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December 14, 2005

VIA E-FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol St. NE, Suite 215
P. O. Box 2148
Salem, Oregon 97308-2148

Re: *UE 88/DR 10/UM 989*

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of Portland General Electric Company's Post-Hearing Response Brief (Phase I). This document is being filed electronically per the Commission's eFiling policy to the electronic address PUC.FilingCenter@state.or.us, with copies being served on all parties on the service list via U.S. Mail. A photocopy of the PUC tracking information will be forwarded with the hard copy filing.

Very truly yours,

David F. White

DFW/ldh
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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 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)	**PORTLAND GENERAL ELECTRIC COMPANY'S POST-HEARING RESPONSE BRIEF (PHASE I)**

Pursuant to the Administrative Law Judge's Rulings on September 19 and October 10, 2005, Portland General Electric Company ("PGE") submits this Response Brief.

I. INTRODUCTION

The post-hearing submissions of the Utility Reform Project and the Class Action Plaintiffs (collectively, "URP") are riddled with internal contradictions and violations of the Commission's governing Scope Orders (Order Nos. 04-597 and 05-091). For example, URP argues that:

- Because "time does not run backwards" (URP Opening Brf. at 15) the Commission may not determine what UE 88 rates it would have set under a new interpretation of ORS 757.355, but the Commission may turn back the clock to order refunds of amounts PGE collected under Commission-approved tariffs;
- The Commission should take no new evidence, but may consider new evidence URP's witness presents;

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- The Commission must not prejudge the outcome, but URP argues that an alternative UE 88 revenue requirement cannot be higher than the actual UE 88 revenue requirement no matter what the evidence shows;
- The Commission should strike all testimony relating to facts that were unknowable in 1995, yet consider PGE's actual earnings and actual tax payments by Enron after the UE 88 final order;
- The Commission should not use a declining balance as the basis for determining the "return on" Trojan even though URP's expert proposed a declining balance basis earlier in this docket;
- The use of interest to reflect the time value of money is inappropriate for PGE's and Staff's alternatives, but appropriate when URP uses interest to calculate a refund amount; and
- URP's expert calculates the "return on" Trojan in isolation when the Commission concluded that this phase should focus on addressing the UE 88 revenue requirement.

URP provides no basis upon which the Commission may make a reasonable, lawful and fact-based decision. PGE and Commission Staff have presented alternatives that comply with the remand orders, abide by the Commission's Scope Orders and are supported by the evidence. PGE requests that the Commission adopt a final order that is substantially similar in form to the proposed Final Order attached as Exhibit 1 to PGE's Opening Brief.

This Response Brief is organized as follows: (II) the scope of this docket; (III) URP's argument that PGE's and Staff's approaches provide an "indirect return on" Trojan; (IV) flaws in Mr. Lazar's analysis; (V) URP's procedural objections; (VI) reclassification of a portion of the Trojan balance as plant-in-service; and (VII) responses to other URP arguments.

II. URP ARGUMENTS CONCERNING THE SCOPE OF THIS DOCKET ARE THE SAME ARGUMENTS THE COMMISSION HAS REJECTED REPEATEDLY IN THIS DOCKET

The centerpiece of URP's post-hearing briefs is its claim, stated in the first sentence of its Opening Brief and repeated throughout its Reply Brief, that "the Commission has allowed this proceeding an unlawful scope" by permitting the introduction of new evidence and engaging in ratemaking. URP Opening Brf. at 1. As is now familiar, URP

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believes the Commission should focus on calculating the "amount of Trojan profits charged" to customers and returning that amount to customers.

Such an approach ignores the fundamental nature of this remand proceeding and the Commission's authority. This proceeding is a combination of the remand orders in UE 88, DR 10 and UM 989. The UE 88 and DR 10 remand order provided the Commission with little guidance other than requiring compliance with the Court of Appeals' decision that ORS 757.355 prohibited rates that included a "return on" retired plant such as Trojan. The Court of Appeals did not find that the UE 88 rates were unjust and unreasonable or in violation of any statute other than ORS 757.355[1]: "Thus, the orders in DR 10 and UE 88 were reversed solely on the ground that the Commission had exceeded its legislative authority." Order No. 04-597, Ex. A at 15.

The remand order in UM 989 provided more guidance for the Commission. The Circuit Court's order faulted the Commission for failing to consider past collections when it reviewed the UM 989 settlement. The combination of these two remand orders thus requires the Commission to reconsider its UE 88 rate determination to decide what UE 88 rates it would have set under the Court of Appeals' interpretation of ORS 757.355. Only such a rate-making process accommodates the UE 88 remand order's admonition concerning ORS 757.355 while making the type of retrospective rate determination that the UM 989 remand order requires. Such a rate-making process requires the Commission to take new evidence.

URP's reliance on case law describing the limited authority of a trial court on remand is misplaced. URP Opening Brf. at 5. The Commission has broad authority and

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[1] Order No. 05-091 at 10 ("Notably, the Court of Appeals did not rule that the end result rates approved in Docket No. UE 88 were unlawful. Rather, the Court of Appeals 'deemed approval of rates that included a return on Trojan investment to have exceeded what the Commission was empowered to do by the Legislature'").

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discretion in this docket. Unlike a trial court, the Commission, on remand, is not constrained from implementing its own regulatory policies. *Securities & Exchange Comm'n v. Chenery Corp.*, 332 US 194, 201 (1947). Like any other agency, the Commission may reopen the factual record, make new findings, and consider different approaches and rationales. *Federal Trade Comm'n v. Morton Salt Co.*, 334 US 37, 55 (1948); *United States v. Morgan*, 307 US 183, 192 (1939); *Pacific Tel. & Tel. Co. v. Hill*, 229 Or 437, 486, 365 P2d 1021 (1961). Taking additional evidence is consistent with the remand orders. Order No. 05-091 at 10 (distinguishing cases URP cites by noting that "the mandate from the Court of Appeals in *Citizens' Utility Board v. PUC* is very broad, compelling us to take and consider new evidence to comply with it").

In any event, the Commission has already decided this issue, initially through the ALJ's Phase I Scope Ruling (August 30, 2004), affirmed in Order No. 04-597 and confirmed again in Order No. 05-091:

> Based on analysis of the two remand orders in context of each other, and the Court of Appeals' opinion in *Citizens' Utility Board* as well as in context of pertinent judicial precedent regarding general principles of ratemaking, the Ruling determined that we are required by the courts to undertake a retrospective examination of what rates would have been approved in UE 88 if the Commission had interpreted the authority delegated to it by the legislature in ORS 757.355 to not allow a return on investment in retired plant, as the Court of Appeals did in *Citizens' Utility Board*. . . . We also agree with the ruling that we must engage in ratemaking in order to set end rates that comply with the pertinent statutes, including ORS 757.355 as interpreted by the Court of Appeals, and ORS 757.020, requiring just and reasonable rates. A proper review of rates established in UE 88 may not focus on costs attributable to earnings on Trojan, an isolated rate component, without considering further other factors offset this amount. Doing so would constitute single-issue ratemaking, which is prohibited. Rather, we agree with the Ruling that these remand proceedings must address the ratemaking question: "What rates would have been approved in UE 88 if ORS 757.355 had been interpreted to prohibit a return on Trojan?"

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Order No. 04-597 at 6.[2] URP offers no new arguments or evidence to warrant a reversal of the Commission's position.

A. PGE ACTED PRUDENTLY IN COMPLYING WITH THE FINAL ORDERS IN DR 10 AND UE 88

URP argues that PGE was unreasonable and imprudent in seeking to recover a return on Trojan. URP Opening Brf. at 20-22. URP urges that PGE should have surmised in 1994 that ORS 757.355 did not permit a "return on" its undepreciated investment in Trojan, notwithstanding an Attorney General's opinion and Commission order in DR 10 to the contrary. Because in 1994 PGE did not make different rate-making proposals (ones that would have departed from the prevailing interpretation of ORS 757.355), URP claims the Commission should block PGE from presenting evidence consistent with the new interpretation of ORS 757.355. URP Opening Brf. at 21.

URP's claims of imprudence are baseless because PGE acted prudently. It complied with Oregon law, as the Attorney General's office and the Commission interpreted it. In response to a request from the Commission, the Department of Justice issued an opinion in June 1992 concluding that ORS 757.355 did "not apply to plant which has been in service." Attorney General's Opinion 6454 (June 8, 1992) at 2 (attached as Appendix A to Order No. 93-1117).

PGE sought specific guidance from the Commission in DR 10 before filing its UE 88 rate case. The Commission confirmed that it would follow the Attorney General's opinion and authorize rates that included a return on the undepreciated investment in Trojan if PGE's rate case evidence satisfied a set of evidentiary requirements. Order No. 93-1117 at 12-13. URP appealed that ruling to the Marion County Circuit Court, which affirmed it in

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[2] For further authority supporting the Commission's position regarding the scope of this docket, see PGE's Opening Memorandum (June 3, 2004) at 3-10, PGE's Reply Memorandum (June 25, 2004) at 3-5, PGE's Opposition to Application for Reconsideration (January 14, 2005) at 1-4, and PGE's Opening Post-Hearing Brief at 2-4.

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late 1994. Judgment entered Dec. 27, 1994 by Judge Barber in *Citizens' Utility Board v. Public Utility Commission*, Marion County Case No. 94C 10372.[3]

PGE presented its rate case in 1994, relying upon the Commission's assurance that "if we [PGE] met our burden of proof with respect to the required elements, the Commission would approve a revenue requirement for PGE that included our interest costs associated with Trojan and a profit opportunity on the remaining balance." PGE/6100, Dahlgren/20; *see also* Order No. 93-1117 at 7 (the final order in DR 10 "establishes the rules within which a rate case will be conducted and the facts that must be proven for recovery to occur"). The Commission authorized UE 88 rates that included a return on the undepreciated balance of Trojan, and PGE charged those rates as Oregon law required. ORS 757.225. PGE's compliance with the Commission orders cannot be the basis of an imprudence finding.

Again, the Commission has already rejected URP's position, urged in the scoping phase of this proceeding, and URP offers no new arguments or evidence:

> We reject [URP's] arguments that PGE is precluded from presenting new evidence. As we previously determined, the primary question presented by the trio of remanded cases is the ratemaking question: "What rates would have been approved in UE 88 if ORS 757.355 had been interpreted to prohibit a return on Trojan?" In contrast, PGE presented evidence in Docket No. UE 88 that was properly limited to determining rates that included a return on the Trojan plant, based on the Commission's interpretation of ORS 757.355 in docket no. DR 10. When the scope of a proceeding is narrowed, parties are prohibited from raising issues outside of that scope. Parties must be able to rely on the legitimacy of scope restrictions without concern that arguments outside these scope restrictions will be waived should they become relevant upon remand.

Order No. 05-091 at 9.

[3] Judge Barber ruled the same way in the companion appeal of URP and the Public Power Council, Marion Co. Case No. 94C 10417.

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B. THE COMMISSION HAS NOT PREJUDGED THE ISSUES IN PHASE I OF THIS DOCKET

Next, URP argues that this proceeding is a "pointless exercise" and "dead on arrival" because it claims the Commission has prejudged the issues. URP Opening Brf. at 24. In particular, URP argues that the Commission position in the pending appeal of Order No. 02-227, that Oregon law does not authorize retroactive refunds, renders this remand proceeding "meaningless and moot." URP Opening Brf. at 23.

URP's argument ignores the phasing of this proceeding. The question of the Commission's legal authority to order refunds, which the parties may address in a later phase, is distinct from the issues in Phase I, which require consideration and determination of the UE 88 revenue requirement. Depending upon the outcome of Phase I, the legal issue regarding the Commission's authority to order refunds may be moot. If the Commission determines that it would have established an alternative UE 88 revenue requirement higher than the actual revenue requirement, and finds that the UM 989 settlement was reasonable, then the Commission will have no reason to address whether or not it has the legal authority to order refunds.

Most telling, the Circuit Court remanded UM 989 to the Commission in the face of the same arguments URP advances here.[4] The Circuit Court must have disagreed that a remand proceeding would be "pointless."

In any event, the Commission has already rejected URP's claim:

> URP expresses concerns that these remand proceedings are "pointless," "meaningless," and "moot," speculating that relief cannot be granted due to the Commission's legal position that refunds violate the rule against retroactive ratemaking. As the ruling observed, however, the Commission's legal position that it is not authorized to issue refunds is not necessarily

[4] URP argued to the Marion County Circuit Court that remand to the Commission "would be futile" because the Commission has "repeatedly stated that they can offer no relief . . . for past unlawful charges." July 23, 2003 Transcript of Proceedings at 242. *See* Order No. 04-597, Appendix A at 19, n12.

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> implicated in the first phase. We agree that, "prior to completing the investigation of what rate determinations would have been made by the Commission under the statutory framework provided by the Court of Appeals, it is impossible to know whether any retroactive adjustments of rates will be necessary." We also agree the ruling's conclusion that "preconceptions about the law neither invalidate individual commissioners pursuant to ORS 756.026, nor the Commission generally from acting under the law.

Order No. 04-597 at 7-8.[5]

C. THIS PROCEEDING WILL NOT INTERFERE WITH ANY VESTED RIGHTS

URP raises a variety of arguments predicated on its contention that customers have vested rights in a refund. URP Opening Brf. at 36-39. The vested rights allegedly arise from the Marion County Circuit Court's grant of partial summary judgment in the class action suit still pending in Marion County. URP claims that the Commission is prohibited from taking any action that would interfere with these vested rights or violate the Contract Clause of the United States or Oregon Constitutions, or abrogate rights protected under the Remedies Clause of the Oregon Constitution. URP's argument collapses under the weight of its false assumption that the Circuit Court's grant of partial summary judgment has created vested rights:

> Applicants assert several arguments based on their belief that the Circuit Court's Ruling conferred vested rights. As Oregon law deems vested rights to accrue only when a judgment is final, however, none of these arguments legitimately warrant reconsideration of Order No. 04-597 pursuant to OAR 860-014-0095(3)(b). Consequently, we conclude it is not necessary to further evaluate Applicants' arguments that are based on a vested-rights theory, including: (1) that the Commission is prohibited from any action that may alter the vested rights; (2) that the scope of the first phase of this proceeding as adopted by Order No. 04-597 violates the Remedy Clause of Article I, § 10 of the Constitution; and (3) that implied contract rights have been created which are

[5] For further authority supporting the Commission's conclusion, see PGE's Reply Memorandum (June 25, 2004) at 1-3.

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> protected by the contract clauses of the Oregon and United States Constitutions.

Order No. 05-091 at 9.[6]

D. URP'S CLAIM THAT COMMISSION ORDER NO. 95-322 IS VOID *AB INITIO* IS MISPLACED

URP claims that Order No. 95-322 is void *ab initio* and that UE 88 rates were, therefore, unlawful. URP Opening Brf. at 39-43. URP appears to believe that this point somehow invalidates this proceeding. URP's position is ill-founded. The Commission's Scope Orders acknowledge that the Court of Appeals concluded that the Commission exceeded its legislative authority in Order No. 95-322. Order No. 05-091 at 10. The Commission is now correcting that error by determining what UE 88 rates it would have established had it known ORS 757.355 did not permit a "return on" retired plant.

URP "void *ab initio*" may concern the Commission's legal authority to issue refunds. If so, it is premature:

> Based on further guidance from the Circuit Court, again we have concluded that it is necessary for us to determine, on remand, what rates should have been authorized in Docket UE 88. That is the question we undertake in the first phase of these proceedings. [URP's] claim that rates established in Docket UE 88 are void *ab initio* is, therefore, erroneous—or at least premature. We have indicated that subsequent phases of these proceedings will address, as necessary, reconciliation of the results of Phase I with rates approved in Docket UE 88, and adjustment of rates.

Order No. 05-091 at 11.

III. PGE'S AND STAFF'S PROPOSED METHODOLOGY DOES NOT SEEK OR PROVIDE AN INDIRECT "RETURN ON" TROJAN

Other than complaints about the scope of this proceeding, URP's principal argument is that the alternatives PGE and Staff propose involve an indirect return on Trojan. *See, e.g.*, URP Opening Brf. at 16; URP Reply Brf. at 9-11. URP makes this claim in a

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[6] For further authority supporting the Commission's conclusion, see PGE's Opposition to URP's Application for Reconsideration at 4-9.

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variety of forms. Sometimes it objects to PGE's use of deferred accounts (URP Reply Brf. at 10); elsewhere it complains about the use of interest applied to differences between the previously authorized revenue requirement and the alternative revenue requirement to be determined in this proceeding (URP Opening Brf. at 16); at other times URP complains about the use of certain regulatory assets and customer credits such as the Boardman credit, SAVE, AMAX and power cost deferrals (URP Reply Brf. at 10-11); and finally, URP suggests that any outcome that would have resulted in a higher UE 88 revenue requirement would constitute an unlawful return on Trojan. URP Opening Brf. at 20. None of these arguments holds any water.[7]

A. PGE'S APPROACH DOES NOT RELY UPON A POWER COST DEFERRAL

In its Reply Brief, URP claims that the methodology PGE and Staff propose "allow PGE to keep the unlawful Trojan return on investment merely by changing the name of the stack of dollars from 'Trojan return on investment' to 'deferred power costs earning the same return on investment.'" URP Reply Brf. at 10. As a threshold matter, only one of the three approaches PGE supports includes a power cost deferral. If the Commission is concerned that a power cost deferral reflects an impermissible return on Trojan, PGE recommends that it adopt either the alternative Staff recommendation that does not include a power cost deferral[8] or adopt the 17-year amortization alternative PGE supports that also does not include a power cost deferral. *See* PGE's Opening Brf. at 8-10 and Proposed Final

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[7] One of PGE's return on equity expert, Dr. Colin Blaydon, rebutted URP's allegation that PGE's proposal reflected a "model of corrupt regulation" designed to support a "predetermined outcome." PGE/7000, Blaydon/3 ("What . . . Mr. Lazar fail[s] to recognize, however, is that the Commission needs to provide the utility with a fair return on its capital in order to be able to continue to attract investors and to provide the proper incentives to pursue the least cost alternatives that are in the best interest of customers"). URP did not cross examine Dr. Blaydon regarding his testimony on this point.

[8] With the adjustments PGE recommends. *See* PGE's Opening Brf. at 8; Proposed Final Order at 16.

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Order at 15-17. Under either approach, PGE's revenue requirement in UE 88 would have been higher than the actual UE 88 revenue requirement. *Id.*

More fundamentally, the use of a power cost deferral does not constitute an indirect return on Trojan. PGE offered this alternative as a way to smooth the rate impact under a one-year recovery approach. PGE/6000, Lesh/35-36. Such a deferral would have lessened the revenue requirement increase during the first year following the UE 88 final order and softened the revenue requirement decrease thereafter when the Trojan balance would have been fully recovered. It would have served to mitigate rate fluctuations, one of the Commission's rate-making objectives and one of the statutory bases for deferred accounting treatment. *See* ORS 757.259(2)(e).

In any event, the use of a power cost deferral is not necessary. The other alternatives PGE recommends reach the same conclusion: that the UE 88 revenue requirement as set in 1995 is lower than the reasonable alternatives. In the end, this is the most convincing evidence that the power cost deferral is not an indirect return on Trojan.

B. PGE'S BALANCE SHEET OPTIONS DO NOT PROVIDE AN INDIRECT RETURN ON TROJAN

URP also suggests that PGE's proposed balance sheet options involve an indirect return on Trojan. URP Reply Brf. at 16. Recall, in the one-year recovery alternatives, PGE and Staff proposed offsetting the Boardman credit against the Trojan balance in UE 88. *See* PGE's Opening Brf. at 8-9; Proposed Final Order at 15-16. Because the Commission used the Boardman credit in UE 93 to offset against several accounts customers owed PGE, including the AMAX termination payments, previously authorized power cost deferrals, and the SAVE incentive PGE earned, this alternative would require the Commission to establish a new recovery period for these accounts. PGE/6000, Lesh/33-35. PGE proposed a 10-year recovery for these regulatory assets. PGE/6200, Tinker-Hager-Schue/23-24. Both Staff and PGE support this approach because it would reduce the rate

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impact on customers and serve the goal of intergenerational equity among customers. *See* PGE Opening Brf. at 19-20.

This brief description of these balance sheet options reveals that they are not "an indirect return on Trojan." First, the use of Boardman to offset against the Trojan balance is not a contrivance of this remand proceeding. In UE 93, the Commission offset $20 million of the undepreciated Trojan balance against the Boardman credit. UE 93, Order No. 95-1216 at 3-4, Ex. B at 23. It is an established and accepted rate-making tool.

Second, the AMAX, power cost and SAVE accounts existed independent of any of the alternatives proposed in this remand proceeding. The Commission approved these deferred accounts in Commission proceedings other than UE 88.[9] The deferred balances accrued interest in accord with general Commission policy. Nothing PGE or Staff suggests in this remand docket would change or depart from that general policy. The delay in the recovery of these assets, which PGE and Staff propose, furthers the Commission's policies of rate stability and intergenerational equity among customers. PGE/6000, Lesh/35-36.

Third, the purpose behind these rate-making tools is not to reach some predetermined revenue requirement figure. The approaches PGE recommend further important goals, such as least cost planning, intergenerational equity and stable rates. *Id.*

C. PGE'S USE OF INTEREST DOES NOT CONSTITUTE AN INDIRECT RETURN ON TROJAN

URP also suggests that the use of interest is inappropriate. URP Opening Brf. at 15-16. As a threshold matter, this objection is inapplicable to the central issue in this phase – an alternative UE 88 revenue requirement. With respect to the establishment of an alternative UE 88 revenue requirement, neither PGE nor Staff applied interest to any balance.

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[9] UM 504, Order No. 91-186 (AMAX); UM 594, Order No. 93-1493 (Trojan replacement power costs); UE 79, Order No. 91-98 (SAVE).

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The differences in UE 88 revenue requirements in both Staff's and PGE's approaches include no amount for interest.

PGE and Staff used interest to state account balances as of the time of the initial approval of the UM 989 settlement, September 30, 2000. The remand order in UM 989 essentially required this by instructing the Commission to review the 2000 settlement while considering alternative rate-making approaches in UE 88, five and a half years earlier. The use of interest was necessary in order to state all account balances and revenue requirement differences in terms of the same currency: dollars as of September 30, 2000.

PGE's and Staff's use of interest is not for the purpose of giving PGE a return on Trojan. Indeed, it is the same use of interest that URP's own expert, Jim Lazar, applies. Mr. Lazar applied interest to amounts he deemed over-collections in the past to arrive at his current claim. In short, he used interest to state amounts collected in the past in today's dollars:

> Q: How did you convert the amounts paid in the past into a refund amount due to ratepayers?
>
> A: I have computed the escalation factor for each year of the analysis period, using the pre-tax rate of return that PGE used in its analysis of Trojan costs. The sum of the interest since the original $193 million was collected comes to $330 million.

URP/200, Lazar/4. PGE's testimony rebutted Mr. Lazar's use of the pre-tax rate of return as the appropriate *rate* of interest.[10] The point here is not the rate of interest, but Mr. Lazar's recognition that interest must be applied to translate past dollar amounts into today's currency.

[10] PGE/6900, Hager-Tinker-Schue/4-5.

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D. THE COMMISSION MAY REACH THE SAME END RATES FOR DIFFERENT REASONS WITHOUT VIOLATING THE COURT OF APPEALS' DECISION OR PROVIDING AN INDIRECT RETURN ON TROJAN

At bottom, the essence of URP "indirect return" argument is that any outcome that would result in a higher UE 88 revenue requirement would violate the Court of Appeals' decision. URP's position in this regard is internally inconsistent and contrary to the law. URP has repeatedly claimed that the Commission has prejudged the outcome. The Commission has said that it will wait until the record is complete to make its decision:

> Prior to completing the investigation of what rate determination would have been made by the Commission under the statutory framework provided by the Court of Appeals, it is impossible to know whether any retroactive adjustment of rates will be necessary. Analysis could show end rates would remain the same as, be greater than or lesser than rates approved in UM 989 (and other relevant rate orders). Prejudgment of any outcome is inappropriate.

Commission Order No. 04-597 at 7, Ex. A at 19. On the other hand, URP does not need to see the evidence. Any outcome that would result in a higher UE 88 revenue requirement (and therefore no refund) would constitute an indirect return on Trojan and violation of the Court of Appeals' decision, according to URP.

An unbroken line of cases contradicts URP's position. Courts have uniformly held that an administrative agency on remand may reach the same conclusion but for different reasons than the initial decision. *Bowen v. Hood*, 202 F3d 1211, 1219 (9th Cir 2000) ("It can hardly be doubted that 'an agency is free on remand to reach the same result by applying a different rationale'"); *Chenery Corp.*, 332 US at 200-201.[11] This fact does not

[11] 3 Kenneth Culp Davis, *Administrative Law Treatise*, § 18.1 (3d ed. 1994) ("the agency often can support the same action on remand with a set of reasons or findings that is consistent with the applicable law announced by the reviewing court"); 2 Charles Koch, *Administrative Law and Practice*, § 8.31 (2nd ed. 1997) ("the agency is free on remand to reach the same result on different grounds").

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mean that the agency is "corrupt" or "deceitful" as URP suggests.[12] URP Reply Brf. at 6. In fact, agencies often reaffirm their prior determination.[13] This practice reflects the way appellate review of administrative orders works. Courts identify legal errors and remand with orders to correct the error. *Federal Power Comm'n v. Idaho Power Co.*, 344 US 17, 20 (1952) ("the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare."). They do not order a particular outcome, which is a matter committed to the discretion, expertise and regulatory policy of the agency.[14]

The correction of a legal error may or may not result in a different outcome on remand. The point of this phase is to see whether it will make a difference. But a necessary predicate is that correcting the legal error may not result in a different outcome. The remand orders contemplated this, the Circuit Court anticipated it, the Commission recognized it, and a broad unbroken line of case law endorses it. Only URP disagrees; and it is wrong.

IV. MR. LAZAR'S ANALYSIS IS FLAWED AND FAILS TO ADDRESS THE APPROPRIATE ISSUES

In its Opening Brief, URP mistakenly suggests that neither PGE nor Staff presented objections to Mr. Lazar's testimony. URP Opening Brf. at 13-14. In fact, PGE's Opening Brief noted a number of errors in Mr. Lazar's analysis to which URP makes no

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[12] *See, e.g., Bowen*, 202 F3d at 1219 ("We see nothing sinister" in the agency on remand reaching the same outcome based on a different rationale).

[13] 3 Davis, *Administrative Law Treatise*, § 18.1 ("A study of agency actions on remand in 1984-85 found that agencies reaffirmed their earlier decision in 20 to 25 percent of the cases").

[14] *See FCC v. Pottsville Broadcasting Co.*, 309 US 134, 145 (1940) ("On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge"); *Federal Power Comm'n v. Pacific Power & Light Co.*, 307 US 156, 160 (1939) (court reviews for legal errors and "cannot fix rates nor make divisions of joint rates nor relieve from the long-short haul clause nor formulate car practices").

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response in its Reply Brief. *See* PGE Opening Brf. at 25-29. The most glaring is Mr. Lazar's failure to address the central question at issue in Phase I: what rates would the Commission have established in UE 88? Instead, Mr. Lazar "compute[d] the amount of refund that is due to ratepayers as a result of including profit on the Trojan investment in PGE's rates . . . I believe that the best estimate of the amount due to ratepayers to reimburse for the amount of return on Trojan charged to ratepayers during the 5.5-year period is $642 million." URP/200, Lazar/1-2. The Commission has already rejected this narrow rate-making approach in the Scope Orders.

Other errors include his mistaken assumption that the Court of Appeals' decision required a complete write-off of the undepreciated balance of Trojan (which is essential to his capital structure adjustment and his deferred tax adjustment);[15] his failure to use Trojan's declining balance, which violates standard accounting procedures, fails to comport with how PGE reports earnings to the SEC and OPUC, and contradicts Mr. Lazar's previous analysis in UM 989; [16] and Mr. Lazar's use of PGE's pre-tax authorized cost of capital as the appropriate interest rate, when the Commission's policy is to allow interest on deferred amounts to accrue at PGE's cost of capital (after-tax). PGE/6900, Hager-Tinker-Schue/4. The use of the wrong interest rate alone accounts for between $125 million and $149 million of URP's refund claim. *Id.*/5.

V. THE COMMISSION AND ALJ PROVIDED A FAIR OPPORTUNITY FOR URP TO PRESENT ITS EVIDENCE AND ARGUMENTS

URP contends that the ALJ was biased against it and committed legal errors at the hearing and throughout the proceeding. *See, e.g.,* URP Opening Brf. at 24-28; URP Reply Brf. at 7. None of these claims have any merit.

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[15] *See* PGE's Opening Brf. at 27.

[16] PGE/6900, Hager-Tinker-Schue/2 (citing Complainants 200, Table URP-1, attached as Ex. 1 hereto).

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A. THE ALJ DID NOT ERR IN DECLINING TO ADMIT MR. MEEK'S TESTIMONY INTO THE RECORD

URP's Opening Brief objects to the application of the witness-advocate bar (Oregon Rule of Professional Conduct 3.7) to Mr. Meek's testimony. URP Opening Brf. at 24-28. URP claims again that application of the rule would cause undue hardship. URP Opening Brf. at 24-28. The ALJ's Ruling properly rejected URP's position. *See* ALJ Ruling (Sept. 19, 2005) at 4-5. URP should have known about ORPC 3.7's prohibition from the outset of this docket. At a minimum, URP should have known about the witness-advocate bar no later than July 25, 2005, when ALJ Grant issued his ruling putting URP on notice that Mr. Meek "should not be representing URP while appearing as a witness." ALJ Ruling (July 25, 2005) at 2, n1.

After this warning, URP had ample time to locate and prepare replacement counsel for Mr. Meek. Ms. Williams has represented a related party, the Class Action Plaintiffs, throughout this proceeding. URP and the Class Action Plaintiffs have submitted joint filings and sponsored each other's testimony throughout this proceeding. And there was sufficient time for Ms. Williams to prepare for the hearings on August 29 and 30, more than one month after ALJ Grant's July 25 Ruling. Instead, URP waited until August 23 to seek clarification of the July 25 Ruling. URP's election not to prepare Ms. Williams for the hearing and wait until the eve of the hearing to raise these issues proves that any "undue hardship" was self-inflicted.

Moreover, the ALJ's ruling causes no prejudice to URP. The ALJ's ruling permits the Commission to consider Mr. Meek's testimony as comments and allowed URP to renew the arguments in post-hearing briefs. ALJ Ruling (Sept. 19, 2005) at 5. URP availed itself of this opportunity by urging the same arguments in post-hearing submissions. URP Reply Brf. at 15. URP fails to identify a single argument it cannot make, or cannot make as effectively, because of the ALJ's Ruling.

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B. THE ALJ DID NOT PREVENT URP FROM PRESENTING EVIDENCE URP DEEMED RELEVANT

In its Reply Brief, URP claims that "the proceeding excluded all issues and evidence to warrant a lower revenue requirement." URP Reply Brf. at 7. URP identifies no ALJ ruling or Commission order that prevented URP from presenting such evidence. Indeed, the ALJ permitted cross examination regarding URP's claim that PGE earned more than its allowed rate of return after UE 88 and that PGE charged ratepayers for state and federal taxes while PGE filed consolidated tax returns. Hearing Transcript (Aug. 29 and 30, 2005) ("TR") 174-200. More specifically, URP introduced documents relating to PGE's actual earnings and tax payments, which the ALJ admitted into the record. URP Exhibits 500, 600, 700; TR 180-200. And URP renews these arguments in its post-hearing briefs. URP Reply Brf. at 15. That URP's claims are misguided because they impute knowledge to the Commission in 1995 that it could not have known at the time is not our point here. *See* PGE's Opening Brf. at 27-30 (rebutting URP's tax and "overearning" arguments). The point here is that the ALJ and Commission allowed URP to present its evidence and make its arguments.

C. THE ALJ DID NOT PRECLUDE URP FROM CONDUCTING CROSS EXAMINATION REGARDING THE WITNESSES' WRITTEN TESTIMONY

In its Opening Brief, URP contends that it was "precluded from cross-examining PGE and OPUC Staff witnesses on a very substantial portion of their testimonies," again without identifying a particular ALJ ruling. URP Opening Brf. at 35. URP is wrong. At the outset of the hearing, the ALJ properly ruled that cross examination would be limited by the Scope Orders. The ALJ informed the parties that she would consider objections to the scope of cross examination on a witness-by-witness, question-by-question basis. TR 19, 24 and 26. Mr. Meek was free to cross examine witnesses based upon their written testimony. No part of the written testimony was outside the permitted scope of cross

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examination. Indeed, URP cross examined witnesses on topics of its own choosing, including alleged over-earnings and tax payments, without limitation. TR 174-200.

D. THE ALJ PROPERLY DENIED URP'S MOTION TO STRIKE

URP mistakenly claims that the "ALJ granted PGE's Motion in Limine but then refused even to consider URP's parallel motion to strike." URP Opening Brf. at 28. The ALJ fully considered URP's parallel motion to strike, providing URP with additional time after the hearing to present its motion to strike. The ALJ denied URP's motion to strike because it was inadequate and untimely. It did not refuse to consider it.

The ALJ's ruling on the motion to strike was correct. URP misunderstands the ALJ's ruling on PGE's motion in limine. That ruling granted the portion of PGE's motion in limine that sought to limit cross examination based upon the Scope Orders. The ALJ's ruling on PGE's motion was not predicated upon URP's label "future facts." Indeed, the ALJ permitted cross examination regarding PGE's earnings and tax payments after 1995, both of which fit URP's classification as "future facts." And it was URP that introduced exhibits on these topics into the record. *See* URP 500, 600 and 700. URP cannot complain about the ALJ's denial of its motion to strike all references to "future facts" when it introduced facts that could not have been known by the Commission in 1995.

Finally, PGE's motion in limine was not based on URP's "future fact" label. PGE based its motion on the generally recognized rate-making principle that in determining an appropriate revenue requirement, evidence should be limited to information that the Commission could have known at the time. URP's request to strike was significantly broader, seeking to bar any reference to "future facts" which would encompass a number of relevant topics. For example, URP's "future facts" category would sweep in generally recognized regulatory principles, general background information, and the accounting and

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rate-making consequences of differences in the UE 88 revenue requirement, all of which are relevant to this phase. *See* PGE's Opposition to Motion to Strike at 2-4.

VI. URP'S ARGUMENT AGAINST CLASSIFICATION OF A PORTION OF THE TROJAN BALANCE AS PLANT-IN-SERVICE RELIES ON INAPPLICABLE STATUTES

In its Reply Brief, URP claims that two statutes, ORS 758.400(3) and ORS 30.180, show that no part of the Trojan balance should be classified as "plant-in-service" and therefore placed outside the scope of ORS 757.355. URP Reply Brf. at 24. Neither statute URP relies upon is relevant to the definition of "utility service" used in ORS 757.355. ORS 758.400 defines "utility service" for purposes of the territorial allocation statutes and therefore encompasses only distribution assets. By definition, it excludes all transmission and generation assets, whether or not they are classified as "plant-in-service" or "used or useful." If URP was correct, ORS 757.355 would prohibit the Commission from including transmission or generation assets in rate base, an absurd outcome. In fact, the statute explicitly states that the definition of "utility service" in ORS 758.400(3) is for use "in ORS 758.015 and 758.400 to 758.475" and not Chapter 757. Similarly, the other statute URP relies upon (ORS 30.180(7)) expressly states that its definitions do not apply generally. ORS 30.180 (limiting definitions, including the definition of "utility service," to ORS 30.180 to 30.186).

In contrast, ORS 756.010(8)—which provides that "service is used in its broadest and most inclusive sense and includes equipment and facilities related to providing the service or product served"—provides the definition for "ORS chapters 756, 757, 758 and 759."

Aside from looking to the wrong statutes, URP is wrong that "utility service" in ORS 757.355 is limited to equipment and facilities over which electricity flows to customers. This has never been the Commission's or any other commission's view of what

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constitutes utility service. In *Pacific Northwest Telephone*, the Commission rejected the same type of narrow reading of services URP offers here:

> The definition of "telecommunications service" suggested by PNB would exclude those services which do not involve the physical facilities required to transmit telephone messages. However, the Oregon statutory scheme provides that, in the context of utility regulation the term "service" should be construed broadly to include all services imbued with the public interest.

110 PUR 4th 132, 1989 WL 418536 (OPUC Dec. 29, 1989). In that docket, the Commission concluded that publishing telephone directories was closely related to telephone service to fall under the Commission's control. Similarly, in *Northwest Climate*, the Commission found that appliance adjustment, pilot light relighting, and inspection and repair services performed by the natural gas utility were services subject to Commission regulation. *Northwest Climate Conditioning Ass'n v. Lobdell*, 79 Or App 560, 565, 720 P2d 1281 (1986). The Court of Appeals in *Northwest* recognized that the Commission possesses authority over not only the provision of natural gas and electricity, but also over ancillary services which are closely related to providing electricity and natural gas, or telephone services. *Id.*

Other states with statutory provisions similar to ORS 756.010 have also rejected URP's narrow view of "utility service." *See, e.g., West Penn Power Co. v. Pennsylvania Public Utility Comm'n*, 578 A2d 75 (Pa Commw Ct 1990) ("utility service is not confined to the distribution of electrical energy" but includes "any and all acts related to that function," including tree-trimming services).

Order No. 95-322 recognized that the Trojan assets "provide service necessary for safety and asset preservation pending decommissioning and dismantling the plant." *Id.* at 53. As Staff concluded, "it is hard to argue that these are not legitimate and necessary utility services." Staff/100, Busch-Johnson/16.

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VII. OTHER URP CLAIMS

A. PGE HAS CONSISTENTLY STATED THAT THE COMMISSION MUST ENGAGE IN RATEMAKING

It is unclear why URP claims that PGE's Opening Brief says that the Commission need not engage in ratemaking in this first phase. URP Reply Brf. at 8. Whatever the basis of URP's claim, it is wrong. PGE has clearly stated throughout this proceeding that the Commission must engage in ratemaking to determine what rates it would have set if it knew in 1995 that ORS 757.355 did not permit rates to include a return on the undepreciated balance of Trojan.

B. PGE DOES NOT CLAIM THAT A REFUND AMOUNT CAN NEVER BE CALCULATED

URP mistakenly claims that PGE "argues that the Commission can never calculate appropriate refunds for customers." URP Reply Brf. at 14. PGE's position is that the Commission lacks the legal authority to order refunds (*see* PGE's Opening Brf. (Feb. 15, 2005) at 22-23). That legal issue will be the subject of a future phase. ALJ Ruling (May 5, 2004) at 8. For purposes of this phase of the proceeding, PGE has projected alternative revenue requirement amounts and stated the account balances as of September 30, 2000. PGE Opening Brf. at 8-10; Proposed Final Order at 15-17. The Scope Orders require nothing more and nothing less.

C. THE COURT OF APPEALS' DECISION CONCLUDED THAT THE COMMISSION'S DECISION PERMITTING RECOVERY OF PGE'S UNDEPRECIATED INVESTMENT IN TROJAN WAS LAWFUL

URP questions whether the Court of Appeals' decision supports recovery of the undepreciated balance of Trojan. URP Reply Brf. at 13. The Court of Appeals' decision rested squarely on its interpretation harmonizing the two applicable statutes by interpreting ORS 757.140 to permit "return of" the undepreciated balance while reading ORS 757.355 to bar "return on" retired plant. It thus expressly stated that ORS 757.140(2) authorizes "rates

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necessary to compensate utilities for the principal amount of their undepreciated investment in their unused or retired plant." *CUB*, 154 Or App 702, 713. Because of this understanding, the Court of Appeals dismissed URP's argument that ORS 757.355 prohibited recovery of Trojan's undepreciated balance.

D. PGE'S ACTUAL EARNINGS AND ACTUAL TAX PAYMENTS AFTER UE 88 ARE IRRELEVANT

In its Reply Brief, URP presses again its claim that the Commission should consider PGE's actual earnings in 1995 and thereafter when determining what UE 88 rates it should have set. URP Reply Brf. at 14-16. PGE addressed this argument in its Opening Brief. PGE Opening Brf. at 27-28. In setting UE 88 rates, the Commission should not consider future events it could not have known in 1995. As the ALJ's Ruling striking a portion of Mr. Meek's testimony concluded: "While the Commission must now apply a different legal interpretation of ORS 757.355, the factual evidence to which that statute is applied must encompass the same timeframe, that is, information that could have been presented during UE 88." ALJ Ruling (July 25, 2005) at 5.

E. NONE OF URP'S ATTACKS ON THE CREDIBILITY OF PGE'S WITNESSES IS PERSUASIVE

URP makes a number of baseless accusations regarding the credibility of PGE's witnesses. First, URP makes the puzzling claim that "PGE outside witnesses also lacked credibility because they based their testimony on 'facts' of which they had no knowledge." URP Reply Brf. at 17. PGE's outside witnesses presented expert testimony regarding the appropriate authorized rate of return on equity. Under the Oregon Rules of Evidence, an expert witness may present opinion testimony based upon "facts or data . . . made known to the expert at or before the hearing." ORS 40.415; *State v. Nefstad*, 309 Or 523, 545, 789 P2d 1326 (1990) ("the facts assumed by an expert in forming her opinion did not need to come from her firsthand observations or analysis"). PGE's outside experts relied

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upon the factual testimony of PGE's other witnesses, which the Oregon Rules of Evidence permit.

Second, URP claims that PGE's employees should not be believed because "they suffer a disabling conflict of interest." URP Reply Brf at 17. URP offers no evidence for this bald assertion, and there is none. No PGE witness has a direct or indirect financial interest in the outcome of this docket.

Third, URP claims that the Commission should not believe PGE experts because they have been paid "to prepare their testimony and appear at the hearing, on the order of at least $50,000 for each witness." URP Reply Brf. at 16. The payment of witnesses for their time preparing testimony and attending Commission hearings is a routine practice, one which provides no basis for questioning the credibility of PGE's witnesses. Moreover, the record does not confirm URP's accusations. One of PGE's outside experts, Dr. Makholm, was unsure of the amount of his expert fees. TR 113-116. And there is no information in the record regarding the expert fees for Dr. Hess, another of PGE's outside experts. TR 133-138.

F. PGE HAS ADDRESSED THE RELEVANT PERIOD

Finally, URP is mistaken when it suggests that PGE has not presented an analysis of the entire "5.5 years" from the date of Order No. 95-322 to the date of the initial order in UM 989. URP Reply Brf. at 18-22. PGE has presented revenue requirement alternatives for UE 88 and the financial and accounting implications of those alternatives as of September 30, 2000. *See* PGE Opening Brf. at 8-10; Proposed Final Order at 15-17. As PGE stated from the outset of this docket, no party appealed the final rate order in UE 93 and UE 100. Accordingly, the rates set in UE 93 and UE 100 are final and conclusive. *See* PGE's Opening Brief (Feb. 15, 2005) at 22-23. Nevertheless, PGE asks that the Commission make findings regarding the entire five and a half year period, including the UE 93 and UE 100 rate periods, to facilitate an orderly and efficient process. The issues in this phase

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are the alternative UE 88 revenue requirement and a statement of the account balances as of September 30, 2000. There is no reason for the Commission to address the legal question of whether the UE 93 and UE 100 rate periods are at issue.

VIII. CONCLUSION

For the reasons stated above and in PGE's Opening Post-Hearing Brief, the Commission should issue a final order substantially similar in form to the proposed final order attached as Ex. 1 to PGE's Opening Brief.

DATED this 14th day of December, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S POST-HEARING RESPONSE BRIEF (PHASE I)** by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the U.S. mail at Portland, Oregon.

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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 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)	**PORTLAND GENERAL ELECTRIC COMPANY'S POST-HEARING RESPONSE BRIEF (PHASE I)**

Pursuant to the Administrative Law Judge's Rulings on September 19 and October 10, 2005, Portland General Electric Company ("PGE") submits this Response Brief.

I. INTRODUCTION

The post-hearing submissions of the Utility Reform Project and the Class Action Plaintiffs (collectively, "URP") are riddled with internal contradictions and violations of the Commission's governing Scope Orders (Order Nos. 04-597 and 05-091). For example, URP argues that:

- Because "time does not run backwards" (URP Opening Brf. at 15) the Commission may not determine what UE 88 rates it would have set under a new interpretation of ORS 757.355, but the Commission may turn back the clock to order refunds of amounts PGE collected under Commission-approved tariffs;
- The Commission should take no new evidence, but may consider new evidence URP's witness presents;

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- The Commission must not prejudge the outcome, but URP argues that an alternative UE 88 revenue requirement cannot be higher than the actual UE 88 revenue requirement no matter what the evidence shows;
- The Commission should strike all testimony relating to facts that were unknowable in 1995, yet consider PGE's actual earnings and actual tax payments by Enron after the UE 88 final order;
- The Commission should not use a declining balance as the basis for determining the "return on" Trojan even though URP's expert proposed a declining balance basis earlier in this docket;
- The use of interest to reflect the time value of money is inappropriate for PGE's and Staff's alternatives, but appropriate when URP uses interest to calculate a refund amount; and
- URP's expert calculates the "return on" Trojan in isolation when the Commission concluded that this phase should focus on addressing the UE 88 revenue requirement.

URP provides no basis upon which the Commission may make a reasonable, lawful and fact-based decision. PGE and Commission Staff have presented alternatives that comply with the remand orders, abide by the Commission's Scope Orders and are supported by the evidence. PGE requests that the Commission adopt a final order that is substantially similar in form to the proposed Final Order attached as Exhibit 1 to PGE's Opening Brief.

This Response Brief is organized as follows: (II) the scope of this docket; (III) URP's argument that PGE's and Staff's approaches provide an "indirect return on" Trojan; (IV) flaws in Mr. Lazar's analysis; (V) URP's procedural objections; (VI) reclassification of a portion of the Trojan balance as plant-in-service; and (VII) responses to other URP arguments.

II. URP ARGUMENTS CONCERNING THE SCOPE OF THIS DOCKET ARE THE SAME ARGUMENTS THE COMMISSION HAS REJECTED REPEATEDLY IN THIS DOCKET

The centerpiece of URP's post-hearing briefs is its claim, stated in the first sentence of its Opening Brief and repeated throughout its Reply Brief, that "the Commission has allowed this proceeding an unlawful scope" by permitting the introduction of new evidence and engaging in ratemaking. URP Opening Brf. at 1. As is now familiar, URP

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believes the Commission should focus on calculating the "amount of Trojan profits charged" to customers and returning that amount to customers.

Such an approach ignores the fundamental nature of this remand proceeding and the Commission's authority. This proceeding is a combination of the remand orders in UE 88, DR 10 and UM 989. The UE 88 and DR 10 remand order provided the Commission with little guidance other than requiring compliance with the Court of Appeals' decision that ORS 757.355 prohibited rates that included a "return on" retired plant such as Trojan. The Court of Appeals did not find that the UE 88 rates were unjust and unreasonable or in violation of any statute other than ORS 757.355[1]: "Thus, the orders in DR 10 and UE 88 were reversed solely on the ground that the Commission had exceeded its legislative authority." Order No. 04-597, Ex. A at 15.

The remand order in UM 989 provided more guidance for the Commission. The Circuit Court's order faulted the Commission for failing to consider past collections when it reviewed the UM 989 settlement. The combination of these two remand orders thus requires the Commission to reconsider its UE 88 rate determination to decide what UE 88 rates it would have set under the Court of Appeals' interpretation of ORS 757.355. Only such a rate-making process accommodates the UE 88 remand order's admonition concerning ORS 757.355 while making the type of retrospective rate determination that the UM 989 remand order requires. Such a rate-making process requires the Commission to take new evidence.

URP's reliance on case law describing the limited authority of a trial court on remand is misplaced. URP Opening Brf. at 5. The Commission has broad authority and

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[1] Order No. 05-091 at 10 ("Notably, the Court of Appeals did not rule that the end result rates approved in Docket No. UE 88 were unlawful. Rather, the Court of Appeals 'deemed approval of rates that included a return on Trojan investment to have exceeded what the Commission was empowered to do by the Legislature'").

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discretion in this docket. Unlike a trial court, the Commission, on remand, is not constrained from implementing its own regulatory policies. *Securities & Exchange Comm'n v. Chenery Corp.*, 332 US 194, 201 (1947). Like any other agency, the Commission may reopen the factual record, make new findings, and consider different approaches and rationales. *Federal Trade Comm'n v. Morton Salt Co.*, 334 US 37, 55 (1948); *United States v. Morgan*, 307 US 183, 192 (1939); *Pacific Tel. & Tel. Co. v. Hill*, 229 Or 437, 486, 365 P2d 1021 (1961). Taking additional evidence is consistent with the remand orders. Order No. 05-091 at 10 (distinguishing cases URP cites by noting that "the mandate from the Court of Appeals in *Citizens' Utility Board v. PUC* is very broad, compelling us to take and consider new evidence to comply with it").

In any event, the Commission has already decided this issue, initially through the ALJ's Phase I Scope Ruling (August 30, 2004), affirmed in Order No. 04-597 and confirmed again in Order No. 05-091:

> Based on analysis of the two remand orders in context of each other, and the Court of Appeals' opinion in *Citizens' Utility Board* as well as in context of pertinent judicial precedent regarding general principles of ratemaking, the Ruling determined that we are required by the courts to undertake a retrospective examination of what rates would have been approved in UE 88 if the Commission had interpreted the authority delegated to it by the legislature in ORS 757.355 to not allow a return on investment in retired plant, as the Court of Appeals did in *Citizens' Utility Board*. . . . We also agree with the ruling that we must engage in ratemaking in order to set end rates that comply with the pertinent statutes, including ORS 757.355 as interpreted by the Court of Appeals, and ORS 757.020, requiring just and reasonable rates. A proper review of rates established in UE 88 may not focus on costs attributable to earnings on Trojan, an isolated rate component, without considering further other factors offset this amount. Doing so would constitute single-issue ratemaking, which is prohibited. Rather, we agree with the Ruling that these remand proceedings must address the ratemaking question: "What rates would have been approved in UE 88 if ORS 757.355 had been interpreted to prohibit a return on Trojan?"

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Order No. 04-597 at 6.[2] URP offers no new arguments or evidence to warrant a reversal of the Commission's position.

A. PGE ACTED PRUDENTLY IN COMPLYING WITH THE FINAL ORDERS IN DR 10 AND UE 88

URP argues that PGE was unreasonable and imprudent in seeking to recover a return on Trojan. URP Opening Brf. at 20-22. URP urges that PGE should have surmised in 1994 that ORS 757.355 did not permit a "return on" its undepreciated investment in Trojan, notwithstanding an Attorney General's opinion and Commission order in DR 10 to the contrary. Because in 1994 PGE did not make different rate-making proposals (ones that would have departed from the prevailing interpretation of ORS 757.355), URP claims the Commission should block PGE from presenting evidence consistent with the new interpretation of ORS 757.355. URP Opening Brf. at 21.

URP's claims of imprudence are baseless because PGE acted prudently. It complied with Oregon law, as the Attorney General's office and the Commission interpreted it. In response to a request from the Commission, the Department of Justice issued an opinion in June 1992 concluding that ORS 757.355 did "not apply to plant which has been in service." Attorney General's Opinion 6454 (June 8, 1992) at 2 (attached as Appendix A to Order No. 93-1117).

PGE sought specific guidance from the Commission in DR 10 before filing its UE 88 rate case. The Commission confirmed that it would follow the Attorney General's opinion and authorize rates that included a return on the undepreciated investment in Trojan if PGE's rate case evidence satisfied a set of evidentiary requirements. Order No. 93-1117 at 12-13. URP appealed that ruling to the Marion County Circuit Court, which affirmed it in

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[2] For further authority supporting the Commission's position regarding the scope of this docket, see PGE's Opening Memorandum (June 3, 2004) at 3-10, PGE's Reply Memorandum (June 25, 2004) at 3-5, PGE's Opposition to Application for Reconsideration (January 14, 2005) at 1-4, and PGE's Opening Post-Hearing Brief at 2-4.

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late 1994. Judgment entered Dec. 27, 1994 by Judge Barber in *Citizens' Utility Board v. Public Utility Commission*, Marion County Case No. 94C 10372.[3]

PGE presented its rate case in 1994, relying upon the Commission's assurance that "if we [PGE] met our burden of proof with respect to the required elements, the Commission would approve a revenue requirement for PGE that included our interest costs associated with Trojan and a profit opportunity on the remaining balance." PGE/6100, Dahlgren/20; *see also* Order No. 93-1117 at 7 (the final order in DR 10 "establishes the rules within which a rate case will be conducted and the facts that must be proven for recovery to occur"). The Commission authorized UE 88 rates that included a return on the undepreciated balance of Trojan, and PGE charged those rates as Oregon law required. ORS 757.225. PGE's compliance with the Commission orders cannot be the basis of an imprudence finding.

Again, the Commission has already rejected URP's position, urged in the scoping phase of this proceeding, and URP offers no new arguments or evidence:

> We reject [URP's] arguments that PGE is precluded from presenting new evidence. As we previously determined, the primary question presented by the trio of remanded cases is the ratemaking question: "What rates would have been approved in UE 88 if ORS 757.355 had been interpreted to prohibit a return on Trojan?" In contrast, PGE presented evidence in Docket No. UE 88 that was properly limited to determining rates that included a return on the Trojan plant, based on the Commission's interpretation of ORS 757.355 in docket no. DR 10. When the scope of a proceeding is narrowed, parties are prohibited from raising issues outside of that scope. Parties must be able to rely on the legitimacy of scope restrictions without concern that arguments outside these scope restrictions will be waived should they become relevant upon remand.

Order No. 05-091 at 9.

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[3] Judge Barber ruled the same way in the companion appeal of URP and the Public Power Council, Marion Co. Case No. 94C 10417.

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B. THE COMMISSION HAS NOT PREJUDGED THE ISSUES IN PHASE I OF THIS DOCKET

Next, URP argues that this proceeding is a "pointless exercise" and "dead on arrival" because it claims the Commission has prejudged the issues. URP Opening Brf. at 24. In particular, URP argues that the Commission position in the pending appeal of Order No. 02-227, that Oregon law does not authorize retroactive refunds, renders this remand proceeding "meaningless and moot." URP Opening Brf. at 23.

URP's argument ignores the phasing of this proceeding. The question of the Commission's legal authority to order refunds, which the parties may address in a later phase, is distinct from the issues in Phase I, which require consideration and determination of the UE 88 revenue requirement. Depending upon the outcome of Phase I, the legal issue regarding the Commission's authority to order refunds may be moot. If the Commission determines that it would have established an alternative UE 88 revenue requirement higher than the actual revenue requirement, and finds that the UM 989 settlement was reasonable, then the Commission will have no reason to address whether or not it has the legal authority to order refunds.

Most telling, the Circuit Court remanded UM 989 to the Commission in the face of the same arguments URP advances here.[4] The Circuit Court must have disagreed that a remand proceeding would be "pointless."

In any event, the Commission has already rejected URP's claim:

> URP expresses concerns that these remand proceedings are "pointless," "meaningless," and "moot," speculating that relief cannot be granted due to the Commission's legal position that refunds violate the rule against retroactive ratemaking. As the ruling observed, however, the Commission's legal position that it is not authorized to issue refunds is not necessarily

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[4] URP argued to the Marion County Circuit Court that remand to the Commission "would be futile" because the Commission has "repeatedly stated that they can offer no relief . . . for past unlawful charges." July 23, 2003 Transcript of Proceedings at 242. *See* Order No. 04-597, Appendix A at 19, n12.

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> implicated in the first phase. We agree that, "prior to completing the investigation of what rate determinations would have been made by the Commission under the statutory framework provided by the Court of Appeals, it is impossible to know whether any retroactive adjustments of rates will be necessary." We also agree the ruling's conclusion that "preconceptions about the law neither invalidate individual commissioners pursuant to ORS 756.026, nor the Commission generally from acting under the law.

Order No. 04-597 at 7-8.[5]

C. THIS PROCEEDING WILL NOT INTERFERE WITH ANY VESTED RIGHTS

URP raises a variety of arguments predicated on its contention that customers have vested rights in a refund. URP Opening Brf. at 36-39. The vested rights allegedly arise from the Marion County Circuit Court's grant of partial summary judgment in the class action suit still pending in Marion County. URP claims that the Commission is prohibited from taking any action that would interfere with these vested rights or violate the Contract Clause of the United States or Oregon Constitutions, or abrogate rights protected under the Remedies Clause of the Oregon Constitution. URP's argument collapses under the weight of its false assumption that the Circuit Court's grant of partial summary judgment has created vested rights:

> Applicants assert several arguments based on their belief that the Circuit Court's Ruling conferred vested rights. As Oregon law deems vested rights to accrue only when a judgment is final, however, none of these arguments legitimately warrant reconsideration of Order No. 04-597 pursuant to OAR 860-014-0095(3)(b). Consequently, we conclude it is not necessary to further evaluate Applicants' arguments that are based on a vested-rights theory, including: (1) that the Commission is prohibited from any action that may alter the vested rights; (2) that the scope of the first phase of this proceeding as adopted by Order No. 04-597 violates the Remedy Clause of Article I, § 10 of the Constitution; and (3) that implied contract rights have been created which are

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[5] For further authority supporting the Commission's conclusion, see PGE's Reply Memorandum (June 25, 2004) at 1-3.

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> protected by the contract clauses of the Oregon and United States Constitutions.

Order No. 05-091 at 9.[6]

D. URP'S CLAIM THAT COMMISSION ORDER NO. 95-322 IS VOID *AB INITIO* IS MISPLACED

URP claims that Order No. 95-322 is void *ab initio* and that UE 88 rates were, therefore, unlawful. URP Opening Brf. at 39-43. URP appears to believe that this point somehow invalidates this proceeding. URP's position is ill-founded. The Commission's Scope Orders acknowledge that the Court of Appeals concluded that the Commission exceeded its legislative authority in Order No. 95-322. Order No. 05-091 at 10. The Commission is now correcting that error by determining what UE 88 rates it would have established had it known ORS 757.355 did not permit a "return on" retired plant.

URP "void *ab initio*" may concern the Commission's legal authority to issue refunds. If so, it is premature:

> Based on further guidance from the Circuit Court, again we have concluded that it is necessary for us to determine, on remand, what rates should have been authorized in Docket UE 88. That is the question we undertake in the first phase of these proceedings. [URP's] claim that rates established in Docket UE 88 are void *ab initio* is, therefore, erroneous—or at least premature. We have indicated that subsequent phases of these proceedings will address, as necessary, reconciliation of the results of Phase I with rates approved in Docket UE 88, and adjustment of rates.

Order No. 05-091 at 11.

III. PGE'S AND STAFF'S PROPOSED METHODOLOGY DOES NOT SEEK OR PROVIDE AN INDIRECT "RETURN ON" TROJAN

Other than complaints about the scope of this proceeding, URP's principal argument is that the alternatives PGE and Staff propose involve an indirect return on Trojan. *See, e.g.,* URP Opening Brf. at 16; URP Reply Brf. at 9-11. URP makes this claim in a

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[6] For further authority supporting the Commission's conclusion, see PGE's Opposition to URP's Application for Reconsideration at 4-9.

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variety of forms. Sometimes it objects to PGE's use of deferred accounts (URP Reply Brf. at 10); elsewhere it complains about the use of interest applied to differences between the previously authorized revenue requirement and the alternative revenue requirement to be determined in this proceeding (URP Opening Brf. at 16); at other times URP complains about the use of certain regulatory assets and customer credits such as the Boardman credit, SAVE, AMAX and power cost deferrals (URP Reply Brf. at 10-11); and finally, URP suggests that any outcome that would have resulted in a higher UE 88 revenue requirement would constitute an unlawful return on Trojan. URP Opening Brf. at 20. None of these arguments holds any water.[7]

A. PGE'S APPROACH DOES NOT RELY UPON A POWER COST DEFERRAL

In its Reply Brief, URP claims that the methodology PGE and Staff propose "allow PGE to keep the unlawful Trojan return on investment merely by changing the name of the stack of dollars from 'Trojan return on investment' to 'deferred power costs earning the same return on investment.'" URP Reply Brf. at 10. As a threshold matter, only one of the three approaches PGE supports includes a power cost deferral. If the Commission is concerned that a power cost deferral reflects an impermissible return on Trojan, PGE recommends that it adopt either the alternative Staff recommendation that does not include a power cost deferral[8] or adopt the 17-year amortization alternative PGE supports that also does not include a power cost deferral. *See* PGE's Opening Brf. at 8-10 and Proposed Final

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[7] One of PGE's return on equity expert, Dr. Colin Blaydon, rebutted URP's allegation that PGE's proposal reflected a "model of corrupt regulation" designed to support a "predetermined outcome." PGE/7000, Blaydon/3 ("What . . . Mr. Lazar fail[s] to recognize, however, is that the Commission needs to provide the utility with a fair return on its capital in order to be able to continue to attract investors and to provide the proper incentives to pursue the least cost alternatives that are in the best interest of customers"). URP did not cross examine Dr. Blaydon regarding his testimony on this point.

[8] With the adjustments PGE recommends. *See* PGE's Opening Brf. at 8; Proposed Final Order at 16.

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Order at 15-17. Under either approach, PGE's revenue requirement in UE 88 would have been higher than the actual UE 88 revenue requirement. *Id.*

More fundamentally, the use of a power cost deferral does not constitute an indirect return on Trojan. PGE offered this alternative as a way to smooth the rate impact under a one-year recovery approach. PGE/6000, Lesh/35-36. Such a deferral would have lessened the revenue requirement increase during the first year following the UE 88 final order and softened the revenue requirement decrease thereafter when the Trojan balance would have been fully recovered. It would have served to mitigate rate fluctuations, one of the Commission's rate-making objectives and one of the statutory bases for deferred accounting treatment. *See* ORS 757.259(2)(e).

In any event, the use of a power cost deferral is not necessary. The other alternatives PGE recommends reach the same conclusion: that the UE 88 revenue requirement as set in 1995 is lower than the reasonable alternatives. In the end, this is the most convincing evidence that the power cost deferral is not an indirect return on Trojan.

B. PGE'S BALANCE SHEET OPTIONS DO NOT PROVIDE AN INDIRECT RETURN ON TROJAN

URP also suggests that PGE's proposed balance sheet options involve an indirect return on Trojan. URP Reply Brf. at 16. Recall, in the one-year recovery alternatives, PGE and Staff proposed offsetting the Boardman credit against the Trojan balance in UE 88. *See* PGE's Opening Brf. at 8-9; Proposed Final Order at 15-16. Because the Commission used the Boardman credit in UE 93 to offset against several accounts customers owed PGE, including the AMAX termination payments, previously authorized power cost deferrals, and the SAVE incentive PGE earned, this alternative would require the Commission to establish a new recovery period for these accounts. PGE/6000, Lesh/33-35. PGE proposed a 10-year recovery for these regulatory assets. PGE/6200, Tinker-Hager-Schue/23-24. Both Staff and PGE support this approach because it would reduce the rate

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impact on customers and serve the goal of intergenerational equity among customers. *See* PGE Opening Brf. at 19-20.

This brief description of these balance sheet options reveals that they are not "an indirect return on Trojan." First, the use of Boardman to offset against the Trojan balance is not a contrivance of this remand proceeding. In UE 93, the Commission offset $20 million of the undepreciated Trojan balance against the Boardman credit. UE 93, Order No. 95-1216 at 3-4, Ex. B at 23. It is an established and accepted rate-making tool.

Second, the AMAX, power cost and SAVE accounts existed independent of any of the alternatives proposed in this remand proceeding. The Commission approved these deferred accounts in Commission proceedings other than UE 88.[9] The deferred balances accrued interest in accord with general Commission policy. Nothing PGE or Staff suggests in this remand docket would change or depart from that general policy. The delay in the recovery of these assets, which PGE and Staff propose, furthers the Commission's policies of rate stability and intergenerational equity among customers. PGE/6000, Lesh/35-36.

Third, the purpose behind these rate-making tools is not to reach some predetermined revenue requirement figure. The approaches PGE recommend further important goals, such as least cost planning, intergenerational equity and stable rates. *Id.*

C. PGE'S USE OF INTEREST DOES NOT CONSTITUTE AN INDIRECT RETURN ON TROJAN

URP also suggests that the use of interest is inappropriate. URP Opening Brf. at 15-16. As a threshold matter, this objection is inapplicable to the central issue in this phase – an alternative UE 88 revenue requirement. With respect to the establishment of an alternative UE 88 revenue requirement, neither PGE nor Staff applied interest to any balance.

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[9] UM 504, Order No. 91-186 (AMAX); UM 594, Order No. 93-1493 (Trojan replacement power costs); UE 79, Order No. 91-98 (SAVE).

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The differences in UE 88 revenue requirements in both Staff's and PGE's approaches include no amount for interest.

PGE and Staff used interest to state account balances as of the time of the initial approval of the UM 989 settlement, September 30, 2000. The remand order in UM 989 essentially required this by instructing the Commission to review the 2000 settlement while considering alternative rate-making approaches in UE 88, five and a half years earlier. The use of interest was necessary in order to state all account balances and revenue requirement differences in terms of the same currency: dollars as of September 30, 2000.

PGE's and Staff's use of interest is not for the purpose of giving PGE a return on Trojan. Indeed, it is the same use of interest that URP's own expert, Jim Lazar, applies. Mr. Lazar applied interest to amounts he deemed over-collections in the past to arrive at his current claim. In short, he used interest to state amounts collected in the past in today's dollars:

> Q: How did you convert the amounts paid in the past into a refund amount due to ratepayers?
>
> A: I have computed the escalation factor for each year of the analysis period, using the pre-tax rate of return that PGE used in its analysis of Trojan costs. The sum of the interest since the original $193 million was collected comes to $330 million.

URP/200, Lazar/4. PGE's testimony rebutted Mr. Lazar's use of the pre-tax rate of return as the appropriate *rate* of interest.[10] The point here is not the rate of interest, but Mr. Lazar's recognition that interest must be applied to translate past dollar amounts into today's currency.

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[10] PGE/6900, Hager-Tinker-Schue/4-5.

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D. THE COMMISSION MAY REACH THE SAME END RATES FOR DIFFERENT REASONS WITHOUT VIOLATING THE COURT OF APPEALS' DECISION OR PROVIDING AN INDIRECT RETURN ON TROJAN

At bottom, the essence of URP "indirect return" argument is that any outcome that would result in a higher UE 88 revenue requirement would violate the Court of Appeals' decision. URP's position in this regard is internally inconsistent and contrary to the law. URP has repeatedly claimed that the Commission has prejudged the outcome. The Commission has said that it will wait until the record is complete to make its decision:

> Prior to completing the investigation of what rate determination would have been made by the Commission under the statutory framework provided by the Court of Appeals, it is impossible to know whether any retroactive adjustment of rates will be necessary. Analysis could show end rates would remain the same as, be greater than or lesser than rates approved in UM 989 (and other relevant rate orders). Prejudgment of any outcome is inappropriate.

Commission Order No. 04-597 at 7, Ex. A at 19. On the other hand, URP does not need to see the evidence. Any outcome that would result in a higher UE 88 revenue requirement (and therefore no refund) would constitute an indirect return on Trojan and violation of the Court of Appeals' decision, according to URP.

An unbroken line of cases contradicts URP's position. Courts have uniformly held that an administrative agency on remand may reach the same conclusion but for different reasons than the initial decision. *Bowen v. Hood*, 202 F3d 1211, 1219 (9th Cir 2000) ("It can hardly be doubted that 'an agency is free on remand to reach the same result by applying a different rationale'"); *Chenery Corp.*, 332 US at 200-201.[11] This fact does not

[11] 3 Kenneth Culp Davis, *Administrative Law Treatise*, § 18.1 (3d ed. 1994) ("the agency often can support the same action on remand with a set of reasons or findings that is consistent with the applicable law announced by the reviewing court"); 2 Charles Koch, *Administrative Law and Practice*, § 8.31 (2nd ed. 1997) ("the agency is free on remand to reach the same result on different grounds").

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mean that the agency is "corrupt" or "deceitful" as URP suggests.[12] URP Reply Brf. at 6. In fact, agencies often reaffirm their prior determination.[13] This practice reflects the way appellate review of administrative orders works. Courts identify legal errors and remand with orders to correct the error. *Federal Power Comm'n v. Idaho Power Co.*, 344 US 17, 20 (1952) ("the guiding principle, violated here, is that the function of the reviewing court ends when an error of law is laid bare."). They do not order a particular outcome, which is a matter committed to the discretion, expertise and regulatory policy of the agency.[14]

The correction of a legal error may or may not result in a different outcome on remand. The point of this phase is to see whether it will make a difference. But a necessary predicate is that correcting the legal error may not result in a different outcome. The remand orders contemplated this, the Circuit Court anticipated it, the Commission recognized it, and a broad unbroken line of case law endorses it. Only URP disagrees; and it is wrong.

IV. MR. LAZAR'S ANALYSIS IS FLAWED AND FAILS TO ADDRESS THE APPROPRIATE ISSUES

In its Opening Brief, URP mistakenly suggests that neither PGE nor Staff presented objections to Mr. Lazar's testimony. URP Opening Brf. at 13-14. In fact, PGE's Opening Brief noted a number of errors in Mr. Lazar's analysis to which URP makes no

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[12] *See, e.g., Bowen*, 202 F3d at 1219 ("We see nothing sinister" in the agency on remand reaching the same outcome based on a different rationale).

[13] 3 Davis, *Administrative Law Treatise*, § 18.1 ("A study of agency actions on remand in 1984-85 found that agencies reaffirmed their earlier decision in 20 to 25 percent of the cases").

[14] *See FCC v. Pottsville Broadcasting Co.*, 309 US 134, 145 (1940) ("On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge"); *Federal Power Comm'n v. Pacific Power & Light Co.*, 307 US 156, 160 (1939) (court reviews for legal errors and "cannot fix rates nor make divisions of joint rates nor relieve from the long-short haul clause nor formulate car practices").

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response in its Reply Brief. *See* PGE Opening Brf. at 25-29. The most glaring is Mr. Lazar's failure to address the central question at issue in Phase I: what rates would the Commission have established in UE 88? Instead, Mr. Lazar "compute[d] the amount of refund that is due to ratepayers as a result of including profit on the Trojan investment in PGE's rates . . . I believe that the best estimate of the amount due to ratepayers to reimburse for the amount of return on Trojan charged to ratepayers during the 5.5-year period is $642 million." URP/200, Lazar/1-2. The Commission has already rejected this narrow rate-making approach in the Scope Orders.

Other errors include his mistaken assumption that the Court of Appeals' decision required a complete write-off of the undepreciated balance of Trojan (which is essential to his capital structure adjustment and his deferred tax adjustment);[15] his failure to use Trojan's declining balance, which violates standard accounting procedures, fails to comport with how PGE reports earnings to the SEC and OPUC, and contradicts Mr. Lazar's previous analysis in UM 989; [16] and Mr. Lazar's use of PGE's pre-tax authorized cost of capital as the appropriate interest rate, when the Commission's policy is to allow interest on deferred amounts to accrue at PGE's cost of capital (after-tax). PGE/6900, Hager-Tinker-Schue/4. The use of the wrong interest rate alone accounts for between $125 million and $149 million of URP's refund claim. *Id.*/5.

V. THE COMMISSION AND ALJ PROVIDED A FAIR OPPORTUNITY FOR URP TO PRESENT ITS EVIDENCE AND ARGUMENTS

URP contends that the ALJ was biased against it and committed legal errors at the hearing and throughout the proceeding. *See, e.g.,* URP Opening Brf. at 24-28; URP Reply Brf. at 7. None of these claims have any merit.

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[15] *See* PGE's Opening Brf. at 27.

[16] PGE/6900, Hager-Tinker-Schue/2 (citing Complainants 200, Table URP-1, attached as Ex. 1 hereto).

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A. THE ALJ DID NOT ERR IN DECLINING TO ADMIT MR. MEEK'S TESTIMONY INTO THE RECORD

URP's Opening Brief objects to the application of the witness-advocate bar (Oregon Rule of Professional Conduct 3.7) to Mr. Meek's testimony. URP Opening Brf. at 24-28. URP claims again that application of the rule would cause undue hardship. URP Opening Brf. at 24-28. The ALJ's Ruling properly rejected URP's position. *See* ALJ Ruling (Sept. 19, 2005) at 4-5. URP should have known about ORPC 3.7's prohibition from the outset of this docket. At a minimum, URP should have known about the witness-advocate bar no later than July 25, 2005, when ALJ Grant issued his ruling putting URP on notice that Mr. Meek "should not be representing URP while appearing as a witness." ALJ Ruling (July 25, 2005) at 2, n1.

After this warning, URP had ample time to locate and prepare replacement counsel for Mr. Meek. Ms. Williams has represented a related party, the Class Action Plaintiffs, throughout this proceeding. URP and the Class Action Plaintiffs have submitted joint filings and sponsored each other's testimony throughout this proceeding. And there was sufficient time for Ms. Williams to prepare for the hearings on August 29 and 30, more than one month after ALJ Grant's July 25 Ruling. Instead, URP waited until August 23 to seek clarification of the July 25 Ruling. URP's election not to prepare Ms. Williams for the hearing and wait until the eve of the hearing to raise these issues proves that any "undue hardship" was self-inflicted.

Moreover, the ALJ's ruling causes no prejudice to URP. The ALJ's ruling permits the Commission to consider Mr. Meek's testimony as comments and allowed URP to renew the arguments in post-hearing briefs. ALJ Ruling (Sept. 19, 2005) at 5. URP availed itself of this opportunity by urging the same arguments in post-hearing submissions. URP Reply Brf. at 15. URP fails to identify a single argument it cannot make, or cannot make as effectively, because of the ALJ's Ruling.

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B. THE ALJ DID NOT PREVENT URP FROM PRESENTING EVIDENCE URP DEEMED RELEVANT

In its Reply Brief, URP claims that "the proceeding excluded all issues and evidence to warrant a lower revenue requirement." URP Reply Brf. at 7. URP identifies no ALJ ruling or Commission order that prevented URP from presenting such evidence. Indeed, the ALJ permitted cross examination regarding URP's claim that PGE earned more than its allowed rate of return after UE 88 and that PGE charged ratepayers for state and federal taxes while PGE filed consolidated tax returns. Hearing Transcript (Aug. 29 and 30, 2005) ("TR") 174-200. More specifically, URP introduced documents relating to PGE's actual earnings and tax payments, which the ALJ admitted into the record. URP Exhibits 500, 600, 700; TR 180-200. And URP renews these arguments in its post-hearing briefs. URP Reply Brf. at 15. That URP's claims are misguided because they impute knowledge to the Commission in 1995 that it could not have known at the time is not our point here. *See* PGE's Opening Brf. at 27-30 (rebutting URP's tax and "overearning" arguments). The point here is that the ALJ and Commission allowed URP to present its evidence and make its arguments.

C. THE ALJ DID NOT PRECLUDE URP FROM CONDUCTING CROSS EXAMINATION REGARDING THE WITNESSES' WRITTEN TESTIMONY

In its Opening Brief, URP contends that it was "precluded from cross-examining PGE and OPUC Staff witnesses on a very substantial portion of their testimonies," again without identifying a particular ALJ ruling. URP Opening Brf. at 35. URP is wrong. At the outset of the hearing, the ALJ properly ruled that cross examination would be limited by the Scope Orders. The ALJ informed the parties that she would consider objections to the scope of cross examination on a witness-by-witness, question-by-question basis. TR 19, 24 and 26. Mr. Meek was free to cross examine witnesses based upon their written testimony. No part of the written testimony was outside the permitted scope of cross

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examination. Indeed, URP cross examined witnesses on topics of its own choosing, including alleged over-earnings and tax payments, without limitation. TR 174-200.

D. THE ALJ PROPERLY DENIED URP'S MOTION TO STRIKE

URP mistakenly claims that the "ALJ granted PGE's Motion in Limine but then refused even to consider URP's parallel motion to strike." URP Opening Brf. at 28. The ALJ fully considered URP's parallel motion to strike, providing URP with additional time after the hearing to present its motion to strike. The ALJ denied URP's motion to strike because it was inadequate and untimely. It did not refuse to consider it.

The ALJ's ruling on the motion to strike was correct. URP misunderstands the ALJ's ruling on PGE's motion in limine. That ruling granted the portion of PGE's motion in limine that sought to limit cross examination based upon the Scope Orders. The ALJ's ruling on PGE's motion was not predicated upon URP's label "future facts." Indeed, the ALJ permitted cross examination regarding PGE's earnings and tax payments after 1995, both of which fit URP's classification as "future facts." And it was URP that introduced exhibits on these topics into the record. *See* URP 500, 600 and 700. URP cannot complain about the ALJ's denial of its motion to strike all references to "future facts" when it introduced facts that could not have been known by the Commission in 1995.

Finally, PGE's motion in limine was not based on URP's "future fact" label. PGE based its motion on the generally recognized rate-making principle that in determining an appropriate revenue requirement, evidence should be limited to information that the Commission could have known at the time. URP's request to strike was significantly broader, seeking to bar any reference to "future facts" which would encompass a number of relevant topics. For example, URP's "future facts" category would sweep in generally recognized regulatory principles, general background information, and the accounting and

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rate-making consequences of differences in the UE 88 revenue requirement, all of which are relevant to this phase. *See* PGE's Opposition to Motion to Strike at 2-4.

VI. URP'S ARGUMENT AGAINST CLASSIFICATION OF A PORTION OF THE TROJAN BALANCE AS PLANT-IN-SERVICE RELIES ON INAPPLICABLE STATUTES

In its Reply Brief, URP claims that two statutes, ORS 758.400(3) and ORS 30.180, show that no part of the Trojan balance should be classified as "plant-in-service" and therefore placed outside the scope of ORS 757.355. URP Reply Brf. at 24. Neither statute URP relies upon is relevant to the definition of "utility service" used in ORS 757.355. ORS 758.400 defines "utility service" for purposes of the territorial allocation statutes and therefore encompasses only distribution assets. By definition, it excludes all transmission and generation assets, whether or not they are classified as "plant-in-service" or "used or useful." If URP was correct, ORS 757.355 would prohibit the Commission from including transmission or generation assets in rate base, an absurd outcome. In fact, the statute explicitly states that the definition of "utility service" in ORS 758.400(3) is for use "in ORS 758.015 and 758.400 to 758.475" and not Chapter 757. Similarly, the other statute URP relies upon (ORS 30.180(7)) expressly states that its definitions do not apply generally. ORS 30.180 (limiting definitions, including the definition of "utility service," to ORS 30.180 to 30.186).

In contrast, ORS 756.010(8)—which provides that "service is used in its broadest and most inclusive sense and includes equipment and facilities related to providing the service or product served"—provides the definition for "ORS chapters 756, 757, 758 and 759."

Aside from looking to the wrong statutes, URP is wrong that "utility service" in ORS 757.355 is limited to equipment and facilities over which electricity flows to customers. This has never been the Commission's or any other commission's view of what

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constitutes utility service. In *Pacific Northwest Telephone*, the Commission rejected the same type of narrow reading of services URP offers here:

> The definition of "telecommunications service" suggested by PNB would exclude those services which do not involve the physical facilities required to transmit telephone messages. However, the Oregon statutory scheme provides that, in the context of utility regulation the term "service" should be construed broadly to include all services imbued with the public interest.

110 PUR 4th 132, 1989 WL 418536 (OPUC Dec. 29, 1989). In that docket, the Commission concluded that publishing telephone directories was closely related to telephone service to fall under the Commission's control. Similarly, in *Northwest Climate*, the Commission found that appliance adjustment, pilot light relighting, and inspection and repair services performed by the natural gas utility were services subject to Commission regulation. *Northwest Climate Conditioning Ass'n v. Lobdell*, 79 Or App 560, 565, 720 P2d 1281 (1986). The Court of Appeals in *Northwest* recognized that the Commission possesses authority over not only the provision of natural gas and electricity, but also over ancillary services which are closely related to providing electricity and natural gas, or telephone services. *Id.*

Other states with statutory provisions similar to ORS 756.010 have also rejected URP's narrow view of "utility service." *See, e.g., West Penn Power Co. v. Pennsylvania Public Utility Comm'n*, 578 A2d 75 (Pa Commw Ct 1990) ("utility service is not confined to the distribution of electrical energy" but includes "any and all acts related to that function," including tree-trimming services).

Order No. 95-322 recognized that the Trojan assets "provide service necessary for safety and asset preservation pending decommissioning and dismantling the plant." *Id.* at 53. As Staff concluded, "it is hard to argue that these are not legitimate and necessary utility services." Staff/100, Busch-Johnson/16.

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VII. OTHER URP CLAIMS

A. PGE HAS CONSISTENTLY STATED THAT THE COMMISSION MUST ENGAGE IN RATEMAKING

It is unclear why URP claims that PGE's Opening Brief says that the Commission need not engage in ratemaking in this first phase. URP Reply Brf. at 8. Whatever the basis of URP's claim, it is wrong. PGE has clearly stated throughout this proceeding that the Commission must engage in ratemaking to determine what rates it would have set if it knew in 1995 that ORS 757.355 did not permit rates to include a return on the undepreciated balance of Trojan.

B. PGE DOES NOT CLAIM THAT A REFUND AMOUNT CAN NEVER BE CALCULATED

URP mistakenly claims that PGE "argues that the Commission can never calculate appropriate refunds for customers." URP Reply Brf. at 14. PGE's position is that the Commission lacks the legal authority to order refunds (*see* PGE's Opening Brf. (Feb. 15, 2005) at 22-23). That legal issue will be the subject of a future phase. ALJ Ruling (May 5, 2004) at 8. For purposes of this phase of the proceeding, PGE has projected alternative revenue requirement amounts and stated the account balances as of September 30, 2000. PGE Opening Brf. at 8-10; Proposed Final Order at 15-17. The Scope Orders require nothing more and nothing less.

C. THE COURT OF APPEALS' DECISION CONCLUDED THAT THE COMMISSION'S DECISION PERMITTING RECOVERY OF PGE'S UNDEPRECIATED INVESTMENT IN TROJAN WAS LAWFUL

URP questions whether the Court of Appeals' decision supports recovery of the undepreciated balance of Trojan. URP Reply Brf. at 13. The Court of Appeals' decision rested squarely on its interpretation harmonizing the two applicable statutes by interpreting ORS 757.140 to permit "return of" the undepreciated balance while reading ORS 757.355 to bar "return on" retired plant. It thus expressly stated that ORS 757.140(2) authorizes "rates

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necessary to compensate utilities for the principal amount of their undepreciated investment in their unused or retired plant." *CUB*, 154 Or App 702, 713. Because of this understanding, the Court of Appeals dismissed URP's argument that ORS 757.355 prohibited recovery of Trojan's undepreciated balance.

D. PGE'S ACTUAL EARNINGS AND ACTUAL TAX PAYMENTS AFTER UE 88 ARE IRRELEVANT

In its Reply Brief, URP presses again its claim that the Commission should consider PGE's actual earnings in 1995 and thereafter when determining what UE 88 rates it should have set. URP Reply Brf. at 14-16. PGE addressed this argument in its Opening Brief. PGE Opening Brf. at 27-28. In setting UE 88 rates, the Commission should not consider future events it could not have known in 1995. As the ALJ's Ruling striking a portion of Mr. Meek's testimony concluded: "While the Commission must now apply a different legal interpretation of ORS 757.355, the factual evidence to which that statute is applied must encompass the same timeframe, that is, information that could have been presented during UE 88." ALJ Ruling (July 25, 2005) at 5.

E. NONE OF URP'S ATTACKS ON THE CREDIBILITY OF PGE'S WITNESSES IS PERSUASIVE

URP makes a number of baseless accusations regarding the credibility of PGE's witnesses. First, URP makes the puzzling claim that "PGE outside witnesses also lacked credibility because they based their testimony on 'facts' of which they had no knowledge." URP Reply Brf. at 17. PGE's outside witnesses presented expert testimony regarding the appropriate authorized rate of return on equity. Under the Oregon Rules of Evidence, an expert witness may present opinion testimony based upon "facts or data . . . made known to the expert at or before the hearing." ORS 40.415; *State v. Nefstad*, 309 Or 523, 545, 789 P2d 1326 (1990) ("the facts assumed by an expert in forming her opinion did not need to come from her firsthand observations or analysis"). PGE's outside experts relied

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upon the factual testimony of PGE's other witnesses, which the Oregon Rules of Evidence permit.

Second, URP claims that PGE's employees should not be believed because "they suffer a disabling conflict of interest." URP Reply Brf at 17. URP offers no evidence for this bald assertion, and there is none. No PGE witness has a direct or indirect financial interest in the outcome of this docket.

Third, URP claims that the Commission should not believe PGE experts because they have been paid "to prepare their testimony and appear at the hearing, on the order of at least $50,000 for each witness." URP Reply Brf. at 16. The payment of witnesses for their time preparing testimony and attending Commission hearings is a routine practice, one which provides no basis for questioning the credibility of PGE's witnesses. Moreover, the record does not confirm URP's accusations. One of PGE's outside experts, Dr. Makholm, was unsure of the amount of his expert fees. TR 113-116. And there is no information in the record regarding the expert fees for Dr. Hess, another of PGE's outside experts. TR 133-138.

F. PGE HAS ADDRESSED THE RELEVANT PERIOD

Finally, URP is mistaken when it suggests that PGE has not presented an analysis of the entire "5.5 years" from the date of Order No. 95-322 to the date of the initial order in UM 989. URP Reply Brf. at 18-22. PGE has presented revenue requirement alternatives for UE 88 and the financial and accounting implications of those alternatives as of September 30, 2000. *See* PGE Opening Brf. at 8-10; Proposed Final Order at 15-17. As PGE stated from the outset of this docket, no party appealed the final rate order in UE 93 and UE 100. Accordingly, the rates set in UE 93 and UE 100 are final and conclusive. *See* PGE's Opening Brief (Feb. 15, 2005) at 22-23. Nevertheless, PGE asks that the Commission make findings regarding the entire five and a half year period, including the UE 93 and UE 100 rate periods, to facilitate an orderly and efficient process. The issues in this phase

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are the alternative UE 88 revenue requirement and a statement of the account balances as of September 30, 2000. There is no reason for the Commission to address the legal question of whether the UE 93 and UE 100 rate periods are at issue.

VIII. CONCLUSION

For the reasons stated above and in PGE's Opening Post-Hearing Brief, the Commission should issue a final order substantially similar in form to the proposed final order attached as Ex. 1 to PGE's Opening Brief.

DATED this 14th day of December, 2005.

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 989
Advice No. 00-13

In the Matter of the Application of PORTLAND GENERAL ELECTRIC CO. for an Accounting Order and Order Approving Tariff Sheets Implementing a Rate Reduction

TESTIMONY OF JIM LAZAR

May 15, 2001

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Linda K. Williams

Table URP-1

CHARGES TO RATEPAYERS FOR TROJAN APPROVED BY OPUC ORDER NO. 95-322* (millions of dollars)

	Balance of Undepreciated Investment	Annual Depreciation Charged to Ratepayers	Annual Return on Investment Charged to Ratepayers		Cumulative Annual Return on Investment Charged to Ratepayers		Annual Charges to Ratepayers	Annual Charges with interest to 12/31/99	Cumulative 1995-Present Charges to Ratepayers		Years to End of 1999
			without interest	with interest to 12/31/99	without interest	with interest to 12/31/99			without interest	with interest to 12/31/99	
1995	$250.70	$14.75	$33.82	$54.35	$33.82	$54.35	$48.57	$78.05	$48.57	$78.05	4.5
1996	$235.95	$14.75	$31.83	$46.86	$65.65	$101.21	$46.58	$68.57	$95.14	$146.62	3.5
1997	$221.21	$14.75	$29.84	$39.90	$95.49	$141.11	$44.59	$59.62	$139.73	$206.24	2.5
1998	$206.46	$14.75	$27.85	$33.49	$123.34	$174.60	$42.60	$51.22	$182.33	$257.46	1.5
1999	$191.71	$14.75	$25.86	$27.61	$149.20	$202.21	$40.61	$43.35	$222.94	$300.81	0.5
2000	$176.96	$14.75	$23.87		$173.08		$38.62		$261.56		
2001	$162.22	$14.75	$21.88		$194.96		$36.63		$298.19		
2002	$147.47	$14.75	$19.89		$214.85		$34.64		$332.83		
2003	$132.72	$14.75	$17.90		$232.76		$32.65		$365.48		
2004	$117.98	$14.75	$15.92		$248.67		$30.66		$396.14		
2005	$103.23	$14.75	$13.93		$262.60		$28.67		$424.82		
2006	$88.48	$14.75	$11.94		$274.53		$26.68		$451.50		
2007	$73.74	$14.75	$9.95		$284.48		$24.69		$476.19		
2008	$58.99	$14.75	$7.96		$292.44		$22.70		$498.90		
2009	$44.24	$14.75	$5.97		$298.41		$20.72		$519.61		
2010	$29.49	$14.75	$3.98		$302.39		$18.73		$538.34		
2011	$14.75	$14.75	$1.99		$304.37		$16.74		$555.07		
Totals		$250.70	$304.37	$202.21			$555.07	$300.81			
		1995-99	$149.20								

Paid by Ratepayers

	without interest	with interest to 12/31/01	Years to end of 2000
1995	59	$102.78	5.5
1996	59	$94.82	4.5
1997	59	$86.86	3.5
1998	59	$78.90	2.5
1999	59	$70.94	1.5
2000	59	$62.98	0.5
	354	$497.26	

CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S POST-HEARING RESPONSE BRIEF (PHASE I)** by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the U.S. mail at Portland, Oregon.

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