of the Commission is to decide what the rule meant in 1974, not to reinterpret the rule in this proceeding by reference to any later adopted "policy." If the Commission had intended to amend the rule to conform to some later circumstances, then it should have engaged in rulemaking at the relevant time.

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6. "We have an independent obligation under the law to discern the correct interpretation of an administrative rule, regardless of the arguments of the parties." ***Tye v. McFetridge***, 199 OrApp 529, 532, 112 P3d 435, 437 (2005).

7. This is a universally understood definition of an agency "rule." See ***PBW Stock Exchange, Inc. v. Securities and Exchange Commission***, 485 F2d 718, 731-33 (3rd Cir 1973), *cert. denied*, 416 US 969, 94 SCt 1992, 40 LEd2d 558 (1974); ***American Export Co. v. U.S.***, 472 F2d 1050, 1055-56 (CCPA 1973); ***In re: FTC Corporate Patterns Report Litigation***, 432 FSupp 291, 301-04 (DDC 1977), *aff'd*, 595 F2d 685 (DC Cir 1978).

The "context" for a textual reading includes other provisions of the same closely related rules. ***State v. Cooper***, 319 Or 162, 874 P2d 822 (1994), *on remand* 130 OrApp 209, 880 P2d 514 (1994), *review denied* 320 Or 325, 883 P2d 1303 (1994); ***State ex rel Schrunk v. Bonebrake***, 318 Or 312, 865 P2d 1289 (1994); ***Matter of Marriage of Holm***, 323 Or 581, 919 P2d 1164 (1996); ***1000 Friends of Oregon v. Land Conservation and Development Com'n***, 303 Or 430, 737 P2d 607 (1987). Thus, the context of OAR 860-022-0045 is OPUC Order No. 74-307 (effective date May 11, 1974), in which the rules relating to the treatment of city and county taxes were promulgated in the same rulemaking. OAR-860-022-0040 has been modified in several rulemakings since then, and OAR 860-02200045 has remained essentially unchanged.

> **860-022-0040 Relating to City Fees, Taxes, and Other Assessments Imposed Upon Electric, Gas, and Steam Utilities**
>
> (1) The aggregate amount of all business or occupation taxes, license, franchise or operating permit fees, or other similar exactions or costs, excepting volumetric-based fees in section (3) of this rule, imposed upon gas, electric, or steam heat utilities by any city in Oregon for engaging in business within such city or for use and occupancy of city streets and public ways, which does not exceed 3 percent for gas utilities or 3.5 percent for electric and steam heat utilities, applied to gross revenues as defined herein, shall be allowed as operating expenses of such utilities for rate-making purposes and shall not be itemized or billed separately. All other costs not allowed as operating expenses shall be itemized or billed separately.
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> (2) Except as otherwise provided herein, "gross revenues" means revenues received from utility operations within the city less related net uncollectibles. Gross revenues of a gas, electric, and steam heat utilities shall include revenues from the use, rental, or lease of the utility's operating facilities other than residential-type space and water heating equipment. Gross revenues shall not include proceeds from the sale of bonds, mortgage or other evidence of indebtedness, securities or stocks, sales at wholesale by

one utility to another when the utility purchasing the service is not the ultimate customer, or revenue from joint pole use.

* * *

(Promulgated 1967 or earlier, and repromulgated in Order No. 74-307.)

860-022-0045 Relating to Local Government Fees, Taxes, and Other Assessments Imposed Upon an Energy or Large Telecommunications Utility

(1) If any county in Oregon[8], 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.

* * *

(Promulgated in Order No. 74-307.)

In the present case, the broader, general context of how rates are established and costs allowed is also well known and needs only brief summary here. In determining what costs the utility is allowed to pass on to customers, the PUC treats

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8. The only obvious change of language between the 1974 version and the current OAR 860-022-0045, often repromulgated, is the substitution of the introductory phrase, "If any county, other than a city-county imposes upon an energy or large telecommunications utility * * *" for the earlier, "In the event any county of the State of Oregon, other than a city-county, should impose upon any public utility * * *."

the estimated prospective state and federal tax liabilities of PGE as legitimate costs of service[9] (just as labor, equipment, depreciation and hundreds of other estimated costs can be legitimate). All legitimate costs of service are rolled into the rates approved by the Commission for that utility--the per unit costs of energy services which appear on bills and are on file in tariff sheets. Thus, the estimated state and federal income taxes are not separately stated on utility bills. Tariffs remain in effect until replaced under one of several formal rate-making procedures, regardless of whether the actual costs conform to estimated costs. In sum, state and federal income taxes are treated "in the same manner as most other utility revenues and expenses; estimated in rate cases and not trued up." *Treatment of Income Taxes in Utility Ratemaking*, Staff "White Paper," p. 3 (February 2005).

But none of the above reasoning applies to the rules the Commission has adopted for city and county taxes. These rules treat the recovery of costs incurred for (1) city and (2) county income taxes very differently. OPUC does not rely upon estimates and does not roll county income taxes into rates. Instead, for whatever reason, the Commission adopted a rule allowing utilities to fully recoup actual taxes paid previously to county governments. There is full reimbursement for this actual cost, and no windfall collections and charges to ratepayers when no taxes were paid. There are no estimates of these taxes in rate cases.

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9. Intervenors disagree with the reasonableness of this treatment, which has allowed PGE to collect over $750 million in "state and federal income taxes" since 1997 that has not been paid to any government. But this declaratory ruling concerns only the MCBIT collected by billing adder, not the excess "state and federal income taxes" included in PGE rates.

2. FIRST LEVEL CANONS OF CONSTRUCTION APPLIED TO TEXT AND CONTEXT.

In considering the text and context, this body can consider those rules of construction that bear directly on "how" to read the text. ***PGE v. BOLI***, 317 Or at 611. One such rule is that "words of common usage typically should be given their plain, natural, and ordinary meaning." *Id*. "Unless defined otherwise in the rule, we give the words of the rule their ordinary meanings." ***Tye v. McFetridge*****,** 199 Or App 529, 534, 112 P3d 435, 437 (2005); ***Western Generation Agency v. Or. Department of Revenue***, 959 P2d 80, 327 Or 327 (1998).

However, words which have clear legal meanings--such as "tax"--are to be given that more precise meaning. "[W]ords therein which have well-defined legal meaning must be given such meaning." ***Cordon v. Gregg***, 164 Or 306, 97 P2d 732 (1940), *adhered to on rehearing* 164 Or 306, 101 P2d 414. In giving meaning to the text, no "unwritten text" is inserted, nor are words omitted.

> Giving the text of the statute its plain, natural, and ordinary meaning, the court ascertains and declares what is, in terms or in substance, contained therein, without inserting what has been omitted, or omitting what has been inserted.

Deschutes County Sheriff's Ass'n v. Deschutes County, 9 P3d 742, 169 OrApp 445, *review denied* 27 P3d 1043, 332 Or 137 (2000); ***State ex rel Click v. Brownhill***, 331 Or 500, 15 P3d 990 (2000) ("Giving words of common usage their plain, natural, and ordinary meanings, * * * includ[es] the statutory enjoinder not to insert what has been omitted * * *."). In looking at the words of closely related rules in context,

expressio unius est exclusio alterius[10] applies--"the inclusion of specific matter tends to imply a legislative intent to exclude related matters not mentioned." ***Smith v. Clackamas County***, 252 Or 230, 448 P2d 512.

When considering context, as where several rules are simultaneously promulgated, the canons of construction require the interpretation of the text to give meaning to the whole, and not to render some portions invalid. ***Bolt v. Influence, Inc.***, 333 Or 572, 43 P3d 425 (2002); ***Moustachetti v. State***, 319 Or 319, 877 P2d 66 (1994); ***City of Portland v. Welch***, 229 Or 308, 364 P2d 1009 (1961), *modified on other grounds on denial of rehearing* 229 Or 308, 367 P2d 403; ***Leonard v. Ekwall***, 124 Or 351, 264 P 463 (1928); ***Lane County v. State of Oregon***, 74 US 71, 19 LEd 101, 7 Wall 71, (1868). Where there are several provisions, they must be construed so as to give effect to all. ***In re Moore's Estate***, *supra*.

3. THE RULES ADOPTED IN OPUC ORDER NO. 74-307 HAVE A PLAIN AND EASILY UNDERSTOOD MEANING UNCHANGED IN THE PAST 30 YEARS.

The Commission has previously determined that it is "reasonable" under ratemaking principles to allow utilities to recoup all of any County tax payments from the residents of the county imposing the tax. It allows a billing adder after the tax is imposed and paid. OAR 860-022-0045 provides that an electric utility which is "required to pay such [county imposed] taxes or fees shall collect from its customers within the county imposing such taxes or fees the amount of the taxes or fees * * *" by

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10. Accord on the applicability of the maxim: ***In re Moore's Estate***, 210 Or 23, 307 P2d 483, 65 ALR2d 715,(1957), *mandate recalled and corrected on other grounds* 210 Or 23, 308 P2d 180.

separately itemizing the tax on bills for electric service in addition to the rates and charges authorized in any then-applicable tariff sheets. PGE is forced to claim that construing what the words "tax" and "imposed by" and "required to pay such taxes" is a complicated ratemaking issue, when none of these terms are complicated (and ratemaking is not involved).

As with any statutory construction, the first step is to read the words for the obvious meaning. ***PGE v. BOLI***. Let's start with the title. What do the words in the title, "Taxes * * * Imposed," mean? Prior to re-titling sometime after 1996, the earlier version of this rule was titled generically as, "Relating to Local Government Fees, Taxes, or Other Assessments." This was changed to the more specific, "Relating to Local Government Fees, Taxes, and Other Assessments *Imposed* Upon an Energy or Large Telecommunications Utility." Specific words limit general words. ***O'Neill v. Odd Fellows Home of Oregon***, 89 Or 382, 174 P 148 (1918). Thus, the title was changed to more clearly and specifically identify the topic of the rule: taxes that local governments have imposed.[11] It is not a rule about how a utility "determines" what its local tax hypothetically might have been on a stand-alone basis. The title (and its clarification) make it clear that the topic is government *imposed* taxes, not what PGE "determines" about taxes that are not in fact imposed.

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11. Interestingly, this specific language was added contemporaneously with the move towards out-of-state consolidated tax filings for both major electric utilities, PacifiCorp and PGE. There is no record that PGE (or any utility) commented upon this change after its purchase by Enron. This tends to suggest that everyone understood that the title merely clarified the existing text which.

In both the commonly understood and the legal sense of the word, a tax is paid to the government. ***Cordon v. Gregg***, *supra*. In our system of taxation, taxpayers owe taxes to a government. BLACK'S LAW DICTIONARY (7th ed 1999), defines:

> **tax**, *n*. A monetary charge imposed by the government on persons, entities, or property to yield public revenue. Most broadly, the term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, imposts, and excises. Although a tax is often thought of as being pecuniary in nature, it is not necessarily payable in money. -- **tax,** *vb*.
>
> "Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs. * * *." 1 Thomas M. Cooley, THE LAW OF TAXATION § 1, at 61-63 (Clark A. Nichols ed, 4th ed 1924).

What PGE did was calculate and collect a hypothetical amount of MCBIT each year, even though the government did not impose a tax at all. Under the rule, imposition of the tax which the utility was required to pay is the condition precedent to then collecting the "amount of *taxes"* from customers.

PGE wants the Commission to construe these words to mean that somehow the "tax" it was "required to pay" means some transfer of money to its corporate parent. But this makes no sense at all. First, whatever PGE may or may not have paid to Enron was not a "tax," because Enron is not a local government in Oregon (and is not a government anywhere). Second, there is no rule of tax law or OPUC order that "*required*" PGE to pay the alleged "amounts" it collected for MCBIT "taxes" to Enron when it claims it did, for any reason. Since PGE was never "required to pay" any amounts to Enron, an interpretation which would somehow permit PGE to make voluntary payments to Enron ignores the words "required to pay." The Commission

cannot omit the word "required" [***Deschutes County Sheriff's Ass'n v. Deschutes County***, *supra*; ***State ex rel Click v. Brownhill***, *supra*] nor now adopt some occult meaning to the well-understood word "tax." ***Tye v. McFetridge***, *supra.*[12] "Unless defined otherwise in the rule," this Commission in obligated to "give the words of the rule their ordinary meanings." *Id.* The Commission has not chosen to redefine "tax" to mean "a potential tax liability not actually incurred by a utility or paid by a utility." It has not defined "tax" to mean a transfer of money to a corporate parent.

Also, without variation in English usage, the past tense of a verb refers to an act completed in the past. Consider the phrase, "Relating to Local Government Fees, Taxes, and Other Assessments Imposed Upon an Energy or Large Telecommunications Utility." OAR 860-022-0045 uses the past tense in defining when taxes "imposed upon" a utility and which the utility is "required to pay" can be charged to ratepayers by the adder. Thus the plain meaning of the rule allows PGE (or any regulated utility) an adder separately stating MCBIT only when MCBIT has been "imposed" in the past and only when the utility was "required to pay" the MCBIT, also in the past. Only if those conditions are met is the utility authorized to recoup such taxes as it was "required to pay" by an billing adder.

Common sense, the applicable Oregon rules of statutory interpretation, and interpretation of the tax laws of this state are clear: When the words "tax" and

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12. [W]ords of common usage typically should be given their plain, natural, and ordinary meaning. See ***State v. Langley***, 314 Or 247, 256, 839 P2d 692 (1992) (illustrating rule); ***Perez v. State Farm Mutual Ins. Co.***, 289 Or 295, 299, 613 P2d 32 (1980) (same).

PGE v. BOLI*, supra*, 317 Or at 611.

"impos*ed*" are used in the same phrase, such as the title to OAR 860-22-0045, "Relating to Local Government * * * Taxes * * * Imposed Upon an Energy * * * Utility," the words refer to assessments actually imposed by a taxing authority and paid. For example, ORS 316.082(1) provides a tax credit for income taxes "imposed" by another taxing authority:

> A resident individual shall be allowed a credit against the tax otherwise due * * * for the amount of any income tax imposed on the individual * * * for the tax year by another state on income derived from sources therein and that is also subject to tax under this chapter.

The Oregon Tax Court held that the words "amount of income tax imposed," meant the amount of income tax "actually imposed." It explained:

> Oregon provides a credit against Oregon income taxes for income taxes paid to another state. ORS 316.082. However, there are a number of prerequisites to the credit. Of relevance here are the requirement[] that [the other state] must have *actually imposed income taxes* on Plaintiff * * *.

Welsheimer v. Or. Dept. Rev., 2004 WL 1237577 (Or Tax Court 2004) (final, unappealable decision, ORS 305.514) (emphasis supplied).

Moving from the title to the text of the rule, consider the phrase, "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." The subject in this phrase is "the utility required to pay such taxes." The verb is "collect" and the object is "the amount of the taxes." Note the use of the definite article "the" twice in the phrase "the amount of the taxes." The amount which the utility may collect from customers is not a hypothetical charge that it somehow "determines" but is a definite sum--"the amount of the taxes." That sum is the same as the taxes referenced in the phrase "such taxes"--that is, the sum certain of taxes which the utility was required to

pay the taxing authority is what it can collect from its customers. It cannot collect some other amount. As we know, the County never actually imposed $6.9 million of MCBIT on PGE (or any taxfiler associated with PGE) in 1997-2004. PGE could not have lawfully charged to ratepayers amounts for "such taxes" that were not imposed and which PGE did not pay to the County.

The obvious meaning to be drawn from the use of the past tense is reiterated in the next sentence of OAR 860-022-0045, which states that, when a county tax is not imposed county-wide, the taxed "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." In the most ordinary and in a legal sense, "recover" means to regain--if something is not first taken away, one cannot "recover" it.[13]

The Commissioner dealt with the topic of local municipal taxes in two separate rules--one for city taxes, and a later one for county taxes. The rule for city taxes expressly declares them to be "expensed" (partially). The rule for county taxes adopts

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13. MERRIAM-WEBSTER'S DICTIONARY OF LAW (1996) defines "recover":

> transitive verb
> 1 : to get back or get back an equivalent for <recover costs through higher prices>
> 2 a : to obtain or get back (as damages, satisfaction for a debt, or property) through a judgment or decree <recover damages in a tort action>
> 2 b : to obtain (a judgment) in one's favor
>
> intransitive verb
> 1 : to get something back
> 2 : to obtain damages or something else through a judgment <argued that the plaintiff should not be permitted to recover>

BLACK'S LAW DICTIONARY (7th ed 1999), defines "recover":

> To get back or obtain again, to collect, to get renewed possession of; to win back; to regain, as lost property, territory, appetite, health, courage.

a different system for collection and for recovery. PGE asks the Commission to pretend that the language expressly chosen for treatment of city taxes in OAR 860-022-0040 (that the taxes imposed by any city "shall be allowed as operating expenses of such utilities for rate-making purposes") also be imported into OAR 860-022-0045, where it clearly does not exist.

OAR 860-022-0040 and OAR 860-022-0045 were at one time considered in the same rulemaking. If the Commissioner in 1974 had wanted to express that part or all of *county*-imposed taxes were to be "allowed as operating expenses," he would and could have done so by using the same language as in the then-existing rule relating to city taxes. He did not do so. For 31 years the rule has not been substantively changed or amended, except to clarify in the title that the rule relates to taxes actually imposed on utilities (see discussion, *ante*).

This is a clear example of *expressio unius est exclusio alterius*. Where the rules of the Commission have included "specific matter" in OAR 860-022-0040 by expressly treating taxes as "expenses for ratemaking purposes," it signifies that the same specific treatment is not intended when those words are omitted from the treatment of county taxes in OAR 860-022-0045. The text of that latter rule is clear: The taxes imposed, which the utility was required to pay, are simply added to the bills of customers within the county. They are not rolled into rates in the same manner as state taxes, federal taxes, or the designated portions of city taxes.

Thus PGE argues that the phrase should be read along these lines, "If any county in Oregon * * * imposes upon an energy or large utility any * * * taxes * * * the utility ~~required~~ **which determines a hypothetical amount which it would have been**

required to pay as ~~such~~ taxes or fees shall collect from its customers * * * the **hypothetical** amount ~~of the taxes or fees~~ **which is never paid to the government** * * *." The Commission cannot *insert* words into OAR 860-022-0045 which are not there, nor delete words that are there. This Commission is prohibited from inserting into its rules those words expressly omitted decades ago. ***State v. Linn***, 131 OrApp 487, 885 P2d 721, (1994), *rev den*, 320 Or 508, 888 P2d 569, *recon den*, 321 Or 42, 892 P2d 695 (1994); ***Deschutes County Sheriff's Ass'n v. Deschutes County***, *supra*; ***State ex rel Click v. Brownhill***, *supra*.

PGE by necessity must be left with the argument that the words with hidden meanings to accomplish unannounced tax treatment can be inserted into OAR 860-022-0045 merely because this Commission has elsewhere expressed a policy for inclusion of all prospective state and federal income taxes to be included in rates, estimated on a stand-alone basis (however inaccurately forecasted the potential tax liability turns out to be). This argument would amount to an assertion that this "policy" has rendered both OAR-860-022-0040 and OAR-860-022-0045 meaningless. PGE is actually arguing that all estimated prospective tax assessments (city and county) are charged to ratepayers and collected from them as if they were all expensed without regard to whether the utility was "required" to pay those taxes "imposed" by the municipalities.

Such an "interpretation" renders both rules meaningless and invalid and must be rejected. ***Bolt v. Influence, Inc.***, *supra*. "The elementary proposition that an agency of government must follow its own rules requires no citation of authority." ***Moore v.***

Oregon State Penitentiary, Corrections Division*,** 16 OrApp 536, 519 P2d 389 (1974). "When an agency has the authority to adopt rules and does so, it must follow them." ***Albertson's, Inc. v. Bureau of Labor and Industries, 128 OrApp 97, 101, 874 P2d 1352 (1994). An agency does not have the authority to ignore its own rules. *Id.*; ***Georgia-Pacific Corp. v. Kight***, 126 OrApp 244, 246, 868 P2d 36 (1994); ***Harsh Investment Corp. v. State Housing Division***, 88 OrApp 151, 157, 744 P2d 588 (1987), *rev den* 305 Or 273, 752 P2d 1219 (1988).

Further, if the current Commission "policy" regarding tax treatments for state and federal taxes was actually in the contemplation of the Commissioner in 1974, then neither of the rules promulgated relating to city and county income taxes made any sense at the time. Why promulgate different rules, if all income taxes are going to be treated in the same manner?

If, on the other hand, the policy for the treatment of state and federal taxes was implemented *after* the rules were adopted in 1974 and was "meant" to *sub silentio* repeal duly promulgated rules, then that "repeal" is invalid, as the agency was required to undertake rulemaking to accomplish such a change.[14] Unless a rule is promulgated according to the rulemaking statute,[15] and filed with the Secretary of

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14. And this theory of PGE's also makes no sense, because the taxes at issue here are local taxes, not federal or state taxes.

15. The purpose of a notice requirement for rulemaking is twofold: it serves to inform the interested public about intended agency action, and it triggers the opportunity for an agency to receive the benefit of the thinking of the public on the matters being considered.

Bassett v. State Fish and Wildlife Commission, 27 OrApp 639, 642, 556 P2d 1382,1384 (1976).

State, it is not effective, whatever policies the agency may wish to advance. ***Burke v. CSD I***, *supra*.

> Without repeal or a court declaration of invalidity, a rule
>
> remains an effective statement of existing practice or policy, binding on the agency, until repealed according to procedures required by the Administrative Procedures Act. An agency may not rely on its own procedural failures to avoid the necessity of compliance with its rules.

Burke v. Children's Services Division (Burke v. CSD II), 288 Or 533, 538, 607 P2d 141, 144 (1980).

A substantive change in the meaning of a rule through "policy" changes is the kind of administrative action which is a "rule" regardless of what the agency calls it. ***Fitzgerald v. Oregon Board of Optometry***, 75 OrApp 390, 392, 760 P2d 586 (1985) (examination grading criteria a "rule".) As noted, a "rule" means any agency pronouncement in any format which implements, interprets or prescribes law or policy for general application. ***National Ass'n of Psychiatric Treatment Centers for Children v. Weinberger***, *supra*, and cases cited in footnote 7; ***Burke I,*** *supra*. For example, in ***McCleery v. State By and Through Oregon Bd. of Chiropractic Examiners***, 132 OrApp 14, 887 P2d 390 (1994), the Board of Chiropractic Examiners issued what it called a "policy statement" forbidding chiropractors to use certain devices. This "policy statement" was found to be a rule and invalid for failure to comply with statutory provisions for rulemaking. The policy was a rule because it

applied to all chiropractors and involved agency's quasi-legislative power to forbid all chiropractors from using devices for any purpose.[16]

Thus, if the current "policy" of ratemaking treatment of county taxes is different from the plain language of OAR 860-022-0045, it amounts to a "new" rule--in this case an invalid one since it was "adopted" without any notice and without repeal of the promulgated rule. The change in this so-called "policy" would allow for additional charges imposed upon Multnomah County ratepayers that the plain language of long-existing rule did not authorize. Such a change directly affects the pocketbooks of over 200,000 customers and is a "rule" as it, "affected or imposed burdens upon the public generally * * *." ***Burke v. CSD I****, supra*, 26 OrApp at 151, and discussion therein. Announcing such a broad rule is quasi-legislative and not an exercise of the quasi-judicial power exercised in making factual determinations and individual complaint adjudications.

Of course, the OPUC can revisit its rules, after proper notice, and can adopt some other rule to apply prospectively. But it cannot revisit the rule retroactively in this proceeding nor claim it somehow changed the plain meaning of its rules through some other process which covertly changed the plain meaning of words--leaving them

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16. The policy statement is not directed to a named person or persons. ***Portland Inn v. OTC***, 39 OrApp 749, 752, 593 Pd 1233 (1979). Rather, it applies to all chiropractors. Further, it involves a "quasi-legislative act" of general applicability, because it forbids all chiropractors from using a Toftness or Toftness-like device at any time for any purpose. See ***Don't Waste Oregon Com. v. Energy Facility Siting***, 320 Or 132, 149, 881 P2d 119 (1994); ***Amazon Coop. Tenants v. Bd. High Ed***., 15 OrApp 418, 420, 516 P2d 89 (1973), rev den (1974).

McCleery v. State By and Through Oregon Bd. of Chiropractic Examiners, 132 Or App at 16-17, 887 P2d at 391.

intact on the public record--but altering the impacts upon the utility shareholders and over 200,000 customers. If and when a rulemaking takes place, the various pros and cons of the current "recoupment" method can be discussed. But for now, it is apparent that the OPUC rules treat local income taxes differently from state and federal taxes.

The agency's interpretation of its own rule must be "plausible and not inconsistent with the wording of the rule itself, the rule's context, or any other source of law * * *." ***Thomas Creek Lumber v. Board of Forestry***, *supra;* ***Don't Waste Oregon Com. v. Energy Facility Siting****,* 320 Or 132, 142, 881 P2d 119 (1994). Mere potential "[l]inguistic tenability of proffered interpretation of statutory term does not make interpretation plausible," ***Department of Land Conservation and Development v. Yamhill County***, 949 P2d 1245, 151 OrApp (1997). Here, there is not even a tenuous "linguistic" analysis to support PGE's request. The only grammatical reading of the words in context admits only one plausible interpretation of the long-standing rule.

A tortured construction which makes a number of longstanding rules meaningless, ignores context and the text's use of grammar, English verb tenses and the plain meaning of words cannot be plausible. In addition to being inconsistent with the wording of the text, the construction advanced by PGE is inconsistent with the "source" of the OPUC's rulemaking authority. An agency cannot amend established rules about recouping county taxes which have actually been paid *sub silentio* by

policy statements about **other** subjects, such as rate treatment of state and federal income taxes, or by any means other than valid rulemaking.

B. THE TEXT AND CONTEXT OF OAR-022-0045 DO NOT ALLOW THE CONCLUSION THAT PGE ACTED IN CONFORMITY WITH THE RULE WHEN IT CHARGED RATEPAYERS FOR AMOUNTS IT NEVER PAID TO ANY GOVERNMENT FOR COUNTY TAXES.

For similar reasons, the Commission should reject PGE's second requested ruling, that:

> PGE acted in conformity with OAR 860-022-0045 when it charged customers for county income taxes imposed on PGE as a stand-alone regulated operation and when PGE paid those sums to Enron during the period when Enron filed a consolidated tax return.

The requested ruling proffers language which is clearly not based on facts and therefore renders the answer to a hypothetical meaningless for any practical purposes. No "tax" was ever "imposed" on PGE by Multnomah County (apart from the $3,631 paid in 2003). Moreover, in many years, PGE kept all the money it collected for MCBIT and did not pay Multnomah County, even when not a consolidated tax filer with Enron (May 7, 2001, through December 24, 2002).

The Commission should reject this interpretation in favor of the plain meaning of the rule: Since county income taxes were never imposed upon PGE on any basis by any government entity (apart from $3,631), it could not keep the other $6.9 million for "Multnomah County tax" collected from ratepayers. It is irrelevant to the operation and interpretation of the rule what PGE did with the money it improperly collected and kept. PGE had no authority to collect amounts for "taxes" that were not "imposed" on it and which it was not "required" to pay and did not pay.

It violates the rules of construction and the known facts to even suggest that the phrase "the utility required to pay such taxes or fees" should mean "the utility which may or may not have sent the amounts it collected for taxes which it is not required to pay its corporate parent." The Commission cannot insert these words. PGE cannot "conform" to the rule based on "required" payment of taxes by paying something (or nothing) to Enron.

Besides being unsupported by evidence, the claim and interpretation that PGE "paid" amounts equal to MCBIT to itself or its corporate parent violates the plain meaning of OAR 860-22-0045. A utility cannot not "pay" taxes owed the government to itself or other private companies. By definition, a tax is a payment to the government. What PGE did was calculate and collect a hypothetical amount of MCBIT each year. It now claims it transferred a like amount of money to Enron (although there is no proof it did). Multnomah County did not impose a tax at all on either PGE or Enron. Some private-party transfer of funds did not "pay" a "tax" and was not required by any rule or ordinance relating to taxes.

Since the plain language of the text shows that there was never a tax "imposed" in the years 1997-2004 (apart from the $3,631), PGE is forced to make the implausible argument that the rule does not mean what it plainly says, because the word "utility" means two different things in the title and in the sentence: "If any county in Oregon * * * imposes upon an energy or large telecommunications utility any * * * taxes * * * the utility required to pay such taxes or fees shall collect from its customers * * * the amount of the taxes or fees * * *." This odd reading requires that the same word--"utility"--simultaneously means two different things.

1. First, it means "public utility," the regulated entity actually owning and providing utility service or affiliated interest providing certain services to a utility (statutory meaning at ORS 757.005(1)[17]);

2. Second, it then also means the consolidated taxfiler and not the utility, since only the taxfiler *might* even be "required to pay" tax liabilities for PGE (the fictional stand-alone is never required to pay taxes).

This is an impossible reading. The taxfiler is not a "utility;" was not "required to pay" the taxes; and does not have "customers." Giving a different and obscure meaning to the same word each time it is used in the same sentence makes a mockery of ordinary language and usage. It violates the simple maxims that words are to be given their commonly understood meanings and consistent meanings in the same sentences, rules and related rules.

C. OPUC RULE ON METER-READING DOES NOT APPLY.

The third ruling PGE requests is that:

> If the Commission determines that PGE has improperly billed for local income taxes, the provisions of OAR 860-021-0135 apply.

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17. **757.005. Definitions**

(1)(a) As used in this chapter, except as provided in paragraph (b) of this subsection, "public utility" means:

(A) Any corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city.

(B) Any corporation, company, individual or association of individuals, which is party to an oral or written agreement for the payment by a public utility, for service, managerial construction, engineering or financing fees, and having an affiliated interest with the public utility.

This interpretation of OAR 860-021-0135 should be rejected. PGE argues here that the OPUC-created rule limiting monetary adjustments for meter-reading problems applies to multi-year unauthorized overcharges. This flies in the face of the legislatively determined statutes of limitations for each of the causes of action alleged in the Complaint and Amended Complaint and contravenes the legislative commands of ORS 756.200:

> **Effect of utility laws on common law and other statutory rights of action, duties and liabilities.**
>
> (1) The remedies and enforcement procedures provided in ORS chapters 756, 757, 758 and 759 do not release or waive any right of action by the state or by any person for any right, penalty or forfeiture which may arise under any law of this state or under an ordinance of any municipality thereof.
>
> (2) All penalties and forfeiture accruing under said statutes and ordinances are cumulative and a suit for and recovery of one, shall not be a bar to the recovery of any other penalty.
>
> (3) The duties and liabilities of the public utilities or telecommunications utilities shall be the same as are prescribed by the common law, and *the remedies against them the same, except where otherwise provided by the Constitution or statutes of this state*, and the provisions of ORS chapters 756, 757, 758 and 759 are cumulative thereto. (Emphasis supplied).

The common law and statutory remedies include legislative and court-announced statutes of limitation, and ultimate repose for violations. Courts, in equity, may determine applicable statutes of limitations for court actions--the OPUC cannot. Of course, the OPUC, as does any agency, adopts a number of rules for conduct of proceedings, customer deposits, shut-off procedures, time payment plans, equipment standards, and safety procedures. But these delegated rulemaking powers do not override the general laws of the state or deny or limit the remedies provided by the

Legislature, because the agency acts within its sphere of delegated legislative authority and is subordinate to the legislative power of statutes.

Division 21 of OPUC's administrative rules are captioned "MEASURING AND BILLING SERVICE." OAR 860-021-0135 is adopted under authority granted by ORS 757.250[18] to set standards for measuring the services. This rule allows for "Adjustment of Utility Bills" when there is a meter-reading error or meter malfunction and the amount of electricity used is incorrectly calculated. Minor metering errors of less than 2% are waived as *de minimis*.

> (1) 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.
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> ***
>
> (3) No billing adjustment shall be required if an electric or gas meter registers less than 2 percent error under conditions of normal operation.

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18. ORS 757.250:

> (1) The Public Utility Commission shall ascertain and prescribe for each kind of public utility suitable and convenient standard commercial units of service. These shall be lawful units for the purposes of this chapter.
>
> (2) The commission shall ascertain and fix adequate and serviceable standards for the measurement of quality, pressure, initial voltage or other conditions pertaining to the supply of the service rendered by any public utility and prescribe reasonable regulations for examination and testing of such service and for the measurement thereof. It shall establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for the measurements, and every public utility is required to carry into effect all orders issued by the commission relative thereto.

The MCBIT adder overcharge has nothing to do with any error in calculating any customer's "usage" or any problems with how a meter registers usage. It was an intentional billing adder applied to the entire bill, regardless of how usage was measured or calculated. The class action plaintiffs' damages did not arise through mechanical or computer error or meter reader error.

The Commission is a creature of statute. There is nothing which authorizes it to override legislative statutes of limitations and repose. It is confined to its delegated sphere of authority--in this case establishing standards of service, not interfering with civil suits for damages and the equitable powers of the courts to determine laches.

D. CONCLUSION.

For the foregoing reasons, and based on the authority cited herein, should the Commission reach the merits of the requested declaratory rulings, the Commission should decline the requests of petitioner PGE and adopt the rulings and interpretations proffered by Lewis and URP.

Dated: July 14, 2005

Respectfully Submitted,

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Attorneys for Intervenors

CERTIFICATE OF SERVICE

I hereby certify I filed the foregoing MOTION TO DISMISS AND OPENING MEMORANDUM OF KEN LEWIS AND URP, by e-filing upon the OPUC, followed by mail of the original and 5 copies this date to the Oregon Public Utility Commission, and further I certify that I served copies by e-mail to the service list maintained this day on the OPUC web site for this docket, pursuant to the statement in the ALJ Order of June 10, 2005, that "All parties agreed to electronic service among themselves."

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Dated: July 14, 2005

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