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VIA E-FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
Attn: Filing Center
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Re: *UM 1226*

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Enclosed for filing in the above-referenced docket are an original and a courtesy copy of Portland General Electric Company's Reply in Support of Motion to Dismiss Amended Complaint . 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,

A handwritten signature in black ink, appearing to read 'Jeanne M. Chamberlain', written over a horizontal line.

Jeanne M. Chamberlain

JC/ldh
Enclosures
cc (w/enc.): Service List
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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UM 1226**

UTILITY REFORM PROJECT and
KEN LEWIS,

Complainants,

v.

PORTLAND GENERAL ELECTRIC
COMPANY,

Defendant.

**PORTLAND GENERAL ELECTRIC
COMPANY'S REPLY IN SUPPORT OF
MOTION TO DISMISS AMENDED
COMPLAINT**

Pursuant to the ALJ's Scheduling Memorandum dated December 21, 2006, Portland General Electric Company ("PGE") files this Reply in support of its Motion to Dismiss Utility Reform Project's and Ken Lewis's ("URP") First Amended Complaint.

I. URP'S COMPLAINT LACKS A STATUTORY BASIS

URP's Response waffles between two equally untenable positions. First, URP suggests that its complaint falls under ORS 757.210, arguing that SB 408's amendment of that statute prohibited the Commission from authorizing "rates that are not fair, just, and reasonable" and that PGE's 2005 rates violated that "general prohibition." URP Resp. at 3.

But URP cannot be seeking relief under that statute. The Commission established PGE's 2005 rates under ORS 757.210 in 2004, well before SB 408 became effective. UE 161, Order No. 04-573 (Oct. 5, 2004) (setting PGE's power costs for 2005 rates). The only ratemaking order the Commission entered in 2005 was Order No. 05-1262, but that order set PGE's 2006 rates, after the period of time in which URP is interested—the last quarter of 2005. URP makes no claim that the rate orders setting PGE's rates were unlawful, under ORS 757.210, SB 408 or otherwise. Moreover, ORS 757.210 offers only prospective rate relief, not the type of retroactive rate relief URP seeks here. URP admits as much when characterizing its own

complaint: "the Complaint does not seek to initiate a rate case, based on any test year, but to recover for ratepayers PGE's unlawful charges during the Pre-Adjustment Clause Period." UM 1226, URP's Response at 6 (Oct. 4, 2006).

URP's second position is less clear but no more viable. Here, complainants suggest that PGE violated some other rate-making statute and they are seeking rate relief under some other rate-making authority. The source of URP's alternative rate-making authority is unclear, but its Response suggests three possible statutes, none of which SB 408 amended.

A. ORS 756.500

URP suggests that ORS 756.500 provides an alternative to ORS 757.210. URP Resp. at 4-6. But that statute provides a mechanism for initiating a rate proceeding for prospective changes in rates or for alleging a "violation of any law claimed to have been committed by the defendant." ORS 756.500(3). PGE's rates could not have violated ORS 756.500 because that statute is purely procedural, imposing no substantive standard PGE or its rates could have transgressed. If a complaint fails to allege a violation of some other statute, rule or order, then the Commission summarily dismisses the complaint. *Wilson v. Qwest Corp.*, UC 584, Order No. 01-798 (Sept. 12, 2001) (dismissing complaint that "failed to establish that Qwest violated a statute, rule or Commission order").

In addition, the procedural requirements of the complaint statutes are inconsistent with what URP seeks. A rate complaint may start an investigation and rate-case-type proceeding. But ORS 756.512(1) requires a hearing before the Commission may issue an order based upon a complaint. Any new rates established after the hearing can have prospective effect only, an alternative URP has expressly declined to pursue. See *Pacific Northwest Bell Telephone Co. v. Eachus*, 135 Or App 41, 898 P2d 774 (1995).

B. ORS 756.040

URP also suggests that ORS 756.040 authorizes its complaint. URP Resp. at 5. It does not. That statute grants general powers to the Commission and provides standards for the Commission when it engages in ratemaking. URP assumes that the statute provides a static

standard against which utility rates are constantly measured and empowers the Commission to deem rates unlawful at any instant and immediately subject to refund.

On its face, URP's position is implausible. The Commission's general rate-making statute—ORS 757.210—does not operate in this fashion. In that context, rate-making standards apply in a rate-making proceeding; variances from those standards between rate proceedings do not render rates "unlawful."¹ URP offers no rationale for why rate-making standards under ORS 756.040 and ORS 757.210 should operate in a fundamentally different manner. Moreover, if ORS 756.040 supplied a constant check on rates condemning any variance as "unlawful," as URP suggests, a utility could claim a surcharge every time it earned less than its authorized rate of return. That prospect is no less absurd than URP's construct that ORS 756.040 tests rates at all times, and offers relief for any variance.

It is, therefore, not surprising that both the Commission and the courts have rejected just such an interpretation of ORS 756.040 in almost identical circumstances. In docket UT 85, CUB alleged that existing utility rates were no longer just and reasonable because the telephone company was allegedly over-earning,² just as URP alleges that PGE's rates are unjust and unreasonable, and therefore unlawful. In both cases, the complainants were not satisfied with prospective relief under the specific rate-making statutes—ORS 757.210 for electric utilities and ORS 759.180 for telephone utilities. CUB claimed that ORS 756.040 authorized the Commission to deem current rates "interim subject to refund;"³ URP suggests that rates that violate ORS 756.040 are unlawful and immediately subject to refund.

¹ See, e.g., *In re Portland General Electric*, UM 47/48, Order No. 89-687 at 8-9 (May 24, 1989) ("If [the Commission] follows those court-prescribed rules in the review of a utility's proposed rates, its job is finished, until the next rate case. * * * The reasonableness of the rates under consideration is judged at an instant in time—namely the rate decision. * * * 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."); *In re PacifiCorp*, UE 170, Order No. 06-379 at 17 (July 10, 2006).

² *Pacific Northwest Bell*, 135 Or App at 45.

³ *Id.* at 48-49.

The Commission rejected CUB's request, concluding that it lacked the legal authority to declare existing rates interim and subject to refund. UT 85, Order No. 89-132 at 1-2 (Feb. 9, 1989). It reasoned that the applicable utility statutes effectively required a hearing before implementing a Commission-ordered rate reduction.. *Id.* The Court of Appeals agreed, finding that ORS 756.040 provides no basis for declaring existing rates unlawful and immediately subject to refund.

We agree that the text of those statutes [ORS 756.040] are broad enough to permit the type of order that CUB seeks. However, other provisions of the public utility statutes show that PUC's authority to declare rates to be interim and subject to refund is circumscribed * * *. The effect of an order declaring those rates to be interim would have been to allow a rate reduction before the reduced rate had been approved; it would, in essence, have been a retroactive adjustment which we conclude would have been inconsistent with the [specific ratemaking statutes]. * * * We hold that it was not error for the PUC to refuse to declare PNB's existing rates to be interim and subject to refund.

Pacific Northwest Bell, 135 Or App at 49-50. ORS 756.040 provides no independent rate-making authority, much less the kind of "retroactive" rate-making relief URP seeks.⁴ SB 408 neither amended ORS 756.040 nor altered this fundamental tenet of utility regulation in Oregon.

Even if ORS 756.040 permitted the type of relief URP seeks, URP has made nothing like the allegations necessary to establish that PGE's rates exceeded the Commission's rate-making standards. ORS 756.040 requires an appropriate balancing of customer and utility interests to determine whether rates are fair, just and reasonable. Rates must permit recovery of a utility's operating expenses and a reasonable return commensurate with businesses with a similar risk profile. ORS 756.040(1). URP does not allege or contend that PGE's 2005 rates exceeded this measure. Indeed, if the measure were sufficient to render existing rates unlawful at an instant (which it is not), PGE would be due a surcharge, given that PGE earned about

⁴ See Attorney General's Opinion, OP-6076 at 9, 1987 WL 278316 (March 18, 1987) (rejecting argument that ORS 756.040 conferred authority to issue deferred accounting orders: "Because the legislature has granted specific ratemaking authority to the commissioner [in ORS Chapter 757], the legislature impliedly has limited the commissioner's ratemaking authority to that which the legislature has specifically granted").

6.64% for 2005, well below its authorized level.⁵ If URP was right and ORS 756.040 tested rates at all times, PGE's 2005 rates were too low, not too high.

C. ORS 757.259

URP also inaccurately suggests ORS 757.259 as authority for the complaint. URP Resp. at 7-8. No complaint is required for a deferred accounting application, which parties may file directly under ORS 757.259 and the accompanying rules. Nor does ORS 757.259 provide a statutory basis for URP's claim of "unlawful rates." The deferred accounting statute is an enabling statute: it enables the Commission to exercise its discretion to permit the use of deferred accounting under appropriate circumstances. PGE rates cannot be said to "violate" such a statute.

PGE does not dispute URP's ability to file a deferred accounting application. Docket UM 1224 concerns just such an application, and PGE has set forth in that docket why the Commission should deny URP's application. That proceeding neither requires nor validates URP's complaint.

II. URP'S RESPONSE MISUNDERSTANDS THE DEFECT IN THE COMPLAINT

URP's mantra in its Response is that PGE's position requires that different standards apply to rates under ORS 757.210 and "to utility rates set by the OPUC in any manner other than ORS 757.210." URP Resp. at 5. URP is unable to attribute this straw man to anything we filed or identify how the Commission might set rates other than through ORS 757.210. We know URP's mantra is wrong given that we disagree with its premise that the Commission may set rates other than through ORS 757.210. In any event, let us be categorically clear about our position: there is only one standard for fair, just and reasonable rates.

⁵ See PGE's Regulated Results of Operations (June 1, 2006) showing that PGE's earnings test adjusted return on equity for 2005 was 6.64%. Pursuant to OAR 860-014-0050(1)(e), the Commission may take official notice of PGE's 2005 Regulated Results of Operation, a document "in the files of the Commission which have been made a part of the file in the regular course of performing the Commission's duties."

The problem with URP's complaint is that it alleges "unlawful" rates without specifying any violation of law. As we have seen, PGE's 2005 rates were lawfully adopted under ORS 757.210, and did not violate that statute, ORS 756.040, ORS 757.259 or ORS 757.268 (SB 408's automatic adjustment clause).⁶ It is not that there are two rate-making standards or authorities. The problem is that URP cannot identify a single law PGE violated, a single unlawful Commission order or a single statute that authorizes the relief it seeks.

Based upon URP's frequent citation to SB 408, it would be reasonable to presume that SB 408 authorizes the Commission to grant this type of relief, but it does not. The SB 408 Legislature amended ORS 757.210 to change how the Commission sets rates prospectively, and it enacted a new automatic adjustment clause, ORS 757.268, for retroactive adjustments effective January 1, 2006. URP seeks relief under neither of those provisions. It seeks retroactive relief before the effective date the Legislature selected for such relief. URP tries to seize the mantle of SB 408, but it cannot abide the choices the SB 408 legislature made.

III. URP'S RELIANCE ON UE 170 IS UNFOUNDED

URP continues to confuse the Commission's orders in UE 170, claiming those orders as supportive authority. In UE 170, the Commission could not have been clearer that its decision was limited to the facts in that case: ratemaking under ORS 757.210 before implementation of the SB 408 automatic adjustment clause.⁷ Neither predicate applies here. First, URP eschews any claim to rate relief under ORS 757.210; and second, the SB 408 automatic adjustment clause is now operative.

Nor is the deferred accounting the Commission authorized in UE 170 any solace for URP. The Commission authorized that deferred account because of its adjustment to the tax

⁶ See PGE's Motion to Dismiss at 6.

⁷ *In re PacifiCorp*, UE 170, Order No. 06-379 at 6-7 ("We affirm our earlier decision, however, that the application of SB 408 to this proceeding required a *prospective adjustment* to PacifiCorp's base rates. * * * Our decision here is limited to the application of SB 408 during the four-month interim period which SB 408 was in effect, but prior to our ability to use the automatic adjustment clause to help align taxes collected and taxes paid.) (Emphasis added.)

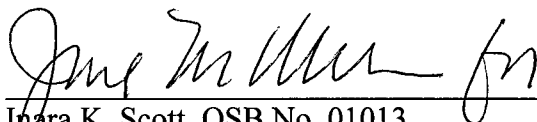
expenses disallowance in the original UE 170 final order. Order No. 06-379 at 1. It had nothing to do with what URP seeks here: a deferred account based solely on SB 408.

Finally, URP appears to concede that the legislative findings in SB 408 have no legal force and effect. URP Resp. at 12. URP's suggestion that legislative findings may be used to interpret a bill's substantive provisions is uncontroversial and also unavailing. In UE 170, the Commission used SB 408 legislative findings to interpret the amendments to ORS 757.210, which it applied in that docket. This is unavailing to URP because its complaint seeks no relief under ORS 757.210 or any of the other substantive statutory provisions of SB 408.

IV. CONCLUSION

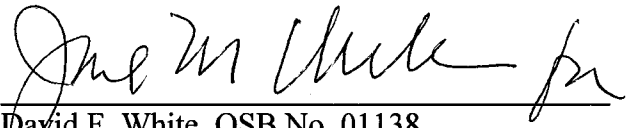
For the reasons stated above and in PGE's Motion to Dismiss, PGE respectfully requests that the Commission dismiss the First Amended Complaint.

DATED this 5th day of January, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT** 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.

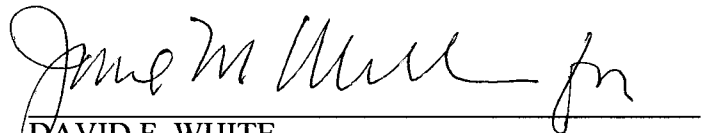
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DATED this 5th day of January, 2007.



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