

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 10, UE 88, and 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))
)
and)
)
Portland General Electric Company's)
Application for an Accounting Order and)
for Order Approving Tariff Sheets)
Implementing Rate Reduction. (UM 989))

**RULING
AND
NOTICE OF CONFERENCE**

DISPOSITION: SCOPE OF PHASE III ESTABLISHED

INTRODUCTION

On December 20, 2007, a status conference was held in the above-captioned dockets. The purpose of the conference was to determine what additional proceedings are necessary in Phase III of these proceedings. Phase III is intended to respond to the Court of Appeals' recent decision in *Utility Reform Project v. Public Util. Comm'n of Or.*,¹ which was the result of the appeal of Order No. 02-227 in docket UM 989.

To allow the Public Utility Commission of Oregon (Commission) to make an informed decision regarding the scope of Phase III, I asked the parties to submit written arguments regarding the issues to be addressed and the scope of any new evidence that the parties wish to present. I requested that the Utility Reform Project (URP) "identify, with as much specificity as possible, the cross-appeal issues that URP would like the Commission to consider on remand and the nature of the new evidence that URP believes is necessary to present for the Commission to adequately consider the issues."² URP submitted its opening memorandum on January 14, 2008. Portland General Electric Company (PGE) responded on January 22, 2008, and URP submitted a reply memorandum on January 29, 2008.

¹ 215 Or App 360, 170 P3d 1074 (2007).

² *Conference Report* at 2 (December 21, 2007).

BACKGROUND

Phase III of these remand proceedings will address the Court of Appeal's remand of Order No. 02-227 in docket UM 989. The rates adopted in Order No. 02-227 implemented a settlement reached by Staff, PGE, and the Citizens' Utility Board of Oregon (CUB) in 2000. That settlement was intended to respond to the Court of Appeals' decision in *Citizens' Utility Board v. Commission*³ by prospectively removing both the return on and the return of PGE's remaining Trojan investment from rates. URP challenged the rates implementing the settlement and argued, among other things, that the remaining Trojan balance should have been offset by the amounts collected in rates from 1995 to 2000 that represented the return on PGE's Trojan investment. The Commission rejected URP's challenges and affirmed the settlement and the new rates in Order No. 02-227.⁴ In response to URP's arguments regarding an offset for the amounts ratepayers already paid for a return on the Trojan investment, the Commission expressed doubt regarding its legal authority to retroactively address rates (citing the filed rate doctrine), but ultimately concluded that the issue was irrelevant because Supreme Court review of *Citizens' Utility Board* was still pending at that time, and it was unlikely that the court would order a refund because that issue was not litigated in the lower courts and was therefore not under review.⁵

URP appealed the Commission's decision to the Marion County Circuit Court. Although the court rejected many of URP's arguments, the court found that the rates approved in Order No. 02-227 were neither just nor reasonable because "[a]s part of the adjustment of offsetting charges and liabilities related to the Trojan write-off, PGE should have been required to account for all refunds due to ratepayers."⁶ The court remanded the order and specifically ordered the Commission to:

[I]mmediately 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 this court and the Court of Appeals.⁷

The Commission appealed the circuit court's decision to the Court of Appeals, but simultaneously proceeded with Phase I of these remand proceedings. In the ruling establishing the scope of Phase I, the Administrative Law Judge (ALJ) found that, in light of the remands of DR 10, UE 88, and UM 989, the first question to be addressed is what rates would have been established in 1995 if the Commission had interpreted ORS 757.355 to prohibit a return on PGE's remaining Trojan investment.⁸ The ALJ further stated that if the

³ 154 Or App 702, 962 P2d 744 (1998).

⁴ The rates implementing the settlement were allowed to go into effect on October 1, 2000, and were not stayed pending resolution of URP's challenges. See Order No. 02-227 at 1. See also Order No. 00-601.

⁵ Order No. 02-227 at 10-11.

⁶ *Utility Reform Proj. v. Commission*, Case No. 02C14884, Opinion and Order at 6 (Marion County Circ. Ct., November 7, 2003).

⁷ *Id.*

⁸ See *Ruling Establishing Scope of Phase I* at 18 (August 31, 2004) ("Phase I Ruling").

Phase I inquiry resulted in an adjustment to rates, then the affect of that adjustment on subsequent dockets, including UM 989, may be considered in a later phase.⁹ The Commission affirmed and adopted the ALJ's ruling.¹⁰

On October 10, 2007, the Court of Appeals vacated the circuit court's order reversing Order No. 02-227, finding that the remand instructions were erroneous.¹¹ The Court of Appeals also found, however, that the Commission's refusal to offset the Trojan balance to reflect amounts paid by ratepayers for the return on the Trojan investment from 1995 through 2000 was based on an erroneous interpretation of the filed rate doctrine.¹² The court therefore ordered the circuit court to remand Order No. 02-227 to the Commission for reconsideration.

PHASE III ISSUES

In its comments on the proper scope for Phase III, URP states that the issues to be addressed include all issues presented by any party: (1) in the original Commission proceedings addressing URP's challenge to the rates implementing the settlement (docket UM 989); (2) before the circuit court in the appeal of Order No. 02-227; and (3) before the Court of Appeals in the appeal and cross-appeal of the circuit court's reversal of Order No. 02-227. In response to the request to identify, with specificity, the cross-appeal issues URP wishes to pursue on remand, URP listed four specific issues.

I appreciate URP's attempt to comply with the instructions in the Conference Report. Unfortunately, those instructions were unintentionally too narrow because they focused only on the cross-appeal issues. The intent was for URP to identify with specificity *all* of the issues related to Order No. 02-227 that URP would like to pursue in Phase III, with the assumption that the intervening court decisions may have affected URP's desire to pursue some of its original arguments.

Given this error in the instructions in the Conference Report, I identify the issues to be considered in Phase III broadly to encompass most of the arguments raised during the prior proceedings before the Commission, the circuit court, and the Court of Appeals. Based on the record in docket UM 989, the complaint challenging Order No. 02-227 in circuit court, and the briefs on appeal and cross-appeal before the Court of Appeals, I identify the following issues to be addressed in Phase III:

- Issue 1: What was PGE's remaining undepreciated investment in Trojan as of October 1, 2000?
- Issue 2: Do the rates approved in Order No. 02-227 provide PGE with the functional equivalent of a "return on" the remaining undepreciated investment in Trojan?

⁹ *See id.* at 16.

¹⁰ Order No. 04-597 (October 18, 2004).

¹¹ *Utility Reform Proj.*, 215 Or App at 374-375.

¹² *Id.* at 373-376.

- Issue 3: Should the creation of a new regulatory asset to pay the customers' FAS 109 liability be disregarded because it is a phantom bookkeeping asset?
- Issue 4: Did the settlement improperly transfer the proceeds from PGE's NEIL policy from ratepayers to PGE?
- Issue 5: Were the rates adopted in Order No. 02-227 unjust and unreasonable because they were higher than the rates adopted in UE 88, which the Court of Appeals "declared unlawful" in *Citizens' Utility Board*?
- Issue 6: Was Order No. 02-227 supported by substantial evidence?
- Issue 7: Did the Commission deny URP due process in docket UM 989?

These issues are intended to be broad enough to encompass any sub-issues raised in prior proceedings. For example, URP's arguments that the Trojan balance used in the settlement inappropriately included construction-work-in-progress expenses would be considered a sub-issue under Issue 1. Furthermore, although the issues are broad, the parties may not raise any issues that were not raised in prior proceedings before the Commission, the circuit court, or the Court of Appeals. If URP does not wish to pursue any of these arguments or wishes to add an issue it believes has been missed, URP shall so notify the Commission in writing by March 11, 2008.

As stated above, the issues have been broadly stated to encompass "most" of the arguments raised in prior proceedings. There is one issue—whether the portion of rates collected from customers from 1995 to 2000 that reflect a return on the Trojan investment should be used to reduce or eliminate the Trojan balance—that the Commission will not consider in Phase III. The Commission will not address that question in this phase because it depends upon the assumption that ratepayers paid too much from 1995 to 2000, and therefore the Trojan balance should be offset in the amount of the "overpayment."¹³ Whether ratepayers paid too much from 1995 to 2000 is being addressed in Phase I of these proceedings. If the answer to that question is yes, the Commission will order PGE to issue refunds to redress this overpayment as part of the Phase I analysis. To carry forward that offset to also reduce the starting point for the Phase III analysis would result in doubly compensating ratepayers for any overpayment during the 1995 to 2000 period.

In its comments regarding the scope of Phase III, URP makes two further arguments relevant to the issues to be addressed. First, URP argues that the appropriate "starting point" (*i.e.*, the Trojan balance as of October 1, 2000) cannot be determined because Phase I has not been completed. Second, URP argues that the appropriate ending point cannot be determined because the rates adopted in Order No. 02-227 "remain in effect on a continuing basis."

¹³ The use of "overpayment" is intended to refer only to amounts the Commission concludes should be refunded to ratepayers as a result of the legal error contained in the Commission's UE 88 rate order. It is not intended to be synonymous with the term "overcharge," which occurs when a utility charges a consumer a rate that is in excess of the Commission-approved rate schedules.

In response to the argument that that appropriate starting point cannot be determined, PGE contends that the parties can argue for various alternatives based on differing outcomes in Phase I. Regarding URP's argument that there is no ending point, PGE asserts that URP is "wrong concerning the rate impact of Order No. 02-227" because those rates were "superseded by numerous later rate orders."

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 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*. In other words, it must look at the relevant facts as they existed on or before October 1, 2000. The outcome of Phase I of these proceedings is irrelevant to this inquiry. Only if one accepts the argument that the Trojan balance as of October 1, 2000, should be offset by any "overpayment" from 1995 to 2000 is the outcome of Phase I relevant to Phase III. As discussed above, any such "overpayment" will be remedied through refunds in Phase I. Therefore, no offset is necessary or appropriate to begin the Phase III analysis. To be clear, URP is free to argue that the remaining Trojan balance was incorrectly calculated at the time of the UM 989 settlement, but URP may not argue that it should have been offset by the amounts collected in rates from 1995 to 2000 that represented a return on PGE's Trojan investment.

PGE's and URP's assumption that the result in Phase I is relevant to Phase III is understandable given the indication in the Phase I Ruling that any adjustments to rates set in subsequent dockets, including UM 989, may be considered in a subsequent phase. The Phase I Ruling, however, was designed to respond to both the Court of Appeals' order requiring the circuit court to remand the orders in DR 10 and UE 88 to the Commission *and* the circuit court's remand of UM 989 (the appeal of the circuit court's decision was pending before the Court of Appeals' at the time the Phase I Ruling was issued). The circuit court specifically ordered the Commission to revise the rates adopted in UM 989 to offset or refund the rates collected by PGE from 1995 to 2000 that represented a return on PGE's remaining Trojan investment. Thus the Phase I Ruling was consistent with the circuit court's explicit instructions. The circuit court's decision has since been vacated, however, and thus the Commission is no longer bound by the court's instruction. In the absence of an express directive to the contrary, the Commission must reconsider Order No. 02-227 based on the facts in existence at the time the rates went into effect.

As to arguments regarding the appropriate "ending point," PGE is correct that the rates approved in UM 989 were superseded by subsequent rate orders. Generally speaking, collateral attacks on final rate orders are not permitted. The Supreme Court, however, has indicated that there is an exception to this general prohibition when an error identified in a rate order is carried forward into subsequent rate orders.¹⁴ Therefore, URP may argue that one or more of the alleged errors in Order No. 02-227 were carried forward into subsequent rate orders and that the remedy for any error(s) must fully address these continuing rate effects.

¹⁴ *Dreyer v. PGE*, 341 Or 262, 280-281, 142 P3d 1010 (2006).

SCOPE OF NEW EVIDENCE

URP contends that it needs the opportunity to conduct discovery and submit new evidence to: (1) determine the proper remaining Trojan balance as of October 1, 2000, including evidence relied upon in including Trojan construction-work-in-progress expenses as part of the balance; (2) determine the appropriate interest rate to apply to the unlawful amounts charged to ratepayers from 1995 to 2000; (3) determine PGE's ability to carry out any remedial action ordered by the Commission; (4) quantify the continuing rate effects of any error in Order No. 02-227; (5) 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; (6) update the amounts of NEIL proceeds to determine the amount diverted from ratepayers and to bring these amounts to present value; and (7) update the amount of the rate increase caused by Order No. 02-227.

PGE responds that no further discovery is warranted and new evidence should not be permitted. PGE contends that the Commission could resolve Phase III based on the records in Phase I and in the original UM 989 proceedings. PGE also argues that discovery has already been conducted and testimony submitted in Phase I regarding some of the evidence sought by URP, including the appropriate interest rate to apply to any unlawful amounts charged to ratepayers. In addition, PGE argues that the purpose of Phase I is to determine what rates should have been in 1995, and therefore URP has already conducted discovery and presented evidence that could be used to determine the appropriate Trojan balance as of October 1, 2000.

I find that the parties should be permitted to present new evidence in Phase III, but the scope of the evidence should be limited to be consistent with the scope of the Commission's reconsideration of a remanded rate order. The first step in the Commission's reconsideration is to examine each of URP's alleged errors in Order No. 02-227, including examining whether the rates approved in that order were just and reasonable. As discussed above, 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. In reviewing Order No. 02-227 and the rates approved therein, the Commission may not consider actual results from subsequent years. The Commission would violate the rule against retroactive ratemaking if it adjusted past authorized rates to reflect actual revenues and costs.¹⁵

Only one of URP's specific requests to present new evidence is relevant to this first step of the Commission's review—evidence related to determining the proper remaining Trojan balance as of October 1, 2000. URP may have the opportunity to conduct discovery and submit new evidence regarding the remaining balance of PGE's undepreciated investment in Trojan as of October 1, 2000. As discussed above, the outcome of Phase I is irrelevant to the appropriate consideration of Order No. 02-227. The Commission must consider the *actual* Trojan balance as of the effective date of the rates implementing the settlement (October 1, 2000), and not a *hypothetical* balance premised on rate adjustments in

¹⁵ See, e.g., *Pacific Northwest Bell Tel. Co. v. Katz*, 116 Or App 302, 311, 841 P2d 652 (1992) (indicating that “comparing *authorized* revenues with *actual* revenues and then adjusting for unexpected profits or shortfalls” would conflict with the rule against retroactive ratemaking.).

Phase I. Thus, URP (and other parties) may submit evidence regarding the actual Trojan balance as of October 1, 2000. I emphasize, however, that this evidence must have existed on or before October 1, 2000.

Furthermore, URP's request for a month-by-month accounting of the exact amounts collected in rates from April 1995 through September 2000 for the return of and the return on PGE's remaining Trojan investment reflects a misunderstanding of utility accounting. The money collected in rates is not color-coded or otherwise earmarked to be used for certain purposes. The records sought by URP simply do not exist. There may, however, be other accounting information that URP could request from PGE to help determine the appropriate Trojan balance as of October 1, 2000. URP may also request information regarding the process and information used by the settling parties in determining the Trojan balance used in the settlement.

URP's request to present evidence related to the appropriate interest rate to apply to the amount charged to ratepayers from 1995 to 2000 for a return on the Trojan balance is denied. Because the remedy for any "overpayment" by ratepayers during that period will be determined in Phase I, and thus the appropriate interest rate to apply to those amounts will also be determined in Phase I, this evidence is irrelevant to the inquiry in Phase III.

URP's remaining specific requests to introduce new evidence are related to the second step in the Commission's reconsideration. If URP prevails on one or more of its challenges to Order No. 02-227, the Commission must then determine the appropriate remedy for the identified error(s).¹⁶ Although URP's requests are unclear, it appears that URP wishes to collect data regarding PGE's actual financial results since 2000 and use that data to determine an appropriate remedy for any identified errors. As discussed above, the Commission cannot use actual financial results to determine whether past approved rates were just and reasonable. Neither can the Commission use actual financial results to determine an appropriate remedy for an error in a past rate order. URP may present arguments regarding the appropriate remedy based on the existing record in UM 989 and, to the extent URP argues that the identified errors have continuing effect in subsequent rate orders, URP may request official notice of the records in those dockets. Therefore, I deny URP's requests to present new evidence to quantify the continuing rate 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 to determine the amount diverted from ratepayers and to bring these amounts to present value, and update the amount of the rate increase caused by Order No. 02 227.

URP's request to seek evidence related to PGE's ability to carry out any remedial action ordered by the Commission is also denied. The Commission has previously

¹⁶ Although the Court of Appeals found that the Commission erroneously interpreted the filed rate doctrine in refusing to offset the remaining Trojan balance with amounts collected in rates from 1995 to 2000 representing the return on the Trojan investment, this error is not relevant to the inquiry in Phase III because the appropriate remedy for the collection of those amounts, if any, will be determined in Phase I. The Court of Appeals did not address the other arguments raised on appeal and cross-appeal.

crafted mechanisms to provide remedies to former customers¹⁷ and, if necessary, will adopt appropriate measures here. URP and the other parties may present argument as to how these measures will ensure that past and present customers, not PGE, will receive the full benefit of any ordered remedy.¹⁸

Another conference will be held to establish a procedural schedule for the remainder of Phase III. The parties are directed to discuss proposed schedules before the conference and be prepared to present an agreed-upon schedule for consideration. The schedule should allow time for discovery and should include dates for filing testimony, conducting a hearing, and filing briefs. Notice is given, below, of the conference date and time:

DATE: Wednesday, March 12, 2008

TIME: 1:30 p.m.

LOCATION: Public Utility Commission of Oregon
550 Capitol Street NE
Main Hearing Room - 1st Floor
Salem, OR 97301

ADMINISTRATIVE

LAW JUDGES: Michael Grant and Sarah Wallace

POSTPONEMENT will be made only upon a showing of good cause. Please call the Administrative Hearings Division (503) 378-3885, if you have questions.

Dated in Salem, Oregon, this 22nd day of February, 2008.

Michael Grant
Chief Administrative Law Judge

¹⁷ See, e.g., *In Re US WEST Communications*, Order No. 00-190 (April 14, 2000).

¹⁸ Under the refund mechanism adopted in Order No. 00-190, any unclaimed amounts were credited to current customers. *Id.* at 17.