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)

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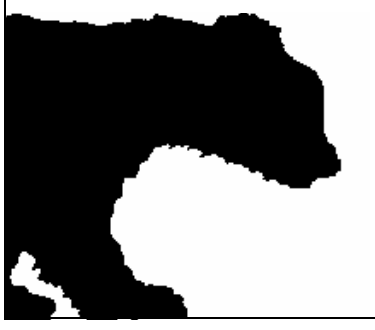
OPENING BRIEF OF
THE CITIZENS' UTILITY BOARD OF OREGON
REGARDING THE COMMISSION'S AUTHORITY TO ORDER RELIEF



June 20, 2007

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I. Introduction

The Citizens' Utility Board surprises itself in offering the Commission our opinion that, while there remains a general rule against retroactive ratemaking, in the limited circumstances where a utility fails to follow the law and relies on a rate order that violates that law and which itself is then invalidated by a reviewing court, the Commission has the authority to provide refunds back to the date of the issuance of the rate order. This revelation comes on the heels of the Oregon Supreme Court's decision in *Dreyer v. Portland General Electric Co*., 341 Or 262, 142 P3d 1010 (2006), in which the

Court found that the utility has a responsibility to make sure that a Commission's rate order does not cause it to collect rates that would be disallowed under ORS 757.355, and that no statute bars a remedy to the over-collection of monies collected under the invalid rate order. The question is, in this limited circumstance, can the Commission reconstitute the rates going back to the date of issue to fix the element that was found to be invalid, and then include a credit on customers' bills on a going-forward basis? In this limited scenario, we opine that the Commission may have the authority and obligation to do so.

In addressing this issue we start with three global points. First, under no circumstances should parties, including the Commission, bend over backwards to find an ability to make refunds in order to avoid the specter of juries setting rates in civil court. To the extent that a party views the latter as a "horrible" to be avoided, the law still prevents the discovery of an authority that does not exist and has not been delegated. We hope that parties agree that the creation of one "horrible" to prevent another "horrible" is bad law and bad policy.

Second, to the extent that we can find an ability for the Commission to make refunds in on-going rates, it is strictly limited to the situation at issue in *Dreyer* where a utility fails its affirmative statutory duty to make sure a Commission order does not cause it to collect unlawful revenues and where the order has been invalidated by a reviewing court. The Court in *Dreyer* consciously avoided ruling on the existence of the filed rate doctrine and retroactive ratemaking generally; however, the Court technically leaves open the question of whether a *utility* can appeal a rate order and get a remedy retroactively. Nevertheless, a plausible reading of the decision could find the wholesale invalidation of the filed rate doctrine, and the Court's specific statements about the filed

rate doctrine do not show wild enthusiasm in respect to its validity. Since elimination of the filed rate doctrine and the ability to use retroactive ratemaking or order refunds could go either way, and show up as either a credit or a surcharge on customers' bills, we need to proceed carefully.

Finally, the discovery of the authority to order refunds or make retroactive rates must be made without the benefit of statutory language that speaks to the specific delegation or the specific withholding of that authority by the legislature. The prohibition on retroactive rate making, like the filed rate doctrine, is not specifically described in statute. The discovery of the Commission's ability to craft retroactive rates or order refunds must come from the Commission's general ratemaking authority in statute, and that authority in the context of how courts have interpreted those statutes.

II. Rate Reductions Or Refunds

The prohibition against retroactive ratemaking protects consumers by ensuring that, under authorized rates, customers will not have to pay for past under-collections or cost deviations, and safeguards consumers from surprise charges based on facts dating back several years that we assume are over and done with. On the other hand, the prohibition also prevents the utility from using future rates to collect on past costs for the benefit of shareholders, which, if allowed, would undermine any incentive to operate in an efficient manner going forward. In principle, retroactive ratemaking could result in either a credit or a surcharge to the consumer, but in any case, neither the consumer nor the utility would be confident about the certainty of rates during any given time period.

Is the prohibition on retroactive ratemaking an immutable fact of utility regulation? In approaching the subject, the Rhode Island Supreme Court said this: "No

rule should be blindly applied, however, without prior consideration of the underlying policy that originally precipitated its adoption. Such an approach ensures that the application of the rule in a particular instance will not undermine its original purpose." *Narragansett Electric Co. v. Burke*, 415 A.2d 177, 178 (1980) (quashing a PUC order denying a temporary rate adjustment to recoup costs incurred during a crippling ice storm). While the particular facts of the case are not helpful, the case does provide some insight into how to consider this problem.

If the Oregon Supreme Court has said that the rates established in 1995, pursuant to the UE 88 rate order, have essentially been invalid (and therefore, for practical effect, interim) since the date the order was issued and that rates should be reconsidered and a refund made, how does this affect the original purpose of the policy underlying the prohibition against retroactive ratemaking? At the agency level, the policy is unchanged: in lawfully establishing rates the Commission still may not look at past under- or over-collections to determine rates collected in the present. In other words, the Commission may not compare the authorized revenue requirement with the actual revenues and then charge or credit the difference to customers during the next rate case. However, when the agency gets an element of the law wrong in setting rates, and a utility fails in its statutory duty to correct the unlawful rates, thereby over-collecting from customers, even while relying on the approved rates, and a reviewing court says that the Commission has incorrectly established rates, then there is no legitimate authorized rate to compare actual revenues against. In addition, the utility has benefited from the unlawful rate as a result of its dereliction of duty. In this circumstance, retroactive ratemaking is not implicated,

but the Commission's general powers to protect customers from "unjust and unreasonable exactions and practices" under ORS 756.040(1) through refunds is.

The distinction between setting rates retroactively and ordering refunds is real in Oregon law. In sending the issue back to the Commission, the Court said that the Commission has the role of determining what remedy it can offer PGE ratepayers "through rate reductions or refunds." *Dreyer* at 286.

III. The Commission's Authority To Order Refunds

In *Dreyer*, the Court was trying to reconcile 757.225, which PGE argued embodies the filed rate doctrine by stating that rates "are lawful until they are changed" by 757.210, and 757.355, which states that a utility may not collect from rates any costs for any investment that is not used for providing utility service. PGE argued that, due to the filed rate doctrine, the Commission-set rates are valid until a reviewing court says the rates are invalid and, then, the rates are only invalid on a going-forward basis. The Court rejected the argument that 757.210 freed the utility from the requirements of 757.355 until the final appellate judgment is entered. *Dreyer* at 279.

Technically, the Court said that the utility has a responsibility to make sure that the Commission's rate order does not cause it to collect rates that would be disallowed under ORS 757.355. The Court recognized that the utility may be placed in the uncomfortable position of being "statutorily bound to collect a PUC-approved rate that includes amounts that, by statute, are unlawful for them to collect," however the Court found that utilities are rarely passive actors in the PUC proceedings. *Id.* at 279, footnote 15.

In addition, the Court found that the UE 88 order was invalid dating back to its issuance as it pertains to the collection in rates for costs that are prohibited in ORS 757.355. In doing so, the Court had to explain why PGE's reliance on the filed rate doctrine in ORS 757.225 was ineffectual. The Court said it was skeptical that "ORS 757.225 manifests a legislative intent that PUC-approved rates be treated as conclusively lawful for all purposes" until they are changed by 757.210. *Id.* at 278-279. To the contrary, the Court found that "in the context of the present controversy" there is no conflict between the statutes, and that the prohibition found in 757.355 dates back to the rate change. *Id.* at 279-280. The Court said, in the specific context of a violation of 757.355, the rates must be adjusted or a refund offered going back to the date rates went into effect. *Id.* at 286. In other words, in this case, until a reviewing court has issued a judgment finally disposing of the rate order, the rates are interim or temporary.

This raises two questions relating to the ability to refund the judicially determined infirmity. First, where does one find the authority to set rates retroactively or offer refunds? Second, is a refund due to an invalidated order necessarily retroactive ratemaking? These questions are implicated in *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or App 302 (1992). Initially we believed that this case was fundamentally different from the current context, but upon deeper reflection, we think that the analogy is fairly strong. We read the *Pacific NW* case as saying that the Commission can order refunds of amounts over-collected under a temporary order that did not comply with a valid order. In *Pacific NW*, the utility filed for a revised rate schedule and the Commission ordered rates interim and subject to refund during the pendency of the case. See *Pacific NW* generally, 305-307. The Commission, after a hearing, issued an order

reducing the utility's revenues. When PNB filed the compliance tariffs, the Commission rejected the extended area service tariff because further study of the service was expected, and the Commission did not want to establish a rate that was likely to change soon. As a result, the EAS tariff stayed at the level of the interim rate basis, essentially allowing PNB "to operate temporarily under an interim rate schedule that was $5.04 million per year higher than the authorized revenue level." *Id.* at 306.[1] CUB raised the issue with the Commission. The Commission ultimately ordered PNB to refund monies it had over-collected as a result of the interim rate being different from the authorized final order.

In its review of the order, the Court of Appeals rejected the argument that the over-collection was intentionally part of an interim rate order. *Id.* at 308. The facts indicated that the court was dealing with a final rate order. Nevertheless, the court found in the Commission's general powers the authority to refund monies that were over-collected as a result of a temporary set of rates not comporting with the legally adopted final rates. The *en banc* majority disagreed with Judge Warren's dissenting opinion that there was no express statutory authority to order refunds, and instead, found the authority in the "broad power" delegated to the Commission by the legislature in ORS 756.040. *Id.* at 309. The power to authorize refunds where the utility has over-collected unlawfully stems from the Commission's responsibility to "protect customers from unjust

[1] In retrospect, although it was not raised in the court's decision, it seems to us that PNB had a duty to prompt the Commission to rectify the rate disparity based on ORS 757.020. That statute reads in full: "Every public utility is required to furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited." This would seem consistent with *Dreyer*, which says that a utility has an obligation to correct even Commission-approved rates if those rates violate the law.

and unreasonable exactions and practices and to obtain for them adequate service at fair and reasonable rates."

As for whether a refund is necessarily retroactive ratemaking, the Court of Appeals says:

> PNB's argument that a refund would constitute retroactive ratemaking is not well taken. Retroactive ratemaking occurs when past profits or losses are incorporated in setting future rates. 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 over-collected under an interim rate schedule that was not in compliance with the authorized revenue level.

Id. at 311, original emphasis.

Here's the analogy: in *Dreyer*, the Court essentially said that all rates are interim while they are under challenge and those rates must ultimately be trued-up with the authorized, *i.e.*, legally valid, revenue level, at least as regards a violation of ORS 757.355. Together with *Pacific NW*, this seems to indicate that the Commission, when faced with a rate order that is no longer authorized going back to the date of issue, can craft a refund based on the over-collection under the interim invalidated rates as against the valid authorized rates without implicating retroactive ratemaking.

As a last point, the Court goes out of its way to invoke the doctrine of primary jurisdiction whose purpose is to recognize "the need for orderly and sensible coordination of the work of agencies and of courts." *Dreyer* at 283, quoting Kenneth Culp Davis, Administrative Law Text (3d ed 1972). The Court goes on to say:

> 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.

Id. at 285.

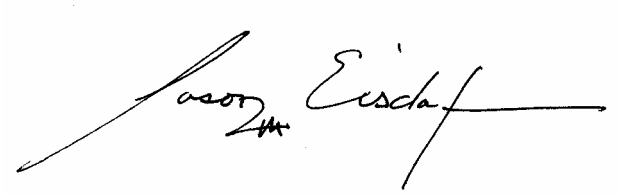
The Court makes no prediction concerning what authority the Commission will determine it has to provide relief. However, the Court could put itself into a curious conundrum if, in some later appeal, the courts find that the Commission does not have statutory authority to order refunds or grant retroactive rate relief. To invalidate the UE 88 rate order as it pertains to the used and useful statute in ORS 757.355, to find that ORS 757.225 does not prevent a remedy back to the date the order was issued, and to then find that the Commission has no authority to order a refund, logically results in an implicit finding that the legislature intended that, when a utility allows the Commission to violate 757.355, the only remedy is one through the civil courts. If this were the case, then the PUC has no further role in this matter. Such a legislative intent inherent in the statutory framework is not apparent to us.

IV. Conclusion

The Court's holding in *Dreyer* is a very narrow one, to wit: a utility has a responsibility to make sure that a Commission's rate order does not cause it to collect rates that would be disallowed under ORS 757.355, and that no statute bars a remedy to the over-collection of monies collected under the invalid order. The Court goes out of its way to avoid ruling generally on the filed rate doctrine. *Id.* at 279, footnote 14. In addition, the Court specifically avoids predicting the Commission's decision on its authority to provide retroactive rate relief or refunds. *Id.* at 286, footnote 19. We believe that a plausible argument can be made that the Commission, as a result of *Pacific NW* and

limited to the context of the *Dreyer* case, does have the authority to order PGE to refund monies that were collected during an interim period of appellate review that ultimately is found to be above the lawfully authorized level.

Respectfully Submitted,
June 20, 2007



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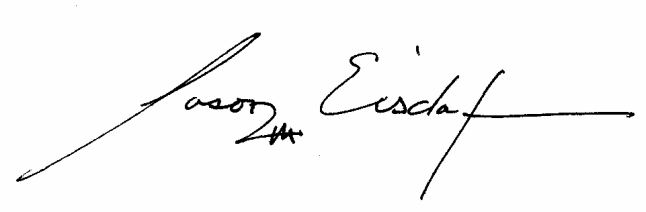
CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2007, I served the foregoing Opening Brief of the Citizens' Utility Board of Oregon in docket UE 88 upon each party listed below, by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending 6 copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

Respectfully submitted,



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