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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)

**PACIFICORP'S OPENING BRIEF  
IN PHASE II**

**I. INTRODUCTION**

The case involves issues that are critical to the litigants, as well as a much larger set of stakeholders. For this reason, PacifiCorp appreciates the opportunity the Commission has provided for third-party participation in this proceeding.

The resolution of this case requires the Commission to fairly adjudicate the rights and obligations of the direct parties, a complex matter given the long history of this case and the important issues involved. It also requires the Commission to articulate a set of ratemaking principles that incorporates *Dreyer v. PGE*, 341 Or 262, 142 P3d 1010 (2006), remains true to the principles that have historically defined Oregon's ratemaking construct, and provides a fair and sustainable regulatory framework for the future. This is an ambitious undertaking, one that may ultimately require assistance from the Oregon Legislature.

Consistent with urging the Commission to work toward the dual goals of deciding this case fairly and articulating a coherent, post-*Dreyer* regulatory framework, PacifiCorp's brief

1 has three sections. The first section provides general background on the key ratemaking  
2 principles implicated by this case.

3 The second section reviews these principles in greater detail and addresses how  
4 *Dreyer* has changed the Oregon regulatory landscape. This section also proposes  
5 approaches to the filed rate doctrine and the rule against retroactive ratemaking in Oregon  
6 that address the concerns articulated or implied by the *Dreyer* decision, while promoting  
7 underlying policies of rate predictability, fairness and stability.

8 More specifically, the second section posits that the filed rate doctrine and the rule  
9 against retroactive ratemaking should operate to prevent a retroactive ratemaking order for  
10 approved rates, except when a rate order is reversed on judicial review *and* parties have fair  
11 notice that the rates are subject to change. Upon such a reversal, a court has authority to  
12 order the Commission to determine a rate refund or surcharge and, as an adjunct to its  
13 exclusive authority regarding ratemaking, the Commission has exclusive jurisdiction over the  
14 calculation and implementation of such a refund or surcharge. Absent specific statutory  
15 authorization or the consent of the impacted party, the Commission must act pursuant to a  
16 court order reversing a Commission judgment before it may issue a rate refund or surcharge  
17 for approved rates. In all circumstances, Commission orders are *not* subject to collateral  
18 attack.

19 The third section applies these regulatory principles to the specific issue the  
20 Commission has asked the parties to address, which is the Commission's ability to provide a  
21 refund or other rate relief for PGE's rate collections in violation of ORS 757.355 from 1995 to  
22 2000.

## 23 II. SUMMARY OF KEY OREGON RATEMAKING PRINCIPLES

24 This case involves the power of Oregon courts and the Commission to order a refund  
25 or a surcharge when a rate order is reversed on appeal. The fundamental ratemaking  
26 principles involved are the filed rate doctrine and the rule against retroactive ratemaking.

1 Under the filed rate doctrine, “any rate filed with and approved by the relevant  
2 ratemaking agency represents a contract between the utility and the customer and is  
3 conclusively lawful until a new rate is approved.” *Dreyer*, 341 Or at 270, n.10. Two Oregon  
4 utility statutes embody aspects of the filed rate doctrine. One is ORS 757.225, which  
5 requires utilities to charge rates according to their approved rate schedules and declares  
6 such rates to be “lawful” until changed under ORS 757.210 and 757.220 (statutes covering  
7 utility-initiated rate changes). The second is ORS 756.565, which provides that rates  
8 approved by the Commission “shall be in force and shall be prima facie lawful and  
9 reasonable until found otherwise in a proceeding brought for that purpose under ORS  
10 756.610 [the judicial review statute for Commission orders].”

11 The filed rate doctrine operates to prevent claims against utilities involving the  
12 reasonableness of their filed rates on the basis that the rate filed with a commission “is the  
13 only lawful charge” and “deviation from it is not permitted under any pretext.” *American*  
14 *Tel. & Tel. Co. v. Central Office Tel. Inc.*, 524 US 214, 222, 118 S Ct 1956, 141 L Ed 2d 222  
15 (1998). The filed rate doctrine has two purposes: (1) the preservation of the agency’s  
16 primary jurisdiction to determine the reasonableness of rates; and (2) ensuring that utilities  
17 charge only those rates approved by the agency. See *Arkansas Louisiana Gas Co. v. Hall*,  
18 453 US 571, 577-78, 101 S Ct 2925, 69 L Ed 2d 856 (1981).

19 While no court in Oregon has expressly adopted the filed rate doctrine, the theory  
20 underlying the doctrine was recognized first in *Oregon-Washington R. & Nav. Co. v.*  
21 *Cascade Contract Co.*, 101 Or 582, 590-91, 197 P 1085 (1921). In this case, the court  
22 applied filed rate doctrine principles announced by the U.S. Supreme Court and concluded  
23 that the Commission had no authority to award reparations for rates claimed to be  
24 unreasonable. Later, in *McPherson et al v. Pacific P. & L. Co.*, 207 Or 433, 296 P2d 932  
25 (1956), the court concluded that it lacked authority to decide whether lawfully filed rates  
26 were unreasonable because this question was within the exclusive jurisdiction of the

1 Commission. Similarly, the Oregon courts have rejected civil damages claims on the basis  
2 that they are an improper collateral attack on Commission rate orders. *See Mt. Hood*  
3 *Stages v. Haley*, 252 Or 538, 542, 451 P2d 125 (1969); *Morgan v. Portland Traction*, 222 Or  
4 614, 331 P2d 344 (1958).

5 Based upon these cases, as well as the widespread application of the filed rate  
6 doctrine, Oregon courts and the Commission have assumed the recognition of the filed rate  
7 doctrine in Oregon. *See Adamson v. Worldcom Communications*, 190 Or App 215, 222, 78  
8 P2d 577 (2003) (assuming existence of filed rate doctrine but rejecting its applicability); *In re*  
9 *Portland General Electric*, UM 989, Order No. 02-227, 2002 WL 1009970 at \*6 (“Order No.  
10 02-227”) (argument for redress of Commission-approved rates on the basis that they contain  
11 illegal charges violates filed rate doctrine, which is embodied in Oregon law in ORS  
12 757.225).

13 A related principle, the rule against retroactive ratemaking, requires that the  
14 “ratemaking function be prospective unless the Legislature authorizes that it be otherwise.”  
15 Order No. 02-227, 2002 WL 1009970 at \*7. *See also Dreyer*, 341 Or at 270, n. 10 (the rule  
16 holds “that approved utility rates may be modified only prospectively and that utilities cannot  
17 provide retrospective relief from such rates.”) The Commission has recognized the rule  
18 against retroactive ratemaking, along with the filed rate doctrine, as “cornerstones of Oregon  
19 regulatory law.” *Id.*

20 While Oregon courts have never directly ruled on the issue of retroactive ratemaking,  
21 the Oregon Attorney General has opined that there is “no question that retroactive  
22 ratemaking is unlawful in Oregon.” Or Op Atty Gen OP-6076 (1987). The same opinion  
23 observes that the rule “has been adopted by the highest court of every jurisdiction in the  
24 United States that has considered the issue.” *Id.* at n 3 (citing *F.P.C. v. Tennessee Gas*  
25 *Co.*, 371 US 145, 153, 83 S Ct 211, 9 L Ed2d 199 (1962), *Arizona Grocery v. Atchison Ry.*,  
26 284 US 370, 52 S Ct 183, 76 L Ed2d 348 (1932) and numerous state supreme court cases).

1 See also Krieger, *The Ghost of Regulation Past: Current Applications of the Rule Against*  
2 *Retroactive Ratemaking in Public Utility Proceedings*, 1991 U Ill L Rev 983, 984 (1991)  
3 (noting universal acceptance by courts of rule against retroactive ratemaking as basic canon  
4 of public utility regulation).

5 The filed rate doctrine and the rule against retroactive ratemaking apply equally to  
6 Commission proceedings and court cases, operating in both contexts as necessary to  
7 effectuate the purposes of the doctrines.

### 8 III. POST-DREYER REVIEW OF OREGON RATEMAKING PRINCIPLES

#### 9 A. Oregon's Filed Rate Doctrine, as Modified by *Dreyer*, Does Not Preclude a 10 Court-Ordered Rate Refund or Surcharge on Judicial Review.

11 The *Dreyer* decision rejected the argument that ORS 757.225 codifies the filed rate  
12 doctrine in Oregon in a manner that renders Commission rate decisions conclusively and  
13 permanently binding in all contexts. *Dreyer*, 341 Or at 279. At the same time, *Dreyer*  
14 acknowledged that Oregon utility law could espouse another form of the filed rate doctrine  
15 and cited ORS 756.565, which provides that Commission rate decisions are prima facie  
16 lawful until found otherwise on judicial review. *Id.* at 279 n. 14, 278. Additionally, *Dreyer* did  
17 not dispute Oregon's well-settled rule that Commission rate orders are not subject to  
18 collateral attack, instead concluding only that the rule was not *necessarily* implicated by  
19 plaintiffs' damages claims against PGE. *Id.* at 280-81.

20 Combining these concepts, the *Dreyer* decision suggests a modified formulation of  
21 the filed rate doctrine in Oregon, one embodied in ORS 756.565 instead of ORS 757.225.  
22 Under this approach, Commission rate orders are presumptively lawful pending judicial  
23 review. After the period for judicial review is concluded, the rate order is final, conclusively  
24 lawful and may serve "as a shield against a claim of unlawfulness." *Dreyer*, 341 Or at 278.  
25 Following *Dreyer*, it remains clear that both pre- and post-judicial review, Commission rate  
26 orders are not subject to collateral attack.

1 Under this construction, the filed rate doctrine does not prevent a reviewing court  
2 from ordering a refund or surcharge for rates determined on appeal to be unlawful,  
3 assuming it otherwise has this authority. This approach effectuates the language of ORS  
4 756.565 and directly responds to the *Dreyer* court's concern that ratepayers have a "clear  
5 mechanism for obtaining a refund of charges that the PUC approves and that the utility  
6 collects, but that later are determined to be lawful." *Id.*

7 **B. The Courts Have Authority to Order Refunds or Surcharges for Rates Found to**  
8 **Be Unlawful on Judicial Review.**

9 Oregon courts have broad authority to fashion remedies upon judicial review of final  
10 agency orders. ORS 183.486 is the statute that governs the form and scope of a decision of  
11 the reviewing court on appeal of Commission orders. See ORS 756.610(1) (Commission  
12 orders are subject to provisions governing review of contested case orders under ORS  
13 183.480 to ORS 183.497); ORS 183.315(6) (Commission exempted from many sections of  
14 Oregon APA, but not from ORS 183.486).

15 Under ORS 183.486(1), the reviewing court's order may be "mandatory, prohibitory  
16 or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the  
17 original form of the petition." Under ORS 183.486(1)(b), the reviewing court may "[o]rder  
18 such ancillary relief as the court finds necessary to redress the effects of official action  
19 wrongfully taken or withheld." If the court sets aside agency action or remands the case to  
20 the agency, it "may make such interlocutory order as the court finds necessary to preserve  
21 the interests of any party and the public pending further proceedings or agency action."  
22 ORS 183.486(2).

23 The courts have recognized that ORS 183.486(1)(b) "clearly authorizes monetary  
24 relief." *Burke v. Children's Services Division*, 288 Or 533, 544, 607 P2d 141 (1980). More  
25 specifically, "[a]ncillary relief" in monetary form might include repayment of direct losses that  
26 result from erroneous agency action or inaction, such as the recovery of benefits that an

1 agency has wrongly denied or terminated.” *Burns v. Board of Psychologist Examiners*, 116  
2 Or App 422, 841 P2d 680 (1992). A rate refund or surcharge resulting from an unlawful  
3 Commission rate order appears to fall squarely within a reviewing court’s statutory power to  
4 order ancillary relief under ORS 183.486, absent limitations imposed by the rule against  
5 retroactive ratemaking.

6 **C. The Rule against Retroactive Ratemaking Should Limit a Court’s Ability to**  
7 **Order Rate Refunds or Surcharges Unless the Impacted Party Has Adequate**  
8 **Notice of the Provisional Nature of the Rates.**

9 While the rule against retroactive ratemaking appears unassailable in its most  
10 obvious applications at the Commission and in the courts, the scope of the rule in the more  
11 complex context presented by this case—to define remedies after a rate order is reversed  
12 on judicial review—is less clear. This question has resulted in decisions from other  
13 commissions and courts that are “divergent and contradictory, at times even within the same  
14 jurisdiction.” Krieger, 1991 U III L Rev at 1022.

15 One of the common themes that emerges from these cases, however, is the need for  
16 rate uniformity, stability and predictability, and the importance of notice that rates are either  
17 final or provisional. See *CPUC v. FERC*, 988 F2d 154 (DC Cir 1993) (predictability is  
18 underlying purpose of the rule against retroactive ratemaking); see also Order No. 02-227,  
19 2002 WL 1009970 at \*7 quoting Commissioner Charles Davis (“From the customer’s  
20 viewpoint, the principle underlying the prohibition against retroactive ratemaking is that the  
21 customer should know what a utility service costs him at the time he takes it. The posted  
22 tariff on the day of the service represents a contract between the customer and the utility.  
23 The customer should not expect to pay more and the utility should not expect to get less.”)

24 Consistent with this theme, FERC has shaped its approach to post-reversal rate  
25 refunds or surcharges around protecting reasonable and rational reliance interests. If  
26 parties do not have reasonable notice that a rate is potentially subject to refund or  
surcharge, the rule against retroactive ratemaking prevents FERC from making such a

1 change in the rates. *OXY USA, Inc. v. FERC*, 64 F3d 679, 700 (DC Cir 1995). But, the rule  
2 does not apply when parties have adequate notice that the rates are subject to change.  
3 This is because the “goals of equity and predictability are not undermined when the  
4 Commission warns all parties involved that a change in rates is only tentative and might be  
5 disallowed.” *Id.* at 699.

6 Many cases have followed this rationale, reasoning that notice of a potential future  
7 rate correction “changes what would be purely retroactive ratemaking into a functionally  
8 prospective process by placing the relevant audience on notice at the outset that the rates  
9 being promulgated are provisional only and subject to later revision.” *National Gas*  
10 *Clearinghouse v. FERC*, 965 F2d 1066 (DC Cir 1992), quoting *Columbia Gas Transmission*  
11 *Corp. v. FERC*, 895 F2d 791 (DC Cir 1990). See, e.g., *NStar Electric & Gas Corp. v. FERC*,  
12 481 F3d 794 (DC Cir 2007) (bar on retroactive ratemaking is satisfied “when parties have  
13 notice that a rate is tentative and may be later adjusted with retroactive effect, or where they  
14 have agreed to make a rate effective retroactively”), quoting *Consolidated Edison Co. v.*  
15 *FERC*, 347 F3d 964, 969 (DC Cir 1990).

16 These cases demonstrate that Oregon courts may order rate refunds or surcharges  
17 after judicial review without undermining the important reliance interests protected by the  
18 rule against retroactive ratemaking. The approach requires advance notice that a reversal  
19 of the rate order could lead to a refund or surcharge. This notice should be specific,  
20 requiring a party to clearly indicate what aspect(s) of the rates they will seek to have  
21 refunded or surcharged and the grounds for seeking a refund or a surcharge. This notice  
22 should be meaningful and unambiguous, requiring the Commission or the reviewing court to  
23 issue an order indicating the provisional nature of specific aspects of the rates on appeal.

24 In the case of a potential rate refund, such notice would permit a utility to gauge its  
25 potential financial exposure and decide whether and for how long it will risk charging  
26 provisional rates. In the case of a potential rate surcharge, notice would permit customers



1 to plan for the possibility of higher rates. In both cases, the party impacted by the potential  
2 rate change would be better positioned to urge the court to expedite judicial review, given  
3 the risk associated with provisional rates.

4 Under current Oregon procedures for judicial review of a Commission order, a party  
5 filing for judicial review could accomplish notice of a refund or surcharge by a motion to the  
6 reviewing court, as a part of a motion to the court to stay the order under ORS 756.610(2) or  
7 to the Commission to suspend the order under ORS 756.568, or through a request for  
8 deferred accounting under ORS 757.259. See *Pacific Northwest Bell Telephone Co v.*  
9 *Eachus*, 135 Or App 41, 50 n. 6, 898 P2d 774 (1995) (effect of a deferral is similar to  
10 declaring present rates to be interim rates subject to refund). To formalize and clarify the  
11 process, Oregon may seek to enact legislation to establish procedures for accomplishing  
12 notice that specific rates are subject to refund or surcharge on judicial review. Such  
13 legislation could also provide for expediting the judicial review process when rates are  
14 declared to be provisional through such a notice procedure.

15 **D. The Commission Has No Authority to Independently Order a Refund or**  
16 **Surcharge for Rates Properly Charged Under Validly Approved Tariffs.**

17 There are two relatively recent cases in Oregon that define the scope of the  
18 Commission's authority to issue rate refunds or surcharges in the absence of an order from  
19 the appellate courts expressly directing such relief.

20 First, when rates are overcollected, charged under an invalid tariff or are otherwise  
21 inconsistent with rates the Commission has authorized, the Commission has implied  
22 authority under ORS 756.040 to order a rate refund or surcharge. *Pacific Northwest Bell*  
23 *Telephone v Katz*, 116 Or App 302, 310, 841 P2d 652 (1992). The court held that a refund  
24 in this context does not violate the rule against retroactive ratemaking because of the  
25 underlying non-compliance in the interim charged rates. *Id.* at 311.

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1           Second, when rates are properly charged under validly approved tariffs, the  
2 Commission has only the refund or surcharge authority expressly granted to it by statute.  
3 *Pacific Northwest Bell Telephone Co v. Eachus*, 135 Or App 41, 49-50, 898 P2d 774 (1995).  
4 This case held that the Commission lacked implied refund or surcharge authority under ORS  
5 756.040 for properly charged rates because the Commission's retroactive ratemaking  
6 authority was expressly circumscribed by other statutes, including ORS 757.215 (the interim  
7 rate statute) and ORS 757.259 (the deferred accounting statute).

8           The court in *Eachus* expressly distinguished the *Katz* case on the basis that the  
9 challenged rates in *Eachus* "complied with all previous PUC rate orders," unlike the  
10 challenged rates in *Katz*. *Id.* at 49. In *CUB v. PUC*, 154 Or App 702, 716-17, 962 P2d 744  
11 (1998) (the case which decided the UE 88 appeal), the court cited *Eachus* for the  
12 proposition that the Commission's general ratemaking authority under ORS 756.040 was in  
13 some contexts circumscribed by other, more specific Commission statutes.

14           Notwithstanding the Commission's lack of independent refund or surcharge authority,  
15 the party whose interests are protected by this limitation may consent to the Commission's  
16 exercise of this authority. *See, e.g., In re PacifiCorp*, Order No. 02-853, UE 121/UE 127  
17 (2002) (approval of settlement that allowed increased amortization rate for deferred expense  
18 coupled with a voluntary refund provision if the order approving recovery of the deferred  
19 expense was reversed on appeal; refund provision was designed to avoid the legal  
20 impediment to the Commission unilaterally imposing such a refund obligation). Without the  
21 impacted party's consent, however, the Commission cannot order refunds or surcharges for  
22 rates properly charged under validly approved tariffs except pursuant to court order or  
23 specific statutory authority.

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1 **E. The Commission Has Exclusive Jurisdiction to Implement a Rate Refund**  
2 **Ordered By a Court on Judicial Review.**

3 While the Commission lacks independent authority to order refunds or surcharges for  
4 properly charged rates, the Commission has exclusive authority over the ratemaking  
5 exercise of implementing a court-ordered refund or surcharge.

6 Oregon courts, including *Dreyer*, have recognized that ratemaking is within the  
7 Commission's exclusive jurisdiction. *Dreyer*, 341 Or at 282 (it is "beyond serious dispute"  
8 that ratemaking is exclusively within the Commission's jurisdiction). *See also Pacific*  
9 *Northwest Bell Co. v. Sabin*, 21 Or App 200, 213-14, 534 P2d 984 (1975) (ratemaking is a  
10 legislative function and Commission has been granted the broadest authority possible for  
11 the exercise of this function).

12 The implementation of a rate refund or surcharge requires the Commission to  
13 engage in ratemaking. *See In re Portland General Electric*, Order No. 04-597 at 6 (2004)  
14 (rejecting argument that calculation of refund was a ministerial act and concluding that the  
15 Commission "must engage in ratemaking in order to set rates that comply with the pertinent  
16 statutes . . . requiring just and reasonable rates.") This conclusion follows from the fact that  
17 rates are normally set and reviewed on an overall, as opposed to single item, basis. *Id.* ("A  
18 proper review of rates established in UE 88 may not focus on costs attributable to earnings  
19 on Trojan, an isolated rate component, without considering whether other factors offset this  
20 amount. Doing so would constitute single issue ratemaking, which is prohibited."). In  
21 implementing a rate refund, the Commission must ensure that rates remain fair and  
22 reasonable, the minimum standard required by ORS 756.040. *See Alaska Public Utilities*  
23 *Commission v. Municipality of Anchorage*, 902 P2d 783, 789 (1995) (commission may issue  
24 refunds as necessary to reduce rates to reasonable levels but refunds beyond this point  
25 exceed the commission's authority and result in windfall to customers).

26

1 **F. The Commission Has Primary Jurisdiction Over A Damages Claim under**  
2 **ORS 757.355.**

3 The *Dreyer* decision disagreed with PGE's position that the plaintiffs' class action  
4 claims for violation of ORS 757.355 necessarily involved ratemaking. *Dreyer*, 341 Or at 282.  
5 It acknowledged, however, that the claims at least indirectly implicated ratemaking, such  
6 that their resolution was within the Commission's primary jurisdiction. *Id.* at 283 (plaintiffs'  
7 class action involves "the same effort at determining a remedy for PGE's collection of  
8 unlawful rates" as PUC remand proceedings). The court in *Dreyer* thus recognized both the  
9 Commission's exclusive jurisdiction over cases that involve ratemaking and its primary  
10 jurisdiction over cases that indirectly involve ratemaking.

11 In addition to the ongoing joint remand proceedings, the Commission should  
12 exercise its primary jurisdiction to determine the central issue in the class action case, as  
13 described by the *Dreyer* court: "the issue whether plaintiffs have been injured (and, if they  
14 have been, the extent of the injury)." *Id.* at 285.

15 **IV. APPLICATION OF THESE PRINCIPLES TO ISSUE PRESENTED**

16 The Commission approved the following issue statement in this case: "What, if any,  
17 remedy can the Commission determine and provide to PGE ratepayers, through rate  
18 reductions or refunds, for the amounts that PGE collected in violation of ORS 757.355  
19 between April 1995 and October 2000?" Building from the principles outlined above,  
20 PacifiCorp suggests the following analysis:

- 21
- 22 • PGE's rates during the 1995-2000 period were properly approved and  
23 were charged in compliance with Commission orders. See Order No.  
24 02-227, 2002 WL 1009970 (no claim has been made that PGE  
25 overcollected its approved rates during 1995-2000 period). Thus, the  
26 Commission's authority to order refunds is subject to the filed rate  
doctrine and the rule against retroactive ratemaking, as outlined  
above.
  - Upon review and reversal of the rate order in UE 88 in 1998, the court  
had the authority to order the Commission to implement a rate refund.  
The court remanded the case to the Commission, however, without an

1 express refund directive. See *CUB v. PUC*, 154 Or App at 718  
2 (“Judgments...reversed and remanded with instructions to remand  
3 orders to PUC for reconsideration.”) See also Order No. 02-227,  
4 2002 WL 1009970 at \*8 (“URP argues that the equitable powers of  
5 the courts permit the Commission to grant a refund in this case. The  
6 equitable powers of the courts are irrelevant in this case. The  
7 Commission is not a court. The Commission is a legislative agency  
8 and has the powers, and only the powers, granted to it by the  
9 Legislature. Except in the cases set out above, for deferrals or interim  
10 rates, we have no power to make rates retroactively. *Nor has any  
11 court ordered the Commission to grant a refund.*”) (Emphasis added).

- 12 • Upon review and reversal of the rate order in UM 989 in 2004, the  
13 circuit court specifically ordered a rate reduction or refund related to  
14 the 1995-2000 period preceding the UM 989 order. Resolution of  
15 whether the circuit court’s refund order was within the proper scope of  
16 its ancillary relief authority is necessary to determine whether this  
17 order vests the Commission with refund authority.
- 18 • A refund in this case would violate the rule against retroactive  
19 ratemaking unless PGE had adequate notice that its rates were  
20 subject to refund. The Commission should hear from the parties and  
21 make a determination on this issue.
- 22 • Notwithstanding legal impediments to the Commission’s exercise of  
23 refund authority, PGE can consent to the Commission’s exercise of  
24 refund authority.
- 25 • Consistent with the abatement order in *Dreyer*, the Commission  
26 should exercise jurisdiction over that case and provide the class  
action plaintiffs a full opportunity to be heard on how they have been  
damaged by PGE’s violation of ORS 757.355. There are several  
determinations which the Commission should make based upon this  
evidence. First, the Commission should address the jurisdictional and  
legal issues raised by these claims, including the relationship between  
plaintiffs’ damages claims and the joint remand proceedings (*i.e.*,  
whether the two cases present identical issues), whether the  
resolution of plaintiffs’ claims involves ratemaking and whether  
plaintiffs’ claims constitute a collateral attack on the order that the  
Commission will ultimately issue in the joint remand proceedings.  
Second, and potentially in the alternative, the Commission should  
address the factual questions raised by these claims, including  
whether PGE’s rates during 1995-2000 exceeded “fair and  
reasonable” levels because they included an illegal return on Trojan  
and if so, identify the amount of the excessive charges and the  
remedy for these excessive charges.

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**V. CONCLUSION**

PacifiCorp urges the Commission to consider and incorporate the foregoing points and authorities in resolving this case in a fair and just manner and defining a coherent regulatory architecture for Oregon's future.

DATED: June 20, 2007.

McDOWELL & RACKNER PC



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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing document in Dockets DR 10/UE 88/UM 989 on the following named person(s) on the date indicated below by email and first-class mail addressed to said person(s) at his or her last-known address(es) indicated below.

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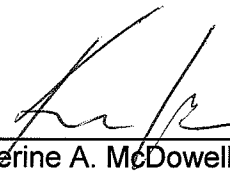
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