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July 14, 2005

Public Utility Commission of Oregon
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PO Box 2148
Salem, Oregon 97308-2148

Re: DR 32

Dear filing center:

Enclosed for filing, please find the Staff Opening Brief in Docket No. DR 32.

Thank you for your attention.

Very truly yours,

Stephanie S. Andrus
Assistant Attorney General

Enc.
c. Service list

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR 32

In the Matter of the Petition of Portland General Electric Company for a Declaratory Ruling Regarding the Application of OAR 860-022-0045	STAFF OPENING BRIEF

Pursuant to ORS 756.040 and OAR 860-013-0020, Portland General Electric Company ("PGE") has requested that the Commission issue a declaratory ruling addressing the following three questions:

1. Whether utilities are required to determine their local income taxes on a regulated, stand-alone basis and collect such amounts from customers when applying OAR 860-022-0045; and

2. Whether PGE acted in conformity with OAR 860-022-0045 when it charged customers for county income taxes imposed on PGE as a stand-alone regulated operation and when PGE paid those sums to Enron during the period when Enron filed a consolidated tax return.

3. If the Commission determines that PGE has improperly billed for local income taxes, whether the provisions of OAR 860-021-0135 apply.

For purposes of this declaratory ruling proceeding, the parties and Commission are to assume as the underlying facts those that are alleged in PGE's Petition for Declaratory Ruling. (June 10, 2005 Prehearing Conference Report.)

Question No. 1: Whether utilities are required to determine their local income taxes on a regulated, stand-alone basis and collect such amounts from customers when applying OAR 860-022-0045?

The resolution to this question is not found in any particular language of OAR 860-022-0045, but in the Commission's policy regarding estimation and collection of costs for income taxes. OAR 860-022-0045 specifies how utilities must collect taxes imposed by a county.[1] Specifically, the rule provides that to the extent a county imposes

[1] OAR 860-022-0045 provides,

(1) If any county in Oregon, other than a city-county, imposes upon an energy or large telecommunications utility any new taxes or license, franchise, or operating permit fees, or increases any such taxes or fees, the utility required to pay such taxes or fees shall collect from its customers within the county imposing such taxes or fees the amount of increase in such taxes of fees. However, if the taxes or fees cover the operations of an energy or large telecommunications utility in

upon an energy utility any taxes, licenses, franchise or operating permit fees, the utility will collect from its customers within that county the amount of the tax or fee. It also provides that the utility will collect the amount from each customer within the county through a separately stated and identified charge on each customer's bill. The rule does not dictate whether utilities should calculate their county tax liability on a stand-alone basis. However, long-standing Commission policy does.

The Commission implicitly addressed the first question posed by PGE in two related dockets, Docket Nos. UCB 13 and UM 1074. In early 2003, the Utility Reform Project ("URP") filed with the Commission a document styled as a petition to open an investigation under ORS 756.515 to determine the amount that PGE paid in state and local income taxes since being acquired by Enron Corporation in 1997 and a complaint under ORS 756.500 alleging, among other things, that PGE's rates between 1997 and the date PGE decoupled from Enron's consolidated tax filings were not just and reasonable because they contained $14.7 million per year in charges to ratepayers for the payment of state and local income taxes, which PGE may never have paid.

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only a portion of the county, then the affected utility shall recover the amount of the taxes or fees or increase in the amount thereof from customers in the portion of the county which is subject to the taxes or fees. "Taxes," as used in this rule, means sales, use, net income, gross receipts, payroll, business or occupation taxes, levies, fees, or charges other than ad valorem taxes.

(2) The amount collected from each utility customer pursuant to section (1) of this rule shall be separately stated and identified in all customer billings.

(3) This rule applies to new or increased taxes imposed on and after December 16, 1971, including new or increased taxes imposed retroactively after that date.

(4) If any county, energy or large telecommunications utility, or customer affected by this rule deems the rule's application in any instance to be unjust or unreasonable,

The Commission docketed URP's request to open an investigation as Docket No. UM 1074 and its complaint as Docket No. UCB 13. In Docket No. UCB 13, the Commission denied URP's complaint regarding PGE's collection of local and state income taxed on the ground that URP had failed to allege a claim for which relief could be granted. In doing so, the Commission noted,

> URP misapprehends how we set rates for a utility that is held by a holding company. To protect the customers' interests, we view utility operations separately from the financial operations of the parent company. That means that the expenses used to calculate the rates are solely those of the utility. For taxes, we look at the utility as a stand-alone enterprise. We do not explore the holding company's tax liability, only the regulated utility's liability as though it were operating without the holding company. (Order No. 03-401 at 6.)

Although the Commission did not expressly state that its ruling applied to local income taxes as well as state income taxes, this conclusion is implicit. The allegations at issue concerned PGE's collection of federal, state and local income taxes.[2] In absence of

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> it may apply for a waiver of this rule by petition to the Commission, setting forth the reasons why the rule should not apply.

[2] URP's UCB 13 complaint alleged the following facts:

1. Since 1997, PGE has charged ratepayers in excess of $14.7 million per year for the alleged purpose of paying its state and local income taxes.

2. Since 1997, PGE has charged ratepayers in excess of $71.3 million per year for the alleged purpose of paying its federal income taxes.

3. PGE has not paid $14.7 million in state and local income taxes to government authorities in Oregon, since its acquisition by Enron in 1997 and its consolidation with Enron for income tax purposes.

4. PGE has not paid $71.3 million in federal income taxes to government authorities in Oregon, since its acquisition by Enron in 1997 and its consolidation with Enron for income tax purposes.

any statement to the contrary, the Commission's ruling necessarily applied to PGE's collection of federal, state *and* local income taxes.

Further, the reasons underlying the Commission's policy apply to the collection of local as well as state and federal income taxes. The Commission explained that policy as follows in its UCB 13 order:

> The benefits to customers [of requiring utilities to calculate their tax liability on a stand-alone basis] are obvious. Our policy prevents a holding company from transferring unjustifiable expenses to the utility or taking actions that would improperly inflate the utility's cost of capital. It also prevents the parent from imposing costs on ratepayers by using utility assets for purposes unrelated to customer needs. As Staff explained in its report for the March 31, 2003 public meeting [for Docket No. UM 1074]:
>
> > In the case of PGE's taxes, we determine the amount that PGE would pay if it were not a subsidiary of Enron. Enron's own tax liability is of little consequence to us. For ratemaking purposes, the Commission sets PGE's rates to reflect the costs of the company's regulated operations. That is, in a rate proceeding, PGE rates are set based on its own revenues, costs and rate base for a given test year. Income taxes are calculated using PGE's net operating income. The tax effects of Enron's other operations are ignored for purposes of setting rates. This is consistent with standard ratemaking principles. (Order No. 03-401 at 6-7.)

The Commission's resolution of URP's request to open an investigation in Docket No. UM 1074 mirrors its resolution of URP's complaint in UCB 13. As in UCB 13, the allegations underlying URP's request for relief in Docket No. UM 1074 included URP's allegations that PGE had improperly collected federal, state and local income taxes. The

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5. PGE has paid far less than $14.7 million in state and local income taxes even after its tax filing was decoupled from Enron's as of May 7, 2001. It appears that PGE has instead paid on the order of $3 million per year for which is information is available (2001).

6. PGE has paid far less than $71.3 million in federal income taxes, even after its tax filings were decoupled from Enron's as of May 7, 2001. It appears that PGE instead has paid on the order of $33 million per year for which information is available (2001). (*See* Order No. 03-401.)

Commission declined URP's request to open the investigation, based on the Commission's long-standing policy to determine utilities' income taxes on a stand-alone basis for ratemaking and regulatory purposes. Again, although the Commission did not expressly state that its long-standing policy applied equally to state, federal and local income taxes, this conclusion is implicit because the allegations underlying URP's request to open an investigation concerned federal, state and local income taxes.

Furthermore, following its decisions in UCB 13 and UM 1074, the Commission incorporated its policy regarding calculating taxes on a stand-alone basis into rule. Specifically, the Commission adopted OAR 860-027-0048, which is consistent with requiring electric utilities in Oregon to calculate and report income taxes on a regulated, stand-alone basis for ratemaking purposes and regulatory reporting, even if those taxes are paid on a consolidated basis.

Under the Commission's rulings in UM 1074 and UCB 13, and under the long-standing policy that underlies those rulings, the answer to the first question presented in PGE's request for a petition for declaratory ruling is that utilities *are* required to determine their local income taxes on a regulated, stand-alone basis and collect such amounts from customers when applying OAR 860-022-0045.

Question No. 2: Whether PGE acted in conformity with OAR 860-022-0045 when it charged customers for county income taxes imposed on PGE as a stand-alone regulated operation and when PGE paid those sums to Enron during the period when Enron filed a consolidated tax return.

The second question in PGE's petition for declaratory ruling, which asks whether PGE acted in conformity with OAR 860-022-045 by paying sums to Enron during the period that Enron filed consolidated tax returns, suggests that OAR 860-022-0045 may

impose some requirement on PGE with respect to the filing of taxes imposed by counties. In fact, it does not. Accordingly, the second question is not whether PGE acted in conformity with OAR 860-022-0045 when it paid sums collected for local taxes to Enron, but whether PGE contravened the rule. The answer to this restated question is "no."

Parent corporations are entitled to file a consolidated tax return on behalf of all corporations in an affiliate group. If the parent corporation elects to file a consolidated tax return, it becomes the agent for all the corporations in the affiliated group, and it is incumbent on the parent corporation to file the appropriate tax returns and taxes. As stated in *Accounting for Public Utilities:*

> The election to file a consolidated tax return makes the parent corporation the agent of all corporations included in the affiliated group. This agency relationship includes, but is not limited to, the duties to file proper and timely consolidated tax returns, to receive deficiency notices, to file refund claims, to execute waivers of the statute of limitations, to respond to Internal Service audits, and to conduct proceedings in the courts." (*Accounting for Public Utilities*, section 17.04[1].)

The facts, as stated in PGE's Petition for Declaratory Ruling, reflect that from July 1997 to May 2001, and from December 2002 to the present, Enron filed consolidated federal, state and local income tax returns for an affiliated group that includes PGE. During the periods that PGE was included in Enron's consolidated tax returns, PGE computed its federal, state, and local income tax liabilities on a stand-alone basis and paid those amounts to Enron. (PGE Petition at 2-3.)

In Docket No. UM 1074, the Commission adopted staff's conclusion that during the periods that are now at issue in this declaratory ruling, during which Enron elected to file its taxes on a consolidated basis, PGE properly paid its income tax liability to Enron. (Order No. 03-214; Appendix A at 4.) In other words, the Commission has already

decided the second question posed in PGE's Petition for Declaratory Ruling. There is no reason for the Commission to reach a different conclusion in this proceeding. The Commission should conclude that PGE did act in conformity with (or did not contravene) OAR 860-022-0045 when it charged customers for county income taxes imposed on PGE as a stand-alone regulated operation and when PGE paid those sums to Enron during the period when Enron filed a consolidated tax return.

Question No. 3. If the Commission determines that PGE has improperly billed for local income taxes, whether the provisions of OAR 860-021-0135 apply.

As discussed above, this declaratory ruling proceeding does not present new issues for the Commission. Because the Commission has already ruled that PGE properly calculated its local income tax liability for the periods that it was consolidated with Enron for tax purposes and that it properly forwarded to Enron the amounts that it collected for that liability, it is not necessary to address the third question presented in PGE's Petition for Declaratory Ruling.

However, assuming *arguendo* that the Commission determined that PGE improperly billed for local income taxes, either because PGE improperly calculated its tax liability for the Multnomah County Business Income Tax (MCBIT) on a stand-alone basis, or because it improperly forwarded sums collected for this tax to Enron for the periods that Enron filed consolidated tax returns, OAR 860-021-0035 would not apply. [3]

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[3] OAR 860-013-0135 provides:

> (1) When an underbilling or overbilling occurs, the energy or large telecommunications utility shall provide written notice to the customer detailing the circumstances, period of time, and amount of adjustment. If it can be shown that the error was due to some cause and the date can be fixed, the overcharge or undercharge shall be computed back to

As a general matter, OAR 860-021-0135 applies when lawful rates have been billed incorrectly, not simply when the rates themselves are unlawful. If the Commission determined that PGE improperly billed for local income taxes based on the facts alleged in this declaratory ruling proceeding, it would not be because PGE incorrectly billed for the taxes, but because the charges it imposed were unlawful.

DATED this 14th day of July 2005.

Respectfully submitted,

HARDY MYERS
Attorney General

/s/Stephanie S. Andrus
Stephanie S. Andrus, #92512
Assistant Attorney General
Of Attorneys for Staff of the Public
Utility Commission of Oregon

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such date. If no date can be fixed, the energy or large telecommunications utility shall refund the overcharge or rebill the undercharge for no more than six month's usage. In no even shall an overbilling or underbilling be for more than three years' usage.

(2) The energy or large telecommunications utility may waive rebilling for underbilling when the costs to the utility make it uneconomical.

(3) No billing adjustment shall be required if an electric or gas meter registers less than 2 percent error under conditions of normal operation.

(4) When a customer is required to repay an underbilling, the customer shall be entitled to enter into a one-time payment agreement without regard to whether the customer already participates in such an agreement. If the customer and utility cannot agree upon payment terms, the Commission shall establish terms and conditions to govern the repayment obligation. The energy or large telecommunications utility shall provide written notice advising the customer of the opportunity to enter into a time-payment agreement and of the Commission's complaint process.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July 2005, I served the foregoing DR 32 STAFF OPENING BRIEF upon the parties, hereto by the method/s indicated below:

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