BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

DR 32

In the Matters of:
PORTLAND GENERAL ELECTRIC COMPANY Petition for a Declaratory Ruling Regarding the Application of OAR 860-022-0045

REPLY BRIEF

OF

KEN LEWIS AND UTILITY REFORM PROJECT

August 12, 2005

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
(503) 293-9021 voice
(503) 293-9099 fax
dan@meek.net

For Utility Reform Project (URP)

LINDA WILLIAMS
OSB NO. 78425
KAFOURY & McDOUGAL
320 S.W. Stark Street #202
(503) 224-2647 voice
(503) 245-2772 fax
linda@lindawilliams.net

For Ken Lewis

TABLE OF CONTENTS

I. SUMMARY.

In their Opening Briefs Staff, PGE, and Pacificorp do not offer *any* alternative construction of the text and context of OAR 860-022-0045. Thus, the plain meaning of the rule, explicated by Lewis and URP, ICNU, City of Portland and CUB, is the only proffered construction of this rule. That should end the Commission's inquiry as to the first and second questions presented. And for the reasons set out in our Opening Brief, and the Opening Briefs of Staff, ICNU, City of Portland, and CUB, OAR 860-021-0135 does not apply as a "statute of limitations," when a utility places unauthorized charges on customer bills and overcharges customers.

Since the language of OAR 860-022-0045 is controlling, and contrary to the construction PGE urges, Staff and the utilities are forced to engage in misdirection--attempting to distract from the obvious by pointing to actions which are unrelated to the inquiry and answering a question that was not presented. No purported hidden repeals or similar legerdemain can obscure the fact that, contrary to the published rule, PGE has collected millions of dollars from customers "on behalf" of Multnomah County when it and Staff knew no taxes had been imposed by the County.

II. RESPONSE TO STAFF OPENING BRIEF AND SIMILAR ARGUMENTS OF THE UTILITY INTERVENORS.

Staff (p. 1) concedes that the text of OAR 860-022-0045 cannot be read to support the interpretation that PGE seeks, which is that:

1. 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

Therefore, Staff declines to address the question presented in the Declaratory Ruling-- what charges for local income taxes is a utility authorized to add to Multnomah County customers' bills under the terms of OAR 860-022-0045. Instead, Staff claims a "repeal" of the rule, arguing that it "must" be construed in contradiction to its plain terms because of later-adopted OPUC policies regarding expensing for rate treatment estimated state and federal taxes.

Staff is purposely vague about *when* these later policies ever actually were adopted or made effective for state and federal income taxes, and when the policy was adopted and made effective for the treatment of county taxes. Although Staff refers to a general "historic" treatment and "longstanding" policies (without explaining why the actual words in OAR 860-022-0045 are not also even more historical and longstanding), Staff does not venture an effective date for departure from the text of the rule. It conjures up an "implicit" policy relating to county taxes somehow encoded within, but not discussed, in Order No. 03-214, entered April 10, 2003. PGE and Pacificorp offer no other "historical" or

"background" date regarding the repeal of OAR 860-022-0045, so let's assume the earliest date proffered for some sort of repeal is April 10, 2003.

Putting aside for the moment the glaring procedural problems inherent is claiming any Commission action accomplished a substantive amendment to OAR 860-022-0045 without notice, mentioning the rule being amended, and subsequent filing with the Secretary of State, the Staff/PGE position is that a covert repeal of treatment for MCBIT was first "implied" on April 10, 2003. Yet, prior to 2003, from 1997 through the fourth quarter of 2002, PGE charged Multnomah County ratepayers over $6.66 million for MCBIT, and the county actually received nothing from PGE and/or Enron, as documented in the Opening Brief of Lewis and URP.

Staff, PGE and Pacificorp do not offer even a figleaf to cover the fact that apparently, at all times until April 2003 Staff and (some) utilities had been ignoring the plain meaning of OAR 860-022-0045. These same commentators only weakly justify continued defiance of the text thereafter by arguing that repeal of the rule was revealed through administrative DA VINCI CODE in lieu of statutory rulemaking.

In addition to purportedly amending the rule without agency notice in a manner discernable to only a few utility *cognoscenti* and Staff, this so-called "implicit" repeal of OAR 860-022-0045 was actually hidden from the public by

PGE's misleading statements on customer bills after April 10, 2003, that the MCBIT adder was billed and "collected on behalf of local government * * *." Certainly, after the "repeal" of OAR 860-022-0045, PGE and Staff (if no one else) would have known this statement could not be true. How could customers guess that the substantive authority of PGE to recoup actual tax liabilities paid to Multnomah County had been altered to allow collection of "as if" amounts which were never imposed or received by the county? This course of conduct defies statutory notice requirements and fair play.

A. OPUC MUST PUBLISH RULES, AMENDMENTS AND REPEALS.

The duties of the agency do not need much elaboration in this forum. In brief, OPUC is required to promulgate rules, amendments and repeals of rules through publication with the Secretary of State.[1] ORS 183.355(1)(a) requires

---

1. ORS 183.310 [2005 Oregon Laws Ch 523 (S.B. 45)] applies to the PUC

> (1) "Agency" means any state board, commission, department, or division thereof, or officer authorized by law to make rules or to issue orders, except those in the legislative and judicial branches.
>
> * * *
>
> (9) "Rule" means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:
>
> > (a) Unless a hearing is required by statute, internal management directives, regulations or statements which do not substantially affect the interests of the public:

(continued...)

that OPUC "shall file in the office of the Secretary of State a certified copy of each rule adopted by it." ORS 183.355(3) further requires OPUC to notify the Secretary of State of amendments and repeals:

> When a rule is amended or repealed by an agency, the agency shall file a certified copy of the amendment or notice of repeal with the Secretary of State who shall appropriately amend the compilation required by ORS 183.360(1).

Moreover, subsection (5) provides that, "No rule of which a certified copy is required to be filed shall be valid or effective against any person or party until a certified copy is filed in accordance with this section." No certified copy of the

---

1.(...continued)

(A) Between agencies, or their officers or their employees; or

(B) Within an agency, between its officers or between employees.

(b) Action by agencies directed to other agencies or other units of government which do not substantially affect the interests of the public.

(c) Declaratory rulings issued pursuant to ORS 183.410 or 305.105.

(d) Intra-agency memoranda.

(e) Executive orders of the Governor.

(f) Rules of conduct for persons committed to the physical and legal custody of the Department of Corrections, the violation of which will not result in:

(A) Placement in segregation or isolation status in excess of seven days.

(B) Institutional transfer or other transfer to secure confinement status for disciplinary reasons.

(C) Disciplinary procedures adopted pursuant to ORS 421.180.

"implicit" repeal of OAR-022-0045 hidden within Order No. 03-214 has been filed, nor has this implied amendment become effective.[2]

On the other hand, OPUC adopted the current version of OAR 860-022-0045 decades ago, and there is no dispute it became valid and effective. In commenting upon this rule and the authority of OPUC to adopt it, the Court of Appeals noted:

> The effect of the rule is that utility expenses resulting from payment of the county's net business income tax are passed on to county ratepayers only rather than being reflected as part of a utility's general rate structure.

Multnomah County v. Davis, 35 Or App 521, 524, 963 P2d 687 (1988). In its Opening Brief, Pacificorp also relies upon this case for the proposition that the rule is a proper exercise of OPUC authority and has a rational basis in providing for an adder for recoupment of county taxes. In fact, Pacificorp notes that it and the ***Multnomah County v. Davis*** opinion find the adder is based on sound policy: "Tax *revenues* for one county do not typically provide benefits to the utility system and thus should be passed on to county residents only" (emphasis supplied). Pacificorp at 3. We agree. In this case, PGE has billed, collected

---

2. The last sentience of ORS 183.310(5) allows an exception to filing a rule "if an agency, in disposing of a contested case, announces in its decision the adoption of a general policy applicable to such case and subsequent cases of like nature the agency may rely upon such decision in disposition of later cases." The summary disposition of the petition for an investigation was not a "contested case," and even if it were, the "contested case" exception does not apply to allow pronouncement of a major substantive rule change for the first time at the conclusion of the proceeding, as discussed in greater detail, *infra*.

and kept an adder adding millions to customer bills, but there have been no "tax *revenues*" generated at all.

Pacificorp fails to explain the contradiction in the utilities' position: if Pacificorp agrees that the rationale for allowing utilities' to recoup county tax exactions from county customers only (via the adder) rests on the premise that those county utility customers benefited from the "tax revenue" received by the county government, then how can the utility charge county customers for "tax revenue" that never existed? As we and ICNU, City of Portland and CUB consistently point out--when there are no "tax *revenues*" resulting from taxes imposed and received by the county, there is no authority to charge an adder. That is what the rule states.

Any later-adopted policy changing a rule, such as Staff discerns, and which impacts the public interest is itself also a "rule":

> [A]n agency makes a 'rule within broad meaning of that term when it does nothing more than publish its official position on how it interprets a requirement, standard, or procedure already provided in the governing statute itself, and how it proposes to administer such statutory provision.

Morgan v. Stimson Lumber Co., 1980, 288 Or 595, 603, 607 P2d 150 (1988), rehearing denied 289 Or 93, 610 P2d 830, on remand 47 Or App 315, 618 P2d 970. If the "implicit" policy was intended to alter the interpretation and application of OAR 860-022-0045 it had to be codified as a rule, amendment or

repeal. See discussion at URP/Lewis Opening Memorandum at pp. 22-23, and 36-37. ***Burke v. Children's Services Division***, 26 OrApp 145, 552 P2d 592 (1976); ***Burke v. Children's Services Division***, 288 Or 533, 538, 607 P2d 141, 144 (1980); ***McCleery v. State By and Through Oregon Bd. of Chiropractic Examiners***, 132 OrApp 14, 887 P2d 390 (1994).

B. ORDER NO. 03-214 IS COMPLETELY IRRELEVANT.

We respond here to the Staff's discussion and also to PGE's discussion at pp. 5-7 of its Opening brief (identified as Background §§ I-V) on the lack of relevance of Order No. 03-214 and UM 1074 to the amendment or repeal of OAR 860-022-0045. Both PGE (Background § VI) and Staff seem to believe that Order No. 03-214 is relevant. They argue that how to calculate local income taxes was determined by the OPUC in a request for investigation/complaint filed by URP in 2003. This is both not true and also legally wrong.

First, the denial of a request for investigation or dismissal of a complaint is not an adjudication of any issue not actually addressed or decided. The Commission based its orders on the "filed rate doctrine" and lack of available remedies. The orders said exactly nothing about how to calculate local income taxes.

Second, the Commission's decision in UCB 13 was reversed by the Marion County Circuit Court, a fact Staff never mentions. Marion County Circuit Court No. 03C-22117. How is it possible that Staff can rely upon a reversed order for the validity of its content? And why does the Staff Opening Brief attach a copy of OPUC Order No. 03-214, which is not even the order which addressed URP's complaint? The actual order was OPUC Order No. 03-401. It is because Staff wishes to disregard the content of the real order.

Third, the appealed order, OPUC Order No. 03-401, contains no decisions pertaining to taxes. It is based upon the "filed rate doctrine" and URP's allegedly defective request for a deferred account. As an aside, the Commission engages in a discussion of now it treats taxes "for ratemaking purposes" (p. 7) and describes that treatment (always referring to "income taxes" generically and never separating out local income taxes) in the context of rate cases.

> That is, in a rate proceeding, PGE's 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.

Obviously, this discussion refers to treatment of state and federal income taxes, because it would be clearly wrong if applied to MCBIT, which is not and never had been the subject of "a rate proceeding."

Fourth, Staff knows well that the treatment of local income taxes under OAR 860-022-0045 was never an issue in the UCB 13 docket at all. The entire discussion about taxes was about how they are treated in rate cases. The MCBIT is not treated in any rate case.

Fifth, Staff repeatedly refers to the URP petition for investigation and complaint, which itself referred to "rates" (p. 4) and to fraud in "contested cases," neither of which is applicable to the MCBIT billing adder at issue here.

Sixth, all of the numbers in the URP request for investigation and complaint were actually for state income taxes $(14.7 million), as that was all that Staff could provide. As noted in the Opening Brief of Lewis and URP, Staff claims no knowledge whatever of the amounts of PGE's local income taxes.

C. ORDER NO. 03-214 CANNOT IMPLICITLY REPEAL A RULE.

As noted above, the law imposes procedural duties upon all agencies when changing rules which affect the public. It is "assumed" that procedural protections will be afforded when an "administrative agency [is] performing quasi-legislative act pursuant to delegation of legislative authority." ***United Parcel Service, Inc. v. Oregon Transp. Commission***, 27 OrApp 147, 152, 555 P2d 778 (1976). What was the posture of Order No. 03-214? Could it be the lawful occasion for promulgating an amendment or repeal of a rule?

OPUC Order No. 03-214, which merely declined to open an investigation into all of PGE's income taxes, was neither a "rulemaking," nor a "contested case."[3] It applied only to URP's petition for an investigation based on what was described as "fraud on the agency" in procuring the tax treatment adopted by the Commission in rate proceedings for PGE.[4] The Commission summarily denied the petition based on a Staff Report which made factual assertions about the transfers of amounts for state and federal taxes to Enron (characterizing the treatment of estimated state and federal tax liabilities as a policy and characterizing the fund transfers as tax "payments").

The Staff Report adopted by the Commission merely refers to some previously determined "policy" regarding treatment of collections for state and federal taxes, which itself was never embodied in rules. Staff opined that these policies, known to Staff, controverted any potential factual proof that the

---

3. OAR 860-012-0007 refers to a contested case as "a proceeding before the Commission in which a person is provided the opportunity for a hearing which is substantially of the character described in ORS 183.310(2)." ORS 183.310(2)(a) defines, Contested case as "a proceeding before an agency:

   (A) In which the individual legal rights, duties or privileges of specific parties are required by statute or Constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard;
   (B) Where the agency has discretion to suspend or revoke a right or privilege of a person;
   (C) For the suspension, revocation or refusal to renew or issue a license where the licensee or applicant for a license demands such hearing; or
   (D) Where the agency by rule or order provides for hearings substantially of the character required by ORS 183.415, 183.425, 183.450, 183.460 and 183.470."

4. State law fraud-on-the-agency is a common law tort. See ***Buckman v. Plaintiffs Legal Committee***, 531 US 341, 121 SCt 1012, 148 LEd2d 854 (2004).

Commission had been misled about actual amounts/disbursements of money collected for state and federal income taxes. (Presumably, activity known to Staff could not be a misrepresentation upon which Staff relied to sustain a theory of fraud on the agency.) Neither the Staff report, any underlying petition, nor OPUC Order No. 03-214 mentions OAR 860-022-0045. Staff has never recommended repeal of the rule, nor did the Commission give notice it was repealing OAR 860-022-0045 by OPUC Order No. 03-214. The Commission took no further steps to make such repeal "effective."

This proffered "implicit" and unmentioned amendment to OAR 860-022-0045 in the dismissal of a request for investigation necessarily came at the conclusion of the summary process. Even if the truncated petition process had risen to the status of a "contested case," no "interpretation" to "an established interpretation that the agency alters to a significant degree in the course of a proceeding" can ever be announced in such a peremptory and occult manner, even within a contested case. ***Martini v. OLCC****,* 110 OrApp 508, 513, and 51 n4, 823 P2d 1015 (1992).

> [T]he hearing process had been completed before adoption of the new interpretation was made known.
>
> However, when there is an established interpretation that the agency alters to a significant degree in the course of a proceeding, the parties are entitled to be heard under the new standards.

Martini*, supra*, 110 Or at 513.

Staff admits OPUC Order No. 03-214 did not discuss OAR 860-022-0045 but claims nevertheless the public was somehow to ferret out the "implicit" repeal of OAR 860-22-0045. It has still never been the subject of any notice of repeal or amendment. Further obscuring the "implicit" repeal of OAR 860-022-0045 are PGE's continued misstatements on its bills that the adder is being billed and "collected on behalf of local government * * *." Under the very timeline advocated by Staff and PGE, it cannot be true or accurate that MCBIT was added and collected on "behalf" of the County, after it was known to PGE and Staff that nothing was being paid to or collected for county use.

D. THE DEFINITION OF INCOME IN OAR 860-027-0048, EFFECTIVE IN DECEMBER 2003, DID NOT REPEAL OAR 860-022-0045.

Staff also suggests that its definition of "income taxes" promulgated and effective on December 11, 2003, should have alerted the public that OAR 860-022-0045 no longer meant what it plainly said about the adder for recovering actually imposed county income taxes. Pacificorp (p. 5) makes a similar argument. We refer to and incorporate the discussion of the agency's rulemaking duties referenced in the preceding section.

860-027-0048(4)(h) states:

> Income taxes shall be calculated for the energy utility on a standalone basis for both ratemaking purposes and regulatory reporting. When income taxes are determined on a consolidated basis, the energy

utility shall record income tax expense as if it were determined for the energy utility separately for all time periods.

PUC 25-2003, f. & cert. ef. 12-11-03

First, as pointed out in our Opening Brief, state law and Multnomah County ordinances all tell the utility "how" to determine tax liability *to the government*.[5] This particular rule tells the utility what tax calculation to offer the agency for ratemaking and reporting purposes (an "as if" calculation) after December 11, 2003. This rule does not instruct or imply anything about prior tax years. Nor does this rule say anything about how the various jurisdictional "income taxes" will be expensed, *if at all*, after December 2003. It merely instructs what dollar figure to report to the agency.

Second, OAR 860-027-0048(3) and OAR 860-027-0048(4) refer only to accounting methods to use when the utility is "transferring assets or supplies, or providing or receiving services between regulated and unrelated activities" or to "when transferring assets or supplies or providing or receiving services involving its affiliates." Neither has any bearing on OAR 860-022-0045.

Third, since 1974 OAR 860-022-0045 has and does deal with expensing county taxes for ratemaking purposes, specifically and unambiguously. Such

---

5. URP and Lewis do not disagree on the present hypothetical presentation for the purposes of the Declaratory Ruling that consolidated PGE/Enron did not owe MCBIT, nor do they disagree that standalone PGE had an "as if" MCBIT calculation. Neither hypothetical fact is relevant.

exactions can be recovered from customers after they are actually paid to a taxing authority. PGE billed and collected money from ratepayers for MCBIT--*that* is relevant. OAR 860-022-0045 is not a rule about "how" to report "as if" tax liability. Instead, it is a rule about "when" a utility is authorized to use a billing adder to recoup taxes it has paid to the government.

Fourth, OAR 860-027-0048 became effective in December 2003. It cannot have any bearing or relevance on the amounts PGE billed and kept "on behalf" of the County for "MCBIT" prior to that date--amounts in excess of $6.66 million. The Commission cannot implicitly repeal rules or retroactively sanction conduct that was unauthorized.

As discussed above, this Commission is bound by the statutory requirement that it must engage in rulemaking to change rules. It cannot "implicitly repeal" its own rule by arrogating to itself authority to do repeal rules through referencing policies about other matters in Staff memoranda attached to orders in summary denials of petitions for investigations. Let's be clear: Legislative "implied repeal" is disfavored; administrative agency "implied repeal" is just *ultra vires*. Lawmakers acting with full legislative powers cannot *sub silentio* repeal laws. ***State ex rel Huddleston v. Sawyer***, 324 Or 597, 604-05, 932 P2d 1145, cert den 522 US 994, 118 SCt 557, 139 LEd2d 399 (1997) (repeal by implication is disfavored); ***Wilson v. Matthews***, 291 Or 33, 37, 628

P2d 393 (1981) ("We generally do not assume that a statute is intended to repeal or amend another by implication."); ***State ex rel. Med. Pear Co. v. Fowler***, 207 Or 182, 195, 295 P2d 167 (1956) ("It is well settled that amendments or repeals by implication are not favored by the courts.").

Moreover, even express legislative repeals cannot be retroactive in the sense that they change the lawfulness of conduct. Prohibited "retroactive" lawmaking attempts to change the legal consequences that attach to past actions or impairs a person's existing rights. ***Black v. Arizala***, 182 OrApp 16, 33, 48 P3d 843, 852 (2002). The Commission's ratemaking and its rulemaking powers are mere delegations of legislative power. This quasi-legislative power cannot be used to accomplish results that are impermissible for the legislature. Yet, Staff, PGE and Pacificorp advocate exactly that kind of retroactive change in the rules--some tortured interpretation of OAR 860-022-0045 or some hidden repeal nestled within discussion of a different topic such as the definition of reporting income taxes adopted in late 2003--to relieve the utilities of consequences of their past unauthorized billing conduct.

Finally, the Commission's continued republishing OAR 860-022-0045 as originally drafted (with the acquiescence of Staff and the utilities closely watching the proceedings for the implicit meanings unknowable to the public)

strongly suggests that it retains its original meaning as of the date it first became effective. ***State v. McGinnis***, 56 Or 163, 108 P 132, 133 (1910):

> Whatever the rule may be in other jurisdictions, it is settled in this state that where a section of an act is amended 'so as to read as follows,' and the later law sets forth the changes contemplated, the parts of the old section that are incorporated in the new are not to be treated as having been repealed and re-enacted, but are to be considered as portions of the original statute, unless there is a clear declaration to the contrary, in the absence of which it is only the additions that have been made to the original section that are to be regarded as a new enactment.

III. RESPONSE TO PGE OPENING BRIEF.

A. RESPONSE TO "BACKGROUND."

The Background §§ I-VI are disputed in our Opening Brief. Background VI is discussed above. In Background VII, PGE's reliance upon some testimony filed in 2005 in unrelated proceeding is also irrelevant. The Staff's position on these other matters is noted in its Opening Brief in this proceeding. We are concerned with the text of OAR 860-022-0045 from 1997 to the present, not how Staff recommends standalone treatment for state and federal income taxes in mid-2005.

B. RESPONSE TO MERITS.

PGE does not even try to construe OAR 860-022-0045 to justify its current legal position. The plain meaning of the words will not admit it. It argues that it

makes no sense for the local taxes to be treated differently than state and federal taxes. We agree. In fact, we contend that the better policy would be to not allow any collections for state or federal taxes either. However, that is a policy decision, and as ***Multnomah County v. Davis*** instructs, the OPUC had the authority to make the decisions and the authority to adopt different treatment by rule for local taxes, which it clearly did.

IV. RESPONSE TO PACIFICORP OPENING BRIEF.

Pacificorp's reliance upon ***Multnomah County v. Davis*** is discussed above. No one particularly disputes the commonplaces advanced by PacifiCorp (pp. 1-3). PacifiCorp (p. 4) explains apportionment of MCBIT--again, no party has questioned the nature of the calculation of the tax.

Pacificorp (p. 5) argues that there is no mechanism for "deconsolidating" MCBIT. No one is asking PGE to "deconsolidate" MCBIT for tax purposes. OAR 860-022-0045 is already "deconsolidated" for *billing* and *recoupment* purposes, as it is separately stated and added only when certain preconditions are met. Since there was no MCBIT imposed on the "standalone" utility, it cannot bill MCBIT to ratepayers and then keep the money collected. It is irrelevant how the consolidated tax liability, if any, was determined.

V. RESPONSE TO CITY OF PORTLAND'S SUGGESTION THAT THE AGENCY CONSIDER THE QUESTION OF WHETHER OAR 860-022-0045 HAS BEEN APPLIED UNREASONABLY.

The question of whether the charges billed and collected for MCBIT were unreasonable or unjust is not before the Commission. The question is whether the amounts for MCBIT which were billed to and collected from customers were authorized by the rule and therefore, lawful. Under the plain meaning of the rule, only the amounts actually imposed by the county and actually paid by the utility to the county for taxes can be recouped, and no other billing adder charge is authorized. The Commission is not authorized to undertake an examination of how much of the unauthorized charges might be "just" or "reasonable."

"Reasonable" and "just" describe discretionary determinations by the agency acting in its quasi-legislative function. The OPUC sets utility rates by examining, to a degree which can range from cursory to comprehensive, the utility's asserted costs and the utility's expected sales of units to customers. The OPUC (in theory) determines which asserted costs are lawfully cognizable and which of those lawfully cognizable costs are reasonable and just to charge to ratepayers. ORS 756.040(1), 757.205(2). It may disallow unreasonable costs or imprudently incurred expenses and determine a reasonable profit for shareholders.

Oregon courts have long distinguished the legislative or administrative function of the OPUC in "determining what rate is just or reasonable" and the judicial function of "finding and awarding reparation of damages." ***Oregon-Washington R. & Nav. Co. v. McColloch***, 153 Or 32, 49, 55 P2d 1133, 1141 (1936). The ***McColloch*** court reaffirmed the rule announced in ***Service & Wright Lumber Co. v. Sumpter Valley Ry. Co***., 67 Or 63, 75-76, 135 P 539 (1913), holding that "There is no necessity of resorting first to the commission in those instances in which the only question involved is an overcharge * * *." 153 Or at 49. Accord, ***McPherson v. Pacific Power & Light Co***., 207 Or 433, 453, 296 P2d 932, 942 (1956).

VI. CONCLUSION.

Staff and the utilities do not offer any plausible construction or interpretation of OAR 860-022-0045. The rule means what it says and what the text has always meant, since adopted over 30 years ago. The Commission should dismiss the Petition for Declaratory Ruling, as the briefing shows that there is no cogent dispute about what this rule presently says or means.

If the Commission wants to consider amending or repealing the rule that has been effective for 30 years, or the procedure suggested by ICNU at § 4 of its Opening Brief, it should announce its intention to do so.

If PGE wants to argue to the Circuit Court that its conduct in charging for MCBIT "on behalf" of the County was not willful or fraudulent because it had some "background" understanding with Staff or some good faith *mis*understanding about what the rule meant, it is free to do so--to the judicial factfinder in Circuit Court. Questions of motive, intent or wilfulness are not matters within the Commission's purview, and this petition for a Declaratory Ruling about "meaning" of the rules does not provide the arena for the Commission to weigh in for that contest.

Dated: August 12, 2005

Respectfully Submitted,

LINDA K. WILLIAMS
OSB No. 78425
10266 S.W. Lancaster Road
Portland, OR 97219
503-293-0399 voice
503-245-2772 fax
linda@lindawilliams.net

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
503-293-9021 voice
503-293-9099 fax
dan@meek.net

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I hereby certify I filed the foregoing REPLY BRIEF OF KEN LEWIS AND URP, by e-filing 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 copies by e-mail to the service list maintained this day on the OPUC web site for this docket, pursuant to the statement in the ALJ Order of June 10, 2005, that "All parties agreed to electronic service among themselves."

stephanie.andrus@state.or.us
lowrey@oregoncub.org
jason@oregoncub.org
tlannom@ci.portland.or.us
kl04@mailstation.com
dan@meek.net
mwp@dvclaw.com
doug.tingey@pgn.com
mail@dvclaw.com
bwalters@ci.portland.or.us
linda@lindawilliams.net
jffell@stoel.com

Dated: August 12, 2005

_____
Daniel W. Meek