BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

UE 88/DR 10/UM 989

In the Matters of: **Various Applications regarding Acquire Portland General Electric Co.**	**JOINT REPLY MEMORANDUM ON SCOPE OF PROCEEDING, PHASING, AND SCHEDULE** **BY** **UTILITY REFORM PROJECT (URP), ET AL., AND MORGAN, GEARHART, & KAFOURY BROTHERS, LLC,**

The Utility Reform Project (URP) and the Class Action Plaintiffs (Morgan, Gearhart, and Kafoury Brothers, LLC) submit this memorandum in reply to the opening memoranda filed on June 3, 2004, by Staff and PGE.

I. REPLY TO STAFF MEMORANDUM.

Staff contends that calculating the amount ratepayers have been charged in unlawful return on investment on Trojan is akin to a "single-issue rate case," which Staff believes "the Commission, as a general matter, prohibits . . ."

First, a court order remanding a case to the OPUC does not open a new rate case, whether it is "single-issue" or not. As noted in our JOINT REPLY MEMORANDUM ON SCOPE OF PROCEEDING, PHASING, AND SCHEDULE (June 3, 2004) [hereinafter "URP Opening Memorandum on Scope"], an OPUC proceeding consistent with both of the currently effective remand orders would not entail "ratemaking." Calculating the appropriate refunds and ordering PGE to send out the refund checks is not "ratemaking."

Second, Staff cites no authority for the proposition that the Commission prohibits single-issue rate cases. State commissions, including the OPUC, often conduct such cases when large new capital investments go into operation or when other significant events occur. Further, the Staff statement means that the Commission does not

conduct rate cases, unless all potential issues are on the table. Otherwise, the alleged prohibition on single-issue rate cases makes no sense. Is Staff saying that a single-issue rate case is prohibited but a 2-issue rate case is not? What possible rationale could support such a distinction? Staff offers none.

Thus, claiming that the Commission prohibits single-issue rate cases is akin to saying that the Commission never limits the scope of issues or costs that can be addressed in a rate case. This is, of course, not true. The Commission often limits the scope of issues or costs to be addressed in a rate case. For example, when URP in the rate case next following UE 88 sought to raise the issue of the continued charges to ratepayers for unlawful Trojan investment "costs," the Commission (at the urging of PGE), refused to consider the issue.[1]

Staff apparently now recommends, for the first time, that this proceeding be subject to several additional layers of phasing, so that UE 88 can be addressed first, before UM 989 is addressed. This is an entirely new proposal and would require that all of the phases earlier proposed by URP, for example, would have to be performed twice in succession. Staff's purpose is clear, however: Staff reasons that the remand order applicable to the UE 88 case does not specifically require refunds or rate reductions, as does the remand order generated in the appeal of the UM 989 case. Thus, Staff believes that the Commission, by addressing only UE 88 first, will have the opportunity

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1. In the PGE rate case after the UE 88 rate case, for example, URP intervened and made the same claims that it had made in the docket (UE 88): that charging Trojan costs and profits to ratepayers was illegal. The PUC in a preliminary order refused to even consider the issue. Then, in OPUC Order No. 95-1216, the Commission refused to consider the issue of Trojan costs and profits in rates, because "URP's claim relating to Trojan was presented in UE 88." PUC Order No. 95-1216, p. 12. This outcome had been urged by PGE:

> PGE responds by noting that it is not seeking recovery of **additional** costs associated with Trojan in this proceeding and by pointing out that issues relating to Trojan were resolved in UE 88.

PUC Order No. 95-1216, p. 12 (emphasis added). This restriction on issues and/or costs to be considered in a rate case is not consistent with Staff's new assertion of that issues in rate cases cannot be limited.

to adopt the PGE plan--declare that there are "other costs" that would have justified the unlawful charges and then provide no relief to ratepayers.

Staff (p. 3) states that "there is merit to the argument that Utility Reform Project (URP) should bear the burden of proof in these proceedings as petitioner." URP is not the petitioner in any of these cases. In DR 10, PGE is the petitioner. In UE 88, PGE is the applicant. In UM 989, URP is the complainant under ORS 757.210, but PGE bears the burden of proof in cases generated by that statute. ***Coalition for Safe Power v. OPUC***, 325 Or 447, 939 P2d 1167 (1997).

II. REPLY TO PGE MEMORANDUM.

PGE (p. 2) contends, "It is at least arguable that the opinion [of the Court of Appeals] does not permit any such refunds or rate reductions." PGE then argues in a footnote that the Court of Appeals merely "identified an error in the Commission's process, that does not mean the result of that process is necessarily overturned." The decisions of the Marion County Circuit Court and the Court of Appeals in the challenges to the final order in UE 88 did not identify any errors in OPUC process. Instead, they found that the adopted rates substantively violated the prohibitions in ORS 757.355.

Further, PGE does not correctly state the relationship between the dual requirements that rates be "just and reasonable" and that rates comply with statutory directives. A conclusion by the OPUC that it is adopting "just and reasonable" rates does not exempt the Commission from any of the statutes restricting the types of costs that may be included in rates, such as ORS 757.355. If that were true, then the Oregon courts would never be able to reach issues under ORS 757.355, since the OPUC always deems the rates it adopts as "just and reasonable."

Regarding the UM 989 remand order, PGE (pp. 2-3) contends that it "requires the Commission to exercise its discretion to determine just and reasonable rates." That is

simply wrong. The UM 989 remand Judgment (January 28, 2004), remands for "proceedings consistent with the Opinion and Order of this Court," which had been issued November 7, 2003. That Opinion and Order, p. 6, stated:

> The challenged OPUC's order, No. 02-227, is reversed and remanded to the Commission with directions to immediately revise and reduce the existing rate structure so as to fully and promptly offset and recover all past improperly calculated and unlawfully collected rates, or alternatively, to order PGE to immediately issue refunds for the full amount of all excessive and unlawful charges collected by the utility for a return on its Trojan investment as previously determined to be improper by both this Court and the Court of Appeals.

This does not call upon the Commission to "exercise its discretion to determine just and reasonable rates." Instead, it orders the Commission to calculate the past unlawful charges and immediately return those funds to ratepayers, either in the form of a rate reduction or in the form of refunds.

PGE (pp. 5-9) introduces "at least three separate determinations related to UE 88 rates that are affected by the Courts' Opinions." Note that PGE is not stating that the remand proceeding would or should be limited to these 3 determinations. Further, if the Commission adopts the "new rate case" approach advocated by PGE, its consideration of PGE costs and revenues during the applicable periods cannot be limited solely to issues PGE wishes to raise. Instead, any party can raise any issue pertaining to PGE costs or revenues.

PGE engages in its usual discussion of why the Commission ordered UE 88 rates to include profits on Trojan--so that PGE would not have a disincentive to close Trojan. Never mind that (1) the UE 88 order was issued more than two years after Trojan permanently closed and (2) Trojan was not voluntarily closed but instead broke down, permanently, in November 1992. The same lack of factual predicate infects PGE's later discussion (pp. 8-9) about the need for a "net benefits test" to avoid deterring PGE from closing Trojan. Trojan closed itself.

PGE (p. 9) then repeats an argument it has made many times to the courts, without prevailing, that the period at issue here is truncated at November 28, 1995, the effective date of OPUC Order No. 95-1216. PGE made this specific argument to Judge Lipscomb in Marion County Circuit Court No. 02C-14884 [hereinafter the "UM 989 Appeal"], but the court apparently did not accept it. We offer here the argument that has apparently prevailed in Marion County Circuit Court:

> The PGE Memorandum (pp. 42-43) claims that OPUC Order No. 95-322 established rates only for a period which ended in November 1995 and was then replaced by subsequent OPUC orders. This is irrelevant.
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> PGE admits that, in the next PGE rate case at the OPUC, the Utility Reform Project (URP) intervened and made the same claims that it had made in the docket (UE 88) which had culminated with OPUC Order No. 95-322: that charging Trojan costs and profits to ratepayers was illegal. The OPUC in a preliminary order refused to even consider the issue. In the order PGE now touts and attaches to its motion, OPUC Order No. 95-1216, the OPUC refused to consider the issue of Trojan costs and profits in rates, because "URP's claim relating to Trojan was presented in UE 88." OPUC Order No. 95-1216, p. 12.[2] This outcome had been urged by PGE:
>
> > PGE responds by noting that it is not seeking recovery of **additional** costs associated with Trojan in this proceeding and by pointing out that issues relating to Trojan were resolved in UE 88.
>
> OPUC Order No. 95-1216, p. 12 (emphasis added). Thus, PGE procured a decision of the OPUC stating that rate cases subsequent to UE 88 (which culminated with OPUC Order No. 95-322) would not even consider the issue of Trojan costs or profits in rates. PGE claimed that Trojan rate elements would be a proper subject in the subsequent rate case, only if PGE were seeking "recovery of **additional** costs associated with Trojan in this proceeding." Instead, PGE was seeking to continue the same unlawful Trojan charges as were included in OPUC Order No. 95-322.
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> PGE cannot now argue that, instead, the OPUC should have rejected PGE's position and should have started from scratch in each subsequent docket to consider, again, the same charges for Trojan. PGE is judicially estopped from claiming that the subsequent rate case decisions should have been appealed, because the OPUC adopted PGE's position on whether the Trojan rate elements would even be considered in cases subsequent to OPUC Order No. 95-322, as long as PGE did not seek **additional** amounts for Trojan, above and beyond the rate treatment for Trojan adopted in OPUC Order No. 95-322. PGE took a position below that the issue of Trojan rate

2. UE 88 was the docket which culminated with adoption of OPUC Order No. 95-322.

treatment was not to be altered in the subsequent proceeding and therefore should not be considered at all. PGE sought to gain a benefit therefrom--continued illegal charges.

> Judicial estoppel may be applied when a litigant has benefitted from a statement or position in an earlier proceeding that is inconsistent with that same litigant's statement or position in a later proceeding. Most courts require the statement or position to have been accepted and acted upon by the court in the earlier proceeding in order for the doctrine to apply.

White v. Goth, 182 Or App 138, 141-142, 47 P3d 550, 551-552 (2002). Here, the OPUC in OPUC Order No. 95-1216 accepted PGE's position that issues of Trojan costs or profits in rates could not be considered in the later proceeding, because PGE was not proposing any change to OPUC Order No. 95-322 rate treatment for Trojan. Judicial estoppel does not require that any party detrimentally rely on the position [***Hampton Tree Farms, Inc. v. Jewett****,* 320 Or 599, 612-13, 892 P2d 683 (1995)], because the purpose is "preventing litigants from `playing fast and loose' with the courts." ***White v. Goth,*** *supra*. See ***Caplener v. U.S. National Bank****,* 317 Or 506, 516-21, 857 P2d 830 (1993), where judicial estoppel barred a claim for any damages amount greater than the amount disclosed by the litigant in a prior bankruptcy proceeding.[3]

Another, simple answer is that ORS 757.355 is a prohibition on utility conduct in that it states:

> No public utility shall, directly or indirectly, by any device, charge, demand, collect or receive from any customer rates which are derived from a rate base which includes within it any construction, building, installation or real or personal property not presently used for providing utility service to the customer.

It does not matter that the OPUC purported to authorize PGE to charge the unlawful Trojan profits to ratepayers in OPUC Order No. 95-322. It certainly does not matter that the OPUC allowed those exact same charges to continue, unchanged, through the end of September 2000, despite the additional rate cases that occurred during that 5.5-year period. PGE's unlawful conduct and unlawful charges to ratepayers is the issue. PGE's use of OPUC orders as a shield would certainly qualify as a "device" pursuant to which PGE made its unlawful charges. ORS 757.355 prohibits those charges, imposed "**by any device**."

In addition, the charges for Trojan profits authorized by OPUC Order No. 95-322 remained in place until the end of September 2000. PGE can

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3. In addition, the utility bears the burden of proof in each rate case that the rates it proposes are just and reasonable. ORS 757.210. Since PGE presented zero analysis or evidence regarding the Trojan rate elements in any case subsequent to UE 88 (culminating with OPUC Order No. 95-322), PGE could not possibly have met its burden of proof.

point to no OPUC order, prior to the UM 989 docket in September 2000, which again authorized PGE to charge ratepayers for a profit on Trojan.

Disregarding the plain language of ORS 757.355, PGE now claims that, since URP did not appeal OPUC Order No. 95-1216 or subsequent OPUC orders which did not address Trojan costs or profits, then PGE is home free on Trojan profits for the entire period after November 28, 1995. PGE cites no law for the proposition that an intervenor must appeal every public utility commission rate order, following an unlawful one, in order to prevail in its appeal of the unlawful order and ultimately secure relief from the courts. As PGE itself contends, ratemaking is considered a legislative function. The PGE claim here is akin to saying that, if someone appeals the adoption of an agency rule as unlawful, then that appeal is abandoned if that person does not subsequently appeal every other instance of rulemaking by the agency, as the subsequent rulemakings implicitly re-adopt the original, unlawful rule.

Or consider this: Frank asks for a zoning density change to allow development of apartments on his land. His neighbor, Phil, intervenes and objects. The zoning change is adopted, and Phil files an appeal. Then, Frank decides that he wants another zoning change to allow him to alter a watercourse on his land. Phil intervenes and seeks to argue that the board still should not approve the density change. Frank replies that the board has already approved the density change and cannot address the density change further in the second case, where Frank seeks no change to that part of the zoning. The zoning board then approves the new watercourse zoning that Frank has requested, and Phil does not file an appeal of the second order. Frank then files a motion in court to dismiss Phil's earlier appeal of the first zoning change, arguing that the zoning board's second order embodied the density change that allowed the land to be used for apartments, and Phil had failed to appeal the second order, thus allowing that order to become final (despite the fact that Frank succeeded in having the zoning board entirely disregard the density issue in the second proceeding). Is Phil's original appeal rendered moot, because the zoning order he appealed was then somehow superseded by a zoning order (embodying the density change) he did not appeal? That is PGE's argument here. It is not absurd?

Further, if indeed the entire matter of Trojan profits in rates became moot on November 28, 1995 (since no ratepayer appealed OPUC Order No. 95-1216) then why did PGE fail to raise that point in any of the appeals of OPUC Order No. 95-322? PGE filed several motions with the Oregon Supreme Court on the issue of the mootness of review of OPUC Order No. 95-322. On July 1, 2002, for example, PGE filed a Notice of Mootness and Motion to Dismiss and Vacate with the Oregon Supreme Court, claiming that the order currently under review here, OPUC Order No. 02-227, "has mooted the case." URP responded, and the Oregon Supreme Court rejected this contention in its November 19, 2002, order:

> On July 1, 2002, Portland General Electric Company moved to dismiss the appeal, to vacate the opinion of the Court of Appeals,

> and to remand the case to the circuit court with instruction to vacate the judgment and dismiss all claims as moot. That motion is denied.

335 Or 91, 58 P3d 822 (November 19, 2002). In no motion to the Oregon Supreme Court did PGE argue that OPUC Order No. 95-322 had been rendered moot by OPUC Order No. 95-1216 or by any other OPUC order prior to the orders in UM 989 (which took effect October 1, 2000).

If the appeal of OPUC Order No. 95-322 was rendered moot, because OPUC Order No. 95-322 itself had been superseded by OPUC Order No. 95-1216 in November 1995, why did PGE not offer that contention to the Oregon Supreme Court? Because it was contrary to longstanding practice and interpretation of utility regulation statutes, including the ORS 757.225 that PGE cites. The context of a statute for the purposes of ***PGE v. BOLI***, *supra*, includes other provisions of the same statute and related statutes, prior enactments and prior judicial interpretations of those and related statutes and the historical context of the relevant enactments.[4]

Applying the historical context rules to the present situation, the fact that the Oregon Supreme Court in the year 2002 rejected all of PGE's contentions regarding the mootness of OPUC Order No. 95-322 also refutes PGE's assertion of such mootness here, under the doctrine of contemporaneous interpretation. See 2 SUTHERLAND, STATUTORY CONSTRUCTION, pp. 514-515, § 5104 (3d ed). The doctrine has special relevance where, as here, the proponent of a novel interpretation has been involved for years with the application of the statute and never before pursued its new interpretation.

PGE (p. 10) agrees with the hearing officer's scoping memorandum that "questions about the Commission's authority to order refunds can be deferred to this implementation stage. Thus, PGE proposes that the parties:

1. first engage in a lengthy and complex "ratemaking" proceeding, which can examine all of PGE's costs and revenues, both estimated and actual, over the period of time from April 1, 1995, to the present day;

2. be subject to an OPUC determination that the entire proceeding was moot, because no relief can be granted (as PGE contends that Oregon law "does not permit any such refunds or rate reductions," and the Commission to date has expressed its complete agreement with that conclusion of law).

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4. ***Owens v. Maass,*** 323 Or 430, 435, 918 P2d 808 (1996); ***Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto,*** 322 Or 406, 415, 908 P.2d 300 (1995), *on recons* 325 Or 46, 932 P2d 1141 (1997); ***Krieger v. Just***, 319 Or 328, 876 P2d 754 (1994); *see generally* Jack L. Landau, *Some Observations About Statutory Construction in Oregon,* 32 WILL L REV 1, 38-40 (1996).

Thus, PGE wishes to exhaust all resources of URP and the other parties opposing PGE in this docket, then have all of their efforts declared, retroactively, to have been futile. Adopting such an approach would be a fundamental error, upon which we would seek certification to the Commission, at the least.

Dated: June 25, 2004

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing JOINT REPLY MEMORANDUM ON SCOPE OF PROCEEDING, PHASING, AND SCHEDULE by email to the email addresses shown below.

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