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August 12, 2005

Via Electronic Filing and U.S. Mail

Oregon Public Utility Commission
Attention: Filing Center
PO Box 2148
Salem OR 97308-2148

Re: In the Matter of PORTLAND GENERAL ELECTRIC COMPANY Petition for a
Declaratory Ruling Regarding the Application of OAR 860-022-0045
OPUC Docket No. DR 32

Attention Filing Center:

Enclosed for filing in the above-captioned docket is Portland General Electric's Reply Brief in Support of Petition for Declaratory Ruling and in Opposition to Motions to Dismiss. This document is being filed by electronic mail with the Filing Center.

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Douglas C. Tingey".

DCT:am

cc: DR 32 Service List

Enclosure



1 **BEFORE THE PUBLIC UTILITY COMMISSION**

2 **OF OREGON**

3 **DR 32**

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

Portland General Electric
Company's Reply Brief In Support
Of Petition For Declaratory Ruling
and in Opposition to Motions to
Dismiss by Lewis and Utility
Reform Project

8 **INTRODUCTION**

9 PGE seeks a declaration that utilities must bill local income taxes under OAR 860-
10 022-0045 on a stand-alone basis consistent with the Commission's requirements for other
11 taxes. Seven opening briefs were filed. The Staff and intervenor PacifiCorp fully support
12 PGE's position that billing taxes on a stand-alone basis was proper. As the Staff Opening
13 Brief stated, "utilities *are* required to determine their local income taxes on a regulated,
14 stand-alone basis and collect such amounts from customers when applying OAR 860-022-
15 0045." (Staff Opening Brief at 5.) Nonetheless, the opposing intervenors - the Citizens'
16 Utility Board of Oregon ("CUB"), the City of Portland ("City"), the Industrial Customers of
17 Northwest Utilities ("ICNU") and Ken Lewis and Utility Reform Project ("Lewis/URP")
18 (collectively, "opposing intervenors") - argue on various grounds that OAR 860-022-0045
19 does not permit utilities to bill local income taxes on a stand-alone basis. For the following
20 reasons, the opposing intervenors' arguments are not persuasive.

21 **ARGUMENT IN SUPPORT OF PETITION FOR DECLARATORY RULING**

22 **I. OAR 860-022-0045 is silent about how to calculate the MCBIT, but a stand-**
23 **alone calculation is required under the Commission's long-standing policy.**

24 The opposing intervenors argue that under OAR 860-022-0045 PGE may only collect
25 the amount of MCBIT that PGE actually pays the County. In fact, the rule is silent about
26

1 how a utility should calculate the amount it collects. The rule says only that if a county
2 imposes a new tax (such as the MCBIT) on a utility, the utility required to pay the new tax
3 shall collect from its customers "the amount of the taxes." The rule gives no direction about
4 how the utility should calculate the amount. (See Staff Opening Brief at 1, stating that "[t]he
5 resolution to this question [whether utilities are required to determine their local income
6 taxes on a regulated stand-alone basis and collect such amounts from customers when
7 applying OAR 860-022-0045] is not found in any particular language of OAR 860-022-0045
8") The rule particularly does not direct that there should be a match between what PGE
9 collects and what it pays the taxing entity.

10 The Commission has a deeply rooted policy, now incorporated in OAR 860-027-0048
11 and also reflected in the Commission's prior decisions (see Staff Opening Brief at 2-7,
12 describing prior decisions), that a utility should calculate its federal, state and local income
13 tax liability on a stand-alone basis based solely on its regulated operations. This long-
14 standing policy and rule fill any void in the meaning of OAR 860-022-0045. They prove that
15 opposing intervenors' different interpretations of OAR 860-022-0045 - interpretations that
16 focus instead on what the utility paid the taxing entity - are not correct.

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19 ¹ OAR 860-022-0045 provides:

20 "(1) If any county in Oregon . . . imposes upon an energy . . .
21 utility any new taxes or . . . fees, the utility required to pay
22 such taxes or fees shall collect from its customers within the
23 county imposing such taxes or fees the amount of the taxes or
24 fees. . . . 'Taxes,' as used in this rule, means sales, use, net
25 income, gross receipts, payroll, business or occupation taxes,
26 levies, fees, or charges other than ad valorem taxes.

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

(Ex A to Petition for Declaratory Ruling of PGE is the full text of OAR-860-022-0045.)

1 As PGE explained in its opening brief, PGE followed the direction given by the
2 Commission's long-established policy. PGE calculated the amount charged customers for
3 the MCBIT on a stand-alone regulated basis but, consistent with tax laws allowing the filing
4 of consolidated returns (either consolidated with Enron or, during periods of deconsolidation
5 from Enron, consolidated with its subsidiaries), computed the amount it paid for MCBIT
6 based on both its regulated and non-regulated operations and paid that amount to Enron,
7 which was the County taxpayer during consolidation, or directly to the County when PGE
8 was the taxpayer during deconsolidated periods. As the Staff Opening Brief explains, in so
9 doing "PGE did act in conformity with (or did not contravene)" OAR 860-022-0045.² (Staff
10 Opening Brief at 7.)

11 The Commission's long-standing policy reflects the mainstream historical wisdom of
12 the accounting profession about the appropriate accounting treatment of utilities' income
13 taxes in ratemaking. (See Ex C to Petition for Declaratory Ruling of PGE at 7, Excerpts
14 from Accounting for Public Utilities, stating that "a 'stand alone' method . . . for computing
15 the income tax expense component of cost of service is the proper and equitable method to be
16 followed for ratemaking purposes.")

20 ² At page 10 of its opening brief the City argues that PGE falsely characterized the
21 MCBIT on its bills to customers, and suggests that this was an unlawful trade practice.
22 However, PGE's bills accurately portrayed the amount of MCBIT due and were not a false
23 characterization of amounts actually collected or amounts due. By lawfully complying with
24 the Commission's long-established policy interpreting OAR 680-022-0045 PGE could not
25 have violated Oregon's unfair trade practices statutes, even if a claim could be asserted under
those statutes. See *Daaleman v. Elizabethtown Gas Co.*, 390 A2d 566, 568-69 (NJ 1978)
(where consumers sued utility under New Jersey consumer fraud act for alleged overcharging
under Purchased Gas Adjustment Clause, a filed tariff permitted under PUC administrative
order, claim could not be maintained because application of Clause involved interpretation of
PUC administrative order and regulations of which PUC was vested with exclusive
jurisdiction).

1 **II. Perceived “unjustness” occurred only because Enron's and PGE's unregulated**
2 **operations were not profitable.**

3 The opposing intervenors’ complaints about injustice arise only because Enron's and
4 PGE's non-regulated activities were not profitable. During consolidation with Enron, losses
5 in unregulated operations reduced the amount of MCBIT owed the County. Likewise, during
6 the periods of deconsolidation, losses in PGE's unregulated operations reduced the amount of
7 MCBIT owed the County.

8 Carried to their logical end, the opposing intervenors’ arguments would mean that if
9 PGE's unregulated activities were instead profitable, creating a higher tax liability than PGE
10 would owe on a stand-alone basis, PGE could pass the higher tax liability along to its
11 customers. Passing along higher tax liability as a result of unregulated activities would just
12 as certainly be criticized, but one cannot have it both ways. The stand-alone rule protects the
13 public from a higher tax during a year in which a utility’s unregulated operations are
14 profitable. The stand-alone method is considered "equitable" because “[n]on-utility
15 operations involve financial risks that are different from a utility's regulated operations." (Id.
16 at 7, Excerpts from Accounting for Public Utilities.) "When these risks are not borne by the
17 ratepayers, it is unfair to make use of the business losses generated in those nonregulated
18 entities to reduce the utility's cost in determining the rates to be charged for utility services."
19 (Id.; emphasis added). When a company's nonregulated activities are profitable, the result is
20 also fair to ratepayers because they are not "required to pay any of the income taxes that arise
21 as a result of those profits." (Id.) Therefore, abandoning the stand-alone rule would not
22 produce a more just outcome for utility customers.³

23 _____
24 ³ A former PUC Commissioner explained why the stand-alone basis of utility tax
calculation is fair:

25 "The unfortunate downside [to the PUC allowing regulated
26 utilities to pay their stand-alone tax liability to their parent
companies] is that in certain years when parent companies
perform poorly, they pay no taxes.

1 As the Staff Opening Brief pointed out, at least by the time the Commission refused
2 URP's request to open an investigation in Docket No. UM 1074, the Commission had
3 implicitly concluded that its "long-standing policy to determine utilities' income taxes on a
4 stand-alone basis for ratemaking and regulatory purposes . . . applied equally to state, federal
5 and local income taxes." (Staff Opening Brief at 4-5; emphasis added.) Because URP
6 alleged that PGE had improperly collected federal, state and local income taxes, the
7 Commission's refusal to open an investigation implicitly concluded that PGE acted properly.
8 Accordingly, PGE objects to the characterization of PGE's collection of the MCBIT as unfair
9 or unjust. PGE acted fairly and justly because PGE followed the law.

10 In this proceeding, PGE seeks a declaration that PGE did what the law required. If
11 the Commission's stated purposes of linking the utility's tax "burden" and the taxpayers'
12 "benefit" as expressed in the stand-alone policy applicable under OAR 860-022-0045 seem
13 "quaintly naive" (as the City argues at page 7 of its opening brief), and if there should be
14 greater symmetry between the collection and payment of the MCBIT than has occurred to
15 date, the appropriate route to obtaining relief is prospectively, through the Oregon legislature,
16 not in this proceeding. Although the legislature recently passed SB 408, which addresses
17 these issues, it does not apply retroactively.

21 Certainly, this may seem unfair in years when a company's
22 poor financial performance exempts it from any tax liability.
23 But what about those years in which the local regulated utility
24 performs poorly and owes no taxes, but its parent company
25 does very well and is faced with a massive tax bill? Should the
local utility - and its customers - then be held liable for the
shortfall as would most often be the case? This clearly isn't
fair."

26 (Attachment D to City's Opening Brief, Letter from former PUC Commissioner Joan Smith.)

1 **III. Parsing OAR 860-022-0045 does not demonstrate the "plain meaning" opposing**
2 **intervenor's seek.**

3 The opposing intervenors try to demonstrate OAR 860-022-0045's "plain meaning"
4 by separately parsing its words and phrases, arguing that they prove a utility may only collect
5 from customers the amount of the MCBIT the utility actually paid to the County. PGE
6 disagrees with opposing intervenors' interpretation since it is clearly contrary to the
7 Commission's long-standing policy, rules and prior decisions requiring utilities to calculate
8 the amount charged customers on a stand-alone regulated basis.

9 Further, PGE, Staff and PacifiCorp's interpretation of the rule is the only
10 interpretation consistent with the Commission's historical policy. With regard to the word
11 "impose," for example, because the MCBIT was "imposed" when Multnomah County
12 enacted it, and was further "imposed" because PGE was required by the Commission to
13 calculate the tax based on the regulated stand-alone accounting by the Commission, PGE met
14 all requirements set by OAR 860-022-0045. The Multnomah County Code itself uses the
15 word "imposed": "[A] tax is imposed upon each person doing business within the county
16 equal to 1.45% of the net income from the business within the county" MCC
17 §12.500(A). Whether a colorable interpretation of the rule would limit utilities to
18 recoupment of MCBIT already paid is immaterial and irrelevant because the Commission has
19 already determined what the rule requires.⁴

20 **IV. The only significant difference between a utility's tax liability under "normal"**
21 **ratemaking and under OAR 860-022-0045 is that OAR 860-022-0045 does not**
22 **apply statewide.**

23 As PGE demonstrated in its opening brief, there is no substantive difference between
24 charges made to recover local income taxes under OAR 860-022-0045 and rates set by the

24 ⁴ At page 12 of its opening brief, Lewis/URP tries to re-write OAR 860-022-0045 by
25 arguing that its "plain meaning" is that "[u]tilities are required to recoup amounts for local
26 (county-imposed) income taxes which they have actually been required to pay from
ratepayers within that taxing district." This is not the language of the rule and not the
meaning the Commission ascribes to the rule.

1 Commission under statute to recover federal and state income taxes, only a procedural
2 difference dictated by the fact that charges made under OAR 860-022-0045 apply to
3 customers within particular counties but rates set under statute apply to customers statewide.⁵
4 The Staff Opening Brief states that "the reasons underlying the Commission's policy
5 [requiring stand-alone calculation] apply to the collection of local as well as state and federal
6 income taxes." (Staff Opening Brief at 4.)

7 None of the opposing briefs demonstrates that there is a distinction between rates
8 incorporating federal and state income taxes and OAR 860-022-0045 that might preclude
9 application of the stand-alone rule under OAR 860-022-0045. At page 5 of its opening brief,
10 for example, the City quotes an attorney general's letter supporting PGE's position that the
11 only distinction between county taxes imposed under OAR 860-022-0045 and federal and
12 state taxes imposed on all ratepayers is to prevent taxes designed to benefit one segment of
13 ratepayers from being spread statewide. The need to prevent county taxes from being
14 imposed statewide is also the answer to the question posed at page 29 of the Lewis/URP
15 opening brief, "Why promulgate different rules, if all income taxes are going to be treated in
16 the same manner?" The ICNU's argument that the MCBIT is not calculated or collected in
17 the same way as federal and state income taxes because "[f]ederal and state taxes are treated
18 as normalized expenses in setting rates [but] MCBIT is treated as an expense that is directly
19 passed through to customers" (ICNU opening brief at 10) highlights a procedural difference,
20 not a substantive distinction.

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23 ⁵ At page 3 of its opening brief, CUB argues that PGE recognizes that "the purpose of
24 the rule was to create an exception to traditional ratemaking." To the contrary, ensuring that
25 taxes imposed by counties are not included in general rates imposed statewide - which is the
26 only distinction - does not make OAR 860-022-0045 an "exception" to traditional
ratemaking. Rather, as was held in Multnomah County v. Davis as PGE demonstrated at
page 10 of its opening brief, OAR 860-022-0045 is a ratemaking rule promulgated within the
Commission's broad authority to set rates, not an "exception" to ratemaking.

1 CUB argues that there are multiple ways to treat taxes and that therefore the
2 Commission could allow other approaches to forecasting taxes than the stand-alone
3 approach. (CUB's opening brief at 4-5.) Whatever might be the merits of this argument if
4 the Commission were facing a blank slate, the Commission long ago determined that the
5 stand-alone rule applied to federal, state and local income taxes. None of the opposing
6 intervenors demonstrates that the historical policy was anything other than stand-alone.

7 **V. PGE is authorized to collect the MCBIT.**

8 ICNU's opening brief argues at page 2 that the Commission has not authorized PGE
9 to collect the MCBIT. However, OAR 860-022-0045 is referenced in PGE's Commission-
10 approved tariff in Rule E(1)(D). (Ex F to Petition for Declaratory Ruling of PGE at 2.) The
11 tariff proves that PGE acts with the Commission's authorization.

12 **VI. OAR 860-021-0135 limits any recovery for overbilling to a three year period.**

13 Although Staff and the opposing intervenors argue that OAR 860-021-0135 does not
14 apply to limit recovery if PGE wrongly applied OAR 860-022-0045, no party cites any
15 evidentiary support for its position beyond the language of OAR 860-021-0135 and its
16 location in a section of the rules governing measuring and billing of service. In PGE's view,
17 if PGE despite following the Commission's established policy concerning OAR 860-022-
18 0045 did not properly apply it, PGE actions were an innocent mistake and therefore an
19 "error" within the meaning of OAR 860-021-0135.

20 **OPPOSITION TO MOTIONS TO DISMISS**

21 Lewis/URP presents no valid basis for dismissing PGE's petition. Because the
22 petition does not seek or even address a refund, for example, the Commission's position
23 regarding its authority to order refunds under the filed rate doctrine is irrelevant to any issue
24 presented.

1 At pages 3-4 of its opening brief Lewis/URP argues that PGE's counsel, David
2 Markowitz, represented to the Multnomah County Circuit Court that the Commission's
3 ruling would not be binding. What actually happened was that, after a long colloquy with the
4 court, Mr. Markowitz said that the ruling clearly had precedential impact but he could not
5 commit to whether it could be the basis for issue preclusion, because he had not researched
6 the matter and therefore did not know. (Exhibit A, Affidavit of Tami S. Hall, attaching a
7 partial transcript of Kafoury, et al. v. Portland General Electric Co.. Mult Cty Cir Ct No
8 0501-00627 (June 23, 2005) (Wittmayer, J).)

9 Lewis/URP argues there is no justiciable controversy. However, based on the
10 opening briefs of the opposing intervenors that disagree with PGE, Staff and PacifiCorp
11 about how OAR 860-022-0045 should be interpreted and applied, clearly there is a justiciable
12 controversy.

13 Lewis/URP argues that the Commission does not "enforce" OAR 860-022-0045, but
14 this is not accurate insofar as it suggests that the Commission disavows construing its own
15 rules. To the contrary, as signaled by the Commission's acceptance of PGE's petition
16 seeking a determination that PGE correctly applied OAR 860-022-0045, the Commission
17 continues to determine whether utilities have complied with the Commission's rules.

18 Finally, Lewis/URP contends at page 9 of its opening brief that the Commission, by
19 accepting PGE's petition, divested the Multnomah County Circuit Court of jurisdiction. The
20 court after conducting an initial hearing on the Lewis/URP class action complaint, decided to

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1 stay the case pending a ruling herein by the Commission. Thus, there is concurrent
2 jurisdiction and the Commission may proceed without regard to the court action.

3 DATED this 12th day of August, 2005.

4 PORTLAND GENERAL ELECTRIC COMPANY

5
6 By: 

7 Douglas C. Tingey, OSB #04436
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13 Of Attorneys for Portland General Electric Co.
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PGEPUC\9546

David Kafoury, et al. v. Portland General Electric Co.
Multnomah County Circuit Court Case No. 0501-00627
Hearing on Defendant's Motions to Dismiss and, in the Alternative, Motion to Stay
June 23, 2005
Hon. John Wittmayer

1:51

Markowitz: ...I think that if there was ever a case to demonstrate the reasoning behind the doctrine of primary jurisdiction and why it makes good sense to, essentially, just let the agency do its work for whatever assistance it can create for this court. In describing the reasoning for the primary jurisdiction doctrine, the Oregon Supreme Court in Boise Cascade wrote that the reason for the doctrine is that a court confronted with problems within an agency's area of specialization should have the advantage of whatever contributions the agency can make to solutions. And so what we have here is a long-standing policy that is the result of a lot of reasoned thinking by the agency and its staff, charged with responsibility for the matter, that now is specifically being asked to address the question of the Multnomah County business tax and whether there is some reason that that tax should be created differently than the state and federal and other local taxes that are imposed on PGE and the other utilities. And it ought to be, I think, important for this court to simply wait to see whatever help the PUC might give in consideration of this court rule.

Court: In that respect, whatever help it might be, would it be defendant's position that whatever help it might be would, in effect, be advisory?

Markowitz: Well, I think it's more than advisory. I think it is precedential. It's the equivalent of an opinion of the attorney general.

Court: Alright.

Markowitz: It does have precedential impact but it is not binding on the court.

Court: So in the event that I do grant the stay and the PUC rules in favor of PGE, you would not then be saying that there is any kind of issue preclusion?

Markowitz: Um...

Court: Because if it's not precedential, it's not issue preclusion. Or if it's not binding, I mean, it's not issue preclusion.

Markowitz: I have not researched...

Court: Okay.

Markowitz: ...whether in other states, where the primary jurisdiction issue is more evolved, that issue preclusion has ever been granted with the exact same issue presented in both forums, and there was actual participation by plaintiff in the first forum. So...

Court: Well, to the extent...

Markowitz: ...I can't commit.

Court: Let me tell you what my concern is. My concern is that, because we all understand that I do have jurisdiction. My concern is that if I grant your stay, then in effect, I will be losing—in the event that there is issue preclusion—that I will in effect be losing jurisdiction. If you're correct that there is—if it turns out that there is issue preclusion. That's the same thing as dismissing the case, if in fact issue preclusion might apply. Then that would deprive Circuit Court of the opportunity to rule, in effect, other than on the issue preclusion. See the sort of conundrum...

Markowitz: I see your issue, but I just don't know the answer to it. I'm not...

Court: Okay, that's fair—fair answer.

Markowitz: ...I'm not familiar with any case in Oregon that's addressed the question specifically. I know that under issue preclusion, there generally is issue preclusion as to participation in administrative proceedings if they actually participate and there's an adverse factual finding. But what we're talking about here is a question...

Court: Is a legal issue.

Markowitz: ...is a legal issue of application of long-standing policy to a particular tax in this county—I just don't know the answer to your question.

Court: Okay. Thank you.

1:54:44

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CERTIFICATE OF SERVICE

I certify that I have caused to be served the foregoing Reply Brief in Support of Petition for Declaratory Ruling and in Opposition to Motions to Dismiss by Ken Lewis and Utility Reform Project of Portland General Electric, in OPUC Docket No. DR 32, by electronic mail and First Class U.S. Mail, postage prepaid and properly addressed, and by electronic mail, to those persons on the attached service list maintained by the OPUC.

Dated this 12th day of August, 2005.

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By



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