

**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 RESPONSE TO  
UTILITY REFORM PROJECT'S  
OPENING MEMORANDUM AND  
JOINT MOTION TO REINSTATE  
SCHEDULE FROM ORDER  
NO. 07-157**

**I. INTRODUCTION**

Portland General Electric Company ("PGE") files this Response to the Utility Reform Project's ("URP") Opening Memorandum and to the Joint Motion of URP and the Class Action Plaintiffs seeking a final order solely on the issue of the Commission's legal authority to order relief. Because URP and the members of the Class Action Plaintiffs are represented by the same counsel and are advocating the same positions in this proceeding, we will address their arguments together and refer to them as "URP" in this brief for the sake of clarity.

In its filings, URP identifies no new issues or evidence that require additional discovery or delay here. Nor does URP articulate any principled reason why the Commission should rule on Trojan issues piecemeal rather than in a comprehensive order.

URP seeks to delay proceedings at the Commission, while using the specter of that delay to urge the Marion County Circuit Court to reinstate the class actions the Supreme Court abated in the *Dreyer* decision. While URP professes concern about additional delay, its tactic of seeking to slow proceedings at the Commission and address issues piecemeal

undermines those expressions of concern. Counsel for URP is asking in this forum for (1) a limited order regarding the Commission's legal authority (generating the inevitable appeals) and (2) a further contested case proceeding at the Commission, while simultaneously (3) asking the Circuit Court to restart the class actions because of delays at the Commission. URP is creating the delay of which it complains.

Now that the Commission finally has before it all Trojan-related issues, the Commission should reject URP's attempts to delay or fragment these proceedings. URP is trying to return to the piecemeal Trojan litigation which the recent remand of UM 989 from the Court of Appeals expressly sought to avoid.<sup>1</sup> No further process is warranted before the Commission issues a final order. We urge the Commission to issue a single comprehensive final order addressing all Trojan-related issues as soon as practicable so that this process may move forward as efficiently as possible.

## **II. URP FAILS TO IDENTIFY ANY ISSUES WHICH WARRANT A FURTHER PROCEEDING**

URP first attempts to identify general issues that require additional evidence and then turns to "new issues" relating to the cross appeal. Neither attempt is persuasive.

First, URP suggests that new evidence is needed to determine the appropriate Trojan investment balance as of the effective date of the settlement agreements approved in UM 989. URP Resp. at 11. Specifically, URP seeks discovery about how much customers were allegedly overcharged for "Trojan return of investment" and "Trojan return on investment" during the "5.5-year period" from the issuance of the UE 88 order until the date of the settlement agreements in UM 989.

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<sup>1</sup> On January 10, 2008, the Marion County Circuit Court entered its "Order Vacating Judgment and Remanding to the Public Utility Commission" with respect to the UM 989 portion of these consolidated remand proceedings. The remand orders with respect to DR 10 and UE 88 were entered by the Marion County Circuit Court on November 3, 2003.

This is no new issue. In these remand proceedings, URP has already conducted extensive discovery on this question and has submitted written testimony specifically attempting to quantify the alleged unlawful charges to customers during the 5.5 year period. *See* UE 88/DR 10/UM 989, URP/200, Lazar/2 (computing refund "due to ratepayers as a result of including profit on the Trojan investment in PGE rates during the period April 1, 1995 through September 30, 2000"). The entire purpose of the proceeding the Commission opened in response to the remand orders in UE 88, DR 10 and UM 989 was to determine what the proper UE 88 rates would have been if the Commission had complied with ORS 757.355. All parties had the opportunity to submit written testimony on what those rates would have been and how such rates would have affected the Trojan investment balance as of the date of the settlement agreements. Order No. 04-597 at 5 (Oct. 18, 2004) ("We are required by the courts to undertake a retrospective examination of what rates would have been approved in UE 88 if the Commission had interpreted the authority delegated to it by the legislature in ORS 757.355 to not allow a return on investment in retired plant, as the Court of Appeals did in *Citizens' Utility Board*.").

URP next claims that the "appropriate interest rate" to apply to alleged unlawful charges is a new issue that requires additional testimony. URP Resp. at 11. This is another topic that was the subject of discovery, written testimony, hearing and briefing in these remand proceedings. URP's witness Lazar testified that PGE's pre-tax cost of capital was the appropriate interest rate. UE 88/DR 10/UM 989, URP/200, Lazar/4. PGE submitted testimony supporting a post-tax cost-of-capital rate. UE 88/DR 10/UM 989, PGE/6900, Hager-Tinker-Schue/4. URP identifies no reason for a further proceeding on this topic, and the *URP v. OPUC*<sup>2</sup> decision offers no basis for re-examining the issue.

Finally, URP asks for further investigation concerning "PGE's authorized return on investment during and after the 5.5-year period (to a projected future date for repayment to

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<sup>2</sup> 215 Or App 360, 376, 170 P3d 1074 (2007)

ratepayers) and PGE's actual return on investment during those periods." URP Resp. at 11. PGE has responded to data requests on this very topic from URP; it was the subject of a URP motion to compel; and URP entered PGE's results of operations for the period into the record at the hearing in these remand proceedings, showing PGE's actual return on investment. UE 88/DR 10/UM 989 Hearing Transcript 185-189 (August 29, 2005), URP 600. URP offers no explanation why further investigation is justified. The *URP v. OPUC* decision does not even mention this issue, much less create the need for a further proceeding on the topic.

### **III. THERE ARE NO FACTUAL ISSUES RELATED TO URP'S CROSS APPEAL**

With respect to both the First and Third Assignments of Error, URP suggests that further evidence is needed to update the "continuing impact" of Order No. 02-227. URP's argument is premised on the mistaken belief that "rates adopted in OPUC Order No. 02-227 have continued in effect to the present day and will continue." URP Resp. at 12.

In fact, Order No. 02-227 had no rate impact whatsoever. PGE's current rates are set pursuant to Order No. 07-573 (UE 188). Here is a brief chronology:

- September 30, 2000 - Last day for the rates approved in UE 100
- October 1, 2000 - New rates go into effect pursuant to Order No. 00-601, which implemented the settlement agreements
- September 30, 2001 - Last day for the rates approved in Order No. 00-601
- October 1, 2001 - New rates go into effect pursuant to Order No. 01-777, at the conclusion of PGE's general rate case (UE 115)
- October 1, 2001 to Present - Each year PGE's rates are revised based on annual updates to power costs or in general rate cases UE 180 (effective January 1, 2007) and UE 188 (effective January 1, 2008)

In short, Order No. 02-227 did not institute a rate increase, as URP suggests; indeed, it had no rate impact. The rate impact of the settlement agreements implemented by Order No. 00-601 has been superseded by numerous later rate orders.

With respect to the second assignment of error, URP claims that "evidence is needed to update the amounts of NEIL insurance rebates PGE has received." URP Resp. at 12.

In fact, the amount PGE received as a result of the NEIL insurance was disclosed and confirmed in UM 989. UM 989 Hearing Transcript 63-67 (July 11, 2001); UM 989, Staff-PGE/200, Busch-Hager-Tinker/3; Order No. 02-227 at 3. URP offers no basis for "updating" the record on this topic.

With respect to the fourth assignment of error, URP focuses on the Trojan investment balance used in Order No. 95-322 (UE 88). URP Resp. at 13. As an initial matter, this issue concerns the Commission decision in UE 88 and could have been raised in the remand proceedings the Commission opened in 2004. URP elected not to pursue it when it had the opportunity in Phase I. Moreover, URP's suggestion of procedural error is ill-founded. In UM 989 the Commission took official notice of testimony in UE 88. *See* Order No. 02-227 at 17. URP waived its right to object when it failed to respond or offer rebutting evidence within 15 days, as permitted by Commission rule, OAR 860-014-0050. In any event, the Commission committed no error by taking official notice of UE 88 testimony which is now part of the comprehensive remand record.

**IV. URP'S CLAIM THAT IT IS IMPOSSIBLE TO IDENTIFY FURTHER ISSUES IS UNFOUNDED**

URP claims it is impossible to identify further issues for two reasons, neither of which is persuasive. First, URP claims that "Phase III has no ending point" because the rates approved in Order No. 02-227 "remain in effect on a continuing basis." URP Resp. at 3. As discussed above, URP is wrong concerning the rate impact of Order No. 02-227.

Second, URP claims it cannot identify all the issues until it knows the appropriate Trojan investment balance as of the date of the settlement agreements, September 30, 2000. Carried to its logical conclusion, URP's position would require a separate phase and Commission decision for each and every regulatory issue that arises in a rate proceeding. No Commission docket proceeds on such a basis. Parties routinely address multiple interdependent issues, advocating for their position and against other parties', while exercising judgment about which

alternatives to address and which to ignore. A single comprehensive Commission order in these remand proceedings is nothing novel.

**V. URP'S RESPONSE IS AN EFFORT TO DELAY THESE REMAND PROCEEDINGS**

URP's strategy is to delay these Commission proceedings while simultaneously arguing in Circuit Court for reinstatement of the Class Action Cases based on the very delay it seeks to foster at the Commission. In arguing for reinstatement of the Class Action Cases in Circuit Court, counsel for URP, Dan Meek (acting in his role as counsel for the class action plaintiffs), stated:

The Commission is now likely embarking upon an evidentiary hearing in Phase III, which pertains to Trojan profits in rates from October 1, 2000 to the present, a period of over seven years. We cannot predict the length of this contested case process, but an additional year would appear likely. The ALJ is to consider various proposed schedules to be submitted in January 2008, and undersigned will continue to advise the Court on any adopted schedule.

Class Representatives' Reply on Motion to Remove Cases From Abatement at 4.

Mr. Meek neglected to inform the Marion County Court that his other client, URP, was the party seeking a further contested case at the Commission. Instead, he merely argued that procedural delays at the Commission mandated that the Class Action Cases be reopened. The result Mr. Meek is seeking—delay at the Commission and a rush to Circuit Court—could not be more at odds with the holdings in *Dreyer* and *URP v. OPUC*. The *Dreyer* decision plainly stands for the proposition that the Commission has primary jurisdiction to decide whether customers have been injured by rates collected in violation of ORS 757.355, the extent of injury, and the appropriate relief, if any. *Dreyer v. PGE*, 341 Or 261, 285-86, 142 P3d 1010 (2006). The Court of Appeals just as clearly decried "piecemeal" litigation, remanding the UM 989 docket to the Commission so that "all of the issues relating to Trojan should be resolved in one forum." *URP v. OPUC*, 215 Or App at 376. URP's strategy of delay at the Commission should be rejected.

**VI. A SINGLE COMPREHENSIVE ORDER IS APPROPRIATE**

In keeping with *Dreyer* and *URP v. OPUC*, the Commission should expeditiously proceed to issue a comprehensive final order addressing all Trojan related issues. As discussed above, URP has identified no outstanding factual issues that require a contested case proceeding. After years of fragmented, disjointed proceedings in which different parts of the Trojan puzzle have been split between the courts and the Commission, all Trojan-related issues are finally before the Commission. The opinions in *Dreyer* and *URP v. OPUC* recognize that the Commission, not the courts, has primary jurisdiction to address the central issues in this proceeding, namely the extent of the injury to customers, if any, and the appropriate relief. The Commission should take this unique opportunity to address all Trojan-related issues without further process at the Commission. URP's position would unnecessarily delay final resolution of all Trojan-related matters and return the Commission, courts and parties to the quagmire of piecemeal Trojan litigation.

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**VII. CONCLUSION**

For the reasons stated above, PGE urges the Commission to issue a single comprehensive final order addressing all Trojan-related issues as soon as practicable and without the further unwarranted process URP requests.

DATED this 22nd day of January, 2008.

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## CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S RESPONSE TO UTILITY REFORM PROJECT'S OPENING MEMORANDUM AND JOINT MOTION TO REINSTATE SCHEDULE FROM ORDER NO. 07-157** 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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