ORDER NO. 05-091

ENTERED 02/11/05

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)	)	
	)	ORDER
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)	)	

DISPOSITION: RECONSIDERATION DENIED

Procedural History

The Commission reopened the above captioned dockets to comply with two remand orders by the Marion County Circuit Court (Circuit Court).[1] The remand orders followed a ruling by the Oregon Court of Appeals (Court of Appeals) finding that the Commission wrongly interpreted ORS 757.140(2) in Docket Nos. DR 10 and UE 88.[2] The Commission undertook these remand proceedings in order to simultaneously address all of the reviewing courts' rulings. There has been disagreement among the parties from the start of these remand proceedings, however, about how to proceed. Administrative Law Judge (ALJ) Kirkpatrick issued a ruling on May 5, 2004, that phased the proceedings and asked the parties to address what the proper scope and procedure of the first phase should be. On August 31, 2004, ALJ Kirkpatrick issued a ruling that established the scope of the first phase of these proceedings and outlined a procedural framework to proceed upon (Phase I Scope Ruling).

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[1] In November of 2003, the Circuit Court remanded our orders in DR 10 (Orders No. 93-1117 and 93-1763) and UE 88 (Order No. 95-322). On January 9, 2004, the Circuit Court remanded Order No. 02-227 in UM 989.

[2] *Citizens' Util.Bd. v. Pub. Util. Commn.*, 154 Or App 702, 962 P 2d 744 (1998), *rev. dismissed*, 335 Or 91, 58 P3d 822 (2002).

On September 13, 2004, a motion to certify the Phase I Scope Ruling was filed. On October 18, 2004, the Commission entered Order No. 04-597 that simultaneously granted certification and affirmed the Phase I Scope Ruling in its entirety. Order No. 04-597 incorporated Phase I Scope Ruling by reference.

On December 20, 2004, the Utility Reform Project, et al. and intervenors, Morgan, Gearhart and Kafoury Brothers, LLC (collectively referred to as Applicants) [3] filed an Application for Reconsideration and Rehearing of Order No. 04-597 (Application for Reconsideration), pursuant to ORS 756.561 and OAR 860-014-0095, with the Public Utility Commission of Oregon (Commission). On January 14, 2005, Portland General Electric (PGE) filed a reply to Applicants' motion (PGE's Reply). On January 18, 2005, Commission Staff (Staff) filed a reply (Staff's Reply).[4]

Legal Standard for Reconsideration

ORS 756.561(1) authorizes a party to request reconsideration by the Commission of any order within sixty (60) days of service of that order. The Commission may grant reconsideration "if sufficient reason therefore is made to appear." OAR 860-014-0095(3) provides that the Commission may grant an application for rehearing or reconsideration if the applicant establishes one or more of the following grounds:

(a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
(b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
(c) An error of law or fact in the order which is essential to the decision; or
(d) Good cause for further examination of a matter essential to the decision.

OAR 860-014-0095(2) also requires the Applicant to specify what changes in the order the Commission is requested to make and to indicate how such changes will alter the outcome.

Application for Reconsideration

Applicants argue that the Commission should reconsider Order No. 04-597 because it improperly sanctions a broad investigation that contemplates the introduction and evaluation of new evidence in the first phase of these remand

[3]Although intervenors, Morgan, Gearhart and Kafoury Brothers, LLC, refer to themselves as "Class Action Plaintiffs," they intervened on behalf of themselves and do not represent any class in these remand proceedings. Their identification as class action plaintiffs apparently refers to their status in a civil action suit.
[4] A ruling, dated January 24, 2005, granted Staff's motion to accept the late filed reply.

proceedings. Applicants take the position that the Commission is prohibited on remand from taking and considering new evidence. Applicants offer several legal theories why the Commission is so constrained.

Applicants maintain that PGE had a full opportunity to present evidence regarding its cost of service in the original UE 88 and UM 989 proceedings and should not have another opportunity to introduce evidence on remand. Applicants posit that the Oregon Supreme Court has previously ruled that a lower court should follow a remand order without taking new evidence.[5]

Applicants further contend that PGE proceeded at its own risk by filing and litigating a rate case in accordance with the Commission's declaratory ruling in Order No. 93-1117, entered in Docket No. DR 10, prior to the order being final and not subject to judicial review.[6] Applicants suggest that PGE could have raised, as an issue in Docket No. UE 88, the uncertainty about the validity of the Commission's legal interpretation in Order No. 93-1117 as justification for a higher rate of return. Applicants argue that PGE waived its right to present evidence on remand related to legal theories it could have, but did not, raise during the original proceeding.[7]

Applicants also argue that the doctrine of "the law of the case" operates in Oregon, such that "the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case."[8] Should a party not challenge a trial court's ruling on a particular issue, or brief that issue on appeal, Applicants assert that the party waives the issue.[9] Applicants contend that the "rule is the same in administrative review cases—where an appeal is taken with respect to only a particular issue or issues, there can be no retrial after remand of issues previously tried and determined but not appealed from." Applicants offer *Hitt v. State of Alabama Personnel Board*, __ Ala __, 873 So 2d 1080, 1088 (2003) as a recent, relevant case. In that case, an administrative order was appealed to circuit court and the judgment of the trial court was reversed and remanded by a higher court. On remand, one party sought to reopen other determinations of the trial court which had not been the subject of the appeal and the Supreme Court of Alabama declared that: "In cases where an appeal is taken with respect to only a particular issue or issues, there can be no retrial after remand of issues previously tried and determined but not appealed from." Under this "law of the case" doctrine, Applicants assert that the issues not appealed may not be addressed on remand.

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[5] Application for Reconsideration at 5, citing *Bank of Com, v. Ryan*, 157 Or 231, 234, 69 P2d 964 (1937).
[6] *Id*. at 6, citing *Harvey Aluminum v. Sch. Dist. No. 9*, 248 Or 167, 172, 433 P2d 247, 250 (1967) (*Harvey Alum.)*.
[7] Application for Reconsideration at 6-7, citing *Barratt Am., Inc. v. Transcon. Ins. Co.*, 102 Cal App 4th 848, 125 Cal Rptr 2d 852 (2002); *Eline v. Com. Life Ins. Co.*, 126 SW 2d 1103 (Ky 1939); and *Bassett v. Shepardson*, 24 NW 182 (Mich 1885).
[8] *Id*. at 7.
[9] *Id*. at 8-9, citing *See William Hanley Co. v. Combs*, 60 Or 609, 610, 119 P 333 (1911); *Washer v. Clatsop Care and Rehabilitation Dis.t*, 98 Or App 232, 235, 778 P2d 987 (1989); *City of Idanha v. Consumer's Power*, 8 Or App 551, 495 P2d 294 (1972); *City of Idanha v. Consumer's Power*, 13 Or App 431, 434, 509 P2d 1226 (1973).

In a class action proceeding at the Circuit Court, independent of any proceeding or remand order at issue in these reopened dockets, the Circuit Court granted Applicants summary judgment on issues of PGE's liability for refunds of rates collecting a return on Trojan on the basis of ORS 756.185 and restitutionary principles of money had and received.[10] Applicants represent that the class members, all present and former PGE ratepayers who have paid rates including a return on investment in the Trojan nuclear plant after its retirement, now have a vested right to damages incurred by paying such rates. Applicants assert that the Commission may not retroactively alter the amount owed.[11] Applicants also point out that no legislative body can alter vested rights.[12]

Applicants further avow that deprival of the vested rights to damages would violate the Contract Clauses of the Oregon and United States Constitutions.[13] Applicants assert that ratepayers have an implied, contractual right to have illegal charges returned, indicating the Commission may not retroactively eliminate a common law remedy that is currently available.

Additionally, Applicants argue that the orders authorizing rates that include a return on the retired Trojan plant are *void ab initio* as a result of the remand orders. Applicants further contend that PGE is not authorized to retain rates ruled unlawful by a reviewing court, as the court's ruling renders the rates unlawful from their outset.[14] Applicants observe that a rate order is *prima facie* valid, pursuant to ORS 756.565, but only until found to be otherwise, thereby making it subject to overturn and refund.[15] Recognizing that ratemaking is a legislative function, Applicants note that a successfully challenged legislative act is void *ab initio*.[16] Applicants conclude that should rates be deemed unlawful from their outset, it is not retroactive ratemaking to refund them.[17]

The Applicants open and conclude by repeating arguments that adoption of the First Phase Scope Ruling adopted by Order No. 04-597 should be reconsidered because it misconstrues the statutory authority of ORS 756.568 to take and consider new evidence, misinterprets remand orders as compelling the Commission to undertake

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[10] *Id.*
[11] *Id.* at 11, citing *Hall v. N.W. Outward Bound Sch. Inc.*, 280 Or 655, 661-663, 572 P2d 1007, 1011 (1977).
[12] *Id.* at 11-12, citing *State ex rel. Bayer v. Funk*, 105 Or 134, 209 P 113, 25 ALR 625 (1922); *Hall v. A.N.R. Freight Sys. Inc.*, 717 P2d 434 (Ariz 1986); *Ettor v. City of Tacoma*, 228 US 148, 150, 33 SCt 428, 428 (1913); *Fisk v. Leith*, 137 Or 459, 299 P 1013 (1931).
[13] *Id.* at 12, citing Or. Const. art. 1, § 10, cl 1 (2003).
[14] *Id.* at 15-16, citing *State ex rel. Nantahala Power & Light Co*., 313 NC 614, 332 SE2d 397, 472 (1985); *Accord*, *PSC Nevada v. S.W. Gas Corp.*, 99 Nev 268, 662 P2d 624, 627-28 (1983).
[15] *Id.* at 17-18, citing *Oregon-Washington R.R.. & Nav. Co. v. McColloch*, 153 Or 32, 53-54, 56 P2d 1133, 1141-1142 (1936); *United Gas Improvement Co., v. Callery*, 382 US 223, 229, 86 SCt 360, 364 (1966).
[16] Applicants cite: *State v. Grimes*, 163 Or App 340, 348, 986 P2d 1290, 1294 (1999), citing *State v. Hays*, 155 Or App 41, 48, 964 P2d 1042, *rev den* 328 Or 40, 977 P2d 1170 (1998), *cert den* __ US __ 119 SCt 2344, 144 Led 2d 240 (1999); *State v. Metcalfe*, 328 Or 309, 314, 974 P2d 1189, 1192 (1999); *City of Lake Oswego* v. *$23,232.23*, 140 Or App 520, 916 P2d 865 (1996).
[17] Applicants cite: *State ex rel Utilities Comm. v. Conservation Council of N.C.*, 312 NC 59, 67, 320 SE2d 679, 685 (1984).

ratemaking, and improperly inflates the scope of the first phase of these remand proceedings without imposing sufficient limits.

Staff's Reply

Staff asserts that Applicants fail to establish that reconsideration of Order No. 04-597 is warranted under any subsection of OAR 860-014-0095(3). Staff also complains that Applicants do not identify the change in fact or law that warrants reconsideration under OAR 860-014-0095(3)(b), or explain why good cause warrants reconsideration under OAR 860-014-0095(3)(d).

With regard to whether reconsideration is warranted due to a change in law, Staff asserts that Applicants' characterization of a Circuit Court ruling, issued on December 14, 2004, that grants summary judgment against PGE in favor of class action plaintiffs in Circuit Court Case Nos. 03C10639 and 03C16040 as a relevant change in law is misguided. Staff argues that the Circuit Court ruling does not constitute a change of law on an issue relevant to Order No. 04-597. Staff explains that Applicants' only vested right is the right to adjudicate the claim to recover rates that include a return on investment in the retired Trojan plant, and states that this right cannot be retroactively altered. In any case, Staff contends that it is not possible to have a vested right in a particular remedy.[18]

Staff also contests Applicants' theory that ratepayers have an implied contractual right to have unlawful rates refunded. Staff asserts that there is no legal right to a rate other than the filed rate.[19]

Staff challenges the ability of Applicants to set forth new legal arguments that could have previously been made in an attempt to demonstrate that the Commission made an error of law. In any case, Staff characterizes Applicants' theories that implicate claim preclusion as being off point. Staff observes that no court has found rates established in Docket No. UE 88 to be "unreasonable or unlawful," but rather found that the Commission made a legal error in establishing the rates. This legal conclusion does not automatically invalidate the UE 88 rates, Staff asserts; rather, the purpose of these remand proceedings is to determine what the rates should have been absent the legal error. Indeed, Staff posits that since no court has concluded that rates authorized in Docket No. UE 88 are unjust and unreasonable, it is arguable whether Applicants are precluded from making the argument that UE 88 rates are unjust and unreasonable.

Staff also disputes the ability of Applicants to rely on any argument based on the doctrine of claim preclusion and rejects the arguments that Commission orders in UE 88 and UM 989 have been rendered *void ab initio*. Finally, Staff dismisses any argument previously made by Applicants as not being a basis for reconsideration.

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[18] Staff Reply at 4, citing *Fisk v. Leith*, 137 Or 459, 462, 299 P 1013 (1931).
[19] *Id.* at 4-5, citing *Montana-Dakota Utilities Co. v. N.W. Public Service Co.*, 341 US 246, 71 SCt 692 (1950).

PGE's Reply

PGE argues that Applicants' reliance on *Bank of Commerce v. Ryan* is misplaced, both for its applicability to administrative agencies and as an analogy. PGE indicates that the case has no relevance to remands of administrative agency orders: while an agency must respect a court's resolution of a legal issue, there is significant judicial precedent establishing that an agency is not constrained on remand "from enforcing the legislative policy committed to its jurisdiction."[20] Oregon courts, PGE asserts, have adopted this approach, allowing the Commission the discretion to determine whether to hear additional evidence and whether to make alternative findings.[21] In any case, PGE notes, the Commission has already recognized that it has alternative authority pursuant to ORS 756.568 to consider new evidence, make new findings and "rescind, suspend or amend any order." Moreover, PGE states, the policy against single-issue ratemaking requires consideration of all evidence relevant to a central question at issue in these remand proceedings.

PGE also questions the comparison value of *Bank of Commerce v. Ryan*. While the remand order in that case was narrow, PGE observes, the remand orders in these proceedings require the Commission to undertake a ratemaking question, which cannot be accomplished by evaluating a single issue.

PGE challenges Applicants' assertions that PGE either waived its right to present evidence in these remand proceedings or is barred from presenting evidence by the doctrine of the "law of the case." PGE argues that Applicants inappropriately seek to apply civil law rules to an administrative remand and fail to cite any administrative law support for their theories.[22] PGE opines that it would have been illogical and unreasonable to expect PGE to have addressed their hypothetical outcomes in the underlying proceedings.

PGE contests all of Applicants' constitutional claims. First, Applicants assert that no rights to damages have vested, as there is *no* ruling on *damages* in the Circuit Court case that Applicants refer to. PGE explains that the Circuit Court has ruled only on liability issues. Moreover, PGE notes, this ruling on liability for two of four claims is not final and is subject to appeal. The vested-rights doctrine applies under federal and Oregon law, PGE maintains, only when a judgment is final[23] and a claim is

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[20] PGE Reply at 2, citing *Sec. & Exch. Commn. v. Chenery Corp.*, 332 US 194, 201,67 SCt 1575 (1947); *Fed. Trade Commn. v. Morton Salt Co.*, 334 US 37, 55, 68 S Ct 822 (1948); *U S v. Morgan*, 307 US 183, 192, 59 S Ct 795, 800 (1939); *City of Charlottesville v. FERC*, 774 F2d 1205, 1212 (DC Cir 1985).
[21] *Id.*, citing *P. Tel. & Tel. Co. v. Hill*, 229 Or 437,486, 365 P2d 1021 (1961).
[22] *Id.* at 3, citing *Morton Salt*, 334 US at 55.
[23] *Id.* at 5-6, citing *Plyler v. Moore*, 100 F3d 365, 374 (4th Cir. 1996); *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F3d 78, 83-84 (2d Cir. 1993) ("[A] case remains 'pending,' and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse"); *State ex rel. Weingart v. Kiessenbeck*, 167 Or 25, 29, 114 P2d 147, 149 (1941) ("The first and essential quality of such judgment [creating vested rights] . . . is that it be a final determination of the rights of the parties.") (*Kiessenbeck).*

not ripe if it depends upon contingent future events.[24] Moreover, PGE refutes Applicants' theory that the Commission will violate the Remedy Clause of Article I, § 10 of the Oregon constitution by undertaking the scope of proceeding adopted by Order No. 04-597. The Remedy Clause, which protects "common-law rights respecting person, property, and reputation, as those rights existed when the Oregon Constitution was drafted in 1857,"[25] is not applicable because damages have not been awarded to Applicants. Moreover, PGE states, since the Remedy Clause allows damages for liability based on the principle of money had and received to be offset, any damages awarded in the Circuit Court case could reflect the Commission's actions in these remand proceedings. PGE observes that the "measure of damages for money had and received is the amount of plaintiff's money that defendant obtained without being entitled to it."[26]

PGE also disputes that the partial summary judgment ruling creates an "implied-contract right" protected by the Contract Clauses of the Oregon and United States constitutions. PGE states that the Contract Clauses only protects contracts supported by consideration, not implied contracts.[27]

Finally, PGE observes that any argument that the first phase of these remand proceedings will constitute retroactive ratemaking is premature since the focus of the first phase is gathering evidence on what rates would have been established in Docket No. UE 88 under the Court of Appeal's legal interpretation of ORS 757.355. PGE agrees that, "[p]rejudgment of any outcome is inappropriate."[28]

Analysis and Resolution

Although Applicants contend that reconsideration should be granted on three separate grounds under OAR 860-014-0095, Applicants do not categorize or break their arguments down by individual basis. In the absence of such delineation, we conclude that Applicants primarily offer two classifications of arguments. Under OAR 860-014-0095(3)(b), Applicants argue that a recent Circuit Court ruling qualifies as a change of law creating vested rights which would be violated by Order No. 04-597. Secondly, Applicants assert that the Commission's conclusion that it may take and consider new evidence on remand is an error of law under OAR 860-014-0095(3)(c). As we do not discern that Applicants have made any argument indicating good cause to reconsider Order No. 04-597 that is separate from these two classes of arguments, we do not address whether reconsideration is justified pursuant to OAR 860-014-0095(3)(d).

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[24] *Id*. at 4-5, citing *Texas v. United States*, 523 US 296, 300, 118 S Ct 1257, 1259 (1998); *see also McInteire v. Forbes*, 322 Or 426, 434 909 P2d 846, 851 (1996).
[25] *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 118, 23 P3d 333, 353 (2001).
[26] PGE Reply at 8.
[27] *Id*. at 6-7, citing *Crane v. Hahlo*, 258 US 142, 146, 42 SCt 214, 215 (1922); *Cloverdale Equip. Co. v. Manitowoc Engr. Co.*, 964 F Supp 1151, 1165 (ED Mich 1997); *Credit Bureau Enter., Inc. v. Pelo*, 608 NW2d 20, 25 (Iowa 2000), *superseded,Tama County v. Grundy County,* 648 NW 2d 83 (Iowa 2002).
[28] *Id*. at 9, citing Phase I Scope Ruling at 19.

As further discussed below, there has been no final change in law since Order No. 04-597 was entered. Thus, all arguments based on vested rights granted by a change of law are without merit. Applicants' request for reconsideration is, therefore, primarily evaluated based on whether it is justified under OAR 860-014-0095(3)(c). As fully discussed below, we conclude that it is not. There is ample legal justification to take and consider new evidence in these remand proceedings. Consequently, Applicants' request for reconsideration of Order No. 04-597 is denied.

There Has Been No Relevant Change in Law Since Order No. 04-597 Was Entered

We agree with Staff that Applicants appear to consider a Circuit Court ruling that was issued in Case Nos. 03C10639 and 03C16040 to constitute a change in law relevant to Order No. 04-597. Although we have not been provided a copy of the ruling, we understand that these Circuit Court cases constitute a civil class action suit, separate and apart from any of the administrative proceedings on remand, that seeks to recover damages related to the payment to PGE of rates that include a return on retired Trojan plant. Applicants represent that the ruling grants summary judgment to Applicants on two issues of liability, one based on ORS 756.185, and another based on the restitutionary principle of money had and received. PGE clarifies, however, that the ruling pertains to only two of the four liability claims at issue in the cases, and that there has been no ruling on damages. PGE also points out that the ruling is subject to appeal and can not be considered final.[29]

We are not persuaded that the Circuit Court ruling at issue is relevant to the remand orders we are operating under in these remand proceedings. The Circuit Court has not revised or directly preempted either of the two remand orders we act under. Until it does, we must continue to implement those remand orders. In Order No. 04-597, we adopted the analysis set forth in the Phase I Scope Ruling that concluded that "the concurrent remand of all three dockets provides an opportunity to revisit rate determinations made in UE 88 in light of the Circuit Court's ruling regarding the UM 989 order." We have not been presented with any evidence that the Circuit Court ruling at issue affects either the opinion of the Court of Appeals or the remand orders of the Circuit Court.

We also agree with Staff and PGE that the Circuit Court ruling does not constitute a change in law. As Applicants themselves observed, a trial court's ruling that is either on appeal, or may still be appealed, is not considered final.[30] While the Circuit Court may have made a legal determination on two theories of liability in a separate civil suit, that ruling does not resolve the cases, as two liability claims remain and there has been no ruling on damages. Moreover, legal rights obtained by court ruling do not vest until a final judgment has been rendered.[31] As PGE observes, "[u]nder Oregon law, a partial summary judgment is not 'final' and remains subject to revision at any time unless

[29] As of the date that PGE filed its Reply, PGE observed "[t]here is no signed order yet, let alone a judgment on that order" and "[t]he time for appeal has not yet begun to run, let alone expired."
[30] *Harvey Alum.*, *supra*, n. 6 at 172.172.
[31] *Kiessenbeck*, *supra,* n.23 at 29.

the court makes 'an express determination that there is no just reason for delay and expressly direct[s] the entry of judgment . . .'"[32]

Applicants assert several arguments based on their belief that the Circuit Court's Ruling conferred vested rights. As Oregon law deems vested rights to accrue only when a judgment is final, however, none of these arguments legitimately warrant reconsideration of Order No. 04-597 pursuant to OAR 860-014-0095(3)(b). Consequently, we conclude it is not necessary to further evaluate Applicants' arguments that are based on a vested-rights theory, including: 1) that the Commission is prohibited from any action that may alter the vested rights; 2) that the scope of the first phase of this proceeding as adopted by Order No. 04-597 violates the Remedy Clause of Article I, § 10 of the Constitution; and 3) that implied contract rights have been created which are protected by the Contract Clauses of the Oregon and United States Constitutions.

Order No. 04-597 Does Not Contain an Error of Law that Warrants Reconsideration

Applicants continue to insist that the Commission may not take and consider new evidence in these remand proceedings. Applicants newly claim that PGE is precluded from presenting additional evidence due to failure to preserve the right to do so.[33] Applicants also articulate new legal arguments why actions taken by the reviewing courts prohibit our review of all additional evidence in these remand proceedings. All of Applicants' arguments fail on legal grounds.

We reject Applicants' arguments that PGE is precluded from presenting new evidence. As we previously determined, the primary question presented by the trio of remanded cases is the ratemaking question: "What rates would have been approved in UE 88 if ORS 757.355 had been interpreted to prohibit a return on Trojan?" [34] In contrast, PGE presented evidence in Docket No. UE 88 that was properly limited to determining rates that included a return on the Trojan plant, based on the Commission's interpretation of ORS 757.355 in Docket No. DR 10. When the scope of a proceeding is narrowed, parties are prohibited from raising issues outside of that scope. Parties must be able to rely on the legitimacy of scope restrictions without concern that arguments outside these scope restrictions will be waived should they become relevant upon remand. Applicants' case citations are inapplicable. Past scope restrictions in the three dockets at issue set these remanded proceedings apart from remanded civil litigation proceedings.

As noted in the Phase I Scope Ruling, "the most important event bearing on these remand proceedings is the Court of Appeals' determination in *Citizens' Utility Board* that the Commission is not statutorily authorized to compensate utilities for a rate

[32] *Dohr v. Marquardt*, 71 Or App 765, 768, 694 P2d 576, 577 (1985).
[33] We need not address arguments that the scope of the first phase of these remand proceeds are not sufficiently limited, as arguments previously made and dismissed do not constitute proper cause for reconsideration of an order and need not be addressed again.
[34] Phase I Scope Ruling at 18.

of return on unused or retired property."[35] The opinion of the Court of Appeals, in context of the pertinent judicial precedent regarding ratemaking, and the resulting remand of Docket Nos. DR 10 and UE 88, together with the remand of Docket No. UM 989, constitute the full instructions given by reviewing courts to the Commission about how to conduct these remand proceedings. Neither the opinion of the Court of Appeals, nor the remand orders of the Circuit Court, limit the evidence we may take and consider in these remand proceedings. Indeed, as discussed at length in the Phase I Scope Ruling, the orders collectively require us to engage in ratemaking, which necessarily requires that we take and consider new evidence. We again emphasize that Circuit Court Judge Lipscomb anticipated this course of action, having stated at a hearing on July 23, 2003:

> * * * [A]t the Commission you [PGE] can argue * * *, if you can't give us that [a return on the Trojan investment], you have to give us something else, because otherwise we aren't made whole * * * And that's probably what you're going to do. * * * And that may or may not result in any net relief * * *[36]
>
> I'm not prepared to buy off on that today, but I'm certainly not prepared to conclude that you can't argue on remand to the PUC that if you can't get a return on your investment, they need to put something else in your [rate] base for some other reason that * * * allows you to have * * * a rate of return that's economically viable for you to continue on as a successful utility company.[37]

Given the latitude of the rulings of the reviewing courts, *Bank of Commerce v. Ryan* is inapposite. We decline to determine whether the case's holding is applicable to administrative proceedings, as the case is irrelevant to these remand proceedings as a legal analogy. The remand mandate in *Bank of Commerce v. Ryan* was very specific, instructing the trial court to, "determine the amount of taxes which the appellants had paid, direct the plaintiff to pay that amount to them, and enter a decree foreclosing the mortgage against all."[38] In comparison, as discussed herein, as well as in the Phase I Scope Ruling and Order No. 04-597, the mandate from the Court of Appeals in *Citizens' Utility Board v. PUC* is very broad, compelling us to take and consider new evidence to comply with it.

Notably, the Court of Appeals' did not rule that the end result rates approved in Docket No. UE 88 were unlawful. Rather, the Court of Appeals "deemed approval of rates that included a return on Trojan investment to have exceeded what the

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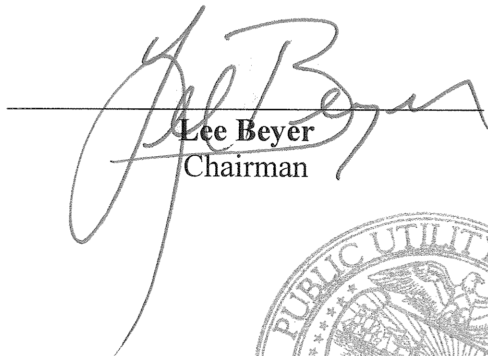
[35] 154 Or App at 716-17.
[36] Order No. 04-597 at 6, citing July 23, 2003 Hearing, Tr. at 177.
[37] *Id.*, citing July 23, 2003 Hearing, Tr. at 179.
[38] PGE Reply at 3, citing *Bank of Com. v. Ryan*, 157 Or at 236.

Commission was empowered to do by the legislature."[39] Consistent with judicial review of ratemaking, the Court of Appeals left it to us, on remand, to determine how to address the identified legal error. Based on further guidance from the Circuit Court, again we have concluded that it is necessary for us to determine, on remand, what rates should have been authorized in Docket No. UE 88. That is the question we undertake in the first phase of these proceedings. Applicants' claim that rates established in Docket No. UE 88 are *void ab initio* is, therefore, erroneous—or at least premature. We have indicated that subsequent phases of these remand proceedings will address, as necessary, reconciliation of the results of Phase I with rates approved in Docket No. UE 88, and adjustment of rates.

ORDER

IT IS ORDERED that the Application for Reconsideration of Order No. 04-597 by the Utility Reform Project, et al. and intervenors, Morgan, Gearhart and Kafoury Brothers, LLC, is denied.

Made, entered, and effective FEB 11 2005.



Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

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

[39] Phase I Scope Ruling at 15, citing *Citizens' Utility Board*, 154 Or App at 717.