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VIA E-FILING & FIRST CLASS MAIL

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

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of Portland General Electric Company's Amended Motion to Dismiss or Make More Definite and Certain. 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,

Leslie Hurd, Legal Assistant to
David F. White

/ldh
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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 AMENDED MOTION TO DISMISS OR MAKE MORE DEFINITE AND CERTAIN**

Pursuant to the Revised Scheduling Memorandum dated August 15, 2006, Portland General Electric Company ("PGE") hereby files this Amended Motion to Dismiss or Make More Definite and Certain. This Amended Motion to Dismiss replaces and supersedes PGE's original Motion to Dismiss.

Pursuant to OAR 860-013-0031 and ORCP 21(A) and (D),[1] PGE requests that the Commission or the Administrative Law Judge ("ALJ") enter an order or ruling:

1. Dismissing Utility Reform Project's and Ken Lewis' ("Complainants" or "URP") Complaint because it fails to state ultimate facts sufficient to constitute a claim; or

2. Ordering Complainants to make their allegations more definite and certain.[2]

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[1] ORCP 15 extends the time for filing an answer pending the outcome of a motion to dismiss. Because the Commission rules generally adopt the Oregon Rules of Civil Procedure where there is no governing Commission rule or order (OAR 860-011-0000(3)) and there is no applicable Commission rule or order, ORCP 15 should apply. If the Commission deems that ORCP 15 does not apply, PGE hereby denies all material allegations in the Complaint and will file an answer to that effect if the Commission requires one at this stage of the proceeding.

[2] Complainants have also filed an Application for Deferred Accounting, which we address in PGE's Amended Comments on URP's Application for Deferred Accounting, filed separately.

I. INTRODUCTION

In their Complaint, Complainants appear to allege that PGE's rates are unjust and unreasonable as of September 2, 2005, the effective date of Senate Bill 408 ("SB 408"). We say "appears" because Complainants allege unjust and unreasonable rates only in an introductory paragraph to the Complaint, and they neither repeat nor elaborate on that claim in the body of the Complaint.

The substance of the allegation that PGE's rates are unjust and unreasonable seems to be that, in the past, PGE collected amounts in rates for federal and state income taxes and remitted those amounts to its parent company, Enron Corp. ("Enron"), which filed consolidated income tax returns. Complaint ¶ 5A. According to Complainants, SB 408 provides that a utility's rates should reflect only collections for taxes that the utility pays directly to a governmental entity or taxes the parent pays that are properly attributed to the utility. *Id.*, ¶ 5B-D. Because PGE's rates have in the past included a component for income taxes PGE paid to Enron, Complainants allege that PGE's rates will be unjust and unreasonable going forward. *Id.*, p. 1 and ¶ 5.

This Complaint is untimely and unnecessary. First, the Complaint ignores what is now a fact: Enron no longer owns PGE and that in any reasonably representative test-year for new rates pursuant to the Complaint, PGE will file its own federal and state tax returns and make no tax payments to a parent entity.[3] That PGE remitted its tax charges to its parent company when it was a subsidiary establishes nothing about PGE's tax payments in the future as the entity that will file federal and state tax returns and pay federal and state taxes directly to taxing authorities.

Second, the Commission's pending issuance of administrative rules implementing SB 408, in particular the rules relating to the automatic adjustment clause, renders this Complaint moot. The Complaint alleges that rates are unjust and unreasonable because of the potential

[3] *See* PGE's testimony in UE 180, PGE/200, Tooman-Tinker/12-13.

mismatch between the tax expense collected in rates and the taxes paid. The entire purpose of SB 408's automatic adjustment clause is to identify such mismatches and reconcile them.

Last, on March 15, 2006, PGE filed its general rate case, which will result in a Commission final order in December 2006 setting new rates effective January 16, 2007. UE 180, Prehearing Conference Report (April 15, 2006). It is pointless and a waste of the parties' and the Commission's resources to engage in a parallel rate-making complaint process when the parties are currently engaged in a review of all rate-making components in PGE's concurrent general rate case. Any concerns regarding the inclusion of PGE's tax expense in rates must be raised in docket UE 180, which will result in a Commission final order setting "fair, just, and reasonable" rates on a prospective basis.

II. DISCUSSION

A. IF THE COMPLAINT ALLEGES UNJUST AND UNREASONABLE RATES, THE COMMISSION SHOULD DISMISS IT

1. PGE WILL BE A STAND-ALONE ENTITY IN ANY REASONABLY REPRESENTATIVE TEST YEAR

Complainants' specific allegations about PGE's tax payments, Complaint ¶ 5A, are entirely the product of PGE's historic status as a subsidiary in a holding company structure. Such allegations regarding the past are irrelevant to setting PGE's rates on a prospective basis. In light of the distribution of PGE common stock terminating Enron's ownership in April 2006, PGE will operate as its own parent entity, filing its own consolidated state and federal tax returns, and paying state and federal taxes directly to taxing authorities. UF 4218/UM 1206, Order No. 05-1250 (Dec. 14, 2005) (approving issuance and distribution of new PGE common stock). PGE's status as a subsidiary of a parent company that filed consolidated tax returns is not evidence of what PGE will pay taxing authorities in the future as the consolidated entity responsible for paying taxes.

If the Commission permits URP to proceed with a rate case in response to this Complaint, that case will be for the purpose of determining whether to change PGE's rates

prospectively.[4] In such a rate case, the appropriate rate-making approach would treat PGE as a stand-alone entity in any representative test year. PGE's past status as a subsidiary in a holding company would provide no basis for a tax-related adjustment to PGE's rates. Rather, the Commission and parties would focus on PGE's forecasted tax payments going forward. The Complaint contains no allegations about PGE on a going-forward basis.

Complainants do not, and can not, allege the essential predicate of its complaint—that PGE would continue to pay income tax payments to a parent entity in a holding company structure. Even when the Complaint was filed, Complainants could not allege in good faith that Enron's ownership was likely to continue, given the then-pending distribution of PGE's common stock held by Enron. Accordingly, it appears that this Complaint is based not on a violation of SB 408, or any other statute or rule, but on Complainants' speculation that PGE's rates would be unjust and unreasonable in the future if PGE remained as an Enron subsidiary and Enron filed consolidated tax returns. That speculation was unlikely when URP filed its Complaint. It has now been proven false.

In fact, URP has acknowledged that the issuance of new PGE common stock and the termination of Enron's ownership of PGE undercut the foundation of the Complaint by ending PGE's membership in the Enron consolidated tax group. It was PGE's membership in that consolidated tax group that created differences between taxes collected in rates and taxes paid by Enron to taxing authorities. In UM 1206/UF 4218, URP filed an application for reconsideration, claiming that the stock distribution would harm customers because after the issuance of new PGE common stock, PGE would begin to make tax payments directly to taxing authorities:

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[4] We do not understand the Complaint to be seeking a retroactive adjustment to PGE's rates for the period before the effective date of SB 408 to reflect PGE's remittance of tax-related charges to its parent Enron. If we are mistaken, and Complainants are seeking retroactive ratemaking here, then their Complaint should be dismissed because, among other reasons, there is no basis in Oregon law for such a retroactive adjustment, particularly, where, as here, there has been no appeal of a final Commission order setting PGE's rates. *See Pacific Northwest Bell v. Eachus*, 135 Or App 41, 49-50, 898 P2d 774 (1995).

> But Enron has stated that it cannot or will not include in its consolidated returns any corporation, unless it owns at least 80% of that corporation. Under the proposal in this docket, PGE will fail that test in just a few months. In fact, the Applicants tout the deconsolidation of PGE from Enron as some sort of benefit, but it is certainly not a benefit for PGE ratepayers. This deconsolidation will cost PGE ratepayers approximately $93 million per year for the foreseeable future, as it will remove PGE from one of the extremely rare benefits of being owned by Enron—the opportunity to avoid paying income taxes.

URP Application for Reconsideration at 4-5. The Commission rejected URP's Application for reconsideration. UM 1206/UF 4218, Order No. 06-156 (April 10, 2006). The Complaint is no longer viable in light of the Commission's order permitting the stock issuance and distribution to go forward and ending Enron's ownership of PGE.

2. SB 408 AND ITS ADMINISTRATIVE RULES WILL FULLY ADDRESS THIS ISSUE

The Commission should also dismiss the Complaint because SB 408, and the Commission's rules enacted under SB 408, will address the issue the Complaint raises. In Section 3(4) of SB 408, the Legislature provided for the establishment of an automatic adjustment clause for utilities effective January 1, 2006. ORS 757.268(6); SB 408, § 4(2). The central purpose of that adjustment clause is to determine any difference between the tax expense included in rates and the taxes paid to taxing authorities. *Id.* The rules implementing SB 408 will provide specific rules for determining whether any such difference exists and provide a mechanism for reconciling such variations. Because the threshold that triggers the automatic adjustment clause is so low ($100,000), it is virtually certain that PGE will have an automatic adjustment clause that is effective beginning January 1, 2006 and each year thereafter. Thus, even if the circumstances alleged in the Complaint continue on a going-forward basis and there is a variance between the tax expense included in rates and the taxes paid to taxing authorities, the automatic adjustment clause under SB 408 will make any adjustments necessary to account for the difference. The Commission will issue permanent rules implementing SB 408 in the next few weeks. By the time the Commission and parties could conclude a contested case concerning

the allegations in the Complaint, the Commission will have addressed the tax issue identified in the Complaint through implementation of SB 408.

3. PGE'S TAX EXPENSE SHOULD BE ADDRESSED AS PART OF A GENERAL RATE CASE TYPE PROCEEDING

The Complaint alleges that PGE's rates will be unjust and unreasonable in the future because of the historic treatment of PGE's tax expense in rates. It is inappropriate to consider only tax expense in prospectively revising a utility's rates because tax expense depends entirely upon a utility's opportunity to recover its cost of equity capital and, thus, depends on the outcome of all other elements of test-year ratemaking, including the regulatory framework within which the test-year ratemaking resides.

The infirmity of URP's tax expense-related Complaint is all the more evident in light of PGE's concurrent general rate case (UE 180). If, as we believe, the Complaint is alleging that PGE is charging unjust and unreasonable rates going forward, then the appropriate forum to address this allegation is in PGE's general rate case. Complainants have intervened in UE 180 and have full party rights in that proceeding. UE 180, ALJ Ruling (granting petitions to intervene filed on behalf of URP, Ken Lewis and Dan Meek) (May 23, 2006). They could have raised any issue, filed testimony, conducted discovery or, in the upcoming hearing, cross examine witnesses in that docket. It would be wasteful and improper to commence a rate proceeding based on this Complaint that will run parallel to a general rate case where the same issues could have been raised and where the Commission will consider all of PGE's costs, revenues, taxes and other rate-making components.[5]

Moreover, the heart of the instant Complaint is its claim that PGE's rates are "unjust and unreasonable." But the Commission's final order in UE 180 will establish rates that are "fair, just, and reasonable" under the Commission's general rate-making statute, ORS 757.210. PGE's new rates will reflect the most current, accurate information concerning its

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[5] The Commission has routinely dismissed complaints under ORS 756.500, leaving the complainant to pursue its complaint under the Commission's general rate-making statute, ORS 757.210. UM 989, Order No. 01-152 (Feb. 2, 2002); UM 564, Order No. 94-771.

costs, revenues, taxes and other rate-making components. If Complainants disagree with that final order, Oregon law enables Complainants to seek reconsideration or appeal to the courts.

The final order in UE 170 (the "Reconsideration Order") is wholly consistent with these arguments and conclusions. The Commission's Reconsideration Order addressed a very narrow issue: does SB 408 authorize the Commission to change its approach to setting rates under ORS 757.210 during the four-month period after enactment of SB 408 but before the SB 408 automatic adjustment applies? The Commission answered that question in the affirmative but specifically deferred consideration of whether SB 408 authorized or required a change in how the Commission sets rates prospectively under ORS 757.210 after January 1, 2006:

> Our decision here is limited to the application of SB 408 during that four-month interim period while SB 408 was in effect, but prior to our ability to use the automatic adjustment clause to help align taxes collected and taxes paid. We leave open the question, indirectly raised by the intervenors' arguments, whether SB 408 mandates a change in all future rate proceedings as to how we set base rates.

Order No. 06-379 at 7.

The four-month period between passage of SB 408 and January 1, 2006, that was at issue in UE 170 is irrelevant to URP's complaint. We are more than nine months past the date on which the SB 408 automatic adjustment clause became operative. The Complaint cannot turn back the clock to the fall of 2005. Unlike in UE 170, SB 408 will be operative and the automatic adjustment clause in effect during all times relevant to the Complaint. As to the question left unresolved in Order No. 06-379—the impact of SB 408 on how the Commission sets rates under ORS 757.210 after January 1, 2006—that issue may be appropriately addressed in PGE's current rate case, not this Complaint proceeding, given that, in the general rate case, the Commission will establish PGE's rates under ORS 757.210.

B. IF THE COMPLAINT DOES NOT ALLEGE UNJUST AND UNREASONABLE RATES, THE COMMISSION SHOULD DISMISS IT

As noted, Complainants fail to allege in the body of the Complaint that PGE's rates are unjust and unreasonable going forward. Rather, the Complaint focuses on past collections and tax payments. To the extent Complainants are arguing only about collections, payments and rates from *before* the filing of their Complaint, their Complaint is ill-founded. ORS 756.500 does not authorize retroactive ratemaking; further, the closed docket UCB 13 resolved any issues regarding historic tax collections under Commission rate orders which no party appealed to the courts. UCB 13, Order No. 03-629 at 2-3 (dismissing complaint); Order No. 03-401 at 8-9 (rejecting reconsideration of Order No. 03-629).[6] Again, we believe that Complainants intend to allege unjust and unreasonable rates going forward. If we are wrong, however, then the Complaint violates the rule against retroactive ratemaking.[7]

We also note that the only specific relief requested in the Complaint is the establishment of a deferred accounting order. Complaint ¶ 6A. As a procedural matter, complaints may make that request under ORS 757.259, not in a complaint under ORS 756.500. As noted, Complainants have also filed a request for deferred accounting under ORS 757.259. That request places the issue of deferred accounting before the Commission and makes this Complaint superfluous, as well as procedurally improper. Even if Complainants *could* request deferred accounting in a Complaint, it is unnecessary given their parallel request under ORS 757.259.

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[6] The Marion County Circuit Court remanded Order No. 03-629 permitting URP to proceed with its claim that rates had been fraudulently set. Ultimately, URP withdrew its complaint that PGE's rates were based on fraud (*see* Order No. 05-198) and Complainants make no fraud claims in the Complaint.

[7] See PGE's Amended Comments (§ 3) filed separately in UM 1224 and hereby incorporated by reference in this Amended Motion to Dismiss.

C. IN THE ALTERNATIVE, THE COMMISSION SHOULD REQUIRE COMPLAINANTS TO MAKE THE COMPLAINT MORE DEFINITE AND CERTAIN

In the alternative, the Commission should require Complainants to make their allegation more definite and certain. ORCP 21D. The current allegations are so uncertain that PGE cannot determine whether Complainants are alleging wrongdoing with respect to PGE's past tax payments or speculating about what those payments will be in the future. Nor are the allegations clear about whether Complainants are requesting deferred accounting alone or are also seeking a rate complaint proceeding. ORS 756.500.

The Commission's rules require a complaint to "set forth the specific acts complained of in sufficient detail to advise the parties and the Commission of the acts constituting the grounds of the complaint." OAR 860-013-0015(2). This Complaint falls short of that standard. At a minimum, the Commission should require Complainants to specify whether they are complaining about PGE's historic tax payments as a subsidiary of Enron, or speculating about PGE's payments as a stand-alone entity going forward.

III. CONCLUSION

For the reasons stated, PGE respectfully requests that the Commission dismiss the Complaint or, in the alternative, require Complainants to make clear the basis of their claim under ORS 756.500.

DATED this 11th day of September, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S AMENDED MOTION TO DISMISS OR TO MAKE MORE DEFINITE AND CERTAIN** 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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