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VIA E-FILING & FIRST CLASS MAIL

Oregon Public Utility Commission
Attn: Filing Center
550 Capitol St. NE, Suite 215
P. O. Box 2148
Salem, Oregon 97308-2148

Re: *DR 10/UE 88/UM 989*

Attention Filing Center:

Enclosed for filing in the above-referenced docket are the original and five copies of Portland General Electric Company's Opening Brief with Respect to the Authority of the PUC to Award Relief. This document is being filed electronically per the Commission's eFiling policy to the electronic address PUC.FilingCenter@state.or.us, with copies being served on all parties on the service list via U.S. Mail. A photocopy of the PUC tracking information will be forwarded with the hard copy filing.

Very truly yours,

David F. White

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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 OPENING BRIEF WITH RESPECT TO THE AUTHORITY OF THE PUC TO AWARD RELIEF**

I. INTRODUCTION

This brief addresses the following question:

> "What remedy, if any, can the Commission offer to PGE ratepayers, through rate reductions or refunds, for the amounts that PGE collected in violation of ORS 757.355 between April 1995 and October 2000?"

That question was posed by the Oregon Supreme Court in *Dreyer v. Portland General Electric Co.*, 341 Or 262, 285, 142 P3d 1010 (2006). According to the Supreme Court, this Commission has "special expertise" to answer that question, along with "primary jurisdiction" to do so. *Id.* In order that this Commission could address that question, along with other related questions, the Supreme Court ordered the Marion County Circuit Court to abate class actions against PGE that overlapped the issues in this proceeding. *Id.* at 287.

In the past, our answer to the question stated above was that the Commission's authority to make retroactive adjustments to correct previous rate errors was limited. Our position was that the Commission acted prospectively, not retroactively, except for a few

special circumstances. As we understand it, our position was shared by most others who were familiar with utility regulation in Oregon.

The *Dreyer* decision, however, has changed the law as we understood it. Because of *Dreyer*, our answer now is that the Commission may authorize any remedy—whether refunds to former and current customers or adjustment of future rates to reflect refund amounts—that carries out the Commission's statutory duty to "protect" the customers and to "balance the interests" of the utility investor and the consumer. ORS 756.040(1).

The justification for our answer is the next section of this brief. After that, we will explain how *Dreyer* has changed the law as we understood it, and how it reinforces our answer.

II. OREGON LAW GIVES THE COMMISSION THE POWER TO MAKE RETROACTIVE ADJUSTMENTS IN OUR CASE.

A. THE RELEVANT STATUTE

The statutes are the first source to consult when inquiring into the Commission's authority. Here is the statute that confers general powers upon the PUC:

> "Powers in general
>
> "(1) In addition to the powers and duties now or hereafter transferred to or vested in the Public Utility Commission, the commission shall represent the customers of any public utility or telecommunications utility and the public generally in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction. In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. The commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates. * * *
>
> "(2) The commission is vested with power and jurisdiction to supervise and regulate every public utility and telecommunications

utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.

* * * "

ORS 756.040.

Although this statute does not expressly mention a power to grant refunds or other retroactive relief, its broad language authorizes such a power.

First, the statute confers jurisdiction on the Commission "in all controversies respecting rates." That necessarily includes the controversy that led to the Commission's Order No. 95-322. Jurisdiction over this controversy has now returned to the Commission, pursuant to the remand from the Court of Appeals, and is the subject of this very proceeding.

Second, in this ongoing controversy, the statute imposes on the Commission the duty to protect PGE's customers "from unjust and unreasonable exactions." Therefore, if the 1995 rates were "unjust and unreasonable exactions," the statute *requires* the Commission to do something about them—it provides that "the commission *shall* make use of the jurisdiction and powers of the office" to protect the customers. ORS 756.040(1) (emphasis added).

B. THE *KATZ* OPINION

This analysis is supported by the Court of Appeals' *en banc* opinion in *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or App 302, 841 P2d 652 (1992). That opinion states that the power granted by this statute to the Commission is "broad," and that it included the implied power to order refunds even in circumstances where the statutes do not explicitly authorize refunds. 116 Or App at 309.

In *Katz*, the Commission determined, after a rate hearing, that Pacific Northwest Bell's ("PNB's") revenues were excessive. The Commission therefore issued an order to reduce rates, whereupon PNB duly filed compliance tariffs. Then, however, the Commission rejected one of the compliance tariffs because it had decided in the meantime to

make a more thorough study of the particular issue involved in that tariff.[1] The Commission expected to complete that study "within a relatively short period of time," and did not want to put into effect a tariff which it expected to change soon. *Id.*; PUC Order No. 89-1355. As a result, the existing tariff, which had been found to be excessive, continued in effect.

The Commission did not act as quickly as it had expected, however, so the "excessive" but lawful tariff continued in effect for more than a year. After CUB protested, the Commission ordered a rate reduction to solve the problem prospectively, but held that it had no power to order a refund for past "overcollections," as requested by CUB. PUC Order No. 88-1523.

CUB petitioned for reconsideration, arguing that the situation should be treated as an "interim rate increase" for which refunds were expressly authorized by ORS 757.215. PUC Order No. 89-461. Although the Commission rejected CUB's argument that a refund was expressly authorized by that statute, the Commission nevertheless changed its mind and ordered the requested refund be put into effect anyway.

> "Given that PNB was not entitled to the additional revenues, PNB has been unjustly enriched * * *. While PNB was not responsible for rejection of the optional EAS tariffs, the Commission cannot allow PNB to retain excess revenues * * *."

PUC Order No. 89-461.

Next, however, the Commission vacated this order when it learned that CUB had not served a copy of its petition for reconsideration on PNB. The Commission then returned to the issue, on its own motion, and again ordered the refund. PUC Order No. 89-1355. This time the Commission articulated a different rationale for the refund. The Commission reasoned that instead of rejecting the compliance tariff it could have handled the

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[1] The tariff had to do with a charge for "Extended Area Service," which had been mandatory on customers. The Commission ordered that it be changed to an optional charge, estimating that that would reduce revenues by about $5 million per year.

situation differently—it could have left the rate case open so that the disputed tariff would constitute an interim tariff subject to refund under ORS 757.215; therefore, it should be treated as an interim tariff subject to refund. PUC Order No. 89-1355 at 4.

PNB appealed and the Marion County Circuit Court reversed the Commission, holding that the refund was not authorized by ORS 757.215. The Court of Appeals agreed with the circuit court, rejected the Commission's holding that it was an interim tariff subject to refund under ORS 757.215, and therefore held that the refund was not specifically authorized by any statute.

However, the Commission also offered the Court a different reason for approving the refund:

> "Paramount among PUC's powers is the power to protect utility customers 'from unjust and unreasonable exactions and practices.' ORS 756.040(1). Unjust enrichment of a utility at its customers' expense cannot be allowed, even when the unjust enrichment is not the utility's fault. PNB may argue that PUC does not possess equitable powers and PUC does not have specific statutory authority to order a refund on an unjust enrichment theory. However, PUC has such implied powers as are necessary to carry out the powers expressly granted to PUC. *See Warren v. Marion County*, 222 Or 307, 319-20, 353 P2d 257 (1960). ORS 756.040(1) and equitable principles compel reversal of the circuit court and affirmance of Order No. 89-1355."

Brief of appellant Public Utility Commission, December 7, 1990, at 27-28.

The Court of Appeals agreed with this other justification offered by the Commission, and therefore approved the refund anyway as an exercise of the Commission's general powers under ORS 756.040. *Katz*, 116 Or App at 308-310. According to the Court of Appeals, to deny the Commission the implicit power to order refunds "would deprive PUC of much of its power to protect customers from abusive delay tactics or, as in this case, unexpectedly long delays in implementing an ordered revenue reduction." 116 Or App at 308-310. The Court said that to deny the Commission the power to correct, by means of a

refund, the problem caused by its delay "would be inconsistent with its regulatory role and statutory duties."[2] *Id.*

This interpretation of ORS 756.040 by the Court of Appeals in *Katz* appears to conclusively establish the Commission's power to order refunds or other retroactive relief in our case. At the least, it should shift the burden of the argument to those who would deny such a power to the Commission. Instead of asking whether the PUC has power to award retroactive relief, the question should be turned around, as follows:

> "Is there any justification in this case for denying to the Commission the power that ORS 756.040(1) grants it to award retroactive relief?"

For in general, an agency *does* have the power to correct its own mistakes, retroactively, after its decision has been reversed by a court. State and federal agencies regularly provide retroactive relief, and often even promulgate regulations requiring themselves to provide retroactive relief in certain circumstances. *See, e.g., Guerrero v. Adult & Fam. Servs.*, 67 Or App 119 (1984) (recognizing that regulations promulgated by state agency required agency to pay retroactive welfare benefits in certain circumstances).[3] To answer this

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[2] The Commission order that the Court of Appeals affirmed provided for refunds to former customers as well as current customers. PUC Order No. 89-1355 at 6, PUC Order No. 89-461 at 3, PUC Order No. 87-406 at 128.

[3] *See also French v. Dept. of Children and Families*, 920 So 2d 671 (Fla App 2006) (concluding that Medicaid recipient was entitled to retroactive benefits from the time of the agency's incorrect decision under both federal and state administrative regulations); *Thiboutot v. State*, 405 A2d 230 (Me 1979) (ordering state agency to pay retroactive welfare benefits consistent with its own departmental regulations); *Beverly Enterprises v. Mississippi Div. of Medicaid*, 808 So 2d 939 (Miss 2002) (holding that agency's denial of retroactive relief to medical services provider where computer glitch resulted in underpayment for Medicaid-covered services was arbitrary and capricious); *Beame v. DeLeon*, 662 NE2d 752, 756 (NY App 1995) (concluding that it was "unquestionably proper" for agency to award retroactive relief, specifically retroactive seniority to female police officers, to remedy past employment discrimination given agency's broad remedial authority); *Burton v. Dept. of Health and Human Services*, 309 NW2d 388 (Wis App 1981) (enforcing federal regulations requiring retroactive award of welfare benefits where agency improperly withheld benefits).

question in the affirmative will require some special reason to depart from the general principle that permits retroactive relief.

III. THE "FILED RATE DOCTRINE" AND "RETROACTIVE RATEMAKING"

The argument against retroactive relief in this particular case has depended on two concepts: (a) the "filed rate doctrine," and (b) the "rule against retroactive ratemaking." We address them in turn.

A. THE FILED RATE DOCTRINE AND ORS 757.225

The Commission has previously said that the filed rate doctrine prohibits it from making refunds in this case:

> "More important, however, URP's central premise is incorrect: that the Commission approved tariffs contain illegal rates that should be redressed. This premise violates the filed rate doctrine, which is embodied in Oregon law in ORS 757.225:
>
> "No public utility shall charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in printed rate schedules as may at the time be in force, or demand, collect or receive any rate not specified in such schedule. The rates named therein are the lawful rates until they are changed as provided in ORS 757.210 to 757.220.
>
> "This statute permits the Commission to change rates on a prospective basis, but neither the utility nor the Commission may undo rates charged in the past pursuant to Commission approved tariffs."

PUC Order No. 02-227 at 8.

We have championed this view in the past, in the courts as well as before this Commission. However, the Supreme Court rejected this view as follows:

> "Plaintiffs[4] deny that [ORS 757.225] embodies the extreme form of the 'filed rate doctrine' that PGE (and, apparently, the PUC)

[4] The plaintiffs in *Dreyer* are the parties who have intervened in this proceeding and who are referred to as the "class action plaintiffs." They join in the briefs of the Utility Reform Project with whom they are allied. *See* PUC Order No. 04-597, Appendix A at 9.

> advocate. They suggest that, so long as it is appealed, a rate order is not final (and, therefore, cannot serve as a shield against a claim of unlawfulness), at least until the final appellate judgment is entered * * *
>
> "Plaintiffs also * * * argue that * * * ORS 757.225 should be read as requiring utilities to treat published rates as provisionally lawful, but not as absolutely shielding utilities from having to return any part of their rates that later is adjudged to be unlawful.
>
> "We share plaintiffs' skepticism of the proposition that is at the heart of PGE's argument—that ORS 757.225 manifests a legislative intent that PUC-approved rates be treated as conclusively lawful for all purposes * * *
>
> "Based on the foregoing, we therefore agree with plaintiffs that ORS 757.225 is most reasonably read as a direction to utilities to charge all their ratepayers the PUC-approved rate and, if a utility is dissatisfied with a rate, to obtain a new PUC-approved rate * * *. The statute is not aimed, as PGE suggests, at conclusively and permanently binding the entire world to the rate decisions of the PUC."

Dreyer, 341 Or at 278-79.

Therefore, the rates that the Commission established in Order PUC 95-322 were not "conclusively and permanently binding." That order was not final "so long as it is appealed." Since it was not only appealed but reversed, and since it is now once again before the Commission on remand from the Court of Appeals, it is neither final nor binding now. Consequently, neither the filed rate doctrine nor ORS 757.225[5] limit the Commission's authority and duty pursuant to ORS 757.040(1) to provide such retroactive relief as may be warranted in this case.

B. RETROACTIVE RATEMAKING

In the past, the Commission appeared to think the "rule against retroactive ratemaking" also stood in the way of retroactive relief in this case:

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[5] Since "filed rate doctrine" is not a statutory term, we prefer to frame the issue as what ORS 757.225 requires instead of what the filed rate doctrine requires.

"The filed rate doctrine is a companion to the rule against retroactive ratemaking, and these two concepts are cornerstones of Oregon regulatory law. Then Commissioner Charles Davis explained the connection between the filed rate doctrine and the rule against retroactive ratemaking as follows:

'There is a rule of law that utility rates may not be made retroactively in absence of express statutory authority * * *. From the customer's viewpoint, the principle underlying the prohibition against retroactive ratemaking is that the customer should know what a utility service costs him at the time he takes it. The posted tariff on the day of service represents a contract between the customer and the utility. The customer should not expect to pay more and the utility should not expect to get less.'

"Testimony of Commissioner Charles Davis on HB 2145, March 21, 1987, at 3.

"Under the filed rate doctrine and the rule against retroactive ratemaking, the Commission's ratemaking function must be prospective unless the Legislature authorizes that it be otherwise. The Oregon Attorney General Opinion No. 6076, March 18, 1987, 1987 WL 278316, at 5, notes that where the rule against retroactive ratemaking does not implicate constitutional concerns, the Legislature may authorize the Commission to act retroactively. The Oregon Legislature has authorized retroactive ratemaking in two cases: ORS 757.215(4) and (5) (permitting refunds for interim and nonsuspended rates) and ORS 757.259 (permitting deferred accounting orders). Those provisions do not apply here. Apart from them, the Commission's ratemaking authority is prospective only. URP cites no statute that would permit customers or utilities to undo Commission approved tariffs retroactively, as URP suggests the Commission should do here."

PUC Order No. 02-227 at 8-9.

We respectfully suggest, however, that the rule against retroactive ratemaking has no bearing on this case now.

First, "retroactive ratemaking" is not a statutory term, nor does any statute prohibit "retroactive ratemaking." Instead, the statute that does govern this case is the statute quoted earlier, the statute that confers general powers on the Commission, ORS 756.040(1). In *Katz*, PNB relied on the "rule against retroactive ratemaking" against the Commission's

proposed refunds to customers, but the Commission invoked the statute against that argument. Here is the Commission's brief to the Court of Appeals in *Katz*:

> "* * * PNB argues that because the refund was not authorized by ORS 759.185(4), the refund violated the rule against retroactive ratemaking. PNB's argument misconstrues that rule and ignores the full scope of PUC's power.
>
> "ORS 756.040(1) requires PUC to protect ratepayers 'from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates.' ORS 756.040(2) vests PUC with power 'to do all things necessary and convenient in the exercise of [its] power and [jurisdiction].' * * *"

Reply brief of appellant Public Utility Commission, June 10, 1991, at 2-3. The Court of Appeals agreed, and rejected PNB's "retroactive ratemaking" argument:

> "Retroactive ratemaking occurs when past profits or losses are incorporated in setting future rates. [Footnote omitted.] This case does not concern comparing *authorized* revenues with [*actual*] revenues and then adjusting for unexpected profits or shortfalls. PUC is not ordering PNB to refund past *profits*. Rather, PUC is ordering PNB to refund amounts that were overcollected under an interim rate schedule that was not in compliance with the authorized revenue level." [Emphasis in original.]

Katz, 116 Or App at 311.

There are, therefore, three reasons why the rule against retroactive ratemaking does not apply in this case:

1. This is not retroactive ratemaking as explained by the Court of Appeals. The issue here was not whether past profits or losses should have been incorporated in setting the rates in Order No. 95-322. Instead, the issue was one of statutory interpretation, i.e., whether ORS 757.355 prohibited a "return on" Trojan.

2. The rates in Order No. 95-322 were not final, according to the Supreme Court in *Dreyer*, because an appeal had been taken and their correctness had not yet been definitely established. Because the Court of Appeals held in *CUB v. OPUC* that the

Commission erred in establishing those rates, the question of what those rates should have been is still alive, and is indeed the principal issue in this proceeding. It is the Commission's duty to correct its former error as necessary to execute the remand from the Court of Appeals. In this remand proceeding, the Supreme Court said, the Commission "is performing part of its regulatory functions when it responds to those remands." *Dreyer*, 341 Or at 286. The Commission's duty is still to get the 1995 rates right.

3. Finally, the Commission pointed out in Order 93-1117 that "the prohibition on retroactive ratemaking does not come into play when ratepayers are better off if the facility is retired or if ratepayers are neither harmed nor benefited by the retirement." Order 93-1117 at 14.[6] The conclusion in Order 95-322 that ratepayers were not harmed by the retirement was neither challenged nor overturned.

IV. THE DECISIONS OF OTHER JURISDICTIONS SUPPORT OUR ANSWER

Some other jurisdictions have held that a regulatory commission cannot award retroactive relief in the circumstances of our case. *See, e.g., Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill 2d 205, 117 NE2d 774, 776 (1954). Other jurisdictions have held the opposite. *See, e.g., North Carolina ex rel Utilities Commission v. Conservation Council*, 312 NC 59, 320 E 2d 679, 685 (1984). Up to now in this controversy, we have invoked the former line of cases and URP has invoked the latter. Now that the Supreme Court has rejected our interpretation of that statute, it no longer matters that other jurisdictions upon which we relied would have interpreted it differently.

It is the same with the Federal Energy Regulatory Commission. FERC has the authority to order a refund or surcharge to remedy the effects of a prior agency order that a court has overturned. The seminal case in this area is *United Gas Improvement Co. v.*

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[6] The Commission was referring here to a dispute about recovery of decommissioning costs, but the principle is a general one.

Callery Properties, Inc., 382 US 223 (1965). In that case, the Supreme Court reviewed a refund order of FERC's predecessor agency, the Federal Power Commission ("FPC"). The FPC had established prices for the sale of gas in Louisiana, ranging from 21.4 to 23.8 cents per Mcf. Purchasers challenged the rate order in various courts of appeals, with the Supreme Court ultimately remanding the rate orders for reconsideration by the FPC in light of the court's ruling in *Atlantic Refining Co. v. Public Service Commission*, 360 US 378 (1959). On remand, the FPC lowered rates to 18.5 cents per Mcf. and ordered producers to refund amounts collected that reflected rates above the proper level of 18.5 cents per Mcf. The producers challenged, among other aspects of the ruling, the FPC's ability to order a refund.

The Supreme Court began its analysis by recognizing that the FPC must set rates on a prospective basis. Nonetheless, that rule did not prevent the agency from ordering a refund to remedy a prior order that was determined to be unlawful.

> "We reject, as did the Court of Appeals below, the suggestion that the Commission lacked authority to order any refund. While the Commission has "no power to make reparation orders," its power to fix rates under section 5 being prospective only, it is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here the original certificate orders were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order. An agency, like a court, can undo what is wrongfully done by virtue of its order. Under these circumstances, the Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold gas at prices exceeding those properly determined to be in the public interest."

382 US at 229 [internal citations omitted].

V. IN THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE, THE COMMISSION HAS BROAD AUTHORITY TO CORRECT THE ERROR IT MADE IN 1995.

This is a unique case. If the Commission is reluctant to accept the argument we have made up to this point, there is a narrower reason for authorizing retroactive relief in circumstances such as these, which are unlikely to recur.

A. THE COMMISSION ORDERED PGE TO VIOLATE A STATUTE.

The Court of Appeals held in *CUB v. PUC* that the Commission's Order 95-322 violated ORS 757.355. That statute, according to *Dreyer*, directly prohibits a utility from charging the rate that the Commission ordered it to charge:

> "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 to the customer."

According to *Dreyer*, this statute does not merely guide the Commission as to what it should and should not include in rates. *Dreyer*, 341 Or at 278-79. It is a direct command to the utility, regardless of the Commission's order. *Id.*

The Commission's Order 95-322 was therefore an anomaly, for it, upon PGE's application following the Commission's Order in DR-10, ordered PGE to violate ORS 757.355. Although the Commission acted in good faith and according to its interpretation of the law, the Commission's order placed PGE in the impossible position that it would violate ORS 757.355 if it *obeyed* the Commission's rate order, yet violate ORS 757.225 if it *disobeyed* the Commission's rate order. Order 95-322 forced PGE to violate a statute; therefore that order was fundamentally flawed. Order 95-322 therefore was subject to a defect that is different in kind from other defects that may be present in a Commission order. An order that commands a utility to violate a state statute should be treated as invalid from the beginning.

URP and the class action plaintiffs made a similar argument to the Supreme Court in *Dreyer*. They argued that:

> "Charges for return on investment in Trojan during the 5.5-year period were void *ab initio*."[7]

Although we opposed this argument at the Supreme Court, we lost. The Commission may therefore conclude, in the unique circumstances of this case, that its Order 95-322 was void *ab initio* for requiring PGE to violate ORS 757.355. The doctrine of judicial estoppel should bind URP and the class action plaintiffs from arguing the contrary of what they argued to the Supreme Court. *See, e.g., Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 609-13, 892 P2d 683 (1999).

The Oregon Supreme Court has held that when a Commission order is unconstitutional, it is invalid from the beginning. *State v. Portland Traction Co.*, 236 Or 38, 47-48, 386 P2d 435 (1963) (order requiring railroad to continue commuter operations was unconstitutional and therefore invalid from the beginning). According to the Supreme Court, a court opinion that holds invalid a Commission order does not "operate[] only prospectively from the day of its pronouncement and leave[] the past untouched. * * * [The Commission order] was either totally valid or totally invalid." *Id.*, 236 Or at 48. URP and the class action plaintiffs also argued this same point to the Supreme Court in *Dreyer*.[8]

To sum up: where the Commission has issued an order that commands a utility to violate a state statute, that order should be treated as invalid from the beginning. The Commission's duty now is to issue a valid order, and the invalid prior order cannot limit the range of options open to the Commission.

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[7] *See* Answering Brief of Plaintiffs-Adverse Parties at 35 et seq., S 52217 and S 52284, filed July 26, 2005 (attached as Exhibit 1).

[8] *See* Surreply Brief of Plaintiffs-Adverse Parties at 4-8, filed September 6, 2005 (attached as Exhibit 2).

B. THE COMMISSION'S 1993 DECLARATORY ORDER UNDERMINED THE VALIDITY OF ITS 1995 RATE ORDER.

The Commission made its decision to allow the unlawful return on Trojan in the 1993 declaratory proceeding DR-10, not in the 1995 rate proceeding UE 88. The Commission therefore rejected arguments about that issue in Order 95-322 as follows:

> "The Commission established the legal framework for the Trojan issues in this case in DR 10, Order No. 93-1117. In that order, the Commission adopted the reasoning of the Attorney General's Opinion Letter OP-6454, which advised that the Commission may allow a utility to recover undepreciated investment in retired plant and a return on that investment if the Commission finds such recovery to be in the public interest under ORS 757.140(2)(b).
>
> "* * * 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. [Footnote omitted.] 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."

PUC Order No. 95-322 at 26-27.

The error therefore occurred in the Commission's 1993 declaratory opinion. Order 93-1117 therefore undermined the subsequent rate orders that relied on that opinion. In issuing that order, the Commission said:

> "The declaratory ruling or judgment procedure was designed to remove uncertainty surrounding legal issues. [Citations omitted.] The statute gives the Commission broad authority to rule on questions presented to it. This Commission may render binding determinations in response to PGE's application in this proceeding without unlawfully limiting or unduly impacting the rights of parties in subsequent ratemaking proceedings."

PUC Order No. 93-1117 at 7. The mandate of the Court of Appeals now orders the Commission to revisit Order 93-1117. The Commission should pursue the correction of its 1993 error wherever it leads.

As the Commission is aware, that 1993 declaratory order was itself prompted by the Commission's policy of Least Cost Planning, which required PGE to consider continued Trojan operation. The Commission did find that it was PGE's least-cost option to close Trojan early, and that conclusion was never challenged or overturned. PUC Order No. 95-322 at 28-29.

VI. THE COMMISSION HAS A DUTY TO CORRECT ITS OWN ERRORS

If the Commission does not correct the error it made in Order No. 95-322, the task of doing so will fall instead to a jury. That is the result of the decision in *Dreyer*:

> "[T]he PUC proceeding that is underway [i.e., this very proceeding] thus has the potential for disposing of the central issue in these cases, *viz.*, the issue whether plaintiffs [in the class actions] have been injured (and, if they have been, the extent of the injury). In that regard, we note that the PUC has been instructed either to revise and reduce rates to offset the previous 'improperly calculated and unlawfully collected rates' or to order PGE to issue refunds. Depending on how the PUC responds to that remand, some or all plaintiffs[']claimed injuries may cease to exist. Moreover, the PUC's specialized expertise in the field of ratemaking gives it primary, if not sole, jurisdiction over one of the remedies contemplated in the remand: revision of rates to provide for recovery of unlawfully collected amounts. Certainly, if the PUC decides to take that approach to the problem, its special expertise makes it a far superior venue for determining that remedy.
>
> "* * * If [the PUC] can and does provide a full or partial remedy, then plaintiffs either are not injured at all or, if they remain injured, their remedy is to seek judicial review of the PUC's order. In the former case, the circuit court can dismiss the actions. In the latter case, the scope of the court's work will be usefully curtailed. In either event, 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.

The Supreme Court has therefore left it to the Commission to decide:

1. Whether plaintiffs have been injured.

2. If they have been, what to do about it.

The guiding principle from the *Dreyer* decision is that this Commission has primary jurisdiction to quantify the injury to customers stemming from the legal error the Commission made in setting UE 88 rates. Therefore, whatever result is reached with respect to the Commission's authority to provide a remedy, it continues to have the obligation to quantify the harm, if any.

Now that the Supreme Court (*Dreyer*) and the Court of Appeals (*Katz*) have ruled that errors by the Commission *can* be redressed retroactively, it is the Commission that must do it, not a jury. The Court of Appeals remanded this case to the *Commission*—not to a jury—to take what action is necessary. Fulfilling that remand is part of the Commission's function, according to *Dreyer*, to "supervise and regulate every public utility." ORS 756.040(2). In doing so, the Commission has the duty to "do all things necessary and convenient." *Id.* There is no precedent in which a regulatory commission has bucked the duty to correct its own mistakes to a jury, leaving the utility whipsawed between the conflicting experience and expertise of commission and jury.

There is one final point that the Commission should bear in mind. When the Court of Appeals reviewed Order No. 95-322 in *CUB v. OPUC*, the validity of the return *on* Trojan was not the only issue decided by the Court. As the Commission will recall, URP also challenged the return *of* PGE's unrecovered investment in Trojan. The Court of Appeals, however, rejected that challenge to Order No. 95-322 by URP, saying it did not "warrant further discussion." *CUB v. OPUC*, 154 Or App at 706-707, 717, 962 P2d 744 (1998). Therefore, in this remand from the Court of Appeals, there are *two* decisions that must be given effect: (1) correct the previous return *on* Trojan; *and* (2) implement PGE's right to the full return *of* its unrecovered investment in Trojan. Only the Commission can

reconcile both prongs of the mandate, for that solution requires the exercise of the Commission's broad regulatory discretion and expertise.[9]

VII. CONCLUSION

For the reasons stated above, the Commission should conclude that it has the legal authority to order refunds or adjustment of future rates for amounts that PGE collected in violation of ORS 757.355 between April 1995 and October 2000.

DATED this 20th day of June, 2007.

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[9] We have addressed in Exhibit 3 specific issues identified in the ALJ's Ruling of June 6.

Exhibit 1

IN THE SUPREME COURT OF THE STATE OF OREGON

PHIL DREYER, FRANK GEARHART, and KAFOURY BROS., LLC, an Oregon limited liability corporation, and as potential class representatives Plaintiffs-Adverse Parties, v. PORTLAND GENERAL ELECTRIC CO., Defendant-Relator.	Marion County Circuit Court Case No. 03 C10639
PATRICIA MORGAN, an individual, and as representative of the class of similarly situated electric service customers of Portland General Electric Company during a certain period of time; Plaintiff-Adverse Party v. PORTLAND GENERAL ELECTRIC CO., Defendant-Relator.	Marion County Circuit Court Case No. 03 C10640 Consolidated under No. 03 C10639 MANDAMUS PROCEEDING Supreme Court No. S 52217 Supreme Court No. S52284

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(attorneys continued inside cover) July 26, 2005

that court issues another appealable final order and judgment. **Harvey Aluminum**, *supra.* During all levels of the appeals, PGE continued to impose the unlawful charges. If Paula Plaintiff has to pay back the money she collected while her case was on appeal, then the same rule of law applies to PGE when it collects money under an final order and Circuit Court judgments that are appealed.

PGE (p. 32) offers a series of additional questions about ORS 757.355.

a. When did PGE violate it by not making refunds?

PGE violated ORS 757.355 by charging rates that are prohibited by ORS 757.355. The unlawfulness of the charges was established, with finality, by the judgments entered January 9, 2003, in ***CUB/URP v. OPUC***. No one contends that PGE violated ORS 757.355 "by not making refunds," although PGE could mitigate its liability by making such refunds now.

PGE (pp. 32, 33) again mischaracterizes the DR 10/UE 88/UM 989 remand proceeding, which cannot retroactively deem lawful the charges that the courts have already determined, with finality, were unlawful. The Circuit Court most certainly did not order the OPUC to "look into" PGE's new contention that "$16-18 million was enough." See *Amicus Brief of URP*.

5. CHARGES FOR RETURN ON INVESTMENT IN TROJAN DURING THE 5.5-YEAR PERIOD WERE VOID *AB INITIO*.

We incorporate by reference here the discussion in the *Plaintiffs' Response to (First) Petition for Mandamus*, pp. 88-92. The PGE Opening Brief does not respond to this discussion or otherwise indicate that the unlawful rates were not *void ab initio*.

CUB/URP v. OPUC determined that the charges for return on investment for Trojan were unlawful. Once the court overcame the *prima facie* validity of those rates, those charges under the OPUC rate order were unlawful to the extent they violated ORS 757.355. OPUC Order No. 95-322 (and subsequent orders) could never have lawfully included charges based on a return on investment for Trojan, as such charges have been unlawful in Oregon since voters enacted ORS 757.355 in 1978. As the Court of Appeals held, "ORS 757.355

precludes PUC from allowing rates, of the kind its orders here would allow, that include a rate of return on capital assets that are not currently used for the provision of utility services * * *." ***CUB/URP v. OPUC***, 154 OrApp at 716 (emphasis added).

Charges in utility rates found by judicial review to be unlawful are *void ab initio*. "Rates which are found to be excessive are then considered to have been illegal from the outset, and are not considered to have been illegal only as of the date on which the court has found them to be so." ***State ex rel. Nantahala Power & Light Co.***, 313 NC 614, 332 SE2d 397, 472 (1985). *Accord*, ***PSC Nevada v. Southwest Gas Corp.***, 99 Nev 268, 662 P2d 624, 627-28 (1983).

The OPUC itself has stated:

> We concur with the Ruling, that the Court of Appeals reversed our orders in dockets DR 10 and UE 88 because our authorization of a return on undepreciated investment in retired plant violated the legislative authority delegated by ORS 757.355.
>
> 6. URP's contention that "the Commission violated ORS 757.355" is consistent with the Ruling's conclusion that "the orders in DR 10 and UE 88 were reversed solely on the grounds that the Commission had exceeded its legislative authority.

OPUC Order No. 04-597 (October 18, 2004), p. 5 (DR 10/UE 88/UM 989 remand proceeding).[22] If the orders authorizing PGE to charge Trojan profits to ratepayers "violated" or "exceeded its legislative authority," then such orders were *void ab initio*.

This nullifying of illegal rate orders is hardly surprising or unique. It is the usual rule of law that substantively defective laws and orders are null *ab initio*. See note ?, *supra*. We agree with PGE that ratesetting is a "legislative function." ***American Can v. Lobdell***, 55 Or

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22. This order is available at:

http://www.puc.state.or.us/orders/2004ords/04-597.pdf

App 451, 461, 638 P2d 1152, 1159 (1982).[23] In Oregon (and under the federal constitution), a successfully challenged legislative act is void *ab initio*.[24]

> The effect of declaring a statute unconstitutional--whether on substantive or procedural grounds--is to render it void *ab initio*. *See, e.g.*, ***State v. Hays***, 155 Or App 41, 48, 964 P2d 1042, *rev den* 328 Or 40, 977 P2d 1170 (1998), *cert den* 527 US 1006, 119 SCt 2344, 144 LEd2d 240 (1999) (statute declared unconstitutional was void *ab initio*).

State v. Grimes, 163 Or App 340, 348, 986 P2d 1290, 1294 (1999).[25]

D. CIVIL DAMAGES ARE NOT "RETROACTIVE RATES."

Court-ordered damage awards do not implicate "retroactive ratemaking," as PGE (p. 24) argues. The rule against retroactive ratemaking applies to the *authority of the regulator*. Th damages remedy is no more "retroactive" than any adjudicative proceeding which looks at past conduct and makes decisions having consequences affecting present and future rights and liabilities.

The prohibition against retroactive ratemaking by regulatory agencies relies upon the fact that ratemaking is quasi-legislative, and delegated power and cannot alter the consequences of conduct that was legal at the time it was undertaken since a legislature cannot do so. "Retroactive" lawmaking attempts to change the legal consequences that attach

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23. PGE (p. 36) claims that setting of rates is a legislative function. None of this history is relevant to this case. The quotation from ***Hammond Lumber Co. v. Public Service Commission***, 96 Or 595, 604-05, 189 P 639 (1920), is irrelevant, because here the courts determined that the rates charged by PGE were unlawful, not unreasonable.

24. The effect of voiding a statute is so complete that the slate is wiped clean. In a criminal case, the defendant may be granted a new trial, because the prosecution was based on a statute voided *ab initio*. But because all acts thereunder are voided, the constitutional prohibition against double jeopardy does not apply, and the State may retry the defendant. ***State v. Metcalfe***, 328 Or 309, 314, 974 P2d 1189, 1192 (1999); ***City of Lake Oswego v. $23,232.23***, 140 OrApp 520, 916 P2d 865 (1996).

25. The rule that statutes are void *ab initio* if unconstitutional is true for voter-initiated ballot measures [id.] and legislative measures. Unconstitutionally collected taxes must be refunded. After the United States Supreme Court held that a state taxing system unconstitutionally discriminated against federal retirees, ***Davis v. Michigan Dept. of Treasury***, 489 US 803, 817, 109 SCt 1500, 103 LEd2d 891 (1989), Oregon federal retirees received refunds for state income taxes paid on retirement benefits. ***Vogl v. Dept. of Rev.***, 327 Or 193, 960 P2d 373 (1998).

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Exhibit 2

IN THE SUPREME COURT OF THE STATE OF OREGON

PHIL DREYER, FRANK GEARHART, and KAFOURY BROS., LLC, an Oregon limited liability corporation, and as potential class representatives **Plaintiffs-Adverse Parties,** **v.** **PORTLAND GENERAL ELECTRIC CO.,** **Defendant-Relator.**	**Marion County Circuit Court** **Case No. 03 C10639**
PATRICIA MORGAN, an individual, and as representative of the class of similarly situated electric service customers of Portland General Electric Company during a certain period of time; **Plaintiff-Adverse Party** **v.** **PORTLAND GENERAL ELECTRIC CO.,** **Defendant-Relator.**	**Marion County Circuit Court** **Case No. 03 C10640** **Consolidated under** **No. 03 C10639** **MANDAMUS PROCEEDING** **Supreme Court No. S 52217** **Supreme Court No. S52284**

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Oregon courts have concluded, with finality in the appeals of the underlying OPUC rate order, that the utility itself and the OPUC transgressed utility law of Oregon by (1) PGE charging ratepayers for a Trojan return on investment and (2) the OPUC purporting to allow PGE to charge ratepayers for a Trojan return on investment.

> The general grants of authority in ORS 756.040 and other general statutes **do not empower PGE to charge or PUC to approve** rates of a kind that are specifically contrary to the limitations in ORS 757.355 and ORS 757.140(2).

CUB/URP v. OPUC, *supra*, 154 Or App at 716-17 (emphasis added). This conclusion expressly applies both to PGE and to the OPUC.

1. THIS COURT IN *MCPHERSON* AND *PORTLAND TRACTION IV* HAS ALREADY RECONCILED THE STATUTES THAT PGE FINDS CONFUSING.

McPherson v. Pacific Power & Light Co., 207 Or 433, 453, 296 P2d 932, 942 (1956), was a class action of ratepayers against the utility for recovery of what the plaintiffs claimed was an unlawful surcharge. While this Court ultimately determined that the underlying rate surcharge had been lawful, it also concluded that ratepayers are entitled to proceed directly to court, under the language now codified in ORS 756.185 or pursuant to an action for money had and received, when their claim is that the charges imposed upon them were in excess of the lawful rates.

The problem before this court is well-stated in appellants' opening brief:

> If this large sum of money was collected in accordance with statutory authority, plaintiffs' complaint does not state a cause of action. On the other hand, if the imposition of the surcharge was not legally authorized or if it was in excess of defendant's lawful schedule of rates, then the complaint does state a cause of action * * *.'

McPherson, 207 Or at 454. Plaintiffs here contend that the charges imposed upon them by PGE during the 5.5-year period (1995-2000) were in excess of the lawful rates, because they included unlawful charges for Trojan return on investment (as finally established in ***CUB/URP v. OPUC***).

McPherson concluded that "charges in excess of those lawfully established are in violation of the provisions of this act, § 112-431, OCLA (now ORS 757.225)." 207 Or at 451, and:

> Section 112-467, OCLA [since renumbered ORS 756.185], grants to a patron of a public utility, guilty of doing any act declared to be unlawful, a cause of action before a court for treble damages.

207 Or at 453. ***McPherson*** refers to an action under what is now ORS 756.185 against a utility "guilty of doing any act declared to be unlawful." ***CUB/URP v. OPUC***, *supra*, 154 Or App at 716-17, declared that Oregon law did "not empower PGE to charge or the PUC to approve rates of a kind that are specifically contrary to the limitations in ORS 757.355 and ORS 757.140(2)." It is hard to imagine a more direct declaration that PGE did an unlawful act.

McPherson refers to ORS 757.225 and does not find it to be a bar to the suit by ratepayers. ***McPherson*** instructs that, where the allegation is that the utility charges were in excess of the lawfully filed schedule of rates, the customer may proceed directly in court under ORS 756.185 (our First and Second Claims) or by bringing an action for money had and received (our Third Claim).[7]

PGE attempts to interpose ORS 757.225, as if it made the unlawful charges permanently lawful, despite the ultimate conclusion in ***CUB/URP v. OPUC***. But, when OPUC orders are overturned on appeal, they are considered *void ab initio* and do not provide a lawful basis for either punishing a utility for noncompliance with the unlawful order or for keeping the unlawful charges collected from ratepayers during the pendency of the appeals process.

> Obviously, orders entered by the commissioner, like statutes enacted by the legislature, are presumed valid. The maintenance of law and order require nothing less. But that does not mean that a decision by a court which holds an order or a statute unconstitutional operates only prospectively from the date of its pronouncement and leaves the past untouched. * * *. **It was impossible for the order to have operated upon a split-second basis. It was either totally valid or totally invalid.**

State v. Portland Traction Co., 236 Or 38, 47-48, 386 P2d 435 (1963) (emphasis added) [hereinafter ***Portland Traction IV***, to distinguish it from the related cases arising from the OPUC order requiring continued streetcar service across the Willamette River in Portland].[8] There, the

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7. Here, parties representing ratepayers also very fully exhausted the administrative remedies by challenging the OPUC orders interpreting ORS 757.355 to allow PGE to charge Trojan profits to ratepayers. These challenges culminated in ***CUB/URP v. OPUC***, which held that the charges for Trojan return on investment were unlawful. Thus, plaintiffs can proceed under ORS 756.185 and under the common law, under either prong of ***McPherson***.

8. This was the last case in the series of four. PGE (pp. 11-12) cites only ***Morgan v. Portland Traction Co.***, 222 Or 614, 331 P2d 344 (1958) [hereinafter ***Portland Traction I***] and disregards

(continued...)

OPUC's original order requiring continued service was issued January 25, 1958, and the OPUC sought to impose penalties on the utility for its refusal to obey the order. This Court nearly 6 years later (October 23, 1963) found the original order invalid[9] and refused to allow the company to be penalized for failure to comply with a substantively invalid order during the intervening 6 years.[10]

This outcome had been presaged in ***Portland Traction II***, *supra*, where this Court endorsed the view that statutes giving validity to orders until overturned are procedural and meant to afford orderly review. It specifically relied upon a full discussion of ***Gulf, C. & S. F. Ry. Co. v. American Sugar Refining Co.***, 130 SW2d 1030 (Tex App 1939), which addressed a statute very similar to Oregon's, 222 Or at 649-50, 352 P2d at 558-59, and adopted the view that due process requires that a party challenging an order of the OPUC must be able to obtain judicial review and that such an appeal must be capable of affording "full relief." Such relief would not be afforded, "if the railroads are bound by the rates which have been successfully attacked in the method prescribed b y statute pending the time required for the court to determine their invalidity." 222 Or at 651, 352 P2d at 559. We discuss these cases further at pages ?-7 of this brief.

While ORS 757.225 mandates that a utility charge rates "which may be in force," unless not "in force" by court judgment or until superseded, charges found by the courts to have been lawful

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8.(...continued)
the subsequent cases on the same matter: ***Portland Traction Co. v. Hill***, 222 Or. 636, 352 P.2d 552, 353 P.2d 838 (1960) [hereinafter ***Portland Traction II***]; ***Portland Traction Co. v. Hill***, 231 Or. 354, 372 P.2d 501 (1962) [hereinafter ***Portland Traction III***]; and ***State v. Portland Traction Co.***, 236 Or. 38, 386 P.2d 435 (1963) [hereinafter ***Portland Traction IV***].

9. ***Portland Traction IV*** concluded that the OPUC order at issue constituted an unconstitutional confiscation. In ***CUB/URP v. OPUC***, the Oregon courts concluded that the OPUC order at issue violated ORS 757.355 and was beyond the OPUC's authority. According to PGE, however, that is a distinction without a difference. PGE (p. 12) argues, regarding the ***Portland Traction*** situation: "If that applies to an order that is invalid because it is contrary to the constitution, it applies to Order 95-322, whatever the reason for its supposed invalidity." We agree.

10. This also answers PGE's "briar patch" argument about being coerced by the OPUC into charging the unlawful amounts. Of course, PGE affirmatively sought to impose the unlawful charges on ratepayers in its UE 88 rate filing and successfully precluded any party from addressing the issue of Trojan profits in rates in any other OPUC proceeding through the end of the 5.5-year period that is the subject of the instant class actions. But, under ***Portland Traction IV***, if PGE was merely an innocent victim of an unlawful OPUC order, PGE could not be penalized for noncompliance with it.

are not in force *ab initio*. Thus, upon reversal of OPUC Order No. 93-1117 and dependent orders such as OPUC Order No. 95-322, all prohibited charges based on those orders become necessarily "in excess" of the lawful rates, and all the subsequent rate orders containing those charges could not be considered as "in force" as to the unlawful charges.

Plaintiffs are not asking any court to "construe two statutes so that one commands what the other prohibits" (p. 3) or to make charging for Trojan profits "retroactively unlawful." The charges for profits on Trojan after it closed were always substantively unlawful. The meaning of ORS 757.355 did not flip-flop when the courts spoke [***Portland Traction IV***, *supra*]. Because the Commission did not have authority in 1995 to allow PGE to charge Trojan profits to ratepayers, OPUC Order No. 93-1117 (DR 10)[11], the related portion of the Order No. 95-322 and all subsequent orders allowing the prohibited charges were *void ab initio*. The fact that ratepayers obeyed ORS 757.225 in an orderly fashion during the appeal period does not mean that the OPUC's *ultra vires* interpretation of ORS 757.355 was substantively lawful for some period of time, allowing PGE to keep the money it collected before reversal.[12]

PGE (pp. 3, 6) claims the entire concept of "provisionally lawful" OPUC decisions does not exist. This Court has used a very similar phrase ("seeming order and in truth no order at all") in describing the OPUC order in ***Portland Traction IV***, 236 Or at 53, which was "in force" for over 6 years before being declared unlawful by this Court.[13]

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11. The OPUC addressed the lawfulness of charging Trojan profits to ratepayers in one, and only one order: OPUC Order No. 93-1117 (August 9, 1993), which was the final order in the DR 10 declaratory ruling proceeding, held pursuant to ORS 756.450. 145 PUR4th 113 (1993). There, the OPUC issued a final, appealable declaratory ruling on PGE's request for a legal determination on the application of ORS 757.355 to treatment of Trojan nuclear plant costs following its permanent closure. OPUC Order No. 93-1117 (DR 10), was summarily affirmed by the Marion County Circuit Court (Barber, J.) in 1994, Marion Circuit Court Nos. 94C 10372 (CA A86940) and 94C 10417 (CA A86973).

12. The Commission acknowledges that "the orders in DR 10 and UE 88 were reversed solely on the grounds that the Commission had exceeded its legislative authority." OPUC Order No. 04-597 (October 18, 2004), p. 5 (REC. O-82).

13. ***Portland Traction IV***, 236 Or at 53, 386 P2d at 442, compared the overturned OPUC order to an invalid order of a lower court, which it called a "seeming order."

(continued...)

Similarly, as discussed at p. 20, *infra*, when the Oregon courts in ***CUB/URP v. OPUC*** struck down OPUC Order No. 93-1117, which concluded that PGE could charge Trojan profits to ratepayers, that order (and the rate case orders which relied upon it for this legal conclusion) became "either totally valid or totally invalid." Approval for including Trojan profits in rates did not "operate[] on a split-second basis" but rather was *void ab initio* and therefore void at all times and each time thereafter that the Commission purported to authorize the unlawful charges.

2. MANY ORDERS ARE LAWFUL AND BINDING BUT *VOID AB INITIO* WHEN REVERSED BY HIGHER COURTS.

The status of an order being lawful and binding, while subject to reversal, is fundamental to orderly administration of justice. ***Portland Traction IV.*** Decisions remain in force *while* appealed. "[T]his court has consistently reaffirmed the majority opinion in ***Day v. Holland***, [] to the effect that an appeal to this court from the circuit court does not vacate or nullify the decree sought to be reviewed." ***Malik v. Malik***, 271 Or 183, 186, 530 P2d 1243, 1245 (1975). But decisions in force pending appeal are nullified upon reversal.

> In Oregon, judgments appealed from are considered final until reversed. ***Porter v. Small***, 62 Or 574, 120 P 393, 124 P 649, 40 LRA, NS, 1197 (1912); ***Day v. Holland***, 15 Or 464, 15 P 855 (1887).

Western Bank v. Morrill, 246 Or 88, 96 424 P2d 243, 247 (1967). OPUC decisions also are final until reversed: "Unless set aside in the manner provided by the act, the order of the commission is in effect." ***Crown Mills v. Oregon Electric Railway Company***, 144 Or 25, 33 P2d 214 (1933). In both cases, the word "until" does not mean that the original decision or judgment is in effect permanently during the pendency of the appeals ("until reversed"). It means that, once reversed, the original decision or judgment is *void ab initio*.

Pending appeal, ratepayers respected the effect of the OPUC orders "in force" and paid the

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13.(...continued)

> In ***State ex rel. v. La Follette***, 100 Or 1, 196 P 412, this court, in speaking of the vindication of the judicial order through the means of contempt proceedings, declared: "* * * If, however, an order is void because made without jurisdiction, then a party can question the validity of the order and can prevent punishment as for a contempt. An order which is absolutely void is only a seeming order and in truth is no order at all * * *."

Exhibit 3

The Administrative Law Judge's ruling of June 6 adopted the issue to be addressed and observed that the issue required the parties to explore a number of underlying matters. We have addressed the central issue and these underlying matters either in this opening brief, in PGE's briefs regarding the appropriate scope of these consolidated remand proceedings, or in Phase I testimony. For convenience, we identify below where the topic was addressed:

1. Nature of Ratemaking

In comments submitted on the scope of this proceeding, PGE argued that the Commission must engage in ratemaking and not limited itself to ministerial matters. *See* PGE Opening Comments (dated June 3, 2004) at 2-5; PGE Reply Comments (dated June 25, 2004) at 3-4. PGE argued that the Commission's discretion in exercising its ratemaking authority was broad, relying upon court decisions and applicable Oregon statutes which leave the selection of rate-making methods and policies within the discretion of the Commission. *See* PGE Opening Comments at 4. The Commission adopted this position, concluding that "we must engage in ratemaking in order to set end rates that comply with the pertinent statutes, including ORS 757.355 as interpreted by the Court of Appeals, and ORS 757.020, requiring just and reasonable rates." DR 10/UM 989/UE 88, Order No. 04-597 at 6 (Oct. 18, 2004) ("Scope Order"); *see also* ALJ Ruling, dated August 31, 2004, at 17.

2. Scope of the Legislature's delegated authority

We have addressed this issue in Section II of this opening brief.

3. Rule against retroactive ratemaking and the filed rate doctrine

We have addressed this issue in Section III of this opening brief.

4. Prohibition against single issue ratemaking and the ratemaking equation used to determine just and reasonable rates

This topic was the focus of the briefing on the scope of this proceeding with URP advocating for single-issue ratemaking. *See* PGE Opening Comment at 2-5; PGE Reply Comments at 3-4. The Commission's Scope Order squarely resolved the issue, rejecting "single issue" ratemaking:

> A proper review of rates established in UE 88 may not focus on costs attributable to earnings on Trojan, an isolated rate component, without considering whether other factors offset this amount. To do so would constitute single-issue ratemaking, which is prohibited.

Order No. 04-597 at 6.

As discussed in the attached opening brief, the *Dreyer* court concluded that the Commission has primary jurisdiction and special expertise to determine whether customers were injured by the rates established in UE 88 and, if so, the extent of that injury. PGE has advocated, and the Commission has accepted, that the appropriate framework for determining injury to customers is to address the ratemaking question: "What rates would have been approved in UE 88 if ORS 757.355 had been interpreted to prohibit a return on Trojan?" and compare those rates with the actual UE 88 rates *Id.*

5. Other states' approaches to cancelled or delayed nuclear plants

Dr. Jeff Malcolm provided testimony regarding other states' treatment of plants that were retired before amortization for economic, and not prudential, reasons. *See* PGE/6500 – Makholm/19-23. Dr. Malcolm concluded that these states permitted the utility to recover its investment and a return on the unamortized portion of the plant when the plants were shut down for economic reasons. He found that this approach fit within the broader framework of the long-recognized regulatory compact. *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S OPENING BRIEF WITH RESPECT TO THE AUTHORITY OF THE PUC TO AWARD RELIEF** by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the US mail at Portland, Oregon.

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DATED this 20th day of June, 2007.

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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 OPENING BRIEF WITH RESPECT TO THE AUTHORITY OF THE PUC TO AWARD RELIEF**

I. INTRODUCTION

This brief addresses the following question:

> "What remedy, if any, can the Commission offer to PGE ratepayers, through rate reductions or refunds, for the amounts that PGE collected in violation of ORS 757.355 between April 1995 and October 2000?"

That question was posed by the Oregon Supreme Court in *Dreyer v. Portland General Electric Co.*, 341 Or 262, 285, 142 P3d 1010 (2006). According to the Supreme Court, this Commission has "special expertise" to answer that question, along with "primary jurisdiction" to do so. *Id.* In order that this Commission could address that question, along with other related questions, the Supreme Court ordered the Marion County Circuit Court to abate class actions against PGE that overlapped the issues in this proceeding. *Id.* at 287.

In the past, our answer to the question stated above was that the Commission's authority to make retroactive adjustments to correct previous rate errors was limited. Our position was that the Commission acted prospectively, not retroactively, except for a few

special circumstances. As we understand it, our position was shared by most others who were familiar with utility regulation in Oregon.

The *Dreyer* decision, however, has changed the law as we understood it. Because of *Dreyer*, our answer now is that the Commission may authorize any remedy—whether refunds to former and current customers or adjustment of future rates to reflect refund amounts—that carries out the Commission's statutory duty to "protect" the customers and to "balance the interests" of the utility investor and the consumer. ORS 756.040(1).

The justification for our answer is the next section of this brief. After that, we will explain how *Dreyer* has changed the law as we understood it, and how it reinforces our answer.

II. OREGON LAW GIVES THE COMMISSION THE POWER TO MAKE RETROACTIVE ADJUSTMENTS IN OUR CASE.

A. THE RELEVANT STATUTE

The statutes are the first source to consult when inquiring into the Commission's authority. Here is the statute that confers general powers upon the PUC:

> "Powers in general
>
> > "(1) In addition to the powers and duties now or hereafter transferred to or vested in the Public Utility Commission, the commission shall represent the customers of any public utility or telecommunications utility and the public generally in all controversies respecting rates, valuations, service and all matters of which the commission has jurisdiction. In respect thereof the commission shall make use of the jurisdiction and powers of the office to protect such customers, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates. The commission shall balance the interests of the utility investor and the consumer in establishing fair and reasonable rates. * * *
>
> > "(2) The commission is vested with power and jurisdiction to supervise and regulate every public utility and telecommunications

> utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.
>
> * * * "

ORS 756.040.

Although this statute does not expressly mention a power to grant refunds or other retroactive relief, its broad language authorizes such a power.

First, the statute confers jurisdiction on the Commission "in all controversies respecting rates." That necessarily includes the controversy that led to the Commission's Order No. 95-322. Jurisdiction over this controversy has now returned to the Commission, pursuant to the remand from the Court of Appeals, and is the subject of this very proceeding.

Second, in this ongoing controversy, the statute imposes on the Commission the duty to protect PGE's customers "from unjust and unreasonable exactions." Therefore, if the 1995 rates were "unjust and unreasonable exactions," the statute *requires* the Commission to do something about them—it provides that "the commission *shall* make use of the jurisdiction and powers of the office" to protect the customers. ORS 756.040(1) (emphasis added).

B. THE *KATZ* OPINION

This analysis is supported by the Court of Appeals' *en banc* opinion in *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or App 302, 841 P2d 652 (1992). That opinion states that the power granted by this statute to the Commission is "broad," and that it included the implied power to order refunds even in circumstances where the statutes do not explicitly authorize refunds. 116 Or App at 309.

In *Katz*, the Commission determined, after a rate hearing, that Pacific Northwest Bell's ("PNB's") revenues were excessive. The Commission therefore issued an order to reduce rates, whereupon PNB duly filed compliance tariffs. Then, however, the Commission rejected one of the compliance tariffs because it had decided in the meantime to

make a more thorough study of the particular issue involved in that tariff.[1] The Commission expected to complete that study "within a relatively short period of time," and did not want to put into effect a tariff which it expected to change soon. *Id.*; PUC Order No. 89-1355. As a result, the existing tariff, which had been found to be excessive, continued in effect.

The Commission did not act as quickly as it had expected, however, so the "excessive" but lawful tariff continued in effect for more than a year. After CUB protested, the Commission ordered a rate reduction to solve the problem prospectively, but held that it had no power to order a refund for past "overcollections," as requested by CUB. PUC Order No. 88-1523.

CUB petitioned for reconsideration, arguing that the situation should be treated as an "interim rate increase" for which refunds were expressly authorized by ORS 757.215. PUC Order No. 89-461. Although the Commission rejected CUB's argument that a refund was expressly authorized by that statute, the Commission nevertheless changed its mind and ordered the requested refund be put into effect anyway.

> "Given that PNB was not entitled to the additional revenues, PNB has been unjustly enriched * * *. While PNB was not responsible for rejection of the optional EAS tariffs, the Commission cannot allow PNB to retain excess revenues * * *."

PUC Order No. 89-461.

Next, however, the Commission vacated this order when it learned that CUB had not served a copy of its petition for reconsideration on PNB. The Commission then returned to the issue, on its own motion, and again ordered the refund. PUC Order No. 89-1355. This time the Commission articulated a different rationale for the refund. The Commission reasoned that instead of rejecting the compliance tariff it could have handled the

[1] The tariff had to do with a charge for "Extended Area Service," which had been mandatory on customers. The Commission ordered that it be changed to an optional charge, estimating that that would reduce revenues by about $5 million per year.

situation differently—it could have left the rate case open so that the disputed tariff would constitute an interim tariff subject to refund under ORS 757.215; therefore, it should be treated as an interim tariff subject to refund. PUC Order No. 89-1355 at 4.

PNB appealed and the Marion County Circuit Court reversed the Commission, holding that the refund was not authorized by ORS 757.215. The Court of Appeals agreed with the circuit court, rejected the Commission's holding that it was an interim tariff subject to refund under ORS 757.215, and therefore held that the refund was not specifically authorized by any statute.

However, the Commission also offered the Court a different reason for approving the refund:

> "Paramount among PUC's powers is the power to protect utility customers 'from unjust and unreasonable exactions and practices.' ORS 756.040(1). Unjust enrichment of a utility at its customers' expense cannot be allowed, even when the unjust enrichment is not the utility's fault. PNB may argue that PUC does not possess equitable powers and PUC does not have specific statutory authority to order a refund on an unjust enrichment theory. However, PUC has such implied powers as are necessary to carry out the powers expressly granted to PUC. *See Warren v. Marion County*, 222 Or 307, 319-20, 353 P2d 257 (1960). ORS 756.040(1) and equitable principles compel reversal of the circuit court and affirmance of Order No. 89-1355."

Brief of appellant Public Utility Commission, December 7, 1990, at 27-28.

The Court of Appeals agreed with this other justification offered by the Commission, and therefore approved the refund anyway as an exercise of the Commission's general powers under ORS 756.040. *Katz*, 116 Or App at 308-310. According to the Court of Appeals, to deny the Commission the implicit power to order refunds "would deprive PUC of much of its power to protect customers from abusive delay tactics or, as in this case, unexpectedly long delays in implementing an ordered revenue reduction." 116 Or App at 308-310. The Court said that to deny the Commission the power to correct, by means of a

refund, the problem caused by its delay "would be inconsistent with its regulatory role and statutory duties."[2] *Id.*

This interpretation of ORS 756.040 by the Court of Appeals in *Katz* appears to conclusively establish the Commission's power to order refunds or other retroactive relief in our case. At the least, it should shift the burden of the argument to those who would deny such a power to the Commission. Instead of asking whether the PUC has power to award retroactive relief, the question should be turned around, as follows:

> "Is there any justification in this case for denying to the Commission the power that ORS 756.040(1) grants it to award retroactive relief?"

For in general, an agency *does* have the power to correct its own mistakes, retroactively, after its decision has been reversed by a court. State and federal agencies regularly provide retroactive relief, and often even promulgate regulations requiring themselves to provide retroactive relief in certain circumstances. *See, e.g., Guerrero v. Adult & Fam. Servs.*, 67 Or App 119 (1984) (recognizing that regulations promulgated by state agency required agency to pay retroactive welfare benefits in certain circumstances).[3] To answer this

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[2] The Commission order that the Court of Appeals affirmed provided for refunds to former customers as well as current customers. PUC Order No. 89-1355 at 6, PUC Order No. 89-461 at 3, PUC Order No. 87-406 at 128.

[3] *See also French v. Dept. of Children and Families*, 920 So 2d 671 (Fla App 2006) (concluding that Medicaid recipient was entitled to retroactive benefits from the time of the agency's incorrect decision under both federal and state administrative regulations); *Thiboutot v. State*, 405 A2d 230 (Me 1979) (ordering state agency to pay retroactive welfare benefits consistent with its own departmental regulations); *Beverly Enterprises v. Mississippi Div. of Medicaid*, 808 So 2d 939 (Miss 2002) (holding that agency's denial of retroactive relief to medical services provider where computer glitch resulted in underpayment for Medicaid-covered services was arbitrary and capricious); *Beame v. DeLeon*, 662 NE2d 752, 756 (NY App 1995) (concluding that it was "unquestionably proper" for agency to award retroactive relief, specifically retroactive seniority to female police officers, to remedy past employment discrimination given agency's broad remedial authority); *Burton v. Dept. of Health and Human Services*, 309 NW2d 388 (Wis App 1981) (enforcing federal regulations requiring retroactive award of welfare benefits where agency improperly withheld benefits).

question in the affirmative will require some special reason to depart from the general principle that permits retroactive relief.

III. THE "FILED RATE DOCTRINE" AND "RETROACTIVE RATEMAKING"

The argument against retroactive relief in this particular case has depended on two concepts: (a) the "filed rate doctrine," and (b) the "rule against retroactive ratemaking." We address them in turn.

A. THE FILED RATE DOCTRINE AND ORS 757.225

The Commission has previously said that the filed rate doctrine prohibits it from making refunds in this case:

> "More important, however, URP's central premise is incorrect: that the Commission approved tariffs contain illegal rates that should be redressed. This premise violates the filed rate doctrine, which is embodied in Oregon law in ORS 757.225:
>
> "No public utility shall charge, demand, collect or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in printed rate schedules as may at the time be in force, or demand, collect or receive any rate not specified in such schedule. The rates named therein are the lawful rates until they are changed as provided in ORS 757.210 to 757.220.
>
> "This statute permits the Commission to change rates on a prospective basis, but neither the utility nor the Commission may undo rates charged in the past pursuant to Commission approved tariffs."

PUC Order No. 02-227 at 8.

We have championed this view in the past, in the courts as well as before this Commission. However, the Supreme Court rejected this view as follows:

> "Plaintiffs[4] deny that [ORS 757.225] embodies the extreme form of the 'filed rate doctrine' that PGE (and, apparently, the PUC)

[4] The plaintiffs in *Dreyer* are the parties who have intervened in this proceeding and who are referred to as the "class action plaintiffs." They join in the briefs of the Utility Reform Project with whom they are allied. *See* PUC Order No. 04-597, Appendix A at 9.

> advocate. They suggest that, so long as it is appealed, a rate order is not final (and, therefore, cannot serve as a shield against a claim of unlawfulness), at least until the final appellate judgment is entered * * *
>
> "Plaintiffs also * * * argue that * * * ORS 757.225 should be read as requiring utilities to treat published rates as provisionally lawful, but not as absolutely shielding utilities from having to return any part of their rates that later is adjudged to be unlawful.
>
> "We share plaintiffs' skepticism of the proposition that is at the heart of PGE's argument—that ORS 757.225 manifests a legislative intent that PUC-approved rates be treated as conclusively lawful for all purposes * * *
>
> "Based on the foregoing, we therefore agree with plaintiffs that ORS 757.225 is most reasonably read as a direction to utilities to charge all their ratepayers the PUC-approved rate and, if a utility is dissatisfied with a rate, to obtain a new PUC-approved rate * * *. The statute is not aimed, as PGE suggests, at conclusively and permanently binding the entire world to the rate decisions of the PUC."

Dreyer, 341 Or at 278-79.

Therefore, the rates that the Commission established in Order PUC 95-322 were not "conclusively and permanently binding." That order was not final "so long as it is appealed." Since it was not only appealed but reversed, and since it is now once again before the Commission on remand from the Court of Appeals, it is neither final nor binding now. Consequently, neither the filed rate doctrine nor ORS 757.225[5] limit the Commission's authority and duty pursuant to ORS 757.040(1) to provide such retroactive relief as may be warranted in this case.

B. RETROACTIVE RATEMAKING

In the past, the Commission appeared to think the "rule against retroactive ratemaking" also stood in the way of retroactive relief in this case:

[5] Since "filed rate doctrine" is not a statutory term, we prefer to frame the issue as what ORS 757.225 requires instead of what the filed rate doctrine requires.

> "The filed rate doctrine is a companion to the rule against retroactive ratemaking, and these two concepts are cornerstones of Oregon regulatory law. Then Commissioner Charles Davis explained the connection between the filed rate doctrine and the rule against retroactive ratemaking as follows:
>
> 'There is a rule of law that utility rates may not be made retroactively in absence of express statutory authority * * *. From the customer's viewpoint, the principle underlying the prohibition against retroactive ratemaking is that the customer should know what a utility service costs him at the time he takes it. The posted tariff on the day of service represents a contract between the customer and the utility. The customer should not expect to pay more and the utility should not expect to get less.'
>
> "Testimony of Commissioner Charles Davis on HB 2145, March 21, 1987, at 3.
>
> "Under the filed rate doctrine and the rule against retroactive ratemaking, the Commission's ratemaking function must be prospective unless the Legislature authorizes that it be otherwise. The Oregon Attorney General Opinion No. 6076, March 18, 1987, 1987 WL 278316, at 5, notes that where the rule against retroactive ratemaking does not implicate constitutional concerns, the Legislature may authorize the Commission to act retroactively. The Oregon Legislature has authorized retroactive ratemaking in two cases: ORS 757.215(4) and (5) (permitting refunds for interim and nonsuspended rates) and ORS 757.259 (permitting deferred accounting orders). Those provisions do not apply here. Apart from them, the Commission's ratemaking authority is prospective only. URP cites no statute that would permit customers or utilities to undo Commission approved tariffs retroactively, as URP suggests the Commission should do here."

PUC Order No. 02-227 at 8-9.

We respectfully suggest, however, that the rule against retroactive ratemaking has no bearing on this case now.

First, "retroactive ratemaking" is not a statutory term, nor does any statute prohibit "retroactive ratemaking." Instead, the statute that does govern this case is the statute quoted earlier, the statute that confers general powers on the Commission, ORS 756.040(1). In *Katz*, PNB relied on the "rule against retroactive ratemaking" against the Commission's

proposed refunds to customers, but the Commission invoked the statute against that argument. Here is the Commission's brief to the Court of Appeals in *Katz*:

> "* * * PNB argues that because the refund was not authorized by ORS 759.185(4), the refund violated the rule against retroactive ratemaking. PNB's argument misconstrues that rule and ignores the full scope of PUC's power.
>
> "ORS 756.040(1) requires PUC to protect ratepayers 'from unjust and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates.' ORS 756.040(2) vests PUC with power 'to do all things necessary and convenient in the exercise of [its] power and [jurisdiction].' * * *"

Reply brief of appellant Public Utility Commission, June 10, 1991, at 2-3. The Court of Appeals agreed, and rejected PNB's "retroactive ratemaking" argument:

> "Retroactive ratemaking occurs when past profits or losses are incorporated in setting future rates. [Footnote omitted.] This case does not concern comparing *authorized* revenues with [*actual*] revenues and then adjusting for unexpected profits or shortfalls. PUC is not ordering PNB to refund past *profits*. Rather, PUC is ordering PNB to refund amounts that were overcollected under an interim rate schedule that was not in compliance with the authorized revenue level." [Emphasis in original.]

Katz, 116 Or App at 311.

There are, therefore, three reasons why the rule against retroactive ratemaking does not apply in this case:

1. This is not retroactive ratemaking as explained by the Court of Appeals. The issue here was not whether past profits or losses should have been incorporated in setting the rates in Order No. 95-322. Instead, the issue was one of statutory interpretation, i.e., whether ORS 757.355 prohibited a "return on" Trojan.

2. The rates in Order No. 95-322 were not final, according to the Supreme Court in *Dreyer*, because an appeal had been taken and their correctness had not yet been definitely established. Because the Court of Appeals held in *CUB v. OPUC* that the

Commission erred in establishing those rates, the question of what those rates should have been is still alive, and is indeed the principal issue in this proceeding. It is the Commission's duty to correct its former error as necessary to execute the remand from the Court of Appeals. In this remand proceeding, the Supreme Court said, the Commission "is performing part of its regulatory functions when it responds to those remands." *Dreyer*, 341 Or at 286. The Commission's duty is still to get the 1995 rates right.

3. Finally, the Commission pointed out in Order 93-1117 that "the prohibition on retroactive ratemaking does not come into play when ratepayers are better off if the facility is retired or if ratepayers are neither harmed nor benefited by the retirement." Order 93-1117 at 14.[6] The conclusion in Order 95-322 that ratepayers were not harmed by the retirement was neither challenged nor overturned.

IV. THE DECISIONS OF OTHER JURISDICTIONS SUPPORT OUR ANSWER

Some other jurisdictions have held that a regulatory commission cannot award retroactive relief in the circumstances of our case. *See, e.g., Mandel Brothers, Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill 2d 205, 117 NE2d 774, 776 (1954). Other jurisdictions have held the opposite. *See, e.g., North Carolina ex rel Utilities Commission v. Conservation Council*, 312 NC 59, 320 E 2d 679, 685 (1984). Up to now in this controversy, we have invoked the former line of cases and URP has invoked the latter. Now that the Supreme Court has rejected our interpretation of that statute, it no longer matters that other jurisdictions upon which we relied would have interpreted it differently.

It is the same with the Federal Energy Regulatory Commission. FERC has the authority to order a refund or surcharge to remedy the effects of a prior agency order that a court has overturned. The seminal case in this area is *United Gas Improvement Co. v.*

[6] The Commission was referring here to a dispute about recovery of decommissioning costs, but the principle is a general one.

Callery Properties, Inc., 382 US 223 (1965). In that case, the Supreme Court reviewed a refund order of FERC's predecessor agency, the Federal Power Commission ("FPC"). The FPC had established prices for the sale of gas in Louisiana, ranging from 21.4 to 23.8 cents per Mcf. Purchasers challenged the rate order in various courts of appeals, with the Supreme Court ultimately remanding the rate orders for reconsideration by the FPC in light of the court's ruling in *Atlantic Refining Co. v. Public Service Commission*, 360 US 378 (1959). On remand, the FPC lowered rates to 18.5 cents per Mcf. and ordered producers to refund amounts collected that reflected rates above the proper level of 18.5 cents per Mcf. The producers challenged, among other aspects of the ruling, the FPC's ability to order a refund.

The Supreme Court began its analysis by recognizing that the FPC must set rates on a prospective basis. Nonetheless, that rule did not prevent the agency from ordering a refund to remedy a prior order that was determined to be unlawful.

> "We reject, as did the Court of Appeals below, the suggestion that the Commission lacked authority to order any refund. While the Commission has "no power to make reparation orders," its power to fix rates under section 5 being prospective only, it is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here the original certificate orders were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order. An agency, like a court, can undo what is wrongfully done by virtue of its order. Under these circumstances, the Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold gas at prices exceeding those properly determined to be in the public interest."

382 US at 229 [internal citations omitted].

V. IN THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE, THE COMMISSION HAS BROAD AUTHORITY TO CORRECT THE ERROR IT MADE IN 1995.

This is a unique case. If the Commission is reluctant to accept the argument we have made up to this point, there is a narrower reason for authorizing retroactive relief in circumstances such as these, which are unlikely to recur.

A. THE COMMISSION ORDERED PGE TO VIOLATE A STATUTE.

The Court of Appeals held in *CUB v. PUC* that the Commission's Order 95-322 violated ORS 757.355. That statute, according to *Dreyer*, directly prohibits a utility from charging the rate that the Commission ordered it to charge:

> "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 to the customer."

According to *Dreyer*, this statute does not merely guide the Commission as to what it should and should not include in rates. *Dreyer*, 341 Or at 278-79. It is a direct command to the utility, regardless of the Commission's order. *Id.*

The Commission's Order 95-322 was therefore an anomaly, for it, upon PGE's application following the Commission's Order in DR-10, ordered PGE to violate ORS 757.355. Although the Commission acted in good faith and according to its interpretation of the law, the Commission's order placed PGE in the impossible position that it would violate ORS 757.355 if it *obeyed* the Commission's rate order, yet violate ORS 757.225 if it *disobeyed* the Commission's rate order. Order 95-322 forced PGE to violate a statute; therefore that order was fundamentally flawed. Order 95-322 therefore was subject to a defect that is different in kind from other defects that may be present in a Commission order. An order that commands a utility to violate a state statute should be treated as invalid from the beginning.

URP and the class action plaintiffs made a similar argument to the Supreme Court in *Dreyer*. They argued that:

> "Charges for return on investment in Trojan during the 5.5-year period were void *ab initio*."[7]

Although we opposed this argument at the Supreme Court, we lost. The Commission may therefore conclude, in the unique circumstances of this case, that its Order 95-322 was void *ab initio* for requiring PGE to violate ORS 757.355. The doctrine of judicial estoppel should bind URP and the class action plaintiffs from arguing the contrary of what they argued to the Supreme Court. *See, e.g., Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 609-13, 892 P2d 683 (1999).

The Oregon Supreme Court has held that when a Commission order is unconstitutional, it is invalid from the beginning. *State v. Portland Traction Co.*, 236 Or 38, 47-48, 386 P2d 435 (1963) (order requiring railroad to continue commuter operations was unconstitutional and therefore invalid from the beginning). According to the Supreme Court, a court opinion that holds invalid a Commission order does not "operate[] only prospectively from the day of its pronouncement and leave[] the past untouched. * * * [The Commission order] was either totally valid or totally invalid." *Id*., 236 Or at 48. URP and the class action plaintiffs also argued this same point to the Supreme Court in *Dreyer*.[8]

To sum up: where the Commission has issued an order that commands a utility to violate a state statute, that order should be treated as invalid from the beginning. The Commission's duty now is to issue a valid order, and the invalid prior order cannot limit the range of options open to the Commission.

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[7] *See* Answering Brief of Plaintiffs-Adverse Parties at 35 et seq., S 52217 and S 52284, filed July 26, 2005 (attached as Exhibit 1).

[8] *See* Surreply Brief of Plaintiffs-Adverse Parties at 4-8, filed September 6, 2005 (attached as Exhibit 2).

B. THE COMMISSION'S 1993 DECLARATORY ORDER UNDERMINED THE VALIDITY OF ITS 1995 RATE ORDER.

The Commission made its decision to allow the unlawful return on Trojan in the 1993 declaratory proceeding DR-10, not in the 1995 rate proceeding UE 88. The Commission therefore rejected arguments about that issue in Order 95-322 as follows:

> "The Commission established the legal framework for the Trojan issues in this case in DR 10, Order No. 93-1117. In that order, the Commission adopted the reasoning of the Attorney General's Opinion Letter OP-6454, which advised that the Commission may allow a utility to recover undepreciated investment in retired plant and a return on that investment if the Commission finds such recovery to be in the public interest under ORS 757.140(2)(b).
>
> "* * * 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. [Footnote omitted.] 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."

PUC Order No. 95-322 at 26-27.

The error therefore occurred in the Commission's 1993 declaratory opinion. Order 93-1117 therefore undermined the subsequent rate orders that relied on that opinion. In issuing that order, the Commission said:

> "The declaratory ruling or judgment procedure was designed to remove uncertainty surrounding legal issues. [Citations omitted.] The statute gives the Commission broad authority to rule on questions presented to it. This Commission may render binding determinations in response to PGE's application in this proceeding without unlawfully limiting or unduly impacting the rights of parties in subsequent ratemaking proceedings."

PUC Order No. 93-1117 at 7. The mandate of the Court of Appeals now orders the Commission to revisit Order 93-1117. The Commission should pursue the correction of its 1993 error wherever it leads.

As the Commission is aware, that 1993 declaratory order was itself prompted by the Commission's policy of Least Cost Planning, which required PGE to consider continued Trojan operation. The Commission did find that it was PGE's least-cost option to close Trojan early, and that conclusion was never challenged or overturned. PUC Order No. 95-322 at 28-29.

VI. THE COMMISSION HAS A DUTY TO CORRECT ITS OWN ERRORS

If the Commission does not correct the error it made in Order No. 95-322, the task of doing so will fall instead to a jury. That is the result of the decision in *Dreyer*:

> "[T]he PUC proceeding that is underway [i.e., this very proceeding] thus has the potential for disposing of the central issue in these cases, *viz*., the issue whether plaintiffs [in the class actions] have been injured (and, if they have been, the extent of the injury). In that regard, we note that the PUC has been instructed either to revise and reduce rates to offset the previous 'improperly calculated and unlawfully collected rates' or to order PGE to issue refunds. Depending on how the PUC responds to that remand, some or all plaintiffs[']claimed injuries may cease to exist. Moreover, the PUC's specialized expertise in the field of ratemaking gives it primary, if not sole, jurisdiction over one of the remedies contemplated in the remand: revision of rates to provide for recovery of unlawfully collected amounts. Certainly, if the PUC decides to take that approach to the problem, its special expertise makes it a far superior venue for determining that remedy.
>
> "* * * If [the PUC] can and does provide a full or partial remedy, then plaintiffs either are not injured at all or, if they remain injured, their remedy is to seek judicial review of the PUC's order. In the former case, the circuit court can dismiss the actions. In the latter case, the scope of the court's work will be usefully curtailed. In either event, 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.

The Supreme Court has therefore left it to the Commission to decide:

1. Whether plaintiffs have been injured.

2. If they have been, what to do about it.

The guiding principle from the *Dreyer* decision is that this Commission has primary jurisdiction to quantify the injury to customers stemming from the legal error the Commission made in setting UE 88 rates. Therefore, whatever result is reached with respect to the Commission's authority to provide a remedy, it continues to have the obligation to quantify the harm, if any.

Now that the Supreme Court (*Dreyer*) and the Court of Appeals (*Katz*) have ruled that errors by the Commission *can* be redressed retroactively, it is the Commission that must do it, not a jury. The Court of Appeals remanded this case to the *Commission*—not to a jury—to take what action is necessary. Fulfilling that remand is part of the Commission's function, according to *Dreyer*, to "supervise and regulate every public utility." ORS 756.040(2). In doing so, the Commission has the duty to "do all things necessary and convenient." *Id*. There is no precedent in which a regulatory commission has bucked the duty to correct its own mistakes to a jury, leaving the utility whipsawed between the conflicting experience and expertise of commission and jury.

There is one final point that the Commission should bear in mind. When the Court of Appeals reviewed Order No. 95-322 in *CUB v. OPUC*, the validity of the return *on* Trojan was not the only issue decided by the Court. As the Commission will recall, URP also challenged the return *of* PGE's unrecovered investment in Trojan. The Court of Appeals, however, rejected that challenge to Order No. 95-322 by URP, saying it did not "warrant further discussion." *CUB v. OPUC*, 154 Or App at 706-707, 717, 962 P2d 744 (1998). Therefore, in this remand from the Court of Appeals, there are *two* decisions that must be given effect: (1) correct the previous return *on* Trojan; *and* (2) implement PGE's right to the full return *of* its unrecovered investment in Trojan. Only the Commission can

reconcile both prongs of the mandate, for that solution requires the exercise of the Commission's broad regulatory discretion and expertise.[9]

VII. CONCLUSION

For the reasons stated above, the Commission should conclude that it has the legal authority to order refunds or adjustment of future rates for amounts that PGE collected in violation of ORS 757.355 between April 1995 and October 2000.

DATED this _____ day of June, 2007.

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[9] We have addressed in Exhibit 3 specific issues identified in the ALJ's Ruling of June 6.

CERTIFICATE OF SERVICE

I hereby certify that on this day I caused to be served the foregoing **PORTLAND GENERAL ELECTRIC COMPANY'S OPENING BRIEF WITH RESPECT TO THE AUTHORITY OF THE PUC TO AWARD RELIEF** by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to each party listed below and depositing in the US mail at Portland, Oregon.

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