

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 28

In the Matter of a Declaratory Ruling for)
PORTLAND GENERAL ELECTRIC)
COMPANY pursuant to ORS 756.450.)

ORDER

DISPOSITION: PETITION GRANTED

On June 27, 2001, Portland General Electric Company (PGE) petitioned the Commission for a declaratory ruling. The petition stems from a lawsuit filed by Blue Heron Paper Company (Blue Heron) against PGE in Clackamas County Circuit Court (the Court).¹ PGE asks the Commission to declare that PGE is required to collect, and Blue Heron is required to return to PGE, a portion of the amount credited to Blue Heron under Schedule 86 of PGE’s tariff. Blue Heron asserts it does not have to return the amount to PGE. The amount in dispute is \$281,057.01.

This matter came before the Commission at its November 20 and December 3, 2001, public meetings. Staff submitted its public meeting memo, dated November 13, 2001. On November 16, 2001, PGE filed a response to the Staff public meeting recommendations. At the December 3, 2001, public meeting, the Commission took the matter under advisement. Also, on December 3, 2001, Blue Heron replied to PGE’s response to Staff recommendations.

On December 26, 2001, Thomas G. Barkin, Administrative Law Judge, issued a memorandum setting forth a statement of assumed facts and establishing a briefing schedule. The ALJ asked the parties to address two sets of issues: 1) should the Commission issue a declaratory ruling; 2) if a ruling is issued, how should the Commission resolve the issues. The parties filed opening briefs on January 14, 2002, and reply briefs on January 21, 2002. PGE also filed a motion to strike portions of Blue Heron’s brief.

¹ *Blue Heron v. PGE*, Clackamas County Circuit Court, Case No. 01-6-223.

STATEMENT OF ASSUMED FACTS²

Under PGE's Rate Schedule 86, Electricity Exchange Rider (now called the Demand Buy Back Rider), a customer may voluntarily reduce its electricity usage in exchange for a credit when PGE calls an exchange event. Schedule 86 describes the method for determining the amount of the credit. Blue Heron is a customer eligible for credits under Schedule 86.

Blue Heron participated in Schedule 86 exchange events in November and December 2000. Blue Heron received credits of \$196,689.85 for the November exchange and \$700,713.32 for the December exchange.

On March 16, 2001, PGE ~~notified~~ wrote a letter to Blue Heron explaining that it had discovered errors made in the calculation of Blue Heron's exchange credits, and that the errors had led to an overpayment of \$281,057.01 by PGE to Blue Heron for exchange events in November and December 2000. PGE ~~further~~ notified Blue Heron that PGE was obligated to recover the overpayment.

On April 10, 2001, PGE ~~informed~~ wrote to Blue Heron and stated its expectation that the parties would work out a mutually acceptable resolution regarding the overpayment described in the March 16 letter. PGE suggested a repayment plan that would use the credits from Blue Heron's participation in exchange events in March and April 2001 to repay the overpayment amount, but left open to Blue Heron to suggest an alternative. ~~that the errors arose from miscalculations by a sub-contractor that PGE had retained to help administer its Demand Exchange Program.~~

By letter dated May 4, 2001, PGE notified Blue Heron that it intended to take action to collect the overpayment under OAR 860-021-0135. The letter informed Blue Heron that PGE intended to deduct one-half of the \$140,528.51 overpayment from PGE's March Exchange credits, and the second half from Blue Heron's April exchange credits. PGE deducted the credits as promised.

PGE'S MOTION TO STRIKE

Before turning to the merits, we first address PGE's motion to strike a portion of Blue Heron's brief. One of the key issues in the Circuit Court lawsuit is Blue Heron's claim that the parties entered into a settlement agreement in September 2000 and a letter agreement in February 2001 (the agreements) that bar PGE from collecting the \$281,057.01. In the Circuit Court proceeding, Blue Heron asserts the agreements bind the parties and form the basis for contract and tort claims against PGE. At the public meetings in November and December, Blue Heron argued the Commission should not

² In its opening brief, PGE suggested several changes to the assumed facts set forth in the ALJ's December 26, 2001, memorandum. Blue Heron did not object to the changes and they are adopted. PGE's additions are underscored and deletions are struck through.

grant the petition for a declaratory ruling because the dispute involves contract and tort issues that are beyond the Commission's jurisdiction.

In the briefing directions to the parties, the ALJ acknowledged the Commission's limited jurisdiction by excluding the agreements from the statement of assumed facts. Despite the briefing instructions, Blue Heron's opening brief discusses the formation, purpose, and legal impact of the agreements. Blue Heron argues the contract issues are essential to understanding the proper interpretation of Schedule 86.³ It contends that because the Commission does not have jurisdiction over the contract issues, we should decline to issue a declaratory ruling on the administrative rule and rate schedule issues.⁴

In its January 21, 2002, filing, PGE moved to strike the portions of Blue Heron's opening brief that address the agreements. PGE argues these portions of the brief address matters that are properly before the Court.

We grant the motion to strike. In presentations at the Commission public meetings, Blue Heron argued that the Commission should not entertain this petition because the courts are the proper venue for contract and tort issues. By limiting the issues in the manner set forth in the assumed facts, the ALJ focused discussion on the matters uniquely within our jurisdiction. This is the type of analysis the Court anticipated we would provide.⁵

We note that an analysis of how PGE's rate schedule and the laws we administer interact is important to the lawsuit. In its complaint, Blue Heron alleges that PGE violated requirements of ORS chapter 757. Under ORS 756.185, a utility which does, causes, or permits to be done any matter prohibited by ORS chapter 756, 757, or 758, or which omits to do any matter required by these statutes, is liable to the injured party for treble damages. As a result, our inquiry into the assumed facts and the statutes we enforce bears directly into the issues in the lawsuit.

Whether The Commission Should Issue A Declaratory Ruling

As noted above, this petition asks the Commission to participate in an ongoing action before the Clackamas County Circuit Court. At a conference with the

³ Blue Heron asserts Blue Heron and PGE used Schedule 86 as a vehicle to satisfy a private obligation. Blue Heron Opening Brief, p. 14.

⁴ In this order, the terms rate schedule and tariff are used interchangeably.

⁵ Transcript of Proceedings, Clackamas County Circuit Court, Case No. 01-6-223, September 17, 2001, p. 4, ("THE COURT: If (the Commissioners) ignore the question of the settlement agreement and they decide that PGE now has incorrectly added up the credits, PGE loses")

parties, the Court stayed the lawsuit in anticipation of timely Commission action on PGE's petition.⁶

Given the Court's interest in our view of how our rules and PGE's rate schedules should apply to the facts underlying the lawsuit, we will grant PGE's petition for a declaratory ruling. In doing so, we find no need to analyze the considerations that courts apply when deciding whether to invoke primary jurisdiction.⁷ In this case, the Court has deferred the proceeding pending our decision on the petition for declaratory ruling. Consistent with the Court's decision, we will take the opportunity to explain our view of how the laws we enforce apply to the assumed facts.

Merits of the Dispute⁸

Whether applicable statutes, Commission rules and orders, and PGE's tariff, require PGE to collect, and require Blue Heron to return, the amount of \$281,057.01 that PGE credited in error to Blue Heron for exchange events in which Blue Heron participated in November and December, 2000.

Parties' Positions.

As set forth in the statement of assumed facts, in November and December 2000, Blue Heron participated in PGE's Electricity Exchange Rider. Under this program, the customer receives a credit for voluntarily reducing its electrical usage. Because of a miscalculation, PGE credited Blue Heron \$281,057.01 more than the amount called for under the rate schedule. PGE recouped the amount by reducing credits in bills for March and April 2001.

PGE argues its actions to recover the \$281,057.01 were necessary to comply with the statutes and rules the Commission administers. As a result, it asserts it has not violated ORS chapters 756, 757, and 758.

PGE describes Schedule 86 as different from most rate schedules. Usually, the customer pays charges or fees set forth in the schedules for services received. In contrast, under Schedule 86, the customer receives a payment (or, in some circumstances, a credit) according to a calculation based on specific, defined variables, set forth in the rate schedule.

⁶ Tr., p. 17.

⁷ *Boise Cascade v. Board of Forestry*, 325 Or 185, 192; 935 P.2d 411 (1997) (The doctrine of primary jurisdiction "is one ordinarily invoked by a court in the traditional judicial system with the belief that a previous agency disposition of one or more issues before the court will assist the court in resolving the case before it.")

⁸ These are the issues set forth in PGE's petition. Neither party asked the Commission to determine whether the amount in dispute is properly calculated.

This dispute arose because PGE made an error in calculating the proper amount of the credit it owed to Blue Heron. There is no suggestion the error was due to disagreements over the variables defined in the rate schedule.

According to PGE, OAR 860-021-0135 requires that when the utility or customer discovers over- or underbilling for a tariffed utility service and it can be shown that the error was due to some cause and the date can be fixed, the overcharge or undercharge must be computed back to such date.⁹ PGE argues this rule applies to situations when a customer is credited too much or too little, if the basis for the charge or credit is a tariff lawfully in effect. PGE contends the effect of crediting a customer too much is the same as underbilling.

PGE requests the Commission to approve its actions regarding the excess credit because the flow of money between the customer and the utility lies at the heart of utility regulation in Oregon. As PGE points out, the rule is part of the scheme of regulations and tariffs that implement the Commission's general statutory authority.¹⁰ PGE asserts the purpose of the rule is to achieve uniformity in the handling of corrections to errors arising under a utility's tariffs. PGE contends the rule is mandatory because if a utility is not required to correct billing errors, a customer could be charged more or less than that is required in the tariffs. Such an outcome, PGE argues, is prohibited under

⁹ OAR 860-021-0135 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 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 months' usage. In no event shall an overbilling or underbilling be for more than three years' usage.

(2) The energy or large telecommunications utility may waive rebilling for underbillings when the costs to the utility of rebilling 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 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.”

¹⁰ ORS 756.040(2) provides: “The commission is vested with power and jurisdiction to supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.”

ORS 757.225.¹¹ It would also be considered unjust discrimination under ORS 757.310.¹²

PGE contends this rationale applies in a case where a customer is credited more than he or she is entitled to under the tariff, because the net effect would be that the customer would not be paid in accordance with the tariffs that provide for such payments. PGE emphasizes there is no meaningful difference between instances where the customer is charged too little for services and must pay the utility the difference between what was charged and the tariff rate, and a situation where the customer received too great a credit and must refund the excess credit. PGE contends Blue Heron was entitled to a certain amount of value for its participation in the exchange program. The value should have been calculated the same for all customers participating in the program. Whether PGE owed Blue Heron a check or a credit under the tariff, Blue Heron was never entitled to more than the correct numbers would have yielded.

PGE also notes the rule applies regardless of any fault of the parties involved. In Order No. 92-1168, the Commission held that PGE was entitled to recover underbilling from a commercial customer even though the underbilling was caused by PGE's failure to enter a multiplier number correctly in the customer's account record. PGE adds the purpose behind the rule is to make certain payments or refunds are consistent with the tariffs.

Blue Heron argues that OAR 860-021-0135 does not apply to this case. Blue Heron contends the rule addresses PGE's ordinary pattern of business: measuring usage with meters, selling and delivering electricity, and receiving payment. It was not written with Schedule 86 transactions in mind. Rather, Blue Heron argues, it was written to protect utilities (unlike other businesses) and their customers from having to go to court to recover over billings or under billings. Finally, Blue Heron notes that the rule describes when and how much of a billing error may be recovered by the utility or customer.

Blue Heron argues the rule applies exclusively to the standard meter-bill-pay transaction typical of utility service. In that type of transaction, the money flows one-way from the customer to the utility in payment for service. In this case, the money flows from the utility to the customer in payment for specific actions taken by the customer at the utility's request.

¹¹ ORS 757.225 provides: "No public utility shall charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in printed rate schedules as may at the time be in force, or demand, collect or receive any rate not specified in such schedule. The rates named therein are the lawful rates until they are changed as provided in ORS 757.210 to 757.220."

¹² ORS 757.310 prohibits a utility from charging or receiving from "any person a greater or less compensation for any service rendered or to be rendered by it than a) that prescribed in the public schedules or tariffs then in force or established; or b) it charges, demands, collects or receives from any other person for a like and contemporaneous service under substantially similar circumstances."

Blue Heron maintains that Schedule 86 requires PGE to pay (not bill) the customer the difference between the customer's normal level of consumption (baseline consumption) and the reduced level of consumption that the customer achieves in response to PGE's declaration of an exchange event. Blue Heron notes the error occurred when PGE's contractor incorrectly calculated the baseline usage for the exchange events in November and December 2000. Blue Heron asserts this is not a billing error. Rather, it is a payment error not contemplated by OAR 860-021-0135.

Blue Heron also asserts that rule is not applicable because it applies only to the limited number of ways the bill can be erroneous: errors attributable to misread meters, defective meters, and incorrect rates.¹³ Blue Heron argues none of these types of errors are at issue here. Blue Heron notes PGE has not claimed that it misread PGE's meters or that the meters were defective. Nor is the determination of the rate improper. Blue Heron states that the correct rate under Schedule 86 (other than incidental charges and adders) is the price PGE receives on the open market for the amount of energy exchanged by the customer. Blue Heron notes PGE is not claiming the market price was incorrect.

Commission Decision.

The Commission concludes that Oregon law and PGE's tariffs require it to collect, and require Blue Heron to return, the amount of \$281,057.01 that PGE credited in error to Blue Heron for exchange events in which Blue Heron participated in November and December, 2000.

Blue Heron cites various reasons why it believes OAR 860-021-0135 does not apply to the assumed facts. We conclude Blue Heron misapprehends the operation of the rate schedules involved in this case. Blue Heron could take advantage of Schedule 86 only because that schedule was a rider to the rate schedule under which Blue Heron, presumably, was receiving standard service (i.e., Schedule 83¹⁴).¹⁵

The sale of the power and the credits are inextricably intertwined. A review of the rate schedule shows how closely the calculation of the credit under Schedule 86 is tied to the underlying sale of power. The credit received for an hour of

¹³ PGE argues the rule is not so limited. It points to Order No. 92-1168, in which the Commission applied the rule to a utility that entered an inaccurate number into a customer's account records, causing the bills to be too low.

¹⁴ See Schedule 83, "General Service—Primary Voltage." (PUC Oregon No. E-16, First and Second Revisions of Sheet 83-1.) These sheets were in effect in November and December 2000 and have since been superseded.

¹⁵ See Schedule 86, "Electricity Exchange Rider" (PUC Oregon No. E-16, Original and First Revised Sheets 86-1.) (Schedule 86 is applicable to "qualifying industrial ... Customers under Schedule(s)... 83... who satisfy the conditions contained in this Schedule.") These sheets were in effect in November and December 2000 and have since been superseded.

reduced consumption is determined by multiplying the hourly amount of reduced load (the Buy Back Amount) by the hourly credit rate. The hourly credit rate is the difference between the price PGE will pay for the reduced consumption and “the energy charge contained in the rate schedule under which the Consumer is served...”¹⁶

Consequently, when Blue Heron purchases power under the standard rate schedule, it is engaged in a meter-bill-pay transaction. The offsets authorized under Schedule 86 reduce the amount owed for power. As a result, OAR 860-021-0135 applies directly to this transaction. As described in the statement of assumed facts, PGE underbilled for power consumed under the standard tariff by erroneously providing too large a credit under Schedule 86.

It may be argued the credit for reduced consumption and the charges for actual power consumed are separate transactions. We do not subscribe to that view. PGE is in the business of selling power, not providing credits. It makes no difference if the credit is larger than the charges for power or if PGE sends a check rather than netting the credit against the power charges on the bill. The method of compensation does not change the fundamental relationship between the utility and consumer.

We believe it important to add one additional comment. Our authority to adopt OAR 860-021-0135 stems from the Oregon statutes requiring utilities to set forth the terms, conditions, and rates for service in filed rate schedules and the statutes proscribing unjust discrimination. The language of ORS 757.310(1)(a) is unequivocal. No public utility shall, “directly or indirectly, by any device” charge, demand, collect or receive from any person greater or less compensation for any service “rendered or to be rendered” than the compensation set forth in the public rate schedules. Under the assumed facts, PGE must collect from Blue Heron the amounts specified in the rate schedules, no more, no less. Failure to do so would violate the law.

Applying the rule to the facts, then, we conclude PGE is obligated to collect, and Blue Heron is required to return, the amount of the underbilling, \$281,057.01.

Whether the method PGE proposed to Blue Heron and subsequently implemented to recover the amount in dispute was reasonable and in accordance with applicable statutes, Commission rules and orders, and PGE's tariff on the matters of billing, credits, and collection of the amounts owed.

Parties' Positions.

PGE notes its tariff does not specify how payments of over- or undercharges must be made. OAR 860-021-0135(4) authorizes a time payment agreement if a customer must repay an underbilling. PGE described this concept as

¹⁶ PUC Oregon No. E-16, Original and First Revised Sheets 86-2 and 86-3 (superseded).

underlying its insistence that Blue Heron return the \$281,057.01. As noted above, PGE informed Blue Heron of the error in calculation. PGE proposed to recover the amount by netting the amount owed against the March and April 2001 credits. PGE later unilaterally implemented its proposed repayment plan by netting the excess credit against two months of current payments.

PGE argues if a customer refuses to enter into a time payment agreement to repay the utility where an error has been made, the refusal amounts to a failure to pay tariff charges for services rendered, which is grounds for termination of electric service. Rather than take such an action, PGE claims it attempted to fashion a moderate remedy in keeping with the spirit of the rule. PGE asks that since there is no statute or rule that dictates a contrary conclusion, the Commission should rule PGE's actions reasonable and in accordance with applicable statutes, rules, and tariffs.

Blue Heron submits that even if OAR 860-021-0135 applies to the disputed transaction, PGE is limited to the remedies permitted by rule. It notes that OAR 860-021-0135 does not mention the remedy used by PGE to recover its overpayment to Blue Heron. OAR 860-021-0135 only provides for repayment by the utility to the customer in the case of overbilling, and rebilling the customer for an underbilling. Blue Heron asserts the omission makes sense because OAR 860-021-0135 was not intended to address circumstances where the utility has access to customer funds from which the amount owed can be deducted.

If PGE must rebill and payment is not forthcoming, Blue Heron insists PGE must go to court to collect the amount due. Blue Heron asserts that in normal business transactions rectifying an alleged debt by withholding funds is improper, absent a court order permitting such action or a preexisting agreement with the debtor. Blue Heron claims billing dispute provisions in most commercial contracts require parties to continue to pay amounts owed, including disputed amounts, and not (unless agreed otherwise) offset a disputed payment against a non-disputed payment. Blue Heron does not believe the Commission should permit conduct that, in any other context, would not be condoned.

PGE objects to Blue Heron's assertion that PGE cannot keep customer funds in order to rectify a billing error and that PGE's only option is to go to court to collect what it believes it is due. PGE notes, where billing errors are concerned, netting amounts owed the customer against amounts owed the utility are common. It points to its tariff on credit balances with customers as an example of instances where netting amounts is used.¹⁷ It argues if a utility makes a mistake overbilling a customer, the refund can be made by sending a check or as a credit against future bills. PGE contends

¹⁷ **Credit Balance.** Should the Consumer pay the Company an amount in excess of what is owed the Company for services rendered, the excess amount will be carried as a credit balance on its account and applied to bills for future service unless the Consumer requests a cash refund. PGE *General Rules and Regulations*, Rule E, §4(H), Sheet No. E-9.

this is a reasonable process to be used when the customer owes money to the utility and the rule does not require otherwise.

PGE claims it gave Blue Heron ample opportunity to propose another mutually acceptable payment plan. PGE contends Blue Heron is not entitled to the money, knew it was not entitled to the money, and now hopes the Commission will ignore the unfairness of the windfall and conclude PGE should have gone to court to correct the mistake. PGE concludes this result is not required or suggested by Commission statutes, rules, orders, court precedent, or PGE's tariff schedules.

Commission Decision.

OAR 860-021-0135(4) sets forth the procedure when a customer is required to repay an underbilling and the customer and utility cannot agree on payment terms. The utility must provide written notice advising the customer of the opportunity to enter into a time-payment agreement and of the Commission's complaint process. If there is a disagreement, the Commission "shall establish terms and conditions to govern the repayment obligation."

We conclude PGE failed to follow the procedure set forth in the rule. PGE notified Blue Heron of the opportunity to enter into a repayment plan. The assumed facts do not indicate PGE notified Blue Heron of the Commission's complaint process. In addition, PGE ignored the provision in the rule that specifies, if the parties cannot reach agreement, the Commission sets the terms and conditions of repayment.

We find no provision in the rule authorizing PGE to act unilaterally. In fact, by inserting the Commission in the dispute, the rule suggests that such action is unavailable. We read OAR 860-021-0135 to protect the customer from arbitrary action by the utility. Unilateral action is inconsistent with that policy.¹⁸

PGE Rate Schedule Rule E, §4(H), Sheet No. E-9, cited by PGE, supports our conclusion. This tariff provision authorizes PGE to credit consumer overpayments to future bills. PGE cites this tariff to show netting of charges and credits on a customer's bill is an appropriate procedure. PGE fails to note, however, that the reason it can withhold customer overpayments and apply them against future charges is because the tariff authorizes the conduct. No such provision applies to the Blue Heron situation. In addition, Rule E allows the customer to choose a cash refund. In effect, the customer decides how his or her money will be used.

While OAR 860-021-0135 complicates utility operations, it does not leave the utility without options to collect underbillings. The utility can commence

¹⁸ Our conclusion also applies to customers. Our rules do not authorize a customer with a billing dispute to unilaterally withhold payment and continue to receive service. Our rules prescribe limited circumstances by which a customer with a registered dispute or formal complaint with the Commission can receive continued or restored service while the dispute is pending. OAR 860-021-0015(7) and (8).

disconnection procedures for a customer unwilling to pay the proper amount for service. If the customer disagrees, he or she can file a complaint with the Commission contesting the underbilling or the proposed payment terms. The Commission can determine whether the customer was underbilled and, if so, the appropriate terms for repayment. The utility could also petition for declaratory ruling.

Based on the assumed facts, we conclude PGE's method to recover the amount owed violated OAR 860-021-0135. We note, however, under the assumed facts, had PGE followed the procedures and come to us for resolution of the dispute, we would have found that Blue Heron was obligated to repay the amount of the underbilling. A time-payment agreement similar to the one PGE offered Blue Heron would have been one reasonable way for PGE to recoup the amount owed.

ORDER

IT IS ORDERED that:

1. Portland General Electric Company's petition for a declaratory ruling is granted.
2. Portland General Electric is required to collect, and Blue Heron is required to return, the amount of \$281,057.01 that PGE credited in error to Blue Heron for exchange events in which Blue Heron participated in November and December, 2000.
3. Portland General Electric Company violated OAR 860-021-0135(4) by unilaterally withholding the \$281,057.01.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

ORDER NO. 02-121

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.