

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FRANK GEARHART,
PATRICIA MORGAN, AND
KAFOURY BROTHERS, INC.

Petitioners,

v.

OREGON PUBLIC UTILITY
COMMISSION,

Respondent.

Oregon Public Utility Commission
Docket Nos.

DR 10
UE 88
UM 989

CA _____

RECEIVED

APR 27 2009

Public Utility Commission of Oregon
Administrative Hearing Division

PETITION FOR JUDICIAL REVIEW

1. Petitioners, known in the agency proceeding as the "Class Action Plaintiffs," seek judicial review of a second purported "final" order of the Oregon Public Utility Commission (OPUC) in consolidated Docket Nos. DR 10, UE 88, and UM 989. The final order was OPUC Order No. 08-487, dated September 30, 2008. A petition for judicial review of that order was timely and is designated CA No. A14017. The Commission has now issued another final order, OPUC Order No. 09-093, dated March 19, 2009. This Petition for Judicial Review seeks review of OPUC Order No. 09-093.
2. The parties to this review and their counsel are:

Petitioners:

Frank Gearhart; Patricia Morgan;
Kafoury Brothers, Inc.

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Respondent:

Oregon Public Utility Commission

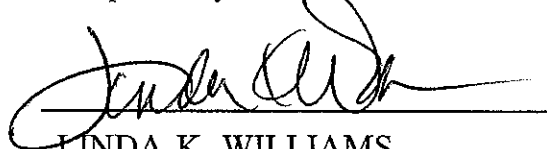
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Salem, OR 97301-4096

3. Judicial review of OPUC final orders is pursuant to ORS 756.610.
4. Accompanying this petition is a copy of the order for which judicial review is sought, OPUC Order No. 09-093.
5. Petitioners were parties to the administrative proceeding which resulted in the order for which review is sought, OPUC Order No. 09-093.
6. Petitioners at this time are not willing to stipulate that the agency record may be shortened for OPUC Order No. 09-093, dated March 19, 2009, the subject of this Petition. The agency record for CA No. A14017 has been stipulated to by the parties but has not yet been filed.

Dated: April 24, 2009

Respectfully Submitted,



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Attorney for Petitioners

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

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 Tariff 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)

ORDER

**DISPOSITION: MOTION FOR APPROVAL OF CHANGES TO
REFUND MECHANISM DENIED**

I. INTRODUCTION

On November 20, 2008, Portland General Electric Company (PGE) filed a motion for approval of changes to the refund mechanism adopted in Order No. 08-487. In that order, the Public Utility Commission of Oregon (Commission) directed PGE to refund to customers \$15.4 million of Trojan nuclear generating plant costs, plus interest. We outlined a refund mechanism in Order No. 08-487, but also invited the parties "to consider and recommend any changes to these procedures to minimize the burdens placed on eligible customers seeking a refund."¹ The Utility Reform Project, et al. (URP) and the Class Action Plaintiffs (CAPs) filed a joint response in opposition to PGE's motion on November 26, 2008.²

¹ Order No. 08-487 at 105.

² In Order No. 08-559, we suspended the refund requirements imposed on PGE for sixty days. Given URP and the CAPs' declared intention of requesting a stay of Order No. 08-487 from the Court of Appeals, we found it imprudent to require PGE to incur expenses to process the refund when the order requiring the refund may be stayed. After URP and the CAPs filed the motion for a stay on January 24, 2009, we issued Order No. 09-039, extending the suspension period indefinitely pending the Court of Appeals' decision on the motion. On February 24, 2009, the Court of Appeals denied URP and CAPs' motion for a stay.

II. DISCUSSION

A. Parties' Positions

1. PGE

PGE's proposed changes to the refund mechanism were developed during workshops with Staff of the Public Utility Commission of Oregon (Staff), URP, and the CAPs, which were held in response to our invitation in Order No. 08-487 to further refine the refund mechanism. PGE contends that the following recommended changes, which Staff fully supports, will minimize burdens on customers, reduce the number of mailings, and simplify the claims process.

- Make eligible customers with current accounts automatically qualified for the refund with no need to file a claim;
- Allow PGE to use a third-party matching service to locate former customers;
- Allow former customers to make a claim via a 1-800 number;
- Eliminate the need for PGE to mail letters to former customers that are not located by the third-party matching service;
- Modify the newspaper publication requirements to add an additional newspaper and to extend the notice from four to six consecutive weeks; and
- Modify how the refund will be allocated to customer classes by combining the Large General Service and Industrial customer classes into a single class.

2. URP and the CAPs

URP and the CAPs contend that PGE's motion to change the refund mechanism adopted in Order No. 08-487 must be denied because it does not follow the statutory procedures required for an agency to modify an order that has been appealed.³ They first characterize PGE's motion as one for reconsideration. Based on that characterization, they argue that the Commission may not reconsider the order without first notifying the Court of Appeals and obtaining an allocation of time to complete the reconsideration. They rely on ORS 183.482(6), which provides in relevant part:

At any time subsequent to the filing of the petition for review and prior to the date set for hearing the agency may withdraw its order for purposes of reconsideration. If an agency

³ URP and the CAPs raise numerous arguments in opposition to PGE's motion. We find it necessary to address only one of these arguments.

withdraws an order for purposes of reconsideration, the agency shall, within such time as the court may allow, affirm, modify or reverse its order.

URP and the CAPs also characterize PGE's motion as one to present additional evidence to the Commission. Under this characterization, they argue that the Commission or PGE must apply for leave with the Court of Appeals. They rely on ORS 183.482(5), which provides:

If, on review of a contested case, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and order by reason of the additional evidence and shall, within a time to be fixed by the court, file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or orders, or its certificate that the agency elects to stand on its original findings and order, as the case may be.

Regardless of which provision applies, URP and the CAPs contend the Commission cannot amend Order No. 08-487 without following these statutory requirements and conducting additional proceedings.

B. Resolution

Whether ORS 183.482(5) or (6) apply in Commission proceedings is a question that has not yet been addressed by the appellate courts.⁴ Although we are not specifically exempt from those provisions under ORS 183.315(6), the provisions appear to conflict with ORS 756.568, which provides:

The Public Utility Commission may *at any time*, upon notice to the public utility or telecommunications utility and after opportunity to be heard as provided in ORS 756.500 to 756.610, rescind, suspend or amend any order made by the commission. Copies of the same shall be served and take effect as provided in ORS 756.558 for original orders. (Emphasis added.)

⁴ Whether these provisions apply in *this* case is even more uncertain because the Commission specifically gave the parties permission to propose changes and refinements to the refund mechanism. Order No. 08-487 at 105.

We decline to decide whether ORS 183.482(5) or (6) apply in this proceeding because, whatever our decision, additional proceedings and further delay of the customer refunds would inevitably result. Although we appreciate the work of PGE and Staff to solicit input from URP and the CAPs and offer improvements to minimize the burdens placed on eligible customers seeking a refund, we nonetheless must conclude that the improvements to the refund mechanism offered by PGE are outweighed by the risk of delay and extended litigation. We therefore deny PGE's motion for approval of changes to the refund mechanism and decline to reconsider or otherwise modify Order No. 08-487. We also lift our suspension of the timelines imposed on PGE by the refund mechanism.⁵ All timelines previously imposed on PGE are reset from the date of this order.

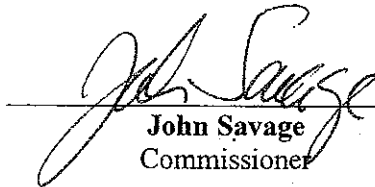
III. ORDER

IT IS ORDERED that Portland General Electric Company's Motion for Approval of Refund Methodology is denied. Portland General Electric Company must comply with the timelines imposed by the refund mechanism outlined in Order No. 08-487 as measured from the date of this order.

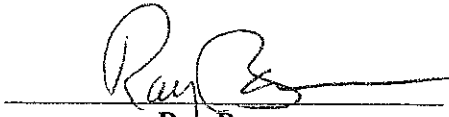
Made, entered, and effective MAR 19 2009



Lee Beyer *JH*
Chairman



John Savage
Commissioner



Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

⁵ See Order No. 08-559 at 2 (indefinitely granting PGE's motion for extension of time to comply with Order No. 08-487 pursuant to OAR 860-014-0093.)

CERTIFICATE OF SERVICE

I certify that on April 24, 2009, I served a true copy of this Petition for Judicial Review, by deposit into the United States Mail, first class postage prepaid, certified, to:

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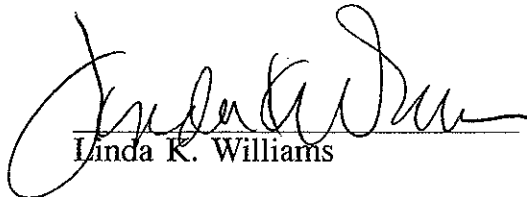
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CERTIFICATE OF FILING

I certify that on April 24, 2009, I filed the original of this Petition for Judicial Review,
by deposit into the United States Mail, first class postage prepaid, to:

State Court Administrator
1163 State Street
Salem, OR 97301-2563

Dated: April 24, 2009.


Linda K. Williams