BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

DR 10/UE 88/UM 989

In the Matters of

The Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement. (DR 10)

Revised Tariffs Schedules for Electric Service in Oregon Filed by Portland General Electric Company. (UE 88)

Portland General Electric Company's Application for an Accounting Order and for Order Approving Tariff Sheets Implementing Rate Reduction. (UM 989)

REPLY BRIEF OF UTILITY REFORM PROJECT, ET AL. AND THE CLASS ACTION PLAINTIFFS

PHASE I

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At the outset, we note that this entire Phase I is an exercise in ratemaking that both violates ORS 757.355 and separately constitutes unlawful retroactive ratemaking. It is also an exercise in fantasy that could and should have been completely avoided. The techniques offered by PGE and advocated by Staff constitute transparent violations of ORS 757.355 and amount to nothing more than a series of meaningless numbers to illustrate a concept that no one disagrees with: Yes, it is possible to rearrange a series of numbers under the pretense that, instead of charging ratepayers for Trojan return on investment, as authorized by OPUC Order No. 95-322 and as occurred in fact, PGE instead during the early years (1995, 1996, 1997) instead was charging ratepayers for Trojan return of investment and was therefore not charging ratepayers for other costs that in fact were included in rates.

Yes, those other costs could hypothetically have been "deferred" for collection in later years. This is all tautological.[1] And all of the PGE and Staff analyses depend upon applying a rate of interest or return to those "deferred" amounts equal to PGE's authorized rate of return on investment, thus magically changing Trojan return on investment to return on the "deferred" costs. It is entirely an unlawful exercise and eerily similar to the accounting frauds of Enron, documented in CONSPIRACY OF FOOLS by Ken Eichenwald and other books and reports, where Enron would recharacterize loans as income (except for tax purposes, of course).

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1. Inadvertently, PGE admits this. "The Commission need not choose from among these alternatives because they all demonstrate the same thing." PGE Opening Post Hearing Brief, p. 7 [hereinafter PGE Brief].

I. RETROACTIVE RECLASSIFICATION OF TROJAN ASSETS AS USED FOR RADIOLOGICAL PROTECTION DOES NOT AVOID APPLICATION OF ORS 757.355.

Staff (p. 9) advocates retroactively reclassifying $80.2 million of the Trojan investment into "plant in service," despite the fact that the plant was never in service after November 1992. Thus, says Staff, it is legal for PGE to earn a return on investment on that $80.2 million.

First, the issue of now reclassifying Trojan investment from abandoned plant to "plant in service" is not lawfully before the Commission. PGE made this argument in the UE 88 case, and the Commission rejected it. PGE did not appeal the UE 88 final order, OPUC Order No. 95-322, and thus cannot now raise the issue on remand (as fully documents in the URP/CAP Opening Brief).

Second, Staff misunderstands the relationship between FERC accounting categories and ORS 757.355, apparently believing that anything categorized as "plant in service" necessarily is exempt from the ORS 757.355 prohibition on return on investment. Such is not the case. ORS 757.355 states:

> **757.355 Costs of property not presently providing utility service excluded from rate base.**
>
> No public utility shall, directly or indirectly, by any device, charge, demand, collect or receive from any customer rates which are derived from a rate base which includes within it any construction, building, installation or real or personal property not presently used for providing utility service to the customer.

Assets can be in various FERC "plant in service" categories and still not be "presently used for providing utility service to the customer." This is obvious in the case of the assets PGE seeks to move into that category--those allegedly necessary to protect

workers and the public from the radiological hazards posed by pieces of the Trojan plant, including the highly radioactive spent fuel storage pool at Trojan, as well as the hazards presented by contamination of the site itself and by the intensely radioactive Trojan reactor, which has been buried at the Hanford site in Washington.

Setting aside for the moment the bizarre concept that severely dangerous items that must be shielded and isolated are somehow "assets" at all or "provide service" of any sort, it is obvious that these "assets" are "not presently used for providing utility service to the customer," for many reasons.

First, the alleged service being provided is not "utility service" but is radiological protection service. All definitions and references in Oregon law to "utility service" are entirely inconsistent with the notion that radiological protection is a utility service. ORS 758.400(3) contains the only definition of "utility service" in the statutes applicable to the OPUC.

> (3) "Utility service" means service provided by any equipment, plant or facility for the distribution of electricity to users or the distribution of natural or manufactured gas to consumers through a connected and interrelated distribution system. "Utility service" does not include service provided through or by the use of any equipment, plant or facilities for the production or transmission of electricity or gas which pass through or over but are not used to provide service in or do not terminate in an area allocated to another person providing a similar utility service.

Clearly, the hazardous hulk of Trojan and the buried reactor at Hanford are not facilities "for the distribution of electricity to users." They do not serve that function in the least. ORS 30.180(7), applicable to all utilities in Oregon, defines:

> (7) "Utility service" means the provision of electricity, gas, water, telephone, cable television, electronic communications, steam or any other service or commodity furnished by the utility for compensation.

Not mentioned in that list is radiological protection. Nor does PGE provide radiological protection "for compensation," as it does not send ratepayers a bill identifying "radiological protection" along with "electricity."

PGE offers ORS 756.010(8), but that section does not define "utility service" or "service" except in a circular way: "Service * * * includes equipment and facilities related to providing the service or the product served." But Trojan after November 1992 and certainly as of April 1995 was not "providing the service or the product served," because the service is the provision of electricity to customers, not the protection of workers and residents outside of PGE's service area from radiological hazards created by PGE itself.

Further, if radiological protection is "utility service," then the OPUC has been incredibly lax in failing to require firms which provide radiological protection service to be regulated as utilities in Oregon. As only one example, the firm that manages the uranium mine and mill waste dumps at Lakeview, Oregon, should be regulated as a utility. Of course, it is not, which only shows the absurdity of the PGE/Staff position on this issue.

Second, this "service" is not being provided "to the customer." Protecting against the radiological hazard at Trojan (and Hanford, where much of the waste today sits) does not provide a protection service for PGE ratepayers, as there are zero PGE ratepayers within 30 miles of the Trojan site or within 200 miles of Hanford, where the Trojan reactor is buried. Trojan is in the service area of Clatskanie PUD and is surrounded by other PUDs in Washington and Oregon. Drawing a 30-mile radius

around Trojan does not intersect any of PGE's service area, with the possible exception of one Boise Cascade mill in Columbia County. Thus, PGE is providing radiological protection service to perhaps one of its approximately 750,000 customers yet seeks on that basis to charge not only the full cost of providing that service but also a $500 million profit on that service--to be paid by all PGE ratepayers.

In addition, this approach also rewards the construction of facilities that present long-term dangers. Only if the facility remains hazardous, after closing, is the utility rewarded with continued return on investment on the closed plant, because only then are the assets to be deemed as providing the "utility service" of protecting people from the assets.

In fact, this entire notion turns the concept of "assets" on its head. The radioactive pieces of Trojan, and the intensely radioactive spent fuel storage pool, are not assets. They are liabilities. A business is supposed to earn a return on its assets, not a return on its liabilities. The PGE/Staff approach grants to PGE a return on liabilities, not a return on assets.

Finally, this issue is entirely precluded by *res judicata*, the law of the case. In OPUC Order No. 95-322, the Commission rejected the position PGE now advocates. PGE never appealed that decision. As shown in the URP/CAP Opening Brief, a party cannot raise at remand an issue decided against it in the original proceeding which was not the subject of the successful appeal.

II. STAFF POSITION REWARDS OUTRAGEOUSLY UNLAWFUL RATE PROPOSALS BY UTILITIES.

Staff position is that the utility takes no risk by seeking and obtaining outrageously unlawful rate orders from the OPUC. Staff says that a utility can go right ahead and obtain an unlawful rate order and charge unlawful rates. If, after enormous unpaid effort, representatives of ratepayers manage to reverse the OPUC decision all the way through the Oregon courts, with finality, then (says Staff) the utility merely returns to the OPUC and gets a new order authorizing the utility to keep all of the unlawful charges--or even impose new, higher charges on ratepayers for the locked-in past period! Staff's Opening Post Hearing Brief (Phase I) [hereinafter Staff Brief or just Staff with a page reference], pp. 6-7.

Staff's position thus confirms the fear of Presiding Judge Lipscomb (in reversing and remanding OPUC Order No. 02-227) that OPUC decisions "could well encourage increasingly aggressive and perhaps even deceitful utility rate proposals," rendering OPUC regulation as "more in keeping with the satiric scenarios of Joseph Heller's *Catch 22* and Lewis Carrol's *Through the Looking Glass* than with responsible utility rate regulation." If a utility can seek and obtain unlawful rates, lose throughout the courts and yet suffer no consequences, there is no downside to proposing and aggressively seeking to charge such rates.

Staff's position thus strongly encourages utilities to seek outrageously unlawful rates (as PGE did in UE 88 and UM 989), comforted by the knowledge that there is no risk to the utility in this approach. Less responsible utility regulation can hardly be imagined.

III. THE ADOPTED SCOPE OF THE PROCEEDING IS UNLAWFUL.

A. THE PROCEEDING EXCLUDED ALL ISSUES AND EVIDENCE TO WARRANT A LOWER REVENUE REQUIREMENT.

PGE (p. 3) claims that "the Commission invited the parties to raise any other rate-making issues." In fact, URP did seek to raise other such issues, none of which were allowed. The scope allowed only consideration of issues that would increase rates, not consideration of issues that would decrease rates. For example, The ALJ refused to consider the evidence preferred to show that the rates adopted in OPUC Order No. 95-322 actually produced a far higher than expected overall return on investment for PGE, even with Trojan included in ratebase. She refused to allow evidence that PGE charged ratepayers (the period to be addressed in this Phase), PGE charged ratepayers either $80.1 million or $86.1 million per year for "state and federal income taxes" that was not paid to either government during most, if not all, of those years. This had the effect of nearly doubling the net income (or return on investment) obtained by PGE's shareholder, Enron, on PGE.

Thus, the ALJ erred in excluding all evidence and all issues preferred that would justify a revenue requirement lower than adopted by the Commission for PGE during the 5.5-year period. This procedural irregularity destroyed the fairness of the proceeding and the validity of any result it might produce.

B. THE PROCEEDING UNLAWFULLY ALLOWED PGE TO INTRODUCE ISSUES AND EVIDENCE NOT COGNIZABLE ON REMAND.

This is addressed in the URP/CAP Opening Brief and the PGE Opening Brief. Allowing such issues and evidence is also inconsistent with the decisions of the same

ALJ in the remand of the UCB 13 docket, where the issues and evidence were limited to only those meeting two criteria:

1. The matter or issue was brought in the original proceeding; and

2. The matter or issue was the subject of the court's remand order.

Here, all of the PGE case and all of the Staff case depend on matters and issues that do not meet these criteria. They both offer all sorts of reasons that OPUC Order No. 95-322 should be different than it was. Most of those reasons were never introduced in UE 88. Others were introduced but rejected by the Commission, with no appeal by PGE. These matters and issues are not cognizable on remand. All that is cognizable are the issues that were successfully appealed--namely, the application of ORS 757.355. The ALJ has recognized this in other cases, such as UCB 13, where the ALJ dismissed all claims in the remand case, except those what were (1) brought in the original case and (2) the subject of the court's order remanding the case to the OPUC.

C. PGE NOW SAYS THE COMMISSION NEED NOT ENGAGE IN RATE-MAKING AT ALL.

Curiously, the PGE Opening Brief, pp. 7-8, now contends that the Commission need not actually engage in ratemaking in these dockets but merely adopt PGE's analysis that charging rates conclusively found by the Oregon courts to have been unlawful were actually okay.

IV. THE PGE AND STAFF POSITIONS VIOLATE ORS 757.355.

The Staff Brief (p. 3) contends:

> If the Commission then required the utility to recover the uneconomic investment over a period of time without a return on investment (rather than "immediately"), the utility's investors would be short-changed through the loss of opportunity cost on their funds.

But "short-changed" in comparison to what? In comparison with earning a return on investment on the undepreciated investment in the plant? Earning such a return is prohibited by ORS 757.355 and thus provides no valid baseline.

The proposal of Staff (pp. 4, et seq.) is basically that "the Commission would have made other rate adjustments to minimize the effect of Trojan not earning a rate of return."

> Staff believes that the Commission would have allowed a moderate level of additional increase in rates with the intent of minimizing the amount of "return on" PGE loses, and would have spread the rate impact over a number of years.

Thus, Staff offers an unlawful plan to grant PGE a Trojan return <u>on</u> investment indirectly, by retroactively pretending to take away the direct Trojan return on investment while merely transferring that return to other dollars that are retroactively "deferred" as the Trojan return <u>of</u> investment is charged to ratepayers on an retroactively accelerated basis. As Staff (p. 5) summarizes:

> By authorizing recovery of the investment over the original remaining life of 17 years and including a return on the undepreciated balance in rates, the Commission explicitly approved recovery of the present value of $340.2 million. To argue in this remand proceeding that the Commission would have made a ratemaking decision in UE 88 that resulted in a significantly different recovery amount is inconsistent with the original decision.

That is correct. The original decision was unlawful. The Staff Brief is premised on the belief that the Commission simply wanted PGE to charge ratepayers for the Trojan return on investment in OPUC Order No. 95-322 and would have found some other way to get that money to PGE in any event. This posits an inherently corrupt model of utility regulation, in which the Commission decides on an amount of money to grant the utility, regardless of the evidence or the law, and then cobbles together a way to do that. Note also that the Staff brief makes absolutely clear that Staff believes that the Commission should now 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."

As noted in the URP/CAP Opening Brief, the PGE and Staff schemes all depend upon retroactively charging more Trojan return of investment to ratepayers in the early years (1995, 1996, etc.). Since that is physically (and legally) impossible, their schemes include:

1. "deferring" (not charging to ratepayers) other costs in those years that were in fact charged to ratepayers;

2. slowing down or temporarily stopping the "amortization" (charging to ratepayers) of regulatory assets in favor of PGE, such as the SAVE incentives;

3. acceleration the "amortization" of regulatory assets in favor of ratepayers, such as the gain on the sale of a portion of the Boardman coal-fired power plant that ratepayers had paid for in ratebase.

All of these techniques simply take costs that were charged to ratepayers in the early years (1995, 1996, etc.) and pretends that they were not charged to ratepayers but instead were put into "deferred accounts" so they could be charged to ratepayers in

later years. The key element is that both PGE and Staff propose that all of these deferred accounts earn "interest" (same as a return on investment) at a rate equal to PGE's authorized rate of return on ratebase--the rate of return that was applied to the Trojan investment balance in OPUC Order No. 95-322. Thus, their entire schemes consist of nothing more than pretending that ratepayers in the early years were paying Trojan return of investment instead of paying these other costs. Then these other costs are put in account that earn the same return on investment that was allowed to the Trojan investment by the unlawful OPUC orders. Later, those "deferred" costs, with interest, are then charged to ratepayers, resulting in exactly the same unlawful outcome as produced by OPUC Order No. 95-322. Neither PGE nor Staff in their opening briefs even mentions this crucial fact. It means that the PGE case and the Staff case amount to nothing more than a game of recharacterizing the Trojan return on investment as a return on the same dollars but under a different name.

Also, none of the PGE or Staff scenarios take into account the end effects on ratepayers, beyond the end of September 2000. Extinguishing or accelerating the amortization of various amounts and accounts owed by PGE to ratepayers means that those accounts no longer exist in the future to be amortized to ratepayers then. PGE and Staff truncate their analyzes and leave hanging millions of dollars in these unaccounted for end effects.

V. RESPONSES TO LAZAR TESTIMONY.

Staff contends that the Lazar procedure of removing the remaining Trojan investment from PGE's ratebase (which is exactly what ORS 757.355 expressly

requires for plant no longer providing utility service to customers) is somehow wrong, for these reasons:

1. It is "not consistent with the use of a hypothetical capital structure."

ORS 757.355 does not allow a utility to use a hypothetical capital structure that continues to include in ratebase the cost of property not presently used to provide utility service to the customer. Further, we understand that the capital structure adopted for PGE is not hypothetical but is based upon PGE's known elements of capital, slightly adjusted for expected changes during the test year. It is not a classic hypothetical capital structure, which would be based on expectations of what a normative capital structure might include.

2. It is "not consistent with the use of . . . a broad sample of utilities and multiple methods of estimating the cost of equity."

Removing Trojan from ratebase has nothing to do with estimating the cost of equity. It only affects the amount of equity and thus affects the overall rate of return on investment.

3. It is "not consistent with . . . the non-recurring nature of the Trojan write-off"

This just makes no sense. Every write-off of a discrete asset is non-recurring. That fact does not allow the completely nonfunctional asset to remain in ratebase or to support a similar amount of "equity" in the capital structure.

4. It is "not consistent with . . . PGE's efforts to reduce dividends."

This is a non sequitur. PGE's efforts to reduce dividends, whatever that might have been (and whatever Enron might have allowed), is completely irrelevant to the

requirement that the closed Trojan must be removed from ratebase and thus constitute an equity write-down.

VI. PGE MISCHARACTERIZES *CUB/URP v. OPUC*.

PGE (p. 6) states attributes to ***Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon***, 154 Or App 702, 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (November 19, 2002) [hereinafter ***CUB/URP v. OPUC***] the conclusion "that PGE is entitled to recover the undepreciated investment in Trojan. The opinion contains no such statement.

VII. PGE OFFERS VARIOUS STATEMENTS WITH NO LEGAL, FACTUAL, OR EVEN MATHEMATICAL VALIDITY.

The PGE Opening Brief offers various fantastic, yet telling, statements, such as (p. 13) that "Customers enjoy a net benefit in the closure scenario that increases with every year that PGE's return of its investment is deferred." Note that PGE states that its return on Trojan investment would be "deferred," not avoided, thus placing its proposal squarely in violation of ORS 757.355. Further, PGE proposes to more than make up for that hypothetical "net benefit" by accelerating charges to ratepayers for Trojan return <u>of</u> investment. Obviously, charging ratepayers the same as under OPUC Order No. 95-322 is not a net benefit to them.

A. PGE INCORRECTLY CLAIMS THAT "INTEREST" IS NOT "RETURN."

As noted at Staff/100/25 and Staff/200, a utility's return on investment includes both return on equity and return on debt. An item in ratebase, as was the Trojan

investment under OPUC Order No. 95-322, earns a return on investment that is calculated as the average of return on equity and return on debt, weighted by the contribution of each to the utility's capital structure. A "return on debt" is a "return on investment." Debt in a utility consists of the holding of utility bonds, which are an "investment."

B. PGE IRRATIONALLY ARGUES THAT THE COMMISSION CAN NEVER CALCULATE REFUNDS OF ANY OVERCHARGES.

The PGE Opening Brief, pp. 26-27, argues that the Commission can never calculate appropriate refunds of overcharges, because:

> The costs included within revenue requirement have no direct correlation to the rates ultimately set for various types of electricity usage. Moreover, actual costs and revenues always vary from forecasted costs and revenues.

This proves entirely too much. According to PGE, then, no one could ever calculate a correct refund of previously collected unlawful rates. One wonders, then, how PGE will implement the refund it has publicly promised to ratepayers for its prior collection of Multnomah County Business Income Tax that was in fact never paid.[2]

C. PGE's CLAIMS ABOUT ITS EARNINGS ARE CONTRADICTED BY THE FACTS IN THE RECORD.

The PGE Opening Brief, pp. 28-29, claim that PGE earned less than its authorized return on equity in the years 1999-2003. The relevant years here are

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2. PGE's promise to do so is contained in documents filed in ***Kafoury, et al. v, PGE***, Multnomah County Circuit Court **Case No. 0501-00627**, for which we request official notice regarding the undisputable fact that PGE has offered to refund a portion of the unpaid MCBIT charges to ratepayers.

1995-2000, as the 5.5-year period ended on October 1, 2000. During those years, PGE consistently earned more than its authorized return on equity, as documented in the excluded testimonies of Daniel W. Meek, URP/204 and URP/400. As noted there, and here, the level of PGE overearning during the 5.5 year period is quantifiable by reference to PGE financial reports to the Securities and Exchange Commission (SEC), to Federal Energy Regulatory Commission (FERC), and to the OPUC itself. These documents are in the record of this proceeding and clearly show the extent of PGE's massive overearning during the 5.5-year period. See Exhibits URP 500, 600, 700; TR 180-200. These exhibits and cross-examination answers by PGE witnesses show that PGE significantly overearned its authorized return on investment during the 5.5-year period, even when those earnings numbers assumed that PGE had paid on the order of $90 million per year in income taxes, which the exhibits and testimony showed that PGE had in fact not paid.

Thus, if PGE's theory is that the OPUC wanted PGE to earn a specific level of overall profit, then the profit on Trojan can be removed without depriving PGE of the level of overall profit that the OPUC supposedly intended to bestow on PGE in OPUC Order No. 95-322. Even if the Trojan profits had not been included in rates, PGE would still have earned more than the overall level that PGE theorizes that the OPUC must somehow have intended. Thus, even under PGE's corrupt model of utility regulation, in which the Commission first determines the outcome that it wants and then cobbles together some rationales for it, PGE would not get to keep the charges

to ratepayers for Trojan profits. Even without those charges in rates, PGE would have earned more than the "end result" that PGE claims the OPUC intended.

Consequently, under PGE's theory that the Commission can retroactively determine rates for PGE as of April 1, 1995, the Commission should set rates lower than authorized in OPUC Order No. 95-322, to take into account the known fact that PGE earned far more under OPUC Order No. 95-322 that the Commission had contemplated or intended. There are many way to make this adjustment. The Commission could take PGE's average utility operating income during the 5.5 year period and subtract from that the utility operating income contemplated by OPUC Order No. 95-322. The result would be a measure of PGE's excess earnings and would be subtracted from the OPUC Order No. 95-322 revenue requirement. Since PGE was able to earn that much more, per year, than OPUC Order No. 95-322 contemplated, such a reduction in rates would have allowed PGE to earn what the OPUC actually intended in OPUC Order No. 95-322.

Another method would be to reduce PGE's authorized rate of return on equity in OPUC Order No. 95-322 to account for the overearning during the 5.5 year period.

VIII. THE PGE WITNESSES WERE BIASED AND LACKED CREDIBILITY.

The PGE brief cites the testimony of its various witnesses. Cross-examination at the hearing demonstrated that PGE paid its outside witnesses huge amounts of money to prepare their testimony and appear at the hearing, or the order of at least $50,000 for each witness. This inherently undermines the credibility of those

witnesses, whose resumes indicated their careers as well-paid voices for utility interests.

As for the PGE witnesses who are also PGE employees, their self-interest in seeking to enable PGE to retain an amount in excess of $600 million hardly needs comment. PGE did not present even a single witness who did not suffer a disabling financial conflict of interest in the testimony being given. Their inherent bias in favor of their benefactors is exemplified in this exchange from the hearing transcipt (TR 70):

> Q Okay. If investors in a regulated utility actually receive a greater return than the authorized rate of return on investment, should they be required to give the money back to ratepayers?
>
> A [PGE witness Blaydon] No.
>
> Q If they obtain a return that is less than the authorized rate of return on investment, should they be entitled to a higher rate of return on investment in the next rate case because of that?
>
> A They should not be entitled to it if the cause of the lower return are that things worked out about their expectations, cash flows, differently. If the rules of the game have been changed that change the cost of equity in the marketplace in a way that that should be increased, then yes, they should be.

Thus, says PGE's noted economic experts, fulfilling investor "expectations" is a one-way street.

The PGE outside witnesses also lacked credibility because they based their testimony on "facts" of which they had no knowledge, such as the reason that Trojan closed (TR 42-43), legal decisions applicable to Trojan (TR 43-55), PGE's actual earnings (TR 59-68), and many other matters (TR 56-339).

IX. THE RELEVANT TIME PERIOD FOR PHASE I IS THE 5.5 YEARS, INCLUDING THE TIME COVERED BY THE UE 93 AND UE 100 ORDERS.

Here, as elsewhere, PGE (pp. 30-31) contends that it got away with the unlawful Trojan charges in UE 93 and UE 100, because no one appealed those orders. PGE is repeating an argument it has made many times to the courts, without prevailing, that the period at issue here is truncated at November 28, 1995, the effective date of OPUC Order No. 95-1216. PGE made this specific argument to Judge Lipscomb in Marion County Circuit Court No. 02C-14884 [the "UM 989 Appeal"], but the court apparently did not accept it. We offer here the argument that has apparently prevailed in Marion County Circuit Court:

> The PGE Memorandum (pp. 42-43) claims that OPUC Order No. 95-322 established rates only for a period which ended in November 1995 and was then replaced by subsequent OPUC orders. This is irrelevant.
>
> PGE admits that, in the next PGE rate case at the OPUC, the Utility Reform Project (URP) intervened and made the same claims that it had made in the docket (UE 88) which had culminated with OPUC Order No. 95-322: that charging Trojan costs and profits to ratepayers was illegal. The OPUC in a preliminary order refused to even consider the issue. In the order PGE now touts and attaches to its motion, OPUC Order No. 95-1216, the OPUC refused to consider the issue of Trojan costs and profits in rates, because "URP's claim relating to Trojan was presented in UE 88." OPUC Order No. 95-1216, p. 12.[3] This outcome had been urged by PGE:
>
> > PGE responds by noting that it is not seeking recovery of **additional** costs associated with Trojan in this proceeding and by pointing out that issues relating to Trojan were resolved in UE 88.
>
> OPUC Order No. 95-1216, p. 12 (emphasis added). Thus, PGE procured a decision of the OPUC stating that rate cases subsequent to UE 88 (which culminated with OPUC Order No. 95-322) would not even consider the

3. UE 88 was the docket which culminated with adoption of OPUC Order No. 95-322.

issue of Trojan costs or profits in rates. PGE claimed that Trojan rate elements would be a proper subject in the subsequent rate case, only if PGE were seeking "recovery of **additional** costs associated with Trojan in this proceeding." Instead, PGE was seeking to continue the same unlawful Trojan charges as were included in OPUC Order No. 95-322.

PGE cannot now argue that, instead, the OPUC should have rejected PGE's position and should have started from scratch in each subsequent docket to consider, again, the same charges for Trojan. PGE is judicially estopped from claiming that the subsequent rate case decisions should have been appealed, because the OPUC adopted PGE's position on whether the Trojan rate elements would even be considered in cases subsequent to OPUC Order No. 95-322, as long as PGE did not seek **additional** amounts for Trojan, above and beyond the rate treatment for Trojan adopted in OPUC Order No. 95-322. PGE took a position below that the issue of Trojan rate treatment was not to be altered in the subsequent proceeding and therefore should not be considered at all. PGE sought to gain a benefit therefrom--continued illegal charges.

> Judicial estoppel may be applied when a litigant has benefitted from a statement or position in an earlier proceeding that is inconsistent with that same litigant's statement or position in a later proceeding. Most courts require the statement or position to have been accepted and acted upon by the court in the earlier proceeding in order for the doctrine to apply.

White v. Goth, 182 Or App 138, 141-142, 47 P3d 550, 551-552 (2002). Here, the OPUC in OPUC Order No. 95-1216 accepted PGE's position that issues of Trojan costs or profits in rates could not be considered in the later proceeding, because PGE was not proposing any change to OPUC Order No. 95-322 rate treatment for Trojan. Judicial estoppel does not require that any party detrimentally rely on the position [***Hampton Tree Farms, Inc. v. Jewett****,* 320 Or 599, 612-13, 892 P2d 683 (1995)], because the purpose is "preventing litigants from 'playing fast and loose' with the courts." ***White v. Goth,*** *supra*. See ***Caplener v. U.S. National Bank****,* 317 Or 506, 516-21, 857 P2d 830 (1993), where judicial estoppel barred a claim for any damages amount greater than the amount disclosed by the litigant in a prior bankruptcy proceeding.[4]

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4. In addition, the utility bears the burden of proof in each rate case that the rates it proposes are just and reasonable. ORS 757.210. Since PGE presented zero analysis or evidence regarding the Trojan rate elements in any case subsequent to UE 88

(continued...)

Another, simple answer is that ORS 757.355 is a prohibition on utility conduct in that it states:

> No public utility shall, directly or indirectly, by any device, charge, demand, collect or receive from any customer rates which are derived from a rate base which includes within it any construction, building, installation or real or personal property not presently used for providing utility service to the customer.

It does not matter that the OPUC purported to authorize PGE to charge the unlawful Trojan profits to ratepayers in OPUC Order No. 95-322. It certainly does not matter that the OPUC allowed those exact same charges to continue, unchanged, through the end of September 2000, despite the additional rate cases that occurred during that 5.5-year period. PGE's unlawful conduct and unlawful charges to ratepayers is the issue. PGE's use of OPUC orders as a shield would certainly qualify as a "device" pursuant to which PGE made its unlawful charges. ORS 757.355 prohibits those charges, imposed "**by any device**."

In addition, the charges for Trojan profits authorized by OPUC Order No. 95-322 remained in place until the end of September 2000. PGE can point to no OPUC order, prior to the UM 989 docket in September 2000, which again authorized PGE to charge ratepayers for a profit on Trojan.

Disregarding the plain language of ORS 757.355, PGE now claims that, since URP did not appeal OPUC Order No. 95-1216 or subsequent OPUC orders which did not address Trojan costs or profits, then PGE is home free on Trojan profits for the entire period after November 28, 1995. PGE cites no law for the proposition that an intervenor must appeal every public utility commission rate order, following an unlawful one, in order to prevail in its appeal of the unlawful order and ultimately secure relief from the courts. As PGE itself contends, ratemaking is considered a legislative function. The PGE claim here is akin to saying that, if someone appeals the adoption of an agency rule as unlawful, then that appeal is abandoned if that person does not subsequently appeal every other instance of rulemaking by the agency, as the subsequent rulemakings implicitly re-adopt the original, unlawful rule.

4.(...continued)
(culminating with OPUC Order No. 95-322), PGE could not possibly have met its burden of proof.

Or consider this: Frank asks for a zoning density change to allow development of apartments on his land. His neighbor, Phil, intervenes and objects. The zoning change is adopted, and Phil files an appeal. Then, Frank decides that he wants another zoning change to allow him to alter a watercourse on his land. Phil intervenes and seeks to argue that the board still should not approve the density change. Frank replies that the board has already approved the density change and cannot address the density change further in the second case, where Frank seeks no change to that part of the zoning. The zoning board then approves the new watercourse zoning that Frank has requested, and Phil does not file an appeal of the second order. Frank then files a motion in court to dismiss Phil's earlier appeal of the first zoning change, arguing that the zoning board's second order embodied the density change that allowed the land to be used for apartments, and Phil had failed to appeal the second order, thus allowing that order to become final (despite the fact that Frank succeeded in having the zoning board entirely disregard the density issue in the second proceeding). Is Phil's original appeal rendered moot, because the zoning order he appealed was then somehow superseded by a zoning order (embodying the density change) he did not appeal? That is PGE's argument here. It is not absurd?

Further, if indeed the entire matter of Trojan profits in rates became moot on November 28, 1995 (since no ratepayer appealed OPUC Order No. 95-1216) then why did PGE fail to raise that point in any of the appeals of OPUC Order No. 95-322? PGE filed several motions with the Oregon Supreme Court on the issue of the mootness of review of OPUC Order No. 95-322. On July 1, 2002, for example, PGE filed a Notice of Mootness and Motion to Dismiss and Vacate with the Oregon Supreme Court, claiming that the order currently under review here, OPUC Order No. 02-227, "has mooted the case." URP responded, and the Oregon Supreme Court rejected this contention in its November 19, 2002, order:

> On July 1, 2002, Portland General Electric Company moved to dismiss the appeal, to vacate the opinion of the Court of Appeals, and to remand the case to the circuit court with instruction to vacate the judgment and dismiss all claims as moot. That motion is denied.

335 Or 91, 58 P3d 822 (November 19, 2002). In no motion to the Oregon Supreme Court did PGE argue that OPUC Order No. 95-322 had been rendered moot by OPUC Order No. 95-1216 or by any other OPUC order prior to the orders in UM 989 (which took effect October 1, 2000).

If the appeal of OPUC Order No. 95-322 was rendered moot, because OPUC Order No. 95-322 itself had been superseded by OPUC Order No. 95-1216 in November 1995, why did PGE not offer that contention to the Oregon Supreme Court? Because it was contrary to longstanding practice and interpretation of utility regulation statutes, including the ORS 757.225 that PGE cites. The context of a statute for the purposes of ***PGE v. BOLI***, *supra*, includes other provisions of the same statute and related statutes, prior enactments and prior judicial interpretations of those and related statutes and the historical context of the relevant enactments.[5]

Applying the historical context rules to the present situation, the fact that the Oregon Supreme Court in the year 2002 rejected all of PGE's contentions regarding the mootness of OPUC Order No. 95-322 also refutes PGE's assertion of such mootness here, under the doctrine of contemporaneous interpretation. See 2 SUTHERLAND, STATUTORY CONSTRUCTION, pp. 514-515, § 5104 (3d ed). The doctrine has special relevance where, as here, the proponent of a novel interpretation has been involved for years with the application of the statute and never

5. ***Owens v. Maass,*** 323 Or 430, 435, 918 P2d 808 (1996); ***Goodyear Tire & Rubber Co. v. Tualatin Tire & Auto,*** 322 Or 406, 415, 908 P.2d 300 (1995), *on recons* 325 Or 46, 932 P2d 1141 (1997); ***Krieger v. Just***, 319 Or 328, 876 P2d 754 (1994); *see generally* Jack L. Landau, *Some Observations About Statutory Construction in Oregon,* 32 WILL L REV 1, 38-40 (1996).

before pursued its new interpretation.

Dated: November 30, 2005

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing REPLY BRIEF OF UTILITY REFORM PROJECT, ET AL. AND THE CLASS ACTION PLAINTIFFS by email to the email addresses shown below, which comprise the service list on the Commission's web site as of this day.

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