

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 UM 1224

4 In the Matter of

5 UTILITY REFORM PROJECT and KEN
6 LEWIS,

7 Application for Deferred Accounting.

STAFF'S REPLY BRIEF

8 **I. INTRODUCTION**

9 In Order No. 07-351 the Commission granted a deferred accounting application filed by
10 Utility Reform Project and Ken Lewis (hereinafter URP) under ORS 757.259 and directed
11 Portland General Electric Company (PGE or Company) to calculate the deferred amount using
12 the SB 408 methodology. *Id.* at 7-8. The Commission, in approving the deferral, concluded that
13 an earnings review is required by ORS 757.259(5) and directed PGE to conduct an earnings test
14 that the Commission will review at the time it considers amortization of the deferral. *Id.* at 8.

15 PGE filed testimony that used three methods to calculate the deferred amount. Two
16 methods do not follow the SB 408 methodology that the Commission directed it to follow in
17 Order 07-351. *Id.* at 7-8. PGE, Staff, and URP agree that under the SB 408 methodology the
18 deferral amount is \$26.5 million.¹

19 This is deferred accounting case under ORS 757.290, not a rate case under ORS 757.210.
20 Both PGE and Staff agree that the earnings review conducted by PGE shows that its earnings are
21 far below its authorized rate of return that will not support the amortization of the deferred
22 amount when the Commission considers that issue. URP does not dispute the results of the
23 earnings test. Rather it argues that SB 408 applies as of September 2, 2005, and that not
24 requiring PGE to refund amounts for income taxes that were not actually paid to governments
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¹ See PGE Exhibit 200/Hager-Tamlyn-Tinker/2-3; Staff/100, Owings/3; and URP's Opening Brief at 5

1 because of an earnings test violates SB 408 and would constitute retroactive ratemaking. URP’s
2 arguments are without merit.

3 SB 408 does not apply here. The Commission’s authority to even address utility
4 expenses or revenues outside a general rate case – and outside the automatic adjustment clause
5 provisions of SB 408 – is based on ORS 757.259, which includes an earnings test. The
6 Commission is required by ORS 757.259(5) to apply an earnings test when it considers
7 amortization. Nor would the Commission violate the rule against retroactive ratemaking by
8 applying an earnings test. ORS 757.259 is an express legislative exception to the rule against
9 retroactive ratemaking.

10 II. DISCUSSION

11 1. The calculation of the deferral amount using the SB 408 methodology

12 PGE, Staff, and URP all agree the deferral amount is \$26.5 million using the SB 408
13 methodology.²

14 2. PGE’s Alternative Calculations

15 PGE offers two alternatives to the SB 408 methodology that consider the so-called
16 “double whammy.” *See* PGE Exhibit 100/Hager-Tamlyn-Tinker/10. Under PGE’s alternative
17 methodologies the deferral amount would be either zero or \$20.9 million. *See* PGE Exhibit
18 200/Hager-Tamlyn-Tinker/3. The Commission exercised its discretion when it determined that
19 PGE should calculate the deferral amount using the SB 408 methodology. *See* Order No. 07-351
20 at 8. PGE neither argues nor shows that the Commission abused its discretion in directing the
21 Company to calculate the deferral amount based on the SB 408 methodology.

22 3. The Earnings Test

23 In Order No. 07-351 the Commission granted a deferred accounting application filed by
24 URP under ORS 757.259. The Commission, in approving the deferral concluded that an
25 earnings review is required under ORS 757.259(5). *Id.* at 8. PGE’s authorized rate of return for
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² *See* fn. 1.

1 the earnings period is 10.5%. Staff/100, Owings/6. Under Staff's calculation PGE's actual ROE
2 is 6.92%, more than 350 basis points below PGE's authorized ROE. Staff/100, Owings/9-10.
3 The Company's earnings are far below even the minimum reasonable level under the earnings
4 test. *See* Staff/100, Owings/3; *see also* Order No. 93-257 (Dockets 82/UM 445).

5 URP acknowledges, as it must, that this is a deferred accounting proceeding under ORS
6 757.259. URP's Opening Brief at 1. URP does not dispute the earnings test results. Rather it
7 argues that SB 408 applies as of September 2, 2005, and that not requiring the utility to refund
8 amounts for income taxes that were not actually paid to governments because of the earnings test
9 violates SB 408 and would constitute retroactive ratemaking. *Id.* at 9-10. URP's arguments are
10 misplaced.

11 This is a deferred accounting proceeding under ORS 757.259, not a proceeding under
12 SB 408. It is significant that the legislature, in enacting SB 408, expressly limited the use of the
13 automatic adjustment clause to taxes paid to units of government collected on or after January 1,
14 2006. *See* Or Laws 2005, c. 845, section 4(2). Because the deferral period here is October 5,
15 2005, to December 31, 2005, the automatic adjustment clause authorized by SB 408 does not
16 apply. The Commission's authority to review the Company's revenues and expenses outside a
17 general rate case is limited to a deferred accounting proceeding. *See* Order 07-351 at 7-8.

18 A statutory rule of construction requires the Commission "not to insert what has been
19 omitted or to omit what has been inserted..." *PGE v. Bureau of Labor and Industries*, 317 Or
20 606, 611, 859 P2d 1143 (1993); ORS 174.010. ORS 757.259(5) expressly requires the
21 Commission to "review the utility's earnings at the time of application to amortize the deferral."
22 Thus, the Commission was correct when it concluded that it must review PGE's earnings when it
23 considers whether to amortize the deferral.

24 Nor would the Commission's review of PGE's earnings in considering whether to
25 amortize the deferral violate the rule against retroactive ratemaking. URP correctly quotes from
26 a Department of Justice Letter of Advice to Charles Davis, Commissioner, Public Utility

1 Commission, dated March 18, 1987, WL 278316 (OP-6076) regarding the rule against
2 retroactive ratemaking. *See* URP’s Opening Brief at 10-11. But URP’s limited discussion of
3 retroactive ratemaking does not fully describe that rule. Elsewhere, the opinion notes

4 “the rule against retroactive ratemaking is derived from and rooted in the
5 legislative nature of the ratemaking process. A legislature, however, can
explicitly authorize the regulator to set rates retroactively.”

6 *Id.* at 7. The opinion also states “[t]he general rule is that ratemaking is prospective unless the
7 legislature expressly authorizes retroactive ratemaking,” *Id.* at 16, citing *Joseph v. Lowery*, 261
8 Or 545, 495 P2d 273 (1972) (emphasis in original).

9 The Department of Justice, in a subsequent advice letter to the Public Utility
10 Commission, described the rule against retroactive ratemaking as follows:

11 “[i]n substance the prohibition against retroactive ratemaking precludes
12 inclusion in rates of costs related to a past service, unless expressly authorized by
13 the legislature. Letter of Advice dated March 18, 1987, to Charles Davis, Public
Utility Commissioner (OP-6076). **ORS 757.140(2) and ORS 757.259 are
express legislative exceptions to that principle.**”

14 Letter of Advice to Ron Eachus, Commission Chair, Public Utility Commission, dated June 8,
15 1992, (OP-6454), 1992 Ore. AG LEXIS 9, 19, fn. 7 (underline in original, emphasis supplied).

16 Commissioner Davis in his testimony regarding HB 2145, also recognized that the
17 legislature, in enacting ORS 757.259, expressly authorized retroactive ratemaking:

18 **Under the filed rate doctrine and rule against retroactive ratemaking,**
19 **the Commission’s ratemaking function must be prospective unless the**
20 **Legislature authorizes that it be otherwise.** The Oregon Attorney General
Opinion No. 6076, March 18, 1887, 1987 WL 278316, at 5, notes that where the
21 rule against retroactive ratemaking does not implicate constitutional concerns, **the**
22 **Legislature may authorize the Commission to act retroactively. The Oregon**
Legislature has authorized retroactive ratemaking in two cases: ORS
757.215(4) and (5) (permitting refunds for interim and nonsuspended rates) and
ORS 757.259 (permitting deferred accounting orders).

23 *See* URP’s Opening Brief at 11-12 (emphasis supplied). In sum, ORS 757.259 expressly
24 authorizes the Commission to perform retroactive ratemaking.

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1 The Commission should not amortize the deferred amount when it considers that issue in a rate
2 proceeding under ORS 757.210.

3 DATED this 28th day of April 2008.

4 Respectfully submitted,

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6 Attorney General

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10 Of Attorneys for Staff of the Public Utility
11 Commission of Oregon
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1 **CERTIFICATE OF SERVICE**

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3 I certify that on April 28, 2008, I served the foregoing upon all parties of record in this
4 proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid
5 first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

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