IN THE COURT OF APPEALS OF THE STATE OF OREGON

UTILITY REFORM PROJECT and KEN LEWIS, **Petitioners,** **v.** **OREGON PUBLIC UTILITY COMMISSION,** **Respondent.**	**Oregon Public Utility Commission** **No. UM 1224**

PETITION FOR JUDICIAL REVIEW

Petitioners seek judicial review of the final order of the Oregon Public Utility Commission (OPUC), Order No. 09-316, in case No. UM 1224, dated August 18, 2009, and served by the OPUC on August 19, 2009.

The parties to this review are:

Petitioners:	Respondent:
Utility Reform Project Ken Lewis	Oregon Public Utility Commission

Below listed are the names, bar numbers, addresses, and telephone numbers of the attorneys for the parties in this case:

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Attached to this petition is a copy of the order for which judicial review is sought. Petitioners were parties to the administrative proceeding which resulted in the order for which review is sought.

Plaintiff is not presently willing to stipulate that the agency record may be

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shortened.

Dated: October 16, 2009

Respectfully Submitted,

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ORDER NO. 09-316

ENTERED 08/18/09

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1224

In the Matter of UTILITY REFORM PROJECT and KEN LEWIS Application for Deferred Accounting.	ORDER

DISPOSITION: AMORTIZATION OF DEFERRAL DENIED

I. INTRODUCTION

Senate Bill 408 (SB 408) was passed by the 2005 Oregon Legislative Assembly. Signed into law on September 2, 2005, SB 408 is generally codified at ORS 757.268. The law requires certain investor-owned utilities to file an annual tax report (Tax Report) on or before October 15 of each year, for the preceding year. Based on the Tax Report, the Public Utility Commission of Oregon (Commission) must determine if the amount of taxes that the utility was authorized to collect in rates (Taxes Collected—as defined by SB 408) differs from the taxes paid by the utility (Taxes Paid—as defined by SB 408) that year by $100,000 or more. If so, the utility is required to implement an automatic adjustment to "true-up" the taxes, by refunding or surcharging the variance. SB 408 mandated that the automatic adjustment clause would be applied "only to taxes paid to units of government and collected from ratepayers on or after January 1, 2006."[1]

On October 5, 2005, the Utility Reform Project and Ken Lewis (collectively referred to as URP) filed a complaint pursuant to ORS 756.500 and OAR 860-013-0015. The complaint was docketed as UM 1226. The complaint alleged that Portland General Electric Company's (PGE) rates as of September 2, 2005, were not just and reasonable and were in violation of SB 408 because they contained approximately $92.6 million in annual charges for state and federal income taxes not paid to any unit of government. The same day, URP also filed an application for deferred accounting pursuant to OAR 860-027-0300. The application for deferred accounting was docketed as UM 1224. The application for deferred accounting requested that the Commission order PGE to set up a deferred account for any variance in Taxes Collected and Taxes Paid for the period beginning September 2, 2005, and

[1] Or Laws 2005, ch. 845, §4(2).

ending December 31, 2005—*i.e.*, the period of time between the effective date of SB 408 and the implementation date of SB 408's automatic adjustment clause.

On August 14, 2007, in Order No. 07-351, the Commission dismissed URP's UM 1226 complaint, but ordered deferred accounting treatment, under ORS 757.259, for revenue attributable to PGE's liabilities for federal and state income taxes for the period beginning October 5, 2005, the date the application for deferred accounting was filed, and ending December 31, 2005 (the Deferral Period). The Commission ordered PGE to calculate the amount to be deferred (Deferral Amount) using the methodology for determining the variance between Taxes Collected and Taxes Paid set forth in OAR 860-022-0041—*i.e.*, the SB 408 Methodology. The Commission ordered PGE to file the Deferral Amount by December 1, 2007. The Commission also directed PGE to file an earnings test by the same date, pursuant to ORS 757.259(5).

On November 30, 2007, PGE filed direct testimony and exhibits in compliance with Order No. 07-351. Although PGE calculated the Deferral Amount, the Company did not file new tariffs, arguing that the deferral amount should not be amortized and that rates should not be changed.

II. PROCEDURAL HISTORY

On January 24, 2008, Traci Kirkpatrick, an Administrative Law Judge (ALJ) for the Commission, held a prehearing conference. Representatives of PGE, Commission Staff (Staff), and URP appeared at the conference to discuss a procedural schedule to address PGE's testimony. Pursuant to the adopted procedural schedule, Staff filed reply testimony on February 28, 2008. On March 27, 2008, PGE filed rebuttal testimony. The schedule also provided URP with an opportunity to file testimony replying to the testimony of PGE and Staff, but URP did not file such testimony. On April 2, 2008, a hearing was held. Opening and reply briefs were submitted by all parties on April 14, 2008 and April 28, 2008, respectively.

III. DISCUSSION

A. Procedural Issues

At the hearing on April 2, 2008, URP asked three questions related to the procedural posture of this case. URP does not appear to challenge the validity of these proceedings, but rather seeks assurance that this phase of the UM 1224 proceeding meets the applicable criteria required to amortize a deferred account. ALJ Kirkpatrick directed Staff and the parties to address these questions in briefing. The issues and parties' positions on each issue are addressed below.

1. Positions of Staff and Parties

URP's first question asks whether this phase of UM 1224 is a "ratemaking proceeding." No person contends that it is not.

URP's second question asks whether this phase is a proceeding under ORS 757.210, to change rates. The question implicitly refers to the requirement in ORS 757.259(5) that any amount in a deferred account may be included in rates pursuant only to a proceeding under ORS 757.210. Although URP prefers that the issues raised in this phase be resolved without further proceedings, URP questions whether this phase qualifies as an ORS 757.210 proceeding because PGE's filing did not propose any new rates. As noted, PGE argues that the Deferral Amount should not be amortized and that rates should not change.

URP's third question asks whether this phase is a request for amortization of a deferred account under OAR 860-027-0300(9). URP observes that PGE's opening testimony did not request amortization, but rather requested that the Commission deny amortization of the Deferral Amount. In contrast, URP asserts that a request for amortization of a deferred account was initiated when URP requested that a procedural "schedule for completing UM 1224" be established.[2]

PGE responds that URP's concerns are based on a faulty interpretation of the procedural requirements for amortization of deferred accounts. PGE contends that, under URP's interpretation, the Commission would only be allowed to address the amortization of a deferred account when a utility files a rate proceeding under ORS 757.210. This reading is inconsistent, PGE observes, with the provision in ORS 757.259(2) that allows either a utility or a ratepayer to request deferral. PGE asserts that "the better reading of the statutes is that a utility or ratepayer may seek deferred accounting and amortization in a proceeding such as this one and, if the Commission ultimately orders amortization, then the utility must file a tariff consistent with the final order and ORS 757.210."[3]

2. Resolution

Due to the procedural context of this deferred accounting docket, the deferral accrual period had already elapsed when we authorized the deferred account. Given this passage of time, data was simultaneously available to calculate the deferral amount and conduct an earnings review. Consequently, in Order No. 07-351, we directed PGE to make a filing by December 1, 2007, that: (1) calculated the deferral amount using the SB 408 methodology; and (2) provided information to conduct an earnings test review pursuant to ORS 757.210. Our goal was to determine what rate change, if any, was appropriate as a result of the deferral, concurrent with changes in rates that would result, on June 1, 2008, from the automatic adjustment clause under SB 408.

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[2] URP's Opening Brief , p. 4.
[3] PGE's Reply Brief, p. 2.

In directing PGE to file earnings test information on December 1, 2007, we effectively required PGE to request an amortization review at that time. An earnings test associated with a deferred account is performed at the time amortization is requested, pursuant to ORS 757.210. Thus, although PGE asks us to conclude that the amortization of any deferral amount in this proceeding is inappropriate, PGE requested, according to our schedule, that we undertake the amortization phase of this deferred accounting proceeding.

As directed, on December 1, 2007, PGE filed testimony and exhibits addressing the calculation of the Deferral Amount and a review of PGE's earnings for a period of the deferral. In testimony, PGE argued that no amount of revenue should be amortized, and that rates should remain unchanged. Consequently, PGE did not file new tariffs. URP argued in return, however, that rates should be changed to amortize any amount deferred.

We find that PGE's filing was made under ORS 757.210, despite the fact that PGE did not actually file new tariffs. As PGE does not advocate changed rates, it is appropriate that PGE did not file new tariffs. It would be administratively burdensome and legally meaningless to require a utility to file new tariffs that are unchanged in any way other than the date from the rates that are already on file with the Commission. We find that the filing of new tariffs was implied when PGE filed testimony and exhibits that advocated no change in rates. ORS 757.210 does not preclude a utility from taking the position that a deferred account should not be amortized. Should we authorize amortization of the deferred funds at the conclusion of this proceeding, we will order PGE to file new compliance tariffs consistent with this order.

B. Substantive Issues

1. Calculation of the Deferral Amount

a. Overview

The SB 408 methodology is embodied in OAR 860-022-0041, as approved by the Commission in Docket AR 499, with modifications in Docket AR 517. The rule requires each utility to file a Tax Report annually, on or before October 15 of each year, setting forth the utility's Taxes Collected and Taxes Paid for the preceding year. Any difference between Taxes Collected and Taxes Paid of $100,000 or more is refunded to or collected from ratepayers by an automatic adjustment clause.

On October 15, 2007, PGE filed the Company's first Tax Report. PGE's initial Tax Report covered multiple years from 2004 through 2006. This report contains the information needed to calculate the Deferral Amount at issue in this proceeding.

b. Positions of Staff and Parties

PGE reports a difference between Taxes Collected and Taxes Paid for the year of 2005 in the amount of $111.6 million. PGE asserts that this difference should be adjusted, however, to $110.4 million, in order to remove $1.2 million that was collected for Multnomah County income taxes, but refunded pursuant to a law suit settlement. Using the amount of $110.4 million, PGE calculates the Deferral Amount, for the period from October 5, 2005 through December 31, 2005, to be $26.6 million.[4]

PGE contends that the difference between Taxes Paid and Taxes Collected for 2005, as calculated pursuant to the SB 408 methodology, is significant due to consolidated tax savings by its then parent company, Enron, and so called "double whammy" impacts. PGE explains that while the Company's stand-alone tax liability in 2005 was $91.9 million (an amount transferred to PGE's parent company), a consolidated tax return for the parent company resulted in a nearly zero tax liability for Enron. As a result, under SB 408, consolidated tax savings are now attributed back to PGE. PGE further explains that because the Company's earnings were low in 2005, the SB 408 calculation results in a $23.8 million dollar "double whammy." PGE explains that under the SB 408 methodology, PGE was presumed to collect $69.5 million in income taxes for 2005. PGE states that the Company's actual net (current and deferred) stand-alone utility tax liability for 2005 was $45.7 million. The difference, PGE states, of $23.8 million measures the "double whammy" impact of SB 408.

Staff also calculated the Deferral Amount using the SB 408 methodology. Staff's calculation differs from PGE's calculation by $100,000, because Staff adjusts the base difference between Taxes Paid and Taxes Collected by a greater amount than PGE does. Staff removes the entire $1.2 million dollar impact of the Multnomah County income tax refund. The effect is to adjust the 2005 difference between Taxes Paid and Taxes Collected by $1.6 million, down to $110.0 million. Using this number, Staff calculates the Deferral Amount to be $26.5 million. PGE agrees with the adjustment.[5]

URP also agrees that the proper amount to be considered for deferral is $26.5 million, but notes that appropriate interest should be applied as well.[6] URP observes that the $26.5 million in income tax overcollection from ratepayers did not all occur on December 31, 2005, but rather over an 88-day deferral period. URP asserts that interest, at PGE's authorized rate of return, should be applied as of the midpoint of that period, which is November 17, 2005.

Despite agreement among the parties regarding calculation of the Deferral Amount using the SB 408 methodology, PGE argues that the SB 408 methodology is problematic and that the Commission should calculate the Deferral Amount under one of two

[4] PGE uses the following calculation: $110.4 million * (88 days/365 days) = $26.6 million. (PGE Exhibit 100, Hager-Tamlyn-Tinker/5).
[5] PGE Exhibit 200, Hager-Tamlyn-Tinker/2-3.
[6] URP's Opening Brief, p. 5.

alternative methodologies. PGE asserts that the Commission has broad discretion to determine how to calculate the Deferral Amount and need not use the SB 408 methodology.

Renewing earlier objections about the reasonableness of the SB 408 methodology, PGE first recommends that the Commission calculate the actual tax differential for the year by comparing the amount of taxes approved in rates to PGE's actual income tax liability, as based on the Company's actual revenues and costs. PGE indicates that the Company actually undercollected income taxes during the Deferral Period. PGE explains that the Company collected $45.7 million in taxes in 2005, despite having rates designed to collect $75.0 million. Rather than requesting that the difference be collected from ratepayers, PGE recommends instead that the Commission find that the Deferred Amount is zero,

Alternatively, PGE argues that the Commission should then adjust the SB 408 methodology to remove the "double whammy" effect. PGE asserts that the "double whammy" impact can be removed by replacing the SB 408 defined Taxes Collected number in the equation with PGE's actual income tax liability for 2005. The difference between Taxes Paid and PGE's actual income tax liability for 2005 would be $86.6 million, yielding a Deferral Amount of $20.9 million.

Staff did not address, in any detail, PGE's alternative calculations of the Deferral Amount. Staff determined that it was unnecessary to fully review PGE's alternative calculations because both alternatives are inconsistent with the methodologies for determining Taxes Collected and Taxes Paid under OAR 860-022-0041, and thereby contrary to the Commission's directions in Order No. 07-351. Staff observes that the Commission's direction to PGE to calculate the Deferral Amount using the SB 408 methodology was an exercise of discretion. PGE does not challenge that the Commission abused its discretion.

URP concurs with Staff's position regarding the calculation of the Deferral Amount. URP also agrees with Staff that PGE's alternative calculations are inconsistent with the methodology under OAR 860-022-0041, and are contrary to the Commission's directions in Order No. 07-351. In addition, URP asserts that PGE's calculations do not accurately track or model the amount of taxes collected from ratepayers. URP points out that amounts charged to a utility's ratepayers for income taxes vary with the utility's gross income, not the utility's net income, as PGE presumes. Moreover, URP accuses PGE of seeking to inconsistently apply the alternative calculation to remove the "double-whammy" effect to the Company's benefit. URP concludes that the SB 408 methodology must be applied to determine PGE's tax overcollection during the Deferral Period and that SB 408 requires this amount be returned to taxpayers.

c. Resolution

In Order No. 07-351, we authorized deferred accounting for revenue that is attributable to PGE's liabilities for federal and state income, as calculated using the SB 408 methodology, for a period of time beginning October 5, 2005, the date URP filed the application for deferral, and ending December 31, 2005, the date the SB 408 automatic adjustment clause took effect. PGE fails to convince us that any other methodology should

be used to calculate the Deferral Amount. We agree with Staff and all other parties that the Deferred Amount is $26.5 million, using the SB 408 methodology. We authorize PGE to recognize a Deferral Amount of $26.5 million, with interest to be applied as appropriate.[7]

2. *Amortization of Deferral Amount*

a. *Overview*

ORS 757.259 requires the Commission to consider the Company's earnings when determining whether a deferred account should be amortized into rates. ORS 757.259(5) provides in part:

> Unless subject to an automatic adjustment clause under ORS 757.210(1), amounts described in this section shall be allowed in rates only to the extent authorized by the commission in a proceeding under ORS 757.210 to change rates and *upon review of the utility's earnings at the time of application to amortize the deferral*[.] *(Emphasis added.)*

Staff and the parties dispute the meaning of the italicized language. They disagree whether the language indicates when, as a procedural matter, an earnings review should be performed—that is, at the time a utility applies for amortization of a deferral—or whether the language specifies, as a substantive matter, the earnings to be reviewed—that is, earnings at the time of the application for amortization. PGE and Staff endorse the former interpretation, arguing that an earnings test to determine whether a deferral should be amortized must consider the earnings during the period of the deferral. URP supports the latter interpretation, contending that the text of the statute directs the Commission to consider earnings concurrent with the application to amortize.

b. *Positions of Staff and Parties*

PGE contends that the legislative history of ORS 757.259 and prior Commission application of that statute support a conclusion that the earnings review must examine earnings at the time of the deferral period. When ORS 757.259 was a bill under consideration by the Oregon legislature, PGE indicates that then Oregon Public Utility Commissioner Charles Davis testified 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." PGE further states that Commissioner Davis remarked, "[i]f earnings are higher than authorized, expense amortization will not be appropriate."[8] PGE asserts that the "fundamental predicate of the earnings test" is that "amortization of the

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[7] URP's position regarding interest is consistent with how interest is typically handled for a deferral amount calculated over a period of time.

[8] PGE observes that Commissioner Davis' comments addressed only the amortization of deferred expenses when earnings were low and not the situation in this proceeding—*i.e.*, amortization of excess income when earnings are high—likely because the bill originally provided only for deferral applications by utilities. The bill was later amended to allow a party other than a utility to apply for a deferral. PGE's Opening Brief, p. 7.

deferred amount should not occur if amortization moves the utility's actual earnings away from a reasonable range of return on equity."[9]

PGE observes that the Commission first addressed how to perform an earnings review in a 1992 letter between Staff and a utility. In that letter, Staff stated:

> The purpose of this stage is to produce an earnings picture that can be used to perform earnings tests required by ORS 757.259. Such tests are necessary for evaluating potential amortization of deferred costs and revenues. Accordingly, the operating results at this stage of the report should reflect as closely as possible the company's actual earnings for the reporting period and its ability to absorb a deferred cost or its need to retain deferred revenues.[10]

When the Commission next addressed the earnings test, PGE states, it was in context of deferred power costs related to an outage of PGE's Trojan nuclear plant, and the Commission established a standard which tests a utility's earnings against a reasonable range of return on equity (ROE).[11] In that case, PGE states the Commission applied a 100 basis point range around the Company's authorized ROE, 50 basis points above and below an established mid-point, to test whether amortization of the deferred costs was appropriate. PGE indicates that the Commission permitted amortization, finding that PGE's earnings were sufficiently low to warrant recovery of the deferred power costs.

In this case, PGE calculated earnings for the period beginning October 1, 2005, and ending September 30, 2006. PGE notes this earnings review period is consistent with OAR 860-027-0300(9), which requires that the earnings review period "encompass all or part of the period during which the deferral took place or must be reasonably representative of the deferral period."

PGE calculates the Company's actual ROE during the deferral period, without amortization of any Deferral Amount, to be 5.11 percent, more than 500 basis points below its authorized ROE of 10.5 percent.[12] If PGE were required to refund a Deferral Amount of $26.6 million, PGE asserts that the Company's ROE would drop to 3.54 percent, almost 700 basis points below PGE's authorized ROE during the deferral period. PGE asserts that the Company's earnings during the deferral period are so far below a minimum reasonable ROE, it would be inappropriate for the Commission to require PGE to refund the Deferral Amount.

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[9] *Id.*

[10] PGE's Opening Brief, pp. 7-8, citing Letter from T. Ray Lambeth to Anne Eakin, Pacific Power & Light Co., et al., pp. 1-2 (Mar 25, 1992).

[11] PGE's Opening Brief, p. 8, citing *In the Matter of the Revised Tariff Sheets filed by PGE to Implement the Provisions of Order No. 91-1781*, UE 82/UM 445, Order No. 93-257 (1993).

[12] Without any refund of the Deferal Amount, PGE asserts that the Company's adjusted ROE for the earnings test period is 3.55 percent, far below the authorized 10.5 percent ROE. PGE is currently seeking recovery of replacement costs associated with an outage of the Company's Boardman plant during part of 2005. Even if PGE is granted amortization of the full amount deferred for the Boardman outage, PGE estimates its adjusted ROE would be 5.11 percent during the earnings test period, still far below the Company's authorized ROE.

Staff agrees with PGE that the relevant earnings period is that during the time of the deferral. Due to implications of SB 408, however, Staff calculated that PGE's earnings during the deferral period provided the Company with a 6.92 percent ROE, more than 450 basis points below the authorized return of 10.5 percent ROE. Staff calculates that PGE's ROE would fall to 6.11 percent if the Company was required to refund $26.5 million. As PGE's earnings are well below a minimum reasonable level to start, Staff argues that a refund of any amount in the deferred account is not warranted.

URP challenges the earnings review period selected by PGE and Staff, however. Pointing to the language of ORS 757.259(5), URP argues that an earnings test must be based on earnings contemporaneous to URP's application for amortization on January 11, 2008. URP asserts that the phrase, "at the time of application," modifies the term, "utility's earnings." URP declares that the earnings period for review should therefore correspond to the most recent 12 months of data available, as of either: 1) November 30, 2007, the date PGE filed testimony regarding amortization; or 2) January 11, 2008, the date URP requested that a schedule be established to complete UM 1224. URP claims that OAR 860-027-0300(9) is unlawful to the extent that it permits review of a period in conflict with ORS 757.259. However, URP contends that the rule can be reconciled with the statute with the understanding that the deferral period actually runs from the beginning of deferral until or through amortization.

URP purports that the Commission cases discussed by PGE "show that the earnings review periods (whether 12 or 24 months) have been the most recent periods for which data is available at the time of the application for amortization" as is consistent with the language of ORS 757.259.[13] To the extent that the Commission has reviewed earnings other than the period contemporaneous with the amortization application, URP indicates that those earnings have been reasonably representative of current revenues and expenses.[14] URP argues that earnings during the deferral period are not reasonably representative of current earnings in this instance.

c. Resolution

In the past, we have interpreted ORS 757.259(5) to procedurally require an earnings review during the amortization phase of a deferral, as evidenced by OAR 860-027-0300(9).[15] Nevertheless, the statutory construction of ORS 757.259(5) is appropriately at issue in this proceeding, regardless of any prior interpretation of the statute that this Commission may have made. At any time that statutory construction is an issue, our

[13] URP's Reply Brief, p. 9.
[14] *Id.*, citing Order No. 01-503.
[15] OAR 860-027-0300(9), which requires that the earnings review period "encompass all or part of the period during which the deferral took place or must be reasonably representative of the deferral period," is incompatible with an interpretation in this case that ORS 757.259(5) requires us to review earnings at the time an amortization filing is made. OAR 860-027-0300(9) was adopted contemporaneously with the ORS 757.259(5), with the participation, it is likely, of the same persons involved with the passage of ORS 757.259(5).

foremost goal is to ascertain the intent of the legislature when it passed a statutory provision.[16]

Staff and PGE support our prior interpretation of ORS 757.259(5), arguing that the legislature intended the phrase "at the time of application to amortize the deferral" to indicate when we should procedurally conduct an earnings review—i.e., at the time a utility applies for amortization of a deferred account. URP contends that this interpretation is wrong, arguing that the phrase "at the time of application" modifies the term "utility's earnings," thereby indicating that the legislature intended to specify the period of earnings that we should review during an earnings review—i.e., earnings at the time a utility applies for amortization.

As the phrase "at the time of application" directly follows the term, "utility earnings," we agree with URP that one can, at least at first glance, read the sentence to direct us to test earnings that exist at the time of a utility's application to amortize. We do not agree with URP, however, that this is the *only* interpretation of ORS 757.259(5). Rather, we find this statutory clause to be a long sentence with minimal punctuation that is imprecise and open to interpretation.

As such, we find it appropriate to consider the clause in context of all the applicable rules of statutory construction.[17] As we discuss below, we conclude, after conducting a full statutory analysis, that the legislature intended the phrase "at the time of application to amortize the deferral," in ORS 757.259(5) to be a stand-alone phrase that directs us, from a procedural standpoint, to conduct an earnings test when a utility files an application for amortization.

Closer examination of the clause reveals that URP's interpretation of the clause is textually problematic. For example, we find that the words "at the time of" strongly suggest an occasion, as opposed to a period of time. Supporting this interpretation is the fact that when the same legislature wanted to identify an interval of time to be used in calculating the maximum annual rate impact of an amortization in the next section of the statute, ORS 757.259(6), it unambiguously identified a specific period of time.[18] As an earnings review is conducted over a period of time—as opposed to a moment in time—the clause's use of the word "at" (instead of a word such as "around" or "during") indicates that the legislature did not intend the phrase "at the time of application to amortize the deferral" to identify the interval of earnings to review.

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[16] *See* ORS 174.020; *See also State v. Gaines*, 346 Or. 160, 206 P3d 1042 (April 30, 2009), *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *England v. Thurderbird*, 315 Or 633, 638, 848 P2d 100 (1993).

[17] *Id.*

[18] ORS 757.259(6) states, in pertinent part, "the overall average rate impact of the amortizations authorized under this section in any one year may not exceed three percent of the utility's gross revenues for the preceding calendar year."

URP's interpretation of the clause is also contextually problematic. A statutory provision should be analyzed in the context of the rest of the statute.[19] ORS 757.259(8) specifically directs the Commission to consider two elements related to the earnings of a utility during the deferral period.[20] URP did not explain, nor can we discern, why the legislature would direct us to review earnings at the time of the request for amortization in ORS 757.259(5), while directing us to consider earnings during the deferral period when evaluating whether to increase the rate impact of an amortization in ORS 757.259(8). This discrepancy suggests that ORS 757.259(5) should be interpreted to be consistent with ORS 757.259(8), as PGE and Staff contend, so that we consider earnings during the deferral period when making decisions about whether to amortize a deferral, and about what the rate impact of an amortized deferral should be.

Arguably, however, the relevance of ORS 757.259(8) is undermined by the fact that it was enacted subsequent to ORS 757.259(5). Generally speaking, other language of the same statute should be used for contextual analysis of a statutory provision only if all the language is contemporaneous.[21] Then again, ORS 757.259(8) was added following the Commission's adoption of rules to implement ORS 757.259(5). As the mandate in ORS 757.259(8) to examine earnings from the time of the deferral period is consistent with the requirement in OAR 860-027-0300(9) that the earnings review encompass all or part of the deferral period, an inference can be drawn that the legislature endorsed the Commission's interpretation by specifying that an earnings review under ORS 757.259(8) should analyze earnings during the deferral period. Otherwise, it would seem that the legislature would have explained the discrepancy between ORS 757.259(5) and 757.259(8).

Despite textual and contextual concerns with URP's interpretation of ORS 757.259(5), we find there to be some lingering ambiguity regarding the legislature's intent. Consequently, it is appropriate to consider whether the legislative history of the statutory clause reveals the legislature's intent.[22] Unfortunately, however, legislative comment about the purpose of the earnings test mandated by ORS 757.259 is absent. The only historical comment that addresses the intended purpose of the earnings test is testimony by Commissioner Davis, who stated that an earnings review would "allow the Commission to determine whether amortization of a deferred income or expense amount is warranted based

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[19] *See Stevens v. Czerniak*, 336 Or 392, 401, 84 P3d 140 (2004); *Lane County v. LCDC*, 325 Or 569, 578, 942 P2d 278 (1997) ("we do not look at one subsection of a statute in a vacuum; rather, we construe each part together with the other parts in an attempt to produce a harmonious whole").

[20] ORS 757.259(8) provides:

> The commission may authorize amortizations for an electric utility under this section with an overall average rate impact not to exceed six percent of the electric utility's gross revenues for the preceding calendar year. If the commission allows an overall average rate impact greater than that specified in subsection (6) of this section, the commission shall estimate the electric utility's cost of capital for the deferral period and may also consider estimated changes in the electric utility's costs and revenues during the deferral period for the purpose of reviewing the earnings of the electric utility under the provisions of subsection (5) of this section.

[21] *See Stull v. Hoke*, 326 Or 72, 79, 948 P2d 722 (1997); *but see, Nibler v. Or. Dept. of Transp.*, 338 Or 19, 22, 105 P2d 361 (2005) (examining later enacted statutes as part of contextual analysis).

[22] Very recently, the Oregon Supreme Court emphasized the relevance of legislative history to the interpretation of a statute, finding it appropriate to consider even when the text of the statute does not appear to be ambiguous. *Gaines*, 346 Or at 171-172, 206 P3d at 1050-1051.

on the utility's earnings."[23] Commissioner Davis' testimony does not specify the timeframe of the earnings reviewed. A graphic attached to his testimony, however, indicates that he envisioned the deferral period and the amortization process would happen within a one-year period.[24] It is likely, therefore, that Commissioner Davis envisioned that the earnings reviewed would be contemporaneous with the deferral period, as well as the request for amortization.

It is also likely that Commissioner Davis, and the legislators who enacted ORS 757.259(5), never contemplated the unusual situation we are presented with in this proceeding, where the period of deferral occurred much earlier than the request for amortization. Indeed, our current rules do not envision the unique situation presented here. Under OAR 860-027-0300(9)(a), an energy utility must request that amortization of a deferred account "commence no later than one year from the date the deferral ends." OAR 860-027-0300(9) requires an energy utility, when requesting amortization of a deferral, to present financial data for a period of at least 12 months. Our rules, therefore, envision the testing of earnings that are contemporaneous with *both* the deferral period and the utility's request for amortization.

As we discussed above, the procedural context of this deferred accounting docket caused a significant delay between the period of deferral, the authorization of that deferral, and the proceeding to consider the amortization of the amount in the deferred account. In Order No. 07-351, we bypassed OAR 860-027-0300(9)(a) to direct PGE to make a filing with earnings review information by December 1, 2007, nearly two years after the end of the deferral period. PGE made this filing, providing information for a period of time that included the past deferral period, as is consistent with the requirement in OAR 860-027-0300(9) that the earnings review period encompass the period during which the deferral occurred. This situation has given rise to the following question: When there is a significant period of time between the deferral period and the request for amortization, what earnings did the legislature intend that we review to determine whether the deferred account should be amortized? Legislative history does not indicate that the legislature answered, or even considered this question when ORS 757.259(5) was enacted.

Pursuant to *PGE v. BOLI*, when legislative intent remains unclear after analysis of a statute's text and context, as well as consideration of the statute's legislative history, we must next consider whether there are any general maxims of statutory construction that resolve any lingering ambiguity. For example, *PGE v. BOLI* identifies, as an example, the maxim that, "where no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue." Another relevant canon assumes that the legislature did not, or would not have, intended an unreasonable result.[25]

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[23] Testimony of Commissioner Davis, Before the House Committee on Environment and Energy regarding HB 2145, p. 5. (Mar 11, 1987).
[24] Attachment to Testimony of Commissioner Davis.
[25] *See, e.g., State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996).

As discussed, it is doubtful that the legislature that enacted ORS 757.259 contemplated a deferral situation involving a significant time gap between the deferral period and the utility's request for amortization. Under ORS 757.259(5), Staff and parties argue that there are two approaches to address such a gap. Staff and PGE assert that earnings during the deferral period should be reviewed, regardless of when the request for amortization was made. URP counters that earnings contemporaneous with the request for amortization must be reviewed, regardless of how much earlier the deferral period was. The fundamental question posed by the differing viewpoints is: When there is a significant gap between the period of deferral and a utility's request for amortization, should the earnings that are reviewed, for the purpose of determining whether it is appropriate to reset rates to account for an unforeseen past event, be contemporary earnings or earnings contemporaneous with the deferral period? We consider the context of ratemaking to determine whether either outcome is unreasonable, and if not, whether one outcome is more reasonable than the other.

A fundamental ratemaking goal is to set *future* rates that provide a utility with the *opportunity* to collect revenue sufficient to recover reasonable operating expenses, and to earn a reasonable return on investments made to provide service.[26] A utility's rates are established based upon *expectations* of that utility's future expenses and revenues. While these expectations are typically based on normalized test year revenues and expenses that are presented at the time the rates are set, they are still expectations which never align precisely with reality. A utility must operate with the rates in effect until future rates are approved in the next rate case. It is expected that the utility will manage its operations to balance and offset unexpected expenses in a fiscal year with operating efficiencies and unexpected revenues in that same year, with the understanding that the utility keeps all revenues in excess of its expenses in any year. If a utility's previously unexpected costs or revenues can be forecast to continue into the future, however, a general rate case to revaluate the utility's rates may be appropriate. Although the next rate case may result in altered rates, the rates will compensate the utility on a going-forward basis only. In other words, a general rate case does not provide a utility with an opportunity to recoup expenses beyond those forecast in prior rates, nor is the utility expected to remit revenues higher than previously forecast. This prohibition against the retroactive adjustment of rates to account for unexpected expenses or revenues is known as the rule against retroactive ratemaking.[27] Almost immediately prior to the introduction of the bill that would become ORS 757.259 and authorize deferred accounting, the Commission asked then Attorney General Dave Frohnmayer to opine about whether the Commission could use a balancing account to track certain unpredictable expenses and revenues for future recovery in rates. Attorney General Frohnmayer indicated that such action would constitute deferred accounting that, unless authorized by the legislation, would violate the rule against retroactive ratemaking.[28]

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[26] *See* Order No. 08-487, p 7.

[27] *See, e.g., In Re Portland General Electric*, Dockets DR 10, UE 88, and UM 989, Order No. 08-487, pp. 36-42 (generally discussing the rule against retroactive ratemaking).

[28] *See* Attorney General Opinion Letter, Re: Opinion Request OP-6076, pp. 8-18, (Mar 18, 1987).

Thus, deferred accounting must be statutorily mandated as an exception to the rule against retroactive ratemaking. Pursuant to ORS 757.259, deferred accounting allows rates to be adjusted outside of a general rate case when certain expenses or revenues arise that are deemed exceptional.[29] Our rules and policies emphasize that deferred accounting treatment is appropriate only for costs or revenues that are truly *exceptional* in some way, whether due to unpredictability or magnitude, or a combination of both factors.[30] A cost or revenue change that is imposed on a utility by the legislature due to statutory modification is typically considered exceptional, because the change cannot be predicted and may have significant financial impact on the utility. Indeed, Commissioner Davis identified costs imposed upon a utility by a governmental authority, other than the Commission as a specific example of costs that arise between rate cases that are exceptional in nature and worthy of deferred accounting.[31] Similarly, we concluded, in Order No. 07-351, that the impact from the change in law represented by SB 408 warranted an exercise of our discretion to grant URP's deferral request.

When a worthy deferral expense or revenue is identified and approved pursuant to ORS 757.259, that expense or revenue is tracked in a balancing account that is referred to as a deferred account. When accruals to the deferred account are complete, a utility may request amortization of the amount in the deferred account. Amortization permits the utility to recover or return an amount in a deferred account in future rates, over some period of time. ORS 757.259 directs us to review a utility's earnings before we authorize the amortization of a deferred account, but the current statute does not elaborate with regard to the purpose of or the process for the review.

We find, however, that the general principles of ratemaking guide us. If a utility has the responsibility, under general ratemaking, to operate within a fixed level of rates despite actual costs or revenues while striving to earn a certain level of return, then it seems appropriate to determine, under deferred accounting, whether the utility actually operated within its fixed rates despite the deferral of certain funds. If a utility operated within its fixed rates, then the need to amortize the deferred funds is obviated. Reviewing the earnings of a utility during the deferral period provides the Commission with an opportunity to confirm whether costs or revenues that were deferred were truly exceptional, or whether they were absorbed by the utility.

Based on this reasoning, we conclude that ORS 757.259(2) directs us to review a utility's earnings for an interval that includes the deferral period. Reviewing earnings that are entirely distinct from the deferral period would be inconsistent with general principles of ratemaking and deferred accounting. It is appropriate to review a utility's recent earnings when forecasting rates for the future. In contrast, in the extraordinary situation of deferred accounting, it is appropriate to review the utility earnings during the deferral period in order to determine whether retroactive ratemaking is appropriate to address the exceptional revenues or expenses that were deferred. If past ratepayers paid an

[29] *See* Testimony of Commissioner Davis, p. 3.
[30] *See* Order No. 05-1070, p.7.
[31] *Id.*

appropriate amount of rates for service received, it is inappropriate to burden or enrich future ratepayers based upon retroactive events.

We note that URP's counsel originally protested the adoption of a deferred accounting statute that he alleged would "allow private utilities to charge today's ratepayers for costs incurred to provide service in the past, whether or not the utility's rates in the past were sufficient to cover those costs."[32] If ORS 757.259(2) is applied to review a utility's earnings during the deferral period, then the possibility that a utility could be retroactively compensated by amortization of deferred costs that a utility could have absorbed with existing rates will be unlikely to occur.

Having concluded that the legislature would have intended that we review PGE's earnings during the deferral period, we agree with Staff and PGE that PGE's earnings should be reviewed for the period beginning October 1, 2005 through September 30, 2006. PGE calculates the Company's ROE during this earnings period to be 5.11 percent, more than 500 basis points below its authorized ROE of 10.5 percent. Staff, on the other hand, calculates a ROE of 6.92 percent, more than 350 basis points below the Company's authorized ROE of 10.5 percent. URP did not review earnings during this period of time. We accept that PGE's actual ROE during the earnings review period was between 5.11 percent and 6.92 percent, more than 500 to 350 basis points below the Company's authorized ROE of 10.5 percent.

We further find that any ROE within this range is outside any reasonable range of ROE for purposes of amortization under ORS 757.259(5), and that PGE needs to retain deferred revenues in order to not fall further outside the zone of reasonableness. We deny URP's request to amortize the Deferral Amount.

3. *Any Tax Overcollection During Deferral Period Must Be Returned to Ratepayer Regardless of PGE's Earnings*

a. *Positions of Staff and Parties*

URP argues that PGE's earnings should not be used to justify a failure to amortize the Deferral Amount. URP asserts that PGE and Staff's position that PGE should not be required to amortize the Deferral Amount because the Company earned less than its authorized rate of return during an earnings review period that included the Deferral Period is flawed, because it violates SB 408 and the rule against retroactive ratemaking. According to URP, PGE's obligation to return taxes collected in rates but not paid to tax authorities is SB 408 (mostly codified at ORS 757.268), not ORS 757.259 (the deferred accounting statute). URP contends that offsetting the Deferral Amount by an amount that PGE was authorized to earn but did not earn, violates the rule against retroactive ratemaking which precludes the recovery of past profits or losses in future rates. URP observes that "[w]hile

[32] Testimony on HB 2145 by Dan Meek on behalf of the Utility Reform Project and Forelaws on Board before the Committee on Environment and Energy, Oregon House of Representatives, p. 7 (Mar 11, 1987).

PGE's income tax overcollections were lawfully deferred, PGE's lack of sufficient earnings was never deferred (and was not legally eligible for deferral)."[33]

PGE counters that this is a proceeding under ORS 757.259, a statute that requires the Commission to review PGE's earnings to determine if amortization of the Deferred Amount is appropriate. PGE also reminds URP that the proceeding was initiated by URP. URP asked the Commission to undertake retroactive ratemaking, but the Commission can only retroactively adjust rates, PGE explains, after conducting an earnings test.

b. Resolution

URP fails to recognize the statutory distinctions between a proceeding to defer and amortize amounts under ORS 757.259 and a proceeding to adjust income tax amounts under ORS 757.268. As we explained in Order No. 07-351, the automatic adjustment clause created by SB 408 applies to taxes collected from ratepayers and paid to units of government on or after January 1, 2006.[34] Even though SB 408 became law in September 2005, the legislature precluded us from using, before January 1, 2006, the adjustment mechanism in ORS 757.268. Thus, the provisions of SB 408 do not apply to this proceeding.

We concluded in Order No. 07-351 that we were authorized to address URP's request to adjust the amount of PGE's income taxes for the period of time beginning October 5, 2005, the date of the request, and ending December 31, 2005, the last day before the effectiveness of the automatic adjustment clause in SB 408, pursuant to ORS 757.259, the deferred accounting statute. As we have already discussed, the legislature expressly authorized us to engage in retroactive ratemaking to address unique events, including changes in the law, under the deferred accounting statute. In contrast to the adjustment mechanism in SB 408, ORS 757.259(5) expressly requires us to perform an earnings review before we adjust rates by amortizing a deferral amount.

[33] URP's Reply Brief, p. 4.
[34] *See* Or Laws 2005, ch.845, § 4.

IV. ORDER

IT IS ORDERED that:

1. We authorize Portland General Electric Company to recognize a Deferral Amount of $26.5 million.

2. The Deferral Amount shall not be amortized in rates.

Made, entered, and effective AUG 18 2009.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

CERTIFICATE OF SERVICE

by certified mail,

I certify that on October ~~16~~ 19, 2009, I filed and served a true copy of this Petition for Judicial Review on:

Rick Willis
Oregon Public Utility Commission
550 Capitol Street, NE
Suite 215
Salem, OR 97301-2551

John Kroger, Attorney General
Jerome Lidz, Solicitor General
Department of Justice
1162 Court St., Suite 400
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Douglas Tingey
Assistant General Counsel
Portland General Electric Co.
121 SW Salmon Street, 1WTC13
Portland, OR 97204

by U.S. Postal Service, ordinary first class mail, and by means of this Court's Efile system to the attorneys registered with that system.

CERTIFICATE OF FILING

I certify that on October ~~16~~ 19, 2009, I filed the original of this petition for judicial review with the State Court Administrator by Efile. AND BY CERTIFIED MAIL.

Dated: October ~~16~~ 19, 2009

Respectfully Submitted,

/s/ Daniel W. Meek

DANIEL W. MEEK
Attorney ~~for~~ Petitioners

10/19/2009