ORDER NO. 07-421

ENTERED 09/26/07

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1271

In the Matter of	)	
	)	
PORTLAND GENERAL ELECTRIC COMPANY	)	
	)	ORDER
Deferred Accounting Authorization for Certain Expenses/Revenue Refunds Associated with Senate Bill 408 and the Sale of Certain Non-Utility Assets.	)	

DISPOSITION: APPLICATION FOR DEFERRED ACCOUNTING DENIED

On July 14, 2006, Portland General Electric Company (PGE or the Company) filed an application with the Public Utility Commission of Oregon (Commission) seeking to defer, for later rate-making treatment, tax losses associated with the sale of non-utility assets. The Citizens' Utility Board (CUB); Industrial Customers of Northwest Utilities (ICNU); the Utility Reform Project, Ken Lewis, and Nancy Newel (collectively, URP); and the Commission Staff (Staff) oppose the request. For the reasons stated below, we conclude that PGE's request is legally barred and, accordingly, deny the application.

PROCEDURAL BACKGROUND

PGE's July 14 application under ORS 757.259(2)(e) sought authorization to defer amounts related to the sale of a combustion turbine and transformer. In the application, PGE stated that it acquired the assets in 2001 using shareholder equity and sold them at a loss in 2006. PGE anticipates that the tax benefit relating to the sale of these non-utility assets will be flowed through to customers under the provisions of Senate Bill 408 (SB 408), passed by the 2005 Legislative Assembly.[1] Because customers have not paid any part of the costs associated with the turbine and transformer, PGE filed the application to ensure that shareholders retain the tax benefits and to properly align the costs borne by and benefits received by customers.

[1] SB 408 was codified as ORS 757.267 and 757.268.

PGE proposes two alternative accounting treatments for deferral. First, PGE proposes to defer the amount of revenue identified for refund to customers resulting from any rate adjustment required by SB 408. Alternatively, PGE proposes to defer the tax effect of the tax loss, which the Company estimates to be approximately $4.9 million.

On August 1, 2006, Administrative Law Judge (ALJ) Grant issued an order holding this docket in abeyance pending the adoption of administrative rules implementing SB 408. The Commission adopted final rules on September 14, 2006. *In the Matter of Adoption of Permanent Rules to Implement SB 408 Relating to Utility* Taxes, AR 499, Order No. 06-532 (September 14, 2006). This docket resumed on October 10, 2006.

PGE filed written testimony in support of its application on December 6, 2006; Staff, CUB, and ICNU filed testimony in opposition on January 22, 2007; PGE filed rebuttal testimony on February 21, 2007. The parties waived cross-examination of witnesses, and the presiding ALJ admitted all pre-filed testimony into the record.

Pursuant to the adopted briefing schedule, Staff, CUB, ICNU, and PGE submitted concurrent opening briefs on April 27, 2007. Staff, CUB, ICNU, and URP submitted reply briefs on May 18, 2007. PGE filed a reply brief on June 8, 2007.

FINDINGS OF FACT

The facts are undisputed. In May 2001, PGE entered into a contract to purchase an LM 6000 Gas Turbine Generator and associated transformer for a proposed Port of Morrow gas generating project. The purchase price was $16.8 million for the turbine and $414,800 for the transformer. PGE/200, Piro-Tamlyn/1-2.

PGE decided not to pursue the generating project, but it completed purchase of the turbine and transformer. *Id.* at 2. The costs associated with the turbine and transformer were recorded in non-utility accounts. *Id.* PGE used shareholder equity to purchase both assets. PGE/100, Dahlgren-Tinker/3. Customers were never at risk for paying for the turbine and transformer or any associated tax expense. PGE retained the transformer, but transferred the turbine to Portland General Resource Group, Inc. (PGRD), a non-regulated subsidiary.

In July 2006, PGRD sold the turbine for $6.1 million, incurring a $12 million tax loss. PGE/200, Piro-Tamlyn/4. PGE also sold the transformer, generating a combined tax loss of approximately $12.3 million. *Id.*

PGE files income taxes on a consolidated basis with PGRD and other affiliates. The sale of the turbine and transformer decreased PGE's consolidated 2006 income tax liability by approximately $4.9 million. *Id.* PGE's 2006 quarterly estimated federal and state tax payments reflect this $4.9 million reduction in tax liability.

By reducing PGE's taxable income, the tax loss on the sale of the turbine and transformer will reduce the amount of PGE's "taxes paid" under SB 408. ORS 757.268(13)(f). Consequently, the tax benefit associated with the sale of these non-utility assets will likely be passed through to customers when, under its rules implementing SB 408, the Commission compares "taxes paid" with "taxes collected" to determine whether any rate adjustment is required.

CONCLUSIONS OF LAW

Applicable Law

This application implicates two primary statutory provisions. The first is ORS 757.259, which gives this Commission the discretion to authorize a utility to defer, for later rate-making treatment, amounts including identified utility expenses or revenues necessary "to match appropriately the costs borne by and benefits received by ratepayers." ORS 757.259(2)(e).

A decision to defer costs under ORS 757.259 involves a two-step analysis. First, we examine whether the application is legally sufficient—*i.e.*, does the application meet the criteria set forth in ORS 757.259? If an application qualifies under ORS 757.259, we then consider whether the application merits an exercise of our discretion. In this second step, we use a flexible two-pronged approach that examines the nature of the triggering event and the magnitude of the financial impact on the utility. *In re Staff Request to Open an Investigation Related to Deferred Accounting*, UM 1147, Order No. 05-1070 at 7.

The other implicated statute is ORS 757.268, which codifies SB 408. SB 408 generally requires a utility to true-up any differences between the amount of income taxes collected in rates from customers and the amount of taxes paid to the government that are "properly attributed" to the utility's regulated operations. ORS 757.268(4). If amounts collected and amounts paid differ by more than $100,000, the utility must adjust rates accordingly through an automatic adjustment clause. ORS 757.268(4), (6)(a).

To implement SB 408, we adopted rules to define amounts "properly attributed" to the utility. Order No. 06-532 at 2-3. Those rules use an apportionment method that relies on ratios for property, payroll, and sales for each affiliate in a consolidated group to determine the amount of taxes paid to units of government that is properly attributed to the regulated utility. OAR 860-022-0041(3)(a), (c). We concluded that this methodology properly identifies the amount of taxes related to a

utility's regulated operations from other entities and activities in a utility's tax-paying group. Order No. 06-532 at 2-3.

Analysis

Under SB 408 and its implementing rules, the tax benefit arising from the loss on the sale of the turbine and transformer will likely be passed through, at least in part, to customers. As discussed above, SB 408 compares "taxes paid" with "taxes collected" and requires a refund or surcharge to customers for the difference. By reducing PGE's taxable income, PGE estimates that the loss on the sale will reduce the utility's "taxes paid" amount for 2006 by $4.9 million, while the "taxes collected" amount will remain unchanged.

PGE seeks to prevent the transfer of this tax benefit to customers through this application for deferred accounting. The Company contends that its request satisfies the statutory criteria and warrants an exercise of Commission discretion under ORS 757.259(2)(e). It also argues that approval of its application is necessary to avoid an unlawful and potentially unconstitutional application of SB 408 to the utility's loss on the sale of an unregulated asset. All other parties oppose PGE's request on numerous grounds.

Deferral Application

Position of Parties. PGE contends that its application qualifies under ORS 757.259(2)(e) because it specifies an identifiable expense that matches the costs borne by and benefits received by ratepayers. *See* PGE Opening Brief at 4. Because it never sought to include the cost of the turbine and transformer in rates and customers were never at risk for any losses associated with the non-utility assets, PGE argues that customers should not benefit from the tax losses related to sale of the property. *See id.* at 5.

PGE further states that we should exercise our discretion and grant the application to further important Commission policies. PGE cites past Commission decisions in which it pursued a policy of matching the benefits of a transaction with the party that bore the attendant risks or burdens. *See id.* at 6 (citing *In re PacifiCorp*, UP 168, Order No. 00-112). PGE emphasizes that customers should not receive tax benefits for unregulated expenses because customers did not bear the burden of paying for those expenses. Alternatively, PGE argues that we should grant the request based on the nature of the event and the magnitude of financial harm. Because the changes in Oregon law governing the collection of taxes in rates were not reasonably foreseeable when the turbine was purchased, PGE contends it should be considered a "scenario" event requiring a lower level of impact to justify deferral. *See* PGE Opening Brief at 8-10. PGE argues that the $4.9 million impact of the tax adjustment is a sufficient level of impact to meet this standard. *See id.* at 10.

ICNU, CUB, and Staff make numerous arguments in opposition to PGE's application. At the outset, all parties generally contend that SB 408 and its implementing rules fundamentally changed rate-making treatment for utility income taxes, and assert that PGE's request is invalid under this new regulatory regime. Staff characterizes SB 408 as changing "the paradigm for analyzing tax treatment for certain utilities" and describes PGE's application as an improper attempt to return to the old paradigm. *See* Staff Opening Brief at 2. Similarly, CUB criticizes PGE for filing an application that asks "the Commission to ignore the law and treat the Company's loss as if we were still in the world that existed in 2001." *See* CUB Opening Brief at 1.

ICNU and Staff also specifically attack PGE's two proposed methods for deferral. As to PGE's first proposal, ICNU contends that the deferral of the tax benefit associated with the sale of the assets would, effectively, offset the rate adjustment that SB 408 requires. *See* ICNU Opening Brief at 4. As to the second proposal, ICNU and Staff contend that deferral of the tax effect of the sale would constitute an impermissible adjustment to the calculation of "taxes paid." *See id*. at 5; Staff Opening Brief at 3. While the statute provides for certain adjustments to "taxes paid," the parties note that an adjustment for unregulated losses is not one of them. ORS 757.268(13)(f).

ICNU and CUB also contend that PGE's application also fails to meet deferred accounting standards.[2] ICNU argues that the Company's reliance on the matching of benefits and burdens under ORS 757.259(2)(e) is misplaced, because, in enacting SB 408, the Legislature concluded that "the proper matching of costs and benefits in the context of utility income taxes occurs when customers' rates reflect the income taxes that are actually paid to taxing authorities." ICNU Opening Brief at 8. CUB likewise disputes PGE's assertion that the application appropriately matches burdens and benefits. CUB observes that ratepayers would not have benefited if the operation of the turbine resulted in profits. Now that the turbine has been sold at a loss, CUB argues that ratepayers should not have to pay more taxes than will go to the taxing authorities. *See* CUB Opening Brief at 10-11.

Even if the application qualified under ORS 757.259(2)(e), ICNU further contends that the request does not warrant an exercise of Commission discretion. ICNU argues that PGE could have foreseen the tax effect of SB 408, particularly because the law took effect on January 1, 2006, and PGE chose to sell the turbine after that date. *See* ICNU Opening Brief at 9-10. Furthermore, ICNU disputes PGE's assertion that failure to defer the $4.8 million tax loss will result in "substantial" harm. *See id.* at 10.

[2] Staff does not take a position on whether PGE's request meets the requirements for deferred accounting. Because it believes SB 408 bars the application, Staff contends such analysis is "is extraneous to the crux of this dispute." *See* Staff Reply Brief at 1.

Resolution. As the parties are aware, we previously addressed the possible use of deferred accounting to offset the impact of SB 408. In docket AR 499, the rulemaking proceeding to implement SB 408, PGE proposed rules to incorporate a standing deferral mechanism for the treatment of expenses that are not included in rates. *See In the Matter of the Adoption of Permanent Rules to Implement SB 408 Relating to Utility Taxes*, AR 499, Straw Proposals of PGE at 1-2 (April 24, 2006). In that proceeding, PGE argued, as it does here, that any tax impact of these expenses should not be credited to ratepayers in the calculation of "taxes paid." PGE even used, as an example, the sale of a turbine not included in rates that was sold at a loss. *See* AR 499, PGE Opening Comments at 19 (May 3, 2006).

We rejected PGE's rulemaking proposal. After saying that we would view any SB 408-related deferral applications with a "skeptical eye," we concluded:

> [A]doption of a deferral mechanism would be in opposition to the intent of the legislature, because it would effectively offset the automatic adjustment clause so that it did not 'adjust' rates, as it was designed to do. * * * [T]his deferral mechanism could net out the automatic adjustment clause. Because this would be contrary to the intent behind SB 408 to adjust rates for the difference between taxes collected and taxes paid, we decline to adopt a deferral mechanism as proposed by PGE.

AR 499, Order No. 06-400 at 12.

We reach the same conclusion here. Our authority to establish rates that include amounts for income tax expense has been specifically constrained by the Legislative Assembly. SB 408 expressly prohibits rates ultimately paid by customers to be based on the estimated taxes of the utility itself, without regard to unregulated activities or the operations of its parents and affiliates. Instead, the law requires that customers receive a share of tax savings realized when taxes are filed on a consolidated basis. Given the nature of the utility business, these tax savings are generally created when unregulated losses offset regulated revenues. While we have adopted rules to ensure that customers receive only the portion of those benefits properly attributed to regulated operations of the utility, SB 408 does not allow us to withhold all such realized benefits from ratepayers.

The facts underlying PGE's application merely serve to illustrate how SB 408 has changed the rate-making treatment of utility taxes. Previously, ratepayers would have paid estimated taxes based on PGE's stand-alone operations, regardless of whether the sale of the turbine and transformer would have reduced PGE's consolidated tax liability. Under SB 408, those rates must now be adjusted to ensure that taxes collected match taxes actually paid and properly attributed to the utility's regulated operations. This means that customers may receive a portion of tax savings resulting from affiliate losses.

For this reason, PGE's proposed use of deferred accounting to block the flow of the tax benefits to customers would require interpreting ORS 757.259(2)(e) in a manner that conflicts with the specific mandates of SB 408. When statutes conflict, the later-enacted, more specific statute controls. *See, e.g., Ware v. Hall*, 342 Or 444, 452 (2007). Here, SB 408 is the more recent and specific statute. We agree with ICNU that, by enacting SB 408, the Legislature concluded that the proper matching of costs and benefits in the context of utility income taxes occurs when customers' rates reflect income taxes that are actually paid to taxing authorities. We cannot grant an application for deferred accounting that would effectively thwart this legislative mandate.

The fact that PGE purchased the turbine and transformer before SB 408 was enacted does not alter this conclusion. As CUB notes, SB 408 has no grandfathering provision to prevent its application to unregulated activities that occurred prior to the bill's passage, but resulted in changes to taxes paid on or after January 1, 2006. Rather, SB 408's automatic adjustment clause applies to all taxes paid on and after January 1, 2006, regardless of whether the amount of those taxes is reduced by corporate activities occurring prior to that date. PGE and its affiliates undoubtedly engaged in numerous unregulated activities prior to January 1, 2006, that will affect its tax liability for many years to come. The purchase of the turbine and transformer is just one example.

For these reasons, PGE's application for deferred accounting to retain, for shareholders, the tax benefits arising from the sale of the turbine and transformer, must be denied.

Ripeness of PGE's Legal Challenges to the Validity of SB 408

Our conclusion that this Commission has been prohibited by the Legislative Assembly from deferring the tax effects of the sale of non-regulated assets is based on the assumption that SB 408 is legally valid. PGE argues that, unless this deferral application is granted, the future application of SB 408 to the $4.9 million in tax benefits at issue in this case would result in serious statutory and constitutional violations and constitute a regulatory taking. Staff and CUB argue these issues are not ripe for decision.

Position of Parties. According to CUB, denial of PGE's application for a deferred account "would not cause the utility to lose anything of substance, and, therefore, there would be no adverse affect to the utility." CUB Reply Brief at 2. CUB argues that the appropriate time to raise these arguments is in an appeal of the rate adjustment after PGE files its tax report on October 15, 2007.

Staff agrees with CUB's view that because this case does not involve a SB 408 adjustment, it is premature to consider PGE's attacks on the statute. *See* Staff Reply Brief at 5. Moreover, Staff argues that the Commission should exercise caution in declaring statutes and rules unconstitutional. *See id.* at 12.

PGE argues that, while the Commission's decision on the deferral may not have constitutional ramifications, the deferral may be the best vehicle to avoid serious statutory and constitutional problems in the future and "harmonize all applicable legal principles." PGE Opening Brief at 11. For this reason, PGE urges the Commission to consider these issues before the automatic adjustment clause is implicated in PGE's October 15 tax filing.

Resolution. "An issue is ripe for judicial determination when the interests of the plaintiff are in fact subjected to or imminently threatened with substantial injury." *Oregon Newspaper Publishers Assn v. Peterson*, 244 Or 116, 120 (1966). PGE argues that it is threatened with substantial injury because "[d]enial of this Application will deprive PGE of approximately $4.9 million of tax benefits arising from the sale of unregulated property." PGE Reply Brief at 1.

We disagree. Contrary to PGE's assertion, denial of this deferral application will not result in the loss of $4.9 million in tax benefits. Rather, it is the future application of SB 408 in a separate proceeding that *may* result in the "loss" of those tax benefits. As PGE admits, "until the Commission orders a rate adjustment under SB 408—which would likely take place in late 2007 or early 2008—we will not know for certain whether a refund will be distributed to customers." PGE Deferral Application at 1. Accordingly, PGE's arguments that it would be unconstitutional or otherwise illegal to "deprive PGE of $4.9 million in tax benefits" are premature. It is the future application of SB 408, and not denial of this deferral application, that may deprive PGE of these tax benefits. PGE may raise its constitutional arguments if and when that future contingency occurs.[3]

[3] PGE argues that "[w]ithout this deferral, there may be no way to prevent this tax benefit from being taken from PGE through SB 408." PGE Reply Brief at 3. PGE fails to explain, however, why it will not be able to raise its constitutional and statutory challenges during the Commission's determination of whether SB 408 requires a rate adjustment, which will occur after PGE files the annual tax report required by ORS 757.268(1).

ORDER

IT IS ORDERED that Portland General Electric Company's deferral application is denied.

Made, entered, and effective SEP 26 2007.

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 by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.