

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

2
3 **UM 1226**

4
5 **UTILITY REFORM PROJECT and**
6 **KEN LEWIS,**
7
8 **Complainants/Applicants,**

COMPLAINANTS' RESPONSE
TO PGE'S AMENDED MOTION
TO DISMISS, ABATE, OR MAKE
MORE DEFINITE AND CERTAIN

9
10 **v.**

11
12 **PORTLAND GENERAL ELECTRIC CO.,**
13
14 **Defendant.**

15
16
17 **I. OVERVIEW.**

18
19 PGE'S Amended Motion to Dismiss, Abate, or Make More Definite and Certain
20 [hereinafter "PGE Motion" or just PGE and a page reference], p. 2, claims that it
21 cannot understand the Complaint, because the Complaint states that PGE's rates
22 are unjust and unreasonable, as of September 5, 2005, only once. Brevity is the
23 hallmark of clarity. In light of subsequent developments, however, including the
24 Commission's issuance of OPUC Order No. 06-379 and the decision of the Oregon
25 Supreme Court in *Dreyer v. Portland General Electric Company*, --- P.3d ---,
26 2006 WL 2507055, Complainants ("we") do not object to filing an amended
27 complaint to make our claims more definite and certain.

28 All of PGE's arguments should be evaluated in light of OPUC Order No. 06-
29 379 and *Dreyer*. In OPUC Order No. 06-379, the Commission granted the creation

1 of a deferred account in nearly the precise circumstances presented here, except
2 that the deferred account contained money to the credit of the utility, while the
3 deferred account we seek will contain money to the credit of the ratepayers. In
4 both cases, the amount to be deferred for later recovery/crediting in rates is the
5 same: The difference between the amount to be charged to ratepayers for "federal
6 income taxes" and "state income taxes" under (a) the OPUC's past methodology¹
7 and (b) the requirements of SB 408 during the period commencing during the
8 period after the effective date of SB 408 but before the effective date of the
9 automatic adjustment clause for the utility that the OPUC must eventually create
10 under the terms of SB 408.

11 It is not known what effective date the Commission will choose for the
12 amounts to be accounted for in the SB 408 automatic adjustment clauses. Section
13 4 (2) of SB 408 requires that "the automatic adjustment clause shall apply only to
14 taxes paid to units of government and collected from ratepayers on or after January
15 1, 2006." The Commission could attempt to make the effective date some date
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17 January 1, 2006." So we do not know for what period of time the automatic
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19 1. The Commission has referred to this as the "stand-alone" methodology, but other
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4 If the Commission adopts some date later than April 2006, then this case will need
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6 taxes actually paid during (1) the Enron 100% ownership period and (2) the Enron
7 57% ownership period. But the extent to which Enron owned or owns PGE is not
8 material. What is material is the difference between taxes charged to ratepayers
9 and taxes actually paid.

10 SB 408 creates a new category or species of unacceptable rates, which the
11 Commission recognized in OPUC Order No. 06-379 and in OPUC Order No. 05-
12 1050: Rates which include an amount for income taxes other than "taxes that are
13 paid to units of government." OPUC Order No. 06-379, p. 2. By deeming that "fair,
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20 to determine whether rates are acceptable or even allowable based on the
21 presence of absence of one particular element of cost (or alleged cost). SB 408

1 changes those terms, however, so that rates which include a particular item of cost
2 (assumed taxes higher than actually paid taxes) are automatically not "fair, just and
3 reasonable" and therefore are not allowed under Oregon statutes and are beyond
4 the power of the OPUC to authorize the utility to charge. A term that accurately
5 describes such an element of cost that cannot lawfully be included in rates is
6 "unlawful."

7 Thus, when our Complaint (p. 1) alleged that "PGE's rates, since September
8 2, 2005, and continuing to the present, are not just and reasonable and are in
9 violation of SB 408 (2005), because they contain approximately \$92.6 million in
10 annual charges for state and federal income taxes that are not being paid to any
11 government," we were using "just and reasonable" in the new sense--the sense
12 required by SB 408. SB 408 does not envision or even allow the usual overall
13 balancing test applied to determine whether utility rates are "just and reasonable"
14 as a whole, and our allegations were not related to any sort of overall balancing
15 test. Instead, our allegations were focused on the element of alleged cost that SB
16 408 deems to be not allowed in rates under Oregon law: amounts for income taxes
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11 have an effective date of January 1, 2006, although that could change. We shall
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13 PGE remained wholly-owned by Enron.

14 Also, it remains to be seen whether PGE will, as it claims, "file its own federal
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19 PGE then refers to the administrative rules to implement the automatic
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21 2. Alternatively, the starting date for amounts to be credited to the deferred account may be
22 the date of the request for deferred accounting, which was October 5, 2005.

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4 18. This section of SB 408 is in addition to the parts requiring the adoption of
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6 The automatic adjustment clause, based upon prior year collections and
7 tax payments, is the exclusive ratemaking method under SB 408 for
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9 form the basis for ratepayer suit pursuant to ORS 756.185. The implementation of
10 either remedy does not require a rate case or changes to rates. As the Court
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12 If the PUC determines that it can provide a remedy to ratepayers, then
13 the present actions may become moot in whole or in part. If, on the other
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16 Certainly, after the PUC has made its ruling, plaintiffs will retain the right
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24 3. If necessary, we will file an Amended Complaint with this included in the relief requested
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5 dispute—that ratemaking is a quasi-legislative function that is vested in the
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12 We disagree. Although a jury theoretically could go about deciding the
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21 **Or.App. 702. The first approach arguably would invade the PUC’s**
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25 *Id.* (emphasis added). The Complaint does not seek to initiate a rate case, based
26 on any test year, but to recover for ratepayers PGE’s unlawful charges during the
27 PACP. As the Court in *Dreyer* made absolutely clear, rates which the OPUC
28 deems to be “fair and reasonable” can nevertheless be unlawful and therefore
29 entitle ratepayers to relief in some forum.

30 The Complaint has no concern about PGE’s corporate structure; it concerns
31 only the lack of correlation between PGE’s tax charges to ratepayers and the tax
32 payments by PGE or on behalf of PGE to government entities during the PACP.
33 The Complaint does allege that PGE is charging ratepayers for income taxes that

1 are not being paid, contrary to PGE's flatly wrong assertion. If PGE needs
2 clarification, then Complainants refer PGE to Complaint, p. 1.

3 PGE's citation (pp. 4-5) of an URP filing in UM 1206 is irrelevant, as it has
4 nothing to do with the PACP.

5 PGE (p. 5) asserts that the SB 408 automatic adjustment clause rules "will
6 address the issue the Complaint raises." Clearly not. Those rules apply to rates
7 collected on or after the effective date of the automatic adjustment clause, which
8 may be January 1, 2006 or some later date. Those rules do not apply to the
9 PACP. The Commission in OPUC Order No. 06-379 rejected a similar argument by
10 PacifiCorp. To the extent such automatic adjustment clauses are actually
11 implemented and actually reduce or eliminate the divergence between the "income
12 taxes" PGE charges to ratepayer and the "income taxes" PGE actually pays to
13 government, then ratepayers will be entitled to less relief under this Complaint. But,
14 since the automatic adjustment clause cannot reach back prior to January 1, 2006,
15 ratepayers will be entitled to at least some relief under this Complaint.

16 PGE (pp. 6-7) tries to shoehorn the Complaint into the UE 180 rate case. But
17 the Complaint addresses the period commencing September 2, 2005, not the period
18 commencing sometime in 2007. Whatever PGE charged to ratepayers,
19 commencing September 2, 2005, would surely be ruled irrelevant in UE 180, as it
20 involves future rates under a future test period. This is, of course, a version of the

1 "intervenors must participate in every OPUC rate proceeding and must appeal
2 every order" argument that the Oregon Supreme Court soundly rejected in *Dreyer*.

3 PGE (p. 7) claims that the last 4 months of 2005 are "irrelevant to URP's
4 complaint," because "we are more than nine months past the date on which the SB
5 408 automatic adjustment clause became operative." In the real world, there are
6 no SB 408 automatic adjustment clauses operative, as the Commission has
7 adopted none. And, of course, those clauses cannot address the period prior to
8 January 1, 2006. The Complaint need not "turn back the clock to the fall of 2005,"
9 because it was filed in the fall of 2005 and properly requested creation of a deferred
10 account. The only reason time has passed is because the Commission decided to
11 abate this docket, pending the outcome of rehearing and reconsideration in UE 170.

12 PGE (p. 8) raises the specter of "retroactive ratemaking." Because we timely
13 filed for deferred accounting, the statutes expressly authorize such ratemaking.
14 Having established the deferred account and placed in it the amounts PGE charged
15 in violation of SB 408, prior to the effective date of the automatic adjustment clause,
16 if and when that is adopted by the Commission, the amount owed to ratepayers in
17 the deferred account could be returned to ratepayers in any rate proceeding.

18 The UCB 13 proceeding is not relevant to Complaint, which alleges violation of
19 SB 408, which did not exist in 2003. PGE's references to UCB 13 are misplaced.
20 The orders cited by PGE were reversed by the Marion County Circuit Court. The

1 case was later, on remand, resolved by a voluntary withdrawal of the complaint,
2 which did not resolve any issues.

3 To the extent relevant, we incorporate by reference the Complainants'
4 Response to PGE Motion to Dismiss, Abate, or Make More Definite and Certain,
5 filed December 5, 2005.

6
7 Dated: September 26, 2006

Respectfully Submitted,

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10949 S.W. 4th Avenue
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Attorney for
Complainants/Applicants

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CERTIFICATE OF SERVICE

I hereby certify that I filed served for foregoing COMPLAINANTS' RESPONSE TO PGE MOTION TO DISMISS, ABATE, OR MAKE MORE DEFINITE AND CERTAIN 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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Portland, OR 97204

David B. Hatton
Assistant Attorney General
Oregon Department of Justice
Regulated Utility & Business Section
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Salem, OR 97301-4096

Linda K. Williams
Kafoury & McDougal
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Portland, OR 97219-6305

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

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Daniel W. Meek

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6 address the issue the Complaint raises." Clearly not. Those rules apply to rates
7 collected on or after the effective date of the automatic adjustment clause, which
8 may be January 1, 2006 or some later date. Those rules do not apply to the
9 PACP. The Commission in OPUC Order No. 06-379 rejected a similar argument by
10 PacifiCorp. To the extent such automatic adjustment clauses are actually
11 implemented and actually reduce or eliminate the divergence between the "income
12 taxes" PGE charges to ratepayer and the "income taxes" PGE actually pays to
13 government, then ratepayers will be entitled to less relief under this Complaint. But,
14 since the automatic adjustment clause cannot reach back prior to January 1, 2006,
15 ratepayers will be entitled to at least some relief under this Complaint.

16 PGE (pp. 6-7) tries to shoehorn the Complaint into the UE 180 rate case. But
17 the Complaint addresses the period commencing September 2, 2005, not the period
18 commencing sometime in 2007. Whatever PGE charged to ratepayers,
19 commencing September 2, 2005, would surely be ruled irrelevant in UE 180, as it
20 involves future rates under a future test period. This is, of course, a version of the

1 "intervenors must participate in every OPUC rate proceeding and must appeal
2 every order" argument that the Oregon Supreme Court soundly rejected in *Dreyer*.

3 PGE (p. 7) claims that the last 4 months of 2005 are "irrelevant to URP's
4 complaint," because "we are more than nine months past the date on which the SB
5 408 automatic adjustment clause became operative." In the real world, there are
6 no SB 408 automatic adjustment clauses operative, as the Commission has
7 adopted none. And, of course, those clauses cannot address the period prior to
8 January 1, 2006. The Complaint need not "turn back the clock to the fall of 2005,"
9 because it was filed in the fall of 2005 and properly requested creation of a deferred
10 account. The only reason time has passed is because the Commission decided to
11 abate this docket, pending the outcome of rehearing and reconsideration in UE 170.

12 PGE (p. 8) raises the specter of "retroactive ratemaking." Because we timely
13 filed for deferred accounting, the statutes expressly authorize such ratemaking.
14 Having established the deferred account and placed in it the amounts PGE charged
15 in violation of SB 408, prior to the effective date of the automatic adjustment clause,
16 if and when that is adopted by the Commission, the amount owed to ratepayers in
17 the deferred account could be returned to ratepayers in any rate proceeding.

18 The UCB 13 proceeding is not relevant to Complaint, which alleges violation of
19 SB 408, which did not exist in 2003. PGE's references to UCB 13 are misplaced.
20 The orders cited by PGE were reversed by the Marion County Circuit Court. The

1 case was later, on remand, resolved by a voluntary withdrawal of the complaint,
2 which did not resolve any issues.

3 To the extent relevant, we incorporate by reference the Complainants'
4 Response to PGE Motion to Dismiss, Abate, or Make More Definite and Certain,
5 filed December 5, 2005.

6
7 Dated: September 26, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed served for foregoing COMPLAINANTS' RESPONSE TO PGE MOTION TO DISMISS, ABATE, OR MAKE MORE DEFINITE AND CERTAIN 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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Dated: September 26, 2006

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