BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

DR 10/UE 88/UM 989

In the Matters of

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

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

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

RESPONSE OF UTILITY REFORM PROJECT, ET AL. TO PREHEARING CONFERENCE REPORT

January 14, 2008

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Utility Reform Project, Lloyd K. Marbet, and Colleen O'Neil [hereinafter URP] join the motion of the Class Action Plaintiffs (CAPs) to reinstate the schedule of OPUC Order No. 07-157, under which the Commission would first and promptly issue a final order regarding its authority to provide a remedy for ratepayers who paid the unlawful Trojan charges during the April 1995 - September 2000 period. There is simply no reason for the Commission to delay its resolution of the legal issue referred to it by ***Dreyer v. Portland General Electric Company***, 341 Or 262 (2006) [hereinafter ***Dreyer***]. There, the Oregon Supreme Court asked the Commission to decide only one issue: "what, if any, remedy it can offer to PGE ratepayers."

> We conclude, in short, that the PUC has primary jurisdiction to determine what, if any, remedy it can offer to PGE ratepayers, through rate reductions or refunds, for the amounts that PGE collected in violation of ORS 757.355 (1993) between April 1995 and October 2000. If the PUC determines that it can provide a remedy to ratepayers, then the present actions may become moot in whole or in part. If, on the other hand, the PUC determines that it cannot provide a remedy, and that decision becomes final, then the court system may have a role to play. Certainly, after the PUC has made its ruling, plaintiffs will retain the right to return to the circuit court for disposition of whatever issues remain unresolved, including the question of a fee award.

Dreyer, 341 Or at 286.

There is no reason to delay deciding that issue until after conducting the remand proceeding on OPUC Order No. 02-227, which addressed a period completely different from the period referenced in ***Dreyer***.

I. PHASE III ISSUES.

A. SCOPE OF ISSUES ON REMAND.

Phase III issues would include all issues:

1. Presented by any party in URP's original appeal of OPUC Order No. 02-227;

2. Presented by any party in the appeal or the cross-appeal of the Marion County Circuit Court decision holding OPUC Order No. 02-227 to have been unlawful.

The issues to be considered on remand are not merely those in the cross-appeal but include "issues raised on appeal and cross-appeal." ***Utility Reform Project v. OPUC***, 215 Or App 360, 376, 170 P3d 1074 (2007) [hereinafter "***URP v. OPUC*** (UM 989)"]. Among the issues raised on appeal were those raised by URP in the appeal of OPUC Order No. 02-227 to Marion County Circuit Court.

B. CROSS-APPEAL ISSUES ON REMAND.

The Conference Report inquires about "the cross-appeal issues that URP would like the commission to consider on remand and the nature of the new evidence that URP believes is necessary." The cross-appeal issues are set forth in the briefs filed by URP in UM 989 and in the Circuit Court and Court of Appeals in the appeals of OPUC Order No. 02-227, all of which are in the Commission's files. The issues were most succinctly presented in the BRIEF OF PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS filed in the Court of Appeals in No. CA A123750 on September 27, 2005. The portion of that brief addressing the cross-appeal issues is reproduced below in a different typeface, for the convenience of the parties.

It must be noted, however, that the issues on remand pertaining to OPUC Order No. 02-227 cannot be fully specified at this time, because the starting point for the proceeding is unknown. The starting point is the lawful balance of PGE's Trojan investment as of October 1, 2000. We cannot know that number, because the Commission has issued no order on Phase I. Consequently, it will be virtually impossible to conduct the hearing on Phase III, because all testimony will have to address a wide range of starting points, all the way from a negative number to the full $180.5 million claimed in OPUC Order No. 02-227.

Further, there is another reason that the issues on remand pertaining to OPUC Order No. 02-227 cannot be fully specified at this time: Phase III has no ending point. Phase I pertained to a discrete period, the 5.5-year period encompassing April 1995 - September 2000. As of October 1, 2000, the Trojan investment-related rates adopted in OPUC Order No. 95-322 were superseded by those adopted in the precursor to OPUC Order No. 02-227, OPUC Order No. 00-601. Those rates remain in effect on a continuing basis. The changes to multiple accounts made by OPUC Order No. 00-601 and OPUC Order No. 02-227 continue to affect rates today and every additional day that passes. Consequently, additional discovery is necessary to quantify those effects.

I. FIRST ASSIGNMENT OF ERROR: OPUC ORDER NO. 02-227 UNLAWFULLY AND UNREASONABLY "TRADED" RETURN-BEARING ACCOUNTS HELD BY RATEPAYERS FOR A NON-RETURN-BEARING ACCOUNT HELD BY PGE.

PGE and Staff have agreed that the "offset" accounts shown in Staff-PGE Exhibits 203-205 (AR 269-71) (totalling at least $161.9 million) were interest- or return-bearing accounts. The majority of the credits to ratepayers cancelled under the "Stipulation" were those stemming from

the Enron acquisition of PGE (M Credit) and from the power sale contract settlement with Southern California Edison Co. (SCE). These accounts and the others listed as "offsets" were credits to ratepayers which accrued interest for the benefit of ratepayers at the company's post-tax authorized return on investment.

The trading of a **non-return bearing Trojan ratebase amount** in exchange for the cancellation of **return-bearing credits that PGE owes to ratepayers** does not produce lawful or just and reasonable rates. The entire trade is, from a ratepayer perspective, absurd. Imagine that I offer to trade to you $300 million in zero-coupon U.S. Treasury bonds due in 2012. In exchange, I would receive from you $300 million in U.S. Treasury bonds, also due in 2012, which carry a 10% rate of interest. Would anyone consider this a reasonable exchange of value? Obviously not, because the zero-coupon bonds are worth far less than the bonds which carry the 10% rate of interest. This is the utility-industry equivalent of Wimpy's adage: "I will gladly pay you tomorrow for a hamburger today," except in this case Wimpy is offering to pay you that same hamburger more than 10 years from now.

This "offset" is also unlawful under ORS 757.355, because it has exactly the same result as placing the remaining Trojan investment into ratebase which earns a return on investment. OPUC Order No. 02-227 removed from PGE's rate calculations credits of at least $161.9 million that PGE admittedly owed to ratepayers, **all of which were carried on PGE's books in accounts which earned a return on investment for the ratepayers and credited to the ratepayers on an annual basis**. Cancelling these accounts is exactly equivalent to placing a $168 million item into return-bearing ratebase, which is precisely what ORS 757.355 prohibits, whether such is accomplished directly or indirectly.

II. SECOND ASSIGNMENT OF ERROR: OPUC ORDER NO. 02-227 UNLAWFULLY AND UNREASONABLY AWARDED TO PGE 45% OF NEIL DISTRIBUTIONS.

NEIL is a mutual insurance pool to cover certain types of harm to its members, including PGE, in the case of nuclear accidents. PGE agreed that the premiums paid to NEIL have previously been included in the test years upon which PGE rates have been based and that previous NEIL distributions back to PGE have been credited to ratepayers. Thus, PGE agreed that ratepayers have paid the NEIL insurance premiums and in the past have received any refunds of those premiums from NEIL to PGE. Consequently, the diversion of 45% of all future distributions by NEIL to PGE represents a new net cost to ratepayers, because it removes from them money that has been credited to ratepayers in the past. The record shows that this new OPUC Order No. 02-227 treatment of NEIL refunds has cost ratepayers at least $15.4 million in NEIL refunds diverted to PGE's shareholder (45% of the $34.3 million payment by NEIL to PGE that occurred in October 2000).

As we argued below, diverting NEIL distributions to PGE's shareholder also contradicts the fundamental tenets of ratemaking. Ratepayers paid the premiums. Over the years, NEIL found that it was not necessary to use all of the premium revenue to pay claims and administrative costs, so it has been returning the surplus funds to its members, including PGE. Since the premiums were counted as a cost charged to ratepayers, then return of surplus premiums should be credited to ratepayers.

Allowing shareholders to capture the premium rebates opens a hole through which the utility is now funnelling tens of millions of ratepayer dollars into the pockets of its shareholder. It is a "heads I win, tails you lose" system, where the costs are borne by ratepayers but subsequent refunds are diverted to the shareholder.

The Staff-PGE Opening Brief (pp. 14-15) claims:

> PGE's shareholders were subject to a variety of risks for these payments. For example, PGE's shareholders bore the risk that premiums would increase between

> rate cases, that NEIL might experience a greater number of claims than anticipated, and that the NEIL investment strategies might fail.

All this is true in the opposite direction. Ratepayers were also subject to a variety of risks. Under the Commission's approach, they would have continued to pay higher NEIL premiums between rate cases, even if the actual NEIL premiums were reduced. As for NEIL investment strategies failing, NEIL investment strategies could have been more successful, also. There is no evidence as to the astuteness or success of those investment strategies. All the record shows is that NEIL is distributing money back to the utilities from which they derived the premiums but that it was PGE ratepayers who paid the premiums, not PGE's stockholders (or current stockholder).

The bottom line is that there is no dispute that the NEIL premiums had been forecasted and fully included in rates and were paid for by ratepayers. But OPUC Order No. 02-227 nevertheless diverted 45% of the premium refunds away from PGE ratepayers.

The Circuit Court declined to address the issue of the NEIL diversion, solely because he thought that Plaintiffs were challenging a "factual conclusion of the Commission," for which "this Court is simply not permitted to substitute its judgment." But the facts were not in dispute regarding the NEIL diversion. All parties agreed that ratepayers had paid the NEIL premiums in rates and that all past rebates had been credited to ratepayers. The issue raised by Plaintiffs below was not a dispute about facts. It was their claim that "OPUC ORDER NO. 02-227 UNLAWFULLY AND UNREASONABLY AWARDED TO PGE 45% OF NEIL DISTRIBUTIONS."

If the Circuit Court had not mistakenly categorized Plaintiffs' claim as a dispute about facts, he may well have granted relief to Plaintiffs on this basis. The Circuit Court Opinion and Order (p. 6) [ER-34] states:

> Frankly, this Court would be inclined to agree with Plaintiffs as to some of these additional claims, particularly with respect to the handling of the FAS 109 amounts and the final NEIL distribution. Charging rate payers for purported increases in PGE taxes without requiring proof that those taxes were ever actually paid is certainly

> questionable. Similarly, no persuasive explanation was offered to justify the shift of much of the final NEIL insurance refunds from the rate payers to PGE.

Thus, the Circuit Court found that the diversion of NEIL refunds from ratepayers to PGE lacked a persuasive explanation. The Circuit Court should have addressed whether the diversion had a rational stated basis, as required by ***Market Transport***, *supra*, and the other applicable cases.

III. THIRD ASSIGNMENT OF ERROR: THE RATES ADOPTED IN OPUC ORDER NO. 02-227 ARE NOT JUST AND REASONABLE.

PGE and Staff admitted that, as of the end of the first year after implementation of the OPUC Order No. 00-601 rates (also adopted by OPUC Order No 02-227 at the culmination of the contested case proceeding), the result of adopting the "Stipulation" was to **increase** rates by $25.7 million in Year 2, to **increase** rates by $15.7 million in Year 3, and to **increase** rates by $15.7 million in Year 4. Staff-PGE Exhibit 204 (AR 270), column 17; TR 115-18 (AR 429-32).[1]. And

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1. TR 115-16 (AR 429-30):

> MR. MEEK: And the first year rate impact for year 2002 is to increase rates by $27.5 million by adopting the stipulation?
> MR. BUSCH: My understanding is that column is compared to if the rates had remained in place and the offset had not occurred, that's correct.
> MR. HAGER: Mr. Meek, let me just jump in real quick for a clarification.
> MR. MEEK: Okay.
> MR. HAGER: I believe you said 27.5.
> MR. MEEK: Oh, I'm sorry.
> MR. HAGER: It's 25.7.
> MR. MEEK: I agree. I'm just trying to make sure I understand what that column means. And I think I do. Does anyone else on the panel disagree with what Mr. Busch said about that?
> MR. TINKER: No.

TR 117-18 (AR 431-32):

(continued...)

this is $25.7 million on top of and in addition to the level of rates that the Oregon Court of Appeals declared unlawful in ***CUB/URP v. OPUC***, because it included Trojan return on investment (profit).

OPUC Order No. 02-227 is seriously misleading on this subject, stating that the "Stipulation" results in a rate reduction of at least $10.2 million over first 12 months (October 1, 2000 - 2001) and an additional $2.5 million reduction in the future. This is not a finding of fact warranting any deference to the agency; it is the agency's characterization of its own order. And it is simply not true. Staff and PGE admitted that the "Stipulation" results in an annual rate **increase** of $25.7 million in months 13-24 and an annual rate **increase** of $15.7 million in each of the subsequent 2 years. Staff-PGE Exhibit 204 (AR 270), column 17; TR 115-18 (AR 429-32). There is utterly no basis for stating that the "Stipulation" results in "an additional $2.5 million reduction in the future."

Since there can be no lawful charges for Trojan investment-related annual revenue requirement after October 1, 2000 (if not before), there is no rationale for imposition of the additional $211.5 million (present value) of costs upon ratepayers, which is the result of the "Stipulation". With no rationale, imposition of such costs in rates is not just and reasonable.

1.(...continued)

MR. BUSCH: I think I may have said that those represent the rate changes that would have occurred had the offset occurred in those years. And I misspoke. What this represents, in my opinion, is this particular transaction difference between what the rates will be, the revenue requirement will be, in each of those years under the offset case compared to what it would have been, what the revenue requirement would have been had the offset not occurred.

MR. MEEK: And by "the offset", you're referring to what we have also been calling the settlement, stipulation, it's what the Commission adopted back last September?

MR. BUSCH: Yes.

The amounts that PGE claims as a "benefit" for ratepayers in its net benefit analysis include an unspecified amount of Trojan return on investment. When specifically asked for the Trojan amortization amounts from past years, Staff and PGE did not provide them. TR 42-43 (AR 356-57). PGE witness Hager admitted that none of their testimony identified the amounts of amortization, return on investment, or other elements of the Trojan investment-related revenue requirement. TR 45. The PGE witness guessed that the amount of amortization (return of investment) in the $59 million alleged first year benefit from removing the Trojan investment-related annual revenue requirement (shown in Staff-PGE Exhibits 203, 204, 205) was $24 million. As shown above, it can easily be calculated that the Trojan profits authorized in OPUC Order No. 95-322 were at least $22.8 million per year. Thus, the net benefit calculations offered by PGE are based upon the assumption that removing the very charges found unlawful by the Court of Appeals is counted as a huge "benefit" for ratepayers. So, PGE's (p. 52) alleged "$16-18 million rate reductions," even if in any way accurate, would represent a reduction from a baseline that is unlawful by easily over $125 million.

IV. FOURTH ASSIGNMENT OF ERROR: THE STAFF-PGE ANALYSIS, ADOPTED BY OPUC ORDER NO. 02-227 AS JUSTIFICATION FOR THE DECISION, LACKED CONCEPTUAL AND MATHEMATICAL ACCURACY.

A. IT COUNTED AS A BENEFIT NOT CHARGING RATEPAYERS FOR CWIP ON TROJAN.

OPUC Order No. 02-227 adopted the PGE-Staff Net Benefit Analysis, despite its fatal flaws pointed out during the proceeding.

Exhibit URP-305 (AR 293) shows that the Trojan plant investment balance claimed by PGE as of the effective date of OPUC Order No. 95-322 included several forms of construction work in progress (CWIP), including $4.2 million in "Nuclear Fuel - CWIP" and $6.1 million in "Cancelled CWIP," which the PGE witnesses stated was work that was "ongoing that we hadn't finished." TR 93. Thus, ratepayers have not only fully repaid PGE's investment in Trojan, that repayment

included paying off over $10 million in amounts that PGE itself has labeled CWIP, which under its conventional definition refers to a return on investment during project construction.

All of the PGE and OPUC Staff analyses disregarded this unlawful element of the Trojan ratebase value. When PGE claims a benefit using its Net Benefit Analysis, for example, that benefit must be reduced by an additional $10.3 million, because the CWIP amounts could not lawfully have been charged to ratepayers in any event, pursuant to ORS 757.355.

Further, the discussion of this subject in OPUC Order No. 02-227 relies entirely upon evidence never introduced into the record of this case.

B. IT INFLATED THE ASSERTED BENEFIT BY A FAULTY ASSUMPTION ABOUT FUTURE RATE CHANGES.

The Staff-PGE net benefit analysis assumed that the $59 million Trojan investment-related annual revenue requirement would have continued for the full calendar year of 2001, because there would be no general rate revision effective prior to January 1, 2002. Their net benefit analysis assumed that, as soon as a general rate revision became effective, the annual Trojan investment-related charges would fall from $59 million to $33.3 million, which is $25.7 million less. Staff-PGE Exhibits 203-205 (AR 269-71).

But the OPUC ordered for PGE a general rate revision effective October 1, 2001. Thus, the Staff-PGE net benefit analysis, simply by assuming that the $59 million Trojan investment-related annual revenue requirement would have continued for the entire calendar year of 2001, TR 30 (AR 344), overstated the alleged "benefit" to ratepayers by one-quarter of $25.7 million, which equals $6.425 million. PGE knew about this overstatement, since PGE itself requested an effective date of October 1, 2001, for its UE 115 general rate revision. TR 30 (AR 344).

END OF EXCERPT

II. NATURE OF NEW EVIDENCE.

Evidence is required to prove the proper starting point or baseline for the October 1, 2000, Trojan investment balance. URP diligently sought such evidence in UM 989, but both PGE and Staff did not provide it.[2] This evidence includes:

1. the exact amount, per month, that PGE charged ratepayers during the 5.5-year period for Trojan return of investment;

2. the exact amount, per month, that PGE charged ratepayers during the 5.5-year period for Trojan return on investment.

The $180.5 million balance was created by the Stipulation among PGE, CUB, and Staff. Discovery is needed to determine how that balance was arrived at and whether the participating parties had conflicts of interest in negotiating that balance. Further, the Commission merely adopted the Stipulation without doing further analysis.

Evidence should also be taken on the appropriate interest rate to apply to the unlawful amounts charged to ratepayers. This would include investigating both PGE's authorized return on investment during and after the 5.5-year period (to a projected future date for repayment to ratepayers) and PGE's actual return on investment during those periods.

Evidence is also needed to determine to what extent PGE is able to carry out any remedial action ordered by the Commission. For example:

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2. As noted below: When specifically asked for the Trojan amortization amounts from past years, Staff and PGE did not provide them. TR 42-43 (AR 356-57). PGE witness Hager admitted that none of their testimony identified the amounts of amortization, return on investment, or other elements of the Trojan investment-related revenue requirement. TR 45.

1. What records does PGE maintain of forwarding addresses for ratepayers who have left the PGE system, whether due to moving, going out of business, or death?

2. How much would it cost to locate former customers who have paid unlawful charges?

3. How much would it cost for PGE to issue checks to the former customers?

A. FIRST ASSIGNMENT OF ERROR.

Evidence is needed to update the cost to ratepayers from trading interest-bearing accounts to PGE in return for cancellation of the non-interest bearing (by law) Trojan investment account. As noted above, the rates adopted in OPUC Order No. 02-227 have continued in effect to the present day and will continue. Further, evidence is needed to bring these sums to present value.

B. SECOND ASSIGNMENT OF ERROR.

Evidence is needed to update the amounts of NEIL insurance rebates (or other payments) PGE has received in order to determine the amounts diverted from ratepayers to PGE by this stratagem. Further, evidence is needed to bring these sums to present value.

C. THIRD ASSIGNMENT OF ERROR.

Evidence is needed to update the rate increases ratepayers have experienced as a result of OPUC Order No. 02-227.

D. FOURTH ASSIGNMENT OF ERROR.

Discovery is needed to examine the evidence relied upon by the Commission on this issue, which evidence was not introduced at the evidentiary hearing but was later inserted into OPUC Order No. 02-227 by the Commission. This evidence was never subject to discovery or scrutiny of any sort.

III. OUTSTANDING MOTIONS AND LISTS OF EXHIBITS IN PHASE I.

Undersigned counsel is still reviewing his files on the subject and requests an additional 2 days to complete this review. No party would be prejudiced by this time extension. It is necessitated, in part, by today's instructions of Judge Paul Lipscomb of Marion County Circuit Court that the class action plaintiffs prepare subpoenas for the Commissioners to appeal in court to answer questions about the schedule for deciding the remedy authority issue referred to the Commission by ***Dreyer***.

Dated: January 14, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 5 copies of the foregoing by email to the Filing Center and by mail, postmarked this date, and that I served a true copy of the foregoing RESPONSE OF UTILITY REFORM PROJECT, ET AL. TO PREHEARING CONFERENCE REPORT by email to the physical and email addresses shown below, which comprise the service list on the Commission's web site as of this day (email service only to those who have waived physical service).

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Dated: January 14, 2008

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