

1 **BEFORE THE OREGON PUBLIC UTILITIES COMMISSION**

2
3 **DR 32**

4
5 **In the Matters of:**
6 **PORTLAND GENERAL ELECTRIC**
7 **COMPANY** Petition for a Declaratory
8 **Ruling Regarding the Application of**
9 **OAD 860-022-0045**

PETITION FOR INTERVENTION OF:
KAFOURY BROTHERS LLC
DAVID KAFOURY
KEN LEWIS
UTILITY REFORM PROJECT

10
11 1.

12 Pursuant to OAR 860-13-021, KAFOURY BROS., LLC, DAVID KAFOURY, KEN
13 LEWIS, and the UTILITY REFORM PROJECT (URP) each petition to intervene in this
14 docket as a party. In support of this petition, each alleges as follows.

15
16 2.

17 Kafoury Brothers, LLC, (hereinafter "Kafoury Brothers") does business at 1515
18 S.E. Ankeny Street in Portland, Oregon, and within Multnomah County. It has been a
19 PGE customer for decades and continues to be a commercial customer of Portland
20 General Electric Company ("PGE").

21 3.

22 David Kafoury resides in Multnomah County, Oregon. He has been a residential
23 customer of PGE for decades and is currently a PGE residential customer.

24
25 4.

26 Ken Lewis is PGE ratepayer. He resides in Multnomah County at:

27 2880 N.W. Ariel Terrace
28 Portland, OR 97210
29 503-222-2454 voice
30 503-222-7447 fax
31 KL04@mailstation.com

32 He has been a residential customer of PGE for decades and is currently a PGE
33 residential customer.
34

1 5.

2 The Utility Reform Project (URP) is a ratepayer advocacy group formed in 1984,
3 which has participated in dozens of OPUC proceedings and resulting court dockets.

4 URP which has among its members:

- 5 a. Current PGE ratepayers who are residents of Multnomah County and
6 residents of the City of Portland;
- 7 b. Current PGE ratepayers who are residents of Multnomah County but not
8 residents of the City of Portland;
- 9 c. Former PGE ratepayers who formerly resided in Multnomah County and paid
10 PGE bills which included Multnomah County Business Income Tax (MCBIT)
11 charges that were not paid to Multnomah County by PGE.

12 6.

13 Kafoury Brothers, Kafoury and Lewis (hereinafter collectively "Class Action
14 Plaintiffs") are each and all plaintiffs seeking to be certified as class representatives in
15 currently pending civil suits against Portland General Electric Co., Multnomah County
16 Circuit Court No. 0501-00627. A copy of the complaint is attached as Exhibit A to
17 PGE's Petition. A copy of the Amended Complaint is attached as Exhibit A to this
18 Petition to Intervene. This suit seeks damages, *inter alia*, for PGE's conduct and
19 statements on its bills for electric service that it was billing and collecting from Kafoury
20 Brothers, Kafoury, Lewis and other ratepayers amounts that it had been required to pay
21 Multnomah County for MCBIT which it had neither been required to pay and had not
22 paid.

23 7.

24 Petitioners intend to monitor the current proceeding for any information, legal
25 argument, position or representation relevant to their claims in the ongoing court
26 proceeding.

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Petitioners are represented by attorneys Linda K. Williams and Daniel W. Meek. Both are experienced in practice before the Commission, having appeared in dozens of proceedings before it, and each is a member in good standing of the Oregon State Bar.

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9.

Identification of specific issues petitioners intend to raise will depend upon the scope, timing, and procedural rules of the proceeding, and the positions advocated by PGE and staff, each of whom are in adverse litigation postures to petitioners regarding significant legal and factual issues raised in ongoing civil matters. In general, petitioners will seek to ensure that the proceeding, if any ensues, complies with all applicable laws and that the resolution, if any, will produce concrete benefits for ratepayers and former ratepayers similarly situated to petitioners.

10.

The interests and perspective of (1) former residents of Multnomah County who were PGE ratepayers and paid MCBIT, (2) smaller business and commercial customers who paid MCBIT (3) residents of Multnomah County who paid MCBIT and are not within the City of Portland, and (4) the Class Action Plaintiffs are not represented by any other party in this proceeding, nor by any potential statutory intervenor (Citizens Utility Board represents only residential customers), nor any association of industrial customers.

11.

To the extent a proceeding ensues, petitioners intend to participate as parties, to file testimony, conduct appropriate discovery, brief legal issues germane to their

1 interests as well as others similarly situated. They will seek to coordinate their filings,
2 potential witnesses, discovery and other matters with other parties in an effort to
3 efficiently use resources and to not burden the proceeding.

4 WHEREFORE, Kafoury Brothers, Kafoury, Lewis and Utility Reform Project
5 request that the Commission:

- 6 (1) Grant them intervenor status in the current proceeding;
7
8 (2) Add to the service list of this proceeding its counsel and Ken Lewis.

9
10 March 14, 2005

Respectfully submitted,

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16 _____
17 LINDA K. WILLIAMS
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22 lawyer@lindawilliams.net
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CERTIFICATE OF SERVICE

I hereby certify I FILED the foregoing PETITION FOR INTERVENTION OF:
KAFOURY BROTHERS, KAFOURY, LEWIS AND URP by e-mail upon the OPUC,
followed by mail of the original and 5 copies this date to the Oregon Public Utility
Commission, and further I certify that I served a courtesy copy as noted, by placing a
true copy of the foregoing placed in a sealed envelope and deposited in the U.S. Postal
Service at Portland, Oregon, with first class postage prepaid, to

Benjamin Walters
Deputy City Attorney
Office of the City Attorney
1221 SW 4th Avenue Rm 430
Portland, OR 97204

Dated:

March 14, 2005

Linda K. Williams

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3 EXHIBIT A- PETITION TO INTERVENE (KAFOURY BROTHERS, ET AL
4 DR 32
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6 IN THE CIRCUIT COURT FOR THE STATE OF OREGON
7 COUNTY OF MULTNOMAH
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10 DAVID KAFOURY, and KEN LEWIS,
11 individuals, and KAFOURY BROTHERS,
12 LLC, an Oregon Limited Liability
13 Corporation, each as representative of the
14 class of similarly situated electric service
15 customers of Portland General Electric
16 Company;

17 PLAINTIFFS,

18
19 V.
20

21
22 PORTLAND GENERAL ELECTRIC
23 COMPANY, an Oregon corporation,
24

25 DEFENDANT.
26
27

Case No. 0501-00627

FIRST AMENDED
COMPLAINT

JURY TRIAL REQUESTED

EXEMPT FROM
ARBITRATION

28 Plaintiffs request a jury trial and allege as follows:
29

30 GENERAL ALLEGATIONS
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32 1.

33 Defendant Portland General Electric Company (PGE) is an Oregon corporation
34 and utility regulated by the Oregon Public Utility Commission (OPUC) which at all
35 relevant times has provided and does provide electric utility services in Multnomah
36 County and elsewhere in Oregon with a place of business at 121 SW Salmon Street,
37 Portland, in Multnomah County, Oregon.

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2.

Plaintiff David Kafoury resides in Portland, Oregon, in Multnomah County and is and has been a residential customer of PGE at relevant times, with one or more accounts for electric service in his name in said county.

3.

Plaintiff Kafoury Brothers LLC does business at 1515 S.E. Ankeny Street in Portland, Oregon, in Multnomah County and is a commercial customer of PGE. It, and its business predecessors in interest at that address, were commercial customers of PGE at all relevant times.

4.

Plaintiff Ken Lewis resides in Portland, Oregon, in Multnomah County and is and has been a residential customer of PGE at relevant times, with one or more accounts for electric service.

5.

Plaintiffs seek to represent a class consisting of all customers of PGE electric utility services who were billed on their electric bills and paid amounts to PGE purportedly for PGE's Multnomah County Business Income Tax (MCBIT) for each year in which defendant was not required to pay, or did not pay, MCBIT in the amounts billed and collected from plaintiffs, as described below.

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6.

From 1974, and in particular from 1997 through the present, defendant billed and is billing its electricity customers, including plaintiffs, for service rendered in Multnomah County. Defendant has stated on these bills that an amount for "Taxes and Fees" purportedly on "behalf" of Multnomah County has been added, and due and owing, to pay the MCBIT supposedly owed or paid by defendant to the County. These bills contained an itemized line and charge for "Taxes and Fees" on the front of the first page, and on the reverse of that page the Multnomah County Business Income Tax was specifically identified as such a billed and itemized "tax." At other times the reverse of the first page carried the explanatory statement, "**Taxes and Fees** (Collected on behalf of local government and other agencies" and listed "Multnomah County Tax" and a percentage amount of the bill attributed to such tax. The reference to "Multnomah County Tax" is a reference to the MCBIT.

7.

Charging ratepayers for MCBIT is not and has not been authorized by any rate order of the OPUC.

8.

Charges for MCBIT were and are billed and collected under a rule of the OPUC, OAR 860-022-0045, which provides that an electric utility which is "required to pay such [county imposed] taxes or fees shall collect from its customers within the county imposing such taxes or fees the amount of the taxes or fees * * *" by separately

1 itemizing the tax on bills for electric service in addition to its rates and charges
2 authorized in any then-applicable rate order.

3 9.

4 During the time period of 1997 through the present, PGE billed and continues to
5 bill customers within Multnomah County and has collected and continues to collect
6 from them a total aggregate amount in excess of \$7 million, purportedly for
7 defendant's MCBIT liability.

8 10.

9 During the time period of 1997 through the third quarter of 2004, PGE paid to
10 Multnomah County a total aggregate amount of less than \$4,000 for MCBIT, which
11 was paid in 2003.

12 11.

13 Multnomah County did not impose upon PGE any MCBIT in excess of \$4,000 in
14 the time period 1997 to the present, nor was PGE ever "required to pay" MCBIT in
15 that amount above \$4,000.

16 12.

17 Upon information and belief, plaintiffs allege that PGE billed and collected
18 additional substantial unknown amounts to be proved at trial in excess of any amounts
19 it was required to pay for MCBIT liability for years prior to 1997.

20 13.

21 At all times between 1997 and the present defendant knew that Multnomah
22 County had not imposed upon it MCBIT in the amounts billed and collected from

1 plaintiffs and plaintiff class; and defendant further knew that it had not been required
2 to pay, and did not pay, any amount in excess of an aggregate of \$4,000 during the
3 period that period.

4 14.

5 Plaintiffs and the plaintiff class had no recourse but to pay the bills presented to
6 them by defendant, such bills stating an itemized charge for MCBIT, or risk electric
7 service shut-off.

8 15.

9 Plaintiffs and the plaintiff class had no opportunity for notice or knowledge of the
10 facts that MCBIT had not been imposed by the county in the amounts billed and
11 collected by PGE, nor did they have opportunity for notice or knowledge that PGE had
12 not been required to pay more than \$4,000 in MCBIT in the period of 1997 to the
13 present, and they did not discover such facts until November 22, 2004.

14 16.

15 Defendant has retained all the monies (with the exception of less than \$4,000)
16 that defendant collected from plaintiffs for MCBIT between 1997 and the present.

17 **FIRST CLAIM FOR RELIEF--EXPRESS TRUST**

18 17.

19 Plaintiffs reallege ¶¶ 1-16.

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21 18.

1 Defendant's statements on its bills created an express trust that monies billed
2 and collected for MCBIT would be held by defendant and paid over to Multnomah
3 County for the purpose of paying actual taxes which PGE was required to pay to the
4 County and for no other purpose.

5 19.

6 Defendant was and remains a trustee of monies collected for MCBIT from
7 plaintiffs with fiduciary duties to the plaintiffs.

8 20.

9 Sums billed and collected for MCBIT were not expended for the intended
10 purpose, and the moneys should be returned to plaintiff ratepayers with interest.

11 **IN THE ALTERNATIVE, AS A SECOND CLAIM FOR RELIEF--RESULTING TRUST**

12 21.

13 Plaintiffs reallege ¶¶ 1-16.

14 22.

15 Defendant's statements on its bills created a resulting trust that monies billed and
16 collected for MCBIT would be held and paid over to Multnomah County for the
17 purpose of paying actual taxes which PGE was required to pay the County and for no
18 other purpose.

19 23.

20 Defendant was and remains a trustee of monies collected for MCBIT from
21 plaintiffs with fiduciary duties to plaintiffs.

22 24.

1 Funds billed and collected for MCBIT were not spent for the intended purpose
2 and the moneys should be returned to ratepayers with interest.

3 **AS A FURTHER ALTERNATIVE TO THE FIRST AND SECOND CLAIMS, A THIRD**
4 **CLAIM FOR RELIEF--UNJUST ENRICHMENT**

5
6 25.

7 Plaintiffs reallege ¶¶ 1-16.

8 26.

9 Sending bills which contained charges for MCBIT that PGE was never required
10 to pay caused ratepayers to pay amounts to defendant that were not authorized by
11 law and plaintiffs were damaged thereby in the amounts of such unlawful charges.

12 27.

13 Plaintiffs and the plaintiff class were harmed by defendant's conduct, and it
14 would unjustly enrich defendant to retain monies collected from plaintiffs for taxes
15 never imposed.

16 28.

17 Plaintiffs, and the class of all PGE ratepayers in Multnomah County, are entitled
18 to restitution of the amounts paid by them to defendant for MCBIT which was never
19 paid to Multnomah County, with interest.

20 **FOURTH CLAIM FOR RELIEF--CONVERSION.**

21 29.

22 Plaintiffs reallege ¶¶ 1-16, 18-20, and 22-24.

23 30.

1 Plaintiffs notified defendant PGE of their intent to amend their Complaint with
2 claims for damages under ORCP 32.H and also made demand upon it for payment of
3 monies due them more than thirty days prior to filing this amendment.

4 31.

5 Defendant did not pay the sums billed and collected from plaintiffs and the
6 plaintiff class for MCBIT to the County but instead has kept the monies for its own use
7 and plaintiffs are harmed thereby.

8 32.

9 Plaintiffs have a present right to all monies paid by them to defendant for MCBIT
10 which was never paid to Multnomah County, with interest.

11 **FIFTH CLAIM FOR RELIEF-- VIOLATION OF ORS 757.225.**

12 33.

13 Plaintiffs reallege ¶¶ 1-16 and 30.

14 34.

15 Charging plaintiffs for MCBIT and collecting money from plaintiffs for MCBIT that
16 was never imposed or charged to the defendant and which PGE was never required
17 to pay and never did pay is unlawful, and all such charges are in excess of the lawful
18 rates for electric service, thus violating ORS 757.225 and also violating ORS 756.185,
19 which forbids defendant from causing or permitting acts prohibited by ORS 757.225.

20
21 35.

1 Defendant's conduct in repeatedly billing and collecting money for taxes that it
2 was not required to pay and never paid was grossly negligent or willful.

3 36.

4 Plaintiffs are harmed thereby in the amounts charged and collected from them for
5 MCBIT which PGE was never required to pay, including interest.

6 **SIXTH CLAIM FOR RELIEF--MONEY HAD AND RECEIVED.**

7 37.

8 Plaintiffs reallege ¶¶ 1-16 and 30.

9 38.

10 PGE knowingly billed and collected and retains amounts from plaintiffs and
11 plaintiff class which were intended solely for the payment of MCBIT, and PGE was
12 never required to pay MCBIT in the amounts billed and collected and never did pay
13 such amounts.

14 39.

15 Plaintiffs and plaintiff class were harmed thereby in the amounts charged and
16 collected from them for MCBIT which PGE was never required to pay, and it would
17 unjustly enrich defendant to retain monies collected from plaintiffs which were billed
18 and collected but which were never paid to Multnomah County for MCBIT and
19 plaintiffs are entitled to return of their money with interest.

1 **SEVENTH CLAIM FOR RELIEF--FRAUD**

2 40.

3 Plaintiffs reallege ¶¶ 1-16 and 30.

4 41.

5 PGE knew that Multnomah County had not imposed upon it MCBIT in the
6 amounts billed and collected from plaintiffs and knew that it had never been required
7 to pay the amounts it billed and collected for MCBIT and further knew that it had not
8 paid such amounts to Multnomah County for MCBIT.

9 42.

10 Defendant made the statements on each bill to each ratepayer in Multnomah
11 County that amounts were being billed and collected for MCBIT with knowledge that:
12 the statement was false, or with reckless disregard for the truth of such statement;
13 plaintiffs would reasonably believe under the circumstances that the charges and
14 amounts were authorized to be billed for the stated purposes of "taxes"; plaintiffs
15 would rely upon the apparent truth of the billing statement to their financial damage by
16 paying charges for "taxes"; and, plaintiffs had no way of knowing or discovering that
17 the statements were false, and that no taxes in the amounts billed and collected were
18 due to or paid to the County.

19 43.

20 Plaintiffs and plaintiff class were harmed by defendant's statements and
21 omissions of material facts about the reason for the charges, and the amounts it was

1 required to pay for MCBIT, in the amounts collected from them for MCBIT which were
2 never paid by PGE for MCBIT and the interest thereon.

3 **CLASS ALLEGATIONS**

4
5 44.

6
7 Plaintiffs reallege ¶¶ 1-16, and all paragraphs stating their claims: 18-19, 21-22,
8 24-26, 30, 31-32, 34-36, 38 and 39.

9 45.

10 Plaintiffs are representative of a class consisting of all customers of PGE electric
11 utility services charged for MCBIT in the period of 1997 and earlier to the present.

12 46.

13 The class of PGE customers represented by the plaintiffs numbers over 150,000
14 and hence is so numerous that joinder of all members is impractical.

15 47.

16 There are identical and substantial questions of law common to the claims of
17 each class member.

18 48.

19 There are identical and substantial questions of fact common to the claims of
20 each class member.

21 49.

22 The claims of the representative parties are typical of the claims of each class
23 member as they arise from the same events, practices and course of conduct of PGE.

24 50.

1 The representative parties can fairly and adequately protect the interests of the
2 class.

3 51.

4 The representative parties are represented by experienced counsel who have
5 participated in dozens of proceedings before utility regulatory commissions and
6 numerous complex matters, including quasi-class and class actions.

7 NOTICE OF INTENT TO SEEK PUNITIVE DAMAGES

8 Plaintiffs intend to move for leave to amend to include a request for punitive
9 damages on their FOURTH and SEVENTH claims for relief.

10 WHEREFORE, plaintiffs pray for:

- 11 1. An order certifying a plaintiff class of PGE customers who were overcharged for
12 MCBIT at all times;
- 13 2. Judgment in favor of plaintiffs and plaintiff class and against defendant, for an
14 accounting of all amounts charged for MCBIT and not paid to Multnomah
15 County on their FIRST, SECOND, or THIRD claims for relief;
- 16 3. Judgment in favor of plaintiffs and plaintiff class and against defendant, for
17 return of all amounts charged for MCBIT and not paid to Multnomah County on
18 their FIRST, SECOND, or THIRD claims for relief;
- 19 4. Judgment in favor of plaintiffs and plaintiff class and against defendant, for
20 damages in the amounts charged for MCBIT and not paid to Multnomah County
21 on their FOURTH, FIFTH, SIXTH and SEVENTH claims for relief;
- 22 5. Award of prejudgment interest;

- 1 6. Judgment in favor of plaintiffs and plaintiff class and against defendant, for an
2 additional amount triple that charged for MCBIT and not paid to Multnomah
3 County on their FIFTH claim for relief;
4 7. Recoverable costs and reasonable attorney fees; and
5 8. Such other relief as the court deems warranted.

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7 Dated: February 25, 2005

Respectfully Submitted,

DANIEL MEEK

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing PLAINTIFFS' FIRST AMENDED COMPLAINT and by HAND DELIVERY this date:

Lisa A. Kaner
MARKOWITZ, HERBOLD, GLADE & MEHLHAF, P.C.
1211 SW Fifth Avenue, Suite 3000
Portland, OR 97204
Attorney for Defendant PGE

Courtesy copies by e-mail
email: LisaKaner@MHGM.com

David Aamodt, Counsel
Portland General Electric Company
121 SW Salmon Street Ste 1300
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DavidAamodt@pgn.com

Dated: February 25, 2005

Linda K. Williams