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June 25, 2004

**VIA FACSIMILE & FIRST CLASS MAIL**

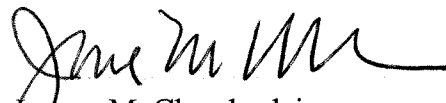
Ms. Carol Hulse  
Administrative Hearings  
Oregon Public Utility Commission  
550 Capitol St. NE, Suite 215  
P. O. Box 2148  
Salem, Oregon 97308-2148

Re: *UE 88/DR 10/UM 989*

Dear Ms. Hulse:

Enclosed for filing in the above-referenced docket are the original and five copies of PGE's Reply Memorandum Regarding Phase I Scope.

Very truly yours,

  
Jeanne M. Chamberlain

JMC/ldh  
Enclosure  
cc: Service List  
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**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)

**PORTLAND GENERAL ELECTRIC  
COMPANY'S REPLY  
MEMORANDUM REGARDING  
PHASE I SCOPE**

**I. INTRODUCTION**

The remand orders in DR 10, UE 88 and UM 989, and the Commission's duty to set just and reasonable rates, must guide these proceedings. In light of the Court of Appeals' decision in DR 10 and UE 88, and the Circuit Court's remand of UM 989, the record should be reopened and Portland General Electric ("PGE") should be allowed to submit evidence on affected issues.

**II. THE COMMISSION'S PREVIOUSLY ARTICULATED LEGAL POSITION CONCERNING THE SCOPE OF ITS AUTHORITY DOES NOT RENDER THIS PROCEEDING MOOT NOR DOES IT SUGGEST IMPERMISSIBLE BIAS OR PREJUDICE**

Utility Reform Project ("URP") wrongly suggests that this proceeding is moot unless the Commission withdraws its appeal of the Circuit Court judgment in UM 989<sup>1</sup>. Over a period of years, and in several different contexts, the Commission has carefully

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<sup>1</sup> URP made essentially the same argument before Judge Lipscomb. It said that remand of UM 989 to the Commission "would be futile" because the Commission has "repeatedly stated that they can offer no relief \* \* \* for past unlawful charges." July 23, 2003 Transcript of Proceedings at 242.

developed its legal position about the scope of its authority to order refunds. Almost 20 years ago, Commissioner Charles Davis testified before the legislature:

"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.

It is this concept that is embodied in ORS 757.225.<sup>2</sup> This principle informed the Commission's decisions in UM 989 and it is this principle, among other reasons, that the Commission has articulated in defense of its decision in UM 989 before the Circuit Court.

URP offers no principled reason for the Commission to repudiate its long held legal position at the outset of these proceedings and abandon its appeal of the Circuit Court's judgment. URP cites not a single case and provides no substantive analysis. As such, URP's charge should be summarily rejected. Questions about the scope of the Commission's authority pursuant to ORS 757.225 should be deferred to the implementation stage of these proceedings.

It is reasonable and common for agencies to argue the merits of their own opinions on appeal. *See State of Texas v. United States*, 866 F2d 1546, 1554 (5th Cir 1989). That is the manner in which agencies in general, and the Commission in particular, carry out their legislatively delegated responsibilities. To say that an agency's participation in an appeal eliminates the possibility of a fair remand because the agency is biased by its own legal argument would frustrate the entire system of administrative adjudication. *Id.* URP

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<sup>2</sup> "No public utility shall charge \* \* \* or receive a greater or less compensation for any service performed by it \* \* \* than is specified in printed rate schedules as may at the time be in force \* \* \* or receive any rate not specified in such schedule. The rates named therein are the lawful rates until they are changed \* \* \*." ORS 757.225.

suggests that these proceedings are biased by the Commission's participation in the judicial appeal of UM 989, but URP offers no case law to support the notion that an agency cannot simultaneously pursue an appeal in which a legal issue is to be decided and at the same time hold hearings to develop a factual record.

There is a significant body of law supporting the general proposition that preconceptions about the law cannot invalidate agency actions. *See, e.g., Samuel v. Board of Chiropractic Examiners*, 77 Or App 53, 60, 712 P2d 132 (1985), *rev. denied*, 300 Or 704 (1986) (preconceived point of view concerning an issue of law is not an independent basis for disqualification of agency board member). *City of Charlottesville v. FERC*, 774 F2d 1205 (DC Cir 1985), *cert. denied*, 475 US 1108 (1986) (preconception regarding the law no more invalidates an agency action than the action of a court). The Commission must respond to the direction from the courts in the remand orders, but it need not abandon its pending appeal to do so.

This proceeding is not moot. Its outcome is not predetermined. The Commission need not withdraw its pending appeal in UM 989 to respond to the courts' remand orders.

### **III. THERE IS NO NEED TO REVISIT PRIOR RATE DECISIONS "IN THEIR ENTIRETY" AS SUGGESTED BY URP**

The Commission needs to revisit those prior determinations that are affected by the Court of Appeals' decision concerning DR 10 and UE 88<sup>3</sup>. Determinations made concerning UE 88 rates may impact the UM 989 settlement. PGE has identified at least three separate determinations that are affected: (1) the appropriate recovery period for the Trojan

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<sup>3</sup> PGE takes issue with URP's statement that no party disputes URP issues 1 through 4. URP implies that calculating PGE's prior receipts is all the Commission need do. These remand proceedings are not purely mathematical exercises. The Commission must exercise legislative ratemaking functions. It can and must consider several specific determinations in light of the public interest. The Commission must strike the appropriate balance between the interests of utility investors and the interests of customers.

investment balance; (2) the cost of capital effects of the utility's change of circumstances; and (3) the application of the net benefits formula given that PGE is precluded from recovering the cost of capital represented by the Trojan investment balance. PGE has never suggested that every aspect of the UE 88 rate case is affected by the Court of Appeals' ruling.

Judge Lipscomb anticipated this effort. He said that PGE is "entitled to make the attempt" to convince the Commission that aspects of its prior decisions other than the "return on" Trojan should be modified. July 23, 2003 Transcript of Proceedings at 223. Judge Lipscomb said that "PGE has the power to consider quite a number of things on remand." Transcript at 224.<sup>4</sup> Contrary to URP's suggestion, the Commission will not "violate the judgment" entered by the Circuit Court in UM 989 by considering the focused reopening that PGE seeks. Rather, the Commission will be doing just what Judge Lipscomb anticipated and the circumstances might require.

Our view concerning reopening is consistent with the law. Once the Commission reacquires jurisdiction, it has discretion to reconsider the whole of its original decision. *See Southeast Michigan Gas Co. v. FERC*, 133 F3d 34 (DC Cir 1998). It can reopen the factual record. *See Federal Trade Comm'n. v. Morton Salt Co.*, 334 US 37, 68 S Ct 822, 832 (1948) (Commission may hear other evidence and make other findings on remand.) *See also United States v. United States Smelting*, 339 US 186, 70 S Ct 537, 544 (1950) (the Commission had a right on reconsideration to make a new record); *Central Telephone Co. v PUC*, 911 SW2d 883 (Tex App 1995) (on remand to consider rate order in light of intervening court decision, the commission could reopen evidence on the affected question and related issues). The Commission is also free to consider different approaches or rationales. *See City of Charlottesville v. FERC*, 774 F2d 1205, 1212 (DC Cir 1985). As detailed in PGE's opening memorandum, the Court of Appeals changed the ground rules for

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<sup>4</sup> The transcript refers to "PGE." The context suggests that Judge Lipscomb was instead referring to the Commission.

UE 88. PGE should be allowed to present new evidence and argue new approaches in UE 88 and UM 989 as a result.

**IV. THE COMMISSION SHOULD NOT SHORTCHANGE PGE'S RIGHT TO FAIRLY PRESENT ITS EVIDENCE JUST BECAUSE IT'S INCONVENIENT FOR URP'S COUNSEL**

Finally, URP asserts that to allow PGE to present its evidence about the impact of the Court of Appeals' decision would impose "insurmountable burdens" on URP. It complains it has no ability to recover the attorney fees it incurs in the process. URP chose to participate in PGE's rate case. URP initiated the challenge to PGE's settlement of that rate case. It shouldn't be allowed to unreasonably restrict PGE's ability to present necessary evidence so that the Commission can determine just and reasonable rates. URP's difficulties with intervenor funding should have no bearing on the Commission's ratemaking determinations.

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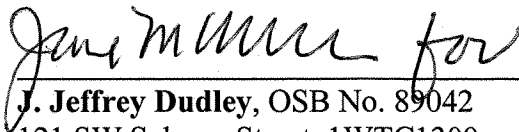
**V. CONCLUSION**

PGE asks that the record be reopened and that it be allowed to present evidence concerning the ratemaking determinations affected by the Court of Appeals decision in DR 10 and UE 88 and the impact on the settlements approved in UM 989.

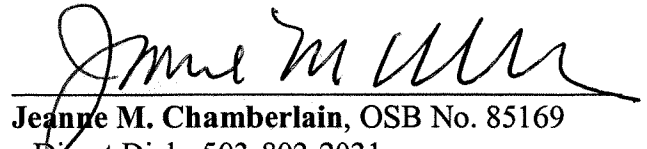
DATED this 25<sup>th</sup> day of June, 2004.

PORTLAND GENERAL ELECTRIC  
COMPANY

TONKON TORP LLP



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Company

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1 MR. MEEK: Okay. And -- and they can't make  
2 assertions now about it after it's -- after -- after  
3 having refused to provide the information on the  
4 record.

5 Several times Mr. Lyon -- Lyons [sic]  
6 referred to the earlier decision as -- that is, the --  
7 of the Court's reviewing 95-322, as saying, oh, they  
8 just -- they didn't say the rates were unreasonable,  
9 they just said the procedure was wrong.

10 No, they didn't. They said that the rates  
11 were substantively unlawful under 757.355.

12 THE COURT: I think the base included  
13 improper amounts.

14 MR. MEEK: Yes. It was not a procedural  
15 issue. It was a substantive issue on what was in the  
16 rates and what was not in the rates.

17 THE COURT: The -- the point that he did make  
18 is that if those amounts hadn't been in, something  
19 else would have had to have been in, in order for the  
20 rates to be reasonable. And on remand, that's an  
21 issue that would still be open to the Commission.

22 Did you disagree with that proposition,  
23 Mr. Meek?

24 MR. MEEK: Well, it sort of stands that  
25 retroactivity argument on its head. They're saying if

1 MR. MEEK: Okay. I'm going to skip  
2 everything about the history of Trojan and how unfair  
3 everything is to PGE.

4 THE COURT: It goes -- it goes to the power  
5 to make a decision, as opposed to what the correct  
6 decision might be. That's the distinction.

7 PGE has the power to consider quite a number  
8 of things on remand.

9 MR. MEEK: Uh-huh.

10 THE COURT: And it's not really my job at  
11 this point, as I see it, to suggest what that decision  
12 ought to be.

13 MR. MEEK: Okay. PGE makes arguments about  
14 inverse condemnation. They should have been raising  
15 that in the appeal of 95-322.

16 THE COURT: That's not ripe for determination  
17 at this point.

18 MR. MEEK: Yes, and --

19 THE COURT: That issue is not before me.

20 MR. MEEK: Agreed.

21 PGE -- Mr. -- you noted that the earlier --  
22 that the 95-322 order provided that PGE could collect  
23 as return of investment \$250 million for Trojan over  
24 time. I note that PGE did not appeal that part of the  
25 order.

1 you remand now, they can basically start the case from  
2 the beginning.

3 THE COURT: Uh-huh.

4 MR. MEEK: And they can say, "Retroactively  
5 now we are going to change everything else about the  
6 case in order to make up for the unlawful rates that  
7 we charged."

8 THE COURT: The Commission might not allow  
9 them to do that, or might allow them to do that and  
10 then give them no relief. But it's his position that  
11 they're entitled to make the attempt, and I don't  
12 necessarily disagree with him.

13 MR. MEEK: I don't believe that was his  
14 position. I believe the position of both the -- of  
15 both PGE and the PUC is that if unlaw- -- if a court  
16 finds that rates are unlawful and remands to the PUC,  
17 that the PUC can't provide ratepayers any relief,  
18 because the rates are permanently in effect.

19 THE COURT: Right.

20 MR. MEEK: Right.

21 THE COURT: But I'm not buying off on that.

22 MR. MEEK: Well, then you're getting a couple  
23 of steps ahead of me, and I'll -- I'd have to think  
24 more about your proposition.

25 THE COURT: Okay.

1 So that now when they're coming in here and  
2 saying that instead what they should be getting is  
3 \$250 million now, instead of \$250 million over 17  
4 years, they should have been appealing that part of  
5 the original order which they did not appeal.

6 Mr. Dudley at one point stated to you, in  
7 response to a question, rates were lowered. I just  
8 wanted to clarify that in the first year of the -- of  
9 these new rates, under 2- -- under 01-601 -- 00-601,  
10 was then later confirmed in 02-227.

11 There was a \$10.2 million rate reduction.  
12 That was starting October 1st of 2000. However, in  
13 year two under that order, this is fully admitted on  
14 the record, and it's in my brief, there's a 27. --  
15 \$25.7 million rate increase. In year three, there's a  
16 \$15.7 million rate increase, and year four there's a  
17 \$15.7 million rate increase.

18 THE COURT: Are these further increases?

19 MR. MEEK: All of those compare --

20 THE COURT: Or increases over the base, yeah.

21 MR. MEEK: Increase over the base, which  
22 consists of the order that included the unlawful  
23 return on investment for Trojan.

24 So, yes, down a little bit in the first year,  
25 up considerably more in the next three years, and

**CERTIFICATE OF SERVICE**

I hereby certify that on this day I served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S REPLY MEMORANDUM REGARDING PHASE I SCOPE** by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the U.S. mail at Portland, Oregon.

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DATED this 25<sup>th</sup> day of June, 2004.

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