BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

DR 10/UE 88/UM 989

In the Matters of **The Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement. (DR 10)** **Revised Tariffs Schedules for Electric Service in Oregon Filed by Portland General Electric Company. (UE 88)** **Portland General Electric Company's Application for an Accounting Order and for Order Approving Tariff Sheets Implementing Rate Reduction. (UM 989)**	**REPLY OF UTILITY REFORM PROJECT, ET AL. REGARDING PREHEARING CONFERENCE REPORT** **and** **REPLY OF CLASS ACTION PLAINTIFFS RE: MOTION TO REINSTATE SCHEDULE**

Utility Reform Project, Lloyd K. Marbet, and Colleen O'Neil [hereinafter URP] respond to the PGE Response to URP's Opening Memorandum and Joint Motion to Reinstate Schedule from Order No. 07-157 [hereinafter PGE Response or just PGE]. Further, the Class Action Plaintiffs reply regarding the Joint Motion to Reinstate Schedule from Order No. 07-157.

First, we note that, while PGE purports to respond to the Joint Motion, there is nothing in PGE's memorandum addressing it. There is simply no reason for the Commission to delay its resolution of the legal issue referred to it by ***Dreyer v. Portland General Electric Company***, 341 Or 262, 142 P3d 1010 (2006) [hereinafter ***Dreyer***], or to insist upon resolving the UM 989 appeal before such resolution, since UM 989 does not even apply to the period at issue in the class action.

It is unfortunate that PGE would file a response that includes so many distortions and even an outright falsehood. Let us begin with a falsehood. PGE (p. 6) states:

> Mr. Meek neglected to inform the Marion County Court that his other client, URP, was the party seeking a further contested case at the Commission. Instead, he merely argued that procedural delays at the Commission mandated that the Class Action Cases be reopened.

This is false. Undersigned counsel fully informed the court of the status of the remand proceedings, including URP's request for a contest case in Phase 3 and the opposition to that request by PGE, at the January 14, 2008, hearing. Attorney Meek noted that PGE was seeking to require URP to give up its rights to a Phase 3 contested case upon remand[1] in order to get the Commission to issue an order regarding its authority to order refunds or rate reductions to redress the past imposition of unlawful rates.[2] PGE's false statement is all the more baffling, since counsel from the Tonkon Torp law firm, representing PGE, and from PGE's own legal department were both present at the January 14, 2008, court hearing.

The topic of the procedural delay and the attempt by Class Action Plaintiffs to reinstate the promised schedule of Order No. 07-157 was first described to the Court in the opening arguments of co-class counsel, Linda Williams, who took the lead on the pending motion to lift the one-year abatement. The topic emerged again when PGE counsel, William F. "Rick" Martson, Jr., incorrectly stated to Judge Lipscomb during his reply argument that "they" had sought delay in the remand proceedings (gesturing to co-lead class counsel at counsel table). Williams clarified at the time that Mr. Martson was incorrect and that the Class Action Plaintiffs had and were strenuously urging an immediate decision of Phase 2 before the Commission and supported the rights of other ratepayers in the later time-period to be afforded full administrative due process. Attorney Meek reiterated that the contested case sought by URP related to a time period not included in the certified class description.

The false statements are additionally baffling because we will soon have the CD-ROM of the January 14 hearing, which will conclusively discredit the PGE assertions

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1. The Court of Appeals in ***Utility Reform Project v. OPUC***, 215 Or App 360, 170 P3d 1074 (2007) [hereinafter "***URP v. OPUC*** (UM 989)"], had remanded to the OPUC all issues raised by URP in the original contested case back in 2001.

2. Counsel for the Class Action Plaintiffs ordered the transcript of the January 14, 2008, hearing before Judge Lipscomb. It has not yet arrived, but we will provide it to the Commission when it does.

about what was stated. Since the assertions are in fact false, and not particularly relevant to the rights of any ratepayers or the merits of any issue pending, we are forced to conclude that these misstatements must be an effort to discredit counsel by unfounded accusations of some sort of double-dealing. This effort to personalize a complex proceeding is utterly misguided.

In addition, PGE conflates the direction of the Oregon Supreme Court in ***Dreyer v. Portland General Electric Company***, 341 Or 262 (2006) [hereinafter ***Dreyer***], with the remand of UM 989 in ***URP v. OPUC*** (UM 989). As noted in the Response of URP, et al. to Prehearing Conference Report (January 14, 2008), the Supreme Court in ***Dreyer*** asked the Commission to decide only one issue: "what, if any, remedy it can offer to PGE ratepayers." The Court then contemplated that, depending upon the remedy provided (or not provided) by the Commission pertaining to the 5.5-year period at issue in the class actions, the class actions would resume, if there remained harm to ratepayers not compensated via the Commission. We continue to urge the Commission to make the decision called for by the Supreme Court. Any implied recommendation by a lower court to consolidate that issue with other issues and time periods (specifically, the post-September 2000 time period in UM 989 and "Phase 3" of these remand dockets) does not and cannot countermand the instructions of the Supreme Court to the Commission.

I. PHASE 3 ISSUES.

PGE apparently fails to comprehend the scope of issues upon remand of a contested case decision, when those issues were indeed raised on appeal and were indeed remanded by the court to the Commission. For example, PGE (p. 3) states, "This is no new issue," as if it were URP's duty to specify only "new issues" to be addressed in a contested case upon remand. To the contrary, the contested case on remand is to address issues that include all that were appealed or cross-appealed, and

that is even the express instruction of the Court of Appeals in this case. Yes, determining the proper Trojan investment baseline, as of October 1, 2000, is not a "new issue." It does not need to be. Nor do any of the other issues noted by URP need to be a "new issue."

PGE then (p. 4) contradicts itself by demanding that a proposed issue be excluded from the remand, because it was not addressed in the court decision (PGE's actual return on investment after the close of the UM 989 evidentiary record). Thus, according to PGE, an issue cannot be raised on remand if it is "no new issue" (p. 3) but also cannot be raised if it is a new issue not addressed in UM 989. There appears to be no underlying principle in PGE's arguments. Whether an issue is "not new" or is "new," it cannot be raised, according to PGE.

And, to be consistent with Phase 1, the issue in Phase 3 would be, "What would the Commission have ruled in UM 989, if it had known that its `filed rate doctrine' construct was legally wrong?"

II. NATURE OF NEW EVIDENCE.

URP pointed out, however, that new evidence is needed on several of the issues. Here, PGE again fails to comprehend the function of a remand, when the issues have indeed been raised on appeal and have been remanded to the agency. Further, various unknown relevant events have occurred since the close of the evidentiary record in UM 989 in 2001, yet the rates for Trojan adopted in UM 989 have remained in effect. New evidence is required on the effect on ratepayers of the compulsory trade of interest-bearing for non-interest-bearing accounts forced upon them by OPUC Order No. 02-227. Part of that effect is determined by PGE's actual return on investment during the post-2001 period. New evidence is required to determine whether PGE has received additional NEIL insurance premium rebates that, according to URP, should have been credited 100% to ratepayers instead of 45% to PGE. The fact that PGE may

have responded to data requests seven years ago does not establish the evidence to be considered upon remand now.

Also, PGE fails to note that the Commission has already decided that the remand proceeding in UM 989 ("Phase 3") will be conducted as a contested case, an evidentiary proceeding. As documented below, the Commission expressly decided this in OPUC Order No. 04-597, at the behest and express urging of PGE itself. The Commission denied URP's motion for reconsideration of that decision, and the Marion County Circuit Court (Lipscomb, J.) dismissed a court challenge to that decision on grounds that OPUC Order No. 04-597 was not a final agency order subject to challenge under ORS 756.580. Having procured an agency decision commanding that the remand proceedings on all of the dockets shall be contested cases, PGE is now precluded by the doctrine of judicial estoppel from arguing otherwise.[3]

PGE never appealed or in any way contested that order. The Commission has never altered it. Further, the Commission in OPUC Order No. 04-597 concluded that the remand proceeding for UM 989 must be conducted as a contested case, because the "evidence" supporting its original decision had been entered by means of stipulation (among some parties) and not testimony.

Now for the documentation of the above. OPUC Order No. 04-597 expressly adopted and affirmed the August 31, 2004, Ruling of ALJ Kirkpatrick regarding the scope of the proceeding. It also stated (p. 6, n8):

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3. 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). 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.

> To conduct these reviews, we agree with the Ruling's conclusion that the records in UE 88 and UM 989 must be reopened to allow the Commission to take and consider new evidence.

Note that the decision "to take and consider new evidence" applied to both dockets. The Commission has never rescinded this order. It would appear incumbent upon PGE to seek such recision.

Further, the ALJ's Ruling (p. 16) stated:

> Moreover, to consider issues raised by remand of Order No. 02-227, the Commission must take and consider new evidence in UM 989, as evidence in that docket was introduced by settlement, not adjudication. In any case, ORS 756.568 authorizes the Commission to consider additional evidence, with no restrictions on the scope and nature of such evidence, in the court of rescinding, suspending or amending an order.

Also, in OPUC Order No. 04-597 and the ALJ Ruling it affirmed was extensive discussion of avoiding "single issue" rate cases. Here and now, PGE insists that the UM 989 remand can consider only the single issue of the Trojan investment baseline as of October 1, 2000, and that even that issue is out of bounds. Apparently, PGE proposes a "no issue" rate case as the UM 989 remand. Again, PGE contradicts itself and seeks to gain benefit by reversing the prior position it relied upon and benefitted from.

PGE (p. 4) then demands that PGE already knows all the facts, so no evidentiary hearing is needed. PGE claims that OPUC Order No. 02-227 had no rate impact whatever. This is a repeat of an argument PGE made to the Oregon Supreme Court in ***Dreyer***--that the effects of a given rate order are superseded by the next rate order and thus rendered moot. The Court in ***Dreyer*** dismissed PGE's contention with some degree of vehemence.

> PGE's argument fails on a number of grounds. * * * Furthermore, PGE fails to acknowledge that the "unchallenged" [subsequent] rate orders do not address in any manner the rate treatment of Trojan. Those orders retained the rate treatment that previously had been approved (and thereafter was excluded from the decision-making process), at least in part because the two prior orders that had decided the issue were in the courts on appeal.

341 Or at 280-81. Further, it is obvious that OPUC Order No. 02-227 had rate impacts, and those impacts were expressly addressed in UM 989 in the "net benefits analysis" and otherwise.

Regarding NEIL rebates, PGE (p. 5) claims that "the amount PGE received as a result of the NEIL insurance was disclosed and confirmed in UM 989." However, the impact on rates of OPUC Order No. 02-227 depends on the amounts of NEIL rebates PGE has received after the close of the UM 989 record. OPUC Order No. 02-227 allowed PGE to retain 45% of all NEIL rebates, whether received prior to the close of the UM 989 record or later. Discovery is needed to determine the extent of any later rebates. At the Phase 1 hearing, PGE witness Patrick Hager admitted that PGE did later receive "some settlements" from NEIL but denied that he knew the amounts. TR 262-63.

PGE (p. 5) then offers a bizarre argument that additional evidence in the UM 989 remand is precluded, because the Commission in OPUC Order No 02-227 took official notice of testimony in UE 88. So what? An important issue for "Phase 3" is the appropriate baseline of Trojan investment. The Court of Appeals remanded UM 989 to the Commission to address all of the issues raised on appeal and cross-appeal. The appropriate baseline was raised on appeal and is thus a proper issue on remand.

PGE then attempts to refute the "no ending point" argument by again referring to its "rate order superseded" argument rejected by the Oregon Supreme Court in ***Dreyer*** and discussed above. As for our "no starting point" argument, the Commission itself in OPUC Order No. 04-597 (p. 6) states that the UM 989 remand proceeding would be undertaken subsequent to the decision to be rendered by the Commission in the UE 88 remand proceeding (now known as "Phase 1"). That order states that the Commission would "revisit rate determinations made in UE 88 * * *, with subsequent reconciliation of the revised rate determinations against rates established in other dockets, such as UM

989, if necessary." The order does not refer to "simultaneous reconciliation," which is what PGE now demands. In addition, the ALJ Ruling (p. 16) adopted by OPUC Order No. 04-597 expressly stated that the UM 989 issues would be addressed in "a later phase," coming after "determinations in the first phase" have been made. But now PGE demands that the UM 989 remand ("Phase 3") take place before the Phase 1 determinations are made. The ALJ Ruling also stated (p. 19) that "reconciling the results of Phase 1 with actual rates and adjusting rates, to the extent necessary, shall be addressed in future phases," again calling for a decision in Phase 1 to precede the addressing of the subsequent phases.[4] Again, PGE did not appeal this Commission order, and the Commission has not modified it. Yet, PGE now demands that the Commission ignore it and decide something else entirely.

Note that PGE (pp. 5-6) does not deny that Phase 3 has no starting point. Instead, says PGE, the parties should be required to "address multiple interdependent issues." This is entirely contradicted by PGE's own policy witness in Phase 1, Pamela Lesh, who stated (TR 164):

> We typically do not file cases multiple ways. Rate cases are complicated as it is; they contain forecasts for many, many elements of revenue requirement. And it is normal to choose one coherent theme and file on that basis. It is not normal to ask -- file multiple options.

Thus, PGE is against filing rate cases in multiple ways yet now insists that it is perfectly fine to conduct the Phase 3 contested case with no discernible starting point, which will necessarily require the parties to, as PGE now puts it, "address multiple interdependent issues."

We urge the Commission to follow its own adopted Order No. 04-597 and decide Phase 1 and Phase 2 (UE 88 and refund authority) before proceeding with the UM 989 phase.

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4. Back in 2004, Phase 1 included the determination of the Commission's authority to order refunds or rate reductions. It was only in 2007 that the Commission started calling that determination "Phase 2."

III. CONCLUSION.

Finally, PGE (p. 7) refers to the "quagmire of piecemeal Trojan litigation." They also used this term at the January 14, 2008, hearing before Judge Lipscomb in Marion County Circuit Court. The judge responded that one who makes a mess should not be heard to complain about it.[5] PGE could have ended the quagmire at any time by complying with ORS 757.355. PGE could have avoided the quagmire of UM 989 following UE 88 by not demanding that UM 989 occur and that the Commission change the rate treatment for Trojan investment. PGE can end the quagmire at any time by giving back the unlawful collections, with appropriate interest.

Dated: January 29, 2008

Respectfully Submitted,

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5. We will provide his exact words, when the transcript arrives.

CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 8 copies of the foregoing by email to the Filing Center and by mail, postmarked this date, and that I served a true copy of the foregoing REPLY OF UTILITY REFORM PROJECT, ET AL. REGARDING PREHEARING CONFERENCE REPORT and REPLY OF CLASS ACTION PLAINTIFFS RE: MOTION TO REINSTATE SCHEDULE by email to the physical and email addresses shown below, which comprise the service list on the Commission's web site as of this day (email service only to those who have waived physical service).

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