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September 9, 2005

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

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

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

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of Portland General Electric Company's Opposition to URP's and Class Action Plaintiffs' Motion to Strike. This document is being filed electronically 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 the hard copy filing.

Very truly yours,

A handwritten signature in black ink that reads "D. F. White".

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 OPPOSITION TO URP'S AND CLASS ACTION PLAINTIFFS' MOTION TO STRIKE**

Portland General Electric Company ("PGE") hereby submits its Opposition to the Motion to Strike filed on behalf of the Utility Reform Project and the Class Action Plaintiffs (collectively, "URP").

**I. URP'S MOTION FAILS ON THE MERITS**

URP's Motion is inadequate. The principal basis for the motion is PGE's Motion in Limine, which the ALJ granted in part at the August 29 hearing. URP misunderstands the nature of PGE's Motion in Limine and the ALJ's ruling. PGE's motion sought to preclude cross examination about topics beyond the scope of these proceedings as delineated in the Commission's earlier Order No 04-597. The Commission must determine what UE 88 rates would have been assuming that PGE could not earn a "return on" the Trojan investment. Therefore, some evidence should be limited to facts that were known or knowable when the Commission set UE 88 rates. At the hearing, the ALJ agreed that evidence *offered for the purpose of determining UE 88 rates* should be limited to such facts. The ruling did not, as URP suggests, exclude from the record *any reference* to subsequent

events.

Such a blanket ruling would not make any sense. This proceeding is taking place in 2005. Plainly some portions of the record will reference the intervening decade. The point of the ALJ's ruling was that such evidence may not be offered as factual evidence the Commission would have considered in setting UE 88 rates.

A few examples (set forth below) will illustrate this point and the unfounded nature of URP's Motion. In Exhibit A, we identify the particular testimony URP seeks to strike and the reason URP's Motion should be denied in each instance.

1. Generally Recognized Regulatory Principles. Significant portions of the testimony URP seeks to strike concern generally recognized regulatory principles that PGE maintains the Commission would have used in UE 88 had it known that rates could not include a "return on" the Trojan plant. *See, e.g.,* PGE/6000, Lesh/16, 35. This testimony provides illustrative examples of Commission policies that existed at the time of the UE 88 decision and thereafter. The existence of these regulatory policies and their potential use in this docket are plainly relevant. The examples are not offered as factual evidence the Commission would have considered in setting UE 88, but rather as illustrations of the general principle at issue.

2. General Background Information. Other testimony provides useful background information. For example, general background information regarding PGE rate proceedings between the UE 88 and the UM 989 settlement are plainly helpful given that this is a remand proceeding of DR 10, UE 88, and UM 989. PGE/6100, Dahlgren/23-24. This material is offered not as evidence the Commission would have considered in setting UE 88 rates, but to set the stage and put UM 989 in context.

3. Accounting Treatment and Rate Consequences for Relevant Time Period. Other testimony simply describes the accounting treatment of assets and liabilities

throughout the time period between UE 88 and UM 989. PGE/6201. This testimony is not offered as evidence the Commission should consider in determining what UE 88 rates would have been. Rather, it is offered to show the financial impact on assets and liabilities of the various scenarios PGE proposes for what UE 88 rates would have been. This information is particularly relevant given the Commission ruling regarding the relationship between UE 88 and UM 989 in this remand proceeding:

The concurrent remand of all three dockets provides an opportunity to revisit rate determinations made in UE 88 in light of the Circuit Court's ruling regarding the UM 989 order, with subsequent reconciliation of the revised rate determinations against rates established in other dockets, such as UM 989, if necessary.

Order No. 04-597 at 6. This testimony simply reconciles the accounting treatment in intervening dockets (UE 93 and U 100) and UM 989, as contemplated by the Commission's scope ruling.

Other testimony that is the subject of URP's Motion simply describes PGE's position in this docket. For example, Ms. Lesh concludes that the Commission would have approved the UM 989 settlement under the scenarios PGE recommends for UE 88 rates. PGE/6000 Lesh/4. This testimony is not offered as factual evidence the Commission would have considered in determining UE 88 rates. It merely illustrates the consequences that will follow from the rate decisions at issue.

4. Plant in Service. URP seeks to strike portions of the Quennoz-Peterson-Dahlgren testimony it characterizes as "legal opinion, argument or discussion." The identified passages of the testimony are not provided by a lawyer and do not constitute legal opinion. Rather, the witnesses describe their understanding of the limitations imposed by ORS 757.355 and the Commission's treatment of plant in service in UE 88 Order 95-322.<sup>1</sup> On page 5, the witnesses answer a simple, factual question: was Trojan abandoned? They

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<sup>1</sup> PGE/6300, Quennoz-Peterson-Dahlgren/4:8-22.

describe plant at issue. Further, they describe the Commission's treatment of that plant in the 1995 Order No. 95-322.

URP moves to strike all of PGE/6300, arguing that the testimony is beyond the scope of this phase and that it requires consideration of facts "unknown and unknowable in early 1995, when the Commission set UE 88 rates." The Quennoz -Peterson-Dahlgren testimony first describes and refers to PGE's 1994 testimony concerning plant remaining in service following Trojan closure. PGE/6300, Quennoz, et al/2-3. They go on to describe why the Commission should reconsider its decision concerning plant in service. PGE/6300, Quennoz, et al/4-5. They describe the work done in 1992 through 1994 to identify plant in service. PGE/6300, Quennoz, et al/6. They describe their current review that simply affirms that the \$80 million net plant in service value developed in 1992 was reasonable. PGE/6300, Quennoz, et al/6-8. In sum, distinguishing between abandoned plant and plant remaining in service following Trojan's closure was an important aspect of the initial UE 88 proceedings. The Commission's 1995 decision concerning Trojan investment classification is implicated by the Court of Appeals' determination. Therefore, revisiting Trojan investment classification is squarely within the scope of the existing proceeding.

## **II. URP'S MOTION IS PROCEDURALLY INADEQUATE**

URP's Motion is procedurally deficient in at least two respects. First, it is untimely and prejudicial to PGE. The vast majority of testimony URP seeks to strike is PGE's Opening Testimony, which PGE filed on February 15, 2005. PGE filed the remaining testimony that is the subject of URP's Motion on June 27, 2005.<sup>2</sup> Yet URP postponed lodging its objections until the hearing on August 29, 2005, over six months after PGE filed Opening Testimony. There is no excuse for this delay. The basis for URP's Motion—the Commission's scoping order (Order No. 04-597) and its allegation that certain testimony is legal opinion—were known to URP well in advance of the hearing.

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<sup>2</sup> URP also seeks to strike Staff Exhibit 102, which Staff filed on May 19, 2005.

The untimely nature of URP's Motion creates the prospect of substantial prejudice to PGE. Had URP filed its Motion in a timely fashion, PGE would have had the opportunity to recraft its testimony if the motion to strike were granted. PGE will have no such opportunity if URP's Motion is granted now because the record is closed. Under these circumstances, the most appropriate course is to admit the testimony and exhibits into the record, while affording URP the opportunity to argue in legal briefing that the Commission should give the testimony no weight for the purpose offered. This will preserve URP's arguments while providing the Commission with a complete record upon which to base its decision.

Second, URP has plainly failed to meet its burden to justify why testimony should be stricken. URP puts conclusory labels on over 59 separate pieces of testimony and exhibits without any explanation regarding why the material should be stricken. According to URP, each of the 59 pieces of testimony and exhibits is either "future facts" (ff), legal opinion, or both. But URP offers no analysis whatsoever to show that the material is either a "future fact" or legal opinion or why the evidence should be disregarded for the purpose offered. Such unsubstantiated claims cannot warrant the extreme remedy URP seeks—striking testimony without the opportunity to submit alternative testimony.

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**CONCLUSION**

The ALJ should reject URP's Motion to Strike.

DATED this 9th day of September, 2005.

PORTLAND GENERAL ELECTRIC  
COMPANY

*David White* <sup>As JJO</sup>

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## **EXHIBIT A**

### **PORTLAND GENERAL ELECTRIC COMPANY'S OPPOSITION TO URP'S AND CLASS ACTION PLAINTIFFS' MOTION TO STRIKE**

<u>EXHIBIT</u>	<u>PAGES</u>	<u>LINES</u>	<u>DESCRIPTION</u>
PGE 6000	2	16-20	This testimony describes the UM 989 settlement and order. PGE does not offer this testimony as evidence the Commission should consider in determining what UE 88 rates would have been had the Commission known that ORS 757.355 prohibited the inclusion of retired plant in rate base. It is offered as background information to provide context.
PGE 6000	4	8-13	This testimony describes PGE's recommendation concerning what the Commission would have done had it known that ORS 757.355 prohibited the inclusion of retired plant in rate base. It is not a legal conclusion. It is PGE's response to the very question the Commission posed in its order defining the scope of this docket.
PGE 6000	9	3-27	This testimony describes Commission policy regarding balancing the interests of customers and shareholders in connection with rate setting and capital investments. It is not legal opinion but rather testimony regarding Commission policy.
PGE 6000	16	7-11	This testimony addresses one of the building blocks available to the Commission in determining what it would have done in setting UE 88 rates (i.e., permitting the utility to share in some of the benefit that accrued from the early retirement of Trojan). It describes Commission policy adopted before and after UE 88.
PGE 6000	21	2-3	This testimony provides an example of the Commission's policy of matching the depreciation life of an asset within the time period over which the asset provides a benefit to customers. The example comes from PGE's Port Westward plant which is under construction. It is used for illustrative purposes only.
PGE 6000	23	4-8	This testimony describes PGE's position that it faces increased risk if ORS 757.355 prohibits the inclusion of retired plant in rate base.



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PGE 6000	35	14-18	This testimony provides an example of a power cost deferral. While the example provided is a 2001 power cost deferral, the Commission's deferral policy existed before and after 1995. Indeed, the Commission authorized power cost deferrals throughout 1993-1995 for replacement power costs associated with the Trojan outage and shutdown.
PGE 6100	3	18-27	This testimony quotes from ORS 756.040. It is not legal opinion.
PGE 6100	4	1-6	This testimony quotes from ORS 756.040. It is not legal opinion.
PGE 6100	19	19-24	This testimony describes Commission Order No. 93-1117. The testimony reflects PGE's understanding and is offered to provide context with respect to the expectations of PGE and its investors. It is not offered as legal opinion.
PGE 6100	23	6-24	This testimony describes PGE ratemaking orders between UE 88 and September 2000 when the UM 989 settlement was approved.
PGE 6100	24	1-7	This testimony describes the UM 989 settlement and Commission order approving that settlement. It is offered as helpful background information.
PGE 6200	11	15-17	This testimony describes the application of PGE's proposed ROE throughout the period between UE 88 and UM 989. This is not information PGE proposes that the Commission consider in determining what UE 88 rates would have been. Rather, it is information necessary to describe the accounting and ratemaking changes that would have occurred throughout the relevant rate period (starting with UE 88 through UM 989) if UE 88 rates had been established as PGE recommends. See PGE Opposition, Section I.3.

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<u>EXHIBIT</u>	<u>PAGES</u>	<u>LINES</u>	<u>DESCRIPTION</u>
PGE 6201	All		This exhibit describes in table form the financial impact of the three scenarios described in PGE's testimony. As URP did not move to strike the associated testimony, there is no basis upon which to strike the exhibit. In any event, this is not information PGE proposes that the Commission consider in determining what UE 88 rates would have been. Rather, it is information necessary to describe the accounting and ratemaking changes that would have occurred throughout the relevant rate period (starting with UE 88 through UM 989) if UE 88 rates had been established as PGE recommends. See PGE Opposition, Section I.3.
PGE 6300	4	8-22	This testimony quotes ORS 757.355. It is not legal opinion.
PGE 6300	5	11-16	This testimony describes facts supporting PGE's position that the Trojan plant was not abandoned in 1995. It is not legal opinion.
PGE 6300	5	17-19	This testimony describes why the Trojan facility protects public health and safety. All facts identified in this testimony that would have been available to the Commission in UE 88.
PGE 6300	6	20-22	See PGE Opposition, Section I.4
PGE 6300	7	1-2	See PGE Opposition, Section I.4
PGE 6300	All		See PGE Opposition, Section I.4
PGE 6302			See PGE Opposition, Section I.4
PGE 6303	All references to facts not known as of January 1995; no line numbers exist		See PGE Opposition, Section I.4

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<u>EXHIBIT</u>	<u>PAGES</u>	<u>LINES</u>	<u>DESCRIPTION</u>
PGE 6400	16	1-13	This testimony updates the November 1994 analysis PGE performed calculating PGE's financial ratios using 1995 financial data.
PGE 6400	17	1-23	This testimony updates the November 1994 analysis PGE performed calculating PGE's financial ratios using 1995 financial data.
PGE 6400	18	1-13	This testimony updates the November 1994 analysis PGE performed calculating PGE's financial ratios using 1995 financial data.
PGE 6400	24	19-22	This testimony demonstrates the impact of the regulatory environment on the financial market.
PGE 6400	25	1-2	This testimony demonstrates the impact of the regulatory environment on the financial market.
PGE 6400	27	All	This testimony describes PGE's original cost of capital testimony, analyzes the cost of capital effects of the Oregon Court of Appeals' interpretation of ORS 757.355 and estimates PGE's Required Return on Equity.
PGE 6401	All		This exhibit describes PGE's original cost of capital testimony, analyzes the cost of capital effects of the Oregon Court of Appeals' interpretation of ORS 757.355 and estimates PGE's Required Return on Equity.
PGE 6402	All		This testimony demonstrates the impact of the regulatory environment on the financial market.
PGE 6500	12	17-21	This testimony describes the scope of capital investment by investor-owned utilities from 2000 to 2004. It is offered as evidence of the importance of the regulatory compact in supporting such investment.
PGE 6500	12	22-23	This is a heading and a question. It is not legal opinion.
PGE 6500	13	1-29	This testimony describes how investors' expectations have

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			been informed by the United States Supreme Court cases in <i>Hope</i> and <i>Bluefield</i> defining the standard for fair and reasonable return. It is not legal opinion.
PGE 6500	14	1-3	This testimony describes how investors' expectations have been informed by United States Supreme Court cases in <i>Hope</i> and <i>Bluefield</i> defining the standard for fair and reasonable return. It is not legal opinion.
PGE 6500	14	19-23	This testimony describes PGE's capital expenditures from 1994 to 2003. It is used to underscore the potential harm to customers if the regulatory compact were abrogated. The existence of the regulatory compact and its impact on customers are important regulatory principles that were known to the Commission both before and after UE 88.
PGE 6500	15	All	This testimony describes PGE's capital expenditures from 1994 to 2003. It is used to underscore the potential harm to customers if the regulatory compact were abrogated. The existence of the regulatory compact and its impact on customers are important regulatory principles that were known to the Commission both before and after UE 88.
PGE 6500	16	Figure 2	This testimony describes PGE's capital expenditures from 1994 to 2003. It is used to underscore the potential harm to customers if the regulatory compact were abrogated. The existence of the regulatory compact and its impact on customers are important regulatory principles that were known to the Commission both before and after UE 88.
PGE 6500	19	18-22	This testimony concerns other jurisdictions' treatment of early retired assets. It is presented to show what investors generally would have expected in terms of ratemaking treatment for early retired assets. This information is relevant because it informs what investors expected at the time Trojan was shut down. It is neither a legal opinion nor factual testimony that is beyond the scope of this docket.

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PGE 6500	20	1-23	This testimony concerns other jurisdictions' treatment of early retired assets. It is presented to show what investors generally would have expected in terms of ratemaking treatment for early retired assets. This information is relevant because it informs what investors expected at the time Trojan was shut down. It is, therefore, neither legal opinion nor factual testimony that is beyond the scope of this docket.
PGE 6500	21	1-24	This testimony concerns other jurisdictions' treatment of early retired assets. It is presented to show what investors generally would have expected in terms of ratemaking treatment for early retired assets. This information is relevant because it informs what investors expected at the time Trojan was shut down. It is, therefore, neither legal opinion nor factual testimony that is beyond the scope of this docket.
PGE 6500	22	1-17	This testimony concerns other jurisdictions' treatment of early retired assets. It is presented to show what investors generally would have expected in terms of ratemaking treatment for early retired assets. This information is relevant because it informs what investors expected at the time Trojan was shut down. It is, therefore, neither legal opinion nor factual testimony that is beyond the scope of this docket.
PGE 6500	23	1-19	This testimony concerns other jurisdictions' treatment of early retired assets. It is presented to show what investors generally would have expected in terms of ratemaking treatment for early retired assets. This information is relevant because it informs what investors expected at the time Trojan was shut down. It is, therefore, neither legal opinion nor factual testimony that is beyond the scope of this docket.

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PGE 6500	24	8-21	This testimony describes how other jurisdictions have responded to early retired assets. This is offered not as legal opinion but rather as information that would inform investors' expectations at the time Trojan was shut down.
PGE 6500	27	2-3	This testimony describes how other jurisdictions have responded to early retired assets. This is offered not as legal opinion but rather as information that would inform investors' expectations at the time Trojan was shut down.
PGE 6500	30	10-13	This testimony describes investors' expectations regarding the ratemaking treatment of early retired plant. This expectation was in place before the UE 88 order. It is used as the basis for increasing the authorized return on equity in light of the Court of Appeals' decision.
PGE 6500	30	13-30	This testimony contrasts investors' expectations at the time of the UE 88 order with investors' expectations in light of the Court of Appeals' decision. It is not legal opinion.
PGE 6500	31	4-15	This testimony describes the difference between the regulatory compact and a ratemaking policy according to which a utility cannot earn a "return on" early retired plant. It is not legal opinion.
PGE 6500	32	1-6	This testimony contrasts investors' expectations at the time of the UE 88 order with investors' expectations in light of the Court of Appeals' decision.
PGE 6500	32	12-15	This testimony describes the risk premium that results from the Court of Appeals' decisions. It is not legal opinion.

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PGE 6500	32	16-27	This testimony concerns the change in investors' expectations as a result of the Court of Appeals' decision. The S&P report cited supports PGE's conclusion that the Court of Appeals' decision could well create a risk premium that should be reflected in a higher authorized ROE.
PGE 6600	12	5-7	This testimony describes the risk premium in Oregon due to the Court of Appeals' decision. It is not legal opinion.
PGE 6600	12	18-23	This testimony reflects Dr. Blaydon's conclusion that investors in Oregon utilities will demand above-average returns as compensation because of the risk associated with early retired plant.
PGE 6800	11	15-17	This testimony describes PGE's understanding regarding the scope of this docket. It is not legal opinion.
PGE 6800	12	10-12	This testimony responded to Mr. Lazar's assertion that PGE significantly "over-earned" during the late 1990s. The testimony pointed out that the Commission sets rates so that the utility has an opportunity "on average" to earn its authorized rate of return. Years in which the utility earns more than anticipated are balanced by years in which the utility earns less than expected. This testimony observed that in later years (1999 to 2003) PGE earned less than its authorized return on equity.
PGE 6800	18	2-3	This testimony states that, in 1995, PGE was consolidated for tax purposes with Portland General Corporation. This is a fact that was known to the Commission in UE 88.
PGE 7000	2	3-7	This testimony reflects Dr. Blaydon's conclusion that investors in Oregon utilities will demand above-average returns as compensation because of the risk associated with early retired plant.
PGE 7000	7	17-19	This testimony describes the unique risk that Oregon utilities face in light of the Court of Appeals' decision. It

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			is not legal opinion, nor is it beyond the scope of this docket.
PGE 7000	8	2-7	This testimony reflects Dr. Blaydon's conclusion that investors in Oregon utilities will demand above-average returns as compensation because of the risk associated with early retired plant.
Staff 102	2-3	All	This exhibit describes in table form the financial impact of the scenarios described in Staff's associated testimony. We do not understand Staff to be offering the exhibit as information the Commission would have considered in setting UE 88 rates. Rather, it is information necessary to describe the accounting and ratemaking changes that would have occurred throughout the relevant period (UE 88 through UM 989) if UE 88 rates had been established as Staff recommends or as PGE suggests. See PGE Opposition, Section I.3.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S OPPOSITION TO URP'S AND CLASS ACTION PLAINTIFFS' MOTION TO STRIKE** 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 9th day of September, 2005.

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