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VIA E-FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol St. NE, Suite 215
P. O. Box 2148
Salem, OR 97308-2148

Re: *UM 1224 – Tracking No. 4117*

Attention Filing Center:

Enclosed for filing in the above-referenced docket are an original and a courtesy copy of page 1 of Portland General Electric Company's Reply Comments, originally filed yesterday, November 21, 2006, as Tracking No. 4117. The only change to the original filing is the reference to the Joint Ruling dated October 10, 2006 rather than the superseded Revised Scheduling Memorandum dated August 15, 2006 in the first paragraph on the first page. This document is being filed electronically per the Commission's eFiling policy to the electronic address PUC.FilingCenter@state.or.us, with copies being served on all parties on the service list via U.S. Mail. A photocopy of the PUC tracking information will be forwarded with the hard copy filing.

Very truly yours,

Dil White

David F. White

DFW/ldh
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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1224

In the Matter of UTILITY REFORM PROJECT and KEN LEWIS Application for Deferred Accounting	**PORTLAND GENERAL ELECTRIC COMPANY'S REPLY COMMENTS**

I. INTRODUCTION

Pursuant to the Joint Ruling, dated October 10, 2006, Portland General Electric Company ("PGE") hereby files these Reply Comments.

URP's Response Comments make the nature of its deferred accounting request abundantly clear. The parallel Amended Complaint alleges that PGE's rates were "unauthorized" and "unlawful" under SB 408. URP Resp. at 5-6. URP seeks to make its Complaint effective upon filing through its deferred accounting application, deferring the "unlawful" amounts collected in rates for later refunding. In fact, the only remedy URP seeks for the alleged "unlawful" rates is the creation of a deferred account for later refunding. Amended Complaint, § 10(B), (C), (E) and (F).

URP's comments also clarify the relevant time period, which URP defines as the Pre-Adjustment Clause Period, referring to the SB 408 adjustment clause. URP Resp. at 5-6. The Commission has made it clear that SB 408 adjustment clauses will take effect for taxes paid on January 1, 2006 and thereafter.[1] Accordingly, the time period at issue is the three-month

[1] *See* AR 499, Order No. 06-532 Appendix A (Sept. 14, 2006)(adopting permanent rules that require implementation of rate adjustment "applying to taxes paid to units of government and

period between the filing of this deferral application (Oct. 5, 2005) and December 31, 2005 (the "Deferral Period").[2]

URP's comments confirm three decisive flaws in URP's request: (1) during the Deferral Period, the predicate of URP's request fails: PGE's rates were neither unauthorized nor unlawful; (2) deferred accounting is inappropriate for URP's purpose of locking-in a rate adjustment effective upon filing of the complaint; and (3) the financial impact of the proposed deferral would depress PGE's earnings to less than 5.5% for 2005, well below the level appropriate for deferred accounting.

II. PGE'S RATES WERE LAWFUL AND AUTHORIZED

URP suggests that PGE's rates were unlawful under SB 408, but it never identifies what statutory provision PGE's rates violated. Unpacking what laws SB 408 changed reveals that PGE's rates were authorized and lawful. Three components of SB 408 are at issue: its amendment of ORS 757.210; enactment of an automatic adjustment clause (ORS 757.268); and legislative findings and declarations (ORS 757.267), none of which PGE violated.

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collected from ratepayers for each fiscal year beginning on or after January 1, 2006" (OAR 860-22-0041(8)).

[2] It is theoretically possible that the SB 408 automatic adjustment clause will not trigger in 2006 if the difference between taxes collected and taxes paid is less than $100,000. ORS 757.268(4). Given such a minimal threshold, this is more a theoretic than a real possibility. URP does not suggest that its Application is designed to address such an unlikely scenario in which taxes paid and taxes collected essentially match. URP's request seeks refunds to customers when there is a significant discrepancy between taxes collected and taxes paid, precisely the circumstances in which the SB 408 automatic adjustment clause will be triggered. In any event, it is well within the Commission's discretion under ORS 757.259 to decline a deferral request for an immaterial amount, particularly where the Legislature has designed a rate-making tool that specifically addresses the issue and declines to refund or surcharge that amount to customers.

A. PGE'S RATES WERE AUTHORIZED UNDER ORS 757.210 AND LAWFUL

The Commission's general rate-making statute—ORS 757.210—governs the Commission's process when a utility files a new rate or seeks to increase an existing rate. ORS 757.210(1)(a). The statute requires a hearing if a party files a written complaint concerning the new rates, provides that the utility bears the burden of showing that rates are "fair, just and reasonable," and bars the Commission from adopting rates that are not "fair, just and reasonable." SB 408 amended the statute to replace "just and reasonable" with "fair, just and reasonable" and confirmed what was implicit before: that the Commission may not authorize a new rate under ORS 757.210 that does not meet the "fair, just and reasonable" standard.

URP's suggestion that PGE's rates violated ORS 757.210 is misconceived, reflecting a misunderstanding of the statute and the Commission's rate-making practice. An essential predicate for the application of the statute is a triggering request for new rates. If there is no request for new rates, ORS 757.210 does not apply.

PGE did not ask the Commission during the Deferral Period to adopt new rates pursuant to ORS 757.210. The Commission set PGE's 2005 rates in Order No. 01-777 in 2001. UE 115, Order No. 01-777 (Aug. 31, 2001). The Commission updated the power cost portion of customers' 2005 rates in the fall of 2004 in Order No. 04-573. UE 161, Order No. 04-573 (Oct. 5, 2004). These rate orders were lawfully issued under ORS 757.210; no party appealed these orders.

The Commission sets rates based upon forecasts that parties make in the rate-making proceeding. Those rates are tested against the rate case forecasts and rate-making principles to determine whether the proposed rates satisfy the standards of ORS 757.210. If rates

meet that standard, the Commission's work is done until the next rate proceeding. What happens between rate proceedings is of no moment.

> A basic premise of utility regulation is that when the Commission prescribes or approves a utility's rates, it does so according to the rules of rate setting in a rate case. If it follows those court-prescribed rules in the review of a utility's proposed rates, its job is finished, until the next rate case. * * * The Commission moves from rate case to rate case, reviewing proposed rates each time by the same rules. Between cases, the utility is on its own.

UM 47/48, Order No. 89-687 at 8-9 (May 24, 1989).

The UE 170 orders are consonant with this view. PacifiCorp placed the Commission in the unique position of setting rates under ORS 757.210 during the period after passage of SB 408 but before implementation of the SB 408 automatic adjustment clause. Order No. 06-379 at 6-7 (July 10, 2006). That was not the case for PGE's 2005 rates, which the Commission set in 2001 and updated at the end of 2004. In fact, the UE 170 Reconsideration Order reaffirmed the principle that ORS 757.210 has no import between rate proceedings: "[R]atemaking requires that an estimate be made at a specific point in time as to the utility's reasonable operating costs: Accordingly, the 'reasonableness of the rates under consideration is judged at an instant in time—namely, the rate case decision.'" Order No. 06-379 at 17 (quoting from Order No. 89-687).

As the Commission recognized in Order No. 06-379, the SB 408 amendment to ORS 757.210 could well apply to prospective changes to utility rates. *Id.* at 7. But URP has disclaimed any interest in such prospective changes to PGE's rates, focusing instead on amounts collected in the past. *See* URP Resp. at 2, 5-6, 10 ("Future amortization of deferred account we seek will 'look backwards'"). In fact, URP intervened in PGE's current general rate case (UE 180), which will set new prospective rates under ORS 757.210, but declined to raise any issues with respect to PGE's tax expense in that proceeding.

B. PGE'S RATES DID NOT VIOLATE SB 408'S ADJUSTMENT CLAUSE

PGE's 2005 rates were not unlawful under the automatic adjustment clause SB 408 establishes—ORS 757.268. URP does not, and cannot, allege that PGE violated that provision. In any event, URP's application concerns the period *before* the automatic adjustment clause applies.

C. LEGISLATIVE FINDINGS LACK THE FORCE OF LAW

URP's "unlawful rate" claim places undue reliance on Section 2(1)(f)—a single sentence from SB 408's preamble. *See* Amended Complaint, ¶ 5; ORS 757.267(1)(F). That legislative finding and declaration cannot bear such weight. Legislative findings can provide insight into the Legislature's motives, but they are not part of the substantive law.[3] They may be used as a tool for statutory construction, but they have no legal force and effect. *See, e.g., Portland Van & Storage Co. v. Hoss*, 139 Or 434, 444-45, 9 P2d 122 (1932) ("The preamble of a statute is a recital of the motives and inducements which led to its enactment. It is not an essential part of the act and neither enlarges nor confers powers"); *Department of Land Conservation and Development v. Jackson County*, 121 Or App 210, 218, 948 P2d 731 (1997) (preamble did not confer authority which substantive provisions of law withheld, "they are instructive only insofar as they have a genuine bearing on the meaning of the provision that is being construed").

Had the Legislature intended for the Commission to adopt an immediate true-up of taxes collected and taxes paid, it could have done so. It could have made the automatic adjustment clause effective immediately and not limited its operation to taxes paid after

[3] 1A Sutherland Statutory Construction § 20:3 (6th ed.) ("the preamble of a legislative act is not part of the law—it cannot be given the effect of enlarging the scope or effect of a statute"); 73 Am Jur 2d Statutes § 46 (2d ed.) ("A preamble is not part of a statute itself and has no substantive legal force").

January 1, 2006. It could have amended the deferred accounting statute to permit an immediate true-up. But the Legislature chose neither alternative. Instead, it amended ORS 757.210 for prospective changes in rates and created a true-up mechanism effective no sooner than January 1, 2006.

URP is not pleased with these legislative choices. But such decisions are the prerogative of the Legislature, not private parties or the agency charged with implementing the substantive laws. Findings and declarations in the preamble cannot create legal rights the Legislature declined to adopt in the substantive provisions of the act. *See Ochoco Construction, Inc. v. Dep't of Land Conservation and Development*, 295 Or 422, 667 P2d 499 (1983) (authority mentioned in preamble but not adopted in substantive provision was not conferred on agency: "Had the Legislature intended to charge the Department with the additional responsibility * * * the Legislature would have delineated the responsibility as clearly as it did the above-listed provisions").

III. URP'S APPLICATION IMPROPERLY COMBINES A RATE COMPLAINT WITH DEFERRED ACCOUNTING

In our Amended Comments, we noted that the Commission has already addressed and rejected the type of pernicious combination of rate complaint and deferred accounting URP proposes. PGE's Amended Comments at 3-5. It violates the utility statutes and the Commission's practice.

URP makes a series of unavailing responses. First, it claims that the Commission order we cited (Order No. 92-1128) was "simply wrong." URP Resp. at 7. URP fails to explain why the Order was wrong other than offering speculation that later amendments "could well have" rendered the order "obsolete." *Id.* The amendments to ORS 757.259 were unrelated to the issue here, and URP points to no specific amendment to support its unsubstantiated claim. The

Commission order is based on the understanding that deferred accounting is designed to address events that occur between rate cases. It is not designed to lock-in rate changes that are the subject of a complaint or general rate case filing. The Commission's interpretation is a sound reading of the deferred accounting statute and the legislative intent. In any event, the Commission's adoption of such a policy is well within the broad discretion the statute affords the Commission. URP offers no reason for a change in the Commission's interpretation or policy.

Next, URP states that the Commission can simply declare existing rates "interim subject to refund." This is just wrong, and the Court of Appeals so held in *Pacific Northwest Bell v. Eachus*, 135 Or App 41, 49, 898 P2d 774 (1995).

IV. THE FINANCIAL IMPACT OF THE DEFERRAL WOULD DROP PGE'S EARNINGS BELOW THE LEVEL APPROPRIATE FOR DEFERRED ACCOUNTING

The deferral statute sets forth a two-stage review process at the authorization phase. UM 1071, Order No. 04-108 at 8 (March 2, 2004). First, the Commission considers whether the application meets the legal requirements of ORS 757.259. Satisfying the legal requirements is a necessary, but not sufficient condition. *Id.* Second, the applicant bears the burden of showing that the Commission should exercise its discretion to grant the deferral request. Under this second stage of review, the Commission weighs a number of factors to determine whether granting the application is good policy and furthers the Commission's goals. UM 1147, Order No. 05-1070 at 7 (Oct. 5, 2005).

In our Amended Comments, we argued that the Commission should reject URP's deferral request under this second stage review given the financial impact of the deferral and PGE's extremely low earnings in 2005. PGE Amended Comments at 8-9. URP claims that PGE's earnings during the Deferral Period in 2005 are relevant only at the amortization phase and not at the authorization phase. URP Resp. at 10, 11. URP's assertion flatly contradicts the

Commission's recent policy decision in which it concluded that the financial impact on the utility is a significant factor affecting the Commission's authorization decision. UM 1147, Order No. 05-1070 at 7. Thus, the financial impact of the proposed deferral plays a role at *both* the amortization phase and the authorization phase. URP does not dispute that PGE's earnings for 2005 were 6.64% and that the deferral would drop PGE's earnings to more than 500 basis points below the authorized level. *See* PGE's Amended Comments at 9.

URP coyly suggests that no party is asking for amortization now. URP Resp. at 11. This simply begs the question. Authorization of deferred amounts is an act of Commission discretion affected by the financial impact on the utility. There is no reason for the Commission to exercise its discretion to grant a deferral when the undisputed evidence shows that granting the deferral will depress PGE's earnings to just over 5%, and the deferred amounts will never be refunded because of the operation of the earnings test, which is required by law.

V. URP'S OTHER ARGUMENTS ARE UNAVAILING

URP argues that the *Dreyer* decision validates its request. URP Resp. at 5-6. The *Dreyer* decision had nothing to do with deferred accounting. The *Dreyer* Court interpreted statutes not at issue here—ORS 757.185, ORS 757.225 and ORS 757.355. *Dreyer v. Portland General Electric Co.*, 341 Or 262, 142 P3d 1010 (2006). The *Dreyer* court concluded that ORS 757.225 did not bar retroactive relief for amounts paid under a rate order that the courts later found violated ORS 757.355. *Id.* at 279. The essential predicate of the *Dreyer* opinion was an unlawful Commission order or violation of law. *Id.* at 268-270. Here, URP cannot point to any unlawful order. The rate orders that established PGE's 2005 rates were lawfully authorized and never appealed. And as shown above, PGE violated no law. Thus, no retroactive relief is available.

URP also claims that its deferred accounting application is just like the deferral the Commission approved in UE 170. URP Resp. at 5, 8. This is untrue. In that docket, there was no question that SB 408's amendment to ORS 757.210 applied; the only issue was the impact of that change. The Commission initially disallowed $16 million of PacifiCorp's tax expense based on SB 408 but later reduced that disallowance to $12 million. Order No. 06-379 at 1. The Commission used deferred account to make up for the revenue shortfall from this error, assisting in the implementation of a statutory provision that clearly applied in the proceeding. On the other hand, in this docket it is equally clear that SB 408's changes to ORS 757.210 have no application. In fact, URP does not seek prospective rate relief through ORS 757.210 at all. In any event, no party in UE 170 presented evidence showing the deferral's detrimental financial impact or that amortization of the deferred amount would never survive an earnings test, as PGE has shown here.

VI. CONCLUSION

For the reasons stated above and in PGE's Amended Comments, the Commission should deny URP's Application. If the Commission declines to deny URP's Application without further proceedings, PGE requests a hearing under ORS 757.259(2).

DATED this 21st day of November, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S REPLY COMMENTS** by mailing a copy thereof in a sealed envelope, first-class postage prepaid, addressed to each party listed below, deposited in the U.S. Mail at Portland, Oregon.

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