

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)**

**URP AND CAPs OPPOSITION
TO PGE MOTION FOR APPROVAL
OF REFUND METHODOLOGY**

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The Utility Reform Project (URP), et al., and the Class Action Plaintiffs (Gearhart, Morgan, Kafoury Brothers, Inc.) [hereinafter URP/CAPs or "we"] oppose the PGE Motion for Approval of Refund Methodology [hereinafter "PGE Methodology Motion"].

I. ORDERING ANY REFUND METHODOLOGY IN THIS MATTER LACKS ANY EVIDENTIARY BASIS AND DENIES DUE PROCESS TO URP AND CAPs.

No party presented any evidence regarding either the feasibility, efficiency, or legality of refund methodologies in these remand dockets. When we suggested that such evidence be developed, our request "to seek evidence related to PGE's ability to carry out any remedial action ordered by the Commission is also denied." Ruling and Notice of Conference (February 22, 2008) [hereinafter "Phase 3 Scoping Order"], p. 7.

Despite our attempts to raise issues related to the mechanics of refunds, the Commission failed to include any such issues on the list of issues to be addressed in these remand dockets. Conference Report (March 12, 2008).

Now, PGE seeks to litigate issues surrounding refund methodologies, but without any evidence at all. There remains zero evidence in the record on these issues, because the Commission chose to deny us discovery on such issues and to exclude it from the list of allowed issues. To render decisions on such methodology now, with no evidence and after having denied us the opportunity to either develop or present such evidence, is a clear denial of due process and of required contested case procedures.

Further, the Commission also affirmatively excluded such issues also from Phase 1 of these remand dockets. The ALJ Ruling of May 5, 2004, stated (p. 8) (emphasis added):

URP requested that the question of whether the Commission has the authority to pay refunds, URP's issue number five, be addressed in the first phase of the proceedings. As parties indicate that this issue is likely to be identified in briefing to the Court of Appeals as a legal question on appeal, I am reluctant to prematurely address this legal issue. **In any case, I note that URP's underlying concern with regard to this issue relates to implementation of relief and the timing of potential refunds. The fundamental question appears to be, assuming that the Commission orders PGE to pay refunds, when shall PGE implement such refunds? This is an implementation issue that can be addressed in a later phase of these proceedings.**

Yet, as shown above, when URP/CAPs raised the issue in "a later phase of these proceedings" (what is now being called Phase 3), the Commission again refused to address it.

URP/CAPs have appealed OPUC Order No. 08-487. One reason, among many, that order is unlawful is that it devised and adopted a refund methodology without consideration of any evidence.

II. PGE'S MOTION CONTAINS NO EVIDENCE AND NOT EVEN UNDOCUMENTED ASSERTIONS REGARDING THE MOST IMPORTANT CONSIDERATIONS.

Further, the PGE Methodology Motion contains no evidence but merely assertions of counsel, which are not sworn and have not been subjected to discovery or cross-examination. Such assertions are not evidence in a contested case proceeding. In addition, those assertions fail even to mention the major costs of the refund methodology PGE is proposing (printing letters and envelopes, stuffing envelopes, postage, dealing with returns, preparing checks, preparing the required tax information for checks issued to businesses, etc.). PGE fails even to assert these costs and fails to compare them to the cost of PGE issuing credits to current customers or doing other tasks in-house. There is no evidence therefore of the

reasonableness of either the process it employed before deciding to hire a contractor to do some or all of the work, or the relative cost comparisons for out-sourcing major components of the tasks associated with the refund.

Undersigned counsel know that the vendor costs are considerable, based on their own experience. Note Attachment A, "Poorman-Douglas Corporation Class Action Estimates" for *Kafoury/Lezak v. PGE*, Multnomah County Circuit Court Case Nos. 0501-00627 and 0512-12762, addressed to CAP counsel, Linda Williams.¹ The first two lines on page 2 show the difference in vendor charges in preparing a refund for a business customer compared to the costs for a residential ratepayer. The greater costs for business customers reflects the additional work and processing required to prepare tax information, such as the 1099-Misc, for those receiving larger refunds by check. The PGE filing does not address these costs and shows no awareness of potential negative tax implications for those businesses which receive large refund amounts as income compared to receiving a credit lowering a cost of electric service (not income). Conveying the refund in the form of a bill credit does not necessitate the preparation and mailing of tens of thousands of IRS 1099 forms.

1. This estimate does not include the costs of newspaper notice, which were billed separately. We move for official notice of this document, pursuant to OAR 860-014-0050(1)(a), which allows official notice of "all matters of which the courts of the State of Oregon take judicial notice." Those matters are specified in Rule 201(b), Oregon Rules of Evidence [ORS 40.065]:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the trial court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Nor does it require the refund recipients to complicate their business income tax filings by including the refund as "income."

Some of PGE's proposals appear on their face to be wasteful. PGE proposes to send out 430,000 letters to existing customers to notify them that they need not take any action. There does not appear to be any need to incur this expense, which serves no apparent purpose for the benefit of ratepayers and instead appears to be a public relations effort by PGE to offset news accounts of the ordered refund. There is no evidence why this separate mailing expense for existing customers is being incurred. Instead, PGE could place an insert in its billing envelope. Such an insert could convey the necessary information to customers and add no postal expense if within the first ounce. The number and weight of billing envelope inserts is entirely within PGE's control, and it could plan to omit some optional inserts in order to include the Notice. If PGE chooses to not limit other inserts about its products and services, it--and not ratepayers--should bear the additional postage costs. (Even if inclusion of a Notice would push the weight to above one ounce, such an insert would cost far less than a separate mailing and the cost should not be borne by the customers.)

And there is no evidence, or even any undocumented assertion, that the method chosen by PGE is efficient compared to the alternatives. PGE fails to offer even the most rudimentary assertions about the effectiveness of its plan. Locator services vary in cost and reliability. See, Attachment A, p. 1 "Locator Services." The National Change of Address database from the United States Postal Service is usually available as a one-year rolling list, which the vendors save over a period of time in order to preserve some older changes of address. "Allfind" or a similar proprietary database from an information aggregator is far more expensive and relies upon

matching taxpayer identification numbers (SSN for individuals and EIN for others). It is not clear what locator services will be used, so there is no way to assess the proposed costs and how many of the Unmatched Customers will not be found by the locator services. How many of them will thus subsequently be notified only by newspaper notice or excluded from all relief, under PGE's plan? Depending upon the estimated costs and success rate of locator services, the proposal for newspaper publication might need to be expanded. Many courts also consider a variety of additional notice mechanisms, some of which might well apply in this situation, such as: cable TV and radio spots (especially for rural markets and non-English speaking audiences), public service reminders on public access and local government cable channels, notices posted in bill-paying locations, and e-mail notices to customers paying on-line.

Also unclear is how PGE proposes to know what refund amount to issue any customer, since the amount of each refund depends on the number of customers who actually claim refunds. Must the refunds to current customers wait until after Unmatched Customers have filed all their claims and had those claims validated? PGE offers no hint as to an approach to this problem. PGE's plan, even if accepted on the basis of unsworn and untested assertions of counsel, cannot withstand even the most simple questions.²

If the appropriate procedures were followed, PGE could possibly develop a

2. Because contested case procedures should be in effect, we will seek to conduct discovery on PGE's assertions. This is the ordinary course, when orders are subject to rehearing. ***Wah Chang v. PacifiCorp***, OPUC Order No. 04-304.

record persuading the Commission that it should pay a vendor to send checks to all current customers or that it should send a separate mailing to all current customers-- but so far it has not. On the current record, the Commission lacks any reason or any factual basis to modify its Order as requested.

III. PGE SEEKS TO AMEND A FINAL ORDER IN A CONTESTED CASE WITHOUT CONTESTED CASE PROCEDURES.

PGE seeks amendment of OPUC Order No. 08-487, citing ORS 756.568 for authority. That statute allows such amendment only if there is lawful "opportunity to be heard as provided in ORS 756.500 to ORS 756.610." Those statutes include the procedures for contested cases.³ It tautological that amendment of a final agency order in a contested case itself requires contested case procedures, not merely filing of what amount to undocumented suggestions or comments. Any other rule would entirely eviscerate the requirement for contested case procedures in the first place by allowing decisions reached by means of evidentiary proceedings to be changed without evidentiary proceedings.

Further, ORS 756.558 expressly forbids the taking of additional evidence, after the taking of evidence has been concluded, except upon "a reasonable opportunity of the parties to examine any witnesses with reference to the additional evidence and

3. The list of statutes also includes ORS 756.610, which now governs appeals from OPUC orders. At the next section in this memorandum demonstrates, that statute makes OPUC orders subject to the appeals process under the Administrative Procedures Act. That process forbids the agency from conducting rehearing to modify or amend a final order in a contested case, after the order has been appealed, without permission from the Court of Appeals. Thus, even the statute cited by PGE expressly incorporates statutes which forbid the Commission action PGE is seeking.

otherwise rebut and meet such additional evidence." This statute applies to all periods after the taking of evidence in the hearing has concluded and is thus applicable now.

It is not the privilege of the Commission to amend an order in a contested case by procedures other than contested case procedures. But that is exactly what PGE now proposes.

IV. THE COMMISSION CANNOT AMEND AN ORDER ALREADY ON APPEAL, EXCEPT BY FOLLOWING SPECIFIC STATUTORY PROCEDURES.

Appeals of OPUC final orders are now governed by ORS 183.480 -.497, as applicable to orders in contested cases. ORS 756.610(1). Those statutes specify how an agency can amend an order already appealed. ORS 183.482(6) states:

At any time subsequent to the filing of the petition for review and prior to the date set for hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws an order for purposes of reconsideration, the agency shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal for purposes of reconsideration, the petitioner may refile the petition for review and the review shall proceed upon the revised order. An amended petition for review shall not be required if the agency, on reconsideration, affirms the order or modifies the order with only minor changes. If an agency withdraws an order for purposes of reconsideration and modifies or reverses the order in favor of the petitioner, the court shall allow the petitioner costs, but not attorney fees, to be paid from funds available to the agency.

In order to conduct reconsideration on a final order that has been appealed, the OPUC must notify the Court of Appeals and obtain from the Court an allocation of time for completing its reconsideration. This has not been done.

Further, in ***Gritter v. Adult & Family Services Division***, 182 Or App 249, 48 P3d 195 (2002), the Court of Appeals concluded that ORS 183.482(6) allows an agency only to "reconsider" an order which has been appealed, which means to

rethink it without taking additional evidence.⁴ Here, however, PGE obviously seeks to provide additional information to the Commission.⁵ According to the Court of Appeals, that necessitates use of ORS 183.482(5), which requires the party seeking to provide additional evidence to apply to the court for leave to present the additional evidence to the agency. PGE has made no such application. It is entirely clear that ORS 183.482(5) and (6) are now applicable to appeals of OPUC orders; see ORS 756.610(2) (only exception is ORS 183.482(3)).

V. PGE MOTION IS TANTAMOUNT TO A REQUEST FOR A RATE INCREASE, WITH NO CONTESTED CASE HEARING.

PGE is seeking Commission approval to incur costs that will be charged to ratepayers, pursuant to OPUC Order No. 08-487. Obtaining such approval for a rate increase requires a filing under ORS 757.210, which PGE has not made.

PGE cannot merely increase rates to an unknown extent, based upon OPUC Order No. 08-487, as the cost of administering refunds were not addressed in the consolidated remand dockets, despite our attempts to raise the refund implementation issues.

After PGE makes the required ORS 757.210 filing, we will file a written complaint under ORS 757.210 (1), thus necessitating contested case procedures.

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4. The Court of Appeals decision was later vacated for mootness. ***Gritter v. Adult & Family Services Division***, 183 Or App 578 (2002). Nevertheless, its reasoning is sound, and this Commission has itself discussed it. ***Wah Chang v. PacifiCorp***, OPUC Order No. 04-305. In 2004, the statutes governing appeals from OPUC orders were quite different. But the Commission concluded that it would reopen the record for receipt of additional evidence and, accordingly, permit Wah Change to conduct additional discovery.
 5. As noted earlier in this memorandum, that information needs to be evidence, because the underlying proceeding was a contested case.

Lest PGE argue that the Commission has already authorized those costs to be charged to ratepayers in OPUC Order No. 08-487, the part of OPUC Order No. 08-487 that authorizes PGE to charge to ratepayers the cost of implementing the refund is also unlawful. No party proposed such a charge or submitted any evidence about it. There is no evidence in the record pertaining to such a charge. Thus, that part of OPUC Order No. 08-487 lacks any basis in evidence or reasoning. In addition, charging ratepayers to receive a refund of unlawful charges is itself an unlawful charge, as it is exactly the same thing as refunding less of the unlawful charges. To the extent that OPUC Order No. 08-487 orders a refund of Trojan profits, charging ratepayers to receive the refund is tantamount to refunding less than the amount of Trojan profits found in that order. Thus, the refund administration charges also violate ORS 757.355.

VI. REFUNDING THE WRONG AMOUNT IS LIKELY TO BE INEFFICIENT AND TO INCUR THE SAME ADMINISTRATIVE COSTS TWICE.

The refund ordered in OPUC Order No. 08-487 is the wrong amount. URP and CAPs presented uncontroverted evidence (testimony of Jim Lazar) that Phase 1 ratepayers were unlawfully charged an amount that now totalled over \$625 million (as of January 1, 2006) when appropriate interest is applied, and Phase 3 ratepayers were further overcharged by another \$436.4 million for Trojan profits on and after October 1, 2000. We will pursue these contentions in the courts.

Ordering PGE to refund only about 3% of the unlawful charges for Trojan profits (when appropriate interest is factored in) is likely to be highly wasteful. To the extent that PGE ratepayers and former ratepayers are to obtain relief by means of OPUC and/or court orders, we expect the courts to require far greater relief, thus

necessitating a second (and much larger) PGE payment to current and former PGE customers. The same administration costs would then be incurred twice.

VII. THE COMMISSION IS PROPOSING TO ISSUE REFUNDS TO THE WRONG RATEPAYERS, IN DEFIANCE OF THE SCOPING ORDER FOR THE REMAND PROCEEDINGS.

OPUC Order No. 08-487 identifies the Trojan profit overcharges to have occurred during the Phase 1 period (5.5-year TRIP period). But it then orders that none of the overcharges be refunded to the Phase 1 period ratepayers. Instead, it sends the refunds to those who were PGE customers during the first year of the Phase 3 period. Thus, OPUC Order No. 08-487 proposes to issue refunds to the wrong set of customers, another reason that order is invalid and likely to be overturned in the courts.

Note that this mixing of Phases 1 and 3 is entirely contrary to the Commission's own scoping orders in the remand dockets. The Phase 3 Scoping Order, p. 4, stated:

As stated above, the issues have been broadly stated to encompass "most" of the arguments raised in prior proceedings. There is one issue--whether the portion of rates collected from customers from 1995 to 2000 that reflect a return on the Trojan investment should be used to reduce or eliminate the Trojan balance--that the Commission will not consider in Phase III. The Commission will not address that question in this phase because it depends upon the assumption that ratepayers paid too much from 1995 to 2000, and therefore the Trojan balance should be offset in the amount of the "overpayment." Whether ratepayers paid too much from 1995 to 2000 is being addressed in Phase I of these proceedings. If the answer to that question is yes, the Commission will order PGE to issue refunds to redress this overpayment as part of the Phase I analysis. To carry forward that offset to also reduce the starting point for the Phase III analysis would result in doubly compensating ratepayers for any overpayment during the 1995 to 2000 period.

But OPUC Order No. 08-487 does precisely what the Phase 3 Scoping Order outlawed from the proceeding: carrying forward the Phase I balance into the

subsequent Phase III period (beginning October 1, 2000). OPUC Order No. 08-487 then states that the refund shall go to the Phase 3 ratepayers, even though the unlawful charges were imposed during the Phase 1 period.

Refunding Phase 1 overcharges to the Phase 3 ratepayers will necessitate a further, correct refund to the Phase 1 customers--those who paid the unlawful rates during the 5.5-year Trojan Return on Investment Period (TRIP) of April 1, 1995, through September 30, 2000. Ordering the wrong refund now will simply double the administrative cost, because the same costs will be incurred to make the correct refund later.

VIII. URP AND CAPs INTEND TO ASK THE COURT OF APPEALS TO STAY OPUC ORDER NO. 08-487.

Implementation of OPUC Order No. 08-487 would cause irreparable harm to ratepayers in the form of requiring PGE to incur unnecessary costs in administering a undersized refund, to be followed by administering another, larger refund. There is no reason to require ratepayers to foot the bill for receiving two separate refunds, which would be the likely result of proceeding with the refund of the \$33.1 million ordered by OPUC Order No. 08-487.

Consequently, if the Commission indicates an intent to proceed with the refund, we will ask the Court of Appeals to stay OPUC Order No. 08-487.

IX. PGE'S PROPOSED NOTICES ARE AN EXERCISE IN CORPORATE PUBLIC RELATIONS.

URP and the CAPs object to the text of the proposed notices. PGE's proposed notices completely fail to inform ratepayers of the basis for the refund. The refund in this case is not the product of negotiated settlement or the desire of the utility to

resolve matters. Instead it is the result of a protracted adversarial dispute, spanning over 15 years. The refund is being *ordered*, not willingly undertaken. Affected ratepayers and the public have a right to be informed of the conduct of the regulated industry and the efforts of those who have pursued this litigation for over 15 years. Such information would be both therapeutic in deterring future misconduct and apprise ratepayers of what roles the agency and ratepayer advocates play in utility and government activities.

The proposed notices are affirmatively misleading, stating that the refunds are due to a revision in "the amount that customers should have paid for the Trojan Power Plant." To the contrary, it is [a small fraction of] the amount that customers paid to allow PGE to enjoy profits on the Trojan Power Plant, after it permanently closed. It has nothing to do with paying the cost of the plant.

None of the proposed notices note the 15 years of litigation, all during which PGE has opposed any relief for ratepayers in any manner. It fails to state the reason for the refund--that PGE unlawfully charged ratepayers for profits on the Trojan nuclear power plant, after it permanently closed. It fails to name the agents causing this refund to occur. Particularly egregious is that PGE proposes to charge ratepayers

for the privilege of receiving this propaganda--and then also fails to disclose that in the notices.

Dated: November 26, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 8 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 URP AND CAPs OPPOSITION TO PGE MOTION FOR APPROVAL OF REFUND METHODOLOGY 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: November 26, 2008

Daniel W. Meek

Poorman-Douglas Corporation Class Action Estimate

Draft Dated: March 17, 2006

RE: PGE Tax - Linda Williams

ACTIVITY	Rate	Per Item Cost	Estimated Volume	Estimated Total
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Administrative Activities**Case Startup**

Case Setup	one-time fee	\$ 3,000.00	1	\$3,000
Desktop Publishing and other Professional Support	hourly	\$ 90.00	12	\$1,080
Programming Support	hourly	\$ 125.00	45	\$5,625
VRU Setup (English Only)	one-time fee	\$ 1,500.00	1	\$1,500
Website Design and Setup (Informational Only)	one-time fee	\$ 1,500.00	1	\$1,500

Administration

General Administrative Support - Includes discussion with counsel, generating reports and other services requested	hourly	\$ 125.00	40	\$5,000
Account Manager Support	hourly	\$ 90.00	80	\$7,200
Senior Claims Analyst	hourly	\$ 75.00	75	\$5,625
Distribution Calculation, Audit, Reconciliation	blended hourly	\$ 80.00	60	\$4,800

Administrative Activities Sub Total \$ 35,330

Volume-Driven / Piece Rate Activities**Direct Mail Campaign**

Print/Mail 2-Image Notice and 1-Image Claim Form Self-Tabbed Mailer	per piece	\$ 0.09	200,000	\$18,000
Receive and enter returned mail into data base	per address	\$ 0.19	20,000	\$3,800
Enter changes of address	per address	\$ 0.39	6,000	\$2,340
Request Fulfillment - Weekly Mailing and Remails	per piece	\$ 0.15	13,500	\$2,025

Locator Services

NCOA update	per datafile	\$ 750.00	1	\$750
AllFind based on Tax ID	per record	\$ 0.39	150,000	\$58,500

Call Center Support

VRU Charges (Assumes 35,000 calls @ 3 min call)	per min	\$ 0.19	105,000	\$19,950
Monthly Support	per month	\$ 200.00	8	\$1,600
Notice Request Transcription	per address	\$ 0.49	7,500	\$3,675
Live Operator Support (Assumes 10,000 calls @ 4 min call)	per min	\$ 0.60	40,000	\$24,000

Website

Monthly Maintenance	per month	\$ 250.00	12	\$3,000
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Opt Out Processing

Receive, Log, Review and Report on Requests for Exclusion	per opt out	\$ 2.50	50	\$125
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ACTIVITY	Rate	Per Item Cost	Estimated Volume	Estimated Total
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Claims Processing

Process Paper Claim Filed by Individual	per claim	\$ 3.50	10,000	\$35,000
Process Paper Claim Filed by Company	per claim	\$ 7.50	1,500	\$11,250
Defective Claims Processing	per claim	\$ 10.00	1,000	\$10,000

Distribution

Print Mail Check	per check	\$ 0.25	8,500	\$2,125
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Volume Driven Activities Sub Total \$ 196,140

Pass Thru Costs

Postage - Initial Mailing (billed as used)	at cost	\$ 0.31	200,000	\$62,000
Postage - Re-Mails/Fulfillment	at cost	\$ 0.33	13,500	\$4,455
Postage - Checks	at cost	\$ 0.33	8,500	\$2,805
Banking Fees	at cost	\$ 400.00	6	\$2,400
Tax Prep and Filing on QSF	per year	\$ 2,500.00	1	\$2,500

Pass Thru Activities Sub Total \$ 74,160

TOTAL FOR ESTIMATE

\$305,630

Standard Hourly Rates

Data Entry & Clerical Support	\$ 40.00	per hour
Live Operator Claimant Services	\$ 36.00	per hour
Claims Analyst	\$ 60.00	per hour
Senior Claims Analyst	\$ 75.00	per hour
Account Manager	\$ 90.00	per hour
Technical Support	\$ 90.00	per hour
Account Executive	\$ 125.00	per hour
Systems and Programming	\$ 125.00	per hour
Senior Management	\$ 225.00	per hour

ATTACHMENT A