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November 15, 2006

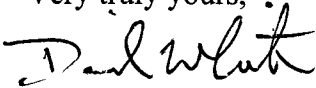
**VIA E-FILING & FIRST CLASS MAIL**

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 each of the above-referenced dockets are an original and a courtesy copy of Portland General Electric Company's Motion to Consolidate Phases and Re-Open Record. This document is being filed electronically in each case per the Commission's eFiling policy to the electronic address [PUC.FilingCenter@state.or.us](mailto: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 each hard copy filing.

Very truly yours,  


David F. White

DFW/ldh  
Enclosures  
cc: Service List  
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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 MOTION TO  
CONSOLIDATE PHASES AND  
RE-OPEN RECORD**

**I. INTRODUCTION**

Pursuant to ORS 756.558 and OAR 860-13-0031, Portland General Electric Company ("PGE") requests the entry of an order or ruling (1) amending the procedural schedule to consolidate the phases of this proceeding and (2) re-opening the record to permit the parties to submit additional testimony. Consolidation will expedite this proceeding and give parties the opportunity to submit testimony and briefs on issues raised by the recent Oregon Supreme Court decision in *Dreyer v. Portland General Electric Co.*, 341 Or 262, 142 P3d 1010 (2006). In addition, consolidation will lead to a single comprehensive order that identifies any harm or injury to customers for the entire relevant time period and offers complete and final relief to former and current PGE customers. Such a single final order will lead to an orderly and efficient review by the courts for all customer claims from UE 88 to present. In section V, PGE proposes a schedule that would result in a final comprehensive order no later than July 30, 2007.

## II. BACKGROUND

The Commission re-opened dockets DR 10, UE 88 and UM 989 to comply with the remand orders of the Marion County Circuit Court. The remand orders implemented the Court of Appeals' decision that concluded that the Commission wrongly interpreted ORS 757.140 and ORS 757.355 in dockets DR 10 and UE 88, and the Circuit Court's ruling in connection with the Commission's final order in UM 989. The Commission re-opened these dockets to address all the reviewing courts' rulings. Order No. 05-091 at 1 (Feb. 11, 2005).

On May 5, 2004, the Administrative Law Judge issued a Ruling that divided the proceeding into phases. ALJ Ruling at 8. The Commission ultimately determined that its task in Phase I was:

[T]o 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*.

Order No. 05-091 at 5.

In a later phase (or phases), the parties would address (1) the Commission's legal authority to order refunds, (2) rates set in UM 989, and (3) administrative issues relating to the implementation of any refund. Ruling at 8-9. In particular, the ALJ concluded that the legal question concerning the Commission's legal authority to order refunds was "premature" in light of the pending court proceedings. *Id.*

The parties submitted written testimony on Phase I issues, and a hearing was conducted on August 29 and 30, 2005. On September 19, 2005, ALJ Kirkpatrick issued a ruling closing the record. Briefing was completed on December 14, 2005.

On August 31, 2006, the Oregon Supreme Court issued its decision in *Dreyer v. PGE*, a case directly related to these remand proceedings (the "Class Action Case"). In that case, certain former and current customers, some of whom intervened in

these remand proceedings and all of whom are represented by the same counsel in both venues, filed complaints against PGE in Marion County Circuit Court, seeking refunds of all "unlawful" amounts collected as a result of the Commission's decisions allowing PGE to include the unamortized Trojan balance in rate base from April 1, 1995 forward. *Dreyer*, 341 Or at 273. In the Class Action Case, PGE argued that ORS 757.225 barred plaintiffs' claims because that statute legally obligated PGE to charge the Commission-approved rates and no others. The *Dreyer Court* disagreed, concluding that ORS 757.225 and the common law filed-rate doctrine imposed no bar to plaintiffs' claim or the issuance of refunds to compensate customers for amounts collected under Commission-approved tariffs that a court later finds unlawful. *Dreyer*, 341 Or at 278-79.

Nevertheless, the Oregon Supreme Court abated the Class Action Case. The Court noted that this Commission remand proceeding "involves (essentially) the same controversy, the same ratepayers, and the same effort at determining a remedy for PGE's collection of unlawful rates, as do the [Class Action Cases]." *Dreyer*, 341 Or at 283. Because of the overlapping issues and the Commission's "special expertise" in this area, the Court concluded that the doctrine of primary jurisdiction required abatement of the Class Action Case until a final decision had been reached in this Commission proceeding:

[T]he PUC proceeding that is underway thus has the potential for disposing of the central issue in these cases, viz., the issue whether plaintiffs have been injured (and if they have been, the extent of the injury) \* \* \* Depending on how the PUC responds to that remand, some or all plaintiffs claimed injuries may cease to exist. Moreover, the PUC's specialized expertise in the field of ratemaking gives it primary, if not sole, jurisdiction over one of the remedies contemplated in the remand: revision of rates to provide for recovery of unlawful collected amounts. \* \* \* If [the PUC] can and does provide a full or partial remedy, then plaintiffs either are not injured at all or, if they remain injured, their remedy is to seek judicial review of the PUC's order. In the former case, the circuit court can dismiss the actions. In the latter case, the scope of the court's work will be usefully curtailed.

*Dreyer*, 341 Or at 285. A court decision ordering an appropriate remedy, if any, before the Commission acted would "interfere with that agency's performance of its regulatory functions." *Id.* at 286. The class action was, therefore, deferred to permit the Commission "the opportunity to do its work." *Id.*

### **III. CONSOLIDATE ALL PHASES OF THIS PROCEEDING**

The reasons for separating the issues into phases no longer apply. The Commission delayed consideration of its legal authority because it was "reluctant to prematurely address this legal issue." Ruling at 8. The *Dreyer Court* reached the exact opposite conclusion. It is for the Commission—not the courts—to serve as the primary authority to determine whether former and current customers have been injured, the extent of any injury, and the appropriate remedy, if any. In fact, the issue of the Commission's legal authority is premature *for the courts* until the Commission determines whether a refund is required under these circumstances and whether it has the legal authority to provide such relief:

"whether the PUC has authority to order refunds or other retroactive relief will not be ripe for decision by an appellate court until the PUC acts"

*Dreyer*, 341 Or at 286 n.19.

Moreover, the desire to expedite this proceeding, which initially led to a phased approach, now indicates consolidation. The *Dreyer* decision offers substantial guidance on the legal issue of the Commission's legal authority. In light of the *Dreyer Court's* indication that ORS 757.225 is no bar to refunds, PGE believes the Commission has the legal authority under these circumstances to order refunds and customer rate credits to the extent necessary to provide full, complete and final relief to former and current PGE customers. Before the *Dreyer* decision, this issue may have appeared to require a protracted proceeding to resolve. PGE's acknowledgment of this principle should streamline resolution of the Commission's legal authority.

Finally, consolidation will promote an efficient and orderly process. The Commission should issue a single final order addressing its legal authority to order refunds, any injury to customers that resulted from rates that the Court of Appeals later ruled violated ORS 757.355 or rates approved in UM 989, and relief to current and former customers to remedy any such harm or injury.<sup>1</sup> Such an order would cover the entire time period from the effective date of the UE 88 final order to present, and offer current and former customers complete and final relief. Parties could then appeal a single comprehensive order to the courts, avoiding the type of piece-meal, disjointed court review that has plagued these Trojan-related proceedings.

#### **IV. RE-OPEN THE RECORD**

There are two reasons to re-open the record. First, the *Dreyer* decision addressed a number of significant topics that are directly relevant to this remand proceeding. For example, the *Dreyer* decision underscored the importance of identifying any injury to former and current customers, the Commission's expertise in fashioning complete and final relief, and the relationship between the Class Action Case and this Commission proceeding. The parties should have an opportunity to present factual evidence and submit briefs on these issues and any other relevant issue in this docket in light of the *Dreyer* decision. Such an approach will provide the factual record that is necessary for a comprehensive final order.

Second, consolidation of this proceeding will require re-opening the record. As noted above, Phase I was limited to rates during the 5.5-year period from the effective date of the UE 88 final order until the Commission's initial approval of the UM 989 settlement (Sept. 30, 2000). No party introduced evidence regarding the UM 989 settlement

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<sup>1</sup> Administrative details relating to a customer remedy can be addressed expeditiously after the Commission issues a final consolidated order.

and the time period after September 30, 2000. The parties should now have the opportunity to present evidence regarding the rates established in UM 989.

## V. PROPOSED SCHEDULE

To implement consolidation of the phases and re-opening the record, PGE proposes adoption of the following procedural schedule:

|                  |  |
|------------------|--|
| January 12, 2007 | PGE files opening testimony                |
| March 2, 2007    | Other parties file rebuttal testimony      |
| April 6, 2007    | PGE files reply testimony                  |
| April 13, 2007   | Hearing                                    |
| May 4, 2007      | Simultaneous opening briefs (all parties)  |
| May 18, 2007     | Simultaneous rebuttal briefs (all parties) |
| June 1, 2007     | PGE files reply brief                      |
| July 30, 2007    | Commission order                           |

## VI. CONCLUSION

For the reasons stated above, PGE respectfully requests that the ALJ or Commission enter a ruling or order (1) consolidating the phases in this proceeding, (2) re-opening the record, and (3) adopting a procedural schedule as outlined in this Motion.

DATED this 15th day of November, 2006.

PORTLAND GENERAL ELECTRIC  
COMPANY

TONKON TORP LLP

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Of Attorneys for Portland General Electric  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I caused to be served the foregoing  
**PORTLAND GENERAL ELECTRIC COMPANY'S MOTION TO CONSOLIDATE  
PHASES AND RE-OPEN RECORD** 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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DATED this 15th day of November, 2006.

By \_\_\_\_\_  
J. JEFFREY DUDLEY, OSB No. 89042  
Attorneys for Portland General Electric Company

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**BEFORE THE PUBLIC UTILITY COMMISSION  
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In the Matters of

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and the time period after September 30, 2000. The parties should now have the opportunity to present evidence regarding the rates established in UM 989.

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## VI. CONCLUSION

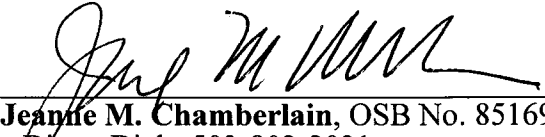
For the reasons stated above, PGE respectfully requests that the ALJ or Commission enter a ruling or order (1) consolidating the phases in this proceeding, (2) re-opening the record, and (3) adopting a procedural schedule as outlined in this Motion.

DATED this 15th day of November, 2006.

PORTLAND GENERAL ELECTRIC  
COMPANY

  
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Of Attorneys for Portland General Electric  
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## CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served the foregoing  
**PORTLAND GENERAL ELECTRIC COMPANY'S MOTION TO CONSOLIDATE  
PHASES AND RE-OPEN RECORD** 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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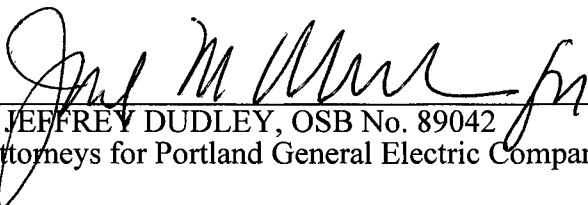
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DATED this 15th day of November, 2006.

By   
J. JEFFREY DUDLEY, OSB No. 89042  
Attorneys for Portland General Electric Company

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