BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1224

In the Matter of: **UTILITY REFORM PROJECT and KEN LEWIS** **Application for Deferred Accounting**	**APPLICANTS' RESPONSE TO PGE AMENDED COMMENTS ON APPLICATION FOR DEFERRED ACCOUNTING**

I. OVERVIEW.

The PGE Amended Comments on Application for Deferred Accounting [hereinafter "PGE Amended Comments" or just PGE and a page reference] should be evaluated in light of the Commission's issuance of OPUC Order No. 06-379 and the decision of the Oregon Supreme Court in ***Dreyer v. Portland General Electric Company***, --- P.3d ---, 2006 WL 2507055.[1]

In OPUC Order No. 06-379, the Commission granted the creation of a deferred account in nearly the precise circumstances presented here, except that the deferred account contained money to the credit of the utility, while the deferred account we seek will contain money to the credit of the ratepayers. In both cases, the amount to be deferred for later recovery/crediting in rates is very the same:

1. We incorporate by reference the entire Applicants' Response to PGE Comments on Application for Deferred Accounting (December 5, 2005). And, to the extent not included in the discussion below, we incorporate by reference all of Complainants' Repose to PGE's Amended Motion to dismiss, Abate, or Make More Definite and Certain, filed this date.

The difference between the amount to be charged to ratepayers for "federal income taxes" and "state income taxes" under (a) the OPUC's past methodology[2] and (b) the requirements of SB 408 during the period commencing during the period after the effective date of SB 408 but before the effective date of the automatic adjustment clause for the utility that the OPUC must eventually create under the terms of SB 408. This is a very specific, discrete amount and is not related to the utility's overall rates or overall rate of return on investment. It is an amount that cannot lawfully be retained by the utility, as explained below.

It is not known what effective date the Commission will choose for the amounts to be accounted for in the SB 408 automatic adjustment clauses. Section 4 (2) of SB 408 requires that "the automatic adjustment clause shall apply only to taxes paid to units of government and collected from ratepayers on or after January 1, 2006." The Commission could attempt to make the effective date some date later than January 1, 2006, as that would semantically qualify as "on or after January 1, 2006." So we do not know for what period of time the automatic adjustment clauses will kick in.

If the Commission does adopt January 1, 2006, as the effective date, then we can disregard all of PGE's arguments about ownership by Enron, as the entire period at issue in this case will be during the 100% Enron ownership of PGE phase.

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2. The Commission has referred to this as the "stand-alone" methodology, but other commissions, including FERC, refer to it as the "separate return" methodology.

If the Commission adopts some date later than April 2006, then this case will need to separately examine the differences between taxes charged to ratepayers and taxes actually paid during (1) the Enron 100% ownership period and (2) the Enron 57% ownership period. But the extent to which Enron owned or owns PGE is not material. What is material is the difference between taxes charged to ratepayers and taxes actually paid.

SB 408 creates a new category or species of unacceptable rates, which the Commission recognized in OPUC Order No. 06-379 and in OPUC Order No. 05-1050: Rates which include an amount for income taxes other than "taxes that are paid to units of government." OPUC Order No. 06-379, p. 2. By deeming that "fair, just and reasonable" rates can include only such amounts to be charged to ratepayers for income taxes, SB 408 effectively deems unacceptable rates which include larger amounts than the utility (or its consolidated tax filer) actually pay in such taxes. SB 408 thus significantly changes the entire concept of "fair, just and reasonable," as applied by the Commission. The Commission has used these terms to evaluate the overall fairness or justness or reasonableness of rates but not to determine whether rates are acceptable or even allowable based on the presence of absence of one particular element of cost (or alleged cost). SB 408 changes those terms, however, so that rates which include a particular item of cost (assumed taxes higher than actually paid taxes) are automatically not "fair, just and reasonable" and therefore are not allowed under Oregon statutes and are beyond

the power of the OPUC to authorize the utility to charge. A term that accurately describes such an element of cost that cannot lawfully be included in rates is "unlawful."

Thus, when our Complaint (p. 1) alleged that "PGE's rates, since September 2, 2005, and continuing to the present, are not just and reasonable and are in violation of SB 408 (2005), because they contain approximately $92.6 million in annual charges for state and federal income taxes that are not being paid to any government," we were using "just and reasonable" in the new sense--the sense required by SB 408. SB 408 does not envision or even allow the usual overall balancing test applied to determine whether utility rates are "just and reasonable" as a whole, and our allegations were not related to any sort of overall balancing test. Instead, our allegations were focused on the element of alleged cost that SB 408 deems to be not allowed in rates under Oregon law: amounts for income taxes that the utility or consolidated tax filer does not actually pay. Perhaps clarity would be served by referring to rates which include the forbidden amount as "unlawful charges" or "unauthorized rates," so that there is no confusion between the old "just and reasonable test" and the new "fair, just and reasonable" exclusion of unpaid taxes from rates. Our Amended Complaint will seek to maintain such clarity.

II. PGE'S SPECIFIC STATEMENTS.

The PGE Amended Comments (p. 2) contend that Applicants filed for the deferred account under the wrong statute. PGE itself is wrong. The only statute that authorizes the creation of a deferred account is ORS 757.259, not SB 408 (which says nothing about deferred accounts).

For example, PacifiCorp on October 28, 2005, filed an Application for Deferred Accounting (UM 1229) that closely parallels the earlier Application filed here by URP and Lewis (filed October 5, 2005). Both applications seek deferred accounting for an amount consisting of the difference between (1) what the utility is charging Oregon ratepayers for federal and state "income taxes" and (2) what is actually being paid for such income taxes to units of government, either by the utility or by its consolidated tax filer. The Commission granted the deferred account to PacifiCorp in OPUC Order No. 06-379 and would have no basis for denying the corresponding deferred account sought here.

PGE (p. 3) contends that "The Complaint appears to seek a prospective change in PGE's rates." The Complaint seeks an OPUC conclusion that the rates charged by PGE for the PACP are not allowed under existing statutes, including SB 408.[3] The Oregon Supreme Court has recently made clear that such a legal conclusion may either trigger the availability of refunds or other relief from the

3. If necessary, we will file an Amended Complaint with this included in the relief requested list at the end.

Commission or may form the basis for ratepayer suit pursuant to ORS 756.185. The implementation of either remedy does not require a rate case or changes to rates, as was recognized in ***Dreyer***, where ratepayers similarly sought return of money PGE unlawfully charged for profit on the Trojan nuclear power plant.

> PGE argues, finally, that dismissal is required because plaintiffs' claims pertain to matters of utility regulation that are the exclusive province of the PUC (and, thus, are beyond the jurisdiction of the circuit court). PGE begins that argument with a proposition that is beyond serious dispute-that ratemaking is a quasi-legislative function that is vested in the PUC by statute. But PGE then moves on to a more debatable proposition, namely, that any resolution of the present action necessarily will involve ratemaking. PGE contends that that is so because "the jury will have to decide what rates the PUC would or should have set if it had not made an error in [PUC] Order [No.] 95-322."
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> We disagree. Although a jury theoretically could go about deciding the damage question in the manner suggested, *i.e.,* by determining what a "fair and reasonable" rate would have been if the objectionable return on Trojan had been excluded and then comparing that rate to the one actually charged during the relevant period, **it also could simply attempt to determine what part of the rates that the PUC had approved as "fair and reasonable" in fact represented a return on PGE's investment in Trojan and, therefore, were unlawful under ORS 757.355 (1993)**, as interpreted in *Citizens' Utility Board,* 154 Or.App. 702. The first approach arguably would invade the PUC's exclusive ratemaking authority, but we are not persuaded that the latter approach would involve a similar trespass.

Id. (emphasis added). The Complaint does not seek to initiate a rate case, based on any test year, but to recover for ratepayers PGE's unlawful charges during the "Pre-Adjustment Clause Period" (PACP). As the Court in ***Dreyer*** made absolutely clear, rates which the OPUC deems to be "fair and reasonable" can nevertheless

be unlawful or "objectionable" and therefore entitle ratepayers to relief in some forum.

Further, adjusting rates to account for past objectionable charges is exactly what ORS 757.259 enables. After establishing the deferred account, the Commission amortizes the amount, positive or negative, in a later rate case under ORS 757.210. ORS 757.259(5).

A. PGE ERRONEOUSLY CLAIMS THAT URP SEEKS A GENERAL RATE CASE.

The URP Complaint is filed under ORS 756.500, not ORS 757.210. In UE 76, OPUC Order No. 92-1128 was simply a wrong interpretation of the applicable statutes. ORS 757.259 clearly provides that the deferral is to commence "beginning with the date of application." And that is exactly what the Commission did in OPUC Order No. 06-379 for PacifiCorp. The conclusion in OPUC Order No. 92-1128 that such "deferral is not permitted by that statute" is simply wrong. Further, ORS 757.259 has been amended at least 5 separate times since 1992, so OPUC Order No. 92-1128 (and all of its excerpts touted by PGE) could well have been based on an obsolete version of ORS 757.259.

PGE (pp. 5-6) offers irrelevant discussion about declaring existing rates interim and subject to refund. The Complaint does not seek such "interim" designation. Further, the OPUC can make such a declaration, if it wishes. ***Pacific Northwest***

Bell v. Eachus, 135 Or App 41, 49-50, 898 P2d 774 (1995), is also irrelevant; it has nothing to do with deferrals, as no one sought a deferral.

PGE (p. 5) further quotes OPUC Order No. 92-1128 for another irrelevant proposition. This Application does not seek deferral for "excessive earnings of the utility." It seeks deferral of the same specific amount of money for which PacifiCorp sought and obtained deferral in OPUC Order No. 06-379: The difference between (1) the amounts charged to ratepayers during the PACP for income taxes and (2) the actual income taxes paid by PGE for the PACP. In the case of PacifiCorp, item (1) was smaller than item (2). For PGE, the opposite is true: item (1) is larger than item (2). But the amount sought for deferral is precisely the same formula as applied by the Commission in OPUC Order No. 06-379.

As noted above, SB 408 has significantly changed the concept of how rates are determined to be "just and reasonable" in Oregon. See pages 3-4 *supra*. It is now a "fair, just and reasonable" standard, and that standard specifically excludes amounts for income taxes not actually paid by the utility [or by its consolidated tax filer and property attributed to the utility].[4]

PGE (p. 5) claims:

> The deferral statute does not authorize deferred accounting for general claims of "unjust and unreasonable" rates.

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4. We need not be overly concerned here about the "properly attributed" text, since during all of 2005 and at least the first quarter of 2006 PGE was wholly owned by a consolidated tax filer, Enron, that paid no applicable income taxes, except perhaps the Oregon $10 corporate minimum.

That might have been the case prior to SB 408, but it is certainly not the case now. If it were, then the Commission could not have ordered the deferral for PacifiCorp in OPUC Order No. 06-379.

B. PGE ERRONEOUSLY CLAIMS THAT SB 408 PRECLUDES THE RELIEF SOUGHT FOR THE PERIOD BEFORE JANUARY 1, 2006.

We do not comprehend this argument. PGE claims that SB 408 did not amend ORS 757.259. SB 408 establishes a new category of unlawful or objectionable or non-allowable rates, and ORS 757.259 remains in place for the creation of deferred accounts, as recognized in OPUC Order No. 06-379. The remainder of PGE's discussion here flatly contradicts OPUC Order No. 06-379, as they Commission there granted to PacifiCorp a deferred account that is based on the same formula we seek here, as explained above. PGE also contradicts OPUC Order No. 05-1050, which concluded that SB 408 did more than merely authorize automatic adjustment clauses but also substantively changed what can lawfully be included in utility rates in Oregon, as of September 2, 2005.

PGE's citation to OPUC Order No. 06-379 misses the point. It was OPUC Order No. 05-1050 that set PacifiCorp's rates prospectively. But then PacifiCorp sought a deferred account for the difference between those rates and the rates PacifiCorp thought it should be allowed to charge. When the Commission granted PacifiCorp's request in OPUC Order No. 06-379, the Commission was indeed looking backwards to the rates that had been in place for PacifiCorp for most of a

year. Future amortization of the deferred account we seek will "look backwards" in the same fashion.

C. PGE ERRONEOUSLY CLAIMS THAT SB 408 PRECLUDES THE RELIEF SOUGHT FOR THE PERIOD AFTER JANUARY 1, 2006.

We cannot at this time specify the extent to which the deferred account will include amounts for the difference between (1) income taxes charged to PGE ratepayers and (2) income taxes paid by PGE or its consolidated tax filer for the period after January 1, 2006. We do not know whether the Commission will adopt an automatic adjustment clause for PGE that has an effective date of January 1, 2006, as explained at page 2, *supra*. If so, then the amount to be entered into the deferred account for the period commencing January 1, 2006, would likely be zero. If not, then the amount would be greater than zero.

PGE (p. 8) then makes entirely unsupported assertions about jeopardizing the availability of accelerated depreciation deductions under the federal tax code, citing no authority and offering no reasoning. We deny these assertions.

D. PGE ERRONEOUSLY CLAIMS THAT THE EARNINGS TEST APPLIES TO THE DEFERRAL PERIOD INSTEAD OF THE AMORTIZATION PERIOD.

PGE (p. 8-9) offers its results of operations during 2005 for the proposition that it had a low return on equity. But ORS 757.259(5) calls for "review of the utility's earnings at the time of application to amortize the deferral," not at the time

of the application to create the deferral. Thus, 2005 results are entirely irrelevant, as no one has applied to amortize the deferral we seek to create.

PGE (p. 9) then cites ORS 757.259(4) as somehow establishing that the Commission must apply an earnings test to a past period, 2005, when the statute contains no such requirement. And that particular section says nothing at all about an earnings test.

Dated: October 4, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed served for foregoing APPLICANTS' RESPONSE TO PGE AMENDED COMMENTS ON APPLICATION FOR DEFERRED ACCOUNTING by email to the list below and by depositing a true copy in the U.S. Mail, first class postage prepaid, a true and correct copy upon the addresses below.

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