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)

OPENING BRIEF OF UTILITY REFORM PROJECT, ET AL. AND THE CLASS ACTION PLAINTIFFS

PHASE I

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I. PROPER SCOPE OF THIS PHASE OF THIS PROCEEDING IS TO DETERMINE THE AMOUNT OF TROJAN PROFITS CHARGED TO RATEPAYERS DURING THE PERIOD APRIL 1995 THROUGH SEPTEMBER 2000.

The Commission has allowed this proceeding an unlawful scope, believing that it has the authority, upon remand from the courts of successful challenges to prior OPUC orders, to recognize for ratemaking purpose new costs which were not included in the original OPUC orders. It contemplates that the Commission can now hear entirely new issues, never before raised, and also change its rulings on numerous issues that were litigated to conclusion in OPUC Order No. 95-322 and which were never appealed by any party. The only lawful function of the Commission, upon the remands from the courts, is to calculate the prior unlawful charges and to return those funds, with appropriate interest, to those who paid them. It is not within the Commission's authority to (1) hear new issues regarding costs not included in rates or (2) reopen issues upon which it previously ruled in OPUC Order No. 95-322, when those issues were not appealed by any party.

By order dated November 3, 2003, the Marion County Circuit Court remanded OPUC Order No. 93-1117 and OPUC Order No. 95-322 to the OPUC (Marion County Circuit Court Nos. 95C 10372, 95C 10417, 95C 11300, and 95C 12542) [hereinafter the "DR 10/UE 88 Remand Order"]. The order of remand required the OPUC to conduct "further proceedings consistent with the opinions and orders of the Court of Appeals."

By order dated November 7, 2003, the Marion County Circuit Court remanded OPUC Order No. 02-227 to the OPUC (Marion County Circuit Court No. 02C 14884) [hereinafter the "UM 989 Remand Order"]. The order stated:

> The challenged OPUC's order, No. 02-227, is reversed and remanded to the Commission with directions to immediately revise and reduce the existing rate structure so as to fully and promptly offset and recover all past improperly calculated and unlawfully collected rates, or alternatively, to order PGE to immediately issue refunds for the full

> amount of all excessive and unlawful charges collected by the utility for a return on its Trojan investment as previously determined to be improper by both this Court and the Court of Appeals.

On January 28, 2004, the Court issued its judgment in No. 02C 14884, ordering the OPUC to conduct "further proceedings consistent with the Opinion and Order of this Court." That judgment is in effect and has not been stayed upon appeal.

ORS 756.568 authorizes the Commission to "rescind, suspend or amend any order made by the commission." This statute does not state that the Commission has "authority to reopen the record and consider all evidence," as PGE asserts. Nor is ORS 756.568 applicable to the remand proceeding. The remand orders do not direct the Commission to "rescind, suspend or amend any order made by the commission." Instead, they direct the Commission to return the unlawful charges to those who paid them (UM 989 Remand Order) or to undertake a proceeding consistent with the decisions of the appellate courts (DR 10/UE 88 Remand Order), as further discussed below. Neither of the remand orders call, either directly or indirectly, for a reexamination or reopening of PGE costs during any past period, particularly those costs (or rate treatment of costs) which PGE never asserted in the original case or those costs (or rate treatment of costs) upon which the OPUC ruled and no one appealed.

Regarding the UM 989 remand order, PGE has contended that it "requires the Commission to exercise its discretion to determine just and reasonable rates." That is incorrect. As noted above, the UM 989 remand order directs the Commission with directions "to immediately revise and reduce the existing rate structure so as to fully and promptly offset and recover all past improperly calculated and unlawfully collected rates, or alternatively, to order PGE to immediately issue refunds for the full amount of all excessive and unlawful charges collected by the utility for a return on its Trojan investment as previously determined

to be improper by both this Court and the Court of Appeals." This does not call upon the Commission to "exercise its discretion to determine just and reasonable rates." Instead, it orders the Commission to calculate the past unlawful charges and immediately return those funds to ratepayers, either in the form of a rate reduction or in the form of refunds.

The remand orders to the Commission do not ask the Commission to engage in ratemaking applicable to the closed, past periods (such as the 5.5-year period from April 1, 1995, until October 1, 2000) [hereinafter the "5.5-year period"]. At most, the Commission would need to engage in "ratemaking" only to the extent that the compensation to those who paid the unlawful rates in the past would be conveyed to them in the form of lower rates in the future. This is one mechanism of providing to some of those past ratepayers a remedy, although it would be quite incomplete (considering the turnover of PGE's customer base since 1995).

"Ratemaking" is the 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.

Determining the amount of money to return to ratepayers and the method for returning the money are not "ratemaking" issues, as they do not involve an inquiry into the utility's costs for the purpose of setting rates.[1] Addressing these issues (amount and method for returning

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1. The only element of possible "ratemaking" embedded in the "refund issues" would be adjusting the rates to current customers to convey to them the value of the unlawful Trojan charges they have paid. This "ratemaking" is not necessary, as the funds could be returned in the form of refund checks (as will necessarily be the case for refunds to customers no longer served by PGE). The scope of the proceeding urged by PGE involves a reexamination of PGE's costs during the past period, commencing April 1, 1995. It is this reexamination of costs that constitutes "ratemaking."

money to ratepayers) does not call for either (1) reopening the factual record of past rate cases or (2) making new findings of fact based on the existing records, or (3) making different decisions on issues that actually were litigated in UE 88, since PGE did not appeal those decisions.

The Commission can comply with the court's January 28, 2004, Judgment (incorporating its Opinion and Order) by quantifying the unlawful past Trojan charges and returning those funds (with interest) to those who paid them. The Commission can violate the Judgment by engaging in the ratemaking inquiry that it is now undertaking.

The same court's earlier DR 10/UE 88 Remand Order is more generic and calls upon the Commission to conduct a proceeding consistent with the orders of the courts. Since the orders of the courts (all the way up to the Oregon Supreme Court and back) involved only whether it was lawful for PGE to charge Trojan return on investment and/or return of investment to ratepayers, a Commission proceeding consistent with those orders would address how to return the unlawful charges to those who paid them. It would not be consistent with the orders of the courts for the Commission to address issues that were not decided by the appellate courts, such as whether PGE can (1) identify some old costs in order to retroactively "justify" charging the unlawful rates adopted by the Commission in the UE 88 and UM 989 dockets or (2) ask for different ratemaking treatment than allowed in those dockets for costs or items that were not the subject of the appeals at all.

The Commission is bound by the mandates of the appellate courts. It cannot take "new" evidence on settled factual issues for a number of reasons, including waiver by PGE and the law of the case doctrine established by the appellate orders. Thus, PGE is bound by the factual record it previously made (in 1995 and 2000) as to its revenue requirements. Those phases of UE 88 and UM 989 are long-since closed, and no court has ordered a re-

examination of the factual records. PGE filed no appeal of the OPUC's final order in either case.

Now that the reviewing courts have instructed the Commission on the law, it must now apply the law to the existing record and disallow all costs based on return on Trojan as unlawful and *ultra vires*.

A. A REMAND DOES NOT AUTHORIZE TAKING OF NEW EVIDENCE NOT PERTINENT TO UNWINDING THE UNLAWFUL ACT.

In ***Bank of Commerce v. Ryan***, 157 Or 231, 234, 69 P2d 964, (1937), the Oregon Supreme Court considered a case where it had earlier reversed a dismissal by the trial court of a mortgage foreclosure action and remanded. Upon remand, the plaintiffs sought to introduce at the trial court new evidence of the dissolution of the bank defendant, which the trial court declined to consider. Plaintiffs appealed again.

In the second appeal, The Oregon Supreme Court explained why such different evidence would have been improper:

> It is elementary that upon the remand of this cause to the circuit court by us it was the duty of the former to obey the mandate; otherwise litigation would never end. ***Simmons v. Washington F. N. Ins. Co.***, 140 Or 164, 13 P(2d) 366; 3 AMJUR p 732, § 1236. Therefore, it was the duty of the circuit court to determine the amount of taxes which the appellants had paid, direct the plaintiff to pay that amount to them, and enter a decree foreclosing the mortgage against all. That the court did in the decree which is now under attack. The appellants contend, however, that they discovered after our decision that the plaintiff had been dissolved and that, hence, it was their duty after making this discovery to call the court's attention to it so that it would not enter a decree in favor of a mere name. But the record clearly indicates that on May 16, 1935, during the trial which resulted in the decree which became the subject-matter of the first appeal, the defendants were fully aware of the liquidation of the plaintiff's business by the superintendent of banks, and of the proceedings in the circuit court attendant thereon. In fact, they offered in evidence, for another purpose, the final report of the bank superintendent's administration of the affairs of the insolvent bank. Appellants' counsel, referring to the report, said: "I will introduce that to show the liquidation and disposition of the assets." We believe that the appellants were as well aware of the facts during the first trial as when they offered for filing the

> tendered answer. Therefore, if the liquidation involved dissolution, the issue should have been incorporated in the first trial.

Here, PGE in UE 88 and UM 989 had every opportunity to present evidence pertaining to all of its costs of service, and all such evidence should have been incorporated into the original factfindings before the Commission. One such fact was the uncertainty that Oregon law would allow PGE to charge Trojan profits to ratepayers, particularly in light of ORS 757.355. In proceeding in the manner it did, filing ratecases and charging and collecting for Trojan return on investment without finality to the DR 10 Order No. 93-1117, PGE took a risky path, as "action taken in reliance upon a lower court decree ordinarily is at the risk that it will be reversed on appeal." ***Harvey Aluminum v. School District No. 9***, 248 Or 167, 172, 433 P2d 247, 250 (1967). PGE could have presented evidence that this uncertainty was somehow causing it to suffer in the financial markets, thereby warranting a higher authorized rate of return. And the Commission could have accepted such evidence and have made findings of fact and conclusions of law consistent with it. But that did not happen.

Similarly, PGE could have identified the costs it now presents in testimony in this remand docket or could have asked for the rate treatments for those costs it now seeks. But that also did not happen, and PGE did not assign error to any Commission order on the grounds that such costs were not recognized or such rate treatments adopted.

B. PGE HAS WAIVED ITS RIGHTS TO PRESENT DIFFERENT EVIDENCE ON REMAND.

1. PGE HAS LONG-SINCE WAIVED ITS OPPORTUNITY TO CHANGE THE FACTUAL RECORD.

PGE waived introducing new evidence, beyond that accepted in UE 88 and UM 989, by choosing to present the rate case it did. Examples of such waiver are numerous and applied in courts in every jurisdiction. In ***Barratt American, Inc. v. Transcontinental Ins. Co.***, 125

Cal Rptr2d 852, Cal App4 Dist (2002), the liability insurer's failure to appeal from a determination that it owed a duty to defend the entire action against an additional insured waived its right to challenge that determination in the remanded proceeding. In ***Eline v. Commonwealth Life Ins. Co.***, 126 SW2d 1103 (Ky 1939), a defendant was precluded at retrial from offering material defenses which had been withdrawn from his answer in the previous trial. In ***Bassett v. Shepardson***, 24 NW 182 (Mich 1885), defendant was not allowed, at his second trial after remand, to attack the validity of plaintiff's appointment as administrator, because such defense had been available to him at the former trial.

PGE waived presenting the "new" evidence at the factfinding level. Since no party challenged the facts underlying the reasonableness of the revenue requirement on appeal, the evidence already presented has become conclusive under the law of the case doctrine.

According to PGE and the OPUC, a utility that charges unlawful rates actually receives a legal benefit! If someone appeals the illegal elements of rates, and the courts agree that those elements are unlawful, then the utility gets to start a new rate case and raise an untold number of new issues and new items of cost in order to retroactively justify the original rates containing the unlawful elements. Thus, it is to the utility's benefit to try to charge illegal rates, because there is utterly no consequence to getting caught. In fact, both PGE and the Staff agree that the utility on remand could somehow be authorized to charge even higher rates than those originally adopted, even though the utility never appealed the rate order and even though the order included costs or rate treatments found by the courts, with finality, to have been unlawful.

PGE's testimony demonstrates the quite obvious notion that the OPUC could change the way it handled dozens of issues in past cases in order to cobble together a new set of

issues for allowing PGE to keep the amounts charged to ratepayers for Trojan profits. But all of these new rationales are beyond the appropriate or lawful scope of the courts' remands.

Losing a case on appeal does not provide the losing defendant with the ability to introduce new issues and new facts upon remand to the trier of fact or to argue for reversal of elements of the original OPUC decision that the defendant never challenged. If the law allowed defendants who lose on issues of law on appeal to then present new issues and new evidence to the trial court on remand (or to relitigate issues originally decided otherwise and not appealed), then litigants throughout the courts would be seeking to lose their appeals, as remand to the trial court would provide an opportunity to re-litigate the case at the trial level on new grounds and new evidence and with opportunity to get earlier rulings reversed, even though they were never challenged on appeal.

For example, say Paula Plaintiff sues Dean Defendant for $1 million in damages due to breach of a contract, under which Dean was required to provide a specific service to Paula in exchange for the payments of money that Paula made to him. Dean's defense at trial that the contract did not require him to provide that specific service, and he prevails at trial on that argument. Paula appeals. The highest appeals court interprets the contract language and agrees with her that Dean was contractually obligated to provide that specific service and remands the case to the trial court. Upon remand, the trial court certainly could not allow Dean to offer new defenses, not previously asserted in his original pleadings. Instead, the trial court would lawfully proceed to determine the amount of damages suffered by Paula and to award her the appropriate sum. If losing on appeal were to allow a litigant to raise new issues at the trial court upon remand, then there would be flood of litigants purposely losing on appeal, whenever they think, after the close of trial, of potential arguments and evidence that they failed to offer to the trial court in the first place.

Here, PGE in UE 88 and UM 989 had every opportunity to present evidence pertaining to all elements its cost of service, and all such evidence should have been incorporated into the original factfindings by the Commission.

2. WAIVER OF CHALLENGE TO FACTS AND LACK OF CHALLENGE TO REASONABLENESS BY PGE ESTABLISHES THE LAW OF THE CASE.

In Oregon, the doctrine of "waiver" is sometimes referred to as part of the doctrine of "the law of the case." The law of the case doctrine generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case. If the facts were known and could have been litigated [***Bank of Commerce v. Ryan***, *supra*], or if there has been no material changes in the facts since the prior appeal, such factual issues may not be relitigated in the trial court or re-examined in a second appeal. PGE waived presenting the "new" evidence at the factfinding level. Since no party challenged on appeal the facts underlying the OPUC's resolution of all of the non-Trojan issues, the evidence already presented has become conclusive under the law of the case.

Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case. Such holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. The failure of a party to challenge a trial court's ruling or to brief a particular issue on appeal results in a waiver of that issue. This is black letter law in Oregon and every reported jurisdiction.

> All questions which could have been raised and adjudicated on that appeal are *res adjudicata*. 3 Cyc 398; ***Smith v. Seattle***, 20 Wash 613, 56 Pac 389; ***Smyth v. Neff***, 123 Ill 310, 17 NE 702; ***Dilworth v. Curts***, 139 Ill 508, 29 NE 861.

Hanley v. Combs, 60 Or 609, 610, 119 P 333 (1911).

The law of the case doctrine is not an historical artifact. In ***Washer v. Clatsop Care and Rehabilitation District***, 98 OrApp 232, 235, 778 P2d (1989), the Court endorsed the principle:

> Questions that could have been raised and adjudicated on appeal are deemed adjudicated. ***City of Idanha v. Consumer's Power***, 13 OrApp 431, 509 P2d 1226 (1973). Plaintiff, as appellant, could have contended on appeal that the ruling striking his claim for pre-formation expenses was error. Because he did not do so, the ruling became the law of the case.

In ***City of Idanha v. Consumer's Power***, 8 OrApp 551, 495 P2d 294 (1972), the appellate court had ruled that plaintiff city had legal authority to enact an ordinance imposing license fees on public utilities operating within the City but that the City could not forbid the utility from passing the tax onto its customers. On remand, the utility argued for the first time that it was prohibited by a federal statute from increasing its rates in order to pay the tax imposed. On the second appeal**, *City of Idanha v. Consumer's Power***, 13 OrApp 431, 434, 509 P2d 1226 (1973), the Oregon Court of Appeals held:

> Even if we were to assume for purposes of argument (a) that the only way defendant can pay the tax is by increasing its rates to Idanha customers, and (b) that defendant is correct in its interpretation of the cited federal statutes, this is a defense which defendant could have made in the trial court in the original proceeding (and thence on appeal to this court), but did not. All questions which could have been raised and adjudicated on appeal are deemed adjudicated. ***William Hanley Co. v. Combs***, 60 Or 609, 119 P 333 (1912).

The rule is the same in administrative review cases--where an appeal is taken with respect to only a particular issue or issues, there can be no retrial after remand of issues previously tried and determined but not appealed from. The failure of a party to take a cross-appeal as to other elements of the agency decision (not included as an issue on appeal by the appellant) will foreclose appellate consideration of the aspect of the agency decision as to which no appeal was taken.

Hitt v. State of Alabama Personnel Board, 873 So 2d 1080, 1088 (Ala 2003), offers a relevant example. The case arose as an appeal of an agency order. After the State Personnel Board failed to act on the former employees' request for computation of benefits, the employees sought judicial review of the administrative action. As is the case in review of OPUC decisions, the first level of review of the Board decision required the parties to the agency proceeding to become plaintiffs in circuit court. Upon the trial of the issue to the first level of review, the trial court ordered a benefit calculation and the State appealed the part of the order allowing prejudgment interest. The judgment of the trial court was reversed as to that portion of the judgment. On remand, the employees sought to open other determinations of the trial court which had not been the subject of the appeal. The Alabama Supreme Court reaffirmed that:

> "'In cases where an appeal is taken with respect to only a particular issue or issues, there can be no retrial after remand of issues previously tried and determined but not appealed from. ***Sewell Dairy Supply Co. v. Taylor***, 113 GaApp 729, 149 S.E.2d 540 (1966) * * *.'" ***Eskridge v. Allstate Ins. Co.***, 855 So2d 469, 472 (Ala 2003) (quoting ***Ex parte Army Aviation Ctr. Fed. Credit Union***, 477 So2d 379, 380-81 (Ala 1985)).
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> Failure of a party to take a cross-appeal as to an adverse aspect of the judgment appealed, but not included as an issue on appeal by the appellant, will, under circumstances such as those presented here, foreclose appellate consideration of the aspect of the judgment as to which no appeal was taken. *See* ***Cavalier Mfg., Inc. v. Clarke***, 862 So2d 634, 643 (Ala 2003).

C. STAFF'S ARGUMENT ABOUT "SINGLE-ISSUE RATE CASE" MAKES NO SENSE.

Staff contends that calculating the amount ratepayers have been charged in unlawful return on investment on Trojan is akin to a "single-issue rate case," which Staff believes "the Commission, as a general matter, prohibits . . ."

First, a court order remanding a case to the OPUC does not open a new rate case, whether it is "single-issue" or not. As noted in our JOINT REPLY MEMORANDUM ON SCOPE OF PROCEEDING, PHASING, AND SCHEDULE (June 3, 2004) [hereinafter "URP Opening Memorandum on Scope"], an OPUC proceeding consistent with both of the currently effective remand orders would not entail "ratemaking." Calculating the appropriate compensation to past ratepayers and ordering PGE to provide that compensation is not "ratemaking."

Second, Staff cites no authority for the proposition that the Commission prohibits single-issue rate cases. State commissions, including the OPUC, often conduct such cases when large new capital investments go into operation or when other significant events occur and limit the issues to the cost and prudency of the new resource. Further, the Staff statement means that the Commission does not conduct rate cases, unless all potential issues are always on the table. Otherwise, the alleged prohibition on single-issue rate cases makes no sense. Is Staff saying that a single-issue rate case is prohibited but a 2-issue rate case is not? What possible rationale could support such a distinction? Staff offers none.

Thus, claiming that the Commission prohibits single-issue rate cases is akin to saying that the Commission never limits the scope of issues or costs that can be addressed in a rate case. This is, of course, not true. The Commission often limits the scope of issues or costs to be addressed in a rate case. For example, when URP in the rate case next following UE 88 sought to raise the issue of the continued charges to ratepayers for unlawful Trojan investment "costs," the Commission (at the urging of PGE), refused to consider the issue.[2]

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2. In the PGE rate case after the UE 88 rate case, for example, URP intervened and made the same claims that it had made in the docket (UE 88): that charging Trojan costs and profits to ratepayers was illegal. The OPUC in a preliminary order refused to even

(continued...)

Finally, we incorporate by reference the arguments regarding the proper scope of this proceeding presented in the memoranda below, to the extent those arguments are not presented in this Opening Brief:

> APPLICATION FOR RECONSIDERATION OF OPUC ORDER NO. 04-597 BY UTILITY REFORM PROJECT, ET AL. AND THE CLASS ACTION PLAINTIFFS (December 20, 2004)
>
> MOTION FOR CERTIFICATION OF RULING TO THE COMMISSION BY UTILITY REFORM PROJECT (URP), ET AL. (September 13, 2004)
>
> JOINT REPLY MEMORANDUM ON SCOPE OF PROCEEDING, PHASING, AND SCHEDULE (June 25, 2004)
>
> JOINT MEMORANDUM ON SCOPE OF PROCEEDING, PHASING, AND SCHEDULE (June 3, 2004)

II. TESTIMONY ESTABLISHED THAT $744 MILLION IS THE APPROPRIATE AMOUNT PGE OWES BACK TO RATEPAYERS FOR UNLAWFUL TROJAN PROFITS CHARGED TO RATEPAYERS DURING THE PERIOD APRIL 1995 THROUGH SEPTEMBER 2000.

The Testimony of Jim Lazar and Surrebuttal Testimony of Jim Lazar establish that the correct sum, as of December 31, 2005, to be returned to those who paid the unlawful charges for Trojan return on investment during the 5.5-year period is $744 million. He also provided

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2.(...continued)
consider the issue. Then, in OPUC Order No. 95-1216, the Commission refused to consider the issue of Trojan costs and profits in rates, because "URP's claim relating to Trojan was presented in UE 88." PUC Order No. 95-1216, p. 12. This outcome had been urged by PGE:

> PGE responds by noting that it is not seeking recovery of **additional** costs associated with Trojan in this proceeding and by pointing out that issues relating to Trojan were resolved in UE 88.

PUC Order No. 95-1216, p. 12 (emphasis added). This restriction on issues and/or costs to be considered in a rate case is not consistent with Staff's new assertion of that issues in rate cases cannot be limited.

support for a sum of $625 million. He fully explained and documented his data, premises, and rationales and answered all of the objections raised by other parties to the approaches taken in his opening testimony.

PGE's only response to the Surrebuttal Testimony of Jim Lazar was this statement:

> In PGE Exhibit 6100, we point out that "costs change over time" and "once we step out of the ratemaking setting into the 'real world' of actual costs and actual revenues, the tie between costs and tariff rates is broken."

PGE/7100/3. The meaning of this statement is a mystery. Lazar pointed out that the charges for Trojan return on investment were set in UE 88 and were not changed until October 1, 2000. Thus, PGE charged the first-year amount of Trojan return on investment 5.5 times. PGE's calculations incorrectly assume that PGE charged the first-year return once, then the second year return once, etc.

PGE 6800/12-13 seeks to distinguish Trojan from the abandoned generating plants noted in the Testimony of Jim Lazar. PGE states that reference to these plants is inapt, because they "were all discontinued before construction was complete, whereas Trojan provided service for many years before PGE closed it in 1993." During the entire period that Trojan operated, however poorly (as documented in OPUC Order No. 95-322), it was included in ratebase, and PGE earned a return on investment on it. After Trojan permanently closed, it became similar to any plant not operating, such as those that were not completed. Further, the Oregon courts concluded that ORS 757.355 applies equally to plants never finished and plants prematurely closed.

In addition, PGE seeks to rewrite the history of Trojan in rates, claiming that the only reason it was assigned a life of 35 years was because "nobody could foretell precisely how long Trojan would be economic to operate." The OPUC adopted a 35-year life for Trojan, because that was part of its analysis that PGE's investment in the plant was a prudent one. If

PGE had come to a PUC and said, "Now put Trojan in ratebase, but nobody knows how long it will be economic to operate," any competent Commission would have rejected that proposal.

III. ALL OF PGE AND OPUC STAFF PROPOSALS VIOLATE ORS 757.355 BY INCLUDING A RETURN ON INVESTMENT FOR THE CLOSED TROJAN PLANT.

The Staff-proposed "One-Year Amortization" proposal is actually a proposal for a 5.5-year amortization, with return on investment during the entire amortization period. As shown on Staff/102/3, the "One-Year Amortization" contemplates a "One-Year Impact" consisting of an increase in revenue requirement of $121.2 million above the revenue requirement adopted in OPUC Order No. 95-322 for the Trojan investment. Since time does not run backwards, such a revenue requirement for the first year (commencing April 1, 1995) is impossible, so the Staff proposal carries forward the unpaid amount into successive years, with a return on it ("interest"). Allowing the unpaid principal to carry forward into successive years, with interest on the balance, is the same thing as a 5.5-year amortization, with return on investment during that period. The Oregon courts have ruled that ORS 757.355 does not allow a return on investment for a non-operating plant, specifically Trojan.

This same problem affects all of PGE's approaches that urge the OPUC to retroactively adopt rates higher in any year than were actually authorized. The PGE calculations do not merely carry over the balances dollar-for-dollar but apply interest rates or return on those balances as they are carried forward. These PGE and Staff proposals merely identify some element of cost that was actually charged to ratepayers during, say 1995, and imagines that that specific cost was instead not charged to ratepayers at all but was "deferred" for collection in future periods. This is nothing more than allowing a return on Trojan investment, because these approaches include interest or return on the deferred costs. Certainly, with a revenue requirement approaching $1 billion, the OPUC could have deferred hundreds of millions of

dollars of other costs, while hypothetically allowing PGE to recover its full remaining Trojan investment in a single year, without return. But all of these approaches include return on the costs now retroactively deemed to have been "deferred," so it amounts to nothing more than return on Trojan, albeit via obvious evasionary maneuver.

ORS 757.355 prohibits utilities from charging return on investment on plant not in service, "directly or indirectly." All of the schemes forwarded by PGE and the OPUC Staff continue to charge ratepayers for a return on Trojan during the 5.5-year period. Whether these charges are done "directly" or "indirectly" is in the eyes of the beholder. But the return on Trojan is certainly embedded in each scheme, at least indirectly. How else could one describe a scheme under which the revenue actually paid by ratepayers during the 5.5-year period is now retroactively characterized as having been for Trojan return of investment (instead of power costs, for example), while interest (at a rate conveniently equal to PGE's authorized rate of return on investment) is applied to the now-"deferred" power costs?

Since it is not physically possible to turn back the clock and charge ratepayers more than authorized in OPUC Order No. 95-322, the only remotely reasonable approach similar to that of Staff would be to assume that all of the amounts ratepayers paid for Trojan investment on and after April 1, 1995, would be applied to the return of Trojan investment. If we remove the unlawful component of these calculations (the return on investment or "interest"), the calculation becomes rather simple. OPUC Order No. 95-322 states that the Trojan investment value at the start of the 5.5 year period was $250.7 million. Ratepayers paid PGE at least $60.8 million for Trojan investment annually during the 5.5-year period; see URP/202/3. Thus, ratepayers paid at least $334.4 million for Trojan investment during the 5.5-year period. At the rate of $60.8 million per year, the entire Trojan investment value set forth in OPUC Order No. 95-322 was returned to PGE within the first 4.12 years (49.5 months) April 1, 1995. That

would be by May 15, 1999. During the final 16.5 months of the 5.5 year period, PGE charged ratepayers an additional $83.6 million for the Trojan investment.

Thus, applying all of the Trojan investment charges as return of investment, Trojan was fully amortized as of May 15, 1999, and PGE then charged an additional $83.6 million to ratepayers for the Trojan investment. So the starting point for the UM 989 proceeding should not have been a positive $180.5 million for Trojan but instead a negative $83.6 million, at an absolute minimum (disregarding the interest that PGE should have paid ratepayers for the $83.6 million overcharge).

Ordinarily, when utilities owe credits to ratepayers, those credits carry a rate of interest equal to the utility's authorized return on investment. If that policy is applied here, then interest in favor of ratepayers on the excess amount already paid for Trojan should have begun at the time that the full Trojan balance was paid (May 15, 1999, if not sooner). For the following 15 months, ratepayers continued to pay PGE at a rate of at least $5.066 million per month for the Trojan investment, resulting in the overcharge of $83.6 million. The average period such overcharge was outstanding was 8.25 months (half of 16.5 months). Assuming an interest rate of 10%, the interest on the overcharge would be $5.75 million, resulting in a balance owed by PGE to ratepayers on the Trojan investment account of $89.35 million as of October 1, 2000.

Staff now claims that the Trojan investment value at the start of the 5.5 year period was $340.2 million. This is contrary to OPUC Order No. 95-322, which stated that the Trojan investment value to be included in rates was $250.7 million). But let's use the $340.2 figure. Since PGE charged ratepayers at least $334.4 million during the 5.5-year period for Trojan investment, this would leave a Trojan investment balance of $6.2 million as of October 1, 2000. Instead, the OPUC passed on a Trojan investment balance, as of that date, of $180.5

million and proceeded to extinguish the "offsetting" ratepayer assets, to divert the NEIL premium rebates, and to allow PGE to charge ratepayers for the newly-invented "regulatory asset." As documented by URP in the UM 989 docket, the net effect of these adjustments on ratepayers was a cost to ratepayers of $211.5 million (present value as of October 1, 2000).

IV. PGE DISREGARDS THE ENORMOUS RETURN ON INVESTMENT ENJOYED BY THOSE WHO HELD ITS STOCK DURING THE 5.5-YEAR PERIOD.

PGE/6800 returns to discussion of the appropriate rate of return for investors and how "investors in 1995 would have demanded a slightly higher return on PGE's equity." PGE/6800/9. What PGE entirely disregards is the fact that these investors in PGE received a huge return, far above any reasonable return on investment, when Enron bought PGE in 1997. According to the Final Staff Report (April 11, 1997) in UM 814, Enron paid a "premium 47% above PGC's market price to PGC shareholders."

> The premium is calculated by taking the difference between PGC's market stock price of $28.125 per share and Enron's market stock price of $41.375 per share on the stock trading day immediately prior to the merger announcement and multiplying this difference by the number of PGC outstanding shares. This calculation results in nearly a $677 million premium to PGC shareholders.

Id., note 1.[3] And, after the Enron takeover, PGE no longer needed to attract equity investment.

V. PGE AND OPUC STAFF TOUT RATEMAKING TO REWARD FAILURE.

PGE 6900/20 advocates a ratemaking model that rewards failure. PGE's model would encourage utilities to build and maintain plants poorly, so that they fail early, as did Trojan. Then, according to PGE, the utility should continue to earn profits on the plants that fail early,

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3. We request official notice of this document, which is contained in the Commission's files, pursuant to OAR 860-014-0050.

plus profits on the plants the utility builds to replace the failed plants. The way to maximize profits under this system is to build and maintain plants poorly, as that will maximize the size of the ratebase and, thus, profits.

If a utility has a plant that is failing or even merely not economical to operate, the regulator can easily induce the utility to close it, without granting the utility a profit on the failing plant. The regulator can remove it from rates entirely, as an imprudent cost, unless the utility closes it (and is rewarded with a return of the remaining investment). If the utility insists upon operating it, the regulator can disallow its cost of operation as imprudent. The alternatives, without granting the utility profits on failing plants, are many.

Similarly, Staff Exhibit 100 postulates a ratemaking philosophy that is inconsistent with least-cost planning. It indicates that a utility should earn a return on investment for a plant that "becomes uneconomic compared to other alternatives," along with a return on the plant that replaces it. Thus, the Staff system would reward the utility for allowing a plant to become uneconomic, as that would provide the utility with return on investment bonus (return on the old plant as well as return on the new plant built to replace it). This would simply be a new form of the well-known incentive for regulated monopolies to overbuild or goldplate their investments in plant, when their allowed profits are determined on the basis of an authorized return on ratebase.

Further, Staff and PGE testimony fail to note that in OPUC Order No. 95-322 the Commission found that the premature "retirement" (complete breakdown) of Trojan was not a cost-effective decision from the ratepayer point of view. The Commission found that it would have been more economical for PGE to continue to operate Trojan, in a prudent manner, than to close it. Thus, rewarding PGE with a return on its Trojan investment was contrary to least-

cost planning, not in support of it. It provided an incentive to prematurely close plants, even if it was not in the best interests of ratepayers to do so, because that is what PGE wanted.

VI. PGE' RISKY COURSE OF CHARGING RATEPAYERS FOR PROFITS ON TROJAN, REGARDLESS OF ITS LOSSES IN THE APPEALS COURT, WAS HIGHLY IMPRUDENT AND SHOULD NOT BE REWARDED BY THE COMMISSION.

PGE assumes it will not be held to the standard of reasonable conduct of its business affairs, even though it imprudently chose to charge rates which were not final (as potent and ultimately successful legal challenges were pending) without taking steps to mitigate the risk. PGE continued to charge ratepayers for Trojan profits, despite the fact that PGE knew that the Marion County Circuit Court in early 1996 declared its OPUC Order No. 95-322 rates to be unlawful and knew that the Oregon Court of Appeals had agreed with this conclusion in June 1998.

PGE's testimony thus views the Commission's ratemaking process as essentially corrupt, with the task now of merely thinking up new reasons to allow PGE to retain the unlawful charges it sought in UE 88 and continued to charge, fully aware that the charges were not final and were quickly declared unlawful by the courts. PGE does not attempt to justify this unreasonable business decision or offer any rationale why it is either just or reasonable why ratepayers should pay for such gross mismanagement, undertaken solely on behalf of PGE's stockholders (prior to mid-1997) and thereafter on behalf of PGE's stockholder.

As a threshold, PGE must persuade the Commission that it should be allowed to present evidence it had available to it in 1995 but chose not to present. Was it prevented from putting on evidence by any facts then existent? If there is no basis for choosing to not make a case for rates in 1995, PGE acted unreasonably.

Furthermore, PGE was unreasonable and imprudent in the course of conduct it undertook since 1995. It continued to charge rates that included Trojan profits after it lost at the first and second levels of appeal. It continued to charge for Trojan profits after the voters overwhelmingly refused to accept the legislative fix PGE engineered in 1999, rejecting the statewide referendum Measure 90 by over 88% of the vote. It delayed consideration by the Oregon Supreme Court for over 2 years by its run through the Legislature with HB 3220 (1999) and charged ratepayers for profit on Trojan during that interval as well. Such persistent conduct without any effort to mitigate risk is imprudent as a matter of law. PGE might look to its managers, advisors and lawyers to recover for their negligence or malpractice, but it cannot justly or reasonably now seek to recover costs from ratepayers that it knew were not final and that every court considering the matter had found to be unlawful--and now claim that it had evidence all the time which it could have presented, but never did.

As all the parties know, when a utility seeks to change rates, the Commission conducts a review under ORS 757.210(1) to determine whether the proposed rate increase is "just and reasonable." The Commission's final determination of costs allowable in PGE's rates is subject to a finding by the commission that the cost was prudently incurred. PGE voluntarily chose a path of extreme financial risk: charging for Trojan profits in rates while a robust challenge worked its way through the courts. A prudently operated business would not have placed itself in this huge financial hole, assuming that the courts would eventually bail it out. PGE took a very large risk and bet it would win, but it lost. PGE bears the burden of persuading the Commission that the strategic path it took (and the lengthy delays it caused) were prudent.

Instead, The various alternative rationales offered by PGE fail every test of plausibility, including the test that PGE itself must have applied when presenting its UE 88 rate case over

10 years ago. PGE chose to seek to recover both return of and return on investment in Trojan. PGE could have chosen to offer any or all of the rationales it now offers, but it did not. It must have judged those rationales to be unsupportable, implausible, or unlawful. Nothing prevented PGE from offering all of the rationales then. If the Commission rejected them, nothing would have prevented PGE from assigning error to those rejections on appeal. PGE chose to rely upon what it must have believed to be the most supportable and lawful case for having ratepayers pay it profit on the closed Trojan plant.

VII. THE FAIRNESS AND REGULARITY OF THE PROCEEDING WAS DESTROYED BY SEVERE PROCEDURAL ERROR AND OUTRIGHT BIAS.

A. THE COMMISSION BIASED THE OUTCOME OF THIS PROCEEDING BY SIMULTANEOUSLY ARGUING AT THE COURT OF APPEALS THAT THIS PROCEEDING CANNOT LAWFULLY PROVIDE ANY REMEDY FOR THOSE WHO PAID THE UNLAWFUL CHARGES.

The Commission itself is presently before the Oregon Court of Appeals in ***URP v. OPUC*** (UM 989), No. A123750, arguing that OPUC Order No. 02-227 (UM 989) was lawful, because of the "filed rate doctrine," which (according to the Commission) also makes it legally impossible for the Commission to grant any relief or remedy to the ratepayers who paid the unlawful charges for Trojan return <u>on</u> investment during the period starting April 1, 1995. See the OPUC Appellant's Brief (September 10, 2004), pp. 17-22.

Considering the OPUC's continued reliance on the "filed rate doctrine," despite its rejection by Judge Lipscomb in his order remanding OPUC Order No. 02-227, the Commission has irretrievably prejudiced this remand proceeding. The OPUC's position, in UM 989 itself, before the courts is that the outcome of this remand proceeding is irrelevant, because "There is no statutory authority by which the PUC could have awarded a refund of rates already paid by customers."

> ORS 757.225 specifically provides that the rates established by the PUC are the lawful rates until they are changed by later PUC action. The PUC construed this provision to prohibit retroactive ratemaking.

Appellant's Brief (September 10, 2004), p. 17. And:

> Here, although PGE charged rates that concluded an unlawful component, as this court later ruled, it charged only rates that were legally authorized. Because the commission is authorized to set rates only on a prospective basis, the commission has no authority to penalize PGE for charging the rates it ordered PGE to charge, anymore than the commission could order customers to pay increased rates in the future if the utility fails to realize the rate of return the commission authorized in the past.

Id., p. 22. The intermediate 5 pages consists of discussion of the "filed rate doctrine".[4]

Thus, the OPUC is on record before the courts of this state as taking a position which precludes the provision in this remand proceeding of any relief or remedy to ratepayers for the past unlawful Trojan charges. Taking this legal position renders this remand proceeding meaningless and moot from the outset. According to the Commission's stated legal position, this proceeding cannot result in relief or remedy for ratepayers.

Many months ago, we requested that the Commission repudiate its position that the "filed rate doctrine" (or any other doctrine) precludes relief for ratepayers from unlawful charges they have paid. The Commission has been consistently unresponsive to the concept of refunds (or any other relief) to ratepayers for the unlawful Trojan return on investment. Unless or until the Commission removes this taint of prejudgment by repudiating its express opposition to ratepayer refunds *in the current matter*, this proceeding will be invalidated by the

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4. The Commission had argued before the Marion County Circuit Court:

> Although the Court of Appeals has concluded that the Commission erred in allowing PGE to obtain a return on the Trojan investment, Oregon's statutory scheme, which embodies the filed rate doctrine, does not allow the Commission or the Court to retroactively redress the error.

BRIEF OF THE PUBLIC UTILITY COMMISSION OF OREGON, Marion County Circuit Court Case No. 02 C14884 (UM 989), April 16, 2004.

perception and reality of unfairness, bias, and prejudice. The entire remand proceeding is a pointless exercise, designed to exhaust the resources of those who oppose PGE. It has been effectively dead on arrival.

But, instead of granting the URP request that the Commission simply at the outset of the this remand proceeding simply "make a legal determination that relief for past unlawful charges is available for those who paid the unlawful charges," the Commission insisted that the case proceed with the presentation of elaborate evidence, at great cost to URP and its supporters. The Commission adopted a strategy obviously designed to exhaust the resources of all parties in these cases who oppose the positions of PGE. This demonstrated severe bias in favor of PGE.

B. THE ALJ COMMITTED LEGAL ERROR AND DEMONSTRATED BIAS IN SPONTANEOUSLY EXCLUDING THE TESTIMONY OF DANIEL MEEK, DESPITE NO MOTION FOR DOING SO.

About three weeks after the conclusion of the evidentiary hearing, the ALJ issued a ruling striking the opening and surrebuttal testimony of Daniel W. Meek (URP Exhibits 204, 205, and 400). No party had moved for the exclusion of his testimony.

When the ALJ had earlier raised the issue of whether Meek could serve as both attorney and expert witness, URP filed a detailed memorandum and affidavits showing hardship from exclusion of his testimony. No party contested this filing or the existence of such hardship.

RPC 3.7 codifies the "advocate-witness rule" and provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> * * *
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

One of the original justifications for the rule against permitting an attorney to appear as both advocate and witness in the same trial was the perceived need to preserve the integrity of the judicial process by avoiding even the appearance that an attorney may be manufacturing evidence to support the client's case. This rationale, has been strongly criticized, and is generally rejected today, leaving a rule without its original underpinnings.[5] *See* ***Com. v. Willis***, 380 PaSuper 555, 583, 552 A2d 682, 696 (1988); ABA/BNA LAWYER'S MANUAL OF PROFESSIONAL CONDUCT, § 61:504 at 16-17 (1988) (commentators have rejected the rationale and the ABA Model Code does not offer it as a justification); Note, *The Advocate-Witness Rule*, 52 NYU LAW REV 1365, 1390-93 (1977) ("Reliance on an unsubstantiated and incalculable fear of public criticism to justify the advocate-witness rule obscures the often substantial burdens that the rule imposes on clients").

Application of the advocate witness rule demands a balancing of the litigants' interests. MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.7 *comment* (1984). URP never had the opportunity or benefit of such factfinding. The comment to Model Rule 3.7 identifies the balancing factors as "the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses." *Id.* It further provides that "due regard must be given to the effect of disqualification on the lawyer's client." *Id.* To this list of factors offered in the comment to Rule 3.7 Professor Wydick would add "Who is the trier-of-fact?" on the theory that a judge is far less likely to be confused than a jury. Wydick, *Trial Counsel as Witness: The Code and the Model Rules*, 15 UC DAVIS LAW REV 651, 653 (1982).

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5. Other situations, such as where the attorney testimony might *harm* a client, or confuse a jury of laypersons, are not relevant in this case.

The inquiry under these "substantial hardship" balancing factors requires an opportunity to be heard and present evidence and a decision based on findings of fact. Moreover, the right to counsel carries with it a right to counsel of one's choice. The right of choice, however, is subject to judicial discretion if accommodation of the right to choice would result in "a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." ***State v. Greenough***, 8 OrApp 86, 92, 493 P2d 59, 62 (1972). Meek is URP's choice of counsel. His testimony was not stricken until 3 weeks after the evidentiary hearing. Thus, there was no disruption to orderly presentation of the case. The ruling was not made in response to a party who demonstrated harm or prejudice but was *sua sponte* by the hearings officer, without consideration of the factual exceptions within RPC 3.7.

Further, URP on September 6, 2005, filed the Affidavit of Linda K. Williams, which stated:

> *Prejudice to Parties*
>
> 9. URP has not been informed of the basis of alleged prejudice to others. In my role representing another party, to the best of my knowledge no showing of prejudice has been offered into the record. All of the parties had opportunity to do discovery of Meek's conclusions and work papers and to explore any facts which might suggest bias and be used for impeachment.
>
> 10. To the best of my knowledge no showing has been made by any party, or by the hearings officer, that the adjudicators in this cause, the Public Utility Commissioners, will be confused or unduly swayed by the dual role of Mr. Meek to the prejudice of others.
>
> 11. It appears unlikely that the Commission[er]s, with their substantive experience and familiarity with the nature of the conduct of hearings (prefiled testimony, non-existent "demeanor" evidence), would be less than able to fairly perform their responsibilities.
>
> 12. The Board is aware that the very fact of the dual role may itself be construed as evidence of bias, and it accepts that possibility and does not consider that such dual role will seriously impair the testimony proffered, and expressly waives any "prejudice" that might be inferred to its interests.

Hardship

13. Utility Reform Project is a non-profit Oregon corporation incorporated in 1984. Among its activities, it has participated in Oregon utility rate matters before the Oregon Public Utility Commission (OPUC) in dozens of proceedings. It has solicited pro bono legal advice, recruited volunteers for research and office tasks, and received modest contributions sufficient for filing fees, copies and other costs.

14. Attorney Daniel Meek is uniquely qualified to submit testimony in this cause. He has over 25 years of experience as briefly outlined in proffered URP Ex. 205.

15. His role as occasional witness-advocate has heretofore not been alleged to have prejudiced any party. Most recently, his testimony was accepted into the record in Docket No. UM 1121 although he performed therein in the dual role as witness-advocate.

16. Despite very limited financial resources, URP participated in and sought court review of the final orders in the following OPUC dockets: DR 10, UE 88, and UM 989. Exclusive of any professional fees, it has incurred court filing fees and costs for service of process, copies and postage in excess of $1,500 in the DR 10 and UE 88 appeals. It has thus far incurred the costs of participating in the UM 989 case and filing fees and costs in the Marion County Circuit Court and Court of Appeals.

17. I do not intend to itemize all the costs incurred in the remand proceeding DR 10/UE 88/UM 989, but provide an example of one substantial cost. URP has incurred a debt to its very experienced professional economist expert witness, Jim Lazar, of Olympia, Washington, in the current amount of $4,400. Mr. Lazar's bill includes time invested in discussing the testimony of PGE witnesses with attorney Daniel Meek in an effort to prepare him for meaningful cross-examination of other witnesses. This is time-consuming, and Mr. Lazar had other commitments.

18. Forcing URP to abandon the counsel of its choice five weeks before the hearing date would have worked a particular hardship upon it.

19. The hearings officer has suggested that URP seek another person to adopt the testimony originally proffered by Mr. Meek. I am aware that this procedure has occasionally been used, but point out that the adopting witness thereby swears under oath and penalties of perjury that the testimony is in fact the adoptee's testimony. This may be possible when the adoptee has the same qualifications and job description as the original sponsoring witness, but under the circumstances, expert economist Jim Lazar does not have the "same" qualifications as Mr. Meek, nor has he had the opportunity to review all of the record in such a manner that he can state that he has independently researched the record and arrived at exactly the same testimony, word for word.

20. URP has already expended substantial resources in securing the expert testimony of Mr. Lazar and is handicapped in financial ability to find another qualified expert who could, even if time permitted, ethically adopt and sponsor the testimony of Mr. Meek.

21. Under these circumstances having a surrogate adopt Mr. Meek's testimony would not be ethical or proper and the integrity of the testimony would suffer in credibility.

22. For the foregoing reasons of financial hardship and the particular circumstances as they have arisen, URP suffers a hardship if Mr. Meek cannot submit testimony.

Despite the legal argument and uncontested showing of hardship, the ALJ on September 19, 2005, struck all of the Meek testimony. This was legal error, as noted above, and also another illustration of the ALJ's severe bias against URP and its counsel.

C. THE ALJ COMMITTED LEGAL ERROR AND DEMONSTRATED BIAS IN ADOPTING A RULING TO EXCLUDING REFERENCE TO FACTS NOT KNOWABLE AS OF JANUARY 2005--BUT APPLICABLE ONLY TO URP AND NOT TO THE OTHER PARTIES.

Two business days prior to the evidentiary hearing, PGE filed a Motion in Limine, seeking to preclude cross examination on "factual evidence that could not have been presented in the original proceeding" or "regarding facts that were unknown and unknowable at the time the Commission established UE 88 rates" or "facts that were unknown and unknowable when the Commission set UE 88 rates." At the hearing, the ALJ granted PGE's Motion in Limine but then refused even to consider URP's parallel motion to strike, which was based on entirely the same rationale and was necessitated only by the ALJ's granting of PGE's Motion in Limine. This was legal error, severe procedural irregularity, and a further instance of the ALJ's bias against URP.

The ALJ's September 19 ruling on this matter offer statements that demonstrably false. It states (p. 6):

> The Motion in Limine, in relevant part, merely calls for cross examination to be limited to the scope of this first phase of the proceeding.

This is simply and unavoidably wrong. In fact, the PGE motion stated:

> As a result, Chief Administrative Law Judge Grant ruled that factual allegations such as PGE's actual earnings in the late 1990s are outside the scope of this proceeding:
>
> > This proceeding does not allow any party to present factual evidence that could not have been presented in the original proceeding. While the Commission must now apply a different legal interpretation of ORS 757.355, the factual evidence to which that statute is applied must encompass the same timeframe, that is, information that could have been presented during UE 88.
>
> Id.
>
> We ask that this same limitation apply at the hearing. Cross examination should not be permitted regarding facts that were unknown and unknowable at the time the Commission established UE 88 rates.
>
> * * *
>
> For the reasons stated above, PGE respectfully requests the following rulings:
>
> 1. Cross Examination will be limited to the scope of each witness' written testimony.
>
> 2. Cross examination will be limited to the issues in Phase I of this proceeding and shall not include facts that were unknown and unknowable when the Commission set UE 88 rates.

PGE counsel made further similar statements at the hearing, TR 13-14.

At the evidentiary hearing, URP counsel stated that the grounds for striking portions of the PGE and OPUC Staff testimony was that such testimony included "future facts," defined as exactly the premise of the PGE Motion in Limine: "facts that were unknown and unknowable at the time the Commission established UE 88 rates."

The September 19 ruling is based on the statement that URP did not "further explain[] the significance of the term "future fact," implying that the ALJ somehow did not comprehend

it. But at the hearing on August 29, she interrupted URP counsel, stopping his further explanation of the term (including numerous examples), because she stated that she understood the term fully.

> Number two, on limiting the entire inquiry here to facts known or knowable, I suppose that means at the time that the evidentiary record closed in UE 88, which would have been right around the first of the year in 1995. And for clarity, that's what I will be referring to today as "future facts." When I say "future fact", that means a fact that had not occurred as of the close of the evidentiary record in UE 88 back about ten years ago, ten and a half years ago.
> First of all, there's nothing in the scoping order, which was last October 2004, that excludes future facts; absolutely nothing. And I would suggest that PGE take a look at that and identify where, in the scoping order, future facts are excluded.
> Number two, this entire proceeding is premised upon cognizance of a future fact. Let me give you an example of that. In the rebuttal testimony of Pamela Lesh, which is PGE 6800, this is the Lesh/Hager rebuttal testimony, page five, starting on line 13.
>
> ALJ KIRKPATRICK: Yes.
>
> MR. MEEK: All right? It's states, "Staff's first reason merely restates the Commission's decision from UE 88; it does not rebut PGE's policy position that the Commission might have exercised its discretion regarding the construct of the net benefits test and the hypothetical rate treatment of this future cost differently had it known of the Court of Appeal's decision."
> Court of Appeal's decision is a future fact. And that's what this entire proceeding is premised upon. But now the Commission, in using some unheard of time machine in a rate case, goes back and attempts to place itself in the position of being in the year 1995, except that it knows only one future fact, and that is that its decision is unlawful and has been held so by the courts of Oregon all the way through the appellate process with no opportunity for further appeal. It's a final, absolute final judgment.
> So allowing only one future fact without allowing other future facts is a fundamental denial of due process

and logic as well. The only possible consequence of cognizance of this one future fact is to benefit Portland General Electric. Clearly this Commission wished to give Portland General Electric the rate treatment that it received. Allowing cognizance of only one future fact simply allows the Commission to try to make up the difference by now according PGE different rate treatment on issues that either were addressed in UE 88 or were not addressed in UE 88, but in any event were either implicit or explicit decisions in Order 95-322 that were not appealed by any party.

Upon remand, it is totally outside the cognizance of the fact-finder or tribunal, akin to the trial court, entirely outside the cognizance of the trial court to retry issues that were tried in the beginning, that were tried the first time around, and were not appealed by any party on remand.

Now, on the other hand, there are other future facts which we have indicated in testimony, including the testimony of Mr. Lazar, that, for example, PGE significantly over-earned its authorized rate of return on investment during the period at issue in UE 88. Which is April 1st, 1995, through September 30th, 2000.

Had the Commission known that fact, what would the Commission have decided in the UE 88 case? Had it known that authorizing PGE to earn an 11.6 percent return on equity would actually result in a much higher return on equity, would it not be logical to assume that the Commission would have adopted a lower authorized return on equity? That's a future fact. That is an implication of a future fact.

ALJ KIRKPATRICK: Okay, Mr. Meek.

MR. MEEK: Same thing is true about PGE's nonpayment --

ALJ KIRKPATRICK: Okay, Mr. Meek.

MR. MEEK: -- of --

ALJ KIRKPATRICK: I think --

MR. MEEK: -- approximately 500 million dollars' of income taxes that it charged ratepayers during the five-and-a-half year period. If the Commission had known that that money would be flowing either to PGE's

bottom line or to Enron's bottom line during most of that period, then perhaps its decision would have been different.

ALJ KIRKPATRICK: Mr. Meek, I think I understand your definition of what a future fact is, so I don't need any more examples of that.

TR 14-18. She then again interrupted URP counsel and stopped him from moving to strike the specific parts of PGE and OPUC Staff testimony that comprised or included "future facts". TR 23. He began to do that, but the ALJ stopped him. He offered justification for going through the PGE and Staff testimony, line by line, but the ALJ stopped him.

MR. MEEK: Yes. In light of your ruling about future facts, I would now move to strike appreciable portions of PGE's testimony. That is, all testimony that refers to future facts. And we can begin going through that, at this point, I believe, would be appropriate. I'd like to start with Mr. Hager's testimony. Which is PGE's Exhibit --

ALJ KIRKPATRICK: Mr. Meek --

MR. MEEK: -- 6400.

TR 23.

MR. MEEK: I don't agree, because it's impossible to know what questions would be asked on cross-examination so it's impossible to make the ruling in advance; however, it is certainly possible to know what the written testimony is of the utility -- we have it in front of us. And my cross-examination of all witnesses will be affected by whether or not the future facts in any of PGE's testimony is allowed in the record. For example, one witness in this case -- many of PGE's witnesses -- refer to the testimony of other witnesses. I cannot conduct cross-examination of the witnesses unless I know what testimony is stricken and what isn't. So we need to go through all of PGE's testimony at this point to strike out all testimony which refers to future facts.

TR 24.

> MR. MEEK: Are you denying consideration of the proffered motion to strike.
>
> ALJ KIRKPATRICK: Mr. Meek, I am denying your motion to strike at this time, yes.
>
> MR. MEEK: And you're denying me the opportunity to make the motion to strike at this time.
>
> ALJ KIRKPATRICK: Mr. Meek, you have made the motion.
>
> MR. MEEK: No, I haven't. I've referred to a motion, I haven't made it. Because making a motion to strike requires reference to the testimony page and line numbers.
>
> ALJ KIRKPATRICK: I'm sorry, Mr. Meek, I do not understand.
>
> MR. MEEK: A motion to strike has to refer to the specific testimony to be stricken. And as of yet you have not allowed me the opportunity to refer to the specific testimony to be stricken. And I am asking you whether you are going to allow me that opportunity or deny me that opportunity to make the motion to strike.
>
> ALJ KIRKPATRICK: I think -- clarifying what you're asking -- I think -- as I understand it, you have made a general motion with regard to whether or not you will be able to strike testimony that you would identify. I have ruled on that motion.
> With regard to making a motion to strike individual pieces of testimony, you are correct, you have not yet made those motions because my ruling disallowed them.
> But I have also said to the extent necessary we will address motions to strike testimony based on the cross-examination that was conducted in this hearing after -- after the hearing is concluded, in brief, in briefing.
> Mr. Meek.

TR 27-28. Then, after post-hearing memoranda, the ALJ denied wholesale the motions to strike the specifically identified portions of PGE and OPUC Staff testimony, on grounds that

the concept of "future facts" was insufficiently explained, after having halted explanation of the concept at the hearing itself and after refusing to allow URP counsel to address those specific portions of offending testimony at the hearing.

Then, in the post-hearing September 19 ruling, the ALJ claims not to understand what URP counsel meant by "future facts", after stating at the hearing that she so fully understood the term that she interrupted and stopped URP counsel from providing more examples or from examining each offending portion of the testimony filed by PGE and OPUC Staff. A more clear example of procedural irregularity, as well as demonstrated bias, is hard to imagine.

This double standard impaired URP's rights in two ways. At the evidentiary hearing, URP was precluded from cross-examining PGE and OPUC Staff witnesses on a very substantial portion of their testimonies. Further, when URP moved to strike portions of testimony for exactly the same reason set forth in the PGE Motion in Limine, the testimony was allowed to remain in record. See UTILITY REFORM PROJECT AND CLASS ACTION PLAINTIFFS MOTION TO STRIKE PORTIONS OF TESTIMONY, filed September 6, 2005 (and attached to the ALJ's September 19 ruling).

The ALJ also concluded that URP's motion was untimely, even though it was made within the time expressly allowed for it by the ALJ. Further, URP had no reason to make the motion to strike at any earlier time, but for the PGE Motion in Limine filed 2 business days prior to the evidentiary hearings and granted by the ALJ on the first day of the hearings. URP counsel then immediately moved for equivalent and balanced application of the standard by moving to strike the portions of PGE and OPUC Staff testimony that included the sort of "future facts" that the PGE Motion in Limine claimed were not cognizable in this proceeding. URP counsel made this motion within at most a few minutes of the time when the ALJ granted the corresponding part of the PGE Motion in Limine. TR 19, 23.

The ALJ never explains how URP could have been "untimely" when it expressed its motion to strike literally within minutes as the ALJ ruling at the hearing that necessitated the motion to strike. As noted by URP counsel at the hearing, URP could not possibly anticipate every disputed or disputable ruling that the ALJ might make and anticipatorily prepare the appropriate responsive motions some days or weeks in advance of hearing the ALJ's ruling. That is particularly true when the disputed ruling was upon a PGE motion filed only 2 business days prior to the hearings.

The ALJ also erred in denying URP's motion to strike portions of the PGE and OPUC Staff testimony on grounds that those portions consist of "legal opinion, argument, or discussion." The ALJ again stated that she was unable to comprehend the motion, because it did not include an "explanation" of why those identified portions of testimony included legal opinion. The term "legal opinion" is a phrase of common understanding in the legal profession. An adjudicator trained in the law is trained to distinguish between statements of fact, statements which express an expert opinion derived from facts, and statements which state a legal conclusion. The matter identified by URP as legal opinions contained in those portions are patently obvious and readily apparent to any attorney. Thus the statements identified as URP should have been evaluated without further requirement that URP include argument "why" the passage was a legal conclusion. The passage either is or is not objectionable on those grounds and a ruling can be made by examining the "4 corners" of the statement.

Thus, the ALJ erred in failing to exercise any judgment at all on the substance of the motions and instead denied valid motions by URP on grounds not required by any rule or practice. The rationale that the ALJ could not understand the motion without further argument by the moving party could be used to deny any motion, regardless of its merits, but is not a

lawful basis for denying to exercise discretion at all on the relatively mundane task of separating appropriate statements of fact from objectionable legal conclusions.

D. OTHER PROCEDURAL IRREGULARITIES PREJUDICED THE PARTICIPATION OF URP.

The hearing transcript shows numerous other procedural irregularities, which were objected to by URP counsel.

VIII. UNDER THE OREGON AND U.S. CONSTITUTIONS, OVER 800,000 OVERCHARGED PRESENT AND FORMER PGE RATEPAYERS HAVE A PRESENTLY VESTED RIGHT TO RETURN OF MONIES CHARGED TO THEM FOR TROJAN RETURN ON INVESTMENT.

On December 14, 2004, the Marion County Circuit Court allowed the Class Action Plaintiffs (who are also parties in this docket) to proceed as class representatives and certified a class consisting of all PGE current and former ratepayers who paid rates, on or after April 1, 1995, which included a return on the Trojan investment (consolidated Marion County Circuit Court Case Nos. 03 C10639 and 03 C10640). The Marion County Circuit Court also on December 14, 2004, granted to plaintiffs summary judgment on the issue of liability for money damages under two different theories:

1. Plaintiffs can recover from PGE the unlawful charges, pursuant to ORS 756.185; and

2. All unlawful charges collected by PGE must be returned under restitutionary principles of money had and received.

The class members, who include all present and former PGE ratepayers who have paid the unlawful Trojan profits, have a vested right to the return of those funds or to damages in an amount based on those funds. The OPUC does not have authority to remove or impair this right, retroactively, by changing the amounts which are due in restitution or indirectly acting in a legislative manner to eliminate vested rights. "Retroactive application of a change

in the law may be invalid for depriving a litigant of due process in the literal sense of an opportunity to adjudicate an existing claim * * * ." ***Hall v. Northwest Outward Bound School, Inc.***, 280 Or 655, 661-663, 572 P2d 1007, 1011 (1977).

Even if ratemaking is considered a quasi-legislative function, a legislative body cannot change vested rights. ***State ex rel. Bayer v. Funk***, 105 Or 134, 209 P 113, 25 ALR 625 (1922). The general rule is that substantive legal rights may not be retroactively impaired, once vested, which is "when it is actually assertable as a legal cause of action or defense," ***Hall v. A.N.R. Freight System, Inc.***, 717 P2d 434 (Ariz 1986). A cause of action which has accrued, and in fact reached success at summary judgment, is such a vested right which cannot be destroyed.

> [T]heir right to such compensation, having accrued while the act was in force, cannot be destroyed by subsequent legislation without a violation of the rights guaranteed by the 14th Amendment.

Ettor v. City of Tacoma, 228 US 148, 150, 33 SCt 428, 428 (1913).

An Oregon case on point is ***Fisk v. Leith***, 137 Or 459, 299 P 1013 (1931), which holds that an electric utility's cause of action for interference with its statutory right to engage in business could not be destroyed by subsequent legislation. The plaintiff was an electric utility claiming that it was entitled to operate without competition under the "pioneer utility" statute. The Legislature repealed the statute while the action was pending. The Oregon Supreme Court held the utility was entitled to seek damages for the unlawful competition which had existed under the state of the law until the statute was repealed as the utility's rights to sue under then-existing law had vested:

> In the instant case the statute repealed conferred upon the plaintiff a right as distinguished from a remedy. It protected the plaintiff public utility company from competition by other public utilities in the same territory until the Public Service Commission issued to them a certificate of public convenience and necessity. This statutory right thus to engage in business was a property asset--a vested

> right--and, a cause of action having accrued by reason of interference therewith, such could not be destroyed by subsequent legislation. The cause of action which accrued prior to the repeal of the statute is property in the same sense in which tangible things are property, and its destruction would amount to the taking of property without due process of law. COOLEY'S CONSTITUTIONAL LIMITATIONS (8th Ed) vol II, p 756.

137 Or at 463.

Further, the class action plaintiffs cannot be deprived of their remedies for the unlawful overcharges, as such deprivation would violate the Contract Clause of the Oregon and U.S. Constitutions. A legislature cannot repeal a law or pass a retroactive law that impairs obligation of contracts or interferes with vested contract rights. Oregon Const. Art. 1, § 21; US Const. Art. 1, § 10, cl 1.

Hughes v. State, 314 Or 1, 13-14, 838 P2d 1018 (1992), instructs that there is a two-part test in determining whether state action violates the impairment of contract clause. First, it must first be determined whether a contract exists to which person asserting an impairment is a party. Second, it must be determined whether state action impairs the obligations of that contract. In this case, all overcharged ratepayers have an implied-contract right to have the illegal charges they paid to PGE returned to them. Their right to money had and received has matured, and the legal right has been determined upon summary judgment in their favor. Any action by the Commission seeking to retroactively eliminate or reduce the amounts owed by PGE to its customers most certainly impairs these contractual rights. Thus, any such Commission action would be invalid under the Oregon and U.S. Constitutions.

Further and additionally, the scoping order seeks to retroactively eliminate a common law remedy currently available to the Class Action Plaintiffs and the class members in violation of Oregon Constitution, Article I, § 10, which guarantees those remedies which existed at common law and were established when Oregon adopted its constitution. See

generally, ***Smallwood v. Fisk***, 146 Or App 695, 934 P2d 557 (1997). The contract-type remedy of an action for money had and received for sums taken under a reversed order were historically established at the time the Oregon Constitution was adopted. Any interference with the class members' rights to recover the money taken under the DR 10, UE 88, or UM 989 orders thus violates Article I, § 10 of the Oregon Constitution.

IX. SEEKING TO ESTABLISH A NEW EVIDENTIARY BASIS FOR THE UNLAWFUL CHARGES WOULD CONSTITUTE ILLEGAL RETROACTIVE RATEMAKING.

The Commission and utilities often contend that Oregon law does not allow "retroactive ratemaking" and that this bar somehow prevents the Commission from returning previous unlawful charges to ratepayers. The doctrine, if applicable in Oregon, does not have that consequence, because an OPUC rate order, if challenged in the courts, is only provisionally lawful until the courts have issued their final decisions.

Here, the Oregon courts have issued their final decisions, concluding as a matter of law that the rates charged by PGE during the Trojan Return on Investment Period (TRIP) were unlawful. The Commission itself in OPUC Order No. 04-597 characterized the decisions as establishing that the "Commission had exceeded its legislative authority" in allowing PGE to charge ratepayers for a return on Trojan investment during that period. An order which exceeds the legislative authority of an agency, and which is found to be unlawful by courts, is *void ab initio*.

A. THE UNLAWFUL CHARGES FOR TROJAN RETURN ON INVESTMENT WERE *VOID AB INITIO*.

Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon, 154 Or App 702, 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (November 19, 2002) [hereinafter ***CUB/URP v. OPUC***] determined that the charges for return on investment for Trojan were

unlawful. Once the courts overcame the *prima facie* validity, those charges under OPUC rate orders were unlawful to the extent they violated ORS 757.355. OPUC Order No. 95-322 (and subsequent orders) could never have lawfully included charges based on a return on investment for Trojan, as such charges have been unlawful in Oregon since 1978. As the Court of Appeals held: "* * * *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* * * *." Thus, the charges were in excess of any and all lawful charges, and PGE in charging those rates engaged in conduct unlawful under ORS 757.355.

The fact that PGE continued to charge those rates, pending the appeal of OPUC Order No. 95-322, does not make the charges retroactively lawful. It means that it was lawful for PGE to collect the money **at the time**. It does not mean it is lawful for PGE to now **keep** the money, after those specific charges (Trojan return on investment) have been ruled unlawful by the courts. Instead, the situation only illustrates that PGE collected the amounts at its own peril, since it was aware that the appeal sought to "modify, vacate or set aside" the "conclusions of law or order" pursuant to ORS 756.580(1) and 756.598(1).

Thus, the unlawful charges are now void *ab initio*. As one court has held, "rates which are found to be excessive are then considered to have been illegal from the outset, and are not considered to have been illegal only as of the date on which the court has found them to be so." ***State ex rel. Nantahala Power & Light Co.***, 313 NC 614, 332 SE2d 397, 472 (1985). *Accord*, ***PSC Nevada v. Southwest Gas Corp.***, 99 Nev 268, 662 P2d 624, 627-28 (1983).

When OPUC orders are overturned on appeal, they are considered *void ab initio* and do not provide a lawful basis for either punishing a utility for noncompliance with the unlawful

order or for keeping the unlawful charges collected from ratepayers during the pendency of the appeals process.

> Obviously, orders entered by the commissioner, like statutes enacted by the legislature, are presumed valid. The maintenance of law and order require nothing less. But that does not mean that a decision by a court which holds an order or a statute unconstitutional operates only prospectively from the date of its pronouncement and leaves the past untouched. * * *. **It was impossible for the order to have operated upon a split-second basis. It was either totally valid or totally invalid.**

State v. Portland Traction Co., 236 Or 38, 47-48, 386 P2d 435 (1963) (emphasis added) [hereinafter ***Portland Traction IV***, to distinguish it from the related cases arising from the OPUC order requiring continued streetcar service across the Willamette River in Portland].[6] There, the OPUC's original order requiring continued service was issued January 25, 1958, and the OPUC sought to impose penalties on the utility for its refusal to obey the order. This Court nearly 6 years later (October 23, 1963) found the original order invalid and refused to allow the company to be penalized for failure to comply with a substantively invalid order during the intervening 6 years.

This outcome had been presaged in ***Portland Traction II***, *supra*, which endorsed the view that statutes giving validity to orders until overturned are procedural and meant to afford orderly review. It specifically relied upon a full discussion of ***Gulf, C. & S. F. Ry. Co. v. American Sugar Refining Co.***, 130 SW2d 1030 (Tex App 1939), which addressed a statute very similar to Oregon's, 222 Or at 649-50, 352 P2d at 558-59, and adopted the view that due process requires that a party challenging an order of the OPUC must be able to obtain judicial

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6. This was the last case in the series of four. ***Morgan v. Portland Traction Co.***, 222 Or 614, 331 P2d 344 (1958) [***Portland Traction I***]; ***Portland Traction Co. v. Hill***, 222 Or. 636, 352 P.2d 552, 353 P.2d 838 (1960) [***Portland Traction II***]; ***Portland Traction Co. v. Hill***, 231 Or. 354, 372 P.2d 501 (1962) [***Portland Traction III***]; and ***State v. Portland Traction Co.***, 236 Or. 38, 386 P.2d 435 (1963) [***Portland Traction IV***].

review and that such an appeal must be capable of affording "full relief." Such relief would not be afforded, "if the railroads are bound by the rates which have been successfully attacked in the method prescribed b y statute pending the time required for the court to determine their invalidity." 222 Or at 651, 352 P2d at 559.

The meaning of ORS 757.355 did not flip-flop when the courts spoke [***Portland Traction IV***, *supra*]. Because the Commission did not have authority in 1995 to allow PGE to charge Trojan profits to ratepayers, OPUC Order No. 93-1117 (DR 10)[7], the related portion of the Order No. 95-322 and all subsequent orders allowing the prohibited charges were *void ab initio*. The fact that ratepayers obeyed ORS 757.225 in an orderly fashion during the appeal period does not mean that the OPUC's *ultra vires* interpretation of ORS 757.355 was substantively lawful for some period of time, allowing PGE to keep the money it collected before reversal.[8]

The status of an order being lawful and binding, while subject to reversal, is fundamental to orderly administration of justice. ***Portland Traction IV*****.** Decisions remain in force *while* appealed. "[T]his court has consistently reaffirmed the majority opinion in ***Day v. Holland***, [] to the effect that an appeal to this court from the circuit court does not vacate or nullify the

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7. The OPUC addressed the lawfulness of charging Trojan profits to ratepayers in one, and only one order: OPUC Order No. 93-1117 (August 9, 1993), which was the final order in the DR 10 declaratory ruling proceeding, held pursuant to ORS 756.450. 145 PUR4th 113 (1993). There, the OPUC issued a final, appealable declaratory ruling on PGE's request for a legal determination on the application of ORS 757.355 to treatment of Trojan nuclear plant costs following its permanent closure. OPUC Order No. 93-1117 (DR 10), was summarily affirmed by the Marion County Circuit Court (Barber, J.) in 1994, Marion Circuit Court Nos. 94C 10372 (CA A86940) and 94C 10417 (CA A86973).

8. The Commission acknowledges that "the orders in DR 10 and UE 88 were reversed solely on the grounds that the Commission had exceeded its legislative authority." OPUC Order No. 04-597 (October 18, 2004), p. 5.

decree sought to be reviewed." ***Malik v. Malik***, 271 Or 183, 186, 530 P2d 1243, 1245 (1975). But decisions in force pending appeal are nullified upon reversal.

> In Oregon, judgments appealed from are considered final until reversed. ***Porter v. Small***, 62 Or 574, 120 P 393, 124 P 649, 40 LRA, NS, 1197 (1912); ***Day v. Holland***, 15 Or 464, 15 P 855 (1887).

Western Bank v. Morrill, 246 Or 88, 96 424 P2d 243, 247 (1967). OPUC decisions also are final until reversed: "Unless set aside in the manner provided by the act, the order of the commission is in effect." ***Crown Mills v. Oregon Electric Railway Company***, 144 Or 25, 33 P2d 214 (1933). In both cases, the word "until" does not mean that the original decision or judgment is in effect permanently during the pendency of the appeals ("until reversed"). It means that, once reversed, the original decision or judgment is *void ab initio*.

B. UPON REMAND OF AN UNLAWFUL ORDER, THE COMMISSION CANNOT NOW ACCEPT NEW EVIDENCE IN ORDER TO ESTABLISH NEW RATES RETROACTIVELY.

Left with no legal basis for charging Trojan profits to ratepayers under the orders adopted in DR 10, UE 88, and UM 989, PGE and the OPUC Staff now seek to offer new evidence for the purpose of providing some other basis for charging those same amounts of money to ratepayers. The Commission in OPUC Order No. 04-597 has concurred with this strategy. But allowing such evidence, and adopting new findings based on such evidence, would constitute classic "retroactive ratemaking."

The Commission now proposes to allow PGE to introduce new evidence to establish a basis for charging new or different costs to ratepayers than was authorized by any previous OPUC rate order and to have those new or different costs recognized in rates for a period that occurred in the past (the Trojan Return on Investment Period). This is the classic "retroactive ratemaking" that is barred under the doctrines espoused by this Commission.

> In substance, the prohibition against retroactive ratemaking precludes inclusion in rates of costs related to a past service, unless expressly authorized by the legislature. Letter of Advice dated March 18, 1987, to Charles Davis, Public Utility Commissioner (OP-6076). ORS 757.140(2) and ORS 757.259 are express legislative exceptions to that principle.

Attorney General Opinion OP-6454 (1993).[9]

X. CONCLUSION.

This proceeding to date has been conducted pursuant to a scoping order which violates legal precepts about what issues are cognizable in a remand, after the courts have found the original action to have been unlawful. The only witness to offer legally cognizable testimony [accepted by the ALJ] was Jim Lazar, who quantified the unlawful charges for Trojan profits to ratepayers during the 5.5-year period and the sum that now must be returned to those who paid the unlawful charges.

The Commission should rule that the value, as of December 31, 2005, of the unlawful charges imposed upon PGE ratepayers during the 5.5-year period is $744 million or at least the lesser figure of $625 million documented by Mr. Lazar. If the Commission wishes to maintain its position that "there is no statutory authority by which the PUC could have awarded a refund of rates already paid by customers," then it should conclude this proceeding with the quantification of the unlawful charges, as stated above. Ratepayers would then obtain compensation for these unlawful charges by means of class action pursuant to ORS 756.185 and the common law, as is already being pursued in consolidated Marion County Circuit Court Case Nos. 03 C10639 and 03 C10640.

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9. The Oregon courts subsequently found that ORS 757.140(2) did not apply to return on investment for the closed Trojan plant, and ORS 757.259 was not applicable at all.

If the Commission insists upon its present unlawful course of retroactive ratemaking in this proceeding, then it should at a minimum reject the erroneous procedural rulings of the ALJ and reconvene a fair evidentiary hearing, because the taking of evidence, consideration of motions, and evidentiary hearing was conducted with procedural irregularity and clear bias in favor of PGE and OPUC Staff and against all other contesting parties.

Dated: November 9, 2005

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing OPENING BRIEF OF UTILITY REFORM PROJECT, ET AL. AND THE CLASS ACTION PLAINTIFFS by email to the email addresses shown below, which comprise the service list on the Commission's web site as of this day.

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