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Douglas C. Tingey
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February 24, 2005

Via Electronic Filing and U.S. Mail

Oregon Public Utility Commission
Attention: Filing Center
PO Box 2148
Salem OR 97308-2148

Re: In the Matter of the Petition of PORTLAND GENERAL ELECTRIC COMPANY for a Declaratory Ruling Regarding the Application of OAR 860-022-0045
OPUC Docket No. DR___

Attention Filing Center:

Enclosed for filing in the above-captioned docket is Portland General Electric's Petition for Declaratory Ruling. This document is being filed by electronic mail with the Filing Center.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

DCT:am

cc: Linda K. Williams
Daniel W. Meek

Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

DR_____

In the Matter of the Petition of PORTLAND GENERAL ELECTRIC COMPANY for a Declaratory Ruling Regarding the Application of OAR 860-022-0045	**Petition For Declaratory Ruling**

I. Introduction

Pursuant to ORS 756.450 and OAR 860-013-0020, Portland General Electric Company ("PGE") petitions the Oregon Public Utility Commission (the "Commission") for a declaratory ruling that OAR 860-022-0045 requires a utility to collect from customers the local income taxes that the utility would pay for its stand-alone, regulated operations. The Commission already has made clear that it sets utility rates to recover forecasted federal and state income taxes related to regulated operations within the utility as a stand-alone entity. Consistent with its existing policy, the Commission should clarify that utilities must collect local income taxes under OAR 860-022-0045 on the same basis that is used for federal and state income taxes in setting rates generally.

As set forth below, PGE believes it has properly billed customers and complied with OAR 860-022-0045. However, if the Commission decides that OAR 860-022-0045 requires calculation and collection of local income taxes on a different basis than state and federal income taxes, then PGE requests a declaratory ruling whether the provisions of OAR 860-021-0135 for adjustments to utility bills apply to billings under OAR 860-022-0045.

II. Background

OAR 860-022-0045 provides that, if any county imposes a new tax or an increased tax on an energy or large telecommunications utility, the utility shall collect from customers within that county the amount of the tax. The Public Utility Commissioner promulgated this rule on April 18, 1974. It applies to new and increased taxes that are imposed on or after December 16, 1971.[1] A copy of the rule is attached as Exhibit A. Multnomah County promptly challenged the validity of OAR 860-022-0045. The Oregon Court of Appeals upheld the rule in *Multnomah County v. Davis,* 35 Or App 521 (1978) (copy attached as Exhibit B). The court decided that the rule was within the Commissioner's broad statutory power to set rates. *Id.* at 524-27. In particular, the court concluded that the Commissioner was not limited to the procedure for setting rates set forth in ORS 757.205 to 757.225. *Id.* at 524-25.

The Internal Revenue Code generally allows an affiliated group of corporations to elect to file a consolidated federal income tax return whereby the taxable income of the group is reported on a single return. Oregon tax law also permits companies to make consolidated tax filings in certain circumstances. From 1986 to mid-1997, PGE's parent company was Portland General Corporation ("PGC"). In mid-1997, PGC was merged with Enron Corp. ("Enron") and Enron became the parent company of PGE. From July 1997 to May 2001, and from December 2002 to the present, Enron has filed consolidated federal, state, and local income tax returns for an affiliated group that includes PGE. During the periods that PGE was included in Enron's

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[1] Previously, in 1966, the Commissioner had adopted a rule directing utilities to charge customers for taxes and fees imposed by *cities* above a certain threshold amount. *In re Exactions Levied Upon Utilities by Cities*, UF 2620, Order No. 43223 (Dec. 30, 1966). That rule was renumbered OAR 860-22-040 in 1974. Both OAR 860-022-0040 and OAR 860-022-0045 serve to ensure that revenue-raising taxes imposed by counties and cities are not included in general rates, which are paid by customers statewide, but rather are charged only to customers in the counties and cities that benefit from such taxes. For a discussion of the history and purposes of these rules, see *In Re Triennial Review of Chapter 860*, AR 395, Order No. 01-728, App. H (Aug. 17, 2001).

consolidated tax returns, PGE computed its federal, state, and local income tax liabilities on a stand-alone basis and paid those amounts to Enron. As the parent corporation, Enron then had the obligation to prepare and file consolidated tax returns and pay any taxes owed on behalf of the consolidated group to the appropriate taxing authorities.

The Multnomah County Business Income Tax ("MCBIT") is imposed on each corporation doing business in Multnomah County. The starting point for determining a corporation's net income for purposes of the MCBIT is the corporation's net income as reported on its Oregon state tax return. The amount of the net income so determined is then apportioned to Multnomah County based on the ratio of the corporation's Multnomah County gross income to the corporation's total gross income. For corporations that file a consolidated Oregon tax return, the starting point is the group's consolidated net income as reported on its consolidated state tax return. The amount of the consolidated net income so determined is then apportioned to Multnomah County based on the ratio of Multnomah County gross income of the consolidated group to the total gross income of the consolidated group. *See generally* Multnomah County Business Income Tax Law, Multnomah County Code §§ 12.005-12.850.

The Commission has a long-standing policy of considering only expenses and revenues related to providing regulated services for purposes of computing rates. This policy disregards unregulated operations of the utility, its subsidiaries, and its parent company. The policy was recently incorporated into Commission rules governing the allocation of costs by electric utilities. OAR 860-027-0048 (adopted in December 2003). That rule requires electric utilities in Oregon to calculate and report income taxes on a regulated, stand-alone basis for

ratemaking purposes and regulatory reporting, even if those taxes are paid on a consolidated basis. Specifically, the rule states in pertinent part:

> (3) The energy utility shall use the following cost allocation methods when transferring assets or supplies, or providing or receiving services between regulated and nonregulated activities:
>
> . . . . .
>
> (g) Income taxes shall be calculated for the regulated activity on a standalone basis for both ratemaking purposes and regulatory reporting. When income taxes are determined on a consolidated basis, the regulated activity shall record income tax expense as if it were determined for the regulated activity separately for all time periods.
>
> (4) The energy utility shall use the following cost allocation methods when transferring assets or supplies or providing or receiving services involving its affiliates:
>
> . . . . .
>
> (h) Income taxes shall be calculated for the energy utility on a standalone basis for both ratemaking purposes and regulatory reporting. When income taxes are determined on a consolidated basis, the energy utility shall record income tax expense as if it were determined for the energy utility separately for all time periods.

The Commission explained this policy in a recent proceeding in which the Utility Reform Project challenged PGE's accounting of federal, state, and local income tax payments on a stand-alone basis. *See In re Utility Reform Project*, UM 1074, Order No. 03-214 (Apr. 10, 2003) (copy attached as Exhibit C). Staff's Report, which the Commission adopted and incorporated by reference in its Order, explained:

> For ratemaking purposes, the Commission sets PGE's rates to reflect the costs of the company's regulated operations. That is, in a rate proceeding, PGE's rates are set based on its own revenues, costs and rate base for a given test year. Income taxes are calculated using PGE's net operating income. The tax effects of

> Enron's other operations are ignored for purposes of setting rates. This is consistent with standard ratemaking principles.

Id., App. A at 2. Staff reasoned that, 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:

> Calculating PGE's costs, including income taxes, for ratemaking on a stand-alone basis protects PGE's customers from the financial difficulties experienced by Enron's other subsidiaries. When the Commission approved Enron's acquisition of PGE, it had the option of incorporating the effects of Enron's non-utility operations in PGE rates or treating PGE as a stand-alone entity. Consistent with long-standing OPUC policy, the Commission chose the latter approach. . . . [T]he Commission created a wall between PGE's operations and Enron's other subsidiaries. As stated by [PUC] Order No. 97-196: These conditions and commitments provide important measures and requirements, beyond those provided by the Commission's statutory authority and existing rules, to protect PGE's customers, competitors, and the public generally.

Id., App. A at 2-3 (emphasis added). Staff's Report concluded that PGE's "income taxes were properly included in PGE's revenue requirement and customer rates, and that PGE properly paid its income tax liability to its parent or to the taxing authorities, as appropriate." *Id.*, App. A at 4. Staff's Report clearly expresses the customer protection and public policy support beneath calculating income tax liability for ratemaking solely on the income from regulated operations.

Following the Commission's general policy that a utility should account for income tax payments based on regulated operations only, PGE has consistently calculated the amount it would owe for the MCBIT on a stand-alone basis. During the periods that PGE was included in Enron's consolidated tax returns, PGE paid to Enron every year the amount of county income tax that PGE determined it would have owed on a stand-alone basis. Enron had the responsibility to file a consolidated tax return and pay to Multnomah County whatever

amount the consolidated entities as a whole owed. Under the authority of OAR 860-022-0045, PGE charged customers in Multnomah County for the amount of county income tax that PGE calculated on a stand-alone basis and then paid to Enron.

On January 18, 2005, a class action complaint was filed against PGE in Multnomah County Circuit Court by plaintiffs David Kafoury and Kafoury Brothers, LLC, represented by Daniel W. Meek and Linda K. Williams respectively. A copy of the Complaint is attached as Exhibit D. Plaintiffs demand restitution of over $6 million that PGE billed to customers for the MCBIT under OAR 860-022-0045. PGE believes that it properly billed customers for county taxes calculated on the basis of PGE's regulated operations. PGE has filed this petition for declaratory ruling to seek clarification from the Commission on application of OAR 860-022-0045.

The Commission should declare that utilities' county income taxes should be collected from customers on the same basis as utilities' state and federal income taxes, that is on a stand-alone basis rather than a consolidated basis, and that utilities accordingly should charge customers under OAR 860-022-0045 for local income taxes calculated on a stand-alone basis.

If the Commission determines that local income taxes should not be charged on a stand-alone basis, then the Commission should declare that the billing adjustment provisions of OAR 860-021-0135 apply.

III. Argument

As the court in *Multnomah County v. Davis* recognized, OAR 860-022-0045 is a ratemaking rule promulgated within the Commission's broad authority to set fair and reasonable rates. 35 Or App at 524-25. The rule creates a separate *procedure* for charges to customers

based on a utility's county tax expenses. Under the rule, a utility must calculate its local income taxes on an annual basis and charge customers to recover those amounts. By contrast, in a typical ratemaking proceeding, the Commission sets rates to include the utility's projected tax expenses. The only difference in *substance*, however, between charges made to recover local taxes under OAR 860-022-0045 and rates set under ORS 757.205 to 757.225 to recover federal and state taxes is that charges made under OAR 860-022-0045 apply to customers within particular counties, while rates set under ORS 757.205 to 757.225 apply to customers statewide.

Because OAR 860-022-0045 is a ratemaking rule, it should be interpreted and applied consistent with the Commission's general ratemaking policies. The Commission has directed utilities to calculate tax expenses on a stand-alone basis for purposes of ratemaking. When utilities calculate their local tax expenses under OAR 860-022-0045, they should be required to do so in the same manner as the Commission has instructed them to determine tax expenses in general rate cases. Consistency requires uniform application of ratemaking policies regardless of the procedure used to set rates.

Consistency also requires uniform treatment of federal, state, and county income taxes. If the Commission requires a utility to calculate and incorporate in customer rates federal and state income tax payments on a stand-alone basis, disregarding the effects of consolidated tax filing, then the Commission should require a utility to calculate and charge for county income tax payments on a stand-alone basis as well. There is no sound reason to require conflicting accounting methods with respect to the same types of expenses.

The Commission's requirement that utilities determine expenses, including tax expenses, on a stand-alone basis and set rates accordingly is designed to ensure that customers

pay only for costs associated with a utility's service to customers. *See In re Utility Reform Project*, App. A at 2-5. Consolidated tax filings, which are computed from the consolidated financial performance of the utility, its parent company, and any other consolidated subsidiaries, do not provide a fair or reasonable basis for calculating charges to utility customers. *See Id.*, App. A, Attachment ("Excerpts *from Accounting for Public Utilities*").

IV. Applicability of Billing Adjustment Rule

As set forth above, PGE believes that it has complied with the requirements of OAR 860-022-0045 and the policies of this Commission. If the Commission decides otherwise, however, then the question arises as to the applicability of the Commission's rule regarding billing adjustments, OAR 860-021-0135. A copy of that rule is attached as Exhibit E. The rule provides that when an overbilling or underbilling has occurred, the utility is to provide written notice to the customer detailing the circumstances, period of time and amount of adjustment. The rule also fixes the period of time over which a billing adjustment is to be determined as follows:

> 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 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.

Id. As set forth above, PGE has been billing and collecting local income taxes on a stand-alone basis for longer than three years. If the Commission determines that PGE has improperly done so then PGE requests that the Commission declare whether the provisions of OAR 860-021-0135 apply.

PGE believes that, if the Commission determines PGE has incorrectly billed customers for local income taxes, then the provisions of OAR 860-021-0135 would apply. PGE billed for the local income taxes pursuant to the direction of the Commission in OAR 860-022-0045, a rule promulgated within the Commission's authority to set fair and reasonable rates.[2] OAR 860-021-0135 was written and has been interpreted to cover all billing adjustments. In 1983 the Commission issued an order amending various OAR provisions including OAR 860-021-030 (which is now OAR 860-021-0135). *In the Matter of the Adoption and Amendment of Utility Rules relating to Customer Service,* Order No. 83-284 (Oregon Public Utility Comm'n, May 20, 1983). That order stated that the billing adjustment rule had been modified to treat all billing adjustments, both meter and non-meter related errors, in the same manner. *Id.* at p. 6. In addition, in at least two cases the rule has also been interpreted to apply where customers were billed on an inappropriate rate schedule. *See , e.g., In the Matter of Historic Kenton Hotel v. Portland General Electric Company,* Order No. 97-249 (Oregon Public Utility Comm'n, June 30, 1997); *Belozer Poultry Farms, Inc. v. Portland General Electric Company*, Order No. 92-962 (Oregon Public Utility Comm'n, June 8, 1992). If it is determined that PGE has incorrectly billed customers for local income taxes, the Commission should find that the provisions of OAR 860-021-0135 apply.

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[2] This rule is referenced in PGE's Commission approved tariff in Rule E(1)(D). A copy of PGE's tariff Rule E is attached as Exhibit F. Likewise, the provisions of OAR 860-021-0135 are implemented in PGE's tariff in Rule E(3)(D), which states that service that "has been unmetered or incorrectly metered or billed, regardless of cause . . . the Company will adjust its billings and notify the Consumer . . . In no event, however, shall an overbilling or underbilling be for more than three years' usage." *Id.*

V. Conclusion

For the reasons explained above, PGE asks the Commission to rule 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; and

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.

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

VI. Request for Expedited Handling

PGE also requests that this petition be handled expeditiously. If the Commission determines that a pre-hearing or other process is needed, PGE respectfully requests that it be scheduled at the Commission's earliest convenience.

DATED this 24th day of February, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing PETITION FOR DECLARATORY RULING OF PORTLAND GENERAL ELECTRIC COMPANY to be served by First Class U.S. Mail, postage prepaid and properly addressed, and by electronic mail, upon the following parties to Multnomah County Circuit Court Case No. 0501-00627:

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Dated at Portland, Oregon, this 24th day of February, 2005.

Douglas C. Tingey

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

*49829 OAR **860-022-0045**

Oregon Administrative Rules
CHAPTER 860. PUBLIC UTILITY COMMISSION
DIVISION 22. RATES

Current through August 13, 2004

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, 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.

(3) This rule applies to new or increased taxes imposed on and after December 16, 1971, including new or increased taxes imposed retroactively after that date.

(4) If any county, energy or large telecommunications utility, or customer affected by this rule deems the rule's application in any instance to be unjust or unreasonable, it may apply for a waiver of this rule by petition to the Commission, setting forth the reasons why the rule should not apply.

Stat. Auth.: ORS 183, ORS 756, ORS 757 & ORS 759

Stats. Implemented: ORS 757.110 & ORS 759.115

Hist.: PUC 164, f. 4-18-74, ef. 5-11-74 (Order No. 74-307); PUC 7-1998, f. & cert. ef. 4-8-98; PUC 16-2001 J. & cert. ef. 6-21-01

EXHIBIT A
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H

Court of Appeals of Oregon.

MULTNOMAH COUNTY, a home rule political subdivision of the State of Oregon, Respondent,
v.
Charles DAVIS, Public Utility Commissioner of the State of Oregon, Appellant.

No. A7702-02617; CA 9702.

Argued and Submitted May 19, 1978.
Decided Aug. 2, 1978.

A county instituted suit for judgment declaring invalid a rule of the Public Utility Commissioner directing how utilities should allocate certain taxes levied by counties in computing rates charged to utility customers. The Circuit Court, Multnomah County, John C. Beatty, Jr., J., held the rule invalid. The Commissioner appealed. The Court of Appeals, Johnson, J., held that: (1) the suspension procedure described in the statutes is not the exclusive rate-making procedure available to the Commissioner; (2) rule-making procedures followed were wholly proper despite the contention that the rule constituted an a priori determination of the reasonableness of how certain charges would be allocated and that such determination could only be made after hearing in accordance with statutory procedures, and (3) the Commissioner's treatment of taxes levied by counties in a different manner than his other rules treated similar types of taxes levied by cities involved a reasonable classification satisfying the minimum rationality test of the Fourteenth Amendment equal protection clause, particularly as the test is to be applied in matters relating to allocation of tax burdens.

Reversed.

Gillette, J., filed a concurring opinion.

West Headnotes

[1] Administrative Law and Procedure ⚿651
15Ak651 Most Cited Cases
Purpose of statutory provisions for appeal of administrative agency rules was to provide for direct judicial review without having to await contested case proceedings. QRS 183.400, 756.400, 756.440.

[2] Declaratory Judgment ⚿292
118Ak292 Most Cited Cases
County being ratepayer, county had standing to seek declaratory judgment declaring invalid a rule of the Public Utility Commissioner, and was not required to petition for exemption before bringing action. ORS 756.440.

[3] Public Utilities ⚿122
317Ak122 Most Cited Cases
(Formerly 317Ak7.3)
Statutory suspension procedure is not exclusive rate-making procedure available to Public Utility Commissioner. QRS 756.500-756.610, 757.210-757.225, 757.235.

[4] Public Utilities ⚿128
317Ak128 Most Cited Cases
(Formerly 317Ak7.9)
Public Utility Commissioner's rule directing how utilities shall allocate certain taxes levied by counties in computing rates charged to utility customers was within Commissioner's express statutory powers and consistent with sound administrative principles. ORS 183.400, 756.040, 756.060, 756.400, 756.410, 756.440, 756.500-756.610, 756.512, 757.205-757.220, 757.210-757.225, 757.220, 757.225, 757.235.

[5] Public Utilities ⚿123
317Ak123 Most Cited Cases
(Formerly 317Ak7.4)
Public Utility Commissioner's power over rates constitutes broad delegation of legislative authority, and only legislative standards for exercising that authority are that rates be "fair and reasonable." QRS 756.040.

[6] Public Utilities ⚿149
317Ak149 Most Cited Cases
(Formerly 317Ak8)
Rule-making procedures followed by Public Utility Commissioner in directing how utilities shall allocate certain taxes levied by counties in computing rates charged to utility customers were proper, despite contention that rule was in effect an "a priori determination of the reasonableness" of how certain charges would be allocated and that such determination could only be made after hearing in accordance with statutory procedures. QRS 756.500-756.610, 757.210-757.225, 757.235.

[7] Constitutional Law ⚿228.5
92k228.5 Most Cited Cases

EXHIBIT B
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Public Utility Commissioner's treatment of taxes levied by counties in different manner than his other rules treated similar types of taxes levied by cities involved reasonable classification satisfying minimum rationality test of Fourteenth Amendment equal protection clause, particularly as test is to be applied in matters relating to allocation of tax burdens. ORS 756.500-756.610, 757.210-757.225, 757.235; U.S.C.A.Const. Amend. 14.

[8] Constitutional Law 70.3(9.1)
92k70.3(9.1) Most Cited Cases
(Formerly 92k70.3(9))

Argument that Public Utility Commissioner's rule was not good public policy was to be addressed to Commissioner or Legislature. QRS 756.500-756.610, 757.210-757.225, 757.235.

*522 **969 Bruce R, DeBolt, Asst. Arty. Gen., Salem, argued the cause for appellant. With him on the briefs were James A. Redden, Atty. Gen., and John H. Socolofsky, Asst. Atty. Gen., Salem.

Martin B. Vidgoff, Deputy County Counsel, Portland, argued the cause and filed the brief for respondent

Before SCHWAB, C. J., and JOHNSON and GILLETTE, JJ.

*523 JOHNSON, Judge.

[1][2] Multnomah County instituted this suit for a declaratory judgment declaring invalid a rule [FN1] of the Public Utility Commissioner (Commissioner) directing how **970 utilities shall allocate certain taxes levied by counties in computing rates charged to utility customers.[FN2] The *524 effect of the rule is that utility expenses resulting from payment of the county's net business income tax are passed on to county ratepayers only rather than being reflected as part of a utility's general rate structure. The trial court held the rule invalid on the ground that it " * * * purports to establish public utility rates in a manner which does not comply with ratemaking and rate regulatory requirements prescribed by QRS 757.205 to ORS 757.220." On appeal by the Commissioner, the county argues that the trial court was correct, and that in any event the rule should be declared invalid because it violates the Fourteenth Amendment to the United States Constitution and is against public policy. We disagree and reverse.

FN1. The rule at issue is OAR 860-22-045 which provides:
"RELATING TO LOCAL GOVERNMENT FEES, TAXES OR OTHER ASSESSMENTS
"(1) In the event any county of the State of Oregon, other than a city-county, should impose upon any public utility subject to the jurisdiction of the Public Utility Commissioner any new taxes, or license, franchise or operating permit fees, or increase any such taxes or fees, the public 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 provided, however, that should the taxes or fees cover the operations of a public utility in only a portion of a county, then the affected public 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 here, 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) hereof shall be separately stated and identified to all customer billings. "(3) This rule shall apply to new or increased taxes imposed on and after December 16, 1971, including new or increased taxes imposed retroactively after that date.
"(4) Should any county, public utility or customer affected by this rule deem its application in any particular instance to be unjust or unreasonable, it may apply for a waiver of this rule by petition, setting forth the reasons why the rule should not apply."

FN2. The Commissioner conceded both at trial and on appeal that the county has standing and is not required to exhaust its administrative remedies although the rule expressly provides that a party may by petition seek exemption from the substantive provisions. OAR 860-22-045(4). It should be noted that this is not an ordinary declaratory judgment action instituted under ORS Chapter 28, but rather is an appeal challenging the validity of a rule under ORS 756.440 which provides:
"(1) The validity of any rule may be determined upon a petition for a declaratory judgment thereon filed as provided by ORS chapter 28 if the rule, or its threatened

application, interferes with or impairs, or threatens to interfere with or impair, the rights or privileges of the petitioner. The commissioner shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the commissioner to pass upon the validity of the rule in question.

"(2) The validity of any rule may also be determined:

"(a) By a court, upon review of an order in any manner provided by law; or

"(b) Pursuant to QRS 756.580: or

"(c) Upon attempted enforcement of such rule or order in the manner provided by law.

"(3) The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the commissioner or was adopted without compliance with statutory rulemaking procedures."

The right to appeal the validity of the Commissioner's rules provided for in ORS 756.400 is comparable to that provided for appeal of other administrative agency rules under QRS 183.400. The purpose of these statutory provisions is to provide for direct judicial review of administrative agency rules without having to await contested case proceedings. We are satisfied that in light of the fact that the county is a ratepayer, it has standing and was not required to petition for an exemption before bringing an action under QRS 756.440.

QRS 757.205 to 757.225 set forth a statutory procedure by which rates charged by public utilities are established. Utilities are required to file their rate schedules with the Commissioner, QRS 757.205. The Commissioner may, either upon complaint or upon his own motion, order a hearing on the rate schedule, suspend the imposition of the rates and by order establish what he deems to be a fair and reasonable rate. QRS 757.210, 757.215, 757.220 and 757.225. The *525 trial court concluded that the rule at issue here was in effect an "a priori determination of the reasonableness" of how certain charges would be allocated in fixing rates and that such determination could only be made after hearing in accordance with the procedures specified in ORS 757.210 to 757.220. The trial court's premise apparently was that every ratemaking decision by the Commissioner must be ad hoc. However, the statutory powers of the Commissioner contemplate a more comprehensive and flexible regulatory scheme.

[3] In the first place, the suspension procedure described in QRS 757.210 to 757.225 is not the exclusive ratemaking procedure available to the Commissioner. He can, for example, summarily alter, suspend or amend an existing rate under his emergency powers enumerated in ORS 757.235. Likewise, any person, or the Commissioner upon his own motion, can institute the hearing procedures provided for in QRS 756.500 to 756.610 and after such hearing, the Commissioner can enter an order rescinding, suspending or amending an existing rate. These latter statutes are significant in that in specific terms they establish the comprehensive nature of the Commissioner's regulatory authority over rates. Furthermore, **971 the general powers of the Commissioner are set forth in QRS 756.040 which in pertinent part provides:

"(1) In addition to the powers and duties now or hereafter transferred to or vested in the commissioner, he shall represent the customers of any public utility, railroad, air carrier or motor carrier, and the public generally in all controversies respecting rates, valuations, service and all matters of which he has jurisdiction. In respect thereof he shall make use of the jurisdiction and powers of his office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates.

"(2) The commissioner is vested with power and jurisdiction to supervise and regulate every public utility, railroad, air carrier and motor carrier in this state, *526 and to do all things necessary and convenient in the exercise of such power and jurisdiction.

"* * *."omm

ORS 756.060 expressly grants the Commissioner broad rule-making authority. The statute provides:

"The commissioner may adopt and amend reasonable and proper rules and regulations relative to all statutes administered by him and may adopt and publish reasonable and proper rules to govern his proceedings and to regulate the mode and manner of all investigations and hearings of public utilities, railroads, air carriers, motor carriers and other parties before him."

A rule is defined by ORS 756.400 as:

" * * * any directive, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the organization, procedure or practice requirements of the commissioner. * * * "

[4][5][6] The rule adopted here is a directive,

EXHIBIT B
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regulation or statement of general applicability for the purpose of implementing the statutes administered by the Commissioner. Such rule is within his express statutory powers and consistent with sound administrative law principles. The Commissioner's power over rates constitutes a broad delegation of legislative authority. The only legislative standards for exercising that authority are that rates be "fair and reasonable." ORS 756.040. Confronted with such a broad delegation, courts either have encouraged or compelled administrative agencies to adopt rules of the kind at issue here establishing the standards for the exercise of such authority. See Sun Ray Drive-In Dairy v. OLCC, 20 Or.App. 91, 530 P.2d 887 (1975); 1 Davis, Administrative Law s 2.00, (1970 Supplement). Furthermore, in adopting policies of general application such as those at issue here, rulemaking procedures assure broader public input into the agency policy-making decisions than are afforded by the contested-case-type procedures where usually only those parties that are directly affected are given notice and participate in the *527 deliberative process. Compare ORS 756.410 with ORS 756.512 and 757.220; see also, Marbet v. Portland Gen. Elect., 277 Or. 447, 458-464, 561 P.2d 154 (1977). The rulemaking procedures followed by the Commissioner were wholly proper.

[7] The county argues that the subject rule violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because the Commissioner has treated taxes levied by counties in a different manner than his other rules treat similar types of taxes levied by cities. Of course, cities and counties have different jurisdictions and provide different services. The record indicates the Commissioner's rationale for the different treatment of city and county taxes is that some services provided by the cities, such as city streets, are in the nature of a utility operating expense and thus are at least in part passed on to all ratepayers. In contrast he reasons that county taxes of the type at issue here are revenue measures generally benefiting county residents and thus should be passed on to county residents only. We are satisfied that the Commissioner's reasons for the different classification satisfy the minimum rationality test of the Fourteenth Amendment, particularly as that test is applied in matters relating to the allocation of tax **972 burdens. See San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); and Olsen v. State ex rel. Johnson, 276 Or. 9, 554 P.2d 139 (1976).

[8] The county's argument that the Commissioner's rule is not good public policy should be addressed to the Commissioner or the legislature.

Reversed.

GILLETTE, Judge, concurring,

I concur in the court's conclusion, and in most of its rationale, I wish to add the following, however, with respect to the equal protection question: The right of the state to establish classifications for taxation is a *528 right which has always been accorded the widest possible constitutional latitude. See San Antonio School District v. Rodriguez, 411 U.S. 1, 41, 93 S.Ct 1278, 36 L.Ed.2d 16 (1973).[FN1]

FN1. For the purposes of this case, I assume that the Equal Protection Clause of the Fourteenth Amendment, U.S.Const. Amend. XIV, and that of the Oregon Constitution, Or.Const. Art. I, s 20 are synonymous. See Olsen v. State ex rel Johnson, 276 Or. 9, 554 P.2d 139 (1976). Cf. Linde, Without "Due Process" Unconstitutional Law in Oregon, 49 Or.L.Rev. 125 (1970),

But the county is not attacking a taxation scheme: the commissioner has no ability to tax. What the county is attacking is the commissioner's requiring that a public utility someone over whom he does have control treat two similarly situated public entities differently. The county's argument succeeds only if the two public agencies are so similarly situated that it offends equal protection principles to treat them differently.

To me, it is clear that the commissioner could not treat differently identical taxes enacted by two different cities, i. e., the commissioner could not permit PGE to spread a Portland franchise tax throughout the system while requiring that a Salem franchise tax be billed only to Salem customers. The county argues, essentially, that this is what has been done here. The argument fails if either (1) the taxing entities are sufficiently different to justify different treatment, or (2) the taxes are sufficiently different to justify different treatment.

Both tests are met here. Beyond the fact that they are different kinds of governmental entities by label, counties and cities differ in that only the cities have the legal right to veto the extension of public utility power lines through their territory. ORS 758.010(1). With the power to veto comes the power to exact a

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charge for the privilege of passage. The counties have no parallel authority. See QRS 221.450. The Commissioner, in treating the first 3 percent of the city's tax as a license and therefore different from the county's tax, *529 does no more than acknowledge a legislative decision to treat the two entities differently, and the legislative decision is not separately challenged.

The entities being different by virtue of their differing statutory authority, and the entities' taxes however denominated thus being different, it follows that the commissioner's discriminatory treatment of the county meets the "minimum rationality" test.[FN2]

> FN2. San Antonio School District v. Rodriguez, supra. Brusco Towboat Co. v. State Land Board, 30 Qr.App. 509, 529-530, 567 P.2d 1037 (1977).

35 Or.App. 521, 581 P.2d 968

END OF DOCUMENT

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ORDER NO. 03-214

ENTERED APR 10 2003

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1074

In the Matter of	)	
	)	
UTILITY REFORM PROJECT	)	
	)	
Petition for an accounting of the Federal, State and Local Income Tax Payments of PORTLAND GENERAL ELECTRIC CO., since its acquisition by ENRON Corp., and Appropriate Rate Adjustments and Refunds.	)	ORDER

DISPOSITION: PETITION FOR INVESTIGATION DENIED

On March 7, 2003, the Utility Reform Project (URP) filed a petition to open an investigation along with a complaint.[1] The Public Utility Commission (PUC) assigned Docket No. UM 1074 to this filing. URP's petition asks the Commission to commence an investigation to determine the amount that Portland General Electric (PGE) has paid in income taxes since 1997, and order PGE to refund to ratepayers, with interest, funds collected for paying income taxes that were not used for that purpose.

URP's petition is styled as both a request for an investigation under ORS 756.515 and a complaint under ORS 756.500. Staff's recommendation in this matter addresses only the request for investigation under 756.515.

At its public meeting on March 31, 2003, the Commission adopted Staff's recommendation to deny URP's petition to open an investigation regarding PGE's income taxes. Staff's recommendation is attached as Appendix A and is incorporated by reference.

[1] URP's Complaint that accompanied this petition has been docketed as UCB 13, and will be processed by the Administrative Hearings Division.

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ORDER

IT IS ORDERED THAT Utility Reform Project's request to open an investigation is denied.

Made, entered and effective _____.

BY THE COMMISSION:

_____

Becky Beier
Commission Secretary

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A party may appeal this order to a court pursuant to ORS 756.580.

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ORDER NO. 03-214
ITEM NO. 3

PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: March 31, 2003

REGULAR X CONSENT ___ EFFECTIVE DATE NA

DATE: March 24, 2003

TO: John Savage through Lee Sparling

FROM: Ed Busch

SUBJECT: UTILITY REFORM PROJECT: (Docket No. UM 1074) Requests Commission to open an investigation and order Portland General Electric to refund funds collected to pay income tax.

STAFF RECOMMENDATION:

I recommend the Commission deny URP's request to open an investigation regarding PGE's income taxes.

DISCUSSION:

On March 7, 2003, the Utility Reform Project (URP) filed a petition to open an investigation along with a complaint. The filing was docketed as UM 1074. URP's petition asks the Commission to commence an investigation to determine the amount that Portland General Electric (PGE) has paid in income taxes since 1997 and order PGE to refund to ratepayers, with interest, funds collected for paying income taxes that were not used for that purpose.

URP's petition is styled as both a request for an investigation under ORS 756.515 and a complaint under ORS 756.500. Staff's recommendation in this matter addresses only the request for investigation under 756.515.

In its petition, URP states that Enron Corp. (Enron), the parent company of PGE, has paid little or no federal, state or local income taxes since 1997 despite collecting over $400 million from PGE for that purpose. URP also states that "Substantial evidence exists that Enron/PGE engaged in a pattern of fraud and deceit upon the agency when it provided "proof" in rate proceedings that it would incur such tax liabilities but in fact had put in place numerous schemes for the avoidance and evasion of income tax liabilities. . ." URP's petition includes several figures that it believes were amounts

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included in customer rates for payment of income taxes that were not used for that purpose. According to the petition, PGE's rates "are based on fraud and misrepresentation by PGE."

Background

By Order 97-196 (Docket UM 814), the Commission approved Enron's application to exercise influence over PGE. The Internal Revenue Code allows a parent corporation to elect to file a consolidated federal income tax return that reports the combined income and expense items of the consolidated group. From 1997 until May 2001, Enron filed consolidated tax returns that included PGE's income and expenses. During that period, PGE calculated its federal and state income tax liability on its results of operations and forwarded to Enron those amounts. From May 2001 through 2002, while Enron was unconsolidated, PGE made its income tax payments directly to the taxing authorities

For ratemaking purposes, the Commission sets PGE's rates to reflect the costs of the company's regulated operations. That is, in a rate proceeding, PGE's rates are set based on its own revenues, costs and rate base for a given test year. Income taxes are calculated using PGE's net operating income. The tax effects of Enron's other operations are ignored for purposes of setting rates. This is consistent with standard ratemaking principles.[2]

Calculating PGE's costs, including income taxes, for ratemaking on a stand-alone basis protects PGE's customers from the financial difficulties experienced by Enron's other subsidiaries. When the Commission approved Enron's acquisition of PGE, it had the option of incorporating the effects of Enron's non-utility operations in PGE rates or treating PGE as a stand-alone entity. Consistent with long-standing OPUC policy, the Commission chose the latter approach. In adopting the stipulation in Docket UM 814, the Commission created a wall between PGE's operations and Enron's other subsidiaries. As stated by Order No. 97-196: "These conditions and commitments provide important measures and requirements, beyond those provided by the Commission's statutory authority and existing rules, to protect PGE's customers, competitors, and the public generally."

If PGE's rates were set in a manner that captured some of Enron's tax losses, PGE's rates would also have needed to reflect the expenses that created those tax savings, and customers would be worse off. Staff's counsel advised that it would be difficult for

[2] See Attachment to this staff report containing excerpts from Accounting for Public Utilities.

the OPUC to justify picking and choosing which of Enron's revenues and expenses—including tax savings--to include for purposes of setting Oregon customers' rates. Moreover, such an approach may lead to confiscatory rates.

Issues

URP's petition raises two main issues relating to whether ratepayers are entitled to a refund. First, did PGE make "false or misleading representations" regarding the amount of income taxes that should be included in its customers' rates? Second, did PGE collect funds from its customers to pay taxes that were not used for that purpose?

The answer to the first question is clear. URP's petition contains no evidence that PGE made false representations in calculating the amount of income taxes that should be included in customer rates. As described above, PGE's rates that were in effect in 1997 and subsequent years were set on a "stand alone" basis in Docket UE 100 (effective December 1, 1996). Staff believes that income taxes were accurately calculated in that rate case using PGE's test year revenues, expenses and rate base.

As to the second question, it also is clear that PGE made its federal and state income tax payments to Enron while on a consolidated basis, and directly to the proper taxing authorities while on an unconsolidated basis. As reported in the company's annual report, FERC Form 1, from 1997 through 2001, PGE paid a total of $463.4 million in federal and state income taxes, of which $445.1 million related to its electric operations. In fact, this is more than the amount of income taxes that customers' rates were set to collect over this period, a total of $430.5 million. Hence, there is no substance to the argument that PGE collected amounts for payment of income taxes that it did not use for that purpose.

Even if PGE had paid out less for income taxes than it collected from customers, there would be no issue for an investigation. Rates are set based upon a utility's revenues and expenses (including income taxes) for a particular test period; actual results in subsequent years are almost certain to be higher or lower than estimated for the test period. In this case, PGE paid out more in income taxes that the amount calculated in the most recent rate case.

Staff certainly does not condone tax evasion by Enron, if that were proved to be the case. However, the OPUC does not have jurisdiction over whether or not Enron as a corporation appropriately paid its income taxes during the period Enron elected to file its

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taxes on a consolidated basis. Federal and state taxing authorities are responsible for ensuring that Enron paid the income taxes it owed.[3]

In short, staff believes that income taxes were properly included in PGE's revenue requirement and customer rates, and that PGE properly paid its income tax liability to its parent or to the taxing authorities, as appropriate. Whether or not Enron properly paid its income taxes to the IRS and the State of Oregon is beyond the purview of the OPUC. Any underpayments by Enron would be owed to those taxing authorities and their constituents, not to ratepayers.

Alternatives

The Commission can approve URP's application to open an investigation or it can deny the application. PGE has indicated that prior to this public meeting it will provide records that will enable the Commission to verify that PGE did, in fact, make its income tax payments reported in the company's FERC Form 1 for 1997 through 2001 either to Enron or directly to the taxing authorities. Regardless, URP's petition asks the Commission to take action in an area (possible underpayment of income taxes) in which the OPUC does not have jurisdiction. What the OPUC does have jurisdiction over is whether PGE's rates were set properly to include the company's income tax liability on a stand-alone basis. Staff finds that to be the case. Therefore, staff believes there is no reason for the Commission to open an investigation.

As noted above, URP's filing is also a complaint by URP against PGE under ORS 756.500. Staff's counsel advises that URP is still free to pursue that complaint It may serve the complaint on PGE, if it hasn't already done so, and it may, at a hearing, present whatever evidence it chooses to support its complaint and its request for refunds.

PROPOSED COMMISSION MOTION:

Utility Reform Project's request to open an investigation be denied.

UM 1074
Attachment

[3] As stated in Accounting for Public Utilities (section 17.04[1]): "The election to file a consolidated tax return makes the parent corporation the agent of all corporations included in the affiliated group. This agency relationship includes, but is not limited to, the duties to file proper and timely consolidated tax returns, to receive deficiency notices, to file refund claims, to execute waivers of the statute of limitations, to respond to Internal Revenue Service audits, and to conduct proceedings in the courts."

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Attachment

Excerpts from Accounting for Public Utilities
(Publication 016, Release 19, November 2002)

Section 7.08[3]:

"It is not uncommon for a regulated utility to have subsidiary operations that produce tax losses which, on a consolidated tax return, offset taxable income from utility operations. . The only approach that is consistent with standard ratemaking principles that prohibit cross-subsidization between utility and non-utility activities is to put the regulation operations on a 'stand-alone' basis and to assign the full tax burden to the taxable gain source and a tax benefit to the tax loss source. The basic theory is that the regulated costs should not be affected by the results from nonregulated operations."

Section 17.04[3]:

"Income tax normalization is consistent with a fundamental principle of the cost of service approach to ratemaking; the principle that consumers should bear only costs for which they are responsible. Under this principle, there is a well-reasoned, and widely recognized, postulate that taxes follow the events they give rise to. Thus, if ratepayers are held responsible for costs, they are entitled to the tax benefits associated with the costs. If ratepayers do not bear the costs, they are not entitled to the tax benefits associated with the costs.

"Regulators have long used a ratemaking procedure that explicitly embraces this principle. The procedure is to identify utility activities (revenues and costs) and compute taxes directly related to the utility activities.

"Non-utility operations involve financial risks that are different from a utility's regulated operations. When these risks are not borne by the ratepayers, it is unfair to make use of the business losses generated in those nonregulated entities to reduced the utility's cost in determining the rates to be charged for utility services. By the same token, when a company's nonjurisdictional activities are profitable, the ratepayers have no right to share in those profits, but neither are they required to pay any of the income taxes that arise as a result of those profits. Thus, a "stand alone" method (as opposed to a consolidated effective tax rate method) for computing the income tax expense component of cost of service is the proper and equitable method to be followed for ratemaking purposes."

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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
COUNTY OF MULTNOMAH

00627

DAVID KAFOURY, an individual, and KAFOURY BROTHERS, LLC, an Oregon Limited Liability Corporation, each as representative of the class of similarly situated electric service customers of Portland General Electric Company from 1997 to the present;	Case No. 0501-00627
PLAINTIFFS,	**COMPLAINT FOR UNJUST ENRICHMENT AND RESTITUTION**
V.	**JURY TRIAL REQUESTED**
PORTLAND GENERAL ELECTRIC COMPANY,	**EXEMPT FROM ARBITRATION**
DEFENDANT.	

Plaintiffs request a jury trial and allege as follows:

1.

Defendant Portland General Electric Company (PGE) is a corporation and regulated utility which at all relevant times has provided and does provide electric utility services in Multnomah County and elsewhere in Oregon with a

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place of business at 121 SW Salmon Street, Portland, in Multnomah County, Oregon.

2.

Plaintiff David Kafoury resides in Multnomah County, Oregon, and is and has been a residential customer of PGE at all relevant times, with one or more accounts for electric service.

3.

Plaintiff Kafoury Brothers LLC does business at 1515 S.E. Ankeny Street in Portland, Oregon, and is a commercial customer of PGE. It also is a successor in interest to other businesses at that address, which were commercial customers of PGE at all relevant times.

4.

Plaintiffs seek to represent a class consisting of all customers of PGE electric utility services who were billed on their electric bills and paid amounts to PGE purportedly for Multnomah County Business Income Taxes after 1996, as described below.

5.

From 1997 through the third quarter of 2004, defendant billed customers. including Kafoury and Kafoury Brothers LLC, for service rendered in Multnomah County an amount purportedly on "behalf" of Multnomah County to pay the Multnomah County Business Income Tax (hereinafter "MBIT") supposedly owed by defendant to the County.

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6.

Said charges for MBIT were not included in or authorized by any rate order of the Oregon Public Utility Commission (OPUC).

7.

Said charges were billed and collected under a rule of the OPUC which allows an electric utility to collect taxes which are imposed by a county as a separately itemized charge on bills for electric service.

8.

During the time period of 1997 through the present PGE billed customers within Multnomah County and collected from them a total aggregate amount in excess of $6 million, supposedly for PGE's MBIT liability.

9.

During the time period of 1997 through the third quarter of 2004 PGE paid to Multnomah County a total aggregate amount of under $4000.00 for MBIT

10.

Multnomah County did not impose upon PGE county taxes in the amounts charged and collected as alleged in ¶ 4,

11.

Plaintiffs and the plaintiff class had no recourse but to pay bills containing these charges or risk electric service shut-off.

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12.

Plaintiffs and the plaintiff class had no notice of the facts that MBIT had not been paid to Multnomah County for 1997 and in subsequent years until on or about November 22, 2004.

13.

Plaintiffs, and the class of all PGE ratepayers in Multnomah County, are entitled to restitution of the amounts paid by them to defendant for MBIT which was never paid to Multnomah County.

14.

Plaintiffs and the plaintiff class were harmed by defendant's conduct, and it would unjustly enrich defendant to retain monies collected from plaintiffs for taxes never imposed.

CLASS ALLEGATIONS

15.

Plaintiffs realiege ¶¶ 1-14.

16.

Plaintiffs are representative of a class consisting of all customers of PGE electric utility services charged for MBIT in the period of 1997 to the present

17.

The class of PGE customers represented by the plaintiffs numbers over 150,000 and hence is so numerous that joinder of all members is impractical.

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18.

There are identical and substantial questions of law common to the claims of each class member.

19.

There are substantial questions of fact common to the claims of each class member.

20.

The claims of the representative parties are typical of the claims of each class member as they arise from the same events, practices and course of conduct of PGE.

21.

The representative parties can fairly and adequately protect the interests of the class.

22.

The representative parties are represented by experienced counsel who have participated in dozens of proceedings before utility regulatory commissions and numerous complex appeals and trials.

WHEREFORE, plaintiffs pray for:

1. An order certifying a plaintiff class of PGE customers who were overcharged for MBIT from 1997 to the present;

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2. Judgment in favor of plaintiffs and plaintiff class and against defendant, for restitution of actual amounts charged for MBIT and not paid to Multnomah County (an amount in excess of $6 million);

3. Award of prejudgment interest;

4. Recoverable costs and reasonable attorney fees; and

5. Such other relief as the court deems warranted.

Dated: January 18, 2005

Respectfully Submitted,

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Citation/Title
OR ADC 860-021-0135, Adjustment of Utility Bills

***49771 OAR 860-021-0135**

Oregon Administrative Rules
CHAPTER 860. PUBLIC UTILITY COMMISSION
DIVISION 21. UTILITY REGULATION
MEASURING AND BILLING SERVICE

Current through August 13, 2004

860-021-0135 Adjustment of Utility Bills

(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.

(2) The energy or large telecommunications utility may waive rebilling for underbillings when the costs to the utility of rebilling make it uneconomical.

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

(4) When a customer is required to repay an underbilling, the customer shall be entitled to enter into a time-payment agreement without regard to whether the customer already participates in such an agreement. If the customer and utility cannot agree upon payment terms, the Commission shall establish terms and conditions to govern the repayment obligation. The energy or large telecommunications utility shall provide written notice advising the customer of the opportunity to enter into a time-payment agreement and of the Commission's complaint process.

Stat. Auth.: ORS 183, ORS756, ORS 757 & ORS 759

Stats. Implemented: ORS 756.040 & ORS 757.250

Hist.: PUC 164, f. 4-18-74, ef. 5-11-74 (Order No. 74-307); PUC 5-1983, f. 5-31-83, ef. 6-1-83 (Order No. 83-284); Renumbered from 860-021-0030; PUC 16-1990, f. 9-28-90, cert. ef. 10-1-90 (Order No. 90-1105); PUC 13-1997, f. & cert. ef. 11-12-97; PUC 11-1998, f. & cert. ef. 5-7-98; PUC 4-1999, f. & cert. ef. 8-12-99; PUC 16-2001, f. & cert. ef. 6-21-01

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RULE E
BILLINGS

1. Basis for Billing

A. Generally

Unless specifically provided otherwise in a rate schedule or in a contract, the Company's rates are based upon the furnishing of continuous Electricity Service to the Consumer's Premises at a single Point of Delivery and at a single voltage and phase. If the Company agrees to additional Points of Delivery, each Point of Delivery is separately metered and billed and treated as a separate Line Extension under the provisions of Rule G.

B. Individual Metering

Each separately operated business activity and each separate building is individually metered and billed except:

(1) Where two or more buildings on one Premises are occupied and used by one Consumer in the operation of a single and integrated business enterprise, the Company will furnish Electricity Service for the entire group of buildings through one service connection at one Point of Delivery; and

(2) A Consumer may furnish Electricity to tenants of the Consumer on its Premises, provided the cost to the tenant for such Electricity is included in the rent and is not separately billed or paid.

C. Continuing Nature of Charges

Disconnect and reconnect transactions do not relieve a Consumer from the obligation to pay Basic or Minimum Charges that accumulate during the periods where the Company makes Electricity Service available but such service is not used by the Consumer.

D. Tax Adjustment

A separately stated tax adjustment is billed in any community or area where a governmental authority imposes a tax or assessment in excess of the limit established by the Commission in OAR 860-022-0040 and 0045.

E. Restrictions on Resale

Electricity Service will not be provided for resale except where provided prior to November, 1973.

2. Consumer to be Billed; Responsibility for Payment

The Consumer receiving Electricity Service is responsible for payment of all Company charges except when an ESS is providing consolidated billing as specified in Section 5 of this rule. In such case, the ESS is responsible for payment of Direct Access Service and other Company charges.

Consumers are responsible for checking their billings and verifying their accuracy. Questions regarding ESS charges must be directed to the ESS and questions regarding Company charges must be directed to the Company.

When a change in occupancy occurs or the Consumer otherwise chooses to close an account, five days' notice shall be provided to the Company. The Company may accept a change of occupancy notification from a third party. The Company may refuse to process a change of occupancy until it receives satisfactory evidence of the third party's authority to request such a change. The outgoing Consumer (or serving ESS if it is providing a Consolidated Bill) is held responsible for all service supplied to the Premises until the account is closed.

3. Metering and Meter Reading

A. Generally

An accurate record is kept by the Company of all meter readings, which is the basis for determination of all bills rendered for metered service.

B. Assessed Demand

At the Company's option, Demand may be determined by test or assessment. The assessed Demand of each motor is the nameplate horsepower of the motor multiplied by 0.825 rounded to the nearest whole kilowatt.

C. Estimated Meter Readings

The amount of Electricity, Demand, or Reactive Demand used by the Consumer is estimated by the Company from the best available sources and evidence in the following circumstances:

(1) Where a meter is inaccessible due to conditions on the Consumer's Premises; or

(2) When it is determined that the amount of Electricity, Demand, or Reactive Demand used was different from that recorded or billed due to incorrect billing procedures; or

(3) In preparing opening and closing bills. It is the normal practice of the Company, however, to make reasonable efforts to prepare opening and closing bills from actual meter readings.

D. Incorrect Metering or Billing

When Electricity Service has been unmetered or incorrectly metered or billed, regardless of cause, or when a meter is found to be more than 2 percent fast or slow, the Company will adjust its billings and notify the Consumer and any serving ESS. Any such adjustment will be for a period not exceeding six months, unless it can be shown that the error was due to some specific cause, the date of which can be fixed, in which case the actual date will be used. In no event, however, shall an overbilling or underbilling be for more than three years' usage.

E. Special Meter Reading

A charge, as set forth under Schedule 300, is imposed when a Consumer has requested more than one special meter reading during the preceding 12-month period to verify the accuracy of a previous meter reading. If the special meter reading results in a billing correction, the Company will waive the special meter reading charge. An ESS who requests a special meter reading to coincide with the date it will begin serving its Consumer(s) will be charged the special meter reading fee as set forth in Schedule 300.

F. Unmetered Loads

Electricity Service to fixed loads with fixed periods of operation - such as streetlights, traffic lights, television amplifiers, and other similar installations - may, for the convenience and mutual benefit of the Consumer and Company, be unmetered. The estimated monthly usage is billed in accordance with the Consumer's applicable rate schedule. Consumers have the responsibility of notifying the Company of changes in connected load. Without such notice, the Company is not obligated to make retroactive adjustments to billings or continue to offer unmetered service to the fixed load.

G. Special Demand

All rate schedules are based upon loads for which standard Demand measurements reflect adequately the burden imposed on the Company's system. If a Consumer has a load with large short-period fluctuations, the Company reserves the right to employ a special Demand determination.

H. Reactive Demand

All rate schedules assume that the Consumer takes a minimum of Reactive Demand. Charges in the rate schedules for Reactive Demand are separate from and in addition to charges under the monthly rate for Demand and Electricity or under any minimum charge. Where the Consumer installs equipment to supply part or all of its Reactive Demand requirement, such equipment must be switched in a manner acceptable to the Company. Separate charges for Reactive Demand will not be made when the Consumer's Reactive Demand is 30 kVar or less.

4. Presentation and Payment of Bills

A. Generally

The rate schedules in this Tariff set forth the rates for one Billing Month. However, the Company may read meters and render bills for a period shorter or longer than one Billing Month, in which case the charges based on one month of service (e.g. monthly basic charges, charges for facility capacity and other demand related charges) and the number of kilowatt-hours in each of the rate blocks of the rate schedules will be prorated by multiplying by the number of days in the period and dividing by 30 (except for those Consumers billed by the Company's legacy system which applies a proration value of 30.4167). The number of days in the period must be less than 27 or more than 34 for a bill to be prorated.

B. Prorating Initial and Closing Bills

Initial and closing bills are prorated, unless the time between initial and final use of service is less than 27 days.

C. Prorating for Tariff Changes

Changes in Tariff charges or provisions which become effective with service rendered as of a particular date rather than upon the date of meter readings or billings are prorated based on the number of days during the billing period that service was provided under the former and revised rate schedules unless the Company is billing on a daily basis using daily readings.

D. Payment of Bills

All bills, except closing bills, are due and payable at the Company's offices or authorized pay stations within 15 days of the date of presentation, unless otherwise specified on the bill. Closing bills are due and payable on presentation. The date of presentation is the date on which the Company mails the bill. Checks remitted by Consumers in payment of bills are accepted conditionally. A charge, set forth under Schedule 300, is assessed for handling checks upon which payment has been refused by the bank on which drawn.

A Field Service Collection Fee, as specified in Schedule 300, is charged for each visit to a service address by a Company representative to disconnect service for nonpayment of past due amounts where such visit does not result in disconnection of service due to collection of payment from the Consumer or representation regarding payment by the Consumer.

If a Consumer has stopped disconnection or gained reconnection with a non-cash payment that was returned by the Consumer's financial institution within the last 12 months, future payments to avoid disconnection or gain reconnection of service must be made in cash, money order, verified credit card payment or cashier's check.

E. Processing of Payments

Unless otherwise specified by the Consumer, the Company shall allocate payments from Consumers in the following order:

(1) Required deposits currently due;

(2) Past due regulated charges;

(3) Current regulated charges;

(4) Past due unregulated charges by oldest date first; and

(4) Current unregulated charges.

F. Budget Pay Plans

Budget pay options are available to Residential Consumers with satisfactory credit and whose account balance is current. At the Company's option, Small Nonresidential Consumers that are not receiving Direct Access Service may also be offered these plans. No additional charges will be made for rendering bills under a budget pay option. The Company may adjust a Consumer's budget pay amount if changes in the Consumer's usage patterns or other factors cause the budget pay amount to no longer accurately reflect the Consumer's actual billings. (N)

The Company may discontinue a Consumer's budget pay plan if the Consumer fails to pay the monthly budget pay amount in full by the due date. Consumers may discontinue participation in the budget pay plans upon notification to the Company. If a budget pay plan is discontinued, the Consumer must pay the difference between the total amount paid under the budget pay plan and the total amount the bills would have been, based on the actual kWh used. If a budget pay plan is voluntarily or involuntarily discontinued, the Company is not obligated to offer another budget pay plan to that Consumer for a period of 12-months from the time the plan was discontinued. Other monthly charges, such as financing contract and area light charges, will be added to the Consumer's monthly bill but are not included when computing the monthly budget pay amount. The Company offers:

(1) Average Pay Plan

Bills for service under this plan are rendered on a 12-month average basis. The average pay amount is calculated each month and is equal to the average usage of the preceding 12-months (actual or estimated) or less (based on the number of months available), multiplied by the current rate, plus up to 1/10 of any then-outstanding debit or credit balance. (T)

(2) Equal Pay Plan

The monthly payment amount is based upon 1/12 of the anticipated annual bill, adjusted as necessary for Tariff changes. Annually, Consumer accounts are reviewed to determine the equal pay amount for the following 12 months. At the time of the annual review and at their request, Consumers can settle their present account balance; otherwise, any remaining balance will be included in estimating the equal payment for the following year. Adjustments in the equal pay amount may be made at times other than annually if the Consumer's actual bill would differ significantly from their previously calculated anticipated annual bill. (T) (T) (T)

Consumers enrolled in the equal pay plan that were eligible for and did not receive a timely annual adjustment due to changes made by the Company at the time of its billing system conversion on August 11, 2002, will receive an adjustment in accordance with the stipulation adopted by the Commission on August 20, 2003.

G. Time Payment Agreements

The Company will make available two Residential Consumer time payment agreement options. Residential Consumers may choose between a levelized payment plan and an equal pay arrearage plan as described in OAR 860-021-0415.

H. Credit Balance

Should the Consumer pay the Company an amount in excess of what is owed the Company for services rendered, the excess amount will be carried as a credit balance on its account and applied to bills for future service unless the Consumer requests a cash refund.

I- Forced Shutdown of Consumer's Operations

If a Nonresidential Consumer's productive operations are completely shut down for a continuous period of more than 15 days solely by reason of fire, flood, wind, action of the elements, acts of God, or other accident or casualty beyond the Consumer's control, and the Consumer so notifies the Company in writing immediately upon the Consumer's knowledge of such event, any minimum charge provision of the applicable rate schedule shall be waived during the time of such shutdown.

During such time, bills will be computed on the basis of actual Demand and Electricity use and prorated to the number of days involved. The Consumer shall give notice to the Company prior to resumption of any productive operations.

J. Late Payment Charge

A late payment charge may be assessed against any Residential Consumer's account that has an unpaid balance carried forward for two consecutive monthly due dates. A Nonresidential Consumer may be assessed a late payment charge against any account that is not paid in full each month. The charge will be computed on the unpaid delinquent balance at the time of preparing the subsequent month's bill at the rate specified in Schedule 300. Consumers who participate in a time payment agreement (OAR 860-021-0415) or the Equal Pay Plan are exempted from the late payment charge as long as they are current with their scheduled payments; however, they are assessed a late payment charge on any delinquent balances.

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K. Bill History Information Service Fee

Advance payment of a fee, as specified in Schedule 300, is required for each year of requested prior bill information (other than requests for disputed billing information) where the information is no longer accessible on the on-line Consumer information system. The Company will provide unformatted and unanalyzed interval usage data, if available, to a Consumer who requests such data for the fee specified in Schedule 300. In the case where a Consumer requests formatted and analyzed interval data, the fee will be based on a mutually agreeable charge. (T) (T)

5. Special Requirements for Direct Access Billings

A. Generally

A Consumer purchasing Electricity from an ESS may choose from three billing options: the Company bills for all services (Company Consolidated Bill), the ESS bills for all services (ESS Consolidated Bill), or the Company and the ESS each bill for their respective services (Company/ESS Split Bill).

(1) Company Consolidated Bill

A Company Consolidated Bill is the default when there is no selection on the part of the Consumer. This bill will be issued under the Company's name. The Company may disconnect the Consumer for nonpayment under the guidelines set forth in Rule F. The Company will only remit amounts owing to the ESS that have been collected from Consumers.

(2) Company/ESS Split Bill

When the Consumer is receiving a Company/ESS Split Bill, the Company may disconnect Electricity Service for nonpayment of Direct Access Service under the guidelines set forth in Rule F.

(3) ESS Consolidated Bill

When the Consumer receives an ESS Consolidated Bill, failure of the Consumer to pay the ESS for Direct Access Service does not relieve the ESS of the responsibility to pay the Company for Direct Access Services and any other Company charges.

B. ESS Billing Responsibilities

An ESS is responsible for the following:

(1) Confirming receipt of Consumer usage data within 12 hours of transmittal from the Company.

(2) Providing bill-ready data and labeling information to the Company within two business days after receipt of usage data from the Company when the Consumer is receiving Company Consolidated Billing. This billing information can occupy no more than both sides of an 8 ½ x 11 page. With Company approval, an ESS may include additional pages or billing inserts at an agreed to Company charge.

(3) Responding to Consumer inquiries regarding ESS charges.

(4) Under the ESS Consolidated Bill option, issuing a timely corrected bill to the Consumer when the Company provides revised billing information.

C. Company Billing Responsibilities

The Company will provide usage data to the ESS within two business days of the Consumer's meter reading. When the ESS provides an ESS Consolidated Bill, the Company will provide bill-ready data within two business days of the Consumer's meter reading. When the Company is providing a Company Consolidated Bill, the Company may issue the bill to the Consumer without the ESS billing information if the ESS billing information is not provided in a timely manner. The Company is not responsible for computing or determining the accuracy of ESS charges.

D. Information Included in Billing

ESS billing for Consumers shall include the following information:

(1) Meter readings for both the beginning and end of the period for which the bill is rendered, if the billing is based on metered quantities;

(2) The dates the meter was read;

(3) The number of units of service supplied;

(4) The telephone number, identified as a Company number, to call for outage reporting and other local electrical utility matters;

(5) The PODID(s) of the Consumer;

(6) The price and amount due for each service or product the Consumer is purchasing;

(7) Price, power source and environmental impact information in accordance with Oregon Administrative Rule 860-038-0300; and

(8) The amount of the Public Purpose Charge, if any.

When the Consumer receives an ESS Consolidated Bill, the bill shall include the following additional information:

(1) Any tax adjustments;

(2) The amount of any transition charge or credit; and

(3) Mandated legal and safety notices in the format provided by the Company.

RULE E (Concluded)