ORDER NO. 03-401

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UCB 13

In the Matter of	)	
	)	
UTILITY REFORM PROJECT, et al.,	)	
	)	ORDER
Complainants,	)	
	)	
vs.	)	
	)	
PORTLAND GENERAL ELECTRIC COMPANY,	)	
	)	
	)	
Defendant.	)	

DISPOSITION: COMPLAINT DISMISSED

On March 7, 2003, the Utility Reform Project (URP) and Linda K. Williams filed with the Public Utility Commission of Oregon:

1. A petition requesting the Commission to open an investigation to determine the amount that Portland General Electric Company (PGE) paid in state and local income taxes, since being acquired by Enron Corporation (Enron) in 1997. URP is requesting the Commission require PGE to disclose to the public the amounts of state and local taxes PGE actually paid since the Enron acquisition in 1997.

2. A complaint alleging 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. URP seeks customer refunds for funds collected for PGE's tax expense, which in fact were not used for that purpose.

3. A pleading seeking relief for Enron and PGE's violation of Oregon's Unlawful Trade Practices Act (UTPA). ORS 646.608(1)(e) and (s). URP does not state a requested remedy for this claim.

At its March 31, 2003, public meeting, the Commission denied the petition to open an investigation. Order No. 03-214. The Commission referred the complaint to the Administrative Hearings Division for disposition.[1] On May 9, 2003, PGE filed a motion to dismiss the complaint. On June 2, 2003, Thomas G. Barkin, an Administrative Law Judge for the Commission, held a prehearing conference in this matter. URP, PGE, and the Commission Staff appeared at the conference. On June 9, 2003, URP responded to PGE's motion.

COMPLAINT AND MOTION TO DISMISS

URP's Complaint

URP's complaint alleges 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.

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 instead has paid on the order of $3 million per year for which 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).

[1] URP files this complaint under ORS 756.500.

Based on these alleged facts, URP's complaint asserts that PGE violated:

1. ORS 757.020 by charging rates that were not just and reasonable because they contained charges for state and local income taxes that PGE may never have paid.

2. ORS 646.608(1)(e) because PGE represented that electric service purchased from PGE has the benefit of contributing to federal, state, and local income tax collections.

3. ORS 646.608(1)(s) because PGE made false or misleading representations on its bills by stating, explicitly or implicitly, that balances owed include lawful charges for state and federal taxes owed.

URP requests the Commission to:

1. Order PGE to disclose immediately its actual state and local income tax payments during every period since its acquisition by Enron;

2. Order PGE to refund to ratepayers, with appropriate interest, all funds collected for the stated purpose of paying PGE's federal, state and local income taxes to governmental authorities which, in fact, were not used for that purpose;

3. Establish a deferred account to protect ratepayers from further overcharges for taxes that will never be paid to any governmental entity;[2]

4. Order any such relief as the Commission deems proper;[3] and

5. Provide reasonable compensation for the efforts of the complainants.

PGE's Motion To Dismiss

Refund claim. PGE urges the Commission to dismiss URP's refund claim because the Commission does not have statutory authority to order the refunds URP requests. PGE asserts that, no matter what a fact-finding proceeding might uncover, the Commission has no statutory authority to go back and recapture revenue. According to PGE, such an action would require the Commission to engage in retroactive ratemaking of the type that is not authorized by Oregon law.

[2] This requested remedy was included in URP's response to the motion to dismiss.
[3] This remedy is also found in URP's response to the motion to dismiss.

PGE argues that, under Oregon law, ratemaking is prospective in nature. PGE notes that URP is challenging rates that were in effect from 1997 through May 2001. According to PGE, the Commission approved those rates in Order No. 96-306 (UE 100). As a result, PGE concludes, under ORS 757.225, the rates were conclusively lawful until changed pursuant to the procedures set forth in Oregon statutes.

Unlawful Trade Practices Act (UTPA) claim. ORS chapter 646.605 et seq. is the Unlawful Trade Practices Act. URP alleges that PGE violated ORS 646.608(1)(e) and (s) of the UTPA by making false and misleading statements.

PGE responds that URP's consumer protection claims are prohibited by law. ORS 646.612(1) provides that the applicable sections of the UTPA "do not apply to … conduct in compliance with the orders or rules of, or a statute administered by a federal, state or local governmental agency." PGE asserts its rates complied with the Commission Order No. 96-306 and were required by statute, ORS 757.225.

In addition, PGE points out that URP requests no relief for the alleged misstatements. Finally, PGE notes that the UTPA specifies that the exclusive forum for bringing claims under ORS 646.608(1) is the circuit court of a county. ORS 646.638(1) and ORS 646.605. As a result, in PGE's view, there is no basis for bringing consumer protection claims before the Commission. Finally, PGE states that the UTPA permits individual action to recover damages. There is no provision for bringing consumer complaint matters on behalf of all ratepayers.

URP Response To The Motion To Dismiss

URP first argues that PGE's motion to dismiss is actually a motion to strike the claim for refunds, not a true jurisdictional challenge. URP asserts that the Commission has the inherent authority to determine whether it has been misled, has the expertise to determine what the reasonable rates would have been but for the misrepresentations, and has the full panoply of sanctions, penalties, and powers to accomplish some sort of relief. URP then argues that PGE submitted inadequate information to the Commission on the taxes that the company actually paid state and local taxing authorities with the amounts collected from ratepayers.

URP's response to the motion to dismiss requests a remedy that was not included in the original complaint. URP asks the Commission to establish a deferred account to protect ratepayers from alleged overcharges for taxes that will never be paid to any government entity. URP cites the deferred accounting statute, ORS 757.259, but does not mention which subsection it relies on as authority for the Commission to grant the requested relief.

Next URP addresses the applicability of the doctrine of retroactive ratemaking and the filed rate doctrine to this proceeding. URP asserts that the complaint does not seek to lower rates based on past overcharges. It clarifies that the complaint asks the Commission to determine what the rates should have been absent Enron's alleged misrepresentations about taxes it intended to pay. URP continues that the question of remedies for the alleged fraud is distinct from the Commission's expertise to adjudicate the amounts attributable to misrepresentations.

Further, URP asserts that a monetary adjustment or some other form of disgorgement for unjust enrichment would not be a rate, but would be considered damages, a penalty, or forfeiture within the enforcement powers of the state.

URP notes that Oregon courts have not approved or defined a state analog to the federal filed rate doctrine.[4] URP contends, however, that, to the extent the Commission has relied on a filed rate doctrine, the Commission should acknowledge a fraud on the agency exception and inquire into the reasonableness of rates procured by the alleged misrepresentation.

URP urges the Commission to delay considering whether it has jurisdiction to grant a remedy, because it is premature to fix on a particular penalty for past damages caused by misrepresenting anticipated tax liability. URP argues the Commission has authority to determine the amount of overcharges caused by fraud in its own proceedings. URP asserts the Commission cannot discharge its duty to protect customers or establish rates, if it cannot ensure the integrity of its own hearing process.

URP also cites ORS 756.200(1) for the proposition that the Commission's jurisdiction over utility practices does not foreclose any judicial administrative remedies available to plaintiffs or the Commission.

Finally, URP claims that PGE repeatedly made apparently misleading statements about its charges and tax liability in violation of ORS 646.608(1)(s) by making "false or misleading representations concerning the … cost for … services." URP challenges as false or misleading PGE's statements to public officials and to the press that the tax payments have been made and that public acquisition of PGE should somehow harm Oregon schools and other public services by reducing the amount of income tax payments received by the state of Oregon and local jurisdictions. URP alleges that the rates in question were procured by misrepresentation and thus, violated "orders or rules of, or a statute administered by a federal, state or local governmental agency." URP claims that the shield, in ORS 646.612(1) for lawful regulatory conduct should not apply.

DISCUSSION AND RESOLUTION

We grant PGE's motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

[4] URP cites *Keogh v. Chicago & Northwestern Railway Co.*, 260 US 156 (1922), establishing the filed rate doctrine and holding that when the Interstate Commerce Commission has approved rates and found them reasonable, a private shipper could not recover damages for loss of benefit of lower rate it would have enjoyed but for conspiracy between carriers fixing the rate.

Commission rules require that a complaint must:

> (1) …;
>
> (2) Set forth the specific acts complained of in sufficient detail to advise the parties and the Commission of the facts constituting the grounds of complaint and the exact relief requested;
>
> (3) Cite the applicable statutes or rules alleged to have been violated.[5]

As URP points out, the proper standard for ruling on a motion to dismiss for failure to state a claim requires the trier of fact to assume, as true, all facts alleged in the complaint and all reasonable inferences that can be drawn from those facts.[6]

For the purposes of this order on PGE's motion to dismiss, we assume that the facts alleged by URP are true.

Request To Open A Deferred Account. URP raised this request for relief in its response to the motion to dismiss. This request is denied. In effect, URP is amending its complaint in its response to a motion to dismiss. Such an action deprives PGE of its right to respond. Furthermore, URP has not filed an application or notice of an application, as required in our administrative rules.[7] The Commission will not entertain an application for deferral without the required information or notice to affected parties.

There is a further reason for ignoring URP's request for a deferred account. 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 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.

The benefits to customers 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:

> 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.

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[5] OAR 860-013-0015.
[6] ORCP 21A(8). *Anderson v. Evergreen Int'l Airlines*, 131 Or App 726 (1994).
[7] OAR 860-027-0300(3) and (6).

> 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'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. (Citation omitted.)
>
> Calculating PGE's costs, including income taxes, for ratemaking on a stand-alone basis protects PGE's customers from the financial difficulties experienced by Enron's other subsidiaries. When the Commission approved Enron's acquisition of PGE, it had the option of incorporating the effects of Enron's non-utility operations in PGE rates or treating PGE as a stand-alone entity. Consistent with long-standing OPUC policy, the Commission chose the latter approach. In adopting the stipulation in Docket UM 814, the Commission created a wall between PGE's operations and Enron's other subsidiaries. As stated by Order No. 97-196: "These conditions and commitments provide important measures and requirements, beyond those provided by the Commission's statutory authority and existing rules, to protect PGE's customers, competitors, and the public generally."
>
> If PGE's rates were set in a manner that captured some of Enron's tax losses, PGE's rates would also have needed to reflect the expenses that created those tax savings, and customers would be worse off. Staff's counsel advised that it would be difficult for the OPUC to justify picking and choosing which of Enron's revenues and expenses—including tax savings--to include for purposes of setting Oregon customers' rates. Moreover, such an approach may lead to confiscatory rates.

Damages, Penalty Or Forfeiture Claim. In its response to the motion to dismiss, URP asserts that it is not asking the Commission to lower future rates based on past over-collections. It asks the Commission to make a monetary adjustment for fraud, or some other form of disgorgement for unjust enrichment. It claims that such an adjustment would not be a rate, but instead would be based on damages, penalty, or forfeiture. URP provides no authority indicating that we have authority to provide such relief.

As with the request for deferred accounting, URP raises a new claim for the first time in its response to the motion to dismiss. URP's complaint asks for a refund. We understand the term "refund" in ratemaking to mean a process whereby the Commission orders a utility to return to ratepayers amounts previously collected through rates. See ORS 757.215(4)-(6).

The complaint does not ask the Commission to order damages, a penalty or forfeiture. We note that PGE has not had an opportunity to respond to this new theory. Consequently, we must dismiss the request for damages, penalty, or forfeiture.[8]

Refund Claim. URP argues that the Commission should not adopt the filed rate doctrine, but if it does, it should acknowledge a fraud on the Commission exception and inquire into the reasonableness of the rates procured through misrepresentation.

The trail is well-worn on our inability to grant refunds or set rates retroactively based on claims that the tariff rates were calculated on an improper basis. There is no ambiguity. ORS 757.255, which embodies the filed rate doctrine in Oregon law, 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.

The filed rate doctrine derives from the rule against retroactive ratemaking. The issue has been addressed in an Attorney General's Opinion,[9] legislative testimony by a former Commissioner,[10] and an Oregon Court of Appeals decision.[11] In addition, there are two Oregon Supreme Court cases that have recognized and applied the filed rate doctrine.[12] The consistent opinion is that the Commission cannot grant refunds for charges paid by customers based on rates specified in a utility's tariff, without specific statutory authority allowing the refund.

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[8] We note that URP's response does not address the Oregon Supreme Court's conclusion that, "the (Commission) has no authority to award any reparations, either for unreasonable or unjustly discriminatory rates, or for overcharges, and that the (Commission) is granted jurisdiction to hear complaints based only on allegations that rates are unreasonable or unjustly discriminatory." *McPherson v. Pacific Power & Light*, 207 OR 433, 449 (1956).

[9] Office of the Attorney General Opinion No. 6076 (March 18, 1987). ("A rate making order that has retroactive effect is lawful only if specifically authorized by the legislature and cannot be supported by the commissioner's general powers.")

[10] Testimony of Charles Davis on HB 2145, March 21, 1987 at 3, attached as Exhibit B. ("From the customer's viewpoint, the principle underlying the prohibition against retroactive ratemaking is that the customer should know what a utility service costs him at the time he takes it. The posted tariff on the day of service represents a contract between the customer and the utility. The customer should not expect to pay more and utility should not expect to get less.")

[11] *Pacific Northwest Bell Telephone Co. v. Eachus*, 135 Or App 41, 49 (1995). (The Commission could not retroactively grant the refund because "the effect … would have been to allow a rate reduction before the reduced rate had been approved… .")

[12] In the Matter of Portland General Electric Company's Application for an Accounting Order and for Order Approving Tariff Sheets Implementing Rate Reduction, Order No. 02-227 at 8 (available at <http://www.puc.state.or.us/orders/2002ords/02-227.pdf>), citing *Oregon-Washington R. & Nav. v. Cascade Contract Co.*, 101 Or 582 (1921*); McPherson v. Pacific Power & Light*, 207 Or 433 (1956).

As recently as last year, we reaffirmed the rule against retroactive ratemaking in another refund claim by URP against PGE. In Order No. 02-227, we rejected URP's effort to gain refunds for past alleged overcharges, even though the Court of Appeals found that we had improperly included in rates certain costs associated with the Trojan nuclear plant.[13] In that case, URP asked us to order refunds for rates charged while the appeal was pending. We stated:

> URP seeks to circumvent the filed rate doctrine by arguing that ORS 757.225 provides a presumption of lawfulness that may be overcome if a court reverses a Commission order. This position contravenes the plain language of the statute, which contemplates changes to tariffs only pursuant to ORS 757.210 to 757.220. Moreover, those changes are to future rates. The statute does not allow for retroactive changes pursuant to court decision or otherwise.[14]

URP's theory in this case is no more persuasive than its previous claims. URP has provided no legal authority from Oregon or from any other jurisdiction that there is an exception to the filed rate doctrine that would allow us to require refunds for rates that were obtained through a fraud on the agency, if one were proved.

The closest URP comes is *Pink Dot v. Teleport Communications Group.*[15] This case stands for the proposition that, while state filed tariffs have the force and effect of law in California, not all state law causes of action are necessarily precluded. *Pink Dot* is a breach of contract action in California by grocery delivery service against a telecommunications carrier. Pink Dot alleged that Teleport did not provide the services promised during contract negotiations. Teleport responded that its tariff limits its liability for damages caused by willful misconduct, fraud, or violations of law. The California Court of Appeals rejected Teleport's argument. The Court found that Teleport's tariff limiting its liability directly contradicted a California Commission order and, therefore, should not bar Pink Dot's claim.

Even if we assume that the case supports URP's contention that in California there are limits to the filed rate doctrine, we fail to see how that influences our decision. We find nothing in *Pink Dot* that suggests a regulatory commission has authority to order refunds for rates paid under lawfully adopted tariffs, even if the rates were based on fraudulent representations.

URP also cites *Wegoland Ltd. v. Nynex* to argue that the Commission has authority to determine what rates would have been reasonable absent alleged fraud.[16] However, the New York court refused to entertain such a determination because fraud is not an exception to the filed rate doctrine. "…[U]nderlying conduct does not control whether the filed rate doctrine applies."[17]

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[13] Order No. 02-227 at 7-12 (available at <http://www.puc.state.or.us/orders/2002ords/02-227.pdf).
[14] *Id*. at 8.
[15] 89 Cal. App. 4th 407 (2001).
[16] *Wegoland v. NYNEX Corp*., 806 F. Supp. 1112, 1117 (S.D.N.Y. 1992).
[17] *Id*.

URP also argues that at this stage of the proceeding, it is premature to fix on a particular remedy for past damages caused by misrepresenting anticipated tax liability. URP asserts the Commission should determine the amount of the overcharges caused by fraud without determining whether it has authority to fashion a remedy. We conclude that, before proceeding to hearing, URP must, at least, provide notice to PGE and the Commission of the remedies under consideration. Failure to specify a remedy violates the requirement in our rules that a complaint must set forth "the exact relief requested."[18]

URP raises other assertions based on various provisions of Oregon law. It argues the Commission can provide the requested relief because the statutes direct the Commission to represent customers in all matters of which the Commission has jurisdiction and that the Commission should protect the integrity of the hearing process, particularly the prohibition against giving false testimony.[19] In addition, URP contends ORS 756.200(1) provides the Commission freedom to impose remedies on PGE.[20] That provision states that the statutes enforced by the Commission do not preclude a person from availing itself of rights, penalties, or forfeitures that may arise under state or local law. We find that these citations are far from the mark. None of the statutory references provide specific legislative authority for us to delve into prior rates and order refunds or other remedies. To the contrary, ORS 756.200(1), if anything, refers to remedies granted by courts.

UTPA Claim. URP claims that PGE's allegedly misleading statements about its charges and tax liability violate ORS 646.608(1)(s) by making "false and misleading representations of fact concerning the … cost for … services." URP asserts that PGE has been providing information to public officials and to the press claiming that tax payments have been made and that public acquisition of PGE would somehow harm schools by reducing tax payments. URP argues there is no evidence that such statements are true.

Further, URP argues that there is evidence that the rates were procured through misrepresentation of its tax liability, and that PGE was not "in compliance with the orders or rules of, or a statute administered by a federal, state or local governmental agency." URP simply asserts that the ORS 646.612(1) shield for lawful regulatory conduct should not apply.

We agree with PGE that the UTPA does not apply here. ORS 646.612(1) provides that the applicable sections of the UTPA "do not apply to … conduct in compliance with the orders or rules of, or a statute administered by a federal, state or local governmental agency." URP does not allege that PGE charged rates other than the rates specified in its tariffs. We agree with PGE that the challenged rates were in compliance with a Commission order, Order No. 96-306, and were required by statute, ORS 757.225.

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[18] OAR 860-013-0015(2).
[19] ORS 756.040; ORS 756.115.
[20] ORS 756.200 **Effect of utility laws on common law and other statutory rights of action, duties and liabilities.** (1) The remedies and enforcement procedures provided in ORS chapters 756, 757, 758 and 759 do not release or waive any right of action by the state or by any person for any right, penalty or forfeiture which may arise under any law of this state or under an ordinance of any municipality thereof. …

More importantly, as PGE notes, the UTPA specifies that the exclusive forum for bringing UTPA claims is the circuit court of a county. ORS 646.638(1) and ORS 646.605. We have no jurisdiction over consumer protection claims under these statutes.

This claim, too, is dismissed.

ORDER

IT IS ORDERED that the complaint of the UTILITY REFORM PROJECT, et al. is dismissed.

Made, entered, and effective _____.

Roy Hemmingway	**Lee Beyer**
Chairman	Commissioner

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.