

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1925

In the Matter of

PUBLIC UTILITY COMMISSION OF
OREGON,

Application to Defer Changes in
PacifiCorp's Federal Tax Obligations
Resulting from H.R. 1—Tax Cuts and Jobs
Act.

RULING

DISPOSITION: MOTION TO DISMISS DENIED

In late December 2017, both PacifiCorp and Commission Staff filed separate applications to defer changes in the company's tax obligation resulting from the passage of federal tax legislation. PacifiCorp now seeks dismissal of Staff's application, arguing that the company's application already provides a forum to defer federal tax reform impacts. For reasons explained below, I deny PacifiCorp's motion.

I. BACKGROUND

On December 22, 2017, H.R. 1 – Tax Cuts and Job Act (Tax Act) was signed into law, and most provisions took effect on January 1, 2018. On December 28, 2017, an Assistant Attorney General from the Oregon Department of Justice sent an electronic message, on behalf of Staff, to representatives for each regulated utility doing business in Oregon that stated:

I am writing to let you know that tomorrow, December 29th, Staff plans to file applications to defer the impacts from H.R.1 for PGE, PacifiCorp, Idaho Power, NW Natural, Avista and Cascade. It is my understanding that some or perhaps all utilities have communicated with Staff an intent to file their own deferrals, which Staff understands may render its deferral applications moot. Because Staff is not aware of any deferrals [have] been filed at this time and the short time before the end of the year, Staff will file its applications out of an abundance of caution. Please note, Staff's intent is to ensure that deferrals are in place, if deemed necessary, but understands that withdrawal of some or all of its applications may

ultimately be appropriate. Please be in touch if you have any comments, questions or concerns.

That same day, December 28, 2017, PacifiCorp filed an Application to Defer Changes in PacifiCorp's Federal Tax Obligations Resulting from H.R. 1—Tax Cuts and Jobs Act. PacifiCorp's application was docketed as UM 1917. As promised the next day, December 29, 2017, Staff filed an Application to Defer Changes in PacifiCorp's Federal Tax Obligations Resulting from H.R. 1—Tax Cuts and Jobs Act. Staff's application was docketed as UM 1925. Both deferral applications were filed pursuant to ORS 757.259(2)(e).

On February 28, 2017, representatives from Staff, the six energy utilities, and other stakeholders participated in a workshop to discuss issues related to the Tax Act, including: methodologies to calculate the amounts to be deferred; the range of expected financial impacts; rate mechanisms to address the impacts; and next steps. During the workshop, Staff committed to confer internally regarding whether Staff should proceed with its filing and report back. On March 23, 2018, Staff indicated that it would not withdraw its application until the Commission had made a final determination on the utility-filed applications.

The period to file comments on Staff's application was extended to April 30, 2018. On that day, PacifiCorp filed a motion to dismiss Staff's application. Staff filed a response on May 15, 2018, and PacifiCorp filed a reply on May 22, 2018.

II. DISCUSSION

A. PacifiCorp

As UM 1917 already provides a forum to defer federal tax reform impacts, PacifiCorp moves to dismiss Staff's application and to close UM 1925. Pursuant to OAR 860-01-0000(1), the Commission's administrative rules work in conjunction with the Oregon Rules of Civil Procedure (ORCP) to govern all practice and procedure before the Commission, and ORCP 21 (A)(3), therefore, mandates dismissal of a complaint when simultaneous actions involve the same parties, causes of action, issues, and relief, PacifiCorp asserts. As the purpose of ORCP 21 (A)(3) is to "prevent the defendant from being harassed by the pendency at the same time of two actions based on the same cause of action, at the instance of the same plaintiff, who has a complete remedy by one of them," PacifiCorp denounces the need to participate in two parallel proceedings and asks the Commission to dismiss Staff's application.

PacifiCorp vows not to withdraw its deferral application and argues that any concern that it *might* do so should not prevent the Commission from dismissing Staff's redundant application. PacifiCorp contends that Staff will have the opportunity to thoroughly address all issues and concerns raised in either docket, including Staff's proposed calculation methodology which differs from the company's proposed calculation, in UM 1917 alone. Indeed, "the Commission has approved deferral applications when the utility is still calculating the amounts and methodology of the deferral," PacifiCorp observes.¹ As PacifiCorp is the named utility in UM 1925, the company observes, participation is not *optional* and the burden of participating in two parallel proceedings cannot be avoided.

PacifiCorp acknowledges that the parties are differently situated in the two dockets, and observes that the company is potentially prejudiced by Staff's application due to Staff's control of UM 1925. PacifiCorp explains:

Through its duplicative proceeding, Staff is in a position to select which application moves forward. If Staff determines that its application should proceed, it will be reviewing its own application and recommendation, making PacifiCorp's application in docket UM 1917 moot. If PacifiCorp objects to any part of Staff's recommendation, it would have few options other than to request a contested case proceeding given the short period between a Staff memo and the public meeting, prolonging an already extended process. This is precisely why duplicative proceedings threaten due process and the Commission should grant the Motion to Dismiss.

PacifiCorp urges Staff "to seek Commission deliberation and recommend approval of the deferral in docket UM 1917 as soon as possible," and asks the Commission to dismiss Staff's application as "duplicative and unnecessary."

PacifiCorp asks for a waiver of OAR 860-001-0420(3).² PacifiCorp represents that a waiver will not harm or prejudice anyone as "Staff's Application does not request any unique or novel treatment beyond what had already been requested in PacifiCorp's Application."³ PacifiCorp's application already ensures that the Commission will have an opportunity to determine rate effects of the federal tax reform, the company argues.

¹ PacifiCorp Reply Brief to Staff's Response at 2 (May 22, 2018)

² OAR 860-001-0420(3) provides: A motion against an initiating or responsive pleading under OAR 860-001-0400 must be filed within 10 days after the pleading is filed.

³ PacifiCorp Motion to Dismiss and Comments at 2 (Apr 30, 2018).

B. Staff

The applications underpinning UM 1925 and UM 1917 involve the same parties and issues but not remedies, Staff observes, because the parties do not have same procedural footing in each. Since an applicant for a deferral has the sole discretion to withdraw the application at any time (and does not relinquish that right by promising not to use it), PacifiCorp and Staff each control the duration of the respective dockets, Staff explains. If the Commission grants PacifiCorp's motion and dismisses Staff's application, and PacifiCorp subsequently withdraws its application, Staff posits, then Oregon customers would be left without a procedural route to obtain tax benefits under the Tax Act for the gap period between its effective date and the date that base rates account for Tax Act financial effects, Staff warns. As Staff does not have a complete remedy in UM 1917, but does have such in UM 1925, PacifiCorp fails to demonstrate that the requirements for a motion to dismiss under ORCP 21 (A)(3) have been met, Staff argues.

PacifiCorp's motion is also untimely, Staff argues, and PacifiCorp fails to demonstrate that good cause exists to waive OAR 860-001-0400(4)(a) which requires that an answer to an application be filed within 20 days after the pleading is filed, unless otherwise directed by the Commission or an administrative law judge. PacifiCorp, however, didn't file comments and a motion to dismiss until approximately four months after Staff filed the initial application to open UM 1925.

PacifiCorp contends that cause exists to waive the timing requirement because no harm or prejudice would occur to any party and because PacifiCorp is administratively burdened by participating in two duplicative proceedings. Staff contests both claims. Staff argues that it set forth why Staff and ratepayers would be harmed or prejudiced due to a difference in procedural rights under the two applications. Again, if Staff's application is dismissed and PacifiCorp subsequently withdraws its application, customers would not have a procedural means to receive tax benefits between the effective date of the Tax Act and a future date when they are included in base rates on a going forward basis.

Staff also challenges PacifiCorp's claims of administrative burden, pointing out that PacifiCorp need not have filed comments responding to Staff's application, as not doing so would not have precluded the company from addressing concerns or issues at a public meeting or in a contested case proceeding under OAR 860-027-0300. Indeed, Staff and other parties have declined to comment on PacifiCorp's application but have not suffered procedural prejudice or impact. Staff also points out that it is not actively asking or requiring that PacifiCorp file information in UM 1925. Instead, Staff is pursuing the disposition of PacifiCorp's application, which is the reason that Staff requested

supplementation of PacifiCorp's application. Staff filed its own deferral application only as a procedural means to ensure that customers receive the benefits of the Tax Act and has made this intent clear to PacifiCorp through electronic and oral communication with company representatives. Staff concludes:

Finally, by PacifiCorp's own admission, it is not burdened by docket UM 1925, as "Staff's Application does not request any unique or novel treatment beyond what has already been requested by PacifiCorp's Application." Regardless of the docket number, PacifiCorp will be required to calculate the anticipated tax benefits and address the appropriate ratemaking treatment to pass such benefits on to customers.⁴

III. RESOLUTION

As the Commission noted in Order No. 05-1070, "[d]eferred accounts provide a means to address utility expenses or revenues outside of the utility's general rate case proceeding and are a statutorily authorized exception to the general prohibition against retrospective ratemaking" by "allow[ing] a utility to capture and track costs and revenues without passing them to customers until a later time, as authorized by the Commission."⁵ In that order, the Commission adopted principles for the use and consideration of deferred accounting applications. Among other principles discussed, the Commission addressed the burdens of proof and production, stating:

as with other requests for agency action, an applicant is initially responsible for the burden of persuasion and the burden of production in support of a deferred accounting requests. The burden of production shifts to other parties to present evidence that rebuts what an applicant presented. However, the burden of persuasion always rests with the applicant, regardless of opposition to the filing. Thus, for example, an applicant does not necessarily meet its burden merely by presenting un rebutted evidence. The evidence must be persuasive enough to satisfy all requirements required by statute.⁶

Due to these burdens of proof and production, deferral applications are typically filed by a party that will most benefit from the deferral being granted—i.e., either the utility or

⁴ Staff Response to PacifiCorp's Motion to Dismiss at 7 (May 15, 2018).

⁵ *In the Matter of Public Utility Commission of Oregon Staff Request to Open an Investigation Related to Deferred Accounting*, Docket No. UM 1147, Order No. 05-1070 at 2 (Oct 5, 2005).

⁶ *Id.* at 5-6.

ratepayers.⁷ PacifiCorp's motion at issue results because deferral applications have been filed by both a utility and Staff, perhaps because the methodology to calculate the Tax Act impacts is uncertain.

Before any deferral application was filed, Staff notified the utilities that it would file deferral applications related to the Tax Act and acknowledged that these filings might be mooted if the utilities also filed deferral applications. Staff realized, however, that withdrawing a deferral application and addressing the deferral of the Tax Act impacts in only a utility's deferral application could potentially prejudice ratepayers because PacifiCorp would solely control the duration of UM 1917, having the ability to withdraw the company's application at any time. Replying to Staff's Comments, PacifiCorp acknowledged that the company would also be prejudiced if the deferral of Tax Act impacts were addressed only in UM 1925 due to Staff's procedural control of that docket.

Finding that the parties concur that they are differently situated in the two dockets, I deny PacifiCorp's motion. Dismissal of a proceeding is not required under ORCP 21 (A)(3) when two applications involve the same parties, address the same issues, but do not have the same remedies because each party could be denied any remedy without the safeguard of its own application being open. This potential prejudice to Staff also negates cause to waive the timing requirement under OAR 860-01-0400(4)(a). Although I acknowledge that there is some administrative overhead involved with PacifiCorp needing to monitor another docket, I recognize that the parties are both pursuing a disposition that calculates the impacts of the Tax Act during the deferral period in UM 1917 and that UM 1925 is primarily functioning as a placeholder for Staff should PacifiCorp decide to withdraw its application.

Dated this 26th day of June, 2018, at Salem, Oregon.



Traci Kirkpatrick
Administrative Law Judge

⁷ *Id.* at 2 ("For almost 20 years, the Commission has used deferred accounting to benefit both ratepayers, *see, e.g., In the Matter of Citizens' Utility Board*, UM 374, Order No. 91-830 (approving deferred accounting for Measure 5 property tax reductions), and utilities, *see, e.g., In the Matter of Portland General Electric Company*, UM 784/UM 1039, Order No. 02-400 (reauthorizing deferred accounts for a variety of reasons, including to: address costs that are)").