

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1262

CITY OF PORTLAND)	
)	
Complainant,)	
)	
v.)	RULING
)	
PORTLAND GENERAL ELECTRIC)	
COMPANY,)	
)	
Defendant.)	

DISPOSITION: MOTION TO DISMISS GRANTED

On May 3, 2006, the City of Portland (City) filed a complaint against Portland General Electric Company (PGE). In its complaint, the City makes three claims: (1) PGE improperly filed taxes on a consolidated basis with Enron Corp. (Enron) in Oregon; (2) PGE violated rules of the Securities and Exchange Commission (SEC) in transferring funds to Enron without having a tax allocation agreement in place; and (3) PGE paid money to Enron to be used for taxes without having the necessary contract for payments between affiliated entities in place, pursuant to ORS 757.495.

On May 30, 2006, PGE filed a motion to dismiss the City’s first and second claims, arguing that the Commission does not have the jurisdiction to consider violations of laws enforced by the Oregon Department of Revenue and the SEC. PGE does not seek dismissal of the City’s third claim. On June 14, 2006, the City responded to the motion, arguing that the Commission has the jurisdiction to investigate whether PGE’s management acted prudently in taking actions that resulted in the above alleged violations.

Legal Standard for Motion to Dismiss

OAR 860-011-0000(3) states that the “Oregon Rules of Civil Procedure shall govern in all cases except as modified by these rules, by order of the Commission, or by ruling of the ALJ.” ORCP 21A provides for motions to dismiss. In reviewing PGE’s motion to dismiss, it appears to be for lack of jurisdiction over the subject matter.

“Plaintiff bears the burden of alleging and proving the facts necessary to establish jurisdiction. * * * We construe those documents liberally, in favor of jurisdiction.” *Sutherland v. Brennan*, 131 Or App 25, 28 (1994) (citations omitted). In reviewing a motion to dismiss, the decision maker “assume[s] the truth of all allegations, as well as any inferences that may be drawn, and view them in the light most favorable to the nonmoving party.” *Dauven v. St. Vincent Hospital and Medical Center*, 30 Or App 584, 586 (1994) (citations omitted).

Commission Jurisdiction

In the initial complaint, the City requested rulings on “whether PGE was qualified to file unitary tax returns with the State of Oregon together with Enron,” “whether PGE failed to file the required separate Oregon income tax returns with the State of Oregon,” and “whether PGE and Enron violated SEC Rule 45(c) from 1997 through 2004 by distributing amounts collected from Oregon ratepayers for federal and state taxes, without a tax allocation agreement being in place.” *See* Complaint, 7. Following PGE’s motion to dismiss, the City clarified its request, stating in its response that it seeks not a determination as to whether the laws were violated, but a ruling on whether PGE properly accounted for its taxes and whether management made reasonable and prudent decisions in how it handled its tax obligations. *See* City’s Response, 2. The Commission is liberal in its consideration of pleadings, and accepts this amendment of the City’s Complaint. *See* ORS 756.500(4); UE 111, Order No. 00-091, 2.

The Commission’s primary jurisdiction flows from ORS 756.040, which provides a general grant of authority:

[T]he commission shall represent the customers of any public utility or telecommunications utility and the public generally in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction. In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. The commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates. Rates are fair and reasonable for the purposes of this subsection if the rates provide adequate revenue both for operating expenses of the public utility or telecommunications utility and for capital costs of the utility, with a return to the equity holder that is:

(a) Commensurate with the return on investments in other enterprises having corresponding risks; and

(b) Sufficient to ensure confidence in the financial integrity of the utility, allowing the utility to maintain its credit and attract capital.

ORS 756.040(1).

ORS 756.500 through ORS 756.515 enable the Commission to accept complaints and investigate certain utility actions. Specifically, the statutes provide for any person, or the Commission, filing a complaint “against any person whose business or activities are regulated by some one or more of the statutes, jurisdiction for the enforcement or regulation of which is conferred upon the commission.” ORS 756.500(1). In investigating complaints, the Commission may investigate any rate that may be unreasonable or unjustly discriminatory, any service that is unsafe or inadequate, or “is not afforded,” or any matter relating to any public utility or person to determine if such person is subject to the Commission’s jurisdiction. *See* ORS 756.515(1).

The Commission has the authority to investigate and enforce laws “relating to public utilities.” ORS 756.160 (1). Laws relating to public utilities include “rates, valuations, service and all matters of which the commission has jurisdiction.” ORS 756.040. As to these other “matters,” the rules of statutory construction require that they be similar in nature to the items listed before it. *See State ex rel OHSU v. Haas*, 325 Or 492, 503 (1997). Other matters governed by statutes administered by the Commission include allocations of territory, sales of property, and contracts among affiliates. *See generally* ORS chapters 757, 758.

In addition, the Commission has the authority to “inquire into the management of the business of all public utilities * * * and shall keep informed as to the manner and method in which they are conducted.” ORS 756.070. This statute is set in the context of provisions that enable the Commission to administer ORS chapters 756, 757, 758 and 759. *See* ORS 756.075; ORS 756.105. The Commission has been held to have broad authority to take action on utility actions as they relate to the rates and services provided to customers. *See Pacific Northwest Bell v. Katz*, 116 Or App 302, 309 n 5 (1992), *rev den*, 316 Or 528 (1993) (legislature gave PUC the authority to represent a utility’s customers “in all controversies respecting rates, valuations, service and all other matters under its jurisdiction”). However, laws that happen to implicate utilities are not necessarily enforceable by the Commission just because utilities are involved. *See Isom v. Portland General Electric Co.*, 67 Or App 97, 104-05, *rev den*, 297 Or 272 (1984) (claims against utilities under the Unlawful Debt Collection Practices Act are not subject to PUC authority). Further, the legislature – the source of the Commission’s authority – contemplated that there would be some claims against utilities “aris[ing] under any law of this state or under an ordinance of any municipality thereof” that would not be enforceable by the Commission. *See* ORS 756.200. For these reasons, any issue over which the Commission asserts jurisdiction must be related to the service provided or rates charged to Oregon customers.

Claim regarding violation of Oregon tax law

The City argues that PGE improperly filed a consolidated tax return with Enron, in violation of the applicable statutes and rules. The statutes that relate to consolidated and unitary corporate taxes can be found in the Oregon Tax Code, ORS 317.705 through 317.725. The relevant statute provides, “If two or more corporations subject to taxation under this chapter are members of the same affiliated group making a consolidated federal return and are members of the same unitary group, they shall file a consolidated state return.” ORS 317.710(5)(a).

Enforcement of these statutes rests solely with the Oregon Department of Revenue. ORS 305.015 provides: “It is the intent of the Legislative Assembly to place in the Department of Revenue and its director the administration of the revenue and tax laws of this state, except as specifically otherwise provided in such laws.” Moreover, ORS 314.805 similarly declares: “The Department of Revenue shall administer and enforce the tax imposed by any law imposing tax upon or measured by net income. For this purpose the department may divide the state into districts.” Finally, ORS 318.010 provides that the corporate income tax “shall be administered by the Department of Revenue.” For this reason, the unitary tax laws are not “relating to public utilities,” and the Commission does not have authority to investigate under ORS 756.160.

The City argues that the Commission has already asserted jurisdiction over the utility’s collection of taxes, citing *Multnomah County v. Davis*, 35 Or App 521 (1978), regarding Commission treatment of taxes collected for ratepayers. See City’s Response, 6-7.¹ The City is correct that the Commission has exercised its jurisdiction over the *collection* of taxes as a necessary component of base rates. See *Cascade Natural Gas Corp. v. Davis*, 28 Or App 621, 633 (1976), *rev den* (1977). Rate setting is a legislative function, which is conducted within the parameters set forth by the Legislative Assembly. See *Knutson Towboat Co. v. Oregon Board of Maritime Pilots*, 131 Or App 364, 378 n 1 (1994), *rev den*, 321 Or 94 (1995). However, the City’s allegations refer to whether the utility *paid* taxes to various units of government, an issue that does not relate to rates or service, but compliance with tax laws and the impact on taxpayers as a whole. As noted above, this matter is within the jurisdiction of the Department of Revenue, not this Commission. For this reason, the Commission does not have authority to investigate the practice of utility management as related to taxes paid to units of government.

Moreover, after applying a similar analysis to the related requests for relief, it is unclear that the Commission has the authority to grant the requests. The City asks the Commission for a ruling on whether PGE was qualified to file a unitary tax return with Enron, a ruling on whether PGE failed to file the required separate Oregon

¹ The City cites *Oregon Telephone Corp. v. P.U.C.*, 5 Or App 231 (1971) for the proposition that the Commission has jurisdiction over accounting of all liabilities, including taxes. See City Response, 11-12. The City fails to mention that the liability addressed in that case relates to property sold to an affiliate, a matter squarely within the Commission’s jurisdiction. See ORS 757.495. That case is inapposite to the matter at hand, which involves taxes paid to governments, a matter under the jurisdiction of the Department of Revenue. See ORS 305.015; ORS 314.805.

income tax returns when owned by Enron, and a ruling on whether ring-fencing conditions barred PGE from filing a unitary tax return with Enron. *See* Complaint, 7 (requests for relief 2-4). As discussed above, these requests do not relate to service as provided by PGE, or rates collected by PGE, but whether PGE complied with tax laws. These matters are not within the Commission’s jurisdiction.

The motion to dismiss is granted as to the first count and related requests for relief.

Claim regarding violation of Section 12 of PUHCA and SEC Rule 45

Similarly, the Commission does not have jurisdiction over investigation and enforcement of federal securities laws. The City asserts that PGE violated section 12 of PUHCA, *see* 15 USC § 79l (repealed), and SEC Rule 45, *see* 17 CFR 250.45. The statute bars a holding company from borrowing from a public utility or selling securities of any public utility company, as well as prohibiting other distributions between a holding company and other companies within the holding-company system. *See* 15 USC § 79l. Further, the administrative regulation states that there shall be no donation or capital contribution without a declaration from the company and a subsequent order from the SEC. *See* 17 CFR 250.45(a). No such declaration and ruling are required for companies that file a consolidated tax return pursuant to a tax agreement, in writing. *See id.* at (c). The statutory provisions and “any rule or regulation thereunder” were to be enforced by the Securities and Exchange Commission. *See* 15 USC § 79r(a) (repealed).

First, this Commission only has the authority to investigate violations of the laws “of this *state* or any law or ordinance of *any municipality* thereof relating to public utilities.” ORS 756.160 (emphasis added). PUHCA and the related SEC rules are federal laws, over which the Commission has no jurisdiction. Second, as to whether this Commission should investigate PGE’s management, the City makes no assertion that any violation affected the service or rates of PGE customers. Therefore, this is not a matter over which the Commission has jurisdiction. Additionally, the Commission has no jurisdiction over the related request for relief: a ruling as to whether PGE and Enron violated SEC Rule 45(c). For these reasons, the second count and related request for relief are dismissed.

Conclusion

As discussed above, PGE's motion to dismiss the first and second claims is granted. Further, the related requests for relief are also dismissed. Remaining is the claim that PGE and Enron failed to file a contract for payments between affiliated entities pursuant to ORS 757.495. A prehearing conference will soon be held to set a schedule to resolve that issue.

Dated at Salem, Oregon, this 31st day of July, 2006.

Christina M. Smith
Administrative Law Judge