1. BRIEF HISTORY OF PRIOR LITIGATION ESTABLISHING THE LEGAL BASIS FOR THESE CLASS ACTIONS.

In 1978, Oregon voters passed Ballot Measure 9, which enacted ORS 757.355, stating:

> No public utility shall, directly or indirectly, by any device, charge, demand, collect or receive from any customer rates which are derived from a rate base which includes within it any construction, building installation or real or personal property not presently used for providing utility service.

The Trojan plant permanently ceased operating in November 1992, and in early 1993 PGE decided to close it. In 1993, PGE obtained from the Oregon Public Utility Commission (OPUC), over objection of the Utility Reform Project (URP) and other parties, a declaratory ruling that ORS 757.355 did not preclude the Commission from allowing PGE to continue to charge rates which include "return on investment" (or profit) on the Trojan plant. OPUC Order No. 93-1117 (August 9, 1993) (final order in the DR 10 declaratory ruling proceeding, held pursuant to ORS 756.450.[1] This is the only agency proceeding in which the OPUC addressed the lawfulness of charging Trojan profits to ratepayers.

OPUC Order No. 93-1117 decided that ORS 757.355 did not pose any bar to charging ratepayers for all Trojan costs and profits (return of investment and return on investment), because the plant had provided some service prior to its premature permanent closure. The OPUC concluded that ORS 757.355 applied only to plants which had never provided service--i.e., plants terminated before ever starting to

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[1]. This decision was published at 145 PUR4th 113 (1993) and is included as an Appendix with this Response. PGE did not include it in its Excerpts of Record. OPUC Order No. 93-1117 was followed shortly by OPUC Order No. 93-1763, which denied reconsideration of OPUC Order No. 93-1117.

operate. The OPUC expressly adopted the legal reasoning in AG Opinion No. OP-6454, which concluded that ORS 757.355 applies only to plants which have never operated and thus did not apply at all to Trojan.

Both URP and the Citizens Utility Board (CUB) appealed OPUC Order No. 93-1117. It was summarily affirmed by the Marion County Circuit Court (Barber, J.) in 1994. After the case was briefed to the Court of Appeals in 1995, PGE sought to delay consideration there, pending arrival of the UE 88 challenges filed in Marion County Circuit Court in 1995 (which are described below). URP opposed PGE's proposed abatement of the DR 10 appeals. After lengthy consideration, the Court of Appeals did wait, consolidated the DR 10 and UE 88 appeals and, issued its decision on June 24, 1998, reversing both of the OPUC orders under review as unlawful under ORS 757.355. ***Citizens' Utility Bd. of Oregon v. Public Utility Com'n of Oregon***, 154 Or App 702, 962 P2d 744 (1998), *pet rev dis'd*, 355 Or 591, 158 P3d 822 (November 19, 2002) [hereinafter ***CUB/URP v. OPUC***].

In the meantime, PGE in 1994 filed with the OPUC a rate case (UE 88) seeking to continue to charge ratepayers for profit on Trojan. This culminated with OPUC Order No. 95-322 (later reversed in ***CUB/URP v. OPUC***). In UE 88, the Commission refused to consider **any** legal arguments about Trojan return of or return on investment or about ORS 757.355, despite the fact such arguments were fully presented and briefed by URP and other parties.

> In their Phase II briefs, CUB, URP, and the Public Power Council argue against our conclusions in DR 10. They contend that ORS 757.355 bars recovery of and return on undepreciated investment in retired plant. n14 We fully addressed that argument and rejected it in our resolution of DR 10. Our decision was appealed to and affirmed by the Marion County Circuit Court, and is currently pending before the Oregon Court of

Appeals. We will not revisit that issue here.

OPUC Order No. 95-322, p. 21 (in slip op. published by PUR). REC O-7.[2] That is the entire discussion in the UE 88 final order of ORS 757.355 or the lawfulness of charging Trojan profits to ratepayers. Instead, the OPUC made only findings of fact as to whether PGE had met the "assumed findings" of fact regarding Trojan adopted in DR 10. However "reasonable" these determinations of fact may have been, the findings of fact were irrelevant to the **authority** of the OPUC to allow PGE to charge Trojan profits to ratepayers, in light of ORS 757.355.

The Commission again refused to consider any legal issues regarding Trojan return in the next PGE rate case, UE 93, filed in 1995, which culminated with OPUC Order No. 95-1216. There, URP again raised the issue of unlawful Trojan charges in rates, but (as presented in detail later), PGE succeeded with its argument that no party could raise that issue in UE 93, solely because in UE 93 PGE was not seeking any **change** to the rate treatment [i.e., Trojan placed in ratebase] adopted by OPUC Order No. 95-322 in UE 88.[3] Until the final judgment was entered in ***CUB/URP v. OPUC*** in

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[2]. We refer to the page numbers in the "Record Filed by Defendant-Relator Portland General Electric Company" as those numbers appear on those pages.

[3]. Plaintiffs' Combined: Reply Memorandum re Motion for Summary Judgment on issue of Defendant's Liability under First and Third Claims for Relief [and] Response Memorandum to PGE'S Motion for Summary Judgment (September 20, 2004, pp. 47-48):

> In the order PGE now touts, OPUC Order No. 95-1216, the OPUC refused to consider the issue of Trojan costs and profits in rates, because "URP's claim relating to Trojan was presented in UE 88." OPUC Order No. 95-1216, p. 12. This outcome had been urged by

2003 (see below), the OPUC refused to consider the meaning of ORS 757.355 in every case that came along after DR 10, including UE 88. Instead, the OPUC made the determination of law in one case (DR 10) and decided that its determination was binding on everyone and would not be revisited in any OPUC case following DR 10.

After the Court of Appeals issued its decision in ***CUB/URP v. OPUC*** on June 24, 1998, various parties filed petitions for review in the Oregon Supreme Court, which were granted. At the behest of PGE, this Court then postponed consideration of the petitions until after the 1999 Session of the Oregon Legislature, which (at PGE's urging, of course) passed HB 3220 to nullify the Court of Appeals's decision and retroactively abrogate ORS 757.355. But in the fall of 1999, Oregon citizens collected over 60,000 signatures within 90 days after the end of the 1999 Session thereby nullified HB 3220, pending a statewide vote on it. In November 2000, Oregon voters by a majority of over 88% voted on referendum Measure 90 to permanently annul HB 3220, which never took

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PGE:

> PGE responds by noting that it is not seeking recovery of **additional** costs associated with Trojan in this proceeding and by pointing out that issues relating to Trojan were resolved in UE 88.

OPUC Order No. 95-1216, p. 12 (emphasis added) (REC 0-24). Thus, PGE procured a decision of the OPUC stating that rate cases subsequent to UE 88 (which culminated with OPUC Order No. 95-322) would not even consider the issue of Trojan costs or profits in rates. PGE claimed that Trojan rate elements would be a proper subject in the subsequent rate case, only if PGE were seeking "recovery of **additional** costs associated with Trojan in this proceeding." Instead, PGE was merely seeking to continue the same unlawful Trojan charges it was currently charging.

effect. PGE then filed motions in this Court to rescind the Court of Appeals' decision on grounds of mootness, which this Court rejected. Instead, this Court dismissed all of the petitions for review on November 19, 2002, thus allowing the Court of Appeals decision to stand in favor of URP and against PGE and the OPUC.[4] Final appellate judgment was entered in January 9, 2003, and the Marion County Circuit Court remanded the cases to the OPUC.[5]

The Commission then failed to take any action at all for over a year, until Judge Lipscomb again ordered the Commission to refund the unlawful charges in a judgment signed January 9, 2004. Since then, up to the present day, the Commission has taken the official position that it has no authority to order to PGE to refund any of the unlawful charges, which the CAPs allege now amount to over $160 million. Further, the OPUC claims it cannot reduce future rates in order to compensate ratepayers for the past payment of the unlawful charges. PGE officially agrees with these OPUC position in a case now being briefed at the Court of Appeals. See pages 39-45 of this Response. Yet, to this Court, PGE states that the OPUC is the entity to provide relief to ratepayers and that any action by the Circuit Court in the class action interferes with this exclusive authority to provide relief.

1. BRIEF HISTORY OF THESE CLASS ACTIONS.

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[4]. By then, CUB had withdrawn from that litigation.

[5]. This process of OPUC proceedings and appeals consumed almost exactly 10 years, with essentially all of the delay resulting from PGE motions and maneuvers. Thus, PGE's professed concern (Petition, p. 7) that the class actions would be "a long a costly process" lacks credibility.

The CAPs, familiar with the Commission's legal position that it has no authority to require PGE to refund any of the unlawful charges for Trojan profits, filed these class actions on January 22, 2003, two weeks after appellate judgment issued in ***CUB/URP v. OPUC***.

PGE has continued to charge ratepayers for profits on Trojan during the entire period. These class actions, however, pertain only to the period of time governed by the reversals of OPUC Order No. 93-1117 and OPUC Order No. 95-322 by ***CUB/URP v. OPUC***, which ended October 1, 2000.