ISSUED: August 31, 2004

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)	)	
	)	RULING
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)	)	

DISPOSITION: SCOPE OF PHASE I ESTABLISHED

The Public Utility Commission of Oregon (Commission) reopened the above referenced dockets to comply with two remand orders by the Marion County Circuit Court. The scope and proper procedural framework for these remand proceedings has been at issue since an initial consolidated prehearing conference was held on March 31, 2004. Parties submitted simultaneous opening and reply memorandums on April 16, 2004 and April 23, 2004, respectively, that discussed what issues should be taken up in the proceedings and what procedural steps should be used. On April 27, 2004, a consolidated procedural conference was held to further address the proper scope of, and procedural framework for, these proceedings. Parties did not reach consensus, however.

A ruling, dated May 5, 2004, phased the proceedings and called for parties to further comment on the proper scope of and procedure for the first phase (Phase I). The following parties filed both opening and reply memorandums: Commission Staff (Staff), Portland General Electric (PGE or the Company), the Utility Reform Project, et al. (URP) and class action intervenors, Morgan, Gearhart and Kafoury Brothers, LLC (MGK).

Procedural History

As the parties repeatedly refer to the complex procedural history of the above captioned dockets, it is useful to review key events leading to these remand proceedings. On January 4, 1993, PGE retired its Trojan Nuclear Plant (Trojan). Prior to Trojan's retirement, on December 18, 1992, PGE petitioned the Commission to open an investigation to address ratemaking questions regarding PGE's recovery of the Company's remaining investment in Trojan and decommissioning costs. At the time, PGE intended to remove Trojan from operation in 1996. Due to the early retirement in 1993, however, PGE switched courses and filed a request on February 9, 1993, for a declaratory ruling on general legal and policy issues regarding ratemaking for retired utility plant. After opening DR 10, the Commission conducted a review of the issues raised and entered a declaratory order, Order No. 93-1117, on August 9, 1993. The order indicated that the Commission may allow recovery of undepreciated investment in retired utility plant, as well as a return on that investment, if the Commission finds such recovery to be in the public interest under ORS 757.140(2)(b). Subsequently, the Commission denied reconsideration in Order No. 93-1763 (Order Nos. 93-1117 and 93-1763 collectively referred to as the DR 10 Orders). URP, the Citizens' Utility Board (CUB) and the Public Power Council (PPC) appealed the DR 10 Orders to the Marion County Circuit Court (Circuit Court). Both DR 10 Orders were affirmed by Judge Barber in Circuit Court Nos. 94C-10372 and 94C 10417, respectively (DR 10 Circuit Court Appeal Orders).

On November 9, 1993, three months after the Commission issued Order No. 93-1117, PGE filed a request for a general rate increase. The Commission opened UE 88 and undertook an investigation. The proper ratemaking treatment of PGE's remaining investment in Trojan was at issue in the proceeding.

On March 25, 1995, the Commission entered Order No. 95-322 (UE 88 Order), which applied the legal framework adopted in Order No. 93-1117 allowing both a return of, and on, undepreciated investment in retired utility plant, to the actual facts surrounding Trojan's retirement. Concluding that PGE's net undepreciated investment in Trojan was approximately $282.5 million, the Commission disallowed recovery of $37.5 million, but allowed recovery of, as well as a return on, the authorized amount of $250.7 million. Both CUB and URP appealed Order No. 95-322 to the Circuit Court. In judgments issued, respectively, in April (Circuit Court No. 95C-11300) and May (Circuit Court No. 95C-12542) of 1996 (hereafter referred to as UE 88 Circuit Court Appeal Orders), Judge Lipscomb affirmed the portion of Order No. 95-322 that allowed PGE to earn a return *of* its investment in Trojan, but reversed the part allowing PGE to earn a return *on* that investment.

The Oregon Court of Appeals took up both the DR 10 and UE 88 Circuit Court Appeal Orders in a consolidated proceeding to review the underlying Commission orders directly. *Citizens' Utility Board v. PUC*, 154 Or App 702, 962 P 2d 744 (1998),

rev. dismissed, 335 Or 91, 58 P3d 822 (2002).[1] The Court of Appeals reviewed whether PGE rates could recover both the principal of, and a rate of return on, undepreciated Trojan investment. *Id*. at 706-7.

Based on a reconciliation of two statutes, ORS 757.355 and ORS 757.140(2), the Court of Appeals ruled that the Commission was statutorily authorized to compensate utilities only for the principal amount of undepreciated investment in unused or retired property. *Id*. at 716-17. ORS 757.355 was interpreted to preclude the Commission from allowing rates that include a rate of return on capital assets that are not currently used for the provision of utility services. *Id*. ORS 757.140(2) was interpreted to authorize rates that would reimburse the utility for its principal investment in retired capital assets but to disallow any return on that investment. *Id*. The Court of Appeals stated:

> Similarly, in this case, ORS 757.355 precludes PUC from allowing rates, of the kind its orders here would allow, that include a rate of return on capital assets that are not currently used for the provision of utility services; ORS 757.140(2) authorizes rates that would reimburse the utility for its principal investment in retired capital assets, but it does not authorize the return on the investment that ORS 757.355 proscribes. Like the specific statutes that 'circumscribed' PUC's authority in *Eachus*, ORS 757.355 and ORS 757.140(2), as we have interpreted them, disallow the return component that the PUC orders allowed for PGE's investment in Trojan. The general grants of authority in ORS 756.040 and other general statutes do not empower PGE to charge or PUC to approve rates of a kind that are specifically contrary to the limitations in ORS 757.355 and ORS 757.140(2).

Id. The Court of Appeals indicated that other arguments raised by parties either did not warrant discussion or did not need to be addressed. *Id*. at 717. The Court of Appeals reversed and remanded the Circuit Court DR 10 Appeals Orders, with instructions to remand the underlying orders to the Commission for reconsideration, and affirmed the Circuit Court UE 88 Appeals Orders. *Id*. The Circuit Court remanded the DR 10 Circuit Court Appeal Orders and the UE 88 Circuit Court Appeal Orders to the Commission, but not until November 3, 2003, as further discussed below. *Citizens' Utility Board v. PUC*, Case No. 02C14884, Orders of Remand to the Oregon Public Utility Commission (Marion County Circuit Court of Oregon 2004).

On April 28, 1999, the Oregon Supreme Court granted petitions for review of the Court of Appeals' opinion, but subsequently held the case in abeyance pending settlement discussions seeking to resolve the issues on appeal, as well as legislative action (Referendum of HB 3220 (Ballot Measure 90)) that sought to revise the underlying

[1] This is the same case referred to most recently in Order No. 02-227 as *URP v. OPUC*.

statutes. *Citizens' Utility Board v. PUC*, 328 Or 464, 987 P2d 513 (1999). On August 22, 2000, PGE entered into two settlement agreements, one with Staff and one with CUB, which were materially the same (hereafter collectively referred to as the Settlement).

On September 1, 2000, PGE filed an Application for an Accounting Order (Application) and Revised Tariff Sheets (Advice No. 00-13) that sought Commission approval of the Settlement (Attachment 1 to the Application), and of tariffs implementing the terms of the Settlement. The Settlement agreed to remove the remaining Trojan investment from PGE's balance sheet and *future* rates. The Settlement also provided for other rate adjustments on a prospective basis, including the removal of regulatory liabilities and a rate reduction.[2] The intended result of the Settlement's terms was that PGE would no longer recover in future rates, either a return on, or a return of, any investment in Trojan. The Settlement explicitly did not seek to retroactively alter rates. Indeed, the Application requested that the Commission affirm that no changes to the Company's recovery of the cost of decommissioning Trojan would be made and that no refunds would be required. Parties supporting the Settlement represented that it resolved the regulatory treatment of Trojan in a manner consistent with the public interest, based upon the results of two net benefit analyses and other considerations such as ending the prolonged uncertainty caused by the case. On September 29, 2000, the Commission entered Order No. 00-601 (UM 989 Order), approving the Settlement and allowing the tariff sheets to go into effect, thereby deeming the rates implemented to be just and reasonable.

On October 30, 2000, URP with Lloyd Marbet and Linda K. Williams (collectively, URP) filed a complaint challenging the Settlement on multiple grounds. A primary concern was the Settlement's failure to redress past PGE rates. URP argued that PGE's past rates, to the extent they collected a return on Trojan investment, had been deemed unlawful by the Court of Appeals. URP asserted that the unlawfully collected amounts should be refunded and credited to lower the Trojan undepreciated investment balance. Indeed, URP asserted that ratepayers had already paid this balance in full.

On March 25, 2002, the Commission entered Order No. 02-227 denying URP's complaint and finding the rates resulting from PGE's application and revised tariffs to be just and reasonable, in the public interest and of benefit to ratepayers. Among other determinations made, the Commission concluded that the filed rate doctrine, embodied in

[2] In summary terms, the Settlement agreed to: 1) Remove Trojan investment from the company's balance sheet and future rates; 2) Offset a portion of the Trojan investment by removing several other regulatory assets and liabilities; 3) Write off the residual investment balance of approximately $5.9 million (grossed up to approximately $9.8 million on a revenue requirement basis); 4) Implement a rate reduction of $10.2 million over the 12 months beginning October 1, 2000, associated with removing the balance sheet items; 5) Establish a regulatory asset of approximately $56 million related to existing Financial Accounting Standards Board Statement 109 (FAS 109) tax benefits previously advanced to customers but now owed to PGE; 6) Establish a regulatory liability equal to $2.5 million, which will earn interest until the credit has been fully provided to customers; and 7) Share future distributions from the Nuclear Electric Insurance Limited (NEIL) insurance policy between customers (55%) and shareholders (45%), which provides the company significant incentive to seek the highest possible level of NEIL distributions.

ORS 757.225, permits the Commission to change rates only on a prospective basis, not retroactively. The Commission determined it did not have the power to order refunds and that no court had directed it to order refunds:

> The Court of Appeals, in *URP v. OPUC*, 154 Or App at 714, held that PGE could not include retired plant such as Trojan in rate base. The Court said nothing about what conclusions the Commission should draw about past collections. *Id.* at 716. The Commission could determine that if Trojan should not have been included in rate base, PGE should have recovered the entire Trojan balance immediately instead of over 17 years, as provided in Order No. 95-322. This would provide PGE and customers with the same outcome as Order No. 95-322, and PGE would not owe refunds. The Court of Appeals decision expressly did not address this issue.

The Commission further stated that the elimination of the Trojan investment from PGE's balance sheet, as agreed to in the Settlement and set forth in PGE's application, complied with the Court of Appeals' finding that a utility may not include retired utility plant such as Trojan in rate base. Following the Commission's final resolution in UM 989, the Supreme Court dismissed pending petitions for review. *Citizens' Utility Board v. PUC*, 335 Or 91, 58 P3d 822 (2002).

URP appealed Order No. 02-227 to the Circuit Court, alleging that the rates adopted were inconsistent with the prior decisions of the Circuit Court and the Court of Appeals holding that PGE may not recover any return on its Trojan investment. URP complained that the approved rates failed to account for the amounts ratepayers already paid to PGE for return on Trojan investment since November 9, 1992, and since the effective date of Order No. 95-322. Additionally, URP contended that the Commission's order wrongly concluded that ratepayers cannot obtain relief from past unlawful charges due to the filed rate doctrine. URP sought an order requiring the Commission to set aside and modify these unlawful charges and to order refunds to ratepayers.

On January 9, 2004, the Circuit Court adjudged Order No. 02-227 to be unlawful, finding that the approved rates were neither just nor reasonable. *Utility Reform Project v. PUC*, Case No. 02C14884, Judgment (and incorporated Opinion and Order) (Marion County Circuit Court of Oregon 2004) (UM 989 Remand). The Circuit Court remanded Order No. 02-227 to the Commission for further proceedings consistent with its Opinion and Order. The Circuit Court deemed the rates approved in Order No. 02-227 to be neither just nor reasonable because the Commission erred in applying the filed rate doctrine to preclude the rates from recovering past unlawful charges. Opinion and Order at 6. The Circuit Court stated, "[a]s part of the adjustment of offsetting charges and liabilities related to the Trojan writeoff, PGE should have been required to account for all refunds due to rate payers for these unlawfully collected rates as a matter of law." *Id.*

The Circuit Court acknowledged Oregon's adoption of the filed rate doctrine in *McPherson v. Pacific Power & Light*, 207 Or 433, 296 P2d 932 (1956), but observed that the *McPherson* Court did not address the Commission's refund authority following remand due to judicial review overturning rates previously approved by the Commission. Opinion and Order at 2. The Circuit Court also stated, "*McPherson* certainly does not state that the Commission has no authority to consider past problems in setting new rates after the old rates are overturned on appeal." *Id*.

The Circuit Court's remand of Order No. 02-227 closely followed the remand of the orders in DR 10 and UE 88 in November of 2003.[3] Shortly thereafter, the Commission opened these proceedings to address all of the remand orders. On March 31, 2004, a consolidated procedural conference was held to determine the nature of the proceedings needed to comply with the court orders. A Consolidated Procedural Conference Memorandum, dated April 1, 2004, memorialized the agreement among participants at the procedural conference. The parties agreed to submit simultaneous opening and reply memorandums identifying the issues in these remand proceedings and the procedural steps to be used.

Although parties agreed that the purpose of these remand proceedings is to determine how to carry out both court remand orders, parties fundamentally disagreed about the proper scope of the issues involved, thereby leading to disagreement about procedures. A ruling, dated May 5, phased the proceedings and asked the parties to address the proper scope of these remand proceedings.

Question Presented

The ruling asked parties to comment on the following question, as originally posed by Staff:

> [Should the Commission] determine how the courts' opinions in the appeals of these cases [DR 10, UE 88 and UM 989] affect the rate decisions made by the Commission, in their entirety, or whether the Commission's inquiry is more ministerial, and involves only determining the charges customers paid to PGE for interest on PGE's investment in Trojan?

Parties were asked to set forth legal reasoning supporting their positions on the proper scope of Phase I and to discuss legal implications of the recommended scope, such as the effect on the burden of proof.

[3] Although Judge Lipscomb's Opinion and Order is incorporated by the Judgment, which is hand dated on January 9, 2004, it appears to have been originally prepared in November of 2003, concurrent with the Circuit Court's remand of the orders in DR 10 and UE 88.

Positions of the Parties

Opening Memorandums

Staff

Staff takes the position that the remand of the final orders in dockets DR 10 and UE 88 controls the scope of these proceedings and argues that a broader scope of inquiry is consistent with general principles of ratemaking. Staff notes, "[d]etermining how the courts' opinions in the remanded cases affect the rate decisions made by the Commission in their entirety" is consistent with general ratemaking policy that prohibits "single-issue rate cases" in favor of a comprehensive analysis of the just and reasonableness of rates. *Staff's Opening Memorandum Re: Scope of Issues* at 2. Staff further avers, "[l]imiting the scope of this proceeding so that the only issue is determining the amount PGE customers paid for carrying charges on PGE's investment in Trojan is akin to a single-issue rate case." *Id*. at 3. Staff declines to recommend that the Commission undertake a broader inquiry, however. Rather, Staff contends that the Commission has the authority to conduct either a broad or narrow inquiry and acknowledges that the greater resources needed to conduct the broad inquiry may favor undertaking the narrow inquiry.

Should the Commission pursue the broader inquiry of determining how the courts' remand orders affect the Commission's decisions in UE 88 and UM 989 in their entirety, Staff recommends that PGE be assigned the burden of proof to demonstrate what constitutes just and reasonable rates in light of the courts' opinions underlying the remands. Staff asks the Commission to set a due date for PGE's opening testimony, and a date for a subsequent prehearing conference to allow parties to discuss the timing of discovery and replies. On the other hand, if the narrower inquiry is undertaken, Staff asserts that URP should bear the burden of proof on the issue of determining the amount customers paid to PGE for return on undepreciated Trojan investment. In such case, Staff asks the Commission to set a time for a prehearing conference for the purpose of determining a procedural schedule.

PGE

PGE takes the position that since the courts remanded the final orders entered in dockets DR 10, UE 88, and UM 989 due to legal errors in those orders, these remand proceedings are inherently more than merely ministerial in nature. PGE observes that the scope of the two remand orders differ, and that each remand order should be separately analyzed, but concludes that the Commission is ultimately required to set just and reasonable rates pursuant to both remand orders.

PGE notes that the remand "in DR 10 and UE 88 requires the Commission to hold further proceedings." *Opening Memorandum of Portland General Electric Company Regarding Phase I Scope* at 1. Moreover, PGE states that the remand does not direct the Commission to order refunds, to implement rate reductions, or to undertake any

particular form of ratemaking. Rather, as PGE declares, "[l]ike the Marion County Circuit Court, the Court of Appeals left the central ratemaking question to the Commission's discretion in these 'further proceedings'." *Id*. at 4. PGE further argues that statutory law, ORS 756.598, and legal precedent support broad discretion on behalf of the Commission to conduct ratemaking without obligation "to employ a single formula or combination of formulas." *Pacific Northwest Bell Telephone Co. v. Sabin*, 21 Or App 200, 224, 534 P2d 984 (1975). *See, also, American Can Co. v. Lobdell*, 55 Or App 451, 463, 638 P2d 1152 (1982) ("rate-making is a purely legislative function, involving broad discretion in selecting policies and methods").

PGE argues that this scope of the remand for DR 10 and UE 88 is consistent with the Commission's position that it does not have authority to order refunds or rate reductions for past errors, except as specifically provided for by statute. Indeed, PGE questions whether the opinion by the Court of Appeals permits refunds or rate reductions to be made at all. In a footnote, PGE notes that the Commission's finding that rates approved in Order No. 95-322 were just and reasonable was not challenged in any of the appeals of the order and, therefore, was never overturned. Moreover, PGE notes that the Court of Appeals' identification of an error in the Commission's process in UE 88 does not necessarily overturn the result of the process. PGE also claims (without providing legal authority or analysis) that the principle of issue preclusion applies to the question of whether a refund should result from a finding of legal error in Order No. 95-322, as URP demanded that the Circuit Court and the Court of Appeals direct refunds be made, but neither court ordered such action.

PGE argues the proper response to the Court of Appeals' opinion is to establish prospective rates by a process free of error. PGE notes that the Commission already undertook this effort in UM 989, following the Court of Appeals' decision, but prior to remand. PGE further observes that the Circuit Court overturned the UM 989 Order and remanded the DR 10 and UE 88 Orders, concurrently.

PGE avers, despite certain prescriptive language, that the Circuit Court's remand of the UM 989 Order, "requires the Commission to exercise its discretion to determine just and reasonable rates." *Id*. at 2-3. Moreover, PGE asserts, Judge Lipscomb recognized that the scope of the remand would not merely be a ministerial calculation of the return on the Trojan investment when he told PGE that it could argue to the Commission that offsetting rate considerations could result in no net rate relief.

PGE argues that the "determination of just and reasonable rates cannot be accomplished through adjusting one specific cost item in the revenue requirement underlying the challenged rates" established in UE 88. *Id*. at 4. Rather, PGE contends, to the extent UE 88 rates are revisited, the Commission is required to apply the Court of Appeals' interpretation of ORS 757.355 to pertinent ratemaking decisions made in UE 88. PGE declares that "[d]etermining just and reasonable rates in UE 88 under new ground rules will require the Commission to consider all aspects of the UE 88 order that would have been different." *Id*. at 5.

PGE identifies at least three separate determinations previously made by the Commission regarding UE 88 rates that are affected by the opinions of both courts and require reconsideration, as follows: 1) the appropriate recovery period for the Trojan investment balance; 2) the cost of capital effects of the utility's change of circumstances; and 3) the application of the net benefits formula given that PGE is precluded from recovering the cost of capital represented by the Trojan investment balance. PGE asserts that the Commission will also need to delineate the retroactive time period affected. PGE identifies only two rate periods at issue: 1) rates in effect from April 1 to November 28, 1998, pursuant to Order No. 95-322; and 2) rates in effect from October 1, 2000 through September 30, 2001, pursuant to Order No. 02-227. PGE notes that this issues list is not preclusive of other issues arising during the proceedings.

PGE recollects that the Commission has already declared the amortization issue a concern should UE 88 rates need to be reviewed on a retroactive basis: "The Commission could determine that if Trojan should not have been included in rate base, PGE should have recovered the entire Trojan balance immediately instead of over 17 years, as provided in Order No. 95-322." *Id*. at 7, citing Order No. 02-227 (UM 989) at 10. PGE also recalls that cost of capital issues were central to ratemaking decision in UE 88 and asserts that the Commission needs to consider, pursuant to ORS 756.040(1)(a), whether exclusion of any return on Trojan investment retrospectively would change the Company's risk profile. Finally, PGE asserts that the Commission would need to reconsider the net benefits analysis to ensure that new rate treatment did not render customers worse off financially than if PGE had continued to operate Trojan.

PGE assumes the burden of proof with respect to proposing rates and showing them to be just and reasonable. As such, PGE proposes filing opening testimony, followed by responsive testimony by URP and MGK, then responsive testimony by Staff, and ending with a reply by PGE. PGE also proposes that normal discovery rules apply.

URP and MGK

URP and MGK assert, "[i]n order to avoid a remand proceeding tainted by prejudice and futility, the Commission must at the outset repudiate its position that the 'filed rate doctrine' (or any other doctrine) precludes relief for ratepayers from unlawful charges they have paid." *Joint Memorandum on Scope of Proceeding, Phasing, and Schedule by URP, et al., and Morgan, Gearhart, and Kafoury Brothers, LLC* at 1. URP and MGK state that the Commission consistently maintains, and indeed is currently arguing, the position that it cannot provide relief for past charges collected. URP and MGK contend the Commission's legal position renders any efforts undertaken by the Commission pursuant to the remand orders to be "futile," and a waste of time and resources. They call upon the Commission to remove "the taint of prejudgment by withdrawing its appeal of the UM 989 Judgment (Marion County Circuit Court No. 02 C14884) and repudiating its express opposition to ratepayer refunds *in the current* matter." *Id*. at 3 (emphasis included). URP and MGK further state:

> Unless the Commission now declares a new position on this fundamental legal issue, the entire remand proceeding is effectively dead on arrival. Unless the Commission, at the outset of the this [sic] remand proceeding, makes a legal determination that relief for past unlawful charges is available for those who paid the unlawful charges, then the entire proceeding is moot and should be so declared.

Id. at 4.

In the event the proceeding continues, URP and MGK argue the Commission's focus should be on determining the charges that customers paid to PGE for Trojan return on investment. The Commission should also address URP issues 1 through 4.[4]

Asserting that PGE is the only party contending the proceeding should have a broader scope, URP and MGK challenge PGE's assertion that the Commission is statutorily authorized to reopen the record to consider new evidence pursuant to ORS 756.568. They argue that the statute "authorizes the Commission to 'rescind, suspend or amend' any order made by the commission" but that the "statute does not state that the Commission has 'authority to reopen the record and consider all evidence,' as PGE asserts." URP and MGK also argue that ORS 756.568 is inapplicable to the remand proceeding, as the Commission has been directed "to return the unlawful charges," not "rescind, suspend or amend any order made by the commission." *Id*. at 5.

URP and MGK argue the Commission has been directed to undertake "refund issues," not to engage in "ratemaking." URP and MGK define "ratemaking" as:

> [T]he process of considering the panoply of asserted utility costs and expected utility revenue and determining rates which are both:
>
> 1) reasonable and just (ORS 757.020); and
> 2) in compliance with substantive statutes pertaining to rates, including ORS 757.355.

Id. at 6. URP and MGK argue that determining an amount of money to return to ratepayers, and the method for executing the return, are not ratemaking issues and "do not

[4] URP issues 1 through 4 have been identified, as follows:

1) What amount of money has been charged to ratepayers for return on Trojan investment since the effective date of OPUC Order No. 95-322? As a sub-issue, URP asks: "How much were ratepayers charged for Trojan return on investment during each month or other subdivision of that period?
2) What are the applicable rates of interest to apply to these charges to ratepayers in calculating refunds or credits?
3) How should current customers of PGE, who paid rates including Trojan return on investment, receive their refunds?
4) How should former customers of PGE, who paid rates including Trojan return on investment, receive their refunds?

involve an inquiry into the utility's costs for the purpose of setting rates." *Id*. at 7. Further, addressing the amount of and method for a refund of money to ratepayers does not call for either reopening the factual record of past rate cases or for making new findings of facts based on the existing records.

Finally, URP and MGK assert that undertaking the scope of issues proposed by PGE will unduly burden the non-utility parties due to the impracticalities of participation by MGK, class action participants, and the unavailability of attorneys fees or recovery of costs.

Reply Memorandums

Staff

Staff dismisses the argument of URP and MGK that the Commission must discontinue appeal of the UM 989 Remand to avoid bias in conducting these remand proceedings as "frivolous." Staff avows that the appeal does not create a prohibited interest pursuant to ORS 756.026.

Staff also rebuts the contention of URP and MGK that the Commission may not reopen the records in these remand cases. Staff advises, "[i]t is the end result of the PUC's order that must be tested for validity," meaning the Commission and courts evaluate the just and reasonableness of rates by examining them in their entirety. *Staff's Reply Memorandum Re: Scope of Issues* at 2, quoting *Pacific Northwest Bell Telephone. Co. v. Eachus*, 135 Or App 41, 56, 897 P2d 1176 (1995). Staff asserts that the remand orders authorize the Commission to reexamine the end result of rate decisions in UE 88 and UM 989, rather than culling out a single component of these rates.

Staff accuses URP and MGK of overstating the scope of inquiry to be undertaken should the Commission determine it is appropriate to do more than perform a "ministerial calculation." Acknowledging the inappropriateness of conducing a "full-blown general rate case," Staff denies it is the only alternative to conducting a narrow inquiry. Staff asserts that a proceeding consistent with the remand orders would address "issues specifically related to the Court of Appeals' decision that the Commission incorrectly allowed PGE to recover a return on its Trojan investment." *Id*. at 2. Staff agrees with PGE's identification and summarization of the three determinations previously made by the Commission in UE 88 that were affected by the statutory interpretation of the Court of Appeals and should be reconsidered.

PGE

PGE strongly challenges the contention that these remand proceedings are moot unless the Commission withdraws its appeal of the UM 989 Remand. In a footnote, PGE notes that Judge Lipscomb directed the Commission to address identified errors in Order No. 02-227, despite arguments by URP that remand to the Commission would be "futile" due to the Commission's legal position on refunds. PGE argues URP and MGK

have not presented any legal or substantive reasons why the Commission should not continue pursuing its appeal of the Circuit Court's UM 989 Remand that puts the Commission's position on refunds at issue. Indeed, PGE offers case law that agencies may argue the merits of their own opinions on appeal without creating bias[5] and that agency opinions on law, as opposed to facts, do not prejudge a matter.[6]

PGE also takes issue with the characterization by URP and MGK that the Commission has only two options, either to conduct a mathematical calculation, or to revisit "prior rate decisions 'in their entirety'." Taking the general position that the record should be reopened and new evidence considered on issues *affected* by the remand orders, PGE reiterates that it has identified three discrete determinations in Order No. 95-322 that are affected. PGE notes that Judge Lipscomb anticipated a broader inquiry as he stated the belief that PGE is "'entitled to make the attempt' to convince the Commission that aspects of its prior decisions other than the 'return on' Trojan should be modified." *Portland General Electric Company's Reply Memorandum Regarding Phase I Scope* at 4, citing July 23, 2003 Transcript of Proceedings at 223.

PGE argues that legally, "[o]nce the Commission reacquires jurisdiction, it has discretion to reconsider the whole of its original decision." *Portland General Electric Company's Reply Memorandum Regarding Phase I Scope* at 4**.** PGE offers case law supporting this position, citing precedent that an agency may reopen and remake the factual record[7], consider different approaches or rationales[8] and make new findings upon remand.[9]

Finally, PGE contends that burdens on participation in these remand proceedings by URP and MGK should not influence the scope of the proceedings.

URP and MGK

URP and MGK contend that properly scoped remand proceedings that involve only the calculation and distribution of refunds would not entail "ratemaking." To the extent the Commission does not engage in ratemaking, they claim the alleged prohibition on single-issue ratemaking raised by Staff is inapposite. URP and MGK also criticize Staff's failure to cite authority supporting the prohibition on single-issue rate cases. In any case, URP and MGK fundamentally challenge whether the Commission is prohibited from limiting issues in a rate case, or even from engaging in single-issue ratemaking. The Commission may restrict issues in a ratemaking proceeding, they assert,

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[5] *See State of Texas v. United States*, 866 F2d 1546, 1554 (5th Cir 1989).
[6] *See, e.g., Samuel v. Board of Chiropractic Examiners*, 77 Or App 53, 60, 712 P2d 132 (1985), *rev. denied*, 300 Or 704 (1986) (preconceived point of view concerning an issue of law is not an independent basis for disqualification of agency board members). *See also City of Charlottesville v. FERC*, 774 F2d 1205 (DC Cir 1985), *cert. denied*, 475 US 1108 (1986) (preconception regarding the law no more invalidates an agency action than the action of a court).
[7] *See Southeast Michigan Gas Co. v. FERC*, 133 F3d 34 (DC Cir 1998); *Central Telephone Co. v. PUC*, 911 SW2d 883 (Tex App 1995).
[8] *See City of Charlottesville*, 774 F2d at 1212.
[9] *Federal Trade Comm'n v. Morton Salt Co.*, 334 US 37, 68 S Ct. 822 (1948).

as evidenced by its failure to originally address claims about the unlawfulness of certain costs and profits related to Trojan in the PGE rate case following UE 88. URP and MGK also oppose Staff's proposal, as they interpret it, to further phase these remand proceedings in order to address the remand of UE 88 before the remand of UM 989. URP and MGK contend this process would be duplicative, in terms of conducting phases within phases.

Turning to PGE's comments, URP and MGK dispute PGE's proposition that refunds are not required pursuant to the remand orders, and may even be prohibited pursuant to the Court of Appeals' remand in UE 88. URP and MGK contend that the courts' opinions did not identify errors in the Commission's procedure, but rather "found that the adopted rates substantively violated the prohibitions in ORS 757.355." *Joint Reply Memorandum on Scope of Proceeding, Phasing, and Schedule by Utility Reform Project, et al.* at 4. URP and MGK also challenge PGE's position that the UM 989 Remand "requires the Commission to exercise its discretion to determine just and reasonable rates." *Id.* URP and MGK observe that the Circuit Court's ruling direct the Commission to calculate the past unlawful charges and return them in the form of either a rate reduction or refund.

URP and MGK observe that PGE does not limit the scope of a broader inquiry to its identified issues, as PGE or any other party could later raise additional issues. In any case, they advise that parties should be able to raise additional, pertinent issues if the Commission conducts a broad review of PGE's cost and revenues during the applicable period.

URP and MGK comment on two of the potential issues raised by PGE, questioning the need to revisit the net benefits analysis and strongly disagreeing with PGE's suggestion about the limited rate periods at issue. They argue that rates implemented by subsequent Commission orders are also at issue because PGE continues to recover a return on Trojan. As support for this contention, URP and MGK offer a lengthy discussion of related issues previously presented to the Marion County Circuit Court.

URP and MGK represent that it would be a fundamental error for the Commission to undertake the scope proposed by PGE for these remand proceedings. They characterize PGE's proposed scope as necessitating a "lengthy and complex 'ratemaking' proceeding" that is subject to being declared moot after the fact due to a Commission determination that the filed rate doctrine prohibits refunds.

Discussion

Determining the proper scope of these remand proceedings is dependent upon understanding the history that precedes the Commission's reopening of dockets DR 10, UE 88 and UM 989. The two remand orders issued in these three dockets must be considered together, and in context of the foregoing regulatory and legal proceedings, as well as in consideration of the constitutional and statutory authority of the

Commission, as interpreted by the Oregon courts. Given the intricacy and interconnectedness of the precipitating events, it should not surprise any party that the scope of these remand proceedings must be more than merely "ministerial."

The protracted history of the underlying dockets is acknowledged, however. Indeed, it is very tempting to limit the scope of these remand proceedings by focusing, as URP and MGK would have the Commission do, on prescriptive language in the Circuit Court's opinion that accompanied its remand of Order No. 02-227. Solitary focus on one sentence in the Circuit Court's opinion that directs the Commission to "offset and recover" or "refund" past unlawful charges could be interpreted, if considered in the manner urged by URP and MGK, to require the Commission to undertake the limited effort of attempting to calculate the fraction of past rates that compensated PGE for a return on Trojan investment.

It is improper, however, to read any part of the Circuit Court's opinion singularly. One sentence should not be read in isolation of the remainder of the opinion, nor separately from the remand order. It is also inappropriate to interpret the UM 989 remand independently of the DR 10 and UE 88 remand. Due to the unique history of these remand proceedings, all three underlying dockets have been concurrently remanded to the Commission. The two remand orders are interrelated, with the remand of Order No. 02-227 in UM 989 informing the remand of the orders in DR 10 and UE 88. Collectively, the remand orders—particularly when considered in context of the foregoing regulatory and legal proceedings and ratemaking principles recognized by Oregon courts—require the Commission to establish "just and reasonable" rates in these remand proceedings, a task that necessarily entails ratemaking.

<u>These Remand Proceedings Encompass Both Remand Orders</u>

As Staff indicates, the most important event bearing on these remand proceedings is the Court of Appeals' determination in *Citizens' Utility Board* that the Commission is not statutorily authorized to compensate utilities for a rate of return on unused or retired property. 154 Or App at 716-17. The activities in UM 989, both remand orders by the Circuit Court, and all future action in these remand proceedings emanate from this decision by the Court of Appeals. It is imperative, therefore, to understand the import of the Court of Appeals' opinion, particularly as it relates to and intersects with the remand orders of the Circuit Court.

In order to fully appreciate the consequence of the statutory interpretation of the Court of Appeals in *Citizens' Utility Board*, it is necessary to also grasp pertinent judicial precedent. The Court of Appeals has repeatedly acknowledged that the regulation of public utilities, including the fixing of rates, constitutes a legislative function. *See e.g., Pacific Northwest Bell Telephone Co.,* 21 Or App at 213. The Commission's broad authority to regulate utilities, "subject only to constitutional limits and those of the Commissioner's express, legislatively delegated broad powers," is well recognized. *American Can Co.*, 55 Or App at 461.

The Court of Appeals identified the "principal if not only issue before" it, in *Citizens' Utility Board*, as "whether PGE's rates may include the rate of return component, or are instead limited to the recovery of the declining principal amount of the undepreciated Trojan investment." *Citizens' Utility Board*, 154 Or App at 706-7. Thus, the sole purpose of the Court of Appeals' review, as identified by the Court, was to scrutinize the legislature's delegation of authority to the Commission pursuant to ORS 757.355 and ORS 757.140(2).

The Court of Appeals determined that ORS 757.140(2) "authorizes rates that would reimburse the utility for its principal investment in retired capital assets," but does not authorize a return on that investment. *Id*. at 716. The court reasoned that ORS 757.355 precludes the Commission from allowing rates "that include a rate of return on capital assets that are not currently used for the provision of utility services." *Id*. Indicating that specific statutes may "circumscribe" the Commission's authority, 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. *Id*. In reaching its decision, the Court of Appeals explicitly stated that it did not consider any "other assignments and arguments" raised by parties. *Id*. at 717. Thus, the orders in DR 10 and UE 88 were reversed solely on the grounds that the Commission had exceeded its legislative authority.

Had the Circuit Court immediately remanded the orders in DR 10 and UE 88 to the Commission for further proceedings consistent with the Court of Appeals' opinion, the Commission would have had no further direction from the courts on the nature of future proceedings to undertake. This lack of specific instruction is consistent with the Court of Appeals' review of end rates for fairness and reasonableness, but its refusal to either review or mandate use of specific formulae to set rates. *American Can Company*, 55 Or App at 461. So long as the Commission acts within its constitutional and legislative authority, it is "not obligated to employ any single formula or combination of formulas to determine what are in each case 'just and reasonable' rates." *Pacific Northwest Bell Telephone Company*, 21 Or App at 233.

The Circuit Court's remand of Order No. 02-227 in UM 989, in conjunction with the belated remand of orders in DR 10 and UE 88 pursuant to the Court of Appeals' decision, provides the Commission with additional guidance, however. In remanding Order No. 02-227, the Circuit Court deemed end rates approved in UM 989 to be neither just nor reasonable. Taking fault with the scope of the approved rates, the Circuit Court stated, "[a]s part of the adjustment of offsetting charges and liabilities related to the Trojan writeoff, PGE should have been required to account for all refunds due to rate payers" for rates unlawfully collected. *UM 989 Opinion and Order.* To approve end rates within this scope, however, the Commission would have had to conduct far different proceedings than those actually conducted in UM 989. In reviewing the Settlement, the Commission needed to address the following question: What rates would have been approved in UE 88 if the Commission had interpreted the authority delegated to it in ORS 757.355 as the Court of Appeals did in *Citizens' Utility Board*?

The actual scope of the Commission's review and approval of the Settlement involved a very different question, however. As UM 989 addressed the *prospective* rate treatment of Trojan, the question presented by the Settlement was: How should Trojan investment be removed from future rates?[10] In effect, the Settlement and the Commission's review of the Settlement, addressed how to implement future rates that were consistent with the Court of Appeals' statutory interpretation. Reviewing the settlement and supporting evidence only, the Commission did not consider any issue related to the retroactive adjustment of rates.

The Circuit Court's remand of Order No. 02-227 in UM 989 informs the Commission that it addressed the wrong question in that docket and instructs the Commission to rectify the situation by revising existing rates, whether by refund or prospective adjustment, to account for past rates compensating PGE for a return on Trojan investment. By concurrently remanding the orders in DR 10 and UE 88, the Circuit Court provides a forum for the Commission to revisit rate determinations made in UE 88 in light of the Circuit Court's ruling. This effort should comprise the first phase of these remand proceedings, with the goal being to determine, on a retrospective basis, end rates that comply with the Court of Appeals' interpretation of ORS 757.355. A later phase may involve reconciling revised rate determinations in the first phase against rates established in UM 989 (and potentially other dockets) in order to calculate appropriate rate adjustments.

The Record in Each Remanded Docket is Reopened

In order to reassess UE 88 rates on a retrospective basis, the Commission must reopen the relevant records. Given the remand of four orders and court instructions to undertake further proceedings in three dockets, it is disingenuous to suggest the Commission may not reopen the record in any of these dockets to consider new evidence. Further proceedings upon remand will effectively rescind or amend the prior orders that are remanded—that, after all, is the point of a remand. In order to address issues responsive to the Court of Appeals' interpretation of ORS 757.355 not previously raised in UE 88, the Commission must take and consider new evidence. Moreover, to consider issues raised by remand of Order No. 02-227, the Commission must take and consider new evidence in UM 989, as evidence in that docket was introduced by settlement, not adjudication. In any case, ORS 756.568 authorizes the Commission to consider

[10] The Commission unambiguously stated in Order No. 02-227 that only the *prospective* treatment of Trojan was at issue:

> The prospective nature of the current docket is clear in the application, which deals with treatment of the Trojan investment from October 1, 2001, not past customer charges. The application, the Settlement, and Order No. 00-601 all state explicitly that nothing in the Commission's order is 'intended to require PGE to refund any of the funds it has collected through rates related to its investment in Trojan prior to and as of October 1, 2000." Order No. 02-227 at 6; *see also* Application at 5, Settlement Agreement § 2.7.

additional evidence, with no restrictions on the scope and nature of such evidence, in the course of rescinding, suspending or amending an order.

The Commission Must Engage in Ratemaking

In order to satisfy the remand orders, the Commission must engage in ratemaking, as it is defined by URP and MGK, and review pertinent utility operations and associated costs to determine end rates that comply with all pertinent statutes. The Court of Appeals directed that orders in DR 10 and UE 88 be remanded to allow the Commission to conduct further proceedings consistent with its opinion and interpretation of legislative delegation to the Commission. Regardless of the nature of proceedings undertaken, their purpose would involve setting just and reasonable rates (pursuant to ORS 757.020), whether retrospectively or prospectively, within the limitations of ORS 757.355 and ORS 757.140(2). Finding rates established by Order No. 02-227 to be unjust and unreasonable, the Circuit Court remanded Order No. 02-227 to the Commission for further proceedings consistent with its opinion. As discussed herein, the opinion calls for existing rates to be adjusted according to rate determinations made pursuant to the remand of DR 10 and UE 88.

The Commission must engage in a two-step process whenever it engages in making rate determinations, determining first a utility's total revenue requirement and subsequently allocating that revenue amount among ratepayers. *See American Can v. Lobdell* at 454-455. To determine the total revenue requirement, the Commission is required to consider *all* aspects pertinent to the utility's operations. *Id*. This is the rule against single-issue rulemaking. Recognizing that the revenue formula used in ratemaking is designed to determine the revenue requirement based on the aggregate costs and demand faced by a utility, the rule appreciates that a change in one item of the revenue formula may be offset by a corresponding change in another component of the formula. Consequently, the rule makes it improper to consider any change to components of the revenue requirement in isolation.

Should the Commission direct PGE to refund costs attributed to earnings on Trojan investment without considering whether other factors offset this amount, as URP and MGK urge the Commission to do, the Commission would inappropriately engage in single-issue ratemaking. Even assuming it would be possible to isolate rates to be refunded (which has not been demonstrated and seems unlikely since parties don't even agree on what rate periods to review), the Commission is prohibited from isolating certain revenues or costs in setting rates without considering whether there are offsetting changes in other costs or revenues. Judge Lipscomb recognized that the Commission would need to consider potentially offsetting rate considerations. His statements, made at a hearing on July 23, 2003, express anticipation that the Commission would engage in broad ratemaking considerations:

> * * * [A]t the Commission you [PGE] can argue * * * , if you can't give us that [a return on the Trojan investment], you have to give us something else, because otherwise we aren't made whole * * *

> And that's probably what you're going do. * * * And that may or may not result in any net rate relief * * * July 23, 2003 Hearing, Tr. At 177.
>
> I'm not prepared to buy off on that today, but I'm certainly not prepared to conclude that you can't argue on remand to the PUC that if you can't get a return on your investment, they need to put something else in your [rate] base for some other reason that * * * allows you to have * * * a rate of return that's economically viable for you to continue on as a successful utility company. July 23, 2003 Hearing, Tr. At 179.

The goal of these remand proceedings is to definitively resolve the three underlying dockets. Although performing the limited function of calculating refunds would likely lead to an expedited decision in these proceedings, that decision would be subject to appeal on the basis that the resulting rates are unjust and unreasonable, thereby beginning a new round of legal uncertainty.

The Scope of Phase I Shall Address UE 88 Rate Determinations Affected by the Court of Appeals' Opinion

Although the Commission must engage in ratemaking in these remand proceedings, it need not engage in a "full-blown general rate case" in this first phase. The scope of the first phase of these remand proceedings may instead be narrowed to reconsider only those aspects of the ratemaking process in UE 88 that are affected by the Court of Appeals' statutory interpretation. Again, the general question to be considered is: What rates would have been approved in UE 88 if ORS 757.355 had been interpreted to prohibit a return on Trojan? PGE asserts, and Staff agrees, there are at least three separate rate determinations made in UE 88 that are affected, as follows: 1) the appropriate recovery period for the Trojan investment balance; 2) the cost of capital effects of the utility's change of circumstances; and 3) the application of the net benefits formula given that PGE is precluded from recovering the cost of capital represented by the Trojan investment. Delineation of the retroactive rate period must also be addressed as PGE is in disagreement with URP and MGK on this issue. PGE appropriately assumes the burden of proof with respect to proposing rates and demonstrating that they are just and reasonable.

Parties have long anticipated that should the Commission consider the issue of removing the return on Trojan from past rates, the Commission would need to contemplate the issues identified by PGE.[11] Indeed, a reason that parties pursued and supported the Settlement was in order to avoid becoming mired in these complex rate determinations. Consequently, the issues raised by PGE should not surprise any party. Although the Commission is sympathetic to the strains placed on *all* parties by engaging in an investigation of the ratemaking issues raised in these remand proceedings, the

[11] For example, in its reply brief in UM 989, CUB identified nearly the same issues as PGE does now in response to the Court of Appeals' opinion. See *Citizens' Utility Board's Reply Brief*, UM 989 at pp. 1-2.

Commission cannot avoid, modify or otherwise dispense with the obligations imposed on it by the remand orders.

All other issues in these remand proceedings may be deferred to a later phase. For example, reconciling the results of Phase I with actual rates and adjusting rates, to the extent necessary, shall be addressed in future phases.

These Remand Proceedings May Proceed Despite the Ongoing Appeal

Concerns about bias affecting the Commission's ability to address the issues identified by PGE are unwarranted. The Commission may simultaneously proceed with these remand proceedings and the appeal of the Circuit Court's remand of Order No. 02-227. Indeed, it is likely that the Circuit Court understood that the Commission would engage in this dual effort.[12]

In the first place, the ratemaking question to be initially addressed does not necessarily implicate the legal position that the Commission is not authorized to issue refunds. Prior to completing 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 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.

Even if it was assumed that retroactive adjustment would be necessary, the Commission's appeal of the Circuit Court's remand of Order No. 02-227, which may be based on the legal position that refunds are statutorily prohibited, does not interfere with the Commission's ability to execute its legislative charter and conduct fair evidentiary hearings and make just and reasonable rate determinations under *existing* law. Preconceptions about the law neither invalidate individual Commissioners pursuant to ORS 756.026,[13] nor the Commission generally from acting under the law.[14]

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[12] As PGE observes, the Circuit Court remanded Order No. 02-227 to the Commission, in conjunction with remand of the orders in DR 10 and UE 88, despite URP's argument that doing so "would be futile" due to the Commission's legal position on the filed rate doctrine. *PGE Reply Memorandum*, Footnote 1, citing *July 23, 2003 Transcript of Proceedings* at 242.

[13] ORS 756.026 identifies the following prohibited interests: (1) No member of the Public Utility Commission shall: (a) Hold any other office of profit; (b) Hold any office or position under any political committee or party; (c) Hold any pecuniary interest in any business entity conducting operations which if conducted in this state would be subject to the commission's regulatory jurisdiction; or (d) Hold any pecuniary interest in, have any contract of employment with, or have any substantial voluntary transactions with any business or activity subject to the commission's regulatory jurisdiction. *See, also, Samuel v. Board of Chiropractic Examiners*, 77 Or App at 60 (preconceived point of view concerning an issue of law is not an independent basis for disqualification of agency board members).

[14] *See Chartlottesville v. FERC*, 774 F2d at 1212 ("preconceptions regarding the law no more invalidate agency action than they do the action of a court").

A Prehearing Conference Will Be Held

Parties have made preliminary proposals regarding procedural steps to undertake in the first phase of these remand proceedings. Given assignment of the burden of proof to PGE, there is agreement among the parties that PGE should file opening testimony. Timing of this action and subsequent procedural steps should be discussed by the parties at a prehearing conference. A separate memorandum will be issued in order to solicit parties' input regarding a date to hold a prehearing conference to establish a procedural schedule in these remand proceedings.

Dated at Salem, Oregon, this 31st day of August, 2004.

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Traci A. G. Kirkpatrick
Administrative Law Judge