

ISSUED: May 5, 2004

**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) )

RULING

**DISPOSITION: DOCKETS PHASED; PHASE I TO ADDRESS SCOPE  
OF PROCEEDINGS**

In two separate actions, the above referenced dockets were remanded to the Commission for further proceedings. First, the Marion County Circuit Court remanded dockets DR 10 and UE 88 for further proceedings consistent with the opinions and orders of the Court of Appeals. Second, the Marion County Circuit Court remanded docket UM 989 for further proceedings consistent with the Opinion and Order of a decision adjudged by the Honorable Paul Lipscomb on January 9, 2004. Pursuant to the remand orders, the Commission reopened these remand proceedings, and is addressing them in a consolidated manner, except as otherwise agreed, in order to deal with issues particular to one docket.

On March 31, 2004, a consolidated procedural conference was held with the purpose of determining the nature of proceedings needed to comply with the court orders. A Consolidated Procedural Conference Memorandum, dated April 1, 2004, memorialized agreement among participants at the procedural conference to submit simultaneous opening and reply memorandums on April 16, 2004 and April 23, 2004, respectively. Two of the issues to be addressed by the memorandums were the

following: 1) issues to be addressed in the proceedings; and 2) the nature of, and schedule for subsequent procedural steps.

## **Positions of the Parties**

### Opening Memorandums

The following parties filed opening memorandums: Portland General Electric (PGE), the Utility Reform Project, et al. (URP), and intervenors, Morgan, Gearhart and Kafoury Brothers, LLC (Customers). Commission Staff filed a letter indicating that it would not submit an opening memorandum, but anticipated filing a reply memorandum.

### **PGE**

Stating that the remand orders determine the scope of the proceedings, PGE took the position that parties should present evidence and arguments, and the Commission should consider all issues relevant to determining an appropriate remedy. In addition to determining the amount of any past overcharges, PGE indicated that the following question needed to be addressed:

[W]hat final determinations the Commission would have made in each of the consolidation dockets if it had known of the legal conclusions later reached by the courts and issued final orders consistent with the opinions and orders of the courts.

PGE did not elaborate about what determinations made by the Commission might have differed had the legal rulings of the courts been known.

PGE also asserted that the dockets should proceed under the Commission rules and statutes applicable to hearings before the Commission. Pleadings and other filings would comply with Chapter 860, Divisions 12 and 13, of the Oregon Administrative Rules. PGE proposed the following schedule: discovery on an ongoing basis; simultaneous opening testimony due on August 1, 2004; simultaneous response testimony due on October 1, 2004; simultaneous reply testimony due on November 1, 2004, hearing on November 22 to 23, 2004; post-hearing briefs submitted pursuant to a schedule set at hearing; a final order anticipated on January 30, 2005.

### **URP**

URP set forth the most comprehensive list of potential issues, as follows:

1. What amount of money has been charged to ratepayers for return on Trojan investment since the effective date of OPUC Order No. 95-322?

- a. How much were ratepayers charged during each month or subdivision of that period?
2. What are the applicable rates of interest to apply to these charges to ratepayers in calculating refunds or credits?
3. How should current customers of PGE, who paid rates including Trojan return on investment, receive their refunds?
4. How should former customers of PGE, who paid rates including Trojan return on investment, receive their refunds?
5. Does the Commission have authority to require PGE to pay refunds of the unlawful charges to ratepayers?
6. Can the utility introduce new evidence to justify its rates retroactively?

URP indicated that it raised the latter two issues due to anticipation that other parties might.

URP observed that it is not clear what party has the burden of proof in the proceedings. Consequently, it proposed simultaneous filings in the same format as proposed by PGE. URP's proposed timeline is more expedited, however, with initial filings due on June 22, 2004, answering and reply filings due on July 6, 2004 and July 20, 2004, respectively, a hearing conducted on August 2, 2004, and opening and reply briefs due on August 16, 2004 and August 30, 2004, respectively.

## **CUSTOMERS**

The Customers identified the primary issue to be addressed, as follows:

1. How will the Commission implement the remand orders arising from court review of Orders Nos. 95-322 and Orders Nos. 02-227 (which adopted the same rate treatment as the interim rate treatment adopted in PUC Order No. 00-601)?

The Customers further delineated and commented on three related questions:

- a. Are the Remand Orders specific to the time periods for which each of the remanded orders was in effect?

The Customers identify the appropriate period as commencing not later than April 1, 1995, and continuing for the entire collection period for charges including profit on the Trojan plant.

- b. What is the principal factual question under the Remand Orders?

The Customers contend that the only factual issue to address is “the amount of the illegal overcharges for profit on Trojan,” as the applicable rate of interest is a conclusion of law.

- c. What is the nature of the proceeding and what rules of procedure apply?

The Customers also agree the proceedings should be conducted as a contested case, but without discussing responsibility for burden of proof, propose alternative procedural steps, but not a corresponding schedule, as follows: i) Review of the extant factual record through discovery; ii) Staff presents case as to amount of the unlawful charges; iii) PGE presents case as to amount of the unlawful charges; iv) all Intervenors present case as to amount of the unlawful charges; v) Simultaneous rebuttal; and vi) hearing. The Customers recommend opening a separate docket to address the best means to provide notice of and distribution of refunds.

- d. What mechanism will the Commission employ to effect the refunds to ratepayers?

The Customers assert that PGE should remit checks to current and former PGE ratepayers. A fair allocation method for any amounts that cannot be returned after due diligence.

#### Reply Memorandums and Procedural Conference Comments

PGE, URP and Staff filed reply memorandums and were present at the procedural conference.

#### **STAFF**

Staff indicated that all issues proposed by the parties in opening memorandums are appropriate, with one exception and some clarification. Staff took exception to URP’s proposed issue number 5. Staff observed that since the Court of Appeals will address this issue as part of the appeal by PGE and the Commission of

Judge Lipscomb's opinion in Marion County Circuit Court Case No. 02C14884, it is inappropriate to address the issue in this proceeding, as well.

Staff requested clarification regarding URP's proposed issue number 6. Staff characterized the fundamental question underlying the proposed issue as follows:

[W]hether the Commission should reopen the UE 88 and UM 989 dockets to determine how the courts' opinions in the appeals of these cases affect the rate decisions made by the Commission, in their entirety, or whether the Commission's inquiry is more ministerial, and involves only determining the charges customers paid to PGE for interest on PGE's investment in Trojan.

Staff asserted that the answer to this question defines the scope of evidence to be presented by the parties and should be resolved prior to asking parties to submit testimony. Accordingly, Staff recommended that parties be directed to submit opening and reply briefs on the topic. Staff reiterated this point at the procedural conference.

Staff endorsed the format proposed by PGE and URP, including the opportunity for discovery, simultaneous submission of opening, answer and reply testimony, hearing and simultaneous submission of opening and reply briefs. Staff disagreed with the Customers that a separate investigation is needed to address the best means to notice and distribute refunds.

## **PGE**

PGE noted that parties agreed that the central question to be addressed in these proceedings concerns the appropriate remedy to be provided in response to the court remands and noted that all proposed issues relate to this question. PGE asserted that it is not necessary to limit the scope of issues at the commencement of the proceeding. Indeed, PGE claimed it is not necessary to answer whether it is appropriate for PGE to introduce new rate evidence, pursuant to URP's proposed issue number six, prior to beginning discovery and preparation of opening testimony. Although PGE argued that "it is appropriate for the Commission to consider new evidence now that it will be considering ratemaking issues decided in dockets DR 10, UE 88, and UM 989 under a new legal framework," it opined that the decision about the relevance and import of the evidence would be better addressed later in the proceeding.

Observing that the ultimate test for any Commission action in this proceeding is whether rates are fair, just and reasonable, PGE posited, at the procedural conference, that it would behoove the Commission to consider all the evidence that any party may present, including evidence that the Commission might have considered in prior proceedings had it known the legality of allowing a return on PGE's investment in the Trojan plan. PGE also observed that both DR 10 and UE 88 had been remanded and reminded parties of the relationship between those two dockets. PGE asserted that it

instituted DR 10 in order to request Commission guidance on filing a rate case in light of the retirement of PGE's Trojan plant and that UE 88 had been filed within the strictures of DR 10. PGE stated it is appropriate to look at the cases together and to allow PGE an opportunity to revisit what it filed in UE 88, pursuant to DR 10. PGE commented that it has not discovered Oregon precedent regarding the scope of a proceeding such as this one on remand. Agreeing with URP that it is unclear what party has the burden of proof, PGE stated that simultaneous filings would be appropriate and expeditious. Response and reply testimony would allow sufficient opportunity to address all issues raised in opening testimony and if not, the proceeding could be interrupted to address distinct issues.

## **URP**

Based on its review of other parties' comments, URP concluded that one or more parties agreed that URP's issue numbers one through four should be addressed. With regard to URP's issue number five, regarding the authority of the Commission to require PGE to pay refunds, URP noted that there seemed to be consensus among parties filing opening memorandums to not address the issue. In response to Staff's position that the issue should not be addressed because it is an issue in the appeal of the Marion County Circuit Court Case No. 02C14884, however, URP asserted that the issue required resolution in this proceeding in order for the Commission to act, as an appellate decision would likely follow a Commission decision. URP also maintained that regarding its proposed issue number six, PGE should not be allowed to present different factual evidence regarding costs.

Despite requesting that the Commission disregard Staff's Reply Memorandum because Staff did not file an opening memorandum, URP indicated at the procedural conference that it agreed with Staff that issue number six should be addressed upfront, prior to the submission of opening testimony. URP expressed concern that PGE proposed to conduct a "what if" rate case that would require an open-ended re-examination of UE 88 revenue requirements, thereby changing the proper burden of proof and order of presentation in the proceedings. URP indicated that should a "what if" rate case be conducted, it might be appropriate to consider retrospective knowledge on other issues such as return on equity. URP indicated that without prior guidance on the scope of PGE's anticipated case, it would need to assume a broad case and act accordingly, which would be unduly burdensome.

URP proposed phasing the proceeding. URP recommended addressing its issue numbers five and six upfront with the anticipation that its issue number one would be next addressed singularly. URP observed that issue numbers two through four could be addressed in a separate phase.

## **Discussion**

### Consideration of Staff's Reply Memorandum

At the procedural conference, URP did not address its contention that the Commission should disregard Staff's reply memorandum. Instead, URP indicated that it agreed with a particular position asserted by Staff in its reply memorandum. Given URP's actions, I conclude that URP has withdrawn its request that Staff's reply memorandum be disregarded and that I need not address it.

### Nature of Proceedings

The only point of consensus among the parties about the nature and scope of these proceedings is that they should be conducted in a contested case manner. I agree with parties on this point. The above dockets should proceed under the Commission rules and statutes applicable to contested cases before the Commission, and pleadings and other filings shall comply with applicable statutes and rules, including Chapter 860, Divisions 11, 12 and 13, of the Oregon Administrative Rules.

### Scope of Issues

As agreed by the parties, the purpose of these proceedings is to determine how to implement the court remand orders in the above referenced dockets. Parties disagree, however, about the proper scope of issues and data that the Commission needs to consider to accomplish this goal. Moreover, although it initially appeared that the majority of parties agreed about the format of these proceedings, with testimony being simultaneously filed due to uncertainty about responsibility for burden of proof, it became clear at the procedural conference that the scope of issues to be addressed affects parties' opinions about the proper procedural framework for these proceedings. URP is willing to proceed on an expedited procedure comprised of simultaneous filings only if the scope of these proceedings is primarily focused on the factual question of determining the amount of money charged to ratepayers for return on Trojan plant investment. PGE contends that simultaneous filings are viable regardless of the scope of the issues and evidence addressed in testimony.

Although PGE indicated that its testimony addressing a "what if" rate case scenario would not be overly broad, the company was unable to delineate the parameters of its planned testimony. PGE indicated only that ratemaking issues decided in dockets DR 10, UE 88, and UM 989 would need to be reconsidered under a new legal framework. In the absence of parameters on simultaneous opening testimony on this general topic, concerns about the open-ended nature of initial testimony are to be expected. Although parties would have the opportunity to respond in the second and third rounds of testimony to issues introduced by PGE in opening testimony, parties would need to anticipate general topics to be addressed by PGE in order to raise and preserve derivative issues. This effort would be burdensome to parties and procedurally inefficient.

PGE's cautionary comments about the first impression nature of these remand proceedings are also duly noted. I agree it is important that the Commission consider all evidence relevant to developing and implementing an appropriate remedy in these remand proceedings. It is imperative, however, that the process used in these proceedings ensures the fair development of such evidence on behalf of all parties. Although PGE indicated it was not necessary to resolve the scope of issues and evidence to be addressed in the first round of testimony, PGE did not identify any shortcomings, other than time requirements, to phasing the proceeding to address issues of scope upfront.

It is reasonable to ensure upfront that the scope of issues and evidence to be addressed in these remand proceedings is properly delineated. Any benefit of time gained by proceeding without such delineation is illusory if disputes about scope later arise. These proceedings should be phased with the first phase addressing the following question: Should the Commission "determine how the courts' opinions in the appeals of these cases [DR 10, UE 88 and UM 989] affect the rate decisions made by the Commission, in their entirety, or whether the Commission's inquiry is more ministerial, and involves only determining the charges customers paid to PGE for interest on PGE's investment in Trojan"? Parties should set forth legal reasoning supporting their positions. Parties should also discuss the legal implications of their positions, such as the impact on the burden of proof and the order of presentation. If a party advocates a broad scope, an effort should be made to identify what prior Commission determinations are affected by the courts' legal rulings. Parties may also comment on any other issues deemed relevant to a determination of the proper issue and evidentiary scope of these proceedings.

I agree with the parties that the initial phase of these proceedings be handled expeditiously. As process, Staff recommended that parties provide opening and reply briefs. Accordingly, parties should submit simultaneous opening memorandums on June 3, 2004, and simultaneous reply memorandums on June 24, 2004. These dates for filing are considered "in hand" dates.

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.

It is unnecessary at this time to define the scope of, and schedule for subsequent phases, although I anticipate undertaking at least one additional phase, and potentially two. Based on parties' general agreement that the first four issues proposed by URP should be addressed regardless of the ultimate scope of these proceedings, it may be appropriate to address the calculation of the amount of money charged to ratepayers



for return on Trojan investment, with interest, in a second phase and to address implementation issues such as the timing and method for restoring this money to ratepayers in a third phase. Parties may address the proper phasing of these proceedings in opening and reply memorandums. Following resolution of the scope of these proceedings by the Commission, a consolidated procedural scheduled will be scheduled to address procedural next steps.

Dated at Salem, Oregon, this 5<sup>th</sup> day of May, 2004.

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Traci A. G. Kirkpatrick  
Administrative Law Judge