BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 188

In the Matter of	)
PORTLAND GENERAL ELECTRIC,	)
Request for a Rate Increase in Oregon Annual Revenues of $13,000,000 for Biglow Canyon.	)

OPENING BRIEF

OF THE

CITIZENS' UTILITY BOARD OF OREGON

September 11, 2007

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I. Introduction

On July 17th, PGE, Staff, the Industrial Customers of Northwest Utilities (ICNU), and the Citizens' Utility Board (CUB) filed a Stipulation in this matter which settled a number of issues, including:

- The costs associated with Biglow Canyon, as agreed to by the parties in this case, are prudent, and the Company can charge those costs to customers;
- Biglow Canyon's costs will be charged to customers through a special schedule, not through general rates;
- Until Biglow Canyon's fixed costs begin to be charged to customers, the Company will retain any of the benefits of Biglow Canyon (through reduced purchased power costs); and
- The Oregon state tax rate associated with Biglow Canyon will be updated to 5.12%.

What remains is a single issue in the design of Biglow Canyon's special schedule. PGE designed the Biglow special schedule to annually collect a static amount on a per

kWh basis for the costs of Biglow Canyon. This is despite the fact that the capital costs of Biglow Canyon will decline each year with the plant's amortization, the overall balance of other costs associated with Biglow is likely to decline as well, and PGE's load is growing, so a fixed per kWh charge will collect an increasing amount each year. CUB and ICNU oppose this feature of the special schedule as filed by PGE, because it will systematically and progressively overcharge customers. Staff wants more time to investigate the issue in a separate docket.

II. A Special Schedule Should Not Be Designed To Over-Collect

The parties have stipulated in this case that the costs associated with Biglow Canyon will be collected through a special schedule, Schedule 120. Therefore, it seems clear to us that Schedule 120 should collect only those costs associated with Biglow Canyon.

A. PGE's Proposed Special Schedule Would Over-Collect Biglow Canyon Costs

The currently proposed amount in Special Schedule 120 has been set, on a per kWh basis, to recover the 2008 revenue requirement of Biglow Canyon. Unless the special schedule is updated, it will clearly overcharge customers for the ratebase value of Biglow Canyon in 2009, and will almost certainly overcharge customers for the costs of Biglow Canyon in general. ICNU/100/Falkenberg/3-8. ICNU/105/Falkenberg/1.

First, we know that the capital costs associated with Biglow Canyon will decrease each year as customers pay down the capital costs of the plant. Second, we know that the accumulated deferred income taxes will increase each year, further benefiting the Company. ICNU/100/Falkenberg/7. Third, though some costs associated with Biglow Canyon, (such as property taxes and O&M), can be expected to increase over time, other

costs, (such as the National Energy Policy Act tax credits applicable to the project and wind turbine tax treatment that allows a 5-year tax life), will decrease the cost of Biglow Canyon over time. ICNU/100/Falkenberg/6. On balance, this will further reduce the cost of Biglow Canyon each year.

Failing to annually update Biglow Canyon's capital costs would guarantee that PGE would over-collect for the capital costs of Biglow Canyon as it is amortized over time, and on the associated deferred taxes through Biglow's special schedule. Also, because Schedule 120 will be collected on a kWh basis, load growth would result in PGE collecting more revenue through the schedule as load grows. Thus, in 2009, PGE's costs for Biglow will be lower than in 2008, but Biglow's Schedule 120 would collect more revenue than in 2008.

B. PGE's Proposal Would Set A Dangerous Precedent

There are two problems with establishing a precedent in this case that a special schedule can over-collect on the specific costs that the schedule was designed for. First, the legislature passed SB 838 this year, which requires utilities to make substantial investment in new renewable resources, and also requires the Commission to allow recovery of those investments through an automatic adjustment clause. In UM 1330, the docket to establish the form of the SB 838 automatic adjustment clause, the issues and concerns that we are debating here will, undoubtedly, be central to the discussions. A faulty decision in this case could lead to a longer-term policy that is inequitable and possibly unlawful.

Second, most renewable resources, such as wind and solar, have little or no fuel cost associated with their electricity generation. Fossil fuel costs have trended upward over time, and, between rate cases, these increases in costs have been part of the

regulatory cost increases that tend to balance out the cost decreases due to the amortization of capital assets in ratebase. With the passage of SB 838, as utilities make billions of dollars of new investment in renewable generation, if utilities are allowed to systematically overcharge customers for the return on ratebase of each new facility, it stands to put customers and regulators in a very difficult position. A utility would get to include its new renewable ratebase investment in rates without a general rate case; would be allowed to over-earn on that investment until the next general rate case as customers pay down the assets' capital costs while continuing to pay the same first-year rate under the schedule; would not be faced with fuel cost increases for that plant, which would have helped balance out the amortization of the assets; would be collecting additional revenue with the projected load growth; and would, therefore, be less and less inclined to file a general rate case in which the utility's costs and revenues could be brought back into balance.

C. Is Depreciated Ratebase "Presently Used To Serve Customers" ?

Oregon law prohibits utilities from charging customers for ratebase that is not used and useful:

> … a public utility may not, directly or indirectly, by any device, charge, demand, collect or receive from any customer rates that include the costs of construction, building, installation, or real or personal property not presently used for providing utility serve to the customer.

ORS 757.355.

Suppose the special schedule filed in 2008 included $220 million for Biglow Canyon's ratebase. If, in 2009, the customers have paid down the capital cost by $20 million, such that the actual unamortized ratebase value of Biglow Canyon were $200 million, could the Company charge customer $220 million for Biglow's ratebase in

that special schedule? Would the extra $20 million in Biglow's special schedule in this example be "presently used?"

While the Commission is struggling with the meaning of *Dreyer v. Portland General Electric*[1] in another docket, the one clear directive that emerges from that case is that ORS 757.355 creates an ongoing legal obligation for a utility to not charge customers for the costs of an asset not being used to serve customers through any device or charge. The Supreme Court found in the *Dreyer* case that ORS 757.355 creates a prohibition directed at the utilities, and that the Commission cannot relieve the utility of this legal obligation through a rate order.[2] PGE chose to ask for a special schedule to collect Biglow Canyon costs, but PGE should not profit from that special schedule by clearly over-collecting on Biglow's ratebase after the first year.

A utility may not violate the law, and the Commission cannot relieve the utility of its legal obligation even if the violation is a small one. Consider, however, the huge implications of allowing PGE to collect under the special schedule for an asset as if customers were not continuously paying off the return on that investment. If there is no accounting for amortization through an annual update and the utility does not file a general rate case for several years, customers would be paying rates based on the value of a capital asset that far exceeds the actual remaining value of that asset. In other words, customers would be paying in rates on the basis of an investment that does not actually exist, and therefore cannot be considered used and useful. Now, multiply this scenario numerous times for every renewable resource that comes into rates in like circumstances under SB 838.

[1] 341 Or 262, 142 P3d 1010 (2006).
[2] *Id.* at 279.

D. Biglow's Special Schedule Is Isolated From General Rates

CUB's proposal to limit the recovery in Special Schedule 120 to the actual costs associated with the plant has been criticized by PGE and the Staff as a significant departure from the historic regulatory paradigm that needs a great deal of investigation and consideration through additional dockets and proceedings. Staff/100/Owings/2-8. PGE/500/Dahlgren-Tinker/1-8.

In fact, and law, CUB is only responding to the filing made by PGE. PGE filed what amounts to a single-issue general rate case. PGE could have filed for recovery of Biglow under an alternative form of regulation per ORS 757.210(2), (which would have presented its own issues), but the Company chose to file for Biglow cost recovery as a single-issue rate case to be recovered through a special schedule. That is where the significant departure from traditional rate making occurred. We are trying to deal with the consequences of the departure from traditional ratemaking.[3]

Traditionally, when a utility's costs are increasing above what it is collecting in rates, it will file a general rate case to increase its rates to more closely match its costs. A significant new generating asset, such as Biglow Canyon, would usually create such a mismatch and lead to a utility filing a general rate case. In those circumstances, costs associated with that new facility would be reviewed, but so would other costs and revenues that often offset at least some of the cost of that new capital investment, including the amortization of other assets in ratebase. Once rates have been set in a general rate case, some costs go up, some costs go down, and revenues increase as the

[3] It is important to note that, while PGE's requested treatment of Biglow is unusual, it is functionally the same as the treatment of future renewable resources under SB 838, if a utility chooses to use the automatic adjustment clause methodology currently being considered by the Commission. So, what the Commission does here will be meaningful in the future.

number of customers increases, but the rates remain in place, with a general belief that cost increases are generally offset with cost decreases and new revenues.

PGE chose not to utilize this traditional approach to ratemaking in this docket, and instead asked for recovery of the costs of Biglow Canyon through a single-issue rate case and a special schedule. In addition, they asked that the power from Biglow be priced, not at cost during its initial operation, but at market as a way to prevent customers from receiving any benefits until customers begin paying for the fixed costs.[4] PGE has chosen to isolate the costs of Biglow from all of its other costs. In isolating the costs of Biglow Canyon from general rates, an annual update is necessary to substitute for the balance set in a general rate case.

Staff and PGE argue that some costs in general rates will likely increase, and that these will offset the cost over-charge in Biglow Canyon's special schedule. Staff/100/Owings/3. PGE/500/Dahlgren-Tinker/5-7. Of course, some costs in general rates will also likely decrease, and it should be noted that, as this is not a general rate case, neither party offers any evidence to support the claim that other costs will increase or that those increases will offset the expected decline in Biglow Canyon's 2009 costs. Even if Staff and PGE had offered evidence to support this claim, those costs have nothing to do with Schedule 120. Schedule 120 is a tariff limited to the specific,

[4] PGE's request for a special schedule has led to some bizarre twists of ratemaking. Based on the Stipulation in this case, the State tax rate applied to Biglow will be 5.12%, because Oregon has lowered the tax rate it applies to PGE. However, the state of Oregon isn't only applying this new tax rate to Biglow, it is applying it to all of PGE assets. Customers, on the other hand, won't benefit from the lower tax rate as it is applied to the rest of PGE's assets until PGE's next rate case, unless the Commission applies the new tax rate in UE 180 which is currently still open. Applying different tax rates to different assets is not consistent with traditional ratemaking, but is the consequences of using a Special Schedule to bring Biglow Canyon into rates.

identifiable costs of Biglow Canyon, and is not a part of PGE's general rates. Schedule 120 begins:

> **PURPOSE**
>
> This schedule recovers the net costs of the Company's Biglow Canyon I wind project.

UE 188 PGE/401/Cody/1.

General rates are established to be just and reasonable overall. A special schedule tariff is established to collect a discrete, identifiable cost. In a general rate case, the parties and the Commission do their best to accurately forecast costs and revenues, understanding that these forecasts are approximations and that any given variable will go up and down over time. When the balance of costs and revenues moves too far in either direction a utility can initiate a rate case or the Commission can initiate a show cause case. This balance of costs and revenues is an inherent part of a utility's general rates.

For example, Port Westward is now in PGE's general rates, as a result of a general rate case, and its declining ratebase will offset any additional capital costs, as will the declining ratebase of Coyote Springs. Biglow Canyon's special schedule exists outside of the offsetting nature of costs considered in a general rate case, and CUB's proposal to annually update this schedule recognizes this lack of balance, and therefore is appropriately applied to the isolated special schedule.

Biglow Canyon's special schedule has been set to accurately recover the costs of the wind project in 2008, but, in 2009, it will over-collect these costs, and will, therefore, no longer be consistent with its purpose. The amortization of Biglow Canyon's capital costs in Biglow's special schedule will not be offset by other capital improvements, other costs, or other revenues, because the special schedule does not consider capital improvements, costs, or revenues other than those of Biglow Canyon. As long as the

costs of Biglow Canyon are isolated in a special schedule, that special schedule should be limited to the recovery of the costs of Biglow Canyon, and should be updated to reflect the true costs of the asset.

E. Updating A Special Schedule Is Common

As noted by Mr. Falkenberg, the majority of PGE's special schedules are subject to periodic adjustment:

> Schedules 102, 105, 106, 125,126, 128 and 130 are all subject to periodic adjustment. Schedule 107 apparently is not, but it recovers a fixed amount of financing costs over a ten-year period and is subject to a balancing account. Collections pursuant to Schedule 108 and 115 are simply passed on to other organizations, so there is apparently no need to adjust these tariffs. It is a bit ironic that, out of all of PGE's rate adjustment schedules, PGE would believe that the Biglow Canyon tariff should be fixed until the next general rate case, while making provisions for adjustments or true-ups in the great majority of the other schedules.

UE 188 ICNU/100/Falkenberg/10.

In fact, Biglow Canyon's special schedule does get updated. Special Condition 2 of Schedule 120 states that the "rates contained in this schedule will, if necessary, be revised and refiled on November 15, 2007 to be consistent with the load forecast and forward price curves used in the Annual Power Cost Update also filed on that date." PGE/401/Cody/2. The problem is that, after the November update, PGE proposes never to update the schedule again. PGE's proposal is that Biglow's special schedule should not be consistent with the load forecast for 2009 or any other of Biglow Canyon's costs in 2009.

F. The Mechanics Of Updating The Biglow Canyon Special Schedule

Updating the Biglow Canyon special schedule, Schedule 120, like updating any other schedule, would be a simple process. The Company would file an annual update,

and the parties would have a short period of time to review the filing to verify the projections and calculations. Staff, however, is concerned and confused about what would be subject to such an update in Biglow Canyon's special schedule. Would it be limited to ratebase? Would it include O&M? Should it include all of the Company's generation sources? Staff/100/Owings/4-5. The answer is pretty simple. If you require an annual update of Schedule 120, the update would include the items that are in Schedule 120.

III. Staff's & PGE's Opposition Is Unsupported

On June 20th, CUB filed Testimony proposing an annual update to Biglow Canyon's special schedule, and Staff filed its Testimony which was limited to opposing such an update. On July 11th, PGE filed its Rebuttal, also opposing CUB's proposed update. Much of the substance of Staff's and PGE's arguments are the same, and the primary argument made is that such an update would somehow be outside the realm of traditional Oregon ratemaking. Such an argument is nonsense, as isolating a generating resource in a special schedule in the first place is outside the realm of traditional ratemaking.

A. PGE Argues That This Docket Is Unusual But Its Approach Is Fundamental

PGE opens this docket with an acknowledgement that UE 188 is an unusual filing, and that current ratemaking has not specifically addressed this type of single-issue rate case. PGE states:

> This case is a little unusual for a rate case filing … [U]nder current ratemaking rules and practices there is no explicit provision for adjusting a recently adopted revenue requirement for only certain identifiable changes.

UE 188 PGE Pretrial Brief at 1-2.

In PGE's Rebuttal, however, the Company argues that CUB's and ICNU's proposals are a "significant change to regulatory policy," and that our concern is "a fundamental element of cost of service rate making." PGE/500/Dahlgren-Tinker/14. We find it inconsistent that the entire regulatory mechanism that the Company proposed is "unusual" and does not fall under any explicit ratemaking provision, but that PGE sees CUB's proposal to annually update the unusual mechanism as a "significant change to regulatory policy." As stated above, CUB's proposed update is an appropriate response to PGE's filing, and, we contend, more closely adheres to the law expressed in ORS 757.355.

B. Is Staff Comfortable Isolating Biglow Canyon Or Isn't It?

Staff joined the parties in signing the Stipulation filed on July 17th that resolved most of the issues in this case, and made no objection to the unusual nature of this docket. In signing the Stipulation, Staff apparently did not take issue with the isolation of Biglow Canyon's costs in a special schedule. In its Testimony, however, Staff argues vehemently against isolating Biglow Canyon's costs while the plant is in that special schedule. According to Staff:

> How would the Commission justify isolating an annual adjustment to only Biglow Canyon and not to all of the Company's ratebase?
>
> [W]e believe the issue needs more thorough consideration and potentially, an investigation …

UE 188 Staff/100/Owings/5.

If Staff wonders how the Commission could justify isolating an annual adjustment to Biglow's special schedule, we wonder how Staff justifies isolating the costs of Biglow Canyon in a special schedule. As PGE points out in the first two pages of its filing, this is an unusual proceeding, and bringing a generating asset into rates in isolation, without a

general rate case, is not something Oregon ratemaking has a specific procedure for. Apparently, however, Staff did not need more thorough consideration or an investigation into that particular departure from the regulatory paradigm. Considering that we are already operating outside of the traditional regulatory paradigm, we find it odd that Staff protests that an annual update to Biglow Canyon's special schedule would somehow be outside of the regulatory paradigm.

> The Commission may want to view [the SB 838] docket as an opportunity to review the merit of implementing Annual Updates and how it would do so within the confines of the current regulatory paradigm, or whether the Commission wants to depart from historical regulatory paradigm and create a new look at how ratebase should be calculated.

UE 188 Staff/100/Owings/6.

So, once operating outside the regulatory paradigm, Staff is not comfortable operating outside the regulatory paradigm. We think it is too late for Staff to make this argument. Now that Staff has agreed to a single-issue rate case and a special schedule, it should pursue its obligation to make sure that the special schedule results in fair, just, and reasonable rates and comports with the law. Furthermore, this issue is the issue that the Commission will be considering in UM 1330, and the Commission should not pass on the issue in this case simply because this docket came first; to the contrary, a poorly-reasoned decision here will have policy repercussions down the road.

C. There Is No "Test Year" Associated With The Biglow Canyon Schedule

PGE makes numerous references to embedded plant and the ratemaking "test year" used to establish rates. PGE/500/Dahlgren-Tinker/5,10-12. The Company's discussion of a "test year" in regard to Biglow Canyon begins:

> We believe the regulatory 'bargain' as it relates to deriving test year rate base is the expectation that the overall revenue requirement will be relatively stable over some period of time. In other words, decreases in

> revenue requirement due to depreciation of existing rate base will be offset by increases in revenue requirement due to future capital additions and inflation-induced increases in O&M costs.

UE 188 PGE/500/Dahlgren-Tinker/5.

That sounds very much like our discussion of the regulatory balance in general rates above, but, again, Biglow's special schedule is not a part of PGE's general rates and no test year was established in determining the amount to be collected under Biglow Canyon's special schedule.

PGE claims that we are:

> [A]ttempting to "cherry-pick" one element of revenue requirement (i.e., the return component of a particular plant), while ignoring other additions to ratebase and the continuing effects of inflation on O&M.

UE 188 PGE/500/Dahlgren-Tinker/7.

But again, no utility-wide revenue requirement was established for the Biglow Canyon special schedule. The purpose of the Biglow Canyon special schedule is not to recover additions to ratebase and higher O&M costs in general rates that are unrelated to Biglow Canyon, and our update only applies to the Biglow Canyon costs while leaving the general rate balance intact. Updating a special schedule annually is the opposite of cherry-picking; it is ensuring the accurate collection of the specific costs of that isolated schedule.

D. Updating Biglow's Special Schedule <u>IS</u> The Issue In This Docket

> Staff recommends that the Commission defer a decision on whether it is appropriate to apply an Annual Update to Capital Costs to costs associated with the Biglow Canyon Wind project …

UE 188 Staff/100/Owings/1.

What Staff fails to realize in this statement is that the decision that Staff describes above is precisely the question that remains in this docket. According the to Stipulation signed by the parties to this docket:

> The Stipulating Parties agree that the only issue addressed in testimony in this Docket will be whether there should be a means to address yearly changes in the projected fixed costs of Biglow Canyon 1 until PGE's next general rate case, and if the Commission decides there should be an annual adjustment, how that adjustment should be made.

UE 188 Stipulation at 2.

There is no reason to defer this decision to some later date. The conditions and terms of a special schedule are normally defined when the schedule is adopted, including whether the special schedule should be updated. In fact, this schedule explicitly states that it will be updated in November of 2007, though, as written by PGE, the schedule provides for no further updates. This is important, as Biglow's special schedule is expected to be in place until PGE chooses to file a general rate case.

While the Commission can always order a schedule to be changed, it is important to be clear about the rationale that the Commission's decision in this case will be based upon. If the Biglow Canyon special schedule is not to be updated and is to be allowed to over-collect, is it because the costs in the special schedule are presumed to be offset by other, non-Biglow Canyon, costs? If so, when were, or when will, parties be given the opportunity to explore those countervailing costs? Or, if Biglow's special schedule is to be updated, is it because that special schedule is intended to collect only those costs associated with Biglow Canyon?

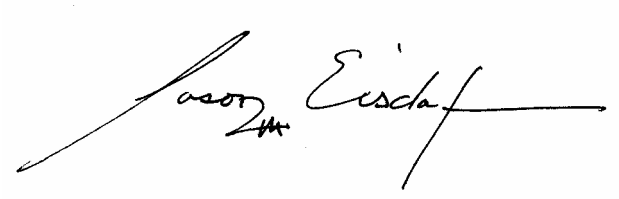
Finally, we note that, if the Commission agrees with the Staff in the need to consider this question in a separate proceeding, then the Commission should limit Schedule 120 to collecting only the 2008 costs of Biglow Canyon. Staff argues that it is

appropriate for the Commission to defer resolution of the outstanding issue for further consideration, but it is not appropriate to default an important component of the special schedule to a decision to defer. In other words, if the Commission is going to take its time resolving this issue, it should not decide the issue on a going-forward basis by choosing not to update the schedule. We believe there is sufficient testimony and policy argument on the record in this proceeding to establish an annual update for the Biglow special schedule. Delaying this decision will not change the merits of the arguments.

IV. Conclusion

The special schedule that is established to collect costs associated with Biglow Canyon should not be designed to overcharge customers on the premise that there may be other costs in general rates, which we have not considered in this docket, that might balance that overcharge. An annual update to the Biglow Canyon special schedule is necessary to achieve fair, just, and reasonable rates and to assure compliance with the used and useful law of this state.

Respectfully Submitted,
September 11, 2007



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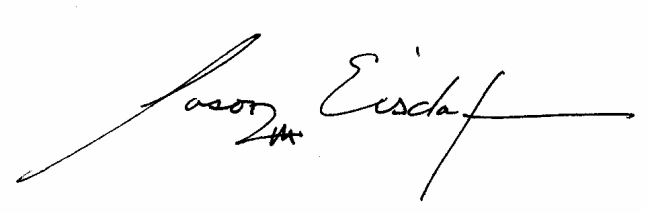
CERTIFICATE OF SERVICE

I hereby certify that on this 11th of September, 2007, I served the foregoing Opening Brief of the Citizens' Utility Board of Oregon in docket UE 188 upon each party listed below, by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending 6 copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

Respectfully submitted,



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