ORDER NO. 02-227

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 989

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY's Application for an Accounting Order and for Order Approving Tariff Sheets Implementing Rate Reduction.	)	ORDER

DISPOSITION: APPLICATION GRANTED; TARIFF SHEETS APPROVED; COMPLAINT DENIED

Procedural Background. On August 22, 2000, PGE entered into two settlement agreements, one with Commission Staff and one with Citizens' Utility Board (CUB). The two agreements are materially the same with respect to the issues in this docket, and we will refer to them together as the Settlement. On September 1, 2000, PGE filed an application for an accounting order and revised tariff sheets (Advice No. 00-13) implementing the Settlement. On September 28, 2000, the Commission considered PGE's application at a public meeting. On September 29, 2000, the Commission entered Order No. 00-601, approving the requested accounting changes in PGE's application. The Commission did not suspend the revised tariff sheets.

On October 30, 2000, the Utility Reform Project (URP), Lloyd Marbet, and Linda K. Williams (collectively, URP) filed a complaint and petition to intervene (the complaint). URP filed its complaint pursuant to ORS 756.500 and ORS 757.210. On November 24, 2000, PGE filed its answer to the complaint. In a ruling dated November 28, 2000, Administrative Law Judge (ALJ) Lowell Bergen granted URP's petition to intervene. The same ruling noted that URP's claims were internally inconsistent in terms of which party bears the burden of persuasion under the two statutes the complaint cites. ALJ Bergen asked URP to elect the provision under which it wished to proceed. URP did not respond, and the Commission dismissed the claim under ORS 756.500 on February 2, 2001 (Order No. 01-152). On February 22, 2001, the ALJ held a procedural conference and established the schedule in this docket.

Parties submitted prefiled testimony, and on July 11, 2001, ALJ Ruth Crowley presided over a hearing in which URP cross examined the panel of witnesses who had submitted joint testimony on behalf of PGE and Staff. Parties submitted posthearing briefs.

Applicable Law. Because URP failed to elect whether its complaint should proceed under ORS 756.500 or ORS 757.210, the ALJ dismissed the charges under ORS 756.500. This complaint proceeds under ORS 757.210. That statute provides, in relevant part:

> (1) Whenever any public utility files with the Public Utility Commission any rate or schedule of rates stating or establishing a new rate or schedule of rates or increasing an existing rate or schedule of rates, the commission may, either upon written complaint or upon the commission's own initiative, after reasonable notice, conduct a hearing to determine the propriety and reasonableness of such rate or schedule. The commission shall conduct such a hearing upon written complaint filed by the utility, its customer or customers, or any other proper party within 60 days of the utility's filing . . . . At such hearing the utility shall bear the burden of showing that the rate or schedule of rates proposed to be established or increased or changed is just and reasonable. . . .

Staff and PGE's Support of the Settlement. Under the terms of the Settlement, PGE seeks Commission approval to eliminate Trojan from its balance sheet and the associated FAS 109 balance,[1] remove a number of regulatory liabilities (i.e., customer credits), create a new regulatory asset to recover FAS 109 amounts, write off an additional $5.1 million (after tax) in residual Trojan balances, establish a $2.5 million customer credit, and implement a $10.2 million rate reduction effective October 1, 2000. The parties agreed to allocate future Nuclear Electric Insurance Limited (NEIL) distributions,[2] 55 percent going to customers and the remaining 45 percent to PGE. Staff, PGE, and CUB claim that the Settlement and the application implementing it accomplished a number of things each of which furthers the public interest.

First, PGE, CUB, and Staff claim that customers received a rate reduction of at least $10.2 million for 12 months beginning October 1, 2000, and an additional $2.5 million reduction in the future. As a result, they claim, customers are financially better off as a result of the Settlement.

Second, these parties claim that the Settlement resolves a longstanding, contentious issue, the regulatory treatment of Trojan. They claim that this aspect of the Settlement provides customers, the Commission, and PGE with substantial value. Since the early 1990s, the uncertainty surrounding Trojan has occupied the attention of the parties. The issue has been a drain on the parties' resources, demanding prolonged examination in multiple proceedings before the Commission and the courts. For instance, the Commission approved

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[1] The FAS 109 asset is a by product of the accelerated tax deductions permitted under the Federal Tax Code. By reducing customer rates, PGE passes through to customers the benefit created by accelerated tax deductions in the early years of an asset's life. As a result, customers owe PGE a balance that reflects the amount of the excess tax due in the asset's later years as the accelerated tax deductions begin to reverse.

[2] NEIL provided PGE with insurance coverage for Trojan.

many deferred accounting orders relating to Trojan.[3] The Commission conducted a declaratory ruling proceeding on the topic.[4] The Commission orders in the UE 88 and DR 10/UM 535 proceedings were appealed, resulting in a number of circuit court proceedings and a Court of Appeals decision, which the Oregon Supreme Court has agreed to review.[5]

The Settlement resolved these issues by reaching an agreement with CUB, one of the parties involved in the litigation. The Settlement also spared the parties from conducting a campaign for or against the then pending Ballot Measure 90. By removing Trojan from PGE's ratebase once and for all, its proponents argue that the Settlement provided the parties with closure. It enabled them to put the distraction of the Trojan proceedings behind them.

PGE and Staff claim that the Settlement aligned the interests of PGE and its customers by allocating future distributions from the NEIL insurance policy between customers (55 percent) and shareholders (45 percent). At the time of the Settlement, the final NEIL distribution had not yet occurred. Previously, incremental NEIL distributions had been forecast and incorporated into the ratemaking process. However, the regulatory treatment of the final NEIL distribution was uncertain. By sharing the final NEIL distribution between PGE shareholders and customers, the Settlement provided PGE with the incentive to maximize the amount of the final NEIL distribution. A few months after the Settlement, customers and PGE received the final distributions. The amount of the final distribution was $33.3 million, $10.5 million higher than the $23.8 million expected. PGE and Staff finally claim that the Settlement enabled PGE to simplify its balance sheet and smooth potential rate changes.

According to the Settlement's proponents, all these factors show that approval of the application is in the public interest and that the rates proposed are just and reasonable. Staff and PGE presented two net benefit analyses to demonstrate that the Settlement provides customers with substantial financial benefits. The analyses compare how customers are treated under the terms of the Settlement and how they would be treated absent the Settlement. Staff and PGE claim that the analyses show that the Settlement benefits customers by between $16.4 and $18.5 million.

In the first net benefit analysis, PGE and Staff compared the unamortized balances of the regulatory assets and liabilities involved in the Settlement. The balances were based on the actual balances as of September 30, 2000. This analysis is summarized in Table 1 below:

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[3] *See*, *e.g.*, UM 529, Order No. 93-309; UM 594/UM 571, Order No. 93-1493; UE 88/UM 692, Order No. 94-1456.
[4] DR 10/UM 535, Order No. 93-117.
[5] *See URP and CUB v. OPUC*, 154 Or App 702, 706 n.1 (1998) (URP v. OPUC) (describing the procedural history of the Trojan litigation); *petition for review granted*, 328 Or 464.

Table 1

($ millions)

Asset Balance—Net Benefit Analysis

	No Settlement Case	Settlement Case	Net Benefit (Settlement Case Less No Settlement Case)
PGE collects remaining Trojan investment balance	$180.5	N/A	$(180.5)
PGE collects FAS 109 balance	$47.4	N/A	$(47.4)
PGE refunds net credit balances	$(161.9)	N/A	$161.9
PGE collects new Regulatory Asset	N/A	$36.7	$36.7
PGE retains 45% of NEIL final distribution	N/A	$15.4	$15.4
Customer Credit	N/A	$(2.5)	$(2.5)
Total NPV	$66.0	$49.6	$(16.4)

Without the Settlement, customers would have to pay off the $180.5 million (after tax) Trojan balance and the $47.4 million FAS 109 balance associated with Trojan. Against these regulatory assets, customers would retain the various refunds and customer credits involved in the Settlement, which equal $161.9 million. Under the no settlement scenario, the accounts involved in the Settlement would result in a net customer liability to PGE of $66 million ($180.5 million + $47.4 million - $161.9 million). In comparison, the Settlement eliminates the Trojan balance, the Trojan related FAS 109 balance, and various customer credits and refunds. In addition, the Settlement allows PGE to collect $36.7 million in net present value (NPV) for the regulatory asset to recover FAS 109 amounts, allocates to PGE $15.4 million or 45 percent of the final NEIL distribution, and provides a $2.5 million customer credit. The net result of the Settlement is a $49.6 million customer liability ($36.7 million + $15.4 million - $2.5 million). A comparison between the Settlement and the no settlement scenarios shows that the Settlement benefits customers by $16.4 million ($66 million - $49.6 million).

Under the second net benefit analysis, Staff and PGE compared the present value of the various regulatory assets and liabilities involved in the Settlement based on the revenue requirement for each. The analysis is summarized in Table 2 below:

Table 2
($ millions)
Revenue Requirements—Net Benefit Analysis

	No Settlement Case	Settlement Case	NPV Benefit (Settlement Case Less No Settlement Case)
Net NPV of assets and liabilities involved in Settlement	$68.1	$36.7	$(31.4)
Customer Credit	---	$(2.5)	$(2.5)
PGE retains 45% of NEIL	---	$15.4	$15.4
Total NPV	$68.1	$49.6	$(18.5)

For this analysis, Staff and PGE assumed that rates set in UE 100, PGE's last rate case, would remain in effect until 2002. For all years after 2002, the Trojan revenue requirement reflects the projected balance and amortization in each respective year. For customer credits, Staff and PGE assumed the amounts included in rates under UE 100 would continue until the credits were exhausted. Under the no settlement scenario, customers face an NPV of $68.1 million for the revenue requirements associated with assets and liabilities involved in the Settlement. Under the Settlement, the NPV is $49.6 million. The conclusion of this net benefit analysis is that customers are $18.5 million better off by virtue of the Settlement ($68.1 million - $49.6 million).[6]

According to the Settlement's proponents, the two net benefit analyses, along with the other important benefits of the Settlement, demonstrate that approval of the application is in the public interest. Because the application has no other effect on rates and accounting changes provide a clear and substantial net benefit to customers, the rates proposed pursuant to the application are just and reasonable. *In re Portland General Electric Company*, UE 93, Order No. 95-1216 at 14 (1995) (approving revised tariffs because "offset proposal provides significant benefits to ratepayers").

URP's Arguments Against the Settlement. URP makes six principal arguments against the Settlement. First, URP contends that the portion of the rates collected from customers in the past that reflects a return on the Trojan investment be used to reduce or eliminate the Trojan balance. Second, URP argues that the Settlement provides PGE with the functional equivalent of a profit return on the Trojan investment that is prohibited by a 1998 Court of Appeals decision, URP v. OPUC (see paragraph below). Third, URP contends that the

[6] In Order No. 00-601 at 3-4, the Commission relied on a net benefit analysis based on the revenue requirements of the accounts involved in the Settlement that is similar to Table 2. The net benefit analysis in Order No. 00-601 estimated the net benefit to customers at $17.1 million. The difference between the net benefit analysis in the Joint Testimony ($18.5 million) and the original net benefit analysis in Order No. 00-601 ($17.1 million) is based on updated information for two factors. First, the net benefit analysis in the testimony reflects the actual amount of the final NEIL distributions, which was unavailable at the time of the original net benefit analysis. Second, the FAS 109 asset balance in the analysis in the testimony is the actual amount, whereas the balance used in the original analysis was an estimate.

creation of a new regulatory asset to pay the customers' FAS 109 liability should be disregarded because it is a "phantom bookkeeping asset." Fourth, URP asserts that the Settlement unfairly expropriates from ratepayers proceeds from PGE's NEIL policy. Fifth, URP claims that the Trojan balance includes construction work in progress (CWIP) expenses that should be excluded pursuant to ORS 757.355. Finally, sixth, URP makes a variety of smaller claims. We discuss the arguments in detail below.

1. ***The portion of rates collected from customers in the past that reflect a return on the Trojan investment should be used to reduce or eliminate the Trojan balance.*** URP does not allege that PGE has collected more than authorized by tariff. URP claims instead that the tariffs are unlawful and that the portion of rates collected under the tariffs that represents a return on Trojan investment must be refunded and credited to customers to lower the Trojan balance. URP's theory is based on the Oregon Court of Appeals case, *Citizens Utility Board and Utility Reform Project, et al. v. OPUC, et al.*, 154 Or App 702 (1998) (URP v. OPUC), which concluded that Commission Order No. 95-322 violated ORS 757.355. The court there stated:

> Similarly, in this case, 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; ORS 757.140(2) authorizes rates that would reimburse the utility for its principal investment in retired capital assets, but it does not authorize the return on the investment that ORS 757.355 proscribes. Like the specific statutes that 'circumscribed' PUC's authority in *Eachus*, ORS 757.355 and ORS 757.140(2) as we have interpreted them disallow the return component that the PUC orders allowed for PGE's investment in Trojan. The general grants of authority in ORS 756.040 and other general statutes do not empower PGE to charge or PUC to approve rates of a kind that are specifically contrary to the limitations in ORS 757.355 and ORS 757.140(2).

Thus, according to URP, the court concluded that the Commission was prohibited from approving rates that charge ratepayers amounts that include a return *on* investment in Trojan, thereby limiting PGE's Trojan investment related revenue requirement to a full return *of* investment. URP then sets about showing that ratepayers have already paid off the Trojan balance.

URP's first accounting theory is that the full $59 million permitted for Trojan in UE 100 (that is, the annual Trojan investment related revenue requirement) should be applied against the Trojan balance approved for recovery in Order No. 95-322, which URP assumes for purposes of argument is $340.2 million, consistent with the balance set forth in PGE-Staff Exhibit 202 as of March 31, 1995. URP then estimates the amount customers have paid for the Trojan investment between March 31, 1995, and October 1, 2000, the effective date of the tariffs approved in Order No. 00-601. That estimate is $324.5 million (66 months x $4.92 million, 1/12 of $59 million). This leaves the Trojan balance at $15.7 million. URP assumes that

this amount has been paid off because PGE witnesses acknowledged that the Trojan revenue requirement in UE 88 rates (effective from April 1, 1995, through December 1996) was greater than $59 million (the UE 100 revenue requirement established for Trojan). URP appears to assume that this excess of $59 million for UE 88 rates would be sufficient to pay off the $15.7 million balance.

URP's second theory is that all amounts collected for the Trojan investment since its shutdown, which URP claims occurred in November 1992 (rather than from the effective date of Order No. 95-322, as assumed in the paragraph above), to October 1, 2000, can be used to reduce the $340.2 million balance. This adds another $142.6 million to the amount collected for Trojan since UE 88 ($324.5 million), for a total of $467.1 million. Because $467.1 million exceeds $340.2 million, URP claims that this shows that the Trojan investment has been paid off with $126.9 million to spare.

URP's third theory questions the $340.2 million Trojan balance as of March 31, 1995. URP claims that the proper amount of the Trojan balance in light of Order No. 95-322 is $250.7 million, because that number is used in Order No. 95-322 at 57. Because both $324.5 million and $467.1 million are greater than $250.7 million, URP claims that customers have already paid off the Trojan balance.

URP claims that all of its theories show that approval of the application is not in the public interest. If URP is right that the Trojan balance has been paid off, it follows that the application harms customers because it eliminates a variety of customer credits in order to gain the benefit of writing off the Trojan investment. If Trojan should be written off anyway, customers are harmed by the application because they lose the customer credits involved in the application.

Discussion and Resolution. URP does not claim that PGE collected more than it was entitled to charge under Commission approved tariffs. Nor does URP claim that PGE failed to reduce the Trojan unamortized balance to reflect the full amount of customer payments. URP's theories are based on the idea that the Commission approved tariffs were illegal under URP v. OPUC and that PGE overcharged customers by including Trojan in PGE's rate base. We address URP's accounting theories first and its underlying assumption about the illegality of the tariffs second.

URP mistakenly applies the entire $59 million collected for Trojan against the balance. In fact, the $59 million collected covers three separate items: the Trojan balance, the Trojan related FAS 109 asset, and the return on Trojan investment that the Commission approved in Order No. 95-322 and subsequent orders. The portion of the $59 million attributable to the FAS 109 asset and the return on Trojan is not available to reduce the Trojan balance. The amount collected for Trojan includes FAS 109 recovery. This amount relates to tax benefits previously flowed through to PGE customers that must be repaid. Thus, URP's accounting theories misunderstand the monies available to reduce the Trojan balance.

URP's attack on the $340.2 million Trojan balance figure is also flawed. URP uses the $250.7 million figure from Order No. 95-322 at 57 as its starting point. That figure represents an after tax balance for Trojan. When reducing the Trojan balance by the amount PGE collects from customers, it is necessary to begin with the pretax Trojan balance, not the after tax balance that URP uses. Otherwise, the analysis will ignore the fact that PGE must pay tax on any amount it collects from customers. The appropriate pretax balance subject to amortization after Order No. 95-322 is $340.2 million.

More important, however, URP's central premise is incorrect: that the Commission approved tariffs contain illegal rates that should be redressed. This premise violates the filed rate doctrine, which is embodied in Oregon law in ORS 757.225:

> No public utility shall charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in printed rate schedules as may at the time be in force, or demand, collect or receive any rate not specified in such schedule. The rates named therein are the lawful rates until they are changed as provided in ORS 757.210 to 757.220.

This statute permits the Commission to change rates on a prospective basis, but neither the utility nor the Commission may undo rates charged in the past pursuant to Commission approved tariffs.

The filed rate doctrine, of which ORS 757.225 is an example, is based on the idea that the rate filed with a commission "is the only lawful charge" and that "[d]eviation from it is not permitted upon any pretext." *American Tel. & Tel. Co. v. Central Office Tel. Inc.,* 524 U.S. 214, 222 (1998). Rates filed with a commission bind both utilities and customers "with the force of law." *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939). The Oregon Supreme Court recognized the doctrine in *Oregon-Washington R. & Nav. Co. v. Cascade Contract Co.*, 101 Or 582 (1921) and applied the doctrine in *McPherson v. Pacific Power & Light Co*., 207 Or 433 (1956), when it found that "the Commission has no authority to award any reparations, either for unreasonable or unjustly discriminatory rates, or for overcharges." 207 Or at 449.

The filed rate doctrine is a companion to the rule against retroactive ratemaking, and these two concepts are cornerstones of Oregon regulatory law. Then Commissioner Charles Davis explained the connection between the filed rate doctrine and the rule against retroactive ratemaking as follows:

> There is a rule of law that utility rates may not be made retroactively in absence of express statutory authority. . . . From the customer's viewpoint, the principle underlying the prohibition against retroactive ratemaking is that the customer should know what a utility service costs him at the time he takes

> it. The posted tariff on the day of service represents a contract between the customer and the utility. The customer should not expect to pay more and the utility should not expect to get less.

Testimony of Commissioner Charles Davis on HB 2145, March 21, 1987, at 3.

Under the filed rate doctrine and the rule against retroactive ratemaking, the Commission's ratemaking function must be prospective unless the Legislature authorizes that it be otherwise. The Oregon Attorney General Opinion No. 6076, March 18, 1987, 1987 WL 278316, at 5, notes that where the rule against retroactive ratemaking does not implicate constitutional concerns, the Legislature may authorize the Commission to act retroactively. The Oregon Legislature has authorized retroactive ratemaking in two cases: ORS 757.215(4) and (5) (permitting refunds for interim and nonsuspended rates) and ORS 757.259 (permitting deferred accounting orders). Those provisions do not apply here. Apart from them, the Commission's ratemaking authority is prospective only. URP cites no statute that would permit customers or utilities to undo Commission approved tariffs retroactively, as URP suggests the Commission should do here.

Oregon utility law also permits a party challenging a Commission order to obtain a stay. *See* ORS 756.590, which requires the challenging party to show cause why the court should issue the stay. If refunds were available, no party could show cause for a stay, because an appeal plus a refund would provide complete relief. The availability of a stay implies that neither customers nor utilities have a refund or surcharge remedy for amounts collected pursuant to Commission approved tariffs. The stay provision underscores the prospective nature of Commission ratemaking.

URP seeks to circumvent the filed rate doctrine by arguing that ORS 757.225 provides a presumption of lawfulness that may be overcome if a court reverses a Commission order. This position contravenes the plain language of the statute, which contemplates changes to tariffs only pursuant to ORS 757.210 to 757.220. Moreover, those changes are to future rates. The statute does not allow for retroactive changes pursuant to court decision or otherwise.[7]

URP also claims that the holding of the Oregon Supreme Court in *McPherson*, *supra*, is inapplicable because that case was not an appeal of a Commission order. Regardless of the procedural posture of *McPherson*, the Supreme Court reached the issue of the Commission's authority to order refunds and unequivocally stated that the Commission lacked such authority under the utility laws. 207 Or at 449.

URP argues that the equitable powers of the courts permit the Commission to grant a refund in this case. The equitable powers of the courts are irrelevant in this case. The Commission is not a court. The Commission is a legislative agency and has the powers, and only the powers, granted it by the Legislature. Except in the cases set out above, for deferrals

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[7] Although URP characterizes this position as antiratepayer, URP is wrong. The filed rate doctrine protects both utilities and ratepayers from after the fact changes in rates.

or interim rates, we have no power to make rates retroactively. Nor has any court ordered the Commission to grant a refund.

URP cites cases from other jurisdictions that support granting a refund. These cases are not binding on this Commission and are not on point. Some cases involved court ordered refunds and thus do not apply to customer or utility petitions for refunds or surcharges. Others involve refunds related to administrative error in automatic adjustment clauses. In the case URP quotes at length, *State ex rel. Utility Consumers Council of Missouri, Inc.,* 585 S.W.2d 41 (Mo. 1979) (the Missouri case), the court permitted refunds only if the utility collected amounts from customers that were based on surcharges that were not the result of the ratemaking process. Here, PGE recovered amounts pursuant to Commission approved tariffs, so the Missouri case rule is inapplicable. Further, the Missouri case court held that the commission "may not . . . redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process." 585 S.W.2d at 58.

URP claims that ORS 756.568 authorizes the Commission to make a refund here. That statute gives the Commission authority to "rescind, suspend, or amend any order made by the commission." This statute does not give the Commission the ratemaking authority needed to order refunds. It contains no explicit ratemaking authority and no retroactive authority ("retroactivity, even where permissible, is not favored except upon the clearest mandate." Office of the Attorney General, Opinion Request 6076 at *5 (citing *Claridge Apartments v. Comm'r*, 323 U.S. 141, 164 (1944)). The only way to read ORS 756.568 in a manner consistent with ORS 757.225, which requires that rate changes be made pursuant to ORS 757.210 through ORS 757.220, is to read ORS 756.568 as conferring no authority to make rate changes. Any other interpretation puts these two statutory sections in direct conflict and must be rejected. *See Fairbanks v. Bureau of Labor and Industries*, 323 Or 88, 94 (1996).

URP's final argument is that ORS 757.215(4) allows the Commission to refund past collections. URP contends that since Order No. 00-601 did not order a suspension of rates that were subject to hearing under ORS 757.210, those rates are automatically subject to refund. ORS 757.215(4). URP is mistaken. It is correct that Order No. 00-601 did not suspend the utility's tariffs, but that order is not the basis for URP's asserted right to a refund of amounts collected in the past. The basis for URP's claimed refund is the tariffs in UE 88, which were suspended by Order No. 93-1754 and Order No. 95-899. Rates that URP asserts are subject to refund were also collected pursuant to UE 93 (Order No. 95-1216) and UE 100 (Order No. 96-306).

We conclude that the filed rate doctrine, embodied in ORS 757.225, defeats URP's arguments in favor of a refund. Even if we had the legal authority to order refunds, however, URP has not shown that refunds and a reduction in the Trojan investment balance are in the public interest. The Court of Appeals, in URP v. OPUC, 154 Or App at 714, held that PGE could not include retired plant such as Trojan in rate base. The Court said nothing about what conclusions the Commission should draw about past collections. *Id*. at 716. The Commission could determine that if Trojan should not have been included in rate base, PGE

should have recovered the entire Trojan balance immediately instead of over 17 years, as provided in Order No. 95-322. This would provide PGE and customers with the same outcome as Order No. 95-322, and PGE would not owe refunds. The Court of Appeals decision expressly did not address this issue. *Id*. at 712 n.5.

Contrary to URP's position, we believe that the "no refund" outcome is consistent with the public interest. In Order No. 95-322 at 2, we expressed the goal of holding customers harmless for the premature closure of Trojan while also providing PGE with the appropriate incentives. If we required PGE to give refunds (leaving aside the fact that we have no power to do so), utilities would have an incentive to continue to operate plants past their economic or efficient useful lives.

We conclude that URP's refund theory gives no ground for rejecting the application at issue in this case. Oregon law does not permit the Commission to give refunds or surcharges for amounts collected pursuant to Commission approved tariffs. Even if we had the statutory authority to order the refunds URP requests, the record here shows that such a refund would create an incentive that is contrary to our policy.

Moreover, URP's refund claim is not relevant to this docket, which concerns the *prospective* treatment of Trojan. It provides us with no basis for rejecting the application. URP contends that the Court of Appeals decision is "central to this docket, as it provides the proper baseline for judging both the legality and the reasonableness of the rates this docket produces." URP Answering Brief at 8. In URP v. OPUC, the Court of Appeals decided that a utility may not include retired plant such as Trojan in rate base. The application, the subject of this docket, complies with that decision by eliminating the Trojan investment from PGE's balance sheet. URP's contention fails to raise an issue for this docket. URP wishes us to take retroactive measures based on the URP v. OPUC decision, but that would be premature. The case has not been remanded to the Commission, and the court has not ordered the Commission to take any action. The Oregon Supreme Court has accepted review of the case. Even if the case were to come back to the Commission on remand after the Supreme Court reaches a decision, it is unlikely that the court would order a refund, because that issue was not litigated in the lower courts and is therefore not under review.

The prospective nature of the current docket is clear in the application, which deals with treatment of the Trojan investment from October 1, 2001, not past customer charges. The application, the Settlement, and Order No. 00-601 all state explicitly that nothing in the Commission's order is "intended to require PGE to refund any of the funds it has collected through rates related to its investment in Trojan prior to and as of October 1, 2000." Order at 6; *see also* Application at 5, Settlement Agreement §2.7.

The prospective nature of the docket is also clear from the procedural posture of URP's complaint. Because URP failed to make an election between its ORS 757.210 claim and its ORS 756.500 claim, the ALJ dismissed the ORS 756.500 claims and permitted this docket to proceed as a contested case proceeding under ORS 767.210, to determine whether the *proposed* rates are just and reasonable. This case is therefore about the change in rates PGE proposes in

its application. It concerns whether the offset of customer credits and liabilities is in the public interest and whether the implementing tariffs are just and reasonable. Order No. 01-152; *see also* ORS 757.210(1) (the Commission may "conduct a hearing to determine the propriety and reasonableness of such rate or schedule").

This case concerns whether the offset of customer credits and liabilities is in the public interest and whether the implementing tariffs are just and reasonable. It is not about whether the Commission erred in a prior case and if so, what the remedy might be, as URP contends. Nor is it about whether the Commission today should permit past customer payments to reduce the Trojan investment balance faster than the applicable Commission orders permitted, as URP argues.

2. ***The Settlement provides PGE with the functional equivalent of a profit return on the Trojan investment that is prohibited by URP v. OPUC***. URP's second theory is that the Settlement harms customers because it exchanges interest bearing customer credits for a noninterest bearing regulatory asset, the Trojan investment balance. URP contends that accepting the Settlement permits a "functional equivalent of a profit return" on Trojan, contrary to the holding of URP v. OPUC.

URP argues that most of the credits to merger credit canceled under the stipulation are those stemming from the Enron acquisition of PGE and from the power sale contract settlement with Southern California Edison Co. These accounts and the others listed as offsets were credits to ratepayers that accrued interest for the benefit of ratepayers at the company's post tax authorized return on investment.

According to URP, trading a nonreturn bearing Trojan ratebase amount for cancellation of return bearing credits that PGE owes to ratepayers does not produce just and reasonable rates. The entire trade is absurd from a ratepayer perspective, URP believes, because interest bearing credits are much more valuable.

Discussion and Resolution. URP's analysis is based on a fundamental error regarding the Commission's treatment of the Trojan balance. The application implementing the Settlement requested, and the Commission granted, a change in the amortization period for Trojan. Under the application as approved in Order No. 00-601, the remaining Trojan balance on PGE's books as of September 30, 2000, was collected in a single day. Under Oregon law, the Commission has the authority to prescribe accounting treatment for public utilities, including prescribing amortization periods for utility assets. ORS 757.105 to ORS 757.140. Because the Trojan balance was collected in a day, there was no "interest" or "profit" allowed on that balance. Interest is associated with the time value of money paid over time. If a loan's principal, for instance, is repaid over a term of years, the borrower pays interest at the stated rate on the unpaid balance. If the loan is prepaid before maturity, the outstanding principal balance is paid immediately and no further interest is due. In this case, the entire Trojan balance was paid on September 30, 2000. As a result, the Commission did not directly or indirectly allow "interest" or "profit" on the Trojan balance.

Likewise, the Commission has the authority to shorten the return period for credits that PGE owes to customers. Normally, if paid over a period of a year or more, the credits would accrue interest based on the remaining balance of the credit. However, if paid at once, the credit amount will be extinguished by a payment equal to the outstanding credit balance at the time of the payment. The Commission has the authority to shorten the lives of either the Trojan balance or customer credits. In the Settlement, the Commission decided to shorten the lives of both Trojan and the credits simultaneously. They were both paid on the same day, September 30, 2000. Under the Settlement, none of the regulatory assets or liabilities bear any interest. The Commission has previously allowed utilities to offset balance sheet amounts owed to and owed by customers. In UE 93, Order No. 95-1216, the Commission offset amounts owed to PGE for power costs and Trojan against amounts PGE owed customers for sale of a partial interest in the Boardman Coal Plant. In that case, a pretax credit of $117 million was offset with amounts owed by customers for power cost deferrals, a coal contract settlement, and $20 million of the Trojan balance. Order No. 95-1216, Appendix B, at 23.

URP believes that the Commission's authority to shorten Trojan's recovery life and trade that life for customer credits is limited by the URP v. OPUC decision. URP is wrong. The Court of Appeals explicitly did not address the Commission's authority to shorten recovery lives. 154 Or App 712, n.5. Nor is URP right in arguing that this transaction created the functional equivalent of interest or profit on Trojan, because both sides of the equation, the customer credits and the Trojan asset, were paid off simultaneously, to cancel out any future interest.

We conclude that it is reasonable and appropriate to shorten the recovery period for the Trojan investment. Both net benefit analyses that Staff and PGE presented show that customers experience a net benefit from shortening the recovery life of Trojan. The second net benefit analyses, which uses then current unamortized balance accounts for the Trojan investment and the customer credits, also shows that regardless of the "return on" issue, customers receive a net benefit from the Settlement.

Moreover, shortening the recovery period for the Trojan investment to enable PGE to recover the balance immediately is reasonable in light of the Court of Appeals decision in URP v. OPUC. This immediate recovery preserves the outcome we ordered in Order No. 95-322 and which we found resulted in just and reasonable rates and furthered important Commission policy goals. The Settlement and application accomplish this while providing customers with a rate reduction for 2001, by offsetting the Trojan investment balance against a variety of customer credits.

3. ***The creation of a new regulatory asset to pay the customers' FAS 109 liability should be disregarded because it is a "phantom bookkeeping asset."*** URP suggests that the new regulatory asset established pursuant to the application reflects a customer liability that would not have existed absent the Settlement. URP's witness explained that he considers the FAS 109 a phantom asset because it is not a physical asset.

Discussion and Resolution. Generally Accepted Accounting Principles (GAAP) require recognition of the expected recovery of tax benefits under FAS 109. The balance in an FAS 109 account reflects the amount customers owe PGE for the accelerated tax deductions that PGE flows through to customers early in the asset's life. In later years, customers must pay this amount to balance the accelerated deductions in the asset's early years. Arthur Anderson LLP performs annual audits of PGE's financial statement, including an examination of the FAS 109 asset. For PGE's 2000 annual audit, which reflected the impact of the Settlement, Arthur Anderson LLP concluded that PGE's financial statements are presented fairly and in conformity with GAAP.

The FAS 109 asset is not a phantom asset, as URP asserts. GAAP standards required PGE to eliminate the Trojan related FAS 109 asset when PGE removed the Trojan investment from its balance sheet. Even though the Settlement removed Trojan from PGE's balance sheet, however, it does not erase the related tax liability. To allow PGE to recover the amount of the related tax liability, the Settlement recommended, and Commission Order No. 00-601 created, a new regulatory asset in an amount equal to the eliminated FAS 109 asset. This reflects the fact that customers who enjoyed the benefit of accelerated tax benefits related to Trojan still owe PGE the amount previously reflected in the Trojan related FAS 109 asset. The Commission, in Order No. 00-601, approved a new regulatory asset to maintain consistency in the ratemaking treatment of FAS 109 amounts. Specifically, the new regulatory asset allows PGE to recover FAS 109 amounts that would have been recoverable if the Settlement had not occurred.

As to URP's contention that the FAS 109 asset is not a physical asset, the same is true of many regulatory assets, such as those PGE maintains for Demand Side Management programs, Year 2K costs (including hiring outside consultants to assist in Y2K compliance), and certain Senate Bill 1149 implementation costs. These have no physical existence but are real, Commission authorized assets.

We conclude that PGE's accounting treatment of the FAS 109 asset and its replacement asset is reasonable and appropriate.

4. ***The Settlement unfairly expropriates from ratepayers proceeds from PGE's NEIL policy.*** URP assumes that customers have a right to all NEIL distributions, rather than the 55 percent that they receive under the Settlement. URP's assumption appears to be based on the fact that ratepayers paid the costs of all NEIL premiums through rates.

Discussion and Resolution. The distribution of payments from NEIL is subject to the Commission's discretion. Although the payment of NEIL premiums was forecasted in the ratemaking process, PGE shareholders were subject to a variety of risks for these payments, and based on those risks PGE customers may or may not have paid all the actual NEIL premiums (as opposed to the forecasted premiums). For instance, PGE's shareholders bore the risk that actual premiums would increase between rate cases, that NEIL might experience a greater number of claims than anticipated, and that the NEIL investment strategies might fail. If NEIL experienced

a greater than anticipated number of claims, those additional claims would translate into higher premiums for all utilities covered through NEIL, including PGE.

This record does not reveal exactly how much customers paid in NEIL premiums. NEIL premiums were not subject to balancing account treatment. Because of this and because of regulatory lag, PGE customers may not have paid all of the NEIL premiums. Some allocation of the NEIL distribution is therefore reasonable between PGE shareholders and customers. The Settlement represents a reasonable sharing of NEIL benefits and is part of the net benefit customers experience under the Settlement.

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.

We conclude that the Settlement did not expropriate NEIL distributions from customers, as URP asserts. Rather, the NEIL distribution sharing was part of a tradeoff that enabled customers to remove Trojan from rates, write off $5.1 million after tax of the remaining Trojan investment, and receive an additional $2.5 million in credits. Customers experienced a net benefit in this transaction. We conclude that the NEIL distribution sharing under the Settlement is reasonable.

5. ***The Trojan balance includes construction work in progress (CWIP) expenses that should be excluded pursuant to ORS 757.355.*** URP notes that the Trojan investment balance, as stated in URP Exhibit 305, reflects $4.2 million in Nuclear Fuel – CWIP and $6.1 million in Cancelled CWIP. URP claims that ORS 757.355 renders this CWIP unrecoverable, which means that the Trojan balance should be reduced by an additional $10.3 million.

Discussion and Resolution. These accounts involve contracts to acquire fuel and other projects that would have been transferred to a plant in service account as the fuel was delivered and consumed and the projects were completed and capitalized into the Trojan investment balance. When Trojan closed prematurely, these contracts and other projects were cancelled and remained in accounts as CWIP.

ORS 757.355 does not apply to routine construction work in progress attached to an operating plant. Ballot Measure 9, codified as ORS 757.355, was intended to apply to CWIP that reflects preconstruction commercial operating plants, not smaller projects attached to an operating plant. *See PP&L v. Dep't of Revenue*, 308 Or 49 (1989) ("When a utility constructs new property, such as a generating facility, that property is not included in the utility's rate base

until it actually is placed into service.").[8] As a result, ORS 757.355 does not apply to the CWIP items at issue here, which involve projects attached to an operating plant.

Furthermore, a close review of Order No. 95-322 shows that URP's analysis is faulty. In Order No. 95-322, the Commission used a net benefit test to determine what portion of the unamortized balance of the Trojan investment should be included in PGE's rate base. Order No. 95-322 at 2. The net benefit analysis compared the cost of Trojan's continued operation with the cost associated with retiring the plant plus the expected long term costs of replacing the plant's output. *Id*. The purpose of the test was to "identify the point at which ratepayers are indifferent between the options of continued operation of Trojan and shutdown and construction or acquisition of replacement resources." *Id*. This test struck an appropriate balance between PGE and its customers. The test held customers harmless for any costs PGE incurred that were above the cost of keeping Trojan in service. On the other hand, the Commission did not want to put PGE in a worse financial position than it would have been in if it continued to operate Trojan. No other test would "encourage PGE to engage in prudent management and responsible least cost planning." *Id*. Based on this test, the Commission concluded that the premature "closure of Trojan resulted in a negative net benefit of approximately $20.4 million" (after tax; $26.8 million pretax). As a result, the Commission ordered a $20.4 million (or $26.8 million pretax) reduction in the Trojan balance, in addition to a $17.1 million reduction related to post 1991 plugging and sleeving expenses that the Commission excluded.

Expressed as a formula, a net benefit exists for closure if:

No Closure Alternative		Closure Alternative
(X + Y)	>	(X + Z)

where X is the unamortized investment in Trojan, Y is expected allowable long term costs of continued Trojan operation, and Z is replacement resource costs. Order No. 95-322 at 33. The $10.3 million in CWIP would have been included in the Commission's calculation of the unamortized investment for purposes of calculating the net benefit test, because the CWIP would eventually have become plant in service in the future under the no closure alternative.

URP's suggestion that CWIP should be excluded from the unamortized Trojan balance for the closure alternative makes no sense. That suggestion would result in the net benefit test comparing incomparables. The unamortized balance for Trojan (X in the above equation) would not be the same on both sides. If CWIP costs were not included in the closure side of the equation, it would tip the balance in favor of plant closure. The closure alternative would always have the benefit of excluding CWIP costs that would be included in the no closure alternative. This form of the net benefit test is not the one the Commission used in Order No. 95-322, nor is it an appropriate test from a regulatory perspective.

[8] The Court of Appeals in URP v. OPUC did not address this issue but focused on whether ORS 757.355 applied to retired plant.

Whether or not CWIP is included in the unamortized investment of Trojan, however, the result is the same: a $26.8 million pretax reduction in the Trojan balance and a resulting $340.2 million balance after Order No. 95-322. Table 3 shows why.

Table 3
(millions)

	CWIP Excluded Before Net Benefit Analysis	CWIP Included in Net Benefit Analysis
Initial CWIP write off	$10.3	$00.0
Net negative benefit of closure	$16.5	$26.8
Total pretax write off	$26.8	$26.8
Trojan unamortized balance	$340.2	$340.2

If CWIP is not included in the net benefit test, Order No. 95-322 would have directed PGE to write off this $10.3 million off the top. That write off would reduce the cost of the closure alternative by $10.3 million, which would reduce the net negative benefit of the closure alternative by $10.3 million. The result of the net benefit analysis would then be a $16.5 million net negative benefit on the closure side. On this set of assumptions, the Commission would have ordered a $26.8 million write off: $10.3 million initially because of the CWIP and $16.5 million through the net benefit test. On the other hand, if CWIP is included in the unamortized investment of Trojan on both sides of the equation, then as the Commission calculated it, the net benefit is a negative $26.8 million. Both alternatives reach the same conclusion: a $26.8 million write off and a $340.2 million Trojan investment balance after the write off.

URP's point about CWIP would mean that the Commission must first have ordered PGE to write off the CWIP costs and then have performed the net benefit analysis and ordered a $26.8 million reduction on top of the CWIP reduction. But the record evidence in UE 88 proves that this was not the case. In UE 88, Staff testimony of David Warner contains an exhibit that shows that the record reflected the CWIP accounts in the unamortized Trojan balance. Staff/66 Warner at 1.[9] In that exhibit, Cancelled Jobs equals $6.0 million, which corresponds to the $6.1 million for cancelled CWIP in URP's Exhibit 305. The CWIP for fuel is embedded in the Nuclear Fuel account, which exceeds $25.1 million in the exhibit. Moreover, the Commission order provides no evidence that the Commission intended to eliminate CWIP as a separate item from the general reduction of $26.8 million. Order No. 95-322 contains specific write offs based on the net benefit analysis ($26.8 million) and for post 1991 plugging and sleeving expenses ($17.1 million). The order contains no specific write off for CWIP, as URP's theory suggests.

We conclude that URP's claim that the CWIP should be disallowed in this docket is unfounded. Allowing CWIP expenses in this case does not violate ORS 757.355. URP

[9] We take official notice of this exhibit pursuant to OAR 860-014-0050(1)(e).

misunderstands that the CWIP at issue here is not for plant not yet in service but is for projects associated with Trojan, an operating plant. 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.

6. URP's Miscellaneous Claims. First, URP claims that the Trojan investment balance after Order No. 95-322 should have been $250.7 million, as stated in Order No. 95-322 at 57. As explained above, that figure is an after tax number. The $340.2 million figure shown in URP Exhibit 305 is a pretax number. The $340.2 million pretax equals $263.9 million after tax. The difference between the two after tax figures, $250.7 million and $263.9 million, is that the $250.7 million figure is based on a combined 1995-1996 forecast year that PGE used in UE 88. Order No. 95-322 at 6. This figure is the Trojan balance at the midpoint of the test years, or about January 1996. The $263.9 million number in UPR Exhibit 305 reflects the actual Trojan balance as of March 31, 1995, immediately following Order No. 95-322 and the reductions the order required. This number is consistent with the first figure, but larger because it has not been reduced by amortization to the end of the year. This is the proper result for the rates ordered in Order No. 95-322.

Second, URP complains that for the first year reflected in the net benefit analysis, PGE and Staff assumed a full year of the UE 100 collections of $59 million in Trojan investment related annual revenue requirement. URP believes that the first year should have been prorated because PGE's UE 115 rates went into effect on October 1, 2001, and the net benefit analysis assumed a reduction in the Trojan revenue requirement to $33.3 million for the second year of the net benefit analysis. It is appropriate not to prorate the $59 million because the application had an effective date of October 1, 2000, a full year before the UE 115 rates became effective. Therefore, a full year of $59 million in collections for Trojan related investment is reasonable and appropriate. 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 were 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.

Third, URP seeks to exclude the responses of its expert from the record, because URP's witness was not present at the hearing to explain his responses to PGE's data requests. URP's argument fails. OAR 860-014-0070(3) permits the introduction of data requests into evidence without limitation.

Conclusion. We conclude that the Settlement and the associated tariff filing in Advice No. 00-13 produce just and reasonable rates. We accept the net benefit analyses that Staff and PGE presented as showing that customers receive a financial benefit from the Settlement and its implementation. We find that the Settlement also allows the parties to it and the Commission to resolve the remaining Trojan issues in a manner consistent with the Commission's approach since the closure of Trojan in 1993. The Commission has consistently apportioned Trojan costs between PGE and its customers in a fair and even handed manner. In the years immediately following the Trojan closure, the Commission required PGE shareholders

and customers to share the resulting costs through deferred accounting orders. S*ee, e.g.,* UE 88/UM 692, Order No. 94-1456 (approving the deferral of 40 percent of incremental Trojan replacement costs from January 1, 1995, to March 31, 1995); UM 529, Order No. 93-309 (approving the deferral of 80 percent of incremental Trojan replacement power costs from December 4, 1992, through March 31, 1993); UM 594/UM 571, Order No. 93-1493 (approving the deferral of 50 percent of incremental Trojan replacement power costs from July 1, 1993, through March 31, 1994). In UE 93, Order No. 95-1216, the Commission approved the amortization of less than the full amount of the deferred amounts, increasing the amount of Trojan costs borne by PGE shareholders. In UE 88, the first general rate case after the Trojan closure, the Commission required PGE and its shareholders to absorb $37.5 million (after tax) of the Trojan investment and permitted PGE to include the remaining $340.2 million pretax investment in rate base. The Settlement removed Trojan investment from PGE's balance sheet, but only after PGE agreed to write off approximately $5.1 million after tax in Trojan related expenses, created a $2.5 million customer credit, and provided customers with a $10.2 million rate reduction beginning October 1, 2000.

URP's arguments against the Settlement have been discussed in detail above. The arguments are not well founded. We conclude that allowing PGE to recover the Trojan balance immediately and remove Trojan from its balance sheet is reasonable and in the public interest. This permits the Commission to preserve the outcome in Order No. 95-322, which we previously found resulted in just and reasonable rates and furthered important Commission policies. We find that offsetting the Trojan balance against customer credits, as proposed in the application, is in the public interest, as both net benefit analyses show. We further conclude that PGE should be permitted to recover the Trojan balance immediately. This provides customers and PGE with the same outcome we ordered in UE 88, Order No. 95-322, and shows that that order does in fact provide the correct baseline for the net benefit analyses. Those analyses show that customers benefit from the Settlement in an amount between $16.4 and $18.5 million.

We conclude that approval of PGE's application and the rate change established by Advice No. 00-13 will benefit PGE's customers, is in the public interest, and will result in just and reasonable rates. We find that the application should be approved and that the tariffs contained in PGE Advice No. 00-13 should continue in effect from October 1, 2000, until superseded by subsequent tariffs.

Nothing in this order is intended to affect PGE's recovery of the cost of decommissioning Trojan as approved in Order No. 95-322. Nothing in this order is intended to require PGE to refund any of the funds it has collected through rates related to its investment in Trojan prior to and as of October 1, 2000.

ORDER

IT IS ORDERED that:

1. The application is approved and the tariffs contained in PGE Advice No. 00-13 shall continue in effect until superseded.

2. All the accounting actions approved in Order No. 00-601 are affirmed.

3. To the extent necessary to be consistent with this order, Order No. 95-322 is amended.

Made, entered, and effective ____________________________.

____
Roy Hemmingway
Chairman

____
Lee Beyer
Commissioner

____
Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

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