

BEFORE THE OREGON PUBLIC UTILITIES COMMISSION

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)**

**URP AND CAPs
OPPOSITION TO
PGE MOTION FOR
MODIFICATION OF
INTEREST RATE
AFTER ORIGINALLY
ORDERED REFUND
DATE**

May 4, 2009

LINDA K. WILLIAMS
OSB No. 78425
10266 S.W. Lancaster Road
Portland, OR 97219
503-293-0399 voice
503-245-2772 fax
linda@lindawilliams.net

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
503-293-9021 voice
503-293-9099 fax
dan@mEEK.net

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The Utility Reform Project (URP), et al., and the Class Action Plaintiffs (Gearhart, Morgan, Kafoury Brothers, Inc.) [hereinafter URP/CAPs or "we"] oppose the PGE Motion for Modification of Interest Rate after Originally Ordered Refund Date (April 17, 2009) [hereinafter "PGE Interest Rate Motion" or just "PGE"]. PGE (p. 1) seeks "an amendment * * * to Order 08-487 as set forth below."

We file this Opposition within the 15-day period provided in the OPUC Rules, despite losing the use of our computers multiple times due to PGE's outages in Southwest Portland on May 2 and 3.

I. PGE SEEKS TO AMEND A FINAL ORDER IN A CONTESTED CASE WITHOUT CONTESTED CASE PROCEDURES.

PGE seeks amendment of OPUC Order No. 08-487, citing ORS 756.568 for authority. That statute allows such amendment only if there is lawful "opportunity to be heard as provided in ORS 756.500 to ORS 756.610." Those statutes include the procedures for contested cases. It tautological that amendment of a final agency order in a contested case itself requires contested case procedures, not merely filing of what amount to undocumented suggestions or comments. Any other rule would entirely eviscerate the requirement for contested case procedures in the first place by allowing decisions reached by means of evidentiary proceedings to be changed without evidentiary proceedings.

Further, ORS 756.558 expressly forbids the taking of additional evidence, after the taking of evidence has been concluded, except upon "a reasonable opportunity of the parties to examine any witnesses with reference to the additional evidence and

otherwise rebut and meet such additional evidence." This statute applies to all periods after the taking of evidence in the hearing has concluded and is thus applicable now.

It is not the privilege of the Commission to amend an order in a contested case by procedures other than contested case procedures. But that is exactly what PGE now proposes.

II. THE COMMISSION CANNOT AMEND AN ORDER ALREADY ON APPEAL, EXCEPT BY FOLLOWING SPECIFIC STATUTORY PROCEDURES WHICH IT HAS NOT FOLLOWED.

Appeals of OPUC final orders are now governed by ORS 183.480 -.497, as applicable to orders in contested cases. ORS 756.610(1). Those statutes specify how an agency can amend an order already appealed. ORS 183.482(6) states:

At any time subsequent to the filing of the petition for review and prior to the date set for hearing the agency may withdraw its order for purposes of reconsideration. If an agency withdraws an order for purposes of reconsideration, the agency shall, within such time as the court may allow, affirm, modify or reverse its order. If the petitioner is dissatisfied with the agency action after withdrawal for purposes of reconsideration, the petitioner may refile the petition for review and the review shall proceed upon the revised order. An amended petition for review shall not be required if the agency, on reconsideration, affirms the order or modifies the order with only minor changes. If an agency withdraws an order for purposes of reconsideration and modifies or reverses the order in favor of the petitioner, the court shall allow the petitioner costs, but not attorney fees, to be paid from funds available to the agency.

In order to amend a final order that has been appealed, the OPUC must notify the Court of Appeals and obtain from the Court an allocation of time for completing its reconsideration. This has not been done, either for OPUC Order No. 08-487 (or for OPUC Order No. 09-093, if the PGE motion is somehow recast as a motion to amend

OPUC Order No. 09-093). Consequently, the OPUC is without authority to amend the order which is already under appeal.

Those Administrative Procedure Act (APA) statutory sections were made applicable to the appeal of OPUC final orders by the Oregon Legislature in 2005. Thus, they have superseded any pre-existing statute which may appear to conflict with those statutes by purporting to authorize any different method for changing an OPUC order which is under appeal, such as ORS 756.568 (adopted decades ago). "If two statutes are inconsistent, the later-enacted statute will prevail over the earlier-enacted statute." *Koennecke v. Lampert*, 198 Or App 444, 453, 108 P3d 653, *review denied* 339 OR 66, 118 P3d 802 (2005). Further, the APA statutes incorporated by ORS 756.610(1) are more specific to this situation, which is a party's attempt to change an order which already has been appealed. Where a specific statute is inconsistent with a general statute, the specific statute is considered an exception to the general statute and prevails. *Smith v. Multnomah County Board of Commissioners*, 318 Or 302, 309, 865 P2d 356 (1994).¹

1. PGE (pp. 1-2) states:

Because the Commission has retained jurisdiction to carry out all aspects of the refund during the pendency of the judicial review, and because the requested modification if ordered will be subject to a supplemental petition for judicial review, there is no jurisdictional obstacle to the Commission's consideration of this Motion.

Why PGE believes any of that is either true, or that it matters, is a mystery. The Commission cannot "retain jurisdiction" of an order, after it has been appealed
(continued...)

III. EVEN IF THE COMMISSION COULD RECONSIDER AN ORDER WHICH HAS BEEN APPEALED (UPON A REQUEST GRANTED BY THE COURT OF APPEALS), THE COMMISSION CANNOT ADOPT PGE'S REQUESTED AMENDMENT, WHICH WOULD REQUIRE REHEARING.

In *Gritter v. Adult & Family Services Division*, 182 Or App 249, 48 P3d 195 (2002), the Court of Appeals concluded that ORS 183.482(6) allows an agency only to "reconsider" an order which has been appealed, which means to rethink it without taking additional evidence.² Here, however, PGE obviously seeks to provide additional information to the Commission not produced in the proceeding, such as (p. 4) "Short term interest rates are at historic lows." According to the Court of Appeals, that necessitates use of ORS 183.482(5), which requires the party seeking to provide additional evidence to apply to the court for leave to present the additional evidence to the agency. PGE has made no such application. It is entirely clear that ORS 183.482(5) and (6) are now applicable to appeals of OPUC orders; see ORS 756.610(2) (only exception is ORS 183.482(3)).

1.(...continued)

- pursuant to ORS 756.610, unless and until the Commission complies with the statutory procedures for recalling the order (which in this case the Commission has not done).
2. The Court of Appeals decision was later vacated for mootness. *Gritter v. Adult & Family Services Division*, 183 Or App 578 (2002). Nevertheless, its reasoning is sound, and this Commission has itself discussed it. *Wah Chang v. PacifiCorp*, OPUC Order No. 04-305. In 2004, the statutes governing appeals from OPUC orders were quite different. But the Commission concluded that it would reopen the record for receipt of additional evidence and, accordingly, permit Wah Change to conduct additional discovery.

IV. ORDERING ANY CHANGE TO INTEREST RATE LACKS ANY EVIDENTIARY BASIS AND DENIES DUE PROCESS TO URP AND CAPs.

No party presented any evidence regarding the interest rate which should apply to the funds during the refund period. When we suggested that evidence about the details of refunding the money be developed in the remand proceeding, our request "to seek evidence related to PGE's ability to carry out any remedial action ordered by the Commission is also denied." Ruling and Notice of Conference (February 22, 2008) [hereinafter "Phase 3 Scoping Order"], p. 7.

Despite our attempts to raise issues related to the mechanics of refunds, the Commission failed to include any such issues on the list of issues to be addressed in these remand dockets. Conference Report (March 12, 2008).

Now, PGE seeks to litigate, without any evidence or any hearing, an issue pertaining to implementation of the refund. There remains zero evidence in the record on these issues, because the Commission chose to deny us discovery on such issues and to exclude it from the list of allowed issues. To render decisions on such methodology now, with no evidence and after having denied us the opportunity to either develop or present such evidence, is a clear denial of due process and of required contested case procedures.

Further, the Commission also affirmatively excluded such issues also from Phase 1 of these remand dockets. The ALJ Ruling of May 5, 2004, stated (p. 8) (emphasis added):

URP requested that the question of whether the Commission has the authority to pay refunds, URP's issue number five, be addressed in the first

phase of the proceedings. As parties indicate that this issue is likely to be identified in briefing to the Court of Appeals as a legal question on appeal, I am reluctant to prematurely address this legal issue. **In any case, I note that URP's underlying concern with regard to this issue relates to implementation of relief and the timing of potential refunds. The fundamental question appears to be, assuming that the Commission orders PGE to pay refunds, when shall PGE implement such refunds? This is an implementation issue that can be addressed in a later phase of these proceedings.**

Yet, as shown above, when URP/CAPs raised the issue in "a later phase of these proceedings" (what is now being called Phase 3), the Commission again refused to address it. Thus, while the Commission up to now in these dockets has refused to hear any evidence pertaining to the implementation of refunds, PGE now demands that the Commission issue yet another order regarding the implementation of refunds, again with no evidence or due process.

V. PGE'S MOTION IS ONE FOR RECONSIDERATION OR REHEARING OF OPUC ORDER NO. 08-487, BUT PGE HAS FAILED TO COMPLY WITH ANY OF THE OPUC RULES FOR SUCH A MOTION.

PGE's motion is correctly characterized as a motion for reconsideration or rehearing of OPUC Order No. 08-487, which set forth the interest rate to apply to the amounts PGE owes ratepayers as a result of the rates PGE has charged for Trojan return on investment. But PGE has failed even to attempt to comply with the OPUC rules for such a motion. OAR 840-014-0094 provides:

Rehearing or Reconsideration

(1) Within 60 days from the date of service of an order entered by the Commission, a party may file an application for rehearing or reconsideration of such order as provided by ORS 756.561. The application shall set forth all grounds for rehearing or reconsideration.

(2) The application shall specify:

- (a) The portion of the challenged order which the applicant contends is erroneous or incomplete;
- (b) The portion of the record, laws, rules, or policy of the Commission relied upon to support the application;
- (c) The change in the order which the Commission is requested to make;
- (d) How the applicant's requested changes in the order will alter the outcome; and
- (e) One or more of the grounds for rehearing or reconsideration set forth under section (3) of this rule.

(3) The Commission may grant an application for rehearing or reconsideration if the applicant shows that there is:

- (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.

PGE's motion fails to comply with any of the above requirements.

It is also untimely. PGE characterizes its motion as one for change to or amendment of OPUC Order No. 08-487 (September 30, 2008). The deadline for such a motion (if it had not been superseded by the appeals of that order filed with the

Court of Appeals in October 2008) was November 1, 2008. Thus, PGE's motion is untimely by 5.5 months.

VI. ON THE MERITS, PGE'S MOTION FOR A REDUCED INTEREST RATE IS UNSUPPORTED AND AUDACIOUS.

PGE has the audacity to contend that it should not be "prejudiced" by delay in refunding the \$33.1 million to ratepayers required by OPUC Order No. 08-487. PGE demands that the involuntary loan PGE forced ratepayers to give to PGE, starting in 1995, was actually a short-term variable rate loan, and its interest rate should fluctuate according to short-term interest rates available to consumers on their savings.

During the 5.5-year period (April 1, 1995, through September 30, 2000), PGE charged ratepayers over \$35.2 million per year in Trojan return on investment, as documented by the uncontroverted testimony of Jim Lazar. The raw amount, without any interest, amounted to \$193.4 million as of September 30, 2000. URP Exhibit 202, p. 2. PGE could have avoided all interest charges merely by complying with ORS 757.355 in the first place instead of insisting upon charging ratepayers unlawful profits on the dead Trojan plant and continuing to do so despite 4 appellate court decisions. PGE also could have refunded its unlawful Trojan charges to ratepayers at any time during the past 14 years, since those charges commenced not later than April 1, 1995.

Since then, PGE has had the use of that money, which rightfully belonged to ratepayers. During the entire period from 1995 through September 2000, PGE was authorized to earn a rate of return on investment of 9.6%. PGE actually earned far greater return than that, as documented by the annual PGE Results of Operations

reports to the OPUC, which show "earnings text adjusted results" of 12.34%, 11.16%, 11.34%, 10.34%, 8.89%, and 9.66% during the years 1995-2000.³ And those numbers are gross underestimates of PGE's actual earnings, because those numbers assume that PGE paid approximately \$92 million of federal and state income taxes each year, which in fact was never paid to any government.⁴ Having earned these very high rates of interest on the ratepayers' money kept in PGE's pocket, PGE now complains about having to pay a mere 9.6% interest on the fractional refund of Trojan profits ordered by OPUC Order No. 08-487.

PGE's complaint is particularly egregious in light of the fact that PGE is currently charging ratepayers 1.5% per month on any amounts that ratepayers owe to PGE for late payment (18% per year, even if not compounded). OPUC Order No. 08-558. At the time of issuance of the Trojan refund order, PGE was charging ratepayers 1.7% per month on any amounts that ratepayers owed to PGE for late payment (20.4% per year, even if not compounded). *Id.* Yet, PGE cries foul when it is charged a mere 9.6% per year on the refund it owes to ratepayers--and is late in paying to them by a period of from 9-14 years. The discrepancy is even more vivid, because the 1.5% and 1.7% apply to short-term balances owed by ratepayers who have been late in paying their bills. A ratepayer who is consistently late gets shut off. The Trojan refund owed

3. These documents were prepared by PGE, submitted to the Commission by PGE, and reside in the OPUC files. Thus, official notice of their contents is appropriate, if necessary.

4. All of these statements of fact are documented in the DR10/UE 88/UM 989 record.

to ratepayers, however, began accumulating in 1995 and is akin to a long-term loan to PGE. If anything should be changed to 2.09%, it is the interest rate that PGE charges to a ratepayer who does not pay what PGE is owed on time.

PGE repeatedly refers to the Blended Treasury Rate adopted for deferral amortizations. The application of such a rate to deferrals during the amortization period was adopted by the Commission in OPUC Order No. 08-263 (May 22, 2008), more than 4 months prior to adoption of the Trojan refund order on September 30, 2008. Thus, if the Commission had believed the Blended Treasury Rate to be appropriate for the Trojan refund, it would have said so. Further, the Commission has already granted exceptions to the Blended Treasury Rate, allowing utilities to return to the historical interest rate applicable to deferred accounts--the utility's authorized rate of return. OPUC Order No. 08-477.

PGE (p. 4) states that the 9.6% interest rate adopted in OPUC Order No. 08-487 "reflects financial conditions in 2000." In that order, the OPUC concluded that the overcharge was imposed upon ratepayers in 2000, and that PGE has held this money owed to ratepayers for over 8 years already, so there is a rationale for adopting that interest rate.⁵ PGE claims that the interest rate should be lowered now, because "Short term interest rates are at historic lows." But PGE offers no rationale for why the OPUC should abandon the previous interest rate in favor of a short-term interest rate now. Short-term interest rates were also low in September 2008, when OPUC

5. We argue that the overcharge commenced in 1995.

Order No. 08-487 was issued. The mere fact that short-term rates are now somewhat lower than in September 2008 is irrelevant to the rationale of OPUC Order No. 08-487.

**VII. URP AND CAPs INTEND TO ASK THE COURT OF APPEALS TO STAY
OPUC ORDER NO. OPUC ORDER NO. 09-093.**

In its decision denying the requested stay of OPUC Order No. 08-487, the Court of Appeals noted that the parties could seek to stay any further order issued by the OPUC. URP and the CAPs will seek to stay OPUC Order No. 09-093 in the Oregon Court of Appeals.

Dated: May 4, 2009

Respectfully Submitted,

LINDA K. WILLIAMS
OSB No. 78425
10266 S.W. Lancaster Road
Portland, OR 97219
503-293-0399 voice
503-245-2772 fax
linda@lindawilliams.net

Attorney for
Class Action Plaintiffs

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
503-293-9021 voice
503-293-9099 fax
dan@meek.net

Attorney for
Utility Reform Project, et al.

CERTIFICATE OF SERVICE

I hereby certify that I filed the original and 8 copies of the foregoing by email to the Filing Center and by mail, postmarked this date, and that I served a true copy of the foregoing URP AND CAPs OPPOSITION TO PGE MOTION FOR MODIFICATION OF INTEREST RATE AFTER ORIGINALLY ORDERED REFUND DATE by email to the physical and email addresses shown below, which comprise the service list on the Commission's web site as of this day (email service only to those who have waived physical service).

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|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------|
| STEPHANIE S ANDRUS DEPARTMENT OF JUSTICE 1162 COURT ST NE SALEM OR 97301-4096 stephanie.andrus@state.or.us | PAUL A GRAHAM DEPARTMENT OF JUSTICE 1162 COURT ST NE SALEM OR 97301-4096 paul.graham@state.or.us |
| PATRICK G. HAGER PORTLAND GENERAL ELECTRIC 121 SW SALMON ST 1WTC0702 PORTLAND OR 97204 patrick_hager@pgn.com | JEFFREY DUDLEY PORTLAND GENERAL ELECTRIC 121 SW SALMON ST 1WTC1301 PORTLAND OR 97204 jay_dudley@pgn.com |
| stephanie.andrus@state.or.us jay.dudley@pgn.com rgale@idahopower.com paul.graham@state.or.us pge.opuc.filings@pgn.com bkline@idahopower.com katherine@mcd-law.com wendy@mcd-law.com dan@meek.net david.meyer@avistacorp.com mmoen@idahopower.com lnordstrom@idahopower.com lisa@mcd-law.com docketing-pdx@lanepowell.com linda@lindawilliams.net williamsr@lanepowell.com myoungblood@idahopower.com | Linda K. Williams Attorney 10266 S.W. Lancaster Road Portland, OR 97219 linda@lindawilliams.net |

Dated: May 4, 2009

Daniel W. Meek