BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1226

UTILITY REFORM PROJECT and KEN LEWIS, **Complainants/Applicants,** **v.** **PORTLAND GENERAL ELECTRIC CO.,** **Defendant.**	**COMPLAINANTS' RESPONSE TO PGE'S MOTION TO DISMISS AMENDED COMPLAINT**

TABLE OF CONTENTS

URP and Lewis (collectively "Complainants" or "URP") filed its First Amended Complaint on November 1, 2006. PGE filed its Motion to Dismiss Amended Complaint [hereinafter "PGE Motion" or just "PGE" and a page reference] on November 21, 2006, pursuant to the scheduling order issued October 10, 2006.

We accept as PGE's "Answer" the last sentence of its footnote 1 in the PGE Motion to Dismiss Amended Complaint. And, while a motion to dismiss is not a "responsive pleading" under ORCP, we believe that this Answer by PGE has satisfied the requirement of ORS 756.512(2) in that the responsive pleading raises some issue of law or fact.[1]

URP originally filed its Complaint on October 5, 2005. Also on that date URP applied for a deferred accounting under ORS 757.259(2)(e), which docketed UM 1224. Both proceedings arise from the terms of Senate Bill 408. A request for an order establishing a deferred account keeps the disputed funds sequestered until such time as rates are set taking the disposition of this Complaint into account.

I. THE FIRST AMENDED COMPLAINT STATES A CLAIM FOR RELIEF UNDER ORS 756.500.

A. THE COMPLAINED OF CONDUCT IS PROHIBITED.

The Commission has plenary power to protect customers from all unjust or unlawful utility charges (whether such charges are rates established in a rate case or adopted or imposed in any manner). It is within the mandate of the Commission to

1. We also waive the defect in PGE's certificate of service for its motion (wrong date).

"protect [utility] customers, and the public generally, in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction" and "to protect such customers and the public generally from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates." ORS 756.040.

The Amended Complaint alleges that PGE continued during the "Pre-Adjustment Clause Period" (PCAP) to collect in rates charges for state and federal taxes it was not required to pay to such taxing authorities and that such conduct was in violation of SB 408. Hence, those charges are unauthorized by law or unlawful. The Amended Complaint forms the basis for the deferred accounting sought in UM 1224 and for recovery by ratepayers of the deferred amounts to ratepayers, upon final disposition of this Complaint. If the amounts are not so deferred and recovered, then this Complaint's request for a declaration regarding the unlawfulness of PGE's charges to ratepayers for unpaid income taxes during the PCAP forms the basis for future actions by ratepayers against PGE under ORS 756.185, as recognized in ***Dreyer v. Portland General Electric Company***, 341 Or 262, 286-87, 142 P3d 1010, 1023 (2006).[2]

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2. In DR 10 and UE 88, the Commission rules that charging ratepayers for Trojan return on investment after its termination was lawful. URP and others appealed those decisions and obtained their reversal by the courts. In ***Dreyer***, the Oregon Supreme Court recognized that such a determination or declaration of unlawfulness then provides the basis for ratepayer causes of action against the utility under ORS 756.185, unless the Commission provides a remedy for those same unlawful charges.

   In this case, ratepayers can thus proceed against PGE under ORS 756.185, should the charges for unpaid income taxes during the PACP not be remedied by the Commission in this proceeding.

B. THE PROHIBITION ON CHARGING RATEPAYERS FOR UNPAID INCOME TAXES DOES NOT APPLY ONLY TO RATES SET VIA A ORS 757.210 PROCESS.

SB 408 added to ORS Chapter 757 the sentence: "The commission may not authorize a rate or schedule of rates that is not fair, just, and reasonable." This sentence was added to ORS 757.210. That does not mean, however, that this prohibition applies only to rates changed via the ORS 757.210 process. It certainly did not alter and limit, *sub silentio*, the power conferred by ORS 756.040 to protect ratepayers in any controversy within the Commission's jurisdiction. Instead, it established a generic prohibition against such rates.

1. THE SUBSTANTIVE LEGAL STANDARDS FOR RATES ARE THE SAME, REGARDLESS OF THE PROCESS USED TO SET THE RATES.

PGE now contends that the substantive standards for rates set under ORS 757.210 are now different from the substantive standards for rates set by any of the other means available to the Commission and that the new prohibition on charging ratepayers for unpaid income taxes apply only to rates set via the ORS 757.210 process. Some of the other processes, including complaints under ORS 756.500, were described by the Oregon Supreme Court in ***Dreyer v. Portland General Electric Company***, 341 Or 262, 278-79, 142 P3d 1010 (2006).

> We share plaintiffs' skepticism of the proposition that is at the heart of PGE's argument--that ORS 757.225 manifests a legislative intent that PUC-approved rates be treated as conclusively lawful for all purposes "until they are changed as provided in ORS 757.210 to 757.220." We find it significant that, although the public utility statutes provide more than one process for changing the filed rates for a utility, ORS 757.225 refers to only

> one such process--the utility-initiated process "provided by ORS 757.210 to 757.220." If PGE's interpretation of ORS 757.225 were correct, then *only* rate changes adopted pursuant to the utility-initiated ratemaking process at ORS 757.210 to 757.220 would be valid. A necessary corollary of that interpretation would be that rate changes adopted under any alternative process provided in the statutes, including the ratepayer-or PUC-initiated process set out at ORS 756.500 to 756.515, would *not* produce a binding change to the "lawful" rate. Those two propositions do not persuade us.

For example, a utility can initiate a change in its rates by filing a complaint under ORS 756.500(5).

PGE's new argument is that the legal substantive standards applicable to rates set via other processes are now different than apply to rate changes initiated under ORS 757.210. We see no basis in SB 408 or in logic for this conclusion. PGE cites nothing in SB 408 or its legislative history that supports the conclusion that it intended to exclude phony tax charges from only those utility rates established by ORS 757.210 and not by any other means or that it intended to establish a different set of substantive standards applicable only to rates set under that particular procedure. Note that all of Section 2 of SB 408 refers generically to "amounts collected from customers" and to "utility rates." It does not refer to utility rates set under ORS 757.210 alone.

Further, it makes no sense to suggest that different substantive standards apply to allowable rates, depending upon the process used to set them. The PGE Motion itself recognizes this. PGE (p. 5) quotes from OPUC Order No. 06-379 about judging reasonableness of rates "at an instant in time." The Commission was there addressing whether the rates approved for PacifiCorp were so low as to violate ORS

756.040, which prohibits "unjust and unreasonable exactions" and requires "fair and reasonable rates." But wait, now PGE claims that SB 408 established a new and **different** standard for rates that are changed pursuant to ORS 757.210 (as opposed to changed in any other manner).

PGE is thus arguing that the substantive standard for rates set under ORS 757.210 is now "fair, just and reasonable" and that this new standard is different from the standard that applies to utility rates set by the OPUC in any manner other than ORS 757.210. Note, however, that ORS 756.040 uses the same words in establishing standards for rates that apply to any OPUC process:

a. ORS 756.040 forbids exactions (charges) that are "unjust and unreasonable" and requires that rates be "fair and reasonable."

b. ORS 757.210 now forbids rates that are "not fair, just and reasonable."

Both sections require the same thing: rates that are "fair", "just" (not "unjust") and "reasonable." The only difference is that ORS 756.040 forbids "unjust" rates, while new ORS 757.210 requires "just" rates. We offer the proposition that these are the same standard.

And the standards in ORS 757.210 and ORS 756.040 are "two-way," in that the Commission cannot set rates that are too low to be fair, just, and reasonable. It is doubtful that PGE would argue that the Commission is now free to authorize rates or rate schedules that are unfair, unjust, or unreasonable to utilities in proceedings which do not arise under ORS 757.210.

2. ACCORDING TO PGE, ALL RATES ARE SET VIA A ORS 757.210 PROCESS.

Further, PGE has contended in 2006 that all rates which actually go into effect are filed under ORS 757.210. If so, then all rates are subject to the substantive prohibition on charging ratepayers for unpaid taxes, even under PGE's new legal theory. According to PGE:

> **(1) ORS 756.500-.610.**
>
> Of course, the PUC has this "ratemaking procedure available" to it. ***Multnomah County v. Davis***, 35 Or App 521, 525, 581 P2d 968 (1978). The PUC can always initiate a proceeding on its own, or on a ratepayer's complaint, to investigate the appropriateness of the rates. (Id.) Suppose there is such a proceeding, and suppose it ends with an order that the existing rates should be changed in such and such a way. ORS 756.558 (2). The rates still have not changed, not yet. Since rates are expressed in cents per kilowatt-hours for each class of customer (Rep App 4), one will rarely find those figures in the PUC rate order, if ever. One additional step is necessary -- the translation of the order's findings and conclusions into so many cents per kilowatt-hour for each class of customer. Until that translation is performed, no one even knows how many cents per kilowatt-hour the new rate will actually change to for customer X. It is the utility's job to perform that translation and produce the dozens of printed rate schedules that flow from it, like Rep App 4.
>
> Consider the final words of the rate order that we have quoted in the footnote. This order came out of the very kind of proceeding that URP claims to be an exception, i.e. a ratemaking procedure initiated pursuant to ORS 756.500-.610. (Rep App 5.) Notice that the rates did not change when the PUC issued the order. (See previous footnote.) They did not change until the utility translated the order into new printed schedules and filed them at the PUC. (Id.) That action -- the action that actually changed the rates -- is governed by the italicized language in the following statute:
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> > "No change shall be made in any schedule * * * except upon 30 days' notice to the Public Utility Commission. * * * However, the commission, for good cause shown, may allow changes without requiring the 30 days' notice *by filing an order specifying the*

> *changes to be made and the time when they shall take effect*. * * *. (Emphasis added.)
>
> What statute is this? This is ORS 757.220. Recall that ORS 757.225 provides that the existing rates remain the lawful rates "Until they are changed as provided in ORS 757.210-.220." Therefore, the ratemaking procedure in ORS 756.500-.610 that plaintiff refers to culminates in an order "as provided in ORS 757.210-.220." When URP states that these statutes "allow only the utility to initiate a change of rates," they are plainly wrong, as shown by the italicized language in the statute quoted above. (Red brief 52.)

Reply by Portland General Electric to Answering Brief in ***URP v. OPUC (UM 989)***, CA No. A123750 (May 2, 2006), pp. 21-22.

Note that ORS 757.210 applies "Whenever any public utility files with the Public Utility Commission any rate or schedule of rates stating or establishing a new rate or schedule of rates or increasing an existing rate of schedule of rates . . ." Thus, when the utility files its so-called compliance tariffs under ORS 757.220, the provisions of ORS 757.210 must necessarily also apply. PGE's new position thus sets up a Catch-22:

a. PGE now contends that different legal standards apply to rate changes initiated under ORS 756.500 or ORS 756.515 than to rate changes initiated under ORS 757.210, but

b. PGE also contends that every rate change initiated under ORS 756.500 or ORS 756.515 must be implemented by means of a utility filing that is expressly subject to ORS 757.210.

C. A DEFERRED ACCOUNTING IS A POTENTIAL REMEDY IN ANY PROCEEDING INITIATED BY UTILITIES OR RATEPAYERS.

ORS 757.259(2) authorizes the establishment of a deferred account upon application by a ratepayer or a utility. Specifically, a ratepayer may seek deferred

accounting for "utility * * * revenues" which "should be deferred in order to * * * to match appropriately the costs borne by and benefits received by ratepayers." ORS 757.259(2)(e). A deferred account is a provisional remedy preserving disputed funds pending ultimate decision on the facts, and it is not a cause of action. There is no statute, rule, order or case law limiting this remedy to any particular type of OPUC proceeding, whether initiated by the Commission, the utility, or a ratepayer.

Suppose the 109th Congress reduces the top federal tax bracket to 10% before it adjourns. Surely a deferred account would be appropriate to sequester all the amounts collected in rates which had been based on the current federal tax rate. The deferred account sought here is for those amounts charged to PGE ratepayers during the PACP which are not allowable under SB 408. The deferred account is thus necessary to appropriately match the costs borne by and benefits received by ratepayers. During the PACP, there is a mismatch, as ratepayers are paying for "federal income taxes" and "state income taxes" that are in fact not paid by PGE.

II. BEING "BETWEEN RATE PROCEEDINGS" IS IMMATERIAL TO THE COMPLAINT.

PGE (p. 5) contends, "What happens between rate proceedings is of no moment" and that PGE gets to keep the unlawful charges for unpaid income taxes during the PACP simply because (pp. 4-5) "PGE did not ask the Commission during the Four-Month Period to adopt new rates pursuant to ORS 757.210."

First, PacifiCorp also "did not ask the Commission during the Four-Month Period to adopt new rates pursuant to ORS 757.210." Instead, PacifiCorp filed its general

rate case application in November 2004. PGE never explains why the timing of general rate cases matters.

Second, this argument fully depends on PGE's other contention that the legal standards applicable to utility rates are different, if the rates are set under ORS 757.210 and not by some other procedure.

Third, PGE's statement is contradicted by OPUC Order No. 06-379, which granted deferred accounting for PacifiCorp's unpaid income taxes. The time period for which the Commission granted deferred accounting in OPUC Order No. 06-379 was indeed "between rate proceedings." The effective date of OPUC Order No. 05-1050 was October 4, 2005. The period for which the Commission later granted deferred accounting commenced October 8, 2005, with the filing of PacifiCorp's application for deferred accounting. Thus, PacifiCorp sought and obtained a deferred account for a period following the effective date of the rates established in its most recent rate case. Similarly, Complainants here seek a deferred account for a period following the effective date of the rates established in PGE's most recent rate case, which effective date was either October 1, 2001 (UE 115) or perhaps October 5, 2004 (UE 161).

Fourth, no one disputes that the rates in place for PGE as of September 2, 2005, had been established pursuant to ORS 757.210. The same was true for PacifiCorp as of the date it filed its application for deferred accounting on October 8, 2005. The fact that both utilities' rates had been set in a ORS 757.210 process did not render them immune from the creation of a deferred account for the purpose of ensuring that ratepayers are not charged for unpaid income taxes, as the passage of SB 408

changed both the nature of the costs which OPUC could authorize as fair, just and reasonable for a utility to recover in rates, as well as the costs to be borne by ratepayers.

Fifth, PGE's contention is also contradicted by OPUC Order No. 06-379, which states:

> An important aspect of our decision, which we further clarify here, is the delayed implementation of SB 408's automatic adjustment clause. Although the legislature included an emergency clause to immediately implement its findings and amendments to ORS 757.210, it expressly reserved the application of the automatic adjustment clause "to taxes paid to units of government and collected from ratepayers on or after January 1, 2006." Section 4(2). Due to those timing differences, an approximate four-month period existed during which **the legislature had mandated that rates reflect taxes paid to government units** but did not yet allow the use of the true-up mechanism to accomplish that mandate.

OPUC Order No. 06-379, p. 6. Note that the Commission stated that, during the approximate 4 month period at issue in the First Amended Complaint, "the legislature had mandated that rates reflect taxes paid to government units." That mandate is what the First Amended Complaint seeks to implement. There is nothing in the Commission's statement of the mandate that limits it to only those rates which happen to be set in a proceeding initiated under ORS 757.210.

PGE (p. 6) notes that URP did not raise any issues regarding charges to ratepayers for unpaid taxes in UE 180. That is because the rates adopted in UE 180 will be in effect during a period of time after the effective date of the automatic adjustment clause required by SB 408. There was no purpose to raising the issue in UE 180.

III. THE COMMISSION HAS INTERPRETED SB 408 IN LIGHT OF ITS COMPELLING PREAMBLE.

PGE (p. 6) states that the Complaint is based entirely on "a single sentence from SB 408's preamble" and that this "legislative finding and declaration cannot bear such weight." The Commission has already considered this issue and ruled to the contrary in OPUC Order No. 06-379.

> Next, PacifiCorp contends that our reliance on legislative findings in the bill's preamble was improper and, even assuming they could be considered, faults our failure to examine other findings that support the continued use of the stand-alone methodology.

OPUC Order No. 06-379, p. 5.

> CUB, ICNU and URP respond that, contrary to PacifiCorp's arguments, this Commission properly interpreted and applied SB 408 to this rate proceeding. These parties contend that, in addition to establishing a backward-looking automatic adjustment clause, SB 408 established a new legislative standard for setting the tax expense in rates on a going-forward basis. As ICNU explains:
>
> > SB 408 is an unequivocal legislative directive that the mismatch between "taxes collected" and "taxes paid" that resulted under the stand-alone methodology is unacceptable, and the statute's emergency clause demonstrates that the legislature intended the Commission to correct that mismatch immediately.
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> ICNU Post-Hearing Brief at 3 (May 16, 2006).
>
> CUB and ICNU also contend that it was appropriate and necessary to look at the legislative findings in the preamble, and that this Commission properly found a connection with the use of the phrase "fair, just and reasonable" throughout the bill. As to the legislative history, CUB, ICNU and URP contend that PacifiCorp's reliance on the cited statements is misplaced. The parties explain those statements merely clarify that SB 408, while not fundamentally altering ratemaking in general, requires that taxes in utility rates must be better aligned with actual utility tax payments in order to comply with the law.

OPUC Order No. 06-379, pp. 5-6. The Commission drew the same conclusion in OPUC Order No. 05-1050:

> However, a review of the general policy statement found in the preamble of SB 408 causes us to believe that the legislature intended immediate action. This preamble language states: "Utility rates that include amounts for taxes should reflect the taxes that are paid to units of government to be considered fair, just and reasonable." SB 408, Section 2 (1)(f).

OPUC Order No. 05-1050, p. 17.

PGE (pp. 6-7) also contends that the preamble to a statute has no legal force or effect. Standing alone, that is true. But the Oregon Supreme Court has used preambles to help discern the intent of statutes. ***State v. Hammerton***, 320 Or 454, 465, 886 P2d 1012 (1994). ***Sunshine Dairy v. Peterson***, 183 Or 305, 317-18, 193 P2d 543 (1948) stated:

> The Milk Control Act must be classified as a remedial statute, and in its construction, it is proper to consider the evils which the legislature declared to exist, although the essential question in the case at bar relates to the remedies which the legislature authorized in view of the declared evils. While we have held that the preamble of a statute is not an essential part thereof, and neither enlarges nor confers powers (***Portland Van and Storage Company v. Hoss***, 139 Or. 434, 9 P.2d 122, 81 A.L.R. 1136), nevertheless, in a doubtful case it has been held that the preamble may be considered in the process of construction. This principle has been recognized in the case of the Milk Control Act. Speaking of the evils which the Oregon Milk Control law is intended to correct, this court said: '* * * They are recited in the preamble to the act, and may be summarized as the demoralization of a paramount industry resulting from the economic emergency and unfair, unjust and destructive economic trade practices which impair the industry in the state and the constant supply of pure, wholesome milk to its inhabitants, and constitute a menace to the health and welfare of the inhabitants of the state. There is a further declaration that the milk industry is a business affecting the public health and interest. In the absence of countervailing evidence-and there is none-these recitals

> must be given variety [verity] by the court, * * *'. ***Savage v. Martin***, 161 Or. 660, 91 P.2d 273, 280.

Even the case cited by PGE states that preambles can indeed form the basis for statutory interpretation. In ***Department of Land Conservation and Development v. Jackson County***, 121 Or App 210, 217, 948 P2d 731 (1997), the court stated:

> Statutes and rules often contain statements of general policy, like the statement that DLCD cites in this rule. Such expressions *can* serve as contextual guides to the meaning of particular provisions of the statutes or rules, as much as any other parts of the enactment can. At the same time, the use of expressions of policy as context is subject to the same limitations as any other proffered type of context: they are instructive only insofar as they have a genuine bearing on the meaning of the provision that is being construed.

Here, the Commission in OPUC Order No. 06-379 has concluded that the SB 408 preamble does have a genuine bearing on the interpretation of the substantive provisions of the statute. In fact, the Commission in OPUC Order No. 05-1050 expressly cited this case in support of its decision to consider SB 408, Section 2 (1)(f), in interpreting the requirements of SB 408. In later accordance was ***Warburton v. Harney County***, 174 Or App 322, 329, 25 P3d 978 (2001):

> While it is true that a policy statement, such as this one, should not provide an excuse for delineating specific policies not articulated in the statutes, such a general purpose statement may serve as a contextual guide for the meaning of a particular statute. ***DLCD v. Jackson County****,* 151 Or App 210, 218, 948 P2d 731 (1997), *rev den* 327 Or 620, 971 P2d 412 (1998).

PGE (pp. 7-8) again contends that the substantive change established by SB 408's outlawing of rates that include unpaid taxes applies only in the context of rate cases initiated under ORS 757.210. We have answered that argument above. In fact, the Commission in OPUC Order No. 06-379 granted deferred accounting for amounts

collected by PacifiCorp after the effective date of the rate order entered under ORS 757.210. The prohibitions in SB 408 apply to the substance of the rates charged by the utility, whether those rates are established pursuant to ORS 757.210 or pursuant to other statutory means for changing rates.

Dated: December 15, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed served for foregoing COMPLAINANTS' RESPONSE TO PGE'S MOTION TO DISMISS AMENDED COMPLAINT 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.

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