

**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))

ORDER

DISPOSITION: MOTION TO AMEND PROCEDURAL SCHEDULE
PARTIALLY GRANTED; SECOND PHASE
INITIATED; FIRST PHASE HELD IN ABEYANCE

I. OVERVIEW

A. HISTORICAL BACKGROUND

The procedural history leading to these remand proceedings is long and complex. Although this history is recounted at length in Order No. 04-597, it is appropriate to highlight this history again.

In 1998, the Oregon Court of Appeals (Court of Appeals) issued an opinion in *Citizens' Utility Board v. PUC*, 154 Or App 702, 962 P2d 744 (*CUB v. PUC*). In that opinion, the Court of Appeals reconciled two statutes, ORS 757.355 and ORS 757.140(2), to determine that the Public Utility Commission of Oregon (Commission) is statutorily authorized to allow utilities to collect rates recovering only the principal amount of a utility's undepreciated investment in retired capital assets, but not a rate of return on the retired capital assets. *CUB v. PUC* at 716-717. The opinion reversed Marion County Circuit Court (Circuit Court) orders upholding Order No. 93-1117 (and Order No. 93-1763 denying reconsideration of Order No. 93-1117), which interpreted the pertinent statutes to allow a utility to both recover and earn a return on retired capital assets, and affirmed Circuit Court orders reversing Order No. 95-322,

which authorized the Portland General Electric Company (PGE or the Company) to collect rates that included a return of, and on, PGE's retired Trojan nuclear plant assets.

Petitions for review of *CUB v. PUC* were filed and granted. 328 Or 464, 987 P2d 513 (1999). While the case was pending (including during an abeyance), PGE, Commission Staff (Staff) and the Citizens' Utility Board of Oregon (CUB) entered into settlement agreements that were intended to entirely remove Trojan from PGE's rate base on a going forward basis, thereby establishing new rates that would prospectively comply with the Court of Appeal's decision in *CUB v. PUC*. The Utility Reform Project, et al. (URP) was not a party to these agreements. To implement the settlement agreements, PGE filed an application for an accounting order and approval of related tariff sheets. In Order No. 00-601, the Commission approved the proposed accounting order and did not suspend the filed tariffs, thereby allowing the new rates to take effect.

URP immediately filed a complaint to challenge the resulting rates. In Order No. 01-152, the Commission allowed URP's complaint to proceed under ORS 757.210. Following a hearing, the Commission issued Order No. 02-227, which approved the rates filed by PGE to implement the settlement agreements, thereby allowing them to continue in effect, and affirmed the accounting actions approved in Order No. 00-601.

There is evidence that the Commission and parties to the settlement agreements considered the settlement and implementing rates to adequately respond to the Court of Appeal's ruling in *CUB v. PUC*, with no further action required. Indeed, PGE filed a motion to dismiss review of *CUB v. PUC*, and to vacate the decisions below, arguing that the implementing rates rendered the controversy moot. URP disagreed, however, and opposed the motion. The Supreme Court of Oregon (Oregon Supreme Court) denied PGE's motion, but nevertheless dismissed the petitions for review, without explanation. 335 OR 91, 58 P3d 822 (2002).

When the Oregon Supreme Court dismissed the petitions for review, Orders Nos. 93-1117, 93-1763 and 95-322 were immediately ready for remand to the Commission under *CUB v. PUC*. Upon such remand, the question of whether past rates needed to be redressed to fully satisfy the Court of Appeal's opinion in *CUB v. PUC* would actually be in front of the Commission. The remand was not immediate, however. Without explanation, the Circuit Court waited approximately nine months before remanding the cases in November of 2003.

In the interim, URP appealed, to the Circuit Court, the Commission's approval of rates to remove Trojan from rates on a prospective basis in Order No. 02-227. URP asserted that the rates failed to account for past rates paid by customers that included a return on PGE's Trojan investment. URP contended that Order No. 02-227 wrongly applied ratemaking principles, such as the rule against retroactive ratemaking, to not redress past rates. URP sought an order from the Circuit Court that would direct the Commission to set aside and modify the rates approved under Order No. 02-227, and to instruct PGE to issue refunds.

On January 9, 2004, the Circuit Court reversed Order No. 02-227 in major part, and remanded the order to the Commission for further proceedings consistent with its Opinion and Order. *Utility Reform Project v. PUC*, Case No. 02C14884, Judgment (and incorporated Opinion and Order) (Marion County Circuit Court of Oregon 2004). The Circuit Court’s judgment stated, “[a]s part of the adjustment of offsetting charges and liabilities related to the Trojan writeoff, PGE should have been required to account for all refunds due to rate payers for these unlawfully collected rates as a matter of law.” *Id.*

Faced with nearly concurrent remands of four orders, Order Nos. 93-117, 93-1763, 95-322 and 02-227, the Commission undertook joint remand proceedings. In Order No. 04-597, the Commission approved undertaking a retrospective examination of rates. The Commission made it clear, however, that the scope of the joint remand proceedings was far different than the likely scope of remand proceedings under *CUB v. PUC* alone. The Commission observed that had the Circuit Court immediately remanded Order Nos. 93-117, 93-1763 and 95-322, the Commission would not have had specific guidance on the nature of remand proceedings to be conducted. Indeed, in its opinion in *CUB v. PUC*, the Court of Appeals simply ordered the case be remanded with no instruction regarding how to implement the decision. 154 Or App at 717.

B. RELATED PROCEEDINGS IN OTHER TRIBUNALS

Related proceedings in other tribunals have further complicated these remand proceedings. At almost the same time the Commission undertook these remand proceedings, the Commission and PGE appealed the Circuit Court’s remand of Order No. 02-227. In its appeal, the Commission asserts that the Circuit Court erred in reversing and remanding Order No. 02-227, and argues that the Court of Appeals’ decision in *CUB v. PUC* did not require the Commission to order a refund of rates.

Concurrent with these remand proceedings and the appeal of *CUB v. PUC*, related civil proceedings were initiated in the Circuit Court, with issues rising to the Oregon Supreme Court. On January 23, 2003, certain past and present ratepayers of PGE filed complaints against PGE in Circuit Court, seeking refunds of rates alleged to be unlawful because they collected a return on Trojan during the period of April 1, 1995 (the effective date of Order No. 95-322), and October 1, 2000 (the effective date of Order No. 00-601).

Numerous procedural challenges and a petition for a writ of mandamus caused the matter to be addressed by the Oregon Supreme Court in *Dreyer v. Portland General Electric Co.*, 341 Or 262, 142 P3d 1010 (2006) (hereafter *Dreyer*). As relevant here, the Oregon Supreme Court concluded that the Commission has primary jurisdiction to determine a remedy when rates are remanded. The Oregon Supreme Court observed that “whether the PUC has authority to order refunds or other retroactive relief will not be ripe for decision by an appellate court until the PUC acts[.]” *Dreyer*, 341 OR at 286,

n. 19. The Oregon Supreme Court also refused to foreclose the opportunity of a civil remedy, in the event that the Commission does not authorize a retroactive remedy.

In light of the *Dreyer* decision, PGE filed a procedural motion with the Court of Appeals regarding the appeal of Order No. 02-227. Among other things, PGE asked the court to summarily reverse the judgment of the Circuit Court and to affirm Order No. 02-227. PGE asserted that the Circuit Court prematurely addressed issues not properly before it when reversing the Commission on Order No. 02-227. PGE observed that the *Dreyer* opinion highlighted the prematurity of the Circuit Court's opinion.

The Court of Appeals denied PGE's motion to reverse the judgment of the Circuit Court, stating:

To support its request that the circuit court judgment be summarily reversed, PGE argues that the issues before the Court of Appeals in this case are premature and that the court would be rendering an advisory opinion. The issues regarding the commission's authority regarding retroactive ratemaking do appear to be premature at this time. However, there are issues before the court in this appeal and cross-appeal that are not premature; namely, whether the PUC properly applied the law in setting prospective rates and removing Trojan from PGE's books, and whether the rates were just and reasonable. Court of Appeals Order Denying Motion to Reverse Judgment, Granting Motion to File Revised Briefs on Cross-Appeal, and Denying Motion to Hold Appeal in Abeyance, p. 2 (February 16, 2007).

C. THESE REMAND PROCEEDINGS

The procedural history, to date, of these remand proceedings has also been lengthy and complicated. Although these remand proceedings were first opened at the beginning of 2004, significant dispute immediately ensued about the proper scope of, and process for, the proceedings. After initial briefing on what the scope and procedure for the proceedings should be, Administrative Law Judge (ALJ) Kirkpatrick issued a ruling, dated May 5, 2004, that phased the proceedings and asked for input on whether the scope of Phase I should be limited to the ministerial calculation of charges already paid by ratepayers for interest on PGE's Trojan investment, or whether the scope should encompass a broader evaluation of how rate decisions were affected by the Court of Appeals' legal interpretation of statutory law in *CUB v. PUC*.

Following briefing by Staff and parties, a second ruling, dated August 31, 2004, established the scope of the first phase of these remand proceedings and a basic procedural framework upon which to proceed. The ruling limited the scope of the first phase to reconsideration of those aspects of the UE 88 ratemaking process affected by the ruling of the Court of Appeals in *CUB v. PUC*. The ruling identified the general question to be considered in the first phase of these remand proceedings as: "What rates

would have been approved in UE 88 if ORS 757.355 had been interpreted to prohibit a return on Trojan?” Under this framework, the ruling identified three specific rate determinations made in UE 88 that were affected by the Court of Appeals’ statutory interpretation of ORS 757.355, but allowed for more to be identified.

On September 13, 2004, a motion to certify the Phase I scope ruling was filed. On October 18, 2004, the Commission granted certification while simultaneously affirming and adopting the ruling in its entirety in Order No. 04-597. The Commission subsequently denied URP’s request for reconsideration in Order No. 05-091.

PGE, Staff and URP submitted several rounds of testimony (which were subject to several challenges) and on August 29 and 30, 2005, a hearing was conducted. Following post-hearing motions, the record was closed and two rounds of briefs were submitted.

II. THE PLEADINGS

A. PGE’S MOTION

On November 15, 2006, PGE filed a motion to amend the procedural schedule for the above-captioned docket to consolidate all phases, and to reopen the record to permit parties to submit additional testimony (Motion). PGE submits that the Oregon Supreme Court’s decision in *Dreyer* warrants these actions by the Commission.

PGE argues that the *Dreyer* decision obviates the reason for phasing the remand proceedings. PGE observes that the Commission phased the remand proceedings in order to postpone consideration of the issue of whether or not the Commission has the legal authority to direct a utility to issue refunds of rates paid until after the Oregon Court of Appeals resolved the Commission’s appeal of the Circuit Court’s reversal of Order No. 02-227. PGE asserts that the Oregon Supreme Court indicated that the Commission need not wait to address this issue until the Court of Appeals acted, quoting the *Dreyer* opinion, as follows:

“ . . . whether the PUC has authority to order refunds or other retroactive relief will not be ripe for decision by an appellate court until the PUC acts. . . ” *Dreyer*, 341 Or at 286, n. 19.

PGE asserts that the *Dreyer* opinion provides substantial guidance on how the Commission should resolve the issue of whether it has the legal authority to order refunds or customer credits for past rates. Indeed, PGE now takes the position, based on the Oregon Supreme Court’s interpretation of ORS 757.225, that the Commission has the legal authority to direct a utility to refund rates. PGE indicates that this new position will streamline the Commission’s resolution of the issue. PGE also argues that consolidation of the phases is in the interest of administrative efficiency, as it would allow the

Commission to issue a single final order addressing all issues raised in the remand proceedings.

To facilitate consolidation of the remand proceedings, PGE requests that the record be reopened to do two things. First, PGE recommends that parties be allowed to address issues raised by *Dreyer*. As an example, PGE states that the Commission should identify any injury to former and current customers resulting from past rates that included a return on Trojan, taking into account the relationship between the class action civil suit and the Commission's proceedings in order to develop complete and final relief. Secondly, PGE indicates that as evidence entered to date in the remand proceedings is relevant only to the 5.5-year period from the effective date of the UE 88 final order until the Commission's initial approval of the UM 989 settlement, on September 30, 2000, additional evidence needs to be taken regarding UM 989 rates after September 30, 2000. PGE proposes a schedule to allow this new evidence to be taken, and requests a final Commission order by July 30, 2007.

B. URP'S ANSWER

On December 1, 2006, URP filed an Answer to PGE's Motion (Answer). URP agrees that parties should be provided with an opportunity to brief the legal issue of whether the Commission can order refunds to customers of rates paid between April 1, 1995, and September 1, 2000. Indeed, URP contends that this has been its position from the start of these remand proceedings. URP disagrees, however, that the phases should be consolidated, or that the evidentiary record should be reopened.

URP complains that PGE's Motion is inappropriate, as it functions as a late and defective request for reconsideration of Order No. 04-597, the order that approved the scope of these remand proceedings. URP contends that PGE's Motion violates the law of case doctrine, as parties to these remand proceedings expect the procedure established in Order No. 04-597 to be followed through and completed. URP argues that reconfiguring the scope of these remand proceedings at this time would prejudice URP because resources already expended would be wasted, and there would be a need to expend yet more resources.

URP also contends that PGE fails to present good cause for its Motion. URP asserts that the *Dreyer* opinion does not have a direct impact on the first phase of these remand proceedings. URP also contests PGE's assertion that the Oregon Supreme Court concluded that the Commission has the authority to direct a utility to issue refunds. URP states that the Oregon Supreme Court instead decided only that the filed rate doctrine does not preclude a civil court from awarding damages for rates paid under ORS 756.185. URP observes that the Oregon Supreme Court expressly stated that it did not address whether Oregon utility law incorporates some other form of the filed rate doctrine.

Rather than provide a reason to consolidate the phases of these remand proceedings, URP argues that *Dreyer* supports the continued phasing of the proceedings.

URP indicates that based on *Dreyer*, the Commission should issue a decision in Phase I of these remand proceedings that addresses its ability to direct a utility to issue refunds of past rates. To that end, URP agrees that there should now be legal briefing on this issue. URP requests that the Commission establish a briefing schedule.

URP counsels that the Commission should not proceed with the second phase of these remand proceedings before the Court of Appeals resolves the UM 989 appeal. URP takes the position that the need to conduct Phase II will be obviated if the Oregon Court of Appeals determines that Order No. 02-227 should not be overturned, as Phase II would address the time period at issue in UM 989. URP contends that the *Dreyer* opinion abated class action litigation in Circuit Court that seeks damages for the period of time between April 1, 1995 through September 30, 2000, which corresponds to the rate period at issue in the first phase of these remand proceedings. URP argues that the Oregon Supreme Court intended to halt the class action litigation only until after the Commission resolved Phase I of these remand proceedings.

C. PGE'S REPLY

On December 15, 2006, PGE filed a reply in support of its Motion. PGE indicates that it filed a reply because URP's Answer inaccurately described the Commission's rulings and opinions on the scope of these remand proceedings, raised legal objections that PGE did not and could not have anticipated, commented about the impact of the *Dreyer* decision and proposed changes in the scope and timing of the remand proceedings.

PGE asserts that URP fundamentally misunderstands the scope of each phase of these remand proceedings. PGE observes that URP seems to understand the scope of Phase I of these remand proceedings to be an assessment of whether rates paid during the period from April 1995 through September 2000 (Period A) should be remedied, and the scope of Phase II to be assessment of whether rates paid for during the period from September 2000 to the present (Period B) should be remedied. As PGE understands the scope of the phases of these remand proceedings, however, Phase I will not result in remedies for either rate period. Rather, later phases, if necessary, would be undertaken to reconcile the findings in Phase I with actual rates for Period A and Period B.

PGE also objects to URP's characterization of the rate periods as entirely distinct. PGE explains that the Circuit Court invalidated the rates established by Order No. 02-227 because they were prospective in nature only and did not account for past rates. PGE observes that the Circuit Court determined that the UM 989 final order was inappropriate as it "did not allow the recovery of 'past unlawful charges' in the rates that went into effect October 1, 2000," thereby rendering those rates neither just nor reasonable." PGE concludes, that "according to the circuit court, the rates for 'Period B' are wrong precisely because they did not deal with 'Period A.'"

PGE rebuts URP's contention that the Commission's resolution of Phase I would reinstate class action litigation. PGE states that the Oregon Supreme Court abated the class action litigation, in *Dreyer*, until the Commission determines whether customers have been injured, the extent of such injury, and whether the Commission has the authority to award relief for any injury. Resolution of Phase I will accomplish the first of these tasks.

PGE also observes that the Commission already rejected the notion that it could not proceed with these remand proceedings until after the Court of Appeals ruled on the appeal of Order No. 02-227, the final order in UM 989. PGE asserts that URP mistakenly suggests that the Court of Appeals' decision may eliminate the need for Phase II. PGE states that the second phase will be needed to reconcile rates for Period A, regardless of whether the Court of Appeals affirms the UM 989 final order, thereby eliminating issues regarding Period B rates. If URP refers to the possibility that the Court of Appeals may determine that the Commission does not have the authority to award retroactive relief, PGE notes that this issue may not be addressed by the Court of Appeals. PGE also reminds the Commission that the Oregon Supreme Court indicated in *Dreyer* that the Commission, not the courts, should first determine whether the Commission has the authority to award retroactive remedies to ratepayers for past rates.

III. MOTION TO AMEND PROCEDURAL SCHEDULE PARTIALLY GRANTED; SECOND PHASE INITIATED; FIRST PHASE HELD IN ABEYANCE

When the Circuit Court remanded Order No. 02-227 in UM 989, directing us to account for past rates, and did so contemporaneously with a remand of certain orders in DR 10 and UE 88, we undertook these joint remand proceedings. The fundamental premise of these joint remand proceedings is a retrospective examination of what rates likely would have originally been set in UE 88, had this Commission interpreted statutory law as the Court of Appeals did in *CUB v. PUC*. The purpose of this examination is to evaluate the harm, if any, to PGE's customers that paid rates including a return on Trojan. This examination, which fundamentally engages in a retroactive review of rates, was undertaken pursuant to the Circuit Court's direction, without any evaluation of our authority to do so.

In *Dreyer*, the Oregon Supreme Court acknowledged that we had yet to determine whether the Legislature has delegated the authority to us to direct utilities to refund rates, or to otherwise retroactively redress rates. The Court of Appeals also indicated in a very recent procedural decision in the appeal of Order No. 02-227 that its consideration of whether the Commission has authority to engage in retroactive ratemaking would be premature until the Commission itself has had the opportunity to fully consider such issues. Moreover, the Court of Appeals stated that its focus in the appeal of Order No. 02-227 would be on two questions: (1) whether the PUC properly applied the law in setting prospective rates that removed Trojan from PGE's books; and (2) whether the prospective rates were just and reasonable.

In light of these statements by the higher courts of this state, we find that we prematurely undertook the first phase of these joint remand proceedings. When we undertook the first phase of these joint remand proceedings, we did so in anticipation that the Court of Appeals might uphold the Circuit Court's reversal of Order No. 02-227 on the grounds that we should not have approved a prospective change in rates to comply with the holding in *CUB v. PUC*, without also considering a retroactive change in rates. If the Court of Appeals took this action, we anticipated that we would have already accounted for the harm, if any, represented by past rates.

Based on the recent procedural ruling of the Court of Appeals, however, it seems more likely that the Court of Appeals will focus on the legality, justness and reasonableness of the rates established in Order No. 02-227, without consideration of whether other rate changes are required to satisfy the holding in *CUB v. PUC*. Depending on the results of the Court of Appeals' review, we discern that changes to the scope of Phase I may be necessary. Consequently, we deem it inappropriate to resolve Phase I issues now. Instead, we will hold the current remand proceedings in abeyance, pending a final decision regarding Order No. 02-227 by the higher courts.

In so doing, we deny PGE's motion to consolidate all of the phases of these joint remand proceedings. We note that it would have been difficult, in any case, to have consolidated all phases of the joint remand proceedings, as those phases had not necessarily been identified. PGE is mistaken that we had previously identified, as a separate phase, the question of whether we have the legal authority to engage in retroactive ratemaking. Rather, these joint remand proceedings were premised on the notion that contemplation of this question had implicitly been affirmatively decided by the Circuit Court when it directed this Commission to redress past rates.

We agree with PGE, however, that it now seems that we need not wait to address this question until after the Court of Appeals finishes its review of Order No. 02-227. As PGE observes, the Oregon Supreme Court stated in *Dreyer*, ". . . whether the PUC has authority to order refunds or other retroactive relief will not be ripe for decision by an appellate court until the PUC acts" *Dreyer*, 341 OR at 286, n. 19. The Court of Appeals' observation in its procedural ruling, as noted above, is also consistent with the premise that the Commission must first resolve issues regarding our authority to redress past rates.

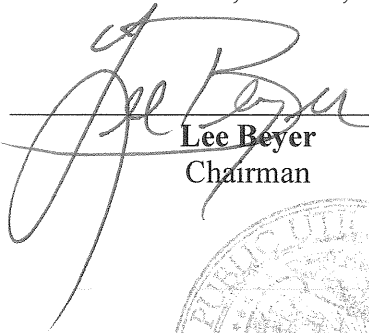
Consequently, while the first phase of the proceedings is held in abeyance, we find it appropriate to modify the procedural schedule of these remand proceedings to immediately commence a second phase of these joint remand proceedings to investigate our delegated authority to engage in retroactive ratemaking. Given the generality and breadth of this issue, we expect that other parties, in addition to those now active in these joint remand proceedings, will want to participate. As such, the procedural schedule will accommodate the intervention of additional parties. Furthermore, because this issue is solely legal in nature, we anticipate that the matter may be resolved with briefing, with no need for evidentiary proceedings. A conference will be scheduled promptly to establish a necessary schedule.

ORDER

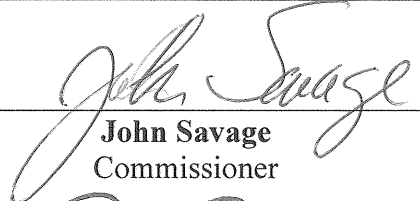
IT IS ORDERED that Phase I of these remand proceedings is held in abeyance while a new phase is initiated to address what delegated authority, if any, we have to engage in retroactive ratemaking.

Made, entered, and effective

APR 19 2007



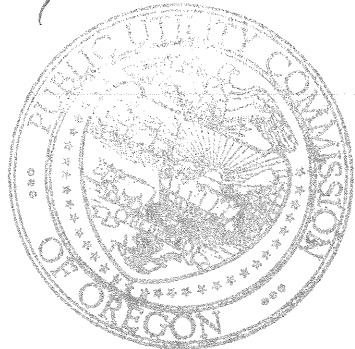
Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
Commissioner



A party may appeal this order to a court pursuant to ORS 756.580.