# 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)**

# APPLICATION FOR RECONSIDERATION OF OPUC ORDER NO. 04-597 BY UTILITY REFORM PROJECT, ET AL. AND THE CLASS ACTION PLAINTIFFS

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Pursuant to ORS 756.661 and 860-014-0095, the Utility Reform Project (URP) and the Class Action Plaintiffs (Morgan, Gearhart, and Kafoury Brothers, LLC) hereby apply for reconsideration of OPUC Order No. 04-597.

This application is timely filed within 60 days of the date of service of the order, which was October 21, 2004.

We address the elements of OAR 860-014-0095(2) below, with the subsections identified with underlined headings. We have combined elements (B) and (E).

**(A) THE PORTION OF THE CHALLENGED ORDER WHICH THE APPLICANT CONTENDS IS ERRONEOUS OR INCOMPLETE.**

The erroneous portion of the challenged order is the portion which concludes that the Commission has the authority, upon remand from the courts of successful challenges to prior OPUC orders, to recognize for ratemaking purpose new costs which were not included in the original OPUC orders. The order is erroneous and unlawful, because the only lawful function of the Commission, upon the remands from the courts, is to calculate the prior unlawful charges and to return those funds, with appropriate interest, to those who paid them.

**(B) THE PORTION OF THE RECORD, LAWS, RULES, OR POLICY OF THE COMMISSION RELIED UPON TO SUPPORT THE APPLICATION.**

**(E) ONE OR MORE OF THE GROUNDS FOR REHEARING OR RECONSIDERATION SET FORTH UNDER SECTION (3) OF THIS RULE.**

OAR 860-014-0095(3) states:

> The Commission may grant an application for rehearing or reconsideration if the applicant shows that there is:
>
> (a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
>
> (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
>
> (c) An error of law or fact in the order which is essential to the decision; or
>
> (d) Good cause for further examination of a matter essential to the decision.

Discussion addressing OAR 860-014-0095(2)(b) and (e) follows. We believe that OPUC Order No. 04-597 qualifies for reconsideration under subsections (b), (c) and (d) of OAR 860-014-0095 (3).

**DISCUSSION OF GROUNDS: THE COMMISSION IS ACTING OUTSIDE THE MANDATE OF THE COURT.**

By order dated November 3, 2003, the Marion County Circuit Court remanded OPUC Order No. 93-1117 and OPUC Order No. 95-322 to the OPUC (Marion County Circuit Court Nos. 94C 10372, 94C 10417, 95C 11300, and 95C 12542) [hereinafter the "DR 10/UE 88 Remand Order"]. The order of remand required the OPUC to conduct "further proceedings consistent with the opinions and orders of the Court of Appeals."

By order dated November 7, 2003, the Marion County Circuit Court remanded OPUC Order No. 02-227 to the OPUC (Marion County Circuit Court No. 02C 14884) [hereinafter the "UM 989 Remand Order"]. The order 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.

On January 28, 2004, the Court issued its judgment in No. 02C 14884, ordering the OPUC to conduct "further proceedings consistent with the Opinion and Order of this Court." That judgment is in effect and has not been stayed upon appeal.

ORS 756.568 authorizes the Commission to "rescind, suspend or amend any order made by the commission." This statute does not state that the Commission has "authority to reopen the record and consider all evidence," as PGE asserts. Nor is ORS 756.568 applicable to this remand proceeding. The remand orders do not direct the

Commission to "rescind, suspend or amend any order made by the commission." Instead, they direct the Commission to return the unlawful charges to those who paid them (UM 989 Remand Order) or to undertake a proceeding consistent with the decisions of the appellate courts (DR 10/UE 88 Remand Order), as further discussed below. Neither of the remand orders call, either directly or indirectly, for a general reexamination or reopening of PGE costs during any past period.

The remand orders to the Commission do not ask the Commission to engage in ratemaking. The Commission can comply with the court's January 28, 2004, Judgment (incorporating its Opinion and Order) by quantifying the unlawful past Trojan charges and returning those funds (with interest) to those who paid them. The Commission can violate the Judgment by engaging in the open-ended ratemaking inquiry that PGE now urges.

The same court's earlier DR 10/UE 88 Remand Order is more generic and calls upon the Commission to conduct a proceeding consistent with the orders of the courts. Since the orders of the courts (all the way up to the Oregon Supreme Court and back) involved only whether it was lawful for PGE to charge Trojan return on investment to ratepayers, a Commission proceeding consistent with those orders would address how to return the unlawful charges to those who paid them. It would not be consistent with the orders of the courts for the Commission to address issues that were not decided by the courts in the appeals, such as whether PGE can dredge up some old costs in order to retroactively "justify" charging the unlawful rates adopted by the Commission in the UE 88 and UM 989 dockets.

The Commission is bound by the mandates of the appellate courts. It cannot take "new" evidence on settled factual issues for a number of reasons, including waiver by PGE and the law of the case doctrine established by the appellate orders. Thus, PGE is bound by the factual record it previously made (in 1995 and 2000) as to its revenue

requirements. Those phases of UE 88 and UM 989 are long-since closed, and no court has ordered a re-examination of the factual records. PGE filed no appeal of the OPUC's final order in either case.

Now that the reviewing courts have instructed the Commission on the law, it must now apply the law to the existing record and disallow all costs based on return on Trojan as unlawful and *ultra vires*.

## I. A REMAND DOES NOT AUTHORIZE TAKING OF NEW EVIDENCE NOT PERTINENT TO UNWINDING THE UNLAWFUL ACT.

In ***Bank of Commerce v. Ryan***, 157 Or 231, 234, 69 P2d 964, (1937), the Oregon Supreme Court considered a case where it had earlier reversed a dismissal by the trial court of a mortgage foreclosure action and remanded. Upon remand, the plaintiffs sought to introduce at the trial court new evidence of the dissolution of the bank defendant, which the trial court declined to consider. Plaintiffs appealed again.

In the second appeal, The Oregon Supreme Court explained why such different evidence would have been improper:

> It is elementary that upon the remand of this cause to the circuit court by us it was the duty of the former to obey the mandate; otherwise litigation would never end. ***Simmons v. Washington F. N. Ins. Co.***, 140 Or 164, 13 P(2d) 366; 3 AMJUR p 732, § 1236. Therefore, it was the duty of the circuit court to determine the amount of taxes which the appellants had paid, direct the plaintiff to pay that amount to them, and enter a decree foreclosing the mortgage against all. That the court did in the decree which is now under attack. The appellants contend, however, that they discovered after our decision that the plaintiff had been dissolved and that, hence, it was their duty after making this discovery to call the court's attention to it so that it would not enter a decree in favor of a mere name. But the record clearly indicates that on May 16, 1935, during the trial which resulted in the decree which became the subject-matter of the first appeal, the defendants were fully aware of the liquidation of the plaintiff's business by the superintendent of banks, and of the proceedings in the circuit court attendant thereon. In fact, they offered in evidence, for another purpose, the final report of the bank superintendent's administration of the affairs of the insolvent bank. Appellants' counsel, referring to the report, said: "I will introduce that to show the liquidation and disposition of the assets." We believe that the appellants were as well aware of the facts during the first trial as when they

offered for filing the tendered answer. Therefore, if the liquidation involved dissolution, the issue should have been incorporated in the first trial.

Here, PGE in UE 88 and UM 989 had every opportunity to present evidence pertaining to its cost of service, and all such evidence should have been incorporated into the original factfindings before the Commission. One such fact was the uncertainty that Oregon law would allow PGE to charge Trojan profits to ratepayers, particularly in light of ORS 757.355. In proceeding in the manner it did, filing ratecases and charging and collecting for Trojan return on investment without finality to the DR-10 Order No. 93-1117, PGE took a risky path, as "action taken in reliance upon a lower court decree ordinarily is at the risk that it will be reversed on appeal." ***Harvey Aluminum v. School District No. 9***, 248 Or 167, 172, 433 P2d 247, 250 (1967). PGE could have presented evidence that this uncertainty was somehow causing it to suffer in the financial markets, thereby warranting a higher authorized rate of return. And the Commission could have accepted such evidence and have made findings of fact and conclusions of law consistent with it. But that did not happen.

## II. PGE HAS WAIVED ITS RIGHTS TO PRESENT DIFFERENT EVIDENCE ON REMAND.

### A. PGE HAS LONG-SINCE WAIVED ITS OPPORTUNITY TO CHANGE THE FACTUAL RECORD.

Moreover, PGE waived introducing such evidence by choosing to present the rate case it did. Examples of such waiver are numerous and applied in courts in every jurisdiction. In ***Barratt American, Inc. v. Transcontinental Ins. Co.***, 125 Cal Rptr2d 852, Cal App4 Dist (2002), the liability insurer's failure to appeal from a determination that it owed a duty to defend the entire action against an additional insured waived its right to challenge that determination in the remanded proceeding. In ***Eline v. Commonwealth Life Ins. Co.***, 126 SW2d 1103 (Ky 1939), a defendant was precluded at retrial from offering material defenses which had been withdrawn from his answer in

the previous trial. In ***Bassett v. Shepardson***, 24 NW 182 (Mich 1885), defendant was not allowed, at his second trial after remand, to attack the validity of plaintiff's appointment as administrator, because such defense had been available to him at the former trial.

### B. WAIVER OF CHALLENGE TO FACTS AND LACK OF CHALLENGE TO REASONABLENESS BY PGE ESTABLISHES THE LAW OF THE CASE.

In Oregon, the doctrine of "waiver" is sometimes referred to as part of the doctrine of "the law of the case." The law of the case doctrine generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case. If the facts were known and could have been litigated [***Bank of Commerce v. Ryan***, *supra*], or if there has been no material changes in the facts since the prior appeal, such factual issues may not be relitigated in the trial court or re-examined in a second appeal. PGE waived presenting the "new" evidence at the factfinding level. Since no party challenged the facts underlying the reasonableness of the revenue requirement on appeal, the evidence already presented has become conclusive under the law of the case.

Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case. Such holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. The failure of a party to challenge a trial court's ruling or to brief a particular issue on appeal results in a waiver of that issue. This is black letter law in Oregon and every reported jurisdiction.

> All questions which could have been raised and adjudicated on that appeal are *res adjudicata*. 3 Cyc 398; ***Smith v. Seattle***, 20 Wash 613, 56 Pac 389; ***Smyth v. Neff***, 123 Ill 310, 17 NE 702; ***Dilworth v. Curts***, 139 Ill 508, 29 NE 861.

***Hanley v. Combs***, 60 Or 609, 610, 119 P 333 (1911).

The law of the case doctrine is not an historical artifact. In ***Washer v. Clatsop Care and Rehabilitation District***, 98 OrApp 232, 235, 778 P2d (1989), the Court endorsed the principle:

> Questions that could have been raised and adjudicated on appeal are deemed adjudicated. ***City of Idanha v. Consumer's Power***, 13 OrApp 431, 509 P2d 1226 (1973). Plaintiff, as appellant, could have contended on appeal that the ruling striking his claim for pre-formation expenses was error. Because he did not do so, the ruling became the law of the case.

In ***City of Idanha v. Consumer's Power***, 8 OrApp 551, 495 P2d 294 (1972), the appellate court had ruled that plaintiff city had legal authority to enact an ordinance imposing license fees on public utilities operating within the City but that the City could not forbid the utility from passing the tax onto its customers. On remand, the utility argued for the first time that it was prohibited by a federal statute from increasing its rates in order to pay the tax imposed. On the second appeal**, *City of Idanha v. Consumer's Power***, 13 OrApp 431, 434, 509 P2d 1226 (1973), the Oregon Court of Appeals held:

> Even if we were to assume for purposes of argument (a) that the only way defendant can pay the tax is by increasing its rates to Idanha customers, and (b) that defendant is correct in its interpretation of the cited federal statutes, this is a defense which defendant could have made in the trial court in the original proceeding (and thence on appeal to this court), but did not. All questions which could have been raised and adjudicated on appeal are deemed adjudicated. ***William Hanley Co. v. Combs***, 60 Or 609, 119 P 333 (1912).

**The rule is the same in administrative review cases--where an appeal is taken with respect to only a particular issue or issues, there can be no retrial after remand of issues previously tried and determined but not appealed from.** The failure of a party to take a cross-appeal as to other elements of the agency decision (not included as an issue on appeal by the appellant) will foreclose appellate consideration of the aspect of the agency decision as to which no appeal was taken.

***Hitt v. State of Alabama Personnel Board***, ___ Ala __, 873 So 2d 1080, 1088 (2003), offers a relevant example. The case arose as an appeal of an agency order. After the State Personnel Board failed to act on the former employees' request for computation of benefits, the employees sought judicial review of the administrative action. As is the case in review of OPUC decisions, the first level of review of the Board decision required the parties to the agency proceeding to become plaintiffs in circuit court. Upon the trial of the issue to the first level of review, the trial court ordered a benefit calculation and the State appealed the part of the order allowing prejudgment interest. The judgment of the trial court was reversed as to that portion of the judgment. On remand, the employees sought to open other determinations of the trial court which had not been the subject of the appeal. The Alabama Supreme Court reaffirmed that:

> "`In cases where an appeal is taken with respect to only a particular issue or issues, there can be no retrial after remand of issues previously tried and determined but not appealed from. ***Sewell Dairy Supply Co. v. Taylor***, 113 GaApp 729, 149 S.E.2d 540 (1966) * * *.'" ***Eskridge v. Allstate Ins. Co.***, 855 So2d 469, 472 (Ala 2003) (quoting ***Ex parte Army Aviation Ctr. Fed. Credit Union***, 477 So2d 379, 380-81 (Ala 1985)).
>
> Failure of a party to take a cross-appeal as to an adverse aspect of the judgment appealed, but not included as an issue on appeal by the appellant, will, under circumstances such as those presented here, foreclose appellate consideration of the aspect of the judgment as to which no appeal was taken. *See* ***Cavalier Mfg., Inc. v. Clarke***, 862 So2d 634, 643 (Ala 2003).

## III. UNDER THE OREGON AND U.S. CONSTITUTIONS, OVER 800,000 OVERCHARGED PRESENT AND FORMER PGE RATEPAYERS HAVE A PRESENTLY VESTED RIGHT TO RETURN OF MONIES CHARGED TO THEM FOR TROJAN RETURN ON INVESTMENT.

On December 14, 2004, the Marion County Circuit Court allowed the Class Action Plaintiffs (who are also parties in this docket and are seeking reconsideration of the instant order) Gearhart, Morgan and Kafoury Brothers, LLC, to proceed as class representatives and certified a class consisting of all PGE current and former ratepayers who paid rates, on or after April 1, 1995, which included a return on the

Trojan investment (consolidated Marion County Circuit Court Case Nos. 03 C10639 and 03 C10640).[1] The Marion County Circuit Court also on December 14, 2004, granted to plaintiffs summary judgment on the issue of liability for money damages under two different theories:

1. Plaintiffs can recover from PGE the unlawful charges, pursuant to ORS 756.185; and

2. All unlawful charges collected by PGE must be returned under restitutionary principles of money had and received.

The class members, who include all present and former PGE ratepayers who have paid the unlawful Trojan profits, have a vested right to the return of those funds or to damages in an amount based on those funds. The OPUC does not have authority to remove or impair this right, retroactively, by changing the amounts which are due in restitution or indirectly acting in a legislative manner to eliminate vested rights. "Retroactive application of a change in the law may be invalid for depriving a litigant of due process in the literal sense of an opportunity to adjudicate an existing claim * * * ." ***Hall v. Northwest Outward Bound School, Inc.***, 280 Or 655, 661-663, 572 P2d 1007, 1011 (1977).

Even if ratemaking is considered a quasi-legislative function, a legislative body cannot change vested rights. ***State ex rel. Bayer v. Funk***, 105 Or 134, 209 P 113, 25 ALR 625 (1922). The general rule is that substantive legal rights may not be retroactively impaired, once vested, and vesting occurs "when it is actually assertable as a legal cause of action or defense," ***Hall v. A.N.R. Freight System, Inc.***, 717 P2d 434 (Ariz 1986). A cause of action which has accrued, and in fact reached success at summary judgment--such as the claims of Gearhart, Kafoury Brothers and Morgan and the class--are such vested rights which cannot be destroyed.

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1. This period is known as the Trojan Return on Investment Period (TRIP).

> [T]heir right to such compensation, having accrued while the act was in force, cannot be destroyed by subsequent legislation without a violation of the rights guaranteed by the 14th Amendment.

***Ettor v. City of Tacoma***, 228 US 148, 150, 33 SCt 428, 428 (1913).

An Oregon case on point is ***Fisk v. Leith***, 137 Or 459, 299 P 1013 (1931), which holds that an electric utility's cause of action for interference with its statutory right to engage in business could not be destroyed by subsequent legislation. The plaintiff was an electric utility claiming that it was entitled to operate without competition under the "pioneer utility" statute. The Legislature repealed the statute while the action was pending. The Oregon Supreme Court held the utility was entitled to seek damages for the unlawful competition which had existed under the state of the law until the statute was repealed on the grounds that the utility's rights to sue under then-existing law had vested:

> In the instant case the statute repealed conferred upon the plaintiff a right as distinguished from a remedy. It protected the plaintiff public utility company from competition by other public utilities in the same territory until the Public Service Commission issued to them a certificate of public convenience and necessity. This statutory right thus to engage in business was a property asset--a vested right--and, a cause of action having accrued by reason of interference therewith, such could not be destroyed by subsequent legislation. The cause of action which accrued prior to the repeal of the statute is property in the same sense in which tangible things are property, and its destruction would amount to the taking of property without due process of law. COOLEY'S CONSTITUTIONAL LIMITATIONS (8th Ed) vol II, p 756.

137 Or at 463.

Further, the class action plaintiffs cannot be deprived of their remedies for the unlawful overcharges, as such deprivation would violate the Contract Clause of the Oregon and U.S. Constitutions. A legislature cannot repeal a law or pass a retroactive law that impairs obligation of contracts or interferes with vested contract rights. Oregon Const. Art. 1, § 21; US Const. Art. 1, § 10, cl 1.

***Hughes v. State***, 314 Or 1, 13-14, 838 P2d 1018 (1992), instructs that there is a two-part test in determining whether state action violates the impairment of contract

clause. First, it must first be determined whether a contract exists to which the person asserting an impairment is a party. Second, it must be determined whether state action impairs the obligations of that contract. In this case, all overcharged ratepayers have an implied-contract right to have the illegal charges they paid to PGE returned to them. Their right to money had and received has matured, and the legal right has been determined upon summary judgment in their favor. Any action by the Commission seeking to retroactively eliminate or reduce the amounts owed by PGE to its customers most certainly impairs these contractual rights. Thus, any such Commission action would be invalid under the Oregon and U.S. Constitutions.

Further and additionally, the scoping order seeks to retroactively eliminate a common law remedy currently available to the Class Action Plaintiffs and the class members in violation of Oregon Constitution, Article I, § 10, which guarantees those remedies which existed at common law and were established when Oregon adopted its constitution. See generally, ***Smallwood v. Fisk***, 146 Or App 695, 934 P2d 557 (1997). The contract-type remedy of an action for money had and received for sums taken under a reversed order were historically established at the time the Oregon Constitution was adopted. Any interference with the class members' rights to recover the money taken under the DR 10, UE 88, or UM 989 orders thus violates Article I, § 10 of the Oregon Constitution.

## IV. SEEKING TO ESTABLISH A NEW EVIDENTIARY BASIS FOR THE UNLAWFUL CHARGES WOULD CONSTITUTE ILLEGAL RETROACTIVE RATEMAKING.

The Commission and utilities often contend that Oregon law does not allow "retroactive ratemaking" and that this bar somehow prevents the Commission from returning previous unlawful charges to ratepayers. The doctrine, if applicable in Oregon, does not have that consequence, because an OPUC rate order, if challenged

in the courts, is only provisionally lawful until the courts have issued their final decisions.

Here, the Oregon courts have issued their final decisions, concluding as a matter of law that the rates charged by PGE during the Trojan Return on Investment Period (TRIP) were unlawful. The Commission itself in OPUC Order No. 04-597 characterized the decisions as establishing that the "Commission had exceeded its legislative authority" in allowing PGE to charge ratepayers for a return on Trojan investment during that period. An order which exceeds the legislative authority of an agency, and which is found to be unlawful by courts, is *void ab initio*.

### A. THE UNLAWFUL CHARGES FOR TROJAN RETURN ON INVESTMENT WERE *VOID AB INITIO*.

***Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon***, 154 Or App 702, 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (November 19, 2002) [hereinafter ***CUB/URP v. OPUC***] determined that the charges for return on investment for Trojan were unlawful. Once the courts overcame the *prima facie* validity, those charges under OPUC rate orders were unlawful to the extent they violated ORS 757.355. OPUC Order No. 95-322 (and subsequent orders) could never have lawfully included charges based on a return on investment for Trojan, as such charges have been unlawful in Oregon since 1978. As the Court of Appeals held: "* * * *ORS 757.355 precludes PUC from allowing rates*, of the kind its orders here would allow, *that include a rate of return on capital assets that are not currently used for the provision of utility services* * * *." Thus, the charges were in excess of any and all lawful charges, and PGE in charging those rates engaged in conduct unlawful under ORS 757.355.

The fact that PGE continued to charge those rates, pending the appeal of OPUC Order No. 95-322, does not make the charges retroactively lawful. It means that it was lawful for PGE to collect the money **at the time**. It does not mean it is lawful for PGE to

now **keep** the money, after those specific charges (Trojan return on investment) have been ruled unlawful by the courts. Instead, the situation only illustrates that PGE collected the amounts at its own peril, since it was aware that the appeal sought to "modify, vacate or set aside" the "conclusions of law or order" pursuant to ORS 756.580(1) and 756.598(1).

Thus, the unlawful charges are now void *ab initio*. As one court has held, "rates which are found to be excessive are then considered to have been illegal from the outset, and are not considered to have been illegal only as of the date on which the court has found them to be so." ***State ex rel. Nantahala Power & Light Co.***, 313 NC 614, 332 SE2d 397, 472 (1985). *Accord*, ***PSC Nevada v. Southwest Gas Corp.***, 99 Nev 268, 662 P2d 624, 627-28 (1983).

The North Carolina Supreme Court approved refunds of utility overcharges arising from illegal charges for construction work in progress (CWIP) on a nuclear plant. It noted:

> [Prohibited] Retroactive rate making occurs when, `* * * the utility is required to refund revenues collected, pursuant to the then lawfully established rates, for such past use.' * * * *The key phrase here is `lawfully established rates.' A rate has not been lawfully established simply because the Commission has ordered it. If the Commission makes an error of law in its order from which there is a timely appeal the rates put into effect by that order have not been `lawfully established' until the appellate courts have made a final ruling on the matter.*

***State ex rel Utilities Commission v. Conservation Council of N.C.***, 312 NC 59, 320 SE2d 679, 685 (1984) (emphasis supplied).

An appealed PUC order is not "final" for ratemaking purposes until after full judicial review. "[Until judicial review is completed, utilities are subject to refund orders, if the rates are ultimately determined to be unlawful." ***Farmland Industries v. PSC***, 29 KanApp2d 1031, 1039, 37 P3d 640 (2001); ***Kansas Pipeline Partnership v. Kansas Corporation Comm'n,*** 24 KanApp2d 42, Syl ¶ 9, 941 P2d 390, *rev. denied* 262 Kan

961 (1997); ***California Mfrs. Ass'n v. PSC, et al.***, 24 Cal3d 251, 155 Cal Rptr 664, 595 P2d 98, 103 (1979) (order must be "annulled"). "[A]mounts collected by a utility pending appeal enjoy no unique immunity from the claims of those to whom they rightfully belong." ***Northwestern Bell Tel. Co. v. State***, 299 Minn 1, 22-30, 216 NW2d 841, 858 (1974).

An appealed rate order is only *prima facie* valid and does not provide a "shield" of lawfulness after its validity is conclusively overcome by court decision. Its validity is a rebuttable presumption, a rule of evidence, not a substantive shield from later suit for overcharges. When a rate order is appealed under ORS 756.580-.610, it is *prima facie* valid "until found otherwise * * *." ORS 756.565. The statute does not state that the order **is** valid. It says only that it is **assumed** to be valid, with that assumption subject to challenge.

In ***Oregon-Washington R. & Nav. Co. v. McColloch***, *supra*, the Oregon Supreme Court rejected the idea that Oregon law provided the same substantive remedies for utility overcharges as those provided in the Interstate Commerce Act, but the Court later approvingly cited federal precedent that orders of the regulatory body were merely *prima facie* valid, and subject to only a **presumption** of lawfulness:

> The provision in section 16 of the [ICC] Act that, 'the findings and order of the Commission shall be prima facie evidence of the facts therein stated' has been held by the Supreme Court only to establish a rebuttable presumption. `It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law.' ***Meeker v. Lehigh Valley R. Co***.,

> 236 US 412, 35 SCt 328, 59 LEd [644], 659 [Ann Cas 1916B, 691][2]; [and numerous citations].

***McCulloch***, 153 Or at 53-54. The principle adopted in ***McColloch*** remains essentially unchanged: In ***United Gas Improvement Co., v. Callery***, 382 US 223, 229, 86 SCt 360, 364 (1966), an order of the Federal Power Commission "which never became final, has been overturned by a reviewing court," and refunds were ordered:

> Here the original certificate orders were subject to judicial review; and judicial review at times result in the return of benefits received under the upset administrative order.

In ***Ring v. Metropolitan St. Louis Sewer Dist.***, 969 SW2d 716 (Mo 1998), taxpayers timely brought a later class action suit for refund of monies all funds paid under unconstitutional charges to a metropolitan sewer district after an ordinance imposing the fees had been ruled unconstitutional in an earlier case.[3] Such voiding of illegal rates and subsequent suits by ratepayers to recover the unlawful charges paid is hardly surprising or unique. It is the usual rule of law in Oregon that substantive or procedurally defective laws and orders are null *ab initio*.

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2. In ***Meeker & Co. v. Lehigh Valley R. R.***, 236 US 412, 430, 35 SCt 328, 335, 59 LEd 644 (1915), the United States Supreme Court explained:

> > It is also urged, as it was in the courts below, that the provision in §§ 16 that, in actions like this, 'the findings and order of the Commission shall be prima facie evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law. This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in any wise work a denial of due process of law. In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained [citations omitted] as have many other state and Federal enactments establishing other rebuttable presumptions.

3. ***Beatty v. Metropolitan St. Louis Sewer District***, 867 SW2d 217 (Mo 1993). The court held that the Metropolitan St. Louis Sewer District had violated Article X, § 22(a) of the Missouri Constitution in adding a charge.

Ratesetting is a "legislative function." ***American Can v. Lobdell***, 55 Or App 451, 461, 638 P2d 1152, 1159 (1982). In Oregon (and under the federal constitution), a successfully challenged legislative act is void *ab initio*.[4]

> The effect of declaring a statute unconstitutional--whether on substantive or procedural grounds--is to render it void *ab initio*. *See, e.g.*, ***State v. Hays***, 155 Or App 41, 48, 964 P2d 1042, *rev den* 328 Or 40, 977 P2d 1170 (1998), *cert den* __ US__ 119 SCt 2344, 144 LEd2d 240 (1999) (statute declared unconstitutional was void *ab initio*).

***State v. Grimes***, 163 Or App 340, 348, 986 P2d 1290, 1294 (1999).

Unconstitutionally collected taxes are void *ab initio*. After the United States Supreme Court held that a state taxing system unconstitutionally discriminated against federal retirees, ***Davis v. Michigan Dept. of Treasury***, 489 US 803, 817, 109 SCt 1500, 103 LEd2d 891 (1989), Oregon federal retirees sued to recover the state income taxes they had paid on retirement benefits. ***Vogl v. Dept. of Rev.***, 327 Or 193, 960 P2d 373 (1998).

Local governmental acts in violation of governing rules are void *ab initio*. ***Sanchez v. Clatsop County***, 146 Or App 159, 932 P2d 557 (1997) (lien recorded in violation of ordinance nullity); ***Western Savings Co. v. Currey,*** 39 Or 407, 411, 65 P360 (1901) ("Defendant thus violated its own ordinance. That violation rendered the liens void *ab initio*."). Amounts collected under county orders later found to be unlawful are credited to the wronged party. ***Hilton v. Lincoln County***, 178 Or 616, 623-624, 169 P2d 329, 332 (1946). PGE itself has availed itself of this principle: in ***Portland General Elec. Co. v. City of Estacada,*** 194 Or 145, 241 P2d 1129 (1952), PGE successfully

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4. The effect of voiding a statute is so complete that the slate is wiped clean. In a criminal case, the defendant may be granted a new trial, because the prosecution was based on a statute voided *ab initio*. But because all acts thereunder are voided, the constitutional prohibition against double jeopardy does not apply, and the State may retry the defendant. ***State v. Metcalfe***, 328 Or 309, 314, 974 P2d 1189, 1192 (1999); ***City of Lake Oswego v. $23,232.23***, 140 Or App 520, 916 P2d 865 (1996).

challenged annexation of lands including its power plant on ground that annexation proceedings were void *ab initio*, as instituted for the sole purpose of taxing its property.

Defective agency orders are also void *ab initio*. ***State v. Benner***, 81 Or App 613, 613, 726 P2d 1209, 1209 (1986) (license suspension void *ab initio* for defective notice); ***Safeway Stores v. State Bd. of Agriculture***, 198 Or 43, 53, 255 P2d 564, 569 (1953) ("Surely, if the findings of fact do not support an order which is challenged by a writ of review, the reviewing court must vacate the order.")

### B. UPON REMAND OF AN UNLAWFUL ORDER, THE COMMISSION CANNOT NOW ACCEPT NEW EVIDENCE IN ORDER TO ESTABLISH NEW RATES RETROACTIVELY.

Left with no legal basis for charging Trojan profits to ratepayers under the orders adopted in DR 10, UE 88, and UM 989, PGE and/or the OPUC Staff now seek to offer new evidence for the purpose of providing some other basis for charging those same amounts of money to ratepayers. The Commission in OPUC Order No. 04-597 has concurred with this strategy. But allowing such evidence, and adopting new findings based on such evidence, would constitute classic "retroactive ratemaking."

The Commission now proposes to allow PGE to introduce new evidence to establish a basis for charging new or different costs to ratepayers than was authorized by any previous OPUC rate order and to have those new or different costs recognized in rates for a period that occurred in the past (the Trojan Return on Investment Period). This is the classic "retroactive ratemaking" that is barred under the doctrines espoused by this Commission.

> In substance, the prohibition against retroactive ratemaking precludes inclusion in rates of costs related to a past service, unless expressly authorized by the legislature. Letter of Advice dated March 18, 1987, to Charles Davis, Public Utility Commissioner (OP-6076). ORS 757.140(2) and ORS 757.259 are express legislative exceptions to that principle.

Attorney General Opinion OP-6454 (1993).[5]

**(C) THE CHANGE IN THE ORDER WHICH THE COMMISSION IS REQUESTED TO MAKE.**

The change sought by this Application for Reconsideration is for the Commission to adopt the scope of the proceeding proposed by URP and the CAPs, which includes these functions:

(1) calculating the unlawful charges paid by PGE ratepayers;

(2) determining an appropriate rate of interest to apply to the unlawful charges, from the time they were imposed upon ratepayers;

(3) devising the most efficient method for returning these sums to ratepayers, including persons and businesses who are no longer customers of PGE; and

The Commission would then order PGE to implement the remedy as soon as possible.

**(D) HOW THE APPLICANT'S REQUESTED CHANGES IN THE ORDER WILL ALTER THE OUTCOME.**

The requested change would alter scope and schedule of the remand proceeding. The parties would be allowed to submit only evidence pertaining to the 3 matters listed above.

The ALJ's Ruling, as fully affirmed and adopted by OPUC Order No. 04-597, does not establish any limitations on the scope of the remand proceeding. First, it does not even address the scope of the remand proceeding. Second, it uses the term "at least" when describing the issues that may be raised. There is no ordering language in any way limiting the scope of the "ratemaking" issues.

Dated: December 20, 2004

Respectfully Submitted,

*Daniel Meek*

5. The Oregon courts subsequently found that ORS 757.140(2) did not apply to return on investment for the closed Trojan plant, and ORS 757.259 was not applicable at all.

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## CERTIFICATE OF SERVICE

I hereby certify that I FILED THE ORIGINAL and 5 copies of the foregoing APPLICATION FOR RECONSIDERATION OF OPUC ORDER NO. 04-597 BY UTILITY REFORM PROJECT AND THE CLASS ACTION PLAINTIFFS by hand delivery and further that I served a true copy of the foregoing by email to the email addresses shown below, which comprise the service list on the Commission's web site as of this day.

| | |
|---|---|
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Dated: December 20, 2004

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Linda K. Williams