

**PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: December 3, 2001**

REGULAR CONSENT EFFECTIVE DATE _____

DATE: November 13, 2001

TO: Phil Nyegaard, Marc Hellman, and Bryan Conway

FROM: Stephanie Andrus and Stefan Brown

SUBJECT: PORTLAND GENERAL ELECTRIC: (Docket No. DR 28) Requests a Declaratory Ruling regarding its obligation under OAR 860-021-0135 to recover an overpayment.

STAFF RECOMMENDATION:

We recommend that the Commission decline Portland General Electric's (PGE) request for a declaratory ruling. Generally, declaratory rulings are preventive remedies, designed to adjudicate rights and duties before wrongs have been committed. PGE requests a declaratory ruling regarding an action it has already taken, and that its customer alleges is a conversion and breach of contract. A declaratory ruling in this case would not be a preventive remedy, but would adjudicate whether a wrong has been committed.

DISCUSSION:

On July 5, 2001, PGE filed with the Oregon Public Utility Commission ("the Commission") a Petition for Declaratory Ruling. PGE filed the petition pursuant to ORS 756.450. PGE seeks a declaratory ruling from the Commission that PGE is required by OAR 860-021-0135(1) to collect an overpayment made to one of its customers, Blue Heron Paper Company ("Blue Heron").

PGE's request arises from a dispute between PGE and Blue Heron about whether PGE wrongfully withheld money from Blue Heron that PGE believed it was owed because of a previous overpayment. Blue Heron believes that it had no obligation to return the overpayment. PGE believes otherwise, and exacted the overpayment from exchange credits owed to Blue Heron. The following is a brief outline of the dispute.

Under PGE's Rate Schedule 86, Electricity Exchange Rider (now called the Demand Buy Back Rider), a customer may voluntarily reduce its electricity usage in exchange for a credit when PGE calls an Exchange Event. Schedule 86 describes the method for

determining the amount of the credit. Blue Heron is a customer eligible for credits under Schedule 86.

On September 11, 2000, PGE and Blue Heron entered into a settlement agreement ("Settlement Agreement") that set forth a resolution for a dispute between Blue Heron and PGE regarding payments from Blue Heron to PGE during a period ending on July 9, 2000. The Settlement Agreement provided that from September 2000 through September 2001, Blue Heron would give PGE \$2,317,000 from various sources, including direct payments and Blue Heron's assignment of rights to Exchange Credits under Schedule 86.

On February 12, 2001, representatives from Blue Heron and PGE signed a letter ("Letter Agreement") setting forth their agreement that the Settlement Agreement executed on September 9, 2000, had been completely satisfied through Blue Heron's continued participation in PGE's Electricity Exchange Program. The Letter Agreement also sets forth the representatives' agreement that the Settlement Agreement would be terminated upon the signing of the Letter Agreement.

On March 16, 2001, PGE notified Blue Heron that it had discovered errors made in the calculation of Blue Heron's Exchange Credits, and that the errors had led to an overpayment of \$281,057.01 by PGE to Blue Heron for exchange events in November and December 2000. PGE further notified Blue Heron that PGE was obligated to recover the overpayment.

According to information Staff has received from Blue Heron, PGE subsequently informed Blue Heron on April 10, 2001 that the errors arose from miscalculations by a sub-contractor that PGE had retained to help administer its Demand Exchange Program.

Blue Heron replied by letter to PGE's notification of the overpayment, asserting that its obligation to make further payments under the Settlement Agreement had been discharged when PGE and Blue Heron executed a release of obligations under the Settlement Agreement on February 12, 2001. Blue Heron noted that the basis of the February 12, 2001 Letter Agreement was the parties' "mutual understanding and agreement" that all amounts owed to PGE by Blue Heron have been paid through Blue Heron's participation in the Electricity Exchange Program. Blue Heron further noted that the overpayment to Blue Heron was the result of a mistake by PGE's contractor that only PGE could have discovered prior to the time the parties executed the February 12, 2001 Letter Agreement.

PGE subsequently notified Blue Heron by letter dated May 4, 2001, that it intended to take action to collect the overpayment and also, that it was entitled to do so under OAR 860-21-0135. The letter informed Blue Heron that PGE intended to deduct one-half of the \$140,528.51 overpayment from PGE's March Exchange credits, and the second half from Blue Heron's April Exchange credits. PGE deducted the credits as promised.

On June 11, 2001, Blue Heron filed a Complaint in Clackamas County Circuit Court, alleging that PGE's refusal to pay Blue Heron the full exchange credits owed to Blue Heron in March and April 2001 was a conversion of Blue Heron's property and/or a breach of contract.

Approximately one month later, PGE filed this request for a declaratory ruling, asking that the Commission declare that PGE is "required to collect", and Blue Heron is "required to return", the erroneous credit of \$281,057.01 made by PGE for the Exchange Events in which Blue Heron participated in November and December of 2000, and that the method it proposed to Blue Heron and subsequently implemented was reasonable and in accordance with the tariffs, rules and statutes." In support of its request, PGE relies on OAR 860-021-0135(1), which provides,

(1) When an underbilling or overbilling occurs, then energy or large telecommunications utility shall provide written notice to the customer detailing the circumstances, period of time, and amount of adjustment. If it can be shown that the error was due to some cause and the date can be fixed, the overcharge or undercharge shall be computed back to such date. If no date can be fixed, the energy or large telecommunications utility shall refund the overcharge or rebill the undercharge for no more than six months' usage. In no event shall an overbilling or underbilling be for more than three year's usage.

STAFF RECOMMENDATIONS:

ORS 756.450 permits, but does not require, the Commission to issue a ruling on the application of agency law to particular facts. See e.g., Order No. 00-622, *In the Matter of the Petition of Portland General Electric Company for a Declaratory Ruling Relating to the Allocation of a Portion of the Public Purpose Charge Collected Pursuant to SB 1149*. No statutes or administrative rules describe how this Commission should exercise its broad discretion in deciding whether to consider a request for a declaratory ruling. However, relying on Oregon Appellate case law holding that declaratory judgments are preventive justice, rather than to address harms that have already occurred, and generally holding that declaratory judgments should not issue when another, more efficient, remedy is available, Staff recommends the Commission decline to issue the requested declaratory ruling.

In *LeMarche v. State of Oregon*, 81 Or App 216, 220 (1986), the Oregon Court of Appeals discussed when a declaratory judgment is an appropriate remedy, noting, “[d]eclaratory judgment is preventive justice, designed to relieve parties of uncertainty by adjudicating their rights and duties before wrongs have actually been committed or damages suffered.” In this case, PGE requests a ruling that an action it has already taken, an action that Blue Heron claims is a conversion and/or a breach of contract, was lawful. A declaratory ruling in these circumstances would not be preventive justice, but instead, would adjudicate whether a wrong has been committed. Under the Court’s ruling in *LeMarche v. State of Oregon*, a declaratory judgment issued by a circuit court would not be an appropriate remedy. See also *State Farm Fire & Cas. v. Reuter*, 294 Or 446, 450 (1983) (Oregon Supreme Court noting that it agreed with Tenth Circuit Court of Appeals statement that “[t]he purpose of the declaratory judgment action is to settle actual controversies before they have ripened into violations of law or legal duty or breach of contractual obligations.”).

Further, under Oregon's Declaratory Judgment Act, whether a more appropriate remedy exists is a relevant consideration in determining whether declaratory relief is proper. *Campbell v. Henderson*, 241 Or 75, 80--81 (1965). See also *Borchard, Declaratory Judgments* 302 (2d ed 1941):

The court will refuse a declaration where another court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, where a special statutory remedy has been provided, Or where another remedy will be more effective or appropriate under the circumstances. In these cases it is neither useful nor proper to issue the declaration. * * *

(Emphasis added.)

Accord, *Nelson v. Knight*, 254 Or. 370 (1969); and *Recall Bennett Com. v. Bennett et al.*, 196 Or. 299 (1952).

Here, the issue raised by PGE in this petition, whether PGE appropriately withheld payments to Blue Heron under OAR 860-021-0135(1), is pending before the Clackamas County Circuit Court, and was pending when PGE filed the petition. It is more efficient for the Commission to allow the issue presented here to be resolved in the circuit court case, because it is only in that case that all the issues raised by the withheld payment may be resolved.

More specifically, PGE’s request for a ruling that it was required to collect an overpayment from Blue Heron under OAR 860-021-0135(1) simply begs a different question -- whether PGE is legally entitled to that overpayment, or whether Blue Heron

was released from its obligation to pay it back under the February 12, 2001 Letter Agreement. That question should be resolved in Clackamas County Circuit Court in the civil suit filed by Blue Heron, and turns on the interpretation of at least two different agreements executed by Blue Heron and PGE. "The determination of parties' rights under a contract is a common-law issue that falls within a circuit court's general jurisdiction." *Oregon Trail Electric Consumers Cooperative, Inc. v. Co-Gen Co.*, 168 Or App 466, 473 (2000).

In any event, even if the Commission decided to consider whether PGE appropriately relied on OAR 860-021-0135(1) to withhold payments from Blue Heron, the parties must still return to circuit court to determine whether PGE is entitled to keep the money at issue, or whether it is owed to Blue Heron under agreements executed by the parties.

In *Nelson v. Knight, supra*, the Oregon Supreme Court noted that one of the reasons underlying the general rule that courts would not entertain declaratory judgment actions when the petitioner has a more efficient remedy is to avoid resolution of a conflict in a "piecemeal" manner. 254 Or at 374 ("The vice of the unrestricted use of declaratory judgment proceedings resulting in the piecemeal trial of the various issues is illustrated by this litigation."). If the Commission chooses to consider the petition for declaratory ruling, it would necessitate that the conflict between Blue Heron and PGE be resolved in a piecemeal manner.

Finally, PGE asserts that the Commission "should feel comfortable" issuing a ruling in this case, notwithstanding the dispute between PGE and Blue Heron over the meaning of the Settlement Agreement and February 12, 2001 Letter Agreement, for at least two reasons. (Petition 4). However, as explained below, it is not at all clear how the contracts executed by the parties should be interpreted. Because this declaratory ruling request does in fact raise, or at least implicate, significant questions regarding the interpretation of the contracts, Staff recommends that the Commission decline the request to issue a declaratory judgment and allow these issues to be resolved in the circuit court case.

First, PGE argues that the February 12, 2001 Letter Agreement cannot be used against PGE to bar any recovery of the overpayment because the agreement was based on a "mutual mistake of fact", meaning neither party realized at that time that PGE had miscalculated the Exchange Credits. PGE's reliance on this doctrine is questionable.¹

¹ Staff discusses PGE's assertions regarding the contract claims arising from PGE's decision to withhold Blue Heron's demand exchange credits only to illustrate the point that there are in fact contract claims stemming from the underlying actions by the parties that must be resolved. Staff takes no position on the merit of any claim arising from the dispute between Blue Heron and PGE or on how it should be resolved, and does not intend for its discussion of these issues to be taken as such.

In *Leshner v. Strid*, 165 Or App 34, 43 (2000), the case cited by PGE in support of its argument, the Oregon Court of Appeals noted that a mutual mistake of fact renders a contract voidable by the adversely affected party where 1) the parties are mistaken as to the facts existing at the time of the contract, 2) the mistake is so fundamental that it frustrates the purpose of the contract and 3) **where the adversely affected party does not bear the risk of the mistake**. Blue Heron asserts that the mistake regarding Exchange Credits was a unilateral mistake made by PGE's contractor, and that Blue Heron had no means of discovering it prior to the time the parties executed the release agreement. If these assertions are true, it appears the third criteria of the test discussed in *Leshner v. Strid*, is not satisfied, in that the adversely affected party, PGE, **did** bear the risk of the mistake.

PGE also argues that even if the February 12 Letter Agreement was not invalid under the mutual mistake doctrine, the Letter Agreement only "purported to terminate the obligations between the parties concerning amounts ow[ed] by Blue Heron for electricity used up to July 9, 2000. It did not speak to or resolve any errors made in the calculation of credits to Blue Heron under Schedule 86." PGE's argument simply begs the question at the heart of this dispute, which is whether the February 12, 2001 Letter Agreement relieves Blue Heron of the obligation to make further payments to PGE. As discussed above, Blue Heron believes that the February 12, 2001 Letter Agreement released it from any obligation to compensate PGE for overpayments PGE made to Blue Heron in November and December. The resolution of this question, as well as whether the mutual mistake doctrine is applicable, properly lies with the circuit court, rather than this agency.

PROPOSED COMMISSION MOTION:

PGE's request for a declaratory ruling in DR 28 be denied.