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

The 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

STAFF REPLY BRIEF

JULY 20, 2007

The Citizens' Utility Board ("CUB"), Portland General Electric Company ("PGE"), and PacifiCorp ("PacifiCorp"), conclude that in the regulatory landscape defined by the Supreme Court in *Dreyer v. Portland General Electric Co.*,[1] the Commission has authority to order retroactive rate relief in the particular circumstances presented in this case – after a judicial order finding Commission-approved rates unlawful. In what is probably a testament to the complexity of the issue presented to the Commission, each of these parties relies on a different theory in support of their arguments. The common denominator in these briefs, however, is the belief that the Supreme Court's opinion in *Dreyer v. PGE*, leads inexorably to the conclusion the Commission has statutory authority to order monetary relief to ratepayers for PGE's collection of "return on" Trojan.[2]

In its opening brief, staff of the Public Utility Commission of Oregon ("staff") did not argue that the opinion in *Dreyer* mandates the Commission to abandon its precedent regarding retrospectively changing rates. As noted in the opening briefs, the Supreme Court's interpretation of ORS 757.225 radically departs from the Commission's previous interpretation of that statute. However, what the Commission has recognized as a general prohibition on its ability to retroactively change rates does not rest exclusively on ORS 757.225. While the *Dreyer* opinion may compel the Commission to conclude that rates are never conclusively lawful, the opinion does not identify any statutory authority empowering the Commission to make a retroactive change to rates approved by the Commission, even assuming they are not conclusively lawful rates under ORS 757.225.

[1] 341 Or 262, 142 P3d 1010 (2006).
[2] The parties are uniform with respect to another point, which is that their arguments were drafted in an effort to make sense of the *Dreyer* opinion and what they believed to be a redefined regulatory landscape in Oregon.

PGE, PacifiCorp and CUB all offer analyses attempting to show how the Commission has authority to retroactively change rates in the specific circumstances presented in this case – upon the reversal of the Commission's rate order on judicial review. As discussed below, staff does not agree with the analyses offered by these parties. The primary flaw with the analyses is that they do not persuasively show that the Commission has authority to retroactively change rates, even assuming the rate order in UE 88 is not final and the rates set by the Commission in that order are not conclusively lawful.

PacifiCorp's analysis.

PacifiCorp argues that the Commission theoretically has authority to order refunds in the circumstances presented in this case under two statutes, ORS 756.565 and ORS 183.486(1)(b).[3] PacifiCorp asserts that a general prohibition against retroactive ratemaking is still in force post-*Dreyer*, except for a limited exception found under ORS 756.565.[4] ORS 756.565 provides that all orders and regulations of the Commission are "prima facie lawful and reasonable until found otherwise in a proceeding brought for that purpose under ORS 756.610." PacifiCorp argues that under this statute, rate orders are presumptively lawful pending judicial review and conclusively lawful after the period for judicial review has concluded. PacifiCorp argues that upon judicial review, a court would not be precluded by "the filed rate doctrine" from ordering retroactive relief for

[3] PacifiCorp notes that the extent to which PGE ratepayers are entitled to refunds must be predicated on certain factual findings.

[4] ORS 756.565 provides:

> All rates, tariffs, and classifications, regulations, practices and service fixed, approved or prescribed by the Public Utility Commission and any order made or entered upon any matter within the jurisdiction of the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a proceeding brought for that purpose under ORS 756.610.

rates that are only presumptively, not conclusively, lawful, and that it could do so if it otherwise had authority to do so.

PacifiCorp asserts that the authority to retroactively change rates under a rate order that has been reversed on judicial review stems from the authority granted a reviewing court in ORS 183.486(1)(b). ORS 183.486(1)(b) authorizes courts to fashion remedies upon judicial review of final agency orders and that those remedies could include a rate refund or surcharge resulting from an unlawful commission order. PacifiCorp contends that while the Commission lacks independent authority to order refunds or surcharges for properly charged rates, it may carry out a refund or rate surcharge order from a reviewing court.[5]

Staff disagrees with PacifiCorp's interpretation of both ORS 756.565 and ORS 183.486(1)(b). An examination of appellate court opinions in this state, as well as in other states, makes clear that ORS 756.565 is intended to inform the scope of review by the judiciary and to protect orders and rules of the Commission from collateral attack. The Oregon Court of Appeals explained the latter purpose in *Garrison v. Pacific Northwest Bell*,

> Under ORS 756.565, "All *rates*, tariffs, classifications, regulations, practices and *service* fixed, approved or prescribed by the commissioner * * * shall be in force and shall be prima facie lawful and reasonable, until found otherwise in a proceeding brought for that purpose under ORS 756.580 to 756.610. **Thus the rates and service levels set by the Commissioner are prima facie lawful and are not open to collateral attack in this proceeding**.[6]

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[5] PacifiCorp's Opening Brief at 11.
[6] 45 Or App 523, 529-30, 608 P2d 1206 (1980)(italics in original, bold added).

The Oregon Supreme Court discussed the former purpose in *State v. Corvallis & Eastern R. Co.*[7] In that case, the defendant railroad appealed a circuit court judgment allowing the state to recover a penalty for the railroad's failure to comply with an order of the Railroad Commission. The railroad alleged the circuit erred in denying its demurer arguing the state had failed to aver facts sufficient to state a claim. The Supreme Court disagreed, holding that some of the allegedly missing allegations were not necessary under Section 31 of the Railroad Commission Act of 1907:

> As the order fixing the service to be performed is *prima facie* reasonable, it was unnecessary to allege that fact in the complaint, or to aver that the erection and maintenance of a depot a Lyons was essential, or to state the volume of railroad business transacted at that place.[8]

In a more recent case, *Pacific Northwest Bell Telephone Company v. Davis*, the Court of Appeals explained that ORS 756.565 is "intended to grant a presumption of validity to the Commissioner's regulations[.]"[9]

Courts in jurisdictions with a statute similar to ORS 756.565 have interpreted those statutes as the Oregon Court of Appeals did in *Pacific Northwest Bell v. Davis*. Specifically, they have held that the statutes inform any appeal of commission orders and rules; specifically providing that any order of the Commission is prima facie lawful and that a petitioner has the burden to prove otherwise. For example, in *Montgomery County v. Public Service Commission, et al.*, the Maryland Court of Appeals explained the scope of its review of orders of the Maryland Public Service Commission as follows:

> Decisions of the Public Service Commission are *prima facie* correct. On any appeal from an order of the Commission, the burden of

[7] 59 Or App 450, 117 P 980 (1911).
[8] *Id.* at 455.
[9] 43 Or App 999, 1008, 608 P2d 547 (1979).

> proof is upon the party seeking to set aside the order to show by clear and satisfactory evidence that it is unreasonable or unlawful.[10]

Similarly, in *Baltimore Gas and Electric Co. v. McQuaid*, the Maryland Court of Appeals rejected the appellees' claim that the Maryland Public Service Commission double counted value of certain facilities when calculating a utility's ratebase.[11] The Court noted that it could not tell from the record whether there was double counting and that "[u]nder Code (1957), Art. 78, Sec. 97, and the cases, the order of the Commission is prima facie correct and the burden is on those who seek to set it aside on appeal to show by clear and satisfactory evidence that there is illegality or unreasonableness."

In *City of Norfolk v. Virginia Electric and Power Company*,[12] the Virginia Supreme Court noted the State Corporate Commission orders must be considered "as prima facie just, reasonable and correct" and described the concomitant limitation on its review as follows, "[h]ence, the rates and regulations promulgated by the Commission in the exercise of its legislative function may not be set aside by this court unless it clearly appears that such action contravenes the Constitution or statutes of the United States, the Constitution of Virginia or the statutes by which the General Assembly has delegated such legislative power to the Commission."[13] Notably, this discussion of how the "prima facie" statute informed the Court's scope of review came shortly after the Court's discussion of the fact the Virginia General Assembly had not authorized the Commission to "redetermine rates for a past period at a different level from those actually charged in accordance with filed schedules."[14]

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[10] 203 Md. 79, 98 A2d 15 (1953) (citing Code 1951, art. 78, sec. 78 and cases).
[11] 220 Md. 373, 386-87, 152 A2d 825 (1959).
[12] 197 Va. 505, 90 SE2d 140 (1955).
[13] *Id.* at 518.
[14] *Id.* at 516.

The second underpinning of PacifiCorp's conclusion that the Commission has authority to order refunds in the circumstances presented in this case also appears flawed. As noted above, PacifiCorp asserts that assuming ORS 756.565 provides an exception to the filed rate doctrine, ORS 183.486(1)(b) authorizes a court to order refunds or surcharges for rates found to be unlawful on judicial review.

PacifiCorp's argument relies on the Court of Appeals' opinion in *Burns v. Board of Psychologist Examiners*.[15] In *Burns*, the petitioner sought review of an order in other than a contested case, challenging the procedures used by the Board of Psychologist Examiners to administer examinations for psychologist licenses, the denial of his application for a license and also, seeking "special and general damages for damage to his professional reputation, mental distress, embarrassment and a loss of earning capacity." At issue was whether ORS 183.486(1)(b) authorized the court to grant all or some of the monetary relief sought by the petitioner.[16]

In its analysis, the Court of Appeals noted that the petitioner essentially alleged a tort claim, and that the Oregon Tort Claims Act is the exclusive remedy for torts by officers, employers or agents of a public body. The Court noted that although the Oregon Supreme Court had previously said in *dictum* in *Burke v. Children's Services Division*, that ORS 183.486(1)(b) clearly authorized monetary relief, it [the Court of Appeals] does not have independent authority to make an initial award of compensatory damages under any circumstances.[17] In other words, the Court concluded that although ORS 183.486(1)(b) specifies that a court may provide whatever relief is appropriate irrespective of the original form of the petition and may provide "ancillary relief as the

[15] 116 Or App 422, 841 P2d 680 (1992).
[16] *Id.* at 424.

court finds necessary to redress the effects of official action wrongfully taken," the statute does not confer on the court authority that it otherwise does not have.

Just as the Court of Appeals does not have authority to make an initial award of compensatory damages, an appellate court does not have authority to set utility rates. Setting utility rates is the exclusive province of the Commission. Further, a court does not have independent authority to set rates retroactively, and thus, cannot grant the Commission authority to grant retroactive rate relief under ORS 183.486(1)(b).

PGE's analysis.

PGE notes that the Commission has previously relied on ORS 757.225 and the rule against retroactive ratemaking for its [the Commission's] conclusion that it does not have authority to order PGE to refund to customers the "return on" Trojan PGE received from customers between 1995 and 2000. PGE asserts that under the Supreme Court's interpretation of ORS 757.225 in *Dreyer*, ORS 757.225 is no longer an impediment to refunds. PGE also asserts that the rule against retroactive ratemaking, which prohibits the Commission from using past profits or losses to set rates, is not implicated in this case. PGE argues that without these impediments, the Commission has authority under ORS 756.040 to order PGE to refund the return on Trojan it collected in order to "protect" customers and "balance the interests" of the utility investor and the consumer.

For purposes of its analysis, staff does not take issue with the assertion that under *Dreyer*, ORS 757.225 is not an impediment to any authority the Commission may have to issue refunds. Staff does, however, take issue with PGE's assertion that the Commission has the requisite authority.

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[17] *Id.* at 425, *citing Burke v. Children's Services Division*, 288 Or 533, 544, 607 P2d 141 (1980).

PGE's argument the Commission has authority to order refunds is inconsistent with the Court of Appeals' opinion in *Pacific Northwest Bell v. Eachus*.[18] *Eachus* was an appeal from an "own motion" rate proceeding in which the Commission, after a contested case hearing, ordered Pacific Northwest Bell ("PNB") to reduce its rates. On appeal, CUB asserted that the Commission erred in concluding it did not have implicit authority under ORS 756.040 to declare PNB's rates as "interim" and subject to refund when it started the own motion proceeding.[19] Had the Commission done so, PNB would have been required to refund to customers the difference between its newly reduced rates and old rates for the period starting with the date the rates were declared interim and the time the new rates became effective.

The Court of Appeals conceded that ORS 756.040 was sufficiently broad to permit the type of order sought by CUB, but held that the statutes giving the Commission express authority to order interim rates for proceedings initiated under ORS 759.175 to 759.250 reflected that the Commission's authority to declare rates as interim and subject to refund is circumscribed.[20]

In other words, the issue in *Eachus* was whether the Commission had authority to modify rates for the period that a rate proceeding was in effect – before the final rate order was even entered by the Commission. Presumably, if the grant of authority in ORS 756.040 is as broad as PGE suggests in its opening brief, the Commission would have been able to modify PNB's rates as requested by CUB.

[18] 135 Or App 41, 898 P2d 774 (1995).
[19] *Id.* at 46.
[20] *Id.* at 49.

In *Friends of the Earth v. Public Service Commission*,[21] the Supreme Court of Wisconsin considered whether the Wisconsin Public Service Commission ("PSC") had authority to order the utility to refund to customers amounts collected under interim rates while a rate case was pending, when the Commission had not stated in the order allowing the interim rates that they were subject to refund. In an analysis similar to that used in *Pacific Northwest Bell Co. v. Eachus,* the Wisconsin Supreme Court held the Commission did not have such authority.

First, the Wisconsin Supreme Court noted that "in fixing the rates to be charged by public utilities, the PSC exercises an essentially legislative power[,]" and that "without statutory authority, [the PSC] is limited to fixing rates to be applied prospectively."[22] The Court noted that while the PSC had authority to grant refunds with respect to rates charged for transportation, it had no comparable authority with respect to utility rates.[23]

The Wisconsin court went on to conclude that while the Commission had authority to order refunds when it had it had issued a conditional rate order, it had no such authority when it had issued an unconditional rate order. The Court held:

> [W]here the interim order is unconditional, we think the attempt to require refunds in the final order is indistinguishable from an attempt to require refund of rates collected under a previous order setting permanent rates.[24]

The Wisconsin Court's ruling helps to juxtapose PGE's argument to the *Eachus* opinion. Assuming the converse of the above quotation is true, that an attempt to require refunds of rates collected under a previous order setting permanent rates is no different

[21] 78 Wis.2d 388, 254 N.W.2d 299 (1977).
[22] *Id.* at 411.
[23] *Id.* at 411-12.
[24] *Id.* at 413.

than requiring refunds for interim rates when the Commission has no authority to do so, refunds are no more permissible in this case than they were in *Eachus*.

CUB's analysis.

CUB argues that the circumstances presented in this case are comparable to those presented in *Pacific Northwest Bell v. Katz.*[25] CUB notes that in *Katz*, the Court of Appeals held that the Commission has authority under ORS 756.040 to order a utility to refund amounts over-collected under a temporary order that did not comply with a valid order. CUB asserts that under *Dreyer*, all rates are interim while they are challenged and that they must ultimately be trued-up with the authorized, *i.e.*, legally valid, revenue level, at least with regard to a violation of ORS 757.355.[26]

CUB's attempt to analogize the circumstances of this case with those in *Katz* fails to take the Court of Appeals' holding in *Pacific Northwest Bell Co. v. Eachus*, into account. The rates at issue in *Eachus* were not final rates. Instead they were interim rates imposed by the Commission pending the final resolution of a rate proceeding. Notwithstanding, the Court of Appeals concluded that the Commission did not have authority to true those interim rates up to the final rates imposed in the proceeding. If in fact the Commission has authority under ORS 756.040 to authorize refunds to protect customers from unjust and unreasonable exactions when the utility has over-collected under temporary rates, the Court of Appeals would presumably have reached a different conclusion in *Eachus.*

[25] 116 Or App 302, 841 P2d 652 (1992).
[26] CUB Opening Brief at 6-8.

Conclusion

To the extent the Commission concludes that ORS 757.225 is no longer a prohibition to retroactively changing rates, the Commission's ability to order PGE to issue refunds for the "return on" Trojan still turns on whether it has statutory authority to do so. As CUB and PGE argue, ORS 756.040 appears to empower the Commission to take almost any action to protect customers. However, the Court of Appeals in *Pacific Northwest Bell, Co. v. Eachus*, concluded that the legislature's express authority to the Commission to make refundable interim rates in proceedings initiated under ORS 757.210 indicated that the legislature had circumscribed whatever authority the Commission had under ORS 756.040 to make retroactive adjustments to "interim" rates in own motion proceedings. Analogously, the legislature's specific authority to the Commission to make retroactive adjustments to rates in specific circumstances appears to circumscribe the Commission's authority to make retroactive adjustments in any circumstances not authorized by the legislature.

As CUB appears to note in its opening brief, however, "a plausible reading of the decision could find the wholesale invalidation of the filed rate doctrine[.]"[27] Staff takes CUB's reference to the "filed rate doctrine" to mean a reference to both the filed rate doctrine and prohibition against retroactive ratemaking. If this interpretation of *Dreyer* is in fact the correct one, then the Supreme Court's *Dreyer* opinion will have effectively overruled the Court of Appeals' opinion in *Pacific Northwest Bell v. Eachus.* Thus, *Eachus* would not stand for the proposition that any authority the Commission has under ORS 756.040 to change rates retroactively is circumscribed by other statutes. Unfortunately, it is unclear whether the *Dreyer* Court intended such a reading of its

opinion. Notwithstanding the Supreme Court's apparent lack of enthusiasm for the "filed rate doctrine" and rule against retroactive ratemaking, the *Dreyer* Court states in its opinion that hat it was not deciding whether the Commission has authority "to order refunds or any form of retroactive relief for amounts that PGE collected in violation of ORS 757.355."[28]

In light of the questions raised in *Dreyer v. PGE* regarding the Commission's authority to retroactively change rates, staff urges the Commission to complete its consideration of the factual questions presented by the courts' remands in these matters, no matter what the Commission concludes regarding its legal authority to issue refunds to PGE's customers. As the Supreme Court notes in the *Dreyer*, the Commission has specialized expertise in the field of ratemaking. It is the Commission, rather than any other entity, that should determine whether PGE ratepayers were harmed by PGE's collection of "return on" Trojan and if so, what remedy is appropriate.[29]

DATED this 20th day of July 2007.

Respectfully submitted,

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[27] CUB Opening Brief at 2-3.
[28] *Dreyer v. PGE, supra*, 341 Or at 285.
[29] Staff rejects the argument put forth by the Class Action plaintiffs that the Commission is bound by the doctrine of claim preclusion in determining whether customers were harmed by Trojan's collection of return on Trojan. As the Class Action plaintiffs note in their opening brief, the setting of rates is a legislative act. Claim preclusion does not apply to legislative acts.

CERTIFICATE OF SERVICE

I certify that on July 20, 2007, I served the foregoing upon all parties of record in this proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid first class mail or by hand delivery/shuttle mail to the parties accepting paper service.

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