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 MEMORANDUM ON SCOPE OF PROCEEDING, PHASING, AND SCHEDULE BY URP, ET AL., and MORGAN, GEARHART, AND KAFOURY BROTHERS, LLC,**

The Utility Reform Project (URP) and the Class Action Plaintiffs (Morgan, Gearhart, and Kafoury Brothers, LLC) submit this memorandum in response to the Ruling of May 5, 2004 [hereinafter "Ruling"].

I. THE RULING DISREGARDS THE MOST IMPORTANT ISSUE RAISED BY THE PARTIES IN PRIOR MEMORANDA AND CONFERENCES.

In order to avoid a remand proceeding tainted by prejudice and futility, the Commission must at the outset repudiate its position that the "filed rate doctrine" (or any other doctrine) precludes relief for ratepayers from unlawful charges they have paid. That is why URP raised in earlier memoranda its Issue No. 5 (as identified in the Ruling).

The Ruling (p. 8) states:

> URP requested that the question of whether the Commission has the authority to pay refunds, URP's issue number five, be addressed in the first phase of the proceedings. As parties indicate that this issue is likely to be identified in briefing to the Court of Appeals as a legal question on appeal, I am reluctant to prematurely address this legal issue. In any case, I note that URP's underlying concern with regard to this issue relates to implementation of relief and the timing of potential refunds. The fundamental question appears to be, assuming that the Commission orders PGE to pay refunds, when shall PGE implement such refunds? This is an implementation issue that can be addressed in a later phase of these proceedings.

URP's underlying concern is not "when shall PGE implement such refunds." Instead, it is whether the Commission shall maintain its oft-stated and currently held position that it can provide no relief for past charges collected from ratepayers, whether

or not those charges were unlawful. The Commission itself steadfastly maintains that position in the courts.

> Although the Court of Appeals has concluded that the Commission erred in allowing PGE to obtain a return on the Trojan investment, Oregon's statutory scheme, which embodies the filed rate doctrine, does not allow the Commission or the Court to retroactively redress the error.

BRIEF OF THE PUBLIC UTILITY COMMISSION OF OREGON, Marion County Circuit Court Case No. 02 C14884 (UM 989), April 16, 2004. This legal contention occupies a large part of the Commission's most recent briefing to the courts on this issue.[1] The Commission has not repudiated or changed this position.

Considering that the Commission's stated legal position is that it has no legal authority to "redress the error" of unlawful charges to PGE ratepayers, conducting the vast review of PGE costs and revenues suggested by PGE would be a large waste of time and resources. Conducting even the more limited case (the "more ministerial" inquiry of "determining the charges customers paid to PGE for interest on PGE's investment in Trojan"[2]) would also be futile.

The Commission has been consistently unresponsive to the concept of refunds (or any other relief) to ratepayers for the unlawful Trojan return on investment. Unless or until the Commission removes the taint of prejudgment by withdrawing its appeal of the UM 989 Judgment (Marion County Circuit Court No. 02 C14884) and repudiating its express opposition to ratepayer refunds *in the current matter*, this proceeding will be invalidated by the perception and reality of unfairness, bias, and prejudice. For example:

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1. The Commission has postponed its opportunity to again state its position in the courts, having sought a 28-day extension of time (to June 24, 2004) for filing of its opening brief in the appeal to the Oregon Court of Appeals of the Marion County Circuit Court's decision in the UM 989 appeal.

2. The Ruling used the term "interest on PGE's investment on Trojan." The issue involves not just interest but all forms of return on Trojan investment.

1. The Commission has had the remand order from the DR 10 and UE 88 cases before it for over 7 months with no decision yet on the scope of the proceeding or likelihood of any final order until sometime in 2005. Appeals of the Commission's order could take years longer. Every day hundreds of ratepayers who are entitled to relief die, go out of business, or relocate without forwarding addresses.

2. The Commission is currently appealing the Marion County Circuit Court order in UM 989 (and has just recently sought to delay that briefing schedule). In that case (as in many others) the OPUC and PGE have persistently argued to the courts that the "filed rate doctrine" (or the ban on "retroactive ratemaking") makes impermissible any return of money to ratepayers, even if the charges to ratepayers have been unlawful. See, Brief of the Public Utility Commission of Oregon, May 16, 2003 (Marion County Circuit Court No. 02 C14884); Transcript of Proceedings before Judge Paul J. Lipscomb, July 20, 2003 (Marion County Circuit Court No. 02C14884).

3. Tbe Commission has, in its press release dated February 19, 2004, announcing the appeal of *URP v. OPUC* (Marion County Case No. 02 C14884), stated publicly that it would not be ordering refunds or other relief for ratepayers:

> "The Commission will apply the filed rate doctrine until it has a ruling from a court of record, such as the Oregon Court of Appeals or Oregon Supreme Court."

Unless the Commission now declares a new position on this fundamental legal issue, the entire remand proceeding is effectively dead on arrival. Unless the Commission, at the outset of the this remand proceeding, makes a legal determination that relief for past unlawful charges is available for those who paid the unlawful charges, then the entire proceeding is moot and should be so declared.

URP and the Class Action Plaintiffs certainly do not have the resources to engage in a pointless OPUC proceeding with a predetermined outcome. The hearing officer and the Commission itself need to address this issue as soon as possible.

II. THE COMMISSION SHOULD NOT "DETERMINE HOW THE COURTS' OPINIONS IN THE APPEALS OF THESE CASES AFFECT THE RATE DECISIONS MADE BY THE COMMISSION, IN THEIR ENTIRETY" BUT SHOULD BE LIMITED TO THE "MORE MINISTERIAL" INQUIRY OF DETERMINING THE CHARGES CUSTOMERS PAID TO PGE FOR TROJAN RETURN ON INVESTMENT.

This is the question posed by the Ruling, p. 8. It appears to be very similar to URP Issue 6, as identified in the Ruling:

> **6. Can the utility introduce new evidence to justify its rates retroactively?**

No party disputes that the Commission can and should determine the charges customers have paid to PGE for Trojan return on investment and otherwise address URP Issues 1-4, as identified in the Ruling.[3] Only PGE contends that the scope of the proceeding should be much broader and should include "what final determinations the Commission would have made in each of the consolidated dockets if it had known of the legal conclusions later reached by the courts and issued final orders consistent with the opinions and orders of the courts." The PGE Reply Memorandum (April 23, 2004) [hereinafter "PGE Reply Memo on Issues"], pp. 3-4, further urges:

> The governing utility statutes confer upon the Commission authority to reopen the record and consider all evidence relevant to an appropriate remedy. See, e.g., ORS 756.568. Moreover, it is appropriate for the Commission to consider new evidence now that it will be considering ratemaking issues decided in dockets DR 10, UE 88, and UM 989 under a new legal framework, as required by the remand orders.

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 Judgments do not direct the Commission to "rescind, suspend or amend any order made by the commission."

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3. Ruling, p. 8. The PGE Reply Memorandum (April 23, 2004), pp. 1-2, seeks leave for the parties to "present evidence and argument concerning all issues relevant to determining an appropriate remedy, including but not limited to all issues identified by the parties submitting opening memoranda."

Instead, they direct the Commission to return the unlawful charges to those who paid them (January 2004 Judgment) or to undertake a proceeding consistent with the decisions of the appellate courts (November 2003 Judgment), as further discussed below. Neither of the remand orders call, either directly or indirectly, for a general reexamination of PGE costs during any past period.

A. THE COMMISSION SHOULD NOT ENGAGE IN OPEN-ENDED RATEMAKING AND REOPEN THE FACTUAL RECORD OF PAST RATE CASES.

Nor do we agree with PGE's statement that the Commission "will be considering ratemaking issues decided in dockets DR 10, UE 88, and UM 989." Instead, the Commission should consider only the issue of quantifying the unlawful charges which have been paid by ratepayers and the most effective manner of returning the funds (including appropriate interest) to those who paid them. We shall refer to these as the "refund issues."

"Ratemaking" is the process of considering the panoply of asserted utility costs and expected utility revenue and determining rates which are both:

1. reasonable and just (ORS 757.020); and
2. in compliance with substantive statutes pertaining to rates, including ORS 757.355.

Determining the amount of money to return to ratepayers and the method for returning the money are not "ratemaking" issues, as they do not involve an inquiry into the utility's costs for the purpose of setting rates.[4] Addressing these issues (amount and method

4. The only element of possible "ratemaking" embedded in the "refund issues" would be adjusting the rates to current customers to convey to them the value of the unlawful Trojan charges they have paid. This "ratemaking" is not necessary, as the funds could be returned in the form of refund checks (as will necessarily be the case for refunds to customers no longer served by PGE). The scope of the proceeding urged by PGE involves a reexamination of PGE's costs during the past period, presumably commencing April 1, 1995. It is this reexamination of costs that constitutes "ratemaking."

for returning money to ratepayers) does not call for either reopening the factual record of past rate cases or for making new findings of fact based on the existing records.

The remand orders to the Commission do not ask the Commission to engage in ratemaking. 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.

The Commission can comply with the court's 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 remand Judgment (November 2003) 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 certain Trojan investment-related "costs" 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 and judgments of the courts for the Commission now 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.

B. ADOPTING THE BROAD SCOPE ADVOCATED BY PGE WOULD IMPOSE INSURMOUNTABLE BURDENS UPON THE NON-UTILITY PARTIES IN THIS PROCEEDING.

If the Commission adopts the scope of issues urged by PGE, the non-utility parties in this proceeding (URP, et al, and the Class Action Plaintiffs) will have insufficient resources to participate effectively. The burdens on parties with no financial resources (URP) or upon individual residential or small business customers (the Class Action Plaintiffs) would be unmanageable.

The PGE-suggested proceeding could consume many months of attorney time and significant fees for the expert witnesses necessary to examine all of PGE costs over a period of at least 5.5 years. In cases before the OPUC, there is no possibility of recouping fees or costs from the Commission. Nor does it make sense for any one ratepayer to pay counsel to retain experts to participate in the agency proceeding. A ratepayer would have many, many (hundreds of thousands) of "free riders" and no incentive to bear such staggering costs. This lack of any marketplace incentive to mount a case, coupled with the complete unavailability of attorney fees and expert witness fees, undermines the adequacy of representation.

No funds are available for any individual or business customer in OPUC proceedings. OAR 860-017-0050(3), 860-017-0050(4).[5] And the award of funding depends upon a decision by the Commission in each case that considers various subjective factors. Further, post-decision awards of attorney fees and costs are not available for intervenors and attorneys who prevail before the OPUC. Nor are they

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5. The ratepayer group, Utility Reform Project (URP), although an active participant in the entire Trojan saga and in dozens of other OPUC cases since 1985, is not eligible for funding either, as it has not done "other" fundraising, which the Commission has made a prerequisite to receiving intervenor funding. OAR 860-017-0050(3)(b)(D), 860-017-0050(4)(c). In another OPUC "Catch 22," intervenor funding is available only to "organizations" which are already funded by other sources, regardless of past demonstrated *pro bono* success in proceedings when not adequately funded. Further, the entire budget for all non-CUB intervenor funding in all of the dozens of PGE cases before the OPUC in 2004 is only $125,000, and CUB is eligible to capture even that amount, in addition to the $50,000 in PGE funds set aside for CUB. See OPUC Order No. 03-388 (July 2, 2003), Appendix A.

available in court for those who successfully appeal OPUC rate orders. ***CUB/URP v. OPUC***, 157 Or App 410, 971 P.2d 459 (1998).

C. IMPLICATIONS FOR BURDEN OF PROOF AND ORDER OF PRESENTATION.

1. IF THE COMMISSION ADOPTS THE SCOPE OF ISSUES PRESENTED BY URP.

The burden of proof would rest with PGE to show that any of its charges for Trojan investment were lawful. The courts identified the type of Trojan charges that were unlawful--those for return on investment. The OPUC orders at issue do not specifically separate the Trojan investment-related charges into "return on investment" and other categories. As PGE is in control of all relevant evidence and accounts, PGE should bear the burden of proving which of its Trojan investment-related charges to ratepayers did not fall into the category of "return on investment."

The order of presentation should begin with testimony by PGE, followed by testimony of others, reply testimony of PGE, the hearing, and briefing. If the Commission determines that PGE does not bear the burden of proof, then the order of presentation should be modified to reflect the Commission's allocation of the burden of proof.

2. IF THE COMMISSION ALLOWS THE ADDITIONAL ISSUES URGED BY PGE.

PGE urges the Commission to reopen the factual record of the past rate cases, no doubt for the purpose of asking the Commission to consider costs that PGE somehow forgot to include in its past filings or otherwise did not claim. If the Commission agrees with the PGE-advocated scope of issues, then this remand proceeding will become a full-blown general rate case, covering at least the period April 1, 1995, through the

present.[6] PGE has not suggested any limitation on the costs which the Commission should consider.

Accordingly, PGE would have the burden of proving the legitimacy of all of the costs it asserts, including all costs which the Commission adopted as proper in the past cases. If the factual record is to be reopened to allow PGE to offer "new old costs," then it must also be reopened for reexamination of all of the costs PGE asserted (and the Commission adopted) in UE 88 and UM 989. As in any rate case, the burden of proof is upon the utility. See ***Coalition for Safe Power v. OPUC***, 325 Or 447, 939 P2d 1167 (1997); ORS 757.210.

The order of presentation should begin with testimony by PGE, followed by testimony of others, reply testimony of PGE, the hearing, and briefing.

III. THE RULING SUGGESTS THE PROPER PHASING OF THIS PROCEEDING.

The Ruling (pp. 8-9) suggests that the proper phasing of the proceeding may (after this first phase of legal memoranda) be a second phase to calculate "the amount of money charged to ratepayers for return on Trojan investment, with interest" and a third phase "to address implementation issues such as the timing a method for restoring this money to ratepayers." We agree with this suggested phasing.

Dated: June 3, 2004 Respectfully Submitted,

6. The UM 989 charges for Trojan profits, in the form of the ratepayer accounts given up in OPUC Order No. 02-227, remain in effect to this day.

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CERTIFICATE OF SERVICE

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

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Dated: June 3, 2004

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