

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1224

UTILITY REFORM PROJECT  
and KEN LEWIS,  
  
Application for Deferred Accounting  
  
(UM 1224)

REPLY BRIEF OF  
UTILITY REFORM PROJECT  
AND KEN LEWIS  
  
April 28, 2008

TABLE OF CONTENTS

I.	POTENTIAL ISSUES OF PROCEDURE. . . . .	1
II.	HOW MUCH WAS PGE'S INCOME TAX OVERCOLLECTION DURING THE DEFERRAL PERIOD? . . . . .	1
	A. THE PGE ALTERNATE METHODS ARE NOT CONSISTENT WITH THE COMMISSION'S ADOPTED AR 499 METHODOLOGY. . . . .	1
	B. THE PGE ALTERNATE METHODS DO NOT ACCURATELY TRACK OR MODEL THE AMOUNTS CHARGED TO RATEPAYERS FOR INCOME TAXES. . . . .	1
	C. PGE PROPOSES TO USE ITS ALTERNATE METHODS INCONSISTENTLY--ONLY WHEN IT RESULTS IN BENEFIT TO PGE SHAREHOLDERS AND HARMS RATEPAYERS--IN VIOLATION OF ITS OWN STATED GOAL OF SYMMETRY IN REGULATION. . . . .	1
III.	WHAT INTEREST RATE SHOULD BE APPLIED TO THE INCOME TAX OVERCOLLECTION? . . . . .	2
IV.	SHOULD LESS THAN ALL OF THE DEFERRED INCOME TAX OVERCOLLECTION BE RETURNED TO PGE RATEPAYERS? . . . . .	2
	A. NOT RETURNING THE INCOME TAX OVERCOLLECTION TO RATEPAYERS WOULD VIOLATE SB 408. . . . .	2
	B. NOT RETURNING THE INCOME TAX OVERCOLLECTION TO RATEPAYERS WOULD VIOLATE THE RULE AGAINST RETROACTIVE RATEMAKING. . . . .	3

C.	NOT RETURNING THE INCOME TAX OVERCOLLECTION TO RATEPAYERS WOULD VIOLATE THE LANGUAGE OF ORS 757.259. ....	4
1.	RESPONSE TO STAFF BRIEF. ....	4
2.	RESPONSE TO PGE BRIEF. ....	5
3.	THE "DEFERRAL PERIOD." ....	9
V.	WHEN SHOULD RATEPAYERS RECEIVE BACK IN RATES THE DEFERRED INCOME TAX OVERCOLLECTION? .....	11

## **I. POTENTIAL ISSUES OF PROCEDURE.**

The Staff Opening Brief does not discuss these issues. The PGE Opening Brief states only a belief that "the parties are following proper Commission procedures to address both the deferral application and possible amortization of the deferred amount." Thus, neither of the other parties actually discussed the procedural issues raised by URP at the April 2, 2008, hearing. As noted in the URP Opening Brief, the issue is not merely whether the OPUC has followed the correct procedures. The issue includes a determination of when a party in this case can be said to have requested amortization of the deferred amount.

## **II. HOW MUCH WAS PGE'S INCOME TAX OVERCOLLECTION DURING THE DEFERRAL PERIOD?**

URP agrees with Staff that the proper amount to be considered for deferral is \$26.5 million, plus appropriate interest.

### **A. THE PGE ALTERNATE METHODS ARE NOT CONSISTENT WITH THE COMMISSION'S ADOPTED AR 499 METHODOLOGY.**

The Staff Opening Brief agrees with URP that none of the alternative methods offered by PGE is consistent with the methodology adopted by the Commission in AR 499 (rulemaking) or in any of its other subsequent orders implementing SB 408.

### **B. THE PGE ALTERNATE METHODS DO NOT ACCURATELY TRACK OR MODEL THE AMOUNTS CHARGED TO RATEPAYERS FOR INCOME TAXES.**

Neither the Staff Opening Brief nor the PGE Opening Brief addresses this issue, beyond mere recitation by PGE of the alleged "double whammy" effect.

**C. PGE PROPOSES TO USE ITS ALTERNATE METHODS INCONSISTENTLY--ONLY WHEN IT RESULTS IN BENEFIT TO PGE SHAREHOLDERS AND HARMS RATEPAYERS--IN VIOLATION OF ITS OWN STATED GOAL OF SYMMETRY IN REGULATION.**

Neither Staff Opening Brief nor PGE Opening Brief addresses this issue.

**III. WHAT INTEREST RATE SHOULD BE APPLIED TO THE INCOME TAX OVERCOLLECTION?**

Neither Staff Opening Brief nor PGE Opening Brief addresses this issue.

**IV. SHOULD LESS THAN ALL OF THE DEFERRED INCOME TAX OVERCOLLECTION BE RETURNED TO PGE RATEPAYERS?**

**A. NOT RETURNING THE INCOME TAX OVERCOLLECTION TO RATEPAYERS WOULD VIOLATE SB 408.**

SB 408 requires the Commission to return all of PGE's income tax overcollections in this docket to ratepayers, with interest. The OPUC decisions to establish the deferred account and its earlier decisions reducing rates for PacifiCorp, effective in October 2005, reflect the Commission's legal determination that SB 408 applies to utility rates as of its effective date, September 2, 2005, provided that the amounts at issue have been properly deferred. Not returning these amounts to ratepayers would violate both SB 408. The source of the utility's obligation not to charge ratepayers more for income taxes than the utility (or its parent) actually pays to government is SB 408, mostly codified at ORS 757.267 and ORS 757.268. The source of the obligation is not ORS 757.259, which merely provides the procedure for returning those funds to ratepayers and immunizes the return from the rule against retroactive ratemaking. ORS 757.259 does not authorize PGE or the Commission to

violate or disregard SB 408.

Further, the URP Opening Brief notes that PGE's obligation to return the income tax overcollection to ratepayers stems from SB 408, which created ORS 757.267 and ORS 757.268 and modified ORS 757.210. ORS 757.210 now forbids any "rate or schedule of rates that is not fair, just and reasonable," and ORS 757.267 requires that utility rates include only those amounts for taxes that "reflect the taxes that are paid to units of government to be considered fair, just and reasonable." ORS 757.259 then provides the procedural mechanism for returning the funds to ratepayers, without violation the rule against retroactive ratemaking. Conversely, PGE has no right to recover from ratepayers additional amounts, merely because it claims to have earned less than its authorized rate of return during parts of 2005 and 2006. There is no statute akin to ORS 757.267(f) stating that utility rates should reflect past failures to earn any particular level of profit "to be considered fair, just and reasonable." In the vernacular of the rule against retroactive ratemaking, there is no statute stating that utility rates should reflect and offset past utility "losses" to be considered fair, just and reasonable. Instead, the rule against retroactive ratemaking states the opposite.

If PGE or another utility earned less than its authorized rate of return during 2006, that is no defense to the requirement under SB 408 to return its 2006 income tax overcollection to ratepayers. This applies equally to the pre-2006 period at issue in this case, because the obligation to return the income tax overcollection is in SB 408, not in ORS 757.259.

**B. NOT RETURNING THE INCOME TAX OVERCOLLECTION TO RATEPAYERS WOULD VIOLATE THE RULE AGAINST RETROACTIVE RATEMAKING.**

PGE and Staff now argue that the properly deferred amount (which we and Staff say is \$26.5 million, plus interest) should be offset by the amount that PGE of its authorized rate of return that PGE allegedly did not earn during the 12-month period starting in October 2005. This recognition and recoument of past "losses" clearly violates the rule against retroactive ratemaking, as demonstrated in the URP Opening Brief. While PGE's income tax overcollections were lawfully deferred, PGE's lack of sufficient earnings was never deferred (and was not legally eligible for deferral).

**C. NOT RETURNING THE INCOME TAX OVERCOLLECTION TO RATEPAYERS WOULD VIOLATE THE LANGUAGE OF ORS 757.259.**

ORS 757.259 requires review of the utility's earnings at the time of the application to amortize the deferral, not at the time that the deferred amounts were charged to ratepayers in the first place.

The only earnings test that ORS 757.259 allows is the "review of the utility's earnings at the time of application to amortize the deferral." The phrase "at the time of the application to amortize the deferral" clearly modifies the phrase "utility's earnings." Thus, the only allowable earnings review in this proceeding would be a review of PGE's earnings "at the time of the application to amortize the deferral." That time was either when PGE filed its testimony on November 30, 2007, or when URP on January 11, 2008, requested a prehearing conference to complete this UM 1224 proceeding.

## **1. RESPONSE TO STAFF BRIEF.**

The Staff Opening Brief relies upon OPUC Order No. 93-257 for its contention that PGE's lack of earnings during a 12-month period commencing October 2005 should allow PGE in 2008 not to amortize any of the \$26.5 million in deferred income tax overcollections. In OPUC Order No. 93-257, however, the Commission applied the earnings test to the period of the amortization, which was essentially the same as the period of the deferral. PGE filed its application for deferral of Trojan replacement power costs on November 1, 1991. The Commission granted the deferral on December 11, 1991, and also allowed PGE to commence amortization of the deferral on January 1, 1992. On December 20, 1991:

The Commission also allowed PGE to file a tariff to increase rates in order to amortize the deferred expenses in rates, as provided by ORS 757.259(4). The Commission authorized PGE to begin amortizing deferred sums as they accrued.

OPUC Order No. 93-257, p. 2. The Commission selected an earning test period of the 12 months from April 1991 through March 1992. This period encompassed the period of the amortization but, more important, was the most recent 12 months for which data was available at the time of the application for final amortization. OPUC Order No. 93-257 (p. 7) states:

The earnings test, coupled with deferral and amortization, is designed to ensure that utilities do not receive the extraordinary relief of retroactive rate making for added costs when earnings exceed a reasonable rate of return.

Thus, the earnings test was applied to the period that included the amortization and was the most recent 12 months for which data was available at the time of the

application for amortization.<sup>1</sup>

In the instant case, however, the PGE-selected 12-month period starting October 2005 does not encompass any of the period of amortization, which would begin sometime in 2008. More important, it is not the most recent 12 months for which data was available at the time of the application for amortization (December 2007 or January 2008).

## **2. RESPONSE TO PGE BRIEF.**

The PGE Opening Brief (p. 7) quotes then-Commissioner Charles Davis as stating at the legislative hearings that the earnings review would "allow the Commission to determine whether amortization of a deferred income or expense amount is warranted based on the utility's earnings; if earnings are higher than authorized, expense amortization will not be appropriate." Note that Commissioner Davis did not say that the earnings review would be retrospective to the time when the deferred amounts were generated. He stated, "if earnings are higher," not "if earnings were higher" or "if earnings had been higher." His use of the present tense indicates that the earnings test was supposed to be a current analysis at the time of the application for amortization.

- 
1. OPUC Order No. 93-257 rejected URP's argument that allowing PGE to amortize the deferred cost to ratepayers, without examining all other factors affecting PGE's earnings, constituted selective updating. The Commission concluded that selective updating was essentially the purpose of ORS 757.259. In the instant case, however, it is Staff and PGE who are saying that the deferred income taxes overcollection should not be returned to ratepayers, because the Commission should examine all other factors affecting PGE's earnings during the period of deferral. Thus, Staff and PGE are now advocating the position that URP presented in 1992 but which the Commission rejected.



This is also supported by the remainder of the discussion in the PGE Opening Brief. The remarks of T. Ray Lambeth (emphasis added) indicate that "amortization of the deferred amount should not occur if amortization moves the utility's actual earnings away from a reasonable range of return on equity." That is referring to the utility's earnings at the time of the application for amortization, not the period when the deferred amounts were generated. Amortization of a deferred amount cannot move a utility's actual earnings during that earlier period of deferral generation; it can only move the utility's actual earnings during the period of amortization. That is why the Commission has implemented the earnings review using the most recent 12 months of data at the time of the application for amortization.

Similarly, the OPUC Order No. 95-1216 cited by PGE used "most recently approved test period revenue requirement as a basis for an earnings review," not a period extracted from 2-3 years in the past. UM 93, which produced OPUC Order No. 95-1216, was a rate case that decided how to amortize a variety of previously deferred costs. The UM 594 part of the case involved Trojan replacement power costs. The deferral application for these costs was filed on July 1, 1993 (UM 594). The application for amortization was filed August 8, 1995 (UE 93). The earnings review period in OPUC Order No. 95-1216 was April 1994 - March 1995, which PGE claimed was the most current earnings information that could be filed in the docket considering amortization of the deferred costs. CUB argued that the earnings review period should include the next quarter (through June 1995), but the Commission rejected that, after PGE argued that "the updated figures to June 30 were not

available as a practical matter for use in this case." OPUC Order No. 95-1216, p. 6.

In any event, the earnings review period was the most recent 12 months data available at the time of the application for amortization.

In the instant case, that would correspond to the most recent 12 months data available as of either:

1. November 30, 2007 (when PGE filed its testimony regarding amortization), or
2. January 11, 2008, when URP conveyed its request to the ALJ and parties "to establish a schedule for completing UM 1224."

In either event, the most recent 12-month period for which data would have been available would probably have been the period October 2006 - September 2007. PGE completed its Third Quarter 2007 10-Q report to the SEC on November 2, 2007, about a month before it filed testimony on November 30, 2007.<sup>2</sup>

PGE cites OPUC Order No. 94-096 (UE 85). There, PGE filed its application for amortization on July 1, 1993. The earnings review period used in the adopted stipulation included the 12 months through March 1993. Again, the earnings review period was the most recent 12 months of data at the time of the application for amortization.

Thus, no case cited by PGE supports the proposition that ORS 757.259 allows an earnings review period that includes only months occurring years prior to the filing of the application for amortization. Instead, the cases show that the earnings review

---

2. If necessary, URP request official notice of the filing date of PGE's Form 10-Q Report to the SEC. It is readily ascertainable at <http://investors.portlandgeneral.com/secfiling.cfm?filingID=784977-07-109>

periods (whether 12 months or 24 months) have been the most recent periods for which data is available at the time of the application for amortization. This is consistent with the language of ORS 757.259. Selecting out only old months of data occurring in past years is not consistent with the language of ORS 757.259 or with past Commission practice.

The Commission has agreed that the earnings review associated with an application for amortization must reflect the utility's "current" earnings at the time of that application. OPUC Order No. 01-503, for example, stated (emphasis added):

According to ICNU, the Commission did not review PacifiCorp's earnings at the time of PacifiCorp's amortization application. Neither Order No. 01-186 nor the accompanying Staff report mentioned PacifiCorp's current earnings. However, the Staff report incorporated by reference in Order No. 01-171 stated that PacifiCorp's "revenues and expenses from UE 111 are reasonably representative of current revenues and expenses, except for power costs, and can be relied upon as an earnings review." Order No. 01-171 at 4.

\* \* \*

**Earnings Review.** We find that the earnings review underlying approval of the amortization in Order No. 01-186 was sufficient for purposes of ORS 757.259(4). We adopt Staff's view, as expressed in its memorandum of January 19, 2001, that the revenues and expenses from UE 111 are reasonably representative of current revenues and expenses except for power costs, and can be relied on as an earnings review.

Additional examples of the Commission using the most recent available 12 months of data, at the time of the application for amortization, are legion. In UE 136, for example, PGE on January 24, 2002, PGE filed an application to amortize a deferred account. The earnings review period was for a 12-month period ending December 31, 2001, obviously the most recent 12 months of data.

In the instant case, PGE has presented no evidence on earnings that is reasonably representative of current revenues and expenses, as of the application for amortization. The only introduced evidence that qualifies under this standard is URP-200 (excerpts from PGE's 2007 Form 10-K report to the Securities and Exchange Commission). That annual report (p. 64) shows that PGE's net income more than doubled between 2006 and 2007. This massive increase in profit appears to have begun in the 4th quarter of 2006, when quarterly net income skyrocketed from \$10 million to \$40 million. It then remained at a high level during most of 2007. PGE provided no data that included any of this period.

### **3. THE "DEFERRAL PERIOD."**

The source of this error by PGE and Staff may be their misconception of the term "deferral period." The deferral period is not just the period during which the deferred amount was generated (in this case, the last 3 months of 2005). By its own plain meaning, it is the period during which the recognition of those amounts in rates is deferred. That period starts with the application for deferral (if granted) and ends either (1) with the start of the amortization period or (2) with the end of the amortization period.<sup>3</sup> Thus, where Commission decisions refer to the "deferral period," in this case that would be from October 5, 2005, until some future time at which the deferral has at least commenced amortization or has been fully amortized. It is not just the last 3 months of 2005 or just a 12-month period that includes those 3 months.

---

3. Until the full deferred amount is amortized, part of it is still deferred and thus continues the deferral period.

OAR 680--27-0030(9) states:

**Amortization:** Amortization in rates of a deferred amount shall only be allowed in a proceeding, whether initiated by the energy or large telecommunications utility or another party. The Commission may authorize amortization of such amounts only for utility expenses or revenues for which the Commission previously has authorized deferred accounting. Upon request for amortization of a deferred account, the energy or large telecommunications utility shall provide the Commission with its financial results for a 12-month period or for multiple 12-month periods to allow the Commission to perform an earnings review. The period selected for the earnings review will encompass all or part of the period during which the deferral took place or must be reasonably representative of the deferral period.

This refers to "the period during which the deferral took place" and "the deferral period." In this case, that period commenced on October 5, 2005, and continues to the present day, because the deferral continues to the present day. Looking only at data from 2005 and some of 2006 is not "representative of the deferral period." Further, it is not within the power of the Commission, by rule or otherwise, to countermand applicable statutes, such as SB 408 and ORS 757.259.

Recently, Order No. 06-507 addressed whether the interest rate applied to deferred accounts should be different (lower) during the amortization period than during "the deferral period." With regard to "the deferral period," the utilities argued that they are on the hook for financing the deferred amount (assuming it is a deferred cost) "over the entire deferral period," which was defined as the period until amortization occurs. The utilities did not argue that their obligation to finance the deferred amount somehow ends when the generation of the deferred amount ceases. The Commission there (p. 5) stated (emphasis added):

The utilities do not assert that short-term financing during the amortization

period cannot be obtained. Instead, they focus on how deferred accounts are currently financed **over the entire deferral period**. PacifiCorp indicates that utilities currently fund deferred accounts upfront, when significant risk is associated with the recovery of the deferred costs. Although deferred accounts are created by regulation, as Staff and ICNU observe, we agree with the utilities that deferred accounts represent an investment, to the extent the utility must carry costs that are deferred. We also agree, as we already determined in Order No. 05-1070, that funding of deferred accounts, at least until some amount is amortized, should not be culled out from other utility investments.

The Commission thus distinguished between the "deferral period" and the amortization period, which do not have a gap between them. The positions of PGE and Staff in this case require the invention of a new term, perhaps the "gap between the deferral period and the amortization period." This term does not exist in statute or in the OPUC rules.

**V. WHEN SHOULD RATEPAYERS RECEIVE BACK IN RATES THE DEFERRED INCOME TAX OVERCOLLECTION?**

The deferred income tax overcollection should be returned to ratepayers as soon as practical. URP suggests a 1-year amortization to commence at the same time as

///

///

///

///

///

///

///

the amortization authorized in UE 178. No other party has addressed this issue.

Dated: April 28, 2008

Respectfully Submitted,

---

LINDA K. WILLIAMS  
OSB No. 78425  
10266 S.W. Lancaster Road  
Portland, OR 97219  
503-293-0399 voice  
503-245-2772 fax  
linda@lindawilliams.net

Attorney for Ken Lewis

---

DANIEL W. MEEK  
OSB No. 79124  
10949 S.W. 4th Avenue  
Portland, OR 97219  
503-293-9021 voice  
503-293-9099 fax  
dan@mEEK.net

Attorney for  
Utility Reform Project

## CERTIFICATE OF SERVICE

I hereby certify that I filed served for foregoing REPLY BRIEF OF UTILITY REFORM PROJECT AND KEN LEWIS 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.

David White  
Tonkon, Trop  
888 SW 5th Avenue #1600  
Portland, OR 97204

David B. Hatton  
Oregon Department of Justice  
Regulated Utility & Business Section  
1162 Court Street NE  
Salem, OR 97301-4096

Linda K. Williams  
Kafoury & McDougal  
10266 SW Lancaster Road  
Portland, OR 97219-6305

Portland General Electric Company  
Rates & Regulatory Affairs  
121 SW Salmon Street, 1WTC0702  
Portland, OR 97204

Douglas Tingey  
Assistant General Counsel  
121 SW Salmon Street, 1WTC13  
Portland, OR 97204

Dated: April 28, 2008

---

Daniel W. Meek