

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 IN SUPPORT OF MOTION TO CONSOLIDATE PHASES AND RE-OPEN RECORD

I. INTRODUCTION

Pursuant to OAR 860-13-0031 and 860-13-0050, Portland General Electric Company ("PGE") requests that the Commission consider this Reply Brief in support of PGE's motion to Consolidate Phases and Re-Open the Record. URP's Answer to our Motion inaccurately describes the Commission's scope rulings, raises legal objections PGE could not reasonably have anticipated, interjects comments on the *Dreyer* decision, and moves for its own changes in the scope and timing of these proceedings. PGE should be afforded an opportunity to respond to URP's submission and its counter-proposal to amend the scope and schedule of this proceeding. PGE's Reply will be of assistance as the Commission considers both PGE's Motion and URP's counter-proposal.

The *Dreyer* decision places in the hands of the Commission the responsibility for determining whether customers have been injured by rates collected in violation of ORS 757.355, the extent of injury, and the appropriate relief, if any. PGE proposes a

schedule in this docket that would allow the parties to address the *Dreyer* decision, close the factual record on all issues by April 2007, and have a final order resolving all substantive issues by July 2007. URP would have the Commission delay indefinitely all Phase II issues, which include fashioning an appropriate remedy for customers, while URP argues its case to the Court of Appeals and the Marion County Circuit Court. URP's stratagem of delay at the PUC while rushing to court is not what the Supreme Court in *Dreyer* had in mind when it ordered abatement of the class action case to give the Commission the "opportunity to do its work" in these remand proceedings.

The intervening *Dreyer* decision provides "good cause" to amend the scope and timing of these proceedings as PGE proposes.¹ Both URP and PGE request the opportunity to address the Oregon Supreme Court's decision. Moreover, the Commission would benefit from a complete factual record that includes the parties' testimony on the issues the *Dreyer* court delegated to the Commission for decision as a matter of primary jurisdiction. The Commission should grant PGE's Motion and deny URP's counter-proposal.

II. URP MISUNDERSTANDS THE COMMISSION'S SCOPE RULINGS

In its Answer, URP urges the Commission to (a) decide Phase I issues immediately; (b) permit truncated briefing on the *Dreyer* decision and OPUC's legal authority; (c) allow reinstatement of the class action case in Marion County Circuit Court; and (d) delay consideration of all other issues until the Court of Appeals has ruled in the appeal of the UM 989 final order.

URP's position is premised on the mistaken assumptions that (a) Phase I concerns the appropriate remedy for the period from April 1995 through September 2000 ("Period A") and Phase II will address the remedy for the period from September 2000 to

¹ See, e.g., *In re PacifiCorp*, UE 121/UE 127, Order No. 02-853 at 3 (Dec. 10, 2002) (amending prior Commission order under ORS 756.568 for "good cause" shown, citing other Commission orders doing the same).

present ("Period B")², and (b) the relief it seeks in Period B is unrelated to the relief it seeks in Period A.

URP misunderstands the phasing of issues in this docket. Phase I will not result in customer relief for either Period A or Period B. Phase I deals with the sole issue of what rates the Commission would have set in UE 88 if it had known that investments in retired plants could not be included in rate base:

By concurrently remanding the orders in DR 10 and UE 88, the circuit court provides a forum for the Commission to revisit rate determinations made in UE 88 in light of the circuit court's ruling. *This effort should comprise the first phase of these remand proceedings*, with the goal being to determine, on a retrospective basis, end rates that comply with the Court of Appeals' interpretation of ORS 757.355.

DR 10/UE 88/UM 989, Ruling dated August 31, 2004, at 16 (emphasis added) ("Scope Ruling").

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.*

DR 10/UE 88/UM 989, Order No 05-091 at 11 (Feb. 11, 2005) (emphasis added).

The Commission's Phase I ratemaking determination is then compared in Phase II with approved rates in both Periods A and B to determine what, if any, relief is appropriate for customers in both Periods A and B:

A later phase may involve reconciling revised rate determinations in the first phase against rates established in UM 989 (and potentially other dockets) in order to calculate appropriate rate adjustments.

Scope Ruling at 16.

² See, e.g., URP Ans. at 5 ("Phase 2 covers precisely the time period addressed in *URP v. OPUC* (UM 989 appeal)").

Reconciling the results of Phase I with actual rates and adjusting rates, to the extent necessary, shall be addressed in future phases.

Id. at 19.

We concur with the Ruling 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, with *subsequent reconciliation* of the revised rate determinations against rates established in other dockets, such as UM 989, if necessary.

DR 10/UE 88/UM 989, Order No. 04-597 at 6 (Oct. 18, 2004).

Phase I thus provides the necessary tools for later phases. Those later phases use the rate-making outcome in Phase I to assess whether a remedy is necessary and, if so, the appropriate amount and form of such remedy. In addition, these later phases would address the Commission's legal authority and administrative issues. DR 10/UE 88/UM 989, May 5, 2004, Ruling at 8-9.

URP is also wrong when it suggests that its claims in Period A and Period B are separate and distinct. URP Ans. at 7-10. The Marion County Circuit Court invalidated the prospective rates set in UM 989 precisely because the Commission did not deal with errors prior to that date.³ Because the Commission did not allow the recovery of "past unlawful charges" in the rates that went into effect October 1, 2000, the rates were "neither just nor reasonable." *Id.* Therefore, according to the circuit court, the rates for "Period B" are wrong precisely because they did not deal with "Period A."

³ The circuit court held that:

As part of the adjustment of offsetting charges and liabilities related to the Trojan write-off [effective October 1, 2000], PGE should have been required to account for all refunds due to rate payers for these unlawfully-collected rates as a matter of law.

Marion County Circuit Court Order and Decision at 6.

The Commission has quite clearly seen that the issues in Periods A and B are inextricably interwoven:

The two remand orders are interrelated, with the remand of Order No. 02-227 in UM 989 informing the remand orders in DR 10 and UE 88.

Scope Ruling at 14.

To approve end rates within [the scope of the circuit court UM 989 remand], however, the Commission would have had to conduct far different proceedings than those actually conducted in UM 989. In reviewing the [UM 989] Settlement, the Commission needed to address the following question: What rates would have been approved in UE 88 if the Commission had interpreted the authority delegated to it in ORS 757.355 as the Court of Appeals did in *Citizens' Utility Board*?

Id. at 15.

Thus, the issues in both Phases I and II will affect customers in both time periods—Periods A and B. Phase I concerns rates that the Commission would have set in Period A, which will provide the basis for the retrospective review of the settlement in UM 989 that the Marion County Circuit court mandated. Later phases then reconcile these findings with actual rates from both Periods A and B to determine an appropriate remedy, if any. URP's artificial manipulation of time periods with phases of this proceeding ignores the interconnected nature of these proceedings which the Commission recognized and the remand orders required.

With this corrected view of the scope and timing of this proceeding, it is easy to see why URP's objections miss the mark and its counter-proposal falls short.

III. URP'S CLAIM THAT PHASE I RESOLUTION WOULD REINSTATE THE CLASS ACTION CASE IS UNFOUNDED

Completion of Phase I will not restart the class action case, as URP contends. In *Dreyer*, the Supreme Court abated the class action case until the Commission determines whether customers have been injured, the extent of injury, and whether it has authority to

award relief for such injury. Only after the Commission awards a remedy to customers, or declines to do so, may plaintiffs seek reinstatement of the civil case:

We conclude, in short, that the PUC has primary jurisdiction to determine what, if any, remedy it can offer to PGE ratepayers, through rate reductions or refunds, for the amounts that PGE collected in violation of ORS 757.355 (1993) between April 1995 and October 2000. *If the PUC determines that it can provide a remedy to ratepayers, then the present actions may become moot in whole or in part.* If, on the other hand, the PUC determines that it cannot provide a remedy, and that decision becomes final, then the court system may have a role to play. Certainly, after the PUC has made its ruling, plaintiffs retain the right to return to the circuit court for disposition of whatever issues remain unresolved.

Dreyer, 341 Or at 286 (emphasis added). The Commission will not award an appropriate remedy in Phase I, much less decide whether it has the authority to award such relief. The remedy phase of this proceeding will occur only when the PUC "reconciles" the rates from Phase I with approved rates and then fashions an appropriate remedy.

IV. THE COMMISSION SHOULD NOT WAIT FOR THE COURT OF APPEALS

URP urges the Commission to delay all other decisions until the Court of Appeals has ruled. URP Ans. at 6. This is little more than a rehash of URP's argument that this docket is "futile." *See* Scope Ruling at 19. The Commission rejected that argument, committing to proceed at the same time with the UM 989 appeal and this remand docket without delay:

The Commission may simultaneously proceed with these remand proceedings and the appeal of the Circuit Court's remand of Order No. 02-227. Indeed, it is likely that the Circuit Court understood that the Commission would engage in this dual effort.

Id. URP offers no justification for the Commission to reverse course at this stage in the proceeding.

URP mistakenly suggests that the Court of Appeals' decision may eliminate the need for Phase II altogether, evidently because the court may affirm the Commission's

decision in UM 989. URP Ans. at 6, 17. Again, URP's confusion regarding phasing leads to this mistake. Phase I will not reconcile the rates the Commission would have set against approved rates for any period, even for the pre-UM 989 timeframe ("Period A"). Phase II will be needed to "reconcile" rates and implement a remedy for Period A even if the Commission need not deal with Period B because the Court of Appeals affirms the UM 989 final order.

URP could mean that the Court of Appeals' decision may make this entire remand proceeding moot by ruling that the Commission has no authority to award retroactive relief. But that is no basis for Commission delay. URP is the only party asking the Court of Appeals to address the Commission's legal authority to order retroactive relief. Both PGE and the Commission have submitted briefs to the Court of Appeals, urging the court not to address that legal issue because it is premature.

Most important, URP's delay strategy contradicts the fundamental tenant of the *Dreyer* decision. The Oregon Supreme Court abated the civil case so that the Commission, not the courts, could first address the question of appropriate customer remedies. It is for the Commission, not the courts, to determine, as a matter of first impression, the appropriate remedy, if any, for former and current customers, and the Commission's authority to award such a remedy. Asking the courts to resolve this question first will interfere with the Commission's regulatory authority.

The issue of the PUC's authority to provide a retroactive remedy is one that, at least initially, belongs before that body.

Dreyer, 341 Or at 285.

Judicial resolution of the remedies issue before the PUC has acted would interfere with that agency's performance of its regulatory functions.

Id. at 286.

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.

Id. at 286 n.19.

V. CONSOLIDATION OF PHASES IS FEASIBLE

URP next claims that the parties cannot now address Phase II issues because they do not know "the remaining legitimate Trojan investment balance as of the close of September 30, 2000." URP Ans. at 5. This is not a legitimate objection to PGE's proposal. The current phasing of issues has the exact same feature. Phase I concerns what rates would have been and involves no "reconciliation" with approved rates. Even after completion of Phase I, the parties would not know for certain the "legitimate Trojan investment balance" as of September 30, 2000.

Carried to its logical conclusion URP's position would require a separate phase for each and every issue. No Commission docket proceeds on such a course. Parties routinely address multiple interdependent issues, advocating for their position and against other parties', while exercising judgment about which alternatives to address and which to ignore. PGE's consolidation request seeks nothing novel, in this docket or in Commission practice.

VI. CONSOLIDATION WILL NOT IMPOSE SIGNIFICANT BURDEN AND DELAY

URP wrongly states that combining the phases will impose significant burden and delay. URP Ans. at 10-17. The only issues not included in Phase I are (a) reconciliation of rates; (b) the Commission's legal authority; and (c) administration of any refund. Alone, none of these additional issues will require protracted proceedings, and combining them will not delay this proceeding. Reconciliation with approved rates will be straightforward given that the approved rates are known and the UM 989 final order involved a relatively simple offset of customer credits against the Trojan balance:

Should reconciliation of the results of Phase I with approved rates, and adjustment of current rates, be necessary, however, *we don't believe it will be necessary to conduct an extensive ratemaking proceeding to "examine all of PGE's costs and revenues" as URP suggests, in order to do so.*

Order No. 04-597 at 7 (emphasis added). Resolution of the legal authority question involves no factual issue, requiring only briefing, which URP acknowledges can be completed expeditiously. URP Ans. at 7. And no one has ever claimed that administrative details for any refunds will require an extended process.

URP also contends that *Dreyer* offers no reason to re-open the record for Phase I issues. URP Ans. at 7. We disagree. The *Dreyer* decision identified several critical factual questions which the Supreme Court directed to the Commission for decision using its expertise in setting utility rates and protecting utility customers. *Dreyer*, 341 Or at 285. Specifically, the *Dreyer* court asked that the Commission first address in these remand proceedings (1) whether customers were injured, (2) the extent of injury, (3) the Commission's authority to award relief, and (4) the appropriate remedy, if any. *Id.* The Court also elaborated on different approaches to determining customers' injury and its extent. *Id.* at 282. Parts of the existing record in Phase I may address these specific issues, but that is by happenstance given that the *Dreyer* court's questions were unavailable and unknown when evidence was submitted. The parties should have the opportunity to supplement the record to respond to the intervening Supreme Court decision.

PGE plans to submit relatively little additional evidence regarding Phase I. The new Phase I evidence will be limited to the approaches the *Dreyer* opinion described, including approaches that have as a component the "part of the rates that the PUC approved" that "represented a return on PGE's investment in Trojan." *Id.* at 282. Such additional evidence will not impose an undue burden and will give the Commission a full and complete record to answer the *Dreyer* court's queries and issue a final order.

VII. THE *DREYER* DECISION IS RELEVANT TO THIS PROCEEDING

URP makes a number of puzzling claims about the *Dreyer* decision. First, it claims *Dreyer* is not relevant to Phase II issues because it is relevant only to Phase I.⁴ Then it claims *Dreyer* is not relevant to Phase I issues either⁵ and "has no direct impact on this matter."

Aside from being internally inconsistent, URP's latter position ignores the fundamental holding in *Dreyer*. The Supreme Court abated plaintiffs' class actions for damages precisely because they sought the same relief as the refunds proposed in these remand proceedings:

We also note that, even before plaintiffs filed their actions, the PUC had received two remands from the courts, at least one of which clearly contemplated that the PUC would fashion a remedy for those very injuries. * * * The PUC proceeding that is underway thus has the potential for disposing of the central issue in these cases, viz., the issue whether plaintiffs have been injured (and if they have been, the extent of the injury) * * * Depending on how the PUC responds to that remand, some or all plaintiffs' claimed injuries may cease to exist.

Dreyer, 341 Or at 284-85. The *Dreyer* decision could not be more relevant to all phases of these remand proceedings.

Most important, *Dreyer* directly bears on the issue of the Commission's legal authority to provide a retrospective remedy. URP is correct that the *Dreyer* court did not decide whether the Commission has the authority to award retroactive relief. It left that decision for the Commission to decide as a matter of first impression. *Dreyer*, 341 Or at 285-86. Nevertheless, *Dreyer* rejected *the* basis upon which the PUC has declined to award retroactive relief. In the past, the PUC concluded that ORS 757.225 prohibited retroactive

⁴ URP Ans. at 13 ("The *Dreyer* case pertains solely to the prior period, which corresponds exactly with Phase 1 of this remand").

⁵ URP Ans. at 7 ("*Dreyer* is not pertinent to the Commission's conclusion of Phase 1").

relief, including the award of refunds. UM 989, Order No. 02-227 at 8-10 (March 25, 2002). The *Dreyer* court expressly rejected that interpretation, concluding that compliance with ORS 757.225 was no bar to retroactive relief. *Dreyer*, 341 Or at 278-79. URP's distinction between the "damages" in the class action case and the "refunds" in the PUC remand case is a distinction without a difference. The *Dreyer* court's abatement order is predicated upon the fact that the "damage" claim and the "refund" claim are one in the same.

VIII. URP'S PROCEEDURAL OBJECTIONS ARE ILL-FOUNDED

URP argues that the "law of the case" prohibits any change to the Commission's scoping order, notwithstanding the fact that it proposes to amend the order to address the Oregon Supreme Court's decision and the Commission's legal authority. URP Ans. at 2-3. The doctrine of "law of the case" applies to prior court rulings in the same or related cases. It has no application to an administrative proceeding in which an agency considers its own prior ruling. Not a single case URP cites concerns an agency decision. Nor does URP offer any statutory authority for the notion that a scope or scheduling order is sacrosanct and inviolate. The utility statutes provide the Commission with authority to control its own process and decide what issues to address and when. It has the authority "rescind, suspend or amend any order by the commission" (ORS 756.568) for "good cause," which PGE has shown. *See, e.g., In re PGE*, UE 102, Order No. 98-279 (significant change in posture of case warrants modification of order under ORS 756.568); Order No. 02-853 ("good cause" justifies amendment under ORS 756.568).

IX. PGE'S MOTION OFFERS THE BEST ALTERNATIVE FOR EXPEDITIOUSLY RESOLVING THE ISSUES IN THESE PROCEEDINGS

The *Dreyer* decision squarely puts in the hands of the Commission the responsibility for determining whether customers have been injured, deciding whether it has legal authority to provide a complete remedy, and, if so, fashioning such relief. The courts have also underscored the need for complete customer relief and the speed with which the

Commission awards such relief. In its abatement order, the Marion County Circuit Court permitted plaintiffs to seek reinstatement if the Commission has not issued a final order in these remand proceedings by October 2007.

The question for the Commission is what process will result in complete and final relief to current and former customers with all due speed. PGE's proposed schedule offers the best alternative. It permits the parties to address the *Dreyer* decision, an opportunity both URP and PGE request. It results in a complete, final and closed factual record by April 2007. It enables the Commission to issue a single comprehensive order awarding final and complete relief to current and past customers over all relevant time periods. It avoids the kind of gamesmanship that has plagued these proceedings, in which URP plays Period A against Period B, UE 88 against UM 989, and civil court remedies against Commission rate relief or refunds.


URP's alternative offers none of these advantages. URP seeks to keep these proceedings fragmented and disjointed, delaying everything other than Phase I issues while URP goes to court to reinstitute the class action case and hedges its bets on Period B issues at the Commission. This is the essence of incomplete, delayed relief from the Commission. It would interpose the courts in the middle of the Commission process, contradicting the *Dreyer* court's admonishment that "judicial resolution of the remedies issue before the PUC has acted would interfere with that agency's performance of its regulatory functions." *Dreyer*, 341 Or at 286. The Commission should reject it.

X. CONCLUSION

For the reasons stated above and in PGE's Motion, the Commission should grant PGE's Motion.

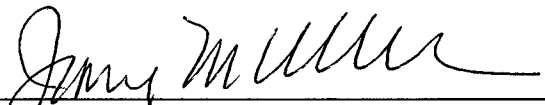
DATED this 15th day of December, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served the foregoing
**PORTLAND GENERAL ELECTRIC COMPANY'S REPLY IN SUPPORT OF
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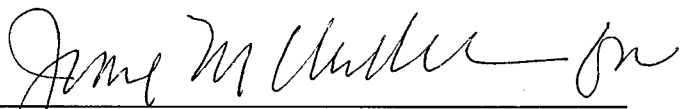
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