ORDER NO. 05-1064

ENTERED 10/05/05

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 32

In the Matter of	)	
	)	
PORTLAND GENERAL ELECTRIC	)	
COMPANY	)	ORDER
	)	
Petition for a Declaratory Ruling Regarding	)	
the Application of OAR 860-022-0045.	)	

DISPOSITION: MOTION TO DISMISS DENIED; MOTION TO STRIKE GRANTED; PETITION FOR DECLARATORY RULING GRANTED

On February 24, 2005, Portland General Electric Company (PGE) filed a petition seeking a declaratory ruling on whether it was required to calculate its county income taxes on a stand-alone basis under OAR 860-022-0045, and whether it lawfully charged its customers accordingly. If those questions are answered in the negative, PGE seeks a declaratory ruling that its liability is limited to the past three years of over charges. We grant consideration of the petition, and answer the first question in the negative, cannot fully answer the second question as presented, and do not answer the third question.

After PGE filed its petition, the Commission opened this docket at its May 17, 2005 Public Meeting. A prehearing conference was held in Salem, Oregon, on June 9, 2005, and a schedule was set in this case. Petitions to intervene were filed by Utility Reform Project (URP), Kenneth Lewis (Lewis) on behalf of "Class Action Plaintiffs,"[1] Industrial Customers of Northwest Utilities (ICNU), PacifiCorp, dba Pacific Power & Light, and the City of Portland, Oregon (City). A notice of intervention was also filed by the Citizens' Utility Board of Oregon. On July 14, 2005, opening briefs were filed by Commission Staff (Staff), PacifiCorp, PGE, City of Portland, ICNU, CUB, and a joint brief by URP and Kenneth Lewis (URP/Lewis). At that time, URP/Lewis also filed a motion to dismiss the petition. On August 12, 2005, reply briefs were filed by Staff, City of Portland, PacifiCorp, PGE, and a joint brief was filed by URP/Lewis. In those filings, replies to URP/Lewis' motion to dismiss were filed in opposition to the motion by Staff and PGE, and in support of the motion by the City. Additionally, Staff

[1] Kafoury Brothers, LLC, and David Kafoury also joined in "Class Action Plaintiffs," but later withdrew their intervention. In subsequent filings, Kenneth Lewis' name is used on his own behalf, and it is so used in this order.

filed a motion to strike portions of the City's and URP/Lewis' opening briefs. URP/Lewis later filed a response to the motion.

We begin by resolving the URP/Lewis Motion to Dismiss. Next, we address Staff's Motion to Strike portions of the City of Portland's testimony and URP/Lewis' testimony. Finally, we answer the questions posed by PGE's Petition for a Declaratory Ruling on the merits.

Motion to Dismiss

In conjunction with its opening brief, URP/Lewis filed a motion to dismiss the petition. URP/Lewis argue that jurisdiction over this matter lies in the Multnomah County Circuit Court, and that the Commission cannot divest the court of its jurisdiction: "Ultimately, the courts will decide the lawfulness of PGE's conduct. Nothing [the Commission] is authorized to do divests the courts of jurisdiction." *See* URP/Lewis brief, 11 (July 14, 2005). In addition, URP/Lewis argues that the Commission cannot exercise quasi-judicial authority without a justiciable controversy, under Article VII, section 1, of the Oregon Constitution. *See* URP/Lewis brief, 4 (July 14, 2005) (citing *Oregon State Shooting Assn v. Multnomah County*, 122 Or App 540, 543 (1993), *rev den* 319 Or 273 (1994)). In its brief, ICNU provides a twist on this final argument by asserting that if the Commission considers the questions posed in the petition, the Commission cannot consider generic facts and can only consider the impact on PGE and the calculation of the Multnomah County Business Income Tax (MCBIT). *See* ICNU brief, 3 (July 14, 2005) (applying *Johnson v. Miller*, 113 Or App 98, 100-01 (1992)). Staff and PGE opposed both URP/Lewis' motion to dismiss and ICNU's efforts to narrowly apply the declaratory ruling.

ORS 756.450 provides the Commission with the authority to issue declaratory rulings:

> On petition of any interested person, the Public Utility Commission may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by the commission. A declaratory ruling is binding between the commission and the petitioner on the state of facts alleged, unless it is modified, vacated or set aside by a court.

This statute mirrors the general statute that provides similar authority to other agencies. *See* ORS 183.410. It also stands in stark contrast to the statutes which give the courts the authority to issue declaratory rulings. *See* ORS 28.010-28.160.

We deny the motion to dismiss. URP misunderstands the nature of PGE's petition: It seeks a ruling on the applicability of the Commission's rules that is only binding on PGE and the Commission. A court may modify, vacate, or set aside our declaratory ruling. *See* ORS 756.450. URP is correct that the Commission cannot divest courts of their

jurisdiction; the final finding of liability or vindication under the Commission's rules, in the posture of this case, lies with the Multnomah County Circuit Court. That court has stayed its proceedings for the Commission to consider the meaning of these administrative rules, and we retain jurisdiction to issue declaratory rulings on the meaning of Commission rules. *See, e.g.*, Order No. 02-121, 3-4.

Additionally, URP and ICNU attempt to impose a justiciability requirement on Commission declaratory ruling proceedings. In their arguments, they cite authorities that rely on the declaratory ruling standards established for courts, which do require a justiciable controversy for the case to proceed. *See Oregon State Shooting Assn.*, 122 Or App at 543 (citing ORS chapter 29); *Johnson*, 113 Or App at 100-01 (citing ORS 28.010); *see also Utsey v. Coos County*, 176 Or App 524 (2001), *rev dismissed* 335 Or 217 (2003) (discussing history and applicability of justiciability requirement in Oregon courts). That same requirement does not apply to declaratory rulings before administrative agencies. *See Northwest Natural Gas Co. v. PUC*, 195 Or App 547 (2004) (reviewing a PUC order based on hypothetical facts). We adhere to the declaratory ruling statute as applied to the Commission and decline to impose a "justiciable controversy" requirement where none exists.

Further, ICNU uses this justiciability argument to assert that the Commission should limit its inquiry, and the applicability of this order, to specific facts. As we have stated in the past,

> Declaratory rulings have the function of allowing an agency to determine how laws under the agency's authority apply to a given set of facts. The "facts" considered by the agency are those supplied by the petitioner. A declaratory ruling proceeding does not allow for fact finding regarding disputed facts.

Order No. 00-306 at 11. For this reason, we will consider the facts as set forth by PGE in its petition.

Motion to Strike

In its reply brief, Staff moves to strike all attachments to the City's opening brief, as well as portions of that brief because they contain assertions of fact that are not included in PGE's Petition. Further, Staff moves to strike portions of URP/Lewis' opening brief that refer to responses to data requests in docket UCB 13. URP/Lewis filed a response to the motion, in which it argued that it provided the challenged material in support of its motion to dismiss the Petition, and not in support of its arguments on the merits of the questions raised in the Petition.

As noted above, the facts to be considered in this docket are limited to those asserted by PGE in its Petition. For this reason, we strike the contested portions of the City's brief, and decline to consider competing facts set forth by other parties in their

briefs. *See* DR 28, Order No. 02-121 at 3. To the extent that URP/Lewis relies on the contested facts in their motion to dismiss, the facts were considered as stated in the above decision on the motion. However, those facts are not part of the record in considering the questions raised in PGE's Petition on the merits.

Request for Declaratory Ruling

We next address the merits of the questions set forth in PGE's petition:

1. Are utilities 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;
2. Did PGE act in conformity with OAR 860-022-0045 when it charged customers for county income taxes imposed on PGE as a stand-alone regulated operation and when PGE paid those sums to Enron during the period when Enron filed a consolidated tax return; and
3. If the Commission determines that PGE has improperly billed for local income taxes, do the provisions of OAR 860-021-0135 apply?

At the outset, the parties disagree as to how this Commission should analyze OAR 860-022-0045. The City of Portland, ICNU, CUB, and URP/Lewis (hereinafter "opposing intervenors") argue that the Commission must follow the steps used to analyze statutes and administrative rules in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12 (1993) ("*PGE v. BOLI*"). *See* URP/Lewis, 14-15 (July 14, 2005); City of Portland, 3 (July 14, 2005); ICNU, 6 (July 14, 2005). The utilities and Staff assert that the Commission must look to the policies behind the administrative rule to determine its meaning. *See* Staff, 2-3 (July 14, 2005); PGE, 4 (July 14, 2005); PacifiCorp (Aug 12, 2005). Both are partially correct.

The steps set forth in *PGE v. BOLI* are used to determine the intent of the body that promulgated the rule. *See PGE v. BOLI*, 317 Or at 610. However, in this instance, the Commission promulgated the rule and so does not have to go through the laborious process in *PGE v. BOLI* to determine its own intent. *See Gage v. City of Portland*, 319 Or 308, 314-15 (1994) (holding that a reviewing body must defer to an entity's interpretation of its own rule, but not the interpretation of the rule by another entity). An agency's interpretation of its own rule will be upheld as long as it is plausible and not inconsistent with the wording of the rule itself, the rule's context, or with any other source of law.[2] *See Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994); *see also Ulrich v. Senior and Disabled Services Div.*, 142 Or App 290, 296, *rev den* 324 Or 323 (1996) (upholding agency interpretation of its own rule where it was plausible and not inconsistent with the *Don't Waste Oregon* analysis); *Lee v. Appraiser Certification and Licensure Board*, 160 Or App 622, 633 (1999) (same).

[2] Prior to issuing *PGE v. BOLI* , the Oregon Supreme Court stated that an agency's interpretation of its own rule must be upheld "unless [the reviewing body] determines that the [agency's] interpretation is inconsistent with express language of the [rule] or its apparent purpose or policy." *Clark v. Jackson County*, 313 Or 508, 515 (1992).

In following this method, we will answer PGE's three questions, considering the broad policies implemented in the administrative rules, as well as the text and context of the rules.

> OAR 860-022-0045(1) states, in relevant part:
>
> > If any county in Oregon, other than a city-county, imposes upon an energy or large telecommunications utility any new taxes or license, franchise, or operating permit fees, or increases any such taxes or fees, the utility required to pay such taxes or fees shall collect from its customers within the county imposing such taxes or fees the amount of the taxes or fees, or the amount of increase in such taxes or fees.

Before considering the text and context of the rule, we consider the broader policies regarding treatment of local taxes. Local income taxes fall into two categories: city taxes which, up to a certain cap, compensate cities for the use of rights of way; and other local taxes which simply raise revenue for services provided by that locality. *See Multnomah Co. v. Davis*, 35 Or App 521, 527 (1978), *rev den* (1979). Compensatory city taxes are part of the utility's operating expenses and are calculated as part of the utility's general ratemaking proceeding at the Commission, which sets rates for all Oregon ratepayers of that utility. In contrast, other local taxes pay for local services and are charged only to ratepayers in that county. *See id.*

This policy – distinguishing between local taxes attributable to local rights of way and included as an operations cost in a general rate case and taxes solely to raise local revenue and stated separately on the bills of those local residents – was initially only applied to city taxes imposed on telecommunications utilities. *See* Order No. 36403. Later, the policy was applied to also include city taxes on electric and gas utilities:

> [O]ften the only practical limitation on the powers of cities to impose such exactions lies in the restraint exercised by the cities themselves.
>
> To the extent that local exactions exceed reasonable compensation for use of the city streets and public ways, and reimbursement for related expenses incurred by the city in connection therewith, the beneficiaries of such exactions are the residents of the cities. Treating these excess amounts in a manner which requires the utilities' customers system-wide to pay a portion thereof, including those outside of the cities who derive essentially no benefits from them and in the imposition of which they had no voice, is manifestly unjust and discriminatory and affords some customers an undue and unreasonable preference over

> others. This discrimination and preference can be eliminated by directing utilities to charge back to consumers within each city that amount by which the exactions exceed a reasonable compensation to the city for the use of its streets and public ways by the utility and the reimbursement for related expenses incurred by the city. Further, the excesses which are charged back to the consumers within each city should, in the public interest, be separately stated on the customer's billing so that the principle of state-wide ratemaking may be preserved and so that the customer will know the origin, character and amount of the additional charge being imposed upon him.

Order No. 43223, 3-4. That order adopted "Rule 21-040," which implemented the distinction between the two levels of city taxes. "Rule 21-040" is now codified as amended at OAR 860-022-0040.

As the rulemaking process went on, the Commissioner further clarified the reasons for that policy:

> If this excess (city tax in excess of two to three percent) were allowed as a general operating expense for state-wide rate making purposes it would constitute an unjust discrimination between users of utility service. Such excess, the Commissioner found, should be borne by those benefited thereby, namely, consumers who reside within the city levying the exaction. This treatment of city exactions would relieve the nonresident from being forced to contribute to the general revenues of a city and could also relieve the residents of one city from paying a portion of the revenue requirements of another city.

Order No. 43427 at 2.

The policy later evolved to encompass county taxes. The Commission considered that county taxes are solely revenue raising measures to pay for county services, and promulgated what is now OAR 860-022-0045 to pass on the charges for county services to ratepayers in that county. *See Multnomah County*, 35 Or App at 527. In keeping with the rule, PGE puts a line item on its customer bills in Multnomah County for the Multnomah County Business Income Tax (MCBIT).

As shown by this brief history, county taxes are to be charged to customers within that jurisdiction. However, the policy underlying the rule does not address how those taxes should be calculated.

The utilities and Staff argue that PGE must calculate the county taxes that it collects under OAR 860-022-0045 on a stand-alone basis, in concert with Commission practice and other Commission rules, and that the amount collected will not necessarily equal the amount paid in taxes by PGE or its parent company to the county. *See* PGE brief, 2 (August 2, 2005) ("The rule particularly does not direct that there should be a match between what PGE collects and what it pays the taxing entity."). Opposing intervenors argue that "the amount of taxes" collected from ratepayers must reflect their share of the taxes actually paid to the county. [3] *See* City of Portland brief, 4 (July 15, 2005); ICNU brief, 5-6 (July 15, 2005).

We find the rule contemplates neither approach. The Commission did not identify a specific approach to the calculation of taxes in the prior orders surrounding the creation of the rule. Rather, the Commission clarified only that taxes imposed by a local jurisdiction should be collected from ratepayers within that jurisdiction. While the electric utilities argue that they have always calculated local taxes on a stand-alone basis, not every utility has chosen that method. In fact, Qwest Corporation chose not to charge Multnomah County customers for the MCBIT after its tax liability was nearly eliminated when it began filing its taxes on a consolidated basis with its parent company. *See Statement of Don Mason, Workshop on White Paper on Utility Income Taxes* (OPUC Feb 23, 2005) (audio file available at http://www.puc.state.or.us/agenda/audio/2005/022305/workshop.htm). The text of the rule simply does not mandate that taxes be calculated in any particular manner.

The utilities argue that newly-enacted OAR 860-027-0048 provides context to OAR 860-022-0045. *See* PacifiCorp brief, 2-3 (August 12, 2005). The new rule states:

> The energy utility shall use the following cost allocation methods when transferring assets or supplies, or providing or receiving services between regulated and non regulated activities: * * * (g) Income taxes shall be calculated for the regulated activity on a standalone basis for both ratemaking purposes and regulatory reporting. When income taxes are determined on a consolidated basis, the regulated activity shall record income tax expense as if it were determined for the regulated activity separately for all time periods.

OAR 860-027-0048(3)(g). The same rule applies to transfers involving affiliates. *See* OAR 860-027-0048(4)(h). These are accounting rules, which require a utility to keep its books of account on a stand-alone basis. In contrast, the rule at issue in this case applies only to determining which customers may be charged by a utility for its taxes. While the

[3] At least one opposing intervenor also argues that the rule mandates that the utility collect the taxes that the utility is "required to pay." *See* ICNU brief, 8 (July 14, 2005). That is a misreading of the rule, which refers to "the utility required to pay" as a means of identifying which utilities are permitted to collect local taxes from ratepayers in only that jurisdiction.

utilities may choose to calculate their local taxes on a stand-alone basis, no particular method is required under the rule.

Utilities and Staff contend that the Commission has already decided that stand-alone treatment is appropriate for all taxes. *See* UCB 13, Order No. 03-401; UM 1074, Order No. 03-214. We rejected the complaint in UCB 13 for several reasons: the complainant failed to properly apply for a deferred account, *see* Order No. 03-401 at 6; the Commission upheld the principle of determining income taxes on a stand-alone basis for ratemaking in general rate cases, *id.*; and the complainant sought a remedy of refunds in violation of the longstanding filed rate doctrine, *id.* at 7-8. The decision in UM 1074, Order No. 03-214, rested solely on the calculation of state and federal income taxes in a ratemaking proceeding and also did not discuss the application of the county tax rule, which is not part of a ratemaking proceeding. Those cases did not decide the questions posed in PGE's petition.

Based on this analysis, we conclude that OAR 860-022-0045 is intended only to allocate county taxes to the ratepayers that reside in that county. Thus, the rule only requires PGE to separately charge county ratepayers for county taxes, but does not require that those taxes be calculated on a stand-alone basis, or in any other particular manner. For these reasons, we answer PGE's first question in the negative.

In its second question, PGE asks whether it acted "in conformity" with OAR 860-022-0045 when it charged customers for county income taxes calculated on a stand-alone basis and when PGE paid those sums to Enron during the period when Enron filed a consolidated tax return. To the extent that PGE charged Multnomah County ratepayers for county taxes as a separate line item on customer bills, PGE did act in conformity with the rule. However, we cannot answer whether PGE calculated its taxes "in conformity" with the rule. As discussed above, the rule specified no particular method of calculating the taxes to be charged to ratepayers. The rule simply does not apply to the question set forth by PGE. Staff reformulates the question as "whether PGE contravened the rule" in its conduct. *See* Staff brief, 6 (July 14, 2005). Because the rule does not address how county taxes are to be calculated when charged to ratepayers, PGE's actions, as stated by the facts set forth in the Petition, did not violate the rule.

In the third question, PGE asks whether OAR 860-021-0135 applies if we find that it improperly billed customers for local income taxes. Because we made no such finding, we need not address the third question.

ORDER

IT IS ORDERED that:

1. The motion to dismiss is denied; and

2. The motion to strike is granted in part, as discussed above; and

3. The Commission makes the following declaratory rulings:

    a. OAR 860-022-0045 does not require calculation of taxes to be collected from ratepayers to be made on a stand-alone basis.

    b. Portland General Electric Company neither acted in conformity nor violated OAR 860-022-0045 when it collected taxes from ratepayers calculated on a stand-alone basis and passed the tax collections to its parent company.

Made, entered, and effective OCT 0 5 2005.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
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.