

1 **BEFORE THE OREGON PUBLIC UTILITIES COMMISSION**

2
3 **UE 88/DR 10/UM 989**

4
5 **In the Matters of:**
6 **Various Applications**
7 **regarding Acquire Portland**
8 **General Electric Co.**

9
10 **MOTION FOR CERTIFICATION OF RULING**
11 **TO THE COMMISSION BY**
12 **UTILITY REFORM PROJECT (URP), ET AL.**

13 The Utility Reform Project (URP) and the Class Action Plaintiffs (Morgan,
14 Gearhart, and Kafoury Brothers, LLC) move for certification of the ALJ's Ruling
15 (August 31, 2004) setting forth a scope and procedural framework for the remand
16 proceedings.¹

17 The effect of the ALJ's Ruling on URP and the class action plaintiffs (CAPs)
18 certainly meets the standards of OAR 860-014-0091:

- 19 (a) May result in substantial detriment to the public interest or undue
20 prejudice to any party; or
21 (b) Denies or terminates any person's participation.

22 The ALJ's Ruling has both of these effects, by requiring URP and CAPs to participate
23 in what amounts to at least two full rate cases (one for the UE 88 period and another
24 for the UM 989 period), before the Commission issues an order that will, under the
25 Commission's legal position stated even within the past 3 days, certainly deny all
26 relief to PGE ratepayers and former PGE ratepayers who have paid rates deemed by
27 the courts to have been unlawful.

28 In sum, the scope and procedural framework adopted in the ALJ's Ruling
29 ensures a proceeding that is extremely burdensome to URP and CAPs, is
30 fundamentally unfair, and is pointless. It would require URP and CAPs to:

1. This motion is timely filed, pursuant to OAR 860-014-0091, as the Ruling was served on the parties on September 1, 2004.

- 1 1. first engage in a lengthy and complex "ratemaking" proceeding, the
2 scope of which is not limited in the ALJ's Ruling and which can
3 examine all of PGE's costs and revenues, both estimated and actual,
4 over the period of time from April 1, 1995, to October 1, 2000;
5
- 6 2. then engage in another lengthy and complex "ratemaking"
7 proceeding, which again can examine all of PGE's costs and
8 revenues, both estimated and actual, over the period of time from
9 October 1, 2000, to the present day;
- 10
- 11 3. then be subject to an OPUC determination that the entire proceeding
12 was pointless, because no relief can be granted (as PGE contends
13 that Oregon law "does not permit any such refunds or rate
14 reductions," and the Commission to date has expressed its complete
15 agreement with that conclusion of law).
- 16

17 This procedure would easily and quickly exhaust all resources of URP and the other
18 parties opposing PGE in this docket, then have all of their efforts declared,
19 retroactively, to have been futile. The adopted procedure thus "may result in
20 substantial detriment to the public interest or undue prejudice to any party" and
21 effectively "denies or terminates any person's participation" by heaping upon URP
22 and CAPs the burden of prosecuting 2 utility rate cases before the OPUC, when all
23 that is needed is an order quantifying the unlawful Trojan profit charges and returning
24 those amounts to the ratepayers who paid them.

25 If this procedure is not changed, URP and the CAPs will decide whether their
26 participating in the remand proceeding is so burdensome that they withdraw.

27 This motion is not the place for detailed argument on why the ALJ's Ruling is
28 wrong and creates a fundamentally unfair and pointless proceeding. Those
29 arguments will be presented in further briefing to the Commission. We note here,
30 however, that our prediction about the content of the OPUC's brief to the Oregon
31 Court of Appeals in **URP v. OPUC** (UM 989), No. A123750, was correct. We
32 predicted that the OPUC would argue to the Court of Appeals that OPUC Order No.
33 02-227 (UM 989) was lawful, because of the "filed rate doctrine." That is exactly what

1 the OPUC is now arguing before the Court of Appeals. Appellant's Brief (September
2 10, 2004), pp. 17-22.

3 Considering the OPUC's continued reliance on the "filed rate doctrine," despite
4 its rejection by Judge Lipscomb in his order remanding OPUC Order No. 02-227, the
5 Commission has irretrievably prejudiced this remand proceeding. The OPUC's
6 position, in UM 989 itself, before the courts is that the outcome of this remand
7 proceeding is irrelevant, because "There is no statutory authority by which the PUC
8 could have awarded a refund of rates already paid by customers."

9 ORS 757.225 specifically provides that the rates established by the PUC
10 are the lawful rates until they are changed by later PUC action. The PUC
11 construed this provision to prohibit retroactive ratemaking.
12

13 Appellant's Brief (September 10, 2004), p. 17. And:
14

15 Here, although PGE charged rates that concluded an unlawful
16 component, as this court later ruled, it charged only rates that
17 were legally authorized. Because the commission is authorized
18 to set rates only on a prospective basis, the commission has no
19 authority to penalize PGE for charging the rates it ordered PGE
20 to charge, anymore than the commission could order customers
21 to pay increased rates in the future if the utility fails to realize the
22 rate of return the commission authorized in the past.
23

24 *Id.*, p. 22. The intermediate 5 pages consists of discussion of the "filed rate doctrine".

25 Thus, the OPUC is on record before the courts of this state, within the past 3
26 days, as taking a position which precludes the provision in this remand proceeding of
27 any relief or remedy to ratepayers for the past unlawful Trojan charges. Taking this
28 legal position renders this remand proceeding meaningless and moot from the outset.
29 According to the Commission's stated legal position, this proceeding cannot result in
30 relief for ratepayers. Thus, as we stated in our briefing on the issue of scope, the
31 Commission should, at the outset of the this remand proceeding," make[s] a legal
32 determination that relief for past unlawful charges is available for those who paid the

1 unlawful charges," or that such relief is not available. If such relief is not available,
2 then the Commission should so order, so that further appeals can be pursued. The
3 Commission should not adopt a strategy obviously designed to exhaust the resources
4 of all parties in these cases who oppose the positions of PGE.

5 The ALJ's Ruling claims that it does not envision a "full-blown general rate case"
6 **but fails to establish any limits on the issues or evidence PGE may use.** It
7 states (p. 18) that "there at least three separate rate determination made in UE 88
8 that are affected." This statement does not establish any limitations on the scope of
9 the remand proceeding. First, it does not even address the scope of the remand
10 proceeding. Second, it uses the term "at least." There is no ordering language in
11 any way limiting the scope of the "ratemaking" issues.

12 Further, the ALJ's Ruling contains numerous incorrect (and even flatly false)
13 statements regarding the procedural status of these cases. For example, it states
14 that the evidence in UM 989 "was introduced by settlement, not adjudication." ALJ's
15 Ruling p. 16. That is not correct. UM 989 was an adjudicated contested case, and
16 the evidence was provided by witnesses, not stipulation. The ALJ's Ruling also
17 contains several incorrect conclusions of law, such as the assertion that the remand
18 orders "require the Commission to establish 'just and reasonable' rates in these
19 remand proceedings, a task that necessarily entails ratemaking." ALJ's Ruling, p.
20 14.² Argument on these subjects will be presented to the Commission, if the ALJ

2. The ALJ's Ruling also incorrectly restates the courts' rejection of the OPUC Order No. 95-322 as "solely on the grounds that the Commission had exceeded its legislative authority." ALJ's Ruling, p. 15. Instead, the courts ruled that the Commission violated ORS 757.355.

1 certifies this ruling to the Commission.

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4 Dated: September 13, 2004

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing MOTION FOR CERTIFICATION OF RULING TO THE COMMISSION BY UTILITY REFORM PROJECT (URP), ET AL. by email to the email addresses shown below.

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