

WHITE PAPER OR WHITE WASH?

Comments of Utility Reform Project the OPUC "White Paper" entitled "Treatment of Income Taxes in Utility Ratemaking"

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The "White Paper" (February 2005) apparently seeks to whitewash the indefensible--the fact that the Oregon Public Utility Commission (OPUC) has allowed one utility, Portland General Electric Co. (PGE), since 1997 to charge ratepayers in Oregon over \$720 million for "income taxes" that were never paid by anyone to any level of government. And that is just one of the regulated utilities in Oregon. The others may be engaged in this practice as well. The whitewash is accompanied by a legal smokescreen, which proves transparent.

What is weakest, and often absurd, is not the accounting explanations but the proffered legal theories, which are flatly unsupportable. According to the OPUC's stated legal analysis, at least 7 states are already violating utility constitutional rights by taking into account the known fact that the parent corporations of regulated utilities generate tax deductions that reduce the the amount of income tax actually paid on the income of the utility. Curiously, no court has ever so stated.

Of particular note is the repeated claim that various alternatives cannot be implemented, because the OPUC cannot obtain utility tax payment information from the Oregon Department of Revenue (ODOR). This is completely irrelevant. The OPUC can obtain that information (as well as federal and local tax payment information) directly from the utility, as the Utility Reform Project (URP) is now obtaining in the UCB 13 docket at the OPUC.¹ We have also there documented that the OPUC and its staff has **never even asked** PGE for information on the amount of federal, state, and local income taxes PGE has paid since 1997. **Never even asked.**

The Commission can require any regulated utility to provide such information directly to the OPUC. It has nothing to do with ODOR. As we pointed out to the Commission some 2 years ago in our Petition to Open Investigation (which the Commission summarily denied):

The OPUC's authority to undertake the requested actions stems from, *inter alia*, the following statutes:

756.040(2) The commission is vested with power and jurisdiction to supervise and regulate every public utility and telecommunications utility in

1. This docket exists at the OPUC only because of an order issued by the Marion County Circuit Court, reversing the OPUC's attempt to dismiss all filed complaints regarding its treatment of phony income tax charges.

this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.

756.075(2) The commission or authorized representatives shall, upon demand, have the right to inspect the books, accounts, papers, records and memoranda of any public utility or telecommunications utility and to examine under oath any officer, agent or employee of such public utility or telecommunications utility in relation to its business and affairs.

756.090(1) The Public Utility Commission may require by rule, or by order or subpoena to be served on any public utility or telecommunications utility the maintaining within this state or the production within this state at such time and place as the commission may designate, of any books, accounts, papers or records kept by such public utility or telecommunications utility in any office or place within or without this state, or verified copies in lieu thereof, if the commission so orders, in order that an examination thereof may be made by the commission or under direction of the commission.

756.115 Failure to furnish requested information. No officer, agent or employee of any public utility, or telecommunications utility shall:

- (1) Fail or refuse to fill out and return any forms required by the Public Utility Commission;
- (2) Fail or refuse to answer any question therein propounded;
- (3) Knowingly or willfully give a false answer to any such question or evade the answer to any such question where the fact inquired of is within the person's knowledge;
- (4) Upon proper demand, fail or refuse to exhibit to the commission or any person authorized to examine the same, any book, paper, account, record or memorandum of such public utility or telecommunications utility which is in possession or under the control of the person;
- (5) Fail to properly use and keep a system of accounting or any part thereof, as prescribed by the commission; or
- (6) Refuse to do any act or thing in connection with such system of accounting when so directed by the commission or authorized representative.

756.555 Powers of commission at hearings. The Public Utility Commission may administer oaths, certify to official acts, issue notices in the name of the commission, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents and testimony, and take and receive testimony, conduct hearings and investigations, whether upon complaint or upon the commission's own motion.

757.125 Duty of utility to keep records and accounts; duty of commission to furnish blanks. (1) The Public Utility Commission shall prescribe the accounts and records required to be kept, and every public utility is required to keep and render its accounts and records accurately and faithfully in the manner prescribed by the commission and to comply with all directions of the commission relating to such accounts and records.

The OPUC's White Paper contends the OPUC is helpless to set utility rates in a way that fairly treats the actual cost of income taxes. Contrary to its assertions, new legislation is not required for any of the alternatives 1-4. All that is required is using the OPUC's existing regulatory authority.

The White Paper offers a number of absurd claims, some of which are refuted in the comments provided by CUB yesterday. We will not repeat any of CUB's comments but merely note that forcing ratepayers to provide an interest-free loan to the utility, in the form of prepaying income taxes that the utility in fact does not pay, is not a "benefit" to ratepayers, as the White Paper claims. Instead, it is a forced ratepayer investment in the utility in the same manner as the practice of construction work in progress (CWIP), outlawed in Oregon by Ballot Measure 9 of 1978 (ORS 757.355).

Also, the White Paper (p. 12) makes the OPUC's often-repeated claim that anything which reduces rates actually increases rates by negatively affecting the utility's credit rating. This is one element of the Commission's regulatory "philosophy," characterized in November 2003 by the Presiding Judge of the Marion County Circuit Court as "more in keeping with the satiric scenarios of Joseph Heller's *Catch 22* and Lewis Carroll's *Through the Looking Glass* than with responsible utility rate regulation."² According to the Commission's theory, then, merely increasing the utility's rates, for no reason at all, would make the utility more attractive to financial market and miraculously result in lower rates through some unidentified (and inherently twisted) feedback loop--because, after all, the resulting lower rates would then cause the need for higher rates, under the Commission's theory.

Conveniently, none of the 5 alternatives offered by the White Paper include the crucial component of any solution--requiring the utilities to give back to ratepayers the amounts they have charged for the phony taxes they have never paid.

2. And this judge was not even referring to the Commission's approach to income taxes; it was another Marion County Circuit Court judge who reversed the Commission in its attempt to squash any attempt to even raise this matter at the agency level.