

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)**

**MOTION TO
REMOVE FROM
PHASE 1 ALL
ISSUES NOT
RAISED IN THE
ORIGINAL UE 88
PROCEEDING OR
NOT PRESERVED
ON APPEAL**

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MOTION

The Utility Reform Project (URP), et al., and the Class Action Plaintiffs (Gearhart, Morgan, Kafoury Brothers, Inc.) [hereinafter URP/CAPs or "we"] move to remove from Phase 1 of this remand proceeding:

- A. all issues (and evidence presented on those issues) that were not litigated in the original UE 88 proceeding or on appeal of OPUC Order No. 95-322, the rate order produced by that proceeding; and
- B. all instances where PGE in Phase 1 changed its position on an issue that had been litigated in the original UE 88 but where PGE the issue was not raised on appeal of OPUC Order No. 95-322.

The acceptance of such issues and evidence in Phase 1 is inconsistent with the proper scope of the issues in a remand proceeding, as concluded by the Ruling and Notice of Conference dated February 22, 2008, p. 4:

These issues are intended to be broad enough to encompass any sub-issues raised in prior proceedings. For example, URP's arguments that the Trojan balance used in the settlement inappropriately included construction-work-in-progress expenses would be considered a sub-issue under Issue 1. Furthermore, although the issues are broad, the parties may not raise any issues that were not raised in prior proceedings before the Commission, the circuit court, or the Court of Appeals.

Moreover, applying inconsistent standards within the same consolidated proceeding is arbitrary and denied movants their rights to equal and consistent due process throughout the proceeding.

DISCUSSION

In Phase 1 of this remand proceeding (the phase dealing with the remand of OPUC Order No. 95-322, the final rate order issued in UE 88), URP/CAPs argued at length that the only issues which could be raised and litigated in the remand before the Commission were issues that (1) had been raised and litigated in the original UE 88 proceeding and (2) had been preserved on appeal of OPUC Order No. 95-322. See Application For Reconsideration Of OPUC Order No. 04-597 By Utility Reform Project and the Class Action Plaintiffs (December 20, 2004); Motion for Certification of Ruling to the Commission by Utility Reform Project (URP), et al. (September 13, 2004); Joint Reply Memorandum on Scope of Proceeding, Phasing, and Schedule by URP, et al., and Morgan, Gearhart, and Kafoury Brothers, LLC (June 25, 2004); Joint Memorandum on Scope of Proceeding, Phasing, and Schedule by URP, et al., and Morgan, Gearhart, and Kafoury Brothers, LLC (June 3, 2004). The most concise legal argument on this point is presented in the Application For Reconsideration Of OPUC Order No. 04-597 (December 20, 2004), pp. 2-17, which we incorporate herein by reference.

The Commission rejected our position and instead allowed PGE and Staff to present voluminous evidence on issues that did not satisfy the above-stated criteria, including the advocacy of numerous alternative scenarios involving issues and

evidence that PGE could have presented in the original UE 88 proceeding but did not.¹ One need only consult the PGE Opening Post Hearing Brief (Phase I) to identify these issues, which include all of PGE's "recommended framework," all of PGE's "ratemaking tools," PGE's proposed net benefits test, PGE's proposal to recategorize most of the Trojan investment as "plant in service," PGE's change to treatment of the balance sheet, PGE's proposed changes to capital structure and allowed rate of return, and every other accounting or ratemaking treatment proposal PGE made in Phase 1 that had not been made in the original UE 88 proceeding. These proposals constitute numerous "issues that were not raised in prior proceedings before the Commission, the circuit court, or the Court of Appeals" [Phase 3 Scoping Order] are thus beyond the lawful scope of a remand proceeding, whether in Phase 1 or in Phase 3.

In Phase 1 the Commission also allowed PGE to take different positions on issues that had been litigated in the original UE 88 proceeding. A prominent example is PGE's new positions on capital structure and rate of return. A party cannot relitigate a specific issue determined in a prior proceeding, unless the party appeals that issue to the courts and prevails. In Phase 1, however, PGE was unlawfully allowed to change its UE 88 positions on issues that had been litigated before the

1. This is separate from the issue of "future facts" that URP/CAPs raised in Phase 1. The ALJ ruled that the parties could not present in evidence any facts that were not in existence at the time of the original UE 88 proceeding. URP/CAPs filed a motion identifying dozens of such "future facts" in the testimony of PGE and Staff, but the ALJ refused to exclude that evidence.

agency and were not raised on appeal. See Application For Reconsideration Of OPUC Order No. 04-597 (December 20, 2004), pp. 2-17.

Failure to exclude those issues (and evidence presented on those issues) would violate Oregon law for the reasons stated in the above-referenced memoranda and for the reasons underlying the ALJ's ruling in Phase 3 that excluded such issues and evidence.

As noted in the Application For Reconsideration Of OPUC Order No. 04-597 (December 20, 2004), p. 17, the only lawful scope for Phase 1 is:

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

Dated: September 12, 2008

Respectfully Submitted,

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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 MOTION TO REMOVE FROM PHASE 1 ALL ISSUES NOT RAISED IN THE ORIGINAL UE 88 PROCEEDING OR NOT PRESERVED ON APPEAL 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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Dated: September 12, 2008

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