

**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))

ORDER

DISPOSITION: MOTION TO REINSTATE SCHEDULE DENIED

The Class Action Plaintiffs (CAPs) move for reinstatement of the procedural schedule announced in Order No. 07-157 and request that the Public Utility Commission of Oregon (Commission) issue a separate order regarding its remedial authority without further delay.¹ The Utility Reform Project, et al. (URP) joins CAPs' motion.² CAPs contend that any delay in addressing the remedies issue creates a permanent harm to the class members certified in *Dreyer v. Portland General Electric Co.*, Marion County Circuit Court Case Nos. 03-C10640 and 03-C1063. For the reasons discussed below, we deny CAPs' Motion.

BACKGROUND

To provide the proper context for considering CAPs' motion, we begin with a brief summary of the complex procedural history of these remand proceedings. We initiated the proceedings in March 2004 shortly after receiving two nearly concurrent remands from the Marion County Circuit Court. The first remand is related to the Court of Appeals' decision in *Citizens' Utility Board v. Commission*, which held that this Commission's rate orders allowing Portland General Electric Company (PGE) to collect a return on its undepreciated investment in the Trojan nuclear generating facility were

¹ *Class Action Plaintiffs' Motion to Reinstate Schedule of OPUC Order No. 07-157*, Docket Nos. DR 10, UE 88, UM 989 (January 14, 2008).

² *Response of Utility Reform Project, et al., to Prehearing Conference Report* at 1, Docket Nos. DR 10, UE 88, UM 989 (January 14, 2008).

erroneous.³ Order Nos. 93-1117, 93-1763, and 95-332. The Marion County Circuit Court remanded the matter “for further proceedings consistent with the opinion and orders of the Court of Appeals.” The second remand came directly from the Marion County Circuit Court, which concluded that the Commission’s 2000 rate order, removing all Trojan costs from future rates was also erroneous. Order No. 00-227. Although the court upheld the new rates on a prospective basis, it concluded that the Commission had failed to redress the rates paid by customers for the time between the two rate orders, *i.e.*, 1995 to 2000, and ordered the Commission to remedy this error.

We began the remand proceedings with an initial phase to determine the amount of refunds due, if any, to customers during the 1995 to 2000 time period. Based on the Marion County Circuit Court’s instructions on remand, we assumed that we must order PGE to issue any refunds due, even though we questioned our authority to do so.

We were nearing the end of Phase I when the Supreme Court issued its decision in *Dreyer v. PGE* in August 2006.⁴ In that decision, the court concluded that the question of the Commission’s remedial authority had not been resolved and that the Commission has special expertise to determine whether it can order refunds or any other form of retroactive relief for the amounts paid by ratepayers for the return on Trojan between 1995 and 2000. Because the Supreme Court expressly directed us to determine our refund authority, we abated Phase I and initiated a second phase. In Order No. 07-157, we notified the parties of our decision to proceed in this manner because resolution of Phase I would be unnecessary if we found that we had no remedial authority.

We were within a few weeks of issuing an order in Phase II, when the Court of Appeals issued its decision in *Utility Reform Project, et al. v. Public Utility Commission* in October 2007. Relying on *Dreyer*, the Court of Appeals concluded that the Marion County Circuit Court’s remand of the 2000 rate order was in error because the question regarding the Commission’s remedial authority must be decided first by this Commission. The Court of Appeals also remanded the matter to the Commission for reconsideration of issues raised on appeal and cross-appeal of the 2000 rate order. The Court of Appeals added that, “for reasons of judicial economy and agency efficiency,” all issues relating to Trojan “should be resolved in one forum rather than through piecemeal litigation.”

Because our remand proceedings had not previously addressed issues raised on appeal and cross-appeal of the 2000 rate order, we opened a third phase to conduct proceedings necessary to respond to the Court of Appeals’ decision in *Utility Reform Project*. The Chief Administrative Law Judge (ALJ) advised the parties that a decision on the Commission’s remedial authority would be necessarily delayed by the new remand, and that, consistent with the court’s instructions, the Commission would

³ *Citizens’ Util. Bd. v. Pub. Util. Comm’n of Or.*, 154 Or App 702 962 P2d 744 (1998).

⁴ *Dreyer v. Portland Gen. Elec.*, 341 Or 262 (2006).

ultimately “issue a single order resolving all issues related to Trojan to ensure that this matter is addressed collectively during any subsequent judicial review.”⁵

PARTIES’ POSITION

CAPs now seek a reinstatement of the schedule announced in Order No. 07-157 and request that the Commission issue a separate order deciding its remedial authority prior to proceeding further. CAPs contend that the repeated changes in scheduling do not appear to have a consistent rationale and suggest that the continued postponement creates an appearance of insensitivity to individual rights. CAPs also emphasize that both the Supreme Court and the Court of Appeals have instructed the Commission to decide its remedial authority, and that nothing requires further delay.

CAPs also contend that further delay causes two kinds of unfairness and irreparable harm. First, CAPs assert that delay deprives many former customers of any meaningful remedy as they leave PGE’s service territory and become harder to locate. CAPs claim that approximately 10 percent of PGE’s electric customers terminate service each year and do not relocate within PGE’s service territory. Second, CAPs contend that delay creates a windfall for PGE. If former ratepayers cannot be located, CAPs claim that PGE would reap these unclaimed refunds.

PGE was the only party to respond to CAPs’ motion.⁶ PGE urges the Commission to reject CAPs’ “attempts to delay or fragment these proceedings.” PGE argues that a single comprehensive order is appropriate and will avoid future piecemeal appeals of Trojan-related decisions.

DISCUSSION AND RESOLUTION

The Commission has been working diligently to complete these remand proceedings. As discussed above, however, intervening appellate decisions have affected our review and necessarily delayed resolution of the issues presented. The remand proceedings initiated in March 2004 are far different from those presented now. Back then, the Commission was directed to examine rates from 1995 to 2000 and to assume it had remedial authority to issue refunds. We are now asked to address rates from 1995 to the present, and to also examine what, if any, remedial authority this Commission has to issue refunds.

Given the continuing evolution of these proceedings, we have been unable to complete our review without modifying earlier adopted schedules. To ensure that all parties are afforded full rights to address newly remanded issues, we have been required to initiate new phases and conduct new proceedings.

⁵ ALJ Grant’s Memo (November 9, 2007).

⁶ *Portland General Electric Company’s Response to URP’s Opening Memorandum and Joint Motion to Reinstate Schedule from Order No. 07-157* (January 22, 2008).

The reason underlying these changes has been the fact that litigation of the Trojan issues has been conducted in a piecemeal fashion in different forums. During our Phase I proceedings, the Court of Appeals was addressing an appeal of the Marion County Circuit Court's remand of the 2000 rate order, while the circuit court and the Oregon Supreme Court were addressing a class action lawsuit seeking refunds of amounts paid by ratepayers during 1995 to 2000.

As a result of the decisions in *Citizens' Utility Board*, *Dreyer*, and *Utility Reform Project*, all outstanding issues related to the rate treatment of the remaining Trojan balance are finally presented concurrently in one forum—this Commission. Given the unique and complex history of these cases, we believe it is extremely important to avoid future piecemeal litigation by resolving all these issues in one comprehensive order, including the issue of our remedial authority.

Both the Supreme Court and Court of Appeals have noted their desire for a uniform resolution of all Trojan issues. In *Dreyer*, the Supreme Court identified the issues pending before the Commission—that is, whether ratepayers were injured, the extent of any injury, and whether the Commission can order refunds or any other form of retroactive relief. The Supreme Court concluded that the Commission has special expertise to decide these issues and “uniform resolution of the issue[s] is desirable.”⁷ The Court of Appeals expressed a similar desire, declining to affirm the Marion County Circuit Court's conclusion upholding the 2000 rate order on a prospective basis. During oral argument in *Utility Reform Project*, the court inquired whether “it would be more efficient to simply remand that part of the decision, along with other issues that are presently before the PUC,” so that the court could “move everything back to the PUC and let them start over again.”⁸ In its subsequent order remanding the case, the court noted the extensive procedural history of these cases and concluded that “all of the issues relating to Trojan should be resolved in one forum rather than through piecemeal litigation.”⁹

To grant CAPs' motion and issue an order deciding our remedial authority in isolation and without consideration of other issues would only reintroduce piecemeal litigation and delay of a final resolution of all Trojan issues. We have witnessed the inefficiency of conducting remand proceedings while courts are simultaneously addressing related issues on appeal and do not believe proceeding in such a manner is beneficial to ratepayers. We decline to recreate such a scenario and therefore deny CAPs' motion.

In reaching this decision, we recognize the CAPs' concerns about the consequences of delay. We have previously crafted mechanisms to provide remedies to former customers¹⁰ and, if necessary, will adopt appropriate measures here. Any such

⁷ *Dreyer*, 341 Or at 285-286.

⁸ Transcript of Oral Argument, *Utility Reform Project v. PGE*, Oregon Court of Appeals Case No. A123750 (June 13, 2007).

⁹ *Utility Reform Project*, slip op at 10.

¹⁰ See, e.g., *In Re US WEST Communications*, Order No. 00-190 (April 14, 2000).

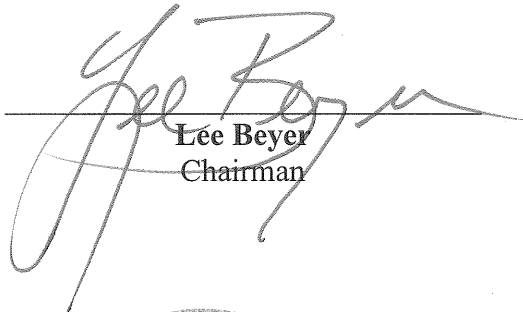
measures would ensure that past and present customers, not PGE, will receive the full benefit of any ordered refunds.¹¹

We also recognize that CAPs' lawsuit pending before the Marion County Circuit Court has been abated pending the Commission's resolution of our refund authority, and we understand that the circuit court, CAPs, URP, and PGE would appreciate some indication of our progress deciding this issue. We have come to the preliminary conclusion that we have refund authority beyond that specifically set forth in ORS 757.215 under limited circumstances. We emphasize that this is a preliminary determination. We will finally decide the question of our remedial authority and fully explain the basis for our decision in the final comprehensive order. We have not yet determined whether it is necessary to exercise our authority in this case, and cannot make such a determination until we have decided all phases of these proceedings.

ORDER

IT IS ORDERED that the Class Action Plaintiffs' motion for reinstatement of the schedule established in Order No. 07-157 is denied.

Made, entered, and effective FEB 13 2008.



Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
Commissioner



¹¹ Under the refund mechanism adopted in Order No. 00-190, any unclaimed amounts were credited to current customers. *Id.* at 17.