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 BRIEF - PHASE III**

Portland General Electric Company ("PGE") submits this response brief in Phase III of these consolidated Trojan remand proceedings.

This phase of the proceeding concerns the settlement reached between PGE, Staff and the Citizens' Utility Board ("CUB") in 2000 (the "settlement"), and the accounting order and proposed tariff implementing the settlement. In Order Nos. 00-601 and 02-227 the Commission approved the accounting application and implementing tariffs and rejected a variety of URP's arguments. One of URP's arguments was addressed in Phase I, namely, whether customers were harmed during the 5.5-year period from 1995 to 2000 by rates set based upon a "return on" Trojan. URP's remaining arguments against the settlement are the subject of Phase III.

In this phase, URP and the Class Action Plaintiffs[1] offer no new evidence or basis for the Commission to abandon its previous conclusions with respect to the settlement. Instead, URP

[1] Unless otherwise noted, "URP" is used to refer to both URP and the Class Action Plaintiffs.

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relies on a series of arguments the Commission has rejected in prior proceedings or on ill-founded legal assumptions:

- URP claims the settlement provides "an indirect return on" when the Commission concluded it "did not directly or indirectly allow 'interest' or 'profit' on the Trojan balance." (Order No. 02-227 at 12).
- URP's argument against the FAS 109 asset reflects an attack on the stand-alone method of ratemaking, a challenge the Commission previously rejected in UCB 13 and UM 1074 and which is at odds with the Commission's position that "PGE's accounting treatment of the FAS 109 asset and its replacement asset is reasonable and appropriate." (Order No. 02-227 at 14.)
- URP's claim that the settlement expropriates the final NEIL distribution contradicts its own expert's admission that the net benefit tests assume customers were entitled to 100% of those proceeds; *see* Order No. 02-227 at 14 ("We conclude that the Settlement did not expropriate NEIL distributions from customers, as URP asserts").
- URP's position that PGE is required to wait to recover the remaining Trojan balance until 2011 without interest has no legal basis and would deny PGE full recovery of its Trojan investment.

We respectfully request that the Commission affirm its determinations in UM 989 (Order Nos. 00-601 and 02-227) that approval of PGE's accounting application and proposed tariffs implementing the settlement provided benefits to PGE's customers, was in the public interest, and resulted in fair and reasonable rates.

I. INTRODUCTORY ISSUES

URP goes to great lengths explaining the alleged impact of undoing the settlement approved in UM 989. URP Op. Brf. at 5-8. This portion of URP's brief is premised on two misunderstandings. First, it ignores the central issue in this phase: was the Commission's decision to approve PGE's accounting application and proposed tariffs justified? It assumes, without support, that the Commission's decisions in UM 989 (Order Nos. 00-601 and 02-227) were wrong and must be undone. As shown in PGE's and Staff's opening briefs, these orders were correct and supported by adequate findings of fact and conclusions of law. Accordingly, URP's proposal to undo the settlement is without foundation.

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Second, URP mischaracterizes the purpose of UM 989. URP Op. Brf. at 1-2. URP assumes the docket was a remand proceeding from the Court of Appeals' 1998 decision reviewing the UE 88 final order. It was not. When the Commission opened the UM 989 docket, the UE 88 appeal was still pending in the Oregon Supreme Court. UE 88 was not remanded to the Commission until 2004, almost four years after Order No. 00-601 and two years after Order No. 02-227. The purpose of the docket was to consider a settlement that removed the remaining Trojan balance from PGE's books, not to address the remand of UE 88.

Finally, URP mischaracterizes Staff's position at the hearing. URP Op. Brf. at 7-8. Remarkably, URP claims that "Staff witness, Judy Johnson, expressed no objection to [URP's] proposal to reverse the rate treatments adopted in OPUC Order No. 02-227, as long as all elements in OPUC Order No. 02-227 were reversed and accounted for." *Id.* As Staff's witness noted at the hearing, URP's line of questions was confusing and ambiguous, at best. Staff's witness submitted written testimony which pointed out that URP "cherry picked" portions of the settlement. Staff/500, Johnson/2-3. Staff's point in written testimony was that *if* the settlement was undone, all aspects of the settlement should be reversed, including parts of the settlement that benefitted customers, namely the removal of the Trojan balance and the FAS 109 asset. *Id.* At hearing, after the confusing series of questions URP cites in its brief, Staff's witness confirmed that she was not agreeing with Mr. Lazar's analysis or URP's position that the Commission should reject the settlement.

> "Q. But are you agreeing with Mr. Lazar's analysis? Is it the intent of line 13 through 22 of your testimony on—in Exhibit 600, is the intent of that to agree with Mr. Lazar's analysis?
>
> "A (Staff Witness Ms. Johnson): Not at all."

Hearing Trans. at 90, (July 10, 2008).

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II. ISSUE #1 – PGE'S REMAINING UNDEPRECIATED INVESTMENT IN TROJAN AS OF SEPTEMBER 30, 2000, WAS $180.5 MILLION

URP claims that the Scoping Order[2], by limiting this issue to "evidence regarding the actual Trojan balance as of October 1, 2000," precluded URP from presenting any evidence contrary to what was shown on PGE's books. URP Op. Brf. at 9. URP is wrong. The only limitation placed on URP was the restriction that it not address issues already litigated in Phase I, namely any harm to customers from rates set based upon a "return on" Trojan during the 5.5-year period from 1995 to 2000. This restriction was necessary and appropriate to avoid double counting.

> "Whether ratepayers paid too much from 1995 to 2000 is being addressed in Phase I of these proceedings. If the answer to that question is yes, the Commission will order PGE to issue refunds to address this overpayment as part of the Phase I analysis. To carry forward that offset to also reduce the starting point for the Phase III analysis would result in doubly compensating ratepayers for any overpayment during the 1995 to 2000 period."

Scoping Order at 4.

Next, URP continues its gamesmanship with the applicable date of the Trojan balance. URP Op. Brf. at 9. Originally, the Scoping Order asked for the undepreciated Trojan balance as of October 1, 2000. URP pointed out that the Trojan balance as of that date was zero because the effect of the settlement was to remove Trojan from PGE's books effective as of September 30, 2000. At the July 10 hearing, the ALJs corrected this error and reformulated the question to ask for the undepreciated balance as of September 30, 2000. Hearing Trans. at 133 (July 10, 2008). URP's brief ignores this change and continues to argue that the undepreciated balance as of October 1, 2000, was zero.

Finally, URP attempts to confuse issues that were the topic of Phase I—whether customers were harmed by rates set based on a "return on" the Trojan balance and, if so, the amount of harm—with the issues in Phase III. In Phase I, URP's witness objected to PGE's use of the declining Trojan balance during the 5.5-year period. URP appears to believe this declining balance

[2] Ruling dated February 22, 2008.

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issue is somehow relevant to Phase III and that customers were not given the benefit of higher than expected loads. URP Op. Brf. at 10-11.

As a threshold matter, URP is wrong that the amount of Trojan depreciation was declining during the 5.5-year period. Table 3, from Staff-PGE/200, Busch-Hager-Tinker/20, shows annual balances for Trojan during the 5.5-year period.

Table 3 – Trojan Balances and Activity Since UE 88

Period	Activity[1]	Balance
4/1/1995	--	$340,162,435
4/1/1995 – 12/31/1995	$(39,139,295)	$301,023,140
1/1/1996 – 12/31/1996	$(25,562,922)	$275,460,218
1/1/1997 – 12/31/1997	$(23,697,173)	$251,763,045
1/1/1998 – 12/31/1998	$(22,560,925)	$229,202,120
1/1/1999 – 12/31/1999	$(26,519,186)	$202,682,934
1/1/2000 – 9/30/2000	$(22,197,125)	$180,485,809

[1] Activity includes amortization, TIRA, retirements, salvage costs, etc. for the period 4/1/95 to 12/31/95, activity reflects the offset of $20.2 million pre-tax per order 95-1216.

The second highest annual depreciation amount occurred in 1999, toward the end of the period. The only higher amortization year was 1995, which included a one-time $20 million amortization or offset against a portion of the gain from the Boardman sale.

More importantly, URP misunderstands how the Trojan balance was amortized. The Trojan balance was amortized based on the TIRA mechanism adopted in UE 88, which was based on actual utility revenues for the year multiplied by the rate case ratio of the Trojan revenue requirement compared with the overall revenue requirement.

> "In UE 100 the Trojan investment related revenues of $59 million, the ratio of that revenue requirement to the revenue requirement in the total of UE 100, not that I can remember what that base is, but it's something like a billion dollars. The ratio of those two represented the percentage of our revenues that was assigned as being incremental revenues for Trojan. And I believe that the ratio was 6.11%."

Hearing Trans. (July 11, 2001) at 54; Order No. 95-322, Appendix D at 6-10.

The ratio of the Trojan revenue requirement to the overall revenue requirement was

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set in rate cases and not adjusted until the next rate case. URP's witness appears to be concerned that customers did not receive the benefit when loads were higher than expected. URP Op. Brf. at 11 (citing URP/300, Lazar/2-3). In fact, the TIRA mechanism ensured that customers received the benefit of higher than expected loads by using actual revenues and the rate case ratio to depreciate the Trojan balance. When loads were higher than expected, revenues increased, thereby benefiting customers through accelerated amortization of the Trojan balance.

III. ISSUE #2 – THE RATES APPROVED IN ORDER NO. 02-227 DO NOT PROVIDE PGE WITH AN INDIRECT "RETURN ON" THE REMAINING UNDEPRECIATED INVESTMENT IN TROJAN

URP has little new to say on this topic. URP's argument relies on two fundamental misconceptions.

First, according to URP, the settlement is measured only by comparison with continued recovery of "return on" Trojan through 2011. URP Op. Brf. at 13. That is untrue. The asset-based net benefit test showed that customers received a substantial net benefit and made no assumptions regarding future revenue requirement amounts. Hearing Trans. at 57.

Second, URP continues to tout the Wimpy adage argument—no one would trade a $300 bond due in 2012 without interest for a $300 bond due in 2012 bearing 7% interest. URP Op. Brf. at 14. The linchpin of this argument is the mistaken assumption that PGE was legally required to wait for return of its investment until 2011 without any interest. As we noted in our Opening Brief, there is no legal basis for this position and URP's witness admitted as much. Hearing Trans. at 99 ("I'm not aware of anything under Oregon law that would regulate the Oregon commission as to what term of amortization it would approve.") Despite the invitation of URP's witness at hearing, URP declined to provide any legal authority on this point in its brief. It is therefore wrong to compare the Trojan balance with a zero interest coupon bond payable in 2011.

URP's Wimpy's adage argument reveals the real source of its complaint. It is not that the settlement gives PGE a "return on" Trojan, but rather that it gives PGE full recovery of its

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investment. URP was against the "return of" the Trojan investment in 1995 and it is still advancing that fight now. Thus, while the undepreciated balance was $180.5 million, URP claims it should have been lower because PGE was required to recover the investment over time without any interest according to URP. This is why Mr. Lazar claims "the entire trade is, from a ratepayer perspective, absurd." URP/500, Lazar/7. PGE's undepreciated investment in Trojan of $180.5 million is really worth only "$106 million [in present value terms] (at PGE's post-tax authorized ROI), or $87 million (at PGE's pre-tax authorized ROI)," according to Mr. Lazar. URP/200, Lazar/11. URP believes PGE was entitled to recovery of only a fraction of its undepreciated investment in Trojan. Because URP compares the settlement to a scenario in which PGE is denied full recovery of its Trojan investment, the analysis presented by URP provides an unreasonable baseline against which to measure the effects of the settlement.

The flaw in this argument is the assumption that PGE must wait for the return of its investment until 2011. Oregon law expressly provides for recovery of amounts "the commission finds represent undepreciated investment in a utility plant, including that which has been retired from service." ORS 757.140(2). URP's position against "return of" the Trojan balance was also rejected by the Court of Appeals, which concluded that ORS 757.140(2) authorized the recovery of the undepreciated Trojan balance. *Citizens' Utility Board v. OPUC*, 154 Or App 702, 713, 716, 962 P2d 744 (1998). URP offers no legal or factual basis for its flawed assumption.

IV. ISSUE #3 – THE FAS 109 LIABILITY AND ITS REPLACEMENT REGULATORY ASSET ARE CONSISTENT WITH STANDARD ACCOUNTING AND RATEMAKING PRINCIPLES

URP's arguments regarding FAS 109 reflect a series of misstatements and misunderstandings. First, URP's contention that there is "no proof that PGE ratepayers in the early Trojan years were somehow benefitting from accelerated depreciation or other tax features applicable to the Trojan investment" is simply wrong. URP Op Brf. at 19-20. The factual record is clear that the Commission set rates using the stand-alone approach and customers received the

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benefit from accelerated depreciation in the early years of Trojan's service life:

> "with respect to depreciation of Trojan, PGE practiced flow-through accounting between the opening of the plant and the enactment of FAS 109. The result of this accounting treatment was to immediately lower PGE's effective tax rate through accelerated depreciation, with the benefit of that lowered tax rate passing through to customers in the form of lower rates."

URP Exhibit 603.

> "Q. Mr. Lazar claims there's no evidence that customers benefitted from accelerated tax deductions in the early years of Trojan's service life. Is that accurate?
>
> "A. No. In the early years of Trojan's service life, customers benefitted from a reduction in PGE's stand-alone tax expenses because of the accelerated depreciation the Federal Tax Code affords. This lowered the tax expense included in rates, reducing the overall rate customers paid. As those accelerated tax deductions reversed in later years, the tax deductions associated with the investment are less than they otherwise would have been. On a stand-alone basis, PGE's tax expense in those later years would have been higher. The FAS 109 asset reflects this fact."

PGE/7700, Tinker-Schue-Hager/2-3.

URP's sole basis for challenging the FAS 109 asset is its desire to capture consolidated tax benefits and pass those benefits through to customers. Thus, URP repeatedly asked PGE's witnesses whether in 2000 PGE expected to pay higher taxes to taxing authorities as a result of the accelerated depreciation applicable to Trojan.

URP did not raise this precise argument in the initial UM 989 proceeding, but we know the Commission would have rejected it because URP made the same argument in Commission dockets UM 1074 and UCB 13. In both dockets, URP sought to change the Commission's stand-alone approach to take into account for ratemaking purposes actual tax payments to taxing authorities, not the utility stand-alone tax payments to parent companies. The Commission in two separate proceedings categorically rejected URP's argument:

> "For ratemaking purposes, the Commission sets PGE's rates to reflect the cost of the company's regulated operations. That is, in a rate

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> setting proceeding, PGE's rates are set based on its own revenues, costs and rate base for a given test year. Income taxes are calculated using PGE's net operating income. The tax effects of Enron's other operations are ignored for purposes of setting rates. This is consistent with standard ratemaking principles. Calculating PGE's costs, including income taxes, for ratemaking on a stand-alone basis protects PGE's customers from the financial difficulties experienced by Enron's other subsidiaries."

UM 1074, Order No. 03-214, Appendix A at 2 (April 10, 2003).

> "URP misapprehends how we set rates for a utility that is held by a holding company. To protect the customers' interests, we view utility operations separately from the financial operations of the parent company. That means that the expenses used to calculate rates are solely those of the utility. For taxes, we look at the utility as a stand-alone enterprise. We do not explore the holding company's tax liability, only the regulated utility's liability as though it were operating without the holding company. The benefits to customers are obvious. Our policy prevents the holding company from transferring unjustifiable expenses to the utility or taking actions that would improperly inflate the utility's cost of capital. It also prevents the parent from imposing costs on ratepayers by using utility assets for purposes unrelated to customer needs."

UCB 13, Order No. 03-401 at 6 (July 9, 2003).[3]

Under the Commission's stand-alone ratemaking methodology, the key question is not URP's mantra of whether PGE's actual tax payments to the government would have been higher, but rather whether PGE's stand-alone tax expense would have been higher. The answer to that question is unequivocally yes. URP Exhibit 603; PGE/7700, Tinker-Schue-Hager/2-3.

URP's claim that SB 408 applies in this proceeding is wrong. URP Op. Brf. at 20-21. The UM 989 proceeding concerned the Commission's review of a proposed settlement and implementing accounting application. The Commission decision should be based on information available to the Commission and the law at the time.

> "This phase of the remand proceedings involves reconsideration of URP's challenges to the rates implementing the settlement reached in 2000. To determine whether the Commission's decisions approving the settlement and rejecting URP's challenges to the rates

[3] Order No. 03-401 was reversed by the Circuit Court of Marion County on other grounds. On remand, URP declined to pursue the docket further. UCB 13, Order No. 05-198 (April 26, 2005).

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> implementing the settlement were lawful and supported by substantial evidence, the Commission must look at the facts as they existed at the *time the rates went into effect*."

Scoping Order at 5 (emphasis in original) (Feb. 22, 2008). SB 408 was enacted in 2005, well after the UM 989 docket closed.

URP urges a retroactive application of SB 408 that cannot be squared with the law or the Legislature's intent. Such retroactive application of laws is prohibited unless the Legislature evidences a clear intent to the contrary. *See, e.g., Joseph v. Lowery*, 261 Or 545, 547, 495 P2d 273 (1972). Here, the Legislature expressed no such intention for SB 408 to apply retroactively. In fact, the law is clear that the automatic adjustment clause in ORS 757.268 applies only to "taxes paid" on or after January 1, 2006. SB 408, § 2. The Legislature never intended SB 408 to be applied to accounting applications and proposed tariffs submitted and approved well before the law's enactment and the effective date of its automatic adjustment clause.

URP does not dispute that the FAS 109 asset was kept consistent with GAAP, subject to independent audit, and reflected in accounting journal entries. PGE/7500, Tinker-Schue-Hager/6. Nor does URP seriously dispute that the Commission's governing ratemaking methodology was the stand-alone method that established rates based upon the utility's stand-alone costs (including tax expense). These undisputed facts are dispositive here.

V. ISSUE #4 – THE SETTLEMENT DID NOT INAPPROPRIATELY TRANSFER THE PROCEEDS FROM THE NEIL POLICY

URP's argument throughout these proceedings has been that customers were entitled to 100% of the NEIL final distribution and that the settlement therefore diverted 45% of the proceeds from customers. However, this argument misses the entire point of the settlement and the net benefit analysis. As part of the settlement, customers were given the full value of the NEIL proceeds and permitted to use 45% of those proceeds to receive the overall benefits of the settlement. Thus, both net benefit tests assumed that customers were entitled to 100% of the NEIL final distribution. The net benefit tests showed that, with this most conservative assumption, customers received a

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substantial net benefit from the settlement of between $16.4 and $18.6 million.[4]

At the hearing, URP's witnesses acknowledged that the net benefit tests make precisely the assumption URP advocates with respect to NEIL:

> "Q: So when judging the net benefit of this settlement, the parties adopted the treatment that but for the settlement, 100% of the NEIL premiums would have been payable to customers; correct?
>
> "A. (URP witness Mr. Lazar) Yes."

Hearing Trans. at 104.

Throughout these UM 989 proceedings PGE and Staff have identified that customers, absent the settlement, might not have received 100% of the final NEIL distribution. A number of factors contributed to this uncertainty: (1) PGE bore the risk that forecasted premiums would be insufficient to cover actual premiums (Staff-PGE/200, Busch-Hager-Tinker/16-17); (2) PGE bore the risk of NEIL's claims performance (*id.*); (3) the final NEIL distribution was a one-time event between rate cases that might not be captured and returned to customers (Staff/500, Johnson/4-5); and (4) the Commission had considerable discretion regarding distribution of the final NEIL settlement payment (*id.*). The removal of that risk means the net benefit of the settlement is actually greater than the $16.4 to $18.5 million range which assumed customers would have received 100% of the NEIL proceeds absent the settlement. URP's argument regarding customers' entitlement to the NEIL proceeds pertains to the issue of how much greater than the $16.4 to $18.5 million range was the net benefit the settlement provided to customers. It does not undermine the fundamental conclusion that the settlement provided customers with at least a $16.4 to $18.5 million net benefit.

[4] *See* PGE/7600, Tinker-Schue-Hager/11 ("Mr. Lazar appears to focus on one aspect of the settlement—NEIL—without recognizing the greater overall benefits that flowed to customers."); Order No. 02-227 at 15 ("URP seems to misunderstand how the net benefit analyses treat the NEIL distributions. The analyses adopt the perspective most favorable to customers, assuming that without the Settlement, customers would get 100 percent of NEIL distributions. Consistent with this assumption, the analyses assume that the 45 percent interest in NEIL that the Settlement assigns to PGE shareholders represents a loss to customers. Even under this scenario, the analyses show a substantial net benefit to customers").

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Finally, URP's citation to the Circuit Court opinion reviewing Order No. 02-227 is unavailing for at least two reasons. The Circuit Court declined to reverse the Commission's decision based on the treatment of the NEIL premium, deferring to the Commission's expertise on such technical matters. Marion County Circuit Court Opinion and Order at 6 (Nov. 7, 2003). In any event, the Court of Appeals vacated the Circuit Court's decision. *URP v. OPUC*, 215 Or App at 376.

VI. ISSUE #5 – THE RATES ADOPTED IN ORDER NO. 02-227 WERE JUST AND REASONABLE

URP makes a series of unsubstantiated points in this section of its brief. We address each of these arguments below.

A. THE NET BENEFIT ANALYSES ARE SOUND

URP complains that the revenue requirement net benefit analysis assumes PGE would continue to earn a "return on" Trojan. URP Op. Brf. at 27. As noted above, this is a recast of the argument URP made to the Court of Appeals and lost, namely, that PGE should not be permitted to recover the full value of its Trojan investment. URP has no legal authority for its position that PGE must wait to recover its Trojan investment through 2011 without interest. The applicable statutes[5] all point in the opposite direction. In any event, the asset-based net benefit test reaches the same conclusion: customers received a substantial benefit from the settlement. That test, because it relies solely on actual balances, not revenue requirement forecasts, provides the more certain test of the settlement.

> "The first analysis was based on projected revenue requirements of the various components of the settlement. The second analysis was based on the existing balances of the components of the settlement as of September 30, 2000. The analyses complemented one another and provided alternative viewpoints, which served as independent checks on one another. While the revenue requirement net benefit analysis

[5] ORS 756.040(1) (the Commission is required to fairly balance the interests of utility customers and shareholders); ORS 757.140 (the Commission may authorize recovery of amounts it "finds represent undepreciated investment in the utility plant, including that which has been retired from service"); ORS 757.120-757.140 (the Commission has authority to determine and establish appropriate utility accounts and depreciation rates).

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> did assume a return on Trojan in the absence of the settlement, the asset balance net benefit analysis did not. Both approaches yielded similar results, with customers receiving a net benefit from the settlement of between $16.4 and $18.5 million."

PGE/7600, Tinker-Schue-Hager/13.

B. PGE USES THE CORRECT INTEREST RATE

URP continues to use the wrong interest rate—the pre-tax interest rate, not PGE's authorized cost of capital, which is the standard the Commission uses. URP Op. Brf. at 27. PGE/7700, Tinker-Schue-Hager/1.

URP claims PGE selectively uses the pre-tax cost of capital. URP Op. Brf. at 28. URP's claim is wrong. PGE used the pre-tax cost of capital when developing revenue requirement figures because revenue requirements must include an income tax gross-up amount. What PGE has criticized is Mr. Lazar's use of pre-tax cost of capital as the appropriate interest and discount rate. Mr. Lazar's approach violates the Commission practice of using the utility's authorized cost of capital as the interest rate applicable to amounts owed by or to customers.

C. URP'S CWIP ARGUMENT IS UNPERSUASIVE

URP's CWIP argument adds nothing new. URP Op. Brf. at 29-31. As with the other issues in Phase III, URP offered no new evidence or basis for the Commission to change its position on this topic. *See* Order No. 02-227 at 17 ("We conclude that URP's claim that the CWIP should be disallowed in this docket is unfounded * * *. URP's claim also reflects a misunderstanding of the net benefit test in UE 88, and is inconsistent with the write-offs the Commission ordered in Order No. 95-322"). URP's opening brief fails to address the fact that even if the Trojan balance included $10.3 million in CWIP in 1995 (a conclusion we do not accept for the reasons specified in our Opening Brief) that balance would have been substantially lower in 2000. PGE/7600, Tinker-Schue-Hager/5.

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D. THE NET BENEFIT TEST MADE REASONABLE ASSUMPTIONS REGARDING UE 100 RATES

Next, URP repeats its argument, raised in the first UM 989 proceeding, that the revenue requirement net benefit test included a full year of UE 100 Trojan revenue requirement for 2002 when in fact UE 115 rates became effective on October 1, 2002. URP Op. Brf. at 31. URP offers no new evidence on this issue and no reason for the Commission to abandon its position in Order No. 02-227 that URP's argument had no merit. *See* Order No. 02-227 at 18.

The deficiencies in URP's objection are apparent. The objection is inapplicable to the asset-based net benefit test, which makes no assumptions regarding future revenue requirements. Moreover, the assumption of a full year of UE 100 rates was in fact reasonable at the time. When PGE, Staff and CUB signed the settlement agreement in August 2000, the exact timing of both the Commission order approving the proposed tariff implementing the settlement and UE 115 rates was uncertain. With these two unknown dates, the assumption that UE 100 rates would be in place for the first year of the net benefit test was eminently reasonable. In fact, because the revenue requirement net benefit test began in 2001, and the settlement was approved on September 30, 2000, the assumption that UE 100 rates would have been in effect, absent the settlement, for the first year turned out to be correct. UE 100 rates would have been in effect, absent the settlement, from October 1, 2000 through September 30, 2001. *See* Order No. 02-227 at 18.

Finally, URP has failed to demonstrate that its adjustment would be material relative to the $16.4 to $18.5 million net benefit the settlement provided. Order No. 02-227 at 18 ("Further, URP failed to show that the adjustment it suggested was material to the net benefit calculation. Even if the revenue requirement for the Trojan-related investment was reduced for the first year to reflect URP's claim, that would simply shift the payments needed to pay off the Trojan investment until later years. There is no suggestion in the record that this change would cause a material difference in the result of the net benefit analysis.").

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VII. ISSUE #6 – ORDER NO. 02-227 WAS SUPPORTED BY ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

URP offers no argument on this topic.

VIII. ISSUE #7 – URP HAS BEEN AFFORDED A FULL OPPORTUNITY TO PRESENT ITS EVIDENCE AND ARGUMENTS IN UM 989

URP makes no specific argument under this heading. URP has been afforded a full opportunity to present its case, well in excess of the constitutional requirements imposed by the due process clause.

IX. ADDITIONAL LEGAL ISSUES

A. THE SCOPE OF PHASE III WAS APPROPRIATE

URP complains about the Scoping Order's exclusion of evidence relating to the return on Trojan during the 5.5-year period from April 1995 to September 2000. URP Op. Brf. at 35. Whether customers were harmed and, if so, the extent of that harm from the Commission's decision to set rates that included a return on Trojan in UE 88, are the principal topics for the Commission's determination in Phase I. Including those same issues in Phase III would potentially create double counting concerns. Scoping Order at 4-5. The Commission therefore appropriately limited the scope of this phase to exclude issues properly part of Phase I.

Next, URP complains that "the Commission restricted the issues to include only those that had been raised in the original UM 989 proceeding or on appeal of the orders produced by that proceeding." URP Op. Brf at 35. The issues in this phase were broadly stated and permitted URP to present evidence and argument on a variety of issues. URP points to no evidence or argument that it was barred from presenting.

URP also argues that the Commission adopted "contradictory approaches to the scope of evidence allowed in a remand proceeding." URP Op. Brf. at 36. In both phases, the Commission limited the proceeding to information that was known or could have been reasonably known at the time of the Commission's original proceeding. URP Op. Brf. at 36; *see* Phase I Ruling at 3 (July 25, 2005) ("While the Commission must now apply a different legal interpretation of ORS 757.355, the

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factual evidence to which that statute is applied must encompass the same timeframe, that is, information that could have been presented in UE 88."); Scoping Order (Phase III) at 6 ("The Commission must reconsider Order No. 02-227 based on the facts existing at the time the rates went into effect. Any new evidence presented by any party must have existed on or before October 1, 2000, to be properly considered.").

URP is confused when it suggests the Commission's rejection of its "future fact" motion to strike in Phase I was tantamount to admitting evidence concerning later events. The Commission rejected URP's "future fact" motion to strike because the motion was untimely and because "URP [made] conclusions about the testimony of PGE and Staff without explanation of those conclusions," not because information available after UE 88 was deemed relevant. Ruling at 6 (Sept. 19, 2005).

B. URP WAS NOT PREJUDICED BY THE SCOPING ORDER FOR PHASE III

URP was not prejudiced by the Scoping Order's denial of URP's request to "update" the "continuing effects of any error in Order No. 02-227, update the cost to ratepayers from trading the non-interest-earning Trojan balance with interest-earning ratepayer credits and to bring these sums to present value, update the amounts of NEIL proceeds" and bring those amounts to present values. URP Op. Brf. at 37. URP's brief and testimony propose undoing the settlement and bringing the value of customer credits, the FAS 109 asset, and the NEIL proceeds used in the settlement to present values as of October 1, 2008. *See* URP/500, Lazar/3-6; URP Exhibit 501; URP Op. Brf. at 5. Thus, the Scoping Order did not materially limit URP's ability to make its case. As to URP's stated need to "update" the amount of NEIL proceeds, the final NEIL distribution amount ($34.3 million) is confirmed in the record. Letter dated November 29, 2000, Attachment 3; Hearing Trans. at 67-68 (July 11, 2001).

C. THE COMMISSION'S DECISION TO ISSUE A COMPREHENSIVE ORDER IS CORRECT

URP claims the Commission's rejection of its motion to reinstate the schedule in

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Order No. 07-157 was error. URP is wrong. URP is not entitled to a piecemeal process in which the Commission responds to each remand and legal issue separately. The Commission correctly heeded the Court of Appeals' warning against such disjointed and piecemeal treatment of the issues raised in this consolidated remand proceeding. A single comprehensive order from the Commission will avoid the confusion and unwarranted fragmentation that has marked these various Trojan proceedings. URP cannot claim prejudice or error in this regard.

D. RESULTS OF OPERATIONS AFTER UM 989 WAS PROPERLY EXCLUDED

URP claims the Scoping Order erred by excluding "consideration of actual results of operations in subsequent years." URP Op. Brf. at 38. URP claims the admission of results of operation in UM 1224 somehow justifies the admission of results of operations pertaining to time periods after UM 989. URP's comparison to UM 1224 is inapt on a number of levels. First, UM 1224 concerned amortization of deferred amounts. The amortization of deferred amounts is subject by law to an earnings test, which requires the use of the utility's results of operation. ORS 757.259(5). The Commission proceedings at issue in this Trojan remand proceeding were not filed on the deferred accounting statute and therefore required no earnings test. Second, the earnings test in UM 1224 pertained to the period in which revenues and costs were deferred. The results of operation became available later but the evidence pertained to the time period at issue, not "actual results from subsequent years" as URP sought in this proceeding.

E. THE COMMISSION HAS AUTHORITY TO ORDER AND IMPLEMENT REFUNDS

URP's argument that the Commission lacks authority to order refunds is ill-founded. URP Op. Brf. at 39-40. For the reasons set forth in Phase II, the Commission has full authority to order refunds and to implement their distribution to current and former customers.

F. URP MISSTATEMENTS REGARDING THE ASSET-BASED NET BENEFIT TEST

URP's remaining claims regarding the asset-based net benefit test are incorrect. URP

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Op. Brf. at 41-42. URP claims the asset-based net benefit test "failed to account for the last quarter of 2000." We don't know what that means, but the balances were accurately stated as of September 30, 2000, and there is no factual evidence to the contrary. URP claims "it appears to have failed to account for NEIL." That is wrong. Both net benefit tests expressly considered and accounted for the final NEIL distribution. *See* Order No. 02-227 at 2; Staff-PGE/200, Busch-Hager-Tinker/5. URP's claim that these asset balances were "constructed 'assets' out of revenue or cost streams" is similarly incorrect. URP Op. Brf. at 42. These balances reflected the actual balance as of September 30, 2000—nothing more, nothing less. They were not constructed using net present values or interest rates.

> "Q Did the asset-based net benefit analysis reduce each asset to present value [as] of September 30, 2000, or October 1, 2000?
>
> "A. (PGE witness Mr. Hager) I missed first part of that question, Mr. Meek.
>
> "Q. Did the asset-based net benefit analysis reduce each asset to present value of approximately one of those dates?
>
> "A. It took the values as of that date.
>
> "Q. So were some of the assets streams of future revenue reduced to present value?
>
> "A. No.
>
> "Q. None of them were?
>
> "A. None of them are streams of payment per se. They are a value at that point in time."

Hearing Trans. at 57.

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X. CONCLUSION

We respectfully request that the Commission issue a comprehensive order resolving all issues in this consolidated remand proceeding, including resolution of the issues in this Phase III in a manner consistent with PGE's opening and response brief.

DATED this 4th day of August, 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 BRIEF - PHASE III** by e-mail and/or mailing a copy thereof, to each party that has not waived paper service, in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the US mail at Portland, Oregon.

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