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February 28, 2006

Filing Center
Public Utility Commission of Oregon
550 Capitol Street N.E., Suite 215
Salem, Oregon 97208-2148

Re: UM 1232: Supplemental Authority and Request to Supplement Record

Dear Filing Center:

Complainants in the above-referenced docket submit this letter in response to Qwest Corporation's Reply to Complainants Response to Qwest's Motion to Dismiss the Complainants' Amended Complaint ("Qwest's Reply"), filed February 24, 2006. In that reply, Qwest relies on two orders to support its assertion that the Commission has repeatedly held that it does not have the authority to award reparations based on unreasonable or unjustly discriminatory rates or overcharges. Qwest Reply at 3, (citing Order No. 02-227 in Docket No. UM 989 and Order No. 03-629 in Docket No. UM 1074).[1] The Marion County Circuit Court reversed and remanded both of the decisions cited by Qwest. Enclosed as supplemental authority in support of Complainants' Amended Complaint are copies of the Marion County Circuit Court orders reversing these decisions. *Utility Reform Project et al. v. Public Utility Commission of Oregon and Portland General Electric*, Circ. Ct. No. 02C14884, Judgment, January 28, 2004 (reversing Order No. 02-227); *Utility reform Project v. Public Utility Commission of Oregon and Portland General Electric*, Circ. Ct. No. 03C21227, Opinion Letter, June 4, 2004. In both decisions, the Circuit Court finds that the Commission has the authority to issue refunds of unlawful rates and questions the applicability of the filed rate doctrine in Oregon.

In addition, Qwest raises several new factual arguments to support its claim that the Complainants knew or should of known of the basis for any cause of action on or around March 2002. Qwest Reply at 4-5. Complainants respectfully request that the Commission not consider these factual arguments. First, it is clear that the question of when the Complainants knew or

[1] Qwest also cites to Order No. 03-629 to support its arguments regarding the applicability of the filed rate doctrine. Qwest Reply at 12.

should have known of the bases for their causes of actions is a question of fact that is not appropriately determined without development of the factual record. Second, it is inappropriate for the Commission to consider issues raised for the first time in a reply brief because the Complainants are not given the opportunity to respond.

Should the Commission determine that it is appropriate to consider the factual allegations raised in Qwest's Reply, Complainants request permission to respond to these factual allegations through the submission of a supplemental reply brief and/or affidavits.

Please contact me if you have any questions. Thank you for your consideration of these matters.

Very truly yours,

Davis Wright Tremaine LLP

Sarah K. Wallace

SKW:jb

cc: Service List
Dan Foley

ENTERED
JAN 28 2004
FILED
JAN - 9 2004
Marion County Circuit Court
FILED
JAN - 9 2004
Marion County Circuit Court

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

UTILITY REFORM PROJECT, LLOYD K. MARBET, and LINDA K. WILLIAMS,

Plaintiffs,

-v-

OREGON PUBLIC UTILITY COMMISSION,

Defendant, and

PORTLAND GENERAL ELECTRIC CO.,

Intervenor.

No. 02C14884

JUDGMENT

This matter is a lawsuit filed under ORS 756.580 to challenge Order No. 02-227 of the Oregon Public Utility Commission (OPUC), which was the final order culminating OPUC Docket No. UM 989.

The cause was briefed and was orally argued to the Hon. Paul J. Lipscomb on July 23, 2003. The Court issued an Opinion and Order, dated November 7, 2003. The matter being fully adjudicated as to all issues and all parties, it is hereby

ADJUDGED that OPUC Order No. 02-227 is unlawful, that the rates

approved in OPUC Order No. 02-227 are neither just nor reasonable, and that the order is remanded to the Oregon Public Utility Commission for further proceedings consistent with the Opinion and Order of this Court.

IT IS SO ADJUDGED.

Dated this 8th day of December, 2003.

The Hon. Paul J. Lipscomb
Circuit Court Judge

Prepared by
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For Plaintiffs

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

UTILITY REFORM PROJECT, LLOYD K. MARBET, AND LINDA K. WILLIAMS, Plaintiffs, v. OREGON PUBLIC UTILITY COMMISSION, Defendant, and PORTLAND GENERAL ELECTRIC CO., Intervener.	Case No. 02C14884 OPINION AND ORDER

Plaintiffs bring their complaint under ORS 756.580 to challenge OPUC Order No. 02-227. OPUC Order No. 02-0227 followed and adopted settlement agreements between PGE and the Citizens' Utility Board and the Commission staff. Under the terms of that Order, PGE was allowed to eliminate the Trojan Nuclear Plant from its balance sheet immediately and to adjust and offset various accounting charges and regulatory liabilities associated with Trojan. The Commission determined that the settlement agreements were "just and reasonable" and provided a net benefit to the ratepayers. Plaintiffs seek to have this Court review and reverse the Commission's order.

Plaintiffs allege, in part, that rates adopted by OPUC Order No. 02-227 are inconsistent with this Court's prior decision, and that of the Court of Appeals, which held that PGE could not recover any return on its Trojan investment as part of its rate structure after the Trojan Nuclear

Plant was taken off line. See *Citizens' Utility Board v. OPUC*, 154 Or App. 702, 962 P2d 744 (1998), rev dismissed, 335 Or 91, 58 P3d 822 (2002).

Essentially, Petitioners complain that the new rates fail to account for the amounts ratepayers have already paid to PGE for return on Trojan investment since November 9, 1992, and since the effective date of OPUC Order No. 95-322. They also contend that the Commission's order "unlawfully concludes that ratepayers cannot obtain relief from past unlawful charges." Petitioners seek an order from this Court requiring the Oregon Public Utility Commission to set aside and modify these unlawful charges and to order appropriate refunds to ratepayers. Plaintiffs also challenge several other aspects of the settlements approved by the challenged OPUC order.

Defendants, in turn, argue that the so called "filed rate doctrine" prevents the Oregon Public Utility Commission from considering past improperly calculated rates when setting new rates, and that the challenged rate order adopting the settlements fully comports with Oregon law in every other respect as well.

PGE and OPUC cite *McPherson v. Pacific Power & Light*, 207 Or 433, 296 P2d 932 (1956) for the proposition that Oregon has adopted the filed rate doctrine. The plaintiffs in *McPherson* sued a utility for a refund of the collection of an allegedly unlawful surcharge. *Id.* at 445-46. The Court held that the only question before it was whether the charges were in excess of the lawfully established rates. *Id.* at 453.

Notably, the *McPherson* Court did not address the Commission's authority upon remand after judicial review overturning the rates previously approved by the Commission. And *McPherson* certainly does not state that the Commission has no authority to consider past problems in setting new rates after the old rates are overturned on appeal. Accordingly, *McPherson* itself offers little support for defendants' position in this case, and certainly it is not controlling here.[1]

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[1] Recently, without deciding whether the filed-rate doctrine would otherwise apply, the Oregon Court of Appeals concluded that the "filed-rate doctrine bars only an action that seeks to vary the terms of an applicable tariff." *Adamson v. WorldCom Communications, Inc.*, ___ Or App ___, ___ P3d ___ (Oct. 22, 2003) (slip op) (citing *AT&T v. Central Office Telephone*, 524 US 214, 222-23, 118 S Ct 1956, 141 L Ed 2d 222

The "filed rate doctrine" was first articulated in *Keogh* v. *Chicago Northwestern Railway Co.*, 260 US 156, 43 S Ct 47, 67 L Ed 183 (1922). In *Keogh*, a manufacturer sued several railroads under the Anti-trust Act. The plaintiff alleged that the railroads joined together to eliminate competition and set arbitrary and unreasonable rates. *Id.* at 160. The plaintiff had previously challenged the rates in proceedings before the Interstate Commerce Commission, but the Commission approved the rates. The Court found that the plaintiffs had no cause of action under the Anti-trust Act because the Commission had already decided that the rates were reasonable and non discriminatory. *Id.* at 161-62.

Unlike the present case, the *Keogh* case did not involve a situation in which the Commission or a Court in review of the Commission's decision had found the rates to be unreasonable. Moreover, the *Keogh* Court specifically noted that "[I]f the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings." *Id.* at 162.

PGE however, also cites several other decisions in support of their proposition that the rates established at the OPUC are the lawful rates, and can be the only lawful rates, until they are superseded by the next rate schedule. For example, the Ohio Supreme Court held that no action for restitution based on unjust enrichment lies to recover the increase in rates charged by a public utility under an order of the Public Utilities Commission when such an order is subsequently reversed by the Supreme Court as unreasonable and unlawful. *Keco Industries, Inc. v. Cincinnati & Suburban Bell Telephone Co.*, 141 NE2d 465 (Ohio 1957). That court noted as follows:

> "[T]he rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection; that any rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court; and that the General Assembly, by providing a method whereby such rates may be suspended until final determination as to their reasonableness or lawfulness by the Supreme Court, has completely abrogated the common-law remedy of restitution in such cases."

(1998). Once again, neither *Adamson* nor *AT&T* concerned rates found to be unlawful by a Court on review of a Commission order.

Id. at 469. Similarly, the Alabama Supreme Court held that the lower Court did not err in refusing to order the utility to refund to the ratepayers the judicially disapproved portion of a rate increase. *State v. Alabama Public Service Commission*, 307 So 2d 521, 526, 539-40 (Ala. 1975).

In reaching that conclusion both the Ohio and the Alabama Courts cited and relied upon the following passage from *Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.*, 117 NE2d 774, 775-76 (Ill. 1954):

> "The fundamental issue in this case is whether a rate which has been approved by the Commerce Commission after a hearing as to its reasonableness can be termed an "excessive" rate for the purpose of awarding reparations. We hold that it cannot, even though the rate approved by the commission has subsequently been set aside upon judicial review."

In *Mandel*, the Court held that the common-law right to recover reparations for unreasonable charges by public utilities had been superseded by statute and that ratepayers were not entitled to reparations after the reviewing Court set aside an order by the Commission approving an increase in rates. *Id.* Notably, however, *Mandel* has since been sharply limited in its application even in its originating jurisdiction. See *Independent Voters of Illinois v. Illinois Commerce Commission*, 510 NE 2d 850 Ill. (1987).

In contrast, the Nevada Supreme Court held that obtaining a stay was not necessary for obtaining a refund of monies improperly paid as a result of an unlawful order. *Public Service Comm'n v. Southwest Gas Corp.*, 662 P2d 624, 627-30 (Nev. 1983). The North Carolina Supreme Court also approved refunds from rates established by an unlawful order. *North Carolina ex rel Utilities Commission v. Conservation Council*, 320 SE 2d 679, 685-86 (N.C. 1984). That Court held that the ordering of refunds was not retroactive rate-making, and its explanation is logically compelling:

> "'[R]etroactive rate making occurs when, . . . the utility is required to refund revenues collected pursuant to the then lawfully established rates, for such past use.' . . . The key phrase here is 'lawfully established rates.' A rate has not been lawfully established simply because the Commission has ordered it. If the

Commission makes an error of law in its order from which there is a timely appeal the rates put into effect by that order have not been 'lawfully established' until the appellate courts have made a final ruling on the matter." *Id.* at 685.

In sum, those jurisdictions that have adopted some form of the so-called filed rate doctrine are, at best, divided on whether that doctrine prevents the Commission from allowing an offset for past improperly calculated rates in setting new rates following a judicial reversal on appeal.[2] And, this Court is reluctant to embrace any form of a new doctrine which would limit the effectiveness of the judicial review explicitly provided for by statute as an integral part of the overall regulatory scheme.

Moreover, in the form urged by PGE and adopted by the OPUC, the filed rate doctrine would, in practice, become a powerful prescription which would immunize the utility from any meaningful judicial review. Clearly at least a potential source of mischief, adoption of the filed rate doctrine in the form urged by PGE could well encourage increasingly aggressive and perhaps even deceitful utility rate proposals. Once approved by the OPUC, the full financial benefit of all rates collected, no matter how poorly warranted and justified, would be permanently locked in and would never become refundable even when finally determined to be unlawful after years of successive court appeals. In short, Defendants' version of the filed rate doctrine has more in keeping with the satiric scenarios of Joseph Heller's *Catch 22* and Lewis Carrol's *Through the Looking Glass* than with responsible utility rate regulation.

PGE apparently finds some degree of cover for their rather immodest proposal in ORS 757.225. However, that statute provides Defendants with, at best, a flimsy fig leaf that is easily penetrated by the light of legal analysis. Rather than purporting to place any limits on either judicial review of rate making decisions, or on the Commission's own powers upon remand after a judicial reversal, that statute is specifically directed to the regulated utility alone:

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[2] For an excellent discussion of the inconsistent resolution of the issues involved in these cases, and the various permutations and contradictory applications of the filed rate doctrine in other jurisdictions, see *Krieger, The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Rate Making in Public Utility Proceedings*, 1991 U. Ill. L. Rev. 983.

> "***No public utility shall*** charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection, therewith, than is specified in printed rate schedules as may at the time be in force, or demand, collect, or receive any rate not specified in such schedule. The rates named therein are the lawful rates until they are changed as provided in ORS 757.210 to 757.220."

ORS 757.225 (emphasis added). Plainly, the statute cited by PGE only provides that the utility cannot deviate from the printed rate schedules. It does not purport to hamper either the Courts or the Commission in the fulfillment of their own statutory duties. Notably, neither ORS 756.594 nor 756.598, which provide for judicial review of Commission rate making orders, include the restrictions urged by PGE.[3]

PGE also argues that the optional stay remedy provided in ORS 756.590 establishes the exclusive remedy for preventing unlawful and unreasonable rates from becoming permanently untouchable. The short answer to that assertion is that no such legislative intent is expressed in that statute, and there is no discernable legislative policy or purpose which would support the interpretation of any discretionary stay provision as the exclusive method for preventing irreparable harm.

Therefore, this Court concludes that the Commission erred in applying the so-called filed rate doctrine to preclude rate relief to recover past unlawful charges, and that, as a direct result, the rates approved in OPUC Order No. 02-227 are neither just nor reasonable. As part of the adjustment of offsetting charges and liabilities related to the Trojan writeoff, PGE should have been required to account for all refunds due to rate payers for these unlawfully collected rates as a matter of law. And since this is strictly a legal issue, rather than a factual determination, no special deference is due the Commissioner's contrary conclusion on judicial review.

Plaintiffs make several other claims in their complaint, but each relates to contested factual conclusions regarding valuation and accounting issues involved in calculating the various offsetting provisions of PGE's settlement proposal. Frankly, this Court would be inclined to

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[3] See also ORS 756.585 providing that Commission approved rates are only "prima facie" lawful and reasonable until set aside on judicial review, and not "conclusively" lawful and reasonable as argued by PGE.

agree with Plaintiffs as to some of these additional claims, particularly with respect to the handling of the FAS 109 amounts and the final NEIL distribution. Charging rate payers for purported increases in PGE taxes without requiring proof that those taxes were ever actually paid is certainly questionable. Similarly, no persuasive explanation was offered to justify the shift of much of the final NEIL insurance refunds from the rate payers to PGE. And certainly the fact that some net benefit is still enjoyed by the rate payers even after the Commission's accounts are adjusted to PGE's benefit is not a complete answer to Plaintiffs' challenge to the adjustment of those accounts. Indeed, a complete review of the net benefits flowing to PGE following Trojan's removal from PGE's balance sheet in comparison to the net benefits accruing to the rate payers would have been more helpful and persuasive. However, in accordance with the statutory deference afforded to the factual conclusions of the Commission, this Court is simply not permitted to substitute its judgment for that of the Commission on those matters where the evidence is in conflict. ORS 756.598 (1). See *Market Transport, Ltd. v. Maudlin*, 301 Or 727, 733, 723 P2d 914 (1986).

The challenged OPUC's order, No. 02-227, is reversed and remanded to the Commission with directions to immediately revise and reduce the existing rate structure so as to fully and promptly offset and recover all past improperly calculated and unlawfully collected rates, or alternatively, to order PGE to immediately issue refunds for the full amount of all excessive and unlawful charges collected by the utility for a return on its Trojan investment as previously determined to be improper by both this Court and the Court of Appeals.

Because the Plaintiffs now have prevailed on the merits, there is no further need to consider their motion for an interim stay, and that motion is denied as moot.

Dated this ____ day of November, 2005.

_____

Hon. Paul J. Lipscomb

Presiding Judge

CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
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June 4, 2004

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Re: Utility Reform Project v. Public Utility Commission of Oregon
Marion County Circuit Court Case No. 03C21227

Counsel:

This matter came on for oral argument on May 11, 2004, on the Oregon Public Utility Commission's (OPUC) Motion to Dismiss and the Intervenor's (PGE) Motion to Dismiss, and Plaintiffs' Response thereto. Plaintiff appeared by and through Linda Williams, and Daniel Meek, of their attornies, the Public Utility Commission appeared by and through Paul Graham and Stephanie Andrus of the Attorney General's Office, and Portland General Electric Appeared by and through Steven Wilker, of its attorneys.

NATURE OF CASE

This is a challenge to orders of the OPUC denying relief requested by Plaintiffs (March 7, 2003), including to (1) halt charges to rate payers for federal and state income taxes not actually paid;

and (2) recover for ratepayers, such fraudulent and unlawful charges since 1997. Jurisdiction is claimed pursuant to ORS 756.580(2).

POSITIONS OF THE PARTIES

Plaintiffs contend:

1. That the rates charged were based on fraud and were unjust and unreasonable between 1997 and 2001.

2. That the findings and conclusions of law by the Commission for the period after PGE was no longer tax consolidated with Enron, was arbitrary and not according to law because it still estimated $14.7 million per year for State taxes and 71.3 million per year for Federal taxes that PGE did not actually pay.

OPUC claims that the Order of the Commission should be affirmed because:

1. For the period that PGE was wholly owned by Enron, PGE was treated for rate making purposes as a "stand alone" entity, and thus the actual taxes paid by the tax connected third party entity is not relevant.

2. For the later period after PGE operated "outside" Eron for tax purposes, the rate making process continued to include an estimate for taxes for PGE, and the actual taxes paid does not establish illegality; and

3. Even if PGE committed fraud in its estimate of taxes, the rates cannot be changed retroactively.

FACTS AND FINDINGS BELOW

The Order of the Commission was entered July 9, 2003 (Agency Record Item 15, pg. 89-99) and the Reconsideration Denial October 22, 2003 (Agency Record Item 18, pg. 126-128) denying the Petition filed March 7, 2003 (Agency Record Item 1, pg. 1-8). The Petition/Complaint (UCB 13) claimed:

> "... that Enron has paid little or no federal, state, or local taxes since 1997 ..." (Emphasis added, page 2); and

> "Substantial evidence exists that Enron/PGE engaged in a pattern of fraud and deceit upon the agency when it provided "proof" in rate proceedings that it would incur such tax liabilities . . ." (Page 2)

In their prayer for relief to the Commission, Plaintiffs requested an investigation, an order requiring PGE to disclose its tax payments, an order for PGE to refund funds to ratepayers, and for OPUC to conduct a hearing.

PGE filed an answer and a motion to dismiss.

By its Order, the OPUC dismissed the Complaint (See Item 15) for failure to state a claim upon which relief could be granted (Item 15, pg. 93). The Order stated that it assumed all facts alleged in the complaint are true.

1. Deferred Account. The request to open a deferred account was not included in the Complaint. OPUC determined that Plaintiffs did not bring this claim before the agency according to the rules.

   OPUC stated that another reason for dismissal was that the expenses considered in calculation of rates are solely those of the utility, and that the agency views the utility operations separate from the financial operations of the consolidated company (a "stand-alone basis")

2. Damages, Penalty or Forfeiture Claim. Plaintiff also argued for a refund, although the Complaint did not request it. OPUC denied it on this ground. Plaintiff requested a monetary adjustment for fraud (Item 15, pg. 7). OPUC determined that Plaintiff gave no authority for such relief.

3. Refund. This also was not requested in the Complaint. Among other grounds, OPUC determined that ORS 757.255 was clear that it did not allow for a refund and that rule derives from the rule against retroactive rate making. A refund was determined to be not proper.

4. UTPA Claim. OPUC determined that the UTPA does not apply to proceedings at the agency (Item 15, pg. 98), and that the rates challenged were in compliance with Commission Order No. 96-306, and ORS 757.225.

DISCUSSION

This Court reviews the record below de novo to determine if the dismissal by OPUC (Order No. 03-401) for failure to state a claim upon which relief could be granted, was arbitrary or contrary

to the law. This Court has had sufficient time to review the record and the submissions of counsel on the matters presented in oral argument. It is interesting that a claim in the Complaint before the Commission was that Enron (the parent company) did not pay taxes (page 2). As stated in the record, OPUC determines the estimated costs of PGE as "stand alone" entity. The Court agrees that what the consolidated company (Enron) paid in taxes is not relevant.

The focus of this determination is whether the argument of PGE and OPUC is correct as it relates to the claim of fraud and deceit of PGE in its estimates of taxes. OPUC and PGE argue that even if true, such claims do not set out an issue of legality of the rates set by OPUC for PGE.

As determined by Judge Lipscomb recently in Case No. 02C14884, the statute cited by PGE (ORS 757.225) plainly only provides that the utility cannot deviate from the printed schedules. It does not purport to hamper either the Court's or the Commission in fulfillment of their own statutory duties. Indeed, ORS 756.565 provides that the Commission approved rates are only "prima facie" lawful and reasonable until set aside on judicial review, and not "conclusively" lawful and reasonable as argued by PGE. To the extent the so called filed rate doctrine is used to support the Commission to preclude recovery of past unlawful changes, such would be an error of law where the rates are set based upon fraud or deceitful practices. Because this is a legal issue, rather than a factual determination, no special deference is due to the Commissions' order as to this issue. Charging rate payers for purported PGE taxes without requiring proof that the taxes were reasonable estimates of actual taxes (on a stand alone basis) upon a claim of fraud is the issue. If true, such would be illegal.

This Court agrees with the arguments and authorities of Plaintiff and the reasoning of Judge Lipscomb in the above referenced case. The challenged order is reversed and remanded to the Commission to deny the Motion to Dismiss with directions to otherwise proceed on Plaintiff's complaint of fraud and deceit, and if appropriate to reduce the rate structure to fully and promptly offset and recover all past improperly calculated and unlawfully collected rates or issue refunds for the amounts of all excessive and unlawful charges collected based upon such fraud. Mr. Meek should prepare an appropriate order with findings and conclusions consistent with this determination.

Very truly yours,

Don A. Dickey
Circuit Court Judge

DAD:kat
060404puclr

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Complainants' Supplemental Authority and Request to Supplement Record was served via electronic mail and U.S. Mail (unless otherwise specified below) on the following parties on February 28, 2006:

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DAVIS WRIGHT TREMAINE

Joyce Brooks

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