ORDER NO. 07-351

ENTERED 08/14/07

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1224 and UM 1226

In the Matters of UTILITY REFORM PROJECT and KEN LEWIS Application for Deferred Accounting, (UM 1224) and UTILITY REFORM PROJECT and KEN LEWIS, Complainants, v. PORTLAND GENERAL ELECTRIC COMPANY, Defendant. (UM 1226)	)	ORDER

DISPOSITION: DEFERRAL GRANTED IN PART; COMPLAINT DISMISSED WITHOUT PREJUDICE

In this order, we grant, in part, an application for deferred accounting filed by the Utility Reform Project and Ken Lewis. We dismiss, without prejudice, a concurrently filed but separate complaint filed by the Utility Reform Project and Ken Lewis against Portland General Electric Company.

I. PROCEDURAL BACKGROUND

These dockets have a long and complex procedural history, during which the parties essentially filed three separate rounds of pleadings. The dockets were initiated on October 5, 2005, when the Utility Reform Project and Ken Lewis (hereafter collectively referred to as URP) made two separate filings. First, URP filed a complaint pursuant to

ORS 757.500 against Portland General Electric Company (PGE) (UM 1226). Second, URP filed a Notice of Application for Deferred Accounting, pursuant to ORS 757.259 (UM 1224). The filings allege that rates charged by PGE after September 2, 2005, violate Senate Bill 408 because they contained charges for income taxes that would not be paid to any governmental entity.

Following a reply and procedural challenge filed by PGE and supplemental filing by URP, both dockets were held in abeyance pending resolution of an application for reconsideration of PacifiCorp's general rate proceeding (UE 170). Because URP's filings are primarily founded on our application of SB 408 to reduce the amount of income taxes included in PacifiCorp's rates, the presiding Administrative Law Judge (ALJ) concluded that URP's filings should be held in abeyance until resolution of PacifiCorp's request for reconsideration of that decision. *See* ALJ Ruling, Dec. 27, 2005.

On July 10, 2006, the Commission issued Order No. 06-379, resolving all issues under reconsideration in UE 170. Shortly thereafter, the presiding ALJ adopted a new procedural schedule for these dockets. Pursuant to that schedule, PGE filed amended comments on URP's filings, as well as an amended procedural challenge seeking the Commission to either dismiss the filings or direct URP to make them more definite and certain. URP filed a response, to which PGE replied.

On October 10, 2006, the ALJ established a new procedural schedule at the parties' request. Among other things, that schedule allowed URP to file an amended complaint and renewal of an application for deferred accounting. PGE subsequently filed a renewal of its comments and motion to dismiss, to which URP filed a reply.

II. FINDINGS

At all times relevant to these proceedings, PGE was collecting from customers rates approved by the Commission in docket UE 115, a general rate proceeding. *See* Order No. 01-777 (Aug. 31, 2001). Those rates included an estimated amount of income tax liability PGE would incur as an operating expense. These amounts were calculated on the regulated revenues and costs of PGE as a stand-alone entity, without regard to the unregulated operations of affiliates or parent company.

Federal and state tax laws allow a corporate holding company to file consolidated tax returns. As a result, losses in some corporate operations can offset profits in others, thereby reducing corporate tax liability. Consequently, the use of consolidated tax reporting may cause a utility to collect amounts for taxes in rates that exceed the income taxes actually paid to taxing authorities.

On September 2, 2005, the Governor signed into law SB 408, passed by the Legislative Assembly to address growing concerns that Oregon energy utilities were collecting income tax expenses that were not ultimately paid to taxing authorities. The bill, generally codified at ORS 757.267 and ORS 757.268, requires a utility to true-up any differences between the amounts of income taxes collected in rates from customers and taxes

paid to the government that are "properly attributed" to the utility's regulated operations. *See* ORS 757.268(4). If amounts collected and amounts paid differ by more than $100,000, the utility must adjust rates accordingly through an automatic adjustment clause. *See* ORS 757.268 (4), (6)(a).

SB 408 became effective upon enactment on September 2, 2005. *See* Or Laws 2005, ch. 845, §15. However, the bill expressly limits the use of the automatic adjustment clause mechanism to taxes paid to units of government and collected from ratepayers on or after January 1, 2006. *See* Or Laws 2005, ch. 845, §4(2).

Shortly after the passage of SB 408, on September 28, 2005, this Commission concluded a general rate investigation for PacifiCorp. In our rate order, we concluded that SB 408 required a departure from our historic use of the "stand-alone" methodology for calculating the amount of income taxes to be incorporated into PacifiCorp's rates. Rather, we determined that SB 408 required us, in setting base rates for PacifiCorp, to consider the taxes that would ultimately be paid to units of government. Finding that an interest deduction on an inter-company loan would reduce PacifiCorp's consolidated group's tax liability, we reduced the utility's proposed tax expense by $16.07 million. *See* Order No. 05-1050 at 18.

PacifiCorp challenged our decision to prospectively adjust its tax expense, arguing that SB 408 establishes only a retrospective "true-up" mechanism. In our order on reconsideration, we agreed that the bill's primary feature is a backward-looking true-up mechanism designed to align taxes paid with those collected from ratepayers. Nevertheless, we affirmed our earlier decision to prospectively adjust PacifiCorp's base rates due to the timing of the rate proceeding. We explained:

> 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. We were required to approve rates that became effective during this interim period. Absent use of the automatic adjustment clause to more closely align taxes collected from ratepayers with taxes paid to units of government, our only option to meet the legislative mandate to ensure that rates were fair, just, and reasonable was to make the necessary adjustments to PacifiCorp's base rates.

Order No. 06-379 at 6.

III. DISCUSSION

As noted above, the parties have made numerous filings. While the last round of filings constitute a complete set of filings, they often incorporate, or refer to, prior pleadings. Consequently, for purposes of our discussion, we deem it appropriate to review all pleadings to summarize the assertions and arguments made by both parties.

In its complaint filings, URP alleges that PGE's rates after the effective date of SB 408 "should reflect the taxes that are paid to units of government in order to be considered fair, just and reasonable." *See* ORS 757.267(1)(f). URP contends that, as of September 2, 2005—the date SB 408 became law—PGE has been in violation of this requirement because its rates have included amounts for taxes that have not and will not be paid to units of government.

URP contends its complaint provides a legal basis for granting its application for deferred accounting. URP identifies the appropriate deferral period to be "from September 2, 2005, until such time at which all unpaid tax charges are removed from PGE's ongoing rates, in accordance with SB 408." *See* First Amended Complaint, 3 (Nov. 1, 2006). URP acknowledges that this period might end as soon as January 1, 2006, the effective date of SB 408's automatic adjustment clause. URP refers to this period as the "Pre-Adjustment Clause Period."

URP relies on our decision to prospectively adjust rates in UE 170 for PacifiCorp by reducing the utility's proposed annual tax expense. Through its filings, URP contends that PGE's rates should be similarly modified for the pre-adjustment clause period, using the deferral process.

PGE makes numerous arguments in opposition of URP's filings. While URP alleges that the rates were unlawful, PGE maintains that URP never identifies the violated statute. PGE states that the challenged rates were both authorized and lawful under ORS 757.210, the statute under which a utility files new rates. PGE contends that rates cannot be challenged under ORS 757.210 between rate case proceedings, as the Commission has articulated:

> A basic premise of utility regulation is that when the Commission prescribes or approves a utility's rates, it does so according to the rules of rate setting in a rate case. If it follows those court-prescribed rules in the review of a utility's proposed rates, its job is finished, until the next rate case. * * * 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.

Motion to Dismiss Amended Complaint at 2, quoting UM 47/48, Order No. 89-687, 8-9.

PGE asserts that a complaint under ORS 757.210 may be made only with regard to newly proposed rates filed under the statute. On this basis, PGE distinguishes its rate situation from that of PacifiCorp. PGE explains that, in UE 170, the Commission clarified that its application of SB 408 was required by the unique situation of having to set new rates for PacifiCorp during the period after passage of SB 408, but before implementation of the SB 408 automatic adjustment clause. *See* Order No. 06-379 at 6-7. Because the Commission was not required to establish new rates for PGE during that period, PGE contends no adjustment for taxes may be made before January 1, 2006, the effective date of SB 408's automatic adjustment clause.

PGE also argues that URP's complaint improperly combines a request for a rate proceeding with an application for deferred accounting.[1] PGE claims that the effect of URP's simultaneous filings is to declare existing rates interim, subject to refund based on the outcome of a rate case, in violation of pertinent statutes, the rule against retroactive ratemaking and ORS 757.225.

For these reasons, PGE seeks dismissal of URP's complaint. PGE concludes that the complaint seeks a remedy—deferred accounting—that is unavailable under ORS 756.500, the statute under which complaints are brought. PGE also argues that the complaint fails to set forth facts sufficient to demonstrate that PGE has violated any statute, administrative rule or Commission order.

PGE also argues that URP's application for a deferral fails on its own, regardless of its coupling with a rate complaint. PGE argues that it fails to meet the legal requirements of ORS 757.259, and does not merit an exercise of discretion by the Commission to grant it. PGE contends that the financial impact of the proposed deferral on its earnings is too great to warrant it being granted. PGE observes that URP does not dispute that PGE's earnings for 2005 were 6.64 percent, and that the deferral would drop PGE's earnings more than 500 basis points below the authorized level. PGE contends that this financial impact of a proposed deferral is relevant when the Commission is determining whether to authorize a deferral, as well as during the amortization phase of an approved deferral.

In response, URP contends that SB 408's modification to ORS 757.210 to provide that "[t]he Commission may not authorize a rate or schedule of rates that is not fair, just and reasonable," does not, as PGE claims, apply only to rates established under ORS 757.210. Rather, URP contends that SB 408 applies to all rate processes, noting that the bill simply refers generically to amounts "collected from ratepayers" and "utility rates." ORS 757.268(4). URP derides PGE's attempt to distinguish between the substantive standard for rates set under ORS 757.210 and other processes, and argues that all rates, regardless of how set, must be "fair, just and reasonable."

[1] In Docket UE 76, PGE explains, URP combined a complaint under ORS 756.500, alleging unlawful late fees, with an application for deferred accounting. PGE states that the Commission rejected retroactive rate adjustment via deferral, in favor of a prospective rate adjustment regarding PGE's late fees. PGE observes that the Commission stated in Order No. 92-1182 at 8-9: "And, except in limited circumstances not applicable here, it was never contemplated that this statute would serve any function, once a rate proceeding was underway."

URP also rebuts PGE's contention that deferred accounting is not a remedy, by arguing that no statute, rule, order or case law limits when or how deferred accounting is imposed. URP calls deferred accounting a provisional remedy that preserves disputed funds, pending an ultimate decision.

Additionally, URP rebuffs PGE's assertion that the Amended Complaint is inappropriate because it complains of rates between rate proceedings, making the following points:

1) PGE does not adequately explain why the timing of PGE's rate case matters;

2) PacifiCorp also didn't ask the Commission to set new rates under ORS 757.210 during the Pre-Adjustment Clause Period, but rather filed a general rate case application in November 2004;

3) General standards apply equally to all rates, regardless of whether set pursuant to ORS 757.210 or other statutes.

4) Deferred accounting for PacifiCorp's unpaid income taxes was established "between rate proceedings." Although the effective date of Order No. 05-1050 was October 4, 2005, deferred accounting was not established until October 8, 2005; and

5) Rates at issue for both PGE and PacifiCorp were established pursuant to ORS 757.210.

IV. RESOLUTION

URP filed two separate filings: the Renewed Application for Deferral and the Amended Complaint. Accordingly, we opened two separate dockets, as captioned above. We did not consolidate these proceedings. As such, we find it appropriate to initially consider each of the filings on a stand-alone basis. We turn first to URP's Renewed Application for Deferral.

A. Application for Deferral (UM 1224)

PGE primarily challenges URP's deferral request as a companion filing to URP's complaint. When viewed as a stand-alone filing, however, PGE's principal objections to URP's deferral application dissipate. Indeed, PGE observes that URP needed only to make the deferral application, calling the complaint superfluous.

As a stand-alone filing, however, the deferral application is procedurally insufficient, providing little information about the reasons why a deferral is justified. Although we could ask URP to refile the deferral application, we are reluctant to do so, given that there have already been three rounds of pleadings in these proceedings. Consequently,

for the sake of administrative efficiency, rather than direct URP to file a new deferral application, we will liberally construe URP's deferral application as a stand-alone filing, using its complaint to provide needed context.

In so doing, we interpret URP's application to request deferred accounting for revenue attributable to PGE's liabilities for federal and state income taxes for a period of time starting either September 2, 2005, the date of passage for SB 408, or October 5, 2005, the date URP originally filed the application. URP alleges that SB 408 requires, as of its passage, that utility rates must reflect taxes actually paid. In UE 170, we made the decision that SB 408's amendments to ORS 757.210 required us, when approving rates for PacifiCorp during the pre-adjustment clause period—*i.e.*, after passage of SB 408 but before implementation of the statute's automatic adjustment clause—to approve rates reflecting only taxes that would actually be paid to governmental units. *See* Order No. 06-379, at 6. We infer URP's deferral application to assert that PGE's rates should be similarly modified for the pre-adjustment clause period, using the deferral process.

Although PGE's rates were not being set during the pre-adjustment clause period, URP raises the question of whether the deferral mechanism could be used to examine the appropriateness of adjusting PGE's rates to align revenues collected for federal and state income taxes with revenues actually paid to governmental units for such taxes.

The legislature has delegated this Commission the authority to use deferred accounting to address utility expenses or revenues outside a general rate proceeding, and we have used that authority in the past to implement legislative mandates. *See e.g.*, *In the Matter of Citizens' Utility Board*, UM 374, Order No. 91-930 (approving deferred accounting for Measure 5 property tax reductions). Recently, we have developed a methodology for considering proposed deferrals that involves two stages of review. *See*, *e.g.*, Order No. 05-1070. One stage involves a determination of whether a proposed deferral meets legal criteria pursuant to ORS 757.259(2). We find that the requested deferral will appropriately match ratepayer costs and benefits pursuant to ORS 757.259(2)(e). The other stage involves a question of whether the deferral request warrants an exercise of our discretion. In exercising this discretion, we consider the type of event causing the deferral request, and the magnitude of the event's effect. If the deferral request is motivated by an unexpected event, such as a law change, then the magnitude of the event's effect must only be material. We conclude that the impact resulting from passage of SB 408 is sufficient to warrant an exercise of our discretion.

For these reasons, we grant URP's deferral request as of the date of its filing, October 5, 2005, to December 31, 2005. We begin the period on October 5, 2005, because, under the deferral statute, we do not have the authority to begin a deferral prior to the date of request. We close the period on December 31, 2005, because the automatic adjustment clause contained in SB 408 will capture any necessary adjustments in rates for unpaid taxes on a going forward basis beginning January 1, 2006. The deferred amounts shall accrue interest at PGE's authorized rate of return. PGE shall calculate the deferred amounts using the methodologies for determining taxes collected and taxes paid adopted in OAR 860-022-0041. By December 1, 2007, PGE shall make a filing that contains the calculation of the deferral

amount and the earnings test, so that the Commission can make a determination for a rate adjustment concurrent with the first automatic adjustment clause rate change, currently scheduled for June 1, 2008.

In reaching this decision, we acknowledge PGE's arguments about the impact that the deferral, if allowed in rates, may have on its earnings. While we do not share PGE's opinion that such impact is to be considered in determining whether to grant a deferral, we agree that PGE's earnings will be reviewed at the time we consider amortization of the deferral. *See* ORS 757.259(5).

B. Complaint (UM 1226)

URP may pursue any tax-related revenues for PGE outside the deferral period—that is, prior to October 5, 2005, and after December 31, 2005—in a complaint proceeding. However, we dismiss, without prejudice, URP's complaint filed in docket UM 1226. We find the complaint superfluous to URP's request for deferred accounting during the deferral period we have authorized above. If URP intends to pursue its complaint for time periods outside this period, URP should file a new complaint under ORS 757.500. In any such complaint proceeding, PGE may renew its arguments raised here, as applicable, in opposition to the complaint.

ORDER

IT IS ORDERED that:

1. The application for deferred accounting, filed by the Utility Reform Project and Ken Lewis pursuant to ORS 757.259(2)(e), is granted as of the date of its filing, October 5, 2005, through December 31, 2005. The deferred revenues shall accrue interest at Portland General Electric Company's authorized rate of return.

2. Ratemaking treatment of these deferred revenues is reserved for a ratemaking proceeding.

3. The complaint filed by the Utility Reform Project and Ken Lewis against Portland General Electric Company is dismissed, without prejudice.

Made, entered, and effective AUG 14 2007.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.