

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

AR 537

In the Matter of Permanently Amending
OAR 860-022-0041 to be Consistent with
ORS 757.268.

ORDER

DISPOSITION: RULE AMENDED; TEMPORARY RULE
REPEALED

INTRODUCTION

Senate Bill 408 (SB 408), passed by the 2005 Legislative Assembly, established a new method for the rate treatment of utility income taxes. SB 408 requires certain public utilities to provide information concerning the amount of taxes paid by the utility and the amount of taxes authorized to be collected in rates during specified time periods. If the Commission determines that the amount of taxes assumed in rates differed by at least \$100,000 from the amount of taxes paid to units of government, the utility must implement a rate schedule with an automatic adjustment clause accounting for the difference.

To implement SB 408, we adopted OAR 860-022-0041. Among other things, the rule addresses claims by a utility that a SB 408-related rate change results in confiscatory or unjust and unreasonable rates in violation of the United State Constitution or ORS 756.040. As originally adopted, OAR 860-022-0041(10) provided:

At any time, a utility may file a claim that a rate adjustment under the automatic adjustment clause violates ORS 756.040 or other applicable law. *In making a determination regarding a potential violation of 756.040, the Commission will perform an earnings review using the utility's results of operations report for the applicable tax year.* (Emphasis added.)

The italicized portion of this rule requires that, in evaluating a challenge by the utility that the SB 408 rate adjustment should not be implemented, the Commission must perform an earnings review using the utility's results of operations "for the applicable tax year."

TEMPORARY RULEMAKING

We recently determined that section 10 conflicts with ORS 757.268. Rather than examining the utility's earnings during the applicable tax year, we concluded that, under SB 408, the Commission must examine the utility's earnings during the period the automatic adjustment clause is in effect. We determined that a review of the utility's current earnings—as opposed to past earnings—is required to determine whether a rate adjustment under an automatic adjustment clause would violate ORS 756.040, or would otherwise have a “material adverse effect on customers.”¹

To correct this discrepancy between ORS 757.268 and OAR 860-022-0041(10), we adopted the following temporary rule:

At any time after filing a tariff implementing an automatic adjustment clause a utility may file a claim that a rate adjustment under the automatic adjustment clause violates ORS 756.040 or other applicable law. *In making a determination regarding a potential violation of 756.040, the Commission will examine the utility's projected earnings during the period the automatic adjustment clause would be in effect.* (Emphasis added.)

The temporary rule also clarified that a claim under OAR 860-022-0041(10) should be made after the tariffs establishing the automatic adjustment clause have been filed, consistent with ORS 757.268(4), (9), and (10).

PERMANENT RULEMAKING

We proposed making the temporary amendment permanent in a Notice of Proposed Rulemaking Hearing and Statement of Need filed with the Oregon Secretary of State on July 15, 2009. We did not propose any changes to the temporary rule. PacifiCorp, dba Pacific Power, Portland General Electric Company, Avista Corporation, dba Avista Utilities, and Northwest Natural Gas Company (collectively the Joint Utilities) filed comments on the proposed permanent amendment on August 25, 2009. A hearing on the proposed permanent amendment was held on August 27, 2009, which was also the deadline for submitting comments. The Administrative Law Judge issued a ruling extending the deadline for public comments to September 10, 2009, to allow the parties to comment on whether the Commission should repeal section 10 of OAR 860-022-0041.

¹ ORS 757.268(9).

Comments

Following the rulemaking hearing, we received comments from a utility group and a customer group. The Joint Utilities submitted comments supporting repeal of section 10. The Joint Utilities state that the United States Constitution prohibits the Commission's ability to impose any restrictions on the right to challenge confiscatory rates. The Joint Utilities ask the Commission to remove section 10, but to clarify that such action "is not intended to suggest that confiscatory rate challenges may not be made to SB 408-related rate changes."²

The Citizens' Utility Board of Oregon, the Industrial Customers of Northwest Utilities, and the Northwest Industrial Gas Users (collectively the Joint Customers) also submitted joint comments. The Joint Customers agree with the Commission that the original rule conflicted with ORS 757.268 and believe that the permanent amendment is an improvement. But the Joint Customers do not support adoption of the permanent amendment to section 10 because they think the section is unnecessary. The Joint Customers argue that the rules implementing SB 408 do not need to address confiscatory rate claims.

Decision

We agree with the Joint Utilities and the Joint Customers. Although we do not address the Joint Utilities' arguments that provisions contained in OAR 860-022-0041(10) are unconstitutional, we find it inappropriate and unnecessary to include any procedural restrictions on the exercise of a constitutional right in our SB 408 rules. We therefore decline to adopt the proposed permanent amendment and instead delete OAR 860-022-0041(10). We clarify that deletion of section 10 is not intended to affect a utility's right to raise a claim under ORS 756.040 or the United States Constitution.

ORDER

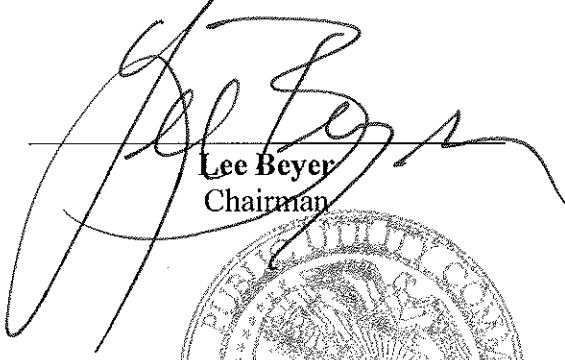
IT IS ORDERED that:

1. The modifications to Oregon Administrative Rule 860-022-0041 as set forth in Appendix A, are adopted.
2. The temporary amendment to OAR 860-022-0041(10) is repealed upon filing of this amendment to OAR 860-022-0041.

² Joint Utilities' Additional Comments at 1 (Sept 10, 2009).

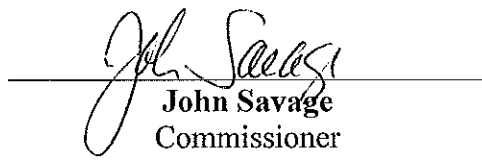
3. The amended rule becomes effective upon filing with the Secretary of State.

Made, entered, and effective OCT 01 2009.



Lee Beyer
Chairman





John Savage
Commissioner



Ray Baum
Commissioner

A person may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.

860-022-0041**Annual Tax Reports and Automatic Adjustment Clauses Relating to Utility Taxes**

(1) This rule applies to regulated investor-owned utilities that provided electric or natural gas service to an average of 50,000 or more customers in Oregon in 2003, or to any successors in interest of those utilities that continue to be regulated investor-owned utilities.

(2) As used in this rule:

(a) "Affiliated group" has the meaning given to "affiliated group" in ORS 757.268(13)(a);

(b) "Deferred taxes" for purposes of the utility means the total deferred tax expense of regulated operations that relate to the year being reported in the utility's results of operations report or tax returns, excluding deferred taxes related to the establishment of a regulatory receivable or payable account for any rate adjustment imposed under ORS 757.268, in the year the deferred tax is established but not thereafter, to eliminate the iterative tax effect of the rate adjustment;

(c) "Income" means taxable income as determined by the applicable taxing authority, except that income means regulatory taxable income when reporting or computing the stand-alone tax liability resulting from a utility's regulated operations;

(d) "Income tax losses" means the negative taxable income of an entity in the federal taxpayer or unity group, excluding the current deduction of tax depreciation on public utility property and federal investment tax credits related to public utility property;

(e) "IRC" means Internal Revenue Code;

(f) "Investment" means capital outlays for utility property necessary or useful in providing regulated service to customers;

(g) "Iterative tax effect" means the tax effect of a rate adjustment for taxes related to ORS 757.267 or 757.268 in the tax reporting period that includes the rate adjustment;

(h) "Local taxes collected" means the total amount collected by the utility from customers under the local tax line-item of customers' bills calculated on a separate city or county basis;

(i) "Pre-tax income" means the utility's net revenues before income taxes and interest expense, as determined by the Commission in a general rate proceeding;

(j) "Properly attributed" means the share of taxes paid that is apportioned to the regulated operations of the utility as calculated in section (3), subject to subsections (4)(a), (4)(b), (4)(g) and (4)(h), of this rule;

(k) "Public utility property" means property as defined by the Code of Federal Regulations, Title 26, Section 168(i)(10);

(l) "Regulated operations of the utility" has the meaning given to "regulated operations of the utility" in ORS 757.268(13)(c);

(m) "Results of operations report" means the utility's annual results of operations report filed with the Commission;

(n) "Revenue" means utility retail revenues received from ratepayers in Oregon, excluding supplemental schedules or other revenues not included in the utility's revenue requirement and adjusted for any rate adjustment imposed under this rule;

(o) "Revenue requirement" means the total revenue the Commission authorizes a utility an opportunity to recover in rates pursuant to a general rate proceeding or other general rate revision, including an annual automatic adjustment clause under ORS 757.210;

- (p) "Stand-alone tax liability" means the amount of income tax liability calculated using a pro forma tax return and revenues and expenses in the utility's results of operations report for the year, except using zero depreciation expense for public utility property, excluding any tax effects from investment tax credits, and calculating interest expense in the manner used by the Commission in establishing rates;
- (q) "System regulated operations" means those activities of the utility, in Oregon and other jurisdictions, that are subject to rate regulation by any state commission;
- (r) "Tax" has the meaning given to "tax" in ORS 757.268(13)(d);
- (s) "Taxes authorized to be collected in rates" means:
- (A) The following for federal and state income taxes calculated by multiplying the following three values:
- (i) The revenue the utility collects, as reported in the utility's results of operations report;
- (ii) The ratio of the net revenues from regulated operations of the utility to gross revenues from regulated operations of the utility, calculated using the pre-tax income and revenue the Commission authorized in establishing rates and revenue requirement; and
- (iii) The effective tax rate used by the Commission in establishing rates for the time period covered by the tax report as set forth in the most recent general rate order or other order that establishes an effective tax rate, calculated as the ratio of total income tax expense in revenue requirement to pre-tax income;
- (B) For purposes of paragraph (2)(s)(A) of this rule, when the Commission has authorized a change during the tax year for gross revenues, net revenues or effective tax rate, the amount of taxes authorized to be collected in rates will be calculated using a weighted average of months in effect;
- (t) "Taxes paid" has the meaning given to "taxes paid" in ORS 757.268(13)(f);
- (u) "Taxpayer" means the utility, the affiliated group or the unitary group that files income tax returns with units of government;
- (v) "Tax report" means the tax filing each utility must file with the Commission annually, on or before October 15 following the year for which the filing is being made, pursuant to ORS 757.268;
- (w) "Unitary group" means the utility or the group of corporations of which the utility is a member that files a consolidated state income tax return; and
- (x) "Units of government" means federal, state, and local taxing authorities.
- (3) The amount of income taxes paid that is properly attributed to regulated operations of the utility is calculated as follows:
- (a) The amount of federal income taxes paid to units of government that is properly attributed to the regulated operations of the utility is the product of the values in paragraphs (3)(a)(A) and (B), subject to subsection (3)(b) of this rule:
- (A) The total amount of federal income taxes paid by the federal taxpayer, to which is added:
- (i) The current tax benefit, at the statutory federal income tax rate, of tax depreciation on public utility property;
- (ii) The tax benefits associated with federal investment tax credits related to public utility property; and
- (iii) Imputed tax benefits on charitable contributions and IRC section 45 renewable electricity production tax credits of the affiliated group, except those tax benefits or credits associated with regulated operations of the utility; and

(B) The average of the ratios calculated for the utility's gross plant, wages and salaries and sales, using amounts allocated to regulated operations of the utility as set forth in the utility's results of operations report in the numerator and amounts for the federal taxpayer in the denominator;

(b) The amount of federal income taxes paid that is properly attributed to the regulated operations of the utility under subsection (3)(a) of this rule shall not be less than the amount of the federal stand-alone tax liability calculated for the regulated operations of the utility, reduced by the product of:

(A) The imputed negative tax associated with all federal income tax losses of entities in the utility's federal taxpayer group; and

(B) The average of the ratios for the utility's gross plant, wages and salaries and sales, using amounts allocated to the regulated operations of the utility as set forth in the utility's results of operations report in the numerator and amounts for the system regulated operations in the denominator;

(c) The total amount of state income taxes paid to units of government that is properly attributed to the regulated operations of the utility is the product of the values in paragraphs (3)(c)(A) and (B), subject to paragraphs (3)(c)(C) and (D) and subsection (3)(d) of this rule:

(A) The total amount of Oregon income taxes paid by the Oregon unitary group taxpayer, to which is added:

(i) The current tax benefit, at the state statutory rate, of tax depreciation on public utility property; and

(ii) Imputed Oregon tax benefits on charitable contributions of the unitary group, except those tax benefits associated with regulated operations of the utility; and

(B) The average of the ratios calculated for the utility's gross plant, wages and salaries and sales using amounts allocated to regulated operations of the utility as set forth in the utility's results of operations report in the numerator and amounts for the unitary group taxpayer in Oregon, adjusted to reflect amounts allocated to regulated operations of the utility, in the denominator;

(C) If a utility's taxes collected in rates reflect non-Oregon state income taxes, the utility must make a one-time permanent election in its October 15, 2006, tax report filing, or in the case of a change of the majority ownership of the utility's voting shares pursuant to ORS 757.511, in the first tax report filing that includes a tax reporting period reflecting the new ownership, to either:

(i) Multiply the total amount of Oregon income taxes paid in paragraph (3)(c)(A) of this rule before adjustments by the ratio calculated as the state income tax rate used by the Commission in establishing rates divided by the Oregon statutory tax rate set forth in ORS 317.061; or

(ii) Calculate the total state taxes paid using the formula set forth in paragraphs (3)(c)(A) and (B) of this rule on a state by state basis, apportioned to Oregon by multiplying the total state taxes paid by the average of the ratios calculated for gross plant, wages and salaries and sales using amounts allocated to the regulated operations of the utility in the numerator and amounts for the system regulated operations in the denominator;

(D) When Oregon income tax attributable to system regulated operations is 100 percent allocated to Oregon in setting rates, 100 percent of the Oregon income tax of system regulated operations must be attributed to the regulated operations of the utility;

- (d) The amount of state income taxes paid that is properly attributed to the regulated utility operations of the utility under subsection (3)(c) of this rule must not be less than:
- (A) For a utility for which Oregon state income taxes are the only state income taxes included in rates, the amount of the Oregon state stand-alone tax liability calculated for the regulated operations of the utility, minus the imputed negative tax associated with all Oregon state income tax losses of entities in the utility's unitary group; or
 - (B) For a utility for which non-Oregon state income taxes are included in rates, the product of:
 - (i) The sum of the state stand-alone tax liability calculated for the applicable system regulated operations in each state in which the utility is a member of a unitary group, minus the sum of the imputed negative tax associated with all state income tax losses of entities in the utility's unitary group in each state; and
 - (ii) The average of the ratios calculated for gross plant, wages and salaries and sales using amounts allocated to the regulated operations of the utility in the numerator and amounts for the system regulated operations in the denominator;
- (e) The amount of local income taxes paid to units of government that is properly attributed to the regulated operations of a utility is the product of the values in paragraphs (3)(e)(A) and (B) of this rule for each local taxing authority in Oregon:
- (A) The total amount of income taxes paid by the taxpayer to the local taxing authority, as adjusted to include the imputed effect on local income taxes of:
 - (i) The current tax benefit of tax depreciation on public utility property; and
 - (ii) Imputed tax benefits on charitable contributions of the taxpayer except those associated with regulated operations of the utility; and
 - (B) The ratio calculated using the method for apportioning taxable income used by the local taxing authority, with the amount for the regulated operations of the utility in the local taxing authority in the numerator and the amount for the taxpayer in the local taxing authority in the denominator.
- (4) On or before October 15 of each year, each utility must file a tax report with the Commission. The tax report must contain the following applicable information for each of the three preceding fiscal years:
- (a) The amount of federal and state income taxes paid to units of government by the taxpayer, as adjusted pursuant to subparagraphs (3)(a)(A)(i), (ii) and (iii) of this rule;
 - (b) The amount of the utility's federal and state income taxes paid that is incurred as a result of income generated by the regulated operations of the utility, where:
 - (A) The amount of federal income taxes paid is equal to the federal stand-alone tax liability calculated for the regulated operations of the utility;
 - (B) For a utility for which Oregon state income taxes are the only state income taxes included in rates, the utility's state income taxes paid is the Oregon state stand-alone tax liability calculated for the regulated operations of the utility; and
 - (C) For a utility for which non-Oregon state income taxes are included in rates, the amount of state income taxes paid is the product of:
 - (i) The sum of the state stand-alone tax liability calculated for the applicable system regulated operations in each state in which the utility is a member of a unitary group; and
 - (ii) The ratio calculated as the income of the regulated operations of the utility divided by the income of the system regulated operations;

- (c) The amount of federal and state income taxes paid to units of government by the taxpayer that is properly attributed to the regulated operations of the utility, as calculated in section (3) of this rule;
- (d) The lowest of the amounts in subsections (4)(a), (4)(b) and (4)(c) of this rule, after making adjustments in paragraphs (4)(d)(A), (4)(d)(B), (4)(d)(C), (4)(d)(D), and (4)(d)(E), but no less than the deferred taxes related to depreciation of public utility property for regulated operations of the utility, except the deferred tax amount must be reduced by any tax refunds recognized in the reporting period and allocated to the regulated operations of the utility:
- (A) The items defined in subsection (2)(t) of this rule;
- (B) A reduction equal to the current tax benefit related to tax depreciation of public utility property for regulated operations of the utility;
- (C) A reduction equal to the tax benefit related to federal investment tax credits recognized by the Commission in establishing rates;
- (D) An increase equal to the tax benefit of Oregon business energy tax credits, including those credits transferred pursuant to ORS 469.206 and 469.208, of the unitary group, excluding those credits covered by 757.268(13)(f)(B); and
- (E) Elimination of the iterative tax effect to the extent such iterative tax effect has not been eliminated by paragraph (4)(d)(A) of this rule;
- (e) The amount of federal and state income taxes authorized to be collected in rates;
- (f) The amount of the difference between the amounts in subsections (4)(d) and (4)(e) of this rule;
- (g) The amount of local income taxes paid to units of government by the taxpayer, calculated for each local taxing authority, and to which is added the imputed effect on local income taxes of the amount in subparagraph (3)(e)(A)(i) of this rule;
- (h) The amount of local income taxes paid to units of government by the taxpayer that is incurred as a result of income generated by the regulated operations of the utility, calculated as the stand-alone tax liability in each local taxing authority;
- (i) The amount of local income taxes paid to units of government by the taxpayer that is properly attributed to the regulated operations of the utility, as calculated in section (3) of this rule for each local taxing authority;
- (j) The lowest of the amounts in subsections (4)(g), (4)(h) and (4)(i) of this rule, calculated for each local taxing authority, after making adjustments for:
- (A) The items defined in subsection (2)(t) of this rule; and
- (B) A reduction equal to the local tax effect of the current tax benefit related to tax depreciation of public utility property for regulated operations of the utility; and
- (C) Elimination of the iterative tax effect to the extent such iterative tax effect has not been eliminated by paragraph (4)(j)(A) of this rule;
- (k) The amount of local income taxes collected from Oregon customers, calculated for each local taxing authority;
- (l) The amount of the difference between the amounts in subsection (4)(j) and (4)(k) of this rule, calculated for each local taxing authority;
- (m) The proposed surcharge or surcredit rate adjustments for each customer rate schedule to charge or refund customers the amount of the differences in subsections (4)(f) and (4)(l) of this rule;

(n) If the utility claims the minimum taxes paid amount set by subsections (3)(b) and (3)(d) of this rule, the total federal and state income tax losses in the utility's affiliated and unitary groups associated with the imputed negative tax claimed; and

(o) Any adjustments, in addition to the adjustments required in section (3) and subsections (4)(a) through (4)(n) of this rule, that the utility proposes to avoid probable violations of federal tax normalization requirements.

(5) In calculating the amount of taxes paid under sections (3) and (4) of this rule:

(a) "Taxes paid" must be allocated to each tax year employed by the utility for reporting its tax liability in the following manner:

(A) For any tax return prepared for the preceding tax year and filed on or before the date the tax report is due for such tax year, the utility must allocate each reported tax liability to the tax year for which such return is filed;

(B) For each tax liability or tax adjustment shown on an amended tax return or made as a result of a tax audit, that is filed, paid or received after the date the tax report is due for the applicable tax year, the utility must allocate the tax liability or tax adjustment to the tax year that is recognized by the utility for accounting purposes;

(C) Taxes paid must include any interest paid to or interest received from units of government with respect to tax liabilities;

(b) When a utility's fiscal year or parent changes, and a partial year consolidated federal income tax return is filed during the year, taxes paid must be calculated in the manner defined by ORS 314.355 and OAR 150-314.355. For purposes of this rule, the amount of taxes paid must reflect a weighted average of the months in effect related to each tax return filing.

(6) The utility must explain the method used for calculating the amounts in this rule and provide copies of all workpapers and documents supporting the calculations.

(7) The Commission will establish an ongoing docket for each of the October 15 tax report filings. Upon signing a protective order prepared by the Commission, any intervenor may have access to all such tax report filings, subject to the terms of the protective order;

(a) Within 20 days following the tax report filings, an Administrative Law Judge will conduct a conference and adopt a schedule;

(b) Within 180 days of the tax report filings, the Commission will issue an order that contains the following findings:

(A) Whether the taxes authorized to be collected in rates for any of the three preceding fiscal years differs by \$100,000 or more from the amount of taxes paid to units of government that is properly attributed to the regulated operations of the utility;

(B) For the preceding fiscal year, the difference between the amount of federal and state income taxes paid to units of government by the taxpayer that is properly attributed to the regulated operations of the utility and the amount of taxes authorized to be collected in rates;

(C) For the preceding fiscal year, the difference between the amount of local income taxes paid to units of government by the taxpayer that is properly attributed to the regulated operations of the utility and the amount of local taxes collected in rates; and

(c) Any other finding or determination necessary to implement the automatic adjustment clause.

(8) Upon entry of an order finding a difference of \$100,000 or more in section (7) of this rule, the utility must file an amended tariff, to be effective each June 1 unless otherwise authorized by the Commission, to implement a rate adjustment applying to taxes paid to units of government and collected from ratepayers for each fiscal year beginning on or after January 1, 2006;

(a) The utility must establish a balancing account and automatic adjustment clause tariff to recover or refund the difference determined by the Commission in paragraph (7)(b)(B) of this rule through a surcharge or surcredit rate adjustment;

(b) A utility that is assessed a local income tax must establish a separate balancing account and automatic adjustment clause tariff for each local taxing authority assessing such tax. The utility must apply a surcharge or surcredit on the bills of customers within the local taxing authority assessing the tax. The amount of the surcharge or surcredit must be calculated to recover or refund the difference determined by the Commission in paragraph (7)(b)(C) of this rule;

(c) Any rate adjustment must be calculated to amortize the difference determined by the Commission in paragraphs (7)(b)(B) and (7)(b)(C) of this rule over a period authorized by the Commission;

(d) Any rate adjustment must be allocated by customer rate schedule according to equal percentage of margin for natural gas utilities and equal cents per kilowatt-hour for electric utilities, unless otherwise authorized by the Commission;

(e) Each balancing account must accrue interest at the Commission-authorized rate for deferred accounts. For purposes of calculating interest, the amount of the difference calculated in this section of the rule will be deemed to be added to the balancing account on July 1 of the tax year;

(f) The automatic adjustment clause must not operate in a manner that allocates to customers any portion of the benefits of deferred taxes resulting from accelerated depreciation or other tax treatment of utility investment or regulated affiliate investment required to ensure compliance with the normalization method of accounting or any other requirements of federal tax law;

(g) On or before December 31, 2006, each utility must seek a Private Letter Ruling from the Internal Revenue Service on whether the utility's compliance with ORS 757.268 or this rule would cause the utility to fail to comply with any provision of federal tax law, including normalization requirements. Each utility must file a draft of its Private Letter Ruling Request with the Commission on or before November 15, 2006. While a utility's request for a Private Letter Ruling is pending, or a related Revenue Ruling is pending, no rate adjustment will be implemented, but interest will accrue according to subsection (8)(e) of this rule on the amount of any rate adjustment determined by the Commission pursuant to paragraphs (7)(b)(B) and (7)(b)(C) of this rule.

(9) No later than 30 days following the Commission's findings in section (7) of this rule, any person may petition to terminate the automatic adjustment clause on the basis that it would result in a material adverse effect on customers. In the event of a filing under this section, the applicable rate adjustment will not be implemented until the Commission makes its determination. If the Commission denies the request to terminate the rate adjustment, interest will accrue according to subsection (8)(e) of this rule on the final amount of the rate adjustment.

~~(10) At any time after filing a tariff implementing an automatic adjustment clause a utility may file a claim that a rate adjustment under the automatic adjustment clause violates ORS 756.040 or other applicable law. In making a determination regarding a potential violation of 756.040, the Commission will examine the utility's projected earnings during the period the automatic adjustment clause would be in effect.~~

Stat. Auth.: ORS 183, 756, 757 & 759

Stats. Implemented: ORS 756.040, 756.060, 757.267 & 757.268