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VIA E-FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
Attn: Filing Center
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Salem, OR 97308-2148

Re: *UM 1226*

Attention Filing Center:

Enclosed for filing in the above-referenced docket are an original and a courtesy copy of Portland General Electric Company's Motion to Dismiss Amended Complaint . 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,

A handwritten signature in cursive script that reads "Leslie Hurd".

Leslie Hurd, Legal Assistant to
David F. White

/ldh

Enclosure

cc (w/enc.): Service List
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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 MOTION TO DISMISS
AMENDED COMPLAINT**

Pursuant to OAR 860-013-0031 and ORCP 21(A)¹, Portland General Electric Company ("PGE") requests that the Commission or the Administrative Law Judge ("ALJ") enter an order or ruling dismissing Utility Reform Project's and Ken Lewis' ("URP") Amended Complaint.² The remedy URP seeks – deferred accounting – is unavailable under the complaint statute (ORS 756.500). Moreover, URP failed to set forth facts sufficient to show that PGE violated any statute, rule or Commission order.

I. INTRODUCTION

In the Amended Complaint, URP alleges that PGE's rates were unlawful because they included tax expenses that were not paid to taxing authorities. URP claims that SB 408 made unlawful and unauthorized any rate that "includes an amount for income taxes other than

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 ORCP 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 Amended Complaint and will file an answer to that effect if the Commission requires one at this stage of the proceeding.

² URP has also filed an Application for Deferred Accounting, which we address in PGE's Amended and Reply Comments on URP's Application for Deferred Accounting, filed separately in UM 1224.

taxes that are paid." Amended Complaint, ¶ 8. The time period covered by the Amended Complaint runs from the date of SB 408's passage (September 2, 2005) until the effective date of the SB 408 automatic adjustment clause. Amended Complaint, ¶ 7 (defining the "Pre-Adjustment Clause Period"). The Commission has recently made clear that the adjustment clause will apply to taxes paid on and after January 1, 2006.³ Accordingly, the Amended Complaint is limited in scope to the four-month period from September 2, 2005 through December 31, 2005 (the "Four-Month Period").⁴

The Amended Complaint requests a deferred account to capture the difference between the tax expense collected in rates and taxes paid to taxing authorities for the Pre-Adjustment Clause Period. Amended Complaint, ¶ 10. The Amended Complaint states that the starting point for the deferral may begin either on September 2, 2005, (the date of SB 408's passage) or October 5, 2005 (the date URP filed its deferred accounting application). *Id.*

II. LEGAL STANDARD FOR MOTION TO DISMISS

Commission rules specifically permit the filing of a motion to dismiss against a complaint. *See* OAR 860-013-0050(3)(a). Objections that the Commission lacks jurisdiction or that the Amended Complaint does not state a claim upon which the Commission may order relief are never waived and may be made at any time. *See* OAR 860-013-0050(4).

To our knowledge, the Commission has not set forth a legal standard for deciding

³ *See* AR 499, Order No 06-532 Appendix (Sept. 14, 2006), (adopting permanent rules that require implementation of rate adjustment "applying to taxes paid to units of government and collected from ratepayers for each fiscal year beginning on or after January 1, 2006" (OAR 860-22-0041(8))).

⁴ It is theoretically possible that the SB 408 automatic adjustment clause will not trigger in 2006 if the difference between taxes collected and taxes paid is less than \$100,000. ORS 757.268(4). Given such a minimal threshold, this is more a theoretic than a real possibility. URP does not suggest that its Amended Complaint is designed to address such an unlikely scenario in which taxes paid and taxes collected essentially match. URP's request seeks refunds to customers when there is a significant discrepancy between taxes collected and taxes paid, precisely the circumstances in which the automatic adjustment clause will be triggered. In any event, it is well within the Commission's discretion under ORS 757.259 to decline a deferral request for an immaterial amount, particularly where the Legislature has designed a rate-making tool that specifically declines to refund or surcharge that amount to customers.

motions to dismiss, but the Commission's practice has been to dismiss claims that are legally defective and do not require an evidentiary hearing for disposition. As such, the Commission has dismissed without a hearing claims that are beyond the Commission's jurisdiction. *See, e.g., Michael Thompson v. Qwest Corp.*, UCB 1, Order No. 02-558 (Aug. 13, 2002) (dismissing complaint based on telephone directory charges as a matter "outside the jurisdiction of the Commission"); *Spring Crest Drapery Center v. Qwest Corp.*, UC 596, Order No. 01-594 (Or PUC 2001) (dismissing complaint seeking monetary damage because "Oregon statutes do not provide the Commission with authority to require telecommunications carriers to pay customers monetary penalties for service failures"). The Commission has also dismissed claims for which it cannot order relief or, if the complaint fails to show a violation of statute, rule or Commission order. *See, e.g., Schultz v. Qwest Corp.*, UC 559, Order No. 00-752 (dismissing complaint that failed "to state a cause of action that would authorize the Commission to act"); *Wilson v. Qwest Corp.*, UC 584, Order No. 01-798 (Sept. 12, 2001) (dismissing complaint that "failed to establish that Qwest violated a statute, rule or Commission order").

For the reasons set forth below, the Commission should grant PGE's motion to dismiss URP's Amended Complaint.

III. AMENDED COMPLAINT SEEKS RELIEF THAT IS UNAVAILABLE

URP's Amended Complaint should be dismissed because it seeks relief unavailable under ORS 756.500—the statute under which it brings this Amended Complaint. The Amended Complaint seeks relief for alleged "unlawful" rates through the establishment of deferred accounts during the last quarter of 2005. Amended Complaint, ¶ 10. ORS 756.500 makes no provision for deferred accounting or retroactive relief. Indeed, the Legislature enacted the deferred accounting statute because the Attorney General's Office concluded that the utility statutes did not otherwise empower the Commission to use deferred accounting. Or. Op. Atty. Gen. OP-6076, 1987 WL 278316 (March 18, 1987). In addition, URP's deferral application places the issue of deferred accounting before this Commission and makes the Complaint superfluous as well as procedurally improper. Even if URP could request deferred accounting

under ORS 756.500, it is unnecessary given its parallel request under ORS 757.259.

IV. PGE'S RATES WERE LAWFUL AND AUTHORIZED

Even if the relief URP seeks was appropriate in a complaint proceeding, URP's Amended Complaint should be dismissed because the essential predicate of its claim fails: PGE's rates were authorized and lawful during the relevant time period.⁵

URP suggests that PGE's rates were unlawful under SB 408, but it never identifies what statutory provision PGE's rates violated. Unpacking what laws SB 408 changed reveals that PGE's rates were authorized and lawful. Three components of SB 408 are at issue: its amendment of ORS 757.210; enactment of an automatic adjustment clause (ORS 757.268); and legislative findings and declarations (ORS 757.267), none of which PGE violated.

A. PGE'S RATES WERE AUTHORIZED UNDER ORS 757.210 AND LAWFUL

The Commission's general rate-making statute—ORS 757.210—governs the Commission's process when a utility files a new rate or seeks to increase an existing rate. ORS 757.210(1)(a) The statute requires a hearing if a party files a written complaint concerning the new rates, provides that the utility bears the burden of showing that rates are "fair, just and reasonable," and bars the Commission from adopting rates that are not "fair, just and reasonable." SB 408 amended the statute to replace "just and reasonable" with "fair, just and reasonable" and confirmed what was implicit before: that the Commission may not authorize a new rate under ORS 757.210 that does not meet the "fair, just and reasonable" standard.

URP's suggestion that PGE's rates violated ORS 757.210 is misconceived, reflecting a misunderstanding of the statute and the Commission's rate-making practice. An essential predicate for the application of the statute is a triggering request for new rates. If there is no request for new rates, ORS 757.210 does not apply.

PGE did not ask the Commission during the Four-Month Period to adopt new

⁵ The remainder of this Section IV is identical to Section II of our Reply Comments in UM 1224. We reproduce it here for convenience.

rates pursuant to ORS 757.210. The Commission set PGE's 2005 rates in Order No. 01-777 in 2001. UE 115, Order No. 01-777 (Aug. 31, 2001). The Commission updated the power cost portion of customers' 2005 rates in the fall of 2004 in Order No. 04-573. UE 161, Order No. 04-573 (Oct. 5, 2004). These rate orders were lawfully issued under ORS 757.210; no party appealed these orders.

The Commission sets rates based upon forecasts that parties make in the rate-making proceeding. Those rates are tested against the rate case forecasts and rate-making principles to determine whether the proposed rates satisfy the standards of ORS 757.210. If rates meet that standard, the Commission's work is done until the next rate proceeding. What happens between rate proceedings is of no moment.

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.

UM 47/48, Order No. 89-687 at 8-9 (May 24, 1989).

The UE 170 orders are consonant with this view. PacifiCorp placed the Commission in the unique position of setting rates under ORS 757.210 during the period after passage of SB 408 but before implementation of the SB 408 automatic adjustment clause. Order No. 06-379 at 6-7 (July 10, 2006). That was not the case for PGE's 2005 rates, which the Commission set in 2001 and updated at the end of 2004. In fact, the UE 170 Reconsideration Order reaffirmed the principle that ORS 757.210 has no import between rate proceedings: "[R]atemaking requires that an estimate be made at a specific point in time as to the utility's reasonable operating costs: Accordingly, the 'reasonableness of the rates under consideration is judged at an instant in time—namely, the rate case decision.'" Order No. 06-379 at 17 (quoting from Order No. 89-687).

As the Commission recognized in Order No. 06-379, the SB 408 amendment to ORS 757.210 could well apply to prospective changes to utility rates. *Id.* at 7. But URP has

disclaimed any interest in such prospective changes to PGE's rates, focusing instead on amounts collected in the past. *See* Amended Complaint, ¶ 7 (limiting relief to Pre-Adjustment Clause Period); URP Resp. (UM 1224) at 2, 5-6, 10 ("Future amortization of deferred account we seek will 'look backwards'"). In fact, URP intervened in PGE's current general rate case (UE 180), which will set new prospective rates under ORS 757.210, but declined to raise any issues with respect to PGE's tax expense in that proceeding.

B. PGE'S RATES DID NOT VIOLATE SB 408'S ADJUSTMENT CLAUSE

PGE's 2005 rates were not unlawful under the automatic adjustment clause SB 408 establishes—ORS 757.268. URP does not, and cannot, allege that PGE violated that provision. URP's application concerns the period *before* the automatic adjustment clause applies.

C. LEGISLATIVE FINDINGS LACK THE FORCE OF LAW

URP's "unlawful rate" claim places undue reliance on Section 2(1)(f)—a single sentence from SB 408's preamble. *See* Amended Complaint, ¶ 5; ORS 757.267(1)(F). That legislative finding and declaration cannot bear such weight. Legislative findings can provide insight into the Legislature's motives, but they are not part of the substantive law.⁶ They may be used as a tool for statutory construction, but they have no legal force and effect. *See, e.g., Portland Van & Storage Co. v. Hoss*, 139 Or 434, 444-45, 9 P2d 122 (1932) ("The preamble of a statute is a recital of the motives and inducements which led to its enactment. It is not an essential part of the act and neither enlarges nor confers powers"); *Department of Land Conservation and Development v. Jackson County*, 121 Or App 210, 218, 948 P2d 731 (1997) (preamble did not confer authority which substantive provisions of law withheld, "they are instructive only insofar as they have a genuine bearing on the meaning of the provision that is being construed").

⁶ 1A Sutherland Statutory Construction § 20:3 (6th ed.) ("the preamble of a legislative act is not part of the law—it cannot be given the effect of enlarging the scope or effect of a statute"); 73 Am Jur 2d Statutes § 46 (2d ed.) ("A preamble is not part of a statute itself and has no substantive legal force").

Had the Legislature intended for the Commission to adopt an immediate true-up of taxes collected and taxes paid, it could have done so. It could have made the automatic adjustment clause effective immediately and not limited its operation to taxes paid after January 1, 2006. It could have amended the deferred accounting statute to permit an immediate true-up. But the Legislature chose neither alternative. Instead, it amended ORS 757.210 for prospective changes in rates and created a true-up mechanism effective no sooner than January 1, 2006.

URP is not pleased with these legislative choices. But such decisions are the prerogative of the Legislature, not private parties or the agency charged with implementing the substantive laws. Findings and declarations in the preamble cannot create legal rights the Legislature declined to adopt in the substantive provisions of the act. *See Ochoco Construction, Inc. v. Dep't of Land Conservation and Development*, 295 Or 422, 667 P2d 499 (1983) (authority mentioned in preamble but not adopted in substantive provision was not conferred on agency: "Had the Legislature intended to charge the Department with the additional responsibility * * * the Legislature would have delineated the responsibility as clearly as it did the above-listed provisions").

V. UE 170 ORDERS DO NOT SUPPORT URP'S AMENDED COMPLAINT

URP's Amended Complaint appears to be based as much upon the Commission's orders in UE 170 as any statutory provision. Thus, URP argues that the Commission recognized a new category of "unacceptable rates," rates which include amounts for tax expenses not paid to taxing authorities. Amended Complaint ¶ 8. URP reliance on UE 170 is misplaced.

The Commission's Orders in UE 170 addressed a very narrow issue: did 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 limited its decision to prospective rate-making decisions under ORS 757.210:

We conclude that, due to a unique combination of SB 408's effective date, the amendments to ORS 757.210, and

corresponding clarification of these amendments in legislative findings, as well as the delayed implementation of the automatic adjustment clause, we were required to prospectively adjust PacifiCorp's base rates to reflect the taxes paid to units of government * * *


Order No. 06-379 at 7. The UE 170 orders specifically addressed amendments to ORS 757.210 in a proceeding under that statute. Here, URP expressly disclaims any interest in changing rates prospectively under ORS 757.210, focusing instead on amounts collected before the effective date of the automatic adjustment clause.

Finally, URP's Amended Complaint violates the spirit of the UE 170 orders and the SB 408 Legislature's intent. In UE 170, the Commission carefully reviewed SB 408, applied a statutory provision that the SB 408 Legislature amended (ORS 757.210), and linked those amendments to the statute's primary objective of aligning the tax expense in rates with the taxes paid. Here, URP seeks to use statutes the SB 408 legislature did not amend or use (ORS 756.500 and ORS 757.259) to accomplish what the Legislature declined to do: impose a true-up of taxes paid and taxes collected before January 1, 2006. The Legislature certainly did not intend this outcome; nor do the Commission orders in UE 170 compel or support such a result.

VI. CONCLUSION

For the reasons stated, PGE respectfully requests that the Commission dismiss the First Amended Complaint.

DATED this 21st day of November, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S MOTION TO DISMISS AMENDED COMPLAINT** 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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DATED this 21st day of November, 2005.



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